CAN THERAPEUTIC JURISPRUDENCE BE NORMATIVELY NEUTRAL? SEXUAL PREDATOR LAWS: THEIR IMPACT ON PARTICIPANTS AND POLICY

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I. INTRODUCTION

Therapeutic Jurisprudence ("TJ") asserts that the law—or, more precisely, its rules, its procedures, and how the legal protagonists play their respective roles—can have positive or negative impact on the psychological well-being of the individuals or groups who become involved in the legal system.[1] One logical corollary of TJ is that social scientists should engage in empirical research to measure these impacts. For example, those who look at law through the TJ lens would urge legislators and policy-makers to evaluate the empirical consequences of laws they have enacted to ascertain whether individuals affected by those laws have been helped or harmed.[2] Another corollary of TJ is that policy-makers should pay attention to the wisdom provided by the social sciences in formulating laws and implementing procedures.[3] Finally, participants in the legal system must be aware

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1. *See, e.g.*, ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (1997). For examples of therapeutic scholarship, see Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184 (1997).

2. *See, e.g.*, Mary L. Durham & John Q. La Fond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395 (1985).

3. *See* David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE, *supra*

that how they perform their assigned function can have therapeutic or anti-therapeutic effects on themselves or on others.[4]

Because it insists on measuring the real-life impact of law through empirical research and on using empirical research to design and implement law (thus defined), TJ relies heavily on the social sciences. Furthermore, because it generates empirical hypotheses, it also provides an experimental research agenda for social scientists.[5]

Some TJ scholars make no normative claim for TJ. In their view, it is simply one way of looking at law and public policy. Professor David Wexler, for example, writes:

> Therapeutic jurisprudence in no way supports paternalism, coercion, or a therapeutic state. It in no way suggests that therapeutic considerations should trump other considerations such as autonomy, integrity of the fact-finding process, community safety, and many more. Nor does it purport to resolve the value questions, although it sets the stage for their sharp articulation.[6]

Other TJ scholars seem to be moving away from this normatively neutral position; instead, they argue that TJ is and should be normative.[7] In their view an *express* assumption of TJ is that law, as broadly defined above, *ought* to be shaped so as to maximize its positive impact while minimizing its negative impact as much as possible. Professor Bruce J. Winick puts it this way: TJ "is thus a field of social inquiry designed to produce law reform that will enhance the law's potential as a healing and health-promoting force."[8] However, even Winick concedes that TJ's goal of maximizing the law's positive therapeutic impact may be trumped by other consequences or values that society may deem more important. As he put it:

> Similarly, although, in general, positive therapeutic consequences should be valued and antitherapeutic consequences should be avoided, there are other consequences that should count, and sometimes count more. There are many instances in which a particular law or a particular legal practice may produce

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note 1, at 199.

4. *See, e.g.*, Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433 (1998).

5. *See* Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 195 (1995).

6. David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 762 (1993). In a critique of the TJ movement, Professor Slobogin argues that TJ is not and *cannot* be completely normatively neutral. Slobogin, *supra* note 5, at 204.

7. *See infra* note 8.

8. Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 508 (1998). *See also* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 162 (1995).

> antitherapeutic effects, but nonetheless may be justified by considerations of justice or by the desire to achieve various constitutional, economic, environmental, or other normative goals.[9]

Thus, even Winick, a strong advocate of the position that law should enhance psychological well-being of those on whom it acts, is prepared to accept antitherapeutic consequences when other social values are deemed more important.[10] This position poses a provocative dilemma for TJ: can the antitherapeutic impact of law in a particular case be so severe that TJ must insist the law should be changed even though policy-makers have determined that other values and consequences are paramount?

This Article will argue that this dilemma has now arisen and must be answered. It will apply a TJ analysis to sexual predator statutes. These laws allow the government to civilly commit sex offenders who have served their full prison term, yet are still considered dangerous, to secure mental health facilities until they are considered safe to be released.[11] This type of law has recently been upheld by the United States Supreme Court in a five to four opinion in *Kansas v. Hendricks*.[12] A number of states have enacted similar laws,[13] and other states appear likely to do so.

In upholding the Kansas predator law, the majority in *Hendricks* explicitly concluded that the sexual predator law was civil and not punitive.[14] The Court rejected Hendricks' argument that the law was criminal in nature because it punished him for his past crimes and, therefore, violated the Constitution's Double

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9. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 191 (1997).

10. *See id.* at 198. (stating that he either would let the legislature or let the court system resolve these value conflicts).

11. For a thorough discussion of the genesis of these laws, see Symposium, *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 507 (1992).

12. 117 S. Ct. 2072 (1997). For recent commentary on this case, see John Kip Cornwell, *Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After* Hendricks, 4 PSYCHOL. PUB. POL'Y & L. 377 (1998); Eric S. Janus, Hendricks *and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL. PUB. POL'Y & L. 297 (1998); Stephen R. McAllister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 4 PSYCHOL. PUB. POL'Y & L. 268 (1998); Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250 (1998); Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL. PUB. POL'Y & L. 323 (1998).

13. *See* ARIZ. REV. STAT. ANN. §§ 13-4601 to 13-4609 (West Supp. 1996); CAL. WELF. & INST. CODE, §§ 6600–6609.3 (West 1998 & Supp. 1999); IOWA CODE ANN. § 709c.1–.12 (West Supp. 1998) (repealed 1996); KAN. STAT. ANN. § 59-29a01–a10 (1994 & Supp. 1998); MINN. STAT. ANN. §§ 253B.02(7a), (18a), (18b), 253B.185 (West 1998); N.J. STAT. ANN. §§ 30:4–82.4 (West 1997); WIS. STAT. ANN. §§ 980.01–.13 (West 1998).

14. *Hendricks*, 117 S. Ct. at 2085. The four-person minority reached the opposite conclusion, deciding that the law was punitive in purpose and effect and, therefore, violated both *ex post facto* and double jeopardy provisions of the Constitution. *See id.* at 2087 (Breyer, J., dissenting).

Jeopardy and Ex Post Facto clauses.[15] Thus, states may not characterize the confinement scheme or any resulting infliction of suffering on individuals committed under the law as appropriate punishment for past crimes they committed.

This Article will demonstrate that sexual predator laws are having a punitive and antitherapeutic effect on individuals committed under them. These statutes are having an antitherapeutic impact on other participants in the legal system as well, including treatment staff and public officials. Finally, predator laws are adversely affecting public policy discourse.

TJ analysis will demonstrate that, in this case at least, a particular law is so destructive of the human psyche, individual and communal, that TJ *must* take a normative stance and assert that the law should be repealed or substantially changed. This Article will thereby have demonstrated that TJ cannot always remain normatively neutral. Thus, TJ scholars must begin the second-generation task of developing cohesive principles derived from TJ's own jurisprudence for determining when law is so antitherapeutic that TJ must assert its primacy and require change regardless of competing values.

II. THE NEW PENOLOGY AND SEXUAL PREDATOR LAWS

In an article entitled *Managing the Monstrous: Sex Offenders and the New Penology,*[16] Jonathan Simon argues forcefully that a new penology that abandons the rehabilitative optimism of an earlier era has emerged in the United States. This new penology is pessimistic about the prospects of changing offenders for the better; thus, rehabilitation has been displaced by increasing emphasis on managing the risk posed by dangerous, immutable individuals.[17] This increased emphasis on risk management rather than treatment has generated heightened demand for incapacitation.[18]

Simon argues that "populist punitiveness" has become a driving force in public policy debates centering on criminal justice goals.[19] In his view sexual predator laws are a prime example of this new penology. Sexual predators are not diseased individuals who can be cured.[20] Instead, they are "monsters" who must be confined to prevent them from committing new and horrible crimes.[21] To illustrate this profound shift from curative optimism to pessimistic nihilism, Simon observes that "predator," the key term used in these laws, has "no foundation in either

15. *See id.* at 2085–86 (1997).

16. Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452 (1998).

17. *See id.* at 453–54.

18. *See id.* at 455.

19. *Id.*

20. *See id.* at 455–56.

21. *See id.* at 456. (stating bluntly that, "[s]ex offenders are our modern day monsters....").

human science or criminal jurisprudence...."[22] Instead, it "indicates the implicit reference to popular emotions including fear and the desire for vengeance."[23]

As this Article will demonstrate, sexual predator laws have the appearance of a civil commitment law providing care and treatment for the mentally disabled. In reality, they are indeterminate preventive detention schemes, which deliberately inflict suffering on individuals committed under them.[24] The manner in which some states have implemented these laws confirm Professor Simon's conclusion: "It is not that transformation [of the criminal through treatment] has disappeared as a goal, but increasingly it amounts to little more than gestures...."[25]

III. SEXUAL PREDATOR LAWS: A BRIEF DESCRIPTION

Sexual predator laws are a relatively recent phenomenon. Washington State enacted the first predator law, which became effective in 1990.[26] These laws are designed to keep in confinement sex offenders considered at high risk of committing a sex crime who have served their criminal sentence and otherwise would have to be released from prison.[27] Predator laws contemplate that these sex offenders will be confined in secure facilities until there is strong evidence that they no longer pose a risk to the public.

When a convicted sex offender[28] who is still considered dangerous is about to be released from prison, the government may file a petition alleging that he is a sexually violent predator ("SVP"). The government must then prove that the individual suffers from a "mental abnormality"[29] or "personality disorder"[30] that

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22. *Id.* at 458.

23. *Id.* at 458. *See also* J. Christopher Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. PUGET SOUND L. REV. 781 (1992).

24. *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, 658–59 (1992).

25. Simon, *supra* note 16, at 453.

26. *See* WASH. REV. CODE ANN. § 71.09.010–.902 (West 1992 & Supp. 1999). For a critique of this law, see La Fond, *supra* note 24.

27. *See* John Q. La Fond, Social Control of Sex Offenders in the USA: Criminal Punishment and Involuntary Hospitalization, (July 7, 1998) (paper presented at the XXIIIrd International Congress on Law and Mental Health, Paris, France) (on file with author).

28. Most predator laws define a sexual predator as someone who has committed a serious sex crime against a stranger or someone with whom he or she has established a relationship for purposes of victimization. *See, e.g.*, WASH. REV. CODE ANN. § 71.09.020(4) (West Supp. 1999). Thus, these statutes do not cover most sex offenders who commit a sex crime against a family member or someone whom they know.

29. This term is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others" in both the Washington and Kansas sexual predator laws. WASH. REV. CODE ANN. § 71.09.020(2) (West Supp. 1999). Kansas virtually copied the Washington predator law. *See* KAN. STAT. ANN. § 59-29A02(b) (1994).

30. The term "personality disorder" is not defined in most predator laws, though

makes him "likely"[31] to commit another sex crime. If a judge or jury determines that the individual is a sexual predator, then he is committed to a high security facility for "control, care, and treatment"[32] until he is safe to be released back into the community. Commitment is indefinite.[33]

Though release provisions vary from state to state, most predator laws make release difficult. Periodic review is generally provided and SVPs may petition a court for release. It is fair to conclude that discharge is much more likely if the treatment staff determines that an individual should be released than if staff does not support release. Even if the staff does support release, some predator laws allow the prosecutor to oppose the individual's release.[34]

To date several hundred men and at least two women have been committed under these laws in the United States.[35] Even more have been committed as inpatients pending trial.[36] Few, if any, of those committed as SVPs have been unconditionally discharged as safe to be at large.[37] Some have been released to community placements[38] (most after being confined for several years), usually with very stringent supervision, including electronic monitoring.[39]

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it is a recognized diagnosis in AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV 629–34 (1994) [hereinafter DSM-IV]. The most common diagnosis used in predator cases is "antisocial personality disorder," a diagnosis based primarily on past criminal and anti-social conduct. *Id.* at 645.

31. WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1999).

32. WASH. REV. CODE ANN. § 71.09.060(1) (West Supp. 1999).

33. *See* WASH. REV. CODE ANN. § 71.09.060 (West Supp. 1999).

34. *See, e.g.*, WASH. REV. CODE § 71.09.090 (West Supp. 1999). For a more thorough discussion of the statutory release provisions, see *infra* notes 145–55 and accompanying text.

35. *See* NATIONAL ASS'N OF STATE MENTAL HEALTH PROGRAM DIRECTORS, SEXUAL PREDATOR LEGISLATION TOOL KIT 4 (1997).

36. In a recent survey dated October 1, 1998, W. Lawrence Fitch, Forensic Director at the Maryland Mental Hygiene Administration, estimated that, nationwide, 423 individuals have been committed as SVPs to custodial facilities, 14 have been committed as SVPs to outpatient status, and 289 individuals have been committed as inpatients for evaluation or pending trial. Three of those committed are under 18 years of age. Thus, it appears that over 700 individuals are now in custodial facilities under SVP laws. W. Lawrence Fitch, Sex Offender Commitment in the United States tbl. 2 (Oct. 1, 1998) (on file with author.) This number will surely increase.

37. As of February 24, 1999, 84 offenders were committed to the Special Commitment Center at McNeil Island in Washington State under the Washington sexually violent predator law. Approximately 35–40 were there as a result of a probable cause hearing. The remainder were committed after a trial at which they were determined to be SVPs. Telephone interview with Cindy Nabbefeld, legal assistant at the SCC (Feb. 24, 1999). To date, no one has been released outright in Washington state. Telephone interview with Chris Jackson, Office of the Public Defender, Seattle, Wash. (Feb. 23, 1999) [hereinafter Jackson Interview].

38. According to Fitch, *supra* note 36, at tbl. 2, 14 individuals have been committed to outpatient status. Washington only permits outpatient commitment *after* an individual has been been committed as inpatient to a secure facility. *See* WASH. REV. CODE ANN. § 71.09.090 (West Supp. 1999). This subsection defines a sexually violent predator as

IV. TJ AND THE IMPLEMENTATION OF SEXUAL PREDATOR LAWS

This Article will analyze how Washington State is implementing its SVP law. It will demonstrate that the legislature did not intend that this law would have a beneficial effect on sex offenders. To the contrary, the Washington legislature *intended* this law to be punitive.

This is not surprising. These laws were usually enacted after the commission of a horrible sex crime by a convicted sex offender.[40] The primary goal of legislators was to prevent convicted sex offenders from committing more sex crimes,[41] and policy-makers believed that incapacitation was essential to achieve that goal.[42] They did not believe that these offenders were mentally ill or that they could be treated effectively so that they could be released back into the community.[43] Legislators considered them the "worst of the worst" and did not believe rehabilitation was likely to succeed.[44] Consequently, long-term incarceration without any serious effort at, or expectation of, rehabilitation is the primary goal of this law.[45]

Another, more sinister goal prompted the enactment of predator laws. Many proponents of these laws, especially victims' rights groups, wanted vengeance for the horrible crimes committed by some sex offenders.[46]

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an individual who is "likely to engage in predator acts of sexual violence *if not confined in a secure facility.*" *Id.* (emphasis added). In states with similar laws, then, outpatient commitment is not available at the initial trial. An offender may be placed in a less restrictive placement only as part of a transitional release program from a secure facility.

39. *See Sex Offender's Restrictions Eased*, SEATTLE POST-INTELLIGENCER, Feb. 21, 1998, at B1.

40. *See* David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525 (1992); *Man Charged in 7-Year-Old Neighbor's Killing*, N.Y. TIMES, Aug. 1, 1994, at B2; Vlae Kershner & Carolyn Lochhead, *Politicians React with Calls for Stiffer Sentences*, S.F. CHRON., Dec. 7, 1993, at A4.

41. The Washington state task force that proposed the first SVP law to be enacted stated in its report: "The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are likely to commit very serious crimes." GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, DEP'T OF SOCIAL AND HEATLH SERVS., OFFICE OF THE SECRETARY, TASK FORCE ON COMMUNITY PROTECTION: FINAL REPORT TO BOOTH GARDNER GOVERNOR STATE OF WASHINGTON II-20 (NOV. 28, 1989) [hereinafter TASK FORCE REPORT]. *See also infra* notes 174–76.

42. *See* TASK FORCE REPORT, *supra* note 41, at II-21 to II-22.

43. *See* WASH. REV. CODE ANN. § 71.09.010 (West 1992). The Washington SVP law contained "legislative findings" concluding that "sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities" and "that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term...." *Id.*

44. *Id.*

45. *See infra* notes 174–76.

46. *See* Stuart A. Scheingold et al., *Sexual Violence, Victim Advocacy, at Republican Criminology: Washington State's Community Protection Act*, 28 L. & SOC'Y REV. 729, 749 (1994).

Incarcerating "predators" in harsh, secure, punitive warehouses with no realistic hope of release provided a symbolic outlet for the pent up rage society had toward criminals in general and sex offenders in particular.[47] This Article will demonstrate just how successful a sexual predator law can be in furthering these punitive and vengeful goals and how this law has been so powerfully antitherapeutic.

V. THE WASHINGTON SEXUAL PREDATOR LAW

Washington State passed the first sexual predator law in 1990.[48] In 1994 Kansas also enacted a sexual predator law, copying the Washington law almost verbatim.[49] In 1996, the United States Supreme Court upheld the Kansas statute against Constitutional attack in the *Hendricks* case.[50] Because the Kansas and Washington laws are almost identical, this Article will focus on their version of the predator law and on the Washington State experience in enacting and implementing it.

A. Legislative Intent

The Washington State legislature intended that this novel law would keep dangerous sex offenders in a prison-like facility until they were safe to be released.[51] It was responding to the public demand for lifetime incarceration for some sex offenders. The *Seattle Post-Intelligencer*, a newspaper in Seattle, Washington, captured the public mood when it wrote in an editorial entitled *Put Mutilators Away*:

> This case makes clear that a class of criminals exists that is *beyond the reach of rehabilitation* because of mental deficiencies. Such people *cannot be put to death* by a just society.
>
> But Justice demands that society be protected from such people.
>
> The legal system needs to be changed to make it possible to *remove* the criminally insane from society, *quickly* and *permanently*.[52]

In its findings, which were enacted as part of the law, the Washington legislature concurred with this strong public sentiment. It found that "the *prognosis* for curing sexually violent offenders is *poor*, the *treatment needs* of this population

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47. *See* Simon, *supra* note 16, at 455–56.

48. *See* WASH. REV. CODE ANN. §§ 71.09.010–.902 (West 1992 & Supp. 1999).

49. *See* KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1998).

50. *See* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

51. *See* La Fond, *supra* note 24.

52. Boerner, *supra* note 40, at 529 (emphasis added). Boerner discusses a particularly horrible sex crime in Washington State that sparked widespread agitation for law reform relating to sex offenders and sex offenses. In Tacoma, Washington, Earl Shriner sexually assaulted and mutilated a young boy, leaving him to die. The boy survived. When the crime was reported, the police immediately suspected Shriner as the perpetrator. *Id. See* Editorial, *Put Mutilators Away*, SEATTLE POST-INTELLIGENCER, May 24, 1989, at A9.

are *very long-term....*"[53] Thus, the law itself promised the electorate that sex offenders committed under it would be confined for a very long time.

The Washington statute was drafted with the intent to make it relatively easy to indefinitely commit sex offenders and to make it extremely difficult for them to be released. The statutory definitions, evidentiary rules, and release provisions make it easy to commit sex offenders as SVPs and difficult for them to obtain their release. It is no surprise that more than eight years after its enactment, not a single sexual predator has been released outright from confinement or intensive community control in Washington state.[54]

B. Litigating Sexual Predator Cases

In a number of important ways, the statute makes it fairly easy for prosecutors to commit an individual. The statutory definition of a "sexually violent predator,"[55] discussed earlier, is extremely problematic.[56] The term "mental abnormality" does not have a meaning recognized by authoritative medical texts or professional groups such as the American Psychological Association.[57] Consequently, each mental health professional must construct his or her own meaning for this unrecognized diagnosis and apply it as he or she sees fit. Consistent application of a generally accepted diagnosis over many cases is impossible.

The other definition, "personality disorder," is a medically recognized term with an accepted definition.[58] However, the diagnosis used most commonly in predator trials to satisfy this statutory term is "antisocial personality disorder,"[59] which is based primarily on a history of criminal and antisocial behavior. Many individuals with a criminal history qualify for this diagnosis. The American Psychiatric Association estimates that one-third to one-half of convicted criminals

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53. WASH. REV. CODE ANN. § 71.09.010 (West 1992) (emphasis added).

54. As of February 23, 1999 only two individuals had been conditionally released. Jackson Interview, *supra* note 37. Stringent conditions, including 24-hour electronic monitoring and random searches, designed to assure community security have been imposed on a sexual predator placed in a less restrictive community placement. *See Sex Offender's Restrictions Eased, supra* note 39, at B1. *But see infra* note 152.

55. WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1999) defines a 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...."

56. *See* Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 367–78 (1997); Robert F. Schopp & Barbara L. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437 (1995); AMERICAN PSYCHIATRIC ASS'N, DRAFT TASK FORCE REPORT ON SEXUALLY DANGEROUS OFFENDERS (Dec. 15, 1996) [hereinafter AMERICAN PSYCHIATRIC ASS'N, DRAFT REPORT].

57. *See* Brief Amicus Curaie in Support of Petitioners, Washington State Psychiatric Association at 3–4, *In re* Young, 857 P.2d 989 (Wash. 1993) (No. 57837-1).

58. *See* DSM-IV, *supra* note 30, at 629–34.

59. *Id.* at 645.

in the United States could qualify for this diagnosis.[60] State-employed experts can use an individual's past criminal offenses to diagnose that person as suffering from a "personality disorder" and to predict that he is dangerous. This tautological definition of illness and dangerousness makes it very easy for prosecutors to obtain commitment.[61] To make matters worse, the Washington law does not even require an extensive criminal history before a person can be committed. The commission of a single qualifying crime renders an individual subject to commitment under the law.[62]

In a 1992 Report compiled at the request of the Washington State Institute for Public Policy, Dr. Vernon Quinsey, an international expert in sex offender research, observed:

> The language of the commitment legislation does not induce therapeutic optimism. On the one hand, the preamble to the Special Commitment Statute asserts that persons who meet the sexual violent predator criteria require longterm treatment but are unlikely to be 'cured', and, on the other, predicates release on a jury or court finding that the committed person's mental abnormality or personality disorder has changed such that the person is safe to be at large and, if released, will not engage in acts of sexual violence. It is, unfortunately, entirely unclear how a personality disorder can be changed through treatment because most of the defining features of personality disorder diagnoses (such as in DSM IIIR) are historical in nature.[63]

Past behavior is used to establish both the diagnosis and the prediction of dangerousness, which justifies commitment.[64] It also provides definitional assurance that treatment will be ineffective because the condition that justifies commitment is based on historical facts that cannot be changed. This "Catch-22" is ingenious; it has also proven effective.

In addition, the law does not require the state to prove that the defendant has recently engaged in behavior indicating he is dangerous.[65] This is in sharp

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60. *See* AMERICAN PSYCHIATRIC ASS'N, DRAFT REPORT, *supra* note 56, at 107.

61. Prosecutors in Washington State have won all but two sexual predator commitment cases. Defense counsel have succeeded in obtaining only one outright acquittal. *See infra* note 235. However, they have succeeded in obtaining a less restrictive placement for two clients over objections by the prosecution. *See* Jackson Interview, *supra* note 37. *But see infra* note 152. Two courts that struck down this type of predator law as unconstitutional specifically noted this deficiency in the statutory definition. *See* Hendricks v. Kansas, 912 P.2d 129 (Kan. 1996); Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

62. *See* WASH. REV. CODE § 71.09.020(1) (West Supp. 1999).

63. Vernon Quinsey, Washington State Institute for Public Policy, Review of Sexual Predator Program, Community Protection Research Project 4 (Feb. 1992) (on file with author) [hereinafter Quinsey, Report].

64. For analyses of this definitional tautology, see La Fond, *supra* note 24; Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113.

65. Neither the Washington or the Kansas SVP law require such proof either in

contrast to what the state must prove in order to commit an individual under its general civil commitment statute.[66] In most predator cases, the state simply uses evidence of past criminal behavior for which the individual has already been criminally punished to establish his present mental condition and dangerousness. [67]

Not content to simply establish that the defendant has been convicted of the requisite single offense required by the law,[68] prosecutors have refused to accept defense counsel's offer to stipulate to the prior conviction(s) and, instead, relitigate the prior sexual offense(s) for which the individual has been convicted.[69] The government may call past victims and have them testify again about the original crime(s).[70] Needless to say, testimony by the victim of a sex crime can easily anger a jury.

Then the prosecutor will present an expert (usually one who only testifies on behalf of the prosecution)[71] who has concluded that the defendant is a sexual predator who suffers from a "mental abnormality" or "personality disorder" and is "likely" to commit another serious sex crime if he is released.[72] After hearing emotional testimony from victims[73] and an "expert" who has predicted that the defendant is likely to commit another serious sex crime if he is released, in most cases juries will play it safe and commit the defendant.[74] (The subtext here is

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their definition of a sexually violent predator or as an evidentiary matter. *See* WASH. REV. CODE ANN. §§ 71.09.010–.902 (West 1992 & Supp. 1999); KAN. STAT. ANN. §§ 59-29a0–a19 (1994 & Supp. 1998). The Washington Supreme Court only required recent evidence of dangerous behavior when the state sought to commit an individual who was living in the community. *See In re* Young, 857 P.2d 989 (Wash. 1993).

66. The Washington Supreme Court has interpreted the state's general civil commitment law, WASH. REV. CODE ANN. §§ 71.05–05.940 (West 1992), to require the state to prove a "recent overt act." This evidentiary requirement provides behavioral evidence of dangerousness. *See In re* Harris, 654 P.2d 109 (Wash. 1982).

67. *See infra* note 69.

68. Both the Washington and Kansas statute require only that the individual must been convicted or charged with a single qualifying crime. *See* WASH. REV. CODE. § 71.09.020(1) (1994); KAN. STAT. ANN. § 59-29a02(a) (1994 & Supp. 1998).

69. In Washington, prosecutors generally present testimony from victims whenever possible, including cases in which a sex offender already committed to the SCC is seeking a less restrictive placement in the community. Jackson Interview, *supra* note 37.

70. In the original commitment trial of Andre Young the prosecutor presented several of the victims who had testified at Mr. Young's previous criminal trials. They described in graphic and poignant terms the same crimes for which Mr. Young had already been convicted and served a prison term. *In re Young*, 857 P.2d 989. Personal observation of the Author at Mr. Young's trial.

71. Most experts who testify for the government in Washington State do not testify on behalf of the defense. Jackson Interview, *supra* note 37.

72. *See* Robert C. Boruchowitz, *Sexual Predator Law—The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827 (1992).

73. TJ would be very interested to ascertain if the victims who testify at these commitment hearings are psychologically benefited or harmed by this experience. Several victims at Mr. Young's trial cried while testifying. Personal observation of Author at Mr. Young's trial.

74. *See supra* note 61.

obvious and persuasive: If you release this person and he commits another sex crime, *you*, ladies and gentlemen of the jury, are *responsible*.)

Not surprisingly, the state has won all but two of the cases it has taken to a full trial in Washington State.[75] If the government loses a case, it can simply retry it.[76] Because the Supreme Court has ruled that the predator law is "civil," and not "criminal," there is no double jeopardy protection against a retrial. This gives the government ample opportunity to strengthen its case and to use a different strategy on retrial.

C. Secure Confinement Paramount

Individuals committed under the Washington statute are placed in a secure wing of a maximum-security prison. This facility is called the Special Commitment Center ("SCC"). Even though it is nominally a "civil commitment law," the Washington predator statute expressly prohibits these individuals from being held in a "state mental hospital."[77] Employees of the state Department of Social and Health services ("DSHS") run the SCC. Nonetheless, in many ways the SCC is run just like a prison. And, in many ways, SCC residents are treated just like prisoners and, in some cases, even worse.

From August 1990 to April 1998, the SCC was located in a wing within Monroe Penitentiary, a maximum security prison in Monroe, Washington, run by the state Department of Corrections ("DOC").[78] At Monroe, electronic gates, high walls with razor wire on top, guard towers, and other heavy security measures were in place.[79] An Assistant Attorney General has advised that guards may use deadly

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75. *See supra* note 61. In California, as of September 28, 1998, the State had prevailed in 126 cases out of 150 in which it sought to commit sex offenders as predators. This is a success rate of 84%. As of that date, trials for 74 other offenders were pending. *Sex Offender Commitment Program, All Cases as of 9/28/98*, CALIF. DEP'T OF MENTAL HEALTH.

76. Prosecutors in Washington State take the position that a jury verdict that is not unanimous is a mistrial and that, consequently, the prosecutor may retry the case. There has only been one hung jury in Washington State in an original commitment trial when the jury could not decide whether to commit the individual or to release him. There have been three hung juries in cases under the old law, which allowed juries to order an offender to be placed in a less restrictive placement at the original commitment trial. The recently enacted Missouri Sexually Violent Predator law explicitly states: "Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted." H.B. Nos. 1405, 1109, 1335 (89th Gen. Assembly (Mo. 1998)) (effective Jan. 1, 1999), § 6.

77. WASH. REV. CODE ANN. § 71.09.060(3) (West Supp. 1999).

78. The Washington law expressly prohibits the state from housing sexual predators in a mental health hospital where other civilly committed patients are maintained. *See* WASH. REV. CODE ANN. § 71.09.060(3) (West Supp. 1999). Some states like California house predators in forensic facilities. These facilities are the most secure facilities in the state system.

79. Personal observation of the author who was one of the first two non-government lawyers to visit the SCC in Monroe. Numerous television and newspaper reports have also described the secure conditions at the SCC in Monroe. *See, e.g.*, Ellis E. Conklin, *A Prison for Predators*, SEATTLE POST-INTELLIGENCER, Mar. 21, 1991, at C1.

force to prevent any person civilly committed as a sexual predator from escaping.[80] In 1995 a state court found that, overall, SCC residents at Monroe do not have a "wider range of privileges" than DOC prison inmates.[81]

In April 1998, the SCC was relocated to its own building within McNeil Island Correctional Center, a medium security prison located on McNeil Island.[82] Its superintendent has described the SCC at McNeil as "a closed custody facility."[83] McNeil Island is near Steilacoom, Washington and is accessible only by ferry.[84] Escape from McNeil is even more problematic because of the extremely cold water and strong tidal currents of Puget Sound.[85] Even though escape from McNeil is very difficult, SCC residents have not been allowed off the unit.[86] Because the island is accessible only by ferry, visits by family and by attorneys are difficult to arrange.[87]

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80. Brief for Appellee at Exhibit B, Young v. Weston, No. 95-35958 (9th Cir. 1999) (Memorandum dated June 21, 1990 to Dave Weston (then Superintendent of the SCC) from Jeff Freimund, Assistant Attorney General). Assistant Attorney General Freimund wrote, *inter alia*: "Although it is a close question, the short answer is that, in my opinion, there is lawful authority for using deadly force to prevent the escape of sexual predators who have been found by a court to have committed a violent sexual offense and likely to reoffend."

81. *See In re* Detention of Richard Garret Turay, No. 91-2-10539-1 (Wash. Super. Ct. Mar. 30, 1995) (Findings of Fact and Conclusions of Law and Order on Respondent's Motion to Dismiss Based on Unconstitutional Conditions of Confinement at the Special Commitment Center).

82. *See* Thirteenth Report of the Special Master, Turay v. Seling, No. C91-664WD at 3, (W.D. Wash. May 18, 1998) [hereinafter Thirteenth Report].

83. *See* Brief for Appellant at 53, Young v. Weston, No. 98-35377 (9th Cir. 1999) (statement of Mark Seling, Superintendent of SCC).

84. *See infra* note 87.

85. *See, e.g., McNeil Island: Officials Find Escapee Clinging to Buoy*, MORNING NEWS TRIB., Mar. 30, 1993, at B2. *See also* Peter Callaghan, *Legislature 1998: Locke Gets Drunken-Driving Bills*, MORNING NEWS TRIB., Mar. 8, 1998, at B1. Callaghan describes House Bill 2905 as "a measure that would prohibit the state from letting its most violent sex offenders even leave McNeil Island prison—even for counseling sessions at nearby Western State Hospital." State representative Mike Carrell commented, "It's way too dangerous to even take a chance they will escape." The use of an island from which escape is virtually impossible to incarcerate prisoners may remind readers of *Papillon*, a novel by Henri Charrière, describing the harsh experience of the author as a prisoner on Devil's Island. *See* HENRI CHARRIÈRE, PAPILLON (1971).

86. *See* Brief for Appellant at 53, Young v. Weston, No. 98-35377 (9th Cir.) (statement of Mark Seling, Superintendent of SCC).

87. In her Thirteenth Report, the Special Master noted, "Visiting McNeil Island is definitely a more cumbersome process than visiting a mainland institution. Visitors to SCC are first processed (along with those going to see inmates) at a small bus terminal at Western State Hospital, then taken to the dock by bus and ferried to the island. Although the ferry ride is brief (about 20 minutes), visitors are allowed on only two of the scheduled ferries going and two returning." Thirteenth Report, *supra* note 82, at 11–12.

Prison guards from the DOC conduct frequent "walk-throughs,"[88] and the DOC provides medical care to the residents as well as food services.[89] Over the objection of the SCC Superintendent and at the insistence of the DOC, residents, unlike other civilly committed patients, are shackled and dressed in prison jumpsuits when taken to the infirmary.[90] Conjugal visits, though afforded prisoners in DOC facilities, are not afforded residents at SCC.[91] Discipline (such as lockdowns or loss of outdoor exercise privileges) for infractions is called "behavioral intervention."[92] The SCC superintendent has determined that residents are not entitled to "due process" hearings of any sort because this is "treatment" not punishment.[93] Thus, by characterizing discipline as treatment, SCC has avoided providing residents with the due process protections that DOC must afford convicted prisoners in prisons.[94] Likewise, residents cannot use the SCC grievance system (instituted only as a result of the special master's reports) to complain about medical care and treatment.[95]

In his recent order Judge Dwyer found:

> (d) The treatment environment at SCC has severely hampered any attempt to meet constitutional standards. Although McNeil Island affords a better physical facility than the old location at Monroe, the treatment space is inadequate and there is no suitable visiting space. In addition, the treatment environment is damaged by the location of SCC within the perimeters of a prison, the McNeil Island Correctional Center ("MICC"), operated by the Department of Corrections ("DOC"). The intertwining of MICC and SCC results in prison-like conditions and restrictions for SCC residents that have no therapeutic or security-based justification. All concerned, including the defendants, recognize that this should not continue. SCC now has 67 residents and projects a population of more than 150 by the year 2001. The space now used will not accommodate this growth. The only viable long-term solution appears to be, as the ATSA [Association for the Treatment of Sexual Abusers] standard

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88. Brief for Appellant at 53, Young v. Weston, No. 98-35377 (9th Cir. 1999) (deposition of Robert Smith, SCC Clinical Director).

89. *See* Brief for Appellant at 52, Young v. Weston, No. 98-35377 (9th Cir. 1999) (statement of Mark Seling, Superintendent of SCC).

90. *See id.*

91. *See id.* at 57–58 (statement of Mark Seling, Superintendent of SCC).

92. Twelfth Report of Special Master, Turay v. Seling, No. C91-664WD, at 9 [hereinafter Twelfth Report].

93. *Id.* at 9. The Special Master asserted,

> One concern raised was the "due process" issue, in which residents wanted hearings with witnesses to precede behavioral interventions. On this, the Superintendent was not open to negotiation, since it had been resolved some time ago that such interventions are considered treatment, not punishment.

Id.

94. *See, e.g.*, Allen v. Sakai, 40 F.3d 1001 (9th Cir. 1994); Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).

95. *See* Twelfth Report, *supra* note 92, at 7.

> states, a separate "treatment-oriented facility that is similar to other settings for persons who are civilly committed in the state."[96]

Unlike other mental health hospitals run by the state DSHS, the SCC does not have halfway houses, work release programs, or a community placement program.[97] This is astonishing in light of the fact that as early as 1992 Dr. Vernon Quinsey, the state's own expert consultant and an internationally recognized expert in sex offender research, considered the absence of such a transitional release program to be a fatal flaw in the predator program. Retained by Washington State as a consultant to review the predator program, Dr. Quinsey wrote:

> In my view, the lack of any provision for aftercare and community supervision is a *fatal problem* with the special commitment program as it stands now. It means that release decisions must be based solely on institutional behavior and that a relapse prevention approach to treatment cannot be effectively implemented. The inability to use measures of risk based on community behaviors to adjust the degree of supervision has to be rectified if treatment is to be effective and release decisions accurate.[98]

Without a community placement and monitoring program, staff cannot reliably determine whether residents have made sufficient treatment progress so that they are "safe" to be released. Without such a realistic risk assessment, staff will be very hesitant to recommend that a resident meets the statutory criteria for final release, and without staff support release is unlikely.[99]

D. More Confining than Prison

In 1994, almost four years after the predator law went into effect, a state judge found that the SCC at Monroe was more restrictive than prison and that residents had more freedom in prison than they enjoyed at the SCC.[100] He also

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96. Turay v. Seling, No. C91-664WD at 13 (W.D. Wash. Nov. 5, 1998) (order of Judge Dwyer). For an interesting discussion of whether this estimate might be excessively low, see John Q. La Fond, *The Costs of Enacting a Sexually Violent Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468 (1998).

97. *See* Brief for Appellant at 58, Young v. Weston, No. 98-35377 (9th Cir.).

98. *See* Quinsey, Report, *supra* note 63, at 5 (emphasis added).

99. *See id.* at 4–5.

100. With respect to SCC conditions while located at Monroe Reformatory a judge found that:

> Space limitations and some elements of the...facility design at the SCC are more restrictive for residents than for prison inmates in general [Department of Corrections] facilities.... Respondent has more restrictions on his physical movement in the SCC facility than he had during his 17 years of custody [in prison.] Residents had even less freedom and educational opportunities than they would have enjoyed in prison.

In re Detention of Young, No. 90-2-21319-6 (King Co., Super. Ct., Mar. 11, 1994) (Findings of Fact and Conclusions of Law on Respondent's Motion to Dismiss Based on Unconstitutional Conditions of Confinement at SCC).

found that strip searches without reasonable suspicion were frequently conducted after residents took trips outside the SCC even though they were under constant surveillance.[101] Prisoners had more privileges and opportunities for residential employment, structured leisure activities, and education than residents.[102]

When the government enacts a predator law with the *intent* that it will be punitive, it will implement it with that goal in mind. The culture of confinement will be punitive and antitherapeutic. In concrete terms, it will be one of extreme physical restriction, a woefully inadequate treatment program delivered by untrained and unqualified staff, and social and educational deprivation and total despair. The law will also create dehumanizing conditions and cultures, which, in turn, will dehumanize the staff as well as residents.

E. Constitutionally Required Treatment Not Provided

In some states, woefully inadequate treatment has been provided to individuals committed as predators. In striking down the Kansas predator law as unconstitutional, the Kansas Supreme Court agreed that incarceration to prevent future crimes was the real purpose of the Kansas law and that providing treatment for sex offenders was not a real concern. The court concluded:

> It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 et. seq. [The act for the care and treatment of mentally ill persons.] If there is nothing to treat under K.S.A. 59-2901, then there is no mental illness.[103]

Washington is, perhaps, even more depressing. Remember that the Washington law went into effect in August 1990. Yet, in 1995, *five years later*, a state judge found that "[t]here are more treatment opportunities and programs in place for convicted sex offenders in the DOC [Department of Corrections] Twin Rivers prison population than there are in the DSHS [Department of Social and Health Services] facility at SCC for civilly committed SVPs."[104]

In 1994, a federal judge in Seattle, Washington, found that the state was not providing constitutionally adequate treatment to individuals committed under its predator law.[105] To remedy this appalling situation, the court issued an

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101. *See id.*

102. *See id.*

103. *In re* Care and Treatment of Hendricks, 912 P.2d 129, 136 (Kan. 1996).

104. *In re* Detention of Turay, No. 91-2-210539-1, at 5–14 (Wash. Super. Ct., Mar. 30, 1995) (Findings of Fact and Conclusions of Law and Order on Respondents' Motion to Dismiss Based on Unconstitutional Conditions of Confinement at the Special Commitment Center).

105. *See* Turay v. Weston, No. C91-664WD (W.D. Wash., June 3, 1994) (Order and Injunction).

injunction ordering the Washington State facility to hire professionally trained staff, develop professional treatment programs, and prepare individualized treatment plans for each offender. Specifically, the Court ordered SCC:

> A. To adopt and implement a plan for initial and ongoing training and/or hiring of competent sex offender therapists at SCC.
>
> B. To implement strategies to rectify the lack of trust and rapport between residents and treatment providers.
>
> C. To implement a treatment program for residents which include all therapy components recognized by prevailing professional standards in comparable programs where participation is coerced. As agreed by the defendants, this shall include the involvement of spouses and family members in the treatment of residents, and plans for encouraging the visitation and support of family members.
>
> D. To develop and maintain individual treatment plans that include objective benchmarks of improvement so as to document, measure, and guide an individual's progress in therapy; and
>
> E. To provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff, including monitoring of the treatment plans of the individual residents, and to consult with staff regarding specific issues or concerns about therapy which may arise. [106]

To implement his initial order the court appointed a special master to inspect the facility and its program and report back to him.[107] As of February 1999, the special master has filed fourteen reports to Judge William L. Dwyer, the federal judge who found that the SCC was not providing constitutionally adequate treatment and issued the injunction and order requiring it to do so.[108] Judge Dwyer has accepted all of them and ordered the facility to comply with her findings. The latest report, the Special Master's fourteenth report, was submitted to the court on September 25, 1998—four years after the court found the SCC was violating residents' constitutional rights.[109]

In her reports, the special master identified five separate areas in which the court had determined that treatment was deficient. This section summarizes some of the more important findings in these areas that the Special Master made in her most recent reports to the court.

1. Staff competence, training, and supervision: (areas 1 and 5 of the injunction.) In her eleventh report, filed in 1997 (almost 7 years after the predator law became effective), she noted the deficiencies she had previously found at the SCC: The SCC clinical staff needed to have "more direct experience, under expert

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106. *Id.*

107. *See* Turay v. Seling, No. C91-664WD (W.D. Wash. Nov. 5, 1998) (First Supplemental Order Regarding Injunction).

108. *See* Fourteenth Report of the Special Master, Turay v. Seling, No. C91-664WD (W.D. Wash.) [hereinafter Fourteenth Report].

109. *See id.*

supervision, with sex offenders who are progressing through treatment."[110] In addition clinical staff did not have sufficient "ongoing supervision and consultation regarding the specific clinical syndromes that are presented by SCC residents, including major mental disorders."[111] There was also a "continuing need for increased supervision on the treatment unit, in order to promote a consistent and non-punitive treatment environment."[112] She specifically noted corrective measures that should be taken to address these issues.[113] As of her visit to the SCC made prior to filing this report, the SCC had not been responsive to these specific directions. In addition, the SCC was still trying to hire additional required staff "with experience in sex offender treatment."[114] Important treatment positions remain unfilled, and as of the time of this report there were no certified sex offender treatment professionals at SCC.[115]

In her Thirteenth Report, the Special Master had noted that, as a result of the program's relocation to McNeil Island, *"nearly 90% of the staff and clinicians have left."*[116] Thus, SCC had to hire new staff and clinicians and train them. It is certain that treatment has suffered during this period.[117]

2. Treatment components and measures of progress (areas three and four of the injunction): The special master had earlier found a need "for more comprehensive treatment planning and improved organization and delivery of services." [118] She had "directed the SCC to work on: (a) further developing the community transition component; (b) improving the clinical data base in order to track services that are delivered and to document progress, and (c) integrating clinical data related to the program's phases into annual reviews."[119] She noted that "some progress was made in these areas."[120]

3. Treatment environment (area two of the injunction): In this area the special master directed management to:

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110. Eleventh Report of the Special Master, Turay v. Seling, No. C91-664WD, at 2 (W.D. Wash. May 8, 1997) [hereinafter Eleventh Report].

111. *Id.*

112. *Id.*

113. *See id.*

114. *Id.* at 4.

115. *See* Twelfth Report, *supra* note 92, at 4.

116. Thirteenth Report, *supra* note 82, at 4 (emphasis added).

117. The Special Master noted:

> It was difficult at the time of my visit (which began on the third day after the move) to assess progress toward the two specific goals that were established for this area of the injunction. Staff were new, and could not be expected to understand the treatment model and structure. Similarly, since the new treatment teams had not yet been formed, the extent to which they were being consistent in making clinical decisions could not be assessed.

Id. at 6.

118. Eleventh Report, *supra* note 111, at 4.

119. *Id.*

120. *Id.*

> (a) finish their policy review and provide staff and residents with current information on policies and procedures; (b) deal with residents' living unit issues in the small treatment team meetings, and have complaints that are not resolved there referred to a resident grievance system; (c) expand the classification system to provide higher privilege levels linked to the phases of the program; and (d) encourage the development of a resident government structure to enable resident representatives to work directly with SCC management.[121]

She then noted that management had focused on the "foundation building," but "in many cases the improvements have yet to yield observable improvements on the unit."[122]

Though not specified in the court's initial injunction and order, the special master has pointed out that the SCC program did not have the types of oversight mechanisms found in established institutional mental health programs.[123] These include:

> [M]echanisms to monitor the services provided and ensure their quality of care. These include internal mechanisms, such as a quality assurance or improvement system, as well as procedures for ensuring that patients' rights are protected. External oversight is also a standard part of established mental health programs, through licensure, accreditation, or other program reviews that are...connected to the community at large, as well as to constituent, academic and related service organizations are usually in place.[124]

In this report, the special master noted that, since her last report, the new superintendent of the SCC had taken "a number of important steps" to ensure monitoring of the program.[125] This is an amazing observation! Until the special master brought it to the court's attention many years after the law went into effect, the sexual predator mental health program did not have *any* of the oversight or quality control mechanisms customarily found in other state mental health programs.[126] The Special Master outlined the following mechanisms:

> Established mental health programs, particularly those in institutions, have in place a number of mechanisms to monitor the services provided and ensure their quality of care. These include internal mechanisms, such as a quality assurance or improvement system, as well as procedures for ensuring that patients' rights are

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121. *Id.* at 6.

122. *Id.*

123. *See id.* at 10–12.

124. *Id.* at 10. The special master then described a number of ways in which the SCC could address this deficiency. These include: "(a) developing a quality assurance system, (b) building a foundation for an external review mechanism, by establishing a broadly-based advisory board, and, (c) starting to connect and exchange with other mental health programs." *Id.*

125. *Id.* at 11.

126. *See id.* at 10.

> protected. External oversight is also a standard part of established mental health programs, through licensure, accreditation, or other program reviews that are conducted by independent professionals. Finally, provisions to ensure that programs remained connected to the community at large, as well as to constituent, academic and related service organizations are usually in place.[127]

This is very strong evidence that Washington state simply did not care whether quality mental health care was being provided at the SCC.[128]

In her most recent reports, numbers Thirteen and Fourteen, the Special Master concluded that, though the SCC has made some improvements, significant deficiencies still exist in the SCC treatment program. These include a need for more advanced staff training in sexual deviance, better documentation of treatment plans for the residents, clear assessment of each resident's progress in therapy, and clear criteria on what each resident must accomplish to be released, a complete community release program to allow the eventual release of residents into the community and to be finally released from the SCC, and a need for family counseling for relatives.[129]

In a recent court hearing held to determine whether the injunction under which the SCC has operated for the last four years should be released, the special master testified that "[p]sychological treatment at the state's center for sex predators still doesn't pass muster and is inappropriately housed in a grim prison environment...."[130] She also concluded that there was "a lack of educational opportunities and meaningful work and social options at the center."[131] Once again, she recommended that the court not lift the injunction because the SCC, though having good policies, has not put them into practice.[132] To date, over eight years after the law was enacted and four years after the initial injunction was issued ordering Washington state to provide constitutionally adequate treatment, Washington has not fully complied with the judge's orders.

On October 1, 1997, Judge Dwyer found that "[t]he central need is to translate into reality a program that exists on paper. What is required is not just a plan but a reality-the genuine providing of adequate mental health treatment to all

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127. *Id.* at 10.

128. In the fall of 1998, the state agreed to pay 16 individuals confined under the law $10,000 each to settle their law suit alleging that they were not receiving constitutionally required treatment at the SCC. The state also agreed to pay $250,000 in legal fees as part of the settlement. The state did not admit liability by entering into this settlement. *See* Elaine Porterfield, *State to Pay 16 Predators*, SEATTLE POST-INTELLIGENCER, Oct. 2, 1998, at A1. Though the state may have settled simply to save litigation costs, settlement is also consistent with its attorneys' concluding that a jury would find against it and would award damages to the plaintiffs.

129. *See* Thirteenth Report, *supra* note 82; Fourteenth Report, *supra* note 109.

130. Elaine Porterfield, *Problems in Predator Treatment*, SEATTLE POST-INTELLIGENCER, Oct. 7, 1998, at B1.

131. *Id.*

132. *See id.*

SCC residents willing to accept it."[133] Apparently, the SCC administration had spent a great deal of its time and energy preparing written documents that are essential for implementing an institutional treatment program, such as comprehensive treatment plans and treatment data base.[134] In addition, the administration prepared and adopted a policy for community reentry.[135]

Judge Dwyer, relying on the Special Master's reports, concluded that the SCC needed to have a "fully operational program."[136] He described the elements necessary for such a program:

> that staff members understand the treatment model and their roles within it; that the delivery of services be effective and consistent across treatment teams; that residents know what they must do to move toward release and where they are in the treatment process; that there be ongoing monitoring of the treatment process; that the residents know the program policies; that policy enforcement be consistent; that the residents be treated with respect; and the program be able to deal with the long-term needs of those not engaged in treatment.[137]

In sum, it appears that, almost seven years after the statute was implemented, the administration spent most of its energy developing the written policies and supporting documentation that should have been in place shortly after the law went into effect. It had still not succeed in ensuring that these polices were operationalized on the wards.

More recently, in an astounding affront to the court, the state argued that the court had no effective authority to determine whether the state was providing constitutionally required treatment. In his order, Judge Dwyer noted:

> Defendants argue that the deference to be afforded to decisions based upon accepted professional judgment, practice, or standards [as held in *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)] means that there should be virtually no judicial review, stating: 'No one questions that Drs. Smith and Seling [the SCC's clinical director and superintendent] are qualified professionals exercising their discretion. The inquiry should end there.' [Defendants' Closing Argument, Dkt. #1010, at 7]. That is not the law, and such a view would eviscerate any protection of constitutional rights. The *Youngberg* standard 'is intended to prevent a judge or jury from using unguided discretion to balance the individual's liberty interest against the state interest in restraining liberty.' [Citation omitted.] It is not meant to transfer the safeguarding of constitutional rights from the courts to mental health professionals. If a mere expression of opinion by a state-employed superintendent or psychologist were

133. Turay v. Seling, No. C91-664WD (W.D. Wash. Oct. 1, 1997) (Order of Judge Dwyer).

134. *See id.* at 3.

135. *See id.*

136. *Id.*

137. *Id.* at 3–4.

> deemed conclusive, the constitutional standard would vanish; conditions of confinement would be upheld without scrutiny, and the outcome would depend on who happened to be in charge of a particular program, with no consistency from state to state or even from one institution to another within a state.[138]

Judge Dwyer noted that "[m]ost of these shortcomings [in treatment] are not based upon professional judgement at all."[139] The court further found that "[t]he necessity of keeping the injunction in force has been confirmed by every independent expert who testified or whose opinion otherwise appears in the record, including defendants' expert, Dr. Robert Prentky."[140]

In the spring and summer of 1992, political scientist Stuart Scheingold and his colleagues interviewed key participants in the enactment of the Washington sexual predator law, including leaders of the victim advocacy organizations. Their findings were remarkably prophetic. They wrote, "The other victim advocates voiced similar sentiments. What they liked about civil commitment was not that it provided treatment but that, because treatment would not work, most if not all predators would remain incarcerated for the rest of their lives."[141] It seems likely that these advocates assumed that the state would make some bona fide effort to treat individuals committed under the law because the Washington law required the state to provide treatment.[142] However, these same advocates did not believe that treatment would be effective. Washington State has fulfilled their prophecy that individuals committed under the law would never be released by not providing constitutionally required treatment.

F. Release Not Intended and Virtually Impossible To Obtain

The Washington sexual predator law provides procedures for releasing residents either into a less restrictive community placement or outright with no conditions or supervision.[143] An individual's condition must be reviewed

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138. Turay v. Seling, No. C91-664WD, at 6 (W.D. Wash. Nov. 25, 1998) (Order of Judge Dwyer).

139. *Id.* at 7.

140. *Id.* at 11.

141. Scheingold et al., *supra* note 46, at 739.

142. The Washington law initially required the state to provide treatment that conforms to "constitutional requirements." WASH. REV. CODE ANN. § 71.09.080 (West 1992) (superceded by new § 71.09.080 in 1995). In 1995, this provision was revised by the legislature. It now provides, in part: "Any person committed pursuant to this chapter has the right to adequate care and individualized treatment." WASH. REV. CODE ANN. § 71.09.080(2) (West Supp. 1999).

143. *See* WASH. REV. CODE ANN. § 71.09.090 (West 1992 & Supp. 1999). It should be noted that the release standards and procedures provided to sex offenders committed under the Washington predator law are much less favorable than those provide to all other civil committees under the state's general commitment law. Under the general commitment law patients are entitled to a jury trial every six months at which the government must re-establish the grounds for continued commitment. *See* WASH. REV. CODE ANN. §§ 71.05–.050 (West 1992 & Supp. 1999). Under WASH. REV. CODE ANN. § 71.09.090(2) (West Supp. 1999), the sexual predator law, the resident may petition to the

annually.[144] If the staff concludes that a resident's condition has changed so that he is safe to be released, the resident may apply to a court to obtain his release.[145] However, the prosecuting attorney must be notified and she may oppose release.[146] The prosecutor may request a jury trial at which she will have the opportunity to prove the individual is still a predator and should not be released.[147] Unlike discharge under Washington State's general civil commitment statute,[148] the professional staff does not have final authority to release someone from the SCC.[149] The prosecutor may attempt to block the release by requesting a trial even if the professional staff has determined that an individual should be released.[150]

Thus, under the Washington law, the easiest way for an offender to obtain release to a less restrictive alternative or outright release is if the staff and Secretary "determine 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 unconditional released..." and the prosecutor does not object.[151] However, until very recently, the staff in Washington State had never recommended that an individual's condition has changed enough to warrant release to a less restrictive alternative.[152] And, until

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court for release even if the staff does not support his petition. However, a judge must find probable cause exists to believe his "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..." before the court shall set a hearing on the issue. Without this finding of probable cause, the person is not entitled to a trial of this issue. WASH. REV. CODE ANN. § 71.09.090(2) (West Supp. 1999). Thus, it is structurally much more difficult to obtain release under the Washington predator law than it is under the state's general civil commitment statute.

144. *See* WASH. REV. CODE ANN. § 71.09.070 (West 1992 & Supp. 1999).

145. *See* WASH. REV. CODE ANN. § 71.09.090(1) (West Supp. 1999).

146. *See id.*

147. *See id.*

148. *See* WASH. REV. CODE ANN. §§ 71.05.010–940 (West 1992 & Supp. 1999).

149. *See* WASH. REV. CODE ANN. § 71.09.090 (West 1992 & Supp. 1999).

150. *See* WASH. REV. CODE ANN. § 71.09.090(1) (West 1992 & Supp. 1999).

151. *See id.*

152. Prior to February 23, 1999, the prosecution had previously agreed to one less restrictive placement, which involved a juvenile sex offender currently, confined in an out-of-state institution. In essence the government agreed that the offender could remain confined there and that this would constitute a less restrictive placement under the law. As of that date, it also appeared that the SCC staff would recommend that a predator currently committed to the SCC be placed in a less restrictive community placement. If the SCC staff did so, it will be the first time. Jackson Interview, *supra* note 37. In her Thirteenth Report the Special Master wrote: "Unfortunately, there are still no residents who have been recommended for a less restrictive setting, or even for transitional programming (attending community treatment groups.)" Thirteenth Report, *supra* note 82, at 7. It is quite likely that the SCC may support a less restrictive placement at this time to demonstrate to Judge Dwyer that release is possible from the SCC. As of May 4, 1999, five individuals have been placed in less restrictive community placements in Washington State. No individual has been released outright either from the SCC or from a community LRA. Telephone communication with Chris Jackson, Office of the Public Defender, Seattle, Washington (May 4, 1999).

very recently, prosecutors have resisted all efforts by defense counsel to obtain less restrictive placement in the community for residents.[153]

Given the strong public outcry over high-profile sex crimes[154] and the political strength of the victims' rights movement,[155] this is not surprising. Both staff and prosecutors undoubtedly see their role as custodians, ensuring that these sex offenders are never released.[156] The political pressure to keep them confined is irresistible.

Unfortunately, the state of expertise in predicting when a sex offender is safe to be released reinforces the political pressure to keep them incarcerated. It is extremely difficult for mental health professionals to conclude that an individual has changed sufficiently so that he "is not likely" to reoffend.[157] As Karl Hanson points out, the predictors of safety are "variable" not "static."[158] That is, these variables change over time. They may include changing perceptions by sex offenders about the harm they caused their victims, their ability to avoid situations that may lead to sexual reoffending, a reorientation of sexual desire, and numerous other variables.[159]

Perhaps more important, there is simply no research establishing which variables correlate with no reoffense upon release.[160] Thus, staff will be extremely hesitant to release offenders without a strong empirical basis for that release. Again, this is not surprising when one considers that many of the laws enacted in the USA during the 1990s were precipitated by murders or mutilations committed by sex offenders shortly after they had been *released* from the prison system.[161]

Professionals have acknowledged they will not recommend release of predators.[162] In written testimony on behalf of the Kansas Secretary of the Department of Social and Rehabilitation Services, the agency responsible for providing treatment under the predator act, George Vega, Commissioner of Mental Health and Retardation Services, told the Kansas House Judiciary Committee that "[i]f the process requires professionals to state a sexual predator is cured or not likely to repeat acts of violence before a person is discharged, the professionals

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153. Jackson Interview, *supra* note 37.

154. *See supra* note 40 and accompanying text.

155. *See* Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809 (1992).

156. *See* Brief for Appellant at 50–51, Young v. Weston, No. 98-35377 (9th Cir. 1999) (Final Report Regarding SCC of Resident Advocate, Stanley Greenberg, Ph.D.).

157. *See* La Fond, *supra* note 96, 492–93 (1998) and sources cited therein.

158. *See generally* R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50 (1998).

159. *See* Judith V. Becker & William D. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 PSYCHOL. PUB. POL'Y & L. 116 (1998); Grant T. Harris et al., *Appraisal and Management of Risk In Sexual Aggressors: Implications for Criminal Justice Policy*, 4 PSYCHOL. PUB. POL'Y & L. 73 (1998).

160. *Id.*

161. *See* La Fond, *supra* note 96.

162. *See supra* note 152 and accompanying text.

will not make such statements which might place their reputations and licenses on the line. This means the patients may never be released."[163]

In Washington, release is made even more unlikely by the continual failure to provide a structured community release and transition component to the SCC as recommended by the state's own expert in 1992[164] and by the special master.[165] Without the ability to observe how residents behave in the community, staff is unable to make a realistic risk assessment.[166] The legislature has not required the SCC to provide a halfway house or other special facility to manage SVPs as outpatients.[167] Even if the SCC wanted to place an SVP in the community as an outpatient in a less restrictive alternative, the law does not allow the SCC to do so on its own authority.[168] And, until very recently, the SCC staff did not recommend that anyone committed to the SCC as an SVP be released to outpatient status.[169] In practical terms, this means residents will not be released unless they persuade a judge that, contrary to the staff's opinion and the opposition of the prosecutor, sheriff, and community, the resident can safely be placed into a community transition program.

In her argument before the Supreme Court, Kansas Attorney General Carla Stovall asserted that the predator law was intended to provide treatment for sex offenders.[170] Washington State has also maintained in various courts that its SVP law was intended to provide treatment for sex offenders.[171] These arguments are disingenuous and belie the real purpose of the statute. A close examination of why these laws were enacted, how they were written, and how they have been implemented discloses that, in some states, these laws were intended to be

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163. *See* Brief for Cross Petitioner [Leroy Hendricks] at 8, Kansas v. Hendricks, 521 U.S. 346 (1996) (No. 95-1646, No. 95-9075).

164. *See supra* note 63 and accompanying text.

165. *See* Eleventh Report, *supra* note 111.

166. *See* Quinsey, Report, *supra* note 63, at 4–5.

167. The Washington predator law 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 *if the person is not confined in a secure facility.*" WASH. REV. CODE ANN. § 71.09.020(1) (West 1992 & Supp. 1999) (emphasis added). If a jury were to determine that a sex offender could be safely committed to outpatient status in Washington, it must find that he or she is not a SVP. The Washington law does contemplate that someone committed to a secure facility as an SVP may become eligible for placement as an outpatient in a less restrictive alternative. *See* WASH. REV. CODE ANN. § 71.09.090(1) (West 1992 & Supp. 1999). However, each of these placements will be court-ordered and tailored for the individual. There is no halfway house or conditional release program operated out of the SCC to which SVPs will be committed if appropriate.

168. *See* WASH. REV. CODE ANN. § 71.09.090(1) (West 1992 & Supp. 1999).

169. *See supra* note 152, at 7.

170. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2084 (1997).

171. *See, e.g.*, Briefs of the State of Washington, *In re* Young, 857 P.2d 989 (Wash. 1993) (Nos. 57837-1, 57838-9).

punitive[172] and to have severe negative psychological impact on individuals committed under them.[173]

That some state legislatures never intended that individuals committed as sexual predators ever be released is apparent from the testimony offered by public officials while legislatures were considering these laws. The Kansas experience confirms that lawmakers intended to confine sex offenders considered dangerous indefinitely. The State Attorney General of Kansas at that time Robert Stephan testified in support of the Kansas predator law:

> You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison release. As I am convinced *none of them should ever be released*, I believe you, as legislators, have an obligation to enact laws that will protect our citizens through incapacitation of dangerous sex offenders.[174]

Then Special Assistant Attorney General, now Attorney General of Kansas, Carla Stovall, also urged the legislature to pass the Kansas predator law. She testified: "We cannot open our prison doors and let these animals back into our communities."[175]

A court-appointed Resident Advocate wrote a Final Report about the Washington program for Judge Dwyer before resigning. He concluded:

> Because the SCC hasn't fundamentally changed over so many years, even with a court injunction, I have come to suspect that it is *designed* and *managed*, either overtly or covertly, to *punish* and *confine* these men and woman to a *life sentence without* any *hope* of *release* to a less restrictive setting.[176]

How is it possible that the state has failed so miserably during the past eight years to provide constitutionally required treatment and has failed to release even one of the sixty-seven men and one woman committed as predators? The most persuasive answer is that this law was intended to punish and to have an antitherapeutic effect on those sex offenders committed under the law. Surely, a bona fide treatment program staffed by qualified professionals, housed in a therapeutic environment, and designed to change sex offender's perceptions and behaviors should have had some success. On the other hand, a law and implementing regime designed solely to incapacitate sex offenders would succeed only if it in fact retained sexual predators in continuing confinement. Simply put, this is a case where the law's intent must be judged by its effect.

Some might defend the Washington predator law because it may have a therapeutic effect on the law-abiding citizens of Washington State.[177] But, as we

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172. *See supra* notes 16–34, 51–54 and accompanying text.

173. *See supra* notes 77–102 and accompanying text.

174. Brief for Cross Petitioner [Leroy Hendricks] at 6, Kansas v. Hendricks, 521 U.S. 346 (1996) (Nos. 95-1646, 95-9075) (emphasis added).

175. *Id.* at 7.

176. Greenberg Report, *supra* note 156 (emphasis added).

177. *See* La Fond, *supra* note 24; Scheingold et al., *supra* note 155.

shall see, the law may actually have an antitherapeutic impact on the community at large.[178] If this is so, then TJ must help policy-makers carefully evaluate whether a sexual predator law may do excessive psychological harm both to individuals confined as predators and to the community.

VI. UNANTICIPATED ANTITHERAPEUTIC EFFECTS

A. Impact on Offenders

Professor Bruce Winick has artfully described a number of ways in which sexual predator laws may have antitherapeutic effects on sex offenders committed as predators.[179] He argues that predator laws may label sex offenders as suffering from a mental abnormality that makes them unable to control their sexual urges.[180] In his view this may diminish their own sense of responsibility and decrease their ability to conform to society's expectations.[181]

Labeling may also adversely affect treatment by discouraging sex offenders from taking responsibility for their conduct and for changing how they think about their behavior.[182] Professor Winick notes:

> Labeling sex offenders as "violent sexual predators" therefore may reinforce their antisocial sexual behavior. The label may function to get in the way of change and provide these individuals with an excuse for giving in to their sexual urges. As a result, it may make it more difficult for sex offenders to exercise the self-control that society would like to encourage.[183]

In addition, delaying treatment until after sex offenders have served their full prison terms and then imposing it on them may well be counter-productive.[184] Professor Winick observes:

> Treatment delivered nearer in time to the offense is more likely to be effective. Inasmuch as some sex offenders have a false ideation concerning the circumstances of their crime, the passage of a long period of time only solidifies this self-deception in ways that make it more difficult to break down. A delay in treatment (or in what presumably is the more effective treatment that specialized sexual predator commitments an offer) can further reinforce the offender's deviant attitudes and behavior patterns making them more chronic. Clinical considerations thus strongly counsel against such a delay in treatment.[185]

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178. *See infra* notes 224–27 and accompanying text.
179. *See* Winick, *supra* note 8.
180. *See id.* at 538–39.
181. *See id.*
182. *See id.*
183. *Id.* at 539.
184. *See id.* at 540–41.
185. *Id.* at 541. *See also* Robert M. Wettstein, *A Psychiatric Perspective on*

In outlining these potential antitherapeutic effects Professor Winick seemingly assumes that the state has enacted a bona fide treatment regime and that a primary purpose of this scheme is the rehabilitation of sex offenders so that they may eventually be released into the community.[186] However, another viewpoint of the state's goal may be more accurate. A persuasive case can be made that the legislature actually intended to create a punitive regime that would have an antitherapeutic impact on individuals committed under the predator law.[187] If so, there is strong evidence that the state has succeeded.[188] It is bad enough that the sexual predator law delays treatment until after the offender has served his full prison term for the offense. In Washington, the failure of the state to provide adequate treatment for almost nine years after its law went into effect makes matters even worse because the state has significantly increased the delay with the resulting loss of treatment opportunity.

B. Gulag Culture

In Washington State, most of the initial staff were "inexperienced in the treatment of sex offenders."[189] Instead, they received minimal on-the-job training. This approach was taken because it would have been too expensive to hire qualified staff who were knowledgeable in treating sex offenders.[190] As described above, professionals certified to treat sex offenders do not staff the treatment program nor does the SCC currently provide constitutionally adequate treatment.[191] SCC residents recognize that the staff is professionally unqualified to treat sex offenders and that the treatment programs being offered are minimal and do not comply with professionally acceptable standards.

As noted earlier, no on-going transitional release program is in place at SCC.[192] Only five individuals have been released to less restrictive placement in the community, and most of these were court-ordered over the objection of staff

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Washington's Sexually Violent Predators Statute, 15 U. PUGET SOUND L. REV. 597 (1992). Dr. Wettstein concludes that "[t]reatment for sexual offending that begins man years after the underlying sexual offense is relatively more difficult than that which occurs soon thereafter." *Id.* at 617. In his opinion, delay allows cognitive distortions to become consolidated over time, making it more difficult for the offender to accept responsibility for his earlier behavior. The passage of time also causes memory loss, which may already have been impaired initially because of intoxication. Objective recollection vital for successful treatment becomes even more difficult. *See id.*

186. *See* Winick, *supra* note 8.

187. *See supra* notes 52–54 and accompanying text.

188. *See supra* notes 77–99 and accompanying text.

189. Turay v. Weston, No. C91-664WD, at 3 (June 3, 1994) (Order and Injunction).

190. Personal communication with David Weston, initial Superintendent of the Special Commitment Center at Monroe, Washington, where predators were kept until April 1998 (Sept. 9, 1991).

191. *See* Eleventh Report, *supra* note 111, at 4–16. *See also supra* notes 105–41 and accompanying text.

192. *See supra* notes 164–69 and accompanying text.

and prosecutors.[193] To date, staff has not recommended placing any resident into a transitional release program. [194]

The failure of staff to recommend release and the inability of a *single* resident to obtain final release during the past eight years provides a counter-incentive for residents to participate in whatever treatment is available. Residents rationally understand that their bona fide attempts to change their attitudes and behavior for the better will not increase their chances to earn their eventual freedom.

Based on this record sex offenders committed under this law have no reason to expect they will *ever* be released. Their hopelessness is well grounded. It is hard to imagine a prison or a culture more like the Russian Gulags.[195] This hopelessness in turn must cause unremitting pain for SCC residents. They surely understand the reality of this special form of 'civil' commitment; it is virtually a life sentence. It is impossible to imagine how residents must feel when they read judicial opinions that simply accept and recite the official narrative[196] that the state provides treatment to individuals committed under these laws.[197]

C. No Therapeutic Alliance

There is minimal trust between staff and patients. This situation has existed from the very outset. In a report compiled shortly after he visited the SCC on December 16, 1991, Dr. Vernon Quinsey, an international expert on sex

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193. *See supra* note 152 and accompanying text.

194. *See supra* note 152 and accompanying text.

195. During Joseph Stalin's regime, political prisoners and criminals were sent to harsh work camps, often in Siberia where the weather was extremely cold. Conditions were exceptionally harsh and confinement was usually for an indefinite term. Many prisoners died in these camps. *See* ALEXANDER SOLZHENITSYN, THE FIRST CIRCLE (1968); ALEXANDER SOLZHENITSYN, ONE DAY IN THE LIFE OF IVAN DENISOVICH (1963).

196. *See* Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing Rules-in-Use*, 8 STAN. L. & POL'Y REV. 71 (1997).

197. In *Kansas v. Hendricks*, Justice Thomas writing for the majority rejected the Kansas Supreme Court's conclusion that "treatment for sexually violent predators is all but nonexistent...." 521 U.S. 346, 365 (1997). Incredibly, Justice Thomas simply accepted the assertion of the Kansas Attorney General in oral argument unsupported by the record that "persons committed under the Act are now receiving in the neighborhood of '31.5 hours of treatment per week.'" *Hendricks*, *id.* at 368 (quoting trans. of oral argument at 14–15, 16).

The dissent rightly castigated the majority for ignoring the finding of the Kansas Supreme Court that "treatment is not a significant objective of the Act," *id.* at 383, and for going beyond the record in the case and engaging in fact-finding based on an advocate's assertions made at oral argument. *Id.* at 384. Justice Breyer noted that the record supported the Kansas court's conclusions: "The [Kansas Supreme] court found that, as of the time of Hendricks' commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified staff." *Id.* The cavalier willingness of the majority to accept a state official's impromptu treatment claims in the *Hendricks* case is all the more unfathomable in light of Washington state's long and well-documented experience of providing constitutionally inadequate treatment even while under a court order to do so.

offender research, wrote a report for the Washington State Institute for Public Policy. He noted:

> The nature of the Sexually Violent Predator Legislation is in itself not conducive to inspiring motivation for treatment among residents. Residents perceive the law to be arbitrary and excessive. This perception certainly appears justifiable in cases where residents have actually been on the street and have been recommitted without parole violation and/or have sought treatment while serving their regular sentences and been denied it for a variety of bureaucratic reasons (e.g., length of sentence). It is, of course, extremely difficult to form a therapeutic alliance with an embittered clientele. [198]

Until very recently, the staff had not recommended that a *single* resident be placed in a less restrictive placement, let alone released outright.[199] In his 1992 report Dr. Quinsey stressed how important it was for treatment efficacy that some residents see that treatment can lead to release. He wrote, "Until some residents actually secure their release as a result of treatment induced changes, it will be extremely difficult to convince residents that a therapeutic release route is feasible."[200] It should come as no surprise that there is minimal possibility of forming a therapeutic alliance between the treatment providers and patients. It is vital that patients believe that their treating therapists sincerely want to help them improve and be released. To achieve this end, patients must also be willing to trust their therapists with intimate knowledge about themselves. Without such an alliance, treatment prospects are dim.[201] It is hard to imagine more difficult circumstances for forming an effective therapeutic alliance between clinician and patient than those that exist at the SCC.

D. The Depersonalizing Effect on Staff

In his insightful article, Professor Winick has explored a number of ways that sexual predator laws may have a negative effect on clinicians who work as therapists in facilities for sexual predators.[202] He notes that patients coerced into treatment may only participate in a formal way and may not have the motivation and commitment necessary for successful treatment. This may create frustration for

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198. Quinsey, Report, *supra* note 63, at 4.

199. *See supra* note 152 and accompanying text.

200. *See* Quinsey, Report, *supra* note 63, at 4.

201. A therapeutic alliance is defined as the feeling of mutual respect that builds out of the respective roles of helper and the helped or, in this case, between the mental health clinician who is trying to assist the patient to change and the patient himself who also desires to change. It may also be defined as encompassing the shared goals of the professional and client, the collaborative tasks each of these two parties must perform during therapy to reach these mutually desired goals, and the bond formed between them. These elements rely on the continuous interaction and mutual confidence and trust between the professional and the client. *See generally* GENERAL SYSTEMS THEORY AND PSYCHIATRY, (William Gray et al., 1969); MALCOLM HIGGINS ROBERTSON & ROBERT HENLEY WOODY, THEORIES AND METHODS FOR PRACTICE OF CLINICAL PSYCHOLOGY (1997).

202. *See* Winick, *supra* note 8.

therapists.[203] The ethics codes of several mental health professional groups stress that treatment should be provided on a voluntary basis and raise serious concerns about the propriety of treating patients against their will. This may present ethical concerns for clinicians.[204] Again though, Professor Winick seemingly assumes that therapists working in these facilities are genuinely interested in rehabilitating sex offenders.[205]

In Washington, the SCC was initially staffed with individuals untrained and inexperienced in treating sex offenders.[206] Moreover, because of the context in which the predator law was enacted and the punitive intent behind the law, many staff viewed themselves primarily as custodians of dangerous and intractable offenders.[207] Staff looked down on the patients and treated them even worse than criminals. Indeed, staff often treated residents not as patients but rather as objects deserving scorn and abuse.[208]

A state judge specifically found that "SCC staff have verbally abused residents, making derisive comments about residents' status or race," and "staff have requested a resident to harm other staff."[209] Another state judge found that SCC staff have verbally abused residents by deriding both their status (calling them names like "rapo," "pervert," and "fucking punk") and their race (calling them names like "niggers, nigger lawyer," "sand niggers," and "sand monkeys").[210] Staff has mimicked a Native American dance in front of a Native American resident.[211] It is incomprehensible that the staff in a treatment facility would manifest such a derogatory attitude toward patients committed to their care. However, this unexpected phenomenon provides some empirical support for Professor Winick's concern that "[c]linicians forced to work in these [sexual predator] programs may therefore perceive themselves more as jailers than as therapists."[212]

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203. *See id.* at 545.

204. *See id.*

205. *See id.* at 544–45.

206. *See* Turay v. Weston, No. C91-664-WD (W.D. Wash. June 3, 1994) (Order and Injunction). *See also* Respondent's Motion to Dismiss Based on Unconstitutional Conditions of Confinement at SCC at 8, *In re* Detention of Andre Brigham Young, No. 90-2-21319-6 (Wash. Super. Ct. Mar. 11, 1994) (Findings of Fact and Conclusions of Law): "The staff [at SCC] directly most directly involved in the treatment milieu and management of SVPs are employees classified as forensic therapists and psychiatric security attendants, whose relevant work experience prior to employment at the SCC consists primarily of work in DOC [Department of Corrections] prison institutions."

207. *See supra* notes 77–99 and accompanying text. *See also* Excerpts of Record [hereinafter ER], App. A. in *Young v. Weston*, No. 98-35377 (9th Cir.).

208. *In re* Detention of Turay, No. 91-2-210539-1, at 5–14 (King Co., Supr. Ct., Mar. 30, 1995) (Findings of Fact and Conclusions of Law and Order on Respondents' Motion to Dismiss Based on Unconstitutional Conditions of Confinement at the Special Commitment Center).

209. *Id.*

210. *Id.* at 9.

211. *See id.*

212. Winick, *supra* note 8, at 545.

E. Effect on Judges and the Police

Judges in Washington State are paid very well.[213] They are also elected.[214] As a result, judges generally rule in favor of the prosecution on all contested trial issues. Two courageous judges have actually ordered individuals committed as predators to be placed in intensively supervised community placements. However, judges generally rule against the defense on virtually all contested issues. For example, Washington courts have ruled that: individuals can be committed under the Washington predator law even if the individual's condition is not treatable;[215] the law does not violate separation of powers even though the law allows courts to commit individuals whom the indeterminate sentence review board had decided was safe to be released from prison;[216] and, admitting testimony that the defendant's victim was pregnant when an alleged predator raped her was highly probative of his dangerousness.[217] Even state judges who have found conditions at the SCC to be stark, more restrictive than prison and not providing appropriate treatment have refused to release residents from there.[218]

Judges are the linchpins of our constitutional due process system of ordered liberty. Often, they must stand up to state oppression. If they become cowed, then the capacity of our legal system to protect everyone's individual liberties against state action becomes weakened.

At a public meeting to discuss these placements, the local sheriff appeared and vowed that a sexual predator would not be placed in the community despite the court's power to order the state to provide the placement.[219] At the community meeting called to discuss the possible placement of a sexual predator in a community less restrictive placement, Snohomish County Sheriff Patrick Murphy "guaranteed the angry crowd that Dennis Petersen would not be moving to a state-funded group home in the Machias neighborhood near Snohomish."[220] Murphy and then-acting superintendent of the SCC, Bill Dehmer, "apparently agreed just before

213. The annual salary of justices of the supreme court and judges in Washington State is established by a citizens' commission. WASH. REV. CODE ANN. §§ 2.04.092, 2.06.062 (West 1988). *See also* 1998 WASHINGTON STATE YEARBOOK: A GUIDE TO GOVERNMENT IN THE EVERGREEN STATE (Richard Yates & Charity Yates eds. 1998). According to the *Washington State Yearbook*, salaries for state judges in 1998 were as follows: Supreme Court Judges, $112,078 (*id.* at 11); Court of Appeals Judges, $106,537; (*id.* at 13); Superior Court Judges, $100,995 (*id.* at 14).

214. *See* WASH. CONST. art. 4, § 5.

215. *See* State v. Gaff, 954 P.2d 943, 949 (Wash. Ct. App. 1998).

216. *See In re* Aqui, 929 P.2d 436, 441–42 (Wash. Ct. App. 1996).

217. *See id.* at 443.

218. *See* Findings of Fact and Conclusions of Law on Respondent's Motion to Dismiss Based on Unconstitutional Conditions of Confinement at SCC, *In re* the Detention of Andre Brigham Young, No. 90-2-21319-6 (King Co., Supr. Ct. Mar. 11, 1994); Findings of Fact and Conclusions of Law and Order on Respondents' Motion to Dismiss Based on Unconstitutional Conditions of Confinement at the Special Commitment Center, *In re* Detention of Turay, No. 91-2-210539-1 (W.D. Wash. Super. Ct., Mar. 30, 1995).

219. *See* Karen Alexander, *Vow to Keep Offender Out—Rapist Won't Live in Machias, Sheriff Says*, SEATTLE TIMES, Sept. 7, 1995, at B1.

220. *Id.*

the meeting to jointly recommend that Petersen not be placed at a home [in the area]." [221]

> Since November [almost one year ago], the State Department of Social and Health Services, which operates the special center at Monroe, has been under a court order from Snohomish Superior Court Judge Larry McKeeman to move Petersen, 23, to a less-restrictive environment. McKeeman said Petersen's developmental disability and his age put him at risk from other, more sophisticated offenders and has hindered his treatment."[222]

Despite such public grandstanding by an elected law enforcement official, the final release decision is up to the court. "Murphy said he expected Petersen would remain in the Special Commitment Center for several months, giving Murphy time to work with legislators and others to change laws to keep sex predators locked up indefinitely." [223]

The community also was angry at the possible placement of Mr. Petersen in a less restrictive setting. According to the *Seattle Times*: "The crowd attending last night's meeting had little patience for judicial decisions. Some threatened to take the law into their own hands if Petersen or other convicted sex offenders moved into their neighborhood."[224]

Other members of the community are also at risk when community resentment boils over. A sex offender in Minnesota was evicted from his parents' apartment after neighbors had threatened his parents' landlord.[225] And, of course, released sex offenders are often the targets of vigilante violence. One offender opened his apartment door to someone who punched him in the mouth and threatened to kill him.[226] People have thrown rocks through the windows of homes where released sex offenders live.[227]

F. Effect on the Legislature

Since its initial enactment, the Washington legislature has changed the law several times.[228] Some of these changes were required by the Washington Supreme

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id. See also* Susan Paynter, *Two Columns on Ballard Sex Offender Ignite Readers*, SEATTLE POST-INTELLIGENCER, Feb. 18, 1998, at B1.

225. *See* David Chanen, *Sex Offender Will Reside at Halfway House for 90 Days*, STAR-TRIB., Mar. 4, 1998, at B5.

226. *See* Lynn Steinberg, *Child Molesters Often Victims of New Law, Angry Neighbors Can't Forgive When Offender Lives in Their Midst*, SEATTLE POST-INTELLIGENCER, Oct. 30, 1990, at A1.

227. *See id.*

228. For example, in 1992 the legislature added "assault of a child in the first or second degree" to the definition of "sexually violent offense" thereby expanding the class of offenders subject to commitment as an SVP. 1992 Wash. Laws ch. 145, § 17. In 1995, the legislature changed the definition of an SVP by adding the phrase "if not confined in a

Court decision in *In re Young*.[229] Invariably, the legislature accepts changes recommended by prosecutors and rejects those supported by defense lawyers.[230]

For example, to satisfy its concerns that the predator law denied equal protection, the Washington Supreme Court required that the law be revised to provide for a less restrictive placement in the community as is provided in the state's general commitment law.[231] The majority concluded: "We therefore hold that equal protection requires the State to comply with provisions of RCW 71.05 [Washington's general commitment law] as related to the consideration of less restrictive alternatives."[232] The general commitment law allowed the decision-maker to commit an individual to a community placement rather than to hospital.[233]

Rather than revise the law to allow predators to be committed initially to a less restrictive alternative, the legislature, at the request of prosecutors, simply changed the definition of a sexually violent predator to be an individual who was too dangerous to be committed to a less restrictive community placement.[234] This revision allows the jury only the stark choice of committing an individual to the SCC or releasing them with no supervision or control in the community. It seems fair to conclude that juries will almost always err on the side of safety and commit.[235] In addition to creating powerful incentives for juries to commit, the state has saved itself the cost of providing a less restrictive community placement-the very component whose absence Dr. Quinsey called a "fatal flaw" in the law.[236]

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secure facility" to the definition of a sexually violent predator. This left the jury with no option to commit an offender to a less restrictive alternative during the initial commitment proceding. 1995 Wash. Laws ch. 216, § 1. *See* WASH. REV. CODE ANN. § 71.09.020 (West Supp. 1999)

229. 857 P.2d 989 (Wash. 1993) (en banc).

230. The author and members of the defense bar testified before a legislative subcommittee arguing that the state should establish a community placement component to the SCC as suggested by Dr. Quinsey (*see* Quinsey Report, *supra* note 63, at 5–6) and that the jury should have the authority to commit an SVP to a community placement at the initial hearing. Testimony of John Q. La Fond before the Washington State Senate Law and Justice Committee, Olympia, Wash. (Feb. 9, 1995). Instead, the legislature enacted the recommendation of a prosecutors' task force after a representative testified at the same legislative hearing. In 1995, the legislature redefined 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 disorder which makes the person likely to engage in predatory acts of violence *if not confined in a secure facility*." WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1999) (italicized language indicates change from previous definition).

231. This component was also recommended as essential by Dr. Quinsey. Quinsey Report, *supra* note 63, at 5–6

232. *In re Young*, 857 P.2d at 1012.

233. *See* WASH. REV. CODE ANN. § 71.05.240 (West 1992 & Supp. 1999).

234. *See* WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1999).

235. In only one case has a jury in Washington determined that an individual was not a sexual predator.

236. *See supra* note 198 and accompanying text.

G. Effect on Public Policy

Because of the violent crimes that precipitated enactment of the Washington predator law and the resulting outpouring of public rage,[237] public policy in Washington state, and probably in every state in the United States, considers sex offenders to be extremely dangerous[238] (as a group they are not[239]) and to be a high priority in public policy formulation.[240] Legislatures across the country have been enacting harsh measures to punish sex offenders and to prevent them from committing new crimes.[241] These include mandatory registration for sex offenders, community notification laws that allow or require law enforcement authorities to notify neighbors that a sex offender is living at a specific address,[242] and mandatory chemical castration laws that require the administration of certain sex-drive reducing drugs to sex offenders as a condition of their release from prison.[243]

Enactment of these harsh measures manifests an abrupt shift in American penology. Public policy no longer strives to help the individual offender change for the better. Rather, sex offenders, like many other criminals, are now simply considered part of a particular dangerous group that poses a long-term threat to community safety.[244] As members of a group, they share the characteristics of their group. Risk of recidivism is measured primarily by actuarial techniques based on these characteristics,[245] and risk management is paramount.[246] There is no expectation that offenders, especially sex offenders, can be rehabilitated, and incapacitation for the more dangerous groups is the primary goal of the criminal

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237. *See* Boerner, *supra* note 40; Scheingold et al., *supra* note 155.

238. As a group, sex offenders are not especially dangerous. *See* R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50 (1998) (reporting the overall sexual offense recidivism rate for general groups of sex offenders is expected to be between 10% and 15% during a 5-year follow-up period).

239. *See* R. Karl Hanson & M.T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998) (based on a meta-analysis of 61 follow up studies the authors report an overall sexual offense recidivism rate of 13.4% for the 4- to 5-year follow up period; they also report rates of 18.9% for rapists and 12.7% for child molesters).

240. *See* TASK FORCE REPORT, *supra* note 41, at IV-1 to IV-9.

241. *See, e.g.*, COLO. REV. STAT. § 16-13-203 (1996); LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS, AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997); *see also infra* note 259.

242. *See* Winick, *supra* note 8.

243. *See* Raymond A. Lombardo, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sex Offenders*, 65 FORDHAM L. REV. 2611 (1997); Robert D. Miller, *Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?*, 4 PSYCHOL. PUB. POL'Y & L. 175 (1998).

244. *See* Simon, *supra* note 16.

245. For a thorough description of current state of the art in predicting sex offender recidivism, see R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50 (1998).

246. *See id.*

justice system. As Professor Simon so poignantly puts it, "The new penology is agnostic toward treatment. The goal is waste management."[247]

In upholding the Kansas predator law, the Court emphasized that the government could exercise its police power to civilly commit individuals who suffered from a mental abnormality that made them dangerous even if they could not be treated.[248] Professor Simon puts it this way:

> The centrality of treatment under previous readings of the Due Process Clause made the constitutionality of confinement turn on the institutional priority of treatment and treatment professionals (i.e. those with a grounding in forms of knowledge and power independent of the penal system). In *Hendricks*, treatment has been reduced to a gesture.[249]

This decision may have important consequences for future public policy. It indicates that civil commitment need not have a therapeutic goal; mere incapacitation without any effort to improve the individual's condition is acceptable.[250] It necessarily depreciates what the common law termed the *parens patriae* power of state, which allows the government to commit individuals because they are unable to make responsible self-regarding decisions and need help.[251]

In so doing, public policy and discourse of public policy[252] may now focus on pure social defense through containment rather than on providing help to those in need.[253] Mental health workers will become predictors of future violence and jailers of individuals considered dangerous, rather than treating present illness and helping individual change for the better.[254]

The *Hendricks* decision signaled to the states that the Court will uphold virtually *any* law that state legislatures might enact to control sex offenders.[255] Consequently, public policy toward sex offenders may become even harsher.[256] Most states have increased criminal sentences for convicted sex offenders and

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247. Simon, *supra* note 16.

248. *See* Kansas v. Hendricks, 117 S. Ct. 2972 (1997). *See also* La Fond, *supra* note 27.

249. Simon, *supra* note 16, at 466.

250. For an excellent analysis of this question, see Janus, *supra* note 12.

251. *See* Schopp, *supra* note 12.

252. This shift in goals is reflected by the change in official rhetoric. Jettisoning the legal term 'patients' traditionally used to describe individuals being civilly committed, legislation and other public discourse now calls these individuals "sexually violent predators," a term that encourages public fear and loathing. *See* J. Christopher Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. PUGET SOUND L. REV. 781 (1992).

253. *See also supra* note 27.

254. This reconfiguration of mental health law and policy and the role of mental health professionals in the United States is not a new development. It has been underway since the mid-1970s. *See* JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 150–71 (1992).

255. *See supra* note 27.

256. *See infra* notes 257–58 and accompanying text.

more sex offenders are actually serving longer prison terms.[257] Some states have passed mandatory life sentences for certain sex offenders.[258] Public resources that could have been spent on preventing sex crimes may now be spent on punishing those who commit them.[259]

VII. RETHINKING THERAPEUTIC JURISPRUDENCE

TJ analysis is frequently useful as a supplementary analysis when applying other primary doctrines. For example, in upholding the Kansas predator law, the *Hendricks* majority concluded that the purpose and effect of the statute was not punitive.[260] Because the Kansas law had only been operational for a few years before reaching the Court, the majority generally relied on formal indicators (such as where the residents were housed, who employed the staff, whether treatment programs were available[261]) to ascertain whether the law's purpose and effect was punitive. If the Court had found that it was punitive, it would violate the ex post facto and double jeopardy prohibitions in the United States Constitution.[262] TJ analysis would surely be relevant to such constitutional scrutiny of other state predator laws.

In voting to uphold the Kansas predator law, Justice Kennedy expressed concern that sexual predator laws may "become a mechanism for retribution." [263] Traditional TJ analysis might, in the future, persuade Justice Kennedy, other Justices in the *Hendricks* majority, or perhaps other courts considering constitutional challenges to other predator laws, that a particular predator law had become a retributive mechanism and should be struck down on Constitutional grounds.

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257. *See, e.g.*, COLO. REV. STAT. § 16-19-203 (1996); GREENFELD, *supra* note 241, at 19–20.

258. *See, e.g.*, CAL. PENAL CODE § 1170.12 (1998); 1996 Wash. Laws ch. 288, amending WASH. REV. CODE § 9.94A.030 and § 9.94A.120(4) (authorizing a mandatory life sentence for a second-time serious sex offender). The Washington law is commonly referred to as a "two strikes and you're out law." Rachel Zimmerman, *Two-Strikes Sex Crime Law Getting Second Test; Lake Forest Park Man is Charged*, SEATTLE POST-INTELLIGENCER, July 10, 1997, at B1.

259. *See* William D. Pithers & Alison Gray, *The Other Half of the Story: Children with Sexual Behavior Problems*, 4 PSYCHOL. PUB. POL'Y & L. 200 (1998).

260. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997).

261. *See Hendricks*, 117 S. Ct. at 2095.

262. *See* U.S. CONST. art. I, § 10 (ex post facto); U.S. CONST. amend. V (double jeopardy). *See also* Collins v. Youngblood, 497 U.S. 37 (1990). The U.S. Constitution precludes enactment of legislation that: (1) punishes as a crime an act previously committed that was not unlawful when done; (2) makes more burdensome the punishment for a crime after its commission; and (3) deprives one charged with a crime of any defense available under the law at the time it was committed. *Id.* at 42 (citing *Calder v. Bull*, 3 Dall. 386 (1789)).

263. *Hendricks*, 117 S. Ct. at 2095.

But, what if no court is willing to take this step, even if the challenge is to a law that is violently and deliberately antitherapeutic?[264] Must TJ remain normatively neutral? As Professor Wexler argues, does TJ simply "set the stage" for resolving value questions?[265] If it limits its roles to empirical assessment and description of those findings, then a TJ analysis may actually *encourage* some lawmakers and the public that the laws are having precisely the punitive effect intended. Even worse, TJ might demonstrate how to make the law *more* punitive and antitherapeutic.

Robert Cover has noted how pejorative legal rhetoric empowers prosecutors, judges, and juries to justify the terrible violence they inflict on other human beings.[266] For example, in sentencing a convicted criminal defendant Professor Cover notes: "Beginning with [the] broad interpretive categories such as 'blame' or 'punishment,' meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence."[267] In using these words to describe and justify her actions, Professor Cover requires us to acknowledge that real violence is thereby being inflicted on the defendant. As he says: "For as the judge interprets, using the concept of punishment, she also acts-through others-to restrain, hurt, render helpless, even kill the prisoner."[268] In many ways these laws, also, are using words like "predator," "commitment," and "treatment" to justify the infliction of indefinite pain and restraint on offenders who have served their full prison terms. It will be ironic and sad if TJ, a movement designed to improve the human condition provides assurance to policy-makers that they have, indeed, succeeded in inflicting pain and violence on others.

TJ now must explore whether it can generate is own approach that articulates broad principles limiting the amount of psychological harm law may inflict on others and, if possible, broad principles requiring when law must have positive psychological effect.[269]

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264. A disturbing corollary of constitutional litigation involving commitment laws in general and sexual predator laws in particular is the seeming severance by courts of the question of whether individuals are being denied their constitutional right to treatment from the question of whether such commitment laws are constitutional. Increasingly, courts may find that individuals committed under these laws are not receiving constitutionally adequate treatment but that the plaintiffs' remedies are limited to requiring the state to provide such treatment. Courts are very reluctant to strike down the laws as unconstitutional or to order the release of individuals simply because the state is not providing them with constitutionally adequate treatment.

265. *See supra* note 6.

266. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) [hereinafter Cover, *Violence*]; Robert M. Cover, *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

267. Cover, *Violence*, *supra* note 267, at 1608.

268. *Id.* at 1609.

269. *See* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161 (1995). Robert Schopp has started this important enterprise by developing and applying a normative TJ theory by examining the role of criminal law and the role of civil commitment law. His brilliant pioneering work provides one way of

VIII. FUTURE DIRECTIONS FOR TJ

TJ must develop a normative philosophy and rhetorical strategies for responding to a law whose goal *is* expressly antitherapeutic. TJ must move beyond simply contributing a perspective from which public-policy analysis can evaluate such a law and its impact on intended and unintended targets. As noted earlier, TJ must set limits on how much psychological harm law may inflict.[270] Though acknowledging that other values are important and, in some cases, may over-ride TJ values, TJ must not accept that other values can always "trump" TJ values.

Undertaking descriptive and empirical analyses that inform policy-makers on whether a law is accomplishing its intended goals is an important contribution. This research may be used to improve the law. To take sexual predator laws as an example, expanding the empirical research to include how the law impacts others not targeted for harm may persuade policymakers to change the law.[271] Thus, researchers might demonstrate that the costs of enacting and implementing a predator law are enormous and divert scarce resources away from more effective crime control strategies.[272] It might demonstrate that the predator law inhibits treatment for other sex offenders.[273] Perhaps studies would show that these laws create excessive fear and anxiety in the community at large, generating a sort of sex offender paranoia that inhibits a sense of community and freedom.[274] Making this empirical case may be sufficient to persuade policy makers to eliminate or change the law, but this approach accepts that TJ is simply one set of values among many. Policymakers are free to weigh TJ values along with others.

In extreme cases, however, TJ must become *normative* and claim primacy. It must establish a framework for setting *limits* on the law's *antitherapeutic* impact. One approach would be to explore whether law is so antitherapeutic that it has become psychologically destructive of essential human qualities.

For example, as demonstrated above,[275] sexual predator laws may have an extremely negative impact on staff at facilities where SVPs are confined. Philip Zimbardo conducted experiments in which two dozen young men were randomly chosen to serve either as guards or as prisoners in a simulated prison.[276] Designed to understand what it means to be a prisoner or a guard, Zimbardo and his colleagues stopped the experiment after only six days because the results were

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approaching this crucial enterprise.

270. *See supra* note 269 and accompanying text.

271. *See, e.g.*, Winick, *supra* note 8.

272. *See, e.g.*, La Fond, *supra* note 96.

273. *See* Winick, *supra* note 8.

274. *See id.*

275. *See supra* notes 209–11 and accompanying text.

276. *See House Subcommittee #3 of the House Judiciary Committee, Oct. 25, 1971, Part II*, at 15357 (statement of Philip Zimbardo, Professor at Stanford), *reprinted in* RICHARD G. SINGER, RIGHTS OF THE IMPRISONED: CASES, MATERIALS AND DIRECTIONS 551–54 (1974).

"frightening."[277] "Guards" could no longer differentiate between role-playing and reality.[278] Their life experience and values gave way and the "ugliest, most base, pathological side of human nature surfaced."[279] Likewise, the "prisoners" became "servile, dehumanized robots who thought only of escape, of their own individual survival and of their mounting hatred of the guards."[280] Thus, a law may so destroy basic human attributes that the risk to those subject to it or required to implement it should not be tolerated.

As we have seen, residents confined at the SCC are treated just like prisoners and in some cases even worse than prisoners.[281] Unlike most prisoners, however, their confinement is indeterminate. Release, so far, is unlikely. It may be difficult to remain a human being in such circumstances. There is also strong evidence that the staff at the SCC have on many occasions treated SCC residents abusively.[282] A law that elicits such behavior from human beings ostensibly assigned therapeutic roles raises such questions.

Another interesting approach for future development would be to focus on how harmful the deliberate infliction of pain and suffering can be on those who inflict it. There is some interesting social science research indicating that persons who discriminate against others on the basis of race or similar characteristics are themselves damaged by their own behavior.[283] Though they were not sophisticated, some of the studies relied on by the Supreme Court in *Brown v. Board of Education*,[284] indicated that segregation adversely affected not only those who were the targets of segregation laws, but were "even more detrimental to the emotional well-being of the prejudiced person than those who are the objects of discrimination."[285] It may be that the rage directed by society against criminals, especially sex offenders, as implemented by law may harm society itself. Thus, law may also be destructive of social integrity.

This may be especially worth considering if, as Professor Simon so cogently argues,[286] society is now using the law as a managerial strategy to

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277. *Id.* at 552.

278. *Id.*

279. *Id.*

280. *Id.* For an interesting account of prison life and its effect on inmates, see JACK HENRY ABBOT, IN THE BELLY OF THE BEAST: LETTER FROM PRISON (1981).

281. *See supra* notes 100–02 and accompanying text.

282. *See supra* notes 209–11 and accompanying text.

283. *See infra* note 284.

284. 347 U.S. 483, 495 (citing K.B. CLARK, EFFECT OF PREJUDICE ON PERSONALITY DEVELOPMENT (1950), and Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948)).

285. *The Effects of Prejudice and Discrimination*, *in* PERSONALITY IN THE MAKING 147 (Helen Leland Witmer & Ruth Kotinsky eds., 1952). Other researchers, also using surveys, concluded: "substantial majorities of social scientists who may be said to have some competence with regard to the matters under inquiry agree that enforced segregation is psychologically detrimental to both the segregated and enforcing groups even when equal facilities are provided." Deutscher & Chein, *supra* note 284, at 268.

286. *See* Simon, *supra* note 16, at 455.

incarcerate "evil" and high-risk groups who will not be restored to the community. This "populist punitivism"[287] may pose a special risk of encouraging social rage that is psychologically destructive both to members of society[288] and to society at large. As this Article has argued, society must think through whether this communal rage and vengeance is, in fact, helpful to its own sense of psychological well-being.[289]

TJ may also learn from the death penalty debate. Opponents of the death penalty claim that taking a human life through capital punishment may diminish respect for life generally.[290] So too, unleashing a collective unbounded anger against sex offenders and committing them indefinitely to a prison-like facility without realistic hope for change or release diminishes society's belief in individual transformation and redemption.[291] TJ must consider whether some laws may be so antitherapeutic that they significantly diminish our communal concern for psychologically improving the individual and society.

A more provocative challenge for TJ is to demonstrate that law *must* have a therapeutic impact! Future scholarship should explore whether TJ can create a jurisprudence that imposes on law an obligation to have a therapeutic purpose and effect when possible. This enterprise should not ground its jurisprudence on constitutional principles or other charter documents, such as the European Convention of Human Rights and Fundamental Freedoms. Instead, it should, generate an internally consistent jurisprudence based on its underlying values, methodologies, and knowledge base.[292] It should explore the possibility that helping other human beings achieve gains in psychological well-being helps the community's own psychological state as well.

It is, of course, too early to determine whether this enterprise will ultimately succeed. The goal of this Article was simply to pose the question: can TJ always remain normatively neutral?

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287. *Id.*

288. For an interesting TJ review of this approach, see Winick, *supra* note 8.

289. Professor Winick explores some of the potential adverse effects (as well as potential beneficial effects) that sex offender registration and community notification laws may have on parents. Winick, *supra* note 8, at 552–55. Newspaper reports of how angry and upset area residents become when notified that a sex offender released from prison will be living in their neighborhood also provide some indication of the anger and, some would say, needless hysteria such laws are fomenting. *See* Alexander, *supra* note 219, at B1; Steinberg, *supra* note 226, at A1.

290. *See, e.g.*, Sister Monica Kostielney, *Understanding Justice with Clarity, Civility, and Compassion: Reflections on Selected Bibilical Passages and Catholic Church Teachings on the Death Penalty*, 13 T.M. COOLEY L. REV. 967 (1996).

291. *See supra* notes 16–23 and accompanying text.

292. Some TJ scholars have started this ambitious undertaking. *See, e.g.*, Schopp, *supra* note 269.