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Protection and Treatment: The Permissible Civil Detention of Sexual Predators

John Kip Cornwell*

*Assistant Professor, Seton Hall University School of Law. A.B., Harvard University; M.Phil., Cambridge University; J.D., Yale Law School. The author would like to thank Professor Edward Hartnett for his generous assistance, Professors John Jacobi and James Boskey for their helpful comments, and research assistants Mark Sblendorio and Burk Burnett for their abundant efforts.

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Introduction

I am doomed to eventually rape and then murder my poor little victims to keep them from telling on me.\(^1\)

So warned Larry Don McQuay, as he faced release from a Texas prison this past April after serving six years of an eight-year sentence for having sex with the six-year-old son of a former girlfriend.\(^2\) A self-described "monster" and "scum of the earth" who claims to have molested more than 240 children,\(^3\) McQuay begged state criminal justice officials to castrate him to prevent further predatory behavior; instead, state officials released him into the community under a host of conditions designed to ensure that he would not come into contact with children.\(^4\)

The McQuay case and others, most notably that of Jesse Timmendequas, who raped and killed seven-year-old Megan Kanka in New Jersey,\(^5\) have inspired widespread legislative action to diminish the risk of predation among sex offenders released from jail. "Megan's Laws," permitting local law enforcement agencies to notify residents that a sexual predator has moved into their community, now exist in thirty states.\(^6\) The recent proliferation of these statutes evidences escalating concern over the management of sexual predators and has garnered the attention of the national media,\(^7\)


3. Denson, supra note 2, at A1; Verhovek, supra note 2, at A16.

4. McQuay agreed to live in a locked facility and to wear electronic devices to allow parole officers to monitor his whereabouts continually. Verhovek, supra note 1, at B7. After initially denying McQuay's requests for castration on the ground that castration was "elective surgery," the Texas Board of Pardons and Paroles eventually consented to the procedure, though the castration has not yet been carried out. Verhovek, supra note 2, at A16.


7. See James Popkin et al., Natural Born Predators, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 64 (noting that growing number of states are enacting notification laws); Jill Smolowe, Not in My Backyard: Citizens Rally to Keep Paroled Murderers and Sex Offenders from Settling in Their Communities, TIME, Sept. 5, 1994, at 59 (same).
However, the movement to protect society from the risks posed by released sex offenders presents only half of the picture. During this same period, a growing number of states have passed laws designed to impede the re-entry of these individuals into the community. Typically, such "retention" statutes facilitate the involuntary commitment of sex offenders to psychiatric hospitals after their criminal sentences have expired and until such time as the offender has recovered from the mental condition that led him to engage in sexual misconduct. In some instances, however, an

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8. In 1994, Congress passed its own version of Megan's Law, providing for mandatory registration of sex offenders with local law enforcement agencies and allowing the dissemination of such information to interested members of the public. See 42 U.S.C. § 14071(b)(1)(A)(i) (1994) (announcing "[d]uty of a State prison official or court . . . [to] inform the [sexual predator] of the duty to register"); id. § 14071(d)(3) (stating that law enforcement authorities "may release information that is necessary to protect the public concerning a [sexual predator]")(emphasis added). In 1996, the statute was modified to require the release of information to certain members of the community. See 42 U.S.C.A. § 14071(d)(2) (West 1996) (directing that law enforcement authorities "shall release information that is necessary to protect the public concerning a [sexual predator]") (emphasis added).

9. After signing into law the mandatory community notification amendment to the federal Megan's Law in May 1996, President Clinton vowed to fight to uphold such statutes "all the way to the Supreme Court," noting that "there is no greater right than a parent's right to raise a child in safety and love. Today, America warns: If you dare to prey on our children, the law will follow you wherever you go, State to State, town to town." Remarks on Signing Megan's Law and Exchange with Reporters, 32 WEEKLY COMP. PRES. DOC. 878 (May 17, 1996).

10. While no statute exempts women from its coverage, due to the historical paucity of female sexual predators, I will not use inclusive language in referring to this statutory classification. For example, statistics of the United States Department of Justice demonstrate that between 1989 and 1993, 94.0% of people arrested for sex offenses, excluding offenses of a commercialized nature such as prostitution, were males. See U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1993, at 234 (GPO 1994), reprinted in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1994, at 386 (Kathleen Maguire & Ann L. Pastore eds., 1995) (reporting that 93.4% of those arrested for sex offenses, excluding crimes of commercialized nature such as prostitution, were males); U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1992, at 234 (GPO 1993), reprinted in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1993, at 430 (Kathleen Maguire & Ann L. Pastore eds., 1994) (noting that males accounted for 94.0% of arrests); U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1991, at 230 (GPO 1992), reprinted in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1992, at 432 (Kathleen Maguire et al. eds., 1993) (stating that males accounted for 94.5% of arrests); U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1990, at 191 (GPO 1991), reprinted in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1991, at 442 (Timothy J. Flanagan & Kathleen Maguire eds., 1992) (explaining that males accounted for 94.0% of arrests); U.S.
individual may be committed indefinitely as sexually dangerous in the absence of a criminal conviction or proof of a mental disorder predisposing him to commit sex crimes.

Both the legal and medical communities have criticized this new generation of retention statutes as unconstitutionally infringing the requirements of present mental illness and "treatability" as prerequisites for commitment to a psychiatric facility. In this Article, I argue that these retention statutes comply with Supreme Court precedent that requires neither the existence of a clinically recognized mental disorder rendering an individual unable to think or act rationally nor the availability of medical or psychotherapeutic interventions that are likely to "cure" his condition as preconditions for involuntary psychiatric commitment.

Part I of this Article outlines the principal features of the involuntary commitment statutes. Parts II and III then discuss, respectively, Supreme Court case law relevant to the involuntary commitment of sexual predators and the lower courts' inconsistent efforts to identify and implement the Supreme Court's constitutional mandate. Part IV provides a road map out of the confusion created by the case law, touching first on the level of scrutiny attendant to due process and equal protection review of these statutes and then clarifying the parameters of the mental impairment requirement justifying involuntary psychiatric commitment. Having demonstrated the legal sufficiency of sexual predator commitment statutes, Part V considers briefly alternative means of managing sexual predators within the criminal arena, such as enhanced sentencing and chemical castration.

I. The Involuntary Commitment of Sexual Predators

A. Historical Antecedents

The involuntary commitment of sexual predators has its roots in the 1930s when state legislatures first introduced special procedures for the detention of "sexual psychopaths," "sexually dangerous persons," and "sex offenders." These statutes varied in certain respects, most significantly in their jurisdictional bases: whereas some required a criminal conviction to

trigger their application, others did not even mandate the pendency of criminal charges. ¹² On the other hand, while the statutes used differing terminology to describe the requisite state of mind, they basically required proof that the individual "suffer[ed] from such an unstable personality that his sexual behavior contravene[d] both the law and the social norms of propriety while demonstrating a compulsive predisposition toward the commission of sexual offenses."¹³ And virtually all of the statutes provided for involuntary detention until such time as the predator no longer posed a threat to society.¹⁴

More than half of the states and the District of Columbia had some form of sexual predator legislation on the books by 1960.¹⁵ By the end of the 1980s, however, this number had been cut in half, principally due to concerns about civil rights and the apparent lack of success of sex offender treatment programs.¹⁶ Still, among the early statutory formulations that have survived, some continue to authorize the commitment of sexual predators in potentially far-reaching terms.

For example, in Minnesota and the District of Columbia government officials must demonstrate a history of sexual misconduct combined with an inability to control one's sexual impulses such that an individual is likely to continue to pose an ongoing risk of harm.¹⁷ Once committed in accordance with these provisions, an individual becomes eligible for release only when he no longer poses a danger to others, as determined by the court or, in the District of Columbia, by a supervisory official of the institution where he is confined.¹⁸

¹². See Swanson, supra note 11, at 216.
¹⁴. Swanson, supra note 11, at 218.
¹⁷. See D.C. CODE ANN. § 22-3503(1) (Supp. 1996) (defining sexual psychopath as someone "who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his or her sexual impulses as to be dangerous to other persons"); In re Blodgett, 510 N.W.2d 910, 913 (Minn. 1994) (noting that state's "psychopathic personality" statute applies 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 [harm others]"). Minnesota's present "sexual psychopathic personality" designation, created in 1994, is basically a recodification of the standard that had existed for more than 50 years. See infra note 119.
¹⁸. See D.C. CODE ANN. § 22-3509; MINN. STAT. ANN. § 253B.17 (West Supp.
Colorado's Sex Offenders Act, by contrast, prescribes a commitment mechanism in lieu of sentencing for defendants convicted of certain sex crimes, including sexual assault and aggravated incest. Such proceedings, which may be initiated by the defendant, the district attorney, or the court, require the state to prove beyond a reasonable doubt at a separate evidentiary hearing that the defendant, "if at large, constitutes a threat of bodily harm to members of the public." Instead of providing commitment as an alternative to sentencing, Illinois allows indefinite psychiatric commitment to substitute for prosecution of an individual charged with a criminal offense when the state proves beyond a reasonable doubt that the individual is a "sexually dangerous person."

B. Contemporary Formulations

After years of declining national interest in the psychiatric commitment of sexual predators, the above-referenced jurisdictions notwithstanding, the 1990s have witnessed a resurgence of legislative activity in this area. Unlike the statutes discussed above, however, the new generation of legislation focuses on sexual predators who have been tried, convicted, sentenced, and who are nearing the end of their period of incarceration. Psychiatric commitment serves, therefore, as a means — perhaps the sole means — of preventing the return of sexual predators to the community where they may prey upon new victims.

The initial inspiration for this groundswell of legislative action was the highly publicized case of Earl Shriner who, upon release from a ten-year sentence for kidnaping and sexually assaulting two teenage girls, raped a

1995); see also Justin v. Jacobs, 449 F.2d 1017, 1025 (D.C. Cir. 1971) (MacKinnon, J., concurring) (explaining that defendant is committed to St. Elizabeth's Hospital until such time as Superintendent believes that defendant no longer presents danger to other persons); Call v. Gomez, 535 N.W.2d 312, 319 (Minn. 1995) (providing that confinement endures as long as individual continues to need inpatient treatment and supervision for sexual disorder and continues to pose public danger).

20. Id. § 16-13-203 (West 1990).
21. Id. § 16-13-202(5).
22. Id. §§ 16-13-205, -211(2).
23. 725 ILL. COMP. STAT. ANN. 205/8 (West 1996).
24. Under the Illinois statute, a sexually dangerous person is someone who has suffered from a "mental disorder" for at least one year prior to the filing of the petition for commitment, is predisposed to commit criminal sex offenses, and has "demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children." Id. 205/1.01.
seven-year-old boy, severed his penis, and left him to die. In response to this tragedy and prior unsuccessful efforts to civilly commit Shriner as mentally ill and dangerous, the State of Washington enacted its sexual predator law in 1990. In the wake of additional cases of sexual assault and murder at the hands of released sex offenders, Wisconsin, Kansas, Iowa, Minnesota, California, and Arizona followed suit in 1994 and 1995, enacting new statutory provisions patterned after the Washington law.

To secure commitment under each of these statutes, the state must prove that the individual in question is a sexual predator. Generally speaking,

26. Attempting to commit Shriner at the end of his prison term, state authorities were unable to produce evidence of a "recent overt act" evidencing dangerousness, as was required under the state's involuntary civil commitment statute for mentally ill persons. Id.
27. WASH. REV. CODE ANN. §§ 71.09.010-.120 (West 1992 & Supp. 1995). Interestingly, the campaign to enact this sort of legislation was initiated by Mrs. Ida Ballasiotes in 1988 following the brutal rape and murder of her daughter by a released sex offender. The state legislature showed little interest, however, until the Shriner incident. See Juliet M. Dupuy, Comment, The Evolution of Wisconsin's Sexual Predator Law, 79 MARQ. L. REV. 873, 873 (1996).
28. Examples include the abduction, rape, and murder of Megan Kanka in New Jersey, see supra text accompanying note 5, and the rape and murder of Stephanie Schmidt in Kansas. See also Kelly A. McCaffrey, Comment, The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times, 42 U. KAN. L. REV. 887, 887 (1994).
29. WIS. STAT. ANN. §§ 980.01-.12 (West Supp. 1995).
31. IOWA CODE ANN. §§ 709C.1-.10 (West Supp. 1995). In 1996 and prior to the statute's effective date, the Iowa Legislature rescinded the statute, replacing it with legislation providing for enhanced sentencing for convicted sex offenders. See Act of Apr. 10, 1996, H.F. 2316, §§ 4, 7, 8, 1996 Iowa Legis. Serv. 175, 176-77 (West); see also infra text accompanying notes 234-36.
32. MINN. STAT. ANN. §§ 253B.02, 253B.185 (West Supp. 1996). The new provisions providing for the commitment of "sexually dangerous persons" did not replace those pertaining to sexual psychopaths, described above. See supra text accompanying note 17. Thus, Minnesota officials have two different mechanisms through which they can endeavor to commit sex offenders.
there are two distinct components to this requirement. First, most states require a criminal conviction for a sexually violent offense, as defined by the statute, although a criminal charge may also suffice when there was no adjudication due to trial incompetency or a finding of nonresponsibility due to mental disease or defect. Accordingly, as the sex offender nears the end of his criminal confinement, state officials may petition the court for mental health commitment. In most jurisdictions, the state officials bear the burden of proving the offender's eligibility for such commitment beyond a reasonable doubt. Second, the state must demonstrate that the


38. See, e.g., ARIZ. REV. STAT. ANN. § 13-4601(3)(a)-(b) (defining sexually violent offense to include sexual assault, child molestation, murder, or kidnapping determined beyond a reasonable doubt to have been "sexually motivated"); CAL. WELF. & INST. CODE § 6600(b) (including rape, lewd acts with child, sodomy, or oral copulation "when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury"); KAN. STAT. ANN. § 59-29a02(e)(1)-(12) (Supp. 1995) (listing rape, criminal or aggravated criminal sodomy, aggravated sexual battery, indecent or aggravated indecent liberties with child, indecent or aggravated indecent solicitation of child, sexual exploitation of child, or any act that has been determined "beyond a reasonable doubt to have been sexually motivated"); WASH. REV. CODE ANN. § 71.09.020(6) (West Supp. 1996) (naming rape, rape of child, statutory rape, indecent liberties by forcible compulsion, or murder, assault, or burglary determined beyond reasonable doubt to have been sexually motivated); WIS. STAT. ANN. § 980.01(6)(a)-(c) (West Supp. 1995) (including sexual assault of child, incest, child enticement, battery, or false imprisonment determined to have been "sexually motivated"). "Sexually motivated" typically means that one of the reasons that the defendant committed the crime was sexual gratification. See, e.g., KAN. STAT. ANN. § 59-29a02(d).

39. See ARIZ. REV. STAT. ANN. § 13-4601(4); KAN. STAT. ANN. § 59-29a03(a)(2)-(4) (Supp. 1995); WASH. REV. CODE ANN. §§ 71.09.020(1)-.030 (West Supp. 1996); WIS. STAT. ANN. § 980.02 (West Supp. 1995). But see CAL. WELF. & INST. CODE § 6600(a) (West Supp. 1996) (noting that statute is limited to individuals convicted of sexually violent offense against two or more victims).

40. See, e.g., ARIZ. REV. STAT. ANN. § 13-4602(A) (Supp. 1995) (requiring petition at least three months prior to predator's scheduled release); CAL. WELF. & INST. CODE § 6601(a) (West Supp. 1996) (mandating petition at least six months prior to release); KAN. STAT. ANN. § 59-29a03(a)(1) (Supp. 1995) (demanding petition at least 90 days prior to release); WASH. REV. CODE ANN. § 1.09.025(1)(a)(i)-(iv) (West Supp. 1996) (ordering petition at least three months prior to release); WIS. STAT. ANN. § 80.02(2)(ag) (West Supp. 1995) (requiring petition at least 90 days prior to release).

41. See, e.g., ARIZ. REV. STAT. ANN. § 13-4606(A) (Supp. 1995); CAL. WELF. & INST. CODE § 6604 (West Supp. 1996); KAN. STAT. ANN. § 59-29a07(a) (Supp. 1995); WASH. REV.
individual in question suffers from some type of mental abnormality or 
disorder, which is commonly defined as "a congenital or acquired condition 
affecting the emotional or volitional capacity" that predisposes him to 
commit sexually violent acts. Washington, Kansas, Minnesota, and 
Arizona also expressly recognize "personality disorders" as sufficient bases 
for commitment, but provide no definition of that term.

In defining the unique mental impairment suffered by sexual predators, 
Washington, Kansas, and Arizona noted the insufficiency of statutory 
criteria otherwise applicable to individuals facing involuntary civil commit-
ment in those states:

The legislature finds that a small but extremely dangerous group of 
sexually violent predators exist who do not have a mental disease or 
defect that renders them appropriate for the existing involuntary treatment 
act . . . . In contrast to persons appropriate for civil commitment under 
[that statute], sexually violent predators generally have antisocial person-
ality features which are unamenable to existing mental illness treatment 
modalities and those features render them likely to engage in sexually 
vioent behavior.

CODE ANN. § 71.09.060(1) (West Supp. 1996); WIS. STAT. ANN. § 980.05(3)(a) (West Supp. 1995). However, not all modern statutes operate in this manner. Minnesota's "sexually 
dangerous person" provisions speak neither of criminal charges nor convictions, requiring 
instead proof of "a course of harmful sexual conduct" by clear and convincing evidence. MINN. STAT. ANN. § 253B.02(18)(b)(a) (West Supp. 1996). In determining the sufficiency 
of the state's evidence in this regard, the court may thus consider prior sexual misconduct not 
resulting in a conviction. See In re Linehan, 544 N.W.2d 308, 312 (Minn. Ct. App. 1996) 
(explaining that "the statute does not require a conviction to establish a rebuttable presumption 
of harmful sexual conduct"). New Jersey has likewise adopted the clear and convincing 
evidence standard for civil commitment of sex offenders at the conclusion of their criminal 

42. ARIZ. REV. STAT. ANN. § 13-4601(1) (Supp. 1995); CAL. WELF. & INST. CODE 
§ 6600(a)-(c) (West Supp. 1996); KAN. STAT. ANN. § 59-29a02(a)-(b) (Supp. 1995); WASH. 
REV. CODE ANN. § 71.09.020(1)-(2) (West Supp. 1996); WIS. STAT. ANN. § 980.01(2) (West 
Supp. 1995). While Minnesota requires proof of a mental disorder or dysfunction, MINN. 
STAT. ANN. § 253B.02(18)(b)(a)(2) (West Supp. 1996), the statute contains no definition of 
these terms.

43. ARIZ. REV. STAT. ANN. § 13-4601(4) (Supp. 1995) (recognizing "mental abnormality 
or personality disorder"); KAN. STAT. ANN. § 59-29a02(a) (Supp. 1995) (same); MINN. STAT. 
ANN. § 253B.02(18)(b)(2) (West Supp. 1996) (recognizing "sexual, personality, or other 
mental disorder or dysfunction"); WASH. REV. CODE ANN. § 71.09.020(1) (West 1992) 
(recognizing "mental abnormality or personality disorder").

44. WASH. REV. CODE ANN. § 71.09.010 (West 1992); see also Sexually Violent 
ANN. § 59-29a01 (Supp. 1995).
In formulating its law authorizing the postincarceration\textsuperscript{45} commitment of sexual predators, New Jersey operated under the premise that certain sexual and other violent offenders "suffer from mental illness which renders them dangerous to others."\textsuperscript{46} The legislature then facilitated sexual predators' detention under the existing civil commitment law by redefining mental illness as "a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, capacity to control behavior or capacity to recognize reality."\textsuperscript{47}

Based on the belief that psychiatrists had too often interpreted the unamended definition as requiring the presence of psychosis,\textsuperscript{48} which is absent in most sex offenders, the new version of the New Jersey statute expressly removed any such requirement in determining the existence of mental illness.\textsuperscript{49} Faced with a definition of mental illness similar to that of the unamended New Jersey statute,\textsuperscript{50} Wisconsin chose instead to pattern its statute after Washington's statute by specifying a separate disorder relating to sexual predation. New Jersey lawmakers rejected this option, avoiding the use of the uncertain terminology of "mental abnormality."\textsuperscript{51}

\begin{thebibliography}{99}
\bibitem{45} N.J. STAT. ANN. § 30:4-27.10(c) (West Supp. 1996).
\bibitem{47} N.J. STAT. ANN. § 30:4-27.2(r) (West Supp. 1994) (emphasis added to denote amended language).
\bibitem{48} Act of Oct. 31, 1994 § 1(c).
\bibitem{50} WIS. STAT. ANN. § 51.01(13b) (West 1987) ("'Mental illness,' for purposes of involuntary commitment, means a substantial disorder of thought, mood, perception orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.").
\end{thebibliography}
At present, therefore, sexual predators face civil commitment in a number of jurisdictions. Civil commitment usually follows a term of incarceration and is based on a mental defect qualitatively different from that suffered by others subject to involuntary psychiatric detention. In evaluating the legal sufficiency of these formulations, it is important first to look to the U.S. Supreme Court for guidance.

II. The Supreme Court and Involuntary Commitment from Pearson to Foucha

From 1940 to 1992, the Supreme Court decided a number of cases addressing the constitutional parameters of involuntary psychiatric commitment, some in the context of sexual predator statutes. Viewed in the aggregate, these cases do not suggest any constitutional infirmity among the current crop of sexual predator statutes. Replete with procedural safeguards, the current laws instead represent permissible civil detention vindicating the states' strong interest in confining and treating dangerous, mentally disordered individuals in a therapeutic environment for the protection of society.

Pearson v. Probate Court,52 which upheld Minnesota's "psychopathic personality" statute against due process and equal protection challenges, was the Supreme Court's first opportunity to consider the psychiatric commitment of sexual predators. In a unanimous opinion, the Court rejected the argument that the statute was impermissibly vague, finding that its three elements — a habitual course of misconduct in sexual matters, an utter lack of power to control sexual impulses, and a likelihood of future harm — "are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime."53 The Justices likewise found no equal protection violation, noting that a legislature may legitimately determine that certain classes of individuals pose greater risks of public harm and may single out these individuals for harsher treatment.54 Finally, the Court held that the procedural safeguards provided — including a hearing, the right to counsel, and the compulsion of witnesses on the respondent's behalf — are sufficient to satisfy due process.55

A series of Supreme Court opinions, beginning in the mid-1960s with Baxstrom v. Herold,56 suggested the existence of certain procedural requirements attendant to the commitment of sexual predators, particularly those

52. 309 U.S. 270 (1940).
54. Id. at 274-75.
55. Id. at 275-77.
previously convicted of sexual or other crimes. In *Baxstrom*, the Court struck down a New York statute that allowed the psychiatric commitment of prisoners at the end of their sentences without, *inter alia*, jury review, which was available in all other civil commitments. In so holding, the Court rejected the argument that past criminal conduct demonstrated a sufficient need for continued confinement to justify the deprivation of procedural safeguards.

Citing the stigmatization that accompanies mental health commitment, the Justices likewise invalidated a Nebraska statute that authorized the transfer of an allegedly mentally ill inmate serving his criminal sentence to a psychiatric facility for involuntary inpatient treatment without procedural protections such as notice, a hearing, and the right to call and to confront witnesses. Similarly, in *Specht v. Patterson*, the Court found that Colorado could not indefinitely commit convicted sex offenders in lieu of sentencing without first providing a range of due process protections, including the right to counsel.

Indeed, while it may be acceptable to provide fewer procedural safeguards when detention is brief, indeterminate commitment "cannot rest on procedures designed to authorize a brief period of observation." For example, in *Humphrey v. Cady* the Justices questioned, as a matter of equal protection, the permissibility of denying jury review to convicted sex offenders facing commitment to a "sex deviate facility" in lieu of sentencing, when all others facing involuntary civil commitment were afforded the right to jury review. The Court left open the possibility, however, that "some special characteristic of sex offenders . . . may render a jury determination uniquely inappropriate or unnecessary."

It is clear from the foregoing jurisprudence that to pass constitutional muster, sexual predator statutes that authorize indefinite commitment, particularly of offenders who have already completed their criminal sentences, must provide extensive due process protections mirroring those otherwise

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58. *Id.* at 114.
60. 386 U.S. 605 (1967).
63. 405 U.S. 504 (1972).
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provided to civil committees. In fact, most state statutes provide, in virtually all respects, identical or greater procedural safeguards. For example, whereas most sexual predator statutes require proof beyond a reasonable doubt that an individual is eligible for commitment, involuntary civil commitment is governed by the clear and convincing evidence standard. Jury review is likewise available in sexual predator proceedings in jurisdictions whose commitment process for mentally ill persons so provides, with Arizona extending the right in sexual predator hearings only. At such proceedings, moreover, individuals facing commitment receive a panoply of evidentiary benefits, including the right to counsel and the right to petition the committing authority for release at regular intervals.

In addition to providing adequate process, sexual predator commitment statutes must also be nonpunitive in nature. A punitive commitment statute would run afoul of the Double Jeopardy Clause of the U.S. Constitution as applied to those defendants who were convicted or acquitted of the underlying offense. A punitive commitment statute would also violate the Ex

65. See supra note 41.
66. See, e.g., ARIZ. REV. STAT. ANN. § 36-540(A) (West 1993); KAN. STAT. ANN. § 59-2917(h) (1994); MINN. STAT. ANN. § 253B.18(1) (West 1994); WIS. STAT. ANN. § 51.20(13)(e) (West 1987); see also Addington v. Texas, 441 U.S. 418, 433 (1979) (specifying that criteria for civil commitment must be satisfied by clear and convincing evidence).
69. See, e.g., CAL. WELF. & INST. CODE § 6603(a) (West Supp. 1996); KAN. STAT. ANN. § 59-29a06 (1994); MINN. STAT. ANN. § 253B.03(9) (West 1994); N.J. STAT. ANN. § 30:4-27.12(d) (West Supp. 1996); WIS. STAT. ANN. § 980.03(2a)-(d) (West Supp. 1995).
70. See, e.g., ARIZ. REV. STAT. ANN. § 13-4609 (stating that sexual predators have right to petition court annually for release); CAL. WELF. & INST. CODE §§ 6605, 6608 (explaining that sexual predators have right to petition every year for release, but hearing may not be granted until expiration of one-year period of commitment); KAN. STAT. ANN. § 59-29a08 (1994) (same); WASH. REV. CODE ANN. § 71.09.090(2) (West Supp. 1996) (same).
71. The Double Jeopardy Clause precludes successive prosecutions or successive punishments for the same offense after an acquittal or an undisturbed conviction. Offenses are the "same" unless each contains an element not included in the other. See United States v.
Post Facto Clause as applied to conduct that occurred prior to the statute's enactment. In this regard, the Supreme Court noted in *Specht* that, unlike the Minnesota "psychopathic personality" statute at issue in *Pearson*, the Colorado Sex Offenders Act prescribed "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." In so characterizing the Colorado statute, the Court cited the "broad powers" of the Board of Parole over the committed offender, as well as the application of probationary provisions.

With the exception of the Arizona law, all statutes award custody of committed sexual predators to state mental health authorities which are responsible for securing appropriate institutional placements. However, in light of the Court's more recent decision in *Allen v. Illinois*, Arizona's assignment of responsibility for sexual predators to corrections officials is insufficient to render detention punitive in nature, even though the commit-

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Dixon, 509 U.S. 688, 696 (1993); Blockburger v. United States, 284 U.S. 299, 304 (1932); see also United States v. Ursery, 116 S. Ct. 2135, 2140 (1996) (stating that civil forfeiture is not punishment for double jeopardy purposes). Therefore, when punitive commitment as a sexually violent predator is predicated on a previous conviction or insanity acquittal for a sex offense, double jeopardy is offended. Double jeopardy is not implicated in the case of incompetent defendants, however, because no prior adjudication would have taken place. United States v. Jorn, 400 U.S. 479 (1991) (noting that jeopardy does not attach prior to "trial before the trier of facts").


74. *Id.* at 609 n.1.

75. See CAL. WELF. & INST. CODE § 6604 (listing "State Department of Mental Health"); KAN. STAT. ANN. § 59-29a07(a) (naming "secretary of social and rehabilitative services"); MINN STAT. ANN. §§ 253B.02(3), .18(1) (West 1994) (granting authority to "Minnesota Security Hospital, a regional center designated by the commissioner [of human services] or to a treatment facility"); N.J. STAT. ANN. §§ 30:4-27.10(h), .15(a) (West Supp. 1996) (investing custody in state forensic hospital after final hearing); WASH. REV. CODE ANN. § 71.09.060(1) (investing authority in state "department of social and health services"); WIS. STAT. ANN. §§ 980.01(1), .06(1) (West Supp. 1994) (giving authority to "department [of health and social services]"). But see ARIZ. REV. STAT. ANN. § 13-4606(B) (investing authority in state department of corrections).

ment proceedings are cloaked in many of the procedural safeguards attendant to criminal prosecutions.

In *Allen*, the petitioner challenged his commitment under Illinois’s Sexually Dangerous Persons Act (Act).\(^7\) In support of his argument that proceedings under the Act were "criminal" within the meaning of the constitutional guarantee against compulsory self-incrimination,\(^7\) Allen pointed to the manifold criminal safeguards provided, including the prosecution’s burden of proving sexual dangerousness beyond a reasonable doubt, and the rights to counsel, jury trial, and confrontation and cross-examination of witnesses.\(^7\) The Court was not convinced, concluding that "the State has indicated quite clearly its intent that these commitment proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there."\(^8\) The Act’s assignment of sexual predators to a maximum-security psychiatric facility housing nonsexually dangerous prisoners in need of mental health services also failed to persuade the Court, because a statute is not rendered punitive simply by virtue of a state’s decision to "supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens."\(^9\)

The following year, in *United States v. Salerno,*\(^8\) the Court went even further, noting that preventing danger to the community is a legitimate regulatory goal that in and of itself justifies the infringement of liberty attendant to pretrial detention,\(^8\) provided the incidents of detention are not excessive in relation to that goal.\(^8\) Paramount among the incidents noted by the Court as bolstering the sufficiency of such confinement as a matter

77. See supra text accompanying notes 23-24.
78. The alleged constitutional deprivation was based on the introduction of testimony at Allen’s commitment hearing from two psychiatrists who had evaluated him by court order, as provided in the Act. Allen v. Illinois, 478 U.S. 364, 368 (1986).
79. Id. at 371.
80. Id. at 372.
81. Id. at 373.
83. At issue was the Bail Reform Act of 1984, which allows federal courts, pursuant to a finding that "no release conditions 'will reasonably assure . . . the safety of any other person and the community,'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (quoting Bail Reform Act of 1984, 18 U.S.C. § 3142(f) (1994)), to order the detention, pending trial, of arrestees of certain serious felonies, such as crimes of violence, offenses where the death penalty or a life sentence may be imposed, and serious drug offenses. 18 U.S.C. § 3142(f).
84. *Salerno*, 481 U.S. at 747.
of substantive due process were the "stringent time limitations" of the detention,\textsuperscript{85} the provision of extensive procedural safeguards,\textsuperscript{86} and a narrow focus "on a particularly acute problem in which the government interests are overwhelming."\textsuperscript{87}

Considered together, \textit{Allen} and \textit{Salerno} confirm that, on its face, the detention prescribed by a sexual predator statute is not impermissibly punitive. Even if the law's inspiration was in large part the protection of society\textsuperscript{88} and sexual predator proceedings incorporate many attributes of criminal trials,\textsuperscript{89} these factors do not defeat the statutes' regulatory purpose when psychiatric treatment is in fact required and release is mandated if the mental disorder producing criminality is alleviated. Indeed, California expressly disavows any punitive purpose,\textsuperscript{90} while Kansas explains its need for separate detention procedures "for the long term care and treatment" of sexual predators in light of the poor prognosis for rehabilitation in the prison setting.\textsuperscript{91} All statutes provide, moreover, for periodic review of the commitment decision and extend a full range of evidentiary protections.\textsuperscript{92}

\textsuperscript{85} \textit{See id.} (noting durational limitations imposed by Speedy Trial Act); \textit{see also} Foucha v. Louisiana, 504 U.S. 71, 82 (1992) (noting that detention found constitutionally permissible in \textit{Salerno} was "strictly limited in duration").

\textsuperscript{86} For example, defendants subject to detention are provided an adversary hearing with the right to counsel, the right to testify and to present information on their behalf, and the right to confront and cross-examine witnesses. The government must, in addition, prove eligibility for commitment by clear and convincing evidence. \textit{Salerno}, 481 U.S. at 751-52.

\textsuperscript{87} \textit{Id.} at 750.


\textsuperscript{89} \textit{See supra} text accompanying notes 66-70.

\textsuperscript{90} \textit{See Act of Oct. 10, 1995, ch. 762, 1995 Cal. Legis. Serv. 4604, 4605 (West); Act of Oct. 10, 1995, ch. 763, 1995 Cal. Legis. Serv. 4610, 4611 (West) ("It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes.").

\textsuperscript{91} KAN. STAT. ANN. § 59-29a01 (1994).

\textsuperscript{92} \textit{See supra} notes 66-70. In \textit{Young v. Weston}, 898 F. Supp. 744 (W.D. Wash. 1995), the court found, conversely, that Washington's sexual predator statute was punitive, noting that it provided for more limited review than the Illinois statute, applied "to behavior that it is already criminal," and promoted retribution and deterrence — "the traditional aims of punishment." \textit{Id.} at 752. As \textit{Allen} makes clear, however, the fact that this legislation may be motivated by the need to protect society is not sufficient to render it punitive when other indicia of regulatory detention — psychiatric treatment and custody decisions placed
The characterization of sexual predator statutes as nonpunitive is necessary, but not sufficient, to ensure their constitutionality as a matter of substantive due process. In addition, there is the issue of whether a state may, in fact, commit individuals to psychiatric institutions as sexual predators, as that term is defined in these statutes. Resolving this inquiry requires a determination of the substantive requirements of involuntary commitment as applied in this particular context.

In *O'Connor v. Donaldson*, the Supreme Court held that the state lacks a constitutional basis for involuntary civil commitment when an individual is mentally ill but is "dangerous to no one and can live safely in freedom." Later, in *Addington v. Texas*, the Justices further specified that a state must satisfy its commitment criteria by clear and convincing evidence. Read together, these cases have been viewed as requiring the state to prove present mental illness and dangerousness by clear and convincing evidence to justify involuntary psychiatric commitment initially.

However, the Court has permitted limited departures from this standard when the state seeks to detain involuntarily criminal defendants that are incompetent to stand trial or that have been found not guilty by reason of insanity. In *Jackson v. Indiana*, for example, the Court permitted the detention of incompetent defendants for a "reasonable period of time" to assess and achieve fitness for trial, a prescription that has resulted in relatively long-term confinement with no application of the standards otherwise attendant to involuntary psychiatric commitment. Likewise, in *Jones v.*

in the hands of noncorrectional personnel — are present. The fact, moreover, that review may be annual as opposed to semi-annual and provide less than an automatic right to a full evidentiary hearing is hardly evidence of a punitive purpose; on the contrary, incarceration is not subject to periodic reconsideration at all. See *In re Young*, 857 P.2d 989, 996-1000 (Wash. 1993) (en banc) (finding statute nonpunitive for purposes of Ex Post Facto and Double Jeopardy Clauses).

95. 441 U.S. 418 (1979).
United States, the Court sanctioned automatic psychiatric commitment following an insanity acquittal, reasoning that the jury verdict established both "concrete evidence" of dangerousness and a presumption of continuing mental illness sufficient to justify detention. "This holding," the Court reasoned, "accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment."  

Foucha v. Louisiana tested the limits of the Jones Court's distinction between ordinary and "special" civil commitment, as the Court assessed the constitutionality of a Louisiana statute allowing the indefinite commitment of insanity acquittees who had regained mental health, but were unable to demonstrate by a preponderance of the evidence that they were no longer dangerous. In a five-to-four decision, the Justices struck down the law on substantive and procedural due process grounds, noting that an insanity acquittee may be held in a psychiatric facility "as long as the acquittee is both mentally ill and dangerous, but no longer." Accordingly, the petitioner, who suffered from an "antisocial personality," was deemed ineligible for further psychiatric detention because the state did not contend that his condition constituted mental illness.

While it may seem at first blush that Foucha requires present mental illness and dangerousness for continued psychiatric commitment of insanity

103. Id. at 370.
105. The term "special commitment" was proffered by the ABA to describe the separate civil commitment procedures it recommended, in the wake of Jones, for insanity acquittees and permanently incompetent defendants whose detention, by virtue of their alleged or proven criminality, "differs fundamentally from compulsory civil commitment of free persons." ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.10 commentary at 224 (1984); see also Gerald Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 GEO. WASH. L. REV. 375, 412 (1985); Elyce H. Zenoff, Controlling the Dangers of Dangerousness: The ABA Standards and Beyond, 53 GEO. WASH. L. REV. 562, 574-78 (1985).
107. Id. at 78.
108. Id. at 78, 80. Four Justices voted to invalidate the statute on equal protection grounds based on its prescription of psychiatric commitment on less than clear and convincing evidence of insanity and dangerousness. Id. at 85-86. While Justice O'Connor felt it unnecessary to reach the equal protection issue, she commented that "the permissibility of holding an acquittee who is not mentally ill longer than a person convicted of the same crimes could be imprisoned is open to serious question." Id. at 88 (O'Connor, J., concurring in part and concurring in judgment).
acquittees, this is not the case. Justice O'Connor, who provided the crucial
fifth vote invalidating the statute, explained in a concurring opinion that she
"d[id] not understand the Court to hold that Louisiana may never confine
dangerous insanity acquittees after they regain mental health." 109 Detention
is appropriate, Justice O'Connor reasoned, provided that two conditions are
met: First, the nature and duration of the detention must "reflect pressing
public safety concerns related to the acquittee's continued dangerous-
ness." 110 Second, "some medical justification" must exist. 111 That is, an
individual may be mentally "healthy," yet suffer from some mental disabil-
ity such that it is medically appropriate to confine him in a psychiatric
hospital.

The juxtaposition of mental illness with medical conditions justifying
special commitment is at odds with Justice White's majority opinion in
Foucha that rejected the involuntary psychiatric confinement of nonmentally
ill acquittees. 112 Justice O'Connor indicated, by the same token, that she
would draw this distinction for all purposes. She noted, for example, that
the "strong" liberty interest of a nonmentally ill acquittee "might well
outweigh" the state's interest in confinement when the only evidence of
dangerousness is the commission of a "nonviolent or relatively minor
crime." 113 But, the state's greater regulatory interest combined with the

109. Id. at 87 (O'Connor, J., concurring in part and concurring in judgment).
110. Id. at 87-88 (O'Connor, J., concurring in part and concurring in judgment).
111. Id. at 88 (O'Connor, J., concurring in part and concurring in judgment). While
Justice O'Connor did not specify what constitutes a valid medical justification, her require-
ment of a "connection between the nature and purposes" of confinement suggests that the
state must provide, at the very least, appropriate treatment for the condition or disorder for
which the acquittee is confined. Id. On this basis, the Supreme Court of Wisconsin
permitted the continued detention of an insanity acquittee, who while no longer mentally ill,
suffered from unspecified mental and behavioral disorders, when the state provided treat-
ment programs designed to reduce his associated aggression, hostility, and impulsiveness. See State v. Randall, 532 N.W.2d 94, 96, 100, 107 (Wis. 1995).

112. For example, in concluding that Foucha's lack of mental illness necessitated his
release, Justice White quoted Jones for the proposition that psychiatric confinement is
permissible "until such time as he has regained his sanity or is no longer a danger to himself
or society." Foucha, 504 U.S. at 77-78 (quoting Jones v. United States, 463 U.S. 354, 370
(1983)). Justice White further noted that even if psychiatric commitment were permissible
based on the petitioner's antisocial personality, detention would be "improper absent a
determination in civil commitment proceedings of current mental illness and dangerousness." 
Id. at 78.

113. Id. at 88 (O'Connor, J., concurring in part and concurring in judgment). Courts
and commentators have not argued nor does this Article contend that nonviolent acts of
sexual predation would constitute the type of "relatively minor" crimes contemplated by
Justice O'Connor. Most modern sexual predator commitment statutes require proof of the
diminished privacy interest of those who undertake criminal acts may justify lesser commitment standards for insanity acquittees than those applicable to law-abiding persons.

For four Justices, the civil commitment standard of present mental illness and dangerousness should be applied consistently to all persons facing long-term, involuntary psychiatric commitment; the four dissenting Justices, by contrast, contend that the refusal to draw a distinction between those who have committed crimes and those who have not committed crimes attempts an end-run around Jones, which they believe confirms the constitutional sufficiency of the Louisiana statute. Justice O'Connor has adopted a middle ground of sorts, recognizing the dissenters' distinction between those who have committed crimes and those who have not, but invalidated the Louisiana statute without "pass[ing] judgment on more narrowly drawn laws that provide for detention of insanity acquittees."

III. The Confusion Below

Unsurprisingly, lower courts have struggled to decipher Foucha's constitutional mandate with respect to the necessity of mental illness as a predicate for continued special commitment. This issue has particular resonance for sexual predator statutes that permit indefinite detention based on a mental abnormality predisposing individuals towards criminal acts of sexual predation. So far, the Supreme Courts of Washington and Wisconsin, as well as lower courts in Minnesota and California, have commissioned a sexually violent offense. See supra text accompanying notes 36-39; infra text accompanying note 181.

114. See Foucha, 504 U.S. at 94 (Kennedy, J., dissenting); id. at 108 (Thomas, J., dissenting). There were two dissents filed, one written by Justice Thomas, in which Chief Justice Rehnquist and Justice Scalia joined, and the other authored by Justice Kennedy and joined by the Chief Justice. Of the five Justices in the majority, two — Justice White, who wrote the opinion, and Justice Blackmun — have retired.

115. Id. at 86-87 (O'Connor, J., concurring in part and concurring in judgment).

116. See supra text accompanying notes 43-44. Inasmuch as sexual predator statutes address insanity acquittees, incompetent defendants, and criminal convicts, "special" as opposed to "ordinary" civil commitment procedures may apply. See also Jones v. United States, 463 U.S. 354, 370 (1983); supra text accompanying note 103.

117. See In re Young, 857 P.2d 989, 1018 (Wash. 1993) (en banc) (finding that statute does not violate Ex Post Facto Clause, Double Jeopardy Clause, or Due Process Clause).

118. See State v. Post, 541 N.W.2d 115, 118 (Wis. 1995) (rejecting due process and equal protection challenges to statute); State v. Carpenter, 541 N.W.2d 105, 107 (Wis. 1995) (rejecting ex post facto and double jeopardy claims).

119. In re Linehan, 544 N.W.2d 308, 316-19 (Minn. Ct. App. 1996), addresses the "sexually dangerous person" classification of the Minnesota statute. Id. Two years earlier,
found their states' laws to be constitutional. On the other hand, a federal district court in Washington struck down its sexual predator statute as violative of Foucha, as did the Supreme Court of Kansas, whose decision the U.S. Supreme Court has agreed to review during the 1996-97 term.

Because the Kansas statute was patterned after Washington's statute, the Weston and Hendricks courts addressed substantially similar legislation. The courts' substantive due process analysis was complementary, each finding that Foucha required present mental illness to justify ongoing commitment and that a "personality disorder" or "mental abnormality" did not satisfy this standard. Mental abnormality, the Weston court opined, "has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals" and, as with the term "personality disorder," employs "a circular definitional structure in which the only observed characteristic of the disorder is the predisposition to commit sex crimes."

Like Hendricks and Weston, the court in Young read Foucha as requiring present mental illness to justify psychiatric commitment, but held that mental abnormalities and personality disorders are sufficient in this regard because the legislature's definition "incorporates a number of recognized

in In re Blodgett, 510 N.W.2d 910, 912-17 (Minn. 1994), the state supreme court upheld the constitutionality of the then-existing "psychopathic personality" classification. Id. However, the "sexual psychopathic personality" designation that replaced it in 1994 is merely a codification of the standard applicable to the former in the wake of Pearson. See Katherine P. Blakey, Note, The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise Between "Mad" and "Bad" — A Study of Minnesota's Sexual Psychopathic Personality Statute, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 291-92 (1996).


121. The New Jersey Supreme Court also recently upheld the involuntary commitment of a sexual predator under that state's amended definition of mental illness. See In re D.C., 679 A.2d 634, 648-49 (N.J. 1996); see also supra text accompanying notes 48-50. In so doing, the court characterized the legislature's actions as merely "clarifying" the mental illness standard of civil commitment, a process that "does not change the balance of considerations that must be weighed in the involuntary commitment determination." D.C., 679 A.2d at 648-49.


mental pathologies." The Young court further held that when the definition does not include various mental pathologies, clinicians may legitimately "identify sexual pathologies that are as real and meaningful as other pathologies already [recognized]." Likewise, Blodgett held that, because a "'psychopathic personality' is an identifiable and documentable violent sexually deviant condition or disorder," it satisfies Foucha's mental illness requirement, even though it is not a separate diagnostic category in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM).

The Post court agreed that the mental disorders specified under Wisconsin's sexual predator statute were sufficient under Foucha, noting that "the Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments." Unlike the foregoing decisions, however, the Post court eschewed reliance on the term "mental illness," emphasizing its lack of "talismanic significance" in Supreme Court precedent. Instead, in its substantive due process analysis, the Post court focused on the standard of Justice O'Connor's concurrence in Foucha, deeming the "medical justification" standard satisfied by the state's provision of appropriate therapeutic intervention for sex offenders, and on the statute's narrow construction, which reached only those sex offenders who have been "diagnosed with a disorder that has the specific effect of predisposing them to engage in acts of sexual violence."
The Post court also rejected the claim that the petitioner’s confinement was unconstitutional under Foucha because the commitment was indefinite and based on the diagnosis of antisocial personality disorder. Indeterminate detention is permissible, the court reasoned, when the duration of confinement is linked to the patient’s treatment through periodic mental examinations designed to gauge his progress.\[^{136}\] The court understood, moreover, that the impropriety of Foucha’s commitment was a function of the state’s concession that Foucha "was neither mentally ill nor was his condition treatable"; Wisconsin, by contrast, commits only those sexual predators who have a mental disorder that the state intends to treat.\[^{137}\]

Various courts have considered the sufficiency of personality disorders as evidence of mental illness under Foucha when addressing procedures providing for the ongoing commitment of insanity acquittees. The Tenth Circuit, for example, framed the inquiry in terms of whether an individual’s personality disorder "fits a constitutionally valid legal definition," as opposed to whether the individual is "ill in the medical sense."\[^{138}\] Thus, because the examining psychiatrists agreed that the petitioner’s antisocial personality disorder met the statutory requirement of an "abnormal mental condition," the petitioner’s continued commitment was valid under Foucha.\[^{139}\]

The District of Columbia Circuit Court of Appeals has likewise rejected the argument that personality disorders are insufficient when this category of mental impairment does not qualify for the insanity defense, noting that Foucha requires only that continued special commitment "bear ‘some reasonable relation’ to the purpose for which the individual was initially committed."\[^{140}\] The Supreme Court of Idaho also has permitted continued detention based on a personality disorder when the same condition led to the petitioner’s insanity acquittal in the first place; independent civil commitment proceedings were necessary only if and when the original basis for commitment had disappeared.\[^{141}\]

\[^{136}\] Id. at 127.
\[^{137}\] Id.
\[^{139}\] Id. at 1478. Three weeks later, a state appellate court relying on Parrish further held that Foucha permits continued commitment based on an antisocial personality disorder provided that the individual "remains under the effects of a treatable abnormal mental condition rendering him or her dangerous and such person continues to receive appropriate treatment for that abnormality." People v. Jones, No. 94-CA-1470, 1996 WL 282291, at *2 (Colo. Ct. App. May 30, 1996).
\[^{141}\] In re Nielsen, 902 P.2d 474, 476-77 (Idaho 1995).
In State v. Perez, the Louisiana Supreme Court held that Foucha did not mandate release of a schizophrenic acquittee presently in remission from mental illness due to drug therapy. The court explained that "synthetic" sanity does not remove an individual's "underlying psychological disorder and need for continuing care." Such reasoning is not only difficult to reconcile with the plain meaning of "present" mental illness, it has troubling implications for the ability of special committees suffering from psychotic disorders ever to gain release.

IV. Eliminating the Confusion

The foregoing discussion highlights the uncertainty and confusion surrounding the permissible scope of involuntary commitment for sexual predators and others linked to prior criminal activity. This problem emanates essentially from two sources: (1) the Supreme Court's lack of guidance as to what constitutes a "mental illness" sufficient to justify involuntary psychiatric commitment; and (2) Foucha's splintered reasoning as to whether this standard is relaxed when applied to individuals with alleged or proven criminality.

In Part IV, I will endeavor to navigate out of the confusion by delineating psychiatric standards for the involuntary commitment of sexual predators that reflect a proper understanding of Supreme Court case law, as well as the purposes of this special form of detention. In so doing, I will illustrate the constitutional sufficiency of current sexual predator laws and will respond to the specific criticisms lodged against them. Before this undertaking, it is important first to determine the appropriate framework for constitutional analysis.

A. Resolving the Scrutiny Problem

A threshold issue in determining the sufficiency of sexual predator statutes from the standpoint of substantive due process and equal protection is the level of scrutiny required. Citing the fundamental liberty interests

142. 648 So. 2d 1319 (La. 1995).
144. While distinctions between these two concepts increasingly have been blurred by the Court, equal protection challenges are based, at least technically, on statutory classifications, whereas due process review relates to restrictions on the liberty of all persons. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.7, at 348-50, § 11.4, at 369 (4th ed. 1991). Due process and equal protection share the same analytical framework. Id. § 11.4, at 371; see also R. Randall Kelso, Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends and Burdens Reconsidered, 33 S.
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implicated in sexual predator commitment proceedings, lower courts generally have applied strict scrutiny.\textsuperscript{145} However, as Justice Thomas noted in \textit{Foucha}, there is no fundamental right to "freedom from bodily restraint" applicable to all persons regardless of the circumstance.\textsuperscript{146} If such a right existed, the Court would not have used less deferential forms of scrutiny when reviewing legislation concerning, for example, pretrial detention\textsuperscript{147} and the custodial detention of alien minors.\textsuperscript{148}

On the other hand, as I have argued elsewhere in the context of insanity acquittees and individuals permanently incompetent to stand trial, U.S. Supreme Court precedent provides strong historical support for the application of midlevel review to laws effecting involuntary psychiatric commitment.\textsuperscript{149} Because the rigor of the Court's heightened scrutiny has varied,\textsuperscript{150} I have advocated a "particularly exacting standard" for involuntary psychiatric commitment, in light of the substantial deprivation of liberty involved


\textsuperscript{146} Foucha v. Louisiana, 504 U.S. 71, 118 (1992) (Thomas, J., dissenting).


\textsuperscript{148} \textit{See} Reno v. Flores, 113 S. Ct. 1439, 1447-49 (1993) (stating that inasmuch as no fundamental right was implicated by regulations providing for involuntary detention of alien minors awaiting deportation proceedings, there need only be "reasonable fit" between government's purpose of protecting welfare of juveniles in its custody and means chosen to advance that purpose).


\textsuperscript{150} For example, in some instances the Court has demanded that a classification be "narrowly drawn," or not substantially more burdensome than necessary to accomplish the state's objectives, whereas in other instances a "reasonable relationship" or "rough proportionality" between means and ends has been sufficient. \textit{See} Cornwell, \textit{supra} note 149, at 678 & nn.123-25. \textit{United States v. Virginia's} requirement of an "exceedingly persuasive justification" in the context of gender-based discrimination constitutes the most relevant evidence of a range of midlevel review. \textit{United States v. Virginia}, 116 S. Ct. 2264, 2274-75 (1996). Chief Justice Rehnquist has labeled this development as unfortunate and instead favors exclusive reliance on the traditional test wherein a classification must bear a "substantial relationship to an important government interest" to pass constitutional muster. \textit{See id.} at 2288 (Rehnquist, C.J., concurring in judgment).
and the political powerlessness and social and cultural isolation faced by class members. This approach is consistent, moreover, with language in both the majority and concurring opinions in Foucha that speak, respectively, of the need for a "particularly convincing reason" for detention and for an appropriate "fit" between the nature and purpose of detention.

A fortiori, sexual predator statutes merit similar scrutiny. Like the foregoing laws allowing involuntary psychiatric commitment, sexual predator statutes prescribe long-term involuntary detention. Moreover, by virtue of the heinousness of their (alleged) misconduct, sexual predators arguably enjoy less political power and more public antipathy than other mentally disordered offenders. Accordingly, the state must proffer an "exceed-

151. See Cornwell, supra note 149, at 679-81.

152. The Foucha majority stated that because "[f]reedom from physical restraint is a fundamental right, the State must have a particularly convincing reason" for committing sane acquittees. Foucha v. Louisiana, 504 U.S. 71, 86 (1992). Although fundamental rights language suggests strict scrutiny, I disagree with those commentators who have suggested that the Court is advocating such review here. See, e.g., James W. Ellis, Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of Foucha v. Louisiana, 15 U. PUGET SOUND L. REV. 635, 645 & n.44 (1992); C. Peter Erlinder, Minnesota's Gulag: Involuntary Treatment for the "Politically Ill," 19 WM. MITCHELL L. REV. 99, 155 & n.330 (1993). A "particularly convincing reason" sounds less demanding than the "compelling state interest" traditionally required in this context. See generally Roe v. Wade, 410 U.S. 113 (1972) (stating that compelling state interest is necessary to justify infringement on fundamental right to privacy); Shapiro v. Thomas, 394 U.S. 618 (1969) (requiring compelling state interest in context of fundamental right to interstate travel). Rather, it seems more akin to the "exceedingly persuasive justification" necessary to support gender-based classifications under the heightened or "skeptical" scrutiny standard. See Virginia, 116 S. Ct. at 2274 (invalidating, on equal protection grounds, exclusion of women from Virginia Military Institute, public institution of higher learning).

153. See Foucha v. Louisiana, 504 U.S. 71, 87-88 (1992) (O'Connor, J., concurring in part and concurring in judgment) (stating that "the nature and duration of detention [must] be tailored to reflect pressing public safety concerns relating to the acquittee's continuing dangerousness"); see also Flores, 113 S. Ct. at 1454 (O'Connor, J., concurring) (noting that confinement in mental hospital implicates individual's "core liberty interest" thereby triggering heightened scrutiny that requires state to demonstrate "sufficiently compelling" reason for its actions).

154. See, e.g., Peter Davis, The Sex Offender Next Door, N.Y. TIMES, July 28, 1996, at 20 (Magazine) (noting that released sex offender "could not be more of an outcast if he were a leper"); Erica Goode, Battling Deviant Behavior, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 74 (noting that even imprisoned sex offenders "are at the bottom of the social totem pole"); Stephen J. Rossetti, The Mark of Cain: Reintegrating Pedophiles, AMERICA, Sept. 9, 1995, at 9 (noting that "child molesters have always been the 'lowest of low' in society, even in prisons"); David van Biema, Burn Thy Neighbor, TIME, July 26, 1993, at 58 (noting that "mass culture and some experts view violent sex offenders as irredeemable monsters").
ingly persuasive justification" for sexual predators' commitment that may circumscribe, in certain respects, the constitutional protections normally available to individuals facing involuntary psychiatric detention.

**B. A Sufficient Mental Impairment**

Under Supreme Court precedent, the state may involuntarily commit individuals to a psychiatric hospital upon proof, by clear and convincing evidence, of mental illness and dangerousness. When the mental illness that serves as a predicate to commitment is clinically recognized, treatable, and characterized by the inability to reason, its constitutional sufficiency is not open to serious question, and this Article accepts that the mental illness provides an "exceedingly persuasive justification" for confinement. However, the purported absence of these attributes in the mental disorder provisions of sexual predator statutes has been widely criticized.

These criticisms are without merit. To constitute a sufficient justification for commitment, the mental impairment specified in sexual predator statutes does not require diagnostic recognitions by the psychiatric community, nor must it be characterized by the inability to engage in rational decision making. The existence, moreover, of a limited right to effective treatment in this context does not invalidate the statutory formulation, in light of advances currently underway in the treatment of sexual predators.

**I. Mental Abnormality**

Critics have attacked the definition of mental abnormality in the sexual predator statutes as both circular and unscientific. I will address each contention in turn.

**a. Circularity**

As noted earlier, sexual predator statutes commonly define a mental abnormality or disorder as "a congenital or acquired condition affecting the emotional or volitional capacity" that predisposes an individual to commit sexually violent acts. This construction, according to Professor Stephen Morse, "collapses all badness into madness" by making "the content of abnormality . . . entirely parasitic on the requirement of 'criminal sexual

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156. *See supra* text accompanying notes 93-97.
157. *See supra* note 42 and accompanying text.
Professor John Q. La Fond agrees, labeling the definition "a pure tautology, conflating both diagnosis and prediction with a single incident of criminal behavior." I agree that this construction predicates the existence of mental abnormality on the commission of acts of sexual violence and, further, that a single criminal act may suffice for this purpose. This construction does not suggest, however, that all individuals who engage in an act of sexual violence will be deemed mentally abnormal by virtue of that act. A jury may alternatively conclude that the offending conduct was the product of a unique set of circumstances unlikely to repeat themselves, as opposed to a genetic or acquired disorder. Consider, for example, the first-time offender who while inebriated sexually assaults a woman because he believed, unreasonably and erroneously, that she wanted to have sex with him. While a jury may find him guilty of sexual assault, it need not necessarily find that his actions stem from pathology since "[n]ot all persons who commit sexually violent crimes... suffer[] from mental disorders, nor are all persons with a mental disorder predisposed to commit [such] offenses." The statutory definition of mental abnormality distinguishes those offenders who suffer from a mental disorder and who are predisposed to commit sexual offenses from all other offenders.

b. The Law and the DSM

Critics further argue that because the mental abnormality or disorder described in these statutes is not found in the DSM, it lacks clinical meaning and cannot serve as the basis for involuntary, psychiatric commitment. This position fails, however, to apprehend important differences

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161. See, e.g., Erlinder, supra note 152, at 141-42; La Fond, supra note 159, at 764; James D. Reardon, Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective, 15 U. Puget Sound L. Rev. 849, 849-50 (1992); Wettstein, supra note 159,
between clinical and legal conceptualizations of mental disease. The DSM is a uniform diagnostic system designed to aid clinicians in identifying and treating individuals beset by functional impairments. Legal definitions of mental illness, by contrast, are not based exclusively on therapeutic needs and vary in accordance with other societal concerns, such as moral responsibility, safety, and fair process. Thus, attempting to graft one system completely onto the other is inappropriate, particularly in light of the Supreme Court's emphatic rejection of "the suggestion that [lawmakers'] power to legislate in this area depends on the research conducted by the psychiatric community."

Relying on the DSM to define legal mental illness is also troubling for other reasons. The manual has gone through several revisions since its initial introduction, with some conditions, such as Premenstrual Dysphoric Disorder (PMDD), added and others, such as homosexuality, deleted.

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164. Jones v. United States, 463 U.S. 354, 364-65 & n.13 (1983) (rejecting argument that legislative presumption of continuing dangerousness following insanity acquittal is unwarranted because psychiatric research does not support predictive value of prior dangerous acts for future dangerousness). Psychiatric predictions of dangerousness have continued to demonstrate limited reliability in the decade following Jones and have failed, despite recent improvements, to achieve accuracy rates in excess of 50%. See Robert Menzies et al., The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence, 18 Law & Hum. Behav. 1, 25 (1994) (noting "dearth of statistically verifiable and clinically operational assessment criteria" of dangerousness and lack of guarantee of significant improvement in future). However, this lack of reliability need not result in limitations on the use of clinical testimony as to future dangerousness, as some have argued. See, e.g., Christopher Slobogin, Dangerousness and Expertise, 133 U. Pa. L. Rev. 97, 148-54 (1984). Rather, the lack of reliability suggests the need for prophylactic procedural protections designed to enhance predictive accuracy. See Cornwell, supra note 149, at 716-17. Sexual predator commitment statutes contain a host of such protections, including jury determinations, periodic review, and the requirement in most jurisdictions of proof beyond a reasonable doubt that an individual is a sexual predator. See supra notes 65-70 and accompanying text.

165. The first edition of the DSM was published in 1952. See DSM-IV, supra note 162, at xvii. The fourth and most current edition, DSM-IV, was introduced in 1994. Id. at xv.

166. PMDD first appeared in the DSM's revised version of the third edition, DSM-III-
Accordingly, an individual may be viewed as having a mental impairment one day and not the next, a result all the more unsettling in light of the political pressures that may bear on a condition’s inclusion in or exclusion from the DSM\textsuperscript{167} and allegations within the psychiatric community that diagnostic categories are as much a reflection of the beliefs and values of the drafters of the manual as they are of scientific data.\textsuperscript{168}

c. Personality and Sexual Disorders

Whether or not a statute expressly refers to personality disorders in defining the mental abnormality necessary for commitment, the importance of such disorders is paramount in the case of sexual predators whose clinical diagnosis is often based on this category of mental dysfunction.\textsuperscript{169} Sexual predators may also suffer from one or more "paraphilies,"\textsuperscript{170} a catchall phrase for various forms of sexual deviancy, including pedophilia.\textsuperscript{171} While personality and sexual disorders are included in the DSM, various courts and commentators have contended that such disorders do not constitute present mental illness under \textit{Foucha} and, hence, cannot justify involuntary psychiatric detention.\textsuperscript{172}

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\textsuperscript{167} See Brooks, supra note 160, at 731-33 (illustrating political considerations contributing to exclusion of "pathologically driven rape" from DSM-III-R).

\textsuperscript{168} See \textit{Caplan}, supra note 166, at 85.

\textsuperscript{169} See \textit{In re} Blodgett, 510 N.W.2d 910, 912 (Minn. 1994) (recognizing polysubstance abuse and antisocial personality disorder); \textit{In re} Linehan, 544 N.W.2d 308, 313 (Minn. Ct. App. 1996) (naming antisocial personality disorder); see also Hammel, supra note 161, at 808 (noting that antisocial personality disorder is most common diagnosis of sex offenders). Various state legislatures have acknowledged the primacy of antisocial personality disorders in authorizing the commitment of sexual predators. See supra text accompanying note 44 (explaining that sexual predators have "antisocial personality features," as opposed to "mental disease or defect that [would] render[] them appropriate for the existing involuntary treatment act").

\textsuperscript{170} DSM-IV defines paraphilias, in significant part, as "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving . . . the suffering or humiliation of oneself or one's partner, or . . . children or other nonconsenting persons, that occur over a period of at least six months." DSM-IV, supra note 162, at 522-23.


\textsuperscript{172} See, e.g., \textit{Young} v. Weston, 898 F. Supp. 744, 750 (W.D. Wash. 1995) (asserting that antisocial personality disorder or other personality disorders "falling short of mental
However, Justice White’s opinion in *Foucha* on which critics rely, does not expressly exclude detention based on personality disorders. Under Justice White’s reasoning, Terry Foucha’s commitment was impermissible not because of the inadequacy of an antisocial personality disorder as evidence of present mental illness, but rather because the state conceded that Foucha was not mentally ill and mental illness was necessary to continue to confine him in a psychiatric institution.

Reliance on Justice White’s reasoning is misplaced, at any rate, because Justice O’Connor, who provided the crucial fifth vote for the majority, would not require present mental illness to justify commitment, and she is joined, for this purpose, by the four dissenting Justices, all of whom remain

illness” are insufficient under *Foucha*; *Hendricks*, 912 P.2d at 137-38 (noting that pedophilia does not satisfy *Foucha’s* requirement of present mental illness); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL’Y & L. 534, 545, 576-77 (1995) (concluding that personality and sexual disorders are not mental illnesses justifying commitment under *Foucha*); see also Erlinder, *supra* note 152, at 141-42, 154 (suggesting that antisocial personality disorder is not mental illness, which *Foucha* requires for involuntary psychiatric commitment); La Fond, *supra* note 159, at 761 (stating that personality disorders are insufficient basis for commitment under *Foucha*).

173. *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992) (“Louisiana does not contend that Foucha was mentally ill at the time of the trial court’s hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis.”).

174. If personality disorders constitute present mental illness, the psychiatric commitment of sexual predators is clearly appropriate based on proof, by clear and convincing evidence, that sexual predators suffer from such a disorder and are presently dangerous. See *Jones v. United States*, 463 U.S. 354, 362-63 & n.10 (1983). Some commentators have suggested that *Foucha* rejects antisocial personality disorder as a basis for commitment "as a matter of constitutional law." See La Fond, *supra* note 159, at 762 (interpreting *Foucha* as establishing a "categorical conclusion that 'personality disorder' and 'antisocial personality disorder' do not constitute mental illness"); see also Winick, *supra* note 172, at 544. However, this theory would call into serious question the Court’s earlier decision in *Pearson*, which upheld a Minnesota "psychopathic personality" statute that contained a mental impairment requirement amounting to a limited form of this condition. See *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994) (discussing nexus between psychopathic personality and antisocial personality disorder). The *Foucha* Court’s failure to signal any erosion in *Pearson’s* vitality suggests, at the very least, a disinclination to decide the sufficiency of this disorder. See Brooks, *supra* note 160, at 728 (noting *Pearson’s* implicit support for commitment on basis of antisocial personality disorder). Professor Erlinder, on the other hand, questions *Pearson’s* current validity by arguing that it is the only Supreme Court case "upholding involuntary [mental health] commitment without any finding of mental illness." Erlinder, *supra* note 152, at 122. However, Erlinder’s position fails to take account of the Court’s recognition that differences between individuals with psychopathic personalities and others facing involuntary commitment may justify the imposition of different standards. See *supra* text accompanying notes 93-108.
on the Court today. By the same token, Justice O'Connor's adoption of a "medical justification" standard for ongoing psychiatric detention is not shared by the dissenters, who would permit psychiatric detention based on dangerousness alone. Still, as the "least common denominator" commanding a five-Justice majority, "medical justification" becomes the de facto legal standard of Foucha.

Accordingly, Foucha permits the commitment of individuals suffering from sexual and personality disorders, provided there is a medical justification for their confinement in a psychiatric facility, coupled with present dangerousness and an adjudicative finding of serious criminal conduct. Some sexual predator statutes apply, however, to incompetent defendants or to individuals who have not been charged with a crime, while Illinois's "sexually dangerous person" provisions pertain only to persons with a pending charge. Because the absence of any proven criminality removes incompetents, arrestees, and nondefendants from the umbrella of Foucha, their commitment in the absence of present mental illness is valid only if there is an "exceedingly persuasive" reason for treating them more like individuals convicted or found not guilty by reason of insanity of serious offenses than like others facing involuntary psychiatric detention. Thus, it is important to ask whether, in this context, relaxing the mental illness requirement otherwise applicable in involuntary psychiatric commitment "serves 'important government objectives . . . [and is] substantially related to the achievement of those objectives.'"

With respect to incompetents, all three sexual predator statutes that provide for their confinement require a precommitment hearing in which the state must prove the defendant's factual guilt of a sexually violent offense charged beyond a reasonable doubt, and "all constitutional rights available to defendants at criminal trials, other than the right not to be tried

175. Foucha, 504 U.S. at 87-88 (O'Connor, J., concurring in part and concurring in judgment).
176. Id. at 87 (O'Connor, J., concurring in part and concurring in judgment) (commenting that insanity acquittal "provides 'concrete evidence' of dangerousness" which "sets [insanity acquittee] apart from ordinary citizens" but that it is not "permissible to treat all acquittees alike, without regard to their particular crimes"); see also id. at 76 (noting that insanity verdict "establishes . . . that the defendant committed an act that constitutes a criminal offense") (quoting Jones v. United States, 463 U.S. 354, 363 (1983)); supra note 113.
177. See supra note 39 and accompanying text.
178. See supra note 12 and accompanying text.
179. 725 ILL. COMP. STAT. ANN. 105/3 (West 1996).
while incompetent, shall apply.\textsuperscript{181} Likewise, Illinois requires proof beyond a reasonable doubt that an individual is a "sexually dangerous person," defined in part as someone who has "criminal propensities to the commission of sex offenses [and who has] demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children."\textsuperscript{182} Because commitment is predicated in both instances on a determination, under the standard of proof applicable to criminal prosecutions, that an incompetent or an arrestee has engaged in sexually predatory behavior, these individuals are sufficiently similarly situated to insanity acquittees and criminal convicts to justify the application of like detention procedures.

In Minnesota, however, the state may commit an individual neither charged with nor convicted of a crime upon demonstrating by clear and convincing evidence that he has a "sexual psychopathic personality" or is a "sexually dangerous person."\textsuperscript{183} The District of Columbia's statute specifies no evidentiary burden, stating only that commitment ensues if an individual "is determined to be a sexual psychopath."\textsuperscript{184} These statutory formulations complicate the analogy to convicts and insanity acquittees and call into question whether proof of the risks of re-offending sufficiently outweighs the individual liberty interest.

Notwithstanding these concerns, I believe that clear and convincing evidence of harmful sexual conduct overcomes individual liberty interests such that the state, in light of its undeniably substantial interest in protecting citizens, may specify alternative standards for psychiatric detention of the


\textsuperscript{182} 725 Ill. Comp. Stat. Ann. 205/1.01.

\textsuperscript{183} While these two designations share common features, under the sexually dangerous person designation, "the state need not demonstrate that the person wholly lacks the ability to control his or her sexual impulses." \textit{In re} Linehan, 544 N.W.2d 308, 316 (Minn. Ct. App. 1996). In addition, while the definition of a "sexual psychopathic personality" is silent as to criminality, a conviction for certain sex offenses creates a rebuttable presumption of "harmful sexual conduct" for purposes of committing someone as a "sexually dangerous person." Minn. Stat. Ann. § 253B.02(7)(a), .02(18)(b)(1) (West Supp. 1996).

New Jersey also commits sexual predators with no pending criminal charge upon a demonstration by clear and convincing evidence of their danger to others, which is defined in terms of the infliction of serious bodily harm or causing serious property damage. N.J. Stat. Ann. § 30:4-27.2(0) (West Supp. 1996). However, as discussed above, New Jersey contends that sexual predators are mentally ill by electing to modify the definition of mental illness to include an incapacity "to control behavior." Id. § 30:4-27.2(0). Thus, sexual predators are committed as mentally ill and dangerous under the procedures and standards applicable to all other civil committees.

\textsuperscript{184} D.C. Code Ann. § 22-3508 (Supp. 1996). Case law is no more availing in this regard.
A preponderance-of-the-evidence standard, by contrast, provides insufficient proof of both past and future wrongdoing; potentially indefinite detention precludes resort to an evidentiary burden that allocates the risk of error equally between the individual and the state.  

2. Treatment and Treatability

Apart from the argument that commitment based on personality and sexual disorders violates Foucha, critics further contend that such impairments are an insufficient basis for psychiatric detention because these disorders are not amenable to treatment. This position presupposes both a constitutional right to effective treatment for individuals involuntarily committed to psychiatric facilities and an understanding of the parameters of that right which renders current efforts to treat sex offenders inadequate.

While the Supreme Court has never confronted the treatment issue directly, the Justices have brushed up against it on several occasions. Jackson v. Indiana, for example, proclaimed that the nature of psychiatric commitment must "bear some reasonable relation to its purpose." Ten years later, in Youngberg v. Romeo, the Court held that institutionalized mentally retarded residents have the right to "minimally adequate training . . . as may be reasonable in light of [their] liberty interests in safety and freedom from unreasonable restraints." In finding that Illinois's commitment scheme was not punitive, the Allen Court emphasized the provision of psychiatric treatment to sexually dangerous persons, while the Foucha majority asserted disapprovingly that allowing "a disorder for which there is no effective treatment" to serve as the basis for commitment was "only a step away" from allowing detention based on dangerousness alone.

Viewed in the aggregate, these cases suggest a right to some form of treatment for individuals subjected to involuntary psychiatric commitment.

189. Allen v. Illinois, 478 U.S. 364, 373 (1986) ("[T]he State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.").
190. Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992). Wholly ineffective treatment might likewise provide an insufficient "medical justification" for detention by eroding the "necessary connection between the nature and purposes of confinement." Id. at 88 (O'Connor, J., concurring in part and concurring in judgment).
The constitutional necessity of treatment is particularly acute in the case of sexual predators that have an express statutory entitlement to treatment. As Justice Blackmun argued in *Youngberg*, when the state has based "deprivations of liberty at least partially upon a promise of treatment, [it] ineluctably has committed the community's resources to providing minimal treatment." 

Although *Foucha* suggests that the Court is uncomfortable authorizing involuntary commitment when the prospects for recovery are dim, the Justices have provided no insight into what might constitute minimally adequate or effective treatment. The *Youngberg* majority simply noted that lower courts should "show deference to the judgment of qualified professionals" in this regard. This lack of judicial guidance has, unsurprisingly, produced a wide range of opinions.

For example, while acknowledging that Supreme Court case law indicates a right to treatment, Professor Brooks argues that treatment need not be efficacious, adding that "the goal of the [sexual predator] statute is not primarily treatment." Professor La Fond, on the other hand, reads these


192. *Youngberg*, 457 U.S. at 326 (Blackmun, J., concurring).


195. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, COMMITTEE ON PSYCHIATRY AND LAW, supra note 11, at 929. The Committee notes:

[Some] view adequacy as implying no more than meeting decent standards of bed and board; [others] believe that inadequacy implies not only reliance on generally agreed upon modes of treatment, but also that the required treatment should be carried out by those qualified and experienced in administering the appropriate treatment needed for an individual. Between these poles a continuum of opinion exists about treatment adequacy.

Id.

196. Brooks, supra note 160, at 735. As discussed above, sexual predator statutes, including the Washington statute addressed by Professor Brooks, require the state to provide treatment. See supra text accompanying note 191; see also *In re Young*, 857 P.2d 989, 997 (Wash. 1993) (en banc) (noting that Washington statute requires "care and treatment for the committed individual . . . in a psychiatric facility").
same decisions as requiring "bona fide" treatment, 197 which, whatever it is, is more than Professor Brooks would require. Professor Winick, by contrast, embraces a concept of "therapeutic appropriateness" which suggests that conditions that do not respond to organic (that is, pharmacological) treatment techniques 198 that have become "the hallmark of the modern psychiatric hospital" cannot serve as the basis for involuntary commitment. 199

Although Professor Winick's distinction between drug and other forms of therapy is tenuous, 200 Professor Brooks's suggestion that the efficacy of treatment is irrelevant is likewise specious in light of the Court's references to "adequate training" and "effective treatment" and its desire for congruence between the means and ends of psychiatric commitment. Indeed, if consideration of the effectiveness of treatment was eliminated entirely, state psychiatric hospitals might provide sex offenders with the most minimal and cheapest form of therapeutic intervention necessary to relieve the state's obligation without regard to its impact on the sexual predator's ability ever to gain release. 201 Such a result would render illusory the state's justification for confining sexual predators which is based, in part, on providing psychiatric treatment. 202 Moreover, due process principles do not allow the

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197. La Fond, supra note 159, at 767.
198. See Winick, supra note 172, at 556-67.
199. Id. at 608.
200. Professor Winick relies, for example, on Washington v. Harper, 494 U.S. 210 (1990), and Riggins v. Nevada, 504 U.S. 127 (1992), which concern the parameters of the state's right forcibly to administer antipsychotic medication respectively to convicts and to criminal defendants. Even assuming arguendo that these cases support Winick's proposition that medical intervention is impermissible if the intervention is not therapeutically justifiable, the cases do not even address the psychotherapy, much less distinguish it from other forms of psychiatric intervention.
201. See David W. Burgett, Note, Substantive Due Process Limits on the Duration of Civil Commitment for the Treatment of Mental Illness, 16 HARV. C.R.-C.L. L. REV. 205, 224 (1981) (noting that Jackson's "reasonable relation" requirement would be "empty concept if any benefit, no matter how minuscule, will justify any deprivation of liberty, no matter how great").
202. It would, moreover, convert the confinement of sexual predators into indefinite preventive detention. While the Salerno Court recognized the government's regulatory authority to preventively detain dangerous individuals based solely on the need to protect society, it emphasized the strictly limited duration of such detention under the statute at issue. United States v. Salerno, 481 U.S. 739, 747 (1987). In construing Illinois's sexual predator act as noncriminal, the Allen Court relied on the statute's dual purposes of both protecting society and providing treatment without commenting on the permissibility of predicking regulatory confinement solely on a public safety rationale. Allen v. Illinois, 478 U.S. 364, 373 (1986). It is therefore unclear whether the Court would view a statutory scheme permitting the indefinite preventive detention of sexual predators as excessive in relation to its purpose, and hence punitive. See Salerno, 481 U.S. at 747 (noting that restrictions on liberty are punitive when
transformation of mental health institutions into warehouses for the socially
dangerous.

By the same token, there needs to be a great deal of flexibility in the
determination of what constitutes effective treatment for purposes of justify-
ing commitment. The fact that the therapeutic regimen prescribed for a
certain class of individuals may prove initially disappointing should not
entitle the individuals to release before clinicians have had the opportunity
to enhance and modify the treatment to yield greater gains. Any contrary
policy would not only preclude the commitment of some for whom involun-
tagary detention is appropriate, but it would also risk forestalling progress in
the management of certain seemingly intractable conditions.\footnote{203}

The need for flexibility cannot, however, justify indeterminate, invol-
untary psychiatric detention. At some point, if treatment protocols fail to
produce positive results, treatment ceases to provide a legitimate basis for
commitment that is based, at least in part, on the provision of care and
treatment. This does not mean that therapeutic interventions must result in
the successful management of a majority of those treated — indeed, that
would likely prove an insuperable standard with respect to certain illnesses
or disorders. Instead, there must be either: (1) demonstrable improvement
over a number of years in the proportion of individuals afflicted by a
condition that can gain release into the community; or (2) sufficient commu-
nity re-entry indicative of an acceptable level\footnote{204} of treatment success.\footnote{205}

While the medical community historically has reported poor outcomes
in treatment programs for sex offenders,\footnote{206} recent studies suggest that

\footnote{203. Otherwise, because schizophrenia was generally considered untreatable before the
introduction of psychotropic drugs, see Winick, supra note 172, at 558, schizophrenics would
have been previously ineligible for involuntary commitment, despite both the propriety of
involuntarily confining at least some schizophrenics in an institutional setting and the clini-
cians' need for developing more effective interventions through work with these patients.}

\footnote{204. In making this determination, courts will need to solicit and weigh the testimony of
professionals in the field. While such testimony merits deference, according it presumptive
validity is unwise when clinicians are in essence evaluating the sufficiency of their own
therapeutic interventions. See Youngberg v. Romeo, 457 U.S. 307, 322 (1982); see also
Susan Stefan, Leaving Civil Rights to the "Experts": From Deference to Abdication Under the

\footnote{205. As discussed above, the limited right to effective treatment advocated here is directed
at individuals involuntarily committed for psychiatric treatment. The involuntary commitment
of persons in need of significant custodial care, such as the severely mentally retarded,
presents issues additional to and distinct from those considered here, and this distinction may
dictate a contrary standard.}

\footnote{206. See, e.g., NATHANIEL J. PALLONE, REHABILITATING CRIMINAL SEXUAL PSYCHO-
PATHS 80-84 (1990) (discussing studies indicating lack of effectiveness of sex offender}
considerable progress is presently being made. For example, two comprehensive reviews have concluded that treatment of sex offenders can subsequently reduce recidivism, although "not all programs are successful and not all sex offenders profit from treatment." W.L. Marshall and his colleagues found, for example, that comprehensive cognitive-behavioral programs were among the most effective, but cautioned that child molesters and exhibitionists were more likely to benefit than were rapists.

Other researchers have, however, reported modest success in reducing recidivism among rapists. Janice Marques and her colleagues reported a dramatically lower rate of sex offense recidivism among rapists that participated in a cognitive-behavioral program conducted by the California Department of Mental Health as compared to those rapists that were not treated. While the smallness of the sample size precluded statistical significance among rapists, reductions in the re-offense rate for the much larger group of child molesters was significant. Functional differences between these two groups of offenders and others suggest, moreover, that specialized modalities may enhance outcomes further.

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207. Horwitz, supra note 159, at 45 n.54; Wettstein, supra note 159, at 616.


209. Marshall et al., supra note 208, at 480; see also Hall, supra note 208, at 805-08.


211. Janice Marques et al., Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism, 21 CRM. JUST. & BEHAV. 28, 49 (1994) (noting 27.8% sex offense recidivism rate for untreated "controls" versus 9.1% for participants in Sex Offender Treatment and Evaluation Project). All participants in the study were convicted of either child molestation or rape and satisfied a variety of additional criteria, including age (18 to 60), admission of guilt, IQ (at least 80), and the absence of "a psychotic or organic mental condition." Id. at 35.

212. Id. at 49.

213. See W.D. Pithers, Treatment of Rapists: Reinterpretation of Early Outcome Data and Exploratory Constructs to Enhance Therapeutic Efficacy, in SEXUAL AGGRESSION: ISSUES IN ETIOLOGY, ASSESSMENT AND TREATMENT 167, 173 (Gordon C.N. Hall et al. eds., 1993) [hereinafter SEXUAL AGGRESSION]; see also W.L. Marshall, A Revised Approach to
Pharmacologic interventions also have shown promise, especially antiandrogens, which reduce the production and effects of the male hormone testosterone. Marshall concluded, for example, that the adjunctive use of two such drugs, medroxyprogesterone acetate (MPA) and cyproterone acetate (CPA) is clearly beneficial for some patients. Paraphiliacs have been a particular target of treatment with MPA, based on the belief that decreasing their levels of testosterone will diminish the compulsive sexual fantasies that lead them to commit sex crimes. While initial results have indicated substantial reductions in deviant sexual behavior among paraphiliacs treated with MPA, much is still unknown about this form of therapy, including its long-term impact on recidivism and why its success varies dramatically among subjects. Further research must explore these issues.

Although uncertainties exist and therapeutic advances have thus far been modest in proportion to the problems attendant to sexual predation, the foregoing belies the notion that sex offender treatments are hopelessly ineffective. Continued improvement, however, will require the refinement of present interventions and the introduction of comprehensive pharmacologic and cognitive-behavioral regimens tailored to the needs of sex offenders. The three-tiered plan forwarded by Marshall and his colleagues, designed to transition sexual predators gradually into the community, is illustrative of such an approach. States unwilling to invest the resources

the Treatment of Men Who Sexually Assault Adult Females, in SEXUAL AGGRESSION, supra, at 143, 156. Marshall and Pithers also criticize the tendency to measure efficacy exclusively in terms of lower recidivism, arguing that delay in offense onset and reductions in the number of victims are equally valid measures of therapeutic success. W.L. Marshall & W.D. Pithers, A Reconsideration of Treatment Outcome with Sex Offenders, 21 CRIM. JUST. & BEHAV. 10, 21-22 (1994).

217. Id. at 426-29, 435-37.
219. W.L. Marshall et al., A Three-Tiered Approach to the Rehabilitation of Incarcerated Sex Offenders, 11 BEHAV. SCI. & L. 441 (1993). The protocol places offenders initially in a maximum- or medium-security institution for six months with three hours of daily group therapy and one to two hours of weekly individual therapy aimed at reducing cognitive distortions and inappropriate attitudes and addressing issues relating to sexuality, social competence, lifestyle, and relapse prevention. Id. at 447-48. After completing Tier One, individuals are moved into a minimum-security facility where they focus on developing a relapse prevention plan while continuing efforts to modify "inappropriate cognitive
necessary to implement such comprehensive methodologies risk relying on treatment approaches that may prove, down the road, to be insufficient to justify the ongoing psychiatric commitment of sexual predators.

3. Impairments of Reason

Apart from any alleged problems of treatability, holding sexual predators in psychiatric institutions violates the notion forwarded by various commentators that involuntary commitment is appropriate only for those incompetent to make rational decisions about their care or treatment, which sexual predators typically are not. Underlying this argument is the concern that any further expansion in the scope of psychiatric confinement exceeds the state's parens patriae justification. This position fails, however, to sufficiently appreciate the state's corresponding imperative, under its police power, "to protect the community from the dangerous tendencies of [those] who are mentally ill." Where, as here, there is strong evidence of an individual's propensity to engage in harmful sexual conduct, the state's substantial interest in protecting society is particularly compelling and justifies the use of a more inclusive standard of mental disease.

New Jersey's alteration of its definition of mental illness to facilitate the commitment of sexual predators reflects the propriety of public safety considerations in this context. Noting that psychiatrists had too often required the presence of psychosis for commitment, lawmakers commented that "the public [was] . . . denied the protection that the Legislature in-

processes." *Id.* at 450-51. Following reentry into the community, Tier Three calls for periodic re-evaluations of likelihood of reoffense, "external management" through a trained parole officer, and further outpatient treatment, if necessary. *Id.* at 451-52.

220. *See, e.g.*, Donald H.J. Hermann, *Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment*, 39 VAND. L. REV. 83, 100 (1986) (stating that commitment should be limited to those who "lack[] sufficient insight or capacity to make a rational decision concerning treatment"); Schopp, *supra* note 163, at 176-77 (noting that legal mental illness focuses on inability to "engag[e] in the deliberation required for [the] competent exercise of the right to informed consent" to treatment); Winick, *supra* note 172, at 588 (explaining that psychiatric detention requires individual that is "incompetent to make the hospitalization decision for himself").

221. The paraphilias and personality disorders associated with sexual predation do not require this sort of cognitive deficit. *See supra* note 220. Thus, the fact that "the instrumental rationality of sexual predators is entirely intact" will not preclude their commitment. Morse, *supra* note 158, at 138; Winick, *supra* note 172, at 592 (asserting that sexual psychopathy "does not produce cognitive or volitional incapacity").


tended to provide in enacting a law that calls for the involuntary civil commitment of the dangerous mentally ill."\textsuperscript{224} In upholding the amended language, the state supreme court rejected the argument that the state's \textit{parens patriae} jurisdiction was invalid, noting the state's "powers to protect the public welfare and to initiate civil commitment proceedings in the exercise of [those powers]."\textsuperscript{225}

Under the New Jersey approach, a sexual predator is "mentally ill" for purposes of psychiatric commitment if he has an impaired capacity to control behavior based on a "substantial disturbance" of perception or orientation.\textsuperscript{226} This is a sensible standard which recognizes that there need not be a total deterioration of volition to justify involuntary detention,\textsuperscript{227} provided the state demonstrates that the functional impairment is linked to a mental abnormality. Antisocial personality disorder, whose diagnostic criteria include impulsivity, consistent irresponsibility, lack of remorse, and aggressiveness (but not irrationality),\textsuperscript{228} fits this behavioral profile, as do paraphilias, which are characterized in part by deviant sexual urges or behaviors.\textsuperscript{229}


\textsuperscript{225} \textit{In re D.C.}, 679 A.2d 634, 644 (N.J. 1996). New Jersey derives its authority to commit dangerous mentally ill persons for purposes of societal protection from both its police and \textit{parens patriae} powers. \textit{Id.} at 643-44; see Brooks, \textit{supra} note 160, at 717 (noting general jurisdiction and breadth of these powers in context of commitment of "mentally disordered and dangerous persons"); cf. Fouca v. Louisiana, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) (referencing state's \textit{parens patriae} power "to protect and provide for an ill individual").

\textsuperscript{226} N.J. STAT. ANN. § 30:4-27.2(r) (Vest Supp. 1996).

\textsuperscript{227} As the court noted in \textit{Linehan}, sexual predators that retain "a measure of self control present an especially insidious risk, for they retain the ability to plan, wait, and delay the indulgence of their maladies until presented with a higher probability of success." \textit{In re Linehan}, 544 N.W.2d 308, 318 (Minn. Ct. App. 1996).

\textsuperscript{228} DSM-IV, \textit{supra} note 162, at 649-50.

\textsuperscript{229} \textit{Id.} at 522-23. States also provide, in other contexts, for the involuntary civil commitment of sane persons who suffer no impairment of reason but pose a danger to society. For example, various jurisdictions detain individuals who suffer from communicable diseases. \textit{See}, e.g., ALA. CODE §§ 22-11A-10, -18 (1990 & Supp. 1996) (tuberculosis and sexually transmitted diseases); COLO. REV. STAT. ANN. § 25-1-650 (West 1989) (communicable diseases); DEL. CODE ANN. tit. 16, § 505 (1995) (communicable disease); FLA. STAT. ANN. § 384.28 (West 1993 & Supp. 1996) (sexually transmissible diseases); HAW. REV. STAT. § 325-8 (1985) (infectious, communicable, or other disease dangerous to public health); IOWA CODE ANN. § 139.5 (West 1989) (communicable diseases); MINN. STAT. ANN. § 144.4180 (West 1989) (communicable diseases); N.H. REV. STAT. ANN. § 141-C:11 (1996) (communicable diseases); N.C. GEN. STAT. § 130A-145 (1995) (communicable diseases); OHIO REV. CODE ANN. § 3707.08 (Anderson 1989) (communicable diseases); TENN. CODE ANN. § 68-5-104 (1992) (communicable or conta-
It is not "perverse," moreover, to subject individuals to civil detention based on a mental abnormality potentially leading to future sexual misconduct when they were previously determined to be sufficiently responsible to deserve criminal punishment for similar activity. Just as the conceptualization of mental illness may differ in clinical and legal contexts, so too does its definition vary from one legal purpose to another. For example, a mental disease or defect insufficient for trial incompetency may well be adequate for the insanity defense. By the same token, exoneration from criminal guilt may legitimately require deficits in cognitive and volitional capacities beyond what is necessary to vindicate the regulatory interests of civil commitment.

V. Punishment Reconsidered

While increasingly common, psychiatric commitment is not the only means of addressing the problem of sexual predation. Constitutional and financial concerns led Iowa, for example, to repeal the sexual predator commitment law, enacted in 1995 before it went into effect. The legislature simultaneously replaced the statute with enhanced sentencing provisions for "sexually predatory offenses." Under the new measures, repeat offenders face escalating mandatory sanctions, ranging from a doubling of
the maximum possible sentence\textsuperscript{237} to life in prison.\textsuperscript{238} In 1995, Georgia and Arkansas also augmented penalties for sex offenders, though not in as dramatic a fashion as Iowa,\textsuperscript{239} while Colorado has increased the presumptive sentencing range for various sex offenses.\textsuperscript{240}

Additionally, a number of states are considering "chemical castration"\textsuperscript{241} as a condition of parole.\textsuperscript{242} California has, in fact, recently enacted a law permitting judges to order chemical castration for paroled persons convicted of certain sex offenses against children under the age of thirteen and requiring such judicial action upon conviction for a second similar offense.\textsuperscript{243} Alternatively, under a bill currently pending in Alabama, the court could sentence a male to chemical castration and a female to sterilization upon a second conviction for certain sex crimes involving children under the age of sixteen.\textsuperscript{244} Pending legislation in Hawaii goes one step

\textsuperscript{237} Id. § 901A.2(1) (doubling maximum sentences for serious or aggravated misdemeanors when there is prior conviction for sexually predatory offense).

\textsuperscript{238} Id. § 901A.2(4) (mandating life in prison for felony when there are two prior convictions for sexually predatory offenses, at least one of which is also felony).


further, mandating chemical or physical castration for certain persons convicted of sexual assault.\textsuperscript{245} While the future of these legislative proposals is unclear, the constitutionality of a court’s authority to order castration or sterilization is open to serious question.

Notwithstanding these extreme proposals, those who doubt the sincerity of states’ interest in psychiatrically treating sexual predators generally prefer augmenting criminal punishment to civil detention.\textsuperscript{246} Enhancements in the length of criminal sentences are, moreover, virtually unimpeachable constitutionally, given the tenuousness of proportionality review.\textsuperscript{247} However, the fact that states enjoy such latitude in defining appropriate punishment introduces the possibility that fear of recidivism, as opposed to moral blameworthiness, will determine the sentence.\textsuperscript{248} Where mentally impaired individuals are concerned, these predictions of dangerousness perhaps are better left to the civil law and the detention it prescribes.\textsuperscript{249}

\textit{Conclusion}

Sexual predation is a particularly noxious and fearsome public problem. Though citizens may, under Megan’s Laws, receive notice that a released sex offender is about to move in next door, they cannot stop the offender’s arrival into the neighborhood. Only mandatory life sentences for all crimes of sexual violence or indefinite civil commitment can keep predators off the streets. This Article has examined the latter option, adopted by an increasing number of states over the last few years.

\textsuperscript{245} S.B. 1249, 18th Leg., § 2 (Haw. 1995).

\textsuperscript{246} See, e.g., Beth Keiko Fujimoto, Sexual Violence, Sanity and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders, 15 U. Puget Sound L. Rev. 879, 911 (1992); Horwitz, supra note 159, at 67-68; Reardon, supra note 161, at 851; Stone, supra note 206, at 192-94.


\textsuperscript{248} This is of particular concern here, where conclusive evidence that sexual predators are more likely to recidivate than other violent offenders is lacking. See, e.g., Stuart Scheingold et al., \textit{The Politics of Sexual Psychopathy: Washington State’s Sexual Predator Legislation}, 15 U. Puget Sound L. Rev. 809, 812-13 (1992) (reviewing recidivism studies).

\textsuperscript{249} By providing separate proceedings wherein future dangerousness is considered, modern sexual predator statutes foster distinctions between criminal punishment and regulatory detention. \textit{See generally} Paul H. Robinson, \textit{Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders}, 83 J. Crim. L. & Criminology 693 (1993).
I have argued that current sexual predator statutes are constitutional in virtually all respects. Although states cannot warehouse sexual predators in the back wards of psychiatric hospitals without violating substantive due process, government officials need not demonstrate an individual’s inability to reason in order to justify psychiatric detention. Neither must states prove that the therapeutic intervention provided is more likely than not to cure an individual’s pathology. Clinicians must instead achieve an acceptable level of treatment success over a period of years. In determining "acceptability," courts should take account of prior treatment success or lack thereof.

Clearly, psychiatrists play an important role in this process. By the same token, differences in the application of mental illness in the clinical and legal contexts limit the extent to which one conceptual framework can and should borrow from the other. While the medical community is a useful adjunct, only the legislatures are invested with both parens patriae and police powers, which operate jointly to define the scope of permissible psychiatric commitment. Subject to the foregoing conditions, there is an "exceedingly persuasive justification" for the inclusion of sexual predators within this definition.