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Fordham Urban Law Journal

Volume 44
Number 3 *Drone City*

Article 9

2017

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Kaitlyn Walsh

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Kaitlyn Walsh, *Antisocial Personality Disorder and Donald DD.: Distinguishing the Sex Offender from the Typical Recidivist in the Civil Commitment of Sex Offenders*, 44 Fordham Urb. L.J. 867 (2017).
Available at: https://ir.lawnet.fordham.edu/ulj/vol44/iss3/9

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ANTISOCIAL PERSONALITY DISORDER AND *DONALD DD.*: DISTINGUISHING THE SEX OFFENDER FROM THE TYPICAL RECIDIVIST IN THE CIVIL COMMITMENT OF SEX OFFENDERS

Kaitlyn Walsh[*]

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[*] Fordham University School of Law, J.D., 2017; Boston College, B.A., 2014. I would like to thank Professor Ian Weinstein for his indispensable wisdom and guidance, the attorneys at the New York State Attorney General's Office, Sex Offender Management Bureau for an invaluable experience, and my loving family for their unwavering support.

INTRODUCTION

Over the span of thirty years, eleven women accused Frank of rape.[1] Frank's first relevant convictions occurred in 1970.[2] That year, Frank broke into four homes over a four-month period.[3] The home invasions were "virtually identical;"[4] Frank would target unsuspecting women, follow each one to her apartment, force his way inside her home and threaten to harm or kill her.[5] He forced the women to undress and proceeded to rape and to rob each of them.[6] Frank was arrested on sexual assault charges[7] and was indicted for sexual

1. *See* State v. Frank P., 2 N.Y.S.3d 483, 485 (N.Y. App. Div. 2015) ("Respondent is a 67-year-old sex offender who was convicted of raping and sodomizing four women in their homes, and accused of raping seven more women, over 30 years ago.").
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*

offenses in one of the four home invasions.[8] He was convicted of burglary in the second and third degrees, robbery in the first, second, and third degrees, and grand larceny.[9] Although he was sentenced to a maximum of twenty-five years, he only served seven.[10]

Upon his release in 1977, Frank committed another six home invasions and rapes within a four-month period.[11] He committed the first invasion one month after he was discharged.[12] The invasions followed the same pattern Frank presented prior to his incarceration.[13] This time, when Frank was caught, he was convicted of three of the rapes and convicted of the nonsexual offenses he committed against each woman.[14]

Frank then spent thirty-three years in prison.[15] In 2010, Frank was up for parole once again.[16] The State of New York began a proceeding to civilly commit Frank under New York Mental Hygiene Law Article 10 ("Article 10").[17] Under this law, New York State has

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8. These charges were dismissed before trial. *See id.*

9. *See id.* There is no public record as to why Frank was only convicted of burglary, robbery and grand larceny or why the indicted sexual charges were dismissed. However, ninety-four percent of state convictions result from plea-bargaining. Stephanie Stern, Note, *Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System*, 52 HARV. J. LEGIS. 245, 245 (2015). Thus, it is possible that Frank's conviction was the result of plea-bargaining.

10. *Frank P.*, 2 N.Y.S.3d at 485 ("He received a maximum prison sentence of 25 years. He was released on parole in May 1977."). There is no public record as to why Frank was let out before serving his maximum sentence. A report published by the U.S. Department of Justice in 1999 stated that "[t]he amount of time offenders serve in prison is almost always shorter than the time they are sentenced by the court." PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUST., TRUTH IN SENTENCING IN STATE PRISONS (Jan. 1999), http://bjs.gov/content/pub/pdf/tssp.pdf [https://perma.cc/EB8T-S3G3].

11. *See Frank P.*, 2 N.Y.S.3d at 485-86.

12. *See id.* at 485.

13. *See id.* at 486 ("As before, he followed the women to their apartments, where he raped and sodomized them. He left the women tied up or in a closet while he burglarized their homes, fleeing with minor items.").

14. *See id.* Frank was sentenced to twelve and a half to twenty-five years' imprisonment for these crimes, but his maximum sentence became twenty-five years to forty-six years to reflect the time not served in his prior convictions.

15. *See id.*

16. Frank was sixty-two years old at the time. *See id.*

17. *See id.*; *see also* N.Y. MENTAL HYG. LAW § 10.06(a) (McKinney 2011) ("If the case review team finds that a respondent is a sex offender requiring civil management, then the attorney general may file a sex offender civil management petition.").

the power to civilly commit detained sex offenders[18] who are determined at trial to suffer from a mental abnormality that predisposes the offender to commit another sex offense.[19] At Frank's trial, two experts concluded that he suffered from paraphilia not otherwise specified ("paraphilia NOS")[20] based on urges related to non-consenting partners, and antisocial personality disorder ("ASPD").[21] Both experts concluded that the diagnosis of paraphilia NOS predisposed Frank to commit sexual offenses and caused him serious difficulty in controlling his sexual impulses.[22] They also opined that his diagnosis of ASPD hindered his volitional control, making him predisposed to committing sexual assaults if released again.[23] At trial, a jury found Frank suffered from a mental abnormality and qualified for civil commitment.[24] The Court placed

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18. A "detained sex offender" is defined under Article 10 as a "person who is in the care, custody, control or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony . . . ." N.Y. MENTAL HYG. LAW § 10.03(g).

19. *Id.* § 10.07(f) ("If the court finds by a clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses . . . the respondent shall be committed to a secure treatment facility for care, treatment and control . . . ."). This type of law, typically referred to as Sexually Violent Predator laws, has been adopted in twenty states, the District of Columbia and by the federal government. *See Civil Commitment of Sexually Violent Predators*, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS (Aug. 17, 2010), http://www.atsa.com/civil-commitment-sexually-violent-predators [https://perma.cc/3AXL-BRWQ]; *see also infra* Section 1.C.

20. A paraphilia diagnosis is given when a person has "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months . . . ." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS-IV-TR 566 (4th ed. 2000) [hereinafter DSM-IV-TR]. "Paraphilia NOS" is used as a category for "coding Paraphilias that do not meet the criteria for any of the specific categories." *Id.* at 576. Although the DSM-5 has split this diagnosis into two categories, Other Specified Paraphilic Disorder and Unspecified Paraphilic Disorder, they are similarly used as diagnoses for persons that do not meet a specific Paraphilic disorder. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 5, 705 (5th ed. 2013) [hereinafter DSM-5]; *see also* Michael B. First, *DSM-5 and Paraphilic Disorders*, 42 J. AM. ACAD. PSYCHIATRY L. 191, 198 (2014).

21. *See Frank P.*, 2 N.Y.S.3d at 486. A person suffers from antisocial personality disorder when he or she presents "a pervasive patter of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." DSM-5, *supra* note 20, at 659.

22. *See Frank P.*, 2 N.Y.S.3d at 487.

23. *See id.*

24. *See id.* at 488.

Frank P. under strict intensive supervision and treatment ("SIST"),[25] a form of civil commitment under Article 10.[26]

Nevertheless, the First Department of the New York Appellate Division reversed the trial court's holding. It instead held that Frank's condition was insufficient for civil commitment.[27] The First Department relied on the New York Court of Appeals' decision in *State v. Donald DD.*[28] *Donald DD.* held that a diagnosis of ASPD alone is insufficient to establish the requirement of a mental abnormality under Article 10[29] because the diagnosis does not distinguish the repeat sex offender from the typical recidivist.[30] The First Department dismissed the petition to civilly confine Frank because his diagnosis of ASPD was insufficient to show he had difficulty in controlling his behavior and therefore he was not distinguished from the typical criminal recidivist.[31] Frank was no longer subject to SIST conditions under Article 10.[32]

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25. *See id.* ("Supreme Court was persuaded by respondent's lack of sexually deviant behavior while incarcerated; his lack of prison disciplinary violations during the last six years of his sentence; his 'constructive work in prison' to complete his education and assist other inmates; his 'realistic goals' upon release; and the continued involvement of his family and relatives in his life, to conclude that respondent could live at liberty without reoffending if strictly supervised.").

26. N.Y. MENTAL HYG. LAW § 10.07(f) (McKinney 2011) ("If the court does not find that the respondent is a dangerous sex offender requiring confinement, then the court shall make a finding of disposition that the respondent is a sex offender requiring strict and intensive supervision . . . .").

27. *See Frank P.*, 2 N.Y.S.3d at 492.

28. *See id.* at 485 ("This proceeding, however, preceded the recent pronouncement by the Court of Appeals in *Matter of State of New York v. Donald DD. . . .* [where] the Court of Appeals limited the evidence that can be used to civilly commit a convicted sex offender . . . ."); State v. Donald DD., 21 N.E.3d 239 (N.Y. 2014).

29. *See Frank P.*, 2 N.Y.S.3d at 490-91.

30. *See id.* at 491 ("[W]hen the ASPD diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality [it] simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.") (quoting *Donald DD.*, 21 N.E.3d at 250).

31. *See id.* at 493 ("[G]iven *Donald DD.*, we find that the inferences that logically flow from such evidence are insufficient to support a determination, under the clear and convincing evidence standard, that respondent will have serious difficulty in controlling his behavior . . . .").

32. N.Y. MENTAL HYG. LAW § 10.07(e) (McKinney 2011) ("If . . . the court . . . determines that the attorney general has not sustained his or her burden of establishing that the respondent is a detained sex offender who suffers from a mental abnormality, the court shall dismiss the petition and the respondent shall be released . . . .").

New York courts have consistently interpreted *Donald DD.* as holding that a sole diagnosis of ASPD is insufficient to civilly confine a sex offender.[33] To be sure, some courts in New York have instead stated that, under certain conditions, ASPD may be sufficient to civilly confine a sex offender.[34] This Note argues that ASPD alone *should* be a condition sufficient to civilly commit a sex offender. This is demonstrated when evaluating the purpose of Sexually Violent Predator Laws,[35] the manner in which other states have permitted ASPD to be a sufficient diagnosis in Sexually Violent Predator proceedings,[36] and why civil commitment hearings should not proceed under bright-line rules, but instead under an individualized approach.[37]

Part I describes the development of the civil commitment of sex offenders through Sexually Violent Predator Laws [38] and the constitutionality of these laws under *Kansas v. Hendricks*[39] and *Kansas v. Crane*.[40] Part I then explains the New York Court of Appeals' decision in *State v. Donald DD.*, which held that ASPD was

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33. *See* State v. Richard TT., 14 N.Y.S.3d 824, 828 (N.Y. App. Div. 2015) ("The Court of Appeals has determined that a diagnosis of ASPD, without more, does not meet that requirement, as it 'establishes only a general tendency toward criminality, and has no necessary relationship to a difficulty in controlling one's sexual behavior.'"); State v. Raymundo V., 8 N.Y.S.3d 543 (N.Y. Sup. Ct. 2015) (holding a diagnosis of ASPD and alcohol dependence insufficient for civil commitment); State v. Maurice G., 4 N.Y.S.3d 860 (N.Y. Sup. Ct. 2015) (holding a diagnosis of ASPD and psychopathy was not sufficient to civilly commit a sex offender because psychopathy, like ASPD, is not a sexual disorder and does not in itself predispose one to commit a sex offense).

34. *See* State v. Jerome A., No. 30261-2014, 2015 N.Y. Misc. LEXIS 3243, at *17-18 (N.Y. Sup. Ct. 2015) ("This Court respectfully disagrees with the reasoning process which the *Donald DD.* majority used to determine that ASPD alone cannot serve as the predicate for a Mental Abnormality, although this Court believes there are other valid arguments which might be advanced to support the same conclusion. Simply because most prison inmates can be diagnosed with ASPD *does not mean most prison inmates could also be subject to Article 10 because of such a diagnosis*.") (emphasis added); *see also* State v. Glenn T., 6 N.Y.S.3d 462, 465 (N.Y. Sup. Ct. 2015) ("[B]ased upon the determination of *Donald DD.*, the Court *must review evidence of each particular case and those particular circumstances* to make a finding of whether or not to vacate the order based on the lack of supporting evidence to provide for a 'mental abnormality.'") (emphasis added).

35. *See infra* Section I.C.

36. *See infra* Sections II.A-B.

37. *See infra* Part III.

38. These laws "provide a legal mechanism for the confinement of a limited number of adult sexual offenders in a secure treatment facility after incarceration when a court determines they are likely to engage in future acts of sexual violence." *See* ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, *supra* note 19, at 83.

39. 521 U.S. 346 (1997).

40. 534 U.S. 407 (2002).

not a sufficient diagnosis on its own to civilly confine a sex offender under New York's law because of the constitutional considerations in *Kansas v. Crane*.[41] Part II presents a comparison of how other states have used the diagnosis of ASPD and the holding in *Kansas v. Crane* in the context of evaluating if the offender has a record to distinguish him[42] from the typical recidivist.[43]

Finally, Part III argues that a diagnosis of ASPD on its own should be sufficient to civilly commit a sex offender under New York's Sexually Violent Predator Law.[44] Part III argues that the totality of the circumstances—an individualized approach—is better than a bright-line rule where the law and psychology interact. This is conveyed by evaluating the constitutional standard set out in *Kansas v. Crane*, which leaves open the possibility that ASPD could be a condition sufficient for civil commitment, by looking at subsequent case law in New York that disagrees with the reasoning in *Donald DD.*, and by evaluating the purpose of civil commitment laws. Part III also demonstrates how the totality of the circumstances approach is already used when balancing the considerations of constitutional rights of a citizen and the police power of the state in the Fourth Amendment context and thus should also be used in this case.[45]

I. AN OVERVIEW OF SEX OFFENDER CIVIL COMMITMENT LAWS IN THE UNITED STATES AND HOW IT RELATES TO PSYCHOLOGICAL DIAGNOSES IN NEW YORK

Sex Offender Civil Commitment Laws have been evolving since their inception. Part I explains the development of civil commitment in the United States. It begins with the early forms of civil commitment and then describes the creation of the modern civil commitment law, the Sexually Violent Predator Law, and its constitutionality. Part I then specifies New York's version of the civil commitment law, Mental Hygiene Law Article 10, and examines the

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41. *See infra* Section I.C.2.

42. This Note will use the male pronoun to refer to sex offenders as most known sex offenders are men. *See* Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROB. 30, 30 (2004) ("Studies of female sex offenders are relatively rare, at least in part because most known sex offenders are male.").

43. *See infra* Section II.B.

44. While most states refer to their respective laws as "Sexually Violent Predator Laws," New York's law was enacted as the "Sex Offender Management and Treatment Act of 2007" and is commonly called Mental Hygiene Law Article 10. This Note will primarily use "Mental Hygiene Law Article 10" and "Sexually Violent Predator Law" for clarity.

45. *See infra* Part III.

New York Court of Appeals' interpretation of this law in light of the United States Supreme Court's interpretation of civil commitment laws.

Section I.A portrays a brief history of civil commitment in the United States of persons with mental illness who were deemed to be a danger to society. Section I.B describes the earliest form of civil commitment laws for sex offenders, Sexual Psychopath Laws. Section I.C portrays the development of modern civil commitment laws for sex offenders, the Sexually Violent Predator Laws. It also explains the leading United States Supreme Court cases, *Kansas v. Hendricks*[46] and *Kansas v. Crane*,[47] which upheld the constitutionality of these laws. Section I.C.1 then describes New York's Sexually Violent Predator Law, Mental Hygiene Law Article 10.[48] Section I.C.2 finally illuminates how the New York Court of Appeals interprets the constitutionality of Article 10 within the context of *Kansas v. Hendricks* and *Kansas v. Crane* in *State v. Donald DD*.[49]

A. History of Civil Commitment in the United States

The idea of the civil commitment of persons with mental illness[50] dates back to colonial times.[51] Initially, there were no hospitals for the mentally ill.[52] It was primarily expected that family would take care of those who could not conform to societal norms.[53] Nevertheless, the public feared that the burden would soon shift to them to support those without familial help.[54] The public also feared those persons with mental illness who were deemed to pose a danger

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46. 521 U.S. 346 (1997).

47. 534 U.S. 407 (2002).

48. *See generally* N.Y. MENTAL HYG. LAW § 10 (McKinney 2011).

49. *See generally* State v. Donald DD., 21 N.E.3d 239 (N.Y. 2014).

50. The National Alliance on Mental Illness defines a mental illness as a "condition that affects a person's thinking, feeling or mood. Such conditions may affect someone's ability to relate to others and function each day. Each person will have different experiences, even people with the same diagnosis." *Mental Health Conditions*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Mental-Health-Conditions [https://perma.cc/4AJ9-NTEU].

51. *See* Paul S. Appelbaum, *Civil Mental Health Law: Its History and Its Future*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 599 (1996).

52. *See* Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment–The American Experience*, 43 ISR. J. PSYCHIATRY RELAT. SCI. 209, 210 (2006); *see also* EDWARD B. BEIS, MENTAL HEALTH AND THE LAW 3 (Michael Brown et al. eds., 1984).

53. *See* Joseph Schneider, *Civil Commitment of the Mentally Ill*, 58 AM. BAR ASSOC. J. 1059 (1972).

54. *See* BEIS, *supra* note 52, at 3 ("Townspeople resented the itinerant poor, fearing they would have to support them.").

to society.[55] This led to the incarceration of those with mental health issues.[56] The "treatment" of these individuals consisted of restraint, sedation with medications, or experimental treatments.[57]

This "treatment" soon proved ineffective in terms of improving patients' ability to live in society.[58] Eventually, poor conditions, the immense overcrowding of jails, and the concern for treatment over restraint led to the development of psychiatric hospitals.[59] The first psychiatric admission to a facility was in Pennsylvania in 1752.[60] Throughout the next century, other states followed.[61] As more mental hospitals were built, the number of persons committed to these facilities increased.[62]

In the second quarter of the nineteenth century, a shift in approach in the treatment of the mentally ill occurred.[63] There was a movement to develop state-supported mental hospitals with an emphasis on "moral treatment"[64] or "treatment for mental illness based on belief that mental illness was caused by moral decay."[65] For example, in 1845, a Massachusetts court held that Josiah Oakes' commitment was justified because he had hallucinations and he was engaged to a "young woman of blemished character shortly after the death of his wife."[66] The Court reasoned that "[t]he question must . . . arise in each particular case, whether a patient's own safety, or that of others requires that he should be restrained for a certain time and *whether restraint is necessary for his restoration* or will be conducive thereto."[67] The "moral treatment" approach rooted its justification on the principle of rehabilitation. Interestingly, persons

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55. *See* Appelbaum, *supra* note 51.

56. *See id.*

57. Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 31 (2010); *see also* BEIS, *supra* note 52 ("If mentally disabled persons were dangerous the sheriff or constable detained and forcibly restrained them . . . . Communities took action to restrain the violent, not treat them.").

58. *See* Testa & West, *supra* note 57, at 32.

59. *See* Anfang & Appelbaum, *supra* note 52, at 209-10.

60. *See id.* at 210.

61. *See* BEIS, *supra* note 52, at 4 (explaining that Virginia opened its first hospital for the mentally ill in 1773, New York authorized the commitment of the mentally unstable in 1788, and Kentucky established the Eastern Lunatic Asylum in 1824).

62. *See id.*

63. *See* Anfang & Appelbaum, *supra* note 52, at 210.

64. *Id.*

65. JAMES MCKENZIE ET AL., AN INTRODUCTION TO COMMUNITY HEALTH 371 (7th ed. 2011).

66. BEIS, *supra* note 52, at 4-5.

67. *Id.* at 4 (quoting Matter of Josiah Oakes, 8 Law Rep. 123, 125 (Mass. 1845)).

with mental illness could be restrained whether or not they posed a danger to society.[68]

When states shifted their thinking from restraint to treatment, early forms of civil commitment laws were enacted by several states.[69] This was the first time that the care of the individual shaped state policy.[70] The laws that were enacted started defining standards for involuntary treatment.[71] States are granted the power to create laws to civilly confine individuals under two legal principles.[72] The first, *parens patriae*, or "father of the country,"[73] allows the government to act as a parent on behalf of individuals who cannot take care of themselves.[74] In doing so, the government uses its own judgment to make decisions for those who lack the capacity to make decisions themselves.[75] The other principle, the state's police power, requires the government to protect the general welfare of society.[76] This power thus grants authority to the government to construct measures that will protect society from individuals that may pose a danger to its security.[77]

Initially, family members and doctors decided whom to admit to the state psychiatric institutions.[78] The bar to admit a person was low; there were no established procedural barriers[79] and there was very little judicial intervention.[80] This made it relatively easy to civilly commit persons "deemed" to have mental illnesses. For example, in

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68. *See id.*

69. *See* Anfang & Appelbaum, *supra* note 52, at 210.

70. *See id.*

71. *See id.*

72. *See* Testa & West, *supra* note 57, at 31.

73. Samuel Jan Brackel, *Involuntary Institutionalization*, *in* THE MENTALLY DISABLED AND THE LAW 24 (Frank T. Lindman & Donald M. McIntyre eds., 3d ed. 1985).

74. Testa & West, *supra* note 57, at 31.

75. *See* Brackel, *supra* note 73, at 24 ("The individual's decisional incompetency is thus the 'threshold requirement' for the state to invoke its *parens patriae* authority . . . .").

76. Testa & West, *supra* note 57, at 31.

77. *See* Brackel, *supra* note 73, at 24 ("Rather than protect individuals from themselves or others, the police power tends to be invoked on behalf of society or societal interests *against* the individual.").

78. *See* Anfang & Appelbaum, *supra* note 52, at 210.

79. Testa & West, *supra* note 57, at 32 ("The standards of the day required only that the presence of mental illness and a recommendation for treatment be established to prove that admission of a person to a psychiatric hospital against his or her will was necessary.").

80. *See* Anfang & Appelbaum, *supra* note 52, at 210 ("Judicial involvement was typically limited to endorsing medical opinions of need for treatment, and may have also served cost control and resource allocation.").

1860, Elizabeth Packard's husband civilly committed her for exploring religions outside of the Presbyterian faith.[81] When she was released three years later, she lost custody of her children and ownership of her property.[82] The public saw involuntary commitments such as Elizabeth Packard's as unjust because the commitment by her husband did not seem to fit the rehabilitative and protective purposes of civil commitment.[83]

In the twentieth century, states changed these laws by placing more regulations and restrictions on civilly committing persons with mental illnesses.[84] For the next 100 years, reformers advocated for procedural safeguards such as jury trials or judicial hearings.[85] Physicians were required to examine individuals and testify as to whether or not they should be involuntarily committed to a psychiatric institution.[86] There was a focus on protecting the "right to liberty of the person being considered for commitment."[87] While this appeared to be a step in the right direction, problems still ensued: persons being considered for commitment were often detained in jail until their trial was finished and physicians often debated which standard should be sufficient for civil commitment.[88]

The next shift in civil commitment reform occurred in the mid-twentieth century.[89] Questions regarding the legitimacy of the psychiatric diagnoses[90] and the development of new medications[91] led

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81. *See* Testa & West, *supra* note 57, at 32.

82. *See id.*

83. *See id.*; *see also* Anfang & Appelbaum, *supra* note 52, at 210 ("Hospitalizations were involuntary and treatment was coerced, since it was presumed that all mentally ill patients had compromised reason to the extent that they were unable to request (or refuse) care on their own behalf.").

84. *See* Testa & West, *supra* note 57, at 32 ("These legal protections included potential inpatient's right to a trial, with attorney representation . . . and the decision-making power was . . . placed in the hands of judges and magistrates.").

85. *See* Anfang & Appelbaum, *supra* note 52, at 210.

86. *See id.* Nevertheless, testimony by physicians could have been thwarted by the fact that homosexual sex was still seen to be contrary to societal norms. For example, as late as 1975, the Supreme Court ruled "there exists no right to privacy for homosexual conduct because homosexuality had no relationship to 'marriage, home, or family life.'" David A. Catania, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy for Homosexuals Based on Customary International Law*, 31 AM. CRIM. L. REV. 289, 295-96 (1994) (quoting Doe v. Commonwealth, 403 F. Supp. 1199, 1202 (E.D. Va. 1975)).

87. Testa & West, *supra* note 57, at 32.

88. *See id.*

89. *See* Anfang & Appelbaum, *supra* note 52, at 211.

90. *See id.* ("[T]here was increased recognition that little effective treatment was being provided in many state hospitals . . . .").

91. *See id.*; *see also* Testa & West, *supra* note 57, at 33.

to an era of deinstitutionalization.[92] Medications permitted patients to live outside of psychiatric institutions.[93] Thus, in the 1960s, mental institutions were no longer seen as an effective avenue of treatment.[94] If patients could survive in the community on medication, there was no rationale for civil commitment in mental institutions.[95] Moreover, mid-twentieth century critics began to question states' authority for civil commitment under *parens patriae* and the effectiveness of the treatment patients received.[96] The focus of civil commitment started shifting from a "need for treatment" standard to a "dangerousness" standard.[97] In other words, civil commitment required more than a showing that the person suffered from a mental illness; the person needed to be a danger to society or himself.

The District of Columbia began implementing the "dangerousness" standard in 1964.[98] The standard required a two-part test for a person to be civilly committed: the person needed to have a mental illness and needed to pose an imminent threat to himself or others.[99] In 1975, the United States Supreme Court supported the idea behind the two-requirement test in its decision in *O'Connor v. Donaldson*.[100] The Court found the civil commitment of a man initially committed by his father to be unconstitutional because ample evidence showed Donaldson was not dangerous to himself or others.[101] Specifically, the Court held "a State cannot constitutionally confine *without more* a nondangerous individual who is capable of surviving safely in freedom."[102] While Donaldson's father's opinion would have been sufficient in the past, here the Court increased the standard for civil commitment by requiring a showing of some indicia that Donaldson was dangerous.

In 1979, the Supreme Court developed another procedural safeguard by establishing "clear and convincing evidence" as the

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92. *See* Anfang & Appelbaum, *supra* note 52, at 211; *see also* Testa & West, *supra* note 57, at 33.

93. *See* Testa & West, *supra* note 57, at 32-33.

94. *See id.* ("The number of psychiatric inpatients declined precipitously from a high of more than 550,000 in 1950 to 30,000 by the 1990s.").

95. *See id.* at 33 ("The medication was so effective in treating psychosis that the idea of community-based outpatient treatment of individuals who were previously considered to be lifelong hospital cases seemed plausible.").

96. *See* Anfang & Appelbaum, *supra* note 52, at 211.

97. *Id.*

98. *See id.*

99. *See* Testa & West, *supra* note 57, at 33.

100. 422 U.S. 563, 565 (1975).

101. *See id.* at 573.

102. *Id.* at 576 (emphasis added).

burden of proof for civil commitment.[103] The Court settled this issue in *Addington v. Texas*.[104] There, Frank O'Neal Addington claimed that the burden of proof used to civilly commit him should not have been the mid-level burden, clear and convincing evidence, but instead the highest burden, beyond a reasonable doubt.[105] The Court disagreed and held that the beyond a reasonable doubt standard is to be used when there are knowable facts. The Court reasoned: "Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient."[106]

Thus, the Court held that the clear and convincing evidence standard was the correct standard to use in a court proceeding dealing with the civil commitment of a mentally ill person.[107] While it may appear that this holding made it more difficult for persons to appeal their sentences of civil commitment, the case actually increased the standard in some states from the lowest standard, preponderance of the evidence.[108] In doing so, it followed the twentieth century trend of making it more difficult to civilly confine mentally ill persons while balancing the idea that it may be impossible to civilly confine even those people who pose a threat to the life or safety of others if the standard of proof is too high.

More recently, policymakers have started once again to assess the importance of the commitment of individuals who may not be imminently dangerous but are regularly at risk to be dangerous to others.[109] The options for commitment have expanded and more focus has been put on involuntary outpatient commitment as a "less

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103. *See* Testa & West, *supra* note 57, at 34. There are three levels of burden of proof. 29 AM. JUR. 2D EVIDENCE § 173 (2016). The lowest standard, the "preponderance of the evidence" standard, requires the fact finder to "believe that the existence of a fact is more probable than its nonexistence." *Id.* The middle standard, the "clear and convincing evidence" standard, requires that the fact finder believe a proposition is "highly probable" or have a "firm believe or conviction" that a proposition is true. *Id.* The highest standard, the "beyond a reasonable doubt" standard, requires the movant to prove every fact necessary to constitute the proposition beyond a reasonable doubt. *Id.* § 185.

104. 441 U.S. 418 (1979).

105. *See id.* at 421.

106. *Id.* at 428.

107. *See id.* at 432.

108. *See id.* at 421.

109. *See* Anfang & Appelbaum, *supra* note 52, at 212.

restrictive alternative."[110] Nevertheless, the "dangerousness" standard has inadvertently excluded those with mental illnesses who do not present themselves to be violent while undergoing treatment.[111] This results in many mentally ill persons becoming homeless or imprisoned.[112] In doing so, the shift to "dangerousness" has served as a speedy but ultimately ineffective long-term solution instead of a sustainable resolution in psychiatric care.[113]

B. Early Forms of Civil Commitment Laws for Sex Offenders: Sexual Psychopath Laws

Initially, psychiatrists and lawmakers did not single out sex offenders; they were treated the same as other groups of offenders.[114] It was not until the prominence of rehabilitation[115] and, more powerfully, an increase in the "wave of sex crimes against young girls"[116] that sex offenders started to be treated differently than other offenders. There were five times more sex crimes reported between the years 1933 and 1941 than were reported between the years 1921 and 1932.[117] To be sure, it is possible that sex crimes did not actually increase, but rather that past sex crimes were unreported[118] or that data was not collected regarding past sex crimes.[119] Moreover, rape laws were sex specific, requiring "a *woman* resist *her* assailant and that there be corroborating evidence apart from that *woman's* testimony."[120] This would inevitably leave out data for one of the most feared offenders, the child molester.[121] Despite the potential

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110. *Id.* This is considered to be less restrictive because the person is not civilly confined in a facility.

111. *See* Testa & West, *supra* note 57, at 34.

112. *See id.* at 35.

113. *See id.*

114. *See* Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 70 (2000) (explaining that sex offenders were dealt with under laws designed to deal with "defective delinquents" and "criminal psychopaths").

115. *See id.* ("This was the dawning of a new rehabilitation-focused era in the U.S., distinguished by a turning toward medical explanations for criminal behavior and an orientation toward treatment goals over punishment . . . .").

116. Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 LA. L. REV. 549, 551 (2009).

117. *See id.*

118. *See id.* at 553 ("Even if police departments were participating, they did not always report all of their arrests.").

119. *See id.* ("The FBI could not compel police to report arrests . . . .").

120. *Id.* at 553-54 (emphasis added).

121. *See id.* at 554 ("The FBI simply did not provide crime statistics on the most feared form of sexual offending: child molestation."). This could have also been

disparities in the statistics, Americans were "outraged at what they saw to be an increase in sex crimes and demanded that something be done."[122] Different solutions were recommended,[123] including legislation designed to deal specifically with sex offenders.[124]

Early forms of legislation addressing sex offenders differ from modern civil commitment laws in that the treatment for committing a sex crime served as an alternative to a prison sentence.[125] In other words, sex offenders were either treated for the mental condition that made them commit sex crimes or they were imprisoned for committing those sex crimes.[126] Michigan and Illinois were the first states to pass such laws, known as Sexual Psychopath Laws.[127] The statutes required a judge to conduct a review of the sex offender and decide if he was "feeble-minded or epileptic . . . to be psychopathic, or a sex degenerate, or a sex pervert, with tendencies dangerous to public safety."[128] If the judge found that the sex offender fit the criteria, the offender would be committed to a "state hospital or institution" until the offender was no longer a danger to society.[129]

Minnesota lawmakers soon followed Michigan and Illinois and the state implemented its own Sexual Psychopath Law.[130] Its statute was the first Sexual Psychopath Law to be constitutionally interpreted by the United States Supreme Court.[131] In 1940, the Supreme Court held in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County* that there was a rational basis for states to create laws that specify the

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because early child molestation occurred within the family and these were matters initially handled within the familial unit. This continues to occur today. *See Sexual Abuse*, AMER. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Nov. 2014), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Child-Sexual-Abuse-009.aspx [https://perma.cc/QQ86-5DEE].

122. Lave, *supra* note 116, at 565.

123. *See id.* at 565-71 (listing some solutions such as making potential victims less vulnerable, treating victims with more sensitivity, and tightening control of sex offenders through increase police monitoring).

124. *See id.* at 571 (discussing the advent of sexual psychopath laws).

125. *See* Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2097 (2010) (explaining that modern sex offender commitment statutes civilly commit sex offenders after their criminal sentence is fulfilled).

126. *See id.*

127. *See* Brakel & Cavanaugh, *supra* note 114, at 71 ("Michigan and Illinois—were in fact the first to pass these laws (1937-1938).").

128. *See* Lave, *supra* note 116, at 571.

129. *Id.*

130. *See* Brakel & Cavanaugh, *supra* note 114, at 71.

131. *See* Minnesota *ex rel.* Pearson v. Prob. Ct. of Ramsey Cty., 309 U.S. 270 (1940).

class of sex offenders.[132] The Court reasoned that "[t]he class [Minnesota] did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control."[133] Thus, laws targeting sex offenders are constitutional.[134] More than half of the other states followed Illinois, Michigan, and Minnesota.[135] These laws went relatively uncontested by lawyers and psychologists.[136]

Nevertheless, Sexual Psychopath Laws that targeted sex offenders eventually did not prove practical or popular.[137] Many health experts realized that the laws were weak in rehabilitating the individual.[138] In the legal realm, the Supreme Court struck down some of these laws due to lack of procedural safeguards, such as the right to counsel and the right to cross-examination.[139] The impracticality and unpopularity of these laws led to the demise of more than half of them by the mid-1980s.[140]

The end of the Sexual Psychopath Law era also resulted from the minimization of the danger sex offenders posed to society.[141] False information was released that conveyed that a sex offender was no more likely to reoffend than any other criminal offender.[142] Thus, it is no surprise that these laws were repealed, in part, because the public was misinformed about how likely sex offenders would offend again.

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132. *See id.* at 274-75

133. *Id.* at 275.

134. *See id.*

135. *See* Brakel & Cavanaugh, *supra* note 114, at 72.

136. *See id.*

137. *See id.* at 73.

138. *See id.* ("Gradually, it became clear to many mental health practitioners as well that the scientific/medical underpinnings that supported the earlier habilitative optimism and the laws it generated were weak indeed.").

139. *See* Specht v. Patterson, 386 U.S. 605, 610 (1967) (holding that all the procedural safeguards of a criminal trial were warranted in this civil-type proceeding); *see also* Allen v. Illinois, 478 U.S. 364 (1986) (holding that the Fifth Amendment self incrimination privilege did not extend to psychiatric examination).

140. *See* Brakel & Cavanaugh, *supra* note 114, at 73.

141. *See id.* at 74-75 ("One of the minimizers saw fit to implicitly criticize the passage of Indiana's sex offender statute as 'the direct result of almost a mass hysteria followed by a series of [sexually motivated] murders which occurred in the summer and fall of 1947*, as if several murders in the space of a few months in a few counties were nothing to be alarmed about.*") (emphasis added).

142. *See id.* at 74 (explaining that data stating that sex offenders only get in trouble once had been released to the public).

Naturally, minimizing the sex offender problem did not make it go away.[143] The media eventually exposed the truth that sex offenders still posed a bigger threat to society than the public was aware of.[144] An escalation of the seriousness of offenses repeat sex offenders committed occurred as well.[145] For example, in 1989 a man named Earl Shriner was released from a Washington prison after serving a ten-year sentence for kidnapping and sexually assaulting two teenagers.[146] He was not eligible for civil commitment under the original Washington Sexual Psychopath Law.[147] After his release, he raped a seven-year-old boy, cut off the boy's penis, and left the boy to die.[148] This escalation effect and the truth that sex offenders continued to pose a danger to society drove the enactment of the modern civil commitment laws, the Sexually Violent Predator Laws.[149]

C. Modern form of Civil Commitment Laws for Sex Offenders: Sexually Violent Predator Laws and the United States Supreme Court's Constitutional Interpretation

Sexually Violent Predator Laws differ from Sexual Psychopath Laws in that the treatment and civil commitment of the sex offender under Sexual Psychopath Laws occurs after a defendant has served his prison sentence.[150] Washington was the first state to pass the modern form of sex offender civil commitment laws in 1990.[151] Today, twenty states, the District of Columbia, and the federal government have adopted similar laws.[152] Though each state's law

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143. *See id.* at 75 ("After all, minimizing a real problem does not make it go away any more than the disappearance of a certain set of sex offender laws will cause sex offenders to disappear.").

144. *See id.*; Joan Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 SAN DIEGO L. REV. 1057, 1060 (2000) (explaining that the media had highly publicized sexual assaults); *see also* Miller, *supra* note 125, at 2097.

145. *See* Comparet-Cassani, *supra* note 144, at 1060 ("Two of the three cases culminated in murder, and, in each case, the offense was committed by an individual who had an extensive prior sexual criminal history and had recently been released from prison.").

146. *See* Brakel & Cavanaugh, *supra* note 114, at 75.

147. *See id.*

148. *See id.*

149. *See* Comparet-Cassani, *supra* note 144, at 1060.

150. *See generally* Miller, *supra* note 125.

151. *See id.* at 2097; *see also* Kasee Sparks, *Differences in Legal and Medical Standards in Determining Sexually Violent Predator Status*, 32 L. & PSYCHOL. REV. 175, 176 (2008); *supra* Section I.B.

152. *See* ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, *supra* note 19 (listing Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota,

may differ in form, Washington's preamble and statutory structure serve as a model for comparable statutes throughout the country.[153] In short, the preamble states "[t]he legislature finds that a small but extremely dangerous group of sexually violent predators exist . . . [and] generally have antisocial personality features which are not amenable to existing medical illness treatment modalities and those features render them likely to engage in sexually violent behavior."[154] Sexually Violent Predator Laws target repeat sex offenders that pose a danger to society.

These laws differ from the previous sex offender laws where courts had the choice to place sex offenders either in prison or in civil commitment facilities. Conversely, Sexually Violent Predator Laws *continue* the detainment of sex offenders who have already served their prison sentences in civil commitment facilities.[155] In other words, the sexual offenders first serve the time for their crime and then are evaluated for civil commitment.[156] Most states define a "Sexually Violent Predator" in the civil commitment statutes as a person "(1) who has been convicted of or charged with a sexually violent offense and (2) who suffers from a mental abnormality or personality disorder (3) that makes the person likely to engage in acts of sexual violence."[157] Thus, these individuals are only civilly committed after their criminal sentence if a court deems them to have a mental abnormality that would predispose them to be a danger to society if released.[158]

Sexually Violent Predator Laws have withstood constitutional challenges. First, in 1997, the Supreme Court in *Kansas v. Hendricks*[159] evaluated Kansas' Sexually Violent Predator Act as it applied to respondent Leroy Hendricks, a man with a history of

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Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin as states that have enacted Sexually Violent Predator Laws); NAT'L DIST. ATT'YS ASS'N., CIVIL COMMITMENT OF SEX OFFENDERS (2012), http://www.ndaa.org/pdf/Sex%20Offender%20Civil%20Commitment-April%202012.pdf [https://perma.cc/53AP-7EYA]; Richard L. Frierson, *DSM-5 and Psychiatric Evaluations of Individuals in the Criminal Justice System, in* THE DSM-5 AND THE LAW: CHANGES AND CHALLENGES 77 (Charles Scott ed., 2015); *see also* Miller, *supra* note 125, at 2098.

153. *See* Brakel & Cavanaugh, *supra* note 114, at 77.

154. WASH. REV. CODE ANN. § 71.09.010 (West 1992).

155. *See* Miller, *supra* note 125, at 2098.

156. *See id.*

157. *Id.*

158. *See* Testa & West, *supra* note 57, at 36.

159. 521 U.S. 346 (1997).

repeated child sexual molestation.[160] Hendricks, who was being evaluated for civil commitment based on his past sexual crimes, the most recent conviction relating to "taking 'indecent liberties' with two thirteen-year-old-boys,"[161] challenged the law on substantive due process, double jeopardy, and *ex post facto* claims.[162] The Court held that the act was constitutional on all grounds.[163]

First, the Court held that the Act's definition of "mental abnormality" satisfied substantive due process.[164] The Act defined a 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."[165] The Court explained that while all individuals have a liberty interest, "[s]tates have in certain narrow circumstances provided for the forcible detainment of people who are unable to control their behavior and thereby pose a danger to the public health and safety."[166] The Court further reasoned these statutes must contain "proper procedures and evidentiary standards."[167] Specifically, the Court noted it had upheld statutes "when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.'"[168] The Court thus reasoned that because the Kansas Act required a finding of dangerousness plus a finding that the respondent suffered from a mental abnormality, the Act was consistent with substantive due process and in line with similarly constitutional laws.[169] Moreover, the Court found that Hendricks' "urge" to molest children, with the prediction of future dangerousness laid out by the trial court made him an offender subject to this type of proceeding.[170]

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160. *See id.* at 350, 354.

161. *Id.* at 353.

162. *See id.* at 350; KAN. STAT. ANN. § 21-5506 (West 2011).

163. *Hendricks*, 521 U.S. at 350.

164. *See id.* at 356. Substantive due process is a doctrine that requires legislation to be "fair and reasonable in content and to further a legitimate governmental objective." *Due Process*, BLACK'S LAW DICTIONARY (10th ed. 2014).

165. *See* KAN. STAT. ANN. § 59-29a02(b) (West 1994).

166. *Hendricks*, 521 U.S. at 357.

167. *Id.*

168. *Id.* at 358.

169. *See id.*

170. *See id.* at 360 ("This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.").

The Court then evaluated Hendricks' double jeopardy and *ex post facto* claims.[171] Hendricks' contention was that the Kansas Act essentially constituted a second criminal punishment, thereby establishing the double jeopardy claim.[172] The Court rejected this argument.[173] First, the Court found that the language of the statute did not warrant any other interpretation than intent to form a civil proceeding.[174] Second, the Court reasoned that the Act did not contain the goals of retribution or deterrence,[175] objectives that would be associated with criminal punishment.[176] Additionally, the Court explained that the confinement of the mentally ill had always been considered non-punitive detention.[177] Thus, the Court found that Kansas' Act did not constitute double jeopardy or an *ex post facto* law. This finding, along with the finding that the Act did not infringe on substantive due process, allowed the Court to hold Kansas' Act constitutional.

The second time the Supreme Court evaluated the constitutionality of a Sexually Violent Predator Law was in 2002. *Kansas v. Crane* focused on whether or not the State must always prove that a sex offender has complete or total lack of control of his behavior.[178] There, the Supreme Court reviewed the civil commitment of Michael Crane, a convicted sex offender who suffered from exhibitionism and antisocial personality disorder.[179] The question was whether it was unconstitutional to civilly commit Crane when there was no showing that he was unable to control his behavior.[180] The Supreme Court ruled that it was unconstitutional because *Hendricks* "underscored

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171. *See id.*

172. *See id.* at 361.

173. *See id.*

174. *See id.* ("Nothing on the face of the statute suggests the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.").

175. *See id.* at 361-63 (stating that the Act is not retributive because it does not assign culpability to criminal conduct and that it is not a deterrent because those suffering from a mental abnormality are unlikely to be deterred by the threat of confinement).

176. *See id.* at 361 ("[W]e will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'") (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).

177. *See id.* at 363.

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

179. *See id.* at 410-11.

180. *See id.* at 411 ("In the [Kansas Supreme Court's] view, the Federal Constitution as interpreted in *Hendricks* insists upon 'a finding that the defendant cannot control his dangerous behavior . . . .").

the constitutional importance of distinguishing a dangerous sexual offender 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'"[181] The Court further reasoned that a diagnosis of a serious mental disorder was a way to distinguish sex offenders from other offenders and a way to display serious difficulty in control.[182] The Court recognized that the standard for "difficulty in control" was not a strict standard[183] but instead reasoned that

> [t]he Constitution's safeguards of human liberty in an area of mental illness and the law are not always best enforced through precise bright-line rules. For one thing, the states retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment. For another, the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of law.[184]

In doing so, the Court once again upheld the constitutionality of a Sexually Violent Predator Law, but reinforced the element of difficulty in control that is necessary to prove in order for a sex offender to be eligible for civil commitment.

1. New York's Sexual Psychopath Law: New York Mental Hygiene Law Article 10

The history of New York's Sexually Violent Predator Law is similar to Washington's. On June 29, 2005, Phillip Grant murdered Concetta Russo Carriero. Later that day he told police "he had hidden in a stairwell with a knife for hours . . . waiting to kill."[185] Grant was a level-three sex offender[186] who had already served twenty-three years in prison for two rape convictions and an

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181. *Id.* at 412 (citing *Hendricks*, 521 U.S. at 360).

182. *See id.* at 412-13 ("The presence of what the 'psychiatric profession itself classified . . . as a serious mental disorder' helped to make [the distinction between civil commitment and retribution] in *Hendricks*. And a critical distinguishing feature of that 'serious . . . disorder there consisted of a special and serious lack of ability to control behavior.").

183. *See id.* at 413 (explaining that difficulty in control will not be "demonstrable with mathematical precision," but must be enough to distinguish the sex offender from the typical recidivist).

184. *Id.* at 407-08.

185. Anahad O'Connor, *Homeless Man Goes on Trial in Hate-Crime Murder*, N.Y. TIMES (June 13, 2006), http://www.nytimes.com/2006/06/13/nyregion/homeless-man-goes-on-trial-in-hatecrime-murder.html [https://perma.cc/8FHE-4N8G].

186. A level-three sex offender in New York State designates that the "risk of repeat offense is high and there exists a threat to public safety." N.Y. CORRECT. LAW § 168-l(6)(c) (McKinney 2000).

attempted sexual assault conviction.[187] Similarly to the people of Washington State, the people of New York State feared this kind of escalation from offenders who had already served their time. This resulted in Governor Pataki's call for legislation called "Concetta's Law," intended to serve a similar function to the Sexually Violent Predator Laws described above.[188] When the New York State Assembly and Senate were unable to agree on the legislation, Governor Pataki sought to have offenders civilly committed under Mental Hygiene Law Section 9.27.[189] Mental Hygiene Law Section 9.27(a) allows a director of a hospital to receive "any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person."[190] Mental Hygiene Law Section 9.27(b) provides eleven options by which the patient can be admitted by application, only one of which requires a court order.[191] In this way, sex offenders can be civilly committed without judicial involvement and without relying on the mentally abnormality plus dangerousness requirements in other statutes.[192]

Not long after Governor Pataki ordered the use of Mental Hygiene Law Section 9.27 to civilly commit sex offenders, the initiative[193] was challenged on procedural grounds.[194] In November 2005, the New York Court of Appeals held that it was improper to use Mental Hygiene Law Section 9.27 to involuntarily commit sex offenders because the law did not specifically permit the release of felony offenders from prison to a mental health institution.[195] It ruled that

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187. *See* N.Y. ST. OFF. OF MENTAL HEALTH, 2008 ANNUAL REPORT ON THE IMPLEMENTATION OF MENTAL HYGIENE LAW ARTICLE 10: SEX OFFENDER MANAGEMENT AND TREATMENT ACT OF 2007 3 (2009), https://www.omh.ny.gov/omhweb/resources/publications/2008_SOMTA_Report.pdf [https://perma.cc/Z75H-P284].

188. *Id.*

189. *See id.* ("New York State was fairly unique in its attempt to [civilly commit sex offenders] through a pre-existing statute"); *see also* N.Y. MENTAL HYG. LAW § 9.27 (McKinney 2007) (allowing the civil commitment of persons with mental illness upon authorization of two physicians).

190. N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2011).

191. *See id.* § 9.27(b).

192. *See* N.Y. ST. OFF. OF MENTAL HEALTH, *supra* note 187.

193. *See id.* at 3. ("The Sexually Violent Predator (SVP) initiative in New York State commenced in September 2005. Under this initiative, OMH was required to conduct a comprehensive record review of all sex offenders who were scheduled for release from DOCS.").

194. State *ex rel.* Harkavy v. Consilvio, 859 N.E.2d 508 (N.Y. 2006) [hereinafter *Harkavy I*].

195. *Id.*

Correction Law Section 402[196] should have been used to civilly confine sex offenders instead.[197] Correction Law Section 402 provides treatment for individuals already imprisoned and already psychiatrically evaluated.[198] The Court of Appeals ruled that it was this law that provided the appropriate evaluation for sex offenders requiring civil commitment.[199] Pending the outcome of the second appeal in that case, the New York Legislature passed the Sex Offender Management and Treatment Act.[200]

The Sex Offender Management and Treatment Act is enumerated in Chapter 7 of the Laws of 2007.[201] Commonly referred to as Article 10, the Act dictates the process for civil commitment in New York.[202] Its focus is "to enhance public safety by continuing to treat and manage mentally abnormal sex offenders who are being released from some type of supervision . . . but remain predisposed to recidivate in the absence of such treatment and management."[203] Thus, it is similar to other Sexually Violent Predator Laws in that its goal is to protect society from sex offenders prone to recidivism by keeping them in civil confinement after the fulfillment of their prison sentences.

The first part of the statute presents legislative findings, mainly, "[t]hat recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management."[204] Moreover, the legislature found that "some sex offenders have mental abnormalities that predispose them to engage in repeat sex offenses."[205] Thus, the law sets out to protect the community from sex offenders that are diagnosed with mental abnormalities that make it difficult to control reoffending or escalating.

In order for a sex offender to be eligible for civil commitment under Mental Hygiene Law Article 10, a case review team reviews a

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196. N.Y. CORRECT. LAW § 402 (McKinney 2014).

197. *Harkavy I*, 859 N.E.2d at 509 ("[W]e hold that the procedures set forth in Correction law § 402, rather than Mental Hygiene Law article 9, better suit this situation.").

198. *Id.* at 511.

199. *Id.* at 511-12.

200. *See* N.Y. ST. OFF. OF MENTAL HEALTH, *supra* note 187, at 4.

201. It was effective April 13, 2007. *See id.* at 5.

202. *See id.*

203. *Id.*

204. N.Y. MENTAL HYG. LAW § 10.01(a) (McKinney 2011).

205. *Id.* § 10.01(b).

detained sex offender's file[206] to see if he is a "dangerous sex offender requiring confinement."[207] The statute defines a "dangerous sex offender requiring confinement" as a person

> who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.[208]

A "detained sex offender" is a person in the "care, custody, control or supervision of an agency with jurisdiction" that either is convicted or charged with a sex offense or convicted of a designated felony that was sexually motivated.[209] Finally, a "mental abnormality" is defined as a "congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."[210] Thus, in order for a person to require civil management, the person must be a "detained sex offender" and have a "mental abnormality" as defined by the statute.

Once it is determined that the "respondent"[211] is a sex offender requiring civil management, the case review team refers the case to the New York Attorney General, who may file a sex offender civil commitment petition in a court with jurisdiction over where the respondent is located.[212] The petition must allege facts "of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management."[213] There is then a probable cause hearing where the court determines whether

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206. *Id.* § 10.05(e) ("[T]he case review team shall review relevant records . . . and may arrange for a psychiatric examination of the respondent. Based on the review and assessment of such information, the case review team shall consider whether the respondent is a sex offender requiring civil management.").

207. Confinement and management are often used interchangeably with commitment. This Note uses commitment for consistency purposes.

208. N.Y. MENTAL HYG. LAW § 10.03(e) (McKinney 2016).

209. *Id.* § 10.03(g).

210. *Id.* § 10.03(i).

211. *Id.* § 10.03(n) (defined as "a person referred to the case review team for evaluation, a person as to whom a sex offender civil management petition has been recommended by a case review team and not yet filed, or filed by the attorney general and not dismissed, or sustained by procedures under this article.").

212. *Id.* § 10.06(a).

213. *Id.*

the respondent is such an offender.[214] If the court determines that there is no probable cause, the petition is dismissed.[215] If the court determines there is probable cause, the court orders the respondent to a secure treatment facility[216] and sets a date for trial.[217] The respondent will not be released until the end of the trial.[218]

A trial must begin within sixty days of the court determining there is probable cause that the respondent is a sex offender requiring civil management.[219] The jury or judge[220] must determine by clear and convincing evidence[221] whether the respondent is a detained sex offender who suffers from a mental abnormality.[222] If the jury or court determines that the respondent is not a sex offender who suffers from a mental abnormality by clear and convincing evidence, the petition is dismissed and the respondent is released.[223] If the jury or court determines that the respondent is a sex offender who suffers from a mental abnormality, the court shall then consider whether the respondent is a "dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision."[224] That is, the court will decide if the sex offender needs to be committed into a facility or can be released into the community under close monitoring and strict supervision.

The court will determine that the respondent is a sex offender requiring commitment if it finds by a clear and convincing evidence that "respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility."[225] If the court does not find this, then the respondent will be a "sex

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214. *Id.* § 10.06(g).

215. *Id.* § 10.06(k).

216. If the respondent or respondent's counsel signs a consent to remain in the prison which he already resides, he may stay there until the end of the trial. *See id.*

217. *Id.*

218. *See id.*

219. *Id.* § 10.07(a).

220. The court may make the determination at trial if a jury trial is waived. *See id.* § 10.07(c).

221. The burden of proof rests on the attorney general. *See id.* § 10.07(d); *see also* Testa & West, *supra* note 57, at 34.

222. N.Y. MENTAL HYG. LAW § 10.07(d) (McKinney 2011).

223. *Id.* § 10.07(e).

224. *Id.* § 10.07(f).

225. *See id.*; *see also id.* § 10.10(a) ("[T]hat facility shall provide care, treatment and control of the respondent until such time that a court discharges the respondent in accordance with the provisions of this article").

offender requiring strict and intensive supervision."[226] This means that the respondent is released, but is closely monitored in the community.[227]

The respondent may petition for release on an annual basis.[228] When this occurs, there is an evidentiary hearing to decide whether or not the respondent still suffers from a mental abnormality and still requires civil commitment.[229] If the court decides the respondent no longer suffers from a mental abnormality and no longer requires civil commitment, the court shall issue an order that discharges the respondent to strict intensive supervision and treatment.[230] Likewise, the respondent may also petition for discharge on strict intensive supervision and treatment. If the court finds respondent no longer requires civil commitment, it shall order the respondent's discharge.[231]

2. The New York Court of Appeals' Interpretation of Article 10 and Its Constitutionality In Relation to Antisocial Personality Disorder

Upon the passing of Mental Hygiene Law Article 10, the New York Court of Appeals ruled that any respondent's challenge to transfer to a secure facility under Article 9 had "been rendered academic."[232] Article 10 is now the law under which New York courts determine whether sex offenders require civil commitment once they near the end of their prison sentences.[233] Recently, and in light of *Kansas v. Crane*, the constitutionality of Article 10 was challenged.[234] On July 26, 2002, eighteen-year-old Donald DD. had sexual

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226. *Id.* § 10.07(f); *see also id.* § 10.11(a) (explaining the supervision requirements may include but are not limited to "electronic monitoring or global positioning satellite tracking for an appropriate period of time, polygraph monitoring, specification of residence or type of residence, prohibition of contact with identified past or potential victims, strict and intensive supervision by a parole officer, and any other lawful and necessary conditions that may be imposed by a court").

227. *See id.* § 10.11.

228. *Id.* § 10.09(a) ("The commissioner shall provide the respondent and counsel for the respondent with an annual written notice of the right to petition the court for discharge.").

229. *Id.* § 10.09(h).

230. *Id.*

231. *Id.* § 10.11(h).

232. State *ex rel.* Harkavy v. Consilvio, 870 N.E.2d 128, 132 (N.Y. 2007) [hereinafter *Harkavy II.*].

233. *See id.* (stating that this included those who are petitioners in *Harkavy II.*).

234. State v. Donald DD., 21 N.E.3d 239 (N.Y. 2014).

intercourse with a fourteen-year-old acquaintance.[235] Afterwards, he asked the acquaintance if he could have intercourse with her twelve-year-old cousin.[236] The twelve-year-old was afraid and did not resist when Donald partially inserted his penis into her vagina.[237] Donald pled guilty to rape in the second-degree,[238] attempted rape in the second degree, and endangering the welfare of a child.[239] He was convicted and sentenced to six months in prison and ten years probation in January 2004.[240]

In the same year he was released,[241] Donald persuaded a young woman to walk with him[242] and then forced her to have sexual intercourse with him.[243] Donald was subsequently arrested and pled guilty to sexual abuse in the second degree.[244] He again served six months in prison, was released, but again was arrested for throwing rocks at an acquaintance's car and injuring a passenger.[245] This time, he was resentenced and convicted to one to three years of imprisonment.[246]

A year later, Donald's prison sentence was coming to an end, and he was evaluated for civil commitment under Article 10.[247] Nevertheless, upon review, a psychiatric examiner testified that he did not believe Donald suffered from a mental abnormality within the meaning of Mental Hygiene Law Section 10.03.[248] Thus, he was

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235. *See id.* at 243.

236. *See id.*

237. *See id.*

238. *Id.*; *see also* N.Y. PENAL LAW § 130.30(1) (McKinney 2009) ("[B]eing 18 years old or more, he or she engages in sexual intercourse with another person less than 15 years old.").

239. *Donald DD.*, 21 N.E.3d at 243.

240. *See id.*

241. *See id.* at 244 ("On July 1, 2004, after release from prison, Donald DD. persuaded a young woman, a close friend of his wife, to accompany him on a walk to a local cemetery. There, he kissed the woman and, ignoring her repeated protests, had sexual intercourse with her.").

242. *See id.*

243. *See id.*

244. *See id.*; *see also* N.Y. PENAL LAW § 130.60 (McKinney 2009).

245. *Donald DD.*, 21 N.E.3d at 244 ("Donald DD.'s probation was revoked in the summer of 2006, after he was arrested following an incident in which he threw stones or rocks at an acquaintance's car, injuring a passenger.").

246. *See id.*

247. It was then 2008; *Donald DD.* had not been evaluated under the law prior to this was because MHL Article 10 was not enacted until 2007. *See* N.Y. ST. OFF. OF MENTAL HEALTH, *supra* note 187, at 5.

248. *Donald DD.*, 21 N.E.3d at 244 ("A psychiatric examiner, Dr. Mark Cederbaum, opined that Donald DD. suffered from ASPD, but did *not* have a mental

conditionally released to parole.[249] His parole terms indicated that he could not contact anyone under eighteen without the presence of an adult.[250] Nevertheless, his children alleged that he was alone with them and he "had touched their 'privates' and encouraged them to touch each other's and his 'privates.'"[251] His parole was thus revoked and he was returned to prison to serve the remainder of his 2007 maximum sentence.[252] In June 2009, another civil commitment proceeding began against Donald as he was nearing the end of his sentence.[253] Donald was committed to a secure treatment facility after the court found probable cause that he was a sex offender requiring civil commitment.[254] A jury trial began in March 2010.[255]

At trial, the State presented two psychologists who testified that Donald suffered from antisocial personality disorder.[256] The psychologists testified that this disorder resulted in a pattern of disregard for others and disregard for the law.[257] One psychologist believed Donald suffered from all seven traits listed under the ASPD diagnosis and the other believed he suffered from at least six.[258] Nevertheless, one of the psychologists testified that "a very small portion of individuals with antisocial personality disorders . . . are actually incarcerated for a sexual offense."[259] He testified that approximately seven percent of those diagnosed with ASPD are probably incarcerated for a sexual offense because "[s]ome with antisocial personality disorder commit sex offenses and some don't."[260] That same doctor believed that in Donald's case, his diagnosis of ASPD predisposed him to commit sex offenses and

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abnormality within the meaning of Mental Hygiene Law § 10.03(i).") (emphasis in original).

249. *See id.* ("Donald DD. was conditionally released to parole supervision in June 2008.").

250. *See id.*

251. *Id.*

252. *See id.*

253. *See id.*

254. *See id.*

255. *See id.*

256. *See id.* ("The State presented two licensed psychologists, Dr. Christopher Kunkle and Dr. Richard Hamill, as witnesses, both of whom had interviewed Donald DD. and reviewed his records.").

257. *See id.* ("[They both] opined that Donald DD. suffered from ASPD . . . . [and] . . . described the disorder as 'characterized by a pervasive pattern of disregard for others and violation of the law.'").

258. *See id.* at 245.

259. *See id.*

260. *Id.*

caused him to have "serious difficulty in controlling his sex-offending conduct."[261] The other psychologist testified similarly, stating, "the large majority, 93 percent of those diagnoses with [ASPD], are not sex offenders."[262] He then similarly stated that ASPD predisposed Donald to engage in conduct constituting a sex offense and resulting in his serious difficulty in controlling his sex-offending conduct.[263] The psychologists' statements support the idea that ASPD can manifest in many ways, and in Donald's case, their opinion was that it manifested as an uncontrollable impulse that made it safer to confine him to protect himself and others.

The State called a third psychologist as a witness.[264] This doctor testified that Donald was an opportunistic offender.[265] He stated that the ASPD diagnosis was not specific to one's sexual impulses.[266] He stated, "I would say the vast majority of individuals in all the state prisons in this state could be diagnosed with antisocial personality disorder. By definition they all have difficulty conforming their behavior to the law."[267] Thus, the third psychologist's testimony reflected the opinion that Donald's ASPD did not qualify him as a sex offender requiring civil commitment under Article 10.[268]

The jury at trial found that Donald had a "condition, disease or disorder that predisposed him to the commission of conduct constituting a sex offense and result[ed] in his having serious difficulty in controlling such conduct."[269] Donald then moved to set aside the

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261. *Id.* ("In [Donald DD.'s] case, his disorder predisposes him in a way because his behavior has shown you that. His behavior has shown you what goes on inside his mind, and he acts upon the urges that he has . . . he acts upon that urge and neglects the laws that govern.").

262. *Id.*

263. *See id.* ("[H]e opined that ASPD predisposed Donald DD. to engage in conduct constituting a sex offense . . . .[and] . . . that Donald DD.'s ASPD resulted in his having serious difficulty in controlling his sexual-offending conduct.").

264. *See id.*

265. *See id.* at 246.

266. *Id.* ("He explained that ASPD can act 'in combination with . . . a diagnosable sexual disorder, and . . . can add extra fuel to the fire, if you will,' but cannot 'in and of itself . . . predict sexual impulse control.'").

267. *See id.*

268. Differing opinions between mental health professionals regarding ASPD are not uncommon. *See* Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 542 (2013) ("[T]he diagnosis of ASPD specifically . . . [has] been the subject of multiple critiques and debate, and these issues are not settled in the mental health field.").

269. *See Donald DD.*, 21 N.E.3d at 246; *see also* N.Y. MENTAL HYG. LAW § 10.03(i) (McKinney 2016).

verdict, but this was denied.[270] Donald grounded his argument in the fact that "ASPD is an inapplicable predicate for a finding of mental abnormality because it is 'not a sexual disorder.'"[271] The Court denied the motion and ordered Donald to be civilly confined.[272] Donald appealed,[273] but the Appellate Division affirmed, holding, "a mental condition need not itself have any sexual component in order to predispose a person to the commission of conduct constituting a sex offense and result in that person's having serious difficulty in controlling such conduct."[274] Donald appealed again to the New York Court of Appeals. [275]

The Court of Appeals reversed the Supreme Court and Appellate Division's decisions.[276] It focused on the constitutionality of civilly confining a sex offender based on the diagnosis of ASPD.[277] The Court referred to *Kansas v. Hendricks* and *Kansas v. Crane* when evaluating Donald's claim that a diagnosis of ASPD was insufficient to civilly confine a sex offender.[278] The Court emphasized that in both cases, the United States Supreme Court explained that the mental abnormality the sex offender is suffering from must distinguish him "from the dangerous but typical recidivist convicted in an ordinary criminal case."[279] This distinction is important in ensuring civil commitment does not act as a device for punitive measures or deterrence.[280] The Court of Appeals held, based on the constitutional requirements set by *Hendricks* and *Crane* as well as the statistics[281] of those in the prison population suffering from ASPD, that ASPD alone "simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical

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270. *See Donald DD.*, 21 N.E.3d at 246.

271. *Id.*

272. *See id.*

273. *See id.* ("Donald DD. appealed, again challenging the use of ASPD as a basis for the jury's finding of mental abnormality.").

274. *See id.*

275. *See id.* at 247.

276. *See id.*

277. *See id.* at 249.

278. *See id.*

279. *Id.* at 250 (quoting Kansas v. Crane, 534 U.S. 407, 413 (2002)).

280. *Id.* at 249.

281. *See id.* (explaining that one of the psychologist's testimony in the *Kenneth T.* case stated that around eighty percent of the people currently in prison suffer from ASPD); *see also supra* notes 259-62.

recidivist convicted in an ordinary criminal case."[282] Thus, the Court of Appeals held that Donald's ASPD diagnosis and evidence of sex crimes was not sufficient for Donald to be subject to civil confinement if there was no other independent mental abnormality diagnosis to go along with it.[283] Thirteen sex offenders have since been released pursuant to the decision in *Donald DD.*[284]

II. ANTISOCIAL PERSONALITY DISORDER AND DISTINGUISHING THE SEX OFFENDER FROM THE TYPICAL CRIMINAL RECIDIVIST

Part II describes the diagnosis of antisocial personality disorder. It also illuminates the manner in which different jurisdictions have used the diagnosis in evaluating respondents under Sexually Violent Predator Laws. Though not many jurisdictions have been as explicit as New York regarding the diagnosis' sufficiency for civil commitment, some jurisdictions permit the use of ASPD alone as a condition sufficient for civil commitment. Most jurisdictions that have had the opportunity to evaluate the sufficiency of ASPD for civil commitment permit it, so long as there is other evidence that the respondents' diagnosis supports his propensity to commit sexually violent offenses.[285] Section II.A provides an explanation of how

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282. *Donald DD.*, 21 N.E.3d at 249-50 ("We must interpret the Mental Hygiene Law article 10 statute on the assumption that it accords with these constitutional requirements.").

283. *Id.* at 251. During the pendency of writing this Note, the New York Court of Appeals decided *State v. Dennis K.*, which again addressed the sufficiency of a diagnosis of ASPD to constitute mental abnormality under Article 10. 59 N.E.3d 500 (N.Y. 2016). In sum and substance, the case clarified that *Donald DD.* did not require that a sex offender suffer from a *sexual* disorder. *See id.* at 517. Moreover, the case declared that sex offenders who are diagnosed with ASPD and some other disorder may be eligible for civil commitment. *See id.* at 521. *Dennis K.* does not affect the argument of this Note.

284. Associated Press, *NY frees "antisocial personality disorder" sex offenders*, ONEIDA DAILY DISPATCH (June 1, 2015), http://www.oneidadispatch.com/article/OD/20150601/NEWS/150609993 [https://perma.cc/ZYV9-FV8D].

285. The analysis in this Part focuses on jurisdictions that have been *explicit* in evaluating antisocial personality disorder under *Hendricks* and *Crane*. While there may be more cases and jurisdictions that implicitly accept or reject ASPD as a sufficient condition for a mental abnormality, the focus on those that are explicit is done for clarity. For example, the Supreme Court of California published a decision, *People v. Williams*, which affirmed a judgment that civilly committed a sex offender who was diagnosed with "psychosis, paranoia and severe antisocial personality disorder." 74 P.3d 779, 792-93 (Cal. 2003). Although the California Supreme Court implicitly ASPD as a condition sufficient to civilly commit a sex offender, it also came to this conclusion based on the other diagnoses, psychosis and paranoia. Furthermore, it did not make any explicit statement that ASPD could be a condition sufficient for civil commitment. Thus, in order to avoid making broad generalizations

ASPD and psychological diagnoses are used in civil commitment proceedings. Section II.B discusses how different jurisdictions[286] use the diagnosis of ASPD when evaluating a sex offender under a Sexually Violent Predator Law.

A. Antisocial Personality Disorder: Its Definition and its Relation to the Law

Antisocial personality disorder is defined in the Diagnostic and Statistical Manual of Mental Disorders-5 ("DSM-5") as "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."[287] The Diagnostic and Statistical Manual of Mental Disorders ("DSM") "defines and classifies mental disorders in order to improve diagnoses, treatment, and research."[288] The DSM has been "widely accepted and relied on in both civil and criminal proceedings."[289] Mental health practitioners usually use the DSM to determine if a person has a certain diagnosis under the applicable law.[290]

Nevertheless, there is criticism as to how much courts should rely on the DSM in legal proceedings.[291] In the most recent edition, DSM-5, there is a cautionary note for forensic use. It recognizes that the DSM is used for forensic purposes but warns that no diagnosis under the DSM implies that a condition meets any legal criteria. The cautionary statement explains that this is a result of "the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."[292] A Nevada Supreme Court case, *Dodd v. Hughes,* explained that "[t]he judicial inquiry is

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about jurisdictions' views on ASPD and civil commitment, this Note will use cases that are explicit in their findings.

286. Specifically, this Part will focus on decisions published by the highest court in each state. While opinions regarding this issue may differ among lower courts in each state, this Note focuses on the highest court in each state because "[a] state court of last resort is the ultimate judicial arbiter of the interpretation and application of the laws of that state." *See* TONI JAEGER-FINE, AMERICAN LEGAL SYSTEMS: A RESOURCE AND REFERENCE GUIDE 49 (Lexis Nexis ed., 2d ed. 2015).

287. *See* DSM-5, *supra* note 20, at 659.

288. *About DSM-5: Development of DSM-5*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm/about-dsm [https://perma.cc/WQ2N-3HTG].

289. Jessica Ferranti, *DSM-5: Development and Implementation*, *in* THE DSM-5 AND THE LAW: CHANGES AND CHALLENGES 18 (Charles Scott ed., 2015).

290. *See id.*

291. *See id.*

292. *See* DSM-5, *supra* note 20, at 25.

not to be limited so as to exclude the totality of circumstances involved in the particular case before the court"[293] when evaluating the significance of medical testimony in relation to a DSM diagnosis.[294] The United States Supreme Court later opined similarly of the risks of the trier of fact misapplying testimony of medical experts in *Clark v. Arizona*.[295] Thus, the Court advised that psychiatric diagnoses in the DSM should be used in conjunction with the totality of the circumstances of a particular case.[296]

Although the Supreme Court ruled in *Hendricks* that a DSM diagnosis is not necessary or sufficient to show a respondent suffers from a mental abnormality,[297] courts and expert witnesses often use the DSM as a reference when diagnosing sexually violent predators.[298] In determining if a person suffers from ASPD, psychologists and psychiatrists look for a repetitive pattern of behavior in which a person violates the basic rights of others.[299] Significantly, a feature associated with ASPD is that those diagnosed with the disorder "may engage in sexual behavior . . . that has a high risk for harmful consequences."[300] Though some cases analyzed in this Note will have used the DSM-IV and the DSM-IV-TR—previous editions of the DSM—the definition of ASPD has not changed in substance in the transition to the DSM-5.[301]

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293. Dodd v. Hughes, 398 P.2d 540, 542 (Nev. 1965).

294. *See* Ferranti, *supra* note 289, at 19.

295. 548 U.S. 735, 778 (2006) ("[E]mpirical and conceptual problems add up to a real risk that an expert's judgment in giving capacity evidence will come with an apparent authority that psychologists and psychiatrists do not claim to have.").

296. This is important in the context of *Donald DD.*, where it may be argued that the New York Court of Appeals did not use the totality of the circumstances in conjunction with the DSM diagnosis, ASPD. This Part shows that jurisdictions have used the totality of the circumstances presented in individual cases along with the DSM diagnosis of ASPD and have concluded that a sex offender should be subject to civil commitment.

297. Kansas v. Hendricks, 521 U.S. 346, 359 (1997) ("Legal definitions . . . must 'take into account such issues as individual responsibility . . . and competency,' [but] need not mirror those advanced by the medical profession.").

298. *See* Frierson, *supra* note 152, at 86 ("Prior to DSM-5's release, DSM-IV-TR paraphilias were some of the most common mental disorders noted to impair an individual's ability to control their sexual behavior.").

299. *See* DSM-5, *supra* note 20, at 659.

300. *Id.* at 660.

301. *Compare* DSM-IV-TR, *supra* note 20, at 701 ("The essential feature of Antisocial Personality Disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."), *with* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS-IV 645 (4th ed. 1994) ("The essential feature of Antisocial Personality Disorder is a pervasive pattern of disregard for, and violation

B. Jurisdictional Analysis of ASPD as a Condition Sufficient under Sexually Violent Predator Laws

Jurisdictions continue to use ASPD as a condition sufficient to civilly commit a sex offender even after the finding that the sex offender needs to be distinguished from the typical criminal recidivist. Generally, jurisdictions require some evidence in addition to ASPD, such as a past record of repeat sexual offenses, to support the diagnosis under the Sexually Violent Predator Laws.

1. Iowa: Individual Inquiry

The State of Iowa accepts the use of ASPD as a condition sufficient for civil commitment so long as all other components of the Sexually Violent Predator Law are met. In doing so, Iowa uses an individualized inquiry to evaluate whether a specific offender's diagnosis of ASPD makes him prone to committing sexually violent offenses if not civilly confined.

Iowa permits the diagnosis of ASPD to be a condition sufficient under Iowa's Sexually Violent Predator Act so long as "all elements of the statute are met."[302] Iowa's Sexually Violent Predator Act requires a finding that a respondent was "convicted of or charged with a sexually violent offense" and that he "suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility."[303] Thus, so long the diagnosis makes an offender likely to engage in sexually violent acts, ASPD may be used in Iowa as a condition sufficient for civil commitment.

In *In re Detention of Barnes,* the Iowa Supreme Court rejected the contention that ASPD "renders the statute overly broad and violates due process."[304] The Court evaluated Allen Albert Barnes under Iowa's Sexually Violent Predator Act and under *Kansas v. Crane*.[305] At thirteen, Barnes sexually molested his nephew.[306] In 1981 he committed voyeurism.[307] In 1985, Barnes was convicted of three

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of, the rights of others that begins in childhood or early adolescence and continues into adulthood.") [hereinafter DSM-IV].

302. *In re* Det. of Hodges, 689 N.W.2d 467, 470 (Iowa 2004). *See also In re* Det. of Barnes, 689 N.W.2d 455, 460 (Iowa 2004).

303. IOWA CODE § 229A.2(1211) (2015).

304. *In re Barnes*, 689 N.W.2d at 456.

305. *Id.* at 457-60.

306. *Id.* at 456.

307. *Id.*; *see also* IOWA CODE § 709.21 (2008) (defining voyeurism as when "[a] person . . . knowingly views, photographs, or films another person, for the purpose of arousing or gratifying the sexual desire of any person . . . [and] . . . (a) the other

counts of third-degree sexual abuse and imprisoned until 1990 for raping three different women at knifepoint.[308] In 1996, Barnes was convicted of third degree sexual abuse when he forced his way into a woman's home and raped her.[309] In 2001, when his prison sentence was coming to an end, the State of Iowa filed a petition to civilly confine Barnes.[310]

Barnes argued that he could not be civilly committed under his diagnosis of ASPD because "this diagnosis is not correlated with sex-offending and . . . forty to sixty percent of the prison population has this diagnosis."[311] He also argued that this diagnosis did not indicate whether or not he had difficulty in controlling himself from committing a future offense.[312] The Iowa Supreme Court rejected these arguments. First, the Court reasoned that the statute does not require "that the condition affect the emotional or volitional capacity of every person who is afflicted with the disorder or condition; the requirement is that it has that effect on the particular individual subject to commitment."[313] The Court deferred to the trial court in holding that Barnes' ASPD constituted a mental abnormality under the statute.[314] Second, the Court reasoned that the statute did not require the mental abnormality to be specific toward sexual offenses.[315] In so ruling, the Court pronounced: "We think this individualized inquiry comports with the requirements of due process because it ultimately serves to limit civil commitment to dangerous sexual offenders. At the same time, it protects those persons inflicted with antisocial personality disorder who are not predisposed to commit sexual offenses from commitment."[316]

Thus, the Iowa Supreme Court upheld the civil commitment of Barnes using the individualized inquiry of how Barnes' ASPD affected him in the context of committing sex offenses. Iowa has

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person does not have knowledge about and does not consent or is unable to consent to being viewed, photographed, or filmed, (b) the other person is in a state of full or partial nudity, [and] (c) the other person has a reasonable expectation of privacy while in a state of full or partial nudity.").

308. *In re Barnes*, 689 N.W.2d at 456.

309. *Id.*

310. *Id.* at 457.

311. *Id.* at 458. This argument was successful in Donald DD., but was not successful in Iowa. *See* State v. Donald DD., 21 N.E.3d 239, 245 (N.Y. 2014).

312. *In re Barnes*, 689 N.W.2d at 458.

313. *Id.* at 459.

314. *Id.* ("[W]e frequently defer to the district court's judgment in such cases because it was in a better position to weigh the credibility of the witnesses.").

315. *Id.* at 460.

316. *Id.*

consistently evaluated ASPD in this way under its Sexually Violent Predator Act.[317]

2. Kansas: Individual Inquiry

ASPD is also allowed as a condition sufficient under Kansas' Sexually Violent Predator Law. The State of Kansas uses an individualized inquiry similar to the one Iowa follows. Importantly, the language of Kansas' Sexually Violent Predator Statute was the same language the Supreme Court evaluated in *Kansas v. Crane*—the case that the New York Court of Appeals in *Donald DD.* used to determine that ASPD alone is insufficient for civil commitment. The Kansas Supreme Court has focused on the language of whether or not the mental abnormality "makes him or her likely to engage in repeat acts of sexual violence, such that he or she or the acts pose 'a menace to the health and safety of others.'"[318] If the respondent's mental abnormality satisfies that language, the respondent is subject to civil commitment.

Richard A. Miller appealed his order of civil commitment based on multiple claims.[319] Relevant to the ASPD inquiry, Miller claimed that he could not be civilly committed because he was never diagnosed with a disorder that was specific to a sex-related abnormality.[320] Miller was a repeat sex offender[321] that was diagnosed with ASPD.[322]

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317. *See e.g.,* Taft v. Iowa Dist. Ct. for Linn Cty., 879 N.W.2d 634, 639 n.1 (Iowa 2016) (citing *In re Barnes*, 689 N.W.2d at 459-60) ("We note that we have determined that antisocial personality disorder may be a sufficient mental abnormality on its own to support civil commitment if it affects the individual person's likelihood to commit a sexually violent offense, a determination made in an individualized inquiry."); *In re* Det. of Altman, 723 N.W.2d 181, 184 (Iowa 2006) (affirming the civil commitment of Altman based on the expert testimony that his ASPD made it more likely than not that he would commit a sex offense in the future); *In re* Det. of Hodges, 689 N.W.2d 467, 470 (Iowa 2004) ("Although Hodges could not be committed solely because of his antisocial personality disorder, antisocial personality disorder can serve as the mental abnormality upon which commitment is based so long as all the elements of the statute are met . . . .").

318. *In re* Miller, 210 P.3d 625, 634 (Kan. 2009) (quoting KAN. STAT. ANN. § 59-29a02(b) (1994)).

319. *Id.* at 628 ("He argues that the district judge erred in denying his motion to stipulate to a prior sex crime case; erred in admitting evidence of other prior crimes or civil wrongs, including those that had no sexual component or had never been proved; and erred in entering judgment after a jury verdict that he qualified as a sexually violent predator under the Act when he had never been diagnosed with a sex-related abnormality or disorder. Miller also advances a cumulative error argument.").

320. *Id.*

321. *Id.* at 628-29.

322. *Id.* at 629.

He claimed that that disorder alone did not distinguish him from the dangerous typical recidivist.[323] Nevertheless, the Kansas Supreme Court maintained that the "language of the statute is clear" and "does not narrowly define mental abnormality as a sex-related disorder. It provides for the commitment of a sex offender with *any* mental abnormality . . . that makes him or her more likely to engage in repeat acts of sexual violence . . . ."[324] Thus, Miller's civil commitment was upheld. However, the Court made it clear that "[n]ot every sex offender whose diagnosis matches Miller's will necessarily qualify as a sexually violent predator under the Act, but Miller received all the process due to him under the Act and the federal Constitution."[325] In doing so, the Kansas Supreme Court emphasized that an individual inquiry is best suited for sex offenders that are diagnosed with ASPD.

3. Minnesota: Individual Inquiry

Minnesota differs from the other states discussed in Section II.B because its Supreme Court accepted ASPD as a condition sufficient for a mental abnormality before *Kansas v. Crane*.[326] Nevertheless, the Court of Appeals for the Eighth Circuit affirmed this use of ASPD in an individualized inquiry of the sex offender after *Kansas v. Crane* was decided.

In *In re Linehan*, Dennis Darol Linehan contended that Minnesota's Sexually Violent Predator Act was unconstitutional.[327] Linehan's sexual offenses began in his teens. In 1956, when he was fifteen, he pulled down the shorts of a four-year-old girl and in 1960, when he was nineteen, he had statutorily raped one thirteen-year-old girl and raped another girl.[328] In 1965, Linehan killed a fourteen-

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323. *Id.* at 633. Importantly, this is the language of the New York Court of Appeals. *See* State v. Donald DD., 21 N.E.3d 239, 250 (N.Y. 2014) ("A diagnosis of ASPD alone—that is, when the ASPD diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality—simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.").

324. *In re Miller*, 210 P.3d at 634 (emphasis in original).

325. *Id.*

326. *See In re* Linehan, 594 N.W.2d 867, 878 (Minn. 1999) ("The district court found that appellant clearly meets all of the prongs of the SDP Act: he has a long history of engaging in harmful sexual behavior, he suffers from . . . antisocial personality disorder, and he is highly likely to engage in acts of harmful sexual conduct in the future. Accordingly, we uphold his commitment under the SDP Act.").

327. *Id.* at 869.

328. *Id.*

year-old girl while attempting to sexually assault her.[329] Before he was arrested, Linehan committed two more sexual assaults, one of which was rape.[330] Linehan was sentenced to forty years in prison, but in 1975 he escaped and assaulted a twelve-year-old.[331] He was returned to prison five years later.[332]

When his prison term was coming to an end in 1992, the State of Minnesota moved to civilly commit Linehan under the Psychopathic Personality Commitment Act,[333] but failed because there was no evidence that he had "utter lack of power to control (his or her) sexual impulses." [334] Nevertheless, Linehan remained under "intensive supervised release."[335] In 1994, Minnesota enacted the Sexually Dangerous Person Act and the State again moved to have Linehan civilly committed.[336] The trial court concluded after a sixty-day review hearing that Linehan was a sexually dangerous person eligible for civil commitment.[337]

The Minnesota Supreme Court upheld the constitutionality of the Minnesota law based on the Supreme Court's decision in *Kansas v. Hendricks* because the Minnesota act "mirror[ed] the Kansas Act."[338] The Court also upheld Linehan's civil commitment because he was found to meet all prongs of Minnesota's Act: "he has a long history of engaging in harmful sexual behavior, he suffers from . . . antisocial personality disorder, and he is highly likely to engage in acts of harmful sexual conduct in the future."[339] Thus, the Supreme Court of Minnesota implicitly held that ASPD was a condition sufficient for civil commitment.

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329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. MINN. STAT. §§ 526.09-10 (1992). This act was similar to the early Sexual Psychopath Laws. *See supra* Section I.B.

334. This is the test that was required prior to the enactment of Minnesota's Sexually Violent Predator Law. *See In re Linehan*, 594 N.W.2d at 869 (quoting State *ex rel.* Pearson v. Prob. Ct. of Ramsey Cty., 287 N.W. 297, 302 (Minn. 1939) *aff'd*, 309 U.S. 270 (1940)).

335. *Id.*

336. Under the new act, it was not necessary for there to be an "utter lack of power to control" impulses. *See id.* at 870 ("(b) For the purposes of this provision, it is not necessary to prove that the person has an inability to control the person's sexual impulses.") (quoting MINN. STAT. § 253B.02, subd. 18c (1994) (current version at MINN. STAT. § 253B.02.16(b) (2013))).

337. *See In re Linehan*, 594 N.W.2d at 870.

338. *Id.* at 873.

339. *Id.* at 878.

The Eighth Circuit reviewed Linehan's case again in 2003. In *Linehan v. Milczark*, Linehan filed a petition for habeas corpus to seek release from civil commitment under Minnesota's Sexually Violent Predator Law.[340] Among Linehan's contentions was that he was unconstitutionally confined because he was only diagnosed with ASPD.[341] Since Linehan's petition was filed after *Kansas v. Crane* he attempted to argue that, "*Crane* limited the kind of mental disorders that can serve as a predicate for civil commitment to those severe in nature, at the far end of an inability to control scale."[342] He argued, that because forty to sixty percent of the male population could be diagnosed with ASPD, he was not sufficiently distinguished from the ordinary recidivist.[343] The Eighth Circuit refuted this by examining the twenty-six page initial commitment order and memorandum the trial court filed.[344] This, along with Linehan's inability to control himself during familial visits[345] and his behavior toward hospital and prison staff, convinced the Eighth Circuit that the Minnesota Supreme Court had sufficient evidence beyond Linehan's diagnosis that he was a sexually violent predator.[346] Thus, the Eighth Circuit ruled Minnesota did not unreasonably apply the Sexually Violent Predator Act to Linehan's case.[347]

4. Missouri: Past Sexually Violent Behavior

Missouri permits ASPD to qualify as a mental abnormality under its Sexually Violent Predator Statute so long as there is evidence "of a link between ASPD and sexually violent behavior."[348]

Mark Murrell challenged the State of Missouri's petition to civilly commit him in 2000.[349] One of his main contentions was that ASPD could not suffice as a mental abnormality under Missouri's Sexually

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340. 315 F.3d 920 (8th Cir. 2003).

341. *Id.* at 928.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* ("Although the visiting time was limited, he left his wife and stepdaughter to go masturbate after some physical play with the young girl").

346. *Id.* ("It concluded that the trial court record and findings were sufficient to distinguish Linehan from the 'typical recidivist' and to establish that his behavior met the SDP Act standard for constitutional civil commitment because of the nature of his A[S]PD, combined with his history of sexual violence") (citing *In re* Linehan, 594 N.W.2d 867, 867-78 (Minn. 1999)).

347. *Id.* at 929.

348. Murrell v. State, 215 S.W.3d 96, 99 (Mo. 2007).

349. *See id.* at 100; *see also* MO. ANN. STAT. § 632.484(1) (2014).

Violent Predator statute.[350] Murrell's criminal history began when he was a teenager.[351] By the time he was fifteen years old, he had already been in two different juvenile facilities.[352] When he was eighteen, he was arrested on an aggravated battery charge.[353] Three months after he was released on that charge, he kidnapped two women at gunpoint and raped them.[354] In 1980, Murrell pled guilty to the rape.[355] He was released on parole in 1991, but it was revoked for driving while intoxicated, unlawful use of a weapon, and possession of a controlled substance.[356] He was released again in 1995, but four months later he pled guilty to child molestation in the second degree for fondling the breasts of a thirteen-year-old girl.[357] Murrell was scheduled for release on April 4, 2000, but the State of Missouri filed a petition for civil commitment on February 28, 2000.[358]

Before his civil commitment proceeding, a forensic psychologist diagnosed Murrell with depressive disorder, polysubstance dependence, and ASPD.[359] The psychologist testified that his ASPD made it more likely than not that Murrell would engage "in predatory acts of sexual violence if not confined in a secure facility."[360] Another psychologist opined similarly that Murrell's ASPD predisposed him to commit sexually violent offenses and caused him serious difficulty in controlling his behavior.[361] Murrell's psychologist opined differently; he did not believe that Murrell suffered from a mental abnormality under Missouri's Sexually Violent Predator statute because ASPD does not necessarily cause sexual urges.[362] The jury nevertheless found Murrell to be a sexually violent predator.[363]

On appeal, the Missouri Supreme Court upheld Murrell's civil commitment.[364] It specifically addressed the issue of whether ASPD can qualify as a mental abnormality and whether it can provide

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350. *See Murrell*, 215 S.W.3d at 99.
351. *See id.* at 100.
352. *See id.*
353. *See id.*
354. *See id.*
355. *See id.*
356. *See id.*
357. *See id.*
358. *See id.*
359. *See id.* at 100-01.
360. *Id.* at 101.
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.* at 113.

sufficient evidence for a jury to find an offender is more likely than not to sexually offend.[365] After reviewing *Kansas v. Crane*, the Court held that mental abnormality under the Sexually Violent Predator statute need only "evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."[366] It is not necessary that the mental abnormality itself predispose a person to commit sexually violent offenses.[367]

The Supreme Court of Missouri conceded that a sole diagnosis of ASPD without past sexual history would not qualify as a mental abnormality under the statute.[368] Nevertheless, it reasoned "[s]imply because ASPD cannot in every case be enough . . . does not make it 'too imprecise.' If ASPD is linked with sexually violent behavior, it can provide the basis for commitment."[369] In Murrell's case, his ASPD distinguished him from the typical recidivist because there was evidence of past sexually violent behavior.[370] Thus, his mental abnormality of ASPD made him a sexually violent predator under Missouri's statute.[371]

5. North Dakota: Nexus Between Disorder and Future Dangerousness

North Dakota allows the diagnosis of ASPD so long as there is a "causal relationship or nexus between an individual's [ASPD] and dangerousness which establishes a likelihood of reoffending."[372] G.R.H. appealed an order civilly committing him as a sexually dangerous individual in North Dakota.[373] In 1994, he was convicted of gross sexual imposition[374] after engaging in sexual acts with a

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365. *Id.* at 105.

366. *Id.* at 106 (quoting Kansas v. Hendricks, 521 U.S. 346, 357-58 (1997)).

367. *Id.*

368. *Id.* at 107.

369. *Id.*

370. *See id.* at 108 ("Murrell has committed sex crimes in two instances, each involving multiple acts of assault, one with multiple victims. Murrell committed the sex crimes impulsively, with little hesitation and without thinking about the consequences of his actions").

371. *See id.* ("To borrow language from *Hendricks*, Murrell's 'lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes (Murrell) from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'") (quoting *Hendricks*, 521 U.S. at 360).

372. *In re* G.R.H., 711 N.W.2d 587, 594 (N.D. 2006).

373. *Id.* at 589.

374. *See* N.D. CENT. CODE ANN. § 12.1-20-03 (West 2015).

victim less than fifteen years old.[375] He was released from custody in 1999 but was charged with corruption or solicitation of a minor,[376] delivery of alcohol to a minor, and failing to register as a sex offender twenty days later.[377] His probation was revoked and he was imprisoned until 2004.[378]

Before he was released, the State's Attorney petitioned to have G.R.H. civilly committed as a sexually dangerous individual under North Dakota's Sexually Violent Predator Law.[379] The trial court found G.R.H. "engaged in sexually predatory conduct and has a congenital or acquired condition that is manifested by an anti-social personality disorder that makes [him] likely to engage in further acts of sexually predatory conduct which constitutes a danger to the physical or mental health or safety of others."[380] Thus G.R.H. was civilly committed under North Dakota's Sexually Violent Predator Law.

On appeal, one of G.R.H's main arguments was that his civil commitment "violate[d] due process and double jeopardy provisions of the state and federal constitutions"[381] because it was based on his diagnosis of ASPD and it ignored his ability to control his behavior. He claimed that under *Kansas v. Crane*, his diagnosis of ASPD did not distinguish him from the typical recidivist and also did not establish a lack of ability to control his behavior.[382] The North Dakota Supreme Court rejected these arguments after evaluating *Hendricks*, *Crane*, and the North Dakota Sexually Violent Predator Act.[383]

The North Dakota Supreme Court agreed that *Crane* stated that the sex offender must be distinguished from the typical recidivist, but also reinforced the fact that "states have considerable leeway to define mental abnormalities and personality disorders that make an individual eligible for involuntary civil commitment."[384] Moreover, the Court stated that other courts that have applied *Crane* have required "a nexus between a disorder and future dangerousness,

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375. *See In re G.R.H.*, 711 N.W.2d at 589.
376. *See* N.D. CENT. CODE. ANN. § 12.1-20-05 (West 2015).
377. *See In re G.R.H.*, 711 N.W.2d at 589.
378. *See id.*
379. *See id.* at 589-90*; see also* N.D. CENT. CODE § 25-03.3-03(1).
380. *In re G.R.H.*, 711 N.W.2d at 589-90.
381. *Id.* at 591.
382. *See id.*
383. *See id.* at 591-95.
384. *Id.* at 592 (quoting Kansas v. Crane, 534 U.S. 407, 412 (2002)).

which, in turn, provides proof that the individual has serious difficulty controlling his behavior."[385] Thus, G.R.H.'s ASPD had to have a causal relationship with his dangerousness in order for G.R.H. to be civilly committed. The Court held that the two expert psychologists that testified that G.R.H. suffered from a serious lack of ability to control his behavior at trial was sufficient for the trial court to find by clear and convincing evidence that G.R.H. was a sexually dangerous individual.[386] In doing so, the North Dakota Supreme Court accepted ASPD as a condition sufficient for a mental abnormality under North Dakota's Sexually Violent Predator Law.

III. ANTISOCIAL PERSONALITY DISORDER SHOULD BE A CONDITION SUFFICIENT TO CIVILLY COMMIT A SEX OFFENDER

Part III explains why there should not be a bright-line rule banning the use of ASPD on its own as a condition sufficient to civilly commit a sex offender. First, this Part rebuts the New York Court of Appeals' argument that a diagnosis of ASPD alone does not distinguish the sex offender from the typical recidivist. This is shown in the Supreme Court's warning against using bright-line rules in this specific area of law and is shown in subsequent New York decisions that comment on the reasoning in *Donald DD*. It is additionally shown in reviewing the purpose of Sexually Violent Predator Laws and in reviewing other courts' treatment of ASPD as a sufficient diagnosis. Part III also argues for a totality of the circumstances, or individualized inquiry approach when evaluating whether a sex offender diagnosed with ASPD should be civilly committed. This is demonstrated by an analogy to searches conducted under the Fourth Amendment, which displays that totality of the circumstances is often used in areas where the police powers of the state and the liberty interests of the individual are intertwined.

A. ASPD Can Distinguish the Sex Offender from the Typical Recidivist

The Supreme Court specifically warned against using bright-line rules in the *Kansas v. Crane*. In doing so, the Supreme Court left open the possibility that a sole diagnosis of ASPD can be sufficient to distinguish a sex offender from a typical recidivist. This Section reviews *Kansas v. Crane* and New York decisions subsequent to *Donald DD.* that disagree with the case's reasoning. These opinions warn against excluding the sole diagnosis of ASPD from *ever* being

385. *Id.* at 592-93.
386. *See id.* at 595.

sufficient to civilly commit a sex offender. Finally, this Section explains how permitting ASPD as a condition sufficient for civil commitment is not inconsistent with the purpose of Sexually Violent Predator Laws and reinforces the idea that other states have already accepted ASPD as a condition sufficient for civil commitment. Thus, ASPD can be a condition sufficient to distinguish the sex offender from the typical recidivist.

1. Kansas v. Crane *Leaves Open the Possibility that ASPD Can Be a Condition Sufficient for Civil Commitment*

It is true *Kansas v. Crane* clarified the constitutionality of Sexually Violent Predator Laws by requiring that there be a showing of some type of "special and serious lack of ability to control behavior."[387] Nevertheless, the Court did not define what "lack of control" means within the context of civil commitment. It stated, "[we] did not give 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 by mathematical precision."[388] The Court further explained that it would be enough to show there is "lack of control" if the mental abnormality presented in the offender distinguishes him "from the dangerous but typical recidivist convicted in an ordinary criminal case."[389] Thus, the New York Court of Appeals was correct in delineating the issue in *Donald DD.* to be whether Donald DD.'s diagnosis distinguished him from the typical recidivist.[390]

Nevertheless, the Supreme Court continued to explain the constitutional standard, or lack thereof, of "lack of control" in civil commitment proceedings. It stated:

> We recognize that *Hendricks* as so read provides a less precise constitutional standard than would those more definite rules for which the parties have argued. *But the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules.*[391]

Moreover, the Supreme Court insisted the states had "considerable leeway in defining the mental abnormalities and personality disorders

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387. 534 U.S. 407, 413 (2002).

388. *Id.*

389. *Id.* (emphasis added) (citing Kansas v. Hendricks, 521 U.S. 346, 357-58 (1997)).

390. *See* State v. Donald DD., 21 N.E.3d 239, 250 (N.Y. 2014) (quoting *Crane*, 534 U.S. at 413).

391. *Crane*, 534 U.S. at 413 (emphasis added).

that make an individual eligible for commitment."[392] Thus, the Supreme Court did not specifically define which mental disorders would qualify under the civil commitment statutes. The Court instead suggested that no bright-line rules be developed in this area of the law.

In fact, the respondent in *Crane* suffered from ASPD and another psychological disorder, exhibitionism.[393] However, the Supreme Court did not hold *either* diagnosis insufficient to civilly commit a sex offender.[394] Instead, it called for a finding that the respondent had difficulty in controlling his behavior and remanded the case.[395] The Supreme Court therefore had the opportunity to declare ASPD insufficient to qualify as a mental abnormality under Sexually Violent Predator Laws—but did not.[396] Thus, in declaring that ASPD can never be sufficient under Article 10,[397] the New York Court of Appeals toed the line of creating a bright-line rule in an area of law where the Supreme Court specifically warned against it and where the Supreme Court had the chance to address it.

2. Subsequent New York Case Law Alludes that ASPD Can Be a Condition Sufficient to Civilly Commit a Sex Offender

Subsequent decisions in New York Courts have had difficulty reconciling *Donald DD.*'s interpretation that ASPD can *never* be a condition sufficient to civilly commit a sex offender. In fact, a few decisions openly disagree with the Court of Appeals' approach.

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392. *Id.* (emphasis added) (citing *Hendricks*, 521 U.S. at 359).

393. *Id.* at 411 (explaining that Crane suffered from both ASPD and exhibitionism). Exhibitionistic disorder is defined in the DSM-5 as having a "sexual attraction to exposing . . . [one's] genitals to unsuspecting persons." *See* DSM-5, *supra* note 20, at 689.

394. *Crane*, 541 U.S. at 413 ("For one thing, the States retain considerable leeway in defining the mental and personality disorders that make an individual eligible for commitment.").

395. *Id.* at 412 ("We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sex offender considered in *Hendricks* without *any* lack-of-control determination.").

396. Shoba Sreenivasan et al., *Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of "Mental Disorder" and "Likely to Reoffend,"* 31 J. AM. ACAD. PSYCHIATRY L. 471, 474 (2003) ("Although [there] was an opportunity for the court to address whether Antisocial Personality Disorder should be considered a qualifying diagnosis for an SVP/ADP commitment, they did not.").

397. *See* State v. Donald DD., 21 N.E.3d 239, 249 (N.Y. 2014) ("We must interpret the Mental Hygiene Law article 10 statute on the assumption that it accords with these constitutional requirements.").

These cases indicate that a more individualized approach may be appropriate in the civil commitment context.

In *State v. Jerome A.*, the Supreme Court of New York County openly disagreed with the Court of Appeals' argument that a sole diagnosis of ASPD does not distinguish the sex offender from the typical recidivist.[398] In that case, Respondent Jerome A. contended that his diagnosis of "ASPD with psychopathy" was insufficient as a mental abnormality under Article 10 and cited *Donald DD.* for that proposition.[399] Although the New York Supreme Court ultimately dismissed the petition for civil commitment, the Court disagreed with *Donald DD.*'s reasoning that ASPD alone is not a sufficient mental abnormality under Article 10. It reasoned:

> Simply because most prison inmates can be diagnosed with ASPD does not mean most prison inmates could also be subject to Article 10 . . . the vast majority of convicted offenders who have been diagnosed with ASPD are not even statutorily eligible for civil management. Of those who are eligible a much smaller fraction prior to *Donald DD.* had become subject to Article 10 and still a smaller percentage had been found to have a Mental Abnormality.[400]

The Court ultimately concluded that "as a factual matter" a sole diagnosis of ASPD can "predispose a small minority of offenders with that diagnosis to commit sex offenses and result in serious difficulty in controlling such conduct."[401]

The Supreme Court of New York County articulated this disagreement again in *State v. Gary K.*[402] In that case, the Court debunked two arguments frequently cited after *Donald DD.* was decided: "*The Argument That ASPD Is Invalid Because of Its Prevalence in the Prison Population*" and "*The Notion that ASPD Plus Some Other Condition Would Be Valid Because an Offender is Diagnosed With More Than One Disorder*."[403] The Court debunked the former argument in stating that "numerical comparisons," are a "poor basis" to decide whether an individual should be subject to civil commitment.[404] It argued that virtually any disorder, then, could be

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398. *See generally* State v. Jerome A., No. 30261-2014, 2015 N.Y. Misc. LEXIS 3243 (N.Y. Sup. Ct. 2015).

399. *See id.* at *2.

400. *Id.* at *17.

401. *See id.* at *19-20.

402. *See* State v. Gary K., No. 30140/16, 2016 N.Y. Misc. LEXIS 3688, at *23-26 (N.Y. Sup. Ct. 2016).

403. *See id.* at *42-43 (alteration in original).

404. *Id.*

looked at on the basis of how it affects the prison population.[405] In essence, the Court stated that just because a certain percentage of the population is diagnosed with the disorder does not mean that diagnosis should disqualify any one individual from civil commitment.[406]

The Court then debunked the latter argument by stating, "offenders who have been diagnosed with ASPD alone have committed repeated horrific sex crimes."[407] In doing so, the Court suggested that the number of diagnoses the individual has should have no bearing on whether or not the individual should be civilly committed.[408] Moreover, the Court implied that ASPD alone may be sufficient to civilly confine a sex offender, since offenders with ASPD alone have the capacity to commit "repeated horrific sex crimes."

3. Permitting ASPD as a Condition Sufficient to Civilly Commit Sexual Offenders is Not Contrary to the Purpose of Sexually Violent Predator Laws

Although the sole diagnosis of ASPD "means little more than a deep-seated tendency to commit crimes,"[409] a person cannot be civilly committed under Sexually Violent Predator Laws unless they have a history of sexually offending.[410] Thus, it is not inconsistent that a person who is diagnosed with ASPD and who has a record of engaging in "nonconsensual sex without forethought or consideration of consequences, and being indifferent to the rights and feelings of others in their sexual acts"[411] meets the criteria for civil commitment. If the fact finder can determine that a person who has committed past

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405. *See id.* at *43 ("[I]t would appear that the percentage of the prison population who could be diagnosed with some kind of substance or alcohol use disorder might equal or exceed the percentage who could be diagnosed with ASPD").

406. *See id.* ("It is difficult to understand why due-process would preclude lifetime confinement for conditions which, for example, 65% of prison inmates had but allow it for disorders which 40% of prisoners had.")

407. *Id.* at *44.

408. *Id.* at *44-45.

409. State v. Donald DD., 21 N.E.3d 239, 250 (N.Y. 2014) (quoting State v. Shannon S., 10 N.Y.3d 99, 110 (N.Y. 2008) (Smith, J., dissenting)).

410. Gregory DeClue, *Paraphilia NOS (Nonconsenting) and Antisocial Personality Disorder*, 34 J. PSYCHIATRY & L. 495, 499 (2000) ("No person who meets criteria for antisocial personality disorder but has never committed a sexually violent act . . . meets criteria for civil commitment as sexually violent predator."); *see also* Miller, *supra* note 125, at 2098 (stating that most states define sexually violent predator as a person "(1) who has been convicted of or charged with a sexually violent offense and (2) who suffers from a mental abnormality or personality disorder (3) that makes the person likely to engage in acts of sexual violence.").

411. *See* DeClue, *supra* note 410, at 500.

sexual acts is a danger to society, then commitment is consistent with the purpose of Sexually Violent Predator Laws.[412]

Moreover, as presented in Part II of this Note, other jurisdictions have held that ASPD is a condition sufficient in distinguishing the sex offender from the typical recidivist.[413] These jurisdictions tend to recognize the argument that a high percentage of the prison population is diagnosed with ASPD[414] and that it is not a sexual disorder.[415] Nevertheless, these jurisdictions hold that an individualized inquiry, or totality of the circumstances approach, is the optimal way to determine if the sex offender requires civil commitment.[416]

B. Balancing Liberty Interests and the Police Powers of the State: An Analogy to Fourth Amendment Searches

Similarly to Sexually Violent Predator Laws, the Fourth Amendment of the United States Constitution[417] works in striking a

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412. *Id.* at 499-500 ("[I]n those states that use 'mental abnormality or personality disorder' to describe the qualifying condition, I see nothing conceptually inconsistent with using a diagnosis of [ASPD] as one—or the sole—qualifying disorder. On a case-by-case basis, some people who show a pervasive pattern of violating the rights of others, repeatedly performing sexual acts that are grounds for arrest . . . may meet the criteria for civil commitment as sexually violent predators."). The holdings of *Frank P.* and *Donald DD.* are enough to make one pause. Frank P. was convicted and imprisoned twice for sexual crimes before he was evaluated to be civilly committed. *See* State v. Frank P., 2 N.Y.S.3d 483, 152-53 (N.Y. App. Div. 2015). Likewise, Donald DD. was imprisoned three times, twice for sexual crimes, before he was evaluated to be civilly committed. *See Donald DD.*, 21 N.E.3d at 244. Both offenders were ineligible for civil commitment because they were only diagnosed with ASPD.

413. *See supra* Section II.B.

414. *See* Linehan v. Milczark, 315 F.3d 920, 928 (8th Cir. 2003); *In re* Det. of Barnes, 689 N.W.2d 455, 458 (Iowa 2004).

415. *In re* Miller, 210 P.3d 634 (Kan. 2009).

416. *See In re Barnes*, 689 N.W.2d at 456 ("We think this individualized inquiry comports with the requirements of due process because it ultimately serves to limit civil commitment to dangerous sexual offenders. At the same time, it protects those persons inflicted with antisocial personality disorder who are not predisposed to commit sexual offenses from commitment."); *In re Miller*, 210 P.3d at 634 ("[The statute] provides for the commitment of a sex offender with *any* mental abnormality . . . that makes *him or her* more likely to engage in repeat acts of sexual violence . . . .") (emphasis added); Murrell v. State, 215 S.W.3d 96, 107 (Mo. 2007) ("[s]imply because ASPD cannot in every case be enough, however, does not make it 'too imprecise.' If ASPD is linked with sexually violent behavior, it can provide the basis for commitment.").

417. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

balance between a constitutional right and the state's police powers.[418] In the case of a Fourth Amendment search, the balance is between "[i]ndividual liberty and the right to be free from government intrusion . . . [and] the government's ability to ferret out criminals and to prevent crime."[419] In the case of the Sexually Violent Predator Laws, "the state has the right to write statutes for the benefit of society at large, even when providing this benefit may come at the cost of restricting the liberties of certain individuals."[420] Thus, a review of how courts evaluate Fourth Amendment searches may provide insight as to how courts should evaluate respondents under Sexually Violent Predator Laws.

The Supreme Court, in Fourth Amendment search cases, has adopted a "totality of the circumstances" approach.[421] *Illinois v. Gates* was a case specifically about a magistrate's issuance of a search warrant "on the basis of a partially corroborated anonymous informant's tip."[422] The Court reasoned that the "totality of the circumstance approach" was the optimal way to "achieve the accommodation of public and private interests that the Fourth Amendment requires than . . . [the rigid two-pronged test approach][423] . . . that has developed in *Aguilar* and *Spinelli*."[424] In *Gates*, the Supreme Court reasoned that this was an area of law that needed a more flexible approach to evaluate whether or not an unreasonable search had occurred.[425]

Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

418. Daniel S. Jonas, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791 (1989) ("Within the fourth amendment resides a tension between the privacy rights of individuals and the ability of the police power to enforce the law.").

419. *Id.*

420. Testa & West, *supra* note 57, at 31.

421. *See* Kin Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75 (2014), http://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-75.pdf [https://perma.cc/C2HW-7DHZ] ("Since its decision more than thirty years ago in *Illinois v. Gates*, the Supreme Court has emphasized that the Fourth Amendment's suspicion requirements—the probable cause required to arrest and search, the reasonable suspicion needed to stop and frisk—are totality-of-the-circumstances tests.").

422. Illinois v. Gates, 462 U.S. 213, 217 (1983).

423. *Id.* at 230 ("We agree [that] . . . an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separated and independent requirements to be rigidly exacted in every case . . . .").

424. *Id.* at 239.

425. *Id.*

A more flexible approach is also warranted in the civil commitment context. This scenario is similar to the Fourth Amendment setting: the balance must be between a person's liberty interest and the government's duty to protect the welfare of citizens from dangerous recidivistic sex offenders.[426] As mentioned in Sections I.C and III.A.1, the Supreme Court specifically warned against a bright-line rule in this area of law.[427] Moreover, as other jurisdictions have noted, the individualized inquiry still serves to eliminate those who are not predisposed to sexually offending[428] and that just because a sex offender convicted of ASPD may require civil commitment in one case does not mean a sex offender will require civil commitment in another.[429] Thus, a totality of the circumstances—or individualized—approach may be the optimal way to achieve the balance of the public and private interests at stake in civil commitment proceedings, just as it has been determined to be the optimal way to achieve the balance of public and private interests at stake in the Fourth Amendment context.

CONCLUSION

Antisocial personality disorder should be permitted as a condition sufficient to civilly confine a sex offender under Sexually Violent Predator Laws. Sexually Violent Predator Laws were enacted to capture those sexually violent offenders that suffer from mental abnormalities and continue to pose a danger to society.[430] The Supreme Court has ruled that in order for these statutes to be constitutional, they must apply to those who lack an ability to control their *sexually* violent behavior, distinguishing those individuals from the typical criminal recidivist.[431] Although ASPD "means little more than a deep-seated tendency to commit crimes,"[432] the Supreme Court cautioned against using bright-line rules in this area of law.[433] Subsequent New York decisions question the bright-line reasoning in *Donald DD.*, and other jurisdictions have permitted the use of ASPD as a condition sufficient to qualify as a mental abnormality under

426. *See* Testa & West, *supra* note 57, at 31.

427. *See supra* Sections I.C, III.A; Kansas v. Crane, 534 U.S. 407, 413 (2002).

428. *See In re* Det. of Barnes, 689 N.W.2d 455, 460 (Iowa 2004).

429. *See In re* Miller, 210 P.3d 634, 634 (Kan. 2009).

430. *See supra* Section I.C.

431. *See supra* Section I.C.

432. State v. Donald DD., 21 N.E.3d 239, 250 (N.Y. 2014) (quoting State v. Shannon S., 10 N.Y.3d 99, 110 (N.Y. 2008) (Smith, J., dissenting)); *see supra* Section II.A.

433. *See supra* Part III.

Sexually Violent Predator Laws.[434] By allowing ASPD to be a condition sufficient for civil commitment, an individualized inquiry should be used to see whether a particular sex offender is prone to reoffend based on his ASPD diagnosis. In this way, courts will be able to thoroughly evaluate which sex offenders require civil commitment, without barring an entire class of offenders that have the same capability to pose a danger to society just because they are diagnosed with ASPD.

434. *See supra* Section III.A.2.