COMMENTS

Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders

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I. INTRODUCTION

In 1981, the Washington State Legislature passed the Sentencing Reform Act. The Act replaced an indeterminate sentencing structure with a determinate sentencing structure. The prior indeterminate sentencing scheme emphasized rehabilitation of the offender. In contrast, the determinate Sentencing Reform Act emphasizes punishment proportional to the severity of the crime committed. In addition, the Act prospectively repealed the prior sexual psychopathy commitment law. By repealing the sexual psychopathy statute, the Wash-

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2. See DAVID BOERNER, SENTENCING IN WASHINGTON 2 (1985). Under the reformed 1984 sentencing system, courts use a statewide sentencing grid that considers the crime(s) or conviction and the offender's criminal history to establish a standard range of sentences for every crime, including a minimum and maximum sentence. See WASH. REV. CODE § 9.94A.310 (Supp. 1990-91). If the court finds that the crime was not typical and involved aggravating or mitigating factors, a departure from the standard range is possible, not to exceed the longest possible term. See id. § 9.94A.390. Any sentence imposed that goes beyond the standard range is an exceptional sentence. Id.


5. WASH. REV. CODE ch. 71.06 (1989), repealed prospectively by 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)). Under Washington's repealed sexual psychopathy statute, a person charged with a sex offense could be committed indefinitely for treatment of the underlying mental condition predisposing the person to commit sexual offenses. See id. § 71.06.091. Only "sexual psychopaths" were subject
ingston legislature followed a pronounced nationwide trend away from sexual psychopathy statutes.\(^6\)

In the past, states emphasized the treatment of sex offenders through involuntary civil commitment procedures, rather than punishment after conviction. During the late 1960’s, well over one-half of the states had enacted some form of rehabilitative sex offender civil commitment law.\(^7\) By 1990, however, most states, including Washington,\(^8\) had repealed these statutes.\(^9\) This trend away from using civil commitment to treat sexual offenders was influenced in part by a growing awareness that sex offenders were not mentally ill\(^10\) and that invol-

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to commitment proceedings. See id. § 71.06.020. For comparisons of the current sex offender involuntary commitment system and the prior Washington sexual psychopathy commitment system, see Bodine, supra note 3, at 110-13.


8. See supra note 5 and accompanying text.


10. For example, when the California Legislature repealed its Mentally


12. See APA Brief, supra note 11. In its amicus brief supporting the Allen petitioner, the APA noted that unlike many mentally ill people, for whom significant treatment potential exists, sex offenders have proved to be a highly treatment-resistant group. Id. at 10.

13. 1990 Wash. Laws ch. 3 (codified at WASH. REV. CODE ch. 71.09 (Supp. 1990-91)).
lent predators"—only six years after the State prospectively repealed its prior sexual psychopathy statute? The legislature's focus on so-called "sexually violent predators" rode the tide of publicity generated by a trilogy of notorious sexual crimes that were unprecedented in cruelty and unmatched in subsequent public outrage.

Of this trilogy, the egregious circumstances of the Earl Shriner case especially seemed to compel legislative action. In 1987, Shriner was released from prison after serving a full ten-year sentence for kidnapping and assaulting two teenage girls. Near the end of that prison term, Shriner wrote letters and made drawings of an elaborate, mobile torture chamber for molesting and killing children.

State corrections officials attempted to commit Shriner for treatment under the Washington Involuntary Treatment Act

14. A sexually violent predator is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." WASH. REV. CODE § 71.09.020(1) (Supp. 1990-91). Further, "[p]redatory" acts are those "directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." Id. § 71.09.020(3). Thus, under the Act, family members who abuse individuals within the same family or a person who has an otherwise preexisting relationship with the victim would not be considered a sexually violent predator.

15. Gene Raymond Kane killed Diane Ballasiotes while on leave through a state prison work release program in September 1988. Barry Siegel, Locking Up "Sexual Predators"; A Public Outcry in Washington State Targeted Repeat Violent Sex Criminals. A New Preventive Law Would Keep Them in Jail Indefinitely, L.A. TIMES, May 10, 1990, at A1. At the time of his release, Kane had served a full sentence for attacking two women in 1975. Id. Next, in December 1988, Gary Minnix broke into a woman's apartment, raped her, and attacked her with a knife. Id. at A31. Minnix had previously been found incompetent to stand trial for similar offenses. Id. Finally, recently paroled, Earl Shriner kidnapped, sodomized, and sexually mutilated a seven-year old boy and choked the child nearly to death. Id. at A30.

16. Ironically, public attention given to sex offenses committed by "sexually violent predators" appears to be disproportionate to the incidence of sex abuse caused by other types of offenders. Nationally, it appears that sex offenses are more likely to be caused by persons having a pre-existing relationship with the victim: “Building on figures from studies conducted by Dr. Mary Koss, a professor of psychiatry at the University of Arizona . . . [one expert] estimates that women ‘are actually four times more likely to be raped by a man they know than by a stranger.’” Helaine Olen & Ronald J. Ostrow, Date-Rape Gains Attention After Years as Taboo Topic; Crime: Authorities Aren't Sure Whether the Problem is Increasing or Victims are Just More Willing to Speak Up, L.A. TIMES, Apr. 23, 1991, at A1.


(ITA)\textsuperscript{19} because they believed he posed a danger to the community.\textsuperscript{20} Shriner, however, could not be committed under the ITA because he failed to meet two criteria for involuntary commitment: he was not mentally ill\textsuperscript{21} and he had not performed any overt act during confinement that demonstrated his dangerousness to himself or others.\textsuperscript{22} Consequently, Shriner was paroled, and approximately two years later, he assaulted a Tacoma boy.\textsuperscript{23} Largely in response to the Shriner case, the Washington Legislature enacted the new involuntary commitment system for “sexually violent predators.”\textsuperscript{24}

\begin{footnotesize}
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  \item WASH. REV. CODE ch. 71.05 (1989).
  \item See Siegel, supra note 15, at A30.
  \item See WASH. REV. CODE § 71.05.150 (1989). The ITA requires, in pertinent part, “[w]hen a mental health professional . . . receives information alleging that a person, as a result of a mental disorder, presents a likelihood of serious harm to others . . . such mental health professional . . . may . . . file a petition for initial detention.” Id. § 71.05.150(1)(a) (emphasis added). Subsequent involuntary commitment proceedings also require that a mental disorder is the cause of the person’s dangerousness to others. See id. § 71.05.150(1)(b) (court may order the mentally ill person to appear for a 72-hour evaluation and treatment); § 71.05.240 (probable cause hearing is required to determine the existence of a mental disorder and dangerousness before fourteen-day involuntary treatment period is imposed); § 71.05.280 (judicial hearing requires finding of a mental disorder before involuntarily committing person for maximum 180-day treatment).
  \item The Washington Supreme Court construed the ITA to require a recent overt act demonstrating the person’s imminent dangerousness. In re Harris, 98 Wash. 2d 276, 284, 654 P.2d 109, 113 (1982) (“We thus interpret RCW ch. 71.05.020 as requiring a showing of a substantial risk of physical harm as evidenced by a recent overt act.”)
  \item See Siegel, supra note 15, at A30. In March 1990, having been convicted of attempted murder, first-degree assault, and two counts of first-degree rape for the assault on the Tacoma boy, Shriner was sentenced to 131 1/2 years. See Shatzkin, supra note 18 at C1. The prosecution had recommended a 600-year term. Id. Shriner’s exceptionally long sentence seems to represent a trend toward increasingly long prison terms, terms that are well beyond the guidelines established by the determinate 1984 Sentencing Reform Act. See Herb Robinson, Nearly All Criminals Serve Short Terms, THE SEATTLE TIMES, May 18, 1990, at A8. Sentencing judges apparently have been responding to public outrage urged on by prosecutors and advocates for crime victims’ families. Id.
  \item WASH. REV. CODE ch. 71.09 (Supp. 1990-91). While the names Earl Shriner and Gene Kane were still nightmares haunting the collective mind of the public, the governor appointed 24 members to a Governor’s Task Force on Community Protection. See GOVERNOR’S TASK FORCE ON COMMUNITY PROTECTION, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, FINAL REPORT I-1 to I-7 (1989) [hereinafter TASK FORCE REPORT]. After holding hearings throughout the state, the Task Force recommended a comprehensive strategy for dealing with sex offenders falling into three broad categories: offender control and treatment, victim services, and community protection. Id. at I-1. The Sexually Violent Predators Act was only one component of the 1990 Community Protection Act and was largely based on the Task Force’s recommendations. The Community Protection Act also (1) increased jail terms for all sexual offenders; (2) increased prison terms for repeat offenders; (3) extended post prison supervision of convicted sex offenders; (4) imposed stricter control over
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The Washington Sexually Violent Predators Act involuntary commitment system is unique in at least two respects. First, commitment proceedings may be initiated only against persons currently confined for certain "sexually violent offenses" who are about to be released. Additionally, the prosecutor may seek the commitment of a convicted sex offender previously confined, but returned to the community, if the prosecutor decides that the person appears to be a sexually violent predator. Second, the Act does not require that a new criminal charge be brought to initiate commitment proceedings.

Does the Sexually Violent Predators Act's involuntary civil commitment system withstand constitutional scrutiny? Civil libertarians say no. The State maintains that it does. A recent United State Supreme Court decision provides a frame-
work for analyzing the constitutionality of the Washington sex offender involuntary commitment provisions.\textsuperscript{32}

In 1986, the United States Supreme Court considered whether the Fifth Amendment privilege against self-incrimination applied to involuntary commitments under the Illinois Sexually Dangerous Persons Act\textsuperscript{33} in \textit{Allen v. Illinois}.

The constitutionality of the Illinois sex offender commitment scheme was not the precise issue before the Court. It appears, however, that \textit{Allen} implicitly establishes that a sex offender involuntary commitment law, which is substantially similar to the Illinois statute and in accord with the Supreme Court’s analysis in \textit{Allen}, will be upheld as constitutional. It also appears that a statute meeting these standards will not amount to unconstitutional lifetime preventive detention.\textsuperscript{35}

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\item protection requirements although he concedes that sexual predators are more easily committed than other civil confinees. \textit{Id.} at 229-33.
\item To date, four sex offenders have been involuntarily committed under the Act. Appeals testing the constitutionality of these commitments have been working their way through Washington courts. On December 5, 1991, the Washington Supreme Court heard oral arguments on consolidated appeals by two persons adjudged to be “sexually violent predators” under the Act and subsequently committed. \textit{In re Young}, No. 57837-1 (Wash. filed Feb. 4, 1991). A case testing the Sexually Violent Predators Act’s civil commitment provisions seems certain to come before the United States Supreme Court.
\item 32. The Court’s disposition of Foucha v. Louisiana, 112 S. Ct. 1780 (1992) is also likely to influence the disposition of a federal constitutional challenge to the statute. A Louisiana statute allows the state to confine an insanity acquittee who is no longer mentally ill for an indefinite period, solely on the ground that the person may be a danger to himself or others. \textit{See} LA. CODE CRIM. PROC. ANN. art. 655 (West 1981 & Supp. 1991). The Court, in an opinion delivered by Justice White, held that the Louisiana statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the law allowed insanity acquitees to be indefinitely committed solely upon a finding of dangerousness. \textit{Foucha}, 112 S. Ct. at 1787-88. The Louisiana statute is similar to the Washington Sexually Violent Predators statute; as a result, the Court’s decision in \textit{Foucha} will be influential if the Court considers the constitutionality of the Washington statute in the future. For a further discussion of \textit{Foucha}, see James W. Ellis, \textit{Limits on the State’s Power to Confine “Dangerous” Persons: Constitutional Implications of Foucha v. Louisiana}, 15 U. PUGET SOUND L. REV. 635 (1992); John Q. La Fond, \textit{Washington’s Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control}, 15 U. PUGET SOUND L. REV. 655 (1992).
\item 33. ILL. ANN. STAT. ch 38, ¶¶ 105-1.01 to 12 (Smith-Hurd 1980 and Supp. 1991). For a discussion of the provisions of the Illinois Act, see infra Part III A.
\item 34. 478 U.S. 364 (1986).
\item 35. \textit{See infra} notes 79-85 and accompanying text discussing \textit{Allen}. When the Washington Supreme Court heard oral arguments on \textit{In re Young}, many questions from the bench were devoted to the Washington scheme’s constitutionality under \textit{Allen}. At the time of this publication, the court had not yet issued an opinion on \textit{Young}; however, it appears to be likely that the \textit{Young} opinion will utilize an \textit{Allen} analysis.
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Accordingly, this Comment will address two questions: (1) whether the Washington law is substantially similar to or fundamentally different from the Illinois statute; and (2) whether the Washington statute should be upheld as a constitutional exercise of the state's civil commitment authority under *Allen v. Illinois*. This Comment argues that the Washington scheme is fundamentally different from the Illinois statute under *Allen* because it is essentially a lifetime preventive detention scheme and therefore fails to meet the constitutional requirements set forth in *Allen*.

To that end, Part II of this Comment generally explores the involuntary commitment of sex offenders, the constitutional standards for police power commitments, and the issue of preventive detention. Part III discusses provisions of the Illinois Sexually Dangerous Persons Act as well as *Allen v. Illinois*, concluding that *Allen* implicitly established a four-part test to judge the constitutionality of sex offender involuntary commitment statutes. Part IV discusses the relevant provisions of the Washington Sexually Violent Predators Act and compares the Washington statute with the Illinois Act. Finally, Part V concludes that the Washington statute fails under the analysis of *Allen* and is therefore unconstitutional.

II. POLICE POWER INVOLUNTARY COMMITMENT OF SEXUAL OFFENDERS: THE PREVENTIVE DETENTION QUESTION

Under either its *parens patriae* authority or police power, the state may civilly commit individuals who are mentally disordered for control and treatment. The state's *parens patriae* authority allows the state to act on behalf of mentally ill persons who are incapable of protecting their own welfare. Most state *parens patriae* commitment statutes authorize the involuntary commitment of individuals who are mentally ill and, as a consequence, are unable to make responsible treatment decisions, are gravely disabled, or are unable to care for their personal safety.

36. Literally, "*parens patriae*" means "parent of the country" and refers to the role of the state as sovereign and guardian of persons under legal disability. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).


38. *Id.* at 504.

39. *Id.* (citations omitted); see *e.g.* Washington's Involuntary Treatment Act, WASH. REV. CODE ch. 71.05 (1989).
The Washington law is not an exercise of the state's *parens patriae* authority. It does not purport to protect the interest of persons who are functionally incapacitated and who are consequently unable to protect their own welfare. On the contrary, the explicit purpose of the Sexually Violent Predators Act is to protect the community.40

Under its police power, the state has authority to prevent harm to the community.41 Courts have traditionally given great deference to legislative enactments concerning the appropriate exercise of this power.42 Most states authorize temporary, emergency commitment of persons deemed to be mentally ill and dangerous to self or others.43 The duration of confinement is permissibly indeterminate44 because a mentally

40. See WASH. REV. CODE § 71.09.010 (Supp. 1990-91). The stated purpose of the statute is to prevent the committed person from harming members of the community:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist [who may not be committed under the Involuntary Treatment Act, WASH. REV. CODE ch. 71.05] . . . which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast . . . predatory sexually violent predators generally have antisocial personality features . . . [rendering] them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act . . . is inadequate to address the risk to reoffend . . . .

*Id.* Because this Comment argues that the Washington sex offender involuntary commitment statute is not an exercise of the State's *parens patriae* authority, *parens patriae* commitment standards are not discussed. Note, however, that other commentators view the Washington scheme as a combined exercise of the state's *parens patriae* and police power commitment authority. See Bodine, *supra* note 3, at 108-09; cf. Gleb, *supra* note 6, at 229, 249 (incapacitation and *parens patriae* authority). For a discussion of *parens patriae* commitment standards, see La Fond, *supra* note 37, at 516-25.

41. La Fond, *supra* note 37, at 501.

42. *Id.*

43. *Id.* For example, the Washington ITA authorizes the emergency detention of persons who, as a result of mental illness, present an "imminent likelihood of serious harm to himself or others," as evidenced by the following behaviors: (a) having threatened or attempted self-inflicted physical harm or suicide; (b) having harmed or caused a substantial risk of harm to others in the past, or having placed others in reasonable fear of sustaining harm; or (c) having caused substantial loss or damage to the property of others. WASH. REV. CODE § 71.05.050, .020(3) (1989).

44. [T]he right to restrain an insane person of his liberty is found in that great law of humanity which makes it necessary to confine those whose going at large would be dangerous to themselves or others . . . . And the necessity which creates the law creates the limitation of the law. The question must then arise in each particular case whether a patient's own safety, or that of others, require that he should be restrained for a certain time, and whether restraint is necessary for his restoration or will be conducive thereto. The
ill person committed pursuant to the state's police power may be confined against his will only until he or she is no longer dangerous. The Washington statute is an exercise of the state's police power; under the statute, the state may isolate a sexual offender in a state facility in order to protect society from harm.

As the United States Supreme Court has stated, the permissible purpose of police power involuntary civil commitment is to treat the individual's mental illness and to protect the person and society from the person's potential dangerousness. Absent a recognized mental disease or defect and an authentic therapeutic purpose, however, confinement to prevent possible recidivism is, in effect, simply preventive detention to prevent future harm.

Therefore, the state's police power is limited in purpose and in scope by these constitutional requirements. Both the federal and Washington state constitutions stringently restrict the government's ability to incarcerate a citizen against his or her will solely on the belief that incarceration may prevent future harm to the community. The state may utilize preventive detention only by demonstrating a compelling state interest, achieved with means not excessive in relation to the ends sought. Additionally, persons subject to preventive detention must be provided with constitutionally effective procedural protections.

The United States Supreme Court has upheld preventive detention schemes only in extraordinary and rare circumstances. Indeed, the earliest approved uses of preventive restraint can continue as long as the necessity continues. This is the limitation and the proper limitation.

La Fond, supra note 37, at 503 n.17 (quoting In re Oakes, 8 LAW REP. 122 (Mass. 1845)).
45. La Fond, supra note 37, at 501.
46. See supra note 40, discussing the purpose of the statute.
48. Every citizen is guaranteed the right to liberty. U.S. CONST. amends. V, XIV; WASH. CONST., art. I, § 3. The state may deprive a person of the right to liberty only after providing due process of law. U.S. CONST. amends. V, XIV; WASH. CONST., art. I, § 3.
49. Because preventive detention impinges on a person's liberty interest under the Fourteenth Amendment, preventive detention schemes are subject to strict scrutiny under the Due Process Clause. In other words, the state interest must be compelling and the means used must be narrowly tailored to achieve the objective. See Developments in the Law—Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190, 1223-24 (1974).
detention arose out of war and insurrection. More recently, the Supreme Court has permitted the government to detain dangerous individuals pending other judicial proceedings. Even then, however, the government's authority is severely circumscribed. The government may preventively detain citizens to prevent harm only in cases where significant harm clearly appears to be imminent, and then only for a very brief period. The Supreme Court has never authorized lifetime or even long-term commitment of individuals solely because they were considered likely to commit a crime at some undetermined time in the future.

Thus, if a sex offender involuntary commitment system does not require a mental disorder and effect treatment, or if it subjects the person to unnecessarily long confinement, the system is not a proper exercise of the state's civil commitment police power. Instead, the commitment merely accomplishes unconstitutional preventive detention.

III. THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT AND ALLEN V. ILLINOIS

Illinois is among a handful of states that retains a sexual psychopathy statute. In some respects, the provisions of the Illinois statute are similar to Washington's Sexually Violent Predators Act. As illustrated below, however, Illinois's statute

51. For example, in Ludecke v. Watkins, 335 U.S. 160, reh'g denied, 335 U.S. 837 (1948), the Court approved the exercise of unreviewable executive power to detain enemy aliens in time of war. Earlier, in Moyer v. Peabody, 212 U.S. 78 (1909), the Court rejected the due process claim of an individual who had been jailed without probable cause by a governor in a time of insurrection.

52. For example, the Court has validated the warrantless arrest and detention of a person suspected of a crime for 48 hours prior to a magistrate's determining if probable cause existed. County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991); see also Gerstein v. Pugh, 420 U.S. 103 (1975). The Court has also upheld the detention of potentially dangerous resident aliens pending deportation proceedings. Carlson v. Lander, 342 U.S. 524, 537-42, reh'g denied, 343 U.S. 988 (1975); see also Wong Wing v. United States, 163 U.S. 228 (1896).

53. The Supreme Court has upheld the short-term confinement of dangerous criminal suspects prior to trial if compelling reasons exist. For example, the Court validated the incarceration of a person arrested until trial if he presented a risk of flight. Bell v. Wolfish, 441 U.S. 520, 534 (1979). Similarly, the Court has upheld the 17-day pretrial detention of juveniles considered to be at "serious risk" of committing a crime. See Schall v. Martin, 467 U.S. 253 (1984). Finally, the Court has validated a provision of the federal Bail Reform Act which allows the pretrial detention of an arrestee if no release conditions "will reasonably assure . . . the safety of any other person and the community." United States v. Salerno, 481 U.S. 739, 741 (1987) (quoting the Bail Reform Act, 18 U.S.C. § 3142(e) (Supp. III 1983)).

54. See supra note 9.
is fundamentally different from the Washington scheme in several crucial respects.\textsuperscript{55}

In 1986, the United States Supreme Court decided \textit{Allen v. Illinois},\textsuperscript{56} a case involving procedures and rights under the Illinois Sexually Dangerous Persons Act. The narrow issue before the Court did not address the statute's constitutionality.\textsuperscript{57} However, the Court's decision in \textit{Allen}, given the provisions of the Illinois statute, implicitly established a four-part test for determining the constitutionality of sex offender involuntary commitment statutes.

Therefore, if the Washington statute is substantially similar to the Illinois statute, and meets the \textit{Allen} criteria, the statute should be upheld as a valid involuntary commitment scheme. If, however, the Washington Sexually Violent Predators Act is fundamentally different from the Illinois statute or fails to meet any of the \textit{Allen} criteria, the Washington statute will be unconstitutional.

Accordingly, this Part first discusses the provisions of the Illinois Sexually Dangerous Persons Act. Second, it discusses the constitutional criteria for sex offender involuntary commitment schemes suggested by \textit{Allen v. Illinois}.

\textbf{A. The Illinois Sexually Dangerous Persons Act}\textsuperscript{58}

Illinois' sex offender civil commitment legislation was initially enacted in 1938 and then reformulated in 1955.\textsuperscript{59} In 1963, the legislation was incorporated into the Illinois Code of Criminal Procedure.

In its original form, the legislation was considered an expansion of the concepts of fitness and sanity; it was designed to prevent persons with sexually-related mental disorders from being tried.\textsuperscript{60} When the legislation changed from the initial Criminal Psychopathic Persons Act to the present Sexually Dangerous Persons Act, the legislation's purpose shifted to

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\item See infra Part IV (comparing the Illinois Sexually Dangerous Persons Act and the Washington Sexually Violent Predators statute).
\item 478 U.S. 364 (1986).
\item See infra notes 82-83 and accompanying text.
\item See ILL. ANN. STAT. ch. 38, ¶¶ 820.01 to 825e (Supp. 1960).
\item People v. Redlich, 83 N.E.2d 736, 739-40 (Ill. 1949).
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providing treatment for the class of sex offenders falling within its provisions. In addition, the Act seeks to protect the public from the accused until the person's treatment has been effected. The Act explicitly states that it is civil in nature.

1. Mental Disorder Required

To be a "sexually dangerous person" under the Illinois Act, the person must have a "mental disorder" continuously for at least one year immediately before the petition's filing. The Illinois statute does not define "mental disorder."

2. Convict and Punish or Commit and Treat

The Attorney General or Prosecutor may initiate dangerousness commitment proceedings under the Illinois Act only when a person is charged with a criminal offense indicating sexual dangerousness. Significantly, the initial criminal charge and dangerousness proceeding under the Act are interdependent: if the underlying criminal charge fails, the com-

62. Id.
63. ILL. ANN. STAT. ch. 38, ¶ 105-3.01 (Smith-Hurd 1980 & Supp. 1991). Although the statute makes proceedings under the Act explicitly civil, the statute also provides for certain procedural protections normally found in criminal trials. For example, to commit a defendant to confinement under the Act, the State must meet the burden of proof required in criminal proceedings: beyond a reasonable doubt. Id. This required higher standard of proof is in accordance with the United States Supreme Court's decision in Addington v. Texas, 441 U.S. 418 (1979). In Addington, the Court held that the Fourteenth Amendment requires at least a "clear and convincing" standard of proof in involuntary state civil commitment proceedings. Id. at 433.

In addition to the criminal law standard of proof, the Illinois law also provides for other criminal procedural protections. The Act confers on the defendant the right to demand a jury trial and to be represented by counsel. ILL. ANN. STAT. ch. 38, ¶ 105-5 (Smith-Hurd 1980). The Washington statute also entitles the person to similar criminal procedural protections. See WASH. REV. CODE §§ 71.09.050, 71.09.060 (Supp. 1990-91).
64. ILL. ANN. STAT. ch. 38, ¶ 105-1.01 (Smith-Hurd 1980). "[S]exually dangerous persons" are

[all persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children.]

Id.
65. This Comment uses the terms "mental disorder" and "mental illness" interchangeably. See infra notes 110, 116-18 and accompanying text discussing "mental disorder."
66. ILL. ANN. STAT. ch. 38, ¶ 105-3 (Smith-Hurd 1980).
mitment proceeding cannot continue.\textsuperscript{67}

Under the Act, the State must make an election at the time the defendant is charged: \emph{either} to punish or to treat, but not both. The prosecution must either prosecute the accused for the criminal offense or seek his commitment as a sexually dangerous person.\textsuperscript{68} Because the prosecution may not seek \emph{both} to punish and to treat, the state cannot first obtain a conviction for the criminal offense and then proceed to commit him as sexually dangerous based on the same incident.\textsuperscript{69} \textit{A fortiori}, the State cannot require a convicted sex offender to serve his full prison term and then commit him indefinitely for treatment. Thus, the Illinois Act provides for psychiatric care \textit{in lieu} of criminal prosecution, not \textit{in addition} to it.\textsuperscript{70}

3. Procedures For Release; Conditional Release Authorized

If the defendant is adjudged to be sexually dangerous, he is committed to the custody of the Illinois Department of Corrections.\textsuperscript{71} The Department has two responsibilities: (1) to "keep safely the person so committed" until he has recovered; and (2) to provide the committed person with care and treatment designed to effect recovery.\textsuperscript{72}

The period of the sexually dangerous person's commitment is therefore indefinite in duration. However, at any time following commitment, the person may file an application showing that he has recovered and petition for release.\textsuperscript{73} Moreover, under Illinois Department of Corrections regulations, a staff psychiatrist is required to review the progress of persons confined at least every six months.\textsuperscript{74}

The committing court \textit{must} hear all applications for release.\textsuperscript{75} If the person is found to be no longer dangerous, the court orders the person discharged; every outstanding information and indictment underlying the present criminal charge is quashed. On the other hand, if the court finds that the person

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  \item \textsuperscript{67} People v. Nastasio, 168 N.E.2d 728, 732 (Ill. 1960).
  \item \textsuperscript{68} People v. Patch, 293 N.E.2d 661, 665 (Ill. 1973).
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} See People v. Allen, 481 N.E.2d 690, 695 (Ill. 1985), aff'd 478 U.S. 364 (1986).
  \item \textsuperscript{72} Ill. Ann. Stat. ch. 38, ¶ 105-8 (Smith-Hurd 1980).
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id. at ¶ 105-9. The Department of Corrections is required to submit a socio-psychiatric report in response. Id. The application is heard by the court which originally committed the person.
  \item \textsuperscript{75} See Ill. Ann. Stat. ch. 38, ¶ 105-09 (Smith-Hurd 1980).
\end{itemize}
has not recovered and continues to be dangerous, the person remains in the custody of the Department of Corrections.\textsuperscript{76}

Finally, if the court cannot determine with certainty that the person is no longer dangerous, a conditional discharge is available subject to terms and conditions that will adequately protect the public.\textsuperscript{77}

\textbf{B. Allen v. Illinois\textsuperscript{78}}

In Allen, the Supreme Court implicitly upheld the constitutionality of the Illinois Sexually Dangerous Persons Act, which permits the indeterminate commitment of persons in lieu of conviction and punishment.\textsuperscript{79} Recall that under the Illinois statute, the state must either convict and punish the accused or commit and treat him; the state cannot do both.\textsuperscript{80} As we shall see later, this mandatory election was crucial to the Court's holding.\textsuperscript{81}

The Allen Court held that proceedings under the Illinois statute were civil rather than criminal.\textsuperscript{82} Therefore, the Fifth

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\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. This conditional release may be revoked if the person violates any terms of the release order. \textit{Id.}; see e.g. People v. Davis, 468 N.E.2d 172 (Ill. 1984).
\item \textsuperscript{78} 478 U.S. 364 (1986). For an additional discussion and analysis of Allen, see Grabowski, \textit{supra} note 58, at 441-47.
\item \textsuperscript{79} See \textit{supra} notes 66-70 and accompanying text.
\item \textsuperscript{80} See \textit{supra} notes 66-70 and accompanying text.
\item \textsuperscript{81} See \textit{infra} notes 93-98 and accompanying text.
\item \textsuperscript{82} Allen, 478 U.S. at 375. Petitioner Terry Allen was charged with the crimes of unlawful restraint and deviate sexual assault. \textit{Id.} at 365. The State also petitioned to have Allen declared a sexually dangerous person under the Illinois Sexually Dangerous Persons Act. \textit{Id.} Both the charges and the petition were initially dismissed. Subsequently, however, Allen was recharged and the petition to declare him sexually dangerous was reinstated. \textit{Id.} at 366.
\end{itemize}

As provided in the Sexually Dangerous Persons Act, with Allen and his counsel present, the trial court ordered Allen to submit to two psychiatric examinations. \textit{Id.; see ILL. ANN. STAT. ch. 38, § 105-4 (Smith-Hurd 1980).} At the trial, the State presented the testimony of the two examining psychiatrists over Allen's objections that the doctors had elicited information from him in violation of his Fifth Amendment privilege against self-incrimination. Allen, 478 U.S. at 366. The trial court ruled that Allen's statements to the psychiatrists were not themselves admissible. However, the court allowed each psychiatrist to give his opinion based on his interview with Allen. Both psychiatrists testified that Allen was mentally ill and had criminal propensities to commit sexual assaults. Based on the testimony of the psychiatrists and the victim of the sexual assault for which Allen had been indicted, the court found Allen to be a sexually dangerous person under the Act. \textit{Id.}

The Illinois Supreme Court held that the Fifth Amendment privilege against self-incrimination was not available in sexually dangerous person proceedings for two reasons. First, the court decided that such proceedings were civil and not criminal in nature, with the statutory goal of "treatment, not punishment." People v. Allen, 481
Amendment did not apply to psychiatric evaluations conducted in accordance with the Act.\textsuperscript{83} Justice Rehnquist, writing for the five-member majority,\textsuperscript{84} established a four-prong analysis for determining when indefinite confinement schemes for sex offenders should be considered a constitutional exercise of the state's civil commitment authority. The statute must (1) require a mental illness; (2) disavow any interest in punishment; (3) provide for the treatment of those it commits; and (4) establish a system under which committed persons may be released after the "briefest time" in confinement.\textsuperscript{85} If a sex offender involuntary commitment statute meets these criteria, the statute will probably be upheld as constitutional. This section will discuss each of these criteria.

1. Mental Disorder Required

Under the first criteria implicitly established in \textit{Allen}, an existing mental disorder is a prerequisite for the involuntary commitment of a sex offender.

As noted earlier, the constitutionally permissible purpose of police power civil commitment is to treat the individual's mental disorder and to protect the person and society from the person's potential dangerousness.\textsuperscript{86} If a person may be committed without having a mental disorder, then, there is nothing to treat.\textsuperscript{87} If there is nothing to treat, commitment for the purpose of treatment will not serve the purpose of the state's police power commitment authority; commitment would simply effect preventive detention.\textsuperscript{88}

The Illinois Sexually Dangerous Persons Act serves the legitimate police power purpose of treating those the State commits. The Act requires that the person have a "mental dis-

\textsuperscript{83} The majority also concluded that the Due Process Clause did not independently require application of the privilege against self-incrimination. \textit{Allen}, 478 U.S. at 696.

\textsuperscript{84} Chief Justice Burger and Justices Powell, White, and O'Connor joined in the majority opinion. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun dissented.

\textsuperscript{85} \textit{Allen}, 478 U.S. at 370.

\textsuperscript{86} \textit{See supra} notes 41-47 and accompanying text.

\textsuperscript{87} \textit{See infra} notes 154 and 155 and accompanying text.

\textsuperscript{88} \textit{See supra} note 47 and accompanying text.
order" for at least one year prior to initiation of commitment proceedings. \(^89\) The term mental disorder is clinically recognized. \(^90\) In applying this commitment prerequisite, the State of Illinois has only sought the commitment of persons having clinically recognized mental disorders. For example, during commitment proceedings, petitioner Terry Allen was diagnosed as having schizophrenia for at least one year prior to the petition's filing. \(^91\) Schizophrenia is a clinically recognized mental disorder. \(^92\) Thus, by requiring a clinically recognized mental disorder, the Act ensures that the legitimate police power goal is served; it offers bona fide treatment for the committed person's mental illness.

Given the fact that treatment of an individual's mental disorder is required for police power commitments and the fact that the Illinois Act requires a finding of mental disorder, Allen seems to establish that a finding of existing mental disorder is required to meet constitutional standards for police power sex offender commitment.

2. Disavowal of Any Interest in Punishment

Under the second prong of the Allen test, the state must disavow any interest in punishing the person it seeks to commit for the underlying sex offense. \(^93\) The Supreme Court agreed in Allen that where a defendant provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention that the proceeding be civil, the scheme fails to meet constitutional requirements for civil commitment statutes. \(^94\)

What evidence will the Court consider in determining whether the purpose of a statute is punitive? In Allen, the Court gave credence to the statute's recitation of legislative intent that proceedings under the Act "shall be civil in nature"; however, the Court conceded that the civil label

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89. ILL. ANN. STAT. ch. 38, ¶ 105-1.01 (Smith-Hurd 1980 & Supp. 1991). See also supra notes 64 and 65 and accompanying text.
94. See id. at 369. The Court's narrow holding stated that if the statute was so punitive either in purpose or effect as to negate a civil label, the statute was criminal, and the Fifth Amendment privilege against self-incrimination must be applied. Id.
would not be dispositive.95

More importantly, for present purposes, the Court emphasized the exclusive treatment election required by the Illinois Act.96 The Court reiterated that under the Illinois statute, the State must elect either to convict the accused and punish him for the criminal act or to civilly commit the person and attempt treatment.97 The State could not both punish and then treat. The Court contrasted a juvenile delinquency proceeding in which the state, in spite of the "delinquency" label, also intended to punish its juvenile offenders through institutional commitment.98

Thus, Allen strongly suggests that treatment must be the exclusive purpose of the statute; the state may not first punish and then treat. Therefore, Allen intimates that treatment rather than punishment is a constitutionally required purpose of sexual offender involuntary commitment statutes.

3. Treatment

Under the third prong of the Allen test, the state must provide treatment for those it commits.99 Recall that the Illinois Sexually Dangerous Persons Act requires the state to prove that the person has had a mental disorder for at least one year immediately prior to the commitment proceeding.100

In support of its conclusion that the proceedings were civil, the Allen Court looked to the treatment provisions of the statute. The Court noted that the statute required the state to provide "care and treatment designed to effect recovery" in a facility set aside to provide psychiatric care.101 Because the Illinois Act provides for compulsory psychiatric care of persons suffering from a "mental disorder," the Court found a mean-

95. Id.
96. See supra notes 66-70 and accompanying text for a discussion of the required election.
97. Allen, 478 U.S. at 373. The Court stated: "[Under the Illinois Sexually Dangerous Persons Act), the 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." Id. (emphasis added).
98. Id. at 373, discussing In re Gault, 387 U.S. 1, 49-50 (1967).
99. Similarly, in the context of parens patriae commitments, the U.S. Supreme Court has held that it is unconstitutional to confine a mentally ill individual under an involuntary commitment statute for the purpose of treating the individual and subsequently to fail to treat him. See O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).
100. ILL. STAT. ANN. ch. 38, ¶ 105-1.01 (Smith-Hurd 1980).
101. Allen, 478 U.S. at 369 (quoting ILL. ANN. STAT. ch. 38, ¶ 105-4 (Smith-Hurd 1980)).
ingful distinction between involuntary commitment under the Act and a criminal prosecution. Accordingly, to meet constitutional standards for sex offender involuntary commitment schemes, the state must provide bona fide treatment for those committed.

4. Committed Persons May Be Released After the Briefest Time in Confinement

Under the fourth *Allen* criteria, the state must release committed sex offenders after the briefest time in confinement necessary to effect recovery. The Court noted that the Illinois statute required patients to be discharged when they were no longer dangerous. The Court also noted that a committed person may apply for release at any time and that the committing court is obligated to hear all applications for release. The Court considered this mandatory release requirement and the procedures readily available to the committed person to apply for release as further evidence that "the State has disavowed any interest in punishment," foregoing "either of the traditional aims of punishment—retribution and deterrence." 

*Allen*, therefore, strongly suggests a fourth constitutional requirement for sex offender involuntary commitment schemes: the person must be released after the "briefest time in confinement" under easily accessible applying procedures for applying for release.

IV. Washington's Sex Offender Involuntary Commitment System Compared to the Illinois Sexually Dangerous Persons Act

Similar to the Illinois statute, the Washington Sexually Violent Predators statute characterizes its commitment proceedings as civil. Like the Illinois statute, the Washington stat-
ute suggests that its proceedings are intended to be civil.\textsuperscript{108} However, the Washington statute is fundamentally different from the Illinois statute, and it cannot rationally be characterized as a legitimate exercise of the state's civil commitment authority.

The Washington law is fundamentally different from the Illinois Sexually Dangerous Persons Act in three crucial areas: (1) persons who are not mentally ill are subject to commitment; (2) commitment and treatment follow conviction and punishment (persons are both punished and treated); and (3) persons committed face higher procedural hurdles before release than persons committed under the Illinois statute.

A. Mental Disorder Not Required

Recall that the Illinois Sexually Dangerous Persons Act requires that the person to be committed must have a mental disorder existing for one year prior to the commitment proceedings.\textsuperscript{109} Although the Illinois Act does not define "mental disorder," that term has clinical significance. Mental disorders have recognized symptoms classified under a medical system of disease for purposes of diagnosis and treatment.\textsuperscript{110} The Washington Act allows commitment of persons having no such clinically recognized mental disorders. In fact, the law specifically applies to persons who do not have a mental disease or defect.\textsuperscript{111}

Under the Washington Sexually Violent Predators statute, a person is subject to commitment if the person is a "sexually violent predator," having a "mental abnormality or personality disorder\textsuperscript{112} which makes the person likely to engage in predatory\textsuperscript{113} acts of sexual violence."\textsuperscript{114} The statute defines "mental

\textsuperscript{108} See WASH. REV. CODE § 71.09.010 (Supp. 1990-91).
\textsuperscript{109} ILL. ANN. STAT. ch. 38, § 105-1.01 (Smith-Hurd 1980).
\textsuperscript{110} See Amicus Curiae Brief of the Washington State Psychiatric Ass'n at 3, In re Young (Wash. filed Sept. 20, 1991) (No. 57837-1) [hereinafter WSPA Brief].
\textsuperscript{111} See WASH. REV. CODE § 71.09.010 (Supp. 1990-91). Compare the Sexually Violent Predators statute, id., with the Washington Involuntary Treatment Act (ITA), WASH. REV. CODE § 71.05.050 (1989) (requiring a finding of a "mental disorder," \textit{inter alia}, to commit a person).
\textsuperscript{112} The statute does not define "personality disorder."
\textsuperscript{113} "Predatory" acts are those "directed toward strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." Id. § 71.09.020(3) (Supp. 1990-91).
\textsuperscript{114} Id. § 71.09.020(1). In effect, this provision requires a prediction of the individual's long-term future dangerousness. The ability of mental health professionals to predict long-term future dangerousness is severely limited, as many
abnormality” as a “congenital or acquired condition affecting the emotional or volitional capacity, which predisposes the person to the commission of criminal sexual acts” to a degree that the person is a menace to the health and safety of others.\textsuperscript{115} In other words, the law equates criminal behavior with mental illness; it does not require an independent mental disorder finding.

Mere criminal deviant behavior, however, does not \textit{per se} constitute a mental disorder.\textsuperscript{116} As the American Psychiatric Association states: “Neither deviant behavior, e.g., political, religious, or sexual, nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of dysfunction in the person.”\textsuperscript{117} Further, most sex offenders commit crimes for the same reasons as other offenders, not because they are mentally ill.\textsuperscript{118} Therefore, the commission of a sex crime does not mean that the person is mentally ill. The Washington law thus differs from the Illinois law in that it does not require a finding of mental disorder.

The Washington law differs from the Illinois law with respect to the mental disorder component in yet another respect. Unlike the Illinois Act, the Washington law fails to require that the person being committed have an \textit{existing} mental disorder. Recall that under the Illinois Act, in addition to the independent mental disorder requirement, commitment proceedings must be based on a new criminal charge.\textsuperscript{119} Thus, the new criminal charge requirement reinforces the requirement that the person have a mental disorder continuously for at least one year immediately before commitment proceedings. The Illinois law’s new criminal charge requirement supports the independent finding that the person has a \textit{currently existing} mental disorder at the time commitment proceedings

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\textsuperscript{115} \textit{WASH. REV. CODE} § 71.09.020(2) (Supp. 1990-91).
\textsuperscript{116} See DSM-III-R, \textit{supra} note 90, at xxii.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} See WSPA Brief, \textit{supra} note 110, at 3-4.
\textsuperscript{119} See \textit{supra} notes 66 and 67 and accompanying text.
are brought. In contrast, under the Washington law, a person may be committed even if many years have passed between the criminal sexual offense and initiation of commitment proceedings.\(^{120}\) Ergo, the commission of one sex offense long ago cannot serve as the basis of inferring a currently existing mental disorder. Even assuming for purposes of argument that a person once committed a sexual offense because he was mentally ill, (although as discussed earlier, most sex offenders are not mentally ill\(^{121}\)), the person may no longer be mentally ill at the time commitment proceedings are brought against him. Consequently, because the Washington law fails to require an existing mental disorder at the time commitment proceedings are initiated against a person, the Washington law differs substantially from the Illinois Act.

**B. Convict and Punish, and Commit and Treat**

The Washington statute is fundamentally different from the Illinois scheme in a second respect. Under the Illinois Sexually Dangerous Persons Act, the State must elect either to prosecute the accused for the criminal offense or seek his commitment as a sexually dangerous person.\(^{122}\) The State may not both convict the person *and* commit him.

In sharp contrast, under the Washington statute, commitment and treatment must *follow* conviction and punishment. Under the Act, commitment proceedings may be brought if the person is currently confined for a sex offense or was once confined for a sex offense and has been released.\(^{123}\) Thus, in

\(^{120}\) The statute applies only to persons who are currently confined or who were once confined but who have been released. *See* WASH. REV. CODE § 71.09.030 (Supp. 1990-91). The only basis for commitment required by the law is a commission of one qualifying sexual offense at some time in the past if the prosecutor decides that person is a "sexually violent predator." *Id.*

\(^{121}\) *See supra* notes 116-18 and accompanying text.

\(^{122}\) People v. Patch, 293 N.E.2d 661, 665 (1973); *see supra* notes 66-70 and accompanying text.

\(^{123}\) The law provides that a petition may be filed:

When it appears that:

1. The sentence of a person who has been convicted of a sexually violent offense is about to expire on, before, or after July 1, 1990;
2. the term of confinement of a person found to have committed a sexually violent offense as a juvenile is about to expire, or has expired on, before, or after July 1, 1990;
3. a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3); or
Washington, commitment under the Act is supplementary to a conviction and punishment for the sex offense (or the equivalent if the person was found to be mentally incompetent).\(^{124}\)

C. Duration of Confinement; Procedures for Release

Under both the Illinois and Washington statutes, the person committed will be confined for an indefinite period of time.\(^{125}\) Under the Illinois Act, however, the person may file an application showing that he has recovered and petition for release at any time following commitment.\(^{126}\) The person is entitled to a review of his case every six months.\(^{127}\) In addition, the Illinois statute provides for the conditional release of persons committed.\(^{128}\) The person must prove, by a preponderance of the evidence, that he is no longer dangerous.\(^{129}\)

In contrast, the Washington statute is considerably more restrictive in its release provisions than the Illinois statute. Under the Washington Act, a petition for release is authorized when the Department of Social and Health Services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released.\(^{130}\)

\footnotesize{(4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3);
and it appears that the person may be a sexually violent predator . . .


124. Contrast the repealed Washington sexual psychopathy statute, WASH. REV. CODE ch. 71.06 (1989), repealed prospectively by 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)). Under this prior commitment system, the prosecution could initiate a sexual psychopathy commitment proceeding when the person was charged with a sex offense. WASH. REV. CODE § 71.06.020 (1989). If the person was found to be a sexual psychopath, the court could order the person to be committed; if the court did not find the person to be a sexual psychopath, the court ordered the person to serve his sentence for the crime or discharge him, as the case merited. Id. § 71.06.060. Under this statute, unlike the present Sexually Violent Predators statute, the person was not both punished for the crime and subsequently committed for treatment. Cf. WASH. REV. CODE ch. 71.09 (Supp. 1990-91).


126. ILL. ANN. STAT. ch. 38, ¶ 105-9 (Smith-Hurd 1980). The Department of Corrections is required to submit a sociopsychiatric report in response. Id. The application is heard by the same court that originally committed the person.


128. ILL. ANN. STAT. ch. 38, ¶ 105-10 (Smith-Hurd 1980).


130. WASH. REV. CODE § 71.09.040 (Supp. 1990-91).
The statute does not prohibit the person from petitioning for release over the Department's objection. Apparently, such a petition for release will only be considered when the Department provides the committed person with an annual written notification of the person's right to petition for release. If the committed person petitions for release over the Department's objection, the person must prevail at a show cause hearing to obtain the right to a trial on his petition.

In contrast, recall that under the Illinois Act, the court must hear all petitions for release, regardless of whether the Department of Corrections concurred with the petition. Also, under the Washington statute, if the first petition is denied, virtually all subsequent petitions without the Department's approval are likely to be denied. Further, in contrast to the Illinois statute, a person committed under the Washington scheme is only entitled to an annual review of his condition. Finally, in contrast to the Illinois statute, the Washington statute does not provide for any type of conditional release.

V. THE CONSTITUTIONALITY OF WASHINGTON'S SEX OFFENDER INVOLUNTARY COMMITMENT SYSTEM UNDER ALLEN V. ILLINOIS

If a state sex offender involuntary commitment scheme fails under any one of the four criteria suggested by Allen, the statute will fail as an unconstitutional exercise of the state's civil commitment authority. The Washington statute fails to meet all four criteria: (1) an existing mental disorder is not

131. Id.
132. Id.
133. ILL. ANN. STAT. ch. 38, § 105-09 (Smith-Hurd 1980).
134. See WASH. REV. CODE § 71.09.100 (Supp. 1990-91). This section provides: [If a person has previously filed a petition for discharge without the Department's approval and the court determined, either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that he or she was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted.

135. See id. § 71.09.070.
136. The repealed sexual psychopathy statute allowed the conditional release of a committed person. See WASH. REV. CODE §§ 71.06.091, .130 (1989), repealed prospectively by 1984 Wash. Laws ch. 209 (codified at WASH. REV. CODE § 71.06.005 (1989)).
required for commitment; (2) punishment is embraced, not disavowed; (3) committed persons will not be treated; and (4) committed persons will not be released after the briefest time in confinement; they will face numerous procedural barriers to applying for release.

A. Mental Disorder is Not Required

The Washington statute fails to meet the first Allen criteria requiring a mental disorder. As discussed earlier, the Washington scheme does not require that the person to be committed have an existing mental disorder. Additionally, mental health professionals have criticized this aspect of the Act on policy grounds.

In recommending the new civil commitment statute, the Governor's Task Force on Community Protection ("Task Force") observed: "Under current laws, sexually violent predators only qualify for civil detention when a mental disorder or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental disorder or mental disorder and therefore were not detainable." Thus, the statute adopted the Task Force's recommendations: persons who are not mentally ill may be committed under the Act.

Additionally, the chief policy criticism advanced by mental health professionals is that the Washington system does not require a finding of mental disorder. In opposing enactment of the commitment statute, the Washington State Psychiatric Association (WSPA) stated:

[the commitment system] will confuse mental disorder with violent sexual behavior. Mental illnesses are specific conditions that result in a loss of contact with reality and can be treated with medication and therapy. Violent sexual behavior is just that—behavior that is always under voluntary control. The rapist or pedophile must decide to commit the sexual act—the mental patient cannot.

137. See supra notes 86-92 and accompanying text (discussing the Allen mental illness requirement); see also supra notes 109-121 and accompanying text (discussing the Washington statute).
138. See supra note 24.
139. TASK FORCE REPORT, supra note 24, at II-21 (emphasis added).
140. See Bodine, supra note 3, at 106 n.13 (citing Dr. James Reardon, Testimony before the 1990 Washington State Legislature (January 1990) at 1). Dr. Reardon's testimony was given on behalf of the WSPA. See id.
The WSPA argued that the statute requires reliance on the concepts of "mental abnormality" and "personality disorder"141 because the legislature recognized that sexual offenses are rarely the product of mental disorder.142 However, the Association stated that the term "mental abnormality" is hopelessly vague and has no clinical significance.143 "Abnormality" is no longer used because it has several different meanings: not typical; not average; not natural; not expected.144 The WSPA then applied these observations about sex offenders and mental disorder to existing state statutes providing for the civil commitment of sex offenders. The WSPA noted that these facts regarding mental disorder have resulted in "a pronounced rejection of the view that sex offenders have an identifiable illness or disorder."145 This view is reiterated by Brakel, Parry and Weiner:

Growing awareness that there is no specific group of individuals who can be labeled sexual psychopaths by acceptable medical standards and that there are no proven treatments for such offenders has led such professional groups as the Group for the Advancement of Psychiatry, the President's Commission on Mental Health, and most recently, the American Bar Association Committee on Criminal Justice Mental Health Standards to urge that these [sexual psychopath] laws be repealed.146

Because persons who are not mentally ill are subject to involuntary commitment under the Washington statute, the statute fails under the first Allen criteria. Accordingly, the Washington statute is probably unconstitutional and, in addition, represents a poor policy choice by the Legislature.

B. Punishment is Embraced, Not Disavowed

The Washington statute fails to meet the second Allen criteria: the state has not disavowed all interest in punishing the committed person. The Washington statute authorizes civil commitment of a person adjudged to be a "sexually violent
predator," in addition to criminal penalties previously served for the criminal conviction. In contrast, the Illinois Sexually Dangerous Persons Act allows treatment through the civil commitment process as an alternative to criminal proceedings. If punishment and treatment are to be effected consecutively, and not alternatively, the Washington statute clearly has not "disavowed all interest in punishment" as Allen requires. On the contrary, the Washington statute embraces both fully punishing a person for his criminal acts, and then requiring him to be treated for sexual deviancy. Thus, the Washington statute clearly does not meet the second Allen criteria.

Additionally, the statute's purpose demonstrates that the State has not disavowed all interest in punishing offenders committed under the statute. The Task Force Report provides evidence of the State's continuing interest in punishing persons committed under the Act. For example, the Task Force's stated objective was to find "ways to confine repeat violent offenders who present an extreme safety risk." The Task Force further noted that it was principally created to answer one question: "What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes?" The Task Force then focused on the offenders and the inadequacy of their sentences.

147. WASH. REV. CODE § 71.09.030 (Supp. 1990-91); see supra note 124.
148. See supra notes 66-70 and accompanying text.
149. TASK FORCE REPORT, supra note 24, at I-1.
150. Id. at II-20.
151. The Task Force found:

Offenders committed under the Sentencing Reform Act are sentenced to a definite term. The most serious offenders are supervised in the community for one year following release. When the confinement and supervision term expire, the State's control over these offenders ceases. State prison inmates sentenced under the indeterminate system (crimes committed before 1984) serve terms set by the Indeterminate Sentence Review Board and are released when they are "fit subjects for release." Some offenders are never found eligible for parole and serve their entire maximum term in prison; the majority are placed on parole. The Board loses all jurisdiction over the offender when the statutory maximum for the crime expires (five year for Class C felonies, ten years for Class B, and life for Class A). Many offenders who committed very serious crimes and are viewed as very dangerous were convicted of Class B offenses. The juvenile system loses all jurisdiction on juvenile offenders when they turn 18, unless the jurisdiction is extended by the juvenile court before the offender turns 18 and then the age is extended to 21. Persons found Not Guilty by Reason of Insanity under the criminal insanity law may be held for the statutory maximum of the crime they
Finally, the Task Force concluded that "existing laws do not offer a sufficient safety net for confinement of sexually violent predators."\textsuperscript{152} The Task Force never stated that the objective of the involuntary commitment statute was to treat the persons committed. Rather, the Task Force only articulated the desire to isolate potentially dangerous persons from members of the community.

In short, under the Washington statute, the State has not disavowed all interest in punishing the person committed, as \textit{Allen} suggests is required for constitutional sex offender commitment statutes. Indeed, the State punishes the person for the offense first and later treats the person for his sexual deviancy. Because the statute does not meet this second \textit{Allen} criterion for sex offender commitment statutes, the Washington statute appears to impose unconstitutional lifetime preventive detention.

\textbf{C. Treatment}

Under the third criteria suggested by \textit{Allen} to meet constitutional standards, a sex offender involuntary commitment statute must provide for the treatment of persons committed.\textsuperscript{153} The Washington statute fails to meet this requirement.

The Washington statute does not—indeed, it \textit{cannot}—pursue treatment because the Act does not apply to a treatable mental condition. The Washington Act itself asserts that persons subject to commitment under the Act do \textit{not} suffer from a mental disease or defect.\textsuperscript{154} In the absence of a mental disor-

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committed or until their mental illness is stabilized and they no longer present a danger to others. They can be held beyond the statutory maximum if they are found dangerous to self or others and are detained under the involuntary treatment law. Persons found incompetent to stand trial can be held for up to one year and 15 days (90 days if the person is developmentally disabled) in order to re-establish their competency. If competency cannot be re-established, the charges are dismissed without prejudice (charges can be refilled if the person regains competency at a later time). A person found incompetent to stand trial can be referred to a state hospital and held under the involuntary treatment law if the person is dangerous to self or others or is gravely disabled.

\textit{Id.} at II-20 to II-21.

152. \textit{Id.} at II-21.

153. \textit{See supra} notes 99-102 and accompanying text.

154. "The legislature finds that a small . . . group of sexually violent predators exist \textit{who do not have a mental disease or defect} that renders them appropriate for the existing involuntary treatment act . . . ." \textsc{Wash. Rev. Code} \S 71.09.010 (Supp. 1990-91) (emphasis added). Further, the Task Force reported that under the Involuntary Treatment Act, "sexually violent predators" only qualify for civil detention when a}
der, nothing exists to treat.\textsuperscript{155}

Consequently, when the Washington law purports to provide treatment for those committed,\textsuperscript{156} there is a clear non sequitur. The provision of "treatment" seems all the more disingenuous given the legislature's explicit finding that sexually violent predators are unamenable to existing mental disorder treatment methods.\textsuperscript{157}

Finally, there is no known effective therapy for sex offenders treated involuntarily. Indeed, in one recent study, researchers concluded: "[w]e can . . . say with confidence there is no evidence that treatment effectively reduces sex offense recidivism."\textsuperscript{158}

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mental illness or mental disorder is present. Thus, some persons were not detainable because they did not have the requisite illness or disorder. TASK FORCE REPORT, supra note 24, at II-21. The Task Force's proposed civil commitment statute was thus aimed at committing individuals who were not mentally ill or disordered. See id. Mental health experts have criticized this provision because the statute does not purport to characterize sex offenders as mentally ill or developmentally disabled in any clinically meaningful sense. See supra notes 140-45; see also Maria Williams, Mental Health Experts Criticize Sex-Predator Law, THE SEATTLE TIMES, Oct. 25, 1990, at B4; Ron Judd, Psychiatrists Challenge State's Law on Sexual Predators, THE SEATTLE TIMES, Jan. 4, 1991, at A1.
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\textsuperscript{155} The Washington State Psychiatric Association states that mental illness can be treated with medication and therapy. See Bodine, supra note 3, at 106 n.13 (citing Dr. James Reardon, Testimony before 1990 Washington State Legislature (January 1990), at 1). Mere violent sexual behavior, in the absence of a mental illness, cannot be treated because it is always under the person's voluntary control. \textit{Id}. A model involuntary commitment statute proposed by the American Psychiatric Association would require that there be a "reasonable prospect that [the person's] disorder is treatable" as a prerequisite for involuntary commitment. See Clifford D. Stromberg & Alan A. Stone, \textit{Statute—A Model State Law on Civil Commitment of the Mentally Ill}, 20 HARV. J. ON LEGIS. 275, 330, 332 (1983). The APA model law also requires that a person have a "severe mental disorder." \textit{Id}.

\textsuperscript{156} See WASH. REV. CODE § 71.09.060 (Supp. 1990-91).

\textsuperscript{157} WASH. REV. CODE § 71.09.010 (Supp. 1990-91). This finding is in accord with existing research on sex offender recidivism rates. See supra note 11 (discussing the findings of California treatment methods and recidivism); see also Lita Furby et al., \textit{Sex Offender Recidivism: A Review}, 105 PSYCHOL. BULL. 3, 35 (1989). These researchers conclude that "we can . . . say with confidence there is no evidence that treatment effectively reduces sex offense recidivism." \textit{Id}. Indeed, their research showed that in six of seven recidivism studies reviewed, the sex offense recidivism rate for treated offenders was higher than for untreated offenders, albeit slightly. \textit{Id}.

\textsuperscript{158} Furby et al., supra note 157, at 25. Empirically, other studies also confirm that little difference exists in the recidivism rate between treated and untreated sex offenders. See Resnik & Wolfgang, supra note 11; Morrow & Peterson, supra note 11.

Why are sex offenders so resistant to treatment as compared to mentally ill individuals? One possible reason is that many sex offenders, having been diagnosed as mentally ill on the basis of their sexual offenses, lack "significant pathology such as psychosis, retardation, or major affective disorders." Vikki H. Sturgeon & John Taylor, \textit{Report of a Five-Year Follow-up Study of Mentally Disordered Sex Offenders
If persons committed under the Washington statute are not treatable, and if the involuntary treatment of sex offenders is ineffective, the statute serves no treatment objective. Therefore, the statute fails to meet the third requirement for constitutionally permissible involuntary civil commitment suggested by *Allen*. If treatment is not the purpose of the statute, as required by *Allen*, the statute effectively authorizes unconstitutional long-term preventive detention.

In short, under the Washington Act, no meaningful distinction exists between involuntary commitment and criminal prosecution because there is no treatment. The Washington scheme uses the "promise of treatment . . . only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits."159

**D. Committed Persons Are Not Released After the Briefest Time in Confinement**

The *Allen* Court suggested a final constitutional requirement for sex offender commitment schemes: the person must be released after the briefest time in confinement, and the committed person must have readily available procedures allowing him to petition for release.160 Under the Washington law, the committed person will *not* be released after the briefest time in confinement.

To authorize the committed person to petition for release, the Department of Social and Health Services must initially find that the committed person's "mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released. . . ."161 Then, in a judicial hearing, to keep the person confined, the prosecutor must show "beyond a reasonable doubt" that the committed person is "not safe to be at large" and that if discharged, the petitioner is likely to commit sexual offenses.162 Essentially, the Department and the court may prevent the

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160. See supra notes 103-07 and accompanying text.
162. Id.
committed person from being released based upon a finding that the person is likely to be dangerous at some time in the future.

The future dangerousness standard for release is problematic; studies have consistently found that mental health professionals cannot accurately predict an individual's long-term future dangerousness. One researcher has concluded that mental health professionals are more often wrong than right in predicting violent behavior over a period of several years. Indeed, he concluded that psychiatrists are correct in predicting future violence in only one out of three cases: "... of every three ... persons predicted by psychiatrists or psychologists to be violent, one will be discovered to commit a violent act, and two will not."166

This data indicates that mental health professionals significantly err on the side of overpredicting dangerousness. Therefore, because the Washington sex offender involuntary commitment statute requires that the person "is not likely to commit predatory acts of sexual violence if released," it is unlikely that such a finding will ever be made.

Given the empirical data, two of every three persons found to be "likely to commit predatory acts of sexual violence if released" would not commit any such acts. Two of every three persons committed under the Act would be unjustifiably detained—probably for life—with no possibility of release. Clearly, this does not meet the Allen requirement of "release after the briefest time in confinement." Therefore, the statute appears to sanction unconstitutional preventive detention

163. See Robert J. Menzies et al., Hitting the Forensic Sound Barrier: Predictions of Dangerousness in a Pretrial Psychiatric Clinic, in DANGEROUSNESS: PROBABILITY AND PREDICTION, PSYCHIATRY AND PUBLIC POLICY 115, 132 (Christopher D. Webster et al., eds. 1985); Bruce J. Ennis & Thomas R. Litwack, Psychiatry & the Presumption of Expertise: Flipping Coins in the Courtroom, 62 CAL. L. REV. 693, 711-16; Gleb, supra note 6, at 222-28; La Fond, supra note 37, at 511.

164. Psychiatrists and psychologists.


166. Monahan, supra note 113, at 250. For a further discussion of older studies reaching similar conclusions on the accuracy of predicting future violence, see generally Ennis & Litwack, supra note 163.

167. See Menzies et al., supra note 163, at 117.

Some commentators have used data on the overprediction of dangerousness to argue that psychiatric testimony should be excluded in involuntary commitment proceedings. See Ennis & Litwack, supra note 163, at 735-73; Gleb, supra note 6, at 240-49. Gleb argues for a constitutionally-based modification of the Frye evidentiary test to exclude psychiatric and similar testimony. See Gleb, supra note 6, at 240-49.
because it seeks to prevent questionable and even unlikely future harm.

Further, as discussed earlier, the Washington statute considerably restricts the committed person’s opportunities to petition for release.\(^{168}\) The committed person in Washington faces a number of procedural barriers to applying for release, unlike the Illinois scheme where a person may petition for release at any time.\(^{169}\) Again, the Washington commitment system fails under Allen.

Thus, the Washington statute is fundamentally different from the Illinois Sexually Dangerous Persons Act. Further, the statute does not meet the four criteria suggested by Allen for constitutionally permissible involuntary civil commitments. Therefore, the Washington statute appears to authorize unconstitutional lifetime preventive detention solely to prevent conjectural future crime. The statute simply seeks to extend the sentences of convicted offenders who are considered to be possible recidivists. Persons who have fully served their sentences and are legally due for release will be pulled back into the institutional gates.

VI. CONCLUSION

Protecting the community is a legitimate legislative goal. A deviant sexual crime may last but minutes; the impact on the offender’s victim will last a lifetime. The trauma suffered by their victims and their victims’ families was—and is—devastating. People like Earl Shriner, Gene Kane, and Gary Minnix\(^{170}\) should be isolated from society to protect the public. But Washington’s new sex offender involuntary commitment system inappropriately utilizes unconstitutional means to do so.

Incapacitation—i.e., isolating a person to protect the community from the dangerous individual—is a chief goal of the criminal justice system. The criminal justice system, with its requisite procedural protections, is the constitutionally appropriate means through which the goal of incapacitation can and should be effected.\(^{171}\)

\(^{168}\) See supra notes 130-35 and accompanying text.

\(^{169}\) See supra notes 73-76 and accompanying text.

\(^{170}\) See supra note 15.

\(^{171}\) "[The] criminal justice system is an apparatus society uses to enforce the standards of conduct necessary to protect individuals and the community. It operates
Sex offenders should be punished—severely—for their crimes—through the criminal justice system.\textsuperscript{172} To be sure, proponents of the sex offender involuntary commitment system argue that the statute was intended to incapacitate those offenders who were perceived as having fallen through the judicial and administrative cracks, or whose sentences were perceived as inadequate. However, the Washington Community Protection Act also amended the Sentencing Reform Act of 1984 by imposing longer sentences for sex offenders.\textsuperscript{173}

Under the revised Sentencing Reform Act, Washington now has longer standard sentences for sex offenders. Further, judges may impose exceptional sentences if the circumstances warrant them. Tough sentences should be the only constitutionally acceptable means of assuring that people like Earl Shriner and Gene Kane are prevented from inflicting their horrors on the people of the state.\textsuperscript{174}

We should convict and punish sex offenders through the criminal justice system. We should not involuntarily commit sex offenders and subject them to disingenuous attempts at treatment.

\textsuperscript{172} Accord Bodine, supra note 3, at 141; Gleb, supra note 6, at 250.

\textsuperscript{173} See 1990 Wash. Laws ch. 3. §§ 701-08.

\textsuperscript{174} Indeed, assuming that Earl Shriner's 131 1/2-year sentence stands, even if his sentence is reduced for good time, he will never again prey outside the prison walls. The community will never again fear his presence in the community. See supra note 23 (discussing Earl Shriner's exceptional sentence).