1993

Minnesota'S Gulag: Involuntary Treatment for the "Politically Ill"

C. Peter Erlinder
MINNESOTA'S GULAG: INVOLUNTARY TREATMENT FOR THE "POLITICALLY ILL"

C. PETER ERLINDER†

I. Introduction ........................................ 100
II. Statutory Background ..................................... 103
   A. Legislative History of The Psychopathic Personality Statute ................. 103
   B. Statutory Language of the Psychopathic Personality Statute .................... 104
      1. The Elements of the Statute: The Pearson Standard ......................... 104
      2. Comparing MID and Psychopathic Personality ............................ 108
      3. Requirements for Discharge ........................................ 111
III. State ex rel. Pearson v. Probate Court ...................... 116
   A. Factual Background ........................................ 116
   B. The Minnesota Supreme Court Opinion .................................. 117
   C. The United States Supreme Court Opinion ................................ 120
   D. Minnesota ex rel. Pearson in a Modern Constitutional Context .............. 121
      1. Generally ........................................ 121
      2. Criminal Punishment versus Civil Commitment ............................ 122
      3. Constitutional Considerations ..................................... 125
   E. Fouche v. Louisiana: Dangerousness as a Basis for Confinement .............. 138
IV. The Constitutionality of the Psychopathic Personality Statute after Fouche v. Louisiana: In re Blodgett ................................. 145
   A. Analysis of the Psychopathic Personality Statute in Light of Fouche v. Louisiana ........................................... 145
   B. The Minnesota Courts' Reaction to Fouche: In re Blodgett ...................... 147

† Professor of Law, William Mitchell College of Law; B.S. 1970, Bradley University; J.D. 1979, Chicago Kent College of Law. I would like to thank Donna Bailey, Steve Appelget, and Julie Swedback for their assistance in the writing and editing of this article.
In 1939, the Minnesota Legislature enacted a statute entitled, "A Bill for an Act Relating to Persons Having a Psychopathic Personality." Currently, the statute allows the involuntary hospitalization of any person found to meet the prescribed statutory definition of psychopathic personality. The statute's method of commitment parallels the procedures used to commit persons who are considered mentally ill and dangerous (MID). While the MID commitment statute requires a judicial determination that a person is both mentally ill and dangerous, the Psychopathic Personality statute allows the state to hospitalize a person indefinitely, without any finding that the person suffers from an illness known to medical science. Thus, the

2. Minnesota law defines a 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 such conditions, as to render such person irresponsible for personal conduct with respect to sexual matters and thereby dangerous to other persons. Minn. Stat. § 526.09 (1992).
3. See Minn. Stat. § 253B.01-25 (1992) (Minnesota Commitment Act of 1982 (MID statute)). See also Minn. Stat. § 526.10 (1992). The Psychopathic Personality statute provides that "the provisions of chapter 253B, pertaining to persons mentally ill and dangerous to the public shall apply with like force and effect to persons having a psychopathic personality, to persons alleged to have such personality, and to persons found to have such personality, respectively." Id.
5. All mental health professionals rely on the Diagnostic and Statistical Manual, published by the American Psychiatric Association, to determine the diagnosis that is appropriate for the symptoms observed in the patient. The Diagnostic and Statistical Manual is the source for diagnostic criteria recognized by mental health professionals. Originally published in 1954, the most recent manual includes neither a diagnosis entitled, "Psychopathic Personality," nor does it recognize any other diagnosis based on the diagnostic criteria set forth in Minnesota's Psychopathic Personality
“psychopathic personality” is not a medical diagnosis but a legislatively created category.

Once a person has been committed under the Psychopathic Personality statute, discharge from any involuntary confinement requires testimony regarding treatment and prognosis grounded in the expertise of mental health experts who have examined the person in question. Because a person committed as a “psychopathic personality” has never been found to suffer from a medically recognized illness, he may never gain

statute. See generally American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987) [hereinafter DSM-III-R].

Commentators have noted that even when a person is diagnosed as having a DSM-III-R disorder resembling the Psychopathic Personality, notably “Sexual Sadism” and “Antisocial Personality Disorder,” this diagnosis does not necessarily justify a prediction of dangerousness. See Gary Gleb, Comment, Washington’s Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Danger from Civil Commitment Proceedings, 39 UCLA L. Rev. 213, 230-31 (1991). Rather, the purpose of the DSM-III-R is diagnostic: the DSM-III-R attempts to apply a label to a class of behaviors and looks backward at the behavior instead of forward for predictive purposes. Id. at 232.

6. See Minn. Stat. § 526.10 (1992). An individual alleged to have a “psychopathic personality” under § 526.09 is entitled to all of the rights and procedures provided for the diagnosis and commitment of persons found to be mentally ill and dangerous. See Minn. Stat. § 526.10 (1992). Minnesota Statutes, Chapter 253B embodies the substantive and procedural limitations on the diagnosis, commitment, treatment and release of mentally ill patients. See generally Minn. Stat. § 253B (1992). This civil commitment statute involves a “massive curtailment of liberty” both for the “psychopathic personality” and for the “mentally ill and dangerous” patient. See Humphrey v. Cady, 405 U.S. 504, 509 (1972). The Humphrey Court examined the Wisconsin Sex Act, an act which provided for compulsory treatment and commitment for individuals convicted of sexual crimes and found either dangerous to the public or mentally ill. Humphrey, 405 U.S. at 507 (referencing Wis. Stat. Ann. § 959.15 (1958)). The court noted that this decision combined medical, social, and legal judgments to justify this “massive curtailment of liberty.” Id. at 509; see also In re Kottke, 433 N.W.2d 881, 883 (Minn. 1988) (noting that a finding of mentally ill and dangerous “impinged significantly upon an individual's liberty interests”).

When committed for an indefinite time, an individual faces the possibility of lifelong deprivation of liberty. Other civil rights may also be at stake. Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1198-99 (1974) (commitment may result in loss of voting rights, custody of children, right to obtain a driver’s license, right to serve on a jury, right to practice a profession, and right to make a contract or will).

In Minnesota, the legislature has specifically provided that civil commitment of an individual will not result in the deprivation of any legal right. See Minn. Stat. § 253B.23(2) (1992). However, during the individual’s confinement, there may be some limitations imposed on correspondence, visitors, and phone calls. See Minn. Stat. § 253B.03(2)-(4) (1992). In addition, when medical treatment of the individual is at issue, there may be limitations on the right to prior consent. See Minn. Stat. § 253B.03(6) (1992).

7. See Dr. William D. Erickson, The Psychopathic Personality Statute, Need for Change,
release by a determination that he has been "cured." Rather, the commitment as a "psychopathic personality" is based upon facts that, once having occurred, provide an ongoing justification for involuntary confinement.

Recently the statute has received increased attention. Prosecutors have used the statute as a "powerful weapon" against violent sexual offenders who have served their sentence and are near release from prison.8 By proving that the prior record of these soon-to-be-released convicted felons matches the definition set forth in the statute, prosecutors have succeeded in sending an increasing number of "psychopathic personalities" to the State Security Hospital.9 Many of these commitments occur over the objection of the Security Hospital staff who acknowledge that meaningful treatment is not available. The Psychopathic Personality statute thus thrusts the responsibility for confinement of individuals, who have completed their prison terms and who are not mentally ill, upon psychiatric institutions designed to treat the mentally ill.10

The involuntary hospitalization of individuals, who have not been found to suffer from a treatable, medically recognized illness, transforms what should be a question of medical necessity into a purely political issue. Ultimately, the Psychopathic Personality statute presents this question: Should a majority of the legislature have the power to create a category of behavioral characteristics and to mandate the involuntary confinement of those who match the statutorily created category? This article will review Minnesota ex rel. Pearson v. Probate

---


9. Currently, 48 persons are being held in the State Security Hospital facility who are not mentally ill and for whom there is no reliable form of treatment. Telephone interview with Dr. William D. Erickson, Director of Medical Services, St. Peter Regional Treatment Center (February 9, 1993). Compounding this problem is the increasing number of Psychopathic Personality commitments. From 1981 to 1990, 13 people were committed to the Saint Peter facility as psychopathic personalities; in 1991, 11 more were committed, and in the first 11 months of 1992, 20 more were committed. Officials Want to Replace State Hospital with Prison, Hospital for Psychopaths, MPLS. STAR TRIB., Nov. 22, 1992, at 6B.

10. Erickson, supra note 7, at 3. Dr. Erickson's article notes that these criminals are placed in the same setting with vulnerable psychiatric patients. Id. The increasing number of psychopathic personality commitments poses a crisis for the Department of Human Services. Id.
Court, the Supreme Court case that upheld the constitutionality of the Psychopathic Personality statute when it was enacted over fifty years ago. This article will compare the standards for commitment under the Minnesota Civil Commitment statute with the standards established by the Psychopathic Personality statute. Further, this article will review both Minnesota decisions, applying the Psychopathic Personality statute following Pearson, and Supreme Court opinions discussing the standards for involuntary hospitalization in the intervening decades. This article concludes that involuntary hospitalization without a judicial finding of both mental illness and dangerousness is a denial of due process. Likewise, involuntary hospitalization based on legislatively created definitions of "illness" violates both due process and equal protection. Finally, even if involuntary hospitalization—on grounds other than a medically recognized diagnosis—is constitutionally permissible, the Psychopathic Personality statute is impermissibly vague both on its face and as construed by the courts of Minnesota.

II. STATUTORY BACKGROUND

A. Legislative History of The Psychopathic Personality Statute

The Psychopathic Personality statute evolved out of a special committee appointed by the Governor of Minnesota. The committee sought to address the general problem of the insane criminal with special reference to "sex criminals." This committee recommended a "change in present laws relating to the care of defectives dangerous to the public to make possible the control of dangerously psychopathic persons without having to wait for them to commit a shocking crime." Thus, the express purpose of the statute was preventive detention. The committee also recognized that, with sex offenses, there is the additional complication of a necessarily vague

11. 309 U.S. 270 (1940), aff'd 205 Minn. 545, 287 N.W. 297 (1939).
and uncertain difference between criminal acts and behavior that is offensive only in light of certain standards or morality or property. These standards of decency and morality appear to be undergoing considerable change. Thus the bathing suits or sun-suits of today would generally have led to arrests for indecency a few years ago; the display of the more or less undraped human figure so common today in theatrical performances, art exhibits, or even in the dress of the so-called socially elite would not have been permitted a few years ago. . . . Formal control of behavior in this field becomes, therefore, exceedingly difficult both from the standpoint of legislation and law enforcement.\(^\text{14}\)

The committee did acknowledge that its recommendations would result in a “considerable” grant of power but believed that the “special conditions of the definition suggested [would] give adequate protection to the citizen against persecution through arbitrary acts of incompetent or unfriendly officials.”\(^\text{15}\)

B. Statutory Language of the Psychopathic Personality Statute

Minnesota Statute Section 526.09 prescribes a litany of conditions to define a psychopathic personality. A psychopathic personality is

\[
\text{the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any such conditions, as to render such person irresponsible for personal conduct with respect to sexual matters and thereby dangerous to other persons.}^{\text{16}}
\]

1. The Elements of the Statute: The Pearson Standard

In response to a challenge that the statute was unconstitutionally vague, the Minnesota Supreme Court, in \textit{State ex rel. Pearson v. Probate Court},\(^\text{17}\) narrowed the statutory definition of “psychopathic personality” to three elements: (1) habitual misconduct in sexual matters, (2) an utter lack of power to control

\(\text{15. Id. at 1396.}\)
\(\text{16. MINN. STAT. § 526.09 (1992) (emphasis added).}\)
\(\text{17. 205 Minn. 545, 555, 287 N.W. 297, 302 (1939), aff'd 309 U.S. 270 (1940).}\)
sexual impulses, and (3) probability that the lack of control will result in harm to others.18

a. Habitual Misconduct in Sexual Matters

A survey of judicial decisions affirming commitment indicates that charges of incest,19 pedophilia,20 exhibitionism,21 and child molestation22 may satisfy the habitual misconduct element.23 While these categories appear to cover a broad base of actionable behavior, courts have imposed some limits. For example, the Minnesota Court of Appeals recently reversed the trial court’s decision to commit an individual who carried the human immunodeficiency virus (HIV) under the Psychopathic Personality statute.24 The court of appeals stated that, although the individual’s “behavior may fall within the broadest possible literal reading of the statutory language, it was not necessary or appropriate for the trial court to stretch the psychopathic personality law to address the health problem presented by appellant . . . .”25

Additionally, the court of appeals noted that the psychopathic personality statute was enacted to “deal with conduct, not

---

18. Id.
19. See In re Martenies, 350 N.W.2d 470 (Minn. Ct. App. 1984). The court affirmed the commitment as a psychopathic personality of a man convicted of intrafamilial sexual abuse in the first degree. Id. at 473. Commitment proceedings were initiated after Martenies pled guilty to the charge and had begun serving a sentence of 108 months. The court noted that Martenies “has a long history of sexual, sadistic, and aggressive behavior” that included abuse of his wife, a niece, and an unrelated thirteen year old girl. Id.
20. See In re Stone, 376 N.W.2d 511 (Minn. Ct. App. 1985). Stone pled guilty to charges of criminal sexual conduct in 1983 and participated in a treatment program while incarcerated for the offense. Id. at 512. The petition for commitment as a psychopathic personality was brought while Stone remained a correctional facility inmate. Id. at 511-12. Stone, age 23, admitted to molesting between 30 and 200 young girls and pled guilty to charges of criminal sexual conduct. Id. at 512.
21. See In re Clements, 440 N.W.2d 133 (Minn. Ct. App. 1989). The court affirmed the commitment as a psychopathic personality of a man convicted of indecent exposure, including both direct confrontations and physical contact with his victims. Id. at 134.
22. See In re Monson, 478 N.W.2d 785 (Minn. Ct. App. 1991). The court affirmed the commitment as a psychopathic personality of a man who pled guilty to charges of second degree criminal sexual conduct involving young boys. Id. at 786.
23. The behavior need not be proven by a conviction. In In re Monson, the court of appeals indicated that “the psychopathic personality statute does not address convictions; it [only] addresses behavior . . . .” Id. at 789.
25. Id. at 735.
health conditions.” Absent an HIV-positive status, the individual’s conduct did not “fit what usually has been found for commitment as a psychopathic personality.”

Further, cases applying the statute fail to distinguish the type of misconduct that may be classified as “habitual.” Although the majority of those committed in the St. Peter facility are recidivistic, a significant percentage are first time offenders who have been convicted of only a single instance of misconduct.

b. Utter Lack of Power to Control Sexual Impulses

In delimiting the second element of the Pearson standard, the Minnesota Supreme Court made clear that commitment under the Psychopathic Personality statute requires proof of an individual’s “utter lack of power to control their sexual impulses.” However, in 1987, the Minnesota Court of Appeals ignored the narrowed Pearson construction and relied, instead, on the explicit language of the statute.

In In re Brown, the court held, without comment, that the trial court had applied each of the statutory elements, including “the requirement that the individual fails to appreciate the consequences of his acts, so as to render him irresponsible for his conduct with respect to sexual matters.” Nowhere did the court find that Brown lacked all power to control his sexual impulses.

The Brown court’s analysis contravenes the holding in Pearson.
son by failing to hold the State to a level of proof demonstrating an "utter lack of power to control sexual impulses." Instead, the court held the State to a lower standard of proof and applied a much broader reading of the standard than that upheld by the United States Supreme Court. According to the Brown court, the possibility that an individual is "operating under an increased lack of control" is sufficient to satisfy the Pearson criterion.

c. Lack of Control Results in Harm to Others

The final element of the Pearson standard requires that, as a result of the utter lack of control, the individual is "likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrolled and uncontrollable desire." According to Pearson, only a prediction of future dangerousness is required. Thus, the third element does not require actual physical harm or other objectively identifiable conduct.

In In re Clements, the Minnesota Court of Appeals apparently rejected the argument that the language of the statute implies or requires actual harm. Clements' sexual misconduct involved incidents of exhibitionism. However, Clements argued that "he [had] never actually inflicted injury or acted on his threats of sexual harm." In reply, the court stated that "so long as the danger of appellant's condition had already become apparent," the trial court was not required to delay commitment until appellant or someone else was actually harmed.

Three experts at Clements' hearing refused to label Clements as a psychopathic personality. One of the experts pos-

33. Brown, 414 N.W.2d at 803; see also In re Martienies, 350 N.W.2d 470, 472 (Minn. Ct. App. 1984). Upholding a civil commitment, the Martienies court again applied the Psychopathic Personality statute rather than the Pearson standard. The court stated, "[t]he statutory definition requires evidence of emotional instability or impulsive behavior or a lack of good judgment or a failure to appreciate the consequences of actions." Id. at 472.
34. Pearson, 205 Minn. at 555, 287 N.W. at 302 (emphasis added).
35. 440 N.W.2d 133 (Minn. Ct. App. 1989).
36. Id.
37. Id. at 136.
38. Id. (quoting In re Terra, 412 N.W.2d 325, 328 (Minn. Ct. App. 1987)).
39. Id. at 134-35.
ited that “Clements had not seriously harmed anyone in the past, and the team [of experts] could not actually predict that [Clements] would harm anyone in the near future.”\textsuperscript{40} Dr. James Jacobson also refused to describe Clements as a psychopathic personality.\textsuperscript{41} According to Dr. Jacobson, Clements did not fit the statutory definition “because he had not actually harmed anyone and did not intend to harm anyone.”\textsuperscript{42} Despite this testimony, the court of appeals upheld Clements’ commitment as a psychopathic personality.\textsuperscript{43}

With regard to potential danger, conflicting testimony of experts does not bar commitment of a “psychopathic personality.” In \textit{Dittrich v. Brown County},\textsuperscript{44} the court upheld the commitment of a man as a psychopathic personality based on conflicting testimony regarding the “dangerousness” determination.\textsuperscript{45} The appellant, initially committed on the basis of “sexual excesses committed upon his wife,” challenged the commitment, alleging insufficient evidence to establish he was dangerous to others.\textsuperscript{46} One expert testified that the appellant “would be like steam under pressure” and that there was “reasonable danger” of his molesting other women because his marital separation would deny him normal marital relations.\textsuperscript{47} Another expert testified that it was “unlikely appellant would attack other women.”\textsuperscript{48} This conflicting testimony, however, did not prevent the trial court from finding that appellant was a “psychopathic personality.”

2. \textit{Comparing MID and Psychopathic Personality}

Three major factors differentiate the MID statute from the Psychopathic Personality statute. First, the MID statute requires a predicate finding of mental illness \textit{before} an individual may be civilly committed.\textsuperscript{49} Under the Psychopathic Personal-

\begin{itemize}
\item \textsuperscript{40} \textit{In re Clements}, 440 N.W.2d 133, 135 (Minn. Ct. App. 1989).
\item \textsuperscript{41} Id. at 137.
\item \textsuperscript{42} Id. at 135.
\item \textsuperscript{43} Id. at 137. The court stated that “the trial court was not required to wait until Clements actually harmed someone.” Id. at 136.
\item \textsuperscript{44} 215 Minn. 234, 9 N.W.2d 510 (1943).
\item \textsuperscript{45} Id. at 235, 9 N.W.2d at 512.
\item \textsuperscript{46} Id. at 235-36, 9 N.W.2d at 512.
\item \textsuperscript{47} Id. at 235, 9 N.W.2d at 512.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} MINN. STAT. § 253B.09 (1992); \textit{see also MINN. STAT.} § 253B.02(13) (1992). By definition, a “\textit{[m]entally ill person}”
\end{itemize}
PSYCHOPATHIC PERSONALITY STATUTE

The definition of mental illness does not appear to include personality disorders. Persons found to be psychopathic personalities are often diagnosed as having antisocial personalities. See, e.g., In re Blodgett, 490 N.W.2d 638, 641 (Minn. Ct. App. 1992). Minnesota appellate courts have not ruled, as a matter of law, that personality disorders are not included within the phrase "substantial psychiatric disorders." Yet, the statutory language, history, and subsequent judicial construction of the definition strongly indicate that personality disorders do not fit within the definition of mentally ill. For example, the definition qualifies the disorder as one of "thought, mood, perception, orientation, or memory." These are psychiatric terms related to reality testing. There is no mention in the definition of character or personality disorder. See Janus, supra, at 21-22.

In In re El-Rashad, 411 N.W.2d 567 (Minn. Ct. App. 1987), the court stated that "[a]n individual who suffers from an antisocial personality disorder, but not a major mental illness, may not be a 'mentally ill person' as that term is defined by statute." Id. at 569. There is some uncertainty about this definition because the trial court decision, which the court of appeals upheld, had specifically found that El-Rashad did not have a "substantial psychiatric disorder." Id. However, the trial court accepted testimony of two experts who testified that El-Rashad did suffer from a substantial psychiatric disorder.

The significance of this distinction is that psychiatric treatment facilities and methods are directed toward psychotic disorders, not personality disorders. See Janus, supra, at 25. When an individual with a personality disorder is committed to such a facility, a risk of long term confinement results because the facility cannot adequately treat the individual and facilitate his/her return to society. Thus, like the person who is adjudicated a "psychopathic personality," the individual potentially faces a life sentence. The treatment facility must deal with 'patients' whom it is unable to treat but must house, and the mandated treatment provision, requiring that the patient be committed "to the least restrictive treatment program which can meet the patient's treatment needs" may be violated. See Minn. Stat. § 253B.09(1) (1992). This article will not address the issue regarding the level of treatment which should
ment” as a psychopathic personality without any finding that he has a treatable mental condition recognized by the medical profession. Second, the MID statute requires an overt act intended to cause serious physical harm to another. This overt act must be linked to the individual’s mental illness. Thus, the MID’s statutory requirements provide some objectively identifiable criteria that delineate the type, extent, and—to some degree—the immediacy of the harm required to justify MID commitment.

Unlike the MID statute, the psychopathic personality definition requires “habitual misconduct in sexual matters” and the probability that the individual’s “utter lack of control” will re-

be accorded to those involuntary committed. However, in Youngberg v. Romeo, 457 U.S. 307 (1982), the United States Supreme Court stated that involuntarily committed mentally retarded individuals are entitled to “minimally adequate or reasonable training to ensure safety and freedom from undue restraint.” Id. at 318; see also Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974), aff’d, 525 F.2d 987 (8th Cir. 1975) (stating that “due process requires that civil commitment for reasons of mental retardation be accompanied by minimally adequate treatment designed to give each committed person ‘a realistic opportunity to be cured or to improve his or her mental condition.’”) (citations omitted).

50. See supra note 5 and accompanying text.

51. See supra note 49.

52. Reome v. Levine, 692 F. Supp. 1046, 1051 (D. Minn. 1988). The Reome court, on habeus corpus petition, stated that the MID definition required the patient to be dangerous as a result of mental illness. Id. The court’s holding demonstrates this requisite connection: “A person may be committed as mentally ill and dangerous only upon clear and convincing evidence that the person is mentally ill, as defined in the statute, and dangerous as a result of that mental illness.” Id. (emphasis added). Although the patient in Reome was dangerous, the dangerousness did not arise from the mental illness. Id. at 1049. But see In re Hofmaster, 434 N.W.2d 279 (Minn. Ct. App. 1989). In Hofmaster, the court found the statutory language ambiguous because it permitted an interpretation that the onset of mental illness after the commitment of a dangerous overt act may satisfy the criteria of MID. Id. at 281. The court cited an expert witness who stated, “[w]ith the major mental illness most people seem to lose even more control over their behavior so we would expect even an increase in that type of behavior.” Id. Accordingly, although the overt act was not causally related to the mental illness, the court upheld the petitioner’s commitment as mentally ill and dangerous. Id. at 282.

53. The Minnesota Court of Appeals has twice cited the following passage from Professor Janus’ treatise on civil commitment: “[T]he ‘clear danger’ to others must be ‘demonstrated’ by past acts and a prediction of future harm... This suggests a temporal relationship between the past acts and the future dangerousness... Clearly, the more remote the past acts are in time, the less predictive value they have.” JANUS, supra note 49, at 24. See also In re Hofmaster, 434 N.W.2d 279, 281 (Minn. Ct. App. 1989); In re Brown, 414 N.W.2d 800, 803 (Minn. Ct. App. 1987). Additionally, the Minnesota Supreme Court noted that the overt act requirement ensures that commitments are not made “solely on the basis of predictions of future dangerousness.” In re Jasmre, 447 N.W.2d 192, 195 (Minn. 1989).
sult in harm to another. The statute does not require a medical diagnosis of a mental disorder. Minnesota courts have found that a person's prior convictions for criminal sexual offenses may provide a basis for commitment and may be used to demonstrate the probability of future harm. Further, the Psychopathic Personality statute requires neither an overt act nor a showing that potential harm is limited to physical injury.

Third, the MID's statute contains medically and objectively based criteria, criteria that have been strictly construed by Minnesota courts. On the other hand, even though the Minnesota Supreme Court narrowed the statute's construction in Pearson, lower appellate courts have failed to follow the Supreme Court's guidance. Instead, lower appellate courts have inconsistently applied varying standards to commit persons under the Psychopathic Personality statute.

3. The Discharge Statute: Requirements for Discharge

Once civilly committed—under either the MID statute or the Psychopathic Personality statute—an individual must satisfy specific statutory criteria for discharge before being released from the treatment facility. In determining whether to recommend a discharge, a special review board and the commis-

54. See supra Part II.B.
55. See supra notes 5-7 and accompanying text.
56. See In re Hofmaster, 434 N.W.2d 279 (Minn. Ct. App. 1989); In re Brown, 414 N.W.2d 800 (Minn. Ct. App. 1987).
57. See Hofmaster, 434 N.W.2d at 281; Brown, 414 N.W.2d at 803.
58. See In re Jasmer, 447 N.W.2d 192, 195 (Minn. 1989) (strictly construing the MID statute's standards).
60. The discharge statute provides:
A person who has been found by the committing court to be mentally ill and dangerous to the public [or a psychopathic personality] shall not be discharged unless it appears . . . that the patient is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.
Minn. Stat. § 253B.18(15) (1992). If the desired conditions do not exist, discharge may not be granted.
61. A special review board makes the final determination regarding discharge or provisional discharge of those committed under the MID statute. "The board shall consist of three members experienced in the field of mental illness. One member of the special review board shall be a physician and one member shall be an attorney.
sioner must consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community. The reviewing personnel must evaluate the patient's status in light of three conjunctive criteria: (1) the patient should be "capable of making an acceptable adjustment to open society"; (2) the patient should "no longer be dangerous to the public"; and (3) the patient should "no longer be in need of inpatient treatment and supervision.""}

a. Capable of Making an Acceptable Adjustment to Open Society

According to the Minnesota Supreme Court in Johnson v. Noot, a mentally ill and dangerous patient is capable of making an acceptable adjustment to open society when "the patient is either no longer mentally ill or no longer dangerous." Here, the court evaluated the first criterion of the discharge statute in light of the statutory definition of "[a] person . . . dangerous to the public" and held that a patient satisfies this standard by showing that either of the initial commitment findings is no longer valid.

Several years after the Johnson opinion, a Minnesota federal district court held that refusal to discharge an MID patient who was no longer mentally ill was unconstitutional—even if the patient continued to be a danger to the public. In Reome v. Levine, the court employed both due process and equal protection doctrine to mandate release of a non-mentally ill yet potentially "dangerous" individual. According to the court,

62. Id.
64. 323 N.W.2d 724 (Minn. 1982).
65. Id. at 728.
66. The Johnson court referenced the statutory definition of "person dangerous to the public" in effect in 1980. Compare MINN. STAT. § 253A.01(17) (1980) (defining "a person who is mentally ill or mentally deficient and whose conduct might reasonably be expected to produce a clear and present danger of injury to others.") with MINN. STAT. § 253B.02(17) (1992) (stating "[a] person mentally ill and dangerous to the public is a person (a) who is mentally ill; and (b) who as a result of that mental illness presents a clear danger to the safety of others . . . ").
67. Johnson, 323 N.W.2d at 728.
69. See id.
"[c]onfinement based on what amounts to a propensity for dangerousness unrelated to mental illness and for which no treatment is required 'is nothing more than preventive detention, a concept foreign to our constitutional order.' "70 Such detention is unconstitutional and due process demands that the individual be released.71

The court also rejected the prosecution's reliance on the Pearson proposition that "dangerousness need not be rooted in mental illness."72 Instead, the court opined that the MID statute, as written, applies only to those who are dangerous as a result of mental illness.73 Citing the narrowed judicial construction given the Psychopathic Personality statute in Pearson, the court stated that the "[Psychopathic Personality] statute does not operate on 'every person guilty of sexual misconduct or even to persons having strong sexual propensities.' "74 Rather, the statute applies "in extreme cases where the danger is clearly identified and the evidence clearly establishes the need for such protection."75 Thus, because the Psychopathic Personality statute, as narrowed by Pearson, operated on only a select few, the danger of preventive detention was avoided.

Further, the Reome court contrasted the provisions of the MID statute, noting that "the [MID] statutory provision as applied here [was] not restricted to those cases where the state's need to act [was] especially great."76 Thus, once a person is no longer mentally ill, "application of the statute is unconstitutional because dangerousness is not confined to the class identified as constituting a dangerous element, i.e., those whose mental illness results in conduct that threatens their own safety or the safety of others."77 If the discharge statute were interpreted to allow confinement on the basis of dangerousness alone, it would

- effectively [transform] mental hospitals into penal institutions where persons who are not mentally ill are held, not

70. Id. at 1051 (quoting In re Torsney, 394 N.E.2d 262, 271 (1979)).
71. Id.
72. Id.
73. Reome v. Levine, 692 F. Supp. 1046, 1051 (D. Minn. 1988) (citing MINN. STAT. § 253B.02(13),(17); § 253B.18(1) (1986)).
74. Id. (quoting Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 275 (1940), aff'g, 205 Minn. 545, 287 N.W. 297 (1939)).
75. Reome, 692 F. Supp. at 1051.
76. Id.
77. Id. at 1052.
because they committed a crime, but because they might at some future time be involved in criminal behavior. Confinement on this basis bears no rational relation to the purpose of the commitment and clearly interferes with rights 'implicit in the concept of ordered liberty.'

Application of the federal court's analysis of the discharge standard to mentally ill and dangerous individuals versus psychopathic personalities produces a dilemma: If the same discharge criteria are applied to an individual committed under the Psychopathic Personality statute, then how can this individual demonstrate the absence of mental illness where there is no diagnosis of mental illness that caused the person to be committed in the first place? In addition, mental health practitioners have no basis upon which to pronounce that the person is no longer "ill."

In Enebak v. Noot, the Minnesota Supreme Court addressed this dilemma. Upholding the trial court's denial of a provisional discharge, the supreme court held that the "psychopathic personality patient's" continuing need for treatment provided a basis for continued commitment, notwithstanding the fact that the patient had exhibited no misconduct for over six years.

Because Enebak did not challenge the constitutionality of the Psychopathic Personality statute, the court did not address whether Enebak still had a "psychopathic personality." Yet, the court's analysis clearly demonstrates that, if any sort of treatment exists to benefit the patient, continued confinement is justified, regardless of whether the patient continues to be mentally ill.

---

78. Id.
79. 353 N.W.2d 544 (Minn. 1984).
80. Id. at 549. Enebak had challenged the provisional discharge statute on the basis of Jones v. United States, 463 U.S. 354 (1983), which held that a person civilly committed must be released if he is either no longer mentally ill or no longer dangerous. Enebak, 353 N.W.2d at 547. The Enebak court interpreted the term "regained his sanity" as used Jones, 463 U.S. at 368, to be equivalent to the term "a need for inpatient treatment or supervision," used in the provisional discharge statute. Enebak, 353 N.W.2d at 547; see also MINN. STAT. § 253B.18(7) (1992). This appears to be contrary to a recent United States Supreme Court interpretation of the Jones decision, where the Court repeatedly states that the Jones criterion is mental illness. See, e.g., Foucha v. Louisiana, 112 S. Ct. 1780, 1784-85 & n.5 (1992).
81. Enebak, 353 N.W.2d at 550.
82. The court noted that Enebak had gone through some treatment programs while confined. Id. at 548. However, Enebak did not receive intensive treatment be-
b. Dangerous to the Public

Under the second criterion of the discharge statute, the court must determine that the patient is "no longer dangerous to the public." Here, the court must consider any prediction of future dangerousness. The second paragraph of the discharge statute requires the court to "consider whether specific conditions exist to provide a reasonable degree of protection to the public." According to one analysis,

[t]he label "dangerous to the public" entails a prediction of physical harm. The prediction must be based on behavior and mental status during a period recent enough to have predictive value. In order to prove that the label "dangerous to the public" is no longer applicable, the patient must prove that his or her behavior and mental status during the relevant period are not sufficient to justify a prediction of dangerousness.

Additionally, in dicta, the Minnesota Supreme Court has commented on the difficulty of predicting dangerousness. In Johnson v. Noot, the court stated that

[t]he statutory definition [of a person dangerous to the public] shows a recognition by the legislature of the obvious problems involved in predicting dangerousness. Many psychiatrists themselves admit that their ability to predict future dangerousness is not reliable; to date, no valid clinical experience or statistical evidence reliably describes psychological or physical signs or symptoms that can be reliably used to discriminate between the harmless and the potentially dangerous individual.

Individuals committed under both the MID and Psychopathic Personality statutes face significant difficulties in establishing that they are no longer dangerous to the public. The cause he was "not an appropriate candidate." Id. Relying on expert testimony, the court stated that "sex offenders like [Enebak] are deterred from inappropriate behavior only by extensive supervision and control." Id. at 549. The only effective treatment was confinement. The state need provide no treatment other than a cell. The risk that a person committed may reoffend if ever released from that cell justifies keeping him in it for the rest of his life. Although couched in the language of mental health, this is nothing but preventive detention.

84. See Janus, supra note 49, at 287.
85. 323 N.W.2d 724 (Minn. 1982).
86. Id. at 728. See also Janus, supra note 49, at 288-89 (discussing the difficulty of predictions of future dangerousness).
patient must negate, by a preponderance of the evidence, all reliable predictions of dangerousness. In addition, the patient seeking to prove a lack of dangerousness faces a trial court that skeptically views evidence of the individual's good conduct while in an artificial environment. Succinctly put, the Minnesota Court of Appeals noted: "[w]e have stated on several occasions that good behavior in the artificial environment of a hospital is not conclusive on the question of dangerousness to the public, when experts testify that the proposed patient remains mentally ill and dangerous.”

c. No Longer in Need of Inpatient Treatment and Supervision

Mental health professionals agree that this criterion should not be used to justify continued confinement, unless necessary to accomplish the purpose of the commitment, i.e., treatment of illness and prevention of physical harm. However, on at least one occasion, the Minnesota Supreme Court upheld the denial of a discharge request by an individual committed as a psychopathic personality based on the patient's need for inpatient treatment—even though no such "treatment" was available. In Enebak v. Noot, the court itemized the extent of treatment that Enebak received in the thirty years since his initial confinement. The court concluded in 1984 that, "[a]lthough petitioner has not had a reported incident of sexual misconduct since 1976, he has never received any substantial treatment for his condition. The evidence strongly indicates that petitioner's behavior disorder will not change if untreated.”

III. STATE EX REL. PEARSON V. PROBATE COURT

A. Factual Background

The Minnesota Supreme Court first addressed the constitutionality of the Psychopathic Personality statute in State ex rel.
**PSYCHOPATHIC PERSONALITY STATUTE**

Pearson v. Probate Court. On April 27, 1939, a police officer filed a petition under the statute charging "on information and belief" that Charles Pearson was a "Psychopathic Personality." After the county attorney certified that "good cause" existed, the Probate Court ordered the Sheriff to take Pearson into custody and set a hearing for May 5, 1939.

Before the orders could be served, Pearson filed a writ of prohibition challenging the constitutionality of the statute. The Minnesota Supreme Court stayed the hearing but issued an opinion upholding the constitutionality of statute on June 30, 1939. Because no hearing had been held on the petition, the Minnesota Supreme Court did not address the propriety of the statute as applied to Pearson. The opinion of the court contains no indication that Pearson had committed any unusual acts or whether any other basis existed for granting the petition. The question before the Minnesota Supreme Court, therefore, was solely the facial validity of the statute.

**B. The Minnesota Supreme Court Opinion**

Pearson's appeal before the Minnesota Supreme Court raised three challenges based on the Minnesota Constitution. The court rejected the first two as technical arguments. Pearson's third challenge, however, argued that the

---

95. 205 Minn. 545, 287 N.W. 297 (1939).
96. Id. at 546, 287 N.W. at 298.
97. Id.
98. Id.
99. Id. at 557, 287 N.W.2d at 303.
100. State ex rel. Pearson v. Probate Court, 205 Minn. 545, 557, 287 N.W. 297, 303 (1939), aff'd, 309 U.S. 270 (1940).
101. Pearson's petition included: (1) a challenge to the probate court's jurisdiction; (2) a challenge to the language of the act's title; and (3) a challenge of vagueness. Id. at 547, 287 N.W. at 299.
102. Id. at 549-52, 287 N.W. at 300-02. The court rejected Pearson's first argument, stating

[w]hile the abnormalities of the group placed under the jurisdiction of the probate court by this act differ in form from those which characterize . . . insane persons, the need for supervision and observation is the same, and the considerations which led this court . . . to recognize the latter as being proper subjects for guardianship apply with equal force to the former. We find no difficulty in holding that the legislature may give to the probate court jurisdiction over such personalities.

Id. at 550, 287 N.W. at 300. Likewise, the court dismissed Pearson's second challenge, stating "the constitutional mandate is not violated by the title here in question. Its defects may offend the principles of legislative draftsmanship but not those of constitutional law." Id. at 554, 287 N.W. at 302.
statute was "void because it is uncertain and indefinite and violates the Fourteenth Amendment to the Constitution of the United States."\textsuperscript{103}

Pearson contended that the language of the statute did not adequately describe those persons who fell under its provisions.\textsuperscript{104} The Minnesota Supreme Court conceded that the statute was "imperfectly drawn"\textsuperscript{105} but went on to assert that the "statute is nevertheless valid if it contains a competent and official expression of the legislative will."\textsuperscript{106} The court stated that "when confronted with a statute which is susceptible of different interpretations, [the court must] accept one which is in conformity with the purpose of the act and in harmony with . . . the constitution."\textsuperscript{107}

The court further concluded that, if, "after exhausting every rule of construction, no sensible meaning can be given to the statute, or if it is so incomplete that it cannot be carried into effect, it must be pronounced inoperative and void."\textsuperscript{108} Consequently, the Minnesota Supreme Court created a narrowed construction of the language of the statute that limited the statute to

include those persons who, by a habitual course of misconduct in sexual matters, 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.\textsuperscript{109}

Without this "narrowed" construction, the Minnesota Supreme Court would have found the statute unconstitutional, because the language on the face of the statute was too "uncertain and vague."\textsuperscript{110} The court also stated that the statute could not be constitutionally applied to "every person guilty of sexual misconduct nor even to persons having strong sexual
propensities.”" 111 Yet, the court did not explain how the narrowed construction would prevent the improper application of the statute.

The court's difficulty in upholding the statute is underscored in its brief discussion of other provisions of the act. 112 According to the court, the "act, in effect, merely extends the concept of insanity to include sexually irresponsible persons who are dangerous to others." 113 Thus, the court, here, implies that the legislature has the power to define mental illness.

But, ironically, the last section of the act precludes the use of "psychopathic personality" as an insanity defense. 114 The court acknowledged this apparent inconsistency inherent in the statute by stating, "[o]n its surface, this section would appear to imply that persons with psychopathic personalities are sane." 115 In a roundabout way, the court, to its satisfaction, resolved the inconsistency by distinguishing "insanity," as a defense to crime, from the provisions of the act which, applied to "persons having uncontrollable and insane impulses to commit sexual offenses, treats them as insane." 116 The court concluded its analysis by making clear that there is a difference between the standards for civil commitment because of mental illness and insanity as a criminal defense: "[w]hile the public welfare requires that they be treated before they have the opportunity to injure others, it does not necessarily follow that their malady must excuse them from criminal conduct occurring in the past." 117

While correct in principle, this statement reveals the difficulty the court had in determining the meaning of the statute in light of the imprecise terminology employed by both the law and medicine at the time the case was decided. 118 Under the

111. Id. at 555, 287 N.W. at 302.  
112. Id. at 556, 287 N.W. at 303.  
113. Id.  
114. Id.  
116. Id.  
117. Id.  
statute, a psychopathic personality is both "sane" and "insane," depending on the legal issue before the court.

C. The United States Supreme Court Opinion

In 1940, Pearson appealed to the United States Supreme Court. In a perfunctory six page opinion, the Supreme Court rejected Pearson's constitutional claims of vagueness, equal protection, and due process.

Beginning with the vagueness claim, the Supreme Court adopted the three part "narrowed" construction imposed by the Minnesota Supreme Court. The Court stated that there must be proof of a "habitual course of misconduct in sexual matters" on the part of the persons against whom a proceeding under the statute is directed that shows "an utter lack of power to control . . . sexual impulses," making them "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." Without greater explanation or citation to authority, the Court concluded that these elements were "as susceptible of proof as many of the criteria constantly applied to prosecutions for crime" and that Pearson's vagueness arguments "find no warrant in the statute as the state court has construed it." The Court also gave short shrift to Pearson's equal protection argument. Applying a rational basis standard of review, the Court held that "the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. . . . [T]he legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." The Court did not discuss

---

119. Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), aff'g, 205 Minn. 545, 287 N.W. 297 (1939). The Court heard Pearson's appeal on February 6-7, 1940 and denied him relief on February 26, 1940, less than a year after the original petition had been filed against Pearson.
120. Id. at 271-73.
123. Id. at 274.
124. Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 274 (1940), aff'g, 205 Minn. 545, 287 N.W. 297 (1939). The Pearson Court determined whether there was any rational basis for the legislature defining the class or group as it did.
125. Id. at 275.
whether the government had a legitimate interest in involuntarily hospitalizing persons who have not been diagnosed as suffering from a medically recognized illness.

Overall, the Court concluded that, on its face, the statute included sufficient procedural safeguards and that Pearson's procedural objections were "premature" because the procedures had not yet been applied to him. The Court did not address the substantive due process question raised by the statute. The Court issued no clear guidance whether the legislature had the power to establish the diagnostic criteria for involuntary hospitalization or to eliminate the mental illness requirement entirely.

D. Minnesota ex rel. Pearson in a Modern Constitutional Context

1. Generally

Many years after Pearson, the Supreme Court established a "clear and convincing" standard of proof for all civil commitment proceedings. With the exception of Pearson, all civil commitment cases that have come before the Supreme Court have involved commitment procedures that included both a finding of mental illness or not guilty by reason of insanity and a finding of dangerousness. The Court has also clearly stated that a finding of mental illness alone is not sufficient for involuntary hospitalization. The Due Process Clause requires

126. Id. at 277. The county attorney must find that good cause exists on the basis of the facts submitted. Id. at 275. The petition must be "executed by a person having knowledge of the facts." Id. The person in question must be examined by two licensed medical doctors. Id. The hearing includes the right to be represented by counsel and compulsory process. Id. at 276. The result is subject to appeal and a petition for release may be filed at any time. Id.

127. Id. at 277.

128. See Addington v. Texas, 441 U.S. 418, 433 (1979). The Court held that, in civil commitment cases, the proof must be greater than the "preponderance of the evidence standard" and that Texas' "clear, unequivocal and convincing" standard was constitutionally adequate. Id. at 432-33. However, the Court also held that states may determine the precise burden as long as it equalled or exceeded the "clear and convincing standard." Id. at 432.

129. Evidentiary rules and state statutes require a medical diagnosis for mental state evidence to be admissible. See Fed. R. Evid. 702-710.

a finding of dangerousness before anyone may be civilly committed.\textsuperscript{131}

In its most recent decision, \textit{Foucha v. Louisiana}, the Supreme Court also stated that dangerousness alone is not enough for civil commitment and that mental illness must also be present.\textsuperscript{132} Before the \textit{Foucha} decision, the Court had never explicitly addressed whether dangerousness alone, without mental illness, was sufficient grounds for involuntary hospitalization. An earlier decision held that

\[\text{Thus, Pearson is the only Supreme Court opinion upholding involuntary civil commitment without any finding of mental illness.}\textsuperscript{133}

\textbf{2. Criminal Punishment Versus Civil Commitment}

Although purportedly a civil commitment statute, the failure of the Psychopathic Personality statute to require a medically recognized mental illness raises the question of whether its purpose is treatment or incarceration. If its intention is incarceration,\textsuperscript{134} the statute should be cast into the criminal category.\textsuperscript{135}Were the Psychopathic Personality statute to impose a prison term of years, rather than an indefinite period of forced hospitalization, clearly the statute would be viewed as


\textsuperscript{132} 112 S. Ct. 1780, 1787 (1992).

\textsuperscript{133} Addington v. Texas, 441 U.S. 418, 426 (1979).

\textsuperscript{134} Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), aff'g, 205 Minn. 545, 287 N.W. 297 (1939).

\textsuperscript{135} 112 S. Ct. 1780 (1992).

\textsuperscript{136} The legislative history indicates that the purpose of the statute was not treatment but rather preventive detention. \textit{See supra} Part II.A.

However, when viewed as a criminal statute, the Psychopathic Personality statute falls far short of the current constitutional standards in several important respects: First, even as limited by the Minnesota Supreme Court, the statute fails to give adequate notice of the actions that are forbidden. Second, the Psychopathic Personality statute punishes a condition rather than an act. If the statute labeled the purpose of con-

138. Criminal liability is grounded upon two elements: *actus reus* and *mens rea*. In order to establish criminal liability, the State must prove that an actor performed a voluntary act or failed to perform a legal duty and did so with the mental state required by the statute. See generally Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 3.1 (1986).

The Model Penal Code also mandates the requirement of the voluntary act. Unequivocally stated, "[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." Model Penal Code § 2.01(1). The *actus reus* or guilty act, therefore, is the act that must occur before criminal liability may attach. See LaFave & Scott, supra, § 3.9 at 250.

Vicarious liability—liability for acts performed by others—may be considered an exception to this principle. However, where a statute prescribes both vicarious and strict liability, liability is imposed without regard to either *mens rea* or *actus reus*.

It is possible to commit a crime without the requisite *mens rea*. See Model Penal Code § 2.02(2) (describing the four types of *mens rea* culpability). Strict liability crimes fall within this category of offenses and reflect a policy decision by legislatures to impose criminal liability for conduct alone. The most common strict liability crimes are public welfare offenses. See, e.g., United States v. Dotterweich, 320 U.S. 277, 281 (1943) (approving strict liability for misbranded foods); see also Morissette v. United States, 342 U.S. 246, 255-60 (1952) (accepting strict liability as permissible for public welfare offenses). However, liability without fault has been imposed in other categories of offenses. See Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 73 (1933) (strict liability imposed for offenses such as violations of anti-narcotic acts, motor vehicle laws, bigamy, and rape).

139. The Supreme Court has restricted the states' power to impose sanctions for a criminal offense without the requisite *actus reus*. See Lambert v. California, 355 U.S. 225 (1957). In Lambert, a California municipal code required that anyone convicted of a felony must register with the chief of police. Id. at 226. Under the statute, failure to register within five days constituted a crime regardless of whether the person was aware of the duty to register. Id. at 227. The Supreme Court voided the conviction holding that failure to register is "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." Id. at 228. Thus, it is a violation of due process for "wholly passive" conduct to constitute the *actus reus* element unless the duty to act was known or should have been known. Id.

140. Although the *mens rea* element may be excluded from a crime, the *actus reus* remains a requisite element of the proscribed offense. See Robinson v. California, 370 U.S. 660 (1962). In Robinson, the Supreme Court set aside a conviction under a California statute that made narcotics addiction a criminal offense. The statute punished the "status" of being a narcotics addict without any showing that the offender had ever used or possessed any narcotics within the jurisdiction of the state. Id. at
finement as "punishment" rather than "treatment," the statute fails to provide the complete trial and due process of law to which an accused is constitutionally entitled in a criminal proceeding.\textsuperscript{141} However, the Psychopathic Personality statute authorizes involuntary hospitalization without a criminal conviction or the commission of any particular act. Thus, the statute will be evaluated in light of the standards established for statutes authorizing involuntary confinement in a civil context.\textsuperscript{142}

The application of the statute to those who have already

\textsuperscript{666}. The State used circumstantial evidence of a "tell-tale track of needle marks and scabs over the veins of his arms" to prove the addict's violation of the statute. \textit{Id.} Recognizing narcotics addiction as an illness, the Court summarily rejected the imposition of criminal liability on one so afflicted as unconstitutional under the Eighth and Fourteenth Amendments. \textit{Id.} at 666-67.

Further, the Supreme Court, in Powell v. Texas, 392 U.S. 514 (1968), interpreted \textit{Robinson} as distinguishing between punishment of "status" and "acts." \textit{Id.} at 533. The Court stated, "The entire thrust of \textit{Robinson}'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in . . . historical terms, has committed some \textit{actus reus}." Clearly, mere status, unaccompanied by some \textit{actus reus}, cannot be made punishable by criminal law. \textit{Id.} at 533-34.

The Psychopathic Personality statute would not survive the \textit{Robinson} or \textit{Lambert} tests if enacted as a criminal statute. The statute would criminalize the "status" of bearing specified traits, as documented by prior criminal convictions. Because the statute does not require the requisite \textit{actus reus}, the Psychopathic Personality statute creates liability for acts which have occurred in the past and have already been punished, without the allegation that any new act has occurred. Thus, the statute would criminalize the "status" of being a sex offender. \textit{Robinson} and \textit{Lambert} make clear that imposing criminal sanctions on this basis is unconstitutional.


\textsuperscript{142}. See \textit{Addington v. Texas}, 441 U.S. 418 (1979). The Court stated: "In a civil commitment state power is not exercised in a punitive sense. . . . [A] civil commitment proceeding can in no sense be equated to a criminal prosecution." \textit{Id.} at 428. In \textit{Allen v. Illinois}, 478 U.S. 364 (1986), the Court rejected petitioner's contention that a statute authorizing involuntary civil commitment of individuals found sexually dangerous was criminal in nature because individuals confined must have committed at least one criminal sexual attempt or act. \textit{Id.} at 370. The Court's analysis relied on the fact that the Illinois law required proof of the existence of a mental disorder, that the purpose of confinement was to treat, rather than punish, sexually dangerous individuals, and that those confined under the statute were not treated like ordinary prisoners. \textit{Id.} at 371-74.

Preventive detention, prior to a criminal trial, raises the issue of whether confinement constitutes punishment for the presumptively innocent. This article will not address the questions raised by such involuntary confinement in a criminal context. \textit{See generally} United States v. Salerno, 481 U.S. 739 (1987) (discussing pretrial detention as potential violation of due process); Marc Miller & Martin Gugenheim, \textit{Pretrial Detention and Punishment}, 75 MINN. L. REV. 395 (1990) (discussing preventive detention as punishment).
been convicted and served their sentences raises additional difficulties. First, society has already punished the individual for the criminal offense. There is no finding that the individual suffers from a psychosis or other mental illness, and there is no objective medical criteria upon which to base further commitment. Second, there is no basis under criminal law that would justify continued detention of the individual after his prison term has been served. Yet, because of the threat of future harm, the Psychopathic Personality statute has been used to indefinitely extend the incarceration, based solely on the same acts for which he has already been punished.

While certainly popular—and perhaps even beneficial to public safety—such a scheme or procedure is expressly forbidden in our constitutional system. In *Foucha v. Louisiana*, Justice White writes:

> This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

3. **Constitutional Considerations**
   a. **Vagueness**

   In 1939, the Minnesota Supreme Court conceded that the language on the face of the statute was too “indefinite and uncertain” to withstand constitutional scrutiny without the “narrowed” construction imposed by the court. The United States Supreme Court also based its “vagueness” analysis on the Minnesota Supreme Court’s narrowed construction.

---

The Minnesota Supreme Court narrowly construed the statutory language to require proof of (1) a “habitual course of misconduct in sexual matters”; (2) “an utter lack of power to control their sexual impulses”; and (3) a likeliness “to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desires.”

In the Supreme Court’s review of *Pearson*, the Court held that these three criteria were not vague because they were “as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.” However, even if this were a correct statement of the constitutional standard in 1939, this standard has since been abandoned by the Court. Under current vagueness standards, the Court has provided ample guidance by stating that a statute is constitutionally vague if people of ordinary intelligence cannot understand what is prohibited, or it encourages arbitrary and discriminatory enforcement.

Under this analysis, the Psychopathic Personality statute may not survive a vagueness challenge. First, people of ordinary intelligence may have difficulty ascertaining the behavior that the statute seeks to sanction. Taken literally, the statute appears to sanction a wide range of behavior that occurs on a regular basis in conventional social relationships. The ordinary person simply has no way of knowing when his or her behavior crosses the line, and, since Psychopathic Personality is not a medical diagnosis, not even a doctor can know.

Second, case law illustrates that courts, too, have faced problems in applying the *Pearson* elements with any consistency. This inconsistent application renders the statute subject to arbitrary enforcement. The statute gives no guidance to limit its application to particular acts or behavior. Both the Minnesota Supreme Court and the United States Supreme Court recognized that applying the statute to “every person guilty of sexual misconduct” or “to persons having strong sex-

151. For example, in *Blodgett*, the two testifying physicians could not agree on the application of the statute. *In re Blodgett*, 490 N.W.2d 638, 641 (Minn. Ct. App. 1992).
ual propensities" would not only be "impracticable," but, "perhaps, unconstitutional." 152

Even if the narrowed construction of the Psychopathic Personality statute could survive a vagueness challenge, the courts in Minnesota have often ignored the narrowed Pearson construction. As early as 1943, only three years after the United States Supreme Court decided Pearson, the Minnesota Supreme Court applied the statutory language rather than the Pearson standard. In Dittrich v. Brown County, 153 the Minnesota Supreme Court stated, "The statute requires that, before a person may be adjudged a psychopathic personality, two facts must be established, viz.: (1) that such person is irresponsible with respect to sexual matters; and (2) that, because of such fact, he is dangerous to others." 154

This incorrect application of statutory language illustrates that the Minnesota courts' commitment of many individuals as psychopathic personalities does not satisfy even the constitutional standard upheld in Pearson. 155

In addition, the Minnesota courts have not always required the state to demonstrate each of the definitive elements of the statute when upholding an individual's commitment. 156 Consequently, despite the purportedly narrowed construction of the statute, subsequent case law has provided no discernible standards to identify the "psychopathic personality."

In essence, all individuals convicted of one or more criminal sexual offenses may be confined under the Psychopathic Personality statute. Even individuals who have never physically injured anyone may be committed under the statute. 157 The courts have not required that individuals so committed demonstrate the "utter lack of power to control sexual impulses" re-

152. State ex rel. Pearson v. Probate Court, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939), aff'd 309 U.S. 270 (1940). See also In re Monson, 478 N.W.2d 785, 788 (Minn. Ct. App. 1991). Monson is one of the few cases to recognize that only a narrowed interpretation of the statute was upheld by Pearson.

153. 215 Minn. 234, 9 N.W.2d 510 (1943).

154. Id. at 236, 9 N.W.2d at 512.


156. See, e.g., Dittrich, 215 Minn. at 235-36, 9 N.W.2d at 512.

157. See In re Clements, 440 N.W.2d 133, 136 (Minn Ct. App. 1989) (upholding the commitment of a man who exhibited himself and spied on young boys); see also supra note 57 and accompanying text.
quired by the *Pearson* standard.158 Neither the courts nor the legislature has established a clear threshold of dangerousness or a definition of harm to guide judgment in the application of this definition.

The inability of testifying experts to objectively identify the conduct that constitutes a psychopathic personality is reflected in court testimony that consistently uses the language of the statute, rather than medical standards, to "diagnose" those individuals against whom the statute is enforced.159 Because a "psychopathic personality" is not, by definition, mentally ill, medical experts are unable to provide a diagnosis of a medical illness to fit the legislatively created label.160

A recent Minnesota case illustrates the potential for misuse inherent in the wording of the *Pearson* definition. In *In re Stilinovich*,161 the trial court committed an HIV-positive individual as a psychopathic personality, when the individual threatened to have sexual intercourse without disclosing his HIV status.162 Even though the Minnesota Court of Appeals reversed the finding, the court conceded that Stilinovich's behavior might "fall within the broadest possible literal reading of the statutory language."163

Even the narrowed definition fails to provide the notice and discernible standards necessary to avoid the void for vagueness challenge. Although the Minnesota Supreme Court stated, "[i]t would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities,"164 it appears that this is exactly the class of individuals against whom the statute has been enforced.

158. See supra Part II.B.1.b.
159. See supra notes 30-32 and accompanying text.
160. See supra note 49.
162. Id.
163. Id. at 735. The court based its ruling on statutory interpretation. Id. (citing *Ehler v. Graue*, 292 Minn. 393, 397-98, 195 N.W.2d 823 (1972); MINN. STAT. § 645.26(1) (1990)). The court indicated that the specific situation of an HIV positive individual threatening to transmit the virus to others was covered by the Health Threat Procedures Act, MINN. STAT. §§ 144.4171-.4186 (1990). The court characterized the Psychopathic Personality statute as the more general provision, which must yield to the more specific and applicable Health Procedures Act. *Stilinovich*, 479 N.W.2d at 736.
b. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment mandates that the state treat, in a similar manner, all persons who are similarly situated.165 Any legislation that accords persons different rights depending on their legislative classification is reviewable under the Equal Protection Clause.166 The level of scrutiny that the court will invoke to review the statutory classification depends on whether the classification burdens either a "fundamental right"167 or creates a "suspect class."168 A strict scrutiny analysis is required if either a fundamental right or suspect class is implicated in the legislative category and an intermediate standard of review is applied in certain other classifications.169

In the 1940 Pearson appeal, the United States Supreme Court examined the Psychopathic Personality statute and considered whether a rational basis existed for the class as defined by the Minnesota Supreme Court’s criteria.170 Applying the rational basis test, the Supreme Court upheld the Psychopathic Personality statute but made two unsupported assertions: “the legislature is free to recognize degrees of harm,”171 and the legislature is free to define what constitutes “a dangerous element in the community.”172

The Supreme Court’s equal protection analysis faltered in two respects: first, the Court inappropriately applied the rational basis standard of review. In light of the fundamental na-

166. Id.
168. The classic "suspect class" is based on race. See Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down a law banning interracial marriage on equal protection grounds).
169. See Lalli v. Lalli, 439 U.S. 259, 265-68 (1978) (holding that classifications based upon illegitimacy must be substantially related to permissible state interests); Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that classifications by gender must serve important governmental objectives and be substantially related to the achievement of those objectives).
171. Id. at 275.
172. Id.
ture of the interest at stake, e.g. freedom from involuntary confinement, the "rational basis" standard did not adequately embrace the issue at hand.\textsuperscript{178} Liberty is a right expressly protected by the United States Constitution,\textsuperscript{174} and involuntary confinement "for any purpose constitutes a significant deprivation of liberty."\textsuperscript{175} Any statute that defines a class of citizens subject to involuntary confinement should be reviewed under the "strict scrutiny" standard to determine whether the state has a compelling interest in creating the classification.\textsuperscript{176}

Second, the equal protection analysis performed by the Court failed to consider whether the legislature has a legitimate interest in confining citizens who were not serving a criminal sentence and who did not suffer from a medically defined illness.\textsuperscript{177} Even under the rational basis test, it is doubtful that the classification created by the Psychopathic Personality statute is permissible. If the purported state interest of the Psychopathic Personality statute is to provide care and treatment

\begin{itemize}
  \item \textsuperscript{173} See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1910). The Court stated:
    \begin{enumerate}
      \item The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
      \item A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
      \item When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
      \item One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.
    \end{enumerate}
  \item Id. See also Foucha v. Louisiana, 112 S. Ct. 1780, 1787 (1992).
  \item U.S. Const. amend. V; U.S. Const. amend. XIV, \S 1.
  \item This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Foucha, 112 S. Ct. 1780, 1785 (citing Jones v. United States, 463 U.S. 354, 361 (1983)); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); In re Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967)); see also Addington v. Texas, 441 U.S. 418, 425 (1979).
  \item In deciding a closely related issue, the Court held that only the gravest imminent danger to public safety may justify forced removal from one's home. See Korematsu v. United States, 329 U.S. 214, 218 (1944). In Foucha, the Supreme Court has expressly stated that freedom from personal restraint is "at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha, 112 S. Ct. at 1785.
  \item See generally supra notes 136-145 and accompanying text.
\end{itemize}
for those identified by the criteria, the question is whether commitment based on the Pearson standard is reasonably related to the state's purpose for the commitment. Is there any good reason at all for the state to commit non-mentally ill individuals, who fit the Pearson standard, to a mental hospital for treatment? Medical experts indicate no treatment programs exist to provide a reasonable expectation of success.

While seemingly designed to provide the procedural protections accorded MID commitments, in reality, the Psychopathic Personality statute eliminates the medically recognized determinations that make the MID commitment statute constitutionally permissible. The absence of these objective determinations—available for all other civil commitments—is inconsistent with the Equal Protection Clause and suggests that the Psychopathic Personality statute should not even survive the minimum rationality standard of review.


179. See Baxstrom v. Herold, 383 U.S. 107, 111 (1966). "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Id. (quoting Walters v. City of St. Louis, 347 U.S. 231, 237 (1954)).

180. "For all but a few of the men currently under commitment, we know of no form of treatment that would have a reasonable expectation of success." Erickson, supra note 7, at 3.

181. "The focus of the commitment act is to impose involuntary treatment, in the least restrictive available setting, upon individuals only if there is no less restrictive alternative disposition which is reasonable." In re Rice, 410 N.W.2d 907, 910 (Minn. Ct. App. 1987), review denied, (Minn. Oct. 28, 1987). The Rice court also commented upon MINN. STAT. § 253B.09 (4) (1986), the commitment act that authorizes trial courts to release patients prior to commitment. "The emphasis in the statute is upon care and treatment. . . . However, we are mindful that courts must balance the state's interest in treating and preventing harm to (and by) mentally ill, mentally retarded, and chemically dependent persons against a patient's qualified right to refuse treatment." Id. at 911. See also In re Kottke, 433 N.W.2d 881, 884 (Minn. 1988) (refusing to commit an individual as mentally ill and dangerous without a showing that the behavior met the statutory standard of "serious physical harm"); JANUS, supra note 49, at 41. Professor Janus states, "[t]he category 'person mentally ill and dangerous to the public' is designed to identify those mentally ill persons who pose a particularly severe danger to others so that appropriate measures can be taken to protect the public from that danger." Id. See generally Jones v. United States, 463 U.S. 354, 368 (1983) ("The purpose . . . of civil commitment is to treat the individual's mental illness and protect him and society from his potential dangerousness."); Addington v. Texas, 441 U.S. 418, 426 (1979).

182. See supra notes 5-6 and accompanying text.

183. See Baxstrom v. Herold, 383 U.S. 107, 110-12 (1966). The Court invalidated, under the Equal Protection Clause, a civil commitment classification scheme that de-
United States Supreme Court has held that a state has a legitimate purpose to protect the public by involuntarily committing those who are mentally ill and dangerous, the Court has never found that involuntary commitment based solely on protection of the public is constitutionally permissible without a predicate finding of mental illness.

Once committed, the discharge standards also implicate Equal Protection guarantees. In Jackson v. Indiana, the Supreme Court dealt with the discharge issue in the context of the indeterminate commitment of a developmentally disabled individual found incompetent to stand trial. The Court invalidated a state statute that subjected incompetent criminal defendants to a more lenient commitment standard and a more stringent release standard than applicable to other civil commitments. Employing an equal protection analysis, the Court stated: "The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release."

In sum, the fundamental nature of the liberty interest requires a heightened level of review. Even the rational basis test should examine the purposes and constitutionality of legislative classifications. As Mr. Justice Jackson expressed in Railway Express Agency v. New York:

[T]here is no more effective practical guaranty against arbitrary prisoners near the end of their penal term the same procedural protections provided for all other allegedly mentally ill persons. "One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

---

186. Those committed as mentally ill and dangerous may obtain release upon a showing that they are no longer mentally ill or dangerous. See Reome v. Levine, 692 F. Supp. 1046, 1047 (D. Minn. 1988). The commitment standards under the Psychopathic Personality statute, however, pose substantial barriers to release. Without a medical finding of mental illness, it is uncertain exactly how one so committed may demonstrate the absence of a non-medical diagnosis.
188. Id. at 720.
189. Id. at 730.
190. Id. at 729.
trary and unreasonable government than to require that the
principles of law which officials would impose upon a mi-
nority must be imposed generally. Conversely, nothing
opens the door to arbitrary action so effectively as to allow
those officials to pick and choose only a few to whom they
will apply legislation and thus to escape the political retri-
bution that might be visited upon them if larger numbers
were affected. Courts can take no better measure to assure
that laws will be just than to require that laws be equal in
operation. 192

c. Due Process

The Supreme Court also rejected Pearson's procedural due
process arguments as "premature." 193 The Court accepted the
Attorney General's assertion that a person committed under
the Psychopathic Personality statute was entitled to the same
procedural protections as a person hospitalized under the Min-
nesota civil commitment statute.

But Pearson contended that a reasonable interpretation of
the Court's analysis resulted in a denial of due process. Pear-
son argued that once "the court finds the patient to be within
the statute, he must be committed 'for the rest of his life to an
asylum for the dangerously insane.' " 194 Because the Psycho-
pathic Personality statute does not include a mental illness re-
quirement, Pearson's contention seems to have been
correct. 195 Once a person has been found to have engaged in
"a habitual course of misconduct in sexual matters" and to
have shown a "lack of power to control sexual impulses" that is
"likely to inflict injury, loss, pain or other evil," 196 the statutory
definition of psychopathic personality applies forever. Hospi-
talization and medical treatment cannot cure a legislatively cre-
ated category. 197

192. Id. at 112-13 (Jackson, J., concurring).
193. Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 275-76 (1940),
aff'd, 205 Minn. 545, 287 N.W. 297 (1939).
194. Id. at 276, 287 N.W. at 302.
195. Numerous commitments of individuals have occurred in which a subsequent
medical diagnosis finding no mental illness has not resulted in release. See Erickson,
supra note 7, at 18; see also In re Stilinovich, 479 N.W.2d 731, 733 (Minn. Ct. App.
196. State ex rel. Pearson v. Probate Court, 205 Minn. 545, 287 N.W. 297, 302
(1939), aff'd, 309 U.S. 270 (1940).
197. See Erickson, supra note 7, at 1-3. In addition, the Supreme Court has held
that those who cannot be cured cannot be held under the guise of treatment. See
Underlying the *Pearson* procedural due process issue is a substantive due process issue, an issue that was not addressed by the Court. In analyzing a substantive due process issue, the question becomes whether the government has a legitimate interest in the indefinite, involuntary hospitalization of citizens who have not been found to suffer from an illness known to medicine. The Court articulated this standard in *Jackson v. Indiana*,\(^{198}\) and provided that "'[a]t the very least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'"\(^{199}\)

More recently, the Supreme Court set forth the test to determine whether a "substantive right protected by the Due Process Clause has been violated."\(^{200}\) In *Youngberg v. Romeo*,\(^{201}\) Justice Powell noted that the Court must balance "'the liberty of the individual and the demands of . . . organized society.'"\(^{202}\) The Court has identified three permissible situations in which an individual could be confined against his will without violating his due process rights.\(^{203}\) First, if a person has

---


\(^{199}\) 406 U.S. 715 (1972).

\(^{200}\) *Id.* at 738.

\(^{201}\) See *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). The question before the Court was whether involuntarily committed mentally retarded individuals have substantive rights under the Due Process Clause of the Fourteenth Amendment. *Id.* at 309.

\(^{202}\) *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). The *Youngberg* Court also articulated the standard to be applied in determining whether a state had adequately protected the rights of the involuntarily committed. "'[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised.'" *Id.* at 321 (adopting the standard expressed in Chief Judge Seitz's concurring opinion from the Court of Appeals for the Third Circuit, *Poe v. Ullman*, 644 F.2d 147 (1980)).

The *Youngberg* Court declared that decisions made by a professional were presumptively valid. *Id.* at 323. The Court further explained:

By "professional" decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. *Id.* at 323, n.30.

\(^{203}\) A substantive due process analysis has been used to uphold pretrial detention conditions. *See Bell v. Wolfish*, 441 U.S. 520, 531-40 (1979) (upholding restric-
been duly convicted of a criminal offense, the state may confine him. Second, the state may hold those found to be both mentally ill and dangerous. Third, the state may confine potentially dangerous persons for a limited time, and under strictly limited circumstances, prior to trial.

Confinement under the Psychopathic Personality statute is not based on a criminal conviction, nor is confinement limited to a pre-trial setting. Thus, in order to survive a due process analysis, the statute must somehow fit into the category of confinement of the mentally ill and dangerous. Two Supreme Court decisions have interpreted what sort of process is due in the finding of mental illness and dangerousness. In *Jones v. United States*, the Supreme Court addressed the constitutionality of a civil commitment procedure in which a defendant, acquitted of a criminal charge by reason of insanity, was automatically committed to a mental hospital.

The question, in *Jones*, was whether the commitment preceding the hearing violated the clear and convincing evidence standard required by the Supreme Court in *Addington v. Texas*. A majority of the Court upheld the procedure and reasoned that because the defendant had the burden of proving insanity by a preponderance of the evidence, the finding of not guilty by reason of insanity in the criminal trial was sufficient to prevent the evils that the Court had earlier sought to

---

204. See supra notes 130-133 and accompanying text.


207. *Jones*, 463 U.S. at 356.

208. *Id.* at 362 (citing *Addington v. Texas*, 441 U.S. 418 (1979)). The defendant in *Jones* was entitled to a hearing within fifty days in which the defendant would gain release upon proof, by a preponderance of the evidence, that he was no longer mentally ill and dangerous. *Id.* at 357. According to the majority in *Jones*, the purpose of the standards set forth in *Addington* was to prevent the incarceration of persons who are not mentally ill. *Id.* at 367. Without the clear and convincing standard, "members of the public could be confined on the basis of some abnormal behavior which might be perceived by some as symptomatic of a mental... disorder, but which is in fact within a range of conduct that is generally acceptable." *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 426-27 (1979)).
prevent in \textit{Addington}.\textsuperscript{209} If a diagnosis and finding of mental illness were not required by due process as a necessary element of involuntary hospitalization, neither the "clear and convincing standard" of \textit{Addington}, nor a finding of not guilty by reason of insanity, as in \textit{Jones}, would have been required before forced confinement.

The Supreme Court addressed another due process challenge in \textit{Vitek v. Jones}.\textsuperscript{210} In \textit{Vitek}, a Nebraska statute allowed prisoners to be transferred from prison to a mental hospital solely upon the recommendation of a mental health professional without a judicial finding that the person was, in fact, mentally ill.\textsuperscript{211} The Supreme Court struck down the Nebraska statute as violative of due process because the statute provided for commitment to a mental institution based only upon a criminal conviction, without a civil commitment proceeding in which mental illness was at issue.\textsuperscript{212} According to the \textit{Vitek} Court "commitment to a mental hospital produces 'a massive curtailment of liberty' . . . [and] is more than a loss of freedom from confinement," even for people who are already in prison.\textsuperscript{213}

The fundamental question posed by the Psychopathic Personality statute is whether a citizen's liberty interest is outweighed by the state interest in hospitalizing citizens who might be dangerous in the future and meet some legislative criterion that is not mental illness.\textsuperscript{214} Predicted dangerous-

\textsuperscript{209} Id. at 367.
\textsuperscript{210} 445 U.S. 480 (1980).
\textsuperscript{211} Id. at 493-95.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 491-92. \textit{See also} \textit{Washington v. Harper}, 494 U.S. 210 (1990). \textit{Washington v. Harper} raised a related issue challenging the involuntary treatment of those already committed as both mentally ill and dangerous. According to the Court, the involuntary treatment did not violate substantive due process because the prison policy in question allowed involuntary treatment only if the prisoner (1) suffered from a mental disorder and (2) was "gravely disabled" or posed a likelihood of serious harm to himself, others, or property. \textit{Id.} at 221. This implies that due process would have been violated had the prisoner not been found mentally ill, as well as potentially harmful. \textit{Id.} at 236.
\textsuperscript{214} The \textit{Pearson} standard requires that the "something else" that may point to probable misconduct need only be "as susceptible to proof" as elements of a crime. Thus, the "something else" could range from being a convicted sex offender to being a law student. \textit{Minnesota ex rel. Pearson v. Probate Court}, 309 U.S. 270, 274 (1940), aff'g, 205 Minn. 545, 287 N.W. 297 (1939). In Minnesota, the state's interest in treatment of the person and protection of the public outweighs the citizen's interest in remaining free from confinement. \textit{See In re Blodgett}, 490 N.W.2d. 638, 643 (1992).
ness, without more, has never been upheld as a state interest sufficient to outweigh an individual's interest in liberty.215

O'Connor v. Donaldson216 is the only Supreme Court case involving involuntary commitment that contains any support for the proposition that the state's interest in confining potentially dangerous persons outweighs the person's liberty interest. In a concurring opinion, Chief Justice Burger asserted that dangerousness alone was a sufficient reason for allowing the state to confine an individual.217 To support his assertion, Chief Justice Burger not only cited to Pearson,218 but also expanded his basis and relied on Jacobson v. Massachusetts.219 In Jacobson, the Supreme Court held that due process was not offended by involuntary smallpox vaccinations because of the inherent police power of the state.220 Jacobson employed no balancing test as set forth in later cases.221 Nor did Jacobson require that the treatment be related to a legitimate purpose.222 The Court appeared to assume that the state had virtually unlimited power to compel medical treatment as an exercise of police power.223

Chief Justice Burger's reading of Pearson and Jacobson appears to authorize the use of virtually any limitation of an individual's liberty, once the legislature concludes that an individual or a group of individuals presents a danger to society.224 This view runs counter to the long line of involuntary

---

215. Even in the context of pretrial detention pending a criminal trial, the Supreme Court has severely limited the use of predicted dangerousness. In United States v. Salerno, 481 U.S. 739 (1987), the Court required a finding of individualized probable cause and recognized that speedy trial provisions reduced the danger of lengthy preventive detention. Id. at 750-51; see also Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992).


217. Id. at 582-83. The O'Connor majority did not join in Chief Justice Burger's reasoning.


220. Id. at 25-29.

221. See Youngberg v. Romeo, 457 U.S. 307, 320 (1982) (stating that an individual's interest in liberty must be balanced against society's reasons for confinement); Bell v. Wolfish, 441 U.S. 520, 548-52 (1979) (holding that an individual's privacy interests must be balanced against the security interests of the institution).


223. This is the rationale adopted by the majority in State v. Foucha, 563 So. 2d 1138 (La. 1990), rev'd, 112 S. Ct. 1780 (1992).

224. If Justice Burger's assertion is correct, mass immunization or mass HIV testing could be imposed on the populace, irrespective of any risk of injury or deaths caused by the procedures. The Supreme Court has never upheld such a broad
hospitalization and involuntary treatment cases that have been decided in the last fifty years and represents a view that has never been adopted by the modern Court.

E. Foucha v. Louisiana: Dangerousness as a Basis for Confinement

In 1992, a majority of the Supreme Court ruled in Foucha v. power. A more appropriate standard would apply public health standards using a finding of illness in an individual, not just a risk to the general population. In Robinson v. California, 370 U.S. 660, 666 (1962), the Court stated:

A State might determine that the general health and welfare require that the victims of these and other human afflictions may be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Id.

Chief Justice Burger seriously misreads the reasoning of Jacobson to reach his conclusion. First, the Court's reasoning was based on the proposition that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." Jacobson, 197 U.S. at 26.

Thus, restrictions may only be based on adverse uses of liberty. In the case of the psychopathic personality, that restriction already exists in the form of criminal sanctions for criminal sexual conduct. The psychopathic personality only engages in an adverse use of liberty when he engages in conduct that is already sanctioned by the state. In contrast, Jacobson engaged in an adverse use of liberty every moment he was alive and unvaccinated against smallpox.

Second, the Massachusetts vaccination program was based on sound scientific evidence. The Jacobson Court devoted an extensive footnote to the scientific grounds for a vaccination program, based on its success in other countries and on scientific studies. Jacobson, 197 U.S. at 31-34 n.1. In contrast, the statutory classification of psychopathic personality has no scientific basis. See supra notes 5, 49.

Third, the issue in Jacobson was actually one of standing. The Supreme Court stated that "the police power of a State . . . may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression." Id. at 38. The Court, in fact, found that this regulation could be construed as an abuse of police power but applied a limiting construction to save the regulation:

[W]e are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death.

Id. at 39. However, "[n]o such case is here presented." Id. In short, Jacobson simply failed to show that his liberty was seriously infringed by the regulation. A "psychopathic personality," on the other hand, does face a serious infringement of liberty by being confined for life.
Louisiana that “predicted dangerousness” alone—without a finding of mental illness—is not a valid basis for confinement. Prior to appeal, a Louisiana trial court had found Terry Foucha not guilty by reason of insanity for crimes of aggravated burglary and illegal discharge of a firearm. Pursuant to Louisiana’s statutory scheme, the court committed Foucha to the state prison hospital. Several years later, Foucha petitioned for release, claiming that he was no longer insane. Physicians who testified at his release hearing agreed, stating that Foucha “is presently in remission from mental illness . . . .” However, the physicians equivocated on whether Foucha remained dangerous; in fact, one physician stated that he “would not feel comfortable” testifying that Foucha was no longer dangerous. But since the statutory scheme required Foucha to prove that he was no longer mentally ill and dangerous, the Louisiana Supreme Court ordered his continued confinement.

The United States Supreme Court struck down the Louisiana statute. The reasoning employed by both the majority and dissenting opinions made clear that, in the context of civil commitment, due process required a finding of both mental illness and dangerousness.

Justice White, writing for a majority composed of Justices Blackmun, Stevens, O’Connor and Souter, held that all recent
involuntary commitment cases decided by the Court are premised on two distinct notions: first, involuntary confinement must bear at least some reasonable relation to the purpose of the confinement; and second, a person who has not been found to suffer from a mental illness may not be confined involuntarily. Citing previous opinions, the majority held that Foucha was entitled to constitutionally adequate procedures to justify his confinement and that due process required the release of mentally ill criminals unless the state had committed the person in a constitutionally adequate civil proceeding.

Given this schema, the Supreme Court found three areas of constitutional infirmity in the continued confinement of Foucha. First, "keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." Second, "if Foucha can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement." Third, the fundamental nature of the right to remain free of confinement triggered the strict scrutiny standard to review the process by which Louisiana confined Foucha.

234. Foucha, 112 S. Ct. at 1785.
236. Foucha, 112 S. Ct. at 1785 (citing Baxstrom v. Herold, 383 U.S. 107 (1966)). Baxstrom had been determined to be mentally ill by the prison authorities while incarcerated. Baxstrom, 383 U.S. at 108. He was moved from prison to the State Hospital for insane prisoners. When his sentence was about to expire, the director of the State Hospital requested that he be civilly committed. Id. In a truncated hearing, the New York court agreed to civilly commit him, and he remained at the hospital for prisoners. Id. at 109. On a writ of habeas corpus, the Supreme Court ruled that the state had violated Baxstrom’s equal protection rights in two ways. First, he was committed in a truncated procedure and not granted the protections and rights granted to other persons civilly committed under New York law. Id. at 110-11. Second, Baxstrom remained in the custody of the hospital for prisoners, not the hospital for other persons civilly committed. Id. at 112-14. See also Grant H. Morris, The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment, 60 Tul. L. Rev. 927, 930-31 (1986).
238. Id. at 1785.
239. Id.; see also id. at 1804 (Thomas, J., dissenting).
Under the Louisiana law, Foucha had the burden to prove facts to justify his release. According to the Court's opinion, this process was not sufficient when considering deprivation of a fundamental right. 240

The Court noted that, whenever a person is committed, "'[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.'" 241 While the Louisiana court purportedly continued Foucha's confinement because he was mentally ill and dangerous, the actual reason for his confinement had little to do with either mental illness or dangerousness. At the trial, physicians had testified that Foucha was not mentally ill; testimony was mixed as to whether Foucha was even dangerous. 242 The Supreme Court concluded that "'if he is to be held, he should not be held as a mentally ill person.'" 243 In short, the purported reason for confinement must have a basis in fact.

As a corollary, the Foucha opinion may be interpreted as stating that not all mental conditions may be classified as mental illness for the purposes of civil commitment. Even though, Foucha did suffer from a mental condition, i.e., he had been diagnosed as suffering from an antisocial personality, the Court noted that an antisocial personality was not synonymous with mental illness as defined by the medical community. 244 Additionally, the Foucha Court clarified its prior holding in Jones v. United States. 245 References to mental illness in Jones were not merely interpretations of the statute but rather specific constitutional requirements for confining persons based on their mental condition. 246 In sum, the Court's references to mental illness in Jones, set forth a necessary condition for involuntary civil commitment and should not be understood to mean that any mental condition the legislature chooses may be the basis of involuntary confinement. Only mental illness, recognized by the medical community, may be the basis for invol-

240. Id.
241. Id. (citing Jones v. United States, 463 U.S. 354, 368 (1983)).
242. The testifying physicians stated that Foucha was suffering from an antisocial personality disorder, "a condition that is not a mental disease and that is untreatable." Foucha v. Louisiana, 112 S. Ct. 1780, 1782-83 (1992).
243. Id. at 1785.
244. Id. at 1782.
Further, the Court found that Louisiana's procedures for confining insanity acquittees did not pass constitutional muster. The Court has held that a state may confine a person "if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous.'"248 The burden of proof, however, is on the state to show the required elements for civil commitment.249 In the case of Foucha, the state had not carried its burden. In fact, the statute placed the burden on Foucha to demonstrate that he no longer fell within the statute.250 Louisiana continued to hold Foucha because he could not prove that he was no longer dangerous and thus reversed the burden of proof required by the Due Process Clause.251

The Court impliedly employed a strict scrutiny standard to review the Louisiana scheme. In light of the interest abridged by involuntary confinement, the Court noted that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."252 Because of the fundamental nature of this liberty interest, states are limited in the reasons they may have for depriving a person of this liberty interest.253

The Court outlined three acceptable reasons for confining a person. First, a person may be confined if he has been duly convicted of a criminal offense, to serve the twin purposes of deterrence and retribution.254 In the absence of a conviction, a state may not confine a person for the purposes of punish-

247. The Court noted the danger of not requiring a finding of mental illness by stating that the Louisiana scheme would allow an insanity acquittee, who suffered from a mental condition "for which there is no effective treatment" to be held indefinitely. Foucha v. Louisiana, 112 S. Ct. 1780, 1787 (1992).
248. Id. at 1786 (quoting Jones v. United States, 463 U.S. 354, 362 (1983)).
249. Foucha, 112 S. Ct. at 1788.
250. "Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous." Id. at 1786.
253. Foucha, 112 S. Ct. at 1785. The Foucha Court specifically held that "there are constitutional limitations on the conduct that a State may criminalize." Id. (citing Brandenburg v. Ohio, 395 U.S. 444 (1969); Robinson v. California, 370 U.S. 660 (1962)).
254. Foucha, 112 S. Ct. at 1785.
ment.255 Second, a state may also confine a person found to be mentally ill and dangerous but only where the state has shown these conditions by clear and convincing evidence.256 Third, a state may confine, for a limited time "in certain narrow circumstances," a person who poses a threat to others.257

The Louisiana statutory scheme, as applied to Foucha, did not fall into any of these categories. Foucha was never convicted of a criminal offense; Foucha was not adjudged mentally ill and dangerous; and the State had not proven that Foucha was dangerous or that Foucha's confinement was limited, pending a final determination of his fate. Notwithstanding the majority's conclusion, the divisive opinions of both the majority and dissent revealed that at least some members258 of the Supreme Court did not object to long term incarceration based only on a prediction of future dangerousness, at least for insanity acquittees.259

Even though Justice Kennedy dissented, he agreed with the majority that "freedom from this restraint is essential to the basic definition of liberty ...."260 However, Kennedy did not agree that continued incarceration of an insanity acquittedee requires proof of mental illness. Basing his analysis on distinctions between the standards for criminal sentencing and civil commitment, Kennedy observed that criminal cases require a heightened level of proof and an "apportionment of risk in favor of the accused."261 He further observed that the Court has applied heightened due process scrutiny to incarceration

255. Id. (citing Jones v. United States, 463 U.S. 354, 369 (1983)).
256. Id. (citing Jones v. United States, 463 U.S. 354 (1983)).
257. Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992) (citing United States v. Salerno, 481 U.S. 739, 750 (1987)). The narrow circumstances are generally pretrial detention, where the confinee is being held prior to a determination of guilt or mental illness and dangerousness. Id.
258. Justice Kennedy wrote a dissenting opinion and was joined by Chief Justice Rehnquist. Id. at 1791. Justice Thomas also wrote a dissenting opinion and was joined by Chief Justice Rehnquist and Justice Scalia. Id. at 1797. For a discussion of the dissenting opinions, see infra notes 260-272 and accompanying text.
259. Relying on its opinion in Jones v. United States, 463 U.S. 354 (1983), the Court stated:

When a person charged with having committed a crime is found not guilty by reason of insanity, however, a State may commit that person without satisfying the Addington burden with respect to mental illness and dangerousness.

Foucha, 112 S. Ct. at 1783.
260. Id. at 1791.
261. Id. at 1792-93 (citing In re Winship, 397 U.S. 358, 369-72 (1970)).
before conviction.\textsuperscript{262} But, according to Justice Kennedy, this heightened level of scrutiny does not apply once the state has met its burden of proving all the elements of a crime beyond a reasonable doubt.\textsuperscript{263} Thus, Justice Kennedy would require proof of mental illness and dangerousness in civil commitment proceedings, except when the involuntary hospitalization follows a criminal "adjudication" where the state has carried its burden of proof on all elements of a criminal offense.\textsuperscript{264}

Justice Kennedy reasoned that, unlike the statute at issue in \textit{Jones},\textsuperscript{265} the Louisiana insanity test did not require the assertion that the defendant was mentally ill at the time of the crime. Since the insanity defense does not require a finding of illness, the state need not prove mental illness to hospitalize a defendant confined as a result of an insanity plea.\textsuperscript{266} For persons acquitted as insane, the commission of the criminal acts and predicted dangerousness would be sufficient justification to allow continued incarceration.\textsuperscript{267} Implicit in this reasoning is a rejection of mental illness as a necessary element of continuing involuntary hospitalization.

Justice Thomas' dissenting opinion\textsuperscript{268} clearly illustrated the danger to individual civil liberties posed by an analysis that fails to recognize that freedom from personal restraint is, and must be, a fundamental right. Like Justice Kennedy, Justice Thomas asserted that, "[a] State may reasonably decide that the integrity of an insanity-acquittal scheme requires the continued commitment of insanity acquittees who remain dangerous."\textsuperscript{269} However, Justice Thomas went further and rejected the premise of the majority that "freedom from bodily restraint" is a fundamental right, subject to heightened scrutiny.\textsuperscript{270} According to Justice Thomas, "[t]he Court and Justice O'Connor have no basis for suggesting that either this Court or the society of which it is a part has recognized some general fundamental right to 'freedom from indefinite commit-

\begin{itemize}
\item \textsuperscript{263} Foucha, 112 S. Ct. at 1792.
\item \textsuperscript{264} Id.
\item \textsuperscript{265} Jones v. United States, 463 U.S. 354 (1983).
\item \textsuperscript{266} Foucha, 112 S. Ct. at 1796-97.
\item \textsuperscript{267} Foucha v. Louisiana, 112 S. Ct. 1780, 1796-97 (1992).
\item \textsuperscript{268} Id. at 1797-1809 (Thomas, J. dissenting).
\item \textsuperscript{269} Id. at 1802.
\item \textsuperscript{270} Id. at 1805.
\end{itemize}
Moreover, the dissenting opinion written by Justice Thomas, made the extraordinary claim that freedom from personal restraint is not a fundamental right protected by the Liberty Clause and thus was not subject to strict scrutiny. On balance, the dissent posited that indefinite confinement of individuals by the government would apparently be permissible if the government could assert merely a "rational basis" for the confinement.

IV. THE CONSTITUTIONALITY OF THE PSYCHOPATHIC PERSONALITY STATUTE AFTER FOUCHA v. LOUISIANA: IN RE BLODGETT

A. Analysis of the Psychopathic Personality Statute in Light of Foucha v. Louisiana

Although the Foucha opinion does not specifically address civil commitments under the Psychopathic Personality statute, the Foucha opinion discussed several issues relevant to Minnesota's statute. It is important to note that the opinions in Foucha were premised upon an insanity acquittal and a mandatory commitment pursuant to that acquittal. Minnesota's Psychopathic Personality statute is not used to restrain persons found not guilty by reason of insanity. Rather, the statute imposes an additional penalty for the same acts that gave rise to the original sentence, after the sentence has been served.

Whether one chooses to characterize "freedom from personal restraint" as a fundamental right, or "fundamental right in the civil context," the effect of civil commitment without a finding of mental illness, as authorized by the Psychopathic Personality statute, violates due process. This interpretation differs substantially from Justice Thomas' approach, which

271. Id. at 1808.
272. "There is simply no basis in our society's history or in the precedents of this Court to support the existence of a sweeping, general fundamental right to 'freedom from bodily restraint' applicable to all persons in all contexts." Foucha v. Louisiana, 112 S. Ct. 1780, 1805 (1992) (Thomas, J., dissenting).
273. The proof beyond a reasonable doubt of the acts alleged in the criminal complaint, together with proof of a mental illness and a prediction of dangerousness, provided a proper basis for Foucha's continued incarceration. However, the involuntary hospitalization was imposed in place of a criminal sentence.
274. See supra note 8 and accompanying text.
275. See supra Part III.D.3.
appears to reject freedom from bodily restraint as a fundamental right in almost any context. Thomas bases his analysis on a mechanistic approach which categorizes fundamental rights that would allow involuntary confinement of individuals based merely upon showing a rational basis.

Justice Thomas' argument that "freedom from involuntary confinement cannot be a fundamental right, or all prison sentences would be subject to strict scrutiny," fails to consider that even fundamental rights must yield to a compelling government interest. The extraordinary judicial scrutiny of all aspects of criminal prosecutions demonstrates that criminal prosecutions have historically been subject to a heightened level of scrutiny. This heightened level of scrutiny preceded "fundamental rights" analysis and confirms that freedom from personal restraint is central to the personal rights protected by the Constitution.

Viewed in this context, Justice White's majority opinion in Foucha provides an analytical construct to harmonize the Court's past opinions which have discussed the right to be free from physical restraint. Except for Pearson, the Court has established that freedom from physical restraint must be a fundamental right, a right which can be abridged only in the limited circumstances where the Court has found a compelling gov-


277. Id. As with other fundamental rights, the right to personal freedom may be curtailed upon a showing of compelling governmental interest. Both the nature of that compelling interest and the burden the government must bear varies according to the right at issue and the government interest asserted. Further, even if the government can show the existence of a compelling interest, the means used to accomplish its objectives must be rational. "The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

278. This heightened scrutiny is reflected by a number of long-standing constitutional and judicial safeguards. See, e.g., Krulewitch v. United States, 336 U.S. 440, 457 (1949) (Jackson, J. concurring) (noting that the doctrine of constructive conspiracy is "fundamentally and irreconcilably at war with our presumption of innocence"); Morissette v. United States, 342 U.S. 246, 275 (1952) (holding that permitting jury to presume criminal intent was inconsistent with presumption of innocence which extends to every element of a crime); In re Winship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause protects the accused against conviction except by proof beyond a reasonable doubt of every element of the crime); Whalen v. United States, 445 U.S. 684, 688 (1980) (holding that Double Jeopardy Clause protects not only against second trial for same offense but also against multiple punishments for same offense).
ernmental interest. Acceptance of this premise leads directly to the conclusion that Minnesota’s Psychopathic Personality statute falls far short of present Constitutional standards. 279

B. The Minnesota Courts’ Reaction to Foucha: In re Blodgett

In In re Blodgett, 280 the first Minnesota decision to follow Foucha, the Minnesota Court of Appeals concluded that Phillip Blodgett could be hospitalized indefinitely as a “psychopathic personality,” despite Security Hospital staff reports indicating that he did not suffer from a mental illness and would not benefit from treatment. 281 Totally disregarding Foucha, the court of appeals relied solely upon Pearson and upheld the constitutionality of the Psychopathic Personality statute. 282

1. Factual Background

Evidence presented pursuant to the commitment petition established that Blodgett had pled guilty to three offenses involving criminal sexual conduct, occurring between 1985 and 1987. 283 The petition for commitment under the Psychopathic Personality statute was filed in 1992, after Blodgett had completed his sentence but before his release from prison. 284

Dr. Michael Farnsworth, a doctor at the State Security Hospital, testified that Blodgett’s “anti-social acts were not impulsive, that he was not emotionally unstable and that he understood the consequences of his actions.” 285 The State Security Hospital treatment team diagnosed Blodgett as a sub-

279. In Foucha, the Court stated that “the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely.” Foucha, 112 S. Ct. at 1787. Minnesota’s process for committing “psychopathic personalities” is similar. See supra Part II.B.3. Minnesota’s scheme, however, provides even less protection than Louisiana’s defective one. Minnesota does not require a criminal act as a predicate for commitment as a psychopathic personality. See In re Monson, 478 N.W.2d 785, 788 (Minn. Ct. App. 1991).


281. Id. at 642-43.

282. Id. at 643 (citing State ex rel. Pearson v. Probate Court, 205 Minn. 545, 287 N.W. 297 (Minn. 1939), aff’d 309 U.S. 270 (1940)).

283. Blodgett, 490 N.W.2d at 640. In addition to other concerns, the State did not inform Blodgett of the possibility that his guilty plea could be used as a basis for later commitment as a psychopathic personality. This omission raises questions as to the voluntariness of Blodgett’s plea. See id. at 646.

284. Id.

stance abuser with antisocial personality characteristics and a "relatively high" potential for engaging in other antisocial acts.\textsuperscript{286} The hospital treatment team did not favor commitment, believing that treatment would significantly alter his attitudes and enhance the likelihood of poor behavior.\textsuperscript{287}

According to the staff report, Blodgett was potentially dangerous, but he was not found to suffer from a mental illness that the Hospital could treat.\textsuperscript{288} Notwithstanding these facts, Dr. Jacobson testified that Blodgett met the standard for commitment as a Psychopathic Personality, even though the doctor could find no evidence of a mental disease.\textsuperscript{289}

Based on the record, the trial court found that Blodgett met the criteria for involuntary commitment as a "psychopathic personality." The court stated that he "displayed an impulsiveness of behavior in his sexual offenses"\textsuperscript{290} and that his assault of a sixteen-year-old girl, while on parole and intoxicated, "showed a lack of customary standards of good judgment."\textsuperscript{291} The trial court found that these "conditions rendered Blodgett irresponsible for his personal conduct in sexual matters, and thereby dangerous to other persons."\textsuperscript{292}

2. The Appellate Court Opinion in Blodgett

The court of appeals held that the trial court's decision was not "clearly erroneous" because Blodgett met the criteria set forth in the statute.\textsuperscript{293} The court of appeals also rejected Blodgett's argument that the commitment violated his plea bargain because this issue had not been raised at trial.\textsuperscript{294}

\textsuperscript{286} Id.
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Dr. James Jacobson agreed with the diagnosis of anti-social disorder and substance abuse disorder. He was unable to find evidence of a mental disease. He also agreed that Blodgett was likely to present a danger in the future. Id.
\textsuperscript{290} In re Blodgett, 490 N.W.2d 638, 641 (Minn. Ct. App. 1992).
\textsuperscript{291} Id.
\textsuperscript{292} Id.
\textsuperscript{293} Id. at 642 (citing In re Joelson, 385 N.W.2d 810, 811 (Minn. 1986)).
\textsuperscript{294} Id. at 647 (citing Thayer v. American Fin. Advisers, Inc., 322 N.W.2d 599, 604 (Minn. 1982)). The court also indicated that even if Blodgett had raised this issue at trial, he would not have prevailed. "Since the two matters are separate, there is nothing in the criminal plea bargain to suggest the individual will not later be subject to civil commitment proceedings. The court has not been made aware of any evidence that the county attorney agreed to waive the right to initiate civil commitment proceedings." Id.
Most important, though, the court found that the Psychopathic Personality statute withstood the multiple constitutional challenges raised by Blodgett and amici. The court noted that the statute had been upheld by the Supreme Court in Pearson and then specifically proceeded to address the four constitutional issues raised in Blodgett’s appeal: due process, equal protection, vagueness, and double jeopardy.

a. Due Process

In approaching the Blodgett appeal, the Minnesota Court of Appeals obviously considered the guidelines established by the Supreme Court in Foucha and deliberated the principles confirmed by prior Supreme Court opinions. Yet the court of


296. The court acknowledged that Foucha v. Louisiana, 112 S. Ct. 1780 (1992), recognized personal liberty is a right protected by substantive due process and that Jackson v. Indiana, 406 U.S. 715 (1972), required commitment to “bear a reasonable relation to the purpose for which the individual is committed.” In re Blodgett, 490 N.W.2d 638, 643 (Minn. Ct. App. 1992). Further, the court cited Younberg v. Romeo, 457 U.S. 307 (1982), for the principle that the court must balance an individual’s liberty interests against relevant state interests.” Id.

Next, the court of appeals turned to Justice Burger’s concurring opinion in O’Connor v. Donaldson, 422 U.S. 563 (1975) (Burger, C.J., concurring). The court honed in on Burger’s statement that “[t]here 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.” Blodgett, 490 N.W.2d at 643 (citing O’Connor v. Donaldson, 422 U.S. 563, 582-83 (1975)). The court also noted that the Supreme Court had recognized in Addington v. Texas, 441 U.S. 418 (1979), that the state has a legitimate interest in providing care and treatment for citizens who are unable to care for themselves. Blodgett, 490 N.W.2d at 644 (citing Addington v. Texas, 441 U.S. 418, 426 (1979)).

The Addington Court’s decision has been criticized for confusing two of the justifications for civil commitment—parens patriae and police power.

The suggestion that both the state’s and the patient’s interests coincide in a decision to confine the individual is premised on the acceptability of a parens patriae justification for commitment. Ironically, Frank Addington had not been committed involuntarily on a parens patriae basis, but had been committed because he was found to be dangerous to himself and to others.

Grant H. Morris, The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment, 60 Tul. L. Rev. 927, 939 (1986). The Addington Court failed to consider whether commitment for a patient’s own good should be considered different from commitment for society’s good. Rather, the Court viewed all indeterminate civil commitments as involving the same purposes. Id.

Continuing its analysis, the court of appeals acknowledged that “all committed persons have the right to proper care and treatment” and that the “refus[al] to engage in therapy or treatment does not render the commitment unconstitutional” and that “the state has the power to keep trying to treat the individual.” Blodgett, 490 N.W.2d at 644. The court recognized that “persons committed under the Psycho-
appeals conspicuously ignored these guidelines and principles. Instead, the court of appeals dredged up the *Pearson* standard and upheld the constitutionality of the Psychopathic Personality statute, thus permitting the continued hospitalization of Blodgett.

Even though the court of appeals conceded that Blodgett’s commitment was not on the basis of mental illness, the court reasoned that mental illness is not the only justification for civil commitment. To support this contention, the court cited various statutes authorizing commitment for mental retardation, chemical dependence, and for persons who are a threat to the health of others. Because one purpose of commitment as a psychopathic personality is “treatment,” commitment is proper “even when the basis of commitment is not mental illness.” This statement by the court belies the fact that the purpose of the legislature in creating the category of “psychopathic personality” was to control those so diagnosed, not to treat them. In essence, the court of appeals had concluded that a majority of the legislature had the power to define a category of persons who require “treatment” and to mandate

---

297. “The basis for Blodgett’s commitment was not mental illness. Instead, he was committed as a psychopathic personality.” *Id.* at 645.

298. *Blodgett*, 490 N.W.2d at 644-45. The *Blodgett* court mentioned several Minnesota statutes as support for its contention that mental illness is not the only basis upon which to commit a person. See, e.g., *Minn. Stat.* § 253B.02(14) (1990) (mental retardation); *Minn. Stat.* § 253B.02(2) (1990) (chemical dependence); *Minn. Stat.* § 144.4172(8) (1990) (threat to the health of others).

Ironically, the court also attempted to garner strength by drawing an analogy to cases involving mentally retarded adults. *Blodgett*, 490 N.W.2d at 645 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985)). Although mental retardation has never been found to be a quasi-suspect class, the court’s analogy is obscured by the fact that mental retardation is not defined by legislative enactment. Rather, mental retardation is a category created and defined by the mental health profession. Instead of supporting the validity of involuntary confinement for those who are not mentally ill, these statutes actually indicate that involuntary confinement is only appropriate for self protection, as in cases of mental retardation, treatable medical conditions, chemical dependence, or conditions recognized by the medical profession as communicable diseases. These statutes do not support the position that the legislature has the power to define mental retardation, chemical dependence or communicable disease.

299. *Id.* at 645.

300. See *supra* Part II.A (discussing legislative history of the Psychopathic Personality statute).
those persons to involuntary "treatment," regardless of whether medical professionals can diagnose mental illness or provide meaningful treatment. 301

b. Equal Protection

The court also rejected Blodgett’s equal protection argument. The court again found Pearson controlling and ignored the plain requirement of Foucha, which held that personal liberty is a fundamental right and is thus deserving of strict scrutiny. 302 Just to cover all bases, the court did note that the statute would satisfy strict scrutiny because the statute serves the compelling state interest of confining individuals where the danger is clearly identified and the need for protection established. 303

c. Void For Vagueness

In deciding Blodgett’s “void for vagueness challenge,” the court relied exclusively on the fifty-year-old Pearson decision to support its conclusion that the statute was not vague. The court asserted that because “the statute has been repeatedly applied without difficulty . . . [t]he Pearson construction is sufficient to overcome any vagueness challenge. 304

d. Double Jeopardy

The court also rejected Blodgett’s double jeopardy argument. 305 Blodgett asserted that his commitment as a psychopathic personality was based on the same facts used to convict him of the original offenses. 306 The court disagreed, stating that the elements of the Psychopathic Personality statute differ from the elements of the criminal offenses. 307 In addition, the court noted that dual commitments have been upheld by Minnesota courts if procedural due process is not violated and the

302. Id. at 645-46.
303. Id. at 646.
304. Id. (citing In re Brown, 414 N.W.2d 800, 803-04 (Minn. Ct. App. 1987); In re Martenies, 350 N.W.2d 470, 472 (Minn. Ct. App. 1984)).
305. Id.
307. Id. at 647.
commitment is for purposes of treatment.308

3. Analysis of In re Blodgett Under Current United States Supreme Court Constitutional Doctrine

Blodgett illustrates the dilemma created when the public demand to confine sex offenders collides with our legal system's long-standing rejection of preventive detention as a means of social control. There was no question that Blodgett's release created the risk that he might re-offend and that such a risk cannot be taken lightly. However, the more fundamental question is whether a legislatively created "treatment" scheme—rather than criminal punishment or treatment for a medically recognized illness—is the proper method of addressing the problem of repeat sex offenders.

a. Due Process

The court's substantive due process analysis was fatally flawed in two respects: first, the court proposed an incorrect balancing test under Youngberg v. Romeo.309 While Youngberg allowed a state to balance any relevant governmental interest against the liberty of the individual,310 Foucha greatly increased the "weight" assigned to the individual's liberty interest where the government proposes bodily restraint.311 The court erred by relying on dicta in Chief Justice Burger's concurrence in O'Connor v. Donaldson.312 Latching onto Chief Justice Burger's statement that "[t]here 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

310. "[W]hether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." Id. at 321. The Court characterized this standard as "lower than the 'compelling' or 'substantial' necessity tests..." Id. at 322.
311. The Foucha Court stated that
[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." We have always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty.
communicable disease,” the Minnesota Court of Appeals construed Chief Justice Burger’s words to mean that “predicted dangerousness” is a sufficient basis for involuntary confinement. If, in fact, the court’s interpretation were reasonable, the question remains why the Supreme Court ruled, in Foucha, that Louisiana could not, through its “police power,” continue to confine Foucha. If such a power did exist, the Supreme Court would not have found Louisiana’s statute unconstitutional. If such a power did exist, the Supreme Court would not have narrowly circumscribed the use of preventative detention in criminal cases as it did in Salerno. The Blodgett court could cite no support—other than the language in Burger’s concurrence—for the proposition that predicted dangerousness is a sufficient basis for involuntary confinement.

Moreover, the Minnesota Court of Appeals misconstrued the parens patriae justification for confinement discussed in Addington v. Texas. The parens patriae justification allowed a state to provide treatment and to care for those unable to care for themselves. This is certainly a valid justification for treating those who are mentally, emotionally, or physically incompetent. However, there is no suggestion that persons committed as “psychopathic personalities” are unable to care for themselves. The statute only requires that such persons present a “danger to others.” The parens patriae justification is therefore facially invalid.

In addition, the “psychopathic personality” classification is a creation of the legislature rather than the mental health profession. No valid medical justification exists for hospitalizing those who fit the profile. The Blodgett court stated quite clearly that an individual need not be mentally ill to be committed to the

314. Foucha, 112 S. Ct. at 1785.
318. Id. at 426. However, “the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.” Id.
Security Hospital as a "psychopathic personality."320 Individuals who have "antisocial" personalities are not mentally ill and cannot be treated in a mental hospital.321

On its face, the Blodgett court's opinion also seems to contravene the well-established principle of Jackson v. Indiana322 which provided that the proposed "treatment" must be reasonably related to the purpose of the involuntary confinement.323 In Blodgett, the trial record clearly showed that the Security Hospital staff could offer no treatment for those confined because they fit the category of persons that the legislature deemed "psychopathic."324 A medical facility cannot treat persons that the medical establishment does not recognize as suffering from an illness.325

Furthermore, contrary to the assertions of the court of appeals, the Blodgett case was not a situation where a mentally ill person had refused treatment, thus forcing the state to exercise its power to "keep trying to treat the individual."326 The Security Hospital staff specifically reported that Blodgett was not mentally ill and therefore could not be treated.327

b. Void For Vagueness

In analyzing the vagueness challenge, the court again relied on Pearson. Because the Supreme Court had upheld the "narrowed" construction of the statute in Pearson, the court of appeals concluded that "[t]he United States Supreme Court has recognized that this construction destroys the contention that the statute is too vague."328 Contrary to the court's analysis, the application of the Psychopathic Personality statute has been, at best, uneven and, at worst, completely unpredictable.329 As currently interpreted, the statute does not put ordi-

321. See Foucha v. Louisiana, 112 S. Ct. 1780, 1782 (1992); see also Erickson, supra note 7, at 3.
323. Id. at 738.
325. Erickson, supra note 7, at 3.
326. Id.
327. Id. (citing In re Wolf, 486 N.W.2d 421 (Minn. 1992)).
nary people of common intelligence on notice as to the nature of the prohibited conduct.

c. Equal Protection

The court of appeals gave short shrift to the equal protection argument.\textsuperscript{330} Personal liberty is, and must be, a fundamental right that can be abridged only in the face of a compelling government interest.\textsuperscript{331} Predicted dangerousness and the need to protect society have been upheld as a legitimate governmental interest—but only in situations of pre-trial detention and after a finding of probable cause.\textsuperscript{332} The court of appeals relied on \textit{Reome v. Levine},\textsuperscript{333} to support its proposition that "[t]he psychopathic personality statute serves compelling state interests of confining only the individuals as to whom the danger is clearly identified, and the need for protection is established."\textsuperscript{334} However, the court of appeals misconstrued the \textit{Reome} holding. \textit{Reome} actually held that predicted dangerousness alone, without a finding of mental illness, is not a sufficient basis for involuntary confinement.\textsuperscript{335}

\textsuperscript{330} The court cited \textit{Pearson} for the proposition that when members of the class defined by the statute constitute a dangerous element in the community that the legislature has the discretion to control, such a statute is reviewed under the "rational basis" test. \textit{Blodgett}, 490 N.W.2d at 645-46 (citing State \textit{ex rel. Pearson v. Probate Court}, 205 Minn. 545, 287 N.W. 297 (1939), aff'd, 309 U.S. 270 (1940)).

The court also referred to \textit{City of Cleburne v. Cleburne Living Ctr., Inc.}, 473 U.S. 432 (1985), a case involving mentally retarded adults, to support the conclusion that the Supreme Court has "applied the rational basis test to . . . commitment cases." \textit{Blodgett}, 490 N.W.2d at 645.

While it is true that mental retardation has never been classified as a suspect class, the court of appeals failed to explain why, in light of \textit{Foucha v. Louisiana}, 112 S. Ct. 1780 (1992), the liberty interest impinged upon by the statute is not a fundamental right requiring a compelling state interest to justify state action. Moreover, \textit{parens patriae} is the government interest at issue in mental retardation commitments based on professionally created categories. This is a far cry from justification for the creation of government categories of predicted dangerousness. However, the court merely asserted, in a conclusory fashion and without authority, that the classification would stand even if "a heightened level of scrutiny were applied." \textit{Blodgett}, 490 N.W.2d at 646.

\textsuperscript{331} \textit{See supra} Part III.D.3.b.

\textsuperscript{332} \textit{See United States v. Salerno}, 481 U.S. 739 (1939).

\textsuperscript{333} 692 F. Supp. 1046 (D. Minn. 1988).


\textsuperscript{335} \textit{Id. at} 1053.
d. Double Jeopardy

Blodgett's double jeopardy argument is significant because virtually all of the psychopathic personality petitions have been brought against individuals, who, like Blodgett, have been convicted of crimes involving sexual assaults and who have completed the sentence imposed prior to commitment under the statute. In form, the court correctly stated that the elements necessary for commitment as a psychopathic personality may require findings in addition to those upon which the criminal conviction was based. Yet, unlike commitments based on a finding of mentally ill and dangerous, those "additional findings" are primarily related to the predicted dangerousness implied by commission of the criminal acts themselves. Thus, like the Louisiana statutory scheme in Foucha, the Minnesota statute allows indefinite incarceration upon proof of dangerousness alone.

Moreover, the dual commitments, upheld by Minnesota courts, have required not only a finding of guilt but also a finding of mental illness requiring treatment under a MID statute. Thus, to be committed under the MID statute, an individual must be found to suffer from a disease—known to the mental health profession—and the individual must not merely exhibit behaviors that a majority of the legislature has deemed worthy of indefinite confinement. It is difficult to conceive of a situation in which a person convicted of a sexual assault could not, in theory, indefinitely be confined as a "psychopathic personality."

Finally, the court speciously asserts that civil commitment of "psychopathic personalities" is for "treatment" rather than punishment. The court's assertion is troublesome when balanced against the acknowledgment by the medical profession that the "psychopathic personality" suffers from no diagnosable mental illness and thus cannot be treated. Moreover, the legislative history of the statute makes clear that "treatment" was never the intended purpose of the statute.

336. See, e.g., In re Hofmaster, 434 N.W.2d 279 (Minn. Ct. App. 1989); In re Brown, 414 N.W.2d 800 (Minn. Ct. App. 1987).
338. Blodgett, 490 N.W.2d at 647.
340. See supra Part II.A.
4. Summary

This critique of the Psychopathic Personality statute is not intended to convey the impression that sexual assault is not a serious problem or that sex offenders should not be vigorously prosecuted. Recidivists should be sentenced to lengthy terms of confinement; perpetrators of sexual assaults who suffer from some form of mental illness should be involuntarily hospitalized and treated for an indefinite period.

However, the Constitution requires legislatively created justifications for confining citizens to be narrowly related to a constitutionally permissible purpose. The requirement that a criminal conviction precede a prison term or that a finding of mental illness and dangerousness precede involuntary hospitalization are not merely procedural niceties. Rather, these requirements are absolutely necessary to prevent the confinement of unpopular or socially eccentric persons. The dissent of the Louisiana Supreme Court’s decision in Foucha, may have best described the importance of the issues presented by the Psychopathic Personality statute:

Something is drastically wrong with a legal system that permits a person who is no longer mentally ill to be confined indefinitely, perhaps for life, to an institution for the criminally insane. . . . In this respect the system is morally bankrupt and clearly violates fundamental notions of due process and equal protection.

Although, over fifty years ago, the Supreme Court upheld the Minnesota Psychopathic Personality statute as constitutional, the Minnesota statute is likely to be found unconstitutional under more recent interpretations of the Constitution. The Psychopathic Personality statute raises several fundamental constitutional questions, only one of which has been directly addressed by the United States Supreme Court. While the Supreme Court has held that the Constitution does not permit involuntary hospitalization without a finding of mental illness, the question remains open whether the legislature may define a category of persons subject to involuntary hospit-
talization who have not been diagnosed as suffering from any condition recognized by the medical profession.

V. Conclusion

There is no question that government must find a way to respond to the legitimate public concern over the danger posed by sexual offenders. Moreover, those who have been found guilty of repeated sexual assaults can, and should be treated differently than first-time offenders. However, it is inappropriate to respond to this problem by creating new categories of commitment on the basis of predicted dangerousness. The obvious results of making civil commitment a political question—rather than a medical question—is too high a price for a democracy to pay.

James Madison noted in The Federalist 345 that, when the public is presented with any major issue, a majority will form, and the power of the majority will be used to the disadvantage of those whom the majority finds “most obnoxious.”346 Sexual predators are certainly a minority that most of society justifiably finds “obnoxious.” However, legitimate concerns for our safety must not be allowed to obscure the fact that involuntary confinement—without criminal conviction, without a medical condition requiring treatment, or without a finding of inability to live without state assistance—makes each of us vulnerable to the definitions of “dangerousness” imposed by a political majority.

The solution is not to create a new basis for commitment but to impose greater sentences on those convicted of sexual assault. Should the legislature mandate a life sentence for those who are not mentally ill and who re-offend, society would be well-protected without creating the threat to personal liberty posed by statutes like Minnesota’s Psychopathic Personality law.

Where legislatures appropriate authority to define the categories of persons subject to involuntary hospitalization or other treatment, involuntary confinement becomes a political question rather than a medical judgment. All Supreme Court opinions regarding civil commitment—other than Pearson—

345. The Federalist No. 10 (James Madison).
346. Id.
have been informed by Addington v. Texas, the Supreme Court case which noted that "[a]t one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder but which is in fact, within the range of conduct that is generally acceptable."347

This is precisely what the Psychopathic Personality statute allows by authorizing confinement based on the perceptions of "abnormal behavior" held by a majority of the legislature in 1939, rather than a currently recognized medical diagnosis of illness.

Involuntary hospitalization based on politically determined standards was one of the central features of the Soviet system in which the state defined "mental illness," and "doctors" adopted the state-created definitions.348 If Minnesota courts hold that it is possible to confine members of the public without a criminal sentence or without a finding of a medically recognized psychiatric disorder, the logically consistent, and constitutionally required response would be the creation of a type of institution our nation has never seen before. It would be a warehouse for the non-criminal, non-ill person that the government has predicted may be "dangerous" in the future.

We could call it the "Gulag."
