

**ONE ARROW IN THE QUIVER—USING CIVIL  
COMMITMENT AS ONE COMPONENT OF A STATE’S  
RESPONSE TO SEXUAL VIOLENCE**

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## I. INTRODUCTION

Sexual assault takes many forms, ranging from the stranger rape of an adult woman or abduction of a child to the repeated molestation of a child by an acquaintance, a family member, or a stranger who has met and groomed the child for assault.

But whatever its manifestation, sexual assault often does extreme damage. “[T]he sexual predator poses a danger that is unlike any other.”<sup>1</sup> “Short of homicide, [rape] is the ‘ultimate violation of self.’ . . . Rape is very often accompanied by physical injury . . . and can also inflict mental and psychological damage. Because it undermines the community’s sense of security, there is public injury as well.”<sup>2</sup> Likewise, the effects of childhood sexual abuse are “frequently lifelong and severe.”<sup>3</sup> Children who are sexually abused “will be damaged physically, emotionally, mentally, and spiritually. Every aspect of their lives will be affected. When they become adults . . . [m]any will become drug addicts. Some will destroy themselves.”<sup>4</sup>

In recent years, an increasing number of states have employed civil commitment as one tool to help prevent repeated sexual assault.<sup>5</sup> “Civil commitment”—the use of civil law processes to commit persons with mental disorders to treatment programs for their own protection or the protection of others—is well established in both law and public policy.<sup>6</sup> Minnesota has long used civil commitment to address the problems of persons with mental illness, mental retardation and chemical dependency;<sup>7</sup> there is little dispute about the general appropriateness of such commitment.

For more than sixty years, Minnesota and other states have used civil commitment to address the problem of persons who

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1. *In re Blodgett*, 510 N.W.2d 910, 917 (Minn. 1994).

2. *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977).

3. MIC HUNTER, *ABUSED BOYS: THE NEGLECTED VICTIMS OF SEXUAL ABUSE* 45 (Lexington Books 1990).

4. *Id.* at ix.

5. Alan Held, *The Civil Commitment of Sexual Predators—Experience Under Minnesota’s Law*, in *THE SEXUAL PREDATOR* 2-4 to 2-5 (Anita Schlank & Fred Cohen eds., 1999).

6. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

7. MINN. STAT. § 253B.02, subs. 2, 13, 14 (2002).

perpetrate sexual assault.<sup>8</sup> The use of civil commitment for this purpose has ebbed and flowed, but has dramatically increased since 1990.<sup>9</sup> Despite its long history, the use of civil commitment for sexual predators remains controversial, both constitutionally and as a matter of policy. Over the last dozen years, sexual predator commitment statutes have faced (and withstood) constant attack on constitutional grounds. Legislatures have continued to confront policy issues related to these commitments—the cost of both the commitment process and the treatment/confinement facilities to which such persons are committed as well as the relative roles of the civil and criminal processes in protecting the public from the ravages of sexual assault.

This article addresses these issues. It summarizes the development and implementation of Minnesota's two laws used to civilly commit sexual predators. It reviews the most significant judicial challenges to the use of these laws in Minnesota's state and federal courts and the U.S. Supreme Court,<sup>10</sup> and describes what issues seem to be well settled and those that remain unclear. Lastly, it discusses the policy issues involved in the use of civil commitment for this purpose.

## II. DEVELOPMENT AND USE OF SEXUAL PREDATOR COMMITMENT LAWS IN MINNESOTA—A WHIRLWIND TRIP FROM 1939 TO 2003

### A. *The Psychopathic Personality Statute*

In 1939, Minnesota became just the third state to adopt a sexual predator civil commitment law<sup>11</sup> with the enactment of the “psychopathic personality” (“PP”) commitment statute.<sup>12</sup> By 1970,

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8. PROGRAM EVALUATION DIV., OFFICE OF LEGISLATIVE AUDITOR, STATE OF MINN., PSYCHOPATHIC PERSONALITY COMMITMENT LAW 3 (1994) [hereinafter LEGIS. AUD. REP.].

9. *Id.* at 11.

10. In written materials for a continuing legal education presentation, the author has provided a relatively comprehensive summary of Minnesota case law discussing the standards and procedures for commitment of persons under Minnesota's two commitment statutes for sexual predators. See John L. Kirwin, *The Commitment of Sexual Predators in Minnesota: Legal Overview*, in *Sexual Psychopathic Personalities and Sexually Dangerous Persons* (Minn. Inst. of Legal Educ. 2002) [hereinafter Kirwin, *Overview*].

11. Michigan and Illinois enacted such laws in 1937. LEGIS. AUD. REP., *supra* note 8, at 3.

12. Act of April 21, 1959, ch. 369, 1939 Minn. Laws 712, 712-13; see LEGIS.

twenty-nine states and the District of Columbia had adopted such statutes.<sup>13</sup>

Minnesota's 1939 statute defined the term "psychopathic personality" as:

the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.<sup>14</sup>

However, responding to a constitutional vagueness challenge the same year the statute was enacted, the Minnesota Supreme Court in *State ex rel. Pearson v. Probate Court*<sup>15</sup> gave the statute what was later regarded as a "narrowing interpretation,"<sup>16</sup> holding that the law applied only to

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 object of their uncontrolled and uncontrollable desire.<sup>17</sup>

#### B. Use of the Psychopathic Personality Law Until 1990

During the 1940s, 50s and 60s, the PP law was used frequently to commit persons to state hospitals, but its use declined following that period. An average of seventy-four persons per decade were committed from 1939 to 1969.<sup>18</sup> During the 1940s and 1950s, the

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AUD. REP., *supra* note 8, at 3.

13. LEGIS. AUD. REP., *supra* note 8, at 3.

14. Act of Apr. 21, 1939, ch. 369, § 1, 1939 Minn. Laws 712, 712-13.

15. 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270 (1940).

16. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 610 (Minn. 1994) (stating *Pearson* "narrowed the reach of the statutory definition").

17. *Pearson*, 205 Minn. at 555, 287 N.W.2d at 302. This interpretation was narrower than the statutory language in at least two ways: it required that the person must have a past history of sexual misconduct and it required an utter lack of power to control harmful sexual behavior. *Id.*

18. LEGIS. AUD. REP., *supra* note 8, at 11. The Legislative Auditor's 1994 report attributes these numbers of committed persons to staff of the Minnesota Security Hospital. Another source had previously reported higher numbers of committed persons. LEGIS. AUD. REP., *supra* note 8, at 11. See Eric S. Janus & Nancy H. Walbek, *Sex Offender Commitments in Minnesota: a Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343, 349 n.35 (2000).

law was used primarily as an alternative to criminal punishment (*i.e.*, persons were committed under the PP law rather than being criminally charged and convicted) and many persons were committed for what would now be viewed as minor offenses.<sup>19</sup> Most committed persons were first-time offenders.<sup>20</sup> In the 1960s and later, committed persons were more violent and more likely to be repeat offenders.<sup>21</sup>

But commitments under the law then diminished dramatically. Only thirteen persons were committed in the 1970s and just fourteen in the 1980s.<sup>22</sup>

C. 1980—Minnesota Changes from “Indeterminate” Criminal Sentences to Determinate Sentences and Sentencing Guidelines

Before 1980, Minnesota employed a system of indeterminate criminal sentencing.<sup>23</sup> Under this system, judges generally imposed lengthy sentences.<sup>24</sup> However, the parole board established an offender’s actual time spent in prison and determined when an offender would be released on parole supervision.<sup>25</sup> Under this system, parole boards released most prisoners after serving relatively short terms—much less than the lengthy terms imposed by the sentencing judges.<sup>26</sup> Offenders who were thought to be unduly dangerous could be detained in prison for longer periods, sometimes up to the maximum length of the sentence.<sup>27</sup> But “serving until expiration” was the exception; for most offenders, release was based on a determination by the parole board that they could be released with reasonable safety.<sup>28</sup>

All of this changed in May 1980 when Minnesota moved to a system of fixed sentences determined according to sentencing guidelines.<sup>29</sup> Under this system, the actual time the offender would

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19. LEGIS. AUD. REP., *supra* note 8, at 16.

20. *Id.*

21. *Id.* at 16.

22. *Id.* at 11. During this period, most states actually repealed their sexual predator commitment laws. *Id.* at 4.

23. Stephen C. Rathke, *Plea Negotiating Under the Sentencing Guidelines*, 5 *HAMLIN L. REV.* 271, 272 (1982).

24. *Id.*

25. *Id.* at 272-73.

26. *Id.* at 273.

27. *Id.*

28. *Id.* at 272-73.

29. See Act of Apr. 5, 1978, ch. 273, art. 1, 1978 Minn. Laws 761, 762-70 (codified as amended at MINN. STAT. §§ 244.01-11 (2002)).

spend in prison would be determined by the sentencing judge according to the guidelines. An offender sent to prison would presumptively serve two-thirds of the pronounced sentence in prison and the remainder on supervised release; however, “good time” could be taken away for disciplinary infractions, so that the prison release date could be extended, usually for a short period.<sup>30</sup> Thus, for offenses committed beginning in May 1980, offenders were released from prison, not based on a determination of their potential to reoffend, but because they had reached the supervised release dates on which they were *entitled* to be released.

*D. Increased Use of Psychopathic Personality Law*

Between 1987 and 1991, Minnesotans were horrified by a number of rape/murders committed by sex offenders recently released from state prisons.<sup>31</sup> Responding to the earliest of these crimes, Attorney General Hubert Humphrey in 1988 convened a task force to address issues of sexual violence against women.<sup>32</sup> The task force issued its Final Report in 1989, containing many recommendations<sup>33</sup> including both stiffer criminal sentences for dangerous sex offenders and, most significant here, increased use of PP commitment to confine and treat the most dangerous offenders being released from prison.<sup>34</sup>

The 1989 Minnesota Legislature enacted several provisions to help assure that highly dangerous sex offenders would not be released prematurely. In addition to enacting tougher criminal sentences,<sup>35</sup> the Legislature required a court sentencing a sex

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30. MINN. STAT. § 244.04 (2002).

31. LEGIS. AUD. REP., *supra* note 8, at 7, 8; Marna J. Johnson, Comment, *Minnesota's Sexual Psychopathic Personality and Sexually Dangerous Person Statute: Throwing Away the Key*, 21 WM. MITCHELL L. REV. 1139, 1148, 1150 (1996).

32. OFFICE OF THE MINNESOTA ATTORNEY GENERAL, TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN, FINAL REPORT 2 (1989) [hereinafter ATT'Y GEN. REP.].

33. See discussion *infra* Part VII.

34. ATT'Y GEN. REP., *supra* note 32, at 10-14, 23.

35. A “patterned sex offender” sentencing option was adopted, allowing longer sentences up to the statutory maximum for offenders evaluated and determined likely to reoffend. Act of June 1, 1989, ch. 290, art. 4, § 10, 1989 Minn. Laws 1580, 1620-21. And the statutory maximum sentences were increased for first-through-fourth-degree criminal sexual conduct. *Id.* §§ 12-15, 1989 Minn. Laws at 1622-23. In addition, the Legislature enacted a thirty-seven year maximum sentence for certain third-time sex offenders. *Id.* art. 2, § 14, 1989 Minn. Laws at 1593.

offender to make a preliminary determination whether a PP commitment may be appropriate and to refer any such cases to the county attorney.<sup>36</sup>

The event that had the greatest effect in increasing sexual predator commitments, however, was an administrative action by the State's Commissioner of Corrections, Frank Wood.<sup>37</sup> In 1990-91, Minnesota reeled from three notorious rape/murders committed by sex offenders just released from prison.<sup>38</sup> Responding to these events, in 1991 Wood began a process to evaluate all high-risk sex offenders before release from prison and to refer selected persons to their county attorneys to be considered for PP commitment.<sup>39</sup> The Legislature enacted this screening process into law the following year,<sup>40</sup> and also adopted further enhancements to the criminal sentencing laws for sex offenders and offenders who had murdered with sexual intent or had a sex offense history.<sup>41</sup>

The result of the Department of Correction's sex offender screening process was dramatic: PP commitments increased from two in 1990 to ten in 1991 and twenty-two in 1992.<sup>42</sup> In contrast to early commitments under the PP law, most persons committed during the early 1990s were repeat sex offenders who either had failed or refused to participate in sex offender treatment in prison.<sup>43</sup> On average, they had spent almost seven years in prison immediately preceding their commitment.<sup>44</sup>

Minnesota's increased use of civil commitment to address problems of sexual violence coincided with a similar movement around the country. Washington, in 1990, had become the first

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36. See Act of June 1, 1989, ch. 290, art. 4, § 9, 1989 Minn. Laws 1580, 1619-20 (codified at MINN. STAT. § 609.1351 (2002)).

37. LEGIS. AUD. REP., *supra* note 8, at 13.

38. *Id.* at 8; Johnson, *supra* note 31, at 1150.

39. LEGIS. AUD. REP., *supra* note 8, at 8; Johnson, *supra* note 31, at 1151 & n.71.

40. Act of Apr. 29, 1992, ch. 571, art. 3, § 3, 1992 Minn. Laws 1983, 2010 (codified at MINN. STAT. § 244.05, subd. 7 (2002)).

41. Act of Apr. 29, 1992, ch. 571, art. 1, §§ 13-14 and art. 4, § 4, 1992 Minn. Laws 1983, 1991-93, 2015-16.

42. LEGIS. AUD. REP., *supra* note 8, at 11. The rate of commitments waned somewhat, settling into the teens per year. By July 1, 1998, there were about 134 persons under commitment. MINN. DEP'T OF CORRECTIONS, CIVIL COMMITMENT STUDY GROUP, 1998 REPORT TO THE LEGISLATURE 2 (1999) [hereinafter DOC CIV. COMMIT. STUDY].

43. LEGIS. AUD. REP., *supra* note 8, at 16-17.

44. *Id.* at 17.

state to adopt a modern, “second-generation,” sexual predator commitment law.<sup>45</sup> By 2001, at least seventeen states had adopted such laws.<sup>46</sup> Unlike earlier laws that generally were used to commit people instead of imprisoning them, the new generation of commitment laws is most often used following completion of a person’s prison term.<sup>47</sup>

*E. 1994—Linehan I and Rickmyer and Deliberations Leading to Sexually Dangerous Person Law*

As commitments under the PP law increased in the early 1990s, committed persons began to challenge both the constitutionality and the applicability of the law. The constitutional challenges, all unsuccessful, are discussed in Part IV. But three 1994 judicial decisions interpreting the *application* of the law are particularly significant here, because they helped spur the enactment of the “sexually dangerous person” law that year.

Responding to the constitutional challenges to the PP law and the public policy debate engendered by those challenges, the 1994 Minnesota Legislature created a task force “to study issues relating to the confinement of sexual predators, including commitment of psychopathic personalities.”<sup>48</sup> Then, in June 1994, before the Task Force held its first meeting, the Minnesota Supreme Court issued decisions *In re Linehan (Linehan I)*<sup>49</sup> and *In re Rickmyer*,<sup>50</sup> overturning

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45. Community Protection Act, ch. 3, §§ 1001-13, 1990 Wash. Laws 12, 97-102 (codified as amended at WASH. REV. CODE §§ 71.09.010-230 (2000)) ; LEGIS. AUD. REP., *supra* note 8, at 37; Johnson, *supra* note 31, at 1172 n.229.

46. Ken Kozlowski, *In the Wake of Hendricks—States Seem “Committed” to SVP Programs*, in 2 THE SEXUAL PREDATOR 4-2 & n.5 (Anita Schlank ed. 2001). The following states have modern sexual predator commitment laws: Arizona (ARIZ. REV. STAT. § 36-3701 (Supp. 2002)); California (CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 1998)); Florida (FLA. STAT. ANN. § 394.910 (West 2002)); Illinois (725 ILL. COMP. STAT. 207/1-207/99 (2002)); Iowa (IOWA CODE § 229A.1 (2000)); Kansas (KAN. STAT. ANN. 59-29a01 (1999)); Kentucky (KY. REV. STAT. ANN. § 17.500 (Michie 2000)); Minnesota (MINN. STAT. §§ 253B.02, subd. 18(c), 253B.185 (2002)); Missouri (MO. REV. STAT. §§ 632.480-632.513 (2000)); New Jersey (N.J. STAT. ANN. §§ 30:4-27.24 to 30:4-27.38 (West Supp. 2002)); North Dakota (N.D. CENT. CODE § 25-03.3 (2002)); South Carolina (S.C. CODE ANN. § 44-48-10 (Law. Co-op. 2002)); Texas (TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon 2003 Supp.)); Virginia (VA. CODE ANN. § 37.1-70.1 (2002 Supp.) (not effective until Jan. 1, 2004)); Washington (WASH. REV. CODE § 71.09 (2002)); and Wisconsin (WIS. STAT. § 980.01 (1998)).

47. LEGIS. AUD. REP., *supra* note 8, at 37; Johnson, *supra* note 31, at 1172 n.229.

48. Act of May 10, 1994, ch. 636, art. 8, § 20, 1994 Minn. Laws 2170, 2312-13.

49. 518 N.W.2d 609 (Minn. 1994).

PP commitments.

Dennis Linehan was committed under the PP statute in 1992, shortly before his scheduled release from a prison term for the sexually motivated kidnap/murder of a fourteen-year-old babysitter, Barbara Iverson, in 1965. The issue addressed by the Minnesota Supreme Court was “whether the record supports, by clear and convincing evidence,” the trial court’s conclusion that Linehan met the *Pearson* requirement that he have an utter lack of power to control his sexual impulses.<sup>51</sup> Reversing Linehan’s commitment, the supreme court said the evidence “fail[ed] to support the trial court’s finding.”<sup>52</sup>

Although *Linehan I* is most narrowly characterized as a case involving sufficiency of the evidence, some of the court’s statements raised concerns among county attorneys and policy makers as to the continued vitality and usefulness of the PP law. Noting “a key distinction in the *Pearson* test—the difference between uncontrolled desire and uncontrollable desire,” the court emphasized expert testimony that Linehan’s behavior leading up to the 1965 kidnap/murder was “planned” and “planful.”<sup>53</sup> *Linehan I* left it unclear whether the county attorney simply needed better testimony to commit someone like Linehan, or whether evidence of planning by a proposed patient would undercut a finding of “utter lack of power to control sexual impulses.”

The other decision, *Rickmyer*, concerned a pedophile. Rickmyer had a history of molesting children, including exposing himself to young boys in a motel room, approaching children at a playground and touching their bare buttocks, touching the “private parts” of one boy a number of times, and repeatedly “spanking” children at a playground.<sup>54</sup> Experts agreed, and the district court found, that Rickmyer was likely to continue to victimize children.<sup>55</sup>

The Minnesota Supreme Court considered whether Rickmyer’s acts were sufficiently harmful to warrant commitment under the PP law. The court held that physical harm was not required, but rather that “[t]here may be instances where a pedophile’s pattern of sexual misconduct is of such an egregious

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50. 519 N.W.2d 188 (Minn. 1994).

51. *Linehan I*, 518 N.W.2d at 613.

52. *Id.*

53. *Id.* at 612.

54. *Rickmyer*, 519 N.W.2d at 189.

55. *Id.* at 189-90.

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.”<sup>56</sup> However, the court held that Rickmyer’s “unauthorized sexual ‘touchings’ and ‘spankings’ while repellent, do not constitute the kind of injury, pain ‘or other evil’ that is contemplated by the psychopathic personality statute.”<sup>57</sup> The court also held that “the record does not support the trial court’s findings” that Rickmyer inflicted serious physical or mental harm on his victims.<sup>58</sup>

Because the meetings of the Task Force began almost immediately after the *Linehan I* and *Rickmyer* decisions, there was a great deal of concern regarding the effects of the two decisions. Moreover, shortly after the Task Force began meeting, the Minnesota Court of Appeals decided *In re Schweningen*,<sup>59</sup> holding that a pedophile with a fifteen-year history of preying on numerous young boys, including bribing, fondling, exposure and oral sex, did not pose a sufficient level of harm to warrant commitment under the statute.<sup>60</sup> The appellate court held that a pedophile could not be committed absent a showing of “violence.”<sup>61</sup>

The court in *Schweningen* also addressed the “utter-lack-of-power-to-control” issue.<sup>62</sup> Schweningen had engaged in “classic grooming” behavior<sup>63</sup> with his victims.<sup>64</sup> The appellate court held that Schweningen’s “plotting, planning” and “seduction” were inconsistent with utter lack of power to control.<sup>65</sup> The *Schweningen* decision added to the *Rickmyer/Linehan I* confusion as to what

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56. *Id.* at 190 (emphasis added).

57. *Id.*

58. *Id.*

59. 520 N.W.2d 446 (Minn. Ct. App. 1994).

60. *Id.* at 447-49.

61. *Id.* at 450.

62. *Id.* at 449-50.

63. “Grooming” consists of a set of behaviors commonly used by pedophiles to make the child available for sexual abuse. See *In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. Ct. App. 1994). For example, in *In re Adolphson*, No. C5-95-533, 1995 WL 434386 (Minn. Ct. App. 1995), the pedophile “enticed the boys by first offering them jobs at his theater and furniture store, paying them in cash. He socialized with them, inviting them to his apartment or lake home singly or in small groups. Once there, he supplied them with alcohol, cigarettes, and pornography.” *Id.* at \*1. Pedophiles sometimes access children by befriending their parents. See, e.g., *In re Ayers*, 570 N.W.2d 21, 22 (Minn. Ct. App. 1997); see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 571 (4th ed. text revision 2000) [hereinafter DSM-IV-TR].

64. *Schweningen*, 520 N.W.2d at 448.

65. *Id.* at 450.

conduct would be harmful enough for a PP commitment, and whether any person could really have an *utter* lack of power to control sexual impulses.<sup>66</sup>

The Attorney General and several county attorneys told the Task Force that, with these interpretations, the appellate courts may have significantly decreased the usefulness of the PP statute to protect the public from sexual predators.<sup>67</sup> After many meetings over the course of five weeks, the Task Force issued an Interim Report proposing a set of statutory amendments relating to the civil commitment of sexual predators.<sup>68</sup>

#### F. *Enactment of Sexually Dangerous Person Law*

The Legislature met in a special session on August 31, 1994 and enacted statutory amendments essentially as recommended by the Task Force.<sup>69</sup> The new law added a commitment category to Minnesota's Civil Commitment Act, Minnesota Statutes chapter 253B. The new commitment category was for a "sexually dangerous person" or "SDP":

Subd. 18c. **Sexually dangerous person.** (a) A "sexually dangerous person" means 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.

(b) For purposes of this provision, it is not necessary to prove that the person has an inability to control the

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66. Another decision, issued a week after *Schweninger* by the same court of appeals panel, furthered this confusion. See *Bieganowski*, 520 N.W.2d 525 (Minn. Ct. App. 1994). *Bieganowski* affirmed the commitment of a child molester and also called into question the meaning of the inability-to-control discussion in *Linehan I*. See *id.* at 530-32. The court in *Bieganowski* held that evidence of planning does not necessarily negate an inability to control sexual impulses, seemingly contradicting what it had said the previous week in *Schweninger*. *Id.* at 530.

67. John L. Kirwin, *Civil Commitment of Sexual Predators: Statutory and Case Law Developments*, HENNEPIN LAWYER, Sept.-Oct. 1995, at 22, 24 [hereinafter Kirwin, *Developments*].

68. TASK FORCE ON SEXUAL PREDATORS, INTERIM REPORT TO THE MINNESOTA LEGISLATURE 3 (Aug. 19, 1994).

69. See Act of Aug. 31, 1994, ch. 1, art.1, §§ 1-7, 1995 Minn. Laws 5, 6-9 (1994 first special session).

person's sexual impulses.<sup>70</sup>

The term "harmful sexual conduct" used in the SDP definition is also defined in the statute:

Subd. 7a. **Harmful sexual conduct.** (a) "Harmful sexual conduct" means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.

(b) There 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: [provisions defining first-, second-, third-, and fourth-degree criminal sexual conduct]. 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 [provisions defining murder; manslaughter; first-, second-, and third-degree assault; robbery; kidnapping; false imprisonment; incest; witness tampering; first-degree arson; first-degree burglary; terroristic threats; harassment and stalking].<sup>71</sup>

The new commitment category contained the same three basic elements as the *Pearson* standard, *i.e.*, (1) history of harmful sexual conduct, (2) a mental dysfunction and (3) resulting likelihood of future harmful sexual conduct.<sup>72</sup> However, because of the issues that arose regarding the PP law, the SDP commitment standard made two substantive changes.

First, in response to the *Linehan I* decision, the new statute defined the dysfunction differently than either the PP statute or *Pearson*. The new law required the person to have a "mental disorder or dysfunction;" sexual and personality disorders were two types of mental disorders that may be included.<sup>73</sup> The new statute made it clear that this definition of disorder, and not the inability-to-control standard from *Pearson*, applied.<sup>74</sup> The language of the SDP statute was drafted in consultation with mental health professionals, and was written in contemporary language used by such persons, rather than the archaic language of the PP statute

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70. MINN. STAT. § 253B.02, subd. 18c (2002).

71. *Id.* subd. 7a.

72. *See State ex rel. Pearson v. Probate Ct. of Ramsey County*, 205 Minn. 545, 555, 287 N.W.2d 297, 302 (1939).

73. MINN. STAT. § 253B.02, subd. 18c(a)(2) (2002).

74. *Id.* at subd. 18c(b).

and *Pearson*.<sup>75</sup>

The second significant change was in response to the *Rickmyer* decision. While the definition of “harmful sexual conduct” was taken essentially verbatim from *Rickmyer*, the new statute created a rebuttable presumption that conduct violating certain criminal statutes would be sufficiently harmful to support civil commitment.<sup>76</sup> This addressed the concern that the decisions in *Rickmyer* and *Schweninger* had not given sufficient weight to the serious long-term emotional harm caused to children by the acts of pedophiles who inflict their harm without force.<sup>77</sup>

In addition to enacting the new “SDP” commitment standard, the 1994 law also made minor, non-substantive changes regarding the PP statute. It was renamed “sexual psychopathic personality” (or “SPP”) and was moved from the probate statutes to the Civil Commitment Act, Minnesota Statutes chapter 253B.<sup>78</sup> Moreover, the *Pearson* construction, including the utter-lack-of-power-to-control requirement, was incorporated into the SPP law.<sup>79</sup> The 1994 act expressly stated that these amendments were not intended to make any substantive change in the PP law.<sup>80</sup>

The SPP law was retained because it was certain that there would be a constitutional challenge to the new SDP law. Even though the Legislature believed the new law would be upheld, it seemed prudent to keep the old law on the books and to commit persons under both statutes if possible.<sup>81</sup> Since 1994, county attorneys have sought and obtained commitments under both laws in most cases.<sup>82</sup>

*G. Key Interpretations of SDP Law—Likelihood of Reoffense and Inability to Control*

Because almost every committed person appeals his

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75. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 185 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999); Kirwin, *Developments*, *supra* note 67, at 24.

76. See MINN. STAT. § 253B.02, subd. 7a (2002).

77. Kirwin, *Developments*, *supra* note 67, at 24-25.

78. Act of Aug. 31, 1994, ch. 1, art.1, §§ 2, 4-6, 1995 Minn. Laws 5, 6-9 (1994 first special session).

79. MINN. STAT. § 253B.02, subd. 18b (2002).

80. Act of Aug. 31, 1994, ch. 1, art. I, § 5, 1995 Minn. Laws 5, 8 (1994 first special session).

81. Kirwin, *Developments*, *supra* note 67, at 25.

82. Janus & Walbek, *supra* note 18, at 354.

commitment, the courts have made many interpretations of the SDP law since its enactment in 1994.<sup>83</sup> Two interpretations, however, stand out as most important.

1. *Highly Likely to Reoffend*

The first of these relates to the language of the SDP law requiring the court to find that the person is “likely” to engage in additional harmful sexual conduct as a result of his mental disorder.<sup>84</sup> When Dennis Linehan was committed under the SDP law soon after its enactment, the trial court interpreted the term “likely” to mean “highly likely.”<sup>85</sup> On appeal, the Minnesota Supreme Court agreed.<sup>86</sup> The court asserted that a “highly likely” probability of reoffense is required in order to be consistent with the clear-and-convincing standard of proof in commitment cases.<sup>87</sup> In addition, the court said, “[t]he due process clauses of both the federal and state constitutions require that future harmful sexual conduct must be highly likely in order to commit a proposed patient under the SDP Act.”<sup>88</sup> While the court did not specifically quantify “highly likely,” it is clear from the court’s discussion that it is a higher standard than “more probable than not,” or fifty-one percent.

The court’s reasoning in adopting the highly likely standard is questionable. First, commentators generally recognize that risk probability and standard of proof are distinct concepts.<sup>89</sup> Thus, a low risk probability (*i.e.*, risk of a future event occurring) can be proven by a high standard of proof, and vice versa.<sup>90</sup> There is no

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83. See Kirwin, *Overview*, *supra* note 10, at 13-34, 55-64 (describing the interpretations in detail).

84. See MINN. STAT. § 253B.02, subd. 18c(a)(3) (2002).

85. *Linehan III*, 557 N.W.2d 171, 176 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999).

86. *Id.* at 180.

87. MINN. STAT. § 253B.18, subd. 1 (2002) (requiring a clear and convincing standard of proof in SDP cases); *Linehan III*, 557 N.W.2d at 180.

88. *Linehan III*, 557 N.W.2d at 180.

89. Thomas Grisso & Paul S. Appelbaum, *Is It Unethical to Offer Predictions of Future Violence?*, 16 L. & HUM. BEHAV. 621, 626-27 n.7 (1992); John Monahan & David Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV. 37, 38-42 (1978). See generally, Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 CRIM. & CIV. CONFINEMENT 347, 381 (1997).

90. *People v. Superior Court (Ghillotti)*, 44 P.3d 949, 974 n.15 (Cal. 2002) (“[I]t is not incongruous to require a unanimous jury to be convinced beyond reasonable doubt that one . . . presents a serious and well-founded risk [a standard

logical reason that the required risk level under the SDP law must, or even should, parallel the clear-and-convincing-evidence standard.

Second, there is no reason that substantive due process requires a high likelihood—*i.e.*, a standard that is higher than a more-probable-than-not standard—to support civil commitment. The “danger” posed by the proposed patient, and therefore the weight of the public interest in his civil commitment, has several components, often expressed as the magnitude of the expected harm, the probability of it occurring, how frequently it will occur and, perhaps, how imminently it will occur.<sup>91</sup> Under the SDP law, the gravity of the harm is, by definition, great; the anticipated conduct must be so egregious that it creates a substantial likelihood of serious physical or emotional harm.<sup>92</sup> Where such harm is anticipated, the state’s interest is compelling and outweighs the individual’s interest, even where the likelihood of the person engaging in the conduct is “only” fifty-one percent. Dennis Linehan and Clark Bailey, for example, each killed an adolescent girl in the course of a sexual assault.<sup>93</sup> Richard Enebak, who had at least thirty-seven sexual assault victims, permanently paralyzed his last victim and left her lying in a field.<sup>94</sup> The Minnesota Supreme Court’s decision in *Linehan III* holds that the State would not have a sufficiently strong interest to civilly commit such persons if the likelihood that they would repeat such conduct is “merely” fifty-one percent.<sup>95</sup>

Moreover, it seems implausible that the Minnesota court would impose a “highly likely” standard for other types of commitments, even though the “clear and convincing” proof standard applies to all of the commitment categories.<sup>96</sup> Under the

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less than 50%] of committing new acts of criminal sexual violence.”).

91. Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington’s Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 298 (1992); see also *Cross v. Harris*, 418 F.2d 1095, 1100-01 (D.C. Cir. 1969) (stating that dangerousness involves consideration of both likelihood and gravity); William D. Andrews, Note, Developments in the Law, *Civil Commitment of the Mentally Ill*, 87 HARV. L. R. 1190, 1236, 1238 (1974) (same).

92. MINN. STAT. § 253B.02, subd. 7a (2002).

93. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 610-11 (Minn. 1994); *Bailey v. Noot*, 324 N.W.2d 164, 165 (Minn. 1982).

94. *Enebak v. Noot*, 353 N.W.2d 544, 545-46 (Minn. 1984).

95. 557 N.W.2d 171, 182 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999).

96. MINN. STAT. § 253B.09, subd. 1 (2002) (providing the proof standard for

“mentally ill” commitment category,<sup>97</sup> for example, would the court hold that a person who posed a risk of suicide due to her mental illness could not constitutionally be committed for safekeeping and treatment if the probability of suicide were “only” fifty-one percent? Under the “mentally ill and dangerous to the public” commitment category,<sup>98</sup> would the court hold that a person who had murdered due to her mental illness could not constitutionally be committed for treatment if the probability of homicide were “only” fifty-one percent? Stated slightly differently, would the court hold that a group of mentally ill persons was not sufficiently dangerous to be committed *even if more than half of the persons would kill themselves or others if not committed?*

While the Minnesota Supreme Court is not alone in requiring a high likelihood of reoffense for sexual predator commitments,<sup>99</sup> other courts have rejected such an interpretation and have found the Minnesota court’s reasoning faulty. In 2002, the California and Massachusetts Supreme Courts interpreted the word “likely” in their Sexually Violent Predator civil commitment statutes to not require a likelihood of even fifty percent.<sup>100</sup> In this context, the California court defined “likely” to mean that “the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community.”<sup>101</sup> The court rejected the argument that substantive due process requires a “more likely than not to reoffend” standard, much less a higher standard.<sup>102</sup>

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mentally ill, mentally retarded, and chemically dependent commitments); MINN. STAT. § 253B.18, subd. 1 (providing the proof standard for mentally ill and dangerous, SPP and SDP commitments).

97. MINN. STAT. § 253B.02, subd. 13 (2002).

98. *Id.* subd. 17.

99. In *In re W.Z.*, 801 A.2d 205, 217 (N.J. 2002), the New Jersey Supreme Court read the statutory term “likely” to mean “highly likely,” in order to implement the “serious difficulty in controlling” discussion in *Kansas v. Crane*, 534 U.S. 407, 413 (2002). In *In re Leon G.*, 59 P.3d 779, 786-87 (Ariz. 2002), the Arizona Supreme Court interpreted the term “likely” to mean “highly probable” based on other language peculiar to the Arizona statute. The Arizona court observed that interpreting the term to mean merely “probable” would not raise constitutional concerns. *Id.* at 786.

100. See *People v. Superior Court (Ghillotti)*, 44 P.3d 949, 973 (Cal. 2002); *Commonwealth v. Boucher*, 780 N.E.2d 47, 47 (Mass. 2002). In addition, the Florida Supreme Court in *Westerheide v. State*, 831 So. 2d 93, 105-06 (Fla. 2002), affirmed the interpretation of the term “likely” as meaning “having a better chance of occurring than not.”

101. *Ghillotti*, 44 P.3d at 972 (emphasis in original).

102. *Id.* at 973.

The Massachusetts high court likewise rejected the argument that “likely” must mean “more likely than not,” explaining that it is for the fact finder to determine what is “likely.” Such a determination must be made on a case-by-case basis, by analyzing a number of factors, including the seriousness of the threatened harm, the relative certainty of the anticipated harm, and the possibility of successful intervention to prevent that harm.<sup>103</sup>

“[B]y its plain meaning,” the Massachusetts court said, “likely” is a term that “demands contextual, not statistical, analysis.”<sup>104</sup>

The Minnesota Supreme Court’s “highly likely” requirement for SDP commitments appears to result from the court’s general belief that standards for sexual predator commitments, as opposed to other types of commitments, must be very high. Nevertheless, no sound constitutional analysis supports this distinction.

## 2. *Requirement of Inability to Adequately Control*

The other significant judicial interpretation of the SDP law concerns the need to prove inability to control. While the *Pearson* standard applicable to the SPP law requires a showing of “utter lack of power to control sexual impulses,” the SDP law specifically states that “it is not necessary to prove that the person has an inability to control the person’s sexual impulses.”<sup>105</sup> However, as discussed more fully below, in *Linehan IV* the Minnesota Supreme Court interpreted the U.S. Supreme Court’s decision in *Kansas v. Hendricks*<sup>106</sup> to require that, to civilly commit a person as sexually dangerous, a state must prove an intermediate level of inability to control behavior.<sup>107</sup> The state court therefore gave the SDP law a narrowing interpretation, holding that:

the provision in subdivision 18c (b), stating that “it is not necessary to prove that the person has an inability to control the person’s sexual impulses,” should be read very narrowly . . . to mean only that the state does not need to prove that a person meets the *Pearson* utter inability

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103. *Boucher*, 780 N.E.2d at 49-50 (citation omitted).

104. *Id.* at 50 (footnote omitted).

105. *Compare* MINN. STAT. § 253B.02, subd. 18b (2002), with MINN. STAT. § 253B.02, subd. 18c(b) (2002).

106. 521 U.S. 346 (1997).

107. *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 876 (Minn. 1999).

standard.<sup>108</sup>

The court then said:

We now clarify that the SDP Act allows civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction *does not allow them to adequately control* their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future.<sup>109</sup>

### III. COMMITMENT PROCEDURES

The procedures used in SPP and SDP commitment cases are the same as those applied to persons who are alleged or found to be “mentally ill and dangerous” (“MI&D”).<sup>110</sup> The standards and procedures for commitment and discharge of persons committed under these three “highly dangerous to others” commitment categories provide greater public protection than the standards and procedures that apply to the “regular” commitment categories of “mentally ill,” “mentally retarded” and “chemically dependent” persons.<sup>111</sup>

In an SPP/SDP case, the county attorney must determine whether good cause exists to file a commitment petition in the district court.<sup>112</sup> In order to make this decision, the county attorney may move for a court order to obtain pre-petition access to a wide variety of records regarding the person who may be committed.<sup>113</sup>

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108. *Id.* at 875.

109. *Id.* at 876 (emphasis added).

110. MINN. STAT. § 253B.185, subd. 1 (2002) (establishing the applicability of the same procedures); MINN. STAT. § 253B.02, subd. 17 (2002) (defining an MI&D person as one who is mentally ill and “has engaged in an overt act causing or attempting to cause serious physical harm to another”).

111. MINN. STAT. § 253B.02, subds. 2, 13, 14 (2002) (defining “chemically dependent person,” “person who is mentally ill,” and “mentally retarded person”); MINN. STAT. §§ 253B.07-09, 253B.12-14, 253B.15-16 (2002) (setting forth commitment procedures); *Lidberg v. Steffen*, 514 N.W.2d 779, 784 (Minn. 1994); *In re K.B.C.*, 308 N.W.2d 495, 498 (Minn. 1981). While each of these categories requires a showing of danger to self or others, the SPP, SDP and MI&D categories are distinguished by the requirement that the court find the person to present a danger of conduct seriously harmful to other persons.

112. MINN. STAT. § 253B.185, subd. 1 (2002).

113. *Id.* subd. 1b. The constitutionality of the provision allowing issuance of an order for pre-petition access to the person’s relevant records was upheld in *In re Bartholomay*, No. P8-00-554, 2001 WL 1645818, at \*5 (Minn. Ct. App. Dec. 26, 2001).

After a petition is filed and if the person will be released from prison before the final commitment decision can be issued, the petitioner may move the court for an interim order to hold the person in a treatment facility.<sup>114</sup>

The court appoints an attorney for the proposed patient.<sup>115</sup> The court also appoints an “examiner”—a psychiatrist or doctoral-degree psychologist—to examine the proposed patient and report to the court.<sup>116</sup> Upon request, the court must appoint a second examiner selected by the proposed patient.<sup>117</sup>

The commitment trial is before a judge, without a jury.<sup>118</sup> The privilege against self-incrimination does not generally apply to these proceedings, so the county attorney may call the proposed patient to testify.<sup>119</sup>

Following the trial, the court must determine by clear and convincing evidence whether the person meets the requirements for commitment.<sup>120</sup> If so, the court must commit the patient to a “secure treatment facility” (the Minnesota Sex Offender Program, or “MSOP”), unless the proposed patient “establishes by clear and convincing evidence that a less restrictive treatment program is available that is consistent with the patient’s treatment needs and the requirements of public safety.”<sup>121</sup>

The court’s commitment following trial is an “initial” commitment.<sup>122</sup> The program to which the person is committed must then evaluate the patient and file a report within sixty days following the initial commitment order.<sup>123</sup> After receiving the

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114. MINN. STAT. § 253B.07, subds. 2b, 7 (2002).

115. *Id.* subd. 2c.

116. *Id.* subd. 3 (requiring the appointment of an examiner); MINN. STAT. § 253B.02, subd. 7 (2002) (defining the qualifications of an examiner).

117. MINN. STAT. § 253B.07, subd. 3 (2002).

118. MINN. STAT. § 253B.18, subd. 1 (2002).

119. *See In re Woodruff*, No. P7-97-60079, 1998 WL 345478, at \*2 (Minn. Ct. App. June 30, 1998); *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986).

120. MINN. STAT. § 253B.18, subd. 1 (2002).

121. MINN. STAT. § 253B.185, subd. 1 (2002) (requiring commitment to secure treatment facility); MINN. STAT. § 253B.02, subd. 18a (2002) (defining “secure treatment facility” as either the Minnesota Security Hospital or Minnesota Sexual Psychopathic Personality Treatment Center). In practice, persons committed as SPP and/or SDP are committed to MSOP, rather than the Security Hospital.

122. MINN. STAT. § 253B.18, subds. 1, 2 (2002).

123. *Id.* subd. 2. Among other things, the report must address whether the patient’s condition has changed since the initial commitment, whether treatment facility staff believe the patient meets the commitment requirements and what program or facility can best meet the patient’s treatment and security requirements. Minn. Commit. & Treatment Act, MINN. STAT. § 253B, app. B, Rule

report, the court must hold a “review hearing” to determine whether the commitment will be continued for an indeterminate period.<sup>124</sup>

A person committed as SPP or SDP is entitled to all of the rights of other committed persons under the “Rights of Patients” section of the Minnesota Commitment and Treatment Act.<sup>125</sup> Importantly, this includes “the right to receive proper care and treatment, best adapted, according to contemporary professional standards, to rendering further supervision unnecessary.”<sup>126</sup>

Once the person is indeterminately committed, the committing court lacks the authority to terminate the commitment.<sup>127</sup> Rather, the commitment law provides a special procedure for granting full or partial release to any person committed as SPP, SDP or MI&D.<sup>128</sup> Whenever either the patient or the treatment facility seeks to have the patient discharged, provisionally discharged or transferred out of MSOP, the applicant must petition a three-member “special review board,” which then holds a hearing on the petition.<sup>129</sup> The requested relief can be granted only with the concurrence of the special review board and the Commissioner of Human Services.<sup>130</sup> Following the Commissioner’s decision, either the patient or the county attorney may petition a specially appointed three-judge district court panel to conduct a *de novo* hearing and render a decision that supercedes the Commissioner’s decision.<sup>131</sup> The Minnesota Supreme Court has described the graduated release process—transfer to a less-secure facility, provisional discharge, and ultimately discharge—as an important part of the overall commitment process, allowing the patient to demonstrate that he has gained sufficient control over his sexual behavior to be released into the public with reasonable safety.<sup>132</sup>

The statutory standards for transfer and provisional discharge need not be repeated here.<sup>133</sup> The standard for discharge, however,

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23(d) (2002).

124. MINN. STAT. § 253B.18, subds. 2, 3 (2002).

125. MINN. STAT. § 253B.03 (2002).

126. *Id.* subd. 7.

127. MINN. STAT. § 253B.18, subd. 3 (2002).

128. *See id.* subds. 4b-15.

129. *Id.* subd. 5.

130. *Id.* subds. 6, 7, 15.

131. MINN. STAT. § 253B.19, subds. 1-3 (2002).

132. *See In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994).

133. *See* MINN. STAT. § 253B.18, subds. 6, 7 (2002) (enumerating the standards

merits some discussion. The statutory discharge provision states that the patient may not be discharged unless the Commissioner and special review board determine “that the patient [1] is capable of making an acceptable adjustment to open society, [2] is no longer dangerous to the public, and [3] is no longer in need of inpatient treatment and supervision.”<sup>134</sup> This provision, by its terms, indicates that a person committed as MI&D, SPP or SDP may not be discharged so long as any of the three facts continues to be true; for example, a person committed as MI&D could not be discharged if he continued to be dangerous or was unable to make an acceptable adjustment to open society, even if he no longer had the mental disorder that supported the commitment.<sup>135</sup> However, in 1988 in *Reome v. Levine*,<sup>136</sup> the federal district court held that the statute could not constitutionally be applied in that manner, and that a person committed as MI&D was entitled to discharge when it was shown that he was no longer mentally ill (Reome probably never had been<sup>137</sup>), even though he remained dangerous to the public.<sup>138</sup> The U.S. Supreme Court later made essentially the same holding in *Foucha v. Louisiana*.<sup>139</sup>

Following *Reome* and *Foucha*, in *Call v. Gomez*,<sup>140</sup> the Minnesota Supreme Court clarified the SPP/SDP discharge standard in two ways. First, the court adopted the holding of *Foucha*, stating that:

the statutory discharge criteria [must be] applied in such a way that the person subject to commitment as a psychopathic personality is confined for only so long as he or she continues *both* to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public . . . .<sup>141</sup>

Thus, the court made it clear that the patient could not continue to

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for transfer and provisional discharge, respectively).

134. *Id.* subd. 15 (2002) (numbering and emphasis added).

135. Indeed, the Minnesota Court of Appeals so held in *Reome v. Levine*, 363 N.W.2d 107, 108 (Minn. Ct. App. 1985), *appeal after remand*, 379 N.W.2d 208 (Minn. Ct. App. 1985), stating that a person committed as MI&D could not be discharged so long as he continued to be dangerous, irrespective of whether he continued to be mentally ill. *See also* Enebak v. Noot, 353 N.W.2d 544, 547 (Minn. 1984) (making same holding under provisional discharge provision).

136. 692 F. Supp. 1046 (D. Minn. 1988).

137. *Id.* at 1052.

138. *Id.* at 1051.

139. 504 U.S. 71, 79 (1992).

140. 535 N.W.2d 312, 319 (Minn. 1995).

141. *Id.* (emphasis added).

be held based simply on continued dangerousness, but that the dangerousness and the underlying disorder must both persist. In addition, without discussion, the court omitted the “capable of making an acceptable adjustment to open society” requirement, apparently assuming it was included within the danger-to-the-public requirement.

Second, the court held that the disorder need not persist at the level required for commitment in order for the commitment to continue, or, stated conversely, that the patient is not entitled to be discharged the minute the disorder improves so that it falls just below the severity required for commitment. The court said:

In applying the discharge criteria, we note that a slight change or improvement in the person’s condition is not sufficient to justify discharge. Moreover, . . . it is also not sufficient that the person no longer evinces the utter lack of control over his sexual impulses. The utter lack of control over one’s sexual impulses is part of the threshold showing that must be met to justify commitment. Confinement may continue without meeting this threshold if the confinement still bears the reasonable relation to the original reason for commitment; that is, the person continues to need treatment for his sexual disorder and continues to pose a danger to the public, which are the reasons for which the person was originally committed as a psychopathic personality. We do not believe that a person who is one step below an utter lack of control over his sexual impulses is necessarily in “remission” of his or her sexual disorder, such that his or her “deviant sexual assaultive conduct is brought under control.”<sup>142</sup>

#### IV. CONSTITUTIONAL CHALLENGES

Minnesota’s two commitment laws have been challenged repeatedly on constitutional grounds, when first enacted and again in recent years. In addition, of course, decisions of the U.S. Supreme Court affect the constitutionality of these statutes.

##### A. 1939-40—Pearson

The first of these cases was *State ex rel. Pearson v. Probate Court*.<sup>143</sup>

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142. *Id.* (citation omitted).

143. 205 Minn. 545, 287 N.W. 297 (1939), *aff’d*, 309 U.S. 270 (1940).

Pearson sought a writ to prohibit the PP proceeding against him.<sup>144</sup> He challenged the law on four grounds: (1) that placing PP commitment matters under the jurisdiction of the probate court exceeded the constitutional jurisdiction of that court; (2) that the act adopting the PP law violated the state constitutional requirement that the subject of a law be expressed in its title; (3) that the law was unconstitutionally vague; and (4) that the law violated Pearson's right to a jury trial and other procedural rights not specified in the opinion.<sup>145</sup> Just two months after the law's enactment, the Minnesota Supreme Court issued its opinion rejecting each of these claims.

The court's most notable holding addressed the vagueness claim. The court asked: "Is the act so indefinite and uncertain as to make it void? Conceding that it is imperfectly drawn, the statute is nevertheless valid if it contains a competent and official expression of the legislative will."<sup>146</sup> After describing a number of principles of statutory construction, the court, in rather casual fashion, set forth what has been regarded as the *Pearson* narrowing interpretation:

Applying these principles to the case before us, it can reasonably be said that the language of Section 1 of the act is 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. 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. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined.<sup>147</sup>

Significantly, the court never directly stated how it answered its own question: "Is the act so indefinite and uncertain as to make it void?" Nor did the court say that it was intending to adopt a "narrowing interpretation," rather than simply explaining why the

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144. *Id.* at 546, 287 N.W. at 298.

145. *Id.* at 547, 556, 287 N.W. at 298-99, 303.

146. *Id.* at 554, 287 N.W. at 302 (citation omitted).

147. *Id.* at 555-56, 287 N.W. at 302-03 (citing Draper, *Mental Abnormality in Relation to Crime*, in 2 AM. JUR. MED. J., No. 3, p. 163).

statute was not unduly vague.

The Minnesota court's answer to the final question was clearer:

The final argument of the relator is that the act denies a "patient" a jury trial and fails to secure certain other rights of defendants in criminal proceedings. Since the proceedings here in question are not of a criminal character, we will confine ourselves to consideration of relator's right to a jury trial.<sup>148</sup>

Thus, the court expressly determined that criminal procedures were not required. The court's subsequent discussion concluded, apparently under the state constitution, that a jury trial was not constitutionally required.<sup>149</sup>

Pearson then appealed to the U.S. Supreme Court,<sup>150</sup> contending that the statute violated his due process and equal protection rights.<sup>151</sup> Addressing the vagueness aspect of the due process claim, the high Court accepted the state Attorney General's assurance that the state court's interpretation of the statute quoted above was, literally, the *definitive* reading of the statute: "This construction is binding upon us. . . . For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."<sup>152</sup> The Court then held: "This construction of the statute destroys the contention that it is too vague and indefinite to constitute valid legislation."<sup>153</sup> Referring to the Minnesota court's interpreting language, the high Court said: "These underlying conditions, calling for evidence of past conduct pointing to probable consequences, are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime."<sup>154</sup>

The Supreme Court also addressed Pearson's equal protection claim—that the state Legislature could not constitutionally select the defined class for special treatment (*i.e.*, commitment).<sup>155</sup>

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148. *Id.* at 556, 287 N.W. at 303.

149. *Id.* at 557, 287 N.W. at 303.

150. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

151. *Id.* at 272. Even though the Minnesota court decision made no reference to an equal protection claim, the United States Supreme Court indicated that the claim was raised in the state court. *See id.*

152. *Id.* at 273 (citations omitted).

153. *Id.* at 274.

154. *Id.*

155. *Id.*

Rejecting this claim, the Court said:

The class it 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 clearest.<sup>156</sup>

Pearson also raised a due process challenge to the commitment procedures under the state law, but the Supreme Court rejected that claim as premature.<sup>157</sup>

One of the most curious aspects of the *Pearson* litigation is that the Minnesota Supreme Court's mere *discussion* of the meaning of the PP statute, addressing the claim that the statutory language was vague, became the operating definition. There is no indication that the court chose its language so carefully or intended the melodramatic verbiage—"utter lack of power to control,"<sup>158</sup> "injury, loss, pain or other evil,"<sup>159</sup> and "objects of their uncontrolled and uncontrollable desire"<sup>160</sup>—to become the actual definition to be applied in commitment cases for years to come.

#### B. 1994—Blodgett

After PP commitments increased beginning in 1991, several persons challenged the constitutionality of the PP law in their commitment cases. The first of these cases to reach the appellate courts was *In re Blodgett*.<sup>161</sup> In the court of appeals, Blodgett challenged the PP statute based on vagueness, double jeopardy, substantive due process and equal protection grounds, and claimed that his commitment violated the terms of his prior criminal plea bargain.<sup>162</sup> The court rejected all of these claims.<sup>163</sup>

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156. *Id.* at 275.

157. *Id.* at 275-77.

158. *See id.* at 274.

159. *See id.*

160. *See id.*

161. 490 N.W.2d 638 (Minn. Ct. App. 1992), *aff'd*, 510 N.W.2d 910 (Minn. 1994), *cert. denied*, 513 U.S. 849 (1994). In addition, in *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991), the Eighth Circuit perfunctorily rejected a committed person's due process and equal protection challenges to his PP commitment.

162. *Blodgett*, 490 N.W.2d at 645-47.

163. *Id.*

At Blodgett's request, the Minnesota Supreme Court granted review of the substantive due process and equal protection claims only.<sup>164</sup> In a 4-3 decision, the court upheld the constitutionality of the statute.<sup>165</sup>

Justice Simonett wrote the majority opinion. Considering Blodgett's due process argument, the Minnesota Supreme Court held that the statute served a compelling government interest—protecting the public from persons who have an uncontrollable impulse to sexually assault.<sup>166</sup> The *Blodgett* court rejected the argument that the PP statute was inconsistent with the U.S. Supreme Court's decision in *Foucha v. Louisiana*.<sup>167</sup> The court concluded that *Foucha* did not hold that typical mental illness is the only mental disorder that may support civil commitment.<sup>168</sup> The court stated that the disorder identified in the PP statute and *Pearson* "is an identifiable and documentable violent sexually deviant condition or disorder."<sup>169</sup> Likewise, the court rejected Blodgett's assertion that the ability to assess risk of sexual reoffense is insufficient to justify commitment.<sup>170</sup>

The Minnesota Supreme Court acknowledged disagreement among treatment professionals about whether the mental disorders exhibited by persons committed as PP are treatable, but noted that there are many treatment programs for persons whose mental disorders render them sexually dangerous.<sup>171</sup> The court observed that "even when treatment is problematic, and it often is, the state's interest in the safety of others is no less legitimate and compelling.

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164. *In re Blodgett*, 510 N.W.2d 910, 912 (Minn. 1994). Blodgett did not raise the vagueness argument in his appeal to the Minnesota Supreme Court. This argument obviously faced an uphill battle because the PP commitment standard from *Pearson* was a standard announced by the Minnesota Supreme Court in response to a vagueness challenge, and then upheld by the U.S. Supreme Court in response to such a challenge. See *State ex. rel. Pearson v. Probate Court*, 205 Minn. 548, 554-55, 287 N.W. 297, 302 (1939), *aff'd*, 309 U.S. 270 (1940). Blodgett was left in the uncomfortable position of arguing that the Minnesota Supreme Court's own standard was unconstitutionally vague. *Blodgett*, 490 N.W.2d at 646. The appellate court easily rejected this challenge. *Id.* Notably, the appellate court emphasized that it applied the vagueness standard used to judge civil measures, rather than the stricter standard applied to criminal enactments. *Id.*

165. *Blodgett*, 510 N.W.2d at 910.

166. *Id.* at 914.

167. *Id.* at 914-15 (citing *Foucha v. Louisiana*, 504 U.S. 71, 78-79 (1992)).

168. *Id.*

169. *Id.* at 915.

170. *Id.* at 917 n.15.

171. *Id.* at 916 n.12.

So long as civil commitment is programmed to provide treatment and periodic review, due process is provided.”<sup>172</sup>

Applying intermediate scrutiny analysis, the court also rejected Blodgett’s equal protection claim, which the court described as merely a variation of his substantive due process claim.<sup>173</sup> The court observed that “the sexual predator poses a danger that is unlike any other,” and that the law “delineates genuine and substantial distinctions which define a class that victimizes women and children in a particular manner.”<sup>174</sup>

The court acknowledged that there are other approaches to dealing with mentally disordered sexual predators.<sup>175</sup> Such persons may constitutionally be given long or indeterminate criminal sentences, instead of civil commitments.<sup>176</sup> However, the court concluded, “where there are no definitive answers, it would seem a state legislature should be allowed, constitutionally, to choose either or both alternatives for dealing with the sexual predator.”<sup>177</sup>

Three justices, led by Justice Wahl, dissented.<sup>178</sup> They asserted that civil commitment of sexual predators amounts to a “system of wholesale preventive detention, a concept foreign to our jurisprudence.”<sup>179</sup>

The United States Supreme Court denied Blodgett’s petition for certiorari review.<sup>180</sup>

### C. 1995—Call

Although Blodgett had raised a double jeopardy claim in the state court of appeals, he did not raise this claim before the Minnesota Supreme Court. The year after *Blodgett*, however, the state high court rejected a double jeopardy claim to a PP commitment in *Call v. Gomez*, saying: “[O]ur decision in *Blodgett* clearly establishes that commitment under the psychopathic personality statute is remedial and does not constitute double jeopardy because it is for treatment purposes and is not for

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172. *Id.* at 916.

173. *Id.* at 916-17.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 918.

178. *Id.* (Wahl, J., dissenting).

179. *Id.*

180. 513 U.S. 849 (1994).

purposes of preventive detention.”<sup>181</sup>

D. 1996—Linehan III

A few months after *Blodgett* was decided, the Minnesota Legislature adopted the SDP law in response to several interpretations of the PP law, including *Linehan I*.<sup>182</sup> Linehan’s PP commitment was overturned by the Minnesota Supreme Court, which held that utter lack of power to control had not been sufficiently proved.<sup>183</sup> After the passage of the SDP law, the Ramsey County Attorney promptly petitioned to commit Linehan under the new law.<sup>184</sup> Linehan, in turn, challenged the constitutionality of the new law on numerous grounds.<sup>185</sup>

The district court rejected Linehan’s claims that the SDP law was unconstitutional and found that he met the commitment criteria.<sup>186</sup> The Minnesota Court of Appeals subsequently affirmed the decision.<sup>187</sup> The Minnesota Supreme Court then granted review and, in its 1996 *Linehan III* decision, upheld the constitutionality of the statute and Linehan’s commitment by a 4-2 margin.<sup>188</sup>

Writing for the majority, Chief Justice Keith first addressed Linehan’s several substantive due process arguments. The *Linehan III* court rejected Linehan’s argument that the utter-lack-of-power-to-control standard of the SPP law is constitutionally required for commitment.<sup>189</sup> It held that the mental disorder element of the SDP law is even more narrowly tailored to serve the State’s “compelling interest in protecting the public from sexual assault”<sup>190</sup>

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181. 535 N.W.2d 312, 319-20 (Minn. 1995).

182. See *supra* Part II.E.

183. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 614 (Minn. 1994).

184. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 175-76 (Minn. 1996), *vacated and remanded*, 522 U.S.1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999).

185. *Id.* at 176.

186. *Id.* at 176-77.

187. *In re Linehan (Linehan III)*, 544 N.W.2d 308, 319 (Minn. Ct. App. 1996), *aff’d*, 557 N.W.2d 171 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999).

188. *Linehan III*, 557 N.W.2d 171, 191 (Minn. 1996). The careful reader will ask what happened to *Linehan II*. In *In re Linehan (Linehan II)*, 557 N.W.2d 167 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999), the Minnesota Supreme Court considered Linehan’s appeal of the order making his initial commitment indeterminate under Minnesota Statute section 253B.18, subdivision 3 (1994).

189. *Linehan III*, 557 N.W.2d at 183.

190. *Id.* at 181.

than the utter-lack-of-power-to-control standard: “[T]he SDP Act is an attempt to protect the public by treating sexual predators even more dangerous than those reached by the PP Act—the mentally disordered who retain enough control to ‘plan, wait, and delay the indulgence of their maladies until presented with a higher probability of success.’”<sup>191</sup>

The *Linehan III* court also rejected Linehan’s reason for contending that utter lack of power to control is constitutionally required: Linehan had argued that the utter-lack-of-power-to-control element was necessary to identify persons who lack criminal responsibility, and are therefore “unreachable” by the criminal law.<sup>192</sup> He asserted that a public-protection commitment may be used only for persons who cannot be criminally punished for their acts.<sup>193</sup> Nevertheless, the court noted that this argument was expressly rejected in *Pearson*, the case that first articulated the utter-lack-of-power-to-control standard.<sup>194</sup> The court also observed that Linehan’s criminal responsibility justification was precluded by *Blodgett*; Blodgett had been criminally responsible for his acts, but nonetheless was properly subject to later PP commitment.<sup>195</sup>

In addition, the court rejected Linehan’s argument that an antisocial personality disorder (or “APD”) is constitutionally insufficient to meet the mental disorder requirement for

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191. *Id.* at 182 (citation omitted).

192. *Id.* at 183.

193. *Id.*

194. *Id.*

195. *Id.* Of course, the same may be true of a person civilly committed as “mentally ill and dangerous to the public” as defined in Minnesota Statute section 253B.02, subdivision 17 (2002). A person may be mentally ill for purposes of civil commitment, but nonetheless not meet the requirements of *M’Naghten* to be relieved of criminal responsibility. Compare, e.g., *State v. Wendler*, 312 Minn. 432, 436, 252 N.W.2d 266, 269 (1977), with *In re K.B.C.*, 308 N.W.2d 495, 497 (Minn. 1981) (holding Wendler did not meet standard for acquittal by reason of insanity, but was committed as mentally ill and dangerous). See MINN. STAT. § 611.026 (2002) (stating Minnesota criminal insanity test as: “person . . . laboring under such a defect of reason, from [mental illness or deficiency], as not to know the nature of the act, or that it was wrong”). Nor does logic require that the criminally responsible/civilly committable categories be mutually exclusive. The purposes of criminal conviction and criminal commitment are necessarily different. The purpose of the insanity defense in the criminal system is to make a “moral judgment of the culpability of the accused.” *State v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982) (citation omitted); see also *In re Blodgett*, 510 N.W.2d 910, 918 n.16 (Minn. 1994). The purpose of the “police power” civil commitment, on the other hand, is to protect the public from one whose mental disorder renders him dangerous. *Blodgett*, 510 N.W.2d at 914, 916; *Addington v. Texas*, 441 U.S. 418, 429 (1979).

commitment.<sup>196</sup> The court said that Linehan's APD diagnosis did not simply characterize his past antisocial conduct, but rather was based significantly on his disordered mental processes, specifically his lack of empathy and remorse.<sup>197</sup> The Court noted that the purpose of the APD diagnosis is "to identify an *underlying* mental disorder that accounts for the behavior," and that it did so in Linehan's case.<sup>198</sup>

The court also found no merit in Linehan's equal protection claim.<sup>199</sup> Linehan asserted that the SDP law unconstitutionally discriminates among persons who present a sexual danger, based upon whether they have mental disorders.<sup>200</sup> The court held that limiting the application of the statute to persons with mental disorders serves the State's interest in predicting which persons will engage in harmful conduct, as well as the State's interest in providing treatment to sexual predators.<sup>201</sup>

Finally, the court rejected Linehan's ex post facto and double jeopardy claims, holding that commitment under the law is not for punitive purposes.<sup>202</sup> The court noted that Minnesota has made a substantial investment to treat persons committed under the act, both in statute and by actual implementation of a treatment program.<sup>203</sup> The court said that the "purpose and effect of the SDP Act is therefore predominantly remedial, not punitive."<sup>204</sup>

#### E. 1997—Kansas v. Hendricks

Several months after *Linehan III*, in June 1997, the United States Supreme Court issued its decision in *Kansas v. Hendricks*.<sup>205</sup> By a 5-4 margin, the Court upheld the commitment of Leroy Hendricks, who had been civilly committed under Kansas' "Sexually Violent Predator Act."<sup>206</sup> That Act defined a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a

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196. *Linehan III*, 557 N.W.2d at 193.

197. *Id.* at 185.

198. *Id.*

199. *Id.* at 187.

200. *Id.* at 186.

201. *Id.* at 186-87.

202. *Id.* at 187-89.

203. *Id.* at 188.

204. *Id.*

205. 521 U.S. 346 (1997).

206. *Id.* at 371, 373.

mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.”<sup>207</sup>

Hendricks was civilly committed at the completion of his prison term for sexually molesting two young boys.<sup>208</sup> He had a long history of sexually molesting children.<sup>209</sup> During the civil commitment proceedings, Hendricks told an examiner that he “[could]n’t control the urge” to molest children,<sup>210</sup> and the experts diagnosed Hendricks with pedophilia.<sup>211</sup> A jury found that Hendricks met the requirements of the Kansas law, and he was civilly committed to a state treatment program.<sup>212</sup>

The Kansas Supreme Court reversed Hendricks’ commitment.<sup>213</sup> That court held that the commitment violated substantive due process because the law did not require, and Hendricks’ pedophilia did not constitute, a “mental illness.”<sup>214</sup> Because it concluded that Hendricks’ commitment violated substantive due process, the majority of the Kansas court did not reach his double jeopardy and ex post facto arguments.<sup>215</sup>

The United States Supreme Court, however, granted certiorari to review both the substantive due process and the double jeopardy/ex post facto claims.<sup>216</sup> The high Court rejected all of these claims and reversed the Kansas Supreme Court’s decision.<sup>217</sup>

In an opinion by Justice Thomas, the Court first addressed Hendricks’ claim that substantive due process requires that civil commitment be based on a “mental illness” as that term may be defined by the psychiatric profession.<sup>218</sup> “Contrary to Hendricks’ assertion,” the Court said, “the term ‘mental illness’ is devoid of any talismanic significance.”<sup>219</sup> Instead, the Court observed: “[W]e have traditionally left to legislators the task of defining terms of a

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207. KAN. STAT. ANN. § 59-29a02(a) (1994); *see also Hendricks*, 521 U.S. at 352.

208. *Hendricks*, 521 U.S. at 354.

209. *Id.* at 350, 354.

210. *Id.* at 355.

211. *Id.* at 356 n.2.

212. *Id.* at 355-56.

213. *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996).

214. *Hendricks*, 521 U.S. at 356; *In re Hendricks*, 912 P.2d at 138.

215. *Hendricks*, 521 U.S. at 356.

216. *Kansas v. Hendricks*, 518 U.S. 1004 (1996) (granting cross petitions for writ of certiorari); *Hendricks*, 521 U.S. at 360-61.

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

218. *Id.* at 358-59.

219. *Id.* at 359.

medical nature that have legal significance.”<sup>220</sup> The Court held that the Kansas law’s mental disorder requirement satisfied the requirements of substantive due process saying: “The precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”<sup>221</sup>

The Court also considered Hendricks’ double jeopardy and ex post facto arguments. The court stated “as a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.”<sup>222</sup> In addressing this issue, *Hendricks* firmly settled a question that had troubled many courts—whether civil confinement of a dangerous person primarily for purposes of public protection is a non-punitive civil purpose. Such confinement is sometimes derisively termed “preventive detention.”<sup>223</sup> The Supreme Court clearly held that such confinement is not punitive for the purposes of double jeopardy and ex post facto prohibitions, saying: “[T]hat the Act’s ‘overriding concern’ was the continued ‘segregation of sexually violent offenders’ is consistent with our conclusion that the Act establishes civil proceedings.”<sup>224</sup>

While Justice Kennedy offered additional comments in a concurring opinion, he nonetheless joined the Court’s majority opinion “in full.”<sup>225</sup>

Justice Breyer, joined by three other justices, dissented.<sup>226</sup> He agreed that Hendricks’ mental disorder was sufficient to satisfy the requirements of substantive due process.<sup>227</sup> But he stated that he did “not subscribe to all of [the] reasoning” of the majority opinion,<sup>228</sup> and instead identified three limiting circumstances that

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220. *Id.*

221. *Id.* at 358.

222. *Id.* at 361-62.

223. See, e.g., *In re Blodgett*, 510 N.W.2d 910, 918 (Minn. 1994) (Wahl, J., dissenting); *In re Linehan (Linehan III)*, 544 N.W.2d 308, 326 (Minn. Ct. App. 1996) (Randall, J., dissenting), *aff’d*, 557 N.W.2d 171 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999).

224. *Hendricks*, 521 U.S. at 366 (citation omitted).

225. *Id.* at 371 (Kennedy, J., concurring).

226. *Id.* at 373 (Breyer, J., dissenting).

227. *Id.*

228. *Id.* at 374.

he believed combined to make Hendricks' disorder constitutionally sufficient for commitment: "(1) many mental health professionals consider pedophilia a serious mental disorder; and (2) Hendricks suffers from a classic case of irresistible impulse, namely he is so afflicted with pedophilia that he cannot 'control the urge' to molest children; and (3) his pedophilia presents a serious danger to those children . . . ." <sup>229</sup>

While Justice Breyer agreed that substantive due process was satisfied in Hendricks' case, he concluded that Hendricks' commitment constituted punishment, and was thus precluded by the prohibition against ex post facto laws. <sup>230</sup> Justice Breyer posited that a remedial, nonpunitive law would be expected to provide treatment for a person committed because of a mental abnormality, to the extent that such treatment may be available. <sup>231</sup> He said that Kansas delayed treatment until after the person's prison sentence was completed, that the state did not attempt to provide meaningful treatment to persons even after commitment, and that Kansas law did not require the consideration of alternatives less restrictive than placement in the state treatment program. <sup>232</sup> He concluded: "The statutory provisions before us do amount to punishment primarily because . . . the legislature did not tailor the statute to fit the nonpunitive civil aim of treatment, which it concedes exists in Hendricks' case." <sup>233</sup>

F. 1999—"Once More, With Feeling"—Linehan IV

Meanwhile, back in the *Linehan* case, Linehan had petitioned for certiorari to the U.S. Supreme Court to review the 1996 *Linehan III* state court decision rejecting his challenge to the SDP law. After deciding *Hendricks*, the U.S. Supreme Court vacated the *Linehan III* decision and remanded it to the Minnesota Supreme Court to reconsider in light of *Hendricks*. <sup>234</sup> The Minnesota Supreme Court issued its decision, *Linehan IV*, <sup>235</sup> in mid-1999.

In a 4-2-1 decision, the state court in *Linehan IV* again upheld the constitutionality of the SDP law, but adopted an interpretation

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229. *Id.* at 376-77.

230. *Id.* at 389.

231. *Id.* at 382-83.

232. *Id.* at 383-89.

233. *Id.* at 396.

234. *Linehan v. Minnesota*, 522 U.S. 1011 (1997).

235. *In re Linehan (Linehan IV)*, 594 N.W.2d 867 (Minn. 1999).

of *Hendricks* midway between the positions argued by Linehan and the State.<sup>236</sup> Linehan argued that substantive due process, as interpreted in *Hendricks*, requires an utter lack of power to control (*i.e.*, the *Pearson* standard<sup>237</sup>) to support a sexual predator civil commitment.<sup>238</sup> The State contended that *Hendricks* did not require a separate showing of inability to control, but instead held that the three elements of the Kansas statute (equivalent to those of Minnesota's SDP law) "narrow[ed] the class of persons eligible for commitment to those who are unable to control their dangerousness."<sup>239</sup> The State's alternative argument on this point was that, even if *Hendricks* required some showing of inability to control, it was not a *complete* or *utter* inability to control, as Linehan argued, but only lack of *adequate* control, or *difficulty* in controlling behavior.<sup>240</sup>

This alternative argument is the position the Minnesota Supreme court adopted in *Linehan IV*. The court held that, despite the SDP law's statement that the petitioner need not show inability to control, the law must be interpreted in light of *Hendricks* to require a showing of some impairment of that ability—that the person's mental disorder "does not allow [him] to adequately control [his] sexual impulses."<sup>241</sup>

Linehan also argued that *Hendricks* provided additional support for his double jeopardy and ex post facto arguments, and that *Hendricks* required states to provide certain procedural measures, including jury trial, proof beyond a reasonable doubt and periodic review with the burden on the state to show that the commitment requirements continue to be met.<sup>242</sup> The Minnesota Supreme Court in *Linehan IV* responded that *Hendricks* supported the state court's previous rejection of Linehan's double jeopardy and ex post facto arguments in *Linehan III*, and that the U.S.

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236. *Id.* at 878.

237. *State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939), *aff'd*, 309 U.S. 270 (1940).

238. *Linehan IV*, 594 N.W.2d at 872.

239. Brief for State of Minnesota at 16, 13-22, *Linehan IV*, 594 N.W.2d 867 (Minn. 1999) (Nos. C1-95-2022, C3-96-511) (citing *Hendricks*, 521 U.S. at 358).

240. *Id.* at 22-24 (citing *Hendricks*, 521 U.S. at 358, 362).

241. *Linehan IV*, 594 N.W.2d at 876. The court then examined whether the record showed that Linehan satisfied the commitment standard identified in the decision and affirmed Linehan's commitment, holding that the "district court records . . . are replete with findings concerning appellant's lack of volitional control over his sexually dangerous tendencies." *Id.*

242. *Id.* at 871 & n.2.

Supreme Court had not considered any procedural due process arguments in *Hendricks*.<sup>243</sup>

Justice Page dissented from the court's decision upholding the law.<sup>244</sup> Justice Lancaster wrote a decision, joined by Justice Paul Anderson, concurring in part and dissenting in part.<sup>245</sup> These latter two justices did not disagree with the majority's interpretation of *Hendricks*, or the determination that Linehan satisfied the "inability to control" standard.<sup>246</sup> But they did not believe it possible to interpret the SDP law to contain an "inability to control" requirement.<sup>247</sup>

The U.S. Supreme Court denied Linehan's certiorari petition.<sup>248</sup>

G. 2002—*The U.S. Supreme Court Strikes Again*—*Kansas v. Crane*

The U.S. Supreme Court's opportunity to clarify *Hendricks* arose in another Kansas case, *Kansas v. Crane*.<sup>249</sup> In *In re Crane*, the Kansas Supreme Court had overturned a sexual predator civil commitment, holding that the U.S. Supreme Court's decision in *Hendricks* required "a finding that the defendant cannot control his dangerous behavior."<sup>250</sup> The Kansas court reversed Crane's commitment and required a new trial because the jury had not

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243. *Id.* at 871-72, 871 n.2.

244. *Id.* at 878 (Page, J., dissenting).

245. *Id.* at 885 (Lancaster, J., dissenting).

246. *Id.* at 886.

247. *Id.* at 886-87. The *Linehan IV* majority and the concurring/dissenting justices made this issue more difficult than necessary. Linehan could challenge the validity of the statute *only as applied to him*. Except in limited circumstances (not present here), "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Thus, if Linehan manifested the inability to control required by *Hendricks*, his commitment would not be invalid simply because the statutory language did not contain such a requirement. Indeed, this is precisely what occurred in *Hendricks*. Even though the Kansas statute did not contain an inability-to-control requirement, the Court affirmed *Hendricks*' commitment because *he* had the constitutionally required inability to control. It was therefore unnecessary for the court in *Linehan IV* to interpret the statute to contain an inability-to-control requirement. Instead, the Court could have held simply that a person's commitment under the statute would be constitutional only if he were shown to have the required level of inability to control.

248. *Linehan v. Minnesota*, 528 U.S. 1049 (1999).

249. 534 U.S. 407 (2002).

250. 7 P.3d 285, 290 (Kan. 2000), *vacated*, 534 U.S. 407 (2002).

been instructed to make such a finding.<sup>251</sup>

The U.S. Supreme Court granted Kansas' petition for certiorari.<sup>252</sup> Among other things, the Kansas court's decision in *In re Crane*, by requiring a total lack of control,<sup>253</sup> directly conflicted with the Minnesota Supreme Court's decision in *Linehan IV*.<sup>254</sup>

The parties in *Crane* made the same basic arguments that the parties in *Linehan IV* made to the Minnesota Supreme Court.<sup>255</sup> *Crane* argued that *Hendricks* required the State to show that the person has a complete inability to control his behavior.<sup>256</sup> The State, on the other hand, argued that no showing of inability to control is required, except for that implicit in the commitment standard—that the person engages in harmful conduct *because of* his mental disorder.<sup>257</sup>

And, like the Minnesota Supreme Court in *Linehan IV*, the high Court adopted an intermediate position.<sup>258</sup> The Court, this time with Justice Breyer writing the majority opinion, concluded that the state court's reading of *Hendricks* had been too restrictive.<sup>259</sup> The high Court held that the Constitution, as interpreted in *Hendricks*, "set forth no requirement of total or complete lack of control,"<sup>260</sup> but rather *Hendricks* referred to a disorder "that makes it difficult, if not impossible, for the person to control his dangerous behavior."<sup>261</sup> The *Crane* Court then observed: "The word 'difficult' indicates that the lack of control to which [*Hendricks*] referred was not absolute," and that "an absolutist approach is unworkable."<sup>262</sup>

But the Court also rejected the State's argument that no separate showing of inability to control is required, instead holding:

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251. *Id.*

252. *Kansas v. Crane*, 532 U.S. 957 (2001).

253. While the Kansas court's decision was less than clear on this point, this is the interpretation later given it by the U.S. Supreme Court. See *Crane*, 534 U.S. at 411.

254. Compare *Crane*, 534 U.S. at 411, with *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 876-79 (Minn. 1999).

255. Compare *Crane*, 534 U.S. at 411, with *Linehan IV*, 594 N.W.2d at 872-73.

256. *Crane*, 534 U.S. at 411.

257. *Id.* at 411-12.

258. Compare *Linehan IV*, 594 N.W.2d at 875-76, with *Crane*, 534 U.S. at 411.

259. *Crane*, 534 U.S. at 409.

260. *Id.* at 411.

261. *Id.* (citing *Hendricks*, 521 U.S. at 358).

262. *Id.*

[W]e recognize that in cases where lack of control is at issue, “inability to control behavior” will not be demonstrable with mathematical precision. *It is enough to say that there must be proof of serious difficulty in controlling behavior.* And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, [is] sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical<sup>263</sup> recidivist convicted in an ordinary criminal case.

The Supreme Court made it clear that it was not prescribing the precise terms that must be contained in States’ commitment standards:

We recognize that *Hendricks* as so read provides a less precise constitutional standard than would those more definite rules for which the parties have argued. But the Constitution’s safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules. For one thing, the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment. For another, the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law. Consequently, we have sought to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require. *Hendricks* embodied that approach.<sup>264</sup>

The Court also engaged in an intriguingly oblique discussion of “volitional impairment” of ability to control, as opposed to “emotional impairment” or “cognitive impairment.”<sup>265</sup> The Court explained that, by “volitional impairment,” it referred to situations in which the person has sexual urges that the person has particular difficulty in controlling:

We agree that *Hendricks* limited its discussion to volitional

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263. *Id.* at 413 (emphasis added).

264. *Id.* at 413-14 (citations omitted).

265. *See id.* at 414-15.

disabilities. And that fact is not surprising. The case involved an individual suffering from pedophilia—a mental abnormality that critically involves what a lay person might describe as a lack of control. DSM-IV 571-572 (listing as a diagnostic criterion for pedophilia that an individual have acted on, or been affected by, “sexual urges” toward children). Hendricks himself stated that he could not “control the urge” to molest children. In addition, our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior—in the general sense described above. And it is often appropriate to say of such individuals, in ordinary English, that they are “unable to control their dangerousness.”<sup>266</sup>

But the Court appeared to indicate that commitment would be permissible in cases of “emotional” abnormalities, as well as “volitional” ones:

*Hendricks* must be read in context. The Court did not draw a clear distinction between the purely “emotional” sexually related mental abnormality and the “volitional.” Here, as in other areas of psychiatry, there may be “considerable overlap between a . . . defective understanding or appreciation and . . . [an] ability to control . . . behavior.” Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments.<sup>267</sup>

By this discussion, the Court was apparently recognizing that “serious difficulty in controlling behavior” could arise not only where the person’s disorder renders him unable to avoid sexual assault, despite his desire to avoid it, but also in situations where the disorder causes the person to *want* to engage in sexual assault (emotional impairments) or causes the person to not understand the nature of what he is doing (cognitive impairments).

Justice Scalia, joined by Justice Thomas (who had authored the Court’s opinion in *Hendricks*), dissented from the majority opinion.<sup>268</sup> They disagreed emphatically with the *Crane* majority’s interpretation of Justice Thomas’ opinion for the Court in

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266. *Id.* (citations omitted).

267. *Id.* at 415 (additions and ellipses in original) (citations omitted).

268. *Id.* (Scalia, J., dissenting).

*Hendricks*: “It could not be clearer that, in the Court’s estimation [in *Hendricks*], the very existence of a mental abnormality or personality disorder that causes a likelihood of repeat sexual violence in itself establishes the requisite ‘difficulty if not impossibility’ of control.”<sup>269</sup>

#### H. Crane Applied in Minnesota

Following *Crane*, several committed persons have raised the legal claim that the *Linehan IV* standard does not comply with *Crane*. To date, these challenges have been easily rejected.

Immediately after the decision in *Crane*, Jimmie Ramey appealed his 2001 SDP commitment to the Minnesota Court of Appeals.<sup>270</sup> He argued that the *Linehan IV* standard under which he was committed—“does not allow them to adequately control”—did not comply with the *Crane* requirement that “there must be proof of serious difficulty in controlling behavior” or *Crane*’s requirement that the person’s disorder must be sufficient to distinguish him from the ordinary criminal recidivist. The court of appeals rejected the claim, holding that the *Linehan IV* standard comports with *Crane*,<sup>271</sup> and the state supreme court denied review.

The Minnesota Court of Appeals also addressed the same issue in a second case, *In re Martinelli*.<sup>272</sup> In a 2000 decision, the state court of appeals had held that Martinelli’s SDP commitment satisfied the *Linehan IV* standard, and the state supreme court denied review.<sup>273</sup> Martinelli petitioned for certiorari to the U.S. Supreme Court, asserting that the *Linehan IV* standard and its application in his case did not comply with *Hendricks*. After it decided *Crane* in January 2002, the Supreme Court granted Martinelli’s certiorari petition and vacated and remanded to the Minnesota Court of Appeals to reconsider the case in light of

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269. *Id.* at 419-20.

270. *In re Ramey*, 648 N.W.2d 260 (Minn. Ct. App. 2002), *review denied* (Minn. Sept. 17, 2002).

271. *Id.* at 267. The appellate court also rejected Ramey’s claim that *Linehan IV*’s inability-to-adequately-control requirement was unconstitutionally vague. *Id.* at 267-68.

272. *In re Martinelli*, 649 N.W.2d 886, 888 (Minn. Ct. App. 2002), *review denied* (Minn. Oct. 29, 2002), *cert denied*, No. 02-8775, 2003 WL 271237 (U.S. Mar. 24, 2003).

273. *In re Martinelli*, No. C4-00-748, 2000 WL 1285430 (Minn. Ct. App. Sept. 12, 2000), *review denied* (Minn. Oct. 26, 2002), *vacated and remanded*, 534 U.S. 1160 (2002).

*Crane*.<sup>274</sup>

As in *Ramey*, the state appellate court rejected Martinelli's claim, holding that the *Linehan IV* standard was consistent with *Crane*. The appellate court concluded that *Crane* does require "a judicial finding of 'lack of control.'"<sup>275</sup> But the court termed the difference between the *Crane* "serious difficulty in controlling behavior" standard and *Linehan IV*'s "does not allow them to adequately control their sexual impulses" standard only a "semantic distinction."<sup>276</sup> It noted that the U.S. Supreme Court in *Crane* had declined to "give the phrase 'lack of control' a particularly narrow or technical meaning," and had expressly stated that it "was not laying down any 'bright line rules.'"<sup>277</sup> The appellate court held that Martinelli's lack of ability to control, considered in light of his diagnosis of hebephilia and antisocial personality disorder, "was sufficient to distinguish Martinelli from the 'typical recidivist' offender, as required by *Crane*."<sup>278</sup> The state supreme court denied Martinelli's petition for review, and the U.S. Supreme Court denied his certiorari petition.<sup>279</sup>

The third significant case to address the *Linehan IV/ Crane* issue was an Eighth Circuit decision involving Linehan, himself.<sup>280</sup> After the U.S. Supreme Court denied his certiorari petition seeking to review the Minnesota Supreme Court's *Linehan IV* decision, Linehan brought a federal habeas petition contending that the *Linehan IV* standard did not comply with the Supreme Court's holding in *Hendricks*.<sup>281</sup> The federal district court rejected the claim, and Linehan appealed to the Eighth Circuit.<sup>282</sup> While his appeal was pending, the Supreme Court decided *Crane*, and the issue became whether the *Linehan IV* standard complied with *Crane*.

The circuit court issued its decision in January 2003, rejecting Linehan's habeas claim and holding that the Minnesota standard complies with the dictates of *Crane*.<sup>283</sup> Significantly, the court held that evidence meeting the *Linehan IV* standard is *per se* sufficient to

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274. *Martinelli v. Minnesota*, 534 U.S. 1160 (2002).

275. *In re Martinelli*, 649 N.W.2d at 890.

276. *Id.* at 891.

277. *Id.* at 890 (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002)).

278. *Id.*

279. *Martinelli*, 534 U.S. at 1160.

280. *Linehan v. Milczark*, 315 F.3d 920 (8th Cir. 2003).

281. *Id.* at 924.

282. *Id.*

283. *Id.*

distinguish the committed person from the typical recidivist, and thus that *Crane's* "sufficient to distinguish" language does not impose a separate requirement to be proved. The circuit court said:

The standard enunciated in *Linehan IV* requires a finding of "lack of adequate control" in relation to a properly diagnosed disorder or dysfunction, as well as findings of past sexual violence and resultant likelihood of future sexually dangerous behavior. This combination of required findings will adequately distinguish an offender subject to civil commitment, who has difficulty controlling his behavior because of a disorder or dysfunction, from the more typical offender with behavioral problems, who is best dealt with in the criminal system. *The SDP Act standard, as narrowed by the Minnesota Supreme Court in Linehan IV, therefore adequately distinguishes between the typical recidivist and the dangerous sexual offender and complies with substantive due process requirements.*<sup>284</sup>

#### V. SETTLED CONSTITUTIONAL ISSUES— WHAT WE KNOW FOR SURE, OR PRETTY SURE

When the increased use of civil commitment of sexual predators began in 1991, many constitutional issues were unsettled. The answers to most of those questions now seem fairly clear. Except for the Supreme Court's placement of some limitation on the "mental disorder" element, the final court decisions have now uniformly rejected the constitutional challenges. Here is what we know, at least for now.

##### A. *Civil Commitment of Sexual Predators Does Not Constitute Double Jeopardy or Imposition of an Ex Post Facto Law*

A frequent refrain of those opposing civil commitment of sexual predators is that such commitment constitutes "punishment."<sup>285</sup> Based on this premise, opponents have asserted that commitment following a criminal prison term constitutes impermissible double jeopardy, and commitment under a law enacted after the person's sexual assaults relies upon an ex post

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284. *Id.* at 927 (emphasis added).

285. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 360-61 (1997); C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the "Politically Ill,"* 19 WM. MITCHELL L. REV. 99, 122-23, 156 (1993).

facto law.<sup>286</sup>

### 1. *Settled Issues*

In *Hendricks*, the Supreme Court definitively rejected such arguments. The Court said that “[t]he categorization of a particular proceeding as civil or criminal ‘is first of all a question of statutory construction.’ We must initially ascertain whether the legislature meant to establish ‘civil’ proceedings. If so, we ordinarily defer to the legislature’s stated intent.”<sup>287</sup> Examining the Kansas statute, the Court easily concluded that it was civil in form, and that “[n]othing on the face of the statute suggests that the legislature sought to create anything other than a *civil commitment scheme designed to protect the public from harm*.”<sup>288</sup>

The Court recognized that the inquiry does not necessarily end there; however, the Legislature’s characterization will be rejected “only where a party challenging the statute provides ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”<sup>289</sup> The Court found such proof lacking with respect to the Kansas statute.<sup>290</sup> The Court held:

- “the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence”;<sup>291</sup>
- the statute did not impose retribution for prior conduct, but rather “such conduct is used solely for evidentiary purposes, either to demonstrate that a ‘mental abnormality’ exists or to support a finding of future dangerousness”;<sup>292</sup>
- “the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment”;<sup>293</sup>
- the fact that Kansas chose to provide many of the same procedures used in criminal cases “does not transform a civil commitment proceeding into a criminal

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286. *Hendricks*, 521 U.S. at 360-61.

287. *Id.* at 361 (citation omitted).

288. *Id.* (emphasis added).

289. *Id.* (alteration in original) (citation omitted).

290. *Id.* at 368-69.

291. *Id.* at 361-62.

292. *Id.* at 362.

293. *Id.* at 363.

prosecution”;<sup>294</sup>

- the fact that the primary purpose of commitment was public protection, and that treatment was secondary, did not render the law punitive, nor did the fact that some committed persons may be untreatable:

[T]he Kansas court’s determination that the Act’s “overriding concern” was the continued “segregation of sexually violent offenders” is consistent with our conclusion that the Act establishes civil proceedings, especially when that concern is coupled with the State’s ancillary goal of providing treatment to those offenders, if such is possible. While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a “punitive” purpose by involuntarily confining persons affected with an untreatable, highly contagious disease.<sup>295</sup>

The Court summarized its double jeopardy/ex post facto analysis:

Where the State has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.<sup>296</sup>

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294. *Id.* at 364-65.

295. *Id.* at 366 (citations omitted).

296. *Id.* at 368-69. In *Seling v. Young*, the Supreme Court gave this summary of the double jeopardy/ex post facto holding of *Hendricks*:

We concluded that the confined individual in [*Hendricks*] had failed to satisfy his burden with respect to the Kansas Act. We noted several factors: The Act did not implicate retribution or deterrence; prior criminal convictions were used as evidence in the commitment proceedings, but were not a prerequisite to confinement; the Act required no finding of scienter to commit a person; the Act was not intended to function as a deterrent; and although the procedural safeguards were similar to those in the criminal context, they did not alter the character of the scheme.

After *Linehan III* was remanded to the Minnesota Supreme Court to reconsider in light of *Hendricks*, the state court held that *Hendricks* supported the Minnesota court's previous determination that commitment under the SDP law did not violate double jeopardy and ex post facto prohibitions, because the Minnesota law was similar to the Kansas law in relevant respects.<sup>297</sup> In federal habeas petitions after *Hendricks*, the federal district court has also concluded that *Hendricks* resolves any double jeopardy or ex post facto challenge to the SPP or SDP law.<sup>298</sup>

## 2. *Unsettled Issues*

A remaining issue that is unclear is whether and when the actual conditions of committed persons' treatment and confinement may be considered in making the punitiveness determination. In a 2001 decision, *Seling v. Young*, the U.S. Supreme Court considered whether a committed person could challenge his commitment on double jeopardy and ex post facto grounds based on his allegation that the post-commitment conditions of his treatment program rendered his commitment punitive.<sup>299</sup> The Court rejected Young's claim, which it termed an "as applied" challenge,<sup>300</sup> saying that the Court had "expressly disapproved of evaluating the civil nature of an Act by reference to

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We also examined the conditions of confinement provided by the Act. . . . We noted . . . that conditions within the unit were essentially the same as conditions for other involuntarily committed persons in mental hospitals. Moreover, confinement under the Act was not necessarily indefinite in duration. Finally, we observed that in addition to protecting the public, the Act also provided treatment for sexually violent predators. We acknowledged that not all mental conditions were treatable. For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.

531 U.S. 250, 261-62 (2001) (citations omitted).

297. *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 871-72 (Minn. 1999).

298. Order at 3-4, *Linehan v. Milczark* (D. Minn. Sept. 20, 2001) (No. 00-2635) (DSD/AJB), *aff'd on other grounds*, 315 F.3d 920 (8th Cir. 2003); Report and Recomm. at 13-16, *Linehan v. Milczark* (D. Minn. Aug. 8, 2001) (No. 00-2635) (DSD/AJB); Report and Recomm. at 13-14, *Woodruff v. O'Keefe*, (D. Minn. May 30, 2001) (No. 00-2478) (JMR/FLN).

299. 531 U.S. 250, 250 (2001).

300. *Id.* at 263.

the effect the Act has on a single individual.”<sup>301</sup>

The Court’s precise holding in *Seling* is not wholly clear. On the one hand, the Court observed that the “particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive.”<sup>302</sup> But the Court appeared to say that such evidence could, at most, affect a determination of whether the law was punitive “in the first instance.”<sup>303</sup> The Court stated that there must be a “final determination” of whether the law is punitive and that “the query must be answered definitively”: “The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.”<sup>304</sup>

*Seling* clearly holds that a person already committed cannot challenge his commitment on double jeopardy or ex post facto grounds based on the individual conditions of his treatment and confinement following commitment.<sup>305</sup> But the decision is murky regarding when the actual conditions of the treatment program, as opposed to the conditions of treatment described by the governing statute, may be used to support a challenge at the time of the commitment trial.<sup>306</sup>

*B. A Person May Be Civilly Committed As Sexually Dangerous Even If There Is No Effective Treatment, But (Probably) Available Treatment Must Be Offered*

The Supreme Court’s discussion in *Hendricks*, quoted above, makes it abundantly clear that persons can be civilly committed as sexually dangerous even if they personally are not amenable to treatment or if effective treatment for sex offenders is not available.<sup>307</sup> The Court reiterated this proposition in *Seling*.<sup>308</sup>

Even the dissenting justices in *Hendricks* did not disagree on this point. Justice Breyer wrote: “[M]y decision [does not] preclude a State from deciding that a certain subset of people are mentally ill, dangerous, and untreatable, and that confinement of

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301. *Id.* at 262.

302. *Id.* at 263.

303. *Id.*

304. *Id.*

305. *See id.*

306. *See id.*

307. *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).

308. *Seling*, 531 U.S. at 262.

this subset is therefore necessary.”<sup>309</sup> The dissenters argued only that, in order to avoid acting in a punitive manner, the State must provide what treatment is possible: “[W]hen a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat . . . begins to look punitive.”<sup>310</sup> The dissent cited the Court’s language in a previous decision stating that failure to use the least-harsh methods to accomplish a nonpunitive objective may show that the legislature’s purpose was to punish.<sup>311</sup>

The majority did not dispute the dissent’s analysis on this point, but did not expressly adopt it either. The majority did respond at length to the dissent’s conclusion that Kansas was not making a good faith effort to provide treatment.<sup>312</sup> From this it might be argued that the majority agreed that a bona fide attempt to provide treatment is constitutionally required. Moreover, in its recap of factors showing the nonpunitive nature of the law, the majority of the Court in both *Hendricks* and *Seling* recited that “the State has . . . recommended treatment if such is possible.”<sup>313</sup> But in neither case did the majority expressly hold, or need to hold, that it was a necessary factor. The Supreme Court has therefore not definitively answered that question.

*C. Civil Commitment of Persons As Sexually Dangerous Generally  
Does Not Violate Equal Protection*

Both the SPP and SDP statutes have been challenged on equal protection grounds, without success. These challenges have identified various allegedly unconstitutional “classifications.”

The classification challenged at the U.S. Supreme Court in *Pearson* is not completely clear from the decision. It appears that *Pearson* generally challenged the power of the Legislature to identify the class of persons covered by the statute for special treatment.<sup>314</sup> The Court rejected the claim, employing “rational basis” analysis, saying: “[T]he legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes

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309. *Hendricks*, 521 U.S. at 390 (Breyer, J., dissenting).

310. *Id.*

311. *Id.* at 388 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

312. *Id.* at 365-69.

313. *Id.* at 368. *See also Seling*, 531 U.S. at 261-62.

314. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274-75 (1940).

of cases where the need is deemed to be clearest.”<sup>315</sup>

In *Blodgett*, the Minnesota Supreme Court described Blodgett’s equal protection claim as “obscure,” but concluded that he was apparently challenging the legislative distinction between persons who are sexually dangerous due to mental disorders and similarly dangerous persons who are not disordered.<sup>316</sup> The *Blodgett* court also considered an equal protection claim raised by an amicus that distinguishing between recidivist sex offenders and recidivists who engage in other kinds of crimes was unconstitutional.<sup>317</sup> The Minnesota Supreme Court rejected these two claims, applying an intermediate level of equal protection scrutiny.<sup>318</sup> The court said that “the sexual predator poses a danger that is unlike any other,” and that the law “delineates genuine and substantial distinctions which define a class that victimizes women and children in a particular manner.”<sup>319</sup>

In *Linehan III*, the patient again challenged the classification between disordered and non-disordered sexual predators.<sup>320</sup> The Minnesota Supreme Court once again rejected this challenge, with a more extensive and explicit explanation that it was applying intermediate scrutiny, rather than either strict scrutiny or rational-basis scrutiny.<sup>321</sup> The court explained that limiting the statute’s application to persons whose sexual dangerousness was due to mental disorders served two important purposes: to aid in the prediction of dangerousness<sup>322</sup> and to serve the State’s interest in providing treatment to persons who are sexually dangerous.<sup>323</sup>

*D. The Dangerousness Assessment Necessary to Civil Commitment of Sexual Predators Is Constitutional*

Some persons challenge the “prediction of dangerousness”

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315. *Id.* at 275.

316. *In re Blodgett*, 510 N.W.2d 910, 917 (Minn. 1994).

317. *Id.*

318. *Id.* (citing, *inter alia*, *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (describing Minnesota intermediate scrutiny equal protection review)).

319. *Id.* at 917.

320. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 186 (Minn. 1996), *vacated and remanded*, 522 U.S.1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999). The Eighth Circuit, with minimal discussion, rejected the same claim in *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991).

321. *Linehan III*, 557 N.W.2d at 186.

322. *Id.* at 186-87.

323. *Id.* at 187.

that is required by laws like the SPP and SDP laws.<sup>324</sup> “Prediction” is a bit of a misnomer here because the court’s function is not to “predict” that the person will reoffend, but rather to assess the *likelihood* that the person will reoffend or to determine a “risk class” into which the person falls.<sup>325</sup> Under the SDP law, for example, the court must determine that the person falls into the “highly likely” risk category.<sup>326</sup>

Even though this claim was not presented in *Hendricks*, the U.S. Supreme Court’s discussion rejects any such notion, citing its earlier decision in *Schall v. Martin*<sup>327</sup> for the proposition that, “from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.”<sup>328</sup> Likewise, informed commentators generally acknowledge that such risk assessments may constitutionally be used not only in civil commitments, but also in many other legal settings ranging from determining child custody, detaining a person before criminal trial, and even imposing the death penalty.<sup>329</sup>

The Minnesota Supreme Court also has made it clear that assessment of risk in SPP and SDP cases is constitutional.<sup>330</sup> Further, based on Linehan’s argument in *Linehan I*, the court has specified a list of six factors for trial courts to use in assessing risk, if evidence regarding those factors is offered.<sup>331</sup> These factors include

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324. See, e.g., *In re Blodgett*, 510 N.W.2d at 917 n.15 (summarizing Blodgett’s argument); Eric S. Janus, *Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences*, 18 BEHAV. SCI. & L. 5, 16-17 (2000) [hereinafter Janus, *Lessons*].

325. Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL’Y & L. 33, 42 (1997).

326. *Linehan III*, 557 N.W.2d at 180. This is a standard higher than a fifty-one percent-likelihood standard, and corresponds to the clear-and-convincing-evidence standard. *Id.*

327. 467 U.S. 253, 278 (1984).

328. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); see also *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940) (stating that elements of PP definition, including likelihood of reoffense, “are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime”).

329. Eric S. Janus, *Sex Predator Commitment Laws: Constitutional But Unwise*, 30 PSYCHIATRIC ANNALS 411, 414 (2000) [hereinafter Janus, *Constitutional*] (noting that “*Hendricks* confirms that a law’s reliance on prediction of dangerousness does not render the law unconstitutional.”); Janus & Meehl, *supra* note 325, at 36; Johnson, *supra* note 31, at 1184 n.309.

330. *In re Blodgett*, 510 N.W.2d 910, 917 n.15 (Minn. 1994).

331. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 614 (Minn. 1994). The court said:

[T]he trial court, in predicting serious danger to the public, should

actuarial risk assessment methods.<sup>332</sup> But, in *Linehan III*, the court rejected Linehan's argument that actuarial methods should predominate over the other factors, stating that "dangerousness prediction under the SDP Act is not simply a matter for statisticians."<sup>333</sup> Instead, the Minnesota Supreme Court held that the trial court can determine which factors are most helpful in a particular case and can also consider other risk factors not listed in *Linehan I*.<sup>334</sup>

*E. The Kansas Commitment and Discharge Procedures Described in Hendricks Are Not Constitutionally Required*

The commitment and discharge procedures under Minnesota's SPP and SDP laws are not typical of the procedures used under such laws around the country. The procedures under the Kansas statute at issue in *Hendricks* and *Crane* are more common. In *Hendricks*, the Supreme Court noted that the Kansas law provided for a right to jury trial and proof beyond a reasonable doubt.<sup>335</sup> If committed, the person was entitled to automatic annual judicial review, at which the State would be required to prove that the initial commitment standard continued to be met.<sup>336</sup>

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consider the following factors if such evidence is presented: (a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts); (c) the base rate statistics for violent behavior among individuals of this person's background (*e.g.*, data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.); (d) the sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner); (e) the similarity of the present or future context to those contexts in which the person has used violence in the past; and (f) the person's record with respect to sex therapy programs. In reviewing psychopathic personality commitments in the future, we will look to see whether these factors have been considered, particularly where, as here, there is a large gap of time between the petition for commitment and the appellant's last sexual misconduct.

*Id.*

332. See *Linehan I*, 518 N.W.2d at 614 (referring to factors (a) and (c)).

333. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 191 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999).

334. *Id.*

335. *Kansas v. Hendricks*, 521 U.S. 346, 353-54 (1997).

336. *Id.* at 353.

Among the factors the Supreme Court listed as showing the state's non-punitive intent, the Court noted that Kansas had "provided strict procedural safeguards."<sup>337</sup>

Minnesota's procedures are different. The standard of proof is clear and convincing evidence, and no jury is provided.<sup>338</sup> Periodic review is not automatic, but rather the patient or the treatment facility must petition for relief.<sup>339</sup> The petitioning party bears the burden of going forward with evidence sufficient to show entitlement to discharge or provisional discharge; only if this burden is met does the party opposing such relief bear the burden of proof by clear and convincing evidence.<sup>340</sup> Moreover, as explained earlier,<sup>341</sup> the standard in a discharge proceeding is related to, but not identical to, the standard for commitment.<sup>342</sup>

Since *Hendricks*, persons committed under the Minnesota statutes have challenged their commitments on the ground that Minnesota does not provide procedures identical to those provided under the Kansas law.<sup>343</sup> The Minnesota Supreme Court summarily rejected this claim in *Linehan IV*, saying that *Hendricks* provided no new basis for Linehan's procedural arguments.<sup>344</sup> Likewise, the Minnesota Court of Appeals rejected the claim in *Joelson v. O'Keefe*, stating that "the United States Supreme Court did not mandate the adoption of these procedures to maintain the constitutionality of a sexual predator commitment law."<sup>345</sup> The federal district court for Minnesota has also repeatedly rejected this claim,<sup>346</sup> although in

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337. *Id.* at 368.

338. MINN. STAT. § 253B.18, subd. 1(a) (2002).

339. *Id.*, subd. 5(a).

340. MINN. STAT. § 253B.19, subd. 2 (2002); *Caprice v. Gomez*, 552 N.W.2d 753, 757 (Minn. Ct. App. 1996).

341. *See supra* Part III.

342. MINN. STAT. § 253B.18, subs. 7, 15 (2002); *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

343. *See, e.g., In re Linehan (Linehan IV)*, 594 N.W.2d 867, 872 (Minn. 1999); *Joelson v. O'Keefe*, 594 N.W.2d 905, 910-11 (Minn. Ct. App. 1999).

344. *Linehan IV*, 594 N.W.2d at 871 n.2.

345. 594 N.W.2d 905, 910-11 (Minn. Ct. App. 1999).

346. *See* Report and Recomm. at 16, *Call v. O'Keefe* (D. Minn 2000) (No. 98-1532) (RHK/RLE):

[N]o where did the Court mandate every State to adopt such procedures. [*Hendricks*, 521 U.S.] at 364-65. It was simply analyzing the statute so as to determine if it was punitive in nature. The Court did not set in stone what procedures would be necessary in order for a civil commitment law, like Minnesota's Sexual Psychopathic Personality Act, to withstand a constitutional challenge. We should not assume, without a more explicit pronouncement, that the Court's decision

one recent habeas corpus case that court granted a certificate of appealability allowing an appeal to the Eighth Circuit concerning a claim of right to a jury trial.<sup>347</sup>

*F. The SDP Law's Rebuttable Presumption Is Constitutional*

The SDP law contains a harmfulness standard virtually identical to the *Rickmyer* standard specified by the Minnesota Supreme Court for the SPP statute—"sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another."<sup>348</sup> But the SDP law adds a rebuttable presumption that if conduct would violate certain criminal statutes, including first-through-fourth-degree criminal sexual conduct, it also meets the harmfulness requirement.<sup>349</sup>

In *In re Kindschy*, the Minnesota Court of Appeals considered a claim that this rebuttable presumption is unconstitutional because it shifts the burden of proof to the proposed patient.<sup>350</sup> The U.S. Supreme Court has held that the State must bear the burden of proof in civil commitment cases.<sup>351</sup>

The appellate court rejected Kindschy's argument. The court

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regarding Kansas' law was meant to set the minimum standard with regard to civil commitment laws, especially when such a pronouncement would affect many State laws.

*See also* Report and Recomm. at 14 and Order, *Patterson v. O'Keefe* (D. Minn. 2000) (No. 99-1195) (DWF/RLE); Order, *Joelson v. O'Keefe* (D. Minn. 2000) (No. 99-1196) (DWF/RLE); Order, *Caprice v. O'Keefe* (D. Minn. 2000) (No. 99-1197) (DWF/RLE); Order, *Mattson v. O'Keefe* (D. Minn. 2000) (No. 99-1198) (DWF/RLE); Order, *Duvall v. O'Keefe* (D. Minn. 2000) (No. 99-1199) (DWF/RLE); Report and Recomm. at 11-13 and Order at 2-3, *Linehan v. Milczark* (D. Minn. 2001) (No. 00-2635) (DSD/AJB), *aff'd on other grounds*, 315 F.3d 920 (8th Cir. 2003); Report and Recomm. at 6-10 & Mem. and Order, *Poole v. O'Keefe* (D. Minn. 2002) (No. 01-1460) (PAM/JGL), *certif. of appealability granted on jury trial issue* (addressing proof beyond reasonable doubt and jury trials) Report and Recomm. at 7-9, *Woodruff v. O'Keefe* (D. Minn. 2001) (No. 00-2478) (JMR/FLN). In *Patterson, Joelson, Caprice, Mattson, Duvall*, both the district judge and the Eighth Circuit denied certificates of appealability. The United States Supreme Court denied certiorari in all five cases. *See Patterson v. O'Keefe*, 534 U.S. 852 (2001); *Joelson v. O'Keefe*, 534 U.S. 851 (2001); *Caprice v. Buckhalton*, 534 U.S. 851 (2001); *Mattson v. O'Keefe*, 534 U.S. 851 (2001); *Duvall v. O'Keefe*, 534 U.S. 852 (2001) (all denying certiorari).

347. *Poole v. O'Keefe* (No. 01-1460) (D. Minn. Jan. 13, 2002) (granting certificate of appealability only on jury trial issue).

348. MINN. STAT. § 253B.02, subd. 7a(a) (2002).

349. *Id.* subd. 7a(b).

350. 634 N.W.2d 723, 730 (Minn. Ct. App.), *review denied* (Minn. Dec. 19, 2001).

351. *Addington v. Texas*, 441 U.S. 418, 427 (1979).

first noted that, under the Minnesota Rules of Evidence, a presumption “imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof.”<sup>352</sup> In addition, the court observed that Kindschy’s argument was akin to the claim rejected by the U.S. Supreme Court in *Jones v. United States*.<sup>353</sup> In *Jones*, the Supreme Court held that it was constitutional for the government to automatically civilly commit a person based on his successful assertion of the insanity defense in a civil proceeding.<sup>354</sup> The Supreme Court said that Congress could reasonably infer dangerousness, for purposes of the civil commitment, from the person’s criminal act established in the criminal proceeding.<sup>355</sup>

*G. The Statutes’ Least-Restrictive-Alternative Provision is Constitutional*

Kindschy also challenged the statutory “least restrictive alternative” provision, asserting that it unconstitutionally placed the burden of proof on him.<sup>356</sup> For the “non-highly dangerous” commitment categories, Minnesota’s commitment act requires the court to commit the person to the least-restrictive available treatment program that can meet the person’s needs.<sup>357</sup> But the least-restrictive-alternative provisions for the “highly dangerous” commitments—MI&D, SPP and SDP—are different. Those provisions require the court to commit the person to the Minnesota Security Hospital or the Minnesota Sex Offender Program “unless the patient establishes by clear and convincing evidence that a less restrictive treatment program is available that is consistent with the patient’s treatment needs and the requirements of public safety.”<sup>358</sup>

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352. *Kindschy*, 634 N.W.2d at 730 (quoting MINN. R. EVID. 301).

353. *Id.* (citing *Jones v. United States*, 463 U.S. 354, 364-65 (1983)).

354. 463 U.S. at 364-65.

355. *Id.*

356. *Kindschy*, 634 N.W.2d at 731.

357. MINN. STAT. § 253B.09, subd. 1(a) (2002).

358. MINN. STAT. §§ 253B.18, subd. 1, 253B.185, subd. 1 (2002). In *In re Senty-Haugen*, 583 N.W.2d 266, 269-70 (Minn. 1998), the Minnesota Supreme Court held that the least-restrictive-alternative provision that applies to the mentally ill, mentally retarded and chemically dependent commitment categories does not apply to MI&D, SPP and SDP commitments. Responding to that decision, the Legislature adopted the special least-restrictive-alternative provisions for those

The court of appeals rejected Kindschy's claim that this provision unconstitutionally placed the burden on him.<sup>359</sup> The court noted that the statute does not give a person committed as SPP or SDP the right to be placed in the least restrictive setting, but instead gives him the opportunity to show that an appropriate alternative placement is available.<sup>360</sup>

#### *H. The Discharge Standard is Constitutional*

The discharge standard under the SPP/SDP statutes has also been challenged. The U.S. Supreme Court has held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>361</sup> As explained in Part III above, the discharge standard for persons committed as SPP and SDP does not simply mirror the commitment standard—a person is not entitled to discharge as soon as it is shown that he no longer meets the commitment standard. Instead, "[c]onfinement may continue without meeting this threshold if . . . the person continues to need treatment for his sexual disorder and continues to pose a danger to the public."<sup>362</sup> In *Call v. Gomez*, the Minnesota Supreme Court rejected the patient's constitutional challenge to this discharge standard, concluding that as long as "the confinement still bears the reasonable relationship to the original reason for commitment," the constitutional requirement is met.<sup>363</sup>

### VI. WHAT WE KNOW, AND DON'T, ABOUT THE CONSTITUTIONAL REQUIREMENT OF MENTAL DISORDER

Ten years ago the constitutionality of the civil commitment of sexual predators was doubtful in the minds of many. Probably the most substantial question was whether a mental disorder is required and, if so, what kind. For the most part, these questions are answered by *Hendricks* and *Crane*.

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categories quoted in text. See Act of May 4, 1999, ch. 118, §§ 3, 6, 1999 Minn. Laws 481, 482-83.

359. *Kindschy*, 634 N.W.2d at 731.

360. *Id.*

361. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

362. *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

363. *Id.*

A. *A Mental-Disorder-Type Element is Constitutionally Required to Support the Civil Commitment of A Sexual Predator*

First, *Hendricks* appears to make it clear that the Supreme Court would not approve civil commitment of sexual predators based simply on their past conduct and the prediction of likely future harm. The Court said:

A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a “mental illness” or “mental abnormality.”<sup>364</sup>

The Court clearly did not hold that a mental disorder or something akin to a mental disorder would be the only “additional factor” that would be constitutionally sufficient.<sup>365</sup> But this was the additional factor contained in the Kansas statute<sup>366</sup> and, indeed, in all of the other sexual predator commitment statutes around the country.<sup>367</sup>

The Supreme Court did not explain why an additional factor was necessary—why a sound assessment of future risk based in part on a history of harmful sexual conduct would not be sufficient. In both *Hendricks* and *Crane*, the Court explained that the mental disorder requirement was necessary to distinguish the committed person “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>368</sup> But the Court did not explain why such persons “more properly”

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364. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

365. *Id.* (stating commitment may be supported by “*some additional factor such as a ‘mental illness’ or ‘mental abnormality’*”) (emphasis added). See also *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (describing *Hendricks* as allowing preventive detention only “where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint’”).

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

367. *E.g.*, ARIZ. REV. STAT. § 36-3701 (7)(b) (Supp. 2002); CAL. HEALTH & SAFETY CODE § 6600(a), (c) (West 1998); FLA. STAT. ANN. § 394.912(10) (2002); 725 ILL. COMP. STAT. 207/5(b), (f) (2002); IOWA CODE § 229A.2(4), (9) (2000); MINN. STAT. § 253B, subd 18(c) (2002); MO. REV. STAT. § 632.480(5) (2000); N.J. STAT. ANN. § 30:4-27.2(6) (West Supp. 2002); N.D. CENT. CODE § 25-03.3-01(8) (2002); S.C. CODE ANN. § 44-48-30(1) (Law. Co-op. 2002); VA. CODE ANN. § 37.1-70.01 (Supp. 2002) (effective January 1, 2004); WASH. REV. CODE § 71.09.020(4), (12) (Michie 2002); WIS. STAT. § 980.01(2), (7) (1998).

368. *Kansas v. Crane*, 534 U.S. 407, 410 (2002); *Hendricks*, 521 U.S. at 360.

should be dealt with through the criminal process. The Court's reasoning contains an underlying assumption that cannot be explained except by tautology.

Professor Peter Erlinder has provocatively suggested that the civil commitment of sexual predators, rather than dealing with such persons exclusively as criminals, opens the door to Soviet Union-type abuses of mental health commitment.<sup>369</sup> But he too fails to explain why civil processes are more subject to abuse than criminal ones.

Further, it is not helpful to label commitment without a disorder as "preventive detention."<sup>370</sup> All of the justices of the U.S. Supreme Court agree that civil commitment may be used to confine a person to protect the public even where no effective treatment is currently available.<sup>371</sup> Indeed, the Supreme Court itself has non-pejoratively referred to the civil commitment involved in *Hendricks* as *permissible* "preventive detention."<sup>372</sup>

But this is not to advocate for civil commitment of sexual predators without a mental disorder component in the commitment criteria. From their inception sixty-six years ago, such statutes have regarded the persons subject to commitment as having mental abnormalities for which treatment is appropriate, and the states have generally included these commitments in their "mental health" commitment processes. The Court's analysis in *Hendricks* and *Crane* thus approves the commitment of sexual predators within a mental health framework.

*B. The Purpose of the Supreme Court's Mental Disorder Standard is Unclear*

The Supreme Court in *Crane* also made clear—clearer than in *Hendricks*—the nature of the mental disorder it would require: "that there must be proof of serious difficulty in controlling behavior."<sup>373</sup> What this means and how the courts have implemented and should implement it, is discussed below. But it may be helpful to attempt to ascertain why the Court chose this particular description of a

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369. Erlinder, *supra* note 285, at 158-59.

370. See, e.g., *In re Blodgett*, 510 N.W.2d 910, 918 (Minn. 1994) (Wahl, J., dissenting).

371. *Hendricks*, 521 U.S. at 366, 390 (Court's opinion and Breyer, J., dissenting).

372. *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).

373. *Crane*, 534 U.S. at 412.

mental disorder and what purpose it serves in the Court's constitutional analysis.

Justice Breyer, who wrote the dissenting opinion in *Hendricks* and later the majority opinion in *Crane*, introduced the inability-to-control concept into the Court's analysis. In the *Hendricks* oral argument, groping for a standard to assess the constitutional adequacy of a State's mental disorder standard, Breyer asked Hendricks' counsel:

The issue is, in addition, you have to be mentally ill, and it's like civil commitment, and how do you decide whether for legal purposes a person is sufficiently mentally ill?

....

So what's the definition distinguishing the one from another, and what I'm going to ask you about is the ALI's definition, which had for a different purpose to say that a person was insane if, as a result in part of a mental defect, he lacked substantial capacity, in this case it would be to conform his conduct to the requirements of law, which would suggest a kind of irresistible impulse, a compulsion.

And we know that there is in one of the psychiatric associations' brief evidence that some psychiatrists call this a kind of compulsion, so is the ALI test a possible test?<sup>374</sup>

When the *Hendricks* opinion was subsequently issued, Justice Breyer *concurred* with the Court's holding that Hendricks' commitment satisfied substantive due process.<sup>375</sup> He concluded that Kansas could constitutionally classify Hendricks as "mentally ill" because of the presence of three factors, one being that "Hendricks suffers from a classic case of irresistible impulse, namely, he is so afflicted with pedophilia that he cannot 'control the urge' to molest children."<sup>376</sup>

Justice Breyer gave two reasons for resorting to the inability-to-control standard. First, citing the opinions of the United States and Minnesota Supreme Courts in *Pearson*, he said: "The law traditionally has considered this kind of abnormality akin to insanity for purposes of confinement."<sup>377</sup> Second, he said, "[t]he notion of an 'irresistible impulse' often has helped to shape

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374. *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-9075, 95-1649) (Dec. 10, 1996) (transcript available at 1996 WL 721073, at \*49-50).

375. *Hendricks*, 521 U.S. at 374.

376. *Id.* at 376 (Breyer, J., dissenting).

377. *Id.* at 375.

criminal law's insanity defense and to inform the related recommendations of legal experts as they seek to translate the insights of mental health professionals into workable legal rules."<sup>378</sup>

The many references to inability to control in the *Hendricks* majority opinion were obviously meant simply to respond to Justice Breyer's contention: the Court was saying that the very terms of the Kansas statute (*i.e.*, mental disorder that causes the person to act in a harmful manner) "by definition" identifies persons whose disorder "prevents them from exercising adequate control over their behavior."<sup>379</sup> Justice Thomas, the author of the Court's opinion in *Hendricks*, confirmed this interpretation of *Hendricks* by subscribing to the dissenting opinion in *Crane*.<sup>380</sup>

The point here is that it was Justice Breyer who came up with the inability-to-control standard for evaluating states' commitment criteria, and he has given little explanation as to why that particular standard was chosen. It appears that he was grasping for a standard, and inability to control was the only one offered. It seems that he found some degree of comfort in that standard because it had been previously upheld for purposes of sexual predator commitment in *Pearson* and it was similar to one of the common criminal insanity tests, thus providing some apparent legitimacy.

Justice Breyer's near desperation to find some standard is shown by the fact that the one he chose—inability to control—has been roundly criticized in recent years as being difficult to apply at best and devoid of content at worst. Legal and psychiatric commentators agree that whether a person is *able* to control his impulses—whether an impulse is truly *irresistible*—is ultimately unknowable. Professor Stephen Morse has written:

[F]amously, we cannot distinguish between irresistible impulses and those impulses simply not resisted. . . . [T]he studies do not address and folk psychology does not know whether and to what degree people are *unable* to refrain from acting. Neither in psychology, philosophy, nor folk psychology is there a reasonably uncontroversial understanding of these matters.<sup>381</sup>

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378. *Id.* at 376.

379. *Id.* at 362 (majority opinion).

380. *Kansas v. Crane*, 534 U.S. 407, 419 (2002) (Scalia, J., dissenting).

381. Stephen J. Morse, *Causation, Compulsion, and Involuntariness*, 22 BULL. AM. ACAD. PSYCHIATRY L. 159, 177 (1994).

Similarly, Professor Richard Bonnie has stated:

There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by “moral guesses.”<sup>382</sup>

And Professor Paul Robinson has stated:

No test is available to distinguish between those who cannot and those who will not conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations.<sup>383</sup>

As the American Psychiatric Association has observed, “the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.”<sup>384</sup> Professor Eric Janus has written that “there is good evidence that the inability-to-control concept lacks substance.”<sup>385</sup> Because of these difficulties, Congress abandoned the “control prong” of the ALI test<sup>386</sup> in the Insanity Defense Reform Act of 1984,<sup>387</sup> and many states that had adopted some version of that test have abandoned it as well.<sup>388</sup>

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382. H.R. REP. NO 98-1030, at 226-27 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3408-09 (quoting Professor Richard J. Bonnie).

383. *Id.* (quoting Professor Paul H. Robinson).

384. *Id.* at 228, *reprinted in* 1984 U.S.C.C.A.N. at 3410.

385. Eric S. Janus, *Sex Offender Commitments and the “Inability to Control”—Developing Legal Standards and a Behavioral Vocabulary for an Elusive Concept*, in 2 THE SEXUAL PREDATOR 1-1, 1-2 (Anita Schlank ed., 2001); *see also* Janus, *Lessons, supra* note 324, at 14 (“the conventional wisdom is that ‘inability to control’ is a highly confused concept with little or no meaningful content”). But Professor Janus’ position on this point has been inconsistent. At the same time he was making these assertions, he was arguing on behalf of Linehan that inability to control was the *only* constitutionally sufficient standard. *See In re Linehan (Linehan III)*, 557 N.W.2d 171, 185 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999).

386. *See* MODEL PENAL CODE § 401(1) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”).

387. *See* Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, ch. IV, § 402(a), 98 Stat. 2057 (codified at 18 U.S.C. § 17).

388. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 173 & nn. 2, 4, 56.5 (1984)

The only explanation Justice Breyer offered for the inability-to-control requirement is that it is necessary to distinguish the person subject to commitment from mere criminals:

We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without any lack-of-control determination. *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.” That distinction is necessary lest “civil commitment” become a “mechanism for retribution or general deterrence”—functions properly those of criminal law, not civil commitment.<sup>389</sup>

While this explanation may vaguely explain the Court’s desire to identify some limiting standard, it provides no justification for the inability-to-control standard as opposed to some other limiting standard.<sup>390</sup>

The better explanation may be contained in Justice Thomas’ majority opinion for the Court in *Hendricks*. He explained that persons whose mental disorders prevent them from exercising adequate control over their behavior “are therefore unlikely to be deterred by the threat of confinement.”<sup>391</sup> However, as Justice Thomas made clear by joining the dissenting opinion in *Crane*, he had referred to inability to control only in the sense that the person engages in his harmful acts *because* of his mental disorder.<sup>392</sup>

While the U.S. Supreme Court has not been specific about the purpose of the mental disorder requirement in constitutional analysis, in *Linehan III* the Minnesota Supreme Court suggested two purposes served by this requirement. First, the court said the mental disorder requirement helps to assess risk of dangerous

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& Supp. 1999-2000). See, e.g., IND. CODE ANN. § 35-41-3-6 (Michie 1998 & Supp. 2002); ME. REV. STAT. ANN. tit. 17-A, § 39 (West 1983 & Supp. 2002); S.C. CODE ANN. § 14-24-10 (Law. Co-op. 1985); TEX. PENAL § 8.01 (1994).

389. *Kansas v. Crane*, 534 U.S. 407, 412 (2002).

390. *Janus*, *Constitutional*, *supra* note 329, at 414 (stating that, in *Hendricks*, the “Court did not explain why it focused on this sort of dysfunction or how this dysfunction serves to limit and justify civil commitment”).

391. *Kansas v. Hendricks*, 521 U.S. 346, 362-63 (1997).

392. *Crane*, 534 U.S. at 420-21 (Scalia, J., dissenting).

behavior.<sup>393</sup> Second, the court held that the requirement of a mental disorder served the State's interest in providing intensive treatment for sex offenders, rather than simply extending criminal sentences.<sup>394</sup>

One thing that is clear is that neither the U.S. nor the Minnesota Supreme Court has adopted Professor Janus' oft-repeated argument that sexual predators can be civilly committed only if they lack criminal responsibility, *i.e.*, are criminally insane.<sup>395</sup> Both Hendricks and Crane had been previously criminally convicted for their sexual offenses.<sup>396</sup> Yet, there is no suggestion in either decision that, because the two men had been held criminally responsible for their acts, they could not be civilly committed. Had the Court even entertained this possibility, surely the issue would have been discussed; if the view had been adopted, each of the decisions would have come out the opposite way.

The Minnesota Supreme Court expressly rejected the criminal-non-responsibility argument in *Linehan III*,<sup>397</sup> and the court's decision in *Linehan IV* (upholding Linehan's commitment despite the fact he was criminally responsible) necessarily reaffirmed that holding.<sup>398</sup> Justice Simonett, writing for the Minnesota Supreme Court in *Blodgett*, discussed the court's reasons for rejecting the dichotomous either-criminally-responsible-or-civilly-committable argument:

Is it better for a person with an uncontrollable sex drive to be given an enhanced prison sentence or to be committed

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393. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 186-87 (Minn 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999). As Professor Janus stated in a related context: "The expert's prediction takes the following form: this patient's illness has caused dangerousness in the past; the illness continues; therefore, this patient's dangerousness continues." ERIC S. JANUS, CIVIL COMMITMENT IN MINNESOTA 45 (2d ed. 1991). Without referring to his own previous statement, Professor Janus has recently written that mental disorder is at best a modest predictor of dangerousness. See Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1296-99 (1998) [hereinafter Janus, *Foreshadowing*].

394. *Linehan III*, 557 N.W.2d at 187.

395. See, e.g., *id.* (describing the argument before the Minnesota Supreme Court); Janus, *Lessons*, *supra* note 324, at 14-15.

396. *Crane*, 534 U.S. at 411 (majority opinion), 872 (Scalia, J., dissenting); *Hendricks*, 521 U.S. at 353-54.

397. *Linehan III*, 557 N.W.2d at 183-84.

398. *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 876 (Minn. 1999), *cert. denied*, 528 U.S. 1049 (1999).

civilly? . . . For the legislature which must provide the necessary prison cells or hospital beds, there are no easy answers. Nor are there easy answers for society which, ultimately, must decide to what extent criminal blame is to be assigned to people who are what they are.

....

In the present imperfect state of scientific knowledge, where there are no definitive answers, it would seem a state legislature should be allowed, constitutionally, to choose either or both alternatives for dealing with the sexual predator.<sup>399</sup>

C. *State Courts Are Split Regarding Whether Crane Requires A Finding Or Jury Instruction Expressly Addressing Inability To Control*

As discussed above, the Minnesota courts and the Eighth Circuit have read *Crane* to require an express finding of some level of inability to control behavior. This has not, however, been obvious to all courts that have examined the issue. Since *Crane* was decided, courts in ten states (besides Minnesota) have addressed whether *Crane* requires that there be a court finding or jury instruction expressly addressing inability to control. In most of these states the commitments followed jury trials in which the jury instructions did not contain express mention of inability to control. Committed persons in these states have therefore demanded that their commitments be overturned and that they receive new trials at which the inability-to-control issue would be specifically addressed.

At this writing, it appears that two (maybe three) state supreme courts and the intermediate appellate court of one additional state have required an express finding or jury instruction addressing *Crane's* serious-difficulty-in-controlling-behavior holding.<sup>400</sup> These

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399. *In re Blodgett*, 510 N.W.2d 910, 917-18 (Minn. 1994).

400. See *In re Barnes*, No. 01-1545, 2003 WL 152308 (Iowa Jan. 23, 2003) (reversing commitment under statute similar to Kansas statute because jury instruction did not expressly address inability to control); *In re Thomas*, 74 S.W.3d 789 (Mo. 2002) (same); *Spink v. Washington*, 48 P.3d 381 (Wash. Ct. App. 2002) (same). It is unclear whether a decision of the New Jersey Supreme Court also falls into this group. In *In re W.Z.*, 801 A.2d 205 (N.J. 2002), the court remanded the case to the trial court, in a non-jury case, for additional findings based on the state court's reading of *Crane*. However, the court in *W.Z.* also interpreted the statute to contain a highly-likely-to-reoffend requirement. It appears that the

courts have remanded cases where the necessary jury instructions were not given or findings were not made.

On the other hand, four state supreme courts and the appellate courts of two other states have held that *Crane* does not require a jury instruction expressly addressing inability to control.<sup>401</sup> These decisions acknowledged the *Crane* requirement that there be “proof of serious difficulty in controlling behavior,” but held that such a finding is implicit in the states’ commitment criteria (which, in each case, were essentially identical to the requirements of the Kansas act at issue in *Crane*). The Wisconsin Supreme Court explained in *In re Laxton*:

We conclude that the required proof of lack of control, therefore, may be established by evidence of the individual’s mental disorder and requisite level of dangerousness, which together distinguish a dangerous sexual offender who has serious difficulty controlling his or her behavior from a dangerous but typical recidivist.

Wisconsin ch. 980 satisfies this due process requirement because the statute requires a nexus between the mental disorder and the individual’s dangerousness. Proof of this nexus necessarily and implicitly involves proof that the person’s mental disorder involves serious difficulty for the person to control his or her behavior. The definition of a sexually violent person requires, in part, that the individual is “dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.”<sup>402</sup>

Will the U.S. Supreme Court resolve this split between the state courts regarding the meaning of *Crane*? Perhaps the Court is weary of this issue. It has already denied a certiorari petition in one case, *In re Laxton*, even though there were squarely conflicting state

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court may have been saying that *Crane*’s serious-difficulty-in-controlling requirement was implicit in the statutory commitment criteria, similar to the cases discussed below, but that the remand was necessary because the court had gleaned the “highly likely” requirement from *Crane*.

401. See *In re Leon G.*, 59 P.3d 779 (Ariz. 2002); *Westerheide v. State*, 831 So. 2d 93 (Fla. 2002); *In re Luckabaugh*, 568 S.E.2d 338 (S.C. 2002); *In re Laxton*, 647 N.W.2d 784 (Wisc. 2002), cert. denied, 123 S. Ct. 870 (2003); *People v. Williams*, 120 Cal. Rptr. 2d 11 (Cal. Ct. App. 2002), review granted (Cal. July 17, 2002); *People v. Wollschlager*, 122 Cal. Rptr. 2d 171 (Cal. Ct. App. 2002), review granted (Cal. Oct. 16, 2002); *People v. Hancock*, 771 N.E.2d 459 (Ill. App. Ct. 2002), appeal denied (Ill. Oct. 2, 2002).

402. *Laxton*, 647 N.W.2d at 793 (citing Wis STAT. § 980.01(7) (1999) (emphasis added)) (footnote omitted).

supreme court decisions.<sup>403</sup>

*D. What Constitutes Inability to Control?*

If a State must specifically prove “serious difficulty in controlling behavior,” or a similar standard, what kind of evidence is sufficient to meet this standard? Because Minnesota has been operating under an inability-to-control standard for many years, Minnesota (unlike most states) has actually compiled a body of case law applying an inability-to-control standard.<sup>404</sup>

*1. Development of an inability to control standard*

Of course, the simplest type of inability to control is presented by *Hendricks*. *Hendricks* stated that he wished to avoid further molestation of children, but that he “c[ould]n’t control the urge” to do so; he said that only his own death would stop him from molesting children.<sup>405</sup> The Supreme Court in *Crane* later described *Hendricks*’ condition as a *volitional* disability,<sup>406</sup> apparently referring to situations where the person wishes to avoid the harmful behavior, but has such strong urges, such low impulse control, or a combination of the two, that he is unable to do so. *Hendricks*’ condition, the Court said, “involves what a lay person might describe as a lack of control.”<sup>407</sup>

In Minnesota, a similar scenario frequently found to demonstrate inability to control is repeated sexual assault without apparent regard for the consequences. As a dramatic example, the Minnesota Court of Appeals described the acts of Robert Kunshier,

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403. See *Laxton v. Wisconsin*, 123 S. Ct. 870 (2003) (denying certiorari). When the order denying certiorari in *Laxton* was issued on January 13, 2003, the Missouri Supreme Court’s decision in *Thomas* conflicted with the Wisconsin, Arizona, Florida and South Carolina supreme court decisions cited in note 400, above. The Iowa Supreme Court’s decision in *Barnes*, agreeing with *Thomas* and disagreeing with *Laxton*, *Leon G.*, *Westerheide* and *Luckabaugh*, was issued subsequently on January 23, 2003.

404. E.g., *Blodgett*, 510 N.W.2d at 915; *In re Linehan (Linehan I)*, 518 N.W.2d 609, 614 (Minn. 1994); *State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939), *aff’d*, 309 U.S. 270 (1940); *In re Preston*, 629 N.W.2d 104, 111 (Minn. Ct. App. 2001); *In re Irwin*, 592 N.W.2d 366, 375 (Minn. Ct. App. 1995); *In re Pirkel*, 531 N.W.2d 902, 905 (Minn. Ct. App. 1995); *In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. Ct. App. 1994); *In re Schweninger*, 520 N.W.2d 446, 460 (Minn. Ct. App. 1994). See also Kirwin, *Overview*, *supra* note 10, at 4-13 & 17-18.

405. *Hendricks*, 521 U.S. at 355.

406. *Crane*, 534 U.S. at 414.

407. *Id.*

noting that he had committed

some of these acts while on probation, after escaping from custody, and during or after completing sex offender programming. His assaults have been committed within a day or a week of being released from or escaping from custody . . . . He rapes while actively fleeing pursuing peace officers. His sexual impulses override any normal fear of capture or consequences . . . .<sup>408</sup>

But the U.S. Supreme Court in *Crane* emphasized that it was not limiting inability to control to volitional impairments: “Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments.”<sup>409</sup> The Court said that it did not decide, either in *Hendricks* or *Crane*, whether commitment based only on “emotional” abnormality would be constitutional.<sup>410</sup>

The *Crane* Court’s discussion of “volitional,” “cognitive” and “emotional” disorders is obscure.<sup>411</sup> The Kansas statute at issue in *Crane* provided that the mental disorder element could be satisfied by a “mental abnormality or personality disorder.”<sup>412</sup> “Mental abnormality” was defined, in part, as a “condition affecting the emotional or volitional capacity” of the person.<sup>413</sup> The term “personality disorder” was not further defined.<sup>414</sup> The Kansas Supreme Court concluded that only “volitional” impairment could include an inability to control, and the volitional impairment must include “capacity involving the exercise of will.”<sup>415</sup> This type of impairment has been described as “ego-dystonic;” the person’s “higher self” struggling against his urges, or “lower self.”<sup>416</sup>

At the U.S. Supreme Court, the State of Kansas argued strenuously that the Kansas Supreme Court had erred, both by

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408. *In re* Kunshier, No. C7-95-1490, 1995 WL 687692, at \*3 (Minn. Ct. App. Nov. 21, 1995).

409. *Crane*, 534 U.S. at 415.

410. *Id.*

411. *See generally id.* at 408.

412. *In re* Crane, 7 P.3d 285, 289 (Kan. 2000) (quoting KANS. STAT. ANN. § 59-29a02(a) (Supp. 1999)).

413. *Id.* (quoting KAN. STAT. ANN. § 59-29a02(b) (Supp. 1999)).

414. *Id.* at 289.

415. *Id.*

416. Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL’Y. REV. 71, 81 (1997). Like the Kansas Supreme Court, Janus argued that only volitional impairment should qualify for commitment. *Id.* at 76.

requiring specific proof of inability to control and by holding that only a “volitional,” as opposed to an “emotional,” impairment could qualify for commitment.<sup>417</sup> The State’s brief pointed out that the inability-to-control standard would not apply even to persons whose dangerous acts resulted from schizophrenia or other serious psychoses.<sup>418</sup> Similarly, an amicus brief explained that a complete-lack-of-control standard would not apply “even to the most delusional and psychotic people.”<sup>419</sup> Both briefs quoted a journal article stating that, “as [Stephen] Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control over them.”<sup>420</sup>

The point that Kansas and the amicus were making was that the inability-to-control test could not be universally applied to civil commitment standards, because most traditional mental illness commitments would not qualify. The typical mental illness commitment does not involve a person who wants to avoid particular conduct, but cannot control his urges. Rather, it generally involves delusions (*e.g.*, the person acts defensively because he thinks the victim is trying to harm him) or hallucinations (*e.g.*, God is telling the mentally ill person to kill or harm another person).<sup>421</sup> In either case, the person willfully acts (albeit in response to impaired thought processes), rather than succumbing to irresistible urges. The *Crane* Court’s reference to “cognitive” and “emotional” impairments apparently referred to this issue.<sup>422</sup> The Court said:

*Hendricks* must be read in context. The Court did not draw a clear distinction between the purely “emotional” sexually related mental abnormality and the “volitional.” Here, as in other areas of psychiatry, there may be “considerable overlap between a . . . defective

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417. Petitioner’s Brief at 11, 21, 25, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957) (available at 2001 WL 674238).

418. Reply Brief at 6, *Crane* (No. 00-957) (available at 2001 WL 991493).

419. Brief of Amicus Curiae Ass’n for Treatment of Sexual Abusers [“ATSA”] at 3, *Crane* (No. 00-957) (available at 2001 WL 670067).

420. Reply Brief at 6, *Crane* (No. 00-957); Brief of Amicus Curiae ATSA at 3, *Crane* (No. 00-957) (quoting Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1238 (2000)).

421. See, *e.g.*, *In re Clemons*, 494 N.W.2d 519, 520 (Minn. Ct. App. 1993) (describing how woman beat two-year-old grandson unconscious, trying to “drive out the demons”); *In re Miner*, 411 N.W.2d 525, 526 (Minn. Ct. App. 1987) (describing how man killed father, under delusion that father was “the enemy”).

422. See *Crane*, 534 U.S. at 408.

understanding or appreciation and . . . [an] ability to control . . . behavior.”<sup>423</sup>

Minnesota SPP and SDP cases have generally not involved psychotic persons with delusions or hallucinations. However, many of these cases have involved persons who did not have the “will” to avoid committing sexually predatory acts, but rather chose to commit those acts due to their “defective appreciation or understanding” of the nature or harmfulness of their acts. Merlin Adolphson, for example, was a pedophile who engaged in sexual activity with adolescent boys.<sup>424</sup> Adolphson did not wish to refrain from sexual contact with the children; to the contrary, his pedophilia involved the entrenched belief that sex with children was acceptable, even beneficial, to them.<sup>425</sup> The Minnesota Court of Appeals noted that Adolphson “ha[d] no will to stop sexually assaulting adolescent males,” but concluded that this did not preclude a finding of inability to control: “This complete lack of will shows he continues to have an utter lack of power of control.”<sup>426</sup> *Crane* appears to contemplate the commitment of such persons, and not to limit “serious difficulty in controlling behavior” to those persons who experience an ego-dystonic struggle between their will and their urges.<sup>427</sup>

## 2. *Personality Disorders*

One type of mental disorder that has provoked debate as a basis for sexual predator commitment is the “personality disorder.” Most of the recent sexual predator commitment statutes specifically list “personality disorder” as one type of disorder that will support commitment.<sup>428</sup> A personality disorder “is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.”<sup>429</sup> In Minnesota, the two types of personality disorders most often involved in SPP and SDP

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423. *Id.* at 415 (alteration in original) (citation omitted).

424. *In re Adolphson*, No. C5-95-533, 1995 WL 434386 (Minn. Ct. App. July 25, 1995).

425. *Id.* at \*3-4.

426. *Id.* at \*4.

427. *See generally* *Kansas v. Crane*, 534 U.S. 407, 407 (2002).

428. *See, e.g.*, KAN. STAT. ANN. § 59-29a02(a) (2001); MINN. STAT. § 253B.02, subd. 18c(a)(2) (2002).

429. DSM-IV-TR, *supra* note 63, at 685.

commitment cases are “antisocial personality disorder” and “narcissistic personality disorder.”<sup>430</sup> These two disorders share some characteristics related to sex offending, particularly the inability to experience empathy towards others and the tendency to exploit others for one’s self-gratification.<sup>431</sup>

The antisocial personality disorder, in particular, is sometimes criticized as a basis for a sexual predator commitment on the basis that it simply characterizes a history of bad behavior.<sup>432</sup> This disorder, sometimes referred to as “psychopathy,”<sup>433</sup> is described generally as “a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.”<sup>434</sup> Extreme callousness and lack of empathy or remorse are central features of the disorder.<sup>435</sup> The American Psychiatric Association’s diagnostic manual, DSM-IV-TR, provides for the diagnosis of this mental disorder primarily through a defined set of behaviors.<sup>436</sup> If this behavioral pattern is present, the “Antisocial Personality Disorder is diagnosed because a psychological dysfunction can then reasonably be inferred.”<sup>437</sup>

In situations where significant consequences may attach to the diagnosis of “psychopathy,” however, most experts now use a more-focused set of criteria developed by Dr. Robert Hare called the Psychopathy Checklist–Revised, or PCL-R.<sup>438</sup> The PCL-R, better than DSM’s diagnostic criteria, identifies persons who exhibit the primary mental features of a psychopath—callousness and lack of empathy or remorse.<sup>439</sup> Researchers believe that psychopaths, as

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430. See, e.g., *In re Linehan (Linehan III)*, 557 N.W.2d 171, 184-85 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff’d as modified*, 594 N.W.2d 867 (Minn. 1999) (antisocial personality disorder); *In re Poole*, No. C8-00-171, 2000 WL 781381, at \*2 (Minn. Ct. App. June 20, 2000) (narcissistic personality disorder); DSM-IV-TR, *supra* note 63, at 701-06 (describing antisocial personality disorder) and 714-17 (describing narcissistic personality disorder).

431. DSM-IV-TR, *supra* note 63, at 703, 705, 714-15.

432. *Linehan III*, 557 N.W.2d at 184 (describing Linehan’s argument).

433. DSM-IV-TR, *supra* note 63, at 702.

434. *Id.* at 701.

435. *Id.* at 702-03.

436. *Id.* at 706.

437. Robert L. Spitzer & Janet B. W. Williams, *The Definition and Diagnosis of Mental Disorder*, in *DEVIANCE AND MENTAL ILLNESS* 15, 21 (W. R. Gove ed., 1982).

438. Heather M. Gretten et al., *Psychopathy and Recidivism in Adolescent Sex Offenders*, 28 *CRIM. JUST. & BEHAV.* 427, 427-28 (2001); Robert D. Hare, *Psychopathy: A Clinical Construct Whose Time Has Come*, 23 *CRIM. JUST. & BEHAV.* 25 (1996); Grant T. Harris et al., *Criminal Violence: The Roles of Psychopathy, Neurodevelopmental Insults, and Antisocial Parenting*, 28 *CRIM. JUST. & BEHAV.* 402, 406 (2001).

439. Harris, *supra* note 438, at 406; Stephen D. Hart et al., *The Psychopathy*

measured by the PCL-R, make up a group that is qualitatively distinct from other violent offenders.<sup>440</sup>

As it relates to civil commitment of sexual predators, psychopathy is much more than just another description of the person's past misdeeds. It serves two significant purposes. First, it helps to separate out those persons most likely to commit new sex offenses. Psychopathy, at least as measured by the PCL-R, has been shown to be a helpful predictor of sexual (as well as violent) recidivism.<sup>441</sup>

Second, it identifies a group of persons who are not adequately addressed through the criminal justice system. In *Hendricks*, the Supreme Court observed that persons whose mental disorders prevent them from exercising adequate control over their behavior "are therefore unlikely to be deterred by the threat of confinement."<sup>442</sup> Researchers have found that psychopaths in particular exhibit this characteristic: they have marked deficits in the ability to learn from, or be deterred by, the prospect of punishment or other aversive stimuli.<sup>443</sup> Thus, to the extent the purpose of the Supreme Court's inability-to-control requirement is to distinguish persons subject to commitment from persons more properly addressed through the criminal system, psychopathy serves that purpose as effectively as many other mental disorders: it identifies persons whom the criminal system is unlikely to deter from committing future sexual assaults.

#### VII. ONE ARROW IN THE QUIVER—A NECESSARY COMPONENT OF A STATE'S RESPONSE TO SEXUAL VIOLENCE

For various reasons, many people are uncomfortable with the idea of civilly committing sexual predators. But for governmental decision makers, using civil commitment within constitutional bounds may be the only responsible decision.

As explained earlier, in 1988 through 1991, Minnesota policy

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*Checklist-Revised (PCL-R): An Overview for Researchers and Clinicians*, in 8 ADVANCES IN PSYCH. ASSESSMENT 103, 105-06 (James C. Rosen & Paul McReynolds eds. 1992); Thomas A. Widiger et al., *DSM-IV Antisocial Personality Disorder Field Trial*, 105 J. ABNORMAL PSYCH. 3, 4 (1996).

440. Harris, *supra* note 438, at 406.

441. Gretten, *supra* note 438, at 429-30; Hare, *supra* note 438, at 44.

442. *Kansas v. Hendricks*, 521 U.S. 346, 362-63 (1997).

443. Robert F. Schopp & Andrew J. Slain, *Psychopathy, Criminal Responsibility, and Civil Commitment as a Sexual Predator*, 18 BEHAV. SCI. & L. 247, 252, 258-61 (2000) (discussing research and hypotheses of reasons for this deficit).

makers were confronted with several rape-murders committed by repeat sex offenders recently released from prison.<sup>444</sup> Under Minnesota's determinate sentencing system, similar to sentencing systems now commonly used across the country, these persons were absolutely entitled to be released from prison, irrespective of the well-founded views of prison officials that they remained highly dangerous.<sup>445</sup> Intensive post-release correctional supervision is only a partial—and often unsuccessful—answer.

The criminal-justice system can protect members of the public from such a person only *after* the person has committed additional offenses. One of the most liberal members of the Minnesota Legislature responded to the argument by Professor Janus that the Legislature should take the “just convict them for their next crime” approach: “And now I think, if we follow your logic, we just have to let them go and do it again and have another person victimized before we can take any action. That’s a very difficult thing for us to explain or to justify.”<sup>446</sup> This is not simply an expedient “political” response to the issue: it *should* be hard for public officials to justify failing to protect the public—standing by and permitting serious sexual victimization of many women and children—when the officials have the constitutional means to prevent such harm.

Currently, there are approximately 195 persons committed as SPP, SDP, or both, who are not also held under criminal sentences.<sup>447</sup> It is appropriate—not sensational—to look at the past sexual assault victims of these persons who are currently committed to quantify the harm that has been prevented by their commitment. It is appropriate to look not only at the sexual assault/murder victims of persons like Dennis Linehan and Clark Bailey,<sup>448</sup> but also at the countless women and children who survived the devastation of rape or other sexual abuse and whose lives are irreparably changed by the acts of these two men and other committed persons. Richard Enebak, for example, left the last of his at-least-thirty-seven sexual assault victims permanently

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444. See *supra* Part II.D.

445. MINN. STAT. §§ 244.01-244.11 (2002).

446. *Proposed Language of the Task Force on Sexual Predators: House Judiciary, Senate Judiciary, and Senate Crime Prevention Committees*, 78th Minn. Leg. (Aug. 24, 1994) (statement of Sen. Allan Spear).

447. Telephone conversation with Anita Schlank, Clinical Director, Minnesota Sex Offender Program (Mar. 12, 2003).

448. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 611 (Minn. 1994); *Bailey v. Noot*, 324 N.W.2d 164, 165 (Minn. 1982).

paralyzed.<sup>449</sup> In one of Donald Martenies' sexual assaults, he spread his seven-year-old stepdaughter's legs with such force that he tore her vaginal area; he then tied her to a table and sewed up the tear without anesthesia.<sup>450</sup> Clear and convincing evidence showed that these committed persons were likely to repeat such sexual assaults if not confined and treated.

So why is the policy decision not an easy one? Why do some persons still have concerns?

A. *Reliance Solely on Criminal Justice System is Inadequate*

Many concerns have been raised. One is that it is dangerous to depart from the primacy of the criminal justice system as society's means of confining persons to prevent serious future harm.<sup>451</sup> Those opposing civil commitment of sexual predators generally profess not to oppose lengthy, even life, sentences for serious repeat sex offenders.<sup>452</sup> So the question may be asked whether Minnesota has made maximum, reasonable, use of the criminal-justice system.

Since Minnesota adopted its system of fixed criminal sentences twenty-three years ago,<sup>453</sup> the Legislature has frequently revisited the subject of criminal sentences for sex offenders. It has increased sex offender sentences generally and has provided enhanced sentencing options for sex offenders who have particularly serious offense histories or are assessed to be the most dangerous.<sup>454</sup>

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449. *Enebak v. Noot*, 353 N.W.2d 544, 545-46 (Minn. 1984).

450. *In re Martenies*, 350 N.W.2d 470, 471 (Minn. Ct. App. 1984).

451. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 82 (1992); *Janus, Lessons, supra* note 324, at 12-13. The *Foucha* court stated that

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

504 U.S. at 82.

452. *See, e.g., Erlinder, supra* note 285, at 158-59.

453. Act of Apr. 5, 1978, ch. 723, art. 1, 1978 Minn. Laws 761, 762-70.

454. Act of May 17, 2002, ch. 381, § 2, 2002 Minn. Laws 942, 942 (increasing presumptive guidelines sentence for second-degree criminal sexual conduct); Act of May 29, 2001, ch. 210, § 24, 2001 Minn. Laws 878, 897 (mandating assessment of offender by Minnesota Security Hospital before sentencing any repeat felony sex offender); Act of Apr. 3, 2000, ch. 311, art. 4, § 2, 2000 Minn. Laws 185, 211 (increasing presumptive guidelines sentence for first-degree criminal sexual conduct); Act of May 25, 1995, ch. 226, art. 2, §§ 12-13, 1995 Minn. Laws 1753, 1785 (increasing statutory maximum in patterned sex offender cases and

Following statutory changes in 2001 and 2002, the presumptive guideline sentences for first- and second-degree criminal sexual conduct are executed sentences of twelve years and seven and one-half years, respectively.<sup>455</sup> Offenders determined to be “patterned sex offenders” according to a statutory definition must be given a sentence of at least double the presumptive sentence and up to forty years.<sup>456</sup> Certain repeat sex offenders must be given executed sentences of life, thirty years, or double the presumptive guidelines sentence, depending on the category into which the offender falls.<sup>457</sup>

Returning to a system of indeterminate sentences, perhaps even indeterminate life sentences, for some or all sex offenders has been considered as an option but has been rejected for several reasons.<sup>458</sup> Chief among these is the concern that, if criminal sexual conduct convictions carried extremely long or lifetime indeterminate sentences, accused persons would seldom be willing to plead guilty to a sex offense, but would be willing to plead guilty to other offenses not covered by the indeterminate sentences.<sup>459</sup> Sex offenses almost always involve other crimes, such as assault, kidnapping or false imprisonment (even though such offenses are not always charged). For example, although Dennis Linehan killed the young babysitter he was attempting to rape in his most

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increasing scope of statute); Act of May 10, 1994, ch. 636, art. 2, § 16, 1994 Minn. Laws 2170, 2197-98 (making consideration of patterned sex offender sentencing mandatory in cases of first- and second-degree criminal sexual conduct); Act of Apr. 29, 1992, ch. 571, art. 1, §§ 11, 14, 15, 22-24, 1992 Minn. Laws 1983, 1990-95, 2000-02 (making patterned sex offender sentence mandatory, increasing maximum sentences and adding mandatory life, thirty-year and double-presumptive sentences for certain sex offenders); Act of June 1, 1989, ch. 290, art. 2, § 14 and art. 4, §§ 10, 12-15, 1989 Minn. Laws 1580, 1593-94, 1620-23 (enacting patterned sex offender law, increasing maximum sentences for criminal sexual conduct and thirty-seven-year sentence for some third-time sex offenders). *See also* Act of Apr. 9, 1998, ch. 367, art. 6, § 5, 1998 Minn. Laws 666, 727-29 (recodifying patterned sex offender, life and mandatory-thirty-year sentence statutes).

455. *See* Act of May 17, 2002, ch. 381, § 2, 2002 Minn. Laws 942, 942 (codified at MINN. STAT. §§ 609.342, subd. 2(b) and 609.343, subd. 2(b) (2002)); Act of Apr. 3, 2000, ch. 311, art. 4, § 2, 2000 Minn. Laws 185, 211. As explained earlier, offenders serve at least two-thirds of their pronounced sentence in prison; prison time may be increased somewhat for loss of “good time” due to prison discipline. MINN. STAT. § 244.04 (2002).

456. MINN. STAT. § 609.108 (2002).

457. MINN. STAT. § 609.109 (2002).

458. DOC CIV. COMMIT. STUDY, *supra* note 42, at 24.

459. *Id.*

notorious offense, he actually pled guilty only to a kidnapping charge.<sup>460</sup> Thus, a statute providing indeterminate sentences for persons convicted of sex offenses would not have applied to him. For a variety of reasons, prosecutors are likely to accept guilty pleas to non-sex crimes in many or most of these cases, rather than having to go to trial in essentially all sex offense cases. Prosecutors not only face great caseload pressures, but also must consider the potential psychological harm to victim witnesses in sex offense cases. Moreover, in deciding whether to accept a guilty plea only to a non-sex charge, the prosecutor may not have a complete history of the offender's charged and uncharged offenses or his complete treatment history. Indeterminate sentences for sex offenses, therefore, are unlikely to be a significant solution for the danger posed by repeat sex offenders. In addition, Minnesota officials are reluctant to revert to an indeterminate sentencing system, even a partial one, because the system of determinate sentences is widely regarded as superior to the previous system.<sup>461</sup>

Minnesota officials *have* taken several hard looks at the criminal sentencing system. The Legislature must consider not only the practical issues discussed above, but also the integrity of the criminal justice system. As the Minnesota Supreme Court noted in *Blodgett*, "there are no easy answers"<sup>462</sup> to the question of the allocation of the public protection function between the criminal and civil systems: "The concern with enhanced criminal punishment on the basis of dangerousness is that the punishment may tend to become divorced from moral blameworthiness."<sup>463</sup>

Moreover, while the Minnesota Department of Corrections ("DOC") has provided sex offender treatment in prison for many years,<sup>464</sup> the Legislature and DOC have recently taken additional steps to enable and encourage prisoners to make the best use of their prison time so that they may avoid or shorten the term of civil commitment.<sup>465</sup> Under this program, DOC is evaluating and

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460. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 611 (Minn. 1994).

461. DOC CIV. COMMIT. STUDY, *supra* note 42, at 24.

462. *In re Blodgett*, 510 N.W.2d 910, 917 (Minn. 1994).

463. *Id.* at 918 n.16.

464. PROGRAM EVALUATION DIV., OFFICE OF LEGISLATIVE AUDITOR, STATE OF MINN., SEX OFFENDER TREATMENT PROGRAMS 46 (1994).

465. Act of Apr. 7, 2000, ch. 359, § 1, 2000 Minn. Laws 381, 381-83; MINN. DEP'T OF CORRECTIONS, SEX OFFENDER POLICY AND MANAGEMENT BOARD STUDY 13 (2000) [hereinafter DOC SEX OFFENDER POLICY STUDY]; Anita Schlank & Rick Harry, *The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years*, 29 WM. MITCHELL L. REV. 1236 (2003); Stephen J. Huot, *Sex Offender*

notifying prisoners at the beginning of their prison terms that they may be candidates for SPP/SDP commitment.<sup>466</sup> DOC then provides them the opportunity and substantial inducement to participate while imprisoned in the most-intensive sex offender treatment the State has to offer—the same Department of Human Services-run program provided to civilly committed persons.<sup>467</sup> In his dissent in *Hendricks*, Justice Breyer suggested that a non-punitive state commitment program should attempt to provide available treatment at the earliest possible stage.<sup>468</sup> Minnesota's treatment efforts, particularly with the recent refinements, are certainly consistent with that observation.

Minnesota policy makers obviously believe that they have increased criminal sentences for sex offenders as far as is legitimate and feasible within the context of Minnesota's sentencing system. As the Minnesota Supreme Court noted in *Blodgett*, that decision is for the legislative branch.<sup>469</sup> Further, it also seems clear that the recent combined efforts of the Departments of Corrections and Human Services are designed to maximize the use of prison time to provide treatment in prison, rather than through civil commitment following release from prison.

*B. Other Policy Arguments Against Civil Commitment Are Unsupported*

Professor Janus has argued that civil commitment of sexual predators is the first step down a slippery slope—that “[l]egitimate concerns for public safety will combine with sensational media coverage to produce intense political pressure to expand this new use of civil commitment” into other areas.<sup>470</sup> This appears to be boxing with shadows. Despite the increased use of civil commitment to address problems of sexual predators over the last thirteen years, there has been no attempt to use this process more generally to address other criminal behavior. Prosecutors and legislators did not concoct the notion that sexual predators are

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*Policy and Management Board Study, in IV SEXUAL PSYCHOPATHIC PERSONALITIES AND SEXUALLY DANGEROUS PERSONS* 9, 11 (Minn. Inst. of Legal Educ. 2001).

466. Schlank & Harry, *supra* note 465, at 1236-37; Huot, *supra* note 465, at 9, 11.

467. Huot, *supra* note 465, at 9, 11; DOC SEX OFFENDER POLICY STUDY, *supra* note 465, at 13.

468. *Kansas v. Hendricks*, 521 U.S. 346, 385-86 (1997) (Breyer, J., dissenting).

469. 510 N.W.2d at 917-18.

470. Janus, *Constitutional*, *supra* note 329, at 415.

properly viewed as subjects of treatment and a mental-health-type system. At least as far back as *Pearson* and in the period before the increased use of PP commitments in 1990, the mental health system regarded sex offenders as patients and provided treatment programs for them.<sup>471</sup> No basis has been shown to fear that civil commitment will begin to pervasively overlap the criminal system.

Opponents of civil commitment for this group also often argue that civil commitment is disingenuous because the state is claiming that commitment is for the purpose of treatment, while treatment for this group is difficult, at best.<sup>472</sup> Under Minnesota's commitment act, persons committed as SPP and SDP, like all other committed persons, are entitled to be provided the best available treatment.<sup>473</sup> But, in the legal defense of sexual predator commitment, the State of Minnesota has not asserted that commitment is primarily for the good of the patient or to provide treatment. To the contrary, defending the constitutionality of the SDP law in *Linehan III*, the State told the Minnesota Supreme Court:

The purpose and effect of the law is readily acknowledged. First and foremost, it is to confine disordered, sexually dangerous persons for the protection of society.

Second, it is the goal of the law to make treatment available to a person who must be confined under the law so he can "demonstrate that he has mastered his sexual impulses and is ready to take his place in society." No doubt, in most instances, the purpose of treatment is secondary to the purpose of confinement, *i.e.*, if it were not necessary to confine

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471. *In re Blodgett*, 510 N.W.2d 910, 916 n.12 (Minn. 1994) (describing professional literature discussing treatment programs for sex offenders); Johnson, *supra* note 31, at 1142 (describing assumptions underlying enactment of PP statute). The Minnesota Department of Human Services began the Intensive Treatment Program for Sexual Aggressives, the predecessor to the current Minnesota Sex Offender Program, in 1975, and also had a treatment program in place before that. Anita Schlank, *The Minnesota Sex Offender Program*, in *THE SEXUAL PREDATOR* 10-2 (Anita Schlank & Fred Cohen eds., 1999).

472. *See, e.g., Linehan III*, 557 N.W.2d 171, 199 (Minn. 1996) (Tomljanovich, J., dissenting), *vacated and remanded*, 522 U.S. 1011 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999) (stating "only that the legislature's reason for passing the SDP Act, once properly exposed under the spotlight of strict scrutiny, was not for the *stated* purpose of treatment, but for the *actual* purpose of detaining a person who frightens us" (emphasis in original)).

473. MINN. STAT. § 253B.03, subd. 7 (2002).

the person for the protection of the public, the State would not confine the person simply for the treatment of his disorder.<sup>474</sup>

Minnesota's description of the relative roles of public protection and treatment, which seems obvious and indisputable, is precisely the view later validated by the Supreme Court in *Hendricks*:

[T]he Kansas court's determination that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" is consistent with our conclusion that the Act establishes civil proceedings, especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible.<sup>475</sup>

Thus, civil commitment of SDPs and SPPs, and the state's justification of it, are not disingenuous.

*C. Janus' Misallocation of Resources Argument—Good Question, Flawed Analysis*

Perhaps the most common, and most difficult, criticism of sexual predator commitment involves allocation of resources and the effectiveness of civil commitment in reducing sexual violence. In his article in this issue, Professor Janus poses provocative questions about whether civil commitment of sexual predators has a net positive or negative effect in reducing sexual violence and, even if the net effect is positive, whether more sexual violence would be prevented by spending some or all civil commitment dollars on other prevention measures. As Janus acknowledges, of course, he comes to this debate as a defense attorney who for the past ten years has represented a particular individual seeking to avoid an SDP commitment.<sup>476</sup>

Janus' misallocation argument asserts there is a limited pot of public money (apparently the amount currently being spent) to be used for measures to reduce sexual violence in Minnesota, and that public safety would be better served by transferring all or part of the money currently spent for sexual predator commitment to other sexual-violence-prevention programs. Janus' premise of a

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474. State's Brief at 34, *Linehan III* (No. C1-95-2022) (citations omitted).

475. *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).

476. Janus has represented Dennis Linehan, a person ultimately committed as an SDP, in all of the *Linehan* cases cited in this article.

fixed pot of money should not be accepted blindly. It seems odd for an article advocating measures to reduce sexual violence to jump immediately to the argument that only the current level of funding is available, rather than first arguing for adequate funding to implement all sexual-violence-reduction measures that have a positive cost-benefit ratio. That approach is more consistent with a goal of simply reducing or eliminating civil commitment than reducing sexual violence.

For policy makers, the first question should be whether the state's civil commitment program, considered by itself, results in a net benefit — a decrease in the human suffering of the victims and avoidance of financial and other secondary costs due to sexual abuse. (Among other things, sexual assault victims may require mental health counseling, may have a greater incidence of chemical dependency, may abuse or neglect their own children, may sexually assault others, and may be less financially productive members of society than persons who have not been sexually assaulted. In addition, sexual assault undermines the community's sense of security.) If it is concluded that there is a net benefit from civil commitment of sexual predators, policy makers must consider whether this benefit is sufficient to justify its cost: is it worth it to society to spend the money in this way and to prevent a repeat of the victimization perpetrated by the persons currently under commitment, or would society prefer to have this money not collected in taxes? To date, the Legislature and Governor have decided the civil commitment program is worth the cost. Nevertheless, Janus is perhaps correct to suggest that the answer to this question not be taken for granted.

The other sexual-violence-prevention efforts suggested by Janus also appear to be worthy. However, each of these measures should be judged on its own merits; policy makers must determine whether each is sufficiently beneficial to merit the collection of tax revenues to support it. At the point the Legislature and Governor decide not to fund a sexual-violence-reduction program, they are deciding, in effect, that the benefit of leaving that amount of money in the hands of taxpayers is greater than the benefit that would be achieved by spending the same amount on the sexual-violence-reduction program. The advocate for reduction of sexual violence would press policy makers to consider what Minnesotans will buy with their tax savings and whether the increase in quality of life or other benefit due to such tax savings outweighs the harm

that will be suffered by the children or women whose sexual assault or molestation could have been prevented and the other social costs—financial and otherwise—that will result from such assaults.

Janus' allocation-of-resources argument appears to contain another erroneous premise. He implies that Minnesota has (thoughtlessly) elected civil commitment as the single approach to reducing the incidence of sexual violence, rather than considering and implementing the several other measures he suggests. This gives insufficient credit to the Minnesota policy makers who have addressed these issues. The 1989 Final Report of the Attorney General's Task Force on the Prevention of Sexual Violence Against Women<sup>477</sup> recommended many measures to reduce the incidence of sexual violence. These included more vigorous prosecution and longer sentences for both adult and juvenile sex offenders;<sup>478</sup> increased and more-intensive treatment for adult and juvenile sex offenders;<sup>479</sup> more incentives for sex offenders to participate in treatment;<sup>480</sup> more intensive supervision and treatment following release of sex offenders from jail or prison, including electronic monitoring;<sup>481</sup> implementation of sexual violence prevention curricula in schools;<sup>482</sup> and intervention with young sexual aggressors through child protection agencies.<sup>483</sup> Many of these measures have been implemented. The Task Force also recommended increased use of civil commitment of sexual predators,<sup>484</sup> but this was only one of many recommendations for the reduction of the incidence of sexual violence.

Janus advances his misallocation-of-resources argument by attempting a rough estimate of the annual number of sexual assaults that would be committed by the current group of civilly committed sexual predators, if not confined, and by comparing this number to a similarly rough estimate of the annual number of sexual assaults that are committed by sex offenders released from prison or released on probation. This article does not attempt to critically examine Janus' attempt to quantify the sexual assaults by released persons who are not civilly committed.

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477. ATT'Y GEN. REP., *supra* note 32.

478. *Id.* at 5-14.

479. *Id.* at 8-9, 16-17.

480. *Id.* at 19-20.

481. *Id.* at 18, 27.

482. *Id.* at 31-33.

483. *Id.* at 47-49.

484. *Id.* at 23.

However, Janus' estimate of the number of sexual assaults avoided annually due to the confinement of civilly committed persons is suspect. He estimates that between six and twenty-three sex crimes per year are prevented by having the current commitment group of 190 persons confined in a treatment facility.<sup>485</sup> He arrives at this figure using a series of assumptions that range from questionable to indisputably wrong.

First, the merely questionable. Janus attempts to determine an average sexual recidivism rate, or a range of such rates, to apply to the group of committed persons.<sup>486</sup> He uses two separate approaches to produce recidivism estimates. One way he attempts to do this is to assume that, among the group of persons referred by the Department of Corrections to county attorneys for consideration for commitment, the recidivism rate for the group of persons who are committed would be "roughly the same" as the group of referred persons who are not committed.<sup>487</sup> But this assumption, rather than being facially sensible, is facially unsound. County attorneys and courts review referred persons to separate those who meet commitment standards (including the requirement that they be highly likely to sexually reoffend) from those who do not. Janus seems to assume that courts and county attorneys make these decisions randomly, rather than by applying the commitment standards. The far more sensible assumption is that the commitment group would have a higher recidivism rate than the noncommitment group.

Moreover, Janus' assumed six-year sex offense recidivism rate of eighteen percent for the noncommitted group is undoubtedly a substantial underestimate even for that group, due to the "vast underreporting" of sex offenses.<sup>488</sup> Some researchers estimate that

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485. Eric C. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy be More Effective?*, 29 WM. MITCHELL. L. REV. 1083, 1102 (2003) [hereinafter Janus, *Empirically-Based Prevention Policy*].

486. *Id.* at 1100.

487. *Id.* at 1094. The Department of Corrections reports that about fifty percent of persons the Department refers for consideration for commitment are actually committed. In about forty percent of the referrals the county attorney decides not to pursue commitment. In the other ten percent, the county pursues commitment but the court denies the petition. DOC CIV. COMMIT. STUDY, *supra* note 42, at 3.

488. See Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989); see also *In re Linehan (Linehan III)*, 557 N.W.2d 171, 178 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999); Janice K. Marques et al., *Effects of Cognitive-Behavioral Treatment*

fewer than ten percent of sex offenses are reported;<sup>489</sup> Janus himself asserts that only half of sexual assaults are reported, although he does not then apply this assumption to his presumed eighteen percent recidivism figure.<sup>490</sup>

Janus' second method of attempting to estimate a recidivism figure is to make what he terms "a plausible argument" that the average recidivism rate for the group of committed persons does not exceed the highest-risk-group recidivism figures produced by various actuarial sex offender risk assessment instruments.<sup>491</sup> However, other than asserting that it is a plausible argument,<sup>492</sup> Janus fails to demonstrate that the Minnesota courts have been unable to identify a very small group of sex offenders with particular histories showing that they are most likely (specifically, "highly likely") to reoffend. It is more reasonable to assume that Minnesota trial and appellate courts have complied with the directive of the Minnesota Supreme Court and have identified a group of persons who are shown by clear and convincing evidence to meet the "highly likely"-to-reoffend standard, i.e., having a likelihood of reoffense ranging from perhaps sixty percent to nearly 100% (near certainty of reoffense).<sup>493</sup>

Janus' next analytical step recognizes that persons who will sexually reoffend will not all do so within the first year after release. Rather, the model supported by the literature is that, in a potential recidivism group, higher numbers will reoffend in the first few years after release, with additional but diminishing numbers of persons reoffending in subsequent years.<sup>494</sup> Janus reports, for example, that the developers of the Minnesota Sex Offender Screening Tool-Revised conclude that seventy percent of sex

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*on Sex Offender Recidivism*, 21 CRIM. JUST. & BEHAV. 28, 32 (1994) (stating "officially reported numbers of sex offenses are widely recognized to be gross underestimates").

489. Furby, *supra* note 488, at 27.

490. Janus, *Empirically-Based Prevention Policy*, *supra* note 485, 1024.

491. *Id.* at 1096.

492. Janus later asserts that his "plausible argument" is one that he makes "with some confidence." *Id.* at 1098.

493. In *Linehan III*, 557 N.W.2d at 180, the Minnesota Supreme Court interpreted the SDP law to require that the person be "highly likely" to reoffend. The court made clear that this is a standard higher than a bare fifty-one percent standard, and instead corresponds to the clear and convincing evidence standard. The court emphasized this "highly likely" element must be proved by clear and convincing evidence. *Id.*; see also MINN. STAT. § 253B.18, subd. 1 (2002) (specifying clear and convincing standard of proof for commitment).

494. Janus, *Empirically-Based Prevention Policy*, *supra* note 485, at 1096, n.54.

offenders in the highest risk group on that instrument will sexually reoffend within the first six years, and an additional eighteen percent will reoffend if the follow-up period is extended another fourteen years.<sup>495</sup>

Using such figures for various actuarial tools, Janus attempts to determine a range of average *annual* recidivism rates, and then apply such rates to the entire group of committed persons. He calculates these annual recidivism rates by dividing the recidivism rate for each actuarial instrument by the length of the follow-up period used to achieve that rate.<sup>496</sup> He apparently acknowledges that the validity of this annualization method is not well established, asserting only that it “seems a permissible technique.”<sup>497</sup> Curiously, using Janus’ method, any “annual recidivism rate” can be decreased simply by adding more years to the follow-up period.<sup>498</sup> And, again, Janus’ assumed gross recidivism and annual recidivism rates fail to account for unreported or unsolved acts of sexual assault.

Finally, and most fundamentally erroneous, Janus’ figures include the unspoken assumption that each recidivist commits only one sexual assault. He calculates that between six and twenty-three of the total of 190 committed persons will reoffend in a given year.<sup>499</sup> He then asserts that this means that civil commitment during that year has “prevent[ed] between six and twenty-three of the “cleared” crimes of sexual violence.”<sup>500</sup> This one-recidivist-equals-one-assault assumption is obviously not true. Janus’ own previous work shows that more than half of committed persons in Minnesota had more than one (known) victim during their most recent period of freedom prior to incarceration, and that more than one-quarter had three or more (known) victims.<sup>501</sup> Indeed, the committed person Janus himself represents, Dennis Linehan, had at least five sexual assault victims during his last period of non-incarceration—the violent rapes of two young women, the

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495. *Id.* at 1096.

496. *Id.*

497. *Id.* at 1096 n. 55.

498. As his figures illustrate, the annual recidivism rate (as he calculates it) on the Minnesota Sex Offender Screening Tool–Revised is reduced from twelve percent to four percent simply by increasing the follow-up period from six to twenty years. *Id.* at 1096.

499. *Id.* at 1102 n. 82.

500. *Id.* at 1102.

501. Janus & Walbek, *supra* note 18, at 360-61.

molestation of two young girls and the strangulation death of a teenage babysitter during an attempted sexual assault.<sup>502</sup> Thus, in Linehan's case, what Janus is counting as one sex offense *victim* to be avoided is actually five. When Richard Enebak was arrested for his last sexual assault before his civil commitment (which left his victim permanently paralyzed), he had pictures of *thirty-four* other victims.<sup>503</sup> In Enebak's case, what Janus is counting as one sex offense *victim* to be avoided is actually thirty-five.

Not only do many committed persons have multiple victims when they reoffend, but often (particularly with pedophiles), the offender commits numerous sexual assaults against each victim. For example, during his most-recent period of non-incarceration, Rodger Robb molested at least three (known) adolescent boys with a total number of assaults ranging between approximately fifteen and thirty.<sup>504</sup> In Robb's case, therefore, what Janus is counting as one sexual assault to be prevented is actually between fifteen and thirty such assaults.

Therefore, the relevant inquiry is what amount of sexual violence would occur absent the commitment of the group of persons currently committed in Minnesota. The examples just given show the amount of sexual violence that a single reoffender may commonly inflict prior to apprehension and reincarceration.<sup>505</sup> Janus' equation of one *recidivist* with a single *sexual assault*, therefore, vastly understates the amount of sexual victimization that is avoided by the commitment of the current Minnesota commitment group.

In addition to his mistaken effort to quantify the numbers of sexual assaults avoided by civil commitment, Janus challenges the notion that only the "most dangerous" sex offenders are civilly committed. However, the commitment standards contain two requirements that insure that only sufficiently dangerous persons

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502. *In re Linehan (Linehan III)*, 544 N.W.2d 308, 311 (Minn. Ct. App. 1994), *aff'd*, 557 N.W.2d 171 (Minn. 1996), *vacated and remanded*, 522 U.S. 1001 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999); *In re Linehan (Linehan I)*, 518 N.W.2d 609, 611 (Minn. 1994).

503. *Enebak v. Noot*, 353 N.W.2d 544, 545-46 (Minn. 1984).

504. *In re Robb*, 622 N.W.2d 564, 567 (Minn. Ct. App. 2001), *review denied* (Minn. Apr. 17, 2001). According to the opinion, Robb molested one boy ten to fifteen times and the other two boys "several" times. *Id.*

505. Of course, a committed person may also have only a single known sexual assault during his last period of nonincarceration. *See, e.g., In re Givens*, No. C4-02-995, 2002 WL 31554041 (Minn. Ct. App. Nov. 19, 2002). Givens murdered his previous rape victim. *Id.* at \*1.

are civilly committed. First, as just explained, the laws require the person be “highly likely” to reoffend with additional sexual offenses. Second, both the SPP and SDP laws require that the person’s past and anticipated future conduct be “of such an egregious nature that it creates a substantial likelihood of serious physical or mental harm being inflicted on the victims.”<sup>506</sup> This does not mean that the harmful nature of the sexual assault has to be greater than the average sexual assault, but rather it excludes sexual assaults that are at the least-harmful end of the spectrum.<sup>507</sup> Thus, the person must be *highly likely* to engage in *seriously harmful* sexual assault. These two requirements together identify the “most dangerous” sex offenders released from prison.

Janus argues there is a “wide variation in the ‘dangerousness’” of persons committed as SPP and SDP, and he uses his own previous study to suggest that committed persons are not consistently among the most dangerous sex offenders.<sup>508</sup> Undoubtedly, committed persons will vary in the severity of their past offenses (some have even murdered their victims), and similarly they may vary from just meeting the “highly likely” standard to being virtually certain to reoffend. Thus, even among the “most dangerous” there will be a range of dangerousness. However, Janus’ previous work suggesting that some committed persons are not very dangerous contains obvious flaws. Most significant, he observes that some committed persons have “no prior adult sex crimes,” suggesting that persons with no history or a limited history of sex offenses are committed along with persons who have extensive sex offense histories.<sup>509</sup> But Janus simply ignores the fact that many committed persons have extensive juvenile histories of sexual offenses that were the bases for their commitments,<sup>510</sup> and that committing courts make specific findings

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506. *In re Rickmyer*, 519 N.W.2d 188, 190 (Minn. 1994) (stating harmfulness standard under SPP law). The SDP law contains a standard that is essentially identical. MINN. STAT. § 253B.02, subd. 7a (2002).

507. The Minnesota Court of Appeals has issued contradictory decisions on this point. *Compare Robb*, 622 N.W.2d at 571-72 (under SDP law, level of harmfulness must be greater than typical sexual assault), with *In re Preston*, 629 N.W.2d 104, 113 (Minn. Ct. App. 2001) (stating that state supreme court has not required greater-than-normal harm).

508. Janus, *Empirically-Based Prevention Policy*, *supra* note 485, at 1110 (citing Janus & Walbek, *supra* note 18).

509. Janus & Walbek, *supra* note 18, at 371.

510. *See, e.g., In re Anderson*, No. C9-97-2225, 1998 WL 281914 (Minn. Ct. App. June 2, 1998); *In re Gleason*, No. C2-97-2194, 1998 WL 218223 (Minn. Ct. App.

of many sexual assaults that were not the subject of previous criminal convictions.<sup>511</sup> Janus' method of looking to previous sex offense *convictions* to quantify the person's history of sexual assaults is wholly misleading.

Janus makes some arguments that these civil commitments are actually counterproductive—that they tend to increase, rather than decrease, the incidence of sexual assault. He asserts, for example, that civil commitment creates disincentives for prisoners to participate in sex offender treatment, due to the possibility that their treatment disclosures will be used to support later civil commitment.<sup>512</sup> Thus, he has contended, some offenders will decline to participate or not fully participate in prison sex offender treatment, and society will be less safe. This concern is not without basis: in Minnesota, therapist-client privileges do not apply in civil commitment proceedings,<sup>513</sup> and treatment disclosures are sometimes used in commitment cases.<sup>514</sup> A 1998 study group created by the Legislature decided not to recommend a statutory change prohibiting the use of prison treatment disclosures in sexual predator commitment cases.<sup>515</sup> However, even if the Legislature were to determine the detriment from such use outweighed the public benefit, the remedy would be to bar consideration of the treatment disclosures, not abandon civil commitment.

The questions Janus asks—whether public monies spent on civil commitment of sexual predators are well spent and whether the money spent on that program could be more productively spent elsewhere—deserve to be asked, and serious and unbiased research efforts to help provide answers to those questions are warranted. Nevertheless, Janus' assertion that the “evidence seems fairly clear that a net prevention of sexual violence might well result from the total elimination of sex offender commitments” and a transfer of those funds to other violence prevention efforts<sup>516</sup> is a dramatic overstatement. For the reasons explained above (among

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May 5, 1998).

511. See, e.g., *In re Ramey*, 648 N.W.2d 260, 263-64 (Minn. Ct. App. 2002), *review denied* (Minn. Sept. 17, 2002).

512. Janus, *Empirically-Based Prevention Policy*, *supra* note 485, at 1130.

513. MINN. STAT. § 253B.23, subd. 4 (2002); *In re Robb*, 622 N.W.2d 564, 575-76 (Minn. Ct. App. 2001), *review denied* (Minn. Apr. 17, 2001).

514. DOC CIV. COMMIT. STUDY, *supra* note 42, at 27-28.

515. *Id.* at 28.

516. Janus, *Empirically-Based Prevention Policy*, *supra* note 485, at 1131-32.

others), Janus' writings should be regarded only as raising important questions, not answering them.

#### VIII. CONCLUSION

Is the government constitutionally helpless to protect the public through civil commitment when a still-dangerous sex offender—one who has a mental disorder that results in serious difficulty controlling behavior—reaches a mandatory prison release date? The Supreme Court has said no. Should government decline to act in such cases because commitment is costly, or for the other reasons advanced by commitment opponents? The Minnesota Legislature and many other legislatures have answered no.

Since 1989 there have been many significant developments in Minnesota and elsewhere involving the sentencing, treatment, correctional supervision and civil commitment of persons who commit sex offenses. Of these efforts, it is civil commitment that began this period in greatest doubt as to its constitutionality and utility. But much has been resolved over this period, judicially, legislatively and administratively. The constitutionality of these laws has been affirmed and judicial guidance has been provided for their application. Minnesota developed a specialized treatment program to address the unique problems of this difficult-to-treat group. Laws have been changed to make greater use of the criminal system to provide public protection, and state agencies have worked to make the corrections and human services systems mesh more effectively to provide treatment and to minimize the cost and period of necessary confinement.

Because of these efforts, countless children will escape the long-term harm of sexual molestation. Innumerable women will not have to personally experience the trauma of rape. We cannot know, of course, who most of these potential victims are. We need only look at the stories of the committed persons' past victims to see a vivid picture of what has been prevented.