Reconciling Morality and Moral Responsibility in the Law: A Due Process Challenge to the Inconsistent Mental Responsibility Standards at Play in Criminal Insanity Defenses and Sexually Violent Predator Civil Commitment Hearings

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I. Introduction

When an individual's liberty is at stake, procedural schemes that allow the state to simultaneously endorse diametrically opposed mental responsibility standards undermine the moral backbone of our legal system. Legislative enactments that take such a disingenuous approach to rulemaking demonstrate a dangerous absence of an identifiable guiding morality and cannot be saved by the mere recitation of a legitimate governmental interest. And yet, that is precisely the have-your-cake-and-eat-it-too approach adopted by many states in this country when instituting policies for the civil commitment of sexually violent offenders.[1]

When seeking to civilly commit an inmate nearing release from prison, states often adopt a formulation of mental responsibility for criminal behavior that is inconsistent with the standard on which they rely when rebutting a criminal insanity defense. This contradiction

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1. Civil commitment involves the involuntary transfer of custody of a person to the state for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." KAN. STAT. ANN. § 59-29a07(a) (1994).

draws into question the legitimacy of the state's position in both contexts and fails to adequately address the fundamental issue of what constitutes mental and moral responsibility.

Procedural fairness can only be attained through a consistent framework based on an identifiable guiding morality. The morality of a procedural scheme must be judged, however, independent of the subjective inquiry into contemporary morality made by lawmakers considering social legislation. Attitudes toward the relationship between mental health and criminal responsibility have fluctuated over time. Societal morals as a whole perpetually evolve, and the law – for better or worse – adapts concurrently. But as a society's moral perspectives change, the procedural mechanisms by which resulting moral legislation is exercised must continue to respect the law's guiding principles of fairness and consistency. Otherwise, systems put in place during a period dominated by one moral viewpoint fail to operate in concert with those implemented during an era marked by a different notion of morality, thereby subjecting individuals to unfair, inconsistent fates.

Many jurisdictions in the United States now apply inconsistent mental and moral responsibility standards in criminal and civil proceedings. Defendants are permitted to raise certain incapacity defenses in one context, and yet they are prohibited from advancing those same defenses in another. As a result, the state is now able to seek criminal punishment on the theory that a defendant is legally sane and then later argue that the same person has a serious mental abnormality characterized by a propensity to engage in criminal conduct and should be involuntarily detained.

Judgments on the morality of an individual's conduct should be governed by a procedure that reveals the morality of the prosecutorial system itself and in turn engenders confidence and respect for that system. Instead, the moral underpinnings of the procedures that govern society's determination of moral responsibility have become unhinged.

Procedural morality is often safeguarded by the notion of due process as well as the legal doctrines of double jeopardy and collateral estoppel, which both serve to prevent the relitigation of final judgments. This article highlights the inconsistency found in criminal insanity defense and civil commitment mental responsibility standards and articulates a new due process paradigm, incorporating double jeopardy and collateral estoppel, that compels a reconciliation of these standards in order to maintain fairness and to preserve an identifiable guiding morality behind legislative enactments.

II. Background on Sexually Violent Predator Civil Commitment Statutes

In *Kansas v. Hendricks*,[2] the United States Supreme Court upheld the constitutionality of the Kansas statute[3] that allows the state to civilly commit individuals convicted of certain enumerated sex crimes just prior to the completion of their criminal sentences, thereby extending their confinement beyond the duration of their criminal term. The Court found the Kansas scheme provided sufficient procedural safeguards by requiring a separate hearing to determine whether these individuals present a risk of danger to themselves or others as a result of a volitional mental abnormality.[4] According to the Court, state statutes that follow the Kansas model do not violate the Double Jeopardy Clause,[5] the Due Process Clauses,[6] or the Ex Post Facto Clause[7] of the United States Constitution.[8] The Court relied primarily on the Kansas legislature's professed regulatory intent and public safety rationale in enacting the Kansas Sexually Violent Predator Act ("the Kansas SVP Act") in determining that its provisions are civil (and not criminal) and therefore avoid running afoul of the Constitution.[9]

Arguments that statutes like the Kansas SVP Act violate the aforementioned constitutional clauses are straightforward, if unsuccessful to date.[10] These laws implicate the Double Jeopardy Clause because the underlying act at the heart of the prior criminal trial serves as the primary trigger for the initiation of the subsequent civil commitment hearing. Thus, defendants have argued that they face separate, consecutive periods of judicially enforced confinement for the same proscribed conduct.[11] The Due Process Clauses are drawn into the debate by the predictive and unreliable nature of the standard of

2. 521 U.S. 346 (1997).

3. KAN. STAT. ANN. § 59-29a0 (1994).

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

5. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

6. *Id.* ("No person shall be . . . deprived of . . . liberty . . . without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of . . . liberty . . . without due process of law . . . .").

7. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

8. *Hendricks*, 521 U.S. at 371.

9. *Id.* at 368-69.

10. *See id.* at 371.

11. *See id.* at 369.

proof that is permitted to support a deprivation of liberty pursuant to a civil commitment hearing.[12] Lastly, the Ex Post Facto Clause comes into play as a result of the additional involuntary detention imposed after the issuance of the offender's criminal sentence, particularly when the state seeks to commit individuals convicted prior to the law's enactment.[13] Despite the logic of these arguments, the Supreme Court has steadfastly upheld these "public safety" statutes[14] (as it has recently with respect to sex offender registration laws,[15] which often invoke similar constitutional criticism).

The Kansas SVP Act defines a sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."[16] While the original version of the Kansas SVP Act explicitly defined four classes of individuals to whom the act would apply,[17] the current version of the statute more generally applies to individuals "presently confined"[18] who meet the above-referenced statutory definition of a "sexually violent predator."[19] Neither the original scope of the Kansas SVP Act nor the current reach of the law precludes its applicability to individuals who unsuccessfully asserted an insanity defense to the crime for which they were originally imprisoned.

III. The Hypothetical Test Case

While this article revisits some of the previously mentioned constitutional arguments, it focuses on the hypothetical case of an individual whose insanity defense was rejected by a jury at the trial stage and yet who was found to suffer from a mental abnormality just

12. *See id.* at 358.

13. *See id.* at 370-71.

14. *See id.* at 371; Seling v. Young, 531 U.S. 250 (2001); Kansas v. Crane, 534 U.S. 407 (2002).

15. *See* Smith v. Doe, 538 U.S. 84 (2003) (rejecting an ex post facto challenge to Alaska's sex offender registration act); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (rejecting a due process challenge to Connecticut's sex offender registration act).

16. KAN. STAT. ANN. § 59-29a02(a) (1994).

17. KAN. STAT. ANN. § 59-29a03(a) (1994) (stating that the Kansas SVP Act applies to presently confined individuals convicted of a sexually violent offense who are scheduled for release, individuals charged with a sexually violent offense who are found incompetent to stand trial, individuals found not guilty by reason of insanity of a sexually violent offense, and individuals found not guilty of a sexually violent offense because of a mental disease or defect).

18. KAN. STAT. ANN. § 59-29a04(a) (1994).

19. *Id.*

prior to completing his or her criminal sentence, thereby qualifying for civil commitment under the Kansas SVP Act and similar statutes. Essentially, in such a case, the individual was expressly deemed by a jury *not* to have committed the sexual crime at issue as a result of his or her mental condition. Nevertheless, the very same system that sought to distinguish mental incapacity from criminal behavior at the trial stage in order to exact criminal punishment may now, under the scheme approved by the Court in *Hendricks*, seek to equate them (often many years later[20]) in order to prolong an individual's incarceration.[21] The cases decided by the Supreme Court involving civil commitment of sexually violent predators have not dealt with individuals who previously asserted an unsuccessful insanity defense.[22] In such a case, a state's concurrent adoption of conflicting stances demonstrates a lack of procedural consistency or any identifiable guiding morality and should be barred by a due process analysis informed by the protections embodied in double jeopardy and collateral estoppel.

IV. Collateral Estoppel

The concept of collateral estoppel (also known as issue preclusion), could pose an obstacle to the constitutionality of applying sexually violent predator commitment schemes to individuals who unsuccessfully assert an insanity defense and then face a re-examination of the relationship between their mental health and past criminal behavior in order to assess future dangerousness during a civil commitment hearing. According to the doctrine of collateral estoppel, a party to a civil action is barred from relitigating an issue determined against that party in an earlier action (be it civil or criminal[23]), even if the second action differs significantly from the first

20. Justice Breyer alluded to the suspect timing of the initiation of civil commitment hearings under the Kansas SVP Act in his dissent in *Hendricks*, noting that "when a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive." *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting).

21. *See Hendricks*, 521 U.S. 346.

22. *See id.*; *Seling*, 531 U.S. 250; *Crane*, 534 U.S. 407; Allen v. Illinois, 478 U.S. 364 (1986).

23. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("[I]t is much too late to suggest that [collateral estoppel] is not fully applicable to a former judgment in a criminal case . . . ." (quoting United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961))).

one.[24] Justice Stewart's majority opinion in *Ashe v. Swenson*[25] stated that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." The Restatement (Second) of Judgments § 27 defines issue preclusion in the following manner:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[26]

Therefore, once the issue of mental capacity has been determined in a criminal proceeding, that finding of fact should be binding and, as a result, prohibited from being relitigated in a civil action brought by the same opposing party (the state, in this case). In such a hypothetical case, a jury would have found that the defendant's mental condition was not the cause of his or her criminal behavior, thereby rejecting such a link. Nevertheless, during the civil commitment hearing, the criminal conviction for the defendant's past sexual offense is the triggering event that launches a new inquiry into his or her mental responsibility for criminal behavior.[27] Sexually violent predator civil commitment statutes, therefore, may unjustly provide for the relitigation of previously adjudicated issues in violation of collateral estoppel.

The Supreme Court has never held that collateral estoppel in a state civil action is directly mandated by the Fourteenth Amendment's Due Process Clause (or by any provision of the Bill of Rights and thus incorporated against the states by the Fourteenth Amendment's Due Process Clause).[28] On the other hand, in *Ashe*, the Court held "the

24. BLACK'S LAW DICTIONARY 108 (2d Pocket ed. 2001).

25. 397 U.S. at 443.

26. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

27. *See Hendricks*, 521 U.S. at 380 (Breyer, J., dissenting) ("Moreover, the Act, like criminal punishment, imposes its confinement (or sanction) only upon an individual who has previously committed a criminal offense .... [C]riminal behavior triggers the Act ....").

28. Hoag v. New Jersey, 356 U.S. 464, 471 (1958) ("Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held."). *But see* Benton v. Maryland, 395 U.S. 784, 795 (1969) ("Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments." (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968))).

federal collateral estoppel rule to be an 'ingredient' of the Fifth Amendment guarantee against double jeopardy and [applied] it to the States through the Fourteenth Amendment...."[29] Therefore, collateral estoppel in the criminal context has been firmly entrenched in state courts as a constitutionally mandated component of the Fifth Amendment's Double Jeopardy Clause for over thirty years.[30]

V. Hendricks' Traditional Double Jeopardy Challenge to the Kansas SVP Act

The *Hendricks* Court described the protections inherent in the Double Jeopardy Clause in the following section of its opinion:

> The Double Jeopardy Clause provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[31] Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition to prevent the State from "punishing twice, or attempting a second time to punish criminally, for the same offense."[32]

Therefore, when considering a traditional double jeopardy challenge, the Court must determine whether the proceedings in question are criminal in nature and whether the aims or impact of the proceedings constitute punishment.[33] While it is undeniable that a criminal prosecution for a sexually violent offense constitutes a criminal proceeding that may result in punishment, the crux of Hendricks' double jeopardy challenge was that the civil commitment proceedings established by the Kansas SVP Act also constituted criminal proceedings because of the punitive goal and effect of the confinement resulting from the Kansas civil commitment scheme.[34]

Courts employ a two-part, intent-effects test to determine whether the provisions of a statute constitute punishment.[35] The intent prong of the test requires courts to inquire whether the

29. *Ashe*, 397 U.S. at 464 (Burger, C.J., dissenting); *see also Benton*, 395 U.S. at 794 ("[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.").

30. *See generally Ashe*, 397 U.S. 436.

31. U.S. CONST. amend. V.

32. *Hendricks*, 521 U.S. at 369 (quoting Witte v. United States, 515 U.S. 389, 396 (1995)).

33. *Id.*

34. *Id.*

35. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

legislature intended the statute to be punitive.[36] If this analysis leads to a finding that the legislative intent was punitive, the statute violates the Double Jeopardy Clause, and the inquiry ends.[37] If, on the other hand, a court does not find the legislative intent to be punitive, the test continues.[38] The effects prong of the test involves seven factors, often referred to as the *Mendoza-Martinez* factors, which seek to ascertain whether a statute is so punitive in effect as to constitute punishment, despite the professed non-punitive intent of the legislature.[39] Upon a showing that the statute's effects are punitive, notwithstanding the legislature's civil intent, a double jeopardy claim can bar further punishment.[40]

In *Hendricks*, Justice Thomas, writing for a 5-4 majority, rejected the defendant's double jeopardy claim, asserting that the Court was "unpersuaded by Hendricks' argument that Kansas has established criminal proceedings."[41] The Court determined that the proceedings, established by the Kansas SVP Act, were not criminal because of the law's professed civil intent ("to protect the public from harm"[42]) and its non-punitive effect.[43] Absent a finding that the Kansas SVP Act's civil commitment scheme equals a criminal prosecution or punishment, the Court, over a vigorous dissent,[44] refused to accept the

36. United States v. Ward, 448 U.S. 242, 248 (1980).

37. *See Mendoza-Martinez*, 372 U.S. at 169. While the *Mendoza-Martinez* case did not involve a double jeopardy challenge, the test outlined in *Mendoza-Martinez* to determine whether a law is punitive has been used by the Court on a regular basis in order to resolve double jeopardy and ex post facto challenges. *See Smith*, 538 U.S. at 97 ("In analyzing the effects of the Act we refer to the seven factors noted in [*Mendoza-Martinez*] as a useful framework. These factors, which migrated into our *ex past facto* case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses.").

38. *Mendoza-Martinez*, 372 U.S. at 169.

39. *Id.* at 168-69. The seven *Mendoza-Martinez* factors are: "[1] whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . ." (footnotes omitted).

40. *Hendricks*, 521 U.S. at 361.

41. *Id.*

42. *Id.*

43. *Id.* at 361-69 (noting that that while civil commitment does pose an affirmative restraint, it does not, according to the Court, promote the traditional aims of punishment and is "only *potentially* indefinite").

44. Four justices did not accept the Court's conclusion in this respect and found the Kansas SVP Act to be a punitive measure. *Id.* at 394 (Breyer, J., dissenting) ("I believe

validity of a double jeopardy challenge to the Kansas SVP Act.

Writing for the majority, Justice Thomas pointed to *Jones v. United States*,[45] a case affirming the constitutionality of involuntary civil commitment for individuals found not guilty by reason of insanity, as precedent for subjecting individuals to consecutive criminal and civil proceedings based on a single criminal offense.[46] A finding of not guilty by reason of insanity is reasonable evidence of a mental condition that renders an individual potentially ripe for civil commitment, which is sufficient to trigger involuntary commitment or a hearing to make such a determination.[47] In fact, had Hendricks been found not guilty by reason of insanity, it is doubtful that a challenge on his behalf would have reached the Court's docket, especially considering the holding in *Jones*.[48] However, because *Jones* applies only when a jury has explicitly found a connection between a defendant's lack of mental responsibility and criminal behavior, both Hendricks' double jeopardy claim and that of the hypothetical defendant at issue in this note raise questions for which *Jones* does not offer a solution. Nevertheless, current Supreme Court cases have rejected traditional double jeopardy challenges to sexually violent predator civil commitment statutes.

VI. Using Collateral Estoppel and Double Jeopardy to Wage a New Due Process Challenge

Even if one accepts the Court's conclusion that the proceedings created by the Kansas SVP Act neither constitute criminal proceedings nor impose punishment, one could still make the argument that sexually violent predator civil commitment statutes implicate the spirit and purpose of the Double Jeopardy Clause of the Fifth Amendment in such a manner as to trigger closer scrutiny under the Due Process Clauses of the Fifth and Fourteenth Amendments. As noted above, the concept of double jeopardy incorporates that of

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the Act before us involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment) and is excessive in relation to any alternative purpose assigned.").

45. 463 U.S. 354 (1984).

46. *Hendricks*, 463 U.S. at 369 (relying on *Jones*, 463 U.S. at 366).

47. *Jones*, 463 U.S. at 366 ("It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment.").

48. *Id.*

collateral estoppel.[49] In *Palma v. Powers*,[50] which is cited in the Restatement (Second) of Judgments section 27, the District Court for the Northern District of Illinois, relying on Supreme Court and other federal court precedent, held:

> The concept of issue preclusion has been applied on the basis of a prior criminal conviction in a substantial number of civil suits. Since issue preclusion is applicable in both criminal and civil litigation, there would seem to be no viable reason to bar its application in a civil suit simply because the initial litigation was in a criminal court. The rationale underlying preclusion generally supports its application regardless of the type of litigation involved.[51]

Therefore, collateral estoppel can be invoked even when the first proceeding is a criminal trial and the second one is a civil action.

While it is true that the Supreme Court has never extended the double jeopardy protection to situations in which the second proceeding is expressly civil, the Court "repeatedly has recognized that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[52] If a situation is serious enough to trigger strict scrutiny under the Fifth and Fourteenth Amendments' Due Process Clauses, particularly with respect to an involuntary and potentially indefinite deprivation of individual liberty, then such a situation should likewise merit review from a double jeopardy perspective, so long as at least one of the proceedings is criminal in nature, and the state is a party to both actions.[53] In the context of sexually violent predator civil

49. *Ashe*, 397 U.S. at 445-46.

50. 295 F.Supp. 924 (N.D. Ill. 1969).

51. *Id.* at 933-34 (citing Local 167 Int'l Bd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am. v. United States, 291 U.S. 293, 298 (1934); United States v. Gramling, 180 F.2d 498 (5th Cir. 1950); Austin v. United States, 125 F.2d 816, 818-19 (7th Cir. 1942); O'Neill v. United States, 198 F. Supp. 367, 369-70 (E.D. N.Y. 1961); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 606-07 (1962); Hurtt v. Stirone, 416 Pa. 493 (1965) in support of the statement that "issue preclusion has been applied on the basis of a prior criminal conviction in a substantial number of civil suits.").

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

53. Requiring at least one of the proceedings to be criminal in nature avoids the problem of not being able to subject appropriate individuals to multiple civil commitments stemming from the same or similar actions, behaviors, and states of mind. I do not dispute that involuntary civil commitment, even on a recurring basis, may serve a legitimate governmental interest and does not violate due process or double jeopardy in its ordinary use outside of reliance on criminal convictions. *See Addington*, 441 U.S. at 426 ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies

commitment, where the line between criminal and civil incarceration has become increasingly blurred, constitutional challenges on due process grounds should be informed by the Court's double jeopardy jurisprudence. Such an approach would mark an important step toward preventing the government from justifying the application of inconsistent mental responsibility standards by hiding behind a fast-eroding distinction between criminal and civil proceedings.

There are three main components to collateral estoppel: (1) the issues of law or fact involved in a later case must be identical to issues of law or fact presented in an earlier case; (2) those issues must have been actually litigated and decided in the earlier case; and (3) the decision concerning those issues must have been a necessary and integral part in arriving at the final judgment on the merits in the earlier case.[54] Moreover, unlike res judicata[55] (also known as claim preclusion), collateral estoppel prohibits relitigation of issues actually litigated and determined in the earlier suit, regardless of whether the first suit was based on the same cause of action as the second suit.[56] It is also irrelevant to the applicability of collateral estoppel that the two cases involve different claims and employ different legal theories.[57]

The public policy rationale behind collateral estoppel is straightforward. "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[58] With respect to the promotion of judicial economy, the systematic interests addressed by collateral estoppel arguably remain the same whether the proceeding is a tort action for damages or a civil

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of some who are mentally ill.").

54. James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir. 1971).

55. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.").

56. Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 326 (1955).

57. *Id.*

58. *Parklane*, 439 U.S. at 326.; *cf.* Green v. United States, 355 U.S. 184, 187 (1957) (noting that the similar rationale behind double jeopardy is that "the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.").

commitment hearing.[59] The conservation of judicial resources, particularly time and money, is not inherently related to a particular cause of action. On the other hand, the protections collateral estoppel affords civil defendants do vary according to the nature of the cause of action. In the ordinary civil action, collateral estoppel prevents an individual (or entity) from relitigating an issue already determined in an earlier proceeding, saving the parties and the courts time and money.[60] In the context of civil commitment, however, there is a third and even more pressing concern that collateral estoppel preserves: personal liberty. The ordinary civil litigant does not risk the prospect of losing his or her freedom when forced to stand trial. But a defendant facing involuntary civil commitment always confronts this very real possibility.[61] For this reason, collateral estoppel offers its most precious protection in the civil commitment setting – the rare occasion in which a defendant to a civil action confronts a potential loss of liberty in the form of involuntary confinement.[62]

VII. Criminal Insanity Defense – Mental Responsibility Standards

Most states apply one of two mental responsibility standards when a defendant raises an insanity defense during a criminal trial. The relevant determination under either of the two major insanity defense schemes is the defendant's mental culpability in connection with the criminal act for which he or she stands accused. To demonstrate the two different criminal insanity defense standards and their interaction with sexually violent predator civil commitment statutes, this article uses Kansas and Wisconsin as model jurisdictions. These two states have similar sexually violent predator statutes, but offer competing approaches to criminal insanity defenses.

Kansas, like most jurisdictions in the United States,[63] follows the

59. *See Parklane*, 439 U.S. at 326.

60. *Id.* at 328.

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

62. *Id.*

63. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATIONS, 257-59 tbl.38 (1998). According to this report from the U.S. Department of Justice, as of 1998, twenty-five states and the federal court system follow the *M'Naghten* rule or a modified form of it. Twenty-one states and the District of Columbia follow the Model Penal Code/American Law Institute formulation of the insanity defense. New Hampshire is the lone state to follow the *Durham* "Product" test. Three states (Idaho, Montana, and Utah) do not offer an insanity defense.

M'Naghten[64] formulation of the insanity defense.[65] The Kansas Supreme Court, quoting the original nineteenth century British *M'Naghten* case, has held that in Kansas:

> [T]he test of mental responsibility is whether the accused "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." It is important to note that the *M'Naghten* rule has *two* branches. The accused is to be held not criminally responsible (1) where he does not know the nature and quality of his act, or in the alternative, (2) where he does not know right from wrong with respect to that act.[66]

Kansas, therefore, like the other states that rely on *M'Naghten*, adheres to a cognition-based test of insanity.[67] The question of insanity hinges on whether the defendant has a mental "defect" or "disease" that inhibited his or her ability to distinguish right from wrong in relation to the alleged crime.[68]

The other commonly employed insanity defense stems from the American Law Institute's Model Penal Code insanity defense ("ALI") test.[69] In 1966, the Wisconsin Supreme Court endorsed the use of the ALI insanity defense test in a Wisconsin trial court for the first time.[70] Four years later, the Wisconsin legislature codified the ALI test and adopted the following statutory definition of the insanity defense: "A person is not responsible for criminal conduct if at the

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64. *M'Naghten's Case,* 8 Eng. Rep. 718 (H.L. 1843).

65. State v. Boan, 686 P.2d 160, 167 (Kan. 1984).

66. *Id.* (quoting *M'Naghten*, 8 Eng. Rep. 718).

67. *See Boan*, 686 P.2d at 167. This article refers to the *Boan* test as cognition-based because *Boan* asks whether the defendant "[knew] the nature and quality of the act he was doing...." *Id.* Cognition, as defined in the dictionary, is "the act or process of knowing...." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 287 (Jess Stein ed. 1966).

68. *Boan*, 686 P.2d at 167.

69. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (or alternatively, wrongfulness) of his conduct (cognitive standard) or to conform his conduct to the requirements of law (volitional standard).").

70. State v. Shoffner, 143 N.W.2d 458, 465 (Wis. 1966). Interestingly, the court did not embrace the ALI test as the only form of the insanity defense to be applied in Wisconsin. Instead, the court provided defendants with the option of asserting a defense based on the *M'Naghten* test, for which the burden of proof would be on the state, or asserting an affirmative defense based on the ALI test, for which the burden of proof would be on the defendant. When the state legislature later adopted the ALI test as the sole insanity defense in Wisconsin, the burden of proof remained with the defendant. WIS. STAT. ANN. § 971.15(3) (1998).

time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law."[71]

While the first portion of the statutory language encompasses the cognitive inquiry derived from the *M'Naghten* test (whether the defendant could differentiate between the rightfulness and wrongfulness of his or her conduct), the second half of the formulation takes into account the defendant's ability to control his or her behavior as a result of his or her mental capacity.[72] Therefore, if a defendant asserts a lack of sufficient capacity to control his or her actions as an excuse for the criminal act with which he or she is charged, juries in Wisconsin criminal courts must take into consideration the volitional analysis forbidden in Kansas and other *M'Naghten* states.[73]

VIII. ALI Jurisdictions – The Wisconsin Model

The best jurisdiction to test the application of a new due process test incorporating elements of collateral estoppel and double jeopardy would be a state in which the trial court insanity defense standard mirrors the standard at play in the civil commitment setting. Because every state statute that provides for civil commitment of sexually violent predators nearing completion of their criminal sentences contains the volitional control language of the Kansas SVP Act, that ideal model jurisdiction would be one like Wisconsin, which has a civil commitment statute for sexually violent offenders and follows the ALI insanity defense test in criminal trials. Therefore, this note uses Wisconsin law to illustrate how collateral estoppel could be applied to prevent the civil commitment of sexually violent offenders who previously unsuccessfully pursued a criminal insanity defense in an ALI jurisdiction.

Wisconsin's statute authorizing the civil commitment of "sexually violent persons" ("the Wisconsin SVP Act") took effect on June 2, 1994.[74] The law defines a sexually violent person as someone

> who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty or not responsible for a sexually

71. WIS. STAT. ANN. § 971.15(1).

72. *Id.*

73. *See id.*; *Boan*, 686 P.2d at 167.

74. WIS. STAT. ANN. § 980.13 (1998).

> violent offense by reason of insanity or mental disease, defect or illness, and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.[75]

Like the Kansas SVP Act, the Wisconsin SVP Act consists of four primary components: (1) past criminal sexual conduct; (2) a mental health abnormality; (3) a lack of control resulting from that mental health condition; and (4) a determination that, absent state intervention, future criminal sexual conduct is highly likely due to the combination of the previous three elements.[76]

On the surface, this construction of the Wisconsin SVP Act appears to parallel the volitional prong of the ALI insanity defense test.[77] In fact, the Supreme Court's own description of why the Kansas SVP Act meets due process requirements also seems to comport with the ALI test.[78] In *Hendricks*, the Court stated that the Kansas SVP Act did not deprive defendants of due process because it requires a finding of future dangerousness based on "evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."[79] The Wisconsin SVP Act's reliance on past criminal behavior and mental capacity mirrors much of the state's criminal insanity defense.[80] Upon closer inspection, however, there exist superficial differences between the governing statutes. As noted above, in order for collateral estoppel to be invoked, the issue litigated in both settings (mental responsibility in the criminal and civil commitment settings) must be identical.[81] Therefore, these discrepancies demand further analysis.

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75. WIS. STAT. ANN. § 980.01(7) (2003).

76. *Id.*; KAN. STAT. ANN. § 59-29a02(b) (2003).

77. WIS. STAT. ANN. § 971.15(1) (1993); WIS. STAT. ANN. § 980.01(7); *see also* DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 30 (1999) ("The Hendricks Court thus seems to have reinserted the volitional prong [of the insanity defense] into the [civil commitment] legal standard.").

78. Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

79. *Id.*

80. While it is true that the Court in *Hendricks* refers to a "present" mental condition, the defendant's mental condition at a civil commitment hearing is generally analyzed in relation to past criminal behavior. Therefore, except for situations in which an individual's mental capacity has significantly deteriorated during incarceration, this temporal element should not be given too much weight and would probably be better described as requiring a "continuing" mental abnormality as opposed to a "present" one.

81. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir. 1971).

Under the Wisconsin SVP Act, "'antisocial personality disorder' is sufficiently precise to satisfy the criterion of 'mental disorder.'"[82] On the other hand, Section 2 of Wisconsin's ALI insanity defense test explicitly states that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."[83] Therefore, the question arises as to whether the statutory language of Wisconsin's ALI test categorically excludes antisocial personality disorders from a valid insanity defense. If Wisconsin's ALI test affirmatively prevents an insanity defense premised on antisocial personality disorders, while the Wisconsin SVP Act has been held to allow for civil commitment in reliance on such conditions,[84] then the collateral estoppel "identical issue" requirement might not be met in civil commitment proceedings based on antisocial personality disorders, which are frequently the bases of the civil commitment of sex offenders.[85]

In *State v. Werlein*,[86] the Wisconsin Court of Appeals addressed this very question. In response to a strict construction of the Wisconsin ALI test, which would have barred an insanity defense based on an antisocial personality disorder, the court noted the following:

> We do not construe *Simpson*[87] to exclude every diagnosis of an antisocial personality disorder from the definition of mental disease or defect. Section 971.15 was drafted so as to define within broad terms the considerations under which a defendant would not be held responsible for his criminal conduct. The statute specifically refrains from resorting to labels that would place a defendant's disorder in a certain category and then have such categorization determine the outcome of the inquiry.
>
> In enacting sec. 971.15, the legislature could have excluded antisocial personality disorders as a mental disease or defect

82. State v. Adams, 588 N.W.2d 336, 341 (Wis. Ct. App. 1998).

83. WIS. STAT. ANN. § 971.15(2) (1998).

84. *Adams*, 588 N.W.2d at 341.

85. *See* Kansas v. Crane, 534 U.S. 407, 414 (2002) ("[O]ur cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior . . . ."). In *Crane*, Michael Crane's classification as a sexually violent predator was based on expert testimony that he suffered from an "antisocial personality disorder." *Id.* at 411. Additionally, in a Supreme Court case challenging Washington's SVP law, Andre Brigham Young was deemed a sexually violent predator upon a finding that he suffered from "a severe personality disorder." Seling v. Young, 531 U.S. 250, 256 (2001).

86. 401 N.W.2d 848 (Wis. Ct. App. 1987).

87. Simpson v. State, 215 N.W.2d 435 (Wis. 1974).

> if it wished to do so. However, the legislature refrained from doing so and instead permitted a case-by-case determination to be made as to whether a specific disorder rose to the level of a mental disease or defect. By so doing, the legislature evinced its intent that categorization and labels placed on a disorder are not to be determinative of a defendant's responsibility for a crime.
>
> Many states, including Wisconsin, have attempted to deal with the complex question of when a defendant's mental condition will absolve the defendant from responsibility for his criminal conduct. Wisconsin has chosen to recognize that certain mental conditions will be a defense to criminal responsibility but has also chosen to exclude from those conditions sociopathic personalities that are evinced only by criminal or other antisocial conduct. Medical diagnoses do not fit neatly within the requirements of law, nor do the requirements of law embrace or embody the nomenclature of the *Diagnostic and Statistical Manual* of mental disorders. These conflicts are to be reconciled at a jury trial by the citizens selected for this most important duty.[88]

In essence, the court held that evidence proving that a defendant suffers from an antisocial personality disorder is not per se insufficient to sustain an insanity defense.[89] Admittedly, the pursuit of such an avenue would be more difficult than establishing an insanity defense based on a mental condition less commonly associated with antisocial conduct. Nevertheless, the door remains open for a defendant to travel this uphill path.[90]

If the justice system is to adhere to a consistent and identifiable procedural morality, the wholesale exclusion of antisocial personality disorders from the insanity defense cannot coexist with either: (1) a scheme that allows the government to base the civil commitment of sexually violent predators on such disorders; or (2) the ALI insanity defense itself. The Court's acknowledgement in *Hendricks*[91] and *Crane*[92] that antisocial personality disorders can be accurate predictors of future dangerousness (because of the resulting inability

88. *Werlein*, 401 N.W.2d at 852.

89. *Id.*

90. *See id.*

91. Kansas v. Hendricks, 521 U.S. 346, 358 (1997) ("The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.").

92. Kansas v. Crane, 534 U.S. 407, 410 (2002) (restating the *Hendricks* rationale for permitting reliance on personality disorders).

to control one's actions) undermines the rationale behind refusing to exculpate a defendant at the trial court level who is able to demonstrate that an antisocial personality disorder prevented him or her from conforming his or her conduct to the requirements of the law.[93] Moreover, the ALI insanity defense test is premised on the very notion that mental responsibility can be directly related to one's ability (or inability) to conform one's actions to the requirements of the law.[94] If courts and legislatures believe that there is enough of a correlation between a lack of control resulting from an antisocial personality disorder and sexually violent criminal behavior to justify civilly committing someone, then a criminal defendant should be able to rely on that judicial or legislative finding to support an insanity defense, which, if successfully argued, in most cases would also lead to civil commitment.[95] For the sake of consistency and fairness, as guaranteed by due process,[96] either personality disorders should be expressly permitted to serve as the foundation of an ALI criminal insanity defense or they should be prohibited from functioning as the primary justification for the civil commitment of sexually violent offenders.[97]

If the mental disorder at issue during both a criminal trial and a subsequent civil commitment proceeding is the same, then one element of collateral estoppel's identity of issues requirement is satisfied.[98] However, a discrepancy between the required standards and/or burdens of proof at the respective hearings could buttress an argument that the issues were not "identical" or were not "actually

93. WIS. STAT. ANN. § 971.15(1) (2005).

94. *See* MODEL PENAL CODE § 4.01(1) (2001).

95. *See* Jones v. United States, 463 U.S. 354, 366 (1984).

96. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986) ("By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions.").

97. If state governments were truly interested in committing potentially dangerous sex offenders after completion of their criminal sentences in order to protect the public and provide treatment (and not to exact further retribution), then forcing the government to operate within more consistent mental responsibility standards at the criminal trial and civil commitment levels would lead to additional mutually acceptable (to both defendants and prosecutors) insanity pleas in criminal trials. Given the fact that civil commitment provides for indefinite detention, prosecutors could satisfy the concerns of people seeking longer confinement as well as people advocating for treatment over punishment by accepting more insanity pleas, particularly in cases where the potential criminal sentence would be shorter than the likely length of a civil commitment.

98. *See* James Talcott, Inc. v. Allahabad Bank, Ltd. 444 F.2d 451, 458-59 (5th Cir. 1971); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

litigated."[99] For example, if the standard of proof regarding a particular issue at a second hearing is lower than that of an earlier hearing, failure to satisfy that standard at the first proceeding does not foreclose satisfying the lower standard of proof in the latter proceeding.[100] It is for this reason that collateral estoppel does not preclude a finding of individual liability at a wrongful death hearing subsequent to a not guilty verdict at that same person's murder trial.[101] Conversely, however, if the required standard of proof were higher in the second case, collateral estoppel prevents the relitigation of a particular issue already decided adversely to the moving party in the earlier action.[102] Logically, if there is not enough evidence for a jury to find liability applying a preponderance of the evidence standard, then there certainly is not enough evidence to find proof of liability beyond a reasonable doubt.[103]

Essential elements of a criminal charge must be proven by the prosecution beyond a reasonable doubt.[104] On the other hand, in Wisconsin, the introduction of a "[m]ental disease or defect . . . is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of credible evidence."[105] Therefore, the threshold defendants must overcome in order to proffer a successful insanity defense is lower than the rigorous reasonable doubt burden to which the prosecution is bound in order to achieve a conviction in criminal court.[106] While this "reasonable certainty by the greater weight of credible evidence" standard may "ease" the onus on criminal defendants exercising an insanity

99. *See Talcott,* 444 F.2d at 458-59 (incorrectly citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Section 28(4) actually addresses this issue. *See* In Interest of T.M.S., 152 Wis.2d 345, 448 N.W.2d 282 (Wis. Ct. App. 1989)).

100. *See* Helvering v. Mitchell, 303 U.S. 391, 397 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" (quoting Lewis v. Frick, 233 U.S. 291, 302 (1914))). Although *Helvering* specifically refers to res judicata, the logic of its holding can be extrapolated to collateral estoppel, as the same concerns are at play with respect to standards and burdens of proof.

101. *See Helvering*, 303 U.S. at 397.

102. *Id.*

103. *Id.*

104. *In re* Winship, 397 U.S. 358, 362 (1970) ("[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required.").

105. WIS. STAT. ANN. § 971.15(3) (2005).

106. *See id.*; *Winship*, 397 U.S. 358.

defense,[107] it concurrently raises the burden on the prosecution, should it choose to challenge an insanity defense based on credible evidence.[108] Instead of just rebutting the defendant's affirmative defense by showing that the defendant has failed to establish insanity beyond a reasonable doubt, the prosecution faces the more difficult task of demonstrating that the defendant did not even reach the lower reasonable certainty standard.[109] To do so, the prosecution must not only inject a modicum of reasonable doubt into the minds of the jury, but also must eliminate the possibility of a reasonable certainty that the defendant is not mentally responsible for his or her actions.[110]

In contrast to the criminal insanity defense standard of proof requirements, when seeking to civilly commit a sexually violent person, Wisconsin law requires the state to prove all elements of its petition beyond a reasonable doubt, including the defendant's mental disorder.[111] Therefore, if the prosecution at a criminal trial successfully defeats the defendant's claim that he or she was not mentally responsible to a reasonable certainty, why then should the prosecution be able to contradict its own position at a subsequent civil commitment hearing in order to assert at a later date that the defendant's mental health prevents conformity with the requirements of the law beyond a reasonable doubt? The logical inconsistency between the two positions should serve as a bar to relitigation of the defendant's mental responsibility.

As noted above, the state does not *have* to offer evidence of its own to rebut the defendant's mental health evidence at the criminal trial level.[112] Thus, not only are the standards of proof distinct, but so, too, are the respective burdens of proof.[113] The state, in arguing that the issue of mental responsibility has not been "actually litigated," might contend that because the burden of proof is on the defendant,

107. Use of the word "ease" should not be construed to imply that making out a successful insanity defense is easy. According to a 1991 study funded by the National Institute of Mental Health, only 26 percent of insanity pleas are successful, and 80 percent of those successful insanity pleas were cases in which the prosecution and defense agreed on the appropriateness of the insanity plea before trial. http://www.psych.org/public/public_ info/insanity.cfm.

108. Gibson v. State, 197 N.W.2d 813, 818 (1972) (holding that the state does not have to produce evidence contradicting an insanity defense, as the burden is on the defendant).

109. WIS. STAT. ANN. § 971.15(3).

110. *Id.*

111. WIS. STAT. ANN. § 980.05(3)(a) (West 2005).

112. *Gibson*, 197 N.W.2d at 818.

113. WIS. STAT. ANN. § 971.15(3); WIS. STAT. ANN. § 980.05(3)(a).

the state has never affirmatively sought to comment on the defendant's mental responsibility, particularly if the state opts not to rebut the defendant's insanity defense at all. Such an argument ignores the concept of *mens rea*, a fundamental premise of criminal law that requires proof of a guilty state of mind to successfully prosecute a criminal offense.[114] Even though the burden is on the defendant to offer an affirmative defense that his or her mental disorder inhibited his or her ability to conform his or her conduct to the requirements of the law, the state's failure (or conscious decision not) to rebut such evidence with mental health evidence of its own cannot be viewed as not having contested the defendant's mental culpability; the very prosecution of criminal charges against the defendant underscores the state's intent to prove the defendant's mental responsibility for his or her behavior.[115]

To illustrate this point, imagine that the American criminal justice system were not premised on the notion of presumed innocence (but that the Constitution's double jeopardy protection remained intact). What if all "not guilty" pleas were affirmative defenses, which the prosecution were not required to rebut? Surely, double jeopardy could not coexist with a system in which the government could strategically choose not to contest the affirmative defense of "not guilty" in order to reserve the right to relitigate the case at a later date. A tactical choice against rebutting a defendant's case should not be without consequence and certainly should not redound to the benefit of the prosecution in the form of a second chance. Along those lines, meeting an insanity defense with a strategic silence should not provide the state with an opportunity to take the opposite position with respect to the defendant's mental state at a subsequent judicial inquiry.

The final prong of the collateral estoppel test is whether the issue of mental responsibility was a necessary and integral part in arriving at the judgment in the earlier case.[116] This last question is less controversial than the preceding ones. Had the jury accepted the defendant's insanity defense during the criminal trial, he or she could

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114. *See* Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

115. *See id.*

116. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-459 (5th Cir. 1971).

not have been convicted of the sexual offense with which he or she was charged.[117] Rejecting the defendant's insanity defense subjected the defendant to criminal sanctions.[118] As a result, there is little doubt that the issue of mental responsibility was a necessary and integral part in arriving at the judgment in the criminal trial.

The close relationship between the insanity defense and the ultimate disposition of the case is particularly true in a state like Wisconsin, which provides for a bi-furcated trial when a defendant raises an insanity defense.[119] In Wisconsin, juries do not consider an insanity defense until after they have already found the defendant guilty of a crime, whereupon a second hearing will be held solely to determine the defendant's mental responsibility.[120] There can be little doubt, then, that the inquiry into the link between the defendant's mental state and criminal behavior has been adjudicated with finality and forms a necessary and integral part in arriving at the final judgment.

The ALI insanity defense test and sexually violent predator civil commitment statutes contain parallel analyses of the defendant's level of volitional control with respect to his or her past criminal conduct.[121] The uniformity of these inquiries, the mutuality of the parties involved, the fact that the inquiry was conclusively adjudicated at the earlier criminal trial, and the relevance of the inquiry to the judgment in the first proceeding all satisfy the requirements of collateral estoppel.[122]

Collateral estoppel is a necessary tool to prevent the government from presenting contradictory arguments aimed at indefinitely incarcerating individuals past the length of their prescribed prison terms. If mental responsibility determinations are adjudicated according to the ALI standard in a civil tort action, then the doctrine of collateral estoppel bars the plaintiff in the first trial from relitigating that issue in a subsequent tort proceeding.[123] And yet a

117. *See* WIS. STAT. ANN. § 971.165(3)(b) (West 1998).

118. *See id.* § 971.165(3)(a).

119. *See id.* § 971.165(1) ("If a defendant couples a plea of not guilty by reason of mental disease or defect: (a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.").

120. *See id.*

121. *See* WIS. STAT. ANN. § 971.15(1); *see also* WIS. STAT. ANN. § 980.01(7).

122. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27; *Talcott*, 444 F.2d at 458-459.

123. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27; *see also Talcott*, 444 F.2d at 458-459.

civil commitment defendant does not receive a comparable safeguard when faced with potential confinement. This inconsistency has the bizarre effect of actually providing defendants who face the prospect of physical confinement with less stringent protections than defendants who face mere monetary damages.[124] The Wisconsin framework, which perpetuates such an irrational distinction, is repugnant to the liberty which due process is meant to protect and is unconstitutional.

IX. *M'Naghten* Jurisdictions – The Kansas Model

Kansas follows the *M'Naghten* criminal insanity defense test.[125] Because *M'Naghten* eschews the volitional control analysis found in the ALI test, the question of whether the issue of law or fact involved in the civil commitment hearing in Kansas is identical to the issue of law or fact presented in the preceding criminal trial poses a greater hurdle to the application of collateral estoppel than the Wisconsin model.[126]

In order to fulfill the initial collateral estoppel "identical issue" requirement, the Kansas SVP Act would have had to predicate its determination regarding whether to civilly commit the defendant on the same inquiry made into the relationship between the defendant's conduct and his or her mental condition during the criminal trial.[127] As previously noted, the Kansas SVP Act defines a sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."[128] The Kansas SVP Act offers the following definition of "mental abnormality:" "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[129] Viewed in isolation, it is difficult to gauge what role cognition plays in the Kansas SVP Act mental abnormality standard.

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124. *See* United States v. Oppenheimer, 242 U.S. 85, 87 (1916) ("It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.").

125. State v. Boan, 686 P.2d 160, 167 (Kan. 1984).

126. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27; *Talcott*, 444 F.2d at 458-459.

127. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27; *Talcott*, 444 F.2d at 458-459.

128. KAN. STAT. ANN. § 59-29a02(a) (1994).

129. KAN. STAT. ANN. § 59-29a02(b) (1994).

The Court has twice provided guidance as to how to interpret this text.[130] In *Hendricks*, the Court was reluctant to require an exact correlation of legal and medical terms to characterize the mental impairment necessary to trigger civil commitment in accordance with due process.[131] Therefore, facially, the fact that Kansas criminal trial courts employ a standard based on mental "defects or disease" while civil commitment proceedings focus on whether a defendant suffers from a mental "abnormality" does not necessarily create mutually exclusive analyses. Both standards require mental health experts to diagnose and explain a mental health condition that impairs the defendant's conduct.[132]

The inquiry becomes more complicated when considering the requisite effect that the mental condition at issue must have on the defendant's actions and the relationship between cognition and volition. The Kansas criminal court insanity defense standard requires a showing that the mental disease or defect inhibits the defendant's ability to distinguish right conduct from wrong conduct.[133] In contrast, in the civil commitment setting the mental abnormality must affect the emotional or volitional capacity of the defendant in such a manner as to render him or her likely to commit a sexually violent offense.[134] The Kansas SVP Act is silent as to the cognitive question inherent in the *M'Naghten* standard, containing no overt discussion of right and wrong.[135] Instead, the inquiry appears to hinge on the intersection of the defendant's mental health and the defendant's likelihood of committing one of the proscribed acts, as a result of either a volitional or emotional abnormality.[136] Because the Court has yet to rule on the requisite manifestation of an emotional abnormality necessary to trigger commitment under the Kansas SVP Act,[137] the Court's current jurisprudence in this area centers solely on

130. *See* Kansas v. Hendricks, 521 U.S. 346 (1997); Kansas v. Crane, 534 U.S. 407 (2002).

131. 521 U.S. at 359-360 ("[T]he term 'mental illness' is devoid of any talismanic significance.... [W]e have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes.... Legal definitions... need not mirror those advanced by the medical profession.").

132. *Boan*, 686 P.2d at 167; *Hendricks*, 521 U.S. at 359-360.

133. *Boan*, 686 P.2d at 167.

134. KAN. STAT. ANN. § 59-29a02(b).

135. *See* KAN. STAT. ANN. § 59-29a01-21 (1994); *Boan*, 686 P.2d at 167.

136. *See* KAN. STAT. ANN. § 59-29a02(b); *Crane*, 534 U.S. at 413.

137. *Crane*, 534 U.S. at 415 ("The Court in *Hendricks* had no occasion to consider whether confinement based solely on 'emotional' abnormality would be constitutional,

the notion of a volitional abnormality.[138] Seeking to refine its "lack of control" articulation of a volitional abnormality first asserted in the *Hendricks* case,[139] the Court, in *Crane*, subsequently stated that "[i]t is enough to say that there must be proof of serious difficulty in controlling behavior."[140]

If the state were to argue during a civil commitment hearing that an individual (who unsuccessfully asserted a *M'Naghten* insanity defense to a sex crime) possesses a mental abnormality that inhibits his or her ability to distinguish right from wrong, so as to make him or her likely to engage in criminal sexual behavior, then such a prosecution should clearly be barred by collateral estoppel. In such a case, the issue of mental responsibility would be identical in both settings. However, while an inability to control one's behavior may include the inability to distinguish right from wrong, cognitional impairment is neither a necessary nor sufficient condition for a finding of volition impairment. An individual whose insanity defense is rejected in a Kansas state criminal court (because a jury found the defendant capable of distinguishing right from wrong) may still suffer from the volitional impairment required to trigger civil commitment under the Kansas SVP Act, thus potentially protecting the state from collateral estoppel claims.

From the standpoint of procedural morality, however, any inquiry into the relationship between mental health and its relationship to an individual's criminal behavior (and culpability) should be enough to meet collateral estoppel's identity of issues requirement. To allow otherwise means that, despite a jury's evidentiary finding that a defendant had the mental capacity to be morally responsible for his or her criminal conduct, states may rely on the very same evidence in proving that the defendant's mental health justifies civil commitment.[141] In essence, in *M'Naghten* jurisdictions, the state may contradict its previous assertion of mental responsibility to prolong the individual's involuntary detention on a theory of a lack of volitional control – an avenue intentionally made unavailable to the defendant during the preceding criminal trial.

Despite the arguably more compelling *legal* argument with

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and we likewise have no occasion to do so in the present case.").

138. *Crane*, 534 U.S. 407; *Hendricks*, 521 U.S. 346; Seling v. Young, 531 U.S. 250 (2001).

139. 521 U.S. at 358.

140. 534 U.S. at 413.

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

respect to ALI states, the *moral* inconsistency of the different mental responsibility standards in criminal trials and civil commitment hearings in *M'Naghten* jurisdictions is still pronounced. Legislatures and judges are turning a blind eye to the irreconcilability of the standards at play, allowing the government to argue on the one hand that a criminal defendant has the mental capacity to tell right from wrong (and should therefore face imprisonment), only to then turn around and argue later that the defendant does not have the mental capacity to avoid committing similar offenses, and should therefore be indefinitely confined to a mental institution.

Indeed, looking to the development of mental responsibility standards within Kansas itself demonstrates the generational inconsistency which lies at the heart of procedural immorality. Rejecting the competing standard upon which the ALI model is based in *State v. Andrews*, the Kansas Supreme Court justified its narrow view of criminal insanity by noting "at the present time, there is no better rule for the protection of society."[142] In *State v. Lucas*, a case relied on heavily by *Andrews*, the New Jersey Supreme Court noted even more explicitly, "Until such time as we are convinced by a firm foundation in scientific fact that a test for criminal responsibility other than M'Naghten will serve the basic end of our criminal jurisprudence, *i.e.*, the protection of society from grievous anti-social acts, we shall adhere to it."[143] Ironically, the Kansas Supreme Court, and other jurisdictions upon which it has relied, legitimize their restrictive insanity defense standards with the very public safety rationales that the civil commitment statutes directly address. The *Hendricks* decision, by allowing states the sweeping power to indefinitely detain individuals who exhibit "serious difficulty in controlling behavior,"[144] obviates the need for restrictive insanity standards in the name of protecting the public. Yet despite the evolution of the law, in Kansas the conflicting procedural standards remain. The only discernible guiding morality for such a system is that the ends justify the means – a notion abhorrent to the many individual protections afforded by the very notion of due process.

142. 357 P.2d 739, 747 (Kan. 1960).

143. 152 A.2d 37, 50 (N.J. 1959).

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

X. Conclusion

In the recent decision *Bradshaw v. Stumpf*,[145] the United States Supreme Court addressed the implications of procedural immorality. In *Bradshaw*, a prisoner claimed a violation of due process when the state argued in one co-defendant's murder trial that he was the triggerman and then contradicted this position by alleging in a subsequent trial that a co-defendant was in fact the murderer.[146] Although the Court ultimately remanded the petitioner's claim, Justice Souter, in a concurring opinion joined by Justice Ginsberg, noted:

> [Petitioner's] position was anticipated by Justice Stevens' observation 10 years ago that "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens . . . ."[147] "Justice Stevens' statement in turn echoed the more general one expressed by Justice Sutherland in *Berger v. United States* (citation omitted), that the State's interest in winning some point in a given case is transcended by its interest 'that justice shall be done.'"[148]

The same concerns acknowledged by Justice Souter in *Bradshaw* are implicated when the state adopts conflicting positions in a defendant's criminal trial and subsequent civil commitment hearing.[149] To allow the state to endorse irreconcilable positions in order to deprive an individual of his or her liberty on multiple occasions is to allow "the adversary system of prosecution . . . to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth . . . ."[150] This quest for the truth – not the thrill of victory – should be the government's paramount concern when seeking to remove a citizen from society at large, whether through criminal proceedings or civil commitment.

To remedy this unfair discrepancy, the Supreme Court's sexually violent predator civil commitment due process jurisprudence should incorporate the protections afforded by collateral estoppel and the

145. 125 S. Ct. 2398 (2005)

146. *Id.* at 2408 (Souter, J., concurring).

147. *Id.* at 2409 (quoting Jacobs v. Scott, 513 U.S. 1067, 1070 (1995)).

148. *Id.* at 2409 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

149. Justices Souter and Ginsberg also joined the portion of Justice Breyer's dissenting opinion in *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting), arguing that the involuntary civil commitment provisions of the Kansas SVP Act constitute punishment.

150. Kyles v. Whitley, 514 U.S. 419, 439 (1995) (noting that when the prosecution in a criminal case is unsure whether information in its possession is exculpatory, the prosecutor should err toward disclosure rather than withhold such information from the defendant).

Fifth Amendment's Double Jeopardy Clause. Since 1970, collateral estoppel has been an essential ingredient of double jeopardy which prevents the relitigation of identical issues.[151] Because a civil commitment hearing involves a potential deprivation of liberty, it should conform not only with the Fifth and Fourteenth Amendments' due process requirements,[152] but also with these amendments' implicit double jeopardy protections.[153] Application of this understanding of due process leads to one conclusion: states that provide for criminal insanity defenses and sexually violent predator civil commitment should apply a uniform standard of mental responsibility for criminal conduct. Otherwise, sexually violent predator civil commitment hearings based on the same offense and the same mental health inquiry previously rejected in an insanity defense will lack the consistency and fairness which due process affords all citizens.

151. Ashe v. Swenson, 397 U.S. 436, 465 (1970) (Burger, C.J., dissenting).

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

153. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27; *Talcott*, 444 F.2d at 458-59.