I. INTRODUCTION

Recently, the public has been outraged by a number of gruesome sexual offenses committed by individuals having a history of sexual deviance.\(^1\) Many people feel that these sexual offenses could have been predicted with complete accuracy. Even so, the Washington legal system was powerless to prevent the commission of these crimes.

In response to the public's outrage over the legal system's inability to prevent these sexual offenses,\(^2\) several groups proposed changes to the system to help prevent future acts of sexual violence.\(^3\) The proposal that was enacted into law was prepared by the Governor's Task Force on Community Protec-

1. Two particular incidents were covered in great detail by the media. In the first incident, Gene Raymond Kane was convicted of killing Diane Ballasiotes. At the time of Ballasiotes' murder in September, 1988, Kane was a work release prisoner in downtown Seattle. Kane had previously been imprisoned for two different sexual assaults. Seattle Times, Oct. 11, 1989, at B3, col. 1; Seattle Times, June 18, 1989, at A1, col. 1. The second incident involved the rape and mutilation of a seven-year-old Tacoma boy. The man charged with these offenses, Earl Shriner, had a history of committing violent crimes, many of which appear to have been sexually motivated. Seattle Post-Intelligencer, May 22, 1989, at A1, col. 1; Morning News Tribune (Tacoma), May 22, 1989, at A1, col. 6; Morning News Tribune (Tacoma), June 21, 1989, at B1, col. 1. Shriner was convicted of one count of first-degree attempted murder, two counts of first-degree rape, and one count of first degree assault. Seattle Times, February 7, 1990, at A1, col. 1. For these crimes, Shriner was sentenced to 131 and 1/2 years. Seattle Times, March 26, 1990, at A1, col. 1.


3. Morning News Tribune (Tacoma), Oct. 12, 1989, at B1, col. 1. The governor established the Task Force on Community Protection to study the problem of sexual violence and to make recommendations for changes to the legal system to reduce the violence. In addition to the Governor's Task Force, an ad hoc legislative committee and the Attorney General studied the situation. Executive Committee on Violent Sex Offenders, Findings and Recommendations, (September, 1989).
tion. The legislation relies on several strategies to control, monitor, and change the behavior patterns of sexual offenders. These strategies include increased jail terms for all sexual offenders, increased jail terms for repeat offenders, particularly for adult offenders with a history of committing sexual offenses as juveniles; indefinite civil commitment of those offenders found to be "sexually violent predators;" extended post-prison supervision of convicted sexual offenders; stricter control of offenders placed in community outpatient treatment programs; decreased amounts of early release credit due to "good time" served in prison for sexual offenders; and mandatory registration of sexual offenders with the Washington State Patrol.

The most controversial portion of the legislation is the civil commitment system that allows the state to commit indefinitely those offenders determined to be "sexually violent predators." The commitment scheme is also the component

4. Compare 1990 Wash. Laws ch. 3, § § 1001-1013 with the Governor's Task Force on Community Protection, Department of Social and Health Services, Final Report (1989) [hereinafter Final Report]. The only major change that the legislature made to the legislation proposed by the Task Force concerned the procedure by which the predatory sexual offender could petition for release. For a further discussion of the changes made, see infra note 130.
5. 1990 Wash. Laws ch. 3.
6. Id., Part VII.
7. Id., Part III.
8. Id., Part X.
9. Id., Part VII.
10. Id., Part VIII.
11. Id., Part II.
12. Id., Part IV.
13. The legislature heard testimony from the Washington State Psychiatric Association opposing passage of the commitment system. In his testimony, Dr. James Reardon stated the Washington State Psychiatric Association's view that the current proposed legislation will confuse mental illness 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.

Dr. J. Reardon, Testimony before 1990 Washington State Legislature (January, 1990) at 1 (copy on file at University of Puget Sound Law Review) [hereinafter Dr. Reardon Testimony]. Reardon concludes:
[w]e urge you not to reinstate the failed programs begun in 1949 under the old Sexual Psychopath Laws, under the guise of Civil Commitment of Sex Offenders. You've been down that road before, and found it to be expensive and unsuccessful in treating violent sexual behavior. Instead . . . [l]ock up the rapists . . . for a long time.
Id. at 2-3.
of the legislation most likely to be subjected to constitutional attack.\textsuperscript{14}

This Comment will discuss the portion of the legislation that established the system of involuntary civil commitment of violent sexual predators [hereinafter Violent Sexual Predator Commitment System]. This Comment will explore whether the Violent Sexual Predator Commitment System could withstand procedural and substantive due process challenges. Additionally, because the system is premised on a mental disorder of the sexually violent person, the commitment scheme will also be compared with the Involuntary Treatment Act's\textsuperscript{15} civil commitment system, to determine whether the Violent Sexual Predator Commitment System violates the equal protection clause of the fourteenth amendment to the United States Constitution.

After determining that the Violent Sexual Predator Commitment System would not survive constitutional attack and that it is inconsistent with the purposes of the criminal law, this Comment concludes that the new Violent Sexual Predator Commitment System should not have been enacted. Rather, sexual offenders should be dealt with through the existing criminal justice system.

II. THE STATE'S POWER TO COMMIT SEXUALLY DANGEROUS PERSONS

The new Violent Sexual Predator Commitment System allows the state to detain and treat a person found to be a "sexually violent predator," a finding based on an assumption of a person's "mental abnormality" and a prediction of his future violence.\textsuperscript{16} In this respect, the new commitment system is typical of involuntary civil commitment systems that are used to commit the mentally ill to provide treatment to the individual and protection to the public.\textsuperscript{17}

\textsuperscript{14.} The American Civil Liberties Union has stated that it will challenge the new commitment system as soon as the state commits someone. Seattle Post-Intelligencer, June 29, 1990, at B2, col. 2. Other portions of the legislation are also likely to be subjected to constitutional attack. The most obvious is the sex offender registration portion of the proposal. The apparent difficulty with this portion of the proposal is a lack of notice of the requirement of registration. See Lambert v. California, 355 U.S. 225 (1957) (registration act requiring convicted felons to register violates due process).

\textsuperscript{15.} WASH. REV. CODE § § 71.05.010—930 (1979 & Supp. 1990).

\textsuperscript{16.} 1990 Wash. Laws ch. 3, § § 1002 & 1006. For further discussion, see infra text accompanying notes 56-76.

\textsuperscript{17.} See infra text accompanying notes 18-19.
Typical involuntary civil commitment systems are based upon one of two sources of state power. First, under its police power, the state can commit persons who pose a danger to others, thereby regulating the public safety. 18 Second, under its parens patriae power, the state can commit an individual when the individual has lost the ability to act in his own best interest and the individual's best interest would be served by involuntary commitment and treatment. 19

Similarly, typical sexually dangerous offender commitment systems are based upon a combination of the state's police power and parens patriae power. 20 By isolating the dangerous sexual offender in a state facility to protect society from harm by the offender, the state exercises its police power. By providing a treatment program for the dangerous sexual offender and ostensibly acting in the offender's best interest, the state exercises its parens patriae power. Thus, the typical dangerous sexual offender commitment system emphasizes both the protection of society and the treatment of the danger-

18. See Rudolph and Rudolph, The Limits of Judicial Review in Constitutional Adjudication, 63 NEB. L. REV. 84, 89 (1983) (state's police power can be used to regulate public health, safety, and welfare). To commit a person under its police power, a state is generally required to show that (1) the person to be committed is mentally ill, and (2) the person is a danger to himself or others. La Fond, An Examination of the Purposes of Involuntary Civil Commitment, 30 BUFFALO L. REV. 499, 501 (1980) [hereinafter La Fond]. Some states, such as Washington, require that the dangerousness be manifested by a recent overt act. In re Harris, 98 Wash. 2d 270, 284-85, 654 P.2d 109, 112 (1982) (interpreting WASH. REV. CODE § 71.05.020 (1975) to require a recent overt act). 19. La Fond, supra note 18, at 504. Under its parens patriae powers, a state may substitute its judgment for the judgment of an individual who, because of a severe mental disorder, is unable to provide for his or her basic requirements of health or personal safety, or is gravely disabled. The state is then acting in the best interest of those who have lost the ability to act in their own best interest. Id. A comprehensive discussion of involuntary civil commitment is beyond the scope of this Comment. For such a discussion, see La Fond, supra note 18. For a brief discussion of the Washington Involuntary Treatment Act, see infra text accompanying notes 171-180. For an in-depth discussion of the Washington Involuntary Treatment Act, see Durham & La Fond, The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment, 3 YALE L. & POL'Y REV. 395 (1985) (hereinafter Durham & La Fond).


It is hereby declared that the frequency of sex crimes within this state necessitates that appropriate measures be adopted to protect society more adequately from dangerous sexual offenders; ... that society as well as the individual will benefit by a legal process which would provide for indeterminate confinement, under conditions permitting segregation and psychiatric treatment as may be deemed necessary for such persons.

Id.
ous sexual offender.\textsuperscript{21}

The assumption underlying such commitment systems is that the propensity to commit violent crimes of a sexual nature is a product of a specific mental disability.\textsuperscript{22} If the propensity to commit sexual offenses is caused by a mental disability, that disability could be treated and the violent sexual offender could possibly be cured.\textsuperscript{23} Because of a growing awareness that violent sexual offenders cannot be isolated as a definable group and an increasing skepticism toward the effectiveness of treatment of violent sexual offenders, several professional groups have urged that statutes mandating commitment of dangerous sexual offenders be repealed.\textsuperscript{24}

At one time, over half of the states and the District of Columbia had statutory authority to involuntarily commit dangerous sexual offenders.\textsuperscript{25} However, recognition that not all violent sexual offenders are likely to respond to the same type of therapy, coupled with a lack of proven treatment methods, has caused many states to re-examine their dangerous sexual

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\textsuperscript{21} Note, The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence, 41 Notre Dame Lawyer 527 (1966) [hereinafter Legislative Blunder].


\textsuperscript{23} Id.

\textsuperscript{24} See id. at 743. The Group for the Advancement of Psychiatry, the President's Commission on Mental Health, and the American Bar Association Committee on Criminal Justice Mental Health Standards have all urged that these laws be repealed. Id. Additionally, the Washington State Psychiatric Association opposed the Violent Sexual Predator Commitment System. See generally Reardon Testimony, supra note 13. In its repeal of an existing sex offender commitment statute, at least one state has declared that sexual offenses are not in and of themselves the product of mental disease. Cal. Welf. & Inst. Code § 6301 (1981). Section 4 of the Historical Note to the repealed statute states:

In repealing the mentally disordered sex offender commitment, the Legislature recognizes and declares that the commission of sex offenses is not in itself the product of mental diseases. It is the intent of the Legislature that persons convicted of a sex offense . . . who are believed to have a serious, substantial, and treatable mental illness, shall be transferred to a state hospital for treatment.

Apparently, the legislature made the determination that prison terms in effect after the repeal of the statute would be sufficient to protect society without the sex offender's commitment.

\textsuperscript{25} Legislative Blunder, supra note 21, at 558. When Legislative Blunder was published in 1966, Alabama, California, Colorado, Connecticut, the District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin, and Wyoming had some form of sexual offender commitment system in force. Id.
offender commitment laws.\textsuperscript{26} Currently, only 12 states and the District of Columbia have dangerous sexual offender commitment systems,\textsuperscript{27} and only five states actively enforce the laws in more than a few isolated cases.\textsuperscript{28} Additionally, numerous states have repealed their dangerous sexual offender commitment laws.\textsuperscript{29} Therefore, the current trend is away from using dangerous sexual offender commitment systems.

\section{A. The Prior Washington Sexual Psychopath Commitment System}

Prior to the enactment of the Sentencing Reform Act,\textsuperscript{30} Washington had a statute that allowed the state to commit persons found to be "sexual psychopaths."\textsuperscript{31} This statute provided prosecutors with the discretion to allege that a defendant charged with a sexual offense was a "sexual psychopath."\textsuperscript{32} The court would then hear and decide the criminal charges. If the defendant was found guilty of the sexual offense or had

\begin{itemize}
\item 26. See Brakel, \textit{supra} note 22, at 741-43. The Washington legislature has reached the same conclusion. As stated in the introductory section to the new Washington Violent Sexual Predator Commitment System,
\item 28. See Brakel, \textit{supra} note 22, at 740. At the time the book by Brakel was published, six states actively used the violent sexual offender statutes. \textit{Id.} Washington was considered to be among those six states. However, the Washington statute has not been used since 1984. \textit{WASH. REV. CODE} § 71.06.005 (Supp. 1989).
\item 31. \textit{WASH. REV. CODE} § § 71.06.005—.270 (1975 & Supp. 1989).
\item 32. \textit{WASH. REV. CODE} § 71.06.020 (1975).
pledged guilty, the court would pronounce a sentence.\textsuperscript{33} The defendant's acquittal, however did not suspend the hearing on the sexual psychopath petition.\textsuperscript{34} While acquittal would eliminate the state's criminal jurisdiction over the defendant, the sexual psychopath petition allowed the court to retain civil jurisdiction over the defendant.\textsuperscript{35} After finding the defendant guilty or innocent, the court would then consider whether the defendant was a "sexual psychopath."\textsuperscript{36}

The Washington Supreme Court recognized that commitment under the sexual psychopath statute was a "massive curtailment of liberty" that branded the "sexual psychopath" with a lifelong stigma.\textsuperscript{37} Because of this stigma, as well as the curtailment of liberty associated with commitment, the court intimated that the alleged "sexual psychopath" would have the right to be heard, the right to counsel, the right to be confronted with evidence against him, and the right to offer evidence in his behalf, even though the statute left the option of a full adversarial hearing to the trial court's discretion.\textsuperscript{38} Furthermore, even though the commitment was civil in nature, the state had to prove the defendant's dangerousness beyond a reasonable doubt,\textsuperscript{39} a standard of proof more commonly associ-

\textsuperscript{33} Wash. Rev. Code § 71.06.030 (1975).
\textsuperscript{36} Wash. Rev. Code § 71.06.030 (1975). If the court found reasonable grounds that the defendant was a "sexual psychopath," it could order the defendant to undergo observation at a state hospital for 90 days. Wash. Rev. Code § 71.06.040 (1975). After the completion of the observation period, the superintendent of the hospital was required to return the defendant to the court, and provide a written report of his findings on the issue of sexual psychopathy. Wash. Rev. Code § 71.06.050 (1975). If after the observation period the court found that the defendant was a "sexual psychopath," it had to commit the defendant to a designated state facility for detention, care, and treatment. State v. Bunich, 28 Wash. App. 713, 626 P.2d 47 (1981) (interpreting Wash. Rev. Code § 71.06.060 (1975) (now found in Wash. Rev. Code § 71.06.060 (1975 & Supp. 1989)). Otherwise, the court would order that the original sentence be executed or the defendant be released. Wash. Rev. Code § 71.06.060.
\textsuperscript{37} State v. Rinaldo, 98 Wash. 2d 419, 425, 655 P.2d 1141, 1144 (1982).
\textsuperscript{38} State v. McCarter, 91 Wash. 2d 249, 253, 588 P.2d 745, 748 (1978). In McCarter, the respondent challenged Wash. Rev. Code § 71.06.091 (1975) (now found in Wash. Rev. Code § 71.06.091 (1975 & Supp. 1989) because the statute did not require a full adversarial hearing prior to commitment. Because the respondent was in fact accorded these due process rights, the court concluded that the respondent did not have standing to challenge the statute. However, the court did indicate in dicta that it "might well be inclined to invalidate that section of the statute which makes the hearing an optional one and dependent upon the discretion of the committing court." McCarter, 91 Wash. 2d at 253, 588 P.2d at 748 (1978).
\textsuperscript{39} Rinaldo, 98 Wash. 2d at 427, 655 P.2d at 1145.
ated with criminal proceedings.\footnote{40}

If the court found the defendant to be a “sexual psychopath,” it committed the defendant to a state hospital until the superintendent of the treating hospital determined that the defendant (1) was safe to be at large; (2) had received the maximum benefit of treatment; (3) was not amenable to treatment; or (4) was a custodial risk or a hazard to other patients.\footnote{41} If the court received a report from the treating hospital’s superintendent that one of the above conditions was met, the court could order that the defendant be (1) released, either with or without conditions; (2) returned to the hospital for continued treatment; (3) transferred to a prison to serve his sentence, less time spent in the hospital; or (4) transferred to a prison with psychiatric facilities.\footnote{42} The prior commitment system prohibited the release of a person found to be a “sexual psychopath” unless so ordered by the court that initially committed the person.\footnote{43}

This commitment system allowed a person found to be a “sexual psychopath” to receive treatment for his “illness” instead of punishment for his actions. The system provided “sexual psychopaths” with an incentive to seek and undergo treatment to effect a cure and speed his re-entry into society. At the same time, the system maintained the state’s control over the person.

Superseded by the Sentencing Reform Act, the sexual psychopath commitment statute now applies only to offenses committed before 1984.\footnote{44} The Sentencing Reform Act replaced an indeterminate sentencing structure with a determinate sen-

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\footnote{40} The Washington Supreme Court has required similar procedural protections prior to involuntary civil commitment under the Involuntary Treatment Act. Dunner v. McLaughlin, 100 Wash. 2d 832, 676 P.2d 444 (1984) (procedural due process requirements for involuntary civil commitment under the Washington Involuntary Treatment Act); In re Harris, 98 Wash. 2d 276, 654 P.2d 109 (1982) (due process guarantees required for involuntary civil commitment). In addition, the United States Supreme Court has examined a sexual offender commitment system and required various due process protections before commitment. Specht v. Patterson, 386 U.S. 605 (1967). Thus, both the United States Supreme Court and the Washington Supreme Court would require that any sexual offender commitment system offer significant procedural safeguards.


\footnote{43} WASH. REV. CODE § 71.06.091.

\footnote{44} WASH. REV. CODE § 71.06.005 (1975 & Supp. 1990).
tencing structure. The prior sentencing structure was based on a rehabilitative model, whereas the Sentencing Reform Act shifted the emphasis from rehabilitating convicted criminals to punishing them in proportion to the severity of their crimes.

B. The New Violent Sexual Predator Civil Commitment System

Washington's existing involuntary civil commitment system, which predates the new Violent Sexual Predator Commitment System, allows the state to commit mentally ill persons under both its police power and its parens patriae power. This involuntary civil commitment system, which was modified by the Involuntary Treatment Act of 1979, provides for short-term, crisis-intervention treatment of the severely mentally disabled. However, this system is not designed to provide long-term confinement of those who are not mentally ill.

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46. Id.
47. Wash. Rev. Code § 9.94A.010 (1988 & Supp. 1989). This section of the Sentencing Reform Act provides that the act is designed to:
   (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; . . .
   (3) Be commensurate with the punishment imposed on others committing similar offenses;

Id.
48. Wash. Rev. Code §§ 71.05.010—.930 (1975 & Supp. 1989). For a detailed discussion of this system and involuntary civil commitment in general, see La Fond, supra note 18; and Durham & LaFond, supra note 19. For a general discussion of the commitment procedures and procedural safeguards contained in the commitment scheme, see infra text accompanying notes 171-180.
50. Wash. Rev. Code § 71.05.010 (Supp. 1989). Intent of the Involuntary Treatment Act of 1979 was
   (1) To end inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;
   (2) To provide prompt evaluation and short term treatment of persons with serious mental disorders;
   (3) To safeguard individual rights;
   (4) To provide continuity of care for persons with serious mental disorders;
   (5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;
   (6) To encourage, whenever appropriate, that services be provided within the community.

Id.
51. Id.
Many violent sexual offenders do not meet the Involuntary Treatment Act's requirement of mental illness and therefore cannot be committed under the act.

This inability to involuntarily commit violent sexual offenders was seen as a "gap[ ] in our law and administrative structures [that] allow[s] the release of known dangerous offenders who are highly likely to commit very serious crimes." To fill this gap, the Governor's Task Force on Community Protection proposed, and the legislature enacted, legislation establishing the new Violent Sexual Predator Commitment System.

This new commitment system allows the state to involuntarily commit those persons found to be "sexually violent predators." The act defines a "sexually violent predator" as a person charged with or convicted of a crime of sexual violence, who, because of a "mental abnormality or personality disorder," is likely to commit crimes of sexual violence. The commitment process may be initiated when the prison term of a

52. 1990 Wash. Laws ch. 3, § 1001. The legislation provides that [t]he legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, 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.

54. Id. at II-20-23, III-74-79.
55. 1990 Wash. Laws ch. 3, Part X.
57. Id. at § 1002. The statute defines the following terms:

(1) "Sexual violent predator" means 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.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Predatory" means acts directed towards strangers or individuals with
person convicted of a violent sexual offense nears expiration;\textsuperscript{58} when a person found to be incompetent to stand trial for a violent sexual offense is about to be released;\textsuperscript{59} when a person found not guilty by reason of insanity of a violent sexual offense is about to be released;\textsuperscript{60} or when a person commits certain enumerated crimes with a sexual motivation.\textsuperscript{61}

The commitment procedure begins when the prosecuting attorney or the attorney general files a petition alleging that the person is a "sexually violent predator."\textsuperscript{62} If a judge finds

whom a relationship has been established or promoted for the primary purpose of victimization.

(4) "Sexual violence" means: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) any conviction for a felony offense in effect at any time prior to the effective date of this section, that is comparable to a sexually violent offense as defined in subsection (4)(a) of this section, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; or (c) any act of murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this section, has been determined beyond a reasonable doubt to be sexually motivated, as that term is defined in section 602 of this act; or, as described in chapter 9A.28 RCW, is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

\textit{Id.} The wording of subsection (3) eliminates those persons convicted of sexual violence against family members from commitment.


59. \textit{Id.} Although the defendant in this instance could not be tried for the underlying sexual offense due to his incompetence, the new commitment system would allow the court to hear evidence and make a finding of whether the defendant committed the sexual offense. If the court found beyond a reasonable doubt that the defendant committed the sexual offense as charged, the court could then consider whether the person should be committed under the "sexually violent predator" commitment scheme. \textit{Id.} A trial such as this would likely be found to violate the defendant's right not to be tried while incompetent. Further, this portion of the new commitment system would likely be found to violate the equal protection clause. A discussion of these possible violations is beyond the scope of this Comment.

60. \textit{Id.}

61. \textit{Id.} The enumerated crimes are murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, and residential burglary. \textit{See supra} note 57 for the text of the statute.

62. 1990 Wash. Laws ch. 3, § 1003. The statute reads:

When it appears that: (1) the sentence of a person who has been convicted of a sexually violent offense is about to or has expired at any time in the past; (2) the term of confinement of a person found to have committed
that reasonable cause exists to support this allegation, the judge may order that the person be transferred to an appropriate facility for evaluation to determine if the person is in fact a "sexually violent predator." The person may then be detained up to 45 days from the filing of the petition. Finally, a trial is held to determine whether the person is in fact a "sexually violent predator."

At the trial to determine whether the person is a "sexually violent predator," the person will be given the right to the assistance of counsel; the right to retain experts or professionals to perform an examination on his behalf; and the right to demand a jury trial. The act does not give the person the right to remain silent or the right to refuse to be examined prior to the trial. The state has the burden of proving beyond a reasonable doubt that the person is a "sexually violent offender as a juvenile is about to or has expired; (3) a person who has been charged with a sexually violent offense and has been determined to be incompetent to stand trial is about to be or has been released pursuant to RCW 10.77.090(3); or (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released pursuant to RCW 10.77.020(3); and it appears that the person may be a "sexually violent predator", the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

Id.

63. Id., § 1004. The statute reads:
   Upon the filing of a petition under section 1003 of this act, the judge shall determine whether probable cause exists to believe that the person named in the petition is a "sexually violent predator". If such determination is made the judge shall direct that the person be taken into custody and the person shall be transferred to an appropriate facility for an evaluation as to whether the person is a "sexually violent predator." The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the State department of social and health services.

Id.

64. Id.

65. Id., § 1005.

66. Id.

67. Id. The respondent is given this right at all stages of the proceedings under the commitment system. If the defendant is indigent, the state will appoint counsel to represent the petitioner. Id.

68. Id. If the petitioner is indigent, "the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf." Id.

69. Id. The prosecuting attorney, the attorney general, the judge, and the respondent each have the right to demand a trial by jury.

70. The statute is silent on the use of information acquired from the defendant
predator."  

If the court or jury determines that the person is a "sexually violent predator," he will be indefinitely committed to the custody of the state department of social and health services for control, care, and treatment. During this commitment, the "sexually violent predator" has the right to care and treatment. Additionally, an examination of the "sexually violent predator's" mental condition must be performed at least once every year, and the court must receive periodic reports concerning that mental condition. The "sexually violent predator" will be detained "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."  

Under the Violent Sexual Predator Commitment System, a person determined to be a "sexually violent predator" may be released in one of two ways. First, the Secretary of the State Department of Social and Health Services may determine that, if released, the "sexually violent predator" is no longer likely to commit predatory acts of sexual violence. The "sexually violent predator" may then petition the court for his release, which may be granted only after a trial concerning the "sexually violent predator's" probable dangerousness. Before the trial, however, the state may request that the "sexually violent predator" undergo an examination to determine if his mental abnormality or personality disorder

during the examination phase of the commitment procedure. Apparently, the prosecutor would be allowed to introduce this evidence against the respondent.

72. Id. If a respondent is not found to be a "sexually violent predator," the court must release him. Id.
73. Id., § 1008. The statute mandates that the care and treatment must conform to "constitutioinal requirements." Id.
74. Id., § 1007. This examination is presumably to be conducted by state employees. The statute allows the "sexually violent predator" to retain his own qualified expert or professional to conduct an independent examination. If the "sexually violent predator" is indigent, he may request that the court appoint the expert. Id.
75. Id.
76. Id., § 1006.
77. Id., § 1009. The statute reads:
   (1) If the Secretary of the Department of Social and Health Services determines that the ["sexually violent predator"]'s mental abnormality or personality disorder has so changed that [he] is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release.

Id.
78. Id.
has changed so as to insure that he is no longer likely to commit acts of sexual violence.\textsuperscript{79} Either the state or the "sexually violent predator" may demand that the trial be held before a jury.\textsuperscript{80} The court will deny the "sexually violent predator's" release if at the trial the state can show beyond a reasonable doubt that he is likely again to commit violent sexual offenses.\textsuperscript{81}

The second method by which the "sexually violent predator" may obtain release is to petition the court for release over the secretary's objection.\textsuperscript{82} The "sexually violent predator" may not petition the court for release, however, if he has previously filed a petition over the secretary's objection and either (1) the petition was found to be frivolous, or (2) the "sexually violent predator's" mental condition was found to be sufficiently unchanged so that he could not safely be at large.\textsuperscript{83} If either of these conditions apply, the court must refuse to hear a 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 [is] warranted."\textsuperscript{84}

Washington's new Violent Sexual Predator Commitment System differs from dangerous sexual offender commitment systems of other states. Other dangerous sexual offender commitment systems allow the state to commit the dangerous sexual offender in lieu of punishment.\textsuperscript{85} The new Washington commitment system allows the state to involuntarily commit a person found to be a "sexually violent predator" in addition to punishing him for the underlying offense.\textsuperscript{86} This feature of the

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. The "sexually violent predator" must be notified annually that he has the right to petition for release. If he does not affirmatively waive this right, the court must hold a show cause hearing to determine whether he is safe to be at large. If at the show cause hearing the court determines that the "sexually violent predator's" mental abnormality or personality disorder has changed so that he is no longer likely to commit acts of sexual violence, a date for a hearing on the matter will be set. The hearing will be similar in nature to the initial commitment proceeding. At this hearing, the state will have the burden of proving that the "sexually violent predator's" mental abnormality or personality disorder has not changed sufficiently to allow him to be safe to be at large. Id.
\textsuperscript{83} Id., § 1010.
\textsuperscript{84} Id.
\textsuperscript{86} See 1990 Wash. Laws ch. 3, ¶ ¶ 1003, 1006.
new commitment system raises questions of constitutional magnitude.

IV. ANALYSIS OF THE VIOLENT SEXUAL PREDATOR COMMITMENT SYSTEM

A. Due Process of Law

Because involuntary civil commitment is a significant deprivation of liberty, the United States Supreme Court has traditionally required that the commitment procedures comport with fourteenth amendment due process. Similarly, the Washington Supreme Court has required various due process protections for those committed under the Involuntary Treatment Act. Therefore, Washington’s Violent Sexual Predator Commitment System raises both substantive and procedural due process considerations under the fourteenth amendment to the United States Constitution.

1. Substantive Due Process Analysis

The United States Supreme Court has determined that commitment systems allowing a state to indefinitely commit a “sexually dangerous person” in lieu of punishment comply with due process requirements. Washington’s new Violent Sexual Predator Commitment System, however, allows the state to indefinitely commit a person found to be a “sexually violent predator” in addition to criminal punishment. This feature invites constitutional challenges to the statute’s validity based on substantive due process.

87. See Jackson v. Indiana, 406 U.S. 715 (1972) (indefinite commitment of criminal defendant who is incompetent to stand trial violates due process); Addington v. Texas, 441 U.S. 418 (1979) (due process requires that the state prove that respondent needs to be involuntarily committed by clear and convincing evidence); Specht v. Patterson, 386 U.S. 605 (1967) (full judicial hearing required to commit convicted sex offender under Colorado Sex Offender Act).


89. U.S. CONSTITUTIONAL AMENDMENT XIV, § 1. The amendment reads in part “nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .”


91. See id. (holding petitioner’s due process rights were not violated by his involuntary commitment under Illinois dangerous sexual person statute where commitment was in lieu of criminal sanctions).

Substantive due process prohibits a state from limiting an individual's fundamental right unless the limitation is justified by a compelling state interest and the legislation is narrowly drawn to achieve the state interest. The threshold question presented by the Violent Sexual Predator Commitment System is whether the state abridges a fundamental right by committing an individual declared to be a "sexually violent predator." Certainly, an individual's interest in liberty, which is abridged by confinement as a "sexually violent predator," is a fundamental right protected by the fourteenth amendment.

The next question is whether the state has a compelling interest in committing a person declared to be a "sexually violent predator." The United States Supreme Court has declared that a state cannot confine an individual solely because the individual is mentally ill or dangerous. However, if the state can show that the individual is mentally ill and is likely to cause imminent harm, the state may confine the individual under its police power. Washington's interests in committing a "sexually violent predator" under the new commitment system are the protection of society and the treatment of the "sexually violent predator." Therefore, at least superficially, the state appears to be asserting a compelling interest that would allow commitment.

However, research indicates, and the legislature recognized, that treatment of the "sexually violent predator" is rarely effective. If treatment of a "sexually violent predator" is not possible, the confinement loses its therapeutic purpose of

94. U.S. CONST. amend. XIV, § 1; see also O'Connor v. Donaldson, 422 U.S. 563, 574 (1975). For other rights protected by substantive due process, see, e.g., Youngberg v. Romeo, 457 U.S. 307 (1982) (the right to reasonably safe conditions of confinement, the right to freedom from unreasonable bodily restraint, and the right to minimally adequate training as required by these interests); Wyatt v. Stickney, 344 F. Supp. 373 (N.D. Ala. 1972) (the right to treatment).
95. O'Connor, 422 U.S. at 574 (1975).
96. See Allen v. Illinois, 478 U.S. 364 (1986). "Intent to commit a crime is not itself a crime. There is no law against a man's intending to commit a murder the day after tomorrow. The law only deals with conduct." Allen, 478 U.S. at 382 n.16 (Stephens, J., dissenting) (quoting O. HOLMES, THE COMMON LAW 65 (1923 ed.)).
97. See supra text accompanying note 18. See also La Fond, supra note 18.
99. 1990 Wash. Laws ch. 3, § 1001. The legislation states that "sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities . . . the prognosis for curing sexually violent offenders is poor." Id. See also Final Report, supra note 4, at II-12. The Task Force stated:
treatment and should be labeled as preventive detention. Preventive detention is permissible only if the potential harm is substantial, the harm is highly probable, and the commitment procedures afford sufficient procedural protections.

The magnitude of harm potentially caused by a "sexually violent predator" is indeed substantial. This harm includes the extreme physical and emotional injury inflicted on the victim, as well as emotional trauma inflicted upon the victim's family, friends, and acquaintances. Additionally, other individuals in society may feel that their safety is threatened. This potential harm is of sufficient magnitude, therefore, to allow preventive detention of the "sexually violent predator," but only if the potential harm is highly probable.

The probability of the potential harm depends upon whether the prediction of the "sexually violent predator's" dangerousness is accurate. At the present time, psychiatrists cannot accurately predict the dangerousness of any violent criminal. At best, scientific predictions of dangerousness are no better than 42% accurate. If the prediction of dangerousness is not accurate, the state's interest is merely to prevent harm. The commitment statute then loses its benign purpose.

Research has demonstrated that sex offenders are repetitive and compulsive. Since their acts result in sexual gratification, offenders receive a high level of positive reinforcement from their behavior. Research also demonstrates that child sex offenders will continue their abuses for several years and rarely are "cured." The primary treatment goal is to teach impulse control.

Id. (emphasis added).

101. Id. at 1100-01.
102. Id. at 1099-1100.
103. Id. at 1102. The Cross court required that the alleged sexual psychopath be given all of the procedural protections afforded the criminal defendant. Id. For a discussion of the commitment procedures under the Violent Sexual Predator Commitment System, see infra notes 114-136.
104. Id. at 1099-1100.
105. Dr. Reardon Testimony, supra note 13, at 2.
106. Id. The validity and reliability of such predictions has also been questioned in the context of involuntary civil commitment of the mentally ill. See Ennis and Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 CALIF. L. REV. 693 (1974). Reliability, in this context, is defined as the frequency or probability that two or more independent psychiatrists would both come to the same diagnosis, while validity refers to the accuracy of such diagnosis. Id. at 695.
107. Dr. Reardon Testimony, supra note 13, at 2. "The statistics show that 42% of all violent criminals will be reconvicted within three years—but which 42%? We submit that there is no scientific method currently available to make that prediction. Even the Task Force agrees, and I quote, '[i]t is very difficult to predict accurately which individuals will reoffend.'" Id. (quoting Final Report, supra note 4, at II-20).
of treatment of the "sexually violent predator," and the confinement becomes punitive. Because the statute is civil in nature, such punitive actions are prohibited.

An additional problem with Washington's new Violent Sexual Predator Commitment System concerns its underlying assumption that sexual offenses are the product of a mental abnormality or personality disorder and that this disorder predisposes the "sexually violent predator" to commit acts of sexual violence. Another state that has examined its sexually violent offender commitment system has concluded that sexual offenses are not in and of themselves the product of mental disease. Moreover, several professional groups that have studied sexual offenders have made similar findings. Finally, the American Psychiatric Association has recognized that numerous other factors may lead a person to commit violent sexual acts. Thus, the new Washington Violent Sexual Predator Commitment System, which would allow the state to commit persons found to be "sexually violent predators" based on the finding of a "mental abnormality or personality disorder," is overinclusive in terms of those individuals who could

108. *See* Cross, 418 F.2d at 1101. Chief Judge Bazelon recognized that "[i]ncarceration may not seem [to be] 'punishment' to the jailors, but it is punishment to the jailed." *Id.* (footnote and citation omitted).


111. *See* Brakel, *supra* note 22, at 743. Additionally, the Washington State Psychiatric Association concludes that violent sexual behavior is not necessarily a product of mental illness. As Dr. Reardon stated in his testimony:

> We are troubled with [the Task Force's] recommendations for a number of reasons:

> Basically, we believe that the current proposed legislation will confuse mental illness 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 the pedophile must decide to commit the sexual act—The mental patient cannot. . . .

> We believe there is no scientifically valid method of treating all but a small minority of sex offenders. Except for pedophilia, there are no conclusive research findings demonstrating that sex offenders suffer from a mental abnormality or personality disorder that has any direct causative effect on their dangerous behavior. . . .

> The Task Force assumption that there is a specific mental abnormality or personality disorder causing violent sexual behavior has no scientific basis. Violent behavior begets violent behavior whether it ends in rape, murder, or armed robbery.

Dr. Reardon Testimony, *supra* note 13, at 1-2.

be committed: It authorizes the commitment of persons with a mental abnormality even though those persons may not be likely to commit future violent sexual offenses. Because the new Violent Sexual Predator Commitment System would commit some persons who are not dangerous or whose acts of sexual violence are not attributable to a "mental abnormality or personality disorder," the statute is not narrowly drawn to achieve a compelling state interest, as required by due process. Therefore, the new Washington Violent Sexual Predator Commitment System violates substantive due process.

2. Procedural Due Process

Besides allowing involuntary commitment and treatment in addition to, rather than in lieu of, punishment, the Violent Sexual Predator Commitment System differs from the prior Washington sexual psychopath commitment system in another significant respect: the time at which the court determines that the person is a "sexually dangerous person." Under the prior sexual psychopath commitment system, the court determined whether the person was a "sexual psychopath" immediately after the completion of the criminal trial. Under the new Violent Sexual Predator Commitment System, the court does not determine whether the person is a "sexually violent predator" until after the criminal sentence has expired or is about to expire. In many instances, therefore, this determination will be made several years after the underlying criminal offense. This delay, coupled with other procedural mechanisms contained in the new system, raises the question of whether the Violent Sexual Predator Commitment System meets the requirements of procedural due process under the fourteenth amendment of the United States Constitution.

At a minimum, procedural due process prohibits a state from taking any action against a criminal defendant until he has received a fair and impartial hearing. In addition, for a hearing to be fair and impartial, the fact finder must be unbiased against the person being tried. In the case of a petition

113. See supra text accompanying notes 30-43, and 36-72.
114. The term "sexually dangerous person" used here refers to both the "sexual psychopath," as used in WASH. REV. CODE § 71.06.005—270 (1975 & Supp. 1990), and the term "sexually violent predator" as used in 1990 Wash. Laws ch. 3, Part X.
115. See supra text accompanying notes 30-43.
116. See supra text accompanying notes 56-72.
117. Pierce v. Dept. of Social & Health Services, 97 Wash. 2d 552, 554, 646 P.2d
to have a person declared a "sexually violent predator," a jury may be biased against the person by virtue of the jury's knowledge that he was either charged with or convicted of a crime of sexual violence. Although it would appear that most respondents could avoid this potential bias by simply not requesting a jury trial, the new commitment system also allows the state to request a jury trial.118

Assuming that the fact finder is impartial, the court will then determine whether the procedures afforded to the respondent meet due process requirements. To make that determination, a court will balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the functions involved and the burdens that additional procedural requirements would place on the state.119

In examining involuntary civil commitment systems, courts have recognized that the private interest involved is the individual's right to freedom.120 When used in addition to sentencing, an involuntary commitment as a "sexually violent predator" results in a longer period of confinement than a sentence for the conviction for the crime.121 Even when the period of involuntary commitment does not run for an extended period of time, it has still been described as a "massive curtailment of liberty."122 Further, a person has a strong interest in not being erroneously labeled a "sexually violent predator," because the stigma associated with that label is as

1382, 1385 (1982) (requiring state to hold a judicial hearing prior to revocation of parole) (citing Morrissey v. Brewer, 408 U.S. 471 (1972)).

118. 1990 Wash. Laws ch. 3, § 1005. While the availability of an impartial trier of fact may be questioned, that issue is beyond the scope of this Comment.


120. Id.

121. The period of commitment is in addition to the time served in jail as a result of a criminal conviction. See 1990 Wash. Laws ch. 3, § 1002, 1003 & 1006. This commitment continues until the person is determined safe to be at large. See 1990 Wash. Laws ch. 3, § 1009.

122. Humphrey v. Cady, 405 U.S. 504, 509 (1972). The commitment need not be for a long term to be considered to be a "massive curtailment of liberty." Even a commitment as short as 72 hours has been held to be "a massive curtailment of liberty." In re Harris, 98 Wash. 2d 276, 279, 654 P.2d 109, 114 (1982) (commitment under the Involuntary Treatment Act) (citing Humphrey v. Cady, 405 U.S. at 509).
great as that associated with many criminal convictions.\textsuperscript{123} Therefore, commitment under the Violent Sexual Predator Commitment System affects a substantial interest of the person committed.

The next element required to show a violation of procedural due process is the risk that the procedures used may result in an erroneous deprivation of liberty. Under the new commitment system, the most serious, erroneous deprivation of liberty may arise because of the legislature's assumption that the "sexually violent predator's" mental abnormality is a continuing condition.\textsuperscript{124} This condition is manifested by a criminal act of a sexual nature committed before the imposition of criminal sanctions.\textsuperscript{125} Thus, the person determined to be a "sexually violent predator" might be indefinitely committed based on an act that occurred several years prior to the initial commitment.

Once committed to state custody, the "sexually violent predator" has two methods of gaining release. The first alternative allows the "sexually violent predator" to petition for release after the Secretary of the Department of Social and Health Services determines that the "sexually violent predator" is unlikely to commit future acts of sexual violence.\textsuperscript{126} The second alternative allows the "sexually violent predator" to petition for release over the objection of the secretary.\textsuperscript{127} This second alternative raises procedural due process

\textsuperscript{123} Allen v. Illinois, 478 U.S. 364, 377 (1986) (Stephens, J., dissenting) (person committed as dangerous sexual person has interest in avoiding stigma of being wrongly labeled as a dangerous sexual person). For a similar analysis in a different context, see Parham v. J.R., 442 U.S. 584, 602 (1979) (child has interest in not being erroneously labeled as mentally ill).

\textsuperscript{124} This assumption is manifested by the fact that before releasing the "sexually violent predator," the Secretary of the Department of Social and Health Services must determine that the "sexually violent predator's" mental abnormality has so changed to make it safe for him to be at large, or the "sexually violent predator" must petition for release over the secretary's objection. In the second instance, the "sexually violent predator" must allege facts showing that he has recovered. See supra text accompanying notes 82-84.

\textsuperscript{125} In the context of involuntary civil commitment, Washington requires a showing of dangerousness manifested by a recent overt act. In re Harris, 98 Wash. 2d 276, 654 P.2d 109 (1982). The Violent Sexual Predator Commitment System recognizes that during incarceration "offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement." 1990 Wash. Laws ch. 3, § 1001. Thus, the new commitment system allows commitment based on an act committed several years earlier.

\textsuperscript{126} See supra text accompanying notes 77-81.

\textsuperscript{127} See supra text accompanying notes 82-84.
questions.

While the “sexually violent predator” may petition for release over the secretary’s objection, the court’s ability to hear the petition is conditioned on whether the “sexually violent predator” has previously petitioned for release.\textsuperscript{128} If a prior petition has been denied or found to be frivolous, the court is required to deny any subsequent petitions unless the “sexually violent predator” alleges facts in his petition that show he is unlikely to commit acts of sexual violence if he is released.\textsuperscript{129} In essence, this procedure gives the “sexually violent predator” only one opportunity to petition for release. The “sexually violent predator” is forced to decide whether to petition for release at a given point in time or wait until a future time to petition. For those persons who were unlikely to commit acts of sexual violence and were not given approval to petition for release, the procedure results in an erroneous deprivation of liberty.

Thus, prior to petitioning for release, the “sexually violent predator” must be confident that he can prove that he is safe to be released. In the context of involuntary civil commitment under the Involuntary Treatment Act, such a burden of proof has been described as “an almost insurmountable” barrier to release.\textsuperscript{130} The continued commitment becomes punitive,\textsuperscript{131}

\textsuperscript{128} 1990 Wash. Laws ch. 3, § 1010. See supra text accompanying notes 82-84.

\textsuperscript{129} Id.

\textsuperscript{130} See Alter v. Morris, 85 Wash. 2d 414, 435, 536 P.2d 630, 641 (1975) (Rosellini, J., dissenting in part). As Justice Rosellini stated, [t]he confinement of a person . . . beyond the time when he has recovered from his mental disorder sufficiently to be reasonably safe to be at large — is not to be sanctioned. To place upon a patient the burden of proving his own recovery, an almost insurmountable burden if his custodians do not choose to cooperate, is to accomplish this result in an indirect manner. In effect it permits the custodians to impose a prison sentence upon the criminally insane at their discretion.

\textsuperscript{131} See id. In this context, it must be remembered that the new commitment system purports to be civil in nature. The commitment is predicated on treatment of the “sexually violent predator” and protection of society, not on further punishment of the “sexually violent predator.” The commitment is not to be administered in a punitive manner. See supra text accompanying notes 108-109.

It is not difficult to imagine a situation in which the caretaker of the “sexually violent predator” would be inclined to act in a punitive sense against the “sexually violent predator” by refusing to recommend his release. The Violent Sexual Predator
and the “sexually violent predator” is erroneously deprived of his liberty.

This deficiency can easily be cured by substituting a release procedure in the new commitment system similar to the release procedure of the Involuntary Treatment Act. Under the Involuntary Treatment Act’s procedures, a person’s commitment must end at a specified time unless the state petitions for further commitment and proves that the person requires further treatment. A similar release procedure in the Violent Sexual Predator Commitment System would force the state to file commitment proceedings to continue to confine the “sexually violent predator” beyond a specified time—perhaps six months.

The state would then have the burden of alleging and proving that the “sexually violent predator” is still dangerous because he failed to respond sufficiently to treatment. Because the “sexually violent predator” is under the control and supervision of the state, this procedure would place the burden where it logically belongs. Whether treatment is provided and whether that treatment is effective are matters within the state’s control. Further, even though the “sexually violent predator” is still dangerous, he will be released at some point, and the state will have the burden of proving he is dangerous even then.

Commitment System is less severe concerning release procedures than was the Task Force’s proposal. The Task Force’s proposal would have required the “sexually violent predator” who did not receive the secretary’s blessing to petition for release to prove his own recovery by a preponderance of the evidence. Final Report, supra note 4, at III-78. This requirement would violate procedural due process. See Alter, 85 Wash. 2d 414, 536 P.2d 630.

132. For a more detailed discussion, of the release procedures of the Involuntary Treatment Act, see infra text accompanying notes 171-180. Note that the Involuntary Treatment Act presumes that the person’s underlying mental illness is treated so that the person is safe to be at large unless the state specifically proves the contrary at a commitment hearing. The Violent Sexual Predator Commitment System presumes that the person’s underlying mental abnormality is not treated.

133. The state could argue that because of the long-term nature of sexual deviance, “sexually violent predators” require a longer commitment term than those committed under the Involuntary Treatment Act. However, only the seriously mentally ill will be committed for periods of time as long as six months under the Involuntary Treatment Act. Most commitments under the Involuntary Treatment Act are of a shorter duration ranging from 14 to 90 days. See infra text accompanying notes 171-180. Thus, a six-month commitment should be considered to be a long-term commitment. Therefore, release procedures under the Violent Sexual Predator Commitment System commitment scheme should be comparable with the release procedures under the Involuntary Treatment Act. See infra text accompanying notes 171-185 for an evaluation of the procedures.

134. Alter, 85 Wash. 2d at 437, 536 P.2d at 642 (Rosellini, J., dissenting in part). While Justice Rosellini’s discussion concerned commitment under the Involuntary Treatment Act, the principle should apply equally when the state controls the treatment, control, and supervision of the “sexually violent predator.”
predator" may consult an outside expert, the trier of fact at a release hearing is more likely to believe the testimony of the state's experts who have observed the "sexually violent predator" over an extended period of time, than that of an outside expert who has examined the "sexually violent predator" only once.135

The release procedure described above would place additional procedural burdens upon the state. However, when balanced against the serious deprivation of liberty suffered by the individual, these additional burdens are warranted. If the state were required to petition for recommitment every six months, its only additional burden would be the filing of recommitment petitions prior to the hearing concerning the release of the "sexually violent predator." The interval between petitions could be made the same as under the Involuntary Treatment Act's 180 days.136

The value that a free society places on individual freedom should be reflected by procedures required to deprive an individual of that freedom.137 The state should be forced to bear the burden of filing a recommitment petition on a regular basis. Because it currently does not, however, the procedures utilized during the commitment process are not adequate to protect the substantial interests of the person sought to be committed. As a result, these procedures likely violate procedural due process requirements.

B. Equal Protection Analysis

In addition to violating substantive and procedural due process requirements, the new Violent Sexual Predator Commitment System may also violate requirements of the equal protection clause of the fourteenth amendment of the United States Constitution.138 This danger of a violation arises out of

135. Id. at 437-38.
136. This would also eliminate some of the Violent Sexual Predator Commitment System's equal protection problems. See infra text accompanying notes 143-185.
137. See Addington v. Texas, 441 U.S. 418, 425 (1979). The Addington Court was asked to decide what standard of proof was required in a civil commitment proceeding. In deciding that a standard equal to or greater than "clear and convincing" proof was required, the Court stated that "[i]n cases involving individual rights, whether criminal or civil, [t]he standard of proof [at a minimum] reflects the value society places on individual liberty.") Id. (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. denied sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972)).
several assumptions made by the legislature. When drafting the legislation for the Violent Sexual Predator Commitment System, the legislature recognized that the propensity to commit crimes of sexual violence is not in and of itself a product of mental disease.\textsuperscript{139} However, the legislature assumed that a sexual offender suffering from a "mental abnormality or personality disorder" could be differentiated from a sexual offender who does not suffer from any mental aberration.\textsuperscript{140} Additionally, the legislature assumed that the mental abnormality predisposes the individual to repeatedly commit crimes of sexual violence.\textsuperscript{141}

The above assumptions raise the question of whether a prior conviction for a sexual offense is sufficient to establish a separate class from those persons committed under the existing involuntary civil commitment system.\textsuperscript{142} If a prior conviction for a sexual offense does not justify the creation of a class separate from those committed under the Involuntary Treatment Act, the Violent Sexual Predator Commitment System may violate the equal protection requirements of the fourteenth amendment.

The equal protection clause of the fourteenth amendment provides that people situated similarly with respect to the law must be treated similarly.\textsuperscript{143} To conduct an equal protection analysis of two different involuntary civil commitment systems, a court must first compare the two groups of people to be committed under each system to determine if they are similarly situated.\textsuperscript{144} If the court finds that the groups are simi-

\textsuperscript{139} See 1990 Wash. Laws ch. 3, § 1001.
\textsuperscript{140} See 1990 Wash. Laws ch. 3, §§ 1001-1006.
\textsuperscript{141} See 1990 Wash. Laws ch. 3, § 1001.
\textsuperscript{142} A similar question could also arise in other contexts: first, whether the finding of a sexual motivation for an enumerated crime justifies a separate class apart from those committed under the Involuntary Treatment Act; second, whether the fact that the defendant is incompetent to stand trial for a sexual offense justifies a separate class apart from all others found incompetent to stand trial; third, whether the fact that a defendant is found not guilty by reason of insanity of a sexual offense justifies a separate class apart from all others found not guilty by reason of insanity. However, these questions are beyond the scope of this Comment.
\textsuperscript{143} Harmon v. McNutt, 91 Wash. 2d 126, 130, 587 P.2d 537, 540 (1978).
\textsuperscript{144} Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983). The Hickey court performed an equal protection analysis of the differing procedures for individuals committed under the Involuntary Treatment Act and those committed by virtue of being found not guilty of a crime by reason of insanity. The Hickey court also discussed the differing standards of judicial review involved in an equal protection analysis. See id.
larly situated, it must examine the differing commitment procedures to determine if the disparity of treatment between the groups is related to the achievement of an important governmental objective. The statutes will be upheld only if the different procedures are "substantially related to the purposes of each statute and do not reflect discrimination" against the complaining group.

The first step in an equal protection analysis of the Violent Sexual Predator Commitment System is to determine if persons committed under that system are similarly situated with those committed under the Involuntary Treatment Act. Persons committed under the Involuntary Treatment Act and the Violent Sexual Predator Commitment System share similar characteristics. In each case, commitment may be based on a finding of (1) mental abnormality, (2) dangerousness to others, and (3) likelihood of serious harm in the future. In each case, the person is committed to receive treatment so

at 545-46. For a further discussion of those standards of review, see infra text accompanying notes 186-200.

145. Hickey, 722 F.2d at 547.
146. Id.

147. While the requirements for mental abnormality are not identical, for purposes of an equal protection analysis the requirements should be considered to be similar. The Involuntary Treatment Act defines a "mental disorder" as any "mental, or emotional impairment which has substantial adverse effects on an individual's ... volitional function." WASH. REV. CODE § 71.05.020 (1975 & Supp. 1989). The Violent Sexual Predator Commitment System requires a "mental abnormality or personality disorder" that predisposes the "sexually violent predator" to commit acts of sexual violence. 1990 Wash. Laws ch. 3, § 1001. For a further discussion of the Involuntary Treatment Act's commitment criteria see La Fond, supra note 18; and La Fond & Durham, supra note 19. For a further discussion of the Violent Sexual Predator Commitment System criteria, see supra text accompanying notes 56-61.

148. The Involuntary Treatment Act has been interpreted to require that "the substantial risk of physical harm" be "evidenced by behavior" which has either caused harm or created a reasonable apprehension of dangerousness. In re Harris, 98 Wash. 2d 276, 284, 654 P.2d 109, 113 (1982) (interpreting WASH. REV. CODE § 71.05.020(3)(b)). Accord In re Meistrell, 47 Wash. App. 100, 106-107, 733 P.2d 1004, 1008 (1987) (interpreting WASH. REV. CODE § 71.05.020(3)(b)). The Violent Sexual Predator Commitment System requires that the person present a risk of dangerousness as manifested by either (1) conviction of a sexual offense; (2) conviction of a specified offense with a sexual motive; (3) a finding of not guilty by reason of insanity of a sexual crime; or (4) a finding of incompetency to stand trial for a sexual offense. See 1990 Wash. Laws ch. 3, § 1003. In each case, the Violent Sexual Predator Commitment System would require some showing of previous violent sexual behavior. However, this showing of violence must be evidenced not by recent behavior, but rather by the past criminal act. See 1990 Wash. Laws ch. 3, § 1001-1002.

149. Under either the Involuntary Treatment Act or the Violent Sexual Predator Commitment System, the commitment would be an exercise of the state's police power. See supra text accompanying notes 16-21; La Fond, Purposes of Involuntary
that he can safely rejoin the community. Both commitment systems purport to protect the community through treatment and isolation of the offender.\textsuperscript{150}

However, persons committed under the Involuntary Treatment Act differ in certain respects from those committed under the Violent Sexual Predator Commitment System. A person committed under the Involuntary Treatment Act must be found to be mentally ill prior to commitment.\textsuperscript{151} This mental illness must be amenable to short-term treatment.\textsuperscript{152} Moreover, the treatment modality for some of the mentally ill committed under the Involuntary Treatment Act has been proven to be effective.\textsuperscript{153} In contrast, a person committed under the Violent Sexual Predator Commitment System is not mentally ill but rather suffers from a "mental abnormality or personality disorder."\textsuperscript{154} This condition requires long-term treatment.\textsuperscript{155} Additionally, the treatment for a "sexually violent predator" is rarely, if ever, effective.\textsuperscript{156}

Despite the apparent differences in mental condition between offenders committed under the Involuntary Treatment Act and those committed under the Violent Sexual Predator Commitment System, the groups are similarly situated for the purposes of an equal protection analysis. Persons deemed similarly situated to those committed under general civil commitment systems for equal protection purposes include: (1) state prisoners committed at the end of their criminal sentences,\textsuperscript{157} (2) persons against whom criminal charges have been filed,\textsuperscript{158} (3) persons acquitted of crimes by reason of

\textit{Civil Commitment, supra} note 18; and \textit{La Fond & Durham, Policy Implications, supra} note 19.

\textsuperscript{150} Compare the intent of the Involuntary Treatment Act as expressed in WASH. REV. CODE § 71.05.015 (Supp. 1989) and WASH. REV. CODE § 71.05.010 (1975 & Supp. 1989), discussed \textit{supra} text accompanying notes 48-51, with the intent of the Violent Sexual Predator Commitment System, 1990 Wash. Laws ch. 3, § 1001, discussed \textit{supra} in the text accompanying notes 52-55.

\textsuperscript{151} WASH. REV. CODE § 71.05.150.

\textsuperscript{152} WASH. REV. CODE § 71.05.005 (1979 & Supp. 1989).

\textsuperscript{153} See Dr. Reardon Testimony, \textit{supra} note 13, at 1.

\textsuperscript{154} 1990 Wash. Laws ch. 3, § 1002(1).

\textsuperscript{155} 1990 Wash. Laws ch. 3, § 1001.

\textsuperscript{156} See \textit{Final Report, supra} note 4, at II-12, 1990 Wash. Laws ch. 3, § 1001.

\textsuperscript{157} Bazstrom v. Herold, 383 U.S. 107 (1966). The Bazstrom Court stated that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." \textit{Id.} at 111-12.

\textsuperscript{158} Commonwealth v. Druken, 356 Mass. 503, 508-09, 254 N.E.2d 779, 781 (1969). Because a criminal conviction is insufficient to justify differing procedural and
insanity, and (4) persons civilly committed in lieu of sentencing following conviction as sex offenders. This list substantiates a finding that persons committed under the Violent Sexual Predator Commitment System are similarly situated to those committed under the Involuntary Treatment Act.

Because both groups are similarly situated, the equal protection clause requires that they be treated alike unless an important governmental objective justifies the differential treatment. In Jackson v. Indiana, the United States Supreme Court examined Indiana's three involuntary commitment systems to determine whether commitment under one of the systems violated equal protection. The Jackson trial court had committed the petitioner as a criminal defendant who was incompetent to stand trial. The procedures used to commit the petitioner were more lenient than similar procedures under either of Indiana's other two commitment systems. Additionally, the release standards for those committed as criminal defendants incompetent to stand trial were more stringent than similar release standards under either of the other two commitment systems.

In deciding Jackson, the Supreme Court examined the case of Baxstrom v. Herold, which had established the principle that no basis exists for distinguishing all persons civilly committed from those committed at the end of a prison term. The Jackson Court reasoned that if a criminal conviction and the resulting sentence were insufficient to justify less procedural and substantive protections available to others committed, then the mere filing of criminal charges would also be insufficient. The Jackson Court noted that the Baxstrom principle had been extended to commitment following an insanity acquittal and to commitment under a sexual

substantive protections, the mere filing of a criminal charge would also be insufficient to support different safeguards. See id.

162. Id. at 719.
163. Id. at 727-28.
164. Id. at 728-29.
167. Id. at 724 (citing to Commonwealth v. Druken, 356 Mass. 503, 508-09, 254 N.E.2d 779, 781 (1969) (holding that filing of criminal charges was insufficient to allow different procedures for civil commitment)).
168. Id. (citing Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968)).
offender statute instead of criminal sanction arising from a conviction for a sexual offense. 169 The Jackson Court held that by subjecting the petitioner to a more lenient commitment procedure and to a more stringent standard of release than would be applied to a person committed under the other civil commitment statutes, the state deprived the petitioner of equal protection. 170

Similar to the procedures that were held to deprive the petitioner of equal protection in Jackson, the procedures for commitment and release under Washington State's Violent Sexual Predator Commitment System differ significantly from those under the Involuntary Treatment Act. Under the Involuntary Treatment Act, a person committed may be detained for only 72 hours prior to a judicial hearing concerning the commitment. 171 After the initial commitment, the person may be detained only for a definite period of time (14, 90 or 180 days) unless a petition is filed for further commitment and he is recommitted by a judicial hearing. 172 At each judicial hearing, the state must prove that the person is dangerous as manifested by a recent overt act. 173 At each stage of the commitment process, the person retains the right to counsel, 174 the right to remain silent, 175 the right to cross examine adverse witnesses, 176 and the right to present evidence on his own behalf. 177 In addition, at any hearing where the person is faced with a commitment of 90 days or more, he may request a jury trial. 178 The person may petition for release at any time before the end of his commitment, 179 and in no instance may a person be held longer than the term of his previous commitment without a new judicial determination of his mental illness and dangerousness. 180

169. Id. at 724-25 (citing Humphrey v. Cady, 405 U.S. 504 (1972)).
170. Id. at 730.
171. WASH. REV. CODE § 71.05.150(1)(d) and (2) allow for emergency civil commitment for an initial period of 72 hours prior to a judicial hearing. See also In re Harris, 98 Wash. 2d 276, 654 P.2d 109 (1982); Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983).
172. WASH. REV. CODE § 71.05.280.
173. Harris, 98 Wash. 2d at 284-85, 654 P.2d at 112.
174. WASH. REV. CODE § 71.05.250.
175. Id.
176. Id.
177. Id.
178. WASH. REV. CODE § 71.05.310.
179. WASH. REV. CODE § 71.05.480.
180. WASH. REV. CODE § 71.05.150 (2); WASH. REV. CODE § 71.05.320.
In contrast, a person committed under the Violent Sexual Predator Commitment System may be held for an indeterminate period of up to 45 days before a judicial determination concerning his commitment.181 If at this initial judicial determination the court finds reasonable grounds that the person is a "sexually violent predator," the person may be confined for up to 45 days after the date that the petition for commitment was filed for evaluation. At the end of this confinement, the court will hold a trial to determine if the person should be further committed as a "sexually violent predator."182 At this trial, the person retains the right to the assistance of counsel, the right to retain experts, and the right to produce evidence.183 However, unlike a person committed under the Involuntary Treatment Act, a person committed under the Violent Sexual Predator Commitment System is not explicitly entitled to remain silent, cross examine adverse witnesses, or present evidence in his own behalf.184

Additionally, once the person is committed as a "sexually violent predator," the state need never again file a petition to continue his commitment. A "sexually violent predator" can gain release only upon a court order. There are two methods for this release: (1) the Secretary of the Department of Social and Health Services determines that the "sexually violent predator" is no longer dangerous, and the "sexually violent predator" petitions the court for release; or (2) the "sexually violent predator" petitions the court for release and the state fails to prove that the petitioner is too dangerous to be at large.185

When compared with the Involuntary Treatment Act, the Violent Sexual Predator Commitment System effectively allows a more lenient standard for commitment and a more stringent standard for release. Thus, the two similarly-situated groups are not treated similarly. Therefore, unless the state can show that the Violent Sexual Predator Commitment Sys-

181. 1990 Wash. Laws ch. 3, § 1005. The 45-day detention is the time from the filing of the petition until the final trial on the issue of whether the respondent is a "violent sexual predator." Id.
184. See id. The statute is silent as to these rights.
185. 1990 Wash. Laws ch. 3, § 1009. For a full discussion of the procedures applicable to release procedures under the Violent Sexual Predator Commitment System, see supra text accompanying notes 77-84.
tem is related to the achievement of an important governmental objective, the system violates the equal protection guarantee of the fourteenth amendment.

To answer the question of whether the differences in the commitment schemes are related to the achievement of an important governmental objective, a court will apply one of three different standards of judicial review: strict scrutiny, mid-level scrutiny, or the rational basis test.186 For the court to apply strict scrutiny, the classification in question must be suspect, or must have an impact on a fundamental right or interest of the person challenging the classification.187 If the strict scrutiny test is applied, the law will be struck down unless it is found to be necessary to achieve a compelling governmental interest. The strict scrutiny test has been held inapplicable to civil commitment systems.188

Both the United States and Washington Supreme Courts have either expressly stated or implied that the rational basis test applies to civil commitment systems.189 Under the rational basis test, the state must show only that the differing classifications are rationally related to the governmental objective to be furthered.190 If the rational basis test is applied, the classification will be upheld "unless no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government."191 Thus, where the rational relationship test is applied, the classification will almost always be upheld.192

The mid-level scrutiny test is basically a rational basis test

186. Hickey v. Morris, 722 F.2d 543, 545-46 (9th Cir. 1983).
187. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985). A statute will be subjected to strict scrutiny when it classifies by race, alienage, or national origin.
188. Hickey v. Morris, 722 F.2d at 546.
189. Humphrey v. Cady, 405 U.S. 504, 510 (1972) (proper to inquire on remand what justification exists for depriving sex offender the right to a jury trial offered to other persons civilly committed); Jackson v. Indiana, 406 U.S. 715, 730 (1971) (state cannot, without reasonable justification, apply different standards to those committed following charge of a crime than to those committed under general civil commitment procedures); Baxstrom v. Herold, 383 U.S. 107, 111-12 (1966) (no conceivable basis for distinguishing commitment of prisoner nearing end of sentence from all other civil commitments); In re Patterson, 90 Wash. 2d 144, 149-50, 579 P.2d 1335, 1338 (1978) (rational basis test applicable to statutes creating differing classes of persons for purposes of involuntary civil commitment).
190. Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983).
192. See id. at 528-37. The rational basis test requires only that the court can
with "a sharper focus." This higher scrutiny is appropriate where a quasi-suspect group affected by the classification has an immutable characteristic that makes them different from the general public, can claim some prejudice from the public, and does not have effective access to the political process.

Persons committed under the Violent Sexual Predator Commitment System fall within a classification that should be considered quasi-suspect. By definition, they suffer from a "mental abnormality or personality disorder" that sets them apart from the general public. Because of this characteristic, the general public is prejudiced against the group. This prejudice, coupled with the small size of the group, leaves them no access to the political process. Thus, the group should be considered "quasi-suspect" and within the class protected by mid-level scrutiny.

In addition to the foregoing reasons for applying mid-level scrutiny, many courts examining civil commitment systems have used the rational basis test language to invalidate the classification. Because a classification is almost always upheld if the rational basis test is applied, these holdings suggest that the actual standard applied was the mid-level or heightened scrutiny test. Given these suggestions, a court reviewing the Violent Sexual Predator Commitment System under an equal protection challenge should apply mid-level scrutiny.

conceive of a rational relationship between the classification and the governmental objective. Id. at 537.


196. See Legislative Blunder, supra note 21 at 527-28. In Legislative Blunder, the author characterizes the public's attitude towards sexual offenders as one of "acerbity and indignation." Id. at 528.


198. Jackson v. Indiana, 406 U.S. 715 (1971). See also Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966). These courts all purport to use the rational basis test while invalidating the classification. In Harmon v. McNutt, 91 Wash. 2d 126, 587 P.2d 537 (1978), the Washington Supreme Court applied the rational basis test and invalidated the classification that differentiated between persons committed under WASH. REV. CODE ch. 10.77 and WASH. REV. CODE ch. 71.06 in regard to their transfer between the prison system and the mental health system. Applying what it interpreted to be Washington state law, the court in Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983), explicitly applied the heightened scrutiny test.

199. But see City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 445-46 (1985) (no rational basis for different zoning procedure for mental institution than
Under the mid-level scrutiny test, the classification must be substantially related to the important government objectives to be achieved.200 Thus, the procedural differences between the two different civil commitment systems must be substantially related to the achievement of important governmental objectives.201 The governmental objectives to be furthered by both the Involuntary Treatment Act and the Task Force's proposal are the protection of the public202 and the treatment of the committed person.203

The assumption underlying the Violent Sexual Predator Commitment System is that the higher recidivism rate of "sexually violent predators" provides a sufficient basis for treating them differently from all others committed under the Involuntary Treatment Act.204 However, in terms of danger presented to the public, it is difficult to distinguish between a mentally ill and dangerous person committed under the Involuntary Treat-

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201. Hickey v. Morris, 722 F.2d 543, 547 (9th Cir. 1983).
202. The requirement that the "sexually violent predator" be confined until he is no longer likely to commit further acts of sexual violence shows that the commitment system is designed to protect the public. See 1990 Wash. Laws ch. 3, § 1009. While the Involuntary Treatment Act does not explicitly state an intention to protect the public, that fact can be inferred from the requirement of the "sexually violent predator's" dangerousness to self, others, or others' property found in WASH. REV. CODE § 71.05.280.
203. Treatment of the committed person is an explicit goal of each commitment system. Compare WASH. REV. CODE § 71.05.010(2) with 1990 Wash. Laws ch. 3, § 1006.
ment Act and a mentally abnormal and dangerous person committed under the Violent Sexual Predator Commitment System. Both arguably present a danger to the public and are presumably in need of treatment. Thus, the governmental objective of each commitment system is the same.

Because the objectives of both commitment systems are the same, the state cannot justify the procedural differences between the two systems. As a result, the differing treatment of the two groups is intolerable and the new Violent Sexual Predator Commitment System violates the equal protection guarantees found in the United States Constitution.205

C. Policy Considerations

The foregoing discussion demonstrates that the Violent Sexual Predator Commitment System violates both the due process and equal protection clauses of the United States Constitution. In addition to violating these constitutional provisions, the commitment system is not a wise policy choice for several reasons.

First, the Violent Sexual Predator Commitment System applies only to those people charged with or convicted of a sexual offense. Because a violent sexual offender has committed a criminal act, he should be subjected to the full force of the criminal justice system. The criminal justice system has greater competence to deal with those convicted of crimes than does the mental health system.206 Furthermore, treatment of an individual who is ultimately found to be a "sexually violent predator" is expensive207 and ineffective.208 Finally, classification of the detention as punishment, instead of as treatment, reflects societal values concerning sexual offenses.209

205. Those individuals committed by reason of incompetence to stand trial or by reason of being found not guilty by reason of insanity could also raise equal protection challenges to the commitment system. An analysis of these equal protection challenges is beyond the scope of this Comment.

206. The Involuntary Treatment Act is designed only to treat those persons found to be mentally ill. See supra text accompanying notes 48-51. See also LaFond, supra note 18. The Involuntary Treatment Act is not designed to incapacitate criminals. In contrast, the criminal justice system is specifically designed to incapacitate criminals.

207. The Washington State Psychiatric Association estimates that the "treatment" mandated by the commitment system will cost $60,000 per cell and $25,000 per year to hospitalize sex offenders. Reardon Testimony, supra note 13, at 3.

208. See supra text accompanying notes 22-29. See also Dr. Reardon Testimony, supra note 13.

209. The Involuntary Treatment Act specifically deals only with those people who suffer from mental illness. If proven as a defense to a crime, insanity separates those
Second, the criminal law's high standard of proof for a criminal act minimizes the chances of an erroneous decision. If the state proves that the person committed an act which has been declared criminal, it should punish the offender. If the state cannot prove that the person committed a criminal act, the state should not be able to punish him. And, if the offender is mentally ill within the definition of the Involuntary Treatment Act, he should be committed under those procedures, avoiding the danger that a mentally ill person may be sent to prison.

Third, if a person is found guilty of a sexual offense, the criminal justice system is better suited to achieving the goals of the criminal law—deterrence, retribution, and incapacitation. A potential sexual offender will more likely be deterred by the threat of a long prison sentence than by that of detention in a state mental facility. Society's desire to punish offenders will be fulfilled by sending the offender to prison instead of to a mental facility. Society will then have greater faith in the criminal justice system. Furthermore, a prison is better adapted to incapacitating offenders than is a hospital. Therefore, a convicted sexual offender should be incarcerated in a prison rather than in a state mental facility.

Fourth, forced treatment of sexual offenders is of questionable value. Even if treatment were found to be effective, the legislature would be unlikely to properly fund a program

mentally ill individuals who should be given medical treatment in a therapeutic setting from those individuals who are not mentally ill and who should be subject to the criminal justice system. See W. LAFAVE & A. SCOTT, CRIMINAL LAW, 304 (2nd ed. 1986) [hereinafter LAFAVE & SCOTT]. At this point, it is important to recall that those individuals targeted for commitment by the Violent Sexual Predator Commitment System are not sufficiently "mentally ill" to be committed under the Involuntary Treatment Act. See supra text accompanying notes 48-55.


211. Helen Harlow, the mother of a sexual assault victim, made the following statement while touring the new sexual offender commitment facility: "I tried to envision Earl Shriner [the man convicted of the assault on Mrs. Harlow's son] here and decided no, I'd rather have him behind bars . . . . I don't think he deserves this opportunity. It's nicer than prison." Seattle Times, June 29, 1990 B2, col. 2.

212. See LAFAVE & SCOTT, supra note 209, at 22-27.

213. The state prison system was specifically designed to incapacitate criminals as its primary function. In contrast, the primary function of a mental hospital is treating mental illness, not incapacitating its patients. It follows that the state prison system is more adept at incapacitating criminals.

214. See Reardon Testimony, supra note 13; Brakel, supra note 22; Final Report, supra note 4; 1990 Wash. Laws ch. 3, § 1001.
to rehabilitate the incarcerated sexual offender.\textsuperscript{215} Furthermore, treatment of a sex offender in a secure state mental facility is likely to be very expensive.\textsuperscript{216} Therefore, because of the expense and ineffectiveness of treatment, a convicted sex offender should be incarcerated in prison rather than being treated in a secure mental facility.

A final reason to imprison rather than to hospitalize sex offenders is to reflect society's values concerning sexual offenses. By classifying incarceration as treatment, the Violent Sexual Predator Commitment System detracts from the seriousness of crimes of a violent sexual nature. Classifying the incarceration as punishment shows society's abhorrence of acts of sexual violence.\textsuperscript{217} The term "punishment" also shows that society will not tolerate such violent behavior. The detention must be labeled what it really is—punishment.

By increasing the punishment for sexual offenses, the legislature took an important step in attempting to reduce the frequency of sexual offenses. The prior system of sentencing sexual offenders was too lenient in dealing with the offenders. For example, in a recent case a mental health worker was found guilty of second degree rape for the rape of a hospital patient.\textsuperscript{218} At the time of the rape, the victim was a patient in physical restraints in a locked ward at Harborview Medical Center. In spite of the fact that the defendant had abused his position of trust and had taken advantage of a particularly vulnerable person, the judge declined to exceed the state's sentencing guidelines and sentenced the defendant to only 27 months in prison.\textsuperscript{219} Under the sentencing guidelines of the Violent Sexual Predator Commitment System, a longer sentence would be imposed for the same crime.\textsuperscript{220} This longer sentence would express society's intolerance of violent sexual offenses and deter others who would commit similar crimes.

However, the new system does not go far enough. For a first-time violent sexual offender, the new sentencing struc-

\textsuperscript{215} See Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered, 70 Calif. L. Rev. 54, 79-84 (1982).

\textsuperscript{216} For the estimated costs of maintaining a secure hospital for violent sexual predators, see supra note 207.

\textsuperscript{217} See W. LaFAVE & A. SCOTT, supra note 209, at 25-27.

\textsuperscript{218} Seattle Post-Intelligencer, Nov. 4, 1989, at B1, col. 1.

\textsuperscript{219} Id.

\textsuperscript{220} 1990 Wash. Laws ch. 3, § 701. Under the new sentencing structure, the same defendant would receive a sentence ranging from 51-68 months to 149-198 months for the second degree rape. Id.
ture may inflict adequate punishment. For the repeat offender, the sentences are too lenient. The sentencing structure should be amended to provide for life sentences for repeat offenders. By providing life sentences for repeat violent sexual offenders who are not mentally ill, the legislature would send a message to these offenders: Change your behavior or face the possibility of life imprisonment. This message would better serve the goals of the criminal justice system—retribution, deterrence, and incapacitation.

V. CONCLUSION

The Violent Sexual Predator Commitment System will not survive challenges in the courts based on due process and equal protection. Additionally, the new commitment system may be arbitrarily enforced and may lead to erroneous detention of individuals. Furthermore, the new commitment system does not reflect the values of a just society.

Instead of being committed for treatment, violent sexual offenders should be subjected to the full force of the criminal law. The criminal justice system provides adequate safeguards to minimize arbitrary and erroneous detention of the innocent. Processing sex offenders through the criminal justice system recognizes a sexual offense for what it is: a crime. Labelling the violent sexual act a crime reflects societal revulsion at the commission of such acts. Therefore, the Violent Sexual Predator Commitment System should be repealed, and the sentencing structure for sexual offenses as modified should be allowed to serve the goals of the criminal law—retribution, deterrence, and incapacitation.

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