COMMENT

Washington State's Return to Indeterminate Sentencing for Sex Offenses: Correcting Past Sentencing Mistakes and Preventing Future Harm

Jennifer M. McKinney*

I. INTRODUCTION

What is personal safety worth? What rights are we willing to sacrifice as a society in return for our personal safety? How important is public safety and how much power does the State have to make laws that secure the community’s safety, while compromising the personal liberty of others? Preventative detention for a few, as opposed to personal safety for the many, is a legitimate state goal and is one of the sacrifices we make for safety as a society and civilized populous.

Earl Shriner and Andre Brigham Young are infamous in sex offender case law and literature. Both served convictions for sex offenses only to commit new, more heinous sex crimes upon their releases. After completing a sentence for rape, Earl Shriner violently and brutally beat, mutilated, and raped a seven-year-old boy. Similarly, after serving a sentence for forcibly raping four different women, two at knife-point, Andre Brigham Young was in and out of prison. Young later raped two other women, one with three small children present. Most recently, Joseph Rosenow raped and murdered Jennie Mae Osborn, a 15-year-old Shelton, Washington girl. Rosenow had recently been re-

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* J.D. Candidate 2003, Seattle University School of Law; B.A., Louisiana State University.
3. Young, 122 Wash.2d at 25, 857 P.2d at 994.
4. Newswatch, Sex Offender Please Guilty to Slaying of 15-Year-Old Girl, SEATTLE TIMES, Aug. 28, 2001, at B3; see Gordy Holt, Sex Offender Facing Charges; Mason County Rocked by
leased from prison after serving a sentence for second-degree assault with sexual motivation and had previously been convicted of a violent rape in 1993. How do we prevent known sex offenders from committing more sex crimes? By making it a part of their sentence to keep them in prison if they continue to be dangerous.

The Washington legislature's return to indeterminate sentencing corrects its original mistake of setting fixed sentences for sex offenders with no supervision after release. Unlike the present civil commitment system, indeterminate sentencing preventatively detains offenders in the criminal system, protects the public, and ensures more control over offenders following their prison terms. Indeterminate sentencing provides a more efficient and effective alternative to the civil commitment process.

Section II will briefly discuss the progression of sex offender sentencing from the original parole system to the present changes, and why past structures were instituted and later modified or repealed. Furthermore, Section II will examine the distinctions between criminal indeterminate sentencing and civil commitment, outline the current state of sentencing for sex offenders, and discuss why sex offenders merit disparate sentencing treatment. Section III will then address the changes under the new law, how this sentencing will work, and why this new sentencing scheme will provide a rational system.

II. BACKGROUND—CLARIFYING AND CORRECTING SEX OFFENDER SENTENCING

A. History of Sentencing Provisions for Sex Offenders in Washington

Sex offender sentencing has seen many transitions and changes in procedure as well as in policy over the past 100 years. Under the original indeterminate sentencing or parole system, judges sentenced offenders to prison terms at their discretion with a parole board determining the release date. This parole-based indeterminate sentencing focused on the rehabilitation of the offender and on the opportunity

Slaying of Girl, Arrest of Man Community was warned about, SEATTLE POST-INTELLIGENCER, Feb. 21, 2001, at B2.

5. See Holt, supra note 4.

6. I use the examples of Earl Shriner, Andre Brigham Young, and Joseph Rosenow to illustrate dangerous sex offenders as all three have been the source of much public outrage and media attention, which has led to legislative action.

for reformation.\textsuperscript{8} Because of the inconsistency with discretionary sentencing and lack of assurance that convicted offenders would serve any portion of their full sentence term through the parole system,\textsuperscript{9} presumptive determinate sentencing\textsuperscript{10} in the form of the Sentencing Reform Act ("SRA") was introduced as an across the board change to all crimes, including sex crimes.\textsuperscript{11} The SRA's purpose, as cited within the text of the statute, was to devise just punishment proportionate with the seriousness of crimes as well as with offenders' criminal history and consistency in punishments for similar offenders.\textsuperscript{12}

While the SRA achieved justness, proportionality, and consistency in sentencing for offenders overall, the Washington legislature has found determinate sentencing does not present the most effective sentencing scheme for sex offenders in particular.\textsuperscript{13} Most importantly, presumptive determinate sentencing under the SRA automatically released sex offenders back into the community after serving their sentences, with no supervision and no provision for further government action absent another offense.\textsuperscript{14}

In 1990, in response to public outrage over a convicted sex offender released into the community who violently raped and mutilated a young boy,\textsuperscript{15} Governor Booth Gardner convened a task force to assess the needs for sex offender sentencing.\textsuperscript{16} Due to the absence of supervision and high potential for recidivism for some sex offenders, the Governor's Task Force on Community Protection recommended that the Washington legislature adopt a civil commitment procedure for a

\begin{enumerate}
\item \textsuperscript{8} Id.; see 1935 Wash. Laws ch. 114, § 1; 1947 Wash. Laws ch. 47, § 1.
\item \textsuperscript{9} 1981 Wash. Legis. Report ch. 137, § 81 (providing background to indeterminate sentencing; although maximum sentences are provided, the discretionary power of sentencing judges and the Board of Prison Terms and Paroles failed to ensure offenders were serving sentences). Other reasons for the change include: wide disparity in sentences received by similar offenders, lack of accountability, absence of predictability favored in law, and the inability to plan for prison capacity and management. 1981 Wash. Legis. Report at 71.
\item \textsuperscript{10} 1981 Wash. Legis. Report ch. 137 at 71 (presumptive determinate sentencing is premised upon creation of sentence ranges reflecting the severity of offenses).
\item \textsuperscript{12} 1981 Wash. Laws ch. 137, § 1 (outlining the purpose of the SRA and goals it hoped to accomplish for sentencing; other purposes included protection for the public, opportunity for improvement of offenders, and efficient use of state resources).
\item \textsuperscript{13} See Boerner, supra note 1, at 525.
\item \textsuperscript{14} Id. at 546 (Governor's Task Force found legal system worked as designed, i.e., punishing crimes committed and releasing offenders back into the community, which was believed to be unacceptable for sex offenders likely to re-offend).
\item \textsuperscript{15} Id. at 525.
\end{enumerate}
small portion of "sexually violent predators." The Task Force recommendations culminated in the Community Protection Act, also known as the Sexually Violent Predator statute, which enabled the State to involuntarily civilly commit sexually violent predators after serving their criminal sentence. While this civil commitment scheme provided an immediate solution to the problem of dangerous sex offenders being released with no supervision and satiated the public outcry, it also presented pressing constitutional issues that garnered much litigation.

Additionally, the Sexually Violent Predator ("SVP") statute did not apply to all sex offenders, and most offenders were released back into the community after serving their sentences. Responding to concerns about convicted sex offenders relocating to neighborhoods, the legislature enacted several measures requiring registration and community notification, and finally authorized the Department of Corrections to make changes to offenders' community custody conditions. However, these measures did not grant the State the means necessary for controlling sexually violent offenders, once released, in an efficient and cost-effective manner.

In the 2001 Second Special Session, the Washington Legislature drastically changed sex offender sentencing beginning with crimes

17. See Boerner, supra note 1, at 547–550 (Task Force found it unnecessary at that time to overturn the sentencing system for all sex offenders; it just tried to protect public from small portion of extremely violent individuals).
19. WASH. REV. CODE § 71.09.010 (2001) (a "sexually violent predator" has a personality disorder or mental abnormality that is not amenable to treatment, making them likely to engage in sexually violent behavior).
20. The SVP statute provided an immediate avenue to preventing convicted sex offenders from re-offending. Being civil in nature, the SVP statute was not subject to the double jeopardy concerns that an additional criminal procedure would be subject to. The Governor's Task Force considered other options aside from civil commitment and felt trapped by the double jeopardy concerns of other sentencing schemes. Boerner, supra note 1, at 548–550.
21. See e.g., Selig v. Young, 531 U.S. 250 (2001) (finding statute civil in nature and non-punitive and not violating double jeopardy and ex post facto clauses); Brock v. Weston, 31 F.3d 887 (9th Cir. 1994) (finding civil confinement not an extension of previous sentence); In re Young, 122 Wash.2d 1, 857 P.2d 989 (1993) (finding statute constitutionally permissible civil commitment and not violating due process, double jeopardy prohibition, or ex post facto prohibition); In re Brooks, 94 Wash. App. 716, 973 P.2d 486 (1999) (finding statute does not violate equal protection); In re Aqui, 84 Wash. App. 88, 929 P.2d 436 (1996) (finding statute does not violate separation of powers doctrine); In re Aguilar, 77 Wash. App. 596, 892 P.2d 1091 (1995) (finding statute not void for vagueness and satisfying equal protection when court considers less restrictive alternatives to total confinement).
committed on and after September 1, 2001.23 With the passage of the Third Engrossed Substitute Senate Bill 6151,24 also known as the Sex Offender Management Act ("SOMA"), the legislature provided for the management and sentencing of sex offenders. The bill targets both those being preventatively detained in civil commitment and those imprisoned in the criminal system for punishment. Both parts of SOMA address legitimate public concerns: sex offense prevention and sex offender management.

To grant the State more control over violent sex offenders and to ensure public safety, the Washington Legislature returned to a "parole-based" indeterminate sentencing model for sex offenders with SOMA. The newly enacted SOMA differed from the pre-existing Sentencing Reform Act. The SRA punished offenders based on desert; convicted offenders served sentences proportionate with crimes committed and they were released after completing their sentences. However, the new sentencing structure under SOMA combines both deserved punishment with preventative detention in the criminal system. With the new system, the State is not only punishing based on desert but also on prevention. These are two inconsistent goals and principles. Incapacitating based on a finding of dangerousness is not deserved punishment, but is solely based on prevention. The new system efficiently combines both the purpose of determinate sentencing in the criminal system with the incapacitation of the civil commitment process into one sentence.

B. Criminal Indeterminate Sentencing for Sex Offenders Compared to the Civil Commitment System

Major distinctions can be drawn between the civil and criminal systems. First, the new system under SOMA is criminal in nature—all of the detention is accomplished in the criminal prison system, compared to detention at the Special Commitment Center for civil commitment under the SVP statute.25 Second, the civil commitment system requires proof that the offender is a sexually violent predator, finding beyond a reasonable doubt the offender has a mental abnormality or personality disorder not amenable to treatment, making the offender likely to re-offend.26 The new criminal system established

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23. 3ESSB 6151, enacted as the Sex Offender Management Act, 2001 Wash. Laws, ch. 12, § 9.
under SOMA requires a finding beyond a reasonable doubt that the offender committed the crime charged, but does not require a finding of mental illness, abnormality, or personality disorder. In order to continue holding or preventively detaining the offender, the State must find the offender is more likely than not to re-offend if released.\textsuperscript{27} Third, offenders sentenced under SOMA's criminal system will all be detained in a state prison facility.\textsuperscript{28} Unlike the civil commitment statute, which requires several specific facilities to house the residents,\textsuperscript{29} there is no costly special facility for detention of this target group.\textsuperscript{30}

Finally, since its enactment in 1990, the SVP statute has been and continues to be the subject of controversy and litigation. The SVP statute has been attacked as unconstitutional on several of the following fronts: as violating the residents' substantive and procedural due process rights, as excessive punishment in violation of the Eighth Amendment, as ex post facto and Double Jeopardy violations, and in violating the residents' Equal Protection rights.\textsuperscript{31} Additionally, the Special Commitment Center, where those civilly committed reside, currently operates under an injunction because the Center failed to provide the residents with constitutionally required mental health treatment and opportunities for eventual rehabilitation and release.\textsuperscript{32}

Although the constitutionality of the overall SVP statute seems to have been settled by \textit{Seling v. Young} (discussed infra), the costs to maintain and defend the system, along with the potential risk of the Center being shut down for constitutional deficiencies, have seemingly proved too great for the State to bear.\textsuperscript{33} The need for efficient, effective

\textsuperscript{27} \textit{See} Sex Offender Management Act, 2001 Wash. Laws ch. 12, § 306.

\textsuperscript{28} \textit{See id.} at § 304.

\textsuperscript{29} \textit{See} WASH. REV. CODE § 71.09.010 (2002). Because the statute is civil, rather than criminal in nature, those committed are not housed in prison, but in special facilities established specifically for the civil commitment system.

\textsuperscript{30} Prisons under the control of the Department of Corrections are already built and maintained, unlike the SVP statute that required the State to build entirely new facilities to house those civilly committed. \textit{See id.}

\textsuperscript{31} \textit{See e.g.,} Seling v. Young, 531 U.S. 250 (2001) (holding SVP statute civil and therefore constitutional); Young v. Weston, 176 F.3d 1196 (9th Cir. 1999), \textit{amended at} 192 F.3d 870 (9th Cir. 1999) (holding SVP statute unconstitutional because punitive as applied); Turay v. Seling, 108 F. Supp. 2d 1148 (W.D. Wa. 2000); Young v. Weston, 898 F. Supp. 744 (W.D. Wa. 1995) (petition for writ of \textit{habeas corpus} because SVP criminal and unconstitutional); In re the Detention of Turay, 139 Wash.2d 379, 986 P.2d 790 (1999); In the Matter of the Personal Restraint of Young, 122 Wash.2d 1, 857 P.2d 989 (1993) (attacking the SVP statute as unconstitutional because criminal in nature).

\textsuperscript{32} Turay v. Seling, 108 F. Supp. 2d 1148,1150 (W.D. Wa. 2000) (discussing the injunction and the Special Commitment Center's obligations for compliance with the injunction).

\textsuperscript{33} By rehauing the entire sentencing system, the State is obviously concerned about efficiency and cost; \textit{see} Final Bill Report 3ESSB 6151, 2001 Wash. Legis Report.
control over dangerous sex offenders has always been a concern. The Washington legislature has again chosen to rely on a criminal parole based indeterminate sentencing, rather than increase the need for future reliance on the civil commitment system. This change toward increased management and decreased reliance on the civil commitment system is a long-range goal. Eradicating the need for the civil commitment system will take many years before it can be fully realized.

When the legislature granted the State greater control over sex offenders through the new sentencing structure, it corrected its original mistake in setting determinate sentences with no supervision and no state control after release. Additionally, preventatively detaining sex offenders provides greater means for protecting the public in a more effective and efficient manner than the present civil commitment system. Accordingly, as the new sentencing measures target the same offenders as the civil system, the need for the civil commitment system will eventually be abolished.

C. Overview of the Current State of Sentencing for Sex Offenders

Sex offender sentencing is complicated and convoluted due to the many changes in law and procedure. Therefore, only a summary overview of the process will be provided for a rudimentary understanding of the competing issues. For the vast majority of sex offenders, the determinate sentencing structure under the SRA still applies. For crimes committed after the SRA took effect, and before September 1, 2001, convicted offenders will be given a sentence for a specific time period rather than a sentencing range. Once the offender serves his or her time, the State is powerless to return a person under supervision in the community to prison beyond the end of his

34. See generally Boerner, supra note 1.
35. It is important to keep in mind that the new law does not immediately repeal or do away with the SVP statute. The SVP statute will still be in operation as well as the Special Commitment Center where the residents are housed. However, with the new sentencing statute in effect under the SOMA that includes provisions for indeterminate detention, hopefully the State will be able to take advantage of the preventative detention under SOMA without having to rely on the SVP statute.
36. See WASH. REV. CODE § 71.09.010 (2002); Sex Offender Management Act, 2001 Wash. Laws ch 12, § 303.
37. This excludes offenders who committed crimes before the Sentencing Reform Act took effect and after the Sex Offender Management Act took effect.
38. This includes offenders already convicted or having committed crimes prior to September 1, 2001. These offenders will still be sentenced under determinate sentencing, since applying the new act to these crimes would violate ex post facto prohibitions in the constitution.
39. September 1, 2001, was the date that Sex Offender Management Act took effect.
or her defined term.\textsuperscript{41} Although the registration and notification laws provide notice, communities are threatened with the risk of sex offenders re-offending.

After release from determinate sentencing, the only "option"\textsuperscript{42} the State has to prevent offenders from re-entering the community is the civil commitment process under the SVP statute. The SVP statute and its civil commitment process will still be in effect, provided the Special Commitment Center is not shut down. However, it is expensive and only applies to a very small percentage of all sex offenders.\textsuperscript{43} Although the civil commitment system will still operate, the function of the criminal sentencing under SOMA will reduce the amount of offenders eligible for civil commitment. Offenders currently out of prison who are convicted of new crimes and those convicted of first offenses committed after September 2001 will be sentenced under SOMA, so the State will not need the civil commitment system for these offenders. Furthermore, the Department of Corrections' ability to supervise sex offenders in the community, or place conditions on their behavior upon supervised release, varies depending on the date of the offender's crime.\textsuperscript{44} Not until July 1, 2000, when the Offender Accountability Act took effect, could the Department of Corrections adjust conditions pursuant to an offender's changing risk level, and this only applies to crimes committed after that date.\textsuperscript{45}

By enacting the new sentencing structure, the Washington legislature responded to a public need for greater safety measures and provided the means for total state control over convicted sex offenders. Through the implementation of the new indeterminate sentencing system, the State will protect the community from the most dangerous sex offenders, return control over convicted sex offenders to the criminal system, and provide efficient control in a cost effective manner for the State. Because the new sentencing scheme will serve the same preventative detention purposes once it is fully implemented, the State


\textsuperscript{42} Of course, the State could release the offenders, count on the high recidivism rate, and wait for the offender to reoffend. After reoffending and conviction, the State could then sentence the offender under the Sex Offender Management Act. But, this result is exactly what the State was taking action against in enacting the SVP statute and its recent return to indeterminate sentencing.

\textsuperscript{43} This percentage includes only those who have already been convicted of a crime and suffer from a mental abnormality or personality disorder making them likely to reoffend—this must be found beyond a reasonable doubt at special trial. See WASH. REV. CODE § 71.09.010 (2002).

\textsuperscript{44} See Final Bill Report, 3ESSB 6151.

\textsuperscript{45} See Final Bill Report, 3ESSB 6151.
should stop using the civil commitment system, allowing it to become obsolete.

D. Why Sex Offenders Are Treated Differently in the Law

The Washington legislature has enacted several laws treating sex offenders differently than others convicted of non-sex crimes. Many of the laws regarding sex offender treatment pertain to the prevention of future sex crimes, such as community notification, sex offender registration, and civil commitment. Why might legislatures treat sex offenders differently than non-sex offenders? Like others convicted in our criminal system, sex offenders just commit crimes. All crimes inflict pain, loss, and emotional suffering upon their victims, whether petty theft or rape in the first degree. Though the effects of sex offenses are logically similar to non-sex offenses, sex offenses receive different treatment in the law because, in reality, the sex offenders are different from non-sex offenders. Furthermore, the effects of sex offenses are grossly dissimilar to the effects of non-sexual offenses.

Women and children are frequently sexually assaulted, presenting a very serious problem in our society. While men are victims and targets of sexual assault, women and children are more frequently assaulted than men. Therefore, this section will refer to sex offenses against women and children.

The effects of these sexual assaults on innocent victims are devastating and long lasting, and any reduction in the offense rate would benefit society. Contrary to popular belief, sex is not necessarily the main motivating factor in sexual crimes. Previously, sex itself and sexual gratification were believed to motivate sex crimes, but studies have found power and humiliation to be the motivating factors. Sexual assaults are blatant attempts to physically and emotionally control other people. In order to understand why women and children are repeatedly and overwhelmingly victimized in sexual, rather than non-sexual assaults, psychologists have looked at our cultural habits and

47. Id.
51. Id. at 58.
mores. A power inequality exists between males and females, with men possessing the means and ability to control females. Studies have shown that men in crisis seek victims for abuse; female and child victims are often considered safer targets than other males.

In analyzing why assaults contain sexual elements, psychologists have acknowledged the importance of social constructs of heterosexuality and historical concepts of male ownership of women, women's sexuality, and their reproductive capabilities. To fully control their victims, offenders must also rob women of their sexual freedom, arguably a woman's most fundamental value. Sexual assaults are gross personal invasions and extreme violations of bodily integrity, which inflict more personal violations and inure greater victim vulnerability than nonsexual assaults. Because of these findings, psychologists propose offenders "sexually assault to control, dominate, and humiliate their victims."

Sexual predators have a high recidivism rate; coupled with a mental abnormality, sex offenders are more dangerous than persons with other disorders. Moreover, while most victims of non-sexual assault can receive redress for their violation through the use of the criminal justice system, restitution, or settlement, sexual assault victims have been robbed of more than their possessions—they have been stripped of their bodily integrity, personal autonomy, pride, and most importantly, their sexual freedom. What redress can a sexual assault victim achieve? Will a child ever be able to regain his or her sexual innocence or a woman her sexual integrity? Additionally, the public stresses the need for prevention of future sex offenses and demands the State remove the offenders from society. On behalf of Washington State citizens, our government has a duty to protect, but it has chosen to punish these offenders differently. Sex offenders create disparate damage and present unique challenges; and for these reasons merit disparate treatment in the law.

Sex offenders who repeatedly intentionally humiliate, denigrate, and mutilate their victims deserve different treatment in the law. For example, in 1989, a repeat sex offender named Earl Shriner anally and

52. Id.
53. Id.
54. Id. at 59.
55. Id. For example, rape, as a crime against a man's property interest, violated husbands' access to sexual property.
56. Id.
57. Id.
58. Id.
59. See In re Young, 122 Wash.2d 1, 857 P.2d 989 (1993).
orally raped a 7 year-old boy, repeatedly stabbed him in the back, cut off his penis, and left him for dead. The boy had just gone out to ride his bike in his neighborhood. Word of society's worst nightmare quickly spread with urgent demands for vengeance, action, and protection.

Sex offenders prey upon the weak and vulnerable for their victims. They steal innocence from children and security from the women they violate. Even non-victimized persons live with the knowledge that sex offenders could next victimize them, a family member, or a friend. Logic fails to describe why these offenders are so hated and feared for the misery they wreak on our society. Since sex offenders cause so much destruction in our society, we have chosen to treat them differently, refusing to bear the risk of more victims when there is the opportunity for prevention.

III. NEW LAW—PREVENTATIVE DETENTION FOR PUBLIC SAFETY AND GREATER STATE CONTROL

A. History of the Sex Offender Management Act—Back to Indeterminate Sentencing for Sex Offenders

The new sentencing structure and the need for more control over sex offenders were anticipated long before the present changes. Revising sex offender sentencing back to indeterminate sentencing was first considered in 1990 when the Governor's Task Force convened. The sentencing scheme enacted under SOMA was actually suggested by the Executive Committee on Violent Sex Offenders established by the Washington State Attorney General in 1990 at the same time the Task Force was convened. However, the Task Force chose not to adopt the sentencing reform, as it would implicate double jeopardy and ex post facto concerns if implemented immediately. As the Task Force was searching for a way to immediately detain recidivist sex offenders after their release from prison, the Task Force recommended the SVP

60. See Boerner, supra note 1, at 525.
61. Id.
62. Id.
63. Id.
64. Id. at 548; see generally ATTORNEY GENERAL OF WASHINGTON, EXECUTIVE COMMITTEE ON VIOLENT SEX OFFENDERS, FINDINGS AND RECOMMENDATIONS (September 1989) (suggesting creation of "sexually dangerous offender sentencing alternative," all sentences would have been for maximum with the sentencing judge setting minimum based on Sentencing Reform Act range including a review board hearing to decide future dangerousness after serving minimum sentence).
65. See Boerner, supra note 1, at 549–550.
civil commitment process. Soon after its implementation, the civil commitment statute was challenged on constitutional grounds.

Kansas has a statute virtually identical to the SVP statute in Washington. Kansas's statute was similarly challenged on constitutional grounds in *Kansas v. Hendricks*. Consequently, the Washington legislature considered sex offender sentencing scenarios without the civil commitment process, in case the civil commitment statute was declared unconstitutional. A return to indeterminate sentencing for sex offenders was proposed to replace determinate sentencing and the civil commitment procedure. In 1997, when the Court found the Kansas civil commitment statute to be civil and non-punitive in nature and constitutionally sound, the Washington legislature abandoned the complete overhaul of sex offender sentencing and continued to depend on the civil commitment statute for preventative detention.

However, the barrage of litigation was far from over regarding Washington's civil commitment statute. In 1994, in response to a resident's lawsuit against the facility and the facility administrators, Judge Dwyer of the District Court for Western Washington issued an injunction ordering the Special Commitment Center ("SCC") to bring the treatment program into compliance with constitutional standards. In 1998, due to lack of progress by the SCC, Judge Dwyer held the Center in contempt and ordered it to take actions to bring the facility into compliance with constitutional requirements, as well as providing a coherent and individualized treatment program to each resident showing the way to improvement and release.

In 2000, the SCC at McNeil Island, Washington, again came before Judge Dwyer for review, who examined whether the Center was

66. *Id.* at 550.
68. *See KAN. STAT. ANN.* § 59-29a01 (2001) (with similar finding to Washington statute, requiring involuntary civil confinement for sexually violent predators with mental abnormalities or personality disorders who are likely to reoffend if untreated).
70. *See 3ESSB 6151, Final Bill Report.*
71. *Id.*
72. *Hendricks*, 521 U.S. at 369 (holding that Kansas act does not establish criminal proceedings and is non-punitive and such finding renders Double Jeopardy and ex post facto analysis irrelevant).
73. *See 3ESSB 6151, Final Bill Report.*
74. *Cunningham v. David Special Commitment Center*, 158 F.3d 1035, 1036 (9th Cir. 1998) (factual background of appeal to Ninth Circuit Court of Appeals includes Judge Dwyer's injunction).
75. *See Sharp v. Weston*, 233 F.3d 1166, 1169 (9th Cir. 2000) (affirming order of contempt and describing Judge Dwyer's order and requirements for compliance by the Center).
providing adequate mental health treatment to the residents as required by the Due Process clause, Supreme Court decisions, and his 1994 injunction.\textsuperscript{76} Judge Dwyer found the State, per the SCC, while making enormous steps to provide adequate treatment to the residents, still failed to provide less restrictive alternatives for the residents.\textsuperscript{77} Judge Dwyer also remarked in his opinion reviewing the Center's improvements that the question of whether "better and more economical ways exist to prevent sex offenders from re-offending is for the public and the state legislature, not the courts, to decide."\textsuperscript{78}

Because the SVP system is civil in nature, the residents must be offered mental health treatment and an opportunity for eventual release after successful treatment. The State must provide less restrictive housing alternatives to the total confinement SCC.\textsuperscript{79} If less restrictive alternatives were not provided, the plaintiffs would be unconstitutionally denied due process and the SVP statute would fail. It is interesting to note that the SCC operates under the same injunction to this present date.\textsuperscript{80}

While cases were pending at the Washington State Supreme Court level,\textsuperscript{81} the United States Supreme Court granted certiorari to Young \textit{v.} Weston, on appeal from the Ninth Circuit, to decide the constitutionality of the Washington SVP statute.\textsuperscript{82} On certiorari, Young \textit{v.} Weston became Seling \textit{v.} Young.\textsuperscript{83} Under Seling, the Washington SVP statute came under direct constitutional attack. The Supreme Court granted certiorari on March 20, 2000, to resolve a split between the Ninth Circuit and the Washington State Supreme Court.\textsuperscript{84} Seling was argued on October 31, 2000,\textsuperscript{85} and the court issued its opinion on January 17, 2001.\textsuperscript{86} While the Young litigation was pending, the

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\item 76. Turay \textit{v.} Seling, 108 F. Supp. 2d 1148 (W.D. Wash. 2000) (consolidated several cases for purposes of injunctive relief involving similar claims).
\item 77. \textit{Id.} (finding the less restrictive alternatives are necessary for the constitutional requirement of treatment and the possibility of cure and release).
\item 78. \textit{Id.} at 1152.
\item 79. See WASH. REV. CODE § 71.09.010 (2002).
\item 80. See Sara Jean Green, \textit{Sex-offender plan spurs changes in some cities, others gamble that State will pick sites elsewhere}, SEATTLE TIMES, Sept. 15, 2002, at B1.
\item 81. \textit{In re} Turay, 139 Wash.2d 379, 986 P.2d 790 (1999); \textit{In re} Campbell, 139 Wash.2d 341, 986 P.2d 771 (1999).
\item 82. 192 F.3d 870 (9th Cir. 1999), \textit{cert granted}, Seling \textit{v.} Young, 529 U.S. 1017 (2000) (deciding whether the conditions of confinement are punitive or non-punitive for purposes of the ex post facto and double jeopardy clauses).
\item 83. 529 U.S. 1017 (2000).
\item 84. \textit{Id.}
\item 85. 531 U.S. 250 (2001).
\item 86. \textit{Id.}
Washington legislature again considered changing sex offender sentencing in case the civil commitment process was rendered unconstitutional. The Supreme Court found Washington's SVP statute to be constitutionally sound, and the Washington legislature was not faced with eradicating the civil commitment procedure.

Although constitutionally sound, Washington State has spent a great deal of money litigating the cases to defend its law, in addition to the mounting costs of running the SCC. Those costs, along with the remaining need for an efficient, effective system for preventing sexually violent offenses, and a way to provide less restrictive alternatives, prompted the legislature to pass the omnibus bill in the 2nd Special Session in 2001. Indirectly heeding Judge Dwyer's advice, the Third Engrossed Substitute Senate Bill 6151, or SOMA, was passed on June 21, 2001. Governor Gary Locke signed the Bill on June 26, 2001.

B. How the New Sentencing System Works for Sex Offenders

While the whole act pertains to the management of sex offenders in the civil commitment system and criminal system, the new sentencing structure located in section 303 of SOMA is the practical focus of the legislation. The sentencing structure under section 303 applies

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88. Seling v. Young, 531 U.S. 250 (2001) (declining to use "as applied" analysis and finding the statute to be civil on its face and not violating double jeopardy and ex post facto prohibitions).
89. H.B. 3124 and S.B. 6836 both died in committee.
90. Budget figures for the SCC are about $125,000 per resident, per year. See 3ESSB 6151, Final Bill Report.
93. The Sex Offender Management Act states:
   (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
   a. Is convicted of:
      i. Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;
      ii. Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or
      iii. An attempt to commit any crime listed in this subsection (1)(a); committed on or after the effective date of this section; or
   b. Has a prior conviction for an offenses listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after the effective date of this section.
only to crimes committed after September 1, 2001.\textsuperscript{94} Offenders convicted of included sex crimes,\textsuperscript{95} including crimes with a finding of sexual motivation,\textsuperscript{96} or attempts to commit any included crimes,\textsuperscript{97} will be sentenced under section 303, unless he or she has already been convicted of a Two Strike offense, which provides for sentencing according to the persistent offender proceedings.\textsuperscript{98}

If an offender is convicted and section 303 applies, the court will impose a minimum and a maximum sentence according to the statutory prescription, either within or outside the standard range.\textsuperscript{99} The sentence will be served in prison, or another state facility, under the control of the Department of Corrections ("DOC").\textsuperscript{100} Treatment

\begin{enumerate}
\item An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.
\item Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard range for the offense, or outside the standard range pursuant to RCW 9.94A.390, if the offender is otherwise eligible for such a sentence.
\item A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.
\begin{enumerate}
\item Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to sections 304, 307, and 308 of this act.
\item As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under sections 304 and 306 through 309 of this act.
\end{enumerate}
\end{enumerate}

\textit{Sex Offender Management Act, 2001 Wash. Laws ch. 12, § 303.}

\begin{enumerate}
\item Id.
\item Id. Included crimes are: rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion. Id.
\item Id. Included crimes are: any of the following with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree. Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
shall be provided to offenders while incarcerated, although the guidelines for such treatment are not outlined in the Act itself.

No later than ninety days before the minimum term expires, the Indeterminate Sentencing Review Board101 ("ISRB") shall examine the offender, using methodologies recognized by experts in the prediction of sexual dangerousness, to determine whether the offender will engage in sex offenses if released.102 The ISRB will determine by a preponderance of the evidence if the offender is more likely than not to commit sex offenses if released on conditions set by the board.103

The presumption is toward release of the offender, unless the State proves the offender is more likely than not to re-offend. If found likely to re-offend, the offender will be sent back to the Department of Corrections with a new minimum term, not to exceed two years.104 This procedure of dangerousness review and setting minimum sentence terms will continue until the offender is released or has served his or her maximum term.105 After release, the offender will be subject to conditions set by the Board until the expiration of the maximum sentence.106 If the offender fails to comply with any condition, the State has the authority to return the offender to prison under the maximum sentence.107 The ISRB was chosen to make these release decisions because the Board has immunity from lawsuits resulting from its release decisions.108 This immunity will be even more important now that the purpose of detention is to prevent future crimes, rather than to rehabilitate offenders.

C. The Sex Offender Management Act's Purpose & Policies

The main focus of SOMA is public health, safety, and welfare. Although the sentencing changes for sex offenders are the practical focus of the Act for the criminal justice system, the Bill addresses more than just sentencing. The Sex Offender Management Act accomplishes two major legislative goals. First, it provides location siting for less restrictive alternatives to comply with the due process constitutional requirements of the SVP statute; it provides funds and guide-

101. The ISRB was originally known as the Board of Prison Terms and Paroles under the original parole system and was renamed the "Indeterminate Sentence Review Board" in 1986. 1986 Wash. Laws ch. 224.
103. Id.
104. Id.
105. Id.
106. Id.
lines for location selection in surrounding communities meant for eventual reintegration of some residents into the community, and pre-
empts local land use codes and plans.  

Second, the Act restructures sex offender sentencing and returns it to an indeterminate sentencing scheme in the criminal justice system, allowing for more direct control over offenders through completion of sentence and release.  

The portion of the Bill relating to siting and operation of secure transition facilities is a vital piece of the legislation as it is essential to the sur-
vival of the civil commitment process; it provides less restrictive alter-
natives for housing civilly committed offenders. These two Bill func-
tions go hand in hand—pertaining to sex offenders—although they may not seem like it at first glance.

**D. Constitutionally Justifying Limited Preventative Detention of**  
**Criminally Convicted Sex Offenders**

There are two separate phases to the detention under SOMA: (1) the immediate detention served under the minimum sentence; and (2) the detention after the dangerousness review, based on prevention of future crimes. The entire sentence, from the mandatory minimum to the maximum, is logically not "deserved," as indicated by the danger-
ousness review. The first phase of the detention is not based on pre-
vention, but punishment based on desert. As a result, it will not be at issue. Because the second phase of the sentence arguably is not based on desert, but is based on preventing future crimes, this phase of detention will raise issues of justification. Although proponents will argue the detention is part of the complete sentence based on deserved punishment, with opportunity for early release for good behavior just like the earlier parole system, the second phase of the detention only takes place after dangerousness has been proved. Therefore, the sec-
ond phase is not deserved detention, but is detention based on preven-
tion of future harm.

Limited preventative detention following a criminal conviction of a sex offense based on an offender's continuing dangerousness is con-
stitutionally valid when no release condition would reasonably assure public safety.  

For instance, the United States Supreme Court has

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111. Desert is a fundamental justification for punishment after commission of a crime against the State.; see Boerner, supra note 1.
112. United States v. Salerno, 481 U.S. 739, 741 (1987) (deciding that pre-trial detention was valid where arrestee was held under the Bail Reform Act of 1984—different context than post-trial, post-conviction preventative detention).
had ample opportunity to review different methods of "preventative detention" in the last twenty years. The Supreme Court has upheld methods of detention based on civil commitment, pre-trial detention, and detention of aliens unlawfully residing in the U.S. Because SOMA is a criminal sentencing scheme, it can be differentiated from the Supreme Court's previous holdings.

The statutory language under SOMA is clear and unambiguous. The Act establishes criminal, punitive detention for sex offenses. Freedom from bodily restraint is a fundamental liberty protected by the Due Process Clause. However, a state, pursuant to its police power, may imprison those convicted of crimes against the state for deterrence and retribution. There are, of course, constitutional limits on what conduct the state can criminalize. Because it is criminal detention, SOMA must comport with Due Process.

The Fourteenth Amendment's Due Process Clause forbids state governments from depriving any person of liberty without due process of law. The Due Process Clause contains a substantive component that bars certain "arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." State detention violates the Due Process Clause unless ordered in a criminal proceeding with adequate procedural protection or in narrow non-punitive circumstances, such as pre-trial detention and civil commitment where special justifications provide constitutional justification.

Alternatively, SOMA is constitutionally valid on its face. For instance, the Act is legitimate as criminal detention for deserved crimes and limited preventative detention based on continuing dangerousness. Strict scrutiny analysis applies to fundamental rights in due


114. Supra, footnote 113.


117. Foucha, 504 U.S. at 80.

118. Id.


120. Foucha, 504 U.S. at 80.

process questions,\textsuperscript{122} in this case the freedom from restraint, requiring a compelling interest and a narrowly tailored measure to the interest being served.\textsuperscript{123} Courts have found that sufficiently compelling governmental interests can justify detention of dangerous persons in narrow circumstances.\textsuperscript{124} First and foremost, a state’s regulatory interest in public safety can, at times, outweigh an individual’s interest in personal liberty.\textsuperscript{125}

The government’s interest in preventing crime, especially violent sex crimes, is both legitimate and compelling.\textsuperscript{126} This compelling interest is heightened after the state has proved beyond a reasonable doubt in a criminal trial that the offender committed a sex crime.\textsuperscript{127} The conviction illustrates the offender’s potential for committing such offenses in the future\textsuperscript{128} and justifies the Act’s preventative detention function.

A convicted sex offender’s liberty interests may be subordinated by the State’s compelling interest in preventing further sex crimes. Due Process requires the nature and duration of the detention bear some reasonable relation to the purpose of the detention.\textsuperscript{129} Detention based on preventing future dangerousness is therefore permissible if the nature and duration of the detention are tailored to reflect pressing safety concerns related to the offender’s dangerousness.\textsuperscript{130}

The Salerno decision is significant to this discussion of commitment and preventative detention because it was the first Supreme Court decision to analyze the constitutionality of adult preventative detention in the criminal system.\textsuperscript{131} The Salerno reasoning is therefore more relevant and persuasive than reasoning in other preventative detention cases because the court analyzed detention in criminal cases, rather than civil commitments. The Salerno Court concluded that the pretrial detention under the Bail Reform Act of 1984 was not punitive

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{122} See Foucha, 504 U.S. at 80.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} United States v. Salerno, 481 U.S. 739, 748 (1987).
  \item \textsuperscript{125} See id.
  \item \textsuperscript{126} See id. at 749–750 (emphasis added).
  \item \textsuperscript{127} See id. at 750–751.
  \item \textsuperscript{128} See Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (finding “previous instances of violent behavior are an important indicator of future violent tendencies”); Jones v. United States, 463 U.S. 354, 364 (1983) (finding “the fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicate dangerousness”).
  \item \textsuperscript{129} Jones, 463 U.S. at 368.
  \item \textsuperscript{130} Foucha, 504 U.S. at 88 (citing to Salerno).
\end{itemize}
\end{footnotesize}
and was permissible regulatory detention because Congress intended the detention to provide safety to the community in preventing further crimes, which the Court found to be a legitimate regulatory goal.\textsuperscript{132} Under the Bail Reform Act, arrestees charged with certain crimes involving violence or repeat offenses and who posed a significant danger to the community if released could be preventatively detained pending trial.\textsuperscript{133} In order to detain the arrestee, the Government must prove by clear and convincing evidence in an adversary hearing that no conditions of release would reasonably assure the community's safety.\textsuperscript{134} The \textit{Salerno} Court upheld this detention as it was carefully limited to the most serious of crimes, the arrestee was entitled to a prompt detention hearing where the Government bore the burden of proving dangerousness, and the length of the pretrial detention was of a finite duration.\textsuperscript{135}

Additionally, the \textit{Salerno} Court did not find the pretrial detention excessive, as it related to the regulatory goal of protecting the public and preventing future dangerousness.\textsuperscript{136} Also, the Government's compelling interest in preventing crime was bolstered by its ability to offer convincing proof that the person detained, already indicted on a serious crime, was dangerous.\textsuperscript{137} Under these narrow circumstances, the crime prevention interest was penultimate,\textsuperscript{138} and consistent with the Due Process Clause, the arrestee could be detained in order to protect that interest.\textsuperscript{139} Under SOMA, offenders will be imprisoned following a criminal conviction, either by criminal trial and proof beyond a reasonable doubt or by a guilty plea.

The criminal conviction of a sex offense is proof in itself that the offenders are dangerous. These sex offenders will serve a mandatory minimum sentence and will be preventatively detained only after the State proves upon a preponderance of the evidence that the offender is more likely than not to commit another sex offense if released. If it is shown that an offender is likely to re-offend, he or she is held for a finite duration of no more than two years. The total detention is not indefinite. Rather, the detention, based on dangerousness, is limited by the stringent time limitations of the offender's maximum sentence.

\begin{itemize}
\item \textsuperscript{132} \textit{Salerno}, 481 U.S. at 747.
\item \textsuperscript{133} \textit{Id}.
\item \textsuperscript{134} \textit{Id.} at 751.
\item \textsuperscript{135} \textit{Id}.
\item \textsuperscript{136} \textit{Id}.
\item \textsuperscript{137} \textit{Id.} at 750.
\item \textsuperscript{138} \textit{Id}.
\item \textsuperscript{139} \textit{Id.} at 751.
\end{itemize}
The detention under SOMA, like the detention in *Salerno*, is permissive and narrowly tailored to a compelling state interest. These persons are dangerous, and more dangerous than the detained persons under *Salerno*, as they have already been convicted of sex crimes and are serving their sentences. Their prolonged detention is based on prevention of future crimes. Because the State has shown that the offenders are more likely than not to re-offend if released, even with conditions of community custody like notification and reporting to a community custody officer, the State has determined that no measure other than their continued detention would provide community safety.

Procedural due process requires that the substantive elements be implemented in a fair manner. The detention takes place following a criminal conviction with all of its procedural safeguards. In order to further detain these offenders following the minimum sentence, the State must prove by a preponderance of the evidence that the offender is likely to re-offend and that no other protection except continued detention will suffice. The State must bear this burden at every single dangerousness review. The offenders will be provided treatment to decrease the likelihood of their re-offending and to increase the likelihood of their release. The duration of the preventative detention is finite. Detention following the dangerousness review cannot exceed two years and total confinement cannot exceed the offender's maximum sentence.

A potential area for concern regarding substantive and procedural Due Process is the State's burden of proof that the offender continues to pose a threat if released, will re-offend, and should therefore be further detained. The Sex Offender Management Act only requires a simple preponderance of the evidence standard. The initial proof beyond a reasonable doubt that the offender committed a sex crime, in addition to the dangerousness review standard, is more than sufficient to withstand scrutiny. However, because the dangerousness review is a separate and distinct proceeding, it should be bolstered with a heightened burden of proof similar to that required by the Bail Reform Act upheld in *Salerno*. The Bail Reform Act requires proof upon clear and convincing evidence that there are no suitable release conditions. The State should reconsider the preponderance of the evidence standard in light of previous Supreme Court decisions and amend the Act to re-

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140. If the government's interest in preventing crime by arrestees was both legitimate and compelling in *Salerno*, then it surely is here where the individuals have already been convicted of crimes instead of just charged with them.

141. *Salerno*, 481 U.S. at 746 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
quire the State to show clear and convincing evidence of the offender's continuing dangerousness.

With all of these procedural safeguards in addition to the substantive safeguards provided by SOMA and the criminal justice system itself, limited detention of sex offenders following criminal convictions based on continuing dangerousness is constitutionally justified. As the system is constitutionally valid, an inquiry into its rationality and viability as a preventative detention scheme is warranted.

E. Is the Act a Rational System and Will It Succeed As a Preventative Detention Scheme?

The new scheme presents two goals and functions of sentencing: (1) incarceration and punishment based on desert; and (2) preventative detention based on a finding of future dangerousness.

Paul Robinson, a professor of law at Northwestern University, recently examined the divergent goals in punishing dangerousness in an article entitled Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice. In the article, Professor Robinson posits if further detention is needed beyond a prison term to prevent future crimes, the system preventatively detaining offenders should be open about its purpose. Robinson believes the criminal justice system is the wrong place for such efforts and should only be used as punishment for deserved sentences, not future crimes. Robinson argues that cloaking preventative detention as criminal justice offers practical advantages in bypassing the logical restrictions to preventative detention.

Robinson also presents four factors to analyze the rationality of preventative detention in criminal systems. First, if the detention is justified with dangerousness, then as soon as the dangerousness is no longer a factor, the justification for detention ends. While detained for dangerousness, the government should be required to periodically prove the offender's continuing dangerousness. Characterizing the preventative detention as deserved punishment eliminates the need for periodic review, as dangerousness is not an element of deserved pun-

143. See Id. at 1432.
144. Id.
145. Id. at 1446.
146. Id.
147. Id.
148. Id. at 1432.
ishment. Second, when the detention benefits society with increased public safety, rather than functioning as punishment deserved by the offender, the confinement should not be punitive. Imprisonment for punishment inflicts suffering upon the offender, suffering that is inconsistent with preventative detention's goal of protecting the public. Rather than being punished, those who are preventatively detained for a societal benefit should only suffer an intrusion of personal liberty at the least. Third, this preventative detention should be limited to the minimum necessary for the public's safety. In contrast, deserved punishment does not merit the same minimum punishment analysis as detention for prevention. Finally, if treatment could reduce the length or the intrusiveness of the detention, it should be provided under the preventative detention principle.

Using Robinson's factors, indeterminate sentencing under SOMA can be analyzed to determine whether it is a rational preventative detention system or whether Washington is cloaking preventative detention and is now "punishing dangerousness." Although Robinson believes using the criminal justice system to prevent future crimes perverts the justice process, Washington's use of the criminal justice system to prevent future crimes outweighs the costs and controversy of prevention using the civil commitment system.

Overall, Washington's indeterminate sentencing for sex offenders provides a rational system for preventative detention as it periodically reviews and proves offenders' dangerousness, is limited to the minimum detention necessary for public safety, and provides treatment to offenders. First, the sentencing scheme under SOMA clearly presents itself as a criminal system. The sentencing format is added to the criminal sentence statute and describes the management of offenders in the criminal justice system as being one of its main purposes. Additionally, the detention is clearly labeled as a "sen-
tence"\textsuperscript{159} and is not referred to as commitment or some other label connoting anything other than a criminal measure.\textsuperscript{160}

Second, the Act requires continuing examinations of dangerousness and justification for continued incarceration.\textsuperscript{161} Before the minimum sentence has been completed,\textsuperscript{162} the offender will be examined to determine whether he or she is likely to engage in sex offenses if released.\textsuperscript{163} Although this portion of the sentence is clearly predicated on punishment for the crime committed,\textsuperscript{164} what follows after the dangerousness assessment is confinement based on prevention.\textsuperscript{165} Under determinate sentencing, the offender would have been presented with the same sentence range.\textsuperscript{166} However, after serving the minimum range of his or her sentence, that portion which is based on punishment and desert, the offender would have been released back into the community.\textsuperscript{167} On the other hand, under indeterminate sentencing, the offender is subject to further detention after serving the portion of his or her sentence based on desert.\textsuperscript{168} If it is found by a preponderance of the evidence that the offender is more likely than not to commit another sex offense if released,\textsuperscript{169} then the offender will be held for a new minimum term, not to exceed two years.\textsuperscript{170} At the end of this new minimum term, the offender will again be subject to a dangerousness assessment, and this process will continue for the statutory maximum of the crime.\textsuperscript{171} The opportunity for dangerousness review, although infrequent, does provide a recurring method of proving current dangerousness, thereby justifying continued incapacitation.

\begin{itemize}
\item \textsuperscript{159} Id.
\item \textsuperscript{160} As distinguished from the civil commitment system, which refers to "commitment."
\item \textsuperscript{161} See Sex Offender Management Act, 2001 Wash. Laws ch.12, § 306.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. (using incorporated methodologies recognized by experts in the prediction of sexual dangerousness and including a prediction of the probability that the offender will re-offend).
\item \textsuperscript{164} This portion of the crime is mandatory and would be served under a determinate sentencing structure.
\item \textsuperscript{165} The State has proved that the offender is more likely than not to commit another sex offense if released, so the finding is based on prevention, as opposed to deserved punishment.
\item \textsuperscript{166} See Sex Offender Management Act, 2001 Wash. Laws ch. 12; WASH. REV. CODE § 9.94A.130 (SRA).
\item \textsuperscript{167} WASH. REV. CODE § 9.94A.130 (2002).
\item \textsuperscript{168} Sex Offender Management Act, 2001 Wash. Laws ch. 12, § 303 at 9.
\item \textsuperscript{169} Sex Offender Management Act, 2001 Wash. Laws ch. 12, § 306(3).
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\end{itemize}
Third, the system on its face is clearly punitive. However, when offenders are released into community custody rather than further detained in prison after the dangerousness review, the resulting measure is then non-punitive. The offender serves his or her sentence in prison in the custody of the Department of Corrections. This includes not only the minimum sentence based on desert and punishment, but also the extended sentence after the dangerousness assessment, based on prevention. Therefore, the offender being incapacitated, based on a premise of prevention, suffers the same incarceration as those offenders serving sentences based on punishment. Contrary to punitive detention, another distinct provision of SOMA is the community custody requirement upon offender release, where offenders are returned their personal liberty, subject to conditions placed upon their community custody. Offenders sentenced under the Act are subject to community custody until the expiration of their maximum sentence, which could be life for some offenses. Some might consider this release from detention with community custody restrictions punitive, however, in comparison to total confinement in prison, it could hardly be considered punitive.

At the dangerousness review, after proving that the offender is likely to re-offend and that even with community custody, community registration and notification, the community will not be safe, the offender is returned to prison. The State should consider detaining these offenders, following the dangerousness review, in a less restrictive alternative to total confinement with other prisoners serving deserved sentences. The less restrictive alternative should be non-punitive, as the State should not be punishing these offenders for their continuing dangerousness. Rather, the State should be simply detaining and providing treatment to them until they are no longer a threat and can be released.

Fourth, preventative detention should be limited to the measure of confinement necessary for the public's safety. During the minimum portion of their sentence, offenders are in prison under the control of the Department of Corrections. Offenders remain in prison

172. Community custody is the effective equivalent of parole. Offenders are released from prison with restrictions on their mobility and requirements for periodic communication with their community custody officers.
175. Id.
176. Id.
177. Id.
only so long as they are still considered dangerous and likely to re-offend. When the offender is found less likely to re-offend, then he or she should be allowed back into the community. Even after release, all offenders will remain subject to conditions of community custody further protecting the public. At each level of the sentence, detention is limited to the minimum confinement necessary for the public safety.

Fifth, treatment should be available to offenders during their incarceration, especially if it could reduce the amount of time they are incapacitated or affect their determination of dangerousness. Sex offender treatment shall be provided to offenders during their incarceration.178 Because this is a different system than provided for under the civil commitment statute, and the system is not predicated on mental illness, abnormality, or treatable personality disorders,179 treatment is not constitutionally required. However, since the system is predicated on prevention and eventual release once dangerousness is no longer at issue, treatment is logically required. Because the treatment for offenders is not defined in the Act, when the treatment should occur remains undefined. If the release determination will be made upon finding of non-dangerousness, treatment should logically be provided at all times during incarceration to provide offenders an opportunity to be released after only their original minimum sentence and reduce the chances they will re-offend once released.

All sentencing is politically motivated and SOMA is no exception. The legislative process, as a political machine negotiating compromises between the law and the public, rarely provides theoretically pure policies and procedures. Even though Washington's new system for sex offenders does not match up with all of Robinson's factors, indicating Washington may now be punishing dangerousness, the legislature responded to what the public needed by providing greater security and protection from repeat sex offenders.

IV. CONCLUSION

Transitions, changes in legislation, and their effects often take time and usage to come to fruition. Because the new sentencing measures only apply to crimes committed after September 1, 2001, sentencing for those crimes may be months from now. Accordingly, it may

take years for the full system, with the working release determinations, to be reviewed.

The new sentencing structure is a departure from presumptive determinate sentencing for sex offenders and a return to indeterminate "parole-based" sentencing. It will eventually obviate the need for the SVP statute and provide a more efficient, effective alternative in the interim. Consider the following characteristics of the new system: it presents determinate sentencing minimums; it pertains to only the most dangerous, violent sex offenders, a small percentage of total offenders; it provides an opportunity for treatment; it appropriately targets sexually violent offenders likely to re-offend; it provides non-violent offenders an opportunity to get out of prison; and it offers preventative detention solutions in response to dangerousness without requiring a finding of mental abnormality or personality disorder to preventatively detain offenders. Most importantly, the new system is superior to the civil commitment system as a method of sex offender management. It allows for community custody and supervision of the offender for the statutory maximum of the offense and enables the State to immediately pull the offender back into the system if he or she re-offends. Additionally, the new system, which was enacted in response to the public's concerns, is a more efficient expenditure of the State's resources, and it provides a rational system for preventative detention.

Finally, the newly enacted system is not perfect as it stands, and it may be improved. The Sex Offender Management Act would better withstand due process scrutiny if a heightened burden of proof were substituted for a preponderance of the evidence standard at the dangerousness review, in light of previous Supreme Court precedent. In addition, the Act would provide a fully rational system if non-punitive housing conditions were provided for those preventatively detained after the dangerousness review.

While it may take time for the new structure to function, the changes present the most comprehensive reform in sex offender sentencing to date. As long as the system works as designed, the return to indeterminate sentencing for sex offenders will correct the lack of supervision of sex offenders created by determinate sentencing, return

180. The Sexually Violent Predator civil commitment statute requires a jury finding of mental abnormality or personality not amenable to treatment to commit an offender and hold the offender beyond his or her sentence. WASH. REV. CODE § 71.09.010 (2001). The new statute requires no such finding. See Sex Offender Management Act, 2001 Wash. Laws ch. 12.
much control to the State, and provide an alternative to civil commitment, eventually rendering it obsolete.