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Sexual Predator Law: The Nightmare in the Halls of Justice

Robert C. Boruchowitz

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> K. lived in a country with a legal constitution, there was universal peace, all the laws were in force; who dared seize him in his own dwelling?[1]

I. THE STORY

It is 1992. You are the defense attorney representing a client, B., who has been arrested by the state as a potential "sexually violent predator."[2] For the four months prior to his arrest, B. lived and worked in the community, reporting to the Department of Corrections as required after serving his full prison sentence for two 1987 second degree rape convictions.[3] He was employed and had just obtained a new job to go fishing in Alaska when he was arrested.[4] The state does not accuse B. of committing a new offense. Yet the state does seek to lock him up indefinitely in a "treatment facility" located inside a prison.

B. is taken to this facility to await trial. Inside the facility, he has fewer rights than he did in prison as a convicted crimi-

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1. FRANZ KAFKA, THE TRIAL (1937).

2. WASH. REV. CODE ch. 71.09, entitled Sexually Violent Predators Act, was passed by the legislature in 1990 and provides for indefinite commitment "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." WASH. REV. CODE § 71.09.060(1) (Supp. 1990-91).

3. See Clerk's Papers at 1183-86, 1311-13, State v. Cunningham (King County Super. Ct. 1991) (No. 90-2-20568-1) [hereinafter CP Cunningham]. This imaginary scenario is based on a combination of actual events and procedures from several different cases brought in King County. In addition to *Cunningham*, the scenario refers to State v. Young (King County Super. Ct. 1991) (No. 90-2-21319-6); it also refers to *In re* McL (King County Super. Ct. 1992) (No. 91-2-24039-6) (dismissed on motion of the state in March, 1992).

4. Report of Proceedings at 113, State v. Cunningham (King County Super. Ct. filed May 29, 1991) (No. 90-2-20568-1) [hereinafter RP Cunningham].

nal. On the outside, the media swarm like locusts, grasping the prosecutors' statements about the newly accused "sexual predator."[5]

As you begin work on B.'s case, you first discover that when the state obtained the arrest order for your client, in an ex parte proceeding, it failed to tell the judge that the only psychologist who actually interviewed B. concluded that B. did *not* meet the statutory criteria for a "sexually violent predator."[6] The state also failed to tell the judge that the two psychologists it did rely on disagreed on an element of the diagnosis.[7] But when you attempt to challenge the probable cause determination in court, the judge refuses your challenge because you have not made a sufficient showing. You also attempt to have B. considered for pretrial release, but the judge finds that no bail or release hearing is possible and that your client may not attend any pretrial hearings.[8]

At some of these pretrial hearings, the state argues that the trial will be a civil proceeding. The state seeks to classify the trial as civil for several reasons; one reason is that the state argues that it can commit the accused with a nonunanimous jury if the trial is classified as civil.[9] The judge rules that even

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5. *See, e.g.*, Marla Williams, *Predator's Release is Blocked—Maleng Takes Rare Action to "Make our World Safe,"* THE SEATTLE TIMES, Oct. 24, 1990, at A1, and *County Wants "Sex Predator" in Prison*, THE MORNING NEWS TRIBUNE (Tacoma), May 9, 1991, at B1. Seattle television stations ran numerous stories in October 1990, with leads such as the following: "King County is launching a bold new effort to stop sex crimes. . . . Today the King County Prosecutor believes he found the perfect criminal to test this law." *The Nightly News* (KOMO Television broadcast, Oct. 24, 1990).

6. The statute requires the state to prove that the accused has either a personality disorder or a "mental abnormality" that "makes the person likely to engage in predatory acts of sexual violence." WASH. REV. CODE § 71.09.020(1) (Supp. 1990-91). In one case, the prison psychologist who interviewed the accused while he still was in prison could find nothing in the *DSM-III-R* diagnostic manual that described the accused and certainly no diagnosis that would prompt him to act out in a sexually violent way. CP Cunningham at 1274-76. When asking the judge to arrest the accused, the prosecutor did not tell the judge about this psychologist's opinion. CP Cunningham at 1277-79.

7. CP Cunningham at 1277-1281.

8. The statute is silent on the question of pretrial release. One trial court judge has ruled that the accused did not need to be geographically near for counsel to prepare effectively, that the accused had no right to be present before trial, and that the statute does not address pretrial release; therefore, a release hearing was not necessary. Clerk's Papers at 9, State v. Young (King County Super. Ct. 1991) (No. 90-2-21319-6) [hereinafter CP Young]; Report of Proceedings at 19-20, State v. Young (King County Super. Ct. filed Oct. 29, 1991) (No. 90-2-21319-6) [hereinafter RP Young].

9. While the statute calls for proof beyond a reasonable doubt, it does not address the question of jury unanimity or describe itself as civil or criminal. WASH. REV. CODE § 71.09.060 (Supp. 1990-91). Trial judges have decided this failure to specify unanimity

though B. faces an indeterminate term in the prison treatment facility, the proceeding is civil; therefore, a unanimous jury is not required. Further, the jury may not be told that the commitment will be indefinite or that the facility is in a prison; nor may the jury be told that the burden will be on B. to prove that he should be released, if he is committed.[10] At other hearings, the prosecutor argues that the trial will be "akin to" a criminal case to prevent the jury from hearing about the consequences of their verdict.[11]

Further, in another unreported *ex parte* proceeding, the judge rules that B. has no Fifth Amendment protections relating to the trial and may be required to talk to the state's "expert" witness about his most secret thoughts and feelings. The state lists a psychologist as its key witness, but it does not produce the psychologist's report until a month after the state received the report. When challenged, the prosecution says it had no obligation to produce the report because "this is a civil case." The state also resists your efforts to depose its psychologist. You advise B. not to talk to the state's witnesses.

At the trial, however, the judge allows into evidence B.'s refusal to talk to the state's psychologist; the judge also allows the state to argue that B.'s refusal to talk supports the state's allegation of his dangerousness. In a separate evidentiary issue, the judge allows into evidence the accused's eleven-year-old juvenile assault offense record, despite the fact that it was not a conviction and that the evidence would not be allowable under relevant evidence rules and case law.[12] The judge even allows into evidence B.'s twenty-year-old misdemeanor "threat to bomb" conviction, stemming from a college campus meeting in 1972, to show B.'s "sexual dangerousness."[13]

The state calls as witnesses two police officers who took a statement from the client in 1962 and fails to disclose that one of the officers has a criminal trespass conviction and was demoted from chief of police in a controversy over misfeasance in the vice squad. The other officer was removed from the vice

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permits 10-2 verdicts. CP Cunningham at 1740-44; RP Cunningham at 36-51 (May 8, 1991). One of the verdicts was 11-1. CP Cunningham at 1902.

10. RP Young at 91-108 (Feb. 13, 1991); RP Young at 1-19 (Feb. 14, 1991).

11. RP Young at 2 (Feb. 14, 1991).

12. State v. Schaaf, 109 Wash. 2d 1, 743 P.2d 240 (1987); WASH. R. EVID. 609.1; FED. R. EVID. 609(d): Evidence of juvenile adjudications is generally not admissible under this rule.

13. RP Young at 34, 49 (Mar. 4, 1991).

squad. None of this was disclosed to the defense, and in fact one of the officers, questioned before the trial by the defense, said he had never been charged or convicted of a crime and had had no disciplinary problems while a police officer. When you discover this history from a reporter, the judge does not permit you to recall the witnesses to inquire about it.[14]

When you seek to call B. in his own defense, the judge rules that he may not testify until after he has been deposed by the state. The judge allows the state's psychologist to witness the testimony and to testify about it. The state's psychologist is allowed to testify that B. meets the statutory definition of "sexual predator,"[15] thereby performing the jury's job. When you ask for time and money to fly your own expert back to testify about her interview with the client, the judge denies the motion.

At the appropriate time, you submit proposed jury instructions on the presumption of innocence under the statutorily mandated[16] beyond a reasonable doubt standard. The judge refuses your instructions, however, and instead admits into evidence a jury instruction from B.'s 1963 rape trial: "The rule of law . . . is not designed to aid one who is in fact guilty of crime to escape, but it is a humane provision of law intended, so far as human agencies can, to prevent any innocent person being unjustly punished."[17]

Under this instruction, the jury in effect is told that the reasonable doubt protection is a humane provision that is not applied to one guilty of crime. B.'s prior convictions already have been admitted, so the reasonable doubt standard does not seem to apply to B. under this instruction. Instead, the presumption of innocence slides toward a presumption of guilt. The instruction makes the presumption of innocence seem like a charitable provision applied only once the jury has found the person to be innocent, rather than the bedrock of the law. The Ninth Circuit Court of Appeals held this instruction to be prej-

14. RP Young at 98-9, 100, 104 (Feb. 27, 1991).

15. WASH. REV. CODE § 71.09.020(1) (Supp. 1990-91): "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence. *Id.* § 71.09.060(1) requires that "[t]he court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator."

16. *Id.* § 71.09.060(1).

17. CP Young at 722.

udicial error in 1956.[18]

Impossible? Can't happen in America? Combinations of these unimaginable events happened in sexual predator cases in Washington in 1991 and 1992. These trials might as easily be occurring in the fictional world of Franz Kafka, where innocent people are arrested, tried, and executed without ever knowing why, without their advocates ever knowing the information against them.

> Was help at hand? . . . Where was the Judge whom he had never seen? Where was the High Court, to which he had never penetrated?[19]

II. THE INTRODUCTION

The hysteria that produced the statute authorizing commitment of persons found to be sexually violent predators has spawned legal procedures used against the accused that are unlike any others in Washington's jurisprudence. The accused faces a nightmarish procedure that begins with the highly publicized and emotionally charged labeling of his alleged status, and then proceeds to exclude him from hearings, handicaps his lawyer, and allows into evidence against him irrelevant and prejudicial material that would not be permitted in other cases. The accused has fewer protections than a defendant in a shoplifting case or a parent in a dependency case. He has fewer rights than a mentally ill person being detained in a civil commitment case because the state labels him *not* mentally ill, but "mentally abnormal." Further, the prosecutor's arbitrary application of the labels "civil" or "akin to criminal" creates an artificial, hybrid proceeding in which labels are used to deny fundamental rights.

The legislatively created definition of a "sexually violent predator," relying as it does on the nonscientific term "mental abnormality," is unique. It is unsupported by medical research or testimony. The term "mental abnormality" is not recognized by mental health professionals. Using this legislatively created status of mental abnormality to detain preventively people who have completed their original court imposed criminal sentences has led to a distorted judicial proceeding in

18. Reynolds v. United States, 238 F.2d 460 (9th Cir. 1956).

19. FRANZ KAFKA, THE TRIAL (1937).

which the most basic individual protections have been sacrificed.

Part of this distortion has been the result of reliance on contrived psychological speculation as a purported scientific basis for the state's commitment action. It is contrived in part because it adjusts to a nonscientific concept of mental abnormality. One might expect that when a new concept like mental abnormality is developed and applied to a person on trial for his freedom, the courts would ensure that expert testimony interpreting that concept would meet the same standard of evidence that any new and unproven concept must. Yet the trial courts have been unwilling to subject this novel approach to the same basic evidentiary test applied to fingerprints, radar guns, breath machines, and DNA testing.

The carte blanche provided to prosecutors to proceed as they choose under the statute has led trial courts to refuse to apply the *Frye* test[20] to this new psychological speculation about "mental abnormality."

Prosecutors have presented contorted arguments to avoid application of *Frye*. This Article will demonstrate that the unfounded psychological speculation offered by the state should be subjected to at least the same standard of evidence that a blood test or breath machine must meet. This examination will illustrate the type of distortions that the courts have sanctioned in the predator prosecutions.

III. THE PROBLEMS WITH THE STATUTORY SCHEME

The statute enabling the civil commitment of sexually violent predators is based on a novel assertion, unparalleled in American law, that unspecified mental attributes can produce acts of sexual violence and that these acts can be predicted accurately.[21] To prove the allegations based on this assertion, the prosecutor presents one psychologist's testimony in each case. The psychologist asserts that he can diagnose a mental abnormality or personality disorder that makes the accused

20. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *See infra* note 24.

21. WASH. REV. CODE § 71.09.010 (Supp. 1990-91) states as follows: "The legislature finds . . . [i]n contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior." Nowhere does the legislature specify or define the features involved or cite authority for this conclusion.

likely to commit predatory acts; the psychologist's testimony also asserts that he can predict that the person on trial is likely to commit predatory acts.

In the cases brought in King County and Walla Walla County to date, only two state witnesses, both psychologists, have testified that they are capable of making such assessments. The defendants have presented psychologists and one psychiatrist who have said that assessments linking personality disorders or unspecified "abnormality" to future sexual violence and predicting that a particular person is likely to commit violent acts, cannot scientifically be made.[22] This testimony, purporting to analyze mental states and predict future acts, lies at the heart of the state's case, as the following excerpt from one trial transcript shows:

> A: I formed a diagnostic impression that Mr. [B.] appeared to meet the statutory definition of sexual—
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> [Defense Counsel]: Objection, your honor. That's the ultimate question for the jury, not for this doctor.
>
> The Court: The objection is overruled.
>
> The witness: To meet the statutory definition of sexually violent predator.[23]

These psychologists' assertions of predictive capabilities based on novel, legislatively-created psychological theories must be subject to the standard requirements for all new theories as ennunciated in *Frye v. United States*.[24] Thus, the specific issue on appeal in the sexual predator cases might be framed as follows: Under *Frye* and relevant Washington statu-

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22. RP Young at 111 (Mar. 1, 1991); RP Young at 99-103, 171-73 (Mar. 4, 1991).

23. RP Young at 152 (Feb. 27, 1991).

24. 293 F. 1013 (D.C. Cir. 1923). The *Frye* rule requires that the reliability of new scientific methods be tested on three factors: "1) the validity of the underlying principle; 2) the validity of the technique applying that principle; and 3) the validity of the application of the technique used on the particular occasion." State v. Huynh, 49 Wash. App. 192, 194-95, 742 P.2d 160, 163 (1987), *review denied*, 109 Wash. 2d 1024 (1988) (citing Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1201 (1980)). The state has never established these factors in a sexual predator case. The purpose of the *Frye* rule is to prevent a jury from being misled by unproven and ultimately unsound scientific methods. People v. Shirley, 641 P.2d 775, 782-84 (Cal.), *cert. denied*, 485 U.S. 1125 (1982) (holding that *Frye* applies to hypnotically aided recall). "The rationale of the *Frye* standard is that expert testimony may be permitted to reach a trier of fact only when the reliability of the underlying scientific principles has been accepted by the scientific community." State v. Canaday, 90 Wash. 2d 808, 813, 585 P.2d 1185, 1187 (1978).

tory and decisional law,[25] did the trial court err when it failed to require a *Frye* hearing before admitting testimony on a new psychological theory that asserts 1) there is a mental disorder that predisposes a person to commit rape; 2) the respondents suffered from such a disorder; and 3) therefore, the respondents would commit acts of sexual violence in the future? Specifically, under *Frye*, did the court err when the new psychological theory 1) is supported by only two psychologists; 2) is not recognized in the scientific literature; 3) is not supported by evidence of a consensus in the scientific community; and 4) is contradicted by defense evidence of a consensus in the scientific community opposed to the new theory?

The brief answer is yes.

The first problem with these purported psychological theories is that the label mental abnormality has no meaning. In effect, the psychologists who testified for the prosecution were using a *legislative* concept to diagnose persons as mentally abnormal and then to tie that abnormality to likely future behavior. But Dr. Nancy Steele, who supervises the Minnesota Department of Corrections Transitional Sexual Offender Program, testified at one trial that the statutory definition of mental abnormality could not be applied "in any consistent, fair, rational way by the psychiatric or psychological community . . . because no one knows for sure what causes rape . . . . I do not believe that it is caused by an illness or disease."[26]

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25. Two Washington cases are particularly relevant in the sexual predator context: first, State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987) (holding that the *Frye* test does apply in Washington in a case involving rape trauma syndrome); second, State v. Fitzgerald, 39 Wash. App. 652, 659, 694 P.2d 1117, 1122, *aff'd sub nom.* 110 Wash. 2d 403, 756 P.2d 105 (1988) (holding inadmissible under *Frye* a psychologist's testimony that child molesters could have outward manifestations of good character because no evidence was presented that the opinion was based on a generally accepted theory in the psychological community).

26. RP Young at 112 (Mar. 1, 1991). The legislature itself was concerned that the term mental abnormality is vague. At the Senate Law and Justice hearing, Professor David Boerner, principal draftsperson of the new law, testified in response to a question about vagueness:

> Abnormality is a very broad term. . . . What we had in mind was the case like Shriner where you had direct physical evidence of plans to commit future crimes, diaries, notes, and those sorts of things. I think absent that, that kind of evidence or something, it's simply a psychiatric prediction plus the crime years ago [and it] isn't going to be enough to satisfy a jury under the standards we've provided.

David Boerner, Tape of Testimony at the Senate Law and Justice Hearing (Jan. 11, 1990) (transcribed by Defender Association staff from legislature tape) (on file with author).

Moreover, when testifying before the state legislature, Lucy Berliner of Washington's Harborview Sexual Assault Center, a member of the task force that drafted the sexual predator legislation, testified regarding the lack of definition for mental abnormality as follows: "But you're right that mental abnormality per se is not meaningful in terms of our diagnostic theme and some of the forensic practitioners that I talked to before coming here said they would find it helpful to have some definition."[27]

There is no substantiated psychological understanding that establishes a causal link between rape and "mental abnormalities." The only physician to testify in the sex predator cases, Dr. G. Christian Harris, a psychiatrist with more than twenty years of experience, stated that there is no personality disorder or mental abnormality that makes a person likely to commit an act of sexual violence in the future.[28]

Challenging any attempt to link mental condition and the prediction of future predatory acts of sexual violence, the Washington Psychiatric Association (WSPA) appeared as amicus in the Washington State Supreme Court.[29] The WSPA argued that it "is impossible to generalize a causal connection between sexual offenses in general and any particular psychiatric condition."[30] Indeed, as Dr. Barbara Schwartz, director of the Sex Offender Treatment Program of the Washington Department of Corrections, testified, "there's very little evidence that personality disorders are related to [committing a sex offense] in any meaningful way."[31] No causal link has

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27. Lucy Berliner, Tape of Testimony at the Senate Law and Justice Hearing (Jan. 11, 1990) (transcribed by Defender Association staff from legislature tape) (on file with author). The legislature defined mental abnormality as follows:

> "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

WASH. REV. CODE § 71.09.020(2) (Supp. 1990-91).

28. RP Young at 99-103 (Mar. 4, 1991). Specifically responding to the state's witnesses' opinions, Dr. Harris testified that a personality disorder not otherwise specified, with antisocial paranoid borderline and narcissistic features, does not predispose a person to rape. *Id.*

29. In the *Young* case, the WSPA appeared as amicus at the trial level, where it was joined by the Washington State Association of Community Psychiatrists, and at the State Supreme Court level. *See* CP Young at 339-50, 635-36, 640-43; Amicus Curiae Brief of Washington State Psychiatric Ass'n, *In re* Young (Wash. filed Sept. 26, 1991) (No. 57837-1) [hereinafter Amicus Brief of WSPA].

30. Amicus Brief of WSPA, *supra* note 29, at 4.

31. R.P. Young at 18 (Jan. 22, 1991).

been established between mental abnormalities and predatory behavior.

There is no established psychological understanding that links rape with a mental disorder or that supports a prediction that a given offender is more likely than not to reoffend violently. Dr. Schwartz, a forensic psychologist with over twenty years of experience who specializes in sex offenders, testified that she could never predict whether a particular rape offender would be fifty-one percent likely to reoffend.[32] Dr. Schwartz testified that a recent study by Marshall and Barbieri showed that "rapists have a reoffense rate of between 7 and 35 percent."[33] The Bureau of Justice Statistics reports that only 7.7 percent of released rapists were rearrested for rape within three years of their release.[34] As Dr. Harris testified at trial,[35] neither psychologists nor psychiatrists can predict whether a particular person will reoffend.

IV. THE TRIAL AND THE *FRYE* TEST

How should the courts handle this proffered speculative testimony? Washington's courts have guarded against the use of such speculative psychological testimony, ruling that psychologists sailing in uncharted waters may not do so before a jury.[36] Operating under the guidance of *Frye*,[37] and Washington Rule of Evidence 702 (ER 702),[38] the courts have held that in order for expert testimony to be admissible, 1) the witness must be qualified as an expert; 2) the witness's opinion must be based "upon an explanatory theory generally accepted in the scientific community"; and 3) the witness's testimony must be helpful to the jury.[39]

In the sexual predator cases, the expert's testimony is not

32. RP Young at 18 (Jan. 22, 1991).

33. *Id.* at 26.

34. Amicus Brief of WSPA, *supra* note 29, at 4.

35. RP Young at 109-09 (Mar. 4, 1991).

36. *See, e.g.*, State v. Fitzgerald, 39 Wash. App. 652, 659, 694 P.2d 1117, 1122 (1985), *aff'd sub. nom.* 110 Wash. 2d 403, 756 P.2d 105 (1988).

37. 293 F. 1013 (D.C. Cir. 1923).

38. WASH. R. EVID. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

39. State v. Black, 109 Wash. 2d 336, 341, 745 P.2d 12, 15 (1987). *Black* held that expert testimony based on the new psychological theories involving "rape trauma syndrome" was subject to the *Frye* test. *Id.*

based on an explanatory theory that is generally accepted in the scientific community, as the authorities cited above indicated.[40] In fact, those authorities show that the consensus in the scientific community is that there is *not* a personality disorder or mental abnormality that makes a person likely to commit sexual acts of violence. Other than the two witnesses called by the state, no scientific professional person cited by the state agrees that such testimony can ethically and competently be given. As the WSPA's amicus brief to the Washington Supreme Court suggests, such testimony is not competent.[41]

If such testimony is not competent under ER 702 and *Frye*, it logically cannot be "helpful to the jury." Such testimony presented in sexual predator cases invades the province of the jury because it constitutes an opinion as to the guilt of the accused.[42] That is, such testimony involves the ultimate issue for the factfinder: Whether these accused would, because of a mental condition, commit sexual crimes in the future. Expert testimony expressing a witness's opinion whether the defendant meets the statutory definition of "sexual predator"[43] could be seen by the jury as determinative.

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40. *See supra* notes 19-31 and accompanying text. A recent law review comment suggests the use of a modified *Frye* test. Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213 (1991). The comment argues that the value of the procedural safeguards in Washington's predator law is questionable "because Washington is free to present unreliable psychiatric evidence," namely, shaky long-term predictions that most psychiatrists refuse to make. *Id.* at 233-34. It concludes that " . . . the absence of any reliable means of identifying sex crime recidivists shows that Washington's law is ill-conceived." *Id.* at 247. The author suggests admitting expert testimony only if the technique has won at least substantial acceptance within the appropriate community after critical scrutiny by the community. This would not require consensus but would require that the appropriate community "not generally reject the technique or regard it as insufficiently tested." *Id.* at 245 n.206. The comment suggests also requiring evidence of a pool of experts larger than the ones testifying, to be able to demonstrate that the technique has been tested according to reigning methodology and has been reviewed in a reasonable number of published studies. *Id.* at 245.

The commentator seems to assume that the prediction of long-term dangerousness is not novel and therefore *Frye* normally would not apply. *Id.* at 246 n.211. In fact, the development of long-term predictions based on a legislatively contrived mental abnormality and the diagnosis of sexually violent predator are novel and *Frye* must be applied.

41. Amicus Brief of WSPA, *supra* note 29, at 4. The WSPA wrote that "mental health professionals do not consider sex offenders to be suffering from a personality disorder which causes an individual to commit a sex offense." *Id.* at 5.

42. State v. Black, 109 Wash. 2d 336, 348-49, 745 P.2d 12, 18-19 (1987).

43. *See supra* text accompanying notes 21-24.

The *Black* rule prohibiting invading the province of the jury rests on a sound foundation. First, such testimony "unfairly prejudices the [defendant] by creating an aura of special reliability and trustworthiness" around the concepts of mental abnormality and predictability.[44] To permit an expert to suggest that, because of symptoms of a legislatively defined "mental abnormality," a person is going to commit sexual crimes in the future unfairly prejudices the accused by creating an aura of special reliability around the speculative testimony.[45] The danger of prejudice is particularly acute when, as here, the testifying expert states that the accused are likely to commit future acts of "predatory" sexual violence, which is in essence an answer to the question the jury was asked.[46]

A second reason to reject this testimony is that allowing it undermines the jury system itself. As Karl Tegland emphasizes, "[a]n expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."[47] As the Washington Supreme Court succinctly put the point, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference."[48] To allow such testimony threatens the accused's due process right to a fair jury trial.

In these cases, there is an independent reason to exclude

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44. People v. Bledsoe, 681 P.2d 291, 301 n.14 (Cal. 1984), *cited with approval in* State v. Black, 109 Wash. 2d 336, 349, 745 P.2d 12, 19 (1987). In *Bledsoe*, the California Supreme Court contrasted psychological testimony on rape trauma syndrome to other scientific methods of proof, such as fingerprints and blood tests, which have been admitted into evidence. *Id.*

45. The *Bledsoe* court held that expert testimony suggesting, based on symptoms, that a victim had been raped "unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness." *Bledsoe*, 681 P.2d at 301 (quoting State v. Saldara, 324 N.W.2d 227, 230 (Minn. 1982)). In a Ninth Circuit case upholding the application of the *Frye* test to exclude testimony about the use of so-called anatomically correct dolls, the court held that "the prejudicial effect of an aura of scientific respectability outweigh[s] the slight probative value of the evidence." United States v. Gillespie, 852 F.2d 475, 480 (9th Cir. 1988) (citing United States v. Solomon, 753 F.2d 1522, 1526 (9th Cir. 1985)).

46. *Black*, 109 Wash. 2d at 340, 745 P.2d at 14. In *Black*, the court held that the use of the term rape trauma syndrome constitutes, in essence, a statement that the defendant is guilty of the crime of rape. *Id.*

47. 5A K. TEGLAND, WASH. PRAC. EVIDENCE § 292, at 39 n.4 (2d ed. 1982), *cited in* State v. Fitzgerald, 39 Wash. App. 652, 659, 694 P.2d 1117, 1122 (1985), *aff'd sub nom.* 110 Wash. 2d 403, 756 P.2d 105 (1988).

48. *Black*, 109 Wash. 2d at 348, 745 P.2d at 18. The *Black* court emphasized that expert testimony on rape trauma syndrome is unfairly prejudicial because it constitutes an opinion as to the guilt of the defendant, invading the province of the factfinder. *Id.*

the psychologist's prediction—the testimony itself lacks reliability. To be found reliable in Washington, expert testimony on a new scientific theory must meet the three-pronged *Frye* standard:[49] 1) the underlying principle must be valid; 2) the technique applying that principle must be valid; and 3) the application of the technique used on the particular occasion must be valid.[50] As to the first prong, as the authorities cited earlier partially demonstrate,[51] the underlying principle of predicting future predatory acts based on a diagnosis of the legislatively created concept of "mental abnormality" is not valid. Another reason that the principle underlying such testimony is invalid is that the variety of circumstances and factors in the lives of sexual offenders make prediction based on such a classification highly questionable.[52]

Given the overwhelming lack of scientific support for the notion that mental abnormalities exist that allow predictions of future predatory acts, it is little wonder that the state argues against the application of the *Frye* test in the sexual predator cases. The state relies on *State v. Young*,[53] which addressed the use of medical testimony involving a colposcope.[54] The court found that the physician "merely testified that certain

49. *Black*, 109 Wash. 2d at 342, 745 P.2d at 15. The Washington courts have applied this analysis in excluding hypnosis evidence (State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984)) and in disallowing expert testimony regarding the alleged propensity of baby-sitting boyfriends to inflict child abuse (State v. Mulder, 29 Wash. App. 513, 629 P.2d 462 (1981)).

50. *See supra* note 22.

51. *See supra* notes 19-31 and accompanying text.

52. *See, e.g.*, *Black*, 109 Wash. 2d at 344, 745 P.2d at 16, wherein the court found that symptoms of rape victims embrace such a "broad spectrum of human behavior" that a diagnosis of rape trauma syndrome provides a highly questionable means of identification. The state's experts in the predator cases relied primarily on record reviews and did not interview people who knew the accused. RP Young at 146-47 (Feb. 27, 1991); RP Young at 31-36 (Feb. 28, 1991); RP Cunningham at 29-31, 56-57 (May 21, 1991). One said that "[o]ur ability to predict people's future behavior is really quite imperfect." RP Young at 140 (Feb. 27, 1991). He acknowledged that mental abnormality is a statutory term and that professionals trying to apply the term each would have to establish their own working definition. RP Young at 111-12 (Feb. 28, 1991). *Cf.* State v. Huynh, 49 Wash. App. 192, 197-98, 742 P.2d 160, 162, *review denied*, 109 Wash. 2d 1024 (1988) (finding the expert's reliance on his own small, nonrandom experiments to be insufficient in the absence both of publication and other studies duplicating the expert's results). *Id.*

53. 62 Wash. App. 895, 802 P.2d 829 (1991). *Young* involved testimony by a physician regarding her medical examination of an alleged rape victim. The court permitted the physician's opinion that the complaining witness' condition was consistent with sexual abuse. *Id.* at 899, 802 P.2d at 831.

54. A colposcope is a magnifying device used to take photographs of microscopic injuries.

clinical findings existed, and that in her own professional experience those clinical findings were consistent with penetration and abuse."[55]

There are several reasons why *Young* is not controlling. *Young* concerned *medical* evidence, not *psychological* evidence. This is a major distinction because the medical testimony was based on injuries that were "physical, observable, and measurable, and had few possible causes other than sexual abuse,"[56] while the mental abnormality testimony is based on psychological speculation that is neither physical nor measurable. Indeed, the *Young* court itself distinguished the *Black* case, which involved a psychological determination of "rape trauma syndrome," because of this very distinction.[57]

In the sexual predator cases, there is no injury to be observed through a microscope; there are no clinical findings, examining physicians, medical tests, or even interviews involved in these cases. The state's experts may never have even seen the accused until the trial. In fact, these "experts" have no personal clinical experience with treatment of sex offenders in prison.

The California appellate court has emphasized these distinctions in a case upholding the admissibility of colposcopic examination and a physician's opinions based on it, saying:

> [T]he expression of an expert medical opinion as to the cause of a wound or injury falls outside of the realm of what is subject to the *Kelly-Frye* rule. An expert medical witness is qualified to give an opinion on the cause of a particular injury based on his or her deduction from the appearance of the injury itself.[58]

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55. *Young*, 62 Wash. App. at 899, 905-06, 802 P.2d at 831, 834-35. California courts have allowed an expert's testimony concerning colposcopy, stating that the *Frye* test did not apply to the expression of expert medical opinions "concerning the cause of an injury." People v. Pitts, 273 Cal. Rptr. 757, 903 (Cal. Ct. App. 1990). The California court wrote in *Shirley*: "We do not doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the *Frye* standard of admissibility." People v. Shirley, 641 P.2d 775, 795 (Cal. 1982).

56. *Young*, 62 Wash. App. at 907, 802 P.2d at 836.

57. *Id. See also* State v. Fitzgerald, 39 Wash. App. 652, 659, 694 P.2d 1117, 1122 (1985) (holding inadmissible under *Frye* psychologist's testimony that child molesters could have outward manifestations of good character because no evidence was presented that the opinion was based on a generally accepted theory in the psychological community), *aff'd sub. nom.* 110 Wash. 2d 403, 756 P.2d 105 (1988).

58. People v. Pitts, 273 Cal. Rptr. 757, 903 (Cal. Ct. App. 1990).

Another California case that the state relies on, *People v. Mendibles*,[59] made clear that it was addressing the admissibility of an expert opinion on the cause of a particular injury " 'on the basis of the expert's deduction from the appearance of the injury itself.' "[60] In *Mendibles*, the court asserted that California courts have *never* applied the *Frye* rule to expert medical testimony, or even to psychiatric predictions or unusual diagnoses.[61]

Unlike California's courts, however, the Washington courts have applied *Frye* to bar speculative psychological testimony. *Young* stands for the proposition that evidence of a colposcopic examination may be admitted into evidence.[62] It does not contradict the well-established rule in Washington that *Frye* applies to new, untested theories. *Frye*'s application requires that the state may not offer expert testimony that purports to prove scientifically that an accused suffers from a particular personality disorder or mental abnormality that

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59. 245 Cal. Rptr. 553 (Cal. Ct. App. 1988).

60. *Id.* at 562 (citing People v. Bledsoe, 681 P.2d 291, 299-300 (Cal. 1984)). In *dicta*, the court said that "a medical diagnosis based on medical literature will not be viewed as a new scientific technique, but simply the development of an opinion from studies of certain types of cases." *Mendibles*, 245 Cal. Rptr. at 562; People v. Phillips, 175 Cal. Rptr. 703, 714 (Cal. Ct. App. 1981). *Phillips* was a 3-2 appellate court decision finding admissible a hypothetical question to a psychiatrist about a particular disease. It did not address either a new scientific technique or "conflict within the scientific community." *Phillips*, 175 Cal. Rptr. at 714. The appellant did not question the trustworthiness or accuracy of the doctor's interpretation.

But the *Mendibles* court was not contemplating the kind of testimony the state's psychologists offered here. It went on to illustrate the characteristics of those instances in which diagnosis is considered to be no more than the expression of expert medical opinion, including: an opinion that a death resulted from strangulation, a conclusion that rectal abrasions indicate anal intercourse without lubricant, a determination that death was caused by a blunt instrument, an analysis of whether a wound was self-inflicted, the determination that certain bruises were not caused by a fall, and the use of the battered child syndrome to determine that a child's injuries were not accidental. *Mendibles*, 245 Cal. Rptr. at 562. It also said that less typical was diagnosis of an esoteric form of mental illness known as "Munchausen's syndrome." *Id.* at 563 (citing *Phillips*, 175 Cal. Rptr. at 715.) Such a diagnosis requires the existence of a body of literature, involving the study of similar cases, upon which such a diagnosis could be based. *Id.* No such body of literature exists concerning "sexual predators," a term invented not by psychologists but by the legislature, and even if such literature did exist, the witnesses herein went beyond *diagnosis*, acceptable to the California court, to *predict* behavior. And the court emphasized that in *Mendibles*, it was permitting testimony about the use of an instrument that "is nothing more than a weak microscope—an instrument long accepted as scientifically reliable." *Mendibles*, 245 Cal. Rptr. at 563. Further, the doctor's "opinion was based entirely upon visual examination and the observations she made therein." *Id.* at 563.

61. *Mendibles*, 245 Cal. Rptr. at 562.

62. State v. Young, 62 Wash. App. 895, 802 P.2d 829 (1991).

makes him likely to commit "predatory" acts of sexual violence. The scientific evaluation of rape related to personality disorders or mental illness and to prediction of future behavior has not reached a level of reliability that meets the *Frye* standard and the state's proffered testimony should not be admissible.

Even if one were to apply the *Young* analysis, *Frye* still applies. *Young* teaches that there is a difference between development of a new scientific technique, development of a novel method of proof, and development of a body of medical knowledge and expertise. *Frye* must still be applied in the sex predator cases because the psychological determinations involved fall into the first, rather than the last, category. The state has never presented evidence in a sexual predator case of development of a body of medical knowledge and expertise *either* 1) identifying a personality disorder or mental abnormality that makes one likely to commit sexual acts of violence or 2) demonstrating that mental health professionals are able to predict with certainty that people with such disorders or abnormalities will in fact commit acts of violence.

While the state may wish that it could put microscopes in prisoners' brains, it cannot do so yet. The *Young* case does not apply.

Kafka's *The Trial* ends with the summary execution by stabbing of the hero/accused. Even as the knife is plunging he wonders whether an unseen appellate court might be coming to his rescue at last. One can hope that the 1992 version of the Kafka nightmare will have a happier ending.