

EROSION OF CONSTITUTIONAL RIGHTS IN COMMITMENT OF SEX OFFENDERS

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I. INTRODUCTION

Following a number of highly publicized homicides involving sexual assaults by recent parolees in the late 1980s,¹ a task force from the Minnesota Attorney General’s Office² recommended, among other interventions, the use of a rarely used 1939 Sexual

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1. Julie A. Hoffman, *Humphrey Asks [for] Tougher Sentences for Rapists*, SAINT PAUL PIONEER PRESS DISPATCH, June 27, 1988, at A5; Marna J. Johnson, *Minnesota’s Sexual Psychopathic Personality and Sexually Dangerous Person Statute: Throwing Away the Key*, 21 WM. MITCHELL L. REV. 1139, 1148 (1996).

2. ATTORNEY GENERAL’S TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN, FINAL REPORT (1989).

Psychopathic Personality Statute.³ This statute was originally used to civilly commit individuals who were deemed to have sexual disorders rendering them incapable of control over their behavior. Shortly after its passage in 1939, the Sexual Psychopathic Personality ["SPP"] statute was challenged in the Minnesota Supreme Court⁴ and reviewed by the United States Supreme Court.⁵ These cases narrowed the SPP statute, allowing civil commitment only on specific grounds.⁶ The United States Supreme Court adopted the Minnesota Supreme Court's construction of the statute when it stated:

[The statute] 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.⁷

Beginning in the late 1980s, attorneys used this statute to invoke commitment at the end of the sentences for selected sex offenders.⁸ Because commitment is a civil procedure, the Minnesota Supreme Court held the process was not double jeopardy.⁹ Attorneys for the proposed patients, on the other hand,

3. MINN. STAT. §§ 526.09, 526.10 (1994), *re-codified as* MINN. STAT. § 253B.02, subd. 18(b) (1998), and *re-titled* Sexual Psychopathic Personality Statute, Act of Aug. 31, 1994, ch.1, art.1, 1995 Minn. Laws 5, 5-9 (1994 1st spec. sess.). The current version defines a sexual psychopathic personality as follows:

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

Id.

4. State *ex rel.* Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 287 N.W. 297 (1939).

5. State *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940).

6. *Id.* at 275-76 (describing procedural safeguards authorized by the statute to protect due process).

7. *Id.* at 273 (emphasis added).

8. STATE OF MINN., PROGRAM EVALUATION DIV., OFFICE OF THE LEGISLATIVE AUDITOR, PSYCHOPATHIC PERSONALITY COMMITMENT LAW 11 (1994). See also, Johnson, *supra* note 1, at 1150-51.

9. *In re* Blodgett, 490 N.W.2d 638, 646-47 (Minn. Ct. App. 1992), *aff'd*, 510

argued that the commitment proceedings were a transparent attempt to extend the confinement of sex offenders who would otherwise be eligible for parole.¹⁰

Consequently, the Minnesota Supreme Court in *In re Linehan* [*Linehan I*]¹¹ overturned a commitment for psychopathic personality because the Ramsey County District Court failed to find the “utter lack of power to control sexual impulses” required for commitment under the SPP statute.¹² In response, the Minnesota Legislature passed the Sexually Dangerous Person [*SDP*]¹³ statute, which indicated that proof of an “utter lack of power to control sexual impulses” was not necessary.¹⁴ In an immediate challenge, the Minnesota Supreme Court upheld the SDP statute in *In re Linehan* [*Linehan II*].¹⁵ Minnesota, therefore, has two statutes for the commitment of sex offenders: the Sexual Psychopathic Personality statute¹⁶ and the Sexually Dangerous Person statute.¹⁷ A superficial viewing of the two statutes suggests that the SPP statute has a higher standard for commitment (utter lack of power to control sexual impulses) than the SDP statute (power to control is specifically excluded as an element). Just how high the standard is for commitment under the SPP statute is discussed below.

Balancing the competing policies of public safety and personal

N.W.2d 910 (Minn. 1994), *cert. denied*, 513 U.S. 849 (1994); *see also* Call v. Gomez, 535 N.W.2d 312, 319-20 (Minn. 1995) (holding “commitment under the psychopathic personality statute is remedial and does not constitute double jeopardy because it is for treatment purposes and is not for purposes of preventative detention”).

10. *See, e.g.*, C. Peter Erlinder, *Minnesota’s Gulag: Involuntary Treatment for the Politically Ill*, 19 WM. MITCHELL L. REV. 99, 124-25 (1993).

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

12. *Id.* at 614.

13. MINN. STAT. § 253B.02, subd. 18c (1998). The statute states:

(a) A “[s]exually 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 person’s sexual impulses.

14. *Id.* at subd. 18c(b); *see also*, Johnson, *supra* note 1, at 1173-74.

15. *In re Linehan* [*Linehan II*], 557 N.W.2d 171, 191 (Minn. 1996).

16. MINN. STAT. § 253B.02, subd. 18(b) (1998).

17. *Id.* § 253B.02, subd. 18(c).

freedom, commitments under the SPP and SDP statutes present a particular challenge because an extremely unpopular group of people pose a potential societal danger.¹⁸ Following the Attorney General's report, many predicted the SPP statute would be used for preventive and continued detention of violent offenders at the end of their sentences.¹⁹ This prediction has yet to be disproved. Since the State of Minnesota began using the SPP statute for commitment of offenders after their prison terms, only one patient has been placed on provisional discharge while more than 170 offenders remain in "treatment" more than a decade after their initial commitments.²⁰

The premise of this article is that under the SPP/SDP statutes, substantive due process for persons alleged to be sexual predators has greatly eroded and the rationale for allowing such erosion—the promise of rehabilitation under the SPP/SDP statutes for these men—is of questionable validity. This article will discuss the erosion of strict due process protections that are justified by questionable arguments of increased public protection. A due process analysis does not stop at the end of the commitment proceeding. Determining if due process requirements are satisfied requires an examination of what transpires after the commitment hearing. When the courts ignore the fact that treatment is not working, proposed patients are indeterminately committed to unproven treatment programs, negating one justification for the commitment. In other words, double jeopardy becomes an issue if commitment is shown to be a sham. This article will: (1) describe the development of commitment law to date, detailing the relaxation of due process standards; (2) discuss further areas of current litigation relating to the commitment process and attempts to preserve substantive due process; and (3) discuss the due process

18. *Protecting Against Sexual Predators*, Editorial, STAR TRIBUNE, July 21, 1991, at 22a.

19. See cases cited *supra* note 9. Preventive detention has become to some degree an acceptable concept. See, Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U.L. REV. 113, 115 (1996) ("[T]he general argument is that although some preventive detention can be theoretically justified, the increased use of preventive detention would be unwise because the resulting increase in safety would not justify the corresponding massive liberty deprivation.").

20. No individual admitted since 1983 has been granted a direct discharge. No individual committed after 1988 was on provisional discharge as of December 1999. Eric S. Janus, *An Empirical Study of Minnesota's Sex Offender Commitment Program*, 1 SEX OFFENDER LAW REPORT, 49, 50 (2000).

implications of the virtual absence of treatment completion.

II. THE COMMITMENT PROCESS

A. *The Starting Point: The “Utter Lack of Power to Control Sexual Impulses” Standard*

Civil commitment is state-sanctioned physical confinement, historically used for the purpose of providing necessary treatment to mentally ill persons who refuse treatment on their own.²¹ There is a tension between two competing philosophies in the law of civil commitment.²² The libertarian model holds that civil commitment should be applied sparingly for the limited purpose of protecting the public from harm by persons suffering from psychiatric maladies.²³ The paternalistic model seeks to use state intervention (commitment) as a vehicle to give help to anyone who needs it.²⁴

The Minnesota commitment statute prior to 1982 was more paternalistic than its successor law. In 1982, the legislature passed the Minnesota Commitment Act. This act defines the following categories of civil commitment: mentally ill persons,²⁵ chemically dependent persons,²⁶ mentally retarded persons,²⁷ persons mentally ill and dangerous to the public,²⁸ sexual psychopathic personalities,²⁹ and sexually dangerous persons.³⁰ Of these categories, mentally ill persons, chemically dependent persons, mentally retarded persons, and persons mentally ill and dangerous to the public were part of the original Commitment Act of 1982.³¹ In 1982, the SPP statute was referred to in another chapter of the statutes.³² Later, in 1994, the legislature codified the SPP statute as part of Chapter 253B³³ and at the same time the legislature drafted

21. *Baily v. Noot*, 324 N.W.2d 164, 167 (Minn. 1982).

22. RALPH REISNER ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 636 (West Group, 3d ed. 1999).

23. *Id.*

24. *Id.*

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

26. *Id.*, subd. 2.

27. *Id.*, subd. 14.

28. *Id.*, subd. 17.

29. *Id.*, subd. 18b.

30. *Id.*, subd. 18c.

31. MINN. STAT. § 253B.02 (1982).

32. MINN. STAT. § 526.09-.10 (1982).

33. 1995 Minn. Laws, 1994 1st Spec. Sess., ch. 1, art. 1.

and added the SDP statute as part of Chapter 253B.³⁴

Recognizing that civil commitment was a massive intrusion into a person's fundamental right to physical liberty,³⁵ the United States Supreme Court insisted that clear and convincing proof must be met prior to forced confinement for the purpose of "treatment."³⁶ In cases of committing mentally ill persons, chemically dependent persons, and mentally retarded persons, a petitioner must demonstrate that a person has a requisite behavioral disability and that, as a result of the disability, there is a threat to their safety or the safety of others.³⁷ Mentally ill, chemically dependent, and mentally retarded commitments are time limited³⁸ and can be discharged by the treating institutions.

In the case of committing persons who are mentally ill and dangerous to the public, a much greater sanction is imposed. The mentally ill and dangerous persons are confined in a secure facility and the commitment may be made indeterminate; that is, the person will be held until released through a lengthy administrative process.³⁹ To commit a mentally ill and dangerous person, a petitioner must show that the person meets the criteria for mental illness and that there is a threat of serious physical harm to others as demonstrated by a recent act.⁴⁰

Commitments for sexual psychopathic personalities and sexually dangerous persons, like commitments for mentally ill and dangerous persons, carry severe sanctions. Sentences can be made indeterminate and persons committed as sexual psychopathic personalities and sexually dangerous persons are held in secure facilities.⁴¹

Prior to the passage of the SDP statute in 1994, three levels of

34. *Id.*

35. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Jackson v. Indiana*, 406 U.S. 715, 717 (1972); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *In re Gault*, 387 U.S. 1, 50 (1967); *Sprecht v. Patterson*, 386 U.S. 605, 606 (1967).

36. *Addington*, 441 U.S. at 432-33. "[T]he State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others." *Id.* at 426.

37. MINN. STAT. § 253B.02, subd. 13 (2002) (mentally ill person); *id.*, subd. 2 (chemically dependent person); *id.*, subd. 14 (mentally retarded person).

38. MINN. STAT. § 253B.09, subd. 5 (2002). Mentally retarded persons have the possibility of indeterminate commitment. MINN. STAT. § 253B.13, subd. 2 (2002).

39. MINN. STAT. § 253B.18 (2002).

40. MINN. STAT. § 253B.02, subd. 17 (2002) ("[T]he person has engaged in an overt act causing or attempting to cause serious physical harm to another[.]").

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

commitment could be identified. First, the lowest level of harm, likelihood of harm to self or others, was used in cases involving mentally ill, chemically dependent, and mentally retarded persons.⁴² It resulted in commitment for a certain time and easy discharge. Second, serious physical harm to others was used in cases involving persons mentally ill and dangerous to the public. Third, utter lack of power to control was used in sexual psychopathic personality cases. It resulted in indeterminate commitments in secure facilities with restraints on discharge. The commitment criteria for sexual psychopathic personalities has subsequently become much less clear.⁴³

The Minnesota law authorizing the non-criminal confinement of persons who have psychopathic personalities began with the passage of the SPP statute in 1939.⁴⁴ This statute was quickly challenged on constitutional grounds. Recognizing that the statutory language⁴⁵ was too vague, the Minnesota Supreme Court judicially narrowed the statute by holding that:

[T]he 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.⁴⁶

Because there was a distinct constitutional basis for non-criminal confinement under the “utter lack of power to control” standard, the court defined a third standard, which met clear policies.⁴⁷ Beginning in the late 1980s and early 1990s, Minnesota and several other states began to utilize commitments under this category for the continued confinement of sex offenders who were

42. MINN. STAT. § 253B.10, subd. 5 (2002) (transfer to voluntary status); MINN. STAT. § 253B.12, subd. 2 (2002) (discharge if a report not timely submitted).

43. See *infra* Part II.C.

44. See A Bill For An Act Relating to Persons Having a Psychopathic Personality, ch. 369, § 1, 1939 Minn. Laws 712-13.

45. See *id.* (defining “psychopathic personality” to mean “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”).

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

47. See *infra* notes 51–79 and accompanying text.

eligible for supervised release.⁴⁸ The Minnesota Supreme Court reaffirmed the constitutionality of this method of confinement in *Linehan I.*⁴⁹ In the first several commitments of the early 1990s, the focus of appeals was on the substantive due process requirement that a civil commitment must be based on an “utter lack of power to control.”⁵⁰

Until the late 1980s and early 1990s, this was settled law. It has since been changed in two ways, both of which erode the due process protections of people committed as sexual predators. First, the standard was bypassed by the passage of the SDP statute.⁵¹ Second, the definition of “utter lack of power to control” has become quite vague.⁵²

B. Lowering the Bar: SDP Act and Volitional Impairment

The constitutional standard of “utter lack of power to control” sexual impulses was assailed, ironically, due to a case that affirmed that standard. In 1965, Dennis Linehan kidnapped, raped and killed a teenager⁵³ named Barbara Iverson. He pled guilty to kidnapping and was sentenced to forty years in prison.⁵⁴ In 1975, he escaped from minimum security prison and was captured after sexually molesting twelve-year-old⁵⁵ Tracy Liggett in Michigan. He was imprisoned in Michigan for five years and returned to Minnesota for twelve additional years⁵⁶ before his scheduled supervised release in December 1992.⁵⁷ A petition for commitment as a psychopathic personality was filed before his release.⁵⁸ The Ramsey County district court committed Linehan, who then appealed. His commitment was affirmed by the Minnesota Court of Appeals⁵⁹ but overturned by the Minnesota Supreme Court.⁶⁰

Following a public outcry, Governor Arne Carlson ordered

48. *See supra* note 2.

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

50. *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992); *In re Blodgett*, 490 N.W.2d 638 (Minn. Ct. App. 1992).

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

52. *See infra* notes 80-90 and accompanying text.

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

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 610.

58. *Id.* at 611.

59. *In re Linehan*, 503 N.W.2d 142, 148 (Minn. Ct. App. 1993).

60. *Linehan*, 518 N.W.2d 609 (Minn. 1994).

Linehan detained and called a special session of the Legislature in the summer of 1994 to find a way to continue Linehan's confinement.⁶¹ The Legislature responded by enacting the SDP statute and re-codifying the SPP statute.⁶² The result permitted the use of civil commitment for the confinement of sex offenders, leaving Minnesota with two statutes containing different standards for the indeterminate commitment of sexual predators. The SPP statute retains the original high threshold of "utter lack of power to control sexual impulses" for commitment, while the SDP statute has a considerably lower threshold for commitment, requiring only harmful sexual conduct, the presence of a mental illness, character disorder or dysfunction, and the likelihood of re-offending.⁶³ The language of the statute itself relieves the state of the need to prove lack of power to control sexual impulses.

The passage of the SDP statute, which specifically eliminated the criterion of "utter lack of power to control sexual impulses,"⁶⁴ and the continued use of the SPP statute has given rise to various attempts in appellate courts to define the conditions under which a person may be civilly committed as a sex offender.⁶⁵ Committed sex offenders attacked the SDP statute as inherently unconstitutional, arguing that the deletion of the need to demonstrate lack of control, or volitional impairment, automatically invalidated this statute.⁶⁶

Following the passage of the SDP Act, Ramsey County committed Dennis Linehan; *Linehan II*⁶⁷ affirmed the SDP statute.⁶⁸ The question remaining is whether the new statutory standard has a limit.⁶⁹ At first, a case from Kansas appeared to settle the issue.

61. Jack Coffman, *Special Session Called for Wednesday: Bill on Sexual Psychopaths Expected to Pass Quickly*, ST. PAUL PIONEER PRESS, Aug. 30, 1994, at 1C.

62. Act of August 31, 1994, *supra*, note 3.

63. *Id.* Fifteen other states have commitments for sexual predation. Eric S. Janus, *An Empirical Study of Minnesota's Sex Offender Commitment Program*, 1 SEX OFFENDER LAW REPORT, 49 (2000).

64. MINN. STAT. § 253B.02 subd. 18c(b) (2002). "For the purposes of this provision, it is not necessary to prove that the person has an inability to control the person's impulses." *Id.*

65. *Linehan II*, 557 N.W.2d 171 (Minn. 1996), *vacated by* 522 U.S. 1011 (1997); *In re Robb II*, 622 N.W.2d 564 (Minn. Ct. App. 2001), *review denied*, (Minn. Apr. 17, 2001); *In re Preston*, 629 N.W.2d 104 (Minn. Ct. App. 2001).

66. *See, e.g., Linehan II*, 557 N.W.2d at 174.

67. 557 N.W.2d at 171.

68. *Id.* at 180; *see Robb II*, 622 N.W.2d at 576.

69. *See generally, In re Linehan [Linehan IV]*, 594 N.W.2d 867 (Minn. 1999), *cert. denied*, 528 U.S. 1049; *In re Civil Commitment of Ramey*, 648 N.W.2d 260

The Kansas case, *Kansas v. Hendricks*,⁷⁰ involved the commitment of a multiply-convicted child molester who admitted that he would probably re-offend if released.⁷¹ The trial court committed Hendricks, and the Kansas Supreme Court reversed on the grounds that the criteria for commitment, a mental abnormality and a likelihood of future danger, did not meet the constitutional requirements of mental illness and likelihood of future danger.⁷² The United States Supreme Court granted certiorari and reversed the Kansas Supreme Court.⁷³

The Hendricks Court reiterated the need for volitional control as a necessary element in the civil commitment of sex offenders.⁷⁴ The court stated:

To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria.⁷⁵

In a subsequent case, *Kansas v. Crane*, the United States Supreme Court held that volitional impairment was required.⁷⁶ The dissent in *Crane*, joined by the author of *Hendricks*, was adamant that volitional impairment was not required.⁷⁷

The majority in *Crane* held that some form of volitional impairment is necessary for a sexual predator commitment.⁷⁸ An open question, discussed in another article in this volume,⁷⁹ is how

(Minn. Ct. App. 2002).

70. 521 U.S. 346 (1997).

71. *Id.* at 354-55.

72. *Id.* at 356.

73. *Id.* at 371.

74. *Id.* at 360.

75. *Id.*

76. 534 U.S. 407, 411 (2002).

77. *Id.* at 419, 421-23. Under Justice Scalia's analysis, a finding of a mental impairment is all that is necessary for commitment. The hypothetical at the end of Scalia's dissent, however, illustrates a basic misunderstanding of the historical basis for this type of commitment. That is, his hypothetical is illustrative of a "mentally ill and dangerous to the public style" of commitment. The hypothetical is that a person could be exercising complete control but be under a delusion that all women were coming on to him. This is clearly within the realm of a psychosis, therefore a commitment for mental illness, and in Minnesota, in all likelihood, would be a commitment for being mentally ill and dangerous.

78. *Id.* at 412, 414.

79. Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1088-91 (2003).

much volitional impairment is required for a commitment as a SDP.

In conjunction with *Hendricks v. Kansas* and before *Crane*, the United States Supreme Court granted certiorari to Linehan, and vacated and remanded *Linehan II*.⁸⁰ On remand, the Minnesota Supreme Court affirmed the commitment of Dennis Linehan under the SDP statute but held that the statutory removal of lack of control actually meant that the statute required “adequate control.”⁸¹ Linehan subsequently filed for *habeas corpus* and the Eighth Circuit Court of Appeals affirmed Linehan’s commitment.⁸² Though relying on *Hendricks* rather than *Crane*, the court held that Minnesota’s standard of “adequate control” meets substantive due process.⁸³

C. *Erosion of the “Utter Lack of Power to Control Sexual Impulses” Standard: Role of Psychological and Psychiatric Experts*

The SPP statute continues to be used,⁸⁴ but the standard of “utter lack of power to control sexual impulses” has lost its force. The definition of the standard has gone through such a metamorphosis that its plain English meaning no longer applies. Several cases have attached qualifiers to the definition that have nothing to do with volitional control, including the following: the offender’s relationship, or lack thereof, to the victim,⁸⁵ refusal of

80. 522 U.S. 1011, 1011 (1997).

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

82. 315 F.3d 920, 929 (8th Cir. 2003).

83. *Id.* at 927.

84. In 2002, six petitions for SPP were filed in Hennepin County. Contrary to the perceptions of many, both statutes are used for commitment. In an Information Brief by the Research Department of the Minnesota House of Representatives, Legislative Analyst Judith Zollar stated, “Minnesota law contains a second civil commitment law applicable to sexually dangerous persons, known as the ‘psychopathic personality’ commitment law. It was enacted in the 1930s and has been replaced, from a practical standpoint, by the sexually dangerous persons civil commitment law. It remains on the books, however, because there are individuals in the state treatment facilities who were originally committed pursuant to the older law and remain subject to that commitment.” JUDITH ZOLLAR, MINN. HOUSE OF REPRESENTATIVES RESEARCH DEPARTMENT, SEX OFFENDERS AND PREDATORY OFFENDERS: MINNESOTA CRIMINAL AND CIVIL REGULATORY LAWS, 2001-2002 Sess. at 22 n.5 (2002), *available at* <http://www.house.leg.state.mn.us/hrd/pubs/sexofdr.pdf> (last visited Mar. 5, 2003).

85. *See In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994), *cert. denied*, 513 U.S. 849 (1994) (considering the nature and frequency of party’s sexual assaults,

treatment and lack of relapse prevention plan,⁸⁶ and exhibition of grooming behavior.⁸⁷ The significant aspect of these cases is that it has distorted the common sense definition of “utter lack of power to control”⁸⁸ and has created a non-clinical definition of a clinical concept.⁸⁹ Thus, courts have attempted to construe the phrase “utter lack of power to control,” and in so doing, have lowered the substantive due process standard that it once stood for.

In addition, there is a blurring of the line between an expert witness and a finder of fact in the determination of “utter lack of power to control sexual impulses.” Civil commitment requires the input of experts in mental health.⁹⁰ Clearly, experts in human behavior are needed in SPP and SDP cases to answer questions related to issues of dangerousness, victim impact, and likeliness of re-offending. However, there are elements of the commitment that appear to be of a psychological or psychiatric nature but are in fact legal in nature.

degree of violence involved, relationship, or lack thereof, between party and his victims, party’s attitude and mood, party’s medical and family history, results of psychological and psychiatric testing and evaluation, and such other factors as bear on party’s predatory sexual impulse and lack of power to control it).

86. See *In re Pirkle*, 531 N.W.2d 902, 907 (Minn. Ct. App. 1995) (stating that refusal of treatment and lack of relapse prevention plan can show utter lack of control necessary for involuntary commitment under psychopathic personality statute). See also, *In re Irwin*, 529 N.W.2d 366, 375 (Minn. Ct. App. 1995) (explaining how the court, in applying test to determine existence of psychopathic personality, will consider the nature and frequency of sexual assaults, degree of violence, relationship between offender and victims, offender’s attitude, mood, medical history, testing results, and other facts which weigh on predatory sexual impulse and lack of power to control it).

87. See *In re Bieganowski*, 520 N.W.2d 525, 527 (Minn. Ct. App. 1994). Evidence that patient lacked control over sexual impulses supported his commitment as psychopathic personality; patient had manifested pattern of habitual sex offenses involving multiple victims over extended period of time, exhibited classic pedophilic grooming behavior, and failed to remove himself from situations that provided opportunity for similar offenses. *Id.*

88. A literal rendering of “utter lack of power to control” would never control his behavior. See AMERICAN HERITAGE DICTIONARY (3d ed. 1992) (defining “utter” as “complete, absolute, entirely”). But see *Linehan I*, 518 N.W.2d 609 (Minn. 1994). The factors used in deciding “utter lack of power to control” modify a literal definition. *Id.*

89. “Power to control” or “volitional control” are subjects of psychological and psychiatric science.

90. See, e.g., *In re Martinelli*, 649 N.W.2d 886, 890 (Minn. Ct. App. 2002) (requiring expert testimony tying lack of control to a properly diagnosed mental abnormality before civil commitment may occur); *In re Givens*, No. P601060242, 2002 WL 31554041, at *4 (Nov. 19, 2002) (observing that expert testimony is often used to assist the trier of fact when considering civil commitment).

In *In re Blodgett*, *In re Pirkl*, *In re Irwin*, and *In re Bieganowski*, the Minnesota appellate courts have listed a number of factors which the trial courts consider in deciding if an “utter lack of power to control sexual impulses” exists. These include: the nature and frequency of the party’s sexual assaults, degree of violence involved, relationship, or lack thereof, between the party and his victims, the party’s attitude and mood, the party’s medical and family history, results of psychological and psychiatric testing and evaluation;⁹¹ refusal of treatment and lack of relapse prevention plan;⁹² nature and frequency of sexual assaults, degree of violence, relationship between offender and victims, offender’s attitude, mood, medical history, and testing results;⁹³ and, pattern of habitual sex offenses involving multiple victims over an extended period of time, exhibited classic pedophilic grooming behavior, and failing to remove himself from situations that provided the opportunity for similar offenses.⁹⁴ These factors are legal factors, most of which contain elements from behavioral sciences. Courts should determine if the legal standard has been met by asking experts in psychology or psychiatry if any one of the factors has been exhibited in a way that would affect the subject’s ability to control his sexual impulses.

It is, however, the practice of petitioners’ attorneys to ask behavioral experts if the legal standard itself has been met. Minnesota Rule of Evidence 704 allows any witness to address the ultimate legal issue *if it is contained in an otherwise admissible question*.⁹⁵ Far from being questions “otherwise admissible that embrace the ultimate issue,”⁹⁶ questions relating to whether a statutory or case law element has been met require no psychological expertise. Instead, these questions call for statutory interpretation, an area of expertise which psychologists are not competent to answer. Whether a person meets a statutory or case law element is not substance that falls within the expertise of a psychologist.⁹⁷ The questions do not entail descriptions of scientific

91. See *Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994).

92. See *Pirkl*, 531 N.W.2d 902, 907 (Minn. Ct. App. 1995).

93. See *Irwin*, 529 N.W.2d 366, 375 (Minn. Ct. App. 1995).

94. See *Bieganowski*, 520 N.W.2d 525, 530 (Minn. Ct. App. 1994).

95. MINN. R. EVID. 704.

96. *Id.*

97. See, e.g., Robert C. Boruchowitz, *Sexual Predator Law – The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827, 830 (1992) (noting that deciding whether a defendant meets the statutory definition of sexual predator is the jury’s

examination or terms of art to which psychologists are competent to testify.⁹⁸

A judge should make an impartial decision rather than relinquish that responsibility to an expert witness on a mixed question of fact and law. Abdicating the trial court's responsibility to take the facts and apply it to the law violates the clear standards of the case law and the evidentiary rules. Case law requires the trial court to protect its decision-making authority, but does account for incidental testimony that may weigh on an ultimate issue:

Standing alone, the objection that the opinion of a qualified witness is asked upon the very issue and the ultimate one for decision is not sufficient. So long as the matter remains in the realm where opinion evidence is customarily resorted to, there is ordinarily no valid objection to permitting a person who has qualified himself to express an opinion upon the ultimate issue. That is a matter well left to the discretion of the trial judge. While in a will contest the opinion of a witness, lay or scientific, should not be asked as to the testator's capacity to make a valid will, there is certainly no objection to questions concerning his ability to comprehend his property and dispose of it understandingly.⁹⁹

In SPP and SDP cases, the courts have permitted the expert witnesses to cross a bright line.¹⁰⁰ The courts have placed the decision of who is to be committed in the hands of expert witnesses. Thus, psychologists and occasionally psychiatrists testify

job, not a psychologist's). *See also* Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 530 (1997) (stating that expert witnesses must ultimately testify to fact issues).

98. *See generally* WRIGHT & GOLD, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 6285 (1977).

99. *In re Olson*, 223 N.W. 677, 681 (Minn. 1929). *See also, In re Estate of Jenks*, 189 N.W.2d 695, 698 (Minn. 1971).

100. *See State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (stating that opinions involving legal analysis or mixed questions of law and fact are deemed to be of no use to the jury); *Conover v. N. States Power Co.*, 313 N.W.2d 397, 403 (Minn. 1981) (stating that legal analysis by an expert is usually not admissible); *Teslow v. Minneapolis-Honeywell Regulator Co.*, 273 Minn. 309, 312, 141 N.W.2d 507, 509 (1966) (explaining that purpose of expert testimony is to assist jury, not to take over its function); *State v. Scott*, 41 Minn. 365, 368-69, 43 N.W. 62, 63 (1889) (determining that the issue of insanity was for the jury to decide and that the question put to expert was properly disallowed); *Behlke v. Conwed Corp.*, 474 N.W.2d 351, 359 (Minn. Ct. App. 1991) (determining that expert testimony is inadmissible if it takes the responsibility of deciding the ultimate fact).

beyond their area of expertise and instead act as legal advisors. Courts have also cited opinions of these expert witnesses in their findings of fact, thereby clearly abdicating their own role as finder of fact and law.¹⁰¹

The statutory definitions of SPP and SDP contain terms that are of clinical or scientific significance where an expert's testimony would be of help to the finder of fact. Psychologists and psychiatrists are competent to answer whether habit is present, whether volition has been impaired, and what the risk of re-offending may be. These questions go to "ultimate issues" but are within the competence of psychologists and psychiatrists. It is questions such as these that Minnesota Rule of Evidence 704 is designed to permit.

It is improper for a psychological expert to testify whether statutory criterion or an element from case law has been met.¹⁰² Time and again the appellate courts have drawn a line at which experts are to stop.¹⁰³ There are limits to what an expert may testify. Allowing experts to opine that a proposed patient has or has not met statutory criteria crosses this limit, and if relied on by the trial court to reach its conclusions, is an improper abandonment of its role as finder of law.

III. DUE PROCESS AFTER THE COMMITMENT: TREATMENT, QUASI-TREATMENT OR PSEUDO-TREATMENT

Two of the central tenets of our constitutional scheme of government are the proscriptions against double jeopardy and preventive detention.¹⁰⁴ These issues have been litigated repeatedly

101. *In re Matter of Joseph Nathaniel Givens*, No. C4-02-995 (Minn. Nov. 19, 2002).

102. *E.g.*, *State v. Provost*, 490 N.W.2d 93, 101 (Minn. 1992) (excluding psychiatric testimony on whether defendant had requisite *mens rea* when he committed crime because a medical opinion cannot be properly elicited on a mixed question of law and fact); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (stating that experts' opinions involving legal analysis are not admissible because they do not help the jury find facts).

103. *See, e.g.*, Douglas R. Richman, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 571 n.308 (1997) (citing cases in which a rule similar to Minnesota Rule of Evidence 704 was properly used to limit expert testimony).

104. *See Green v. United States*, 355 U.S. 184, 187 (1957) (quoting Blackstone's Commentaries for the universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (protecting the presumption of innocence, only secured after centuries of struggle).

in SPP/SDP matters.¹⁰⁵ Concerns arise from the fact that a nominally civil sanction¹⁰⁶ is used to extend the confinement of persons who have served their sentences for crimes. Double jeopardy and preventive detention have been dismissed as defenses by the appellate courts, which have held that the confinement is not for punishment but for treatment.¹⁰⁷ Nevertheless, jurists have expressed concern that SPP/SDP commitments come close to violating these proscriptions.¹⁰⁸

Persons committed under the SPP or SDP statutes are confined to the Minnesota Sex Offender Program ["MSOP"], which is facilitated in two locations: St. Peter, Minnesota (for admissions and discharges) and Moose Lake, Minnesota (for programming). Since 1990, only one person has been placed on provisional discharge.¹⁰⁹ The absence of completion would suggest that as MSOP is currently operated, the primary purpose for the commitment is preventive detention. Requiring commitment for treatment needs to be evaluated to determine if the end result is or is not *de facto* double jeopardy.

Prior to the passage of the SDP statute, the first major case dealing with the SPP statute was *In re Blodgett*.¹¹⁰ Phillip Blodgett was committed shortly before his scheduled release from a criminal sentence for burglary in 1991. The Minnesota Court of Appeals affirmed the commitment.¹¹¹ The Minnesota Supreme Court granted review and affirmed in a four to three decision.¹¹² In upholding the commitment as constitutional, the majority stated that, *inter alia*:

105. *Linehan II*, 557 N.W.2d 171, 188 (Minn. 1996) (stating that Linehan failed to demonstrate that his commitment was "punishment" or that the treatment was a "sham"); *Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995) (showing that commitment is remedial and therefore does not violate the proscription against double jeopardy); *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994) (explaining the commitment hearing was not a retrial of the criminal matter but a hearing on the "new" issues of the elements of civil commitment).

106. In *Kansas v. Hendricks*, 521 U.S. 346 (1996), the Kansas Supreme Court held that the Kansas commitment act was punitive in nature and therefore a criminal statute triggering double jeopardy.

107. *Linehan II*, 557 N.W.2d at 188; *Call*, 535 N.W.2d at 319-20; *Blodgett*, 490 N.W.2d at 647.

108. See *Blodgett*, 510 N.W.2d at 918 (Wahl, J., dissenting); *Linehan II*, 557 N.W.2d at 201 (Page, J., dissenting).

109. Janus, *supra* note 20.

110. 510 N.W.2d at 910.

111. *In re Blodgett*, 490 N.W.2d 637 (Minn. Ct. App. 1992).

112. *Id.*

[I]t is not clear that treatment for the psychopathic personality never works. . . . But even when treatment is problematic, and it often is, the state's interest in the safety of others is no less legitimate and compelling. So long as civil commitment is programmed to provide treatment and periodic review, due process is provided.¹¹³

The opinion recited the statutory process by which a person committed as SPP/SDP theoretically can be released. The possibility of discharge was cited as justification for affirming the commitment.¹¹⁴ Clearly, the constitutionality of the SPP statute depends on effective, yet problematic, treatment that ultimately can lead to release.

Justice Rosalie Wahl, in a strong dissent,¹¹⁵ stated that the SPP statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and "is creating a system of wholesale preventive detention."¹¹⁶ The *Blodgett* dissent pointed out that "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed."¹¹⁷ Justice Wahl opined that the SPP statute was tantamount to a lifetime confinement that was not premised on a criminal conviction or a mental illness.¹¹⁸ The dissent depended heavily on *Foucha v. Louisiana*,¹¹⁹ which held that dangerousness alone is not a sufficient constitutional reason to confine an individual.¹²⁰ Further, Justice Wahl pointed out that the statute "does not provide for a confinement that is strictly limited in duration or, for that matter, limited in duration at all."¹²¹ The dissent stated:

It is questionable whether [Blodgett] can show he is no longer in need of "inpatient treatment and supervision" when the very psychiatrists who are charged with treating him say there is no treatment for an antisocial personality disorder and that any "treatment" he could receive at the security hospital would be "sham" or "placebo" treatment with "no evidence at the end of spending time in these

113. *Id.* at 916.

114. *Id.*

115. *Id.* at 918.

116. *Id.*

117. *Id.* at 921.

118. *Id.* at 924-25.

119. 504 U.S. 71 (1992).

120. *See Blodgett*, 510 N.W.2d at 920.

121. *Id.* at 923.

groups that he would be less or more likely to commit the same crime.”¹²²

Three years after *Blodgett, Linehan II*¹²³ affirmed a commitment based on the new SDP statute. Double jeopardy and preventive detention were again discussed. In his dissent in *Linehan II*, Justice Page, who voted with the majority in *Blodgett*, stated, “While I did believe then, and still believe now, that our decision in *Blodgett* fit within constitutional limits, I also believe that with that decision we reached the extreme limits of constitutionality permitted preventive detention.”¹²⁴

Justice Page distinguished *Blodgett* from *Linehan II* on the basis of the intentional absence of a volitional control element.¹²⁵ The concerns Justice Wahl raised in *Blodgett* apply with equal force to *Linehan II* and the SDP statute; that is, if the treatment is “sham” or “placebo” in nature, the statute runs afoul of constitutional proscriptions against double jeopardy and preventive detention.¹²⁶

Double jeopardy was also raised in the United States Supreme Court case of *Kansas v. Hendricks*.¹²⁷ The Supreme Court came close to endorsing preventive detention:

Accepting the Kansas court’s apparent determination that treatment is not possible for this category of individuals does not obligate us to adopt its legal conclusions. We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law.¹²⁸

The Court however pulled back from this, concluding:

Even if we accept this determination that the provision of treatment was not the Kansas Legislature’s “overriding” or “primary” purpose in passing the Act, this does not rule out the possibility that an ancillary purpose of the Act was to provide treatment, and it does not require us to conclude that the Act is punitive. Indeed, critical language in the Act itself demonstrates that the Secretary [of Social and Rehabilitation Services], under whose

122. *Id.*

123. 557 N.W.2d 171, 191, 196 (Minn. 1996).

124. *Id.* at 201.

125. *Id.*

126. *See id.*

127. 521 U.S. 346 (1997).

128. *Id.* at 365-66.

custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks.¹²⁹

The concurrence strengthened the tepid requirement of treatment by stating, “If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.”¹³⁰ Similarly, the dissent expressed strong reservations stating:

Kansas, however, concedes that Hendricks’ condition is treatable; yet the Act did not provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter. These, and certain other, special features of the Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him.¹³¹

It appears, then, that the proscription against preventive detention is not absolute but still not permissible except after strict due process and with some level of treatment necessary.

A. *Using Findings of Fact in Treatment*

The Minnesota Sex Offender Program has never discharged a single patient,¹³² indicating that MSOP’s policies need to be examined to determine if they are indeed restorative or methods of detaining patients indefinitely.

It is virtually a universal practice among sex offender treatment programs to require a patient to admit to every offense found in the committing courts findings of fact, whether the patient himself believes that he committed the offense or not.¹³³ Treatment programs will accumulate a list of victims of the patients by culling them from criminal findings, criminal complaints, criminal pleas, accusations, commitment findings, and past reports,

129. *Id.* at 367.

130. *Id.* at 373.

131. *Id.*

132. *See* Janus, *supra* note 20.

133. Telephone Interview with Gerald Kaplan, Director of Alpha Human Services, a private sex offender treatment program in Minneapolis, Minnesota. (Aug. 29, 2002).

such as pre-sentence investigations completed by the patients' probation officers.¹³⁴ The patient must take responsibility for each alleged incident or they will not be able to complete the program. Programs are not required to investigate the veracity of the findings or reports; programs expect the patient to acknowledge the findings regardless of the patient's claims of inaccuracy.¹³⁵

The rationale of treatment professionals for this policy is to encourage patients to accept responsibility for their behavior.¹³⁶ In addition, proper evaluation of an offender's history is essential to any treatment program,¹³⁷ and is therefore performed early in the treatment process. The patient is evaluated early in the treatment process. The evaluation at MSOP involves an analysis of documentation of offenses which includes the findings of fact from the commitment proceedings.¹³⁸ It is not general practice in other clinical areas for treatment professionals to abdicate the development of a clinical database to a court or to use a court's findings of fact as a starting point for treatment.¹³⁹

As a class, sex offenders may not be the best source of data.¹⁴⁰ This is partly because they are generally in denial. To overcome patients' initial reluctance to admit elements of offenses, sex offender treatment professionals insist firmly that patients take responsibility for an objective version of the offense.¹⁴¹ Similarly,

134. Email from Anita Schlank, Clinical Director, Minnesota Sex Offender Program, regarding client findings. Dr. Schlank directs clients to "work with their attorneys" to change the Findings of Fact if the patient/client is insistent that they are in error. *Id.*

135. *Id.*

136. Telephone Interview with Mark Willenbring, M.D., Staff Psychiatrist, Addictions Unit, Minneapolis Veterans' Administration Hospital (Aug. 28, 2002); Telephone Interview with Gerald Kaplan, Director of Alpha Human Services, a private sex offender treatment program in Minneapolis, Minnesota (Aug. 29, 2002).

137. Telephone Interview with Mark Willenbring, M.D., Staff Psychiatrist, Addictions Unit, Minneapolis Veterans' Administration Hospital (Aug. 28, 2002).

138. Telephone Interview with Gerald Kaplan, Director of Alpha Human Services, a private sex offender treatment program in Minneapolis, Minnesota (Aug. 29, 2002).

139. Telephone Interview with Mark Willenbring, M.D., Staff Psychiatrist, Addictions Unit, Minneapolis Veterans' Administration Hospital (Aug. 28, 2002).

140. *See* Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association 4th ed. 2000). The majority of the patients at MSOP are — diagnosed with Antisocial Personality Disorder. A characteristic of the Antisocial Personality is habitual dishonesty.

141. Telephone Interview with Mark Willenbring, M.D., Staff Psychiatrist, Addictions Unit, Minneapolis Veterans' Administration Hospital (Aug. 28, 2002).

chemical dependence programs also seek to overcome the patient's denial, which is a central theme in the treatment of the chemically dependent.¹⁴²

It is not common, however, for them to search findings of fact to create an exhaustive list of "offenses." Treatment professionals' insistence that patients confess to and express remorse for an offense they in fact did not commit has no clinical purpose and may have adverse clinical consequences.

The objections to strict compliance with this policy are that it is coercive, acceptance of false information creates cognitive distortion, admissions may lead to further convictions, and there are limits on what an attorney may accomplish by way of amending findings.

B. Using Polygraph in Treatment

In order to graduate from MSOP, a patient must pass a polygraph.¹⁴³ The purported purpose of this test is to make sure that all victims have been accounted for.¹⁴⁴ Polygraph technology, however, has very questionable validity.¹⁴⁵ As with using findings of fact for a database of victims, the use of a polygraph to develop a clinical database forsakes clinical judgment.¹⁴⁶

Polygraphs were not developed by scientists¹⁴⁷ and the method for estimating their reliability is flawed.¹⁴⁸ The questionable validity

142. *E.g., The Disease of Addiction, Current Concepts*, at <http://www.wemac.com/cdconcept.html#hdwri> (last visited Mar. 16, 2003); Douglas Stellato-Kabat et. al, *Treating Chemical Dependent Couples and Families*, available at <http://www.drug-test.com/tcd.htm> (last visited March 16, 2003).

143. MSOP Patient Handbook (App. 1). This policy is not statutorily required.

144. Telephone Interview with Gerald Kaplan, Director of Alpha Human Services, a private sex offender treatment program in Minneapolis, Minnesota (Aug. 29, 2002).

145. *See* DAVID T. LYKKEN, *A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR* 49 (Plenum Press 1998).

146. *See id.*

147. *Id.* at 49. Major figures in the development of the polygraph were lawyers and policemen, none of which had credentials as scientists.

148. *Id.* at 67–88. The subjective method frequently used to verify accuracy is to compare the number of "deceptive" profiles with the number of confessions that result from the polygraph interviews. Since persons who pass the polygraph generally are not re-interviewed, the sample of polygraphs that form the basis of the verification are those which the subject does not pass. The subject is then re-interviewed and told that he did not pass the polygraph. When faced with this information, confessions often are forthcoming. Dr. Lykken points out that numbers similar to the data thus compiled may be obtained if the subject's polygraph is not analyzed at all but deception is determined by a flip of a coin.

of polygraphy has been known for decades¹⁴⁹ and polygraphs have never been widely accepted among scientists.¹⁵⁰ Their use by clinicians in SPP/SDP retention decisions is therefore curious.

Even if polygraph reports are to be believed, they are not so reliable that they can be validated. For example, even if collateral information conflicts with the polygraph results, failure of a polygraph is still an absolute block to discharge. The practice of requiring such an exam serves no purpose other than creating another reason for preventing discharge.

C. Emphasis of Confinement is Security Not Therapy

If, in fact, the confinement of persons committed as SPP/SDP is for the purpose of treatment, courts should focus their inquiry on the confinement portion of the program. The dissents of Justices Wahl and Page take on increased credence if there is no true psychotherapeutic aim of the Minnesota Sex Offender Program, i.e., if the program is a sham or a placebo.¹⁵¹

One method to determine whether the treatment program is a “sham” or “placebo” would be to look at the focus of the treatment program. The focus of the treatment program at MSOP appears to be on preventing breaches of security and only tangentially on treatment. A recent Minnesota Supreme Court case is illustrative. In *Hince v. O’Keefe*, patients at MSOP sought a declaratory judgment requiring the Department of Human Services, which is the state agency responsible for the operation of MSOP, to establish a

Laboratory studies, because they do a poor job of simulating the high-stakes scenario that exists in real-life criminal investigations, cannot be relied on to estimate polygraph (lie detector) accuracy. Field studies that employ confessions following a failed polygraph also cannot be relied on for this purpose. Credible field studies would be possible, but difficult to implement. To date, no scientifically credible field study of the validity of the CQT (Control Question Test) in detecting guilty suspects has been accomplished. However, as Patrick and Iacono showed, because police practices differ between cases that yield at least one failed test and those that yield only passed tests, it is possible to collect data that bear on the accuracy of the CQT for innocent subjects.

Id. at 88.

149. Jerome H. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961); David T. Lykken, Ph.D., *Polygraph Tests in Business Unscientific, Unamerican, Illegal*, HENNEPIN LAWYER, May-June 1976, at 4.

150. LYKKEN, *supra* note 145, at 49.

151. *In re Blodgett*, 510 N.W.2d 910, 918 (Minn. 1994) (Wahl, J., dissenting); *Linehan II*, 557 N.W.2d at 201 (Page, J., dissenting).

hospital review board.¹⁵²

Prior to 1995, SPP/SDP committees were held and treated at the Minnesota Security Hospital in St. Peter, Minnesota. In 1995, a new facility was built in Moose Lake, Minnesota, and the SPP/SDP committees transferred there. At the time of the transfer, the new program (MSOP) was placed under its own administration and new rules were promulgated for its operation. The Minnesota Department of Human Services did not view MSOP as a “regional center”¹⁵³ and did not provide for a review board. MSOP is the only facility that admits persons thus committed and has two very high security locations.

The Commissioner of the Department of Human Services is required by statute to establish a review board at each of the regional treatment centers.¹⁵⁴ Review boards have two functions. The first is to review the admission and retention of patients.¹⁵⁵ With this function, the review board has the authority to advise the head of the regional treatment center if it believes the patient is inappropriately detained and recommend his or her release.¹⁵⁶ The second function is to receive and investigate conditions affecting the care of patients.¹⁵⁷

In 1998, twenty-eight men committed as either a SPP or SDP brought suit against the Minnesota Department of Human Services to establish a complaint review tribunal known as a “review board” at MSOP.¹⁵⁸ The Commissioner of the Department of Human Services refused to establish such a review board at the MSOP facilities on three grounds. First, the Commissioner argued that no one committed as SPP or SDP may be released by any other means than going before a “special review board”¹⁵⁹ (which is a completely different entity). Thus, the first function of the review board, to review admissions and retentions, was already being performed by

152. 632 N.W.2d 577, 579 (Minn. 2001).

153. Minnesota’s state hospitals were renamed “regional centers” in 1986.

154. MINN. STAT. § 253B.22, subd. 1 (1998).

155. MINN. STAT. § 253B.22, subd. 4 (2000). “Regional treatment centers” were formally known as “state hospitals” and are the state’s inpatient treatment programs for persons with mental illness, chemical dependence, or mental retardation. As a result of the Minnesota Supreme Court’s *Hince* opinion, they are also for persons mentally ill and dangerous to the public, sexual psychopathic personalities, and sexually dangerous persons. *Hince*, 632 N.W.2d at 584.

156. MINN. STAT. § 253B.22, subd. 4.

157. *Id.*

158. *Hince v. O’Keefe*, 613 N.W.2d 784, 785 (Minn. Ct. App. 2000).

159. *Hince*, 632 N.W.2d at 583.

the “special review board,” and therefore the legislature could not have meant that another review board was required at MSOP. MSOP’s second argument was that a review board was unnecessary because there are a number of other mechanisms to review resident complaints.¹⁶⁰ The third argument was that MSOP is not a regional treatment center,¹⁶¹ and therefore the statute requiring establishment of a review board does not apply to MSOP.

The matter was dismissed at the district court and affirmed by the Minnesota Court of Appeals.¹⁶² The Minnesota Supreme Court reversed the lower court and ordered the establishment of a review board at MSOP.¹⁶³

The Minnesota Supreme Court reinforced certain notions about SPP and SDP commitments in general.¹⁶⁴ In its opinion, the court referred to persons committed as SPP and SDP as “patients,” a term that the Department of Human Services has studiously avoided applying to these persons. The opinion clearly reinforced the concept that the commitments are based on a mental disorder. The court held:

[T]he state asserts that the district court properly dismissed appellant’s action because SPP and SDP patients are not ‘mentally ill’ and therefore Sex Offender Program facilities are not regional treatment centers. The state’s argument gives us pause because when the state argued *Blodgett*, *Linehan I*, *Linehan III*, and *Linehan IV*, it argued that the parties suffered from mental disorders. Without the mental disorder component, commitment would be based on dangerousness alone, which does not satisfy due process.¹⁶⁵

The significance to the due process argument is that MSOP is clearly primarily concerned with maintaining a secure facility and that rehabilitation is secondary. Yet, to avoid running afoul of the prohibition against double jeopardy, MSOP must make a good

160. *Id.*

161. *Id.* at 583-84.

162. *Id.* at 579.

163. *Id.* at 585.

164. *Id.* at 580. “The current civil commitment statutes for SPP and SDP are the product of a delicate balancing between the ‘legitimate public concern over the danger posed by predatory sex offenders’ and the fundamental right of those persons committed to live their lives ‘free of physical restraint by the state.’” *Id.* (quoting *In re Blodgett*, 510 N.W.2d 910, 912, 914 (Minn. 1994)).

165. *Id.* at 583 (citations omitted); see also, *Foucha v. Louisiana*, 504 U.S. 71, 75-83 (1992); *Addington v. Texas*, 441 U.S. 418, 432-33 (1979).

faith effort at rehabilitation. Further, equal protection demands that similarly situated individuals be treated similarly. In addition to heightened security requirements for mentally ill and dangerous patients, there is a clear emphasis on treatment at Minnesota Security Hospital (MSH).

D. Constitutional Challenges to Discharge Criteria

Another area where double jeopardy and preventive detention concerns are raised is the discharge criteria for SPP/SDP commitments. Following a pre-discharge commitment trial, the treating program (MSOP) must submit a treatment report to the trial court within sixty days.¹⁶⁶ If the trial court finds that the person continues to be mentally ill and dangerous to the public,¹⁶⁷ the commitment becomes indeterminate, that is, the person will remain in a secure treatment facility until statutory discharge criteria are met.¹⁶⁸ The trial court then loses jurisdiction of the matter of discharge and the committed person must go through an administrative review process to be discharged.¹⁶⁹

The criteria for discharge are that the person is no longer dangerous and that he can make an acceptable adjustment to the community.¹⁷⁰ At first glance, a United States Supreme Court case, *Foucha v. Louisiana*,¹⁷¹ seemed to create an argument for the ending of sexual predator commitments. In *Foucha*, the Court clearly required that there be something more than dangerousness in order to confine someone within a civil commitment scheme.¹⁷² Dangerousness must be accompanied by a mental illness.¹⁷³ A Minnesota case, *Reome v. Levine*,¹⁷⁴ also stands for the proposition that a patient still considered dangerous but no longer mentally ill may not be committed against his will.¹⁷⁵ Earlier, the Minnesota Court of Appeals held that the discharge statute must be read in

166. MINN. STAT. § 253B.18, subd. 2(a).

167. The person may have a sexual psychopathic personality or may be a sexually dangerous person.

168. MINN. STAT. § 253B.18, subd. 3. Before release from civil commitment, the patient must satisfy the requirements of § 253B. *Id.*

169. MINN. STAT. § 253B.18, subd. 4c.

170. MINN. STAT. § 253B.18, subd. 7.

171. 504 U.S. 71 (1992).

172. *Id.* at 78.

173. *Id.* at 78-79.

174. 692 F. Supp. 1046 (D. Minn. 1988).

175. *Id.* at 1053.

conjunction with the commitment statute and that when a person is no longer mentally ill or no longer dangerous because of mental illness, the person could no longer be detained.¹⁷⁶ This clearly indicates that the dangerousness must arise from a mental illness.

The SPP statute was challenged and upheld on due process and equal protection grounds in two cases.¹⁷⁷ In *Call v. Gomez*, the Minnesota Supreme Court found that the SPP statute comported to the basic constitutional requirement that the commitment bear some reasonable relationship with the purpose of the original commitment and therefore the discharge criteria did not violate due process.¹⁷⁸ In *Caprice v. Gomez*,¹⁷⁹ patient Caprice argued that because he did not have a major mental illness, the discharge criteria could not apply to him.¹⁸⁰ The Minnesota Court of Appeals held that the statute did not violate the equal protection requirement that similarly situated persons be treated similarly when applied to persons committed as mentally ill and dangerous.¹⁸¹ This reasoning suggests that the commitment as a psychopathic personality is predicated on a mental illness. This premise raises a problem for persons committed under the SPP/SDP statutes. The “psychiatric” conditions with which patients are diagnosed¹⁸² are, for the most part, conditions that are not treatable within the traditional scheme of psychiatric treatment.¹⁸³ Unlike mentally ill and dangerous committees, SPP committees have virtually no chance of having their psychiatric diagnoses declared “in remission” and are therefore unable to take advantage of the *Foucha*¹⁸⁴ protections.

SPP and SDP commitments are based on the premise that the committed sex offenders had behavioral conditions that could be

176. *Reome v. Levine*, 350 N.W.2d 428, 431 (Minn. Ct. App. 1984).

177. *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995); *Caprice v. Gomez*, 552 N.W.2d 753 (Minn. Ct. App. 1996).

178. 535 N.W.2d at 318-19 (Minn. 1995).

179. 552 N.W.2d 753 (Minn. 1996).

180. *Id.*

181. *Id.* at 758-59.

182. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text rev. 2002). The most common diagnosis is that of antisocial personality disorder.

183. *Id.* Treatment for psychosis includes antipsychotics; treatment for bipolar disorder includes mood stabilizers; treatment for depression includes antidepressants and electroconvulsive therapy.

184. 504 U.S. 71 (1992).

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treated.¹⁸⁵ Although community protection may be part of the justification, without a good faith effort at therapeutic rehabilitation, the entire scheme of civil commitment of sex offenders who have completed their criminal sentences becomes preventive detention.

IV. CONCLUSION

A fine balance is needed between public safety and substantive and procedural due process. Many of the due process protections available in traditional commitments are in flux in SPP/SDP commitments, and at the present time, this balance is tipped in favor of public safety. However, further litigation may change this balance. A more critical area of litigation in the near future needs to focus on the treatment process. If the rulings on double jeopardy are to remain valid, treatment must be shown to be rehabilitative and not merely a pretext for preventive detention.

185. See *Linehan II*, 557 N.W.2d 171, 188 (Minn. 1996).