Civil Commitment without Psychosis:
The Law's Reliance on the Weakest Links in Psychodiagnosis

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"Psychotic" (Taken from the DSM-II)

"Patients are described as psychotic when there mental functioning is sufficiently impaired to interfere grossly with their capacity to meet the ordinary demands of life. The impairment may result from a serious distortion in their capacity to recognize reality. Hallucinations and delusions, for example, may distort their perceptions. Alterations of mood may be so profound that the patient's capacity to respond appropriately is grossly impaired. Deficits in perception, language, and memory may be so severe that the patient's capacity for mental grasp of his situation if effectively lost. ***(APA, 1968, p. 29)***

"Psychosis" (APA's American Psychiatric Glossary (1994)

"A severe mental disorder characterized by gross impairment in reality testing, typically shown by delusions, hallucinations, disorganized speech, or disorganized or catatonic behavior."

"The APA recommends that Civil Commitment be limited to those persons who have ***'a severe mental disorder'*** and who ***'lack capacity to make a reasoned treatment decision'*** (Stromberg and Stone, 1983). "Severe Mental Disorder" in this context is ***"generally of a psychotic magnitude"*** (Zonona, Bonnie, & Hoge, 2003).

"Mental Health Law commentator Bruce Winick (1995) heralded the ***Foucha*** decision as a landmark in mental health law, declaring ***'Through Foucha's window, mental health law looks different.' (p. 534)*** He went on to speculate that the decision established ***'new constitutional limits on the power of the states to impose civil commitment and involuntary mental health treatment'"***

In other words, Winick (1995) suggested that the logic of ***Foucha*** would lead to civil commitment being limited to persons with psychotic disorders that are typically treated with psychotropic medications. However, as will be explained, the prediction that ***Foucha*** would constitutionally limit civil commitment to persons who were psychotic and dangerous was Pollyannaish.

Kansas v. Crane (2000): "In recognizing [in Hendricks] that [lack of control], we 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 a 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 in an ordinary criminal case." (Id. @ 413)***

Wisconsin v. Post (1995, pp. 142-144)

"But a recognition that mental illness or the neologism "mental condition component" may be defined in more than one way hardly suggests that mental illness can be defined howsoever the state pleases. If the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing… Finally "mental disorder" is defined in chapter 980 not in terms of mental illness, mental disease or mental defect but in terms of a predisposition to sexual crimes. Under chapter 980 "mental illness" is "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in act of sexual violence." ***(Wis. Stat. §980.01(2))*** Since every condition is necessarily either congenital or acquired, and since "emotional or volitional capacity" simply describes the decision making processing affecting how people act, mental disorder under chapter 980 means no more than a predisposition to engage in acts of sexual violence. Thus chapter 980 attempts to create a mental disorder authorizing lifetime commitment based not on mental illness but on past crimes for which the prospective committee has already served the prescribed sentence. This definition is entirely circular; a prospective committee's "mental disorder" is derived from past sexual offenses which, in turn, are used to establish a predisposition to commit future sexual offenses." ***(Wisconsin Supreme Court Justice Shirley Abrahamson, Dissent to Wisconsin v. Post)***

"As Justice Abrahamson observed, ***'there is circularity to these criteria for civil commitment because the criteria themselves define the outcome.'"***

"Presumably, an "acquired" mental condition is one that is developed through learning, experience, or other environmental factors. According to Webster's Third New International Dictionary of the English Language, "congenital" can mean "existing at or dating from birth" ***(Gove, 2002, p. 478)*** But a second definition of "congenital" in that same dictionary is, "acquired during development in the uterus *and not through heredity"* ***(Gove, 2002, p. 478)*** [italics added]. Similarly, *Elsevier's Enclyclopaedic Dictionary of Medicine* defines "congenital" as, "Relating to an alteration or disease which has been produced or developed in the course of uterine life" ***(Dorian, 1987, p. 184)***

The only way to give the words "congenital or acquired" meaning and avoid redundancy is to apply these latter two definitions to the statute, and thereby exclude mental disorders that are arguably genetic in origin, such as personality disorders ***(First, Bell, Cuthbert, Krystal, Malison, Offord, Reiss, Shea, Widiger, & Wisner, 2002)***

Are Legal Standards for "Mental Disorder/Abnormality" and "Personality Disorder" separable from Psychodiagnosis?

In theory, legal criteria for civil commitment that state or imply a psychodiagnostic construct, such as "mental illness", "mental disorder", or "personality disorder" are distinguishable from the diagnostic categories found in DSM-IV-TR. In fact, DSM-IV-TR itself makes this distinction by offering the following caveat:

> When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic

> information will be ***misused or misunderstood.*** These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in clinical diagnosis. In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental defect," "mental disease," or "mental defect." In determining whether an individual meets a specified legal standard (e.g. for competence, criminal responsibility, or disability), additional information is usually required beyond that contained in the DSM-IV diagnosis. ***(pp. xxxii – xxxiii)(Emphasis added)***
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> "When used appropriately, diagnoses and diagnostic information can assist decision makers in their determinations. For example, when the presence of a mental disorder is the predicate for a subsequent legal determination (e.g. involuntary civil commitment), the use of an established system of diagnosis enhances the value and reliability of the determination." ***(DSM-IV-TR, p. xxxiii)***

Similarly, the US Supreme Court, in ***Crane***, recognized the essential contribution of Psychodiagnosis to the legal determination in a sex offender civil commitment case:

> "Hendricks underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." [….] ***The presence of that the "psychiatric profession itself classified … as a serious mental disorder" helped to make that distinction in Hendricks.*** And a critical distinguishing feature of that 'serious …disorder' there consisted of a special and serious lack of ability to control behavior. In recognizing that fact, we 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 the 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. "***(Crane @ p. 412-413) (Emphasis Added)***
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> Thus, for the reasons recognized in DSM-IV-TR and by the US Supreme Court, Psychodiagnosis is a critical and perhaps essential component of the legal determination in a civil commitment case. Although Psychodiagnosis in this context may be problematic under any circumstances, as will be shown, allowing civil commitment ***based on a***

> ***diagnosis of a mental disorder that is not a psychotic disorder, invites special problems of diagnostic validity and reliability; moreover this practice may have legal and social implications not envisioned by the legislators and judges who have allowed civil commitment without evidence of psychosis."(Emphasis added)***

Debates about the validity of the construct of "mental illness" and "mental disorder" have raged for the past half century. One of the first commentators to raise the question of the validity of the concept of "mental illness" was psychiatrist Thomas Szasz who published an article in the journal, ***American Psychologist (1960) that*** became his groundbreaking book: ***The Myth of Mental Illness (1961)***. Szasz forcefully argued that the term "mental illness' is not an "illness" in the sense that it identified any abnormal physical pathology. Rather, he argued, "mental illness" is a metaphor for psychological or social problems experienced by the person so labeled. He further argued that psychiatry enforces societal norms and justifies coercive interventions by claiming that the "patient's" "illness" deprives him/her of the ability to make competent choices. Szasz's writings document countless examples of psychiatry being used as an instrument of social control.***(Szasz, 1961)*** *Sociologists and other scholars supported Szasz's contentions with sociological research and evidence from the practice of clinical psychology and psychiatry that questioned the validity of Psychodiagnosis by demonstrating its arbitrary application.****(Scheffm 1966, 1975; Laing, 1967; Foucault, 1965)*** *Kutchins and Kirk (1997) summarized the conclusions of these thinkers as follows: "Mental disorder … is not a scientific or medical concept, but a lay concept and a value judgment."****(p. 29)***

As Caine (2003) wrote:

> "Most psychiatric disorders are idiopathic conditions with no known causes. The literature is filled with debate about what constitutes a disorder, or how one defines a case. Critics question the validity of ***current diagnostic classifications*** or nosologies, challenging their fundamental assumptions or theoretical underpinnings. Because there is ***no method for externally validating current diagnostic constructs (i.e., verifying their accuracy using external measures that do not depend on the constructs themselves), it is likely that the field will be rife with controversy until the causes that lead to the emergence of specific clinical conditions can be determined (Caine, 2003).***

However, the argument that the controversy about the validity of Psychodiagnosis will abate once external tests for mental illness are clinically available begs the question about the validity of Psychodiagnosis, because ***all*** behavior has "an organic etiology," i.e., a biological substrate. Only three decades ago, homosexuality was a diagnosis set forth in DSM-II ***(APA, 1968)***. By a vote of the members of the American Psychiatric Association, that organization removed this diagnosis from the manual, based not only on any neurophysiological discovery, but rather on the judgment that homosexuality is a natural variation in human sexuality ***(Bayer, 1981).*** The fact that homosexuality may be

identifiable neurologically ***(Savic, Berglund, &Lindstrom, 2005; LeVay, 1993)*** would not justify reinserting the diagnosis of homosexuality in the DSM. Thus, the decision of whether or not to label ***any*** behavior ***(and its biological substrate)*** "abnormal" or "mental illness" remains as much a social and political judgment as it ever was. Therein lies the debate about the validity of all Psychodiagnosis.

Definitions of "Diagnostic Validity" and "Psychodiagnostic Reliability:

The term "Validity" in psychology generally refers to the "extent to which a test measures what it purports to measure ***(Kazdin, 2003).*** Bentall (2003) defined "Diagnostic Validity" as follows:

> "[T]he extent to which … a diagnostic system fulfills the purpose for which it was designed… For example, the validity of a diagnostic concept might be assessed by seeing whether is corresponds to a naturally occurring cluster of symptoms, by seeing whether the diagnosis runs in families, or is associated with any particular type of pathology, or by seeing whether it usefully predicts what happens to the patient in the future or which types of treatment are likely to be effective. ***(p. 526)***
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> ***Note:*** "Unless psychiatrists and psychologists can agree about which patients suffer from which disorders; there is no possibility that the process of diagnosis will fulfill any useful function."***(Zander, p. 30)***

Diagnostic Validity as a Legal Requirement of Substantive Due Process:

The US Supreme Court justices deciding ***Hendricks*** and ***Crane*** also recognized a substantive due process form of conceptual validity for Psychodiagnosis. In Kansas v. Crane (2002), the Court limited the scope of SVP commitments as follows:

> '[T]here 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. ***(Crane @ p. 413)***

Justice O'Connor's concurring opinion in ***Foucha v. Louisiana (1992, p. 83)*** in which she stated that civil commitment could not be justified "absent ***some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent."***

In Justice White's plurality opinion in ***Foucha (1992, p. 76, note 3)*** he refers to the need for psychiatric opinion to be "reliable enough to permit the courts to base civil

commitments on clear and convincing ***medical evidence*** that a person is mentally ill and dangerous. In ***Crane***, the Kansas Attorney General initially contended that a State would not need a DSM-recognized mental disorder to justify civil commitment upon being pressed by Justice Souter, agrees with him that a ***"medically recognized" "categorical"*** approach is "less likely to be abused." Thus, diagnostic validity is not simply an issue for Psychodiagnosis; it is also relevant issues of constitutional law and sound public policy.

In this regard, it is noteworthy that in ***Kansas v. Hendricks (1997)*** – the decision that marked the turning point between civil commitments being used primarily for persons with psychotic disorders to it being used for persons with non-psychotic disorders – Justice Kennedy warned, in his concurring opinion, ***"[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedence would not suffice to violate it"(p. 373)[italics supplied].*** If Justice Kennedy had not joined the four other justices who made up the majority in ***Hendricks***, the case would have probably resulted in the Kansas commitment law being struck down as unconstitutional. Thus, the conceptual validity of Psychodiagnosis becomes pivotal in considering the viability of law and social policy that allows civil commitment without psychosis.

As is admitted in the DSM-IV-TR ***(APA, 2000b, p. xxx),*** "[N]o definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations." Yet, even among the strongest critics of the medical-model approach to the classifications of mental disorders, as reflected in the DSM, there is agreement as to the validity of the diagnosis of psychotic behavior as mental disorder ***(Bentall, 1993).***

The Prevalence of the Diagnosis of Pedophilia in SVP Commitment Cases:

LeRoy Hendricks, the Kansas sex offender whose case led to the US Supreme Court's landmark decision in ***Kansas v. Hendricks (1997, p. 355),*** admitted that when he "gets stressed out," he "can't control the urge" to have sexual contact with children. Pedophilia was the diagnosis that led to the ***Hendricks*** decision, and it is one of the most frequently made diagnoses in SVP cases. For example, in a review of 120 cases of men committed as SVPs in Arizona, Becker, Stinson, Tromp, and Messer (2003) found that 63% had been diagnosed with pedophilia. In a study of 450 male sex offenders who were considered for SVP commitment in Florida, the diagnosis that had the third highest correlation with a decision to commit was pedophilia (Levenson, 2004a). Fitch (2003) reviewed diagnostic data for men committed as SVPs in 14 states, and found that in 12 of those states, at least 70% of sex offenders committed had a paraphilia diagnosis, and, of that percentage, 45-88% had a diagnosis of pedophilia.

The files of 193 sex offenders who had been evaluated by Wisconsin Department of Corrections psychologists for SVP commitment between 1995 and 2005 were reviewed

for his article to determine prevalence of diagnosis. Of that number, 71 (31%) had a diagnosis of pedophilia as at least one of their diagnoses. Of 242 men committed to Wisconsin's SVP facility on June 10, 2005, 143 (59%) had a firm or provisional diagnosis of pedophilia (L.G. Sinclair, personal communication, June 10, 2005). Clearly, the diagnosis of pedophilia is a major basis for SVP commitments.

There has been considerable debate within the fields of psychiatry and clinical psychology about the conceptual validity of the diagnosis of pedophilia. ***There is no credible dispute about the fact that society legitimately criminalizes sexual behavior between adults and prepubescent children.*** But the fact that behavior is legitimately deemed a crime ***does not, by itself, justify its being labeled a mental disorder.*** If it did the DSM could incorporate the criminal codes of every state. Thus, for example, though Moser and Kleinplatz make it clear that they do not condone sexual activity between adults and children, they forcefully argue for the removal of the entire paraphilia category from the DSM, and they note that, if the paraphilias were removed from the DSM, this diagnostic category would not be relied on by adults who have sex with children to avoid criminal responsibility by asserting the insanity defense.