Washington Law Review

Volume 71 | Number 2

4-1-1996

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ABUSE OF JUDICIAL REVIEW: THE UNWARRANTED DEMISE OF THE SEXUALLY VIOLENT PREDATORS STATUTE BY *YOUNG V. WESTON*

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Abstract: In *Young v. Weston*, the U.S. District Court for the Western District of Washington struck down Washington's Sexually Violent Predators statute which allows involuntary commitment of persons classified as sexual predators. This Note analyzes the arguments that the court put forth when it determined that the statute was unconstitutional. This Note argues that the case was wrongly decided because the statute is a constitutionally sound exercise of the State's police power.

In 1990, after the widely publicized attack and sexual mutilation of a seven-year-old boy in Tacoma, Washington, the Legislature enacted the Sexually Violent Predators statute ("the Statute"), which empowered the State to commit[1] those determined to be sexual predators.[2] In 1991, Andre Brigham Young, who had been convicted of six felony rapes, was committed under the Statute.[3] He appealed directly to the Washington Supreme Court, which sustained the Statute's constitutionality.[4] On August 25, 1995, the U.S. District Court for the Western District of Washington granted Young's petition for a writ of habeas corpus, ruling that the Statute was unconstitutional because it violated substantive due process, the prohibition on ex post facto laws, and double jeopardy.[5]

The court has unnecessarily terminated a legitimate exercise of the State's police power. A close analysis reveals that the Statute is constitutionally sound. If this decision is upheld,[6] the public will again be exposed to a group of sexually violent persons who are unable to control their actions.

This Note argues that the court improperly applied the constitutional doctrines upon which it relied and that the Statute is constitutional. Part I

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1. "To send a person to . . . a mental health facility . . . by authority of a court or magistrate." *Black's Law Dictionary* 273 (6th ed. 1990).

2. 1990 Wash. Laws, ch. 3 § X. The Statute was amended in 1992 and 1995. 1992 Wash. Laws, ch. 45; 1995 Wash. Laws, ch. 216. It is now codified at Wash. Rev. Code ch. 71.09 (1994 & Supp. 1995).

3. *In re* Young, 122 Wash. 2d 1, 16, 857 P.2d 989, 995 (1993).

4. *Id.* at 59, 857 P.2d at 1018.

5. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

6. The State appealed to the Ninth Circuit Court of Appeals, which heard oral argument on March 6, 1996.

details the Statute and its history. Part II provides background on the relevant constitutional doctrines. Part III reviews the facts and procedural history of Young's case. Finally, part IV criticizes the court's decision and argues that the Statute meets constitutional requirements.

I. THE SEXUALLY VIOLENT PREDATORS STATUTE

A. History

On May 20, 1989, Earl Kenneth Shriner raped and sexually mutilated a seven-year-old boy in Tacoma, Washington.[7] While riding his bicycle to a friend's house, the boy was abducted by Shriner. Shriner forced the boy to perform fellatio, sodomized him, stabbed him in the back, choked him with a cord, and severed the boy's penis. Nonetheless, the boy survived the attack.[8]

Public outcry was tremendous, over both the viciousness of the attack and the fact that Shriner, a man with a lengthy history of murder, assault, and sexual crimes against children, somehow had been free to re-offend.[9] By May 26, the Governor Booth Gardner's office had received 1000 letters and phone calls about the case—the most ever received by the Governor in such a short time.[10] On June 15, 1989, less than one month after the attack, Gardner created the Governor's Task Force on Community Protection.[11]

The Task Force had the following responsibilities:

> 1. Review the current criminal justice system and the mental health civil involuntary commitment process to measure their effectiveness in confining persons who are not safe to be at large in the community.
>
> 2. Assess the relationship between these criminal and mental health systems to identify the shortcomings.

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7. David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. Puget Sound L. Rev. 525 (1992). Boerner, a former prosecutor and current Professor of Law at Seattle University, was a member of the Governor's task force on community protection, and was the principal author of the Sexually Violent Predators statute. *Id.* at 566–75.

8. *Id.* at 525.

9. *Id.* at 526–27.

10. *Id.* at 534.

11. *Id.* at 538 (citing Exec. Order No. 89-04, Wash. St. Reg. 89-13-055 (1989))

3. Research the feasibility of creating a specialized, secure facility for certain categories of people who represent the most risk to society.

4. Consider research and approaches to enhancing our ability to accurately predict future behavior of persons who have committed or who have threatened to commit violent criminal acts and establish legal criteria for confining them.[12]

The Task Force, chaired by Norm Maleng, King County Prosecuting Attorney, delivered its final report to the Governor on November 28, 1989.[13]

The Task Force first looked at the existing criminal justice system. It determined that changing the criminal justice system would promote unjust punishment rather than incapacitation, and that any change in criminal laws could not have the necessary retroactive effect to protect the community.[14]

The Task Force also noted that the Legislature had reformed the civil commitment system in 1973 to emphasize short-term treatment and release and only applied it to those with serious mental illness.[15] Because the civil commitment statute requires proof of a recent act and was clearly intended for short-term confinement,[16] the Task Force concluded that this statute would not meet its goal.[17] Instead, the Task Force proposed a new civil commitment statute for offenders defined as "sexually violent predators."[18]

The aim of the new statute was to fill the gap between the existing civil commitment process and the criminal justice system.[19] Shriner's case underscored this gap—his criminal sentence had expired, yet he

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12. *Id.*

13. Task Force on Community Protection, *Final Report to Booth Gardner, Governor, State of Washington* (1989) [hereinafter *Final Report*].

14. Boerner, *supra* note 7, at 548–50 (stating that inflexible sentencing would not match culpability and that changing the criminal code would not incapacitate prior offenders).

15. *Id.* at 543; *see also* Wash. Rev. Code § 71.09.010 (1994).

16. Wash. Rev. Code § 71.05.010 (1994).

17. Boerner, *supra* note 7, at 544; *see also Final Report*, *supra* note 13, at II-21. Furthermore, although the statutory standard for civil commitment includes many mental disorders common to sex predators, in practice the standard of commitment is more narrowly defined. Boerner, *supra* note 7, at 543. Commonly, commitment hinges on medical rather than legal definitions of mental illness. *Id.* at 543 n.17.

18. *Final Report*, *supra* note 13, at II-23, III-74 to 79.

19. Boerner, *supra* note 7, at 566.

continued to pose a threat to the community. Nevertheless, his mental illness did not meet the statutory criteria, so he was not committed.[20] The new Statute was not intended to replace or supersede either of the existing systems.[21] The Task Force did not want the Statute to be unworkable or unconstitutionally broad.[22] Therefore, the Statute was narrowly drawn to apply only to those who had committed a sexual crime and had a mental pathology that predisposed them to commit further acts of sexual violence.[23]

B. The Statute

The Sexually Violent Predators statute was passed as part of the larger Community Protection Act by the Washington State Legislature in 1990.[24] The Statute was amended in 1992 and again in 1995.[25] It provides for indefinite civil commitment of "Sexually Violent Predators."[26]

A "sexually violent predator" is defined as a 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 not confined in a secure facility."[27] "Predatory" acts are those "directed towards strangers or persons with whom a relationship has been established or promoted for the primary purpose of victimization."[28] A "sexually violent offense" includes not only sexual crimes such as rape and child molestation, but also murder, assault, kidnapping, burglary, and unlawful imprisonment if it is determined beyond a reasonable doubt that such a crime was sexually motivated.[29] The Statute does not define "personality disorder" and instead defers to the generally accepted

20. *Id.* at 542.

21. *Id.*

22. *Id.* at 567–68.

23. *Id.* at 568–69.

24. 1990 Wash. Laws, ch. 3.

25. 1992 Wash. Laws, ch. 45; 1995 Wash. Laws, ch. 216. Although the 1995 amendments took effect on July 23, 1995, the decision in Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995), was based on the Statute as it was codified before the amendments. However, the amendments do not significantly change the analysis here. Any relevant differences will be indicated.

26. Wash. Rev. Code ch. 71.09 (1994 & Supp. 1995).

27. Wash. Rev. Code § 71.09.020(1) (Supp. 1995).

28. Wash. Rev. Code § 71.09.020(4) (Supp. 1995).

29. Wash. Rev. Code § 71.09.020(6) (Supp. 1995).

medical definition.[30] The Statute defines "mental abnormality" 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."[31] "Mental abnormality" is a legal term designed to include paraphilia, the most common medical diagnosis of sexual predators.[32] This term also was chosen because it had withstood constitutional attack in a similar context.[33]

Under the Statute, the State can initiate the involuntary commitment process when a person's criminal sentence is about to expire; or, if the person is found incompetent to stand trial or found not guilty by reason of insanity, the State can initiate the process when he[34] is about to be released or after he can be released.[35] If a person has been convicted of a sexually violent offense and released, the state may initiate proceedings if the person has committed a recent overt act.[36] To initiate the process, the prosecuting attorney or the attorney general files a petition alleging that the person is a "sexually violent predator."[37] A judge then holds a hearing to determine if probable cause exists to indicate that the person is a sexually violent predator.[38] The person has a right to be present at this

30. Boerner, *supra* note 7, at 569 (stating that the Statute "included 'personality disorder,' a term with a generally accepted definition in the medical community") (footnote omitted); *see also* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 335 (3rd ed. rev. 1987) [hereinafter *DSM-III-R*]. The *DSM-III-R* was often used by courts when determining if a psychiatric diagnosis is acceptable. *See* Heller v. Doe, 113 S. Ct 2637, 2642–44 (1993); *In re* Young, 122 Wash. 2d 1, 27–28, 857 P.2d 989, 1001 (1993). The *DSM-III-R* has now been replaced by the *DSM-IV* (4th ed. 1994), which is substantially similar.

31. Wash. Rev. Code § 71.09.020(2) (Supp. 1995).

31. Boerner, *supra* note 7, at 569.

32. *Id.*

33. *Id.* (citing Humphrey v. Cady, 405 U.S. 504, 510 n.6 (1972) (sustaining unanimously Wisconsin statute which allowed continuing commitment of persons who were dangerous "because of a mental or physical deficiency, disorder or abnormality")).

34. In November 1995, the first female was committed under the Statute. At that time, there were 31 males committed. *Female Sex Offender Is Considered a Sexual Predator*, Seattle Post-Intelligencer, Nov. 24, 1995, at B6. Because the vast majority of sexually violent predators are male, this Note will use the masculine pronoun.

35. Wash. Rev. Code § 71.09.030 (Supp. 1995).

36. Wash. Rev. Code § 71.09.030. A recent overt act is "any act that has either caused harm of a sexually violent nature or creates reasonable apprehension of such harm." Wash. Rev. Code § 71.09.020(5) (Supp. 1995).

37. Wash. Rev. Code § 71.09.030.

38. Wash. Rev. Code § 71.09.040 (Supp. 1995).

hearing.[39] If the judge finds probable cause, the person is taken into custody and evaluated by a professionally qualified person.[40]

Within forty-five days, the court conducts a trial to determine whether the person is a sexually violent predator.[41] The person is entitled to the assistance of counsel and to retain experts on his behalf.[42] If the person is indigent, the court must appoint counsel, and if requested, assist the person in obtaining an expert to examine him and to participate in the trial on his behalf.[43] Either party or the judge has the right to demand a trial before a twelve-person jury.[44]

At trial, the State must prove beyond a reasonable doubt that the person is a sexually violent predator.[45] If the person is incompetent to stand trial, the court first holds a hearing to determine if the person committed the act or acts charged.[46] At this hearing, the person has all the constitutional rights available to criminal defendants except for the right of not being tried while incompetent.[47] If the court finds beyond a reasonable doubt that the person committed the acts charged, it enters an appeallable order to this effect and then proceeds with the commitment trial.[48] If the court or a unanimous jury[49] finds beyond a reasonable doubt that the person is a sexually violent predator, he is committed to the custody of the Department of Social and Health Services (DSHS). He is detained in a secure facility for control, care, and treatment until the court determines that he is safe to either be at large or be released to a

39. Wash. Rev. Code § 71.09.040.

40. Wash. Rev. Code § 71.09.040.

41. Wash. Rev. Code § 71.09.050 (Supp. 1995).

42. Wash. Rev. Code § 71.09.050.

43. Wash. Rev. Code § 71.09.050.

44. Wash. Rev. Code § 71.09.050.

45. Wash. Rev. Code § 71.09.060(1) (Supp. 1995).

46. Wash. Rev. Code § 71.09.060(2) (Supp. 1995).

47. Wash. Rev. Code § 71.09.060(2). Because the scheme involves civil commitment, the State need not afford the person all criminal procedural rights. Because the Statute is designed to commit those with a mental pathology, the right to not be tried while incompetent would render the Statute ineffective in many cases.

48. Wash. Rev. Code § 71.09.060(2).

49. Wash. Rev. Code § 71.09.060(1).

less restrictive alternative,.[50] If the person is not found to be a sexually violent predator beyond a reasonable doubt, he is released.[51]

The person does not give up any legal rights, except those specifically withheld by the Statute.[52] The person must receive adequate care and personalized treatment,[53]including an annual mental examination.[54] The examination must consider whether conditional release to a less restrictive alternative is in the best interests of the person and will adequately protect the community.[55] A report from this examination is forwarded to the court which committed the person.[56] The person has a right to retain his own expert during the examination, or have the court appoint one if he is indigent.[57]

If the Secretary of DSHS finds that the person's condition has changed such that he is not likely to engage in further predatory acts of sexual violence if released to a less restrictive alternative or unconditionally discharged, the Secretary must authorize the person to file with the court and the State a petition for release to a less restrictive alternative or unconditional discharge.[58] The court must then hold another hearing in which the prosecuting attorney or the attorney general must prove beyond a reasonable doubt that the person is still a sexually violent predator.[59]

Independent of the decision by the Secretary, the person also has a right to petition for conditional release to a less restrictive alternative or unconditional discharge.[60] The Secretary must provide the person with an annual written notice of this right.[61] If the court does not receive a written waiver of this right from the person with the annual report, it must hold a

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50. Wash. Rev. Code § 71.09.060(1). The provisions in the Statute allowing conditional release to a less restrictive alternative were part of the 1995 amendments, and were not discussed by the district court.

51. Wash. Rev. Code § 71.09.060(1). The person will usually have completed his criminal sentence because the commitment trial does not occur until the end of the criminal sentence. Wash. Rev. Code § 71.09.030 (Supp. 1995).

52. Wash. Rev. Code § 71.09.080(1) (Supp. 1995).

53. Wash. Rev. Code § 71.09.080(2) (Supp. 1995).

54. Wash. Rev. Code § 71.09.070 (Supp. 1995).

55. Wash. Rev. Code § 71.09.070.

56. Wash. Rev. Code § 71.09.070.

57. Wash. Rev. Code § 71.09.070.

58. Wash. Rev. Code § 71.09.090(1) (Supp. 1995).

59. Wash. Rev. Code § 71.09.090(1).

60. Wash. Rev. Code § 71.09.090(2) (Supp. 1995).

61. Wash. Rev. Code § 71.09.090(2).

show cause hearing with the person's attorney to determine if facts exist to warrant a further hearing to determine whether the person's condition has changed so that he is now safe to be conditionally released to a less restrictive alternative or unconditionally discharged.[62] At this hearing, the person is entitled to the full procedural rights of the initial commitment proceeding, and the State must prove beyond a reasonable doubt that the person is still a sexually violent predator.[63]

II. RELEVANT CONSTITUTIONAL DOCTRINES

In *Young v. Weston*, the court invalidated the Statute on three alternative constitutional grounds. It held that the Statute violated substantive due process, double jeopardy, and the prohibition on ex post facto laws.[64]

A. Substantive Due Process

The Due Process Clause of the U.S. Constitution protects persons from being deprived of life, liberty, or property without due process of law,[65] including both substantive and procedural rights.[66] The substantive component prevents arbitrary and wrongful government action that "shocks the conscience,"[67] even if that action was implemented through a fair procedure.[68]

Freedom from bodily restraint has always been a liberty interest protected by the Due Process Clause,[69] and this interest is fundamental.[70] When the government seeks to infringe on a person's fundamental liberty interest, the scheme must be narrowly tailored to serve a compelling interest.[71] In the context of bodily restraint, this means the nature of the

62. Wash. Rev. Code § 71.09.090(2).

63. Wash. Rev. Code § 71.09.090(2). The district court's decision was based on the Statute prior to the 1995 amendments. *See supra* note 25. In the previous version, a provision required the court to ignore all petitions that followed a frivolous petition unless the person could set forth facts that would warrant a hearing due to a change in the person's condition. Wash. Rev. Code § 71.09.100 (1994). That subsection was repealed by the 1995 amendments. 1995 Wash. Laws, ch. 216, sec. 22.

64. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

65. U.S. Const. amend. XIV.

66. Zinermon v. Burch, 494 U.S. 113, 125 (1990).

67. Rochin v. California, 342 U.S. 165, 172 (1952).

68. *Zinermon*, 494 U.S. at 125.

69. Youngberg v. Romeo, 457 U.S. 307, 316 (1982).

70. United States v. Salerno, 481 U.S. 739, 750 (1987).

71. Reno v. Flores, 507 U.S. 292, 305 (1993).

commitment must bear a reasonable relation to the purpose for which the person is committed.[72] The U.S. Supreme Court has identified several situations in which a compelling governmental interest allows a state to confine a person for non-punitive reasons. These situations include detention prior to deportation for aliens,[73] pretrial detention of dangerous criminal defendants,[74] and post-arrest detention prior to a probable cause hearing by a magistrate.[75]

The U.S. Supreme Court also has allowed states to commit persons who are dangerous to themselves or to others.[76] Because this commitment must be narrowly tailored, the Court has held that state must prove by clear and convincing evidence[77] that the person is mentally ill and dangerous before that person can be subject to civil commitment.[78] The Court has not defined mental illness, nor has it stated what level of mental pathology is constitutionally sufficient for indefinite civil commitment. In the civil commitment context, however, the Court has used "mental illness" and "mental disorder" synonymously.[79] The Court also has used "emotional disorder" in this same context,[80] and it has stated that "mental aberrations . . . might also amount to mental illness."[81]

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

73. *Flores*, 507 U.S. at 306.

74. *Salerno*, 481 U.S. at 751.

75. Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

76. Addington v. Texas, 441 U.S. 418, 426 (1979). The Court stated:

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

Id. The issue in *Addington* was the minimum standard of proof required by the Constitution to commit a person. *Id.* at 419–20.

77. In *Addington*, the Court determined that mere preponderance of the evidence was not a constitutionally sufficient standard for indefinite civil commitment. *Id.* at 427. The Court also decided that beyond a reasonable doubt was too unworkable to mandate, and therefore states were free to set any standard of proof equal to or above "clear and convincing evidence." *Id.* at 433.

78. Jones v. United States, 463 U.S. 354, 370 (1983) (holding that successful insanity defense to criminal charge established necessary mental illness for commitment, and therefore due process did not require additional hearing to establish mental illness).

79. Allen v. Illinois, 478 U.S. 364 (1986) (holding that commitment for sexually dangerous person who suffered from mental disorder was civil, rather than criminal in nature, and therefore Fifth Amendment guarantee against self incrimination did not apply).

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

81. In Humphrey v. Cady, 405 U.S. 504, 512 (1972), the Court noted that the Wisconsin Sex Crimes Act, Wis. Stat. ch. 975 (1971), required a "mental aberration" for initial commitment and a "mental abnormality" for continuing commitment. The Court stated that those who suffer from such conditions might, by definition, suffer from a "mental illness," *Humphrey*, 405 U.S. at 512, which

Although it is unclear what the necessary standard of mental pathology is in civil commitment cases, the Court has been explicit in its view that courts should defer to reasonable legislative judgments in the field of mental illness.[82]

B. Ex Post Facto

The U.S. Constitution prohibits the states from passing ex post facto laws.[83] An ex post facto law is defined as one that is retrospective and disadvantages the offender.[84] Specifically, an ex post facto law applies to a previously charged person and "aggravates" a crime or makes it a more serious violation, permits a different or greater punishment than could have been imposed, or changes the legal rules to allow conviction based on less or different testimony than at the time the crime was committed.[85] The Ex Post Facto Clause ensures that individuals have fair warning of the effect of legislation and restrains the government from passing arbitrary or vindictive legislation.[86]

The ex post facto prohibition applies only to criminal laws and not to those of a civil nature.[87] Categorizing a particular statute as civil or criminal involves a two-stage analysis.[88] First, the court must inquire into the intent of the legislature.[89] Second, even if the court finds that the legislature intended to pass a civil statute, the court must then analyze the

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allowed for civil commitment under the Mental Health Act, Wis. Stat. ch. 51 (1947). Because the commitment procedures differed, this raised an equal protection concern. Although the Court remanded for an evidentiary hearing on the matter, *Humphrey*, 405 U.S. at 517, its comparison of these terms indicated that they are quite possibly synonymous, and certainly not exclusive, in the Court's view.

82. *Jones*, 463 U.S. at 365 n.13. Specifically, the Court stated:

> "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . ." The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.

Id. (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)).

83. U.S. Const. art. I, § 10.

84. Weaver v. Graham, 450 U.S. 24, 29 (1981).

85. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

86. *Weaver*, 450 U.S. at 28–29.

87. *Calder*, 3 U.S. 386; Wayne R. LaFave & Austin W. Scott Jr., *Substantive Criminal Law* § 2.4 n.9 (1986).

88. United States v. Ward, 448 U.S. 242, 248–49 (1980).

89. *Id.*

statute further to see if it is "so punitive either in purpose or effect as to negate that intention,"[90] thus effectively making it criminal in nature.

Determining the legislative intent involves examining the language of the statute, and if necessary, the legislative history. In most cases, it is clear whether the legislature intended a statute to be civil or criminal. However, intending a statute to be civil "does not thereby immunize it from scrutiny."[91] Where the defendant has provided "the clearest proof" that the statute is so punitive in either purpose or effect, a court must categorize the statute as criminal.[92] The U.S. Supreme Court has set forth a non-exclusive list of factors to be considered in determining whether a statute is civil or criminal. These factors include whether: (1) the statute involves affirmative restraint; (2) it requires a finding of scienter; (3) it promotes retribution and deterrence; (4) the behavior is already criminal; and (5) the sanction appears excessive.[93] A criminal statute found to be retroactive and disadvantageous to the defendant violates the Ex Post Facto Clause and will be held unconstitutional. If the statute can be legitimately classified as civil, the Ex Post Facto Clause does not apply.

C. Double Jeopardy

The Double Jeopardy Clause states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[94] The clause prevents three distinct abuses of governmental power: a second prosecution for a single offense after acquittal; a second prosecution for a single offense after conviction; and multiple punishments for a single offense.[95]

The Double Jeopardy Clause, by its nature, always applies in a criminal context. However, unlike the effect of the Ex Post Facto Clause, a civil law can also violate the constitutional prohibition on double jeopardy. If the purpose served by a civil sanction is punitive rather than remedial, the Double Jeopardy Clause is implicated.[96] Furthermore, the purpose need not be exclusively punitive.[97]

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90. *Id.*

91. Collins v. Youngblood, 497 U.S. 37, 46 (1990).

92. Allen v. Illinois, 478 U.S. 364, 369 (1986).

93. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

94. U.S. Const. amend. V.

95. United States v. Halper, 490 U.S. 435, 440 (1989).

96. *Id.* at 448–49.

97. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . . ." *Id.* at

III. ANDRE BRIGHAM YOUNG

A. Facts

Young was convicted in October 1963 on four counts of first-degree rape, including two committed with a deadly weapon,.[98] Within one year, while temporarily free on an appeal bond, Young was charged with an attempted rape.[99] Because he was found incompetent to stand trial, he was never tried for the attempted rape.[100] In 1977, five years after his release for the 1963 convictions, Young was convicted of rape again.[101] He was released in 1980. After entering the apartment of a woman and raping her in front of three small children, he was convicted a sixth time in 1985.[102]

Young underwent a psychiatric evaluation for his commitment trial. He was diagnosed with paraphilia, a sexual disorder.[103] Paraphilia is characterized by intense and recurrent sexual urges often involving children or other nonconsenting persons.[104] Young's paraphilia was classified as "severe," which means that he "has repeatedly acted on the paraphilic urge."[105]

B. Procedural History

The petition for commitment in Young's case was filed on October 24, 1990.[106] Young was scheduled to be released the following day after

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448. In *Halper*, the Court held that a civil fine for Medicare fraud, imposed after a criminal sentence had been served, constituted double jeopardy. *Id.* at 449.

98. *In re* Young, 122 Wash. 2d 1, 14, 857 P.2d 989, 994 (1993).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 29, 857 P.2d at 1002.

104. The features of paraphilic mental illness include "recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other non-consenting persons." *DSM-III-R*, *supra* note 30, at 279; *DSM-IV*, *supra* note 30, at 522–23. "Not otherwise specified" is a residual category of paraphilias that are less commonly encountered. *DSM-III-R*, *supra* note 30, at 280; *DSM-IV*, *supra* note 30, at 532. "Severe" means "[t]he person has repeatedly acted on the paraphilic urge." *DSM-III-R*, *supra* note 30, at 231. The *DSM-IV*, published in 1994 after Young's commitment, no longer specifies the severity of the disorder.

105. *In re* Young, 122 Wash. 2d at 29, 857 P.2d at 1002; *see also DSM-III-R*, *supra* note 30, at 281.

106. *In re* Young, 122 Wash. 2d at 13, 857 P.2d at 994.

serving his sentence for his 1985 rape conviction.[107] The petition listed his criminal history, including the six rape convictions, and included two psychological evaluations of Young.[108]

However, Young's commitment trial did not begin until February 12, 1991.[109] The delay apparently was caused by Young's failed constitutional objections to the Statute. On March 8, 1991, after expert testimony from both sides, the jury determined Young to be a sexually violent predator.[110] After being denied a personal restraint petition by the trial court, Young appealed directly to the Washington Supreme Court.[111] On August 9, 1993, the supreme court upheld the constitutionality of the Statute in a six-three decision.[112]

Young filed a petition for a writ of habeas corpus with the U.S. District Court for the Western District of Washington.[113] Oral argument was heard before a federal magistrate on March 24, 1995.[114] On August 25, 1995, U.S. District Judge John Coughenour, in an order on cross-motions for summary judgment, granted Young's writ of habeas corpus.[115] The court subsequently ordered that Young continue to be held pending the State's appeal to the Ninth Circuit Court of Appeals.

C. *Contradictory Holdings*

The Washington Supreme Court's opinion is primarily dedicated to three different constitutional challenges to the Statute. It addresses ex post facto, double jeopardy, and substantive due process claims.[116]

After examining the factors set forth by *Kennedy v. Mendoza-Martinez*,[117] the court relied primarily on *Allen v. Illinois*[118] in

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107. *Id.*

108. *Id.* at 14, 857 P.2d at 994.

109. *Id.* at 15, 857 P.2d at 994.

110. *Id.* at 16, 857 P.2d at 995.

111. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

112. *In re* Young, 122 Wash. 2d at 10, 857 P.2d at 992.

113. After exhausting the relief available through state courts, persons who are incarcerated under state law can file a petition for habeas corpus in the federal court system, alleging that they are held in violation of the U.S. Constitution. 28 U.S.C. § 2254 (1995).

114. Young v. Weston, 898 F. Supp. at 745.

115. *Id.* at 754.

116. *In re* Young, 122 Wash. 2d at 10–11, 857 P.2d at 992.

117. 372 U.S. 144 (1963). *See supra* note 93 and accompanying text for list of factors.

118. 478 U.S. 364 (1986). *See infra* notes 204–33and accompanying text.

determining that the Statute was civil in nature[119] and therefore could not violate the Ex Post Facto Clause. However, the court recognized that civil proceedings may, in some circumstances, implicate the Double Jeopardy Clause.[120] After examining the holding of *United States v. Halper*,[121] the court determined that civil commitment under the Statute was not punitive, and thus did not constitute double jeopardy.[122] Finally, the court analyzed the statutory requirements in view of *Addington v. Texas*[123] and *Jones v. United States*[124] to determine that the Statute did not violate substantive due process.[125] In this determination, the court carefully distinguished *Foucha v. Louisiana*,[126] which holds that a person acquitted by reason of insanity may not be incarcerated when that person no longer shows symptoms of mental illness.

The district court analyzed the Statute in the context of the same three issues considered by the Washington Supreme Court. The court held, however, that the Statute violates all three constitutional doctrines.[127]

The court determined that the Statute did not require the constitutionally necessary element of mental illness for civil commitment under *Jones* and therefore was equivalent to the unconstitutional preventive detention in *Foucha*.[128] Based on the factors in *Mendoza-Martinez*, the court held that the Statute was criminal rather than civil and that it therefore violated the Ex Post Facto Clause.[129] The court distinguished Washington's statute from the Illinois Sexually Dangerous Persons Act,[130] which *Allen* holds to be civil in nature.[131] Finally, relying on its previous finding that the Statute was criminal, the court held that the Statute also violated the Double Jeopardy Clause by subjecting Young to multiple punishments for the same act.[132]

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

120. *Id.* at 24, 857 P.2d at 999.

121. 490 U.S. 435 (1989). *See supra* notes 95–97 and accompanying text.

122. *In re* Young, 122 Wash. 2d at 25, 857 P.2d at 1000.

123. 441 U.S. 418 (1979). *See supra* notes 76–77 and accompanying text.

124. 463 U.S. 354 (1983). *See supra* note 78 and accompanying text.

125. *In re* Young, 122 Wash. 2d at 26, 33, 857 P.2d at 1000, 1004.

126. *Id.* at 35–39, 857 P.2d at 1005–08 (citing Foucha v. Louisiana, 504 U.S. 71 (1992)).

127. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

128. *Id.* at 750–51 (citing *Foucha*, 504 U.S. 71).

129. *Id.* at 752–53.

130. Ill. Ann. Stat. ch. 725, act 205 (Smith-Hurd 1992).

131. Young v. Weston, 898 F. Supp. at 752–53. *See* Allen v. Illinois, 478 U.S. 364, 375 (1986).

132. *Id.* at 753–54.

IV. ANALYSIS

A. The Statute Complies with the Constitutional Requirement of Substantive Due Process

In *Young v. Weston*, the court improperly concluded that the Statute violated substantive due process. The court analyzed both the statutory language and the legislative history in determining that the Statute did not contain the constitutional requirement of mental illness.[133] In doing so, the court placed undue weight on related psychiatric terminology and misconstrued the language of the Statute through an incomplete analysis of the legislative history. Moreover, because it erroneously determined that the Statute required little more than a showing of dangerousness, the court improperly concluded that the Statute violated the holding in *Foucha*. Furthermore, the court also erred when it conducted a facial constitutional analysis of the Statute[134] when the facts before it presented a constitutionally valid application.

1. The Court Misconstrued the Statutory Language That Requires a Mental Defect

In its analysis of the statutory language, the court first concluded that the legislative findings codified at the beginning of the Statute indicated the lack of a mental illness requirement.[135] Because the Legislature acknowledged that sexually violent predators do not suffer from a disease or defect appropriate for the existing involuntary commitment act,[136] the court quickly concluded that the Legislature meant that sexually violent predators do not suffer from a mental disease or defect at all.[137] However, the reason the Governor's Task Force found the existing

133. *Id.* at 751.

134. *See infra* notes 192–95 and accompanying text.

135. *Id.* at 749–50.

136. Wash. Rev. Code ch 71.05 (1994)

137. The legislature found "that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act." Wash. Rev. Code § 71.09.010 (1994). Focusing on the phrase "do not have a mental disease or defect," the court concluded that the legislature set out to confine persons who are only dangerous and not mentally ill. Young v. Weston, 898 F. Supp. at 749. However, the legislative finding continues by explaining that the existing act "is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to persons with serious mental disorders and then return them to the community." Wash. Rev. Code § 71.09.010. Thus it was the system of treatment, not the lack of a mental disease, that led the legislature to conclude that the existing system was inappropriate.

civil commitment statute inadequate for dealing with sexually violent predators was not because sexual predators lack a mental pathology. Rather, the civil commitment regime's weakness lay in its requirement of a recent overt act[138] and in its very narrowly construed mental illness requirements.[139] In fact, the Statute clearly requires proof beyond a reasonable doubt[140] of either a mental abnormality or a personality disorder.[141]

After the court examined the statutory definitions, it improperly concluded that the definitions revealed an abandonment of a mental illness requirement.[142] The court stated that "the term 'mental abnormality' has neither a clinically significant meaning, nor a recognized diagnostic use among treatment professionals."[143] This conclusion placed undue weight on current psychiatric terminology. The U.S. Supreme Court has frequently recognized the uncertainty in the field of psychiatry and has clearly indicated that this does not prevent legislatures from defining terms necessary for legal judgments.[144] The psychiatric community also has recognized this definitional uncertainty.[145] Accordingly, the court should have followed the lead of the U.S. Supreme Court in deferring to the judgment of the legislature.[146]

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138. Boerner, *supra* note 7, at 544 n.18. The existing civil commitment statute requires a recent overt act for continuing confinement. Wash. Rev. Code § 71.05.320 (1994). The Washington Supreme Court noted that this would be impossible for those who are already incarcerated for a criminal conviction. *In re* Young, 122 Wash. 2d 1, 41, 857 P.2d 989, 1010 (1993).

139. Boerner, *supra* note 7, at 543 n.17.

140. Wash. Rev. Code § 71.09.060 (Supp. 1995).

141. Wash. Rev. Code § 71.09.020 (Supp. 1995).

142. Young v. Weston, 898 F. Supp. 744, 749–50 (W.D. Wash 1995).

143. *Id.* at 750. *See infra* note 148 and accompanying text.

144. *See, e.g.*, Greenwood v. United States, 350 U.S. 366, 375 (1956). The Court stated:

> The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . . Certainly, denial of constitutional power of commitment to Congress . . . ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues.

Id.

145. Scientific categorization of a mental disorder may not be "wholly relevant to legal judgments." *DSM-III-R*, *supra* note 30, at xxix; *DSM-IV*, *supra* note 30, at xxvii.

146. Jones v. United States, 463 U.S. 354, 365 n.13 (1983) (stating that in psychiatry, "courts should pay particular deference to reasonable legislative judgments"). The Washington Supreme Court has noted the frequent discrepancy between psychiatric and legal judgments. *In re* Young, 122 Wash. 2d 1, 28 n.5, 857 P.2d 989, 1001 n.5 (1993) ("Over the years, the law has developed many specialized terms to describe mental health concepts. For example, the legal definitions of 'insanity' and 'commitment' vary substantially from their psychological and psychiatric counterparts.").

The court believed that the statutory definitions were unacceptable.[147] The Legislature chose to define "mental abnormality" 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 a person a menace to the health and safety of others."[148] The court, however, held that the statutory definition was based on circular logic: A sexually violent predator was defined by acts of sexual violence and vice versa.[149] Likewise, the court reached an incorrect conclusion in its analysis the term "personality disorder." Although the court recognized that "personality disorder" has a clinically significant meaning, it stated that no personality disorder is peculiar to sexual offenders, and therefore the Statute's use of the term again invoked a circular definitional structure.[150] In construing the Statute this way, however, the court ignored the following, more reasonable interpretation.

The definitions in the Statute anticipate that the effect of the type of mental condition contemplated is a predisposition to commit sex crimes. This reading stands in contrast to the court's interpretation that the predisposition is the condition itself. The Statute's reference to sexual acts narrows the class of persons who can be committed under the Statute, but it does not by itself establish the mental condition. The existence of a "congenital or acquired condition affecting the emotional or volitional capacity"[151] is not dependent upon a predisposition to commit sexual acts any more than mens rea is dependent upon the actus reus in a criminal case. Likewise, although there may be no personality disorders unique to sexual offenders, the Statute's additional requirement of an overt sexual act[152] prevents detention of those who suffer from a personality disorder but who are not sexually dangerous.

When confronted with alternate interpretations of a statute, a court is bound to construe the statute to be constitutional if doing so does not violate the intent of the legislature.[153] The court emphasized that the

147. Young v. Weston, 898 F. Supp. 744, 750 (W.D. Wash. 1995).

148. Wash. Rev. Code § 71.09.020(2) (Supp. 1995).

149. Young v. Weston, 898 F. Supp. 744, 750 (W.D. Wash. 1995).

150. *Id.*

151. Wash. Rev. Code § 71.09.020(2).

152. *See* Wash. Rev. Code § 71.09.020(1) (Supp. 1995).

153. Robinson v. California, 370 U.S. 660, 685 n.1 (1962) (White, J., dissenting). Justice White stated:

> It has repeatedly been held in this Court . . . that state statutes will always be construed, if possible, to save their constitutionality despite the plausibility of different but unconstitutional

Governor's Task Force on Community Protection found that some persons were sexually violent predators, but not mentally ill and therefore not detainable under the existing commitment statute.[154] Furthermore, the court noted that testimony before the Legislature described a person who was not mentally ill "as that term is defined" and who did not suffer from a "classic" mental illness.[155] The court concluded that the Legislature intended to draft a statute that did not include the existing statute's requirement of mental illness.[156] However, as discussed previously, the Legislature enacted the Statute because commitment under the existing involuntary commitment act usually requires a mental illness as defined by the medical rather than the legal community.[157] The Legislature intended to require a mental condition,[158] and more importantly, the Statute expressly requires such a condition.[159]

Similarly, the legislative history indicates that the Legislature did not intend to establish the existence of a condition solely on sexual behavior, but rather to limit the application of the statute to a very narrow range of persons who already suffer from a mental pathology. The Legislature used the term "mental abnormality" because it includes paraphilia, a medically accepted term, and because it had previously withstood constitutional challenges.[160] There is no indication of the Legislature's intended construction of "personality disorder," other than that the term was acknowledged to have a generally accepted definition within the medical community.[161] Presented with a constitutionally permissive interpretation of the Statute, the court had a duty to construe it this way.[162]

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interpretation of the language . . . . Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution . . . .

Id. See also United States v. Rumely, 345 U.S. 41, 45 (1953); Asbury Hosp. v. Cass County, 326 U.S. 207, 213 (1945). *Cf.* Alabama St. Fed'n of Labor, Local 103 v. McAdory, 325 U.S. 450, 461–62 (1945).

154. Young v. Weston, 898 F. Supp. at 750.

155. *Id.* at 750 n.3.

156. *Id.* at 750.

157. *See supra* note 17.

158. Boerner, *supra* note 7, at 569.

159. Wash. Rev. Code § 71.09.020 (1994).

160. *See supra* text accompanying notes 32–33.

161. Boerner, *supra* note 7, at 569; *see DSM-III-R*, *supra* note 30, at 335.

162. *See e.g.*, Robinson v. California, 370 U.S. 660, 685 (1962) (White, J., dissenting); United States v. Rumely, 345 U.S. 41, 45 (1953); Asbury Hosp. v. Cass County, 326 U.S. 207, 213 (1945); *cf.* Alabama St. Fed'n of Labor, Local 103 v. McAdory, 325 U.S. 450, 461–62 (1945).

2. *The Court Improperly Analogized the Statute to* Foucha v. Louisiana

Having incorrectly interpreted the Statute to lack the required mental condition, the court then compared it to Louisiana's preventive detention scheme ruled unconstitutional in *Foucha v. Louisiana*.[163] In *Foucha*, Louisiana attempted to confine, based upon mere dangerousness, an insanity acquittee who doctors believed had recovered from his mental illness.[164] The U.S. Supreme Court ruled that this was a violation of the narrowly tailored requirements of mental illness and dangerousness necessary for continued civil commitment.[165] In *Young v. Weston*, the court concluded that *Foucha's* holding applied to Washington's statute,[166] comparing Foucha's "antisocial personality," which fell short of mental illness,[167] to the "personality disorder" targeted by the Washington statute.[168]

However, the court failed to follow the example of the Washington Supreme Court in *In re Young*[169] by further analyzing these terms. The supreme court, in upholding the Statute, noted that the *DSM-III-R*[170] distinguished "antisocial personality" from "antisocial personality disorder." While the former is categorized under "Conditions Not Attributable to a Mental Disorder," the latter is a recognized mental disorder.[171] Moreover, the U.S. Supreme Court has upheld the Illinois sexual predator statute[172] that uses the term "mental disorder."[173] The Washington statute more closely resembles the substance and procedure of the Illinois statute than the Louisiana statute[174] that was struck down in *Foucha*. In fact, in holding that the Statute met the constitutional requirement of "mentally ill," the Washington Supreme Court took note

163. Young v. Weston, 898 F. Supp. 744, 750–51 (W.D. Wash. 1995).

164. Foucha v. Louisiana, 504 U.S. 71, 74–75 (1992). A three-member panel at the mental hospital where Terry Foucha was detained determined that he no longer suffered from a mental illness, but one of the doctors testified that he had an "antisocial personality." *Id.*

165. *Id.* at 86.

166. Young v. Weston, 898 F. Supp. at 750–51.

167. *Foucha*, 504 U.S. at 74.

168. *Id.*

169. 122 Wash. 2d 1, 38 n.12, 857 P.2d 989, 1007 n.12 (1993).

170. *See supra* note 30.

171. *In re* Young, 122 Wash. 2d at 38 n.12, 857 P.2d at 1007 n.12 (1993) (citing *DSM-III-R*, *supra* note 30, at 342, 359).

172. Ill. Ann. Stat. ch. 725, act 205 (Smith-Hurd 1992).

173. Allen v. Illinois, 478 U.S. 364, 365 n.1 (1986).

174. La. Code Crim. Proc. Ann. art. 654 (West 1981).

of this and the fact that the U.S. Supreme Court has used "mental disorder" and "mental illness" interchangeably on several occasions.[175]

Moreover, the Statute is readily distinguishable from the Louisiana scheme. The Court in *Foucha* based its holding on three factors: (1) because there was no evidence of mental illness, the nature of the commitment did not reasonably relate to the purpose of the commitment; (2) the procedural safeguards were constitutionally inadequate; and (3) confinement was not imposed under any previously recognized authority of the State, such as criminal incarceration, pre-trial detention, or civil commitment.[176] Louisiana sought to detain Foucha in a mental institution despite his lack of mental illness.[177] This violated the due process requirement that the nature of commitment bear a reasonable relation to the purpose of the commitment.[178] In contrast, the Washington statute commits persons with a diagnosed mental pathology to a secure facility for control, care, and treatment,[179] thereby specifically serving the dual purposes of incapacitation and treatment.[180]

In addition, the Statute has the procedural safeguards which the Louisiana scheme lacked. The State must meet the highest burden of proof, beyond a reasonable doubt, in order to commit a person.[181] This exceeds the U.S. Supreme Court's minimum standard of "clear and convincing evidence."[182] The Louisiana statute, on the other hand, placed the burden on the person to prove that he was no longer dangerous.[183] Hence, unlike Louisiana's scheme, Washington's heightened burden of proof helps equalize the risks of an erroneous determination in a commitment proceeding.[184]

Finally, unlike the Louisiana statute, detention under the Washington Statute clearly requires a mental pathology, in addition to a showing of dangerousness,[185] and therefore satisfies the requirements for a traditional

175. *In re* Young, 122 Wash. 2d at 27 n.3, 857 P.2d at 1001 n.3 (citing Allen v. Illinois, 470 U.S. 364 (1986); Addington v. Texas, 441 U.S. 418 (1979)). *See also supra* notes 79–81 and accompanying text.

176. Foucha v. Louisiana, 504 U.S. 71, 78–80 (1992).

177. *Id.* at 78.

178. *Id.* at 79 (citing Jones v. United States, 463 U.S. 354, 368 (1983)).

179. Wash. Rev. Code § 71.09.060(1) (Supp. 1995).

180. Wash. Rev. Code § 71.09.010 (1994).

181. Wash. Rev. Code § 71.09.060(1).

182. Addington v. Texas, 441 U.S. 418, 433 (1979).

183. Foucha v. Louisiana, 504 U.S. 71, 73 (1992).

184. *See* Heller v. Doe, 113 S. Ct. 2637, 2644 (1993).

185. Wash. Rev. Code § 71.09.020(1) (Supp. 1995).

civil commitment scheme like those in *Addington v. Texas*[186] and *Jones v. United States*.[187] Louisiana allowed detention under a scheme that was not consistent with any previously recognized authority of the State. Following a not-guilty verdict on a weapons charge because of a successful temporary-insanity defense, Foucha was detained because a doctor refused to certify that he was no longer dangerous, although there was "no evidence of mental illness."[188] This detention represented a significant loss of liberty not permitted under civil commitment or criminal schemes.[189] Because the Washington Statute clearly requires a mental pathology, it meets the requirements for civil commitment.

Furthermore, as the Washington Supreme Court correctly indicated,[190] *Foucha* was a five-four decision in which Justice O'Connor cast the deciding fifth vote. Although concurring in the Court's opinion, Justice O'Connor wrote separately to indicate that the *Foucha* holding was limited to the broad statutory scheme at issue, and did not apply to more narrowly drawn statutes.[191] The Washington statute is limited to sexual predators and clearly requires a mental pathology, two factors which make its application far more limited than the Louisiana detention scheme.

3. *The Court Erred in Conducting a Facial Analysis of the Statute When the Facts Before It Constituted a Constitutionally Valid Application*

With respect to the substantive due process requirement, the court's method of constitutional adjudication was erroneous. In constitutional adjudication, a party does not have standing to challenge the constitutionality of a statute that does not adversely impact his own constitutional rights.[192] At the beginning of its opinion, the court

186. 441 U.S. 418 (1979).

187. 470 U.S. 354 (1983).

188. Foucha v. Louisiana, 504 U.S 71, 74–75 (1992).

189. *Id.* at 79.

190. *In re* Young, 122 Wash. 2d 1, 38, 857 P.2d 989, 1007 (1993).

191. *Foucha*, 504 U.S. at 86–87. (O'Connor, J., concurring) ("I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities. This case does not require us to pass judgment on more narrowly drawn laws . . . .").

192. County Court v. Allen, 442 U.S. 140, 154 (1979) (citing Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973)). The Court stated:

> A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the

incorrectly held that the Sexually Violent Predators statute was unconstitutional on its face and therefore there was no need for an evidentiary hearing to assess its application.[193]

Even assuming the legitimacy of the argument that the Statute allows commitment upon a mere demonstration of a mental pathology short of the constitutional standard, Young's diagnosis met the that standard.[194] Neither the court nor Young put forth any evidence to suggest that he was not mentally ill. Because the Statute is valid as applied, it cannot be unconstitutional on its face with respect to the Due Process Clause.[195] The court should not have conducted a facial analysis of the Statute without first determining if the facts before it constituted a valid application of the Statute. Furthermore, even if the Statute was unconstitutional as applied to Young, there would undoubtedly be constitutionally valid applications of the statute; that is, cases where the person clearly suffers from a mental illness severe enough to exceed the constitutional minimum. Therefore, regardless of the severity of Young's mental pathology, the court overstepped its bounds when it conducted a facial due process analysis.

B. The Statute Did Not Violate the Ex Post Facto Clause

The court further erred in concluding that the Statute violated the Ex Post Facto Clause.[196] After correctly acknowledging that the prohibition on ex post facto laws turns on whether a statute is classified as civil or criminal, the court incorrectly classified the Statute as criminal.[197]

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application of the statute to the litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

Id.

193. Young v. Weston, 898 F. Supp. 744, 746 (W.D. Wash. 1995).

194. Young was diagnosed with severe paraphilia. *In re* Young, 122 Wash. 2d 1, 29, 857 P.2d 989, 1002 (1993). Severe paraphilia is a medically defined mental disorder which is characterized by uncontrollable impulsive sexual urges that are frequently acted upon. *See supra* note 104.

195. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (facial challenge to statute difficult because "challenger must establish that no set of circumstances exists under which [the statute] would be valid"); *Broadrick*, 413 U.S. at 610–11 (statute cannot be challenged "on the ground that it may conceivably be applied unconstitutionally to others"); *see also* Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012, *denying cert. to* 962 F.2d 1366 (9th Cir. 1992). Justice Scalia, joined by Chief Justice Rehnquist and Justice White, dissented from a denied petition for certiorari. "[A] facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied." *Id.* (Scalia, J., dissenting).

196. U.S. Const. art I, § 10.

197. Young v. Weston, 898 F. Supp. at 753.

1. *The Statute and Its Legislative History Clearly Indicate a Civil Intent*

The Statute is clearly intended to be civil in nature. There is absolutely no evidence that the Legislature intended the Statute to be anything but a civil commitment scheme. The Washington Supreme Court so held,[198] and the district court failed to put forth any argument to the contrary. The original law passed by the Legislature was entitled "Civil Commitment."[199] Although that term is not part of the law as it is now codified, the Statute is codified under Title 71, Mental Illness, in the Revised Code of Washington.[200] The care and custody of sexually violent predators is the duty of the Department of Social and Health Services, not the Department of Corrections.[201] Furthermore, the task force that proposed a sexually violent predator statute referred to it as civil commitment,[202] and the final legislative report stated that "a new civil commitment procedure is created for 'sexually violent predators.'"[203]

2. *The Washington Statute Is Sufficiently Similar to the Illinois Statute in* Allen v. Illinois

Noting that a civil intent does not end the analysis, the court examined the purpose and effect of the Statute. The court correctly acknowledged that only the clearest proof is sufficient to negate the legislative intent that a statute be classified as civil.[204] Therefore, the court's analysis must be viewed in that context.

The court put forth three arguments to support its ruling that the Statute was criminal in nature. It held that the Statute unconstitutionally subjected persons to affirmative restraint, applied to behavior that was already criminal, and promoted the traditional aims of punishment—retribution and deterrence.[205]

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198. *In re* Young, 122 Wash. 2d at 19, 857 P.2d at 996 ("Both the language of the Statute and the legislative history evidence a clear intent to create a civil scheme.")

199. 1990 Wash. Laws, ch. 3, § X.

200. Wash. Rev. Code ch. 71.09 (1994 & Supp. 1995).

201. Wash. Rev. Code § 71.09.060(1) (Supp. 1995).

202. *Final Report, supra* note 13, at II-23.

203. 1990 Final Legislative Report, 2SSB 6259, at 144.

204. Young v. Weston, 898 F. Supp. 744, 751 (W.D. Wash. 1995).

205. *Id.* at 752–53.

First, the court noted that affirmative restraint is one of many factors that may point to the criminal nature of the statute.[206] The court then compared the Statute to the Illinois Sexually Dangerous Persons Act,[207] which the U.S. Supreme Court determined to be civil rather than criminal in nature.[208]

a. Affirmative Restraint

In attempting to distinguish the two statutes, the court noted that in Illinois, the person detained under the statute was free to "'apply for release at any time.'"[209] The court implied that the Washington statute did not allow this and therefore constituted an unconstitutional application of affirmative restraint.[210] A close examination, however, reveals many similarities between the two statutes. In Washington, the case is reviewed every year and the person may petition for release at any time.[211] In Illinois, the case is reviewed every six months, and the person may petition for release at any time.[212] The court noted that in Washington, the petitioner must show probable cause that he is no longer dangerous in order to receive a "full adversarial hearing."[213] The Illinois statute is silent on the guarantee of an adversarial hearing, and only allows a hearing if the application for release sets forth "facts showing that such . . . person has recovered."[214] In effect, the Illinois statute requires the same display of probable cause to warrant a release hearing. Furthermore, the court failed to note the Washington's statute's additional safeguard—without the annual written waiver for a show cause hearing, the court is required to hold such a hearing.[215]

The court further noted that the Illinois statute provides for conditional release while the Washington statute does not.[216] The Washington statute has now been amended to provide for conditional

206. *Id.* at 752 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

207. Ill. Ann. Stat. ch. 725, act 205 (Smith-Hurd 1992).

208. Allen v. Illinois, 478 U.S. 364, 374 (1986).

209. Young v. Weston, 898 F. Supp. at 752 (quoting *Allen*, 478 U.S. at 369).

210. *Id.*

211. Wash. Rev. Code § 71.09.090(2) (Supp. 1995).

212. *Allen*, 478 U.S. at 369 n.3.

213. Young v. Weston, 898 F. Supp. at 752.

214. Ill. Ann. Stat. ch. 725, ¶ 205/9 (Smith-Hurd 1992).

215. Wash. Rev. Code § 71.09.090(2) *See supra* text accompanying notes 60–62.

216. Young v. Weston, 898 F. Supp. at 752.

release.[217] Nevertheless, this apparent distinction turns out to be illusory, whether one is comparing the Statute in its prior form or current form to the Illinois statute. The Illinois statute allows for conditional release if the person "appears no longer to be dangerous" but it is impossible to determine "with certainty" that the person "has fully recovered."[218] In Washington, once the person has set forth facts which establish probable cause that he is safe to be at large, the State must prove otherwise beyond a reasonable doubt or he is unconditionally discharged.[219] Because of the heightened standard of proof in the Washington statute, when a person "appears no longer to be dangerous," and thus would be eligible for only conditional release under Illinois law, the person would have created a reasonable doubt as to his dangerousness and be unconditionally discharged. Thus, contrary to the assertion of the court, the Washington statute is actually less restrictive in this respect, especially considering the newer provision for conditional release.

In sum, the Washington statute gives the person greater procedural rights to release than the Illinois statute. The only argument to the contrary is that absent a petition for release, cases are reviewed every six months in Illinois compared to every year in Washington. This is hardly a distinction which provides "the clearest proof"[220] that Washington's statute is criminal when the U.S. Supreme Court has already determined that the Illinois statute is civil. The court's argument that the Washington statute subjects persons to unconstitutional affirmative restraint is, therefore, simply not convincing.

b. Criminal Behavior

The court's second argument in support of its assertion that the Washington statute is criminal in nature is that the "[s]tatute applies to behavior that is already criminal."[221] In giving credence to this argument, however, the court completely ignored the precedent in *Allen*, in which the petitioner raised this exact argument.[222] The Illinois statute, like Washington's, requires proof of a criminal act before the State can initiate commitment proceedings.[223] The U.S. Supreme Court decided

217. Wash. Rev. Code ch. 71.09 (1994 & Supp. 1995) *See supra* note 25.

218. Ill. Ann. Stat. ch. 725, ¶ 205/9 (Smith-Hurd 1992).

219. Wash. Rev. Code § 71.09.090 (Supp. 1995). *See supra* text accompanying note 63.

220. Allen v. Illinois, 478 U.S. 364, 369 (1986).

221. Young v. Weston, 898 F. Supp. 744, 752 (W.D. Wash. 1995).

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

223. Ill. Ann. Stat. ch. 725, ¶ 205/1.01 (Smith-Hurd 1992).

that such an argument was without merit, stating "[t]hat the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one."[224]

c. Retribution and Deterrence

The court's final argument was that the Statute promotes the traditional aims of punishment—retribution and deterrence.[225] Because the Illinois statute is remarkably similar to Washington's, the court relied on one distinguishing factor: In Washington, the State does not initiate commitment proceedings until just prior to release, whereas in Illinois, the State may initiate proceedings at any time.[226] The court noted that Illinois must choose either punishment or treatment at the time the offender is charged with a crime.[227] The court regarded this as "central" to the Illinois scheme, while implying that Washington was more concerned with punishment than treatment.[228] The court quoted *Allen* to support this contention: "'[T]he State serves its purpose of treating rather than punishing sexually dangerous persons.'"[229] A look at *Allen* reveals that the court took this statement entirely out of context. The U.S. Supreme Court used this language not to argue that the Illinois statute's alternative to punishment was crucial to the Court's decision, but rather to negate the argument that the Illinois statute was criminal because the sexual offenders were detained along with other convicts in a maximum-security facility.[230]

Contrary to the court's beliefs, the Washington statute's purpose is control, care, and treatment.[231] The fact that a person may have been imprisoned in Washington does not change the nature of the subsequent civil commitment.[232] Once a person has been committed in Washington

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

225. Young v. Weston, 898 F. Supp. at 752.

226. *Id.*

227. *Id.*

228. *Id.* at 753.

229. *Id.* at 752 (quoting *Allen*, 478 U.S. at 373).

230. *Allen*, 478 U.S. at 373.

231. Wash. Rev. Code § 71.09.060(1) (1994).

232. David Boerner states:

> In *Baxstrom v. Herold*, a unanimous Court . . . held that it was a denial of equal protection for a state to provide for civil commitment at the termination of a prison sentence without a jury trial when a jury trial was provided for all others subject to civil commitment . . . . The Court said not

(or Illinois), the purpose is the same: to protect the community and to treat the person. While the court seemed to focus exclusively on an alleged lesser emphasis on treatment in the Washington statute when compared to the Illinois statute, it failed to even mention the legitimate goal of incapacitation for the safety of the community that a civil statute may provide.[233] More importantly, the court failed to provide any evidence that the Statute promotes retribution or deterrence any more than the Illinois statute.

Particularly when analyzed under the clearest proof standard, the court's attempt to distinguish the Washington statute from the Illinois statute fails to demonstrate why the Washington statute is criminal instead of civil. The holding of *Allen* covers Washington's Sexually Violent Predators statute, and the Statute, therefore, must be classified as civil.

C. *The Court Failed to Provide Evidence that the Statute Violated the Double Jeopardy Clause*

The court listed three distinct possible double jeopardy abuses, but it noted that only one was at issue—multiple punishments for the same offense.[234] When the purpose of a civil sanction is punitive, it may constitute double jeopardy if enforced after a criminal proceeding.[235] The court relied on the fact that a person committed under the Statute already may have been incarcerated for a crime.[236] However, for the Statute to constitute double jeopardy, it must serve a punitive purpose beyond its remedial one.[237] In simply relying on its prior determination that the statute was criminal, the court failed to provide any evidence that the Statute had a punitive aim or purpose. The court illogically imputed the punitive nature of criminal incarceration to the subsequent civil commitment and then stated that Young had been punished twice for the

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a word to indicate that any substantive limits existed as to the use of civil commitment at the conclusion of a prison sentence.

Boerner, *supra* note 7, at 555 (citing Baxstrom v. Herold, 383 U.S. 107 (1966)).

233. Addington v. Texas, 441 U.S 418, 426 (1979) ("[T]he state also has the authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.").

234. Young v. Weston, 898 F. Supp. 744, 753 (W.D. Wash. 1995).

235. United States v. Halper, 490 U.S. 435, 447 n.7 (1989).

236. Young v. Weston, 898 F. Supp. at 754.

237. *See Halper*, 490 U.S. at 448–49 (Double Jeopardy clause is violated when "the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.") (emphasis added).

same crime. Furthermore, civil commitment under the Statute is not based solely on the criminal conviction and therefore cannot violate the Double Jeopardy Clause.[238] Accordingly, because civil commitment under the Statute is not punitive and is not predicated by the same offense, the Statute does not violate the Double Jeopardy clause.

V. CONCLUSION

Washington has enacted a civil commitment statute to address a legitimate social need. The Task Force that drafted the Statute carefully incorporated the constitutionally required mental pathology component and narrowly tailored the Statute to meet a legitimate state interest without jeopardizing the liberty of its citizens. Unfortunately, the U.S. District Court has erred by ruling the Statute unconstitutional and thereby preventing the state from taking legitimate steps to protect its communities.

238. Referring to this very statute, the Ninth Circuit stated:

> Yet, while the Act's application is predicated upon the existence of one or more past criminal convictions, confinement under the Act is not simply an extension of an inmate's previous sentence: it has additional prerequisites and involves a separate jury trial. [The person's] current confinement . . . was not imposed directly pursuant to [his prior conviction].

Brock v. Weston, 31 F.3d 887, 889 (9th Cir. 1994).