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Abstract

Sex offender commitment laws present courts with a difficult choice: either allow creative efforts to prevent sexual violence or enforce traditional constitutional safeguards constraining the power of the state to deprive citizens of their liberty. Three state supreme courts have deflected this hard choice while upholding sex offender commitment schemes. As part of their "official narrative" that legitimizes sex offender commitments, the courts claim that society can have prevention and still maintain the primacy of the criminal justice system. This narrative neutralizes the conflict in values by claiming that sex offender commitments are just like mental illness commitments, a small, discrete area of the law unprotected by the safeguards of criminal procedure. This article shows the dissolution of the values reconciliation in these official narratives when courts confront concrete cases and the intense public pressure to lock up sex criminals. Part I of this article explains that sex offender commitments need to be legitimized because they appear to encroach on fundamental American legal values. Part II describes the official narrative that three state supreme courts have developed to justify sex offender commitments. Part III of the article examines the violent public and political reaction to one attempt to implement the legal limitations actually contained in, but never before followed, in Minnesota's official narrative. Part IV uses the corpus of sex offender commitment cases in Minnesota to show that the official narrative is reduced to a "legal fiction" when the lower courts confront actual cases where the conflict in values must be concretely resolved. Part V argues that the clashing values are too important to be resolved with a false reconciliation. It recommends that courts reviewing sex offender commitment schemes understand how they are actually administered in concrete cases and concludes that the official narrative of sex offender commitments is, to a material degree, fiction.

Keywords

sex offenders, sex offender commitment, state supreme courts, criminal procedure, *In re Linehan*, *State ex rei. Pearson v. Probate Court*, *In re Blodgett*

Disciplines

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Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use

by

Eric S. Janus

Blossoming during the heyday of psychiatric “fix everything” optimism, the idea of committing sex offenders to mental hospitals to be “cured” appeared to have failed and died by the 1980s.¹ But reports of its demise were premature. Like cicadas, insects that lie dormant for years between plague-like onslaughts, civil commitment for “mentally disordered” sex offenders is back. It has returned in a more robust, and potentially more dangerous, form. Whereas the main thrust of the first generation sex offender commitment statutes was to divert certain sex offenders from prisons to hospitals in order to treat in a humane manner those too sick to deserve punishment,² the second

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generation statutes assert the right to use civil incarceration *after* and *in addition to* criminal punishment³ to contain those who are “too dangerous” to be released from prison.⁴

These second generation laws⁵ are rooted in the legitimate governmental interest in preventing sexual violence. They claim to be civil rather than criminal, regulatory rather than punitive.⁶ Thus, these statutes claim to be exempt from key constraints imposed by the constitution on criminal law interventions, such as the prohibitions against double jeopardy⁷ and ex post facto laws,⁸ the right to a trial by jury,⁹ and the right to insist upon the highest standard of proof.¹⁰ Furthermore, they appear to contravene the prohibitions against criminalizing

a status¹¹ as well as those against basing criminal conviction on predicted, rather than committed, crimes.¹²

This claim of exemption is not an incidental aspect of sex offender commitment schemes, but rather the very basis courts use to legitimize their existence. These laws have developed, often in the white light of intense media and political activity, to deal with the impediments created by criminal constitutional protections.¹³ The explicit purpose of sex offender commitment laws is to

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prevent the release of sex offenders from prison when they have completed their prison sentences.

Thus, these laws place two important objectives in conflict: preventing sexual violence and protecting basic constitutional rights. Powerful stories of sexual violence, told and re-told, create a legitimate and long-overdue mandate to prevent sexual violence.¹⁴ In conflict are the "great safeguards which the law adopts [to protect individuals] in the punishment of crime and the upholding of justice."¹⁵ The prevention mandate seeks to avoid these very safeguards.

Sex offender commitment laws present courts with a difficult choice: either allow creative efforts to prevent sexual violence or enforce traditional constitutional safeguards constraining the power of the state to deprive citizens of their liberty.¹⁶ Three state supreme courts have deflected this hard choice while upholding sex offender commitment schemes.¹⁷ As part of their "official narrative" that legitimizes sex offender commitments, the courts claim that society can have prevention and still maintain the primacy of the criminal justice system. This narrative neutralizes the conflict in values by claiming that sex offender commitments are just like mental illness commitments, a small, discrete area of the law unprotected by the safeguards of criminal procedure. This article shows the dissolution of the values-reconciliation in these official narratives when courts confront concrete cases and the intense public pressure to lock up sex criminals.

Part I of this article explains that sex offender commitments need to be legitimized because they appear to encroach on fundamental American legal values. Part II describes the official narrative that three state supreme courts have developed to justify sex offender commitments. Part III of the article examines the violent public and political reaction to one attempt to implement the legal limitations actually contained in, but never before followed, in Minnesota's official narrative. Part IV uses the corpus of sex offender commitment cases in Minnesota to show that the official narrative is reduced to a "legal fiction" when the lower courts confront actual cases where the conflict in values must be concretely resolved.¹⁸ Part V argues that the clashing values are too important to be resolved with a false reconciliation. It recommends that courts reviewing sex offender commitment schemes understand how they are actually administered in concrete cases and concludes that the official narrative of sex offender commitments is, to a material degree, fiction.

I. THE NEED FOR LEGITIMIZATION OF SEX OFFENDER COMMITMENTS

Sex offender commitments push the boundaries of

standard civil commitment.¹⁹ They use preventive detention to accomplish purposes that hitherto have been reserved exclusively for criminal law. Contemporary sex offender commitment laws are, by statutory definition, designed to prevent "crimes."²⁰

The fundamental constitutional legitimacy of standard civil commitment laws has been, for the most part, assumed rather than proven.²¹ But sex offender commitment laws are different. The questionable constitutionality of their inadequately defined limits demands special justification or legitimization. In contrast to years of jurisprudential silence on the substantive limits of standard civil commitment,²² the advent of second generation sex offender commitment laws has spawned a spate of cases directly addressing the perimeters of their constitutionality.²³

Sex offender commitment schemes were enacted precisely because standard civil commitment laws were not broad enough to cover sex offenders.²⁴ The targets of sex offender commitments do not appear to be "crazy" or "mentally ill," at least not in the sense traditionally required for standard civil commitment.²⁵ Furthermore, the societal motivations for sex offender commitments appear to differ from those underlying standard civil commitments. For instance, many standard civil commitments are based on the *parens patriae* power of the state and thus have a rather benign flavor to them: people who are too ill to make their own decisions, and whose illnesses are so serious as to be potentially harmful, are protected by society from themselves and often given significantly therapeutic services.²⁶ The other key use of civil commitment has been to protect the public from dangerous individuals, a use based on the police power of the state. This use has been explicitly approved in a series of cases decided by the U.S. Supreme Court.²⁷ The most obvious context for these cases has been the use of civil commitment to incarcerate insanity acquittees—those whose mental illness was so severe as to render them non-responsible for crimes they had committed—as well as those deemed incompetent to stand trial.²⁸

Sex offender commitments depart from these paradigms. They do not arise out of a benign, *parens patriae*, motive.²⁹ The subjects of sex offender commitments are not incompetent to make decisions about their own mental health treatment.³⁰ And they have not been found incompetent to stand trial or not guilty by reason of insanity.³¹

Sex offender commitments possess many of the qualities that elicit condemnation of "preventive detention."³² Most centrally, unlike standard civil commitments, sex offender commitments are aimed directly at those guilty of criminal acts,³³ and are explicitly intended to circumvent the traditional strict

constitutional limitations on the state's power to incarcerate.³⁴ In addition, though courts may categorize them as "civil commitment as usual," sex offender commitments are well outside the traditional boundaries for standard civil commitment. For these reasons, sex offender commitment schemes need special justification or legitimization.

II. THE OFFICIAL NARRATIVES AND ESPOUSED RULES OF SEX OFFENDER COMMITMENTS AS ILLUSTRATED BY THREE STATE SUPREME COURT DECISIONS

Sex offender commitment laws are the crystallization of a particular set of stories about sexual violence.³⁵ Some of these stories, or narratives, are "private;" they are the stories of individuals who have been victimized by sex offenders and the stories of sex offenders whose lives have been caught in the web of these new laws.³⁶ Some of the narratives have become public. These are the narratives that come to represent the reasons for having a law, or its effects, or its legal and ethical issues, or its justifications. Of these public stories, some have been officially adopted, by legislatures or by courts, to explain and justify the laws. These narratives are the "official narratives" of the sex offender commitment laws.³⁷

The stories evolve as they move from the realm of the news media and the legislature to the appellate courtroom. While the most salient stories in the early stages of the development of sex offender commitment laws were stories of sexual violence and pain,³⁸ the official narrative contains other strands. These seek to reassure the legal community and the broader public that this form of preventive detention is legitimate and that the adoption of sex offender commitment laws does not mean a retreat from the fundamental constitutional protections of the criminal law.³⁹

Inherent in the notion of an "official narrative" is a claim to be telling the truth. In the sex offender commitment context, the official narrative concerns a legal proceeding governed by law. Thus, the official narrative implies the existence of a set of rules that translate the official narrative into courtroom practices. I will call these the "espoused rules" of sex offender commitments. These are the rules that the courts *claim* to be applying.⁴⁰

The rules the courts actually use to decide sex offender commitment cases—the "rules-in-use"—reflect the real patterns of decisions and may be quite different from the espoused rules. These departures may be intentional or entirely unconscious.⁴¹ To the extent that the rules-in-use depart materially and consistently from

the official narrative and the espoused rules, the official narrative becomes fiction, not truth.⁴² It is fiction in the sense that the courts tell one story and act another. The true nature of sex offender commitments, reflected in the rules-in-use, remains invisible and untold.⁴³

As with any narrative, the most important points may be made through subtle hints that evoke a particular set of themes or emotions. The most powerful point of the story may, indeed, be a counterpoint to the explicit subject matter of the story. In the sex offender commitment context, the official narrative hews to such a theme, deftly expressed as an ethos or emotional tone to the stories. It is communicated as much by the manner in which the courts tell the story of the legitimacy of sex offender commitments as by the explicit terms of the story itself.

Supreme courts in three states have upheld sex offender commitment laws: Washington,⁴⁴ Minnesota,⁴⁵ and Wisconsin.⁴⁶ The narratives spun by these courts are deceptively simple. They intend to comfort their readers by reframing the potentially frightening story of unprincipled "psychiatric" preventive detention⁴⁷ into a familiar and safe story: Sex offender commitments are really nothing more than the ubiquitous and limited standard civil commitment. But this simple story is not persuasive. At key points in each of their narratives, the three courts invoke the "principle of criminal interstitiality"⁴⁸ to dispel doubts that sex offender commitment laws are truly legitimate.

A. MENTAL DISORDER, NOT VIOLENCE, IS THE LEAD CHARACTER OF THE NARRATIVE

The narratives spun by each of these courts in justifying sex offender commitments contain the same elements. Each of the narratives begins with the stories of sexual violence that have generated sex offender commitment laws.⁴⁹ Each of the courts identifies the past crimes committed by the defendants and the predictions that sexual violence is highly likely to recur.⁵⁰ Each court identifies the state interest in protecting citizens against this violence, and each characterizes this interest as a "compelling" state interest.⁵¹

Thus far, the narrative is not new. It is the same story that led to the enactment of these laws. But here the official narrative introduces a new theme: mental disorder. Rhetorically and legally, it seems, the story of violence and protective response is no longer persuasive.

It is not immediately clear why this should be so. The story of violence sufficed to persuade legislators that creative approaches to prevention were warranted. Legally, due process simply requires that the state narrowly tailor its actions to meet a compelling state interest, a characterization clearly applicable to focused

protections against sexual violence.⁵² Why do the supreme courts' narratives need to add mental disorder as a significant element of the story to legitimize sex offender commitments? All three courts assume, with varying degrees of explicitness, that dangerousness "alone" is insufficient to justify preventive detention.⁵³ The role of "mental disorder" in the narrative is to offer assurances that the use of preventive detention in sex offender commitments is "safely" circumscribed.

Note that the courts could have assigned this boundary-setting role to the "violence" element of the stories. The limitation on the use of preventive detention could have been accomplished by restricting sex offender commitments to the "most dangerous" sex criminals.⁵⁴ The fact that "mental disorder" was chosen over violence for this role increases the dramatic tension to discover how "mental disorder" legitimizes sex offender commitments.

The "mental disorder" element must accomplish two tasks. First, it must offer reassurance that the use of preventive detention for sex offenders is principled and does not represent an uncontrolled breach in the hitherto high wall around the use of preventive detention.⁵⁵ Robert F. Schopp and Barbara J. Sturgis describe this as the discriminative role for mental disorder.⁵⁶ Second, it must explain why the preventive detention of sex offenders is justified.⁵⁷

Without explicitly saying so, all three courts engage in this analysis. The courts begin with a mechanical argument by analogy. Sex offender commitments are "just like" standard civil commitments.⁵⁸ Both forms of civil commitment ("standard" and sex offender) are based on a simple three-part formula: past acts plus mental disorder plus predicted future harm.⁵⁹ Though most standard civil commitment statutes require a form of "mental illness," and the sex offender commitment statutes require a showing of "psychopathic personality"⁶⁰ or "mental abnormalities" or "mental disorder" or "personality disorder,"⁶¹ these differences are initially dismissed by the courts as mere semantics. The U.S. Supreme Court, they accurately observe, has used a variety of terms to describe the mental status predicate to civil commitment.⁶² One form of "mental condition" is just as good as another for legitimizing sex offender commitments.

B. GENERAL ASSURANCES ABOUT "MENTAL DISORDER"

This simple analogy is unpersuasive. New commitment laws were needed for sex offenders precisely because the mental disorders of sex offenders fell outside of those cognizable in standard civil commitment cases.⁶³ An analogy asserts that two things are so similar that the

known qualities of the first can be attributed to the second. All analogies express an implicit judgment about which aspects of the two things are significant. If the ways in which the things are alike are significant, then the analogy works.⁶⁴ Thus, the narrative must demonstrate that despite the differences, the mental disorders in sex offender commitment provide a basis for limiting preventive detention and for justifying its use that is as "real" as that which delineates the mental illnesses of standard civil commitments.

Further, the attempt to extend the coverage of civil commitment by expanding the term "mental disorder" triggers an underlying skepticism in American culture about the basic validity of psychiatry and its potential for manipulation and misuse.⁶⁵ To be persuasive, the story about the mental disorder element has to neutralize the charge that psychiatric categories are manipulable and unreliable.⁶⁶ Thus, each of the courts attempts to establish that the mental disorder element is a definite and limited one.⁶⁷

Neither of these assurances is particularly convincing. The courts, for example, cannot seem to decide what significance to give the medical definitions of "mental disorder." At times they claim the term "mental disorder" is a legal, not a medical one, but at times they cite medical authority.⁶⁸ The Wisconsin court's explanation merely replaces one rather opaque concept, "disorder," with several others: "normality," "pathology," and "clinically significant."⁶⁹ The Minnesota court characterizes its statute as requiring a "volitional dysfunction" which it suggests, without authority, is somehow comparable to the standard civil commitment definition of "mental illness."⁷⁰ But the court offers no explanation for what a "volitional dysfunction" is,⁷¹ and seems to throw up its hands at the complexity of the subject and simply assert its conclusion: "Whatever the explanation or label, the 'psychopathic personality' is an identifiable and documentable violent sexually deviant condition or disorder."⁷² The Washington Supreme Court argues that the "reality" of "personality disorders" is attested to by its inclusion in the official nomenclature of the American Psychiatric Association, and that the reality of "mental abnormality," which is not included, can be ascertained from the "good faith" testimony of mental health professionals.⁷³

These discussions should be viewed critically, with some measure of skepticism. There is a large and sophisticated body of literature on the issues surrounding the "reality" of various mental disorders,⁷⁴ and none of the courts cite this literature or give the faintest acknowledgment of the density or complexity of the issues. The point of this article, however, is not to

critique the official narrative generated by the courts, but rather to understand it and articulate its rhetorical structure. These discussions must be seen as acknowledgments by the courts of the need for a principled and usable limitation on preventive detention. The courts' narrative endorses the proposition that "mental disorder" must perform a discriminative role⁷⁵ if sex offender commitments are to be legitimate.⁷⁶

Even if the courts' attempts to establish the "reality" of the mental disorder elements were sound, the fundamental analogy would still be unpersuasive. Merely knowing that sex offender commitment statutes discriminate based on a "real condition" is insufficient to provide a *justification* for the discrimination.⁷⁷ That is, the narrative needs to explain why the State may use preventive detention against a sexual offender with a "mental disorder" while it could not use the same technique against a person without such a "disorder."

C. "CRIMINAL INTERSTITIALITY" AS THE KEY LEGITIMIZING PRINCIPLE

The official narrative for sex offender commitments invokes a particular legitimizing principle, which this article will refer to as "criminal interstitiality." Simply put, criminal interstitiality ensures legitimacy by maintaining the primacy and ubiquity of the criminal justice system. The boundaries of civil (non-criminal) confinement are defined *in terms of* the boundaries of the criminal justice system. Civil commitment is permitted to reach only where the criminal justice system cannot reach.⁷⁸ Under this principle, civil commitment is interstitial to the criminal law in two senses: criminal law is the *primary* and *ubiquitous* system for addressing public health and safety issues *through the deprivation of liberty*. Criminal law remains primary in the sense that it is first in line to be used and is by-passed only when its inherent substantive limitations prevent its operation. It remains ubiquitous in the sense that the "secondary" systems take up only a small—and well-bounded—fraction of the work.⁷⁹ Thus, the principle of criminal interstitiality permits criminal law to remain the primary tool for the State to curtail liberty as a means of controlling antisocial, violent behavior, while legitimizing sex offender commitments in defined circumstances beyond the limits of criminal law.

There are deeply entrenched and socially approved boundaries for our criminal law.⁸⁰ The criminal law maintains a sense of moral⁸¹ (and constitutional) force in our society for two reasons. First, it imposes the ultimate interventions (deprivation of liberty and life) *only* under stringent procedural conditions. This fundamental compact—stringent rules for ultimate sanctions—is threatened to the extent the State can utilize the same

interventions (deprivation of liberty) without abiding by the same stringent limitations. Second, criminal law addresses only "actions" for which persons are "responsible" because they have a non-excused criminal intent.⁸² Behaviors that fall outside of these categories are not proper subjects for criminal sanctions.⁸³

Thus, there are two types of human behaviors that are beyond the reach of criminal law. Some behaviors cannot be subject to its reach because of the operation of stringent procedural rules. Others are beyond its reach because of the operation of "substantive" rules about "actions" and "responsibility." For simplicity here, this article will refer to the latter, substantive category as the mental state rules of the criminal law. The principle of interstitiality holds that the state may use the civil system of incapacitation to protect itself, but only against behavior that it is otherwise incapable of reaching because of the inherent limitations imposed by the substantive mental state rules of the criminal law.

The principle of interstitiality preserves the moral force of the criminal law because it retains the basic compact underlying the criminal law: stringent procedural safeguards for ultimate interventions. It does not permit lesser procedural protections merely because the stringent protections have some bite and occasionally result in unpopular outcomes. But it does allow the State to use an alternative system when the criminal law is substantively disabled from addressing the harm posed by a potentially dangerous individual.⁸⁴

The principle of interstitiality, if adopted as a limiting principle for civil commitment, is strongly legitimizing.⁸⁵ It has a solid scholarly pedigree.⁸⁶ It puts a categorical cap on preventive detention, providing a principled boundary which ensures that preventive detention will not swallow the criminal justice system. Finally, the principle of criminal interstitiality serves to situate the concept of "mental disorder" within the legitimizing narratives, thus providing solid grounding for the analogies of the courts.

Of course, the principle of interstitiality has a cost. The principle limits the reach of sex offender commitments to those persons whose mental disorders render them inappropriate for prosecution. This result is sharply at odds with the narratives that gave birth to the sex offender commitment statutes, whose main theme included the need to address predicted crimes by persons who had been, and would continue to be, fully amenable to criminal prosecution. As a result, the courts are reluctant to embrace the principle of criminal interstitiality explicitly. Instead, they evoke its theme by indirect allusion. One of the benefits of the rhetorical techniques of analogy and evocation is that the narrative of legitimization need not squarely resolve this apparent

conflict.

D. THE EVOCATION OF INTERSTITIALITY

The article now examines how the principle of interstitiality is expressed in the narratives of the three state supreme court decisions. It begins with Minnesota, since that court's treatment of the subject is the most direct. Minnesota's sex offender commitment law was enacted in 1939 and has survived unrepealed, though it was recently supplemented.⁸⁷ The original statute authorized the civil commitment of persons with "psychopathic personalities." In *State ex rel. Pearson v. Probate Court*,⁸⁸ the statute was challenged on the ground that it was "so indefinite and uncertain as to make it void."⁸⁹ The court found the statute to be "imperfectly drawn,"⁹⁰ and narrowed its application so that it would be "in conformity . . . with the provisions of the constitution."⁹¹ So narrowed, the statute was held to apply only to persons who "have evidenced an utter lack of power to control their sexual impulses and who as a result are likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrolled and uncontrollable desire."⁹² In 1994, when the Minnesota Supreme Court was again called on to pass on the constitutionality of this statute in *In re Blodgett*, it reaffirmed the vitality of the *Pearson* "utter lack of power to control" test, calling the condition a "volitional dysfunction which grossly impairs judgment and behavior with respect to the sex drive."⁹³

These formulations rely on the principle of interstitiality to justify sex offender commitments, but they do so by evocation, rather than straightforward articulation. The language and concepts used by the court—"utter lack of power to control" and "volitional dysfunction"—recall the volitional prong of criminal law mental state defenses.⁹⁴ More than fifty years earlier, the court noted that the statute specified that such problems of control did not constitute an excuse from crime:

The act before us, in providing for the care and commitment of persons having uncontrollable and insane impulses to commit sexual offenses, treats them as insane. While the public welfare requires that they be treated before they have opportunity to injure others, it does not necessarily follow that their malady must excuse them from criminal conduct occurring in the past.⁹⁵

In 1994, the *Blodgett* court did not characterize the "utter lack of power to control" test as a criminal excuse test either. But the court's 1994 pronouncements are highly ambiguous, especially when considered in their

historical context. In 1972, the Minnesota Supreme Court held that the exclusion of volitional dysfunction from the insanity defense was of doubtful constitutionality:

By the very nature of criminal law and the nature of our statute, volition is an element which almost necessarily must be considered if the statutory defense is to have any substance when applied to many cases, and certainly to this one. This is so because if, as in this case, a defendant might realize in a general way that it is illegal to strike a blow with a knife, but if he did not know that the act was ethically wrong, if he did not "freely and deliberately" choose to commit the act, and if he did not have the will to prevent the act, there is missing an ingredient that has almost *universally been considered essential* before a crime can be committed. As indicated above, a basic postulate of our criminal law is a *free agent* confronted with the choice between doing right and doing wrong and *choosing freely* to do the wrong.⁹⁶

Thus, by adopting a volitional dysfunction test for sex offender commitments in 1994, the court was at least indirectly invoking its 1972 ruling. More to the point, the 1994 court seems to suggest that individuals would be assigned to prisons or hospitals depending on the extent to which "criminal blame" could be assigned to them: "For the legislature which must provide the necessary prison cells or hospital beds, there are no easy answers. Nor are there easy answers for society which, ultimately, must decide to what extent criminal blame is to be assigned to people who are what they are."⁹⁷ In the penultimate paragraph of the opinion, the court asserts that the "moral credibility of the criminal justice system . . . is at stake."⁹⁸ The court supports this assertion with a quote from Professor Paul H. Robinson: "[I]t would be better to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason, than to divert the criminal justice system from its traditional requirement of moral blame."⁹⁹ Put simply, criminal punishment is for those who are blameworthy, and civil commitment for those who are not. This is, of course, the principle of criminal interstitiality.

But the court's parting shot in the opinion left unclear the significance of this discussion: "In the present imperfect state of scientific knowledge, where there are no definitive answers, it would seem a state legislature should be allowed, constitutionally, to choose either or

both alternatives for dealing with the sexual predator."¹⁰⁰ Did the court mean that the legislature could deal with a particular "sexual predator" in both systems? Or, was the court suggesting that, collectively, the group of sexual predators could be dealt with in either system, as individual circumstances dictated?

The facts of the cases are ambiguous, and this prevents a definite conclusion about the significance of the "utter lack of power to control" test. The 1939 *Pearson* case¹⁰¹ reported no facts about the individual to be committed, so there is no way to tell whether he was (or could have been) held criminally responsible for his actions. The individual in the 1994 case, *Blodgett*, had been prosecuted and convicted for his crimes and had served his sentence. These facts suggest quite strongly that the "utter lack of power to control" test is not a test of criminal responsibility. However, the court carefully crafted the question presented so that it could avoid deciding just that point. "Blodgett then petitioned this court for further review, raising, however, only the constitutional challenge. In other words, Blodgett does not challenge here the findings that he has an uncontrollable sexual impulse dangerous to others."¹⁰² Thus, in the court's view, Blodgett did not contest the applicability of the "utter lack of power to control" standard to himself. The court eschewed the opportunity to determine whether or under what circumstances the test would be properly met by an individual who had been held responsible for his crimes.¹⁰³ Thus, a close reading of *Blodgett* reveals that the court spoke distinctly of the principle of criminal interstitiality, even though it carefully insulated the holding from the inconvenient fact that Blodgett had been held responsible for his actions and that his criminal responsibility had never been questioned.

The official story told by the Minnesota Supreme Court, then, uses the language of criminal excuse, thereby evoking the principle of criminal interstitiality. But it does so in an incomplete and somewhat ambivalent way. The court never says that sex offender commitments must be interstitial to the criminal justice system, but its reliance on the "utter lack of power to control" test indicates that the court is operating according to this assumption. Thus, Robert Schopp recognizes that the Minnesota court's "utter lack of power to control" construction "is a classic excusing condition."¹⁰⁴ Katherine Blakey's support for the Minnesota sex offender commitment scheme depends centrally on an interstitial reading of the "utter lack of power to control" story told by *Pearson* and *Blodgett*:

Minnesota's Sexual Psychopathic Personality Statute draws on the notion of legal insanity to

justify the civil commitment of a person who has a SPP [Sexual Psychopathic Personality] or is a SDP [Sexually Dangerous Person]. Because the statutory criteria are parallel to the irresistible impulse insanity test, the constitutional requirement that persons be "mentally ill" before they can be involuntarily committed in the civil system is satisfied.¹⁰⁵

There is substantial evidence that the *Pearson* court's language on control was similarly interpreted by other readers. The *Pearson* "utter lack of power to control" test, subsequently affirmed by the U.S. Supreme Court,¹⁰⁶ became a touchstone for litigation on other first generation sex offender commitment cases.¹⁰⁷ It was clear that many of the courts in those cases regarded the "utter lack of power to control" formulation as key to the legitimacy of the statutes. Appellate decisions upholding the first generation sexual psychopath statutes commonly pointed to the legislative adherence to the *Pearson* "utter lack of power to control" test. Particularly instructive is Judge Bazelon's lengthy analysis of the D.C. Sexual Psychopath Act, which was modeled on the Minnesota Act, in which he characterized the proper subjects for commitment under the act as those "too sick to deserve punishment."¹⁰⁸

Judicial commentary subsequent to the Minnesota court's 1994 reaffirmation of the "utter lack of power to control" standard in *Blodgett* confirms that the story told by that language is the story of criminal interstitiality. Justice Gardebring, who formed part of the majority in *Blodgett*, explained in a subsequent dissent that the "utter lack of power to control" formula of *Blodgett* negates criminal intent:

Either appellant has the capacity to intend his vicious acts, in which case he is properly held accountable in the criminal justice system, or he suffers from the "utter lack of power to control [his] sexual impulses," and is therefore subject to commitment as a psychopathic personality. How can he simultaneously intend his acts and manifest an inability to control his behavior?¹⁰⁹

The narratives of the Washington and Wisconsin courts invoke the principle of criminal interstitiality with similar subtlety and ambiguity. As in the Minnesota case, the principle is positioned critically in the narratives of these courts, appearing in the stories just in time to vanquish the key challenges to the laws.

The Washington court's opinion discusses whether the "primary" diagnoses given to the defendants, "paraphilia not otherwise specified" and "rape as

paraphilia," actually constitute mental illnesses warranting intervention outside of the criminal realm. At the turning point in the court's argument, it chooses language of volition and control to silence the defendants' arguments. The court asserts that people who suffer from paraphilia experience:

recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again. This [is a] cycle of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime.¹¹⁰

As a result, such people require psychiatric treatment in order to "gain control" of their urge to assault.¹¹¹

To be sure, the Washington court does not announce the full implications of its focus on volitional control as a defining characteristic of sex offender commitments. But two of the commentators supportive of the sex offender commitment statute clarify the implications of the court's position. Alexander Brooks, a respected academic whose writing was relied on by the Washington court at a critical juncture of its discussion of the meaning of "mental disability,"¹¹² asserted in his article that sex offender commitments should be limited to those exhibiting "uncontrollable pathological rape. . . . [A] rapist selected for civil commitment," he argued, "should have a recurrent, compulsive urge and a pathological need to repetitively carry out psychologically driven rape."¹¹³ He suggests that the statutory definition is limited to those whose mental pathology "impairs volitional controls and causes them to behave in the compulsive, repetitive, irrational, and self-destructive ways that are typical of mental disorders."¹¹⁴ Marie Bochnewich, in a second article relied on by the Washington court,¹¹⁵ explicitly ties her support for the sex offender commitment statute to the principle of criminal interstitiality. She asserts that sex offender commitments are justified because they are directed against only those sex offenders who "are less blameworthy because they are less capable of exercising self control. . . . These uncontrolled, impulsive sex offenders . . . are least deserving of punishment."¹¹⁶

The Wisconsin court's allusion to criminal interstitiality is still more subtle. It occurs, as with the other two courts, in the context of a discussion of whether the mental disorder at issue is constitutionally sufficient to support civil commitment. In response to the argument

that the statutory category of "mental disorder" is too broad, the court cites the *Diagnostic and Statistical Manual* for authority that the term "is only appropriate when a manifestation of dysfunction crosses the 'boundary between normality and pathology.'"¹¹⁷ But this authoritative definition does not appear to satisfy the court. In the ultimate volley of its argument, the court narrows the statutory definition of "mental disorder." The court takes the statutory language requiring a disorder that "*predisposes* a person to engage in acts of sexual violence"¹¹⁸ and narrows it: The disorder must be one that "*specifically causes* the person to be prone to commit sexually violent acts in the future."¹¹⁹ This small change in language is best understood as the court's attempt to invoke the legitimizing power of criminal interstitiality by suggesting that sex offender commitments apply only to those people whose sexual misbehaviors are "caused" by a disorder and hence beyond their control. Causation rings of determinism, which, in turn, seems incompatible with the imposition of criminal responsibility.¹²⁰

All three courts tell a similar story in order to rationalize sex offender commitments as legitimate "preventive detention." The story told is that sex offender commitments will be applied to a narrow, well-defined set of individuals with a particular kind of "condition," one that is a "mental disorder." In this story, mental disorder serves a discriminative function.

But all three courts feel compelled to refine even that story, and the narrowing hovers around the core notion of criminal interstitiality: that sex offender commitments will be applied only where volitional control is absent or diminished, free will is inoperative, and punishment is inappropriate. This is the story that gives sex offender commitment laws their "moral force."¹²¹ This is the story that explains that the subset of citizens who are committed are just like mentally ill persons, who may be committed without the stringent protections that are normally required when the State deprives a person of liberty.

III. THE CONSEQUENCES OF IMPLEMENTING THE OFFICIAL NARRATIVE: A CASE STUDY

A. THE CONTEXT FOR *LINEHAN I*

The courts resolve the hard policy choice involved in sex offender commitment statute challenges by invoking the principle of criminal interstitiality. But the resolution in the official narrative is a theoretical, doctrinal one. This section explores the explosive consequences of the Minnesota Supreme Court's actual implementation of the principle in *In re Linehan*.¹²² This story demonstrates that the theoretically sound balance

imposed by the principle of criminal interstitiality falters upon application. In concrete cases, the powerful public and political mandate for prevention preempts the traditional safeguards of the Constitution.

The early years of the Minnesota sex offender commitment law give context to this story. *Pearson* adopted the "utter lack of power to control" test in 1939. During the 1940s, 114 individuals were committed under the law.¹²³ The Minnesota Supreme Court decided one additional sex offender commitment case during this period,¹²⁴ but did not mention the "utter lack of power to control" test. Nonetheless, in its early years, the law appears to have had a set of rules-in-use that was consonant with the espoused excuse-oriented "utter lack of power to control" legitimating construct. Thus, the law was used chiefly to hospitalize people who exhibited a variety of sexual behaviors that were illegal but relatively benign and non-violent. These commitments were often relatively brief.¹²⁵ They were viewed as a humane diversion from the criminal system for people whose "deviant" sexual interests were "more appropriately" treated as illness than crime.¹²⁶ Thus, in a sense the law served a purpose interstitial to the criminal justice system.¹²⁷

The 1960s through late 1980s saw the law decline into relative disuse.¹²⁸ During this period, the Minnesota Supreme Court decided six additional cases involving the psychopathic personality commitment law.¹²⁹ In only one, *Clements*, did the court even mention the "utter inability to control" standard.¹³⁰ Beginning in the early 1990s, prosecutors in Minnesota rediscovered the law,¹³¹ but the larger social context in which the law had been developed was forgotten or ignored. The context for the resurrection of the law was public outcry over sexual violence committed primarily by recently released prisoners,¹³² a context decidedly different from that in which the law had originally been used and justified. The passage of time, along with the transformation of social context, reshaped the rules-in-use.

Rather than a diversionary program for non-violent, "deviant" individuals, the law became a tool of social control applicable to the "most dangerous" sexual predators.¹³³ In this new context, where the focus became not how mad but how bad the individual was,¹³⁴ the archaic *Pearson* test seemed like surplusage.¹³⁵

Of the appellate cases decided in 1990, 1991, and 1992, fifty-seven percent contained no mention of the *Pearson* "utter lack of power to control" standard.¹³⁶ In a small number of cases, the defendant pointed out that the trial court had ignored the standard. In these cases, the Court of Appeals uniformly overruled the argument, stating that the evidence was sufficient to support the commitment.¹³⁷ None of those cases contained any

discussion of the meaning of the "utter lack of power to control" element.

Gradually, the Court of Appeals began to acknowledge that *Pearson* required a showing of "utter lack of power to control." Still, in these cases, the court did not discuss the meaning of the term. It characterized the issue as one of fact and dismissed all claims based on this mental disorder element by adopting a deferential review of the trial court's determination.¹³⁸ In no case was failure to satisfy the "utter lack of power to control" test cited as a basis for reversing a sex offender commitment.¹³⁹

Thus, by the time the constitutionality of the sex offender commitment law was before the Minnesota Supreme Court in *Blodgett*, the "utter lack of power to control" test had been on the books for fifty-five years, but had hardly been mentioned. It had never served as a basis for reversing or denying a commitment in an appellate court case. In *Blodgett*, a major thrust of the dissent was that this abandonment of the "utter lack of power to control" test rendered the statute unconstitutional.¹⁴⁰ In the majority's analysis, this was beside the point. The fact that the statute *could* be applied incorrectly did not mean that it had *no* legitimate sphere. The court reaffirmed the *Pearson* "utter lack of power to control" test as the legitimizing element of the statute, and, in effect, promised to use appellate review to bring the rules-in-use into concordance with this official narrative.¹⁴¹

B. THE MINNESOTA SUPREME COURT IMPLEMENTS THE OFFICIAL NARRATIVE: *LINEHAN I*

Five months after deciding *Blodgett*, and fifty-five years to the day after *Pearson* announced the "utter lack of power to control" test, the Minnesota Supreme Court made good on its promise. For the first time in the statute's fifty-five year history, the supreme court reversed a sex offender commitment. In *In re Linehan*,¹⁴² the court held that the state had failed to meet its burden of proving the "utter lack of power to control" element. It ordered 53 year-old Dennis Darol Linehan released.

During the preceding fifty-five year period, over 300 people had been quietly deprived of their liberty under a law whose constitutionality was justified on the basis of the principle of criminal interstitiality.¹⁴³ When, for the first time, the supreme court actually implemented that principle, all hell broke loose. The story of the *Linehan* case and its aftermath unambiguously show that the public and the political process want an official narrative for sex offender commitments that paints a picture of legitimization but does not pay the concomitant price.

On March 25, 1992, less than two months before

Linehan's mandatory release from prison, the Ramsey County (Minnesota) Attorney's office filed a petition for his commitment as a Psychopathic Personality. Linehan, a convicted kidnapper, strangled his 14 year-old victim in a 1965 attempted sexual assault, escaped from prison in 1975, and within two weeks from the time of the escape attempted to sexually assault a 12 year-old. By 1992, Linehan had served twenty-seven years in prison. After a two week bench trial involving four mental health experts, Linehan was committed as a psychopathic personality. The commitment relieved the State of its legal obligation to parole him.¹⁴⁴

On June 30, 1994, the Minnesota Supreme Court reversed Linehan's commitment for failure to satisfy the *Pearson* "utter lack of power to control" standard. The prosecutor filed a petition for rehearing, delaying Linehan's release. During the ensuing weeks, public and political attention began to focus on the court's decision and Linehan's impending release. The matter headlined local news coverage for many days in a row.¹⁴⁵ A prominent legislator characterized the chief justice of the Minnesota Supreme Court, who wrote for the majority in *Linehan*, as the "zookeeper" who proposed "let[ting] the tigers out one by one to see if they're dangerous."¹⁴⁶ A previously appointed Sexual Predators Task Force¹⁴⁷ held legislative hearings attended by the Governor and the Attorney General to assess the effects of the *Linehan* decision. Politicians characterized the court's decision as potentially devastating to Minnesota's efforts to use sex offender commitment statutes to prevent sexual violence.¹⁴⁸ The Attorney General framed the question generated by *Linehan* thusly: "The question before us today is simple: how do we protect the public from some of the most dangerous criminals in society[?]"¹⁴⁹ He proposed "tough" new laws, including a "sexually dangerous persons" commitment act that eliminated the *Pearson* "utter lack of power to control" standard.¹⁵⁰ The Governor agreed to call a special session of the legislature if the Task Force and legislative leaders could agree on a new sex offender commitment law.¹⁵¹

On August 15, 1994, the Minnesota Supreme Court denied Ramsey County's petition for rehearing. On that date, the State lost the authority to hold Linehan as a "patient" and was obligated to release him on parole. The Linehan matter became front page news and the lead story on local television news broadcasts.¹⁵² The Governor hastily ordered Linehan "paroled" to a cottage on the grounds of the state prison. He was guarded twenty-four hours a day by two guards and required to wear an electronic bracelet around his ankle. The State secretly installed hidden television surveillance cameras in the cottage and monitored Linehan's moves via monitors in an RV "command post" parked 100 yards

away. The taxpayers of Minnesota paid hundreds of thousands of dollars to provide this security for Linehan.¹⁵³

Between August 15 and August 30, media attention intensified. Local talk show hosts, one of whom conducted interviews from her back yard hot tub, vigorously solicited Linehan and his attorneys to be guests on talk shows. Tabloid television shows such as "Geraldo" and "Behind Bars" sought interviews with Linehan and his attorneys. National news wires carried the story.¹⁵⁴ CBS Morning News juxtaposed an interview of Linehan's 1975 attempted rape victim with a debate-format discussion of the legal issues between one of Linehan's attorneys and the Ramsey County Attorney.¹⁵⁵ The underlying question posed in all the news coverage was whether the state could keep a "sex psychopath" locked up even though he had served his time in prison: Will the constitution stand in the way of society's efforts to stop this man from raping again?

On August 30, 1994, the Governor called the legislature into special session to debate the proposed Sexually Dangerous Persons Commitment Act.¹⁵⁶ This Act explicitly rejects the *Pearson* "utter lack of power to control" standard, thereby providing that persons with a "mental disorder" may be civilly committed even if they retain full control of their sexual behavior.¹⁵⁷ Its chief advocate, the Attorney General, acknowledged that the constitutionality of the new law was unclear.¹⁵⁸ Media editorials split as to the constitutionality and advisability of using civil commitment to lock up sex offenders after they have served their full criminal sentences.¹⁵⁹ The legislature retained the old Psychopathic Personality Law on the books as a safeguard in case the courts determined that the new law was unconstitutional.¹⁶⁰ Despite the constitutional doubts and the greater breadth of the new law as compared to the old psychopathic personality commitment statute (which had garnered only four of seven votes on the Minnesota Supreme Court), both houses of the legislature passed the bill unanimously.¹⁶¹ The Governor immediately signed the legislation.¹⁶² On September 1, 1994, the new Sexually Dangerous Persons Act became effective, and the Ramsey County Attorney's office filed a petition against Linehan under the new law.¹⁶³

Hundreds of sex offenders are released from prison each year in Minnesota.¹⁶⁴ What explains the intensity of the public and political reaction to Linehan's anticipated release? Linehan's crimes were indeed serious, and his case was notorious in Minnesota even before the 1994 decision.¹⁶⁵ In part, the public response reflected the fear that a notorious rapist/murderer would be released to repeat his crimes. Amplified in the heat of the highly contested political campaign of the chief prosecutor for a

seat on the United States Senate, this fear became a firestorm fed by political posturing on crime and violence.

But there is another much more compelling story. This story confirms the moral and legal centrality of the "utter lack of power to control" test. In *Linehan*, the state got caught with its hand in the "preventive detention" till, helping itself to "civil commitment" without paying the "utter lack of power to control" price for it. Hypocrisy sharpens the sting of discovery and correction. Expressions of outrage stemming from this discovery are a measure of the moral distance between the state's false claim of legitimacy and the newly exposed rules-in-use. The *Linehan* decision was not a simple piece of statutory construction. It unearthed and threatened to remedy an embarrassing hypocrisy involving fundamental democratic values.

Taken together, *Blodgett* and *Linehan* demonstrate the centrality of the mental disorder element to the official narrative of sex offender commitments. *Blodgett* adopted the test, and *Linehan*, in the face of a firestorm of protest, insisted on applying it. Together, these two cases suggest an official narrative that legitimates sex offender commitments by applying a real boundary, one defined by the principle of interstitiality. But the *Linehan* story illustrates the enormity of the public and political pressure underlying the mandate for prevention. In an unusual special session, the legislature unanimously enacted the Sexually Dangerous Persons Commitment Act, sending a clear and chilling message to the judiciary: Narratives about the constitutionality of sex offender commitments are fine as long as they do not interfere with the mandate for prevention.

IV. EXPOSING THE RULES-IN-USE: "MENTAL DISORDER" BECOMES A LEGAL FICTION

In the previous part, this article described a visible enforcement of the official narrative and the firestorm of public and political reaction it generated. In this part, the article examines the actual practice of sex offender commitments in Minnesota in the post-*Linehan I* period. With a larger corpus of reported sex offender appellate commitment cases than any other state with a second generation sex offender commitment law, Minnesota serves as an appropriate subject of study to understand the actual operation of sex offender commitments in concrete cases. In evaluating the rules used by lower courts, this article looks to whether the "mental disorder" element serves a discriminative function, and, if so, whether such discrimination is justified by respect for the principle of criminal interstitiality.

In the corpus of Minnesota cases, the "mental disorder" element fails on both grounds. In applying the

"utter lack of power to control" test, the courts have created a set of rules with no discriminative or justificatory power. In the rules-in-use, the mental disorder element becomes a legal fiction, an element of proof that must be invoked, but that does not do any substantive work in the litigation.

The task of formulating workable rules-in-use based on the "utter lack of power to control" test has fallen to the Minnesota Court of Appeals. The task is certainly not an easy one. The rules-in-use must set out a non-arbitrary method for distinguishing between those who merely did not, and those who could not, control their sexual misbehavior. It is the inference from behavior (which the individual did not control) to capacity (which the individual could not control) that furnishes the "mental disorder" justification for sex offender commitments.

This concept of "volitional dysfunction" has consistently baffled judges, forensic professionals, and philosophers.¹⁶⁶ If the "utter lack of power to control" test is to accomplish the discriminative function required for legitimization, the Court of Appeals and similarly situated appellate courts must develop a coherent theory of its meaning. Unfortunately, despite twenty-five cases raising the issue during the post-*Linehan* period, the Court of Appeals has thus far failed to do so.¹⁶⁷ Though the court appears to engage in a process of reasoning about the "utter lack of power to control" test, nowhere in the corpus of its cases can one find a straightforward declarative sentence explaining how one distinguishes incapacity to control (a mental disorder) from a failure to control (criminal behavior).¹⁶⁸

The Court of Appeals has not only failed to establish a workable test, it sends conflicting messages that frustrate efforts to extrapolate any coherent pattern. In some of its opinions, it has seemed to focus on impulsiveness as the meaning of "utter lack of power to control."¹⁶⁹ In others, the court has taken pains to explain how behavior that appears planned and deliberate can reflect "utter lack of power to control."¹⁷⁰ In some cases, the court has pointed to the individual's lack of acknowledgment that his behavior is wrong.¹⁷¹ In others, the court has found a mental disorder where "he knows what he is doing and that it is wrong, but he chooses to do it anyway."¹⁷² In some opinions, the court has relied on evidence of the individual's misbehavior in controlled settings.¹⁷³ In others, only the individual misbehavior when not supervised supported such a finding.¹⁷⁴ Finally, in some cases, the court has also suggested that proof that the individual's "will" is overwhelmed by strong sexual impulses,¹⁷⁵ or that the individual's behavior is strongly "compulsive" points to a mental disorder.¹⁷⁶ In others, it is the strength of the individual's will to have sex that provides the factual support.¹⁷⁷ Frequently, what supports

the finding is simply that the individual has repeatedly engaged in prohibited sexual behavior despite the consequences,¹⁷⁸ a characterization that would apply to all repeat sex offenders.

Even the two cases in which the court reversed a finding of "utter lack of power to control" do not help develop a coherent theory. In *In re Schwenger*, the court reversed a commitment of a non-violent pedophile. The court clearly understood "utter lack of power to control" as requiring impulsiveness and found that the individual's "planned and calculated" behaviors were inconsistent with such a finding.¹⁷⁹ The *Schwenger* case came directly on the heels of *Linehan* and appeared to be the beginning of an "impulsiveness" theory of "utter lack of power to control." But the court quickly altered its course. In *In re Bieganowski* and a series of other cases, the court explained that planning and deliberation could be consistent with "utter lack of power to control."¹⁸⁰

The Court of Appeals has reversed only one other case since *Linehan*. In *In re Mentzos*,¹⁸¹ the court overturned the lower court's "utter lack of power to control" conclusion, but only on the grounds that it was not supported by any expert testimony. *Mentzos* is devoid of any theory defining what constitutes "utter lack of power to control."

Although the Court of Appeals has failed to articulate a theory, it is possible that a theory is inherent in its cases. To test this hypothesis, some principled theories of volitional incapacity are set out here for comparison with the court's decisions.

In the most ubiquitous image underlying the "utter lack of power to control" concept, the individual has a "predatory sex impulse" and lacks the "power to control it."¹⁸² The "power" and the "impulse" are seen as two separate parts of the individual self.¹⁸³ The metaphorical image is of the person's "higher" self struggling against the overpowering sexual impulses of the "lower" self. Psychologists describe this mechanism as "ego-dystonic,"¹⁸⁴ in the sense that the person "himself" is unhappy with the sexual impulses, tries to suppress or contain them, but eventually fails. The person is described as being "overpowered" by the strength and intensity of the impulses.¹⁸⁵

The volitional theories of both Morse¹⁸⁶ and Schopp¹⁸⁷ are consistent with this ego-dystonic approach and have the potential to perform a real sorting function. These theories translate volitional dysfunction into intense psychic pain as well as impaired cognitive and rationality functions. Psychologists and psychiatrists could identify circumstances in which psychic pain is a predominant feature or in which cognitive and rationality functions are severely impaired.¹⁸⁸ These are psychic phenomena that are, subject to the usual epistemological

problems associated with measuring mental and emotional states, relatively verifiable.¹⁸⁹ To make the test more principled, the courts would be required to set a threshold, as a matter of law, beyond which the "pain" or the cognitive impairment would have to pass.¹⁹⁰ If this threshold were equivalent to the threshold for excusing criminal behavior, then the test would truly fulfill the theme of criminal interstitiality evoked in the official narrative.

The Court of Appeals' early post-*Linehan* decision in *Schwenger* appeared to flirt with this theory of volitional dysfunction. In *Schwenger*, the court reversed a commitment because Schwenger's behavior was "planned and calculated," distinguishing "plotting, planning, seductions, payments, and coercive behavior . . . from an impulsive lack of control."¹⁹¹ In this line of reasoning, planning is evidence that "conscious cognitive processes have intervened,"¹⁹² negating the conclusion that it is the "lower" impulses that are "in control" of the person's actions.¹⁹³ In *In re Kunshier*,¹⁹⁴ the court seems to consider both Morse's pain theory and Schopp's rational impairment theory, citing testimony that Kunshier's "impulse to rape becomes all intrusive" and that his behavior is "impulse driven past any point of rational control."¹⁹⁵ Similarly, in *In re Hart*, the court recited that the individual "experiences intense urges to sexually offend despite a victim's protests or resistance, and has profound difficulty controlling his behavior."¹⁹⁶

However, the court never fully articulated this theory of volitional dysfunction, did not set legal thresholds, and quickly abandoned any required showing of impulsiveness. In *Bieganowski* and *Mayfield*, the court decided that "uncontrollability" was consistent with "planning and controlled behavior."¹⁹⁷ In addition, the court made clear that it did not have in mind any sort of internal pain or internal struggle test. In both *Adolphson* and *Irwin*, the court appears most impressed with the fact that the individuals seemed to view their deviant sexual behavior as acceptable.¹⁹⁸

Other theories of volitional dysfunction do not rely on a bifurcation of the self into "higher" and "lower" parts. In these theories the individual's crimes flow from some core of his personality structure, not from an "internal struggle" between the lower impulses and the higher faculties. In this "ego-syntonic" approach to the control issues, all aspects of the personality are consonant. Volitional dysfunction is found when the sexual violence is so much a part of the person's psychological makeup that he "cannot" make any other choices.¹⁹⁹ *Irwin* and *Adolphson*, discussed above, both appear to adhere to this sort of a theory.²⁰⁰

At a literal level, integrated self theories are much too broad. Acting in accord with the core of one's own

personality is certainly not a sign of volitional dysfunction, but rather of normal psychological functioning.²⁰¹ But there is a narrower, more charitable reading of the integrated self test which is much more discriminative and perhaps closer to the principle of criminal interstitiality. Under this narrower construction, action is beyond the actor's volitional control to the extent that it would be continued despite negative environmental consequences. According to philosophers Culver and Gert, if a person always acts contrary to strong negative disincentives in the environment, he or she lacks the volitional ability to act otherwise.²⁰² The American Psychiatric Association Task Force Report agrees, arguing that the best evidence of the ability to control behavior is a person's adaptation of his or her behavior to changing environmental conditions.²⁰³

The underlying theory is that the consequences flowing from misbehavior are so negative and, more importantly, so patent, that all "rational," "volitionally-able" individuals would have avoided the misbehavior.²⁰⁴ However, there are convincing arguments that even this narrowed integrated self test is not a meaningful account of volitional dysfunction. It is not discriminative, because virtually all repeat criminal behavior fits this test.²⁰⁵ Thus, it fails to discriminate between those who "could not" and those who merely "did not" control their behaviors.

At a more philosophical level, Daniel Dennett's insightful discussion of this issue shows that the conclusion that a person "could not have done otherwise" may say something about the "character" of the person, but says nothing about any "dysfunction" or about his or her moral or criminal responsibility:

"Here I stand," Luther said. "I can do no other." Luther claimed that he could do no other, that his conscience made it *impossible* for him to recant. He might, of course, have been wrong, or have been deliberately overstating the truth. But even if he was—perhaps especially if he was—his declaration is testimony to the fact that we simply do not exempt someone from blame or praise for an act because we think he could do no other. Whatever Luther was doing, he was not trying to duck responsibility.²⁰⁶

But given that even the philosophers are undecided on the point, it is worth noting that some decisions of the Court of Appeals appear at least implicitly to adopt the environmental-consequences theory. These cases point out that the defendant continued to engage in criminal or anti-social activity despite numerous sanctions for his bad behavior. For example, in *Patterson*, the court referred,

with apparent approval, to the state hospital's report that assumed that "'lack of power to control' relates to choosing to commit the offenses despite negative consequences."²⁰⁷ In *Kunshier*, the court cited testimony that the individual's "sexual impulses override any normal fear of capture or consequences, and he has admitted feeling 'fearless' while committing these assaults."²⁰⁸

If the court had hewed to this environmental-consequences test, its "utter lack of power to control" jurisprudence might have had some legitimizing discriminative power. But the court's 1995 *Toulou* decision demonstrates that the court had no such narrowed test in mind. Turning the theory on its head, the court cited *Toulou's* *conformance* to external stimuli as the central evidence supporting the finding of "utter lack of power to control."²⁰⁹

This analysis shows that the concept of "utter lack of power to control," as established by the Minnesota Court of Appeals, has neither discriminative nor justificatory content. Instead, the court relies on pseudo-reasoning: statements purporting to sound like legal reasoning that are in reality tautological and hence non-explanatory.

Recall that the central, and most difficult, task of the "utter lack of power to control" construct is to demonstrate that a *mental* dysfunction legitimizes sex offender commitments. The key move is to infer mental incapacity from behavior. The philosophical theories provide rules for making that transformation, but the Court of Appeals has followed none of them. Consider the following, which the court has proffered as explanations of the inference from behavior to mental incapacity:

- "He explained that an utter lack of control begins when the individual has an urge that *cannot be delayed*." Here, "experts explained how uncontrollability could occur with planning and controlled behavior."²¹⁰
- "The psychologists' explanations show that, while Young may show planning and premeditation by his grooming behavior, his behavior is nonetheless impulsive and without volitional control in that he acts upon *uncontrollable* desires when presented with the opportunity to sexually abuse young girls."²¹¹
- "The trial court concluded that Patterson 'demonstrates an utter lack of power to control his conduct with regard to sexual matters.' In support of this finding, Dr. [M] testified that he believed that Patterson had an utter lack of power to control his

sexual impulses. Once 'the impulse has been created,' [M] explained, Patterson 'cannot control over time *the need to act* upon the urge.'²¹²

- "Dr. [M] testified that appellant met this criteria (sic), because once appellant has the urge to be sexually active with an individual, he is *compelled* to do so, whether it occurs in several minutes or several hours."²¹³
- "Dr. [F] defines the term 'utter lack of control' in terms of an impulse control problem 'in which there is an *inability to stop* one's behavior despite being in an area of risk of being apprehended or caught.'²¹⁴

Though these passages have the rhetorical form of explanations, they simply replace one abstract psychological construct ("utter lack of power to control") with another equally opaque psychological construct ("inability to stop," "compelled to do so," "cannot control," "uncontrollable desires," "cannot be delayed").²¹⁵ They do not explain how "did not" is transformed into "could not,"²¹⁶ and hence they do not perform the necessary discriminative and justificatory tasks claimed for the mental disorder element.

V. HOLDING THE COURTS TO HARD CHOICES: CLOSING THE GAP BETWEEN THE OFFICIAL NARRATIVE AND THE RULES-IN-USE

Courts confronting challenges to sex offender commitment statutes face two strong and opposing pulls. On one hand, the mandate for prevention demands long-overdue, creative action to prevent sexual violence. On the other, fundamental American legal values—the "great safeguards" that American jurisprudence enforces when the State deprives its citizens of their liberty—abhor unlimited, unprincipled preventive detention.

Courts have three choices to resolve this dilemma. The first two acknowledge that the two pulls are largely irreconcilable in the context of civil commitment. The first path strikes down sex offender commitment laws in order to maintain the primacy of the criminal system in addressing antisocial conduct. The second path upholds sex offender commitment laws, frankly acknowledging that they represent a hitherto unprecedented breach in our reliance on the criminal justice system. Two courts have taken the first path.²¹⁷ None has taken the second path successfully.²¹⁸

The third path is the one taken by the supreme courts of Minnesota, Wisconsin, and Washington. These courts uphold sex offender commitment schemes in order to vindicate the mandate for protection. But they also

insist on respect for the traditional constitutional protections and the primacy of the criminal law that those protections entail. They reconcile this dichotomy through a narrative that portrays sex offender commitments as business-as-usual civil commitments that fit comfortably into the traditional and limited exemption from criminal constitutional protections.

The core truth of this narrative is that civil commitments are legitimate to the extent that they fill *only* the interstices unaddressed by the criminal law. This truth is a hard truth, because it stands precisely in the path of the mandate for prevention. But it is the truth, nonetheless, and that is why the three courts were compelled to include it in their narratives.

But even if the three courts have told the truth about the principle of criminal interstitiality, their narratives are nonetheless fiction. Creative, aggressive, preventive civil confinement simply is not, and cannot be, consistent with the primacy of the criminal protections in our system. The courts have sought to preserve the integrity of their narratives by invoking the principle of criminal interstitiality; but in doing so, they have told a story that cannot be true.

What are the consequences of a system that countenances the fictionalization of its legitimizing narrative? Chris Argyris and Donald Schon, in a somewhat different context, suggest that a system that does not act to bring its "espoused theories"²¹⁹ into consonance with its actual practices is in, at best, a "tenuous equilibrium."²²⁰ Eventually, the dissonance will come out. And when it does, it tends to come out in revolutionary rather than evolutionary ways.²²¹ A system based on fiction invites collapse.

Courts reviewing sex offender commitment laws should evaluate them as they truly operate. Espoused claims for legitimacy need to be checked against actual rules-in-use. The Minnesota experience demonstrates that the legitimizing constructions of high courts can be systematically fictionalized by the lower courts. Indeed, given the strong mandate for prevention and the narrowness of the legitimizing conditions, it is likely that the experience of other states will be similar. The mandate for prevention seeks to prevent criminal behavior. The fundamental values of our Constitution and our Nation tell the hard truth that crime is punished and prevented through the criminal justice system. Legitimizing narratives that minimize this truth will, in the end, be fiction.

Prevention of sexual violence ought to have as its foundation stories of pain, response, and legitimacy that are truth, not fiction.²²² Otherwise, prevention of sexual violence will find its fate tied to unlimited, unprincipled preventive detention. The truth about sexual violence

cannot be vindicated by doing such violence to the "great safeguards" of our constitutional and moral values.

NOTES

¹ See John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 661 (1992) (remarking on the "buoyant therapeutic optimism" expressed by legislation); William D. Pithers, *Relapse Prevention with Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES & TREATMENT OF THE OFFENDER 343 (William L. Marshall et al. eds., 1990) (describing underlying medical model as a failure, "outmoded and based on false assumptions."); see also SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 739-40 (3d ed. 1985); William D. Erickson, *The Psychopathic Personality Statute, Need for Change* (1991) (Unpublished manuscript on file with the *Williams Mitchell Review*) [hereinafter Erickson, *Psychopathic Personality Statute*]; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PUB. NO. 98, *PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S* (1977) [hereinafter *GAP Report*]; William D. Erickson, "*Northern Lights*": *Minnesota's Experience with Sex Offender Legislation*, AMERICAN ACAD. PSYCHIATRY & L. NEWSLETTER (American Acad. of Psychiatry and the Law, Bloomfield, Conn.), April 1995, at 3 [hereinafter *Northern Lights*].

² See *Millard v. Harris*, 406 F.2d 964, 966 (D.C. Cir. 1968) ("The Sexual Psychopath Act was enacted in 1948 as a 'humane and practical approach to the problem of persons unable to control their sexual emotions.'") (quoting SENATE COMM. ON THE DISTRICT OF COLUMBIA, PROVIDING FOR THE TREATMENT OF SEXUAL PSYCHOPATHS IN THE DISTRICT OF COLUMBIA, S. REP. NO. 80-1377, at 5 (1948)); *GAP Report*, *supra* note 1. The first generation laws had a social control purpose as well. Sarah H. Francis, Note, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment*, 29 SUFFOLK U. L. REV. 125, 145 (1995) (stating that the purpose of the 1939 Minnesota Psychopathic Personality Commitment Act was to enable the state to commit individuals before they commit "horrifying crimes").

³ See MINN. STAT. § 244.25, subd. 7 (1994) (requiring a risk assessment of sex offenders prior to their release from a correctional facility); WASH. REV. CODE ANN. § 9.94A.151 (West Supp. 1996) (providing for the notification of county prosecutors prior to the release of persons from a correctional facility who may meet the commitment criteria); OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, *PSYCHOPATHIC PERSONALITY COMMITMENT LAW*, at xii (Feb. 1994) ("Approximately 90 percent of those committed under the psychopathic personality statute since January 1991 had just completed a prison sentence . . . and were scheduled to be released when commitment proceedings were initiated."); see also David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 566-67 (1992) (seriatim use of sex offender commitments is "unique"); John L.

Kirwin, *Civil Commitment of Sexual Predators: Statutory and Case Law Developments*, HENNEPIN LAWYER, Sept.-Oct. 1995, at 22.

⁴ See Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709 (1992).

⁵ The following are recently enacted sex offender commitment laws: ARIZ. REV. STAT. ANN. §§ 13-4601-4609 (West Supp. 1995); CAL. WELF. & INST. CODE §§ 6600-6608 (West 1996); IOWA CODE ANN. §§ 709C.1-.12 (West Supp. 1996); KAN. STAT. ANN. §§ 59-29a01-a17 (1994); MINN. STAT. ANN. § 253B.02, subds. 7a, 18a, and 18b and § 253B.185 (West 1992 & Supp. 1996); N.J. STAT. ANN. § 30:4-82.4 (West Supp. 1996); WASH. REV. CODE ANN. §§ 71.09.010-.092 (West 1992 & Supp. 1996); and WIS. STAT. ANN. §§ 980.01-.13 (West Supp. 1996).

⁶ See Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329 (1989).

⁷ Sex offender commitment laws are often applied against people who have served their entire sentences for crimes they have committed. Imposing an additional sentence of incarceration for the same crime would violate the protection against double jeopardy. See *United States v. Halper*, 490 U.S. 435, 440 (1989); *Artway v. Attorney Gen.*, 876 F. Supp. 666 (D.N.J. 1995); *Young v. Weston*, No. C94-480C, 1995 U.S. Dist. LEXIS 12928 (W.D. Wash. Aug. 25, 1995). Sex offender commitment statutes claim that they can impose additional periods of incarceration without violating this provision. See *In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996); *In re Young*, 857 P.2d 989 (Wash. 1993).

⁸ The prohibition against ex post facto laws prevents the state from increasing a person's criminal sentence after it has been imposed. See *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-92 (1789)); *Artway*, 876 F. Supp. 666; *Young v. Weston*, 1995 U.S. Dist. LEXIS 12928.

⁹ See generally *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (discussing general nature of right to, and importance of, jury trial). Some sex offender commitment laws provide for jury trials. ARIZ. REV. STAT. ANN. § 13-4605 (West Supp. 1995); IOWA CODE ANN. § 709C.5 (West Supp. 1996); KAN. STAT. ANN. § 59-29a06 (1994); WASH. REV. CODE ANN. § 71.09.050 (West Supp. 1996); WIS. STAT. ANN. § 980.03(3) (West Supp. 1996).

¹⁰ Some sex offender commitment laws require the highest standard of proof beyond a reasonable doubt. ARIZ. REV. STAT. ANN. § 13-4606 (West Supp. 1995); CAL. WELF. & INST. CODE § 6604 (West 1996); KAN. STAT. ANN. §§ 59-29a07 (1994); WASH. REV. CODE § 71.09.060 (1995); WIS. STAT. § 980.05 (1994); see also *In re Winship*, 397 U.S. 358 (1970). Others require some lesser showing. MINN. STAT. § 253B.18 (1995)

(requiring proof by clear and convincing evidence). It is generally held that the highest standard (i.e., "beyond a reasonable doubt") does not apply to civil commitments, see *Addington v. Texas*, 441 U.S. 418 (1978), though the precise reach of *Addington* has not been adjudicated.

¹¹ A key feature of civil commitment incarceration is that it is predicated on the existence of a status, often expressed as a requirement for the existence of a "mental disorder." See CAL. WELF. & INST. CODE § 6600(a), (c) (West Supp. 1996); IOWA CODE ANN. § 709C.2, subd. 4 (West Supp. 1996); KAN. STAT. ANN. § 59-29a02(a) (1994); MINN. STAT. ANN. § 253B.02, subd. 18b (West Supp. 1996); WASH. REV. CODE ANN. § 71.09.020(1) (West 1992 & Supp. 1996); WIS. STAT. ANN. § 980.01(7) (West Supp. 1996); see also Paul H. Robinson, *Foreword: The Criminal - Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993).

¹² See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.2, at 195 (2d ed. 1986) ("[T]he common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined."); see also C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the Politically Ill*, 19 WM. MITCHELL L. REV. 99 (1993) (discussing constitutional deficiencies of Minnesota's Psychopathic Personality Law).

¹³ See generally Boerner, *supra* note 3; LaFond, *supra* note 1; see also Alexander D. Brooks, *The Incapacitation by Civil Commitment of Pathologically Violent Sex Offenders*, in *LAW, MENTAL HEALTH, AND MENTAL DISORDER* 385 (Bruce Sales & Daniel Shuman eds., 1996); Kirwin, *supra* note 3; Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 KAN. L. REV. 887 (1994).

¹⁴ Kansas' Sexually Violent Predator Act was passed "[i]n response to the urging of an Ad Hoc Sexual Offender Task Force given impetus by the parents of Stephanie Schmidt . . ." *In re Hendricks*, 912 P.2d 129, 140 (Larson, J., dissenting), *cert. granted*, 116 S. Ct. 2522 (1996). Stephanie Schmidt was kidnapped, sodomized, and murdered in 1993. See *State v. Gideon*, 894 P.2d 850, 857 (Kan. 1995). Megan's Law, consisting of a group of bills concerning sex offenders, "was named after the second female child abducted, raped and murdered during [1993 in New Jersey]." *Doe v. Poritz*, 662 A.2d 367, 372 (N.J. 1995). Washington's Community Protection Act of 1990 was passed after an investigation by a task force commissioned by the governor, which was convened as the result of "two violent crimes: the murder of a Seattle woman by an offender on work release, and the violent sexual attack on a young Tacoma boy." *In re Young*, 857 P.2d at 992 (citing GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, FINAL REPORT, at I-1). The enactment of Wisconsin's sexual predator law "was preceded by a widely publicized, highly politicized and extremely emotional public debate following the release of the notorious sex offender Gerald Turner." *State v.*

Post, 541 N.W.2d 115, 138-39 (Wis. 1995) (Abrahamson, J., dissenting), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204). Turner had sodomized and murdered nine-year-old Lisa Ann French in 1973. See *Turner v. State*, 250 N.W.2d 706 (Wis. 1977).

Professors Rideout and La Fond explore the transformation of these stories into law. See La Fond, *supra* note 1, at 671-77; J. Christopher Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. PUGET SOUND L. REV. 781, 783 (1992) (examining "the originating narratives that led to the demand for a change in Washington law regarding violent and predatory sex offenders").

¹⁵ *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1383 (1996) (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).

¹⁶ See Brooks, *supra* note 13, at 385, framing the question posed by sex offender commitment statutes as:

. . . whether a state is helpless to protect women and children from the palpable dangers caused by previously convicted dangerous sex offenders who are again at large, who are known to be recidivistic and pathological, and whose persistent and repeated sex crimes over a long period of time establish beyond a reasonable doubt that their future victims are in immense danger.

¹⁷ See *infra* notes 47-49.

¹⁸ In Professor Perlin's terminology, the official narrative becomes "pretextualized" when it is applied in the concrete tough choices confronted by lower courts. See generally Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 369 (1994).

¹⁹ See *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Millard*, 406 F.2d at 972; *Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950).

²⁰ Both the Minnesota and Washington laws define committable sex offenders partly in terms of past criminal acts. Washington's law defines "sexually violent predator," in part, as a person who "has been convicted of or charged with a crime of sexual violence." WASH. REV. CODE ANN. § 71.09.020(1) (West 1992 & Supp. 1996). Minnesota's law is somewhat less direct. That law defines a "sexually dangerous person" as a person who "has engaged in a course of harmful sexual conduct." MINN. STAT. ANN. § 253B.02, subd. 18b (West Supp. 1996). "Harmful sexual conduct" is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm . . . [to the victim]." *Id.* at subd. 7a. The commission of certain crimes will raise a presumption that the victim will suffer serious physical or emotional harm. *Id.* at subd. 7b.

In contrast, the standard civil commitment language in

Minnesota and Washington is *not* defined in criminal terms. See MINN. STAT. ANN. § 253B.02, subd. 17 (West 1992) (commitment of persons "mentally ill and dangerous to the public"); WASH. REV. CODE ANN. § 71.05.020(1) (West 1992) (commitment of "gravely disabled" persons).

21 *Addington v. Texas*, 441 U.S. 418 (1979), begins from the proposition that civil commitment of mentally ill persons is constitutional. See John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFF. L. REV. 499, 501 (1981) ("The power of the state to confine mentally ill persons who pose imminent danger to themselves or to third persons was established at early common law."); *Developments in the Law - Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1208 (1974) [hereinafter *Developments - Civil Commitment*] ("[T]he Supreme Court [has] suggested that the *parens patriae* power, like the police power, is rooted in the very nature of the state in modern society.") (citing *Mormon Church v. United States*, 136 U.S. 1, 57 (1890)).

22 As recently as the 1996 term, the Supreme Court said:

Although we have not had the opportunity to consider the outer limits of a State's authority to civilly commit an unwilling individual, our decision in *Donaldson* makes clear that due process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of "surviving safely in freedom[.]"

Cooper v. Oklahoma, 116 S. Ct. 1373, 1383 (1996) (citations omitted).

23 *Young v. Weston*, 1995 U.S. Dist. LEXIS; *In re Hendricks*, 912 P.2d 129; *In re Linehan*, 518 N.W.2d 609 (Minn. 1994) [*Linehan I*]; *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994), *cert. denied*, 115 S.Ct. 146 (1994); *In re Young*, 857 P.2d 989 (Wash. 1993); *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995), *petition for cert. filed*, (U.S. Mar. 7, 1996); *Post*, 541 N.W.2d 115. It is arguable that the jurisprudential thread addressing the substantive issues pre-dated the sex offender commitment cases. Thus, in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), Chief Justice Burger's concurrence suggested that commitment based on dangerousness alone might be constitutional. See *id.* at 582-83. *United States v. Salerno*, 481 U.S. 739, 755 (1987), upheld a form of preventive confinement without mental illness, fueling speculation that mental illness was not, in general, a necessary predicate for preventive confinement. *Salerno* used a balancing test, suggesting that preventive confinement might be justifiable if the state's interest was high enough to outweigh the liberty interest of the individual. In *Foucha v. Louisiana*, 504 U.S. 71 (1992), the State of Louisiana pushed that theory and lost. *Foucha* has become the fulcrum against which the sex offender commitment cases are litigated. For a full discussion of this issue, see Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157 (1996) [hereinafter Janus, *Preventing Sexual Violence*].

24 See *In re Young*, 857 P.2d 989; *In re Hendricks*, 912 P.2d 129.

25 The legislative preambles to the Washington and Kansas sex offender commitment laws support this observation. WASH. REV. CODE § 71.09.090 (1995) ("[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act . . ."); KAN. STAT. ANN. § 59-29a01 (1995) (containing language essentially identical to that used by the Washington legislature). See generally Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437 (1995); Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 3 PSYCHOL. PUB. POL'Y & L. 534 (1995).

26 See BRAKEL ET AL., *supra* note 1, at 329 ("The introduction of psychotropic medications has revolutionized the treatment of the mentally ill, vastly diminishing the number of persons needing institutionalization and significantly relaxing the terms of confinement for those who are institutionalized."); *cf.* *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

27 See *Jones v. United States*, 463 U.S. 354 (1983); see also *Humphrey v. Cady*, 405 U.S. 504 (1972).

28 See *Jackson v. Indiana*, 406 U.S. 715 (1972).

29 The Minnesota Supreme Court's decisions upholding sex offender commitment statutes claim no support from the *parens patriae* power of the state. See *In re Blodgett*, 510 N.W.2d at 914 (government's compelling interest is "the protection of members of the public from persons who have an uncontrollable impulse to sexually assault."); *In re Linehan*, 557 N.W.2d at 181 (state's interest in treating sex offenders "serves and falls within the state's interest in protecting the public from sexual assault.").

Parens patriae rationales are not entirely missing from the discussions of sex offender commitment laws. See *Allen v. Illinois*, 478 U.S. 364, 373 (1986); *In re Young*, 857 P.2d at 998-1000; *Post*, 541 N.W.2d at 122. Note that in neither *Young*, 857 P.2d at 994-96, nor *Post*, 541 N.W.2d at 119-20, does the statement of the facts support the notion that the *parens patriae* doctrine is properly invoked because the defendant is incompetent.

30 In general, sex offenders are not incompetent to make treatment decisions. Paraphilia, one of the major diagnostic categories into which sex offenders are placed, denotes deviant sexual arousal patterns. Like other personality disorders, the paraphilia designation does not necessarily entail impaired

cognitive processes, but rather maladaptive, rigid, and persistent patterns of behavior. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522-25, 633 (4th ed. 1994) [hereinafter *DSM-IV*]; see generally THEODORE MILLON, DISORDERS OF PERSONALITY (1981); Emily Campbell, Comment, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?*, 69 NEB. L. REV. 190 (1990).

31 See *Linehan I*, 518 N.W.2d at 610; *In re Blodgett*, 510 N.W.2d at 910-12; cf. WASH. REV. CODE ANN. § 71.09.025 (West Supp. 1996) (aiming Washington's sex predator law at both those found incompetent and those about to be released from prison).

32 See *Williamson*, 184 F.2d at 282 ("Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it."); *Millard*, 406 F.2d at 972 ("Substantively, there is serious question whether the state can ever confine a citizen against his will simply because he is likely to be dangerous in the future, as opposed to having actually been dangerous in the past.").

33 See, for example, MINN. STAT. ANN. § 253B.02, subd. 7b (West Supp. 1996); and WASH. REV. CODE ANN. § 71.09.020(6) (West Supp. 1996), which incorporate certain criminal offenses into their definitions of the committable sex offender.

34 Although the Constitution requires an *actus reus* prior to criminal prosecution or punishment, see LAFAVE & SCOTT, *supra* note 12, at 195, the purpose underlying the 1939 Psychopathic Personality Commitment Act in Minnesota was to enable the state to commit individuals before they commit "horrifying crimes." See *In re Blodgett*, 510 N.W.2d at 914 ("[T]he compelling government interest [at stake] is the protection of members of the public from persons who have an uncontrollable impulse to sexually assault."); Francis, *supra* note 2, at 145.

The legislative histories of sex offender commitment statutes often specify that the statutes are needed to compensate for "shortcomings" in the criminal justice system, including those caused by the double jeopardy prohibition and burden of proof requirements. See McCaffrey, *supra* note 13, at 912 n.258; Psychopathic Personalities Subcommittee, *Report*, in MINNESOTA DEPT. OF HUMAN SERVICES, REPORT TO THE COMMISSIONER: COMMITMENT ACT TASK FORCE, at 45, 48-50 (1988) (Commitment law needed to protect the public against "individuals . . . who may not have been convicted of a sex offense, because of the reluctance of young and/or scared victims to testify against perpetrators of sexual abuse," because of the "comparatively short correctional sentences" for sex offenders, and to confine persons who "may be dangerous but evade conviction due to the high burden of proof required in criminal cases.").

35 See La Fond, *supra* note 1, at 671-77; Rideout, *supra* note

14, at 784-89.

36 The stories of the victims are recounted in Boerner, *supra* note 3, at 525-37; La Fond, *supra* note 1, at 671-80; Rideout, *supra* note 14, at 784-89; and McCaffrey, *supra* note 13, at 887. For stories of the rapists, many of whom also have been victims in their lives, see Lawrence Wright, *A Rapist's Homecoming*, NEW YORKER, Sept. 1995, at 56; Conrad deFiebre, *Linehan: I Just Want to Live a Normal Life*, MINN. STAR-TRIB., Aug. 29, 1994, at A1.

37 See La Fond, *supra* note 1, at 670-84 (describing the official narrative that came to stand for the Washington State sex offender commitment law).

38 See sources cited *supra* note 36.

39 Although sex offender commitment laws enjoy broad support, they have not met with universal acceptance even outside the legal community. See, for example, the following newspaper opinion pieces, which question the legitimacy of sex offender commitment legislation: *Loophole-Closing a Mistake*, DULUTH NEWS-TRIB., Sept. 2, 1994, at 7A; *New Law Endangers Constitutional Rights*, ST. PAUL PIONEER PRESS, Jan. 18, 1995, at 8A; *Preventive Imprisonment*, WASH. POST, Dec. 14, 1996, at A26; Terry Tang, *Popular Result at the Cost of a Dangerous Precedent*, SEATTLE TIMES, Aug. 15, 1993, at B4.

40 My use of the terms "espoused rules" and "rules-in-use" is largely based on CHRIS ARGYRIS & DONALD A. SCHON, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS (1974).

41 See *id.* at xiii-ix. Compare Argyris and Schon's discussion of "espoused theories" and "theories in use." *Id.*

42 As LaFond points out, "every story is a reduction, a fiction, made from a certain point of view." LaFond, *supra* note 1, at 672 (quoting JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 174 (1985)). I suggest a stronger use of the word "fiction." This is not the inevitable fiction of reduction, of point of view. Rather, I am suggesting that the story the high courts tell in the official narrative is not representative of what really happens in the lower courts. The official narratives are "made up" fiction, not reality observed and described from a point of view. See Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 631 (1993) (discussing "legal fictions" in mental health law).

43 The invisibility of the rules-in-use in sex offender commitments has important consequences for litigators. I explore these issues in Eric S. Janus, *Defending Sex Offender Commitments in Minnesota*, in PSYCHOPATHIC PERSONALITIES AND SEXUALLY DANGEROUS PERSONS § 3 (1995).

44 In *In re Young*, 857 P.2d 989, the Washington Supreme Court considered constitutional challenges to the sex-offender commitment provisions of Washington's Community Protection Act of 1990. Andre Young and Vance Cunningham were

involuntarily committed to mental health facilities after juries determined that they were "sexually violent predators." *Id.* at 992-93. The supreme court reversed Cunningham's commitment and affirmed in part and remanded Young's case.

Under Washington law, a person who is found to be a "sexually violent predator" can be committed after he or she has served a criminal sentence. The statute defines "sexually violent predator" as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1996).

A petition to commit Young was filed on October 24, 1990, one day prior to his release for his most recent rape conviction. *In re Young*, 857 P.2d at 994. He had been convicted of several rapes, starting in 1962. After a hearing in 1991, a jury concluded that Young was a "sexually violent predator." *Id.* at 995. The petition to commit Cunningham was also filed in 1990. The state filed the petition about four and one-half months after Cunningham had completed his most recent prison term for rape. Although Cunningham was only 26 years old when the state filed the petition, his criminal history reached back 10 years, including three rape convictions. *Id.* After a hearing, a jury concluded that Cunningham was a "sexually violent predator." *Id.* at 996.

Young and Cunningham challenged the statute on several constitutional grounds. First, they claimed that the statute violated ex post facto and double jeopardy protections. *Id.* at 992. Second, they raised issues of substantive due process. Third, Young and Cunningham alleged procedural due process violations. The court first held that neither the double jeopardy nor the ex post facto clause is violated by the law, finding the law to be civil, and not criminal, in nature, and its purpose remedial rather than punitive. *Id.* at 999.

Addressing the substantive due process argument, the court held that Washington had a compelling interest in treating sex predators and protecting society from them. *Id.* at 1000. In addition, it found no substantive due process problem because the statute allows civil commitment only after a finding of both a mental disorder and dangerousness. However, these must be proved by evidence of a recent overt act if the individual is not incarcerated at the time of the petition.

The court found that the state did not afford equal protection because the state did not require the consideration of less restrictive alternatives for confinement of sex offenders although it is required by Washington's mental health statute. Thus, although the court affirmed the commitment for Young, it remanded the decision to determine whether less restrictive confinement was appropriate. As to the other issues, the court held that a unanimous jury verdict was required, that the statute was not vague, and that Young and Cunningham did not retain the right to remain silent at their civil hearings.

45 *In re Blodgett*, 510 N.W.2d 910, involved a challenge to Minnesota's Psychopathic Personality Law. The Minnesota Supreme Court held that the statute conformed to constitutional requirements and upheld Blodgett's commitment to a secure mental health facility.

Minnesota law provides for the involuntary civil commitment of any person found to be a "psychopathic personality," defined as:

the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

MINN. STAT. ANN. § 253B.02, subd. 18a (West Supp. 1996).

Blodgett, 28 years old at the time of this case, had a history of sexual misconduct which began at the age of 16. Shortly before his 1991 release date from prison, and after evaluation by a psychologist, the state filed a petition for his commitment. The trial court found that Blodgett was a psychopathic personality, and committed him to the Minnesota Security Hospital. *Blodgett*, 510 N.W. 2d at 912.

In his appeal to the Minnesota Supreme Court, Blodgett raised two issues. First, Blodgett claimed that Minnesota's statute violated his right to substantive due process. Second, he claimed the statute violated his right to equal protection of the laws under the Minnesota and U.S. Constitutions.

Blodgett pointed out that in *Foucha v. Louisiana*, 504 U.S. 71 (1992), the U.S. Supreme Court stated that a state may constitutionally: (a) imprison a convicted criminal for deterrence and retribution reasons; (b) confine persons who are mentally ill and dangerous; and (c) in certain narrow cases, subject persons who pose a danger to others or the community, to limited pre-trial confinement. *Blodgett*, 510 N.W. 2d at 914. Blodgett argued that he did not fit into any of these categories.

Relying on *State ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940), in which the U.S. Supreme Court upheld the constitutionality of Minnesota's law, the Minnesota Supreme Court decided that *Foucha* did not prohibit the commitment of psychopathic personalities. The court further held that the State had a legitimate interest in the safety of the community. In addition, the court observed that Blodgett was entitled to release if his conduct was brought under control, which appeared to satisfy the requirements of *Foucha*.

Blodgett also argued that to deny sexual predators their liberty while other dangerous people, not considered mentally

ill, were set free, violated equal protection. *Blodgett*, 510 N.W. 2d at 917. The court dismissed this argument, noting the special danger, particularly to women and children, posed by sexual predators. Finally, the court reiterated the State's compelling interest in public safety which, when considered in light of the imperfect state of medical and scientific knowledge concerning the motivations behind the conduct of sex offenders, provided a sufficient justification for any unequal burden imposed by the law. *Id.* at 918.

46 In *Post*, 541 N.W.2d 115, the State of Wisconsin appealed a trial court decision holding its "sexually violent person" statute unconstitutional. While the statute was challenged on grounds of double jeopardy, ex post facto laws, substantive due process, equal protection, and whether the governor's partial veto created a law which is incomplete and unworkable as applied to the state's Sex Crimes Act, this court dealt with only the last three issues. The court determined the double jeopardy and ex post facto issues in a companion case decided the same day. *See Carpenter*, 541 N.W.2d 105.

The Wisconsin statute in question provides for the commitment of persons adjudicated "sexually violent persons" until the person no longer falls under this classification. WIS. STAT. ANN. § 980.06(1) (West Supp. 1995). A "sexually violent person" is defined as someone who has been convicted of a sexually violent offense . . . 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." *Id.* § 980.01(7).

Samuel E. Post had been confined to the Mendota Health Institute following several convictions of sexual assault. *Post*, 541 N.W.2d at 119. Ben R. Oldakowski also had been confined to Mendota after several sexual assaults involving kidnapping and other charges of assault and exposing himself. The State Department of Justice filed petitions to commit Post and Oldakowski as sexually violent persons on July 12, 1994, three days before their scheduled releases. The trial court found probable cause to believe that both men were sexually violent persons and ordered them confined to Mendota.

Post and Oldakowski filed motions to dismiss the commitment, alleging the unconstitutionality of the Wisconsin statute. The trial court held that the statute violated double jeopardy and ex post facto laws, substantive due process, and the equal protection clause. *Id.* at 119-120. Thus, the trial court ordered the release of Post and Oldakowski.

The Wisconsin Supreme Court held that the statute did not violate substantive due process. *Id.* at 122. It found a compelling state interest in protecting the public from those who are a threat to the safety of the community. It also found that the statute was narrowly tailored to meet that interest because it allowed commitment of only the most dangerous sex offenders—"those whose mental condition predisposes them to reoffend." *Id.* at 124. The court also rejected the argument that the statute's definition of "dangerousness" was an impermissibly low standard of "substantial risk." *Id.* at 126.

Post and Oldakowski also argued that the "sexually violent person" statute violated equal protection because it treated persons differently than under chapter 51 of the Wisconsin statutes for initial commitment for people with mental illnesses. *Id.* at 128. The court did not decide on a level of scrutiny to use because it found that all but one of the differences challenged passed strict scrutiny. *Id.* at 130. The court again found that the state had a compelling interest in protecting the public from sexually violent persons who are likely to commit future sex crimes.

In addition, the court found that the distinction between dangerous and non-dangerous mentally ill persons is a sufficient reason for determining the type of care to be given. The court held that communities, through their elected representatives, can choose how to resolve their social problems in more than one way, as long as the solution is constitutional. *Id.* Since the question in equal protection cases is whether the government has an appropriate interest furthered by the differential treatment, the court found that treating violent sex criminals differently was constitutionally justified, as they pose a greater threat to the community.

In *Carpenter*, 541 N.W.2d 105, the Supreme Court of Wisconsin upheld the constitutionality of its "sexually violent person" statute. *See* WIS. STAT. ANN. § 980 (West Supp. 1995). In *Carpenter*, the court dealt with only the Ex Post Facto and Double Jeopardy Clauses of the Wisconsin and U.S. Constitutions.

The State of Wisconsin filed a petition to commit Carpenter in 1994 after he had served prison sentences for sexual assaults on minors. *Carpenter*, 541 N.W.2d at 108. Schmidt had also been incarcerated for sexual assaults on minors when the state filed a petition against him. The trial courts found that the statute violated the Ex Post Facto, Double Jeopardy, and Substantive Due Process Clauses of the Wisconsin and U.S. Constitutions. *Id.*

The Wisconsin Supreme Court first held that there was not a double jeopardy violation. A statute violates double jeopardy if its principal purpose is punishment, retribution, or deterrence. *Id.* at 109-10 (citing *State v. Killebrew*, 340 N.W.2d 470, 475 (Wis. 1983)). Here, the court held that Carpenter and Schmidt failed to show that the statute had the principal purpose of punishment, or that it had the sufficient criminal characteristics such that it could be considered punishment. *Carpenter*, 541 N.W.2d at 113. Much like the double jeopardy analysis, the court found no violation of ex post facto laws, because the purpose of the "sexually violent person" statute was not punitive, but, rather, to protect the public by providing treatment for sex offenders.

47 The misuses of psychiatry as social control evoke frightening images. *See, e.g.,* ANTHONY BURGESS, *A CLOCKWORK ORANGE* (1st rev. ed. 1988); Erlinder, *supra* note 12, at 159 (likening Minnesota's system of psychopathic personality commitment to a "gulag").

48 The principle of criminal interstitiality limits civil commitments to legitimate state interests that cannot be vindicated by use of the criminal law. The State, for example, has a legitimate interest in controlling dangerous individuals who are not criminally responsible. It also has a legitimate interest in protecting individuals who are incompetent to protect themselves. Neither of these interests is addressable by the criminal law. *See infra* Part II.C.

49 *See supra* note 36, discussing the narrative origins of the various laws.

50 *Blodgett*, 510 N.W.2d at 911-12; *Young*, 857 P.2d at 994-97; *Post*, 541 N.W.2d at 119-20.

The "past crime" and "likelihood of future harm" requirements are incorporated into the language of the statutes. Minnesota's law illustrates this, defining "sexually dangerous person" as a person who:

- (1) has engaged in a course of harmful sexual conduct . . . ;
- (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and
- (3) as a result, is likely to engage in acts of harmful sexual conduct.

MINN. STAT. ANN. § 253B.02, subd. 18b (sexually dangerous person); *see also* WASH. REV. CODE ANN. § 71.09.020(1) (sexually violent predator); WIS. STAT. ANN. § 980.01(7) (sexually violent person).

51 *See Blodgett*, 510 N.W.2d at 914; *Young*, 857 P.2d at 1000; *Post*, 541 N.W.2d at 129.

52 The courts in all three decisions either state or suggest that sex offender commitments are narrowly tailored to meet the compelling interest of protecting against sexual violence. *See Blodgett*, 510 N.W.2d at 914-15; *Young*, 857 P.2d at 1006; *Post*, 541 N.W.2d at 124.

53 *See In re Blodgett*, 510 N.W.2d at 914 n.5; *In re Young*, 857 P.2d at 1005-07; *see also Post*, 541 N.W.2d at 126. In *Foucha v. Louisiana*, 504 U.S. 71, the U.S. Supreme Court held that a Louisiana civil commitment statute, which allowed an insanity acquittee, who had an antisocial personality disorder but no longer a mental illness, to remain indefinitely committed to a mental hospital on the basis of dangerousness alone, violated substantive due process.

54 An influential writer on preventive detention suggests that the major legitimizing principle should be the principle of proportionality, where the nature of the confinement would be tied to the severity of the danger posed by the individual. Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1371 (1974).

All three states claim that sex offender commitments are limited to the "most dangerous." *See Kirwin, supra* note 3, at 24; OFFICE OF THE ATTORNEY GEN., STATE OF MINNESOTA, TESTIMONY OF ATTORNEY GENERAL HUBERT HUMPHREY III BEFORE THE LEGISLATIVE TASK FORCE ON SEXUAL PREDATORS: PROPOSED SEXUAL PREDATOR REFORMS (AUGUST 11, 1994), 1 ("[H]ow do we protect the public from some of the most dangerous criminals in society?"). The Minnesota Supreme Court held that sex offender commitments must be limited to those who are "highly likely" to be violent, though the statute itself only requires a showing that violence is "likely." *In re Linehan*, 557 N.W.2d 167; MINN. STAT. ANN. § 253B.02, subd. 18b. The Washington Supreme Court construed the statutory term "likely" to refer only to persons whose "likelihood of re-offense is extremely high." *In re Young*, 857 P.2d at 1003. The Wisconsin statute requires proof of a "substantial probability" of future sexual violence. In upholding the statute against constitutional attack, the Wisconsin Supreme Court described the commitment group as those who are "most likely" to engage in sexual violence, "distinctively dangerous," and "only of the most dangerous of sexual offenders." *Post*, 541 N.W.2d at 118, 124, 130.

55 *See Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996).

56 *Schopp & Sturgis, supra* note 25, at 449 ("mental status" terms in the law serve "discriminative" functions).

57 *Id.* ("mental status" terms in the law serve "justificatory" functions).

58 The Washington Supreme Court's story in this regard reads as follows:

Here, petitioners Young and Cunningham were diagnosed with a mental disorder and share a lengthy criminal history of violent rape. Other individuals encompassed under the commitment law share similar profiles. In such circumstances, the Court has consistently upheld civil commitment schemes.

In re Young, 857 P.2d 989 at 1001 (citing *Addington v. Texas*, 441 U.S. at 426). The Minnesota Supreme Court explains:

Mental illness is simply that, an illness, and should be treated no differently than other illnesses and with due respect for personal liberties. When, however, a person is both "mentally ill and dangerous to the public," our legislature has provided for commitment to the state security hospital. In like measure, and with like concern, our legislature has provided for commitment of the "psychopathic personality" who, because of an uncontrollable sexual impulse, is dangerous to the public.

In re Blodgett, 510 N.W.2d at 914-15 (citation omitted).

59 See ARIZ. REV. STAT. ANN. § 13-4601; CAL. WELF. & INST. CODE § 6600(a), (c) (West Supp. 1996); IOWA CODE ANN. § 709C.2, subd. 4 (West Supp. 1996); KAN. STAT. ANN. § 59-29a02(a) (1994); MINN. STAT. ANN. § 253B.02, subd. 18b; WASH. REV. CODE ANN. § 71.09.020(1); WIS. STAT. ANN. § 980.01(7); see also BRAKEL ET AL., *supra* note 1, at 740; Kirwin, *supra* note 3, at 24. It is not clear that civil commitment statutes need to require a showing of past overt acts. See BRAKEL ET AL., *supra* note 1, at 35-36.

60 Minnesota defines "sexual psychopathic personality" as

the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

MINN. STAT. ANN. § 253B.02, subd. 18a.

61 See CAL. WELF. & INST. CODE § 6600(a), (c); IOWA CODE ANN. § 709C.2, subd. 4; KAN. STAT. ANN. § 59-29a02(a); MINN. STAT. ANN. § 253B.02, subd. 18b (referring, without further elaboration, to a "sexual personality, or other mental disorder or dysfunction"); WASH. REV. CODE ANN. § 71.09.020 (defining "abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others").

Despite the "mental disorder" requirement, it is generally acknowledged that sex offenders are not susceptible to standard civil commitment methods. For example:

[The Washington] legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders

Id. § 71.09.010 (West 1992).

62 See *In re Blodgett*, 510 N.W.2d at 915-16; *In re Young*, 857 P.2d at 1001-03; *Post*, 541 N.W.2d at 122-23; Katherine P. Blakey, Note, *The Indefinite Civil Commitment of Dangerous Sex Offenders is an Appropriate Legal Compromise Between*

"Mad" and "Bad"—A Study of Minnesota's Sexual Psychopathic Personality Statute, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 259-64 (1996) (exploring the mad/bad dichotomy).

63 The Washington legislation discusses this explicitly. WASH. REV. CODE ANN. § 71.09.020(2) (West 1992). The differences are the focus of the Kansas Supreme Court's discussion of its sex offender commitment statute. See *In re Hendricks*, 912 P.2d at 135.

64 See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 49-78 (1990).

65 See STUART A. KIRK & HERB KUTCHINS, THE SELLING OF DSM: THE RHETORIC OF SCIENCE IN PSYCHIATRY 21 (1992) (describing the view taken by "many sociologists" that "mental illness was merely another instance of how society labels and controls those who behave badly"). This concern is the main theme of most of the articles that are critical of sex offender commitments. See, e.g., Lisa T. Greenlees, *Washington State's Sexually Violent Predators Act: Model or Mistake?*, 29 AM. CRIM. L. REV. 107, 130 (1991) (arguing that vague definitions allow those who should not be committed to slip through the cracks); LaFond, *supra* note 1, at 658 (demonstrating the Washington Legislature "deliberately chose to abuse" the medical model of civil commitment); Wettstein, *supra* note 25, at 603.

66 The undesirable consequences of the manipulability of psychiatric labels would be magnified in the sex offender commitment context compared to the standard civil commitment context. In the standard civil commitment setting, as envisioned by the Supreme Court in *Addington v. Texas*, 441 U.S. 418 (1978), there is a layered review to catch mistakes in the commitment process. *Id.* at 428-29. In the sex offender commitment context, in contrast, there are layered impediments to review, which magnify "mistakes" in the initial commitment process. See Janus, *Preventing Sexual Violence*, *supra* note 23, at 195-206.

67 The Washington court addressed the issue by stating "psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM." *In re Young*, 857 P.2d at 1001. Minnesota's assurance is equally as conclusory: "Whatever the explanation or label, the 'psychopathic personality' is an identifiable and documentable violent sexually deviant condition or disorder." *In re Blodgett*, 510 N.W.2d at 915. The Wisconsin court addresses this issue as follows:

In support of its argument that a "mental disorder" cannot be a sufficient condition for commitment, the dissent cites testimony that "mental disorders are the broad big umbrella that all of us could fall under." On the contrary, the DSM-IV states that a diagnosis of "disorder" is only appropriate when a manifestation of dysfunction crosses the "boundary

between normality and pathology." The DSM-IV acknowledges that "no definition adequately specifies precise boundaries for the concept of 'mental disorder.'" However, a mental disorder is "conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual" and must reflect a current state of distress, impaired functioning or significant risk of pain, death or loss of freedom. Disorders do not include merely deviant behaviors that conflict with prevailing societal mores.

Post, 541 N.W.2d at 123.

68 *See In re Blodgett*, 510 N.W.2d at 914-15; *In re Young*, 857 P.2d at 1001-03; *Post*, 541 N.W.2d at 122-24. This approach has been criticized by the Supreme Court of Kansas. *See In re Hendricks*, 912 P.2d at 135.

69 *See Post*, 541 N.W.2d at 123-24; Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values*, 47 AM. PSYCHOL. 373 (1992) [hereinafter Wakefield, *Concept of Mental Disorder*]; Jerome C. Wakefield, *Disorder as Harmful Dysfunction: A Conceptual Critique of DSM-III-R's Definition of Mental Disorder*, 99 PSYCHOL. REV. 232 (1992) [hereinafter Wakefield, *Disorder as Harmful Dysfunction*] (discussing difficulties in defining "mental disorder").

70 *See In re Blodgett*, 510 N.W.2d at 915 ("The psychopathic personality statute identifies a volitional dysfunction which grossly impairs judgment and behavior with respect to the sex drive. Cf. MINN. STAT. ANN. § 253B.02, subd. 13 (West 1992 [defining 'mentally ill person']").

71 The court ignores a huge literature on the subject of "volition." *See, e.g.*, HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* (1979); ROBERT F. SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY* (1991); Seymour L. Halleck, *Which Patients Are Responsible for Their Illnesses?*, 42 AM. J. PSYCHOTHERAPY 338 (1988); Stephen J. Morse, *Culpability and Control*, 142 U. PENN. L. REV. 1587 (1994).

In fact, the author of the court's opinion ignored his own dictum from a previous case:

[T]here is no practical way of distinguishing between an uncontrollable and a controllable impulse. Because an impulse has not been resisted does not always mean that it could not have been. . . . The irresistible impulse test leaves too much to conjecture and unverifiable theorizing

State Farm Fire & Casualty Co. v. Wicka, 474 N.W.2d 323, 334 (Minn. 1991) (Simonett, J., dissenting).

The court cites two social science references on the issue of mental disorder. But neither reference touches on the issue of

"volitional dysfunction" even tangentially. *See In re Blodgett*, 910 N.W.2d at 915 n.7 ("The manual indicates that the antisocial personality disorder may at times be characterized by sexual promiscuity.") (citing AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 342-46 (3d ed. rev. 1987)); *id.* at 915 n.8 ("Sexual offenders have been found to present distorted and disturbed thought processes") (quoting Margit Henderson & Seth Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, PSYCHIATRIC Q., Winter 1990, at 281).

72 *In re Blodgett*, 510 N.W.2d at 915. Here the court's terminology seems imprecise. *See Park E. Dietz, Sex Offenses: Behavioral Aspects*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1485 (Sanford H. Kadish ed., 1983) (asserting that some sexual crimes result from sexual deviancy, and some are the product of sexual "normalcy" combined with antisocial behaviors). Does the Court here mean to restrict the term "psychopathic personality" to those who have a "sexual deviancy" in addition to a "volitional dysfunction"?

73 *In re Young*, 857 P.2d 989 at 1001. This approach has been criticized by the Supreme Court of Kansas. *See In re Hendricks*, 912 P.2d at 135.

74 *See Vernon L. Quinsey, The Prediction and Explanation of Criminal Violence*, 18 INT'L J.L. & PSYCHIATRY 117 (1995) (discussing whether psychopathic personality is a real disorder; *see generally* Wakefield, *Concept of Mental Disorder*, *supra* note 69; Wakefield, *Disorder as Harmful Dysfunction*, *supra* note 69; *see also* KIRK & KUTCHINS, *supra* note 65, at 28-30 (discussing the problems of diagnostic validity in the DSM-III); Allen Frances, *The DSM-III Personality Disorders Section: A Commentary*, 137 AM. J. PSYCHIATRY 1050, 1050 (1980) ("[P]ersonality disorders are not at all clearly distinct from normal functioning or from each other."); R. Rogers et al., *Diagnostic Validity of Antisocial Personality Disorders*, 16 L. & HUMAN BEHAV. 677 (1992); Thomas A. Widiger & Timothy J. Trull, *Personality Disorders and Violence*, in *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT* 203 (John Monahan & Henry J. Steadman eds., 1994) ("DSM III-R is a dichotomous model that imposes arbitrary categorical distinctions between the presence and absence of a disorder that may have little relationship to the predictability of violent behavior. The diagnostic categories are substantially heterogeneous with respect to the personality variables that are most likely to be predictive of violent behavior."); James S. Wulach, *Diagnosing the DSM-III Antisocial Personality Disorder*, 14 PROF. PSYCHOL. RES. & PRAC. 330 (1983) (questioning validity of Antisocial Personality Disorder diagnosis).

75 *See* SCHOPP, *supra* note 71; Schopp & Sturgis, *supra* note 25, at 449 (observing that "mental status" terms in the law serve "discriminative" and "justificatory" functions); *see generally* sources cited *supra* note 73 and accompanying text.

76 Part V of this article assesses the Minnesota mental

disability element for its ability to perform this discriminative task.

77 See Schopp & Sturgis, *supra* note 25.

78 See, e.g., Robinson, *supra* note 11 (observing that criminal, though not civil, confinement is premised on culpability, and advocating the proposition that civil commitment should “pick up the slack” to protect the public from dangerous offenders who are not reached by the criminal justice system).

79 For fuller discussion of this principle, see generally Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157 (1996); SCHOPP, *supra* note 71; Schopp & Sturgis, *supra* note 25; Winick, *supra* note 25; Blakey, *supra* note 62.

80 See Janus, *supra* note 79.

81 See *Addington*, 441 U.S. at 428 (“moral force of the criminal law”) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

82 See MICHAEL L. PERLIN, 3 MENTAL DISABILITY LAW § 15.02 (1989) (recounting the historical bases of the insanity defense); Stephen J. Morse, *Causation, Compulsion, and Involuntariness*, 22 BULL. AM. ACAD. PSYCHIATRY LAW 159 (1994); Robinson, *supra* note 11 (discussing how this legitimizes the criminal law).

83 There are other inherent, “substantive” limits on the reach of the criminal law. For example, the criminal law, which operates retrospectively on individuals, may not be able to deal effectively with the threat of epidemic. Thus, non-criminal confinement may be acceptable in some situations to address epidemic disease. See Eric S. Janus, *Aids and the Law: Setting and Evaluating Threshold Standards for Coercive Public Health Interventions*, 14 WM. MITCHELL L. REV. 503, 505 (1988).

84 The principle of interstitiality underlies all non-criminal forms of incarceration. Very briefly, there are four major forms of non-criminal incarceration. *Parens patriae* commitments address the incapacity of an individual to act in his or her best interests, and thus address non-criminal harm. Insanity acquittees are committable because their behavior is substantively beyond the reach of the criminal law. As a regulatory measure, pre-trial detainees may be held based on their future dangerousness because, by definition, criminal sanctions are unavailable prior to trial. See *United States v. Salerno*, 481 U.S. 739 (1987). Quarantine laws are addressed to epidemics, a threat of a different order than individual crimes; because epidemics grow exponentially and threaten entire populations, the harm is beyond the reach of post-behavior criminal sanctions. See Janus, *supra* note 83.

The principle of interstitiality is consistent with the result and the key language of *Foucha v. Louisiana*, 504 U.S. at 82:

[T]he State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct.

85 There are other, less persuasive narratives the courts could have adopted in an attempt to legitimize sex offender commitments. They could have adopted a “jurisprudence of prevention” theme, see Richards, *supra* note 6, in which it is the strength of the state’s interest in countering sexual violence which alone suffices to justify a “regulatory” taking of the individual’s liberty. This theme entails the principle of proportionality, alluded to *supra* note 52. All of the courts clearly reject this story.

Second, the courts could have invoked a *parens patriae* justification for sex offender commitments. This would have involved characterizing sex offenders as incompetent, in the sense of being unable to care for themselves. The *parens patriae* justification can be viewed as a subset of the principle of interstitiality, in the sense that the “self-protection” role of *parens patriae* commitments is beyond the reach of the criminal justice system. The Washington and Wisconsin courts both mention the *parens patriae* interest, but do not develop it. In particular, neither court attempts to characterize the mental disorder element as fitting into a *parens patriae* theory. Compare *Allen v. Illinois*, 478 U.S. 364 (1986), where the *parens patriae* assumption seems to be a key assumption the U.S. Supreme Court makes in describing Illinois’ sex offender commitment statute.

Finally, the courts could have adopted a narrative of difference, in which the state’s right to invoke non-criminal incarceration arises not from an enhanced interest of the state, but from a set of rights that are diminished because of the individuals’ membership in a “degraded” class or category. Cf. *Buck v. Bell*, 274 U.S. 200 (1927). Though none of the courts openly espoused such a narrative, its seeds are liberally scattered throughout the cases on sex offender commitments. I discuss this issue in more detail in Eric S. Janus, *Toward a Conceptual Framework for Assessing Police Power Commitment Legislation*, 76 NEB. L. REV. (forthcoming 1997).

86 The classic articulation is found in *Developments - Civil Commitment*, *supra* note 21. Citing *Pearson*, 287 N.W. 297, 303 (Minn. 1939), this article notes that “police power commitment standards would appear to be unconstitutionally overbroad unless mental illness is interpreted to mean a condition which induces substantially diminished criminal responsibility.” *Developments - Civil Commitment*, *supra* note 21, at 1233-34. “Criminal irresponsibility” would be defined “in terms of inability to control one’s conduct.” *Id.* at 1235; see also Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 86 (1968); Note, *Standards of Mental Illness in the Insanity Defense and Police*

Power Commitments: A Proposal for a Uniform Standard, 60 MINN. L. REV. 1289, 1298 (1976) (police power commitments justified by inability to control behavior); Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 59 (1982) ("The primary theoretical reason for allowing involuntary commitment of only the mentally disordered is the belief that their legally relevant behavior is the inexorable product of uncontrollable disorder, whereas the legally relevant behavior of a normal person is the product of free choice. . . . Because the individual will ultimately have little or no choice in deciding whether to act violently, it does not violate the disordered person's dignity or autonomy to hospitalize him or her preventively, even in the absence of strong predictive evidence of future dangerousness.").

The contemporary scholarship confirms this pedigree. See SCHOPP, *supra* note 71; Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CASE W. RES. L. REV. 277, 305 (1992) (Sex offender commitment is justified because it is directed only against those sex offenders who "are less blameworthy because they are less capable of exercising self control." "[T]hese uncontrolled, impulsive sex offenders . . . are 'least deserving of punishment.'"); Winick, *supra* note 25, at 538 ("[F]or the purpose of commitment to a psychiatric hospital, a condition must be capable of so impairing functioning that the individual is unable to engage in rational decision making or to control his or her behavior.")

87 The law was supplemented in 1994 with the Sexually Dangerous Persons (SDP) Act. MINN. STAT. ANN. § 253B.02, subd. 18b. See *supra* note 50 for the statute's definition of "sexually dangerous person." Both laws contain "past act" and "dangerousness" requirements. The SDP Act differs from Minnesota's psychopathic personality law, see *supra* note 58, in that "it is not necessary [for purposes of the SDP Act] to prove that the person has an inability to control the person's sexual impulses." § 253B.02, subd. 18b.

88 *Pearson*, 287 N.W. at 303.

89 *Id.* at 302.

90 *Id.*

91 *Id.*

92 *Id.*

93 *In re Blodgett*, 510 N.W.2d at 915.

94 See Paul H. Robinson, 1 CRIMINAL LAW DEFENSES § 173(c) (1st ed. 1984); Schopp & Sturgis, *supra* note 25, at 446; see generally SCHOPP, *supra* note 71; Blakey, *supra* note 62; Morse, *supra* note 71.

95 *Pearson*, 287 N.W. at 303. Minnesota's law provides that "[t]he existence in any person of a condition of sexual

psychopathic personality or the fact that a person is a sexually dangerous person shall not in any case constitute a defense to a charge of crime, nor relieve such person from liability to be tried upon a criminal charge." MINN. STAT. ANN. §253B.185, subd. 3.

96 *State v. Rawland*, 199 N.W.2d 774, 788 (Minn. 1972) (emphasis added).

97 *In re Blodgett*, 510 N.W.2d at 917.

98 *Id.* at 918.

99 *Id.* at 918, n.16, citing Robinson, *supra* note 11, at 716.

100 *In re Blodgett*, 510 N.W.2d at 918.

101 287 N.W. at 303.

102 *In re Blodgett*, 510 N.W.2d at 912.

103 The court characterizes the "utter lack of power to control" element as a "finding," presumably a finding of fact. *Id.* Several months later, in *In re Linehan*, the court recognized that the "utter lack of power to control" test should be reviewed de novo as a question of law. 518 N.W.2d at 613.

104 Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 161 (1995). Schopp also notes that the Minnesota Supreme Court "did not question the convictions or prison sentences" of those who had been committed. *Id.* While this is technically correct, it does not acknowledge that the court construed the question before it as a facial, rather than as applied, challenge. *In re Blodgett*, 510 N.W.2d at 915. Thus, as pointed out in the text, the court had no opportunity to question the applicability of a (properly construed) "utter lack of power to control" test to a person who, like Blodgett, had been held criminally responsible. The distinction is important. Schopp's characterization might be read to suggest that the court held that the "utter lack of power to control" test could properly include criminally responsible individuals, whereas the more conservative interpretation of the court's opinion is that it avoided the issue altogether.

105 Blakey, *supra* note 62, at 263.

106 *Pearson*, 309 U.S. at 274.

107 *Sas v. Maryland*, 334 F.2d 506, 514 (4th Cir. 1964) (noting that the statute was "carefully drawn to conform to the [Pearson] definition," and therefore not facially unconstitutional, but "may be fraught with the possibility of abuse in that if not administered in the spirit in which it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society"); *Director v. Daniels*, 221 A.2d 397, 409 (Md. Ct. App. 1966) (constitutionality of the Maryland statute saved by construction requiring a "psychiatric disorder manifested by . . . an

uncontrollable desire . . . which is uncontrollable by the individual"); *State v. Mandary*, 178 Neb. 383, 396 (1965) (Nebraska's sex offender statute mandates commitment and treatment for those "likely to attack or otherwise inflict injury" as a result of "uncontrolled and uncontrollable desires").

108 *Millard*, 406 F.2d at 969.

109 *Linehan I*, 518 N.W.2d at 615 (Gardebring, J., dissenting).

110 *In re Young*, 857 P.2d at 1002 (emphasis added).

111 The court's account of the dynamics of rape is remarkably similar to Professor Morse's prescription for the volitional excuse. See Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 820 (1985).

112 See *In re Young*, 857 P.2d at 1000-03 (citing Brooks, *supra* note 4, at 733).

113 Brooks, *supra* note 4, at 732.

114 *Id.* at 730 (emphasis added).

115 *In re Young*, 857 P.2d at 998 (citing Bochnewich, *supra* note 86, at 278).

116 Bochnewich, *supra* note 86, at 305.

117 *Post*, 541 N.W.2d at 123 (quoting *DSM-IV*, *supra* note 30, at xxi).

118 WIS. STAT. ANN. § 980.01(2) (emphasis added).

119 *Post*, 541 N.W.2d at 124 (emphasis added).

120 Some prominent tests of criminal responsibility turn on the presence or absence of such causation. The American Law Institute adopted the following language: "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 [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962) (emphasis added). Chief Judge Bazelon held in *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), "that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect" (emphasis added). Cf. John Q. La Fond, *Washington's Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET SOUND L. REV. 755, 767 (arguing that "mental illness assumes there is a causative defect in cognitive, emotional, or volitional processes that can be diagnosed and, in most cases, treated" and that absence of this "defect" in sex offender commitment cases is fatal).

There is no need to engage here in a discussion of causality and its relationship to criminal responsibility. See Morse, *supra* note 86, for a cogent debunking of the notion that "causation"

equals lack of criminal responsibility. It is sufficient to point out that the Wisconsin court used the notion of behaviors "caused by" a disorder to make its argument more persuasive, evoking an image of human behaviors that de-emphasizes free will and human behavioral agency. *Id.* at 159.

121 Courts often acknowledge the importance of maintaining the moral legitimacy of the criminal law. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) (discussing "moral force" of the criminal law); *In re Blodgett*, 510 N.W.2d at 918 ("moral credibility of the criminal justice system" at stake).

122 *Linehan I*, 518 N.W.2d 609.

123 Erickson, Psychopathic Personality Statute, *supra* note 1.

124 *Dittrich v. Brown County*, 9 N.W.2d 510, 511 (Minn. 1943).

125 See Erickson, *Northern Lights*, *supra* note 1, at 3; see also *In re Blodgett*, 510 N.W.2d at 910 (Wahl, J., dissenting).

126 See *Millard*, 406 F.2d at 966 ("The Sexual Psychopath Act was enacted in 1948 as a 'humane and practical approach to the problem of persons unable to control their sexual emotions.'") (quoting SENATE COMM. ON THE DISTRICT OF COLUMBIA, PROVIDING FOR THE TREATMENT OF SEXUAL PSYCHOPATHS IN THE DISTRICT OF COLUMBIA, S. REP. NO. 80-1377, at 5 (1948)); Erickson, *Northern Lights*, *supra* note 1, at 3 ("Despite the emphasis on dangerousness in Minnesota's Psychopathic Personality statute, persons committed under it in the first decade were mostly window peepers, teenagers who masturbated excessively or had sexual contact with animals, consenting adult homosexuals, or non-violent pedophiles."); John Pratt, *Governing the Dangerous: An Historical Overview of Dangerous Offender Legislation*, 5 SOC. & LEGAL STUD. 21, 26-27 (1996) (discussing the treatment of homosexuality in "dangerous persons" statutes).

127 Cf. Chief Judge Bazelon's lengthy analysis of the D.C. Sexual Psychopath Act, which was modeled on the Minnesota Act upheld in *Pearson*, 309 U.S. 270. Bazelon characterized the proper subjects for commitment under the act as those "too sick to deserve punishment." *Millard*, 406 F.2d at 969.

128 See Kirwin, *supra* note 3, at 22. According to the Minnesota Department of Human Services, admissions under Minnesota's psychopathic personality statute declined as follows:

1940's	1950's	1960's	1970's	1980's
141	85	32	18	14

Facsimile transmission from Minnesota Security Hospital, Number of Men Admitted as Psychopathic Personalities (Oct. 17, 1995) [hereinafter MSH Fax] (on file with author).

129 *In re Joelson*, 385 N.W.2d 810 (Minn. 1986); Enebak v. Noot, 353 N.W.2d 544 (Minn. 1984); *In re Joelson*, 344

N.W.2d 613 (Minn. 1984); *Bailey v. Noot*, 324 N.W.2d 164 (Minn. 1982); *In re K.B.C.*, 308 N.W.2d 495 (Minn. 1979); *Keiser v. Sheppard*, 194 N.W.2d 286 (Minn. 1972). During the same period, the Minnesota Court of Appeals also decided six cases. *In re Clements*, 440 N.W.2d 133 (Minn. Ct. App. 1989); *In re Clements*, No. CX-88-1058, 1988 Minn. App. LEXIS 654 (Minn. Ct. App. July 27, 1988); *Bailey v. Gardebring*, No. C8-87-1839, 1988 WL 19366 (Minn. Ct. App. Mar. 8, 1988); *In re Brown*, 414 N.W.2d 800 (Minn. Ct. App. 1987); *In re Stone*, 376 N.W.2d 511 (Minn. Ct. App. 1985); *In re Martenies*, 350 N.W.2d 470 (Minn. Ct. App. 1984).

130 440 N.W.2d 133. In that case the court alluded to the standard, but reviewed compliance with the standard using an error-of-fact, deferential review. *Id.* at 136 ("When evidence as to the existence of a psychopathic personality is in conflict, the question is one of fact to be determined by the trial court upon all the evidence.") (citing *In re Martenies*, 350 N.W.2d at 472).

131 PROGRAM EVALUATION DIV., OFFICE OF THE LEGIS. AUDITOR (MINNESOTA), PSYCHOPATHIC PERSONALITY COMMITMENT LAW 1 (Feb. 1994). From January 1990 through August, 1995, 100 people were admitted under Minnesota's sex offender commitment laws. Conrad deFiebre, *Psychopathic Sex Offenders Get New Home*, MINNEAPOLIS STAR-TRIB., Nov. 5, 1995, at 1B; MSH Fax, *supra* note 128.

132 See Kirwin, *supra* note 3, at 22.

133 *Id.* at 25 ("Under the current system, civil commitment is applied only to the relatively few, most dangerous, sexual predators."); *Hearings*, *supra* note 54, at 1 (testimony of Attorney General Humphrey) ("[H]ow do we protect the public from some of the most dangerous criminals in society?").

134 For example, in *Linehan I*, 518 N.W.2d 609, a sex offender commitment case in which I was involved as a defense lawyer, the State's attorneys tried the case without mentioning the *Pearson* "utter lack of power to control" standard. The State's chief attorney was a criminal prosecutor whose theory of the case was that Linehan was a hardened, remorseless criminal. Part of the State's case was devoted to showing that Linehan had apparently engaged in prior planning of his sexual offenses, and had not acted impulsively. This was hardly a theory designed to demonstrate an "utter lack of power to control." The prosecutor's trial theory initially proved successful, and the trial court committed Linehan. The initial order committing Linehan contained no reference to the *Pearson* standard; the final order mentioned the standard in only a conclusory fashion. *Id.* at 614. The Minnesota Court of Appeals affirmed. *Linehan*, 503 N.W.2d 142. The commitment was reversed by the Minnesota Supreme Court precisely because the State had not proved the "utter lack of power to control" element. See *Linehan I*, 518 N.W.2d at 619; see also Blakey, *supra* note 62, at 259-64.

135 See, e.g., *Salerno*, 481 U.S. 739. This case gave strong hope to proponents of a "jurisprudence of prevention" that would allow preventive detention based on dangerousness

alone. See Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329 (1989). In this doctrinal climate, the State of Louisiana could argue in *Foucha* that dangerousness alone could justify civil commitment. See Brief of Respondent, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (No. 90-5844). In such a climate, the "utter lack of power to control" test would indeed seem like archaic surplusage. See Janus, *supra* note 79, at 179.

136 See *In re Walton*, No. C9-92-1749, 1992 WL 383448 (Minn. Ct. App. Dec. 29, 1992); *In re Rickmyer*, No. C4-92-489, 1992 WL 174676 (Minn. Ct. App. July 28, 1992); *In re Nicolaison*, No. C1-92-613, 1992 WL 160843 (Minn. Ct. App. July 14, 1992); *In re Reeves*, No. C5-91-1589, 1991 WL 271528 (Minn. Ct. App. Dec. 24, 1991); *In re Hubbard*, No. C9-91-1031, 1991 WL 191651 (Minn. Ct. App. Oct. 1, 1991); *In re Devillion*, No. C8-91-1070, 1991 WL 191653 (Minn. Ct. App. Oct. 1, 1991); *In re Thomas*, No. C2-90-1863, 1990 WL 204264 (Minn. Ct. App. Dec. 18, 1990); *In re Martenies*, No. CX-94-90-1545, 1990 WL 152685 (Minn. Ct. App. Oct. 16, 1990).

137 See *in re Hendrickson*, No. C6-92-1790, 1992 WL 383446, at *2 (Minn. App. Dec. 29, 1992); *In re Holly*, No. C9-92-1055, 1992 WL 238360, at *2 (Minn. App. Sept. 29, 1992); *In re Blodgett*, 490 N.W.2d at 642.

138 See, e.g., *In re Fitzpatrick*, No. C6-94-255, 1994 WL 164218 (Minn. Ct. App. May 3, 1994); *In re Sadiki*, No. C4-93-2317, 1994 WL 111336 (Minn. Ct. App. Apr. 5, 1994); *In re Buckhalton*, No. C2-93-1446, 1994 WL 43870 (Minn. Ct. App. Feb. 15, 1994); *In re Rickmyer*, No. CX-93 1446, 1993 WL 480177 (Minn. Ct. App. Nov. 23, 1993); *In re Benson*, No. C0-93-1357, 1993 WL 459840 (Minn. Ct. App. Nov. 9, 1993); *In re Sabo*, No. C6-93-1329, 1993 WL 366718 (Minn. Ct. App. Sept. 21, 1993); *In re Sadiki*, No. C3-93-1045, 1993 WL 355906 (Minn. Ct. App. Sept. 14, 1993).

139 Through this period of time, the Minnesota Court of Appeals reversed two sex offender commitments. *In re Rodriguez*, 506 N.W.2d 660 (Minn. Ct. App. 1993); *In re Stilinovich*, 479 N.W.2d 731 (Minn. Ct. App. 1992). In both, the basis for reversal was that the individual posed a type of harm that was outside of the scope of the state's sex offender commitment law.

The "utter lack of power to control" test was the basis for several trial court decisions dismissing sex offender commitment petitions. In *In re Kotowski*, No. P5-93-0037 (Dist. Ct., Ramsey County, Minn. Sept. 3, 1993), the trial court denied a petition to commit on the grounds that the "utter lack of power to control" standard had not been proved. The court cited with approval the testimony of one psychologist who testified that Kotowski "is able to choose whether or not to act in a particular manner. He has a conscious ability to control himself." The court concluded: "If society needs protection from his behavior, he should be in prison if he commits criminal acts."

See also *In re Greene*, No. P8-92-13161 (Dist. Ct., Anoka County, Minn. July 8, 1993) (Pearson standard requires (1) "high threshold regarding frequency and type of sexual misconduct and markedly deficient controls"; and (2) a "lack of habitual and repeated misconduct" in the respondent).

140 See *In re Blodgett*, 510 N.W.2d at 920 (Wahl, J., dissenting) ("It is troubling that since the Minnesota statute went into effect in 1939, it has been arbitrarily and inconsistently enforced despite the limiting construction in Pearson.").

141 *In re Blodgett*, 510 N.W.2d at 915 ("The fact that the statute has been misapplied on occasion is not a valid criticism of the statute itself. The remedy for misapplication is not to declare the statute unconstitutional but to appeal erroneous decisions and get them reversed. More pertinent to the facial challenge to the statute are the cases where the statute has been properly applied.") (footnotes omitted).

This exchange was foreshadowed by *Sas*, 334 F.2d at 514, 516 (noting that the statute was "carefully drawn to conform to the [Pearson] definition," and therefore not facially unconstitutional, but "may be fraught with the possibility of abuse in that if not administered in the spirit in which it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society").

142 518 N.W.2d 609. On the same day, the court also reversed the commitment of Rickmyer. *In re Rickmyer*, 519 N.W.2d 188 (Minn. 1994). The court held that the conduct of Rickmyer, who was a non-violent pedophile, did not meet the dangerousness threshold for a sex offender commitment. *Id.* at 190.

143 MSH Fax, *supra* note 128 (indicating 371 individuals "admitted" to state hospital under psychopathic personality law); deFiebre, *supra* note 131 (indicating that 314 persons were committed during the same time period).

144 See *Linehan I*, 518 N.W.2d at 610.

145 See, e.g., Paul Gustafson & Robert Whereatt, *Rapist/Murderer Wins Release - And Tight Surveillance*, MINN. STAR-TRIB., Aug. 16, 1994, at 1A; Donna Halvorsen, *Task Force Agrees on Bill to Control Sexual Predators*, MINN. STAR-TRIB., Aug. 20, 1994, at 1A; Amy Kuebelbeck, *House Speaker Wants Special Session to Avert Freeing Sexual Predators*, ST. PAUL PIONEER PRESS, July 9, 1994, at 3E; Robert Whereatt, *Laws Proposed to Keep Sex Predators Off Streets*, MINN. STAR-TRIB., Aug. 12, 1994, at 1A.

146 *Panel Blasts Court Decision to Free Sex Offenders*, MINN. STAR-TRIB., July 15, 1994, at 5B (quoting Rep. Dave Bishop, R-Rochester, Minn.).

147 1994 Minn. Laws ch. 636, art. 8, § 20.

148 See *Panel Blasts Court Decision to Free Sex Offenders*,

supra note 146; Kuebelbeck, *supra* note 145; Whereatt, *supra* note 145.

149 *Hearings*, *supra* note 54, at 1 (testimony of Attorney General Humphrey).

150 *Id.*

151 See Kirwin, *supra* note 3, at 23-24.

152 See Gustafson & Whereatt, *supra* note 146, at 1A; Lisa G. Lednicer & Tim Nelson, *Linehan Release*, ST. PAUL PIONEER PRESS, Aug. 16, 1994, at 1A.

153 Conrad deFiebre, *Linehan Recommitment Trial Ends - Judge to Rule in May*, MINNEAPOLIS STAR-TRIB., Mar. 3, 1995, at 1B; Conrad deFiebre, *Violation Ruled Insufficient for Linehan Imprisonment*, MINNEAPOLIS STAR-TRIB., June 1, 1995, at 2B.

154 See Mimi Hall, *A Furor Brews Over Release of Sex Offenders*, USA TODAY, Aug. 17, 1994, at 3A; *Molesters Reassigned Amid Furor, Minnesota Court Limits Hospitalization of Sex Offenders*, CHICAGO TRIB., Aug. 17, 1994, at 16; *Neighbors Angry as Sex Killer Secretly Enters Halfway House*, ARIZ. REPUBLIC, Aug. 17, 1994, at A3; *Sex Offender's Release Has Minn. Governor Scurrying to Tighten Law*, CHARLESTON GAZETTE, Aug. 17, 1994, at 10A.

155 *Good Morning America* (CBS television broadcast, Aug. 23, 1994).

156 1994 Minn. Laws, 1st. Spec. Sess., ch. 1.

157 See Minn. Stat. Ann. § 253B.02, subd. 18b ("[I]t is not necessary [for purposes of the SDP Act] to prove that the person has an inability to control the person's sexual impulses.")

158 See *Hearings*, *supra* note 54, at 3 (testimony of Attorney General Humphrey) ("One of our concerns is that any new statute we come up with may be subject to a constitutional challenge. No matter how carefully we design this statute, we can never be sure that the courts will uphold its validity.").

159 See *Our Perspective: Linehan's Lament*, MINN. STAR-TRIB., Aug. 30, 1994, at 8A (supporting new law); *New Law Endangers Constitutional Rights*, ST. PAUL PIONEER PRESS, Jan. 18, 1995, at 8A (opposing new law); *Loophole-Closing a Mistake*, DULUTH NEWS-TRIB., Sept. 2, 1994, at 7A (opposing).

160 See Kirwin, *supra* note 3, at 25.

161 House of Representatives, State of Minnesota, *Special Session of the Seventy-Eighth Legislature*, 7 JOURNAL OF THE HOUSE OF REPRESENTATIVES 8821, 8823 (1994); Senate, State of Minnesota, *Special Session of the Seventy-Eighth Legislature*, 5 JOURNAL OF THE SENATE 1, 8 (1994).

162 See Donna Halvorsen & Robert Whereatt, *Sexual Predator Bill Ok'd*, MINN. STAR-TRIB., Sept. 1, 1994, at 1A.

163 After five weeks of trial, the district court committed Linehan as a Sexually Dangerous Person. *In re Linehan*, No. P8-94-0382 (Dist. Ct., Ramsey County, Minn. 1995). Linehan appealed. His commitment was affirmed by the Minnesota Court of Appeals. *In re Linehan*, 544 N.W.2d 308, 313 [*Linehan II*]. In December 1996, the Minnesota Supreme Court affirmed, holding that the SDP Act is constitutional as applied to Linehan. *In re Linehan*, 557 N.W.2d 167 (Minn. 1996); 557 N.W.2d 171 (Minn. 1996).

164 See Stephen J. Huot, *Screening and Referral by the Department of Corrections, in PSYCHOPATHIC PERSONALITIES AND SEXUALLY DANGEROUS PERSONS* (1995).

165 See Donald J. Giese, *Iversen Slay Suspect Named*, ST. PAUL PIONEER PRESS, July 29, 1965, at A1; Donald J. Giese, *Linehan Signs Statement*, ST. PAUL PIONEER PRESS, July 30, 1965, at A1; Donald J. Giese, *Linehan Confesses Slaying*, ST. PAUL PIONEER PRESS, July 31, 1965, at A1.

166 See Morse, *supra* note 82, at 166, where it is observed that:

No consensus about involuntariness exists among "experts" or laypeople. Although many forensic psychiatrists and psychologists (and lawyers) assume that they possess a good account of involuntariness and of so-called pathologies of the will and volition, no satisfactory and surely no uncontroversial account of any of these topics exists in the psychiatric, psychological, philosophical, or legal literatures.

167 *In re Crocker*, No. C0-95-2500, 1996 WL 192974 (Minn. Ct. App. Apr. 23, 1996); *Call v. Gomez*, No. C6-95-2470, 1996 WL 162466 (Minn. Ct. App. Apr. 9, 1996); *In re Mattson*, No. C8-95-2423, 1996 WL 167638 (Minn. Ct. App. Apr. 9, 1996); *In re Edstrom*, No. C2-95-2448, 1996 WL 132141 (Minn. Ct. App. Mar. 26, 1996); *In re Mentzos*, No. C3-95-2331, 1996 WL 81721 (Minn. Ct. App. Feb. 27, 1996); *In re Hart*, No. C9-95-2057, 1996 WL 56504 (Minn. Ct. App. Feb. 9, 1996); *Kruger v. Comm'r of Human Servs.*, No. C4-95-1866, 1996 WL 5786 (Minn. Ct. App. Jan. 9, 1996); *In re Kunshier*, No. C7-95-1490, 1995 WL 687692 (Minn. Ct. App. Nov. 21, 1995); *In re Patterson*, No. C3-95-935, 1995 WL 550098 (Minn. Ct. App. Sept. 19, 1995); *In re Adolphson*, No. 1995 WL 434386 (Minn. Ct. App. July 25, 1995); *In re Mattson*, No. C5-95-452, 1995 WL 365374 (Minn. Ct. App. June 20, 1995); *In re Pirkel*, 531 N.W.2d 902 (Minn. Ct. App. 1995); *In re Sadiki*, No. C7-95-419, 1995 WL 311799 (Minn. Ct. App. May 23, 1995); *In re Toulou*, No. C0-94-2518, 1995 WL 265071 (Minn. Ct. App. May 9, 1995); *In re Mayfield*, No. C2-95-103, 1995 WL 254407 (Minn. Ct. App. May 2, 1995); *In re Irwin*, 529 N.W.2d 366 (Minn. Ct. App. 1995); *In re Young*, No. C1-94-1779, 1994 WL 654508 (Minn. Ct. App. Nov. 22, 1994); *In re Patterson*, No. C0-94-1367, 1994 WL 615035 (Minn. Ct. App. Nov. 8, 1994); *In re Mayfield*, No. C8-94-1407, 1994 WL 593885 (Minn. Ct. App. Nov. 1, 1994); *In re Toulou*, No. C9-94-993, 1994 WL 593907 (Minn. Ct. App. Nov. 1, 1994); *In re*

Fitzpatrick, No. C1-94-1409, 1994 WL 586962 (Minn. Ct. App. Oct. 25, 1994); *In re Kunshier*, 521 N.W.2d 880 (Minn. Ct. App. 1994); *In re Bieganowski*, 520 N.W.2d 525 (Minn. Ct. App. 1994); *In re Schweninger*, 520 N.W.2d 446 (Minn. Ct. App. 1994); *In re Holly*, No. C9-94-492, 1994 WL 396314 (Minn. Ct. App. Aug. 2, 1994).

168 In *In re Blodgett* the Minnesota Supreme Court set forth factors that courts should use in evaluating the "utter lack of power to control" standard:

In applying the *Pearson* test, the court considers the nature and frequency of the sexual assaults, the degree of violence involved, the relationship (or lack thereof) between the offender and the victims, the offender's attitude and mood, the offender's medical and family history, the results of psychological and psychiatric testing and evaluation, and such other factors that bear on the predatory sex impulse and the lack of power to control it.

510 N.W.2d at 915. But these factors, though they may well be relevant, give no instruction about how to distinguish lack of capacity to control from failure to control. See SCHOPP, *supra* note 71, at 188 (criticizing *Blodgett* factors as being irrelevant to volitional dysfunction).

169 See *In re Blodgett*, 490 N.W.2d at 642-46.

170 See *In re Bieganowski*, 520 N.W.2d at 530 (affirming commitment although "the [pedophilic] 'grooming' process requires time, thus eliminating any 'suddenness' regarding the sexual activity"); *In re Mayfield*, 1995 Minn. App. LEXIS 602, at *8 (approving of expert testimony "explaining how planning could occur even when the person had an utter lack of control over his sexual impulses"); *In re Young*, 1994 Minn. App. LEXIS 1159, at *6 ("[W]hile Young may show planning and premeditation by his grooming behavior, his behavior is nonetheless impulsive and without volitional control.").

171 In *In re Irwin*, 529 N.W.2d at 375, the court approved of testimony indicating that:

[A]n important factor in determining whether one has power to control sexual impulses is whether the person feels he has a problem; if so, he at least has some control since he knows he is flawed, and may be more vigilant in seeking assistance. . . . Without this basic insight, appellant has the utter lack of control required by *Pearson*.

See also *In re Fitzpatrick*, 1994 Minn. App. LEXIS 1029, at *3 (Fitzpatrick "habitually shifts blame for his actions to others . . . [and] fails to appreciate the consequences of his actions"); *In re Adolphson*, 1995 Minn. App. LEXIS 965, at *10 ("Appellant's actions show he has no will to stop sexually assaulting adolescent males. Although appellant is aware that his conduct is against the law, he shows no remorse and expresses no second

thoughts.”)

172 *In re Toulou*, 1994 Minn. App. LEXIS 1067, at *9.

173 *See In re Holly*, 1994 Minn. App. LEXIS 715, at *5 (noting that “[e]ven while at the security hospital, [Holly] has ‘mooned’ a female staff person . . . and made inappropriate sexual comments to another female staff person,” and concluding that Holly could not control his sexual impulses).

174 *See In re Toulou*, 1995 Minn. App. LEXIS 623, at *7 (citing trial court finding “that Toulou is ‘totally dependent on external forces to conform to society’s mores,’ and that a ‘removal of those external controls, however, will predictably result in [Toulou] acting on his impulses.’”).

175 *In re Kunshier*, 521 N.W.2d at 882 (reciting expert testimony that “[Kunshier’s] impulse to rape becomes all intrusive[.]” and that his “behavior was usually ‘impulse driven past any point of rational control or concern regarding negative impact upon victims or the risk of incarceration.’”)

176 *In re Adolphson*, 1995 Minn. App. LEXIS 965.

177 *Id.* at *10 (“Appellant’s actions show he has no will to stop sexually assaulting adolescent males.”); *In re Holly*, 1994 Minn. App. LEXIS 715, at *5 (“continued preoccupation with sexual gratification and his constant desire to attain this gratification at whatever cost”).

178 *In re Mattson*, 1995 Minn. App. LEXIS 805, at *6 (“[W]hen a person engages in behavior despite repeated consequences, it evidences a lack of control”).

179 *In re Schweninger*, 520 N.W.2d at 450 (distinguishing “plotting, planning, seductions, payments, and coercive behavior . . . from [an] impulsive lack of control”).

180 *In re Bieganowski*, 520 N.W.2d at 530; *In re Mayfield*, 1995 Minn. App. LEXIS 602, at *8; *In re Young*, 1994 Minn. App. LEXIS 1159, at *6.

181 No. C3-95-2331, 1996 WL 81721 at *5 (Minn. Ct. App. Feb. 27, 1996).

182 *In re Blodgett*, 510 N.W.2d at 915.

183 *In Powell v. Texas*, 392 U.S. 514, 540 (1968) (concurring opinion), Justice Black said:

When we say that appellant’s [conduct] is caused not by “his own” volition but rather by some other force, we are clearly thinking of a force that is nevertheless “his” except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of “his” personality that should not be regarded as criminally responsible.

184 MILLON, *supra* note 30, at 181-215.

185 Compare this description with that given by Gene G. Abel & Joanne L. Rouleau, *The Nature and Extent of Sexual Assault*, in HANDBOOK OF SEXUAL ASSAULT 9, 18 (William L. Marshall et al. eds., 1990):

[M]any individuals report having recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again.

186 *See Morse*, *supra* note 82, at 170-74 (arguing that volitional impairment arises where the individual suffers a “desire or craving . . . so intense that the fear of the pain of not satisfying it was the true motive for offending”).

187 Schopp writes that volition is “an exercise of the faculty or function by which one engages in conscious and intentional action as a result of decision or choice through deliberation. A volitional impairment would involve some disorder of the capacities by which one engages in conscious and intentional action in response to deliberation and choice.” SCHOPP, *supra* note 71, at 202 (claiming that “severe cognitive psychopathology” is the basis for volitional impairment).

188 *See Morse*, *supra* note 82, at 177 (asserting that the cognitive/rationality functions are more easily assessed than the “strength of another’s desires and dysphoria or fear of it.”).

189 *See, e.g., Halleck*, *supra* note 71, at 338-53; Seymour L. Halleck et al., *The Use of Psychiatric Diagnoses in the Legal Process: Task Force Report to the American Psychiatric Association*, 20 BULL. AM. ACAD. PSYCHIATRY L. 481, 494 (1992); *cf. Morse*, *supra* note 82, at 177.

190 *See Morse*, *supra* note 82, at 177; Halleck, *supra* note 71, at 338-53 (discussing the setting of threshold levels).

191 *In re Schweninger*, 520 N.W.2d at 450.

192 Lawrence Z. Freedman, *Psychoanalysis, Delinquency, and the Law*, in BY REASON OF INSANITY 81, 85 (Lawrence Z. Freedman ed., 1983).

193 *See Gary Watson*, *Free Agency*, 72 J. PHIL. 205, 217-19 (1975) (drawing distinction between the “lower” desires, drives, and impulses, and the “higher” faculties of rationality, deliberation, and planning).

194 521 N.W.2d 880 (remanded for further findings on the issue of “utter lack of power to control”).

195 *Id.* at 882.

196 *In re Hart*, 1996 WL 56504, at *7.

197 *In re Bieganowski*, 520 N.W.2d at 530; *In re Mayfield*,

1995 Minn. App. LEXIS 602, at *8.

198 Thus, the following passage from the opinion:

[A]n important factor in determining whether one has power to control sexual impulses is whether the person feels he has a problem; if so, he at least has some control since he knows he is flawed, and may be more vigilant in seeking assistance. . . . Without this basic insight, appellant has the utter lack of control required by *Pearson*.

In re Irwin, 529 N.W.2d at 375; see also *In re Adolphson*, 1995 Minn. App. LEXIS 965.

There is no suggestion in either *Adolphson* or *Irwin* that the beliefs or desires were so irrational, as opposed to illegal and immoral, that they would satisfy a cognitive based theory of criminal irresponsibility. See *Morse*, *supra* note 82.

199 See *MILLON*, *supra* note 30, at 11.

200 *In re Irwin*, 529 N.W.2d at 375; *In re Adolphson*, 1995 Minn. App. LEXIS 965.

201 See *Morse*, *supra* note 82, at 175 (“We are all in large measure the product of biological endowments and environments over which we had no control, and many of our central desires are firmly established well before we reach the age of genuine, independent moral reflection on those desires.”).

202 Charles M. Culver & Bernard Gert, *Volitional Disabilities*, in *PHILOSOPHY OF MEDICINE* 111, 119 (1982).

203 Halleck et al., *supra* note 189, at 495.

This is a variant of the “policeman-at-the-elbow” test for an “irresistible impulse.” See Lawrence Z. Freedman, *Psychiatry and the Law: An Overview*, in *BY REASON OF INSANITY*, *supra* note 192, at 117, 126 (criticizing the test and quoting an Ontario judge: “We shall dangle a rope in front of you and see whether your impulses are irresistible . . .”).

204 As *Morse*, *supra* note 82, at 179, observes:

Those who offend in the face of certain capture have either rationally decided for political or other reasons that the offense is worth the punishment, as in cases of civil disobedience, or they are irrational. We generally tend to conclude that intense internal coercion was operative if conduct was so irrational that we can’t make any sense of it; otherwise, why would the person do it?

205 See *Pratt*, *supra* note 126, at 34 (“The dangerous’ have always found themselves in a juridical position between the sane and the insane; not sane enough to stop breaking the law, not insane enough to satisfy the legal requirements for this defense.”) (quoting John Pratt, *Dangerousness, Risk and Technologies of Power*, 28 *AUSTL. & N.Z. J. CRIMINOLOGY* 1

(1995)).

206 DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 133 (1983).

207 Similarly, in *In re Sabo*, 1993 Minn. App. LEXIS 947, at *3, Sabo “received numerous discipline violations for drug use and smuggling, verbal abuse, and threatening others,” which supported a finding that he was unable to control his sexual impulses. See also *In re Holly*, 1994 Minn. App. LEXIS 715, at *5; *In re Mattson*, 1995 Minn. App. LEXIS 805, at *6 (citing with approval expert testimony that “utter lack of control was demonstrated by the fact that even when appellant was in a structured setting, he had difficulty refraining from the use of pornography”); *In re Fitzpatrick*, 1994 Minn. App. LEXIS 1029, at *4 (lack of control demonstrated by “recent inappropriate behavior while incarcerated”); *In re Patterson*, 1995 Minn. App. LEXIS 1199, at *8 (offenses committed “despite negative consequences” also supports a finding of “utter lack of power to control”).

208 *In re Kunshier*, 1995 WL 687692, at *3.

209 More specifically:

The trial court cited testimony that Toulou was like a wild, predatory animal, which will strike when it is hungry and when prey is available unless deterred by other larger predators. The court found that Toulou is “totally dependent on external forces to conform to society’s mores,” and that a “removal of those external controls, however, will predictably result in [Toulou] acting on his impulses.”

In re Toulou, 1995 Minn. App. LEXIS 623, at *7.

210 *In re Mayfield*, 1995 Minn. App. LEXIS 602, at *4-5 (emphasis added).

211 *In re Young*, 1994 Minn. App. LEXIS 1159, at *6 (emphasis added).

212 *In re Patterson*, 1994 Minn. App. LEXIS 1094, at *6 (emphasis added).

213 *In re Patterson*, 1995 Minn. App. LEXIS 1199, at *8 (emphasis added).

214 *In re Biegenowski*, 520 N.W.2d at 527 (emphasis added).

215 See *Morse*, *supra* note 82, at 178 (criticizing R. Rogers, *APA’s Position on the Insanity Defense: Empiricism versus Emotionalism*, 42 *AM. PSYCHOL.* 840 (1987), for “beg[ging] the question” by defining an assessment of volitional capacity in terms of “loss of control”).

216 See *Morse*, *supra* note 82, at 177 (“[F]amously, we cannot distinguish between irresistible impulses and those impulses simply not resisted.”).

217 See *Young v. Weston*, 1995 U.S. Dist. LEXIS; *In re Hendricks*, 912 P.2d 129.

218 This was the path advocated by the State of Louisiana in *Foucha v. Louisiana*. See Brief of Respondent at 9-12, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (No. 90-5844). It was rejected by the Supreme Court. See Janus, *supra* note 79, at 170-77.

219 See ARGYRIS & SCHON, *supra* note 40, at xiii, ix (espoused theories are those explanations to which the agent gives its allegiance).

220 *Id.* at 80.

221 *Id.* at 81.

222 "The chief asset of the legal system is its legitimacy." Charles Kester, *The Language of Law, the Sociology of Science and the Troubles of Translation Defining the Proper Role for Scientific Evidence of Causation*, 74 NEB. L. REV. 529, 563 (1995) (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 56, 129-70 (1980)).