

# Will California's "One Strike" Law Stop Sexual Predators, or Is a Civil Commitment System Needed?

*This Comment urges California\* and other jurisdictions to enact sexual predator laws to civilly commit dangerous, mentally ill sex offenders who are nearing release from prison and are a credible threat to re-offend. Such statutes, though, are appropriate and constitutional only when they are narrowly tailored to achieve this goal. A Model Sexual Predators Act included in the Appendix surmounts substantive and procedural due process concerns, increases the safety of the public, and safeguards the accused individual's interest in liberty.*

## I. INTRODUCTION

In 1987, the ten-year prison sentence of convicted child molester Earl Shriner was nearing completion in the State of Washington. As his release date neared, prison officials sought to keep Shriner behind bars because they discovered letters and drawings that expressed his desire to molest and kill children by using a mobile torture chamber.<sup>1</sup> However, Shriner did not meet Washington State's existing mental health civil

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\* Editor's Note: After this Comment was written, the California Legislature passed a sexual predator commitment law. See CAL. WELF. & INST. CODE § 6600-08 (West Supp. 1996). However, according to the author of this Comment, California's sexual predator law is very similar to Washington's law, which was recently declared unconstitutional by a federal district court. See *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) (holding that the law violated the Due Process, Ex Post Facto, and Double Jeopardy Clauses of the Constitution). Because California bases its approach on what is believed to be an unconstitutional civil commitment scheme, the author urges the California Legislature to adopt a substantively fairer approach such as that suggested by the Model Sexual Predators Act in the Appendix of this Comment.

1. Kate Shatzkin, *Lack of Remorse Key in Sentence for Shriner, Exceptional 131-Year Term Given for Mutilation of Tacoma Boy*, SEATTLE TIMES, Mar. 27, 1990, at C1.

commitment statute<sup>2</sup> because he had not committed a “recent overt act”<sup>3</sup> and was not mentally ill according to psychiatrists. Shriner was released from prison and two years later<sup>4</sup> acted on his intentions. He lured a young Tacoma boy into the nearby woods, raped him repeatedly, stabbed him in the back, cut his penis off with a knife, and left the boy for dead after choking him. Despite this brutal attack, the boy survived and identified Shriner as his assailant.<sup>5</sup> Following this incident, a wave of public outcry compelled the Washington State Legislature to take action.<sup>6</sup> The result was Washington’s Sexually Violent Predators (SVP) law, which permits civil commitment<sup>7</sup> of violent sex offenders *after* the offender’s prison term has been served.<sup>8</sup>

When twelve-year-old Polly Klaas disappeared from her home in Northern California on October 1, 1993, the limitations of the criminal justice system were again exposed. Two months after she vanished, parolee Richard Allen Davis<sup>9</sup> was arrested and led authorities to Klaas’s body.<sup>10</sup> Davis had allegedly kidnapped Klaas from a slumber party at

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2. WASH. REV. CODE ANN. § 71.05 (West 1992 & Supp. 1995).

3. See *In re Harris*, 654 P.2d 109, 113 (Wash. 1982). Shriner was locked up in prison for 10 years, thereby making a recent overt act a virtual impossibility. For further discussion on overt act requirements, see *infra* text accompanying notes 146-52.

4. During these two years, Shriner had additional problems with the law. Three months after his 1987 release, Shriner was given a 90-day sentence for stabbing a 16-year-old boy in the arm. Then, a year later, he grabbed a boy behind a store, unbuttoned the boy’s pants, tied him to a fence post, and beat the boy with his fists. That crime earned him a 67-day jail sentence. Sally MacDonald & Jim Simon, *Suspect Fell Through the Cracks of the System*, SEATTLE TIMES, May 24, 1989, at A7.

5. *Id.*

6. Gary Gleb, Comment, *Washington’s Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 214 (1991) (citing Barry Siegal, *Locking Up “Sexual Predators,”* L.A. TIMES, May 10, 1990, at A1, A30).

7. Civil commitment rather than criminal incarceration is used for those individuals, such as insanity acquittees or the mentally ill, who are in need of treatment and are a danger to society. Unlike criminal prosecution and incarceration, which are based on deterrence and retribution, civil commitment, although usually indefinite in duration, must end when the individual is either no longer dangerous to society or is no longer mentally ill. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1992). The SVP law allows the state to use the civil system rather than the criminal justice system to indefinitely remove a sexual predator from society.

8. WASH. REV. CODE ANN. § 71.09 (West 1992 & Supp. 1995).

9. Davis had been previously convicted of burglary, attempted sexual assault on a woman at knife-point, assaulting a woman with a fireplace poker, escaping from a mental hospital, and forcing his way into a woman’s apartment and compelling her at gun-point to give him money. He was released from prison in June of 1993 after serving his sentence for the most recent of these offenses. On October 1, 1993, less than four months after Davis’s release, Polly Klaas was kidnapped and killed. Debra J. Saunders, *What Price Justice for Polly?*, S.F. CHRON., Sept. 30, 1994, at A27.

10. Ron Sonenshine, *Polly Klaas Slaying Suspect to Stand Trial, Richard Allen Davis Could Be Sentenced to Death*, S.F. CHRON., May 14, 1994, at A1.

her home, sexually assaulted her, strangled her to death, and then buried her in a shallow grave.<sup>11</sup> The public was outraged to learn that the alleged killer was a parolee who had prior sex-related convictions. California lawmakers scrambled to push through legislation, as constituents statewide demanded tougher laws to protect society from repeat offenders, especially violent sex offenders.<sup>12</sup> Within a year, California had passed the "one strike" law, which mandates a minimum sentence of either fifteen or twenty-five years to life for violent sex offenders.<sup>13</sup>

The public's reaction to these two horrifying stories spurred the respective state legislatures to attempt different solutions to the problem of repeat violent sex offenders who slip through the cracks of the criminal justice system. Washington's SVP statute and California's "one strike" law are examined in Section II of this Comment. Washington's law seeks to prevent new offenses from occurring by committing the "predator" before another offense can be perpetrated. On the other hand, California's law severely stiffens prison sentences for those convicted of newly committed sex offenses. Although California's "one strike" law promises to keep *future* offenders off the streets for substantially longer periods of time, the "one strike" law cannot effectively protect its citizenry from violent sex offenders who are nearing release from prison, yet remain credible threats to re-offend. Therefore, this Comment argues that California should adopt a modified version of Washington's SVP law to fill in the dangerous void left by the "one strike" law.

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11. Dan Reed & Ron Sonenshine, *8 Charges In Polly Case—Suspect Faces Death Penalty*, S.F. CHRON., Dec. 8, 1993, at A1. Four of the counts against Davis alleged that he tied and gagged two of Klaas' friends who witnessed the abduction and threatened them with a knife. *Id.* One hour after the kidnapping had occurred, two sheriff's deputies apparently talked with Davis about the fact that his car was in a ditch next to a main road. After helping Davis get his car out of the ditch, the deputies left. Later in the investigation, law enforcement agents discovered strips of cloth, Klaas's tights, and a sweatshirt only 60 feet from where the officers had questioned Davis. Discovery of an unrolled condom with the clothing near the ditch, *id.*, as well as the fact that Klaas's body was found with her skirt pushed above her waist and her shirt open, led prosecutors to charge Davis with sexually assaulting the girl. Sonenshine, *supra* note 10.

12. See Ken Chavez, *Wilson Claims Victory on Dozen Crime Bills*, SACRAMENTO BEE, Sept. 2, 1994, at A3.

13. 1994 Cal. Legis. Serv. 14 (West) (codified at CAL. PENAL CODE §§ 667.61, 667.71, 1203.066 (West Supp. 1995)).

The constitutional problems facing Washington's SVP scheme<sup>14</sup> are discussed in Section III of this Comment. That section focuses on *In re Young*,<sup>15</sup> the first Washington Supreme Court decision to consider constitutional challenges to the SVP law. Section III will analyze the *Young* court's decision regarding the issue of whether the SVP law is civil or punitive in nature, as well as the substantive and procedural due process challenges raised by the petitioners.<sup>16</sup>

The Appendix to this Comment consists of a model statute that was drafted by the author. The model statute incorporates portions of established "sexual predator" statutes from various jurisdictions as well as innovations created by the author.<sup>17</sup> Accompanying each section of the model statute is commentary describing the origins of that particular section and the reasons for the modifications or innovations contained therein. This model statute, the Model Sexual Predators Act (MSPA), was carefully drawn to be more narrow in scope than Washington's commitment statute. The MSPA overcomes the potential constitutional shortcomings of the SVP law by requiring a psychiatrically recognized mental illness rather than the SVP's legislatively created and defined "mental abnormality." The MSPA also strikes a better balance between society's legitimate need for protection and the moral and constitutional rights to which an accused individual is entitled. Although the Due Process Clause, as interpreted by the current United States Supreme Court, is unlikely to require an increased number or quality of individual protections in future sexual predator statutes,<sup>18</sup> fairness and morality mandate this development.<sup>19</sup> The MSPA meets these goals and also includes a unique section that mandates the classification of accused predators by degree of dangerousness and severity of mental illness,<sup>20</sup> thereby enabling jurists to choose meaningful alternatives to indefinite commitment.<sup>21</sup>

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14. This Comment will not address the presumed constitutionality of California's sentence-enhancing "one strike" law because the focus of this Comment is on civil commitment schemes for sexual predators, not sentence-enhancing laws.

15. 857 P.2d 989 (Wash. 1993).

16. For the discussion of these issues, see *infra* Section III.

17. See Appendix, *infra*.

18. For a discussion of the procedural due process arguments, see *infra* text accompanying notes 122-57.

19. Compare Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 753-54 (1992), with John Q. La Fond, *Washington's Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET SOUND L. REV. 755, 778 (1992).

20. See *infra* Appendix, MSPA § 2(3)-(4).

21. See *infra* Appendix, MSPA § 5.2.

## II. THE STATUTES

## A. California's "One Strike" Law

California's Governor, Pete Wilson, signed into law a number of anti-crime bills, including the "one strike" law, in September of 1994.<sup>22</sup> The "one strike" law increased the length of the prison terms to which sex offenders will be sentenced by adding a new section to the California Penal Code and amending two other sections.<sup>23</sup> Specifically, the "one strike" law mandates that a person convicted of a sex offense listed in Penal Code section 667.61(c)<sup>24</sup> will be sentenced under certain circumstances to life in prison without the possibility of parole for twenty-five years.<sup>25</sup> A person convicted of a sex offense under other

22. See Chavez, *supra* note 12. In addition to the enactment of Senate Bill 26, commonly referred to as the "one strike" law, other like-minded legislation was signed into law: 1993-94 Cal. Legis. Serv. 447 (West) (any person convicted of felony violation of specified sex offenses shall be punished by additional consecutive term of 25 years to life); 1993-94 Cal. Legis. Serv. 446 (West) (punishes habitual sex offender with 25-year-to-life sentences and prohibits parole for at least 25 years); 1993-94 Cal. Legis. Serv. 878 (West) (provides that specified sex offenses against a child under 14 years of age shall be punished by a 15-year-to-life prison term); 1993-94 Cal. Legis. Serv. 18 (West) (increases the sentences of felony sex offenders who kidnap their victims).

23. 1994 Cal. Legis. Serv. 14 (West) (codified at CAL. PENAL CODE §§ 667.61, 667.71, 1203.066 (West Supp. 1995)).

24. Section 667.61(c) applies to any of the following offenses: (1) Rape by force or fear (CAL. PENAL CODE § 261(a)(2)); (2) Rape of a person unable to give consent (CAL. PENAL CODE § 262(a)(3)); (3) Aiding or abetting rape (CAL. PENAL CODE § 264.1); (4) Lewd and lascivious acts, by means of force or fear, with a child under 14 years of age (CAL. PENAL CODE § 288(b)); (5) Penetration by foreign object (CAL. PENAL CODE § 289); (6) Sodomy (CAL. PENAL CODE § 286) or oral copulation (CAL. PENAL CODE § 288a) by force or fear; and (7) Lewd and lascivious acts with a child under 14 years of age (CAL. PENAL CODE § 288(a)), unless defendant qualifies for probation under CAL. PENAL CODE § 1203.066(c) (*see infra* note 35). CAL. PENAL CODE § 667.61(c) (West Supp. 1995).

25. CAL. PENAL CODE § 667.61(a) (West Supp. 1995). Section 667.61(a) states that a person who is convicted of an offense specified in subd. (c) under one or more of the circumstances specified in subd. (d) or under two or more of the circumstances specified in subd. (e) shall be punished by life imprisonment and shall not be eligible for parole for 25 years. *Id.* Section 667.61(d) includes any of the following enumerated circumstances: (1) Prior conviction of offenses specified in subd. (c), including those in other jurisdictions with elements equivalent to subd. (c) offenses; (2) Kidnapping that substantially increased the risk of harm above the risk level inherent in the underlying offense specified in subd. (c); (3) Aggravated mayhem (CAL. PENAL CODE § 205) or

circumstances will be sentenced to life in prison without the possibility of parole for fifteen years.<sup>26</sup> If there are multiple victims, the law mandates that the offender receive a separate prison term for each victim.<sup>27</sup> The law further denies the convicted offender the possibility of probation or the suspension of his or her sentence if the offense is one of the first six offenses enumerated in Penal Code section 667.61(c).<sup>28</sup> Habitual sex offenders<sup>29</sup> that are sentenced under the “one strike” law also receive a sentence of twenty-five years to life.<sup>30</sup> For first-time sex offenders and habitual sex offenders alike, the opportunity for parole is expressly prohibited until the offender has served at least eighty-five percent of the minimum prison term.<sup>31</sup>

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torture (CAL. PENAL CODE § 206); (4) Commission of the offense during a burglary (CAL. PENAL CODE § 460(a)) with the intent to commit an offense specified in § 667.67(c). CAL. PENAL CODE § 667.61(d) (West Supp. 1995). Section 667.61(e) includes any of the following enumerated circumstances: (1) Except as provided in § 667.61(d)(2), kidnapping (CAL. PENAL CODE §§ 207, 208, 209, or 209.5); (2) Except as provided in § 667.61(d)(4), commission of the offense during a burglary (CAL. PENAL CODE § 460(a)) or burglary of a building, including a commercial establishment that was closed to the public (CAL. PENAL CODE § 459); (3) Personal infliction of great bodily injury during the commission of an offense (CAL. PENAL CODE § 12022.7-.8); (4) Use of a dangerous or deadly weapon in the commission of an offense (CAL. PENAL CODE §§ 12022, 12022.3, or 12022.5); (5) In the present case or cases, conviction of a subd. (c) offense against more than one victim; (6) Tying or binding the victim or another in the commission of the offense; (7) Administering a controlled substance to the victim by force, violence, or fear in the commission of the offense (CAL. PENAL CODE § 12022.75). CAL. PENAL CODE § 667.61(e) (West Supp. 1995).

26. CAL. PENAL CODE § 667.61(b) (West Supp. 1995). The section states that a person who is convicted of an offense specified in subd. (c) under one of the circumstances specified in subd. (e) shall be sentenced to life in prison and shall not be eligible for parole for 15 years. *Id.*

27. CAL. PENAL CODE § 667.61(g) (West Supp. 1995).

28. CAL. PENAL CODE § 667.61(h) (West Supp. 1995). See *supra* note 24 for the enumerated offenses.

29. Defined by statute as “a person who has been previously convicted of one or more of the offenses listed in subdivision (d) [of § 667.71] and who is convicted in the present proceeding of one of those offenses.” CAL. PENAL CODE § 667.71(a) (West Supp. 1995). Section 667.71(d) expands the number of offenses that trigger the habitual sex offender section. This section also includes other jurisdictions’ convictions that meet the elements of one of the specified offenses. CAL. PENAL CODE § 667.71(d) (West Supp. 1995).

30. However intriguing the plight of the overcrowded prison system may be, this Comment will not focus on the inevitable budgetary and other problems associated with implementing the “one strike” law or other sentence enhancement laws. For a discussion of these issues, see Saunders, *supra* note 9; Editorial, *On Mandatory Sentences. . . ‘One Strike’ Will Backfire*, L.A. DAILY J., Apr. 12, 1994, at 6.

31. Credit reduction of prison terms does apply to reduce the minimum terms under the “one strike” law. However, § 667.61(j) prohibits the article’s application beyond 15% of the minimum term and dictates that parole is not possible until 85% of minimum term has been served. CAL. PENAL CODE § 667.61(j) (West. Supp. 1995). Section 667.71(b) has the identical prohibitions regarding credit reduction for habitual sex offenders’ minimum 25-year term. CAL. PENAL CODE § 667.71(b) (West. Supp. 1995).

One of the earlier drafts of the "one strike" legislation called for life sentences without the possibility of parole for all sex crimes, including so-called "acquaintance rape" cases and cases involving family members.<sup>32</sup> However, women's groups and some prosecutors opposed this tough stance. Victims, especially children, they argued, would be hesitant to testify against a loved one if a conviction would automatically lead to a life sentence without the possibility of parole.<sup>33</sup> Since the early stages, the "one strike" legislation has been amended numerous times to factor into account similar considerations.<sup>34</sup> Accordingly, to avoid the inequitably harsh result of either no conviction or life imprisonment, the "one strike" law presently permits the courts to punish some sex offenders, in severely limited situations, with sentences as lenient as probation.<sup>35</sup>

32. Ken Chavez, 'One Strike' Bill Amended to Satisfy Critics, SACRAMENTO BEE, May 7, 1994, at A3.

33. *Id.*

34. Senate Bill 26, introduced by Senator Bergeson on Feb. 2, 1994, was amended four times before the final version was enacted. The original bill only called for enhancing existing sex offender sentences to 6, 12, or 16 years. 1994 Cal. Legis. Serv. 14 (West) (codified at CAL. PENAL CODE §§ 667.61, 667.71, 1203.066).

35. CAL. PENAL CODE § 1203.066 (West Supp. 1995). Subsection (c) allows lesser penalties if the court finds that:

(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the household.

(2) A grant of probation to the defendant is in the best interest of the child.

(3) Rehabilitation of the defendant is feasible . . . and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence.

(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim.

(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so.

*Id.* Subsection (c) also requires that the court appoint a psychiatrist or psychologist to make a report regarding paragraphs (2), (3), and (4). *Id.*

For more detailed comments on psychiatry and sex offenders, see Robert M. Wettstein, M.D., *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992), and see also Gleb, *supra* note 6.

The purpose of the "one strike" law is to effectively remove both first-time and habitual sex offenders from the streets.<sup>36</sup> Under the statute, courts are compelled to dole out prison sentences of unprecedented length for sex offense convictions. Once imprisoned under the "one strike" scheme, convicted offenders may be monitored by parole boards for signs of future dangerousness to ensure that high-risk parole candidates are not released.<sup>37</sup> Although the "one strike" law promises to be successful at enhancing punishment and enabling consideration of dangerousness before parole, it is not currently capable of responding "to the long-existing but previously unsolved problem of what to do about sex offenders whose prison terms are [presently] expiring, yet who are regarded as still extremely dangerous."<sup>38</sup> The "one strike" law is silent with respect to those habitual sex offenders awaiting release from prison who have expressed a credible desire to harm others again. Although the days of lenient sentencing may have passed,<sup>39</sup> many dangerous offenders who were given light sentences in the past are now being released into a society that is screaming for protection after the Polly Klaas and Earl Shriner tragedies.<sup>40</sup> The "one strike" law is likely to be an effective means to lock up dangerous sex criminals after they have been caught again, but the law is powerless to stop already known sex offenders from stepping out of their prison cells and preying on new victims.

### B. Washington's Sexually Violent Predators Act

In 1990, the Washington Legislature made a bold move away from the modern trend of abolishing statutes that call for the civil commitment of sex offenders<sup>41</sup> by enacting the Sexually Violent Predators Act.<sup>42</sup> The

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36. Chavez, *supra* note 32.

37. Subsections (a) and (b) of § 667.61 mandate a life term upon conviction with parole eligibility beginning in either 25 or 15 years, respectively. CAL. PENAL CODE § 667.61(a)-(b) (West Supp. 1995). Under this scheme, the court will sentence offenders to life terms and the parole boards will then have the authority to parole the offenders only when and if they are safe for release. If implemented in this fashion, the "one strike" law could effectively impact the number of violent repeat offenders in society by keeping them in jail *ad infinitum*.

38. Brooks, *supra* note 19, at 710.

39. *Nearly Half of Sex Offenders Avoid Prison, Paper Says*, SACRAMENTO BEE, May 31, 1994, at B8. "Nearly half of the sex offenders in California don't go to prison, and those who do serve time are released in an average [of] 3-1/2 years because of jail overcrowding . . ." *Id.* The article cites its source as a 1992 California Department of Justice analysis of 1992 sex crime data.

40. See *supra* text accompanying notes 1-13.

41. See, e.g., Gleb, *supra* note 6, at 215. Concern about civil rights and claims of ineffective treatment for sex offenders have been the principal motivation for repealing

SVP law permits indefinite confinement of sexually violent predators who do not necessarily have a psychiatrically recognized mental disease or defect. To qualify as a sexual predator under the statute, the sex offender must have been previously convicted of a crime of sexual violence and suffer from a "mental abnormality" or "personality disorder"<sup>43</sup> that makes him or her likely to engage in predatory acts of sexual violence.<sup>44</sup> Washington's legislature considered the state's existing commitment statute for the mentally ill<sup>45</sup> inappropriate for

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sex offender civil commitment schemes. By 1990, only 13 states still had these schemes, compared to 26 states in 1960. *Id.* California repealed its sex offender commitment scheme in 1981. See CAL. WELF. & INST. CODE §§ 6300-31 (repealed 1981). During this period, many jurisdictions repealed their schemes because of the

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

Beth K. Fujimoto, Comment, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 904 (1992) (citing SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 740, 743 (3d ed. 1985)).

Led by Washington's initiative, state legislatures in Wisconsin, Kansas, Iowa, and Minnesota have recently enacted sexual predator statutes similar to the SVP law. Also, 10 other states are considering such legislation. See Erin Gunn, Comment, *Washington's Sexually Violent Predator Law: The 'Predatory' Requirement*, 5 UCLA WOMEN'S L.J. 277, 279-80 n.13 (1994).

42. WASH. REV. CODE ANN. § 71.09 (West 1992 & Supp. 1995).

43. The Washington Legislature has defined the term "personality disorder" as a disorder recognized by psychiatric medicine. The term "mental abnormality" has been legislatively defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." WASH. REV. CODE ANN. § 71.09.020(2) (West 1992 & Supp. 1995). The term "mental abnormality" is not a psychiatric term. For a discussion of the problems caused by the Washington Legislature's definition of that term, see *infra* notes 103-21 and the accompanying text.

44. WASH. REV. CODE ANN. § 71.09.020 (West 1992 & Supp. 1995). Note: the sex offender need not be imprisoned for a petition to be filed for civil commitment. For example, Vance Cunningham was a free man when he was convicted of being a sexual predator and indefinitely committed. *In re Young*, 857 P.2d 989, 995 (Wash. 1993).

45. WASH. REV. CODE ANN. § 71.05 (West 1992 & Supp. 1995).

civilly committing sexual predators because that statute requires a more specific and higher level of mental disease or defect.<sup>46</sup>

Washington's sexual predator commitment scheme is designed to operate in the following manner. As the prison release date of each sex offender approaches, the Department of Corrections staff performs a screening procedure to determine which offenders should still be considered dangerous to the public. The End of Sentence Review Referral Subcommittee (ESRRS)<sup>47</sup> and the Indeterminate Sentence Review Board (ISRB)<sup>48</sup> then further narrow this group of potential sexual predators by determining which offenders present a high risk of committing future sex offenses. This is the group that is brought to the attention of prosecuting attorneys and the Attorney General.<sup>49</sup> In order to make this determination, the ESRRS and the ISRB examine the offender's record of prior arrests and convictions for sexually violent crimes, overall criminal history, records of prior mental evaluations and/or treatments,<sup>50</sup> current mental health evaluations, pre-sentence and end-of-sentence review reports, the offender's version of his offenses, records of any interviews, and institutional records describing the offender's behavior while in custody.<sup>51</sup> After receiving an ESRRS referral, the prosecuting attorney then reviews the case and has the authority to file a personal restraint petition with the court to seek civil commitment of the offender.<sup>52</sup> In cases where the alleged predator has

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46. See WASH. REV. CODE ANN. § 71.09.010 (West 1992 & Supp. 1995). The statute for committing the mentally ill is not well suited to committing sexual predators because its aim is directed towards individuals with "serious mental disorders" that only need short-term treatment before being returned to society. *Id.* Furthermore, the mental illness commitment statute requires an overt act. Legislators wanted to avoid the overt act requirement because imprisoned sexual predators have no opportunity to perform an overt act and, therefore, could not be committed under the existing statute. See *id.*

47. The ESRRS is composed of members from the Departments of Corrections and Social and Health Services. Brooks, *supra* note 19, at 714 (citing DIVISION OF PRISONS, WASHINGTON DEP'T OF CORRECTIONS, DIVISION DIRECTIVE REFERRING SELECT OFFENDERS TO THE END OF SENTENCE REVIEW COMMITTEE (ESRC) (May 28, 1991)).

48. Formerly the Parole Board. *Id.*

49. *Id.*

50. Including psychological or psychiatric testing, group notes, autobiographical notes, progress notes, psycho-social reports, and other material gathered while the offender was in custody. *Id.* (citing letter from Jeanne Tweten, Assistant Attorney General, State of Washington, Criminal Division, to Professor Alex Brooks, Rutgers Law School (Apr. 7, 1992) (containing final draft of Washington Attorney General's "Sexually Violent Predator Filing Standards") (on file with the *University of Puget Sound Law Review*)).

51. *Id.* at 715.

52. WASH. REV. CODE ANN. § 71.09.030 (West 1992 & Supp. 1995). The law defines a sexually violent predator as any person who suffers from a personality disorder that makes the person likely to engage in predatory acts of sexual violence and is convicted or charged with a violent sex crime against a stranger (such as first degree

already been released from prison, the onus lies solely with the prosecuting authority to initiate an investigation and file a petition with the court seeking commitment.<sup>53</sup> Although the SVP law itself does not require any showing of recidivism, the Washington State Attorney General requires that the offender exhibit a pattern of predatory acts before a prosecutor may file a petition under the statute. If the court decides that probable cause exists for the charge, the alleged predator is moved to a special maximum security facility, which is operated by the Department of Social and Health Services (DSHS), for further evaluation and preparation for trial.<sup>54</sup>

Unlike an ordinary civil trial, the prosecution carries the burden of proving beyond a reasonable doubt, not by a preponderance of the evidence, that the person before the court is a sexually violent predator.<sup>55</sup> The Washington legislation assures that the alleged predator is afforded the right to a jury trial within forty-five days after the filing of the petition, the right to have legal counsel appointed, and the assistance of mental health professionals for evaluation and expert testimony.<sup>56</sup> If convicted, the predator is indefinitely committed to the DSHS facility.<sup>57</sup> Washington law then requires the DSHS staff to develop an

rape, second degree rape by forcible compulsion, or indecent liberties against a child under age 14). WASH. REV. CODE ANN. § 71.09.020 (West 1992 & Supp. 1995).

53. WASH. REV. CODE ANN. § 71.09.030 (West 1992 & Supp. 1995). If the court finds probable cause for the petition, an arrest warrant is issued and the alleged predator is apprehended and taken to a Department of Social and Health Services facility. See WASH. REV. CODE ANN. § 71.09.040 (West 1992 & Supp. 1995).

54. Brooks, *supra* note 19, at 715. Among other things, the Attorney General's filing standards also require a mental health professional to find a "mental abnormality or personality disorder" that makes the offender more likely to commit sexually violent acts. *Id.* For a discussion of the problems created by the Washington Legislature's definition of "mental abnormality," see *infra* notes 103-21 and accompanying text.

55. WASH. REV. CODE ANN. § 71.09.060(1) (West 1992 & Supp. 1995).

56. WASH. REV. CODE ANN. § 71.09.050 (West 1992 & Supp. 1995).

57. WASH. REV. CODE ANN. § 71.09.060 (West 1992 & Supp. 1995). Once a person is committed as a sexual predator, the predator is given an annual examination to determine mental condition. WASH. REV. CODE ANN. § 71.09.070 (West 1992 & Supp. 1995). The predator also has an annual right to petition for a hearing. The court first determines whether to deny the hearing or whether there is probable cause to believe that the predator's condition has changed enough to warrant another trial. WASH. REV. CODE ANN. § 71.09.100 (West 1992 & Supp. 1995). At trial, the prosecution again bears the burden of proving beyond a reasonable doubt that the "person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released will engage in acts of sexual violence." WASH. REV. CODE ANN. § 71.09.090(2) (West 1992 & Supp. 1995). If the prosecution bears its burden, the

individualized treatment plan for the committed predator<sup>58</sup> and to provide the predator with a number of rights and privileges not usually associated with maximum-security prison facilities.<sup>59</sup>

The Washington Legislature's intent is unequivocal: keep sexual predators away from society, regardless of whether they have already served their so-called "debt to society." The means to achieve this goal is a system of indefinite civil commitment and treatment, which the SVP statute itself admits is doubtful to produce any cure or effective treatment for these sex offenders.<sup>60</sup> The standards and procedures established by the varied legislation that constitutes the SVP law are essential to keep truly dangerous individuals out of mainstream society. Although "[o]pponents' fears of a civil commitment drift-net cast by overzealous prosecutors over the prison population to catch hundreds of sex offenders" have not materialized,<sup>61</sup> Washington's current system still appears vulnerable to abuse if its virtually limitless definition of "mental abnormality" remains untempered.<sup>62</sup>

### III. CONSTITUTIONAL DILEMMAS

From the outset, commentators have argued vehemently over the constitutionality and validity of Washington's Sexually Violent Predators law.<sup>63</sup> This section focuses on the constitutional problems facing

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predator's commitment will once again continue indefinitely.

58. WASH. ADMIN. CODE § 275-155-040 (1994). This code section requires the DSHS to develop an individualized treatment plan ("ITP") that includes: (a) a description of the predator's specific treatment needs; (b) an outline of intermediate and long-term treatment goals; (c) treatment strategies; (d) a description of the DSHS staff's responsibilities; and (e) criteria for recommending whether the predator should be released. Furthermore, this section provides for a review of the predator's ITP at least every six months. *Id.*

59. WASH. ADMIN. CODE § 275-155-050 (1994). Some of these rights and privileges include having an attorney and retaining a "professionally qualified person" for psychological evaluation, wearing their own clothes and keeping some personal possessions, having personal storage space, having reasonable telephone and other correspondence privileges, and having the right to petition the court for release. *Id.*

60. See WASH. REV. CODE ANN. § 71.09.010 (West 1992 & Supp. 1995) ("[S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities . . .").

61. Norm Maleng, *The Community Protection Act and the Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 821, 825 (1992).

62. For a discussion on the mental illness requirement and the problems related to it, see *infra* text accompanying notes 103-21.

63. Compare La Fond, *supra* note 19 (SVP statute unconstitutional and capricious) and Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990) (unconstitutional) with Brooks, *supra* note 19 (law constitutional and morally acceptable) and Marie A. Bochnewich, Comment, *Prediction of Dangerousness*

Washington's SVP law and scrutinizes the Washington State Supreme Court's decision in *In re Young*,<sup>64</sup> where the court decreed that there are "no substantive constitutional impediments to the sexually violent predator scheme."<sup>65</sup> In order to determine the validity of the appellants' ex post facto and double jeopardy claims, Section III.A. of this Comment concentrates on the question of whether the SVP statute is civil or punitive in nature. The appellants' substantive due process claims, which are the strongest challenges set forth by the appellants, are considered in Section III.B. Section III.C. explores the procedural due process and equal protection challenges raised by the appellants.

The appeals of Andre Brigham Young and Vance Russell Cunningham from their respective sexual predator convictions were consolidated by the *Young* court. Young's personal restraint petition was filed against him one day before he was set for release from prison, after serving time for his latest rape conviction.<sup>66</sup> In an *ex parte* proceeding,<sup>67</sup> the judge, after reviewing two psychological evaluations and Young's prior criminal history,<sup>68</sup> found probable cause for the petition and ordered Young to the DSHS facility until trial. After hearing testimony from Young's previous rape victims and starkly contrasting testimony from expert psychologists for both the prosecution and the defense, the jury

and Washington's Sexually Violent Predator Statute, 29 CAL. W. L. REV. 277 (1992) (constitutionally permissible and morally responsible to restrain offender's liberty).

64. 857 P.2d 989 (Wash. 1993). This case is expected to be appealed to the U.S. Supreme Court. As of the date of printing, a federal district court has reversed the state supreme court ruling and held that the SVP law is unconstitutional. See *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). An appeal to the Ninth Circuit is pending.

65. *Young*, 857 P.2d at 1000.

66. *Id.* at 994.

67. See WASH. REV. CODE ANN. § 71.09.040 (West 1992 & Supp. 1995).

68. *Young*, 857 P.2d at 994. Young's first known rapes occurred in 1962 when he was convicted of four counts of first degree rape: Young broke into the respective homes of four women and forced all of them to have sexual intercourse with him. In two of these rapes, he threatened the victims with a knife. While on appeal bond for his 1962 rapes, Young entered another woman's home, exposed himself with her child present, and threatened to hurt the child and rape and kill the woman. Young was scared away before he could act out his threats. He was charged with attempted rape, but was held incompetent and was never tried. In 1972, Young was released on parole. Five years later, he was convicted of another rape after breaking into another woman's home. Young was released from prison in 1980 and again, five years later, forced his way into an apartment and raped another woman while three small children were present. *Id.*

unanimously concluded that Young was a sexually violent predator.<sup>69</sup> Since his conviction, Young has been confined at the DSHS facility.

Unlike Young, Cunningham had been a free man for more than four months, without incident, before prosecutors filed a personal restraint petition against him. In Cunningham's *ex parte* proceeding, the judge found probable cause to issue an arrest warrant after reviewing two psychological evaluations and Cunningham's history of sexual crimes.<sup>70</sup> At Cunningham's trial, the jury again heard conflicting testimony from the opposing parties' expert witnesses, testimony from Cunningham's previous rape victims, his prior criminal history, and Cunningham's own testimony. After being instructed that unanimity was not required, the jury returned an eleven-to-one verdict concluding that Cunningham was a sexually violent predator.<sup>71</sup>

### A. *Nature of Sexually Violent Predators Law*

In order to resolve the appellants' challenges that their constitutional protection against *ex post facto* laws and double jeopardy were violated by the SVP law, the court sought to determine whether the law was civil or criminal in nature. Generally, the Double Jeopardy and *Ex Post Facto* Clauses are only held applicable to punitive statutes. Once a court establishes that a statute is civil in nature, the double jeopardy and *ex post facto* challenges no longer apply.<sup>72</sup> In *Young*, the majority opinion first looked to the language of the statute and its legislative history, then to the purpose and effect of the statutory scheme, in order to determine whether the SVP law was civil or criminal in nature.<sup>73</sup> The court noted that the legislature's intent to create a civil rather than criminal statute was evidenced by the statute's plain language, which calls for a civil

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69. *Id.* at 994-95.

70. *Id.* at 995. Cunningham was 26 years old at the time of the petition for his commitment as a sexual predator. When he was 15 years old, he jumped out of some bushes in a park and brandished a knife towards a woman and her three children. He fled when the woman screamed. Cunningham later admitted that he intended to force the woman to have oral sex with him. Four years later, he raped a woman hitchhiker after striking her several times and threatening to kill her. He was sentenced to 31 months in prison. In 1987, three months after his November 1986 release, he grabbed a woman and forced her to have anal intercourse. In April of 1987, he assaulted another woman in a like manner. Cunningham was convicted for both rapes. *Id.*

71. *Id.* at 995-96.

72. *See, e.g.,* *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (deciding *ex post facto* issues on civil versus criminal distinctions); *United States v. Halper*, 490 U.S. 435, 447-48 (1989) (deciding double jeopardy issues based on punitive nature of proposed scheme).

73. *Young*, 857 P.2d at 996 (citing two-part analysis from *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

system of committing sexual predators. The legislative history of the statute, the court claimed, also indicated a "clear intent" to create a civil scheme.<sup>74</sup>

Next, the court interpreted *Allen v. Illinois*,<sup>75</sup> a 1986 United States Supreme Court decision, to resolve the question of whether the *actual* impact of the SVP law was civil or criminal.<sup>76</sup> In *Allen*, the Court held, in a five-to-four decision, that proceedings under the Illinois Sexually Dangerous Persons Act were not criminal in nature and, therefore, the sex offender could not claim a privilege against compulsory self-incrimination.<sup>77</sup> The *Allen* Court stated that even if a legislature expressly provides that a statute shall be civil in nature, the defendant has the opportunity to present the "clearest proof" that the scheme is "so punitive either in purpose or effect" that it must be considered criminal.<sup>78</sup> The Court found the following facts persuasive: the Illinois Supreme Court had interpreted the statute as civil in nature; under the statute, the state has an obligation to provide sex offenders care and treatment in a special facility; and the court is obliged to discharge the offender once he or she is no longer dangerous.<sup>79</sup> Based upon these factors, the *Allen* Court held that the appellants had failed to meet their burden of proving that the statute was essentially criminal punishment.<sup>80</sup>

Contrary to the appellants' challenges, the *Young* court cited the similarities between the Illinois and Washington sex offender schemes and upheld the SVP's civil stature. The *Young* court ruled that the Washington scheme is not focused on punishing offenders, but instead on providing treatment and protecting society.<sup>81</sup> The *Young* court

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74. *Id.* at 996-97. The court cited the Governor's Task Force on Community Protection as support for this proposition, namely the Task Force's recommendation that a special system of civil commitment be legislated due to the failings of the state's prevailing criminal justice and civil commitment systems. *Id.*

75. 478 U.S. 364 (1986).

76. *Young*, 857 P.2d at 997.

77. *Allen*, 478 U.S. at 375. By doing so, *Allen* implicitly upheld the Illinois sex offender civil commitment statute, which is similar to Washington's SVP statute. See ILL. REV. STAT. ch. 725, para. 205 (1994).

78. *Allen*, 478 U.S. at 369.

79. *Id.*

80. *Id.*

81. *In re Young*, 857 P.2d 989, 997 (Wash. 1993).

relied on the United States Supreme Court's assertion in *Addington v. Texas*<sup>82</sup> that

[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.<sup>83</sup>

The *Young* court concluded that the stated goals and intentions of the legislature to create a civil system were dispositive because there was insufficient proof of a punitive or illegitimate civil goal.<sup>84</sup> Accordingly, the court held that the commitment scheme was civil in nature and that the ex post facto and double jeopardy challenges were therefore inapplicable.<sup>85</sup> However, it appears that the *Young* majority sidestepped some important differences between the Washington statute and the Illinois statute that could greatly affect the analysis of the nature of the SVP law. First, the Illinois statute instructs that only after a criminal charge is pending may a prosecutor seek to civilly commit the offender.<sup>86</sup> Second, under the Illinois law, prosecutors may not first seek criminal penalties and then bring another action seeking commitment based upon the same incident.<sup>87</sup> Washington's SVP statute is simply not driven by the same civil goal of providing treatment in lieu of punishment. "[O]nly after the individual has completed his or her sentence does the [Washington] Statute purportedly seek to provide specialized 'care and treatment' for the individual."<sup>88</sup>

Although there are some significant differences between the Illinois statute and Washington's SVP law, the United States Supreme Court would likely uphold the SVP law as civil in nature, because Washington's commitment scheme appears to have the legitimate goals of protecting society and treating offenders. Thus, the Court would likely deny the appellants' ex post facto and double jeopardy challenges. This forecast is also based upon the Court's *Allen* decision, the present conservative make-up of the Court, and the fact that the SVP law

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82. 441 U.S. 418 (1979).

83. *Young*, 857 P.2d at 1000 (quoting *Addington v. Texas*, 441 U.S. 418, 426 (1979)).

84. *Id.* at 998-99.

85. *Id.* at 999.

86. ILL. REV. STAT. ch. 725, para. 205/3 (1994). The critical difference is that in Washington, civil commitment may be initiated *after* the individual has already served a lengthy criminal sentence. In Illinois, the individual must perpetrate a *new* offense and the prosecutor must, after some investigation, decide whether to divert the individual for treatment rather than criminal prosecution.

87. *People v. Patch*, 293 N.E.2d 661, 665 (Ill. App. Ct. 1973).

88. *Young*, 857 P.2d at 1025 (Johnson, J., dissenting).

disavows an interest in punishment, provides treatment, and provides procedures to effectuate release.

### B. *Substantive Due Process*

Opponents of the Sexually Violent Predator law claim that the statute violates the substantive due process rights of the accused because the law does not serve a valid state interest and it imprisons individuals who are not mentally ill.<sup>89</sup> Section III.B.1. considers the competing interests between the individual and the state and strictly scrutinizes the SVP law and the *Young* court's analysis of that law. Section III.B.2. focuses on arguably the greatest obstacle to the SVP scheme: the Washington Legislature's vague definition of "mental abnormality."

#### 1. *Strict Scrutiny of Washington's Statute*

An individual's interest in liberty is a fundamental concept of Anglo-American law. When the government seeks to infringe on this fundamental right, the courts are empowered to strictly scrutinize the statute to ensure that the state's interests are compelling and that the statute is narrowly drawn to accomplish those interests.<sup>90</sup>

Although the *Young* court proclaimed that "it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions,"<sup>91</sup> this statement may be only partially supportable. Unquestionably, the government has a strong interest in protecting the public from dangerous, mentally ill sex offenders. However, how can the state possess a compelling interest in treating sex offenders when effective treatment, according to the statute itself, simply does not exist?<sup>92</sup> This appears to be a counter-intuitive proposition. In response, some argue that efficacy of treatment is not a constitutional requirement.<sup>93</sup> If this argument is correct, the *Young*

89. *Id.* at 1000.

90. *See, e.g.,* United States v. Salerno, 481 U.S. 739, 750-51 (1987).

91. *Young*, 857 P.2d at 1000.

92. *See* WASH. REV. CODE ANN. § 71.09.010 (West 1992 & Supp. 1995). "[S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities . . . . [T]he prognosis for curing sexually violent offenders is poor . . . ." *Id.*

93. Professor Brooks asserted:

court's reliance on "treatment" is an unnecessary fiction. Alternatively, if effective treatment is constitutionally required, what level of effectiveness would satisfy the Due Process Clause? Justifying a precise level of accomplishment for psychiatric treatment is not only difficult, it may be impossible. For some mental defects, there are established modes of treatment that can be followed, whereas for others, such as violent sex offenders, there is simply no known, effective solution. Constitutionally demanding a substantive and successful treatment program where one does not exist would be irrational. Therefore, the most equitable solution would be to require the state to provide "reasonable" psychiatric treatment regardless of efficacy until such time as an effective treatment is discovered. In sexual predator cases, the required treatment should not focus on effectiveness, but on its undertaking and availability. The *Young* court acknowledged this reality.<sup>94</sup> By providing the sexual predator with individualized care, treatment, and special confinement conditions at the DSHS facility,<sup>95</sup> the SVP law probably meets the requisite level of treatment required by the Constitution.<sup>96</sup> The state's interests in protecting society and treating offenders are of such a quality that they would satisfy the "compelling state interest" prong of the strict scrutiny test.

In order to pass the second prong of the strict scrutiny test, the statute must also be drawn as narrowly as possible to achieve the state's interests. The appellants in *Young* successfully argued that the SVP law

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[I]f the [Sexually Violent Predators] statute is perceived as primarily a 'treatment program,' and if treatment is not likely to work, there appears to be a massive hypocrisy if violent sexual offenders are confined, ostensibly to treat them, when the likelihood of success is remote. . . . But it must be recognized that the goal of the . . . statute is *not* primarily treatment. The statute is designed to confine an extremely limited number of dangerous and mentally abnormal persons because they are too dangerous to be at large. . . . It is not [constitutionally] necessary that treatment be efficacious.

Brooks, *supra* note 19, at 735.

94. The court remarked:

[T]he mere fact that an illness is difficult to treat does not mean that it is not an illness. For example, some forms of schizophrenia cannot be treated, but the diagnosis nonetheless remains a valid one. The Legislature should not be admonished for its honest recognition of the difficulties inherent in treating those afflicted with the mental abnormalities causing the sex predator condition.

*Young*, 857 P.2d at 1003.

95. See WASH. ADMIN. CODE §§ 275-155-030 to 050 (1994).

96. See, e.g., *Allen v. Illinois*, 478 U.S. 364, 373 (1986) (stating that confinement for a sexual psychopath is unlike that for a felon because the state provides special treatment and psychiatric care); cf. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (holding that a mentally retarded individual has constitutionally protected liberty interests in reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and minimally adequate training).

violated this second prong because it did not afford consideration of less restrictive alternatives to confinement.<sup>97</sup> However, the *Young* court resolved this problem by reading into the statute the need for courts to consider whether less restrictive alternatives are feasible on a case-by-case basis.<sup>98</sup> In its efforts to conform the SVP statute to Washington's existing short-term mental health commitment statute, the *Young* majority's penmanship frustrates the legislature's stated intent<sup>99</sup> and fails to conform to its own analysis.<sup>100</sup> Although the court correctly decided that the SVP law violated the appellants' substantive due process rights by not considering less restrictive alternatives, it should have left any proposed changes for the legislature. By playing the role of a super-legislature, the court failed to apply the second prong of the strict scrutiny test—whether the statute *as a whole* is narrowly tailored to achieve its ends.<sup>101</sup> The SVP law's sweeping authority to snatch

97. *Young*, 857 P.2d at 1012. The court stated that the SVP statute violates equal protection principles because Washington's existing mental health commitment statute requires the consideration of less restrictive alternatives. "The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so." *Id.* For a more thorough discussion of the equal protection claims, see *infra* notes 122-41, 146-57 and accompanying text.

98. *Id.*

99. See WASH. REV. CODE ANN. § 71.09.010 (West 1992 & Supp. 1995).

100. The majority stated: "Given the nature of sexually violent predators, it would not be safe to house them in a less secure setting. . . . [T]he dangerousness of committed sex predators justifies a secure confinement facility." *Young*, 857 P.2d at 1005. Later, the majority flip-flopped and stated: "Here, the State offers no justification for not considering less restrictive alternatives under [Washington's mental health commitment statute] and denying the same under [the SVP law]." *Id.* at 1012. The court's call for less restrictive alternatives cannot be harmonized with its stated belief that sexual predators are so dangerous that they should be kept in a special maximum security facility.

101. See *id.* at 1012. The *Young* court concedes that the statute is not narrowly drawn when it proclaims that "[n]ot all sex predators present the same level of danger, nor do they require identical treatment conditions . . . . [I]t is necessary to account for these differences by considering alternatives to total confinement." *Id.* This commentator urges not only consideration of these alternatives, but codification of these alternatives to avoid inequitable, unjust, and unconstitutional results.

individuals from society is unnecessarily broad<sup>102</sup> and would not pass a properly administered strict scrutiny test.

## 2. *Mental Illness, Dangerousness, and Preventative Detention*

The Supreme Court has held that the Due Process Clause requires a finding of both dangerousness and mental illness before a state in a civil proceeding can commit a person involuntarily to a mental facility.<sup>103</sup> Opponents of the SVP scheme claim that Washington's law mandates unconstitutional preventative detention because some sex offenders, who do not suffer from a mental illness that is recognized by psychiatry, will be committed and also because psychiatry cannot accurately predict dangerousness or likelihood of recidivism.<sup>104</sup> The United States Supreme Court's 1992 decision in *Foucha v. Louisiana*<sup>105</sup> provides guidance on what magnitude of mental incapacity and dangerousness is constitutionally required.

In *Foucha*, the Court reviewed a Louisiana statute that permitted the confinement of an insanity acquittee on the grounds that the individual in question was dangerous and had some lack of mental health. After being found not guilty of aggravated burglary and illegal discharge of a firearm by reason of insanity, Foucha was committed to a mental hospital in Louisiana.<sup>106</sup> Three and one-half years later, a review panel recommended that Foucha be conditionally discharged because he no longer suffered from the drug-induced psychosis that impelled his commitment.<sup>107</sup> At a subsequent hearing, court-appointed doctors testified that although the defendant showed no signs of mental illness, Foucha did display an antisocial personality. The doctors added that they could not comfortably state whether Foucha would pose a danger to himself or others.<sup>108</sup> Based on this testimony, the trial court found Foucha dangerous to himself or others and ordered him recommitted to

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102. For example, the legislature's definition of "mental abnormality" is circular and can be manipulated to incarcerate individuals with quite mild mental problems. Mental abnormality, as vaguely defined by the legislature, unnecessarily exposes many to confinement who do not exhibit traits of traditional mental illness.

The broad scope of Washington's SVP law is also evidenced by the fact that its qualifying crimes range from one extreme, murder-rape, all the way down to attempted sexually motivated burglary. *Young*, 857 P.2d at 1024 (Johnson, J., dissenting).

103. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979).

104. *Bochnewich*, *supra* note 63, at 283.

105. 504 U.S. 71 (1992).

106. *Id.* at 73-74.

107. *Id.* at 74.

108. *Id.* at 74-75. The doctors also cited a number of altercations Foucha had with other patients at the hospital. *Id.*

the mental hospital. The Louisiana Supreme Court upheld the decision and the case was appealed to the United States Supreme Court.<sup>109</sup> Justice White wrote the Court's plurality opinion, which held that the Louisiana scheme violated Foucha's substantive due process, procedural due process, and equal protection rights.<sup>110</sup> The Court flatly rejected Louisiana's assertion that diagnosis of an "antisocial personality" could satisfy the mental illness requirement imposed by the Due Process Clause of the Fourteenth Amendment.<sup>111</sup> Because Foucha suffered from no mental illness, the Court declared his continued civil confinement unconstitutional.

According to the *Young* court, its holding—that Washington's commitment scheme comports with the mental illness and dangerousness requirements of the Due Process Clause—is in accord with the *Foucha* decision.<sup>112</sup> The *Young* majority said the Louisiana civil commitment statute was struck down because the state attempted to continue the defendant's commitment when he only displayed an antisocial personality rather than a mental illness. The court observed that an antisocial personality is formally designated by psychiatrists as "antisocial behavior" and, therefore, is not a mental disorder or illness.<sup>113</sup> In contrast, the SVP legislation requires a current finding of either a "personality disorder," that is, a disorder recognized by psychiatric medicine, or a "mental abnormality" before permitting civil commitment.<sup>114</sup> "Mental abnormality" is not a psychiatric term, but is legislatively defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."<sup>115</sup> The court acknowledged that by "using the concept of 'mental abnormality' the Legislature

109. *Id.* at 75.

110. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

111. *Id.* at 75-80. Because "Foucha is not suffering from a mental disease or illness . . . he should not be held as a mentally ill person." *Id.* at 79. The state may civilly confine a person if it shows that "the individual is mentally ill and dangerous. Here, the State has not carried that burden." *Id.* at 80 (citation omitted).

112. *In re Young*, 857 P.2d 989, 1006 (Wash. 1993).

113. *Id.* at 1006-07 n.12. The court relied on the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders* for its psychiatric definitions.

114. *Id.*

115. WASH. REV. CODE ANN. § 71.09.020(2) (West 1992 & Supp. 1995).

has invoked a more generalized terminology that can cover a much larger variety of disorders.”<sup>116</sup> The *Young* court believed that “mental abnormality” would be analogous to the *Addington* and *Foucha* mental illness prerequisite, provided that “psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies.”<sup>117</sup>

This analysis by the *Young* court is incomplete because it avoids the issue of what level of mental incapacity must be shown before the state is constitutionally permitted to civilly confine its citizens.<sup>118</sup> Although mental health practitioners are most capable of diagnosing mental illness, the legislature and courts must be the ones to determine what level of mental incompetence is needed before constitutionally permitting civil commitment. The practical impact of the *Young* court’s decision is that psychiatrists are bestowed not only with the power to determine future dangerousness, a sketchy proposition at best,<sup>119</sup> but also the unbridled latitude to create any good faith argument that a mental disorder meets

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116. *Young*, 857 P.2d at 1001.

117. *Id.* (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committed Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 733 (1992)).

118. For example, the APA currently classifies paraphilia (a type of sexual disorder) as either mild, moderate, or severe. AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 281 (3d ed. rev. 1987) [hereinafter DSM-III-R]. Following the court’s expansive interpretation of “mental abnormality,” a sex offender could be committed indefinitely for even a mild paraphilia as long as health care practitioners testify in good faith that the offender has an abnormality and that they believe the offender might be dangerous in the future. Is this enough to constitutionally warrant indefinite commitment? Although Washington has been cautious in selecting offenders with pronounced mental ailments, the court’s flexible interpretation of “mental abnormality” and “personality disorder” opens a Pandora’s box for future misuse and unconstitutional detention.

119. According to one commentator:

The state will attempt to [prove mental abnormality and dangerousness] by presenting psychiatrists and other mental health professionals who will testify that the person has the requisite abnormality and propensity to commit violent sex crimes. Even though these professionals cannot make reliable predictions concerning recidivism, this evidence is difficult to undermine for several reasons. The trier of fact . . . is likely to find the testimony of specialists persuasive. Also, as the [American Psychiatric Association] observes, the adversely affected party will find it hard to challenge this testimony effectively:

Because most psychiatrists do not believe that they possess the expertise to make long-term predictions of dangerousness, they cannot dispute the conclusions of the few who do. . . .

In a typical case, then, the defendant’s inability to find a psychiatrist who will make the long-term prediction that the defendant will not be a recidivist cripples his or her defense.

Gleb, *supra* note 6, at 233-34 (citations omitted).

the statute's definition, regardless of whether the claimed disorder is recognized by contemporary psychiatry.

Washington's definition of "mental abnormality" is too nebulous and imprecise to support the indefinite incarceration of an individual. The *Young* court did not place enough importance on Justice White's admonition in *Foucha*:

[T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.<sup>120</sup>

Therefore, the definition of "mental abnormality" should be narrowed from the *Young* court's standard of "any good faith assertion" to include only pathologies and disorders that are recognized by mainstream psychiatry. Doing so will (1) provide guidance and limits to psychiatrists, prosecutors, courts, and juries; (2) meet the constitutionally dictated mental illness requirement; and (3) lessen the possibility of erroneous confinement. Unfortunately, the *Young* court did not seize upon the opportunity to clarify Washington's "mental abnormality" definition and still find a mental illness from the facts in the case before it—both appellants had been diagnosed with a severe paraphilia, a sexual disorder currently recognized by the American Psychiatric Association.<sup>121</sup>

### C. Procedural Due Process & Equal Protection

The appellants and amicus curiae in *Young* argued that the SVP law is unconstitutional because it violates the rights granted to the appellants

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120. *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992).

121. *Young*, 857 P.2d at 1002. The APA defines paraphilia as a sexual disorder that features "recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting persons." *Id.* (quoting DSM-III-R, *supra* note 118, at 279).

by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>122</sup> In particular, the petitioners maintained that these rights were violated because the law authorizes *ex parte* hearings, permits non-unanimous jury verdicts, and denies accused predators the right to remain silent.<sup>123</sup> Although the SVP law arguably possesses some of these alleged procedural deficiencies, it is unlikely that any of these deficiencies rise to the level of constitutional violations, because the SVP law meets all of the applicable constitutional standards for an individual to be involuntarily civilly committed.

Before an individual may be committed, a state must show, in a sufficiently reliable manner, that the goal it seeks to achieve outweighs the individual's interest in not being involuntarily confined.<sup>124</sup> Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed<sup>125</sup> and that involuntary commitment continue only so long as there is a constitutional basis for it.<sup>126</sup> Three distinct factors must be considered in the procedural due process balancing test: (1) the private interest, (2) the risk of erroneous deprivation and the value of additional or substitute safeguards, and (3) the government's interest.<sup>127</sup> The state must shoulder the burden of persuasion by clear and convincing evidence, a "middle level" of proof that is higher than the preponderance of the evidence standard, but lower than the beyond a reasonable doubt standard.<sup>128</sup> In addition to these due process requirements, equal protection requires that any distinction made between groups of people must have some rational relation to the purpose for which the distinction is made.<sup>129</sup>

Involuntary civil commitment is a serious infringement on an individual's liberty interest<sup>130</sup> and can lead to significant, "adverse social consequences."<sup>131</sup> Because of this, the state is constitutionally

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122. *Id.* at 1009.

123. *Id.*

124. *Addington v. Texas*, 441 U.S. 418, 425 (1979).

125. *Jones v. United States*, 463 U.S. 354, 368 (1983).

126. *Foucha v. Louisiana*, 504 U.S. 71, 75-78 (1992). The court applied the reasoning from its earlier decisions in *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975), and *Jones*, 463 U.S. at 368, 370.

127. See generally *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

128. *Addington*, 441 U.S. at 431-33.

129. *Baxtrom v. Herold*, 383 U.S. 107, 111 (1966). In a subsequent case, the Supreme Court applied the *Baxtrom* rationale and held that sexual psychopaths could not be denied due process protections accorded the mentally ill without citing some sort of characteristic applicable to sex offenders that would make the denial of protections sensible. *Humphrey v. Cady*, 405 U.S. 504, 512 (1972).

130. *Jones*, 463 U.S. at 361.

131. *Addington*, 441 U.S. at 425-26.

permitted to deprive an individual of liberty only in certain narrow circumstances and only after invoking an array of procedural safeguards.<sup>132</sup> These circumstances exist when the state, under its police power, seeks to commit an individual who suffers from a mental illness and is dangerous.<sup>133</sup> The severe consequences associated with erroneous, indefinite commitment necessitate expanded procedures. Accordingly, Washington's SVP Act has many procedural safeguards that conform to and even surpass those approved by the *Foucha* and *Allen* Courts.<sup>134</sup> However, due to the significant negative impact of a possibly indefinite period of confinement, it is important to scrutinize the Act's existing procedures, or lack thereof, that tend to abridge fairness or increase the possibility of erroneous commitment.

The SVP statute allows court proceedings that exclude the charged individual from appearing during the probable cause hearing<sup>135</sup> or other hearings during the forty-five day pretrial period.<sup>136</sup> However, Washington's existing civil commitment statute for the mentally ill affords an individual the opportunity to be present at a probable cause hearing within seventy-two hours of detention and have a psychological evaluation within twenty-four hours of detention.<sup>137</sup> The petitioners in *Young* did not receive notice of the petition and the judicial determination of probable cause was made *ex parte*.<sup>138</sup> Furthermore, both were denied the opportunity to personally appear in court during the forty-five day pretrial period.<sup>139</sup> Due to the fact that Washington has given these procedural rights to similarly situated mental health patients, the *Young* court construed the statute so as to provide accused sexual predators with the right to be present at a probable cause hearing

132. *Foucha v. Louisiana*, 504 U.S. 71, 79-82 (1992).

133. *Id.*

134. These include the right to a full adversarial proceeding, jury trial, legal representation, experts for psychological examinations, trial within 45 days after the filing of the petition, the state bearing the burden of the highest standard of proof, annual mental examinations, and procedures for petitioning for release. WASH. REV. CODE ANN. § 71.09.020-.100 (West 1992 & Supp. 1995).

135. WASH. REV. CODE ANN. § 71.09.040 (West 1992 & Supp. 1995).

136. WASH. REV. CODE ANN. § 71.09.050 (West 1992 & Supp. 1995).

137. *In re Young*, 857 P.2d 989, 1010 (Wash. 1993); WASH. REV. CODE ANN. § 71.05.200-.210 (West 1992 & Supp. 1995).

138. *Young*, 857 P.2d at 1010.

139. *Id.* at 1009-10.

conducted within seventy-two hours of his or her detention.<sup>140</sup> The *Young* court construed the statute in this manner in order to ensure that the statute was constitutional. The United States Supreme Court is likely to agree that due process similarly requires notice and the opportunity to be promptly heard at a probable cause hearing.<sup>141</sup>

In *Young*, the SVP statute was construed by one of the trial courts to allow a non-unanimous jury verdict.<sup>142</sup> Because the statute was silent on the issue, the *Young* court looked at the SVP law's burden of proof to determine the legislature's intent.<sup>143</sup> Based on the heightened burden of proof and the unanimity that is generally required by that standard, the court ruled that the legislature intended to include the need for a unanimous jury verdict in the statutory scheme.<sup>144</sup> Although the Supreme Court only requires that the state prove its case by clear and convincing evidence,<sup>145</sup> future commitment schemes would be wise to follow Washington's lead and adopt the highest standard of proof, as well as unanimity of verdicts, in order to increase fairness and dissipate the inherent risks of programs that endorse possible lifetime confinements.

Although the Washington Legislature purposely avoided incorporating an overt act requirement into the SVP law, the *Young* court held that a recent overt act is required for those individuals who were already free from prison, but not for individuals committed directly from prison.<sup>146</sup> Recent overt act requirements were derived from the belief that the finding of a recent overt act would lend accuracy and objectivity to dangerousness predictions. Requiring a recent overt act in cases where

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140. *Id.* at 1011. The court then ruled that the failure to afford the petitioners these procedures had no bearing on the outcome and was therefore harmless error. *Id.* at 1011-12.

141. Although the *Young* court was bound by equal protection principles to choose a 72-hour period (mentally ill were permitted by statute to attend the probable cause hearing), the Supreme Court is likely to defer to state determinations of what is the proper period of time, whether the period is shorter or longer, within reason. *See, e.g.,* *United States v. Salerno*, 481 U.S. 739, 747 (1987) (holding that an arrestee is entitled to a prompt detention hearing).

142. *Young*, 857 P.2d at 1012. Cunningham's jury returned with an 11-to-1 verdict after the trial court did not instruct the jury that unanimity was required. *Id.*

143. *Id.* In *Addington*, the Court remarked: "Increasing the burden of proof is one way to impress the fact finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." *Addington v. Texas*, 441 U.S. 418, 427 (1979).

144. *Young*, 857 P.2d at 1012. Due to the fact that petitioner Cunningham was convicted based upon an 11-to-1 jury verdict, the court found the verdict "insufficient." However, petitioner *Young* was convicted based upon a unanimous jury verdict and, therefore, the court affirmed his jury's findings. *Id.*

145. *Addington*, 441 U.S. at 431-33.

146. *Young*, 857 P.2d at 1009.

the offender is in prison is not practicable because imprisoned offenders have "little or no opportunity to commit an overt sexually violent act."<sup>147</sup> The *Young* court agreed that requiring prisoners to commit an overt sexually violent act would be illogical.<sup>148</sup> However, the court was constrained by existing case law<sup>149</sup> and, therefore, read an overt act requirement into the SVP statute for individuals not incarcerated at the time a petition is filed against them. Absent a similarly restrictive precedent, other jurisdictions need not be likewise encumbered. Forcing prosecutors to prove a recent overt act before committing sexual predators, even those already free in the community, is tantamount to emasculating the main purpose behind any sexual predator legislation: societal protection. It is reprehensible to wait for another sexual assault to occur before taking action when there is ample proof that the individual in question is mentally ill, has prior violent sex offense convictions, and is likely to re-offend. Requiring an overt act of violence before permitting involuntary commitment of either imprisoned or already released offenders is an unreasonable burden because requiring evidence of a single overt act adds little or nothing to ensure an accurate prediction of future dangerousness.<sup>150</sup> Psychiatrists believe that they are competent at predicting future behavior even without evidence of a recent overt act.<sup>151</sup> Because overt act prerequisites do not increase the reliability of predicting future dangerousness, sexual predators derive no due process benefit from the added "protection."<sup>152</sup> If a jurisdiction does require an overt act, the legislature should opt to reshape its definition to include overt physical manifestations as well as *any* credible evidence of dangerousness, including correspondence, notes,

147. Brooks, *supra* note 19, at 751. "[D]uring confinement these offenders do not have access to potential victims and therefore will not engage in an overt act during confinement." WASH. REV. CODE ANN. § 71.09.010 (West 1992 & Supp. 1995).

148. *Young*, 857 P.2d at 1008-09. When California's sex offender civil commitment system was in operation, a California appellate court also rejected the claim that due process required a recent overt act for prisoners: "Due process does not require that the absurd be done before a compelling state interest can be vindicated." *People v. Martin*, 107 Cal. App. 3d 714, 725, 165 Cal. Rptr. 773, 780 (1980).

149. *See In re Harris*, 654 P.2d 109 (Wash. 1982) (requiring an overt act before the state can commit a mentally disordered individual).

150. *See, e.g., Mathew v. Nelson*, 461 F. Supp. 707, 710 (N.D. Ill. 1978) (expert witnesses testified that evidence of one recent overt act does little, if anything, to sharpen the accuracy of a dangerousness prediction).

151. *Id.* at 710-11.

152. Brooks, *supra* note 19, at 751.

and statements made by the predator which exhibit a desire to commit future harm.

The *Young* petitioners also argued that they were unconstitutionally denied the right to remain silent in violation of their Fifth Amendment privilege against self-incrimination when they were ordered by the trial court to speak to the state's psychologists.<sup>153</sup> The petitioners' arguments are likely to be insupportable because the Supreme Court held in *Allen* that the Fifth Amendment privilege does not apply to non-criminal proceedings and that due process does not independently require application of the privilege.<sup>154</sup> A more persuasive argument is that equal protection mandates application of the privilege against self-incrimination to sexual predators because Washington's mentally ill are granted the privilege.<sup>155</sup> Although the *Young* court casually dismissed the petitioners' equal protection claim,<sup>156</sup> the United States Supreme Court, if *Foucha's* plurality can gain a swing vote, should hold that sexual predators are indeed similarly situated to the mentally insane and that the state violated equal protection principles when it denied sexual predators the right to remain silent.<sup>157</sup>

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153. *Young*, 857 P.2d at 1013.

154. *Allen v. Illinois*, 478 U.S. 364, 375 (1986).

155. *Young*, 857 P.2d at 1014.

156. The *Young* majority's equal protection stance, which denied accused sexual predators the right to remain silent, is diametrically opposed to its equal protection analysis for the less restrictive alternatives to confinement requirement, *supra* text accompanying notes 97-102, and the recent overt act requirement, *supra* text accompanying notes 146-48. Surprisingly, the court stated:

[W]e see good reasons to refuse the statutory right to remain silent to sexually violent predators even though the Legislature has granted such a right to the mentally ill. . . . [S]exually violent predators are not similarly situated to the mentally ill in regard to the treatment methods employed, or the information necessary to ensure that they receive proper diagnosis and treatment.

*Young*, 857 P.2d at 1014. The majority's treatment of the equal protection questions and its treatment of the due process questions are wholly inconsistent. *Id.* at 1022 n.5 (Johnson, J., dissenting).

157. *Foucha* indicated that absent a convincing reason for the disparity in procedural rights between similarly situated groups (the Court cited the difference between insane persons who had the right to remain silent and a now sane acquittee who was denied that right), the law would violate the Equal Protection Clause. *Foucha v. Louisiana*, 504 U.S. 71, 84-86 (1992). Interestingly, the *Young* court denied the appellants' equal protection claims on the issue of the right to remain silent, whereas, earlier in its opinion, the court asserted that sexual predators and the mentally ill were *indistinct* groups deserving of the same rights to appear within 72 hours at probable cause hearings. See *supra* notes 135-41 and accompanying text.

## IV. CONCLUSION

California's "one strike" law will significantly increase the length of prison sentences for individuals who commit sex offenses in the future. However, the "one strike" law cannot protect Californians from dangerous sex offenders who are presently nearing release from prison or have already been released from prison. The character of our system of justice, based on individual liberty, should *not* be radically altered in order to prevent all sex offenders from committing sex crimes. Nevertheless, a subgroup of the sex offender population can be stopped. This subgroup—sexual predators—can be prevented from committing another rape, molestation, or murder. However, the only plausible way to adequately protect society and preserve our system's essence of freedom is through a narrowly drawn civil commitment statute. The Supreme Court has held that commitment is proper upon a finding of mental illness and dangerousness. Furthermore, principles of fairness, morality, and dignity require additional precautions. The "one strike" legislation took a considerable step forward in protecting society from sex offenders. Washington's SVP law took another step to protect its citizenry, but because of its vague definitions, unequal treatment of sexual predators, and potential for inconsistent and erroneous application, that law is ill-suited for California's populace. Furthermore, the SVP law fails to truly consider appropriate alternatives to indefinite confinement and is likely to violate the offender's substantive due process rights. By enacting a more balanced civil commitment approach like that proposed by the Model Sexual Predators Act, which follows in the Appendix, California will maximize the protection of its citizenry while still safeguarding principles of fairness and the accused individual's interest in liberty.

PETER A. ZAMOYSKI

## APPENDIX

### THE MODEL SEXUAL PREDATORS ACT (MSPA)

#### § 1. FINDINGS AND PURPOSE

The Legislature finds that there is a small, but extremely dangerous, group of sexual predators whose mental defects and dangerousness render them inappropriate for confinement under the existing civil commitment act. The current criminal justice and short-term civil commitment systems cannot properly address the problem of sexual predators whose prison terms have expired, or are presently expiring, and who are still regarded as extremely dangerous.

The Legislature expressly denounces any desire to punish the individuals' past actions. Individuals who are eligible for criminal prosecution for committing sexually violent offenses are not appropriate for inclusion under the provisions of this Act. This Act is intended to create a civil commitment system that provides a range of treatment plans and confinement alternatives in order to provide long-term care for sexual predators and, at the same time, promote the public's safety.

#### *COMMENTARY*

Section 1 of the MSPA<sup>1</sup> states that the existing criminal and civil commitment statutes are ineffective at stopping sexual predators. Although sentence enhancing laws, such as California's "one strike" law, greatly enhance the sentences for newly convicted sex offenders, the current criminal justice system is ineffective because it must wait for another offense to be perpetrated, even when there is significant evidence that a prior offender is still dangerous.<sup>2</sup> The current civil commitment scheme is ineffective because it is a short-term system designed for individuals who do not pose as serious a risk of violence. Additionally, sexual predators need special confinement and long-term treatment.

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1. MODEL SEXUAL PREDATORS ACT [hereinafter MSPA]. The first paragraph of MSPA § 1 is an altered version of WASH. REV. CODE ANN. § 71.09.010 (West 1992 & Supp. 1995).

2. The criminal justice system is usually appropriate only after a criminal offense has been committed. The exceptions to the rule occur when there is an attempt or conspiracy to commit the offense. Sexual predators who are nearing release from prison do not fit within these two exceptions.

Individuals eligible for criminal prosecution are inappropriate for civil commitment under the MSPA.<sup>3</sup> This clause in section 1 is intended to inhibit prosecutors from using the civil system as an alternative to the criminal justice system. The Act's provisions are simply not intended to reach every accused sex offender. Because of effective sentence enhancing laws, such as the "one strike" law, only those prisoners who are nearing release, or have been recently released, and are still extremely dangerous should be considered for commitment under the civil system.<sup>4</sup>

## § 2. DEFINITIONS

For purposes of this Act, the terms defined in this section shall apply throughout the statute.

(1) "Sexual Predator" means any person who: (a) has committed more than one sexually violent offense, (b) suffers from a mental illness, and (c) poses a danger to commit future sexually violent offenses against the public.

(2) "Sexually violent offense" means any criminal conviction or acquittal by reason of insanity for:

(a) "Harmful sexual conduct" that resulted in serious physical or emotional harm to another. Harmful sexual conduct includes, but is not limited to, the following felonies: first or second degree rape, first or second degree rape by forcible compulsion, rape of a child under age fourteen, first or second degree sexual assault, first or second degree sexual assault of a child under age fourteen, indecent liberties by forcible compulsion, indecent liberties with a child under age fourteen, incest against a child under age fourteen, first or second degree child molestation, any felony sexual offense analogous to harmful sexual conduct as defined in this paragraph or any comparable federal or out-of-state

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3. The prohibition against including individuals subject to penal laws is derived in part from the Illinois statute, which forces a prosecutor to choose between a civil or criminal trial at the outset of the proceedings. ILL. REV. STAT. ch. 725, para. 205/3 (1994). Under the Illinois system, a prosecutor may not first seek criminal penalties and then bring another action seeking commitment based upon the same incident. *People v. Patch*, 293 N.E.2d 661 (Ill. App. Ct. 1973). Under the MSPA, a prosecutor does not have the choice. If the individual is alleged to have committed a new offense, the prosecutor must bring criminal charges.

4. The reason for limiting the scope of the Act is that prior sentences for sex offenders have been relatively short although the offenses were quite violent. *See supra* note 39.

felony sexual offense that would constitute harmful sexual conduct as defined in this paragraph;

(b) "Sexually motivated offenses." This paragraph only applies to convictions of first or second degree murder, voluntary manslaughter, unlawful imprisonment, kidnapping, arson, first degree burglary, harassment, or stalking. In order for one of the crimes listed in this paragraph to satisfy the sexually violent offense prerequisite, the sexual motivation for the crime must be proven beyond a reasonable doubt either at the time of sentencing for the crime or at the civil commitment proceedings;

(c) Attempt, criminal solicitation, or criminal conspiracy to commit any of the felony offenses described in paragraphs (a) or (b) of this subsection; or

(d) "Deviant sexual conduct" that resulted in physical or emotional harm to another. Deviant sexual conduct is a sexual offense of lower culpability than harmful sexual conduct. Felony sexual offenses not otherwise covered under paragraphs (a), (b), or (c) of this subsection fall within deviant sexual conduct.

(3) "Mental illness" means any sexual, personal, or other mental illness, disorder, or dysfunction existing for no less than three months prior to the filing of the petition that is hereinafter provided. The illness, disorder, or dysfunction must be one recognized by mainstream psychiatric medicine. To determine the proper level of treatment and confinement, the individual's mental illness shall be classified as either mild, moderate, or severe.

(4) "Danger to commit future sexually violent offenses" means the strong or very strong likelihood that an individual will engage in any of the sexually violent offenses defined in subsection (2) at some point in the future.

(5) "Offenses against the public" means any acts directed towards strangers or individuals with whom a relationship has been established or promoted for the purpose of victimization.

(6) "Alternative housing facility" means any facility, such as a half-way house, designed to treat, oversee, and restrict, but not totally confine, the movements of less menacing sexual predators.

(7) "Secure facility" means a special maximum security facility, not located on the grounds of a state mental facility, with the purpose of confining, caring for, and treating sexual predators.

(8) "Mental health professional" means any person certified or licensed in the State to practice as a mental health counselor, psychiatric nurse, psychiatrist, psychologist, or social worker.

(9) "Mental health evaluation" means a determination, by at least two qualified mental health professionals who have personally examined the

alleged sexual predator, of whether the individual suffers from a mental illness that makes it likely the individual will engage in future sexually violent offenses against the public. The evaluation shall include suggestions for the appropriate levels of confinement, care, and treatment and the anticipated duration of the necessary confinement, care, and treatment.

#### COMMENTARY

Section 2 is devoted to defining the relevant terms used throughout the Act. The definition of "Sexual Predator" under the MSPA<sup>5</sup> is principally derived from other jurisdictions' commitment statutes,<sup>6</sup> the case law of those jurisdictions, and this commentator's own insights.<sup>7</sup> By requiring more than one conviction for a sexually violent offense,<sup>8</sup> rather than merely being charged, the MSPA assures that the offender has at least some sort of proven history of recidivism that makes him or her worthy of these extraordinary measures.<sup>9</sup> The MSPA's requirement of the presence of a mental illness for at least three months<sup>10</sup> before permitting involuntary commitment is derived from the *Foucha* decision, the Illinois statute, and equal protection considerations. *Foucha's* plurality adhered to *Addington*, holding that civil commitment is

5. MSPA § 2(1).

6. See, e.g., WASH. REV. CODE ANN. § 71.09.020 (West 1992 & Supp. 1995); MINN. STAT. ANN. § 253B.02(18b) (West 1995); ILL. REV. STAT. ch. 725, para. 205/1.01 (1994).

7. E.g., *Allen v. Illinois*, 478 U.S. 364 (1986); *In re Young*, 857 P.2d 989 (Wash. 1993); *People v. Patch*, 293 N.E.2d 661 (Ill. App. Ct. 1973).

8. MSPA § 2(1)(a).

9. For example, the Washington statute encompasses "any person who has been convicted of or charged with a crime of sexual violence." WASH. REV. CODE ANN. § 71.09.020 (West 1992 & Supp. 1995). Minnesota's statute authorizes commitment after the person "has engaged in a course of harmful sexual conduct . . . that creates a substantial likelihood of serious physical or emotional harm." MINN. STAT. ANN. § 253B.02(7a), (18b) (West 1995). Perpetration of enumerated crimes leads to a "rebuttable presumption that [the] conduct described . . . creates a substantial likelihood that a victim will suffer serious physical or emotional harm." MINN. STAT. ANN. § 253B.02(7a) (West 1995). Both jurisdictions' statutes inherently allow for commitment of offenders who have not been criminally convicted of even one offense. However, Washington's Attorney General reportedly requires a pattern of sexually violent behavior before a petition can be filed. See Brooks, *supra* text note 19, at 714-15. The MSPA codifies this requirement directly into its definition of "sexual predator."

10. MSPA § 2(1)(b), (3).

appropriate only upon a finding of mental illness and dangerousness.<sup>11</sup> Although the Court did not specify exactly what constitutes a mental illness, this commentator believes the Court will require, at the very least, that the dysfunction or disorder be one recognized by mainstream psychiatry, such as the American Psychiatric Association.<sup>12</sup> Requiring a recognized mental illness lends credibility to the commitment. The MSPA's three month period of mental illness was so chosen in order to exclude individuals who are experiencing only temporary mental imbalances.<sup>13</sup> Furthermore, the MSPA instructs the evaluating mental health professionals to classify the individual's mental illness as either mild, moderate, or severe.<sup>14</sup> This will compel evaluators to sharpen their diagnoses within reasonable parameters and provide all involved parties with a better assessment of the individual's mental illness. At the same time, the classification will enable the court to reach a more informed decision on the proper level of confinement.

A verifiable mental illness is a prerequisite to any involuntary civil commitment. A civil commitment system that requires dangerousness without mental illness would be difficult to justify under an equal protection theory. Why would sex offenders be the only individuals dangerous enough to warrant civil commitment? What justification could there be for committing sex offenders but not other dangerous people, such as murderers?<sup>15</sup> If dangerousness alone could justify civil commitment, our present system of punishment, which incarcerates individuals only upon violation of a criminal law, would be usurped and

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11. For a discussion of these requirements, see *supra* text accompanying notes 103-21.

12. *Contra In re Young*, 857 P.2d 989, 1001 (Wash. 1993) (allowing a finding of "mental abnormality" upon a good faith identification of mental pathology).

13. Similarly, the Illinois statute calls for a mental disorder that exists for at least one year prior to the filing of a petition. ILL. REV. STAT. ch. 725, para. 205/1.01 (1994). The MSPA only requires three months as opposed to the Illinois one-year period of mental illness because of the MSPA's allowance for less restrictive confinement alternatives instead of across-the-board indefinite commitments. See MSPA § 5.2. Also, because the MSPA is founded on the belief that sexual predators are not appropriate for short-term commitment, the three-month requirement assures proper use of the existing mental health and commitment system.

14. MSPA § 2(3).

15. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 84-86 (1992). Justice White's dangerousness-equal protection argument can be easily applied to sexual predator civil commitment schemes:

Many [criminals] will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law does not allow for their continuing confinement based merely on dangerousness. Instead, the State controls the behavior of these similarly situated citizens by relying on other means, such as punishment, deterrence, and supervised release.

*Id.*

our nation's present system, which is based on individual liberty, would be ominously transformed into a police state.

The MSPA, like other sex offender commitment statutes, includes the likelihood of dangerousness as a key element in determining whether an individual is a sexual predator.<sup>16</sup> Although many argue that psychiatric predictions of future dangerousness are too imprecise for civil commitment statutes,<sup>17</sup> the Supreme Court is likely to uphold the use of these predictions.<sup>18</sup> Before permitting commitment, the MSPA requires a mental health professional to find not only that the individual is likely to engage in future sexually violent offenses, but that there is at least a *strong* likelihood of that occurrence.<sup>19</sup> Using the adjective "strong" implies a higher degree of belief, perhaps more than a fifty percent probability, ensuring that only those offenders believed to be a legitimate threat to commit new offenses are subject to involuntary confinement.

### § 3.1. REFERRAL TO PROSECUTING ATTORNEY<sup>20</sup>

(1) When it appears that an individual may satisfy the definition of a sexual predator under MSPA section 2(1), the agency with jurisdiction

16. MSPA § 2(1)(c).

17. See, e.g., Gleb, *supra* text note 6; La Fond, *supra* text note 19, at 770-71.

18. The Court has allowed dangerousness predictions in pretrial bail hearings, *United States v. Salerno*, 481 U.S. 739, 751 (1987) (upholding Bail Reform Act authorization of pretrial detention on basis of future dangerousness); in capital offense sentencing hearings, *Barefoot v. Estelle*, 463 U.S. 880 (1983); and implicitly in other sex offender civil commitment schemes, *Allen v. Illinois*, 478 U.S. 364 (1986) (upholding Illinois' Sexually Dangerous Persons Act). See also *In re Blodgett*, 510 N.W.2d 910 (Minn.) (upholding Minnesota's former Psychopathic Personality Commitment Act, *repealed and recodified by* MINN. STAT. ANN. § 253B.01-.23 (West 1995)), *cert. denied*, 115 S. Ct. 146 (1994). The Court stated in *Foucha* that although psychiatry is an inexact science,

such opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous and to base release decisions on qualified testimony that the [individual] is no longer mentally ill or dangerous. It is also reliable enough for the State not to punish a person who by a preponderance of the evidence is found to have been insane at the time he committed a criminal act, to say nothing of not trying a person who is at the time found incompetent to understand the proceedings.

*Foucha*, 504 U.S. at 76 n.3. Therefore, use of psychiatric predictions in the MSPA and other civil commitment statutes should easily withstand attack.

19. See MSPA § 2(4).

20. This section is based on WASH. REV. CODE ANN. § 71.09.025 (West Supp. 1995). See also MINN. STAT. ANN. § 253B.185(1) (West 1995).

over the individual shall refer the case, in writing, to the prosecuting attorney of the county where the individual was charged. When practicable, referrals shall occur at least three months prior to:

(a) The anticipated release from confinement of a person previously convicted of a sexually violent offense as either an adult or a juvenile;

(b) The release of a person who has been charged with a sexually violent offense but has been found incompetent to stand trial; or

(c) The release of a person found not guilty by reason of insanity of a sexually violent offense.

(2) As used in this section, "agency with jurisdiction" encompasses any agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the departments of corrections and social and health services.

### § 3.2. SEXUAL PREDATOR PETITION; FILING

(1) If it appears that an individual may be a sexual predator and good cause exists for that belief, the prosecuting attorney for the county where the individual was convicted or charged, or the attorney general if requested by the prosecuting attorney, may file a petition with the court alleging that the individual is a sexual predator and stating facts sufficient to support that allegation, provided that:

(a) The term of confinement of a person previously convicted of a sexually violent offense as either an adult or juvenile is about to expire or has expired;

(b) A person who has been charged with a sexually violent offense, but has been found incompetent to stand trial, is about to be or has been released; or

(c) A person found not guilty by reason of insanity of a sexually violent offense is about to be or has been released.

(2) A copy of the petition shall be served upon the individual, unless the prosecuting attorney or attorney general shows just cause for an *ex parte* judicial determination of probable cause.

#### COMMENTARY

Section 3.2 elaborates on Washington's petition filing system.<sup>21</sup> Most notably, the MSPA adds a provision requiring service of process.<sup>22</sup> Serving the petition on the individual, unless the prosecutor can show a good reason for not doing so, gives the individual notice that the

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21. See WASH. REV. CODE ANN. § 71.09.030 (West 1992 & Supp. 1995).

22. Minnesota's commitment statute has a somewhat similar notice requirement. See MINN. STAT. ANN. § 253B.07(4) (West 1995).

State is seeking to take away his liberty. This allows the individual time to take appropriate steps, such as retaining an attorney or disputing the contents of the petition.

### § 3.3. PROBABLE CAUSE DETERMINATION

Within forty-eight hours of filing the petition under MSPA section 3.2, a judge shall determine in a hearing whether probable cause for the charge exists. The alleged predator has the right to attend the hearing, have counsel present, and challenge the prosecuting attorney's assertion, unless the prosecuting attorney or attorney general has shown just cause for an *ex parte* judicial determination. If the judge determines that probable cause exists, the court shall issue an arrest warrant, when necessary, and the individual shall be taken into custody for an initial mental health examination.

#### COMMENTARY

After a petition is filed under the MSPA, the individual is permitted a probable cause hearing within forty-eight hours and other significant procedural protections.<sup>23</sup> Although the protections listed in section 3.3 may not be required by due process,<sup>24</sup> the stigma attached to commitment as a sexual predator and the seriousness of the charge mandate reasonable procedural safeguards. From a morality and fairness perspective, it is not unreasonable to allow a probable cause hearing within forty-eight hours because similar hearings are common for criminal charges. Likewise, permitting the alleged predator to appear in court to refute the charges increases the chances of a fair hearing and assures the individual the best opportunity to preserve his right to remain free from confinement. The MSPA's procedures and protections are aimed at providing reasonable, workable safeguards that protect the charged individual without handcuffing the State.<sup>25</sup>

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23. MSPA § 3.3. Minnesota requires a hearing within 14 days, but the individual may demand an immediate hearing. MINN. STAT. ANN. § 253B.08(1) (West 1995). Washington's statute simply states that the judge shall determine whether probable cause exists "[u]pon the filing of a petition." WASH. REV. CODE ANN. § 71.09.040 (West 1992 & Supp. 1995).

24. For a discussion of the appropriate procedural due process analysis, see *supra* text accompanying notes 122-57.

25. See, e.g., MSPA §§ 3.3-4.2. After commitment, the sexual predator is afforded additional rights, such as yearly mental health evaluations, individualized treatment plans,

§ 3.4. INITIAL EXAMINATION<sup>26</sup>

When the court finds probable cause for a sexually violent predator petition under MSPA section 3.3, the individual shall be taken into custody and transferred to an appropriate facility, as determined by social services, for a mental health evaluation as defined by MSPA section 2(9) within forty-five days of the petition filing date. The department shall then provide the court, the prosecuting attorney, and the individual with its written recommendation of whether the individual meets the statutory definition of a sexual predator under MSPA section 2(1).

§ 4.1. RIGHTS OF THE ACCUSED<sup>27</sup>

The alleged sexual predator has the following rights throughout the proceedings:

(1) The right to be represented by legal counsel or have legal counsel appointed if the individual cannot afford counsel;

(2) The right to retain qualified mental health practitioners to perform examinations on the individual or have qualified mental health practitioners appointed if the individual cannot afford such assistance; the right to reasonable access to all relevant medical and psychological records and reports;

(3) The right to be present, with counsel, at any of the commitment proceedings, unless good cause is shown for an *ex parte* hearing;

(4) The right to reasonable access to consult with counsel, to be examined by qualified mental health professionals, and to prepare a proper defense;

(5) The right to a trial within forty-five days after the filing of a petition pursuant to MSPA section 3.2; the right to a twelve-person jury, to testify, to present witnesses on his or her behalf, and to a unanimous verdict;

(6) The right to remain silent; and

(7) The right against self-incrimination.

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and the keeping of personal belongings. See MSPA § 7.1-.2.

26. The influence for this section came from WASH. REV. CODE ANN. § 71.09.040 (West 1992 & Supp. 1995). A 45-day deadline and service of the written recommendation to all parties was incorporated by this author.

27. The rights listed in MSPA § 4.1 originated principally from WASH. ADMIN. CODE § 275-155-050 (1994), as well as other civil commitment statutes.

## COMMENTARY

Section 4.1(6) grants the individual the right to remain silent and section 4.1(7) grants the individual the privilege against self-incrimination. Both the Washington Supreme Court and the United States Supreme Court have held that the Constitution does not extend these rights to sex offenders in civil proceedings.<sup>28</sup> However, the extension of these rights does not truly hamper prosecutions,<sup>29</sup> though concededly, the determination of whether the person is a sexual predator would be facilitated by the individual's cooperation and would perhaps even benefit the individual. Allowing the alleged sexual predator these rights will encourage the State to remain fair and evenhanded.

§ 4.2. RIGHTS OF PARTIES<sup>30</sup>

(1) For good cause shown, the court may extend time for trial up to an additional thirty days.

(2) Unless trial is commenced within forty-five days from the petition filing date, the petition shall be automatically discharged and the individual freed from the treatment facility, absent an extension of time under subsections (1) or (3) of this section. Nothing in this subsection

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28. See *In re Young*, 857 P.2d 989 (Wash. 1993); *Allen v. Illinois*, 478 U.S. 364 (1986). This commentator believes that if a jurisdiction extends these rights in other civil commitment settings, it should do likewise for sexual predators. The *Allen* court stated that the Fifth Amendment's rights are intended to curb improper extraction of confessions, not to enhance reliability, and even if it were intended to enhance reliability, that it is "plausible . . . that denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would decrease the reliability of a finding of sexual dangerousness." *Allen*, 478 U.S. at 374-75. However, as the dissent pointed out, the Court overlooked the equal protection argument that because Illinois' mentally ill were afforded the rights under the Fifth Amendment and sexually dangerous persons are similarly situated to the mentally ill, they should also be granted the Fifth Amendment rights. *Id.* at 380-81 (Stevens, J., dissenting).

29. The prosecution can still use other sources to make its case, such as past mental health evaluations, criminal history, school and juvenile records, and other witnesses. For example, even though the *Young* majority claimed that "cooperation with the diagnosis and treatment procedures is essential," *Young* refused to speak to the state's psychologists and was still declared a sexual predator by a unanimous jury. *Young*, 857 P.2d at 995, 1013-14.

30. The majority of this section is attributed to MINN. STAT. ANN. § 253B.08(1) (West 1995) and partially attributed to WASH. REV. CODE ANN. § 71.09.050 (West 1992 & Supp. 1995).

creates a right to freedom if the individual's confinement can be continued on an alternative basis.

(3) On demand and for good cause shown, the court may extend time for trial an additional ten days.

(4) The prosecuting attorney or attorney general, the judge, or the individual has the right to demand that trial be held before a twelve-person jury. If no demand is made, the trial shall be before the court.

(5) The prosecuting attorney or attorney general may move to dismiss the petition without prejudice at any time during the proceedings prior to a final judgment being rendered.

#### § 5.1. TRIAL<sup>31</sup>

(1) The proceedings under this Act shall be civil in nature. However, due to the individual's strong liberty interest and the stigma attached to a sexual predator conviction, the individual is entitled to procedures normally required in criminal proceedings, including the highest standard of proof, rules of evidence, constitutional rights, and unanimity of verdict. Before trial, the prosecuting attorney shall have the right to have the petitioner examined by at least one expert or mental health professional of his or her choice. At trial, the finder of fact shall determine whether, beyond a reasonable doubt, the individual is a sexual predator, as defined in MSPA section 2. To reach that conclusion, the court or jury must find that the individual's propensity to commit future sexually violent offenses is causally linked to the individual's mental illness.

(2) If the individual is found to be a sexual predator, the finder of fact shall specify whether the sexual predator's mental illness is mild, moderate, or severe and whether the likelihood that the predator will engage in future sexually violent offenses is strong or very strong.

(3) In cases where the individual is found incompetent to stand trial for a sexually violent offense, absent a prior judicial finding, the court must determine whether the individual did commit the act in question before considering whether the individual should be committed pursuant to this Act. The hearing under this subsection shall have the same substantive and procedural protections found in subsection (1), except for the right not to be tried while incompetent.

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31. This section is based on a combination of WASH. REV. CODE ANN. § 71.09.050-.060 (West 1992 & Supp. 1995) and ILL. REV. STAT. ch. 725, paras. 205/3.01, 4, 5 (1994).

§ 5.2. COMMITMENT ALTERNATIVES GUIDELINES<sup>32</sup>

The court shall determine the proper restriction on the individual's freedom after the finder of fact has satisfied its duties under MSPA sections 5.1(1)-(2). The court may choose from the following restrictions on freedom based upon the individual's prior convictions of sexually violent offenses, the severity of the individual's mental illness, and the likelihood of the individual's future dangerousness:

(1) *Indefinite Commitment to Secure Facility*. This subsection shall apply to predators who have been found to have more than two convictions of prohibited conduct listed under MSPA sections 2(2)(a)-(c), a severe mental illness, and a very strong likelihood of engaging in future sexually violent offenses against the public.

(2) *Thirty-Six Month Commitment to Secure Facility*. This subsection shall apply to predators who have been found to have at least two convictions of prohibited conduct listed under MSPA sections 2(2)(a)-(c) or a combination of one conviction of prohibited conduct listed under MSPA sections 2(2)(a)-(c) and at least two prior convictions of deviant sexual conduct, a moderate or severe mental illness, and a very strong likelihood of engaging in future sexually violent offenses.

(3) *Eighteen Month Commitment to Secure Facility*.

(a) This subsection shall apply to predators who have been found to have at least one conviction of a sexually violent offense listed under MSPA sections 2(2)(a)-(c) or more than two convictions of deviant sexual conduct, a severe mental illness, and a strong or very strong likelihood of engaging in future sexually violent offenses.

(b) This subsection shall also apply to predators who have been found to have at least one conviction of a sexually violent offense listed under MSPA sections 2(2)(a)-(c) or more than two convictions of deviant sexual conduct, a mild or moderate mental illness, and a very strong likelihood of engaging in future sexually violent offenses.

(4) *Nine Month Commitment to Secure Facility*. This subsection shall apply to predators who have been found to have at least one conviction of a sexually violent offense listed under MSPA sections 2(2)(a)-(c) or more than two convictions of deviant sexual conduct, a mild or moderate

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32. The guidelines proposed in this section were created by the author; they were roughly inspired by the Federal Sentencing Guidelines. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL (Nov. 1994).

mental illness, and a strong likelihood of engaging in future sexually violent offenses.

(5) *Twenty-Four Month Commitment to Alternative Housing Facility.* This subsection shall apply to predators who have been found to have at least one conviction of a sexually violent offense listed under MSPA section 2, but no more than two convictions listed under MSPA sections 2(2)(a)-(c), if it appears to the court, after a favorable recommendation by the secretary of social services and in light of the circumstances, that the predator's admission to the alternative housing facility will not expose the public to an unreasonable risk; a mild or moderate mental illness; and a strong likelihood of engaging in future sexually violent offenses. The court may order any additional restraints on the predator's movements that the court deems necessary to better treat the predator or protect the public.

(6) *Twelve Month Commitment to Alternative Housing Facility.* This subsection shall apply to predators who have been found to have at least one conviction of a sexually violent offense, but no more than two convictions listed under MSPA sections 2(2)(a)-(c), or no more than one conviction listed under MSPA sections 2(2)(a)-(c) with three convictions of deviant sexual conduct, if it appears to the court, after a favorable recommendation by the secretary of social services and in light of the circumstances, that the predator's admission to the alternative housing facility will not expose the public to an unreasonable risk; a mild or moderate mental illness; and a strong likelihood of engaging in future sexually violent offenses. Under this subsection, the court may order any additional restraints on the predator's movements that the court deems necessary to better treat the predator or protect the public.

(7) *Less Restrictive Commitment Alternatives.*

(a) This subsection shall apply to predators who have been found to have at least one conviction of deviant sexual conduct as defined by MSPA section 2(2)(d), but no more than four such convictions, if it appears to the court, after a favorable recommendation by the secretary of social services and in light of the circumstances, that the predator's eligibility under this subsection will not expose the public to an unreasonable risk; a mild mental illness; and a strong likelihood of engaging in future sexually violent offenses. Predators convicted of offenses under MSPA sections 2(2)(a)-(c) do not qualify for this subsection unless the court, in its discretion, believes that application of this subsection is appropriate under the circumstances.

(b) Under this subsection, the court has a duty to order the least restrictive restraints on the predator's freedom in order to permit the predator societal interaction while minimizing the possibility of harm to the public. These restraints include, but are not limited to, house arrest,

attaching a radio transmitter to the predator, daily check-ins with probation officers, reduced periods at an alternative commitment facility, curfews, and denials of access to certain areas, such as schools. Any alternative or alternatives chosen by the court under this subsection must be coupled with a comprehensive treatment plan and a definite term for the alternative restriction. Under this subsection, courts are encouraged to create alternative solutions to achieve the treatment and protection goals of this Act. If the predator qualifies for the alternatives in this subsection, but the court is unsatisfied that the proposed alternative restriction or restrictions would accomplish the Act's goals of treatment and protection, after providing the parties with adequate notice and an opportunity to be heard on the matter, the court shall order the predator committed under subsection (6) and state its reasons for so holding.

#### COMMENTARY

MSPA section 5.2 is an innovative way to achieve the proper balance between society's interest and the interests of the predator. The guidelines established under the Act eliminate some of the most pervasive problems associated with indefinite civil commitment schemes. First, the guidelines provide the court with alternative levels of restriction that correspond to the individual's degree of mental illness, dangerousness, and prior offenses. Once the finder of fact has determined that the individual is a sexual predator, the guidelines ensure fair sentencing of the predator based on objective criteria. Second, the individual is properly confined at the level appropriate to his or her personal background. Under other commitment schemes, sexual predators are simply committed indefinitely regardless of the individual's actual dangerousness or the severity of his or her mental illness. The MSPA allows for restrictions ranging from indefinite commitment (for sexual predators with the highest propensities to offend again, combined with severe mental illnesses and most harmful past sexual conduct)<sup>33</sup> to the least restrictive alternatives possible (for sexual predators who are the least likely to offend again, combined with mild mental illnesses and past deviant sexual conduct).<sup>34</sup> Third, the guidelines help to minimize

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33. MSPA § 5.2(1).

34. MSPA § 5.2(7). The MSPA also calls for intermediate restrictions where the predator would be sent to a specialized housing facility that resembles a half-way house or committed to a secure facility for an assigned period of time instead of indefinitely.

the external political and societal pressures that could cause the court to choose the maximum commitment for any sexual predator. The court must use the specific findings from trial to choose the commitment term, unless it would be in the best interests of the predator and the public to deviate from the guidelines.<sup>35</sup> Lastly, the predator will likely recover faster because he or she will receive the proper mixture of exposure to society, confinement, care, and treatment.

### § 5.3. HOUSING PREDATORS<sup>36</sup>

Predators committed under sections 5.2(1)-(4) shall be housed in a secure facility for control, care, and treatment until such time as the individual's condition has so changed that he or she no longer satisfies the requirements of MSPA section 2(1) or the period of commitment expires without petition for renewal under MSPA section 5.5. Predators committed under sections 5.2(5)-(6) shall be entered into an alternative housing facility as defined under MSPA section 2(6) until such time as the individual's condition has so changed that he or she no longer satisfies the requirements of MSPA section 2(1) or the period of alternative commitment expires without petition for renewal under MSPA section 5.5. Predators committed under the provisions of section 5.2(7) shall have their freedom restricted in such manner as determined by the court until such time as the individual's condition has so changed that he or she no longer satisfies the requirements of MSPA section 2(1) or the period of the less restrictive commitment alternative expires without petition for renewal under MSPA section 5.5.

### § 5.4. DEVIATION FROM COMMITMENT GUIDELINES<sup>37</sup>

The Legislature has established a comprehensive commitment system aimed at minimizing intrusion on the predator's liberty interests, providing treatment, and maximizing societal protection. However, when deviation from the guidelines established in MSPA section 5.2 would be in the best interests of the predator and the public, and has reasonable support in the facts, the court may enhance or reduce the proposed restriction on the predator's freedom after providing the parties with adequate notice and an opportunity to be heard on the matter.

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MSPA §§ 5.2(2)-(6).

35. See MSPA § 5.4 (stating that after adequate notice, the court may enhance or reduce the commitment level provided there is reasonable support in the facts).

36. This section was influenced by many civil commitment statutes.

37. This section was created by the author.

§ 5.5. PETITION FOR RENEWAL OF COMMITMENT PERIOD<sup>38</sup>

(1) Three weeks prior to the expiration of a period of commitment under this Act, the prosecuting authority may file a petition with the court for renewal of the predator's commitment. Failure to petition the court for renewal before the expiration of the predator's commitment is presumptive evidence that the individual is no longer a sexual predator and the court shall order the individual released. After a renewal petition is filed with the court, the rights of the parties under this section are identical to those provided for in MSPA sections 4.1-.2 and 5.1(1), except that for individuals committed for periods of one year or less, the court shall determine if the individual is still a sexual predator; for individuals committed for periods of more than one year, the individual shall have the right to a jury trial. The prosecuting attorney has the burden of proving beyond a reasonable doubt that the individual still suffers from a mental illness and poses a danger to commit future sexually violent offenses against the public. If the finder of fact determines that the individual is still a sexual predator, but with different categories of mental illness or dangerousness than when last determined, the court shall apply a new term of commitment pursuant to MSPA sections 5.2 and 5.4. Otherwise, if the predator's categories of mental illness and dangerousness remain the same as at the last determination of the issue, the court shall renew the predator's prior term of commitment.

(2) The predator has the right to waive this hearing. A valid waiver of the hearing constitutes a presumption that the individual is still a sexual predator. The court shall renew the term of commitment, absent facts that the predator's condition has worsened. In that case, the court shall determine the predator's current degrees of mental illness and dangerousness and commit the predator to the appropriate term under MSPA sections 5.2 and 5.4.

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38. This section was principally influenced by MINN. STAT. ANN. § 253B.12 (West 1995).

§ 6. PETITION FOR RELEASE FROM COMMITMENT<sup>39</sup>

(1)(a) If the secretary of social services determines that an individual's condition has changed to the extent that he or she believes that the individual is no longer a sexual predator as defined under section 2(1), the secretary shall authorize the individual to petition the court for release. The release petition shall be served upon the court and prosecuting attorney and the court shall order a hearing on the matter within thirty days of the filing date.

(b) If the prosecuting attorney does not respond to the predator's release petition within twenty days of receipt, absent a valid extension of time, the matter will be deemed presumptively conceded. The court shall then adopt the secretary's findings as its own at the hearing, if reasonable to do so, and release the individual from commitment. If the circumstances warrant, the court may apply appropriate conditions to the individual's release.

(c) If the prosecuting attorney contests the release petition, the court shall set aside the hearing date and order a trial within thirty days. The procedures for trial and commitment under this section are governed by MSPA sections 4.1, 4.2(4) and 5.1-.4.

(2)(a) A predator may petition the court for release without the secretary's authorization as a matter of right during the commitment, provided the period of commitment is longer than one year. For commitment periods of one year or less, the secretary's authorization is required. Unless paragraph (c) applies, upon filing of the petition, the court shall set a hearing date within thirty days and direct the secretary to prepare a mental health evaluation of the individual, including reports from mental health professionals with substantial knowledge of the individual's present condition.

(b) The secretary's evaluation and any evaluations prepared on the petitioner's behalf should be submitted to the court at least five days prior to the hearing. At the hearing, the court shall determine if there is probable cause for the predator's claim. If so, the prosecuting attorney shall be given fourteen days to respond to the claim. Failure to respond within the allotted time constitutes a presumption that the individual is no longer a sexual predator and the court shall order the individual released. After a response is filed with the court, trial shall be commenced within thirty days. The trial procedures under this section are identical to those provided for in MSPA sections 4.1-.2 and

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39. This section was created by incorporating portions of ILL. REV. STAT. ch. 725, paras. 205/9, 10 (1994); MINN. STAT. ANN. §§ 253B.18(5), (7) (West 1995); and WASH. REV. CODE ANN. §§ 71.09.090-.100 (West 1992 & Supp. 1995).

5.1(1), except that the finder of fact need only determine whether the individual is a sexual predator.

(c) After denying a predator's initial petition for release during any one term of commitment, the court shall scrutinize subsequent petitions for sufficient grounds that lend support to the individual's claim that he or she is no longer a sexual predator before ordering a hearing and a new mental health evaluation. If sufficient grounds exist, the court shall follow the procedures in paragraph 2(b).

(3) For good cause shown, the court may extend time for trial or a response to a release petition up to an additional thirty days. The court may consolidate renewal and release petitions into one hearing or trial when practicable. Nothing in this section creates a right to freedom if the individual's confinement can be continued on alternative basis.

#### § 7.1. RIGHTS OF COMMITTED PREDATORS<sup>40</sup>

All predators civilly committed to the secure or alternative housing facilities and, where applicable, predators committed under less restrictive commitment alternatives are entitled to:

(1) Mental health evaluations at least every twelve months or once per term, whichever is more often;

(2) Individualized treatment plans as defined under MSPA section 7.2;

(3) Available and adequate treatment;

(4) Access, for purposes of evaluation, to all records and reports related to the predator's commitment, control, care, and treatment;

(5) Wear their own personal clothes, keep personal possessions, and furnish their living quarters, within reason;

(6) Reasonable freedom of movement within the facility;

(7) Have approved visitors within reasonable limitations;

(8) Reasonable access to receive and send correspondence and telephone calls;

(9) Retain his or her own qualified mental health professionals in lieu of the department's professionals and have reasonable access to these professionals;

(10) Reasonable access to his or her attorney and to have an attorney appointed if indigent;

(11) Be present at any court proceedings involving the predator;

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40. This section is principally derived from the Washington Administrative Code. See WASH. ADMIN. CODE § 275-155-050 (1994).

- (12) Receive notice of his or her right to petition the court for release from the commitment;
- (13) Petition the court for release from commitment;
- (14) Opt to voluntarily waive the right to a hearing; and
- (15) Opt to voluntarily waive his or her right to petition the court for release.

§ 7.2. INDIVIDUALIZED TREATMENT PLAN<sup>41</sup>

(1) When the court commits a person as a sexual predator, social services staff must develop an individualized treatment plan (“ITP”) for that person. The ITP shall include, but is not limited to:

- (a) A description of the predator’s specific treatment needs;
- (b) An outline of intermediate and long-range treatment goals;
- (c) A projected timetable for reaching the treatment goals;
- (d) The treatment strategies for achieving the treatment goals;
- (e) A description of the social services staff’s responsibilities; and
- (f) Criteria for recommending to the court whether release, less restrictive alternatives, or modification of the person’s confinement should be considered.

(2) The predator’s ITP must be reviewed and updated at least every six months.

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41. This section is derived from the Washington Administrative Code. See WASH. ADMIN. CODE § 275-155-040 (1994).