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Prof Eric Janus: Critical Perspectives on Megan's Law

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STEPHEN NEWMAN: The next speaker is Professor Eric Janus of the William Mitchell College of Law.

Prof. Eric Janus

ERIC JANUS:⁶⁵⁹ Thank you very much for inviting me. I feel very honored to be paired with Professor Brooks, and indeed, he stated my argument very well, but I will state it a little bit further.

I am here, in part, because Minnesota actually was one of the first states to have a civil commitment law, dating back to 1939, dealing with sex offenders.⁶⁶⁰ That law was challenged and taken up to the United States Supreme Court in *Pearson v. Ramsey County*.⁶⁶¹ Among the cases that were cited by the State of Minnesota in its successful defense of the law was *Buck v. Bell*,⁶⁶² the infamous case upholding the forced sterilization of so-called mentally retarded people.⁶⁶³ Although I do not have time to develop this theme, it seems clear to me that these laws come out of the same context, and that is the use of the coercion of the state to enforce some sort of notion having to do with mental health.⁶⁶⁴

⁶⁵⁹ Professor, William Mitchell College of Law, St. Paul, Minnesota.

⁶⁶⁰ See generally Andrew Hammel, *The Importance of Being Insane: Sexual Predator Civil Commitment Law and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 776-77 ("Laws designed to allow state authorities to confine indefinitely people with a history of violent sex crimes through civil mental health commitment have a long history in the United States. . . . Minnesota passed the first generation of these laws from the 1930's to the 1960's.").

⁶⁶¹ 309 U.S. 270 (1940).

⁶⁶² 274 U.S. 200 (1927).

⁶⁶³ *Id.* at 207.

⁶⁶⁴ See John Petrila, *Ethics, Money, and the Problem of Coercion in Managed Behavioral Health*, 40 ST. LOUIS U. L.J. 359, 393 (1996) ("Coercion plays an important role in the mental health system. It theoretically enables the state to exercise its police and

Professor Brooks characterized these laws, it is fair to say, as being necessary because there are certain very dangerous sex offenders who have "slipped through the cracks," of the criminal justice system.⁶⁶⁵ I think that is an accurate characterization of why these laws are in place.

Another word for "cracks" are the guarantees of the United States Constitution. These guarantees state that when a person is sentenced to prison for a certain length of time, that person has to be let out after that length of time is over.⁶⁶⁶ These guarantees also state that we do not put people in prison in this country until it has been adequately proven that they have committed a crime.⁶⁶⁷

What I would like to do is try to focus directly on what I think are two of the key issues in both the constitutional and public policy concerns about civil commitment.⁶⁶⁸ They do not have to do with whether protecting the public from sexual violence is a compelling state interest.⁶⁶⁹ It is clear that it is.⁶⁷⁰ The key questions do not have to do

parens patriae powers in protecting individuals from themselves and the public from individuals with mental disorders.").

⁶⁶⁵ See Zamoyiski, *supra* note 535, at 1251. "[T]wo horrifying stories spurred the respective state legislatures to attempt different solutions to the problem of repeat violent sex offenders who slip through the cracks of the criminal justice system." *Id.*

⁶⁶⁶ See Nancy K. Roden, *Law and Psychiatry Part II: The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L. J. 375, 414 (1982) (pointing out that civil "commitment is similar to criminal confinement in that a person's liberty is impaired").

⁶⁶⁷ See Sonia Y. Lee, *OC's PD's Feeling the Squeeze—The Right to Counsel: In Light of Budget Cuts, Can the County Office of the Public Defender Provide Effective Assistance of Counsel?*, 29 LOY. L.A. L. REV. 1895, 1926 (1996) ("[F]undamental to the viability of the criminal justice system is the ideal that all persons are innocent until proven guilty. . . . The goal of the Constitution is not to convict as many defendants as possible, but rather to convict, after a fair and equitable trial, those persons found guilty of a crime.").

⁶⁶⁸ See Earl-Hubbard, *supra* note 4, at 849. "The child sex offender registration laws should do more than merely pass constitutional muster. They should prove to be good policy." *Id.*

⁶⁶⁹ See *Doe v. Portiz*, 662 A.2d 367, 412 (1995) (stating that "[t]he state interest in protecting the safety of members of the public from sex offenders is clear and compelling").

with whether preventive detention is a constitutional technique.⁶⁷¹ As Professor Brooks said, it is constitutional.⁶⁷² Civil commitment is preventive detention.⁶⁷³ Certain forms of quarantine are preventive detention.⁶⁷⁴ There have been other forms of preventive detention used in this country as well.⁶⁷⁵ So, to argue about whether it is preventive detention is not fruitful. The key issues here are not whether there have been certain sex offenders who were sentenced to too short a sentence or whether sometimes plea bargaining lets people out too early.⁶⁷⁶ The clear answer to those questions is yes, that is true.

The question is: what are the boundaries for the appropriate use of preventive detention in our society and under our constitutional system? Another way of putting that question is: under what circumstances, under our constitutional system, under our system of a belief in democracy, are we willing to throw off those guarantees of a jury trial, of conviction, of due process, of *ex post facto* laws, and of

⁶⁷⁰ *Id.*

⁶⁷¹ "The inescapable conclusion is that this Court found indefinite preventive detention based solely on dangerousness to be constitutionally acceptable." Hammel, *supra* note 660, at 782 (citing Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1989)).

⁶⁷² See Brooks, *supra* note 568, at 752 (indicating that a civil commitment statute satisfies constitutional requirements because it is designed to protect society against mentally abnormal dangerous persons).

⁶⁷³ See Blacher, *supra* note 548, at 918; Roy E. Pardee III, *Fear and Loathing in Louisiana: Confining the Sane Dangerous Insanity Acquittee*, 36 ARIZ. L. REV. 223, 229 (1994).

⁶⁷⁴ See Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Powers of the State*, 23 HARV. C.R.-C.L.L.REV. 139, 145 (1988) ("[Q]uarantines resemble both the civil commitment of the mentally ill or disabled and the preventive detention of criminal suspects awaiting trial.").

⁶⁷⁵ See Sally Baumler, *Appellate Review Under the Bail Reform Act*, 1992 U. ILL. L. REV. 483, 494 (1992) ("[P]reventive detention is used in involuntary commitment, decisions setting the amount of bail, sentencing, national security, and medical quarantines.").

⁶⁷⁶ See Zamoyski, *supra* note 535, at 1296 (citing *Nearly Half of Sex Offenders Avoid Prison*, SACRAMENTO BEE, May 31, 1994, at B8). "Prior sentences for sex offenders have been relatively short although the offenses were quite violent." *Id.*

double jeopardy? Under what circumstances are we willing to throw those off and adopt sequentially, much looser procedures of the civil commitment system? I agree with Professor Brooks also when he says that every court that has looked at it, and I think everybody agrees, that the formula that justifies preventive detention is dangerousness plus a mental illness or mental disorder.⁶⁷⁷ Everybody agrees that dangerousness alone is an unconstitutional basis for preventive detention.⁶⁷⁸ It has to be dangerousness plus something else.⁶⁷⁹ The corollary of that is that the state's admittedly compelling interest in protecting the public from sexual violence is insufficient to support prevention detention.⁶⁸⁰ Why? Because that is an interest that goes to dangerousness alone, and that alone is insufficient.⁶⁸¹

Rather, there has to be some sort of plus factor, something in addition to the state's terribly strong interest in protecting women and children from violence, some plus factor that puts the state over the constitutional tripline.⁶⁸² That plus factor has to be furnished by the mental illness element.⁶⁸³ So if we want to ask what kinds of mental illnesses or mental disorders will be sufficient to support preventive detention, the answer has got to come, not from looking at the DSM, not from asking the psychiatrists or the psychologists what they think a mental disorder is, because they are not particularly expert in judging the

⁶⁷⁷ See Matthew J. Herman, Note, *Are the Children of Illinois Protected from Sex Offenders?*, 28 J. MARSHALL L. REV., 883, 905 (citing *Foucha*, 504 U.S. 71). "Absent a determination of current mental illness and dangerousness, continued confinement . . . [is] impermissible." *Foucha*, 504 U.S. at 86.

⁶⁷⁸ *But see* United States v. Salerno, 481 U.S. 739, 747 (1987) (holding that potential for danger is sufficient cause to detain without bail during pretrial period).

⁶⁷⁹ See *Jones v. United States*, 463 U.S. 354, 368 (1983) (stating that civil commitment is permitted to "treat the individual's mental illness and to protect him and society from his potential dangerousness").

⁶⁸⁰ *Fujimoto*, *supra* note 519, at 889 (stating that involuntary commitment of sex offender who does not have a mental disorder is unconstitutional preventive detention).

⁶⁸¹ *Id.*

⁶⁸² *Id.* at 888-89.

⁶⁸³ *Id.* at 888.

constitutional balance that is at stake here,⁶⁸⁴ but from looking at what role the mental illness or mental disorder element plays in this constitutional calculus.⁶⁸⁵

There have been two key cases that have given us some hints about this. The first is the *Addington* case, which is a United States Supreme Court case that upheld civil commitment.⁶⁸⁶ In this case, the Court held that civil commitment is a constitutional set of procedures.⁶⁸⁷ A state can have lowered procedural protections even though you are depriving people of their liberty.⁶⁸⁸ There were two possible understandings from *Addington*.⁶⁸⁹ One is that because people were

⁶⁸⁴ See generally *Sex Offenders Pose Threat*, *supra* note 427, at A3 (quoting president of the New Jersey Psychiatric Association, Dr. Daniel Greenwald, as saying "I think it's really impossible for psychiatrists to know this person is no longer dangerous" in reference to sex offenders); Morse, *supra* note 521, at 126-27. "The ability of mental health professionals to predict future violence among mental patients may be better than chance, but it is still highly inaccurate, especially if these professionals are attempting to use clinical methods to predict serious violence." *Id.* at 126.

⁶⁸⁵ Morse, *supra* note 521, at 126-28.

⁶⁸⁶ *Addington v. Texas*, 441 U.S. 418 (1979).

⁶⁸⁷ See *id.* at 426, 433 (holding that civil commitment is constitutional because a state has a legitimate interest under its *parens patriae* power to protect its citizens and that in the civil commitment hearings, states must provide clear and convincing evidence to meet due process standards).

⁶⁸⁸ See *id.* at 425 (stating that civil commitment "constitutes a significant deprivation of liberty that requires due process protection").

⁶⁸⁹ See Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 355 (1989); John A. Washington, *Prevention Detention: Dangerous Until Proven Innocent*, 38 CATH. U. L. REV. 271, 278-79 (1988) (both law review articles discuss the two understandings from *Addington*: 1) that it is less harmful to improperly detain mentally ill people because they might derive some therapeutic benefit from commitment, and 2) that the lesser "clear and convincing" standard of proof is sufficient to involuntarily commit the mentally ill because the courts decision is based on psychiatric evaluations, and not facts).

mentally ill, depriving them of their liberty is less harmful to them than depriving non-mentally ill people of their liberty.⁶⁹⁰

A second possible understanding of *Addington* is that people who are mentally ill have a lower entitlement to liberty than people who are not mentally ill, and that is the reason why it is okay to lock them up under lower standards than people who are not mentally ill.⁶⁹¹ The first justification is a *parens patriae* justification.⁶⁹² It assumes that the mental illness produces some sort of incompetence in the individual.⁶⁹³ It also assumes a kind of benign system, where people are locked up for treatment, but there are a lot of people who are concerned about them, and if there is a mistake made, they will be let out soon.⁶⁹⁴ As I will suggest in a moment, neither of those assumptions is true for sex offenders.⁶⁹⁵

The second key case is the *Foucha* case.⁶⁹⁶ That case, I suggest, stands for what I would call the principle of interstitiality. That is, the criminal law has got to be the primary means of protecting the public

⁶⁹⁰ See Richards, *supra* note 689, at 355 (discussing how the value of liberty for non-mentally ill people facing mistaken confinement is high, but the value of liberty "shifts" for mentally ill people because those who are mentally ill who are improperly detained can benefit by receiving treatment). But see *Heller v. Doe*, 509 U.S. 312, 341 (1993) (Souter, J., dissenting) (stating that it is not a presumption that curtailing the liberty of a disabled person is less severe because of his disability).

⁶⁹¹ See Washington, *supra* note 689, at 278-79 (stating that "due process warrants a lesser standard of proof in proceedings to involuntary commit the mentally ill").

⁶⁹² See *Addington*, 441 U.S. at 426.

⁶⁹³ *Id.*

⁶⁹⁴ See generally *id.* at 428-29 (discussing the opportunities available in the event erroneous confinement occurs).

⁶⁹⁵ See Marie A. Bochnewich, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 303 (1992) (discussing that civil commitment for sex offenders is unjustified under *parens patriae* power because due to a lack of treatment "the released offender reemerges untreated to reoffend").

⁶⁹⁶ *Foucha v. Louisiana*, 504 U.S. 71 (1992).

from any kind of violence, including sexual violence.⁶⁹⁷ The key issue is whether the state can show some sort of additional interest in throwing off the criminal law and using the secondary system of civil commitment. Also, the question is whether, as I interpret *Foucha* and understand that other people do not see it this way: does the mental disorder somehow disable the state from using the criminal justice system to vindicate its interest in protecting the public?⁶⁹⁸

If one looks at how that could be the case, one will see two possibilities: one, the mental disorder might render somebody incompetent to stand trial, and that is not in the *parens patriae* rationale.⁶⁹⁹ The other possibility is that a mental disorder might render somebody excused from criminal liability or unable to form a criminal intent.⁷⁰⁰ Those are the ways in which mental disorder disables the state's ability to use the criminal justice system and, therefore, gives it the heightened interest it needs to go outside of that system and use this alternative system.⁷⁰¹

⁶⁹⁷ See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L. J. 507, 536 (1991) (addressing how the traditional English Law has the legislature enact criminal laws to protect life and how the courts have a duty to enforce the laws to protect society from violence).

⁶⁹⁸ See *Ambiguities*, *supra* note 617, at 540 (stating that *Foucha* will continue the trend in the years since *United States v. Hinckley*, Crim. No. 81-306 (D.D.C. June 21, 1982), to restrict the category of excuse from criminal responsibility on the basis of mental illness).

⁶⁹⁹ See generally Bruce J. Winick, *The Side Effects of Incompetency and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 27 (1995) [hereinafter *Side Effects of Incompetency*] (discussing how mental incompetency is required in order for the government to assert the *parens patriae* power).

⁷⁰⁰ See, e.g., N.Y. PENAL LAW §40.15 (McKinney 1996) ("[I]t is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect."); see also Amy L. Nelson, *Postpartum Psychosis: A New Offense?* 95 DICK. L. REV. 625, 646 (1991) (discussing how jurisdictions admit evidence of mental abnormality to negate elements of criminal intent).

⁷⁰¹ See *Addington v. Texas*, 441 U.S. 418, 426 (1978) (explaining that the state has a legitimate interest to care for individuals who are unable to care for themselves because they have emotional disorders throughout civil commitments and that the state also has the authority to protect the community from those with dangerous tendencies).

This is a key point illustrated in Professor Brooks' writing, if you read the Washington State Supreme Court case of *Young*,⁷⁰² and if you read the Minnesota court case of *Pearson*.⁷⁰³ They invoke this notion of diminished responsibility.⁷⁰⁴ They do not necessarily label it as such, but diminished responsibility is what they all refer to.⁷⁰⁵ Professor Brooks, for example, maintains that not all mental disorders are appropriate for civil commitment.⁷⁰⁶ "Only those," and I hope I am not misquoting him, "which produce uncontrollable psychopathic rape are suitable for such treatment."⁷⁰⁷ The opinions in *Young* and *Pearson* indicate the same utter inability to control.⁷⁰⁸ They all ring of a volitional dysfunction, something that, at its extreme, would excuse people from criminal liability.⁷⁰⁹

That I call the espoused justification for civil commitment, and if you read how the courts and the writers justify using preventive detention, that is, in the end, how they take that crucial step.⁷¹⁰

What is the actual practice? Minnesota has a track record that I have studied.⁷¹¹ Unlike the State of Washington, where apparently

⁷⁰² *In re Young*, 857 P.2d 989 (Wash. 1993).

⁷⁰³ *Pearson v. P. Ct. of Ramsey County*, 287 N.W. 297 (Minn. 1939).

⁷⁰⁴ See generally *Young*, 857 P.2d at 993-94; *Pearson*, 287 N.W. at 300.

⁷⁰⁵ *Young*, 857 P.2d at 993-94; *Pearson*, 287 N.W. at 300.

⁷⁰⁶ See Brooks, *supra* note 568, at 751.

⁷⁰⁷ *Id.* at 727-28.

⁷⁰⁸ *Young*, 857 P.2d at 1018; *Pearson*, 287 N.W. at 302.

⁷⁰⁹ See Deborah W. Denno, *Gender Issues and the Criminal Law: Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 122 (1994) (stating that a disability, such as a "defect in volition, because the actor cannot stop herself from violating the law" may relieve one from responsibility).

⁷¹⁰ See Morse, *supra* note 521, at 117 (reviewing the justifications for preventive detention and sexual predator commitment statutes).

⁷¹¹ See generally Conrad deFiebre, *Psychopathic Sex Offenders Get New Home*, STAR TRIBUNE (Minnesota), Nov. 5, 1995, at B1 (discussing the new Minnesota Sexual Psychopathic Personality Treatment Center in the context of Minnesota's approach to civil commitment).

there have been twenty-two people committed,⁷¹² in Minnesota there have been seventy-five people committed under this law in the last five years, from 1990 to 1995.⁷¹³ In the modern history of the law since 1975, there have been ninety-four people committed, and it has picked up in recent years.⁷¹⁴ Of those people who have been committed, guess how many have ever been discharged? None have ever come out of that system.⁷¹⁵ There have been six people who have been so-called "provisionally discharged."⁷¹⁶ Two went into the community,⁷¹⁷ one returned after a year,⁷¹⁸ and five got so old that they were discharged to nursing homes.⁷¹⁹

So what we are talking about is not the benign system that was approved in *Addington*,⁷²⁰ where there are concerned doctors and family looking out for people who have been railroaded⁷²¹ into a mental hospital

⁷¹² See Lied, *supra* note 525 (stating that the number of sexual predators confined under the Washington statute has grown to 36).

⁷¹³ *Id.*

⁷¹⁴ *Id.*

⁷¹⁵ Letter from John L. Kirwin, Assistant Attorney General, State of Minnesota, to Eric Janus, Professor of Law, William Mitchell College of Law (Feb. 8, 1996). The letter attaches charts which list the fate of patients who either were provisionally discharged, transferred to prison, or died. *Id.* The letter and attached charts are on file with the *New York Law School Journal of Human Rights*.

⁷¹⁶ *Id.* at 4 (charting six provisionally discharged patients from 1975-1995).

⁷¹⁷ "Two clients are on unauthorized absence." *Id.*

⁷¹⁸ *Id.*

⁷¹⁹ *Id.* "Often clients committed as psychopathic personalities who are on provisional discharge, five are in state-operated nursing homes." *Id.*

⁷²⁰ *Addington*, 441 U.S. 418 ("[A] 'clear and convincing' standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state hospital.").

⁷²¹ *Id.* at 420-21.

these are life sentences,⁷²² and it is not surprising. Why? Because once a judge has certified you as sexually dangerous,⁷²³ who in their right mind would ever certify you as being safe? No one will ever do that.⁷²⁴ So the first conclusion is that this is not an *Addington* case.⁷²⁵

Second, none of the ninety people who have been committed in Minnesota have ever been found to be incompetent.⁷²⁶ That is not a

⁷²² See Sarah H. Francis, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 SUFFOLK U. L. REV. 125, 128 (1995) (asserting that "because neither psychologists nor legislatures have clinically defined sexual dangerousness. . . [m]ost persons classified as sexually dangerous find themselves confined for life"). See also Hammel, *supra* note 660, at 759 (indicating that "the real motivation for [sexual predator civil commitment laws] was lifetime incarceration. . ."). But see *In re Blodgett*, 510 N.W.2d 910, 914 (Mass. 1994) ("[I]t is not clear that treatment for psychopathological personality never works. . . [b]ut even when treatment is problematic, and it often is, the state's interest in the safety of others is no less legitimate and compelling. . .").

⁷²³ A court will usually determine whether an individual is sexually dangerous based on expert testimony and its own review of the background of the person charged. See generally *In re Linehan*, 544 N.W.2d 308, 313-14 (Minn. 1996) (stating that reliance on such expert testimony comports with a state's burden of proof in a civil commitment case); see also MINN. STAT. ANN. §253B.185(1) (West 1996) (prescribing court review of all petitions prepared by the county attorney that allege a proposed patient is sexually dangerous).

⁷²⁴ See C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the "Politically Ill"*, 19 WM. MITCHELL L. REV. 99, 101-02 (1993) ("Because a person committed as a 'psychopathic personality' has never been found to suffer from a medically recognized illness, he may never gain release by a determination that he has been 'cured.' Rather, the commitment as a 'psychopathic personality' is based upon facts that, once having occurred, provide an ongoing justification for involuntary confinement.").

⁷²⁵ *Addington v. Texas*, 441 U.S. 418 (1979). In this case concerning a request by a mother to commit her son to a mental institution because of his alleged mental incapacity, the Supreme Court held that involuntary commitment for an indefinite period based on mental incapacity and dangerousness to others requires a "clear and convincing" standard of proof. *Id.*

⁷²⁶ See, e.g., deFiebre, *supra* note 711 (stating that most of Minnesota's recently civilly committed sex offenders, comprised of ninety-five men and one woman, "have no psychiatric diagnosis at all . . . [and] most have average or above-average intelligence . . .").

finding in any of these cases. This is not a *parens patriae* situation.⁷²⁷ Third, in committing people, the courts do not limit their commitments to people who have a volitional dysfunction of some sort.⁷²⁸ They are not limiting these people to those who are not prosecutable for crimes.⁷²⁹ Many of the people committed, including my client, Dennis Linehan,⁷³⁰ have a diagnosis of anti-social personality disorder.⁷³¹ That is an

⁷²⁷ See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (defining *parens patriae* as "the principal that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents"). For a discussion of the evolution of the doctrine of *parens patriae*, see Neil H. Cogan, *Juvenile Law: Before and After the Entrance of the Parens Patriae*, 22 S.C.L. REV. 147, 151-61 (1970); see also *In re Blodgett*, 510 N.W.2d 910, 924 (Minn. 1994) (Wahl, J., dissenting) (explaining that since a mental illness is not required in order to civilly commit a person under Minnesota's commitment statute, the state's argument that it is acting pursuant to its *parens patriae* interest is not valid).

⁷²⁸ See, e.g., MINN. STAT. ANN. §253B.02(18)(b)(3) (b) (West 1995). "For purposes of [the Civil Commitment Act], it is not necessary to prove that the person has an inability to control the person's sexual impulses." *Id.* For a discussion about the relationship between volition and behavior, see Kevin W. Saunders, *Voluntary Acts and the Criminal Law*, 49 U. PITT. L. REV. 443 (1988).

⁷²⁹ Individuals in Minnesota, for example, have been subject to both criminal prosecution and subsequent civil commitment. See, e.g., *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994). Prior to his civil commitment, Blodgett was in prison for two counts of criminal sexual conduct in the second degree. *Id.* *In re Linehan*, 544 N.W.2d 308 (Minn. Ct. App. 1996). Prior to his civil commitment, Linehan had been in prison for murder and kidnaping. *Id.*

⁷³⁰ *In re Linehan*, 544 N.W.2d 308. Appellant, Dennis Linehan, was convicted as a sexually dangerous person after he pleaded guilty to the charge of kidnaping in satisfaction of an indictment for murder and kidnaping. *Id.* Prior to his parole, Linehan was committed for an indeterminate period as a psychopathic personality. *Id.* Although the Minnesota Supreme Court reversed the commitment, he was later successfully committed under the newly-enacted sexually dangerous person statute (MINN. STAT. ANN. § 253B.02(18)(b) (West 1995)) because he exhibited a personality disorder, an impulse control disorder, and an anti-social personality disorder. *Id.*

⁷³¹ "To support an antisocial personality disorder diagnosis . . . the trial court found Linehan had shown: a failure to conform to social norms . . . deceitfulness . . . irritability and aggressiveness. . . consistent reckless disregard for the safety of others . . . and lack of remorse . . ." *Id.* at 313; see also DSM-IV, *supra* note 606 (defining Anti-social Personality Disorder as, inter alia, "a pervasive pattern of disregard for, and violation of, the rights of

extremely broad diagnosis.⁷³² Basically, it means that you have a history of bad behavior,⁷³³ which some people say is applicable to 80 percent of people in prison.⁷³⁴ So, essentially, if these laws are upheld, the basic principle involved is applicable to eighty percent of the people in prison.⁷³⁵ The principle underlying these laws, therefore, could swallow the whole criminal justice system.⁷³⁶

Let me give you just a very brief summary of some of the characteristics of people who have been committed under the Minnesota law.⁷³⁷ I am going back to 1940 when this law was first enacted,⁷³⁸ but it is the same law.⁷³⁹ This is apparently what it meant then: persistent window peeping and exhibitionism, sexual contact with cows, fondling of strange children, excessive masturbation, consenting homosexual

others. . . . [D]eceipt and manipulation are central features. . . .").

⁷³² See, e.g., DSM-IV, *id.*

⁷³³ "Individuals with Anti-social Personality Disorder fail to conform to social norms. . . . *Id.* "They may repeatedly perform acts that are grounds for arrest such as destroying property, harassing others, stealing, or pursuing illegal occupations." *Id.* at 646.

⁷³⁴ See Abraham L. Halpern, *The Insanity Verdict, The Psychopath and Post-Acquittal Confinement*, 24 PAC. L.J. 1125, n.68 (1993) (citing Robert Hare, et al., *Psychopathy and the DSM-IV Criteria for Anti-social Personality Disorder*, 100 J. ABNORMAL PSYCHOL., 1-8 (1991)) (stating that "Hare and his colleagues have shown that seventy-five to eighty percent of convicted felons warrant the diagnosis of Anti-social Personality Disorder . . .").

⁷³⁵ *Id.*

⁷³⁶ See, e.g., Felicia G. Rubenstein, Note, *Committing Crimes While Experiencing a True Dissociative State: The Multiple Personality Defense and Appropriate Criminal Responsibility*, 38 WAYNE L. REV. 353, 371-72 (1991) (arguing that if anti-social personality disorders were to be routinely considered, the whole criminal justice system would break down since the only criteria for the disorder is engaging in criminal activity; therefore, all defendants could be deemed mentally ill).

⁷³⁷ MINN. STAT. ANN. §253B.02 (West 1995).

⁷³⁸ 1939 MINN. LAWS 369.

⁷³⁹ See, e.g., *In re Blodgett*, 510 N.W.2d 910, 919 (Minn. 1994) (asserting that "since the legislature, in response to the report from the Governor's committee on the Care of Insane Criminals and Sex Crimes...passed the first Psychopathic Personality Statute in 1939, the definition of the term 'psychopathic personality' has remained essentially unchanged...").

contact with adults, sexual contact with boys, indecent exposure, et cetera.⁷⁴⁰ These laws are exceedingly elastic, and whomever happens to be the dangerous deviant person *du jour* is subject to being committed, potentially for life, under these laws.⁷⁴¹

The proceedings are also error prone because of their dependance on predictions.⁷⁴² Now, Professor Brooks indicates that Dr. Quinsey in Canada says eighty percent of predictions can be correct.⁷⁴³ We could go on at length, but in one minute I shall say that he was using

⁷⁴⁰ See *id.* at 920 n.6 (citing Dr. William Erickson, The Psychopathic Personality Statute, Need for Change, at 20-26 (1991) (unpublished paper presented by the Commissioner of Human Services to the legislature in 1991). "[P]ersons have been committed as psychopathic personalities for a wide range of behaviors, including window peeping, excessive masturbation, sexual contact with cows, homosexuality, incest, pedophilia, and rape." *Id.*

⁷⁴¹ See generally Zamoyski, *supra* note 535, at 1253-54 (discussing California's "one strike" law (CAL. PENAL CODE §667.61) which sets up a road map for the severity of the punishment imposed for committing sex offenses). In contrast, Washington's Sexual Violent Predators Act (WASH. REV. CODE. ANN. §71.09) allows "indefinite confinement of sexually violent predators who do not necessarily have a psychiatrically recognized mental disease or defect." *Id.* at 1257. Under Washington's law, a sexual predator is someone who has previously been convicted of a violent sexual crime and suffers from a "'mental abnormality' or 'personality disorder' that makes him likely to engage in predatory acts of violence." *Id.*

⁷⁴² Prediction error rates can be decreased by "including sex offense history, psychopathy and phallometrically measured sexual preferences as predictors." Vernon L. Quinsey, et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85, 103 (1995) [hereinafter *Actuarial Prediction*].

⁷⁴³ Vernon L. Quinsey is a professor of psychology and the coordinator of forensic/correctional studies at Queens University in Kingston, Ontario, Canada. *Id.* at 105. According to Dr. Quinsey, "using theoretically relevant and empirically tested predictors, predictive accuracy [of sexual recidivism] can realistically be expected to be in the 80 percent range." *In re Young*, 857 P.2d 989, 1003-04 (Wash. 1993) (quoting Vernon L. Quinsey, *Review of the Washington State Special Commitment Center Program for Sexually Violent Predators*, at 9) (appended to Wash. State Inst. for Pub. Policy, *Review of Sexual Predator Program: Community Protection Research Project*, (Feb. 1992)).

an actuarial formula⁷⁴⁴ that makes use of phalometric measurements,⁷⁴⁵ together with a very specific test, the "Psychopathy Checklist Revised."⁷⁴⁶ They found that those two things taken together are highly predictive, up to 80 percent accurate.⁷⁴⁷ Yet, when you take that eighty percent and apply it to the fairly low base rate of recidivism,⁷⁴⁸ and you check to see what the false positive rate is,⁷⁴⁹ that is where the errors come in. I do not have time to explain it thoroughly right now, but you will see that clinicians, who cannot be as scientifically accurate as the actuarial tables,⁷⁵⁰ are going to be less accurate than that eighty percent.⁷⁵¹ When they do their guesswork on the actual population and

⁷⁴⁴ See generally *Actuarial Prediction*, *supra* note 742 (explaining that the actuarial formula accounts for such variables as criminal histories, sexual preference data, and outcome variables). Calculations were made using what is referred to as a Recidivism Prediction Instrument. *Id.* at 97.

⁷⁴⁵ "Phallometry (or penile plethysmography) is a technique for measuring penile erection in response to a variety of stimuli, used with many procedural variations in different sex offender assessment centers." G. Launay, *The Phallometric Assessment of Sex Offenders: Some Professional and Research Issues*, CRIM. BEHAV. MENT. HEALTH 48 (1994).

⁷⁴⁶ The Psychopathy Checklist is a device "strongly related to criminal conduct [with a] high interrater reliability." *Actuarial Prediction*, *supra* note 742, at 87. Psychopathy is considered the "best predictor of violent recidivism in a maximum security psychiatric sample." *Id.*

⁷⁴⁷ See generally *id.* and accompanying text.

⁷⁴⁸ See BLACK'S LAW DICTIONARY 1269 (6th ed. 1990) (defining a recidivist as a "habitual criminal . . . [who makes a] trade of crime").

⁷⁴⁹ False positives are "those incorrectly classified as dangerous." *Actuarial Prediction*, *supra* note 742, at 100.

⁷⁵⁰ Predictions based solely on a clinician's analysis "may be suboptimal . . ." Vernon L. Quinsey & Anne Maguire, *Maximum Security Psychiatric Patients, Actuarial and Clinical Prediction of Dangerousness*, 1 J. INTERPERSONAL VIOLENCE 143, 145 (1986); see also Francis, *supra* note 722, at 139 (stating that "inaccuracy primarily stems from the inherent vagueness of the dangerousness element, which is subject to a variety of interpretations").

⁷⁵¹ See, e.g., Morse, *supra* note 521, at 126 (stating that "the ability of the mental health professionals to predict future violence among mental patients may be better than chance, but it is still highly inaccurate, especially if the professionals are attempting to use clinical methods to predict serious violence").