Keynote Address: Predators and Politics

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The task of a keynote speaker in a contentious and difficult subject like the Washington statute is not easy. The keynote speech is the secular equivalent of a blessing. And I, in all modesty, have to confess that I am the ideal person to offer a secular blessing. I have a Jewish father and an Irish mother, so secular blessings come easy to me. When I get invited to do keynote speeches, I'm generally clear about what I want to say. I advance my opinions with that modesty for which economists at the University of Chicago Law School are famous. But today, I don't have a clear line at all. I hope my views will develop throughout the day. Like all of you, I have prejudices and rationalizations and imprecisions, but I don't have any clear party line.

To begin, I thought that I would indulge myself a little in the history of my own involvement with these questions, talk about the relationship between the mental health power and the criminal law power of the State, and then talk a little about the new Washington statute.

I first came in contact with this question of what to do with the violent sexual predator in 1948 when I went with an English psychiatrist, Dr. Trevor Gibbon, to visit the Karolinska Institute in Stockholm, then the leading innovator in this field. From there, we moved down to Denmark to an institution called Herstedvester, near Copenhagen, run by a wonderful man, a Dr. George Sturup. I fell under his influence for many years. He came to visit me when I was teaching in Australia and then came to Chicago a couple of times. I translated, with his assistance, a Danish film on that institution. Herstedvester

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was one of the first institutions to be written up for the psychiatric treatment of serious sexual offenders. George Sturup became either famous or notorious by virtue of the fact that his institution performed surgical castration on what he called "volunteers." I think that they were as near to volunteers as you could get. They were people who otherwise had been sentenced for very long terms for their offenses. At that stage, having been sentenced, George would offer them the opportunity for surgical castration and for replacement in the community with family support and job opportunities within six months. That arrangement was about as close to volunteering as you could get under the circumstances.

George died a couple of years ago, still believing in the validity of his work but no longer favoring surgical castration. He felt that the same results could be achieved by estrogen and other chemical techniques. I had always been and remain troubled by the castration technique, not dogmatically troubled, I hope, but troubled. If I could be sure that people of George Sturup's quality were making these treatment decisions, my trouble would be small. Unfortunately, I don't think there are many people of his capacity, quality, sensitivity, or purity of heart to handle the terribly emotionally disturbing problems that we're addressing in today's colloquy.

The final egotistical narrative that I want to offer relates to the group of sexually dangerous persons currently held at the Menard Psychiatric Facility, located some three hundred miles south of Chicago on the north bank of the Mississippi. Fifteen years ago, I was chairman of a gubernatorial commission on that psychiatric facility, and I arranged to visit it often for entirely selfish reasons. I was then learning to fly little aeroplanes, and I could get free flying time back and forth. As I came and went, the prisoners would wave to me, and it was rather fun. So self-interest as usual matched intellectual ambition, and I worked down there. There are still about twenty sexually dangerous persons held in the psychiatric facility at Menard. Of course, there's no treatment worth talking about. It's really rather hard to get competent psychiatric treatment to make the pilgrimage from East St. Louis across to Menard. I think you have to do it by camel train if you don't have an aeroplane, and putting a fine phrase upon it, treatment is an hypocrisy. It is detention.

What are these twenty prisoners like? Well, they're the
least disturbed group in the psychiatric facility, and they're the most difficult to handle. They tend to be a little better educated, and they're stuck there for an enormously long time. Fifteen years ago, we found eighteen men who had been held illegally, all for over twenty years. They tend to be forgotten. We got them out, a psychiatrist and I, after some collaboration with the state authorities.

So I approach this problem with a recognition of its difficulty and its political anguish, and with respect for those who think they need to make trade-offs between political pressure and punishment principle. I also approach this problem with a real sense that this is not a new road we're on; it's a very old one. I think that I know what will happen in Washington State. Very few people will be committed, and then those numbers will drop off, and they'll be forgotten until some new sensational event occurs. Well, that's not a very cheerful version, but it may have the benefit of truth. But, anyhow, Alex Brooks¹ as usual will put me right, and you will be properly guided.

Let me turn to the second theme. It is the question that Alex tells me he will deal with later and in detail—the problem of prediction and its relationship to two powers: the mental health power, which is essentially a civil commitment power, and the criminal law power, which is a punishment power. A lot of ink has been spilled on this topic. One of the more important Supreme Court cases is the McCleskey² case, in which all nine justices agreed about the best available prediction for what Dr. Grigson from Texas, known as Dr. Death, described as a sociopath, which used to be described as a psychopath, which used to be described as a moral imbecile, and so on. Before that they were called warlocks and witches, but I'm not sure; I think they're the same people. Even for them, the best we could do for a prediction of violence would be one true positive prediction of danger for two false positives. Some people have said that's bad prediction. To find a group with a base expectancy rate of serious violence of one in three is an astonishingly good prediction rate. Much better than what you will be able to do in practice under the violent sexual predator legislation.

But let's suppose you can predict one repeat offender in three. The problem is that, of the three, you don't know which one will be the repeat offender. There is no way to find out—all three will have serious records. As a result, courts will over-predict danger and hold all three in custody. There is no way in which you can uncover an error, or put correctly, there is no way in which you can ethically test the violent sexual predator legislation.

The Supreme Court has spoken in a reasonably useful way on two of the issues we face today, and so let me inflict three cases on you briefly. You'll hear them again from others in more detail.

The Backstrom v. Herold case is a very interesting one on the topic of today's symposium. This case occurred in 1966; some folks challenged New York's practice of transferring prisoners at the end of their term to psychiatric hospitals. When prisoners completed their term—you'll see how this practice was similar to your violent sexual predator legislation—the State would hold a civil commitment hearing. They didn't call it that, but it was analogous to a civil commitment hearing. The State would order a psychiatric interview and psychiatric assessment. Then, if the prisoner was seen to be still mentally ill, which is a very plastic concept, and still a danger to others, which is also a very plastic concept, he would be transferred either to the Dammemora or Mattewan institutions and held under the civil commitment power of the State.

This practice was challenged in the Supreme Court, and there was a firm decision that this practice resulted in an unequal protection of the law. The Court held that the prisoner had served his term by way of punishment and that the protections that must be given for the transfer to the civil hospital had to be the same as would be given to any citizen. Other, various defects existed in the State's civil commitment hearing process that the prisoners has just received: There wasn't a jury trial; there wasn't representation; the transfer mechanism was defective as well. So what the Supreme Court was saying was there could not be, in the prison context, a hybrid classification, which had neither the protections of criminal law nor the protections of civil commitment.

A somewhat similar result was reached in Jackson v. Indi-

ana in 1972. Jackson was a deaf-mute who was charged with stealing a purse and its contents. It still is not known whether he actually committed the crime. Anyhow, he was found unfit to plead. The Indiana assessment authorities decided he never would be fit to plead. The school for the deaf said they wouldn't take the criminal deaf for training, but of course, he hadn't been convicted. He was being held as unfit for trial for, in effect, a life sentence. In any event, the case reached the Supreme Court, which held that after a reasonable time to make Jackson fit for trial, if that could be achieved, he should be taken to trial. If it could not be achieved, the State should be forced to choose between civil commitment or release.

At that stage in the development of the case law, I was fairly clear how the law stood, particularly because the United States Supreme Court had never invalidated a sexual psychopath law. But a more recent case, Jones v. United States, shakes my confidence. In Jones, a majority of the Supreme Court held that a person, who had pleaded not guilty by reason of insanity and for whose offense the maximum punishment could only be one year's imprisonment, could be held indeterminately if he presented a continuing danger to others and was mentally ill. Furthermore, that person could be held by procedures that are less than those required for civil commitment.

In other words, I do not think that Backstrom v. Herold and Jones v. United States are reconcilable. In that situation, given the Supreme Court's record on sexual psychopath laws, given the recency of the Jones decision, and given the fact that the Supreme Court of the United States in its capital punishment jurisprudence has simply become a political body, not a legal body at all—this material is not capable of legal analysis; it's only capable of political understanding—then I think it is quite likely that, if the matter reaches the Supreme Court, your violent sexual predator law will be held constitutional. Now, is that an important point? Not really. It's an interesting point, or I hope you think it's interesting. But the important question is: "Is it wise?" not "Is it Constitutional?" Not everything that's constitutional is wise, and not everything that is unconstitutional is unwise.

What are the problems here? The person who has had the greatest influence on my thinking about these problems is

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Karl Popper, a person whom some of you will know. At the age of 87, he gave a lecture called *A World of Propensities*, which I recommend. I’ve come to see almost all human relationships as problems of propensities and their fortuitous acting out. The first problem about propensities is a question that I briefly alluded to: “What is a good prediction and what is a bad prediction?” Put in more concrete terms, how can one predict that “beyond a reasonable doubt” a person is likely to commit a crime of violence? I don’t know what that means. I think it can be given meaning, but only if it is expressed in terms of some base expectancy rate. That is to say, some precise statement as to the proportion of this group that will be involved in violence. Then we could make the moral judgment—because it is a moral judgment. That moral judgment is how many false positives can be justified for the avoidance of one true positive.

And our present knowledge of this proportion is fairly slight. I mean, these are great chaps they’ve got on this platform today, with one exception; but, strictly between ourselves, they don’t know very much about hard numbers. Not because they’re not good; they’re probably as good as anyone. The simple fact is that mankind doesn’t know a great deal about this world of propensities. One of the ways we protect ourselves is by overpredicting risk. It’s easy to overpredict risk. The person you’re predicting about has a dreadful record. There’s no way of being sure he’s safe. And while you keep him locked up, you can’t be proved wrong. The only way that you can lapse into political error is to take a risk. Put in accurate terms, Willie Horton is going to happen in every system where there’s discretion. That’s why its use as a political ploy was so improper. Because we just don’t have the ability to prevent all future violence—unless you lock up all people at risk permanently—we just don’t have the capacity to predict.

Now let me come briefly to the Washington statute. Maine, Washington, and Minnesota are seen by those of us in the trade as states with rational, thoughtful, humane sentencing practices, as amongst the leaders. You clearly are. In the book that Michael Tonry and I wrote on intermediate punishments, we wrote at length about the wisdom and the quality of your community-based treatments for sexual offenders.

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Incidentally, in those three states, sexual offenders are also the modal group in prison. This isn't any change in human behavior; it's a change in human reaction to the behavior of others. It's a change in political and social attitude, not in human sexual behavior. Since you've got a background of leadership in community-based treatment; therefore, I suppose, you have a right to experiment at the other end of the spectrum.

What about this very small group of awful offenders? Can we do anything about them? What are the moral and social costs for doing so? I'm glad you're trying. I'm interested in it. I do not think you should deceive yourself that you can measure it. I do not believe, given even limitless resources, that I would know how to do a good evaluation of this program. There are ethical and statistical reasons why it cannot be tested. So you'll assume it works, because you'll hold people in who look like they're very dangerous.

Well, I'll conclude by mentioning one sort of dream idea I had last night. Let me propose the following to you: If you really want to stop the injury to citizens, including death to Washington citizens, then there's another group with a very, very high rate of subsequent violence that you should turn your mind to. They are not people who have killed. Most murderers are not dangerous; most of them have solved their problem. But the people that are really dangerous are people who have carried or threatened with a gun when they committed a robbery or a burglary. Their base expectancy rate for crime, subsequently doing great injury, is very high indeed. Much higher than the base expectancy rates that you are dealing with. Why don't we, at the end of their sentence, lock up permanently everyone who's used a gun or carried a gun when they commit a crime? Now, the problem with my dream is that some damned reporter will come up to me and say, "I don't think I got that clearly. What were you recommending?" And I'm not. But I think it might be a stimulating thought, and I hope it helps. My secular blessing on all of you. Thank you.