

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 00–957

KANSAS, PETITIONER v. MICHAEL T. CRANE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[January 22, 2002]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today the Court holds that the Kansas Sexually Violent Predator Act (SVPA) cannot, consistent with so-called substantive due process, be applied as written. It does so even though, less than five years ago, we upheld the very same statute against the very same contention in an appeal by the very same petitioner (the State of Kansas) from the judgment of the very same court. Not only is the new law that the Court announces today wrong, but the Court’s manner of promulgating it—snatching back from the State of Kansas a victory so recently awarded—cheapens the currency of our judgments. I would reverse, rather than vacate, the judgment of the Kansas Supreme Court.

I

Respondent was convicted of lewd and lascivious behavior and pleaded guilty to aggravated sexual battery for two incidents that took place on the same day in 1993. In the first, respondent exposed himself to a tanning salon attendant. In the second, 30 minutes later, respondent entered a video store, waited until he was the only customer present, and then exposed himself to the clerk. Not stopping there, he grabbed the clerk by the neck, demanded she perform oral sex on him, and threatened to rape her, before running out of the store. Following respondent’s plea to aggravated sexual battery, the State

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filed a petition in State District Court to have respondent evaluated and adjudicated a sexual predator under the SVPA. That Act permits the civil detention of a person convicted of any of several enumerated sexual offenses, if it is proven beyond a reasonable doubt that he suffers from a “mental abnormality”—a disorder affecting his “emotional or volitional capacity which predisposes the person to commit sexually violent offenses”—or a “personality disorder,” either of “which makes the person likely to engage in repeat acts of sexual violence.” Kan. Stat. Ann. §§59–29a02(a), (b) (2000 Cum. Supp.).

Several psychologists examined respondent and determined he suffers from exhibitionism and antisocial personality disorder. Though exhibitionism alone would not support classification as a sexual predator, a psychologist concluded that the two in combination did place respondent’s condition within the range of disorders covered by the SVPA, “cit[ing] the increasing frequency of incidents involving [respondent], increasing intensity of the incidents, [respondent’s] increasing disregard for the rights of others, and his increasing daring and aggressiveness.” *In re Crane*, 269 Kan. 578, 579, 7 P. 3d 285, 287 (2000). Another psychologist testified that respondent’s behavior was marked by “impulsivity or failure to plan ahead,” indicating his unlawfulness “was a combination of willful and uncontrollable behavior,” *id.*, at 584–585, 7 P. 3d, at 290. The State’s experts agreed, however, that “[r]espondent’s mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior.” *Id.*, at 581, 7 P. 3d, at 288.

Respondent moved for summary judgment, arguing that for his detention to comport with substantive due process the State was required to prove not merely what the statute requires—that by reason of his mental disorder he is “likely to engage in repeat acts of sexual violence”—but also that he is unable to control his violent behavior. The

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trial court denied this motion, and instructed the jury pursuant to the terms of the statute. *Id.*, at 581, 7 P. 3d, at 287–288. The jury found, beyond a reasonable doubt, that respondent was a sexual predator as defined by the SVPA. The Kansas Supreme Court reversed, holding the SVPA unconstitutional as applied to someone, like respondent, who has only an emotional or personality disorder within the meaning of the Act, rather than a volitional impairment. For such a person, it held, the State must show not merely a likelihood that the defendant would engage in repeat acts of sexual violence, but also an inability to control violent behavior. It based this holding solely on our decision in *Kansas v. Hendricks*, 521 U. S. 346 (1997).

II

Hendricks also involved the SVPA, and, as in this case, the Kansas Supreme Court had found that the SVPA swept too broadly. On the basis of considerable evidence showing that Hendricks suffered from pedophilia, the jury had found, beyond a reasonable doubt, that Hendricks met the statutory standard for commitment. See *id.*, at 355; *In re Hendricks*, 259 Kan. 246, 247, 912 P. 2d 129, 130 (1996). This standard (to repeat) was that he suffered from a “mental abnormality”—a disorder affecting his “emotional or volitional capacity which predisposes [him] to commit sexually violent offenses”—or a “personality disorder,” either of which “makes [him] likely to engage in repeat acts of sexual violence.” Kan. Stat. Ann. §§59–29a02(a), (b) (2000 Cum. Supp.). The trial court, after determining as a matter of state law that pedophilia was a “mental abnormality” within the meaning of the Act, ordered Hendricks committed. See 521 U. S., at 355–356. The Kansas Supreme Court held the jury finding to be constitutionally inadequate. “Absent . . . a finding [of mental illness],” it said, “the Act does not satisfy . . . con-

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stitutional standard[s],” 259 Kan., at 261, 912 P. 2d, at 138. (Mental illness, as it had been defined by Kansas law, required a showing that the detainee “[i]s suffering from a severe mental disorder”; “lacks capacity to make an informed decision concerning treatment”; and “is likely to cause harm to self or others.” Kan. Stat. Ann. §59–2902(h) (1994).) We granted the State of Kansas’s petition for certiorari.

The first words of our opinion dealing with the merits of the case were as follows: “Kansas argues that the Act’s definition of ‘mental abnormality’ satisfies ‘substantive’ due process requirements. We agree.” *Hendricks*, 521 U. S., at 356. And the *reason* it found substantive due process satisfied was clearly stated:

“The Kansas Act is plainly of a kind with these other civil commitment statutes [that we have approved]: It requires a finding of future dangerousness [viz., that the person committed is “likely to engage in repeat acts of sexual violence”], and then links that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ *that makes it difficult, if not impossible, for the person to control his dangerous behavior.* Kan. Stat. Ann. §59–29a02(b) (1994).” *Id.*, at 358 (emphasis added).

It is the italicized language in the foregoing excerpt that today’s majority relies upon as establishing the requirement of a separate *finding* of inability to control behavior. *Ante*, at 4.

That is simply not a permissible reading of the passage, for several reasons. First, because the authority cited for the statement—in the immediately following reference to the Kansas Statutes Annotated—is the section of the SVPA that defines “mental abnormality,” *which contains*

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*no requirement of inability to control.** What the opinion was obviously saying was that the SVPA's required finding of a *causal connection* between the likelihood of repeat acts of sexual violence and the existence of a "mental abnormality" or "personality disorder" *necessarily* establishes "difficulty if not impossibility" in controlling behavior. This is clearly confirmed by the very next sentence of the opinion, which reads as follows:

"The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness." 521 U. S., at 358.

It could not be clearer that, in the Court's estimation, the very existence of a mental abnormality or personality disorder *that causes* a likelihood of repeat sexual violence in itself *establishes* the requisite "difficulty if not impossibility" of control. Moreover, the passage in question cannot possibly be read as today's majority would read it because nowhere did the jury verdict of commitment that we reinstated in *Hendricks* contain a separate finding of "difficulty, if not impossibility, to control behavior." That finding must (as I have said) have been embraced within the finding of mental abnormality *causing* future dangerousness. And finally, the notion that the Constitution requires in every case a finding of "difficulty if not impossibility" of control does not fit comfortably with the broader holding of *Hendricks*, which was that "we have

*As quoted earlier in the *Hendricks* opinion, see 521 U. S., at 352, §59–29a02(b) defines "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."

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never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance.” *Id.*, at 359.

The Court relies upon the fact that “*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment ‘from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.’” *Ante*, at 4–5 (quoting 521 U. S., at 360). But the SVPA as written—without benefit of a supplemental control finding—already achieves that objective. It conditions civil commitment not upon a mere finding that the sex offender is likely to reoffend, but only upon the additional finding (beyond a reasonable doubt) that the *cause* of the likelihood of recidivism is a “mental abnormality or personality disorder.” Kan. Stat. Ann. §59–29a02(a) (2000 Cum. Supp.). Ordinary recidivists *choose* to reoffend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under the SVPA, because their mental illness is an affliction and not a choice, are unlikely to be deterred. We specifically pointed this out in *Hendricks*. “Those persons committed under the Act,” we said, “are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.” 521 U. S., at 362–363.

III

Not content with holding that the SVPA cannot be applied as written because it does not require a separate “lack-of-control determination,” *ante*, at 4, the Court also reopens a question closed by *Hendricks*: whether the

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SVPA also cannot be applied as written because it allows for the commitment of people who have mental illnesses other than volitional impairments. “*Hendricks*,” the Court says, “had no occasion to consider” this question. *Ante*, at 8.

But how could the Court possibly have avoided it? The jury whose commitment we affirmed in *Hendricks* had not been asked to find a volitional impairment, but had been charged in the language of the statute, which quite clearly covers nonvolitional impairments. And the fact that it did so had not escaped our attention. To the contrary, our *Hendricks* opinion explicitly and repeatedly recognized that the SVPA reaches individuals with personality disorders, 521 U. S., at 352, 353, 357, 358, and quoted the Act’s definition of mental abnormality (§59–29a02(b)), which makes plain that it embraces both emotional and volitional impairments, *id.*, at 352. It is true that we repeatedly referred to *Hendricks*’s “volitional” problems—because that was evidently the sort of mental abnormality that he had. But we nowhere accorded any legal significance to that fact—as we could not have done, since it was not a fact that the jury had been asked to determine. We held, without any qualification, “that the Kansas Sexually Violent Predator Act comports with [substantive] due process requirements,” *id.*, at 371, because its “precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness,” *id.*, at 358.

The Court appears to argue that, because *Hendricks* involved a defendant who indeed *had* a volitional impairment (even though we made nothing of that fact), its narrowest holding covers only *that* application of the SVPA, and our statement that the SVPA in its entirety was constitutional can be ignored. See *ante*, at 7–8. This

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cannot be correct. The narrowest holding of *Hendricks* affirmed the constitutionality of commitment on the basis of the jury charge given in that case (to wit, the language of the SVPA); and since that charge did not require a finding of volitional impairment, neither does the Constitution.

I cannot resist observing that the distinctive status of volitional impairment which the Court mangles *Hendricks* to preserve would not even be worth preserving by more legitimate means. There is good reason why, as the Court accurately says, “when considering civil commitment . . . we [have not] ordinarily distinguished for constitutional purposes between volitional, emotional, and cognitive impairments,” *ante*, at 7. We have not done so because it makes no sense. It is obvious that a person may be able to exercise volition and yet be unfit to turn loose upon society. The man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances, is surely a dangerous sexual predator.

IV

I not only disagree with the Court’s gutting of our holding in *Hendricks*; I also doubt the desirability, and indeed even the coherence, of the new constitutional test which (on the basis of no analysis except a misreading of *Hendricks*) it substitutes. Under our holding in *Hendricks*, a jury in an SVPA commitment case would be required to find, beyond a reasonable doubt, (1) that the person previously convicted of one of the enumerated sexual offenses is suffering from a mental abnormality or personality disorder, and (2) that this condition renders him likely to commit future acts of sexual violence. Both of these findings are coherent, and (with the assistance of expert testimony) well within the capacity of a normal jury. Today’s opinion says that the Constitution requires the addition of a third finding: (3) that the subject suffers from an inability to

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control behavior—not utter inability, *ante*, at 4, and not even inability in a particular constant degree, but rather inability in a degree that will vary “in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself,” *ante*, at 5.

This formulation of the new requirement certainly displays an elegant subtlety of mind. Unfortunately, it gives trial courts, in future cases under the many commitment statutes similar to Kansas’s SVPA, *not a clue* as to how they are supposed to charge the jury! Indeed, it does not even provide a clue to the trial court, on remand, *in this very case*. What is the judge to ask the jury to find? It is fine and good to talk about the desirability of our “proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require,” *ante*, at 6, but one would think that this plan would at least produce the “elaboration” of what the jury charge should be in the “specific circumstances” of the present case. “Proceeding deliberately” is not synonymous with not proceeding at all.

I suspect that the reason the Court avoids any elaboration is that elaboration which passes the laugh test is impossible. How *is* one to frame for a jury the degree of “inability to control” which, in the particular case, “the nature of the psychiatric diagnosis, and the severity of the mental abnormality” require? Will it be a percentage (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is 42% unable to control his penchant for sexual violence”)? Or a frequency ratio (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is unable to control his penchant for sexual violence 3 times out of 10”)? Or merely an adverb (“Ladies and gentlemen of the jury, you may commit Mr. Crane under

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the SVPA only if you find, beyond a reasonable doubt, that he is appreciably—or moderately, or substantially, or almost totally—unable to control his penchant for sexual violence”)? None of these seems to me satisfactory.

But if it is indeed possible to “elaborate” upon the Court’s novel test, surely the Court has an obligation to do so in the “specific circumstances” of the present case, so that the trial court will know what is expected of it on remand. It is irresponsible to leave the law in such a state of utter indeterminacy.

* * *

Today’s holding would make bad law in any circumstances. In the circumstances under which it is pronounced, however, it both distorts our law and degrades our authority. The State of Kansas, unable to apply its legislature’s sexual predator legislation as written because of the Kansas Supreme Court’s erroneous view of the Federal Constitution, sought and received certiorari in *Hendricks*, and achieved a reversal, in an opinion holding that “the Kansas Sexually Violent Predator Act comports with [substantive] due process requirements,” 521 U. S., at 371. The Kansas Supreme Court still did not like the law and prevented its operation, on substantive due process grounds, once again. The State of Kansas again sought certiorari, asking nothing more than reaffirmation of our 5-year-old opinion—only to be told that what we said then we now unsay. There is an obvious lesson here for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try.

A jury determined beyond a reasonable doubt that respondent suffers from antisocial personality disorder combined with exhibitionism, and that this is either a mental abnormality or a personality disorder making it likely he will commit repeat acts of sexual violence. That is all the SVPA requires, and all the Constitution de-

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mands. Since we have already held precisely that in another case (which, by a remarkable feat of jurisprudential jujitsu the Court relies upon as the only authority for its decision), I would reverse the judgment below.