

# Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments

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## INTRODUCTION

Two forces are converging in litigation testing sex offender commitments. Our society's belated and proper concern for sexual violence pushes legislators to seek novel and effective means to prevent—not just punish—sexual violence. Along with notification and registration laws,<sup>1</sup> states are adopting sex offender commitment laws to institutionalize sex criminals after they have completed their criminal sentences and prevent them from striking again. These laws, however, pay a dear constitutional price. Eschewing the “great safeguards which the law adopts in the punishment of crime and the upholding of justice,”<sup>2</sup> they seek the shelter of psychiatric diagnosis and civil commitment to avoid condemnation as “preventive detention.”

The sex offender commitment cases are headed for the Supreme Court,<sup>3</sup> which will be pressed to decide whether the “great safeguards” of the Constitution dictate a principled stopping place for the drive toward prevention. Despite a steady stream of litigation,<sup>4</sup> the Supreme Court has laid down but few markers in this constitutional territory. Just last term, the Court observed:

Although we have not had the opportunity to consider the outer limits of a State's authority to civilly commit an unwilling individual, our decision in *Donaldson* makes clear that due process requires at a minimum a showing

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1. See Sarah Glazer, *Punishing Sex Offenders*, 6 CONG. Q. RESEARCHER 27 (1996) (describing prevalence of sex offender registration and notification laws).

2. *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1383 (1996) (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).

3. E.g., *In re Hendricks*, 912 P.2d 129 (Kan.), *cert. granted*, 116 S. Ct. 2522 (1996).

4. *Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979); *Vitek v. Jones*, 445 U.S. 480 (1980); *Jones v. United States*, 463 U.S. 354 (1983); *Foucha v. Louisiana*, 504 U.S. 71 (1992).

that the person is mentally ill and either poses a danger to himself or others or is incapable of "surviving safely in freedom."<sup>5</sup>

As the Court decides the sex offender cases, it will likely draw a bright line on the constitutional map of civil commitment.

Dating back some twenty years, the Court's civil commitment decisions now point squarely to "mental disorder" as the pivotal concept in ascertaining the outer bounds of the state's power to use civil commitment.<sup>6</sup> The litigation generated by sex offender commitments<sup>7</sup> is converging on the same issue.

5. *Cooper*, 116 S. Ct. at 1383 (citations omitted).

6. In addition to *Cooper*, the following cases are often cited for the proposition in the text: *Foucha*, 504 U.S. at 71; *Jones*, 463 U.S. at 354; *Addington*, 441 U.S. at 418; *O'Connor*, 422 U.S. at 563.

The other constitutional element mentioned in *Cooper*, danger to self or others, is a less likely candidate for bright line classification, in part because it lies along a continuously variable axis, and in part because the Supreme Court appears unlikely to set a constitutional floor on dangerousness. *See, e.g., Jones*, 463 U.S. at 364-65 ("We do not agree with petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a nonviolent crime against property. This Court never has held that 'violence,' however that term might be defined, is a prerequisite for a constitutional commitment."). Nonetheless, some courts have drawn lines based on dangerousness. *See In re Rickmyer*, 519 N.W.2d 188 (Minn. 1994); *In re Kotke*, 433 N.W.2d 881 (Minn. 1988); *In re Rodriguez*, 506 N.W.2d 660 (Minn. Ct. App. 1993), *review denied*, 1993 Minn. LEXIS 824 (Minn. Nov. 30, 1993); *cf. State v. Post*, 541 N.W.2d 115, 126 (Wis. 1995) ("The Supreme Court has refused to proscribe strict boundaries for legislative determinations of what degree of dangerousness is necessary for involuntary commitment."), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204).

7. At least eight states have enacted new laws specifically aimed at using civil commitment to confine sex offenders after they have been released from their prison sentences: Arizona, ARIZ. REV. STAT. ANN. §§ 13-4601 to -4609 (Supp. 1995); California, CAL. WELF. & INST. CODE §§ 6600-6608 (West Supp. 1996); Iowa, IOWA CODE ANN. §§ 709C.1-.12 (West Supp. 1996); Kansas, KAN. STAT. ANN. §§ 59-29a01 to a15 (1994); Minnesota, MINN. STAT. ANN. §§ 253B.02(7a), (18a), (18b), 253B.185 (West 1992 & Supp. 1996); New Jersey, N.J. STAT. ANN. § 30:4-82.4 (West Supp. 1996); Washington, WASH. REV. CODE ANN. §§ 71.09.010-.230 (West 1992 & Supp. 1996); and Wisconsin, WIS. STAT. ANN. §§ 980.01-.13 (West Supp. 1995).

Civil commitment aimed at "mentally disordered sex offenders" was common during the middle part of this century, but most states repealed those laws or allowed them to fall into disuse. *See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PUB. NO. 98, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S* (1977); Glazer, *supra* note 1. The first generation sex offender commitment laws differed from contemporary laws in that the latter, but not the former, are intended to be used in sequence with criminal punishment, rather than as an alternative to it. *Compare In re Young*, 857 P.2d 989 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) and *In re Blodgett*, 510 N.W.2d 910 (Minn.), *cert. denied*, 115 S. Ct. 146 (1994) with *Millard v. Harris*, 406 F.2d 964, 969 (D.C. Cir. 1968) (noting that the District of Columbia's Sex Psychopath Act is limited to those "too sick to deserve eriminal punishment").

Contemporary sex offender commitment laws generally require a showing of some past sexual violence, a current mental disorder, and predicted future sexual violence. *See infra* text accompanying notes 146-48.

Coming to the Court now from a half dozen states,<sup>8</sup> this litigation has badly split the state and federal courts<sup>9</sup> over the constitutionality of using civil commitment to confine competent, criminally-responsible sex offenders after their release from prison.

At their core, the sex offender commitment cases seek to define when a state may deprive a person of liberty without the constitutional safeguards of the criminal law. The role played by mental disorder in justifying civil commitment marks the fault line in the sex offender commitment litigation. The Supreme Court's review of these laws will likely result in a landmark decision that defines how mental disorder justifies the state's power to abandon the "great safeguards" of the criminal law and use civil commitment to vindicate its police power interests.

This Article traces the steps in the Supreme Court's trajectory towards the decision about civil commitment's boundaries. Each of the courts that has ruled on contemporary sex offender commitment schemes has begun with the proposition that "mental disorder" is a constitutional predicate for civil commitment.<sup>10</sup> The narrow issue of contention, the issue that has split the courts most clearly, is how "mental disorder" is to be defined for constitutional purposes. The Court's decision in *Addington v. Texas*<sup>11</sup> provides a blueprint for identifying the boundaries of "constitutional mental disorder."

*Addington* applied, in a flawed and rudimentary way, the methodology of therapeutic jurisprudence.<sup>12</sup> Therapeutic jurisprudence is a call to observe the

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8. E.g., *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *In re Hendricks*, 912 P.2d 129 (Kan. 1996), cert. granted, 116 S. Ct. 2522 (1996); *Linehan II*, 544 N.W.2d 308, (Minn. Ct. App. 1996), review granted, Nos. C1-95-2022, C3-96-51 (Minn. Mar. 19, 1996); *State v. Post*, 541 N.W.2d 115, 122 (Wis. 1995), petition for cert. filed, (U.S. Mar. 7, 1996) (No. 95-8204). Litigation is also pending in California and Iowa.

9. The Supreme Courts of Minnesota, Washington, and Wisconsin have held sex offender commitment laws constitutional. *Blodgett*, 510 N.W.2d at 910; *Young*, 857 P.2d at 989; *Post*, 541 N.W.2d at 115. The Supreme Court of Kansas and the United States District Court in Washington have held similar laws unconstitutional. *Young*, 898 F. Supp. at 744; *Hendricks*, 912 P.2d at 129.

10. See *Hendricks*, 912 P.2d at 134; *Blodgett*, 510 N.W.2d at 914-15; *Young*, 857 P.2d at 1001; *Post*, 541 N.W.2d at 122.

11. 441 U.S. 418 (1979).

12. See generally DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161 (1995).

*Addington* is a flawed and rudimentary application of therapeutic jurisprudence in part because it paints mentally disabled persons with a broad and undifferentiated stroke, and makes no use of behavioral or empirical research. Thus, for example, the key suggestion of the Court that seriously mentally ill people are "not wholly at liberty" is unexplained and unsupported. Though much of the best work postdates *Addington*, see, e.g., Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study. I: Mental Illness and Competence to Consent to Treatment*, 19 L. & HUM. BEHAV. 105 (1995); Thomas Grisso et al., *The MacArthur Treatment Competence Study. II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 L. & HUM. BEHAV. 127 (1995); Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric*

therapeutic and anti-therapeutic consequences of legal rules and practices on the people and systems they govern.<sup>13</sup> *Addington* is a grand therapeutic compromise, permitting the state, in the name of therapy, to deprive people of their liberty without the “great safeguards” of the criminal law. This Article illustrates that *Addington*’s jurisprudence is based on the “principle of criminal interstitiality.” The state may use civil commitment to deprive a person of liberty only when that person’s mental disorder situates the state’s compelling interests in the interstices of the criminal law.

It might have been otherwise. The Supreme Court’s commitment cases might have veered towards a very different jurisprudence—a “jurisprudence of prevention.”<sup>14</sup> The jurisprudence of prevention supports widespread use of preventive detention to protect the public from predicted violence, whether arising from mental disorders or not.<sup>15</sup> This doctrine is based on a simple, bilateral calculus in which the police power interest of the state—its interests in safety—is balanced against the liberty interests of the individual. Civil commitment is justified under this theory not because its objects are mentally disordered, but because they are dangerous.

In *Foucha v. Louisiana*,<sup>16</sup> the Court definitively rejected the jurisprudence of prevention. In doing so, it embraced a therapeutic jurisprudence<sup>17</sup> that places

*and Medical Treatments*, 19 L. & HUM. BEHAV. 149 (1995); Steven J. Schwartz, *Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities*, 47 U. MIAMI L. REV. 867 (1993), the literature was not altogether barren when the case was decided, *see, e.g.*, Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279 (1977).

13. Michael L. Perlin, *What is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

14. Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329 (1989).

15. *See infra* part 1.

16. 504 U.S. 71 (1992).

17. I do not intend, by using this term, to suggest that the constitutional limits of civil commitment cannot reach beyond that which is “therapeutic,” meaning amenable to treatment. Professor Winick makes a case for this principle in his recent article. *See* Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 3 PSYCHOL. PUB. POL’Y & L. 534, 537 (1995) (stating that coercive mental health intervention must be in the “therapeutic interests” of the individual). This principle seems to have clear validity for civil commitment that is based on the *parens patriae* power of the states. But it is problematic in the police power context because it would leave the state defenseless against the potential harm posed by insanity acquittees whose mental disorders are untreatable. However, Professor Winick’s notion of “therapeutic appropriateness” may be a principle of “appropriate institutional placement,” demanding that committed individuals be housed and treated in therapeutically appropriate ways. *See id. passim*.

Understood in this way, the principle is not troublesome, but does not pose significant limits on the police power of the states. Minnesota has, at considerable expense, constructed separate treatment programs and facilities for sex offenders. Though the program has not been tested for legal sufficiency, *but see* Call v. Gomez, 535 N.W.2d 312, 318 (Minn. 1995) (praising the program in dictum), it appears to be designed to provide treatment that meets contemporary professional standards. Compare MINNESOTA PSYCHOPATHIC TREATMENT CENTER, MINNESOTA SECURITY HOSPITAL, SEX OFFENDER PROGRAM (Rev. ed., 1993) [hereinafter SEX OFFENDER PROGRAM] with William D. Pithers, *Relapse Prevention with Sexual Aggressors: A Method for*

mental disorder, its interrelationship with legal context, and the principle of criminal interstitiality, at the center of any analysis of the bounds of civil commitment.<sup>18</sup> In Part I, this Article describes the jurisprudence of prevention, and in Part II, its rejection by the Supreme Court. These descriptions are

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*Maintaining Therapeutic Gain and Enhancing External Supervision*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 343 (William L. Marshall et al. eds., 1990); William L. Marshall et al., *Present Status and Future Directions*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 389 (William L. Marshall et al. eds., 1990). However, the treatment program in Washington state has been found wanting. U.S. District Court Judge William Dwyer found following a jury trial that the state had denied constitutionally adequate treatment. *Turay v. Weston*, C91-664WD (W.D. Wash. June 3, 1994) (order enjoining defendants to provide adequate care). Nearly six years after the implementation of the law, on April 2, 1996, Judge Dwyer found that "more remains to be done to achieve full compliance." *Turay v. Weston*, C91-664WD (W.D. Wash. Apr. 2, 1996) (order maintaining injunction and not finding defendants in contempt).

18. A number of writers and advocates contend that the Supreme Court has left the "definition" of mental illness-related concepts entirely to the states. *See, e.g.*, 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 (1996). The Wisconsin Supreme Court took this view:

[T]he Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments. The Court has wisely left the job of creating statutory definitions to the legislators who draft state laws. Noting that the substantive as well as procedural mechanisms for civil commitment vary from state to state, the Court declared that "the essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Particularly when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation."

*State v. Post*, 541 N.W.2d 115, 123 (Wis. 1995) (quoting *Addington v. Texas*, 441 U.S. 418, 431 (1979)) (citations omitted), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204). These arguments reason, by analogy, that since "mental illness" can be defined by the states in the context of criminal excuse, the Court will take a similar hands-off attitude in civil commitment cases.

This Article shows that the civil commitment context is quite different, in this regard, from the criminal context. Whereas states are free to adopt or reject a "mental illness" defense in criminal law, mental disorder plays a central constitutional role in civil commitment, and hence is constrained by that role. Similarly, the Constitution prohibits the trial of "incompetent" individuals, and the Constitution sets standards for the definition of incompetence. *See Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996); *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam).

In both cases, states may retain some freedom to define "mental illness." However, the definitions must comply with the constitutional limits set by the Supreme Court.

This Article argues that the outer bounds of civil commitment are tied to the reach of the criminal law. Civil commitment is limited to legitimate state purposes that cannot be reached by criminal prosecutions. States may define the reach of the criminal law in part by changing their definitions of criminal responsibility. States can use civil commitment to fill the interstices created by their self-imposed limits on criminal liability. But states are not permitted to reach beyond those interstices and use civil commitment to address conduct that is squarely within the reach of standard criminal prosecutions. *See discussion infra* part V.

important because they provide the context for understanding *Addington* and its mental-disorder-centered jurisprudence, which is discussed in Part III.

*Addington* was decided in a context where therapeutic values were high. This Article refers to this idea as the “standard civil commitment” context. The method of *Addington* placed those therapeutic values centrally in the constitutional calculus. As the Court moves towards setting constitutional boundaries on civil commitment, the hard cases will be those in which therapeutic values are harder to find. In the sex offender commitment cases, therapy is a hope that takes a distant second place to the community’s desire to protect itself against those whom it perceives to be the most dangerous sex offenders.<sup>19</sup> The challenge facing the Court in the sex offender commitment cases is to apply the jurisprudence of *Addington* in a setting in which therapy is peripheral.

Part IV of this Article analyzes sex offender commitments using the methodology of *Addington*. It shows that the therapeutic compromise structured by the Court in *Addington* collapses in the police-power context of sex offender commitments. Part V proposes a principled basis for marking the outer boundaries of civil commitment. This is the principle of criminal interstitiality. It holds that criminal prosecutions are the primary tool available to the state to effect liberty deprivation. The states may invade “the great safeguards which the law adopts in the punishment of crime and the upholding of justice”<sup>20</sup> only when a person’s mental condition so diminishes competency or responsibility that the state cannot vindicate its legitimate and compelling interests through the criminal justice system.<sup>21</sup>

#### I. A ROAD NOT TAKEN: THE JURISPRUDENCE OF PREVENTION

When the Supreme Court inevitably confronts the task of constitutional boundary-drawing for civil commitments, the question before it most likely will

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19. See *Young v. Weston*, 898 F. Supp. 744, 746 (W.D. Wash. 1995); *In re Hendricks*, 912 P.2d 129, 136 (Kan.) (“The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 et seq. If there is nothing to treat under 59-2901, then there is no mental illness.”), *cert. granted*, 116 S. Ct. 2522 (1996); *In re Blodgett*, 510 N.W.2d 910, 916 (Minn.) (noting that treatment of sex offenders is often “problematic”), *cert. denied*, 115 S. Ct. 146 (1994); *In re Pirkel*, 531 N.W.2d 902, 910 (Minn. Ct. App. 1995) (“While treatment of persons committed as psychopathic personalities may not always be successful, the state has the power to keep trying to treat such persons.”), *review denied*, 1995 Minn. LEXIS 754 (Minn. Aug. 30, 1995); *In re Young*, 857 P.2d 989, 993 (Wash. 1993) (noting that “[t]he legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities.”), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *Post*, 541 N.W.2d at 123 (stating that “lack of a precommitment finding of treatability is not offensive to the constitution”).

20. *Cooper*, 116 S. Ct. at 1383 (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).

21. See *Foucha v. Louisiana*, 504 U.S. 71 (1992).

be framed as one involving the constitutional role of mental disorder. Since the form of the question asked is often an important determinant of the answer, it is important to understand how the issue became framed in this way. The current way of framing the question is the product of an evolution that posited, tested, and ultimately rejected a doctrine described as the jurisprudence of prevention.<sup>22</sup>

The jurisprudence of prevention divides the world of liberty-deprivation into two categories: punishment and prevention. Punishment requires strict, criminal procedures; prevention can be undertaken with looser, civil procedures. Liberty deprivation may be punishment or prevention depending on the purpose of the state. When the state sentences a person for a crime, it uses the strict criminal procedures because it intends to punish the criminal. When a state incarcerates a person to protect the public against future harm, it may use looser, civil procedures because its main goal is prevention. Civil commitment falls on the prevention side of the ledger because it is not undertaken with the purpose to punish for past crimes, but simply to protect against future violence.

When the state's purpose is prevention, the only limits on its power to confine stem from a simple calculus: if the state's interest in safety outweighs the individual's interest in liberty, the confinement is constitutional. The state's right to confine a person for prevention is not based on the existence of a "mental disorder" or any other special categorical description of the individual. Thus, "civil commitment," under this jurisprudence of prevention, extends to all forms of preventive confinement; mental disorder is not a constitutional predicate.

Advocates of the jurisprudence of prevention argue that it is the inheritor of a robust "traditional public health jurisprudence—society's right to restrict individuals for the common good." As Professor Richards explains:

The link between the old disease control cases and the Supreme Court's recent decisions is that both attempt to preserve social order through prevention rather than punishment. Although pragmatically a detainee may care little whether he is locked up for punishment or to prevent future harm, jurisprudentially the difference is profound.<sup>23</sup>

Because it is linked to the "traditional public health jurisprudence," the jurisprudence of prevention has a strong appeal. After all, if the "right of societal self-defense"<sup>24</sup> justifies quarantining carriers of contagion, does it not also justify confining sex offenders and other dangerous individuals?

From the perspective of this Article, a central feature of the jurisprudence of prevention is that it does not account for the mental disorder element in civil commitment. The underlying structure of this jurisprudence is a balancing calculus which figures in only two variables: the safety of the public and the pain that the deprivation of liberty causes to the detainee.<sup>25</sup> An individual's liberty may be deprived using civil commitment if the purpose of the deprivation is prevention rather than punishment *and* the safety/liberty balance tips in society's

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22. See Richards, *supra* note 14.

23. *Id.* at 330.

24. *Id.* at 331.

25. *Id.* at 378 (noting the "judicial balancing of the pain of detention against the safety of society").

favor. Under this jurisprudence, the civil commitment of nondisordered as well as mentally disordered individuals depends equally and solely on the level of dangerousness of the individuals. As its name suggests, the jurisprudence of prevention would justify broad-based preventive detention.

As stated, the jurisprudence of prevention is an attractive theory. If the jurisprudence of prevention is valid, then the constitutionality of sex offender commitments is assured, since society's interest in protecting against sexual violence is compelling and the states disclaim any punitive intent.<sup>26</sup> The analysis need pay no attention to mental disorder since it is not a factor in the jurisprudence of prevention.

Much of the commentary defending the constitutionality of sex offender commitment statutes adopts a simple safety/liberty calculus.<sup>27</sup> The following passage from a comment is typical:

This is clearly a balancing test, wherein society decides which harms it will tolerate, and which it will not. . . . [T]he Washington state legislature appears to have decided that even if theoretically the probability of future sex offense[s] by the potential sexual predator is only one-third . . . such a relatively low probability is outweighed by the magnitude of the harm to the victim.<sup>28</sup>

More importantly, the reasoning of the courts that have upheld sex offender commitment statutes often rings of a jurisprudence of prevention, even though the courts recognize that "mental disorder" is a constitutional predicate to civil commitment. For example, in *Young*, the Washington Supreme Court stated:

The State's interest in preventing the sort of harm exacted by sexually violent predators is clearly compelling. The Statute complies with due process because it conditions civil commitment on a finding of both a mental disorder and dangerousness. . . . As noted by the chair of the task force when he

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26. The jurisprudence of prevention might entail thresholds for the severity or probability of violence. See Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 298 (1992) (citing ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM (1974)); cases cited *supra* note 6.

27. See, e.g., Sarah H. Francis, Note, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 SUFFOLK U. L. REV. 125, 137-38 (1995). This note cites *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) for the proposition that "the Due Process Clause requires balancing an individual's liberty with the 'demands of an organized society'" and characterizes sex offender commitment courts as holding "that the government's interest in pretrial detention or post-sentence civil confinement can outweigh an individual's liberty interest where the individual's release would endanger society." The note also cites *United States v. Salerno*, 481 U.S. 739, 750-51 (1987), for this proposition. See *infra* text accompanying notes 70-77 for this Article's discussion of *Salerno*; see also Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 218 (1991) ("Due process requires that the state commit a person only when it can show, in a sufficiently reliable way, that the goal it seeks to achieve outweighs the person's loss of liberty and other costs.") (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

28. Bochnewich, *supra* note 26, at 299.



transmitted the Report to the Governor, the Statute is "a serious response commensurate with the harm caused."<sup>29</sup>

Here, the court pays lip service to the requirement of "mental disorder," but the balance it strikes pits the harm caused by sexual violence against the response of the state—deprivation of liberty. Mental disorder is simply window dressing for this bilateral balance. The Wisconsin Supreme Court states, "The state's compelling interest in protecting the public provides the necessary justification for the differential treatment of the class of sexually violent persons whose mental disorders make them distinctively dangerous because of the substantial probability that they will commit future crimes of sexual violence."<sup>30</sup>

This is simply a variation on the jurisprudence of prevention. Mental disorder plays a role in this formulation, but it is a role that is secondary to dangerousness. In the *Post* calculus, it is the level of dangerousness that matters. The fact that the source of the dangerousness is a "mental disorder" has no apparent function in the court's constitutional analysis.

The Minnesota Supreme Court's analysis, as well, is centered on a constitutional calculus in which the harm from violence is weighed against individual liberty. Though the court acknowledges that mental disorder plays a role in the constitutionality of civil commitments, its balancing calculus does not account for that role. "The state must show a legitimate and compelling interest to justify any deprivation of a person's physical freedom. Here the compelling government interest is the protection of members of the public from persons who have an uncontrollable impulse to sexually assault."<sup>31</sup> The use of the term "uncontrollable" suggests a form of mental disorder, but the court's analysis does not explain the role of "uncontrollability" in the liberty/safety balance.<sup>32</sup>

Historically, the jurisprudence of prevention had a strong claim as the proper way to analyze substantive limits on civil commitment. Writing in 1974, Professor Dershowitz, in one of the earliest and most complete discussions of preventive detention, appears to suggest that the only limits on state power to use prevention detention arise from a simple safety/liberty calculus.<sup>33</sup> Dershowitz addresses the issue of "'substantive constitutional limitations' on the power to confine persons on preventive grounds." Unable to locate any solid categorical

29. *In re Young*, 857 P.2d 989, 1009 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

30. *State v. Post*, 541 N.W.2d 115, 130 (Wis. 1995), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204).

31. *In re Blodgett*, 510 N.W.2d 910, 914 (Minn.) (citing *Salerno*, 481 U.S. at 748).

32. See Schopp, *supra* note 12, at 173 (noting that although uncontrollability suggests classic excuse, the *Blodgett* court did not question Blodgett's conviction or prison sentence). In a subsequent case, the Minnesota Court of Appeals suggested that "controlled" sexual violence might, indeed, be more dangerous than "uncontrollable" violence, see *Linehan II*, 544 N.W.2d 308, 318 (Minn. Ct. App. 1996) ("Persons whose mental afflictions leave them with 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."), *review granted*, Nos. C1-95-2022, C3-96-51, 1996 Minn. LEXIS 197 (Minn. Mar. 19, 1996).

33. Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1321-24 (1973).

limitations on preventive detention, he proposes that the concept of "proportionality," of "making the punishment fit the crime," should provide the substantive limitations on the state's power to confine preventively in the civil context. "To confront this difficult problem, courts must realize that any civilized system of justice requires a relationship between the crime committed or predicted and the duration of the confinement authorized."<sup>34</sup> Dershowitz acknowledges the difficulties inherent in constructing a scheme of proportionality in the context of preventive detention.<sup>35</sup> Nonetheless, he appears to assert that the only "substantive" limitation on preventive confinement arises from a balance between the degree of harm (however measured) and the burden on the individual's liberty interest (measured by the length of the confinement). Nowhere in Dershowitz's calculus does the existence of a mental disorder have a role in placing outer limits on the state's prevention power.

The central thesis of the jurisprudence of prevention, as articulated by Professor Richards, is the assertion that civil commitment is the inheritor of the expansive police power that allows the state to deprive a person of liberty in the name of public health. To some writers, this logic seems ineluctable. If a state has the power to prevent the spread of contagious disease by locking up infectious carriers as a means of prevention,<sup>36</sup> does not the same principle allow it to lock up those whose danger arises from other sources? For example, political scientist Alan Wertheimer writes:

But if we could think of and respond to [dangerous persons] as if they were the carriers of a dangerous disease, I do not see how—as a matter of principle—we could accept a practice of quarantine and reject a practice of preventive detention. Do not say that whereas a DCP [dangerous contagious person] has no control over what he or she does, the [dangerous person] does have such control. For we do not, in fact, quarantine DCPs simply because they carry a contagious disease, but because we believe there is a high risk that their close contact with others will be dangerous. . . . They, too, are quarantined because of what they are likely to do and not because they are ill. Moreover, that we can predict (with some accuracy) what a person will do does not mean that they are *not* in control of their actions.<sup>37</sup>

As Wertheimer notes, the logic of prevention does not stop at mental-illness-based confinement, but extends to all dangerous persons.<sup>38</sup>

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34. *Id.* at 1322.

35. He asks: "To *what* must the duration and severity of the confinement be proportional? To the past harm actually caused? To the past danger threatened? To the future harm predicted? To the actor's culpability?" *Id.* at 1323 (emphasis in original).

36. See generally Larry Gostin & William J. Curran, *The Limits of Compulsion in Controlling AIDS*, HASTINGS CENTER REP., Dec. 1986, at 24; Eric S. Janus, *AIDS and the Law: Setting and Evaluating Threshold Standards for Coercive Public Health Intervention*, 14 WM. MITCHELL L. REV. 503 (1988); Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

37. Alan Wertheimer, *A Philosophical Examination of Coercion for Mental Health Issues*, 11 BEHAV. SCI. & L. 239, 256 (1993) (emphasis in original).

38. See *id.* at 255 ("At least some of the following remarks may also apply to the use of [coercive restraint] on dangerous persons who are not mentally disordered.").

The key paradigm in this jurisprudence emerges from quarantine, the principle that the state, under its police power, has the power to deprive individual disease carriers of their liberty in order to protect the public health.<sup>39</sup> The authority cited for the constitutionality of this kind of intervention is *Jacobson v. Massachusetts*.<sup>40</sup> Professor Richards characterizes *Jacobson* as upholding the “right of the state to invade Jacobson’s person by *forcing him* to submit to vaccination.”<sup>41</sup> He quotes from the case:

This court has more than once recognized it as a fundamental principle that “persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.”

Richards continues, “With this language, the Court stated the basic bargain of civilization: an individual must give up some personal freedom in exchange for the benefits of being in a civilized society.”<sup>42</sup>

Thus, *Jacobson*, and more broadly quarantine, are frequently taken as supporting the broad principle that the state’s interest in protecting the public from danger can be sufficient to support a civil deprivation of liberty. In *O’Connor v. Donaldson*,<sup>43</sup> Chief Justice Burger cites *Jacobson* as support for a pure danger-based civil confinement system, “There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts . . . .”<sup>44</sup> Burger’s statement was dictum, but nonetheless is freely cited in support of civil commitment schemes.<sup>45</sup>

The public health-based argument has a strong appeal to it. As Wertheimer shows, if one accepts that the state has the right to deprive people of their liberty to prevent disease spread, the same principle would appear to support preventive detention for other forms of harm. But the extension of reasoning from quarantine to a broad-based “jurisprudence of prevention” requires several key steps. First, it must be shown that the public health jurisprudence (quarantine) justifies a process for deprivation of liberty that is civil, as opposed to criminal. This may seem to be self-evident, but the Supreme Court has never confronted a case which puts this question to a test. In dicta, it has upheld border

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39. See sources cited *supra* note 36.

40. 197 U.S. 11 (1905).

41. Richards, *supra* note 14, at 341 (emphasis added).

42. *Id.*

43. 422 U.S. 563 (1975).

44. *Id.* at 582-83 (1975) (Burger, C.J., concurring).

45. *E.g.*, *In re Blodgett*, 490 N.W.2d 638, 643 (Minn. Ct. App. 1992), *aff’d*, 510 N.W.2d 910 (Minn. 1994), *cert. denied*, 115 S. Ct. 146 (1994); *In re Young*, 857 P.2d 989, 1003 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) (“Instead, there must be a showing that the person is dangerous to the community.”); Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 710 (1993).

quarantines.<sup>46</sup> But it has never held that a state may use civil process to deprive a person of liberty in order to prevent the spread of communicable disease.

In particular, *Jacobson* involved the imposition of a criminal penalty for failure to abide by the public health regulations of the City of Cambridge which required adults to be vaccinated for smallpox. *Jacobson* stands for the proposition that the state has broad authority under the police power to enact public health regulations and to impose on the liberty of the individual when it deems such imposition necessary to protect the public from harm, but it says nothing about what procedures the state may employ to enforce those regulations. *Jacobson* did not involve an assertion that the state could use civil processes to deprive a person of liberty, or that the state had the right to “force” a person to be vaccinated, at least if “force” means to inject the vaccine without the person’s consent. The question decided in *Jacobson* was the scope of the police power. The question was whether the behavior of Jacobson was the kind of thing the state could prohibit and, upon violation of the prohibition, punish criminally.

*Jacobson*, then, is a case which helps define what kind of conduct can be prohibited by the state (refusing to get a vaccination), and what kind of evidence a state needs to make such a regulation (scientific evidence is sufficient). *Jacobson*, however, is not a case which sheds any light on whether or under what circumstances a state can use noncriminal processes to deprive a person of liberty. This case supports the conclusion that states have plenary authority to deal with sexual or other forms of violence, but it does not support the state’s claim that it can use civil commitment as a tool to accomplish that end.

This discussion of *Jacobson* highlights a distinction that is important to a careful discussion of the scope of civil commitment and its public-health regulation heritage. This is the distinction, drawn above, between the permissible *scope* of regulation, on the one hand, and the permissible *means* for regulation, on the other. Richards’s article, in its broad use of *Jacobson* as a precedent, elides the distinction.

*Jacobson* also helps in understanding another key distinction: public health regulation may be carried out through either indirect or direct means. Indirect methods of enforcement work on the individual’s will by punishing failure to abide by regulations, or by threatening and applying sanctions to coerce compliance in the future. *Jacobson* involved *indirect* enforcement of public health regulation. Civil commitment, on the other hand, constitutes direct

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46. In *Jacobson*, the Court states:

An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, . . . that the danger of the spread of the disease among the community at large has disappeared.

*Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905). But the Court cites no specific authority for this proposition.

regulation of behavior. The individual's body is confined not to punish or coerce an act of will, but rather directly to prevent harmful behavior.<sup>47</sup>

With these distinctions in mind, is quarantine an appropriate paradigm for the jurisprudence of prevention? Quarantine is clearly a preventive measure, in that it prohibits certain conduct that is deemed dangerous. The Supreme Court, however, has never decided when or whether a state may use direct civil processes to enforce preventive public health measures.<sup>48</sup> Further, a good argument exists that the nature of the harm underlying quarantine (the exponential spread of epidemic disease) makes it different in kind, and more severe, than even the most serious sexual violence.<sup>49</sup>

A full discussion of quarantine and public health regulation is beyond the scope of this Article and unnecessary for its purposes. Whatever the true nature

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47. Of course, not all enforcement of regulation is "pure." Much criminal confinement has mixed purposes: it is designed to punish (and hence deter), and is indirect. It is also direct in that it incapacitates.

48. Though *Jacobson* is not authority for a directly enforced (i.e., civil commitment style) public health regulation, the traditional use of quarantine appears to use such direct enforcement methods, at least on superficial examination. But on closer examination, the precise claim which states make (or more precisely, made historically) when they used quarantine is somewhat fuzzy. Historically, quarantine has been a patchwork of procedural devices. The criminal law was a clear tool for the enforcement of violation of quarantine. Further, at least historically, it appears that quarantine followed the model described in *Jacobson*. Contagious carriers were "ordered" or "removed" to a hospital or separate place. But, at least in some instances, the only enforcement provided in law was criminal prosecution for violation of such quarantine orders. The quarantine laws of the State of Minnesota, for example, did not clearly arrogate to the state the power to commit the body of a person to confinement until 1987, when the state legislature adopted a civil commitment paradigm for the quarantine function. Prior to that time, the public health regulations allowed the Board of Health to make "rules and regulations, as they may deem most effectual, for the preservation of the public health . . ." 1851 MINN. GEN. LAWS Ch. 18 § 2. If the Board of Health learned that the individual had smallpox, it could "immediately cause him to be removed to a separate house . . . and shall provide for him nurse and necessaries . . ." *Id.* § 9. Any two justices of the peace were authorized to make an order directing the law officers to "remove any person infected with contagious disease." *Id.* § 11. Violation of any of the regulations of the Board was a misdemeanor, punishable by a fine not exceeding \$100 or imprisonment not exceeding three months. Note that the law did not contain many of the features of a civil commitment law. It did not, at least explicitly, allow officers to break into a dwelling to remove someone. There was no procedure for the commitment of the person's body to a facility. There was nothing in the law authorizing officials to civilly restrain or hold an individual.

More modern Minnesota regulations were directed at physicians, and required them to "make certain that isolation precautions are taken to prevent spread of disease to others." MINN. R. 4605.7400(1) (1987). The enforcement tool in these regulations is an authorization to the commissioner of health to "seek injunctive relief . . . if the person represents a public health hazard" and refuses to comply with the prescribed isolation precautions. *Id.* at 4605.7400(2). The use of injunctive relief as a tool for enforcing health precautions is especially instructive. Injunctions are not "directly" enforced on the body of the person. Rather, they are intended to operate on the person's will. That is, persons who violate the injunction are either imprisoned as a means of coercing compliance, or are imprisoned (or fined) as punishment for violation. But in neither case does the deprivation of liberty take on the direct character of civil commitment confinement.

49. See Janus, *supra* note 36, at 512-13.

of quarantine, it does not serve as a constitutional precedent for a jurisprudence of prevention. The Supreme Court has not followed Chief Justice Burger's dictum. Though "danger" may, by itself, be the proper subject for police power *regulation*, it is now clear that a state may not, without more, enforce such regulation by civil confinement.

## II. THE SUPREME COURT REJECTS THE JURISPRUDENCE OF PREVENTION

In the past twenty-one years, the Supreme Court's jurisprudence of non-criminal confinement has appeared to flirt with, but has finally rejected, a jurisprudence of prevention. The seeds for the rejection were planted in *Addington v. Texas*<sup>50</sup> or earlier, but the final rejection has come only in the Court's 1992 *Foucha v. Louisiana*<sup>51</sup> decision. In that case, the State of Louisiana argued that civil commitment is justified solely on the safety/liberty balance of the jurisprudence of prevention.<sup>52</sup> To understand how such an argument could be seen as feasible, and to thereby understand the significance of its clear rejection by the Court in *Foucha*, requires an examination of a series of cases beginning with *O'Connor v. Donaldson*.<sup>53</sup>

*O'Connor* was a frontal assault on a shameful and neglectful mental health system. Because the facts showed no reason for Donaldson's confinement in a mental hospital (he was not dangerous and was receiving no treatment for mental illness), the Court held that his civil commitment violated the Constitution.<sup>54</sup> The *O'Connor* holding was open to several interpretations. It could have been read as requiring *both* treatable mental illness and dangerousness, or *either* mental illness and dangerousness as constitutional requirements for civil commitment. In his concurrence, Chief Justice Burger feared that the former interpretation would gain currency, and sought to emphasize the possibility of the latter. Wishing to leave the door open for humane custodial care for those who might be a danger to themselves, he warned that amenability to treatment would not be a constitutional predicate for commitment. Symmetrically, he stated that those who posed a danger to society might be committable, perhaps even if they were not mentally ill.<sup>55</sup>

In 1979, the Court decided *Addington v. Texas*. Part III discusses *Addington* in some detail. Here, *Addington* is discussed simply to show that it can be read as consistent with a jurisprudence-of-prevention approach to the constitutionality of civil commitment.

50. 441 U.S. 418 (1979).

51. 504 U.S. 71 (1992).

52. See Respondent's Brief at 3, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (No. 90-5844). The state argued that to "be maintained in a psychiatric facility based solely on the danger that the acquitee poses to himself and to the community is not violative of the Fourteenth Amendment to the United States Constitution."

53. 422 U.S. 563 (1975).

54. *Id.* at 576.

55. His warning is contained in the dictum quoted above in connection with the discussion of jurisprudence of prevention. See *supra* note 44 and accompanying text.

*Addington* tests one of the fundamental characteristics of civil commitment, the use of sub-criminal procedures. The *Addington* Court identifies two sources for the state's "legitimate interest" in civil commitments. The first is the *parens patriae* power, which gives the states an interest "in providing care to its citizens who are unable because of emotional disorders to care for themselves." The second is the "police power," which gives the state "authority . . . to protect the community from the dangerous tendencies of some who are mentally ill."<sup>56</sup>

The jurisprudence-of-prevention theorist could make several telling points. To begin, the Court's wording leaves its readers unclear as to whether the two state interests are jointly necessary for civil commitment, or severally sufficient. The Court states, "[T]he State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others."<sup>57</sup> Although logicians might insist that properly read, this sentence means that the state has an interest in confining individuals involuntarily *only if* they are *both* mentally ill *and* pose some danger, a less careful reader (or one assuming less care in the writing) might understand the Court to be suggesting that either condition is sufficient to support civil commitment.<sup>58</sup> The latter interpretation would be consistent with Justice Burger's dictum and with the jurisprudence of prevention.

Further, *Addington* makes no statement about the outer limits of civil confinement. Nothing in *Addington* says that mental disorder is a constitutional requirement for civil commitment. The jurisprudence-of-prevention theorist might say that out of the two state interests cited by the Court, only the *parens patriae* power depends, for its internal logic, on the existence of some form of mental disability.<sup>59</sup> The police power, however, is not limited to harm arising from mental disorders. The jurisprudence-of-prevention theorist would argue that the salient aspect of the police power branch of *Addington* is the harm to the

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

57. *Id.*

58. Manipulating these propositions symbolically can help clarify the possible meanings. Under the first reading, the Court's statement is  $(\sim MI \vee \sim D) \Rightarrow \sim SI$  (no mental illness or no dangerousness implies no state interest), which is logically equivalent to  $SI \Rightarrow MI \wedge D$ . The second reading is this:  $\sim(MI \vee D) \Rightarrow \sim SI$ , which translates to  $SI \Rightarrow MI \vee D$ . Since the Court's actual language distributed the negative over both terms of the "or" statement (not MI or not D), it is clearly the first reading, not the second, that is correct.

Katherine Blakey's discussion of this passage is confused. She says, correctly, that "or" can mean either "this or that, not both," or "this or that or both." Blakey, *supra* note 18, at 275 n.216. She continues, "If both, the word 'or' is equivalent to the word 'and.'" She then says that the Court's statement may have meant that states cannot confine people unless they are "both mentally ill and dangerous." Or, it might have meant that states cannot confine people who are "both safe and sane." *Id.* Blakey reads the Court's statement, [1]  $MI \vee D \Rightarrow SI$ , as being the equivalent of [2]  $MI \wedge D \Rightarrow SI$ . *Id.* Though expression [1] implics expression [2], they are not equivalent statements, since [2] does not imply [1].

59. Schopp, *supra* note 12, at 174; see *Jarvis v. Levine*, 418 N.W.2d 139, 147-48 (Minn. 1988) (assuming that state has the "best interest[] at heart" of a patient diagnosed as mentally ill); ALLEN E. BUCHANAN & DAN. W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* 359 (1989) (discussing the need to find the patient incompetent for *parens patriae* commitment).

public, and not the source (mental disorder) of the harm. By approving preventive, civil confinement for mental-illness-caused harm, the Court has also approved its use for *any* equally harmful danger, since the critical safety/liberty balance would be identical.<sup>60</sup>

Four years later, in *Jones v. United States*,<sup>61</sup> the Court suggested, but in a highly ambiguous way, that the jurisprudence-of-prevention reading of *Addington* was wrong. The issue in *Jones* was ostensibly a procedural due process issue: whether an insanity acquittee, who had been automatically committed after the acquittal, had a right to release at the expiration of the maximum possible criminal sentence. Jones's argument rested on a combination of *Addington* and the principle that prisoners can be civilly committed at the end of their sentences "only as would any other candidate for civil commitment."<sup>62</sup> Adding this principle to *Addington*, Jones argued that he could not be civilly held for longer than the criminal sentence unless his commitment met the standard of *Addington*. Since the elements supporting his civil commitment had been proved by only a preponderance of the evidence during his criminal proceeding, Jones argued that the *Addington* standard had not been met and that he deserved to be released.<sup>63</sup>

The Court's analysis required two steps. First, the Court examined whether "the finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment."<sup>64</sup> The second question was whether Congress had a valid basis for using a preponderance standard, rather than the clear and convincing standard, in cases of insanity acquitees.

This Article discusses mostly the first prong. Jones argued that civil commitment required proof of both mental illness and dangerousness.<sup>65</sup> The criminal trial findings of insanity and criminal act were not the same as a finding of current mental illness or current dangerousness. The Court appeared to accept the principle that civil commitment required both mental illness and dangerousness, and that the requirement was a constitutionally based requirement, rather than merely an accident of the particular statutory scheme at issue.<sup>66</sup> The Court could have dismissed Jones's argument on the grounds that no showing of mental illness was constitutionally required, and that, therefore, Congress was free to treat the statutory mental illness element in any way it saw fit. The fact that the Court did not dispose of the argument in that way suggests that the Court considered mental disorder to be a constitutionally required element. This conclusion is strengthened by the Court's treatment of *Jones's*

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60. For example, Gleb, citing *Addington*, states the constitutional test for civil commitment as a safety/liberty balance that does not measure mental disorder, "Due process requires that the state commit a person only when it can show, in a sufficiently reliable way, that the goal it seeks to achieve outweighs the person's loss of liberty and other costs." Gleb, *supra* note 27, at 218.

61. 463 U.S. 354 (1983).

62. *Id.* at 369 n.19.

63. *Id.* at 363.

64. *Id.* at 364.

65. *Id.* at 362.

66. *Id.* at 364.



length of commitment issue, "The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous."<sup>67</sup> Though, again, this could have been merely a recitation of the statutory requirements, the Court's citation of *O'Connor* seems to signal a statement of constitutional law and a rejection of Chief Justice Burger's suggestion in his *O'Connor* concurrence that dangerousness alone can satisfy the constitutional requirements for commitment. Here, the Court appears to state that both mental illness and dangerousness are constitutional predicates for civil commitment.<sup>68</sup>

Despite this analysis, the statements in *Jones* about mental illness were clearly dicta. Thus, *Jones* was weak and ambiguous authority for a constitutional role for mental illness in civil commitment. The ambiguities about the significance of *Jones* and the status of the jurisprudence of prevention were heightened by the Court's 1987 decision in *Salerno*,<sup>69</sup> in which the Supreme Court's reasoning appeared to give strong support to the jurisprudence of prevention. The Court faced a substantive due process challenge to the provisions of the Bail Reform Act of 1984.<sup>70</sup> This Act allowed pretrial detention without bail, based on a prediction of dangerousness. The subject of considerable scholarship,<sup>71</sup> the debate about the Act focused on whether this "preventive detention" was constitutional.

The *Salerno* Court considered two competing ways of framing the question of constitutionality. *Salerno* and the court of appeals argued that the proper doctrinal approach to the question was a categorical approach. They argued that preventive confinement is limited to specific categories, such as mental illness commitments. Those categories, they argued, do not include pretrial detention.<sup>72</sup> The *Salerno* majority rejected this categorical approach. The majority acknowledged that confinement intended as punishment may be imposed only after a criminal conviction. But, outside the category of punishment exists the realm of regulation, where the legitimacy of confinement is measured by a noncategorical balancing test. The impairment of liberty is measured against the government's interest in preventing violence. If the balance tips in favor of the government, regulatory confinement is proper, so long as the means used by the government are narrowly tailored to achieve the legitimate goal of prevention of violence. This is, of course, the jurisprudence-of-prevention argument.<sup>73</sup>

Under the circumstances of *Salerno*, the Court found the government's interests to be "both legitimate and compelling." The pretrial detention was

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67. *Id.* at 368 (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1979)).

68. Though the Court here states the elements in the context of release from civil commitment, the implication is the same. Constitutionally, commitment may last only as long as its constitutional predicates apply. See *Jackson v. Indiana*, 406 U.S. 715 (1972).

69. *United States v. Salerno*, 481 U.S. 739 (1987).

70. 18 U.S.C. §§ 3141-56 (1994).

71. See, e.g., Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986).

72. *Salerno*, 481 U.S. at 749. Under this argument, pretrial confinement could be used only to insure presence at the trial, not to prevent future harm.

73. See *supra* part I.

sharply focused. It was time-limited, applied only to well defined, highly violent circumstances, and imposed only after a full evidentiary hearing.<sup>74</sup>

In *Salerno* the Court's rationale appeared explicitly to reject a categorical approach to civil confinement. The categorical approach would have added a third element to the danger/liberty balance by asking whether the confinement fell into a permissible category, such as mental disorder commitments. By rejecting the categorical approach, the Court seemed to hold that only two factors were relevant to the constitutional balance: the danger posed by the defendant, and the government's interest in protecting the public.<sup>75</sup> Mental disorder drops out of the constitutional equation under this theory. Although the Court focused on the strict time limitations of the pre-trial detention in *Salerno*, jurisprudence-of-prevention advocates could argue that severe danger might be enough to justify long term confinement such as that involved in sex offender commitments. After all, if the government's interest in *Salerno* was sufficient to deprive a person of his liberty for six months, why not for a year, two years, or indefinitely? So long as the risk to the safety of society remains strong, the safety/liberty balance would appear to hold. The *Salerno* balancing calculus, like the jurisprudence of prevention, is as expansive as the government's interest in preventing violence.

Five years later, the State of Louisiana placed full reliance on the jurisprudence of prevention and lost. *Foucha v. Louisiana*<sup>76</sup> is in many ways a murky case,<sup>77</sup> but many commentators, as well as the state supreme courts that have ruled on sex offender commitment schemes, appear to agree that it stands squarely for the proposition that civil commitment may not be based on dangerousness alone.<sup>78</sup>

74. *Salerno*, 481 U.S. at 750.

75. *See id.* at 748-49.

76. 504 U.S. 71 (1992).

77. *See* Winick, *supra* note 17, at 536; Blakey, *supra* note 18, at 279-80.

78. *See In re Hendricks*, 912 P.2d 129, 138 (Kan.) ("Foucha, clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible."), *cert. granted*, 116 S. Ct. 2522 (1996); *In re Blodgett*, 510 N.W.2d 910, 914 n.5 (Minn.) ("In *Foucha v. Louisiana*, the United States Supreme Court held that a Louisiana civil commitment statute, which allowed a person acquitted by reason of insanity, who had an antisocial personality disorder but no longer a mental illness, to remain indefinitely committed to a mental hospital on the basis of dangerousness alone, violated substantive due process.") (citations omitted), *cert. denied*, 115 S. Ct. 146 (1994); *In re Young*, 857 P.2d 989, 1001 (Wash. 1993) ("In *Addington [v. Texas]*, the Supreme Court held that a person must be both mentally ill and dangerous for a civil commitment to be permissible under the due process clause of the constitution.") (citing *Foucha* as agreeing with the quoted proposition) (citations omitted), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); 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, 647-48 (1992); Winick, *supra* note 17 *passim*; Blakey, *supra* note 18, at 281. The Wisconsin Supreme Court, in *State v. Post*, 541 N.W.2d 115 (Wis. 1995), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204), is a bit more ambivalent. Relying on Justice O'Connor's concurrence, the Wisconsin court appears to think that the Supreme Court may have left the door open, at least a crack, for dangerousness-only commitments, at least for insanity acquitees. *Id.* at 127 (citing *Foucha*, 504 U.S. at 87-88 (O'Connor, J., concurring)).

In addition to dangerousness, the state must prove that the individual is “mentally ill.”

Foucha, an insanity acquittee, sought his release from civil commitment. The rather scanty record suggested that Foucha was diagnosed as having an Antisocial Personality Disorder.<sup>79</sup> Mental health professionals testified that an Antisocial Personality Disorder was not a mental illness, and that they could not

79. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645-50 (4th ed. 1994) [hereinafter DSM-IV] (defining Antisocial Personality Disorder). As many as 70% or 80% of all prisoners are diagnosable with Antisocial Personality Disorder. See also HANS J. EYSENCK, THE CAUSES AND CURES OF CRIMINALITY 217 (1989); Allen Frances, *The DSM-III Personality Disorders Section: A Commentary*, 137 AM. J. PSYCHIATRY 1050, 1053 (1980) (“Using criteria comparable to those in [DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS] III, approximately 80% of all criminals are diagnosed as antisocial.”); Samuel B. Guze et al., *Psychiatric Disorders and Criminality*, 227 JAMA 641 (1974); Stephen D. Hart et al., *The Psychopathy Checklist: An Overview for Researchers and Clinicians*, in 8 ADVANCES IN PSYCHOL. ASSESSMENT 105, 105 (stating that 75% or 80% of convicted felons warrant the diagnosis of Antisocial Personality Disorder); Rosalie Wells, *A Fresh Look at the Muddy Waters of Psychopathy*, 63 PSYCHOL. REP. 843 (1988) (claiming that DSM-III’s Antisocial Personality Disorder category is a nondiscriminatory dump all for society’s undesirables, and that approximately 80% of the criminal population would qualify for the diagnosis).

Foucha may have had a drug induced psychosis when he was found not guilty by reason of insanity. See *Petition for Cert.* at 31, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (No. 90-5844).

The Washington Supreme Court argued that Foucha had been diagnosed not with an Antisocial Personality Disorder, but with “antisocial behavior,” which does not constitute a “mental disorder” according to the DSM-III-R. *In re Young*, 857 P.2d 989, 1007 n.12 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

The record in the *Foucha* case shows that the Washington court was mistaken. Foucha was clearly diagnosed as having a “personality disorder.” All of the courts that reviewed his case understood that he had been diagnosed with a personality disorder.

The Review Panel Report to the trial court stated, “Foucha’s main diagnosis is Antisocial Personality Disorder . . .” *Petition for Cert.* at 27, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (No. 90-5844). The key passage in the transcript is the testimony of the doctor:

Q: Doctor, you described the defendant’s condition as anti-social behavior. What specifically—is that a diagnosis, is that—

A: Yes, an anti-social personality is a diagnosis.

Q: Okay. Is that a—

A: The basis for that diagnosis is early development of anti-social behavior during early teenagers which—which continued, and anti-social meaning illegal behavior.

Q: Is that termed as a mental or a social illness?

A: That is termed as a personality disorder.

*Id.* at 32. The Louisiana Supreme Court appeared to think that Foucha might have a “paranoid personality.” The court described Foucha as “rather suspicious and paranoid and denies any responsibility for his actions. The paranoia he exhibited . . . upon interview . . . probably reflects an additional . . . diagnosis of paranoid personality . . . He has minimal insight into his responsibilities for his own behavior . . .” *State v. Foucha*, 563 So. 2d 1138, 1141 n.10 (La. 1990) (quoting a facility mental status examination, April 3, 1989), *rev’d*, 504 U.S. 71 (1992). The dissent clearly understood “that he has a personality disorder, in that he has an antisocial personality, but that this condition does not constitute a mental illness and is not subject to medical treatment.” *Id.* at 1146 (Dennis, J., dissenting).

certify that Foucha would not be dangerous if released. The trial court thought that dangerousness alone was sufficient to continue Foucha's commitment. The State of Louisiana apparently concurred, and made no effort to prove or argue that an Antisocial Personality Disorder was a "mental illness."<sup>80</sup> Rather, the state argued that civil commitment was properly based on dangerousness alone, and that it did not need to prove that Foucha was mentally ill. It conceded that its statute allows confinement "regardless of whether the individual remains mentally ill."<sup>81</sup> Citing *Salerno*, it made the classic jurisprudence-of-prevention argument, "in certain instances, the needs of society as a whole outweigh the liberty interest of the individual. Such is the case here . . . ."<sup>82</sup> The state continued with the jurisprudence-of-prevention theme: civil commitment "serves the regulatory purpose of preserving the safety of the community . . . ."<sup>83</sup> Its brief cited *Addington* for the proposition that the police power alone is sufficient to support civil commitment, "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."<sup>84</sup> This legal theory was effective in the lower courts.<sup>85</sup>

The Supreme Court, however, rejected Louisiana's jurisprudence-of-prevention argument. The Court directly held that mental disorder is a constitutionally required element for civil commitment.<sup>86</sup> In addition, the Court explained why mental disorder is required. In the key passage, the Court set out the condition that the state must meet to escape from the confines of criminal procedure:

[T]he State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct. Had they been employed against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way.<sup>87</sup>

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80. See Respondent's Brief, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (No. 90-5844).

81. *Foucha*, 563 So. 2d at 1138.

82. Respondent's Brief at 4, *Foucha* (No. 90-5844).

83. *Id.* at 5.

84. *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 426 (1979)).

85. *Foucha*, 563 So. 2d at 1144.

86. Justice White wrote:

We stated [in *Jones v. United States*] that "the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." The court below was in error in characterizing the above language from *Jones* as merely an interpretation of the pertinent statutory law in the District of Columbia and as having no constitutional significance. In this case, 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.

*Foucha*, 504 U.S. at 77-78 (citations omitted).

87. *Id.* at 82.

Here, the Court clearly rejects the simple safety/liberty calculus of the jurisprudence of prevention. Merely reciting a prevention purpose, and proving sufficient danger, will not suffice. The safety interests of the state are not merely to be balanced against the liberty interests of the individual. To use the civil prevention system, the state must compete on a second, "means" axis. It must show that its interests cannot be vindicated by the "normal means of dealing with persistent criminal conduct," the criminal justice system.<sup>88</sup>

*Foucha* echoes the distinction drawn above with respect to *Jacobson*,<sup>89</sup> between the scope of the police power and the means available to enforce it.<sup>90</sup> Louisiana did not lose the *Foucha* case because its interest in public safety was outbalanced by *Foucha's* liberty interest; it lost because it chose the wrong means of enforcing that interest.

The decision and rationale of *Foucha* are distinctly inconsistent with the jurisprudence of prevention. *Foucha* rejects the bilateral balancing of the jurisprudence of prevention, and instead insists that mental disorder play some role, along with danger and liberty, in the constitutional calculus. Dangerousness, triggering the police power, justifies loss of liberty, but not the use of civil rather than criminal process. The concept of mental disorder holds the key to proof of a state interest that "would not be vindicated by the ordinary criminal processes involving charge and conviction."<sup>91</sup>

The mental-disorder-oriented therapeutic jurisprudence of *Addington* provides the blueprint for an analysis of the role played by mental disorder in justifying the abandonment of the strict procedures of the criminal law. Together, *Addington* and *Foucha* point to the principle of criminal interstitiality as the key to the justification of civil commitment.<sup>92</sup>

### III. ADDINGTON DEFINES THE ROLE OF MENTAL DISORDER IN THE CONSTITUTIONAL CALCULUS

The narrow question before the Court in *Addington* was what burden of proof standard the Constitution required in a civil commitment proceeding. This burden of proof issue can be seen as a proxy for the entire set of ways in which civil commitment compromises the core protections of the criminal law. *Addington* asks when it is permissible for a state to deprive people of their liberty using a system that is not based on conviction of a crime and subsequent punishment.

The case before the Court was a typical mental illness commitment case, referred to in this Article as a "standard civil commitment" case. Frank Addington was experiencing serious delusions and had "psychotic schizophrenia" with "paranoid tendencies."<sup>93</sup> He had been in and out of mental hospitals ten times. His mother was concerned about his threatening and violent behavior towards her. Addington was arrested on misdemeanor charges of

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88. *Id.*

89. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

90. *See supra* text accompanying note 48.

91. *Foucha*, 504 U.S. at 82.

92. *See discussion infra* part V.

93. *Addington v. Texas*, 441 U.S. 418, 421 (1979).

“assault by threat” against his mother. His mother filed a petition for his commitment. At his commitment trial Addington did not contest that he was properly diagnosed with schizophrenia, that he had been assaultive in the hospital, that he had caused substantial property damage in his own apartment and in his parents’ home, or that he had threatened to injure both of his parents. Two psychiatrists testified that Addington was “probably dangerous” to himself and others.<sup>94</sup> The case was submitted to a jury for determination of two questions: “1. Based on clear, unequivocal and convincing evidence, is Frank O’Neal Addington mentally ill? 2. Based on clear, unequivocal and convincing evidence, does Frank O’Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?”<sup>95</sup> Addington objected that these questions posed the standard of proof incorrectly. He claimed that the proper standard required proof beyond a reasonable doubt.<sup>96</sup> The jury answered the questions in the affirmative, and Addington was committed to Austin State Hospital for an indefinite period.<sup>97</sup>

Addington appealed. The intermediate court of appeals agreed with his contention on the burden of proof issue and reversed. The Texas Supreme Court reversed the court of appeals, holding that the proper standard of proof was the preponderance of the evidence standard of civil litigation. The court rejected the criminal burden of proof in part on the ground that dangerousness would be impossible to prove beyond a reasonable doubt. The court rejected an intermediate (clear and convincing evidence) standard on the grounds that such an instruction was not provided for in the Texas rules of procedure.<sup>98</sup>

The U.S. Supreme Court began its analysis by enumerating the functions that the standard of proof plays. It expressed the “degree of confidence our society thinks [the finder of fact] should have in the correctness of factual conclusions . . . serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”<sup>99</sup> The Court identified a continuum of standards, generally expressed at three levels. Under the preponderance standard of typical civil cases, the risk of error is shared roughly equally by the litigants, “since society has a minimal concern with the outcome.”<sup>100</sup> Under the criminal (reasonable doubt) standard, “the interests of the defendant are of such magnitude that . . . our society imposes almost the entire risk of error upon itself.”<sup>101</sup> The intermediate (“clear . . . and convincing

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94. *Id.* at 421.

95. *Id.* at 421. The Texas commitment statute at issue required a third determination, “whether he is mentally incompetent.” It is not clear why this question was not submitted to the jury, though perhaps it was considered to be a conclusion of law to be drawn from the other two findings.

96. He also objected to the substantive standard expressed in the instructions. *Id.* at 421-22. The Supreme Court did not address the substantive issue, apparently because the resolution of the procedural question was sufficient to reverse the state court’s judgment.

97. *Id.* at 421.

98. *Id.* at 422.

99. *Id.* at 423.

100. *Id.*

101. *Id.* at 424.

evidence”) standard has been used to protect “particularly important individual interests in various civil cases.”<sup>102</sup> Thus, in the Court’s initial analysis, the level of proof required for any particular kind of litigation appears to be a function of the relative intensity or weight of the individual and state interests at stake.

Turning to the case at hand, the Court framed its task as one involving interest analysis. “[W]e must assess both the extent of the individual’s interest in not being involuntarily confined indefinitely and the state’s interest in committing the emotionally disturbed under a particular standard of proof.”<sup>103</sup> Note that the Court does not frame the balance as one involving the state’s interests in *confinement* (later announced to be the *parens patriae* and police power interests), but rather the state’s interest in using a particular standard of proof to accomplish the commitment. This recognizes the distinction, referred to earlier, between questions of the *scope* of the state’s police power and the *means* by which the state may enforce it.<sup>104</sup>

Turning first to the individual’s interest, the Court recognized both that civil commitment is a significant deprivation of liberty and that it significantly affects the individual’s reputational interest; that is, it creates a stigma. The Court then characterized the state’s interests in civil commitment, “The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its *police power* to protect the community from the dangerous tendencies of some who are mentally ill.”<sup>105</sup> This passage mentions both the *parens patriae* power and the police power. The Court did not explicitly state the relative roles of the two interests of the state in its interest calculus.<sup>106</sup> Nonetheless, the Court’s analysis and its factual assumptions all point to a central role for the *parens patriae* power.

Next, the Court turned to an analysis of these interests in the context of the typical civil standard of proof: preponderance of the evidence. Note that though the Court addressed a procedural question, it necessarily engaged in a discussion of the substantive constitutional limits on the state’s power to use civil commitment. “[T]he state has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others.”<sup>107</sup> The wording here seems precise: the Court intended to say that both mental illness and dangerousness are necessary predicates for civil commitment.<sup>108</sup> If one or both is missing, the state has no constitutionally-cognizable interest in civil commitment.<sup>109</sup> Since the preponderance of the

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102. *Id.*

103. *Id.* at 425.

104. *See supra* text accompanying notes 47 and 48.

105. *Addington*, 441 U.S. at 426 (emphasis added).

106. *See supra* text accompanying note 56 for a discussion about the ways in which this passage might be interpreted.

107. *Addington*, 441 U.S. at 426.

108. *See supra* note 58 and accompanying text.

109. Any doubt that the Court here was drawing substantive constitutional lines, rather than simply describing the interests that Texas claimed, has been eliminated by the Court’s decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992).

evidence standard “creates the risk of increasing the number of individuals erroneously committed,”<sup>110</sup> it is unclear how the state’s interests would be furthered by use of this standard.

The Court then engaged in a discussion that was apparently meant to exemplify at least one way in which commitment decisions can be “erroneous”:

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior.<sup>111</sup>

Here, the Court confirmed that there are substantive constitutional limits to the state’s power to use civil commitment: “[L]oss of liberty [requires] something more serious than is demonstrated by idiosyncratic behavior.”<sup>112</sup> The mental disorder must be serious enough and unacceptable enough to warrant compelled treatment and confinement. Though at this stage of the Court’s argument the location of the substantive limits remained obscure, the Court’s discussion made clear that the limits relate to the nature of the mental disorder suffered by the individual. If there were no constitutionally significant boundaries relating to mental disorder, the dangers of error from misdiagnosis would not receive the emphasis it does.

The Court concluded this portion of its analysis by noting that:

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.<sup>113</sup>

Here the Court compared the potential injuries resulting from erroneous decisions and found that the risk is “significantly greater” for the individual than for the state.<sup>114</sup> The analytical structure underlying this conclusion is important for an understanding of *Addington*. A mistaken release of Frank Addington would have injured the state’s police power interests, because Addington posed a threat of possible violence to his parents. By ranking the potential harm to Addington as “significantly greater” than the state’s harm, the Court appears to be discounting the injury to the state’s police power interest. This appears a paradoxical result in light of the Court’s indication that the police power is one of the two state interests that supports civil commitment.

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110. *Addington*, 441 U.S. at 426.

111. *Id.* at 426-27.

112. *Id.* at 427.

113. *Id.* at 427.

114. *Id.*



One can, however, reconcile this paradox. Recall that the calculus as framed by the Court is along the means not the scope axis.<sup>115</sup> As the remainder of the discussion of *Addington* will show, the *parens patriae* interests of the state give it the authority to use civil rather than criminal procedures.<sup>116</sup> The police power interest in avoiding violence can support the deprivation of liberty (if it overbalances the liberty interest along the scope axis). But in the means calculus, the state's bare interest in avoiding violence does not count.<sup>117</sup>

The Court then turned to the main thrust of its opinion: the explanation for why civil commitment does not require the reasonable doubt standard of criminal law. The Court began this discussion by asserting that the standard is necessary in the criminal law because criminal confinement is "exercised in a punitive sense."<sup>118</sup> The high standard, therefore, is a critical part of the "moral force of the criminal law."<sup>119</sup> Civil commitment is different, the Court then stated, because, "[i]n a civil commitment state power is not exercised in a punitive sense. . . . [A] civil commitment proceeding can in no sense be equated to a criminal prosecution."<sup>120</sup> The Court's reasoning is that the punitive nature of criminal sanctions heightens the individual's interest in avoiding error because it sharpens the pain of liberty deprivation. The moral bargain struck by the state in criminal proceedings requires the most stringent standard of proof because the interest of the individual is the highest. Since civil commitments can in no sense be equated with criminal proceedings, the weight on the individual's side of the balance will be less.

The Court's "in no sense criminal" statement is hyperbolic. There are many ways in which some forms of civil commitment, particularly sex offender commitments and other police power commitments, can be equated to criminal

115. *See supra* text accompanying note 104.

116. *See especially infra* note 121 and accompanying text.

117. This is a consequence of the Court's rejection of the jurisprudence of prevention and is the central rationale for the Court's decision in *Foucha*. *See supra* text accompanying notes 87-88.

118. *Addington*, 441 U.S. at 428.

119. *Id.* (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); *see Schopp, supra* note 12, at 166 (discussing moral basis for the criminal law). In *Blodgett*, the Minnesota Supreme Court invoked a related "moral force" argument:

The concern with enhanced criminal punishment on the basis of dangerousness is that the punishment may tend to become divorced from moral blameworthiness, thus adversely affecting the criminal justice system's credibility, which largely rests on a sense of blameworthiness. Professor Robinson argues "that it would be better to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason, than to divert the criminal justice system from its traditional requirement of moral blame."

*In re Blodgett*, 510 N.W.2d 910, 918 n.16 (Minn.) (citation omitted), *cert. denied*, 115 S. Ct. 146 (1994). Blakey, *supra* note 18, at 270-72, repeats the same argument, and it is made with significant force by Schopp, *supra* note 12, at 169. This Article makes the moral force argument in yet a third way. The strict procedural safeguards of the criminal law confer moral legitimacy only to the extent that they are mandatory on the state. The principle of criminal interstitiality, advocated by this Article, insures that the state can escape from those strict rules only in limited circumstances. *See infra* part V.

120. *Addington*, 441 U.S. at 428.

proceedings. These will be discussed in detail in Part IV. The Court's characterization makes strong sense, however, in the standard civil commitment context, where the state's *parens patriae* interests predominate. The Court, for example, supports its "in no sense" assertion by stating that Texas "confines only for the purpose of providing care designed to treat the individual."<sup>121</sup>

Two of the important purposes of criminal proceedings are to punish and to incapacitate.<sup>122</sup> To say that *parens patriae* commitments lack a punitive purpose is almost tautological. Further, their central purpose is not incapacitation, but rather self-protection and care. Indeed, it is arguable that the primary purpose of *parens patriae* confinement is not to reduce the capacity (incapacitate) of the individual, but rather to restore autonomy and thereby enhance his or her capacities.<sup>123</sup>

Noting that the criminal standard "manifests our concern that the risk of error to the individual must be minimized," the Court turned to two ways in which the risk of error is ameliorated in civil commitment cases.<sup>124</sup> First, the Court asserted that "layers of professional review" will reduce the likelihood of error.<sup>125</sup> The individual's interest in avoiding erroneous commitment "in the first instance" (at the commitment hearing) is lessened by "the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."<sup>126</sup> Essentially, the Court here is saying that the procedures at the commitment hearing can be looser because errors can be corrected later.

Although the Court provided no authority for its assertion, its characterization is most likely correct for standard civil commitments.<sup>127</sup> Two common structures of standard civil commitments are specifically designed to facilitate professional review and error correction. Many states place rather short time limits on civil

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121. The Court's characterization of the state's purpose in commitment seems at odds with the Texas court's characterization, which is also quoted by the U.S. Supreme Court, "The involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others." *Id.* at 428 n.4 (quoting *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977)). Thus, while the Texas court clearly is stating a police power purpose to its commitment, perhaps even as the predominant purpose (release comes not when treatment is sufficient, but when danger is no longer possible), the U.S. Supreme Court emphasizes only the *parens patriae* or treatment aspect. This foreshadows the remainder of the Court's analysis.

122. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION* 3-5 (1995).

123. The state's main purpose in *Addington* was to provide treatment that was desperately needed. *Addington*, 441 U.S. at 428 n.4.

124. *Id.* at 428. Note that the Court's analysis does not stop with the observation that civil commitments are "civil" and not "criminal" or "punitive." This fact is a consequence of the rejection, inherent in the Court's reasoning, of the jurisprudence of prevention. Were the jurisprudence-of-prevention analysis correct, the fact that civil commitments are not punitive would suffice to remove them from the strict limitations of criminal procedure.

125. *Id.*

126. *Id.* at 428-29.

127. Error correction in sex offender commitments is considerably different. See *infra* part IV.B.3.

commitment; under these schemes, indefinite commitment is not possible,<sup>128</sup> and the maximum duration of erroneous commitments is, in theory, capped.<sup>129</sup> In many states,<sup>130</sup> discharge decisions are made by treatment personnel rather than by courts, and discharge criteria are described in clinical treatment terms which fit comfortably with the expertise of treatment personnel. By focusing on clinical, rather than legal, standards for discharge, these structures allow treatment personnel to re-evaluate the findings of the commitment court based on their own observation of the patient's condition. Where hospitalization is not therapeutically beneficial, treatment professionals are free, in these structures, to follow their professional and ethical practices and discharge patients.<sup>131</sup> In fact, standard civil commitments are generally quite short, especially when compared to police power commitments.<sup>132</sup>

Second, the Court suggested that the individual's interest in liberty may be diminished in civil commitment cases compared to criminal cases. "[I]t is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma."<sup>133</sup> This passage is perhaps more interesting for the tone it sets and the assumptions it makes than for its actual contribution to the interest calculus. The narrow point made by this passage is that use of the looser civil standard of proof will decrease the number of erroneous releases, and that this is good for genuinely mentally ill persons. This passage is a clear invocation of the state's *parens patriae* power. Involuntary hospitalization is good for an individual only when the individual is incompetent to choose for her or himself.<sup>134</sup> The broader point is that the Court in this passage appeared to define genuine mental illness in the context of civil commitment as mental illness that renders the individual not wholly at liberty. In view of the Court's invocation of

128. See, e.g., MINN. STAT. ANN. § 253B.13 (West 1994); WASH. REV. CODE ANN. § 71.05.280 (West 1992); WIS. STAT. ANN. § 51.20(17) (West 1987).

129. States may allow commitments to be "stacked," but generally only after the appropriateness of commitment is proved anew. MINN. STAT. ANN. § 253B.13 (West 1994); SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 72 (3d ed. 1985).

130. BRAKEL ET AL., *supra* note 129, at 208-11.

131. See AMERICAN PSYCHIATRIC ASS'N, *MODEL STATE LAW ON CIVIL COMMITMENT OF THE MENTALLY ILL* (American Psychiatric Association 1982), reprinted in Clifford D. Stromberg & Alan A. Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 HARV. J. LEGIS. 275, 359 (1983) (noting that statute requires that "prompt, competent and appropriate treatment that offers [the patient] a realistic prospect of improvement."). "Many dangerous people cannot be treated effectively, so that present statutes confining them to mental hospitals merely achieve preventive detention under a therapeutic guise. This is both bad law and bad medicine." *Id.* at 281.

132. See *infra* discussion accompanying notes 229-37.

133. *Addington v. Texas*, 441 U.S. 418, 429 (1979).

134. See ALLEN E. BUCHANAN & DAN. W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* 317 (1989) ("Criteria for involuntary commitment that appeal to the good of the person committed should always include the requirement that the person him- or herself is incompetent to make a decision about hospitalization."); Schopp, *supra* note 12, at 176.

the *parens patriae* power, the Court meant that mental illness is genuine when it renders the individual incompetent to choose or act for him or herself.

The Court then turned to the central pillar of its reasoning, the argument from necessity. The Court said that the inquiry in a civil commitment proceeding is very different from the central issue in a criminal proceeding. In criminal cases, the central issue is a "straightforward factual question" whereas in civil commitment cases "the meaning of the facts . . . must be interpreted by expert psychiatrists and psychologists."<sup>135</sup> Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. "The trier of fact, required to rely on the reasonable doubt standard, would be forced . . . to reject commitment for many patients desperately in need of institutionalized psychiatric care. Such 'freedom' for a mentally ill person would be purchased at a high price."<sup>136</sup> Here, again, the Court invokes the *parens patriae* power for commitment. This analysis invokes the state's interests in commitment, but only to the extent that the state is looking out for the interests of its mentally ill citizens. The high price for freedom is the loss of desperately needed treatment, not the danger to the community posed by wrongfully freed mentally ill persons. The use of "scare quotes" around the word "freedom" echoes the Court's previous point that mental illness is genuine when it renders the individual not wholly at liberty. Here, too, the *parens patriae* power is basis for the Court's reasoning.

To summarize: The *Addington* Court recites four aspects of civil commitment that support its use of a standard of proof lower than the criminal standard. First, civil commitment is not punitive and can in no sense be equated with criminal proceedings. Second, mentally ill persons have less to lose, and more to gain, from incarceration than do criminal defendants. Third, the decision process in civil commitments has layers of professional review of the patient's condition that provide a continuous opportunity to correct errors. Fourth, the nature of proof in civil commitment cases may make the "beyond a reasonable doubt" standard impossible to meet, thus depriving the state of its ability to satisfy its *parens patriae* interest.

It is worth emphasizing here that the state's police power interests play no role at all in the actual accounting for interests. Though the Court mentions the state's police power several times in the opinion, nowhere in the Court's analysis is the police power interest a concrete weight on the scales.

The explanation for the disparate treatment of *parens patriae* and police power concerns is straightforward and central. It is not that the police power interests at stake in *Addington* were weak, but that they were not interests cognizable in the particular balance the Court was striking. Police power interests justify regulation of conduct, and can justify deprivation of liberty, but the issue in *Addington* was not whether liberty can be deprived, but by what means. On *that* scale, the state's police power concerns are not measured because they do not count. On the means scale, it is the features of civil commitment that differentiate

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135. *Addington*, 441 U.S. at 429.

136. *Id.* at 430.

it from criminal law, not those that assimilate it, that give the state the interest it needs to abandon the strict constraints of the criminal law. The Court could have, but did not, argue that the difficulty in proving dangerousness would leave the state unable to enforce its police power interests.<sup>137</sup> Why did it not make this argument? The Court's *Foucha* decision, fourteen years later, provides the answer: because the state's police power interest in preventing recidivist violence can, in general, be dealt with in the criminal justice system. The state need not prove future violence beyond a reasonable doubt, it need only prove *past* violence by that standard. Thus, police power interests, by themselves, do not support the argument from necessity.

#### IV. TRANSLATING THE LESSONS OF *ADDINGTON* FROM PARENS PATRIAE TO POLICE POWER: THE COLLAPSE OF THE THERAPEUTIC COMPROMISE

While the focus of *Addington* is on means, its important lessons are about the substantive conditions that permit the use of those means. *Addington* sets substantive boundaries for civil commitment. Louisiana's pitch in *Foucha*, a mental-disability-is-unnecessary argument, landed well outside those boundaries, teaching the simple but important lesson that the jurisprudence of prevention is dead.

Sex offender commitment statutes push against the constitutional boundaries in a more robust way. Having learned the *Foucha* lesson, these statutes adopt a mental-disorder-based jurisprudence and challenge the Court to draw constitutional lines between and among the constructs of psychiatry and psychology. This can seem a daunting task, given the philosophical and scientific complexity of mental disease nosology,<sup>138</sup> the Court's reluctance to tie constitutional doctrine to evolving science,<sup>139</sup> and an inclination to leave to the laboratory of the states such complex definitions.<sup>140</sup>

From the lessons of *Addington*, taken together with *Foucha*, a principle emerges that cuts through this complexity. The purpose of the following discussion is to develop this principle, called the principle of criminal interstitiality. Mental disorders justify civil commitment only when they disable the state from pursuing its legitimate interests through the primary system for liberty deprivation—the criminal justice system. This is the rule the Supreme

137. The Texas Supreme Court had, in contrast, made just such an argument. *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977).

138. See, e.g., STUART A. KIRK & HERB KUTCHINS, *THE SELLING OF DSM: THE RHETORIC OF SCIENCE IN PSYCHIATRY* 21 (1992) (discussing the lack of "validation" of psychiatric disease categories); Vernon L. Quinsey, *The Prediction and Explanation of Criminal Violence*, 18 INT'L J.L. & PSYCHIATRY 117 (1995) (positing a nonpathological explanation for psychopathy); Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values*, 47 AM. PSYCHOLOGIST 373 (1992); Jerome C. Wakefield, *Disorder as Harmful Dysfunction: A Conceptual Critique of DSM-III-R's Definition of Mental Disorder*, 99 PSYCHOL. REV. 232 (1992).

139. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 87 (1992) (quoting *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983)).

140. *Foucha*, 504 U.S. at 87.

Court should apply when it sets substantive boundaries for civil commitments. If the Court uses the sex offender commitment cases as an opportunity to set those boundaries, it will find that the mental disorders generally involved in sex offender commitments do not meet this simple test and thus do not save sex offender commitment schemes from unconstitutionality.

This Article develops the principle of criminal interstitiality in three steps, using the sex offender commitment litigation as a vehicle. In the first step, it traces the transformation of *Addington* from a case about burden of proof, to a case that sets the substantive framework for determining the boundaries of civil commitment. Second, it shows that the police power based sex offender commitment schemes differ so materially from standard civil commitments that the grand therapeutic compromise of *Addington* is destroyed. Third, it shows how *Addington* and *Foucha* together create a mental-disorder-based therapeutic jurisprudence, incorporating the principle of criminal interstitiality, that accommodates but limits police power commitments.

#### A. *Addington*: from Burden of Proof to Substantive Boundaries

*Addington* can be called a case about burden of proof, or about the sub-criminal rules of civil commitment, or most broadly about the circumstances that justify the reformulation of the moral bargain under which the state may take a person's life or liberty in the criminal law. *Addington* has come to stand for the broadest of the propositions.

Challengers to sex offender commitments have complained that the sex offender commitment schemes improperly shortcut some or all of the criminal law protections.<sup>141</sup> The judicial responses inevitably find their ways back to *Addington*; it is cited for the proposition that states may civilly commit persons who are mentally ill and dangerous, and that the state interests legitimately underlying these commitments include both the *parens patriae* power and the police power. *Addington* is taken as expressing the justification for the entire package of stunted procedures, not merely the burden of proof.<sup>142</sup>

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141. Civil commitment is liberty deprivation governed by a set of rules that are less strict than those that govern the criminal law. The standard of proof, directly at issue in *Addington*, is just one among the package. They include exemption from the constitutional right to a jury and right against self-incrimination, *Allen v. Illinois*, 478 U.S. 364 (1986); exemption from the prohibition against double jeopardy prosecutions and *ex post facto* laws, *In re Bobo*, 376 N.W.2d 429 (Minn. Ct. App. 1985); and exemption from the requirement of a guilty mind and a criminal act, *actus reus*, *In re Young*, 857 P.2d 989 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995); see C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the "Politically Ill"*, 19 WM. MITCHELL L. REV. 99 (1993).

142. In fact, most of the contemporary sex offender commitment statutes incorporate a "reasonable doubt" standard of proof. ARIZ. REV. STAT. ANN. § 13-4606 (Supp. 1995); CAL. WELF. & INST. CODE § 6604 (West Supp. 1996); IOWA CODE ANN. §§ 709C.5, C.6(1) (West Supp. 1995); KAN. STAT. ANN. § 59-29a07 (1994); WASH. REV. CODE ANN. § 71.09.060 (West Supp. 1996); WIS. STAT. ANN. § 980.05 (West Supp. 1995).

For example, the Washington Supreme Court cited *Addington* for the proposition that, “[i]ncapacitation has often been recognized as a legitimate civil goal.”<sup>143</sup> In *Post*, the Wisconsin Supreme Court cited *Addington* as supporting the use of civil commitment to vindicate the state’s police and parens patriae powers:

In this instance, the state has dual interests—to protect the community from the dangerously mentally disordered and to provide care and treatment to those with mental disorders that predispose them to sexual violence. The Supreme Court has recognized both of these interests as legitimate, the first under a state’s police powers and the latter under its parens patriae powers.<sup>144</sup>

The Minnesota Supreme Court similarly treated *Addington* as a substantive, not merely procedural, holding.<sup>145</sup>

*B. Comparing Standard Civil Commitments and Sex Offender Commitments on the Addington Foundations: The Collapse of the Grand Therapeutic Compromise*

*Addington* justifies reformulating the moral bargain underlying liberty-deprivation by examining the nature of the individual’s mental disorder as it interrelates with the legal context. *Addington* determined that the subcriminal procedures of standard civil commitment intruded minimally on individual liberty and were necessary to achieve an important therapeutic end. In this Part, the Article examines whether the *Addington* therapeutic compromise retains its validity in the very different context of sex offender commitments.

“Standard civil commitments” are civil commitments like those in *Addington*. These are characterized by serious mental illness that renders the individual substantially disconnected with reality, immediate but relatively minor violence or threats of violence, and either no interaction with the criminal justice system or the use of the civil commitment as an informal diversion from the criminal justice system. While standard civil commitments may invoke the police power of the state (as in *Addington*), the overall tenor is that the state is intervening in a relatively benevolent manner to protect individuals who are so mentally disabled that they are not competent to make their own decisions about their lives. As demonstrated in the discussion of *Addington* above, the parens patriae power of the state is a strong feature of standard civil commitments.

At the other end of the continuum are sex offender commitments. Like standard civil commitments, sex offender commitment schemes generally require the state to demonstrate three elements: (1) a past conduct element (generally, commission of sexual violence, often repeated and egregious);<sup>146</sup> (2) a mental disorder,

143. *Young*, 857 P.2d at 998.

144. *State v. Post*, 541 N.W.2d 115, 122 (Wis. 1995) (citing *Addington v. Texas*, 441 U.S. 418, 426 (1979)), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204).

145. See *In re Blodgett*, 510 N.W.2d 910, 914 (Minn.) (“[T]he United States Supreme Court has decided a number of cases . . . which have restricted a state’s power to confine individuals in a non-criminal setting.”), *cert. denied*, 115 S. Ct. 146 (1994).

146. See, for example, the following code sections, which incorporate certain criminal offenses into their definitions of the committable sex offender: MINN. STAT. ANN. § 253B.02(7b) (West Supp. 1996); WASH. REV. CODE ANN. § 71.09.020(6) (West Supp. 1996).

dysfunction, or abnormality,<sup>147</sup> (3) resulting in a likelihood of future sexual violence.<sup>148</sup> Sex offender commitment schemes make use of a standard of proof that meets or exceeds the *Addington* standard.<sup>149</sup> Sex offender commitment schemes differ from standard civil commitments in significant ways. Sex offender commitments are characterized by seriatim<sup>150</sup> use of criminal and civil interventions, mental disorders that do not, in general, render the individual

For descriptions of the types of criminal histories exhibited by sex offender committees, see *In re Blodgett*, 510 N.W.2d at 913; Kathy M. Hebert & Cheryl Heilman, *Civil Commitment of Sexual Predators: Minnesota's Psychopathic Personality Statute*, THE HENNEPIN LAWYER, Sept.-Oct. 1993, at 4; John L. Kirwin, *Civil Commitment of Sexual Predators: Statutory and Case Law Developments*, THE HENNEPIN LAWYER, Sept.-Oct. 1995, at 22.

147. CAL. WELF. & INST. CODE § 6600(a), (c) (West Supp. 1996); IOWA CODE ANN. § 709C.2(4) (West Supp. 1996); KAN. STAT. ANN. § 59-29a02(a) (1994); MINN. STAT. ANN. § 253B.029(18b) (West Supp. 1996); WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1996); WIS. STAT. ANN. § 980.01(7) (West Supp. 1995).

148. ARIZ. REV. STAT. ANN. § 13-4601 (Supp. 1995); CAL. WELF. & INST. CODE § 6600(a), (c) (West Supp. 1996); IOWA CODE ANN. § 709C.2(4) (West Supp. 1996); KAN. STAT. ANN. § 59-29a02(a) (1994); MINN. STAT. ANN. § 253B.02(18b) (West Supp. 1996); WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1996); WIS. STAT. ANN. § 980.01(7) (West Supp. 1995); see Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings* (manuscript on file with author) (describing and estimating the de facto prediction standard used by sex offender commitment courts.).

149. Some sex offender commitment laws require the highest standard of proof, "reasonable doubt." ARIZ. REV. STAT. ANN. § 13-4606 (Supp. 1995); CAL. WELF. & INST. CODE § 6604 (West Supp. 1996); KAN. STAT. ANN. § 59-29a07 (1994); WASH. REV. CODE ANN. § 71.09.060 (West Supp. 1996); WIS. STAT. ANN. § 980.05 (West Supp. 1995).

150. See facts in *In re Blodgett*, 510 N.W.2d at 911-12; *In re Young*, 857 P.2d 989, 992-96 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *State v. Post*, 541 N.W.2d 115, 119-21 (1995), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204). In this way, contemporary sex offender commitment schemes differ from first generation schemes, which were intended as diversions from prison for those persons considered too sick to be punished. See *Millard v. Harris*, 406 F.2d 964, 969 (D.C. Cir. 1968) (noting that the District of Columbia's Sex Psychopath Act limited to those "too sick to deserve punishment"); *In re Blodgett*, 510 N.W.2d at 914 (Wahl, J., dissenting); *State v. Carpenter*, 541 N.W.2d 105, 112 (Wis. 1995) (acknowledging that the Illinois sex offender commitment scheme in *Allen v. Illinois*, 478 U.S. 364 (1986), was "distinguishable from the present case because the Illinois statute at issue in *Allen* provides for commitment in lieu of serving a criminal sentence."), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8131); William D. Erickson, "Northern Lights": *Minnesota's Experience with Sex Offender Legislation*, AM. ACAD. PSYCHIATRY & L. NEWSL., Apr. 1995, at 3 (noting that persons committed under the 1939 Minnesota statute in its first decade were "mostly window peepers, teenagers who masturbated excessively or had sexual contact with animals, consenting adult homosexuals, or non-violent pedophiles. These individuals were hospitalized for only a few months at most, and did not go on to face criminal charges or to serve prison sentences.").



incompetent or criminally excused,<sup>151</sup> and, consequently, almost primary reliance by the state on its police power to justify the intervention.<sup>152</sup>

Intermediate to these two forms of commitment fall the commitments of insanity acquitees. Like sex offender commitments, these commitments often involve serious violence, and rely heavily on the state's police power. But like standard civil commitments, they are used interstitially with the criminal justice system and involve mental illnesses which have substantially impaired the individual's ability to reason or control his or her behaviors.<sup>153</sup>

This Article will focus mainly on the two ends of the continuum. Because of their special relationship to the criminal justice system, commitments of insanity acquitees may well be a special class, whose rationale is tied in various ways to the fact that the individual has raised, and proved, a mental illness excuse for his or her criminal actions.<sup>154</sup>

*Addington* identified four aspects of civil commitment that helped to justify the therapeutic compromise. Examined in the context of sex offender commitments, each of the four loses the force it had in the *parens patriae* context of standard civil commitment.

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151. See discussion *infra* notes 175-77 and accompanying text; see also Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437 (1995) (criticizing current sexual predator statutes as providing an inadequate "conception of legal mental illness."); Winick, *supra* note 17, at 597; cf. Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992).

Minnesota's Sexual Psychopathic Personality Commitment Act, MINN. STAT. ANN. §§ 253B.02(18a), .185 (West 1992 & Supp. 1996), allows commitment only for sex offenders who have an "utter lack of power to control" their sexual impulses. As a number of commentators have noted, this standard tracks the classically recognized volitional excuse from criminal responsibility. See *Linehan I*, 518 N.W.2d 609, 613 (Minn. 1994) (Gardebring, J., dissenting); Schopp, *supra* note 12, at 187. But in its application, the Minnesota statute is not limited to those whose mental condition excuses them from criminal liability. See Eric S. Janus, *The Practice of Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules in Use*, 8 STAN. L. & POL'Y REV. (forthcoming Spring 1997).

152. The Minnesota Supreme Court did not rely on the *parens patriae* power at all in *Blodgett*. *In re Blodgett*, 510 N.W.2d at 910. The Minnesota sex offender commitment statute requires no finding of incompetence, and does not invoke the *parens patriae* power of the state in any way. MINN. STAT. ANN. §§ 253B.02(18b), .185 (West 1992 & Supp. 1996). Though *Young* and *Post* both mention the *parens patriae* power as a source of power for sex offender commitments, they do not explain how that power is applicable to people who are fully competent. *In re Young*, 857 P.2d at 1000 (quoting *Addington v. Texas*, 441 U.S. 418, 446 (1979)); *Post*, 541 N.W.2d at 122.

153. These cases involve situations in which the defendant has been found to be non-eulpable for his or her criminal behavior. They are similar to standard civil commitment cases because the mental disorder of the individual is clearly related to the state's interest in using civil confinement procedures. In sex offender commitments, on the other hand, the mental disability element is not related to the need to use civil commitment.

154. See *Foucha v. Louisiana*, 504 U.S. 71, 85 (1992) ("*Jones* established that insanity acquitees may be treated differently in some respects from those persons subject to civil commitment . . ."); *Jones v. United States*, 463 U.S. 354 (1983).

1. The “Civil/Criminal” Distinction: Civil Commitments Can “In No Sense Be Equated to a Criminal Prosecution.”<sup>155</sup>

The Court’s statement that civil commitments can “in no sense be equated to a criminal prosecution” applies with substantial force to standard civil commitments with their focus on *parens patriae* intervention.<sup>156</sup> But sex offender commitments are almost entirely based on the police power of the state.<sup>157</sup> As such, they are almost identical to criminal prosecutions in all senses except one: while the state professes a punitive purpose for criminal incarceration, it denies the purpose for sex offender commitments.

Most notably, the punitive purpose of the criminal law is not even its major feature. In fact, many would argue that incapacitation is the defining feature of punishment.<sup>158</sup> “Of all of the justifications for criminal punishment, the desire to incapacitate is the least complicated . . . and often the most important.”<sup>159</sup> Justice Kennedy made the same point in his *Foucha*<sup>160</sup> dissent:

The Constitution does not require any particular model for criminal confinement. “The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation,” and upon compliance with *In re Winship*, the State may incarcerate on any reasonable basis. Incapacitation for the protection of society is not an unusual ground for incarceration. “Isolation of the dangerous has always been considered an important function of the criminal law.”<sup>161</sup>

The purpose of incapacitation is the central goal of sex offender commitments. *Young*,<sup>162</sup> *Post*,<sup>163</sup> and *Blodgett*<sup>164</sup> all describe the protection of the public through incapacitation as a central goal of sex offender commitments. Each also lists the provision of treatment as a goal,<sup>165</sup> but all acknowledge that the effectiveness of

155. *Addington v. Texas*, 441 U.S. 418, 428 (1979).

156. *See supra* text accompanying note 121.

157. *See supra* note 152 and accompanying text.

158. *See generally* ZIMRING & HAWKINS, *supra* note 122.

159. *Id.* at v; *see also id.* at 25 (discussing “thesis that the primary task of the prison system in respect of *all* prisoners was not deterrence or reform, but containment or control”).

160. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

161. *Foucha*, 504 U.S. at 98-99 (Kennedy, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in judgment) (quoting *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring) (citations omitted)).

162. *In re Young*, 857 P.2d 989 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

163. *State v. Post*, 541 N.W.2d 115 (Wis. 1995), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204).

164. *In re Blodgett*, 510 N.W.2d 910 (Minn.), *cert. denied*, 115 S. Ct. 146 (1994).

165. *Blodgett*, 510 N.W.2d at 916 (“But even when treatment is problematic, and it often is, the state’s interest in the safety of others is no less legitimate and compelling.”); *Young*, 857 P.2d at 992:

Important constitutional and technical issues are raised by this unique legislation, which seeks to protect our citizens by incapacitating and attempting to treat those whose mental abnormalities create a grave risk of future harm. Although the ultimate goal of the statute is to treat, and someday cure those whose mental

the treatment provided is unknown.<sup>166</sup> The provision of treatment is not a distinguishing feature of commitment, since states can, and often do, provide treatment in prison settings.<sup>167</sup> As is shown in more detail below, the criminal law setting can be just as effective in forcing treatment as the civil commitment setting.<sup>168</sup>

The fact that sex offenders can be released from commitments when they demonstrate that they are no longer dangerous is often cited as a basis for distinguishing sex offender commitments from criminal prosecutions,<sup>169</sup> but this is only a contingent difference. Some criminal sentences are structured in the same way.<sup>170</sup> More significantly, this difference generally does not inure to the benefit of the sex offender. In fact, the fixed, though brief, length of many criminal sentences is often cited as the chief justification for sex offender commitments.<sup>171</sup> As the Minnesota experience shows,<sup>172</sup> sex offender commitments are, in reality, lifetime incarcerations. From the perspective of the individual, the risk from an erroneous sex offender commitment is greater than the risk from an erroneous conviction.

The fact that the state does not claim a punitive purpose when it commits sex offenders does not ameliorate the risk associated with sex offender commitments. From the perspective of the individual whose liberty is at stake, this is immaterial. Since sex offender commitments are held out as being applicable only to the "most dangerous criminals,"<sup>173</sup> the stigma from sex offender

condition causes them to commit acts of sexual violence, its immediate purpose is to ensure the commitment of these persons in order to protect the community.

*Post*, 541 N.W.2d at 132:

Where, as here, one of the purposes of the commitment is to protect the public through incapacitation and treatment of dangerous mentally disturbed individuals who are substantially likely to engage in future acts of sexual violence, release properly hinges on the progress of treatment rather than any arbitrary date in time.

The commitment ends when this purpose is satisfied—when the committed person no longer poses a danger to the community as a sexually violent person.

166. See *Blodgett*, 510 N.W.2d at 916; *Young*, 857 P.2d at 993; *Post*, 541 N.W.2d at 124.

167. See *Linehan I*, 518 N.W.2d 609, 611 (Minn. 1994).

168. See *infra* notes 238-43.

169. See, e.g., *Blodgett*, 510 N.W.2d at 916; *Young*, 857 P.2d at 1004; *Post*, 541 N.W.2d at 124 n.14; *State v. Carpenter*, 541 N.W.2d 105, 112 (Wis. 1995), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8131).

170. See the following on indeterminate sentencing practices: NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INDETERMINATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990); Gary L. Mason, *Indeterminate Sentencing: Cruel and Unusual Punishment, or Just Plain Cruel?*, 16 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 89 (1990).

171. Alexander D. Brooks, *The Incapacitation by Civil Commitment of Pathologically Violent Sex Offenders*, in *LAW, MENTAL HEALTH, AND MENTAL DISORDER* 384, 385 (Bruce Sales & Daniel Shuman eds., 1996) (identifying "limitations of the criminal justice system in providing sufficient protection from violent sexual predators").

172. See *infra* notes 227-35 and accompanying text.

173. See *Young*, 857 P.2d at 1003 (noting that Washington statute identifies offenders whose "likelihood of re-offense is extremely high"); *Post*, 541 N.W.2d at 124 (noting that Wisconsin statute applies only to those who are "distinctively dangerous"); OFFICE OF THE ATTORNEY GENERAL, STATE OF MINNESOTA, TESTIMONY OF ATTORNEY GENERAL HUBERT HUMPHREY III

commitments is arguably much worse than that of a criminal prosecution.<sup>174</sup> Recall that sex offender commitments are added onto, and do not replace, criminal proceedings. Thus the stigma of the sex offender commitment and the criminal proceeding are cumulative.

Finally, it is also arguable that the nonpunitive approach of sex offender commitments is actually more harmful to the dignity of the individual than criminal proceedings. In criminal proceedings, the operative assumption is that the defendant is a free agent, a full human being. Criminal proceedings focus on what the defendant did, and the intent with which the defendant acted. In contrast, in sex offender commitment cases, the respondent is treated as an object to be examined and evaluated. He is classified. The key questions are not what he did (although that is relevant) but what his "condition" is, what he is "like," and whether he is the "type" of offender who will re-offend. The language of commitment is the language of determinism, not free agency.<sup>175</sup> It is the language of classification—objectifying and demeaning.<sup>176</sup> In sex offender commitments, the determinism of the commitment court seems a cruel hypocrisy, following as it does the prosecution and punishment of the individual for the same behavior.<sup>177</sup>

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BEFORE THE LEGISLATIVE TASK FORCE ON SEXUAL PREDATORS: PROPOSED SEXUAL PREDATOR REFORMS, at 1 (Aug. 11, 1994) ("The question before us today is simple: how do we protect the public from some of the most dangerous criminals in society."); Kirwin, *supra* note 146, at 25 ("Under the current system, civil commitment is applied only to the relatively few, most dangerous, sexual predators.").

174. In Minnesota, during the period 1991 to 1995, approximately 1000 inmates were released from prison after serving sentences for sex offenses. Stephen J. Huot, *Screening and Referral by the Department of Corrections*, in MINNESOTA INSTITUTE OF LEGAL EDUCATION, PSYCHOPATHIC PERSONALITIES AND SEXUALLY DANGEROUS PERSONS (1995). Approximately 63 of these individuals were civilly committed as sex offenders upon their release from prison. Facsimile transmission from Minnesota Security Hospital, Number of Men Admitted as Psychopathic Personalities (Oct. 17, 1995) [hereinafter MSH Fax] (on file with author). Thus, approximately 6% of released sex offenders are civilly committed. A judgment of commitment as a sex offender is an official determination that an individual is among the worst of the worst.

175. See *In re Blodgett*, 510 N.W.2d 910, 915 (Minn.) ("utter lack of power to control"), *cert. denied*, 115 S. Ct. 146 (1994); *Young*, 857 P.2d at 1003 (describing "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts"); *Post*, 541 N.W.2d at 124 ("current diagnosis of a present disorder suffered by an individual that specifically causes that person to be prone to commit sexually violent acts in the future"); Schopp, *supra* note 12, at 169; Blakey, *supra* note 18, at 291-96.

176. Cf. ANTHONY BURGESS, *A CLOCKWORK ORANGE* (New American ed., Norton 1988) (1967) (treating criminality as a medical, rather than moral, problem). As in Kafka's *The Trial*, sex offender commitment proceedings often do not specify what sex crime is predicted, or when it will take place. FRANZ KAFKA, *THE TRIAL* (Definitive ed., Schocken Books 1995) (1956); see, e.g., Order and Memorandum in *Linehan II*, File No. P8-94-0362 (Ramsey County, Minn.).

177. *Linehan I*, 518 N.W.2d 609, 616 (Minn. 1994) (Gardebring, J., dissenting):

If such persons are found to intend such acts, they should be convicted of serious crimes and sentenced accordingly. If, however, it is the position of the state that they cannot—rather than will not—control their sexual appetites, and the state can so demonstrate, civil commitment under the psychopathic personality statute is appropriate. To allow the state to first choose the criminal sanction, which

## 2. The "Impaired Autonomy" Assumption: Those Subject to Commitment Are Not "Truly Free"

The *Addington* Court characterizes persons subject to standard civil commitments as being not wholly at liberty. Thus, their loss of physical liberty occasioned by civil commitment is somewhat diminished, in part because their liberty is not as full as others, in part because hospitalization offers them a chance to regain their autonomy.

The Court bases its argument on the assumption that persons committed in standard civil commitments are incompetent to make their own treatment decisions. The *parens patriae* power therefore justifies standard civil commitments.

Observe how the "not wholly at liberty" argument applies in the case of sex offenders. Since most sex offenders are not considered incompetent or criminally excused, the *parens patriae* rationale does not apply to them.<sup>178</sup> Nonetheless, one might argue that many sex offenders are not wholly free because their behavior

requires a finding of a specific state of mind, and when that sanction is completed, to choose another sanction which requires a finding of the opposite state of mind, is a mockery of justice which places both the criminal and civil systems for dealing with sexual predators in disrepute.

178. See Schopp, *supra* note 12, at 183; Winick, *supra* note 17, at 587. Personality disorders do not generally render a person incompetent, and thus would not trigger a *parens patriae* commitment. Stephen Rachlin et al., *The Volitional Rule, Personality Disorders and the Insanity Defense*, 14 PSYCHIATRIC ANNALS 139 (1984); Abraham Rudnick & Amihay Levy, *Personality Disorders and Criminal Responsibility: A Second Opinion*, 17 INT'L J.L. & PSYCHIATRY 409 (1994); Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAVIORAL SCI. & L. 437, 441 (1995) ("In summary, neither sex offenders nor paraphiliacs consistently manifest any particular pattern of impaired psychological capacities."); Winick, *supra* note 17, at 584-85; Emily Campbell, Comment, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?*, 69 NEB. L. REV. 190 (1990); see *State v. Carpenter*, 541 N.W.2d 105, 112 (Wis. 1995) (acknowledging that the Illinois sex offender commitment scheme in *Allen v. Illinois* was "distinguishable from the present case because the Illinois statute at issue in *Allen* provides for commitment in lieu of serving a criminal sentence"), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8131); cf. *Allen v. Illinois*, 478 U.S. 364, 374 (1986) (In this "first generation" sex offender commitment case, the Supreme Court found the *parens patriae* interest to be operative.). Some commentators who support civil commitment for sex offenders assume that the *parens patriae* principle has some applicability. See, e.g., Bochnewich, *supra* note 26, at 305. *Post* and *Young* both mention the state's *parens patriae* interest, but do not demonstrate how it has any applicability in their respective sex offender commitment schemes. *Young*, 857 P.2d at 1000; *Post*, 541 N.W.2d at 122. It is theoretically possible that some sex offenders are so severely mentally impaired that they are incompetent. See *Young*, 857 P.2d at 994 (noting that appellant *Young* had been found "incompetent" to stand trial in the past); *Post*, 541 N.W.2d at 122. Most, however, are not. *Linehan I*, 518 N.W.2d at 610-13 (discussing facts of case); *In re Blodgett*, 510 N.W.2d 910, 911-12 (Minn.) (discussing facts of case), *cert. denied*, 115 S. Ct. 146 (1994).

Some advocates of sex offender commitments argue that the commitments are justified because the sexual violence will not stop unless treatment is provided. This argument is not about impaired autonomy, but rather about the state's interests in regulating dangerous behavior. It is discussed below, in part IV.B.4.

is caused by their disordered personalities<sup>179</sup> and abnormal sexual arousal patterns.<sup>180</sup> A similar argument, however, could be made for all humans who have abnormal personalities or propensities. Sex offenders are not less free because their personalities and sexual preferences are out of the norm.<sup>181</sup> Further, although sex offender treatment might be beneficial for some sex offenders,<sup>182</sup>

179. Causation is a complex issue. *See, e.g.*, Thomas A. Widiger & Timothy J. Trull, *Personality Disorders and Violence*, in *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT* 203, 216 (John Monahan & Henry J. Steadman eds., 1994) (“Violent behavior results from a complex interaction among a variety of social, clinical, personality, and environmental factors whose relative importance varies across situations and time.”); Edward P. Mulvey, *Assessing the Evidence of a Link Between Mental Illness and Violence*, 45 *HOSP. & COMMUNITY PSYCHIATRY* 663, 665 (1994):

No clear information about the causal paths that produce the association between mental illness and violence is available. The literature to date has demonstrated an association between these two variables without a clear indication of causality between them. The presence of mental illness might be the first link in a chain of events resulting in violence. It is also possible that frequent violent encounters exacerbate a disorder.

A full discussion of the causal relationship between mental disorder and sexual violence is unnecessary here because most sex offenders are treated as responsible for their behavior and competent to make their own decisions. From the perspective of the law, whatever causal connection exists is immaterial.

From a scientific perspective, there are significant unresolved questions about the relationship between Antisocial Personality Disorder and violence. Antisocial Personality Disorder is characterized, in part, by a lack of remorse, empathy and conscience, which is thought to be a factor predisposing a person to sexual violence. Marnie Rice & Grant T. Harris, *Cross-Validation and Extension of an Actuarial Instrument for the Prediction of Recidivism Among Sex Offenders*, in *PENETANGUISHENE MENTAL HEALTH CENTRE RESEARCH REPORT*, September 1995, at 18 (noting that psychopathy, in combination with deviant sexual preferences, is an “especially strong” predictor for sexual violence). But while violence and absence of normal empathetic feelings may be related, it is not at all clear which way the causal arrow runs. For the provocative hypothesis that the personality characteristics might be the effect, rather than the cause, of the violence, see Quinsey, *supra* note 138, at 122-26 (positing a non-pathological explanation for psychopathy) and Randy Thornhill & Nancy W. Thornhill, *Human Rape: An Evolutionary Analysis*, 4 *ETHOLOGY AND SOCIOBIOLOGY* 137 (1983) (discussing the possibility that rape, though immoral and wrong, may be a nonpathological adaptive development in the evolution of human males).

180. *See* Howard E. Barbaree & William L. Marshall, *Deviant Sexual Arousal, Offense History, and Demographic Variables as Predictors of Reoffense Among Child Molesters*, 6 *BEHAVIORAL SCI. & L.* 267, 278 (1988) (concluding that deviant arousal patterns are “an important predictor” of child molestation). *But see* Park E. Dietz, *Sex Offenses: Behavioral Aspects*, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1485, 1490 (Sanford M. Kadish ed., 1983) (The author maintains that only a small proportion of rapists have sexually deviant impulses. “The paraphilia determines the form of the offense, not the fact of its taking place. Failure to control or find lawful outlets for deviant sexual impulses must not be confused with incapacity to control these impulses.”).

181. *See generally* DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* (1984) (showing how the concept of free will co-exists with the notion that people’s behavior is often strongly determined by their personalities).

182. Though all of the sex offender courts have acknowledged that treatment is “problematic,” *see, e.g.*, *Blodgett*, 910 N.W.2d at 916, there are studies that show some positive effects of treatment. *See* Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A*

most sex offenders are not incompetent, and are therefore considered entitled to make their own decisions about the comparative benefits of treatment.<sup>183</sup>

### 3. Layered Levels of Professional Review and Continuous Opportunities to Correct Erroneous Commitments

*Addington* admits that use of the sub-criminal standard of proof will result in a higher level of “error” than in criminal cases. The Court ameliorates the risk of error in its calculus, at least partially, by “layers of professional review” of the “patient’s condition” that provide a “continuous opportunity” to correct erroneous commitments.<sup>184</sup> The opportunity for continuous review lightens the liberty-deprivation burden on the individual in two ways: by catching errors in the initial commitment, and by insuring that institutionalization ends when the commitment becomes erroneous.

A careful empirical study of the process of error correction has not been found. There are sound structural, as well as empirical, grounds for concluding that the efficacy of error correction in sex offender commitments is close to zero, and, in any event, significantly less than it is in the standard civil commitment context considered by the Court in *Addington*.

We can divide the kinds of errors manifested by commitments into two categories. Type One errors are errors in the findings and conclusions underlying the commitment ab initio. Type Two errors arise from changed circumstances that render the commitment no longer proper. They transform a proper

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*Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802 (1995) (discussing meta-study of sex offender treatment outcome studies and finding robust treatment effect, medium sized with respect to outpatients, small with respect to inpatients).

183. In Minnesota, sex offender treatment can be given only to competent persons who consent to the treatment. See SEX OFFENDER PROGRAM, *supra* note 17; *In re Hayes*, 608 P.2d 635, 639 (Wash. 1980) (holding that the state may not force sterilization on competent mentally retarded persons); cf. *Jarvis v. Levine*, 418 N.W.2d 139, 145 (Minn. 1988) (holding that “intrusive” treatment may not be forced on unconsenting, competent mental patients). *Jarvis* would suggest that the treatment may not be “forced.”

Of course, the state is also free in some circumstances to attach consequences to an individual’s decisions about treatment. States can “force” competent sex offenders to have treatment by making treatment a condition of parole or probation. This type of force is consistent with the free will of the individual, and is not based on the *parens patriae* interests of the state.

184. Many states use the “reasonable doubt” standard in the sex offender commitment schemes. E.g., ARIZ. REV. STAT. ANN. § 13-4606 (West Supp. 1995); CAL. WELF. & INST. CODE § 6604 (West 1996); IOWA CODE ANN. §§ 709C.5, 709C.6(1) (West Supp. 1995); KAN. STAT. ANN. § 59-29a07 (1994); WASH. REV. CODE ANN. § 71.09.060 (West 1992 & Supp. 1996); WIS. STAT. ANN. § 980.05 (West Supp. 1996); Janus & Meehl, *supra* note 148. The higher rate of error predicted by the Court may, nonetheless, persist. Error is inherent in the kinds of determinations that underlie civil commitment, not simply in the proof standard. This Article shows that the determinations in sex offender commitments are more prone to error, and less easily detected and corrected, than those of standard civil commitments. See *infra* notes 196-234. Further, the Court’s calculus considered error-correction to include discharge of committed individuals when they are no longer committable. A “reasonable doubt” standard for the initial commitment decision does not have any effect on this type of error correction.

commitment into an erroneous commitment. Arguably only Type One errors result from the choice of standard of proof. Commitments must end, constitutionally, when the grounds supporting commitment no longer apply.<sup>185</sup> Type Two errors are created when commitments continue past that point, and are thus not attributable to the initial decision making process. *Addington*, however, characterizes the available review as continuous, suggesting that the Court had both types of errors in mind.

The Court may have been concerned about the correction of Type Two errors for two reasons. First, the fact that commitments are corrected as soon as they become erroneous lightens the burden on the individual, and thus makes the therapeutic compromise struck by the Court more reasonable.<sup>186</sup> Second, the Court may have understood that a bifurcation of errors into Type One and Type Two is necessarily artificial. Especially in marginal cases, where errors would be most likely, it may be impossible to distinguish between a person who should not have been committed in the first place, and one whose condition promptly improves after commitment. Both patterns may be within the margin of error of psychiatric decision-making.

#### a. The Legal Structures for Error Correction

As was discussed above, many of the structural features of standard civil commitments are designed to facilitate error correction.<sup>187</sup> In contrast, sex offender commitment schemes employ structures that are inhospitable to the correction of errors. Sex offender commitment schemes provide for unlimited commitment periods,<sup>188</sup> and keep discharge decisions carefully under the control

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185. See *Foucha v. Louisiana*, 504 U.S. 71, 84 (1992); *Jones v. United States*, 463 U.S. 354, 368 (1983); *Jackson v. Indiana*, 406 U.S. 715, 731 (1972).

186. This feature of sex offender commitments is frequently cited by courts as a significant feature in the constitutional calculus. See *Blodgett*, 510 N.W.2d at 916; *In re Young*, 857 P.2d 989, 997 (Wash. 1993) (“In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement.”) (quoting *Allen v. Illinois*, 478 U.S. at 364, 370 (1986)), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *State v. Carpenter*, 541 N.W.2d 105, 111 (referring to the same passage in *Allen v. Illinois*), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8131).

187. See *supra* notes 127-30 and accompanying text.

188. Under the Minnesota sex offender commitment schemes, sex offenders are committed first for a 60-day period of evaluation and observation. After the treatment facility submits a report to the court, the court must hold a further hearing to determine whether the individual “continues” to meet the statutory criteria for commitment. Upon finding that the criteria continue to be met, the court may commit the individual for an indeterminate period. MINN. STAT. ANN. §§ 253B.185(1), .18(2) (West Supp. 1996); see also ARIZ. REV. STAT. ANN. § 13-4606(b) (West Supp. 1996); CAL. WELF. & INST. CODE §§ 6602, 6604 (West Supp. 1996); IOWA CODE ANN. § 709C.6 (West Supp. 1996); KAN. STAT. ANN. §§ 59-29a05, -29a07(a) (1994); WASH. REV. CODE ANN. §§ 71.09.040(4), 71.09.040(1) (West 1992 & Supp. 1996); WIS. STAT. ANN. §§ 980.04(1), 980.06(1) (West Supp. 1996).



of the courts.<sup>189</sup> Type One errors (commitments that are erroneous ab initio) may be virtually insulated from correction.<sup>190</sup> Courts are accustomed to applying legal constructs of finality (such as law of the case and collateral estoppel) to their decisions at post commitment stages of the proceeding.<sup>191</sup> Under these constructs, only Type Two errors are likely cognizable. Unlimited commitments end when there is proof that the individual has changed sufficiently that he is no longer dangerous.<sup>192</sup> For a variety of reasons explored below this is almost impossible to prove.<sup>193</sup>

Further, when courts, rather than treatment professionals, make discharge decisions, several factors undercut the efficacy of professional review. Courts may decide that legal standards are different from medical standards.<sup>194</sup> Such decisions curtail professional input, and tend to focus less on whether the commitment is medically suitable for the patient, and more on the social policies of public protection.

#### b. Aspects of Sex Offender Commitments That Generate Errors

The errors made in sex offender commitments are likely to be difficult to ascertain and correct. In many sex offender commitment cases, the mental

189. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-4609(e) (West Supp. 1995); CAL. WELF. & INST. CODE §§ 6608(e) (West 1996); IOWA CODE ANN. §§ 709C.8 (1)(2) (West Supp. 1996); KAN. STAT. ANN. §§ 59-29a10 (1994); WASH. REV. CODE ANN. §§ 71.09.096 (1) (West 1992 & Supp. 1996); WIS. STAT. ANN. §§ 980.08 (4) (West Supp. 1996).

190. Of course, commitment orders are appealable and legal errors may be corrected on appeal. But the correction of legal errors is not a special feature of civil commitments, and legal errors are not the kinds of errors that the *Addington* Court worried about.

191. See *In re Patterson*, No. C3-95-935, 1995 Minn. App. LEXIS 1199, at \*6 (Minn. Ct. App. Sept. 19, 1995) (noting that prior cases have upheld "indeterminate commitment, where initial commitment had been affirmed, and testimony at review hearing indicated condition had not changed since initial commitment") (quoting *In re Clements*, 440 N.W.2d 133, 137 (Minn. Ct. App.), review denied (Minn. June 21, 1989)); *In re Moore*, 108 A.2d 212 (N.H. 1954); *In re Katz*, 638 A.2d 684 (D.C. App. 1994).

192. See *In re Blodgett*, 510 N.W.2d 910, 916 (Minn.), cert. denied, 115 S. Ct. 146 (1994); *Call v. Gomez*, No. C6-95-2470, 1996 WL 162466 (Minn. Ct. App. Apr. 9, 1996). Theoretically, a patient can be discharged if he is no longer "mentally disordered." But the mental disorders generally attributed to sex offenders, personality disorders and paraphilias, are considered to be chronic. See DSM-IV, *supra* note 79. These disorders are not cured through treatment. See Pithers, *supra* note 17, at 343. The most common form of sex offender treatment (relapse prevention) does not rest on the notion that treatment will "cure" a "disorder," but rather that clients need to strengthen self-control by "identifying problematic situations, analyzing decisions that set up situations enabling resumption of substance abuse, and developing strategies to avoid, or cope more effectively with, these situations." Pithers, *supra* note 17, at 346. Thus, "[t]reatment is seen as training or education rather than therapy." Marshall, *supra* note 17, at 391.

193. See discussion *infra* at notes 219-22.

194. See *In re Patterson*, No. C5-95-935, 1995 Minn. App. LEXIS 1199 (Minn. Ct. App. Sept. 19, 1995); *In re Adolphson*, No. C5-95-533, 1995 Minn. App. LEXIS 965 (Minn. Ct. App. July 25, 1995); *In re Young*, 857 P.2d 989, 1001 (Wash. 1993) (noting that legal standard "mental abnormality" may be broader than medical standard as reflected in DSM-IV), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

disorder element is satisfied with a diagnosis of a personality disorder or a paraphilia.<sup>195</sup> Personality disorders are evidenced by long lasting, stable traits.<sup>196</sup> Paraphilias, as well, are chronic in course.<sup>197</sup> Paraphilias are consistent with volitional control in the individual<sup>198</sup> and thus would not be negated by nonparaphiliac behavior in an institutional setting.<sup>199</sup> Mental hospitals often do not provide obvious opportunities for rape or pedophilic behaviors. Thus, current behaviors of the individual, those that can be observed by the error-correcting treatment staff, are less probative of the existence or non-existence of a personality disorder or a paraphilia than are the current behaviors and intentions of a person alleged to be psychotic. "Good" behavior in the structured setting of a mental hospital may be discounted as aberrational, faked, or inevitable when viewed by treatment personnel in the context of a history of antisocial or paraphiliac behavior.<sup>200</sup> In short, diagnoses of personality disorders and paraphilias may be based mostly on historical, community-based information rather than current, institutional observation. The facts that can be observed in an institutional setting simply do not, at least in the short run, provide a basis for contradicting a judicially-endorsed finding that an individual has a personality disorder or paraphilia.<sup>201</sup>

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195. See *In re Hendricks*, 912 P.2d 129, 133-38 (Kan.), cert. granted, 116 S. Ct. 2522 (1996); *Blodgett*, 510 N.W.2d at 912-16; *Young*, 857 P.2d at 1000-04; *State v. Post*, 541 N.W.2d 115, 122-24 (Wis. 1995), petition for cert. filed, (U.S. Mar. 7, 1996) (No. 95-8204).

196. DSM-IV, *supra* note 79, at 645-50; THEODORE MILLON, DISORDERS OF PERSONALITY DSM-III: AXIS II (1981).

197. DSM-IV, *supra* note 79

198. See *Dietz*, *supra* note 180, at 1490-91.

199. Physiological testing of sexual arousal is sometimes used to assess sexual dangerousness. See, e.g., *Rice & Harris*, *supra* note 179, at 14. However, it is considered unethical to rely solely on physiological testing. ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, THE ATSA PRACTITIONER'S HANDBOOK 19 (1993). Further, the absence of deviant response in the laboratory setting may not be a reliable indicator due to volitional control of the response by the individual. See cases cited *infra* note 200.

200. *State v. Ward*, 369 N.W.2d 293, 296-97 (Minn. 1985); *In re Hofmaster*, 434 N.W.2d 279, 281 (Minn. Ct. App. 1989) ("Good behavior in the artificial atmosphere of a prison or hospital is not determinative where the medical experts testify the person would act out in a sexually aggressive or harmful manner with less supervision."); see *In re Toulou*, No. C0-94-2518, 1995 Minn. App. LEXIS 623, at \*7 (Minn. Ct. App. May 9, 1995):

The trial court cited testimony that Toulou was like a wild, predatory animal, which will strike when it is hungry and when prey is available unless deterred by other larger predators. The court found that Toulou is "totally dependent on external forces to conform to society's mores," and that a "removal of those external controls, however, will predictably result in [Toulou] acting on his impulses."

It was largely for this reason that the *Young* court rejected a "recent overt act" requirement for sex offender commitment petitions that are brought respecting institutionalized individuals. *In re Young*, 857 P.2d 989, 1009 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 794 (W.D. Wash. 1995).

201. Professionals may disagree about how to interpret the historical data on an individual. But such re-interpretations do not show "changed circumstances."

In standard civil commitment cases, in contrast, the mental disorder is characterized generally by a psychotic illness.<sup>202</sup> Psychoses “wax and wane in their severity over time, and . . . display themselves as the acute and more dramatic forms of psychopathology.”<sup>203</sup> Manifestations of psychoses—delusions, paranoid ideation, depressed thinking—are less under the volitional control of the individual than are the behaviors manifesting personality disorders or paraphilias, at least in the relatively short run. Thus, institutional observation is important and fruitful in identifying when a standard civil commitment should end.

Though sex offender commitment courts often claim that the predicate mental disorder is a legal, rather than a medical, concept, they often appear to accept medically-defined diagnoses as sufficient.<sup>204</sup> In these medical definitions, personality disorders and paraphilias are dimensional constructs sliced into a categorical nosology.<sup>205</sup> Antisocial Personality Disorder, for example, is a description of one end of a continuum of personality traits.<sup>206</sup> Paraphilias are an extreme end of a continuum of sexual proclivities.<sup>207</sup> In sex offender commitments, then, diagnosis consists of ascertaining where lines are drawn on continua of personalities and sexual preferences. Clearly, the placement of the lines depends very strongly on social<sup>208</sup> and legal context, and less on medical/scientific judgment. Professional diagnoses are thus entitled to diminished weight since a key aspect of the diagnostic process involves the application of socio-legal categorizations.

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202. See MINNESOTA DEPARTMENT OF HUMAN SERVICES, A SURVEY OF ADULTS WITH MENTAL ILLNESS IN MINNESOTA'S REGIONAL TREATMENT CENTERS 35 (1991). Among the adult mentally ill population (nonforensic), 63.6% were diagnosed with schizophrenia, 19.5% with affective disorder, and 4.1% “other psychosis.” *Id.* Due to the possibility of multiple diagnoses, it is not possible to determine from these data what the total percentage of psychotic illness is.

203. MILLON, *supra* note 196.

204. See *Linehan II*, 544 N.W.2d 308, 313 (Minn. Ct. App. 1996), *review granted*, 1996 Minn. LEXIS 197 (Minn. Mar. 19, 1996); *Young*, 857 P.2d at 1001-04; *State v. Post*, 541 N.W.2d 115, 122-24 (Wis. 1995), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204).

205. Frances, *supra* note 79; Thomas A. Widiger et al., *The DSM-III-R Personality Disorders: An Overview*, 145 AM. J. PSYCHIATRY 786; Widiger & Trull, *supra* note 179, at 216 (“First, DSM III-R is a dichotomous model that imposes arbitrary categorical distinctions between the presence and absence of a disorder that may have little relationship to the predictability of violent behavior. Second, the diagnostic categories are substantially heterogeneous with respect to the personality variables that are most likely to be predictive of violent behavior.”).

206. MILLON, *supra* note 196, at 8 (“[N]ormality and pathology are relative concepts; they represent arbitrary points on a continuum or gradient, since no sharp line divides normal from pathological behavior.”); Rudnick & Levy, *supra* note 178, at 415 (noting that personality disorders are exaggerations of normal personality traits.). Quinsey, *supra* note 138, at 123-24, writes that the construct of psychopathy (as distinguished from Antisocial Personality Disorder) may be a “real” entity, rather than an arbitrarily designated extreme of a continuum. But he raises the provocative question of whether, even if it is a real entity, it is a mental disorder.

207. Dietz, *supra* note 180. That is, paraphiliacs differ not in kind, but rather in amount, from “normals.”

208. See DSM-IV, *supra* note 79, at 181-215 (defining paraphilia and Antisocial Personality Disorder).

The great ambiguity about the role that mental disorder plays in justifying sex offender commitments also impedes error correction. Sex offender commitment legislation is not clear about the role that mental disorder plays in civil commitment or on the definitions or boundaries for mental disorder.<sup>209</sup> Sex offender commitment courts have provided little explicit guidance on the role or purpose of the mental disorder element. None of the courts assume that mental disorder is to be coterminous with medical definitions but neither have they straightforwardly articulated a policy or other basis for choosing a nonmedical definition of the term. As a result, the legal concept of "mental disorder" remains highly elastic. Without a reliable reference standard, the concepts of error and error correction lose their meaning.<sup>210</sup>

Predictions of future dangerousness are central to any form of civil commitment.<sup>211</sup> Prediction is likely to be problematic in standard civil commitments as well as sex offender commitments, but features of sex offender commitments suggest that the errors in prediction will be greater, and their correction more difficult, than in standard civil commitments.

Standard civil commitments are usually triggered by relatively recent acts of violence or threatening behavior.<sup>212</sup> The issue for prediction is whether the individual will be violent in the relatively short term. On the other hand, sex offender commitment predictions are likely to be based on violence that is quite remote, occurring often years or decades before the commitment proceedings.<sup>213</sup> This is because sex offender commitments are aimed at sex offenders who have been in prison serving lengthy sentences for the same past behavior.<sup>214</sup> In

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209. Janus, *supra* note 151; Schopp, *supra* note 12, at 187; Winick, *supra* note 17, at 555.

210. Janus, *supra* note 151 (showing that the "espoused" rules of sex offender commitments provide almost no power to discriminate those appropriate for civil commitment from those who are not appropriate).

211. BRAKEL ET AL., *supra* note 129, at 33-34; MICHAEL L. PERLIN, 1 MENTAL DISABILITY LAW § 2.06 (1989); John Monahan & David Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 L. & HUM. BEHAV. 37, 37 (1978).

212. In *Addington*, threatening behavior immediately preceded the commitment petition. Minnesota law requires a "recent attempt or threat to physically harm self or others" for standard civil commitments. MINN. STAT. ANN. § 253B.02(13) (West 1994).

213. The sex offender commitment statutes, in contrast to the standard civil commitment statutes do not have a "recency" requirement. The court in *Young* specifically declined to read such a requirement into the sex offender commitment statute, except for those situations in which the individual had been out of custody immediately prior to the petition. *In re Young*, 857 P.2d 989, 1008-09 (Wash. 1993), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *State v. Post*, 541 N.W.2d 115, 130-31 (Wis. 1995) (holding that absence of "recent overt act" requirement does not render Wisconsin statute unconstitutional), *petition for cert. filed*, (U.S. Mar. 7, 1996) (No. 95-8204).

214. See MINN. STAT. ANN. § 244.25(7) (West 1994) (requiring a risk assessment of sex offenders prior to their release from a correctional facility); WASH. REV. CODE ANN. § 9.94A.151 (West Supp. 1996) (providing for the notification of county prosecutors prior to the release of persons from a correctional facility who may meet the commitment criteria); OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, PSYCHOPATHIC PERSONALITY COMMITMENT LAW at xii (1994) ("Approximately 90 percent of those committed under the psychopathic personality statute since January 1991 had just completed a prison sentence . . . and were scheduled to be released when commitment proceedings were initiated.") See

addition, sex offender commitment statutes appear to be aimed at long term, rather than short term, predictions.<sup>215</sup> Both recency of past violence and short future horizons are thought to enhance predictive accuracy.<sup>216</sup>

Violence associated with acute mental illness is predicted by active symptoms, rather than diagnostic categories.<sup>217</sup> Thus, in the standard civil commitment setting, behaviors and symptoms that are directly observable to clinical staff provide strong bases for making predictions. Further, psychotic symptoms are often promptly brought into some stage of remission by medications.<sup>218</sup> This observable change in symptoms provides a strong basis for professional opinions that pre-medication violence is no longer likely. The situation for sex offender commitments is quite different. There will be little about the structured environment of the mental hospital that will entitle a clinician to definitively identify the court-endorsed prediction of future sexual danger as erroneous.<sup>219</sup>

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generally *Linehan I*, 518 N.W.2d 609 (Minn. 1994); *In re Blodgett*, 510 N.W.2d 910 (Minn.), cert. denied, 115 S. Ct. 146 (1994).

215. *Linehan II*, 544 N.W.2d 308, 315 (Minn. Ct. App. 1996) (deeming proffered base rate statistics "too low because the statistics . . . covered only a three-year period following the release of convicted rapists . . ."), review granted, Nos. C1-95-2022, C3-96-51, 1996 Minn. LEXIS 197 (Minn. Mar. 19, 1996). The Minnesota statute explicitly contemplates that some sex offender commitments will be made simultaneously with a long criminal sentence. The predictions in such cases are targeted at a time window years into the future. *In re Duvall*, No. C5-91-1799, 1991 Minn. App. LEXIS 1233 (Minn. Ct. App. Dec. 19, 1991) (upholding sex offender commitment that would take effect after the individual's release from prison, 240 months (20 years) into the future).

216. Robert J. Menzies et al., *The Dimensions of Dangerousness: Evaluating the Accuracy of Psychometric Predictions of Violence Among Forensic Patients*, 9 L. & Hum. Behav. 49, 68 (1985) ("[W]e suggest that short-term predictions, based upon the immediate behavior and situation of the subject, should become the primary format for these decisions. The stability of social action, and the precision of judgments about such action, deteriorate with the passage of time."); Randy K. Otto, *Prediction of Dangerous Behavior: A Review and Analysis of "Second-Generation" Research*, 5 FORENSIC REP. 103, 120 (1992); cf. Thomas R. Litwack & Louis B. Schlesinger, *Assessing and Predicting Violence: Research, Law, and Applications*, in HANDBOOK OF FORENSIC PSYCHOLOGY 205, 206 (Irving B. Weiner & Allen K. Hess eds., 1987) (There is no research showing that certain "commonsense" long term predictions cannot be accurately made.); Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 783, 790 (1994) (contending that his data do not show that short term predictions are more accurate than long term and that "these data do not allow mental health professionals to claim any special ability to discriminate violent patients from those who will not be violent").

217. Mulvey, *supra* note 179, at 665 ("Active symptoms are probably more important as a risk factor than is simply the presence of an identifiable disorder.").

218. See MINNESOTA DEPARTMENT OF HUMAN SERVICES, RTC OCTOBER 1994 LEVEL OF CARE SURVEY: LENGTH OF STAY AT THE TIME OF SURVEY BY LEGAL STATUS (1994) [hereinafter 1994 LENGTH OF STAY SURVEY] (showing that fewer than 25% of all state hospital patients committed as mentally ill (standard civil commitments) had been institutionalized more than one year); Winick, *supra* note 17, at 559.

219. There is evidence that when mental health staff evaluate "forensic" mental health patients compared to standard civil commitment patients, horizons for prediction are extended. For example, a 1994 survey about Minnesota mental patients showed that "forensic" patients and sex offender committees were more likely to be rated as "now dangerous to others" by

Further, since sex offender commitment predictions are acknowledged to be long term predictions, there is, by definition, nothing observable in the short term post-commitment period that could possibly count as a definitive negation of the court's prediction.<sup>220</sup>

An additional difference likely to affect the accuracy of the predictions is the size of the group to be committed as a proportion of the group referred for screening for commitment. Sex offender commitment schemes incarcerate a very small percentage of the sex offenders being released from prison. In Minnesota, for example, approximately only six percent of the sex offenders being released from prison are committed.<sup>221</sup> Thus, the commitment process must identify these six percent out of the entire group considered for commitment, sex offenders who are eligible for release from prison. A well-established principle of social science shows that the identification of such low base rate phenomena will be highly error prone.<sup>222</sup>

When an individual has been judicially identified as sexually dangerous, a number of factors may operate to impede professionals from finding that he or she is not. These factors include: the skewing of vision which comes from a fear of liability or censure from a false prediction of safety;<sup>223</sup> the absence of any external consequences from a false prediction of violence (in fact, the absence

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staff, and less likely to have committed a violent act in the past 30 days, as compared to other adult mentally ill patients. The following table illustrates the relationship:

	Adult mentally ill	Forensic	Psychopathic Personality
Violent behavior directed at others in last 30 days	14.6%	11.3%	3.1%
Now dangerous to others	12.9%	76.1%	100%

MINNESOTA DEPARTMENT OF HUMAN SERVICES, RTC OCTOBER 1994 LEVEL OF CARE SURVEY: VIOLENT BEHAVIOR IN LAST 30 DAYS BY PATIENT TYPE.

220. See *supra* note 200.

221. See HOUT, *supra* note 174, at 5.

222. See, e.g., BUCHANAN & BROCK, *supra* note 134, at 330-31 (discussing the "low base rate" problem in connection with police power commitments); Randy Borum et al., *Improving Clinical Judgment and Decision Making in Forensic Evaluation*, 21 J. PSYCHIATRY & L. 35 (1993); Janus & Meehl, *supra* note 148.

223. Litwack & Schlesinger, *supra* note 216, at 233 ("[O]verprediction [of violence] may occur because mental health professionals are extremely fearful of the grave consequences of a false-negative prediction and are determined to be cautious."); Saleem A. Shah, *Legal and Mental Health System Interactions: Major Developments and Research Needs*, 4 INT'L J.L. & PSYCHIATRY 219, 238 (1981) ("Powerful social contingencies are associated with [false negative errors] . . . [D]ecision-makers will tend to be more careful about avoiding 'false negative' errors, viz., releasing persons who may later commit some serious or violent crimes, than about 'false positive' errors, viz., retaining persons who may not be likely to commit serious crimes if released.").

of any way to measure false predictions of violence); and the tendency of clinicians to see those factors which confirm the existing diagnosis and predictions, and ignore those which disconfirm it.<sup>224</sup> Because the consequences of false predictions of safety are perceptibly less drastic for the professional, these pressures decrease considerably in standard civil commitments.<sup>225</sup>

This discussion suggests that in sex offender commitments a combination of factors conspires to create layered impediments to error correction. Several straightforward empirical observations suggest that error correction is nearly non-existent in sex offender commitment cases. For these observations, this Article focuses on Minnesota sex offender commitment cases. Minnesota has a large corpus of such cases, having resurrected its sex offender commitment law in the late 1980s and early 1990s.<sup>226</sup> The empirical evidence confirms that there exists almost no possibility of error correction in Minnesota sex offender commitment cases.

Minnesota's commitment system provides for a mandatory review hearing sixty days after the initial commitment. Under Minnesota law, sex offender commitments cannot become final and indeterminate unless the individual has been committed to a state institution for a sixty day period of evaluation and observation. The law requires the treatment facility to submit a report to the court at the end of the evaluation period. The standards for commitment at the initial hearing are the same as the standards applied at the review hearing. Thus, the rate at which commitments are reversed at the review hearing is a good indication of how well error correction works in sex offender commitments.

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224. See Borum et al., *supra* note 222, at 47.

225. In fact, some conclude that the mental health system has become too eager to discharge vulnerable mentally ill persons into a community that is unprepared to provide for their safekeeping. See ANDREW SCULL, SOCIAL ORDER/MENTAL DISORDER 300-29 (1989) (Chapter 13: "The Asylum as Community or the Community as Asylum: Paradoxes and Contradictions of Mental Health Care"); see also RAE L. J. ISAAC & VIRGINIA C. ARMAT, MADNESS IN THE STREETS (1990).

226. *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994) (Wahl, J., dissenting), *cert. denied*, 115 S. Ct. 146 (1994); Erickson, *supra* note 150; Kirwin, *supra* note 146.

A review of sixty-nine sex offender commitment cases<sup>227</sup> indicates that the error correction process is non-functional. In no case did the trial court, having committed an individual after a contested hearing at the initial hearing, reverse itself after the review hearing.<sup>228</sup> In six cases, appellate courts overturned trial court decisions of commitment.<sup>229</sup> All of the reversals were based on legal errors by the committing courts. While this type of error correction is important, it is not the type counted on in *Addington*.<sup>230</sup> There, the Court looked for methods by which factual, not legal, errors in commitments would be corrected.

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227. I have reviewed 69 separate proceedings in which sex offender commitments were sought. I define a proceeding as all of the stages of a commitment based on a single petition.

In 54 of these proceedings, appeals were filed and appellate decisions are available. To my knowledge, these cases are the universe of appellate decisions on contemporary sex offender commitments in Minnesota (those committed in or after 1990). Some of these cases have generated more than one appellate decision. One individual has generated two separate proceedings. *Linehan I*, 518 N.W.2d 609 (Minn. 1994); *Linehan II*, 544 N.W.2d 308 (Minn. Ct. App. 1996), *review granted*, Nos. C1-95-2022, C3-96-51, 1996 Minn. LEXIS 197 (Minn. Mar. 19, 1996). Fifty-four is the unduplicated count of proceedings. In 53 of these cases, the trial court had committed the individual. In one case, the trial court had denied the petition, but the appellate court reversed and remanded., *In re E.D.F.*, No. C0-95-1556, 1995 Minn. App. LEXIS 1557 (Minn. Ct. App. Dec. 8, 1995). In six of the cases, the appellate court reversed a commitment for an error of law. *In re Rickmyer*, 519 N.W.2d 188 (Minn. 1994); *Linehan I*, 518 N.W.2d at 609; *In re Schweninger*, 520 N.W.2d 446 (Minn. Ct. App. 1994); *In re Hince*, No. C9-94-1366, 1994 Minn. App. LEXIS 1142 (Minn. Ct. App. Nov. 15, 1994), *review denied*, 1995 Minn. LEXIS 64 (Minn. Jan. 13, 1995); *In re Rodriguez*, 506 N.W.2d 660 (Minn. Ct. App.), *review denied*, (Nov. 30, 1993); *In re Stilinovich*, 479 N.W.2d 731 (Minn. Ct. App. 1992).

In addition, I have reviewed the circumstances of 15 proceedings for which there is no appellate decision. In 12, sex offender commitment proceedings were dismissed or denied at various stages of the commitment process. In two, the petition was granted but the individuals did not appeal. The 15 unappealed cases do not constitute the entire universe of non-appealed cases. There is no centralized tracking system in Minnesota for sex offender commitments. The Minnesota Department of Corrections tracked its referrals for sex offender commitment cases since 1991. Information from the Department of Corrections indicates that there were 16 petitions where commitment was not granted, including 13 that I have not reviewed.

Thus, in the proceedings reviewed, 56 individuals were committed. Of those, six were discharged after they won an appeal. One was discharged after the 60-day hearing, leaving a total of 49 committed. (In one case, the district court's initial denial of the petition was reversed and remanded. No further developments have occurred in that case.)

In addition, approximately 18 other individuals have been admitted (though not judicially committed) as sex offenders since 1990. I have no information on those individuals at this time.

228. In one case, the petition to commit the individual as a psychopathic personality was denied at the review hearing. However, in this case, the initial commitment was stipulated to by the parties. At the review hearing, the individual was committed as mentally retarded. The prayer for commitment as a sex offender was denied. *In re DeWald*, No. P7-88-0820 (2d Dist. Ct. Minn., Aug. 11, 1993).

229. *In re Rickmyer*, 519 N.W.2d at 188; *Linehan I*, 518 N.W.2d at 609; *In re Schweninger*, 520 N.W.2d at 446; *In re Hince*, C9-94-1366, 1994 Minn. App. LEXIS 1142 (Minn. Ct. App. Nov. 15, 1994), *review denied*, 1995 Minn. LEXIS 64 (Minn. Jan. 13, 1995); *In re Rodriguez*, 506 N.W.2d at 660; *In re Stilinovich*, 479 N.W.2d at 731.

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



In at least seventeen of the fifty-five cases resulting in commitment, the trial court ordered the individual indeterminately committed despite testimony from the evaluating state hospital staff that either recommended against commitment, or was neutral on the subject of commitment.<sup>231</sup>

A comparison with standard civil commitments highlights the significance of these data. In a 1994 survey of all state hospital patients, fewer than 25% of those committed as mentally ill (standard civil commitments) had been institutionalized more than one year. By contrast, nearly 80% of sex offender committees had been institutionalized for longer than one year. Whereas only 13% of the standard civil commitments had lasted more than two years, 45% of the sex offender commitments had already exceeded that time period.<sup>232</sup> Of the seventy-five sex offenders held as of October 1995, almost 10%, seven of the seventy-five, had been committed for more than ten years. Since 1974, only one

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231. The figure in the text is based on a review of reported appellate cases. *In re Mentzos*, No. C3-95-2331, 1996 WL 81721 (Minn. Ct. App. Feb. 27, 1996); *In re Hart*, No. C9-95-2057, 1996 WL 56504 (Minn. Ct. App.), review granted, (Apr. 16, 1996); *In re Patterson*, No. C3-95-935, 1995 WL 550898 (Minn. Ct. App. Sept. 19, 1995); *In re Mayfield*, No. C2-95-103, 1995 WL 254407 (Minn. Ct. App. May 2, 1995); *In re Adolphson*, No. C5-95-532, 1995 WL 434386 (Minn. Ct. App. July 25, 1995); *In re Young*, No. C1-94-1779, 1994 WL 654508 (Minn. Ct. App. Nov. 22, 1994); *In re Kunshier*, 521 N.W.2d 880 (Minn. Ct. App. 1994); *Schweninger*, 520 N.W.2d at 446; *In re Benson*, No. C0-93-1357, 1993 WL 459840 (Minn. Ct. App. Nov. 9, 1993); *In re Bailey*, No. C2-93-1487, 1993 WL 459842 (Minn. Ct. App. Nov. 9, 1993); *In re Walton*, No. C9-92-1749, 1992 WL 383448 (Minn. Ct. App. Dec. 29, 1992), *aff'd*, 510 N.W.2d 203 (Minn. 1994); *In re Blodgett*, 490 N.W.2d 638, 642 (Minn. Ct. App. 1992), *aff'd*, 510 N.W.2d 910 (Minn. 1994), *cert. denied*, 115 S. Ct. 146 (1994); *Stilnovich*, 479 N.W.2d at 731 (Minn. Ct. App. 1992); *In re Monson*, 478 N.W.2d 785 (Minn. Ct. App. 1991); *In re Devillion*, No. C8-91-1070, 1991 WL 191653 (Minn. Ct. App.), review denied, (Nov. 26, 1991); *In re Hubbard*, No. C9-91-1031, 1991 WL 191651 (Minn. Ct. App. Oct. 1, 1991); *In re Clements*, 440 N.W.2d 133 (Minn. Ct. App. 1989).

In seven cases the staff was opposed to commitment, testifying that commitment as a sex offender would not be appropriate. *Mentzos*, 1996 WL 81721; *Kunshier*, 521 N.W.2d at 880; *Blodgett*, 490 N.W.2d at 638; *Monson*, 478 N.W.2d at 785; *Devillion*, 1991 WL 191653; *Hubbard*, 1991 WL 191651; *Clements*, 440 N.W.2d at 133. In three cases, the staff's only reported testimony was that there had been "no change" in the patient's condition. *Hart*, 1996 WL 56504; *Young*, 1994 WL 654508; *Bailey*, 1993 WL 459842. In seven cases, the staff testified that they could come to no conclusion, or it is impossible to ascertain from the court report whether the staff came to a conclusion. *Patterson*, 1995 WL 550898; *Mayfield*, 1995 WL 254407; *Adolphson*, 1995 WL 434386; *Stilnovich*, 479 N.W.2d at 731; *Benson*, 1993 WL 459840; *Schweninger*, 520 N.W.2d at 446; *Walton*, 1992 WL 383448. In all 17 of the cases, the trial court committed the patient for an indeterminate period, despite the opinions of the staff. The commitments were upheld on appeal in all but three of the cases. In one of the seven where the staff recommended against commitment, the commitment was reversed on one ground but affirmed on another. *Mentzos*, 1996 WL 81721. In two other of the seven, the commitment was reversed on the grounds that the harm posed by the patient was not covered by the sex offender commitment act. *Schweninger*, 520 N.W.2d at 446; *Stilnovich*, 479 N.W.2d at 731.

232. DEPARTMENT OF HUMAN SERVICES 1994 SURVEY, *supra* note 218. The survey was done in 1994. The great bulk of sex offender commitments occurred in 1991 and after. Of the 75 sex offender committees in Department of Human Services custody as of October 1995, 63 (84%) were committed in 1991 or later. MSH Fax, *supra* note 174.

sex offender has been placed on a provisional discharge in the community, in 1987.<sup>233</sup> Five have been placed in state operated nursing homes since 1980.<sup>234</sup> Not one person committed since 1975 has been discharged from a final sex offender commitment in Minnesota.<sup>235</sup>

#### 4. The Argument from Necessity: The Reasonable Doubt Standard Is Impossible to Meet in Commitment Hearings

The fourth foundational leg of the *Addington* Court's analysis of civil commitment is the argument from necessity. The Court concluded that the high, criminal standard of proof may be difficult to reach, given the interpretive and imprecise nature of the psychological evidence that underlies both diagnosis and prediction in civil commitment cases.<sup>236</sup>

As made in *Addington*, the necessity argument is a *parens patriae* argument. Sex offender commitment schemes do not require a showing of incompetence, and hence are not supported by the state's *parens patriae* power. Further, states will have difficulty making the burden of proof argument in sex offender commitment cases, because the majority of state sex offender commitment statutes use the criminal standard of proof.<sup>237</sup> It will be impossible for those states, and difficult for the others, to argue that the high standard frustrates their legitimate purposes. If the argument from necessity is to work in sex offender commitments, it must work on some other basis.

Sex offender commitment advocates use a broader form of the argument from necessity. States need to use civil commitment to incapacitate sex offenders and provide them treatment. The criminal law cannot accomplish these goals, and therefore, civil commitment is necessary.

The criminal justice system is as effective as civil commitment at providing sex offender treatment. Treatment for sex offenders is generally cognitively based.<sup>238</sup> Therefore, it is ineffective with refusers.<sup>239</sup> Even chemically-based treatments for

233. MSH Fax, *supra* note 174. The data on community placement are slightly ambiguous. One committee was "provisionally discharged or transferred" during the 1990s, but was "returned" to the state hospital two years later. It is not clear whether this person was placed in the community, in an open hospital, or in a nursing home. *Id.*

234. *Id.*

235. *Id.*

236. *Addington v. Texas*, 441 U.S. 418, 432 (1979).

237. *E.g.*, ARIZ. REV. STAT. ANN. § 13-4606 (1995); CAL. WELF. & INST. CODE § 6604 (West 1996); IOWA CODE ANN. §§ 709C.5, C.6(1) (West Supp. 1995); KAN. STAT. ANN. § 59-29a07 (1994); WASH. REV. CODE ANN. § 71.09.060 (West 1995); WIS. STAT. § 980.05 (West 1994). Minnesota does not adopt this standard. MINN. STAT. ANN. § 253B.18 (West 1994) (requiring proof by clear and convincing evidence). Compare these statutes to *Addington*, where the Court identified only a small minority of states that used the reasonable doubt standard in standard civil commitments. *Addington*, 441 U.S. at 430-32.

238. Pithers, *supra* note 17, at 343.

239. *See In re Young*, 857 P.2d 989, 1014 (Wash. 1993) ("[T]heir cooperation with the diagnosis and treatment procedures is essential."), *habeas corpus granted*, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

sex offenders,<sup>240</sup> which theoretically could be forcibly injected, may not be forced on competent but unconsenting individuals.<sup>241</sup> Both civil and criminal systems, therefore, have available the same tools to encourage or force sex offenders to undergo treatment. They both use the threat of lengthy incarceration, and the incentive of possible release from incarceration, to obtain consent and cooperation with treatment.<sup>242</sup> Thus, civil commitment offers no treatment gain on criminal sentences.<sup>243</sup>

States sometimes argue that they need to use civil commitment because the requirement of an actus reus,<sup>244</sup> or the prohibition against double jeopardy prosecutions, or the right to confrontation, frustrates their ability to protect the public fully from the most dangerous, recidivistic sex offenders.<sup>245</sup>

240. See Douglas J. Besharov & Andrew Vachss, *At Issue: Is "Chemical Castration" an Acceptable Way to Treat Sex Offenders?*, A.B.A. J., July 1992, at 42, 42, reprinted in 6 CONG. Q. RESEARCHER 41, 41 (1996).

241. *Jarvis v. Levine*, 418 N.W.2d 139 (Minn. 1988); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942); Winick, *supra* note 17, at 589; cf. *Buck v. Bell*, 274 U.S. 200 (1927).

242. See *In re Blodgett*, 510 N.W.2d 910, 916 (Minn.) ("These relaxations of security hospital confinement provide an opportunity (and an incentive) for the committed person to demonstrate that he has mastered his sexual impulses and is ready to take his place in society."), *cert. denied*, 115 S. Ct. 146 (1994).

243. The threat of criminal prosecution or punishment is often an incentive for treatment, and treatment is often a condition for release from prison. In Minnesota, the same treatment program is used for committed sex offenders and for convicted sex offenders for whom treatment is a condition of parole. See SEX OFFENDER PROGRAM, *supra* note 17. See generally David B. Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, in ESSAYS IN THERAPEUTIC JURISPRUDENCE 187 (David B. Wexler & Bruce J. Winick eds., 1991).

244. In *Linehan II*, the State of Minnesota argued that the requirement of an actus reus frustrated its ability to protect the public against sex offenders, and thus supported an argument from necessity:

Linehan asserts that, where a person being released from prison poses a great danger of sexual assault due to a mental disorder, society has only one option. His proposal is that persons like him must be allowed to rape (and perhaps murder) again, and only then can society use the legal process to protect its members. If this Court affirms the lower court finding that Linehan is likely to commit further sexually violent acts of the same type as he has committed in the past, then society's interest in the safety of its members (in Linehan's case, girls and young women) is clearly not fully served through the criminal system. As Senator Allan Spears said at the legislative hearing on the SDP bill, in response to legislative testimony by Linehan's attorney: "And now I think, if we follow your logic, we just have to let them go and do it again and have another person victimized before we can take any action. That's a very difficult thing for us to explain or to justify."

Brief of the State of Minnesota, *Linehan II*, 544 N.W.2d 308 (Minn. Ct. App. 1996) (quoting *Hearing on the Sexually Dangerous Persons Commitment Act Before the Joint Senate/House Committee*, 78th Minn. Leg. (Aug. 24, 1994) (statement of Allen Spears, Senator)), *review granted*, No. C3-96-511, 1996 Minn. LEXIS 197 (Minn. Mar. 19, 1996).

245. A task force was convened by the Minnesota Commissioner of Human Services to study civil commitment, including sex offender commitments. The Task Force was badly split in its recommendations and findings regarding sex offender commitments. Those who favored sex offender commitments argued that the criminal justice system was inadequate for protecting against certain sex offenders. For example, members pointed to "individuals . . . who may not

Though this argument sounds like the argument from necessity used in *Addington*, it proves too much and is invalid. It would allow states free exit from the rules of criminal law whenever the state feels their bite. This argument is really the jurisprudence of prevention in a slightly altered guise. While the jurisprudence of prevention claims the right to use preventive detention whenever the purpose is not punitive,<sup>246</sup> this argument claims that right whenever the strict rules of punishment are too limiting. Like the jurisprudence of prevention, this argument justifies preventive detention without a visible role for mental disorder. The Supreme Court's trajectory since *Addington* has soundly rejected this line of argument.<sup>247</sup>

#### V. REFORMULATING THE THERAPEUTIC COMPROMISE FOR POLICE POWER COMMITMENTS: THE PRINCIPLE OF CRIMINAL INTERSTITIALITY

*Addington's* grand therapeutic compromise collapses in the police-power context of sex offender commitments. None of the four foundational assumptions of *Addington* is an accurate description of sex offender commitments. *Addington* assumed that standard civil commitment is characterized by the benign *parens patriae* of the state. In sex offender commitments that interest is marginal. This part of the Article argues that, nonetheless, the therapeutic jurisprudence of *Addington* and the principle of criminal interstitiality provide the map for locating the constitutional boundaries of police power commitments.<sup>248</sup>

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have been convicted of a sex offense, because of the reluctance of young and/or scared victims to testify against perpetrators of sexual abuse." *Psychopathic Personalities Subcommittee, Report in MINNESOTA DEPARTMENT OF HUMAN SERVICES, REPORT TO THE COMMISSIONER: COMMITMENT ACT TASK FORCE*, at 45, 48 (1988). Another problem addressed by the sex offender commitment law is the "comparatively short correctional sentences" for sex offenders. These offenders can be "transferred to the mental health system" after they have served their sentences, thereby protecting the public. *Id.* The law was needed, in addition, in order to confine persons who "may be dangerous but evade conviction due to the high burden of proof required in criminal cases." *Id.* The Subcommittee considered the repeal of the sex offender commitment laws and the strengthening of sentencing guidelines and actually voted in favor of that proposal. *Id.* at 49. But the Subcommittee was badly split on the issue. Those in favor of retaining sex offender commitments supported their position by pointing out that repeal of the commitment law, coupled with increased sentences,

does not prevent the eventual release of sex offenders into the community, nor does it confine individuals who escape conviction due to a lack of evidence, or unwillingness of the victim to testify against the perpetrator . . . Adequate sentencing would not take place if this were strictly a correctional issue, because it was frequently quite difficult to gain a conviction on serious sex crimes.

*Id.* at 49-50.

246. See *supra* part I.

247. See *supra* part II.

248. The classic articulation of this principle is found in *Developments in the Law: Civil Commitment*, 87 HARV. L. REV. 1190, 1234 (1974) ("Police power commitment standards would appear to be unconstitutionally overbroad unless mental illness is interpreted to mean a condition which induces substantially diminished criminal responsibility."); see also BUCHANAN & BROCK, *supra* note 134, at 329 (1989) ("If the dangerous mentally ill are justifiably [involuntarily committed], it must be because they are not capable of responsibly

The principle of criminal interstitiality holds that the criminal law is the primary and ubiquitous means for the state to enforce its police power through the deprivation of liberty. Civil commitment is a secondary means of enforcing the state's police power and may be used only when the state is disabled from using the criminal justice system because of the mental disability of the individual. The state's disability may arise because the individual's mental disorder renders him or her unamenable to prosecution, or because the disorder renders him or her unable to make treatment or self-care decisions. In either case, the state is disabled from vindicating its legitimate interests through the criminal law.

Under this principle, civil commitment is interstitial to the criminal law, in two senses: Criminal law is both the primary system, and the ubiquitous system for addressing public health and safety issues through the deprivation of liberty. Criminal law remains primary in the sense that it is first in line to be used, and is by-passed only when its inherent substantive limitations prevent its operation. It remains ubiquitous in the sense that the secondary system takes up only a small—and well-bounded—fraction of the work. Thus, the principle of criminal interstitiality permits the criminal law to remain the primary tool for states to curtail liberty as a means of controlling antisocial, violent behavior, while legitimizing civil commitments in defined circumstances where it is necessary because the state's interests cannot be vindicated by the criminal law.

Under the principle of criminal interstitiality, the limits of civil commitment depend on a functional understanding of mental disorder. Mental disorder that

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controlling their behavior that is dangerous to others as required by criminal prohibitions . . . . [T]he requirement should be understood to be that persons' mental illness causes them to be both dangerous to others and not in control of nor thus responsible for their dangerous behavior as required under the criminal law."); Bochnewich, *supra* note 26, at 305 (noting that sex offender commitment is justified because it is directed only against those sex offenders who "are less blameworthy because they are less capable of exercising self control." These uncontrolled, impulsive sex offenders are "least deserving of punishment.") (quoting HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 50-51 (1968)); Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 86 (1968); Schopp, *supra* note 12, at 181; Winick, *supra* note 17, at 538 ("[F]or the purpose of commitment to a psychiatric hospital, a condition must be capable of so impairing functioning that the individual is unable to engage in rational decision making or to control his or her behavior."); Blakey, *supra* note 18, at 230 (noting that sex offender commitments are appropriately aimed at offenders who have diminished responsibility); Note, *Standards of Mental Illness in the Insanity Defense and Police Power Commitments: A Proposal for a Uniform Standard*, 60 MINN. L. REV. 1289, 1298 (1976) (stating that police power commitments justified by inability to control behavior).

In an article published after this article was submitted for publication, Professor Stephen J. Schulhofer argues that "'civil' deprivation of liberty is permissible only as a gap-filler, to solve problems that the criminal process cannot address." Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 85 (1996). Along with a number of other commentators, Schulhofer argues that this limitation is necessary to maintain the "core commitment to respect the autonomy of the individual." *Id.* at 91. He argues that civil commitment that goes beyond this principle "represents an unnecessary infringement of liberty." *Id.* at 93.

renders a person incompetent to make treatment decisions supports *parens patriae* commitments, just as it did in *Addington*. Mental disorder that renders a person unamenable to prosecution supports police power commitments.<sup>249</sup>

The principle of criminal interstitiality is inherent in the Court's rejection of the jurisprudence of prevention. In the jurisprudence of prevention, states could shift from the criminal to the civil system simply by describing the deprivation of liberty as prevention rather than punishment. In its rejection of the jurisprudence of prevention, the Supreme Court clearly articulated the principle of criminal interstitiality. Louisiana could not use civil commitment because it did not "explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct."<sup>250</sup> The jurisprudence of prevention operated on a simple, bilateral balance of the state's safety interest against the individual's liberty interest.<sup>251</sup> In both *Addington* and *Foucha*, the Supreme Court rejected that formula. In its place, the Court used a two-axis balance. The first axis measures the strength of the state's police power, and determines whether it is strong enough to support a deprivation of liberty. The second axis measures the state's interest in using the civil system to enforce that interest. In this means-of-enforcement balance, the principle of criminal interstitiality articulates the standard of calibration the Court uses. Prevention of violence does not tip the balance on the means axis unless it is accompanied by a mental disorder that disables the criminal response to the violence.

The principle of criminal interstitiality is inherent in *Addington's* therapeutic jurisprudence, as well. Like *Addington's* jurisprudence, it is centered on mental disorder. It requires a functional and contextual approach to mental disorder by asking whether the mental disorder impairs amenability to criminal prosecution or renders the person incompetent. The principle minimizes the intrusion on individual rights by placing a principled cap on civil commitment. It abides by the argument from necessity, allowing the state to abandon the criminal law only when its ability to enforce its police power interests is curtailed by the mental disability of the individual.

Most significantly, it follows from *Addington's* insistence on a compromise that respects therapeutic interests. Therapeutic interests were central to the *parens patriae* commitment in *Addington*, so the therapeutic aspects of the

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249. See Schopp, *supra* note 12. States have some latitude in deciding how to define mental illness excuses for criminal responsibility. The types of mental disorder that will support police power commitments are to that extent in the hands of the states. See discussion *supra* note 18.

Thus, states that hold that Antisocial Personality Disorder can support an insanity defense would also be free to make the same condition a basis for civil commitment. See *Johnson v. Noot*, 323 N.W.2d 724, 727 (Minn. 1982) (holding that personality disorders can be sufficient to support a civil commitment, but only when they meet an utter inability to control standard); *Rudnick & Levy, supra* note 178, at 415 (discussing states' approach to personality disorders and criminal excuse).

250. *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992).

251. See *supra* part I.

*Addington* compromise were patent. But it is more problematic to understand how therapeutic interests can be represented in civil commitments with high police-power orientation.

Consider two cases. Some dangerous individuals are incompetent to make their own treatment decisions. In this first case, if there is effective treatment available, involuntary administration of the treatment would be therapeutic. This case is just like *Addington*. Civil commitment could proceed on *parens patriae* grounds.

In the second case, suppose that the conditions of the first case do not hold. In other words, suppose the person is either competent, or there is no predictably effective treatment.<sup>252</sup> The principle of criminal interstitiality would allow civil commitment nonetheless, but only if the individual's mental disorder rendered him or her unamenable to criminal prosecution.<sup>253</sup> The unamenability could arise from a condition that rendered the person incompetent to stand trial,<sup>254</sup> or excused the person from criminal liability,<sup>255</sup> or negated the person's capacity to form criminal intent.<sup>256</sup>

This outcome respects therapeutic values even though there is no effective treatment, because it limits the use of procedures that offend the full humanity of individuals. Criminal law is based on the assumption of human free agency. Criminal incarceration is punishment because it is deserved by the free actions of a person. Criminal law focuses on what a person did, and whether he or she is responsible for the act. Criminal law is an affirmation of full personhood because it holds people responsible for their actions.<sup>257</sup>

Civil commitment, on the other hand, often connotes an assumption of diminished personhood. Historically, civil commitment was based on a subordinate status conferred on the mentally disordered in which the nature of the legal personality was diminished.<sup>258</sup> Contemporary civil commitment statutes

252. Treatment for sex offenders might be effective for some offenders and not for others. See, e.g., Hall, *supra* note 182. However, if there is no way to predict in advance of treatment who will be a good candidate, then the *parens patriae* grounds for commitment are weakened. As important, there seems to be no valid way of determining its effectiveness in a given individual even after treatment. See, e.g., J. Marques et al., *The Relationship Between Treatment Goals and Recidivism Among Child Molesters*, 32 BEHAVIOUR RES. & THERAPY 577 (1994) (seeking to develop tools to predict treatment success). Without this knowledge, officials will be reluctant to release any sex offenders from commitment. The zero-discharge record in Minnesota's sex offender commitment system supports this conclusion. See *supra* text accompanying note 235.

253. This is consistent with *Jones v. United States*, 463 U.S. 354 (1983), in which the Court found that a finding of insanity in a criminal prosecution was sufficient to satisfy the civil commitment mental disorder predicate.

254. See *Jackson v. Indiana*, 406 U.S. 715 (1972).

255. *Jones*, 463 U.S. at 354.

256. See *Linehan I*, 518 N.W.2d 609, 615 (Minn. 1994) (Gardebring, J., dissenting); Schopp, *supra* note 12.

257. See Schopp, *supra* note 12.

258. CLIVE UNSWORTH, *THE POLITICS OF MENTAL HEALTH LEGISLATION* 36 (1987). Mentally disordered persons were excluded from full participation in the benefits of a legal personality, characterized by freedom, autonomy and responsibility. *Id.*

According to Unsworth, several classes of persons were excluded from the category of legal

are based on fitting individuals into classifications and assessing and evaluating their conditions. The underlying rhetoric of these statutes is causal determinism. Mental disorder causes violence. Future behavior is determined and predictable. In civil commitments, humans are treated as patients who are examined, analyzed, diagnosed, and essentialized. Instead of persons who act and are held responsible for their acts, they are reduced to their disorders which cause violent behaviors and require treatment and hospitalization.

Civil commitment, so understood, undermines the fundamental assumption of humanity and free agency.<sup>259</sup> In this sense, it is anti-therapeutic when it is applied to people whose freedom and autonomy are sufficient for responsibility. Moreover, it is anti-therapeutic because it is demeaning. And, it is anti-therapeutic because its message is contrary to the central theme of rehabilitation, that violent offenders can, and must, take responsibility for their own actions.<sup>260</sup>

### CONCLUSION

The principle of criminal interstitiality draws the constitutional boundary for civil commitment at a location that excludes most sex offender commitments. There will be a price in human suffering to pay for curtailing these efforts at prevention, but there is also a gain in the fight against sexual violence. It is the gain that comes from structuring social systems so that the messages they speak

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person, and thus were excluded from the full access to legal rights which that classification entailed:

However, this equalization of legal status was not to be unlimited and there were certain residual categories to whom it did not extend and for whom special legal provisions had to be made within the liberal order, namely those deemed not to have attained adulthood and the mentally disordered, comprising the mentally handicapped and the insane. These categories were subject to partial legal exclusion because of their perception as deficient in the rational self-determination which would qualify them as fully human and capable of exercising legal rights. Their treatment should be distinguished from that of paupers and criminals whose civil and political disqualifications were imposed as a deliberate mark of social disapprobation, as they were held responsible for their own predicament.

*Id.* at 41-42.

259. See Schopp, *supra* note 12, at 181.

260. William L. Marshall & Howard E. Barbaree, *Outcome of Comprehensive Cognitive-Behavioral Treatment Programs*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 363, 370 (William L. Marshall et al. eds., 1990) (noting sex offenders' "denials of harm and responsibility need to be changed if treatment is to be effective"); Pithers, *supra* note 17 at 354-55 (stating that treatment involves informing sex offenders that "giving in to an urge is an active *decision*, an intentional choice for which he is responsible.") (emphasis in original); Marques, *supra* note 252, at 578 (noting that "acceptance of personality responsibility" is a goal of sex offender treatment). See generally Bruce J. Winick, *Competency to Consent to Treatment: The Distinction between Assent and Objection*, 28 HOUS. L. REV. 15 (1991), reprinted in DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 68-74 (1991) (discussing the "therapeutic value of patient choice").



are true, consistent, and principled. If our sentences for sex offenders have been too short, or our procedural protections too stringent, our Constitution says we must live with the consequences. Though we have strong desires to prevent sexual violence, we also value the constitutional right to liberty and the primacy of the criminal law.

Prevention is a powerful force whose jurisprudence will swallow the great safeguards of the criminal law unless cabined by a principle whose logic and application are clear. The principle of criminal interstitiality is such a limiting principle. It demonstrates how the concept of mental disorder functions to provide a principled and consistent boundary for the state's vindication of its prevention mandate.

The principle of criminal interstitiality explains the role that mental disorder plays in the jurisprudence of civil commitments. *Addington* provided the map, but its jurisprudence must be translated from the therapeutically rich context of *parens patriae* commitments, to the prevention focus of police power commitments. To decide on the proper boundaries of police power civil commitments, the Supreme Court need not penetrate the complexity of psychiatric nosology. Mental disorder functions as the limiting feature of police power commitments precisely because, and in the same way that, it is a limiting feature for criminal liability.

The principle of criminal interstitiality preserves the moral force of the criminal law and the legitimacy of civil commitment. It insists that the states use the criminal law—and be bound by the great safeguards that limit it—to protect the public from crimes committed by responsible adults. At the same time, it allows the state to use nonpunitive, regulatory confinement, but only to address dangerous behavior for which the actor is not criminally responsible. Criminally responsible adults are, in this way, held accountable, and are not subjected to the civil commitment system which speaks the language of psychological causation and thus discounts individual responsibility and accountability. The principle allows the state to vindicate the full range of its police power mandate, while respecting the great safeguards of the Constitution.

A system that compromises our traditional constitutional values cannot last. Sex offender commitment laws confuse too many important values. Obscuring the critical role that mental disorder plays in defining the state's police powers, these laws embrace a dangerous jurisprudence of prevention. We must find other, more truthful and more principled ways to prevent sexual violence.

## CONCLUSION

The principle of criminal interstitiality draws the constitutional boundary for civil commitment at a location that excludes most sex offender commitments. There will be a price in human suffering to pay for curtailing these efforts at prevention, but there is also a gain in the fight against sexual violence. It is the gain that comes from structuring social systems so that the messages they speak are true, consistent, and principled. If our sentences for sex offenders have been too short, or our procedural protections too stringent, our Constitution says we must live with the consequences. Though we have strong desires to prevent sexual violence, we also value the constitutional right to liberty and the primacy of the criminal law.

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