
COMMENT

CONSTRUING *CRANE*: EXAMINING HOW STATE COURTS HAVE APPLIED ITS LACK-OF-CONTROL STANDARD

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INTRODUCTION

The Supreme Court recently upheld the constitutionality of a federal statute that authorizes the Department of Justice to civilly commit federal prisoners after their release if they suffer from a mental illness or abnormality that causes “serious difficulty in refraining from sexually violent conduct.”¹ Not only has the federal government authorized civil commitment for sexually violent predators, but as of 2009, twenty states have also enacted statutes authorizing the same.² By 2006, more than 3646 people had been detained or committed under these laws.³ Such commitments generally occur in secure mental health facilities, some of which are connected to, or within, prisons.⁴ A person committed under a sexually violent predator law is committed until he⁵ no

¹ United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (quoting 18 U.S.C. § 4247(a)(6) (2006)) (internal quotation marks omitted). The statute was upheld under the Necessary and Proper Clause. *Id.* at 1965.

² Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439, 441 (2009).

³ *Id.*

⁴ *Id.* at 444. Of the states authorizing commitment, only Texas employs outpatient treatment and supervision in lieu of inpatient commitment. *Id.*

⁵ Sex offenders may, of course, be male, female, or self-identify outside of traditional gender norms. However, for the sake of convenience, and because the overwhelming majority of sex offenders are male, I use male pronouns throughout this Comment.

longer presents a danger to the community.⁶ This often results in commitment for life;⁷ the *New York Times* reported that, as of 2007, only 250 civilly committed sex offenders had been released from confinement.⁸ Often unsympathetic characters in the courtroom, sex offenders face an uphill battle in proving that they should be set free despite their past offenses.

Statutes providing for the civil commitment of sexually violent predators typically require that the State prove at least three elements before commitment can be effected: (1) the defendant must have been convicted of, or at least have been charged with, a sexually violent offense; (2) the defendant must have a mental disorder or abnormality, generally defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others”;⁹ and (3) there must be a prediction of future dangerousness—a likelihood that the defendant will continue to engage in sexually violent behavior.¹⁰ In the landmark decision *Kansas v. Crane*, the Supreme Court held that, in

⁶ See 51 AM. JUR. 3D PROOF OF FACTS § 13 (Supp. 2008) (“The SVP [sexually violent predator] laws provide that a person can be released if it can be shown that his mental disorder has changed to the extent that it is safe to release him, as he will no longer engage in sexually violent acts.”).

⁷ See Mary Prescott, Note, *Invasion of the Body Snatchers: Civil Commitment After Adam Walsh*, 71 U. PITT. L. REV. 839, 854 (2010) (noting that very few civilly committed sex offenders ever receive a full discharge).

⁸ See Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1 (“Nationwide, of the 250 offenders released unconditionally since the first law was passed in 1990, about half of them were let go on legal or technical grounds unrelated to treatment.”).

⁹ KAN. STAT. ANN. § 59-29a02(b) (Supp. 2008). Many commentators have noted that the statutory definition of a mental illness or abnormality is all encompassing and does not limit itself to what clinicians or even the general populace would naturally consider as falling under these categories. See, e.g., Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL’Y & L. 250, 260-61 (1998) (stating that the statutory definition of mental illness describes a person as abnormal “if any biological or environmental variable caused the person’s emotional or volitional capacity to predispose the agent to engage in criminal sexual misconduct” and concluding that this definition is “simply a description of the causation of any behavior”); see also LOLA ROMANUCCI-ROSS & LAURENCE TANCREDI, WHEN LAW AND MEDICINE MEET: A CULTURAL VIEW 44-45 (2007) (“This definition incorporates the causation of every conceivable behavior . . . [and] nothing about the definition . . . narrows the class of persons that can be designated as ‘abnormal.’ The definition is entirely predicated on the presence of ‘criminal sexual acts’ and becomes a tautology, i.e. ‘mental abnormality’ equals ‘criminal sexual acts’ and vice versa, an equation that provides justification for commitment.”).

¹⁰ 51 AM. JUR. 3D PROOF OF FACTS, *supra* note 6, § 8.

addition to these statutory elements, “there must be proof of serious difficulty in controlling behavior” before the state may, consistent with due process, subject the defendant to civil commitment.¹¹

While the application of *Crane*’s holding—that there must be proof that the offender lacks control—is problematic on account of its ambiguity, this Comment argues that there are ways in which courts can better apply the standard to ensure that due process is provided to defendants. Specifically, *Crane* mandates that states require a separate finding on the issue of whether the defendant has serious difficulty controlling his behavior.¹² In light of this mandate, states should attempt to operationalize the evidentiary requirement by developing a standard definition—grounded in the norms and judgment of the community—on the issue of what constitutes serious difficulty in controlling oneself to assure a more consistent and fair application of the concept across cases.¹³ In addition, state courts should restrict expert testimony to a qualitative description of the defendant’s ability to control himself rather than permitting experts to render ultimate conclusions. Lastly, juries should be instructed that there is no generally accepted method for measuring volitional impairment in the mental health community. These procedures will help ensure that the trier of fact understands that “proof of serious difficulty in controlling behavior”¹⁴ is a legal standard and can then properly weigh expert testimony.

It is important to note from the outset that this Comment, in arguing for a more stringent application of the control test to justify civil commitment, does not argue that sex offenders should face less restrictive or less severe consequences for their actions. The sex offenders facing civil commitment in these cases have already been found guilty of their crimes and have been punished by the criminal justice system. The issue is whether some sex offenders should face civil commitment *after* and *in addition to* the time they have already served for their crimes. As explained by Professor Stephen Morse,

¹¹ 534 U.S. 407, 411-13 (2002).

¹² See *id.* at 413 (explaining that, in order to justify civil commitment of a sex offender, “there must be proof of serious difficulty in controlling behavior,” such that the “dangerous sexual offender” can be distinguished from the “typical recidivist”).

¹³ For an example of one scholar’s operational definition of “substantial difficulty controlling oneself” as well as commentary on how this definition may be bolstered, see *infra* note 139.

¹⁴ *Crane*, 534 U.S. at 413.

Our society routinely and regretfully releases from prison inmates we know are highly likely to re-offend, because culpability limits the term of possible confinement. Their prison term “cleanses” their culpability for past crime, and no general form of pure preventative detention exists for responsible agents who are simply dangerous, no matter how serious their past record nor how predictable their future violence might be.¹⁵

Thus, sex offenders do not face detention simply because society considers them likely to re-offend; offenders face detention only if society also deems that they are substantially unable to *control* their behavior.¹⁶ Because of this distinction, the factfinder’s determination on the issue of control is an essential safeguard that limits the number of offenders who are eligible for civil commitment. This Comment is premised on the idea that our justice system must clearly define the rules for determining when a person who has already faced criminal punishment and been “cleansed” of his prior crimes should be incapacitated indefinitely via civil commitment solely for the future protection of the community.

Part I discusses the legal background of civil commitment for sexually violent predators, including the Supreme Court’s decisions in *Kansas v. Hendricks* and *Kansas v. Crane*. Part II surveys and critiques the various ways in which state appellate and supreme courts have construed the Supreme Court’s mandate in *Crane* that the State must prove the defendant has serious difficulty controlling his behavior in order to justify civil commitment. Part III provides recommendations for how courts can better apply the control test going forward to ensure that defendants facing civil commitment proceedings for sexually violent behavior are afforded due process.

I. THE CONSTITUTIONALITY OF CIVILLY COMMITTING SEXUALLY VIOLENT PREDATORS

A. *Kansas v. Hendricks: Addressing Due Process Challenges to Civil Commitment*

The Kansas Sexually Violent Predator Act permits the State to civilly commit sexually violent predators. The statute defines a sexually violent predator “as any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage

¹⁵ Morse, *supra* note 9, at 253.

¹⁶ *Crane*, 534 U.S. at 411-12.

in repeat acts of sexual violence.”¹⁷ It defines “mental abnormality” as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”¹⁸ In *Kansas v. Hendricks*, the State sought to civilly commit Leroy Hendricks, an inmate about to be released from prison after serving time for sexually molesting children.¹⁹ Hendricks challenged the Act on substantive due process grounds, among others. The Supreme Court upheld the constitutionality of Kansas’s civil commitment of sexually violent predators, as well as Hendricks’s confinement.²⁰

The *Hendricks* Court explained that the liberty afforded to citizens by the Constitution is not absolute and that certain exceptions are necessary for the “common good.”²¹ The Court noted that, under certain conditions, it had upheld statutes providing for the civil confinement of individuals who could not control their actions and who posed a threat to the community.²² Articulating the narrow standard under which a person may be committed, the Court explained that a mere finding of dangerousness is generally insufficient to warrant commitment.²³ However, proof of a mental illness or abnormality that is linked to the finding of dangerousness “serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control,” thereby fulfilling the narrow tailoring required by the Due Process Clause.²⁴ The Court left individual states with the discretion to define what constitutes a mental illness or abnormality and explained that the legal significance of these terms need not directly equate with medical standards.²⁵ In specifically upholding Hendricks’s civil commitment, the Court found that an “admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguish[ed] Hendricks from other dangerous persons who [were] perhaps more properly dealt with exclusively through criminal proceedings.”²⁶

¹⁷ KAN. STAT. ANN. § 59-29a02(a) (Supp. 2008).

¹⁸ *Id.* § 59-29a02(b).

¹⁹ 521 U.S. 346, 350 (1997).

²⁰ *Id.* at 368-69.

²¹ *Id.* at 356-57 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)).

²² *Id.* at 357.

²³ *Id.* at 358.

²⁴ *Id.*

²⁵ *Id.* at 359.

²⁶ *Id.* at 360.

B. *Kansas v. Crane*: Closing the Gap Left Open by *Hendricks*

Hendricks's reference to lack of control left uncertainty in the governing law—namely, whether a showing that a defendant completely lacked the ability to control himself was necessary to justify civil commitment.²⁷ *Kansas v. Crane* directly answered this question but left further ambiguity in its wake. In *Crane*, the State sought civil commitment of Michael Crane, who had previously been convicted of aggravated sexual battery and lewd and lascivious behavior for exposing himself.²⁸ Crane argued that the Constitution required the State to show that he could not control his dangerous behavior in order to commit him.²⁹ The Supreme Court first stated that *Hendricks* did not establish a requirement of *total* lack of control, explaining that “*Hendricks* referred to the Kansas Act as requiring a ‘mental abnormality’ or ‘personality disorder’ that makes it ‘difficult, if not impossible, for the person to control his dangerous behavior.’”³⁰ The Court then stated that the Constitution did not allow the State to commit a sex offender without *any* lack-of-control finding; the “distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment.”³¹

The *Crane* Court acknowledged that lack of control was a difficult concept to define and quantify. Justice Breyer wrote:

[W]e did not give to the phrase “lack of control” a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, “inability to control behavior” will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.³²

²⁷ See, e.g., *People v. Kirk*, No. A094086, 2001 WL 1659543, at *6 (Cal. Ct. App. Dec. 28, 2001) (discussing different states’ pre-*Crane* interpretations of what *Hendricks* required, including whether the standard for commitment required “total lack of control” or merely “volitional control that [is] impaired at some level”).

²⁸ *In re Crane*, 7 P.3d 285, 286-87 (Kan. 2000), *vacated sub nom. Kansas v. Crane*, 534 U.S. 407 (2002).

²⁹ *Id.* at 288.

³⁰ *Crane*, 534 U.S. at 411 (quoting *Hendricks*, 521 U.S. at 358).

³¹ *Id.* at 412 (quoting *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring)).

³² *Id.* at 413.

The Court again acknowledged that states have “considerable leeway” in defining the mental abnormalities that might justify civil commitment.³³ It noted that pedophilia, the disorder from which Crane suffered, “critically involves what a lay person might describe as a lack of control” and that “it is often appropriate to say of such individuals, in ordinary English, that they are ‘unable to control their dangerousness.’”³⁴ The Court nonetheless vacated the Kansas Supreme Court’s decision³⁵ and remanded the case for further proceedings.³⁶

C. Justice Scalia’s Dissent in Crane

Justice Scalia wrote an oft-referenced dissenting opinion in *Crane*, in which he claimed that the majority had misconstrued *Hendricks* by requiring a separate finding pertaining to an individual’s lack of control. Rather, Justice Scalia argued, “[w]hat the [*Hendricks*] opinion was obviously saying was that the SVPA’s [Sexually Violent Predator Act] required finding of a *causal connection* between the likelihood of repeat acts of sexual violence and the existence of a ‘mental abnormality’ or ‘personality disorder’ necessarily establishes ‘difficulty if not impossibility’ in controlling behavior.”³⁷ Justice Scalia would have held that a finding of lack of control inhered in the finding of a mental abnormality that caused future dangerousness.³⁸ Justice Scalia also bemoaned the Court’s failure to define lack of control as a legal criterion and lamented that the majority opinion “gives trial courts, in future cases under the many commitment statutes similar to Kansas’s SVPA, *not a clue* as to how they are supposed to charge the jury!”³⁹

D. Control and the Insanity Defense

The debate about whether lack of control can be demonstrated in a legal or clinical context originated outside of the civil commitment context. Most notably, the 1982 trial of John Hinckley Jr. brought the issue

³³ *Id.*

³⁴ *Id.* at 414-15 (quoting *Hendricks*, 521 U.S. at 358).

³⁵ The Kansas Supreme Court had held that the Constitution, as interpreted in *Hendricks*, required “a finding that the defendant cannot control his dangerous behavior,” and found that the trial court committing *Hendricks* had made no such finding. *In re Crane*, 7 P.3d 285, 290 (Kan. 2000).

³⁶ *Crane*, 534 U.S. at 415.

³⁷ *Id.* at 419 (Scalia, J., dissenting) (citing *Hendricks*, 521 U.S. at 358).

³⁸ *Id.* at 420.

³⁹ *Id.* at 423.

of volitional impairment to the attention of both the legal and medical communities.⁴⁰ Hinckley, who attempted to assassinate President Ronald Reagan, was found not guilty by reason of insanity under a volitional test that “exculpate[d] an offender who lack[ed] substantial capacity . . . to conform his conduct to the requirements of the law.”⁴¹ The decision prompted the legal and medical communities to call for the elimination of this “irresistible impulse” test.⁴² The American Bar Association (ABA) released a report recommending that the insanity defense only be available to a defendant who was “unable to appreciate the wrongfulness of his or her conduct,” since “[m]ost academic commentary . . . continues to question the scientific basis for assessments of volitional incapacity.”⁴³ Similarly, the American Psychiatric Association (APA) noted that psychiatrists debated the meaning of volitional impairment and that “[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.”⁴⁴ As a result of pressure from these organizations and the general public, several states and the federal government subsequently eliminated the volitional tests from their insanity defense statutes.⁴⁵

Because of the Supreme Court’s ruling in *Crane*, the same concerns that led states to eliminate the volitional element of the insanity defense now plague civil commitment decisions. As one commentator has opined, “The unintended irony is that volitional impairment lacks the

⁴⁰ See Bd. of Trs. Comm. on Medicolegal Problems, Am. Med. Ass’n, *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony: Report of the Board of Trustees*, 251 JAMA 2967, 2970 (1984) [hereinafter *Insanity Defense in Criminal Trials*] (noting that Hinckley’s acquittal “served to focus national attention on the insanity defense” and led to “[w]idespread public outrage”); see also Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1548-52 (1985) (describing the trial of John Hinckley Jr., the reaction of the general public, and the shifting opinions of the psychiatric community).

⁴¹ *Insanity Defense in Criminal Trials*, *supra* note 40, at 2970 (internal quotation marks omitted).

⁴² See *id.* (discussing how the ABA adopted a policy eliminating the “volitional” test and replacing it with the question of “whether the defendant, as a result of mental disease or defect, was unable to appreciate the wrongfulness of his or her conduct at the time of the offense charged”).

⁴³ *Report of the Standing Committee on Association Standards for Criminal Justice and Commission on the Mentally Disabled*, 108 ANN. REP. A.B.A. 715, 715-16 (1986); see also *Insanity Defense in Criminal Trials*, *supra* note 40, at 2970-71 (describing ABA and APA reform proposals).

⁴⁴ Insanity Defense Work Grp., *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983).

⁴⁵ Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1214 (2000).

empirical basis for exculpation in federal insanity cases, but clearly is justified for the indefinite detention of sex offenders.”⁴⁶

II. STATE APPLICATIONS OF *CRANE*'S LACK-OF-CONTROL STANDARD

While the *Crane* Court conclusively held that lack of control is essential to the constitutionality of civilly committing sex offenders, it declined to articulate a way in which lower courts should actually apply this criterion. After *Hendricks* and *Crane*, state courts were left to define the meaning of and evidentiary requirements for the lack-of-control standard individually, although many of these states had rejected the lack-of-control standard as unworkable for the insanity defense.⁴⁷ Consequently, states have developed numerous approaches, which can be broken down into three groups.⁴⁸ First, three states have adopted an implicit lack-of-control approach: courts in these jurisdictions do not actually instruct the jury on the issue of control, but rather subscribe to the idea that proof of a mental abnormality *predisposing* one to engage in acts of sexual violence, combined with a showing of future dangerousness, *necessarily* entails proof that the defendant seriously lacks control over his behavior.⁴⁹ Second, seven states have adopted a nested lack-of-control approach, in which the court reads the statutory requirement of a mental abnormality or illness as requiring that the abnormality or illness *cause* the defendant to have serious difficulty controlling his behavior.⁵⁰ Finally, eight states have adopted a re-

⁴⁶ Richard Rogers, *Imposing Order on Diverse Mental Health Laws*, 48 CONTEMP. PSYCHOL.: APA REV. OF BOOKS 158, 159 (2003) (book review).

⁴⁷ Slobogin, *supra* note 45, at 1214.

⁴⁸ Other commentators have classified the states' sexually violent predator statutes somewhat differently from the scheme presented in this Comment. See generally *State v. White*, 891 So. 2d 502, 508-09 (Fla. 2004) (noticing that Arizona, California, Illinois, Massachusetts, South Carolina, Texas, Washington, and Wisconsin do not interpret *Crane* to require a separate finding on the issue of control, while Iowa, Minnesota, Missouri, and New Jersey "have found that *Crane* imposes an affirmative, additional duty to determine lack of control"); Kenneth W. Gaines, *Instruct the Jury: Crane's "Serious Difficulty" Requirement and Due Process*, 56 S.C. L. REV. 291, 300-01 (2004) (classifying Arizona, California, Illinois, Massachusetts, Minnesota, South Carolina, Texas, Washington, and Wisconsin as states that do not require a separate finding of lack of control, but Iowa, Missouri, and New Jersey as states that do require such a finding); Peter C. Pfaffenroth, Note, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, 55 STAN. L. REV. 2229, 2249-50 (2003) (same).

⁴⁹ See *infra* Section II.A.

⁵⁰ See *infra* Section II.B.

quirement that the government must prove, separate from the other elements required for civil commitment, that the defendant has serious difficulty controlling his behavior.⁵¹

This Comment criticizes each of the three approaches to applying the control standard, concluding that (1) jurisdictions embracing the first approach are disregarding the Supreme Court's holding in *Crane* and have essentially adopted Justice Scalia's dissent as the law; (2) states that utilize the second approach, while faithful to *Crane*, make it too easy for juries to conflate a mental abnormality with difficulty controlling oneself, even though these two concepts should be treated as analytically distinct; and (3) states adopting an approach that requires a separate finding of the defendant's lack of control have failed to operationalize this concept and rely too heavily on opinions from expert witnesses. This last approach risks turning the separate finding on the issue of control into an empty legal conclusion that necessarily follows from the facts of any case.

A. *The Implicit Lack-of-Control Theory*

1. Declining to Require Specific Proof of Lack of Control

Surprisingly, despite the Supreme Court's clear language that "there must be proof of serious difficulty in controlling behavior" to justify civil commitment,⁵² a number of states have failed to adopt a separate jury finding requirement on the issue of control. These jurisdictions interpret *Crane* to require some evidence of an offender's lack of control but not a separate finding. When the state proves that the sex offender has a mental abnormality and a likelihood of future dangerousness, these courts conclude that evidence of lack of control is necessarily shown.

⁵¹ See *infra* Section II.C. Of the twenty states with civil commitment statutes, two were omitted from this analysis. New Hampshire was omitted for lack of pertinent case law. Pennsylvania was omitted because its civil commitment statute is limited to persons aging out of the juvenile system, a factor which may change the relevant analysis and invoke ancillary issues not addressed in this Comment. See 42 PA. CONS. STAT. § 6358 (2006) (calling for civil commitment hearings for minors who have been adjudicated delinquent for an act of sexual violence and who remain incarcerated in a juvenile detention center upon reaching twenty years of age).

⁵² *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

The first case to adopt this implicit lack-of-control theory was *In re Commitment of Laxton*.⁵³ John Lee Laxton was found to be a sexually violent predator under Wisconsin's civil commitment statute after being convicted and serving a prison sentence for offenses including sexual assault, child abduction, and window peeping on young girls.⁵⁴ Laxton argued that his civil commitment determination was unconstitutional because the jury was not instructed to determine whether he had a mental disorder involving serious difficulty controlling his behavior.⁵⁵ The Supreme Court of Wisconsin held that a separate finding that Laxton's mental disorder involved lack of control was not required, because it was already established by the nexus between his mental disorder and his dangerousness.⁵⁶ The court explained that "evidence showing that the person's mental disorder predisposes such individual to engage in acts of sexual violence, and evidence establishing a substantial probability that such person will again commit such acts, necessarily and implicitly include[] proof that such person's mental disorder involves serious difficulty in controlling his . . . behavior."⁵⁷

Once Wisconsin established that a state could validate its current commitment statute under *Crane* without adding an additional requirement to the State's burden of proof, other states quickly embraced the implicit lack-of-control theory. In 2004, the Supreme Court of Florida held that *Crane* did not impose an additional element to justify civil commitment.⁵⁸ Rather, under the Florida statute, the State has to prove only that a sex offender suffers from a mental abnormality that "predisposes him to commit sexually violent offenses" and that the per-

⁵³ 647 N.W.2d 784 (Wis. 2002); see also Eric G. Barber, Note, *State v. Laxton: How the Wisconsin Supreme Court Ignored the U.S. Supreme Court (And Why It May Have Gotten Away with It)*, 2003 WIS. L. REV. 977, 1002, 1006 (explaining that the Wisconsin Supreme Court granted certiorari to hear Laxton's appeal only seven days after the U.S. Supreme Court issued its *Crane* opinion and noting that in *Laxton*, the Wisconsin Supreme Court set a lower bar than the Supreme Court did in *Crane*).

⁵⁴ *In re Laxton*, 647 N.W.2d at 787.

⁵⁵ *Id.* at 786.

⁵⁶ *Id.* at 786-87, 793.

⁵⁷ *Id.* After the hearing committing Laxton, Wisconsin changed its jury instructions to include a reference to lack of control, providing that "[m]ental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior." *Id.* at 794 n.14. However, the *Laxton* court noted that it rendered its decision using only the old instructions that contained no reference to control. *Id.*

⁵⁸ *State v. White*, 891 So. 2d 502, 509 (Fla. 2004).

son is “likely to engage in acts of sexual violence.”⁵⁹ Like the *Laxton* court, the *White* court concluded that “[o]ne who fits such a description necessarily will have difficulty controlling his behavior.”⁶⁰

While the Texas Supreme Court has not spoken directly to the issue, several appellate cases have adopted the implicit lack-of-control theory. In *In re Commitment of Taylor*, Billy Robert Taylor, whose criminal history included several convictions for rape and burglary with attempt to rape, appealed a trial court’s judgment that he was a sexually violent predator and was properly subject to involuntary civil commitment.⁶¹ Texas’s civil commitment statute required the State to prove that Taylor had a mental abnormality “that, by affecting a person’s emotional or volitional capacity, predispose[d] him to commit a sexually violent offense.”⁶² Taylor argued that the trial court erred in denying his proposed jury instructions, which would have required the jury to also find that Taylor had “serious difficulty controlling behavior.”⁶³ The appellate court rejected his argument,⁶⁴ explaining that a jury’s finding that a person was predisposed “to threaten the health and safety of others with acts of sexual violence entails a determination that he has ‘serious difficulty in controlling behavior.’”⁶⁵

2. The Implicit Lack-of-Control Approach Disregards *Crane*

Jurisdictions adopting an implicit lack-of-control theory have disregarded the Supreme Court’s mandate in *Crane*. In fact, many commentators have noted that states embracing this theory have essentially adopted Justice Scalia’s dissent as the law.⁶⁶ These states typically ar-

⁵⁹ *Id.* at 509-10 (quoting FLA. STAT. § 394.912(4)-(5) (1999)).

⁶⁰ *Id.* at 510.

⁶¹ No. 09-10-00231-CV, 2010 WL 4913948, at *1 (Tex. App. Dec. 2, 2010).

⁶² *Id.* at *3 (quoting TEX. HEALTH & SAFETY CODE ANN. § 841.002(2) (West Supp. 2009)).

⁶³ *Id.*

⁶⁴ *Id.* at *4.

⁶⁵ *In re Commitment of Almaguer*, 117 S.W.3d 500, 505 (Tex. App. 2003) (quoting *In re Commitment of Browning*, 113 S.W.3d 851, 863 (Tex. App. 2003)).

⁶⁶ Chief Justice Abrahamson’s dissent in *In re Commitment of Laxton* espouses this view: “The majority opinion’s linkage or nexus analysis of the jury instructions adopts Justice Scalia’s dissenting view in *Crane*. . . . The court is obliged to follow the majority opinion in *Crane*, not the dissent.” 647 N.W.2d 784, 797-98 (Wis. 2002) (Abrahamson, C.J., dissenting) (emphasis omitted) (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002), and *id.* at 419-20 (Scalia, J., dissenting) (internal quotation marks omitted)); see also Barber, *supra* note 53, at 991 (“In a final jab at the majority and the Kansas Supreme Court, Justice Scalia wrote: ‘There is an obvious lesson here for state supreme

gue that the Supreme Court's endorsement of state discretion to define legal terms like "mental abnormality" and "lack of control" provides them with the latitude to find lack of control implicit in the other elements required for commitment.⁶⁷ These states also emphasize the fact that *Crane* did not overrule *Hendricks*, which did not require a separate finding on the issue of Hendricks's ability to control himself.⁶⁸

Neither of these arguments carries any weight. Surely the *Crane* Court, in granting the states leeway to determine the precise meaning of lack of control, did not intend to provide states with the discretion to adopt a dissenting Justice's opinion. Reliance on the fact that the *Crane* Court did not overrule *Hendricks* is similarly misguided because in *Hendricks*, the issue of control was not in dispute—Hendricks admitted that he had serious difficulty controlling himself.⁶⁹ By contrast, in *Crane*, in which the central issue was the defendant's ability to control himself, the Court vacated the Kansas high court's decision and remanded the case for further proceedings in light of its ruling that the state must offer some proof that the defendant is unable to control himself.⁷⁰ The *Crane* Court thus responded to an issue that the *Hendricks* Court did not have the occasion to address. As such, *Crane* did not overrule *Hendricks*

courts that do not agree with our jurisprudence: ignoring it is worth a try.' His advice did not go unheeded." (quoting *Crane*, 534 U.S. at 424 (Scalia, J., dissenting)); Gaines, *supra* note 48, at 299-300 ("The trend of state appellate courts, with Justice Scalia's blessing, has been to ignore *Crane*. . . . These state court decisions are contrary to the Court's determination in *Crane*, which required specific proof of 'serious difficulty controlling behavior.'" (citations omitted)); Pfaffenroth, *supra* note 48, at 2250 ("[T]he courts appear to be following Justice Scalia's dissent, not the majority holding, by finding an implicit lack of volitional control in the determination that an offender suffers from a mental abnormality.").

⁶⁷ See, e.g., *In re Laxton*, 647 N.W.2d at 791 (describing how the *Crane* court eschewed the use of "precise bright-line rules" to safeguard constitutional rights in the area of mental illness and instead gave the states "considerable leeway" to define terms like "mental abnormality" in civil commitment statutes (quoting *Crane*, 534 U.S. at 413)).

⁶⁸ See *State v. White*, 891 So. 2d 502, 510 (Fla. 2004) (finding it significant that *Crane* upheld *Hendricks* even though *Hendricks* had not required the jury to find that the defendant had "serious difficulty in controlling behavior" (citation omitted)).

⁶⁹ See *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997) ("Hendricks admitted that he had repeatedly abused children whenever he was not confined. He explained that when he 'get[s] stressed out,' he 'can't control the urge' to molest children. . . . He stated that the only sure way he could keep from sexually abusing children in the future was 'to die.'" (citations omitted)); see also Pfaffenroth, *supra* note 48, at 2250 (arguing that there was proof of lack of control on the record in *Hendricks* but not in *Crane*).

⁷⁰ *Crane*, 534 U.S. at 415.

but rather expanded upon the decision by requiring proof of a sex offender's volitional impairment in order to comport with due process.⁷¹

Most importantly, the implicit lack-of-control theory does not actually provide any proof of the defendant's inability to control himself. The *Laxton* court explained that the "key to constitutionality" was the fact that a sex offender's mental disorder must have "the specific effect of predisposing [him] to engage in acts of sexual violence."⁷² However, a "predisposition"—which under the Wisconsin statute can be a mental condition that is congenital or acquired,⁷³ essentially including any causal agent whatsoever—has no bearing on whether that person can ultimately control himself.⁷⁴ To understand this distinction, one could consider how a hypothetical man with perfect self-control would measure up under the implicit lack-of-control theory. A person with perfect self-control may nevertheless be shown to have a mental disorder *predisposing* him to engage in acts of sexual violence. As psychologists have explained, a person's predispositions do not necessarily bear on his volitional capacity.⁷⁵ Further, not all predispositions come to fruition.⁷⁶ The person with perfect self-control may also fulfill the *Laxton*

⁷¹ "Because *Crane* did not overrule *Hendricks*, many states narrowly read *Crane* as implicitly approving the *Hendricks* position that requires no separate finding as to volitional impairment." Gaines, *supra* note 48, at 315. According to Gaines, these states ignore the fact that the Supreme Court *vacated* rather than reversed the Kansas Supreme Court's judgment in *Crane*. Such a move by the Court "clarified that *Crane* was not a blind reaffirmation of *Hendricks*, but instead a clarification that requires states to add additional due process protections beyond those that may be implicit in their statutory definitions of mental abnormality." *Id.*

⁷² *In re Laxton*, 647 N.W.2d at 790 (quoting *State v. Post*, 541 N.W.2d 115, 124 (Wis. 1995)).

⁷³ WIS. STAT. ANN. § 980.01(2) (West Supp. 2008).

⁷⁴ The American Psychiatric Association has explained that psychiatry, as a deterministic science, "views all human behavior as, to a large extent, 'caused.'" Insanity Defense Work Grp., *supra* note 44, at 685. The suggestion is that mere causation, in reference to a mental abnormality or state, should not be probative on the issue of whether a defendant has or lacks control.

⁷⁵ See Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY & L. 443, 450 (2008) ("Do not assume that diagnosis of a paraphilia implies volitional impairment. One needs to provide positive evidence that the offender has difficulty controlling his sexually assaultive behavior as a result of the paraphilia or of a comorbid condition."); *cf.* *State v. Rosado*, 889 N.Y.S.2d 369, 382-83 (Sup. Ct. 2009) ("The two concepts of predisposition and volition are separate and distinct, like 'apples and oranges.' A disorder, like pedophilia, might predispose someone to the commission of sex offenses, but the offender might have a great degree of control over the predisposition." (citation omitted)).

⁷⁶ For a simple illustration, consider a person with a genetic "predisposition" toward obesity, who nonetheless due to lifestyle choices never becomes obese.

court's second criterion—that he has a high likelihood of again committing sexual offenses—because he *chooses* to do so, exercising his perfect self-control. This exercise demonstrates that fulfilling the *Laxton* court's burden of proof for commitment does not necessarily prove anything regarding a sex offender's ability to control himself. This standard contradicts the Supreme Court's ruling that "there must be proof of serious difficulty in controlling behavior."⁷⁷ Thus, the states that disregard the holding of *Crane* remove a key constitutional safeguard from jury consideration.

The dissenting opinion in Florida's *State v. White* aptly criticized this approach, noting that "the entity charged with resolving the most important and core issue in the proceedings is not even told about the issue."⁷⁸ Empirical studies buttress the idea that decisionmakers do not consider the defendant's actual lack of control under the implicit lack-of-control formulation. One Florida study found that psychologists' and psychiatrists' recommendations that civil commitment was appropriate under the Florida law could be predicted based on the following attributes of sex offenders: diagnoses of pedophilia and paraphilia not otherwise specified, actuarial risk assessment instrument scores, psychopathy, younger victim age, and nonminority race.⁷⁹ While this study did not directly test for volitional impairment as a factor predicting commitment, it is notable that the enumerated factors, none of which directly bears on an individual's capacity for self-control, could predict decisions with ninety percent accuracy.⁸⁰ Thus, in addition to the fact that the elements of these states' civil commitment statutes do not necessitate a judgment regarding the defendant's ability to control himself, this study suggests that considerations of control do not play a determinative role in practice.⁸¹

⁷⁷ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

⁷⁸ 891 So. 2d 502, 516 (Fla. 2004) (Anstead, J., dissenting).

⁷⁹ Jill S. Levenson & John W. Morin, *Factors Predicting Selection of Sexually Violent Predators for Civil Commitment*, 50 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 609, 625-26 (2006).

⁸⁰ *Id.* at 621. For a discussion of which factors decisionmakers tend to consider when actually instructed to determine whether the defendant suffers from a volitional impairment, see *infra* notes 124-26 and accompanying text.

⁸¹ The study also notes that "evaluator recommendations have been found to predict court outcomes." Levenson & Morin, *supra* note 79, at 613 (citing N. Zoe Hilton & Jaret L. Simmons, *The Influence of Actuarial Risk Assessment in Clinical Judgments and Tribunal Decisions About Mentally Disordered Offenders in Maximum Security*, 25 LAW & HUM. BEHAV. 393, 393-94 (2001)).

B. *The Nested Lack-of-Control Theory*

1. Including Lack of Control in the Definition of “Mental Abnormality”

A second group of states does not require a separate jury finding on the issue of lack of control but does require a tighter nexus between the sex offender’s mental abnormality and future dangerousness. Like the implicit lack-of-control states, these states’ sexually violent predator statutes explicitly permit commitment where an individual has been previously convicted of a sexually violent offense and has a mental abnormality that makes him likely to engage in future sexually violent acts.⁸² But whereas jurisdictions adopting the implicit lack-of-control theory require only that the mental abnormality *predispose* an offender to engage in sexually violent acts (and never explicitly mention control), jurisdictions adopting this nested lack-of-control approach explicitly require the mental abnormality to *cause* a lack of control by reading this requirement into the statutory definition of “mental abnormality.” This interpretation of *Crane*—nesting the idea of loss of control in the definition of a mental disorder or abnormality and actually explaining this connection to the jury—has gained popularity in several jurisdictions.

In *In re Leon G.*, the Arizona Supreme Court held that *Crane* did not require the State to change the language of its civil commitment statute to include a “serious difficulty in controlling behavior” requirement but emphasized that such statutes should meaningfully narrow the group of individuals eligible for commitment.⁸³ With this view of *Crane*, the court found that Arizona’s civil commitment statute, which requires that the State prove that a sex offender “[h]as a mental disorder that makes the person likely to engage in acts of sexual violence,”⁸⁴ meets the constitutional requirement that such a statute be narrowly tailored.⁸⁵ The court construed the word “makes” as meaning “im-pair[ing] or tend[ing] to overpower the person’s ability to control his

⁸² See ARIZ. REV. STAT. ANN. § 36-3701(7) (2009); CAL. WELF. & INST. CODE § 6600(3) (West Supp. 2009); 725 ILL. COMP. STAT. 207/5 (2005); MASS. ANN. LAWS ch. 123A, § 1 (LexisNexis 2003); S.C. CODE ANN. § 44-48-30(1) (Supp. 2008); WASH. REV. CODE § 71.09.020(1) (2011).

⁸³ 59 P.3d 779, 786 (Ariz. 2002) (en banc).

⁸⁴ ARIZ. REV. STAT. ANN. § 36-3701(7)(b) (2001).

⁸⁵ *In re Leon G.*, 59 F.3d at 787.

or her behavior”⁸⁶ and found that “[a]lthough the statute does not mimic *Crane’s* ‘serious difficulty in controlling behavior’ language, the statute necessarily requires the state to prove that an alleged SVP’s dangerousness results from a mental impairment rather than from voluntary behavior.”⁸⁷

The Arizona court’s holding is a variation on that in *Laxton*, because the Arizona court emphasized the causal connection between the requisite mental disorder and future dangerousness, explaining that “serious difficulty in controlling” behavior requires proof that a mental disorder, as opposed to a voluntary decision, caused the person to act as he did.⁸⁸ The Arizona court specifically rejected the *Laxton* court’s jury instructions because they did not clearly explain this causal connection and instead adopted the following instruction: “[a]n individual’s dangerousness must be caused by a mental disorder which, in turn, causes the person to have serious difficulty in controlling his or her behavior.”⁸⁹ Several other jurisdictions have adopted a similar approach with their civil commitment statutes.⁹⁰

⁸⁶ *Id.* (quoting *In re Detention of Wilber W.*, 53 P.3d 1145, 1149 (Ariz. Ct. App. 2002), *vacated*, 62 P.3d 126 (Ariz. 2003)).

⁸⁷ *Id.* at 786.

⁸⁸ *Id.* at 787.

⁸⁹ *Id.* at 788.

⁹⁰ The Supreme Court of Illinois held that Illinois’s Sexually Dangerous Persons Act (SDPA) was constitutional under *Crane* because the court “construe[s] the term ‘mental disorder,’ as used in the SDPA, to mean a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in the commission of sex offenses and results in serious difficulty controlling sexual behavior.” *People v. Masterson*, 798 N.E.2d 735, 749 (Ill. 2003). Similarly, the Supreme Judicial Court of Massachusetts held that a statute fulfills due process if it requires the State to show that the offender’s behavior resulted from “a mental condition that causes serious difficulty in controlling behavior.” *In re Dutil*, 768 N.E.2d 1055, 1064 (Mass. 2002). The California Supreme Court upheld the constitutionality of jury instructions that require the state to prove that a sex offender “has a mental disorder which seriously impairs volitional control of violent sexual impulses.” *People v. Superior Court (Ghilotti)*, 44 P.3d 949, 974 n.15 (Cal. 2002). In New York, the court of appeals found that offenders are eligible for civil commitment where they have a mental abnormality that causes “serious difficulty in controlling” their sexually violent urges. *State v. Rashid*, 942 N.E.2d 225, 238 (N.Y. 2010). Similarly, the Supreme Court of South Carolina held that “*Crane* does not mandate a court must separately and specially make a lack of control determination,” but it does “require[] a court to determine an individual suffers from a mental illness which makes it seriously difficult, though not impossible, for that person to control his dangerous propensities.” *In re Treatment & Care of Luckabaugh*, 568 S.E.2d 338, 348 (S.C. 2002). And in Washington, the state’s supreme court explained that *Crane* did not mandate a separate jury finding on the issue of the defendant’s control, but it did require that the defendant’s mental disorder be linked “to

2. The Nested Lack-of-Control Approach Conflates Mental Abnormality with Lack of Control

Insofar as courts construe *Crane* as requiring proof of serious difficulty controlling behavior but not mandating a separate finding on the issue, these jurisdictions appear to follow the letter of the law. However, the cases are problematic for a different reason. By collapsing the requirements of a mental disorder and lack of control into one finding instead of two, these cases weaken *Crane's* constitutional safeguard. Specifically, this approach could lead the factfinder to improperly conflate the two discrete concepts and find that because a mental abnormality “causes” an individual to act in a certain way, the individual must also lack substantial control over himself. Professor Morse has explained that

identifying a cause for behavior, including an abnormal cause, does not mean that the agent cannot control the behavior. Causation is not per se an excusing condition; causation is not the opposite of control; the causal link between abnormality and conduct is not mechanistically inexorable; and it is simply not the case that all conduct causally influenced by mental abnormality also indicates a sufficient defect in rationality to warrant the conclusion that the agent was not responsible. The causal link simply describes the causation of action. Although all actions are caused, not all actions are generated by lack of control capacity or by substantial rationality defects.⁹¹

This position finds support in the psychiatric community, which has criticized expert witnesses for assuming that a diagnosis of a mental disorder, such as a paraphilia,⁹² automatically equates to a lack of control.⁹³ In fact, only a subset of those sex offenders that have a diagnosable paraphilia will also have difficulty controlling their deviant behavior.⁹⁴

By requiring that a defendant have a mental disorder that causes volitional impairment, these statutes suggest that mental disorders and

a serious lack of control.” *In re Detention of Audett*, 147 P.3d 982, 989 (Wash. 2006) (quoting *In re Detention of Thorell*, 72 P.3d 708, 728 (Wash. 2003)) (internal quotation marks omitted).

⁹¹ Stephen J. Morse, Essay, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1043 (2002) (emphasis added).

⁹² Paraphilia is a psychiatric term used to describe a deviant pattern of sexual arousal. See First & Halon, *supra* note 75, at 450 (describing the DSM-IV-TR definition of paraphilia and distinguishing volitional impairment from this definition).

⁹³ See *id.* at 444 (suggesting that experts should not take it upon themselves to determine whether a defendant has a mental abnormality but rather should assist the factfinder in making this determination).

⁹⁴ *Id.* at 453. It also should be noted that not all sex offenders have a diagnosable paraphilia. *Id.*

volitional impairment go hand-in-hand. This suggestion opens the door for the factfinder to conflate the two concepts rather than properly keeping the concepts analytically distinct.⁹⁵ Several state court commitment proceedings have demonstrated this error. Expert witnesses frequently (and often successfully) argue for commitment by relying on diagnoses that are widely criticized in the psychiatric community as not probative of the defendant's volitional capacity, without offering further evidence of the defendant's lack of control.⁹⁶ Even the Supreme Court has suggested in dicta that a mental disorder implies a lack of control.⁹⁷ Observers may reasonably argue that presence of a mental abnormality provides a good indicator of whether the defendant lacks control, but this rule is too broad to ensure due process of law. As demonstrated, the rule potentially captures a multitude of persons with no volitional impairment. Further, allowing the burden to be met with evidence that has no particular bearing on the issue would render the lack-of-control requirement empty.

⁹⁵ See, e.g., *People v. Williams*, 74 P.3d 779, 782 (Cal. 2003) (describing an expert witness's testimony that the "defendant does not 'have very good control over his impulses or his emotions in general because he suffers from a mental illness'").

⁹⁶ Compare *State v. Stout* (*In re Detention of Stout*), 114 P.3d 658, 664 (Wash. Ct. App. 2005) (finding that evidence viewed in the light most favorable to the State justified commitment, where a psychiatrist testified that defendant's antisocial personality disorder [APD] and paraphilia caused him to have "difficulty in controlling his urges"), and *Roush v. State*, No. 29679-9-II, 2004 WL 1157833, at *1, *7-9 (Wash. Ct. App. May 25, 2004) (finding that a diagnosis of "paraphilia not otherwise specified" involving nonconsenting persons, a history of reoffending, and statements by the defendant indicating a desire to "break the cycle" were sufficient to support commitment), with John Matthew Fabian, *To Catch a Predator, and Then Commit Him for Life: Sex Offender Risk Assessment* (pt. 2), CHAMPION, Mar. 2009, at 32, 34-35 (noting that "offenders with APD . . . have control over most, if not all, of their behaviors and are unwilling to restrain their impulses" and that there is a debate "as to whether the diagnosis Paraphilia Not Otherwise Specified-Nonconsent (rape subtype) even exists" because of the lack of research establishing its validity and the fact that rapes are often driven by the desire to exercise power and control rather than out of sexual interest).

⁹⁷ See *Kansas v. Crane*, 534 U.S. 407, 414 (2002) (describing pedophilia as "a mental abnormality that critically involves what a lay person might describe as a lack of control"). But see First & Halon, *supra* note 75, at 450 ("It is important to understand that having a diagnosis of a paraphilia does not imply that the person also has difficulty controlling his behavior."); Fabian, *supra* note 96, at 33 (arguing that a diagnosis of a mental abnormality is not enough to show that a person lacks control such that he may be committed).

C. Control as a Separate Element for Commitment

1. Requiring a Separate Finding of a Sex Offender's Lack of Control

To justify civil commitment, a number of states require that the factfinder make a separate finding regarding the defendant's lack of control. Thus, courts in these states generally interpret *Crane* to require the State to prove both that the defendant has serious difficulty controlling his sexually violent behavior and that the state's statutory elements for commitment are met.⁹⁸ States requiring a separate finding on the issue of control have not operationalized the *Crane* standard; rather, they have relied on case-specific factors and expert testimony to civilly commit sex offenders.

a. Remanding Cases Without Giving a Standard

The Supreme Court of New Jersey has held that "the State must prove by clear and convincing evidence that the individual has serious difficulty controlling his or her harmful sexual behavior such that it is highly likely that the person will not control his or her sexually violent behavior and will reoffend."⁹⁹ The case, *In re W.Z.*, concerned the civil commitment of a man with a history of sexual assault crimes who had been diagnosed with antisocial personality disorder and intermittent explosive disorder.¹⁰⁰ The court remanded the case to the trial court to determine whether the defendant had serious difficulty controlling himself¹⁰¹ but gave no further guidance on how to determine the requisite degree of volitional impairment.

Similarly, the Supreme Court of Missouri reversed the civil commitment judgments against two defendants and remanded their cases because both trial courts had given jury instructions that did not require a finding of whether the defendant's mental abnormality caused the defendant "serious difficulty in controlling his behavior."¹⁰² The court noted that there was enough evidence to justify such a finding in

⁹⁸ Statutes in Nebraska and Virginia explicitly require a showing that the defendant has substantial difficulty controlling behavior, so courts do not have to read this requirement into the statutory language. See NEB. REV. STAT. § 83-174.01 (2008); VA. CODE ANN. § 37.2-900 (West Supp. 2010).

⁹⁹ *In re W.Z.*, 801 A.2d 205, 219 (N.J. 2002).

¹⁰⁰ *Id.* at 207-08.

¹⁰¹ *Id.* at 219.

¹⁰² *Thomas v. State*, 74 S.W.3d 789, 791-92 (Mo. 2002).

both cases but remand was nonetheless necessary because the instructions failed to state the requirements for commitment in this “essential way.”¹⁰³ The court provided no further explanation of what constituted “serious difficulty” in controlling behavior.

b. *Affirming Commitment with a Factor-Based Approach*

In Kansas, where *Crane* originated, the state has adopted pattern jury instructions that require the State to prove the defendant’s lack of control as a separate element for commitment.¹⁰⁴ In *In re Care & Treatment of Ward*, the Court of Appeals of Kansas found sufficient evidence to establish the defendant’s serious difficulty in controlling his behavior due to his pedophilia, which an expert testified made the defendant “likely to engage in repeat acts of sexual violence,” and his resistance toward “therapeutic efforts to help control his behavior.”¹⁰⁵

The Supreme Court of North Dakota requires the State to prove, “by expert evidence in the record,” that the defendant has difficulty controlling his behavior.”¹⁰⁶ In *In re Vantreece*, the court upheld the civil commitment of a sexually violent predator based on the trial court’s specific findings that the defendant both demonstrated and admitted to having uncontrolled anger, masturbated compulsively while in jail, failed to cooperate in past treatments, lacked remorse, and stalked several women.¹⁰⁷

c. *Affirming Commitment By Relying on Expert Testimony*

Some courts rely heavily on testimony from expert witnesses in determining whether the defendant has serious difficulty controlling himself. For instance, because Iowa treats the issue of whether a sex offender has serious difficulty controlling behavior as a separate element that the State must prove to justify civil commitment, its courts often rely on expert testimony.¹⁰⁸ In *In re Detention of Barnes*, the Su-

¹⁰³ *Id.* at 792.

¹⁰⁴ See KANSAS JUDICIAL COUNCIL, PATTERN INSTRUCTIONS FOR KANSAS—CRIMINAL 57.40 (3d ed. 2006); see also *State v. White*, 891 So. 2d 502, 512 (Fla. 2004) (noting the post-*Crane* revision of Kansas’s pattern jury instructions).

¹⁰⁵ 131 P.3d 540, 551 (Kan. Ct. App. 2006).

¹⁰⁶ *State v. Vantreece (In re Vantreece)*, 771 N.W.2d 585, 590 (N.D. 2009).

¹⁰⁷ *Id.* at 592.

¹⁰⁸ See *State v. Barnes (In re Detention of Barnes)*, 658 N.W.2d 90, 100 (Iowa 2003) (“[D]ue process requires the State to show a person has ‘a serious difficulty in controlling behavior’ to support civil commitment as a sexually violent predator.”).

preme Court of Iowa affirmed the civil commitment of a sexually violent predator who had been diagnosed with antisocial personality disorder.¹⁰⁹ The court found that the issue of the defendant's control "essentially turned on a judgment of credibility between two experts with different opinions" regarding whether the defendant's mental disorder caused volitional impairment.¹¹⁰ The court upheld the trial court's decision to give greater weight to the testimony of a psychiatrist who stated that "antisocial individuals with sexually violent histories[] are the subset of antisocial personality disordered individuals that have specific difficulty in controlling their behavior."¹¹¹ This testimony contradicted the testimony of a psychiatrist who explained that antisocial personality disorder did not affect the ability to control behavior and who argued that punishment of antisocial individuals should fall to the criminal system.¹¹²

Similarly, in *In re Civil Commitment of Ramey*, the Minnesota Court of Appeals held that while "*Crane* adds to *Hendricks* the affirmative duty to make a lack of control determination," it provided no clear standard for making that determination.¹¹³ The court concluded that the district court had made specific findings on the interaction between Ramey's "past violent sexual behavior and his present mental disorders or dysfunctions" that supported a lack-of-control determination.¹¹⁴ In affirming his commitment, the court also relied on an expert who testified that "Ramey lacked 'utter control' over his sexual impulses when drinking or using cocaine," both of which he was likely to use upon his release from prison.¹¹⁵

In order to justify commitment, Nebraska courts require the State to prove by clear and convincing evidence that a defendant is "substantially unable to control his criminal behavior," meaning that the defendant "ha[s] serious difficulty in controlling or resisting the desire or urge to commit sex offenses."¹¹⁶ In *In re Interest of O.S.*, the Supreme Court of Nebraska upheld a determination that the defendant was a

¹⁰⁹ State v. Barnes (*In re Detention of Barnes*), 690 N.W.2d 455, 461 (Iowa 2004).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 648 N.W.2d 260, 266-67 (Minn. Ct. App. 2002).

¹¹⁴ *Id.* at 268.

¹¹⁵ *Id.*

¹¹⁶ O.S. v. Mental Health Bd. (*In re Interest of O.S.*), 763 N.W.2d 723, 729 (Neb. 2009) (quoting NEB. REV. STAT. § 83-174.01 (2008)) (internal quotation marks omitted).

“dangerous sex offender” on the basis of expert testimony that the defendant had been diagnosed “with psychopathy personality disorder, exhibitionism, and paraphilia, . . . [and] lack[ed] the capacity or control, because of mental illness or other factors, to refrain from engaging in a sexually inappropriate act.”¹¹⁷

Virginia’s civil commitment statute explicitly requires the State to prove that “because of a mental abnormality or personality disorder, [the defendant] finds it difficult to control his predatory behavior” in order for the defendant to be deemed a “sexually violent predator” subject to commitment.¹¹⁸ The Supreme Court of Virginia upheld a sexually violent predator’s commitment based on the opinion of a clinical psychologist, who testified that the defendant “met the criteria for a sexually violent predator” under Virginia law.¹¹⁹ Specifically, the psychologist stated that the defendant suffered from pedophilia as well as a personality disorder that “cause[d] him to violate society’s rules and customs” and made it difficult for him to “control his predatory behavior.”¹²⁰

2. Overreliance on Expert Testimony and the Need for a Clear Standard

Jurisdictions that require the State to prove that the defendant has serious difficulty controlling his sexually violent behavior clearly follow *Crane*’s mandate that there must be proof of lack of control “to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”¹²¹ However, none of the states that have adopted this approach has attempted to operationalize the control standard or explain exactly what the State must show to civilly commit a sex offender. The supreme courts of both New Jersey and Missouri remanded cases

¹¹⁷ *Id.* at 730.

¹¹⁸ VA. CODE ANN. § 37.2-900 (West Supp. 2010).

¹¹⁹ *Boyce v. Commonwealth*, 691 S.E.2d 782, 784 (Va. 2010).

¹²⁰ *Id.*

¹²¹ *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Some commentators argue that the only correct interpretation of *Crane* is that the Supreme Court was mandating a separate jury finding regarding defendants’ lack of control in order to justify civil commitment. *See, e.g.*, Gaines, *supra* note 48, at 316 (explaining that the Supreme Court’s granting certiorari, vacating, and remanding certain cases for reconsideration in light of *Crane* demonstrates the Court’s requirement of a separate jury finding on lack of control).

because the trial court failed to instruct the jury on the issue of lack of control.¹²² However, these states did not use the opportunity to articulate a clear definition of what constitutes lack of control and instead simply reiterated the Supreme Court's mandate in *Crane*.¹²³

At least one empirical study has examined what decisionmakers actually consider in determining whether a defendant lacks substantial ability to control himself in the context of both civil commitment proceedings and insanity hearings.¹²⁴ Noting courts' failure to clarify the standard, the researchers found that legal professionals, psychologists, and mock jurors consider the defendant's verbalization of control (such as an admitted lack of control), the defendant's history of sexual offenses, and the context of the proceeding to be the criteria most relevant to a finding of volitional impairment.¹²⁵ Moreover, decisionmakers were more likely to find volitional impairment in the context of a civil commitment proceeding than in an insanity hearing.¹²⁶ As the researchers noted, "[i]f the[se] are not the types of variables that should 'matter,' then this suggests that the courts and legislatures need to be more explicit in articulating" a standard for volitional impairment.¹²⁷ To give courts more explicit guidance, the research concluded, legislatures and courts should explain how "these identified factors and others support or fail to support a finding of volitional impairment."¹²⁸

The fact that decisionmakers were more likely to find lack of control in the context of a commitment proceeding than in an insanity hearing is especially distressing from the standpoint of assuring due process because the context of the proceeding should have no bearing on the determination of a defendant's inherent biological or character trait.¹²⁹ This research suggests that bias against sex offenders may

¹²² See *supra* text accompanying notes 93-97.

¹²³ See *supra* notes 93-97 & accompanying text.

¹²⁴ See Cynthia Calkins Mercado et al., *Decision-Making About Volitional Impairment in Sexually Violent Predators*, 30 LAW & HUM. BEHAV. 587, 589-90 (2006) (noting courts' lack of clarity and setting forth the study's purpose in evaluating conceptions of volitional impairment among different groups).

¹²⁵ See *id.* at 597.

¹²⁶ *Id.*

¹²⁷ *Id.* at 600.

¹²⁸ *Id.*

¹²⁹ While there is nothing necessarily wrong with adopting different standards for measuring control in different contexts, this study is noteworthy because the subjects were not instructed to apply a different standard based on the context of the proceeding. See *id.* at 592. Thus, the fact that participants' judgments regarding lack of control depended on the context of the proceeding suggests that "participants may have been

cause the concept of volitional impairment to be used as a sword to civilly commit defendants¹³⁰ more frequently than it is used as a shield to exculpate defendants of criminal responsibility in the context of an insanity hearing.¹³¹

In addition to failing to operationalize the control standard, states frequently err by identifying factors *ex post* that prove a defendant lacks substantial ability to control himself. The supreme courts of Kansas and North Dakota relied on a variety of factors, such as refusal of treatment, paraphilia diagnoses, admissions by the defendant, and patterns of past criminal sexual activity to uphold the civil commitment determinations in *Ward* and *Vantrecee*.¹³² The problem with this approach is that the courts did not identify *ex ante* the factors that would be considered in making these determinations, nor did they state that these factors should be determinative in cases going forward. In essence, they declined to promulgate a rule for the future, and the factors they identified served only to affirm the lower courts' determinations. This approach makes it all too easy for a court to selectively identify the factors that it wants to consider in a particular case based on the outcome it hopes to reach. The unsympathetic nature of sex offender defendants suggests that courts will identify factors that weigh in favor of commitment.

Lastly, many cases err by relying almost exclusively on expert testimony in affirming commitment decisions, even though there is no consensus among medical professionals on how to measure self-control.¹³³ Experts frequently reference only the defendant's clinical diagnosis and past criminal conduct when providing an opinion on whether the defendant has serious difficulty controlling himself.¹³⁴ However, drawing a conclusion that the defendant has a volitional im-

more apt to endorse a vacuous notion [of lack of control] when it supported continued confinement over release . . . or incarceration over hospitalization." *Id.* at 598.

¹³⁰ That is, when the factfinder determines that a defendant has serious difficulty controlling his behavior and should therefore be detained indefinitely, even though he has already endured criminal sanctions.

¹³¹ That is, when a factfinder determines that *because* a defendant is substantially unable to control himself, he should not be culpable and subject to criminal punishment.

¹³² See *supra* text accompanying notes 105-07.

¹³³ See Holly A. Miller et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 LAW & HUM. BEHAV. 29, 46 (2005) ("In addition to the lack of agreed upon methodology to assess 'inability to control,' at present there is no consistently utilized definition of just what is being assessed.").

¹³⁴ See, *supra* note 95 and accompanying text (recounting an expert's testimony that the defendant lacked control because he suffered from a mental illness).

pairment from only a diagnosis and past offenses “is at best *post hoc ergo propter hoc* reasoning, and at worst a complete tautology,”¹³⁵ since the relevant diagnoses, like paraphilia or personality disorder, are constructs drawn from evidence of past and current behavior and lack an identifiable underlying pathology that can be said to cause the behavior.¹³⁶

In addition to the fact that the mental health community has not developed a consistent way to measure volitional impairment or identified its pathology, the usefulness of expert testimony is also tempered because ultimately the question of the defendant’s capacity for self-control is a *legal*, rather than a medical, issue. Thus, a medical professional’s conclusions regarding a defendant’s volitional impairment may not have any correlation to the relevant legal standard. But because courts do not define the legal standard, they leave the door open for medical judgment to substitute for legal judgment. The conflation of these two standards is contrary to the Court’s admonition in *Crane* that the “science of psychiatry [should] inform[] but . . . not control ultimate legal determinations” because its “distinctions do not seek precisely to mirror those of the law.”¹³⁷

III. RECOMMENDATIONS TO COURTS APPLYING *CRANE*

States should construe *Crane* to require a separate finding on the issue of whether the defendant has serious difficulty controlling himself. States adopting an implicit lack-of-control theory—in which lack of control is necessarily proven by demonstrating that the defendant has a mental abnormality that predisposes him to commit sexually violent acts—have clearly disregarded the Court’s holding in *Crane* and incorrectly adopted Justice Scalia’s dissent as the law. Other jurisdictions that adopt a slightly different interpretation of *Crane*—maintaining that the defendant must have a mental abnormality that causes serious difficulty controlling behavior—do not violate *Crane* insofar as the decision requires only that the State put forward some proof of lack of control in order to commit the defendant. However, this construction of the stat-

¹³⁵ Stephen D. Hart & P. Randall Kropp, *Sexual Deviance and the Law*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT* 557, 564 (D. Richard Laws & William T. O’Donohue eds., 2008).

¹³⁶ Miller et al., *supra* note 133, at 41, 46-47 (discussing the classification of paraphilia and personality disorder and noting that they are classifications based on symptoms and behaviors alone).

¹³⁷ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

ute makes it too easy for the factfinder to conflate a defendant's mental abnormality with volitional impairment.

The requirement of a separate finding is the best understanding of the proof mandated by *Crane*. However, states that have embraced this interpretation have failed to operationalize *Crane's* control test—leading to inconsistent and ad hoc decisions—and instead have relied heavily on the opinions of experts who lack scientific backing for their determinations.

A. Operationalizing the Control Standard

States should attempt to operationalize the rule that the defendant must have serious difficulty controlling himself in order to justify civil commitment. If we conceive of self-control as a spectrum and *Crane's* ruling as a vaguely directed mandate for high-stakes line drawing along this spectrum, then states should more clearly elucidate the point where decisionmakers should aim to draw the line. This guidance could come in the form of a standardized list of factors that bear on the issue of control¹³⁸ or a definition of control that appeals to community judgments, similar to the “reasonable person” standard. One potential implementation of the control standard would ask the jury to consider whether the offender would be likely to commit a sexually violent crime in nearly all situations where punishment is not clearly imminent, and whether the offender would *want* to exercise discipline over his desires—although unable to do so—in these circumstances.¹³⁹

¹³⁸ See *supra* notes 105-07 and accompanying text for factors currently used by some courts in making this determination.

¹³⁹ This effort has its origins in Professor Michael Corrado's scholarship. He has developed a definition for determining whether someone is “*substantially* unable to control his behavior and conform to the law.” Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 88 (2005). That definition would require the following:

1. He committed the crime;
2. He did not suffer from a defect of rationality at the time; and
- ...
- 3(a). The desire that led him to perform the action that constituted the crime would have done so, at that time, in any but the most exceptional circumstances.

Id. at 87-89. Professor Corrado explains that the “most exceptional” circumstances should be determined by the community, in keeping with the criminal law's tradition of deferring to community judgment. *Id.* at 88. He notes that this inquiry should not focus on whether there is *any consequence* that could make a person curb his offending behavior—since even the “severely addicted” are unlikely to offend when there is a “policeman at the elbow.” *Id.* Rather, the inquiry should focus on *how severe a consequence must be* to induce a person to curb his offending behavior; in other words, “how

Both of these approaches have their drawbacks. Factor-based tests do not provide strict guidance or standardization to the lower courts and can be easily manipulated to justify a particular outcome. A definitional approach, on the other hand, provides a clearer legal standard but risks being over- or underinclusive. To be sure, state courts and legislatures would face a formidable challenge in drafting a legal definition of lack of control based on community norms. Still, this approach seems to be the best way to assist the factfinder in conceptualizing the legal standard so that it may be applied more fairly, predictably, and consistently (rather than permitting decisions to be made ad hoc and rationalized ex post).

Even an admittedly imperfect operationalization of lack of control would still be an improvement on the present state of the law, which leaves the factfinder utterly without guidance. Operationalizing the definition would help guard against the fallacy of presuming lack of control based upon the existence of a mental abnormality and would prevent conclusory determinations that a defendant lacks control based only on his past illegal conduct and clinical diagnoses. It would also render trial court decisions more easily reviewable by higher courts and would let defendants know how their dispositions and conduct will be judged upfront, thus presenting them with a better opportunity to rebut these characteristics in their defense.

much of a risk compulsion leads to.” *Id.* This definition is likely overinclusive—capturing offenders who may simply be particularly risk-seeking and who *freely choose* to commit the crime in all but the most exceptional circumstances while still exercising perfect self-control.

To narrow this definition, one could permit the factfinder to consider whether the offender *wanted to act* on his desire, or whether the offender *wanted to stifle or overcome* the desire, but was unable to do so in the absence of exceptional circumstances (e.g., the policeman at the elbow). An offender who wants to act on his desires in certain situations and accordingly does so is able to exercise self-control in those situations and is therefore not eligible for civil confinement (but should only be relegated to the criminal justice system if and when he commits a crime). An offender who does not want to commit the crime but cannot exercise discipline over his desires in all but exceptional circumstances is one who has substantial difficulty controlling himself and should be civilly confined to protect the public under the *Crane* rationale.

States could also raise the bar on what constitutes substantial difficulty controlling oneself, requiring that the offender be unable to stop himself from offending *even in* the most exceptional circumstances.

B. *Monitoring the Use of Expert Testimony*

There are a number of ways that testimony from and reliance on expert witnesses could be improved. First, the court should carefully instruct the jury as to the role of expert testimony in the lack-of-control determination. Second, the court should use its discretion under the Rules of Evidence to exclude expert testimony on the ultimate issue of whether the defendant has serious difficulty controlling behavior and restrict expert testimony to a qualitative description of the defendant's volitional capabilities based on the expert's observations and experience in the field.¹⁴⁰

A court should carefully instruct the jury as to how it should consider expert testimony. Specifically, the jury should be informed that (1) the issue of the defendant's ability to control himself is a legal, not a scientific, issue to be considered independently by the jury acting as factfinder, although potentially informed by expert testimony;¹⁴¹ and (2) that there is presently no consensus among medical professionals on how to measure a person's self-control.¹⁴² Expert witness testimony should be considered with this legal and scientific background in mind so that the expert's apparent authority does not unduly persuade the jury.

Experts should also refrain from giving their opinions on the ultimate issue of whether the defendant has serious difficulty in controlling behavior, since this is a decision for the factfinder based on the totality of the evidence and is measured by a legal rather than a clinical approach.¹⁴³ Allowing the court to exclude expert testimony would be in keeping with the reasoning behind Federal Rule of Evidence 704(b), which restricts expert witnesses from rendering ultimate con-

¹⁴⁰ See *infra* notes 133-36 & accompanying text.

¹⁴¹ See *supra* text accompanying note 137.

¹⁴² See Miller et al., *supra* note 133, at 46.

¹⁴³ There are many examples of civil commitment cases in which judges have admitted ultimate opinions rendered by expert witnesses, and appellate courts have used these opinions to justify upholding trial courts' commitments of defendants. See, e.g., *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 264 (Minn. Ct. App. 2002) (considering statements from two examiners that the defendant "lack[ed] adequate ability to control his sexual impulses" in reviewing the determination of defendant's volitional capacity); *In re Preston*, 629 N.W.2d 104, 109 (Minn. Ct. App. 2001) (summarizing a doctor's testimony that the defendant "met all of the criteria for commitment" under two state statutes); *Boyce v. Commonwealth*, 691 S.E.2d 782, 785 (Va. 2010) (describing how a clinical psychologist had formed the opinion that the defendant "met the criteria for being a sexually violent predator" under the state statute and finding this opinion supported by the evidence).

clusions regarding the “mental state or condition” of a defendant in criminal cases.¹⁴⁴ Alternatively, courts should consider using Federal Rule of Evidence 403 to exclude expert testimony of ultimate conclusions and technical diagnoses when the probative value of this information is low and the potential of prejudicing the jury is substantial.¹⁴⁵ In most situations, the probative value of an expert’s opinion regarding whether the defendant is substantially unable to control himself is low, because the witness—no matter how knowledgeable in psychiatry—will not be an expert in applying the *legal* standard. A conclusion from an authoritative figure on an issue that appears to be within his expertise has the potential to strongly influence the jury. For similar reasons, some commentators have recommended that courts go even further by banning experts from discussing clinical diagnoses at all in their testimonies.¹⁴⁶

Expert testimony may still play a useful role in the hearing process by providing a qualitative description of the defendant’s particularized volitional impairment, based on the expert’s observation and study of the defendant.¹⁴⁷ Experts should “attempt to directly evaluate the voli-

¹⁴⁴ See FED. R. EVID. 704(b). While expert witnesses are typically permitted to render opinions on ultimate issues, this exception was added by the Insanity Defense Reform Act of 1984 so that psychiatrists could not testify as to whether a defendant was insane. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL RULES OF EVIDENCE 190-91* (7th ed. 2011). The rationale behind this addition was to “eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact.” *Id.* Further, quoting the American Psychiatric Association, the Senate Judiciary Committee noted that “[d]etermining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.” *Id.* These rationales are no less applicable when determining a defendant’s volitional impairment in a civil commitment proceeding. In addition, as in the case of insanity, the defendant in this context faces the potential for indefinite commitment.

¹⁴⁵ See FED. R. EVID. 403.

¹⁴⁶ See, e.g., Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 603-04 (1978) (arguing that experts “should not . . . be allowed to draw conclusions or to state their data in other than commonsense and observational terms”); cf. Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 446 (1995) (arguing that expert testimony describing an individual’s psychological capacities is relevant to the court’s determination of legal mental illness but that testimony regarding an individual’s diagnosis is not relevant).

¹⁴⁷ For a useful and comprehensive list of factors that experts should consider in analyzing the offender’s volitional capacity, see Fabian, *supra* note 96, at 36. He recommends that expert witnesses take the following considerations into account:

- [Offender h]istorically and currently meets criteria for a paraphilia diagnosis and preferably multiple paraphilias;

tional impairment by scrutinizing . . . why [the defendant] decided to commit sexual violence at some times or against some people or for some reasons, but not at other times or against other people or for other reasons.”¹⁴⁸ Specifically, the main function of expert testimony should be to describe clearly and nontechnically the defendant’s relevant medical history, general demeanor, responses to studies and questioning, and other attributes that the expert believes bear on a person’s volitional capacity. The expert should not render a conclusion about whether this information amounts to a legal lack of control. Furthermore, the expert should be permitted to provide general information regarding research in the area of volitional impairment and context for the level of impairment that the expert observed in the defendant as compared to other persons whom the expert has studied.

Restricting expert testimony to a qualitative description of the defendant’s volitional capacity and a presentation of contextual evidence would not only prevent conclusory analyses from biasing the jury, but would also serve a useful evidentiary function. Expert testimony provides the factfinder with a description of the defendant’s capacity for self-control from a knowledgeable and experienced third party. This information helps the factfinder form a more complete picture of the defendant so that it can apply the legal standard regarding lack of control with consideration of the many facets of this complicated issue. Restricting expert testimony in this way allows the factfinder to gain additional insight to inform its ultimate determination of the main

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- [Offender has h]istory of frequent sex crimes in the community indicating sexual preoccupation and hypersexuality;
 - [Offender engages in f]requent acts of sexual violence within a closely proximate period of time when at risk in the community (while on supervision or while participating in outpatient sex offender treatment programming);
 - Offender engages in behavior when he is aware of a high probability of getting apprehended;
 - Offender lacks insight and understanding into his offending behavior;
 - Offender lacks control of his behavior when it is unreasonable to expect him to engage or not engage in a certain act under his particular circumstances (considering context of offender’s offending patterns);
 - Offender sexually acts out to relieve overwhelming anxiety and distress; and
 - Offender’s strength of sexual desire interferes with his ability to consider alternative courses of action, and decision/ability not to reoffend.

Id. (footnote omitted).

¹⁴⁸ Hart & Kropp, *supra* note 135, at 564.

issue of the case—whether the defendant has serious difficulty controlling his behavior

CONCLUSION

States have already committed thousands of sex offenders to mental health facilities.¹⁴⁹ The Supreme Court's recent ruling on the constitutionality of a federal civil commitment statute for sex offenders¹⁵⁰ suggests that even more offenders will soon be committed indefinitely. In this high-stakes decision regarding the liberty of citizens, the Supreme Court has chosen to safeguard due process in commitment proceedings by requiring proof that the defendant has "serious difficulty in controlling behavior."¹⁵¹ The Court's decision not to elaborate on this standard has given states wide discretion to determine what amount and kind of proof is sufficient to justify commitment and has resulted in numerous problems that sacrifice due process. Indeed, it may be ideal to eliminate the control test in its entirety, as many states have done with the insanity defense, because of its unclear and amorphous meaning. However, assuming that *Crane's* constitutional holding will remain good law and that eliminating civil commitment statutes for sexually violent predators would be politically unpopular, it is important that we improve the current test to ensure that the protections of due process extend to this unpopular segment of society.

¹⁴⁹ See Deming, *supra* note 2, at 441 (reporting that, as of May 2006, 3646 people were being held as civilly committed sex offenders).

¹⁵⁰ United States v. Comstock, 130 S. Ct. 1949, 1965 (2010).

¹⁵¹ Kansas v. Crane, 534 U.S. 407, 413 (2002).