The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise between Mad and Bad - A Study of Minnesota's Sexual Psychopathic Personality Statute

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THE INDEFINITE CIVIL COMMITMENT OF DANGEROUS SEX OFFENDERS IS AN APPROPRIATE LEGAL COMPROMISE BETWEEN "MAD" AND "BAD" — A STUDY OF MINNESOTA'S SEXUAL PSYCHOPATHIC PERSONALITY STATUTE

KATHERINE P. BLAKEY*


In 1982, when Phillip Jay Blodgett was 16, he was adjudicated a delinquent for having sexual contact with his brother.\(^1\) Seven months later he battered a social worker and was again found delinquent. In May of 1985, Blodgett was found guilty of violating a domestic abuse restraining order. Four months later, three hours after his release from jail where he served time for burglary and obstructing the legal process, Blodgett broke into the home of the parents of his ex-girlfriend; he entered the room where she lay sleeping and sexually assaulted her. In early 1986, Blodgett pled guilty to these crimes, was convicted of first degree burglary with intent to commit criminal sexual conduct, and was sent to prison. In 1987, while enrolled in a release program where inmates may leave the prison, but must return at night, Blodgett sexually assaulted a woman in a supermarket parking lot as he attempted to steal her car. When his victim resisted, he asked, "Do you want to die?" Only five weeks later, while on supervised release at a halfway house, Blodgett raped a 16-year-old girl both vaginally and anally. He pled guilty to two counts of criminal sexual conduct in the second degree and was returned to prison in 1987. He was scheduled for release in 1991. Shortly before his release, Blodgett was indefinitely committed to the

\(^1\) The following facts are taken from In re Blodgett, 510 N.W.2d 910, 911 (Minn.), cert. denied, 115 S.Ct. 146 (1994). In re Blodgett is the principal recent case addressing the constitutionality of Minnesota's Psychopathic Personality Statute, Minn. Stat. Ann. §§ 526.09-526.115 (West 1975) (repealed 1994), under which Blodgett was civilly committed.
Minnesota Security Hospital in St. Peter as a "psychopathic personality."

Unfortunately, this sort of story is all too familiar. The news is full of tragic stories in which sex offenders, like Blodgett, attack again almost as soon as they are released from prison.² Often, the offender does not even complete his sentence, and he is free on parole or some other release program. One Los Angeles Times article describes the past of some of the individuals now committed in Minnesota.³ They include Richard Enebak, who committed at least 37 sexual assaults in 14 years, including one rape, where the 16-year-old girl suffered internal injuries and was left paralyzed; David Anthony Thomas, who committed four rapes — killing the last victim — within four weeks of being paroled from prison, after being convicted in connection with more than a dozen rapes; and Charles Stone, a pedophile who has confessed to molesting as many as 200 young girls. The relentless criminal activity of individuals like these and the legal system's repeated failure to protect the public from them, demands a re-evaluation of the legal system's response to persistent sexual offenders.

According to received doctrine, Blodgett must be placed in one of two legal categories: "mad" or "bad." Under the "mad" approach, if Blodgett were determined to be mentally ill and dangerous, the state could civilly commit him.⁴ Under the "bad"

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2. See, e.g., Nancy Gibbs, The Devil's Disciple, TIME, Jan. 11, 1993, at 40 (discusses how self-proclaimed sexual predator Westley Allan Dodd molested dozens of children and never served a sentence longer than four months in jail before he was finally sentenced to death for the kidnapping, rape, and murder of three young boys); John Leo, Dealing with Career Predators, U.S. News & WORLD REPORT, April 11, 1994, at 19 (discusses how, despite his 26-year career of sexual attacks and torture, the state of California released Warren Bland five times before finally putting him on death row for the mutilation and murder of a 7-year-old girl); Barry Siegel, Locking Up "Sexual Predators," L.A. TIMES, May 10, 1990, at A1 (discusses how, after serving a 13-year prison sentence for attacking two women, Gene Raymond Kane raped and murdered a 29-year-old woman within two months of his release, and how, after serving a ten year prison sentence for kidnapping and assaulting two teenage girls, Earl K. Shriner, a man with a 24-year-long history of assaults on young people, raped a 7-year-old boy, cut off his penis, and abandoned him near death within two years of his release).


approach, if Blodgett were convicted of a crime, the state could imprison him. Thus, the law sets up a paradigm of extremes: people who do terrible things to others are either sick, or evil. The difficulty is that, in reality, mental illness and wickedness do not exist as two opposite conditions with nothing in between. Rather, "mad" and "bad" are the ends of a continuum upon which moral culpability varies according to the degree of madness or badness in any one individual. Some offenders are not easily classified as "mad" or "bad," because they are, to some degree, a little of both, that is, they are culpable for their conduct to some extent, but also to some extent inculpable due to the role that mental illness played in their conduct.

Moral culpability requires an evil mind as well as an evil act. This is why an individual who is truly "mad" is not morally responsible for his conduct; he either acts pursuant to some irrational delusion, is unable to possess a particular state of mind, that is, to choose to act recklessly, knowingly or purposefully, or

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5. Under the common law, "[c]rime . . . [was] a compound concept, generally constituted only from concurrence of an evil-meaning mind . . . [and] an evil-doing hand . . . ." Morissette v. United States, 342 U.S. 246, 251 (1952); Wayne LaFave & Austin Scott, Criminal Law 193 (2d ed. 1986) [hereinafter LaFave & Scott] ("[A] basic premise [of Anglo-American substantive criminal law] is that conduct, to be criminal, must consist of something more than mere action (or non-action where there is a legal duty to act); some sort of bad state of mind is required as well."); IV William Blackstone, Commentaries on the Law of England 21 (1769):

[As] a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

These two elements of criminality are called mens rea (state of mind) and actus rea (conduct). LaFave & Scott, supra, at 212 ("The basic premise that for criminal liability some mens rea is required is expressed by the Latin maxim actus non facit reum nisi mens sit rea (an act does not make one guilty unless his mind is guilty)).

lacks substantial control over his conduct.\(^7\) Criminal culpability rightly attempts to mirror moral culpability as much as possible: although a defendant engaged in prohibited conduct, he may not be found guilty of a crime unless he also possessed the required state of mind. In brief, people should be punished for conduct only to the extent they are responsible for that conduct.

If offenders are, in some sense, both "mad" and "bad," the law must account for the lessened culpability of those individuals. Minnesota sought to achieve this objective by enacting its Sexual Psychopathic Personality Statute\(^8\) that applies to individuals who engage in criminal sexual conduct and yet are somewhere in the middle of the continuum between "mad" and "bad." Once an individual qualifies as a "sexual psychopathic personality" or a "sexually dangerous person," the statute provides for civil commitment as opposed to criminal confinement.

The Constitution restricts the conditions under which individuals may be civilly committed. In 1992, the United States Supreme Court further delineated these restrictions in *Foucha v. Louisiana.*\(^9\) "Foucha" is sometimes interpreted as requiring that all individuals committed under legislation like Minnesota's Sexual Psychopathic Personality Statute must be mentally ill and dangerous.\(^10\) Whether individuals classified as possessing sexual psychopathic personalities or being a sexually dangerous person are "mentally ill" is disputed. The dispute arises because the classifications are primarily legal, not medical. In addition, these indi-

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7. *See generally LaFave & Scott, supra* note 5, at 320-22 (discussing "irresistible impulse" test) and at 329-32 (discussing "substantial capacity" test of American Law Institute).

8. MINN. STAT. ANN. §§ 526.09-526.115 (West 1975), *repealed by* 1994 Minn. Laws, 1st Sp., c.1, art. 1, § 6, eff. Sept. 1, 1994. The repealed sections were re-enacted within the Civil Commitment Act as MINN. STAT. ANN. § 253B.02, subd. 18a and § 253B.185 (West Supp. 1995). The re-enactment "shall be construed as a continuation of the earlier repealed provisions. Judicial decisions interpreting or applying the repealed sections shall continue to apply to the same extent as if the repeal and re-enactment had not occurred." 1994 Minn. Laws, 1st Sp., c.1, art. 1, § 6, eff. Sept. 1, 1994. Also, additional sections, MINN. STAT. ANN. § 253B.02, subds. 7a and 18b (West Supp. 1995), were added when the Psychopathic Personality Statute was re-enacted as part of the Civil Commitment Act generally. All of the sections relating to the civil commitment of psychopathic personalities under MINN. STAT. ANN. §§ 526.09-526.115 (West 1975) and of sexual psychopathic personalities or sexually dangerous persons under MINN. STAT. ANN. § 253B.02, subds. 7a, 18a and 18b and § 253B.185 (West Supp. 1995) will hereinafter be referred to as "Minnesota's Sexual Psychopathic Personality Statute."


Individuals are often not treatable, which is a general goal of medicine. Thus, civil commitment pursuant to Minnesota's Sexual Psychopathic Personality Statute is highly controversial.

In light of this dispute, this note assesses the wisdom and constitutionality of Minnesota's Sexual Psychopathic Personality Statute. This note argues that a person who possesses a sexual psychopathic personality or is a sexually dangerous person under the statute qualifies as "mentally ill" and dangerous. Accordingly, this note concludes Minnesota's effort to acknowledge the lessened culpability of such individuals while maintaining public safety is not only constitutional, but commendable.

Part II of this note discusses the statutory requirements under Minnesota's Sexual Psychopathic Personality Statute and their early construction by the Supreme Court of Minnesota and the United States Supreme Court. Part III contrasts civil and criminal confinement. The first two subsections discuss the traditional rationales for confinement and the rationales behind Minnesota's statute in light of those traditional rationales. The next subsection addresses concerns surrounding the prediction of dangerousness. Part III concludes by asserting that expanding civil commitment is preferable to diverting the criminal system from its requirement of moral blameworthiness. Part IV addresses the constitutionality of Minnesota's statute, especially in light of Foucha. In Part V, recommendations are made for improving Minnesota's statute. Finally, a model statute is proposed.

II. MINNESOTA'S CIVIL COMMITMENT OF SEXUAL PSYCHOPATHIC PERSONALITIES AND SEXUALLY DANGEROUS PERSONS: THE STATUTORY REQUIREMENTS AND THEIR EARLY CONSTRUCTION

Minnesota's Sexual Psychopathic Personality Statute provides for the civil commitment of dangerous individuals who are arguably not mentally ill in a traditional medical sense, but who nevertheless, suffer from a sexual, personality, or other mental disorder or dysfunction that results in a pattern of harmful conduct. Because these individuals' misconduct may be more attributable to their disorder than to their will, the criminal system, concerned with culpable, responsible individuals, is less suited than the civil system to deal with them appropriately. Faced with individuals who do not fit neatly into the categories used by either the civil or the criminal system, Minnesota has legally expanded its legal notion of "mental illness." Minnesota civilly
commits, rather than criminally confines, these individuals who are in some fundamental sense irresponsible.

To be subject to commitment under Minnesota's Sexual Psychopathic Personality Statute, an individual must either possess a "sexual psychopathic personality" or be a "sexually dangerous person." A person who possesses a sexual psychopathic personality (SPP) is a person whose emotional instability or impulsiveness renders that person irresponsible. This irresponsibility is evidenced by a lack of control and a pattern of sexual misconduct that results in dangerousness. A sexually dangerous person (SDP) is a person who engages in a pattern of harmful sexual conduct, possesses a sexual, personality, or other mental disorder or dysfunction, and is, therefore, dangerous.

11. Minn. Stat. Ann. § 253B.02, subd. 18a defines a "sexual psychopathic personality" as
   the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

12. Id. § 253B.02, subd. 18b defines a "sexually dangerous person" as a person who "(1) has engaged in a course of harmful sexual conduct as defined in subdivision 7a; (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 as defined in subdivision 7a." Id. § 253B.02, subd. 7a(a) defines "harmful sexual conduct" as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Id. § 253B.02, subd. 7a(b) states, "[t]here is a rebuttable presumption that conduct described in the following provisions creates a substantial likelihood that a victim will suffer serious physical or emotional harm: section 609.342 (CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE), 609.343 (CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE), 609.344 (CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE), or 609.345 (CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE). If the 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, the presumption also applies to conduct described in section 609.185 (MURDER IN THE FIRST DEGREE), 609.19 (MURDER IN THE SECOND DEGREE), 609.195 (MURDER IN THE THIRD DEGREE), 609.20 (MANSLAUGHTER IN THE FIRST DEGREE), 609.205 (MANSLAUGHTER IN THE SECOND DEGREE), 609.221 (ASSAULT IN THE FIRST DEGREE), 609.222 (ASSAULT IN THE SECOND DEGREE), 609.223 (ASSAULT IN THE THIRD DEGREE), 609.24 (SIMPLE ROBBERY), 609.245 (AGGRAVATED ROBBERY), 609.25 (KIDNAPPING), 609.255 (FALSE IMPRISONMENT), 609.365 (INCEST), 609.498 (TAMPERING WITH A WITNESS), 609.561 (ARSON IN THE FIRST DEGREE), 609.582, subdivision 1 (BURGLARY IN THE FIRST DEGREE), 609.713 (TERRORISTIC THREATS), or 609.749, subdivisions 3 or 5 (HARASSMENT AND STALKING)."
Minnesota's Civil Commitment Act of 1982, in which these conditions are defined, provides the procedure for all civil commitment in Minnesota. The procedures apply to the commitment of the mentally retarded, the chemically dependent, the mentally ill and the mentally ill and dangerous to the public. Other than the method of initiating the proceedings and of transfer, the commitment procedure for a person who possesses a SPP or is a SDP is identical to the procedure used to commit someone who is mentally ill and dangerous to the public.

Before commitment proceedings may begin, the Sexual Psychopathic Personality Statute first requires that facts supporting commitment be submitted to the county attorney, who, if satisfied that good cause exists, will prepare a petition to be executed by a person having knowledge of the facts and filed with the committing court of the county in which the proposed subject for commitment is present. If the proposed subject of commitment is in the custody of the commissioner of corrections, the petition may be filed in the county where the conviction for which the subject is incarcerated was entered.

As in all other judicial commitments, the petition must contain detailed factual descriptions of the subject's recent behavior and all factual allegations must be supported by the observations of witnesses named in the petition. The statements must be made in behavioral terms and "judgmental or conclusory statements" are specifically forbidden. The petition must also be accompanied by the written statement of an examiner stating that he or she has examined the subject and is of the opinion that the subject is suffering from a designated disability and recommends commitment.

After receiving the filed petition, the court hears the petition according to the procedures set out for the commitment of

13. See id. §§ 253B.01-253B.23.
15. Id. § 253B.185, subd. 1. The statute also allows for the creation by the Supreme Court of Minnesota of a statewide judicial panel that would be authorized to preside over the commitment of any person who possesses a SPP or is a SDP. In the event this panel is created, all petitions for civil commitment pursuant to the Sexual Psychopathic Personality Statute would be filed with the Minnesota Supreme Court rather than with the district court in the county where the subject of commitment is present. The procedures would otherwise remain the same. Id. § 253B.185, subd. 4(b).
16. Id. § 253B.185, subd. 1.
17. Id. § 253B.07, subd. 2.
18. Id.
19. Id.
those who are mentally ill and dangerous. The hearing must be held in a timely fashion and notice must be given to all the interested parties. The subject has the right to attend and testify, as well as present and cross-examine witnesses through his attorney. All relevant evidence must be admitted and an adequate record must be made and preserved.

The subject enjoys other procedural rights, including access to all medical records relevant to commitment, representation by counsel at any proceeding, the appointment of counsel if not otherwise retained, and written notification of all rights.

If the court finds that the subject possesses a SPP or is a SDP, it must commit the subject to the Minnesota Security Hospital or other designated treatment facility. The burden of proof is upon

20. *Id.* § 253B.185 provides, "[u]pon the filing of a petition alleging that a proposed patient is a sexually dangerous person or is a person with a sexual psychopathic personality, the court shall hear the petition as provided in section 253B.18." *Id.* § 253B.18, subd. 1 states, "the court shall hear the petition as provided in sections 253B.07 and 253B.08" which provide for the civil commitment of patients generally.

21. *Id.* § 253B.08, subd. 1, in relevant part, provides, "[t]he hearing on the commitment petition shall be held within 14 days from the date of the filing of the petition. For good cause shown, the court may extend the time of the hearing up to an additional 30 days. When any proposed patient has not had a hearing on a petition filed . . . the proceedings shall be dismissed.

In addition, the proposed patient or the head of the treatment facility in which the person is held may demand in writing that the hearing be held immediately. *Id.*

22. *Id.* § 253B.08, subd. 2, in relevant part, provides, "[t]he proposed patient, patient's counsel, the petitioner, and any other persons the court directs shall be given at least five days' notice that a hearing will be held and at least two days' notice of the time and date of the hearing, except that any person may waive notice."

23. *Id.* § 253B.08, subd. 3, in relevant part, provides, "[a]ll persons to whom notice has been given may attend the hearing and, except for the proposed patient's counsel, may testify."

24. *Id.* § 253B.08, subd. 4.

25. *Id.* § 253B.08, subd. 7.

26. *Id.* § 253B.08, subd. 8.

27. *Id.* § 253B.03, subd. 8.

28. *Id.* § 253B.03, subd. 9 provides, "[c]ounsel shall have the full right of subpoena. In all proceedings... counsel shall: (1) consult with the person prior to any hearing; (2) be given adequate time to prepare for all hearings; (3) continue to represent the person throughout any proceedings... unless released as counsel by the court; and (4) be a vigorous advocate on behalf of the client."

29. *Id.* § 253B.03, subd. 10.
the state to demonstrate by clear and convincing evidence that the subject possesses a SPP or is a SDP.\textsuperscript{30}

While at the commitment facility, subject to safety concerns and other reasonable regulations, the subject enjoys the following rights: to be free from restraints; to correspond freely without censorship; to receive phone calls and visitors, including visits from personal physicians, spiritual advisors, and counsel at all reasonable times; to receive periodic medical assessment; to be free from all medical procedures and treatments without prior consent; and to receive proper care and treatment in the form of an individualized written program plan.\textsuperscript{31}

After the initial commitment, a written treatment report must be filed with the committing court within 60 days.\textsuperscript{32} Another hearing is then held prior to making a final commitment determination.\textsuperscript{33} If, at this hearing, the court finds the subject continues to possess a SPP or be a SDP, the court will commit the subject for an indeterminate period of time.\textsuperscript{34}

Subsequent to a final determination that the subject possess a SPP or is a SDP, all petitions for transfer and all petitions relative to discharge, provisional discharge, and revocation of provisional discharge, are heard by a special review board established to hear petitions regarding those committed as mentally ill and dangerous.\textsuperscript{35} A person committed for having a SPP or being a SDP may not be placed on release on pass-eligible status unless that status is approved by the medical director of the Minnesota Security Hospital.\textsuperscript{36}

\textsuperscript{30} Id. § 253B.18, subd. 1; In re Blodgett, 510 N.W.2d 910, 915 (Minn.), cert. denied, 115 S.Ct. 146 (1994).
\textsuperscript{31} MINN. STAT. ANN. § 253B.03.
\textsuperscript{32} Id. § 253B.18, subd. 2.
\textsuperscript{33} Id. The hearing must be held within 14 days of court's receipt of the treatment report or within 90 days of initial commitment or admission, whichever is earlier. Automatic discharge, however, is unavailable. Id.
\textsuperscript{34} Id. § 253B.18, subd. 3.
\textsuperscript{35} Id. § 253B.18, subd. 4. The statute also provides that the "board shall consist of three members experienced in the field of mental illness. One member of the special review board shall be a physician and one shall be an attorney. No member shall be affiliated with the department of human services. The special review board shall meet at least every six months and at the call of the commissioner." Id.
\textsuperscript{36} Id. § 253B.18, subd. 4b.

At least ten days prior to [determining whether to grant pass-eligible status], the medical director shall notify the committing court, the county attorney of the county of commitment, the designated agency, any interested persons, the petitioner, and the petitioner's counsel of the proposed status, and their right to request review by the special review board. If within ten days of receiving notice any notified
The subject or the head of the treatment facility may also file a petition for an order of transfer, discharge, provisional discharge, or revocation of provisional discharge upon which a hearing will be held. A subject committed as possessing a SPP or being a SDP, however, may not be transferred out of the Minnesota Security Hospital unless the commissioner, after a hearing and favorable recommendation by a majority of the special review board, determines transfer to be appropriate. Detailed procedures for provisional discharge are specified, including consideration of specific factors. Similar procedures exist for discharge that may be granted if the subject is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision. Finally, the subject or the county attorney may petition an appeal panel for a rehearing and reconsideration of a decision by the commissioner. After notice is provided to interested parties, a hearing on the petition is held at which procedural protection including the right to cross-

person requests review . . . a hearing shall be held before the special review board. The proposed status shall not be implemented unless it receives a favorable recommendation by a majority of the board and approval by the commissioner. The order of the commissioner is appealable [to a judicial panel] as provided in section 253B.19.

Id.

37. Id. § 253B.18, subd. 5.

38. Id. § 253B.18, subd. 6. The transfer may be to other regional centers under the commissioner's control. Id. If the subject is later committed to the custody of the commissioner of corrections, the subject may be transferred from a hospital to another facility designated by the commissioner of corrections. The following factors are considered in determining whether a transfer is appropriate: (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 public or private hospital; (4) the danger posed by the person to other patients or staff at the public or private hospital; and (5) the degree of security necessary to protect the public. Id. § 253B.185, subd. 2.

39. Id. § 253B.18, subd. 7. Provisional discharge will not be granted unless the subject is found capable of making an acceptable adjustment to open society. In making their determination, the review board and the commissioner consider (a) whether the patient's course of hospitalization and present medical status indicate there is no longer a need for inpatient treatment and supervision; and (b) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the patient to adjust to the community. Id. Provisional discharge is subject to review, id. § 253B.18, subd. 9, and may be revoked, id. § 253B.18, subd. 10. Revocation is also subject to appeal. Id. § 253B.18, subd. 13.

40. Id. § 253B.18, subd. 15.

41. Id. § 253B.19, subd. 2.
examine all witnesses is provided.\textsuperscript{42} The petitioning party bears the burden of going forward with the evidence, and the party opposing discharge bears the burden of proof by clear and convincing evidence that the respondent is in need of commitment.\textsuperscript{43} A majority of the appeal panel rules upon the petition and their decision may be appealed to the court of appeals as in other civil cases.\textsuperscript{44}

The Sexual Psychopathic Personality Statute provides a method of civil commitment and is, thus, not part of Minnesota's criminal code. Accordingly, the statute states,

[t]he existence in any person of a condition of a sexual psychopathic personality or the fact that a person is a sexually dangerous person shall not in any case constitute a defense to a charge of crime, nor relieve such person from liability to be tried upon a criminal charge.\textsuperscript{45}

The statute also provides that any criminal sentence imposed on the subject, prior to commitment for possessing a SPP or being a SDP, will be served first and followed by transfer to a regional center designated by the commissioner of human services.\textsuperscript{46}

The constitutionality of Minnesota's Sexual Psychopathic Personality Statute in its previous form\textsuperscript{47} was challenged in 1939 in \textit{State ex rel. Pearson v. Probate Court}.\textsuperscript{48} In Pearson, the Minnesota Supreme Court held that the statute was not unconstitutionally vague under the fourteenth amendment; it did not, therefore, violate due process.\textsuperscript{49} Applying the usual principles of legislative construction, including deference to the legislature and a presumption of constitutionality, the court held the act was intended to include those persons who, by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.\textsuperscript{50}

Through this judicial construction, the holding of \textit{Pearson} became the three-part test that the state must meet in order to

\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} § 253B.19, subd. 2; In re Blodgett, 510 N.W.2d 910, 917 (Minn.), cert. denied, 115 S.Ct. 146 (1994).
\textsuperscript{44} \textit{Minn. Stat. Ann.} § 253B.19, subds. 3 and 5.
\textsuperscript{45} \textit{Id.} § 253B.185, subd. 3.
\textsuperscript{46} \textit{Id.} § 253B.185, subd. 2(b).
\textsuperscript{47} \textit{Id.} §§ 526.09-526.115 (repealed 1994).
\textsuperscript{48} 287 N.W. 297 (Minn. 1939), \textit{aff'd}, 309 U.S. 270 (1940).
\textsuperscript{49} \textit{Pearson}, 287 N.W. at 302.
\textsuperscript{50} \textit{Id.}
demonstrate someone was a "psychopathic personality." The state must show (1) habitual misconduct in sexual matters, (2) an utter lack of power to control sexual impulses, and (3) a likelihood that this lack of control will result in injury to others. These elements are now expressly included in the text of the re-enacted statute.\textsuperscript{51} The \textit{Pearson} court also emphasized the limited application of the statute: "It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities."\textsuperscript{52} Thus, the Minnesota Supreme Court narrowly construed the statute, imposed on it the three-part test and rejected the allegation that the statute was vague and overly broad.

Significantly, the \textit{Pearson} court discussed the reasoning behind the classification "psychopathic personality" and its relation to mental illness or insanity. The court first emphasized that under the statute, all laws relating to mentally ill persons who are dangerous to the public also apply to persons with psychopathic personalities.\textsuperscript{53} This approach is appropriate, the court explained, because the psychopathic personality statute legally "extends the concept of insanity to include sexually irresponsible persons who are dangerous to others."\textsuperscript{54} Nevertheless, unlike being medically insane, possessing a SPP (or being a SDP under the re-enacted act) does not constitute a defense to a criminal charge.\textsuperscript{55}

At first, this exclusion may appear contradictory. If the legislature extended the notion of legal insanity when it created the categories "sexual psychopathic personality" and "sexually dangerous person," then, like being insane, why should these categories not constitute a defense to criminal conduct as well as a basis for civil commitment? The word "expand," as used by the \textit{Pearson} court, should not be misread. The \textit{Pearson} court did not mean that the Minnesota legislature generally expanded the definition of "legal insanity." No general legal definition of insanity exists in Minnesota jurisprudence. Rather, the definition of "insanity" or "mental illness" is context-specific, as are its legal consequences.\textsuperscript{56} In fact, Minnesota jurisprudence contains one defini-

\begin{itemize}
\item \textsuperscript{51} MINN. STAT. ANN. § 253B.02, subd. 18a.
\item \textsuperscript{52} Pearson, 287 N.W. at 302.
\item \textsuperscript{53} \textit{Id.} at 298.
\item \textsuperscript{54} \textit{Id.} at 303.
\item \textsuperscript{55} MINN. STAT. ANN. § 253B.185, subd. 3.
\item \textsuperscript{56} SANFORD H. KADISH \& STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 929 (6th ed. 1995):
\end{itemize}

Insanity can become an important legal issue in a variety of circumstances. A contract may be unenforceable if one of the parties
tion of insanity in the criminal context, but another complementary definition in the civil context. The Pearson court explained,

[o]n its surface [Minn. Stat. Ann. § 526.11] would appear to imply that persons with psychopathic personalities are sane. The confusion which is thus caused is obviated when we consider the limited scope of the term ‘insanity’ when used to indicate a defense to crime. In [Minnesota], an uncontrollable and insane impulse to commit crime, in the mind of one who is conscious of the nature and quality of the act, is not allowed to relieve a person of criminal liability.57

In other words, Minnesota employs the M’Naghten58 test for criminal insanity — a lack of appreciation for the nature and quality of an act as right or wrong — and rejects the “irresistible impulse” test. A legislature is, of course, constitutionally entitled to make this choice. As the United States Supreme Court held in Leland v. Oregon, the “choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge [of right and wrong] should

was insane when the contract was made. A will may be held void if the testator was insane. In the criminal process, insanity can be relevant at different stages. Of greatest importance to the substantive criminal law, insanity at the time of the offense is usually a defense to a criminal charge. In addition, a person who is insane may not be tried, convicted, or sentenced. Neither may such a person be executed if convicted of a capital offense. Further, under many state statutes, a person who becomes insane while in prison must be transferred to a mental hospital.

The legal definition of insanity varies from context to context. See, e.g., Dusky v. United States, 362 U.S. 402, 402 (1960) (requiring a defendant to have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and . . . a rational as well as factual understanding of the proceedings against him” to stand trial); Ford v. Wainwright, 477 U.S. 399, 422 (1986) (stating execution consistent with the Eighth Amendment requires that defendants, at minimum, “know the fact of their impending execution and the reason for it.”) (Powell, J., concurring); Penry v. Lynaugh, 492 U.S. 302, 333 (1989) (Powell’s concurring text assumed, refusing to adopt a general rule that mentally retarded individuals can never possess the level of moral culpability that would justify a capital sentence and upholding death sentence of mentally retarded petitioner despite evidence that he possessed a mental age of seven). See generally LAFAVE & SCOTT, supra note 5, 302-403; ABRAHAM S. GOLDSTEIN, Excuse: Insanity in II ENCYCLOPEDIA OF CRIME AND JUSTICE 735-41 (1983) [hereinafter ENCYCLOPEDIA].

57. Pearson, 287 N.W. at 303.

58. This test is named for the English decision in which it was formulated, M’Naghten’s Case, 10 Cl. & Fin. 200 (H.L., 1843).
determine criminal responsibility." In Leland, the Supreme Court upheld an Oregon statute that adopted the traditional M‘Naghten “right and wrong” test, but did not recognize the more modern “irresistible impulse” test; that choice, the Court found, did not offend any concept of ordered liberty and did not violate the Due Process Clause of the Constitution.

Because Minnesota does not adopt the “irresistible impulse” definition of criminal insanity, possessing a SPP or being a SDP does not by itself imply sanity or constitute a defense to a criminal charge. Minnesota’s legislature recognizes the potential for lessened culpability when someone experiences an “irresistible impulse” or a similar lack of self-control. Instead of extending its definition of criminal insanity, it extended its notion of civil insanity. The Pearson court rightly continued,

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

Thus, Minnesota acknowledged the tension between “mad” and “bad” and responded to a potentially unworkable either/or paradigm with a creative solution.

One year later, Pearson was unanimously affirmed by the United States Supreme Court in Minnesota ex rel. Pearson v. Probate Court of Ramsey County. The Minnesota Supreme Court’s construction of the statute was, of course, binding on the Court. Accordingly, Chief Justice Hughes wrote, “[t]his construction of the statute destroys the contention that it is too vague and indefinite to constitute valid legislation.” In fact, Justice Hughes continued, the three elements from the Pearson test “are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.” Thus, the Court held that Minnesota’s

59. 343 U.S. 790, 800 (1952).
60. Id. at 800.
63. Kolender v. Lawson, 461 U.S. 352, 355 (1983) (“In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.”) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982)).
64. 309 U.S. 270, 274 (1939).
65. Id.
Sexual Psychopathic Personality Statute, at least in its original form, did not on its face violate substantive due process.\textsuperscript{66}

The Court also found that the statute did not violate procedural due process. After rehearsing the detailed and extensive procedural protection provided by the statute, the Court recognized the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality . . . and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration.\textsuperscript{67}

Yet, the Court stated, "we have no occasion to consider such abuses here, for none have occurred. The applicable statutes are not patently defective in any vital respect."\textsuperscript{68}

Finally, the Court concluded the statute did not violate the Equal Protection Clause of the Fourteenth Amendment. That provision ordinarily requires only that a legislature have a reasonable basis for selecting a class of people that a statute affects. The Court saw no reason for doubt upon this point. . . . whether the legislature could have gone farther is not the question. The class [the legislature] did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, 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 the clearest.\textsuperscript{69}

In the fifty-five years after the Supreme Court decided Pearson, the Court issued a number of opinions dealing with the constitutional issues surrounding civil commitment.\textsuperscript{70} In light of these cases, Minnesota's Sexual Psychopathic Personality Statute

\begin{itemize}
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id. at 276-77.
\item \textsuperscript{68} Id. at 277.
\item \textsuperscript{69} Id. at 274-75.
\end{itemize}
came under new constitutional attack. *In re Blodgett*\(^{71}\) is the primary Minnesota case upholding the constitutionality of the Sexual Psychopathic Personality Statute.\(^{72}\) The statute's 1994 repeal, re-enactment, and amendment, however, will likely fuel further debate — whether justified by the additions to the statute or not. This note argues that the current draft of Minnesota’s Sexual Psychopathic Personality Statute remains constitutional, even in light of the Supreme Court’s current jurisprudence on civil commitment. While not all the additions to the statute are wise, the statute should be upheld.

### III. Civil vs. Criminal Confinement

Minnesota passed its Sexual Psychopathic Personality Statute to deal with offenders who are, to some degree, both “mad” and “bad.” Rather than evaluating the statute in light of the contrast between the civil and criminal systems that gives rise to the “mad” or “bad” paradigm, this note evaluates the statute in light of the general rationales for confinement. Deconstructing the civil-criminal distinction demonstrates the potential for a new solution free from the “mad” or “bad” paradigm, particularly to the extent that the old paradigm does not reflect reality or achieve sound social goals. Although the basic distinction between confinement in the civil system and confinement in the criminal system is generally workable, the reality manifested by the existence of these types of sex offenders is not captured by the legal categories created under the two systems. Unthinkingly repeating the traditional boundaries of these categories is unproductive. Re-examining their practical implications is necessary. The categories were created to achieve specific purposes. They must be examined in light of those purposes. The boundaries of our legal categories are not fixed, but malleable in light of our goals. Confinement in any context is appropriate or inappropriate in light of its purposes, not in light of the labels pinned on it. With this in mind, Minnesota's decision to expand civil commitment rather than to divert the criminal system from its fundamental requirement of moral blameworthiness is best evaluated as a commendable attempt to address the danger posed by a set of uniquely disturbed individuals.

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71. 510 N.W.2d 910 (Minn.), *cert. denied*, 115 S.Ct. 146 (1994).
72. *Id.* at 916-17.
A. A Distinction Rooted More in Purpose than Reality

The civil-criminal distinction is, in some sense, artificial; whatever it is, it is an artifact made by law not found in nature. The distinction is rooted more in purpose than reality. In fact, early law was originally concerned primarily about maintaining peace and long predates the distinction. As the purposes of law became more sophisticated and diverse, the civil-criminal distinction arose in order to delineate and implement those purposes more effectively.

The civil and criminal law systems, therefore, differ not so much in the conduct they regulate, but in their purposes. For example, A hits B with his car and kills him. The same conduct may give rise to a civil suit for wrongful death resulting in monetary damages or a criminal prosecution for reckless homicide resulting in a prison sentence, or both. In this example, the principal purpose of the civil system is to compensate, while the principal purpose of the criminal system is to punish. Apart from the purpose the community is pursuing, nothing about A's conduct itself demands a certain form of response by the community.

In the above example, the civil and criminal systems substantially overlap because the same conduct gives rise to both civil and criminal consequences, each system pursuing related, but

73. See generally Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 HASTING L.J. 1325 (1991); Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795 (1992). Constitutional analysis properly follows substance, not label. See, e.g., Hicks v. Feiock, 485 U.S. 624, 631 (1988) (stating the criminal or civil label affixed to a contempt proceeding under state law was not controlling for federal constitutional purposes).

74. See Max Radin, Criminal Intent, VIII ENCYCLOPEDIA OF THE SOCIAL SCIENCES 126 (1944). Radin observes:

[H]istorically, the necessity for the existence of any mental element is the late requirement. The right of satisfaction recognized by early law is an undifferentiated claim which may in modern terminology be based on tort, crime or breach of contract. . . . Since the right . . . is a right to reparation, the question of the wrongdoer's intent is irrelevant.

Id. at 128.


76. See generally LAFAVÉ & SCOTT, supra note 5, at 12-16 (outlining theories of crime and tort and the interaction of criminal and civil law).
distinct purposes. The purposes pursued by each system may, however, also overlap. For example, the civil system, which usually seeks to compensate victims, often provides for punitive damages and certain types of forfeitures, that act to sanction the wrongdoer.\footnote{77} Even the criminal system, which primarily seeks to punish the blameworthy, provides for certain kinds of strict liability for regulatory crimes where the defendant must pay a fine or even go to jail despite his lack of personal culpability; the sanctions at least may be seen as compensating the community.\footnote{78} Based on the historical origins of the two systems and the overlap between them, it can hardly be persuasively argued that a civil or criminal label is somehow essential to a law's legitimacy.\footnote{79} Rather, the purpose a law is trying to achieve is the central factor to evaluate.

B. The Traditional Rationales for Confinement

Confinement, itself, is common to both the civil and criminal systems. Confinement is, in principle, acceptable because it can be used to pursue any number of purposes. The civil system, although it sometimes pursues punishment as a goal, does not employ confinement to punish. Deprivation of liberty as a punishment is considered too serious a sanction to be administered apart from a determination of guilt beyond a reasonable doubt.\footnote{80}


\footnote{78} Compare United States v. Park, 421 U.S. 658 (1975) (holding president of food chain strictly and vicariously criminally liable for storage of adulterated food) with United States v. Ward, 448 U.S. 242, 248-51 (1980) (upholding imposition of civil penalty for oil spill, even though conduct separately criminal). The "regulatory" offense category is not closed-ended. See Morissette v. United States, 342 U.S. 246, 250, 258 n.20 (1952) ("We attempt no closed definitions [of regulatory crimes], for the law on the subject is neither settled nor static.") (citing Francis B. Sayre, Public Welfare Offenses, 33 Col. L. Rev. 57, 73, 84 (1933) (examples of offense categories include: liquor, adulterated food or drugs, misbranded articles, anti-narcotics, criminal nuisances, traffic regulations, motor vehicle laws, and police regulations)). The Supreme Court's most recent view of regulatory crimes is reflected in Staples v. United States, 114 S.Ct. 1793 (1994) (requiring proof beyond a reasonable doubt that the defendant knew that the weapon he possessed was capable of firing as a machine gun to convict for possession of an unregistered machine gun). See also generally Phillip E. Johnson, Strict Liability: The Prevalent View, Encyclopedia, supra note 56, at 1518.

\footnote{79} See supra note 73.

\footnote{80} In re Winship, 397 U.S. 358 (1970).
Rather, confinement in the civil system is reserved to those who are in need of care and treatment and who pose some danger to themselves or others. The traditional goals of civil confinement are treatment and prevention of harm to the person confined or to the public.

In the criminal system, confinement is used primarily to punish individuals found guilty of crimes. It is also, however, used to prevent harm before guilt has been determined in limited circumstances. The traditional goals of criminal confinement are retribution and prevention of harm through deterrence and incapacitation. While punitive confinement may also provide an opportunity for some treatment, rehabilitation alone is not reason enough to support a prison sentence, and it is not a primary goal of the criminal system.

Thus, the traditional purposes pursued in each system formed the foundation for the paradigm that classifies individuals as either "mad" or "bad." Although the rationales behind confinement are often discussed thematically as either civil or criminal, for the purposes of this note, the rationales are best considered apart from the usual labels.

The four primary rationales for confinement in our legal system are retribution, deterrence, rehabilitation, and incapacitation. Essentially, each rationale states a purpose of confinement as it relates to the individual and society. In brief, a certain purpose and sort of individual is presupposed by each

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81. In the rather unique context of civil contempt, confinement in the civil system may also be used to coerce.

82. See, e.g., LINDSAY G. ARTHUR ET. AL., INVOLUNTARY CIVIL COMMITMENT—A MANUAL FOR LAWYERS AND JUDGES, 3 (Jeanne A. Dooley & John W. Party eds., 1988) (stating "[t]he principal purpose of civil commitment is treatment and protective isolation of the individual"); Addington v. Texas, 441 U.S. 418, 426 (1979) (stating "[t]he state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill").

83. See, e.g., United States v. Salerno, 481 U.S. 739, 748, 751-52 (1987) (holding that the Constitution did not prohibit the pretrial detention of an arrestee imposed as a regulatory measure on the ground of community danger pursuant to the Bail Reform Act, when Government proved by clear and convincing evidence that arrestee presented identifiable and articulable threat to an individual or the community).

84. See supra note 75.

85. In fact, rehabilitation alone is not even reason enough to support involuntary civil commitment of a person who is mentally ill, but harmless. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

86. See supra note 75.
rationale: to punish the culpable, to deter the rational, to cure the sick, and to disable the dangerous. In each case, the key to determining whether pursuing a particular purpose or purposes is appropriate in a particular situation is not whether the situation is similar to what has been traditionally considered civil or criminal. Rather, evaluation should focus on whether the characteristics and activity of the individual to be confined, the situation out of which the need for confinement arises, and the conditions of confinement and release are consistent with the asserted rationale’s purpose and presuppositions.

1. Retribution

Retribution means “repayment, recompense.” Yet, unlike personal restitution to an individual victim, retribution as a rationale for confinement refers to the wrongdoer repaying his “debt to society” by enduring punishment for his wrongdoing. The rationale presupposes a rational individual whose deliberate acts are evaluated as right or wrong. When a person does wrong, that is, causes or threatens harm with sufficient state of mind to do so, he asserts a power that places himself above every other individual in the community. This assertion of power is

88. See, e.g., Roscoe Pound, Criminal Justice in America, 126 (1930) (stating “the starting point of the criminal law... [in] the [19th] century... [was] that a criminal was a person possessed of free will who, having before him a choice between right and wrong... freely and deliberately chose... to do wrong....”).
89. See generally Pope Pius XII, Crime and Punishment, in Gerber and McAnany, supra note 75, at 59.

The criminal act... is... an opposition of one person against another... Considered in the object affected by it, the criminal action is an arrogant contempt for authority, which demands the orderly maintenance of what is right and good, and which is the source, the guardian, the defender and the vindication of order itself... The object affected by this act is also the legally established community, if and in as far as it places in danger and violates the order established by the laws... The punishment is the reaction, required by law and justice, to the crime... The order violated by the criminal act demands the restoration and re-establishment of the equilibrium which has been disturbed. It is the proper task of law and justice to guard and preserve the harmony between duty, on the one hand, and the law, on the other, and to re-establish this harmony if it has been injured.

Id. at 59-61. See also Immanuel Kant, The Philosophy of Law (W. Hastie trans., 1887).

But what is the mode and measure of Punishment which Public Justice takes as its Principle and Standard? It is just the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more
wrong because all individuals are equal and each possesses a moral and legal right not to be reduced to a mere means for another’s gratification.\textsuperscript{90} Through his self-preference, the wrongdoer upsets the order of the community.\textsuperscript{91} In order to restore moral and legal order, representatives of the community as a whole judge the individual accused of wrongdoing and, if he is found guilty, they punish him.\textsuperscript{92} By asserting authority over the individual through adjudication and punishment, the community counters the threat to the community and vindicates the individual victim, albeit vicariously.

Thus, punishment is inflicted upon an individual not simply because he has caused harm, but because he culpably willed the harm, and thereby asserted an unjustifiable right to harm. The assertion of an illegitimate right to harm, not simply the harm itself, upsets moral order reflected in the law. Punishment is, therefore, reserved for those who are morally responsible. Moral responsibility requires a guilty hand and a guilty mind\textsuperscript{93} — that is, an assertion of an illegitimate right to harm equals through action.\textsuperscript{94}

2. Deterrence

The deterrence rationale for confinement is related to retribution and, as such, is often joined with retribution as an appropriate community response to individuals who cause harm. The deterrence rationale focuses more on the individual than on the

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\textsuperscript{90} See supra note 89.
\textsuperscript{91} Id.
\textsuperscript{92} Id. note 5.
\textsuperscript{93} See supra note 89. See also 2 James FitzJames Stephen, A History of the Criminal Law of England 81-82 (1883).
\textsuperscript{94} The sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. . . . [T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law.
harm. People are presumed to be rational individuals who deliberately choose to act as they do, either causing harm or not causing harm. Based on the presumption of rationality, deterrence is the use of punishment as a disincentive.\textsuperscript{95} If a rational individual knows that punishment is the sufficiently swift, sure, and severe result of defined wrongdoing, then that individual is likely to avoid wrongdoing.

Deterrence may be either specific or general.\textsuperscript{96} That is, punishment of a particular individual may not only deter that individual from future conduct — specific deterrence — but may also deter others who are aware of the punishment — general deterrence. The imposition of punishment in order to achieve both specific and general deterrence requires rational actors and relatively proportional punishment. Otherwise, the link between choice and punishment is arbitrary.\textsuperscript{97} If the link is arbitrary, the

\begin{footnotesize}
\textsuperscript{95} The classic statement of the deterrence rationale is Jeremy Bentham, Principle of Penal Law, Part II Book 1 ch. 3 in I WORKS OF JEREMY BENTHAM 396-402 (Bowring ed. 1843). See generally Johannes Andenaes, Deterrence, ENCYCLOPEDIA, supra note 56, at 591; FRANKLIN E. ZIMRING & GORDON HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).


\textsuperscript{97} Herbert L. Packer, The Practical Limits of Deterrence, GERBER & MCANANY, supra note 75.

People ought in general to be able to plan their conduct with some assurance that they can avoid entanglement with the criminal law . . . . It is precisely the fact that in its normal and characteristic operation the criminal law provides this opportunity and this protection to people in their everyday lives that makes it a tolerable institution in a free society. Take (culpability) away, and the criminal law ceases to be a guide to the well-intentioned and a restriction on the restraining power of the state.

Id. at 106. See also Paul H. Robinson, Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993). Professor Robinson argues:

[T]here is disutility in a criminal justice system that imposes punishment that is not seen as deserved. . . . Moral condemnation is an inexpensive yet powerful form of deterrent threat. . . . This marvellously cost-efficient sanction is available, however, only if the system retains its moral credibility. If the system is seen to convict where no community condemnation is appropriate, the condemnation of criminal conviction is weakened. . . . [S]tudies suggest that most persons are motivated to obey the law, not because they fear being caught and punished (or shamed), but because they believe in the moral weight of the law . . . . because they want to do what is right . . . . But the effectiveness of the law in gaining compliance in this way is again a function of the law's credibility for doing justice. If the law matches closely people's shared intuitive notions of justice, it grows in its power to act as a model for their conduct. If the law is seen as being unjust, its power as a moral force is diminished.
\end{footnotesize}
system will be recognized as unjust due to the lack of culpability and people will be unable, or unwilling, to conform their conduct in light of probable consequences.98

3. Rehabilitation

Unlike retribution and deterrence, the rehabilitative rationale does not presuppose a rational individual who makes deliberate, meaningful choices.99 Instead, this rationale presupposes an individual who is, in some sense "sick," that is, lacking in the abilities required to function and succeed in society. The "sickness" may be a mental, physical, emotional or psychological ailment or disability. Some even argue the crime-causing disability may be a socio-economic disadvantage such as poverty.100 Criminal or otherwise undesired behavior is considered the result of this sickness. Future wrongful conduct is not avoided through penalty or stigma, but by treating the disability that causes it and rehabilitating the person.

While rehabilitation does not always require confinement, it often does because the malady is serious enough to make the person a danger to himself or others or because the person's environment is thought to have played a causal role in his misbehavior. The form of treatment may also require confinement and extensive supervision for its effective administration. When

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98. See supra note 97.
99. See generally Francis A. Allen, The Rehabilitative Ideal, GERBER & MCAHANY, supra note 75, 209-18; Michael Moore, Law & Psychiatry 294-35 (1984); Richard D. Schwartz, Rehabilitation, ENCYCLOPEDIA, supra note 56, at 1364. Compare Morris R. Cohen, Moral Aspects of the Criminal Law, 49 YALE L.J. 987, 1012-14 (1940) ("There are . . . a number of highly questionable assumptions [behind the reform] theory . . ." including that crime is the result of physical or mental disease, that crime is curable, that crime is curable at a reasonable cost, and that reform is an individual rather than a group matter.) with Robert Martinson, What Works? — Questions and Answers About Prison Reform, 6 PUB. INTEREST 22, 25 (1974) ("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism.") and Michael Vitiello, Reconsidering Rehabilitation, 65 TULANE L. REV. 1011, 1037 (1991) ("More sophisticated research techniques demonstrate that some offenders are amenable to rehabilitation . . .").
100. See, e.g., Jeffrie Murphy, Marxism and Retribution, 2 PHIL. & PUB. AFF. 217 (1973) (principally relying on Willem Bonger, Criminality and Economic Conditions (1916), a sustained Marxist analysis of crime and punishment); Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 L. & INEQUALITY 9, 20-23 (1985).
an individual is civilly confined, rehabilitation is principally uncontroversial. Rehabilitation of an individual serving a prison sentence, however, presents a conflict between the retributive and rehabilitative rationales: punishment presupposes choice and responsibility, while treatment, in this setting, presupposes the lack of choice and responsibility. The retributive rationale presupposes individuals who are exercising their free will, while the rehabilitative rationale presupposes individuals whose actions are determined by their social, emotional, or psychological condition — individuals who are not in control.

The simultaneous pursuit of punishment and treatment is legitimate, however, if the person is, in some sense both free and determined. Philosophically, arguments can be made that humans are “essentially” one or the other. The law, however, is a more flexible and practical endeavor, and it recognizes that human nature displays the qualities of both freedom and constraint. Treatment and care is appropriate to both individuals who are culpable and those who are not. The difficulty in applying the law is determining the degree of individual culpability. If culpable enough, the individual may be punished. Treatment, if useful, may accompany this punishment. If, on the other hand, any exercise of the will is sufficiently outweighed by sickness or disability so as to make the person predominately irresponsible, the degree of punishment appropriate may be so greatly reduced that it is unreasonable for society to impose it at all. Then, treatment or incapacitation becomes the appropriate, practical response, insofar as any response at all is appropriate.

4. Incapacitation - The Prevention Rationale

Incapacitation occurs whenever an individual is confined, regardless of the reasons for or conditions of confinement. Unlike the first three rationales, incapacitation is not based upon an assumption that human persons are rational and free or sick and determined. The only basic presumption is that the individual confined will act or is likely to act in an undesirable

101. The tension between our moral ideal and the assumptions of our science is ably explored at length in Lloyd L. Weinreb, Natural Law and Justice (1987). Weinreb concludes, “[t]he contradiction between freedom and cause . . . is more than a weakness in our moral understanding . . . or our science. . . . It is an antinomy which cannot be overcome; it is complete and final.” Id. at 9. See generally, Matthew A. Pauley, The Jurisprudence of Crime and Punishment from Plato to Hegel, 39 Am. J. Juris. 97 (1994) (demonstrating that each of the contemporary approaches to crime and punishment are closely linked to assumptions about human nature by examining the contributions of important western philosophers and sociologists).
manner if he is not confined or otherwise restrained. The simple
goal, therefore, is to disable the individual.\textsuperscript{102} Usually incapacitation means denying the individual access to his potential victims or placing the individual under enough control and supervision to keep him from hurting himself or others.

Thus, prevention of harm is achieved whenever someone dangerous is incapacitated — whether it be to punish, to deter, or to treat. Whether the prevention of harm may be pursued by itself, outside of the context of the other three rationales for confinement, however, is controversial.\textsuperscript{103} A common objection to incapacitation solely to prevent harm is that it involves highly fallible predictions of future behavior.\textsuperscript{104} The degree of certainty attainable or required to justify such detention, as well as the degree to which the other three rationales support or discredit commitment of a person who possesses a SPP or is a SDP, is at the heart of much of the controversy surrounding Minnesota’s Sexual Psychopathic Personality Statute.

C. The Rationales Behind Minnesota’s Sexual Psychopathic Personality Statute

Rehabilitation and incapacitation are the two rationales that justify civil commitment pursuant to Minnesota’s Sexual Psychopathic Personality Statute. The statute provides for commitment that keeps these dangerous individuals from harming the public, but it also requires they be given individualized care and treatment.\textsuperscript{105} These two rationales correspond to the two constitutional requirements for involuntary civil commitment in the civil system: that the person committed be both mentally ill and dan-


gerous. This note argues that a person who possesses a SPP or is a SDP is dangerous and mentally ill, although not arguably in a traditional medical sense. The purpose of commitment pursuant to Minnesota's Sexual Psychopathic Personality Statute is to treat and incapacitate. As such, the commitment is constitutional.

Other views exist, however. Professor C. Peter Erlinder, the author of an article critical of Minnesota's Sexual Psychopathic Personality Statute writes, "[a]lthough purportedly a civil commitment statute, the failure of the Psychopathic Personality statute to require a medically recognized mental illness raises the question whether its purpose is treatment or incarceration. If its intention is incarceration, the statute should be cast into the criminal category." Equating the imprecise term "incarceration" first with preventive detention and then with punishment, Professor Erlinder asserts the legislative history indicates that the purpose of the statute is preventive detention, not treatment. The legislative history is confirmed, he asserts, because the condition of possessing a SPP or being a SDP is not "medically recognized" and because these individuals are considered generally untreatable. Accordingly, Professor Erlinder concludes, the statute constitutes "criminal" punishment in "civil" disguise. Even worse, he writes, "the Psychopathic Personality statute punishes a condition rather than an act." Unfortunately, Professor Erlinder places misguided emphasis on the labels, "criminal" and "civil." Purpose, not label, as evidenced by all the circumstances surrounding confinement ought to be the focus. A failure to look at purpose leads to serious flaws in reasoning that are addressed in the following subsections.


107. Erlinder, supra note 10. Professor Erlinder's article was written before In re Blodgett, 510 N.W.2d 910 (Minn. 1994), cert. denied, 115 S.Ct. 146 (1994) was decided by the Supreme Court of Minnesota and before Minnesota's Sexual Psychopathic Personality Statute was repealed and reenacted with amendments.

108. Id. at 122.

109. Id. at 103-04, 122-25.

110. Id. at 123. As stated above, the just imposition of punishment requires a guilty mind and a guilty hand. See supra note 5. As such, it is impermissible to punish a person for a state of being that he did not choose or over which he currently possesses no control. Robinson v. California, 370 U.S. 660, 667 (1962) (holding [the status of] being an addict cannot be made criminal consistent with Eighth Amendment); Cf. Baender v. Barnett, 255 U.S. 224, 225-26 (1921) (possessing counterfeit checks construed to require "conscious" possession to avoid constitutional issue).
1. The Rationale for a Particular Instance of Confinement Must be Deduced from All the Surrounding Circumstances.

First, "punishment" must not be inferred from confinement alone. While incapacitation, that is, confinement in order to prevent harm to the person confined or to others, does constitute preventive detention, it does not necessarily constitute punishment, even in the absence of treatment for a "medically recognized" mental illness. On the contrary, preventive detention presumes only that the individual detained will act or is likely to act in an undesirable manner, if he is not confined or otherwise restrained. Accordingly, treatment is compatible with preventive detention, but not analytically necessary. Preventive detention may logically occur for its own sake, in conjunction with treatment in the civil system, or in conjunction with punishment in the criminal system. The purpose of any particular confinement must be determined by looking at all the relevant surrounding circumstances. Accordingly, even if Professor Erlinder is correct that no treatment accompanies confinement pursuant to Minnesota's statute, he cannot justifiably claim that the confinement necessarily constitutes punishment.

In *Kennedy v. Mendoza-Martinez*, the Supreme Court examined whether the automatic forfeiture-of-citizenship provisions of immigration laws amount to mere regulatory restraint or punishment in violation of the Fifth and Sixth Amendments to the Constitution. After examining the traditional tests used to determine whether a governmental act is punitive, the Court in *Mendoza-Martinez* concluded that courts must ultimately decide whether some disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose in light of various factors that may sometimes point in differing directions. Relying on *Mendoza-Martinez*, the Supreme Court found that confinement itself is neutral

111. *See supra* note 83.
113. The factors the Court stated are relevant to the inquiry whether a governmental act is punitive in nature are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . . "

*Id.* at 168-69.
on the issue of punishment in *Bell v. Wolfish*, a case concerning the constitutional rights of pre-trial detainees. In *Bell*, the Court found, whether the pre-trial detention facility was called

a jail, a prison, or a custodial center, the *purpose* of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee’s understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into “punishment.”

Accordingly, the simple fact that the confinement of a person who possesses a SPP or is a SDP may be involuntary, enduring, and arguably uncomfortable, does not mean the commitment constitutes punishment. Employing the language from *Mendoza-Martinez*, the Court in *Bell* concludes that,

> [a]bsent a showing of an expressed intent to punish . . . [whether a particular restriction or confinement imposed by the state constitutes punishment] generally will turn on ‘whether an alternative purpose to which [the restriction or confinement] may be rationally connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’

The “alternative purposes” assigned to confinement pursuant to the Minnesota Sexual Psychopathic Personality Statute are rehabilitation and incapacitation. As stated by the Supreme Court of Minnesota in *Pearson*,

> [w]hile the abnormalities of the group placed under the jurisdiction of the probate court by this act differ in form from those which characterize inebriates, idiots and insane persons, the need for observation and supervision is the same, and the considerations which led this court . . . to recognize the latter as being proper subjects for guardianship apply with equal force to the former. In the interest 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.

115.  Id. at 537 (emphasis added).
116.  Id. at 538 (quoting *Mendoza-Martinez*, 372 U.S. 144 at 168-69).
117.  State ex rel. Pearson v. Probate Court, 287 N.W. 297, 300 (Minn. 1939), aff’d, 309 U.S. 270 (1940).
The *Pearson* court's statement of purpose is affirmed in fact by the actual conditions of confinement under the statute; they reflect the purposes of rehabilitation and incapacitation, not retribution. Unlike most prison sentences, the length of commitment under the Minnesota statute is indefinite. The individual committed may be released whenever he is no longer in need of treatment and no longer a threat to himself or others. The individual is committed to a secured hospital with other mental patients, not to a prison with convicted criminals. In addition, more privileges are available in the hospital than in the prison. For example, an individual committed pursuant to the Sexual Psychopathic Personality Statute has the right to be free from restraints, to correspond freely without censorship, and to receive phone calls and visitors. Finally, treatment is available and administered pursuant to individualized program plans.

Thus, commitment pursuant to Minnesota's Sexual Psychopathic Personality Statute is not punishment. Preventive detention may logically occur apart from treatment or punishment. Nevertheless, commitment pursuant to Minnesota's statute combines preventive detention with treatment in an effort both to incapacitate and to rehabilitate.

2. The Rationale for a Particular Instance of Confinement

May be Rehabilitation Despite the Lack of Effective Treatment of a Medically Recognized Condition

Even when Professor Erlinder concedes for argument's sake that the purposes of Minnesota's Psychopathic Personality Statute are to incapacitate and rehabilitate, not punish, he still asserts that the commitment is pure preventive detention or punishment because, in practice, the treatment offered is ineffective and the condition being treated is not "medically recognized." His argument, however, is unpersuasive.

First, persons committed pursuant to Minnesota's statute may be treatable. The Supreme Court of Minnesota in *Blodgett* refers to several then ongoing efforts to discover effective treat-

119. *Id.* § 253B.18, subds. 7 and 15; In re Blodgett, 510 N.W.2d 910, 916 (Minn.), *cert. denied*, 115 S.Ct. 146 (1994).
121. *Id.* § 253B.03.
122. *Id.*
ment for sex offenders.124 Dr. Barbara K. Schwartz, a scientist involved in one of these efforts states, "[w]hile popular opinion may continue to be 'nothing works,' thousands of professionals are exploring 'what works.'"125 In fact, Dr. Schwartz states, "further studies and more careful analysis of previous studies have yielded positive outcomes in 47% to 86% of the programs studied."126 According to Dr. Schwartz, Paul Gendreau, former president of the Canadian Psychological Association, asserted appropriate treatment programs reduce recidivism by 53%.127 In spite of the pessimistic attitudes held by many, studies have reported success in treating sex offenders.128

In addition, treatment may sometimes be ineffective only because individuals refuse to cooperate. "It... seems incongru-ous," the Supreme Court of Minnesota notes in Blodgett, "that a sexual offender should be able to prove he is untreatable by refusing treatment. . . . [The committed individual] 'may never agree to be treated, but... the state has the power to keep trying.'"129

Second, that rehabilitation may, ultimately, never be attained, is irrelevant; when a reasonable, genuine treatment effort is being made, its relative effectiveness is not the issue. A lack of scientific understanding and an entirely effective treat-

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124. In re Blodgett, 510 N.W.2d 910, 916 n.12 (Minn.), cert. denied, 115 S.Ct. 146 (1994) (citing Barbara K. Schwartz, Ph.D., Effective Treatment Techniques for Sex Offenders, 22 PSYCHIATRIC ANNALS 315 (June 1992) and Harry L. Kozol et. al., The Diagnosis and Treatment of Dangerousness, 18 CRIME AND DELINQUENCY 371, 381 (1972)).

125. Schwartz, supra note 124, at 319.

126. Id. at 315 (citing Paul Gendreau & Robert R. Ross, Revivification of Treatment: Evidence from the 1980s, 4 JUSTICE QUARTERLY 349-408 (1987); P. Freiberg, Rehabilitation is Effective if Done Well, Studies Say, APA MONITOR 1, 3 (1990)).

127. Schwartz, supra note 124, at 315.


ment does not transform treatment into punishment or hospitals into prisons. Legitimacy of effort, not outcome, is determinative. In brief, commitment pursuant to Minnesota's Sexual Psychopathic Personality Statute is not punishment, but a legitimate form of preventive detention that provides for supervision and mandates an attempt at treatment.

The second half of Professor Erlinder's objection — that persons committed under the statute do not suffer from "medically recognized" conditions — is problematic for several reasons. First, "medically recognized" is not only a highly ambiguous term, but it is used in a highly ambiguous manner. Certainly, no general consensus exists in the medical community on the significance of the symptoms and conditions displayed by repeat sexual offenders. On the other hand, doctors are willing to testify at the commitment proceedings, presumably basing their testimony on their medical expertise. Even if a general consensus did exist on what constitutes a medical condition, a portion of these persons committed under the statute may well suffer from those "medically recognized" conditions and those who do not may well exhibit "medically recognized" symptoms. While the application of the statutory criteria does not precisely mirror the diagnosis of well-recognized, specific medical afflictions, the symptoms and tendencies of those whose lives are characterized by pedophilia, sexual sadism, and anti-social personality disorders — all included in the Diagnostic and Statistical Manual of Mental Disorders130 — are substantially similar, if not identical, to the symptoms and tendencies of those individuals the statute addresses.

In addition, Professor Erlinder arguably equates the term "medically recognized" with the existence of effective treatment, blending the second half of his objection into the first. But as previously argued, the relative ineffectiveness of treatment efforts cannot be fairly construed as conclusive evidence that no condition exists, treatable or otherwise. Condition and treatment are related, but AIDS is no less a medical condition because science is currently unable to cure it. In brief, the lack of an effective treatment program has no significant bearing on the question of whether some condition constitutes a "medically recognized" mental illness. Schizophrenia, too, was no less a mental disease because it was at one time misunderstood and difficult or impos-

sible to treat.\textsuperscript{131} As stated in \textit{Eckerhart v. Hensley},\textsuperscript{132} a case examining the constitutional constraints on the treatment and conditions at state mental hospitals, "[t]he state's inability to improve [a dangerous person's] mental condition because no effective treatment is known would not render unconstitutional his involuntary confinement for the protection of himself or others."\textsuperscript{133} Despite ineffectiveness in treatment, rehabilitation is a rationale that, along with incapacitation, warrants commitment under Minnesota's Sexual Psychopathic Personality Statute.

Finally, even if the term "medically recognized" had meaning apart from a measured treatment, a medically recognized condition is hardly a constitutional prerequisite to lawful involuntary civil commitment. The constitutional requirements are, in short, solely that the individual be \textit{mentally ill} and dangerous.\textsuperscript{134} Without justifying his conclusion that "mental illness" in this constitutional context must necessarily be "medically recognized," Professor Erlinder predicts the confinement of "unpopular or socially eccentric persons" because the statutory definition lacks a direct corollary in medicine.\textsuperscript{135} Drawing an emotional analogy to the Soviet Gulag, he writes,

\begin{quote}
the Supreme Court [has] . . . noted that "[a]t one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder but which is in fact, within the range of conduct that is generally acceptable." This is precisely what the Psychopathic Personality Statute allows by authorizing confinement based on the perceptions of "abnormal behavior" held by a majority of the legislature in 1939, rather than a currently recognized medical diagnosis of illness.\textsuperscript{136}
\end{quote}

On the contrary, the 1994 amendments to the Sexual Psychopathic Personality Statute demonstrate the Minnesota legislature's current belief that serial rape and child molestation, conduct typical of a person who possesses a SPP or is a SDP, is

\textsuperscript{131} See generally Marc H. Jacobs, \textit{What is Schizophrenia?}, in \textit{TREATING SCHIZOPHRENIA} 1-25 (Sophia Vinogradov & Irvin D. Yalom eds., 1995) (tracing the understanding of schizophrenia as it developed over the last century).

\textsuperscript{132} 475 F.Supp. 908 (W.D. Mo. 1979).

\textsuperscript{133} Id. at 914-15 n. 16.

\textsuperscript{134} Fouche v. Louisiana, 504 U.S 71, 77-78 (1992) (White, J., plurality opinion). But see infra notes 216 and 222.

\textsuperscript{135} Erlinder, \textit{supra} note 10, at 157.

\textsuperscript{136} Id. at 159.
not merely "abnormal," and is quite outside "the range of conduct that is generally acceptable."\textsuperscript{137}

3. In the Context of Minnesota's Sexual Psychopathic Personality Statute, Mental Illness is Ultimately a Term with a Legal Function and a Legal Definition that Does Not Need a Direct Analog in Medicine

More important, words with legal, not medical, functions must ultimately be defined legally, not medically. The medical meaning of "mental illness" is properly understood to be different from the legal meaning of "mental illness."\textsuperscript{138} In fact, the meaning of "mental illness" or "insanity" varies from one legal context to another.\textsuperscript{139} This is not evidence of arbitrary law-making; it indicates that the law seeks practical ends. Law addresses specific problems and serves various purposes, many of which are quite distinct from the problems and purposes of medicine.

If the purposes of law and medicine were the same, the law might well defer to medical definitions. Because they are not, it cannot. As the Court of Appeals for the District of Columbia Circuit observed in \textit{McDonald v. United States},\textsuperscript{140} a criminal prosecution involving the insanity defense, "mental disease" means one thing to a physician bent on treatment, but something different, albeit similar, to a court of law.\textsuperscript{141} Medicine's purpose is to diagnosis and cure individuals who are ill. While treatment may be a purpose of the law in civil commitment, the law also reflects broader, sometimes conflicting purposes including maintaining a peaceful and safe community. Accordingly, while the law ought to take into account medical and psychological knowledge in order to avoid becoming arbitrary, it must not let itself be unduly constrained by medicine. If the law refused to act beyond

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} See \textit{Foucha v. United States}, 504 U.S. 71, 96 ("The divergence between law and psychiatry is caused in part by the legal fiction represented by the words 'insanity' or 'insane,' which are a kind of lawyer's catchall and have no clinical meaning.") (quoting J. Biggs, \textit{The Guilty Mind} 117 (1955) (Kennedy, J., dissenting)). See also \textit{Foucha}, 504 U.S. at 96 ("The legal and the medical ideas of insanity are essentially different, and the difference is one of substance.") (quoting J. Bouvier, \textit{Law Dictionary} 1590 (8th ed. 1914) (Kennedy, J., dissenting)).

\textsuperscript{139} See supra note 56. Unfortunately, the "lawyer's paradise where all words have a fixed, precisely ascertained meaning" does not exist. JAMES B. THAYER, \textit{Preliminary Treatise on Evidence at the Common Law} 428-29 (1898).

\textsuperscript{140} 312 F.2d 847 (D.C. Cir. 1962).

\textsuperscript{141} \textit{Id.} at 851.
the frontiers of the scientific disciplines of biology, sociology or psychology, the law might well fail in its legal duties to punish, to compensate or to protect. Medicine and law should act at cross purposes as little as possible, but because each discipline is a separate discipline, some incongruity between categories, processes, and the like is not only acceptable, but to be expected.

An examination of the modern development of the criminal insanity defense in this country best demonstrates the need to free the legislature and judiciary to determine for themselves the meaning of a legal term such as "mental illness." Criminal "insanity" has meant many things at different points in legal history; few of the formulations could be described as wholly corresponding to medical knowledge. The point was recognized by the dissent in *Foucha v. Louisiana*:

> Profound differences [exist] between clinical insanity and state-law definitions of criminal insanity. It is by now well established that insanity as defined by the criminal law has no direct analog in medicine or science.

In 1954, the Court of Appeals for the District of Columbia Circuit lost sight of the distinction between clinical and criminal insanity and took a wrong turn in its treatment of the criminal insanity defense. The Circuit was distracted from its primary purpose in criminal cases — to determine individual guilt — by doctors whose primary purpose was to diagnose and to treat. The results were disastrous. In *Durham v. United States*, the Circuit abandoned the *M'Naghten* "right-wrong" insanity test because the Court believed, "[b]y its misleading emphasis on the cognitive, the ... test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility." In its effort — as the Circuit would later describe it — to "facilitate the giving of testimony by medical experts in the context of a legal rule," the Circuit attempted to conform its legal definition of insanity to the medical concept of insanity by adopting the so-called *Durham* test, that is, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental

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142. See generally *LaFave & Scott*, supra note 5, at 311-32 (describing the traditional tests — *M'Naghten* "right-wrong" and "irresistible impulse" — and the modern tests — *Durham* "product" and American Law Institute "substantial capacity").


144. 214 F.2d 862 (D.C. Cir. 1954).

145. *Id.* at 871-72.

defect." The Durham test, in effect, shifted responsibility for determining the legal culpability of a defendant to doctors who testified in medical terms. Once "'some evidence of mental disorder [was] introduced, . . . sanity, like any other fact, [had to] be proved as a part of the prosecution's case beyond a reasonable doubt." In fact, a district court in the District of Columbia Circuit would later state that under the Durham test a "mere scintilla of evidence" of the defendant's insanity would cast the burden on the Government.4 The ease with which some evidence that an act is the product of mental disease or defect can be found, or rather, the ease with which a doctor willing to testify that he found some evidence that an act is the product of a mental disease or defect can be found, came close to eliminating the criminal law's long-standing approach that treated all people as presumptively sane.1 After the adoption of the Durham test, the number of insanity acquittals by the court as a matter of law rose sharply until the Circuit squarely ruled that insanity was not a medical question to be resolved by the court based on psychiatric testimony, but a fact question to be resolved by a well-instructed jury.151

147. Durham, 214 F.2d at 874-75.
148. Id. at 866 (quoting Tatum v. United States, 190 F.2d 612, 615 (1951), aff'd, 249 F.2d 129 (1957), cert. denied, 356 U.S. 943 (1958) (quoting Glueck, Mental Disorder and the Criminal Law 41-42 (1925)).
150. See generally LaFave & Scott, supra note 5, at 342-60 (outlining the procedures applicable to presenting the insanity defense, including the burden of proof); Davis v. United States, 160 U.S. 469 (1895) (holding defendant is presumed sane until contrary evidence introduced).
151. McDonald v. United States, 312 F.2d 847, 850-51 (D.C. Cir. 1962): Our eight-year experience under Durham suggests a judicial definition, however broad and general, of what is included in the terms 'disease' and 'defect' . . . . Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. (emphasis added).

The Report of the President's Commission on Crime in the District of Columbia 550 (1966) reported that insanity acquittals under Durham dropped sharply (more than 50%) and stabilized at two to three percent of all defendants following McDonald.
Finally, in 1972, the Court of Appeals for the District of Columbia Circuit overruled Durham in United States v. Brawner.\footnote{152} Brawner rejected the Durham test because it permitted clinical concepts to determine, without more, a legal result.\footnote{153} The Brawner court observed:

In the absence of a definition of "mental disease or defect," medical experts attached to them the meanings which would naturally occur to them — medical meanings — and gave testimony accordingly. The problem was dramatically highlighted by the weekend flip flop case, In re Rosenfield, 157 F.Supp. 18 (D.D.C. 1957). The petitioner was described as a sociopath. A St. Elizabeth's psychiatrist testified that a person with a sociopathic personality was not suffering from a mental disease. That was Friday afternoon. On Monday morning, through a policy change at St. Elizabeth's Hospital, it was determined . . . that the state of a psychopathic or sociopathic personality did constitute a mental disease.\footnote{154}

Thus, when psychiatric testimony determined criminal liability, it changed, literally, overnight.

This shift in policy at St. Elizabeth's Hospital also resulted in another problematic case, Blocker v. United States.\footnote{155} In Blocker, the defendant claimed insanity in defense of a murder charge.\footnote{156} Three psychiatrists testified at the defendant's trial, one for the Government and two for the defendant. Although the doctor testifying for the Government found no evidence that the defendant was insane, all three doctors testified that a sociopathic personality was not a mental disease or defect.\footnote{157} Less than a month after the defendant was convicted, St. Elizabeth's changed its policy. Based on St. Elizabeth's decision to, in the future, label people suffering from sociopathic personality disturbance as mentally ill, the Blocker court granted the defendant a new trial.\footnote{158} In Brawner, the Circuit acknowledged that continued shifts in legal culpability without corresponding change in defendants or the law was unacceptable.

\footnote{152}{471 F.2d 969, 973 (D.C. Cir. 1972) (adopting the American Law Institute's "substantial capacity" insanity test based on § 4.01 of the Model Penal Code).}
\footnote{153}{Id. at 975-78, 981-85.}
\footnote{154}{Id. at 978.}
\footnote{155}{274 F.2d 572 (D.C. Cir. 1959).}
\footnote{156}{Id. at 572.}
\footnote{157}{Id. at 572-73.}
\footnote{158}{Id. at 573.}
Although the conflict between law and medicine is especially conspicuous in decisions like *Rosenfield* and *Blocker*, it is always a serious concern. Advances in medical knowledge and treatment may come slowly or quickly and sometimes come on a case by case basis. The law, however, requires uniform rules and the equal treatment of similarly situated individuals. Because the medical community does not have a single understanding of insanity or mental illness and because many diverse legal situations arise in which mental health and competency are issues, the Supreme Court has left the states free, constitutionally, to define insanity for themselves.

The Supreme Court put it well in *Leland v. Oregon*:\textsuperscript{159} The "choice of a test of legal insanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge [of right and wrong] should determine criminal responsibility."\textsuperscript{160} In the absence of clear guidance in the text of the Constitution or our constitutional traditions, the resolution of such issues is best left to the states. Justice Marshall, speaking for a plurality of the Court in *Powell v. Texas*,\textsuperscript{161} a case examining whether punishing an alcoholic for public intoxication constitutes cruel and unusual punishment, agreed: "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear to doctors or lawyers."\textsuperscript{162}

Minnesota’s Sexual Psychopathic Personality Statute draws on the notion of legal insanity to justify the civil commitment of a person who has a SPP or is a SDP. Because the statutory criteria are parallel to the irresistible impulse insanity test, the constitutional requirement that persons be “mentally ill” before they can be involuntarily committed in the civil system is satisfied. The fact that these persons “act[ ] destructively for reasons not fully understood by our medical, biological and social sciences”\textsuperscript{163} should not be allowed to paralyze the law. Critics ought to stop arguing mindlessly that *legal* terms must reflect *medical* definitions and focus on these individuals’ need for treatment and supervision, Minnesota’s constitutional right to attempt to provide it, and the danger to the public if these people are released.

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\textsuperscript{159} 343 U.S. 790 (1952).
\textsuperscript{160} *Id.* at 800.
\textsuperscript{161} 392 U.S. 514 (1968) (Marshall, J., plurality opinion).
\textsuperscript{162} *Id.* at 536-37.
\textsuperscript{163} In re Blodgett, 510 N.W.2d 910, 918 (Minn.) *cert. denied*, 115 S.Ct. 146 (1994).
The Minnesota Supreme Court put it well in *Blodgett* when it observed:

> The argument against the constitutionality of civil commitment for a psychopathic personality is that the condition is not a mental illness, at least not one medically recognized, or at least not yet. But while the term “psychopathic personality” is considered outmoded today, the reality it describes is not; this reality, even if it is not currently classified as a mental illness, does not appear to be a mere social maladjustment. . . . Whatever the explanation or label, the “psychopathic personality” is an identifiable and documentable violent sexually deviant condition or disorder. . . . The problem is not what medical label best fits statutory criteria, but whether these criteria may, constitutionally, warrant civil commitment.”164

In sum, Minnesota’s Sexual Psychopathic Personality Statute allows the state to incapacitate and attempt to rehabilitate individuals who because they either possess a SPP or are a SDP are both mentally ill and dangerous within the meaning of constitutional jurisprudence. As long as both treatment and the prevention of harm are the purposes pursued, whether one of the two goals is pursued with greater success or efficiency ought not be crucial. In the end, bickering over medical terminology ought to give way to practical legal solutions.

**D. The Use of Predictions of Dangerousness in Order to Prevent Harm**

One of the two goals of Minnesota’s Sexual Psychopathic Personality Statute is to prevent harm to the public. When Minnesota commits an individual under its statute, the state concludes, based in part upon an individual’s pattern of prior sexual misconduct,165 that an individual will or is likely to harm others in the future if he is not confined. Nevertheless, many assert that predictions of future dangerousness are so fallible that confinement based on a prediction of future dangerousness is a dubious endeavor constitutionally.166 Although prevention of harm is not the only goal of Minnesota’s Sexual Psychopathic Personality Statute, to the extent that commitment under the statute relies

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164. *Id.* at 914-15.

165. A SPP must be evidenced by “a habitual course of misconduct in sexual matters.” MINN. STAT. ANN. § 253B.02, subd. 18a. A SDP must have “engaged in a course of harmful sexual conduct.” *Id.* § 253B.02, subd. 18b.

166. *See supra* note 104.
on a prediction of future dangerousness, these concerns must be addressed.

Disapproval of the use of predictions of dangerousness to justify what is, in part, preventive detention may be rebutted in three ways. First, the prevention of harm is a legitimate and compelling legal goal. Second, prediction is a common and necessary feature of the legal system. Predictions are constantly made without undue difficulty in many areas of legal decision-making. Third, while prediction does involve some uncertainty, the degree of uncertainty involved in the prediction of future dangerousness is acceptable here in light of the exacting statutory criteria and the experience of high recidivism rates.\textsuperscript{167}

1. Preventing Harm is a Legitimate and Compelling Legal Goal

Although preventing harm cannot by itself justify civil commitment under Minnesota's Sexual Psychopathic Personality Statute, it is a legitimate goal that the legal system must vigorously pursue. Prevention of harm serves as a basis for confining dangerous individuals in numerous situations, both criminal and civil.

In 1984 in \textit{Schall v. Martin},\textsuperscript{168} the Supreme Court held that the pretrial detention of juveniles based on a finding that a serious risk exists that the child may commit an act that if committed by an adult would constitute a crime was a “legitimate state objective” and was constitutional.\textsuperscript{169} In that same year, Congress passed 18 U.S.C. § 3124 as part of the Bail Reform Act of 1984. 18 U.S.C. § 3124 allows the pretrial detention of an individual accused of a crime if necessary to ensure the appearance of the defendant at trial or the safety of any other person or the community. The constitutionality of 18 U.S.C. § 3124 was challenged in \textit{United States v. Salerno}.\textsuperscript{170} In \textit{Salerno}, the Court held, “[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal. . . . We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty inter-

\begin{itemize}
  \item \textsuperscript{168} 467 U.S. 253 (1984).
  \item \textsuperscript{169} \textit{Id.} at 255-57.
  \item \textsuperscript{170} 481 U.S. 739 (1987).
\end{itemize}
Relying on Schall, the Court held that the pretrial detention of dangerous arrestees under the Bail Reform Act did not violate the Due Process Clause. The abundance of situations where preventive detention is permitted in order to protect the public demonstrates the interest in preventing crime and other harmful conduct is legitimate and compelling.

2. Prediction is a Common and Necessary Feature of the Legal System

Empirical certainty is not a necessary precondition to legal action. If it were, little could be legally accomplished. In fact, prediction is constantly and successfully employed in both criminal and civil situations. Prediction, for example, is used to determine the length of criminal sentences, whether to terminate parental rights, and whether to grant parole, injunctions, and bail prior to trial. Each of these situations involve substantial, even constitutionally fundamental, individual rights. As Marc Miller and Professor Norval Morris state, "a jurisprudence..."
that pretends to exclude the role of predictions of dangerousness is self-deceptive.”

Although prediction necessarily involves uncertainty, prediction is an essential component of our legal system. The proper reaction to uncertainty is not asserting that prediction can never be a valid basis for confinement, but ensuring adequate due process protection both prior to, during, and following commitment. Minnesota's Sexual Psychopathic Personality Statute provides for elaborate and detailed procedural protection. These procedures will allow any necessary attacks on the credibility or reliability of the evidence offered to prove dangerousness in any particular case.

3. The Level of Uncertainty Involved in Predicting Dangerousness is Acceptable

While uncertainty exists in predicting dangerousness, it should not be overstated. The Supreme Court recognizes the permissibility of preventive detention, which necessarily involves the prediction of future dangerousness, in numerous situations. In fact, the Supreme Court in Schall observed:

"From a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and the district court, "that it is impossi-


180. See supra notes 13-44 and accompanying text.

181. See Barefoot v. Estelle, 463 U.S. 880 (1983). In the course of upholding a statute that, in effect, allowed a finding of future dangerousness to justify a death sentence, the Court rejected the argument that "psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community ...." Id. at 896. The factfinder, the Court pointed out, has the benefit of cross-examination and contrary evidence by the opposing party. Id. at 898.

Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored. ... We are unconvinced ... that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.

Id. at 889-901.

182. See supra notes 168-71, 174-78 and accompanying text.
ble to predict future behavior and that the question is so vague as to be meaningless." While studies suggest that clinical prediction is unreliable, these claims must be qualified by the high rate of recidivism among sexual offenders. In addition, to the extent that recidivism is estimated by referring to arrests, it must be assumed recidivism will be greatly underestimated. Self-reporting by the offenders themselves shows the great disparity that exists between official records and actual incidents. A number of sex offenders committed under a sexual predator statute in Washington anonymously provided information regarding their criminal acts. Law enforcement records showed a mean of 1.8 rape victims per offender, but the offenders reported a mean of 11.7 victims per offender. Law enforcement records stated the offenders, as a group, had been charged with a total of 66 sex offenses, but the offenders reported a total of 433 actual rapes. Child molesters were also interviewed in the same study. Law enforcement records showed that the group had molested 135 different victims, but the group confessed to molesting 959 different victims. The degree of recidivism must also be considered in light of the fact that many crimes go unreported, especially sexual crimes like rape and molestation—the type of crimes primarily addressed by Minnesota's Sexual Psychopathic

184. See supra note 104.
185. Although, results vary significantly from study to study, the Supreme Court of Washington found that the target population of its sexually violent predator law were usually repeat offenders and displayed rates of recidivism as high as 80%. In re Young, 857 P.2d 989, 1003-04 (Wash. 1993). The Washington State Institute for Public Policy predicted 24% of the sex offenders convicted between 1985 and 1991 will be arrested again. Gayle M.B. Hanson, Experts Vexed at What to Do with Sex Offenders; Authorities Try New Methods for Tracking Them, WASH. TIMES, June 6, 1994, at A8. One study followed up 178 known rapists and child molesters for 50 to 88 months and found 27.5% were convicted of a new sex offense and 40% were arrested, convicted, or returned to the psychiatric facility for a new violent or sex offense. Vernon L. Quinsey, Actuarial Prediction of Sexual Recidivism, 10 J. OF INTERPERSONAL VIOLENCE 85 (1995). See also generally A. Nicholas Groth, Robert E. Longo and J. Bradley McFadin, Undetected Recidivism Among Rapists and Child Molesters, 28 CRIME & DELINQUENCY 450 (1982).
Personality Statute. Finally, as Marc Miller and Professor Norval Morris observe in their article on predictions of dangerousness:

Given the relative rarity of the event to be predicted — violent criminality — a base expectancy rate of one in three [over a several-year period] is not a low rate of prediction: it is a very high rate of prediction. The relationships among personal characteristics and social circumstances — among character, personality, and chance — are obviously of extreme complexity and thus most difficult to predict; but a group of three people, one of whom within a few months will commit a crime of extreme personal violence, is a very dangerous group indeed.

In Greenholtz v. Nebraska Penal Inmates, while commenting on the due process implications of Nebraska's parole system, the Supreme Court observed: "[T]here simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations." Legal decision-makers — executive, legislative, or judicial — must exercise judgment. The judgment exercised by the Minnesota legislature by enacting the Sexual Psychopathic Personality Statute and the judicial judgment required by the statute are not significantly different or less certain than legal judgments made in other contexts. The Supreme Court in Pearson observed: The "underlying conditions . . . [to be proved under the Sexual Psychopathic Personality Statute], are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime."

While uncertainty is undesirable, it is also unavoidable. The Sexual Psychopathic Personality Statute contains specific criteria and provides for ample procedural due process protection. As such, the degree of uncertainty is reduced to an acceptable level.


191. *Id.* at 7.

in light of the serious social danger that this statutory scheme seeks to combat.

E. *Expanding Civil Commitment is Preferable to Diverting the Criminal System from its Requirement of Moral Blameworthiness*

The civil and criminal categories were developed to realize different purposes.193 Accordingly, the categories might well expand if those purposes would, thereby, be served appropriately. A person who possesses a SPP or is a SDP is partially responsible and deserving of punishment, but the person is also partially irresponsible and in need of treatment. Either way, public safety requires that such a person be at least incapacitated. By enacting its Sexual Psychopathic Personality Statute, Minnesota expanded the scope of its civil commitment. The elements of the statute demonstrate that Minnesota decided these sex offenders are more "mad" than "bad." Accordingly, expanding civil commitment is preferable to the alternative: expanding the scope of criminal confinement through longer sentences or a "guilty but mentally ill" statute. It is better to incapacitate and treat someone who is somewhat culpable, than to punish someone who is predominately blameless.

Professor Erlinder and the dissenters in *Blodgett* suggest longer sentences or perhaps even life sentences are the appropriate response to the problem of sexual predators.194 Professor Erlinder claims that Minnesota's statute is, in fact, retribution disguised as rehabilitation.195 Ironically, the imposition of longer or life sentences may also be aptly termed incapacitation disguised as retribution. Professor Erlinder argues that the statute wrongly allows the state to punish people not for what they have done, but for who they are or what they may do.196 He then contradicts himself by advocating a longer or life sentence, not because the offender has committed a worse crime, but because the offender is a dangerous person who may cause more harm in the future.197 While sexually violent crimes, including child molestation and rape, are admittedly heinous, Minnesota would hardly have suddenly decided that they are worse crimes than formerly realized if it imposed life sentences. The nature of the

193. See *supra* part III. A.
196. *Id.* at 103-04, 122-25.
197. *Id.* at 158.
crime or the harm it entails would not have changed, and increased deterrence could probably not be expected. An increased prison sentence would not be, therefore, merely an adjustment to reflect new understanding. It would be, in short, additional punishment based on who a person is and what they may do, not on what they have done, precisely what Professor Erlinder counsels against.

Even for those who truly believe that the sentences presently imposed for violent, sexual crimes are inadequate, increasing the length of sentences creates other difficulties. In light of the Supreme Court’s jurisprudence on the subject, any punishment short of death for any serious crime will likely not violate the Eighth Amendment prohibition against cruel and unusual punishment. Accordingly, states could simply lock up sexual predators for life once they were convicted of one offense. Adopting this sort of policy, however, might turn out to be counterproductive. A more severe sentence sometimes makes a conviction harder to obtain. Longer sentences may often mean that many defendants will be acquitted or that many of them will be able to plea bargain to lesser offenses.

Longer or life sentences may also exact a heavy price on the criminal justice system. The Minnesota Supreme Court aptly comments, “the question is not whether the sexual predator can be confined, but where. Should it be in prison or in a security hospital?” Summarizing an article by Professor Paul H. Robin-

198. See, e.g., Harmelin v. Michigan, 501 U.S. 957 (1991) (Scalia, J., plurality opinion). The petitioner in Harmelin was convicted of possessing 672 grams of cocaine. Although the Court was divided on whether the Eighth Amendment involves a guarantee of proportional punishment, a majority of the Court held the imposition of a mandatory life sentence without possibility of parole, and without any consideration of mitigating factors such as the fact that the petitioner had no prior felony convictions, was constitutional. See also Rummel v. Estelle, 445 U.S. 263 (1980) (holding the imposition of a life sentence, under a recidivist statute, upon a defendant who had been convicted, successively, of fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses); Hutto v. Davis, 454 U.S. 370 (1982) (rejecting the Eighth Amendment challenge to a prison term of 40 years and a fine of $20,000 for possession and distribution of approximately nine ounces of marijuana).

199. See Johannes Anderson, supra note 96, at 970 (“Experience seems to show that excessively severe penalties may actually reduce the risk of conviction, thereby leading to results contrary to their purpose.”); Fox Butterfield, “3 Strikes” Law in California is Clogging Courts and Jails, N.Y. Times, Mar. 23, 1995, at A1 (reporting juries failing to convict since they do not want to impose long sentences for petty crimes).

The concern with enhanced criminal punishment on the basis of dangerousness is that the punishment may become divorced from moral blameworthiness, thus adversely affecting the criminal justice system's credibility, which largely rests on a sense of moral blameworthiness. In other words, people believe punishment is legitimate only when they believe it is imposed on those who chose to do wrong. Divorcing criminal punishment from moral blameworthiness by increasing sentences not for what someone does, but for who they are or what they may do arguably reduces the credibility and legitimacy of the criminal law. It may also reduce its efficacy. If the system is perceived as illegitimate, no stigma will attach to breaking the law; without stigma the level of obedience will drop. In order to maintain the integrity and efficacy of the criminal justice system, Minnesota rightly chose to expand its civil commitment to accommodate sexually dangerous persons and persons with sexual psychopathic personalities.

In sum, as Professor Paul H. Robinson argues, "it is better to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason, than to divert the criminal justice system from its traditional requirement of moral blame." Individuals committed pursuant to Minnesota's Sexual Psychopathic Personality Statute require incapacitation and treatment, not punishment. Even if they are never rehabilitated, they belong in a hospital both for their sake and the sake of the system.

IV. THE CONSTITUTIONALITY OF MINNESOTA'S SEXUAL PSYCHOPATHIC PERSONALITY STATUTE

After examining how Minnesota's Sexual Psychopathic Personality Statute operates and the goals it is trying to achieve, one final question remains: whether the incapacitation of a person who possess a SPP or is a SDP in order to treat that person and protect the public is constitutional. Statutes relating to sexual psychopaths similar to Minnesota's Sexual Psychopathic Personality Statute are challenged constitutionally on a number of grounds including due process — both substantive and proce-

201. Robinson, supra note 97.
202. Blodgett, 510 N.W.2d at 918 n.16.
204. Robinson, supra note 97, at 716.
dural, equal protection, double jeopardy, and so on. This note, however, focuses solely on equal protection and due process as they are the most significant grounds for challenge.

A. United States v. Foucha

In the fifty-five years since Minnesota's Sexual Psychopathic Personality Statute was held constitutional in United States v. Pearson,206 the Supreme Court issued a number of opinions dealing with the constitutional issues surrounding civil commitment.207 In 1992, the Supreme Court decided Foucha v. Louisiana208 and took its latest step toward clarifying the standards surrounding involuntary civil commitment.

Terry Foucha, after entering the home of a married couple with intent to steal, brandishing a revolver, and firing on the police officers who confronted him as he fled, was arrested and charged with aggravated burglary and the illegal use of a weapon.209 Foucha entered a dual plea of not guilty and not guilty by reason of insanity. In Louisiana, when such a plea is entered, the factfinder must first determine whether the defendant committed the crime with which he is charged. If the factfinder determines that the defendant did commit that crime, only then may the factfinder proceed to a determination of whether or not the defendant was sane at the time the crime was committed and thereby criminally responsible for committing it. On October 12, 1984 the trial court ruled that Foucha was not guilty by reason of insanity. This means that Foucha was found to have committed the crime, but he was relieved of criminal responsibility for committing it.

Foucha was then committed to a psychiatric hospital. In 1988, the superintendent of the facility recommended that Foucha be released. A hospital review panel reported no evidence of mental illness developed since admission and recom-


206. 309 U.S. 270 (1940).

207. See supra note 70.


209. The following facts are taken from the case Foucha v. Louisiana, 504 U.S. 71 (1992) (White, J., plurality opinion).
mended that Foucha be conditionally released. The trial court then appointed two doctors to examine Foucha. They reported that Foucha was in remission from his mental illness, but refused to certify Foucha would not constitute a menace to himself or others if released. One of the doctors also testified that Foucha possessed an anti-social personality. The doctor did not consider the anti-social personality to be a mental illness. The doctor believed that the anti-social personality would contribute to Foucha’s dangerousness to himself or others if he were to be released.

Under Louisiana law, the trial court found Foucha was still a danger to himself and others and ordered him returned to the psychiatric hospital. The Court of Appeals refused supervisory writs, and the State Supreme Court affirmed, holding Foucha had not met the burden placed upon him by Louisiana law to prove that he was no longer dangerous. The State Supreme Court also held that the Supreme Court’s decision in *Jones v. United States* did not require Foucha’s release, and that the Louisiana statutes allowing the continued confinement of an insanity acquittee based on his dangerousness alone, without any finding of continued mental illness, did not violate either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. The Supreme Court granted certiorari to determine the constitutionality of Louisiana’s commitment scheme in light of their prior decisions on civil commitment, especially *Jones*.

Writing for the majority in *Jones*, Justice Powell stated: “The question presented is whether petitioner, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted.” Yet, in the course of deciding the issue presented, the Court also decided a second issue: whether the Due Process Clause permits a state to civilly commit a criminal defendant automatically and solely on the basis of his insanity acquittal when the defendant has established by a preponderance of the evidence that he was not guilty by reason of insanity.

211. *Foucha*, 504 U.S. at 75.
212. *Jones*, 463 U.S. at 356.
213. *Id.* at 363 n.10.
In Jones, the petitioner argued that the Due Process standards established by the Supreme Court in Addington v. Texas were not met because "the judgment of not guilty by reason of insanity did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance." Jones states that the Court held in Addington "that the Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." An insanity acquittal necessarily involves the determination that the defendant committed a crime and was insane at the time. This determination, the Jones Court held, gives rise to a reasonable inference of both dangerousness and continuing mental illness — the constitutional requirements for civil commitment.

216. Id. at 362 (citing Addington, 441 U.S. at 426-27). Actually, this proposition is not what the Court held in Addington. The question presented in Addington was "what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period of time to a state mental hospital." Addington, 441 U.S. at 419-20. The standard of proof was the only issue presented; the constitutional requirements for civil commitment were not before the Court. In fact, the Court itself stated in Addington, "[a]fter oral argument it became clear that no challenge to the constitutionality of any Texas statute was presented." Id. at 422. That which is not argued is not decided. Bernhardt v. Polygraphic Co. of Am. Inc., 350 U.S. 198, 202, 208 n.2 (1956) (holding that questions that are not considered are not decided). The discussion of the requirements for involuntary civil commitment under the Texas Mental Health Code at pages 426-27 cited by the Court in Jones was pure dicta. The dicta was ambiguous as well. It read: "Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others." Jones, 463 U.S. at 426-27. This sentence could be interpreted as a statement of the specific requirements under Texas law or as a statement of the general constitutional requirements applicable to all civil commitment in light of Texas law. In addition, the use of "or" creates ambiguity. The word "or" can be used exclusively meaning "this or that, not both," but it can also be used inclusively meaning "this or that or both." If both, the word "or" is equivalent to the word "and." See, e.g., United States v. Fisk, 70 U.S. 445, 447 (1865) (treating the construction of "or" and "and" as a matter of policy). Thus, the Court may have meant the State (either Texas or all states including Texas) may not confine an individual involuntarily unless he is both mentally ill and dangerous. But the Court may have also meant the State (either Texas or all states including Texas) may not confine an individual involuntarily when he is both sane and safe. The meaning is unclear, as well as being merely dicta. The Court in Jones, however, elevates this dicta into the "holding" of Addington and establishes a new constitutional standard for civil commitment under the guise of following precedent.

Court did not object that the finding of insanity was supported only by a preponderance of the evidence, despite the Addington requirement that civil commitment be supported by clear and convincing evidence, because of "the important differences between the class of potential civil-commitment candidates and the class of insanity acquittees."218 Addington, the Court explains in Jones, was concerned that individuals who displayed merely idiosyncratic behavior might be wrongfully committed under the low standard of proof and irreparably stigmatized.219 The Court in Jones finds, however, that since automatic commitment in this context follows only if the acquittedee himself advances the insanity defense and proves that his criminal act was a product of his mental illness, there is "good reason for diminished concern as to the risk of error" and the commitment results in little additional stigma.220

After determining that the automatic commitment of an insanity acquittedee was acceptable, the Court in Jones decided the central issue presented: whether an insanity acquittedee, once committed, may be held longer than he could have been imprisoned had he been convicted. This issue was resolved by examining the purpose behind confinement. "Different considerations underlie commitment of an insanity acquittedee"221 as opposed to imprisonment of a convicted criminal. "The purpose of commitment following an insanity acquittal, like that of civil commitment," the Jones Court held was "to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittedee is entitled to release when he has recovered his sanity or is no longer dangerous."222 The insanity acquittedee

218. Id. at 367.
219. Id.
220. Id.
221. Id. at 369.
222. Id. at 368 (citing O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975). The Jones Court once again cites to a precedent that does not support its claim. O'Connor did not hold a committed acquittedee is entitled to release as soon as he recovers his sanity or is no longer dangerous. In O'Connor, the Court held that a "finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." O'Connor, 442 U.S. at 575 (emphasis added). O'Connor's holding was based in large part on the jury's finding that the committed individual was receiving no treatment. Id. at 573-75. In fact, the Court specifically held that "there is no reason now to decide . . . whether the State may compulsorily confine a non-dangerous, mentally ill individual for the purpose of treatment." Id. at 573 (emphasis added). Despite this statement, the holding of O'Connor is consistently interpreted to be that a state may not civilly commit a mentally ill individual who is not dangerous to himself or others, an interpretation that is itself not so troubling. Neither is the Jones Court's application of O'Connor to
may, in fact, be released, the Court reasoned, no matter how seri-
ous a crime he has committed. By the same token, an insanity
acquittee who committed a less serious crime may be confined
for a longer period if he has not recovered. Thus, the Court
states, "[t]here simply is no necessary correlation between sever-
ity of the offense and length of time necessary for recovery. The
length of the acquittee's hypothetical criminal sentence there-
fore is irrelevant to the purposes of his commitment."

In *Foucha*, when the Supreme Court indicated that it granted
certiorari "[b]ecause the case presents an important issue and
was decided by the court below in a manner arguably at odds
with prior decisions of this Court," it referred primarily to
*Jones*. The question presented in *Foucha* was whether the Four-
teenth Amendment requires a state to release a dangerous indi-

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224. *Id.*
225. *Id.*
226. *Foucha*, 504 U.S. at 75.
individual committed as an insanity acquittee when he regains his sanity.

The Court's consideration of this question resulted in a sharply divided court: Justice White wrote for a plurality of the Court made up of himself and Justices Blackmun, Stevens, and Souter; Justice O'Connor filed an opinion concurring in part and concurring in the judgment; Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist joined; and Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

The plurality asserts: "We held [in Jones] that '[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.' "227 In other words, the Foucha plurality held, "the acquittee may be held as long as he is both mentally ill and dangerous, but no longer,"228 just like a person committed in a civil proceeding. Because Louisiana conceded that Foucha was no longer mentally ill, the plurality concluded, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and [Louisiana] is no longer entitled to hold him on that basis."229

Expanding on this conclusion, the plurality examined three situations where the state may involuntarily confine a person in either the criminal or civil context.230 First, the plurality noted, a person may be convicted of a crime and imprisoned for the purposes of deterrence and retribution. Because Foucha was not convicted, he may not be punished. Accordingly, his commitment, the plurality points out, is not justifiable as punishment. Second, the plurality finds, a state may civilly confine a person "if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous.' "231 Because Louisiana did not contend Foucha was mentally ill, commitment based on mental illness was unavailable.232 Finally, the plurality held that the Court had "held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement and it is on these cases, particularly United States v. Salerno,233 that [Louisiana] relies [on] in this case."234 Louisi-

227. Id. at 77 (quoting Jones, 463 U.S. at 368). But see supra note 222.
228. Foucha, 504 U.S. at 77.
229. Id. at 78.
230. Id. at 80-83.
231. Id. at 80 (quoting Jones, 463 U.S. at 362). But see supra notes 216 and 222.
232. Foucha, 504 U.S. at 80.
234. Foucha, 504 U.S. at 80.
ana's argument, however, failed to persuade the plurality. Although the criminal trial that results in an insanity acquittal and the subsequent civil hearings provide comprehensive procedural protection, the plurality decided that the indefinite commitment of an insanity acquittee was too extensive in comparison with the narrowly focused purpose and strictly limited duration of the pre-trial detention authorized by *Salerno.* Thus, the plurality concluded that Louisiana's statutory scheme that permitted the continued confinement of sane, but dangerous, insanity acquittees violated the Due Process Clause of the Fourteenth Amendment.

A plurality of the Court, however, does not carry the day. Whether Justice O'Connor's concurrence coincided with the plurality's perspective on the holding in *Jones* is a key concern in determining the effect of *Foucha* on the constitutional standards for all involuntary civil commitment. Although Justice O'Connor agreed with the plurality's determination that Louisiana may not continue to confine Foucha despite his lack of mental illness, she did not adopt the per se rule that the plurality advocated, at least with regard to insanity acquittees. Justice O'Connor wrote, "I do not understand the Court to hold that Louisiana may *never* confine dangerous insanity acquittees after they regain mental health." For Justice O'Connor, the problem with Louisiana's statutory scheme was not its substance, but its breadth. She wrote:

> This case does not require us to pass judgment on more narrowly drawn laws that provide for the detention of insanity acquittees, or on statutes that provide for punishment of persons who commit crimes while mentally ill. . . . It might . . . be permissible for Louisiana to confine an insanity acquittee who has regained his sanity if, unlike the situation in this case, the nature and duration of detention

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235. *Id.* at 81.

236. *Id.* at 83. The plurality also stated that Louisiana's statutory scheme discriminated against Foucha and other insanity acquittees in violation of the Equal Protection Clause of the Fourteenth Amendment because it did not provide for similar treatment of other classes of persons who have committed criminal acts and who cannot later prove that they would not be dangerous. *Id.* at 84-85.

237. More importantly for the purposes of evaluating Minnesota's statute, Justice O'Connor did not object to the plurality's assertion that an individual who is committed pursuant to a civil proceeding, as opposed to an insanity acquittal, must be released when he regains his sanity.

238. *Foucha,* 504 U.S. at 87 (emphasis added).
were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness.239

Like the dissenters, Justice O'Connor focused on the fact that the insanity acquittee is necessarily found beyond a reasonable doubt to have committed a criminal act that, as noted in Jones, is "concrete evidence" of dangerousness.240 "[T]his finding of criminal conduct," Justice O'Connor argued, "sets them apart from ordinary citizens."241 She then notes: "By contrast, '[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . .'242 Due to this uncertainty, Justice O'Connor urged courts to pay "particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness."243 Although Justice O'Connor indicated, "I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent,"244 she did not equate "medical justification" with a finding of insanity. In fact, she explicitly states that Foucha places no new restrictions on the states' freedom to determine whether and to what extent mental illness should excuse criminal behavior.245 In brief, Foucha does not require that the insanity defense be made available nor does it undermine the validity of laws providing for prison terms after verdicts of "guilty, but mentally ill."246

Thus, although Justice O'Connor is less than clear on what exactly she believes Foucha holds, she indicates that she believes that situations may exist where the state may continue to confine dangerous insanity acquittees, even after they regain their sanity.247 Accordingly, the bald assertion that the Due Process Clause requires that the states release dangerous insanity acquittees once they regain their sanity remains supported only by a plurality of the Court, two members of which no longer sit.

239. Id. at 87-88.
241. Foucha, 504 U.S. at 87.
243. Foucha, 504 U.S. at 87 (quoting Jones, 463 U.S. at 365 n.13).
244. Foucha, 504 U.S. at 88.
245. Id.
246. Id. at 88-89. Justice O'Connor also noted that she felt it was unnecessary to reach equal protection issues on the facts of the appeal. Id. at 88.
247. Id. at 87.
B. *Foucha Applied to Minnesota's Sexual Psychopathic Personality Statute*

Some interpret *Foucha* as invalidating Minnesota's Sexual Psychopathic Personality Statute on constitutional grounds.\(^{248}\) What effect does *Foucha*, a case dealing with the release of those who were civilly committed pursuant to a criminal insanity acquittal, not a civil proceeding, have on Minnesota's statute? After the result, if not the holding, of *Foucha*, the Due Process Clause requires states to release those committed pursuant to a civil proceeding, as opposed to those committed as insanity acquittees, whenever they either regain their sanity or are no longer dangerous.\(^{249}\) While this proposition was not squarely presented, the plurality seems to assume that this principle governs the release of a person committed in a civil proceeding.\(^{250}\) Justice O'Connor and the dissenter emphasized the fact that an insanity acquittee has been found guilty of criminal conduct beyond a reasonable doubt. For Justice O'Connor and the dissenters, this determination distinguishes an insanity acquittee from a person committed in a civil proceeding.\(^{251}\) Because this determination is not made in a civil proceeding, Justice O'Connor and the dissenters also seem to assume that a showing of either sanity or safety requires the release of a person committed in a civil proceeding. Thus, the Court was divided only on the question of whether the standard should be the same for those committed as insanity acquittees. Because of Justice O'Connor's concurring opinion, the question whether a state may constitutionally keep a dangerous, but sane insanity acquittee civilly committed, and under what conditions, is still an open

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249. See supra note 222.
250. The plurality states, *Jones* established that insanity acquittees may be treated differently in some respects from those persons subject to civil commitment, but *Foucha*, who is not now thought to be insane, can no longer be so classified. *Foucha*, 504 U.S. at 85. Implicit in this statement is the assertion that only those persons, committed in a civil proceeding, who are still insane are subject to continued civil commitment. This implicit assertion coupled with the requirement of O'Connor v. Donaldson that a person committed in a civil proceeding must remain dangerous to justify continued civil commitment, demonstrate the plurality's underlying assumption.
251. "Although insanity acquittees may not be incarcerated as criminals or penalized for asserting the insanity defense, this finding of criminal conduct sets them apart from ordinary citizens." Id. at 87 (O'Connor, J., concurring) (citations omitted). "This is a criminal case." Id. at 90 (Kennedy, J., dissenting). "While a state may renounce a punitive interest by offering an insanity defense, it does not follow that, once the acquittee's sanity is 'restored,' the State is required to ignore his criminal act . . ." Id. at 110 (Thomas, J., dissenting).
question. For the purposes of evaluating the constitutionality of Minnesota's Sexual Psychopathic Personality Statute, however, the unresolved questions regarding insanity acquittees and how they might be distinguished from other civil committees is not critical. Nevertheless, *Foucha* is valuable because it clarified the standard of release for those committed pursuant to a civil proceeding and because it provided dicta that may be helpful if applied by analogy.

While the standard that *Foucha* clarified may affect the statute's constitutionality, it does not generally invalidate the statute. The potential adverse effect of *Foucha* on the statute is minimal, and it is easily remedied.

1. Equal Protection

The Fourteenth Amendment to the Constitution provides that no state shall deny any person "equal protection of the laws." Accordingly, the Equal Protection Clause restricts the manner in which laws classify persons. Supreme Court equal protection analysis sets out a three-tier model of review. The three tiers of review are rational basis — the lowest level of review, strict scrutiny — the highest level of review, and middle-tier review. If a law impinges upon a suspect class or a "fundamental" right, then the law is subject to strict scrutiny. Such a law must be "narrowly tailored" to advance a "compelling state interest." If a suspect class or fundamental right is not at stake, the law need only be rationally related to a legitimate state interest to be constitutional. Finally, some rights and classes are subject to middle-tier review. Under such review, the law

253. Race, alienage, and nationality are the suspect classes recognized by the Supreme Court. See Korematsu v. United States, 323 U.S. 214 (1944); Graham v. Richardson, 403 U.S. 365 (1971). Whether a classification is inherently suspect is determined by considering whether the status is 1) an immutable one; 2) often targeted by stereotypical legislation not related to individual responsibility; 3) characterized by a history of repressive legislation; and 4) discrete and insular. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).
254. The catalog of "fundamental" rights includes rights explicitly guaranteed by the constitution such as the right of free speech, but has also been judicially expanded to include, for example, rights such as the right to vote, Kramer v. Union Free School District, 395 U.S. 621, 628-29 (1969); to practice contraception, Griswold v. Connecticut, 381 U.S. 479, 485-86, 486-89 (1965) (Goldberg, J., concurring); to travel in interstate commerce, Shapiro v. Thompson, 394 U.S. 618, 630-31, 634 (1969); and to marry, Loving v. Virginia, 388 U.S. 1, 11-12 (1967).
need only have a "substantial relationship" to an "important" state interest to be constitutional.  

Minnesota's Sexual Psychopathic Personality Statute creates a discernible class of people: persons who possess a "sexual psychopathic personality" and "sexually dangerous persons." While this class is hardly suspect, whether an identifiable fundamental right is at stake is not easily determined. Individuals committed pursuant to Minnesota's Sexual Psychopathic Personality Statute are, of course, deprived of their liberty. Liberty alone, however, cannot be asserted as fundamental in the abstract without reference to another right.  

Freedom to vote, for example, is a fundamental right triggering strict scrutiny, freedom in the abstract is not. The plurality in Foucha found, however, that "freedom from bodily restraint" is at the core of liberty. The plurality cites Youngberg v. Romeo to support its finding. Justice Thomas in dissent in Foucha, on the other hand, points out that  

[w]hat 'freedom from bodily restraint' meant in [Youngberg] is completely different from what the Court uses the phrase to mean [in Foucha]. Youngberg involved the substantive due process rights of an institutionalized, mentally retarded patient who had been restrained by shackles placed on his arms for portions of each day. What the Court meant by 'freedom from bodily restraint,' then, was quite literally freedom not to be strapped to a bed.  

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257. Middle-tier review is applied to laws involving classes considered less significant than those triggering strict scrutiny, but more significant than those requiring only a rational basis. See, e.g., Craig v. Boren, 429 U.S. 190, 210 (1976) (applying middle-tier review to a regulation based on gender) (Powell, J., concurring); Trimble v. Gordon, 430 U.S. 762, 767 (1977) (applying middle-tier review to a regulation based on illegitimacy).  

258. In his dissent in Foucha, Justice Thomas argues:  
A liberty interest per se is not the same thing as a fundamental right. Whatever the exact scope of the fundamental right to 'freedom from bodily restraint' recognized by our cases, it certainly cannot be defined at the exceedingly great level of generality the Court suggests today. There is simply no basis in our society's history or in the precedents of this Court to support the existence of a sweeping, general fundamental right to 'freedom from bodily restraint' applicable to all persons in all contexts. If convicted prisoners could claim such a right, for example, we would subject all prison sentences to strict scrutiny. This we have consistently refused to do. See, e.g., Chapman v. United States, 111 S.Ct. 1919 (1991). Foucha v. Louisiana, 504 U.S. 71, 117-18 (1992) (Thomas, J., dissenting).  

260. Foucha, 504 U.S. at 80 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).  
That case in no way established the broad 'freedom from bodily restraint' — apparently meaning freedom from all involuntary confinement — that the Court discusses today.\textsuperscript{262}

The plurality in \textit{Foucha} also states that because "[f]reedom from physical restraint [is] a fundamental right" the State must have "a particularly convincing reason" for discriminatory confinement.\textsuperscript{263} While the plurality used "fundamental" to refer to the right not to be involuntarily confined, it did not employ strict scrutiny and require a "compelling state interest" to which the statute had to be "narrowly tailored." Accordingly, the right was not treated as truly "fundamental." Such an approach is not surprising. The Court apparently wanted to emphasize the importance of individual liberty to roam free, as it were. If such a right had been recognized as truly fundamental, every statute providing for civil or criminal confinement would give rise to an equal protection claim, and would require that the State demonstrate the statute is "narrowly tailored" to advance a "compelling state interest."\textsuperscript{264} Such an approach is not what the plurality embraced.

While some assert that involuntary civil commitment is, in fact, subject to strict scrutiny,\textsuperscript{265} it is more likely that it is subject to middle-tier or reasonable basis review. Nevertheless, Minnesota's Sexual Psychopathic Personality Statute passes even strict scrutiny because compelling state interests exist to which it is narrowly tailored. These interests are the same interests that support the hospitalization of those who are mentally ill and dangerous: the Government's interest in treating and supervising those who are suffering from a mental, emotional or psychological disorder such that they pose a danger to themselves or others. In \textit{Blodgett}, the Minnesota Supreme Court held, "the compelling government interest [that justifies the commitment] is the protection of members of the public from persons who have an uncontrollable impulse to sexually assault."\textsuperscript{266} In addition, the statute is, in fact, narrowly tailored to this interest in public safety: the statutory categories describe with specificity a particular kind of dangerous individual. The limiting factors introduced in \textit{Pearson} and now specifically incorporated into the

\begin{itemize}
\item \textsuperscript{262} \textit{Foucha}, 504 U.S. at 118 n.12 (Thomas, J., dissenting) (citations omitted).
\item \textsuperscript{263} \textit{Id.} at 86.
\item \textsuperscript{264} \textit{See supra} note 258.
\item \textsuperscript{265} Erlinder, \textit{supra} note 10, at 142.
\item \textsuperscript{266} \textit{In re Blodgett}, 510 N.W.2d 910, 914 (Minn.), \textit{cert. denied}, 115 S.Ct. 146 (1994).
\end{itemize}
statute by the recent amendments, ensure that the statute is not too vague or too broad.

In *Blodgett*, Blodgett argued that subjecting those who repeatedly commit sexually violent crimes to indefinite civil commitment, without subjecting other types of violent recidivist criminals such as arsonists or serial killers to similar treatment, violated equal protection. The objection, however, is invalid. As the Supreme Court observed in *Pearson*,

[w]hether the legislature could have gone farther is not the question. The class [the legislature] did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, 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 the clearest.

In sum, under any of the three tiers of review, Minnesota’s Sexual Psychopathic Personality Statute does not violate the Equal Protection Clause.

2. Due Process

The Fourteenth Amendment to the Constitution provides, in relevant part, that no state shall “deprive any person of life, liberty, or property, without due process of law . . . .” As the federal judiciary developed the jurisprudence of due process under the Fifth and Fourteenth Amendments, it created a body of substantive rights out of the procedural rights implicit in the phrase “due process of law.” Thus, two notions of due process emerged: procedural due process and substantive due process. One author observes:

On its face, the Due Process clause gives the illusion of being concerned only with matters of procedure — with issues such as notice, a right to be heard, and the like. But the clause necessarily is broader, because it is bound up with the concept of ‘life, liberty or property’ that the ‘process’ is invoked to protect. Hence the concept of ‘substantive’ due process: the clause may be used to protect against arbitrary state deprivations of life, liberty or property of various kinds, even if they do not pose issues that we nor-

267. *Id.* at 917.
268. 309 U.S. 270, 274-75.
mally would think of as procedural. According to this notion, a legislative enactment regulating the conduct of an individual . . . may be invalid if it impairs interests in life, liberty or property, even if the procedure by which it is enacted is, strictly speaking, not objectionable. Thus, in many ways substantive due process mirrors equal protection analysis which also necessitates an inquiry into the infringement of "fundamental" rights.

As the Supreme Court stated in Addington, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Due process here involves the application of certain substantive standards and provision of certain procedural protection at two critical stages in a civil commitment proceeding: when the individual is committed and when the individual seeks release. In brief, the civil commitment procedure must be constitutional on the way in and on the way out.

a. The Constitutional Standards for Initial Commitment

The Supreme Court in Foucha held Louisiana’s commitment procedure violated the Due Process Clause because it did not qualify as one of the three situations where the Court — plurality and concurrence — asserted the state may involuntarily confine a person in either the criminal or civil system. The first category noted by the Court in Foucha is criminal confinement. Obviously, a person committed because he possesses a SPP or is a SDP has not necessarily been convicted of a crime and is not imprisoned for the purposes of deterrence and retribution. Second, the Foucha Court noted that "in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement." Despite the due process provided by a criminal trial resulting in an insanity acquittal and the subsequent civil hearings provided by Louisiana’s commitment scheme, the plurality in Foucha thought the indefinite commitment of an insanity acquittee was too extensive. In light of the plurality’s holding, and Justice O’Connor’s focus in her concurring opinion on the fact that an insanity acquittee is found guilty
of criminal conduct beyond a reasonable doubt, it is unlikely that Minnesota's commitment scheme can be justified as belonging to this category of "narrow circumstances." Accordingly, Minnesota's commitment scheme must be justified, if at all, only under the third category — the civil commitment of those who are mentally ill and dangerous.275

In Foucha, whether the commitment procedure could be justified under this category was open and shut because Louisiana did not contend Foucha was mentally ill.276 The Court in Foucha did not directly address the constitutional standards for commitment or release for those committed pursuant to a civil proceeding. The Court definitely did not attempt to define "mental illness." Rather, the Court addressed the standard for the release of insanity acquittees. On the other hand, Professor Erlinder cites Foucha as standing for the proposition that "not all mental conditions may be classified as mental illness for the purpose of civil commitment."277 Professor Erlinder first concludes that

[e]ven though, Foucha did suffer from a mental condition, i.e., he had been diagnosed as suffering from an anti-social personality, the Court [in Foucha] noted that an anti-social personality was not synonymous with mental illness as defined by the medical community.278

On the contrary, the Foucha plurality was merely recounting the opinion of the individual Louisiana doctor who examined Foucha when it commented that an anti-social personality was "a condition that is not a mental disease and that is untreatable."279 Because Louisiana failed to claim Foucha was mentally ill, whether an anti-social personality is a mental illness was not an issue before the Court; nor was the issue decided. Foucha's anti-social personality was relied on by Louisiana only as evidence of "dangerousness," not as evidence of "mental illness." The conclusion of a doctor in Louisiana regarding Foucha's condition has little bearing on the constitutionality of Minnesota's statute. That an anti-social personality is not a "mental illness" was merely assumed in Foucha because Louisiana conceded as much. Even

275. This analysis assumes that the three categories enumerated in Foucha were meant to be exhaustive. As the Minnesota Supreme Court noted in In re Blodgett, the approval of Minnesota's statute in Pearson may be considered either a sub-set of Foucha's mentally ill and dangerous category or an additional category. In re Blodgett, 510 N.W.2d 910, 914 (Minn.), cert. denied, 115 S.Ct. 146 (1994).

276. Foucha, 504 U.S. at 76 n.4, 78, 80.
277. Erlinder, supra note 10, at 141.
278. Id.
279. Foucha, 504 U.S. at 75.
more important, while a person who possesses a SPP or is a SDP may suffer from an anti-social personality, the two conditions are not synonymous and merely suffering from an anti-social personality does not satisfy the criteria of Minnesota's statute. Finally, the Supreme Court has not asserted authority to decide what constitutes a "mental illness." According to the Supreme Court, the legal definition of insanity, at least in the criminal context, is completely left to the states. Just as the states possess the right to define "insanity" for legal purposes in the criminal arena, so the states ought to possess the right to define "mental illness" for legal purposes in the civil arena. "Mental illness," like "insanity," is, above all else, a legal term to be defined in light of purpose, not the essential character of things.

Second, Professor Erlinder concludes that the Court's references to mental illness in Jones, set forth a necessary condition for involuntary civil commitment and should not be understood to mean that any mental condition the legislature chooses may be the basis of involuntary confinement. Only mental illness, recognized by the medical community, may be the basis for involuntary confinement. Here, too, the Professor is misguided. Surely requiring "mental illness" for constitutional purposes as a necessary condition for initial commitment or release from commitment is not the same as defining the concept itself or determining who may legitimately define it for constitutional purposes. In any event, Justice O'Connor's concurrence is the key to discerning the meaning of Foucha, more than the plurality's opinion. Although speaking in the context of the release of insanity acquittees rather than the initial commitment of persons in a civil proceeding, Justice O'Connor stated, "I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the

280. See Leland v. Oregon, 343 U.S. 790, 797-99 (1952) (refusing to, under the Constitution, forbid the states from placing on the defendant the burden of proving the defense of insanity beyond a reasonable doubt); Patterson v. New York, 432 U.S. 197, 210 (1977) (refusing to, under the Constitution, forbid the states from placing on the defendant the burden of proving by a preponderance of the evidence the affirmative defense of acting under extreme emotional distress, in order to reduce the crime of murder to manslaughter in the first degree); Powell v. Texas, 392 U.S. 514, 536-37 (1968) (refusing to adopt a Constitutional insanity test) (Marshall, J., plurality opinion). See also id. at 545 (finding that the Constitution does not impose on the States any particular test of criminal responsibility) (Black, J., concurring).

281. Erlinder, supra note 10, at 141-42.
nature and purposes of confinement would be absent.”

“Medical justification,” however, does not mean that “mentally ill” must correspond to a “medical condition” recognized by doctors, rather than constitute a purposeful legal definition drafted by a state legislature based on medical knowledge. On the contrary, Justice O’Connor argues only that the justification for commitment should be medically related or based, as opposed to morally or politically based. This interpretation of her statement is amply supported by her emphasis of the need for a connection to legal “purpose.” Justice O’Connor argues for deference to legislatures, not psychiatrists. Defining “mentally ill” or “insanity” with regard to culpability and commitment is a purposeful legal task best left primarily to the state courts or legislatures. While “mental illness” is a necessary condition for involuntary civil commitment under the Constitution, what constitutes “mental illness,” or who may define it, was hardly determined in Foucha.

Accordingly, Foucha does not prevent Minnesota from determining that a person who possesses a SPP or is a SDP is “mentally ill.” Blodgett was decided by the Minnesota Supreme Court in 1994, two years after Foucha. In Blodgett, the court stated that the Supreme Court’s approval of Minnesota’s statute in Pearson and the failure to overrule Pearson in Foucha demonstrated that Minnesota’s statute may be considered “a sub-set of Foucha’s second category (mentally ill and dangerous).”

In fact, the Minnesota Legislature did exactly what the Minnesota Supreme Court said it did; the Sexual Psychopathic Personality Statute provides for the civil commitment of a certain class of individuals who are “mentally ill” and “dangerous.” The Sexual Psychopathic Personality Statute draws on the volitional definition of insanity — having an “irresistible impulse” — to define a class of people who lack control over their violent sexual impulses. As the Minnesota Supreme Court pointed out in Blodgett, “whatever the explanation or label, the ‘psychopathic personality’ is an identifiable and documentable violent and sexually deviant condition or disorder.” Because of this form of volitional “mental illness” and the resulting danger to the public, Minnesota commits these individuals to a secured hospital in order that they may be treated, supervised, and prevented from continuing to harm others. “As long as civil commitment is

282. Foucha, 504 U.S. at 88 (O’Connor, J., concurring).
283. Id. at 87.
285. Id.
286. Id.
programmed to provide treatment and periodic review, due process is provided.\textsuperscript{287} Because the states possess the constitutional power to define "mental illness" in both criminal and civil contexts, and because the dangerousness of these individuals can be inferred from a pattern of harmful conduct, the commitment procedure ought to be held valid under \textit{Foucha} as the civil commitment of people who are mentally ill and dangerous.

\textbf{b. The Constitutional Standards for Release}

After \textit{Foucha}, Minnesota's standards and procedure for initial commitment pursuant to the Sexual Psychopathic Personality Statute remain constitutional, but the standards and procedure for release may well be invalid.

The statutory sections that specifically refer to a person who possesses a SPP or is a SDP do not address the standards for release, but the sections incorporate the standards applied to those persons committed as mentally ill and dangerous under the chapter generally.\textsuperscript{288} Accordingly, a person committed under the statute may not be discharged unless it appears to the satisfaction of the commissioner, after a hearing and a favorable recommendation by a majority of the special review board, that the patient is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.\textsuperscript{289}

In other words, a showing of \textit{either} sanity or safety is not sufficient; \textit{both} must be shown in order to be released.

The plurality in \textit{Foucha} argued for a \textit{per se} rule that either sanity or safety requires the release of a civilly committed insanity acquittee.\textsuperscript{290} Justice O'Connor, however, rejected the \textit{per se} rule, but concurred in the result due to the breadth of the statute at issue. Although Justice O'Connor stated, "I do not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health,"\textsuperscript{291} she seemed to base her opinion on the fact that insanity acquittees, unlike those committed pursuant to a civil proceeding, are found guilty of criminal conduct beyond a reasonable doubt. Although not directly at issue in the appeal, in \textit{Foucha}, the plurality con-
currence, and dissents all assume that a showing of either sanity or safety requires the release of a person committed in a civil proceeding.\textsuperscript{292}

On the assumption that this alternative (sane or safe) is indeed the law after \textit{Foucha},\textsuperscript{293} Minnesota's standard for the release of all mentally ill and dangerous persons, including anyone who possesses a SPP or is a SDP may violate the Due Process Clause.\textsuperscript{294} If it exists, the violation is constitutionally significant, but unimportant in terms of the statute's substance. The constitutional defect can be easily remedied by adding an "and" and changing the "and" already present to an "or" so that the section would require that the person committed not be discharged unless it appears to the satisfaction of the commissioner, after a hearing and a favorable recommendation by a majority of the special review board, that the patient is capable of making an acceptable adjustment to open society \textit{and} is no longer dangerous to the public \textit{or} is no longer in need of inpatient treatment and supervision.\textsuperscript{295}

The goals of the Minnesota Sexual Psychopathic Personality Statute remain sound and the bulk of the statute, if not all of it, remains constitutional, even after \textit{Foucha}. If needed, a minor adjustment in the Civil Commitment Act into which the original sections were incorporated will restore the statute's integrity.

\textbf{V. Recommendations}

Although the recent repeal and re-enactment with amendments did not jeopardize the constitutionality of Minnesota's Sexual Psychopathic Personality Statute, the changes deserve discussion in light of their effect on its constitutionality and overall clarity. The legislature made both positive and negative changes.

Prior to its repeal and re-enactment with amendments, Minnesota's Sexual Psychopathic Personality Act consisted of three sections in the chapter of general probate provisions. The first section defined the term "psychopathic personality" as a person

\begin{itemize}
\item \textsuperscript{292} See \textit{supra} notes 250 and 251 and accompanying text.
\item \textsuperscript{293} See \textit{supra} note 222.
\item \textsuperscript{294} The court in Blodgett, unfortunately, blends the notions of sanity and safety into the idea of remission generally when it states: "In Foucha the confinement was for insanity and, when the insanity was shown to be in remission, the United States Supreme Court said Foucha had to be released. Here if there is a remission of Blodgett's sexual disorder, if his deviant sexual behavior is brought under control, he, too, is entitled to release." In re Blodgett, 510 N.W.2d 910, 916 (Minn.), \textit{cert. denied}, 115 S.Ct. 146 (1994) (footnote omitted).
\item \textsuperscript{295} Minn. Stat. Ann. § 253B.18, subd. 15 (changes emphasized).
\end{itemize}
whose emotional instability, impulsiveness, or lack of judgment renders that person irresponsible in sexual matters and thereby dangerous to others.\textsuperscript{296} The second section provided some commitment procedures and incorporated the non-conflicting provisions relating to the commitment of persons mentally ill and dangerous contained in the Minnesota Civil Commitment Act — Chapter 253B.\textsuperscript{297} The third section provided that possessing a psychopathic personality does not constitute a defense to a charge or crime, nor relieve any person from liability to be tried upon a criminal charge. The Minnesota Sexual Psychopathic Personality Statute now exists as four subdivisions within the Civil Commitment Act — Chapter 253B.\textsuperscript{298}

The term "psychopathic personality" was amended to read "sexual psychopathic personality," but the definition itself remained almost identical. The only change was the long-overdue incorporation of the three-part test formulated in Pearson.\textsuperscript{299} After Pearson, in order to demonstrate that someone possesses a psychopathic personality, the state has to show (1) habitual misconduct in sexual matters, (2) an utter lack of power to control sexual impulses, and (3) a likelihood that this lack of control will result in injury to others. The recent amendments include these judicially-created requirements in the definition of a person who possesses a SPP.\textsuperscript{300} The express inclusion of the Pearson three-part test increases the statute’s clarity and reduces the risk of its misapplication.

The addition of an another category — "sexually dangerous persons" — was another significant change in the statutory scheme. Sexually dangerous persons are an additional category of persons who may be involuntarily civilly committed under the statute. A SDP is defined as a person who “(1) has engaged in a course of harmful sexual conduct as defined in subdivision 7a; (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 as defined in subdivision 7a.”\textsuperscript{301}

The term “harmful sexual conduct” is defined as “sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.”\textsuperscript{302} In addition, a rebuttable presumption is created that certain enumerated criminal acts consti-

\begin{itemize}
  \item \textsuperscript{296} Id. § 526.09.
  \item \textsuperscript{297} Id. § 526.10.
  \item \textsuperscript{298} Id. § 253B.02, subds. 7a, 17, 18a and 18b.
  \item \textsuperscript{299} 205 Minn. 545, 287 N.W. 297, 302 (1939), aff’d, 309 U.S. 270 (1940).
  \item \textsuperscript{300} MINN. STAT. ANN. § 253B.02, subd. 18a.
  \item \textsuperscript{301} Id. § 253B.02, subd. 18b(a).
  \item \textsuperscript{302} Id. § 253B.02, subd. 7a(a).
\end{itemize}
tute "harmful sexual conduct."\textsuperscript{303} The inclusion and definition of this term clarifies the statute by making the required finding of dangerousness more focused and specific. In fact, the term "harmful sexual conduct" is superior to the term "misconduct in sexual matters" that is used in the definition of a person who possesses a SPP. "Harmful sexual conduct" as defined is clearer and rebuts the challenge that the statute may be construed to apply to merely idiosyncratic behavior. The definition of "harmful sexual conduct" also refutes the unfounded claims that the harm caused by a person who possesses a SPP must be physical, rather than merely emotional.\textsuperscript{304}

A person who is a SDP is basically equivalent to a person who possesses a SPP; the three elements that the state must prove in order to establish that a person is a SDP correspond to the \textit{Pearson} three-part test contained in the definition of a person who possesses a SPP. The only significant difference is that the state does not have to prove that the person has an inability to control their sexual impulses\textsuperscript{305} — the second factor in the three-part \textit{Pearson} test. Instead, the state need establish only that the person has "manifested a sexual, personality, or other mental disorder or dysfunction."\textsuperscript{306} While the addition of this second category of persons to whom the statute applies was beneficial in that it resulted in the creation of the term "harmful sexual conduct" and its definition, the addition of the second category was, overall, a mistake.

\textsuperscript{303} \textit{Id.} \textsuperscript{253B.02, subd. 7a(b)}. \textit{See supra} note 12.

\textsuperscript{304} Before the statute was amended to create a rebuttable presumption that the commission of certain crimes — many of which are not necessarily violent — creates a substantial likelihood that the victim suffered serious physical or \textit{emotional} harm, the Supreme Court of Minnesota decided \textit{In the Matter of Rickmeyer}, 519 N.W.2d 188 (Minn. 1994). Peter Rickmeyer, a pedophile, habitually had sexual contact with young boys. Primarily, Rickmeyer fondled and spanked young boys at a local playground. Reversing the trial court's decision to commit Rickmeyer, the Minnesota Supreme Court found:

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. In this case, however, the record does not support the trial court's findings that [Rickmeyer] has inflicted or is likely to inflict serious physical or mental harm on his victims. [Rickmeyer's] unauthorized sexual "touchings" and "spankings," while repellent, do not constitute the kind of injury, pain, "or other evil" that is contemplated by the . . . statute.

\textit{Id.} at 190. The holding of this case was set aside by the new statutory language.

\textsuperscript{305} \textit{MINN. STAT. ANN.} \textsuperscript{253B.02, subd. 18b(b)}.

\textsuperscript{306} \textit{Id.} \textsuperscript{253B.02, subd. 18b(a)(2)}. 
The addition seems to have been an effort to get around the requirement that a person who possesses a SPP must have an "utter lack of power to control his sexual impulses." "Utter" is a strong word. It suggests that a person who possesses a SPP must be completely out of control. Yet, case law demonstrates "utter" is not interpreted to require a total and complete lack of control. For example, a person who possesses a SPP may show a

307. Id. § 253B.02, subd. 18a (emphasis added).
308. See, e.g., In re Bieganowski, 520 N.W.2d 525 (Minn. Ct. App. 1994), review denied (Oct. 27, 1994). Before being committed under the Sexual Psychopathic Personality statute, Barry Bieganowski had a history of sexual assaults on adult females as well as children of both sexes. When he was 20 years old, he violently raped his sister-in-law because his wife was eight and a half months pregnant and, as he stated, "[i]t felt right at the time." Id. at 526. He pled guilty, was sentenced to prison and paroled after two years. He then served 120 days for a parole violation. For the next two years after his release, he engaged in multiple acts of oral sex with his seven-year-old son and six-year-old stepdaughter, and in anal intercourse on at least one occasion with his seven-year-old son. Bieganowski also took explicit photographs of this sexual activity. He explained that a friend had told him about intercourse with young children and so he "experimented" with his own children. Id. At Bieganowski's commitment hearing, a psychiatrist, Dr. Farnsworth, testified that while Bieganowski's sexual behavior was habitual he felt it might not demonstrate an "utter" lack of power to control sexual impulses. Id. at 527. Dr. Farnsworth testified that the "grooming" behavior exhibited by pedophiles like Bieganowski — developing a relationship with victims before becoming sexually involved with them — involves some planning and foresight. This grooming, Dr. Farnsworth felt, was contradictory to an utter lack of control. Id. Dr. Farnsworth defined "utter lack of control" as an "impulse control problem 'in which there is an ability to stop one's behavior despite being in an area of risk of being apprehended or caught.'" Id. Another psychiatrist who testified at Bieganowski's hearing, Dr. Satterfield, however, found that Bieganowski did demonstrate an utter lack of power to control his sexual impulses "even though he is not out of control every second of the day." Id. Dr. Satterfield believed the "utter" standard was met because Bieganowski had "absolutely no boundaries around his sexual behavior and impulses, and is extremely likely to have no control [over what] 'triggers' " his behavior. Id. A third psychiatrist, Dr. Malecha, testified that the statutory criteria for commitment were met. After listening to this testimony, in addition to other evidence, the trial court agreed with Dr. Satterfield and Dr. Malecha and found Bieganowski met the standards for commitment. Id. at 528. The Court of Appeals of Minnesota observed:

Although the "grooming" process requires time, thus eliminating any "suddenness" regarding the sexual activity, the habitual nature of [Bieganowski's] predatory sexual conduct indicates an inability to stop the "grooming" behavior. The trial court reasoned that [Bieganowski's] failure to remove himself from situations that provide the opportunity for similar offenses, and his failure to avoid precursors that trigger his impulsive behavior . . . demonstrate his lack of control. His impulsiveness is also evidenced by the established pattern of escape when [Bieganowski] is faced with the consequences of his own
degree of control over his impulses by waiting for the most opportune moment to attack. Interpreting "utter" to mean something less than complete lack of control at any time or under any circumstances is appropriate. Arguing by analogy, simply because a kleptomaniac is able to resist the temptation to steal when a security guard is watching, does not mean he could not be accurately described as having an "utter lack of power to control" his thievery. Simply because an alcoholic is able to refuse a drink on one occasion, does not mean he could not appropriately be described as having an "utter lack of power to control" his drinking. Similarly, the fact that a sexual predator postpones an attack for fear of being captured or detected, or even out of an atypical experience of guilt, does not mean he does not exhibit an "utter lack of power to control" his sexual impulses. Repeatedly lacking control over a period of time should determine whether a person has an "utter lack of power to control" his sexual impulses, not the presence or absence of control in any one instance.

Nevertheless, the addition of the second category is not a constitutionally fatal change. The ability to commit a person in the absence of a judicial determination of some degree of lack of control, however, works against the assertion that the classification is analogous to having an irresistible impulse, that is, an extension of one traditional form of legal concept of insanity. The lack of control that accompanies the emotional, personality, or mental disorders of a person who possesses a SPP supports the claim that these disorders are mental illnesses. Dispensing with the lack of control requirement with regard to a person committed as a SDP does not preclude a finding of "mental illness," but

failure to comply with probation terms or other restrictions. Thus, . . . [his] conduct manifests the "utter lack of power to control" contemplated in Pearson. 
Id. at 530. The Court of Appeals affirmed the commitment. Id. at 532. Compare In the Matter of Schweninger, 520 N.W.2d 446, 450 (Minn. Ct. App. 1994), review denied (Oct. 27, 1994) (finding that planning sexual overtures to children tends to preclude a finding an "utter lack of power to control sexual impulses"). See also In re Lineham, 518 N.W.2d 609, 613-14 (Minn. 1994) (stating that psychiatric testimony must conform to the Pearson test and providing six factors for the trial courts to consider in predicting dangerousness to the public).

309. See generally Powell v. Texas, 392 U.S. 514 (1968) (Marshall, J., plurality opinion). In Powell, five Justices acknowledged that a chronic alcoholic — a status — could most likely not be punished for his drinking, but refused to overturn conviction for public intoxication on Eighth Amendment grounds because "appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion." Id. at 532. But see HERBERT FINGARETTE, HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE (1988).
any weakening of the constitutional basis for commitment was ill-advised.

The tension between the extreme requirement of an "utter lack of power to control" and the overly indulgent elimination of any necessity to prove lack of control might be best remedied by replacing both terms with a single class of persons subject to the statute. The definitions of a person who possesses a SPP and a person who is a SDP could be combined and the second Pearson requirement would become proving that the person to be committed has "irresistible impulses to engage in harmful sexual conduct" rather than an "utter" lack of power to control his sexual impulses.310 Even though persons committed under the new standard might still possess the same degree of control as those committed under the old standard, the phrase "irresistible impulses" is more precise in light of how the statute is actually being applied. In addition, because the same degree of lack of control would be found as under the prior standard, the statute would remain true to the Pearson test for constitutional purposes.

VI. CONCLUSION

The law is not an end in itself, but a powerful instrument to achieve the sound social goals of the community. As an instrument, the law may be used in new ways to implement old purposes in light of a new understanding of reality. Minnesota is attempting to accomplish a new goal with its Sexual Psychopathic Personality Statute. Minnesota recognizes that persons exist in its community that do not fit into either of the traditional legal categories — "mad" or "bad" — that make up the present paradigm of culpability in the law. In order to treat these persons and protect society from the danger they present, Minnesota adapted its legal concept of "mental illness" to include the sort of disorder displayed by these persons and expanded the basis for its civil commitment. Instead of ignoring the problem of sex offenders who are part "mad" and part "bad" or diverting the criminal law from its fundamental requirement of moral blameworthiness, Minnesota developed a new legal compromise. Minnesota's Sexual Psychopathic Personality Statute acknowledges these persons' unique lack of culpability and their unique danger to the community. Minnesota's effort to strike a balance between competing goals and a complex reality that is not adequately captured by two mutually exclusive categories — "mad" and "bad" — is not only constitutional, but commendable.

310. See infra Appendix — Model Statute.
APPENDIX

Although Minnesota’s Sexual Psychopathic Personality Statute as it exists can serve as a model for other states wishing to enact similar legislation, the following model statute incorporates this note’s recommendations for improving the statute. This model statute assumes the provisions will be incorporated into an existing civil commitment act that provides constitutional procedures for the commitment and release of persons who are mentally ill and dangerous.¹

Model Sexual Psychopathic Personality Act²

An Act to Authorize the Involuntary Civil Commitment and Treatment of Sexual Psychopathic Personalities.³

[Insert appropriate enacting clause].⁴

Section 1. [Short Title.] This Act shall be known and may be cited as the “Sexual Psychopathic Personality Act of [insert date].”

Section 2. [Definitions.] As used in this Act:

(a) “Sexual psychopathic personality” means the existence in any person of —

(1) conditions of emotional instability,
(2) impulsiveness of behavior,
(3) lack of customary standards of good judgment,
(4) failure to appreciate the consequences of personal acts, or
(5) a combination of any of these conditions that render that person irresponsible for any personal conduct with respect to sexual matters, if the person evidences, by a habitual course of harmful sexual conduct, that the person possesses irresistible impulses to engage in harmful sexual conduct and is dangerous to other persons because the person is likely to engage in the future in acts of sexual conduct harmful to other persons.

1. See supra part IV.
2. This draft act attempts to follow the form established for uniform or model acts in 75 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 396-403 (1966) [hereinafter HANDBOOK].
3. States impose various requirements on titles. Care should be exercised to comply with them. See generally CARL H. MANSON, THE DRAFTING OF STATUTE TITLES, 10 IND. L.J. 155 (1934).
4. States impose various forms for enacting clauses. Care should be exercised to comply with them; a mistake can be fatal. See, e.g., May v. Rice, 91 Ind. 546 (1883).
5. States sometimes prohibit using section headings. The brackets are a warning to ascertain local law. HANDBOOK, supra note 2, at 399.
(b) "Harmful sexual conduct" means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another person.

Section 3. [Permissible Inferences Based on Conduct.] If any person engages in conduct in violation of [insert], it gives rise to a permissible inference that the person against whom the conduct was directed suffered serious physical or emotional harm.

Section 4. [Permissible Inferences Based on Motivation or Pattern of Conduct Directed Toward a Goal.] If any person engages in conduct in violation of [insert] where the 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, it gives rise to a permissible inference of a substantial likelihood that the person against whom the conduct was directed suffered serious physical or emotional harm.

Section 5. [Applicability of Other Procedures for Commitment.] Except as otherwise provided in this section, the provisions of [insert] relating to persons mentally ill and dangerous to the public apply to persons who are alleged or found to be persons with a sexual psychopathic personality. Before commitment proceedings are instituted, the facts supporting commitment shall be first submitted to the [insert] who, if satisfied that good cause exists, will prepare the petition. The [insert] may request a prepetition screening report. The petition is to be executed by a person having knowledge of the facts and filed with the committing court of [insert] in which the subject of the petition has a settlement or is present. If the subject is in the custody of [insert], the petition may be filed in the [insert] where the conviction for which the subject is incarcerated was entered. Upon the filing of a petition alleging that the subject is a person with a sexual psychopathic personality, the court shall hear the petition according to the procedures otherwise set out

6. Cross references to the appropriate criminal provisions relating to sexual conduct.
7. Cross references to the appropriate criminal provisions relating to homicide, assault, robbery, kidnapping, false imprisonment, incest, tampering with a witness, arson, burglary, threats, harassment and stalking.
8. Reference to the civil commitment chapter in which the Act is placed.
9. Insert appropriate prosecuting official.
10. Insert appropriate prosecuting official.
11. Insert appropriate governmental unit.
12. Insert appropriate correctional official.
13. Insert appropriate governmental unit.
for the commitment of those who are mentally ill and dangerous to the public.

Section 6. [Procedures for Transfer; Factors; Service of Sentence.]

(a) [Transfer.] If a person committed under this Act is later committed to the custody of [insert],\(^{14}\) the person may be transferred from a hospital to another facility designated by the [insert]\(^ {15}\) as provided in section [insert].\(^ {16}\)

(b) [Factors.] The factors to be considered by [insert]\(^ {17}\) in determining whether a transfer is appropriate are —

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 public or private hospital,
4. the danger posed by the person to other patients or staff at the public or private hospital, and
5. the degree of security necessary to protect the public.

(c) [Service of Sentence.] If a person is committed under this Act after a commitment to the custody of [insert],\(^ {18}\) the person shall first serve the sentence in a facility designated by [insert].\(^ {19}\) After the person has served the sentence, the person shall be transferred to a regional center designated by [insert].\(^ {20}\)

Section 7. [Defense or Prohibition Against Trial Precluded.] The possession by any person of a sexual psychopathic personality shall not constitute a defense to a charge of crime or relieve such person from liability to be tried upon a criminal charge.

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15. Insert appropriate correctional official.
16. Cross reference provisions covering the transfer of persons mentally ill and dangerous to the public from hospitals to the appropriate correctional facility.
17. Insert appropriate correctional official or civil commitment official or both.
18. Insert appropriate correctional official.
19. Insert appropriate correctional official.
20. Insert the appropriate civil commitment official.