Sources of Security

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Much of the discussion of the Sexually Violent Predators Act^1 has been devoted to a debate over whether the Act poses various problems. The potential problems that the other commentators have identified can be divided into two groups. On the one hand, we have problems, or at least arguable problems, that are "fixable." That is, if we all agreed that they were problems, we could fix them. On the other hand, we have those problems that are not fixable.

Most problems thus far discussed are fixable problems. For example, if confusion exists about whether civil or criminal procedural rules apply, we could end the confusion by explicitly selecting the appropriate rules or drafting new ones. We might disagree on what those new rules should be, but we should all agree that we could certainly solve the problem of being uncertain about which rules apply. Similarly, if we are unclear about whether a jury must be unanimous, and if that uncertainty is a problem, we could decide that question and clarify the statute accordingly.²

The fixable problems relating to the specifics of the statute thus do not raise the hardest questions that a statute like this one presents precisely because they are fixable. If I agreed that the general idea of the statute was a good one, I still might find the specifics of this statute unacceptable. But I would be able to propose an acceptable statute that accomplished the same basic purpose. Thus, although the specifics of this statute are of enormous importance to the legal questions pending in the courts and to those who must litigate under the statute, the

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^{1.} WASH. REV. CODE §§ 71.09.010-.902 (Supp. 1990-91).

^{2.} I do not suggest that the question of whether the statute ought to require a unanimous jury is an easy one to resolve. It is one on which there has been disagreement among the commentators. Thus, whether we required a unanimous jury or not, dissenters would still assert that the choice reflected in the statute was wrong. But in my view, the statute would remain "fixable" because if the dissenters could convince a majority of the decision-makers that their position was correct, the dissenters' concerns would be satisfied.

specifics are not essential to the most difficult problem posed by this Act. Rather than focus on the specifics of this particular Act, I will direct my comments to the dilemma inevitably posed by any statute like this: can the government acceptably imprison individuals based on a prediction of future dangerousness?

I must begin my consideration by observing that at least two problems are presented by virtually any statutory scheme aimed at identifying and imprisoning individuals based on predictions of how they will behave in the future. First, we cannot with complete accuracy identify those individuals who are dangerous, and second, the unusual decision-making process will inevitably be skewed in favor of incarceration. Taken together, these two problems ensure that we will end up incarcerating some who are not in fact dangerous.

As to the first of these problems, although the other commentators disagree about how accurately dangerousness can be predicted and although some current research may suggest that we can be somewhat more accurate than past studies have suggested, no one has asserted that we can predict dangerousness flawlessly or even with a very high degree of accuracy. Further, no one has advanced the claim that at any time in the foreseeable future we will be able to do so. This leads, of course, to two conclusions. First, we will inevitably detain some people who are not in fact dangerous. These are "false positives." Second, we will release some people who are in fact dangerous. These are "false negatives." Even the most optimistic and faithful of the advocates of this statute, or any statute like it, must acknowledge that we will err on both sides of the line.

The second future dangerousness problem that the Washington statute presents is that we ask a fact-finder to make a decision unlike those decisions we expect fact-finders to make elsewhere in the criminal or civil justice system. Rather than asking the finder of fact, which is typically a jury, to determine what happened in the past, we ask that it tell us what will happen in the future. Although in a technical legal sense the factfinder must determine that some doubt exists about whether the defendant poses a risk of harm in the future in order to conclude that the individual is not a sexual predator, in a practical sense the fact-finder must offer us a personal assurance that the defendant is "safe."³ In order to make an informed determination, the fact-finder must be advised of the terrible crimes that the defendant has committed in the past. Having been advised of the cruelty that the defendant has been capable of in the past, even the most conscientious fact-finder, whether judge or jury, will often choose to ensure the safety of the community rather than assume personal responsibility, even for what may be a very small risk.⁴ Given this choice, many fact-finders inevitably will err on the side of incarceration.

This problem may at first seem most severe when the factfinder is a jury; it could thus seemingly be resolved by simply assigning fact-finding in these cases to judges. But surely an elected judge, as state judges in Washington are, is at least equally susceptible to pressures to err on the side of safety. One can easily imagine that even unelected judges with life tenure might well hesitate before determining, in a close case, to release a person who might be dangerous. The apparent effect of this pressure is to skew the process towards incarceration. Thus, false positives will be multiplied while false negatives, to some extent, may be minimized.⁵

These observations lead to the conclusion that statutes of this kind will necessarily lead to the incarceration of people who are not in fact dangerous. Also, perhaps to a lesser degree, such statutes will only imperfectly achieve their purpose of detaining those who are dangerous. This result recreates the moral dilemma with which we began: can we acceptably adopt a system that will incarcerate innocent and harmless people in order to imperfectly protect ourselves from dangerous people?

^{3.} This question may bear some resemblance to questions that must be faced by judges at sentencing or by parole boards, but it is not one generally presented to a jury. And, given the modern trend towards determinate sentencing, it is a question that is asked less frequently of judges and parole boards.

^{4.} The problem of erring in favor of incarceration is more striking in the Sexually Violent Predators Act because the Act requires that the jury must find, beyond a reasonable doubt, that the defendant is a sexually violent predator. WASH. REV. CODE § 71.09.060(1) (Supp. 1990-91). Even assuming the standard of proof is a problem, however, it is a "fixable" problem.

^{5.} The prosecution has won all of the cases brought to trial to date. 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. 665 (1992). Although this could be because prosecutors have carefully selected only the strongest cases, the result is at least equally consistent with the hypothesis that, when in doubt, juries will err on the side of incarceration.

Although I do not propose to resolve this question, I would now like to turn to two problems generated by the statute that are not "fixable." First, the statute perpetuates the notion that we should lock up those who threaten us; and second, the statute ignores culture's influence upon sexual offenders. Both problems weigh against adoption of such a statute.

Any statute like the Sexually Violent Predators Act perpetuates the notion that the source of our safety, as individuals and as communities, is in confining those who threaten us. Surely this is not true. As a society, we incarcerate a larger proportion of our population than any other country in the world. Indeed, in 1990, our incarceration rate was 455 people per 100,000; this number represents an increase of 6.8% from 1989.⁶ Yet this has not made us safe. Also, the rise in rates of incarceration over the last five years has not brought with it safer cities and towns. We cannot hope to obtain security and safety as individuals or as communities simply by locking people up. Although incarceration may be the appropriate response to some forms of antisocial behavior, it cannot be our primary response. Security will be found in responsible, organized communities and in each of us taking responsibility in our neighborhoods and for our neighbors.

This perspective on the sources of security was not ignored in the package of reforms adopted after the Shriner case. One provision that the legislature adopted ensures appropriate community notification when an identified individual is to be released into the community.⁷ This provision allows the community to take responsible, collective actions to protect its members. Yet as far as I can determine, we pay much less attention to these provisions than to those that permit incarceration. Thus, the tremendous potential of the Act for increasing the safety of our communities through creative individual and community responses goes largely unrealized while substantial resources are devoted to achieving and maintaining the long-term incarceration of fourteen "sexually violent predators."⁸

^{6.} Fox Butterfield, U.S. Expands Its Lead in the Rate of Imprisonment, N.Y. TIMES, Feb. 11, 1992, at A16. This rate is ten times higher than those of Japan, Sweden, Ireland, and the Netherlands. Id. The American rate is also somewhat higher than that of South Africa. Id.

^{7.} WASH. REV. CODE § 71.09.120 (Supp. 1990-91).

^{8.} La Fond, *supra* note 5, at 701. It is difficult to know how to interpret the fact that to date only 14 individuals have been incarcerated under the Act. On one hand, to

Ironically, in relying heavily on incarceration, the statute may render us more vulnerable. Because we rely on the false notion that we can make ourselves safe by identifying the right people and locking them away, we do not take the steps necessary to develop secure communities. We fail to develop adequate protections against the people whose danger cannot be foreseen: the false negatives of the world. Further, when the individuals who are identified as sexual predators are released into our communities (a circumstance which must be possible because the defendants are not sentenced to life in prison) will we know how to protect ourselves? In order for sexual offenders to be re-integrated into communities safely, community security mechanisms must be in place. Yet our reliance on, and our misplaced faith in, incarceration as a primary means of attaining security prevents us from developing these mechanisms.

In short, the assumption embedded in the statute that we can be safe if we can only lock the right people away is false. It is a false assumption that obscures from us the actions we must take to build a safer society.

The second point that weighs against endorsement of the Act as a way to address the problems of sexual violence is also bound up with the assumptions that support the Act. The Act apparently assumes that the violence it seeks to address is the product of illness and not of culture. Even assuming this is true in the case of the very specific individuals targeted by the Act, the message of the Act is that this is more generally true. This message stops us from questioning the relationship between the violence in our culture, particularly violence against women and children, and the violence on our streets. We may obtain some comfort by pointing to individuals who can inflict horrifying injuries on others, saying: "They are not like us"; "they are sick"; "they suffer a disease." Yet in doing so we absolve ourselves of any responsibility for their "sick-

the extent that concerns exist about nondangerous individuals being incarcerated, one may gain some comfort from the fact that so few individuals are incarcerated. After all, even if the rate of false positives is 50%, only seven nondangerous people are presently incarcerated. On the other hand, when the incarceration provisions of the Act have been used in so few cases, one may find it hard to believe that the provisions have actually increased the safety of the citizens of Washington in any meaningful way. Certainly I do not feel safer walking the streets at night knowing that there are 14 (assuming all are correctly identified) fewer dangerous criminals lurking in the shadows.

ness." And in doing that, we may cut ourselves off from the potential understanding of the problem and of the solution.

We are all immersed in a culture replete with images of violence and of degradation of women and children. This much is readily apparent in our magazines, television, movies, music, and advertising. These images are reflected, perhaps, in the prevalence of domestic violence and child abuse. One cannot adequately analyze these cultural problems by saying simply that the perpetrators of sexual crimes are sick. If sexual offenders are sick, societal illness afflicts them at least in part. We will not be able to cure this illness until we as individuals take responsibility for our culture, acknowledge the power of its images, and insist that they change. Here again, the Sexually Violent Predators Act may actually hamper change because it provides us with a simple, exculpatory explanation that these people are sick and that we are not responsible for this sickness. In doing so, the Act discourages or misdirects efforts to bring changes that might result in enhanced safety and security.

The problems of incarceration and cultural influence share a common theme: the messages the Act conveys, as well as the Act itself, are problematic. Indeed, the Act conveys clear messages that security is attained through incarceration and that the people who commit crimes against women and children are isolated, ill individuals. These messages are too simplistic and too easy to accept. They allow us to stop questioning the sources of security and violence in our society, and they hamper us in our search for real solutions.