

Washington's Sexually Violent Predator Statute: Constitutionally Sound and the Best Alternative for the Problem of Violent Predators

Carla B. Keegan*

PROLOGUE¹

One morning in early spring, a five-time convicted rapist is released from prison after serving time on his most recent conviction. Word from his cellmate is that he shows no remorse and is determined to rape again. The prosecutors and corrections officials familiar with his record attempt to keep him confined by civilly committing him to a psychiatric facility. However, under the civil commitment laws in his state, he can only be involuntarily committed upon proof of a recent overt act showing that he is a danger to himself or others. Since he has been incarcerated for the past several years, such proof cannot be obtained. The community to which he relocates is notified of his presence and his record. Although they are frightened and angry, no legal recourse exists. He has served his time and is now free.

Three months after his release, he rapes again. The community is outraged and demands a solution to the problem of sexual offenders. Many alternatives are proposed:

"They should all go to prison for life, no questions asked!"

"How about a two-strikes law for all sexual offenders—as soon as they are convicted for a second time they automatically get life in prison."

* B.A., 1990, University of Washington; J.D. Candidate 1997, Seattle University School of Law. I would like to thank Sarah Sappington, Sarah Coats and Jan Capps for their invaluable assistance with this Comment, as well as my family and friends for their thoughtful editing of numerous drafts.

1. The following scenario and dialogue were created by the author to illustrate the debate over sexually violent predator statutes.

"Wait a minute, not every sex offender is like him. What if they make one mistake and really learn from it—life in prison is a bit harsh for that, don't you think?"

"You're too soft. These guys are sick and shouldn't ever get out."

"Not all of them are sick. Maybe we can find a way to figure out which ones are sick and dangerous and keep them locked up until they can be treated."

"You can't treat these guys. Just put them in prison and you don't have to worry about them anymore."

"Sentencing all sex offenders to prison for life is pretty expensive. Do we want to pay for that when we might be able to treat them?"

"Okay, so we only keep some of them in prison for life, the really bad ones."

"How do we decide which ones are bad—not all rapists will rape again, right?"

"I don't know. I just know that this problem is out of control and we have to do something."

I. INTRODUCTION

The option chosen by the State of Washington for dealing with the dilemma of violent sex offenders was the enactment, in 1990, of the Sexually Violent Predators (SVP) statute.² Since its enactment, the SVP statute has met with both criticism and support, been the subject of differing constitutional interpretations from the Washington State Supreme Court³ and the federal district court,⁴ and been under intense public scrutiny from legal and psychiatric professionals as well as the community at large.

This Comment argues that the SVP statute is not only constitutionally sound, but is also the best alternative for the problem of sexually violent predators. Part II describes the SVP statute and how

2. WASH. REV. CODE §§ 71.09.010-71.09.902 (1994).

3. *In re Detention of Andre Brigham Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993).

4. *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) [hereinafter *Young v. Weston* to avoid confusion with *In re Young*].

it came to be enacted. Next, in examining the constitutionality of the statute, Part III briefly describes the decision rendered by the Washington Supreme Court in 1993 which upheld the SVP statute, as well as the federal district court's 1995 ruling, which held the statute to be unconstitutional. In arguing that the statute is constitutional, Part IV addresses and refutes the arguments made by the federal district court. Lastly, Part V looks at the alternative solutions available for the problem of sexually violent predators, and argues that neither mandatory life sentences nor an expansion of the current civil commitment system is the proper answer to this dilemma.

In 1994, the State of Kansas enacted a sexually violent predator law that is almost identical to Washington's SVP statute.⁵ In March 1996, the Kansas Supreme Court held the law to be unconstitutional⁶ and the ruling is currently on appeal to the United States Supreme Court.⁷ Although this Comment will not address the Kansas sexually violent predator law, because the Washington and Kansas laws are almost identical, any ruling by the United States Supreme Court as to the constitutionality of the Kansas SVP law will also determine the constitutionality of the Washington SVP statute. By closely examining how the courts have handled Washington's SVP statute, this Comment will argue that such laws are constitutional and should be upheld by any court, including the United States Supreme Court.

II. SEXUALLY VIOLENT PREDATOR STATUTE

A. Background

On May 20, 1989, a seven-year-old boy riding his bike to a friend's house was raped and mutilated by Earl Shriner.⁸ Shriner had a twenty-four-year history of criminal assaults and had been released from prison two years earlier after serving a ten-year term for two violent sex crimes.⁹ At the time Shriner was released, some had predicted he was still very dangerous and had petitioned unsuccessfully to have him civilly committed.¹⁰ The community was outraged that

5. KAN. STAT. ANN. § 59-29A (1994).

6. *In the Matter of the Care and Treatment of Leroy Hendricks*, 912 P.2d 129 (Kan. 1996).

7. *Kansas v. Hendricks*, 912 P.2d 129 (Kan. 1996), *cert. granted*, 116 S. Ct. 2522 (June 17, 1996) (Nos. 95-1649, 95-9075).

8. David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 526 (1992) (quoting *Past Sex Offender Suspect in Attack - Boy Too Traumatized to Cry by Mutilation*, TACOMA NEWS TRIBUNE, May 22, 1989 at A1).

9. *Id.*

10. *Id.* at 527 (citing *System Just Couldn't Keep Suspect*, TACOMA NEWS TRIBUNE, May 23, 1989 at A5. State officials had sought to have Shriner civilly committed in 1987 when he was

a man who was a known threat to children could have been out on the streets and able to cause harm again.¹¹ Protesters gathered on the steps of the Capitol Building in Olympia and demanded that the Governor call a special session of the legislature to enact tougher penalties for sex offenders, including life imprisonment for repeat sex offenders.¹² On June 15, 1989, the Governor acted: By executive order, he created The Governor's Task Force on Community Protection.¹³ The job of the Task Force was to review the current criminal justice system and the mental health civil involuntary commitment process and determine its effectiveness in dealing with individuals who are not safe to be at large in the community.¹⁴

The Task Force considered many different alternatives for dealing with sexually violent predators such as Earl Shriner, ranging from expansion of the existing involuntary civil commitment system to mandatory life sentences for repeat offenders.¹⁵ The system had been unable to civilly commit Earl Shriner because the professionals who made the evaluations for such commitment typically interpreted the "mental illness" definition narrowly, rather than using the term as broadly as the statute allows.¹⁶ Earl Shriner did not fit the more narrow definition and subsequently fell through the cracks. The task force considered broadening the existing civil commitment standards so that sexual predators would clearly be covered by the civil commitment statute. However, this alternative was ultimately rejected because it would require such drastic changes to the existing civil commitment

released from prison after serving the "full 10 year sentence for assaulting and abducting two 16-year-old girls." The story revealed that Washington's Parole Board had denied all requests to release Shriner on parole. In addition, it reported that state officials had sought civil commitment when Shriner completed his prison term because he "had hatched elaborate plans to maim or kill youngsters while waiting out the final months of his prison sentence in early 1987 . . .").

11. See Boerner, *supra* note 8, at 527-538 (describing content of newspaper articles and public outcry).

12. *Id.* at 534.

13. *Id.* at 538. The Task Force consisted of 24 members, including professionals in the criminal justice system, legislators, treatment professionals, academics, and three representatives of victims, including the mother of the seven-year-old boy victimized by Earl Shriner. *Id.*

14. *Id.* (citing Exec. Order No. 89-04, Wash. St. Reg. 89-13-055 (1989)). Other responsibilities included assessing the relationship between these criminal and mental health systems to identify the shortcomings; researching the feasibility of creating a specialized, secure facility for certain categories of people who represent the most risk to society; and considering research and approaches to enhancing our ability to accurately predict future behavior of individuals who have committed or who have threatened to commit violent criminal acts and establish legal criteria for confining them. *Id.*

15. *Id.* at 547-549. See *infra* Part V for further discussion of these alternatives.

16. *Id.* at 543 n.17.

law that it would no longer be effective for handling the short-term confinees who were currently committed under that law.¹⁷

The Task Force also considered and rejected mandatory life sentences for repeat sex offenders. While all members of the Task Force agreed that those who commit the most serious sex offenses deserved very long sentences, not all members agreed that every sex offender deserved such an exceptional sentence.¹⁸

After several months of intense work, the Task Force proposed the SVP statute. The statute was enacted by the Legislature in 1990.¹⁹

B. The SVP Statute

The SVP statute allows the state to involuntarily civilly commit "sexually violent predators,"²⁰ until the individual's mental abnormality or personality disorder has so changed that the individual is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive environment or unconditionally discharged.²¹ In order to be deemed a "sexually violent predator," an individual must (1) have been convicted of or charged²² with a crime of sexual violence, and (2) suffer from a mental abnormality or personality disorder that makes them likely to engage in predatory acts of sexual violence if not confined in a secure facility.²³

Under the SVP statute, when a person who at any time previously has been convicted of a sexually violent offense²⁴ is about to be

17. *Id.* at 550. See also discussion *infra* Part V.

18. *Id.* at 549. See also discussion *infra* Part V.

19. WASH. REV. CODE § 71.09 (1994). The statute was amended in the 1995 legislative session to clarify requirements as well as add a conditional release component, which provides for a less restrictive alternative to total confinement before unconditionally discharging residents back into the community. 1995 Wash. Laws ch. 216, § 1.

20. WASH. REV. CODE § 71.09.020(1) (1994).

21. WASH. REV. CODE § 71.09.090 (Supp. 1995). The 1995 amendment replaced "if released" with "if conditionally released to a less restrictive alternative or unconditionally discharged." WASH. REV. CODE § 71.09.090(1) (Supp. 1995).

22. This includes individuals who were charged with a sexually violent offense and determined to be incompetent to stand trial pursuant to WASH. REV. CODE § 10.77.090(3) (1994); or individuals charged with an offense but found not guilty by reason of insanity of a sexually violent offense pursuant to WASH. REV. CODE § 10.77.020(3). WASH. REV. CODE § 71.09.030 (1994).

23. WASH. REV. CODE § 71.09.020(1) (Supp. 1995). The 1995 amendment added the language "if not confined in a secure facility." 1995 Wash. Laws ch. 216, § 1.

24. A "sexually violent offense" means:

(a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent

released from total confinement, the prosecuting attorney of the county where the person was convicted (or the attorney general if requested by the prosecuting attorney) may file a petition alleging that the person is a sexually violent predator.²⁵ A probable cause hearing is then held.²⁶ The individual is entitled to notice and the right to be present at the hearing.²⁷ If the court determines that probable cause exists, the judge directs that the individual be transferred to an appropriate facility for an evaluation to determine if the person is a sexually violent predator.²⁸

Within forty-five days of the filing of the petition by the prosecuting attorney, a trial is conducted in which a jury must unanimously decide beyond a reasonable doubt whether the individual is a sexually violent predator.²⁹ The individual is entitled to assistance of counsel³⁰ at this trial and may retain experts and health

liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated; . . . or (d) an act as described in chapter 9A.28 RCW that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c).

WASH. REV. CODE § 71.09.020(6) (Supp. 1995).

25. The statute also applies to (1) a person who is about to be released from confinement and who committed a sexually violent offense as a juvenile, (2) a person who has been charged with a sexually violent offense and has been determined to be incompetent to stand trial and is about to be released, (3) a person who has been found not guilty by reason of insanity of a sexually violent offense and is about to be released, and (4) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act. WASH. REV. CODE § 71.09.030 (1994).

26. WASH. REV. CODE § 71.09.040 (Supp. 1995).

27. *Id.* At the probable cause hearing, the individual has the following rights: (a) to be represented by counsel; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses who testify against him or her; and (d) to view and copy all petitions and reports in the court file. WASH. REV. CODE § 71.09.040(3) (Supp. 1995).

28. *Id.* The examination shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. WASH. REV. CODE § 71.09.040(4) (Supp. 1995).

29. WASH. REV. CODE §§ 71.09.040-71.09.060 (Supp. 1995). The individual, the prosecutor, or attorney general may demand a trial before a 12-person jury. If not demanded, the trial will be before the court.

30. If indigent, counsel will be appointed. WASH. REV. CODE § 71.09.050 (1994).

professionals to perform an examination on his or her behalf.³¹ If the jury determines that the individual is a sexually violent predator, he or she is committed to the custody of the Department of Social and Health Services for placement in a secure facility for control, care, and treatment. The individual is held until such time as his mental abnormality or personality disorder has so changed that he is safe to either be at large or to be conditionally released to a less restrictive environment.³²

Each individual committed has a yearly examination of his or her mental condition to determine whether conditional release to a less restrictive environment is in the best interest of both the person committed and the community.³³ Any person committed under the SVP statute has the right to adequate care and individualized treatment.³⁴ If the Secretary of the Department of Social and Health Services determines that the individual's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence, the Secretary will authorize the person to petition the court for either conditional release or unconditional discharge.³⁵ A hearing will be held, before a jury if demanded, or before the court, and the burden is on the prosecuting attorney to prove beyond a reasonable doubt that the individual is still

31. *Id.* When the individual wishes to be examined by a qualified expert or professional person of his or her own choice, the examiner is permitted to have reasonable access to the person for the purpose of the examination, as well as to all relevant medical and psychological records and reports. *Id.*

32. WASH. REV. CODE § 71.09.060 (1994). "Less restrictive alternative" means "court-ordered treatment in a setting less restrictive than total confinement." WASH. REV. CODE § 71.09.020(7) (Supp. 1995).

33. WASH. REV. CODE § 71.09.070 (Supp. 1995). The annual report shall include consideration of whether conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community. Just as at trial, the individual has a right to be examined by an expert on the individual's behalf. *See supra* note 31 and accompanying text.

34. WASH. REV. CODE § 71.09.080(2) (Supp. 1995).

The department of social and health services shall keep records detailing all medical, expert and professional care and treatment received by a committed person. All such records and reports shall be made available only to: The committed person, his or her attorney, the prosecuting attorney, the court, the protection and advocacy agency, or another expert or professional person who, upon proper showing, demonstrates a need for access.

Id.

35. WASH. REV. CODE § 71.09.090(1) (1994).

not safe to be at large.³⁶ The individual may also petition the court for release without the Secretary's authorization.³⁷

As a result of the unique character of the SVP statute, which allows civil commitment of sexually violent predators *after* the completion of a prison term, the constitutionality of the statute has been attacked.³⁸ The grounds most often cited are that the statute is a violation of substantive due process requirements, as well as the Ex Post Facto and Double Jeopardy Clauses of the Constitution.³⁹ Both the Washington Supreme Court and the federal district court have ruled on the statute's constitutionality. The supreme court upheld the statute as constitutional,⁴⁰ while the federal district court deemed it unconstitutional.⁴¹

36. *Id.*

37. WASH. REV. CODE § 71.09.090(2) (1994).

The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. . . . If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist to warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large. . . . The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be present himself at the show cause hearing. If the court, at the show cause hearing, determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, then the court shall set a hearing on the issue.

Id. The hearing will be held before a jury, if demanded, or before the court, and the burden is on the prosecuting attorney to prove beyond a reasonable doubt that the individual is still not safe to be at large. *Id.*

38. *In re Young*, 122 Wash. 2d 1, 857 P.2d 989; *Young v. Weston*, 898 F. Supp. 744.

39. *Id.* Another constitutional argument raised regarding the SVP statute is that it contains procedural due process problems. This argument was rejected by the Washington Supreme Court. *In re Young*, 122 Wash. 2d at 42, 857 P.2d at 1009. In addition, the dissent in *In re Young* raised equal protection problems with the recent overt act distinction between incarcerated and noncarcerated individuals. *Id.* at 26, 857 P.2d 1022-23 (Johnson, J., dissenting). Because the federal district court found the statute unconstitutional in only three areas—substantive due process, double jeopardy, and ex post facto—this Comment will focus on rebutting those three areas and will not address any other constitutional arguments.

40. *In re Young*, 122 Wash. 2d 1, 857 P.2d 989.

41. *Young v. Weston*, 898 F. Supp. 744. An appeal of the district court decision is currently pending in the Ninth Circuit Court of Appeals. *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995), *appeal docketed*, No. 95-35958 (9th Cir. Dec. 28, 1995).

III. THE DIFFERING CONSTITUTIONAL INTERPRETATIONS BY THE STATE AND FEDERAL COURTS⁴²

A. General Constitutional Principles

In both the Washington Supreme Court and federal district court decisions, the constitutionality of the SVP statute was analyzed under substantive due process, *ex post facto*, and double jeopardy.⁴³ Under substantive due process analysis, when a state law impinges on a fundamental right, the law is constitutional only if it furthers a compelling state interest and is narrowly drawn to serve that interest.⁴⁴ The state has a compelling interest in treating sex predators and protecting society from their actions.⁴⁵ That interest may be served by civil commitment if a person is both mentally ill and dangerous.⁴⁶

The decisions also examined the *ex post facto* and double jeopardy challenges to the SVP statute. Article I of the United States Constitution provides that the states may not pass any *ex post facto* law.⁴⁷ An *ex post facto* law is "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed."⁴⁸ The Double Jeopardy Clause of the Fifth Amendment protects against two prosecutions for the same offense and multiple punishments for the same offense.⁴⁹ A statute can only violate the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution if (1) it is a criminal statute, or (2) if it is a civil statute, its impact renders it more punitive than civil.⁵⁰

B. Washington Supreme Court

In 1991, two individuals committed under the SVP statute appealed their convictions as sexually violent predators to the Supreme

42. Although the constitutional arguments addressed by the courts will be briefly mentioned here, a more in-depth analysis can be found in Part III, *infra*.

43. See *In re Young*, 122 Wash. 2d 1, 857 P.2d 989; *Young v. Weston*, 898 F. Supp. 744.

44. *In re Young*, 122 Wash. 2d at 26, 857 P.2d at 1000; *Young v. Weston*, 898 F. Supp. at 748 (citing *State v. Farmer*, 116 Wash. 2d 414, 429, 805 P.2d 200, 812 P.2d 858 (1991); *In re Schuoler*, 723 P.2d 1103 (1986)).

45. *In re Young*, 122 Wash. 2d at 26, 857 P.2d at 1000.

46. *Id.* at 27, 857 P.2d at 1001; *Young v. Weston*, 898 F. Supp. at 749.

47. U.S. CONST. ART. I § 10.

48. *Calder v. Bull*, 3 U.S. (3 Wall.) 386, 390 (1798).

49. See, e.g., *United States v. Halper*, 490 U.S. 435, 440 (1989).

50. *In re Young*, 122 Wash. 2d at 18, 857 P.2d at 996.

Court of Washington,⁵¹ claiming that the statute violated substantive due process as well as the ex post facto and double jeopardy prohibitions.⁵² The supreme court upheld the statute as constitutional and affirmed the conviction of one of the petitioners.⁵³

Applying the substantive due process test, the Supreme Court of Washington held that because the SVP statute requires proof of a mental abnormality or personality disorder, as well as dangerousness before an individual can be committed, it passed constitutional muster.⁵⁴

The court also examined the ex post facto and double jeopardy claims. In examining the Legislature's intent in enacting the statute, the court considered the language of the statute as well as the legislative history and determined that the Legislature intended the SVP statute to be civil in nature.⁵⁵ To examine the impact of the statute, the court looked at whether its punitive characteristics negated the civil intent of the Legislature.⁵⁶

First, the court compared Washington's SVP statute to a similar SVP statute in Illinois that was held by the U.S. Supreme Court to be civil in nature.⁵⁷ Next, the Court examined the Washington SVP statute using the factors laid out by the U.S. Supreme Court for determining whether a statute is civil or punitive: (1) whether the sanction involves affirmative disability or restraint; (2) whether it historically has been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6)

51. *In re Young*, 122 Wash. 2d at 14-17, 857 P.2d at 994-996. The criminal history of one of the petitioners included convictions for six violent felony rapes and one violent attempted rape of adult female strangers. Two of the rapes were committed in the presence of the victims' children. The attempted rape occurred while petitioner was free on an appeal bond for previous rape convictions. The criminal history of the second petitioner included convictions for three rapes of adult female strangers. One of the rapes occurred only three months after his release from prison for a previous rape conviction. *Id.*

52. *Id.* at 10, 857 P.2d at 992.

53. *Id.* Although upholding the statute as constitutional, the court did find that if an individual was committed under the statute after having been released into the community, the state was required to show proof of a recent overt act in order to commit the individual. *Id.* at 41, 857 P.2d at 1009. Since one of the petitioners had been released into the community and the state had not shown proof of a recent overt act, his conviction was reversed. *Id.* The SVP statute has since been amended to specifically require proof of a recent overt act if an individual has been released into the community. 1995 Wash. Laws ch. 216, § 6.

54. *In re Young*, 122 Wash. 2d at 42, 857 P.2d at 1009.

55. *Id.* at 19, 857 P.2d at 996-997.

56. *Id.* at 19-20, 857 P.2d at 996-997.

57. *Id.* at 20-21, 857 P.2d at 997 (citing *Allen v. Illinois*, 478 U.S. 364 (1986)).

whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.⁵⁸ The Washington State Supreme Court held that the SVP statute was civil because, notwithstanding an affirmative restraint, the civil commitment goals of incapacitation and treatment are distinct from punishment and have been so regarded historically.⁵⁹ In addition, no finding of scienter is necessary to commit a sexually violent predator; the determination is based on a mental abnormality or personality disorder rather than on one's culpability.⁶⁰ Therefore, the court held that the statute did not violate either the Double Jeopardy or Ex Post Facto Clauses of the U.S. Constitution.⁶¹

C. United States District Court

The petitioner who was unsuccessful in his state Supreme Court bid next filed an action in federal district court challenging the legality of his detention on the same constitutional grounds raised at the state level.⁶² The federal district court found the statute unconstitutional because it violated substantive due process, as well as the ex post facto and double jeopardy prohibitions.⁶³

In contrast to the Washington State Supreme Court, the federal district court found that the SVP statute was missing the "mental illness" component and therefore civil commitment was constitutionally impermissible.⁶⁴ The court held that the "mental abnormality" or "personality disorder" language of the SVP statute was inadequate to meet the standard required for civil commitment—mentally ill and dangerous—and, therefore, the statute violated substantive due process.⁶⁵

58. *Id.* at 21-22, 857 P.2d at 998-999 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

59. *Id.*

60. *Id.* at 22, 857 P.2d at 998.

61. *Id.* at 23, 857 P.2d at 999.

62. *Young v. Weston*, 898 F. Supp. 744.

63. *Id.* at 754.

64. *Id.* at 749.

65. *Id.* at 750. The court essentially adopted the reasoning of the Washington State Psychiatric Association as expressed in an amicus brief filed on behalf of the petitioner arguing that the term "mental abnormality" as used in the SVP statute has no clinically recognized meaning nor recognized diagnostic use among treatment professionals. *Id.* at 750; Amicus Brief submitted by the Washington State Psychiatric Association on Behalf of Petitioner at 5-7, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) (No. C94-480C) [hereinafter WSPA Brief].

Using the same analytical factors as used by the Washington State Supreme Court, the federal district court found that the SVP statute subjects individuals to affirmative restraint, applies to behavior that is already a crime, and promotes the traditional aims of punishment—retribution and deterrence.⁶⁶ Therefore, the court held the statute to be fundamentally criminal in impact.⁶⁷ As a criminal statute, the federal district court held that the law was punishing individuals twice for the same crime (double jeopardy) and inflicting a greater punishment to the crime than was attached to the crime when initially committed (*ex post facto*).⁶⁸ A close examination of the federal district court's findings, however, will show that the court's analysis was flawed.

IV. WASHINGTON'S SVP STATUTE IS CONSTITUTIONAL

A. *Substantive Due Process Requirements*

The Constitution of the United States requires that a person shall not be deprived of life, liberty, or property without due process of law.⁶⁹ The liberty interest of an individual is fundamental and important.⁷⁰ Whenever a state law impinges on a fundamental right, such as liberty, it is invalid unless it furthers a compelling state interest and is narrowly drawn to serve those interests.⁷¹ It is "irrefutable that the state has a compelling interest both in treating sex predators and protecting society from their actions."⁷² The United States Supreme Court has held that a "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."⁷³ This reasoning

66. *Young v. Weston*, 898 F. Supp. at 752.

67. *Id.* at 752-53.

68. *Id.* at 753-754.

69. U.S. CONST. amends. 5, 14; U.S. CONST. art. 1 § 3.

70. *United States v. Salerno*, 481 U.S. 738, 750 (1987).

71. *In re Young*, 122 Wash. 2d at 26, 857 P.2d at 1000 (citing *State v. Farmer*, 116 Wash. 2d 414, 429, 805 P.2d 200, 812 P.2d 858 (1991); *In re Schuoler*, 723 P.2d 1103 (1986)).

72. *In re Young*, 122 Wash. 2d at 26, 857 P.2d at 1000 (citing *Addington v. Texas*, 441 U.S. 418, 426 (1979); *Vitek v. Jones*, 445 U.S. 480, 495 (1980)). *Addington* involved an indefinite commitment in which the Court held that the proper standard of proof for civil commitment was greater than a preponderance of the evidence standard but not as high as beyond a reasonable doubt. *Addington*, 441 U.S. 418.

73. *Addington*, 441 U.S. at 426.

was reiterated in *Foucha v. Louisiana*,⁷⁴ which held that a person may be confined if the state shows "by clear and convincing evidence that the individual is mentally ill and dangerous."

Under the rules set forth in *Addington v. Texas* and *Foucha*, a state law that deprives a person of liberty only furthers a compelling state interest if it is designed to civilly commit individuals who are both mentally ill and dangerous. The SVP statute does not use the term "mentally ill," but instead requires that an individual suffer from a "mental abnormality" or "personality disorder."⁷⁵ It is this seeming discrepancy in characterization that has engendered controversy in the debate over the constitutionality of the SVP statute.

The federal district court found that the "essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill."⁷⁶ The court held that by using the terms mental abnormality and personality disorder, rather than mentally ill, the SVP statute allowed for the civil commitment of individuals "based on little more than a showing of potential future dangerousness."⁷⁷ The court further held that the term mental abnormality has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals.⁷⁸ These arguments are flawed in several respects.

First, the SVP statute does not base commitment "on little more than a showing of potential future dangerousness" because it only allows for the civil commitment of a narrow group of mentally disordered sex offenders whose mental conditions make them likely to commit predatory acts of sexual violence. The argument that mental abnormality does not have a clinically significant meaning misconstrues the question before the court. The question is not whether the term mental abnormality has a specific clinical definition, as can be found in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association,⁷⁹ but whether the statutory

74. 504 U.S. 71, 80 (1992). *Foucha* involved a Louisiana statute requiring that an individual found not guilty by reason of insanity be committed to a psychiatric hospital unless he proves he is not dangerous. The Court held the law unconstitutional because it contained no mental illness requirement. *Foucha*, 504 U.S. at 71.

75. WASH. REV. CODE § 71.09.020(1) (1994).

76. *Young v. Weston*, 898 F. Supp. at 749.

77. *Id.*

78. *Id.* at 750.

79. Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (4th ed. 1994) [hereinafter DSM-IV]. The DSM-IV is a classification of mental disorders that was developed for use in clinical, educational, and research settings. . . . The specific diagnostic criteria included in the DSM-IV are

definition has meaning to those mental health professionals who are called upon to employ and interpret the term so that these professionals can identify specific mental disorders that can be fairly said to predispose an individual to sexually violent predatory acts.⁸⁰ The statutory definition of mental abnormality does have such meaning and in fact incorporates recognized sexual pathologies that are found in the DSM-IV and can be used by experts who are asked to evaluate such pathologies.⁸¹

The second flaw in the district court's holding is that the terms mentally ill and mentally disordered have consistently been used synonymously by the U.S. Supreme Court and by state courts in statutory schemes for civil commitment.⁸²

Third, the purpose behind the long-standing requirement that an individual have a mental illness or mental disorder before a state can civilly commit that individual is to prevent the state from exercising its power too broadly and taking away the liberty of individuals before there is a demonstrated need to do so.⁸³ The SVP statute prevents an over-broad exercise of state power by allowing only the commitment of individuals who meet the criteria of a sexually violent predator as defined by the statute.

Lastly, the SVP statute meets the standard for civil commitment as required by the U.S. Supreme Court in *Foucha*. These four analytical flaws in the district court's ruling are discussed below.

meant to serve as guidelines and are not meant to be used in a cookbook fashion. For example, the exercise of clinical judgment may justify giving a certain diagnosis to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis as long as the symptoms that are present are persistent and severe.

DSM-IV at xxiii.

80. Amicus Brief submitted by the Washington Association for the Treatment of Sexual Abusers/Association for the Treatment of Sexual Abusers at 3, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995), *appeal docketed*, No. 95-35958 (9th Cir. Dec. 28, 1995) [hereinafter WATSA Brief]. The Washington Association for the Treatment of Sexual Abusers (WATSA) and the Association for the Treatment of Sexual Abusers (ATSA) submitted an amicus brief to the 9th Circuit Court of Appeals on behalf of the State in the appeal of *Young v. Weston*. WATSA concluded that Washington's SVP statute uses terms and definitions which, when applied, have meaning to mental health professionals in the field of the assessment and treatment of sex offenders. WATSA Brief at 3, 11.

81. See discussion *infra* Part IV.A.1.

82. See discussion *infra* Part IV.A.2.

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

1. "Mental Abnormality" and "Personality Disorder" Have Meaning to Experts in the Evaluation and Treatment of Sex Offenders

In finding that the SVP statute was missing the mental illness component, the federal district court held that the term mental abnormality has "neither a clinically significant meaning nor a recognized diagnostic use," is "unrecognized in the psychiatric community," and is of "no value to treatment professionals."⁸⁴ These arguments are incorrect. Although mental abnormality has no clinical definition in the DSM-IV, the term is not "unrecognized" in the mental health community and, in fact, can be frequently and commonly found in mental health law.⁸⁵ The term mental abnormality is recognized by treatment professionals when given a further, specific context.⁸⁶ Even well-accepted terms such as mental disorder and mental illness are not meaningful if not given context.⁸⁷ No mental health professional would, for example, report or testify simply that a particular individual is mentally disordered or mentally ill. Such testimony would be too vague or conclusory.⁸⁸

Therefore, the question is not whether mental abnormality has a clinical definition but whether mental health professionals specifically trained in the identification and diagnosis of sexual pathologies are able to identify specific mental disorders which can fairly be said to predispose the individual to commit sexual offenses.⁸⁹ Mental abnormality is defined in the SVP statute as "a congenital or acquired

84. *Young v. Weston*, 898 F. Supp. at 750.

85. WATSA Brief at 7; *see also* *Palmer v. Ashe*, 342 U.S. 134, 136 (1952) (spent several years in institution because of mental abnormality); *Liberty Nat. Life Ins. Co. v. Hale*, 230 So. 2d 526, 528 (Ala. 1970) ("stated his wife's mental abnormality had existed for five years . . . the same diagnosis of mental disability was made by staff at Bryce Hospital"); *People v. Smith*, 486 P.2d 1213, 1216 (Cal. 1971) ("on question of whether he was dangerous to public because of a mental or physical deficiency, disorder or abnormality"); *People v. Hernandez*, 196 Cal. Rptr 31, 33 (Cal. Ct. App. 1983) ("If after a full hearing the court is of the opinion that discharge of the person would be physically dangerous to the public because of his mental or physical deficiency, disorder, or abnormality"); *Dower v. Director, Patuxent*, 396 F. Supp. 1070, 1081 (D.C. Md. 1975) ("that his release would be dangerous to public because of his mental or physical deficiency, disorder or abnormality"); *State v. Ward*, 369 N.W.2d 293, 296 (Minn. 1985) ("dangerous to public because of his mental or physical deficiency, disorder, or abnormality").

86. WATSA Brief at 8 ("Thus, the term 'mental abnormality,' when placed within the context of sexual disorders, can be clearly understood to describe and include certain severe sexual pathologies which are recognized and accepted in the field.>").

87. *Id.*

88. *Id.* Rather, "[t]he report or testimony would have to be in terms of a specific diagnosis." *Id.*

89. *Id.* at 3.

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."⁹⁰ This definition has very specific meaning to clinicians experienced in the evaluation and treatment of sexual offenders and is understood to encompass certain severe forms of paraphilia or sexual disorders that are found in the DSM-IV.⁹¹

Paraphilias, as defined in the DSM-IV, are characterized by recurrent, intense, sexually-arousing fantasies, sexual urges, or behaviors which generally involve (1) nonhuman subjects; (2) the suffering or humiliation of oneself or one's partner; or (3) children or other nonconsenting persons.⁹² These criteria eliminate the one-time or "situational" offender, and ensure the presence of a chronic condition.⁹³ Not all deviant behaviors can be classified as paraphilias, nor do all sexual offenses have their roots in sexual pathology.⁹⁴ Further, not all paraphilias constitute mental abnormalities as defined in the SVP statute. However, three specific forms of paraphilia are described by and encompassed within that term's definition: pedophilia,⁹⁵ sexual sadism,⁹⁶ and paraphilia not otherwise specified: rape.⁹⁷ Although rape is not specifically included in the DSM-IV, even experts brought by the petitioner in federal court agreed that rape is a paraphilia.⁹⁸

90. WASH. REV. CODE § 71.09.020(2) (1994).

91. WATSA Brief at 4.

92. *Id.* (citing DSM-IV at 522-23).

93. *Id.*

94. *Id.* at 5.

95. DSM-IV at 527. Pedophilia involves recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children which cause clinically significant distress or impairment in social, occupational, or other important areas of functioning, conducted by an individual at least 16 years of age, who is at least five years older than the child or children. DSM-IV at 528.

96. *Id.* at 530. Sexual sadism involves recurrent, intense sexually arousing fantasies, sexual urges, or behaviors, involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person and which causes clinically significant distress or impairment in social, occupational or other important areas of functioning of the abuser.

97. Although Paraphilia Not Otherwise Specified: Rape, is not specifically included within the DSM-IV, it is widely recognized by experts in the treatment and assessment of sex offenders. WATSA Brief at 5 (citing Abel & Rouleau, *The Nature & Extent of Sexual Assault*, in *HANDBOOK OF SEXUAL ASSAULT: ISSUES AND TREATMENT OF THE OFFENDERS*, at 18 n.2 (William L. Marshall et al. eds., 1990)).

98. Memo of Authorities in Support of Respondent's Motion for Summary Judgment at 27, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1994) (No. C94-480C) [hereinafter *State's Brief*].

Dr. Gene Abel, a leader in the field of sexual pathology, has suggested two reasons why uncontrollable rape is not included in the DSM-IV.⁹⁹ Dr. Abel suggests that psychiatry has had "limited contact with the more aggressive sex offenders, and as a consequence, less information has been available regarding sexual aggressiveness as compared to the less aggressive paraphiliacs."¹⁰⁰ Second, Dr. Abel argues that leaders in the psychiatric profession are unwilling to characterize sexual misbehaviors such as rape as a psychiatric condition for fear that such a characterization could be used as an excuse for escaping punishment.¹⁰¹ The task force that was convened to revise the DSM-III actually concluded that the weight of scientific evidence supported the inclusion of rape as a paraphilia known as "paraphiliac coercive disorder."¹⁰² That category is intended only for individuals with an intense, repetitive urge to commit rape, who had either acted on their urge or were otherwise disturbed by the urge.¹⁰³ The recommendation to include rape in the "paraphiliac coercive disorder" category was disapproved by the Board of Directors of the American Psychiatric Association.¹⁰⁴ According to Dr. Abel, the behavior of certain rapists fits logically within the general rationale of paraphilia because rapists report having recurrent, repetitive, and compulsive urges and fantasies to commit rape.¹⁰⁵

Contrary to the findings of the federal district court, the term mental abnormality does have a recognized meaning to psychiatric and psychological clinicians who can testify in good faith to the presence of a mental abnormality and identify real and meaningful sexual pathologies.

Unlike "mental abnormality," "personality disorder" does have a clinically recognized definition in the DSM-IV.¹⁰⁶ A personality disorder occurs when personality traits are inflexible, maladaptive, and cause significant functional impairment or subjective distress.¹⁰⁷ In

99. See Abel & Rouleau, *supra* note 97, at 18 n.2.

100. *Id.*

101. *Id.*

102. Alexander D. Brooks, *The Constitutionality & Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 732 (Spring 1992).

103. Gene G. Abel, *Paraphilias*, in *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 1069, 1079-80 (Harold I. Kaplan et al. eds., 1989).

104. *Id.*

105. See Abel & Rouleau, *supra* note 97, at 18.

106. DSM-IV at 629.

107. *Id.* at 630. The essential feature of a personality disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture and is manifested in at least two of the following areas: cognition, affectivity, interpersonal functioning, or impulse control; this enduring pattern is inflexible and pervasive across a broad

its brief, the Washington State Psychiatric Association (WSPA) correctly stated that the DSM-IV describes no personality disorders peculiar to sex offenders.¹⁰⁸ However, the WSPA further argued that as a result, "courts can expect efforts to invent such a personality disorder" and that the manufactured diagnoses will be "entirely circular."¹⁰⁹ In other words, a "summary description of X's behavior will be transformed into its cause."¹¹⁰ There is no reason, however, to believe that the SVP statute will encourage the "invention" of disorders.

First, personality disorders are specifically listed in the DSM-IV. Second, the WSPA failed to reflect all of the elements of the diagnostic process when it stated that the diagnoses listed in sex predator evaluations would be circular.¹¹¹ When diagnosing a mental disorder, the psychiatrist or psychological clinician posits the existence of a mental pathology based upon a combination of objective and subjective data that are then compared and cross-referenced to those diagnostic criteria established by the profession.¹¹² That is how sexual disorders are diagnosed, as well as psychotic disorders, mood disorders, and cognitive disorders; it is not a circular process.¹¹³

In sum, although mental abnormality does not have a clinical definition, its statutory definition is recognized by clinicians and encompasses sexual pathologies contained in the DSM-IV. Personality disorders do have a clinical definition in the DSM-IV and diagnostic guidelines therefore already exist. Although there is no personality disorder specific to sexual predators, the statute does not encourage the invention of a new disorder. The diagnosis of any mental disorder, be it a personality disorder or a mental abnormality, involves the observation of an individual in order to collect data and compare that data to established diagnostic criteria. Therefore, both personality disorder and mental abnormality can be said to encompass mental disorders as defined in the DSM-IV; the Supreme Court's mental illness component is therefore satisfied. The fact that the term mental

range of personal and social situations and leads to clinically significant distress or impairment in social, occupational, or other important areas of function; the pattern is stable and of long duration, and its onset can be traced back at least to adolescence or early adulthood; the pattern is not better accounted for as a manifestation or consequence of another mental disorder and is not due to the direct physiological effects of a substance or a general medical condition. *Id.*

108. WATSA Brief at 9 (quoting WSPA Brief at 7).

109. *Id.*

110. *Id.* (quoting WSPA Brief at 7).

111. *Id.*

112. *Id.* at 10.

113. *Id.*

illness is not used in the SVP statute is irrelevant because the terms mental disorder and mental illness have been used synonymously by both the U.S. Supreme Court and the Washington State Supreme Court in the civil commitment statutory scheme.¹¹⁴

2. Mental Illness and Mental Disorder Have Consistently Been Used Interchangeably

The terms mental illness and mental disorder have been used interchangeably by the courts and the legislature. Since mental abnormality encompasses mental disorders as defined in the DSM-IV, the fact that the term is not commonly found is insignificant. Terms such as emotional disorder and emotionally disturbed are used synonymously with mentally ill and mentally disordered. Mental abnormality is just another term used to describe a type of mental disorder.

In order to understand the Supreme Court's prohibition against the civil commitment of an individual unless shown to be both mentally ill and dangerous, one must examine how the U.S. Supreme Court has historically used the term. The mentally ill requirement was first expressed in *Addington v. Texas*.¹¹⁵ The issue in *Addington* was what standard of proof procedural due process required before a person could be involuntarily civilly committed.¹¹⁶ Because all parties conceded that *Addington* was mentally ill,¹¹⁷ the Court neither discussed nor attempted to define what was meant by mental illness. However, the Court used the terms mental illness, mental disorder, mental disease, emotional disorder, and emotionally disturbed interchangeably throughout the opinion. For example, in describing the State's interest, the Court wrote:

The 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* The expanding concern of society with problems of *mental disorders* is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the *mentally ill*.¹¹⁸

114. See discussion *infra* Part IV.A.2.

115. Brief of Appellant at 12, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995), appeal docketed, No. 95-35958 (9th Cir. Dec. 28, 1995) (citing *Addington*, 441 U.S. 426).

116. *Id.* (citing *Addington*, 441 U.S. at 418).

117. *Id.* (citing *Addington*, 441 U.S. at 420).

118. *Id.* (citing *Addington*, 441 U.S. at 426 (emphasis added)).

In *Allen v. Illinois*,¹¹⁹ the Supreme Court continued to use the terms interchangeably. In *Allen*, the Court considered whether Illinois' Sexually Dangerous Persons Act was criminal or civil in nature.¹²⁰ The statute at issue, like Washington's SVP statute, used the term mental disorder rather than mental illness.¹²¹ In its opinion, however, the Court used the term mentally ill, thus suggesting that the distinction was more semantic than substantive.¹²² In discussing the statute's requirement that a petition may not be brought for commitment unless the person it seeks to commit has perpetrated at least one act of sexual predatory violence, the Court stated that just because "the State has chosen not to apply the Act to the larger class of *mentally ill* persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one."¹²³ Again, although the statute at issue used the term mental disorder, the Court used the term mentally ill.

In *Washington v. Harper*,¹²⁴ the U.S. Supreme Court again made no distinction between the terms mental illness and mental disorder.¹²⁵ In *Harper*, the Court held that a statute permitting the state to administer antipsychotic drugs to prisoners who suffered from a mental disorder did not violate substantive due process.¹²⁶ Throughout the opinion, the Court referred to the treatment of the mentally ill.¹²⁷

The Washington Legislature also consistently uses the terms mental illness and mental disorder interchangeably.¹²⁸ Washington's civil commitment statute¹²⁹ is found under Title 71, "Mental Illness." However, the term mental illness does not appear once in the statute! Instead, the term mental disorder is used throughout.¹³⁰ Civil commitment under Washington's legislative scheme has been

119. 478 U.S. 364 (1986).

120. *Id.* at 365.

121. *Id.* at 365 n.1.

122. *Id.* at 370.

123. *Id.* at 370 (emphasis added).

124. 494 U.S. 210 (1990).

125. Brief of Appellant at 13.

126. *Id.* (citing *Harper*, 494 U.S. at 236).

127. *Id.* at 14 (citing *Harper*, 494 U.S. at 213).

128. Brief of Appellant at 14.

129. WASH. REV. CODE §§ 71.05.010-.940 (1994).

130. Brief of Appellant at 14 (citing WASH. REV. CODE § 71.05.010-.940 (1994)).

consistently upheld as constitutional, despite the use of the term mental disorder.¹³¹

Opponents of the SVP statute argue that regardless of whether mental disorder is used synonymously with mental illness, the legislative findings disavow the notion that individuals committed under the SVP are mentally ill. However, in finding "that a small but extremely dangerous group of sexually violent predators exists who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act,"¹³² the Legislature was not stating that sexually violent predators do not have a mental disorder. Rather, the Legislature was indicating that sexually violent predators have a type of mental disorder that is not appropriate for "existing involuntary treatment" facilities.¹³³ In other words, the intent of the SVP statute is to provide a new kind of treatment and facility for a type of mental disorder that is not amenable to the "existing" involuntary commitment scheme. The federal district court's misreading of the legislative findings is a glaring and fundamental weakness in its argument.

Because mental illness and mental disorder have been used interchangeably not only by the U.S. Supreme Court, which set the substantive due process standard for civil commitment, but also by the state legislature and other authorities, the fact that Washington's statute does not contain the term mental illness is irrelevant.¹³⁴

The prohibition against involuntarily committing individuals who do not suffer from a mental illness or disorder is meant to prevent the state from exercising its police and *parens patriae* powers too broadly

131. See, e.g., *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983); *State v. Saffron*, 146 Wash. 202, 262 P. 970 (1927); *In re La Belle*, 107 Wash. 2d 196, 728 P.2d 138 (1986); *In re Detention of R.S.*, 124 Wash. 2d 766, 881 P.2d 972 (1994).

132. WASH. REV. CODE § 71.09.010 (1994) (emphasis added).

133. WASH. REV. CODE § 71.09.010 (1994). In arguing that the Legislature was saying that sexually violent predators "do not have a mental disease or defect," the opponents have taken the statement out of context. The statement must be read with the rest of the clause attached. Thus, it reads "who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act." Therefore, it becomes clear that the meaning meant by the Legislature is that sexually violent predators do have a mental disease or defect but it is not the type of mental disease or defect that can be appropriately handled by the existing involuntary treatment act.

134. If the debate is truly one of semantics, the Legislature could easily amend the language of the statute to "mental disorder" and avoid further controversy. However, any change in the commitment guidelines would require the State to reinstate proceedings against all of the predators currently committed, involving an inordinate amount of time and expense.

and taking away the liberty of individuals before a need has been demonstrated.¹³⁵ The SVP statute serves this goal.

3. The Purpose of the Mental Illness/Mental Disorder Requirement is Served by the SVP Statute

The U.S. Supreme Court's insistence on a mental illness requirement in civil commitment proceedings was meant to protect the fundamental liberty interest of the individual and only deprive an individual of such an interest when necessary to protect the community.¹³⁶ In other words, the Court sought to prevent the mass commitment of individuals based on improperly drawn and overly broad statutes. Although the Court insisted on a finding of mental disorder, it recognized that "the subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations."¹³⁷ The Court held that "states must be free to develop a variety of solutions to problems and not be forced into a common uniform mold . . . the substantive standards for civil commitment may vary from state to state."¹³⁸

However, despite the cries from opponents, the mental abnormality and personality disorder requirements of the statute do not in fact provide "criterion so elastic that it can be stretched to fit all sex offenders."¹³⁹ In the first three years of the SVP statute's existence, 2,131 adult sex offenders and 650 juvenile sex offenders were released from prison; of the 2,781 sex offenders released, only 14 were tried and committed as sexually violent predators.¹⁴⁰ These statistics support the argument made by the Washington Association for the Treatment of Sexual Abusers in its amicus brief that sexually violent predators constitute a small number of dangerous offenders suffering from *identifiable* sexual pathologies who are likely to reoffend.¹⁴¹ If the criterion used by the SVP statute was "elastic" or "vague," as argued by the WSPA, higher numbers of commitments would be expected. Instead, in the SVP statute's first three years, less than one-half of one

135. See *Addington*, 441 U.S. at 426.

136. *Id.*

137. *Id.* at 430.

138. *Id.* at 431.

139. WSPA Brief at 6.

140. Nine others were awaiting trial. Exhibit C to Respondent's Response to Petitioner's Motion for Summary Judgment and Reply to Petitioner's Response to Respondent's Motion for Summary Judgment, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) (No. C94-480C), [hereinafter *State's Brief II*].

141. WATSA Brief at 11-12.

percent of all sexual offenders released into the community were diagnosed and committed as sexually violent predators.¹⁴²

In *Foucha*,¹⁴³ the U.S. Supreme Court set specific standards for civil commitment statutes.¹⁴⁴ The opponents claim that the SVP statute is unconstitutional under the *Foucha* standards. However, the SVP statute meets the standards as set by the Supreme Court in *Foucha v. Louisiana*.¹⁴⁵

4. The SVP Statute Meets the Standards of *Foucha v. Louisiana*

In *Foucha*, the Supreme Court declared unconstitutional a Louisiana statute that allowed civil commitment of an individual found not guilty by reason of insanity unless the individual could prove that he was not dangerous.¹⁴⁶ The federal district court held that *Foucha* renders Washington's SVP statute unconstitutional. This argument is without merit.

The *Foucha* statute allowed the state to detain an insanity acquittee as long as he was dangerous, even if he did not suffer from any mental illness.¹⁴⁷ The civil commitment statute in *Foucha* had *no mental illness component* whatsoever. In contrast, the SVP statute in Washington requires that an individual be diagnosed with either a mental abnormality or a personality disorder.¹⁴⁸ Civil commitment is allowed only for a certain narrowly defined group of persons who are defined by the statute as "sexually violent predators."¹⁴⁹

Another argument raised before the district court was that *Foucha* holds that an antisocial personality disorder is not a form of mental illness,¹⁵⁰ and, therefore, the SVP statute's requirement of a personality disorder is unconstitutional. However, the question of whether an "antisocial personality" or an antisocial personality disorder constitutes a form of mental illness was not before the Court in *Foucha*.¹⁵¹ The

142. State's Brief II, Exhibit C (2131 adult sex offenders were released; 650 juvenile sex offenders were released; only 14 were tried and committed as sexually violent predators).

143. 504 U.S. 71 (1992).

144. *Id.* at 78-80. The *Foucha* court required that a civil commitment statute both contain a mental illness component and be narrowly drawn. *Id.*

145. 504 U.S. 71.

146. *Id.* at 83.

147. *Id.* at 78.

148. WASH. REV. CODE §§ 71.09.010, 71.09.020 (1994).

149. WASH. REV. CODE § 71.09.020 (1994).

150. *Foucha*, 504 U.S. at 79. Petitioner's Memorandum of Law in Support of a Petition for Writ of Habeas Corpus, Motion for Summary Judgment, and in Opposition to State's Motion for Summary Judgment at 74, *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) (No. C94-480C) [hereinafter *Petitioner's Brief*].

151. State's Brief II at 23; *see also Foucha*, 504 U.S. at 71.

State never contended that Foucha was mentally ill at the time of the hearing because the State was operating under a statute that did not require a finding of mental illness.¹⁵² The *Foucha* Court never addressed this issue. The only question before the Court in *Foucha* was whether a civil commitment statute that contained no requirement of mental illness was constitutional. In addition, it is not clear from the *Foucha* opinion that Foucha was ever diagnosed with an antisocial personality disorder.

As further support that *Foucha* was only intended to address statutes that contained no mental illness component, Justice O'Connor, in her concurrence, explicitly states that "this case does not require us to pass judgment on more narrowly drawn laws" ¹⁵³ The SVP statute is just the kind of narrowly drawn law to which Justice O'Connor was referring.¹⁵⁴ The requirements of *Foucha*, that a civil commitment statute both contain a mental illness component and be narrowly drawn, are satisfied by Washington's SVP statute.

B. *Ex Post Facto and Double Jeopardy*¹⁵⁵

The Ex Post Facto and Double Jeopardy Clauses apply to *criminal* matters and, therefore, if a statute is civil it cannot violate either clause.¹⁵⁶ The exception to this rule is that if a civil statute is punitive in impact, it would also be subject to the Ex Post Facto and Double Jeopardy Clauses.¹⁵⁷ Therefore, if a statute is held to be civil in intent and is not punitive in impact, the Double Jeopardy and Ex Post Facto clauses are not implicated.

In determining whether the SVP statute is civil or criminal, the first issue is whether the Legislature, in establishing the statute, indicated a preference for either a civil or criminal label. If the Legislature indicated an intent to establish a civil statute, the question is whether the statutory scheme is so punitive as to negate that intention.¹⁵⁸ In enacting the SVP statute, the Legislature intended to create a civil statute and the effect of the statute is not so punitive

152. *Foucha*, 504 U.S. at 71.

153. *Id.* at 87 (O'Connor, J., concurring).

154. *In re Young*, 122 Wash. 2d at 38, 857 P.2d at 1007.

155. Ex post facto and double jeopardy are two separate constitutional issues. However, because the SVP statute is civil in both intent and impact, the threshold requirement for applying double jeopardy and ex post facto—that a statute be punitive in either intent or impact—is never met. Therefore, the substantive definition of the two clauses need never be addressed.

156. *In re Young*, 122 Wash. 2d at 18, 857 P.2d at 996 (emphasis added); see also *supra* Part II.A. (discussing ex post facto and double jeopardy).

157. *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

158. *In re Young*, 122 Wash. 2d at 18, 857 P.2d at 996.

as to make the statute criminal.¹⁵⁹ Therefore, the SVP statute does not implicate, let alone violate, the Ex Post Facto or Double Jeopardy Clauses of the U.S. Constitution.

1. The Legislature Intended to Create a Civil Statute

The federal district court, which held the SVP statute violates the Ex Post Facto and Double Jeopardy Clauses, focused mainly on the impact of the statute rather than the legislative intent.¹⁶⁰ In briefs to the court, the petitioners addressed the legislative intent and argued that the intent was clearly to create a punitive statute rather than a civil statute.¹⁶¹ The weaknesses in this argument are demonstrated by examining the language of the statute and the legislative history, which reveal a clear intent to create a civil statutory scheme.

First, as noted by the Washington Supreme Court, the SVP statute is entitled "*Civil Commitment*" and is codified under Title 71, Mental Illness.¹⁶² The residents committed under the SVP statute are housed at a Department of Social and Health Services treatment center.¹⁶³ The Department of Corrections has absolutely no role in caring for the committed sex predators.¹⁶⁴ Lastly, the language and provisions of the SVP statute are very similar to those of Washington's civil involuntary commitment act.¹⁶⁵

The Legislature's final report refers to "*Civil Commitment*," and reports that "[a] new civil commitment procedure is created for 'sexually violent predators.'"¹⁶⁶ The Legislature enacted a bill almost identical to that proposed by the Governor's Task Force and the Task Force clearly recommended a civil law because neither the criminal system nor the existing civil system could accommodate the special needs of sex predators.¹⁶⁷

The petitioner argued, and the federal district court agreed, that the Legislature intended the statute to be criminal in nature because the Legislature admitted in its findings that there is no appropriate treatment available for sexually violent predators.¹⁶⁸ But the Legisla-

159. *Id.* at 19, 857 P.2d at 996.

160. *Young v. Weston*, 898 F. Supp. at 751-752.

161. See Petitioner's Brief at 44-61.

162. *In re Young*, 122 Wash. 2d at 19, 857 P.2d at 996.

163. *Id.*

164. *Id.*

165. *Id.*; see WASH. REV. CODE § 71.05 (1994).

166. *In re Young*, 122 Wash. 2d at 19, 857 P.2d at 996 (quoting 1990 Final Legislative Report, 2nd SSB 6259, at 144).

167. *Id.* (quoting Task Force Report, at II-20 through II-23).

168. See Petitioner's Brief at 41.

ture created the SVP statute precisely because there did not exist current involuntary treatment facilities capable of providing effective treatment for sexually violent predators.¹⁶⁹ The SVP statute sets up a system to provide effective treatment and promote the traditional goals of a *civil* commitment.

The petitioner further argued in district court that the Legislature did not intend treatment since the statute requires an individual to have been convicted of or charged with a crime prior to being committed under the statute.¹⁷⁰ In most cases, furthermore, the individual has already served time for the crime.¹⁷¹ Criminally punishing an individual for a crime prior to civilly committing him does not transform a civil commitment statute into a criminal one. Each proceeding stands on its own merits. A state may both criminally and civilly commit an individual, without nullifying the civil aspect of the civil commitment statute.¹⁷²

Finally, the petitioner argued that the civil language of the statute merely hides its true intent because the SVP statute was primarily a response to public outcry following two brutal sex crimes.¹⁷³ However, "the fact that the new legislation followed hard upon a shocking event that resulted in a great public outcry should not be taken as *per se* criticism of the legislation. Shocking events can generate beneficial responses, not only hysterical, ill thought-out ones."¹⁷⁴ As demonstrated by the statements made prior to forming the Governor's task force which created the SVP statute, the Governor and other legislators wanted a well-thought out solution to the problem of sexually violent predators.¹⁷⁵

The statutory language and the legislative history of the SVP statute demonstrates that the intent of the Legislature was to create a civil statutory scheme. Once it has been found that the Legislature

169. WASH. REV. CODE § 71.09.010 (1994).

170. Petitioner's Brief at 44-45.

171. *Id.*

172. See *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991).

173. State's Brief II at 7.

174. *Id.* (quoting Alexander D. Brooks, "The Constitutionality and Morality of Civilly Committing Violent Sexual Predators," 15 U. OF PUGET SOUND L. REV. 709, 712 (Spring 1992)).

175. The Governor stated, "We want a solution that is not just window dressing." In addition, Rep. Marlin Appelwick, Chair of the House Judiciary Committee, in an article in the *Tacoma News Tribune* on June 2, 1989, urged a slow, deliberate approach to the problem. On June 25, Senate Majority Leader Jeannette Hayner was quoted by the *Tacoma News Tribune* as commenting that, "You don't rush out there and do anything without careful consideration. We're not China." State's Brief at 8 (citing from David Boerner, *Confronting Violence: In the Act and In the Word*, 15 U. PUGET SOUND L. REV. 525, 537 (Spring 1992)).

intended the SVP statute to be civil, the statute must be examined to determine if its impact is so punitive that its civil intent is negated.

2. The Impact of the SVP Statute is Civil Rather Than Punitive

Two lines of analysis can be performed to determine whether the punitive effect of the SVP statute negates its civil intent. First, the SVP statute can be compared to a sexually violent predator statute that has been upheld by the Supreme Court as civil.¹⁷⁶ Second, the factors set forth by the U.S. Supreme Court for determining whether a statute is criminal can be held up against the SVP statute.¹⁷⁷ The federal district court held that the SVP statute is punitive in impact and therefore violates both the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.¹⁷⁸ However, as demonstrated below, both forms of analysis paint the SVP statute as clearly civil in impact.

a. *Allen v. Illinois*: A Sexually Violent Predator Statute Upheld as Civil

In *Allen v. Illinois*, Illinois' Sexually Dangerous Persons Act (Illinois Act) was held to be civil in nature.¹⁷⁹ The Illinois Act allows for the civil commitment of sexually dangerous persons, defined as

[a]ll persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children.¹⁸⁰

Under the Illinois Act, the state has an obligation to provide "care and treatment [for persons adjudged sexually dangerous] designed to effect recovery."¹⁸¹ The U.S. Supreme Court held that the state has established a system "under which committed persons may be released after the briefest time in confinement."¹⁸² The Court held the Illinois Act to be civil in nature, stating that the "State has disavowed

176. See *Allen v. Illinois*, 478 U.S. 364 (1986).

177. See *Kennedy*, 372 U.S. 144.

178. *Young v. Weston*, 898 F. Supp. at 754.

179. *Allen*, 478 U.S. at 364.

180. *Id.* at 366; ILL. ANN. STAT. § ch. 38, ¶ 105-1.01 (Smith-Hurd 1993).

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

182. *Id.* at 370.

any interest in punishment and provided for the treatment of those it commits."¹⁸³

Washington's SVP statute is almost identical to the Illinois Act. Illinois' definition of a sexually dangerous person is virtually the same as the SVP's definition of a "sexually violent predator"—both require a mental disorder that leads to the commission of violent sex offenses.¹⁸⁴ Both statutes require examination by a qualified psychiatrist and a trial with proof beyond a reasonable doubt to determine if the individual should be committed.¹⁸⁵ Both statutes provide for the care and treatment of the committed individual.¹⁸⁶ Both statutes require the release of the individual when he or she is no longer deemed to be mentally disordered and dangerous.¹⁸⁷ A final and

183. *Id.*

184. Washington's statute defines a sexually violent predator as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." WASH. REV. CODE § 71.09.020(1) (Supp. 1995) (emphasis added). The Illinois Act defines "sexually dangerous person" as "all persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities toward acts of sexual assault or acts of sexual molestation of children." ILL. ANN. STAT. ch. 725, ¶ 205/1.01 (Smith-Hurd 1993) (emphasis added).

185. A hearing is held to determine if probable cause exists that an individual is a sexually violent predator; if probable cause is found, a trial is held within 45 days in which a jury must unanimously decide beyond a reasonable doubt that the individual is a sexually violent predator. WASH. REV. CODE §§ 71.09.040-.050 (Supp. 1995) (emphasis added).

After filing of the petition, the court shall appoint two qualified psychiatrists to examine the alleged sexually dangerous person to decide whether such person is sexually dangerous; the respondent has a right to demand trial by jury and to be represented by counsel; the burden of proof required to commit a defendant to confinement as a sexually dangerous person is proof beyond a reasonable doubt.

ILL. ANN. STAT. ch. 725, ¶ 205/3.01, 4, 4.01, 5 (Smith-Hurd 1993).

186. Any person committed has the right to adequate care and individualized treatment. WASH. REV. CODE § 71.09.080 (Supp. 1995). The Director of Corrections shall provide care and treatment for the person committed to him designed to effect recovery. ILL. ANN. STAT. ch. 725, ¶ 205/8 (Smith-Hurd 1993).

187. If the secretary determines the person's mental abnormality has so changed that the person is not likely to engage in predatory acts of sexual violence, the secretary will serve a petition on the court and the court will order a hearing in which the burden is on the prosecutor to show beyond a reasonable doubt that petitioner is not safe to be at large; petitioner may also petition without the secretary's approval annually. WASH. REV. CODE § 71.09.090(1) (Supp. 1995). An application in writing setting forth facts showing that the sexually dangerous person has recovered may be filed with the court at any time; the court shall set a hearing; if the patient is found to no longer be dangerous the court will order a discharge; the burden lies with the petitioner to show by a preponderance of the evidence that he is no longer sexually dangerous. ILL. ANN. STAT. ch. 725, ¶ 205/9 (Smith-Hurd 1993).

important similarity is that both statutes are contingent on the commission, or attempt to commit, a sexual crime.¹⁸⁸

Oponents of Washington's SVP statute argue that because the statute is contingent on a criminal charge, its impact is punitive. However, the Illinois statute is also contingent on a criminal act yet the *Allen* Court concluded that just because the "State has chosen not to apply the Act to the larger class of mentally ill persons [those that have not had a criminal charge] does not somehow transform a civil proceeding into a criminal one."¹⁸⁹

Oponents of the SVP statute attempt to distinguish *Allen* on the ground that the Illinois Act provides for treatment *in lieu of* punishment. In its discussion of the civil nature of the Illinois Act, however, nowhere does the Court express that the absence of initial punishment contributed to its holding. In fact, even though the Illinois Act is contingent on a criminal act (or the attempt of one), the Court held that the state has "disavowed any interest in punishment."¹⁹⁰ Because the Illinois Act provides for treatment *in lieu of* punishment, the Court had no cause to discuss whether a statute allowing civil commitment *in addition to* incarceration would change its finding that the Illinois statute is civil. The court did not, however, state that the "in lieu of" component was determinative of the civil finding. Therefore, although the opponents of the SVP statute are correct in stating that the Washington and Illinois statutes differ in this respect, they are incorrect in making the assumption that this distinction was dispositive.

Other factors examined by the U.S. Supreme Court in determining whether a statute is civil or criminal in impact were set forth in *Kennedy v. Mendoza-Martinez*.¹⁹¹

b. *The Factors Set Forth in Kennedy Support the Civil Impact of the SVP Statute*

In *Kennedy*, the Supreme Court laid out seven factors to determine whether a statute is punitive or regulatory: (1) whether the sanction

188. The Washington statute applies to any person who has been convicted of or charged with a sexual crime. WASH. REV. CODE § 71.09.020 (Supp. 1995). The Illinois statute applies to all persons . . . who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children. ILL. ANN. STAT. ch. 725, ¶ 205/1.01 (Smith-Hurd 1993). Proof of "propensity" under the Illinois Act requires that the state prove the defendant has demonstrated propensity through at least one act of or attempt at sexual assault or sexual molestation. *People v. Allen*, 481 N.E.2d 690 (Ill.), *aff'd*, 478 U.S. 364 (1985).

189. *Allen*, 478 U.S. at 370.

190. *Id.* at 369.

191. 372 U.S. 144 (1963).

involves affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether an initial finding of scienter is required; (4) whether its operation will promote traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.¹⁹² The task of a court in determining whether a statute is punitive or regulatory is not simply to count the factors on each side, but to weigh them.¹⁹³

In holding that the SVP statute was punitive in impact, the federal district only discussed three of the *Kennedy* factors: (1) whether the sanction involves affirmative disability or restraint; (2) whether the behavior to which it applies is already a crime; and (3) whether its operation will promote the traditional aims of punishment—retribution and deterrence.¹⁹⁴ Interestingly enough, these same factors from *Kennedy* were cited by the Washington State Supreme Court in holding that the statute was not punitive in impact.¹⁹⁵ In order to show that the statutory scheme is so punitive that it negates the legislature's civil intent, a litigant must provide the "clearest proof."¹⁹⁶ The arguments made by the petitioners and the holding of the federal district court are not supported by such a standard of proof.

i. Whether the Sanction Involves Affirmative Restraint

The SVP statute does subject individuals to affirmative restraint. Individuals are held in a treatment facility until no longer mentally disordered or dangerous. However, all civil commitment statutes involve affirmative restraint, including the general involuntary civil commitment statutes that are no longer questioned on constitutional grounds. Affirmative restraint in the civil commitment setting is not considered punitive because its goals are incapacitation and treatment, which historically have been considered different from the criminal incarceration goals of retribution and deterrence.¹⁹⁷

192. 372 U.S. at 168-169.

193. *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992).

194. *Young v. Weston*, 898 F. Supp. at 752.

195. *In re Young*, 122 Wash. 2d at 21, 857 P.2d at 998.

196. *Allen*, 478 U.S. at 369 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

197. *In re Young*, 122 Wash. 2d at 22-23, 857 P.2d at 998-999.

In *Director v. Daniels*,¹⁹⁸ the Maryland Supreme Court concluded that Maryland's Defective Delinquents Act (Act)¹⁹⁹ was civil in light of the *Kennedy* factors. The Act defined a defective delinquent as

an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.²⁰⁰

The remainder of the Act provides, in essence, that persons convicted of specified offenses may be thereafter tried as defective delinquents and if found to be such may be confined for an indeterminate period.²⁰¹ The similarity of the Maryland Act to Washington's SVP statute makes the Maryland's court's analysis of the *Kennedy* factors helpful in analyzing the SVP statute.²⁰² In determining that the Act was not punitive under the affirmative restraint factor, the *Daniels* court held that

even though the sanction does involve an affirmative restraint, it is provided only because it is deemed best for the protection and treatment of society and best for the protection and treatment of the individual that he be placed in a maximum security institution maintained solely for defective delinquents and not for other members of the criminal element.²⁰³

Similarly, the affirmative restraint of the SVP statute is done merely as a means to protect society as well as treat the mentally disordered individual.

The federal district court held that the reason the affirmative restraint is punitive is that it entails a complete loss of freedom for an

198. 221 A.2d 397 (Md. 1966).

199. Although the Defective Delinquents Act was later amended by the Maryland legislature in 1977, it was never found to be unconstitutional. See *Gluckstern v. Sutton*, 574 A.2d 898, 901 (Md. 1990).

200. *SAS v. Maryland*, 334 F.2d 506, 510 (4th Cir. 1962).

201. *Daniels*, 221 A.2d at 410.

202. Although the Maryland Act differs from Washington's SVP statute in that it pertains to juveniles, nowhere in the Maryland Supreme Court's decision does the court state that the young age of the committed delinquents was relevant to their holding that the statute was constitutional. See *Daniels*, 221 A.2d 397.

203. *Daniels*, 221 A.2d at 410.

indefinite amount of time.²⁰⁴ The court stated that the reason the *Allen* Court held a similar statute to be civil is that the Illinois Act differs from Washington's SVP statute in two substantial ways: (1) It provides for case review every six months, as opposed to Washington's reviews every twelve months, and (2) the committed person is free to apply for release at anytime in Illinois, whereas in Washington, they may apply only once a year.²⁰⁵ First, there is no indication in the *Allen* opinion that reviews once a year rather than twice a year would make a civil statute punitive.²⁰⁶ Second, although Washington's SVP statute only allows individuals to petition for release once a year, Washington's SVP statute's burden of persuasion and standard of proof differ markedly. In Illinois, although the individual may petition for release at any time, the burden of persuasion remains at all times *on the petitioner*.²⁰⁷ In contrast, under Washington's SVP statute, once probable cause is found that the individual is no longer a sexually violent predator, the burden is *on the State* to prove beyond a reasonable doubt that the individual is still a sexually violent predator.²⁰⁸

Therefore, since the duration of commitment is directly related to the purposes for which an individual is committed—to obtain treatment—the affirmative restraint serves the *civil* commitment goals of incapacitation and treatment.

ii. Whether the Behavior to Which it Applies is Already a Crime

The federal district court held that the SVP statute applies to behavior that is already criminal and is “expressly limited in its application to persons who have been convicted of a crime or who have been charged with a crime but found incompetent to stand trial or found not guilty by reason of insanity.”²⁰⁹ Although the federal

204. *Young v. Weston*, 898 F. Supp. at 752.

205. *Id.* at 753.

206. In fact, the Court brought up the 6-month case review in a footnote pertaining to the state's obligation to provide care and treatment designed to effect recovery, not as a comment on affirmative restraint. *Allen*, 478 U.S. at 369.

207. ILL. ANN. STAT. ch. 725, ¶ 205/9 (Smith-Hurd 1993); *see also* *People v. Rogers*, 574 N.E.2d 1374 (Ill. App. Ct. 1991) (Defendant has burden of showing by preponderance of the evidence that he is no longer sexually dangerous); *People v. Cooper*, 557 N.E.2d 902 (Ill. App. Ct. 1990).

208. WASH. REV. CODE § 71.09.090(1) (Supp. 1995) (“The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large. . .”).

209. *Young v. Weston*, 898 F. Supp. at 752.

district court is correct that the definition of “sexually violent predator” requires that the individual have been convicted of or charged with a sexual offense, the behavior to which the statute applies is the *mental abnormality* or *personality disorder*. This requires no finding of culpability but merely that the individual suffer from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence. The fact that in addition to the mental disorder, the individual must also have been convicted or charged with a sexual crime serves to narrow the scope of the statute, not render it criminal. The SVP statute focuses on treating individuals for a current mental disorder that renders them dangerous; the focus is not on locking them up because they once committed a crime. Individuals are not committed under the SVP statute because they have *committed a crime*; they are committed because they have a *mental abnormality* or *personality disorder* at the time of the commitment proceedings.

iii. Whether Operation of the SVP Statute Will Promote the Traditional Aims of Punishment—Retribution and Deterrence

The SVP statute was enacted to protect society and treat the mentally disordered sexually violent predator. One effect of committing individuals is that they are deterred from carrying out their behavior on the general public. This effect is found in the general civil commitment laws as well because those individuals are also confined and unable to carry out activity that would be harmful to themselves or others. Therefore, the SVP statute does have a deterrent effect. However, because it is aimed at treatment, it is not retributive.

The federal district court found that the SVP statute promotes retribution and deterrence by requiring a convicted sex offender to serve his sentence prior to commitment.²¹⁰ The court stated that the Illinois Act in *Allen* was civil because it provided treatment *in lieu* of punishment.²¹¹ However, the *Allen* Court held the Illinois Act civil *not* because it provided treatment in lieu of punishment, but because of *how* it proceeded to provide treatment.²¹² The issue of whether the Act would have been constitutional had it allowed punishment prior to commitment was never addressed by the *Allen* Court. The Court stated that Illinois' decision to commit only individuals who had been charged with a sexual crime did not make the commitment statute

210. *Id.* at 752.

211. *Id.*

212. *Allen*, 478 U.S. at 369-70.

per se criminal.²¹³ Using the same reasoning, Washington's decision to allow the commitment of individuals who have been previously incarcerated does not render its civil commitment statute criminal. Instead, the SVP statute promotes the civil commitment goals of incapacitation and treatment.

In addition, the federal district court states that the SVP statute "forecloses the possibility that offenders will be evaluated and treated until after they have been punished. . . . the failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern."²¹⁴ The court is incorrect in its suggestion that the SVP statute prevents offenders from receiving treatment until after they have been punished and that the state has no interest in treatment prior to the completion of punishment.

First, the SVP statute, which civilly commits individuals determined to have a *current* mental abnormality and personality disorder, has nothing to do with whether that individual was able to receive treatment before being committed. As with any civil commitment statute, including Washington's involuntary civil commitment act, an individual is always free to get treatment independently.²¹⁵ Second, Washington's interest in treating sex offenders is not a recent development. On the contrary, Washington has one of the largest prison-based treatment programs for sexual offenders in the country,²¹⁶ which existed long before the SVP statute. The Sexual Offender Treatment Program at the Twin Rivers Correction Center provides 200 beds for sex offenders desiring treatment.²¹⁷ When convicted of a sexual offense, individuals expressing an interest in treatment are added to a waiting list.²¹⁸ As vacancies occur, individuals are transferred to Twin Rivers to participate in the treatment program.²¹⁹ When an individual has "absorbed and mastered as

213. *Id.* at 370.

214. *Young v. Weston*, 898 F. Supp. at 753.

215. See *infra* notes 216-220 and accompanying text for discussion on treatment opportunities available for sexual offenders while in prison.

216. See TWIN RIVERS CORRECTION CENTER, TWIN RIVERS CORRECTIONS CENTER SEX OFFENDER TREATMENT PROGRAM, PROGRAM OVERVIEW (1994) [hereinafter SOTP OVERVIEW] (on file with the *Seattle University Law Review*).

217. *Id.*

218. It seems reasonable to assume that the length of time served in prison by the individuals currently committed as sexually violent predators would have been more than enough for them to have made it into the Twin Rivers Program after being placed on the waiting list had they so desired.

219. The treatment program consists of group and individual treatments. SOTP OVERVIEW, *supra* note 216.

much of the relevant knowledge, skills and abilities as he is able," his treatment is considered complete.²²⁰ Finally, the Governor's Task Force additionally made two recommendations regarding improving treatment facilities in prison.²²¹ Therefore, contrary to the federal district court's assertion that the SVP statute prevents treatment prior to completion of punishment and that the state clearly has no interest in treatment, Washington continues to perfect and improve upon its prison-based treatment programs concurrent with the operation of the SVP statute.²²²

Although the federal district court limited its holding to the above three *Kennedy* factors, analysis of the remaining four factors lends further support to the conclusion that the SVP statute is civil in impact.

iv. Whether the Statute's Purpose Historically Has Been Regarded as a Punishment

In analyzing the Defective Delinquents Act in Maryland, the court held that "this type of sanction or restraint . . . has not been regarded as punishment but regulatory and is more akin to those laws consistently held to be civil in nature. . . . Also this is true of laws involving loss of liberty by restraint of many mentally ill persons in mental hospitals in all of the states."²²³ The SVP statute provides for civil commitment of sexually violent predators. In general, civil commitment for the treatment of the mentally ill or disordered has not been considered punitive in impact.²²⁴ After all, the involuntary commitment of the mentally disordered is labeled as "*civil*" commitment. Therefore, committing an individual who has been determined to be a sexually violent predator is civil regardless of whether the individual has sometime in the past committed a *criminal* act.

220. *Id.* The SOTP recognizes that successful treatment is an ongoing process that will continue for years beyond the Twin Rivers Correction Center. *Id.*

221. The Task Force recommended that the beds at Twin Rivers be increased from 200 to 400 and that WASH. REV. CODE § 9.94A.120(7)(c) (1994), which prevented individuals serving sentences longer than six years from receiving treatment, be amended. FINAL REPORT OF TASK FORCE, II-15 through II-16 (on file with the *Seattle University Law Review*). Although the increase in beds has not yet been implemented by the Legislature, WASH. REV. CODE § 9.94A.120(7)(c) (1994) was amended to allow those individuals to receive treatment. 1993 Wash. Laws ch. 31, § 3.

222. See generally FINAL REPORT OF TASK FORCE, *supra* note 221; SOTP OVERVIEW, *supra* note 216.

223. *Daniels*, 221 A.2d at 410.

224. *Id.*

v. Whether the Statute Comes into Operation Only on a Finding of Scienter

This factor analyzes whether or not the statute is activated only when the individual has "guilty knowledge." The opponents argue that because scienter is a prerequisite for a conviction and a conviction is one of the prerequisites for triggering the SVP statute, that scienter is a prerequisite for triggering the SVP statute. However, the opponents ignore the fact that although scienter is a requirement to even be considered a sexually violent predator, it is by no means dispositive. In *Daniels*, the court held that the Act does not "come into play on a finding of 'scienter' because the person involved . . . [is] determined to be a defective delinquent only after an intensive mental examination."²²⁵ Similarly, the SVP statute does not allow commitment of individuals based on a finding of scienter from their previous crimes. On the contrary, an individual is specifically deemed ineligible for commitment under the SVP statute absent an intensive psychological evaluation and trial. The SVP statute comes into play only if an individual is deemed both mentally disordered and dangerous. Past criminal activity is a prerequisite to commitment, but it does not determine whether or not the individual will be committed. The individual must still suffer from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. Therefore, the SVP statute does not come into operation on a finding of scienter, but comes into play only on a finding of a current mental disorder and dangerousness.

vi. Whether an Alternative Purpose to Which it May Rationally Be Connected is Assignable for the Statute

This factor analyzes whether or not the statute has a valid purpose other than punishment. The *Daniels* court held that "[t]here exists alternate purposes which are valid functions of the State as part of its police power. They are the protection of society, coupled with a humanitarian attempt to treat, cure and rehabilitate those suffering from abnormal mental suffering."²²⁶ The United States Supreme Court has held that a "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

225. *Id.* at 411.

226. *Id.*

authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."²²⁷

The purpose of the SVP statute is not to punish but to protect the community while providing adequate care and appropriate treatment for those who pose a threat to the community.²²⁸ The SVP statute is rationally related to those purposes because it commits individuals who have a mental disorder and are a danger to others so that they may be treated and so that society may be protected. Therefore, the SVP statute has a nonpunitive purpose.

vii. Whether the Sanctions Appear Excessive in Relation to the Alternative Purpose Assigned

The *Daniels* court held that

[t]he sanctions or incarceration provided by the Act are not excessive in relation to these alternative purposes since most reputable psychiatrists agree that treatment cannot be related to a fixed period of confinement, as the length of time necessary for treatment and cure, if it can be obtained, is uncertain. In addition, experience has demonstrated that the indeterminate confinement is itself therapeutic, as it has a tendency to generate and motivate the individual to participate in the institutional program in order to help himself.²²⁹

Similarly, the SVP statute is not excessive in light of the goals it seeks to accomplish. Sexually violent predators are extremely dangerous and in order to promote the goal of societal protection, they must be confined in a high security facility. In addition, in order to provide adequate treatment, the individuals must be committed until such time as they are no longer deemed mentally disordered or dangerous. Finally, the narrow application of the statute lends further support to the claim that it is far from excessive given the purpose to which it is assigned (in its first three years, only 14 of the 2,781 sex offenders released were committed as sexually violent predators).

The legislative intent of the SVP statute, its similarity to the Illinois Act, and the *Kennedy* factors all support its standing as a civil statute in design as well as impact. Therefore, neither the Ex Post Facto Clause of Article I or the Double Jeopardy Clause of the Fifth Amendment of the Constitution are violated.

227. *Addington*, 441 U.S. at 426.

228. State's Brief II at 7.

229. *Daniels*, 221 A.2d at 411.

Washington's SVP statute does not violate substantive due process because it furthers a compelling state interest and is narrowly drawn. As required by *Addington*, the SVP statute requires a finding of both a mental disorder as well as dangerousness before an individual may be committed.²³⁰ Although Washington's SVP statute is constitutionally sound, the controversial nature of the law begs the question: "Does a better alternative to dealing with these sexually violent predators exist?" The answer, as discussed in the next section, is "No."

V. THE SVP STATUTE IS THE BEST ALTERNATIVE FOR THE PROBLEM OF SEXUALLY VIOLENT PREDATORS

Washington State arrived at the SVP statute through a careful, deliberative process. In December 1989, the Governor created the Governor's Task Force on Community Protection consisting of twenty-four members, including professionals in the criminal justice system, legislators, treatment professionals, academics, and three victim-advocates.²³¹ The Task Force spent approximately six months creating the SVP statute as well as numerous other recommendations to assist in community protection.²³² Citizens were invited to participate through twelve public hearings that were held across the state.²³³ Before concluding that the SVP statute was the best alternative for handling sexually violent predators, the Task Force considered expansion of the then-existing civil commitment law as well as determinate sentencing.²³⁴ Opponents of the SVP statute, and even supporters who fear it will be overturned, have advocated passage of a "two strikes" law for sexual offenders, similar to Washington's current "three strikes" law.²³⁵

230. WASH. REV. CODE § 71.09.020 (1994).

231. Boerner, *supra* note 8, at 538.

232. The other recommendations made by the Task Force were in the areas of community treatment for adult sex offenders, prison treatment, polygraph and plethysmograph testing, juvenile offender treatment, special ex offender disposition alternatives for juveniles, treatment funds for sexually aggressive youth, crime victims' advocate services, victims' compensation, school prevention programs, professional training on sexual assault, sex offender registration, background checks on employees who will be around children, notification programs for victims and witnesses, law enforcement information, confidentiality statutes and regulations. FINAL REPORT OF TASK FORCE, *supra* note 221, II-1 through II-33.

233. FINAL REPORT OF TASK FORCE, *Introductory letter (on file with the Seattle University Law Review)*.

234. See Boerner, *supra* note 8, at 547-557.

235. In 1990, Washington passed WASH. REV. CODE § 9.92.090 (1994), the "three strikes" law, which provides that any individual convicted of a third felony will be sent to prison for life. The proposed "two strikes" law would target violent sex offenders and send them to prison for life after a second rape conviction.

This Comment next examines each of the proposed alternatives to the SVP statute and discusses why they are less desirable for handling sexually violent predators.

A. Expansion of the Involuntary Civil Commitment Law to Provide for Treatment of Sexually Violent Predators Would Alter that System in Ways Inconsistent with its Basic Purpose

One proposal considered by the Governor's Task Force was revision of the general civil commitment laws to provide for the commitment and treatment of sexually violent predators.²³⁶ However, the Task Force recognized several problems with this approach.²³⁷ First, the existing civil commitment system was working well for the purposes for which it was designed—the short-term commitment and treatment of those who are mentally ill.²³⁸ The field of sex offender treatment, on the other hand, is new and evolving, requiring special training and treatment.²³⁹ As the Legislature stated in the findings to the SVP statute, sexually violent predators as defined by the statute suffer from a mental disease or defect that cannot be appropriately handled by the existing involuntary treatment act.²⁴⁰

Second, sexually violent predators pose a heightened security risk that the existing treatment facilities cannot handle.²⁴¹ When Washington passed a civil commitment law for sexual psychopaths,²⁴² the lack of security at the commitment facilities led to a series of well-publicized crimes.²⁴³ This experience demonstrated that sexually violent predators require special facilities in addition to special treatment. Additionally, the existing involuntary commitment act is inadequate to address the risk of recidivism because during confinement sex offenders do not have access to potential victims and therefore they will not engage in overt acts of sexual violence during confinement.²⁴⁴ The commitment of sexually violent predators,

236. Boerner, *supra* note 8, at 547.

237. *Id.* at 550.

238. *Id.*

239. See WASH. REV. CODE § 71.09.010 (1994).

240. See *id.*

241. See Boerner, *supra* note 8, at 551-52.

242. WASH. REV. CODE § 71.06 (1989) (repealed prospectively by 1984 Wash. Laws ch. 209) (codified at WASH. REV. CODE § 71.06.005 (1989)).

243. Boerner, *supra* note 8, at 552. Among them, in December 1988, was that of Gary Minnix, who had been committed to Western State Hospital as incompetent to stand trial on four rape charges. Minnix committed a rape at knife point while at the hospital. The fact that he had been permitted to leave the hospital on furlough did not reassure the community. *Id.* at 552 n.46.

244. WASH. REV. CODE § 71.09.010 (1994).

therefore, requires different standards for admission, treatment, continued confinement, and release than those standards utilized under the current involuntary commitment law. Attempting to expand that law to provide for the special needs of sexually violent predators would put an inordinate burden on a system that is already working effectively. Therefore, the Task Force determined that a separate law was a better choice.

The passage of a special civil commitment law for sexually violent predators has led to the creation of a Special Commitment Center that not only provides an appropriate level of security, but that allows the residents housed at the Center to receive treatment specifically tailored to their mental disorders.

B. *Mandatory Sentencing Violates the Principle of Proportionality*

Another proposal considered by the Task Force was the creation of a mandatory sentencing system for sex offenders, one in which all sentences would be for the statutory maximum.²⁴⁵ In other words, all sex offenders would receive the maximum term regardless of the character of the offense.

In 1992, Washington enacted the so-called "three strikes" law²⁴⁶ which requires that any individual convicted of a third felony, regardless of the type, be sentenced to life in prison. The "three strikes" law encompassed any Class A felony ranging from first degree murder to possession of a controlled substance.²⁴⁷ Recently, the King County Prosecutor proposed enacting a similar "two strikes" law for sex offenders.²⁴⁸ Although the bill was passed by the Washington State Legislature, it was vetoed by the Governor.²⁴⁹ The rationale behind the "two strikes" law was that three strikes is "one too many chances for violent rapists."²⁵⁰

The problem with mandatory sentencing laws of any type, as discussed by the Task Force (as well as opponents of the SVP statute), is that they do not provide punishment specific to an individual's

245. Boerner, *supra* note 8, at 548.

246. WASH. REV. CODE § 9.92.090 (1992).

247. Daniel W. Stiller, *Washington Voters Go Down Swinging*, 30 GONZ. L. REV. 433 (1995).

248. *Maleng to Propose "Two Strikes,"* SEATTLE TIMES, Aug. 29, 1995 at B1.

249. The bill was vetoed by the Governor on March 30, 1996. Under the measure, a person would have been sentenced to life without parole after two convictions of first or second-degree rape, indecent liberties by force or other felonies found to be sexually motivated. Such crimes include murder, kidnap, assault and first-degree burglary. HB 2320, 54th Leg., Reg. Sess. (1996).

250. *Id.*

crime. While everyone might agree that those who commit the most serious sex offenses deserve very long sentences, not all sex offenders deserve such sentences.²⁵¹ Mandatory sentencing does not take into account the fundamental and substantial differences in both culpability and harm between and among the statutory categories.²⁵²

The SVP statute improves upon mandatory sentencing in two distinct ways. First, the SVP statute is not punitive incarceration. Under the SVP statute, violent sex offenders who have completed a term in prison and yet are still mentally disordered and dangerous have an opportunity to receive treatment and return to society. Second, unlike mandatory sentencing, which takes no account of the specific characteristics or disorder of the individual, the SVP statute mandates an individualized evaluation before determining whether commitment is necessary. As mentioned above, of the 2,781 sex offenders released from prison during the first three years of the SVP statute's existence, only fourteen were tried and committed as sexually violent predators. It seems likely that had a "two strikes" law been in effect, substantially more than fourteen not only would have been taken off the streets, but also would have been sentenced to life in prison.

Even had the Task Force found the general application of mandatory sentencing tolerable, one major problem existed: mandatory sentencing could only be applied to crimes committed after the effective date of the reform because of the constitutional prohibition against retroactive increases in criminal punishment.²⁵³ Therefore, any sexually violent predators currently incarcerated who at the time of their release were mentally disordered and dangerous, would nonetheless be released onto the streets and allowed to victimize another individual before being subject to mandatory sentencing.

C. From the Viewpoint of Both the Sexually Violent Predator and Society, the SVP Statute is the Best Alternative

Because of the inherent security risks posed by sexually violent predators, expansion of the existing civil commitment facilities is not feasible. The only possible alternative to the SVP statute would be enactment of some form of mandatory sentencing for sex offenders. Under careful examination, the SVP statute is the best alternative for the sexually violent predator as well as society.

251. Boerner, *supra* note 8, at 549.

252. *Id.* at 550.

253. *Id.*

From the point of view of a sexually violent predator, the SVP statute is preferable to a life term in prison. At least under the SVP statute, two favorable possibilities exist for a convicted sex offender that do not exist under mandatory sentencing: the chance to avoid commitment in the first place if the evaluation does not support the conclusion that one is a sexually violent predator and, if committed, the chance to receive treatment and return to society. Individuals incarcerated prior to enactment of mandatory sentencing would probably support mandatory sentencing because it would not affect them. However, this is a short-term view. For a sexually violent predator, still mentally disordered and dangerous at the end of a prison term, the likelihood of reoffending is high. Therefore, even if mandatory sentencing did not have an immediate effect on the sexually violent predator, it would have an effect as soon as the predator committed one more sexually violent crime.

Additionally, sentencing all repeat sex offenders to life imprisonment would be extremely expensive. Under the SVP statute, only a small number of sex offenders are committed indefinitely. However, under a two-strikes law, not only would the state bear the expenses of the current sex predators who would all be serving life terms, but the state would also have to bear the expenses for all repeat sex offenders who are released in large numbers each year.

VI. CONCLUSION

Society must decide on an alternative with which it is comfortable. Do we want to automatically sentence all sex offenders to life in prison to avoid even the chance that one of them could get out prematurely and commit a crime? To avoid even the chance that an Earl Shriner²⁵⁴ could happen again? Or do we want to apply a sentence that fits the crime and, after completion of that punishment, if the individual still poses a risk, commit him or her for treatment until he or she can be safely and successfully returned to society? Each individual member of society must decide what he or she is most comfortable with and advocate accordingly. This Comment argues that the alternative chosen by the Task Force—enactment of the SVP statute—is not only an appropriate and measured choice to deal with a complex sociological and legal issue, but is also a constitutional one.

254. See *supra* notes 8-11 and accompanying text.