EDITOR'S PREFACE*

Predators and Politics: The Dichotomies of Translation in the Washington Sexually Violent Predators Statute

> It is better to be violent, if violence is in our hearts, than to put on the cloak of non-violence to cover impotence.
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> —Mohandas Gandhi, *Non-Violence in Peace and War*

> Nonviolence is the answer to the crucial political and moral questions of our time; the need for man to overcome oppression and violence without resorting to oppression and violence.
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> —Martin Luther King, Jr.
> *Speech accepting the Nobel Peace Prize*
> (December 11, 1964)

I. INTRODUCTION

Can our communities constitutionally prevent the release of convicted sex offenders believed to be dangerous? Is such action constitutional or unconstitutional? Legal or moral? Criminal or civil? Treatment or punishment? These and other dichotomies reflect the dualism of the process of translating the language of life into the language of law. As Professor Christopher Rideout asserts in these pages, this process is an exercise of power. Law's power operates by compelling alternatives. Such alternatives often inflict violence on the losers:

* The Editor In Chief wishes to thank Dean Jim Bond for making this symposium possible and to thank the faculty who participated, including: David Boerner, John La Fond, Chris Rideout, and Julie Shapiro. In addition, thanks go to Shelley Kneip, Ken Masters, Kim Deasy, Tracy Forthun, and Brian Lewis for their generous assistance this summer in getting this issue to press.

My warmest thanks go to Mary Beyer, Tammy Lewis, and Jim Mitchell. Given the unforeseen yet unavoidable obstacles that arose during the process of planning and presenting this symposium, both the event and this publication were possible only because of their dedication, organization, and devotion of countless hours. My heartfelt thanks to you all.

either violence on those whose desire for retribution is denied or violence on those whose desire for freedom is denied.

These dichotomies lie at the heart of the current debate about the legitimacy of Washington's Sexually Violent Predators statute. This civil commitment statute, which is part of the larger Community Protection Act, was passed unanimously by the Washington State Legislature in 1990 after several heinous acts of sexual violence provoked community outrage and cries for change. In one of these acts of violence, a young boy (his name was never released) was raped and mutilated. His attacker, Earl Shriner, had recently been released from prison after serving time for a sexual offense. In another violent act, Diane Ballasiotes was brutally murdered by a work-release prisoner with a history of violent sexual offenses. Diane's mother, Ida Ballasiotes, and the mother of the young boy, Helen Harlow, took the lead in the community's fight to develop and enact new legislation.

The result of their efforts is the Washington Sexually Violent Predators statute. Under the statute, if a jury finds that a convicted sex offender is also a "sexually violent predator," that individual may be confined in a specially funded maximum security institution after completing the original criminal sentence. Such individuals are released only after a court has determined that they are no longer dangerous. The statute's constitutionality is currently being challenged before the Washington Supreme Court in the first test case, *In re Young*.

II. THE SYMPOSIUM

On March 9, 1992, the University of Puget Sound Law Review held a symposium to examine the dichotomies raised by the statute. Nationally recognized experts in law, psychology, and psychiatry addressed issues raised by the statute that are relevant to both the mental health and legal communities. The speakers included Norval Morris, David Wexler, Alexander Brooks, James Ellis, Judith Becker, and Robert Wettstein. In addition, local experts participated on two panels. Panel one, "The Process and Politics of Law Reform," was moderated by University of Puget Sound School of Law Professor David Boerner, one of the drafters of the statute. Panelists included Stuart Scheingold, Norm Maleng, Ida Ballasiotes, Christopher Rideout, and Robert Boruchowitz. Panel two, "Evaluating the Statute," was moderated by University of

Puget Sound Law Professor John La Fond, one of the opponents of the statute. Panel two's commentators included Timothy Blood, James Reardon, and Julie Shapiro. Professors Morris and Wexler also responded to the commentators after each panel.

The papers presented by the speakers at the symposium have been brought together in this issue, along with the shorter commentary pieces presented by the panelists.[1] Also included is a transcription of the keynote address by Professor Norval Morris.[2] Finally, this issue includes two appendices. Appendix A sets out the full text of the Sexually Violent Predators statute from the *Revised Code of Washington*. Appendix B presents two tables that give background information on the individuals who have been committed to date under the statute.

III. THE SYMPOSIUM ISSUE

This symposium issue is about dichotomies, about the numerous alternatives raised by a civil commitment law such as the Sexually Violent Predators statute. But this issue is about more than dichotomous choices; it is also about the voices and narratives that attempt to answer the questions raised by those dichotomies. These voices and narratives can first be heard in the articles by Professors David Boerner and Chris Rideout, both of whom give compelling accounts of the events leading to the passage of the statute. As Professor Rideout[3] asserts, the sexual predator statute attempts to trans-

1. In their articles, most of these authors address only issues raised by the Sexually Violent Predators statute and not issues raised by the broader Community Protection Act, the formal title for the entire act of which the sexual predator statute is only a part. Therefore, this symposium issue uses the title "Sexually Violent Predators statute" or "Sexually Violent Predators Act" unless the author specifically discusses the entire Community Protection Act.

2. Professor Norval Morris is the Julius Kreeger Professor of Law and Criminology at the University of Chicago. Professor Morris is the co-author of THE HONEST POLITICIANS GUIDE TO CRIME CONTROL (1974), LETTER TO THE PRESIDENT ON CRIME CONTROL (1977), and BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990). He is also the author of MADNESS AND THE CRIMINAL LAW (1982). Professor Morris is a member of the National Academy of Sciences, the National Research Council, the American Academy of Arts and Sciences, the Academy of Criminology, the Governor's Advisory Committee on Adult Corrections, and the Chair of the National Institute of Corrections.

3. Professor J. Christopher Rideout is Professor of English at the University of Puget Sound, and Assistant Director of the Legal Writing Program at the University of Puget Sound School of Law.

late the community's narratives of pain and fear into generalized and abstract rules of law. According to Professor Rideout, such laws should be judged by their effectiveness in translating the community's emotional outrage against sexual violence into a rational legislative response to both the outrage and the violence. Although the language of the law is inevitably inadequate to the task, Professor Rideout suggests that we look for degrees of success.

Much is lost, however, in that translation. Under the Washington statute, some narratives are lost—the stories of those few who are incarcerated through the sexual predator statute's civil commitment process. This failure to reflect the defendants' stories is something of a reversal from older laws against sexual violence, in which the victims' stories more often were lost or silenced by the process of translation from life to law, from reality to rule. This reversal may have been motivated by the two violent crimes that shocked Washington citizens and effectuated through the efforts of victims' rights groups, as hypothesized by Stuart Sheingold, Toska Olson, and Jana Pershing.[4]

This reversal, however, may be merely the latest manifestation of a decades-long trend away from treatment and toward punishment for sexually violent predators. In his article, Professor John La Fond[5] favors this trend away from treatment because he believes that treating offenders is impossible. Moreover, because the Sexually Violent Predators statute purports to do the impossible—treat rather than punish offenders—La Fond argues that the law is a "deliberate misuse of the

4. Professor Stuart Scheingold is Professor of Political Science at the University of Washington. He has written numerous books and articles about the relationship between politics and the legal system, including THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION (1991) and THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY (1984). Professor Scheingold has received numerous honors such as the Fortunoff Colloquium Lecturer, New York University School of Law, and the Fenton Lecturer, State University of New York School of Law.

Toska Olson and Jana Pershing are Ph.D candidates in sociology at the University of Washington.

5. Professor John Q. La Fond is Professor of Law at the University of Puget Sound School of Law. Professor La Fond wrote the amicus curiae brief on behalf of the American Civil Liberties Union of Washington challenging the constitutionality of the Sexually Violent Predators statute. He also argued the *In re Young* case before the Washington Supreme Court. Professor La Fond is co-author of BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES (1992) and author of numerous articles, book chapters, and papers on law and psychology.

therapeutic state for social control." According to La Fond, this misuse should render the statute unconstitutional.

Treating violent sexual offenders is impossible because the vast majority of these offenders are not mentally ill, according to Dr. James Reardon[6] and Dr. Robert M. Wettstein.[7] Furthermore, Dr. Wettstein argues that the statute is an abuse of psychiatric concepts. He points to statistics showing that psychologists' and psychiatrists' abilities to predict future dangerousness are highly suspect. Finally, Dr. Wettstein argues that testimony by mental health professionals predicting future dangerousness may violate psychiatric standards of ethical behavior.

Professor Alex Brooks,[8] however, challenges Dr. Wettstein's and Professor La Fond's conclusions. According to Professor Brooks, the assertions of purported psychiatric fallibility and the so-called misuse of the therapeutic state do not invalidate the statute. Rather, these assertions are both inaccurate and irrelevant. They are inaccurate because they misread the current research. They are irrelevant because the primary purpose of the sexual predator statute is to protect the public from a small number of extremely violent individuals who can not be treated. Indeed, the statute itself states as much. For Professor Brooks, then, the procedural protections given to those accused under the statute are sufficient to surmount the legal objections to the statute's civil commitment procedures. Ultimately, Professor Brooks concludes that the question is a

6. Dr. James D. Reardon is a consultant for the Washington State Department of Corrections and the Special Commitment Center, which is a special prison for the care and treatment of mentally ill offenders in Monroe, Washington.

7. Dr. Robert M. Wettstein is Assistant Professor of Psychiatry, University of Pittsburgh. He is a consulting psychiatrist at the Mon-Yough Corrections Program and is Co-Director of the Law and Psychiatry Program for the Western Psychiatric Institute and Clinic at the University of Pittsburgh. He currently serves as a member of the Committee on Psychiatric Services in Jails and Prisons for the American Psychiatric Association, a councilor for the American Academy of Psychiatry and the Law, and a director on the American Board of Forensic Psychiatry. His many articles in the area of law and psychiatry include: *The Need for Treatment Versus the Preservation of Liberty*, 15 ADMIN. IN MENTAL HEALTH 110-19 (1987), *No Miranda Warnings for Alleged Sexually Dangerous Persons*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 326-30 (1986), and *The Prediction of Violent Behavior and the Duty to Protect Third Parties*, 2 BEHAV. SCI. & L. 291-317 (1984).

8. Professor Alexander D. Brooks is the Justice Joseph Weintraub Emeritus Professor of Law at Rutgers School of Law. He was awarded the Manfred S. Guttmacher Award by the American Psychiatric Association in 1975 and currently serves as a consultant to the American Bar Association. He is the author of LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM (1974).

moral one: a mistaken decision to confine, however painful to the offender involved, is not morally equivalent to a mistaken decision to release. To Brooks, that release results in much greater harm being inflicted on the predator's innocent victims.

This position—that the procedural protections in the statute are sufficient—is made all the more clear by Professor David Boerner's article, which vividly details his personal account of the law reform process that led to the sexual predator statute. Professor Boerner[9] sees the statute as the least dangerous exercise of the state's civil commitment powers. For him, the need to effectively address the threats of violence presented by the Earl Shriners of the world outweighs any legal objections to a narrowly focused statute allowing civil commitment of sexually violent offenders after they have served their prison terms. The Washington State Legislature and many citizens of Washington apparently agree with Professor Boerner.

Legal objections to the statute, however, are raised on several fronts. While Professor Boerner's reading of court decisions in this area have led him to conclude that the statute is constitutionally and morally acceptable, Professor James Ellis[10] has a different reading. Based on the Supreme Court's recent decision in *Foucha v. Louisiana*, Professor Ellis charts the due process and equal protection limitations set out by the Court in the area of civil commitment of individuals who are no longer mentally ill. Professors Brooks and La Fond also

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9. Professor David Boerner is Associate Professor of Law at the University of Puget Sound School of Law. He was instrumental in drafting the Sexually Violent Predators statute as a member of the Governor's Task Force on Community Protection investigating the Shriner and Ballasiotes crimes. For ten years, Professor Boerner was Chief Criminal Deputy Prosecuting Attorney for King County, Washington. He is the author of SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT (1985).

10. Professor James W. Ellis is Professor of Law at the University of New Mexico. Professor Ellis is a member of the American Orthopsychiatric Association and a director of the Amercian Association on Mental Retardation. Professor Ellis was the priciple drafter of the New Mexico Mental Health and Developmental Disabilities Code and drafted the ABA Model Statute, Developmental Disabilities Services, 1982. He serves as reporter for the ABA Criminal Justice Mental Health Standards and is consulting editor for the Journal of Mental Retardation. Professor Ellis co-authored THE CONSENT HANDBOOK (1977) and THE LEAST RESTRICTIVE ALTERNATIVE (1981). Finally, Professor Ellis helped to draft the amicus curiae brief on behalf of the American Orthopsychiatric Association in *Foucha v. Louisiana*.

join in the debate about the Court's holding in *Foucha* and its constitutional implications for the Washington statute.

In addition to Professor Ellis's constitutional arguments, Beth K. Fujimoto[11] argues that Washington's Sexually Violent Predators Statute is unconstitutional based on the Supreme Court's decision in *Allen v. Illinois*. In *Allen*, Ms. Fujimoto finds a four-prong test for the validity of such statutes and argues that the Washington statute fails on all four counts. One key issue is whether the statute is civil or criminal in nature. While Ms. Fujimoto argues that the Washington statute is criminal in nature, Timothy Blood[12] asserts that the statute is "clearly" civil in nature.

Other legal objections are raised by Robert Boruchowitz,[13] who challenges the legality of the statute. Boruchowitz terms the sexually violent predator law a "nightmare in the halls of justice" akin to Franz Kafka's *The Trial*. In addition to raising constitutional and evidentiary objections, his account of the procedures suffered by those charged under the statute attempts to fill in some of the missing narratives lost in the legislative process.

Most of these commentators would agree that Washington's use of civil commitment proceedings to confine sexual predators is a sobering exercise of power by the state. But to some, far more chilling is the prospect of a community powerless to prevent the release of potentially dangerous criminals, criminals who may continue to prey on unsuspecting victims. Professor Boerner, for example, acknowledges the violence committed against these offenders by the operation of the statute. He and other commentators nevertheless conclude that the state can not be and should not be powerless to protect its citizens. Like Professor Boerner, Norm Maleng[14] argues that the need to protect the public overrides any constitutional or moral objections to the statute. Moreover, Maleng finds that the statute's procedural due process protections are more than adequate.

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11. J.D. 1992, University of Puget Sound School of Law.

12. Timothy Michael Blood is Senior Deputy Prosecuting Attorney for King County, Washington and head of the Sexual Predator Unit.

13. Robert C. Boruchowitz is Director of the Seattle-King County Defender Association. He is co-counsel in the *Young* case challenging the Sexually Violent Predators statute in the Washington Supreme Court.

14. Norm Maleng is King County Prosecutor and was the Chair of the Governor's Task Force on Community Protection.

Most of these commentators discussed above have framed the issues presented by the Sexually Violent Predators statute in terms of dichotomous choices. However, other voices can be heard in this symposium issue, voices calling us to look beyond those dichotomies. One such group of commentators—Jeffrey Klotz,[15] David Wexler,[16] Bruce Sales,[17] and Judith Becker[18]—is currently developing an interdisciplinary approach to law and psychology that they call "therapeutic jurisprudence." This jurisprudential approach encourages courts and legislatures to take into account the possible therapeutic effects of legal procedures, such as the plea process. In their article, these commentators explain why the legal processing of sexual offenders is itself either therapeutic or antitherapeutic. For them, the test of the statute's efficacy is whether it provides procedures that will both protect the public and reduce the risk of recurrent violence by encouraging offenders to admit their crimes and start on the road to recovery. This innovative approach takes us beyond simply asking whether offenders are guilty to asking how best can we cure them—the surest way to protect the public from future violence.

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15. Jeffrey A. Klotz is Adjunct Lecturer of Law and Ph.D candidate in Psychology at the University of Arizona.

16. Professor David B. Wexler is John D. Lyons Professor of Law and Professor of Psychology at the University of Arizona. Professor Wexler received the American Psychiatric Association's Manfred S. Guttmacher Award in 1972. He is the author of several books on law and psychiatry, including CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS (1976), MENTAL HEALTH LAW: MAJOR ISSUES (1981), and THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990). Professor Wexler is the former Vice President of the International Academy of Law and Mental Health, former chair of the ABA Committee on the Mentally Disabled, member of the Legal Task Force Panel for the President's Committee on Mental Health (1977-78), chair of the Advisory Board for the National Center for St. Ct. Institute on Mental Disability and the Law, and member of the MacArthur Foundation Study Group on Mental Health and the Law.

17. Professor Bruce D. Sales is Professor of Psychology, Psychiatry, Sociology, and Law at the University of Arizona.

18. Dr. Judith V. Becker is Professor of Psychiatry and Psychology at the University of Arizona College of Medicine. She currently serves as a member of the Ethics Committee of the Association for the Treatment of Sexual Abusers, a member of the Advisory Board for the National Task Force of the Creation of Standards for the Assessment and Treatment of Juvenile Sex Offenders, and a member of the Commission on Violence and Youth for the American Psychological Association. She has authored numerous book chapters, articles, and papers on the study of sexual offenders, including: *Treating Perpetrators, in* INTERVENING IN CHILD SEXUAL ABUSE (1991), *Assessment of the Adult Sex Offender, in* JUVENILE PSYCHIATRY AND THE LAW (1989), and *Measuring the Effectiveness of Treatment for the Aggressive Adolescent Sexual Offender, in* HUMAN SEXUAL AGGRESSION: CURRENT PERSPECTIVES (1988). Dr. Becker recently testified for the defense in the Jeffrey Dahmer trial.

The surest public protection is also the concern of another commentator who calls us to look beyond mere dichotomous choices. Professor Julie Shapiro[19] argues that laws like the Washington sexual predator statute distract us from the more important issue of how to make our communities truly secure. According to Professor Shapiro, the Washington statute is based on the false assumption that we can be safe only by locking the right people away. But simply locking people up has not made us feel safer nor has it made us safer in fact. Rather, Professor Shapiro argues that we can attain true security only by taking responsibility for our violent culture, with its violent and degrading images of women and children, and insisting that it change.

To the extent that commentators like Professors Shapiro and Rideout call on us to see these issues as more than a choice between dichotomies, they indict the legal process itself. All of the symposium participants, speaking from a variety of different perspectives, acknowledge the past failures of the legal process in dealing with sexual offenders. Whatever particular legal result is obtained from present or subsequent litigation, the diverse voices heard throughout these pages have already challenged the functions of that process. It is our hope that these challenges ultimately result in a legal process that protects the rights of both individual defendants and the community at large.

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19. Professor Julie Shapiro is Associate Professor of Law at the University of Puget Sound School of Law.