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## Prediction of Dangerousness and Washington's Sexually Violent Predator Statute

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## COMMENTS

### PREDICTION OF DANGEROUSNESS AND WASHINGTON'S SEXUALLY VIOLENT PREDATOR STATUTE

In 1991, responding to public outcry against a string of brutal sex crimes against women and children by recidivist sex offenders, the Washington state legislature enacted legislation creating a new civil commitment system.<sup>1</sup> The system is designed to identify sex offenders suffering from a mental abnormality or personality disorder making it likely that they will commit violent, predatory sex crimes.<sup>2</sup> The offender, if found beyond a reasonable doubt to be a sexually violent predator, will be confined to a high-security mental health treatment center within the Washington State penal system.<sup>3</sup> The predator's commitment to the treatment center is indefinite.<sup>4</sup> The predator can obtain release if the state is unable to show beyond a reasonable

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1. WASH. REV. CODE ANN. § 71.09.010-71.09.902 (West 1975 & Supp. 1991).

2. "'Sexually violent predator' means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." WASH. REV. CODE ANN. § 71.09.020(1) (West 1975 & Supp. 1991). "'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." WASH. REV. CODE ANN. § 71.09.020(2) (West 1975 & Supp. 1991). "'Predatory' means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." WASH. REV. CODE ANN. § 71.09.020(3) (West 1975 & Supp. 1991).

"Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under the age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

WASH. REV. CODE ANN. § 71.09.020(4) (West 1975 & Supp. 1991).

3. WASH. REV. CODE ANN. § 71.09.060(1) (West 1975 & Supp. 1991). The new treatment facility for persons committed under the Act is located in a secure facility within the state prison at Monroe, Washington.

4. *Id.*

doubt that he or she is still suffering from the mental illness which caused him or her to be a sexually violent predator.<sup>5</sup>

The Sexually Violent Predator law has been severely criticized on constitutional grounds. Critics allege that it violates procedural and substantive due process and equal protection.<sup>6</sup> The Washington State Supreme Court has heard a case raising the issue and will render an opinion by June of 1993.<sup>7</sup> There are strong indications that the law is constitutional and will stand.<sup>8</sup>

Apart from the constitutionality of the statute, one of the most hotly contested aspects of this commitment scheme is it depends upon the ability of mental health professionals to predict what the offender is likely to do in the future. It is fundamental in the law that we do not punish persons for what they might do. However, the Sexually Violent Predator civil commitment scheme is not a method of punishment. Washington is undertaking to treat the offender pursuant to its *parens patriae* power and to protect the public from "the dangerous tendencies of some who are mentally ill" pursuant to the state's police power.<sup>9</sup> The fact that Washington acknowledges the difficulty of treating this class of offenders does not diminish the state's interest in treating them, provided the treatment is at least somewhat effective for the offenders.<sup>10</sup> Critics of the statute argue that because the

5. WASH. REV. CODE ANN. § 71.09.090(1), (2) (West 1975 & Supp. 1991).

6. See generally Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990); John Q. LaFond, *Washington State's Unconstitutional Reply to Sex Predators*, SEATTLE TIMES, May 30, 1991 at A9.

7. *In re Andre Brigham Young* and *In re Vance Cunningham*, 804 P.2d 1261 (Wash. 1991).

8. See generally Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213 (1991). Gleb asserts the Act will meet constitutional tests for: civil confinement, proper categorization of offenders as "sexually violent predators," procedural due process, equal protection, and adequacy of treatment.

The recent case of *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992) indicates that narrowly drawn statutes addressing confinement of dangerous and mentally ill offenders which contain high levels of procedural due process will be upheld. *Foucha* is discussed *infra*.

See also Supreme Court cases approving the reliance on predictions of dangerousness: *Barefoot v. Estelle*, 463 U.S. 880 (1983) (upholding constitutionality of a Texas death penalty statute that allowed a finding of future dangerousness, based on psychiatric testimony, to justify a death sentence. The adversarial process will "sort out the reliable from the unreliable evidence" *Id.* at 901); *Schall v. Martin*, 467 U.S. 253 (1984) (upholding constitutionality of New York juvenile preventive detention statute and specifically rejecting the contention that it was impossible to predict future dangerousness, stating that "from a legal point of view there is nothing unattainable" about such predictions despite the difficulties in reliability of psychiatric prediction.); *Jones v. United States*, 463 U.S. 354 (1983) (holding that legislatures have a right to enact laws regardless of the current state of psychiatric ability to predict, and that such legislative judgements are to be accorded deference. *Id.* at 364 n.13). These cases and others dealing with psychiatric prediction are discussed below, see text *infra* part II.

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

10. WASH. REV. CODE ANN. § 71.09.010 provides *inter alia* that:

In contrast to persons appropriate for civil commitment under Chapter 71.05 RCW [Washington's short term commitment statute], sexually violent predators generally

prediction of dangerousness by psychiatrists and psychologists are unreliable, they should not be used to separate these predatory sex offenders from the class of sex offenders in general. Rather than commit the offenders indefinitely, those who oppose the statute advocate punishing these offenders with stiffer prison sentences for their crimes.<sup>11</sup> The purpose of this comment is to explore the uses and purposes of predictions of dangerousness in the law. This comment will explore the reasons why the use of predictions of dangerousness are constitutional, and argue that the objections to their use actually rest on moral and ethical grounds.

### I. HISTORY OF THE SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT SCHEME

In 1988, Gene Raymond Kane was released from prison to a work release program in downtown Seattle after serving a thirteen year sentence for attacking two women.<sup>12</sup> Kane was not treated for his mental problems while in prison because he was considered "too dangerous to handle."<sup>13</sup> This, however, did not prevent his release into the Seattle community.

On September 26, 1988, Diane Ballasiotes left her downtown Seattle ad

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have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior . . . the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

WASH. REV. CODE ANN. § 71.09.010 (West 1975 & 1991 Supp.) It is generally accepted that where a person is civilly committed they have a right to treatment which is reasonably certain to change the offender's behavior within a reasonable period of time. George E. Dix, *Special Dispositional Alternatives for Abnormal Offenders*, in *MENTALLY DISORDERED OFFENDERS* 133, 178 (John Monahan and Henry Steadman, eds., 1983). See *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966) (a person committed under District of Columbia's Sex Offender program only has a right to reasonably suitable and adequate treatment); *State v. Sell*, 277 N.W.2d 256 (Neb. 1979) (the right of persons committed as sexual psychopaths, even if essentially untreatable, have a right to "such care and treatment as is appropriate under the circumstances."). Thus, sexually violent predators committed under the Washington statute have a right to be treated, but only to the extent reasonably possible under current methods of treatment for sex offenders. There is no constitutional requirement that the treatment be guaranteed to be successful.

11. See generally Barry Siegel, *Locking Up 'Sexual Predators'*, L.A. TIMES, May 10, 1990, at A1-A30, Bodine, *supra* note 6. It is worthwhile to note that in California at least, imprisonment for a sex offender resulted in a longer confinement period that did civil commitment under the old sexual psychopath legislation (now repealed CAL. WELF. & INST. CODE § 6301 (1981)). For example, a group of imprisoned sex offenders spent a mean of 54 months in prison, while the sex offenders committed as dangerous mentally disordered sex offenders (MDSOs) spent a mean of 21.5 months. The longer time served by the imprisoned sex offenders cannot be explained by a higher prior conviction history because the imprisoned group had lower prior convictions than the MDSO group. Vikki Sturgeon & John Taylor, *Report of a Five-Year Study of Mentally Disordered Sex Offenders Released From Atascadero State Hospital in 1973*, 4 CRIM. JUST. J. 31-56 (1980).

12. Siegel, *supra* note 11, at A1.

13. *Id.*

agency job for the evening.<sup>14</sup> She never returned; her body was found one week later.<sup>15</sup> Gene Raymond Kane had raped and murdered Ballasiotes then dumped her body in another part of the city.<sup>16</sup> Kane had been out of prison for just two months when he killed Ballasiotes.<sup>17</sup>

Diane Ballasiotes' mother, Ida Ballasiotes, was outraged by a legal and penal system that released repeat sex offenders, like Kane, into an unsuspecting community. She began a grass-roots campaign to enact legislation which would prevent, or reduce the likelihood of, violent sex crimes by repeat sex offenders.<sup>18</sup> An initially lukewarm response by the Washington legislature was dramatically kindled into a firestorm of community shock and outrage over a string of continuing violent sex crimes in Washington, most notoriously by Earl K. Shriner. Shriner kidnapped a 7-year-old boy who was riding his bicycle near his Tacoma home. He took the boy into the woods, raped and strangled him, and severed his penis.<sup>19</sup> Shriner had a history of violent crimes. He killed a schoolmate when he was 16.<sup>20</sup> After his release from a mental institution, Shriner kidnapped and assaulted two teenage girls.<sup>21</sup> Shriner once told a prison cellmate that he wanted a van equipped with cages so he could capture children, sexually abuse, and murder them.<sup>22</sup> Shriner's vicious crime galvanized the Washington legislature to enact a new civil commitment system, the Sexually Violent Predator law, which went into effect July 1, 1990.<sup>23</sup>

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14. *Id.* at A30.

15. *Id.*

16. *Id.* at A1, A30.

17. *Id.* at A1.

18. *Id.*

19. *Id.* (The boy miraculously survived and has been given reconstructive surgery.)

20. *Id.*

21. *Id.*

22. *Id.*

23. WASH. REV. CODE ANN. §§ 71.09.101-.120 (West 1975 & Supp. 1991). Westley Allan Dodd, a 31-year-old convicted pedophile and child-murderer was arrested a few months after Earl K. Shriner, and Dodd's crimes were part of the impetus to enact the sexual predator law. Sally MacDonald & Carol M. Ostrom, *Dodd Case Lessons Are Few*, SEATTLE TIMES, Jan. 6, 1993, at A1. Dodd was convicted in 1990 of the torture, rape and murder of three small boys in 1989. *Id.* Dodd had a long history of violent sexual assaults on children, but had never spent more than four months in jail at a time. Timothy Egan, *Illusions Are Also Left Dead as Child-Killer Awaits Noose*, N.Y. TIMES, Dec. 29, 1992, at A1, col. 2. Dodd was executed by hanging in Washington state on January 5, 1993. Jack Broom, *Dodd Hanged*, SEATTLE TIMES, Jan. 5, 1993, at A1. The circumstances surrounding the enactment of the Sexually Violent Predator statute are eerily reminiscent of the events which led to Massachusetts to enact their "sexually dangerous person" statute in 1957. "Six weeks following his release from prison, a child molester kidnapped two boys and sexually assaulted and murdered them. In immediate response to this crime, chapter 123A of the General Laws of Mass. was written into law as a method for preventing the premature release of a potentially dangerous person." Murray L. Cohen et al., *The Psychology of Rapists*, in FORCIBLE RAPE 292 (Duncan Chappell et al., eds., 1977). The Massachusetts law provides for indeterminate commitment for treatment at a specially created psychiatric center within the Massachusetts Correctional Institution at Bridgewater. MASS. GEN. LAWS ANN. ch. 123A §§ 1-11 (1992).

## II. PROVISIONS OF THE SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT SYSTEM

### A. Classification

The Sexually Violent Predator law provides that if a person falls under one of the following categories, the prosecuting attorney of the county where the person was convicted or charged may file a petition alleging the person is a sexually violent predator<sup>24</sup>: (1) imprisoned for a sexually violent offense,<sup>25</sup> (2) confined as a juvenile for a sexually violent offense, (3) charged with a sexually violent offense but was found incompetent to stand trial, or (4) found not guilty of a sexually violent offense by reason of insanity, and that person is about to be released, or has been released on, before, or after July 1, 1990, and if the person appears to be a sexually violent predator.<sup>26</sup> After the petition is filed, the judge determines if probable cause exist to believe the person is a sexually violent predator.<sup>27</sup> If so, the person is taken into custody and is required to submit to a psychiatric evaluation by "a person deemed to be professionally qualified to conduct such an examination."<sup>28</sup> Within forty-five days there must be a trial to determine whether the person is a sexually violent predator.<sup>29</sup>

### B. Trial

At all stages of the trial, the person is entitled to the assistance of counsel as well as expert or professional psychological examination on his own behalf.<sup>30</sup> At the trial, the court or jury's task is to determine whether the person is a sexually violent predator. The state has the burden of proving this beyond a reasonable doubt.<sup>31</sup>

If the person being considered for civil commitment under the Act was found incompetent to stand trial for the offense alleged to be a sexually violent predatory act, the state must first prove that the person committed the act charged.<sup>32</sup> All rules of evidence for criminal trials and all constitutional

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24. WASH. REV. CODE ANN. § 71.09.030 (West 1975 & Supp. 1991).

25. "Sexually violent offense" defined *supra* note 2.

26. "Sexually violent predator" defined *supra* note 2.

27. WASH. REV. CODE ANN. § 71.09.040 (West 1975 & Supp. 1991).

28. *Id.*

29. WASH. REV. CODE ANN. § 71.09.050 (West 1975 & Supp. 1991).

30. *Id.*

31. WASH. REV. CODE ANN. § 71.09.060 (West 1975 & Supp. 1991).

32. WASH. REV. CODE ANN. § 71.09.060(2) (West 1975 & Supp. 1991). An exception is made if the court made a finding that the person committed the offense prior to dismissing the case due to the person's lack of competence to stand trial. *Id.*

rights due a defendant in a criminal trial apply in making the determination.<sup>33</sup> If the person is found to have committed the sexually violent offense that is the basis of the civil commitment proceeding, then the jury or court may determine whether he is a sexually violent predator.<sup>34</sup>

### C. Commitment

If, beyond a reasonable doubt, the person is found to be a sexually violent predator, he will be committed to a secure facility in the custody of the Washington Department of Social and Health Services<sup>35</sup> "for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."<sup>36</sup>

### D. Release

The person must be examined at least annually to determine his current mental condition.<sup>37</sup> If the person has so improved that he is no longer likely to commit sexually violent predatory offenses if released, the person will be permitted to petition for his release.<sup>38</sup> At the release hearing, the prosecuting attorney or attorney general has the burden of proving beyond a reasonable doubt that the petitioner is in fact still likely to commit sexually violent predatory offenses if released.<sup>39</sup> If the state cannot meet this burden, the person is released.

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#### 33. *Id.*

After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

WEST REV. CODE ANN. § 71.09.060(2) (West 1975 & Supp. 1991).

34. WASH. REV. CODE ANN. § 71.09.060(1) (West 1975 & Supp. 1991).

35. Section 71.09.060(3) provides that "[t]he facility shall not be located [at] any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population." WASH. REV. CODE ANN. § 71.09.060(3) (West 1975 & Supp. 1991). The Washington legislature approved \$1.3 million for the new treatment center's first year operating budget. The center is a 36-bed unit at the state prison in Monroe, Washington. The sexual predators will be kept separate from other inmates and will not be allowed to participate in programs that would take them outside the prison walls. Robb London, *Strategy on Sex Crimes is Prison, Then Prison*, N.Y. TIMES, Feb. 8, 1991, at A2.

36. WASH. REV. CODE ANN. § 71.09.060(1) (West 1975 & Supp. 1991).

37. WASH. REV. CODE ANN. § 71.09.070 (West 1975 & Supp. 1991).

38. WASH. REV. CODE ANN. § 71.09.090(1) (West 1975 & Supp. 1991).

39. *Id.*

## III. THE USES OF PREDICTIONS OF DANGEROUSNESS IN THE LAW

One of the most controversial aspects of the Washington Sexually Violent Predator statute is its reliance upon prediction of the offender's future dangerousness by a mental health professional. The most persistent objection to the use of such predictions is their lack of accuracy. Opponents of the new statute claim that the prediction accuracy of individual recidivism is so low that it seriously threatens individual freedom and autonomy without adequate justification.<sup>40</sup> Thus, opponents of the statute argue that the statute violates substantive due process because inaccurate prediction will render the detention merely preventive rather than for treatment.<sup>41</sup> Preventive detention without treatment is then asserted to be punitive and thus the invasion of the offender's liberty interest is not justified by the state's *parens patriae* power.<sup>42</sup> Additionally, the alleged prediction inaccuracy of dangerousness causes the statute to be overinclusive because some sex offenders who are not suffering from a "mental abnormality" may be confined.<sup>43</sup> Critics of the scheme contend such overinclusiveness prevents the statute from being sufficiently narrowly drawn to serve the state's compelling interest in treating the offender and preventing him from re-offending.<sup>44</sup>

These arguments against the Act's constitutionality may be addressed by an analysis of the use of dangerousness predictions in the American legal and penal systems. Predictions of dangerousness are central to law enforcement and the judicial system's mandate to control crime.<sup>45</sup> They are also key to the mental health profession's ability to contribute to the decision of who should be detained involuntarily due to mental disease or abnormality.

Alan Dershowitz states that preventive confinement of persons predicted to be dangerous has "always been practiced, to some degree, by every society in history regardless of the jurisprudential rhetoric it has employed . . . it is likely that some forms of preventive confinement will

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40. See Bodine, *supra* note 6, at 121, 122; LaFond, *supra* note 6, at A9; Jim Simon Peter Lewis, *Challenge of New Lockup System for Sex Offenders is Expected*, SEATTLE TIMES, June 30, 1990, at A9. Gerard Sheehan, legislative director of the American Civil Liberties Union of Washington, states that the Sexual Predator statute is unconstitutional because it confines the offenders "based on the government's speculation about what a person may do in the future. Our system of justice does not deprive people of their liberty before they've been convicted of any wrongdoing." Julie Emery, *Mixed Reaction to Predator Commitment*, SEATTLE TIMES, Mar. 9, 1991 at A9. Of course, the Sexually Violent Predator statute does not confine anyone "before they've been convicted of any wrongdoing." If the offender was found incompetent to stand trial, there must be a finding beyond a reasonable doubt that the sexual offense was committed by the person. WASH. REV. CODE ANN. § 71.09.060(2) (West Supp. 1991). While such a finding is not a criminal "conviction," it does prove that the offender did commit the act.

41. Bodine, *supra* note 6, at 121, 122; Gleb, *supra* note 8, at 228.

42. Bodine, *supra* note 6, at 122.

43. *Id.* at 123; LaFond, *supra* note 6, at A9.

44. *Id.*

45. Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393 (1986).



continue to be practiced by every society."<sup>46</sup> Marc Miller and Norval Morris, two of the foremost authorities on the use of prediction in the law, believe that "a jurisprudence that pretends to exclude the role of predictions of dangerousness is self-deceptive."<sup>47</sup> The Washington Sexually Violent Predator statute depends upon expert prediction. There are many areas of law and mental health where such predictions are routinely used. The following is a discussion of the Supreme Court's approval of the use of predictions of dangerousness in the contexts of pretrial detention of juveniles, sentencing, pretrial detention under the Bail Reform Act, parole release decisions, the imposition of the death sentence, and involuntary civil commitment.

### A. Pretrial Detention

In considering whether pretrial detention of juveniles<sup>48</sup> based on prediction of future dangerousness comported with the fundamental fairness required by due process, in *Schall v. Martin*<sup>49</sup> the Supreme Court upheld the use of such predictions.<sup>50</sup> The District Court below found that because of the limitations on prediction of future criminal conduct,<sup>51</sup> "it is impossible to predict future behavior and . . . the question is so vague as to be meaningless."<sup>52</sup> Thus, the District Court held, the ultimate decision to detain was "intrinsically arbitrary and uncontrolled," and therefore violated procedural due process.<sup>53</sup>

The Supreme Court rejected the argument that the pretrial detention decision was unconstitutionally arbitrary, stating "from a *legal point of view* there is nothing inherently unattainable about a prediction of future criminal conduct."<sup>54</sup> The Court specifically refuted the contention that such predictions were "impossible" and "meaningless."<sup>55</sup>

The Court went on to acknowledge that prediction of future criminal conduct is "an experienced prediction based on a host of variables" which

46. Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law. Part I: The English Experience*, 43 U. CIN. L. REV. 1, 57 (1974).

47. Miller & Morris, *supra* note 45, at 395.

48. The New York statute in question authorized, without probable cause, pretrial detention of an accused juvenile delinquent. The detention was based on a finding that there was a "serious risk" that a juvenile will "before the return date commit an act which if committed by an adult would constitute a crime." NEW YORK JUDICIAL LAW § 320.5 (McKinney 1983).

49. 467 U.S. 253 (1984).

50. *Id.* at 263.

51. *Id.* at 278.

52. *Id.* at 279 (quoting *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (opinion of Stewart, Powell, and Stevens, JJ)).

53. *Id.* at 263 (citing *United States ex rel. Martin v. Strasberg*, 513 F. Supp. 691, 713, 716 (1981)).

54. *Id.* at 278 (emphasis added).

55. *Id.* at 278-79

are not possible to codify.<sup>56</sup> Psychiatric prediction is therefore considered only one part of the full information required for the decision to detain. That prediction may prove "inaccurate" and "dangerousness" impossible to codify does not rule out prediction as an acceptable tool in the decision to detain. Such a decision is a legal, not psychiatric judgement.

Although it is possible the Supreme Court was influenced to permit this short-term, prehearing detention by the need to protect juvenile defendants, the Court later held in *United States v. Salerno*<sup>57</sup> that similar intrusions upon an adult's liberty are also permissible. Furthermore, since the Washington Sexual Predator commitment law is designed to confine the mentally ill, the *parens patriae* justification underlying *Schall v. Martin* is also implicit in the goals of the Washington scheme, which is to treat rather than punish sexually violent predators.

### B. Sentencing

Predictions of future criminal conduct form the basis of enhanced sentences under the federal Dangerous Special Offender statute.<sup>58</sup> That law defines a dangerous offender as a person for whom a "period of confinement longer than that provided for such [a] felony is required for the protection of the public from further criminal conduct by the defendant."<sup>59</sup> In *Schall v. Martin*, while addressing the issue of whether a pretrial juvenile detention statute was unconstitutionally vague because prediction of the juvenile's future dangerousness was "impossible" and "so vague as to be meaningless,"<sup>60</sup> the Court cited the numerous appellate decisions rejecting that contention as applied to the Dangerous Special Offender decision under section 3575(f).<sup>61</sup>

For example, the 4th Circuit Court of Appeals in *United States v. Williamson*<sup>62</sup> declined to hold a judge's determination that a criminal was a Dangerous Offender under section 3575(f) was unconstitutionally vague and

56. *Id.* at 279 (citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1979)).

57. 481 U.S. 739 (1987). *Salerno* is discussed in section III.D, *infra*.

58. 18 U.S.C.A. § 3575 (West 1985).

59. 18 U.S.C.A. § 3575(f) (West 1985).

60. *Schall*, 467 U.S. at 278-79.

61. "[A] judgment [about future criminal conduct] forms an important element in many decisions . . . A prediction of future conduct may . . . form the basis for an increased sentence under [18 U.S.C. § 3575] . . ." The statute has been challenged numerous times on the grounds that the standard (for a finding that an offender should be classified as a "dangerous special offender") is unconstitutionally vague. Every Court of Appeals considering the question has rejected that claim. *Schall*, 467 U.S. at 279 n.30 (citing *United States v. Davis*, 710 F.2d 104, 108-09 (3d Cir. 1983); *United States v. Schell*, 692 F.2d 672, 675-76 (10th Cir. 1982); *United States v. Williamson*, 567 F.2d 610, 613 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States v. Neary*, 552 F.2d 1184, 1194 (7th Cir. 1977); *United States v. Stewart*, 531 F.2d 326, 336-37 (6th Cir. 1976)).

62. 567 F.2d 610 (4th Cir. 1977).

meaningless.<sup>63</sup> The Court explained the “[l]ikelihood of future criminality and the potential danger to society are determinations implicit in sentencing decisions. The concept of dangerousness as defined in section 3575 is a verbalization of considerations underlying any sentencing decision.” Furthermore, “[j]udges are not unfamiliar with determining dangerousness.” Accordingly, the court held that section 3575 was not unconstitutionally vague as applied to the statutory concept of dangerousness.<sup>64</sup>

Further, the Tenth Circuit in the case of *United States v. Schell*,<sup>65</sup> addressed the constitutionality of section 3575’s preponderance of the evidence standard, finding that due process does not require a “beyond a reasonable doubt” standard of proof.<sup>66</sup> Regarding accuracy of such predictions of future criminality under section 3575, the court observed:

We . . . recognize the difficulties in making a finding of dangerousness, and that any clinical or diagnostic process for identifying such offenders probably results in significant overprediction . . . But the Supreme Court has said, in connection with civil commitments for mental illness, “there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.”<sup>67</sup>

While the Supreme Court has not rendered an opinion regarding the federal Dangerous Special Offender statute, the Court’s citing with approval the Courts of Appeals decisions in the case of *Schall v. Martin* indicates that section 3575 would probably not be held unconstitutional. Again, despite the recognized problems with the commonly accepted “one-third” accuracy, the court does not question the validity of dangerousness predictions in criminal justice decisions.

### *C. Preventive Detention under the Bail Reform Act of 1984*

Under the Bail Reform Act of 1984 (the Act), pretrial detention of arrestees is based upon prediction of future dangerousness. The Act requires detention of arrestees charged with certain serious felonies if the Government proves through clear and convincing evidence in an adversary hearing, that no conditions to the arrestee’s release will “reasonably assure . . . the safety of any other person and the community.”<sup>68</sup> In *United States v. Salerno*, use of prediction of dangerousness as a part of the decision to detain under the Act was held constitutional, especially where there are extensive procedural

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63. *Id.* at 613.

64. *Id.* at 613 n.7.

65. 692 F.2d 672, 678 (10th Cir. 1982).

66. *Id.*

67. *Id.* at 679.

68. 18 U.S.C.A. § 3142(e) (West 1985).

safeguards.<sup>69</sup> Petitioners Salerno and Cafaro<sup>70</sup> argued the Due Process Clause absolutely prohibited pretrial detention based upon the detainee's predicted danger to the community,<sup>71</sup> since the criminal law is designed to hold persons accountable for past, not future actions.<sup>72</sup>

Discussing the typical due process challenge to the Act, based on concerns that prediction is so inaccurate as to be unconstitutionally arbitrary, the Supreme Court reemphasized that "there is nothing inherently unattainable about a prediction of future criminal conduct."<sup>73</sup> The court noted the judicial officer making the detention decision was guided by statutorily defined factors, and was required to submit written findings of fact and a written statement of the reasons to detain.<sup>74</sup> Therefore, the decision to detain was not arbitrary and did not violate due process.<sup>75</sup> Similarly, the Washington Sexual Predator Statute involves no unbridled discretion because of the stringent requirements to qualify a person under the statute<sup>76</sup> and because the proceeding is before a judge or jury with all of the constitutional protections normally afforded a criminal defendant.<sup>77</sup>

#### D. Parole Release Decisions

The Supreme Court also approved the use of predictions of dangerousness in deciding whether prison inmates are to be granted parole. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*<sup>78</sup> involved a class action by Nebraska prison inmates who claimed the Parole Board's procedures for deciding whether to grant parole violated procedural due process. Their contention was based upon the asserted lack of accuracy in such prediction.<sup>79</sup> The Court pointed out that:

[T]here simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure errorfree determinations.<sup>80</sup> . . . [T]he parole determination . . . often involve[s] no more than informed predictions as to what would best serve [correctional

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69. 481 U.S. 739, 755 (1987).

70. "Boss" and "captain," respectively, of the Genovese Crime Family of La Cosa Nostra (the Mafia).

71. 481 U.S. at 744.

72. *Id.* at 745.

73. *Id.* at 751 (quoting *Schall v. Martin*, 467 U.S. at 278).

74. 481 U.S. at 751-52.

75. *Id.* at 752.

76. As of December, 1991, nearly 2,000 sex offenders had been reviewed for consideration under the Sexually Violent Predator Act. Only twelve of those cases were filed for a civil commitment hearing. Michael McCarthy, *Do They Belong Behind Bars?*, L.A. TIMES, Dec. 16, 1991, at E1, col. 6.

77. WASH. REV. CODE ANN. § 71.09.050 (West 1975 & Supp. 1991).

78. 442 U.S. 1, 11 (1979).

79. *Id.* at 11.

80. *Id.* at 7.

purposes] or the safety and welfare of the inmate.<sup>81</sup> The decision turns on a 'discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.'<sup>82</sup>

It is apparent from the language that prediction of an aspiring parolee's future risk of dangerousness was acceptable to the Court in spite of despite its imperfection and subjective quality.<sup>83</sup> The Court emphasized that prediction is a combination of "psychological factors combined with fact evaluation."<sup>84</sup>

No ideal, error-free way to make parole-release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior. Our system of federalism encourages this state experimentation.<sup>85</sup>

The decision whether or not to parole is a legal decision, not a purely psychiatric decision. The accuracy of a prediction may be challenged, but its probativeness is not so insubstantial that the Court should automatically exclude it.<sup>86</sup>

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81. *Id.* at 10.

82. *Id.* (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

83. It is interesting to note that at least one state, Michigan, has had reasonably good success in predicting *violent* recidivism (sex crime, robbery or murder) by parolees. This is analogous to the decision whether the person processed under the Washington Sexually Violent Predator statute is likely to be sexually violent in the future. Michigan's "Assaultive Risk Screening" was the subject of a 14-month parole period study involving 1200 male parolees. Of the prisoners predicted to be a "very high" assault risk, 40 percent were re-arrested and returned to state prison while free on parole. Twenty-one percent of the "high risk" prisoners recidivated with a violent offense. Twelve percent of the "medium risk" prisoners, six percent of the "low risk" and two percent of the "very low risk" prisoners re-offended for a violent offense. Thus, the group of prisoners predicted to be a very high risk for violent re-offense were *twenty times* more likely to return to prison for a violent crime than those predicted to be in the "very low risk" group. On the other hand, of every ten prisoners predicted to be a "very high" risk, six did not return to prison for a violent crime in the 14-month period. JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 168-70 (1985). Still, these figures are more accurate than the "two-thirds" false positive so frequently mentioned.

84. *Greenholtz*, 442 U.S. at 13.

85. *Id.*

86. One suggestion to reduce the unreliability of psychiatric prediction in the sexual predator civil commitment hearings is to use a "modified *Frye* test" to allow only psychiatric predictions which are proven based upon prevailing accepted psychiatric prediction methodologies. See Gary Gleb, *supra* note 8, at 240-50. Such an evidentiary hurdle would fulfill the requirement, urged by Marc Miller and Norvall Morris, that clinical predictions of dangerousness be used in the courts only where they are supported by valid actuarial studies. Miller & Morris, *supra* note 45. See also Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgement*, 88 YALE L.J. 1408 (1979) (discussing the relative merits and problems associated with the use of clinical prediction versus statistical prediction).

### E. Predictions of Dangerousness and the Death Sentence

The use of predictions of dangerousness in deciding to impose the death sentence was challenged in *Barefoot v. Estelle*,<sup>87</sup> where it was urged that such predictions were unconstitutional because psychiatrists individually, and as a class, were incompetent to predict dangerousness. The Supreme Court opined that barring psychiatric prediction of dangerousness "is somewhat like asking us to disinvent the wheel."<sup>88</sup>

The Court relied upon John Monahan, one of the foremost authorities on prediction in law and a professor of law at the University of Virginia, who stated: "there may be circumstances in which prediction is both empirically possible and ethically appropriate."<sup>89</sup> The Court explained its rationale for accepting the use of psychiatric prediction of dangerousness in the context of the gravest issue—whether to impose the death sentence:

All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. Petitioner's entire argument . . . is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process. . . . Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false . . . and, when called upon to do so, give greater credence to one party's expert witness than another's.<sup>90</sup>

*Barefoot v. Estelle* gives us one of the most explicit explanations of why the Court has uniformly upheld the use of predictions of dangerousness. Prediction by an expert witness is acknowledged to be imperfect; but like other kinds of expert testimony it is subject to attack by the defendant. The court places its faith in the ability of the jury to decide what weight to assign each expert's testimony. Some have suggested that a *Frye*-type test, designed to prevent introduction of expert testimony or results of tests or experiments which lack acceptance by the scientific community.<sup>91</sup> This may be an effective curb on psychiatric prediction that lack an objective basis.

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87. 463 U.S. 880 (1983).

88. *Id.* at 896. "[I]f it is not impossible for even a lay person sensibly to arrive at [the conclusion that a defendant is likely to commit future crimes], it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify." *Id.* at 896-97.

89. *Id.* at 901 (citing JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR, U.S. Dept. of Health and Human Services Pub. No. 81-921 at v (1981)).

90. *Id.* at 901-02.

91. This is the suggestion of Gary Gleb in his Comment, *Washington's Sexually Violent Predator Law: the Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, *supra* note 8.

*F. Insanity Acquittes and Predictions of Dangerousness*

*Jones v. United States* dealt with an insanity acquittee's involuntary commitment based upon proof, by a preponderance of the evidence, that he was insane. Accordingly, Jones asserted the finding of insanity at his criminal trial was insufficiently probative of mental illness and dangerousness to justify his indefinite civil commitment because of the preponderance standard used.<sup>92</sup> The petitioner urged that under *Addington v. Texas*, a state must demonstrate by clear and convincing evidence, in a civil commitment hearing that the individual was both mentally ill and dangerous before confinement was justified.<sup>93</sup> Therefore, Jones argued, it was unreasonable and therefore unconstitutional to keep him in confinement without additional hearings to demonstrate by clear and convincing evidence that he was mentally ill and dangerous.<sup>94</sup> In *Jones*, the Court held it is not unreasonable to base the insanity acquittee's automatic commitment upon a verdict of not guilty by reason of insanity even if there had been no independent finding of dangerousness:<sup>95</sup> "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. . . . Indeed, this concrete evidence generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding."<sup>96</sup>

Washington's Sexually Violent Predator commitment scheme presents the fact-finder with evidence in the form of prediction of dangerousness by mental health experts as well as the predator's past violent acts. Before past violent acts may be used in the commitment decision, it must be proven, beyond a reasonable doubt, that the subject committed the act.<sup>97</sup> This, coupled with the beyond-a-reasonable-doubt standard, which underlies the commitment decision itself, minimizes the effect of the purported unreliability of prediction.<sup>98</sup>

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92. *Jones v. United States*, 463 U.S. 354, 363 (1983).

93. *Id.* at 362 (citing *Addington v. Texas*, 441 U.S. at 426-27).

94. *Id.*

95. *Id.* at 364.

96. *Id.*

97. If the offender was found not able to stand trial because of mental incompetence, the court must find beyond a reasonable doubt that the person committed the sexually violent offense that is the basis of the action before proceeding to the civil commitment decision. WASH. REV. CODE ANN. § 71.09.060(2) (West 1975 & Supp. 1991).

98. In *Jones v. United States*, Brennan, J. dissenting stated: "[T]o require as a constitutional matter more than clear and convincing evidence—i.e., proof beyond a reasonable doubt—would unduly impair governmental efforts to protect both the mentally ill and society at large." *Jones*, 463 U.S. at 372 (citing *Addington v. Texas*, 441 U.S. at 427-31). The Court recently reemphasized that clear and convincing remains the constitutionally required standard of proof in *Foucha v. Louisiana*, 112 S. Ct. 1780, 1783 (1992). Washington clearly intends to take this burden upon itself to remove any doubt that they may be unduly depriving sexual predators of their civil liberties. Marc Miller and Norval Morris argue the Supreme Court is incorrect in its belief that a state could not ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. They claim "[t]hat an individual is likely to be dangerous *can* be proved

The petitioner in *Jones* directly attacked the value of using past dangerous acts to predict future dangerousness.<sup>99</sup> The Court declined to forbid government reliance upon predictive data, stating:

We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the 'uncertainty of diagnosis in this field and the tentativeness of professional judgement. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgement. . . .' The lesson we have drawn is not that governments may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgements.<sup>100</sup>

The Supreme Court thus rejects the notion that unless legislation to identify mentally disordered offenders is articulated in currently accepted psychiatric diagnostic terms, that it is somehow an invalid exercise of the state's police and *parens patriae* powers to commit such individuals.<sup>101</sup>

In a contentious 5-4 decision, the Supreme Court recently struck down a Louisiana statute which permitted the state to continue to confine insanity acquittees to psychiatric hospitals based upon a finding that the insanity acquittee remained a danger to himself or others, regardless of whether the individual was then mentally ill.<sup>102</sup> In *Foucha v. Louisiana*, the petitioner was found not guilty by reason of insanity of aggravated burglary and ordered committed to a state mental facility for care, custody and treatment.<sup>103</sup> Foucha sought release from the mental facility 3 years and 5 months later.<sup>104</sup>

A lunacy hearing was held to determine whether Foucha should be released. Although the petitioner was no longer psychotic at the time of the hearing, the state's psychiatrist would not certify that Foucha would not be a danger to himself or others if released.<sup>105</sup> Thus, Foucha was confined

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at any level required, provided 'likely to be dangerous' is given careful construction (i.e. that the individual belongs to a group with a risk of dangerousness unacceptable in relation to the gravity of the harm)." Miller & Morris, *supra* note 45, at 423-24.

99. 463 U.S. at 365.

100. *Id.* at 365 (citing *Greenwood v. U.S.*, 350 U.S. 366, 375 (1956); *Estelle v. Smith*, 451 U.S. 454, 472 (1981); *Addington v. Texas*, 441 U.S. 418, 429-30 (1979); *Powell v. Texas*, 392 U.S. 514, 535-537 (1968) (plurality opinion)).

101. Psychiatrists have criticized sexual psychopath legislation as too vague for use in the mental health and legal systems, because they are based on assumptions that a recidivist sex offender is "mentally disordered," "dangerous," and therefore is in need of "treatment." None of these assumptions, it is claimed, have been empirically validated. Carol Veneziano & Louis Veneziano, *An Analysis of Legal Trends in the Disposition of Sex Crimes: Implications for Theory, Research, and Policy*, 15 J. PSYCHIATRY & L. 205, 217 (1987). On the other hand, it seems self evident that at least some sex offenders are amenable to, and in need of, treatment. It is these offenders that sexual psychopath legislation, and the Washington Sexually Violent Predator statute particularly, aim to identify.

102. *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992).

103. *Id.* at 1781.

104. *Id.*

105. *Id.* at 1782-83.



at the mental health facility based upon a finding of future dangerousness alone, without any finding that he possessed any mental illness or abnormality, although one of the doctors who testified at the hearing stated that Foucha suffered from an "antisocial personality," which he stated was not a "mental disease" and was "untreatable."<sup>106</sup> The Louisiana statutory scheme for insanity acquitees expressly permits such detention based solely upon the danger the acquittee poses to himself or society.<sup>107</sup>

The majority opinion held that insanity acquitees are entitled to release from a mental institution when the acquittee has either "recovered his sanity or is no longer dangerous."<sup>108</sup> Thus, it was a violation of due process to continue to confine Foucha without proof that he remained mentally ill.<sup>109</sup> While the state urged Foucha's confinement was justified based upon his antisocial personality, the court rejected this argument. First, keeping Foucha against his will in a mental institution required a determination in a civil commitment hearing that he remained "mentally ill." Based upon the evidence given by the doctor at Foucha's hearing, an "antisocial personality" is not "mental illness"; therefore, Louisiana has no interest in confining him as a mentally ill person.<sup>110</sup> Second, continuing to confine Foucha would require constitutionally adequate procedures to establish the grounds for his confinement; such procedures would necessarily be the same afforded a person whom the state sought to commit, who was not an insanity acquittee.<sup>111</sup> Third, Foucha's fundamental liberty interest cannot be arbitrarily infringed upon without a carefully defined procedure in which the state proves by clear and convincing evidence that he remains dangerous.<sup>112</sup> Due process permits only "carefully limited exceptions" to the fundamental right to individual liberty.<sup>113</sup>

Justice O'Connor's concurring opinion clearly indicates that while the Louisiana scheme is insufficiently protective of an insanity acquitees' procedural and substantive due process rights, more narrowly designed statutes (such as that enacted by Washington) may receive more favorable treatment by the Court: "I do not understand the Court to hold that Louisiana may *never* confine dangerous insanity acquitees after they regain mental health."<sup>114</sup> O'Connor reemphasized that, "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgement . . . courts

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106. *Id.* at 1782.

107. "[T]he court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself." LA. CODE CRIM. PROC. ANN. art. 657 (West 1981 and 1992 Supp.)

108. *Foucha*, 112 S. Ct. at 1784 (citing *Jones v. United States*, 463 U.S. 354, 368 (1983)).

109. *Id.* at 1784-85.

110. *Id.*

111. *Id.* at 1785.

112. *Id.* at 1786 (citing *Jones v. United States*, 463 U.S. at 362).

113. *Id.* at 1786, 1787.

114. *Id.* at 1789 (emphasis added).

should pay particular deference to reasonable legislative judgements about the relationship between dangerous behavior and mental illness."<sup>115</sup> O'Connor stated that she would give judicial deference to "the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior."<sup>116</sup>

*Foucha* indicates that Washington's narrowly drawn Sexual Predator scheme, which applies only to a very select group of sex offenders, and which contains the full procedural protections of an adversarial hearing and a beyond a reasonable doubt standard of proof for the State to prove dangerousness, would be found constitutional by the Court.<sup>117</sup> While the constitutionality of a state's use of psychiatric prediction of dangerousness was not addressed, the entire opinion is based upon acceptance of the premise that dangerousness is a valid basis for confinement. It seems clear the Court has accepted predictions of dangerousness as a legitimate tool for states to employ in determining the nature and duration of criminal and civil confinements.

The above Supreme Court cases unanimously favor the use of prediction of dangerousness by psychiatrists, other mental health professionals, judges and penal authorities. The Court has rejected arguments that such predictions are not sufficiently accurate to supply the requisite certainty in a given situation. Instead, the Court favors the use of prediction as an evidentiary element in a decision that is legal, not purely psychiatric. Additionally, the Court defers to legislative judgements as to what constitutes dangerousness and how dangerousness shall be determined. George E. Dix, Professor of Law at the University of Texas at Austin, comments:

[I]t is unquestionably correct that the issue [of a person's future dangerousness in a sexually dangerous person hearing] should not be delegated—formally or informally—to expert witnesses . . . The degree of certainty or specificity that should be required must be determined in light of what is currently possible given the state of the predictive art. No brief can be made for requiring greater certainty or specificity than is ever possible by conscientious and skilled clinical practitioners who are aware of and sensitive to the debate concerning the value of clinical predictive testimony.<sup>118</sup>

#### IV. PREDICTING DANGEROUSNESS: PITFALLS AND POSSIBILITIES

The cases and critical literature associated with the issue of prediction of dangerousness frequently point to the problem of accuracy. It has been widely accepted for some time that predictions of an individual's likelihood

115. *Id.* (citing *Jones v. United States*, 463 U.S. 354, 365 (1983)).

116. *Id.* at 1790.

117. "It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." *Id.* at 1789.

118. Dix, *supra* note 10, at 173.

of committing future serious violent crime are only one-third accurate.<sup>119</sup> Thus, there is asserted to be a two-thirds "false positive" prediction associated with prediction of future violent behaviors.<sup>120</sup> However, critics recently have suggested that the studies which are the basis of this figure should be regarded with skepticism,<sup>121</sup> because the studies examine judgments which are not dangerousness-specific (e.g. civil commitment) rather than civil commitment specifically because of predicted dangerousness (the nature of the Washington statute.)<sup>122</sup>

Those critical of the use of prediction<sup>123</sup> argue that since we do not incarcerate criminals based upon a less than "beyond a reasonable doubt" probability, nor civilly commit individuals under many civil commitment schemes without a "clear and convincing evidence" standard, then society cannot justify deprivation of individuals liberty based upon a 33% accuracy

119. JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47 (U.S. Dept. of Health & Human Services Pub. No. 81-921 (1981)). Monahan states: "it would be fair to conclude that the 'best' clinical research currently in existence indicates that *psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past (and thus had high base rates for it) and who were diagnosed as mentally ill.*" Monahan's conclusion was based upon the five best available studies at that time.

A summary of their findings regarding accuracy of clinical prediction of violent behavior is as follows: (1) Harry L. Kozol, et al., *The Diagnosis and Treatment of Dangerousness*, 18 *CRIME AND DELINQUENCY* 371-92 (1972), a 10-year study of 592 male offenders, mostly convicted of violent sex crimes, conducted through the Massachusetts Center for the Diagnosis and Treatment of Dangerous Persons—65.3% false positive; (2) HENRY J. STEADMAN & JOSEPH J. COCOZZA, *CAREERS OF THE CRIMINALLY INSANE* (1974), a study of patients released from New York State hospitals for the criminally insane after the U.S. Supreme Court decision *Baxtrom v. Herold*—80.0% false positive; (3) Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 *RUTGERS L. REV.* 1084-1101 (1976), an analysis of 257 indicted felony defendants found incompetent to stand trial in New York State in 1971 and 1972—86.0% false positive; (4) Henry J. Steadman, *A New Look at Recidivism among Patuxent Inmates*, 5 *BULL. AM. ACAD. PSYCHIATRY & L.* 200-209 (1977), an evaluation of the Patuxent Institution in Maryland, 58.7% false positive. This study found only 10 percent difference in rate of re-arrest for violent crime between groups predicted not dangerous by the Patuxent staff, and groups predicted violent by the staff, but released. This small difference resulted in the Maryland legislature abolishing the statute under which the Patuxent program had operated. (5) T. Thornberry & J. Jacoby, *THE CRIMINALLY INSANE: A COMMUNITY FOLLOW-UP OF MENTALLY ILL OFFENDERS* (1979), following the behavior of 438 mentally disordered offenders who successfully petitioned for their release from a Pennsylvania institution (*Dixon v. Pennsylvania* (1971)) subsequent to *Baxtrom*—86.0% false positives. All studies above cited in MONAHAN, *supra*, at 44-48.

120. MONAHAN, *supra* note 119, at 47.

121. Thomas Grisso, *Clinical Assessments for Legal Decisionmaking: Research Recommendations, in LAW AND MENTAL HEALTH: MAJOR DEVELOPMENTS AND RESEARCH NEEDS* 49, 67 (U.S. Dept of Health and Human Services Pub. No. 91-1875 (Saleem Shah and Bruce D. Sales, eds., 1991)).

122. *Id.* Grisso urges that because many studies examining the relationship between case variables and future violence have not improved the clinician's ability to accurately predict individual likelihood of future violence, that the objectives of research should be reconsidered to focus not on predicting violence, but rather on discovering factors which reliably indicate an increase in the risk of violence. Such research, if able to identify which individuals are prone to a greater probability of future violence relative to others, this is significant even though it is not a specific prediction. *Id.* at 68.

123. Some of the most vociferous critics are psychiatrists. Yet their objections are somewhat ironic in that prediction "is an everyday feature in other aspects of [mental health professionals'] . . . clinical practice. This is especially true of medical practice, where the diagnostic process can be viewed as an effort to predict that the patient may experience certain incapacities." SEYMOUR HALLECK, *THE MENTALLY DISORDERED OFFENDER* 89 (U.S. Dept. of Health & Human Serv. Pub. No. 86-1471 (1974)).

rate which apparently cannot meet either of these evidentiary tests.<sup>124</sup> However, Morris and Miller argue persuasively that this view is based upon a fundamental misunderstanding between two distinct concepts: the standard of proof required to establish the individuals' "dangerousness," and the level of "unacceptable" risk that society chooses to define as "dangerous":

The existence of dangerousness is not a question of the weight of the burden of proof . . . and it is a mistake to decide the balance between the risk to the community and the restrictions on the individual in terms of the burden of proof. . . . [T]he elements that lead to a justified use of predictions of dangerousness, the determination of acceptable and unacceptable levels of risk is an *entirely distinct policy question to be decided by a legislature . . . the answer is not capable of expression solely as a problem of evidence*. Once the risk is defined, the elements that go to prove the existence of that risk can be made subject to different burdens of proof, but not the risk itself. . . . We reject on logical grounds any tie between standard of proof and the level of prediction necessary to justify preventive detention. . . . The confusion of the standard of proof with levels of prediction has been the greatest barrier to a sensitive consideration of the jurisprudence of dangerousness in American courts.<sup>125</sup>

John Monahan and David Wexler, prominent theorists of prediction science, also endorse this theory. Monahan and Wexler posit that a prediction of dangerousness includes three separable assertions: (1) the individual has certain characteristics, (2) those characteristics are associated with a certain probability of violence, and (3) the probability of violent behavior is "sufficiently" great to justify preventive detention.<sup>126</sup> They declare the first two assertions may be subjected to varying standards of proof, while the third assertion is a social policy decision.<sup>127</sup> The confusion about prediction of dangerousness and the 66% "false positive problem," therefore, stems from the fact that many erroneously suppose that "standards of proof" apply to the third assertion, and therefore the *probability of violence* must be ninety percent (under a 'beyond a reasonable doubt' standard) or seventy-five percent (under a 'clear and convincing evidence' standard) or fifty-one percent (under a 'preponderance of the evidence' standard.)<sup>128</sup> The proper understanding of this issue, according to Monahan and Wexler, is one must prove to a particular level of certainty only that a specified probability threshold has been crossed, the threshold itself being decided on policy grounds.<sup>129</sup> The issue then is whether a particular probability of violent behavior is sufficient to justify confinement under a civil commitment law,

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124. Michael Tonry, *Prediction and Classification: Legal and Ethical Issues*, 9 CRIME & JUST. 367, 395 (1987).

125. Miller & Morris, *supra* note 45, at 424 & n.67.

126. John Monahan & David Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 L. & HUM. BEHAV. 37 (1978).

127. *Id.* at 37-39.

128. *Id.*

129. *Id.*

which is resolved not by “proof,” but by legislative policy making and constitutional interest balancing.<sup>130</sup>

Another view of the “two thirds false-positive” dilemma is the “false positives,” rather than being considered an error in individual prediction, should be considered a 100 percent correct identification of *members of a group* that have a 33 percent violence<sup>131</sup> probability. In this view, it is an error to envision the prediction of dangerousness as a result.<sup>132</sup> Rather, prediction of dangerousness based on membership in a group for which a consistent, verified pattern of conduct has been proven, is a statement of a *condition*.<sup>133</sup> That condition is membership in a defined group with certain attributes, and not the prediction of a *result* of future violent acts in each individual case.<sup>134</sup> Miller and Morris analogize this situation to the presence of many unexploded bombs in postwar London. Death or injury due to the bombs was quite rare. Yet given that *all the bombs* had the potential to explode, it could not be said that the bombs which did not explode were not “dangerous,” and therefore they could safely remain in the city.<sup>135</sup>

Another indication that the “false positive” problem may be misleading is some of the “false positives” are actually true positives, whose real violent acts were undetected by authorities, unreported by the victims,<sup>136</sup> or not prosecuted for a variety of reasons.<sup>137</sup> For example, a recent study of Washington sex offenders participating in a self-reporting, anonymous interview regarding their actual past criminal acts revealed that among rapists, law enforcement records showed a mean number of 1.8 rape victims per offender.<sup>138</sup> However, this same group of sex offenders self-reported

130. *Id.*

131. Tonry, *supra* note 124, at 396.

132. Miller & Morris, *supra* note 45, at 410.

133. *Id.*

134. *Id.*

135. *Id.* at 411.

136. A recent Senate report revealed that in 1990, 100,433 rapes against women were reported (300 rapes per day) However, if non-reported rapes are taken into account, the report stated there are as many as 2 million rapes per year nationwide. Also, 29 individual states reported record numbers of rapes in 1990. The greatest number occurred in California—12,413. Other leading states in numbers of rapes were Texas—8,427; Michigan—6,938; Florida—6,874; New York—5,315. Janet Bass, *More Women Raped in 1990 Than in Any Year in U.S. History*, UPI, March 22, 1991 available in D)X, Nexis Library, UPI File.

137. In the New York City District Attorney’s office only one-third of cases involving stranger assailants, and 7 percent of known assailants, were indicted. One third of the stranger assailant’s cases were dismissed, and half of the known assailant cases were dismissed. “These numbers are consistent with an almost systematic downgrading or dismissing of cases involving nonstrangers . . .” SUSAN ESTRICH, *REAL RAPE 18* (1987) (citing Maxine Pfeffer, *Where Have All the Sex Crimes Gone*, student paper, Harvard Law School 1985.)

138. Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. OF INTERPERSONAL VIOLENCE 286, 291 (1991). The sex offenders who participated in this study were recruited from the sex offender treatment program at Western State Hospital in Fort Steilacoom, Washington. The offenders were in the facility as civil committees for an indeterminate period as “sexual psychopaths,” and had not been confined under the new Sexually Violent Predator statute. However, it is interesting to note that the group in the study is likely to be representative of the kinds of offenders who are targeted by the Washington law.

a mean rate of 11.7 victims per offender.<sup>139</sup> While the law enforcement records for the group showed a total of 66 charged sex offenses for the group, the self-report revealed a total of 433 actual rapes committed.<sup>140</sup>

Data for child molesters was even more dramatic: while records showed a median of 1 victim per offender, self-reporting revealed a median of seven victims each.<sup>141</sup> While law enforcement reported the group had molested 136 different victims, in the self-report, the molesters admitted to having molested 959 different victims.<sup>142</sup> Several other studies of offender self-reporting support the results of the Washington study above.<sup>143</sup>

Statistics of victim reporting also demonstrate that rape is underreported, contributing to the problem of undetected recidivism. The Department of Justice's victimization surveys indicate that between 1973 and 1982, 165 out of every 100,000 women in the U.S. were victims of either completed rape or a rape attempt.<sup>144</sup> These rates projected result in nearly twice as many offenses as reflected by official police data.<sup>145</sup> The victims reported the crimes between 42% (1980) and 58% (1977) of the time.<sup>146</sup>

These studies suggest that using actual convictions as the true incidence of recidivism is naive. Although Miller and Morris reject the use of unreported crime to bolster the use of predictions, they maintain that unreported crime simply does not make reliance on the "real" (and

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Another recent confidential survey of sex offenders revealed that the frequency of rape and/or child molestation is much higher than reported in the literature. 207 men reported 796 attempted or completed rapes against adult females, for a mean of 3.9 victims per subject; a shocking 14,950 attempted or completed child molestations were admitted by the same group of 207 men, resulting in 72.2 mean number of child victims. Sex offenders primarily interested in homosexual pedophilia (attraction to young boys) reported the largest number of offenses—31 men admitted 6,364 separate attempted or completed offenses. 26 men primarily aroused by heterosexual pedophilia (attraction to young girls) admitted to 3,120 such offenses, for a mean of 120.0 attempted or completed child molestations per subject. The authors of the survey state that "unless effective intervention helps them gain control over their deviant behavior, they are highly likely to continue committing sexual offenses." Gene G. Abel, et al. *Behavioral Approaches to Treatment of the Violent Sex Offender*, in *CLINICAL TREATMENT OF THE VIOLENT PERSON 95-96* (Loren H. Roth, ed. (1987)). See also A. Nicholas Groth, et al., *Undetected Recidivism in Rapists and Child Molesters*, 28 *CRIME AND DELINQUENCY* 450-458 (1982) and G.G. Abel, et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 *J. OF INTERPERSONAL VIOLENCE* 3-25 (1987).

144. SUSAN ESTRICH, *REAL RAPE* 11 (1987) (citing U.S. Dept. of Justice Bureau of Statistics Bulletin, *THE CRIME OF RAPE* (March 1985)).

145. *Id.* at 11.

146. *Id.* Susan Estrich, a leading legal scholar on rape and a professor of law at U.S.C., explains this lack of reporting as partly due to the problem of defining "rape" as "a crime committed by strangers." *Id.* Consequently, women attacked by men they know are unlikely to report the crime to the police, even where the assault involves serious threats, force, or injury to the victim. *Id.* (citing Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 *SOC. PROBS.* 464 (1984), Judy Foreman, *Most Rape Victims Know Assailant, Don't Report to Police, Report Says*, *BOSTON GLOBE*, April 16, 1986 at 27.) Further broadening the definition of "rape" in victimization surveys to include events characterized, not as "rape," but as "forced intercourse or intercourse obtained by threat" reveals that the rape rate will jump from 22% to 56%. *Id.* at 12 (citing DIANA RUSSELL, *SEXUAL EXPLOITATION*, 34-37, 101). This reflects the lack of understanding among many women as to when they are considered true victims of crime.

admittedly lower) crime rate any less acceptable.<sup>147</sup> However, any decision in the criminal justice and mental health systems which will interfere with individual liberty must be made upon as much information as possible. While it may not yet be possible to determine exactly how many more crimes the sexual predator will commit for which he will be neither arrested nor charged, there is compelling evidence that the widely accepted two-thirds "false positive" incidence seriously understates the rate of re-offense by convicted sex offenders.<sup>148</sup>

How one views the fundamental fairness of predicting an individual's future dangerousness depends partly on how one defines dangerousness. According to Alexander Brooks, a prominent theorist of human behavior and the law, dangerousness can be considered as consisting of four different elements: (1) the magnitude of harm (2) the probability that the harm will occur (3) the frequency with which the harm will occur, and (4) the imminence of the harm.<sup>149</sup> The interaction of these elements will allow a judgement about the dangerousness of the individual. For example,

a harm which is not likely to occur but which is very serious may add up to dangerousness. By the same token a relatively trivial harm which is highly likely to occur with great frequency might also add up to dangerousness. On the other hand a trivial harm even though it is likely to occur, might not add up to dangerousness.<sup>150</sup>

This test is essentially Judge Learned Hand's formulation of the "clear and present danger" test applied to government abridgement of First Amendment free speech rights. Originally, the "clear and present danger" test required that where there be reasonable grounds to believe that a grave harm is imminent.<sup>151</sup> However, Hand emphasized the gravity of the harm as the most critical factor in the test, and the imminence or remoteness of the harm was refined to the event's relative probability.<sup>152</sup> Hand's rationale for refining the requirement that the threatened harm be imminent was that

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147. Miller & Morris, *supra* note 45, at 424.

148. While predicting which offenders are likely to be violent in the future is a complex task, some tools of prediction have been developed which assist the decision-maker in arriving at a maximally accurate prediction. In a study of serial rapists and victims of serial rapists for purposes of classifying the rapist by type, and for classifying the offender according to propensity to use increasing violence in successive rapes, it was found that it was possible to classify rapists according to their propensity to increased violence in successive rapes with 92% accuracy. Janet I. Warren, et al., *Prediction of Rapist Type and Violence from Verbal, Physical and Sexual Scales*, 6 J. OF INTERPERSONAL VIOLENCE 55, 61 (1991). The authors offered their method as having potential application for a clinician in an evaluative situation to assess the offenders potential for future violent behavior. *Id.* at 65. Additionally, the classification scheme advanced in the study revealed that some rapist types "reflect a less intrusive form of rape behavior" than others. *Id.* at 64. The ability to classify a sex offender according to how forceful or violent the offender is prone to be would be a useful factor in any proceeding under the Washington Sexually Violent Predator civil commitment scheme.

149. HALLECK, *supra* note 123, at 85 (citing ALEXANDER BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM (1974)).

150. *Id.*

151. Whitney v. California, 274 U.S. 357, 376 (1927).

152. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

otherwise, society would be forced to endure harms which, if they were imminent, they would prevent.<sup>153</sup> Thus, the "clear and present danger" test was employed by Hand to balance the competing values of society's desire for protection with the free speech rights at issue in the case.<sup>154</sup>

Against this formulation of the "clear and present danger" test is the fear that it is expandable to encompass all sorts of "undesireables" who are engaging in behavior that is considered gravely harmful, but unlikely to occur. Without the requirement of imminent harm, it is argued that fundamental freedoms such as free speech, or as in the Washington statute, liberty, will be subject to political judgements about what constitutes a "grave harm" and ad hoc decisions about how probable the harm ought to be. For example, it could be argued that the same justification for indefinitely committing predatory sex offenders under the Washington statute exists where drug addicts can be determined to be likely to commit future crimes to support their drug habit. Would this be a less acceptable application of commitment or detention due to "dangerousness"? Arguably not, because for now, it seems clear that society is willing to accept the risk of robberies, burglaries, petty theft, and even murders committed by drug addicts in order that they can retain their liberty. This is clearly a balancing test, wherein society decides which harms it will tolerate, and which it will not. So long as the intrusion on an individual's rights is supported by a legitimate government interest, then it is simply a matter of policy where the line is drawn between the individual's rights, and those of society. Regarding sex crimes, society has clearly condemned most sex offenses. Until recently, rape was one of a very few crimes in some states for which a person could receive the death penalty.<sup>155</sup> In the case striking down the death penalty as a cruel and unusual punishment for the crime of rape, the Supreme Court stated:

[Rape is] highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relations are to be established. Short of homicide, it is the "ultimate violation of

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153. MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE* 130 (1977).

154. *Id.* Hand's formulation of the "clear and present danger" test was adopted by the Supreme Court in *Dennis v. United States*, 341 U.S. 494, 510 (1951), holding the Communist Party's "highly organized conspiracy" coupled with the reality of the Cold War, created both a grave and probable danger, sufficient to permit the Communist Party's leaders conviction under the Smith Act for willfully and knowingly conspiring to organize as a group to teach and advocate the overthrow and destruction of the United States government by force and violence, and knowingly and wilfully advocating and teaching the duty and necessity of overthrowing and destroying the government by force and violence. *Id.*

155. "In 1925, 18 states, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. By 1971 . . . that number had declined . . . to 16 states plus the federal government . . . [After states revised their death penalty statutes in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972)] only three provided the death penalty for rape of an adult woman . . . Georgia, North Carolina, and Louisiana." *Coker v. Georgia*, 433 U.S. 584, 593-94 (1977). (In *Coker*, the Supreme Court struck down these laws as unconstitutional as a "grossly disproportionate and excessive punishment for the crime of rape and [are] therefore forbidden by the eight amendment as cruel and unusual punishment." *Id.* at 592.)



self." . . . Because it undermines the community's sense of security, there is public injury as well.<sup>156</sup>

Using the Hand/Brooks model of dangerousness, the Washington state legislature appears to have decided that even if theoretically the probability of future sex offense by the potential sexual predator is only one-third (following conventional statistics),<sup>157</sup> such a relatively low probability is outweighed by the magnitude of the harm to the victim. The statute also implies that the higher rate of repetition, particularly among child molesters,<sup>158</sup> constitutes sufficient frequency of occurrence to counterbalance the lack of imminent harm, since the Washington statute is designed to predict long-term behavior.

Part of the judgement that the sex offenders defined by the Washington statute are exceptionally dangerous is their propensity to re-offend.<sup>159</sup> The Washington legislature is deliberately targeting, not only sex offenders who were violent and predatory in the past, but also those who are likely to commit such acts in the future. It is important to realize that any definition of dangerousness lacks precision and cannot be totally free of moral or political judgements.<sup>160</sup> Miller and Morris argue that these decisions are

156. *Coker*, 433 U.S. at 597-98. After this forceful condemnation of the crime of rape, the court appears to miss the point of its own argument by stating that, in contrast to the crime of murder, "[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.* at 598. It is doubtful that most modern commentators on rape would take such a sunny view of the aftereffects of rape. For example, rape victims report a syndrome akin to post-traumatic stress disorder experienced by war veterans. Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, in *FORCIBLE RAPE* 315, 324 (Duncan Chappell et al., eds., 1977). Effects include: fear of the outdoors, fear of the indoors, fear of being alone, fear of crowds, fear of people behind them, and sexual fears. *Id.* at 323-24. The rape victim feels anxious, experiences loss of self-confidence and self-esteem, paranoia, violent dreams or nightmares. *Id.* at 326-27. Justice Powell, in his dissenting opinion in *Coker v. Georgia*, appears to be more aware of these effects than the majority; he stated that: "The deliberate viciousness of the rapist may be greater than that of the murderer . . . there is also a wide variation in the effect on the victim . . . Some victims are so grievously injured physically or psychologically that life is beyond repair." *Coker*, 433 U.S. at 603.

157. Note that if a predator is civilly committed under the statute, they have decided that it is beyond a reasonable doubt that he is likely to commit future sexually violent crimes. Even a jury which has been presented with a one-third probability of reoffense as a prediction by the mental health expert will necessarily have been convinced that together with the other evidence, a very high likelihood of reoffending was established. This only strengthens the dangerousness analysis under this model.

158. RONALD HOLMES, *SEX CRIMES* 108 (1991).

159. Research has shown that "the average adolescent sexual offender may be expected to commit 380 sex crimes (this includes lesser offenses, eg, exhibitionism) during his lifetime." Don Riesenber, *Motivations Studied and Treatments Devised in Attempt to Change Rapists' Behavior*, 257 *JAMA* 899-900 (Feb. 1987). Massachusetts' experience with their sexually dangerous person statute reveals that among individuals who were singled out among all sex offenders to be evaluated for possible civil commitment, 62% had at least one prior conviction for a sex offense. Cohen et al., *supra* note 23, at 294-95. Of the group actually committed, 73% had a prior sex crime record, 47% of which involved force or violence. *Id.* at 295. In a study of 260 mentally disordered sex offenders (MDSO's) released from Atascadero State Hospital in California showed that of the group predicted to still be dangerous upon release (180 offenders), 24% re-offended for a sex crime within five years. Sturgeon, & Taylor, *supra* note 11, at 31-64, 54. Twelve percent of the group predicted nondangerous (80 offenders) reoffended for a sex crime within that period. *Id.* at 54. However, the two groups were almost identical in their re-offense rate for nonsexual crimes against the person, and for property crimes. *Id.* Thus, the staff of Atascadero were far more accurate at predicting re-offense for sex crimes than they were at predicting re-offense for other crimes. *Id.* at 61.

160. HALLECK, *supra* note 123, at 86.

morally responsible:

We assume that present predictive capacities will prove to be the best we have for several decades. Suppose that, even among those with a high risk of committing a future crime of violence, to be sure of preventing one such crime, we would have to detain three of those at risk. We submit that it is still ethically appropriate and socially desirable to take such predictions into account in many police, prosecutorial, judicial, correctional, and legislative decisions.<sup>161</sup>

While the seemingly low level of accuracy of prediction of dangerousness causes critics to reject prediction as unworthy to be considered in the decision to selectively incapacitate, Miller and Morris point out that given the relative rarity of violent criminality—a rate of prediction of one in three is not a low rate of prediction, but actually a very high rate of prediction.<sup>162</sup> The Washington legislature has the responsibility and the mandate from their constituents to define dangerousness in a way that maximizes society's safety.

#### V. ETHICAL AND POLICY CHOICES IN CHOOSING TO USE PREDICTIONS OF DANGEROUSNESS

The Supreme Court cases almost uniformly adopt a choice of public safety from recidivists over the individual liberty interests of the detainees. The critical literature almost universally advocates a greater solicitude for the individual liberty interest infringed upon. Since it is apparent that the Constitution has not been interpreted to prevent the use of prediction, then the rationales for choosing one interest over the other, based upon admittedly imperfect prediction tools, rest upon other than a purely legal justification. These choices are based upon the ethical and policy judgements regarding treatment and the rehabilitative ideal versus punishment for violent offenders.

Opponents of the Sexually Violent Predator statute urge that longer prison sentences are preferable to indeterminate treatment for sex offenders.<sup>163</sup> This would seem to be an acceptable solution only if one agrees that (1) sex offenders are not mentally ill, thus they do not require treatment, (2) treatment for sex offenders does not work, or (3) sex offenders may be mentally ill, but it is still appropriate to punishment rather than treat them. A corollary is the notion that sex offenders are not different in any principled way from other classes of criminals, and therefore singling them out for treatment when other criminals are punished with incarceration or probation is unjustifiable. However, it is clear that there are sex offenders who are *primarily* disturbed and *secondarily* offenders; it is this group of offenders which is targeted by the Washington Sexually Violent Predator statute.

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161. Miller & Morris, *supra* note 45, at 395-96.

162. "[A] group of three people, one of whom within a few months will commit a crime of extreme personal violence, is a very dangerous group indeed." *Id.* at 408.

163. Bodine, *supra* note 6, at 139-41.

One of the worst consequences of treating disturbed sex offenders as though they are primarily offenders and secondarily disturbed is these individuals must then receive mental health services in a prison setting which seriously undermines the effectiveness of the treatment.<sup>164</sup> Due to the general lack of public support for alternatives to prison for disturbed offenders, some observers express the hope that forensic psychiatry will be permitted to have a greater role in sentencing, and that programs to divert disturbed offenders after sentencing can be created.<sup>165</sup> The involuntary commitment program used in Washington, while it may be the most restrictive treatment method for disturbed violent offenders, has the advantage of giving the offender treatment in a setting which is exclusively devoted to mental health care, free from penal concerns other than security. Some might urge that the sex offenders' civil liberties would be better served by a determinate prison sentence rather than indefinite civil commitment. Aside from the very serious problems facing the penal system in the United States today, due to a burgeoning inmate population,<sup>166</sup> it is not true that a disturbed offender will be best served by being freed into the general population after a prison term. The Supreme Court recognized this in *Addington v. Texas*, stating:

One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed . . . [due] process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.<sup>167</sup>

Thus, the very real need of these sex offenders to receive treatment, even if not always assured of success, cannot be denied. The state's interest in treating these individuals must be balanced against the individual's liberty interest. Where the mental disturbance of the individual is accompanied by likelihood of further sex crimes against others, indefinite commitment seems to be the best solution.

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164. Hans Toch & Kenneth Adams, *The Prison as Dumping Ground: Mainlining Disturbed Offenders*, 15 J. PSYCHIATRY & LAW 539, 541 (1987).

165. *Id.* at 551.

166. The number of sex offenders in U.S. prisons rose from 58,000 to 85,647 between 1988 and 1990; a 48 percent increase. Rhonda Hillbery, *Identifying, Treating Sex Offenders*, WASHINGTON POST HEALTH 11, Oct. 22, 1991 (citing CORRECTIONS COMPENDIUM). Apparently, 25 to 30 percent of all incarcerated inmates are actually sex offenders, regardless of the crime for which they were incarcerated. HALLECK, *supra* note 123, at 82. However, it has been found that mental health professionals who work with prison populations believe that incarcerated sex offenders are in fact mentally disturbed and require treatment, despite the fact that the offender has neither qualified as a mentally disordered sex offender (MDSO) or other mentally incapacitated classification. *Id.* Those who urge stiffer penalties rather than resorting to civil commitment and treatment should recognize that most rapes are not committed as a simple criminal act, interchangeable with the motivations of a robber, burglar or mugger. While there is some difference in expert opinion about the precise classification of rapist type and motivation, it is accepted that "there are some specific characteristics present in rapists that differentiate them from other criminals." COHEN, *supra* note 23, at 296-98.

167. *Addington v. Texas*, 441 U.S. at 429-30 (citations omitted).

It is unquestionable that if one concentrates on incarceration, the day will arrive when the prisoner is finished with his sentence and returns to society. Those who urge more frequent incarceration for hard-core repeat sex offenders must become aware of the fact that the prison environment in itself is a "superb breeding ground for mental illness."<sup>168</sup> It seems preferable to treat a mentally ill sex offender by removing, if possible, the source of his inappropriate violent behavior. Robert Freeman-Longo, head of the sex-offender unit of the Oregon State Hospital, which is a part of the Oregon Department of Corrections, states, "[e]very one of these men will be back in the community within six months to four years and will reoffend without therapy. If we are not going to lock them up forever, we have an obligation to treat them."<sup>169</sup> When one recognizes the extremely threatening nature of the prison environment for the sex offender, segregated treatment for the sex offender becomes even more desirable.<sup>170</sup>

It has been argued that treatment for sex offenders is ineffective, and that therefore, any exercise of police power and *parens patriae* power to indefinitely commit the sexually violent predator offender for treatment is unjustified.<sup>171</sup> Yet this is generalization too great. According to some experts, although some sex offenders are more responsive to treatment than others, we as a society should not give in to urges merely to punish the worst cases.<sup>172</sup> Rather, since the result of such an impulse will be that the released offender reemerges untreated to re-offend, we should not be discouraged into abandoning the attempt to treat the worst offenders.<sup>173</sup> Murray Cohen states "[t]he life-long pathological relationships with women seen in these . . . groups of rapists give no reason to believe that a prison sentence will make them less dangerous."<sup>174</sup> Society's natural revulsion against these types of criminals and the consequent reluctance to treat the

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168. HALLECK, *supra* note 123, at 133. Halleck states, "I am never surprised, when visiting a prison and being asked to interview prisoners described as typical or 'troublemakers,' to discover that they are blatantly psychotic. Even a minimal empathic inquiry into their mental status reveals what is often extraordinary pathology." *Id.* at 134.

169. Reisenberg, *supra* note 159, at 899-900.

170. A separate treatment facility like the Washington center at Monroe is certainly safer for the sex offender than a prison, where he can inevitably expect victimization. For example, during a 1980 prison riot in the Penitentiary of New Mexico the prisoners stormed the protective custody unit where sex offenders were housed, using blowtorches to burn their way in. Most of the sex offender inmates were brutally killed with methods which included extreme mutilation and torture. John Monahan & Sharon Kantorowski Davis, *Mentally Disordered Sex Offenders*, in *MENTALLY DISORDERED OFFENDERS, 196-197* (John Monahan & Henry J. Steadman, eds. 1983) (citing M. Serrill & P. Katel, *New Mexico: Anatomy of a Riot*, 6 *CORRECTIONS MAGAZINE* 12-13 (1980)). There is an hierarchy of offenders within prisons, which is: 1) robber, 2) drug offender, 3) murderer, 4) burglar, 5) assaultive offender, 6) thief, 7) murderer-rapist, 8) rapist, 9) incest offender, 10) pedophile. RONALD M. HOLMES, *SEX CRIMES* 110 (1991) (citing Vaughn, et al., *Less than Utopian: Sex Offender Treatment in a Milieu of Power Struggles, Status Positioning, and Inmate Manipulations in State Correctional Institutions*, 69(2) *PRISON J.* 73-89 (1989)).

171. See Bodine, *supra* note 6, at 120, 121.

172. W. L. Marshall & A. Eccles, *Issues in Clinical Practice with Sex Offenders*, 6 *J. OF INTERPERSONAL VIOLENCE* 68, 83 (1991).

173. *Id.*

174. Cohen, *supra* note 23, at 313.

offenders is thought to be the biggest obstacle to actually preventing sexual assaults "at the source—the known or admitted sex offender."<sup>175</sup>

It will be beneficial to understanding why predictions of dangerousness are justified to identify sex offenders who are sexually violent predators if we reject the belief that punishment, not treatment, is the appropriate response to sexual predators. The people of Washington, through their legislature, have clearly indicated that they desire sex predators removed from the population until they are rehabilitated, in order to avoid the horrifying result of prison-without-treatment which was illustrated by Earl Shriner's heinous offense.

What ends will be served by punishing a sex offender who has been found to be a sexually violent predator? The traditional purposes of punishment are retribution, general deterrence, individual prevention, including incapacitation and rehabilitation.<sup>176</sup> Retribution has been called the "ultimate purpose of punishment."<sup>177</sup> It follows from the central premise of retribution that individuals are free agents capable of voluntary choice, that persons should not suffer punishment unless they are blameworthy.<sup>178</sup> Punishment is only proper where the offender can be blamed for failure to make a correct choice in acting.<sup>179</sup> H.L.A. Hart, one of the foremost theorists regarding crime and punishment, argues that retribution "could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behavior to the law its penalties ought not to be applied to him."<sup>180</sup> It is difficult to perceive how the sexual predator is to be expected to have a "fair opportunity to adjust his behavior to the law" without treatment. Despite admittedly low success rates with some kinds of sex offender treatment (which was expressly acknowledged in the preamble to the Washington statute),<sup>181</sup> there is no reason to suppose

175. Gene G. Abel et al., *Behavioral Approaches to Treatment of the Violent Sex Offender*, in *CLINICAL TREATMENT OF THE VIOLENT PERSON* 95, 116 (Loren Roth, ed. 1987).

176. PETER W. LOW ET AL., *CRIMINAL LAW I* (2d ed. 1986).

177. *Id.* at 4.

178. *Id.*

179. *Id.* at 5.

180. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 180-83 (1968).

181. WASH. REV. CODE ANN. § 71.09.010 (West 1975 & 1991 Supp.).

There are a variety of methods used to treat mentally disordered sex offenders. David Weston, superintendent of the new sexually violent predator treatment center at the Washington state prison, states that treatment for the predators will consist of individual and group therapy with a staff psychologist and social workers. Robb London, *Strategy on Sex Crimes is Prison, then Prison*, N.Y. TIMES, Feb. 8, 1991. They intend to aid the predators through "classic behavior modification" to cause them to associate their deviant sexual fantasies with negative thoughts. *Id.* It can be argued that imprisonment for a mentally disordered sex offender is even less moral response than indefinite treatment programs which might include drug therapy. Seymour Halleck, in his landmark study of mentally ill offenders for the National Institute of Health, argues:

It is legitimate to inquire whether forcing offenders to endure the pain, degradation, and suffering associated with spending 10, 20, or 30 years in prison is any less morally reprehensible than allowing offenders to submit to operations or to take drugs that would allow them to lead a life with certain limitations but in a free and relatively safe community. Civil libertarians might argue that prison is preferable, but it is unlikely that most offenders, if given full information about all options, would agree.

prison also will not magically remove the offenders' deviant impulses.

Another primary goal of punishment is incapacitation of the offender, which will prevent any crime from being committed against society at large during the prison term. Professor Herbert Packer expresses the following view in *The Limits of the Criminal Sanction*:

The case for incapacitation is strongest . . . where the offender is least capable of controlling himself, where his conduct bears the least resemblance to the kind of purposeful, voluntary conduct to which we are likely to attach moral condemnation. Baldly put, the incapacitative theory is at its strongest for those who, in retributive terms, are least deserving of punishment.<sup>182</sup>

Washington and states still retaining "sexual psychopath"-type statutes<sup>183</sup> are expressing their conviction that, from a legal point of view, certain types of sex offenders are less blameworthy because they are less capable of exercising self control. The justification for incapacitation under Packer's analysis is very strong for these uncontrolled, impulsive sex offenders; they are "least deserving of punishment."

Society's moral outrage against the rapist or child molester also seems void of any understanding of the abusive, dysfunctional life experiences suffered by many sexually violent predators.<sup>184</sup> It cannot be overlooked that most sex offenders were abused children. One study of incarcerated sex offenders found that 80% of the offenders reported being sexually abused in their childhood.<sup>185</sup> Packer uses the example of kleptomania as one presenting a strong case for incapacitation but a weak case for retribution, because of the kleptomaniac's abnormally strong impulse to steal. Moral outrage seems to be the basis for advocating punishment of a sexually violent predator, but not the kleptomaniac; yet the "abnormally strong impulse" to offend is present in both.

### CONCLUSION

The Supreme Court has consistently upheld the use of psychiatric and other professional predictions of dangerousness, despite its perceived inaccuracy. The real objections to the use of predictions stem from an ethical judgement about individual liberty versus crime control. Retributivism, if followed strictly, cannot justify detention of persons where

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HALLECK, *supra* note 123, at 180.

182. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 50-51 (1968).

183. Colorado, Connecticut, the District of Columbia, Illinois, Massachusetts, Minnesota, Nebraska, New Jersey, Oregon, Tennessee, Utah, Virginia, and Washington retain sex offender commitments statutes.

184. For an excellent illustration of how an abusive and dysfunctional childhood can create a sexually predatory adult sex offender, see JACK OLSEN, *PREDATOR* (1992).

185. J. Wassermann, et al., *Adolescent Sex Offenders*, 255 *JAMA* 181-182 (Jan. 1986) (citing A. Nicholas Groth, *Rapists and Child Molesters*, Conference presentation, Burlington, Vt. 1985.)

the risk is great that the detainee is a "false positive." Utilitarians, on the other hand, would have no ethical difficulty detaining even these "false positives," provided the result was an overall reduction in violent sex offenses.

The Supreme Court has, in recent years, appeared to favor the utilitarian view of crime control, based upon conservative values regarding individual liberty and the practical reality of burgeoning crime. The tremendous increase in sex offenses coupled with the grave effects of sex crimes on the victims of these offenses—generally women and children, certainly justify renewed efforts by states such as Washington to craft new legislation to deal with this terrible social evil. The alternative to statutes such as the Washington Sexual Predator law is to continue to merely punish all sex offenders with incarceration, which does nothing for the mentally ill offender and clearly poses an unacceptable risk to society. When such statutes are narrowly drawn to address only the worst of the worst offenders, as is the Washington Sexual Predator civil commitment scheme, then it seems to be morally responsible, as well as constitutionally permissible, for states to restrain the offender's liberty based upon predictions of future behavior.

*Marie A. Bochnewich\**

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