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Minnesota's Sexual Psychopathic Personality and Sexually Dangerous Person Statute: Throwing Away the Key

Marna J. Johnson

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I. INTRODUCTION

In June 1994, a firestorm of public controversy flared when the Minnesota Supreme Court found there was insufficient evidence to civilly commit two convicted sex offenders, Dennis Linehan and Peter Rickmyer, under the state’s psychopathic personality statute.¹ Fueled

¹ See generally Robert Whereatt, Specter of Freed Sex Predators Worries Officials, STAR TRIB. (Minneapolis), July 7, 1994, at B1 (discussing Governor’s, Attorney General’s, and Department of Human Services’ efforts to block sexual psychopaths’ petitions for release in wake of court’s decisions); Panel Blasts Court Decision to Free Sex Offenders, STAR TRIB. (Minneapolis), July 15, 1994, at B5 (reporting reactions to court’s decisions by

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by the public's escalating fear of violent crime\(^2\) and the customary sound and fury of an election year,\(^3\) the debate engaged Minnesota's Legislature and Governor, who passed and signed, respectively, an expanded statute\(^4\) intended to keep more convicted sex offenders under lock and key beyond their scheduled release from prison.\(^5\)

When passed in 1939, Minnesota's psychopathic personality statute was used to divert "sexual deviates"\(^6\) into treatment rather than prison.\(^7\) During the last four years, however, the statute has been utilized in effect to extend the sentences of convicted sex offenders indefinitely by committing them to a security hospital.\(^8\) While retaining the commitment process for "sexual psychopathic personalities," the legislature's recent action seems calculated to broaden the statute's reach even further, by adding a second category, the "sexually dangerous person" classification, which imposes a less onerous burden upon prosecutors seeking civil commitment.\(^9\) Whether the newly expanded statute will result in more commitments of soon-to-be-released sex offenders or fall to constitutional challenges remains to be seen.

This Comment examines the evolution of the psychopathic personality statute and analyzes the recent enactment authorizing the civil commitment of "sexually dangerous persons." The history of the commitment of sex offenders is traced in Part II. Part III assesses the changes made to the statute in the special legislative session and

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members of legislative task force on sexual predators); Mimi Hall, A Furor Brews over Release of Sex Offenders, USA TODAY, Aug. 17, 1994, at A3 (describing public anger nationwide over crimes committed by previously convicted sex offenders and reporting legislative efforts to address such situations).

2. In early 1994, 29% of those responding to a statewide poll identified crime as "the biggest problem in the state." Minnesotans Optimistic About Future: 53% Surveyed Say They Believe State Is on Right Track, STAR TRIB. (Minneapolis), Jan. 2, 1994, at C4. This represented a dramatic shift in public opinion: "In December 1985... less than [one] percent of the respondents listed crime as their top concern. In June 1988 and May 1990, only [two] percent of Minnesotans cited crime." Id.

3. In November 1994, Many local elections included a race for county attorney, the person who ordinarily brings a petition to commit individuals under the psychopathic personality statute. See infra notes 88-89 and accompanying text (describing county attorney's role).

4. See MINN. STAT. §§ 253B.02, .18, .185 (1994).

5. See infra part III.A. (discussing Minnesota's new sexually dangerous person statute).

6. See infra note 54.

7. See, e.g., State ex rel. Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 550, 287 N.W. 297, 300 (1939), aff'd, 309 U.S. 270 (1940); see also infra part II.A.

8. PROGRAM EVALUATION DIV., OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., PSYCHOPATHIC PERSONALITY COMMITMENT LAW 17 (1994) [hereinafter LEGISLATIVE AUDITOR'S REPORT]; see also infra part II.C.1.

9. See MINN. STAT. § 253B.02, subd. 18b (1994); see also infra parts III.A., IV.
discusses the first constitutional challenge made to the new provision for commitment of sexually dangerous persons. In Part IV, this Comment asserts that the sexually dangerous persons commitment statute represents an inefficient use of public resources and offends fundamental principles of due process and equal protection.

II. BACKGROUND

A. The Original Statute

Beginning in 1937, state legislatures enacted statutes that utilized civil commitment proceedings to commit "sexual psychopaths" to treatment programs. By 1970, twenty-nine states and the District of Columbia had enacted such "sexual psychopath" or "mentally disordered sex offender" statutes.

10. "States have defined a sexual psychopath as one who is predisposed to the commission of sex crimes and who is dangerous to society." Carol Veneziano & Louis Veneziano, An Analysis of Legal Trends in the Disposition of Sex Crimes: Implications for Theory, Research, and Policy, 15 J. PSYCHIATRY & L. 205, 206 (1987). The term "psychopathic personality," however, was expunged from the psychiatric nomenclature in 1952. Hervey Cleckley, The Mask of Sanity 11 (5th ed. 1988) (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (1952)). Cleckley suggests that the modern-day equivalent of the sexual psychopath is classified under the heading of "personality disorders." Id. at 287. But see infra notes 293-97 and accompanying text.

11. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 3. Michigan was the first state to enact a sexual psychopath statute in 1937, followed closely by Illinois. Id.

12. Veneziano & Veneziano, supra note 10, at 206. Most states, however, have repealed their sexual psychopath commitment laws in the past 20 years. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 4. The repeals have been undertaken because of the general belief in the mental health field that treatment is ineffectual; because predictions of dangerousness and diagnoses of sexual psychopathologies are unreliable; because the general public has expressed a preference for punishment over treatment; and, at least in part, because of the high cost of defending against legal challenges to the statutes. Id.

In addition to Minnesota's psychopathic personality statute, such Pearson-era sex offender commitment statutes are retained by just nine other states and the District of Columbia. See COLO. REV. STAT. ANN. §§ 16-13-201 to -216 (West 1990 & Supp. 1995); CONN. GEN. STAT. ANN. §§ 17a-566 to -567 (West 1992 & Supp. 1995); D.C. CODE ANN. §§ 22-3503 to -3511 (1981 & Supp. 1995); ILL. ANN. STAT. ch. 725, paras. 205/0.01 to /12 (Smith-Hurd 1992); MASS. GEN. LAWS ANN. ch. 123A, §§ 1-9 (West 1986 & Supp. 1995); NEB. REV. STAT. §§ 29-2911 to -2921 (1989); N.J. STAT. ANN. §§ 2C:47-1 to -8 (West 1995); OR. REV. STAT. ANN. §§ 426.510-680 (Michie 1995); TENN. CODE ANN. §§ 39-6-301 to -306 (1984 & Supp. 1995); UTAH CODE ANN. §§ 77-16-1 to -5 (1995); VA. CODE ANN. §§ 19.2-300 to -302 (Michie 1995); WASH. REV. CODE ANN. §§ 71.06.005-140 (West 1992). Minnesota, however, appears to be the only state that regularly has utilized its old statute. Rorie Sherman, Psychiatric Gulag or Wise Safekeeping? Lawmakers Use Civil Commitment to Detain Sex Predators, NAT'L L.J., Sept. 5, 1994, at A1. Although these older commitment laws seem to have fallen into disfavor, a growing number of states have considered or passed legislation similar to Minnesota's sexually
In enacting these measures, legislators were operating under several assumptions. First, it was thought that the “sexual psychopath” had a specific, treatable mental disability. Second, treatment was believed to be appropriately within the realm of mental health professionals. Third, it was assumed that treatment usually would be successful. Lastly, legislators hypothesized that those who were treated would be less likely to reoffend and, accordingly, the public would be protected.

In 1939, the Minnesota Legislature enacted a psychopathic personality statute which, although recently expanded, remains largely intact to this day. The legislature acted upon the recommendations of a committee appointed by the governor “to consider the problem

dangerous persons commitment statute. See infra note 229 and accompanying text (listing recently-enacted state statutes and bills considered but not passed by state legislatures). As discussed infra, the classification of “sexually dangerous persons” is a new, broader category of civil commitment under which convicted sex offenders may be detained beyond their scheduled release date from prison. See infra part III.A.; see also MINN. STAT. § 253B.02, subd. 18b (1994) (defining “sexually dangerous person”). In contrast to the old laws, which were intended to divert offenders into treatment instead of prison, see infra notes 13-17 and accompanying text, these new commitment statutes generally are meant to divert convicted offenders into mental health institutions, rather than into society, at the conclusion of their sentences, see infra note 229.


The psychopathic personality commitment law was passed at a time of great ignorance about sexual behavior, before the Kinsey report and long before any strategies were developed or tested for the treatment of sexual misbehavior. The term “psychopathic personality”... is a nineteenth century term relating to the concept of moral insanity, the notion that the will might be defective where the mind was not. Id. at 16.

14. Id. at 12. In the era in which most of these statutes were passed, civil commitment proceedings were motivated by “a paternalistic concern for persons perceived to be ‘in need of treatment.’” John Monahan & Henry J. Steadman, Toward a Rejuvenation of Risk Assessment Research, in VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 1, 1 (John Monahan & Henry J. Steadman eds., 1994). In the late 1960s, however, the patients’ rights movement emerged, and the public policy emphasis shifted from a desire to provide the mentally ill with treatment to an effort to protect others from the risk of harmful behavior. Id.

15. Erickson, supra note 13, at 12.

16. Id.

17. Id. at 12-13.


19. See infra part III.A.

20. Compare MINN. STAT. § 253B.02, subd. 18a (1994) with Act approved Apr. 21, 1939, ch. 369, § 1, 1939 Minn. Laws 712, 712.
of the insane criminal with special reference to sex criminals."

The legislature drew heavily upon the committee's report in drafting the main portion of the act, which defined "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 his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.

Within months of the statute's enactment, the state supreme court was confronted with an application for a writ of prohibition challenging the law's constitutionality.

B. State ex rel. Pearson

1. The Minnesota Supreme Court Decision

In April 1939, a petition was filed in Ramsey County Probate Court seeking commitment of Charles Edwin Pearson as a psychopathic personality. Pearson subsequently sought a writ prohibiting the
probate court from proceeding with a commitment hearing. 25

In his petition to the supreme court, Pearson attacked the statute’s constitutionality on four fronts. 26 First, he contended that the law violated a state constitutional provision defining and limiting the jurisdiction of probate courts. 27 Second, he argued that the statute encompassed more than one subject, which rendered it void under the state constitution. 28 More importantly, however, Pearson maintained that under the United States Constitution, the law (1) was prohibitively vague and (2) violated the Fourteenth Amendment’s Equal Protection and Due Process Clauses. 29

Pearson’s first two contentions were found to be without merit. 30 However, the federal constitutional arguments warrant closer examination.

In addressing Pearson’s assertion that the statute was unconstitutionally vague, the supreme court found that the law adequately reflected the legislature’s intentions. 31 The court stated that “[i]n the interest

25. Pearson, 205 Minn. at 546, 287 N.W. at 298.
26. Id. at 547, 287 N.W. at 298-99.
27. Id. at 547-50, 287 N.W. at 299-300. At the time, the Minnesota Constitution stated that “[a] probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction, except as prescribed by this Constitution.” MINN. CONST. art. 6, § 7 (Mason’s Minn. Stat. 1927). The current analogue to this section expands the probate courts’ jurisdiction to include “all guardianship and incompetency proceedings” and does not contain the proscriptive language of the earlier version. MINN. CONST. art. VI, § 11.
28. Pearson, 205 Minn. at 550-54, 287 N.W. at 300-02. The Minnesota Constitution states that “[n]o law shall embrace more than one subject, which shall be expressed in its title.” MINN. CONST. art. 6, § 27 (Mason’s Minn. Stat. 1927) (current version at MINN. CONST. art. IV, § 17).
29. Pearson, 205 Minn. at 554-57, 287 N.W. at 302-03.
30. Id. at 550, 554, 287 N.W. at 300, 302. As to the first point, the court found that the plain language of the constitution limited the probate courts’ jurisdiction to “‘estates of deceased persons and persons under guardianship.’” Id. at 548, 287 N.W. at 299 (quoting MINN. CONST. art. 6, § 7 (1927)). The court relied on an earlier decision in which it held that “the putting under guardianship of all persons who are proper subjects for it—insane persons, incorrigible drunkards, idiots, spendthrifts, as well as minors—comes within the jurisdiction of the probate court.” Id. (citing State ex rel. Chesley v. Wilcox, 24 Minn. 143 (1877)). The court concluded that psychopathic personalities similarly were “persons subject to guardianship,” as determined by the legislature pursuant to its grant of power. Id. at 548-50, 287 N.W. at 299-300.

Pearson’s second ground for appeal rested on the statute’s title, “A bill for an act relating to persons having a psychopathic personality,” which Pearson maintained “[did] not fairly express the subject of the act.” Id. at 550-51, 287 N.W. at 300. In rejecting Pearson’s argument, the court, construing the constitutional provision liberally, found that “[a] title broader than the statute, if it is fairly indicative of what is included in it, does not offend the constitution. . . . [T]he title indicates that the act deals with persons of abnormal minds . . . .” Id. at 551-53, 287 N.W. at 300-01.
31. Id. at 554-55, 287 N.W. at 302.
of humanity and for the protection of the public, persons so afflicted should be given treatment and confined for that purpose rather than for the purpose of punishment.\cite{32}

However, conceding that the statutory language was somewhat flawed, the court construed the definition of psychopathic personalities\cite{33} to include those persons who, [(1)] by a habitual course of misconduct in sexual matters, [(2)] have evidenced an utter lack of power to control their sexual impulses and who, [(3)] 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.\cite{34}

Known as the Pearson standard,\cite{35} the court’s three-pronged test usually has been considered together with the statutory definition of psychopathic personality\cite{36} to determine whether civil commitment is warranted.\cite{37} Pearson’s final argument was that the statute violated equal protection, since it did not apply to all individuals who committed sexual misconduct, and due process, because the law did not permit a jury trial or “certain other rights” guaranteed criminal defendants.\cite{38}

In the court’s view, while it would be unreasonable and probably unconstitutional to apply the statute to every person guilty of sexual misconduct, it was reasonable to apply it to “sexually irresponsible persons” who posed a danger to others.\cite{39} Furthermore, the court held that the constitutional right to trial by jury does not apply to proceedings of this civil nature, although “persons cannot be adjudged

\begin{itemize}
\item \cite{32} Id. at 550, 287 N.W. at 300.
\item \cite{33} See supra note 23 and accompanying text (providing original statutory definition of psychopathic personality).
\item \cite{34} Pearson, 205 Minn. at 555, 287 N.W. at 302.
\item \cite{35} See, e.g., In re Linehan, 518 N.W.2d 609, 610 (1994) ("The state has failed to prove by clear and convincing evidence that appellant meets the Pearson standard . . .").
\item \cite{36} See supra note 23 and accompanying text for original statutory definition of psychopathic personality. The legislature recently amended this definition to include the Pearson construction. See infra note 294 (providing new statutory definition as codified at MINN. STAT. § 253B.02, subd. 18a (1994)).
\item \cite{37} E.g., In re Buckhalton, 503 N.W.2d 148, 152-53 (Minn. Ct. App. 1993) (applying the statute’s definition of a psychopathic personality as “narrowed” by the supreme court in Pearson), aff’d, 518 N.W.2d 531 (Minn. 1994). It should be noted, however, that some individuals have been committed solely on the basis of the statutory definition. See infra note 180 and accompanying text.
\item \cite{38} Pearson, 205 Minn. at 555-57, 287 N.W. at 302-03. The court did not elaborate what the “certain other rights” were. Id. at 556, 287 N.W. at 303. Had Pearson’s commitment proceeded, his “jury” would have consisted of an attorney, the judge, and an examining doctor. Erickson, supra note 13, at 14-15 n.8.
\item \cite{39} Pearson, 205 Minn. at 555-56, 287 N.W. at 302-03.
\end{itemize}
insane and committed without notice and an opportunity to be heard."

The supreme court quashed Pearson's petition for a writ of prohibition, holding the psychopathic personality statute to be constitutional on its face. Subsequently committed under the statute, Pearson appealed, and the Supreme Court of the United States granted certiorari.

2. The United States Supreme Court Decision

On appeal, the Supreme Court considered Pearson's contention that the psychopathic personality statute was unconstitutionally vague and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court rejected both arguments.

According to the Court, the statutory construction developed by the state supreme court "destroy[ed] the contention that it is too vague and indefinite to constitute valid legislation." Therefore, Pearson's vagueness attack upon the statute was found to be unwarranted in light of the state court's interpretation.

The Court next turned its attention to the Fourteenth Amendment issues. Pearson maintained that the statute denied equal protection of the laws because it treated one group, sexual psychopaths, differently than the larger class of "insane persons." The Court dismissed the argument in short order:

[The 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. If the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

The Court then considered the issue of due process. After a recitation of the steps involved in the commitment process, the
Court held that the applicable statutes were not obviously defective in any material way and should not be construed, prior to the state court's review of an actual commitment proceeding, as to deprive Pearson of due process under the Fourteenth Amendment. With the constitutional issues apparently resolved, implementation of the statute began.

C. Application of the Statute, 1939-1994

1. The Statistics

From 1939 to 1990 an estimated 250 individuals were committed under Minnesota's psychopathic personality statute. In the twenty years immediately following enactment, the statute was used with frequency, but the number of such commitments declined during the 1960s and remained low through 1990.

48. At the time the United States Supreme Court issued its opinion, Pearson's petition for a writ of prohibition (seeking to block the commitment proceeding) was the only case under the psychopathic personality statute that had been considered by the state supreme court. See supra notes 24-25 and accompanying text.

49. Pearson, 309 U.S. at 277 (calling Pearson's objections "premature").

50. Pearson was the first case in which the Court considered and upheld the constitutionality of a state statute providing for the civil commitment of "sexual psychopaths." LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 3. Constitutional challenges to such laws—and civil commitment statutes in general—have rested on grounds of right to a jury trial, arbitrary deprivation of liberty, right to treatment, violation of equal protection, right against self-incrimination, and violation of the Cruel and Unusual Punishment Clause. See, e.g., McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972) (holding that a person who refuses to cooperate in psychiatric evaluation cannot be held indefinitely); Jackson v. Indiana, 406 U.S. 715 (1972) (finding that equal protection is offended where a state indefinitely confines an individual found incompetent to stand trial, when a less stringent standard of release is applied to those committed as mentally ill); Humphrey v. Cady, 405 U.S. 504 (1972) (holding that states requiring trial by jury in other types of civil commitment proceedings must do so for sexual psychopath commitments, absent a compelling justification); In re Winship, 397 U.S. 358 (1970) (applying criminal standard of proof beyond a reasonable doubt to civil proceedings seeking to commit a juvenile); Specht v. Patterson, 386 U.S. 605 (1967) (guaranteeing person sought to be committed the rights to counsel, notice and the opportunity to be heard, confrontation and cross-examination, and appeal).

The United States Supreme Court consistently has upheld psychopathic personality statutes, resting its rationale on the civil nature of the proceedings, as well as upon the state's police and parens patriae powers. See generally Veneziano & Veneziano, supra note 10, at 207-15 (summarizing decisions in which the constitutionality of sexual psychopath statutes was challenged).

51. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 11 (attributing data to staff at the Minnesota Security Hospital).

52. Id. (citing Erickson, supra note 13, at 4, 20-21, and data from the Departments of Corrections and Human Services, various district courts, and county attorneys). Only 13 people were committed as psychopathic personalities during the 1970s, 14 were committed during the 1980s, and two were committed in 1990. Id.
Minnesota's statute, like similar laws enacted across the nation, appears to have been originally intended to divert sexual "deviates" into treatment rather than prison. In fact, most of those committed during the 1940s and early to mid-1950s were first-time offenders—from window peepers to "flashers" to gay men engaging in consensual sex—who were committed for a year or less in lieu of imprisonment. Even as more violent offenders were committed in the late 1950s and 1960s, civil commitment tended to serve as a brief period of psychiatric observation preceding criminal prosecution and sentencing. Not until the 1970s were commitment proceedings increasingly instituted against violent repeat sex offenders, though still on a limited basis.

In the spring of 1988 several highly publicized, barbarous rape/murders were committed by men who recently had been released from prison after serving time for criminal sexual conduct. The Minnesota Attorney General quickly convened a task force to study sexual violence against women. The task force recommended, in part, that the legislature increase the length of determinate sentences
given dangerous sex offenders (or, preferably, reinstitute indeterminate sentencing) and that the psychopathic personality statute be used aggressively to confine especially violent offenders beyond their prison terms.61

The 1989 legislature subsequently passed several measures aimed at keeping violent sex offenders off the streets.62 First, the courts were directed to consider the suitability of psychopathic personality commitment at the time of initial sentencing, a strategy known as "dual commitment."63 Second, determinate statutory maximum sentences for criminal sexual conduct were increased.64 And third, a "patterned sex offender" sentencing statute was passed, authorizing longer sentences for those who were deemed to be likely to reoffend if not treated.65 These measures became law in August 1989.66


63. The statute encouraging "dual commitment" reads:

When a court sentences a person under section 609.1352 [sentencing of patterned sex offenders], 609.342, 609.343, 609.344, or 609.345 [first-, second-, third-, or fourth-degree criminal sexual conduct, respectively], the court shall make a preliminary determination whether in the court's opinion a [commitment] petition . . . may be appropriate and include the determination as part of the sentencing order. If the . . . petition may be appropriate, the court shall forward its preliminary determination along with supporting documentation to the county attorney.

MINN. STAT. § 609.1351 (1994).

64. Maximum sentences and fines for convictions of criminal sexual conduct were increased from 20 to 25 years and from $35,000 to $40,000 for first-degree offenses, Act of June 1, 1989, ch. 290, art. 4, § 12, 1989 Minn. Laws 1580, 1622 (current version at MINN. STAT. § 609.342, subd. 2 (1994)); from 15 to 20 years and from $30,000 to $35,000 for offenses in the second degree, Act of June 1, 1989, ch. 290, art. 4, § 13, 1989 Minn. Laws 1580, 1622 (current version at MINN. STAT. § 609.343, subd. 2 (1994)); from 10 to 15 years and from $20,000 to $30,000 for third-degree offenses, Act of June 1, 1989, ch. 290, art. 4, § 14, 1989 Minn. Laws 1580, 1622 (current version at MINN. STAT. § 609.344, subd. 2 (1994)); and from five to 10 years and from $10,000 to $20,000 for offenses in the fourth degree, Act of June 1, 1989, ch. 290, art. 4, § 15, 1989 Minn. Laws 1580, 1623 (current version at MINN. STAT. § 609.345, subd. 2 (1994)).

In addition, the legislature created an exception to statutory maximum sentences by mandating a 37-year sentence for any offender convicted of first- or second-degree criminal sexual conduct, who also had two previous convictions for first-, second-, or third-degree criminal sexual conduct. Act of June 1, 1989, ch. 290, art. 2, § 14, 1989 Minn. Laws 1580, 1593 (current version at MINN. STAT. § 609.346, subd. 2a (1994)).

65. Act of June 1, 1989, ch. 290, art. 4, § 10, 1989 Minn. Laws 1580, 1620-21 (current version at MINN. STAT. § 609.1352 (1994 & Supp. 1995)). The "patterned sex offender" statute requires judges to sentence offenders to the statutory maximum or at least double the presumptive sentence, whichever is lower, if:

(1) the offender committed
As previously noted, use of the psychopathic personality statute was infrequent from the 1960s through 1990. But in 1990 and 1991, the public was enraged by several more rape/murders committed by recently released sex offenders who had been sentenced under the old guidelines. Again, the legislature reacted to the outcry by enacting tougher criminal measures, including longer sentences for first- and

(a) criminal sexual conduct in any of the first through fourth degrees, or
(b) another specified crime, see MINN. STAT. § 609.1352, subd. 2 (1994), and the court finds that the "crime was motivated by the offender's sexual impulses or was part of a predatory pattern of behavior that had criminal sexual conduct as its goal";

(2) the court finds that the offender poses a danger to the public; and

(3) based upon a professional opinion that the offender is a "patterned sex offender," the court finds that long-term treatment or supervision is required beyond the presumptive sentence and supervised release period.

MINN. STAT. § 609.1352, subd. 1 (1994). The statute defines a "patterned sex offender" as "one whose criminal sexual behavior is so engrained that the risk of reoffending is great without intensive psychotherapeutic intervention or other long-term controls." Id. subd. 1(a)(3); see State v. Christie, 506 N.W.2d 293, 299 (Minn. 1993) (upholding constitutionality of patterned sex offender statute), cert. denied, 114 S. Ct. 1516 (1994). The statute has been employed more frequently each year. In 1990, five individuals were sentenced as patterned sex offenders; in 1991, the number rose to 11; and in 1992, the statute was invoked 19 times. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 33.

In addition to the patterned sex offender law, the legislature formulated a "heinous crimes" statute, which under certain circumstances mandates a life sentence without possibility of release for persons convicted of first-degree murder. Act of June 1, 1989, ch. 290, art. 2, § 10, 1989 Minn. Laws 1580, 1592 (current version at MINN. STAT. § 609.184 (1994)). The sentence was to be imposed on those who had a previous conviction for one of several offenses, including first- or second-degree criminal sexual conduct, if it was committed with force or violence. Id.


67. See supra note 52 and accompanying text.

68. In less than one year, 23-year-old Melissa Johnson, 14-year-old Jamie Cooksey, and 18-year-old Carin Streufert were raped and murdered. See State v. Stewart, 514 N.W.2d 559, 561 (Minn. 1994) (Johnson murder); State v. Moorman, 505 N.W.2d 593, 597 (Minn. 1993) (Cooksey murder); State v. Sullivan, 502 N.W.2d 200, 200-01 (Minn. 1993) (Streufert murder); State v. Swanson, 498 N.W.2d 435, 436 (Minn. 1993) (Streufert murder). Johnson was killed by a twice-convicted sex offender, who had been released from prison just four days earlier. Killer of St. Cloud Student Sentenced to Life in Prison, SAINT PAUL PIONEER PRESS DISPATCH, Aug. 29, 1992, at A10. The man who murdered Cooksey had a prior conviction for criminal sexual conduct and had been sought for nearly ten months for violating his parole. See Wayne Wangstad, Murder Charges Sought in Sex Assault, Strangling, SAINT PAUL PIONEER PRESS DISPATCH, Oct. 19, 1990, at C1. One month after killing Cooksey, he was apprehended while attempting to assault another young woman. Id. Streufert was killed by two men, one of whom had three convictions for felony theft. See Larry Oakes, 2 Arraigned in Slaying of Woman from Grand Rapids, STAR TRIB. (Minneapolis), June 21, 1991, at A1.

69. See Dennis J. McGrath & Jim Parsons, Two Killings Inspire Tough Talk from Legislature, STAR TRIB. (Minneapolis), July 20, 1991, at A1; Lydia Villalva Lijo & Nina
second-degree criminal sexual conduct. And Minnesota's Commissioner of Corrections instituted a system to evaluate soon-to-be-released sex offenders and to refer the cases to county attorneys for possible commitment under the psychopathic personality statute.

Brook, Carlson to Appoint Commission on Violent Crime, SAINT PAUL PIONEER PRESS DISPATCH, July 21, 1991, at A10; Is State's Justice System Tough Enough to Curb Rise in Violence?, SAINT PAUL PIONEER PRESS DISPATCH, Aug. 18, 1991, at A15; Donna Halvorsen, Senate Panel Rejects Death-Penalty Bill: Backers May Try to Tack Issue onto Crime Bill, Put It to Voters, STAR TRIB. (Minneapolis), Feb. 25, 1992, at B1. Most notably, the legislature gave the supreme court authority to establish a statewide judicial panel to preside over psychopathic personality commitment proceedings. See MINN. STAT. § 526.115 (1992) (now codified at MINN. STAT. § 253B.185, subd. 4 (1994)). Thus far, the supreme court has not created such a panel. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 8.

The legislature also expanded the "heinous crimes" statute, see supra note 65, by including third-degree criminal sexual conduct committed with force or violence as a "heinous crime." Act of Apr. 29, 1992, ch. 571, art. 4, § 4, 1992 Minn. Laws 1983, 2015-16 (current version at MINN. STAT. § 609.184, subd. 1(a)(3) (1994)). Thus, someone convicted of first-degree murder who had a prior conviction for third-degree criminal sexual conduct could be sentenced to life under this law. See id. The statute also was augmented to require a life sentence for anyone convicted of first-degree murder who committed the act while committing or attempting to commit first- or second-degree criminal sexual conduct with force or violence. Act of Apr. 29, 1992, ch. 571, art. 1, § 13, 1992 Minn. Laws 1983, 1991-92 (current version at MINN. STAT. § 609.184, subd. 2(1) (1994)).


71. See FRANK W. WOOD, MINN. DEP'T OF CORRECTIONS, RISK ASSESSMENT AND RELEASE PROCEDURES FOR VIOLENT OFFENDERS/SEXUAL PSYCHOPATHS 9-10, 17-20 (1991). This report was prepared at the behest of Governor Arne Carlson, who directed the Department of Corrections to review its policies regarding violent offenders' transition from prison to the community. Id. at attached Executive Summary. "The initial priority was to put in place a procedure to ensure that sexual psychopaths and/or other predatory and violent offenders already in the system are identified." Id. at 3.

At least in part, the department began systematic screening of soon-to-be-released sex offenders because it believed judges were not identifying candidates for commitment at the initial sentencing. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 14; see also supra note 63 and accompanying text (describing "dual commitment"). In fact, only two commitments are believed to have been instituted pursuant to the "dual sentencing" statute that took effect in 1989. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 22.

The purpose of the Department of Corrections' screening process is to identify "offenders already in or entering the corrections system whose behaviors prior to commitment or related to the offender's committing offense or during incarceration indicate that the offender is a candidate for civil commitment as a psychopathic personality or may represent a risk to the public upon release." WOOD, supra, at 9. The legislature subsequently adopted these screening procedures as law. See MINN. STAT. § 244.05, subd. 7 (1994).

Each correctional facility is responsible for screening inmates prior to release.
The Department of Corrections' screening system appears to be responsible, in large part, for the recent dramatic rise in psychopathic personality commitments. From January 1990 through November 1995, 100 individuals were committed as psychopathic personalities or sexually dangerous persons. This stands in sharp contrast to the fourteen individuals committed during the previous decade and the two individuals committed in 1990.

Of the 623 sex offenders released from Minnesota state prisons between January 1991 and July 1993, forty-six (7.4 percent) were committed as psychopathic personalities. On average, each of these individuals had three prior convictions, multiple victims, and served 6.8 years in prison. Most had been sentenced prior to the 1989 and 1991 amendments to the statutory maximum sentences.

At present, ninety-five men and one woman are committed as sexual psychopathic personalities or sexually dangerous persons. Until

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**LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 24.** If a soon-to-be-released sex offender meets any of the "public risk monitoring" criteria, his or her case will be referred to the appropriate county attorney. *Id.* The criteria are:

1. whether the conviction offense involved actual or attempted injury of the victim,
2. prior history of (including convictions for) assaultive behavior,
3. assessments of mental health problems,
4. whether the person has prior convictions for criminal sexual conduct,
5. whether the conviction offense or any prior offenses involved the use of a weapon,
6. whether the corrections staff considers the individual a potential public risk,
7. whether the inmate is a recidivist.

*Id.* at 24 n.47. While data are not available for all correctional facilities, in 1992 one facility referred 29 of its 185 soon-to-be-released sex offenders (16 percent) to county attorneys for possible psychopathic personality commitment proceedings. *Id.* at 25.

**72. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 13.** Two-thirds of the recent petitions for commitment were initiated following a referral from the Department of Corrections. *Id.*


74. See supra note 52 and accompanying text.

75. **LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 14-15.** Another five of these individuals, who were initially sought to be committed as psychopathic personalities, ultimately were committed as mentally ill, mentally ill and dangerous, mentally retarded, or chemically dependent. *Id.* at 15.

76. *Id.* at 17. The average length of prison sentence was calculated from data available for 37 of these individuals. *Id.* at 17 n.33.

77. *Id.* at 22; see supra notes 62-70 and accompanying text (outlining changes in statutory maximum sentences). The average sentence for first-degree criminal sexual conduct increased from 6.5 years in 1986 to 10.6 years in 1992. **LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 32.**

78. *Minnesota's Committed Sex Offenders,* STAR TRIB. (Minneapolis), Nov. 5, 1995, at B6. The 66 sexual psychopaths detained at the Minnesota Security Hospital as of August 1994 collectively are estimated to have victimized at least 300 individuals. Blake
recently, most of them were housed at the Minnesota Security Hospital (MSH) in Saint Peter. A new 100-bed facility, intended to house only sexual psychopathic personalities and sexually dangerous persons, recently opened at Moose Lake, Minnesota. About seventy individuals have been or soon will be transferred from MSH to Moose Lake.

It has been suggested that civil commitments of sex offenders will decrease in the near future, as the individuals sentenced since August 1989 probably will be incarcerated for longer periods. Any abatement, however, is likely to be temporary, since most convicted sex offenders eventually will finish their sentences and become due for release. Corrections staff and county attorneys then will need to determine whether these individuals are candidates for civil commitment as sexual psychopathic personalities or, if the new statutory classification is upheld, as sexually dangerous persons.

2. The Commitment Process

Despite recent changes in the law, the process for committing an individual as a sexual psychopathic personality has remained fairly constant for several decades, and the same procedures now apply to the commitment of sexually dangerous persons. The first step is preparation of a petition for commitment. Such a petition is

Morrison, 66 Sexual Psychopaths Have Victimized 300 People, SAINT PAUL PIONEER PRESS, Aug. 31, 1994, at A1; see also Whom Do We Fear?, SAINT PAUL PIONEER PRESS, Aug. 31, 1994, at B8 (profiling sexual psychopaths confined at the Minnesota Security Hospital).

79. See deFiebre, supra note 73, at B1.
80. See id. A new 50-bed wing also was added to MSH to accommodate overflow from the Moose Lake facility, and Moose Lake was designed to allow for another 50-bed expansion. Id. at B6.
81. See id. at B1. As of November 1995, 76 of the 96 civilly-committed individuals were at MSH or Moose Lake, eight remained in state prisons, 10 were on provisional discharge, and the whereabouts of two escapees were unknown. Minnesota's Committed Sex Offenders, supra note 78, at B6.
82. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 34.
83. Id.
84. See supra note 71 and accompanying text.
85. As discussed infra, the classification of "sexually dangerous persons" is a new, broader category of civil commitment under which convicted sex offenders may be detained beyond their scheduled release from prison. See infra part III.A.; see also MINN. STAT. § 253B.18-.185 (1994).
86. See generally MINN. STAT. §§ 253B.18-.185 (1994) (describing procedures for commitment). In 1969, the legislature passed a measure which rendered psychopathic personality commitments subject to the same procedures governing the commitment of mentally ill and dangerous individuals. Act approved May 15, 1969, ch. 431, § 1, 1969 Minn. Laws 657, 657-58 (amending MINN. STAT. § 526.10 (1967)).
87. See supra note 85.
88. MINN. STAT. § 253B.185 (1994); MINN. R.P. CIV. COMMITMENT 1. As discussed above, the catalyst for action by county attorneys in recent years has been the pre-
initiated by the county attorney if he or she is satisfied that good cause exists to pursue commitment. 89

Once a petition is filed, a person alleged to be a sexual psychopathic personality or sexually dangerous person is committed under the procedures that govern the commitment of mentally ill and dangerous individuals. 90 The court appoints counsel for the individual ("respondent"). 91 The court also designates an examiner and advises the respondent of his or her right to secure an independent second evaluation. 92 After examining the individual, and prior to the initial commitment hearing, the court-appointed examiner(s) files a report with the court. 93

release screening procedures instituted by the Department of Corrections. See supra notes 71-74 and accompanying text.

89. MINN. STAT. § 253B.185, subd. 1 (1994). The county attorney may request a "pre-petition screening report" to assist in determining whether a petition is warranted. See supra note 71 and accompanying text. This procedure typically is conducted by mental health, medical, and social work professionals who interview the individual (or "respondent"), review the available evidence, and prepare a written recommendation to the county attorney. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 20. While it is required for all other civil commitments, the pre-petition screening report is optional for the commitment of sexual psychopathic personalities or sexually dangerous persons, and it rarely is requested by county attorneys. Id. at 20-21.

The petition may be brought in any county where the individual resides, is otherwise "present," or was convicted of the offense for which he or she currently is incarcerated. MINN. STAT. § 253B.185, subd. 1 (1994). The petition must allege specific facts and incidents giving rise to the petition and identify potential witnesses thereto. MINN. R.P. CIV. COMMITMENT 1.01.

90. MINN. STAT. § 253B.185, subd. 1 (1994).
91. MINN. R.P. CIV. COMMITMENT 3.01.
92. MINN. STAT. § 253B.07, subd. 3 (1994); see also MINN. R.P. CIV. COMMITMENT 7.02 (requiring reimbursement of an examiner appointed upon the respondent's request). The court-appointed examiner must be a licensed physician or psychologist who is knowledgeable about the individual's alleged impairment. MINN. STAT. § 253B.02, subd. 7 (1994); see also MINN. R.P. CIV. COMMITMENT 7.01 (stating that examiners are selected from a list compiled by the court). The county attorney and the respondent's attorney may be present during the examination(s). MINN. STAT. § 253B.07, subd. 5 (1994).

The respondent and counsel must be given access to the respondent's medical records. MINN. R.P. CIV. COMMITMENT 5.01-.02. If such access is denied, the records will be excluded from evidence when challenged by the respondent. MINN. R.P. CIV. COMMITMENT 5.03.

93. MINN. STAT. § 253B.07, subd. 5 (1994). Copies of the first examiner's report are made available to the individual and her or his counsel. Id.; MINN. R.P. CIV. COMMITMENT 8.03. If an examiner was appointed at the respondent's request, his or her report must be furnished to the petitioner. MINN. R.P. CIV. COMMITMENT 8.03. Reports prepared by both court-appointed examiners must include opinions regarding (1) whether the respondent is mentally ill, mentally retarded, or chemically dependent; (2) whether commitment is recommended; (3) the examiner's recommendation as to the form, location, and conditions of treatment; and (4) whether a substantial
The initial hearing on the petition must be held within fourteen days of the petition's filing, although the period may be extended an additional thirty days if good cause is shown. The statute assures the respondent, her or his counsel, and the petitioner of the rights to notice, to attend and testify, to present and cross-examine witnesses, and to present relevant evidence. If the court finds by clear and convincing evidence that the respondent is a sexual psychopathic personality or a sexually dangerous person, it will commit the individual to a treatment facility for a sixty-day evaluation.

Within sixty days, a written treatment report must be filed with the court. Within fourteen days of receiving the report, or within ninety days of the initial commitment, the court must hold a second and final hearing. If the court finds by clear and convincing evidence that likelihood exists that respondent will engage in acts capable of inflicting serious harm.

94. MINN. STAT. § 253B.08, subd. 1 (1994). In addition, the respondent may demand an immediate hearing, which must be held within five to 15 business days of the demand. Id.
95. In addition to those appointed to examine the respondent, see supra note 92 and accompanying text, witnesses often include corrections staff, victims, treatment professionals, and those who know the individual. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 20.
96. MINN. STAT. § 253B.08, subds. 2-4, 7 (1994); see also MINN. R.P. CIV. COMMITMENT 10.01 (requiring respondent's presence at hearing). The respondent may waive his or her right to attend the hearing, or she or he may be excluded if "seriously disruptive" or "totally incapable of comprehending and participating in the proceedings." MINN. STAT. § 253B.08, subd. 5 (1994); accord MINN. R.P. CIV. COMMITMENT 10.01-02.

In addition to testimony from the witnesses described above, see supra note 95, the bulk of the evidence presented at commitment hearings consists of files pertaining to the individual's history, especially his or her sexual history. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 22. In particular, the individual's "base file," compiled by the facility at which she or he is incarcerated, plays a key role. Id. at 28. The contents of inmates' base files vary considerably, because different correctional facilities keep different types of information in them. Id. For example, some facilities place all psychological, medical, and program information in the files, while others exclude information such as that confided or written by the person pursuant to treatment. Id. at 28. Since these files greatly influence county attorneys' decisions to petition and judges' decisions to commit, inconsistencies among the record keeping systems can have a powerful effect on the commitment process. Id. at 28-29.

97. MINN. STAT. § 253B.18, subds. 1-2 (1994). The 60-day process typically includes psychiatric and psychological evaluations of the respondent, as well as assessments by vocational rehabilitation, recreational therapy, social work, chemical dependency, and education staff. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 20.
98. MINN. STAT. § 253B.18, subd. 2 (1994); see supra note 93 (describing required contents of treatment report). The treatment facility's failure to submit the treatment report does not result in the individual being automatically discharged. MINN. STAT. § 253B.18, subd. 2 (1994).
99. MINN. STAT. § 253B.18, subd. 2 (1994).
the respondent is a sexual psychopathic personality or a sexually dangerous person, it orders the individual to be committed for an indeterminate period to the Minnesota Security Hospital. Most petitions for commitment are granted. Individuals who are committed as sexual psychopathic personalities or sexually dangerous persons are afforded the same rights as others who are civilly committed under alternate classifications. Chief among those rights is the right to petition for transfer or discharge, and the standards governing the discharge or transfer of mentally ill and dangerous patients apply with like force to sexual psychopathic personalities and sexually dangerous persons.

The individual, or the head of the treatment facility to which the individual is committed, may petition the Commissioner of Human Services for transfer, provisional discharge, or full

100. Id. subd. 3. If the individual simultaneously is sentenced for a criminal conviction, see supra note 63 and accompanying text, he or she serves the prison sentence before being transferred to MSH. MINN. STAT. § 253B.18, subd. 3 (1994).

101. LEGISLATIVE AUDITOR'S REPORT, supra note 8, at 15. Of the psychopathic personality cases finalized between January 1991 and September 1993, 64 percent were decided in favor of commitment. Id.

102. See generally MINN. STAT. § 253B.03 (1994 & Supp. 1995) (enumerating rights of patients). Psychopathic personalities and sexually dangerous persons are grouped with mentally ill and dangerous, chemically dependent, mentally retarded, and mentally ill individuals with respect to the fundamental rights they enjoy. See MINN. STAT. § 253B.02, subs. 2, 13, 14, 15, 17, 18a, 18b (1994). Although subject to some restrictions, these freedoms include the right to be free from restraints; to correspond, receive visitors, and make phone calls; to summon counsel, spiritual advisors, or physicians; to be represented by counsel at any proceeding relating to the commitment; to receive periodic physical and mental assessments; to receive "proper care and treatment" and to accept or reject the same; and to have access to personal medical records. MINN. STAT. § 253B.03, subds. 1-6 (1994 & Supp. 1995).

103. MINN. STAT. § 253B.18, subd. 5 (1994).

104. Id. § 253B.185, subd. 1.

105. Id. § 253B.18, subd. 5.

106. Id. If the transfer contemplated is to the custody of the Commissioner of Corrections, the following factors are weighed:

(1) the person's unamenability to treatment;
(2) the person's unwillingness or failure to follow treatment recommendations;
(3) the person's lack of progress in treatment at the . . . hospital;
(4) the danger posed by the person to other patients or staff at the . . . hospital; and
(5) the degree of security necessary to protect the public.

Id. § 253B.185, subd. 2(a).

107. Provisional discharge is granted if the person committed "is capable of making an acceptable adjustment to open society." Id. § 253B.18, subd. 7. Factors to be considered include:

(a) whether the [person's] course of hospitalization and present mental status indicate there is no longer a need for inpatient treatment and supervision; and
discharge. All such petitions are considered by a three-member “special review board.” The board holds a hearing on each petition and makes its recommendation to the Commissioner, who then issues an order regarding the petition within fourteen days of the hearing. The Commissioner’s decision may be appealed to a special panel and thereafter to the court of appeals.

For an individual to be fully discharged, the Commissioner of Human Services must be satisfied that the person can “[make] an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.” The petitioning party bears the burden of demonstrating,

(b) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the [individual] to adjust to the community.

Id. These criteria have withstood a constitutional challenge from an individual committed as a psychopathic personality. See Enebak v. Noot, 353 N.W.2d 544, 547 (Minn. 1984) (rejecting contention that statute violated due process principles articulated in Jones v. United States, 463 U.S. 354 (1983)).

Provisional discharge is conditioned upon a quarterly evaluation of the individual’s status and compliance with the provisional discharge plan. See MINN. STAT. § 253B.18, subd. 8 (1994). Provisional discharge may be revoked under certain circumstances, see id. subds. 10-14, or continued indefinitely until the person petitions for full discharge, id. subd. 9.

108. See infra notes 114-15 and accompanying text.

109. MINN. STAT. § 253B.18, subd. 4 (1994). Appointed by the Commissioner of Human Services, the review board consists of three individuals, including at least one physician and one attorney, who are experienced in the field of mental illness. Id.

110. Id. subd. 5. While the board must give interested parties written notice of the time and place of the hearing within 45 days of the petition’s filing, id., there is no time frame within which the hearing must be held, although the board must meet at least every six months, id. subd. 4.

111. Id. subd. 5.

112. Id. § 253B.19, subd. 2. Established by the supreme court, the appeal panel consists of three judges and four alternates appointed from the state’s judiciary. Id. subd. 1. The panel must consider the matter within 45 days of the individual’s filing a petition of appeal. Id. subd. 2. The rights afforded the parties and the procedures followed in the appeal closely resemble those used in the initial commitment proceeding. See id.; see also supra notes 90-97 and accompanying text (describing procedures governing initial proceeding).

113. MINN. STAT. § 253B.19, subd. 5 (1994).

114. Id. § 253B.18, subd. 15. The statute also states that discharge must be denied if there is no “reasonable degree of protection to the public” and no assistance available to the individual in adjusting to community living. Id. However, the court of appeals has held that this language “adds no new . . . requirement to the discharge provisions.” Reome v. Levine, 350 N.W.2d 428, 431 (Minn. Ct. App. 1984), review granted and remanded, 361 N.W.2d 29 (Minn. 1985), on remand 363 N.W.2d 107 (Minn. Ct. App. 1985), appeal after remand, 379 N.W.2d 208 (Minn. Ct. App. 1985), habeas corpus granted, 692 F. Supp. 1046 (D. Minn. 1988).
by a preponderance of the evidence, that these criteria are met.115

In 1992, the United States Supreme Court considered a case involving a civilly committed Louisiana man whose petition for discharge had been denied.116 Finding the pertinent Louisiana statute unconstitutional, the Court's opinion precipitated new challenges to civil commitment statutes, including a fresh assault upon Minnesota's psychopathic personality statute.117

D. New Grounds for Challenges: Foucha v. Louisiana

In October 1984, Terry Foucha, charged with aggravated burglary and illegal discharge of a firearm, was found not guilty by reason of insanity.118 At trial, doctors testified that Foucha was unable to distinguish right from wrong at the time of the offense, and the trial court found that he was insane at the time of the crimes and at the time of trial.119

Pursuant to Louisiana statute,120 Foucha was committed to a mental health facility.121 In 1988, after the facility's superintendent

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115. Drewes v. Levine, 352 N.W.2d 456, 458-59 (Minn. Ct. App. 1984). In contrast, a prosecuting attorney or attorney general in Washington state bears the burden of proving beyond a reasonable doubt that an individual committed under the state's "sexually violent predator" statute is still likely to commit sexually violent, predatory acts if released. WASH. REV. CODE ANN. § 71.09.090(1) (West 1992 & Supp. 1996).


117. See In re Blodgett, 510 N.W.2d 910 (Minn.), cert. denied, 115 S. Ct. 146 (1994); see also infra part II.E.

118. Foucha, 504 U.S. at 73-74.

119. Id. Louisiana law absolves a person of criminal responsibility if he or she was "incapable of distinguishing between right and wrong with reference to the conduct in question." LA. REV. STAT. ANN. § 14:14 (West 1986).

120. The pertinent statute provides in part:

When a defendant is found not guilty by reason of insanity in any [non-capital] felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.


121. Foucha, 504 U.S. at 74.
recommended that Foucha be discharged, a three-member panel convened to determine Foucha's condition and concluded that there had been no evidence of mental illness since Foucha's admission three and one-half years earlier. The panel recommended that Foucha be conditionally discharged.

Two of the doctors on the panel then were appointed by the trial judge to serve as a "sanity commission." The doctors reported that Foucha was in remission from mental illness, but they refused to "certify that he would not constitute a menace to himself or others if released." At a hearing, one of the doctors testified that Foucha had an antisocial personality, which the doctor described as an untreatable condition, and that he would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people."

Finding that Foucha was a danger to himself and others, the trial court ordered him back to the mental institution. The state supreme court affirmed, holding that Foucha had not carried the statute-imposed burden of proving that he was not dangerous. Relying on Jones v. United States, the supreme court held that the provision permitting confinement of an insanity acquittee based on dangerousness alone offended neither the Equal Protection Clause nor the Due Process Clause.

On appeal, the United States Supreme Court declared the Louisiana statute unconstitutional.

1. Due Process

The Court cited Jones for the proposition that an individual committed following an insanity acquittal "is entitled to release when

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122. Id.
123. Id. The panel suggested that Foucha be placed on probation, remain drug and alcohol free, regularly attend a substance abuse clinic, submit to drug testing, and be employed or actively seeking employment. Id. at n.2.
124. Id. at 74; see also LA. CODE CRIM. PROC. ANN. art. 655 (West 1981) (amended 1985, 1987) (setting forth the procedure for discharge or release on probation).
125. Foucha, 504 U.S. at 74-75 (quoting from the doctors' written report to the trial court).
126. Id. at 75 (quoting the doctor's testimony from the appellant's brief). It was stipulated that the other doctor would have given the same testimony, had he been available. Id.
127. Id.
128. Id.
129. 463 U.S. 354 (1983) (holding that the government is justified in confining an individual to a mental institution based upon a verdict of not guilty by reason of insanity).
130. Foucha, 504 U.S. at 75.
131. See id. at 83-85.
he has recovered his sanity or is no longer dangerous." Because Foucha was not mentally ill when the trial court considered the petition for release, the Court found that Louisiana’s continued confinement of him was unjustifiable.\footnote{Id. at 77 (emphasis added) (quoting Jones, 463 U.S. at 368).}

The Court also rejected the state’s contention that the commitment was justified on the basis of Foucha’s antisocial personality, which rendered him “dangerous”:

There are at least three difficulties with this position. First, even if his continued confinement were constitutionally permissible, 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 Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” ... Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.\footnote{Id. at 80.}

The Court reasoned that because Foucha was absolved of criminal responsibility, Louisiana could not invoke its police power to “punish” him with continued confinement.\footnote{Id. at 78.}

Relying on United States v. Salerno,\footnote{481 U.S. 739 (1987) (upholding statute authorizing pretrial detention on the basis of dangerousness, given the stringent procedural safeguards provided by the statute and in light of government’s compelling interest in preventing crime by arrestees).} Louisiana argued that persons who are merely dangerous to themselves or others may be confined.\footnote{Id. at 81. The statute challenged in Salerno limited the crimes for which an accused could be detained; required the government to show probable cause; provided for a “full-blown adversary hearing,” at which the government was required to prove that the detainee posed “an identified and articulable threat to an individual or the community”; limited the maximum duration of confinement; and more. Id. (quoting Salerno, 481 U.S. at 751).} The Court rejected this argument, noting that Salerno involved pretrial detention of individuals accused of serious crimes and that numerous procedural safeguards were in place to preserve the detainees’ rights.\footnote{Id. at 80.}
Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. 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.\textsuperscript{139}

The Louisiana statute permitted indefinite commitment based upon a doctor's testimony that he would not "feel comfortable" in certifying that a detainee would not be dangerous to himself or others.\textsuperscript{140} According to the Court, however, such testimony "is not enough to defeat Foucha's liberty interest under the Constitution."\textsuperscript{141} By permitting the indefinite detention of insanity acquittees who are not mentally ill but who cannot prove they pose no danger to themselves or others, Louisiana's statute failed to meet the standards of the Due Process Clause and its "carefully limited exceptions."\textsuperscript{142}

2. *Equal Protection*

The Court has held that insanity acquittees may be treated differently than others who are subject to civil commitment.\textsuperscript{143} But Louisiana's statute authorized the indefinite detention of those who, like Foucha, had regained their sanity.\textsuperscript{144} Because other individuals who had committed crimes and who could not prove they were not dangerous were not subject to such detention,\textsuperscript{145} the Court found the statute violative of the Fourteenth Amendment's Equal Protection Clause. "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not

\textsuperscript{139.} *Id.* at 81-82.
\textsuperscript{140.} *Id.* at 82.
\textsuperscript{141.} *Id.*
\textsuperscript{142.} *Id.* at 83. The Court specified three circumstances under which a state may exercise its police power to confine individuals: (1) a state may incarcerate convicted criminals to punish them and to deter similar conduct; (2) a state may confine those who are shown, by clear and convincing evidence, to be mentally ill and dangerous; and (3) "in certain narrow circumstances [e.g., pretrial detention] persons who pose a danger to others or to the community may be subject to limited confinement." *Id.* at 80.
\textsuperscript{143.} See *Jones v. United States*, 463 U.S. 354, 363-66 (1983) (holding that an insanity acquittee may be committed automatically as a mentally ill and dangerous person without the usual commitment proceeding because the verdict establishes the fact of mental illness and "certainly indicates dangerousness").
\textsuperscript{144.} *Foucha*, 504 U.S. at 85.
\textsuperscript{145.} *Id.* The Court stated, "[S]tate law does not allow for their continuing confinement based merely on dangerousness. Instead, the State controls the behavior of these similarly situated citizens by relying on other means, such as punishment, deterrence, and supervised release." *Id.*
put forward, for such discrimination against insanity acquitteds who are no longer mentally ill.\textsuperscript{146}

The Court noted that in civil commitment proceedings, a state must show by clear and convincing evidence that the individual is insane and dangerous,\textsuperscript{147} and the clear and convincing standard also applies when a state seeks to confine an insane convict beyond his or her criminal sentence.\textsuperscript{148} Absent some justification for the disparate treatment given now-sane acquitteds, the Court held that Louisiana could not continue to confine Foucha "solely because he [was] deemed dangerous, but without assuming the burden of proving even this ground for confinement by clear and convincing evidence."\textsuperscript{149}

Thus, the Court appeared to leave the door open to commitments based upon dangerousness alone\textsuperscript{150} but indicated that the burden was upon the state to show, by clear and convincing evidence, that the individual remained dangerous.\textsuperscript{151}

\textbf{E. In re Blodgett}

In the wake of \textit{Foucha}, the constitutionality of Minnesota's psychopathic personality statute was contested anew, and the state supreme court again upheld the statute in a 4-3 decision issued in January 1994.\textsuperscript{152} The challenge was instigated by Phillip Blodgett, who had a history of violence and sexual misconduct dating back to 1982.\textsuperscript{153} Blodgett had been adjudicated delinquent at the age of sixteen for having sexual contact with his brother.\textsuperscript{154} He subsequently was convicted of battery, violating a domestic abuse restraining order, and

\begin{enumerate}
\item[146.] \textit{Id.} at 86.
\item[147.] \textit{Id.} (citing Addington v. Texas, 441 U.S. 418, 425-33 (1979)).
\item[148.] \textit{Id.} (citing Jackson v. Indiana, 406 U.S. 715, 724 (1972); Baxstrom v. Herold, 383 U.S. 107, 111-12 (1966)).
\item[149.] \textit{Id.}
\item[150.] In addition to the majority's language quoted above, \textit{see supra} text accompanying note 149, Justice O'Connor in her concurring opinion specifically stated:

\begin{quote}
I do not understand the Court to hold that Louisiana may never confine dangerous insanity acquitteds after they regain mental health. . . .
\end{quote}

\begin{quote}
It might . . . be permissible for Louisiana to confine an insanity acquitted who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquitted's continuing dangerousness.
\end{quote}

\textit{Foucha}, 504 U.S. at 87-88 (O'Connor, J., concurring in part and concurring in the judgment).
\item[151.] \textit{Foucha}, 504 U.S. at 86.
\item[152.] \textit{In re Blodgett}, 510 N.W.2d 910 (Minn.), \textit{cert. denied}, 115 S. Ct. 146 (1994). The dissenting opinion was written by Justice Rosalie Wahl, who was joined by Chief Justice A.M. Keith and Justice Esther Tomljanovich. \textit{See infra} text accompanying notes 178-89.
\item[153.] \textit{Blodgett}, 510 N.W.2d at 911.
\item[154.] \textit{Id.}
\end{enumerate}
first-degree burglary for entering a dwelling with intent to commit criminal sexual conduct.\textsuperscript{155} Finally, Blodgett was found guilty on two counts of second-degree criminal sexual conduct for assaults committed while he was enrolled in a pre-release program and while on supervised release to a halfway house.\textsuperscript{156}

Blodgett was finishing his sentence for these last two offenses when, upon the recommendation of the Department of Corrections, the Washington County Attorney filed a petition seeking Blodgett's commitment under the psychopathic personality statute.\textsuperscript{157} At the initial hearing, the five psychologists who had examined Blodgett agreed that he had an antisocial personality disorder, that he was chemically dependent, and that he was dangerous.\textsuperscript{158} Four of the five psychologists testified that Blodgett met the statutory definition of a psychopathic personality.\textsuperscript{159}

Finding by clear and convincing evidence that Blodgett was a psychopathic personality, the trial court committed him to the Minnesota Security Hospital for a sixty-day evaluation.\textsuperscript{160} While generally concurring with the diagnoses of the doctors who had testified at the initial hearing, the hospital staff opposed Blodgett's commitment as a psychopathic personality on the ground that he was untreatable. In fact, the hospital's senior staff psychiatrist testified that any treatment given would be a "sham" or a "placebo."\textsuperscript{161} Nevertheless, the court ordered Blodgett committed to the security hospital for an indeterminate period.\textsuperscript{162}

Blodgett appealed to the court of appeals, which upheld the trial court's determination,\textsuperscript{163} and then to the supreme court.\textsuperscript{164} Relying upon the United States Supreme Court's decision in \textit{Foucha},\textsuperscript{165} Blodgett challenged the statute as violative of substantive due process rights and equal protection under the United States and Minnesota Constitutions.\textsuperscript{166}

With respect to the due process issue, Blodgett argued that because

\begin{itemize}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.} at 911-12.
\item \textsuperscript{158} \textit{Id.} at 912.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} The trial court also found the psychopathic personality statute constitutional. \textit{Id.}
\item \textsuperscript{163} \textit{In re Blodgett}, 490 N.W.2d 638 (Minn. Ct. App. 1992).
\item \textsuperscript{164} \textit{Blodgett}, 510 N.W.2d at 912.
\item \textsuperscript{165} \textit{See supra} part II.D.
\item \textsuperscript{166} \textit{Blodgett}, 510 N.W.2d at 912.
\end{itemize}
he is not mentally ill, according to accepted medical definitions, \(^{167}\) he could not be confined by the state. \(^{168}\) A majority of the supreme court rejected this contention: "Whatever the explanation or label, the 'psychopathic personality' is an identifiable and documentable violent sexually deviant condition or disorder." \(^{169}\) While acknowledging the widespread belief that such individuals are not amenable to treatment, the court found that the state's interest in public safety was overarching. \(^{170}\)

Noting the safeguards in place to guarantee the rights of those committed, \(^{171}\) the court held that the statute did not violate substantive due process. \(^{172}\) The majority concluded, "[I]f there is a remission of Blodgett's sexual disorder, if his deviant sexual assaulitve conduct is brought under control, he, too, is entitled to be released." \(^{173}\)

The court then considered Blodgett's contention that the psychopathic personality statute, as then formulated, \(^{174}\) violated equal protection under the federal and state constitutions. \(^{175}\) Blodgett argued that the statute denied sexual predators their liberty while other dangerous, but not mentally ill, individuals remained free. \(^{176}\) Interpreting this as "simply a variation of [the] substantive due process argument," the majority asserted "that the sexual predator poses a danger that is unlike any other" and rejected Blodgett's challenge. \(^{177}\)

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167. See infra notes 293-95 and accompanying text.
168. Blodgett, 510 N.W.2d at 914. Blodgett argued that he did not fit within the "carefully limited exceptions" allowed by the Due Process Clause as articulated in Foucha. Id.; see also supra note 142 and accompanying text (listing the exceptions enumerated in Foucha).
169. Blodgett, 510 N.W.2d at 915 (citing Margit Henderson & Seth Kalichman, Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data, PSYCHIATRIC Q., Winter 1990, at 281). The court did not believe the list of "carefully limited exceptions" in Foucha to be comprehensive. Id. at 914 n.6.
170. Id. at 916.
171. The court cited such protections as periodic review and reevaluation; petition for transfer; de novo judicial review; and the right to proper care, treatment, and periodic medical assessment. Id.
172. Id.
173. Id. (noting that the appellant in Pearson, see supra part II.B., was released within a year of commitment).
174. See MINN. STAT. §§ 526.09-10 (1992) (repealed 1994); see also supra note 23, 33-34 and accompanying text.
175. Blodgett, 510 N.W.2d at 916-17.
176. Id. at 917.
177. Id. The court distinguished sex offenders from other violent persons, stating that "Pearson delineates genuine and substantial distinctions which define a class that victimizes women and children in a particular manner." Id. (citing Bailey v. Gardebring, 940 F.2d 1150, 1158 (8th Cir. 1991) (rejecting equal protection challenge to psychopathic personality statute)). The court concluded:
The dissenting justices agreed with Blodgett that the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. According to the minority, "[T]he rigor and methodical efficiency with which the psychopathic personality statute is presently being enforced is creating a system of wholesale preventive detention, a concept foreign to our jurisprudence." They noted the arbitrary enforcement of the statute, as well as the inconsistent application of the Pearson standard. The three justices also expressed concern about the indefinite duration of these commitments and the difficulty of procuring release.

While acknowledging that there is a powerful state interest in protecting the public from violent sexual assaults, the minority found that

[the state has not adequately explained why its police power interest cannot be vindicated by ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other constitutionally permissible means of dealing with patterns of criminal conduct. Nor has the state shown that confinement of psychopathic personalities is even rationally related to the asserted purpose of treatment as required by Jackson . . . . [Blodgett] does not suffer from a medically recognized mental illness; he has a personality disorder for which, at least at this point, there appears to be no treatment available.]

The dissent concluded that Foucha did indeed render Minnesota's psychopathic personality statute violative of substantive due process.

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At issue is the safety of the public on the one hand and, on the other, the liberty interests of the individual who acts destructively for reasons not fully understood by our medical, biological and social sciences. In the final analysis, it is the moral credibility of the criminal justice system that is at stake. . . . [A] state legislature should be allowed, constitutionally, to choose either or both alternatives for dealing with the sexual predator. At the very least, we should follow Pearson until the United States Supreme Court says otherwise.

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178. Id. (Wahl, J., dissenting).
179. Id. (footnote omitted).
180. Id. at 920. The dissenting justices cited cases in which courts did not follow the Pearson construction but instead relied solely upon the statutory definition. Id. at n.6 (citing Dittrich v. Brown County, 215 Minn. 234, 235, 9 N.W.2d 510, 511 (1943); In re Monson, 478 N.W.2d 785, 788-89 (Minn. Ct. App. 1991); In re Clements, 440 N.W.2d 135, 136 (Minn. Ct. App. 1989); In re Brown, 414 N.W.2d 800, 803 (Minn. Ct. App. 1987); In re Stone, 376 N.W.2d 511, 513 (Minn. Ct. App. 1985); In re Martenies, 350 N.W.2d 470, 472 (Minn. Ct. App. 1984)).
181. Id. at 924. The dissent stated, "Given the difficulty, if not the impossibility, of the proof required for release . . . of persons committed without a medically diagnosable and treatable mental illness, commitment under the Psychopathic Personality Statutes could result in a potential life sentence served in what amounts to preventive detention." Id.
182. Id. (footnotes and citations omitted).
under the Fourteenth Amendment when used to commit offenders indefinitely on the basis of dangerousness alone.183

The dissenting justices also asserted that the psychopathic personality statute violated the Fourteenth Amendment’s Equal Protection Clause:

[The statute] can be upheld only if the state has a compelling interest, a “particularly convincing reason,” for confining in a mental institution a class of people with psychopathic personalities when it does not confine other classes of people who have committed criminal acts and who cannot later prove that they are not dangerous.184

In the dissenters’ view, strict scrutiny—not the rational basis test applied by the court of appeals—would be the appropriate standard of review for Blodgett’s claim.185 If the strict scrutiny standard were applied, the dissent speculated, the state’s invocation of police and parens patriae powers would not be sufficiently “convincing” to override the individual’s liberty interest.186

The dissent also cited as violative of equal protection the release standards applicable both to those committed as mentally ill and dangerous and those committed as psychopathic personalities.187 Though the former have “a reasonable opportunity for release by showing [they have] been treated and that [their] mental illness is in remission or under control,” those committed as psychopathic personalities effectively do not have that opportunity.188 The dissent concluded, “[S]tatutes which permit the involuntary and indefinite confinement of a non-mentally ill, though potentially dangerous, individual suffering from an untreatable personality disorder cannot pass scrutiny.”189

Evidently, however, the United States Supreme Court did not agree

183. According to the dissent, “The statute . . . has the effect of ’substituting confinement for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcernates only those who are proved beyond reasonable doubt to have violated a criminal law.’” Id. at 923 (quoting Foucha v. Louisiana, 504 U.S. 71, 85 (1992)). “[I]f the state is to have a constitutionally valid basis for Blodgett’s confinement, it must be one of those ’carefully limited exceptions permitted by the Due Process Clause’ where ’in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement.’” Id. (quoting Foucha, 504 U.S. at 80, 83); see also United States v. Salerno, 481 U.S. 739, 748-49 (1987) (setting out limited exceptions to the general principle against detainment).
184. Blodgett, 510 N.W.2d at 925 (quoting Foucha, 504 U.S. at 86).
185. Id.
186. Id.
187. Id.; see also supra notes 105-15 and accompanying text (discussing procedures governing petitions for release).
188. Blodgett, 510 N.W.2d at 925 (footnote omitted).
189. Id. at 926.
with the dissenting state court justices. Blodgett’s petition for certiorari was denied in October 1994. In the intervening months, however, another controversy had erupted over the application of the psychopathic personality statute.

F. In re Rickmyer and In re Linehan

In two rulings issued on June 30, 1994, the Minnesota Supreme Court vacated the psychopathic personality commitments of two convicted sex offenders, provoking a thunderous public uproar. In both cases, the court found that the state had failed to demonstrate one of the three requirements of Pearson. The state failed to show that Dennis Linehan evidenced “an utter lack of ability to control [his] sexual impulses” (the second Pearson criterion) and that Peter Rickmyer had inflicted or was likely to inflict serious physical or mental harm on his victims (the third prong of the Pearson test).

1. In re Rickmyer

As Peter Rickmyer neared the end of a nine-month sentence for second-degree criminal sexual conduct, the Ramsey County Attorney petitioned to commit him as a psychopathic personality. Rickmyer’s conviction stemmed from an incident in which he spanked...
an eight-year-old boy on the buttocks.\textsuperscript{197} This was the latest in a series of occurrences involving Rickmyer's sexually inappropriate conduct toward boys.\textsuperscript{198} The three psychologists who examined Rickmyer agreed that he was not mentally ill but was a pedophile.\textsuperscript{199} Staff at the Minnesota Security Hospital diagnosed him as having both pedophilia and a personality disorder.\textsuperscript{200} Though the psychologists and hospital staff differed as to Rickmyer's "dangerousness,"\textsuperscript{201} the trial court found that he met the \textit{Pearson} standard for commitment as a psychopathic personality,\textsuperscript{202} and the court of appeals affirmed.\textsuperscript{203} Rickmyer appealed, contending that there was insufficient evidence to prove that he was likely to inflict serious harm upon others.\textsuperscript{204} The supreme court agreed:

\begin{quote}
Among the factors to be considered are the nature of the sexual assaults and the degree of violence involved. Ordinarily, . . . there is a pattern of sexual assaults creating the danger of infliction of serious physical harm. . . .

There may be instances where a pedophile's pattern of sexual misconduct is of such an egregious nature that there is a substantial likelihood of serious physical or mental harm being inflicted on the victims such as to meet the requirements for commitment as a psychopathic personality.\textsuperscript{205}
\end{quote}

However, the court found that Rickmyer's conduct, while "repellent," did not rise to the level of "injury, pain, 'or other evil' that is contem-
plated by the . . . statute. 206

Accordingly, the order of commitment was vacated. 207 Rickmyer was sent to a halfway house, from which he was released in October 1994. 208

2. In re Linehan

Dennis Linehan served nearly twenty years for the kidnapping of Barbara Iversen, a fourteen-year-old baby sitter whom he intended to sexually molest. 209 When Iversen resisted, Linehan choked her to death. 210 Linehan had several other convictions for sexual assault and attempted sexual assault, extending from his teenage years to beyond Iversen’s death. 211

Shortly before Linehan was scheduled to be released from prison for the kidnapping conviction, the Ramsey County Attorney petitioned to commit him as a psychopathic personality. 212 The trial court found

206. Id. (quoting State ex rel. Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939)).

207. Id.

208. Child Molester Released After Ruling, STAR TRIB. (Minneapolis), Oct. 19, 1994, at B2. A district court judge ruled that the time Rickmyer spent in the Minnesota Security Hospital under the improper commitment must be counted toward his 21-month sentence. Id. Because Rickmyer had been detained more than 21 months, the judge ordered him released. Id. The Ramsey County Attorney’s office indicated that it likely would seek to recommit Rickmyer, this time as a “sexually dangerous person” under the new statute. Paul Gustafson, Petition Filed Under New Law to Recommit Linehan, STAR TRIB. (Minneapolis), Sept. 3, 1994, at B1.


210. Id. at 611. Because kidnapping carried a stiffer penalty than murder at the time, prosecutors sought conviction only on a kidnapping charge. The Linehan Case, SAINT PAUL PIONEER PRESS, Aug. 16, 1994, at B4 (providing chronology of events leading up to supreme court’s decision). Linehan was given an indeterminate sentence of up to 40 years. Wayne Wangstad, Residents Say Linehan Brings Fear to Bayport, SAINT PAUL PIONEER PRESS, Aug. 17, 1994, at A1.

211. Linehan, 518 N.W.2d at 610-11. As a teen, Linehan was placed in training school for “various violations,” including taking “indecent liberties” with a four-year-old girl. Id. at the age of 22, Linehan was charged with rape, although the charges were dismissed. Id. at 611. After Iversen’s death but before his arrest, Linehan raped another woman (though the incident was not reported) and sexually molested a twelve-year-old girl. Id. A few years after being convicted of Iversen’s kidnapping, Linehan escaped from prison, assaulted a twelve-year-old girl, and was convicted of attempted rape. Id. In several of these incidents, Linehan threatened to kill the victims and either used a knife or told them he had a knife. Id.

212. Id. at 610. Ramsey County also sought to commit Linehan as a chemically dependent person; however, this petition was denied. Id. Linehan successfully had completed an inpatient chemical dependency treatment program while incarcerated, and the trial court found insufficient evidence to support such a commitment. Id. at 613. Without further explanation, the supreme court referred to Linehan’s alcohol abuse as “the precursor of his assaults.” Id.
Linehan to be a psychopathic personality and ordered him to be committed indefinitely to the Minnesota Security Hospital (MSH).\textsuperscript{213} Linehan appealed, arguing that the state failed to meet the second and third elements of the \textit{Pearson} standard, but the court of appeals upheld the order.\textsuperscript{214}

The supreme court, however, agreed in part with Linehan.\textsuperscript{215} In the majority's opinion, the evidence did not support the trial court's finding that Linehan was completely unable to control his sexual impulses.\textsuperscript{216}

First, none of the expert witnesses who had examined Linehan were asked whether they believed he met \textit{Pearson}'s three criteria.\textsuperscript{217} Instead, only the statutory definition was invoked in the proceedings.\textsuperscript{218} Second, the two doctors who testified in favor of commitment differed as to whether Linehan could control his behavior.\textsuperscript{219} Nonetheless, the trial court expressly found that Linehan met the \textit{Pearson} standard, concluding that his conduct "shows an utter lack of power and ability to control his sexual impulses" (the second element of \textit{Pearson}) and that he "continues to be dangerous to others by sexual

\begin{itemize}
  \item[213.] \textit{Id.} at 610. After the petition for commitment had been filed, Linehan was paroled to MSH, where he remained throughout the commitment and appeal process. \textit{Id.} at 611.
  \item[214.] \textit{In re} Linehan, 503 N.W.2d 142 (Minn. Ct. App. 1993).
  \item[215.] \textit{Linehan}, 518 N.W.2d at 613.
  \item[216.] \textit{Id.} at 613-14.
  \item[217.] \textit{Id.} at 613. At the first hearing, the two doctors who recommended commitment based their opinions on the statutory definition. \textit{Id.} at 612. Of the two doctors who did not support the petition for commitment, one felt that Linehan "did not meet the definition of psychopathic personality." \textit{Id.} The other doctor—who was well-versed in the statutory definition and the \textit{Pearson} standard, but who apparently made no direct reference to either in his testimony—felt that Linehan did not pose a danger to the public. \textit{Id.} Quoting the statutory language but not the \textit{Pearson} criteria, the trial court based its 60-day provisional commitment of Linehan upon the testimony of the two doctors who recommended commitment. \textit{Id.} at 612-13.
  \item[218.] \textit{Id.} at 613. In addition, Linehan's treating psychiatrist from MSH testified that while Linehan had made satisfactory progress, he still was highly likely to be a repeat offender absent treatment and supervision. \textit{Id.} The MSH treatment team's report stated that Linehan "ha[d] made no significant change or progress in his behavior since his admission" and declined to "predict any future dangerous acts . . . due to limited experience with him." \textit{Id.} Once again, the testifying experts were not asked whether they believed Linehan met the \textit{Pearson} criteria. \textit{Id.}
  \item[219.] \textit{Id.} While both doctors described Linehan's behavior as controlled, one opined that Linehan was "extremely impulsive" when using alcohol. \textit{Id.} On this point, the supreme court noted again that Linehan appears to have his alcohol abuse under control. \textit{Id.; see also supra} note 212 (discussing the court's reference to Linehan's chemical dependency treatment).
\end{itemize}
MINNESOTA'S SEXUALLY DANGEROUS PERSON STATUTE

The supreme court sharply disagreed with the trial court's method of analysis:

It is not enough . . . for the trial court to use [the Pearson] language in a conclusory fashion when the expert testimony upon which it relies has been given in terms of the statutory definition. Neither the testimony of Dr. Friberg and Dr. Zeller [the two doctors favoring commitment] nor appellant's behavior while incarcerated supports the finding of uncontrollability. There is, therefore, no clear and convincing evidence that appellant has an utter lack of power to control his sexual impulses. 221

The court held that the county had not proven the "utter lack of control" element of the Pearson test. 222

The court declined to analyze whether the county had borne its burden in proving that Linehan was likely to engage again in dangerous behavior, since "[d]angerousness in the context of the Psychopathic Personality Statute is predicated on an utter lack of ability to control sexual impulses." 223 However, the court laid out a set of factors to be considered by trial courts in evaluating a person's propensity for dangerous behavior. 224 The court suggested that trial courts consider the individual's "relevant demographic characteristics," her or his history of violent behavior, the "base rate statistics for violent behavior among individuals of this person's background," the person's exposure and likely response to stress, "the similarity of the present or future context" to situations in which the person has been violent, and his or her success (or lack thereof) in sex offender treatment programs. 225

The court indicated it would look for such an analysis when reviewing future psychopathic personality cases, particularly when a significant period of time had elapsed between the individual's last offense and the petition for commitment. 226

220. Linehan, 518 N.W.2d at 613.
221. Id. at 614.
222. Id.
223. Id. (citing State ex rel. Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939)).
224. Id.
225. Id.
226. Id. In her dissent, Justice M. Jeanne Coyne strongly objected to the use of "base rate statistics" in evaluating a person's potential for future violent behavior: It is the habitual course of criminal sexual conduct revealed by the record of the person in question which provides a basis for predicting serious danger to the public, not the course of misconduct committed by other persons. Not only are the statistics concerning the violent behavior of others irrelevant, but it seems to me wrong to confine any person on the basis not of that person's own prior conduct but on the basis of statistical evidence regarding the behavior of other people.

Id. at 616.
Linehan’s commitment as a psychopathic personality was thereby vacated. On August 16, 1994, he was released from the Minnesota Security Hospital and placed under heavy guard and electronic surveillance in an old staff residence on the grounds of a Minnesota state prison.

III. THE LEGISLATURE REACTS: THE NEW STATUTE

A. The New Statute

In the wake of the Linehan decision and the resulting public outcry, the Minnesota Legislature jumped aboard a bandwagon of states seeking to quell sexual violence via a new form of civil commitment. On August 31, 1994, the legislature convened in special session to enact a new statute (West 1992 & Supp. 1996) to divert sex offenders who are due to be released from prison into mental health facilities.

227. Id. at 614.


Although the Washington Supreme Court upheld that state’s "sexually violent predator" statute, In re Young, 857 P.2d 989, 1018 (Wash. 1993), a federal judge recently declared it unconstitutional and granted a writ of habeas corpus to an individual who had been committed pursuant to the law, Young v. Weston, 898 F. Supp. 744, 754 (W.D. Wash. 1995). In addition, although declared unconstitutional by several trial court judges, Wisconsin’s “sexually violent person” statute recently was upheld by the state supreme court. See State v. Carpenter, 541 N.W.2d 105, 107 (Wis. 1995) (holding that...
session, called by Governor Arne Carlson, to consider a bill that would substantially strengthen prosecutors' power to commit convicted sex offenders. Given the difficulty in proving that an individual "utter[ly] lack[s] ... power to control [his or her] sexual impulses," as evidenced in Linehan, the legislature sought to create a broader category under which sex offenders could be civilly committed.

While essentially retaining the definition and procedures for commitment of a psychopathic personality (now characterized as a "sexual psychopathic personality"), the legislature also created a

Chapter 980, Wisconsin Statutes, does not violate the Ex Post Facto or Double Jeopardy Clauses of the state and federal constitutions); State v. Post, 541 N.W.2d 115, 118 (Wis. 1995) (holding that the statute does not violate state or federal constitutional guarantees of substantive due process and equal protection).

230. GOVERNOR ARNE H. CARLSON, PROCLAMATION FOR SPECIAL SESSION 1994, JOURNAL OF THE HOUSE OF THE SEVENTY-EIGHTH SESSION AND 1994 SPECIAL SESSION OF THE LEGISLATURE OF THE STATE OF MINNESOTA, at 8821 (1994). In addition to the substantive changes discussed in the text, see infra notes 234-39 and accompanying text, the legislature repealed the existing psychopathic personality provisions, MINN. STAT. §§ 526.09-.115 (1992), and incorporated them as amended into the civil commitment act as a whole, MINN. STAT. ch. 253B (1994).

The legislature also amended the statute that requires convicted sex offenders to register their whereabouts for a 10-year period with a designated corrections agent. See MINN. STAT. § 243.166 (1994). The statute was revised to toll that 10-year period during the time an offender is committed pursuant to Minnesota Statutes Section 253B.185 as a sexual psychopathic personality or sexually dangerous person. Act of Aug. 31, 1994, ch. 1, art. 3, § 2, 1995 Minn. Laws 5, 31 (current version at MINN. STAT. § 243.166, subd. 6(a) (1994)).

231. The "utter lack of power to control" is the second prong of the Pearson standard. See supra text accompanying note 34.

232. In re Linehan, 518 N.W.2d 609, 614 (Minn. 1994); see also supra notes 216-22 and accompanying text (discussing evidence of Linehan's control over his sexual impulses).

233. See Gustafson & Whereatt, supra note 228, at A1 (describing state attorney general's proposal to revise the psychopathic personality statute so as to exclude Pearson's "utter lack of control" requirement).

234. The legislature recast the "psychopathic personality" as a "sexual psychopathic personality," incorporating the original statutory definition and the Pearson standard as follows:

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

MINN. STAT. § 253B.02, subd. 18a (1994); see also supra text accompanying notes 23, 34 (stating, respectively, the original statutory definition and the Pearson construction).

The legislature made no substantive changes to the procedures governing the
second category, the "sexually dangerous person," as a target for civil commitment.\textsuperscript{235} A "sexually dangerous person" is one who "(1) has engaged in a course of harmful sexual conduct . . . ;\textsuperscript{236} (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct . . . .\textsuperscript{237} Thus, the legislature deliberately repudiated the second \textit{Pearson} criterion,\textsuperscript{238} stating outright that proof of utter inability to control one's sexual impulses is not required for the commitment of a "sexually dangerous person."\textsuperscript{239}

The legislature passed the bill in short order,\textsuperscript{240} and the governor signed it the same day.\textsuperscript{241} Hours later, on September 1, 1994, the statute took effect.\textsuperscript{242}

\textbf{B. The First Challenge: Linehan Again}

Allowing no moss to grow on the new law, the Ramsey County Attorney filed a petition on September 2, 1994, to commit Dennis Linehan as a "sexually dangerous person" under the new statute.\textsuperscript{243} Linehan moved to dismiss the petition on the grounds that the statute violates substantive due process and equal protection under the federal and state constitutions; that it is void for vagueness; and that it is substantively a criminal law that violates constitutional safeguards against ex post facto laws, double jeopardy, bills of attainder, and

commitment of sexual psychopathic personalities, and the same provisions apply to sexually dangerous persons. See MINN. STAT. § 253B.185, subd. 1 (1994); see also supra part II.C.2. (describing commitment procedures).

\textsuperscript{235} MINN. STAT. § 253B.02, subd. 18b (1994).

\textsuperscript{236} The statute defines "harmful sexual conduct" as that which "creates a substantial likelihood of serious physical or emotional harm to another." \textit{Id.} subd. 7a(a). Criminal sexual conduct of the first through fourth degrees creates a rebuttable presumption of harmful sexual conduct. \textit{Id.} subd. 7a(b). A presumption also is created by a number of felonies (from murder to tampering with a witness), "[i]f the [felonious] conduct was motivated by the person's sexual impulses or was part of a pattern of behavior that had criminal sexual conduct as a goal." \textit{Id.}

\textsuperscript{237} \textit{Id.} subd. 18b(a).

\textsuperscript{238} See supra notes 231-33 and accompanying text.

\textsuperscript{239} MINN. STAT. § 253B.02, subd. 18b(b) (1994) ("For purposes of this provision, it is not necessary to prove that the person has an inability to control the person's sexual impulses.").


\textsuperscript{243} Gustafson, \textit{supra} note 208, at B1.
procedural inadequacies. The trial judge rejected these contentions, concluding that the sexually dangerous persons statute "strikes a delicate balance between the safety of the public and the liberty interests of the individual."

In reaching its decision, the court noted the fundamental difference between commitment as a "sexually dangerous person" and that as a "sexual psychopathic personality": While a sexual psychopathic personality must utterly lack the power to control his or her sexual impulses, a sexually dangerous person must have "manifested a sexual, personality, or other mental disorder or dysfunction" to be committed. The judge acknowledged that this aspect of the sexually dangerous persons measure "is admittedly broader" than the psychopathic personality provision and, therefore, the constitutionality of the new statute was likely to be attacked.

1. Substantive Due Process

Linehan first argued that the new sexually dangerous persons statute violated his right to substantive due process under the federal and state constitutions. Linehan maintained that he did not fit any of the "carefully limited exceptions" enumerated in Foucha and thus could not be deprived of his liberty.

The trial judge agreed that Linehan did not fall within two of the categories outlined in Foucha. However, the court concluded that the diagnoses of Linehan's conditions, as outlined in the petition for


245. Id. at 22.

246. Id. at 3-4 (quoting MINN. STAT. § 253B.02, subd. 18b(a)(2) (1994)). The other two elements of proof, a history of sexual misconduct and a likelihood of future dangerous conduct, are essentially equivalent for commitment as either a sexual psychopathic personality or a sexually dangerous person. Id. at 4; see also supra notes 234-37 and accompanying text (providing current statutory definitions of "sexual psychopathic personality" and "sexually dangerous person").


248. Id. at 5.

249. See supra note 142 and accompanying text (listing circumstances under which a state may exercise its police power to confine an individual).


251. Id. Because Linehan had completed his sentences and would not be subject to "limited confinement" as a sexually dangerous person, the trial judge found that Linehan's situation was not analogous to two of the three listed exceptions (namely, "imprisonment . . . for the purpose[s] of deterrence and retribution" and "limited confinement . . . of persons who pose a danger to others or to the community"). Id.; see also supra note 142 and accompanying text (enumerating the three limited exceptions outlined in Foucha).
commitment,\textsuperscript{252} would be sufficient to establish a "mental disorder or dysfunction,"\textsuperscript{253} which would come within the scope of the second exception specified in \textit{Foucha}.\textsuperscript{254}

The court reached this conclusion in two steps. First, the holding of \textit{Foucha}\textsuperscript{255} would control only if Linehan were petitioning for release from commitment as a sexually dangerous person and if he had shown that one of the three elements required for commitment was no longer applicable.\textsuperscript{256} Second, the court considered itself bound by the Minnesota Supreme Court's interpretation of \textit{Foucha}, where it found that the psychopathic personality was merely a "sub-set" of the "mentally ill and dangerous" category.\textsuperscript{257} Because, in the view of the trial judge, the supreme court found that the "utter lack of power" prong of the psychopathic personality test "could constitutionally be included in the \textit{Foucha} category of mental illness," the judge reasoned that the second element of the sexually dangerous persons test could as well.\textsuperscript{258} Therefore, a "disorder or dysfunction,"\textsuperscript{259} such as Linehan's alleged antisocial personality disorder, would provide a constitutionally sufficient basis to confine an individual as "mentally ill and dangerous" under the exceptions specified in \textit{Foucha}.\textsuperscript{260}

\begin{itemize}
\item \textsuperscript{252} Psychologists' reports appended to the petition alleged that Linehan has an antisocial personality disorder, accompanied by pedophilia, exhibitionism, voyeurism, and chemical dependency. \textit{Linehan}, No. P8-94-0382 at 7.
\item \textsuperscript{253} See \textsc{Minn. Stat.} § 253B.02, subd. 18(b)(2) (1994).
\item \textsuperscript{254} \textit{Linehan}, No. P8-94-0382 at 7-9. Under the second exception articulated in \textit{Foucha}, a state may, under certain circumstances, exercise its police power to confine individuals, including those who are shown by clear and convincing evidence to be mentally ill and dangerous. See supra note 142 and accompanying text.
\item \textsuperscript{255} See supra part II.D.
\item \textsuperscript{256} \textit{Linehan}, No. P8-94-0382 at 8. The court based its interpretation on the fact that Foucha had been committed as a mentally ill and dangerous person, and he was no longer mentally ill when he petitioned for release. \textit{Id.} at 7. But see infra notes 314-15 and accompanying text (describing recent decision in which the Minnesota Supreme Court held that a psychopathic personality could not be released merely because he no longer met one of the statutory criteria under which he was committed).
\item \textsuperscript{257} See \textit{Linehan}, No. P8-94-0382 at 8 (citing \textit{In re} Blodgett's analysis of the three categories of permissible detainment delineated in \textit{Foucha}).
\item \textsuperscript{258} \textit{Id.} at 8-9. Moreover, the trial court cited a Washington Supreme Court case for the proposition that the United States Supreme Court uses the terms "mentally ill" and "mentally disordered" interchangeably. \textit{Id.} at 9 (citing \textit{In re} Young, 857 P.2d 989, 1001 n.3 (Wash. 1993) (upholding the constitutionality of that state's sexually violent predator civil commitment law)).
\item \textsuperscript{259} See \textsc{Minn. Stat.} § 253B.02, subd. 18(b)(2) (1994).
\item \textsuperscript{260} \textit{Linehan}, No. P8-94-0382 at 12; see also supra note 142 and accompanying text (listing exceptions identified in \textit{Foucha}). In a lengthy conclusion to its analysis of the due process issue, the \textit{Linehan} court interpreted the third factor of the sexually dangerous persons standard, the likelihood of engaging in acts of harmful sexual conduct, as requiring proof by clear and convincing evidence. See \textit{Linehan}, No. P8-94-0382 at 10-12. "[P]etitioner will be required to prove, by clear and convincing evidence
\end{itemize}
2. Equal Protection

Linehan also argued that the sexually dangerous persons statute violated equal protection under the federal and state constitutions on two grounds. First, he contended that sexually dangerous persons and mentally ill and dangerous persons are treated disparately. Second, Linehan maintained that the statute effectively discriminates against those sex offenders who have a "disorder or dysfunction," as opposed to sex offenders who do not.

Linehan based his first argument on the fact that commitment of a mentally ill and dangerous person must be predicated upon proof of "a substantial likelihood that the person will engage in acts capable of inflicting serious physical harm on another." The court compared the "substantial likelihood" standard with the sexually dangerous persons standard of "likely to engage in acts of harmful sexual conduct" and concluded that the standard of proof is "identical."

Linehan also contended that a mentally ill and dangerous person can petition for release if he or she is no longer mentally ill or dangerous, while a sexually dangerous person seeking release is held to a higher standard. Citing Foucha, the court rejected this argument, stating that if any one of the three requirements were no longer applicable, a person committed as sexually dangerous necessarily would have to be released, just as a mentally ill and dangerous person would be if she or he were no longer mentally ill or dangerous.

The crux of Linehan's second equal protection argument was that sex offenders who have a "disorder or dysfunction" are subject to harsher treatment than those sex offenders who do not. The court rejected Linehan's contention that both groups are equally dangerous.

... [that] it is highly probable that Respondent will engage in the future in acts of harmful sexual conduct as defined in [the statute]." Id. at 12 (emphasis added).

The second Minnesota district court to address the new statute's constitutionality has followed Linehan's lead, holding that the statute's "likely to" language requires a showing that the respondent is "highly probable" or "substantially likely" to engage in future harmful conduct. In re Schweninger, No. P4-94-35292, slip op. at 16 (Minn. Dist. Ct. filed May 30, 1995).

262. Id.
263. See id. (quoting MINN. STAT. § 253B.02, subd. 18b(a)(2) (1994)).
264. MINN. STAT. § 253B.02, subd. 17 (1994); Linehan, No. P8-94-0382 at 13.
265. See supra notes 236-37 and accompanying text.
267. Id.
268. Id. (citing Foucha v. Louisiana, 504 U.S. 71 (1992)).
269. Id. at 14.
to society:

The problem with [Linehan's] argument is that the Legislature did not see it that way. The Legislature apparently felt that those offenders who have a disorder do in fact pose a greater threat of sexual violence than those who do not. The prediction of future violence is not an act [of] science. . . . The Legislature evidently decided that since personality disorders are marked by enduring patterns of behavior, often of stable and long duration, persons with such disorders should be treated differently than persons without these characteristics. 270

The court concluded that the sexually dangerous persons statute does not offend equal protection under the United States or Minnesota Constitutions. 271

3. Fourteenth Amendment

Linehan next attacked the statute as being unconstitutionally vague. 272 But the court found that the definition of the phrase "sexually dangerous person" was "relatively precise" and that the term "disorder" had a definite meaning in the mental health field. 273 Furthermore, the court construed the statutory definition's last component so as to require the state to show that it was "highly probable" the respondent would engage in future harmful sexual conduct. 274 In short order, the court concluded that the statute was "not so uncertain and indefinite" as to obfuscate legislative intent. 275

4. Ex Post Facto, Double Jeopardy, and Bills of Attainder

Contending that the sexually dangerous persons statute is essentially a criminal measure, Linehan asserted that the statute violates constitutional protections against ex post facto laws, double jeopardy, and bills of attainder. 276 The court summarily dispensed with these arguments. 277

First, the court determined that the sexually dangerous persons statute is essentially civil in nature. 278 It applied a two-step analy-

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270. Id. (citation and footnote omitted).
271. Id.
272. Id. at 15.
273. Id. The court dismissed Linehan's argument regarding the word "dysfunction" as irrelevant, since he is alleged to suffer from a personality disorder. Id. at 16.
274. Id.; see also supra notes 236-37 and accompanying text (stating statutory definition of "sexually dangerous person").
275. Linehan, No. P8-94-0382 at 15-16 (drawing the standard of review from In re Blodgett, 490 N.W.2d 638, 646 (Minn. Ct. App. 1992)).
276. Id. at 16-17.
277. Id. at 16-21.
278. Id. at 20.
sis\textsuperscript{279} to conclude that the legislature clearly intended that the commitment be a civil proceeding\textsuperscript{280} and the actual effect of the statute is civil, not criminal.\textsuperscript{281} Second, since protections against ex post facto laws and double jeopardy relate only to criminal matters,\textsuperscript{282} the court concluded that Linehan's claims as to these issues must fail.\textsuperscript{283}

As to the assertion that the statute constitutes a bill of attainder, the court cited precedent defining a bill of attainder as "a legislative act which inflicts punishment without a judicial trial."\textsuperscript{284} Because the sexually dangerous persons act provides for a judicial proceeding, the court ruled that this last argument, like all those preceding, was without merit.\textsuperscript{285}

Thus, the new statute was upheld against Linehan's challenge. On July 27, 1995, the court declared Linehan to be a "sexually dangerous person" and ordered him committed to MSH.\textsuperscript{286} Linehan appealed,
and the Minnesota Court of Appeals is expected to issue its decision in February 1996.\textsuperscript{287} Regardless of the outcome, appeals to the Minnesota and United States Supreme Courts seem inevitable.

IV. ANALYSIS

Two justifications commonly are advanced for a state's power to detain sex offenders under civil commitment statutes. A state may act pursuant to its \textit{parens patriae} interest in protecting those who are unable to protect themselves, or a state may exercise its police power to protect the public from violence or other evils.\textsuperscript{288} While the psychopathic personality statute appears to have been enacted and initially interpreted with the "protection" and treatment of the individual miscreant in mind,\textsuperscript{289} Minnesota's courts and legislature clearly have shifted their emphasis to the protection of the public.\textsuperscript{290}

A. The Parens Patriae Rationale

Assuming arguendo that the sexual psychopathic personality and sexually dangerous persons statute is intended to assure treatment for individuals who are committed thereunder, one cannot ignore the fact that most mental health professionals regard these persons as untreatable.\textsuperscript{291} For example, the Minnesota Psychiatric Society and the staff of the Minnesota Security Hospital have opposed psychopathic personality commitments on the ground that most of these individuals

\begin{itemize}
\item offender and chemical dependency treatment programs, as well as his age, militated in his favor. \textit{Id.} at 26. However, the court concluded that these factors were outweighed by Linehan's past record, current behavior, and diagnosis of antisocial personality disorder. \textit{Id.}
\item \textsuperscript{287} \textit{In re} Linehan, No. C1-95-2022 (Minn. Ct. App. filed Sept. 20, 1995).
\item \textsuperscript{288} Reome v. Levine, 692 F. Supp. 1046, 1050 (D. Minn. 1988); see also \textit{supra} note 50.
\item \textsuperscript{289} \textit{See supra} part II.A-C.
\item \textsuperscript{290} \textit{See supra} parts II.C-III.A.
\item \textsuperscript{291} \textit{LEGISLATIVE AUDITOR'S REPORT}, \textit{supra} note 8, at 38. \textit{But see} W.L. Marshall & W.D. Pithers, \textit{A Reconsideration of Treatment Outcome with Sex Offenders}, 21 CRIM. JUST. & BEHAV. 10-11 (1994) (expressing cautious optimism regarding recent reports that indicate some success with cognitive-behaviorally-based treatment including relapse prevention components). Marshall and Pithers note one of the key difficulties in assessing the effectivity of treatment: the ethical dilemma and methodological difficulties that arise when those who volunteer to be research subjects are split at random into two groups, those receiving treatment and those not receiving treatment (the control group). \textit{Id.} at 23-24. Witholding treatment from the control group may adversely affect (1) the untreated sex offenders, because they likely will not win release as early as if they had been treated; (2) society as a whole, because untreated sex offenders may attack again; and (3) the research itself, because the delay in release of untreated offenders will render comparisons between the treated and untreated groups unreliable. \textit{Id.}
\end{itemize}
do not have a diagnosable mental illness and are treatment-resistant. 292

The terms “sexual psychopathic personality” and “sexually dangerous person” have no foundation in the mental health profession’s current lexicon. 293 Those who have been or are likely to be committed under either category suffer from no common mental illness or disorder. 294 For example, some psychopathic personalities have been clinically diagnosed as pedophiles or sexual sadists, while others are classified as having antisocial personality disorders or unspecified personality disorders. 295 Likewise, one study showed that nineteen percent of a group of sex offenders produced a “normal” profile on the Minnesota Multiphasic Personality Inventory. 296 Some researchers also have suggested that motivations for committing rape differ widely, and they distinguish between sexual and nonsexual “subtypes” of offenders. 297 It is reasonable to assume that those committed as

292. LEGISLATIVE AUDITOR’S REPORT, supra note 8, at 9; see also Erickson, supra note 13, at 1-3; MINNESOTA PSYCHIATRIC SOCIETY, PROBLEMS WITH THE CURRENT PSYCHOPATHIC PERSONALITY STATUTE 1-3 (1992). A report issued by the Minnesota Department of Corrections concurs: “Individuals who have been found to be psychopathic are those who are least likely to benefit from treatment.” WOOD, supra note 71, at 4.

293. See generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). Widely used by mental health professionals, the manual provides diagnostic criteria and classifications of mental disorders “reflect[ing] a consensus of current formulations of evolving knowledge in [the mental health] field.” Id. at xxvii. “Psychopathic personality” is not listed as a classification, nor are any of the manual’s classifications comparable to the definition provided by the statute or the Pearson construction. See id. at 493-538. The manual states, “Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual . . . .” Id. at xxii.

294. See LEGISLATIVE AUDITOR’S REPORT, supra note 8, at 16-17; see also PROGRAM EVALUATION DIV., OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., SEX OFFENDER TREATMENT PROGRAMS 31-32 (1994) (“[E]mpirical research . . . has found considerable variation among rapists and significant differences between rapists and child molesters.”).

295. LEGISLATIVE AUDITOR’S REPORT, supra note 8, at 16-17.


297. Howard E. Barbaree et al., Comparisons Between Sexual and Nonsexual Rapist Subtypes: Sexual Arousal to Rape, Offense Precursors, and Offense Characteristics, 21 CRIM. JUST. & BEHAV. 95, 98 (1994). A typology developed at the Massachusetts Treatment Center includes nine different subtypes separated on the basis of [sex offenders’] inferred motivation for raping and their social competence. As it happens, these subtypes also differ in their levels of criminality and impulsivity. The subtypes can be broadly divided into those in which sexual motivation for rape is primary (the sexual subtypes) and those in which the motivation for
"sexually dangerous persons" also will embody a wide range of diagnoses and classifications.

Although the Minnesota Security Hospital offers sex offenders a four-phase treatment program that takes at least three years to complete, data show that the vast majority of individuals recently committed as psychopathic personalities already had either refused treatment or failed to complete it prior to their commitments. Given the slim probability that either sexual psychopathic personalities or sexually dangerous persons will benefit from treatment, the parens patriae justification for the statute seems disingenuous at best.

The rationale becomes even more precarious when one considers the costs of civil commitment versus incarceration. In fiscal 1995, detaining one convicted sex offender at MSH will cost an estimated $216 per day, while the per-patient expense at the new Moose Lake treatment facility will be approximately $277 per day. In contrast, each offender incarcerated in the state's most secure prison will cost the taxpayers about $114 per day, a figure that includes the expense of sex offender treatment programs provided to inmates.

No compelling justification has been advanced for indefinitely confining individuals, who are generally thought to be untreatable, in the vain hope that someday they will complete treatment successfully. Until effective methods of treatment are found, civil commitment of sex offenders simply serves as a means of warehousing "people who are what they are."

B. The Police Power Rationale

The decision to commit a sexual psychopathic personality or a sexually dangerous person is predicated primarily upon the individual's past history of violence and predictions of his or her potential for future dangerous conduct. The existence and atrocity of these

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rape is aggression, hostility, or a callous disregard for the feelings of the victim (the nonsexual subtypes).

*Id.* Barbaree et al. conclude that "[s]uch diversity in the characteristics of the act of rape, and in the history and characteristics of men who commit rape, defies any single explanation. . . . Future research is needed to elaborate on the heterogeneity of this population and the diversity of processes leading to rape." *Id.* at 113.

298. *Legislative Auditor's Report,* supra note 8, at 23.

299. *Id.* at 17. Other psychopathic personalities were not allowed to participate in treatment because of safety concerns. *Id.*

300. *Id.* at 31.

301. *Id.* at 30-31. The difference in cost largely is attributable to staff/inmate ratios. *Id.* at 31.


303. *See supra* notes 223-26 and accompanying text.
individuals' criminal histories are undeniable. Yet, as sex offenders serve increasingly lengthy sentences, their past violent acts will become more remote and, according to the Minnesota Supreme Court, necessarily must be given less weight when courts consider petitions for their commitment or release from commitment.\footnote{304. \textit{See In re Linehan}, 518 N.W.2d 609, 614 (Minn. 1994) (noting that the recency of an individual's violent behavior is relevant to a court's analysis of whether he or she poses a future threat to the public). \textit{But cf. In re Linehan}, No. P8-94-0382, slip op. at 7-9, 17 (Minn. Dist. Ct. filed July 27, 1995) (order for judgment): It is true that the last of [Linehan's] criminal acts occurred in 1975. However, ... since his string of violent offenses in the 60's, [Linehan] has had only one opportunity to commit a violent offense and he took advantage of it by attacking [a young woman]. I have considered the fact that 20 years have elapsed since his last violent sexual offense, but have concluded ... that this factor nonetheless weighs against [Linehan]. \textit{Id.} at 17.}

The state supreme court has suggested that even if there is no \textit{parens patriae} justification for the civil commitment of sex offenders, the strong interest in public safety justifies the exercise of the state's police power.\footnote{305. \textit{Blodgett}, 510 N.W.2d at 916 ("[E]ven when treatment is problematic, and it often is, the state's interest in the safety of others is no less legitimate and compelling.").} Because the concern for public safety is rooted exclusively in the desire to avoid future harmful conduct, exercise of the police power in the commitment of sexual psychopathic personalities and sexually dangerous persons is inextricably linked to predictions of future "dangerousness" or "harmful sexual conduct." In both types of commitment proceedings, therefore, the fundamental question will be whether the individual poses a risk of future harm to the public.

Mental health professionals' predictions of an individual's potential for dangerousness usually are based upon data from two sources: actuarial tables and, more frequently, clinical evaluations of the individuals themselves.\footnote{306. Gary Gleb, Comment, \textit{Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings}, 39 UCLA L. REV. 213, 224 (1991). The reliance upon examination of the individual is due to the fact that actuarial data are not well-developed at this time. \textit{Id.} Moreover, compelling arguments have been asserted against using statistical evidence as the basis for predicting an individual's propensity for violence, particularly when the outcome may be indefinite detention. \textit{See, e.g., supra note} 226 (quoting Justice Coyne's dissent in \textit{Linehan}).} But regardless of their bases, such prognostications are notoriously unreliable:

\begin{quote}
[T]he "best" clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past (and thus had high base rates for it) and who
\end{quote}
were diagnosed as mentally ill. 307

While perhaps putting a name to behavior that most people find incomprehensible, official diagnoses are based solely on an individual's past acts and do not provide an objective basis for predicting future conduct. 308

Without a doubt, our justice system sometimes relies on predictions of dangerousness to determine an individual's fate. 309 Ultimately, the psychiatrists and psychologists who offer opinions as to individuals' prospective dangerousness, and the judges who decide whether those persons will be committed, base their conclusions on a question that evokes images of Foucha: "Would I feel 'comfortable' with this person in my neighborhood?" 310 Given the abhorrent acts committed by many of these individuals, most often the answer will be a resounding "no." 311

The Minnesota Supreme Court has intimated that as long as the individual can petition for release, the post-sentence civil commitment

307. John Monahan, The Clinical Prediction of Violent Behavior 47-49 (1981)). Between 1979 and 1993, only one study was published that measured clinicians' accuracy in predicting violence in the community. Monahan & Steadman, supra note 14, at 5. In that study, only 39 percent of those rated as having a medium to high likelihood of being dangerous to others actually committed "dangerous acts" in the two-year period following the assessment. Id. n.1.

However, some "false positives" (i.e., those individuals who are labeled "dangerous" but who are not shown to commit subsequent violent acts) may commit acts for which they are never apprehended or prosecuted or acts that are never reported. Marie A. Bochnewich, Comment, Prediction of Dangerousness and Washington's Sexually Violent Predator Statute, 29 Cal. W. L. Rev. 277, 296 (1992). This may be particularly true in the area of criminal sexual conduct, where a government survey reported that only 52.5 percent of all rapes (completed and attempted) are reported. Bureau of Just. Stat., U.S. Dep't of Just., Sourcebook of Criminal Just. Statistics 252 (Kathleen Maguire & Ann L. Pastore eds., 1993). Other studies show that the reporting level is even lower. For example, a study released by the U.S. Senate Judiciary Committee found that as many as 84 percent of rapes are not reported and 98 percent of the time the attacker is not caught, tried, or imprisoned. Renee Cordes, Rape Not Treated as a Serious Crime, Senate Report Says, Trial, Aug. 1993, at 86, 86.

308. Gleb, supra note 306, at 230-91 (citing Amicus Brief for the American Psychiatric Association at 13, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080)).

309. Bochnewich, supra note 307, at 284. "'[A] jurisprudence that pretends to exclude the role of predictions of dangerousness is self-deceptive.'" Id. (quoting Marc Miller & Norval Morris, Predictions of Dangerousness: Ethical Concerns and Proposed Limits, 2 Notre Dame J.L. Ethics & Pub. Pol'y 393, 395 (1986)). Bochnewich notes that predictions of dangerousness have been found to constitute permissible bases for imposing pretrial detention, criminal sentences (including the death penalty), preventive detention under the Bail Reform Act of 1984, and the indefinite civil commitment of insanity acquittees. Id. at 284-93.

310. See Foucha v. Louisiana, 504 U.S. 71, 74-75 (1992) (quoting doctor as saying he would not "feel comfortable in certifying that [Foucha] would not be a danger").

311. See supra note 101 and accompanying text.
of sex offenders is permissible. Yet, the standards governing discharge are as nebulous as the criteria for commitment. Foucha suggests that to win release, a petitioner need only prove that one of the statutory criteria under which she or he originally was committed is no longer applicable. This reading of Foucha, however, recently was rejected by the Minnesota Supreme Court, which held that a person petitioning for release must meet a separate set of standards governing discharge. In the state court's view, an individual cannot win release simply by showing that he or she no longer meets one of the statutory criteria under which she or he was committed.

Regardless of which set of criteria is applied, the task of winning release is onerous. Under either the commitment or discharge standard, the individual must prove by a preponderance of the evidence that he or she is no longer dangerous. Since the initial prediction of an individual's propensity for dangerous behavior is speculative at best, the party petitioning for discharge must disprove the opinions of the judge and mental health professionals. This difficulty is reflected in the fact that despite the recent increase in psychopathic personality commitments—and a corresponding increase in petitions for discharge—only a few individuals have been released since 1991.

313. See supra notes 132-33 and accompanying text.
314. Call v. Gomez, 535 N.W.2d 312, 318 (Minn. 1995); see also supra notes 114-15 and accompanying text (explaining statutory discharge criteria).
315. Call, 535 N.W.2d at 319. The Call court stated:

So long as the statutory discharge criteria are applied in such a way that the person subject to commitment as a psychopathic personality is confined for only so long as he or she continues both to need further inpatient treatment and supervision for his [or her] sexual disorder and to pose a danger to the public, continued commitment is justified because the confinement bears a reasonable relation to the original reason for commitment. We believe that the statutory discharge criteria set forth in section 253B.18, subd. 15, can be applied to meet these requirements.

...[I]t is ... not sufficient that the person no longer evinces the utter lack of control over his [or her] sexual impulses. The utter lack of control over one[']s sexual impulses is part of the threshold showing that must be met to justify commitment. Confinement may continue without meeting this threshold if the confinement still bears the reasonable relation to the original reason for commitment; that is, the person continues to need treatment for his [or her] sexual disorder and continues to pose a danger to the public ...

Id.
316. See supra notes 303-08 and accompanying text.
317. See supra part II.C.1.
318. According to a February 1994 report, only two individuals committed as psychopathic personalities had been discharged in the preceding three years, and one of them was provisionally discharged to a nursing home. LEGISLATIVE AUDITOR'S
Those who are committed under the new "sexually dangerous persons" provision are likely to encounter even greater difficulty when petitioning for discharge. Even under the more liberal reading of Foucha, the person cannot refute that she or he has a history of harmful sexual conduct, nor, more notably, that he or she "has manifested a sexual, personality or other mental disorder or dysfunction." Under the statute's plain language, one cannot even rely on the fact that one's mental disorder is "cured" or in remission. Therefore, the sexually dangerous person may win discharge only if he or she can prove that she or he is no longer "likely to engage in acts of harmful sexual conduct."

Under the heightened (perhaps strict) scrutiny applied in Foucha, equal protection is violated by a statute that authorizes the indefinite commitment of individuals on the basis of mental disorder and dangerousness, if others, who have manifested the same type of disorder(s) and propensities for dangerous behavior, are not subject to such confinement. The Minnesota Supreme Court has failed to articulate "a particularly convincing reason" that justifies the civil commitment of convicted sex offenders while other violent felons, probably just as "likely to engage in acts of harmful [violent] conduct," go free. The mere assertion "that the sexual predator poses a danger that is unlike any other," absent some supporting qualita-
tive or quantitative evidence, is inadequate to justify the indefinite—perhaps permanent—deprivation of an individual's liberty.

C. Alternatives to Civil Commitment

Our society is faced with a crisis of unforeseen and frightening proportions. It seems as if every few weeks, another headline tells the story of an innocent person whose life was snuffed out or brutally altered by a convicted sex offender. Understandably, the public reacts by demanding that such individuals never be released and, predictably, the government hastens to respond. But the civil commitment of sex offenders as sexual psychopathic personalities and sexually dangerous persons serves as a mere bandage on the gaping societal wound created by sexual violence. Future sex crimes may be averted by proactive measures that also comport with our constitutional guarantees of liberty.

Incidents of sexual violence could be deterred in at least three ways. First, our criminal justice system should impose longer sentences on those who are convicted of criminal sexual conduct and other sex offenses. Second, additional research is needed to develop effective treatment models for sex offenders and to provide more accuracy in predicting their potential for future violence. Third, society should strive to prevent sexual violence by supporting programs that foster socioeconomic stability.

As noted above, the Minnesota Legislature has taken steps in recent years to increase the statutory maximum sentences that may be given sex offenders, particularly repeat offenders, and the Sentencing Guidelines Commission also has acted to increase the length of presumptive sentences for serious crimes. Yet the presumptive sentences for first-time offenders remain considerably lower than the statutory maximums. For example, while the maximum sentence for first-degree criminal sexual conduct is thirty years, an offender with a prior conviction for the same offense is likely to receive a sentence of just 105 to 115 months, and time served may be reduced by up to one-third for good behavior.

mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well. Id. at 597-98 (footnotes and internal quotation omitted).

327. See supra notes 62-70, 82 and accompanying text.
328. Sex Offender Treatment Programs, supra note 294, at 21. For example, the presumptive sentence for criminal sexual conduct in the first degree doubled in 1989, from 43 months to 86 months. Id.
330. Sex Offender Treatment Programs, supra note 294, at 18.
Data show that of 167 individuals sentenced in 1992 for first-degree criminal sexual conduct, more than forty percent were not sentenced to prison.\textsuperscript{331} Those who were sentenced to prison received an average sentence of ten and one-half years.\textsuperscript{332} And of 120 sex offenders who had three or more prior convictions, nearly seventeen percent served less than one year or no time whatsoever.\textsuperscript{333}

In short, there is reason to question whether the punishments being meted out fit the crimes being committed. This author does not advocate requiring offenders to serve the full lengths of their prison sentences.\textsuperscript{334} Moreover, current statutory maximum sentences clearly are adequate and should not be imposed upon every offender. An effort should be made, however, to close the gap between statutory maximum and presumptive sentences. Sex offenders who exhibit a history of victimization—even if only comprised of “less serious” sexually-motivated offenses—should serve sentences that are truly proportionate to the atrocity of their crimes.

Second, efforts must be continued and intensified to develop more effective methods of treating sex offenders and predicting their future violent behavior. As noted above, too little is known about why sex offenders commit the crimes they do, less is known about how to stop their behavior,\textsuperscript{335} and still less is known about whether they will reoffend.\textsuperscript{336} While the answers to these questions seem remote, efforts to find them should receive the full support of government and the public.

Finally, the most effective means of eliminating or reducing the incidence of sexual violence may be prevention:

\begin{quote}
[T]here are no rational actions the legislature, police, courts and/or corrections could take that would put the criminal justice system in a position to declare to the citizenry the elimination of the possibility of violence or homicides in our society. . . . Our attention as a society needs to be refocused on the societal causes of an increasingly violent society and violence towards women and children.\textsuperscript{337}
\end{quote}

\begin{thebibliography}{9}
\bibitem[331]{Id.} Id.
\bibitem[332]{Id.} Id.
\bibitem[333]{Id.} Id. Individuals who are not sentenced to prison may nonetheless serve up to one year in county jails or workhouses as a condition of their probation. Id. at 16 & n.19. The report does not make clear whether the repeat offenders’ previous convictions were for sexual assault or other offenses. See id. at 18.
\bibitem[334]{See supra note 71, at 23.} See WOOD, supra note 71, at 23. Wood notes the potential benefits of placing offenders into residential programs or under intensive supervision before their sentences are fully served. See id. Such early release allows the Department of Corrections to impose release conditions and to monitor post-release behavior. Id. Offenders who violate release conditions can be returned to prison. Id.
\bibitem[335]{See supra notes 291-97 and accompanying text.} See supra notes 291-97 and accompanying text.
\bibitem[336]{See supra notes 306-11 and accompanying text.} See supra notes 306-11 and accompanying text.
\bibitem[337]{WOOD, supra note 71, at 1.} WOOD, supra note 71, at 1.
\end{thebibliography}
A statistical link exists between the prevalence of sexual assault and social instability.\textsuperscript{338} Sexual violence also appears to be connected to urbanism, unemployment, economic disparity, and the social status of women.\textsuperscript{339} Therefore, society's limited resources would be optimized if directed toward programs encouraging greater socioeconomic stability.

To reverse the increasing trend and propensity toward violence in our society, we need to invest our resources early in the lives of our children. Quality child care, day care and preschool programs, early intervention with all children experiencing impulse and anger control problems and children struggling in our education system with learning disabilities and behavior problems must be our priority. We must also provide equal opportunities and access for low income and disadvantaged families to marital, family and single parent counseling; employment; housing; health care; drug education and prevention programs; and the identification and treatment of the addicted. We cannot afford to continue to increase our funding of simplistic, reactionary solutions to complex societal problems in an effort to placate and mislead the citizens.\textsuperscript{340}

Sexual violence—indeed, violence of all types—likely would become less prevalent if society concentrated its efforts on reducing poverty and gross economic disparities, strengthening family and neighborhood infrastructures, and redefining sex roles so as to achieve true equality.\textsuperscript{341}

V. CONCLUSION

Through increased utilization of the psychopathic personality statute and through the expansion of civil commitment to include "sexually dangerous persons," public officials are trying desperately to atone for

\textsuperscript{338} LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS 145 (1989). Baron and Straus postulate that certain factors—rates of geographical mobility, divorce, lack of religious affiliation, female-headed households with children, "non-familied" male households with no females present, and the ratio of tourists to residents—are indicia of "social disorganization." Id. at 129-30. In analyzing the prevalence of these factors in each of the 50 states, the researchers found a correlation between high social disorganization and the rate of rape, "which lends support to the conjecture that a high level of social disorganization increases the risk of rape." Id. at 145. Straus and Baron noted, however, that social disorganization may also "contribute[] indirectly to reducing rape through its relationship with gender equality." Id. at 187.

\textsuperscript{339} Id. at 187-88. Societies in which women are assigned subservient roles are marked by relatively high levels of violence. Id. at 187. Similarly, sexual violence is more likely to occur in urban areas and to involve perpetrators and victims of below-average socioeconomic status. Id. at 188.

\textsuperscript{340} WOOD, supra note 71, at 2.

\textsuperscript{341} BARON & STRAUS, supra note 338, at 193-94.
years of inadequate sentences for criminal sexual conduct. Unfortunately for the victims of these offenders and for the community as a whole, the concern comes too little, too late. Decades of legislative indifference have been followed in the past seven years by reactive, rather than proactive, lawmaking. The tragic events of recent years should not be exploited either to amass political capital or to justify "a system of wholesale preventive detention, a concept foreign to our jurisprudence."\textsuperscript{342}

The civil commitment of sexual psychopathic personalities and sexually dangerous persons cannot be rationalized on \textit{parens patriae} grounds, as these individuals pose no danger to themselves and appear highly unlikely to benefit from treatment. Nor can this system be justified as a legitimate exercise of police power, as it rests upon subjective forecasts of dangerousness which impermissibly infringe upon rights of due process and equal protection.

As odious as the alternative is, we cannot permit the law to run roughshod over constitutionally-protected liberties. The criminal justice system—not civil commitment—should be employed to its fullest extent to protect the public from these heinous crimes. Longer sentences must be served, and more research into effective treatment must be done. Perhaps most importantly, greater efforts should be made to identify and address the social and economic causes of sexual violence, thereby breaking its debilitating cycle.

\textit{Marna J. Johnson}