

## Sex Predators and Federal Habeas Corpus: Has the Great Writ Gone AWOL?

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### INTRODUCTION

It is hardly news that convicted sex predators—especially those who prey on young people and women—occupy the lowest rung of society. This is not surprising; even among their fellow felons, who themselves are regarded as second-class citizens, sex predators are frequently stigmatized as an underclass within the notoriously hierarchical prison systems. And, when it comes time for a sex-offender to leave jail and return to the public, the individual's would-be neighbors often protest, leaving authorities baffled as to where to place these pariahs. Indeed, even the rare judicial opinion that is sympathetic to sex offenders will go to great lengths to emphasize how heinous and despicable their crimes are.<sup>1</sup>

The social stigmatization and moral opprobrium associated with sex crimes manifested itself in the legal system when, in the 1990s, state legislators became enamored with sexually violent predator (SVP) laws. SVP laws essentially were enacted to prevent already-convicted sex predator felons from actually being released to the outside world. The laws were not “punishment” for crimes already committed, because that would violate the Fifth Amendment's Double Jeopardy Clause.<sup>2</sup> Instead, the laws took a different tack by basing continued incarceration on the offender's potential for *future* behavior. SVP laws were, therefore, styled as a civil commitment statute, which operates under the premise that some people are simply too dangerous to be free, even if they have already served their sentence. Under the SVP laws, once the offender's prison term was completed, the individual would be re-tried in a civil suit under the authority of the new SVP law; if found to be dangerous, the offender would continue to be held in the state's custody.

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1. See *Westerheide v. Florida*, 831 So.2d 93, 120 (Fl. 2002) (Pariente, J., concurring in part and dissenting in part) (“Let there be no mistake: I deplore the criminal acts that Westerheide committed”); *State v. Post*, 541 N.W.2d 115, 135 (Wis. 1995) (Abrahamson, J., dissenting) (“No one denies that the crimes precipitating the passage of chapter 980 are among the most heinous afflicting our society”).

2. See *Atwood v. Vilsack*, 338 F. Supp. 2d 985, 1006 (S.D. Iowa 2004) (discussing Fifth Amendment application to SVP law).

Because of their singular unpopularity, sex predators undoubtedly entertain doubts about the impartiality of the state legal system. After all, in almost every state that has a type of SVP statute—there are currently sixteen, with more on the way—judges are subject to reelection or retention elections.<sup>3</sup> Since public attitudes towards sex crimes fostered the SVP laws in the first place, assuming those attitudes could make their way into the judicial branch is not unreasonable. Indeed, what elected judge would want to be known as the judge who released a sex predator on a technicality, or because the evidence of dangerousness was insufficient? What would happen if the sex predator did, in fact, commit a new sex crime? Clearly, pressures at force in state legal systems would allow a reasonable person to question the efficacy of rulings by popularly elected judges because in this context the temptation to do the popular thing is extremely high.

Even if the sex predator lacked complete confidence in the state legal system, he—SVPs are exclusively men—could rely on eventually getting a hearing in front of a federal judge via an application for a writ of habeas corpus.<sup>4</sup> Federal judges have lifetime tenure and thus, in theory, are not as susceptible to the political winds that blow during every trial of an unpopular defendant.<sup>5</sup> Accordingly, in light of the unpopularity of these defendants, federal habeas review takes on added significance.

This Article will discuss two events that have aligned to effectively eliminate the possibility of relief under the federal habeas corpus regime. The first event occurred in 1996, when Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA)—an act that reflected a growing sense of frustration with, and antipathy to, collateral attacks on state court judgments.<sup>6</sup> In essence, as Part II of this article discusses, AEDPA codified an extremely high level of deference into the system.<sup>7</sup>

The second event occurred with the Supreme Court's decision in *Kansas v.*

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3. See AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004) (listing judicial appointment methods in each state), available at [http://www.ajs.org/js/JudicialSelectionCharts\\_old.pdf](http://www.ajs.org/js/JudicialSelectionCharts_old.pdf). Judges are subject to reelection or retention elections in Arizona, California, Florida, Iowa, Kansas, Minnesota, Missouri, North Dakota, and Wisconsin. *Id.* In other states with SVP laws, such as New Jersey and South Carolina, judges are subject to being periodically reappointed by political entities. *Id.*

4. Peter C. Pfaffenroth, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, 55 STAN. L. REV. 2229, 2239 n.76 (2003) (discussing procedure of civil commitment of SVPs).

5. Stephen Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable for Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1826-1833 (2000) (discussing importance of independent judges and habeas relief).

6. Karen M. Marshall, *Finding Time for Federal Habeas Corpus: Casey v. Saffold*, 37 AKRON L. REV. 549, 550 (2004).

7. See *Williams v. Taylor*, 529 U.S. 362, 406 (2000) (providing example of Supreme Court analysis of state habeas corpus proceedings).

*Crane*<sup>8</sup> in 2002. The day the decision was issued, the majority opinion in *Crane* was subjected to the dissent's bitter criticism that the opinion was muddled, unwieldy, and provided no guidance to lower courts. The *Crane* majority opinion has not aged well with the court's "ambiguous" holding even being dubbed "treacherous precedent" by one commentator.<sup>9</sup> Whether that is the case on direct appeal is debatable, but when viewed through the deferential lens created by AEDPA, it is clear that *Crane* dealt a further blow to the availability of federal habeas corpus review for sex predators. The decision's destructive impact on the availability of collateral relief under federal habeas corpus has yet to be documented, despite one federal district court confronting the problem head-on in 2004. Part I of this article briefly analyzes the constitutional and practical underpinnings of SVP laws. Part II highlights certain aspects of federal habeas corpus, with a focus on the relatively recent trend in restrictions placed on the writ by both Supreme Court jurisprudence and Congress. In Part III, the analysis returns to SVP laws with a descriptive analysis of the Supreme Court's two most important opinions on the subject, emphasizing the Court's attempts to craft a standard that is sufficiently flexible yet capable of clarity in application. Part III concludes that the court's standard has failed to provide either clarity or direction to lower courts, a fact which is evidenced in Part IV by the several state supreme courts that have since ruled in widely divergent ways. Finally, in Part V, the article analyzes the Supreme Court's jurisprudence in light of the federal habeas corpus standards discussed in Part II. Part V also discusses one federal district court case, concluding that the Supreme Court's failure to promulgate a clear standard for involuntary incarceration has effectively foreclosed relief under the federal habeas corpus statute. Similar results are likely to occur as committed sex predators work their way through the state appellate systems and, ultimately, into the federal courts.

### I. CIVIL COMMITMENT (SVP) STATUTES

As noted earlier, SVP laws were designed by state lawmakers in the 1990s to deal with what was felt to be a serious problem of recidivism among a particularly unseemly subgroup of criminals.<sup>10</sup> Existing civil commitment procedures were deemed inadequate to address the unique situation of predators for whom standard treatment failed. These individuals, it was found, were extremely likely to commit future acts of sexual violence and, given the risk they posed to society, the need for a new system of incarceration became

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8. 534 U.S. 407 (2002) (limiting availability of federal habeas corpus review to sex predators).

9. Sarah E. Miller, *Out of Control: An Ambiguous Decision Raises the Question of Exactly Who Has Control*, 42 WASHBURN L.J. 353, 354 (2003).

10. See *Kansas v. Hendricks*, 521 U.S. 346, 350-51 (1997) (describing origination of SVP laws).

clear.<sup>11</sup> The history and development of these laws is adequately discussed elsewhere, as are the legal justifications and criticisms of the involuntary confinement of SVPs.<sup>12</sup> It will suffice for the moment to say that the indefinite civil confinement of sex predators based on predictions of future violence has sparked a great deal of controversy and, of course, litigation.

SVP laws generally work as follows: Suppose a man is convicted of sexual assault and is sentenced to ten years. He would normally serve five to seven years of his prison term, depending on state law, and could expect to be released on a mandatory release date that was calculated based on good behavior and/or simple economics (most states simply could not afford to house every prisoner for his full sentence). Some time before his release date (in fact, usually only days or weeks before that date), the state would inform the inmate that it was not comfortable having him on the loose.<sup>13</sup> Under authority of the state's SVP law, the prisoner would then be tried before a jury or a judge—not, of course, for his original crime but instead for a determination of whether the prisoner had a mental disorder making him likely to re-offend.<sup>14</sup> Generally speaking, if the individual was found to have a disorder and was likely to re-offend, he would be deemed a “sexually violent person” (or “sexually violent predator”), and would be indefinitely civilly committed.<sup>15</sup> He would then typically be incarcerated in a facility for similar individuals until such a time as he was deemed to no longer be dangerous to society.<sup>16</sup> Some variation on this procedure exists in seventeen states, and SVP laws are under consideration in at least twenty more.<sup>17</sup>

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11. See *Hendricks*, 521 U.S. at 351-52 (acknowledging sexual predators pose risk to society even after incarceration).

12. See generally Eric G. Barber, *State v. Laxton: How the Wisconsin Supreme Court Ignored the U.S. Supreme Court (And Why They May Have Gotten Away With It)*, 2003 WIS. L. REV. 977 (debating legality of involuntary confinement of sexual predators); Pfaffenroth, *supra* note 4 (explaining law behind involuntary confinement of SVPs).

13. See *Hendricks*, 521 U.S. at 352 (discussing procedures for petition for involuntary prisoner commitment); *Detention of Paschke v. State*, 90 P.3d 74, 76 (Wash. Ct. App. 2004) (informing defendant two days prior to release); *In re Commitment of Lombard*, 669 N.W.2d 157, 160 (Wis. Ct. App. 2003) (informing defendant “several” days prior to release). The Kansas statute, the subject of the two leading Supreme Court cases on the topic, required the custodial agency to notify the prosecutor only 60 days before the inmate's anticipated release; the prosecutor then had 45 days in which to decide whether to bring a petition. *Hendricks*, 521 U.S. at 352.

14. See *Hendricks*, 521 U.S. at 353 (discussing trial procedure for determining whether defendant poses future danger to society); *In re Commitment of Laxton*, 647 N.W.2d 784, 787, (Wis. 2002) (noting due process as part of procedure for evaluating future dangerousness).

15. See *Seling v. Young*, 531 U.S. 250, 254 (2001) (discussing provisions of Washington state SVP statute).

16. See generally KAN. STAT. ANN. § 59-29a10(a)-(b) (2005); WIS. STAT. § 980.08 (2005).

17. See generally National Institute of Corrections, *Involuntary Commitment of Sexually Violent Predators: Comparing State Laws* (detailing issues concerning sex predator laws), at <http://nicic.org/Library/020501> (last visited Feb. 28, 2006); Washington State Institute for Public Policy, *Involuntary Commitment of Sexually Violent Predators: Comparing State Laws* (2005) (comparing different state SVP laws), available at <http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf>; see also *In re Commitment of R.S.*, 773 A.2d 72, 80 (N.J. Super.

## II. FEDERAL HABEAS CORPUS AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

### A. Habeas Corpus Then and Now

Since the Judiciary Act of 1789, federal courts have possessed the ability to inquire into the constitutionality of a conviction, although federal habeas review was originally limited only to federal prisoners.<sup>18</sup> That restriction was lifted after the civil war, and federal courts have since been receiving petitions for the “great writ” on behalf of state prisoners. But federal courts were not given the first crack at resolving wrongful convictions of state prisoners; since the 1886 Supreme Court decision in *Ex Parte Royall*,<sup>19</sup> courts had imposed an exhaustion requirement. In other words, state prisoners could not pass through the federal gateway until they had attempted to gain relief via whatever state proceedings were available to them. Normally, that would constitute following the state appeal process through to its conclusion. The first federal law addressing this principle was codified on June 25, 1948.<sup>20</sup> The requirement that those in custody must exhaust their state remedies before coming to federal court took on new meaning in 1996, when Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>21</sup> In the words of one court, AEDPA reflected “Congress’ intent to bring change to the field.”<sup>22</sup> The change was not a boon to prisoners; instead, AEDPA served to codify several restrictions on federal habeas relief, which the courts had partly developed themselves in recent years in order to “curb the abuse of the statutory writ of habeas corpus.”<sup>23</sup> AEDPA restricted habeas relief in several ways. For instance, it established a one year period of limitations for the filing of federal

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App. Div. 2001). The relevant state laws are largely identical. See ARIZ. REV. STAT. ANN. § 36-3701 (West 2003); CAL. WELF. & INST. CODE § 6600 (West 1998); FLA. STAT. ch. 394.910 (2000); 725 ILL. COMP. STAT. 207/1 (2003); IOWA CODE § 229A.1 (2000); MASS. GEN. LAWS ch. 123A, § 1 (2003); MINN. STAT. § 253B.185 (2003); MO. REV. STAT. § 632.480 (2000); N.J. STAT. ANN. § 30: 4-27.25 (West 1997); N.D. CENT. CODE § 25-03.3-01 (2002); S.C. CODE ANN. § 44-48-100 (Law. Co-op 2002); TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon 2003); VA. CODE ANN. § 37.2-901 (Michie 2005); WASH. REV. CODE § 71.09.010 (2002); WIS. STAT. § 980.01 (1998).

18. See *Medberry v. Crosby*, 351 F.3d 1049, 1058 (11th Cir. 2003) (summarizing federal court ability to question state convictions).

19. 117 U.S. 241 (1886) (holding prisoners must seek relief through state courts before federal courts).

20. See generally 28 U.S.C. § 2254 (2006).

21. See generally, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. § 2241 *et seq.* (2006)).

22. See *Lambert v. Blackwell*, No. 01-CV-2511, 2003 WL 1718511 at 15 (E.D. Pa. 2003) (rejecting petitioner’s request for federal habeas corpus relief).

23. See David Gottlieb & Randall Coyne, *Habeas Corpus in State and Federal Courts*, 31 N.M. L. REV. 201, 202 (2001) (observing that in passing AEDPA, “Congress has grafted yet another layer on top of the Supreme Court’s already high procedural hurdles”). See generally H.R. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (codifying restrictions on habeas relief).

habeas petitions.<sup>24</sup> Further, it eliminated the ability of prisoners to bring second or successive petitions, and it ordered federal courts to defer to the factual findings made by state courts.<sup>25</sup> The AEDPA also restricted the ability of federal courts to hold evidentiary hearings.<sup>26</sup>

The evident thrust of most of these reforms was to increase the deference granted by federal courts to the decisions of the state courts. In sum, AEDPA confirmed, first, that federal habeas petitioners had to give state courts the first try at ruling on their case and, second, that federal courts had to defer to the rulings of those state courts. AEDPA also imposed the novel requirement that deference was to extend not only to the state courts' factual findings, but also to their legal conclusions.<sup>27</sup> Under 28 U.S.C. § 2254(d)(1), a federal court cannot grant habeas relief unless the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."<sup>28</sup> The former clause restricted habeas relief in two key ways. First, it allowed relief only if the underlying state court decision did not comport with "clearly established" federal law, "as determined by the Supreme Court of the United States."<sup>29</sup> That is, courts "may not look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law."<sup>30</sup> This, as the Seventh Circuit recognized, was different from other practices whereby district and circuit courts could rely on their own circuit's jurisprudence in determining whether to grant relief.<sup>31</sup>

In addition to narrowing the basis for potential habeas relief to the holdings of the Supreme Court, the second restriction on habeas relief is found in the "contrary to" and "unreasonable" clauses.<sup>32</sup> Under these clauses, a federal court can only grant relief if the state court's decision was either an unreasonable application of federal law (and then, remember, only Supreme Court-made law) or was actually contrary to that law. The proper interpretation of this clause prompted a 5-4 split at the Supreme Court, with the conservative majority confirming that the statute did, in effect, sharply curtail federal judges' own independent judgment about the rightness or wrongness of a petitioner's

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24. See 28 U.S.C. § 2244(d)(1) (2000) (describing one-year limitation period on habeas corpus rights).

25. See 28 U.S.C. §§ 2244(b)(3), 2254(d)(2) (2000) (proscribing more limitations on prisoners wishing to bring habeas corpus claims).

26. See 28 U.S.C. § 2254(e)(2) (2000) (placing restrictions on federal courts).

27. See *Lambert v. Blackwell*, No. 01-CV-2511, 2003 WL 1718511, at 15 (providing example of court rejecting petitioner's request for habeas corpus relief).

28. See 28 U.S.C. § 2254(d)(1)-(2) (2000).

29. See 28 U.S.C. § 2254(d)(1)-(2) (2000).

30. See *Doan v. Brigano*, 237 F.3d 722, 729 (6th Cir. 2001) (quotation marks omitted).

31. See *Williams v. Taylor*, 529 U.S. 362, 381 (2000).

32. See 28 U.S.C. § 2254(d)(1) (2000).

custody.<sup>33</sup>

In *Williams v. Taylor*, the majority found that the text of 28 U.S.C. § 2254(d)(1) meant essentially what it said.<sup>34</sup> “Contrary to” federal law, as established by the Supreme Court, meant that a decision was “diametrically different” to the holding of a Supreme Court case.<sup>35</sup> The example used by Justice O’Connor was a state court’s application of the wrong standard of proof in an ineffective assistance of counsel case.<sup>36</sup> To show ineffective assistance, the Supreme Court required a criminal defendant only to show a “reasonable probability” that ineffective assistance of counsel affected the outcome of the trial.<sup>37</sup> If a state court required such showing by a preponderance of the evidence (a higher standard), it would be “contrary to” Supreme Court precedent.<sup>38</sup> This sort of decision stands in contrast to what Justice O’Connor described as a “run-of-the-mill state-court decision applying the correct legal rule,” the outcome of which the federal habeas court merely disagrees with.<sup>39</sup> Thus, after AEDPA, even if the federal court disagreed with the state court’s application of the correct legal rule, habeas relief could not be granted because the state court decision was not “contrary to” federal law.<sup>40</sup>

Similarly, the “unreasonable application” clause of § 2254(d)(1) bolstered the requirement that federal judges defer to the legal rulings of state courts.<sup>41</sup> The *Williams* court counseled that “a federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively *unreasonable*.”<sup>42</sup> The “most important point” about the standard, in the court’s view, was that “an *unreasonable* application of federal law is different from an *incorrect* application of federal law.”<sup>43</sup> In summary, Justice O’Connor concluded, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”<sup>44</sup> Thus, it is fair to say that AEDPA, as construed by the Supreme Court, removed the “independent judgment” of the federal judiciary, substituting in its place a highly differential standard under which the federal reviewing judge must not merely disagree with the state

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33. See generally *Williams v. Taylor*, 529 U.S. 362 (2000).

34. See *Williams*, 529 U.S. at 362 (interpreting statute).

35. See *id.* at 405.

36. See *id.* at 405-06.

37. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

38. See *Williams*, 529 U.S. at 406.

39. See *id.*

40. See *id.*

41. 28 U.S.C. § 2254(d)(1) (2000).

42. See *Williams*, 529 U.S. at 409.

43. See *id.* at 410 (italics in original).

44. See *id.* at 411.

judge, but must find the state court decision objectively unreasonable.<sup>45</sup>

However, even though the court stated that the “most important point” about the new standard of deference was that an “unreasonable” decision was different from an “incorrect” one, it did not specify what that difference was. How extreme must a state court decision be in order to be unreasonable? The only guidance given by the Supreme Court is that a state court decision must be “objectively” unreasonable, a standard which, strangely, imputes a reasonableness test into the very determination of what is “unreasonable.”<sup>46</sup> One commentator has expressed his frustration with the standard of review, noting that, “[o]ne thing is certain. The objective unreasonableness standard needs further and substantial elaboration.”<sup>47</sup> It is likely due to this uncertainty that the lower courts have adopted shorthand, more pragmatic, versions of the test. For example, in the Ninth Circuit’s phraseology, “AEDPA directs us to afford the state appeal court’s legal judgment considerable deference.”<sup>48</sup> And, in the Third Circuit’s framework, “[t]he federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.”<sup>49</sup>

Whatever nomenclature is used, it is apparent that a state court decision must be extremely far-afield in order to justify the grant of federal habeas relief. For example, in *Price v. Vincent*,<sup>50</sup> the Supreme Court unanimously reversed a decision to grant habeas relief because the Sixth Circuit Court of Appeals in its decision had gone beyond the limits of federal habeas review put in place by 28 U.S.C. § 2254(d). The Supreme Court found that, “[e]ven if we agreed with the Court of Appeals that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise.”<sup>51</sup> Thus, as the court hypothesized, it is at least conceivable that nine justices of the Supreme Court, plus the four district and circuit judges who found in the petitioner’s favor, could disagree with a state court decision, yet the state court decision could still be deemed “reasonable.” This is deference of the highest degree.

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45. *See id.*

46. *See Williams*, 529 U.S. at 409.

47. *See* Allan Ides, *Habeas Standards of Review Under 28 U.S.C. 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE. L. REV. 677, 718 (2003) (commenting on objective unreasonableness standard).

48. *See Kesser v. Cambra*, 392 F.3d 327, 334 (9th Cir. 2004).

49. *See Matteo v. Albion*, 171 F.3d 877, 890 (3d Cir. 1999).

50. 538 U.S. 634, 636, 643 (2003) (discussing appropriateness of federal deference to state court decision).

51. *See generally id.* (holding state court decision reasonable even if higher courts disagree with reasoning).

### B. AEDPA and Sex Predators

Most of the cases describe habeas relief for “prisoners.” The reader by this point might have observed that those who are involuntarily committed under SVP laws are not, strictly speaking, “prisoners.” These individuals are neither serving a “sentence” nor a definite term of confinement; moreover, they do not live in prisons. Instead, they are generally housed in separate facilities, or minimally, sections of facilities separated from the regular prison population. Because most habeas decisions deal with convicted prisoners, they use the term “prisoner” as if prisoners were the only individuals who would petition for habeas corpus under § 2254, which is not the case.<sup>52</sup> The text of § 2254(a) provides that federal judges “shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”<sup>53</sup> Thus, the operative term is “person in custody pursuant to the judgment of a State court,” which describes SVPs as well as standard prisoners; AEDPA therefore applies to civilly-committed sex predators with equal force.<sup>54</sup>

### III. THE SUPREME COURT’S ATTEMPTS TO CREATE “CLEARLY ESTABLISHED FEDERAL LAW”

As has been demonstrated, AEDPA provides that federal habeas relief may only be granted when a state court’s decision goes against the grain of “clearly established Federal law, as determined by the Supreme Court.”<sup>55</sup> Thus, for any federal habeas petitioner to succeed, he must first demonstrate to a federal judge that a clearly-established Supreme Court law actually governs his case. If successful, the petition next must convince the judge that the state court’s decision contravened that law. In particular, the Supreme Court’s analysis in SVP jurisprudence turns on whether, and to what extent, an individual lacks control over his sexually violent impulses before that individual may be committed against his will.

As will be seen below, self-control is the seminal analysis in involuntary commitment proceedings because it differentiates criminal proceedings from civil ones. A criminal conviction is based on culpability and the notion that the defendant committed a crime *willingly*, that is, with the knowledge and ability

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52. See *Williams v. Taylor*, 529 U.S. 362, 409 (discussing application of Supreme Court law to the facts of a “prisoner’s case”).

53. See 28 U.S.C. § 2254(a) (2000).

54. See *Hubbart v. Knapp*, 379 F.3d 773, 776 (9th Cir. 2004) (applying statute to man convicted of multiple rapes); *Flowers v. Leean*, No. 99-2999, 2000 WL 554518, at \*1 (7th Cir. May 3, 2000) (noting “Von Flowers was committed to the custody of Wisconsin’s department of health and family services [pursuant to Wisconsin’s SVP law] and is presently confined; thus, habeas corpus is available.”).

55. See 28 U.S.C. § 2254(d)(1) (2000).

that he is acting a particular way. For instance, an individual with sufficient mental capacity and control over his behavior may be deterred by the threat of criminal punishment as the risk of punishment is a factor in the putative criminal's decision-making process. This is why a "heat of passion" crime merits less punishment than a premeditated one; where the opportunity for rational decision-making exists, the criminal law metes out its strictest punishment on those who calculate, yet disregard, the risks of punishment.

Civil commitment, however, has always been based on dangerousness to self and others resulting from an *inability* to do otherwise. Central goals of the criminal law, such as deterrence and punishment, are not met when the defendant is unable to control his actions. It makes little sense to "punish" one who could not avoid committing a crime. Similarly, a person who lacks self-control will not be deterred from acting out by the threat of future punishment. Thus, neither of these criminal concerns enters into the mix when society considers whether to involuntarily commit a man after he has served his prison sentence. It is thus only in the finding of a volitional (control-related) mental disorder that the state may commit someone against his will.<sup>56</sup> This section describes the Supreme Court's attempts to define what exactly it means for an individual to lack control over his actions.

#### A. *Kansas v. Hendricks and Behavior Control*

In late 1996 the Supreme Court heard the case of *Kansas v. Hendricks*,<sup>57</sup> which challenged the constitutionality of Kansas' SVP law—a law which largely mirrors the SVP laws of other states. A jury found beyond a reasonable doubt that Leroy Hendricks was a sexually violent predator but, on appeal, Hendricks convinced the Kansas Supreme Court that his incarceration violated his substantive due process rights. The Kansas Sexually Violent Predator Act allowed civil commitment of anyone deemed to be a "sexually violent predator," defining that individual 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 in the predatory acts of sexual violence."<sup>58</sup> "Mental abnormality" was itself defined, somewhat circularly, 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."<sup>59</sup> Accordingly, under Kansas law and the SVP laws of all of the other states, an SVP is a person whose mental condition

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56. See *Kansas v. Crane*, 534 U.S. 407, 411 (2002).

57. 521 U.S. 346 (1997) (holding Kansas SVP law did not violate double jeopardy, and was permissible under Ex Post Facto Clause).

58. See KAN. STAT. ANN. § 59.29a02(a) (2005).

59. See KAN. STAT. ANN. § 59.29a02(b) (2005).

makes him likely to engage in future sexually violent acts.

Eight justices of the Supreme Court agreed that the Kansas statute's definition of "mental abnormality" satisfied substantive due process.<sup>60</sup> Most importantly, the Court held that the Kansas statute did not premise involuntary confinement on a "mere predisposition to violence."<sup>61</sup> While states could not incarcerate someone based merely on predictions or predispositions, the court recognized that in "narrow circumstances" states are allowed to forcibly detain people who are "unable to control their behavior and who thereby pose a danger to the public health and safety."<sup>62</sup> The Kansas statute met these requirements; it required findings that (1) the individual to be committed had committed past sexually violent activity; (2) the individual had a mental abnormality which predisposed him to commit sexually violent offenses; and (3) a mental abnormality or personality disorder made it likely that the individual would engage in future acts of sexual violence.<sup>63</sup> These "added statutory requirements," the court concluded, "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control," as opposed to those who are merely dangerous for other reasons.<sup>64</sup> Because Hendricks' abnormality involved a "specific, serious, and highly unusual inability to control his actions," which Hendricks admitted, the court distinguished him from the typical antisocial criminal and allowed the State of Kansas to deem him dangerous enough to incarcerate.<sup>65</sup>

#### B. *Kansas v. Crane: How Out of Control Must the Sex Offender Be?*

Control of one's behavior is the linchpin in the jurisprudence of the Supreme Court, but that issue had not been front-and-center in *Hendricks* because Hendricks had conceded his inability to control his behavior. In 2002, however, the issue came to the forefront when the Supreme Court again considered Kansas' Sexually Violent Predator Act (SVPA) on a challenge from the state.<sup>66</sup> This time the Kansas Supreme Court found that "[a] fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior."<sup>67</sup> Based on that reading of *Hendricks*, the higher court reversed Crane's commitment because the trial court had not instructed the jury to make a specific finding that Crane "cannot

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60. See *Kansas v. Hendricks*, 521 U.S. 346, 360, 374 (1997).

61. See *id.* at 357.

62. See *id.*

63. See KAN. STAT. ANN. § 59.29a02(a) (2005).

64. See *Hendricks*, 521 U.S. at 358.

65. See *id.* at 376 (Breyer, J., dissenting).

66. See generally *Kansas v. Crane*, 534 U.S. 407 (2002).

67. See *id.* at 411.

control his dangerous behavior.”<sup>68</sup>

At the Supreme Court, the State argued that the Kansas Supreme Court went too far in requiring a specific finding that the defendant could not control his behavior.<sup>69</sup> The State also argued that Crane could be committed involuntarily without *any* lack of control determination.<sup>70</sup> The Supreme Court, however, took a middle approach and vacated the judgment of the Kansas Supreme Court.<sup>71</sup>

First, the Court determined that an *absolute* lack of control was not required in order to forcibly commit someone under the SVP laws.<sup>72</sup> After all, *Hendricks* itself discussed the Kansas statute’s requirement that a defendant have a mental abnormality or personality disorder making it “*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior.”<sup>73</sup> A person having difficulty controlling his behavior is treated very differently than one who has absolutely no control over his behavior. Thus, there was no precedent—at least, none based on *Hendricks*—requiring a *total* lack of control on the part of the sex predator defendant. That said, the court also found that such a requirement—an “absolutist approach”—would be “unworkable.”<sup>74</sup> This is because even many “psychopaths” retain *some* level of ability to control their behavior; if the Court insisted on an absolute lack of control it would result in many “highly dangerous persons” being set free.<sup>75</sup> Besides those practical problems, the Court hinted that the law was straining to respond to human behavior at the limits of scientific understanding and explanation. How is a trained mental health professional, much less a jury, able to determine whether a sexually violent defendant acted purely because he could not help himself or whether his impulse was simply so strong that he let himself give in to his urges? As the court phrased it, “the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.”<sup>76</sup>

Having determined that an absolute lack of control was not required, the Court nevertheless highlighted the importance of the requirement that the defendant have *some* control problems. *Hendricks*, the Court noted, distinguished the dangerous, and committable, sex offender from “other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>77</sup> One of the primary distinguishing features

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68. See *In re Crane*, 7 P.3d 285, 290 (Kan. 2000).

69. See *Crane*, 534 U.S. at 412.

70. See *id.*

71. See *id.* at 415.

72. See *Kansas v. Crane*, 534 U.S. 407, 411 (2002).

73. See *id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).

74. See *id.* (quoting brief for American Psychiatric Association as Amicus Curiae Supporting Petitioner).

75. See *id.* at 412.

76. See *Crane*, 534 U.S. at 412.

77. *Kansas v. Crane*, 534 U.S. 407, 410 (2002) (quoting *Kansas v. Hendricks*, 521 U.S. 326, 360 (1997)).

was the dangerous sex offender's "special and serious lack of ability to control behavior."<sup>78</sup> The Court then proceeded to describe the contours of what it meant by "some" lack of control. "Lack of control," said the majority, was not to be given a "particularly narrow or technical meaning."<sup>79</sup> And, picking up on its earlier suggestion that psychiatry could perhaps never determine the control issue with perfection, the Court acknowledged that "inability to control behavior will not be demonstrable with mathematical precision."<sup>80</sup> Furthermore, the Court noted:

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.<sup>81</sup>

Obviously, the Court was going to great lengths to emphasize that "lack of control" was a protean, nearly indescribable, concept—one that certainly did not (in the majority's view) suit itself to a one- or two-sentence definition by the court. The Court recognized this, admitting that "*Hendricks* as so read provides a less precise constitutional standard than would those more definite rules for which the parties have argued."<sup>82</sup>

Two central concerns, however, convinced the majority that a bright-line rule would not be the best means of propounding the applicable constitutional standard for the forcible commitment of sex predators. First, the Court reiterated that states are to be allowed "considerable leeway" in defining the types of mental disorders that would be grounds for involuntary civil commitment.<sup>83</sup> A bright-line rule, presumably, would tie the hands of the states and reduce—or eliminate—their "leeway." Second, the Court echoed its concerns about the aptness with which the law could only imprecisely describe psychiatric activity, noting that "psychiatry . . . is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law."<sup>84</sup> The Court concluded that, in view of the two concerns it expressed, it was only able to provide "constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and

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78. See *Crane*, 534 U.S. at 412.

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

80. See *id.*

81. See *id.*

82. See *id.*

83. See *Crane*, 534 U.S. at 413.

84. See *id.*

objectives as specific circumstances require.”<sup>85</sup> Thus, while it confirmed that there had to be a proof of a serious difficulty in controlling behavior, the majority declined to elaborate beyond its counsel that the standard was flexible and that states were given leeway to decide for themselves what it meant.

### C. Crane’s *Dissent*

*Crane* was not unanimous. The dissent—written by Justice Scalia and joined by Justice Thomas—deserves some attention because its central argument bears directly upon the habeas standards discussed herein.<sup>86</sup> The dissent’s first contention was that the majority had eviscerated the holding of *Hendricks*, which the court had issued only five years earlier.<sup>87</sup> The dissent noted that the *Hendricks* Court had agreed with Kansas that the SVPA met substantive due process requirements.<sup>88</sup> To introduce the novelty of requiring the finding of “some” lack of control would add an additional step to the framework established by *Hendricks*, which, in the dissent’s view, had sanctioned the involuntary commitment of an SVP if there was a link between the likelihood of re-offending and a mental abnormality or personality disorder.<sup>89</sup> The distinguishing factor between a typical recidivist criminal and one subject to civil commitment was that the typical criminal *chose* to commit more crimes and was thus responsive to the deterrence of the criminal law. Deterrence was unlikely to work on those with a mental illness because their illness was “an affliction and not a choice.”<sup>90</sup>

That issue did not receive the brunt of the dissent’s forceful language, however. As alluded to above, the central issue taken up by Justices Scalia and Thomas was the lack of a clear standard propounded in the majority opinion. In part IV of his dissent, Justice Scalia took the majority to task, doubting the “coherence” of the “new constitutional test” set forth in their opinion.<sup>91</sup> Indeed, he believed that *Hendricks* had effectively been “gut[ted].”<sup>92</sup> The majority, he wrote, created a new prong to the civil commitment due process standard.

[The new standard requires] that the subject suffers from an inability to control behavior—not utter inability . . . and not even inability in a particular constant degree, but rather inability in a degree that will vary ‘in light of such features of

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85. See *Kansas v. Crane*, 534 U.S. 407, 414 (2002).

86. See *id.* at 407, 416 (Scalia, J., dissenting).

87. See *id.* at 415-16 (Scalia, J., dissenting).

88. See *id.* at 416 (Scalia, J., dissenting).

89. See *Crane*, 534 U.S. at 419-20 (Scalia, J., dissenting).

90. See *id.* (Scalia, J., dissenting).

91. See *Kansas v. Crane*, 534 U.S. 407, 422 (2002) (Scalia, J., dissenting).

92. See *id.* (Scalia, J., dissenting). The court stated, “I not only disagree with the Court’s gutting of our holding in *Hendricks*; I also doubt the desirability, and indeed even the coherence, of the new constitutional test which (on the basis of no analysis except a misreading of *Hendricks*) it substitutes.” *Id.* (Scalia, J., dissenting).

the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself.<sup>93</sup>

The standard, the dissenters panned, “certainly displays an elegant subtlety of mind.”<sup>94</sup> Yet, the standard gave trial courts “not a clue as to how they are supposed to charge the jury!”<sup>95</sup>

It is fine and good to talk about the desirability of our “proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require” . . . but one would think that this plan would at least produce the “elaboration” of what the jury charge should be in the “specific circumstances” of the present case. “Proceeding deliberately” is not synonymous with not proceeding at all.

I suspect that the reason the Court avoids any elaboration is that elaboration which passes the laugh test is impossible. How is one to frame for a jury the degree of “inability to control” which, in the particular case, “the nature of the psychiatric diagnosis, and the severity of the mental abnormality” require? Will it be a percentage (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is 42% unable to control his penchant for sexual violence”)? Or a frequency ratio (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is unable to control his penchant for sexual violence three times out of ten”)? Or merely an adverb (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is appreciably—or moderately, or substantially, or almost totally—unable to control his penchant for sexual violence”)? None of these seems to me satisfactory.<sup>96</sup>

Justice Scalia concluded that “[i]t is irresponsible to leave the law in such a state of utter indeterminacy.”<sup>97</sup> And, due to that indeterminacy, his dissent ended with a parting shot: “There is an obvious lesson here for state supreme courts that do not agree with our jurisprudence: *ignoring it is worth a try.*”<sup>98</sup>

#### IV. *KANSAS V. CRANE* IN THE STATE COURTS: “IGNORING IT IS WORTH A TRY”

Following *Crane*, several state courts of last resort have attempted to discern and apply *Crane*’s constitutional standard to sex offenders committed under laws similar (and often identical) to the Kansas SVPA. The purpose of this

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93. See *id.* at 423 (Scalia, J., dissenting).

94. See *id.* at 423-424 (Scalia, J., dissenting).

95. See *Crane*, 534 U.S. at 423-424 (Scalia, J., dissenting).

96. See *Kansas v. Crane*, 534 U.S. 407, 423-24 (2002) (Scalia, J., dissenting).

97. See *id.* at 424 (Scalia, J., dissenting).

98. See *id.* (Scalia, J., dissenting).

article is not to analyze these opinions in depth—that has been done elsewhere—yet some discussion of the cases is warranted because the cases provide the most concrete evidence of the difficulties caused by the loose constitutional standard the majority adopted in *Crane*. In sum, the decisions vindicate Justice Scalia’s complaint that the standards in *Crane* gave lower courts “not a clue” as to how they are to proceed, and they could validate his prediction that state supreme courts might try to ignore *Crane*’s holding.<sup>99</sup>

The decisions fall into two basic categories: some require a separate jury finding that the predator actually lacked some ability to control his behavior, while other courts require only that there be a “nexus” or a link between future dangerousness and a mental disorder, which is essentially the position taken by the *Crane* dissenters. Under this latter view, if an individual is found to have a mental disorder and is found likely to re-offend, it follows that the (implicit) reason for those findings is that the individual lacked the ability to control his behavior, i.e., to prevent himself from re-offending. Based on these rather divergent takes on *Crane*’s central holding, the *Crane* dissent appears to have been prescient in its complaint that the majority opinion left the law in a state of “utter indeterminacy.”<sup>100</sup>

Only months after *Crane* was released, the Missouri Supreme Court issued its opinion in *In Re Thomas*.<sup>101</sup> There, a six-justice majority distilled the holdings of *Hendricks* and *Crane* as follows:

Both *Hendricks* and *Crane* make clear that sexual predator statutes as enacted in Kansas and Missouri are constitutional so long as the mental abnormality causes the individual “serious difficulty in controlling his behavior.” Accordingly, to be constitutional under *Crane*, the instruction must require that the “degree” to which the person cannot control his behavior is “serious difficulty.”<sup>102</sup>

Because the jury in *Thomas* had not been instructed on this point, the court reversed and remanded, directing the trial court to instruct the jury that “mental abnormality” means a condition predisposing “the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior.*”<sup>103</sup>

One justice—Chief Justice Limbaugh—dissented in *Thomas*. He found that the jury instructions adequately met the standards of both *Hendricks* and *Crane* because they “necessarily required . . . ‘proof of serious difficulty in controlling

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99. See *id.* at 423-424 (Scalia, J., dissenting).

100. See *Crane*, 534 U.S. at 424 (Scalia, J., dissenting).

101. 74 S.W.3d 789 (Mo. 2002) (dissecting meaning of two Supreme Court opinions providing for continued commitment of SVPs).

102. See *In re Thomas*, 74 S.W.3d at 792 (Limbaugh, C.J., dissenting).

103. See *id.* (Limbaugh, C.J., dissenting).

behavior.”<sup>104</sup> The Missouri statute was essentially identical to the Kansas SVPA, requiring that the defendant have a mental abnormality that makes him “more likely than not to engage in predatory acts of sexual violence.” This, in the dissent’s view, was “simply one way of proving (more than enough!) that [the] defendant had ‘serious difficulty in controlling behavior.’”<sup>105</sup> Thus, under this reading of *Crane*, a specific instruction need not be given; simply the fact that a jury found a defendant to have a mental abnormality, making him likely to engage in sexual violence, meant that that defendant had serious difficulty in controlling behavior.

Less than two months later, a majority of the Wisconsin Supreme Court agreed with the dissent in *Thomas* in *State v. Laxton*.<sup>106</sup> As in *Thomas*, the jury had been instructed that the state had to prove beyond a reasonable doubt that: (1) Laxton had been convicted of a sexually violent offense (which is not usually contested), (2) Laxton had a mental disorder, and (3) Laxton was dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence.<sup>107</sup> The jury was also instructed that “substantial probability” meant “much more likely than not.”<sup>108</sup>

In analyzing *Crane*, the Wisconsin Supreme Court relied on *Crane*’s cautionary language that the term “lack of control” was not to be accorded a narrow or technical meaning.<sup>109</sup> “Instead,” concluded the majority, “the focus is on the nexus between the mental abnormality and the level of dangerousness, and whether those requirements are sufficient to distinguish a dangerous sexual offender from the dangerous but typical recidivist.”<sup>110</sup> Laxton argued that a finding that he was more likely than not to commit future sexually violent acts did not equate to a finding that he was unable to control his behavior.<sup>111</sup> In other words, the mental disorder could increase his sexually violent urges, which might indeed make him more likely to commit future sex crimes. But heightened urges do not necessarily mean that one will not be able to control such urges—they merely mean that the battle will be more uphill than it would be for one without such urges. To use a crude analogy, the fact that a Ferrari has a 450 horsepower engine under the hood does not mean that its brakes do not work—the engine power (urge) and stopping power (self-control) are actually two separate concepts.

The Wisconsin Supreme Court rejected this argument, relying again on

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104. *See id.* (Limbaugh, C.J., dissenting).

105. *See id.* at 792-93 (Limbaugh, C.J., dissenting).

106. 647 N.W.2d 784, 796 (Wis. 2002).

107. *See State v. Laxton*, 647 N.W.2d 784, 787 (Wis. 2002).

108. *See Laxton*, 647 N.W.2d at 787-88.

109. *See id.* at 791.

110. *See id.*

111. *See id.* at 792.

*Crane*'s warning that its requirement of lack of control was to be generally construed. Instead of adopting Laxton's argument that the underlying urges and the ability to control those urges were different analyses, the court found that *Crane* requires only that there be "proof of a mental disorder and a link between the mental disorder and the individual's lack of control," which itself is not "demonstrable with mathematical precision."<sup>112</sup> In the court's view, it is enough to show dangerousness linked to a mental disorder, which distinguishes the sex offender from the "dangerous but typical recidivist."<sup>113</sup>

Two justices dissented in *Laxton*. In Chief Justice Abrahamson's view, the majority had essentially adopted the reasoning of Justice Scalia's dissent in *Crane*.<sup>114</sup> To recall, Justice Scalia had written that under *Hendricks*, "the very existence of a mental abnormality or personality disorder that causes a likelihood of repeat sexual violence in itself establishes the requisite 'difficulty, if not impossibility, to control behavior.'"<sup>115</sup> Thus, Justice Scalia had equated the likelihood of repeat sexual violence with inability to control that violence. In other words, he presumed that the Ferrari's breaks were unable to stop the car. The *Laxton* dissenters, believing that the majority had adopted this approach, objected that "[t]he court is obliged to follow the majority opinion in *Crane*, not the dissent."<sup>116</sup>

The decisions of the Missouri and Wisconsin Supreme Courts establish the fault lines in the debate over the interpretation of *Crane*. Six of seven justices of the Missouri Supreme Court, as well as two justices of the Wisconsin Supreme Court, believed that their state statutes did not conform to the *Crane* requirement of "proof of serious difficulty in controlling behavior." On the other hand, one justice of the Missouri Supreme Court and four justices of the Wisconsin Supreme Court found that a link, or nexus, between a mental disorder and a likelihood of repeat sex offenses sufficed to meet *Crane*'s due process requirement. These fault lines emerged in cases from other states as well: following *Laxton* and *Thomas*, the Supreme Courts of Arizona, New Jersey, Florida and Washington all grappled with identical issues. In *In re W.Z.*,<sup>117</sup> the New Jersey Supreme Court remanded the case to the trial court for a determination, "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."<sup>118</sup> Thus, in saying that the individual must be

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112. See *State v. Laxton*, 647 N.W.2d 784, 793 (Wis. 2002) (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2000)).

113. See *Laxton*, 647 N.W.2d at 793.

114. See *id.* at 799 (Abrahamson, C.J., dissenting).

115. See *Kansas v. Crane*, 534 U.S. 407, 419-420 (2002) (Scalia, J. dissenting).

116. See *State v. Laxton*, 647 N.W.2d 784, 798 (Wis. 2002).

117. 801 A.2d 205 (N.J. 2002).

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

likely not to control his behavior *and* be likely to re-offend, the court made clear that future dangerousness and ability to control behavior were two separate considerations. This would appear to be a rejection of the “nexus” or “link” constructs used by other courts, which essentially equate likelihood of re-offense with lack of control.

The Florida Supreme Court, on the other hand, adopted the approach taken by the Wisconsin Supreme Court in *Laxton*. In a 4-3 decision, the court in *Westerheide v. Florida*<sup>119</sup> determined that an adequate showing of Westerheide’s lack of control had been made. The majority noted that all of the experts who testified said that Westerheide was “more dangerous and more likely to engage in future violent sexual offenses,” and that even the defense expert agreed that he was “likely to re-offend” without treatment.<sup>120</sup> Thus, based on that likelihood evidence, the court found that the government had shown that Westerheide had serious difficulty in controlling his behavior.

Similarly, the Arizona Supreme Court highlighted the link between a mental disorder and proof of dangerousness, finding that *Crane* did not require a specific finding of serious difficulty in controlling behavior.<sup>121</sup> After citing a dictionary definition of the meaning of “likely” and analyzing the state legislature’s intent, the court concluded that someone with a mental disorder who was highly likely to commit a future act of sexual violence was committable because that person would have “serious difficulty in controlling” his or her dangerous behavior.<sup>122</sup> The Washington Supreme Court took a similar approach, concluding that because the jury is required to find “a link between a mental abnormality and the likelihood of future acts of sexual violence if not confined in a secure facility,” the “fact finder [must] determine the person seriously lacks control of sexually violent behavior.”<sup>123</sup>

Thus, the courts are clearly split. On the one hand, some courts require a fact finder to determine explicitly whether an individual possesses the ability to control his behavior. On the other hand, most courts have found that if a jury finds the individual (1) has a mental disorder and (2) is likely to reoffend, the jury has *ipso facto* found that the individual lacks control over his actions.

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119. 831 So. 2d 93, 109 (Fla. 2002).

120. See *Westerheide v. Florida*, 831 So.2d 93, 109 (2002).

121. *In re Leon G.*, 59 P.3d 779, 787 (Ariz. 2002).

122. See *In re Leon G.*, 59 P.3d at 787. The court hedged, to be sure, through a bizarre analysis of the word “make.” *Id.* at 788. Specifically, the SVP law in question required that “the mental disorder *makes* it highly probable that the person will engage in acts of sexual violence.” *Id.* The court found that in using the word “makes,” the legislature meant that the disorder overpowered the person’s ability to control his behavior, i.e., the disorder “made” the person commit the crimes. *Id.* But the verb “makes” does not relate to the person, it relates to probability: the disorder “makes it highly probable.” *Id.* Thus, while this seems a tortured interpretation of the statute, its effect is that *In re Leon* might satisfy *Crane*.

123. See *In re Detention of Thorell*, 72 P.3d 708, 719 (Wash. 2003).

V. *CRANE*, AEDPA, AND FEDERAL HABEAS CORPUSA. *Crane and AEDPA Create Nearly Insurmountable Hurdles*

Whether or not some state supreme courts have “ignored” *Crane*, as Justice Scalia predicted and as some commentators have claimed, it is clear that the decisions vary in their interpretations of what “lack of control” means. The upshot of that divergence is that SVP defendants in some states such as Missouri have more due process rights than they do in Wisconsin. If an incarcerated SVP believes that the state courts in his case are misreading *Crane*, the normal course of action would be to seek review in federal court via an application for a writ of habeas corpus. But, as outlined above, the stringent standard of review for habeas corpus cases under AEDPA allows relief only when the state court has contravened “clearly established federal law.” Under the Supreme Court’s interpretation of this clause, a federal judge must defer to state court decisions even if in the judge’s independent analysis the state court has made a mistake; relief may be forthcoming only if the state court decision is objectively erroneous.<sup>124</sup> That is a tough standard in its own right.<sup>125</sup>

Yet AEDPA is not the only roadblock standing in the way of habeas relief. *Crane* itself, working in tandem with AEDPA’s deferential standards, has also sharply curtailed the possibility of federal habeas relief. That is because AEDPA requires a violation of “clearly established federal law” before relief can be granted, and *Crane* barely even attempts to establish anything clearly. Indeed, as the *Crane* majority itself admitted, its decision “provides a less precise constitutional standard,” and the key distinction between a strong impulse and a lack of control over that impulse is “probably no sharper than that between twilight and dusk.”<sup>126</sup> In short, the standards set forth in *Crane* are not “clearly established,” and it is for that reason that it is difficult to envision how a habeas petitioner could successfully demonstrate that a state court’s ruling applying *Crane* was “contrary to, or an unreasonable application of clearly established federal law.”<sup>127</sup> Thus, in the same decision in which the Supreme Court granted great leeway to states and conceded that it established a “less precise constitutional standard,” the Court also virtually eliminated any federal check on that leeway.<sup>128</sup> The problem has been flagged by a recent district court opinion, one of the first to address what will undoubtedly be a flood of habeas claims invoking *Kansas v. Crane*.

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124. See 28 U.S.C. § 2254(d)(2) (2000).

125. See 28 U.S.C. § 2254(d)(1) (2000).

126. See *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (quoting brief for American Psychiatric Association as Amicus Curiae supporting petitioner).

127. See 28 U.S.C. § 2254(d)(2) (2000).

128. See *Crane*, 534 U.S. at 413.

*B. A District Court Denies Habeas Relief Following Crane*

The petitioner in the Wisconsin Supreme Court case discussed in Part IV was John Lee Laxton. After losing at the state supreme court by a 4-2 vote, he petitioned for habeas corpus under 28 U.S.C. § 2254 in the federal district court for the Eastern District of Wisconsin. His experience seeking federal habeas corpus demonstrates that the combination of AEDPA and *Crane* will indeed make it difficult, if not impossible, for an SVP habeas petitioner to obtain relief in the future.<sup>129</sup>

The district court in *Laxton v. Bartow* addressed *Crane* head-on, finding that “while the Court held that there must be proof of serious difficulty in controlling behavior, it failed to say what that meant and how it might be shown.”<sup>130</sup> Laxton argued, as he did in his direct appeal, that his involuntary commitment violated *Crane* because it was not proven to a jury that he had serious difficulty in controlling his behavior. After a lengthy discussion of the history of involuntary commitment statutes and the Supreme Court’s *Hendricks* and *Crane* decisions, the district court conceded that there was “some merit” to Laxton’s argument.<sup>131</sup> It also went out of its way to cite the civil liberties concerns implicated in the commitment process:

To many, recognizing a power of the State to order the preventative detention of any sane person based upon a psychologist’s opinion that he suffers from a mental disorder and is likely to commit a crime sometime in the future would seem to create a dangerous precedent for civil liberties.<sup>132</sup>

Yet, the court ultimately disagreed with Laxton’s view of *Crane*, finding that *Crane* did not require the jury to make a separate factual finding that the SVP had a serious difficulty in controlling his behavior.

While in the end the court did not adopt Laxton’s argument, it went on to opine at some length on the problems inherent in the *Crane* decision’s flexibility, and in particular the problems that flexibility posed to habeas corpus review under AEDPA. First, it found the *Crane* decision “riddled with uncertainties, qualifiers and near-apologies for its ‘less precise’ holding.”<sup>133</sup> Moreover, *Crane* “even recognized that the central issue here—lack of control—was scarcely discernible: ‘the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and

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129. See *Laxton v. Bartow*, No. 03-C-977 (E.D. Wis. Oct. 5, 2004), *aff’d*, 421 F.3d 565 (2005). The district court case, like almost all federal habeas corpus decisions, remains unpublished.

130. *Laxton v. Bartow*, No. 03-C-977, at \*18.

131. *Id.* at \*21.

132. *Id.* at \*27.

133. *Id.* at \*25.

dusk.”<sup>134</sup> Thus, the court concluded that “it is scarcely debatable that Justice Scalia was spot-on in his observation that the *Crane* majority’s approach provided little, if any, guidance to the lower courts.”<sup>135</sup> As for habeas relief, the court recognized the implication of *Crane*’s ambiguity in relation to AEDPA and found that habeas relief would be difficult, if not impossible. The court stated: “the Supreme Court’s holding is too vague and imprecise to provide the clearly established federal law that is required to support federal habeas relief for state prisoners.”<sup>136</sup>

Finally, the *Laxton* district court assessed the practical realities of the fact that so many state courts had rejected Laxton’s *Crane*-based argument:

I nevertheless am puzzled as to how I could find that four Wisconsin Supreme Court justices, four Florida Supreme Court justices, seven members of the Washington Supreme Court, a unanimous Arizona Supreme Court and the Chief Justice of the Missouri Supreme Court applied any decision of the [U.S.] Supreme Court in an objectively unreasonable fashion.<sup>137</sup>

In its opinion, the district court recognized two things. First, the court noted the lack of clarity in the *Crane* standard, and second, the court found that because the standard was so vague, it could not serve as the “clearly established federal law” that is a prerequisite for federal habeas relief under AEDPA.<sup>138</sup> In other words, when the federal law at issue is so flexible and amorphous, it is difficult to envision circumstances in which a state court could apply that law in an objectively unreasonable fashion. Thus, the *Laxton* district court’s analysis confirms that any hope of federal habeas relief for involuntarily committed sex predators is likely ephemeral.<sup>139</sup>

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134. *Laxton*, No. 03-C-977 at \*25 (quoting *Kansas v. Crane*, 534 U.S. 407, 412 (2002)).

135. *Laxton v. Bartow*, No. 03-C-977, at \*25 (E.D. Wis. Oct. 5, 2004), *aff’d*, 421 F.3d 565 (2005).

136. *Id.* at \*22.

137. *Id.* at \*26.

138. See 28 U.S.C. § 2254(d)(1) (2000).

139. *Linehan v. Milczark*, 315 F. 3d 920, 924 (8th Cir. 2003) (demonstrating ephemeral nature of federal habeas corpus). In the opinion, the Eighth Circuit addressed a habeas case based on *Hendricks* and with the benefit of *Crane*, which was decided while the habeas case was pending. *Id.*; *In re Linehan*, 594 N.W.2d 867, 874 (Minn. 1999). In *Linehan*, the Minnesota Supreme Court had appeared to apply a saving construction to Minnesota’s SVP law, thereby eviscerating the statute which, unlike the Kansas or other SVP laws, explicitly states that “it is not necessary to prove that the person has an inability to control the person’s sexual impulses.” *In re Linehan* 594 N.W.2d at 874 (quoting MINN. STAT. § 253B.02., subdiv. 18(c) (2004) (defining “sexually dangerous person”). The court construed the statute narrowly to mean only that the individual can be committed involuntarily even if he did not retain “utter inability” to control his behavior. *Id.* at 875. To be committed, however, the Minnesota Supreme Court found that one must have some compromised ability to control behavior. *Id.* at 877 n.4. The state must prove “the current disorder or dysfunction does not allow the person to adequately control his or her behavior such that the person is highly likely to commit harmful sexual acts in the future.” *Id.* Thus, on federal habeas review, the federal courts were able to conclude that the Minnesota Supreme Court did not contravene either *Hendricks* or *Crane* because it had required a showing of a difficulty in controlling behavior. See also *Linehan*, 315 F.3d at 927.

*C. Implications of Curtailed Federal Relief*

As noted earlier, the *Crane* decision has been subject to the criticism—both in its dissent and in subsequent cases and commentary—that its holding is simply too vague to be of any use. And, as just argued above and demonstrated by the federal district court in *Laxton v. Bartow*, the implications for federal habeas review are more striking because *Crane*'s vague holding provides an overly malleable benchmark for state courts to apply. Given such leeway by *Crane*, federal courts will be hard-pressed to hold that state courts have objectively contravened federal law, a prerequisite for relief under AEDPA.<sup>140</sup> Thus, AEDPA and *Crane* might well be viewed as a one-two punch for SVP habeas petitioners in federal court.

This development is cause for concern for a number of reasons. First, as the Supreme Court has often recognized, “[c]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”<sup>141</sup> Yet, the state supreme courts make it clear that there is a great deal of confusion about what due process actually requires before an individual can be committed against his will. Some state supreme courts would require a separate factual finding that the individual has serious difficulty in controlling his behavior. Other jurisdictions do not require such a showing, believing that it is enough to show a “nexus” or some other connection between a mental disorder and a probability of future sexual violence. Under this view, a showing of a likelihood of future sexual violence essentially is the same as a showing that the individual lacks control over his behavior.

A second cause for concern is that there is a good argument that many of the state courts could be wrong in their interpretation.<sup>142</sup> It is true that *Crane* is not a model of clarity, but the decision did require that there be proof of a “serious difficulty in controlling behavior.”<sup>143</sup> The majority opinion admitted that it was giving the states “considerable leeway,” yet having granted such leeway and such flexibility, *Crane* foreclosed any possibility that the federal courts could tighten the leash.<sup>144</sup> In fact, Justice Scalia’s dissent may have even invited state courts to ignore *Crane*'s holding. Indeed, according to one commentator, “[t]he trend so far by state appellate courts has been to behave as if *Crane* had never been decided.”<sup>145</sup> The argument is that many state courts have wrongly

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140. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

141. *Addington v. Texas*, 441 U.S. 418, 425 (1979).

142. See Pfaffenroth, *supra* note 4, at 2249 (finding most state court decisions interpreting *Crane* “fly in the face of *Crane*”); Barber, *supra* note 12 (finding Wisconsin Supreme Court ignored *Crane* and noting it might “get away” with it); Kenneth W. Gaines, *Instruct the Jury: Crane’s “Serious Difficulty” Requirement and Due Process*, 56 S.C. L. REV. 291, 335 (2004) (noting “The failure to instruct juries regarding whether the respondent has serious difficulty in volitional control is a per se constitutional error”). *Id.*

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

144. See *Crane*, 534 U.S. at 413.

145. See Pfaffenroth, *supra* note 4, at 2248.

equated a likelihood of future violence with a lack of control; the equation is wrong because it assumes that *all* sexual violence results from the predator's inability to stop himself. But a jury could find that a defendant had a mental disorder and was likely to re-offend, yet, still believe that he could control his behavior. This is the "irresistible impulse" versus the "impulse not resisted," a distinction the Supreme Court pointed out.<sup>146</sup> In any event, whether the state courts are getting it "wrong" or right is outside the scope of this article; it is enough to say that the state courts are taking vastly different approaches to the rules set forth in *Crane*. Given the difficulty that the state courts are having interpreting *Crane*, it is clear that the issue of SVP confinements is an area crying out for uniformity and correction by federal courts. Yet, the combination of AEDPA and *Crane* makes it difficult to envision how federal habeas relief will be available such that federal courts would meaningfully weigh-in on these issues. One federal district court—in *Laxton*—noted the problem; it remains to be seen if others will do so as well. Unless the Supreme Court will take another sex predator case on direct appeal—a highly unlikely proposition—the states will continue to have widely varying interpretations of the due process requirements imposed by the Supreme Court in *Hendricks* and *Crane*. Constitutional due process has never been intended to vary depending on the state in which a citizen lives.

A final cause for concern about the dilution of federal habeas relief involves the pariah status that most of the individuals involved carry with them. As noted at the outset, there are few criminal defendants less popular than sex predators. These are the "helpless, weak, outnumbered . . . victims of prejudice and public excitement" who, because of their unpopularity, depend upon the hope of additional impartiality from the judges hearing their cases.<sup>147</sup> Thus, the availability of federal habeas corpus takes on added importance to SVP petitioners who must otherwise rely on systems in which judges are subject to the vote. As one commentator has described the federal judicial role, "Article III judges are expected to protect the unpopular classes of society. The writ of habeas corpus allows federal judges to do just that. Judges should not interpret the AEDPA so as to strip this power from the federal courts."<sup>148</sup> Yet, the Supreme Court has done the heavy lifting already, essentially stripping from lower federal courts the ability to find that state court decisions are unreasonable interpretations of *Crane*. Thus, in every state with SVP-style laws, individuals subject to involuntary commitment will have to rely upon the impartiality of judges who will either face elections or other political forces through reappointment proceedings. Accordingly, just where the federal writ

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146. See *Crane*, 534 U.S. at 412.

147. See generally *Chambers v. Florida*, 309 U.S. 227 (1940).

148. See Kimberly Woolley, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 438 (1998).

could be of the most critical impact, the Supreme Court has managed to weaken the possibility of any relief.<sup>149</sup>

In sum, *Crane* has at least three troubling implications. First, the decision's vagueness, combined with the deference owed under AEDPA, sharply restricts the possibility of federal habeas relief for those petitioners who arguably are most in need of a federal habeas tribunal. Second, the decision's "leeway" invited myriad interpretations, yet that very leeway, applied under AEDPA, actually curbed the lower federal courts' ability to rectify any state court decisions that ignored *Crane's* requirements. Finally, the involuntary commitment of sane offenders who have already served prison sentences for their crimes remains a practice on uncertain constitutional footing. *Crane* thus left nearly unfettered discretion to state courts in a historically novel area of law that remains controversial. Because in *Crane's* wake federal district and circuit courts will be hard-pressed to overturn state court interpretations of the proper due process standards, the Supreme Court itself might soon be called on to further clarify the law. If it does, the Court should be mindful that its decision will impact not only cases on direct review but also those which will arise in the habeas corpus context. Under AEDPA, clarity counts. Whichever way the Court rules, it should put in place a clear guide for state courts to follow and for federal habeas courts to enforce. Anything less will once again constitute an unwise punting of this issue to the states.

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149. See Bright, *supra* note 5, at 1832 (discussing whether the "great Writ" still exists).