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Eric S. Janus

Mitchell Hamline School of Law, eric.janus@mitchellhamline.edu

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The Use of Social Science and Medicine in Sex Offender Commitment

Abstract

Sex offender commitment statutes are a controversial and recurring response to the threat of sexual violence. These statutes, claiming exemption from the strict constitutional limitations of the criminal law, use civil-commitment-like procedures to detain sex offenders in secure "treatment centers." Litigation testing these statutes has sought to locate the border between legitimate exercise of the state's mental health power, and illegitimate preventative detention. This article examines the central roles that medicine and behavioral science play in the operation of sex offender commitment statutes and the litigation testing their constitutional validity. The thesis of this article is that the presence of these sciences in sex offender commitment schemes is central to their claims of validity. It is the systemic, rather than causal or interstitial, presence of science that provides the central pillar in the claim for legitimacy. But the way in which science is used, the pattern of its use and non-use, undercuts those very claims. Sex offender commitment statutes can partially rehabilitative their claims to legitimacy by restructuring their use of science. Part IA of this article describes briefly the operation of sex offender commitment laws, introduces the legitimacy claims they make through the use of science, and sketches how the actual usage pattern of science undercuts those claims. Part IB reviews the literature on the use of science in law, highlighting concepts that are useful in assessing science in the context of sex offender commitment laws. Part II sets out in more detail the way in which sex offender commitment schemes use and fail to use science. Part III then sets out recommendations for the use of science in sex offender commitments. The article suggests that science can be used to restore some of the legitimacy claimed by sex offender commitments but lost by current practices. It posits that courts lack the knowledge to set meaningful legal standards for sex offender commitments. The article concludes in Part IV by raising a set of cautions about even this use of science in law.

Keywords

sex crimes, commitment, criminal law

Disciplines

Constitutional Law | Criminal Law

The Use of Social Science and Medicine in Sex Offender Commitment

Eric S. Janus*

Sex offender commitment statutes are a controversial and recurring response to the threat of sexual violence.¹ These statutes, claiming exemption from the strict constitutional limitations of the criminal law,² use civil-commitment-like procedures to detain sex offenders in secure "treatment centers." Litigation testing these statutes has sought to locate the border between legitimate exercise of the state's mental health power, and illegitimate preventive detention.³

This article examines the central roles that medicine and behavioral science play in the operation of sex offender commitment statutes and the litigation testing their constitutional validity. The thesis of this article is that the presence of these sciences in sex offender commitment schemes is central to their claims of validity. It is the systemic, rather than casual or interstitial, presence of science that provides the central pillar in the claim for legitimacy. But the way in which science is used, the pattern of its use and non-use, undercuts those very claims. Sex offender commitment statutes can partially rehabilitate their claims to legitimacy by restructuring their use of science.

Part IA of this article describes briefly the operation of sex offender

* Professor of Law, William Mitchell College of Law. The author served as co-counsel for Linehan in *In re Linehan* (Linehan I), 518 N.W.2d 609 (Minn. 1994) and *In re Linehan* (Linehan II), 544 N.W.2d 308 (Minn. Ct. App.), *aff'd*, 557 N.W.2d 171 (Minn. 1996). I wish to thank David Wilson for his contribution to the editing of this manuscript.

1. See, e.g., Estelle B. Freedman, "Uncontrolled Desires": *The Response to the Sexual Psychopath, 1920-60*, 74 J. AM. HIST. 83 (1987); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, IX PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30s TO THE 80s 853-60 (1977) (hereinafter "GAP").

2. 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) (manuscript at 5, on file with author).

3. See, e.g., *In re Linehan* (II), 544 N.W.2d 308 (Minn. Ct. App.), *aff'd*, 557 N.W.2d 171 (Minn. 1996).

commitment laws, introduces the legitimacy claims they make through the use of science, and sketches how the actual usage pattern of science undercuts those claims. Part IB reviews the literature on the use of science in law, highlighting key concepts that are useful in assessing science in the context of sex offender commitment laws. Part II sets out in more detail the ways in which sex offender commitment schemes use--and fail to use--science. It begins by detailing the ways in which the systemic use of science in sex offender commitments supports claims of legal and social legitimacy. This part then catalogs the complex set of postures in which science is used--or is conspicuously absent--in sex offender commitment schemes and shows how the pattern of use and non-use of science undercuts the claims of legitimacy. Part III then sets out recommendations for the use of science in sex offender commitments. The article suggests that science can be used to restore some of the legitimacy claimed by sex offender commitments but lost by current practices. It posits that courts lack the knowledge to set meaningful legal standards for sex offender commitments. By calibrating the scientific space in which sex offender commitment laws operate, science can help courts articulate the legal standards that provide some of the legitimacy claimed for these statutes. The article concludes in Part IV by raising a set of cautions about even this use of science in law.

I. THE CONTEXT

A. The Operation of Sex Offender Commitment Schemes

Sex offender commitment laws use civil commitment-style procedures to incarcerate sex offenders after they have completed serving criminal sentences for their crimes.⁴ All have a four-element proof structure. They require proof, by the state, of (1) a history of sexually violent acts;⁵ (2) a current mental disorder or abnormality;⁶ (3) the

4. See Janus, *supra* note 2.

5. See CAL. WELF. & INST. CODE § 6600(a), (b) (West Supp. 1996); KAN. STAT. ANN. § 59-29a02(a), (e) (1994); MINN. STAT. ANN. § 253B.02, subd. 7b (West Supp. 1996); WASH. REV. CODE ANN. § 71.09.020(6) (West Supp. 1997); WIS. STAT. ANN. § 980.01(7) (West Supp. 1996).

6. See CAL. WELF. & INST. CODE § 6600(a), (c) (West Supp. 1996); IOWA CODE ANN. § 709C.2, subd. 4 (West Supp. 1996), *repealed by* ch. 1082, §§ 7-8 (1996); KAN. STAT. ANN. § 59-29a02(a) (1994); MINN. STAT. ANN. § 253B.02, subd. 18b (West Supp. 1996); WASH. REV. CODE ANN. § 71.09.020(1) (West 1992 & Supp. 1996); WIS. STAT. ANN. § 980.01(7) (West Supp. 1996).

likelihood of future sexually harmful acts;⁷ and (4) a nexus between the first two elements and the third.⁸ Procedurally, these laws impose a burden of proof on the state that is at least at the “clear and convincing level” and in some cases at the “beyond a reasonable doubt” level.⁹ Some laws provide for trial by jury, others do not.¹⁰ All provide for confinement that is essentially indefinite¹¹ and all allow for the release of the individual committed when it is shown that he or she is no longer dangerous by reason of a mental disorder.¹²

7. See ARIZ. REV. STAT. ANN. § 13-4601 (West Supp. 1995); CAL. WELF. & INST. CODE § 6600(a), (c) (West Supp. 1996); IOWA CODE ANN. § 709C.2, subd. 4 (West Supp. 1996); KAN. STAT. ANN. § 59-29a02(a) (1994); MINN. STAT. ANN. § 253B.02, subd. 18b (West Supp. 1996); WASH. REV. CODE ANN. § 71.09.020(1) (West 1992 & Supp. 1996); WIS. STAT. ANN. § 980.01(7) (West Supp. 1996).

8. See *In re Linehan* (II), 557 N.W.2d 171, 177 (Minn. 1996); *State v. Post*, 541 N.W.2d 115, 124 (Wis. 1995).

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

10. Some sex offender commitment laws provide for jury trials. See, e.g., ARIZ. REV. STAT. ANN. § 13-4605 (West Supp. 1996); IOWA CODE ANN. § 709C.5 (West Supp. 1996); KAN. STAT. ANN. § 59-29a06 (1994); WASH. REV. CODE ANN. § 71.09.050 (West Supp. 1996); WIS. STAT. ANN. § 980.03(3) (West Supp. 1996). But see *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 275-77 (1940) (finding hearing procedures are not “patently defective” even though a jury trial is not included among defendant’s hearing rights).

11. California law limits commitments to two years, but it may be extended if the state proves that the individual’s condition has not changed. See CAL. WELF. & INST. CODE § 6605(e) (West 1996). Cf. ARIZ. REV. STAT. ANN. § 13-4606 (West Supp. 1996) (stating that a “person shall remain in the state hospital or licensed behavioral health or mental health inpatient treatment facility and shall receive care and treatment until the person’s paraphilia has so changed that the person would not be a threat to public safety if the person was conditionally released to a less restrictive alternative or was unconditionally discharged”); KAN. STAT. ANN. § 59-29a07 (1996) (confining “until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large”); MINN. STAT. ANN. § 253B.18, subd. 3 (West 1996) (stating “court shall order commitment of the proposed patient for an indeterminate period of time”).

12. See, e.g., ARIZ. REV. STAT. ANN. § 13-4606 (West Supp. 1996) (providing that commitment continues “until the person’s paraphilia has so changed that the person would not be a threat to public safety if the person was conditionally released to a less restrictive alternative or was unconditionally discharged”); KAN. STAT. ANN. § 59-29a07 (1996) (confining “until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large”); MINN. STAT. ANN. § 253B.18, subd. 15 (West 1996) (requiring showing that individual “is no longer dangerous to the public, and is no longer in need of inpatient treatment

Science functions in three distinct ways in sex offender commitment laws and the litigation challenging their legitimacy. First, legislative and judicial judgments about the wisdom and constitutionality of sex offender commitment schemes depend on a set of factual assertions about mental disorder, future sexual violence, and their relationship. These assertions are generalized statements about mental disorder and violence, and thus sound in the realm of medicine and behavioral science. Courts often reduce the central policy questions about sex offender commitments to issues of science rather than social or legal values.

Second, sex offender commitment laws place science in the central role in the adjudication of individual fact. Courts routinely frame the factual issues as contests to be resolved by judging the credibility of competing "expert" diagnosis and prediction. These courts portray the individual questions of liberty deprivation as turning centrally on questions of scientific, rather than moral, judgment.

Thus, at both the legislative and individual levels, sex offender commitment schemes claim to be highly integrated with science. It is this claim to systemic involvement of science that forms the basis for the third way in which science is used: the assertedly scientific nature of the enterprise forms a central prop in the arguments for the legitimacy of sex offender commitment schemes. It is not merely the content of the science, but more significantly the fact of its centrality, that is given legitimizing significance.

Paradoxically, it is the pattern of scientific involvement that undercuts the claims for legitimacy. By framing policy and individual issues as question of scientific fact, courts avoid careful articulation of legal standards. Conversely, courts assert that generalized relationships exist between mental disorder and sexual violence but do not acknowledge the empirical complexities demonstrated by science. As a result, sex offender commitment statutes are grounded neither in empirically demonstrated empiricism nor in articulated legal standards. The result is an indeterminacy that undercuts the claims that sex offender commitment statutes are legitimate.

B. Classifying the Use of Science in Law

Scholarship has sought to classify the use of science in law along at least three axes. Walker and Monahan's¹³ work suggests a classifica-

and supervision").

13. See Lauren Walker & John Monahan, *Social Frameworks: A New Use Of Social Science In Law*, 73 VA. L. REV. 559 (1987).

tion based on the stage of lawmaking and adjudication at which social science is considered. A second axis addresses the distribution of controlling authority among science, law and "commonsense."¹⁴ A third addresses the rules that determine when scientific evidence may be presented to and considered by the factfinder. These axes provide tools for describing and evaluating the use of science in sex offender commitments.

1. The Posture of Social Science in Law: The Walker/Monahan Classification

Walker and Monahan identify three levels at which social science enters into law. First, at the most general level, social science is used to establish legislative facts. These are the facts that give meaning to laws, that enter into the determination of policy and the evaluation of legislation from a policy or constitutional perspective. Second, social science helps to establish adjudicative facts, which are facts that concern the immediate parties before the court. Third, in social framework testimony, "general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case."¹⁵

As I shall reveal below, sex offender commitment cases make extensive use of all three forms of science testimony. In this article, I suggest a fourth level or use of science. The systemic use of science as a legitimizing device derives its significance not from the "facts" that it supplies to the statutory scheme, but rather from its very presence as part of the structure of sex offender commitments.

2. Distributing Authority Among Law, Commonsense, and Science

Walker and Monahan's articulation of "social framework" testimony makes clear that science can have a role in changing the unspoken, "commonsense" understandings of the world that underlie much factual

14. See Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) [hereinafter Perlin, *Psychodynamics*]; see also Paul E. Meehl, *Law and the Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist*, 2 BEHAV. SCI. & L. 521, 522 (1989) (describing "those commonsense empirical generalizations about human behavior which we accept on the culture's authority plus introspection plus anecdotal evidence from ordinary life . . . [w]hat everybody . . . believes about human conduct, about how it is to be described, explained, predicted, and controlled").

15. Walker & Monahan, *supra* note 13, at 582-83.

decision making.¹⁶ A second axis distributes power among legal rules, commonsense and science.

A familiar distinction, that between law and fact, distributes decision making authority between legal-expert judge and "lay" factfinders, and between appellate and trial courts.¹⁷ The location of the lines between "law" and "fact" are driven by a variety of policy concerns.¹⁸ Some decisions are thought to benefit from or require a high level of "lay" or community influence. These are called "fact." Others require predictability and uniformity, or need to reject or protect against community or commonsense bias. These are often called "law."

The presence of science complicates this picture in at least two ways. First, at the fact end of the spectrum, courts utilize various mixes of science and lay or commonsense observation and reasoning. In some contexts, courts refuse to admit scientific testimony even though sound scientific observations are available.¹⁹ In others, the law refuses to allow commonsense or "lay" decision making to supplant the characterizations arrived at by experts.²⁰ In a third combination, scientific testimony is permitted, but not required; lay testimony and the lay inferences drawn from it are competent to meet applicable proof burdens.²¹

16. See Meehl, *supra* note 14, at 559.

17. See FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 230-31 (1977).

18. See *id.*

19. See, e.g., *State v. Brom*, 463 N.W.2d 758, 762 (Minn. 1990); *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982) (relying upon lay judgment in matters of criminal motivation and intent).

20. See, e.g., *Warner v. State*, 244 N.W.2d 640 (Minn. 1976).

Under these circumstances all of the doctors recommend that she be released from the institution and agree that this can be done without danger to herself or to the public. In this state of the evidence the question of Mrs. Warner's release becomes essentially a medical and not a legal decision. The court was not at liberty to substitute its nonprofessional prognosis for that of the medically trained witnesses who were of a different view.

Id. at 644 (citing *Stak v. Rawland*, 199 N.W.2d 774, 787 (Minn. 1972)); *Ambrosini v Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (holding that the plaintiff's satisfaction of burden of production is treated as turning on admissibility of expert evidence of causation); *Allen v. Pennsylvania Engineering Corp.* 102 F.3d 194 (5th Cir. 1996).

21. In Minnesota, a defendant's ability to rely on the battered wife syndrome is defined in *State v. Hennem*, 441 N.W.2d 793 (Minn. 1989). In *Hennem*, the court established the following:

We hold that in future cases expert testimony regarding battered syndrome will be limited to a description of the general syndrome and the characteristics which are present in an individual suffering

These allocations represent the legal system's view of the relative competence and value of fact finding mediated by empirical and systematic observation, on the one hand, versus commonsense ideas, on the other. A strand of scholarship evaluates the balances struck by the law on this continuum. Some scholars argue that scientifically mediated fact finding deserves a bigger role, and that it ought to supplant, to a greater degree, the "heuristic biases" that they identify as a characteristic of commonsense reasoning.²² Others, for a variety of reasons, are critical of expansions of the role of science in individual fact adjudication.²³

As I show in more detail below, sex offender commitment schemes are portrayed as falling at the high-science/low-commonsense end of this spectrum. In contrast, the other form of social control, criminal law, falls nearly at the other end of the continuum.

from the syndrome. The expert should not be allowed to testify as to the ultimate fact that the particular defendant actually suffers from battered woman syndrome. This determination must be left to the trier of fact.

Id. at 799; *see also* Hawthorne v. State, 408 So. 2d 801, 807 (Fla. Dist. Ct. App. 1982); Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981); State v. Allery, 682 P.2d 312, 316 (Wash. 1984); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 576-77 (1988).

22. *See* Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 669 n.222 (1993) (arguing that judges are reluctant to use social science "or any other system that may appear to challenge law's hegemony over society") [hereinafter Perlin, *Pretexts*]; Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 L. & SOC'Y REV. 123 (1980-81).

23. *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1979); Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 36 (describing argument that "legal insanity ought to rest on the commonsense perspective" and that "medicalized" definitions "remov[e] insanity from its proper moral context").

Bonnie and Slobogin identify two types of skepticism regarding the role of psychological principles or findings in the law. The "moral skeptics" question whether the categories of psychology—e.g., mental disorder or dangerousness—identify differences that are relevant to the social policy (i.e., moral) lines drawn by the law. The "method skeptics" argue that the tools of psychology are too "primitive for the law's purpose." Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 432-33 (1980).

The second complication introduced by science affects the law end of the fact-law continuum. Here, the question is not which method of individual adjudication is favored, but rather whether, and how, the law translates its social policy into the concepts and terminology of science.²⁴ Some legal contexts accomplish this translation by incorporating high-level concepts of science (e.g., "mental disorder," "treatment") directly into the statement of the law.²⁵ A second, contrasting approach, seeks to narrow the use of social science and medicine by emphasizing the policy content of the relevant legal categories. Under this approach, legal categories may cut across the categories of science because the two sets of categories crystallize different concerns.²⁶ For example, law might use the concept "mental disorder" to describe the diminution of certain relatively narrow functional capacities.²⁷ Medicine and the behavioral sciences, in contrast, might use the concept to accomplish a much broader range of purposes.²⁸

24. See Charles Kester, *The Language of Law, the Sociology of Science and the Troubles of Translation: Defining the Proper Role for Scientific Evidence of Causation*, 74 NEB. L. REV. 529, 532 (1995).

25. Professor Winick, for example, constructs a framework in which it is the "medical" nature of psychiatric hospitalization that drives the constitutional boundaries of civil commitment. Medicine and its concepts (treatability, "illness") align quite closely with legal categories defining the scope of the state's power to use police power commitments. See Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534 (1995). This approach is consonant with Erlinder and others who premise their attacks on sex offender commitment statutes on the grounds that they are not based on "medically recognized diagnoses." *In re Blodgett*, 510 N.W.2d 910, 924 n.12 (Minn. 1994) (Wahl, J., dissenting) (citing C. P. Erlinder, *Minnesota's Gulag: Involuntary Treatment for "Politically Ill"*, 19 WM. MITCHELL L. REV. 99, 133 (1993)).

26. See Kester, *supra* note 24, at 556. "Indeed, the courts' uncritical assumption that scientists and lawyers mean the same thing when they discuss causation has caused courts to exaggerate the role of science by failing to recognize the implicit process of translation." *Id.* Stephen Morse makes clear that in translation, the scientific and legal categories may be anything but isomorphic. See Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 789-90 (1985). Indeed, Morse may be said to insist on the primacy of commonsense notions as the primary driving force underlying the law's intersection with psychology. See *id.* Thus, Morse uses the term "crazy" to describe those who are subject to commitment and excused from criminal responsibility; he does so to emphasize the non-scientific, intuitive content of these concepts of social intervention. See *id.*

27. See 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).

28. See STUART A. KIRK & HERB KUTCHINS, *THE SELLING OF DSM: THE RHETORIC OF SCIENCE IN PSYCHIATRY* 21, 235 (1992) (diagnostic categories designed to

The complications of science at both the law and fact levels, then, represent a set of interacting tensions and choices. At both the law and fact levels, there is a choice about how much the methods and concepts of science should be allowed to dominate the construction of legal categories and finding of individual fact, thus displacing the (non-scientific) social policies and world views that otherwise inform these processes.

Superimposed on these choices is the law-fact choice discussed at the beginning of this section. That choice, too, can influence the allocation of power to science. For example, a system could rely heavily on scientific evidence in the prediction of dangerousness or the identification of the requisite mental status, but could increase the degree of legal control over the subject by labeling the determination a question of law rather than one of fact.²⁹

Using these considerations, we can posit a rough classification of legal structures, depending on the extent to which they allow the methods and categories of science to dominate the non-scientific values and viewpoints of law and commonsense. As we shall see, sex offender commitment schemes fall into the "high-science/low-law"-and-commonsense end of the spectrum. As I shall show, this is both a central prop in the arguments for the legitimacy of sex offender commitment schemes, and a central failing in those arguments.

3. A Third Strand: The Admissibility of Scientific Evidence

A third axis along which law and science interact informs the law of evidence. Behavioral science and medicine are expert knowledge. Their admissibility turns not only on questions of relevance (a decision depending in large measure on the substantive decisions, discussed above, about the relative mix of "commonsense" and scientific bases for adjudication), but also on the specific set of rules governing admission of expert testimony. Courts routinely admit, and then rely on this sort of expertise in civil commitment cases, despite the acknowledged shortcomings of the science underlying it.³⁰ Faigman argues that scientific

facilitate communication among colleagues, understandability of research results, insurance reimbursement, etc.).

29. *See, e.g., In re Linehan (I)*, 518 N.W.2d 609 (Minn. 1994) (treating "ability to control" issue as question of law); *see also In re Moll*, 347 N.W.2d 67, 70 (Minn. Ct. App. 1984) (holding that "it is the trial court, not a medical expert, that must determine whether a person is mentally ill").

30. Courts routinely acknowledge the shortcomings of both diagnosis and prediction. *See, e.g., In re Blodgett*, 510 N.W.2d 910, 917 (Minn. 1994) (noting "the

testimony based on theories that have not been fully validated may be admissible if a court makes a determination that the testimony is necessary to effectuate the purposes of the law.³¹ There is clear evidence that sex offender commitment courts adopt a version of this necessity argument.³² In this article, I suggest that scientific evidence can be used to alter the courts' view of necessity by giving judges tools to make law-based discriminations among expert conclusions.³³

II. SCIENCE AS LEGITIMIZER AND DE-LEGITIMIZER

A. The Claims to Legitimacy Through the Use of Science

A central theme sex offender commitment statutes is the claim of legitimacy by reason of the presence of science. It is the systemic presence of science, not merely the content of the science, that props up the claims that sex offender commitment statutes are legitimate.

To understand the significance of the presence of science in sex offender commitments, compare the role of science in the criminal law, the "normal"³⁴ means by which society controls dangerous behavior. For the most part, the basic building blocks of criminal law are taken to be within the realm of basic human understanding, unmediated by "expert" testimony. Ascertaining intent and other states of mind³⁵, and reconstructing past human behaviors from circumstantial facts and eyewitness testimony³⁶ are ultimately left in the hands of lay witnesses

opinions of mental health experts are sufficiently reliable to support commitment proceedings"); *In re Young*, 857 P.2d 989, 1017 (Wash. 1993) (acknowledging that "prediction of dangerousness has its attendant problems" but holding prediction testimony "sufficiently accurate and reliable" to be admissible); *State v. Post*, 541 N.W.2d 115, 126 n.18 (Wis. 1995), *petition for cert. filed* (U.S. Mar. 7, 1996) (holding that although "predictions of future dangerousness may be difficult, they are still an attainable, in fact essential, part of our judicial process"); *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995), *petition for cert. filed* (U.S. Mar. 7, 1996).

31. See David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 574-75 (1995).

32. See, e.g., *In re Young*, 857 P.2d at 1017 (excluding scientific testimony would "eviscerate the entire law of involuntary commitment").

33. See Faigman, *supra* note 31, at 569. "The necessity principle requires judges to take into account the state of the science in light of the nature of the legal issues involved." *Id.*

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

35. See Finkel, *supra* note 23, at 36 (describing use of commonsense and of science in decisions regarding criminal law doctrines of excuse).

36. See E. LOFTUS, *EYEWITNESS TESTIMONY* (1979) (discussing scientific knowledge about the reliability of eyewitness testimony). Compare *State v. Chapple*, 660 P.2d 1208, 1219 (Ariz. 1983) (admitting expert testimony on this subject), with *State*

and lay fact finders (jurors and judges). Expertise is used,³⁷ but only interstitially and exceptionally.³⁸

Sex offender commitments have a proof structure that is, in some ways, analogous to criminal prosecutions. In both contexts, the state must prove a criminal act (future or past) associated with a particular kind of mental condition (criminal intent or "mental disorder"). Sex offender commitments could have been designed to rely on the same kinds of lay judgments that form the basis of criminal adjudications.

But commitments reject this design for one in which science plays the central role. In design, justification and application, sex offender commitments are systematically and intentionally scientific. Science enters into these statutory schemes in at least five distinct ways.

First, legislatures and courts adopt scientific terminology and concepts in the statutory language and in the legislative justifications for these laws. All use the term "mental disorder" or "personality disorder" as a central eligibility criterion for commitment.³⁹ This is a clear adoption of the language of science. The official diagnostic manual of the

v. Helterbride, 301 N.W.2d 545, 547 (Minn. 1980) (refusing to allow such testimony).

37. See, e.g., *State v. Marks*, 647 P.2d 1292 (Kan. 1982) (allowing expert testimony on "rape trauma syndrome"); *State v. Hennem*, 441 N.W.2d 793 (Minn. 1989) (allowing expert testimony on "battered woman syndrome" to assist defense of self-defense); Walker & Monahan, *supra* note 14, at 564 (discussing use of science to establish "battered woman syndrome").

38. See, e.g., *State v. Brom*, 463 N.W.2d 758 (Minn. 1990); *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982) (lay judgment relied upon in matters of criminal motivation and intent); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1 U. ILL. L. REV. 45, 53-64 (1994).

39. WIS. STAT. ANN. § 980.01(7) (West 1996) defines a "sexually violent person" in part as "a person who has been convicted of a sexually violent offense . . . and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." *Id.* KAN. STAT. ANN. § 59-29a02(a) (1996) classifies this person as someone who is "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility." *Id.* California, on the other hand, simply relies upon a "[d]iagnosed mental disorder." CAL. WELF. & INST. CODE § 6600(c) (West 1997). Washington distinguishes a sexual predator by focusing upon whether he or she has a "mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence, if not confined in a secure facility." WASH. REV. CODE § 71.09.020(1) (1997). Lastly, Minnesota defines this person as someone possessing a "sexual, personality, or other mental disorder or dysfunction." MINN. STAT. ANN. § 253B.02, subd. 18b(2) (1997).

American Psychiatric Association is denominated a manual about "mental disorders," uses that term as its central unit for definition, and uses the term "personality disorder" to denominate a major subdivision of diagnoses.⁴⁰ All of the statutes claim a purpose of "treatment,"⁴¹ a term that suggests a process designed and implemented by doctors or psychologists.⁴²

In reviewing these statutes, the courts make liberal use of the language of science and medicine. The Minnesota court characterizes the treatment as being "necessary to abate the mental disorders"⁴³ and ties the length of commitment to the "remission" of those mental disorders.⁴⁴ The Washington court states that its law was based on the "special needs of sex predators."⁴⁵ Scientific language is used, as well, in the legislative justifications.⁴⁶

Second, courts make the explicit claim that science, or scientific concepts, provide *justification* for the laws. The Minnesota court frames its search for a justification as a search for a "medical rationale," "medical basis" or a "mental health basis" for commitments⁴⁷ and the Wisconsin court similarly emphasizes the "medical justification" for its law.⁴⁸

40. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xi-xii, 630 (4th ed. 1994) [hereinafter DSM-IV].

41. CAL. WELF. & INST. CODE § 6604 (West 1997); KAN. STAT. ANN. § 59-29a07 (1996); WASH. REV. CODE ANN. § 71.09.060 (West 1997); WIS. STAT. ANN. § 980.06 (West 1996).

42. See MINN. STAT. ANN. § 253B.03, subd. 7 (1996) (defining "treatment" in terms of "contemporary professional standards"); see also *Youngberg v. Romero*, 457 U.S. 307, 323 (1982) (constitutional right to treatment measured by "professional judgment, practice or standards").

43. *In re Linehan* (II), 557 N.W.2d 171, 182 (Minn. 1996).

44. *Id.*

45. *In re Young*, 857 P.2d 989, 996-97 (Wash. 1993).

46. The Washington Legislature found:

sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities [T]he 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

WASH. REV. CODE § 71.09.010 (1996).

47. *In re Linehan* (II), 557 N.W.2d at 182.

48. *State v. Post*, 541 N.W.2d 115, 130 (Wis. 1995), *petition for cert. filed* (U.S. Mar. 7, 1996) (holding "that the 'unique treatment needs' of the individuals 'justify distinct legislative approaches'" (emphasis added)).

Third, courts claim that it is science which has the competency to make the discriminations critical to the legitimacy of the laws. Repeatedly, the courts turn to science for the authority they seek in legitimizing the laws. A California court of appeals frames the central constitutional question as one turning on the capacity of psychologists and psychiatrists to make relevant diagnoses.⁴⁹ The Minnesota Supreme Court notes that the Minnesota Sexually Dangerous Persons Act “was written with the advice of psychiatrists and psychologists,” and these mental health professionals “believe that DSM-IV offers a helpful categorization of mental disorders.” In both Washington and Minnesota, a key part of the constitutional analysis was devoted to the question of the “medical validity” of the mental disorder component of the statutes.⁵⁰ In its discussion of substantive due process, the Washington Court gives its blessing to the legislative use of “mental abnormality” because it “incorporates a number of recognized mental pathologies.”⁵¹ The Washington court cites the classification of antisocial personality disorder “as a mental disorder in the DSM-III-R.”⁵² The Minnesota court relies on the fact that the antisocial personality disorder diagnosis is “medically recognized.”⁵³ Both the Minnesota and Washington courts emphasize that science can “identify” the conditions that are involved.⁵⁴

Fourth, the laws and courts construe individual adjudication as a “battle of experts”. Sex offender commitment schemes provide for the

49. See *Garcetti v. Rasmuson*, 57 Cal. Rptr. 2d 420, 424 (1996), *superseded by*, 931 P.2d 262 (Cal. 1997) (framing central question as “whether the psychological and psychiatric sciences are capable of diagnosing current mental disorders”).

50. *In re Blodgett* 510 N.W.2d 910 (1994) (Wahl, J., dissenting); *In re Young*, 857 P.2d at 997.

51. *In re Young*, 857 P.2d at 997.

52. *Id.*

53. *In re Linehan* (II), 557 N.W.2d at 182. The court states that “we accept the legislature’s and the American Psychiatric Association’s determination that APD is an identifiable mental disorder that helps explain behavior.” *Id.* at 185. The court continues by pointing to the fact that “antisocial personality disorder is a ‘recognized mental disorder’ under DSM-III-R.” *Id.* at 185 n.11.

54. *In re Blodgett*, 510 N.W.2d at 915 (“Whatever the explanation or label, the ‘psychopathic personality’ is an identifiable and documentable violent sexually deviant condition or disorder.”); *In re Young*, 857 P.2d at 1001 (“psychiatric and psychological clinicians . . . are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM,” and referring to legislative finding that condition is “capable of diagnosis”) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 733 (1992)).

appointment of experts as a regular, rather than unusual, part of the proceeding.⁵⁵ The courts have consistently identified key characterizations as being simply a matter of judging credibility among conflicting testimony of "experts."⁵⁶

Fifth, courts frame the central questions in dispute as questions of science rather than of values. Some courts, such as an intermediate California Court of Appeals in *Garcetti v. Rasmussen*,⁵⁷ are explicit in boiling the complex constitutional issues down to a question of scientific fact. The court framed the relevant questions explicitly as a question of scientific fact: "[w]hether the psychological and psychiatric sciences are capable of diagnosing current mental disorders"⁵⁸ The answer to this scientific question, the court says, will provide the answer to the constitutional question: "[t]here is no conflict between the SVP Act and the ex post facto clause if the psychological and psychiatric sciences can be and are used to identify current mental disorders for treatment."⁵⁹ The Minnesota and Wisconsin courts make the same rhetorical move, but in a more subtle and indirect way. Both courts make reference to the "medical and scientific uncertainties" inherent in this area of the law. Both courts raise the issue in the context of their discussions about the constitutional boundaries of the mental disorder predicate for civil commitment. The Minnesota Supreme Court frames the central question as one of deciding "to what extent criminal blame is to

55. See, e.g., CAL. WELF. & INST. CODE § 6605(a) (West 1997) (providing for examination and review of the person's mental condition at least annually and permits the committed person to retain or have the court provide, if he or she is indigent and so requests, a qualified expert or professional person to examine him or her and have access to all records concerning the person); MINN. STAT. § 253B.07, subd. 3 (1996); WASH. REV. CODE § 71.09.070 (1997).

56. See, e.g., *In re Fitzpatrick*, No. C6-94-255, 1994 WL 164218 (Minn. Ct. App. May 3, 1994); *In re Sadiki*, No. C4-93-2317, 1994 WL 111336 (Minn. Ct. App. April 5, 1994); *In re Buckhalton*, No. C2-93-1446, 1994 WL 43870 (Minn. Ct. App. Feb. 15, 1994); *In re Rickmyer*, No. CX-93 1446, 1993 WL 480177 (Minn. Ct. App. Nov. 23, 1993); *In re Benson*, No. C0-93-1357, 1993 WL 459840 (Minn. Ct. App. Nov. 9, 1993); *In re Sabo*, No. C6-93-1329, 1993 WL 366718 (Minn. Ct. App. Sept. 21, 1993); *In re Sadiki*, No. C3-93-1045, 1993 WL 355906 (Minn. Ct. App. Sept. 14, 1993); see also *In re Mentzos*, 1996 WL 81721, at *5 (Minn. Ct. App. Feb. 27, 1996) (stating that expert testimony provides basis for finding of volitional dysfunction).

57. 49 Cal. Rptr. 2d 420 (1996), review granted, 931 P.2d 262 (Cal. 1997) (U.S. Feb. 5, 1997) (No. S057336).

58. *Id.* at 424.

59. *Id.* at 429.

be assigned”⁶⁰ for “the individual who acts destructively for reasons not fully understood by our medical, biological and social sciences.”⁶¹ The court makes clear that the issue to be decided “is the moral credibility of the criminal justice system.”⁶² The “present . . . state of scientific knowledge” is “imperfect,” and thus, the court suggests, “there are no definitive answers” to these moral questions.⁶³

Paradoxically, these disclaimers by the courts have the effect of claiming more, rather than less, of a role for science and medicine. These statements suggest that the relevant uncertainties in these statutory schemes--uncertainties such as the degree of “blame” to attach to sex offenders--are scientific uncertainties. The Minnesota court’s lament suggests that if only we had better scientific information about the causes of sexual violence, we could decide whether rapists are blameworthy or not. We do not have all of this information, but we must act nonetheless. The courts’ uncertainty claims help stake out the domain of medicine and science as the relevant domain of knowledge. This rhetorical move transforms the tough legal questions about constitutional limits on preventive detention into questions of scientific fact.

The systemic integration of science in the language and operation of sex offender commitment statutes is the central prop in their claim for constitutional and policy legitimacy. The presence of science claims legitimacy at least eight ways.

First, the systemic presence of science claims the mantle of legitimacy traditionally accorded standard civil commitments. The legitimacy of standard forms of civil commitment is solid.⁶⁴ Sex offender commitment laws push the boundaries of those standard civil commitments.⁶⁵ The systematic incorporation of science in sex offender commitments is an attempt to show that sex offender commitments are just like standard civil commitments, and thus entitled to the same stamp of legitimacy.⁶⁶

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

61. *Id.* at 918.

62. *In re Linehan* (II), 557 N.W.2d 171, 202 (Minn. 1996) (quoting *In re Blodgett*, 510 N.W.2d at 918).

63. *In re Linehan* (II), 557 N.W.2d at 184. Again, in *Linehan* (II), the court raises the scientific uncertainty flag in connection with discussing the boundaries of mental disorder when it states, “[w]e are hesitant to restrain legislative judgment in areas of medical uncertainty” *Id.*

64. See *Janus*, *supra* note 2, (manuscript at 4, n.23).

65. See *id.* (manuscript at 5, n.31).

66. According to the Washington Supreme Court, sex offender commitment “falls comfortably within the “civil commitment” category discussed in *Foucha* because the State must prove both a mental illness and dangerousness.” *In re Young*, 857 P.2d

Central to this claim for legitimacy is the notion that standard civil commitments are essentially medical interventions.⁶⁷ First generation of sex offender commitment statutes positioning themselves squarely within the sphere of medicine,⁶⁸ were upheld by the United States Supreme Court twice.⁶⁹ In the key case defining the legitimacy of civil commit-

989, 1007 (Wash. 1993). It "does not create any ominous 'dangerousness court' but rather follows traditional civil commitment norms." *Id.*

67. See Winick, *supra* note 25, at 534; see generally Eric S. Janus, *Towards a Conceptual Framework for Assessing Police Power Commitment Legislation: A Critique of Schopp's and Winick's Explications of Legal Mental Illness*, 76 NEB. L. REV. (forthcoming Spring 1997) (manuscript on file with author) (commenting on this view). Civil commitment of the mentally ill did not begin in the realm of medicine but, over time, and certainly by the 1930s, the involuntary confinement and treatment of the mad came under the hegemony of psychiatry. See ANDRED SCULL, *SOCIAL ORDER/MENTAL DISORDER* 120-61 (1989). At least in part, the history of civil commitment can be seen as a fight between medical doctors and lay individuals for control of the "mad" trade, and as a similar fight between the professionals and the law for control of the admission criteria for involuntary treatment. See *id.* The development of sex offender commitment statutes has not followed this pattern precisely. Psychiatry has played a big, though somewhat reluctant role in the development of sex offender commitment statutes. Freedman points out that the first generation sexual psychopath laws were the product of three constituencies, the media, law enforcement agencies, and private citizens' groups, and that "most psychiatrists remained skeptical" about these laws. Freedman, *supra* note 1, at 84. But psychiatry benefitted from these laws in that they "augmented the authority of psychiatrists." *Id.* Further, Freedman argues that psychiatric ideas about sexuality ("new psychiatric concepts") merged with "popular stereotypes" to produce the model of the psychopath "as oversexed, uninhibited, and compulsive. It was this image that found its way into the popular press and ultimately into the law." *Id.* at 91. On the other hand, organized science played a big role in debunking the prior efforts at medicalizing sexual deviance in the first generation of sex psychopath laws. See GAP, *supra* note 1, at 839-44 (identifying the "problem" of sex psychopath statutes); Freedman, *supra* note 1, at 97-98.

68. Sexual psychopath laws "represent a new approach reflecting thinking of modern psychiatry and psychology." ALAN H. SWANSON, *SEXUAL PSYCHOPATH STATUTES: SUMMARY AND ANALYSIS* (1960) (quoting Annotation, 24 A.L.R. 2d 350, 351 (1952)). In its Brief to the Minnesota Supreme Court in support of the 1939 Psychopathic Personality statute, the State summed up its argument with an appeal to science: "[The act] will provide our courts with a sound and scientific approach for the handling and treatment of these twilight zone defectives whose status in life has confounded our courts, who have been previously handicapped by inadequate legislation on the subject." Brief of Respondents at 22, *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940).

69. See *Allen v. Illinois*, 478 U.S. 364, 369 (1986); *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 275-77 (1940).

ment, *Addington v. Texas*,⁷⁰ a key step in the Supreme Court's reasoning focused on the central place of medicine and psychology.⁷¹ Finally, in 1992, the Supreme Court's *Foucha* decision appeared to insist on a constitutional role for "mental illness" in civil commitment.⁷² An individual who was "untreatable" in a psychiatric hospital and not suffering from a "mental illness" could not be committed.⁷³ The swing vote in *Foucha*, cast by Justice O'Connor, appeared to require a "medical justification" for civil commitment.⁷⁴

Thus, when the second generation sex offender commitment statutes were being developed and tested, doctrinally it seemed clear that a "medical" basis for commitment might be constitutionally significant. The systemic role of science is aimed at giving sex offender commitments such a medical basis.

Second, science is inherently legitimizing. The use of science suggests precision, accuracy, and neutrality. The fact that the battle of the experts is time-consuming, expensive, and arcane adds to the air of legitimacy and fairness of the proceedings. There can be no suggestion of a "railroad" because the proposed "patient" has his or her expert and can thus present a full and vigorous defense.

Third, the use of science tends to reify the issues under dispute.⁷⁵ The battle of the experts must be about *something*, and that "thing" takes on the reality of a fact in the real world.⁷⁶ The dispute is about

70. 441 U.S. 418 (1979).

71. The Court stated "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* at 429.

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

73. *See id.*

74. *Id.* at 88 (O'Connor, J., concurring in part and concurring in the judgment). Specifically, Justice O'Connor stated, "I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent." *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

75. *See* Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 440 (1974) (discussing the reification that occurs with the transformation of actions into attributes and traits); Allen Frances, M.D., *The DSM III Personality Disorders Section: A Commentary*, 137 AM. J. PSYCHIATRY 1050, 1051 (1980) (DSM diagnostic scheme reifies "categories"); Kester, *supra* note 24, at 554.

76. *See generally* Kester, *supra* note 24, at 554; Mark Alford, Wittgenstein Scientific Knowledge, (visited Feb. 2, 1997) <<http://www.sns.ias.edu/~alford/jjapp.html>> ("The realist regards science as a way of increasing our knowledge about the world; and eventually hopes that it might lead us to discover the entities of which the world

things that are out there in the world--“disorders”⁷⁷, risks, a quality called “dangerousness,”⁷⁸ causes⁷⁹--rather than socially defined (and hence arbitrary or contingent) constructs.⁸⁰ The reification is strengthened by the way the courts frame the question: are mental health professionals “capable of diagnosing” the “condition” at issue. The affirmative answer is presented as if it were strictly a factual finding, rather than a determination heavily loaded with the legal/policy question of what constitutes a constitutionally adequate mental predicate for civil commitment. By casting the key question as a factual question about the capabilities and findings of science, the courts suggest strongly that the object to be “diagnosed” is out there in the real world, a real thing, with the only relevant question being whether scientists have tools powerful enough to find it.

The reification contributes to legitimization in various ways. If “mental disorders” and “dangerousness” are real, present qualities, they mark real differences among individuals, and this justifies differential treatment by the law. Additionally, the reification strengthens the claim that the categories drawn by sex offender commitment laws are not socially constructed categories, but rather naturally existing categories. This supports the argument that the categorizations are inevitable and neutral rather than arbitrary. Finally, the reification bolsters the legitimacy of the fact-finding process. The fight between the state and the individual is characterized as being about the “facts”--facts as assessed by experts, but facts nonetheless--and fact finders in our system are, if nothing else, competent to find facts.

Fourth, the use of science suggests that the building blocks of adjudication--the individual’s mental “disorder,” the latent danger of future violence, the nexus between the two--are invisible to the naked eye,⁸¹ thus justifying heavy reliance on experts. The use of experts removes the decisions from a realm deemed accessible by laypeople, who then

is made and the laws they obey.”)

77. See Frances, *supra* note 75, at 1051 (discussing reification produced by categorical rather than dimensional system of diagnosis).

78. See Diamond, *supra* note 75, at 440 (discussing transformation of action into attributes and traits).

79. See Kester, *supra* note 24, at 540.

80. An “anti-realist” view of science, however, views even the scientific concepts as socially defined constructs. See *id.* at 546 (stating that “anti-realists view science as a process through which scientific ‘facts’ are socially constructed, rather than constituting a direct reflection of natural phenomena”) (citation omitted).

81. See Freedman, *supra* note 1, at 98. These laws “targeted a kind of personality, or an identity, that could be discovered only by trained psychiatrists.” *Id.*

have less standing to make independent judgments about the morality and wisdom of the system of commitment. It thereby helps to justify the failure of the courts to offer adequately articulated legal standards for decision.

Fifth, science occupies the realm of causation, suggesting that a non-criminal intervention is both needed and justified. Under the "laws of nature," everything is determined.⁸² A scientific explanation of violence is framed in terms of causes instead of choices. The invocation of cause and determinism suggests, in a flawed but seductive way, that sex criminals do not control their violence and are therefore undeterred by criminal sanctions.⁸³ This formula is a central justification for a preventive approach to public safety.⁸⁴

Sixth, the use of science, and in particular medicine, paints sex offender commitments as humane interventions. From their earliest days, sex offender commitment laws have been portrayed as holding out the promise of treatment rather than criminal punishment,⁸⁵ and confine-

82. See Lawrence Z. Freedman, *Psychoanalysis, Delinquency, and the Law*, in *BY REASON OF INSANITY* 81, 85 (Lawrence Z. Freedman ed., 1983) (discussing "science's working hypothesis of determinism"); Stephen J. Morse, *Causation, Compulsion, and Involuntariness*, 22 *BULL. AM. ACAD. PSYCHIATRY LAW* 159, 159 (1994) (discussing the putative link between science and determinism).

83. See Morse, *supra* note 82, at 159 (identifying "the notion that if behavior is caused or a causal account can be given, then the behavior is fully or partially excused," as "the fundamental conceptual error in forensic psychiatry and psychology").

84. See Freedman, *supra* note 82, at 91 (observing that first generation sex offender commitment laws used psychiatry to awaken "popular stereotypes that harked back to the theory of the born criminal" with uncontrollable sexual appetites); see also Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 *CAL. L. REV.* 54, 59 (1982). Morse states that:

The primary theoretical reason for allowing involuntary commitment of only the mentally disordered is the belief that their legally relevant behavior is the inexorable product of uncontrollable disorder, whereas the legally relevant behavior of normal persons is the product of free choice Because the individual will ultimately have little or no choice in deciding whether to act violently, it does not violate the disordered person's dignity or autonomy to hospitalize him or her preventively, even in the absence of strong predictive evidence of future dangerousness.

Id.

85. See *In re Blodgett*, 510 N.W.2d 910, 917 (Minn. 1994) (observing that "[i]f the state were to be denied the ability to hospitalize the predator, then, rather than let

ment measured by medically or professionally determined "need" rather than by society's desire for retribution.⁸⁶

Seventh, the use of science implies that the class on which civil commitment is to be used is a small and bounded one. Sex offender commitment schemes are constitutional only if they are "narrowly tailored to serve a compelling state interest."⁸⁷ As framed by the Minnesota court, "the judiciary has a constitutional duty to intervene before civil commitment becomes the norm and criminal prosecution the exception."⁸⁸ The courts rely on science to furnish the constitutionally required limiting principle. The Minnesota court, for example, asserts that sex offender commitments are not an unbounded intrusion on the criminal law because "mental disorder . . . explains and helps predict that person's dangerousness."⁸⁹ Science is claimed to act as a limiting principle because mental disorders occupy an extreme end on the continuum of psychological functioning, "caused" behavior is an aberration from the general rule of human free will, and the objectivity and neutrality of science guarantee a dispassionate identification of those unfortunates with these "conditions."⁹⁰

Eighth, framing the issues as disputes about science suggests that courts are absolved from the difficult job of articulating principled justifications for sex offender commitment statutes. The real question underlying the legitimacy of sex offender commitment statutes is a question of constitutional and social values: where *ought* the limits of the state's power of preventive detention be located? The courts transform this question--is civil commitment a normatively appropriate means to deal with sexual violence--into the much narrower question--is civil commitment a scientifically appropriate means to deal with sexual violence?

the offender out on the street, the state will counter by increasing the length of the prison sentence."); Freedman, *supra* note 82, at 98 (acknowledging that "psychiatric care would be more humane than castration, life imprisonment, or execution").

86. *See, e.g.,* Allen v. Illinois, 478 U.S. 364 (1986); *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994) (tying the length and purpose of commitment to medical terminology, the court says that committed persons will be released when their "sexual disorders" are in "remission"). *See generally* Freedman, *supra* note 82, at 98 (psychopaths committed "until the institutional psychiatrists declared them cured").

87. *In re Linehan* (II), 557 N.W.2d 171, 181 (Minn. 1996).

88. *Id.*

89. *Id.* at 182 (explaining why the sex offender commitment legislation is "sufficiently narrow to satisfy strict scrutiny").

90. *See In re Blodgett*, 510 N.W.2d at 915 (explaining that the sex offender commitment law rests upon an "identifiable and documentable violent sexually deviant condition or disorder").

The analytical energy expended to answer the narrow question obscures the courts' failure to address the broader, more central inquiry.

B. The Actual Deployment of Science Undercuts the Claims of Legitimacy

1. Too Much Science, Too Little Law

If, as I have argued above, the systemic presence of science in sex offender commitment schemes provides central support to their claims to legitimacy, the actual deployment of science undercuts those claims. The claims are undercut because the focus on science has displaced a focus on law. The critical step by which the concepts and values of law are translated into the language of science is missing.⁹¹ Without this step, the science and the law fail to engage. Giving the appearance of precision and learning, the emphasis on science actually produces an indeterminacy⁹² that belies claims of justified, limited and carefully drawn legislative categories and precise, fair processes of adjudication.

Let me illustrate first at the legislative level. A number of cases consider whether the diagnosis of "antisocial personality disorder" is a constitutionally sufficient "mental disorder" predicate for sex offender commitments. This issue invokes a legal question (what are the characteristics of constitutionally sufficient mental disorders) and a question of "legislative fact:" what are the characteristics of "antisocial personality disorder?" Both the Minnesota and Washington Courts conflate these two separate questions, translating the legal question directly into a scientific one: is antisocial personality disorder a disorder recognized by psychiatry? The affirmative answer to this question seems to be nearly all the courts want to know to decide the constitutional issue.⁹³ Using the terminology developed above, this is a "high-science/low-law" result. Posing the issue as one to be answered by science camouflages the fact that the courts fail to explain why the scientifically defined mental disorder ought to coincide with the legal category, and provides no information about the underlying legal rules and values that have produced the result.

The consequence of this use of science is to undercut two of the central props in the legitimization of sex offender commitments. The

91. See Kester, *supra*, note 24, at 558 (discussing the difficulty of translating the languages of law into science).

92. See *id.* at 561.

93. The Minnesota Court also deems it significant that antisocial personality disorder "explains and helps predict" sexual violence. See *In re Linehan* (II), 557 N.W.2d 171, 182 (Minn. 1996).

claim that sex offender commitments are legitimate because they have a "medical rationale" just like standard civil commitments is exposed as a superficial factual similarity, lacking the key factor of successful analogical reasoning, an explanation as to why the similarity is legally significant.⁹⁴ Further, this use of science undercuts the claim that sex offender commitments are a small, well-bounded exception to the general rule that social control is accomplished solely through the criminal law. In fact, the courts' adoption of the scientific categories, unmodified by law, opens a wide avenue for the use of preventive detention to supplement the criminal law. It is well established that seventy to eighty percent of all prisoners are diagnosable with antisocial personality disorder;⁹⁵ 28% of the entire population has some identifiable mental disorder,⁹⁶ and a high percentage of all sex offenders have a "medically diagnosable" mental disorder.⁹⁷ The "high-science/low-law" approach lacks a limiting principle that would vindicate the legitimating argument.

The indeterminacy fostered by the "high-science/low-law" approach is compounded at the stage of individual adjudication. Consider for illustration two sex offender commitment cases recently decided by the Minnesota courts. In each case, expert witnesses disagreed about the proper diagnosis of the individual. Some experts in each case testified

94. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 49-78 (1990) (discussing analogical reasoning); Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 449 (1995) (legislative use of "mental disorder" must justify differential treatment).

95. See Stephen D. Hart et al., *The Psychopathy Checklist-Revised (PCI-R): An Overview for Researchers and Clinicians*, in 8 ADVANCES IN PSYCHOLOGICAL ASSESSMENT 103, 105 (J. Rosen & P. McReynolds eds., 1991); Rosalie Wells, *A Fresh look at the Muddy Waters of Psychopathy*, 63 PSYCHOL. REP. 843, 846 (1988); James S. Wulach, *Diagnosing the DSM-III Antisocial Personality Disorder*, 14 PROF. PSYCH.: RES. & PRAC. 330 (1983).

96. See Darrel A. Regier et al., *The de Facto U.S. Mental and Addictive Disorders Service System*, 50 ARCHIVES GEN. PSYCHIATRY 85 (Feb. 1993) (twenty-eight percent of the adult US population meets diagnostic criteria for mental disorder).

97. See Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10 year Followup Study*, 49 FED. PROB. 1, 58-59 (1985) (asserting that sixty-nine percent of adult sex offenders convicted and placed on probation were diagnosed with a personality disorder); Leonore M.J. Simon, *The Myth of Sex Offender Specialization: An Empirical Analysis*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 389 (1997) (finding that nearly 18% of incarcerated child molesters had an antisocial personality disorder diagnosis, 14% a diagnosis of pedophilia, and 28% a diagnosis of alcohol abuse).

that the individual was properly diagnosed as having a personality *disorder*. Others testified that the proper diagnosis was personality *traits*, a diagnosis that does not constitute a “mental disorder” according to the DSM-IV.⁹⁸ In both cases, the trial judges treated the question as one determining the credibility of the competing experts. In one case, crediting the “disorder” experts, the court ordered a commitment.⁹⁹ In the other, crediting the “traits” advocates, the court denied the petition.¹⁰⁰

To be sure, experts, like all witnesses, are credible in different degrees. But the “high-science/low-law” approach inflates the judgment of credibility so that it fills the entire judgment space, crowding out the central issues of law and policy. This inflation has several consequences. Because both courts characterized the issues as fact-based credibility questions, neither felt bound to explain in any detail its grounds for decision. Thus, two central questions went unanswered in each of these cases. First, why does the DSM-IV distinction between “personality disorder” and “personality traits” mark the line defining constitutionally and legally sufficient “mental disorder?”¹⁰¹ Second, how were the underlying evaluative characterizations of the experts consistent with the

98. A personality *disorder* is an “enduring pattern of inner experience and behavior that . . . is inflexible and pervasive, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.” DSM-IV, *supra* note 40, at 630. But not all “enduring patterns” are “disorders.” *Id.* According to the DSM-IV, “[p]ersonality traits are enduring patterns of perceiving, relating to, and thinking about the environment and oneself that are exhibited in a wide range of social and personal contexts.” *Id.* The DSM distinguishes such “traits” from “disorders”: “[p]ersonality traits are diagnosed as a Personality Disorder only when they are inflexible, maladaptive, and persisting and cause significant functional impairment or subjective distress.” *Id.* at 633.

99. See *In re Linehan*, No. P8-94-0362, (Ramsey County, MN). Dr. John Austin testified that Linehan had “sociopathic personality traits.” Other experts testified that he had an antisocial personality disorder. Tr. at 1631. The trial court refused to credit Austin’s testimony. See Order for Commitment at 12, *In re Linehan*, No. P8-94-0362, (Ramsey County, Minn. July 27, 1995) (testimony “unpersuasive”).

100. See *In re Williams*, No. P6-95-468 (Le Sueur County, MN). The court credited the testimony of Dr. Austin that Williams had “borderline and narcissistic personality traits” but no personality or mental disorder. The court rejected the testimony of three other psychologists who had testified that Williams had a “personality disorder.” See Findings of Fact, Conclusions of Law, Order for Dismissal and Judgment of Dismissal (February 26, 1997) (accepting “personality traits” diagnosis) and Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Warrant (June 12, 1996) (describing “personality disorder” diagnoses).

101. A court would need to decide whether a “trait” becomes a constitutional predicate for commitment only when it is “inflexible and maladaptive and cause[s] significant functional impairment or subjective distress” as required by DSM-IV.

underlying legal rules and policies?¹⁰² Further, because the disputes were characterized as credibility determinations, it is unlikely that they will receive careful appellate review,¹⁰³ and consequently unlikely that the legal content of these decisions will be clarified through case-by-case articulation.¹⁰⁴

The result of this way of structuring adjudication creates, and then camouflages, a system of liberty deprivation that lacks meaningful standards for inclusion and exclusion.¹⁰⁵ Lacking underlying legal principles, the credibility determinations--to which all disputes are reduced--must be based on factors unrelated to the legal policies underlying sex offender commitments.

The absence of standards, in turn, renders the claim to constitutional legitimacy through heavy burdens of proof and vigorous adversarial advocacy a sham. Faced with conflicting expert opinions on the ultimate issues of a sex offender commitment case, a decisionmaker is provided no legal standards to assist in the decision. Further, the expert evidence disputes are not anchored to the real world. The disputes are mediated by constructs that are claimed to be configural and judgmental.¹⁰⁶ These break the link between the legal/psychological constructs

102. The court needs to decide whether the experts criteria for inflexibility, maladaptivity, and "subjective distress"--all of which are continuously variable qualities--correspond to those that are legally significant.

103. See, e.g., *In re Fitzpatrick*, No. C6-94-255, 1994 WL 164218 (Minn. Ct. App. May 3, 1994); *In re Sadiki*, No. C4-93-2317, 1994 WL 111336 (Minn. Ct. App. April 5, 1994); *In re Buckhalton*, No. C2-93-1446, 1994 WL 43870 (Minn. Ct. App. Feb. 15, 1994); *In re Rickmyer*, No. CX-93 1446, 1993 WL 480177 (Minn. Ct. App. Nov. 23, 1993); *In re Benson*, No. C0-93-1357, 1993 WL 459840 (Minn. Ct. App. Nov. 9, 1993); *In re Sabo*, No. C6-93-1329, 1993 WL 366718 (Minn. Ct. App. Sept. 21, 1993); *In re Sadiki*, No. C3-93-1045, 1993 WL 355906 (Minn. Ct. App. Sept. 14, 1993).

104. In contrast, in a "high-law/low-science" system, the decisionmaker would need to inquire into the factors and definitions underlying each expert's conclusions. These would then be compared against the legal standard for "mental disorder." The decisionmaker would be required to decide whether the factors and definitions used by the experts satisfied the legal definition. Though there would be issues of credibility to be resolved, the important decision would be a legal one, and would need to be explained by the decisionmaker and by reviewing courts.

105. See Janus, *supra* note 2 (manuscript at 29) (arguing that the mental disorder element of Minnesota's sex offender commitment law provides no ascertainable inclusion standard for commitments). See generally Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 2 PSYCHOL., PUB. POL'Y & L. (forthcoming 1996) (manuscript at 41, on file with authors) (arguing that sex offender commitment laws provide no ascertainable standard for judging predictions of future violence).

106. See David Faust, *Data Integration in Legal Evaluations: Can Clinicians De-*

(mental disorder, dangerousness, nexus) and observable facts about the world.

The absence of clearly articulated standards and the lack of a clear connection to the observable, factual world likely has two consequences. First, social science research shows that decisions made in the absence of clearly articulated standards are likely to reflect the biases of the decisionmaker.¹⁰⁷ Second, the absence of legal standards and clear connections with observable facts produces indeterminacy that places the moral responsibility for decision making squarely with the fact finder. Decisions made on the basis of articulated (or articulable) standards are insulated from personal responsibility. Decisions that appear to be based on the decision maker's "judgment," on the other hand, are clearly attributable to the judge and he or she may be held responsible for them. In sex offender commitments, the stakes are very high. The consequences of error are lopsided.¹⁰⁸ Once the decision is framed as a battle of experts, its outcome is all but inevitable. Except in extreme cases, the credibility judgment will fall to the experts whose opinions are most protective of the public.¹⁰⁹

2. Unsupported Legislative Facts: Too Little Science

In this section, I focus on the use, and absence, of science at the legislative fact level. In Walker and Monahan's scheme, legislative facts are facts that courts and legislatures use to help shape the public policy choices underlying legislation, evaluate its constitutionality, or construe its language. In the context of sex offender commitments, legislative facts are statements about mental disorder, sexual violence, treatment, and the relationships among them.

The legislative facts underlying sex offender commitment schemes exert a particularly high demand for scientific justification. Legislative facts about entities of medicine psychology require expertise to observe.¹¹⁰ They concern a subject, mental disorder, and sexual violence

liver on Their Premises?, 7 BEHAV. SCI. & L. 469 (1989).

107. See Richard Delgado, *Fairness and Formality: Minimizing The Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388 (citing social science literature showing that prejudiced behaviors are diminished in environments structured not to tolerate those behaviors).

108. See Janus & Meehl, *supra* note 105, at 4 (describing the costs of various types of errors in sex offender commitments).

109. See Perlin, *supra* note 14, at 630 (arguing that judge and experts seek to avoid "the worst-case-disaster-fantasy, the false negative," i.e., the release of an individual who latter engages in violence).

110. See Freedman, *supra* note 1, at 98 (explaining the need for expertise).

with respect to which popular notions are often seriously at odds with empirically measured facts.¹¹¹ Historically, sex offender commitment laws have been dismal failures because they were based on assumptions about mental disorder and sexual violence that were scientifically invalid.¹¹² Finally, as I have suggested above, courts and legislatures have claimed the legitimacy of science as an important pillar supporting sex offender commitments.

Courts and legislatures have, indeed, deployed science to support legislative facts in the sex offender commitment context. The deployment, however, is not systematic or complete. The failure to use science to support key assertions--those made in a "universal" sense--has contributed to the indeterminacy that undercuts the legitimacy of these statutory schemes.

As relevant here, general statements about the building blocks of sex offender commitments--mental disorder, sexual violence, treatment, and their relationships--appear in at least three different postures: universal, existential, and prescriptive. When legislative facts are used *universally*, they make general claims about all of the individuals in a given class. Such statements make strong claims about groups of people. In contrast, legislative facts that are made in an *existential* posture make the more

111. See Saleem A. Shah, *Recent Research on Crime and Mental Disorder: Some Implications for Programs and Policies*, in *Mental Disorder and Crime* (Hodgins, ed.) 303, 313 (laypersons misjudge risk). Compare Robert T. Farley, *An Address in Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 23, 36, 136 (1996) (asserting that "statistics have demonstrated that recidivism rates are extremely high with this type [sex] of crime" and that recidivism rates for "pedophiles . . . are in the ninety percent range"), with ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983* (1989) (sexual recidivism rate for rapists 7.8%); OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, *RECIDIVISM OF ADULT FELONS* tbl. 3.2, fig. 3.2 (sex offenders rearrested for a new sex offense at 10% rate, new felony at 24% rate; felony rearrest rate for all prisoners equal to 45%); G.T. Harris et al., *Sexual Recidivism among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. CONSULT. CLIN. PSYCHOL. 381 (1991) (finding 31% sexual recidivism for child molesters released from "maximum security psychiatric institution."); R. Gauthier et al., *Long-term Recidivism of Child Molesters*, 61 J. CONSULT. CLIN. PSYCHOL. 646, 646-52 (1993) (42% of study group of child molesters reconvicted of sex or violent crime).

112. See GAP, *supra* note 1, at 866 (absence of rigorous diagnostic criteria); William D. Pithers, *Relapse Prevention with Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in *HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES & TREATMENT OF THE OFFENDER* 343 (William L. Marshall et al., eds., 1990) (hereinafter *HANDBOOK*) (describing the underlying medical model as a failure, "outmoded and based on false assumptions").

modest claim that certain conditions are true in at least some cases. These claims are much easier to support with social science evidence, since they do not claim universal truth. Finally, some statements that sound like statements of legislative fact are actually statements about the law and what it requires. I call these statements *prescriptive*. These statements make no real claim to empirical truth, and therefore need not be supported by appeals to evidence.

a. Existential Use of Legislative Facts

Courts use legislative facts *existentially* when, in the context of a facial challenge to a statute, they wish to demonstrate that there exists some constitutional application for the statute. Many of the challenges to sex offender commitment statutes have been posed--or at least framed by the courts--as facial challenges to the statutes. To support a facial challenge, a challenger "must establish that no set of circumstances exists under which the Act would be valid."¹¹³ Social science that is offered existentially, then, is used to demonstrate that at least some circumstances in which the attacked statute would be constitutionally applied.

Much of the social science cited by sex offender commitment courts is used in this existential posture. For example the Washington court cited a study asserting that some rapists exhibit the kind of compulsive behavior that characterizes other forms of mental illness.¹¹⁴ That court also cited a study claiming that predictions of future sexual violence could reach accuracy levels of eighty percent.¹¹⁵ The Minnesota and Wisconsin courts use social science similarly.¹¹⁶

113. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994); *Garcetti v. Rasmussen*, 57 Cal. Rptr. 2d 420, 423 (1996), *review granted*, 931 P.2d 262 (Cal. 1997) (U.S. Feb. 5, 1997) (No. S057336) (stating that "[t]o declare a statute wholly unconstitutional as to an entire group, a court generally must find that the statute cannot in any instance be applied in a constitutional manner to any member of that group.")

114. *See In re Young*, 857 P.2d 989, 1002 (Wash. 1993) (citing Gene G. Abel & Joanne L. Rouleau, *The Nature and Extent of Sexual Assault*, in *HANDBOOK*, *supra* note 112, at 9, 18.

115. *See In re Young*, 858 P.2d at 1009 (citing VERNON QUINSEY, REVIEW OF THE WASHINGTON STATE SPECIAL COMMITMENT CENTER PROGRAM FOR SEXUALLY VIOLENT PREDATORS 9 (appended to WASH. STATE INST. FOR PUB. POL'Y, REVIEW OF SEXUAL PREDATOR PROGRAM: COMMUNITY PROTECTION RESEARCH PROJECT (Feb. 1992))).

116. *See State v. Post*, 541 N.W.2d 115, 125 (Wis. 1995) ("there is by no means consensus within the behavioral sciences community" on the effectiveness of treatment); *In re Blodgett*, 510 N.W.2d at 915 n.8, 916 (citing studies showing that some

This use of science might be criticized on the ground that it does not prove that all, or even most, applications of sex offender commitment statutes meet constitutional standards. In that sense, this use of science is not fully responsive to the challengers' arguments. Those arguments are often aimed at showing either that the assumptions underlying the enactment of these laws are not accurate,¹¹⁷ or that *most* of the individuals at whom the laws are aimed have characteristics that render them inappropriate candidates for civil commitment.¹¹⁸ These arguments, however, are more appropriate at the policy setting stage rather than the constitutional adjudication stage. Given the state of the law regarding facial statutory challenges, the courts' existential use of science does not appear to be problematic.

b. Prescriptions

A second way in which courts make statements about the building blocks of sex offender commitments and their relationship to the law is prescriptively. While existential statements can be seen as identifying an area which provides circumstances sufficient for commitment, prescriptive statements identify limits that are necessary for commitment. Some courts engage in prescription to narrow the statute so that it does not apply overbroadly.¹¹⁹ These prescriptive statements make no claim to factual or scientific truth, and thus need not be supported by scientific references.

c. Legislative Facts as Universals

The third way in which legislative facts are used in sex offender commitment cases is as descriptions of the class of people to whom the law applies. These statements are "universals" in the sense that they

sex offenders exhibit "schizotypic characteristics" and that "it is not clear that treatment for the psychopathic personality never works").

117. See Simon, *supra* note 97, at 403.

118. See, e.g., Amicus Brief of Washington State Psychiatric Ass'n at 4, *In re Young*, 857 P.2d 989 (Wash. 1993) (No. 57837-1), *quoted in* Robert C. Boruchowitz, *Sexual Predator Law – The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827, 835 (1992) (arguing that it "is impossible to generalize a causal connection between sexual offenses in general and any particular psychiatric condition").

119. See *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 273 (1940) (narrowing psychopathic personality statute to apply only to those with "utter lack of power to control" sexual impulses); *Post*, 541 N.W.2d at 124 (narrowing statute to apply only to those whose disorders have the "specific effect of predisposing them to engage in acts of sexual violence").

purport to apply generally to all persons in the class subject to commitment. These universal statements are critical to the courts' arguments because they purport to demonstrate that the persons defined by the legislative categories, sex offenders with mental disorders, *in fact* have characteristics (other than those explicitly prescribed by the statutory language) that justify their civil commitment.

These descriptive universals make the strongest factual claims and play central roles in the constitutional analysis. They are, for those reasons, most appropriately measured against the findings of science. Yet, most of these statements are unsupported by citation to any social science, and are of doubtful validity as generalizations about sex offenders with mental disorders.

Examine, first, some of the universal descriptors that the Wisconsin Supreme Court used. That court asserts, with no social science authority, that persons subject to Wisconsin's commitment law have "unique treatment needs." It describes them as people "whose lack of control over their violent behavior is exactly what makes them so dangerous and requires their commitment for treatment." Their "mental disorders make them distinctively dangerous." Those subject to commitment are the "most dangerous of sexual offenders--those whose mental condition predisposes them to reoffend."

Minnesota's court asserts similar generalizations about sex offenders diagnosed with a "mental disorder." That court, like the Wisconsin court, asserts that these individuals are highly dangerous, but the Minnesota court ascribes the severity of danger to the committed individuals' *ability to control* their violence, rather than their lack of control.¹²⁰ The court asserts that the diagnosed "mental disorder" of a committed individual "explains and helps predict that person's dangerousness."¹²¹ "The existence of a mental disorder such as [antisocial personality disorder]," asserts the court, "identifies a cause of enduring harmful behavior."¹²² Like the Wisconsin court, the Minnesota court links the existence of a "mental disorder" to the "state's interest in treating sexual predators."¹²³ Finally, the courts assert that the mental

120. See *In re Linehan* (II), 557 N.W.2d 171, 182 (Minn. 1996). "[T]he mentally disordered who retain enough control to 'plan, wait, and delay the indulgence of their maladies until presented with a higher probability of success' are 'even more dangerous' than those without the ability to control their impulses. *Id.*

121. *Id.*

122. *Id.* at 186-87.

123. *Id.* at 187.

disorders at issue constitute a "real" and "identifiable" condition.¹²⁴

None of these statements is supported by citation to any medical or behavioral science. Indeed, most, if not all, of the statements would be vigorously disputed as gross over-generalizations about sex offenders diagnosed with a mental disorder. The statements about treatment are intended to support the claim that sex offender commitment statutes are narrowly tailored (hence, the emphasis on the "unique treatment needs" of committees).¹²⁵ The claim that sex offenders have "unique treatment needs" is undercut by the fact that sex offender treatment is similar in many ways to other forms of "correctional treatment," aimed more generally at criminals.¹²⁶ Further, the needs sex offenders have for treatment could be met in prison or other settings, and therefore do not justify hospitalization.¹²⁷ Further, there is evidence that the presence of mental disorders in sex offenders is not always related to treatment suitability.¹²⁸ Finally, the reality and reliability of diagnoses are topics

124. *Id.* at 182.

125. *See, e.g., Post*, 541 N.W.2d at 130 ("unique treatment needs of sexually violent persons justify distinct legislative approaches").

126. *See* William D. Pithers, *Treatment of Rapists: Reinterpretation of Early Outcome Data and Exploratory Constructs to Enhance Therapeutic Efficacy*, in *SEXUAL AGGRESSION: ISSUES IN ETIOLOGY, ASSESSMENT, AND TREATMENT* 167, 174 (Hall et al., eds., 1993) [hereinafter *SEXUAL AGGRESSION*] (speculating that some rapists "represent general criminals" rather than "sex offenders," and reflecting on the "relative ineffectiveness of treating general criminals with techniques designed specifically for individuals experiencing problems such as preponderance of abusive sexual fantasies"); *Id.* at 181 ("sex offender" treatment not as effective where rape attributable to "career criminality" rather than sexual deviance); D.A. Andrews, et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 *CRIMINOLOGY* 369 (1990). Most sex offenders are not "specialists." *See* Simon, *supra* note 97, at 389. "[T]he pure sex offender is a rarity; instead, sex offenses are single or infrequent and often are embedded in an extensive criminal history of property and violent crimes." *Id.* at 394.

127. *See* W.L. Marshall, *A Revised Approach to Treating Men who Rape Women*, in *SEXUAL AGGRESSION*, *supra* note 126, at 155 (describing three tier treatment program in the Canadian Penitentiary Services system); Arthur Gordon & Terry Nicholaichuk, *Applying the Risk Principle to Sex Offender Treatment*, 8 *FORUM ON CORRECTIONS RES.* 36 (1996) (stating that "[m]any correctional jurisdictions include treatment as a component of a comprehensive risk management plan for sex offenders"); Simon, *supra* note 97, at 403, (questioning the wisdom of separate treatment programs for sex offenders; suggesting that the public would be better served by "enhancing current treatment programs for all offenders").

128. *See* LEONORE M. J. SIMON, *DOES CRIMINAL OFFENDER TREATMENT WORK?* 19 (unpublished manuscript, on file with author) (citing, but criticizing, studies that show that antisocial personality disorder is a "negative predictor of psychotherapy outcome"); Raymond A. Knight et al., *Predictive Validity of Lifestyle Impulsivity for*

that lack scientific consensus.¹²⁹

The courts' assertions of a link between the level of dangerousness and the presence of a mental disorder contradict each other, and are unsupported by citations to social science.¹³⁰ The Wisconsin court's assertion that mentally disordered sex offenders "lack . . . control" is a generalization that the scientific literature directly contradicts.¹³¹

Rapists, 22 CRIM. JUST. & BEHAV. 106, 128 (1995) (stating that "[i]t is reasonable to speculate that the high impulsive subgroup among treated rapist samples constitutes a large proportion of treatment failures in the follow-up studies"); A.L. Brody & R. Green, *Washington State's Unscientific Approach to the Problem of Repeat Sex Offenders*, 22 BULL. AM. ACAD. PSYCHIATRY L. 343, 356 (1994) (criticizing the Washington state sex offender commitment law because it "selects poor candidates for treatment"); T.A. Shaw et al., *Examination of Treatment Completion and Predicted Outcome Among Incarcerated Sex Offenders*, 23 BULL. AM. ACAD. PSYCHIATRY L. 35 (1995) (antisocial personality disorder not predictive of treatment outcome).

129. See Vernon L. Quinsey, *The Prediction and Explanation of Criminal Violence*, 18 INT'L J.L. & PSYCHIATRY 117 (1995) (discussing whether psychopathic personality is a real disorder); Simon, *supra* note 97, at xxx (questioning validity of "pedophilia" diagnosis); Jerome C. Wakefield, *Disorder as Harmful Dysfunction: A Conceptual Critique of DSM-III-R's Definition of Mental Disorder*, 99 PSYCHOL. REV. 232 (1992); Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values*, 47 AM. PSYCHOL. 373 (1992); KIRK & KUTCHINS, *supra* note 30, at 28-30 (discussing the problems of diagnostic validity in the DSM-III); Thomas A. Widiger & Timothy J. Trull, *Personality Disorders and Violence*, in VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 203 (John Monahan & Henry J. Steadman eds., 1994) ("DSM III-R is a dichotomous model that imposes arbitrary categorical distinctions between the presence and absence of a disorder . . ."); Allen Frances, *The DSM-III Personality Disorders Section: A Commentary*, 137 AM. J. PSYCHIATRY 1050, 1050 (1980) (stating that "personality disorders are not at all clearly distinct from normal functioning or from each other"); R. Rogers et al., *Diagnostic Validity of Antisocial Personality Disorders*, 16 L. & HUMAN BEHAV. 677 (1992); James S. Wulach, *Diagnosing the DSM-III Antisocial Personality Disorder*, 14 PROF. PSYCHOL. RES. & PRAC. 330 (1983) (questioning validity of Antisocial Personality Disorder diagnosis).

130. See Pithers, *supra* note 126, in SEXUAL AGGRESSION, *supra* note 126, at 176 (reporting on study by Prentky finding that high impulsivity rapists were "approximately three times more likely than low impulsivity rapists to have been convicted of new sex offenses" during a twenty-five year follow-up period).

131. See, e.g., W.L. Marshall et al., *Issues in Sexual Assault*, in HANDBOOK, *supra* note 112, at 391 ("Sexual offending is not a 'sickness'. . . [S]exual offenders are not suffering from any disease and their behavior is not out of their control."); Park Elliot Dietz, *Sex Offenses: Behavioral Aspects*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1485, 1490 (Sanford M. Kadish ed., 1983) ("Failure to control or find lawful outlets for deviant sexual impulses must not be confused with incapacity to control these impulses."); William D. Pithers, *Relapse Prevention with Sexual Aggressors, A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in

The Minnesota court's assertions that mental disorder helps explain and predict violence and that antisocial personality disorder is a "cause of enduring harmful behavior" are central to its conclusion that there is a nexus between mental disorder and the state's police power.¹³² While there are many studies that question the robustness of the mental disorder—violence connection,¹³³ the court cites no social science for its broad generalization, and appears unaware of the complexity of the task of attempting to construct explanations for sexual violence.¹³⁴

d. Legislative Facts and the Collapse of the Scientific-Legitimacy Claim

The presence of these unsupported, over-broad universal statements at the center of the courts' arguments is devastating to the claim of legitimacy through science. The fact that these courts fail to avail themselves of existing science where it would be most informative--in making generalizations about groups of people--calls into question the bona fides of the entire science claim. Further, the universals asserted by the courts appear to remove from factual contention at the individual level some of the key questions that could be answered by expert testimony. Thus, if it has already been established that mental disorder causes and explains violence, that the mentally disordered "lack control" of their sexual impulses, and that the mentally disordered are the "most dangerous," little remains for the examining mental health expert at trial than to place the individual in the broad expanse of mental disorder.

HANDBOOK, *supra* note 112, at 355 ("Offenders are informed that urges do not control behavior. Rather, giving in to an urge is an active decision, an intentional choice for which he is responsible.")

132. *In re Linehan* (II), 557 N.W.2d 171, 182 (Minn. 1996).

133. *See, e.g.*, E.P. MULVEY, ASSESSING THE EVIDENCE OF A LINK BETWEEN MENTAL ILLNESS AND VIOLENCE, *HOSP. & COMMUNITY PSYCHIATRY*, 645, 663, 665 (1994).

134. *See, e.g.*, Karen Chambers & Lori L. Oliver, *Introduction: Etiology and Assessment*, in *SEXUAL AGGRESSION*, *supra* note 125, at 7 (reviewing feminist theory, evolutionary theory, and social learning theory explanations for sexual aggression); Lee Ellis, *Rape as Biosocial Phenomenon*, in *SEXUAL AGGRESSION*, *supra* note 126, at 17 (exploring feminist theory, social learning theory, evolutionary theory, and synthesized theory of explanation for rape); Gordon C. Nagayama Hall & Richard Hirschman, *Conceptualizing Sexual Aggression: Progress and Future Needs*, in *SEXUAL AGGRESSION*, *supra* note 126, at 1 (citing a broad range of explanatory factors for sexual aggression, including family, cultural, and evolutionary influences, developmental influences, deviant sexual arousal, cognition, affect and developmentally related personality problems); Pithers, *supra* note 125, in *SEXUAL AGGRESSION*, at 167, 182 (stating rape is a multiply determined act).

III. A PRESCRIPTION FOR THE USE OF MEDICINE AND SCIENCE

A. Introduction

I have demonstrated above that science plays a central role in legitimizing sex offender commitments. The pattern of use and non-use of science, however, creates a highly indeterminate system of adjudication.

Two approaches suggest themselves for realigning the claims and reality about the use of science in sex offender commitments. First, courts could acknowledge that science is not at the center of sex offender commitments. Sex offender commitments would be transformed into a social control scheme much like the criminal law, in the sense that its central and operative concepts would be acknowledged to be commonsense concepts incorporating fundamental values of the society.¹³⁵ Sex offender commitment schemes would then need to be legitimized by examining the content of these commonsense concepts and determining whether those concepts embody values that justify the deprivation of liberty using sub-criminal procedures. Because the basic concepts in such a scheme would be commonsense concepts, the role of science would be greatly reduced,¹³⁶ but the legislative schemes could no longer claim the legitimacy of systemic science.

Second, courts could begin to use science in a way that is more congruent with the claims made about it. To do this, courts need to develop a more highly articulated understanding of the ways in which science and law link to each other. This, in turn, requires the realization that the concepts involved--mental disorder, dangerousness, expla-

135. In its review of Minnesota's psychopathic personality law in 1940, the U.S. Supreme Court apparently viewed sex offender commitments as being very similar to criminal cases, at least in their issues of proof. "These underlying conditions, calling for evidence of past conduct pointing to probable consequences are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." State of Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 274 (1940). Litwack and Schlesinger take a similar approach; they suggest that predictions of future violence are based on commonsense and that "predictions of violence should be given credence, if at all, not because of the professional title . . . of the predictor but only because there is substantial concrete evidence to support the prediction." Thomas R. Litwack & Louis B. Schlesinger, *Assessing and Predicting Violence: Research, Law, and Applications*, in HANDBOOK OF FORENSIC PSYCHOLOGY (eds. Weiner & Hess) 205, 206, 213.

136. See, e.g., Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 810 (1995). Advocating "the concepts of insanity and mental disease, as relevant to the criminal law, must have a meaning and a rationale that are not tied to any specific causal or physical hypothesis at all." (quoting HERBERT FINAGRETTE, *THE MEANING OF CRIMINAL INSANITY* 23 (1972)).

nation, reality, probability--are complex and heterogeneous concepts that have both legal and scientific content. Science is not irrelevant to an understanding of these concepts and their relationship to each other. Nor is it dispositive. The level at which science is allowed to enter, and the balance between science and commonsense, are themselves matters of policy choice that reflect our legal and social values.

Commonsense concepts necessarily operate at a somewhat coarse level. A layperson's ideas of mental disorder, sexual violence, and their relationships is not highly articulated. This lack of articulation, when combined with the use of science, contributes the indeterminacy that I have discussed above. Science can provide tools to help judges be more articulate about this subject by changing the *scale* at which the law sees its subject.

In Kester's words, the legal and scientific terms are homophonic.¹³⁷ That is, both law and science use the terms "mental disorder," "cause," "explain," "predict," "validity." The concepts, in both their legal and scientific meanings, appear opaque and monolithic. Translating between the two domains requires resolving these concepts into finer parts. Without a fuller understanding of how the concepts might be more finely resolved, judges can do little to articulate the terms of translation.

Ultimately, it is the legal issues that need full articulation. But science can contribute, in at least two ways. First, medical and psychological experts can help identify those parts of the adjudication that are properly the subject of social policy judgment rather than scientific judgment.¹³⁸ For example, an expert witness might describe the ways in which her diagnosis of "sociopathic traits" differs from a medically recognized "mental disorder,"¹³⁹ and then clearly identify as a legal issue the question of whether the former diagnosis satisfies the statutory "mental disorder" requirement. Second, science can be used to calibrate the space occupied by the (homophonic) legal and scientific concepts, so that the courts will have the tools to articulate a finer set of legal rules connecting the two.

Consider how scientific evidence could be used to calibrate the issues involved in prediction, and thus give the courts tools to articulate

137. See Kester, *supra* note 24, at 557.

138. See Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 L. & HUM. BEHAV. 655, 665 (1991). "Forensic psychologists are prepared to explain the relationship between their expert testimony and the legal issues and facts of an instant case." *Id.*

139. DSM-IV, *supra* note 40, at 630.

principled legal thresholds for evaluating prediction testimony. This testimony aims at three things. First, it offers a definition of the concept of probability or likelihood.¹⁴⁰ Second, it shows how to measure or quantify the probability involved in the case.¹⁴¹ Third, it establishes the range within which the probabilities of the case probably fall.¹⁴² In combination, these three make it possible for the court to define the

140. Despite its ubiquity, the concept of "probability" is an extremely elusive and complex one. Most scholars agree that it has two distinct meanings. In its epistemological sense, it refers to the degree of confidence that a given state of affairs did or will occur. In its ontological sense, it refers to the "relative frequency" of a given phenomenon; that is, how often the phenomenon occurs *within a given class or group*. Under this understanding of probability, saying that an individual "has" a given probability of being violent means that he or she is a member of, or belongs to, a class or group with that probability, i.e., that frequency or proportion of individuals who will be violent. There are a number of ways in which these definitions of probability are difficult and counterintuitive. The meaning of a statement of future fact has led to philosophical conundrums since at least Aristotle. For a discussion of this conundrum, which may capture at least in some ways why it is so complex, see Michael Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 795-802 (1996) (discussing "extraordinarily subtle philosophical points" underlying issues of prediction). Perhaps the biggest is that "dangerousness" is thought to be a quality of the individual, while this definition places the notion of probability *outside* of the individual. See *In re Linehan (I)*, 518 N.W.2d 609, 616 (Minn. 1994) (Coyne, J., dissenting) (dangerousness is individual quality, not ascertained by looking at other individuals). Nonetheless, it is clear that these two forms of probability underlie most talk of prediction in sex offender commitment cases. Experts commonly cite characteristics that are associated with future violence, a form of reasoning that relies (at least implicitly) on research showing the frequency with which individuals who have those characteristics (the group to which the respondent "belongs") engage in violence. Further, at least the more sophisticated courts and commentators cite accuracy figures for predictions. These figures can be interpreted as either statements of the level of confidence the fact finder has, or ought to have, in the prediction, or as a statement about the frequency of violence among the group predicted to have it.

141. In a recent article, Professor Paul Meehl and I have proposed a prediction model which tracks the prediction schema that courts claim to be using when they commit individuals. See Janus & Meehl, *supra* note 105, at 20-22. We show how the probability of violence can be calculated from a number of variables, including the accuracy of the selection process and the base rate of recidivism in the group from which the commitment group is selected. See *id.*

142. Based on the published literature regarding base rates of sexual recidivism, and accuracy of violence prediction achieved using sophisticated mathematical modeling tools, Meehl and I have proposed that the commitment selection process produces a commitment group with a probability of recidivism that falls in the range of about 20% to a bit over 60%. See *id.* Our method showed that a probability of recidivism of 75% in the commitment group appears difficult to attain. See *id.*

legal threshold for probability and place it along the calibrated scale, and for the state to offer evidence about where on the scale its own predictions of future violence fall.

Similarly, science could be used to reduce the indeterminacy surrounding the mental disorder element. Defining mental disorder and its connection to violence are exceedingly complex both conceptually and scientifically. While not discussing these issues in their full complexity, I set out here a short outline of the role science might play in helping courts articulate legal standards about mental disorder and its nexus to sexual violence. The strategy here, as with prediction, is to use science to delineate the range of values that the matter can attain.

To illustrate, examine the concept mental disorder and the courts' treatment of it. The courts take a realist approach, asserting that mental disorders are real entities with natural boundaries. The only question is whether mental health experts have the capacity to "diagnose" them—a question that those courts upholding sex offender commitments have answered affirmatively. This construction eliminates the need for courts to set legal bounds on mental disorder. Traditional approaches would use scientific evidence to challenge the "mental disorder" element on the grounds that it lacked "medical validity,"¹⁴³ or to question the admissibility, credibility, or weight of expert diagnostic testimony on the grounds of lack of reliability.¹⁴⁴ All of these approaches, however, support the reification of "mental disorder" as a scientific entity, and contribute to the framing of the questions as requiring merely a legislative or adjudicative credibility judgment about scientific facts.

I propose that science be presented in a different posture. The point of this use of science is to illuminate and calibrate the space occupied by scientifically defined mental disorders. Some classifications identify "taxons," "real class[es], . . . nonarbitrary natural kind[s],"¹⁴⁵ while others impose categorization on differences that are distributed more or less continuously along a continuum.¹⁴⁶ A number of writers, for ex-

143. *In re Blodgett* 510 N.W.2d 910, 918 (Minn. 1994) (Wahl, J., dissenting); *In re Young*, 857 P.2d 989, 997 (Wash. 1993); *State v. Post*, 541 N.W.2d 115 (Wis. 1995).

144. *See, e.g.*, KIRK & KUTCHINS, *supra* note 28, at 133-60 (discussing reliability of psychiatric diagnosis).

145. Paul E. Meehl, *Bootstraps Taxometrics*, 50 AM. PSYCH. 266, 269 (1995).

146. On the issue of discontinuity, see THEODORE MILLON, *DISORDERS OF PERSONALITY* 8 (1981) (normality and pathology are relative concepts; they represent arbitrary points on a continuum or gradient, since no sharp line divides normal from abnormal behavior); *see also* Meehl, *supra* note 145, at 268-69 (criticizing "careless definition of a category or class concept as involving sharp distinctions or clear-but boundaries")

ample, suggest that Hare's construct of psychopathy is a real psychological entity.¹⁴⁷ That is, in lay terms, psychopathy may be different in kind, not simply amount, from "normal" psychological functioning. In contrast, the DSM-IV definitions of personality disorders are considered to be more or less arbitrary categories imposed on continuously variable personality traits.¹⁴⁸ Similarly, contemporary social science considers paraphilia (sexual deviancy) to be the extreme ends of continuously variable sexual arousal patterns, rather than discrete types.¹⁴⁹

Continuity of variation, as opposed to discontinuity, does not preclude the classification of individuals, but it does suggest that the location of the boundaries for the classifications are socially constructed for particular purposes.¹⁵⁰ The purpose of this proof is not to challenge the admissibility or credibility of diagnostic testimony, but rather to establish that the boundaries of mental disorder are not natural, but contestable, and are therefore in need of legal articulation since they serve a legal purpose.¹⁵¹

Having opened up the definitional space for mental disorder, science can begin to calibrate the space by demonstrating ways in which psychological function can be measured. This gives courts the tools to determine at a finer level the legal rules for discriminating legally sufficient "mental disorder." For example, scholars suggest that the mental disorder element ought to be calibrated by reference to impairment of functioning along a number of dimensions, such as capacity to make self-care decisions, capacity to reason practically, or capacity to control behavior.¹⁵²

but suggesting that "bimodality [of the quantitative indicators] is strongly suggestive of taxonicity").

147. See Quinsey, *supra* note 129, at 122 (discussing whether the Hare construct is a real disorder).

148. See Abraham Rudnick & Amihay Levy, *Personality Disorders and Criminal Responsibility: A Second Opinion*, 17 INT'L J.L. & PSYCHIATRY 409, 409-20 (1994) ("antisocial personality disorder" has no underlying disorder; personality "disorders" are "exaggeration of normal personality traits").

149. See Dietz, *supra* note 131, at 1490.

150. See Winick, *supra* note 25, at 538 (discussing social construction of diagnostic categories).

151. For example, if the legal purpose of the mental disorder element is to support the prediction of sexual violence, then the medical boundaries of the concept are set incorrectly. See Widiger & Trull, *supra* note 129, at 203, 216. "[T]he diagnostic categories are substantially heterogeneous with respect to the personality variables that are most likely to be predictive of violent behavior." *Id.*

152. See Janus, *supra* note 2, at Part IV (discussing calibration of "capacity to control" element); Robert F. Schopp, *Sexual Predators and the Structure of the Men-*

In the sex offender commitment cases, the courts have placed weight on the requirement that there be some nexus between the mental disorder and the violence.¹⁵³ This nexus is said to exist when mental disorder "causes,"¹⁵⁴ "specifically causes,"¹⁵⁵ "results in,"¹⁵⁶ "predicts,"¹⁵⁷ or "explains"¹⁵⁸ sexual violence. But courts have never explained what any of these complex concepts means, and have apparently never required anything more than conclusory expert opinions to support findings on the nexus issue.

Science should be used to show that each of these nexus relationships requires a set of judgments that are both scientific and socially-determined. For example, most recent science asserts that the relationship between mental disorder and violence is complex, and that violence is multiply determined.¹⁵⁹ Although there may be a weak statistical association between mental disorder and sexual violence,¹⁶⁰ careful scholars admit that there is "no clear information about the causal paths that produce the association between mental illness and violence."¹⁶¹

tal Health System: Expanding the Normative Focus of Therapeutic Jurisprudence, 1 PSYCHOL. PUB. POL'Y & L. 161, 181 (1995) (advocating the use of functional impairment as measures for legal commitment categories); Winick, *supra* note 25, at 538.

153. See *In re Linehan* (II), 557 N.W.2d 171, 182 (Minn. 1996); *In re Young*, 857 P.2d 989, 997 (Wash. 1993).

154. *In re Linehan* (II), 557 N.W.2d at 182.

155. *State v. Post*, 541 N.W.2d 115 at 124 (Wis. 1995).

156. *In re Linehan* (II), 544 N.W.2d 308, 316 (Minn. Ct. App.), *aff'd*, 557 N.W.2d 171 (Minn. 1996).

157. *In re Linehan* (II), 557 N.W.2d 171, 177 n.2 (Minn. 1996).

158. *Id.* at 182.

159. See, e.g., Widiger & Trull, *supra* note 129, at 216:

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. The complexity of this interaction raises the issue of the extent to which one should conceive violent behavior as resulting from a personality disorder rather than a situational, environmental, or other factor

Id.

160. See R.K. Hanson & M.T. Bussiere, PREDICTORS OF SEXUAL OFFENDER RECIDIVISM: A META-ANALYSIS, MONOGRAPH OF THE SOLICITOR GENERAL OF CANADA, MINISTRY SECRETARIAT (Cat. No. JS4-1/1996-4E 1996) tbl. 1 (correlation coefficient of 14% between antisocial personality disorder and sexual recidivism).

161. Mulvey, *supra* note 133, at 665 (1994) ("The literature to date has demonstrated an association between these two variables without a clear indication of causality between them.")

Some science, in fact, suggests that engaging in violence may cause mental disorder.¹⁶² Finally, as a candidate for the “cause” or “explanation” of sexual violence, mental disorder must compete with a host of other, co-existing candidates, each of which has scientific support. These include political and economic forces in the society,¹⁶³ exposure to “aspects of culture that foster male attitudes in which aggression, domination, and sexuality become fused,”¹⁶⁴ misogynist values and attitudes,¹⁶⁵ brain chemistry,¹⁶⁶ evolutionary predispositions,¹⁶⁷ deficient behavioral skills,¹⁶⁸ anger and rage,¹⁶⁹ deviant sexual preferences,¹⁷⁰ impulsivity,¹⁷¹ and bad moral choices.

Scientific evidence of this sort is intended to demonstrate two things. First, mental disorder and the explanations of sexual violence are scientifically complex phenomena. Courts must exercise *legal* choices among competing and heterogeneous accounts of these subjects. Court will need to articulate why they have chosen particular definitions of mental disorder, and in what ways mental disorder, rather than choice or biology or societal values, “explains” sexual violence. Second, this evidence gives courts some tools to construct meaningful legal standards. Knowing that there are many possible perspectives on the etiology of sexual violence, courts can articulate the need to prove a

162. See generally RANDY THORNHILL & NANCY WILMSEN THORNHILL, HUMAN RAPE: AN EVOLUTIONARY ANALYSIS, ETHOLOGY AND SOCIOBIOLOGY 137-73 (1983) (arguing that sexual violence is morally reprehensible but may be a non-disordered adaptation to a variety of social or environmental circumstances); ROBERT WRIGHT, THE MORAL ANIMAL 274 (1994) (listing sources addressing this point); Mulvey, *supra* note 133, at 663 (“It is also possible that frequent violent encounters exacerbate a disorder.”)

163. See Lee Ellis, *Rape as a Biosocial Phenomenon*, in SEXUAL AGGRESSION *supra* note 126, at 17, 18.

164. *Id.* at 20.

165. See W. L. Marshall & H.E. Barbaree, *Outcome of Comprehensive Cognitive-Behavioral Treatment Programs*, in HANDBOOK, *supra* note 112, at 369.

166. See Ellis, *supra* note 163, in SEXUAL AGGRESSION, *supra* note 126, at 17, 24 (examining how rape may be “neurohormonally motivated”).

167. See generally Ellis, *supra* note 163.

168. See generally William D. Pithers, *Relapse Prevention with Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in HANDBOOK, *supra* note 112.

169. See Margit C. Henderson & Seth C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 PSYCHIATRIC Q. 273, 274 (1990) (describing four “motivational dynamics” for rape: “power and control,” “express anger,” “sadistic arousal,” and “impulsivity and antisocial character”).

170. See *id.*

171. See *id.*

mental disorder nexus. Having more fully articulated the policy reasons for selecting a mental disorder explanation for sexual violence, courts will be more fully able to evaluate how that nexus might be proved.¹⁷²

IV. A CONCLUDING CAUTIONARY NOTE

Science is used both too much and too little in sex offender commitments. Too much deference to science at the adjudication stage permits standardless decisions, divorcing adjudication from the social (commonsense) context that ought to determine the boundary conditions in law. Too little science at the legislative fact stage countenances the adoption of decisions grounded on false generalizations.

I have suggested that science be used to change the scale at which courts look at the fundamental concepts involved in sex offender commitments. The choice of *scale*--how finely we choose to resolve the images we see of our subject--is not a neutral choice. Scale determines meaning.¹⁷³ The coarse aggregations of commonsense are ethically meaningful in the criminal law context. When combined with the science-based adjudication of sex offender commitments, however, they produce a standardless indeterminacy. Disaggregating things into their component parts allows a finer, more detailed view, but may divorce things from their social context and change their meanings profoundly.¹⁷⁴ Science has been used to absolve the courts of the tough job of constructing justifiable legal standards for sex offender commitments. But it can be used to rehabilitate at least part of the legitimacy claimed for this kind of police power intervention. Science should be used to disaggregate the fundamental concepts of sex offender commitments. The disaggregation should be undertaken in the full light of the moral and social policy concerns that ought to inform the deprivation of liberty. The purpose of science is to expose the structure of the choices open to courts, to demonstrate the necessity of, and provide the tools for, a principled translation between the languages of law, policy, and morals, on the one hand, and the language of science, on the other.

172. See Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 L. & HUM. BEHAV. 655, 661 (1991) (forensic psychologists must "actively seek . . . information that will differentially test plausible rival hypotheses").

173. See generally JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 81-119 (1987) (demonstrating that scale determines the meaning in information).

174. See Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENV. U. L. REV. 283, 291 (1993).