The Constitutionality and Morality of Civilly Committing Violent Sexual Predators

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**I. INTRODUCTION**

In enacting its new Sexually Violent Predator ("SVP") statute,¹ the Washington legislature has broken new ground with a unique approach to dealing with a small group of extremely violent sex offenders. This novel statute has gener-

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¹ WASH. REV. CODE ch. 71.09 (Supp. 1990-91).

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ated great controversy in Washington State and has also pro-
voked national discussion among those who are concerned with
the punishment and treatment of particularly violent sex
offenders. If declared constitutional by the U.S. Supreme
Court, the Washington enactment may have influence far
beyond its state of origin. Yet, it is important to keep in mind
that the legislation discussed here was not intended to address
the state’s entire sex offender problem. The Washington legis-
lature has also enacted a comprehensive approach to sex
offenders, involving more severe criminal penalties for sex
offenses. The SVP legislation discussed here applies only to a
very small segment, albeit a critical one, of the entire sex
offender population.

Sex offender legislation that provides in general for civil
commitment and treatment in lieu of punishment is not new to
American law. Such legislatively mandated programs have
been in existence in this country for at least sixty-five years;\(^2\)
until recently the state of Washington had such a “sexual psy-
chopath” statute, which has since been, in effect, terminated.\(^3\)

The novelty of the new statute is that it does not substi-
tute treatment for punishment but rather, for a small and
highly selected number of offenders, mandates civil commit-
ment for confinement and treatment after punishment has
been completed. This approach raises new and perplexing
legal questions.

The new statute responds to the long-existing but previ-
ously unsolved problem of what to do about sex offenders
whose prison terms are expiring, yet who are regarded as still
extremely dangerous. The statute designates members of this
very small cohort as “violent sexual predators,” who have been
convicted of violent sexual crimes,\(^4\) and who at the time of

ed. 1985).

3. In 1984, the Washington legislature limited its sexual psychopath statute to sex
offenses committed before July 1, 1984. WASH. REV. CODE ch. 71.06 (1989), repealed
prospectively by 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005
(1989)).

4. Violent sexual crimes are designated as first degree rape, second degree rape by
forcible compulsion, first and second degree rape of a child, first and second degree
statutory rape, indecent liberties by forcible compulsion or against a child under
fourteen, incest against a child under fourteen, and first and second degree child
molestation.

Also included are certain felony and federal or other-state convictions comparable
to these. In addition, certain sexually motivated crimes are included: first and second
degree murder; first and second degree assault; first and second degree kidnapping;
their pending release from prison or other discharge, suffer from a mental condition that causes them to be likely to continue to engage in acts of sexual violence. The term "predator" refers primarily to acts with strangers, thus generally excluding acts of incest.

A brief history of the events that preceded enactment of the legislation will explain why it came into being and what the intention of the legislature was in enacting it. As is often the case with legislation dealing with the dangerous mentally disordered, and especially in the case of sex offender legislation, the immediate genesis of the legislation was a shocking crime. On May 21, 1989, a mentally retarded sex offender, Earl Shriner, raped, stabbed, and sexually mutilated a seven-year-old boy. Shriner had a twenty-five year history of criminal assaults, including murders against children, and had been released from prison two years earlier, where he had served a ten-year term for two violent sexual crimes. This horrible event caused an enormous public outcry. What was regarded as particularly outrageous was the revelation that at the time Shriner was about to be discharged from prison two years earlier, some predicted that he was still very dangerous. Earlier efforts to have him civilly committed and confined immediately on termination of his prison sentence were to no avail. But civil commitment was denied by a judge, in part because it could not be shown that Shriner had committed a "recent overt act," a showing required by Washington's civil commitment statute. Because Shriner had been in prison for ten years and his previous criminal acts had been against children, he had had no opportunity to commit such a recent overt act.

Realization dawned on lawmakers and other legal experts that the criminal justice and civil commitment systems had failed in the Shriner case, if the release into society of a pre-

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first degree burglary; residential burglary; unlawful imprisonment; and attempts, criminal solicitations, or criminal conspiracies to commit any of those felonies. WASH. REV. CODE § 71.09.020(4) (Supp. 1990-91). The statute also applies to offenders who have been "charged" with such crimes but who have not been convicted, either because they were acquitted by reason of insanity or found unfit to stand trial and never tried. Id. § 71.09.020(1).

5. Id.

6. Id. § 71.09.020(3).


8. WASH. REV. CODE § 71.05.020(3) (1975), as interpreted in In re Harris, 98 Wash. 2d 276, 284, 654 P.2d 109, 113 (1982).
dictably dangerous person despite efforts to prevent it could be regarded as a failure. That it was a failure has been agreed upon by virtually everyone concerned. What is not agreed upon is the validity of the civil commitment approach taken by the Washington legislature to rectify one aspect of that failure.

The fact that the new legislation followed hard upon a shocking event that resulted in great public outcry should not be taken as a per se criticism of the legislation. Shocking events can generate beneficial responses, not only hysterical, ill thought-out ones. The legislation must be evaluated on its merits, not on its origin as a response to a horrible crime.

What problems did the legislation intend to address? The first was that previous sentencing legislation and practices were now perceived as having been far too lenient, as a result of which a number of extremely dangerous sex offenders, serving relatively short terms in prison, were eligible for release from prison to society despite their continued dangerousness. This problem could be rectified prospectively by ensuring less lenient sentences in the future for sex offenders believed to be especially dangerous. But the prospective approach would not protect society from sex offenders who already had been convicted and sentenced and whose prison terms would expire while they were still regarded as dangerous.

Second, it was recognized that existing civil commitment legislation in Washington, designed to apply to an entirely different cohort of mentally disordered persons, could not be used to "take up the slack" by providing for the further confinement of dangerous sex offenders. The "recent overt act" requirement of that statute could not be satisfied because imprisoned sex offenders have little or no opportunity to commit such acts. Moreover, the legislation had not been designed with sex offenders in mind and was not suitable for their unique problems.

Third, occasions might arise where new evidence of extreme dangerousness, in the form of letters, diaries, and statements to friends, fellow prisoners, psychiatrists, and

9. See Boerner, supra note 7.
10. The failure of the civil commitment system to provide for the involuntary commitment of violent sex offenders was described by the Task Force as one of several "gaps in our law and administrative structures [that] allow the release of known dangerous offenders who are highly likely to commit very serious crimes." GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, DEP'T OF SOCIAL & HEALTH SERVICES, FINAL REPORT II-20 to -21 (1989).
others would reveal, after sentencing and during imprisonment, an extent of dangerousness that had previously not been known, understood, or appreciated.  

With these limitations of the existing criminal and civil systems in mind, the legislature decided that a new form of involuntary civil commitment should be tailored specifically to apply to that "small but extremely dangerous"\footnote{11} group of violent sex offenders whose sentences under the pre-existing system were now acknowledged as inadequate in terms of societal safety.

The SVP legislation that emerged from that policy decision has now been attacked as unconstitutional. Litigation is now before the Washington Supreme Court,\footnote{12} with a likelihood that, whatever the outcome there, the case will ultimately be presented to the U.S. Supreme Court.

This Article will address not only the federal constitutionality of the SVP statute, but also its fairness or morality, on the assumption that the Constitution, as interpreted by the Supreme Court, does not always address the fairness issue. While both of these concerns necessarily and inevitably involve the wisdom or sound policy of the approach taken in this statute, a fuller discussion of that dimension is left to Professor David Boerner, who in another Article\footnote{13} in this Symposium discusses why the treatment program option seemed to be the wisest and most desirable policy choice among a number of alternative courses of action.

This Article will address four major substantive constitutional and moral challenges to the statute. The first is that the statute provides for unacceptable preventive detention contrary to American tradition and law. The second is that the terminology used to identify the mental condition of sexually violent predators is vague and meaningless, resulting in inaccurate and unfair applications and lacking in uniformity. The third objection is that the treatment program necessarily relies on a false assumption that efficacious treatment is available

\footnote{11} Some time before Earl Shriner was due to be discharged from prison it was learned that he "had hatched elaborate plans to maim or kill youngsters while waiting out the final months of his prison sentence. . . . He had lists of apparatus he might need in that regard." Boerner, supra note 7, at 527.

\footnote{12} WASH. REV. CODE § 71.09.010 (Supp. 1990-91).

\footnote{13} In re Young, 804 P.2d 1261 (Wash. 1991) (No. 57837-1) (granting review of personal restraint petitions by Andre Brigham Young and Vance Cunningham).

\footnote{14} See Boerner, supra note 7.
and argues that without efficacious treatment the statute must fail. Fourth, the confinement involved, which theoretically could last a lifetime, is based on predictions of future dangerousness that are highly inaccurate, resulting in the inappropriate and unjust confinement of many nondangerous persons. This last criticism in particular is subjected to a careful analysis in Sections IV and V of this Article, in which much new data and an entirely new analysis of that data are presented.

II. SELECTING OFFENDERS FOR COMMITMENT

Before moving to a discussion of these four challenges, it is first necessary to examine the selection process for commitment. In the last two years in which the SVP statute has been operative, only a very small number of violent sexual predators (nine) have been selected for civil commitment from a very large cohort of sex offenders (approximately 500 each year) who were about to be released from prison. How were those selections made?

The selection process begins with an evaluation by Department of Corrections staff of all offenders about to be released. From this large group, a "first cut" is referred by Corrections staff to the End of Sentence Review Referral Subcommittee ("ESRRS"), an interagency group with members from Corrections, Social and Health Services, and the Indeterminate Sentence Review Board, formerly the Parole Board.\(^{15}\)

The function of ESRRS is to select from this larger group a much smaller group of high risk cases that it will refer to the county prosecutors. The prosecutors decide which offenders against whom they will file a petition.\(^{16}\)

In deciding which offenders are to be referred to the prosecutors, ESRRS examines and considers a substantial amount of data for each. This data includes the following: (1) records of conviction of sexually violent crimes; (2) records of evaluation and/or treatment such as psychological or psychiatric tests, group notes, autobiographical notes, progress notes, psycho-social reports and other material gathered while the offender was in custody; (3) presentence reports and an end-of-sentence review report and the data on which the report

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16. Id.
was based; (4) the offender's version of his offenses, including records of interviews with him; (5) a current record of all prior arrests and convictions together with police reports on them; (6) institutional records describing the offender's behavior while he was in custody in any institution; and (7) in some cases, a current mental health evaluation.\textsuperscript{17}

The prosecutor to whom an offender is referred obtains an expert opinion on whether the offender suffers from a mental abnormality or personality disorder and whether he is likely to engage in future predatory acts of sexual violence. The prosecutor also examines reports on the offender's history, statements from material witnesses who were involved in his sexually violent offenses, and statements from witnesses who provided treatment or supervisory services in the institutions where the offender was in confinement.\textsuperscript{18}

Filing standards issued by the Washington Attorney General, intended either as an "addition to or in clarification of the statutory requirements," require a showing that the offender "has a provable pattern of prior predatory acts."\textsuperscript{19} Thus, although the statute contains no such criterion, the Attorney General requires a showing of recidivism. Any declarations made by the offender indicating an intent to commit future predatory acts are considered in evaluating such a pattern.

The standards also require that a qualified mental health professional find the statutorily requisite mental abnormality or personality disorder that would make the offender likely to engage in predatory acts of sexual violence. The offender should not have been paroled by the Department of Corrections on his latest offense. The victim or the victim's family should be consulted and agree to testify in commitment proceedings. Normally, commitment proceedings should not be brought if the offender has been released from custody for a "substantial period of time" and has not engaged in activity indicating a continuation of violent sexual predatory behavior. Finally, a petition should not be filed until "all other appropriate civil commitment and/or criminal proceedings have been

\textsuperscript{17} Letter from Jeanne Tweten, Esq., Assistant Attorney General, State of Washington, Criminal Division, to Professor Alex Brooks (Apr. 7, 1992) (containing final draft of Washington Attorney General's "Sexually Violent Predator Filing Standards") (on file with the University of Puget Sound Law Review).

\textsuperscript{18} Id.

\textsuperscript{19} Id.
exhausted."

County prosecuting attorneys are encouraged to consult with the State Prosecutors' Committee on Sexually Violent Predators, which coordinates all prosecutorial actions under the statute and advises about the appropriateness of filing a petition. If a petition is filed, the offender is examined and evaluated by the staff of the Special Commitment Center ("SCC"). The prosecutor must then reevaluate his petition in light of the SCC report.

In the six month period from July to December 1991, 250 sex offenders were about to be released. One hundred eighty-four high risk cases were referred to ESRRS, which then referred only seventeen of these to various prosecutors.

At the time of this writing, after a period of almost two years since the statute has gone into effect, only nine offenders have been committed, including Young and Cunningham, the two petitioners in the litigation pending before the Washington Supreme Court. Young was diagnosed as suffering from "mixed personality disorder with primarily paranoid and antisocial features" that predisposed him "to commit serious, violent sexual acts against women." He has been convicted of six felony rapes, though he was at large for only eleven years between the ages of twenty-one to forty-nine. Cunningham committed four felony assaults, including completed and uncompleted rapes, all before he reached the age of twenty-three.

III. PREVENTIVE DETENTION

A threshold charge against the statute is that it provides for impermissible preventive detention, which, as used in this context, is usually characterized as the confinement of a person to prevent him from engaging in future proscribed antisocial behavior. The ultimate specter is "pure" preventive detention, the confinement of a person who has never committed an offense, but who is predicted to do so, especially where

20. Id.
21. Id.
22. Memorandum from R. Peggy Smith, Dep't of Corrections, to Professor Alex Brooks (Apr. 6, 1992) (on file with the University of Puget Sound Law Review).
24. Letter from Irwin S. Dreiblatt, Ph.D., to Tim Blood, Deputy Prosecuting Attorney, King County (Oct. 6, 1990) (on file with the University of Puget Sound Law Review).
the prediction is highly speculative.25

The preventive detention of the SVP statute is not "pure" because the statute applies only to those offenders who have already been convicted of at least one crime of sexual violence, and usually more than one. Thus, the preventive detention of this statute is crime-related. A person who is sexually deviant cannot be committed as a sexually violent predator, regardless of the evidence of his sexual behavior, if he has never been convicted of a crime of sexual violence as defined in the statute.26

It may seem odd, at first blush, that the preventive detention argument is raised as an objection to a civil commitment system. All existing civil commitment statutes in this country, whose constitutionality is not in question for that reason, necessarily involve preventive detention. A major purpose of any statute that provides for the confinement of mentally disordered and dangerous persons is to prevent them from engaging in future behavior that would be harmful either to themselves or to others. Successful treatment is another purpose of confinement, but not a necessary one, for untreatable patients are not required to be discharged if they continue to be mentally ill and dangerous. Courts have traditionally justified such preventive detention as an exercise of the State's police power or its parens patriae power. No challenge to the State's exercise of these powers of preventive detention has ever been successful.

A particularly close parallel to the SVP statute can be found in statutes that provide for the involuntary civil commitment of prisoners whose prison terms have expired but who are regarded as mentally disordered and too dangerous to be released to society. In fact, a significant part of the population

25. During World War II, American citizens of Japanese ancestry who had committed no offense were "preventively" detained in "assembly centers" and "relocation centers" to prevent deeply feared espionage and sabotage. Their detention was upheld by the U.S. Supreme Court in Korematsu v. United States, 323 U.S. 214 (1944). This was "pure" preventive detention, perhaps the only case of it in the history of this country, but one that has since been severely condemned. See, e.g., MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1976).

of most maximum security mental hospitals consists of patients who have been committed following the completion of their prison terms. The constitutional propriety of such commitments was implicitly approved by the U.S. Supreme Court in Baxstrom v. Herold,27 which declared certain commitments unconstitutional because of procedural infirmities, but not because they were substantively improper.

Thus, there seems to be unchallenged precedent for the imposition of involuntary civil commitment on mentally disordered and dangerous persons following the completion of their prison sentences, although there has been no explicit Supreme Court ruling to that effect. The likelihood that the present U.S. Supreme Court would find otherwise seems remote.

Nevertheless, Washington's SVP statute is a civil commitment program with a difference. What fuels the debate over the propriety of the SVP statute is that many critics see it as providing additional punishment in the guise of a civil treatment program without typical criminal protections. Such critics see the statute as a stop gap measure for cases in which the criminal justice system has failed to impose sufficient punishment or has imposed no punishment at all. Critics of the SVP statute argue that if the criminal justice system has failed, it should be rectified, but only prospectively, to ensure that violent sexual crimes are appropriately punished in the future. Furthermore, they suggest that longer prison terms should be provided for each crime and that a habitual offender approach should be adopted that would require recidivists to serve particularly long terms.28


28. A series of arguments urging the use of the criminal process instead of civil commitment are presented in Brian G. Bodine, Comment, Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law & An Unwise Policy Choice, 14 U. PUGET SOUND L. REV. 105, 138-141 (1990). A brief filed in the Washington Supreme Court on behalf of the ACLU argues that "the constitutionally acceptable way to deal with sex offender recidivists is to use . . . recidivist sentencing statutes which permit extended incarceration including lifetime imprisonment for repeat offenders . . . ." Amicus Curiae Brief of the American Civil Liberties Union of Washington at 20, In re Young (Wash. filed Sept. 26, 1991) (No. 57837-1) [hereinafter ACLU Brief]. Another commentator argues that the State may use psychiatric testimony of long-term dangerousness to enhance the criminal punishment of first-time offenders and recidivists alike. Gary Gleb, Comment, Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness From Civil Commitment Proceedings, 39 UCLA L. REV. 213, 248 (1991). "This enhancement will tend to keep dangerous criminals in confinement for longer periods." Id. at 248. At the same time, Gleb criticizes the SVP statute as "ill-conceived" on the ground that there are no "reliable means of identifying sex crime
Such recommendations actually cut the heart out of the preventive detention argument. Longer terms, especially habitual offender life terms, are also a form of preventive detention. A much longer prison term is obviously not based on the third or fourth offense itself, but on the low-visibility prediction that a third or fourth offender will continue to offend. This raises the question whether preventive detention is acceptable when it results from the processes of the criminal law, but not when it is the result of a civil commitment process perceived as less protective of offenders' rights. This may be the case even though the consequence of criminal punishment for each offender, regardless of the exercise of those rights, would in many cases be more draconian.

In any event, the U.S. Supreme Court addressed the problem of the criminal/civil dichotomy and has asserted its approval of preventive detention under appropriate circumstances. As mentioned above, one reason for the critics' characterization of the SVP statute as impermissible preventive detention is that it is perceived as providing additional punishment in civil disguise but with procedures that are substantially less rigorous than those in the criminal justice system. This position seems reflective of a long-standing view, stemming from the position taken by the U.S. Supreme Court in the 1967 case of In re Gault, that a "civil" designation need not be taken at face value if that term conceals actual punishment. The Court in Gault characterized the juvenile justice system, labelled "civil," as really criminal in nature because the state actually intended to punish juvenile offenders. In that case, the Court required certain criminal-type trial protections instead of the lax civil procedures that had previously been typical of juvenile cases.

By 1985, the Supreme Court's views on the civil-criminal dichotomy had changed. In Allen v. Illinois, the Supreme Court ruled that the Illinois Sexually Dangerous Persons Act, which provides for civil commitment, is civil and regulatory in

recidivists . . . " Id. at 247. Why should preventive detention be encouraged in the criminal justice system but condemned when it is implemented through civil commitment? See also Lisa T. Greenlee, Note, Washington State's Sexually Violent Predators Act: Model or Mistake?, 29 AM. CRIM. L. REV. 107 (1991), which concludes that the statute is a mistake.

31. Id.
nature, not criminal. Justice Rehnquist said, "[T]he State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment." 33

Furthermore, the Court has decided a number of short-term preventive detention cases in recent years. 34 One of the most significant of these is the 1987 case of United States v. Salerno, 35 which concerned the constitutionality of the Bail Reform Act of 1984. 36 That act permits the denial of bail to criminal defendants who pose a serious threat of future criminal activity if released on bail. 37 "Fat Tony" Salerno challenged the denial of bail to him under that act.

In upholding the constitutional validity of a statute that permits short-term preventive detention, the U.S. Supreme Court established a clear demarcation between civil regulatory confinement and criminal confinement. The Court characterized the pretrial detention of Salerno not as "impermissible punishment" before trial, as Salerno had claimed, but as the civil regulation of a dangerous person. 38 The Court demonstrated that such regulatory detention of defendants in criminal cases had ample precedent in constitutional law.

Chief Justice Rehnquist acknowledged the importance of the liberty interest involved, but pointed out that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." 39 He stated, "the individual's strong interest in liberty . . . may, in circumstances where the government's inter-

33. Id. at 373.
37. More specifically, bail can be denied when the case involves the following: (1) a crime of violence, (2) a crime punishable by life imprisonment or death, (3) a major drug offense, or (4) a felony committed by a person previously convicted of two of the crimes listed. The statute also authorizes detention without bond where a case involves a "serious risk that [the defendant] will flee" or that he will "obstruct . . . justice, or threaten, injure, or intimidate a prospective witness or juror." 18 U.S.C. § 3142(f)(2) (Supp. II 1984).
39. See id. at 748.
est is sufficiently weighty, be subordinated to the greater needs of society." 40 Although the preventive detention in Salerno was short-term, Justice Rehnquist cited as supporting the Court's holding several cases approving the long-term unlimited confinement of "mentally unstable" and dangerous persons within the civil commitment structure, including dangerous criminal defendants who were mentally ill and incompetent to stand trial. 41

Justice Rehnquist cited two leading cases, Addington v. Texas 42 and Jackson v. Indiana 43 as illustrations of the Court's earlier approval of the involuntary and indeterminate confinement of these two classes of dangerous, mentally disordered persons. He might also have cited, but did not, the case of Jones v. United States, 44 which approved the indeterminate preventive detention of dangerous and mentally disordered insanity acquittees.

These three types of commitment are long-established illustrations of constitutionally approved preventive detention that are based, as is the SVP statute, on the model of mental disorder plus dangerousness. All are potentially indeterminate in nature.

More recently, the U.S. Supreme Court has again addressed the issue of preventive detention of dangerous persons in Foucha v. Louisiana. 45 The question before the Court was the constitutionality of a Louisiana statute that permitted the confinement of an insanity acquittee in a mental institution on the sole ground that he was dangerous, without requiring that he be mentally ill. In Foucha, the Court set limits to such a confinement, holding that the Louisiana statute violated substantive due process, procedural due process, and equal protection of the laws.

It should be emphasized at the outset that the holding in the Foucha case does not, on its own terms, apply to the Washington SVP statute because the Foucha decision concerned a statute that did not require a finding of mental illness or pathology, whereas the Washington statute does. Thus, the Foucha statute and the Washington statute are fundamentally

40. Id. at 750-51.
41. Id. at 748-49.
42. 441 U.S. 418 (1979).
different. The only conceivable basis on which the Court might apply Foucha to the SVP statute would be if it found that the mental pathology requirement in the Washington statute was a sham. Such a finding would be entirely inappropriate, however, as the discussion in Section IV of this Article demonstrates. Furthermore, as indicated in Foucha, the Court would almost certainly accept a state's own definition of mental illness if that definition was within reasonable bounds.

In Foucha, the Court accepted Louisiana's definition of antisocial personality disorder as nonmental illness, although that disorder is included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, DSM-III-R. The Court was not interested in defining mental disorder and deferred to the state's reasonable definition. Thus, Washington's inclusion in the SVP statute of antisocial personality disorder as one form of mental pathology would almost surely be accepted by the Court. To act otherwise would be to reject previous Supreme Court decisions, as the discussion in Section IV indicates.

Nevertheless, the Foucha case warrants at least a brief discussion here because other aspects of the case may bear on the SVP statute and on the issue of preventive detention generally. A more comprehensive discussion of the Foucha case is provided in Professor James Ellis's Article in this Symposium.

Foucha, who committed two serious crimes, had been acquitted by reason of insanity at a bench trial. Under the prevailing Louisiana statute, he was automatically committed to a state psychiatric hospital. After approximately three and a half years, a review panel of three doctors recommended that Foucha be conditionally discharged on the ground that he was no longer mentally ill, if he had ever been. Three doctors stated in a report that Foucha had not displayed any evidence of mental illness or disease since admission. A court-appointed doctor testified that Foucha had "probably suffered from a drug induced psychosis" at the time of the crime, but had recovered from that temporary condition and was now in

48. Foucha, 112 S. Ct. at 1782.
49. Id.
good shape," showing no signs of psychosis or neurosis. But, said the doctor, Foucha did suffer from antisocial personality disorder, a condition that "does not constitute a mental illness and is not subject to medical treatment." On the question of dangerousness, a psychiatrist testified that he would not "feel comfortable in certifying that Foucha would not be a danger to himself or to other people" because he had been involved in altercations with other patients at the hospital. Given this evidence, the district court found Foucha to be dangerous to himself or others and on that ground alone ordered him to be recommitted. The district court's decision was upheld by the Louisiana Supreme Court, over three dissents, then appealed to the U.S. Supreme Court, which reversed.

The Supreme Court's plurality opinion, finding the statute unconstitutional, was written by Justice White. It was joined by a concurring opinion written by Justice O'Connor, who supported the result, but not the reasoning. The plurality opinion found a denial of substantive due process, procedural due process, and equal protection of the laws. There were four dissenting votes. Two dissenting opinions were written by Justice Kennedy and Thomas. Altogether, there were four written opinions, each stressing different facets of the case.

Justice White, in effect, perceived the confinement of Foucha in a mental hospital as a civil commitment. Based on previous Supreme Court decisions, he interpreted that commitment as requiring for constitutional purposes a finding of mental illness as well as dangerousness in cases where dangerousness is a ground for commitment. Nor did Justice White find the holding of Jones v. United States, which concerned the confinement of an insanity acquittee, inconsistent with the civil commitment cases.

Inasmuch as the State of Louisiana had, understandably, relied heavily on the Salerno case to support their statute, Justice White devoted an important part of his opinion to the implications of that case on Foucha's.

Justice White pointed out that the Court had, indeed, "in certain narrow circumstances" permitted the "limited confine-
ment" of dangerous persons, without more. But, he said, the statute approved in Salerno carefully limited such detention to cases involving the most serious of crimes, such as crimes of violence and certain repeat offenders, and was "narrowly focused" on a problem where government interests were "overwhelming."

Further, highly protective procedures were involved, which he contended were not present in Foucha. Finally, he argued, the Salerno statute strictly limited the duration of confinement, in contrast to the Foucha statute which, at least hypothetically, permitted lifetime confinement.

What is of particular interest is how Justice White's dicta posed the implications of the State's argument in Foucha. Said Justice White,

[T]he State asserts that Foucha may be held indefinitely because he once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

These remarks are dicta that are not likely to be accepted by Justice O'Connor, the swing voter in this case.

Justice O'Connor's concurring opinion also stressed the distinction between the narrowly tailored Bail Reform Act upheld in Salerno and the much broader mandate of Louisiana's statute. She limited the future impact of Foucha, however, by stressing that its ruling was addressed only to the Louisiana statute and that the Court's ruling did not necessarily apply to "more narrowly drawn laws" in which the nature and duration of confinement of sane but dangerous insanity acquittees were justified by pressing public safety concerns. Justice O'Connor went so far as to state her view that the

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55. Foucha, 112 S. Ct. at 1786.
56. Id.
57. Id. at 1787.
58. Id. at 1789 (O'Connor, J., concurring).
Court's holding did not prohibit Louisiana from confining sane but dangerous insanity acquittedees if it retailored its statute. Although Justice O'Connor did not set forth clear-cut guidelines for a constitutionally acceptable statute, she did stress that, at minimum, a sane but dangerous insanity acquittee should not be confined for a period of time in excess of the maximum prison term for the crime committed where there is a conviction. A provision setting a cap on confinement of a currently "sane" insanity acquittee would not be inconsistent with the ruling of Jones v. United States, which held that such a cap is not constitutionally required where the insanity acquittee is mentally ill and dangerous. Justice O'Connor also suggested that a more narrowly designed statute should distinguish between insanity acquittedees who had committed violent and serious crimes from those who had committed nonviolent or relatively minor crimes, in cases where such crimes were the "only" evidence of dangerousness. Finally, she argued that "sane" insanity acquittedees, if confined, should not be held as mental patients, absent some medical justification, inasmuch as the purpose of such a psychiatric confinement would not be present, the acquittee not being mentally ill and not in need of psychiatric treatment.

Inasmuch as Justice O'Connor cast a "swing vote" in Foucha that won a majority for the decision, her narrow view of the ruling in that case is crucial. It should not be too difficult for any state to revise a questionable statute so as to meet Justice O'Connor's objections. There is little question but that Justice O'Connor would join the four dissenters to form a new majority in a case dealing with a statute such as Washington's SVP statute, where mental illness is a requirement and where the statute is, in fact, very narrowly drawn to apply to exceedingly dangerous offenders, where the government's interests are compelling.

Thus, the import of Salerno remains vital for the Washington statute. What remains at issue is an interpretation of the limitations imposed upon Salerno. Justice White's views are to a significant extent at odds with those of Justice O'Connor. He has stressed the "strictly limited" duration of pretrial detention. Justice O'Connor, however, would presumably accept a

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59. Id. at 1790 (O'Connor, J., concurring).
lengthy confinement if it is not in excess of a maximum penalty for the crime or crimes committed. In Foucha's case this could be as long as thirty-two years.

In sum, the Foucha case, along with the other cases discussed above, seems to demonstrate that if the Young and Cunningham cases come before the Supreme Court, a majority of the justices will uphold the constitutionality of the SVP statute as a proper exercise of the State's regulatory powers.

Nevertheless, the moral issue remains. Is it morally acceptable to preventively detain extremely violent sex offenders on the basis of a prediction of future dangerousness, the validity of which has been vigorously challenged? This question, which underscores the notion that it is not preventive detention per se that is objectionable, but only unfair preventive detention, is further discussed in Sections VI and VII, which analyze predictions of dangerousness. But, before we come to that culminating issue, we will discuss the issues of mental condition and efficacy of treatment.

IV. THE MENTAL PATHOLOGY COMPONENT

As indicated in Foucha, it has been broadly accepted for many years that the civil commitment of a dangerous person to a mental institution requires a finding of mental disorder or pathology as well as dangerousness. The drafters of the Sexually Violent Predator statute anticipated the thrust of the Foucha decision. The SVP statute was enacted on the understanding that, along with the dangerousness of the offender, some form of mental pathology should justify the commitment. Accordingly, the statute provides that, for purposes of commitment, the offender must suffer from either a "mental abnormality" or a "personality disorder" that causes the likelihood of future predatory acts of sexual violence. The disorder may not merely co-exist with the sexual behavior, but must be responsible for it.

One criticism of the mental pathology components of the SVP statute is that sex offender civil commitment statutes in general, and this one in particular, are based on the faulty assumption that all sex offenders are mentally disordered, whereas in fact most of them are not and that their deviant behavior does not "in and of itself" constitute a mental disor-

62. Id. at 1780.
It is argued, moreover, that to make "broad generalizations as to a causal relationship between sexual offenses in general and any particular condition" is inappropriate. But these critics agree that some sex offenders do suffer from some form of "recognized mental disorder." There is universal agreement that many sex offenders are not mentally disordered. But such a view does not detract from the equally valid proposition that a certain number of violent sex offenders do, in fact, suffer from some form of mental pathology. Some may be psychotic, although the SVP statute does not emphasize such a group that could invoke an insanity defense. If the SVP statute is directed only at offenders who suffer from some form of pathology and identifies them in an acceptable way, it is not subject to the sweeping objection that "not all" violent sex offenders are "sick."

Another criticism is that the term "mental abnormality," as used to identify disordered offenders, is "hopelessly vague" and cannot be applied accurately or uniformly. How valid are these criticisms? Let us consider, first, the term "personality disorder."

A. Personality Disorder

The particular personality disorder most likely to be applied in the case of a violent sexual predator is Antisocial Personality Disorder. Offenders diagnosed in this manner are familiarly referred to as psychopaths or sociopaths. This mental condition seems to be the less controversial of the two in the statute, apparently because it is listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, **DSM-III-R.** According to the Washington State Psychiatric Association, the term is not objectionable because it has a "clinically recognized meaning." Ironically, although the Association accepts this diagnostic label as "clinically recognized," it is, in fact, somewhat controversial. The labels "psychopath" and "sexual psychopath" have been frequently denounced as meaningless.

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64. Amicus Curiae Brief of Washington State Psychiatric Ass'n at 3, *In re Young* (Wash. filed Sept. 20, 1991) (No. 57837-1) [hereinafter WSPA Brief].
65. *Id.* at 4.
66. *Id.* at 3.
68. WSPA Brief, supra note 64, at 8.
69. For example, psychiatrist Seymour Halleck has stated: "Even within
Moreover, psychiatrists disagree widely about whether personality disorder is a "mental disease" or "mental illness." In fact, in the Foucha case, the majority of the Supreme Court based its holding on the assumption that Foucha was no longer mentally ill, although he was diagnosed as having a personality disorder.\textsuperscript{70} The Supreme Court's ruling seems to have accepted this view because the hospital doctors held it. It seems to be a reasonably safe assumption that if mental health professionals view antisocial personality disorder as a form of mental disorder, as the DSM-III-R does, the Supreme Court would accept that position as a fulfillment of the mental disorder requirement for involuntary civil commitment.

The term "sexual psychopath" has been a common one for many years and many sex offender statutes are called "sex psychopath laws." Indeed, despite the ruling in the Foucha case, it would be difficult to attack as unconstitutional the use in sex offender legislation of the term "personality disorder," under which subsumes the more specific diagnosis of antisocial personality disorder, in light of the 1940 U.S. Supreme Court decision in Minnesota ex. rel Pearson v. Probate Ct.\textsuperscript{71} In Pearson, the Court ruled that a Minnesota statute did not violate due process by providing for the indeterminate commitment of sex offenders with a "psychopathic personality." The Minnesota Supreme Court had defined "psychopathic personality" as describing 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."\textsuperscript{72}

Washington's definition of a sexual psychopath is awkward. Its definition, taken from another statute, is as follows: "[A]ny 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

\textsuperscript{71} 309 U.S. 270 (1940) (upholding sexual psychopath classification as valid).
\textsuperscript{72} Id. at 273.
Constitutionality of Committing

constituting him a menace to the health or safety of others."\textsuperscript{73} "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 or manifested by anomalies of such character as to render satisfactory social adjustment of such person difficult or impossible."\textsuperscript{74}

An objection to the use of the term "sexual psychopath" as a general characterization of sex offenders selected for civil commitment is that many offenders are not psychopaths and do not have a "personality disorder," but suffer from some other mental condition such as sexual sadism, pedophilia, or other paraphilia.\textsuperscript{75} Moreover, the \textit{DSM-III-R}, in its list of the characteristic behaviors of persons with antisocial personality disorder, does not single out sexual offenses as particularly indicative of that disorder. The \textit{DSM-III-R} diagnosis does refer to a "pattern of irresponsible and antisocial behavior," including a failure "to conform to social norms with respect to lawful behavior, as indicated by repeatedly performing antisocial acts that are grounds for arrest (whether arrested or not) . . . ."\textsuperscript{76}

Moreover, in its list of behaviors prior to the age of fifteen, three of which tend to indicate antisocial personality disorder, the act of having "forced someone into sexual activity with him or her" is one criterion.\textsuperscript{77}

Despite the \textit{DSM-III-R}'s lack of more specific examples, deviant sexual behaviors are generally considered to be indicators of antisocial personality disorder if coupled with lack of empathy for the victim, lack of remorse for the act, and belief that the criminal behavior is justified.\textsuperscript{78}

\textit{B. Mental Abnormality}

"Mental abnormality" is defined in the SVP statute 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

\textsuperscript{73} \textit{Wash. Rev. Code} § 71.06.010 (1989).
\textsuperscript{74} \textit{Id}.
\textsuperscript{76} See \textit{DSM-III-R, supra} note 46, at 345.
\textsuperscript{77} \textit{Id} at 344.
\textsuperscript{78} \textit{Id} at 346.
person a menace to the health and safety of others."\(^{79}\)

The Washington State Psychiatric Association argues that the term "mental abnormality" is "hopelessly vague," and "has no clinically significant meaning" as applied to sex offenders.\(^{80}\) The Association further argues that because the term mental abnormality "is not employed as a diagnostic or explanatory concept in authoritative texts such as the DSM-III-R," and "has no recognized diagnostic use, there is no way to assure with a reasonable medical certainty that it will be applied accurately and uniformly in cases arising under the Statute."\(^{81}\) This argument indirectly suggests that other psychiatric terms commonly used in criminal and civil law are applied uniformly and accurately, which is hardly the case. Whenever psychiatric nomenclature is involved in the law, there is invariably great latitude in interpretation and application. For that reason, the question is not whether the term is a common psychiatric term, but whether the term would be applied fairly.

The "mental abnormality" language is not intended to be a psychiatric term. The fact that it is not listed as such in the DSM-III-R is irrelevant. It is a legal term, intended to convey a form of pathology that leads to violent sexual offenses.

In using the term, the legislature seems to have been well aware that a significant number of sex offenders suffer from some form of mental condition, or pathology, that impairs volitional controls and causes them to behave in the compulsive, repetitive, irrational, and self-destructive ways that are typical of mental disorders.

Dr. Gene Abel of Emory University Medical School, a psychiatric leader in the field of sexual pathology, has commented on sex offenders who commit deviant sex acts; he has pointed out that "their compulsive, repetitive, driven behavior, which at times has no rational, logical reward, appears to fit the criteria of an emotional or psychological illness."\(^{82}\)

These mental conditions and behaviors have not as yet been adequately dealt with by the psychiatric profession, either in the diagnosis and treatment of sex offenders or in the DSM-

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80. See WSPA Brief, supra note 64, at 7.
81. Id.
III-R, which contains all of the acceptable mental disorders agreed upon by official psychiatry.

The DSM-III-R does contain a category for paraphilias, which are characterized by "arousal in response to sexual objects or situations that are not part of normative arousal-activity patterns..." The diagnostic category of paraphilia includes pedophilia, sexual sadism, masochism, voyeurism, and an assortment of miscellaneous disorders such as necrophilia, but not rape. Pedophilia is described in DSM-III-R as involving recurrent and intense sexual urges and sexually arousing fantasies concerning prepubescent children thirteen years of age or younger. The sexual behavior may consist of acts that involve no actual physical contact with the child such as undressing, exposing oneself, or masturbating in the presence of the child. Or the acts may be potentially even more traumatic to the child, involving fondling, fellatio, cunnilingus, or penetration of the child's vagina, anus, or mouth, using varying degrees of force. The pedophilic behavior may be coupled with another paraphilia, sexual sadism, which involves acts in which the psychological or physical suffering of the victim is sexually exciting. The mutilation by Earl Shriner of his seven-year-old victim is an illustration of pedophilia coupled with sexual sadism.

Although rape per se is not included in the DSM-III-R's list of sexual disorders, to the extent that sexual sadism is included, that disorder can include rapes and other sexual assaults as manifestations of sexual sadism. In such cases, "the suffering inflicted on the victim is far in excess of that necessary to gain compliance, and the visible pain of the victim is sexually arousing." But why is uncontrollable pathological rape not included as such in the DSM-III-R? Dr. Abel has suggested at least two reasons. First, he says, psychiatry has had "limited contact with the more aggressive sex offenders, and as a consequence, less information has been available regarding sexual aggressiveness as compared to the less aggressive paraphiliacs." Second, the leaders of the psychiatric profession seem to

83. DSM-III-R, supra note 46, at 279.
84. Id. at 284.
85. Id. at 284-87.
86. Id. at 287.
87. Id.
88. Gene G. Abel & Joanne L. Rouleau, The Nature and Extent of Sexual Assault,
be unwilling to accept sexual misbehaviors such as rape as a diagnosis for fear that such a diagnosis could be used to establish a psychiatric excuse for escaping punishment.

In fact, the task force on paraphilias convened to revise the *DSM-III* actually concluded that the weight of scientific evidence supported the inclusion of rape as a paraphilia that they called "paraphilic coercive disorder," a category intended only for individuals with intense, repetitive urges of six months duration to commit rape, who had either acted on these urges or were disturbed by their presence. But the recommendation was disapproved by the Board of Directors of the American Psychiatric Association.\(^9\) Inasmuch as the *DSM* refers to "disorders," the failure to include paraphilic rape in the *DSM-III-R* as a "disorder" may be the reason the drafters of the SVP statute used the term "mental abnormality" instead of disorder.

According to Dr. Abel, the behavior of certain rapists fits logically within the general rationale of paraphilia because rapists report having recurrent, repetitive, and compulsive urges and fantasies to commit rape. Says Dr. Abel, "These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again."\(^9\) Such a cycle is similar to the clinical picture presented by other recognized paraphilias.

Of course, not all rapists fit the paraphiliac rationale. Many rapists are "mentally normal" in the sense that their rapes do not stem from pathology. To be identified as coming within the term "mentally abnormal," a rapist selected for civil commitment should have a recurrent, compulsive urge and a pathological need to repetitively carry out psychologically driven rape.

In sum, the Washington legislature, in providing for the mental disability element required for a constitutionally valid civil commitment, has used two terms that should cover the range of pathologies affecting violent sex offenders.


\(^9\)0. See Abel & Rouleau, supra note 88, at 18.
In using the term "personality disorder," the legislature has wisely repudiated the antiquated term "sexual psychopath" with its false connotation that all or most sex offenders are psychopaths. In using the broader term, which includes antisocial personality disorder, the legislature has identified those sex offenders whose behavior fits the DSM-III-R's stated diagnosis of personality disorder. Some mentally disordered sex offenders will come within that diagnosis; many will not.

In using the concept of "mental abnormality" the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the DSM-III-R; others are not. The fact that pathologically driven rape, for example, is not yet listed in the DSM-III-R does not invalidate such a diagnosis. The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities. What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.

V. THE EFFICACY OF TREATMENT

The SVP statute provides for the care and treatment of a civilly committed violent sex offender, although the legislature has acknowledged that "the prognosis for curing sexually violent offenders is poor" and that the "treatment needs of this population are very long-term." The Washington State Psychiatric Association, in attacking the legislation, asserts: "There is no scientifically reliable and persuasive data showing that violent sex offenders can be successfully treated." Some studies show that the recidivism rate for treated offenders appears to be the same as that for untreated offenders, indicating lack of successful treatment.

92. Id. § 71.09.010.
93. See WSPA Brief, supra note 64, at 10.
Inasmuch as various treatment modalities for sex offenders are discussed elsewhere in this Symposium, there is no need to examine the efficacy of those treatment modalities here. But even if there is agreement that the state of the art shows treatment ineffectiveness, is that dispositive of the issue? What is relevant here are two questions: first, whether the treatment provision of the statute meets constitutional requirements, and, second, whether the asserted lack of effectiveness of treatment undercuts the morality of the statute.

The Supreme Court has never specifically ruled on the issue of the constitutional right to treatment of mentally disordered persons. It avoided the issue in the case of O'Connor v. Donaldson, where the right to treatment issue was presented. However, the Court decided that case on an entirely different basis. In Youngberg v. Romeo, however, the Court did confront the issue of the constitutional right to care and treatment for retarded persons. Romeo had claimed a constitutional right to safe conditions of confinement, freedom from bodily restraints, and a right to “minimally adequate habilitation” or training.

The Court ruled in Romeo that institutionalized mentally retarded residents enjoy “constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.” The Court further stated that retarded persons are constitutionally entitled to “minimally adequate training”; the Court said that in this case, the minimally adequate training required by the Constitution “is such training as may be reasonable in light of respondent’s liberty interests in safety and freedom from unreasonable restraints.” The Court further stated that “reasonableness” and “minimal adequacy” should be defined by qualified professionals, whose judgments are presumptively correct.

96. 422 U.S. 563 (1975).
98. Id. at 316-17.
99. Id. at 324.
100. Id. at 322.
101. Id.
102. Id. at 322-23.
103. Id. at 324.
Finally, the Court said that the state "has considerable discretion in determining the nature and scope of its responsibilities."104 The issue of efficaciousness did not arise.

In Allen v. Illinois,105 the Supreme Court suggested that the treatment objective of the state might be an important factor in determining whether a civil commitment under the state is regulatory or criminal. But, again, the Court did not consider the question of whether the treatment would have to be efficacious, nor was that issue presented.106

Washington's statute provides that "the involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment."107 These requirements do not appear to demand efficacy, and it is unlikely that the Court will rule otherwise.

Assuming that a constitutional challenge to a lack of efficacy will not prevail, does a question of fairness or morality remain? If the SVP statute is perceived as primarily a "treatment program," and if treatment is not likely to work, there appears to be a massive hypocrisy if violent sexual offenders are confined, ostensibly to treat them, when the likelihood of success is remote. This alleged hypocrisy troubles many critics of the statute.

But it must be recognized that the goal of the SVP statute is not primarily treatment.108 The statute is designed to confine an extremely limited number of dangerous and mentally abnormal persons because they are too dangerous to be at large, where the criminal justice system has failed in its duty to protect society. It is not necessary that treatment be efficacious. Whether it is fair or moral to confine offenders in the absence of efficacious treatment is discussed in the conclusion of this Article.

VI. PREDICTIONS OF FUTURE VIOLENT BEHAVIOR

An essential feature of the Sexually Violent Predator statute is its requirement that a prediction be made that the offender selected for civil commitment be "likely to engage in
predatory acts of sexual violence.’”

Can such a prediction be made by a mental health professional and accepted by judge or jury with a reasonable degree of confidence? Some critics of the act insist that it cannot and that it is next to impossible to do so. This Article asserts that such predictions can be made with acceptable accuracy, not only in a number of contexts, but particularly with respect to violent sexual offenders.

The extent to which psychiatrists, psychologists, and other mental health professionals can make accurate long-term predictions of future dangerous behavior of mentally disordered persons has been under attack for at least twenty years. The perceived wisdom until recently can be succinctly illustrated by the frequently expressed proposition that when these professionals make such predictions, they are likely to be wrong at least two times out of three.

This conclusion is based on empirical research done over the years by a number of social scientists, but most particularly by Henry Steadman and his colleagues, whose original research dealt with the subsequent violent behavior of a cohort of 967 patients who had been transferred from prison to security mental hospitals. These patients were discharged following the Baxstrom v. Herold decision by the U.S. Supreme Court, which declared their continued involuntary hospitalization following termination of their prison sentences to be unconstitutional because of procedural defects.

Steadman’s findings, following up on earlier studies, have become highly influential and have been adopted, in effect, by the American Psychiatric Association and cited in a variety of settings, including an important dissenting opinion in the case of Barefoot v. Estelle, decided in 1983 by the U.S. Supreme Court.

The Barefoot case was preceded by the U.S. Supreme

109. WASH. REV. CODE § 71.09.020(1) (Supp. 1990-91). There is no requirement that the acts be imminent.

110. The ACLU brief before the Washington Supreme Court states that accurately predicting dangerousness is “virtually impossible.” ACLU Brief, supra note 28, at 32.


Court's decision in *Jurek v. Texas*,\(^ {115} \) where the question of the validity of predictions of dangerousness was raised for the first time in a death penalty case. The Court rejected the argument that "it is impossible to predict future behavior and that the question is so vague as to be meaningless."\(^ {116} \) The Court acknowledged that to predict future dangerous behavior was "not easy,"\(^ {117} \) but Justice Stevens stated:

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[T]he fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."\(^ {118} \)

But *Jurek* dealt only with the admissibility of predictions, not with the question of who should be permitted to do the predicting.

Later, in *Barefoot*,\(^ {119} \) also a death penalty case, the Court went a step further and addressed the "who" question. The *Barefoot* case tested the constitutional validity of the use of psychiatric testimony concerning the future dangerousness of a convicted murderer who could be executed if the jury found that he would be dangerous in the future. The majority of the Court ruled that such testimony was acceptable. A dissent by Justice Blackmun, relying heavily on the research of Steadman and others, as recapitulated by Professor John Monahan, argued that such testimony was inherently fallacious and that it should not have been permitted on the question of the death

\(^{115}\) 428 U.S. 262 (1976).

\(^{116}\) Id. at 274.

\(^{117}\) Id.

\(^{118}\) Id. at 274-76.

\(^{119}\) *Barefoot*, 463 U.S. at 880.
penalty. Professor Monahan had written that "the 'best' clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past... and who were diagnosed as mentally ill." Justice Blackmun also cited the APA amicus curiae brief in *Barefoot*, which claimed that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." The majority opinion in *Barefoot*, in rejecting the contention that such psychiatric testimony should be barred, did not present an adequate analysis of the flawed empirical research underlying the dissent's position. The Court simply asserted, without further analysis, that "[w]e are not persuaded that such testimony is almost entirely unreliable." Elsewhere in the opinion the Court said, "Neither petitioner nor the [American Psychiatric] Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time," a statement that has led to some ridicule. Nowhere in the majority opinion upholding psychiatric predictions is there a challenge to the proposition that two out of three predictions of dangerousness are wrong.

That a majority of the Supreme Court would validate the use of psychiatric predictions of long-term dangerousness where the consequence, if the prediction is accepted by the jury, is death, clearly indicates commitment to the use of such predictions. Moreover, the Court also upheld, in *Jones v. United States*, the use of predictions of future violent behavior in cases involving persons involuntarily committed following an insanity acquittal, as well as in a variety of other settings, including routine civil commitments. It therefore seems highly unlikely that the Court would balk at the use of such predictions under the SVP statute.

120. Id. at 907-39.
121. Monahan, supra note 111, at 47-49.
122. Barefoot, 463 U.S. at 920.
123. Id. at 899.
124. Id. at 901.
127. In Schall v. Martin, 467 U.S. 253, 278 (1984), the Court said that "there is nothing inherently unattainable about a prediction of future criminal conduct."
But what about the moral issue? Even if the use of these predictions is constitutionally acceptable, should we nevertheless have moral reservations about them if they are, as claimed, highly inaccurate? If it were true that for every one accurate prediction of future dangerousness two would be inaccurate, we would be confining two "false positives" for every "true positive" under the SVP statute. That is a price in human liberty that many libertarians regard as too high to pay.

An examination of the moral issue requires an analysis of prediction research that has not yet been made by the U.S. Supreme Court or, indeed, by any other court. Justice Stevens' opinion in *Jurek* ignored the empirical findings discussed here. Stevens relied on the practical view that predictions of dangerousness were, in fact, being made in numerous settings in thousands of cases and that the practice should not be disturbed.

In *Barefoot*, Justice White did not ignore the empirical research that formed the basis of Justice Blackmun's dissent. He actually went so far as to acknowledge its validity but concluded that the empirical findings should not influence the court. He reasoned, first, as had Justice Stevens, that to ask the Court to exclude psychiatric predictions of future dangerousness was "somewhat like asking us to disinvent the wheel." Second, he argued that the adversarial system is "competent to uncover, recognize, and take due account of [the testimony's] shortcomings."

This Article challenges the previously unquestioned validity of the general proposition that only one out of three predictions of future dangerousness of mentally disordered persons is accurate. Moreover, the Article will attempt to demonstrate that the proposition is particularly inapplicable to predictions of the future dangerousness of mentally abnormal violent sexual offenders.

128. A "false positive" is a prediction of future dangerous behavior that turns out to be incorrect. A "true positive" is one that turns out to be correct. False and true negatives apply to predictions of nondangerousness.
130. Justice Blackmun called attention to this in his dissent, saying, "The Court does not dispute this proposition [that two out of three predictions of dangerousness are wrong] and indeed it could not do so; the evidence is overwhelming." *Barefoot v. Estelle*, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting).
131. *Id.* at 896.
132. *Id.* at 899.
133. Professor John Monahan, a leading theorist on dangerousness predictions
First, this Article argues that much of the empirical research leading to the "two-out-of-three" proposition, as it applies generally to mentally disordered persons, is flawed. It does not identify or address serious methodological deficiencies that have resulted in skewed findings that exaggerate the proportion of false positives. Second, conclusions about predictive inaccuracy that have been drawn from the research are not applicable to the particular cohort of mentally abnormal violent sex offenders who are the subjects of the SVP statute. Third, very little research has been done on the particular cohort dealt with by this statute, although such modest research as has been done seems to result in findings that are substantially different from findings that have been presented in briefs and numerous legal analyses in this area.

Because of these flaws and problems, and because most of the previous research is inapplicable to the cohort of pathological sex offenders dealt with here, this Article will argue that little is still known about the accuracy of dangerousness predictions about this specific group. What little we do know, however, should give us greater confidence in the validity of the predictions that are being made under the statute.

A. Methodological Flaws

Most empirical studies of dangerousness predictions have who has been largely responsible for disseminating the one-in-three formulation, now seems to be reconsidering its validity. In an important 1988 article, Monahan presents a comprehensive critique of earlier prediction studies and expresses second thoughts about his earlier one-out-of-three position. He refers to research published within the last eleven years whose results challenge that view as well as other conclusions about dangerousness predictions. Much of the new research deals with civil patient cohorts. In his article, Professor Monahan analyzes a number of methodological problems in previous research and concludes that if predictor and criterion variables are enriched and other methodological problems overcome, "it is possible that the next generation of risk assessment studies will yield results quite different than those to which we have become accustomed." John Monahan, Risk Assessment of Violence Among the Mentally Disordered: Generating Useful Knowledge, 11 INT'L J.L. & PSYCHIATRY 249, 255 (1988). Another important article, one of whose co-authors (Litwack) originally supported the one-in-three approach, also deals with methodological problems and new research. See Thomas R. Litwack et al., The Assessment of Dangerousness & Predictions of Violence, — PSYCHIATRIC Q. — (forthcoming 1992). See also Thomas R. Litwack & Louis B. Schlesinger, Assessing and Predicting Violence: Research, Law, and Applications, in HANDBOOK OF FORENSIC PSYCHOLOGY 205 (I. Weiner & A. Hess eds., 1987).

134. The Author does not intend that this discussion of methodological flaws be exhaustive. Only the most important ones are analyzed; additional flaws will not be discussed at this time.
methodological flaws, some minor, others major, as a result of which their conclusions are questionable. But these flaws are often not identified. Steadman and Cocozza, however, have acknowledged significant flaws in their first and pioneering study of the so-called Baxstrom cohort.135

Over a period of four years, Steadman and Cocozza studied 967 patients who, as a result of the Baxstrom136 decision, had been discharged from two maximum security mental hospitals, either to civil hospitals or to the community. They concluded that few patients in the Baxstrom cohort turned out to be dangerous and further asserted that their study demonstrated that psychiatrists were unable to predict dangerousness accurately. In his Barefoot dissent, Justice Blackmun cited four Steadman studies to support his argument that “psychiatric predictions of long-term future violence are wrong more often than they are right”137 and that psychiatrists have “no expertise in predicting long-term future dangerousness.”138

But Steadman and Cocozza have acknowledged three significant methodological limitations in their first studies. First, their examination of psychiatric predictions was in fact not based on explicit predictions of dangerousness by psychiatrists but was conducted with the assumption that such predictions had been made. No such predictions were ever found. How many transfers were made for reasons other than a finding of dangerousness—such as bureaucratic inertia and the like—we will never know. Second, the members of the Baxstrom cohort were, on average, forty-seven years old. Steadman and Cocozza acknowledged that the low level of subsequent dangerous behavior of the Baxstrom cohort might well have resulted from the advanced age of the cohort members. Had a dangerousness prediction been made at the time of confinement, it might have been relatively accurate at that time. It was not tested at the time, however. As Cocozza and Steadman pointed out, crime is a young man’s activity.139 Finally, the mean length of continuous institutionalization for members of the Baxstrom cohort was almost fifteen years,

138. Id. at 921-22.
139. See Cocozza & Steadman, supra note 135, at 1084.
another significant factor leading to reduced subsequent violent behavior. These limitations severely undercut the validity of the conclusions drawn.

The other major methodological flaws or deficiencies in a variety of empirical studies of dangerousness predictions further considered here are: (1) the exclusion of and failure to identify significant samples of persons who might be dangerous and whose omission from studies has led to ambiguous conclusions; (2) the use of inadequate outcome criteria, such as arrests or convictions, to determine the extent of subsequent dangerous behavior; (3) the problem of undetected and undetectable dangerous behavior of sex offenders; (4) the application of predictions of average or typical dangerousness to each cohort member regardless of significant individual characteristics of that offender that might yield different results; (5) the application of findings about one cohort of persons, such as schizophrenics, to members of other cohorts, such as psychopaths or paraphiliacs, who have substantially different characteristics and behaviors; and (6) variations in the definition of dangerousness.140 We shall examine each of these flaws in turn.

1. Excluding and Ignoring Significant Samples

A common method of evaluating the accuracy of predictions about dangerousness or nondangerousness is to study the subsequent behavior of a patient discharged by a judge following both a recommendation based on a prediction of nondangerousness or a recommendation based on a prediction of dangerousness. This standard approach has one major limitation, often not recognized. It overlooks what might have been the subsequent behavior of a person who is predicted to be dangerous but whom the judge does not discharge. The subsequent behavior of that person in the community cannot be studied.

One of the best known and most widely cited studies of mental health professionals’ predictions of future violence is that of Kozol, Boucher, and Garofalo, who reported in 1972 on a ten-year study of 592 male offenders, most of whom were vio-

140. A number of these methodological problems, though not all, are discussed in Monahan, supra note 133.
dent sex offenders. Each offender was examined by at least two psychiatrists, two psychologists, and a social worker, and a careful reconstruction of each offender's life history was provided.

The team of Kozol and associates recommended the release of 386 men as nondangerous. All 386 were released. The team opposed the release of 106 men. Of that cohort, the judges discharged 49 but retained 57. A total of 435 men were discharged by the judges. Of the 386 men recommended as nondangerous, only 8% later committed an act of violence within the study period. Apparently 92% did not. Thus, the predictions of nondangerousness were overwhelmingly accurate.

Of the 106 men predicted to be potentially violent, however, only 49 were discharged. Of the latter group of 49, 34.7% later committed an act of violence, a false positive rate of over 65%, which supported the one-in-three proposition. But what of the 57 men who were not discharged by the judge? We can only speculate as to how those men would have behaved if discharged. If a substantial proportion of those 57, about whom the professionals and judge agreed as to potential dangerousness, had been discharged and later committed violent acts, the proportion of false positives would surely have been much lower.

It seems reasonable to infer that the men judicially discharged despite a prediction of dangerousness were marginal cases about whom disagreement between the judge and the team as to dangerousness seemed reasonable. But the men in the nonmarginal and more obvious cases of dangerousness about whom the judge and team were in agreement as to dangerousness would almost surely have committed a much higher level of violent acts if released. If only 37 of the 57 more clearly dangerous men had been released and had committed a violent act, the proportion of accurate predictions would have been more like 50%. Of course, we will never know. But, under the circumstances, it does seem unrealistic to cite the Kozol study unqualifiedly for the proposition that psychiatrists are "wrong in two out of every three predictions of discovered

142. *Id.*
143. *Id.*
violence."\textsuperscript{144} To the extent that judges accepted the dangerousness predictions of the team, they actually prevented a more valid and realistic evaluation of predictive accuracy. What is perhaps of some concern is that the sample deficiency discussed here was not identified in evaluations of this study, leading to an erroneous perception of the validity of this important and frequently cited study.

2. Inadequate Outcome Criteria

Many prediction studies use subsequent arrests or convictions as outcome criteria for determining whether subsequent dangerous behavior has occurred. But it is obvious that much violent behavior, even when detected, is responded to in a variety of ways other than arrests. Typical responses are hospitalization, police adjustment, family adjustment, and the like. It has been reported, for example, that fifty percent of schizophrenic patients studied who committed acts of violence in the community were not arrested but sent to a hospital.\textsuperscript{145} Moreover, arrests in other states are seldom recorded. Studies that rely exclusively on in-state arrests and convictions tend to underestimate the extent of subsequent dangerous behavior and skew conclusions about false positives.

The same is true for studies that use violence in the hospital as an outcome measure. Many patients who are predicted to be dangerous and who are subsequently hospitalized for that reason are heavily medicated and closely supervised to curtail their violent behavior.\textsuperscript{146} The prediction that they are dangerous, which may be highly accurate, becomes the very mechanism for preventing that dangerousness and for appearing to contradict the validity of the prediction.\textsuperscript{147}

3. Undetected Behavior

An egregious weakness of much empirical research on the

\textsuperscript{144} MONAHAN, supra note 111, at 44.


\textsuperscript{147} It has been reported by McNiel and Binder that violent behavior by a newly admitted patient greatly diminishes within two days after admission into the hospital. Dale E. McNiel & Renée L. Binder, Predictive Validity of Judgments of Dangerousness in Emergency Civil Commitment, 144 AM. J. PSYCHIATRY 197 (1987).
Constitutionality of Committing prediction of dangerousness is what Professor John Monahan has referred to as "weak criterion variables." Dr. Monahan points out that an unknown but "perhaps large" extent of violent behavior goes undetected and unreported. Persons who have engaged in unreported acts of violence tend to be described as false positives when, in fact, they are true positives.

Self-reports are one way to correct for this problem but that approach is still in its infancy. Klassen and O'Connor have recently found that by using patient self-reports of violent behavior they have increased predictive accuracy by 27.8%.

The use of this weak criterion variable is a particularly severe problem in predicting the future long-term violence of sex offenders. Newly reported evidence indicates that sex offenders probably commit thousands of illegal sex acts that are neither detected or reported. In an important study, Dr. Gene Abel of Emory University Medical School and a colleague elicited hundreds of self-reports made by sex offenders in a noncriminal setting. They reported that 503 subjects acknowledged 62,131 "completed paraphilic acts" of pedophilia involving 28,298 male and female victims. Another 126 subjects reported 907 rapes involving 882 victims. An FBI study of serial rapists revealed that 41 of them were responsible for at least 837 rapes and 400 attempted rapes. An Oregon psychologist treating 8 sex offenders, who were charged with 16 offenses and convicted of only 12, learned that they had committed over 13,000 deviant acts, including molestation and rape. The United States Department of Justice documented that, in 1979, 48% of all rapes and attempted rapes were not reported.

An important recent study, the National Women's Study, has reported that the Department of Justice's National Crime Victimization Survey has for years significantly under-reported

149. Id.
150. Id. at 253 (citing Deidre Klassen & William A. O'Connor, Predicting Violence in Mental Patients: Cross-Validation of an Actuarial Scale (1987) (paper presented at the Annual Meeting of the American Public Health Association)).
153. Id. at 54-55.
the incidence of rape. The Justice Department, for example, estimated that in 1990 there were 130,260 rapes, a figure that rose to 207,610 in 1991. But the National Women's Study reported that in 1990 there were 683,000 rapes of adult women, a figure five times as high as the Justice Department's 1990 estimate. The National Women's Study did not include rapes of female children and adolescents, or rapes of boys or men. It has been suggested that this latter group might well amount to a similar figure. If so, the total amount of rapes would be 1,366,000.

The NWS study also reported that at least 12.1 million women reported being forcibly raped at least once in their lives, 61% of them as minors. The Director of the Department of Justice's Bureau of Statistics has suggested that their lower estimate reflected methodological differences, sample sizes, and estimating procedures.

Data like this indicate that a very large number of sex offenses go unreported. As a result, claims of false positives, as applied to sex offenders, may be highly exaggerated.

4. Confusing the Individual with the Average

Even critics who accept the questionable generalization that psychiatric predictions are highly inaccurate recognize that there are always exceptional cases where a prediction of long-term future violence can be made with great assurance. In any cohort of persons, there are likely to be those at one end of the spectrum whose dangerousness is marginal and those at the other end whose dangerousness is highly probable.

Professor Norval Morris, who has generally supported the one-in-three proposition, points out that there are "a few very rare individuals" who are obvious exceptions to the general rule. It is not clear what Professor Morris means by

156. Id.
157. Id.
158. "With our present knowledge, with the best possible long-term predictions of violent behavior, we can expect to make one true positive prediction of violence to the person for every two false positive predictions." Marc Miller & Norval Morris, Predictions of Dangerousness: Ethical Concerns and Proposed Limits, 2 J.L., ETHICS & PUB. POLICY 393, 406-07 (1986).
159. Id. at 408.
"very rare," but it is obvious that some offenders are so clearly
dangerous by reason of their repeated acts of violence, state-
ments about future violence, or fantasies of future violence
that ignoring their dangerousness and treating them like
"average" violent offenders would be absurd. Earl Shriner was
one such "very rare" violent offender, whose future violence
had been quite accurately predicted. The notorious Jeffrey L.
Dahmer acknowledged and was convicted of at least fifteen
killings and dismemberings of men and boys, acts which were
categorized by his defense lawyer as paraphilic acts of necro-
philia, a DSM-III-R disorder.\(^\text{160}\) Dahmer would also be one of
the exceptional cases where a prediction of future violent
behavior following several of his killings would be virtually
certain.

Whether such violent offenders are "rare," "very rare," or
simply uncommon, it is necessary to identify them. Presuma-
ibly this identification is what the Washington legislature
meant by a "small but extremely dangerous" group of sexually
violent predators. Generalities do not apply to such
individuals.

5. Applying Findings From One Cohort to a Different
Cohort

In numerous briefs and articles, the results of prediction
studies that have involved entirely different cohorts of men-
tally disordered persons are cited and applied to violent sex
offenders as though findings concerning the other cohorts are
equally applicable to any other mentally disordered group,
which are treated as though they were fungible.

But members of different groups of mentally disordered or
abnormal persons can have widely varying characteristics.
Persons with schizophrenia differ significantly from those with
personality disorder. Psychotic persons are not all alike.
Those with affective disorders differ from those with schizo-
phrenic disorders. Nor are all schizophrenic persons alike.
Those who experience command hallucinations are widely
regarded as particularly dangerous. Moreover, paranoid
schizophrenics tend to be more dangerous than catatonic types
and probably should not be included with other schizophrenic
persons for purposes of studying dangerousness. John

\(^{160}\) Larry King Live: Justice Done—The Jeffrey Dahmer Verdict, Transcript 498-
Monahan has called attention to the "woefully inadequate classifications of patients"\textsuperscript{161} in these studies, criticizing the manner in which various types of mentally disordered persons have been inappropriately lumped together, as though they had common qualities and for whom predictions of violence would be similar.

This issue should have surfaced in the \textit{Barefoot} case, but did not. Barefoot had at least two significant characteristics not common to most cohorts of mentally disordered persons who have been studied. First, he was diagnosed as having an antisocial personality disorder, a diagnosis that is primarily a history of behaviors and emotional qualities substantially dissimilar from those of psychotic persons. Second, he had committed a cold-blooded and irrational murder of a policeman whom he had never met, motivated only by his desire to kill a policeman for the pleasure of doing so. These two variables alone suggest that, at the very least, studies of predictions of the future behavior of psychopaths or of psychopathic murderers would be more applicable to Barefoot than studies of psychotic persons and that studies of psychotics might say very little about the accuracy of a prediction about a psychopath like Barefoot. Similarly, a study of predictions about schizophrenic persons with command hallucinations to kill might be more revealing than generalized studies of schizophrenic patients who do not have such hallucinations. Of course, it is not morally or legally feasible to make such a study by releasing those who have such hallucinations, making a prediction of dangerousness, then determining the extent of false positives!

Applying the results of inapplicable studies to predictions concerning violent sex offenders is highly questionable. Unlike many other mentally disordered persons, violent sex offenders are compulsive in their need to commit offenses that provide them with gratification. Many pedophiles, for example, are notoriously unable to change. Statistics indicate that they act out obsessively and often in situations in which they put themselves at great risk. Studies also show a high rate of recidivism among certain sex offenders. For example, a 1989 federal study has found that released rapists are 10.5 times more likely than nonrapists to be rearrested for rape.\textsuperscript{162}

\textsuperscript{161} Monahan, \textit{supra} note 133, at 252.

6. Variations in the Definition of Dangerousness

A final problem in gauging the validity of research is the extent to which definitions of dangerousness used by clinicians whose predictions are being studied are similar or dissimilar from the definition used by the researcher. The clinician may have had a broad definition that includes as dangerous such items as verbal behavior, actions against property, threats, and the like, leading to a larger number of predictions of dangerousness, whereas the researcher may have used a narrow definition of dangerousness, limited to subsequent physically violent behavior. If so, the proportion of false positives attributed to the clinician would increase, not because the clinician predicted wrongly, but because he predicted differently, using different criteria.

The clinician may also have believed that, in cases where the risk to others was great, a one-in-three or fifty-fifty likelihood justified a prediction of dangerousness, which would lead to confinement or retention, often on a short-term basis. The clinician need not have believed that the likelihood of violent behavior was one hundred percent. If so, the fact that two out of three or one out of two did not later engage in violent behavior does not indicate that the clinician was wrong. His approach to dangerousness may have incorporated a complex definition that anticipated and took account of potential error. 163

B. Actuarial Bases of Prediction

Although the terms of the SVP statute do not require that the SVP be a recidivistic sex offender, it is likely, because of the attorney general's guidelines, that most, if not all, offenders proposed for civil commitment will be offenders who have in fact engaged in repeated violent sexual offenses. Among the considerations recommended by the Washington Attorney General for filing against an offender is a "provable pattern of prior predatory acts." 164 Earl Shriner had committed numerous sex offenses over a long career. Young and Cunningham, the two petitioners in the case currently testing the constitutionality of the statute, are multiple rapists.


164. See Tweten, supra note 17.
It is a well accepted view that offenders who have committed a succession of violent acts are, with each act, increasingly likely to reoffend violently. Dr. Saleem Shah has reported the results of a District of Columbia study, stating that the likelihood of a new offense "approached certainty" after five or more arrests.165 Nigel Walker and colleagues studied a cohort of violent first offenders in Glasgow. By the time these offenders reached their third and subsequent conviction, the likelihood that they would commit another one had gone up to approximately sixty percent.166 G.C.N. Hall, in a 1988 study of convicted sex offenders, found that a past history of sexual offending against adults was the best actuarial predictor of future sexual crimes.167 Emory Hodges has reported that, in the case of convicted sex offenders released from treatment programs against staff advice, eighty-one percent committed new offenses within three years.168

Such actuarial data seems to be reasonably accurate in identifying persons who will engage in future violent acts. But there is a general reluctance to rely exclusively on actuarial data. Some commentators have argued that a combination of clinical and actuarial data appears to be the best approach to predict future sexual violence.169

C. The Recent Overt Act Requirement

Finally, we can deal summarily with the argument that the statute is flawed because it fails to require evidence of a "recent overt act" of violence in order to make a finding that an individual is a sexually violent predator. The recent overt act formula originated as an evidentiary requirement in civil commitment cases that was expected to lend accuracy to a clinically based prediction of future dangerousness. In theory, this

165. The PROMIS research project in the District of Columbia found that "if a defendant had five or more arrests prior to the current arrest, the probability of a subsequent arrest began to approach certainty." Saleem A. Shah, Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 153, 186 n.3 (Calvin J. Frederick ed., 1978).
169. See Litwack et al., supra note 133.
requirement would add an objective factual basis to what was perceived at the time as an otherwise dubious subjective prediction.

However, such a statutory requirement would be inappropriate in the SVP statute for at least two reasons. First, in most cases under the statute, the sex offender presented for commitment would have been in prison with little or no opportunity to commit an overt sexually violent act, especially one involving a child. If there were such a requirement, most sex offenders would not meet it and therefore could not be committed. The requirement would thus defeat the very purpose of the act.

Second, the requirement in fact has little value in further validating clinical predictions. In *Mathew v. Nelson*, a three-judge federal court was confronted with the question whether the Illinois civil commitment statute should be interpreted as requiring a recent overt act. The court held an evidentiary hearing at which the parties presented four experts on dangerousness to help the court decide the question. All four experts, two for the petitioner-patient and two for the State, agreed that evidence of one recent overt act adds little or nothing to the accuracy of a dangerousness prediction. This would be particularly the case for long-term predictions.

Thus, the requirement would do little to protect the sex offender but would tend to ham-string the legislation.

**VII. CONCLUSION**

Of all of the many criticisms that have been made of the SVP statute, the two most formidable ones are, first, that sex offenders are being held in a "treatment" program that is spurious and, second, that many "innocent" offenders who have "paid their debt" to society will be confined needlessly.

The program is criticized as spurious because no known treatment for violent sex offenders appears to be efficacious. Yet it should be clear from the findings of the legislature that incapacitation is the principal function of the program, not treatment. Treatment is offered because of a recognition that to provide treatment in good faith, whether effective or not, may be constitutionally required and is morally necessary.

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171. Id. at 708.
172. Id. at 710.
Supporters of the statute regard confinement with treatment in the civil commitment process, however questionable as to results, as better than confinement without treatment in prison through the criminal process. But the bottom line is that, whether treatment works or not, the U.S. Supreme Court has constitutionally validated confinement that is designed to protect society against mentally abnormal dangerous persons.

The second major criticism is that, inasmuch as predicting dangerousness is "impossible," a significant number of "false positives" or "innocent" persons will be confined on the basis of inaccurate predictions of future violent behavior. But inasmuch as longer prison sentences and habitual offender statutes also rest on predictions of dangerousness, the same constitutional and moral argument could be made against such sentencing approaches, which seem to be approved by critics of the SVP statute as alternatives to it.

As I have indicated, the charge of inaccuracy of prediction in the context of sex offenses is almost surely overdrawn. Empirical studies relied on by critics of the SVP statute are now recognized as seriously flawed and their conclusions highly questionable. The least we can say about these researches is that their major conclusion that psychiatrists make two inaccurate predictions of future dangerousness for every correct one has not been adequately demonstrated. The most we can say is that, in respect of predictions of sexual violence, a great deal of newly published data tends to support the proposition that accurate predictions of future violent sexual crimes can probably be made in at least fifty percent of many cases, with a higher percentage of accuracy in others. This proposition is especially likely where there is a record of repeated violent sexual offenses, which is probably the case with most offenders committed under the SVP statute because of the attorney general's guidelines.

But it is myopic to focus too intensely on quantitative data. The issue is one of balancing values. An argument that emphasizes false positives to the exclusion of concern about the grave harms caused to potential victims by violent sexual offenders obscures the fact that, in deciding whether to accept predictions of future sexual violence, it is necessary to strike a balance between the risk to the offender of a mistake made when we confine him if he is nondangerous and the risk that, if we release him, he will later engage in violent sexual crimes.
A question not typically asked is whether we are imposing a potential great risk of harm to innocent women and children who are the typical victims of these offenders when we try to avoid false positives.

Let us make the reasonable assumption that the risk of a false positive in predicting future sexual violence is approximately 50%. Let us further suppose that we are deciding the disposition of two already convicted sex offenders, now about to be released from prison, one of whom will and one of whom will not commit a violent sexual crime in the future. These two offenders have similar records and psychological profiles. We do not know which of the two will offend if both are not confined.

We have only two options: to release both or confine both.

If we focus predominantly on false positives we will release both men because we regard it as unjust to confine the one potentially nondangerous offender. But we can be confident that the other man will sexually victimize non-blameworthy persons in a violent way. We will have imposed the risk of violence on innocent persons.

On the other hand, if we confine both offenders, we mistakenly detain one, but that person is already an offender who has been convicted of at least one pathological, violent sex offense and usually more. That offender is far from “innocent,” and he will receive treatment.

In an ideal world neither choice is desirable. We would prefer not to make any mistakes at all. But given real-world imperfections of knowledge, mistakes are inevitable. These mistakes are regrettable, but it certainly is not constitutionally wrong to mistakenly confine some presumably nondangerous offenders on the basis of an imperfect prediction. We do it all the time. Is it morally wrong to make such a mistake? Which mistake is more harmful in its consequence to societal values?

A mistaken decision to confine, however painful to the offender involved, is, in my view, simply not morally equivalent to a mistaken decision to release. There is a significant difference between the two. One is much less harmful than the other.

Libertarians who focus exclusively, or heavily, on the injustice being done to a mistakenly confined offender tend to place less significance on the harms caused by the alternative decision, to the extent that they consider them at all. We have
been socialized to emphasize injustices to offenders. We have not been sufficiently sensitive to the harm inflicted by sex offenders, especially violent rapists and violent child abusers. But this emphasis is changing. Today, in part because of the activities of feminist and victims' movements, greater attention is being paid to the harm done to female and child victims of sexual crimes. Moreover, additional information is being revealed today about the nature and extent of serious sexual crimes than has been disclosed in the past. These considerations should be reflected in weighing the rights of victims of sex crimes in the balance as against offenders' rights.

Washington's SVP statute is a modest attempt to use the civil commitment model to correct for gaps and errors that may have occurred in the criminal process. It results in the confinement of a very small cohort of offenders. If properly administered, it should be found not only constitutionally valid but also morally acceptable.