Confronting Violence: In the Act and in the Word

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I. THE ACT

The boy asked his mother if he could ride his bike to a friend's house. It was about 6:30 in the evening, Saturday, May 20, 1989. As the boy rode past a small woods in his South Tacoma neighborhood, a man, also riding a bicycle, asked the boy if he could ride with him on the trails through the woods.

At dusk, about 9:00 p.m., the Mansfield family, father and mother, daughter, and three nieces, entered the wooded area to bury their family cat. As they made their way along a path they saw the boy, in the distance, standing silently, naked, covered with mud and dried blood. Dick Mansfield swept the boy into his arms and carried him to their home and then to the hospital. At the emergency room, doctors found that the boy had been anally and orally raped, stabbed in the back, and strangled with a cord; they also found that his penis had been cut off.

Initially the boy was in shock, unable to speak, only mumbling incoherently. Later, he was able to give a description of a man with a badly pock-marked face and a large nose who was riding a green bicycle with front and back baskets. The description matched that of Earl Shriner, a man well known to the Tacoma police. Detectives went to Shriner's home, where they seized his shoes, stained with blood and mud. The soles of the shoes appeared to match treadmarks at the scene. They also seized his bicycle, which was green with front and rear baskets, and a cord from his jacket that carried blonde hairs similar to the boy's.

On Monday, Earl Shriner was charged with attempted murder in the first degree, rape in the first degree, and assault in the first degree.

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The following is a narrative of my participation in the response to this act of sexual violence. This narrative begins with the public's reaction and then moves to the law's response to that reaction.

II. THE PUBLIC'S RESPONSE

A. Monday, May 22, 1989

The Tacoma Morning News Tribune leads its front page story with the headline:

Past Sex Offender Suspect In Attack—Boy Too Traumatized to Cry by Mutilation.

The opening paragraph of the story reported:

[a] Tacoma man with a 24-year history of killing, assault and kidnapping was arrested Sunday on suspicion of raping and sexually mutilating a 7-year-old Tacoma boy.

The story contained the following description of Shriner's history:

Police on Sunday said Shriner was released from prison in 1987 after serving a 21-year sentence for killing a young girl and has been arrested for crimes involving children since then.

But News Tribune files show Shriner was never convicted of killing the 15-year-old girl whose body he led police to in 1966. Shriner was not charged for that crime but instead was committed to the state Department of Institutions as a "defective delinquent." Psychiatrists at Eastern State Hospital then said he was too dangerous to be at large.

In that incident, after being detained for choking a 7-year-old East Side girl, Shriner, then 16, led authorities to the body of a 15-year-old retarded girl who had disappeared several months earlier. The girl, who was strangled, had been tied to a tree in a wooded area about a half-mile away from the scene of Saturday's assault.

Files also show a long list of Shriner's other victims.

Shriner, who has been described in court records as mildly retarded, in 1977 pleaded guilty to assault and kidnapping charges in connection with the abduction of two 16-year-old girls in Spanaway. He was sentenced to 10 years in prison after Eastern State Hospital officials determined he was not suited for the hospital's sexual psychopath program.
Shriner has twice been acquitted of charges in connection with attacks on young women.

Since his release from state prison in 1987, Shriner has served 66 days in the Pierce County Jail for second-degree assault. Part of that sentence was suspended. Jail and police officials Sunday said they did not know the circumstances of that crime or the victim’s age.

Shriner was released from the county jail last December after serving 67 days for an unlawful imprisonment conviction stemming from an attack on a 10-year-old boy who escaped after being tied to a fence post and beaten. Shriner originally was charged with attempted statutory rape and unlawful imprisonment in connection with that attack. After Shriner pleaded guilty to the unlawful imprisonment count, prosecutors recommended that 30 days of his sentence be converted to community service.

Police on Sunday said another unlawful imprisonment charge is pending against Shriner.

Shriner appeared before the Pierce County Superior Court on Monday afternoon. The courtroom was jammed with spectators and reporters, while pickets outside demanded high bail. The judge set Shriner’s bail at one million dollars.

B. Tuesday, May 23, 1989

Tuesday’s papers carried considerably more detail about Shriner’s past and began to explore the adequacy of the state’s response to that past. Under the headline “System Just Couldn’t Keep Suspect,” the Tacoma Morning News Tribune reported that state officials had sought to have Shriner civilly committed in 1987 when he was released from prison after serving “the full 10 year sentence for assaulting and abducting two 16-year-old girls.” The story revealed that Washington’s Parole Board had denied all requests to release Shriner on parole. In addition, it reported that state officials had sought civil commitment when Shriner completed his prison term because he “had hatched elaborate plans to maim or kill youngsters while waiting out the final months of his prison sentence in early 1987. . . .” The chair of the state Indeterminate Sentence Review Board was quoted as saying that Shriner “had lists of apparatus he might need in that regard. . . .” The story reported that after being held for seventy-two hours, Shriner was released because the judge found that he did not fit the statutory criteria for civil commitment.
The article revealed further details on Shriner’s arrests since his release from prison in 1987. Four months after his release he was arrested for stabbing a sixteen-year-old boy in the arm with a knife. After an evaluation at a state mental hospital, Shriner was found competent to stand trial by a psychologist who reported “[b]ecause he seems to possess such tenuous behavioral controls over aggressive and sexual impulses, we believe he is a high risk for future violent acts, especially against children.”

Initially, Shriner was charged with assault in the second degree for the attack on the sixteen year old. After plea bargaining, Shriner pled guilty to the misdemeanor of attempted simple assault and was sentenced to the statutory maximum sentence of ninety days in jail. The Tacoma Morning News Tribune reported that the judge who sentenced Shriner was a presiding criminal judge who would see up to one thousand cases per month and did not remember Shriner. When asked about the psychologist’s report, the judge stated that “[y]ou can’t give an exceptional sentence based simply on someone’s thought that they might be dangerous in the future.”

The Tacoma Morning News Tribune also reported that Shriner was arrested again in January, 1988 in connection with an attack on a ten-year-old boy who was tied to a fence post and beaten. Originally charged with attempted unlawful imprisonment, a gross misdemeanor, and attempted statutory rape, a felony, Shriner plead guilty to attempted unlawful imprisonment when the attempted statutory rape was dropped as part of a plea bargain. He was sentenced to sixty-seven days in jail and ordered to pay $78 in court costs and $70 to the crime victim’s compensation fund. He was released from jail in December, 1988.

The Tacoma Morning News Tribune story also announced that donations towards the mutilated boy’s medical bills could be sent to a Tacoma bank.

The story quickly spread throughout the state. Tuesday morning’s Seattle Post-Intelligencer, the newspaper with the widest circulation in the state, carried a front page story under the headline “Mutilation Suspect Denies All Charges—Spectators Cheer As Judge Sets High Bail.” The story contained essentially all the information carried by the Tacoma Morning News Tribune. Tuesday afternoon’s The Seattle Times, carried the story on page one under the headline “Outrage In
Tacoma—Police Frustrated, Neighbors Angry That Suspect in Boy's Mutilation Was Free.”

C. Wednesday, May 24, 1989

Wednesday's news focused on the fact that so many officials had known of Shriner's history and had predicted he would commit acts of violence. The Tacoma Morning News Tribune carried two front page stories, one under the headline “Outrage Over the Attack, Over the System,” and the other under the headline “Lack of Options, Data, Time Restrict What Judges Can Do.” It also editorialized about “[a]n offense that calls for outrage.” The Seattle Times headlined its story, “System Couldn't Cope With Assault Suspect,” and detailed Shriner's past contacts with Washington's criminal, juvenile, and civil commitment systems. Under the heading, “Put Mutilators Away,” the Seattle Post-Intelligencer editorialized:

This case makes clear that a class of criminal exists that is beyond reach of rehabilitation because of mental deficiencies. Such people cannot be put to death by a just society.

But justice also demands that society be protected from such people.

The legal system needs to be changed to make it possible to remove the criminally insane from society, quickly and permanently. In such obvious cases as this, the law should err, if it errs at all, on the side of protecting the innocent.

The Seattle Times editorial entitled “Tighter Controls Needed On Repeat Sex Offenders” stated:

Whoever stabbed, raped, sexually mutilated and left for dead the 7-year-old boy in Tacoma should never walk the streets again.

If it was the repeat sex offender who has been accused of the sickening attack, the laws that allow such people to prey on victims over and over must be tightened.

The Spokane Spokesman-Review, the largest circulation paper in Eastern Washington, headlined its Wednesday lead editorial “Protection of Society: Justice System Fails.” It stated:

Two defendants face serious charges in the mutilation of a 7-year-old Tacoma boy.

One defendant is Earl Kenneth Shriner. Culminating a
long record of assaults on children, Shriner allegedly accosted a 7-year-old boy who was out riding his bicycle on Saturday, raped him and cut off his penis.

The other defendant is our criminal-justice and mental health commitment system, which stands accused of a gross failure to protect society.

In Olympia, the state capital, The Olympian reported on the reaction of state officials under the headline “Mutilation Sparks Outrage—Legal Limitations Frustrate Officials.” A spokesperson for Governor Booth Gardner was quoted as saying:

The governor was just pale at the thought of this, it’s hard to fathom. . . . Everyone is in a state of shock and saying, “We’ve got to do something about this.”

This is another case, as unfair as it is, where something awful has to happen to change the laws. But anger can be an opportunity also.

The spokesperson said the Governor called for a change in state law:

[T]o make certain these kinds of cases don’t fall through the cracks, . . . Gardner, the Governor, said there should be a way to involuntarily commit people who have a profile of an individual that is a known risk with a high degree of probability that they would commit this type of crime. The governor wants the debate. He has no specific legislation at this stage. He wants to start the ball rolling . . . .

The Secretary of the Department of Corrections indicated that Washington’s civil commitment laws may be inadequate. He was quoted as saying:

The measure is whether a person is imminently dangerous to one’s self or others. That’s a very difficult standard to meet.

There are gaps between the civil and criminal laws that certain persons with developmental disabilities and mental health problems fall . . . .

The Secretary of the Department of Social and Health Services, the agency that sought civil commitment of Shriner in 1987, was quoted as saying “[i]t seems like our people have done a pretty darn good job of marking the boxes on this person’s future risk to society. The court just didn’t buy it.”
In addition to stories about Shriners and the system's failure to protect the public from him, the boy's story was prominent in the press. The Tacoma *Morning News Tribune* carried a story headlined "The Little Boy Isn't Alone," which featured a photograph of the boy, sitting up in his hospital bed, with his mother, surrounded by stuffed animals and balloons. The article began: "[t]he little boy's mother wants you to know that the healing has begun." The story continued:

The mother would like you to know that her son is sitting up in bed now, playing "Zelda" on the hospital Nintendo. On the video screen he's a little guy who is walking through the woods. Monsters are constantly jumping out of the woods to attack him. The video guy is zapping all the monsters—every one of them.

The story reported that "teddy bears, toys, balloons and hundreds and hundreds of cards" had been received at the hospital, all addressed the same way: "To the Little Boy."

The story quoted extensively from the boy's mother, and concluded:

Her son's present and future pain fills the child's mother with anger—both at his attacker, and at a system that requires a child to suffer before such people are treated or incarcerated.

"I want the people out there to know that they have every right to be angry about this," she said. "They have every right to be concerned and care and I appreciate that part. I want them to know it's being received. It has got to have a lot to do with how quickly things are developing back to normal for us.

"But I don't want them to let go of that anger. That anger is what's got to keep the public opinion of this situation alive until it's actually dealt with, until in some way, not just this person is dealt justice, but this loophole is plugged. If it's [sic] money to create another place, or people to do more studies. I don't know what the answer is to the situation. Whatever it is we have to keep that anger on fire until it's resolved," the mother said.

"People will forget if they're not reminded, and anger reminds them deeply that they'd better do something about it."

The same edition carried a lead editorial that stated, in part:

It's an axiom of law enforcement that sexual psycho-
paths who shun treatment go hunting for new victims sooner or later. Yet Shriner was still at large after multiple convictions. There are no obvious culprits. Judges and corrections officials tried hard to keep him locked up. The police have attempted to watch him. But as Pierce County Prosecutor John Ladenburg said, "[W]e’ve got to wait for the guy to commit a major offense, when everybody knows he’s going to re-offend." Something seems to be fundamentally wrong with the law. Common sense would dictate that sexual psychopaths ought to be permanently isolated from society once it becomes clear they’ll never be rehabilitated.

By Wednesday, more than $17,000 in donations had been received by the boy’s fund. Employees at the Boeing Company offered a trip to Disneyland. The Fern Hill Tavern in the boy’s neighborhood held a benefit, which raised thousands of dollars. Throughout Washington, a variety of activities, from junior high school bake sales to radio auctions, raised money to cover medical expenses.

Concerned legislators responded to the public outrage. The chair of the Washington State Senate Law and Justice Committee, Kent Pullen (R-Kent) announced that his staff was looking into the matter. Senator Phil Talmadge (D-Seattle), the ranking minority member of the Committee, asked Senator Pullen and the chair of the Senate Health Care and Corrections Committee to schedule joint hearings in an effort to determine why Shriner was "out walking on the street."

D. Thursday, May 25, 1989

The newspapers carried stories on the Fern Hill community’s attempt to protect itself from Shriner, who lived with his mother next door to a route children took to and from Larchmont Elementary School. When notified by the police in the fall of 1988 of Shriner’s past and his residence in the area, school officials considered sending parents a letter with Shriner’s picture, but never followed through. In a story from The Seattle Times entitled, "When a Felon Lives Next Door,” the principal was quoted as saying: "I wanted the picture to show parents. They said, ‘No you cannot have it.’ They said, ‘Legally you can’t show parents or tell them...’ They told me this man had served his time and was starting a new life.” An article in the Tacoma Morning News Tribune quoted Tacoma police as saying they were “hampered by laws that keep police from acting unless a crime is committed” and that “we techni-
cally couldn’t put his face on a billboard to tell people he was there.”

The article also reported that school officials had identified the fifty students who walked by the Shriner house on the way to school and had teachers count those children each morning and before they left in the afternoon. An additional crossing guard was hired to help watch the children, and the principal visited the Shriner home to let the Shriners know he was “in the area.”

*The Seattle Times* reported that the felony charges against Shriner in 1987 and 1988 were reduced to misdemeanors because the “children who were the victims of his assaults couldn’t be made to testify against him in court.” *The Seattle Times* reported that “[o]ne victim had moved to Florida and wouldn’t return. The other was a ‘street kid’ who couldn’t be found by prosecutors when it came time to go to trial.” The Prosecuting Attorney was quoted as saying “[i]f we’d have tried to go to trial, we’d have ended up with nothing, twice.”

*The Seattle Times* also reported that the psychiatrist who had testified at the 1987 civil commitment hearing concluded that Shriner was “a high risk for future violent acts, especially against children,” stating:

The laws are very specific, it’s very difficult to have someone committed in this state. . . . There has to be a hearing, you have to have someone testify they were placed in immediate danger.

It makes you feel you’re sitting here, very ineffective. I wish there were laws so this could be acted on. Many of these people should not be on the street.

The attorney who defended Shriner at the civil commitment hearing pointed out that mental health experts disagree as to whether pedophilia is a mental illness. The attorney was later quoted by the May 27, 1989 Tacoma *Morning News Tribune* as saying the law requires that the state must prove “recent and overt acts” that might put the patient or the community at danger. “You can threaten all you want,” he said.

The director of the sex-offenders treatment program at Twin Rivers Correctional Center, Dr. Barbara Schwartz, a nationally recognized expert in the field, said “[f]rom what I’ve read about Shriner, I don’t think there was a state in the nation where he could have been committed.”

The Tacoma *Morning News Tribune* carried a column by
an editorial writer featuring the opinions of Maureen MacNamara, the executive director of the Sexual Assault Crisis Center of Pierce County. The editorial stated that Ms. MacNamara realized that because the issue of child sexual assault is currently so visible, she can reach out to the community and harness emotion, translating it into action. The column announced a "public forum on child sexual assault" for Tuesday, May 30, which "legislators, law enforcement and social service representatives" would attend.

E. Friday, May 26, 1989

A group of protestors gathered on the steps of the Capitol Building in Olympia to demand that the Governor call a special session of the legislature to enact tougher penalties for sex offenders, including life imprisonment for repeat sex offenders. The group was led by Mike Ballasiotes, brother of the late Diane Ballasiotes, who was murdered in Seattle in September 1988.

Ms. Ballasiotes's murder had created its own storm of controversy when it was learned that her murderer, Gene Kane, was a convicted sex offender who had served thirteen years in prison and was, at the time of the murder, a resident of a work-release program in downtown Seattle as a "transition" to release. Kane had not received treatment as a sexual psychopath because he was considered too dangerous for treatment in the mental hospital where the treatment program was then located.

A spokesperson for the Governor stated that the office had received 1,000 calls and letters about the Tacoma boy by Friday afternoon, the most correspondence the Governor had ever received on one issue in such a short time. The Sun (Bremerton) reported that the executive officer of the state Sentencing Guidelines Commission stated that she had calls "from people who indicated they had never made a phone call on a matter of public policy in their lives."

Senators Pullen and Talmadge set a public hearing for the next Friday. Senator Talmadge said he would ask the Governor to create a commission to develop a statewide plan for the criminal justice system to help determine where the money should be spent.

The Governor released a letter directing state officials to find ways to eliminate the "gaps that exist between civil and
criminal commitments, particularly regarding predatory offenders.” The letter stated:

I share the anger and frustration generated in everyone who has heard of this particular case.

I believe we must turn that anger and frustration into finding effective solutions that will keep violent and dangerous people off the streets. Such solutions must be able to withstand any constitutional test so that they won’t be thrown out by the courts, sending us back to square one again.

 Sadly, we can’t turn back the clock for the little boy in Tacoma or erase his pain and suffering, but we must do everything we can, as soon as we can, to try to prevent this kind of thing from ever happening again.

Also on Friday, the first voices of caution were heard. The Seattle Post-Intelligencer quoted Senator Janice Neimi (D-Seattle), a lawyer and former Superior Court judge, as saying:

I’m really worried about this rush to justice. As long as everyone is so concerned about it, I think we should be very thoughtful. We don’t do things well when we do them in a hurry, and I hope we can do it in a studied and reasoned way.

The same article quoted a spokesperson for the American Civil Liberties Union as saying:

There is no simple answer to a problem like this. I think it’s wrong to look for one and it’s wrong to expect politicians to come up with one.

We have to simply accept the fact that there are going to be tragedies that we can’t protect against. We have to realize that that’s life in an urban environment.

F. The Second Week

Public concern continued to mount. On Tuesday, May 30, over 300 people packed an auditorium in Tacoma to participate in a public forum about child sexual assault while another 150 watched the proceedings on closed circuit television in an adjacent room. More than 200, including the state Attorney General, remained locked outside by order of the fire marshall. As reported by The Seattle Times on May 31, 1989, Pierce County Prosecutor John Ladenburg and Tacoma Police Chief Ray Fjetland agreed that the legislature must adopt a law dividing
sex offenders into the treatable and untreatable. Under such a
plan, the treatable would be supervised for life while the
untreatable would be locked up for life. Ladenburg called for
the state to create a "mental health prison" and for changes in
the state's privacy laws to allow authorities to notify the com-
munity when violent offenders are released from prison. The
meeting ended with a statement from the head of the Washing-
ton Coalition of Sexual Assault Programs, who was reported
by the Tacoma Morning News Tribune as saying that "[y]ou
must make a commitment and carry it out of this room and
make it ring so loud throughout this state that nobody can
ignore it."

On Wednesday, May 31, the boy was released from the
hospital and returned home. The Tacoma Morning News Trib-
une quoted the boy's mother as saying:

By noon he had said goodbye to his friends at the hospital,
eaten French toast and cocoa at Hondo's restaurant, changed
into jeans and a T-shirt and asked his mother to let him go
to school and play on the neighborhood Slip and Slide.

She said:

I'm totally thrilled with the recovery rate of my son and the
behavior that he's coming home with. I think my biggest
fear was that he was going to be afraid, that he was going to
be wanting to stay sheltered. He's already talking about
school. He's already at the neighbor's playing, wanting to
get away with breaking rules . . . .

She also announced that she was committed both to helping
her son resume a normal life and to becoming an instrument
of change. She said:

It's important for me to still convey the need to chal-
lenge our legislators to really find a solution. I've stated
before and I truly feel that the answers to the situation are
not negatives.

It's not telling us what won't work and what they can't
do. It's telling us what they do need and what will work, so
the community will be better able to mobilize. I'm out here
to try and help everyone focus the different factions and
ideas that will help the system.

I want to help other kids in this same situation or a sim-
ilar situation—the sexually abused and assaulted children.
As I have said, my son is every child. He could have been
anyone's. And it will be someone else's again if things don't come around for a change. Things have got to change.

G. The Third Week

Contributions to the fund for the boy continued to pour in. By Friday, June 2, the fund had reached $250,000; a week later it had grown to over $335,000. Public meetings continued, and the number and variety of proposals for legislative action grew. On June 3, The Seattle Times reported that Ida Ballasiotes, the mother of Diane Ballasiotes, testified at a Senate hearing: "I'm not mad as hell. I'm enraged. I don't want to hear again that this person or that person fell through the cracks. I want the cracks filled."

The same article reported that citizens and legislators were calling for a special session of the legislature. The Governor stated he was not opposed to a special session, but that the proposed legislation must be carefully crafted and not merely an irrational reaction to public outrage. He said, "we want a solution that would stand the test of time, not a solution that is just window dressing." On June 2, 1989, the Tacoma Morning News Tribune stated that Representative Marlin Appelwick (D-Seattle), chair of the House Judiciary Committee, cautioned that a slow deliberate approach to the problem was needed and that distinctions must be drawn between the actual failures of the system and failures in human judgment by those who had discretion over Shriner in the past. Other legislators voiced similar sentiments. Senate Majority Leader Jeannette Hayner (R-Walla Walla) was quoted by the June 25, 1989 Tacoma Morning News Tribune as saying that she wanted to wait until solutions had been agreed to and drafted, stating, "[y]ou don't rush out there and do anything without careful consideration. We're not China." The Governor reported that many rank and file legislators had complimented, privately, his decision to hold off on calling a special session until concrete proposals existed.

Public demands for action continued to mount. The Tacoma boy's mother, Helen Harlow,¹ joined Ida Ballasiotes, and other victim advocates to found the Tennis Shoe Brigade, an organization that soon expanded statewide. They asked citi-

¹. The boy's surname is not Harlow, and his name has never been reported by the media.
zens to send one child's tennis shoe with a note to the Governor requesting him to "please protect us, have a special session." The shoes were to symbolize the feet of those entitled to walk without fear.

III. THE LAW'S RESPONSE

On June 15, the Governor acted. By executive order, he created The Governor's Task Force on Community Protection and charged it with the following responsibilities:

1. Review the current criminal justice system and the mental health civil involuntary commitment process to measure their effectiveness in confining persons who are not safe to be at large in the community.
2. Assess the relationship between these criminal and mental health systems to identify the shortcomings.
3. Research the feasibility of creating a specialized, secure facility for certain categories of people who represent the most risk to society.
4. Consider research and approaches to enhancing our ability to accurately predict future behavior of individuals who have committed or who have threatened to commit violent criminal acts and establish legal criteria for confining them.²

The Executive Order established a December 1, 1989 deadline for the Task Force. The Governor appointed Norm Maleng, King County Prosecuting Attorney as committee chair.³ The Task Force was composed of twenty-four members, including professionals in the criminal justice system, legislators, treatment professionals, academics, and three representatives of victims; Helen Harlow, Ida Ballasiotes and Trish Tobis, a victim of a violent assault and the president of Family and Friends of Missing Persons and Violent Crime Victims.⁴ I was named a member.⁵

While Helen Harlow and Ida Ballasiotes continued to call

³. Maleng's appointment was widely praised by individuals on all sides of the issue. The director of the Seattle Public Defender Association said: "Maleng is very widely respected, a brilliant pick. You know its not going to be a white wash when you pick your opponent, and with Maleng you also know it's not going to be a screaming crazy guy. He is reasonable." Barry Siegel, Locking Up Sexual Predators, LOS ANGELES TIMES, May 10, 1990, at A-30.
⁴. Families and Friends of Missing Persons and Violent Crime Victims was formed in the 1970's as a response to a series of missing persons who were later determined to be the victims of serial killers. Ted Bundy confessed to a number of these murders the day before he was executed in Florida on January 24, 1989. See
for an immediate special session of the legislature, they agreed to serve on the Task Force. "You've got to work on all fronts," said Ballasiotes.

The editorial reaction to the creation of the Task Force was uniformly favorable. The Seattle Post-Intelligencer said:

This constitutes an orderly, thoughtful and potentially effective procedure. The problem of sexual crime is too special to be thrust before a hastily summoned special session of an unprepared Legislature.

The June 22 Spokane Spokesman Review editorialized that "reforms of the criminal justice system require more than passion," and that "[if] we're going to toughen our laws—and indeed, we should do so—we ought to take the time to do it right."

Legislative leaders backed the Governor and agreed to hold off on independent investigations of the Shriner case. The Senate Majority Leader, Jeanette Haynor, said she wanted to wait until solutions were agreed to and drafted. The June 25, 1989 Tacoma Morning News Tribune quoted her as saying "[y]ou don't rush out there and do anything without careful consideration," she said. The chair of the House Judiciary Committee said:

No one knows what the hell to do. The last thing I want to do is to go to Olympia and have everyone's blood pressure go up with everyone anxious to do something even if it doesn't solve the problem. . . . The situation is such that it would be difficult to resist bad ideas.

We first met as a Task Force on July 6. That meeting established a pattern that continued throughout our existence. The meeting was public and was attended by both print and electronic media. The chair implemented a structure for our work with regard to meeting dates, organization into subcom-


5. Although I have been a law professor since 1981, I practiced law for the previous 18 years, the last 16 as a prosecutor. From 1971 to 1981, I was Chief Criminal Deputy of the King County Prosecuting Attorney's Office, where I worked with and later for Norm Maleng. Maleng and I are longstanding professional colleagues and personal friends. He served as Chief Deputy of the Civil Division of the King County Prosecuting Attorney's Office from 1971 through 1978 while I served as Chief Deputy of the Criminal Division. I remained as Chief Deputy of the Criminal Division when he was elected as King County Prosecuting Attorney in 1978 until I joined the University of Puget Sound faculty in 1981.
mittees, public hearings, and deadlines, but not with regard to the substance of our discussions or the context of our proposals.

Helen Harlow was unable to attend the first meeting, but wrote the Task Force: "I intend to ask and expect more of you than you've done in the past or thought you were prepared to do. I challenge you to share the public's outcry for severe and immediate measures." Ida Ballasiotes said "Helen Harlow and I will be your conscience."

The following discussion is based on my recollection of how the Task Force reached its recommendations. While my primary focus will be on that portion of our recommendations dealing with civil commitment for sexually violent predators, it is important to keep in mind that the Task Force made these recommendations as part of a comprehensive package. The civil commitment proposal was thus developed as a part of an integrated set of recommendations, and the comprehensive nature of our work sheds light on the process by which we reached our conclusions. I do not claim, however, that I am capable of objectively describing the way the Task Force approached its tasks and reached its conclusions, or even that I am capable of describing why I reached the personal judgments that I did. I share Studs Turkel's view: "I make no pretense of 'objectivity'; there ain't no such animal, though we play at the hunt." This is my hunt, in 1992, to recall and reflect on what was done in 1989.

I had been a part of many law reform efforts in the past. In its formal aspects, this experience was similar to those other

6. I was appointed chair of the subcommittee charged with developing proposals for changes in the law.


8. As an Assistant Attorney General, I served as the staff director of Washington's first criminal justice planning agency, initially funded by the Office of Law Enforcement Assistance and later by the Law Enforcement Assistance Administration. From 1969 to 1970, I was involved in drafting legislation to reform Washington's gambling laws. I served as a member of the group responsible for drafting Washington's Rules of Criminal Procedure, adopted in 1973, and of another group that revised the penal code in 1976. I also assisted in drafting Washington's Sentencing Reform Act of 1981, and I have worked with the Sentencing Guidelines Commission on its implementation since becoming an academic in 1981. See Stuart A. Scheingold, The Politics of Street Crime (1991). I am the character referred to in that book as "Billy Dorffler." Over the years, I have been appointed to a number of governmental bodies charged with studying perceived problems and recommending solutions. I was one of the "usual suspects" typically appointed to such bodies as the Task Force on Community Protection. See Memorandum from Patricia Shelledy, Staff
efforts. We began with the general perception that a problem existed that was capable of reform, went through a scoping process to define the parameters of the problem and of potential solutions, and worked toward agreement via the drafting process.

In its substantive aspects, however, this experience was different. The core of this problem was not the exercise of governmental power but the absence of that power. The boy's story was different not only because of the horrific violence that was inflicted, but also because so many government officials knew so much about Earl Shriner, had predicted that he would do what he did, had sought to use the legal system to prevent him from doing what he did, and had failed. Apparently, the law was powerless to protect.

As we came to understand it, the failure was not caused by a mistake on the part of some official. While in some situations one might question the wisdom of the discretionary decisions made by judges and prosecutors, at its core this case could not be explained as involving a systemic mistake. The legal system seemed to work as it was designed. This conclusion, however, was unacceptable to the public and to us. I begin my analysis of the Task Force recommendations by reflecting on that conclusion with an assessment of the law's response to Earl Shriner in the past; I then identify the alter-

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Attorney, House Judiciary Committee to House of Representatives Members (August 1, 1989) (on file with author).

Lest my history leave any question, my use of the narrative form is not because I see myself as an "outsider," see Symposium, Legal Storytelling, 87 Mich. L. Rev. 2073 (1989), but because the form seems best suited to the task at hand. I had no intention of using this form when I participated in the Task Force in 1989. Then I wrote in the language of an insider, that is, in language that authorizes the "organized social practice of violence." Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601, 1602 n.2 (1986). This is a story of how and why I participated in such an act. It serves, for me, as a way to confront the moral qualities of my actions. It is a "tale . . . about how an implicit canonical script has been breached, violated, or deviated from . . . ." Jerome Bruner, The Narrative Construction of Reality, 18 Critical Inquiry 1, 11 (1991). I also recognize that it serves as an example of "the privilege of recounting the past" from the perspective of the "victor." David Luban, Difference Made Legal: The Court and Dr. King, 87 Mich. L. Rev. 2152, 2152 (1989).

9. The need to communicate requires that I impose a structure on this recounting of our discussions and conclusions, but they actually took place in pieces, over time, in different settings and among groups of differing membership. As subcommittee chair, I conducted the meetings with a loose hand. I sought to encourage participation and to achieve consensus. We talked more than we argued, and explained why we believed in what we did more often than we challenged why others believed as they did. We never voted, and our final product was unanimous. What follows is my organization of how the issues were presented and resolved.
natives proposed as a response to the law's failure to protect the community against Earl Shriner. Finally, I describe the considerations that led me, and later the Task Force, to reach our conclusions.

A. The Law's Response To Earl Shriner

Shriner was released from prison in 1987 because his ten year maximum sentence had expired.\textsuperscript{10} He had not been released on parole because the parole board had applied its statutory mandate not to release Earl Shriner unless "in its opinion his rehabilitation had been complete and he is a fit subject for release."\textsuperscript{11} Corrections officials, knowing that the statutory maximum term was about to expire, took Earl Shriner's case to the civil commitment system. Civil commitment proceedings were instituted, all the relevant evidence was apparently presented, and the judge ruled that Earl Shriner could not be civilly committed.

Although the confidentiality surrounding individual civil commitment cases prevented us from gaining a precise understanding of the basis for the judge's dismissal of the civil commitment proceeding against Earl Shriner,\textsuperscript{12} we concluded that the civil commitment system was not designed for cases such

\textsuperscript{10} In 1977, Shriner was convicted of one count of assault in the second degree and of one count of kidnapping in the second degree. Both are class B felonies punishable "by imprisonment in a state correction institution for a maximum term of imprisonment of 10 years." \textit{Wash. Rev. Code} § 9A.20.020(b) (1989). The Sentencing Reform Act of 1981, which imposed a presumptive and determinative sentencing system, applied only to crimes committed on or after July 1, 1984. \textit{Id.} § 9.94A.905.

On December 15, 1977, Shriner was sentenced to 10 years on each count, with no indication as to whether the sentences were to run consecutively or concurrently. The sentence was suspended "to determine if . . . [Shriner] would benefit from psychological therapy." \textit{State v. Shriner}, 95 Wash. 2d 541, 542, 627 P.2d 99 (1981). The suspended sentence was revoked on January 11, 1978 because Shriner "was found not to be amenable to treatment." \textit{Id.} On March 8, 1978, the Prosecuting Attorney submitted a report to the Board of Prison Terms and Paroles that recommended that the sentences be served consecutively. The sentencing judge wrote "I concur" on the report. \textit{Id.} Shriner challenged the Board's determination that the sentences were to run consecutively, and the Washington Supreme Court unanimously held that the sentences were to run concurrently. The court stated that "pursuant to RCW 9.92.080(2), the sentencing court is authorized to fix consecutive sentences through an express order when pronouncing sentence. The sentencing court in this instance did not take the action. Therefore, the sentences imposed are to run concurrently." \textit{Id.} at 544.


as Earl Shriner's and that the dismissal was an accurate application of the intent of the legislature.

Our conclusion was based on the history of the civil commitment laws. In 1973, Washington reformed its civil commitment system so that the system was primarily oriented toward the short-term treatment of acute mental illness. The reforms involved a series of procedural requirements designed to prevent, or at least to discourage, long-term institutionalization.

The reforms had grown out of Washington's experience with mental healthcare. Like the mental health systems in many states, Washington's mental health system had traditionally relied heavily on confinement when the medical community recommended it. Standards for commitment were very general, and few procedural protections governed the initial decision to commit or the later decision to release. By the early 1970's, many came to believe that this "medical" model resulted in the excessive use of long-term confinement to treat those suffering mental disorders. The legislature's intent in 1973 was clear. The reform's purpose was "to end inappropriate, indefinite commitment of mentally disordered persons," "to provide . . . short term treatment of persons with serious mental disorders," and "to encourage, whenever appropriate, that services be provided within the community."

While the statutory standard for civil commitment arguably was broad enough to include many whose mental disorders were manifested through acts of sexual violence, in practice the term was more narrowly defined. In addition, the statute


14. Francis Farmer, whose life is chronicled in WILLIAM ARNOLD, SHADOWLAND (1978), illustrates the effect of such confinement. She was civilly committed to Western State Hospital, located in Pierce County, Washington (and the location of Earl Shriner's civil commitment hearing), from 1944 to 1950.

15. WASH. REV. CODE § 71.05.010 (1989).

16. "Mental disorder' means any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." WASH. REV. CODE § 71.05.020(2) (1989).

17. The statute required evaluation and testimony by a "mental health professional," defined as a "psychiatrist, psychologist, psychiatric nurse, or social worker, and such other mental health professionals as may be defined by rules and regulations adopted by the secretary." Id. § 71.05.020(12). These professionals typically
required multiple procedural reviews to take place within relatively short periods of time and also emphasized that the manifestations of the threat of serious harm to others be recent in time. These requirements indicate that Washington's civil commitment system was not designed for the long-term confinement and treatment of individuals with mental disorders or abnormalities that manifest themselves by episodic acts of sexual violence. We concluded that the judge's decision to dismiss the civil commitment petition against Earl Shriner was not a mistake, but a decision that properly carried out the purpose of the civil commitment law.

We next analyzed the criminal prosecutions of Shriner in 1987 and 1988. Both prosecutions were initially, and apparently properly, charged as felonies. If Shriner had been convicted in 1987 of assault in the second degree, as originally charged, his presumptive sentence range would have been twenty-four to twenty-six months. An exceptional sentence,

employed standards of mental illness as the medical community defined the term, rather than applying the far broader "mental disorder" as defined in id. § 71.05.020(2).

18. An initial determination by a "mental health professional" permits detention for "not more than a seventy-two hour evaluation and treatment period." Id. § 71.05.150(1)(b). Detention for an additional 14 days is authorized upon a judicial determination "by a preponderance of the evidence that such person, as a result of mental disorder, presents a likelihood of serious harm to others . . . and, after considering less restrictive alternatives to involuntary detention and treatment, finds that no such alternatives are in the best interests of such person or others." Id. § 71.05.240. Detention for an additional 90 days is authorized upon a judicial determination that the person either "during the current period of court ordered treatment: (i) has threatened, attempted, or inflicted physical harm upon the person of another . . . and (ii) as a result of mental disorder or developmental disability presents a likelihood of serious harm to others . . ." Id. § 71.05.320(2)(a), or "was taken into custody as a result of conduct in which he attempted or inflicted serious physical harm upon the person of another, and continues to present, as a result of mental disability or developmental disability a likelihood of serious harm to others . . . ." Id. § 71.05.320(2)(b). Successive 180 day periods of detention require the same findings. Id. § 71.05.320(2). "Likelihood of serious harm" is defined as "a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm." WASH. REV. CODE § 71.05.020(3)(b) (Supp. 1990-91).

19. Under Washington's Sentencing Reform Act, as it existed in 1987, assault in the second degree was classified as a seriousness level IV crime. Shriner's prior assault in the second degree was classified as a "violent" offense and thus would have had a criminal history score of 2. See WASH. REV. CODE §§ 9.94A.360 (Supp. 1990-91). His juvenile activities had not resulted in an adjudication of delinquency or conviction of a crime and thus did not constitute criminal history. See id. § 9.94A.030(12)(b) (definition of criminal history). This combination of offense seriousness and criminal history would have produced a presumptive sentence range of 12-14 months. The
based on his future dangerousness, could have been justified.\textsuperscript{20} Thus, if Shriner had received the maximum standard sentence or a longer exceptional sentence on November 5, 1987, the day he was sentenced, he would have been in custody on May 20, 1989, the day he attacked the little boy. The Pierce County Prosecutor explained that the charge was reduced to the misdemeanor of attempted simple assault because the victim could not be located for trial.\textsuperscript{21}

In 1988, Shriner was charged with attempted statutory rape in the first degree\textsuperscript{22} and unlawful imprisonment of a ten-year-old boy.\textsuperscript{23} The presumptive sentence range, assuming he had been convicted as charged, would have been thirty-four and one-half to forty-five and three-quarters months.\textsuperscript{24} The charge was reduced to attempted unlawful imprisonment, a gross misdemeanor, when the victim moved to Florida and could not be induced to return to testify at trial.\textsuperscript{25}

Although we had no way to independently verify this explanation, the Task Force did not doubt the prosecutor's statement that "if we'd have tried to go to trial, we'd have ended up with nothing, twice."\textsuperscript{26} This set of circumstances however, did raise issues of prosecutorial discretion and plea bargaining. We discussed these issues from two perspectives. First, assuming there was a lack of optimal prosecutorial effort, what remedy might be proposed? My own experience as a prosecutor taught me that while a prosecutor can do much to structure and confine the discretion of subordinates and to

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  \item presence of the knife would have added 12 months to that range, thus producing a presumptive sentence range of 24-26 months. See \textit{id.} § 9A.4A.310.
  \item 23. \textit{See id.} § 9A.40.040.
  \item 24. Statutory rape in the first degree was classified as a Level IX offense. \textit{Wash. Rev. Code} § 9.94A.320 (1989). His prior assault in the second degree conviction would have had a criminal history score of 2, \textit{id.} § 9.94A.360 and the unlawful imprisonment charge would have been considered a "current offense," \textit{id.} § 9.94A.400(1)(a) with a criminal history score of 1, thus giving Shriner a total criminal history score of 3. This combination of offense seriousness and criminal history would have produced a presumption sentence range of 46 to 61 months. Because the conviction would have been of attempted rape, the applicable presumptive sentence range would have been 75% of that for the completed offense, or 34.5 to 45.75 months. \textit{Id.} § 9.94A.310(2).
  \item 25. Whitely, \textit{supra} note 21.
  \item 26. \textit{Id.}
motivate them, external efforts to curb the discretionary actions of prosecutors will be ineffectual. 27 We sought reforms that had some potential for effectiveness; it was my judgment, shared by many, that this was an avenue of little potential.

Moreover, focusing on the way prosecutors handled these two cases would have begged the fundamental question. We could not escape the fact that knowing what was known about Earl Shriner in 1987, the state had been unable to prevent him from committing any act of violence, not just the attack on the boy. It was the apparent powerlessness of the state to act under such compelling circumstances that presented the core issue.

Our initial conclusion was that at each stage the legal system worked essentially as intended. Each official acted appropriately, and the law was applied as intended. In the language of the public debate, there was indeed a "gap" into which Earl Shriner had fallen, but the "gap" was a longstanding, if unintentional, part of our legal system. This conclusion was at the core of both the public and the official response. The fact that our society was defenseless against such a manifest danger was simply unacceptable. How could a society, knowing what it knew of Earl Shriner in 1987, lack the authority to act?

One response to this question is that such gaps are the price of freedom. Proponents of this argument assert that to empower the government with authority to act in such situations is inconsistent with the free society we have constructed. These voices do not deny the tragedy that horrific violence produces; rather, they see the tragedy as a random act of nature which is to be endured because the cost of protecting against it, in terms of infringements on individual liberty, is too high. In the abstract, this point of view, based as it is in the conception of individual autonomy, is very powerful. It had influenced me throughout my professional life to support temporal limits on the power of the state. 28 I recognized the importance of this

27. The Sentencing Reform Act sought to use judicial review to enforce a set of legislatively mandated guidelines for prosecutorial charging and bargaining decisions. WASH. REV. CODE 9.94A.430-60 (1989). These guidelines have had, in my judgment, no significant effect on prosecutorial behavior.

28. Temporal limits on the power of the criminal law are not new. Even under the former indeterminate sentencing laws, only Class A felonies could result in life sentences. Sentences for all other crimes were limited to a statutorily established maximum term. WASH. REV. CODE § 9A.20.020(1)(b) (1989) (Class B felony sentences limited to no more than 10 years); id. § 9A.20.020(1)(c) (Class C felonies limited to no more than 5 years); id. § 9A.20.020(2) (Gross Misdemeanors limited to no more than
issue. How much risk a community must bear because the means to alleviate or reduce the risk threatens other more important values is a question that, in major part, defines the nature of a society.

At its core, the public’s reaction to Earl Shriner’s attack on the boy was addressed to this defining issue. The public was saying that the existing law had the balance wrong, at least as applied to Earl Shriner’s case. The costs, in terms of loss of individual freedom that had been sufficient to outweigh for me the abstract dangers that I knew the temporal limits on the state’s power permitted, were no longer sufficient when I faced the case of Earl Shriner, knowing what was known of him in 1987. For me, the reason for the shift in the balance was that the threat Earl Shriner presented in 1987 had been so palpable, so apparent, that I could not conclude the community should bear the risk of that threat.29 The resolution of this issue, which was also reached by all members of the Task Force, set us on the road to law reform.

B. Proposals for Reform

Once we reached this conclusion, our discussion moved to the ways in which the law might be changed to fill the “gap.” Proposals were abundant. They ranged from a return to indeterminate sentencing to fundamental revisions in the general civil commitment laws. All had the potential to remedy the apparent powerlessness which was at the center of the “gap” we sought to fill.

Our examination of the sentencing laws brought us to reconsider Washington’s rejection of indeterminate sentencing. Under indeterminate sentencing, which existed in Washington until it was replaced with presumptive determinate sentencing in 1984,30 all prison sentences were for the statutory maximum: either twenty years to life, ten years or five years, depending upon the classification of the felony. The decision as to when,

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29. I recognized the danger that responding to “horror stories” may lead to “destructive laws” and that “selective empathy or unreflective empathy can mask moral choice.” Lynne Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574, 1651, 1652 (1987). This narrative is a way of confronting the moral choices I made.

if ever, the prisoner was released was made by the Board of Prison Terms and Paroles,\textsuperscript{31} which was directed not to "release a prisoner, unless in its opinion his rehabilitation has been complete and he is a fit subject for release."\textsuperscript{32} This system gave the state legal power for an unlimited time over persons convicted of crimes classified as Class A felonies, which carried a maximum term of life imprisonment. While assault in the second degree and kidnapping in the second degree, the crimes Shriner was convicted of in 1977, were Class B felonies punishable by a maximum of ten years, such serious sex crimes could be reclassified as Class A felonies. This would provide legal authority to confine those persons for the rest of their lives, thus solving the problem of the state's powerlessness to act.

In fact, the Executive Committee on Violent Sex Offenders, established by Washington's Attorney General, recommended essentially this reform.\textsuperscript{33} It proposed the creation of a "sexually dangerous offender sentencing alternative" that would replace the Sentencing Reform Act's presumptive determinate sentence for sex offenders. Under the proposed plan, all sentences would be for the statutory maximum, with the sentencing judge to set a minimum term based on the applicable Sentencing Reform Act range. Release at the end of the minimum term would be subject to the discretion of a "sexually dangerous offenders sentence review board" when, in its opinion, "the offender's rehabilitation is complete, the offender is an acceptable risk to be monitored in the community, and he or she is a fit subject for release."\textsuperscript{34}

My experience with Washington's former indeterminate sentencing system led me to oppose this proposal. I had come to believe that the central premise of indeterminate sentencing, that the nature and quantity of punishment should be based on what was necessary to achieve some utilitarian goal, such as rehabilitation or deterrence, was frequently in conflict with the principle of desert. My commitment to the principle of desert—that punishment was justified only to the extent

\textsuperscript{31} The Board continued in operation after 1984 to exercise its jurisdiction over those convicted of crimes committed before July 1, 1984. It was renamed the Indeterminate Sentence Review Board in 1986. 1986 Wash. Laws ch. 224.

\textsuperscript{32} \textit{WASH. REV. CODE} § 9.95.100 (1989).

\textsuperscript{33} See generally \textsc{Attorney General of Washington, Executive Committee On Violent Sex Offenders, Findings and Recommendations} (September 1989) [hereinafter \textsc{Attorney General Findings}].

\textsuperscript{34} \textsc{Attorney General Findings}, supra note 33, app. A.
that it was deserved for what the individual had done—led me to reject the premises of indeterminate sentencing and to work for reform of Washington’s sentencing laws in the 1970’s and 1980’s.\textsuperscript{35} The passage of years had not changed my position, but not all members of the Task Force shared my view.

We also explored possible changes to Washington’s current determinate sentencing system. The structure of the Sentencing Reform Act makes explicit the components of present crime and criminal history which result in the presumptive sentence range. This permits far more precise changes than would have been possible under Washington’s former sentencing system, which relegated most sentencing authority to each sentencing judge’s individual discretion.\textsuperscript{36} This avenue, however, would also have brought us quickly into conflict with the principle of desert. While all agreed that those who commit the most serious sex offenses deserved very long sentences, not all sex offenders deserved such sentences. In addition, the substantial differences in both culpability and harm between the statutory categories argued strongly, at least to me, against the same very long sentences for all.\textsuperscript{37}

Although we did pursue this avenue,\textsuperscript{38} it and the proposed return to indeterminacy presented a problem we could not overcome: these alternatives could be applied only to crimes committed after the effective date of the reform because of the

\textsuperscript{35} I describe the purposes of the Sentencing Reform Act of 1981 and its origins in David Boerner, Sentencing in Washington § 2 (1985).

\textsuperscript{36} Washington’s judges depart from the presumptive sentence ranges in relatively few cases. The overall rate of exceptional sentences has ranged from 3.7% in 1987 to 4.2% in 1988. Wash. Sentencing Guidelines Comm’n, Sentencing Practices Under the Sentencing Reform Act, Fiscal Year 1987, at 15 (1988). For sex offenses, the exceptional sentence rate was 5% in 1987 and 7.1% in 1988. Telephone interview with David Fallen, Director, Washington Sentencing Guidelines Commission (May 14, 1992). Assuming that this pattern held, and there appeared to be no reason it would not, legislative changes in the presumptive sentence ranges could be expected to directly translate into changes in the actual sentence imposed.

\textsuperscript{37} Such changes would also have imposed substantial fiscal costs. Approximately 1,000 persons were convicted of felony sex offenses in fiscal year 1989. Of these, 400 are convicted of crimes classified as “violent” under the Sentencing Reform Act. Wash. Rev. Code § 9.94A.030(32) (1989) (Sentencing Reform Act definition of “violent offense”). The cost of new prison construction in the 1989-91 biennium was projected at $115,000 per cell, and operating costs, exclusive of debt service, were estimated at $22,000 per inmate per year.

The argument that “we can’t afford it” was not persuasive to the citizen members of the Task Force. I recall Ida Ballasiotes responding to this argument by noting that “if that’s what it will cost to protect the community, then let’s go to the community and ask them if they will pay the bill. I think they will.” I believed she was right.

\textsuperscript{38} See infra note 149.
constitutional prohibition against retroactive increases in criminal punishment.\textsuperscript{39} I had no doubt that if the legislature was to extend the length of sentences previously imposed, the courts would find the legislation unconstitutional.\textsuperscript{40} While the members of the Task Force could accept that legal judgment, they could not accept the result.

From the beginning, we knew that any reform proposals would be tested against one fundamental question. If the reform had been in effect in 1987, would it have given the state the power to act to prevent Earl Shriner from committing future violent acts? Sentencing reforms could not answer this question affirmatively.

Our search turned to the exercise of the state's power to protect its citizens through involuntary civil commitment. Our discussions of broadening the existing involuntary civil commitment system presented two problems. First, changing that system so that individuals such as Earl Shriner could be committed would fundamentally alter that system in ways inconsistent with its basic purpose. We believed that system was working relatively well in accomplishing its purpose and did not want to compromise it by giving it tasks that it was not suited for. That reason alone, in my judgment, would not have been sufficient to prevent recommendations for reforms in the civil commitment system if they had been the only avenue to an affirmative answer to the central question. But we had not reached that point. Another avenue of potential use remained.

Washington, like many states, had experience with civil commitment of sexual psychopaths.\textsuperscript{41} It had authorized the

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\textsuperscript{39} The United States Constitution provides that "...[n]o Bill of Attainder or ex post facto law shall be passed." U.S. CONST. art. I, § 9, cl. 3. It also provides that "[n]o State shall pass any Bill of Attainder, ex post facto Law..." U.S. CONST. art. I, § 10, cl. 1.

\textsuperscript{40} In Miller v. Florida, 482 U.S. 423 (1987), Justice O'Connor stated, speaking for a unanimous court, "to fall within the ex post facto prohibition, two critical elements must be present: first, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it." Id. at 430 (quotations omitted). To attempt to increase either the maximum term of an indeterminate sentence or the length of a determinate sentence after the crime had been committed would have clearly met both elements. In my judgment, no nonfrivolous argument for the constitutionality of either proposal could be made.

\textsuperscript{41} See generally WASH. REV. CODE ch. 71.06 (1989), repealed prospectively by 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)). In 1984 as part of the implementation of the Sentencing Reform Act, the legislature limited the statute to "crimes or offenses committed before July 1, 1984," but did not repeal it. Id. § 71.06.005. See BOERNER, supra note 35, §§ 8-1 to 8-3.
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indefinite civil commitment of sexual psychopaths and psychopathic delinquents who had been charged with a sex offense. The breadth of the statute is illustrated by a 1963 description of those committed under it as those "who have committed almost all common sexual offenses from rape to incest, from indecent exposure to obscene telephoning, from homosexual behavior to indecent liberties with children, from transvestism to voyeurism." During the 1980's the sexual psychopathy program had been the subject of substantial controversy. Commitment occurred in either Western or Eastern State Hospitals, where a lack of security led to a series of well-

42. " 'Sexual psychopath' means any person who is affected in a form of psychoneurosis or in a form of psychopathic personality, which form predisposes such person to the commission of sexual offenses in a degree constituting him a menace to the health or safety of others." WASH. REV. CODE § 71.06.010 (1989). " 'Psychopathic personality' means the existence in any person of such hereditary, congenital or acquired condition affecting the emotional or volitional rather than the intellectual field and manifested by anomalies of such character as to render satisfactory social adjustment of such person difficult or impossible." Id. § 71.06.010.

43. An earlier version of the statute defined "psychopathic delinquent" as follows: " 'Psychopathic delinquent' means any minor who is psychopathic, and who is a habitual delinquent, if his delinquency is such as to constitute him a menace to the health, person, or property of himself or others, and the minor is not a proper subject for commitment to a state correctional school, a penal institution, to a state school for the developmentally disabled, or to a state hospital as a mentally ill person.

1977 Wash. Laws, 1st Ex. Sess., Ch. 80, § 42, repealed by 1985 Wash. Laws, Ch. 354, § 32. This portion of the statute was repealed in 1985 when the legislature enacted chapter 71.34 which dealt with mental health services for minors.

44. The statute defines a "sex offense" as one or more of the following: Abduction, incest, rape, assault with intent to commit rape, indecent assault, contributing to the delinquency of a minor involving sexual misconduct, sodomy, indecent exposure, indecent liberties with children, carnal knowledge of children, soliciting or enticing or otherwise communicating with a child for immoral purposes, vagrancy involving immoral or sexual misconduct, or an attempt to commit any of the said offenses.

WASH. REV. CODE § 71.06.010 (1989). A proceeding under the Act could be commenced "[w]here any person is charged . . . with a sex offense." Id. § 71.06.020. The sexual psychopathy proceeding began after the defendant's guilt or innocence was determined. If the defendant was convicted "judgment shall be pronounced, but the execution of the sentence may be deferred or suspended" and the sexual psychopathy proceedings substituted. Id. § 71.06.030. The statute also provides that "acquittal on the criminal charge shall not operate to suspend the hearing on the allegation of sexual psychopathy." Id.

45. Giulio Di Furia & Hayden L. Mees, Dangerous To Be At Large—A Constructive Critique of Washington's Sexual Psychopath Law, 38 WASH. L. REV. 531, 532-33 (1963). Interestingly, this article, by the superintendent and a clinical research psychologist at Western State Hospital, proposed replacing the definition of "sexual psychopath" with "habitual sexual offender" defined as "a person who has a history of involvement in sexual offenses." Id. at 533.
publicized escapes. Studies by the Legislature raised substantial question as to the effectiveness of the programs. In 1984, at the recommendation of the Sentencing Guidelines Commission, the legislature replaced, prospectively, the sexual psychopath program with sentencing provisions authorizing treatment in the community and in prison.

Resurrecting civil commitment of sexual psychopaths as a means to empower the state to act in cases such as Shriner's would, of course, raise all the issues that had previously plagued its use. Yet this alternative did appear to represent a viable approach, one that would provide authority over individuals that was unlimited in time.

C. The Path to Civil Commitment of Sexually Violent Predators

My years in the criminal justice system had given me a fair working understanding of both desert as the basis for punishment and of the constitutional limits, both substantive and procedural, on the use of the criminal law. I had not had the same opportunity to work in the civil commitment system, except for those border areas of insanity and competency to stand trial, and thus had no real sense of what constitutional limits existed.

I knew that I would be asked, by both Task Force members and legislators, with regard to whatever recommendation we made, "is it constitutional?" I also knew that a negative answer, even one privately given, would doom the recommendation. The Governor created the Task Force, and the legislators deferred to the Task Force because it provided a windbreak to protect them from the raw force of public pas-

46. In December 1988, Gary Minnix, who had been committed to Western State Hospital as incompetent to stand trial on four rape charges, committed a rape at knife point while committed. The fact that he had been permitted to leave the hospital on "furlough" did not reassure the community. State v. Minnix, No. 88-1-03830-1 (Pierce Cty. Super. Ct. filed Dec. 30, 1988).


48. See, e.g., Norval Morris & Marc Miller, Predictions of Dangerousness, 6 CRIME & JUST. 1, 8 (1985) ("They disgraced our jurisprudence, grossly misapplying what little knowledge we have about the sexual offender, achieving injustice without social protection.").

49. The sexual psychopath law authorized commitment until such time as the person "has improved to an extent that he is no longer a menace to the health, lives or property of himself or others." WASH. REV. CODE § 71.06.240 (1985).
sion. Had the Governor and legislature wanted to lead by running in front of the political wind, the Task Force would not have been created. Our role was to modulate the public passion into responsible reform; a requirement that included the judgment that the reform be constitutional. It was at this point that I explored the constitutional limits of the state's power to use involuntary civil commitment to protect its members from danger.

My answer to this question would, of necessity, involve a prediction, because I knew that what that future questioner would really be asking was whether the courts would find our recommendation constitutional. To the practical mind, a law's constitutionality is not an abstract normative issue. It is a prediction, as Holmes put it, of what "the courts are likely to do in fact."\textsuperscript{50} Such an inquiry would not end the matter, for Holmes was referring to an effort by a "badman" who sought to "know the law and nothing else."\textsuperscript{51} I also sought to approach my responsibilities as a "good" man "who finds his reasons for conduct . . . in the vaguer sanctions of conscience,"\textsuperscript{52} but the initial boundaries of permitted action are located by the first inquiry.

Over the years I had come to approach the question of whether to propose a particular reform with two questions. First, "can we?" and then, "should we?" I sought not to confuse the two questions, because separation promotes clarity of thought, forcing one to confront the issues of personal responsibility that are ever present when one works; as I have for so many years, "in a field of pain and death."\textsuperscript{53} Separation of these two questions also prevents one in the privileged position of a lawyer from wrapping judgments of personal value with the rhetorical power of a constitutional imperative. Government may permissibly undertake many actions, under prevailing constructions of the Constitution, that would be, in my judgment, a misuse of power. The point is not that my opinion on the wisdom of a proposal was irrelevant; I was a member of, not a lawyer for, the Task Force. The point is that I had different roles and the failure to keep them separate would prevent both me and those who listened to me from understanding what I was saying.

\textsuperscript{50} Oliver W. Holmes, \textit{The Path of the Law}, 10 Harv. L. Rev. 457, 561 (1897).
\textsuperscript{51} \textit{Id.} at 459.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} See Cover, \textit{supra} note 8.
What I found in my exploration of how the Supreme Court viewed civil commitment was initially surprising but upon reflection made sense. My conclusion did not resolve the moral dilemma that I would face, but it gave me confidence in the prediction I was eventually to make.

Civil commitment, that is the taking control of the person of another for reasons other than punishment, was, I found, a very old tradition.\textsuperscript{54} Since the founding of our country, organized governments had exerted the power to confine persons both for their own good and for the good of the rest of society's members. The two purposes are based on fundamentally different justifications.\textsuperscript{55} The power of the state to take control of a person for that person's own good is based on the \textit{parens patriae} power. The power of a society to protect its members from danger is based on the police power, a power said to be "the least limitable of the exercises of government."\textsuperscript{56} While frequently the power exercised was justified on both grounds, the United States Supreme Court had, by my reading, never imposed substantive limits on the power of a state acting through the use of civil commitment to protect its members from dangerous persons. The only case that imposed any substantive limits on the power of civil commitment stated that the power to involuntarily commit the mentally disordered could not be applied to those who are "dangerous to no one and [who] can live safely in freedom."\textsuperscript{57}

Even though confinement has long been utilized as a means to protect society against those suffering from mental or physical disorders or diseases,\textsuperscript{58} the issue of the constitutionality of civil commitment did not reach the United States Supreme Court until 1940.\textsuperscript{59} The Court unanimously found no violation of due process by a statute which authorized indefinite civil commitment of those with a "psychopathic personal-


\textsuperscript{56} Hall v. Geiger-Jones Co., 242 U.S. 539, 548 (1917).

\textsuperscript{57} O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). "[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." \textit{Id.} at 576.

\textsuperscript{58} See also \textit{Developments in the Law}, supra note 55.

\textsuperscript{59} Minn. \textit{ex rel. Pearson v. Probate Court}, 309 U.S. 270 (1940).
ity." The Minnesota Supreme Court had defined psychopathic personalities as "those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." While the Court did not expressly address substantive as opposed to procedural due process, it evinced no concern that this use of civil commitment was beyond the state's power.

In subsequent decisions, the Court made a point of not restricting a state's substantive powers to use civil commitment. The Court held in Robinson v. California that criminalizing narcotics addiction violated the prohibition on cruel and unusual punishment. Justice Douglas concurred and stated "[h]e may, of course, be confined for treatment or for protection of society..." In Baxstrom v. Herold, a unanimous Court, speaking through Chief Justice Warren, held that it was a denial of equal protection for a state to provide for civil commitment at the termination of a prison sentence without a jury trial when a jury trial was provided for all others subject to civil commitment. The relevant constitutional principle was procedural: that all individuals subject to civil commitment be treated alike. The Court said not a word to indicate that any substantive limits existed as to the use of civil commitment at the conclusion of a prison sentence.

In Humphrey v. Cady, a unanimous court, speaking through Justice Marshall, addressed a Wisconsin statute that authorized commitment for compulsory treatment of a person convicted of a crime who was in need of "specialized treatment for his mental or physical aberrations..." Initially, commitment was limited to the length of the criminal sentence, but the statute authorized renewal of the commitment for additional five-year terms upon a determination that discharge would be "dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality." The

60. Id. at 273.
62. Id. at 669.
64. 405 U.S. 504 (1972).
65. Id. at 510 n.6.
66. Id.
Court characterized this confinement as being conditioned: "not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty."67

The Court then stated: "In making this determination, the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment."68

The Court went on to find that Wisconsin's denial of a jury trial to those who had been previously convicted of a crime, while providing a jury trial to those who had not, raised significant equal protection and procedural due process issues. Significantly, Justice Marshall, speaking for Justices Douglas, Brennan, Stewart, White, Blackmun, and Chief Justice Burger, did not even hint at the question of whether commitment on such grounds exceeded the state's power, even though the commitment far exceeded the maximum sentence permitted for the underlying crime.

The Court reached the same result in Jones v. United States,69 upholding an indefinite commitment following an insanity acquittal even though the commitment far exceeded the one year maximum sentence for the underlying crime.70 Justices Brennan, Marshall and Blackmun dissented on the ground that the finding of not guilty by reason of insanity could not constitutionally justify indefinite commitment.71 Justice Brennan argued that a person found not guilty by reason of insanity was entitled to the same procedural protections as required in Addington v. Texas,72 but he never suggested that the state was without the substantive power to indefinitely commit a person whose mental disorder rendered him dangerous.

67. Id. at 509 (footnote omitted).
68. Id. (footnote omitted).
70. The underlying crime was attempted petit larceny of a jacket from a department store. Id.
71. Id. at 371.
72. 441 U.S. 418 (1979) ("[T]he state . . . has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.") Id. at 426).
Most recently, in *United States v. Salerno*, the Court addressed a substantive due process attack on preventative confinement pending trial in criminal cases. Categorizing the government's purpose as "regulatory" rather than "punitive," a strong majority recognized that preventing danger to the community was a legitimate regulatory goal. Rejecting the Court of Appeals' conclusion that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention," the Court said "[w]e do not think the clause lays down any such categorical imperative. We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." The Court found that "Congress' careful delineation of the circumstances under which detention will be permitted" was a sufficient basis for "the individual's strong interest in liberty" to "be subordinated to the greater needs of society." The Court held "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat."r

Even though *Salerno* addressed confinement pending trial, and Justices Marshall, Brennan, and Stevens dissented, its message was clear. The current, and future Supreme Court would not find substantive due process limits on the power of a state to protect its members from danger.

I recall my reaction to reading this line of cases. I had spent the day in the law library, and as I drove home, I

74. Id. at 747.
75. The opinion was written by Chief Justice Rehnquist and concurred in by Justices White, Blackmun, Powell, O'Connor and Scalia.
76. *Salerno*, 481 U.S. at 747 (citing *Schall v. Martin*, 467 U.S. 253 (1984)).
77. Id. at 748 (quotations omitted).
78. Id.
79. Id.
80. Id. at 755.
81. Id. at 767.
82. By the summer of 1989, when I sought the basis for my prediction, Justice Kennedy had replaced Justice Powell. I saw no reason to believe that he would find greater restrictions than Justice Powell had; nor did I believe that future changes on the Court were at all likely to result in greater limits. The replacement of Justices Brennan and Marshall with Justices Souter and Thomas has not changed my view.
reflected on what I had read. The great liberal judges who had shown such sensitivity to the procedures by which the state exercised power over individuals had shown no inclination to impose substantitive limits on that power. Developing why this apparent dictomy exists is well beyond the purpose of this Article, but at least part of the reason, I thought, must be the nature of the power that the state was exercising. The police power is "the least limitable of the exercises of government" because it is a response to the collective need for self-defense. Collective self-defense, the coming together of individuals to create communities that will protect them from dangers, must surely be at the very core of the rationale behind the police power. The limits on police power would come from the legislation enacted through the democratic process and the jury, and in the form of procedural protections. This helped explain why all the members of the Task Force, myself included, had such a strong intuitive reaction against the idea that government was constitutionally prohibited from acting to protect the community from Earl Shriner in 1987, given what was known of him at the time.

Based on this analysis, my constitutional prediction was that if the state acted rationally and with due care for procedural protections, the courts would find that the state had the power under the United States Constitution to act to protect its members.

I then turned to the Washington State Constitution and

83. See supra note 56.
84. Characteristically, Robert Cover saw this clearly. In his last published work, he observed:

[T]he violence of a posited constitutional order . . . is generally understood to be implicit in the practice of law and government. Violence is so intrinsic a characteristic of the structure of the activity that it need not be mentioned. Read the Constitution. Nowhere does it state the obvious: that the government thereby ordained and established has the power to practice violence over its people. That, as a general proposition, need not be stated, for it is understood in the very idea of government."


85. This is not to suggest that the exercise of this power is beyond judicial review. As the first Justice Harlan said in upholding the power of a state to require compulsory vaccination to prevent the spread of disease: "the police power . . . may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression." Jacobson v. Mass. 197 U.S. 11, 38 (1905). A rational relationship must exist between the means employed and the ends to be served; in addition, the ends must be legitimate.
reached the same conclusion. While the Washington Supreme Court has found in some circumstances that Washington's constitution provides greater protections than does the United States Constitution, the court has not so found with regard to the due process clause of Article I, Section 3. Washington's sexual psychopath law had been challenged on procedural grounds many times and had always been upheld. Although the Washington courts recognized that persons committed as sexual psychopaths suffered a grievous loss of personal freedom, none expressed the view that indefinite civil commitment under the sexual psychopath statute might be beyond the state's power. In a decision similar to Humphrey v. Cady, the Washington Supreme Court held on equal protection grounds that "in a sexual psychopath release proceeding, after expiration of the criminal sentence, the state has the same burden of proving dangerousness as in a civil commitment." The court gave no indication that the fact that the involuntary commitment extended far beyond the statutory maximum for the underlying crime limited the state's power.

Civil commitment under Revised Code of Washington ("RCW") Chapter 71.05 had received the same treatment. The Washington Supreme Court recognized the "massive curtailment of liberty" involved and held that the statute could be applied only when the risk of danger was substantial and the harm was serious. The court did not indicate, however, that the state did not have the substantive power to use civil commitment as a means to protect its citizens, as long as the predicate findings resulted from constitutionally appropriate procedures.

I next turned to the issue of how precisely the state must define the class of persons eligible for civil commitment. Stat-

86. The Washington State Constitution provides: "No person shall be deprived of life, liberty or property, without due process of law." WASH. CONST. art. I, § 3.
87. WASH. REV. CODE § 71.06 (1989).
89. 405 U.S. 504 (1972). See supra note 64 and accompanying text.
91. WASH. REV. CODE ch. 71.05 (1989).
93. Id. at 284, 654 P.2d at 113.
utory definitions were traditionally stated in very broad terms\textsuperscript{94} and courts never found them unconstitutional due to vagueness. I found it to be particularly significant that the courts never required medically based definitions, instead expressing concern that an exclusively medical definition would shift the decision away from the jury toward the medical experts.

In \textit{Humphrey v. Cady},\textsuperscript{95} Justice Marshall, when finding a jury trial to be a constitutional requirement, relied on the fact that "the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment."\textsuperscript{96} The Washington State Supreme Court had expressed concern that a definition that "incorporates medical terminology" might result in a commitment decision that "may involve more a medical decision than a legal one."\textsuperscript{97} Such a definition, it was feared, would receive "excessive judicial deference" and risk indefinite commitment "solely because they [the detainees] are suffering from mental illness and may benefit from treatment."\textsuperscript{98}

Predicting future violence is, of course, a most difficult

\textsuperscript{94} The Minnesota statute upheld in Minn. \textit{ex rel} Pearson v. Probate Court, 309 U.S. 270 (1940) defined "psychopathic personality" as:

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

\textit{Id.} at 272. The Wisconsin statute at issue in Humphrey v. Cady, 405 U.S. 504 (1972) provided for initial commitment if the judge found that the crime was "probably directly motivated by a desire for sexual excitement" and that the person was in need of "specialized treatment for his mental or physical aberrations." \textit{Id.} at 507. Successive five-year commitments required a finding that discharge would be "dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality." \textit{Id.}

Washington's sexual psychopath statutes also used very broad behaviorally focused definitions. WASH. REV. CODE ch. 71.06 (1989); see \textit{supra} note 42. The general civil commitment statute employed a similar definition. RCW 71.05.020(2) provides: "Mental disorder means any organic, mental or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." WASH. REV. CODE § 71.05.020(2) (1989).

\textsuperscript{95} 405 U.S. 504 (1972). \textit{See supra} note 64 and accompanying text.
\textsuperscript{96} \textit{Id.} at 509.
\textsuperscript{97} \textit{In re} LaBelle, 107 Wash. 2d 196, 207, 728 P.2d 138, 146 (1986).
\textsuperscript{98} \textit{Id.}
task, but the courts have never found that its inherent inaccuracies create a constitutional barrier to its use. Although the problem of false positives does not raise a constitutional problem, it clearly presents a moral problem. That is where my Holmesian visit to the law library left me: involuntary civil commitment, applied via a statute drafted with a modicum of skill and a sensitivity to the procedures used, would, in all likelihood, be found constitutional. My answer to the first question “Can we?” was “Yes.” Thus, the central problem was not that the state was powerless to act in 1987, in the sense that the constitution prohibited restraining Earl Shriner; the problem was that the state lacked the legal authority to act. That problem could be cured.


100. The United States Supreme Court has expressly approved basing the death penalty, Barefoot v. Estelle, 463 U.S. 880 (1983), and indefinite civil commitment, Jones v. United States, 463 U.S. 354 (1983), on predictions of future dangerousness. In Jones, the court acknowledged this difficulty but concluded that “[t]he lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.” Jones, 463 U.S. at 364 n.13. The Washington Supreme Court, while recognizing that “the prediction of dangerousness has its attendant problems” and that the “American Psychiatric Association has . . . confessed the profession’s inability to predict dangerousness precisely,” stated that “we are not prepared to abandon the possibility of conforming the law of involuntary civil commitment to the requirements of the constitution.” The court stated that it “can endeavor to protect against abuse by requiring demonstration of a substantial risk of danger and by imposing procedural safeguards and a heavy burden of proof.” In re Harris, 98 Wash. 2d 276, 281, 654 P.2d 109, 111 (1982).

101. False positives are those inaccurate predictions of dangerousness whose proof of accuracy is self-fulfilling.

102. I did not conclude that no nonfrivolous argument for unconstitutionality could be made nor was I so foolish as to offer the Task Force (or later the legislature) a guarantee of constitutionality. What I did conclude was that it was highly likely that the use of involuntary civil commitment for sexually dangerous persons would pass constitutional muster. I was satisfied that if my prediction proved wrong I would be justified in uttering the losing lawyer’s retort, “That was not the law, Your Honor, until you spoke.”
The determination that civil commitment was an available alternative did not, of course, determine whether or how it should be used. Some Task Force members supported broadening the scope of the general civil commitment statute; additionally, the Attorney General had proposed adopting a modified sexual psychopathy statute.\textsuperscript{103}

My prediction of constitutionality still left me with the much more difficult question: "Should we use civil commitment as a means to protect the community?" Throughout my years as a prosecutor, I sought to remain sensitive to the undeniable fact that depriving persons of their liberty involves the intentional infliction of harm to fellow human beings—violence, as Cover correctly characterizes it—that, absent justification, is morally wrong.\textsuperscript{104} The need to justify the violence I inflicted on a daily basis had led me to the principle of desert as a primary justification. My answer to the question "How can you justify the violence your decisions will do?" was "Because it is deserved for what you have done."

While the principle of desert cannot provide a precise answer as to what punishment is deserved in a given case, it does provide a powerful limiting and guiding principle. The use of desert as a limiting principle had become a central value for me and it became a central element of Washington's Sentencing Reform Act.\textsuperscript{105} That principle, based as it is on moral blameworthiness, does not transfer readily to the use of civil commitment where by definition no blame exists.

\textsuperscript{103} ATTORNEY GENERAL FINDINGS, supra note 33.

\textsuperscript{104} Throughout my years of practice as a prosecutor, I kept G.K. Chesterton's warning in mind:

[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it." 

G. K. Chesterton, The Twelve Men, in TREMENDOUS TRIFLES 63, 67 (6th ed. 1920). The characterization of what I did as "violence" was one way I sought to avoid getting "used to it."

\textsuperscript{105} NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974). Morris argues that desert does not require punishment in every instance, it need only limit it. NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW, ANISOMONY OR TREATING LIKE CASES UNALIKE 179-209 (1982). I agreed with Morris on desert as a limiting principle, but I sided with von Hirsch, Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing, 33 RUTGERS L. REV. 772, 783-89 (1981), who argues that desert is a requiring as well as a limiting principle, although in my view there may be a quite large distance between what is required and what is prohibited. The Sentencing Reform Act adopts desert as both a limiting and a requiring principle.
The law, in its formal majesty, may not consider involuntary civil commitment to be punishment, but the definitional stop will not do as a response to the moral question. The fact that this violence was civil or regulatory in form did not in any way lessen the need for justification. I am not a philosopher, but I knew that the limiting principle, if any were available, would be found in utilitarian theory. My experience in sentencing had taught me that the principle of maximizing social utility, "the greatest good for the greatest number," does not readily provide limits in individual cases. But in the aggregate, and one drafting a statute is always working in the aggregate, the balancing of benefit and harm could provide a moral focus that, if it did not provide a strict limit, would at least guide me in resolving what I saw as a dilemma. At a minimum, such a balance would help me to remember that the use of civil commitment inevitably causes harm.

I argued against the proposals for broadening the existing civil commitment statute on the grounds that it would be overbroad. I argued that we should focus our reforms on the central question resulting in the creation of the Task Force. Our remedy for the state's inability to act on its knowledge of Earl Shriner in 1987 ought to be limited to extreme cases that were equally compelling. Broadening the civil commitment process by revising the definition of mental disorder or by lowering the evidentiary requirements for continued commitment was not sufficiently limiting. It would lead, I argued, to the extension

106. As C.S. Lewis argued so powerfully:

[Do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not? C.S. Lewis, The Humanitarian Theory of Punishment, 6 Res Judicata 224, 227 (1953). As John Griffiths pointed out, "the important functional question is not what its name is but whether it is a justifiable practice, and how its costs and benefits compare with those of practices with different rules of implementation." John Griffiths, Review: The Limits of Criminal Law Scholarships, 79 Yale L.J. 1406, 1411 (1970).

107. As Floud and Young put it, "What is the moral choice between the alternative risks: the risk of harm to potential victims or the risk of unnecessarily detaining offenders judged to be dangerous." Floud & Young, supra note 99, at 49. Lynne Henderson wisely counsels that "[e]mpathy cannot necessarily tell us what to do or how to accomplish something, but it does alert us to moral choice and responsibility. It also reminds us of our common humanity and responsibility to one another." Henderson, supra note 29, at 1653.
of state control over many who presented little significant danger and would have eroded the gains of earlier reforms of that system. I preferred a rifle, rather than a scatter gun, as the weapon of self-defense. Yet undeniably, expansion of the general civil commitment statute would solve the retroactivity problem. It would provide an affirmative answer to the central question before us, and for most on the Task Force an affirmative answer to that question was an imperative.

The Attorney General's proposed return to a modified sexual psychopath statute authorizing indefinite civil commitment for "mentally disordered sexually dangerous persons" presented similar problems of overbreadth. Although the Attorney General's proposal applied only to perpetrators of certain enumerated felonies and was somewhat narrower than Washington's former statute, over 700 persons were convicted of those predicate crimes in fiscal year 1989. This proposal did offer an affirmative answer to our central question, but at the cost of excessive harm. I continued to seek a weapon of greater precision.

I also argued against a return to indeterminacy in criminal sentencing for similar reasons. Requiring the statutory maximum sentence for all violent sex offenders or repeat sex offenders, as the Attorney General proposed, or increasing the maximum term for all violent sex offenses to life imprisonment, with release contingent on a future finding that the offender is no longer dangerous, would result in very long sentences and would require future predictions of dangerousness.

My commitment to desert as a limiting principle and my understanding of the inaccuracies inherent in predicting dangerousness led me to oppose this avenue. It would have meant that predictions of future violence would be made in circumstances where procedural protections were minimal. The

109. Attorney General Findings, supra note 33, app. B.
110. Id. at 2-3.
112. Attorney General Findings, supra note 33, app. A.
113. Predictions of dangerousness were, of course, an everyday occurrence under Washington's former indeterminate sentencing system. Those predictions had been held not to involve any constitutionally protected interest and thus not to require any
undeniable difficulty in accurately predicting future dangerousness led me to conclude that it should be done only as a last resort, and only in the full light of day, with generous procedural protections.

As I assessed the situation, I concluded that absent a counterproposal that would affirmatively answer the central question, both retrospectively and prospectively, the Task Force would adopt some variation of all three of the proposals I opposed: a broadening of the eligibility criteria under the general civil commitment statute, a return to a sexual psychopath statute, and a return to life maximum indeterminate sentences for all serious sex offenses.114

As I sought counsel from those who had studied the problems of predicting future violence, I noted that they recognized that cases exist where the circumstances would be so compelling as to make the conclusion one of common sense. As Norval Morris said, "[t]here are exceptional, gravely psychotic, extremely and repetitively violent persons whose likely future criminality does not merit study since it is so obvious."115 Morris answered the question of how to distinguish the "obvious" cases from those not so clear by recounting an experience that John Monahan had related to him:

I gave my stock speech about the probability of violence never being higher than 1-in-3 in the research. A judge raised his hand and said that he recently had a case of a murderer with a large number of prior violent offenses who, when asked if he had anything to say before sentence was imposed, stated: "if I get out, the first thing I am going to do is murder the prosecutor, the second thing I am going to do is murder you. Your Honor, the third thing I am going to do is murder every witness who testified against me and the


114. In New Hampshire, a brutal crime of sexual violence in 1991 resulted in the establishment of a "Joint Ad Hoc Committee to Renew New Hampshire’s Rape Laws." It concluded: "The committee strongly recommends that the penalties for aggravated felonious sexual assault be raised to 10 to 20 years for a first offense. For a second offense, we propose a mandatory 20 to 40 year sentence and if a defendant has been convicted more than two times, we recommend mandatory life imprisonment without parole." REPORT OF THE JOINT AD HOC COMMITTEE TO REVIEW NEW HAMPSHIRE’S RAPE LAWS 6 (Jan. 27, 1992).

fourth thing I am going to do is murder each member of the jury." The judge asked if I thought that this person's probability of violence was no greater than 1-in-3. I called for a coffee break.  

Going for a coffee break, opting out of the struggle, was, of course, a possibility. I could resign from the Task Force or dissent from its recommendations if I found them repugnant to my values. Taking that course would have ended any influence I would have on the Task Force's recommendations, and I knew my opposition would have little, if any, effect on the political process that would follow. My experience has been not only that the perfect is the enemy of the good, but that insistence on perfection is likely to result in the bad. I chose the road that I hoped would lead to the good, or perhaps, the least harm.

It was at that point that I picked up my pencil. Although I shared Morris's and Monahan's judgment that there are cases in which, to borrow Justice Stewart's phrase, "I know it when I see it," and Earl Shriner in 1987 clearly was such a case, I also knew that our challenge was to express that common sense conclusion in a statutory definition. I sought to craft a proposal that would remedy the absence of authority, not replace existing authority with greater authority. From that idea came the notion of limiting the new authority to only those situations where the state had no existing authority. Requiring the state to exhaust its existing mechanisms of social control, both civil and criminal, would narrow the focus. The model that I used was the sexual psychopath statute, not as a substitute for criminal punishment, but to be applied when dangerousness continued after deserved punishment ended. The mechanism used was the requirement that the authority to confine the person either had or was "about to expire."

116. Id. at 17 n.14. Letter from John Monahan to Norval Morris (February 27, 1984).

117. Stuart Scheingold has, correctly in my view, characterized judgments of this nature as "policy moderation at the local level." Stuart A. Scheingold, The Politics of Street Crime 185 (1991). He sees them as one of "a variety of coping strategies that mitigate, but are unlikely to neutralize, the punitive redirection of the justice model." Id. at 188. To the extent that the redirection results from changes in the values of the culture he is, of course, correct.

118. The authorization to initiate the new commitment proceeding contains this limitation:

When it appears that: (1) The sentence of a person who has been convicted of
As far as I could tell, this notion was unique in sexual psychopathy statutes\(^{119}\) but had been used with general civil commitment statutes.\(^{120}\) The use of civil commitment after criminal jurisdiction ended has never presented constitutional impediments. In *Humphrey v. Cady*, Justice Marshall did not even comment on the fact that Wisconsin's indefinite series of five year\(^{122}\) civil commitments far exceeded the statutory maximum for the crime that triggered eligibility for civil commitment. In *Jones v. United States*, all the justices assumed that the power to civilly commit one who was "mentally ill and dangerous" could extend beyond the end of criminal jurisdiction.\(^{122}\) They disagreed with the inadequate procedural protections necessary in the transition from criminal to civil jurisdiction. The provision in Washington's sexual psychopath statute providing that acquittal of the underlying crime did not abate the sexual psychopathy proceeding had withstood constitutional attack.\(^{123}\) The court did not suggest any substantive limitations under the due process clause.\(^{124}\)

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119. In contrast, the District of Columbia has a sexual psychopath statute that does not depend on a criminal prosecution. D.C. CODE § 22-3503 to 22-3511 (1989). It authorizes indefinite commitment of those "not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his desire." D.C. CODE § 22-3503(1) (1989). The constitutionality of this statute has never been passed upon by the United States Supreme Court, but it has been found constitutional by the Court of Appeals for the District of Columbia. Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953); Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968).

120. See *supra* note 63 and accompanying text.

121. 405 U.S. 504 (1972). See *supra* note 64 and accompanying text.


124. My confidence in this prediction of constitutionality was not undermined by the fact that the author of the opinion in *State v. Bunich*, the Honorable Keith Callow, was, in 1989, Chief Justice of the Washington Supreme Court, nor was it undermined...
Restricting the use of civil commitment to those situations where it was the only available protective means would significantly limit its use but would not exhaust the methods of narrowing its scope. Experts confirmed the common sense view that past behavior is the best predictor of future behavior. Therefore, limiting eligibility to those who previously committed acts of sexual violence would both narrow the focus and improve the accuracy of the prediction. The proposal was thus limited to those who had committed a "sexually violent offense" in the past.

The authorization's scope could also be narrowed by focusing on the definition of the danger sought to be prevented through civil commitment. All sex offenses involve violence, but not all sex offenses are the same. Most sex offenses, in fact, occur between persons who know one another. These

by the fact that another member of the panel, the Honorable Barbara Durham, was also now a Justice of the Washington Supreme Court.


126. As defined under Washington law:

[s]exually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.


127. This was made clear to all of us when we presented our tentative recommendations at the six public hearings that the Task Force held throughout the state. In contrast to typical hearings on law reform proposals which attract only the "usual suspects," these hearings attracted hundreds of citizens. Their comments were only infrequently specifically directed to individual recommendations. Over and over, citizens shared personal revelations of the injuries that they, their families, and their communities had suffered because of sexual violence. The chair imposed no requirements of relevance nor limits on time. The Task Force, he announced at the beginning of each hearing, would stay as long as anyone wanted to speak to us. Although not all members could attend each hearing, we all attended some, and we were all moved by the anguish expressed.
crimes, as serious and damaging as they surely are, were not what produced the public outrage that led to the creation of the Task Force. The very randomness of Earl Shriner's act produced the sense of vulnerability that was at the core of the public's fear. The Governor used the term "predatory" in his Executive Order creating the Task Force, and I used that term to further focus the proposed remedy. "Predatory" was defined as "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." Only those who were "likely to engage in predatory acts of sexual violence" would be eligible for civil commitment under the proposal.

The proposal defined the mental condition that produced the danger justifying commitment in two alternative ways. It included "personality disorder," a term with a generally accepted definition in the medical community, and with slight modification, the definition of mental abnormality from Washington's sexual psychopath statute. While the later definition is legal, not medical, it would include those persons suffering from "paraphilias," the medical diagnosis most likely to apply to those who engage in predatory acts of sexual violence. I included this definition because it focused on dangerousness, which was the purpose of commitment, and because it had previously survived constitutional attack.

I was confident that this proposal answered the central question we faced; had it been in effect in 1987 it would have provided the authority to protect the public against Earl Shriner. Although I could not precisely predict how many individuals would be eligible for commitment under this propo-

128. "The safety of people in our communities is being jeopardized by a number of individuals who engage in predatory, violent behavior, often accompanied by sexual assault." Exec. Order No. 89-13-055, WASH. ST. REG. (1989).
130. Id. § 71.09.020(1).
131. Id. § 71.09.020(1).
133. The Washington Statute defines "mental abnormality" as "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).
134. For a definition accessible to laypersons, see 4 ENCYCLOPEDIA OF CRIME AND JUSTICE, Sex Offenses, 1485, 1489 (1983).
135. See supra notes 87-90 and accompanying text.
sal, I was also confident that its limitations would result in far fewer commitments than any of the proposed alternatives.

With the scope of the proposal fixed, I turned to the procedures to be employed. The premise was that the full panoply of procedural protections should be provided. Providing the defendant with full access to counsel and expert witnesses would ensure that the vagaries of prediction were fully explored. It would also provide the balance to check, if not eliminate, the prejudice that can result when the state is providing the only expert testimony. I was confident that attorneys for those subject to commitment would have no difficulty finding qualified experts to present the vagaries of predicting future violence to the jury. Although this would not prevent inaccurate predictions, it would insure that juries were aware of the difficulty of their determination.

Requiring that a jury find the requisite future dangerousness beyond a reasonable doubt would introduce "into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment." The use of the "beyond a reasonable doubt" standard rather than its civil analogue of "clear, cogent and convincing" emphasized the importance of the determination. I believe that "beyond a reasonable doubt" better conveys that message to lay persons.

136. The statute provides for counsel and expert witnesses as follows:
At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

WASH. REV. CODE § 71.09.050 (Supp. 1990-91).

137. "The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand is made, the trial shall be before the court." Id. § 71.09.050.

138. "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Id. § 71.09.060(1).

Treatment of the mental condition that produces predatory acts of sexual violence is problematic at best. Existing treatment in the United States is behaviorally based, and Washington's program at the Twin Rivers Correctional Center appeared to be state-of-the-art. The programs are long term, particularly for the exceptionally violent, and rely on the consent of participants. We anticipated that for some, if not most, of those committed, consent would not be forthcoming. Pharmacological treatment remains in its infancy and raises immediate constitutional issues. We did not want to freeze treatment at our present level of knowledge; yet, we sought some limits to what could be done in the name of treatment. Our solution was to rely on the Constitution and the court's ability to apply constitutional principles to any future treatment practices that might develop.\textsuperscript{140}

With regard to release from commitment, we sought procedures that would both protect the public from dangerous persons and protect those committed from the long-term warehousing characteristic of Washington's civil commitment system prior to the 1973 reforms. Our proposal required annual reexaminations after commitment; in addition, the person committed has the right to retain an independent qualified expert or professional person who is given access to "all records concerning the person."\textsuperscript{141} Reports of the examination "shall be provided to the court that committed the person."\textsuperscript{142}

If the state's experts determine that "the person's mental abnormality or personality has so changed that the person is not likely to commit predatory acts of sexual violence if released," the person is returned to the committing court for a release hearing.\textsuperscript{143} The state has the right to demand a jury trial on the issue of whether the person "is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence."\textsuperscript{144} The burden of proof is on the state,

\textsuperscript{140} RCW 71.09.080 requires conformity to "constitutional requirements for care and treatment." WASH. REV. CODE § 71.09.080 (Supp. 1990-91).

\textsuperscript{141} "Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person." WASH. REV. CODE § 71.09.070 (Supp. 1990-91).

\textsuperscript{142} Id.

\textsuperscript{143} Id.

\textsuperscript{144} Id. § 71.09.090(1).
beyond a reasonable doubt.\textsuperscript{145} The committed person also has the right to petition the court directly for release.\textsuperscript{146} In the absence of an affirmative waiver of this right, the court must conduct a "show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large."\textsuperscript{147} If the court finds that probable cause exists, then a trial, with the same procedural protections as at the original trial, is held on the issue of whether "the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released will engage in acts of sexual violence."\textsuperscript{148} The trial is conducted with the same procedural protections as the original trial, and the burden of proof is on the state, beyond a reasonable doubt.

These procedural requirements are not without cost, but I saw that as desirable. The cost of the procedural requirements would encourage those with the authority to institute the commitment process to weigh their decisions even more carefully. This is particularly important where that decision will be made by thirty-nine independently elected county prosecuting attorneys who are not responsible to any central authority. The proposed statute was drafted as narrowly as possible while still retaining its ability to provide an affirmative answer to our central question. If such a statute had been in effect in 1987, it would have provided the legal authority to confine Earl Shriner.

The Task Force accepted this conclusion and as we worked to refine the proposal, we shifted our attention from amendments to the general civil commitment statute and from revitalization of the former sexual psychopath statute. The proposed statute also provided a basis upon which to reject proposals advocating a return to long indeterminate sentences for sex offenders. It also provided the necessary assurance that the legal power to act in compelling circumstances would exist in the future; as a result, there was no need to depart from the desert-based structure of the Sentencing Reform Act.\textsuperscript{149}

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} We did recommend a series of changes in the presumptive sentences provided for sex offenses. Many Task Force members felt strongly that existing levels of
The proposal had served its purpose. It filled the gap in punishment were lower than were deserved by offenders who caused such harm to their victims. To put a finer edge upon it, some believed that those who established the existing levels of punishment had not seen sex crimes as being as serious as they, in fact, were and consequently had not sufficiently valued the enduring pain and anguish of the victims. For example, the presumptive sentence range for rape in the second degree (forcible rape without a weapon or physical injury) was initially set in 1984 at 21 to 27 months. From the first days after the boy was attacked, advocates for the victims of sex crimes had argued that society's response to sexual violence was inadequate in all cases, not just those that became notorious. The September 1989 public hearings, in which person after person gave witness to the pain and anguish that sexual violence had caused them and their families, led us all to concur in this view.

Judgment as to the quantum of punishment deserved is always reached in context. No neutral principles exist from which to establish starting points. The consciousness of those of us who had been involved in the initial establishment of those presumptive sentences had changed. We concurred in recommending a series of increases in the presumptive sentence ranges for these crimes that we believed provided deserved sentences and retained proportionality between the relative seriousness of those crimes. This was accomplished by increasing the offense seriousness levels of the crimes. See WASH. REV. CODE § 9.94A.320 (Supp. 1990-91). The new seriousness levels result in higher presumptive ranges for both first time and multiple offenders. The following chart shows the increases for first time offenders:

<table>
<thead>
<tr>
<th>Crime</th>
<th>Current Ranking &amp; Midpoint</th>
<th>Proposed Ranking &amp; Midpoint</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Degree Rape</td>
<td>X 5 years</td>
<td>XI 7.5 years</td>
</tr>
<tr>
<td>First Degree Rape of a Child</td>
<td>X 5 years</td>
<td>XI 7.5 years</td>
</tr>
<tr>
<td>Second Degree Rape</td>
<td>VIII 2 years</td>
<td>X 5 years</td>
</tr>
<tr>
<td>Second Degree Rape of a Child</td>
<td>VIII 2 years</td>
<td>X 5 years</td>
</tr>
<tr>
<td>First Degree Child Molestation</td>
<td>VII 18 months</td>
<td>IX 3 years</td>
</tr>
<tr>
<td>Indecent Liberties w/o Forcible Compulsion</td>
<td>VI 13 months</td>
<td>VII 18 months</td>
</tr>
<tr>
<td>Second Degree Child Molestation</td>
<td>VI 13 months</td>
<td>VII 18 months</td>
</tr>
<tr>
<td>Third Degree Rape of a Child</td>
<td>IV 6 months</td>
<td>VI 12+ months</td>
</tr>
<tr>
<td>Third Degree Child Molestation</td>
<td>III 2 months</td>
<td>V 9 months</td>
</tr>
<tr>
<td>First Degree Sexual Misconduct w/o</td>
<td>III 2 months</td>
<td>V 9 months</td>
</tr>
</tbody>
</table>

Although some challenged the effectiveness of longer sentences as general or specific deterrents or as providing the opportunity for rehabilitation, we based our recommendation on the consensus that persons who committed these crimes deserved the sentences we recommended.

We also focused on the presumptive sentence range for repeat sex offenders and concluded for the same reasons that longer sentences were deserved. Once again, the structure of the Sentencing Reform Act permitted us to focus on specific situations in which we believed additional punishment was deserved. We recommended that prior sex offense convictions be scored at three rather than the previous two points, which has the effect of increasing presumptive sentence lengths for subsequent sex offense convictions. We recommended that all juvenile convictions for sex offenses be included in an adult's criminal history, not just those which occurred when the offender was fifteen or older at the time of the juvenile's conviction. We also recommended that convictions of "serious violence," WASH. REV. CODE § 9.94A.030(27)(a) (Supp. 1990-91), begin to run consecutively, rather than concurrently, commencing at the second conviction rather than the third as previously required.

We also addressed the issue of how to accurately identify as sex crimes those
the state's legal authority and, to borrow from equal protection terminology, it did so using the least restrictive alternative. The Task Force accepted the proposal, by consensus, as it made all its decisions. Much discussion ensued, but no votes and no dissents. We delivered our report to the Governor on November 28, 1989. He recommended our proposals to the legislature, which adopted the proposals with only minor modifi-

crimes that had sexual components. Prosecutors have made substantial progress in recent years in accurately labeling sex crimes, yet situations still existed in which crimes of a sexual nature resulted in convictions for assault or burglary. These convictions did not disclose the sexual nature of the crime, resulting in less serious punishment than we believed they should receive. To the extent this treatment was caused by the discretion of prosecutors, little can be done through legislation. But to the extent that motive is rarely an element of a crime and thus sexually motivated crimes without sexual results are accurately charged as nonsexual crimes, legislation could provide a remedy. We recommended the addition of a special allegation of "sexual motivation" in RCW § 9.04A.030(30) that, if proved as any other element, would accurately label the crime with its true nature. Such a finding would authorize an exceptional sentence under RCW § 9.94A.390(2)(e) and would result in the crime being classified as a "sex offense" in the future. WASH. REV. CODE § 9.94A.030(29) (Supp. 1990-91).

Recognizing that almost all sex offenders would return to the community and that recidivism was at its highest in the period shortly following release, the Task Force recommended that the mandatory period of community supervision following release be extended from one to at least two years. Id. § 9.94A.120(8)(b).

This series of recommendations did not mean that we rejected treatment for sex offenders. We recognized the difficulty of successfully treating sex offenders, particularly those whose behavior has become deeply ingrained. Yet we also recognized that almost all sex offenders would be released and that future public safety required us to continue in our efforts to treat sex offenders. As a result, we recommended continuation of the sentencing option permitting treatment of first-time sex offenders in the community, although we recommended a series of changes to increase the accountability. Id. § 9.94A.120(8). Additionally, we advised that statutory limits on eligibility for sex offender treatment programs in prison be removed and that the treatment program be expanded by 200 beds. Id. § 9.94A.120(8)(b). We recommended that a community treatment option be available for juvenile sex offenders, modeled on that for adults, and that funds for the treatment of juvenile sex offenders be increased. Id. § 13.40.160(5).

We also proposed that the state create a system to register convicted sex offenders and authorize law enforcement to notify the community of their release. Id. § 4.24.550, 9A.44.130.

We recommended the creation of a grant program to fund enhanced victim services and the creation of a crime victim advocate position in state government. Finally, we recommended funding for research to evaluate the effectiveness of sex offender treatment programs and of treatment services for victims.

All our recommendations were adopted simultaneously with our proposal for civil commitment of sexually violent predators.

150. By consensus, I do not mean to imply that we all agreed with every detail of our civil commitment proposal or of our other proposals, and certainly not that we all shared the same degree of enthusiasm for each specific recommendation. Each of us, however, recognized that other members strongly supported certain recommendations, and we all sought a set of recommendations that all could support.
Confronting Violence

To a point, the plot of this story is not new. Forty years ago, the eminent criminologist Edwin Sutherland described the events leading to the diffusion of sexual psychopath laws through the United States in a similar story. As he summarized it, "a community is thrown into panic by a few serious sex crimes, which are given nation-wide publicity; the community acts in an agitated manner, and all sorts of proposals are made; a committee is then appointed to study the facts and to make recommendations." The committees, on which psychiatrists were heavily represented, would then recommend the adoption of sexual psychopath laws as "the most scientific and enlightened method of protecting society against sex criminals." Sutherland, who believed such laws were "dangerous and futile," located the cause of this result in "a general social movement," the triumph of "treatment policy" over "punitive policy."

Prior to the formation of the Task Force, the story Sutherland told and the story I have told are the same. But our Task Force had a different composition and our recommendations were significantly different. Those two differences were not unrelated. Psychiatrists and psychologists were not heavily represented on the Task Force, and they did not recommend sexual psychopath laws as "the most scientific and enlightened method of protecting society against sex criminals." They shared our belief in the difficulty of accurately predicting future violence and they promised no cure for predatory sexual violence.

Another group was also represented on the Task Force. The pain that sexual violence produces was the reason that the Task Force was created; it was also present on the Task Force.

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153. Id. at 142.
154. Id. at 147.
155. Id. at 142.
156. Id. at 147.
157. Id.
158. The 24 members of the Task Force included two psychiatrists and a psychologist. Dr. Roland Maiuro of the University of Washington School of Medicine and Dr. Robert Scherz of Mary Bridge Children's Hospital are psychiatrists. Dr. Paul West is a clinical psychologist.
159. See Sutherland, supra note 152, at 142.
The presence of Helen Harlow, Ida Ballasiotes, and Trish Tobias as Task Force members made it impossible to view these issues as abstract legal issues. Our work was "in the field of pain and death," and their presence made us constantly aware that whatever we did, or chose not to do, would have a direct, tangible impact on individuals. I do not believe that this influence blinded us to the presence of the other potential victims, the false positives, those who would lose their freedom when inaccurately labeled as likely to engage in predatory acts of sexual violence. For me, this focus heightened my sensitivity to the balancing that would inevitably occur. I was constantly aware that I was not engaged in an abstract intellectual enterprise, but rather the "organized practice of social violence." This awareness both produced our proposal and was responsible for its narrow focus.

As I reflect on the recommendations we made, I see no "general social movement," only a pragmatic response to a problem, a response which, in its context, seemed the best of the available alternatives, nothing more grand than that.

This justification is akin to triage, rooted in necessity. One facing a situation where harm is inevitable is justified in

160. Cover, supra note 8.
162. Cover, supra note 8.
163. See Sutherland, supra note 152.
164. I use the term "pragmatic" in both senses Thomas Gray identifies: [F]irst . . . it came always embodied in practices—habits and patterns of perceiving and conceiving that had developed out of and served to guide activity . . . [and] [s]econd . . . as an adaptive function . . . to help resolve, by means of conscious reflection and experimental revision, the real problems and live doubts that arose in the course of acting on unreflective and habitual practices.
using his abilities to minimize inevitable harm. My justification was, and is, that the pain that women and children will suffer from sexual violence and the pain that those erroneously committed will also suffer will be, in the aggregate, significantly less than would have been the case had any of the other alternatives been adopted. Law reform is politics, and politics is the art of the possible. This was, in my judgment, the best possible balance that could be achieved. I believed in 1989, and on reflection I still believe, that the course I took did less harm in the pursuit of good than would otherwise have been the case.\footnote{166} I will stand on that.

\footnote{166. As I reread this piece, I have the strong sense that it is far too "I" centered. My justification is that I was there. I used such power as I had to bring about the result I favored. I did not act alone but I was at least an accomplice. My field is criminal law, and the criminal law holds accomplices responsible to the same extent as principals. Thus, the need for justification.}