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SEXUAL PSYCHOPATH LEGISLATION: IS THERE ANYWHERE TO GO BUT BACKWARDS?

*Andrew Horwitz**

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I. INTRODUCTION

In 1990, the Washington State legislature passed the Sexually Violent Predators Act ("SVPA"),¹ a revised version of a sexual psychopath statute² that the very same legislature had voted to repeal just six years earlier.³ The passage of the Washington Act, which allows for the indefinite civil commitment of certain sexual offenders, immediately generated a great deal of interest among scholars and practitioners,⁴ at least in part because it came at a time when the clear national trend was toward the abolition of sexual psychopath statutes.⁵ Washington's return to the use of a sexual psychopath civil commitment scheme to address the problems surrounding sex crime recidivism initially seemed surprising, particularly in light of the severe criticism from the legal community and the psychiatric community that had led to the widespread repeal of most sexual psychopath statutes.⁶ Nonetheless, it quickly proved to be far from anomalous. In the past two years, three other states have enacted legislation modeled closely upon the SVPA and two others have modified existing statutes to expand the use of civil commitment to detain sex offenders.⁷ Indeed, Washington's strategy in handling the difficult legal and social issues surrounding sex crime recidivism seems to have been the beginning of a new legislative trend.

This article seeks to respond to the emerging reality that a widespread return to sexual psychopath laws, while regrettable, is inevitable. The current political and legal climate makes the continued pas-

1. WASH. REV. CODE ANN. §§ 71.09.010-.120 (1992 & Supp. 1995).

2. This article uses the term "sexual psychopath statute" to refer generically to statutes that have allowed for the detention of sex offenders outside of the ordinary procedures for the conviction and sentencing of criminal offenders. Similarly, this article uses the term "sexual psychopath" to describe the individuals to whom those statutes have been intended to apply. While states have historically used a variety of terms to describe these individuals, the term "sexual predator" seems to be the current fashionable term. See, e.g., WASH. REV. CODE ANN. § 71.09.020(1) (West 1992); IOWA CODE § 709C.2(4) (Supp. 1995).

3. WASH. REV. CODE ANN. § 71.06.005 (1992).

4. See, e.g., *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 507 (1992).

5. 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, 216 (1987).

6. See *infra* parts II.C-D.

7. See *infra* part IV.A.

sage of such statutes highly probable, and it seems virtually certain that these statutes will continue to survive constitutional scrutiny. Given that premise, this article proposes a statutory scheme that would minimize the injustices caused by the use of sexual psychopath statutes. At the same time, this article argues that the proposed statutory scheme, while still problematic in many respects, would offer some advantages over the way the criminal justice system currently addresses the issue of sex crime recidivism. After a survey and analysis of the growth and demise of previous sexual psychopath statutes,⁸ this article discusses the reasons for the appearance of the Washington statute and those that have followed it at a time when most other states had moved away from the sexual psychopath approach. Because state legislatures seem to be turning to the SVPA for guidance, this article devotes significant attention to the development, features, and status of that statute. The passage of these new sexual psychopath statutes, this article maintains, represents the beginning of a new era of sexual psychopath legislation justified not by the primary goal of rehabilitating and treating sexual offenders, but rather by the primary goal of preventively detaining them. The new approach still revolves around the use of psychiatric predictions of future dangerousness to justify potentially extensive preventive detention. The difference is that, while the older statutes used civil commitment in lieu of criminal sentencing, the new statutes use civil commitment to add an indefinite period of preventive detention at the expiration of a criminal sentence. While these new statutes, which have generally been passed in conjunction with statutes imposing much longer minimum sentences for various sexual offenses, represent little more than an effort to retroactively extend criminal sentences for previously convicted offenders, it seems clear that they will survive constitutional challenges on the Supreme Court level.⁹

Concluding that this legislative trend is likely to continue in an unabated fashion, this article ultimately outlines a model statute that would address the policy concerns behind this trend in a more honest, productive, and morally acceptable fashion.¹⁰ Such a law, if it were openly designated as a form of enhanced criminal sentencing for the purpose of preventive detention and if it provided a full array of procedural protections, could present a positive alternative to this legislative trend and to the criminal sentencing practices currently in place in

8. See *infra* part II.

9. See *infra* part IV.B.

10. See *infra* part V.A.

most jurisdictions.¹¹ While the reliance on predictions of future dangerousness will always inject a significant element of injustice into any such statutory scheme, the enactment of the type of statute that is envisioned here would significantly reduce the arbitrariness with which such predictions have traditionally been made.

II. SEXUAL PSYCHOPATH STATUTES OF THE PAST

A full understanding of the context and significance of Washington's new sexual psychopath statute and those that have followed it requires some understanding of history. The following section of this article explores the popularity of sexual psychopath statutes in the middle part of this century and the criticisms that ultimately led to their demise.

A. *Historical Origins of the Early Sexual Psychopath Statutes*

In passing the first sexual psychopath statute in the United States in 1937,¹² the state of Michigan began a trend that quickly swept the nation. By 1950, twelve states and the District of Columbia had adopted similar statutes.¹³ By 1970, another seventeen states had joined the fold, creating a total of thirty-three states and the District of Columbia with some version of a sexual psychopath statute in effect.¹⁴

The passage of sexual psychopath legislation generally followed the public uproar flowing from significant publicity after one or more particularly heinous sexual offenses.¹⁵ In the early part of this century, the relatively new phenomenon of the mass media allowed for the greater spread of news events in general and of news of sensational sexual offenses in particular.¹⁶ Because sexual crimes have always stirred up a particular mix of fear, hatred, and hysteria in this coun-

11. See *infra* part V.B.

12. MICH. COMP. LAWS §§ 780.501-.509 (repealed 1968).

13. Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, in CRIME AND THE LEGAL PROCESS 74, 74-75 (William J. Chambliss ed., 1969).

14. Veneziano & Veneziano, *supra* note 5, at 206.

15. See SAMUEL J. BRAKEL & RONALD S. ROCK, *THE MENTALLY DISABLED AND THE LAW* 341 (rev. ed. 1971); Sutherland, *supra* note 13, at 75-77; Michael B. Roche, Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME L. REV. 527, 527-28 (1966).

16. See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30s TO THE 80s*, at 853 (1977); Sutherland, *supra* note 13, at 76; Alan H. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 215, 215 (1960).

try,¹⁷ legislators were called upon to act in some fashion, and the result was the passage of sexual psychopath statutes.¹⁸ As such, the dominant goal in the enactment of sexual psychopath laws was the creation of a system through which sexually violent criminals could be detained indefinitely—at least until they were thought safe to be returned to society.¹⁹

The form that the early sexual psychopath laws took was very much influenced by other aspects of American culture at that time. In the middle of this century, the United States was beginning to move away from more traditional notions of retributive punishment and in the direction of treatment and rehabilitation for criminal offenders.²⁰ In addition, psychiatry as a developing field was gaining widespread recognition, creating a public perception about the psychiatric ability to diagnose and treat sexual dangerousness that far exceeded the established capabilities of the profession.²¹ The psychiatric community, along with other “progressively minded” individuals, played a significant role in the passage of sexual psychopath statutes, hopeful that they might be “harbingers of a future in which all criminals would be ‘treated’” instead of punished.²² Because many people tended to believe that these statutes would result in extended periods of detention,

17. See Anthony D. Oliver, *The Mentally Disordered Sex Offender: Facts and Fictions*, 3 AM. J. FORENSIC PSYCHIATRY 87, 88-89 (1982-1983); Paul W. Tappan, *Sentences for Sex Criminals*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 332, 335-36 (1951). One researcher, upon finding that sex offenders are routinely sentenced “significantly more severely” than nonsex offenders who have committed crimes of equivalent seriousness, concluded that the disparity is caused by an effort on the part of members of society to “assuag[e] guilt and anxiety about the perverse elements” in their own make up and to “emphasize[] the ‘moral distance’ between actor and reactor.” Anthony Walsh, *Differential Sentencing Patterns Among Felony Sex Offenders and Non-sex Offenders*, 75 J. CRIM. L. & CRIMINOLOGY 443, 457 (1984). “By dramatizing the evil of sexual crimes,” he concluded, “we are able to draw the line between the ‘perverts’ and ourselves; the harsher the punishment, the sharper the line.” *Id.* at 457-58.

18. See BRAKEL & ROCK, *supra* note 15, at 341; Frederick J. Hacker & Marcel Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CAL. L. REV. 766, 767 (1955); Sutherland, *supra* note 13, at 75-79.

19. See Anthony D. Oliver, *The Sex Offender: Lessons From the California Experience*, 5 INT’L J.L. & PSYCHIATRY 403, 406 (1982); Hacker & Frym, *supra* note 18, at 767.

20. See BRAKEL & ROCK, *supra* note 15, at 343; Hacker & Frym, *supra* note 18, at 766-67; Sutherland, *supra* note 13, at 79.

21. See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 853; Sutherland, *supra* note 13, at 78-79; Tappan, *supra* note 17, at 336; S. Steven Yang, *Treatability of the Sex Offender: Considerations of Etiology, Pathology, and Treatment in Repealing Sexually Dangerous Offender Statutes*, 8 MED. & L. 319, 326 (1989).

22. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 842; see Hacker & Frym, *supra* note 18, at 766-67; Sutherland, *supra* note 13, at 77-78.

the statutes had broad appeal to "the diverse strivings and tendencies of both the treatment-minded and the punishment-minded."²³

The consequence of these dual forces behind the passage of sexual psychopath laws was the creation of statutes that served neither constituency very faithfully. In many jurisdictions the statutes were rarely used, either because the treatment facilities that they depended upon never became available or because their use failed to result in the extended institutionalization that their supporters had envisioned.²⁴ In those jurisdictions in which the statutes were regularly employed, they were often used to detain relatively minor sex offenders for extended periods of time or to detain individuals against whom there was insufficient evidence for the state to obtain a criminal conviction.²⁵

B. Design of the Early Sexual Psychopath Statutes

The sexual psychopath statutes that were enacted prior to the Washington statute varied widely in a number of respects, but also shared many common elements. Generally, the statutes required at least two findings before an individual could be deemed a sexual psychopath: a finding that the individual had some form of mental defect or impairment, often described as an inability to control one's sexual behavior; and a finding that the individual had committed an overt act, usually of a sexual nature.²⁶ The overt act requirement varied from jurisdiction to jurisdiction, with some statutes requiring a criminal conviction, others merely a criminal accusation, and still others requiring only good cause to believe that the person might commit an overt act in the future.²⁷

23. Hacker & Frym, *supra* note 18, at 767.

24. See Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 543, 553 (1950). The early sexual psychopath statutes, with the "notable exceptions" of those in Wisconsin and California, were reportedly "not widely applied." BRAKEL & ROCK, *supra* note 15, at 348. Although both Wisconsin and California repealed those sexual psychopath laws, some other states have continued to employ older sexual psychopath laws in significant numbers. See Yang, *supra* note 21, at 320. While it remains unclear at this relatively early stage how extensively Washington will employ its statute, in the first two years after the statute was enacted, nine persons were committed as sexually violent predators pursuant to the statute. COMMUNITY PROTECTION RESEARCH PROJECT, WASHINGTON STATE INST. FOR PUB. POLICY, FINDINGS FROM THE COMMUNITY PROTECTION RESEARCH PROJECT: A CHARTBOOK 18 (3d ed. 1992).

25. See *infra* note 58 and accompanying text.

26. Roche, *supra* note 15, at 529.

27. *Id.* at 530-31; Alan H. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 215, 216 (1960). Incredibly, Washington's previous statute even allowed for a commitment proceeding following an *acquittal* on the criminal charges.

While some statutes allowed a sexual psychopath proceeding to be initiated only by a criminal prosecutor, others allowed such proceedings to be initiated by a judge, a criminal defendant, or even simply any interested party.²⁸ Once a proceeding was initiated, some sort of hearing was usually required under the statutes, although the required findings at that hearing, the identity of the finder of fact, the burden of proof, and the procedural rules to be followed varied greatly.²⁹ While many of the more recent statutes established procedures consistent with standard criminal proceedings,³⁰ including the right to counsel, the right to present and cross-examine witnesses, the right to a trial by jury, and the requirement of proof beyond a reasonable doubt, some of the older statutes denied these basic procedural protections.³¹ Evidence presented at the hearing generally included testimony from one or more psychiatrists who had examined the defendant, sometimes involving extended observation in a hospital setting and sometimes involving as little as one conversation.³²

Upon a finding at the close of the hearing that the defendant was a sexual psychopath, the defendant was generally committed to a period of indefinite confinement,³³ sometimes in a hospital setting and sometimes in a prison setting.³⁴ A committed sexual psychopath would generally be released only upon a finding that he was "fully recovered" or that he was no longer dangerous.³⁵

C. Criticisms of the Early Sexual Psychopath Statutes

Sexual psychopath statutes came under severe and sustained criticism very shortly after they began to appear.³⁶ In order to justify the enactment of statutes that sought to treat sex offenders differently from all other types of criminal offenders, state legislatures purportedly re-

BRAKEL & ROCK, *supra* note 15, at 344 n.25.

28. Swanson, *supra* note 27, at 216-17.

29. *Id.* at 217-18; Roche, *supra* note 15, at 534-35.

30. BRAKEL & ROCK, *supra* note 15, at 345.

31. Swanson, *supra* note 27, at 218; Roche, *supra* note 15, at 534-35.

32. BRAKEL & ROCK, *supra* note 15, at 344-45.

33. *Id.* at 345-46; Roche, *supra* note 15, at 535.

34. Roche, *supra* note 15, at 535.

35. BRAKEL & ROCK, *supra* note 15, at 346.

36. For some earlier criticisms of sexual psychopath statutes, see, e.g., Sutherland, *supra* note 24 (written in 1950); Tappan, *supra* note 17 (written in 1951). In Illinois, a law review article criticizing the statute appeared before the statute was even enacted. See W. Scott Stewart, *Concerning Proposed Legislation for the Commitment of Sex Offenders*, 3 J. MARSHALL L.Q. 407 (1938).

lied on several assumptions that were quickly assailed as either unproven or patently false.³⁷ It was assumed that many sex offenses were committed by an identifiable class of "sexual psychopaths" who shared some particular psychiatric diagnosis and who reoffended at a higher rate than other criminals or "ordinary" sex offenders.³⁸ Further, it was assumed that those individuals could be rendered harmless through some form of psychiatric treatment in a way that was not viable for other criminals.³⁹ It also was assumed that professionals could predict reliably when an individual was so "cured."⁴⁰ The result of employing the statutes was presumably to be a reduction in the overall rate of sex crimes by the institutionalization of these sexual psychopaths,⁴¹ particularly since their return to society would be conditioned on their successful treatment.

The process of trying to identify an individual as a sexual psychopath was fraught with a variety of problems. Most critics of sexual psychopath statutes maintained that the term "sexual psychopath" or any other equivalent term is devoid of any diagnostic validity.⁴² These critics pointed out that an act of sexual violence, in and of itself, is not the manifestation of any single mental disturbance, but rather a symptom that can be attributed to any of a large number of causes.⁴³ Since sex offenders are a heterogeneous group that do not necessarily have anything more in common than the fact that they have committed a sex offense, the effort to create a diagnostic category using an act of

37. Some commentators have maintained that the state legislatures knew these assumptions to be false or unsupported, but hid behind them in order to justify the passage of statutes that allowed for the indefinite detention of sex offenders. *See, e.g.,* Oliver, *supra* note 17, at 88; Tappan, *supra* note 17, at 335-36.

38. *See, e.g.,* BRAKEL & ROCK, *supra* note 15, at 348; Oliver, *supra* note 19, at 406; Sutherland, *supra* note 24, at 547-48.

39. *See, e.g.,* BRAKEL & ROCK, *supra* note 15, at 348; Oliver, *supra* note 19, at 406.

40. *See, e.g.,* BRAKEL & ROCK, *supra* note 15, at 348; Oliver, *supra* note 19, at 406.

41. Interestingly, there has never been any evidence that sexual psychopath statutes have reduced the rate of sex offenses. While no study has ever been conducted comparing jurisdictions that have sexual psychopath statutes to those without, Veneziano & Veneziano, *supra* note 5, at 221, it is probable that the amount of crime prevented by the enforcement of such a statute has been negligible at best. *See* Nathan T. Sidley & Francis J. Stolarz, *A Proposed "Dangerous Sex Offender" Law*, 130 AM. J. PSYCHIATRY 765, 765 (1973).

42. *See, e.g.,* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 840; Hacker & Frym, *supra* note 18, at 771.

43. *See* SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 741 (3d ed. 1985); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 938; Oliver, *supra* note 19, at 406; Roche, *supra* note 15, at 551-52.

sexual violence as a common denominator was completely illogical from a psychological perspective.

Particularly when starting with a set of individuals who may share no more than one attribute, the process of differentiating between an "ordinary" sex offender and a sexual psychopath became an insurmountable task. Because "sexual psychopath" is a legal term that has never had a generally accepted diagnostic counterpart, sexual psychopath statutes attempted to differentiate between sexual psychopaths and others using terms and concepts that critics described as "to a great degree meaningless and incomprehensible."⁴⁴ The most commonly cited example of such vagueness was the use of the concept of dangerousness without any attempt to define it; absent some definition, it was unclear whether the future harm to be protected against was a violent sex offense, any sex offense, or even any criminal offense at all.⁴⁵

The only distinguishing characteristic of a sexual psychopath, as opposed to an "ordinary" sex offender, seemed to be that he or she was alleged to be likely to commit some dangerous criminal offense in the future. The reliance of sexual psychopath statutes on psychiatric predictions of future dangerousness in order to make this distinction was the source of the most persistent and forceful criticism of the statutes.⁴⁶ The psychiatric community generally accepted the propositions that psychiatric predictions of long-term future dangerousness are accurate in no more than one in three cases⁴⁷ and that the average psychiatrist was no better at predicting future criminality than the average layperson.⁴⁸ In fact, there is some reason to believe that the average psychiatrist is actually *worse* than the average layperson at predicting future criminality because she has a significant bias toward overprediction, particularly in a setting in which she will be at least partially responsi-

44. Swanson, *supra* note 27, at 220-21.

45. See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 859; George E. Dix, *Special Dispositional Alternatives for Abnormal Offenders: Developments in the Law*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 133, 153 (John Monahan & Henry J. Steadman eds., 1983).

46. See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 863-65.

47. See JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47-49 (1981).

48. Task forces of both the American Psychiatric Association and the American Psychological Association have taken the position that clinicians have no demonstrated expertise in the prediction of future dangerousness. See *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1110 (1978); see also GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 864-65.

ble for the release of a sex offender into the community.⁴⁹ Since there is no single widely accepted model for making such predictions, psychiatrists have never received any formal training in medical school with respect to how to make them;⁵⁰ instead, they have been left to take educated guesses that have depended largely on their own therapeutic biases and a variety of moral and ethical value judgments related to social control.⁵¹ Despite the fact that the accuracy of psychiatric predictions of future dangerousness has never been established, fact finders have tended to grant tremendous deference to those predictions in deciding whether or not an individual should be institutionalized.⁵²

Thus, those sex offenders eventually labeled sexual psychopaths have not necessarily had any attributes in common other than the fact that they had presumably committed a sex offense in the past. As a result, the notion that they represented a group for which a common treatment could be prescribed was quite misguided.⁵³ In fact, it was never clearly established that any form of psychiatric treatment was successful in reducing the recidivism rates of sex offenders, regardless

49. It is apparent that there are tremendous professional and emotional risks involved in predicting that an individual is not dangerous, and that the far safer course for a professional who is asked to make such a prediction is to overpredict dangerousness. See MONAHAN, *supra* note 47, at 86; see also Tappan, *supra* note 17, at 335. A false prediction of dangerousness in the sexual psychopath context will result in the inappropriate detention of an individual who will garner little or no public sympathy; a false prediction of nondangerousness will result in the release of an individual who then reoffends, possibly in a highly publicized fashion. See MONAHAN, *supra* note 47, at 86; Tappan, *supra* note 17, at 335. Moreover, a false prediction of dangerousness will rarely be discovered because the individual is generally detained and the prediction never tested. A false prediction of nondangerousness, on the other hand, will often be discovered. Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 734-35 (1974); Fletcher Paddison, Note, *Evolution of a Procedural Hybrid: The Sexual Sociopath Statutes and Judicial Response*, 13 CAL. W. L. REV. 90, 97 (1976). Another factor that contributes to the overprediction of dangerousness among sex offenders is the high level of disdain with which sex offenders are regarded by the psychiatric community. See generally Leo H. Berman & Lawrence Z. Freedman, *Clinical Perception of Sexual Deviates*, 52 J. PSYCHOL. 157 (1961); Friedemann Pfäfflin, *The Contempt of Psychiatric Experts for Sexual Convicts: Evaluation of 936 Files from Sexual Offense Cases at Courts in the State of Hamburg, Germany*, 2 INT'L J.L. & PSYCHIATRY 485 (1979).

50. Ennis & Litwack, *supra* note 49, at 733; Irving Prager, "Sexual Psychopathy" and Child Molesters: *The Experiment Fails*, 6 J. JUV. L. 49, 76 (1982); Paddison, *supra* note 49, at 97.

51. See BRAKEL & ROCK, *supra* note 15, at 355; Oliver, *supra* note 17, at 94; Prager, *supra* note 50, at 76.

52. See BRAKEL & ROCK, *supra* note 15, at 355; Anthony Granucci & Susan J. Granucci, *Indiana's Sexual Psychopath Act in Operation*, 44 IND. L.J. 555, 570 (1969); Roche, *supra* note 15, at 552.

53. See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 935-36.

of their psychiatric diagnosis.⁵⁴ Moreover, the facilities that were called upon to provide treatment for committed sexual psychopaths were chronically understaffed and underfunded, as were research efforts connected to that treatment.⁵⁵

Once treatment was provided, the assumption built into the statutes was that a psychiatrist would be able to determine when a sexual psychopath was "cured" and no longer likely to commit another sex offense. The reality was that a psychiatrist's ability to predict future behavior was no better at this juncture than it was at the time of potential admission and was fraught with the same sort of biases against release that existed at the initial determination of dangerousness.⁵⁶ As a result, a period of detention as a sexual psychopath often lasted a lifetime.⁵⁷

In addition to pointing out that sexual psychopath statutes were enacted based on faulty premises, critics also raised concerns about the practical operation of the statutes. The most significant of these criticisms was that the statutes were used as a method of circumventing the criminal justice system, either to impose disproportionate sentences on sex offenders or, in the more egregious examples, to impose sentences on individuals who could not be tried or convicted of a criminal charge.⁵⁸ Particularly since the decision of whether to proceed under a

54. *Id.* at 870-71; BRAKEL & ROCK, *supra* note 15, at 352; Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 25, 27 (1989); Oliver, *supra* note 17, at 95; Yang, *supra* note 21, at 320. Recent reports, however, have begun to claim some level of success with certain types of sexual offenders under certain treatment conditions. See generally NATHANIEL J. PALLONE, REHABILITATING SEXUAL PSYCHOPATHS: LEGISLATIVE MANDATES, CLINICAL QUANDRIES (1990); W.L. Marshall et al., *A Three-Tiered Approach to the Rehabilitation of Incarcerated Sex Offenders*, 11 BEHAV. SCI. & L. 441 (1993).

55. BRAKEL & ROCK, *supra* note 15, at 352-53; Hacker & Frym, *supra* note 18, at 777; Oliver, *supra* note 19, at 408; Prager, *supra* note 50, at 71. In Colorado, a state that retains a sexual psychopath statute, funding for the treatment of detainees has been completely eliminated. Robin A. Carey, Comment, *A Constitutional Challenge to the Release Procedures of the Colorado Sex Offenders Act: Is it Just a Matter of Time?*, 58 U. COLO. L. REV. 313, 314-15 (1987).

56. See *supra* notes 47-51 and accompanying text. For a contrary perspective, see Prager, *supra* note 50, at 76. Prager argues that clinicians who have been treating an institutionalized inmate have a bias toward predicting nondangerousness because they have generally advocated treatment in the first instance and because they want to believe that the treatment they have provided has been successful. *Id.*

57. Morris Ploscowe noted that although sexual psychopaths in the Michigan State Prison were designated as "visitors," "like the man who came to dinner, they were apparently there for a long stay." MORRIS PLOSCOWE, SEX AND THE LAW 235 (1951).

58. See Lawrence T. Burick, *An Analysis of the Illinois Sexually Dangerous Persons Act*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 254, 256 (1968) (reporting that Illinois prosecutors employ that state's sexual psychopath statute "[o]nly when they feel they do not have enough

sexual psychopath statute instead of an ordinary criminal statute was frequently placed in the hands of the local prosecutor's office,⁵⁹ it is not surprising that in practice that decision often turned on which system would impose the longer period of detention.⁶⁰ Critics also argued that sexual psychopath statutes allowed the state to punish an individual for his or her status, and not just his or her actions, in a way that has been found unconstitutional in other contexts.⁶¹

Further criticisms of sexual psychopath statutes tended to focus on the lack of procedural protections generally afforded an individual who is the subject of a sexual psychopath proceeding. Although the resulting consequences could often be far more severe than those following from a criminal conviction,⁶² sexual psychopath laws rarely provided

evidence to convict"); Oliver, *supra* note 17, at 88 (reporting that the use of the California sexual psychopath statute fell off dramatically when the state courts held that the period of detention could not exceed the statutory maximum for the underlying criminal offense); Oliver, *supra* note 19, at 404 (maintaining that sexual psychopath laws were "designed, by circumventing procedurally restrictive criminal codes, to ensure a prolonged period of detention"); Sutherland, *supra* note 24, at 553 (maintaining that prosecutors use sexual psychopath laws "only when their evidence is so weak that conviction under the criminal law is improbable"); Swanson, *supra* note 27, at 221 (arguing that imprecise language allows prosecutors to "stretch[] the meaning of the statutory provisions so as to include many persons who could never be successfully prosecuted in a criminal trial"); Veneziano & Veneziano, *supra* note 5, at 220-21 (reporting that the threat of employing a sexual psychopath statute is frequently used by prosecutors as leverage in plea bargaining); Carey, *supra* note 55, at 324 (arguing that the "indirect effect" of the Colorado statute is to "allow the penal system to circumvent the sentencing ranges prescribed by the legislature for sex offenses"); Joseph F. Grabowski V, Comment, *The Illinois Sexually Dangerous Persons Act: An Examination of a Statute in Need of Change*, 12 S. ILL. U. L.J. 437, 445-46 (1988) (noting that the prosecution has an incentive to proceed under the sexual psychopath statute "in cases where it feels it does not have sufficient evidence to convict for the original crime charged"); Paddison, *supra* note 49, at 114 n.154 (noting that 46% of Maryland detainees were held past the statutory maximum sentence for the underlying criminal offense).

59. See Swanson, *supra* note 27, at 216.

60. See *supra* note 58.

61. See BRAKEL & ROCK, *supra* note 15, at 354; Paddison, *supra* note 49, at 123; Susan G. Tanenbaum, Note, *Toward a Less Benevolent Despotism: The Case for Abolition of California's MDSO Laws*, 13 SANTA CLARA L. REV. 579, 609 (1973).

62. In addition to facing the prospect of confinement exceeding the maximum permissible criminal sentence for the alleged offense, there is also the issue of stigma connected with being labeled a sexual psychopath. Paddison has concluded that a sexual psychopath suffers from problems in the community even more severe than those encountered by one with a criminal conviction because he or she is "forever . . . branded with the twin marks of mental and sexual abnormality." Paddison, *supra* note 49, at 114 (quoting *People v. Burnick*, 535 P.2d 352, 362 (Cal. 1975)). The sexual psychopath "is feared and, consequently, faces social ostracism and economic discrimination." *Id.* In the end, the sexual psychopath's "social stigma and loss of liberty have a greater impact upon the defendant's rights and 'interests' than do[es a simple] criminal conviction." *Id.*

some fairly basic procedural rights, such as the right to an appointed attorney, the right to a jury, and the right to remain silent.⁶³

D. Demise of the Early Sexual Psychopath Statutes

Sexual psychopath statutes reached the peak of their popularity in the 1960s. By the 1970s, states had begun repealing their statutes in droves, so that by the time Washington passed the SVPA in 1990, just eleven other states and the District of Columbia had retained any version of a sexual psychopath statute.⁶⁴ While several states had revised their statutes during the 1970s and 1980s, sometimes significantly,⁶⁵ new sexual psychopath statutes were few and far between.

The demise of sexual psychopath statutes has been attributed to a number of different factors,⁶⁶ but can most easily be traced to a growing disillusionment with the concept of criminal rehabilitation and the expanding popularity of retributive sentencing in the effort to control crime.⁶⁷ Just as the enactment of a sexual psychopath statute often came on the heels of a highly publicized sexual offense, so too did repeal often follow from a similar offense committed by an individual who had been "treated" and released from a sexual psychopath facility.⁶⁸ The popular perception was that the statutes allowed violent criminals to avoid stiff prison sentences by spending relatively short periods of detention in ineffective treatment environments.⁶⁹ And just as the enactment of the statutes had involved the unlikely coalition of both the punishment minded and the treatment minded, the repeal of

63. See *supra* notes 30-31 and accompanying text.

64. 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, 215 n.22 (1991).

65. Most of the revisions involved making the treatment voluntary for the offender. BRAKEL ET AL., *supra* note 43, at 216-17.

66. These factors have included the complexity and expense of the procedural requirements and litigation connected to the statutes, the unavailability or perceived ineffectiveness of treatment efforts, and concerns about the constitutional rights of offenders subjected to detention under the statutes. See BRAKEL ET AL., *supra* note 43, at 741, 743; Dix, *supra* note 45, at 185; Veneziano & Veneziano, *supra* note 5, at 216-17.

67. See Dix, *supra* note 45, at 185; Veneziano & Veneziano, *supra* note 5, at 217.

68. For example, the repeal movement in California was sparked by publicity surrounding several brutal murders committed by sex offenders who had been held under the statute and subsequently released. Prager, *supra* note 50, at 55-56. In Wisconsin, the highly publicized release of a serial sex offender, even without any evidence of reoffending, contributed significantly to the repeal of the statute. Marie T. Ransley, Comment, *Repeal of the Wisconsin Sex Crimes Act*, 1980 WIS. L. REV. 941, 953-54 (1980).

69. See Prager, *supra* note 50, at 50; Ransley, *supra* note 68, at 955.

the statutes involved a similarly unlikely coalition: mental health experts, who rejected the premises that constituted the underpinnings of the statutes;⁷⁰ civil libertarians, who were concerned about what they perceived as the extended and often arbitrary detention of individuals without any supportable basis;⁷¹ and the more retributively oriented, who were unsatisfied with the length of the resulting periods of detention.⁷² The coalition for repeal was so broad in Wisconsin in 1979, for example, that not a single witness came forward to speak in favor of retaining the statute, and the bill to repeal the statute was passed unanimously in the state legislature.⁷³

III. WASHINGTON'S SEXUALLY VIOLENT PREDATORS ACT

The passage of Washington's Sexually Violent Predators Act in the face of this historical context merits particular attention due to the striking impact it has had on subsequent legislative activity in the states. In the last two years, three states have enacted sexual psychopath legislation that very closely tracks the SVPA, and two others have modified previously existing statutes based on the Washington model to facilitate the detention and civil commitment of sexual offenders.⁷⁴ Similarly, because the Washington Supreme Court's decision upholding the constitutionality of the SVPA is the only state supreme court decision concerning a new sexual psychopath statute, that decision merits equal attention. The following section of this article analyzes the passage, design, and criticisms of the SVPA, concluding with a discussion of the Washington Supreme Court's decision upholding the statute.

A. *Historical Origins of the Act*

Washington's SVPA, like most of its predecessor sexual psychopath statutes, was enacted on the heels of a very highly publicized and particularly gruesome sexual offense. On May 20, 1989, Earl Shriner, a convicted sex offender who had recently finished a ten-year sentence for kidnapping and assaulting two teenage girls, raped, stabbed, and sexually mutilated a seven-year-old boy in Tacoma, Washington.⁷⁵ The

70. See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 16, at 853-860.

71. See, e.g., Veneziano & Veneziano, *supra* note 5, at 216-17.

72. See, e.g., Prager, *supra* note 50, at 50.

73. Ransley, *supra* note 68, at 949-50 n.66. This lack of dissent renders Wisconsin's passage of a new sexual psychopath statute in 1994 particularly striking.

74. See *infra* notes 171-77 and accompanying text.

75. See David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET

public outcry was extraordinary and the political response swift, with the formation of a Governor's Task Force on Community Protection within less than a month.⁷⁶ Among other things, the Task Force was charged with establishing "legal criteria for [the] confin[ement]" of "individuals who have committed or who have threatened to commit violent criminal acts."⁷⁷ Professor David Boerner, a Task Force member and the chief drafter of the Act, has indicated that, due to the prevailing political climate, any reform proposal that the Task Force considered was ultimately measured against one fundamental question: "If the reform had been in effect [at the time of Shriner's release], would it have given the state the power to act to prevent [him] from committing future violent acts?"⁷⁸ As a result of that orientation, while proposals to increase criminal sentences for sex offenders and for repeat sex offenders were considered and adopted,⁷⁹ the Task Force searched for a solution that could be applied retroactively to sex offenders who were already in the system. Because the constitutional prohibition against ex post facto statutes prevents the retroactive application of criminal sentences, the Task Force was forced to seek a "civil" solution. Consequently, the Task Force moved in the direction of a return to some form of sexual psychopath statute.⁸⁰

In the end, the Task Force included the Sexually Violent Predators Act among its recommendations to the legislature.⁸¹ In recommending the Act, the Task Force emphasized that it was intended to apply to individuals who were not mentally ill, and, therefore, could not

SOUND L. REV. 525, 525 (1992); Gleb, *supra* note 64, at 213; Lisa T. Greenlees, *Washington State's Sexually Violent Predators Act: Model or Mistake?*, 29 AM. CRIM. L. REV. 107, 107 (1991).

76. For a detailed account of the public outcry and the formation of the Task Force, see Boerner, *supra* note 75, at 526-39.

77. *Id.* at 538.

78. *Id.* at 550. It is worth noting here that the proposal I advance in part V of this article would not pass this test. In my view, this test requires the creation of a retroactive criminal statute. While it seems probable that the United States Supreme Court would find otherwise, see *infra* part IV.B, in my opinion the application of this sort of commitment statute to a previously convicted offender would violate the constitutional prohibition against ex post facto laws.

79. See Boerner, *supra* note 75, at 572-73 n.149.

80. *Id.* at 572. The Task Force also considered modifying the state's civil commitment system, but rejected the idea because it felt that it "was working relatively well in accomplishing its purpose and did not want to compromise it by giving it tasks that it was not suited for." *Id.* at 550.

81. See GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, DEP'T OF SOCIAL AND HEALTH SERVICES, FINAL REPORT pt. III, at 74-79 (1989) [hereinafter TASK FORCE REPORT].

be detained under Washington's civil commitment scheme.⁸² The Task Force acknowledged many of the problems that had plagued previous sexual psychopath statutes, such as the unreliability of predictions of future dangerousness⁸³ and the lack of any documented and widely accepted treatment success,⁸⁴ but asserted that progress was possible in those areas.⁸⁵ The legislature unanimously adopted the Task Force's proposals with only minor modifications,⁸⁶ and the Act became effective on July 1, 1990.⁸⁷

B. Design of the Act

The most striking feature that distinguishes the Sexually Violent Predators Act from all of the sexual psychopath statutes that preceded it is that it explicitly provides for detention in addition to, not in lieu of, a criminal sentence.⁸⁸ While other sexual psychopath statutes had allowed for the possibility of lifetime detention, those statutes had claimed to disavow any interest in criminal punishment.⁸⁹ The Washington statute, placing first priority on punishing an offender, expresses

82. See *id.* pt. II, at 21.

83. See *id.* pt. IV, at 4.

84. *Id.* pt. IV, at 6.

85. *Id.* pt. IV, at 4, 6-7.

86. See Boerner, *supra* note 75, at 574-75; Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809, 816 (1992). One of the more significant legislative modifications involved the allocation of the burden of proof at a release hearing held without the endorsement of the treatment officials. While the Task Force would have required the detainee to prove that he was "safe" and would "no longer commit predatory acts of sexual violence" if released, TASK FORCE REPORT, *supra* note 81, pt. II, at 22, the legislature placed the burden on the state to prove beyond a reasonable doubt that the detainee was "not safe" and would be "likely to engage in predatory acts of sexual violence" if released. WASH. REV. CODE ANN. § 71.09.090(1) (West 1995) (amended 1995). Scheingold, Olson and Pershing have commented that they "find it extraordinary" that the statute could "make it through the legislature virtually without opposition" given that it ran contrary to the reforms the same legislature enacted just a few years earlier when it abolished indeterminate sentencing and the state's sexual psychopath statute. Scheingold et al., *supra*, at 818 n.37.

87. Gleb, *supra* note 64, at 214 (citing Act of Jan. 24, 1990, ch. 3, 1990 Wash. Laws 101-1406).

88. See John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 656 (1992); Greenlees, *supra* note 75, at 110.

89. See, e.g., Allen v. Illinois, 478 U.S. 364, 370 (1986) (finding that the Illinois legislature, in passing the Illinois Sexually Dangerous Persons Act, ILL. REV. STAT. ch. 38, paras. 105-1.01 to 105-12 (1985) (current version at 725 ILL. COMP. STAT. ANN. 205/0.01 to 205/12 (Michie 1993)), completely disavowed any interest in punishment).

an interest in the possibility of treatment and rehabilitation only after a full criminal punishment has been meted out.⁹⁰

The Sexually Violent Predators Act applies by its terms to "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."⁹¹ The statute specifies particular offenses that qualify as "sexually violent,"⁹² and further narrows the applicability of the statute by defining "predatory acts" as acts "directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization."⁹³ Under the statute, either a local prosecutor or the attorney general may file a petition alleging that an individual is a sexually violent predator.⁹⁴ If the court hearing the petition finds that probable cause exists to believe that the individual meets the statutory criteria, the individual is then taken into custody for professional evaluation.⁹⁵ Within forty-five days of the filing of the petition, the court must hold a trial to determine whether or not the individual is a "sexually violent predator."⁹⁶

At the trial, the detainee is entitled to some specified procedural protections, including the right to the assistance of counsel, the right to

90. See La Fond, *supra* note 88, at 695-96; Brief of Amicus Curiae for the American Civil Liberties Union of Washington at 30, *In re Young*, 857 P.2d 989 (Wash. 1993) (No. 57837-1) [hereinafter ACLU Brief]. In Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992), the author, a renowned psychiatrist and professor, has provided a cogent explanation for some of the problems caused by a delay in treatment until after a period of incarceration. Significant delays before treatment can allow cognitive distortions and defenses to become "further consolidated," making it "more difficult for the offender to truly accept responsibility for his earlier behavior." *Id.* at 617. In addition, delays can allow for some loss of memory of offenses that are often poorly recalled in the best of circumstances because the offender was intoxicated at the time of the offense. *Id.* These and other problems are exaggerated when the delay involves time spent in prison. "Most maximum security correctional facilities are violent, threatening, antisocial milieus in which an inmate is socialized to avoid disclosing personal weakness or vulnerability, avoid taking responsibility for his crime, or [avoid] reveal[ing] himself to be a sex offender for fear of retaliation." *Id.*

91. WASH. REV. CODE ANN. § 71.09.020(1) (West 1995) (amended 1995).

92. *Id.* § 71.09.020(4). The enumerated offenses include various categories of rape, indecent liberties either by forcible compulsion or against a child under age fourteen, and child molestation. *Id.* In addition, certain serious felony offenses can be included if determined to have been "sexually motivated." *Id.*

93. *Id.* § 71.09.020(3). It is interesting to note that this definition excludes family members, "who have been demonstrated to be the predominant offenders in child molestation cases." Scheingold et al., *supra* note 86, at 815.

94. WASH. REV. CODE ANN. § 71.09.030 (West 1995) (amended 1995).

95. *Id.* § 71.09.040.

96. *Id.* § 71.09.050.

a jury trial, the right to retain an expert witness (at state expense if the individual is indigent), and the right to conduct an independent evaluation or to testify at the trial.⁹⁷ The statute says nothing with respect to certain other procedural issues, such as whether hearsay evidence will be admissible at such a trial, whether the individual has the right to confront and cross-examine witnesses, and whether the individual has the right to remain silent at any stage of the proceedings, including the examination and the trial. The state has the burden of proving beyond a reasonable doubt that the individual is a "sexually violent predator."⁹⁸

If found to be a sexually violent predator, the individual is "committed to the custody of the department of social and health services in a secure facility 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."⁹⁹ Once detained under the statute, an individual is evaluated on a yearly basis,¹⁰⁰ after which a "show cause hearing" will be held unless the detainee affirmatively waives it.¹⁰¹ The purpose of that hearing, at which the detainee will be represented by counsel but has no right to be present, is for the court to "determine [whether] probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and is not likely to engage in predatory acts of sexual violence if discharged."¹⁰² A trial, at which the detainee has the right to be present, the right to retain an expert witness, and the right to a jury, will be held only if the court finds such probable cause or if the Department of Social and Health Services authorizes a petition for the detainee's release.¹⁰³ At the trial, the state has the burden of proving "beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if discharged is likely to engage in predatory acts of sexual violence."¹⁰⁴ Absent a successful verdict at a trial, a detainee will never be released from custody.¹⁰⁵

97. *Id.*

98. *Id.* § 71.09.060(1).

99. *Id.*

100. *Id.* § 71.09.070.

101. *Id.* § 71.09.090(2).

102. *Id.*

103. *Id.* § 71.09.090(1)-(2).

104. *Id.* § 71.09.090(1).

105. *See id.* § 71.09.060.

C. Criticism of the Act

Like every sexual psychopath statute that preceded it, Washington's SVPA has engendered a great deal of criticism. Perhaps the most consistent criticism of the statute is that it describes a diagnostic category that has no clinical significance and then bases a commitment scheme on that category despite the fact that the category is comprised of individuals who may share no more than one attribute, who are not mentally ill, and who, for the most part, are not amenable to any known form of treatment.¹⁰⁸ As a result, the SVPA has been described as "an exercise in lifetime preventive detention disguised as involuntary psychiatric treatment."¹⁰⁷

The terms and concepts used in the SVPA to determine its applicability, it is argued, are just as troubling as those of its ancestors, providing prosecutors and courts with virtually limitless discretion to detain an individual once it has been established that the person committed a sexually violent crime at some point in the past.¹⁰⁸ Although the defenders of the statute point out that it requires a finding of a sexually violent act in the past, of future dangerousness, and of a particular mental aberration, critics claim that the reality is that the last of those three elements is illusory. The term "personality disorder," it is said, is so broad that it includes virtually everybody to some degree and almost certainly every sex offender.¹⁰⁹ As a result, requiring a finding that an offender has a "personality disorder" does little to restrict the applicability of the statute. But even more troubling is the use of the term "mental abnormality," which, unlike "personality disorder," is not even a medically recognized diagnostic term.¹¹⁰ The statutory definition of "mental abnormality" is essentially any "condition" that "pre-disposes the person to the commission of criminal sexual acts."¹¹¹ Thus,

106. See generally ACLU Brief, *supra* note 90; Brief of Amicus Curiae for the Washington State Psychiatric Association, *In re Young*, 857 P.2d 989 (Wash. 1993) (No. 57837-1) [hereinafter WSPA Brief]; La Fond, *supra* note 88; Wettstein, *supra* note 90; 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).

107. ACLU Brief, *supra* note 90, at 30-31.

108. See, e.g., ACLU Brief, *supra* note 90, at 43; Greenlees, *supra* note 75, at 127-28.

109. See WSPA Brief, *supra* note 106, at 8; Greenlees, *supra* note 75, at 118.

110. See Supplemental Brief of Amicus Curiae for the American Civil Liberties Union of Washington at 9, *In re Young*, 857 P.2d 989 (Wash. 1993) (No. 57837-1) [hereinafter ACLU Supp. Brief]; WSPA Brief, *supra* note 106, at 7; Wettstein, *supra* note 90, at 601; Greenlees, *supra* note 75, at 114.

111. WASH. REV. CODE ANN. § 71.09.020(2) (West 1995) (amended 1995). The ACLU described the statutory definition of mental abnormality as "simply a shorthand substitute for

the term could mean nothing more than that the evaluator has predicted that the offender is "likely to engage in predatory acts of sexual violence," rendering any finding related to "mental abnormality" completely circular;¹¹² consequently, a prediction of future dangerousness combined with proof of a sexually violent act at any point in the past could be sufficient to fully satisfy the legal definition of a "sexually violent predator."¹¹³

The finding of future dangerousness, of course, continues to be highly problematic. Not only are such predictions notoriously inaccurate in the best of circumstances, but the statute also leaves unspecified exactly what is being predicted. Critics maintain that, without any statutory guidance on what the term "likely" means, a prediction of future dangerousness could mean anything from just slightly more probable than not to an almost absolute certainty.¹¹⁴ Since no time frame is provided in the statute, the prediction could encompass only the reasonably foreseeable future or the rest of the offender's life; the longer the predictive time frame, the less accurate any prediction can be.¹¹⁵

Similarly, critics claim that the release provisions built into the Washington statute have significant definitional and operative problems. Absent a petition for release that has been approved by the Department of Social and Health Services, a committed offender may be released only upon a court's finding of probable cause to believe that "the person's condition has so changed that he or she is safe to be at large."¹¹⁶ In addition to the significant problems connected to the fact that the term "safe" is left completely undefined, there is the troubling question of whether a "personality disorder" or "mental abnormality" can ever be "changed." Dr. Vernon Quinsey, a renowned expert re-

describing dangerousness." ACLU Brief, *supra* note 90, at 25.

112. See James D. Reardon, *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 852 (1992); see also Wettstein, *supra* note 90, at 602.

113. Even these two remaining factors can often dissolve into just one: whether the individual has a background of committing sex offenses. One psychiatrist has described the logic of the statute in the following terms: "If you commit more than one sex offense, the likelihood of doing it again goes up; therefore, you *must* have a mental abnormality or personality disorder that makes you likely to commit these monstrous crimes." Reardon, *supra* note 112, at 852; see also John Q. La Fond, *Washington's Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET SOUND L. REV. 755, 764 (1992) (arguing that the "definitional strategy [of the statute] is a pure tautology, conflating both diagnosis and prediction with a single incident of criminal behavior").

114. See Greenlees, *supra* note 75, at 115.

115. See Wettstein, *supra* note 90, at 607.

116. WASH. REV. CODE ANN. § 71.09.090(2) (West 1995) (amended 1995).

tained by the Washington State Institute for Public Policy to review the operation of the state's commitment center, points out that it is "entirely unclear how a personality disorder can be changed through treatment because most of the defining features of personality disorder diagnoses . . . are historical in nature."¹¹⁷ Given the widely acknowledged bias that mental health professionals have in the direction of overpredicting dangerousness,¹¹⁸ it is hard to imagine that a confined sex offender will ever be classified as "safe."¹¹⁹

Another significant criticism of the Washington statute is that its claimed interest in treatment and rehabilitation is disingenuous. At every turn, the drafters opted for detention at the expense of maximizing the potential for therapeutic success. Most obviously, the requirement that an offender serve out a full criminal sentence before he may become eligible for the treatment offered under the statute exacerbates a number of therapeutic problems, including resentment and anger. As Dr. Quinsey notes, the Washington statute is "not conducive to inspiring motivation for treatment" because the residents of the commitment center "perceive the law to be arbitrary and excessive. . . . It is, of course, very difficult to form a therapeutic alliance with an embittered clientele."¹²⁰ A long delay between the manifestation of some form of mental aberration and the effort to treat it also belies a bona fide interest in treatment, particularly because experts agree that prolonged incarceration before treatment is extremely countertherapeutic.¹²¹ Perhaps most importantly, the statute does not allow for consideration of the possibility of any less-restrictive form of treatment.¹²² Thus, a person who is deemed to be a sexually violent predator will be detained in a maximum-security facility, even if mental health professionals familiar with the individual feel that treatment could be most effective in a less-restrictive hospital setting or in an outpatient setting. Moreover, there is no provision for the employment of a strategy of graduated release, where an offender could be supervised in community settings

117. COMMUNITY PROTECTION RESEARCH PROJECT, WASHINGTON STATE INST. FOR PUB. POLICY, REVIEW OF SEXUAL PREDATOR PROGRAM app. at 4 (1992) [hereinafter REVIEW].

118. See *supra* note 49 and accompanying text.

119. See WSPA Brief, *supra* note 106, at 11-12; Beth K. Fujimoto, Comment, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 909 (1992); Greenlees, *supra* note 75, at 126.

120. REVIEW, *supra* note 117, app. at 4.

121. See *supra* note 90.

122. See Wettstein, *supra* note 90, at 622.

that more closely simulate complete release from the facility.¹²³ Nor is there any provision for aftercare upon release.¹²⁴ Rather, the release decision must be made "on an all-or-none basis using information gained entirely from a high security (and very artificial) environment."¹²⁵ Since the likelihood of reoffending is greatest at the point of release, largely due to the stress related to readjustment to life in the community, the absence of community supervision and aftercare dooms some offenders who might otherwise be slowly released to a lifetime of incarceration.¹²⁶ Dr. Quinsey refers to this design as a "fatal problem" with the statute.¹²⁷

D. Legal Challenge to the Act

On August 9, 1993, the Supreme Court of Washington issued an *en banc* opinion in *In re Young*¹²⁸ upholding the constitutionality of the Sexually Violent Predators Act. That case, decided by a six to three vote, was a consolidation of two matters in which individuals were committed after being found to be sexually violent predators. The court reviewed a variety of constitutional and evidentiary claims arising out of the two proceedings, ultimately concluding that, with some specific interpretations and modifications, the statute passed constitutional muster.

The most significant of the appellants' claims from the court's perspective was that the statute violated substantive due process because it allowed for indefinite detention without meeting the standards required for civil commitment or other legal forms of preventive detention.¹²⁹ Because the court viewed the statute as a civil commitment scheme, it ultimately distinguished any cases presented on the issue of preventive detention.¹³⁰ In analyzing the SVPA as a civil commitment statute, the court agreed with the appellants' claim that the statute should be subjected to strict scrutiny because it impinged on an individual's "liberty

123. *Id.*

124. *Id.*

125. REVIEW, *supra* note 117, app. at 5.

126. *Id.*

127. *Id.*

128. 857 P.2d 989 (Wash. 1993).

129. *Id.*

130. In particular, the court noted that *United States v. Salerno*, 481 U.S. 739 (1987), which dealt with pretrial preventive detention, was inapposite because the Washington statute "f[ell] comfortably within the 'civil commitment' category." *Young*, 857 P.2d at 1007 (quoting *Foucha v. Louisiana*, 504 U.S. 71 (1992)).

interest,"¹³¹ which the court recognized as "fundamental."¹³² Having so found, the court noted that it was required to determine whether the statute "further[ed] compelling state interests"¹³³ and whether it was "narrowly drawn to serve those interests."¹³⁴ The first prong of the test was dispensed with rather quickly, as the court claimed that it was "irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions."¹³⁵ The second prong of the strict-scrutiny test, whether the statute was narrowly drawn, commanded a more extensive analysis.

The court noted that prior cases had imposed several requirements in determining whether a civil commitment statute was sufficiently narrowly drawn to satisfy the strict-scrutiny test of substantive due process. Several cases, most recently *Foucha v. Louisiana*,¹³⁶ had made it plain that a civil commitment could be justified only after a finding of both mental illness and dangerousness, and that neither finding, standing alone, could satisfy the requirements of due process.¹³⁷ The appellants in *Young* had argued that the term "mental abnormality" that was used in the statute did not describe a mental illness because it is not a clinically recognized diagnosis.¹³⁸ The appellants' position was further bolstered by the fact that the statute explicitly indicated that it was intended to apply only to individuals who "d[id] not have a mental disease or defect that render[ed] them appropriate for the existing voluntary treatment act."¹³⁹ Thus, any individual with a clinically cognizable mental illness seems to have been excluded from the provisions of the Washington statute. Nonetheless, the court dismissed the argument that only a clinically recognized diagnosis could satisfy the constitutionally required finding of mental illness, further noting that legislatively created and defined mental health concepts are commonplace in the law.¹⁴⁰ Moreover, the court asserted that the mere fact that there is an absence of accepted treatment modalities does not render an illness

131. *Young*, 857 P.2d at 1000.

132. *Id.* (citing *Salerno*, 481 U.S. at 750).

133. *Id.*

134. *Id.*

135. *Id.*

136. 504 U.S. 71 (1992).

137. *E.g., In re Young*, 857 P.2d 989, 1001-04 (Wash. 1993).

138. *Id.* at 1001 n.5.

139. WASH. REV. CODE ANN. § 71.09.010 (West 1995) (amended 1995).

140. *In re Young*, 857 P.2d at 1001 & n.5.

not an illness.¹⁴¹ Consequently, the court held that the finding of mental illness required by due process was present in the Washington statute.¹⁴²

The court next addressed the due process requirement of a finding of dangerousness. Citing a previous decision in which the Supreme Court of Washington had held that predictions of dangerousness did not per se violate due process,¹⁴³ the court indicated that the statute was clearly drawn to apply only to dangerous offenders.¹⁴⁴ Deference to that same prior decision was a bit more problematic in another area, however, in that it had found that evidence of a "recent overt act" was required in order to civilly commit an individual consistently with due process.¹⁴⁵ Noting that it "construe[s] statutes to render them constitutional,"¹⁴⁶ the court imposed a "recent overt act" requirement when an individual has been released into the community, but not when an individual has been incarcerated.¹⁴⁷ With that caveat, the court held that the statute satisfied the requirements of due process.¹⁴⁸

The other substantial claim that the court addressed was that the statute violated procedural due process. The appellants and amici curiae raised a number of procedural concerns in their briefs,¹⁴⁹ most of which the court analyzed by comparing the SVPA with the existing civil commitment scheme and applying an equal protection analysis. The court began by noting that equal protection "does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made."¹⁵⁰ Finding that sexually violent predators are "generally considered more dangerous to others than the mentally ill"¹⁵¹ and that "[t]reatment methods are . . . markedly different for

141. *Id.* at 1003.

142. *Id.* at 1004.

143. *Id.* at 1004 n.8 (citing *In re Harris*, 654 P.2d 109, 111 (Wash. 1982)).

144. *Id.* at 1003.

145. *In re Harris*, 654 P.2d at 113.

146. *In re Young*, 857 P.2d at 1009.

147. *Id.* Interestingly, this particular holding required the reversal of one of the two cases being considered, in which the appellant had been released from custody for over four months without committing any further offense. *Id.* The other appellant in the case had never obtained release. *Id.* at 994. For those in his situation, the court indicated that requiring evidence of a recent overt act "would create a standard which would be impossible to meet." *Id.* at 1008.

148. *Id.* at 1009.

149. *See id.* at 1009-15.

150. *Id.* at 1011 (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966)).

151. *Id.* at 1010.

the two populations,"¹⁵² the court indicated that, as a general matter, differences in the two statutory schemes might be justified.¹⁵³ In most areas that it went on to review, however, the court held that the differences were *not* justified. As a result, the court essentially rewrote certain parts of the statute in order to make the statute conform to the requirements of equal protection and due process.¹⁵⁴ In the name of equal protection, the court required that a tribunal hearing a sexually violent predator petition consider less-restrictive alternatives before ordering confinement.¹⁵⁵ Noting that the state "offer[ed] no justification" for considering less-restrictive alternatives under the civil commitment statute and not under the SVPA,¹⁵⁶ the court held that equal protection required such consideration.¹⁵⁷

In one last ruling on an equal protection issue, the court did accept one difference between the SVPA and Washington's civil commitment statute. While the civil commitment statute provides potential committees with a right to remain silent,¹⁵⁸ the SVPA does not. The court found that "sexually violent predators are not similarly situated to the mentally ill in regard to the treatment methods employed, or the information necessary to ensure that they receive proper diagnosis and treatment."¹⁵⁹ Because "[t]he problems associated with the treatment of sex offenders are well documented"¹⁶⁰ and because "[t]he mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent,"¹⁶¹ the court found that the "coop-

152. *Id.*

153. *Id.* at 1010-11.

154. For example, because the court held that one who is alleged to be a sexually violent predator "is entitled to the same opportunity to appear before the court to contest detention" as any other civil committee, the provision allowing for the detention of a sex offender for a forty-five day evaluation period based only on an ex parte court proceeding was struck down; in its place, the court required that detainees be provided with a hearing within seventy-two hours of the initial detention. *In re Young*, 857 P.2d at 1011. The dissenting opinion in the case, signed by three justices, was highly critical of the majority for several instances in which it "read[] in requirements not included by the Legislature," *id.* at 1019, and engaged in "judicial rewriting of the Statute," *id.* at 1022. The dissent called this practice by the majority "unprincipled decisionmaking at its worst." *Id.*

155. *Id.* at 1012.

156. *Id.* Common sense would seem to support the appellants' argument on this point that the only true justification for this omission was the lack of any serious interest in treatment.

157. *In re Young*, 857 P.2d at 1012. This holding required a remand of the remaining appellant's case, in that no such consideration was given before he was ordered confined. *Id.*

158. See WASH. REV. CODE ANN. § 71.05.200(1)(c) (West 1992).

159. *In re Young*, 857 P.2d at 1014.

160. *Id.*

161. *Id.*

eration [of detainees under the statute] with the diagnosis and treatment procedures is essential."¹⁶²

Several other holdings were integral to the determination of the constitutionality of the statute. The court held that the statute was civil in both design and effect, thereby eliminating any claims that it violated *ex post facto* or double jeopardy protections.¹⁶³ The court rejected the appellants' argument that the statute was unconstitutionally vague, finding "[a]mple standards . . . present to guide the exercise of discretion and to provide notice to potential detainees of prohibited conduct."¹⁶⁴ The court read the requirement of proof beyond a reasonable doubt as an indication that the legislature intended to require jury unanimity in a sexually violent predator proceeding, thereby imposing that requirement on all future proceedings.¹⁶⁵

Three members of the court wrote a vigorous dissent to the court's majority opinion. At the heart of the dissent was the rejection of the notion that a legislature could create and use for civil commitment purposes a classification that has no correlation to any medically recognized diagnosis.¹⁶⁶ The dissent maintained that such an approach raised the specter of "an Orwellian 'dangerousness court' " in which any unpopular attribute could be labeled a mental illness and any individual deemed dangerous could be incarcerated.¹⁶⁷ The dissenters deemed the statute "a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution."¹⁶⁸

162. *Id.*

163. *Id.* at 996-1000.

164. *Id.* at 1013.

165. *Id.* at 1012.

166. *See id.* at 1020-21.

167. *Id.* at 1019.

168. *Id.* In establishing its contention that the categories created in the statute are not legitimate categories of mental illness sufficient to satisfy the requirements of due process, the dissent focused on three main points. First, the dissent criticized the categories themselves, pointing out that a diagnosis of a "mental abnormality" can only be derived in a circular fashion and has no clinically recognized significance, *id.* at 1021, and that a diagnosis of a "personality disorder," while clinically meaningful, cannot be connected causally to sexually violent behavior, as required in the statute, except through "speculation or meaningless circularity," *id.* (quoting Wettstein, *supra* note 90, at 603). Second, the dissent noted the explicit indication in the statute that it was intended to apply to a group of people who are *not* mentally ill. *Id.* at 1020 (citing WASH. REV. CODE ANN. § 71.09.010 (West 1992)). And third, the dissent noted in rather scathing terms the obvious inconsistency in the language used in the majority opinion; after holding that a finding that a detainee fit one of the categories in the statute would be sufficient to constitute a finding of mental illness, the majority went on to discuss ways in which sexually violent predators differ from the "mentally ill." *Id.* at 1021 n.2.

IV. THE CURRENT STATUS OF SEXUAL PSYCHOPATH LEGISLATION

Several factors lead to the inevitable conclusion that more and more states will continue to pass new versions of sexual psychopath legislation and that courts will continue to uphold their constitutionality. Legislative activity since the passage of the Washington statute provides the best evidence that states will pass this sort of legislation and that they will look toward the Washington statute for guidance in doing so. Moreover, the passage of this kind of statute seems consistent with a larger societal trend, both in legal decisions and in scholarly writings, toward a greater acceptance of predictive preventive detention. While the statutes that have followed Washington's have yet to be subjected to full judicial scrutiny, several of them are modeled on Washington's statute. Thus, it seems safe to assume that courts will look toward *In re Young* for guidance in ruling on those statutes.¹⁶⁹ Prior United States Supreme Court rulings on sexual psychopath statutes, most recently *Allen v. Illinois*,¹⁷⁰ indicate that such statutes, when challenged, will be upheld constitutionally.

A. The Emergence of New Sexual Psychopath Statutes

Since the passage of Washington's Sexually Violent Predators Act in 1990, five other states have followed suit, enacting legislation very similar to and, in several cases, modeled directly upon the Washington statute. In the past two years, Wisconsin,¹⁷¹ Kansas,¹⁷² and Iowa¹⁷³ have each enacted sexual psychopath statutes that track the language of the Washington act very closely. In 1994, after a highly publicized case in which a young girl was reportedly sexually assaulted and killed

169. The only significant recent state decision concerning the constitutionality of a sexual psychopath statute, *In re Blodgett*, 510 N.W.2d 910 (Minn.), *cert. denied*, 115 S. Ct. 146 (1994), cited *In re Young* with approval. In that case, the Minnesota Supreme Court upheld Minnesota's older sexual psychopath statute in the face of a constitutional challenge based on the United States Supreme Court's holding in *Foucha v. Louisiana*, 504 U.S. 71 (1992). *In re Blodgett*, 510 N.W.2d at 916.

170. 478 U.S. 364 (1986).

171. WIS. STAT. ANN. §§ 980.01-980.13 (West Supp. 1994). As noted earlier, see *supra* note 73 and accompanying text, Wisconsin's passage of a sexual psychopath statute is particularly striking in light of the fact that the same state's legislature had unanimously voted to repeal the prior sexual psychopath statute fifteen years earlier. Like the situation in Washington, the facts in Wisconsin show just how far the pendulum can swing on an issue that is this politically and emotionally charged.

172. KAN. STAT. ANN. §§ 59-29a01-a15 (1994).

173. IOWA CODE §§ 709C.1-709C.10 (Supp. 1995).

by a previously convicted sex offender,¹⁷⁴ New Jersey amended its civil commitment statute to allow for the commitment of repeat sexual offenders.¹⁷⁵ And in response to two 1994 Minnesota Supreme Court decisions that ordered the release of convicted sex offenders,¹⁷⁶ the Minnesota legislature unanimously passed several revisions of its sexual psychopath statute, making it much easier to commit offenders.¹⁷⁷ As many as eleven other states currently have similar legislation pending.¹⁷⁸

The emergence of this new form of sexual psychopath legislation is consistent with recent thinking about the use of criminal sentencing for the purpose of incapacitating potential future criminal offenders. In the 1960s and 1970s, much of the scholarly work on criminal sentencing focused on the use of sentencing as a form of general deterrent or as a means to rehabilitate a criminal offender.¹⁷⁹ By the 1980s, both criminologists and the general public began to feel that sentencing for those purposes had proved to be a failure.¹⁸⁰ From the criminological point of view, the evidence failed to support either the efficacy of the theory of deterrence or the usefulness of any significant efforts at rehabilitation; from the mass public's point of view, the crime problem was spiraling out of control and the efforts to contain it were not working.¹⁸¹ As the public began to cry out for longer sentences for convicted criminals, criminologists began to focus on the retributive and incapacitative aspects of criminal punishment, abandoning much serious discussion of rehabilitation and deterrence.¹⁸² By the early 1980s, even many of those criminologists who had previously expressed vigorous opposition to the notion of incapacitation as a justification for incarceration eventually came to embrace the use of incapacitation as part of an overall criminal sentencing strategy.¹⁸³

174. See Jerry Gray, *Sex Offender Legislation Passes the Senate*, N.Y. TIMES, Oct. 4, 1994, at B6.

175. N.J. REV. STAT. § 2C:47-3 (Supp. 1995).

176. See *In re Rickmeyer*, 519 N.W.2d 188 (Minn. 1994); *In re Linehan*, 518 N.W.2d 609 (Minn. 1994).

177. MINN. STAT. §§ 253B.02, 253B.185 (Supp. 1995).

178. Rogers Worthington, *Legal Dilemma Over Sexual Predators: Paroling Potentially Dangerous Offenders Challenges System*, CHI. TRIB., Sept. 11, 1994, News Section, at 6.

179. See, e.g., NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975).

180. See La Fond, *supra* note 88, at 663-65.

181. *Id.*

182. *Id.*

183. A notable example of this phenomenon is Norval Morris. In his work *The Future Of*

As part of the movement toward greater use of incapacitation, a significant body of literature emerged in the early 1980s on the use of "selective incapacitation."¹⁸⁴ That literature argued that the crime reduction capabilities of incarceration could be maximized by focusing the use of incarceration on a select group of criminals who have been identified as particularly recidivistic.¹⁸⁵ While incapacitation had traditionally been recognized as an element of criminal sentencing,¹⁸⁶ the movement in the direction of selective incapacitation as a dominant motivation for sentencing constituted a significant deviation from the

Imprisonment, the noted criminologist stridently rejected the use of incapacitation as a legitimate part of criminal sentencing, noting that the mass of literature on the subject had proved that our ability to predict long term future violence is very inexact. See MORRIS, *supra* note 179, at 62-73. He stated: "Even when a high risk group of convicted criminals is selected, and those carefully predicted as dangerous are detained, for every three so incarcerated there is only one who would in fact commit serious assaultive crime if all three were released." *Id.* at 72. Morris warned of "the political danger" of accepting dangerousness as a justification for imprisonment, arguing that "the punitively minded will have no difficulty in classifying [as dangerous] virtually all who currently find their miserable ways to prison and, in addition, many offenders who are currently sentenced to probation or other community-based treatments." *Id.* Moreover, Morris maintained that the use of predictions of dangerousness as a justification for imprisonment or prolonged sentences would inevitably lead to overpredictions of dangerousness due to political pressure. *Id.* at 68.

By 1985, however, Morris had modified his views, arguing instead for the use of selective incapacitation through the use of predictions of future dangerousness. In *Predictions of Dangerousness*, 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1 (1985), Norval Morris and Marc Miller set out a theory of criminal punishment that allowed for the use of predictive preventive detention, but only within the confines of the range of deserved punishment. Morris and Miller maintained that "there is a range of just punishments for a given offense," and that we as a society "lack the moral calipers to say with precision of a given punishment, 'That was a just punishment.' All we can with precision say is: 'As we know our community and its values, that does not seem an unjust punishment.'" *Id.* at 37. Using that contention as a premise, they argued for a system that would allow for the use of a prediction of future dangerousness to enhance a sentence within the range of "not . . . unjust punishment[s]." *Id.* It is essentially that system that serves as the premise for the model statute suggested by this article.

184. See, e.g., PETER W. GREENWOOD & A. ABRAHAMSE, SELECTIVE INCAPACITATION (1982); Jacqueline Cohen, *Selective Incapacitation: An Assessment*, 1984 U. ILL. L. REV. 253 (1984); Kenneth R. Feinberg, *Selective Incapacitation and the Effort to Improve the Fairness of Existing Sentencing Practices*, 12 N.Y.U. REV. L. & SOC. CHANGE 53 (1983-84); Lee S. Pershan, Note, *Selective Incapacitation and the Justifications for Imprisonment*, 12 N.Y.U. REV. L. & SOC. CHANGE 385 (1983-84); Andrew von Hirsch & Don M. Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE 11 (1983-84); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511 (1982).

185. See DEAN J. CHAMPION, MEASURING OFFENDER RISK: A CRIMINAL JUSTICE SOURCEBOOK 78 (1994). See generally GREENWOOD & ABRAHAMSE, *supra* note 184; Feinberg, *supra* note 184.

186. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 22-27 (2d ed. 1986).

more traditional notion that a criminal sentence should be designed to "fit the crime" rather than to promote a public policy end. By the 1990s, incapacitation had emerged as "the principal justification for imprisonment in American criminal justice."¹⁸⁷

B. The Constitutional Viability of New Sexual Psychopath Statutes

In 1986, the United States Supreme Court in *Allen v. Illinois* upheld the constitutionality of the Illinois Sexually Dangerous Persons Act, which allowed for the indefinite detention of persons found by a court to be "sexually dangerous."¹⁸⁸ Finding that the statute was civil, not criminal, in nature, the Court held that those subject to detention could not seek protection from the Fifth Amendment's guarantee against compulsory self-incrimination.¹⁸⁹ Noting that a state's labeling of a statute as civil, while important to the analysis, "is not always dispositive,"¹⁹⁰ the Court found that the petitioner had not satisfied his burden of "provid[ing] the 'clearest proof' that 'the statutory scheme [is] so punitive either in purpose or in effect as to negate [the State's] intention' that the proceeding be civil"¹⁹¹ The Court found that the act was civil in nature because the State had "disavowed any interest in punishment"¹⁹² and because the act did not "appear to promote" what the Court described as " 'the traditional aims of punishment—retribution and deterrence.' "¹⁹³

A vigorous dissent picked up on a significant analytical problem with the majority's reasoning: the Court's exclusion of rehabilitation and incapacitation from its description of "the traditional aims of punishment."¹⁹⁴ The dissent noted that, following the majority's analysis, a State could declare that its goals in an ordinary criminal statute were "treatment" and "rehabilitation," thereby rendering all proceedings civil in nature.¹⁹⁵ Under that analysis, the dissent argued,

nothing would prevent a State from creating an entire corpus of "dangerous per-

187. FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 3 (1995).

188. 478 U.S. 364 (1986) (upholding ILL. REV. STAT. ch. 38, paras. 105-1.01 to 105-12 (1985) (current version at 725 ILL. COMP. STAT. ANN. 205/0.01 to 205/12 (Michie 1993))).

189. *Id.* at 374.

190. *Id.* at 369.

191. *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

192. *Id.* at 370.

193. *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

194. *Id.* at 380 (Stevens, J., dissenting).

195. *Id.*

son" statutes to shadow its criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and "criminal propensities," and constitutional protections for criminal defendants would be simply inapplicable. The goal would be "treatment"; the result would be evisceration of criminal law and its accompanying protections.¹⁹⁶

The majority opinion in *Allen* solidified the Court's holding in *Minnesota ex rel. Pearson v. Probate Court*, decided forty-six years earlier, in which the Court upheld a Minnesota sexual psychopath statute against a broad-based claim that the use of indefinite detention in that setting violated both due process and equal protection.¹⁹⁷ The statute at issue in *Pearson* simply applied the state's civil commitment laws to persons who were found to have a "psychopathic personality," which was defined as a

condition[] of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.¹⁹⁸

Finding that the class of individuals to whom the statute applied, as interpreted by state law, was neither too vague to satisfy due process nor without "any rational basis" in violation of equal protection, the Court upheld the statute.¹⁹⁹

The clear sense from the Supreme Court that sexual psychopath statutes could pass constitutional muster was thrown into some confusion by the Court's 1992 decision in *Foucha v. Louisiana*.²⁰⁰ There, the Court held that the continued detention of an insanity acquittee who was deemed to be dangerous but no longer mentally ill violated due process and equal protection. In so holding, the Court reiterated its holding in *Addington v. Texas*²⁰¹ that a civil commitment scheme, in order to survive constitutional scrutiny, must predicate commitment on a finding of both dangerousness *and* mental illness.

That confusion seems to have been short-lived, however, as the

196. *Id.*

197. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1946).

198. *Id.* at 272 (quoting MINN. STAT. ch. 369, § 1 (1939)).

199. *Id.* at 274-75. The Court noted that it would not reach a number of potential procedural objections to the statutory scheme because the case was litigated as a motion *in limine*, rendering those objections premature. *Id.* at 275-77.

200. 504 U.S. 71 (1992).

201. 441 U.S. 418 (1979).

Washington Supreme Court held in *In re Young*²⁰² that the statutory language used in the SVPA, "mental abnormality or personality disorder,"²⁰³ described a mental illness sufficient to satisfy constitutional requirements. In the only other case in which a state supreme court has heard a challenge to a sexual psychopath statute based on *Foucha*, the Minnesota Supreme Court similarly held in *In re Blodgett* that the term "psychopathic personality" was sufficient to describe a mental illness.²⁰⁴ The Supreme Court denied certiorari in that case, which upheld Minnesota's older sexual psychopath statute. While these cases are certainly not determinative on issues of federal constitutional law, *Young* in particular is likely to carry significant weight in the many jurisdictions that have or will have statutes modeled on the SVPA.

V. OUTLINE OF A PROPOSED SEXUAL PSYCHOPATH STATUTE

As noted above, sexual psychopath statutes have historically been the subject of a great deal of criticism, much of it quite well founded, from legal scholars and from the psychiatric community.²⁰⁵ Sexual psychopath statutes have often been used to justify lifetime detention for persons only believed to have committed sexual offenses, based on inappropriate or fictional psychiatric diagnoses and without any significant concern for the accuracy of the predictions of future behavior that the detention entailed as a predicate.²⁰⁶ As many have a period of detention that has no determinate limit, these statutes have disregarded any connection to the notions of proportionality and desert that have traditionally attached to criminal sentences.

Despite the apparent validity of these criticisms and their continued application to the new breed of sexual psychopath statutes, it seems highly probable that the trend toward the reenactment or greater use of sexual psychopath statutes will continue in an unabated fashion.²⁰⁷ It seems equally probable that these statutes will continue to survive constitutional scrutiny.²⁰⁸ Although sexual psychopath statutes, in my view, have been disingenuous and unjust and have often reflected poor public policy in the face of hysteria, it seems productive, in the

202. 857 P.2d 989 (Wash. 1993).

203. WASH. REV. CODE ANN. § 71.09.020(1) (West 1995).

204. 510 N.W.2d 910 (Minn.), cert. denied, 155 S. Ct. 146 (1994).

205. See *supra* part II.C.

206. See *supra* part II.C.

207. See *supra* part IV.A.

208. See *supra* part IV.B.

face of the inevitability of their proliferation, to think about whether a version of such a statute could be created that would constitute a useful contribution to the effort to control sex crimes recidivism.

A. Designing a Modern Sexual Psychopath Statute

A modern and well-designed version of a sexual psychopath statute would, first and foremost, abandon the fiction that the statute is designed primarily to provide "treatment" for the offender, and openly acknowledge that the statute is designed primarily to detain sex offenders for the purpose of incapacitation. Consequently, such a statute is more accurately viewed as criminal, not civil, in nature in that it imposes an enhanced criminal sentence. This classification of a sexual psychopath statute simply follows from the two primary conclusions reached by the Washington Task Force when it investigated the problem of sex crimes recidivism: that there is no evidence to suggest that sex offenders are inherently mentally ill any more or less often than any other type of criminal offender, and that there is no evidence to suggest that there is any viable treatment through which the vast majority of sex offenders can be "cured."²⁰⁹ Once these premises are acknowledged, as they were in Washington, any pretense that a sexual psychopath statute is really a form of civil commitment is revealed as purely disingenuous.

When viewed as an enhanced criminal sentence—a form of criminal punishment—it becomes clearer that the imposition of detention under such a statute, in order to be just, must be predicated on a criminal conviction for a sexually related offense. Statutes that have allowed the state to impose a period of detention without first having to prove the offending behavior have lent themselves to tremendous abuse at the hands of overly zealous prosecutors, allowing for the criminal sentencing of alleged sex offenders without the requirement of a criminal trial and conviction.²¹⁰

After the defendant is convicted, a sentence should initially be imposed to reflect the needs of society with respect to retribution and deterrence. If the state wishes to obtain an enhanced sentence for the purpose of incapacitation on the premise that the defendant is likely to reoffend, it should be required to prove to a jury at a separate hearing that there is a high probability that the defendant will commit a sexu-

209. See *supra* note 106 and accompanying text.

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

ally related offense in the near future. Expert witnesses called by the state should not be permitted to testify about "dangerousness" or about whether the defendant is "dangerous," as those terms have buried within them sets of unexplored premises and biases and the use of those terms obscures the true nature of what is being described. As there is no legitimate category of offenders who can fairly be described as "sexual psychopaths," all an expert witness can legitimately offer is an assessment of the probability of reoffense for that particular offender. Consequently, expert testimony should be limited to a discussion of the probability of the defendant's commission of one of a defined category of sexually related offenses within a specified time period in the future. The level of probability that needs to be proved in order to justify detention should be established legislatively, as the question of how much risk we are ready to bear in the name of a free society is a moral and political question that ought not be left to individual caprice.²¹¹

The state's expert testimony should be based on actuarial and statistical data, not on a clinical assessment of the defendant, as there is evidence that the use of such data will produce a more reliable and consistent prediction of the probability of future dangerousness than will a clinical assessment.²¹² As previously discussed, clinical assessments of sexual offenders are fraught with numerous and significant biases toward the massive overprediction of future dangerousness.²¹³ In addition, the reliance on clinical assessments allows for the masking of the bases underlying an assessment of dangerousness.²¹⁴ In reality, a clinical assessment is simply a form of inchoate statistical decision making;²¹⁵ bringing the underlying premises to the surface will only

211. In *The Clinical Prediction of Violent Behavior*, Professor Monahan takes a similar position, urging psychiatrists and psychologists to limit their role in offering clinical assessments to "providing an estimate of the probability of violent behavior," thereby "leaving to legislators or judges the decision as to whether preventative action should be triggered." MONAHAN, *supra* note 47, at 102. He argues that such behavior "forc[es] those in government to accept responsibility for difficult political decisions dealing with competing claims for freedom and safety." *Id.*; see also Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, TEX. L. REV. 1277, 1317 (1973).

212. Gordon C. Nagayama Hall, *Criminal Behavior as a Function of Clinical and Actuarial Variables in a Sexual Offender Population*, 56 J. CONSULTING & CLINICAL PSYCHOL. 773, 774-75 (1988); Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1424 (1979).

213. See *supra* note 49 and accompanying text.

214. MONAHAN, *supra* note 47, at 83; see also Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 151 (1984); Underwood, *supra* note 212, at 1429-30.

215. See Underwood, *supra* note 212, at 1423. Professor Underwood goes on to assert that there are real differences between clinical and statistical decision making, in that a clinical deci-

enhance the fact finder's ability to evaluate the validity of the prediction, while at the same time exposing and thereby limiting the use of many inappropriate criteria, such as race or socioeconomic status, for the prediction.

Because an enhanced sentence can result from such a hearing, the statute should provide all of the protections to which a criminal defendant is ordinarily entitled: the right to counsel, the right to remain silent,²¹⁶ the right to a trial by jury, the right to present witnesses, the right to confront the testimony against him or her, and a burden of proof at the level of beyond a reasonable doubt. In this respect, the post-conviction hearing should closely resemble the hearings involved in death penalty litigation, in which the issue at hand is future dangerousness and the result of a positive finding is an enhanced criminal sentence.²¹⁷

With respect to the potential duration of any detention authorized under the statute, the statute must, in order to be just, set strict parameters on the maximum sentencing enhancement permitted under the statute so that the enhanced sentences do not violate the principles of proportionality and desert. The state should delineate with respect to each criminal statute qualifying for the imposition of an enhanced sentence a maximum period of confinement. In some cases, lifetime imprisonment may be an appropriate maximum sentence, but the decision about whether a particular crime can justify a lifetime sentence should be made legislatively, not on an ad hoc basis. Sexual psychopath statutes that allow for indefinite detention regardless of the seriousness of the initial offense are patently unjust and fly in the face of our societal notions of the appropriate use of criminal punishment. If the initial offense is not sufficiently serious to merit a potential lifetime sentence, then it would be unjust to impose such a sentence upon a finding of a probability of reoffense.

In recognition that some sexual offenders, like other offenders, have psychiatric disorders in varying degrees, the statute should provide that those offenders committed under its provisions be entitled, but

sion maker is "free to respond to individual differences whose relevance was not anticipated." *Id.*

216. Professor Slobogin argues that "the strongest case for [applying the Fifth Amendment] can be made in the context of 'special track' sentencing when the state attempts to use an offender's statements to enhance her penalty beyond that normally prescribed for individuals convicted of the same offense." Slobogin, *supra* note 214, at 168-69. Since such a statute allows for "what is in effect a second penalty," he maintains that "the accusatorial model should apply." *Id.* at 169.

217. For a description of this type of litigation, see *Jurek v. Texas*, 428 U.S. 262 (1976).

not required, to receive psychiatric counseling and treatment.²¹⁸ More importantly, however, for those inmates who are interested in treatment specifically oriented toward addressing their sexually deviant behavior, such treatment should be made readily available from the outset of their incarceration, preferably in a nonprison setting.

The statute should provide for the possibility of release from detention during the time between the expiration of the defendant's initial criminal sentence and the expiration of the defendant's enhanced sentence. Allowing for the possibility of early release will increase a defendant's incentive to participate in and cooperate with whatever treatment modalities are available in the detention setting.²¹⁹ For those individuals who might be able to work toward controlling recidivistic behavior, it is vital to provide both an incentive and an opportunity for them to do so.²²⁰ Part of this process must involve the ability of the institution to provide limited and gradual release plans that will help integrate the defendant into society and that will monitor the defendant's continued likelihood of success at avoiding a return to sexual criminal behavior.²²¹ Decisions about early release should be placed into the hands of those operating the treatment aspect of the program, and a regular petition and review procedure should be established through which a defendant would be given the opportunity to rebut the presumption that he continues to pose a significant threat of reoffending in the near future.

B. The Value of a Sexual Psychopath Law

A sexual psychopath statute that openly acknowledges that it is criminal in nature and provides primarily for the enhancement of a criminal punishment based on a prediction of future sexual violence could have several advantages over the older and currently emerging versions of sexual psychopath statutes, as well as over the criminal sentencing practices currently in use with respect to sexual offenders.

1. Advantages over Other Sexual Psychopath Laws

One of the primary advantages of the proposed statute in compari-

218. Indeed, the denial of such treatment to *any* incarcerated criminal is both unwise and unjust.

219. See *supra* notes 120-27 and accompanying text.

220. See *supra* notes 120-27 and accompanying text.

221. See *supra* notes 120-27 and accompanying text.

son to other sexual psychopath statutes is that it is honest in its approach to the problem of sex crimes recidivism. Previous and current enactments have often claimed to emphasize treatment when they have in fact emphasized incapacitation, a form of criminal punishment. By resisting the temptation to create a false diagnostic category, this statute would avoid the fiction that the statute is aimed at addressing a form of mental illness rather than at addressing a form of criminal behavior. In large part, as discussed previously, the disingenuous nature of the most recent statutes appears to be a direct result of an effort to avoid *ex post facto* restrictions that prevent the retroactive enhancement of criminal sentences.²²²

Altering the nature of the determination that the jury is asked to make and placing limitations on allowable expert testimony at the hearing would further serve to enhance the honesty with which we as a society approach the problem at hand. Rather than allowing a judge or jury to hide behind deference to a psychiatric determination that a defendant is "dangerous" or a "sexual psychopath," often essentially meaningless or undefined terms,²²³ the proposed statute would ask a jury to decide only whether the state has established beyond a reasonable doubt a specified level of probability that the defendant will commit one of a designated category of sexually related offenses in some stated time period. The level of probability that would be required to justify an enhanced sentence would be determined by the legislature, not by the level of risk that a judge or jury happen to find acceptable, thereby enhancing both fairness and consistency in the application of the statute.

Limiting expert testimony to actuarial and statistical data, thereby eliminating any testimony regarding a clinical assessment of the defendant, will enhance the fairness of the proceedings in several respects. First, the available evidence suggests that actuarial predictions of future violent behavior are more accurate than clinical predictions.²²⁴ Second, the use of actuarial testimony will reduce the infusion into the predictive process of inappropriate factors, such as racial or socioeconomic characteristics.²²⁵ Third, the use of actuarial testimony will help to reduce the undue reliance that juries tend to place on what they

222. See *supra* note 78 and accompanying text.

223. See *supra* notes 42-45 and accompanying text.

224. See *supra* note 212 and accompanying text.

225. See *supra* notes 214-15 and accompanying text.

falsely believe to be the predictive expertise of mental health professionals.²²⁶

The requirement of a criminal conviction as a predicate for the use of the proposed statute would avoid the worst abuses of the older sexual psychopath statutes, in which the process was often used to circumvent the criminal justice system in situations in which a conviction was difficult or impossible.²²⁷ And the requirement of a full array of procedural protections, particularly including the right to remain silent, would similarly avoid the pitfalls of imposing an enhanced criminal sentence through the use of compelled testimony or without every available protection of the individual rights of the defendant. Subjecting the prediction at issue to an open adversarial proceeding becomes useful only when the defendant has a full and fair opportunity to challenge both the facts and the actuarial data upon which the prediction is predicated.

Perhaps most importantly, this statute would introduce notions of proportionality and desert into its functioning, again avoiding the worst abuses of the previous and current statutes by assuring that an individual receives a sentence no longer than might otherwise be deserved even in the absence of a prediction of future dangerousness. The prospect of lifetime detention for anything less than the most serious offenses would thereby be eliminated. Similarly, the proposed statute would avoid the equally troubling situations that arose under the older sexual psychopath statutes in which offenders were sometimes released after periods of confinement shorter than what the offender deserved for the purposes of retribution and deterrence.

After sentence is imposed under the proposed statute, an offender would have the opportunity to begin treatment immediately, rather than at the conclusion of his or her sentence. Although the possibility for release would exist only at the expiration of the defendant's original criminal sentence, that period of time could be therapeutically valuable instead of therapeutically counterproductive.²²⁸

2. *Advantages over Current Criminal Sentencing Schemes*

The proposed statute would provide a number of advantages over current criminal sentencing practices. While some jurisdictions in the

226. Slobogin, *supra* note 214, at 145-46.

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

228. See *supra* notes 120-27 and accompanying text.

United States have adopted various versions of determinate sentencing, the majority of jurisdictions continue to employ indeterminate sentencing with respect to criminal offenses.²²⁹ In either context, a sentencing judge, after a criminal conviction, is granted latitude to sentence the convicted offender to any sentence within the permissible statutory range. Those ranges often must cover the full gamut of offenders—from the offender with a relatively low degree of culpability and for whom the likelihood of repeat offenses seems slim to the most violent and sadistic offender for whom the likelihood of reoffense seems great—resulting in permissible sentencing ranges that are often quite extreme. And because sexual offenses often are charged in multiple-count indictments, the permissible ranges often become broader still, with the possibility of consecutive sentences for distinct but interconnected offenses.²³⁰ States generally do not require a sentencing judge to specify the proportion of the sentence, if any, that is intended to serve the function of incapacitation, as distinguished from retribution, deterrence, or rehabilitation.²³¹ As a result, discretion, often very broad discretion, is exercised with little or no justification, and the extent to which a judge has predicted future sexual dangerousness and the basis or lack of basis for that prediction is rarely, if ever, exposed. The defendant is granted little opportunity to controvert a prediction that he or she may never know about, that may be based on legally impermissible factors such as race or socioeconomic status, and that may even be based on factors that can be affirmatively disproved. The prediction of dangerousness is thus made by a person who is probably not qualified to make such a prediction and based on information that may or may not be accurate but is, in any case, wholly unchallenged.

The statute that this article proposes would remedy, or at least

229. La Fond, *supra* note 88, at 665 & n.39.

230. For example, a defendant in New York accused of abusing the same child repeatedly over the course of several months or years can be charged with numerous separate counts of first degree sexual abuse under N.Y. PENAL LAW § 130.65(3) (McKinney 1987). If that defendant is convicted on all counts, the judge can choose a sentence ranging from no jail time at all to the maximum sentence of two and one-third to seven years in prison on each count, run consecutively. *Id.* §§ 60.01, 70.00(2)(d), 70.00(3)(b), 70.02(2)(b). In the latter situation, a defendant could receive a total sentence of up to ten to twenty years in prison. *Id.* § 70.30(1)(c)(i). If just one count in such an indictment charges first degree rape, which includes having sexual intercourse with a child who is less than eleven years old, a judge could impose any sentence from the minimum penalty of two to six years in prison to a total maximum penalty as high as twenty-five to fifty years in prison. *Id.* §§ 70.02(3), 70.02(4), 70.30(1)(c)(iii), 130.35(3).

231. See generally MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

ameliorate, many of the problems just described. While predictions of future dangerousness will still be unreliable, the limitations within the statute concerning the permissible substance of expert testimony will assure that the bases for those predictions become the subject of a full and fair adversarial analysis. By specifying which factors may not be considered as part of a predictive analysis, and by prohibiting the use of clinical assessments of future dangerousness, many of the worst forms of discrimination and prejudice can be removed from the process.²³² Unlike at a common sentencing hearing, experts in the field could and would be called upon to describe the state of knowledge in the area of predictions of dangerousness, and the jury would then be in a more educated position to make a sound judgment.

The use of a jury instead of a judge would assure a more honest assessment of the statutorily permissible factors and avoid the widely recognized phenomenon that Professor Alan Dershowitz has described as "judicial whispering": the process through which the prosecution uses the informality of a courtroom setting to put before the judge factors that would never be legally permissible for consideration.²³³ A hearing on the record before a jury is not subject to such abuse; a jury will hear only what the statute says it may hear.

Because the statute would provide the state with the ability to enhance punishment on the basis of a prediction of future dangerousness, both the range and the severity of the ordinary sentencing scheme in a given jurisdiction could be reduced, thereby enhancing both the fairness and the consistency of criminal sentencing. In jurisdictions with indeterminate sentencing, the upper ranges of the permissible sentences, which are often designed for application to a defendant that a judge views as highly dangerous, could be reserved for those who are found under the statute to show a high probability of reoffending with a sexually related offense. And in jurisdictions with determinate sentencing, the statute would help avoid the unnecessary and unfair escalation of entire categories of criminal offense sentences due to a public perception that offenders who violate those statutes are highly recidivistic; instead, criminal sentences would be escalated just for those members of the sex offender population deemed to be particularly likely to reoffend. The ability to select individually those upon whom the harsher sentences should fall certainly is an improvement over simply sen-

232. See *supra* notes 214-15 and accompanying text.

233. Dershowitz, *supra* note 211, at 1318.

tencing every offender more harshly if the justification for the enhanced sentence is a prediction of future dangerousness. Under either sentencing system, identifying and evaluating the enhanced punishment of criminal offenders can only represent a step forward.

C. Unavoidable Dangers Inherent in a Sexual Psychopath Law

The foremost objection to the perpetuation of sexual psychopath laws is the inherent unreliability of predictions of long-term future dangerousness.²³⁴ Specific statutory requirements concerning the factors available for use in the making of any such prediction, and a statutory prohibition against the use of a clinical diagnosis for the making of any such prediction, can help increase the accuracy level to some extent. Nonetheless, the most widely accepted data indicate that such predictions will probably still vastly overpredict future dangerousness.²³⁵ Thus, the criticism that any such sentencing scheme relies on inherently unreliable predictions, resulting in the enhanced punishment of "innocent" persons—that is, persons who are falsely predicted to be dangerous—is impossible to completely rebut. On the other hand, as previously indicated, the current sentencing schemes employed by most states allow for the very same prediction of future dangerousness to be made in a much less restricted and protected fashion, thereby increasing the likelihood of a false prediction of dangerousness. Whether it is better to address the existence of such a problem by incorporating it into a statute in an effort to minimize abuses or by refusing to legitimize it in a statute poses a difficult policy decision. Given the current political climate, it is clear that we as a society are heading down the road of significantly enhanced criminal sentencing predicated on the fear of recidivism; it seems preferable to me to head down that road with our headlights on.

Another viable criticism of a sexual psychopath sentencing scheme is that it denies the appropriate role of individual free will upon which much of our criminal justice system is predicated. Since one ought to be punished, it is argued, only for the crimes that one has freely chosen to commit, criminal statutes generally require some form of criminal intent as a predicate for a conviction and a retributive sentence. Deterrence theory makes sense only to the extent that an individual has the ability to choose *not* to commit a crime if the potential consequences

234. See *supra* notes 47-51 and accompanying text.

235. See *supra* notes 47-51 and accompanying text.

are severe enough. The enhanced sentencing of an individual based on an assessment of what he or she may do in the future rather than what he or she has done in the past raises an ethical problem that many theorists find too disturbing to countenance. Again, one enters into a difficult policy decision about whether to regulate, and thereby legitimize, a common practice that may be abhorrent to our system of justice.

The use of a sentencing hearing that will include expert testimony will inevitably involve the widely recognized phenomenon of jury overreliance on purported expertise.²³⁶ As most jurors feel inadequately equipped to make a prediction about future dangerousness, the presence of an "expert" who is prepared to testify that he or she is qualified to make that judgment will result in the jury's reliance on that judgment much more often than it should, and the ability of the adversarial system to counteract that phenomenon is quite limited.²³⁷ A particular problem arises with respect to the testimony that a hearing such as the one proposed here involves; while it is likely that the state will be able to produce an expert witness to predict a high probability of future violence, it is far less likely that a defendant will be able to counter that testimony with an expert who will predict a lower probability.²³⁸ The best a defendant can probably hope for is an expert to testify about the lack of validity of the factors or actuarial figures upon which the prediction is based and about the notorious unreliability of such predictions.²³⁹ In either case, the likelihood of a defendant prevailing under such circumstances seems limited.²⁴⁰

Lastly, the proposed sexual psychopath sentencing scheme, like any other, fuels a false sense of public security and offers in response to a severe societal problem—violent crime and very high recidivism rates—a "solution" that is probably of minimal realistic value. On the other hand, by providing a focused outlet for public pressure to increase criminal sentences, the proposed scheme would reduce the escalation of the entire sentencing structure in response to such pressure and allow for the enhanced punishment of only a select few who might be more appropriately targeted.

236. See *supra* note 52 and accompanying text.

237. Slobogin, *supra* note 214, at 145-46 & n.178.

238. *Id.* at 145.

239. *Id.*

240. *Id.*

VI. CONCLUSION

There is an inevitable movement in this country toward a return to the use of sexual psychopath statutes to address the complex problem of sex crime recidivism. In light of the fact that these statutes seem certain to continue to survive constitutional scrutiny, this article has sought to provide some constructive thinking about any positive role that a well-conceived statute could play. While even a well-designed sexual psychopath law has a variety of serious problems and lends itself to a number of very valid criticisms, such a scheme could actually be an improvement over the current state of affairs in most jurisdictions. While a sexual psychopath law by definition relies on predictions of future dangerousness almost universally recognized as unreliable, the statute proposed in this article might actually reduce the overall reliance on such predictions and would almost certainly make the predictions that are used at least somewhat more reliable.

The proposed statute has benefits that are absent in a recidivist sentencing statute. The primary benefit, of course, is that both the prosecutor and the jury have the opportunity to make an individualized judgment in a particular case, thereby allowing for much greater flexibility in application than does the typical recidivist statute. That flexibility allows for greater consideration of a variety of highly relevant factors beyond simply the number of prior convictions, such as the defendant's culpability or blameworthiness for the present and past crimes, the defendant's age, the recency of a prior conviction and the defendant's age at the time of that offense, and the defendant's age at the time of his or her first conviction.²⁴¹

In addition, while not an ideal situation for challenging a prediction of future dangerousness, at least an adversarial hearing before a jury will allow for a public airing of the factors that are being considered, with an opportunity, albeit somewhat limited, to challenge the bases for and the validity of the prediction. Moreover, by imposing procedural barriers and, therefore, expense to the widespread and essentially random use of predictive judgments, it is likely that the use of such judgments will actually decline. Since public pressure for increased predictive preventive detention is mounting, it seems to me the lesser of possible evils to incorporate into a sentencing scheme the use of unreliable predictions than to pretend, as we have in the past, that

241. See, e.g., MONAHAN, *supra* note 47, at 71-76; Hall, *supra* note 212, at 775; Slobogin, *supra* note 214, at 121-22.

such judgments are not being used to significantly enhance criminal sentences under the statutory schemes in place in most states today. It represents a more honest and open approach that is more likely to accurately reflect a reasoned value judgment about the balancing of societal risk against individual freedom.