

Washington's Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks

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When I recommended my friend, Alex Brooks, as a contributor to this special symposium issue on Washington's new sexually violent predator commitment law,¹ I was confident that Alex, with his keen intellect and extensive experience as pioneer teacher and scholar in the mental health field, would write an article that would stimulate both intense debate and careful reflection on this unique law.² I was not disappointed. His article sets forth a provocative analysis and defense of this controversial legislation.³

Because I believe that scholarly debate is extremely important to a thorough consideration of this law from multiple perspectives and because, as an opponent of the statute,⁴ I have come to conclusions that differ fundamentally from those set forth by my friend, I would like to exercise what might be called the "home field advantage" and respond briefly to his article. I should add, of course, that, though I disagree with Alex, his article is a most welcome contribution to this symposium and to a full understanding of this law. Though my comments will be sharply contrary to his views, the enormous affection and respect I have for him remain as strong as always.

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1. WASH. REV. CODE ch. 71.09 (Supp. 1990-91). For a thorough description of this statute, see Brian G. Bodine, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990).

2. Professor Brooks is the Joseph Weintraub Professor of Law Emeritus at the Rutgers Law School, Newark, and Associate, Institute for Health, Health Care Policy, and Aging Research, Rutgers University.

3. See Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709 (1992).

4. I wrote the Amicus Curiae Brief for the American Civil Liberties Union of Washington attacking the constitutionality of the statute.

I. CONCEPTUALIZING THE STATUTE PROPERLY

To analyze Washington's sexually violent predator commitment law, it is essential that one accurately conceptualize the law. Unfortunately, Professor Brooks does not conceptualize the statute accurately. At various points in his article, he seemingly defends that law as a legitimate exercise of the state's power of preventive detention, civil commitment, and criminal punishment. Because the law authorizes the government to take away an individual's liberty, possibly for life, the clear burden is on the state to establish its authority under a system of confinement that is legally recognized in our constitutional system.⁵ To withstand constitutional scrutiny, the statute must, therefore, be sustained as a legitimate exercise of one—and only one—of these powers.⁶ In my view, it cannot be sustained under any of these theories of state power.

A. *Preventive Detention*

While opponents of the statute have attacked it as an unconstitutional exercise of indeterminate detention to prevent crime,⁷ Professor Brooks argues that the statute should not be considered an exercise of "pure" preventive detention because it is "crime-related."⁸ He writes:

The preventive detention of the SVP statute is not "pure" because the statute applies only to those offenders who have already been convicted of at least one crime of sexual violence, and usually more than one. Thus, preventive detention of this statute is crime-related. A person who is sexually deviant cannot be committed as a sexually violent predator, regardless of the evidence of his sexually behavior, if he has never been convicted of a crime of sexual violence as defined in the statute.⁹

5. *Salerno v. United States*, 481 U.S. 739 (1987); *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992).

6. These systems of control are mutually exclusive. The government must justify its authority to confine an individual in specific institutions for specific purposes. See *Foucha*, 112 S. Ct. at 1781-89 (White, J.).

7. Amicus Curiae Brief of the American Civil Liberties Union of Washington, *In re Young* (Wash. filed Feb. 4, 1991) (No. 57837-1) [hereinafter ACLU Brief].

8. Brooks, *supra* note 3, at 717.

9. *Id.* at 717. Professor Brooks is not precisely accurate. Under the statute a person found incompetent to stand trial or not guilty by reason of insanity can be committed indefinitely at the expiration of his criminal commitment. WASH. REV. CODE §§ 71.09.030(3)-(4) (Supp. 1990-91). Thus, the state need not convict an individual

But this misstates the issue. Preventive detention, whether or not denominated as "pure," does not turn on whether the person to be confined has previously committed a criminal offense. Rather, it depends on whether the government must prove anything more than "dangerousness" to secure an individual's confinement.¹⁰ And, as it happens, the most recent cases in which the United States Supreme Court considered whether the government could constitutionally exercise its power of pure preventive detention involved legislation that confined only those who were charged with a serious crime or had actually committed a criminal act.¹¹

In *Salerno v. United States*,¹² the government had to obtain an indictment or information charging a serious federal crime before it could seek pretrial preventive detention of an individual to prevent him from committing other serious crimes pending his criminal trial. The government did not have to prove Salerno suffered from a mental illness or disorder that caused him to be dangerous. It did, however, have to prove probable cause that the criminal defendant had committed a serious offense and that, within the time provided for by the federal Speedy Trial Act,¹³ it intended to convict him for that past offense. The court in *Salerno* thus upheld as constitutional the federal Bail Reform Act¹⁴ that authorized pure preventive detention that was "crime-related."¹⁵

In the more recent case of *Foucha v. Louisiana*,¹⁶ the

to commit him, though it must prove he committed a criminal act that would have constituted the *actus reus* of a qualifying sex crime under the statute.

10. Statutes that authorize preventive detention limit the class of individuals who might be subjected to preventive detention and the circumstances under which the government may seek preventive detention. The government must also prove those facts when it seeks to confine someone solely to prevent them from committing crimes. See, e.g., *Salerno v. United States*, 481 U.S. 739 (1987). The basic point is that, under its power of preventive detention, the government does not have to prove an individual has committed a crime that would justify his confinement for a punitive purpose nor must it prove that an individual suffers from a mental illness that renders him likely to commit a harmful act and would justify his confinement for care and control.

11. For a brief description of all Supreme Court cases involving preventive detention, see John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 688 n. 126 (1992).

12. 481 U.S. 739 (1987). For a more thorough discussion of *Salerno's* applicability to the statute, see La Fond, *supra* note 11, at 689-90, and ACLU Brief, *supra* note 7.

13. 18 U.S.C. §§ 3161-3174 (1982 & Supp. III 1985).

14. *Id.* §§ 141-3156.

15. *Salerno*, 481 U.S. at 745-52.

16. 112 S. Ct. 1780 (1992). For a more thorough discussion of how the *Foucha* case

Supreme Court rejected Louisiana's argument that the state could exercise its power of pure preventive detention to continue to confine indefinitely an individual found not guilty by reason of insanity who was considered dangerous but no longer mentally ill. Justice White acknowledged in *Foucha* that preventive detention was constitutionally acceptable under limited conditions. He said: "We have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to *limited* confinement . . ." ¹⁷ In rejecting Louisiana's argument that it could indefinitely confine someone who was not mentally ill but was considered dangerous, Justice White said:

Salerno, unlike this case, involved *pretrial* detention. We observed in *Salerno* that the "government's interest in preventing crime by *arrestees* is both legitimate and compelling," and that the statute involved there was a constitutional implementation of that interest. The statute carefully *limited* the *circumstances* under which detention could be sought to those involving the *most serious crimes* (crimes of violence, offenses punishable by life imprisonment or death, serious drug offense, or certain repeat offenders), and was narrowly focused on a particularly acute problem in which the government interests are overwhelming. In addition to first *demonstrating probable cause*, the government was required, in a "full-blown adversary hearing," to convince a neutral decisionmaker by clear and convincing evidence that *no conditions of release* can reasonably assure the safety of the community or any person Furthermore, the *duration* of confinement under the Act was *strictly limited*. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the "stringent time limitations of the Speedy Trial Act." If the arrestee was convicted, he would be confined as a criminal proved guilty; if he were acquitted, he would go free. ¹⁸

The Washington statute is not limited to pretrial detainees or to the most serious crimes. ¹⁹ Moreover, the government need

applies to the Washington law, see James Ellis, *Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of Foucha v. Louisiana*, 15 U. PUGET SOUND L. REV. 635 (1992); La Fond, *supra* note 11, at 692-95; Supplemental Brief of the American Civil Liberties Union of Washington, *In re Young* (Wash. filed June 10, 1992) (No. 57837-1) [hereinafter ACLU Supplemental Brief].

17. *Foucha*, 112 S. Ct. at 1786.

18. *Id.* (citing *Salerno*, 481 U.S. at 747-51) (emphasis added).

19. A crucial factor under the statute is the status of the victim, not the crime.

not establish probable cause that would itself provide evidence of recent dangerous behavior. Nor must it show that other steps would not reasonably assure community safety. Most importantly, the statute does not limit the duration of confinement. Unlike the federal Speedy Trial Act²⁰ and similar to *Foucha's* provision, commitment under the statute may be forever. And, of course, there will be no trial on pending criminal charges, so there can be no acquittal and release.

Foucha forecloses any claim that the statute is a constitutionally permissible exercise of the state's preventive detention authority. Not even the dissenting opinions in *Foucha* attempted to uphold the continued confinement of *Foucha* as a lawful exercise of preventive detention.

The *Foucha* case is particularly applicable to the Washington law because the verdict of not guilty by reason of insanity at the trial clearly established that *Foucha* had committed a criminal act. Indeed, it may also have established that he had acted with a criminal state of mind, but, because mental illness had rendered him unable to know that his act was wrong, he could not be punished.²¹ Thus, Louisiana argued that though it could not confine him as punishment for commission of a past crime and was not asserting its power of involuntary commitment of the mentally ill, the state could exercise its power of pure preventive detention to confine *Foucha* indefinitely to prevent him from committing another crime even though he was not mentally ill. Put differently, the state argued it only had to prove *Foucha* was dangerous. The Court rejected this claim even though Louisiana had argued its power of preventive detention was "crime-related."

Professor Brooks is inaccurate when he limits the state's power of pure preventive detention as applying only to those individuals who have *not* committed a crime or, in his words, as being "crime-related."²² In *Salerno*, the state had established probable cause to believe *Salerno* had committed a serious crime in the past. In *Foucha*, Louisiana had established

Moreover, some of the qualifying crimes may not involve any physical force. WASH. REV. CODE § 71.09.020(4) (Supp. 1990-91).

20. See *supra* note 13.

21. See *Foucha*, 112 S. Ct. at 1791-97 (J. Kennedy, dissenting).

22. Though the Supreme Court has upheld preventive detention of individuals considered dangerous who had not committed a crime (see *supra* note 11), the Washington statute must be analyzed under *Salerno* and *Foucha* because it involves confinement of individuals as dangerous who have committed a crime in the past.

that Foucha had committed a criminal act in the past and, most probably, had acted with the requisite criminal mind.

Opponents of the statute characterize the Washington law as an illegitimate exercise of preventive detention because, though in form a civil commitment statute, the purpose and effect of the law is to confine indefinitely individuals who are not mentally ill or disordered *solely* because they are considered at risk of reoffending.²³ The commission of a single crime (which could have occurred at any time in the past) required by the Washington law is no greater a justification for obtaining a defendant's confinement than was the grand jury's indictment in *Salerno*²⁴ or the verdict of not guilty by reason of insanity in *Foucha*.²⁵ Despite Professor Brooks's argument to the contrary, the Washington law cannot be sustained under either *Salerno* or *Foucha* as a lawful exercise of the state's power of preventive detention.

B. *Involuntary Civil Commitment*

Civil commitment based on the state's police power to prevent harm to the individual or to the community requires the government to prove that an individual suffers from some form of mental disorder that causes him to be dangerous to himself or others.²⁶ Because such commitments seek to prevent future harm, which may include criminal acts, they do have aspects of "preventive detention" as Professor Brooks correctly notes.²⁷ Such commitment schemes have generally been upheld against constitutional challenge.²⁸

But it is essential to understand that this special system of social care and control is only applicable to the mentally disabled. Only if an individual suffers from a mental illness or is developmentally disabled and this condition *causes* him to be dangerous can the state secure indeterminate commitment of an individual. Without *each* of these conditions being satisfied—mental illness or retardation that causes dangerous behavior—the state is not authorized under our constitutional

23. See ACLU Brief, *supra* note 7.

24. *Salerno v. United States*, 481 U.S. 739 (1987).

25. *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992).

26. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974); John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFFALO L. REV. 499 (1981).

27. Brooks, *supra* note 3, at 717.

28. See *supra* note 26.

system to confine someone indefinitely to prevent him from harming himself or others.

There is no serious dispute about the constitutional validity of involuntary civil commitment under the state's police power. There is, however, a serious disagreement as to whether the Washington statute is a *bona fide* system of civil commitment. Opponents argue that the law does not require proof of mental illness as *Foucha* requires.²⁹ Indeed, the Washington law only requires proof of a "personality disorder" or "mental abnormality" that "makes a person likely to engage in predatory acts of sexual violence" against "strangers or persons with whom a relationship was established for purposes of victimization."³⁰

In *Foucha*, the Supreme Court specifically held that neither a "personality disorder" nor an "anti-social personality" (generally considered by mental health professions as a subcategory of "personality disorder")³¹ constitutes a mental illness that would justify involuntary civil commitment either for a person found not guilty by reason of insanity or for a prisoner nearing the end of his prison term.³² The Court's holding makes especially good sense because it is quite easy to qualify as suffering from a personality disorder.³³

Despite the clear mandate of *Foucha*, Professor Brooks nonetheless seems to assert that "personality disorder," because it is defined as a mental illness in the Diagnostic and Statistical Manual of Mental Disorders (*DSM-III-R*)³⁴ (though it is not considered a form of illness that is suffered specifically by sex offenders or that causes sex offenders to commit sexual crimes³⁵) is legally and constitutionally sufficient to sustain

29. *Foucha*, 112 S. Ct. at 1786.

30. WASH. REV. CODE § 71.09.010 (Supp. 1990-91).

31. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-III-R 342 (3d ed. rev. 1987) [hereinafter DSM-III-R].

32. *Foucha*, 112 S. Ct. at 1784-85.

33. Someone who is at least eighteen years of age and, before the age of fifteen, was often truant, often initiated physical fights, and often lied and who has, since 15, been unable to sustain consistent work, fails to honor financial obligations, and has no regard for the truth, could be diagnosed as having an anti-social personality disorder, which is a type of "personality disorder." DSM-III-R, *supra* note 31, at 344-45.

34. *Id.* This manual is the authoritative compilation of mental disorders officially recognized by the American Psychiatric Association. It provides a comprehensive description of symptoms for each recognized mental disorder and a systematic method for diagnosing these disorders.

35. As Professor Brooks himself points out, the *DSM-III-R* does not include rape, even repetitive rape, as a personality disorder. Brooks, *supra* note 3, at 731-32.

involuntary civil commitment.³⁶ Professor Brooks dismisses the relevance and applicability of *Foucha* by concluding that the Supreme Court simply relied on the opinion of a single hospital doctor that personality disorder was not a mental illness.³⁷ Such a reading of *Foucha* ignores the categorical conclusion set forth in the majority's opinion that "personality disorder" and "anti-social personality" do not constitute mental illness and ignores the Court's clear warning against using such waste-basket labels to justify indefinite confinement.³⁸ Indeed, if Professor Brooks is correct, all the state must do to continue *Foucha*'s indefinite confinement is to have a different doctor testify that *he* considers a "personality disorder" to be a mental illness. Surely, the Court's clear delineations of the limits imposed by the substantive Due Process Clause of the United States Constitution on the state's power of civil commitment could not rest on such a fragile factual predicate.

Professor Brooks uses the *DSM-III-R* selectively and inconsistently. Because "personality disorder" is listed (albeit cautiously) in the *DSM-III-R*, it must, he says, qualify as a mental illness that can validate civil commitment. Conveniently, however, just because "mental abnormality" is *not* listed as a mental illness in the same authoritative text, that, he says, does not render it unfit to qualify as a mental illness as required by *Foucha*. Professor Brooks says:

The "mental abnormality" language is not intended to be a psychiatric term. The fact that it is not listed as such in the *DSM-III-R* is irrelevant. It is a legal term, intended to convey a form of pathology that leads to violent sexual offenses.³⁹

Foucha's limit on the civil commitment power of the state surely cannot be so easily circumvented by a legislature's decision to create "legal" mental illnesses out of whole cloth. If Professor Brooks is correct and the legislature can simply declare "pathology"⁴⁰ without any scientific or medical basis, perhaps, Humpty Dumpty was correct when he said to Alice:

36. *Id.* at 733.

37. *Id.* at 728.

38. See *Foucha v. Louisiana*, 112 S. Ct. 1780, 1787 (1992).

39. Brooks, *supra* note 3, at 730.

40. WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1313-14 (2d ed. 1983) describes "pathology" as: "1. that part of medicine that deals with the nature of diseases, their causes and symptoms, and especially the structural and functional changes caused by disease; 2. all the processes, results, or conditions produced by a particular disease."

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."⁴¹

Professor Brooks argues that: ". . .the question is not whether the term [mental abnormality] is a common psychiatric term, but whether the term would be applied fairly."⁴² Conveniently, he never does say what he means by "fairly." Surely Professor Brooks must mean that the term provides a reasonably accurate description of a mental disorder and that the term has both reliability and validity. "Reliability" in this context refers to whether mental health professionals would generally agree among themselves with the same diagnosis when observing the same symptoms in the same individual. "Validity" in this context means that the term ("mental abnormality") accurately describes symptoms which the patient actually manifests in the real world.⁴³ Without a firm mooring in mental health expertise and without a uniform and verifiable system of symptoms, diagnosis, and treatment, the legislature's creation of "pathology" renders illusory any hope that its definitional concoction has any significant "reliability" or "validity." Thus, there is virtually no hope that the term can be applied fairly and consistently in the legal system. What should this "legal" term mean to clinicians and how should they apply it? What are its etiology, symptoms, prognosis, and treatment? How can clinicians apply this term with any uniformity over many cases? How should a defense attorney cross-examine a mental health professional about this purported "legal diagnosis"? Professor Brooks actually suggests a definition of "mental abnormality" that is substantially different from the statute's own definition of this very same term.⁴⁴

41. LEWIS CARROLL, THROUGH THE LOOKING GLASS, in MARTIN GARDNER, THE ANNOTATED ALICE 269 (1960).

42. Brooks, *supra* note 3, at 730.

43. For a good description of "reliability" and "validity," see Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 699-711 (1974).

44. The statute defines the term as follows:

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

WASH. REV. CODE § 71.09.020(2) (Supp. 1990-91). Professor Brooks defines mental abnormality as "some form of mental condition, or pathology that impairs volitional controls and causes them to behave in the compulsive, repetitive, irrational, and self-destructive ways that are typical of mental disorders." Brooks, *supra* note 3, at 730.

In so doing, he has in a wonderfully graphic manner confirmed the fundamental flaw in the statute's use of this term, which was noted by the Washington Psychiatric Association. Each mental health professional will necessarily generate his or her own operative definition. How can such a squishy term possibly be applied "fairly"?

Even assuming that either "personality disorder" or "mental abnormality" does set forth a form of mental illness or disorder, there is no recognized mental illness or disorder that causes an individual to seek out strangers or to establish a relationship with individuals for the purpose of sexual victimization. In conjuring up such an idiosyncratic definition of mental disorder, the legislature has gone beyond the bounds of any behavioral dysfunction recognized by mental health professionals and created a hopeless muddle.

More disturbing, Professor Brooks seems to applaud the legislature's attempt to "convey a form of pathology that leads to violent sexual offenses"⁴⁵ even though it does not provide a definition that has any basis in mental health expertise or that can be applied fairly and consistently by mental health experts within the law's adjudicatory system. Though Professor Brooks seemingly relies on recidivism as the core symptom of his definition of pathology, the legislature does not. Rather, the Washington statute deduces the existence of a causative mental illness from the commission of a *single* qualifying sex crime against qualifying victims. In short, "pathology" can be coextensive with the commission of a single sex crime. This definitional strategy is a pure tautology, conflating both diagnosis and prediction with a single incident of criminal behavior. It is circular reasoning at its worst! This so called pathology is neither medicine nor science; it is legislative legerdemain.

Professor Brooks seemingly does not require the presence of a medically recognized mental illness or disorder that causes an individual to be dangerous before he would permit involuntary civil commitment. Rather, some specious form of "pathology" undefined and undiagnosable is sufficient. This is certainly not the teaching of any civil commitment case cited in his article nor is it the teaching of *Foucha*. Unless legislatures have a clear and accurate conception of involuntary civil

45. Brooks, *supra* note 3, at 730.

commitment and its limits, they can easily misapply or abuse this system of social care and control.

Even if by some incredible stretch of the imagination, the statute does describe a medically meaningful model of mental illness that causes someone to be dangerous and in need of treatment, it is difficult to imagine why the state *requires* that diagnosis and treatment be deferred so long after the purported mental illness has manifested itself through a sexual crime.⁴⁶ No other commitment law in America imposes such a delayed-fuse restriction on diagnosis and treatment.

Professor Brooks cites *Baxstrom v. Herold*⁴⁷ to justify committing prisoners to mental health facilities following the expiration of their prison term.⁴⁸ What he does not mention, however, is that *Baxstrom* held that the Equal Protection Clause of the Fourteenth Amendment requires the state to use the same commitment standards and procedures to commit prisoners nearing the end of their prison terms as are used to commit all other citizens whom the state considers mentally ill or disabled and dangerous.⁴⁹ The Court in *Baxstrom* specifically held that a state could not use a different commitment scheme for these convicted criminals because the fact of a prior conviction is simply not relevant to a determination of mental illness or present dangerousness.

The plurality opinion in *Foucha v. Louisiana* reaffirmed the equal protection analysis of *Baxstrom*.⁵⁰ Thus, the Washington statute should be struck down under *Baxstrom* and *Foucha* because it uses commitment and release standards and procedures substantially more disadvantageous to prospective committees than those provided by the state's Involuntary Treatment Act.⁵¹ The government can commit mentally ill prisoners who are nearing the end of their prison terms or

46. For a more thorough analysis of this point, see La Fond, *supra* note 11, at 695-96.

47. 383 U.S. 107 (1966).

48. He also asserts, without explanation or authority, that a "significant part of the population of most maximum security mental hospitals consist of patients who have been committed there following completion of their prison terms." Brooks, *supra* note 3, at 717. This is certainly not the case in Washington state where most dangerous patients are civilly committed to the state's mental health facilities.

49. *Baxstrom*, 383 U.S. at 114-15.

50. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1788-89 (1992).

51. WASH. REV. CODE ch. 71.05 (1989). For an analysis of this statute, see Mary L. Durham & John Q. La Fond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Involuntary Civil Commitment*, 3 YALE L. & POL'Y REV. 395 (1985).

have been released into the community but only if it uses the general involuntary civil commitment statute. It cannot create a special system of commitment that treats an arbitrarily selected class much more harshly than any other citizen who is entitled to his liberty.

Professor Brooks also concludes that treatment effectiveness is not required by the Constitution.⁵² He presents the facts and holdings of *Youngberg v. Romeo*⁵³ and *Allen v. Illinois*⁵⁴ without much analysis or application of these cases to the Washington statute. He then simply concludes that "it is unlikely the Court will [require efficacious treatment]."⁵⁵

In *Youngberg v. Romeo*,⁵⁶ the Supreme Court held that a developmentally disabled person confined in a state institution has a constitutional right to safe conditions of confinement and freedom from bodily restraint as well as such minimally adequate training as required by these interests. *Youngberg* has minimal applicability to this case because, as Professor Brooks himself notes, Romeo did not seek to enforce a right to treatment. Romeo simply sought such ancillary treatment as would secure for him his constitutional rights to safety and bodily freedom. As Professor Brooks correctly observes, this case can shed no light on whether the Constitution requires effective treatment. Moreover, it was apparent to everyone that Nicholas Romeo was going to spend the rest of his life in a state institution; although Nicholas was thirty-three years old chronologically, he had an IQ equivalent to an eighteen-month-old child. Even then, the Court held Romeo did have a limited right to treatment.

Allen is more to the point. Though the appellant in *Allen* did not claim a right to treatment, the Court's holding is instructive, nonetheless. In *Allen*, the Court characterized the Illinois commitment scheme for sexually dangerous offenders as civil rather than criminal. Under the Illinois law, the prosecutor had to *choose* between *either* conviction and punishment *or* commitment and treatment. As Justice Rehnquist declared: "In short, the State has *disavowed any interest in punishment*, [has] provided for the *treatment* of those it commits, and [has] established a system under which committed persons may be

52. Brooks, *supra* note 3, at 733-35.

53. 457 U.S. 307 (1982).

54. 478 U.S. 364 (1986).

55. Brooks, *supra* note 3, at 735.

56. 457 U.S. 307 (1982).

released after the briefest time in confinement."⁵⁷ Thus, *Allen* strongly suggests that *bona fide* treatment as an *alternative* to conviction and punishment is a constitutionally required purpose of sexual offender commitment statutes. In sharp contrast, the Washington law requires the state to fully punish an offender before permitting indefinite commitment, thereby ensuring extended confinement rather than release in the "briefest time."

Foucha is also revealing. Whether or not a condition was treatable was very important to the majority in determining whether a condition should be considered mental illness. Justice White said:

Here, in contrast, the State asserts that because *Foucha* once committed a criminal act and now has an *antisocial personality* that sometimes leads to aggressive conduct, a disorder for which there is *no effective treatment*, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has *completed* his prison term. It would also be only a step away from *substituting* confinements for *dangerousness* for our present system which, with only narrow exceptions and aside from permissible confinements for *mental illness*, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.⁵⁸

After all, mental illness assumes there is a causative defect in cognitive, emotional, or volitional processes that can be diagnosed and, in most cases, treated. It is certainly more than the commission of a single criminal offense.

Allen also made it clear that the state cannot hide behind a "commitment" system that was really a sham for extended incarceration. Such a system, whether dubbed civil or criminal, would be struck down. As Justice Rehnquist said in *Allen*, if the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intentions' that the proceeding be considered civil, it must be considered criminal . . ."⁵⁹ A good case can be made that the Washington scheme is just such

57. *Allen*, 478 U.S. at 370 (emphasis added).

58. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1787 (1992) (emphasis added).

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

a sham. It does not require the presence of mental illness that causes an individual to be dangerous as required by *Foucha*. The law also precludes commitment and treatment until the state has exacted its full measure of punishment even though the evidence of alleged mental illness, dangerousness, and the need for treatment was almost always available to the government long before commitment was sought.⁶⁰ In reality, the Washington law is lifetime preventive detention masquerading as involuntary psychiatric treatment.

As disturbing is Professor Brooks's use of precedent to support his conclusion that it really does not matter if effective treatment is unavailable for these offenders. As he puts it:

But it must be recognized that the goal of the SVP statute is not primarily treatment. The statute is designed to confine an extremely limited number of dangerous and mentally abnormal persons because they are too dangerous to be at large, . . .⁶¹

Surely, a state statute that creates a fictional class of mentally abnormal offenders unknown to the mental health professions, declares them to be dangerous and virtually untreatable, and conveniently extends their incarceration beyond their lawful term of imprisonment until they are "cured"—by definition an impossibility—must be considered as preventive detention and not civil commitment of the mentally disordered for care and control.

C. Criminal Punishment

Professor Brooks also seems to conclude that, because either an extended determinate sentence or an indeterminate sentence could have been imposed upon conviction for the defendant's past crime, there is no substantial difficulty, constitutional or moral, in simply extending an offender's incarceration beyond his lawful criminal sentence if he is considered still dangerous. In his view, a prediction of dangerousness is built into an extended or indeterminate sentence, thus validating indefinite confinement that is not imposed as punishment for a past criminal act.⁶²

Of course the *Ex Post Facto* Clauses of the United States

60. WASH. REV. CODE § 71.09.030 (Supp. 1990-91).

61. Brooks, *supra* note 3, at 735.

62. Brooks, *supra* note 3, at 718-19.

and Washington Constitutions forbid extending prison terms after conviction regardless of the public policy to be served.⁶³ The principle of legality insists that both the crime and punishment be fixed in advance and that an individual have notice of the punishment. This fundamental principle of American jurisprudence protects all citizens from an oppressive and dictatorial government. Indeed, it is a vital element in the rule of law which distinguishes our democracy from police states.

Aside from constitutional considerations, the primary purpose of extended sentences for repeat offenders under Washington's Sentencing Reform Act is to punish the greater culpability of a multiple offender, not to confine him or her longer because of dangerousness. Indeed, Washington state no longer tries to predict dangerousness as an element of an offender's release from prison precisely because the legislature did not think it could be done accurately.⁶⁴

More importantly, a criminal can avoid any indeterminate sentencing scheme by not offending. The Washington law, however, does not provide any once-convicted offender with such a logical and humane opportunity. To the contrary, a single qualifying sex crime committed in any state at any time in one's life against qualifying victims continues to subject an individual to commitment under the law until he or she dies. In short, there is nothing an individual can do to avoid lifetime commitment under the statute. The statute does not require multiple offenses as a condition of indeterminate commitment. A single crime legally suffices. Thus, any prediction of dangerousness required by the statute is of extremely dubious value because it can legally be based on such scant and stale behavioral evidence.

Finally, the Washington law is extraordinarily sweeping in scope. Literally, thousands of once-convicted sex offenders qualify for commitment under the literal language of the law, including those who are simply visiting the state. Without guidance of any kind, the law effectively delegates to the executive branch *carte blanche* discretion to decide which individuals shall be confined under the law's expansive net. Professor Brooks does not address this issue. Rather, he

63. See *Collins v. Youngblood*, 497 U.S. 37 (1990); *Addleman v. Board of Prison Terms & Paroles*, 107 Wash. 2d 503, 730 P.2d 1327 (1986); *Foucha v. Louisiana*, 112 S. Ct. 1780, 1807 n.16 (1992) (Thomas, J., dissenting).

64. See generally DAVID BOERNER, *SENTENCING IN WASHINGTON* (1985) and the Sentencing Reform Act, WASH. REV. CODE ch. 9.94A (1989 & Supp. 1990, 1990-91).

argues that prosecutors will use the law sparingly and that: "It results in the confinement of a very small cohort of offenders."⁶⁵ There is no empirical basis for this conclusion. Because few, if any, new commitment petitions have been filed during the period in which the Washington Supreme Court is reviewing the constitutionality of the statute, it appears that prosecutors have informally decided to hold additional filings under the law in abeyance until its constitutionality has been decided. If the law is upheld, it is reasonable to expect that prosecutors will file many more commitment petitions.

II. THE PREDICTION OF DANGEROUSNESS

No party, including the American Civil Liberties Union of Washington, has ever argued in the litigation challenging the constitutionality of the Washington law that the Constitution proscribes using dangerousness as a criterion in involuntary civil commitment or preventive detention. As Professor Brooks correctly notes, the United States Supreme Court has permitted predictions of dangerousness as part of a capital sentencing proceeding⁶⁶ and in pretrial confinement of defendants considered too dangerous to be released on bail pending trial.⁶⁷ Consequently, the Court is likely to permit the use of such predictions in civil commitment proceedings.⁶⁸

But numerous courts, including the Washington Supreme Court, recognizing that accurate predictions of dangerousness are extremely difficult to make, require the government to adduce evidence of recent, overt acts demonstrating that the defendant is presently dangerous.⁶⁹ Without such evidence, the probability of an incorrect prediction is extremely high. To support his contrary position, Professor Brooks cites one case, *Mathew v. Nelson*,⁷⁰ which did not require proof of an overt act and ignores many other cases, including a Washington case, which did require an overt act.⁷¹ The *Mathew* case, of course,

65. Brooks, *supra* note 3, at 754.

66. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

67. *Salerno v. United States*, 481 U.S. 739 (1987).

68. See Laura K. Haddad, *Predicting the Supreme Court's Response to the Criticism of Psychiatric Predictions of Dangerousness in Civil Commitment Proceedings*, 64 NEB. L. REV. 215 (1985).

69. *In re Harris*, 98 Wash. 2d 276, 654 P.2d 109 (1982); Reed Groethe, Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562 (1977).

70. 461 F. Supp. 707 (N.D.Ill. 1978).

71. See *supra* note 69 and cases cited therein.

involved a *short-term* prediction of dangerousness as required under the state's general involuntary commitment law. It did not involve a *long-term* prediction of dangerousness like that required by the Washington law. Psychiatrists have much greater confidence in their ability to make short-term predictions of dangerousness than long-term predictions.⁷²

Professor Brooks also argues that the state would be unable to provide recent evidence of dangerousness because most targets of the law would be in prison where they cannot engage in conduct manifesting dangerousness. This is simply not the case. Prisoners serving prison terms can act in violent or sexually explicit ways while in confinement. In addition, the case of Earl Shriner, which inspired this law,⁷³ involved an individual who did provide evidence of his dangerousness while in prison. And Professor Boerner, who participated in drafting the law, asserted that, without evidence of diaries, drawings, or statements by someone presently serving a prison term, the state would probably not succeed in obtaining commitment.⁷⁴ Thus, the author of the law considered such evidence to be reasonably available and necessary for commitment.

The more salient point, however, is that the Washington law does not require any evaluation of the individual's recent or current behavior in predicting dangerousness. It does not, for example, require any evidence of planning sex crimes, sexually violent fantasies, or deteriorating mental condition. In short, it does not require any tangible proof concerning the individual's recent behavior or mental condition upon which a mental health expert might base either a current diagnosis or a prediction. In most cases tried so far, the government has relied on evidence which predates the individual's last convic-

72. See the Amicus Curiae Brief for the American Psychiatric Association, *Barefoot v. Estelle*, 483 U.S. 880 (1983) (No. 82-6080).

73. See David Boerner, *Confronting Violence: In the Act and In the Word*, 15 U. PUGET SOUND L. REV. 525 (1992).

74. In testifying before the legislature, Professor Boerner said:

What we [on the Task Force] had in mind was the case like *Shriner* where you had direct physical evidence of plans to commit future crimes, diaries, notes, and those sorts of things. I think absent that . . . psychiatric prediction plus the crime years ago isn't going to be enough to satisfy a jury under the standards we've provided.

See ACLU Brief, *supra* note 7, at Appendix D (containing excerpts from pages six and seven of transcript compiled from a tape recording of Professor David Boerner's testimony before the Senate Law and Justice Committee on Jan. 11, 1990).

tion and sentencing. Using such stale evidence virtually ensures inaccurate predictions of dangerousness.

Professor Brooks attempts to undermine the rather broad-based and consistent evidence that mental health professionals are not capable of making accurate long-term predictions of dangerousness by critiquing the methodologies used in selected studies.

Probably the most famous of the studies critiquing the ability of mental health professionals ability to accurately predict dangerousness are the *Baxstrom* studies conducted by Henry Steadman and his colleagues.⁷⁵ Steadman and others studied what happened to almost 1000 patients held in psychiatric hospitals for the criminally insane in New York state when, after the Supreme Court ordered New York either to commit them under the state's general commitment law or to release them,⁷⁶ the state decided to release them. Though considered dangerous, all but a small number lived safely in the community after their release.

Professor Brooks criticizes the *Baxstrom* studies because the average age of these patients was forty-seven and their decreased violence after release *may* have resulted from advanced age. Yet, the Washington statute does not limit commitment by age. Douglas Aikens, the first individual against whom a commitment petition was filed, was sixty-nine years old at the time.⁷⁷ Andre Brigham Young, the third person committed under the law, was fifty at the time of his commitment. If Professor Brooks is correct, then a good case can be made that, so far, prosecuting authorities are abusing the law by seeking the commitment of older offenders who are less likely to be violent. At the very least, there is simply no way of knowing the average age of the cohort whose commitment will be sought under the law.

Professor Brooks also is skeptical of the *Baxstrom* studies because continued institutionalization itself may explain why

75. See, e.g., Robert C. Hunt & E. David Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCHIATRY 974 (1968); Henry J. Steadman & Gary Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-70*, 129 AM. J. PSYCHIATRY 309 (1972).

76. See *supra* notes 47-51 and accompanying text [Discussion of the equal protection analysis in *Baxstrom*].

77. State v. Douglas Aikens, No. 90-2-02436-2 (Clark County filed Aug. 16, 1990). See also Debera Carlton Harrell, *First Sex Predator Petition Is Filed*, SEATTLE POST-INTELLIGENCER, Aug. 18, 1990, at B-1. He was also a first time offender.

so many *Baxstrom* patients did not commit acts of violence.⁷⁸ This may be true. But the same can be said for most of the individuals who are likely to be committed under the Washington law. Most of them will have served time in prison. If prosecutors ignore the law and limit commitment to individuals who have a "pattern" of criminal activity, their time spent in prison should be even longer. In any event, the Washington law selects out as prospective targets those who, like many of the *Baxstrom* subjects, will have spent significant time in institutions just before their confinement is sought under the law. If prolonged institutionalization impaired accurate predictions of dangerousness for *Baxstrom* patients as Professor Brooks asserts, it will also impair accurate predictions of dangerousness under the Washington law.

Professor Brooks criticizes a study by Kozol and his colleagues on the prediction of dangerousness because it excluded samples; that is, it did not take into account fifty-seven individuals whom mental health professionals had predicted to be dangerous and whom judges, agreeing with such predictions, committed as dangerous.⁷⁹ Would those individuals have committed dangerous acts if released? We simply don't know nor can we ever know. Nonetheless, Professor Brooks is willing to "speculate as to how those men would have behaved if discharged."⁸⁰ He *assumes* that, if thirty-seven of these fifty-seven individuals—sixty-five percent of the excluded sample—would have committed dangerous acts if released, then predictions of accuracy would have reached almost fifty percent; i.e., one out of two. By simply assuming a hypothetical accuracy rate of sixty-five percent in the excluded sample (which is a figure with absolutely no empirical basis whatsoever and which also assumes an extremely favorable answer to the very question at issue), Professor Brooks has managed by a deft sleight-of-hand to rehabilitate the predictive expertise of mental health professionals to the same level that could be achieved by flipping a coin!⁸¹ That is, it is no better than chance.

Professor Brooks also criticizes studies on the prediction of

78. Professor Brooks notes: "Finally, the mean length of continuous institutionalization for members of the *Baxstrom* cohort was almost fifteen years, another significant factor leading to reduced subsequent violent behavior." Brooks, *supra* note 3, at 741-42.

79. *Id.* at 743-44.

80. *Id.*

81. Ennis & Litwack, *supra* note 43, at 693.

dangerousness because they use inadequate outcome measures and underreport criminal behavior. There is undoubtedly some truth to these criticisms. But, at best, these criticisms only suggest that mental health professionals' predictions of long-term dangerousness may not be as woefully inaccurate as previously thought. Professor Boerner, the author of the Washington law, disagrees with Professor Brooks. He claims that:

All available evidence indicates that our ability to predict the occurrence of future criminal behavior is appallingly poor. When attempts are made to predict future violent crime, the subject of most concern, the results are even worse. The predictive techniques are accurate in no more than one-third of the cases and many studies have been wrong eighty to ninety percent of the time.⁸²

Though Kozol's studies and the other studies Professor Brooks criticizes did have inherent design limitations that may have prevented the researchers from obtaining results with the highest degree of accuracy and generalizability, it is important to remember that these studies, nonetheless, do provide extremely useful and accurate information. Though not without limitations, the research demonstrated consistently that mental health professionals were extremely inaccurate in predicting dangerous behavior.

The current state of the art can be summarized simply. No well-designed studies affirmatively establish that mental health professionals make accurate predictions of dangerousness in more than two out of five cases.⁸³ Even this forty percent success rate is, of course, still less accurate than flipping a coin.

Professor Brooks also asserts that, according to some researchers, a number of sex offenders commit a large number of crimes. Others claim that there are far more sex crimes committed than reported. All of this may or may not be true.⁸⁴ We simply cannot know. But, as we shall see shortly, these

82. BOERNER, *supra* note 64, at 2-17.

83. Robert J. Menzies et al., *Hitting the Forensic Sound Barrier: Predictions of Dangerousness in a Pretrial Psychiatric Clinic*, in DANGEROUSNESS: PROBABILITY AND PREDICTION: PSYCHIATRY AND PUBLIC POLICY (Christopher Webster et al. eds., 1985).

84. It should be noted that "completed paraphiliac acts" can consist of relatively minor incidents, such as placing a hand on a minor's shoulder for sexual gratification. The unsophisticated reader might otherwise assume that all such acts consist of violent or even sexually explicit behavior.

assertions, even if true, would not furnish any empirical support for the law.

To establish his claim that some sex offenders are responsible for a large number of crimes, Professor Brooks cites a "study" reported in the *Reader's Digest*, a popular magazine. In this study, one psychologist interviewed eight offenders to ascertain their criminal history. Of course, no serious social scientist would conclude anything of substance from a non-random sample of eight individuals. Even more bizarre, these eight individuals allegedly self-reported committing "13,000 deviant acts"⁸⁵ which, though undefined in the article, include "molestation and rape."⁸⁶ If believed, these figures indicate that each of them committed a "deviant act" almost five times a day for a year or one such act almost every day for five years. One is tempted to conclude that either a vast majority of these "deviant acts" must have been extremely minor or the subjects must have had active imaginations. More to the point, the use of such a poorly designed and unreliable "study" that is so vague in recounting its "findings" can only inflame public passion; it cannot inform public policy.

But, even if it is true that sex crimes (like most other crimes) are underreported and that some sex offenders commit many sex crimes, these broad-brush claims do not establish that mental health professionals can accurately identify which, if any, offender will commit serious sex crimes. Nor do they establish that these sex offenders suffered from a mental illness that caused their behavior. In short, these assertions throw more heat than light on the subject. To less sophisticated readers, these assertions, many of them woefully speculative and unsubstantiated, will simply stir up anger and a desire for revenge, while provoking lawmakers to take draconian action. They do not establish that the Washington law rests on sound social science or medical knowledge.

There may be, as Professor Brooks asserts,⁸⁷ a small number of notorious criminals who commit serious serial sex crimes. Individuals such as Jeffrey Dahmer and Ted Bundy come to mind. But in almost every such case, it was only after their arrest that we knew who these offenders were. In most of these cases the defendants were sentenced to death or life

85. Brooks, *supra* note 3, at 745.

86. *Id.*

87. *Id.* at 746-47.

imprisonment. If anything, these cases also demonstrate that we really cannot identify such dangerous offenders prospectively. Thus, the Washington law will be of no practical use. Citing exceptional cases, while stirring public fear, does not establish that experts can identify in advance who these "very rare" violent offenders are.⁸⁸

Professor Brooks also criticizes researchers and commentators for not keeping their cohorts straight. That is, they use studies on one group of subjects to generate information that they then claim is relevant to a much different group. For example, studies on schizophrenics may not be useful for generating useful knowledge about individuals who suffer from affective or mood disorders. (It should be remembered that the Kozol study discussed earlier, which demonstrated that mental health experts could not accurately predict recidivism among a group of violent sex offenders, did examine the same general cohort as that targeted by the Washington law.) This is a salutary caution. But Professor Brooks then commits the same error many times over. For example, he reports one study by Abel that indicates a high rate of reoffense for unspecified "completed paraphiliac acts" of pedophilia—again, undefined.⁸⁹ But so far, every individual committed under the Washington law has been convicted of rape, not pedophilia. Thus, studies on pedophiliacs can not be generalized to rapists.

Professor Brooks makes a series of empirical assertions—unencumbered by any citation to authority of any kind—that boggle the mind. He says, for example: "Unlike many other mentally disordered persons, violent sex offenders are compulsive in their need to commit offenses that provide them with gratification. Many pedophiles, for example, are notoriously unable to change. Statistics indicate they act out obsessively, and often in situations that put them at great risk."⁹⁰ Professor Brooks seems to assert that all violent sex offenders are mentally disordered. Surely, he cannot mean this. Are they entitled to the defense of insanity or diminished capacity? Upon what studies is he relying? Is modern law reform (including the virtual abolition of sexual psychopath laws) that rests on the assumption that sex offenders are not mentally ill but rather are moral agents who are responsible for their

88. *Id.* at 747.

89. *Id.* at 745.

90. *Id.* at 748.

actions wrong?⁹¹ Are pedophiles unable or *unwilling* to change their behavior? How can “statistics” establish that pedophiles act out “obsessively” and “at great risk”? These claims need support; yet, none is provided.

Even more disturbing is Professor Brooks’s failure to point to *any study* that examines individuals who “suffer from a personality disorder or mental abnormality” that makes them likely to commit sex crimes against “strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.”⁹² Thus, in mentioning with enthusiasm a number of studies that he claims supports his view, Professor Brooks has committed the same cardinal sin of misapplying findings from cohorts that are very different from the cohort identified by the Washington law. None of these studies generate useful or confirmatory knowledge as far as this law is concerned.

Finally, Professor Brooks argues that “actuarial data” can be used to predict dangerousness more accurately. Unfortunately, the only correlation he uses to conduct what purports to be an actuarial approach is the number of past offenses. In brief, he asserts that the more offenses an individual has committed, the more likely he is to commit a violent act in the future. Besides mismatching cohorts once again — using generalizations based on all offenders to support claims about sex offenders—Professor Brooks conveniently ignores the fact that the Washington law only requires a *single* offense committed at any time in an offender’s past. Thus, the statute relies on an actuarial table that consists of only one offense. Studies about multiple offenders, as Professor Brooks has already demonstrated so forcefully, have no relevance to this law.

In conclusion, Professor Brooks has taken a quick march through a few selected studies on the prediction of dangerousness and taken numerous but mostly harmless potshots at them. In his march, he concludes that those studies that undermine both the constitutionality and morality of the law have fundamentally flawed research designs. On the other hand, he concludes that those studies that lend some empirical credence to the Washington law, including a study published in *Reader’s Digest*, have no methodological flaws and provide

91. See La Fond, *supra* note 11, at 663.

92. This is the essential scope of the Washington law. WASH. REV. CODE § 71.09.020 (Supp. 1990-91).

sound empirical foundations. On other occasions, Professor Brooks makes sweeping empirical generalizations about sex offenders without benefit of any supporting studies. And, of course, Professor Brooks has cited *no study* establishing that mental health professionals can predict dangerousness with sufficient accuracy to avoid confining large numbers of nondangerous individuals to a psychiatric prison for possible lifetime confinement.

Professor Brooks has also relied on a number of studies that have extremely limited usefulness. Many of them are so poorly designed so as to have extremely dubious validity and reliability. Others studied cohorts that are essentially irrelevant to the group targeted by the Washington law; thus, they cannot provide useful knowledge. Relying on these studies virtually guarantees that public policy will not rest on a sound empirical basis but rather on inflamed public passion.

In the end, Professor Brooks comes to the ultimate value judgement that it is better to lock up a group of individuals, even though they have paid their debt to society and are entitled under the law to their freedom, if we are confident that up to half of them will commit another sex crime at sometime in the future. As between convicted sex offenders and possible future victims, we should impose the "risk of error" on the "guilty," not on "innocent" future victims. Though he acknowledges that at least one out of every two persons (and probably more) consigned to the gulag of a psychiatric prison will not reoffend, these "mistakes are regrettable."

In *Foucha*, Justice White has condemned the use of "dangerousness" courts exactly like those Professor Brooks embraces with such enthusiasm.⁹³ If the Washington statute is upheld, it will send the disturbing message to political action groups that, if they capture the political process and insist on heretofore unimagined techniques of crime control, the Constitution imposes no restraints on the power of the majority. After all, constitutional limits on crime control are only questions of "interest balancing." Suddenly, the fundamental assumption of American criminal justice that it "is far worse to convict an innocent man than to let a guilty man go free"⁹⁴ has been transformed into a first principle worthy of George Orwell's *1984*. Now, according to Professor Brooks, it is far

93. See Brooks, *supra* note 3, at 723-24.

94. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring.).

better that at least half, and maybe more, of the people confined to a psychiatric prison indefinitely be harmless in order to "incapacitate" those who may commit a future crime. Even better, why not convert our criminal sentencing system into a game of chance? Release from prison could be decided by a flip of a coin. At least this lottery will be more accurate than the one Professor Brooks embraces.