After *Hendricks*: Defining Constitutional Treatment for Washington State's Civil Commitment Program

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Nothing compels a state to adopt a statute of this nature in the first place and many states have not done so, but a state that chooses to have such a program must make adequate mental health treatment available to those committed.

— JUDGE WILLIAM L. DWYER, *Turay v. Weston, 1999*

ABSTRACT: Washington State's law for sexually violent predators was enacted in 1990; since then, 14 other states have passed similar laws authorizing civil commitment for dangerous sexual offenders following their prison terms. Although the law has survived constitutional challenges at both the state and in the U.S. Supreme Court, a related set of court actions has addressed whether the treatment program is adequate. In 1994, the federal district court placed Washington's program under injunction and appointed a special master to ensure that the state improve deficiencies in the program. As of 2003, the federal court continues to oversee the state's program, with a threat of fines totaling several million dollars if the injunction terms are not met. Over an eight-year period, the special master delivered 19 reports to the court, documenting the program's deficiencies as well as its successes in meeting the court's orders. This article reviews these reports and court orders, detailing the court's requirements for an adequate treatment program.

KEYWORDS: sexually violent predators; civil commitment; adequate treatment program; Washington State

FIRST PROGRAM CRITIQUE: 1992

When Vernon Quinsey, Ph.D., visited Washington State's program for sexually violent predators (SVPs) in February 1992, the program had nine residents who had been civilly committed for "control, care, and treatment" to a special commitment

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center (SCC) inside a medium secure prison after completing their prison sentences (RCW 71.09.060). Quinsey, an international expert in sexual offender research and assessment, visited the program at the request of a state research organization charged with assessing the effectiveness of Washington's 1990 Community Protection Act.[a] This omnibus legislation had been proposed by a governor-appointed Task Force on Community Protection and was designed to remedy various perceived weaknesses in laws concerning sexual offenders. In particular, the law created a new form of involuntary commitment for dangerous sexual offenders who reached the end of their maximum prison term and were not suitable for confinement under the short-term provisions of state mental health law. This new form of civil commitment for a "small, but extremely dangerous" group of persons found to meet the definition of sexually violent predator was first enacted by Washington's legislature and later adopted by 14 other states (Lieb, 2003, p. 41). The law's focus on social control mechanisms following prison terms has been described elsewhere as a "third wave" of legislative and public attention on sexual offenders in the United States (Lieb, Quinsey, and Berliner, 1998, p. 53). As is often the case, this U.S. innovation in legal mechanisms for sexual offenders was precipitated by a horrendous crime. Washington's "trail of tears" leading to its SVP legislation has been described elsewhere and explored with particular care by the law's architect, David Boerner (1992).

At the time that Quinsey visited the SCC program in Monroe, Washington, it was located in a wing of the Special Offender Unit of the Department of Corrections (DOC). The state Department of Social and Health Services was responsible under the law for running the program, so the unit staff were all employed by the DSHS. Security, meals, and transportation were provided under contract by the DOC. The first person was committed to the program in October 1990; by the time of Quinsey's visit in 1992, three residents were engaged in the treatment program; the remaining six refused to participate. Quinsey identified what he described as two "very serious difficulties" with the program: one concerned the legislation itself, and the second concerned its implementation (Quinsey, 1992, p. 3). In terms of the underlying legislation, Quinsey noted that the ambiguous constitutional status of the law created "great uncertainty," and many residents were "simply waiting to see" if the law would be declared unconstitutional. "Everything is on hold until the legal issues are addressed more definitely," Quinsey concluded (p. 3).

Because the SVP law was imposed after, not before or instead of, a criminal sentence, Quinsey observed that it challenged the usual construct of treatment-oriented sentences. In his view, a front-end disposition, such as a sentencing option, was far preferable for "legal, ethical, and therapeutic reasons" (p. 3). Even so, front-end applications had been difficult for jurisdictions to apply in an effective and fair manner, leading to loss of political support and, in some instances, repeal. Because SVP statutes are imposed after completion of a criminal sentence, Quinsey noted residents have particular reason to perceive the law as "arbitrary and excessive," making it extremely difficult for program staff to form a "therapeutic alliance with an embittered clientele" (p. 4). Quinsey observed that many SCC residents saw

[a]The 1990 Community Protection Act directed the Washington State Institute for Public Policy to evaluate the effectiveness of state-supported programs for sexual offenders. The author works for the Institute.

litigation as their only route to release "or at least, quick release" (p. 4). Until some residents secured their release as a result of treatment-induced changes, Quinsey concluded "it will be extremely difficult to convince residents that a therapeutic release route is feasible" (p. 4).

In his report, Quinsey complimented the SCC treatment staff for their dedication and interest in creating a state-of-the-art cognitive-behavioral intervention program. Quinsey observed, however, that the statutory language did not "induce therapeutic optimism" because its preamble referenced a population that was unlikely to be cured (p. 4). To gain release, he noted, residents must convince a jury or court that their thinking/behavior patterns had changed such that they no longer posed a risk to the community. Quinsey questioned how treatment could be shown to alter the residents' mental diagnosis since their common diagnosis was "personality disorder," and most of the defining factors of this diagnosis are historical in nature (p. 4).

How then to improve the law? Quinsey recommended the state amend its statute to include a gradual release mechanism so residents who had progressed in treatment could be tested for release readiness in stages. Without such a mechanism, Quinsey advised, the law had a "fatal problem" (p. 5). In terms of program management, he observed that it was not wise to continue mixing residents awaiting trial with those who were committed for treatment, nor to mix residents participating in treatment with those who were not. In both instances, he predicted a negative affect on treatment participation.

Finally, Quinsey recommended that the state give "considerable thought" to the management and daily living patterns for those residents who were not progressing toward a stage of safe release, or not opting for treatment (p. 6). In these instances, he noted, long-term living arrangements were needed that offered opportunities for education, recreation, and personal development. "For most of these men," he concluded, "it is likely that secure perimeter security can be combined with considerable freedom within the institution" (p. 6).

Whatever the wisdom of Quinsey's recommendations, the state did not respond to the report by altering the SVP legislation or program structure. Given the uncertainty about the law's constitutionality, state leaders instead appear to have taken a "wait and see" attitude. The following year, 1993, the law passed its first major legal hurdle when Washington's Supreme Court found the law constitutional in a 6 to 3 ruling (*In the matter of the Personal Restraint of Andre Brigham Young, August 1993*). Because the law pushed traditional boundaries between civil and criminal law, legal experts were certain the case would ultimately be decided by the U.S. Supreme Court.

FEDERAL COURT INJUNCTION: 1994

The SVP law next made Washington State headlines in 1994 when a federal district court in King County found that the SCC treatment program violated its residents' civil rights. Challengers successfully convinced a jury that the 14th Amendment required that residents have access to mental health treatment offering a realistic opportunity for cure or improvement in the mental condition that caused the confinement. The presiding judge, William L. Dwyer, was an esteemed legal

figure in the Northwest with a portfolio of landmark decisions, including a 1991 ruling that barred timber sales throughout the threatened habitat of the spotted owl.

Dwyer found that Washington failed to provide plaintiffs with access to "constitutionally adequate treatment" that offered "a realistic opportunity to be cured or to improve the mental conditional for which he was confined" (*Richard G. Turay v. David B. Weston et al.* No. C91-664WD, p. 2). Dwyer referenced trial testimony that had revealed that most of the program's clinical staff were inexperienced with a sexual offender population. "Training has been largely ad hoc, consisting primarily of lectures," without a supervising psychologist or psychiatrist available to staff for the majority of the program's operation (p. 3). Staff and residents were unable to assess treatment progress with any objective measures of improvement.

The court's injunction defined the steps necessary for Washington to bring the program into compliance with the constitution. Five injunction elements were specified:

- adopt and implement a plan for initial and ongoing training and/or hiring of competent sexual offender therapists;
- implement strategies to rectify the lack of trust and rapport between residents and treatment providers;
- implement a treatment program that includes all therapy components recognized as necessary by professional standards in comparable programs where participation is coerced, including the involvement of spouses and family members;
- develop and maintain individual treatment plans for residents that include objective benchmarks of improvement; and
- provide a psychologist or psychiatrist expert in the diagnosis and treatment of sexual offenders to supervise the clinical work of treatment staff, including monitoring of treatment plans of individual residents (pp. 4 and 5).

Following the June 1994 ruling, the state had until July 20 to alter the program to satisfy the injunction. On August 22, the court found the state's plans insufficient and ordered the parties to submit nominations for a "special master" to oversee the state's progress in meeting the injunction and offer expert advice to the state. Federal courts periodically use special masters to oversee court-mandated changes in public systems, including state boundary definitions, civil rights desegregation, and prison improvements (Feeley and Rubin, 1998, p. 75).

The person selected as Special Master, Janice Marques, Ph.D., brought strong qualifications to this position. Marques works as a manager in California's Department of Mental Health, previously directed a treatment program for sexual offenders at Atascadero State Hospital, and is a national leader in the field of sexual offender treatment. Her research on a treatment program for sexual offenders is widely regarded as the "gold standard" design on this topic (Marques et al., 1994).

THE FIRST YEARS OF THE INJUNCTION: 1994–1997

The Special Master's first reports to the court confirmed the injunction findings. Following a two-day visit in November 1994, Marques called particular attention to

the "seriousness" of the lack of trust and rapport between residents and treatment providers. She observed that some difficulty in this regard was "inevitable" due to the nature of the involuntary commitment: "This is at best a challenging and difficult context in which to establish the trust and respect necessary for effective treatment" (p. 2). By this point, she reported, the program had a "four-year history of problems in this area" and both "staff and residents appear discouraged" (p. 2). Marques concluded that "significant improvements will not come quickly or easily" (p. 2).

In February 1995, the Special Master issued her second report and offered more descriptions and analysis of the SCC's difficulties (Second Report of Special Master, February 13, 1995). Marques noted that the "boredom, idleness, and impatience among most of the residents" was obvious, "as is their lack of hope regarding their chances for earning release through treatment" (p. 4). The staff, she observed, show "the strain of working in an environment in which their decisions are always challenged and their efforts criticized" (p. 4). Marques described the treatment environment as "particularly difficult and strained," and that the program was pervaded by a "litigious atmosphere" (p. 3) where nearly everyone is "involved in or affected by resident complaints, legal challenges and court actions" (p. 4). Marques urged the clinical team to work quickly to finalize the targets for treatment so that residents could see a "light at the end of the tunnel" (p. 5). She reported that none of the therapists or supervisors were certified as expert sexual offender treatment providers. (This certification was created in the same omnibus legislation authorizing the SVP law.) Although not required in the SVP law, Marques observed that treatment providers with this certification would "enhance the program's content and credibility" (p. 9). In terms of statutory remedies, Marques encouraged the state to pursue statutory revisions to authorize conditional release to the community following treatment (p. 5).

In the spring of 1995, the court received its third report from Marques. The report described progress on several fronts, including the hiring of a part-time, certified sexual offender specialist to lead the clinical team. The negative treatment environment was described as a continuing challenge: "there is still a long way to go before a positive treatment environment is established at SCC" (p. 6). Marques described the residents who actively refused treatment as "dominat[ing] the environment with their complaints and expressions of frustration" (p. 6). The fourth report (June 1995) describes a "very productive work period" (p. 5), with program changes that were intended to "limit interaction between those in treatment and those who are not." Persons who either were "actively opposing treatment" or "presenting significant management problems" (p. 3) were not allowed in the areas occupied by those participating in treatment. Marques noted that this separation, however, was not a complete solution, as treatment participants "continued to feel intimidated by some of the treatment refusers" and the refusers felt "frustrated and unduly restricted" (p. 7).

The legislative revision authorizing a conditional release provision was passed by the 1995 Legislature (Chapter 216, Laws of 1995). Marques observed that this legislation was "encouraging," but residents were unsure whether the required conditions "could ever be met" (p. 9). Marques observed that "it will be a major milestone in the program's development when the first resident, with the support and collaboration of the treatment staff, is released under these new provisions" (p. 10). In a few instances, individual courts in Washington released persons found to be SVPs directly to the community, requiring significant supervision and treatment elements. These

persons usually resided in group homes with 24-hour supervision (DSHS press release, May 4, 2001).

In August 1995, Marques' fifth report placed significant emphasis on the treatment environment. Marques noted that this area of the injunction was the "most complicated and difficult" as it involved all residents and staff (p. 7). In her view, the "realistic goal" was a "healthy and humane environment at SCC, one in which effective treatment can occur," where those in treatment must not be harassed by other residents, and those not in treatment must have alternative productive activities (p. 7). Additionally, management of residents must be "guided by an overall set of rules that are fair, clearly communicated to the residents, and consistently enforced by the unit staff" (p. 7).

The negative SCC atmosphere, in Marques' view, was not the "result of staff incompetence or abuse;" she observed that staff had been "exceptionally resistant in the face of frequent criticism and threats of lawsuit" (p. 10). In her view, "some residents will never want to contribute to a positive environment at SCC and will continue to challenge the law, the program, and the staff on a regular basis" (p. 10). Treatment participants and refusers must be physically separated, she concluded, to create the possibility of a "cohesive, therapeutic environment" (p. 11).

From November 1995 through early 1996, several expert consultants visited the SCC at the request of Marques and offered recommendations. Her two reports during this time period concentrated on resident management issues and efforts to provide fair and consistent application of rules. A new position of ombudsman was established to assist with this goal, with selection made by both parties. Although counsel from both sides helped draft provisions regarding the position's role and authority, creating a structure to support a neutral role in the highly contentious environment was not easy.

The first ombudsman, Tamara Menteer, was hired in January 1996. Difficulties with the position emerged early; Marques' report to the court in July 1996 described the ombudsman's challenges in establishing trust and maintaining a neutral role. The ombudsman described her position to Marques as a "nearly impossible combination of tasks" (p. 8). Eventually, Menteer was terminated; her views became a matter of public record when she published an article about the SCC in a Seattle weekly newspaper (Menteer 1998). Menteer concluded that she found it "all but impossible" to remain neutral (p. 2); after her departure she founded an organization opposing continued punishment of sex offenders beyond their original sentence (Whitestone Foundation, 2003).

By 1996, the program's location as a separate wing in Monroe Corrections Center was clearly problematic. The space limitations made it difficult to separate the population according to their treatment participation, except in a superficial way, nor was there adequate room for recreational and vocational activities.

In 1997, Judge Dwyer visited the SCC and met with staff and residents. His subsequent October 1997 court order reinforced the program shortfalls identified in the injunction: (1) that staff needed experience working "under the direct supervision of an expert in the field;" (2) that "a community transition component... is not yet operational;" (3) that "treatment with a resident's family members has not yet been adequately integrated into the program, although progress has been made;" (4) that "each treatment plan... should broadly assess a resident's needs and skills beyond the offense behavior;" (5) that "each resident should be able to compare his program

to objective measure of progress;" and (6) that "before the injunction is dissolved a structure for objective, external oversight must be in place" (p. 4). The order anticipated compliance by the end of six months. "What is required is not a plan," Dwyer wrote, "but a reality—the genuine providing of adequate mental health treatment to all SCC residents willing to accept it" (p. 4).

Dwyer found that the physical plant was a "serious obstacle to providing constitutionally adequate treatment" and prospects for compliance with the injunction would be enhanced by having the SCC move to a "better facility as soon as possible" (December 23, 1998, p. 5). As the state considered options for relocating the SCC, the range of choices appeared limited. The law called for a "secure facility" (RCW 71.09.060[3]); given the mental health treatment component, an obvious option was a state mental health hospital. Of the 14 states that passed SVP laws, 5 required that the program be located in a hospital setting (Lieb, 2003, pp. 46–51). Washington's history with its previous sexual offender treatment program, however, caused the 1990 Legislature to eliminate this option from the start.

Along with half of the states, Washington had earlier enacted special laws for sexual psychopaths; Washington's law passed in 1947 (Lieb, Quinsey, and Berliner, 1998, p. 59; Bowman, 1952, p. 38). Persons found by Washington's courts to be sexual psychopaths were committed to Western State Hospital near Tacoma or, to a much lesser extent, to Eastern State Hospital near Spokane. The Western State program operated under a model allowing residents more freedom as they progressed in treatment; at the final stage they had keys to their rooms. In the 1970s, the Western State program made headline news when a resident who escaped committed a rape and two murders. In 1979, headlines returned when a graduate who subsequently worked in the program as a therapist was found murdered in an isolated area. He had been shot by a man he was attempting to rape. Other bodies were found in this area, along with the discovery of sadomasochistic items in his apartment. In 1988, a resident on "furlough" committed a rape at knifepoint (Boerner, 1992, p. 552). Shortly thereafter the program was closed. Because of this history, the original SVP legislation specified that the program could not be located on the grounds of a state mental facility or regional rehabilitation center because "these institutions are insufficiently secure for this population" (RCW 71.09.060[4])).[b]

MOVING TO THE ISLAND: 1997

In late 1997, the state moved the program to McNeil Island Correctional Center (MICC), a medium-security prison located on an island off Puget Sound. The island, near Tacoma, formerly housed a federal prison, but in the 1980s the property was transferred to Washington State for use as a prison. As was the case in Monroe, the arrangement between the state Department of Social and Health Services (DSHS) and Department of Corrections called for the DOC to provide medical care, meals, transportation, and external security, while the DSHS was responsible for treatment. The Special Master's twelfth report, in 1997, described the advantages that the SCC superintendent expected from the McNeil Island location: "better program space;

[b]Lieb 1996, pp. 8–9.

greatly enhanced resources, including educational vocational opportunities; and proximity to Western State Hospital, which would allow SCC to share training and clinical resources with a major mental health program" (p. 11).

Most of these advantages, however, did not initially materialize. It was difficult for a mental health program run by the DSHS for less than 70 residents to negotiate terms with the DOC's management running a 1000-bed prison. Although the SCC program had experienced conflict with corrections managers in Monroe, the program was located within a "pod," and it was possible to influence this environment. The move to McNeil Island introduced a new set of variables because program space was not as self-contained; additionally, the injunction required the program to offer residents more opportunities for treatment and recreation, placing greater demands on the SCC to negotiate with the DOC.

The conflicts between the organizations centered on security issues. Prison regulations, for example, called for routine strip searches following a resident's visit with family and friends. Additionally, telephone calls were restricted to collect outgoing calls; a recorded announcement at the beginning of the call identified the caller as a prison inmate. When the federal court entered two court orders to end routine strip searches, prison management finally complied but also disallowed residents' use of the "big yard" due to perceived security threats. Clearly, these rules did not mesh with practices in the state's mental hospitals.

THE U.S. SUPREME COURT SPEAKS: 1997

In 1997, the U.S. Supreme Court settled the constitutionality of the SVP statute ruling on the Kansas statute that was modeled on Washington's law (*Kansas v. Hendricks*, 521 U.S. 346,369). The Supreme Court allowed states "wide latitude in developing treatment regimes [for sexual offenders]... and liability [on a claim for constitutional deprivation] may be imposed only when the decision by the professional is such a satisfactory departure from accepted judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment" (*Kansas v. Hendricks*, 521 U.S. 346, 368 n.4 [1997]).

The Special Master reported that the *Hendricks* decision precipitated a very difficult time for the residents, many of whom had expected to be released immediately after the decision was issued. Her twelfth report in the fall of 1997 described a "tense and negative" unit, with several residents "invested in the failure of SCC, including any of the program's efforts to improve trust and rapport" (p. 19). A second ombudsman had been appointed by this time, with an altered reporting structure so the person was supervised by a DSHS assistant secretary rather than by SCC management (p. 19).

The court's order in February 1997 acknowledged the state's progress in meeting the injunction requirements and described the newly appointed superintendent and clinical director as appearing to have the "credentials, experience, and energy needed to maintain a constitutionally adequate and effective program" (p. 3). Judge Dwyer indicated that he was nonetheless unwilling to release the state from the injunction because "more remains to be done" (p. 3). Dwyer restated the urgent need for a functioning community transition component as well as fuller integration of family members into the program. Additionally, Dwyer described the "treatment

atmosphere and staff-resident relations" as the most difficult area of the injunction (p. 3). In 1998, Dwyer visited the relocated facility and determined that the standards for providing mental health treatment were "still unmet" (November 1998, p. 12). The trial testimony of an expert witness for the plaintiffs, Dr. Craig Harvey, is quoted in the order:

> The first is that, as I suggested earlier, the Department of Corrections very clearly dominates physically, administratively, procedurally, and psychologically the MICC and really in many significant ways encompasses the SCC. It is, for all intents and purposes, a prison. Feels like a prison, looks like a prison, and for the most part operates like a prison.
>
> In my opinion, in addition, in some not insignificant ways, the SCC residents actually have fewer, not more, liberties in comparison to the Department of Corrections prisoners. It is also my opinion that these things collectively represent impediments to any possibility that any significant therapy or treatment can be done under the present circumstances and in addition, because of the quality of life which is created there and the conditions that have been created there,... present me with a concern about potential deterioration of people who are kept in the SCC under the current conditions. (December 23 order, p. 7).

The entanglement of the SCC with the prison clearly disturbed the court. Dwyer took significant issue with the MICC superintendent's request that the court defer to her professional judgment "about the needs of a prison" (p. 7). Dwyer pointed out that "the court has not ordered the DOC to do anything" (p. 6) and that SCC is "required by constitutional law *not* to be a prison" (p. 7). When the state argued that it was unclear what the court meant by directing "better meal and activity schedules," Dwyer's patience appeared strained as he described the obvious meaning: "meal and activity schedules that are more ample and more attuned to the rhythms of ordinary life, as contrasted with the artificial and restricted schedules that have prevailed to date" (p. 9).

In 1998, Washington State settled with 16 long-term SCC residents, paying each $10,000 for the inadequate mental health treatment plus $250,000 in legal fees. The state's attorneys made a strategic decision to stop defending the program's past conditions: "We are in a new place now and we have a relatively new style of treatment program," the SCC Assistant Attorney General stated to the press, "and we figured this is a way to move forward. (Porterfield, October 2, 1998, AI).

INCOMPATIBILITY OF A PROGRAM INSIDE A PRISON: 1998

In 1999, the U.S. Supreme Court agreed to hear a related SVP case, *Seling v. Young*. This case concerned whether the program's conditions of confinement were punitive and therefore violated constitutional prohibitions against *ex post facto* and double jeopardy. Again, many SCC residents hoped that this case would eventually bring them freedom.

The Special Master issued her sixteenth report in September 1999; by this time, the injunction had been operating for five and a half years. Marques described some conditions as improved, including one-third of the residents actively participating in treatment. Serious shortcomings, however, persisted, and the "prison's influence remains pervasive and damaging" (p. 12). A report in October from an independent group with a multidisciplinary focus, the Inspection of Care Committee, found deficiencies similar to those in the Special Master's report and characterized the program

as operating "more like a correctional facility than a treatment center or program" (*Turay v. Weston,* November 15, 1999, p. 17). Dwyer's court order in November 1999 concluded that the only expected advantage of the program's relocation to McNeil that had materialized was "larger space with better views" (p. 11). He described the program as an "unwanted stepchild of a medium-security prison" (p. 16). Clearly, he was tired of waiting for compliance and decided to take action, finding the state in contempt of court (p. 20).

Dwyer identified three main causes for Washington's failure to achieve compliance:

- Inadequate resources: The "chief cause" was the state's failure to devote necessary resources to achieve compliance" (pp. 15–16). "Instead of doing what must be done, the state has treated SCC as an unwanted stepchild of a medium-security prison" (p. 16).
- Entrenched resistance to the injunction: "The defendants have fallen into a pattern of first denying that anything is amiss at SCC, then engaging in a flurry of activity to make improvements before the next court hearing, then admitting at the hearing that shortfalls of constitutional magnitude still exist, then returning to denial" (p. 16).
- The prison's dominating influence: "The placement of SCC within the perimeter of MICC continues to make it difficult to achieve a treatment-oriented environment."

Rejecting plaintiffs' requests to release all SCC residents as a remedy, Dwyer decided instead to impose financial penalties on Washington State. The sanctions were structured to create significant incentives for compliance: the state must pay $50 a day for each resident each day if the court's ordered improvements were not made, with payment deferred for six months. By this route, the judge put pressure on Washington's executive and legislative branches to invest in the law, both with resources as well as political will.

Washington's political leaders quickly responded to Dwyer's ruling. "When Judge Dwyer rules, governors jump" read the editorial in the *Tacoma News Tribune* (May 9, 1999). Within two days of the court ruling, Governor Locke declared his intent to ask legislators for $19 million to improve the program and authorized state officials to immediately spend a portion of this amount. Locke clarified the political stakes: "I ask the Legislature to join me in ensuring that the Civil Commitment program meets constitutional standards so that we are never forced to release dangerous sex offenders into the community without adequate treatment or supervision" (Carter, 1999, B2). That year, the program received an additional $3 million for staff hiring and training, and the Legislature budgeted $14 million for the first stage of a new stand-alone facility to be built on the island outside the McNeil Island Correctional Center (*Turay v. Seling*, May 5, 2000, p. 10).

Dwyer's November 1999 court order included commentary on the inherent difficulty of the SVP law. Although the statute is constitutional "on its face," Dwyer noted, in practice it "causes resentment and resistance because it reconfines, for an indefinite period, offenders who have served their sentence and have been released. Successful treatment of sexual offenders is no easy task even among those who voluntarily seek it; it is harder yet, by and large among those involuntarily committed.

But the difficulties have been recognized fully in the generous time already allowed for compliance, and at this point, on this record, do not excuse a failure to perform" (pp. 17–18). In terms of the relative policy merits of the SVP statute, Dwyer wrote that this question must be determined by the "public and the legislature, not the courts..." (p. 16).

As the SCC program hired staff and concentrated on improving treatment conditions, the Governor and legislative leaders tackled the statutory changes necessary to meet the court's order for a transitional facility in the community. The first efforts by the Department of Social and Health Services to locate transitional housing for individual residents resulted in front-page news when neighbors learned that the state planned to move a multiple rapist into a neighborhood. Local elected officials joined citizens to cry foul (Pacey, 2000, p. A1). The department then created a special task force to identify requirements for the facility and a process to identify and consider sites (Shrkorsky, 2000, p. A1; Washington State Department of Social and Health Services, 2002).

The task force identified several factors essential in site selection, including an average five-minute response time for law enforcement to reach the facility (DSHS, 2002, p. 17). This requirement made it difficult to site the facility in a physically remote location. As the department moved ahead in considering sites, each locality identified as a potential site responded with strong and immediate opposition. In each case, the argument followed the same pattern: Although we are sympathetic to the state's plight, our area is unsuitable and we already shoulder an unfair burden of the state's undesirable facilities—for example, mental hospitals, prisons, or work release programs.

In December 2000, the DSHS secretary authored an op-ed piece entitled, "We Can and Must Make This Sex Offender Program Work." The ten-year-old SCC program was at a "crossroads," Secretary Braddock argued, and "as a state and a society we will either follow through on the promise of civil commitment process for sexual offenders or we will risk losing the opportunity to continue supervising and treating these and future offenders after they are released from prison" (Braddock, 2000, p. B7).

IMPROVEMENT NOTED BUT INJUNCTION RETAINED: 2000

The May 2000 court order acknowledged the state's "genuine and sustained effort" to bring the SCC program into compliance since the contempt order was issued (p. 9). The seventeenth report from the Special Master described the period as "exceptional" (p. 9), noting that DSHS management had declared they would "make every effort not only to bring SCC into compliance with the injunction, but to build a model civil commitment program" (p. 2).

The court stated that "there is no doubt that this effort was caused by the contempt order" and "both sides have proposed findings" to this effect. "At all previous stages, the state agencies moved slowly, and often reluctantly, to make improvements. Faced with a sanction, they have moved with speed and determination" (p. 10).

As the injunction continued, the budgetary implications of sustaining a constitutionally sound treatment program at SCC became clear to legislative leaders. Seeing the long-term expense required by the SVP law, state fiscal leaders chose to create

an alternative policy path for the future. In June 2001, 3ESSB 6151 was passed, establishing a prospective sentencing system for sexual offenders that maintained state controls over those determined to pose high risks. In doing so, the "pipeline" for potential SVP residents would eventually be significantly reduced for sex offenders sentenced after the effective date. "It has become very apparent that the costs of those residents at McNeil Island [have] become a drain," the House Republican's chief budget writer at the time stated. "Things just keep going up and going up with no end in sight" (Carter, 2000, p. 10).

After the next federal court hearing on the injunction in December 2000, Dwyer recognized the state's "genuine and sustained effort to bring the SCC program into compliance," noting that contributions of the SCC administration, the DSHS, the governor, and the state legislature (December 20, 2002, p. 8). "Conditions are much better," Dwyer wrote. The Superintendent, Mark Seling, was acknowledged in this order as providing "capable leadership" (p. 8).

Once again, the ombudsman had become a source of controversy. The court described the individual as a "conscientious and devoted advocate for the SCC residents"; however, his "partisanship" was hampering his effectiveness. Eventually, this person's contract was terminated (p. 10).

The 2000 court order directed that a separate facility was necessary for the SCC to effectively remove the prison's influence on the treatment program. Dwyer identified the program's continuing major flaw as the lack of a "step-down" facility. "Mental health treatment, if it is to be anything other than a sham, must give the confined person the hope that if he gets well enough to be safely released, then he will be transferred to some less restrictive alternative" (p. 11). Dwyer stated that the political opposition to these facilities, although "real and understandable," cannot justify a deprivation of SCC's residents' constitutional right to treatment (p. 7).

CONTROVERSY IN SITING A TRANSITIONAL FACILITY: 2000–2003

With the infusion of funds, the SCC's treatment program, as well as its vocational and recreational activities, were significantly expanded, and the Special Master's eighteenth report, in November 2000, described numerous accomplishments (p. 9). Similarly, her nineteenth report, in June 2001, described progress in these areas. Establishing a community transition facility remained the chief issue for the injunction. Also in 2001, the U.S. Supreme Court rejected the aargument that the State's SVP law "as applied" violated the Constitution (*Seling v. Young*, 2001). For SCC residents, this case had represented the last hope for immediate release through the courts.

In 2001, the Legislature directed all counties and cities to amend their comprehensive plans and development regulations for a Secure Community Transition Facility (SCTF). No jurisdiction elected to pursue the planning process; intead, some passed resolutions and ordinances to further restrict siting (*Turay v. Seling*, April 17, 2002, p. 13). The 2002 Legislature then passed ESSB 6594, preempting and superseding local laws and regulations and granting authority for the state to situate the facility if the counties do not plan for their location (Chapter 68, Laws of 2002). A "fair share" concept was incorporated into the law that requires counties that have committed the largest number of SCC residents to "take back a fair share of those who are condition-

ally released..."(DSHS, July 20, 2002, p. 2). Because more than 30 percent of the SCC residents have been committed from King County, the recent search for a transitional facility has concentrated on that area (DSHS, July 20, 2002, p. 2).

The process of situating a King County facility continues at the time of this writing. The facility is described in the press as "one of the most-despised public projects in recent local memory" (Ko, April 20, 2003). Public hearings have drawn thousands of protesters, with local elected officials leading the charge to fight locating the facility in their area (Barker, December 20, 2002). The law forbids location of the facility within "line of sight" of a "risk potential activity or facility." This definition includes schools, bus stops, day care centers and preschools, parks, trails, sports fields, playgrounds, recreational and community centers, synagogues, temples, mosques, and public libraries" (RCW 71.09.020 [11]). One proposed site was removed from consideration when a "fatal flaw" was discovered—that is, a school bus stop used by one child (DSHS, July 2002, p. 3). State officials plan to announce their decision sometime before the October 2003 federal court hearing on the injunction (Friederich, May 16, 2003, p. B3). The deferred sanctions in the case continue to accrue and will reach more than $6 million in the fall of 2003 (Friederich, February 6, 2003).

In 2002, the case was transferred to Judge Barbara Rothstein after Judge Dwyer's death from liver cancer. Shortly before Dwyer's death, Janice Marques stepped down from her seven-year role as Special Master. Judge Dwyer commended her for her valuable role in the case (*Turay v. Seling*, September 2001), describing her work and reports as "of great benefit to the court, the parties, the public, and to all institutions in the United States devoted to the civil commitment and treatment of persons found to be sexually violent predators" (p.1).

WHY HAS IT BEEN SO DIFFICULT?

Why has Washington's law faced such an arduous journey? Observers point to a variety of answers. Some believe the principal difficulties rest with the law, believing it to be an effort to further punish individuals under the guise of treatment. Others point to Washington's "pioneering" role with the statute and the fact that each step required the establishment of new legal ground.

Some onlookers criticize the state's legal strategy, characterized by Judge Dwyer as denial, followed by foot dragging, followed by denial. For some, politicians are the chief culprit because they embraced the law as a political solution in 1990 but never intended to fund and operate a full-fledged treatment program.

Although this article has focused on court decision-making, Judge Dwyer believed the central policy questions associated with the SVP statute belong elsewhere: "Whether better or more economical ways exist to prevent sex offenders from reoffending is for the public and state legislature, not the courts, to decide (*Turay v. Seling*, May 5, 2000, p. 6).

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