CONFINING CONTROL: NARROWING THE "CONTROL" STANDARD UNDER NEW YORK'S MENTAL HYGIENE LAW ARTICLE 10

Michael Maizel†

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† Senior Notes Editor, *Cardozo Law Review*. J.D. Candidate (May 2016), Benjamin N. Cardozo School of Law; M.A., Tulane University, 2011; B.A. Tulane University, 2010. I am immensely grateful and fortunate to have received the help of the following people: Lisa Volpe and the attorneys at the Special Litigation and Appeals Unit of Mental Hygiene Legal Service, Second Judicial Department; Professor Jessica Roth; the editors of the *Cardozo Law Review*, including Bernard Tsepelman, Amanda Bryk, Liz Robins, and Debby Frisch; my family; and Elise.

INTRODUCTION

New York enacted the United States' twenty-second piece of "sexually violent predator" (SVP) legislation[1] in 2007.[2] Generally, SVP statutes are designed to permit the indefinite civil commitment of convicted sex offenders upon the expiration of their criminal sentences.[3] New York's SVP legislation, entitled the Sex Offender Management and Treatment Act (SOMTA), is no exception.[4] SOMTA—codified as Article 10 of New York's Mental Hygiene Law[5]—creates a system in which sex offenders nearing the end of their current confinement may be subject to further, indefinite confinement in a psychiatric facility, or placed in a community-based treatment program known as Strict and Intensive Supervision and Treatment (SIST).[6] Between April 13, 2007, and October 23, 2013, 276 individuals were committed to secure mental health facilities under the statute; another 112 were placed in SIST.[7]

The reason for SOMTA, and the other twenty-one statutes, is rather unsurprising: the threat of sex offender recidivism.[8] Recidivist sex

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1 *See Civil Commitment of Sexually Violent Predators*, ASS'N FOR TREATMENT SEXUAL ABUSERS, http://www.atsa.com/civil-commitment-sexually-violent-predators (last visited Sept. 13, 2014). By 2010, twenty states including New York had enacted SVP legislation, as had the District of Columbia and the Federal Government. *Id.* It should be noted that New York's legislation does not use the term "sexually violent predator"; however, as most states do use this language in their statutes, this Note will use that term for simplicity and consistency.

2 N.Y. STATE OFFICE OF MENTAL HEALTH, 2013 ANNUAL REPORT ON THE IMPLEMENTATION OF MENTAL HYGIENE LAW ARTICLE 10: SEX OFFENDER MANAGEMENT AND TREATMENT ACT OF 2007, at 2 (2014) [hereinafter N.Y. STATE OFFICE OF MENTAL HEALTH], https://www.omh.ny.gov/omhweb/statistics/somta_report_2013.pdf.

3 Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY & L. 443, 443 (2008).

4 *See* N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007) (noting, in former Governor Spitzer's Program Bill Memorandum, that the bill permits New York "to continue managing sex offenders upon the expiration of their criminal sentences").

5 N.Y. MENTAL HYG. LAW § 10 (McKinney 2011). This Note will refer to New York's SVP statute as both "SOMTA" and "Article 10" interchangeably.

6 *See id.* §§ 10.07, 10.09, 10.11.

7 N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 2, at 4.

8 MENTAL HYG. § 10.01(a) ("The legislature finds . . . [t]hat recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management."). Interestingly, it is unclear exactly how great of a danger is posed by sex

offenders are undoubtedly dangerous persons; yet, the Supreme Court has determined that dangerousness alone is not sufficient to justify civil, preventative confinement.[9] Nor, of course, is dangerousness sufficient to justify criminal confinement, which requires that an offender be found culpable for, and convicted of, a crime.[10] Prior to SVP statutes, then, convicted sex offenders fell into what Professor Stephen Morse calls the "gap" between regular criminal and civil confinement procedures—that is, they are found culpable for a criminal act, and therefore qualify for finite criminal confinement, but not for indefinite civil confinement.[11] Thus, after a sex offender served his mandatory criminal sentence, he would likely be released. With the introduction of SVP legislation, however, that gap has effectively been closed.[12]

Two separate Supreme Court rulings, *Kansas v. Hendricks*[13] and *Kansas v. Crane*,[14] have affirmed the constitutionality of these SVP statutes. In *Hendricks*, the Supreme Court determined that Kansas's SVP statute met substantive due process requirements by providing that civil commitment be conditioned upon a finding of "mental abnormality" that results in dangerousness.[15] In *Crane*, the Court clarified its previous decision, holding that civil commitment under the Kansas statute required a "lack of control" determination.[16] States with SVP statutes enacted prior to *Crane*'s 2002 ruling were thus forced to determine how "lack of control" would fit into their already established statutory schemes.[17]

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offender recidivism. *See* State v. Robert V., No. 251233-2010, 2011 WL 1364452 *3 (N.Y. Sup. Ct. Apr. 11, 2011) (unreported disposition) ("[T]here is scant empirical evidence to support the bases asserted by the Legislature in enacting SOMTA."). It appears that sex offenders actually re-offend at lower rates than non-sex offenders. *Id.* at *4. (citing PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 8 (2003)).

9 *See* Foucha v. Louisiana, 504 U.S. 71 (1992) (holding that an individual acquitted on grounds of insanity could not be confined in a mental institution without a finding of both mental illness *and* dangerousness).

10 Stephen J. Morse, Essay, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1025–26 (2002).

11 *Id.* at 1026–28.

12 *Id.* at 1027–28

13 Kansas v. Hendricks, 521 U.S. 346 (1997).

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

15 *Hendricks*, 521 U.S. at 358.

16 *Crane*, 534 U.S. at 407.

17 *See* Janine Pierson, Comment, *Construing Crane: Examining How State Courts Have Applied Its Lack-of-Control Standard*, 160 U. PA. L. REV. 1527 (2002) (emphasizing the considerable disagreement among the states, and describing the various approaches ultimately chosen by numerous states). Pierson groups the various states' approaches into three groups: (1) those that ignored the *Crane* standard, (2) those that subsumed the standard into the *Hendricks* standard, and (3) those that treat the standard as an independent evidentiary requirement. *Id.* at 1536–47. According to Pierson, New York falls into the second category. *Id.* at 1544 & n.90. For an in-depth discussion of this point, see *infra* note 169.

New York, on the other hand, having enacted its statute five years after the *Crane* decision, was able to write the relevant language of *Hendricks* and *Crane* directly into its statute.[18] A sex offender qualifies for civil management in New York when he is found to have a "mental abnormality," which is some congenital or acquired condition that impacts the individual's emotional, cognitive, or volitional capacity so as to predispose the individual to committing sex offenses, and causes him to have "serious difficulty" controlling his sexual conduct.[19] So constructed, there seems to be no question that SOMTA meets the minimal due process requirements set by the Supreme Court.

However, New York's compliance with the *Crane* standard might be merely nominal. The Supreme Court gave state courts and legislatures wide latitude in determining the meaning of the "lack of control" standard; all that the Court required was "proof."[20] New York has, however, used this latitude to avoid giving the standard the meaning it requires.[21] In the absence of New York case law delineating what constitutes "proof" of a "serious difficulty," it is possible that New York is indefinitely restricting individuals' liberty—either through SIST or through confinement—based on dangerousness alone. While this might be intuitively desirable,[22] it is unlikely to be constitutional.

This Note will address SOMTA's Mental Abnormality trial,[23] and will argue that New York courts must approach the "control" finding in

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18 An offender may be confined under SOMTA only if he is first found to have a "mental abnormality," which entails "difficulty controlling" sexual conduct. N.Y. MENTAL HYG. LAW § 10.03(i) (McKinney 2011).

19 *Id.* ("'Mental abnormality' means 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.").

20 *Crane*, 534 U.S. at 413 ("It is enough to say that there must be proof of serious difficulty in controlling behavior."); *see* Pierson, *supra* note 17, at 1536–53 (explaining how various states permit a "lack of control" finding, and various problems with those approaches).

21 *See* discussion *infra* Part II.A.1–2 (describing the manner in which New York has defined the control standard, and the manner in which it has been left open-ended).

22 That is, many might find the idea of indefinite detention of sex offenders a desirable end simply because of the perceived dangerousness of those individuals. Indeed, SOMTA was politically very popular, and enacted only in light of a great public demand. *See* Allison Morgan, Note, *Civil Confinement of Sex Offenders: New York's Attempt to Push the Envelope in the Name of Public Safety*, 86 B.U. L. REV. 1001, 1021 (2006) (explaining the push for a confinement law in New York after a woman was attacked in Westchester County). This Note does not purport to take a position on whether that aim is desirable; rather, it seeks only to examine how New York's initial "control" standard might be better brought within constitutional limitations.

23 MENTAL HYG. § 10.07. This Note focuses its attention on the "control" standard in the Mental Abnormality trial, as this is the last point under New York's SVP statute that an individual is able to evade some form of civil management, making it a point of considerable constitutional moment in the process. *See* discussion *infra* Part I.C. Though confining an individual under Article 10 necessarily requires a greater, and somewhat different, showing

that trial with greater clarity, and can do so with the inclusion of an express requirement that psychiatric experts testify regarding recent behavioral indicia that implicate an individual's capacity for control. Because of its wording and structure, SOMTA potentially affords its subjects more protection than that available under other SVP statutes.[24] Yet, by failing to define the requirements for a "control" finding—an element that was undoubtedly meant to increase the state's burden in a mental abnormality trial[25]—this potential is simply not fulfilled. By including the proposed requirement, New York would greatly improve the implementation of necessary constitutional protections.

Part I of this Note will provide necessary background, including a description of the *Hendricks* and *Crane* cases, which developed the constitutional standard for SVP legislation, and a description of New York's legislation. Part II will discuss New York's "lack of control" case law, showing how the State has attempted to give effect to the control standard, and how a failure to provide legally relevant factors that might satisfy the standard have limited the standard's effectiveness. This Part will also review how California and federal courts use recent behavioral evidence to solve the problems that are apparent in New York. Finally, Part III will propose that New York adopt the "present behavioral indicia" requirement used by those jurisdictions.

I. THE CONSTITUTIONALITY OF SVP LEGISLATION AND THE CREATION OF NEW YORK'S MENTAL HYGIENE LAW ARTICLE 10

A. Kansas v. Hendricks *and "Mental Abnormality"*

The Supreme Court first had occasion to review the constitutionality of SVP legislation in *Kansas v. Hendricks*.[26] The statute under consideration was Kansas's Sexually Violent Predator Act, enacted in 1994,[27] and invoked for the first time to commit Leroy Hendricks in the same year.[28] Hendricks was initially convicted of two counts of indecent liberties with a child, and was nearing the end of his

with respect to "control" than is necessary to subject that person to SIST, this Note takes the position that a problem exists to the extent that the "control" finding ceases to serve as a limiting principle. *See* discussion *infra* Part I.B.

24 *See* discussion *infra* Part I.C.

25 By articulating that a "control" finding must be an independent element, the *Crane* Court necessarily made any state's burden greater. *See* discussion *infra* Part I.B.

26 Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

27 *See* 1994 Kan. Sess. Laws, ch. 316 (codified as amended at KAN. STAT. ANN. §§ 59-29a01–59-29a15 (West 2008)); *see also In re* Hendricks, 912 P.2d 129, 131 (Kan. 1996), *rev'd*, *Hendricks*, 521 U.S. 346.

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

sentence of five to twenty years when the Kansas District Attorney filed a petition under the Act seeking his continued involuntary commitment.[29] Hendricks challenged the constitutionality of the Act,[30] and the Supreme Court of Kansas found it to be in violation of the Fourteenth Amendment's Due Process Clause.[31] The U.S. Supreme Court disagreed, however, and reversed the Kansas Supreme Court.[32]

Writing for the majority, Justice Thomas found that the Kansas Act conformed to the Court's established substantive due process precedent.[33] As it was written in 1994,[34] the Act permitted the involuntary commitment of a "sexually violent predator": an individual who, due to a "mental abnormality or personality disorder," was "likely to engage in . . . predatory acts of sexual violence."[35] The Court articulated that the constitutionality of civil commitment statutes has historically turned on proof of dangerousness coupled with some additional factor; in this case, a "mental abnormality" served as that additional factor.[36] Specifically, the Kansas Act was constitutionally permissible because it required a finding that the individual's future dangerousness was linked to the additional finding of "mental

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29 *In re Hendricks*, 912 P.2d at 131. Hendricks had served ten years of his sentence and was to be released to a halfway house when the Kansas filed a petition to have him civilly committed. *Hendricks*, 521 U.S. at 353–54.

30 Hendricks claimed that, inter alia, the Kansas Act violated his substantive due process rights because it permitted his indefinite, involuntary civil commitment with only a finding of "mental abnormality" and dangerousness, which fell short of the minimum standard set by the U.S. Supreme Court of mental *illness* and dangerousness. *In re Hendricks*, 912 P.2d at 134.

31 *Id.* at 138.

32 *Hendricks*, 521 U.S. at 371 ("We hold that the Kansas Sexually Violent Predator Act comports with due process requirements . . . .").

33 *Id.*; *see also generally* Foucha v. Louisiana, 504 U.S. 71 (1992) (holding that an individual cannot be civilly committed if he is deemed dangerous but not mentally ill); Addington v. Texas, 441 U.S. 418 (1979) (holding that civil commitment requires a showing by clear and convincing evidence of both mental illness and dangerousness).

34 Since *Hendricks*, Kansas's Sexually Violent Predator Act has undergone a series of revisions. Notably, the original legislation at issue in *Hendricks* used the language "predatory acts of sexual violence." 1994 Kan. Sess. Laws, ch. 316, § 2. The word "predatory" was removed in 1999, however, and replaced with "repeat." 1999 Kan. Sess. Laws, ch. 140, § 2.

35 KAN. STAT. ANN. § 59-29a02 (1994) ("'Sexually violent predator' means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.").

36 *Hendricks*, 521 U.S. at 358 ("We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"). Though Hendricks's claim was based on a constitutionally salient distinction between a "mental abnormality" and a "mental illness," the Court denied such a difference, claiming that "mental illness" was a term "devoid of any talismanic significance." *Id.* at 359. Contrary to Hendricks's claim, the Court articulated that it has "never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, [it has] traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Id.*

abnormality," such that the abnormality made it difficult or impossible for the individual to control his dangerousness.[37] In the Court's view, that scheme created a sufficiently narrow class of individuals eligible for confinement—namely, those unable to control their dangerousness.[38]

Indeed, Hendricks seemed to fit right into that very class of individuals. According to his own testimony, Hendricks had engaged in a number of acts of child molestation since 1955.[39] He was diagnosed with pedophilia, and readily admitted that he not only suffered from such disorder, but also that he had not been cured with treatment.[40] He admitted to harboring sexual desires for children, and explained that he could not control those urges; he articulated that, though he no longer wished to molest children, he knew that the only way to prevent such acts would be for him "to die."[41] The Court found that his admitted lack of control, coupled with a prediction of future dangerousness, adequately distinguished Hendricks from those individuals who might be better dealt with exclusively through criminal proceedings.[42]

B. Kansas v. Crane *and "Lack of Control"*

Coming just five years after *Hendricks*, *Kansas v. Crane* was the Supreme Court's second review of SVP legislation, and also the Court's second review of Kansas's Act.[43] Michael Crane had been civilly committed under Kansas's Sexually Violent Predator Act after a jury found him to possess a mental abnormality that made him likely to sexually reoffend.[44] At trial, the State presented evidence of Crane's past sexual behavior and psychiatric testimony establishing diagnoses of antisocial personality disorder and exhibitionism.[45] The State did not

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37 *Id.* at 358. ("The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, 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.").

38 *Id.*

39 *Id.* at 353–55.

40 *Id.*

41 *Id.* at 355 ("[Hendricks] explained that when he 'get[s] stressed out,' he 'can't control the urge' to molest children.").

42 *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.").

43 Kansas v. Crane, 534 U.S. 407, 409 (2002).

44 *See In re* Crane, 7 P.3d 285, 286–88 (Kan. 2000), *vacated*, *Crane*, 534 U.S. 437.

45 *Id.* The testifying psychologist explained that exhibitionism alone would not be sufficient to establish the presence of a "mental abnormality," but it would when combined with the characteristic disregard of others' rights associated with antisocial personality disorder. *Id.* at 287 ("Crane . . . is a sexual predator due to his combination of antisocial personality disorder and exhibitionism. He cited the increasing frequency of incidents involving Crane, increasing

prove that he lacked control over his sexual behavior, however, and it was on this point that Crane challenged the constitutionality of his commitment.[46] The Supreme Court of Kansas determined that *Hendricks* required a showing that Crane was unable to control his behavior, and reversed his commitment.[47]

The U.S. Supreme Court vacated the Supreme Court of Kansas's judgment, but not because it determined that a finding of no control was required under *Hendricks*.[48] Rather, the Court found that a lack of control finding was at the heart of the *Hendricks* decision: distinguishing the individual subject to civil commitment from the typical recidivist was of particular constitutional significance, and it was Hendricks's lack of control over his dangerousness that established that distinction.[49] While the Court rejected the claim that *Hendricks* required a showing of complete lack of control,[50] it instead adopted the view that civil commitment in the SVP context requires some proof of serious difficulty controlling behavior.[51] Exactly what that proof needed to be, however, was left an open question; the Court's strongest guidance on the issue was requiring that the proof must be sufficient to establish the distinction at the center of *Hendricks*.[52]

Beyond that, the Court articulated only its recognition that this "difficulty" standard was not precise or scientific.[53] To the contrary, it characterized the control problem found in *Hendricks* as a difficulty

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intensity of the incidents, Crane's increasing disregard for the rights of others, and his increasing daring and aggressiveness.").

46 *Id.* ("[T]he controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior.").

47 *Id.* at 290, 294.

48 *Crane*, 534 U.S. at 411–12 (agreeing with the State of Kansas insofar as it argued that *Hendricks* does not require a finding of complete lack of control, but disagreeing insofar as Kansas argued that *Hendricks* does not require any control finding).

49 *Id.* at 412–13 ("*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment . . . . [a]nd a critical distinguishing feature . . . there consisted of a special and serious lack of ability to control behavior.").

50 *Id.* at 411 ("The word 'difficult' [used in *Hendricks*] indicates that the lack of control to which this Court referred was not absolute. Indeed, . . . an absolutist approach is unworkable.").

51 *Id.* at 412–13.

52 *Id.* at 413 ("[W]e did not give to the phrase 'lack of control' a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.").

53 *Id.*

controlling behavior in a "general sense."[54] That is, the sense in which a layperson might use the term "lack of control."[55]

C. *New York's Mental Hygiene Law Article 10 (SOMTA)*

1. The Statutory Scheme

Prior to the addition of Article 10 to New York's Mental Hygiene Law, New York attempted to use two pre-existing statutes to civilly commit sex offenders after the expiration of their criminal sentences.[56] The first was Article 9 of the Mental Hygiene Law, which governed the involuntary commitment of individuals deemed "mentally ill" and in need of involuntary in-patient treatment.[57] Section 402 of the Correction Law, on the other hand, governed the commitment of "mentally ill" inmates.[58] Despite a brief attempt to use Article 9 as a means of committing "mentally abnormal" sex offenders after great public demand,[59] the State was forced to adopt a new statute to achieve the end of managing dangerous sex offenders after the completion of their criminal sentences.[60] Article 9 permitted temporary involuntary

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54 *Id.* at 414 (using the phrase "general sense" to describe the sort of volitional control problem found in *Hendricks* and other cases).

55 *Id.*; *see also generally* Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 75 (2005) (arguing that the notion of an inability to control behavior is one that is firmly rooted in common sense). Somewhat confusingly, the Court also noted that a psychological diagnosis of pedophilia, which sufficed as a mental abnormality in *Hendricks*, involved just such a "general sense" of a control problem. *Crane*, 534 U.S. at 414 ("[*Hendricks*] involved an individual suffering from pedophilia—a mental abnormality that critically involves what a lay person might describe as a lack of control.").

56 *See* N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007) (noting, in former Governor Spitzer's Program Bill Memorandum attached to the bill, that under "Existing Law" the two civil commitment schemes in place prior to SOMTA were not appropriate for sex offenders with mental abnormalities); *see also* Sara E. Chase, Note, *The Sex Offender Management and Treatment Act: New York's Attempt at Keeping Sex Offenders Off the Streets . . . Will it Work?*, 2 ALB. GOV'T L. REV. 277, 279–84 (2009) (describing the civil commitment landscape in New York prior to the enactment of SOMTA).

57 N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2011) ("The director of a hospital may receive and retain therein as a patient 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.").

58 N.Y. CORRECT. LAW § 402 (McKinney 2014) (describing the procedure for committing inmates to mental health facilities).

59 *See* Morgan, *supra* note 22, at 1021–23 (describing the events that led up to Governor Pataki's use of section 9.27 to commit sex offenders after the end of their criminal sentences).

60 N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007). Those individuals convicted of violent offenses were only sentenced to finite terms, with maximum post-release supervision of five years. *Id.*

commitment without a prior judicial determination,[61] and therefore could not be used to commit an individual who was still incarcerated but nearing the end of his sentence.[62] That form of commitment was covered by section 402, which required a judicial finding of mental illness as a prerequisite to confinement.[63] Yet, section 402, though determined to be more appropriate in this context than Article 9,[64] was not suitable for the commitment of sex offenders either, as it was unclear whether that statute's definition of "mental illness" would capture the intended class of individuals.[65] Thus, the New York Legislature enacted SOMTA in 2007 under Article 10 of the Mental Hygiene Law.[66]

Article 10's framework is built around the legislative finding that certain sex offenders possess mental abnormalities that predispose them to commit sex offenses, and that these individuals require extensive, long-term treatment.[67] Yet, significantly, not all require the same treatment; the most dangerous individuals must be confined, while those exhibiting less risk may be managed in the community under SIST.[68] According to the New York Legislature, that scheme is meant to be flexible and responsive to the present needs of the offender.[69] Though Article 10 is modeled after, and largely mirrors, other SVP legislation,[70]

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61 *See* MENTAL HYG. §§ 9.27, 9.33 (requiring only a doctor's certification to commit an individual for up to sixty days, at which point a judicial order is needed).

62 *See* State *ex rel.* Harkavy v. Consilvio (*Harkavy I*), 859 N.E.2d 508 (N.Y. 2006) (holding that the use of section 9.27 violated prisoners' due process rights), *superseded by statute*, N.Y. MENTAL HYG. LAW § 10 (McKinney 2011), *as recognized in* People *ex rel.* Joseph II. v. Superintendent of Southport Corr. Facility, 931 N.E.2d 76 (N.Y. 2010).

63 *See* N.Y. CORRECT. LAW § 402(3)–(5) (McKinney 2014) (describing the procedure for judicial approval of transfer of an inmate to a mental health facility). "Mental illness" is defined there as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care and treatment." *Id.* § 400(6).

64 *See* State *ex rel.* Harkavy v. Consilvio (*Harkavy II*), 870 N.E.2d 128, 131 (N.Y. 2007) ("Correction Law § 402 is the appropriate method for evaluating an inmate for post-release involuntary commitment to a mental facility." (quoting *Harkavy I*, 859 N.E.2d at 512)).

65 *See* N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007) ("[M]entally abnormal sexual offenders may not have the kind of "mental illness" that is a prerequisite for such a commitment [under section 402 of the Correction Law].").

66 N.Y. MENTAL HYG. LAW § 10 (McKinney 2011). Interestingly, SOMTA not only filled the "gap" discussed by Professor Morse, *supra* note 10, at 1026–28, but also filled a statutory gap left by the two existing commitment statutes. *See Harkavy II*, 870 N.E.2d at 131.

67 MENTAL HYG. § 10.01(b); *see also* N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007). According to the legislative findings, "[t]he goal of a comprehensive system [of sex offender treatment and management] should be to protect the public, reduce recidivism, and ensure offenders have access to proper treatment." MENTAL HYG. § 10.01(c).

68 *Id.* § 10.01(b)–(c).

69 *Id.* § 10.01(a).

70 Kansas's Act, for instance, begins the commitment process with a petition from the Attorney General, which leads to a probable cause hearing, which in turn leads to a "mental abnormality" trial that requires a unanimous verdict. KAN. STAT. ANN. §§ 59-29a04–59-29a07

it is the distinction based on dangerousness that affords the statute a unique status[71]: unlike in any other SVP scheme, a finding of mental abnormality in New York does not necessitate an individual's secure confinement.[72]

Long before the question of confinement arises, however, the procedure under Article 10 begins with a case review team that evaluates potential candidates for civil management.[73] When an individual either confined or paroled for a sex offense is nearing the end of his sentence, the case review team will determine whether he qualifies as a "sex offender requiring civil management"—that is, whether he has a mental abnormality.[74] If the team makes an affirmative determination, the Attorney General is then authorized to submit a civil management petition to the court.[75] Once the petition has been filed, the Attorney General may request that the court order the individual—now respondent—to undergo a psychiatric evaluation, the findings of which must be submitted to both parties and to the court.[76]

At this point, the first hearing is held to determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management.[77] If the court determines at the conclusion of this hearing that probable cause has not been established, the petition is

(West 2008). As will be shown in this Section, New York's procedure is virtually identical to Kansas's approach.

71 That is, dangerousness based on the severity of one's "mental abnormality" and the risk one poses as a result. *Compare* MENTAL HYG. § 10.03(i) (definition of "mental abnormality"), *with id.* § 10.03(e) (definition of "dangerous sex offender requiring confinement").

72 *See id.* § 10.01(b)–(c); *see also id.* § 10.07(f).

73 *See id.* § 10.05(a) (describing the review panel set up by the Commissioner of Mental Health, in consultation with the Commissioner of the Department of Corrections and Community Supervision, and with the Commissioner of Developmental Disabilities). This is somewhat of an oversimplification. Really, the process begins when an "agency with jurisdiction," which can be, for instance, the Department of Corrections or the Office of Mental Health, *id.* § 10.03(a), sends notice to the Attorney General and Commissioner of Mental Health that a potential candidate for confinement's release is anticipated. *Id.* § 10.05(b). These are individuals who may qualify as "detained sex offenders." *See id.* § 10.03(g) (defining detained sex offender). Simply, these are individuals currently in the custody of the department of corrections or office of mental health due to the commission of a sex offense, defined under section 10.03(p). *Id.* The material attached to the notice will be reviewed by a staff established by the Commissioner of Mental Health, *id.* § 10.05(d), which will then determine whether the individual's file should be reviewed by the case review team. *Id.*

74 *Id.* § 10.03(q) ("'Sex offender requiring civil management' means a detained sex offender who suffers from a mental abnormality."). The team reviews a number of documents, including a record of the individual's criminal history, his institutional history, and, if needed, will order a psychiatric evaluation. *Id.* § 10.05(c)–(d).

75 *Id.* § 10.06(a).

76 *Id.* § 10.06(d). The respondent is also permitted to request an evaluation. *Id.* § 10.06(e).

77 The first hearing must be held within thirty days of the petition being filed. *Id.* § 10.06(g) ("[T]he supreme court or county court before which the petition is pending shall conduct a hearing without a jury to determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management.").

dismissed and the respondent released;[78] if probable cause has been established, the respondent is ordered to a secure treatment facility pending the completion of the remaining civil trial process.[79]

The next phase in the procedure is the mental abnormality jury trial, held in the same court, in which the issue is once again whether the respondent suffers from a mental abnormality.[80] Now, however, the petitioner must prove by clear and convincing evidence[81] that the respondent suffers from a condition that affects his emotional, cognitive, or volitional capacity in such a way that (1) predisposes him to the commission of a designated sex offense and (2) results in his having "serious difficulty" controlling that conduct.[82] Only a jury's unanimous verdict will result in a final determination of the matter.[83] Anything short of such verdict results in a second trial to establish mental abnormality; only if the jury fails to deliver a unanimous verdict in the second trial is the court required to dismiss the petition.[84]

The mental abnormality trial is the last point in the proceedings at which the respondent might evade some form of civil management.[85] Yet, as only mental abnormality has been addressed, it is not the final point in the proceeding;[86] it is here that Article 10 diverges procedurally from other SVP legislation.[87] Under Article 10, the individual's

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78 *Id.* § 10.06(k) ("If the court determines that probable cause has not been established, the court shall issue an order dismissing the petition . . . .").

79 *Id.* The respondent will be transferred to the treatment facility upon the completion of the sentence already in place; alternatively, he may remain in the custody of the department of corrections upon written request. *Id.*

80 *See id.* § 10.07(a)–(e).

81 *Id.* § 10.07(d). This is the highest burden of proof used in a civil proceeding; its use has been required in involuntary treatment proceedings by the Supreme Court. Addington v. Texas, 441 U.S. 418 (1979).

82 MENTAL HYG. § 10.07(a) ("[T]he court shall conduct a jury trial to determine whether the respondent is a detained sex offender who suffers from a mental abnormality."). These are the two elements of a mental abnormality. *Id.* § 10.03(i).

83 *Id.* § 10.07(d). Significantly, the respondent is statutorily permitted to waive his jury trial, leaving this determination to the court. *Id.* If this waiver occurs, the respondent effectively loses this "unanimous verdict" safeguard. It should be noted that this safeguard is not unique to New York, but is also a feature of Kansas's legislation. *See* KAN. STAT. ANN. § 59-29a07(a) (West 2008) (requiring a unanimous verdict for a finding that a respondent is a "sexually violent predator").

84 MENTAL HYG. § 10.07(e). This element, unlike the unanimity requirement, is not a feature of Kansas's statute. *See* § 59-29a07(e) (directing the respondent's release if a jury is not satisfied that he is a "sexually violent predator").

85 *See* MENTAL HYG. § 10.07(d)–(f).

86 Recall that, under *Hendricks*, civil commitment in this context requires both a finding of mental abnormality and of dangerousness. Kansas v. Hendricks, 521 U.S. 346, 358 (1997); *see also* discussion *supra* Part I.A.

87 *Cf., e.g.*, KAN. STAT. ANN. §§ 59-29a04 to 59-29a07. In Kansas, once it is established by the court or jury that a respondent is a "sexually violent predator," the respondent is committed to a treatment facility for "control, care and treatment." *Id.* § 59-29a07 ("Such control, care and treatment shall be provided at a facility operated by the Kansas department for aging and

disposition—that is, the form of "treatment" required—is not decided during the mental abnormality trial.[88] Thus, in New York, a finding of mental abnormality triggers a final, bench hearing—the "dispositional" hearing—to determine the extent of the afflicted individual's dangerousness and, in turn, whether he will be confined or ordered to a regimen of SIST.[89] So, while a finding of mental abnormality under Article 10 guarantees civil management, it does not guarantee confinement.[90] The procedure is therefore considered bifurcated because it separates the mental abnormality and dangerousness determinations.[91]

During that dispositional hearing, the court will make a final determination as to whether the respondent is a "dangerous sex offender requiring confinement"[92]—and therefore requires commitment to a secure facility—or a "sex offender requiring strict and intensive supervision."[93] The court will order confinement upon a finding that the respondent's mental abnormality involves a particularly "strong" predisposition to commit sex offenses, and an "inability" to control that behavior,[94] such that he is likely to pose a danger to others if

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disability services."). This procedural difference is attributable to the fact that, in New York, the jury trial establishes only a mental abnormality, MENTAL HYG. § 10.07(d), while in Kansas, the trial serves to establish both mental abnormality *and* dangerousness, as per the definition of "sexually violent predator." § 59-29a02(a) (defining "sexually violent predator" to include a likelihood that the individual will engage in repeat acts of sexual violence).

88 *See* MENTAL HYG. § 10.07(f).

89 *See id.* The court will determine the extent of the individual's mental abnormality by determining, based on clear and convincing evidence, "that the 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." *Id.*

90 *See id.* (explaining that a "detained sex offender who suffers from a mental abnormality" may either require confinement or intensive supervision).

91 *See* State v. Farnsworth, 107 A.D.3d 1444 (N.Y. App. Div. 2013) (affirming the lower court's denial of defendant's motion to bifurcate "the jury trial on the issues whether he was sexually motivated in his commission of the underlying crimes and whether he suffered from a mental abnormality," a decision the lower court reached based on the fact that the New York Legislature has already bifurcated Article 10 cases on the issue of mental abnormality and dangerousness).

92 "Dangerous sex offender requiring confinement" is defined 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.

MENTAL HYG. § 10.03(e).

93 This is defined as "a detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement." *Id.* § 10.03(r).

94 The use of the term "inability" to qualify the respondent's control over his behavior in section 10.03(e), even though "serious difficulty" is used to qualify the control standard for mental abnormality in section 10.03(r), is noteworthy, and perhaps provides some insight into how the legislature envisioned the control standard's application. Indeed, the New York Court

confinement is not ordered.[95] Alternatively, absent such finding, the respondent is ordered to SIST.[96] As SIST would place significant restrictions and treatment requirements on the respondent while living in the community,[97] his dangerousness must be assessed with respect to the specific conditions that would be imposed, as well as any other information relevant to his possible re-entry into the community.[98]

Once the respondent is subject to either confinement or SIST under Article 10, he is entitled to periodic judicial review of his management.[99] Those confined are required to undergo an annual psychiatric evaluation,[100] and may petition the court at that time for discharge.[101] The court will then hold an evidentiary hearing to determine whether the individual—now petitioner—is still a "dangerous sex offender requiring confinement."[102] Those subject to SIST are able to petition for modification or termination of their SIST conditions every

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of Appeals recently held that there is a distinction between the meanings of the two terms. *See* State v. Michael M., 26 N.E.3d 769, 775 (N.Y. 2014) ("The statute . . . clearly envisages a distinction between sex offenders who have difficulty controlling their sexual conduct and those who are unable to control it."); *see also* discussion *infra* note 154.

95 MENTAL HYG § 10.07(f).

96 *Id.*

97 The statute provides a list of possible requirements for a SIST program, including: electronic monitoring, polygraph monitoring, specification of residence, prohibition of contact with past or potential victims, and "strict and intensive" parole supervision. *Id.* § 10.11(a)(1). The respondent is also required to adhere to a particular medication regimen, as directed by a psychiatric professional. *Id.* § 10.11(a)(2).

98 *Id.* § 10.07(f).

99 *Id.* § 10.09 (describing the review procedure for those confined); *id.* § 10.11(f)–(h) (describing, in part, the review procedure for those subject to SIST).

100 *Id.* § 10.09(b) (describing that the committed respondent's mental condition must be evaluated at least once every year).

101 *Id.* § 10.09(a), (d) (explaining, inter alia, that the respondent may petition annually for discharge, or waive his right to petition). The permissive annual petition, in conjunction with the annual review, ensures an annual discharge hearing, but is only one way to trigger the judicial proceeding. *Id.* § 10.09(d). The Commissioner of Mental Health is required to provide the committed respondent with annual notice of his right to petition, and a waiver form for that right. *Id.* § 10.09(a). Once the committed respondent has been evaluated by the commissioner's psychiatric expert, and his own expert if he chooses to acquire one, the commissioner reviews the reports generated from those evaluations and determines whether the committed respondent still requires confinement. *Id.* § 10.09(b). All of those documents—the notice, waiver, expert reports, and final determination—are then sent to the court for review. *Id.* § 10.09(c). Even if the committed respondent has not petitioned the court, it must hold an evidentiary hearing on its review of the commissioner's documents in two scenarios. First, when the committed respondent has not affirmatively waived his right to petition. Second, when, despite the commissioner's finding that the committed respondent remains a "dangerous sex offender requiring confinement," the court finds a "substantial issue" with that determination. *Id.* § 10.09(d). The committed respondent may petition for discharge or release to SIST at any time, but this form of petition does not guarantee a hearing. *Id.* § 10.09(f).

102 *Id.* § 10.09(h). The court must order continued confinement if it makes an affirmative determination; alternatively, it may order SIST if the committed respondent no longer meets the criteria for "dangerous sex offender requiring confinement," or release him entirely if it finds that he no longer suffers from a mental abnormality. *Id.*

two years;[103] upon receiving such petition, the court may hold a hearing to determine whether the petitioner still suffers from a mental abnormality.[104] In both cases, the Attorney General maintains the burden of proof by clear and convincing evidence.[105]

2. Evidence in an Article 10 Proceeding

Understanding Article 10 jurisprudence requires a rudimentary understanding of the evidence utilized by the parties at trial. At each of the various proceedings outlined above,[106] psychiatric testimony is used to make—and refute—the petitioner's case.[107] In the mental abnormality trial, a jury is not permitted to make a determination solely on the basis of the respondent's commission of past sex offenses;[108] accordingly, this information is supplemented by expert psychiatric evidence, which is used to assign a pathological explanation for the offenses.[109] The expert

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103 *Id.* § 10.11(f). In determining whether to accept the petition, the court may require that the Department of Corrections and Commission of Mental Health submit a report regarding the individual's conduct while subject to SIST. *Id.*

104 *Id.* § 10.11(h). The use of the word "may" indicates that, unlike with an annual petition submitted by a confined respondent, *id.* § 10.09(d), this petition does not necessitate a hearing. *Id.* § 10.11(h). If a hearing is held, the court may order the respondent's discharge, order continued SIST, or order continued SIST with revised conditions. *Id.* SIST may be revoked, and the respondent committed, upon a hearing initiated by a petition from the Attorney General. *Id.* § 10.11(d).

105 *Id.* § 10.09(d), (h); *id.* § 10.11(h) ("When the petition is filed by the respondent, the attorney general shall have the burden of showing by clear and convincing evidence that the respondent is currently a sex offender requiring civil management.").

106 *See* discussion *supra* Part I.C.1.

107 As the focus of each proceeding in Article 10's bifurcated structure is different—the first on mental abnormality and the second on dangerousness—the psychiatric testimony also differs. While the mental abnormality determination often comes down to the assignment of a particular mental disorder based on past events, the dangerousness determination is predictive, and, as such, focuses on risk determinations. *See generally* State v. Rosado, 889 N.Y.S.2d 369 (Sup. Ct. 2009) (discussing the differing evidentiary focuses of the trial and dispositional phases, with the latter looking toward a respondent's risk of reoffending). There, experts rely on risk assessment tools, such as the STATIC-99, which is a standardized actuarial tool used to predict a sex offender's risk of recidivism. *See* R. Karl Hanson et al., *Predicting Recidivism Amongst Sexual Offenders: A Multi-Site Study of Static-2002*, 34 LAW & HUM. BEHAV. 198, 198–99 (2010); Holly A. Miller et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 LAW & HUM. BEHAV. 29, 43 (2005) (noting that many psychiatric evaluators in SVP cases utilized formal risk assessment tools). For more information on the Static-99 test, see STATIC-99 CLEARINGHOUSE, http://www.static99.org (last visited Aug. 30, 2015).

108 MENTAL HYG. § 10.07(d).

109 *See* People v. C.M., No. 22/2008, 2009 WL 1351208, at *5 (N.Y. Sup. Ct. Mar. 31, 2009) (requiring an understanding of the condition that "motivates the respondent's behavior" for a finding of mental abnormality), *aff'd sub nom.* State v. Maxwell, 63 A.D.3d 707 (N.Y. App. Div. 2009). The definition of mental abnormality requires that a mental condition *cause*s the relevant criteria. MENTAL HYG. § 10.03(i).

retained by the petitioner at the outset of the proceedings will therefore be asked to provide oral testimony on whether the respondent meets the criteria of mental abnormality.[110]

Ultimately, the experts' opinions on this issue are largely a matter of assigning the respondent a particular mental disorder from the Diagnostic and Statistical Manual of Mental Disorders (DSM).[111] A DSM diagnosis was not required by the Supreme Court in either *Hendricks*[112] or *Crane*[113] to support a finding of mental abnormality or its constitutive elements, but in both cases the respondents were assigned DSM diagnoses by psychiatric experts.[114] Following the Supreme Court's guidance, New York does not require a DSM diagnosis to support a finding of mental abnormality;[115] yet, experts are utilized to assign DSM diagnoses in virtually every Article 10 proceeding.[116] When

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110 *See, e.g.*, State v. Mack, 900 N.Y.S.2d 615, 616–19 (Sup. Ct. 2010) (detailing expert testimony at a mental abnormality trial, where petitioner's expert opined that, "with a reasonable degree of professional certainty," respondent suffered from a mental abnormality); *see generally* MENTAL HYG. § 10.06(d); *supra* note 77 and accompanying text.

111 *See, e.g.*, *Mack*, 900 N.Y.S.2d at 617 (assigning respondent a diagnosis of pedophilia). The DSM is "the standard classification of mental disorders used by mental health professionals in the United States." *DSM*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/practice/dsm (last visited Nov. 18, 2015). The Manual is updated periodically, and contains three sections: diagnostic classification, diagnostic criteria sets, and descriptive text. *Id.* A practitioner is able to make a "DSM diagnosis" using the Manual by identifying the presence of certain necessary criteria in a subject (diagnostic criteria), and connecting those signs and symptoms to a particular disorder (classification). *See id.*

112 Kansas v. Hendricks, 521 U.S. 346, 359 ("Legal definitions . . . need not mirror those advanced by the medical profession.").

113 Kansas v. Crane, 534 U.S. 407, 413 ("[T]he 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 the law.").

114 In *Hendricks*, the respondent was diagnosed with pedophilia. *Hendricks*, 521 U.S. at 360. In *Crane*, the respondent was diagnosed with exhibitionism and anti-social personality disorder. *Crane*, 534 U.S. at 411.

115 State v. Shannon S., 980 N.E.2d 510, 514 (N.Y. 2012) ("[A] mental abnormality 'need not necessarily be one so identified in the DSM in order to meet the statutory requirement.'" (quoting United States v. Carta, 592 F.3d 34, 40 (1st Cir. 2010))).

116 *See, e.g.*, State v. Robert V., 975 N.Y.S.2d 390, 392 (App. Div. 2013) (assigning "paraphilia NOS nonconsent and anti-social personality disorder"); State v. Trombley, 951 N.Y.S.2d 782, 783 (App. Div. 2012) (sexual sadism); State v. Clarence D., 917 N.Y.S.2d 700, 701 (App. Div. 2011) (pedophilia); State v. Timothy JJ., 895 N.Y.S.2d 568, 571 (App. Div. 2010) (pedophilia). In light of this trend, it is useful to understand the basics of pedophilia, a diagnosis prevalent in SVP hearings, including those under Article 10. *See, e.g.*, cases cited *supra*. Pedophilia is a form of paraphilic disorder. *See* First & Halon, *supra* note 3, at 445 (explaining that paraphilia is a category of disorders within the DSM, which includes pedophilia, and is characterized by sexual arousal in response to "abnormal" stimuli). A valid pedophilia diagnosis requires three elements: (a) a clearly discernable, deviant mode of sexual gratification; (b) evidence of sexual urges or arousing fantasies in response to that mode of gratification, lasting over six months; and finally (c) that the person has acted on those urges, or that the urges and fantasies have caused distress or interpersonal difficulty. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 572 (4th rev. ed. 2000) [hereinafter DSM-IV-TR].

an expert testifies regarding a respondent's diagnosis, he is attempting to explain the respondent's actions in the context of the diagnostic criteria that comprise the particular diagnosis.

II. THE STATE OF "CONTROL" JURISPRUDENCE WITHIN ARTICLE 10'S MENTAL ABNORMALITY TRIAL

The Supreme Court's decision in *Crane* raised—and intentionally left unanswered—many questions about how to apply its "control" standard.[117] Yet, what is clear is that the "control" standard is a separate test, to be proven independently of the mental abnormality and dangerousness elements established in *Hendricks*.[118] Therefore, after *Crane*, and regardless of a statute's particular wording, a petitioner's burden in an SVP proceeding must be to establish: (1) a mental abnormality that causes sex offending behavior, (2) a difficulty controlling the behavior that the mental abnormality drives,[119] and (3) a risk that the individual will similarly offend in the future.[120] As the Court explained in *Crane*, the purpose of maintaining these as separate criteria is to ensure that the individual facing civil management is adequately distinguished from an individual who is better handled through criminal proceedings.[121] In other words, it must be that the individual is not being preventatively detained on the sole basis of future

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117 *See Crane*, 534 U.S. at 413 ("[T]he 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.").

118 *See id.* ("[T]here must be proof of serious difficulty in controlling behavior."); *see also* Pierson, *supra* note 17, at 1553–54 ("States should construe *Crane* to require a separate finding on the issue of whether the defendant has serious difficulty controlling himself." (italicization added)).

119 This interpretation of the Supreme Court's "control" standard must be contrasted briefly with that articulated by Justice Antonin Scalia in his dissenting opinion in *Crane*. While the majority held that a separate control finding was required, Scalia argued that proof of a mental abnormality that predisposed an individual to engage in acts of sexual violence, coupled with proof that the abnormality would cause future acts of that kind, should be sufficient to show that the individual is unable to control his behavior. *See Crane*, 534 U.S. at 419 (Scalia, J., dissenting). This model, in which a mental abnormality causes an individual to commit repeat acts of sexual violence, is known as the "causal link" model. *Id.* ("What the [*Hendricks*] 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' . . . *necessarily* establishes 'difficulty if not impossibility' in controlling behavior."); *see also* Morse, *supra* note 10, at 1032–35 (explaining Scalia's interpretation as the "causal link" standard).

120 *See generally* Miller et al., *supra* note 107, at 36 (organizing their article based on the three criteria required for an SVP commitment: mental abnormality, volitional capacity, and likelihood of future sexual violence).

121 *Crane*, 534 U.S. at 412–13; *see also* discussion *supra* Part I.B.

dangerousness.[122] The inclusion of an independent "control" element was meant to ensure that these civil proceedings were not serving such an impermissible criminal function.[123]

Leaving the contours of "lack of control" undefined, as the Supreme Court did, has the benefit of allowing states latitude in tailoring their SVP statutes to a perceived need.[124] However, permitting this latitude comes with the risk of allowing states to treat the control standard in such a way that it gets lost in the other elements.[125] If control is conflated with a propensity to commit sex offenses, or potential future risk, then the added "control" element does no work—that is, it does not serve to further narrow the class of individuals eligible for civil management.[126] Thus, treating the control element in a manner that preserves its independence becomes crucially important.

This Section will analyze New York's treatment of control within the mental abnormality trial under Article 10, and then compare its approach to that in two other jurisdictions: California and the Federal Government. This Section will show that New York has aimed to create—and had some success in creating—a sufficiently workable standard, but that it is also still susceptible to a number of problems.[127] A review of California and federal approaches will serve to show how other jurisdictions have used evidence of recent sexual behavior to solve the problems apparent in New York's standard.

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122 *See* Morse, *supra* note 10, at 1027 ("Undoubtedly, dangerous citizens who have committed no crime or who have completed their sentences must be left at liberty if they are responsible."). This seems to be the Court's way of suggesting that, absent the satisfaction of the relevant criteria for confinement, a state can only act once the individual has committed another offense.

123 *See* discussion *supra* Part I.B. (describing the Court's decision in *Crane*).

124 Indeed, this was the Court's stated purpose in leaving the standard open-ended. *Crane*, 534 U.S. at 413 ("[T]he States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment . . . .").

125 *See* Pierson, *supra* note 17, at 1553–54 ("States adopting an implicit lack-of-control theory—in which lack of control is necessarily proven by demonstrating that the defendant has a mental abnormality that predisposes him to commit sexually violent acts—have clearly disregarded the Court's holding in Crane and incorrectly adopted Justice Scalia's dissent as the law. Other jurisdictions that adopt a slightly different interpretation of Crane—maintaining that the defendant must have a mental abnormality that causes serious difficulty controlling behavior—do not violate Crane insofar as the decision requires only that the State put forward some proof of lack of control in order to commit the defendant. However, this construction of the statute makes it too easy for the factfinder to conflate a defendant's mental abnormality with volitional impairment.").

126 *See* Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (explaining that the requirement of mental abnormality is meant to narrow the class of those individuals eligible for confinement to those who cannot control their dangerousness).

127 These problems mostly stem from the use of the DSM. *See* discussion *infra* Part II.A.1.

A. *"Lack of Control" Under Article 10*

1. Narrowing the Standard

If ensuring that the three elements required after *Crane*—predisposition, control, and dangerousness—are kept separate is the proper means of distinguishing those eligible for civil management, New York has made strides toward that end through a combination of statutorily and judicially constructed means. The first is the statutory definition of mental abnormality.[128] It is clear from both Article 10's language,[129] and the New York Legislature's stated intent for the legislation,[130] that an independent "control" finding is fundamental to the mental abnormality portion of the commitment proceedings. Indeed, the Legislature stated that it sought to confine those offenders whose recidivism is "predictable and uncontrollable."[131] Accordingly, New York's jury instructions for a mental abnormality hearing direct the jurors to make an independent finding that a respondent, as a result of his mental abnormality, has difficulty controlling his sexual

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128 A "mental abnormality" in New York entails a finding of both predisposition and "serious difficulty in controlling" sexual behavior. N.Y. MENTAL HYG. LAW § 10.03(i) (McKinney 2011). Two other states have adopted similar definitions of mental abnormality. Nebraska defines a "dangerous sex offender" as either

> (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.

NEB. REV. STAT. § 83-174.01(1) (2006). Virginia, the other state to statutorily include a control finding, defines "sexually violent predator" as

> "Sexually violent predator" means any person who (i) has been convicted of a sexually violent offense, or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial . . . and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

VA. CODE ANN. § 37.2-900 (2009).

129 *See* MENTAL HYG. § 10.03(i) ("'Dangerous sex offender requiring confinement' means a person who is a detained sex offender [(1)] suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and [(2)] such an inability to *control* behavior, [(3)] that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility." (emphasis added)).

130 *See* N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007). The Introducer's Memorandum in Support stated that "[t]he highest risk sex criminals are the ones who should be confined until they can develop the ability to control their own behavior." *Id.*

131 *Id.*

conduct.[132] In so far as "control" is a statutorily explicit and discrete element, there is no question as to whether proof of such element is required, and that civil management ought to turn on this criterion.[133]

Second is the bifurcated trial structure,[134] which ensures that the issues of control and risk are not conflated.[135] Maintaining this distinction is important not only because of the Supreme Court's mandate in *Crane*, but also because the issues are conceptually discrete: the control issue is a matter of proving present mental state, while the issue of risk is a predictive judgment.[136] In *State v. Rosado*, it was established that actuarial risk assessment tools such as the STATIC-99—that is, tools that utilize the presence of various unchangeable, historical facts about an offender to assess the likelihood that a past-offender will re-offend[137]—are not admissible during the mental abnormality trial as a means of proving predisposition or control.[138] While the tools are considered useful for predicting recidivism,[139] they are unable to address an individual's emotional or volitional capacities.[140] Article 10's bifurcated structure has therefore effectively prevented evidence that suggests only future dangerousness from being sufficient as evidence of

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132 N.Y. PATTERN JURY INSTR.—CIVIL 8:8 (COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES OF N.Y. 2014) ("Does CD now suffer from a mental abnormality in that (he, she) has a congenital or acquired condition that (1) predisposes (him, her) to commit sex offenses . . . and (2) results in (his, her) having serious difficulty in controlling such conduct?").

133 *See* N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007) (explaining that commitment under Article 10 is meant to remedy an individual's control issues).

134 *See* discussion *supra* Part I.C.1 (explaining that Article 10 is bifurcated in that the mental abnormality and dangerousness determinations are made in separate proceedings).

135 Under the bifurcated structure, the issues of predisposition and control are already settled before the extent of the risk these elements pose is considered. Conversely, the extent of risk posed by those elements cannot be considered until they are established. *Compare* N.Y. MENTAL HYG. LAW § 10.07(d) (McKinney 2011), *with id.* § 10.07(f).

136 *See supra* note 107 and accompanying text (explaining the differing evidence used to establish mental abnormality and dangerousness).

137 *See* Hanson et al., *supra* note 107, at 198 (noting that static factors are historical factors, such as age and prior offenses, and explaining that "such [risk assessment] tools specify the factors to consider in risk assessment, the method for combining the items into an overall score and the expected recidivism rates associated with the scores.").

138 State v. Rosado, 889 N.Y.S.2d 369, 397 (Sup. Ct. 2009). Significantly, the *Rosado* court also pointed out that mental abnormality and a finding of impaired volition are two discrete issues. *Id.* at 382 ("The definition of 'mental abnormality' under New York State law encompasses what may be viewed as two separate components or elements—predisposition and volition.").

139 *See* Miller et al., *supra* note 107, at 43 ("[M]ental health professionals are able to offer the court consistent evidence that certain factors (and scores on actuarial instruments) are associated with an increased likelihood of sexual recidivism.").

140 *Rosado*, 889 N.Y.S.2d at 391; *see also Case Law Developments: Expert Evidence and Testimony*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 733, 733 (2009) ("[A]ctuarial risk assessment tools do not diagnose a condition, disease, or defect and cannot predict whether a particular condition predisposes a person to the commission of sex offenses, and . . . [do] not assess volitional impairment.").

mental abnormality, and in turn has prevented dangerousness from being the sole criterion for civil management.[141]

The third means of ensuring the *Hendricks*/*Crane* distinction under Article 10 is that the statute has been interpreted to require that the element of control is connected to the sex offenses enumerated within the statute;[142] this further narrows the eligible class to exclude those who might have more general control issues.[143] Article 10's definition of mental abnormality explicitly requires that a mental abnormality predispose the inflicted individual to "conduct constituting a *sex offense*," and cause difficulty controlling the same conduct.[144] "Sex offense" is a term defined in section 10.03 of the Act,[145] and the language of the mental abnormality definition has been construed to refer only to these enumerated offenses.[146] On this interpretation, an individual who

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141 In other words, if actuarial tools only suggest dangerousness, then to use them to show mental abnormality would be to lose the mental abnormality criteria of a risk determination. This would therefore violate even *Hendricks*'s requirement that both mental abnormality *and* dangerousness be established. *See* Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

142 *See, e.g.*, State v. P.H., 874 N.Y.S.2d 733, 746 (Sup. Ct. 2008) (explaining that the language of the "mental abnormality" definition relates back to the list of enumerated sex offenses); *see also* State v. Donald DD., 21 N.E.3d 239, 248 (N.Y. 2014) (describing the control element exclusively as a "serious difficulty controlling sex-offending conduct").

143 The language of *Hendricks*, construed literally, only requires that an individual be "unable to control his *dangerousness*." *Hendricks*, 521 U.S. at 358 (emphasis added). In this case, requiring a showing of *sexual dangerousness* would be a further limiting criterion.

144 N.Y. MENTAL HYG. LAW § 10.03(i) (McKinney 2011) (emphasis added).

145 Under Article 10, a "sex offense" is defined as

> (1) any felony defined in article one hundred thirty of the penal law, including a sexually motivated felony; (2) patronizing a prostitute in the first degree as defined in section 230.06 of the penal law, incest in the second degree as defined in section 255.26 of the penal law, or incest in the first degree as defined in section 255.27 of the penal law; (3) a felony attempt or conspiracy to commit any of the foregoing offenses set forth in this subdivision; or (4) a designated felony, as defined in subdivision (f) of this section, if sexually motivated and committed prior to the effective date of this article.

Id. § 10.03(p); *see also* N.Y. PENAL LAW § 130 (McKinney 2009) (criminalizing various types of sexual conduct).

146 *P.H.*, 874 N.Y.S.2d at 746 ("As is true with the 'predisposition' prong of this definition, the 'serious difficulty' prong, in referring to 'controlling such conduct,' clearly also relates back to the earlier term in the sentence 'sex offense.' Thus, in the Court's view, in order to be found to be in need of civil management, an offender must be found to have a predisposition to commit and serious difficulty in controlling his conduct with respect to committing a 'sex offense' as defined under the statute. That 'sex offense' definition, in turn, clearly refers only to a sex offense as defined under the statute because the term 'sex offense' used in the mental abnormality definition is also, as noted *supra*, a defined term under the law. Thus, the term 'sex offense' in the definition of a mental abnormality under Article 10 is not a generic or general term subject to varying interpretations[—]it is an explicitly defined term which relates to the specific offenses listed in the definition and no other offenses."); *accord* State v. Adrien S., 980 N.Y.S.2d 558, 560 (App. Div. 2014) ("[T]he term 'sex offense,' as employed in the statute, does not have a common or colloquial meaning, and does not encompass all sexually illegal misconduct.").

is determined to have difficulty controlling some criminal conduct that does not constitute an enumerated sex offense is not eligible for civil management.[147] The New York Court of Appeals recently affirmed this reasoning in *State v. Donald DD.*, where it held that a lone diagnosis of anti-social personality disorder (ASPD),[148] coupled with evidence of past sex offenses, cannot support a finding of mental abnormality because the disorder does not bear any necessary relation to sex offending, or to controlling that behavior.[149]

Donald DD. also imposed a further constraint on the "control" element by holding that evidence of the nature of a respondent's past offenses, and the fact that a respondent re-offended after being released from prison for a previous offense, are insufficient bases to ground a conclusion that the individual has difficulty controlling his sexual conduct.[150] In so holding, the court ensured that an individual's recidivism alone cannot be used to justify civil management.[151] The use of this evidence to establish the control element was problematic because it utilized the bare fact of recidivism to distinguish the respondent from the "typical recidivist."[152] In that way, it was not only logically incoherent and therefore necessarily inadequate to establish the constitutionally mandated distinction between control and

147 *See, e.g.*, State v. Young, No. 32874/2008, 2014 WL 2883059, at *5–7 (N.Y. Sup. Ct. June 24, 2014) (finding that domestic abuse does not constitute a "sex offense" under Article 10, and therefore cannot justify a revocation of SIST); *P.H.*, 874 N.Y.S.2d at 746–47 (explaining that exhibitionism and voyeurism are not "sex offenses" under Article 10's definition, and therefore cannot support a finding of mental abnormality). *But see* State v. Jason H., 917 N.Y.S.2d 708, 709–11 (App. Div. 2011) (finding that an individual's drug use was sufficiently connected to his sex offending behavior to justify his confinement).

148 According to the DSM-IV-TR, an ASPD diagnosis requires, in relevant part: (1) a pervasive pattern of disregard for, and violation of, the rights of others; (2) evidence of a conduct disorder; and (3) that the occurrence of anti-social behavior does not occur exclusively during the course of schizophrenic or manic episodes. *See* DSM-IV-TR, *supra* note 116, at 706. As explained by Judge Smith, ASPD is essentially "a deep-seated tendency to commit crimes." State v. Shannon S., 980 N.E.2d 510, 516 (N.Y. 2012) (Smith, J., dissenting). It is possible that over half of the United States' prison population could be diagnosed with this disorder; accordingly, it is unlikely that the diagnosis could be used justifiably to distinguish a respondent from other recidivists. *See id.*

149 State v. Donald DD., 21 N.E.3d 239, 251 (N.Y. 2014) ("ASPD establishes only a general tendency toward criminality, and has no necessary relationship to a difficulty in controlling one's sexual behavior.").

150 *Id.* at 248 ("[S]ufficient evidence of a serious difficulty controlling sex-offending conduct . . . cannot consist of such meager material as that a sex offender did not make efforts to avoid arrest and re-incarceration.").

151 *See id.*; *cf.* State v. Michael R., No. 30237-2012, 2014 WL 503577, at *4 (N.Y. Sup. Ct. Feb. 7, 2014) ("The fact that many of his crimes, including the instant offense, were committed while he was on parole demonstrated that he had serious difficulty in controlling his sexually offending behavior.").

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

dangerousness, but also allowed for a lack of control finding based only on past offenses, which is expressly prohibited under Article 10.[153]

Additionally, this holding carries a further, implied restraint on the "control" element by creating a distinction between an individual that has *difficulty* controlling his behavior, and one that simply *does not* control his behavior.[154] The court explained that the facts underlying particular offenses, and the fact that those offenses occurred in the face of increased risk of arrest, were by themselves insufficient to show that the acts were the result of impaired control, as opposed to a conscious decision.[155] With this explanation, the court has implied that Article 10's statutory language must be narrowly construed,[156] such that the class of persons eligible for management under the statute is restricted to those whose offending is entirely beyond their control.[157]

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153 *See* N.Y. MENTAL HYG. LAW § 10.07(d) (McKinney 2011) (explaining that a jury may not find that a respondent suffers from a mental abnormality based solely on the respondent's commission of sex offenses); *see also id.* § 10.03(i) (defining mental abnormality to include both predisposition and control elements).

154 *See Donald DD.*, 21 N.E.3d at 248 (noting a distinction between having difficulty controlling urges and deciding to gratify them). This distinction was further delineated by the New York Court of Appeals in *State v. Michael M.*, 26 N.E.3d 769, 775 (N.Y. 2014). In that case, the court held that there is a difference between the "difficulty" finding in a mental abnormality trial and the "inability" finding required in the dispositional hearing. *Id.* A "difficulty" means that the individual might "struggle" with his impulses; an "inability" means, essentially, that he cannot overcome that struggle, and is therefore "unable to control" himself. *Id.* ("The testimony in this case tended to show only that respondent was struggling with his sexual urges, not that he was unable to control himself. [The expert] testified that respondent was 'having difficulty' with warding off urges to have sex with very young girls, but not that he was unable to do so. . . . The fact that respondent had difficulty warding off illicit sexual urges shows that respondent suffered at the time from 'mental abnormality' within the meaning of Mental Hygiene Law [A]rticle 10 . . . . But more than this—the inability to control sexual misconduct—would have had to be shown to prove that respondent was a dangerous sex offender requiring confinement."). Though *Michael M.* disregards the dispositional hearing that occurs after the mental abnormality trial, its effect on the mental abnormality control standard is profound. If an individual chooses not to control his behavior, he is ineligible for civil management; if he struggles to control his behavior, he may be eligible for management; if he struggles with, and consistently fails to curb, his behavior, he may be eligible for confinement. *Compare Donald DD.*, 21 N.E.3d at 248, *with Michael M.*, 26 N.E.3d at 775–76. Thus, "difficulty controlling" is neither a dubious exercise of volition, nor an absolute volitional impairment; it falls somewhere between those concepts.

155 *Donald DD.*, 21 N.E.3d at 248. Here, the expert testified that Kenneth T., the respondent in the mental abnormality trial, evidenced serious difficulty controlling his behavior because he carried out two offenses in a manner that permitted him to be identified by his victims, and because the second offense occurred after many years in prison for a prior, similar offense. *Id.*

156 Rules of statutory construction in New York require that legislative intent be ascertained from the words selected by the legislature. N.Y. STAT. § 94 (McKinney 2012). Furthermore, statutes that are intended to restrain an individual's liberty must be strictly construed. *Id.* § 314. In this light, the New York Court of Appeals' interpretation appears appropriate.

157 For an in-depth discussion of this distinction in the context of civil detention, see Corrado, *supra* note 55, at 89–91 (discussing the difference between an individual who cannot control his behavior and one who does not control it, and suggesting that criminal punishment should be applied to the latter to see if it ultimately deters his criminal behavior). Corrado does

Despite the *Donald DD.* court's articulation of what constitutes insufficient evidence for a "control" showing, it declined to go further and provide any explicit description of what would constitute sufficient evidence.[158] However, the court did note that a "detailed psychological portrait" would allow an expert to determine an individual's degree of control.[159] This language suggests that, backed by enough information, an expert's opinion on the issue of control would meet the test of legal sufficiency.[160] As for what would constitute enough information for the basis of an expert's opinion, the court's opinion indicates that it must be information beyond that of a diagnosis.[161] This can be inferred from the fact that the petitioner's expert's basis for a control determination was insufficient even though the diagnoses of ASPD and paraphilia NOS[162] were not contested.[163] Thus, the issue of control turned not on the diagnoses, but on the additional factors presented.[164] In this way,

not necessarily disagree with using this distinction to define a class for confinement, but argues that an individual who continues to offend after being punished for a past offense may be a good candidate. *Id.* In other words, Corrado suggests that an individual who can control his behavior, but continuously chooses not to do so, could justifiably be included in the class of those eligible for confinement. *See id.*

158 *Donald DD.*, 21 N.E.3d at 248 ("We do not decide on this occasion from what sources sufficient evidence of a serious difficulty controlling sex-offending conduct may arise . . . .").

159 *Id.*

160 Elsewhere in the opinion, the court writes that its conclusion regarding ASPD is not "based on research that is outside of the record, or our own armchair psychology, or even common sense (though all of these point in the same direction)[,] . . . [but] on the expert testimony in the appeals before us." *Id.* at 250. Between this claim, and the suggestion that an expert could make a control determination based on sufficient information, the court indicates that it relies heavily on expert opinions when making decisions regarding mental abnormality, even though the standard is strictly legal rather than scientific. *See* discussion *supra* Part I.C.2 (explaining that "mental abnormality" is a legal term rather than a medical or scientific one).

161 *See generally Donald DD.*, 21 N.E.3d at 247–49 (ruling on the issue of sufficiency of past behavior).

162 Paraphilia NOS is a "catch all" category for DSM paraphilias, *see supra* note 116 and accompanying text, that are less frequently encountered. DSM-IV-TR, *supra* note 116, at 567; *see also Donald DD.*, 21 N.E.3d at 247. In *State v. Shannon S.*, the New York Court of Appeals held that paraphilia NOS, though clinically dubious, could be validly used to support a finding of mental abnormality under Article 10; any question of the diagnosis's validity was a matter for the jury to consider. *See* State v. Shannon S., 980 N.E.2d 510, 514 (N.Y. 2012).

163 *Donald DD.*, 21 N.E.3d at 247 (explaining that a diagnosis of Paraphilia NOS is permissible, despite its controversial nature). It should be noted that there were two cases decided in *Donald DD.*—the titular case, as well as the case of Kenneth T. *See id.* While respondent Donald DD. was only diagnosed with ASPD, *id.* at 249, Kenneth T. was diagnosed with both ASPD and paraphilia NOS. *Id.* at 247.

164 *See id.* at 248–49. In passing on the question of paraphilia NOS's validity, the *Donald DD.* court said that it could do so because the issue of predisposition was not in question, but rather the issue of control. *Id.* at 248. This creates an implied distinction between predisposition and control, and further indicates that a DSM diagnosis speaks only to the former element. Indeed, more recently, courts have interpreted *Donald DD.* to maintain such a distinction between predisposition and control. *See, e.g.*, State v. Frank P., 2 N.Y.S.3d 483, 493 (App. Div. 2015) ("[D]rawing a conclusion that a respondent has a volitional impairment from only a diagnosis of sexual abnormality violates the court of appeals' recent mandate in *Donald DD.* that the State

Donald DD. establishes the further restraint that a DSM diagnosis alone is not sufficient to establish a lack of control. Yet, this was not explicitly stated; but even if it were, the question of what those additional factors must look like is still wide open.

2. Problems After *Donald DD.*

In light of the above considerations, it is clear that New York has attempted to structure Article 10 in a manner that makes the class eligible for civil management rather narrow, and the class eligible for confinement even smaller.[165] Perhaps the most significant of these restrictions are the two implied by the New York Court of Appeals in *Donald DD.*: the distinction between one who has *difficulty* controlling his behavior and one who *chooses not to*, and the implied requirement that a DSM diagnosis alone cannot be sufficient for control.[166] However, their significance is in part due to the fact that the New York Court of Appeals did not provide more specific guidance in *Donald DD.*; without clear means of applying these changes to the control standard, it is still possible for the issue of control to collapse into either of the other elements. This is for two principal reasons. First, without an express requirement that a DSM diagnosis cannot suffice to establish the control element,[167] the wording of Article 10's mental abnormality definition permits conflating the predisposition and control elements.[168] Second,

must prove separate from the abnormality that a sex offender has serious difficulty controlling his behavior.").

165 Because of Article 10's bifurcated structure, *see* discussion *supra* Part I.C.1, those individuals found to have a mental abnormality will not necessarily be committed, but might only be subject to SIST.

166 *See* discussion *supra* Part II.A.1. Significantly, these two elements would make New York's Article 10 far narrower than the minimum required by the Supreme Court in *Crane*, where the Court made no claim regarding the distinction between "does not control" and "difficulty controlling," using only "lack of control" to describe the standard. *See* Kansas v. Crane, 534 U.S. 407, 415 (2002). Certainly, New York's distinction between "does not control" and "difficulty controlling" is a permissible means under *Crane* for distinguishing between an individual eligible for civil management and one better left to criminal processes, *see id.* at 413 (giving states "considerable leeway"), but it is not mandated. Additionally, the Court suggested that a diagnosis of pedophilia might carry with it a common sense "lack of control." *Id.* at 414. This implies that the Court would find it acceptable for an appropriate DSM diagnosis to satisfy the standard.

167 Though the existence of a requirement which states that a DSM diagnosis alone is insufficient to establish control has been recognized in some subsequent case law, *see, e.g.*, *Frank P.*, 2 N.Y.S.3d 483, the fact that it was not the case's express holding, *see Donald DD.*, 21 N.E.3d at 248, has insufficiently proscribed its use throughout lower New York courts. This Note therefore proceeds on the understanding that the DSM may continue to pose various problems. *See* discussion *infra* Part II.A.2.a (explaining how the DSM does not implicate volitional control).

168 *See* Pierson, *supra* note 17, at 1544–45.

regardless of the DSM's misuse, it is not clear that an expert is able to discuss the control issue in any meaningful capacity, which means that relying solely on an expert's determination as to whether an individual does not control, or has difficulty controlling, his behavior would be to effectively lose the control element altogether.[169]

a. The DSM Does Not Implicate the Control Issue

The failure to explicitly state the insufficiency of the DSM for the purposes of proving the control element is problematic because a DSM diagnosis, regardless of its accuracy[170] or relation to causing sex offenses,[171] does not implicate the control issue.[172] Nevertheless, the definition of mental abnormality under Article 10 dictates that its

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169 In discussing these issues, this Note seeks to address and build upon a point regarding Article 10 made by Pierson. *See id.* at 1544–45, 1544 n.90. Pierson aptly notes that Article 10's language leaves it open to the problem of conflating predisposition and control because the condition that constitutes a mental abnormality must *cause* an individual to have difficulty controlling behavior, *id.* at 1544 n.90 (citing State v. Rashid, 942 N.E.2d 225, 238 (N.Y. 2010) (Graffeo, J., dissenting)), therefore leaving open the possibility that a jury might understand behavior that is caused by a condition to mean that the individual cannot control that behavior. *See id.* at 1544–45, 1544 n.90. Pierson argues that this would conflate the two discrete issues. *See id.* Much credit is due to Pierson for taking note of this salient problem, and for providing an illuminating and instructive breakdown of the states' use of the control standard. However, while this Note takes the position that Pierson is correct in identifying this as a potential problem, it further asserts that judicial construction of Article 10's language has put New York in her third category—states that overly rely on factor tests and expert opinions—rather than the second category of "nested lack-of-control." *See id.* at 1543–51. This is so because *Donald DD.* created a factor-based test that depends on expert's opinions. *See* discussion *infra* Part II.A.2.ii.

170 The accuracy of DSM diagnoses in SVP proceedings is a matter of some concern amongst the interested legal and psychiatric communities. *See generally* Allen Frances et al., *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. AM. ACAD. PSYCHIATRY & L. 375 (2008) (elaborating on the "no-man's land" between psychiatry and the SVP laws, and articulating the problems that arise from DSM use as a result). A common issue is that a DSM diagnosis is inappropriately made based solely upon the fact of past offense behavior; this is problematic because the offenses themselves do not offer enough information to make a valid diagnosis. *See* First & Halon, *supra* note 3, at 446 (explaining how a DSM diagnosis might be inappropriately assigned on the basis of behavior). As there is no judicial or statutory mandate that a DSM diagnosis be used at all, there are few restraints in place that require one that is used be valid. *See* discussion *supra* Part I.C.2. However, as this Note takes the position that a DSM diagnosis does not implicate control even if it is valid, this issue need not be considered in depth.

171 *See* discussion *supra* Part II.A.1 (explaining that New York requires that a mental abnormality be of the sort that implicates behavior classified as a sex offense under the penal law).

172 *See* Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, Kansas v. Hendricks, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), 1996 WL 469200, at *23 [hereinafter APA Hendricks Brief] ("The authors [of the DSM] further caution that 'a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder.'" (quoting DSM-IV-TR, *supra* note 116, at xxi)).

constitutive condition "results in" the individual's control difficulties,[173] thereby implicitly connecting a DSM diagnosis and control.[174] Yet, the DSM's purpose is to provide a classification scheme for practitioners,[175] meaning that the diagnoses are primarily descriptive.[176] If an individual is diagnosed with pedophilia, for instance, it means only that he has met a series of behavioral criteria, including experiencing certain sexual urges and fantasies.[177] While such diagnosis may be causally connected to past offenses if the offenses themselves correspond with the behavior justifying that diagnosis,[178] to say that an individual's sexual urges and fantasies caused his offending behavior is not to say that the individual has difficulty controlling that behavior.[179] In other words, a DSM diagnosis might implicate predisposition by explaining what causes an individual's behavior, but it does not provide information regarding whether an individual is able to control that behavior.[180] To use a DSM diagnosis to implicate control is to therefore confuse the predisposition and control elements.[181]

A particularly extreme example of this problem can be seen in the case of *State v. Peter Y.*, where a respondent who was diagnosed with

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173 N.Y. MENTAL HYG. LAW § 10.03(i) (McKinney 2011).

174 That is to say, because Article 10's mental abnormality definition creates an explicit, causal connection between the condition and control elements, a causal connection is implied between a DSM diagnosis that serves as the "condition" and the individual's capacity for control. *See id.*

175 APA Hendricks Brief, *supra* note 172, at *22 ("The classification schemes [in the DSM] are developed and periodically altered, through comprehensive field trials, research, and analysis, to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals.").

176 This is particularly true of paraphilias, but less so for diagnoses such as schizophrenia or dementia. *See* Miller et al., *supra* note 107, at 41.

177 *See* DSM-IV-TR, *supra* note 116; sources cited *supra* note 116 (explaining the diagnostic criteria for pedophilia).

178 *See* First & Halon, *supra* note 3, at 448 ("When the pattern of repeated sex crimes is found to be in harmony with a validly diagnosed paraphilia, a reasonable argument can then be made that the sexual offenses are causally related to the diagnosed paraphilia."). However, whether this is coherent is itself a matter of debate. *See* Morse, *supra* note 10, at 1044 ("In the case of many disorders potentially linked to sexual violence, the causal link is tautologically automatic. The necessary and sufficient criteria for the disorder are precisely the behaviors that are supposedly caused, and there is no evidence of an independent 'underlying' disorder.").

179 *See* Morse, *supra* note 10, at 1043 ("[I]dentifying a cause for behavior, including an abnormal cause, does not mean that the agent cannot control the behavior. . . . Although all actions are caused, not all actions are generated by lack of control capacity . . . ." (footnote omitted)).

180 APA Hendricks Brief, *supra* note 172, at *23 ("The authors [of the DSM] further caution that 'a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder.'" (quoting DSM-IV-TR, *supra* note 116, at xxi)); First & Halon, *supra* note 3, at 450 ("It is important to understand that having a diagnosis of a paraphilia does not imply that the person also has difficulty controlling his behavior.").

181 *See* Pierson, *supra* note 17, at 1545–46.

pedophilia and paraphilia NOS was found to have a mental abnormality.[182] The expert in that case opined that the respondent met the criteria for these disorders based on a series of past offenses consistent with those diagnoses.[183] He further opined that the individual suffered from a mental abnormality because his inability to control his sexual urges resulted in his being predisposed to commit those offenses.[184] In other words, the expert used the fact of the individual's sex offenses to support a DSM diagnosis,[185] thereby implicating the predisposition element, and in turn used the combination of the offenses and the diagnosis to prove the control element. However, as a diagnosis does not implicate control, there was virtually no justification for the expert's control determination.

b. Experts Are Unable to Scientifically Address the Control Issue

Even if it is assumed that *Donald DD.* does prevent the use of the DSM in a manner that conflates predisposition and control, a further problem is presented by the fact that an expert is permitted to opine on the ultimate control issue.[186] The New York Court of Appeals' statement, that "a detailed psychological portrait" would allow an expert to determine an individual's capacity for control,[187] implies that the expert is capable of making such a determination, and expressly permits such testimony.[188] However, granting this permission is misguided. Beyond the fact that there is no relationship between the disorders listed in the DSM and volitional control,[189] there is simply no agreed-upon means of scientifically assessing volitional control, no less distinguishing between an inability and an unwillingness to control behavior.[190] It is

182 State v. Peter Y., 952 N.Y.S.2d 651, 652 (App. Div. 2012).

183 *Id.* at 653. The pedophilia diagnosis was supported by two felony convictions involving sexual contact with pre-pubescent boys, and reported sexual contact with a pre-pubescent girl. *Id.* Paraphilia NOS was supported by the fact that respondent had a range of deviant sexual interests, including bestiality, exhibitionism, bondage, and sadomasochism. *Id.*

184 *Id.* ("[R]espondent's disorders predispose him to committing sex offenses because he is unable to control his sexual urges and behaviors, is mentally preoccupied with sex and is sexually compulsive and hypersexual . . . .").

185 Though this example is meant to show the conflation of the predisposition and control elements, the expert's use of past offenses to support a DSM diagnosis is problematic for the reasons previously noted. *See* discussion *supra* note 169.

186 This issue is noted by Pierson, who makes the recommendation that experts should be prevented from making such opinions. Pierson, *supra* note 17, at 1556–59. Pierson explains that because "lack of control" is a legal, rather than a psychological, standard, opining on this issue should be left to juries. *Id.*

187 State v. Donald DD., 21 N.E.3d 239, 248 (N.Y. 2014).

188 *See id.* (stating that an expert could determine whether an individual was unable to control his behavior).

189 *See supra* note 171 and accompanying text.

190 Miller et al., *supra* note 107, at 47 ("There is no scientific data identifying something that is causing loss of control, let alone a loss measurable in degrees of difficulty."). Despite the fact

therefore not clear that an expert is in a privileged position to provide a reliable opinion on whether, and to what extent, an individual is exercising volitional control, regardless of the basis for such opinion.[191]

If this is the case, and an expert cannot adequately address the control issue, then the *Donald DD.* court's reliance on expert opinions—or, for that matter, any court's reliance—presents the risk of allowing a control determination to be devoid of any meaningful content. Thus, the New York Court of Appeals' requirement that an expert consider a "detailed psychological portrait" cannot be a request for more clinically sound control determinations, but instead amounts to turning the control issue into a factor-based test.[192] Per the New York Court of Appeals' mandate, experts must consider a number of factors if their determinations are to be deemed sufficient;[193] but, if such factors do not provide any true clinical basis for that determination, then the factors considered are the only relevant aspect of the expert's opinion. However, as the court chose to let an expert's determination control,[194] it was not required to explain what factors must be considered in making this determination—this would be for the expert to decide.[195] The New York Court of Appeals therefore established a factor-based test in *Donald DD.* without including any necessary factors.[196] The only guidance expressly provided was that the facts underlying past offenses alone were insufficient.[197] In order to remedy this problem, then, it is

that there is no agreed upon scientific method for assessing volitional control, some have argued that identifying the mere presence of a deviant sexual interest is sufficient to adequately assess volitional control. *See, e.g.*, DENNIS M. DOREN, EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND 17 (2002) (explaining that the presence of a deviant sexual urge might alter an individual's reasoning process in a manner that causes him to disregard certain reasons for controlling the urge, thereby necessarily impairing his control).

191 *See* Miller et al., *supra* note 107, at 47 ("Volitional control is not scientifically demonstrable, yet easily implied by the linguistically careless."). It was for this reason that the American Psychiatric Association argued that criminal law's "irresistible impulse test" should be abandoned. Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983) ("The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."); *see also generally* F. LEE BAILEY & KENNETH J. FISHMAN, 1 CRIMINAL TRIAL TECHNIQUES § 35:7 (West ed. 2009) ("[A] legally wrong act should be excused from responsibility if he lacks the freedom of will to resist the impulse to commit the unlawful act.").

192 The issue of factor-based tests is addressed in Pierson, *supra* note 17, at 1548. In New York, because experts are left with the ability to opine on the ultimate issue of control, it appears that these factor-based tests and over-reliance on experts are two parts of one problem; this Note therefore addresses them together.

193 In *Donald DD.*, for instance, the expert's consideration of only offensive history was deemed insufficient. State v. Donald DD., 21 N.E.3d 239, 248–49 (N.Y. 2014).

194 *See id.* at 248.

195 *Id.*

196 This appears to be a common problem in several states. *See* Pierson, *supra* note 17, at 1552 (describing the problem of ex post factor tests in SVP proceedings).

197 *See Donald DD.*, 21 N.E.3d at 248.

essential to identify relevant factors such that the control determination is not lost.

3. Finding Relevant "Control" Factors in New York

The *Donald DD.* court provides some limited insight into what factors might be considered relevant. At the outset of the opinion, the court noted that the respondent had incurred disciplinary "tickets" during his incarcerations for assaulting a staff member, disobeying a direct order, and harassment; the court also noted that none of these offenses were sexual in nature.[198] The New York Court of Appeals has also referenced behavior during incarceration in a previous case, *State v. John S.*, where it upheld a jury's verdict finding mental abnormality.[199] Taken together, these cases suggest the relevance of recent, sexual behavior in assessing an individual's control.[200]

B. *"Control" Factors in Other Jurisdictions*

1. Federal Courts

Other jurisdictions have relied on recent instances of sexual behavior in assessing an individual's capacity for control as well. Circuit courts construing the Federal Adam Walsh Act[201] have expressly required that evidence of both past and present behavior support a "control" finding.[202] The Fourth Circuit in particular has noted that, while evidence of an individual's crimes are certainly important, more

198 *Id.* at 241.

199 State v. John S., 15 N.E.3d 287, 303–04 (N.Y. 2014). It must be noted that the mental abnormality upheld in *John S.* was based, in part, on a lone diagnosis of ASPD, *id.*, which was deemed impermissible by the *Donald DD.* decision. *Donald DD.*, 21 N.E.3d at 249.

200 The Court in *John S.* also notes a number of other factors, including the respondent's denial of his crimes and his failure to partake in sex offender treatment. *John S.*, 15 N.E.3d at 303. Accordingly, recent sexual behavior is certainly not the only factor that might be drawn from the opinion, but it is one that comes up again in the *Donald DD.* case. Additionally, each of these factors regard recent behavior in some way.

201 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (codified as amended at 18 U.S.C. §§ 4247–4248 (2012)). The Act permits the detention of a sex offender if the Government is able to prove that: (1) the individual has previously "engaged or attempted to engage in sexually violent conduct or child molestation;" (2) the individual currently "suffers from a serious mental illness, abnormality, or disorder;" and (3) as a result of such condition, the individual "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." § 4247(a)(5)–(6).

202 *See, e.g.*, U.S. v. Antone, 742 F.3d 151, 168 (4th Cir. 2014) ("[I]n analyzing whether a respondent will have serious difficulty refraining from re-offending, one must look to his past *and* his present condition.").

recent evidence is also necessary in the inquiry;[203] this is so because the individual's volitional impairment must be current and ongoing,[204] and evidence of recent sexual acts allows a court to determine whether an individual is currently in control of his sexual behavior.[205] Under this framework, the Fourth Circuit, in *United States v. Antone*, reversed a finding that an individual could not control his sexual behavior where he had not received a single disciplinary infraction in the last ten years of his incarceration, and had not acted out sexually in the last fifteen; he had also successfully engaged in treatment and completed a number of educational and professional programs, all of which evidenced his self-awareness and control.[206] While evidence of his past crimes and the fact of his alcoholism—a disorder that had been connected to his offense pattern—suggested a lack of control, evidence gleaned from his time in incarceration suggested otherwise.[207]

2. California

Similarly, the Supreme Court of California relies on evidence of sexual behavior during recent confinement, and uses such considerations to distinguish between individuals who cannot, and

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203 *See id.* at 167–68 (explaining that, while placing significant weight on a respondent's pre-incarceration acts is "critical" to the control inquiry, the government must also show evidence that an individual's inability to control his behavior persists). Interestingly, the Fourth Circuit frames the control inquiry as a predictive judgment, asking not whether the individual is currently unable to control his behavior, but whether he will experience such an inability upon his release. *See id.* at 167 (noting that the volitional prong of the Adam Walsh Act is a "predictive finding"). This construal of the control issue is not inconsistent with the one endorsed by this Note—namely, that "control" is a matter of assessing present mental state. *See* discussion *supra* Part II.A.1 (explaining that actuarial tools are inappropriate to determine the control issue because such determination is not predictive). As the Adam Walsh Act does not have the same bifurcated structure as Article 10, federal courts must assess present mental state and the risk of future dangerousness simultaneously, such that the question is always whether an individual will have difficultly controlling his behavior. *Compare* 18 U.S.C. § 4247, *with* N.Y. MENTAL HYG. LAW § 10.07 (McKinney 2011). By comparison, New York courts first ask whether the individual is presently unable to control his behavior, and then whether this will result in his being dangerous if released. *See* discussion *supra* Part I.C.1 (describing Article 10's bifurcated structure).

204 *See Antone*, 742 F.3d at 168; United States v. Hall, 664 F.3d 456, 464 (4th Cir. 2012) (finding that respondent had volitional control based on twenty-eight months without offending). *But see* United States v. Bolander, 722 F.3d 199, 204 (4th Cir. 2013) (finding no volitional control where respondent had stolen pornographic materials from a treatment lab while incarcerated, and collected child pornography during a recent supervised release).

205 *Antone*, 742 F.3d at 165–69.

206 *Id.* at 167 ("[A]s a result of [the respondent's] efforts to obtain treatment, he had improved his ability to control his impulses.").

207 *Id.* at 166–67.

those who simply do not, control their sexual behavior[208]—much like the distinction that was raised by the *Donald DD.* court in New York.[209] In *People v. Williams*, for example, the California court found that an individual's indecent exposure and acts of public masturbation while confined were sufficient to find that the individual could not control his sexual behavior.[210] By contrast, the court in *Howard* reached the opposite conclusion even though the respondent had acted out sexually while confined.[211] Since the respondent's actions while confined appeared calculated, and such planning was also evident in his offense history, the court determined that his behavior was opportunistic and therefore not a product of a lack of control.[212] Thus, in California, recent sexual behavior does not necessitate a finding that a respondent lacks control, but the introduction of such evidence does permit the courts to make more nuanced determinations on that issue.[213]

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208 *Compare In re* Howard N., 106 P.3d 305, 317 (Cal. 2005), *with* People v. Williams, 74 P.3d 779, 793 (Cal. 2003). Under California's Sexually Violent Predator Act (SVPA), an individual may be confined if he is found to be a "sexually violent predator," defined as an individual who "has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." CAL. WELF. & INST. CODE § 6600(a)(1) (West 2010). A "diagnosed mental disorder" means "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." *Id.* § 6600(c). The wording of this statute exhibits a problem similar to the one present in New York, since a jury is likely to conflate the predisposition and control elements by reading the statute to require only that a disorder cause the offending behavior. *See* Pierson, *supra* note 17, at 1544–46, 1544 n.90; *see also Williams*, 74 P.3d at 792 (explaining that the mental disorder required by the SVPA must cause the volitional impairment, which implies a lack of control); discussion *supra* Part II.A.2.

209 *See* discussion *supra* Part II.A.1.

210 *Williams*, 74 P.3d at 793. It should be noted that, as California is susceptible to the predisposition and control conflation problem discussed *supra* note 204, the determination in *Williams* that the respondent was unable to control his sexual behavior was based not only on his recent sexual behavior, but also a paraphilia diagnosis. *Williams*, 74 P.3d at 793.

211 *See Howard N.*, 106 P.3d at 317.

212 *Id.* Specifically, the court found that the

> defendant's committing offense, unlike those in *Williams*, was one of opportunity; his mother was babysitting the sleeping victim. In addition, his incidents of masturbation occurred in his room, not in a public setting such as a library, as in *Williams*. . . . Although defendant undoubtedly intended his behavior to be provocative and disturbing, he discontinued visibly masturbating as soon as he was sure the female officers observed him. Thus, the evidence was not such that "no rational jury could have failed to find [defendant] harbored a mental disorder that made it seriously difficult for him to control his violent . . . impulses . . . [making] the absence of a 'control' instruction . . . harmless beyond a reasonable doubt."

Id. (alteration in original) (citations omitted) (quoting *Williams*, 74 P.3d at 779).

213 *See id.* In other words, despite the possibility of conflating predisposition and control, the California courts are able to use the additional evidence of recent behavior to make a control determination that is not solely based on a DSM diagnosis. The California cases are instructive here because of the use of recent behavior, despite the problems evidenced therein.

III. REQUIRING RECENT BEHAVIORAL INDICIA IN MENTAL ABNORMALITY TRIALS

Despite attempts in New York to make Article 10's "control" standard an effective limiting principle, the exact parameters of the standard are still unclear. Those who have argued that the standard must be clarified are correct in so recommending,[214] but not just any clarification will do; it must be specific enough to sufficiently narrow the class of those eligible for civil management, such that Article 10 does not function as a criminal statute.[215] This Note therefore proposes, in light of the principles implicit in the *Donald DD.* decision, as well as those explicitly used by federal and California courts, that the New York Court of Appeals must adopt express language requiring that any finding that an individual has "serious difficulty" controlling his behavior be based, at a minimum, on that individual's recent sexual behavior. These present behavioral indicia of control should include specific instances of sexual behavior while incarcerated or confined, or instances of behavior that are credibly deemed related to that individual's past behavior, but need not be limited to those factors. Under this new standard, some manner of relevant sexual behavior during a recent confinement would serve as a threshold for a finding that an individual has the "serious difficulty" required for a mental abnormality finding.[216]

A. *The Benefits of Implementing the "Present Behavioral Indicia" Requirement*

By requiring a review of such behavioral indicia, New York would be implementing the established practices of federal and California courts in a manner that is consistent with, and a logical extension of, the principles implied by the New York Court of Appeals in *Donald DD.*[217] If, as this Note argues, *Donald DD.* established that the control issue in New York cannot turn on a DSM diagnosis, but must instead be

214 *See* Pierson, *supra* note 17, at 1552 (describing that operationalizing is necessary in the context of factor-based tests to prevent factors used from being deemed necessary ex post facto).

215 *See* Kansas v. Hendricks, 521 U.S. 346, 372–73 (1997) (Kennedy, J., concurring) (arguing that civil confinement cannot become a "mechanism for retribution or general deterrence").

216 This factor is used similarly in California, where recent sexual behavior is necessary, but not sufficient, to find that an individual lacks control over his behavior. *See supra* note 208 and accompanying text.

217 For a discussion of the principles implied by the court in *Donald DD.*, see *supra* Part II.A.1.

grounded in a thorough review of relevant factors,[218] a necessary examination of recent behavior would affirm those principles. It would do so by ensuring that any "lack of control" finding turned on at least one factor that is independent from both the DSM diagnosis and the facts of the individual's offenses.[219] Additionally, as is the case with the use of present behavioral indicia in California, this extra information could be used to better distinguish between those individuals who choose not to control their sexual behavior, and those who struggle to exercise such control.[220] Assessing a respondent's recent behavior would give a jury sufficient information to compare an individual's offense history with his recent actions, and in turn give them a better sense of whether that individual was simply acting opportunistically, or whether he was struggling to restrain himself.

Inasmuch as this requirement would comport with those aspects of the *Donald DD.* decision, it would also solve the problems that very decision left unresolved.[221] Most obviously, as a DSM diagnosis would no longer be permissible to establish the control issue, a jury would not be able to conflate the predisposition and control elements by assuming that any behavior that was caused by a disorder was uncontrolled behavior.[222] Instead, a jury would be required to assess the individual's behavior independent of his diagnosis, which would only implicate the individual's predisposition for such action.[223] In other words, jurors would have to decide whether an individual's behavior was indicative of a current, ongoing volitional impairment, rather than assume such impairment because the individual's actions were influenced by some paraphilic interest. This would help give proper effect to the separation

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218 *See* discussion *supra* Part II.A.1.

219 Interestingly, requiring an assessment of recent behavior would not only distance the control determination from a DSM diagnosis, but would also improve the quality of that DSM diagnosis. In order to validly diagnose pedophilia, for instance, it must be established that an individual experiences urges and fantasies with respect to pre-pubescent children. DSM-IV-TR, *supra* note 116, at 572; *see also* First & Halon, *supra* note 3, at 448; discussion *supra* Part I.C.2. However, in order to obtain such information about an individual, an expert would be required to look beyond the facts of an offense, for the offense itself would not offer such information. First & Halon, *supra* note 3, at 448. Thus, by requiring an expert to look at an individual's recent behavior, the expert would be put in a position where he would be better able to consider whether that individual was, at the time of the examination, experiencing such fantasies or urges. By requiring this review, this Note's proposal would improve diagnostic accuracy. Insomuch as implementing this Note's proposal would have this effect, it would improve both the control and predisposition elements under Article 10.

220 *See* discussion *supra* Part II.B.2.

221 These problems—of how to establish the difference between "does not control" and "difficulty controlling" and preventing the DSM from grounding a control determination—are described *supra* Part II.A.2.

222 *See* discussion *supra* Part II.A.2.

223 *See* Pierson, *supra* note 17, at 1541–42, 1541 n.75 (describing how a DSM diagnosis only implicates the predisposition issue).

of the predisposition, control, and dangerousness elements mandated by the Supreme Court in *Crane*, and inherent in Article 10's statutory structure.[224]

The new requirement would also provide content to the factor-based test suggested by *Donald DD.*, and in so doing would prevent experts from inappropriately opining on the ultimate issue of control.[225] By requiring that an expert offer, at a minimum, information about an individual's recent behavior, he would be forced to substantiate any conclusions that he might make regarding whether the individual on trial is able to control himself. Thus, even if the expert does opine on this ultimate issue,[226] a jury is still afforded greater information to support its determination than just the opinion of the expert. Moreover, such a requirement would create some uniformity in the evidence offered to support a control finding, giving juries a better sense of what they must consider in reaching their determination on that issue.[227] In turn, similar to the result of prohibiting a DSM diagnosis from grounding a control determination, this uniformity would help to effectively limit the class of individuals eligible for civil management under Article 10.

Beyond remedying those problems, implementing a requirement that courts consider recent behavioral indicia of control is consistent with some of Article 10's other fundamental principles.[228] Primarily, requiring an assessment of present behavioral indicia of control would comport with Article 10's mandate that any mental abnormality determination be based on the individual's present mental state.[229] While it would otherwise be possible for such determination to be made based purely on historical factors—facts of past offenses, psychological history, and DSM diagnoses, for instance—this requirement would ensure that any control determination would be grounded in the most recently available information regarding a respondent's mental state. Indeed, as one of Article 10's primary purported purposes is to provide treatment for offenders such that they might be able to regain control

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224 *See* discussion *supra* Part II.A.1.

225 *See* discussion *supra* Part II.A.2.

226 See *supra* Part II.A.2 for a discussion of this problem. Pierson also discusses the problem of experts opining on the ultimate issue of control in SVP proceedings. Pierson, *supra* note 17, at 1552. This Note asserts that her analysis of that issue is relevant because this problem is present in New York after the *Donald DD.* case. *See supra* note 164 and accompanying text.

227 If there are no factors enumerated for a jury prior to its consideration of the control issue, it is possible for factors to be deemed relevant post hoc, which prevents the control standard from serving as an effective limiting principle. *See* Pierson, *supra* note 17, at 1552.

228 *See* discussion *supra* Parts I.C.1, II.A.1.

229 *See supra* note 68 and accompanying text (explaining that Article 10 is meant to be tailored to an offenders present needs).

over their behavior,[230] it is essential that civil management is based on the most recent evidence available; this Note's proposal would ensure that such evidence is considered.

Additionally, as this Note's proposed requirement focuses only on recent behavior sufficiently related to an individual's offense, it is also consistent with the New York Court of Appeals' mandate that the elements of a mental abnormality bear a close relationship to the sex offenses enumerated under Article 10.[231] Proof of an individual's difficulty controlling behavior that is not related to conduct constituting a sex offense would not be sufficient to establish the control element. To the extent that the proposed requirement only looks to behavior related to such conduct, it further ensures that a jury is giving effect to that limitation by excluding evidence that might suggest a more generalized control problem. Disciplinary tickets given for behavior that is not sexual, for example, would certainly be relevant, but would not be dispositive of the control issues under this proposal.[232]

B. *A Possible Objection*

In response to this proposal, one might object that a review of recent sexual behavior during an individual's incarceration or detention would offer no meaningful information about that individual's ability to control his conduct. This is so, the argument goes, because an individual in confinement would not necessarily have access to his potential victims, and would not, therefore, be in a position where he would have to control the behavior in question. Indeed, it might be the case that an individual who offends against children, for example, would not be able to stop himself from offending in a public place, but would evidence no such problem in confinement, where he has no exposure to children. If this is true, then the fact that he had not acted out sexually during his incarceration may not implicate his ability to control himself whatsoever.

There are three possible responses to this objection. First, the present behavioral indicia requirement is not meant to be exclusive or exhaustive in terms of the evidence presented in support of a control determination. Rather, just as the information is used in California and the Fourth Circuit, it would be compared with evidence supplied from

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230 *See* N.Y. Bill Jacket, 2007 S.B. 3318, ch. 7, 230th Leg. Reg. Sess. (2007).

231 *See* discussion *supra* Part II.A.1.

232 Disciplinary tickets given to prisoners for behavioral infractions are discussed by the *Donald DD.* court. *See* State v. Donald DD., 21 N.E.3d 239, 241 (N.Y. 2014); discussion *supra* Part II.B.2.

past offenses, as well as from other factors.[233] In other words, this requirement is meant to compel the introduction of more evidence that, when added to the established facts underlying past offenses, would help to provide the "psychological portrait" described in *Donald DD.*[234] Even if such evidence was inconclusive in some cases—where there was no evidence of sexual misconduct in confinement, for instance—its introduction would, at the very least, afford juries a sounder and more robust basis for making the ultimate control determination.

Second, as the control standard is primarily a legal one rather than a psychological or moral one,[235] with its sole purpose being to limit the class of those eligible for civil management,[236] the present behavioral indicia requirement survives the critique to the extent that it helps to accomplish that purpose. Currently, there are no specific features that trigger a finding that an individual has difficulty controlling his behavior; under a standard so constituted, the class of individuals that are subject to civil management has no clear parameters. By imposing the requirement that an individual must have exhibited some sexual behavior while confined that is sufficiently related to his past offending, the "control" standard is given a definite, and constitutionally sound, scope.

Finally, a review of recent behavior might actually offer greater insight into an individual's ability to control his behavior. If an individual offends while in public, but ceases to behave similarly while confined, it is permissible to infer that his behavior is merely opportunistic. Conversely, if that individual continues to behave while confined in a manner sufficiently related to his past offense history, it may very well be that he actually has difficulty controlling his behavior, as evidenced by his lack of restraint even while under almost constant supervision. If, as the New York Court of Appeals explained in *Donald DD.*, the distinction between opportunistic behavior and behavior that results from impaired control cannot be established based on past offenses alone,[237] then it must be that the distinction is only discernible when that behavior is compared with more recent actions.

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233 *See* discussion *supra* Part II.B.

234 *See Donald DD.*, 21 N.E.3d at 248; discussion *supra* Part II.A.1.

235 *See* Kansas v. Crane, 534 U.S. 407, 413 (2002); Pierson, *supra* note 17, at 1553; *see also* discussion *supra* Part II.A.2 (explaining how the control issue is not one settled by psychology).

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

237 *Donald DD.*, 21 N.E.3d at 248; *see* discussion *supra* Part II.A.1.

CONCLUSION

In light of the very limited guidance provided by the Supreme Court on how states might best construe *Crane*'s "lack of control" requirement, New York has made laudable efforts to ensure that Article 10 does not function as a criminal statute.[238] There are many ways to handle the threat of sex offender recidivism, and it is not clear that SVP legislation is the most effective or desirable.[239] However, since the Supreme Court has declared statutes like Article 10 to be constitutional,[240] such legislation is likely here to stay. Accordingly, it is paramount that such statutes are being used properly and well within the bounds articulated by the Supreme Court. Though sex offenses are especially heinous, that is no justification for denying offenders basic constitutional protections. This means giving the control issue adequate content, such that it is kept discrete from the other SVP elements. To be sure, Article 10 adheres to such limitations and principles in important respects, and has implemented a number of safeguards to ensure that the control element is given proper treatment. Yet, Article 10 and its jurisprudence are far from perfect, and, as they currently stand, may permit the civil management of more individuals than is, or should be, permissible. In order to ensure that those subject to Article 10 are given the protections to which they are entitled, this Note urges the New York Court of Appeals to adopt express language requiring that any finding that an individual has difficulty controlling his sexual behavior be based, at least in part, on present indicia of sexual behavior. Implementing such a requirement would be a matter of relative ease, but would have a profound and necessary effect on the rights of those subject to civil management proceedings.

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238 *See* discussion *supra* Part II.A.1.

239 *See* Geoffrey S. Weed, *Ending Recidivism: How a Judicial Paradigm Shift Could Prevent Recidivism by Sex Offenders*, 20 WASH. & LEE J. C.R. & SOC. JUST. 457, 492–504 (surveying the various options for handling the threat of sex offender recidivism). Judge Smith, formerly of the New York Court of Appeals, has advocated that increased criminal sentences for sex offenders might be the most preferable means of handling the threat of recidivism, as it avoids the problems inherent in SVP legislation—that is, achieving ends of criminal law through civil means. *See* State v. Shannon S., 980 N.E.2d 510, 515–16 (N.Y. 2012) (Smith, J., dissenting). Though Weed's article suggests that life-long commitments and sentences are similarly problematic for cost-related reasons, the fact that imposing longer sentences would not present the same constitutional problems as SVP legislation gives the option greater appeal. Weed, *supra*, at 500.

240 *See* discussion *supra* Part I.A.