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LOCK THEM UP AND THROW AWAY THE KEY: HOW WASHINGTON'S VIOLENT SEXUAL PREDATOR LAW WILL SHAPE THE FUTURE BALANCE BETWEEN PUNISHMENT AND PREVENTION

*Sarah E. Spierling**

INTRODUCTION

It was not until the latter half of the twentieth century that practitioners in the field of mental health law rejected the draconian approach to the institutionalization of the mentally disabled and initiated a movement to "establish and protect" the rights of those with psychiatric and developmental disabilities as "a means of gaining fair and equal treatment and fostering the respect and dignity every human being deserves."¹ Two United States Supreme Court decisions in particular provide the bookends for the sea change in the attitudes of the public with respect to the rights of the mentally ill: *Buck v. Bell*² in 1927, and *City of Cleburne v.*

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¹ ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 1 (1996). Proponents of involuntary civil commitment believe that "[b]y providing essential treatment, commitment restores decisional capacity and individual liberty. After treatment is completed, most patients . . . will be thankful that they were committed." *Id.* at 25. Furthermore, proponents believe that involuntary commitment will offer some safety to those who would not otherwise survive outside an institution. *Id.* at 25-26.

² 274 U.S. 200 (1927). The issue in *Buck* was whether the State of Virginia could perform involuntary sterilizations on people with mental retardation to prevent them from having children who may also be born retarded. The Supreme Court held that it could. *Id.* at 207.

*Cleburne Living Center*³ in 1985.⁴ Between *Buck* and *Cleburne*, judicial recognition of the rights of people with mental disabilities advanced significantly, and courts eventually concluded that the mentally disabled, "like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law."⁵

Despite the recognition that the mentally ill have due process rights, the development of involuntary civil commitment has operated as a severe check on such rights. Involuntary civil commitment emerged to address a multitude of concerns about people with mental disabilities who were themselves unable to recognize or respond appropriately to their illnesses.⁶ Involuntary civil commitment statutes exist in every state,⁷ and allow the state to commit a person against his or her will if there is proof of a mental disability that poses a substantial threat of serious harm to oneself or others.⁸ The threat of harm must be real and present, and the burden of proof to establish dangerousness (to self or

³ 473 U.S. 432 (1985). The Court held that mental retardation was a characteristic that must be taken into account by the government when making laws, and that legislation that distinguished between the mentally retarded and others, must be rationally related to a legitimate governmental purpose. *Id.* at 446.

⁴ LEVY & RUBENSTEIN, *supra* note 1, at 1-2.

⁵ *Cleburne*, 473 U.S. at 447.

⁶ LEVY & RUBENSTEIN, *supra* note 1, at 24. "Many proponents of [involuntary] commitment insist that confinement should be based on a simple need for treatment . . . [and] help those with diminished mental capacity who are unable to seek the treatment they desperately need." LEVY & RUBENSTEIN, *supra* note 1, at 24.

⁷ See, e.g., 405 ILL. COMP. STAT. 5/3-600 (West 2000); N.J. STAT. ANN. § 30:4-27.13 (West 2001); WASH. REV. CODE § 71.05.150 (West 2000); see also Sandy Lovell, *Court Lifts Three-Month Ban on Megan's Law Notifications*, N.J. L.J. 193, July 17, 2000, at 161. After the enactment of Megan's Law, every state has some type of sexual predator notification statute. *Id.* States that have specific commitment statutes include Arizona, California, Colorado, Connecticut, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Oregon, Tennessee, Utah, Washington and Wisconsin. *Kansas v. Hendricks*, 521 U.S. 346, 397 (1997).

⁸ LEVY & RUBENSTEIN, *supra* note 1, at 26-27.

others) must be clear and convincing.⁹ Proponents of involuntary commitment viewed this form of treatment as a last resort effort to help the mentally disabled who were imminently dangerous and in desperate need of mental health treatment,¹⁰ while critics of the practice focused on the fact that there is no assurance that such commitment accomplishes the goal of treatment and improvement of mental condition.¹¹ Despite ardent opposition by opponents, these statutes have withstood numerous constitutional challenges.¹²

Legislators have traditionally codified treatment by civil commitment within a state's civil code as opposed to its criminal code, because the idea behind civil commitment is not to punish a person for a wrongdoing, but rather to treat a person to make him or her a healthy member of society. Despite the loss of liberty, courts have upheld such commitments as civil in nature because of the treatment purpose behind the statutes. Within the past decade, states have taken this idea of treatment by civil commitment even further, by tying it to criminal sentences for sex offenders.¹³ In 1990, Washington became the first state to implement such a statute,¹⁴ including a controversial provision for the involuntary commitment of sex offenders to the Special Commitment Center ("SCC") housed at McNeil Island, which is also home to the

⁹ LEVY & RUBENSTEIN, *supra* note 1, at 27.

¹⁰ LEVY & RUBENSTEIN, *supra* note 1, at 24-25.

¹¹ LEVY & RUBENSTEIN, *supra* note 1, at 22-23.

¹² See, e.g., *Barefoot v. Estelle*, 463 U.S. 880 (1983) (allowing clinical predictions of dangerous, even if inaccurate, to justify involuntary confinement); *Addington v. Texas*, 441 U.S. 418 (1979) (rejecting proof beyond a reasonable doubt standard at commitment hearings); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (the first Supreme Court case to review the constitutional boundaries of civil commitment).

¹³ See, e.g., 725 ILL. COMP. STAT. 205/1.01 (West 2000); KAN. STAT. ANN. § 59-29a01. Kansas' statute is modeled after Washington's 1990 Community Protection Act and has survived challenges to several constitutional provisions, including the Due Process, double jeopardy and ex post facto clauses, in *Kansas v. Hendricks*, 521 U.S. 346 (1997); see also N.J. STAT. ANN. § 30:4-82.4 (West 2000); WASH. REV. CODE ANN. § 71.09.010 (West 2000).

¹⁴ WASH. REV. CODE ANN. § 71.09. This statute is known as the 1990 Community Protection Act.

McNeil Island Corrections Center.¹⁵ Created under the 1990 Community Protection Act,¹⁶ the SCC houses violent sex offenders deemed too dangerous to be released after serving their criminal sentences.¹⁷ At the SCC, the state has created a hospital-type setting, where residents take classes on anger and stress management, while undergoing therapy designed to help them control their violent impulses.¹⁸ Since the passage of this law, however, the SCC has been severely attacked. Critics argue that its treatment

¹⁵ See Dep't of Corrections, *Institutional Operations*, available at <http://www.wa.gov/doc/Content/oco.htm> (last visited Mar. 25, 2001). McNeil Island is classified as one of Washington's "major institutions," and primarily houses maximum, close and medium custody offenders. It is located in Steilacoom, Wash. *Id.*

¹⁶ WASH. REV. CODE ANN. § 71.09.

¹⁷ *Id.* at § 71.09.030. The statute reads:

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.020(3), 10.77.110 (1) or (3), or 10.77.-150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

Id.

¹⁸ Keiko Morris, *Sex Offender's Plea for Freedom: Rapist Says He's 'Gained A Lot' from Treatment*, SEATTLE TIMES, Aug. 16, 2000, at B1. While the SCC has not specified what treatment is most effective, the center's clinical director, Vincent Gollogly, pointed out in a May report that risk of re-offending diminishes with treatment. *Id.*

program and facilities are punitive in nature, thereby violating the Double Jeopardy and Due Process Clauses of the United States Constitution, and demand the release of those offenders committed under the statute's provisions.¹⁹ The statute survived the most recent constitutional attack in *Seling v. Young*.²⁰ This decisive opinion is critically important to opponents of civil commitment, sex offenders and states because this is likely to be the last time the Supreme Court will accept review of this issue.

None of the sex offender laws with involuntary civil commitment provisions have been held to violate the constitution by the United States Supreme Court.²¹ It is possible, however, that the Court's analysis was not correct. Traditional civil commitment statutes have been deemed constitutional because they provide the means for people with mental disabilities to return to society once successfully treated, in addition to providing for the treatment necessary to attain a socially acceptable level of competence.²² But current sex offender statutes have been held constitutional even if they do not meet the treatment element.²³ In fact, the *Young* decision severely limits the remedies available to the mentally disabled,²⁴ holding Washington State's statute constitutional,

¹⁹ See *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999), *cert. granted*, 529 U.S. 1017 (2000) (holding that the statute is not punitive in nature and is therefore constitutional); *In re Turay*, 986 P.2d 790 (Wash. 1999) (finding that commitment as sexually violent predator is constitutional); *In re Campbell*, 986 P.2d 771 (Wash. 1999) (holding that while some provisions of the statute are unconstitutional, the statute itself is constitutional in its application).

²⁰ *Seling v. Young*, 121 S. Ct. 727 (2001). For a further discussion of the history of *Young's* case, see *infra* at Part II. B.

²¹ See, e.g., *Young*, 121 S. Ct. at 737; *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

²² See, e.g., *Hendricks*, 521 U.S. at 365-66.

²³ See *Young*, 121 S. Ct. at 734. "For those individuals with untreatable conditions . . . there [is] no federal constitutional bar to their civil confinement." *Id.*

²⁴ *Id.* at 735. In *Young*, the Court dismisses *Young's* allegations of inadequate mental health treatment by inferring that these allegations no longer apply to the assessment of the statutory scheme once the statute has been deemed civil in nature. *Id.* at 735. The Court explained:

[W]e do not deny that some of respondent's allegations are serious. Nor do we express any view as to how [Young's] allegations would

despite the fact that its treatment provisions do not pass constitutional muster as applied to currently committed offenders. The Court has now paved the way for states to use civil commitment as a tool for extending criminal sentencing, taking involuntary commitment out of the civil context with its accompanying goal of treatment of mental disabilities, and placing it in the possession of criminal prosecutors as a means of indefinite punishment. This does not comport, however, with the policy reasoning or constitutional limitations that have supported traditional civil commitment laws for decades.

This Note critiques the Supreme Court's analysis of statutes providing for the involuntary commitment of sex offenders, and attempts to predict the future of such statutes, particularly in light of the recent review of Washington's sex offender statute in *Young*.²⁵ Additionally, it explores whether the Supreme Court decisions have conformed to the policy reasoning behind the notion of involuntary civil commitment, and suggests alternatives for the future.²⁶

Part I presents the background of civil commitment statutes, including the history, Supreme Court analysis, criticism, and recent

bear on a court determining in the first instance whether Washington's confinement scheme is civil. Here, we evaluate respondent's allegations as presented in a double jeopardy and *ex post facto* challenge under the assumption that the Act is civil.

Id.

²⁵ *Young*, 121 S. Ct. 727 (2001).

²⁶ This Note will not provide an in-depth analysis of the constitutional implications of using civil commitment as a means of double punishment, nor will it examine the application of these statutes to those offenders committed before the laws were passed, as this has been covered extensively in other Notes. See *Current Developments in the Law: A Survey of Cases Addressing State Statutes Pertaining to the Treatment, Registration and Community Notification Requirements for Sexual Offenders*, 6 B.U. PUB. INT. L.J. 293 (1996); Kimberly A. Dorsett, Note, *Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 DEPAUL L. REV. 113 (1998); Brian D. Gallagher, *Now That We Know Where They Are, What Do We Do With Them?: The Placement of Sex Offenders in the Age of Megan's Law*, 7 WIDENER J. PUBLIC L. 39 (1997); Christine M. Kong, Comment, *The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 VILL. L. REV. 1257 (1995).

developments. This part examines statutes from Washington,²⁷ Kansas,²⁸ Illinois,²⁹ Iowa³⁰ and New Jersey,³¹ providing a sample of the types of statutes currently in existence. In addition, Part I discusses the theory of Therapeutic Jurisprudence ("TJ")³² and how it relates to sexual predator laws. TJ relies heavily on the social sciences, and encourages social scientists to engage in empirical research to measure the type of impact rules of law and procedures have on people who become involved in the legal system.³³ This part also discusses the TJ analyses already conducted in relation to sexual predator laws, and how future legislation may be impacted by the results.

Part II examines current sex offender statutes and their constitutional challenges as reviewed by the Supreme Court. In particular, this part discusses the Supreme Court's landmark decision in *Kansas v. Hendricks*,³⁴ where the Court declared current statutory schemes for the involuntary commitment of sex offenders to be constitutional,³⁵ and *Young*, affirming the *Hendricks* decision.³⁶ It also presents opponents' criticisms of the two decisions. Additionally, Part II looks at *Turay v. Weston*,³⁷ a case from the Western District of Washington, which held the state statute unconstitutional as applied to those committed under it, and ordered an injunction against the state until it complied with certain

²⁷ WASH. REV. CODE ANN. §§ 71.09.010-.09.902 (West 2000).

²⁸ KAN. STAT. ANN. §§ 59-29a01-2986 (West 2000).

²⁹ 725 ILL. COMP. STAT. §§ 205/1.01-207/40 (2001).

³⁰ IOWA CODE § 229A (1999).

³¹ N.J. STAT. ANN. § § 30:4-82.4 (West 2000).

³² See John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375 (1999). The theory of Therapeutic Jurisprudence ("TJ") asserts that the rules and procedures of law, and how well legal 'players' play their roles can have a positive or negative impact on the psychological well-being of those who become involved in our legal system. Because of this, proponents of TJ urge legislators and policy-makers to consider social science policies when formulating new laws and procedures. *Id.* at 375.

³³ *Id.* at 375-76.

³⁴ 521 U.S. 346 (1997).

³⁵ *Hendricks*, 521 U.S. at 371.

³⁶ *Young*, 121 S. Ct. at 737.

³⁷ *Turay v. Weston*, 108 F. Supp. 2d 1148 (W.D. Wash 2000).

treatment provisions of the statute.³⁸ Washington's SCC continues to operate under injunction today.³⁹

Finally, Part III focuses on the future of sex offender statutes, and suggests alternatives to the utilization of current treatment schemes. In particular Part III focuses on the Kansas statute, and discusses why Kansas does not appear to be having the same troubles that Washington is having, despite the fact that its sex offender statute is modeled after Washington's. Additionally, this part presents solutions to current sex offender statutes that would shift their applicability back toward the underlying treatment goals and away from a means of indefinite punishment.

I. TRADITIONAL INVOLUNTARY CIVIL COMMITMENT

People with mental disabilities have endured centuries of stigma, fear and hatred. In an effort to change this, the legal rights movement for people with mental disabilities began in earnest in the early 1970s.⁴⁰ Inspired by the civil rights movement, attorneys argued that the Constitution required that this group of individuals to be treated humanely, and that they be provided with sanitary living conditions and access to appropriate treatment for their mental conditions.⁴¹ Although judges eventually began to agree with these attorneys, creating landmark decisions in cases such as *O'Connor v. Donaldson*⁴² and *Foucha v. Indiana*,⁴³ the struggle to enforce the rights of the mentally disabled continues. This is particularly evidenced in the litigation surrounding modern sex offender laws. In spite of many positive changes throughout the last thirty years, recent Supreme Court decisions in sex offender

³⁸ *Turay*, 108 F. Supp. 2d at 1160.

³⁹ *Young*, 121 S. Ct. at 732.

⁴⁰ LEVY & RUBENSTEIN, *supra* note 1, at 2.

⁴¹ LEVY & RUBENSTEIN, *supra* note 1, at 3.

⁴² 422 U.S. 563 (1975) (holding, in part, that a non-dangerous individual who is capable of surviving safely in freedom cannot be constitutionally confined to a mental hospital).

⁴³ 504 U.S. 71 (1992) (holding that a person can only be confined as long as he or she can be found to suffer from a mental illness that causes him or her to be a danger to him or herself or others).

litigation now threaten the foundation upon which traditional civil commitment rests, sending years of advances back to the turn of the century.

A. History

Proponents of involuntary civil commitment have justified its use on two different public policy rationales: police power and the theory of *parens patriae*.⁴⁴ The police power justification asserts that the state has a duty to protect society from dangerous individuals,⁴⁵ while the idea of *parens patriae* allows the state to protect the interests of the actual individual, by acting in the role of a "parent" and confining the individual for his or her own good.⁴⁶ In the late 1840s, based on these policies, the first institutions for people with mental retardation began to operate in the United States.⁴⁷ At the time, proponents of institutions thought of these places as a "creation of peace and order" that would cure insanity.⁴⁸ But, by the 1860s, it became clear that many in these institutions were incurable, and hope for successful treatment began to fade.⁴⁹

By the end of the nineteenth century, the eugenics movement began to sweep the nation, with many seeing mental disability as the root of crime and poverty.⁵⁰ Thousands of mentally disabled

⁴⁴ See LEVY & RUBENSTEIN, *supra* note 1, at 15; see also Adam J. Falk, Note, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 AM. J.L. & MED. 117 (1999).

⁴⁵ LEVY & RUBENSTEIN, *supra* note 1, at 15-20.

⁴⁶ LEVY & RUBENSTEIN, *supra* note 1, at 15-20. "The theory is that the state has an obligation to protect the interests of those who cannot do so themselves, even if it means overriding their decisions and, in some cases, confining them involuntarily for their own good." LEVY & RUBENSTEIN, *supra* note 1, at 15-20.

⁴⁷ LEVY & RUBENSTEIN, *supra* note 1, at 17. The first institution was created in Massachusetts, approved as a school for "pauper idiots." LEVY & RUBENSTEIN, *supra* note 1, at 17 (citing Herr, *Rights and Advocacy for Retarded People* (1983)).

⁴⁸ LEVY & RUBENSTEIN, *supra* note 1, at 17.

⁴⁹ LEVY & RUBENSTEIN, *supra* note 1, at 17-18.

⁵⁰ LEVY & RUBENSTEIN, *supra* note 1, at 18. "The eugenicists' solution

people were committed as a result. While the eugenics movement began to lose momentum in the 1930s and 1940s, there was very little judicial notice of involuntary commitment until the early 1970s, with prior cases mainly focusing on the legality of criminal confinement under existing laws.⁵¹ The landmark decisions that would follow, however, changed the face of involuntary commitment permanently.

In 1975, the Court examined the limitations of civil commitment for the first time in *O'Connor v. Donaldson*.⁵² Kenneth Donaldson had been civilly committed in Florida, and was kept there against his will for almost fifteen years.⁵³ Throughout his confinement, Donaldson had unsuccessfully petitioned for release, claiming that he was not mentally ill, that he was not a danger to himself or others, and that even if he was, the hospital he was confined in was not providing him with adequate mental health treatment.⁵⁴ After losing in the district court and in the Fifth Circuit Court of Appeals, the Supreme Court granted *certiorari* because of "the important constitutional questions seemingly presented."⁵⁵ After determining that Donaldson was, indeed, not harmless to himself or others, the Supreme Court held that "a finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . Moreover . . . mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."⁵⁶

called for the use of involuntary commitment laws to enforce the strict segregation of mentally retarded people from society at large, in order to prevent them from propagating." LEVY & RUBENSTEIN, *supra* note 1, at 18.

⁵¹ LEVY & RUBENSTEIN, *supra* note 1, at 18.

⁵² 422 U.S. 563 (1975).

⁵³ *Id.* at 564. Donaldson's confinement had been initiated by his father, who claimed that his son was having delusions. Because the state law had very few limitations on civil commitment, he was committed based on the judge's finding that Donaldson suffered from paranoid schizophrenia. *Id.* at 565.

⁵⁴ *Id.* at 565.

⁵⁵ *Id.*

⁵⁶ *Id.* at 575.

In 1992, the Supreme Court again addressed the limitations of civil commitment in *Foucha v. Louisiana*.⁵⁷ The Court was asked to determine whether a person committed to a mental hospital having been found guilty of a criminal charge by reason of insanity can continue to be held there when there had been no finding of mental illness to commit him in the first place.⁵⁸ Terry Foucha had been charged with aggravated burglary and illegal discharge of a firearm, but because he was found to have been insane at the time he committed his crimes, the court ordered him to be committed until he was deemed safe enough to be released.⁵⁹ Four years after his commitment, doctors recommended that Foucha be released, as there was no evidence that he had ever suffered from a mental illness.⁶⁰ Despite the doctors' recommendation, Foucha was not released, but instead ordered to remain confined, with the Supreme Court of Louisiana holding that he had not "carried the burden placed upon him by statute to prove that he was not dangerous . . . and that neither the Due Process Clause nor the Equal Protection Clause was violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone."⁶¹ The Supreme Court disagreed, holding that before anyone can be confined involuntarily, there must be a finding by clear and convincing evidence that the person suffers from a mental illness and is a danger to self or others as a result.⁶²

Civil commitment statutes remain effective because they satisfy three factors: (1) the person committed suffers from a mental illness; (2) the person poses a danger to self or others as a result of that illness; and (3) there is no lesser restrictive alternative to commitment.⁶³ These components have also led to constitutional

⁵⁷ 504 U.S. 71 (1992).

⁵⁸ *Foucha*, 504 U.S. at 73.

⁵⁹ *Id.* at 73-74.

⁶⁰ *Id.* at 74.

⁶¹ *Id.* at 75.

⁶² *Id.* at 86.

⁶³ See, e.g., *Donaldson*, 422 U.S. at 576. "The doctrine of the least restrictive alternative is based on the constitutional principle that, in pursuing legitimate state interests, the government must use means that least restrict

challenges to sex offender statutes that incorporate civil commitment. Many such challengers cite the fact that while there are provisions allowing for release to a less restrictive alternative, no such alternative exists.⁶⁴ Nonetheless, sex offender statutes endure in their present form, and continue to survive, despite many seemingly unconstitutional applications.

B. Recent Trends in Civil Commitment: Sex Offender Legislation

The courts have sent mixed messages in the field of sex offender legislation,⁶⁵ even though they have continued to rely on the policy and treatment goals behind traditional civil commitment statutes explored in cases such as those already discussed above.⁶⁶ The analysis is more difficult because modern sexual predator statutes blur the line between civil laws, which are treatment-oriented, and criminal laws, which are designed to punish specific behavior. In pertaining to sex offenders, the statutes provide that civil commitment becomes an option after the offender has already served time in prison.⁶⁷ This leads to Due Process and Double Jeopardy concerns.⁶⁸ The goals behind all of the statutes purport to be treatment-oriented,⁶⁹ which supports the Supreme Court's

fundamental personal liberties." LEVY & RUBENSTEIN, *supra* note 1, at 32.

⁶⁴ See, e.g., Hunter T. George, *Criteria Proposed for Housing Sex Offenders*, SEATTLE TIMES, Nov. 3, 2000, at B8. After monitoring Washington State's program for sex offenders for almost six years, U.S. District Judge William Dwyer has "threatened the state with big fines if . . . [a] 'less restrictive alternative' to incarceration in the center isn't developed." *Id.*

⁶⁵ See, e.g., *Young*, 121 S. Ct. at 727; compare with *Hendricks*, 521 U.S. at 371 (*Young* held that Washington State's civil commitment scheme is constitutional despite inadequate mental health care, while *Hendricks* held that Kansas' civil commitment scheme, modeled after Washington's, is constitutional because it provides for mental health treatment and a means for release to a less restrictive alternative).

⁶⁶ See *supra* Part I.A (discussing *Donaldson* and *Foucha*).

⁶⁷ See, e.g., WASH. REV. CODE ANN. § 71.09.030.

⁶⁸ See *Young*, 121 S. Ct. at 727; *Hendricks*, 521 U.S. at 350; *Allen v. Illinois*, 478 U.S. 364, 365 (1986).

⁶⁹ See, e.g., WASH. REV. CODE ANN. § 71.09.010 (West 2000). As a basis for enacting its sex offender law, the Washington State legislature found that "the

finding that these statutes are civil on their face. The assumption that these statutes are civil because the state legislators say they are civil, however, has led the Court to make decisions that do not comport with those in the traditional civil commitment arena.

Modern civil commitment statutes for sexual predators have changed significantly since those enacted in the early 1950s.⁷⁰ Current laws are designed to handle sex offenders considered to be a high risk for committing additional sex crimes. They apply to people who have served their criminal sentence, and are going to be released from prison. Procedurally, these statutes follow a similar scheme. When a convicted sex offender is about to be released from prison, the local prosecutor from the county that originally handled the case is notified by the state and asked if he or she wants to pursue a civil commitment.⁷¹ If the prosecutor wishes to do so, a hearing is held to determine whether the convicted offender is too dangerous to be released.⁷² The state must prove beyond a reasonable doubt that the individual suffers from some type of mental disability that would make him likely to commit a future act of sexual violence.⁷³ “If a judge or jury

treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.” *Id.*

⁷⁰ See Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators – A Due Process Analysis*, 82 CORNELL L. REV. 594, 595 (1997). In the early 1930s and 1940s, mental retardation was seen as a major reason behind crime and poverty, resulting in an increase in involuntary institutionalization. LEVY & RUBENSTEIN, *supra* note 1, at 18-19. De-institutionalization began in the mid 1950s, due in part to the introduction of psychotropic drugs and the increased awareness of deplorable conditions. In the 1970s, several reforms to commitment standards further decreased the number of involuntary commitments. LEVY & RUBENSTEIN, *supra* note 1, at 18-19.

⁷¹ *How Sex Offenders Are Committed to McNeil Island Center*, SEATTLE TIMES, Mar. 21, 2000; see also 725 ILL. COMP. STAT. 205/1.01 (2000), KAN. STAT. ANN. § 59-29a01 (West 2000), N.J. STAT. ANN. § 30:4-82.4 (West 2000).

⁷² See, e.g., WASH. REV. CODE ANN. § 71.09.050.

⁷³ See, e.g., *id.* § 71.09 (requiring a finding of “mental abnormality or personality disorder”); 725 ILL. COMP. STAT. 205/1.01 (requiring a finding of “suffering from mental disorder”); KAN. STAT. ANN. § 59-29a01 (requiring a

determines that the individual is a sexual predator, then he is committed to a high security facility for 'control, care, and treatment' until he is safe to be released back into the community. Commitment is indefinite."⁷⁴ These mechanics can be seen particularly in states such as Washington, Kansas, Illinois, Iowa and New Jersey.

1. Washington

The Washington State legislature was the first to address civil commitment for sex offenders, out of response to a horrific crime. In 1987, Earl Shriver was released from prison, where he had been serving nearly eleven years for multiple sexual assaults.⁷⁵ Despite a criminal history dating back to 1966, the state considered Shriver extremely dangerous, but not amenable to psychiatric treatment.⁷⁶ Two years after his release, Shriver violently strangled, stabbed, raped and sexually mutilated a seven-year old boy.⁷⁷ As a result of the huge public outcry, the Task Force on Community Protection⁷⁸ was established to examine how to deal with sexual predation

finding of "mental abnormality").

⁷⁴ La Fond, *supra* note 32, at 380 (quoting WASH. REV. CODE ANN. §71.09.060(1) (West Supp. 1999)).

⁷⁵ See Don Carter, *Shriver Must Never Go Free, Judge Rules*, SEATTLE P.I., Mar. 27, 1990, at A1; Andrea Gross, *The Little Boy from Tacoma; Sexual Assault*, LADIES HOME JOURNAL, May 1990, at 160; Letters, *More on Child Rape - Shriver Case an Example of Blatant Societal Hypocrisy*, SEATTLE TIMES, Apr. 15, 1990, at A19; Barry Siegel, *Locking Up 'Sexual Predators'; A Public Outcry in Washington State Targeted Repeat Violent Sex Criminals. A New Preventive Law Would Keep Them in Jail Indefinitely*, L.A. TIMES, May 10, 1990, at A1.

⁷⁶ Carter, *supra* note 75, at A1.

⁷⁷ Carter, *supra* note 75, at A1.

⁷⁸ See Debra Carlton Harrell, *Legislators Vow Action on Violent Sex Offenders*, SEATTLE P.I., Jan. 9, 1990, at A1. In 1989, Washington Governor Booth Gardner appointed King County Prosecutor Norm Maleng as Chairman of the twenty-four-member Task Force on Community Protection, comprised of prosecutors, advocates and family members of those murdered in heinous, sex-related crimes. *Id.* Members included Helen Harlow, mother of the seven-year old victim of Earl Shriver, and Ida Ballasioles, mother of Diane Ballasioles, who was murdered by a violent rapist in Seattle's Pioneer Square. Other members

tors effectively in the existing criminal system.⁷⁹ Based on the studies of this task force, the 1990 Community Protection Act was passed.⁸⁰

The 1990 Community Protection Act has fourteen sections addressing issues related to violent crimes, and in particular, violent sexual crimes.⁸¹ These provisions, among other things, increase sentences for sexual crimes,⁸² require community registration,⁸³ and even provide for monetary compensation for victims.⁸⁴ The Act also includes the Sexually Violent Predator Code,⁸⁵ which authorizes the indefinite commitment of defendants deemed to be “sexually violent predators.”⁸⁶

included Pierce County Prosecutor John Ladenburg. *See* Debra Carlton Harrell, *Sex-Predator Safeguards Supported; Gardner and Maleng Stress Need for Unity*, SEATTLE P.I., Jan. 5, 1990, at B3; Michele Matassa Flores, *South End Lawmakers Draw Agenda*, SEATTLE TIMES, Jan. 8, 1990, at B3; Diana Meredith, *Eikenberry Urges Tough Sex-Crime Sentences*, SEATTLE P.I., Jan. 4, 1990, at B3.

⁷⁹ WASH. REV. CODE ANN. § 71.09.010 (West 2000).

⁸⁰ *Id.* § 71.09.

⁸¹ *Young*, 898 F. Supp. at 746.

⁸² WASH. REV. CODE ANN. § 9.94A.20 (West 2001).

⁸³ *Id.* § 9A.44.130.

⁸⁴ *Id.* § 7.68.035.

⁸⁵ *Id.* § 71.09.

⁸⁶ *Young*, 898 F. Supp. at 746.

2. *Kansas*

Kansas' statute, the 1994 Sexually Violent Predator Act,⁸⁷ is modeled after Washington's 1990 Community Protection Act. The Act established a plan for civil commitment to provide long term care and treatment for violent sexual predators.⁸⁸ The statute defines a sexual predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."⁸⁹ In *Kansas v. Hendricks*, the Supreme Court held that the statute's civil commitment procedure satisfies due process requirements, and does not violate the Constitution's Double Jeopardy or Ex Post Facto Clauses,⁹⁰ paving the way for other states to overcome constitutional challenges to their own statutes.

3. *Illinois*

Illinois' statute, the Illinois Sexually Dangerous Persons Act,⁹¹ has also been upheld by the Supreme Court.⁹² The Court's

⁸⁷ KAN. STAT. ANN. § 59-29a01.

The Legislature finds that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder. Because the existing civil commitment procedures under K.S.A. 59-2901 et seq. and amendments thereto are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature finds that a separate involuntary commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary.

Id.

⁸⁸ *Hendricks*, 521 U.S. at 350.

⁸⁹ KAN. STAT. ANN. § 59-29a02(a) (West 2000).

⁹⁰ *Hendricks*, 521 U.S. at 371.

⁹¹ 725 ILL. COMP. STAT. 205/1.01 (2000).

⁹² *Allen*, 478 U.S. at 369.

decision in *Allen v. Illinois*⁹³ provided the initial support that the modern sexual predator laws were civil, not criminal, in nature.⁹⁴ Under the Illinois Act, the state is required to provide care and treatment for persons deemed sexually dangerous in a facility set aside to provide psychiatric care, until the person is no longer found to be dangerous.⁹⁵

In *Allen*, the court determined that the Illinois statute was civil in nature, partly because the Act “established a system under which committed persons may be released after the briefest time in confinement,” and were free to “apply for release at any time.”⁹⁶ This has become very important in recent cases where judges have determined that some specific sexual predator statutes are in fact criminal and not civil in nature, because they do not incorporate either element of conditional release.⁹⁷

4. Iowa

Iowa has one of the newest sexual predator statutes modeled after Washington's.⁹⁸ The Act was passed in 1998, and with only a dozen offenders assigned to the program, Iowa is already claiming its statute to be successful.⁹⁹ In a recently released report about the program, Iowa Attorney General Tom Miller noted that the offenders were making progress and the state should develop plans for their release.¹⁰⁰ Miller also noted that part of what has made this program so successful is that it “can be completed within three to five years, if the patient is cooperative and motivated to

⁹³ *Id.*

⁹⁴ *Id.* at 375 (holding that the statute was civil in nature for the purposes of the Fifth Amendment's privilege against self-incrimination).

⁹⁵ *Id.* at 369-70.

⁹⁶ *Id.*

⁹⁷ See, e.g., *Young*, 898 F. Supp at 752. Although Washington's Act was held to violate the Constitution in this case, it has since been amended to include provisions for conditional release to a less restrictive alternative. WASH. REV. CODE ANN. §71.09.090 (West 2000).

⁹⁸ IOWA CODE § 229A (1999).

⁹⁹ See William Petroski, *Sex Offender Treatment Program Appears Successful*, DES MOINES REGISTER, June 22, 2000, at 1.

¹⁰⁰ *Id.*

change.”¹⁰¹ Skeptics of the program, however, are concerned that the treatment provided in the Iowa program might not be meaningful.¹⁰² In a recent interview with the *Des Moines Register*, Ben Stone, Director of the Iowa Civil Liberties Union, said that if no meaningful treatment is provided, the civil commitment provided by the statute “is just mislabeled punishment and not constitutional.”¹⁰³

5. *New Jersey*

New Jersey legislators reacted strongly to public outcry over Megan Kanka’s rape and murder, creating the now well-known “Megan’s Law.”¹⁰⁴ The law was enacted after seven year-old Kanka was raped and murdered in her neighborhood by a convicted sex offender living across the street.¹⁰⁵ The law, however, has had its own troubles; it only recently became enforceable again after a Third Circuit panel lifted a three-month ban on “Megan’s

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ N.J. STAT. ANN. §§ 30:4-82.4 (West 2000).

¹⁰⁵ Michael Booth, *Sex-Offender Bills Awaiting Signature*, N.J. L.J., Oct. 24, 1994, at 8. The group of bills known as “Megan’s Law” were introduced after the July 29, 1994, rape and murder of seven-year-old Megan Kanka by Jesse Timmendequas, a 33-year-old convicted sex offender who lived across the street from Kanka. Kanka’s parents, horrified that they had not been notified that Timmendequas was a sex offender, began a public movement that led to the legislation being introduced in both houses. In addition to measures requiring community notification and establishment of a central registry of sex offenders, the bills:

- 1) make sex offenders serving sentences at the Adult Diagnostic and Treatment Center in Avenel ineligible for good behavior credits unless they cooperate with the treatment program there; 2) require lifetime supervision for convicted sex offenders; 3) require that victims of sex crimes be notified when the convict is about to be released; 4) mandate that sex offenders provide a blood specimen for DNA analysis and establish a database for the results; and 5) allow for a prison term of 30 years to life if a person is convicted of an aggravated sexual assault that involves violence and a victim who is 16 years old or younger.

Id.

Law” community notifications.¹⁰⁶ The decision lifting the ban was affirmed in early September 2000 by the Third Circuit Court of Appeals, which grappled with the question of whether residents who refused to sign confidentiality agreements should receive notification of a sex offender’s whereabouts.¹⁰⁷

Under New Jersey guidelines, the confidentiality agreements contain provisions that bind the signer from releasing the offender’s home address except to those who necessarily need to know – for example school principals – and specifies that violating these provisions could result in court sanctions.¹⁰⁸ New Jersey’s law requires sexual offenders to register with local law enforcement officials upon release, who then notify residents, schools and other organizations that an offender lives nearby.¹⁰⁹ The law was originally much narrower in scope than other state statutes that allow Internet and telephone hotline notifications. Recently, however, by a 1.1 million vote margin, voters in New Jersey have allowed the release of sex offender information via the Internet, which may bring a flood of constitutional challenges.¹¹⁰

¹⁰⁶ Paul P. v. Farmer, 227 F.3d 98 (3d Cir. 2000). In April 2000, Third Circuit Judge Dolores Sloviter issued an injunction on notification of an offender’s whereabouts, citing arguments that the notification practice violates the offender’s privacy rights. *Id.*

¹⁰⁷ *Farmer*, 227 F.3d at 98. In her decision, Judge Maryanne Trump Barry said that notifying neighbors who promise not to divulge the information to school and community organizations of the whereabouts of a sex offender does not violate the offender’s right to privacy. *Id.*; see also Karen DeMasters, *Briefing: Megan’s Law Upheld*, N.Y. TIMES, Sept. 17, 2000, at 6.

¹⁰⁸ *Farmer*, 227 F.3d at 103.

¹⁰⁹ N.J. STAT. ANN. §§ 30:4-82.4 (West 2000).

¹¹⁰ Henry Gottlieb, *By a 1.1 Million-Vote Margin . . .*, N.J. L.J., Nov. 13, 2000, at 1. On November 7, 2000, the people of New Jersey approved an Internet registry of the state’s sex offenders by a 1.1 million-vote margin.

[B]ut the scope of the Web site eventually may be determined by the . . . Supreme Court. Proponents and critics of the plan to make the names and whereabouts of Megan’s Law available online said after the vote that they expect federal constitutional challenges if the site includes the addresses of former sex offenders, as many other states do.

Id. Compare with ALA. CODE § 15-20-21(a)(2) (2000) (providing for notice “distribution of a community notification flyer” by posting it on the Internet or

C. Criticism of Civil Commitment of Sex Offenders

Since their inception, sex offender laws have been met with criticism by organizations such as the American Civil Liberties Union ("ACLU"), and many state psychiatric associations.¹¹¹ These organizations believe strongly that "[c]ivil commitment is a profound abridgment of individual liberties that has continuing consequences after release."¹¹² Not only are critics of civil commitment opposed to the idea because of the loss of liberty it imposes, but also to the stigma that results, causing problems in finding housing, education and employment opportunities.¹¹³ Furthermore, critics argue that it is "unreasonable to single out mentally disordered people for . . . detention based simply on a prediction of future dangerousness, when other people cannot be confined without having violated the criminal law."¹¹⁴ In fact, opponents of the civil commitment of sex offenders believe that the statutes allowing such commitment are "neither medically nor constitutionally sound."¹¹⁵

Both the ACLU and psychiatric groups are concerned about problem sex offenders, but they are more concerned that current statutes are not correctly solving the problems.¹¹⁶ Their primary

by "other means available"); ARIZ. REV. STAT. § 13-3827 (2000) (requiring the Department of Public Safety to maintain a sex offender website on the Internet with information for the public); CAL. PENAL CODE § 290.4 (West 1999) (allowing access to sex offender registration information through a 900 telephone number).

¹¹¹ See Ron Judd, *Psychiatrists Challenge State's Law on Sexual Predators*, SEATTLE TIMES, Jan. 4, 1991, at A1. When Washington State's Community Protection Act passed the state legislature in 1990, members of the Washington State Psychiatric Association joined the ACLU in protest, by filing an amicus brief on behalf of Andre Brigham Young, calling the statute "a denial of every fundamental value, which makes American criminal justice so unique and treasured." *Id.*

¹¹² LEVY & RUBENSTEIN, *supra* note 1, at 22.

¹¹³ LEVY & RUBENSTEIN, *supra* note 1, at 22.

¹¹⁴ LEVY & RUBENSTEIN, *supra* note 1, at 22.

¹¹⁵ Judd, *supra* note 111, at A1.

¹¹⁶ Judd, *supra* note 111, at A1.

criticism is that "sex offender legislation ... defines mental illness by a category of crime ... [and] [t]o state that all sex offenders have a mental illness is an assumption that's probably not true."¹¹⁷ Critics further argue that judges upholding the statutes, do so to "avoid what's right for what's politically expedient."¹¹⁸ This is clearly the situation in the recent *Young* case. In order to uphold Washington's statute, the U.S. Supreme Court rejected the constitutional principles laid out in their previous decisions, such as *Foucha* and *Donaldson*, allowing the unrestrained confinement of sex predators for an indeterminate period of time after they have completed their criminal sentences.¹¹⁹ In *Foucha* the Supreme Court ruled that a state cannot commit a person who is potentially dangerous to the community without a specific finding of mental illness by clear and convincing evidence.¹²⁰ Moreover, the court noted that "antisocial personality" or "personal disorder" are not considered mental illnesses.¹²¹ Yet, sex offenders are committed under a broad definition of mental illness, and are then left to spend their days hoping to receive treatment that may not exist. In *Young*, the Court rejected this as a constitutional violation.¹²²

This criticism has been met with reproach by state prosecutors.¹²³ They believe that these civil commitment provisions reflect "the concerns [legislators] heard from citizens" and are just a small part of larger schemes that "[double] prison time for sex offenders, [allow] police to notify community members when sex offenders are released to live in their neighborhood, [require] sex offenders to register, and [reduce] the amount of 'good time'

¹¹⁷ Judd, *supra* note 111, at A1. Dr. John Chiles, president of the Washington State Psychiatric Association, also said that "[t]he law represents a misuse of a civil commitment proceeding designed to protect individuals with diagnosed mental disorders." Judd, *supra* note 111, at A1.

¹¹⁸ Terry Tang, *Popular Result at the Cost of a Dangerous Precedent*, SEATTLE TIMES, Aug. 15, 1993, at B4.

¹¹⁹ See *supra* Part I.B (discussing recent trends in sex offender legislation).

¹²⁰ *Foucha*, 504 U.S. at 86.

¹²¹ *Id.* at 75.

¹²² *Young*, 121 S. Ct. at 737.

¹²³ See, e.g., Norm Maleng, *Law Gives Public Right to Treat Sex Offenders*, SEATTLE TIMES, Aug. 24, 1993, at B5 (Norm Maleng was Prosecuting Attorney in King County, located in Washington State, at the time of this response).

deducted from prison sentences of sex offenders.”¹²⁴ Furthermore, supporters of the civil commitment of sex offenders believe that although the ultimate goal of these statutes is to treat mental illness, the “immediate purpose is to ensure the commitment of these persons in order to protect the community.”¹²⁵ However, this justification simply does not comport with Supreme Court precedent which has expanded the rights of those who are mentally ill over the past thirty years.¹²⁶

D. Therapeutic Jurisprudence and Its Effect on Sexual Predator Laws

Public policy justifies civil commitment on the two rationales of police power and *parens patriae*.¹²⁷ Both of these theories have also been used to support sex offender commitments, but critics feel that despite the policy behind these two rationales, civil commitment does not accomplish the goal of treatment and improvement, instead it compromises individual autonomy and liberty.¹²⁸ One legal movement that attempts to change this apparent disparity is Therapeutic Jurisprudence (TJ), which is the study of the role of law as a therapeutic agent.¹²⁹ At its inception, TJ was a way to look at mental health law, but has evolved into “a therapeutic perspective on the law in general . . . that is truly interdisciplinary as well as international in scope.”¹³⁰

¹²⁴ *Id.* at B5.

¹²⁵ *Id.* at B5.

¹²⁶ See *supra* Part I (discussing the history of civil commitment).

¹²⁷ See LEVY & RUBENSTEIN, *supra* note 1, at 22; see also Falk, *supra* note 44, at 117.

¹²⁸ See LEVY & RUBENSTEIN, *supra* note 1, at 23. Critics argue that: (1) civil commitment causes a “profound abridgment of individual liberties that has continuing consequences after release”; (2) “treatment may be either impossible or unacceptably compromised when accompanied by the use of force”; and (3) “there is no assurance that involuntary commitment accomplishes the goal of treatment and improvement of the subject’s mental condition.” LEVY & RUBENSTEIN, *supra* note 1, at 23; see also Falk, *supra* note 44, at 117.

¹²⁹ David B. Wexler, *Introduction to the Therapeutic Jurisprudence Symposium*, 41 ARIZ. L. REV. 263 (1999).

¹³⁰ *Id.* at 263.

The laws surrounding violent sexual predators are particularly interesting to analyze from the perspective of TJ, primarily because the policy behind these laws is to treat offenders, not punish them. TJ examines the effects that these laws have not only on the offenders themselves, but also on those who work with sex offenders, and the effects on society at large.¹³¹

Using a TJ analysis, critics of civil commitment provisions for sex offenders have described many antitherapeutic effects on those committed.¹³² One effect that can be seen is that by labeling sex offenders as suffering from a mental illness, it “may diminish their own sense of responsibility and decrease their ability to conform to society’s expectations.”¹³³ Moreover, it “may also adversely affect treatment by discouraging sex offenders from taking responsibility for their conduct and for changing how they think about their behavior.”¹³⁴ A problem that arises from sexual predator statutes is the counter effect of delaying treatment until after a criminal sentence has been served. Proponents of TJ believe that immediate treatment is more likely to be effective.¹³⁵ It is argued that “[a] delay in treatment ... can further reinforce the offender’s deviant attitudes and behavior patterns making them more chronic.”¹³⁶

Proponents of TJ assert that current legislation aimed at sex offenders not only harms those committed under the law, but also

¹³¹ See Leonore M.J. Simon, *Therapeutic Jurisprudence: Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485 (1999); Falk, *supra* note 44, at 117.

¹³² See La Fond, *supra* note 32, at 401.

¹³³ See La Fond, *supra* note 32, at 401.

¹³⁴ See La Fond, *supra* note 32, at 401. Further criticism of labeling sex offenders as mentally abnormal is that:

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

La Fond, *supra* note 32, at 401.

¹³⁵ See La Fond, *supra* note 32, at 401.

¹³⁶ See La Fond, *supra* note 32, at 401.

has harmful effects on those protected by the law.¹³⁷ For example, laws designed to address rape by strangers may create an unnatural fear among women who mistakenly believe that stranger rape occurs more often than acquaintance rape.¹³⁸ "Women who take preventive measures to guard against becoming victims of stranger rape and sexual assault may not take precautionary measures against [rape] by acquaintances."¹³⁹ Furthermore, victims are often affected adversely by the legal system itself.¹⁴⁰ Those that have conducted studies in this area have found that:

One can see most glaringly the adverse effect of the victim-offender relationship on the legal processing of criminal cases in the area of domestic violence. The area of sex offenses is analogous, in that victims who have a prior relationship with the offender are not treated seriously and respectfully by themselves, by social others and by the legal system.¹⁴¹

Others have found specific effects that these laws have on clinicians who work with sexual predators at commitment facilities, the effect on judges and police, the effect on legislators, and the effect on public policy.¹⁴²

In examining the effects that sex offender laws have on clinicians, one major finding is that frustration is a direct result of the law.¹⁴³ "[P]atients coerced into treatment may only participate in a formal way and may not have the motivation and commitment necessary for successful treatment. This causes [the] therapists dedicated to helping sex offenders to feel frustrated, and it may

¹³⁷ See, e.g., Simon, *supra* note 131, at 495-99.

¹³⁸ Simon, *supra* note 131, at 495-96.

¹³⁹ Simon, *supra* note 131, at 496.

¹⁴⁰ See Simon, *supra* note 131, at 526.

¹⁴¹ Simon, *supra* note 131, at 526.

¹⁴² See La Fond, *supra* note 32, at 409-410. La Fond examines the views of Professor David Wexler, who sees TJ simply as a way of examining law and public policy, and the alternative views of Professor Bruce J. Winick, who thinks that "law . . . ought to be shaped so as to maximize its positive impact while minimizing its negative impact as much as possible." La Fond, *supra* note 31, at 375.

¹⁴³ La Fond, *supra* note 32, at 404-405.

raise ethical concerns as well.”¹⁴⁴ Additionally, laws can have devastating effects on judges, especially those who are elected, such as those in Washington. As a result of being elected, judges “generally rule in favor of the prosecution on all contested trial issues.”¹⁴⁵ This can cause resentment among the public and create an environment of distrust in the legal system.

Future legislation will benefit and improve only if policy makers and judges, and all others who help to shape our laws, take all of these therapeutic considerations into account when responding to horrific crimes and public outcry. By incorporating TJ into the law-making process, states have greater chances of moving back toward treatment policies behind civil commitments of sexual offenders, and away from the indefinite criminal punishment that appears to be the actual effect of the laws today.

II. THE SUPREME COURT’S ANALYSIS OF SEX OFFENDER STATUTES

Despite efforts by practitioners in the field of mental health law, as well as scholars in legal fields such as TJ, the Supreme Court has shifted its view on civil commitment in regards to sex offenders, as highlighted in the cases of *Hendricks* and *Young*. Because of this, it is almost certain that there will never be another Supreme Court challenge to sex offender statutes as they exist now, leaving those committed with very few remedies to answer the violations of their constitutional rights.

¹⁴⁴ La Fond, *supra* note 32, at 404-405. “The ethics codes of several mental health professional groups stress that treatment should be provided on a voluntary basis and raise serious concerns about the propriety of treating patients against their will.” La Fond, *supra* note 32, at 405.

¹⁴⁵ La Fond, *supra* note 32, at 406.

A. *Kansas v. Hendricks*¹⁴⁶

The Supreme Court's decisive opinion in *Hendricks* has had severe ramifications on the future of sex offender laws.¹⁴⁷ When the decision came down, many critics believed that states would no longer have to prove a true therapeutic goal, and that a mere appearance of treatment would be sufficient.¹⁴⁸ Moreover, "public policy and discourse of public policy may now focus on pure social defense through containment rather than on providing help to those in need."¹⁴⁹ This apparently held true. Subsequent Supreme Court decisions have held that a sex offender statute containing the same type of scheme as that of the Kansas statute is civil on its face,

¹⁴⁶ 521 U.S. 346 (1997). In this case, Hendricks, a Kansas state prisoner, was found by a jury to be a sexually violent predator shortly before he was to be released to a halfway house after completing his criminal sentence. During his initial trial, Hendricks had agreed with the state physician's diagnosis that he suffered from pedophilia. The trial court then found that as a matter of state law pedophilia qualified as a "mental abnormality" under Kansas' Sexually Violent Predator Act. Hendricks was then ordered to civil commitment pursuant to that act. On appeal to the Kansas Supreme Court, Hendricks alleged that the Act violated the U.S. Constitution's Due Process, Double Jeopardy, and Ex Post Facto clauses. The Kansas Supreme court agreed, holding that the Act violated the prisoner's substantive due process rights under the Constitution's Fourteenth Amendment, in that the Act's definition of "mental abnormality" did not satisfy the Supreme Court's "mental illness" requirement in the civil commitment context, and did not address the double jeopardy or ex post facto claims. See *In re Hendricks*, 912 P.2d 129 (Kan. 1996). The United States Supreme Court reversed, holding that the Kansas Sexually Violent Predator Act's definition of mental abnormality satisfied substantive due process requirements, and that the Act did not violate either the double jeopardy clause or the ex post facto clause of the Federal Constitution. *Hendricks*, 521 U.S. at 371.

¹⁴⁷ Falk, *supra* note 44, at 147. In his Note, Falk asserts that the "*Hendricks* standard undermines the moral foundation of criminal law and the moral neutrality of the mental health system." Falk, *supra* note 44, at 147.

¹⁴⁸ See *Constitutional Law – Due Process (excused) – Minnesota Supreme Court Upholds Minnesota Sexually Dangerous Persons Act*, 113 HARV. L. REV. 1228 (2000); La Fond, *supra* note 32, at 409-410; see also Mike Carter, *Sex Offender Center: 10 Years of Trouble*, SEATTLE TIMES, Mar. 21, 2000, at A1.

¹⁴⁹ La Fond, *supra* note 32, at 410.

based solely on the analysis already conducted in *Hendricks*.¹⁵⁰ This effectively defeats all challenges based on a violation of the double jeopardy clause. Moreover, the Court has used the *Hendricks* analysis to support the broader conclusion that as long as a state provides treatment to sex offenders – whether that treatment is adequate as applied to a specific offender – its statute will be deemed civil in nature, not penal. Once a state's statutory scheme is deemed civil on its face, it cannot be unconstitutional because there are adequate means to remedy the treatment program by the state's own courts.¹⁵¹

Arguably, the *Hendricks* Court did not enunciate the correct analysis, thus the statutes that have relied on *Hendricks*' constitutionality are questionable as well.¹⁵² For example, while the *Hendricks* Court held that statutes such as Kansas' are not punitive in nature, it did not address the fact that there is no known effective treatment for sex offenders. Instead, the Court dismissed this fallacy by stating that "[w]e have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law."¹⁵³ Because of this omission, the Court left open the following question: When one of the required elements of a statute is effective treatment, how can the statute be constitutional if this element can not be accomplished?

The Court directly addressed this question in *Young*. The Court explained that in *Hendricks* it had:

acknowledged that not all mental conditions were treatable.
For those individuals with untreatable conditions, however,

¹⁵⁰ See, e.g., *Young*, 121 U.S. at 737 (holding Washington's statutory scheme to be civil because the same type of scheme was already determined to be civil in *Hendricks*).

¹⁵¹ *Id.*

¹⁵² See Carter, *supra* note 148, at A1. Critics such as Professor John La Fond fear that the law has become "a ruse to indefinitely detain someone . . . that was never enacted to . . . offer [offenders] treatment and a way back into the community." Carter, *supra* note 148, at A1.

¹⁵³ *Hendricks*, 521 U.S. at 365-66 (dismissing the Kansas Supreme Court's conclusion that "the treatment for sexually violent predators is all but non existent" and "[t]he legislature concedes that sexually violent predators are not amenable to treatment").

we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.¹⁵⁴

As Justice Stevens pointed out in his dissent, the majority failed to consider that, if proved, Young's allegations of improper treatment would help establish that the statute should be characterized as criminal in nature, thereby leading to a breakdown in the *Hendricks* analysis, which assumes the statutory scheme to be civil in nature.¹⁵⁵

B. *Seling v. Young*

Washington State has become the focus of sex offender legislation, due to the January 2001 review of its statute.¹⁵⁶ Andre

¹⁵⁴ *Young*, 121 S. Ct. at 734.

¹⁵⁵ *Id.* at 742-43 (Stevens, J., dissenting).

¹⁵⁶ Also making recent headlines is convicted rapist Mitch Gaff. Despite being Washington's first ever convicted sexual predator to receive the SCC's recommendation for release, he too has become a victim of Washington's indefinite civil commitment. *See* *Washington v. Gaff*, 954 P.2d 943 (Wash. 1998). Gaff was civilly committed after serving ten years in prison for the brutal rapes of two teenage girls. During his initial evaluation for civil commitment, Gaff was interviewed by the state psychologist about his history of sexual misconduct, and admitted that "he [had made] numerous obscene phone calls and [had committed] a variety of sexual assaults, including six rapes." *Id.* at 945. He was committed based, in part, on these admissions. On August 18, 2000, after having resided at the SCC since 1995, Gaff failed to convince a jury that he was ready for restricted release, even though he had come to the hearing with support from the SCC's administrators. Keiko Morris & Mike Carter, *Jurors Reject Request to Free 8-Time Rapist*, SEATTLE TIMES, Aug. 19, 2000, at A1. Mitch Gaff's SCC doctors and therapists consider him "one of the most sincere and hard working of the sexual offenders undergoing therapy . . . [a]nd he was the center's first chance to demonstrate that its residents do have a chance of returning to society." *Id.* The twelve-member jury, which is required under the Washington statute for all residents who petition for release, see WASH. REV. CODE ANN. § 71.09.090, unanimously voted to reject the recommendation, preventing Gaff from becoming the first resident of the SCC to be released with the blessings of SCC authorities. *See Jury: Rapist Must Remain in Commitment Center*, SEATTLE TIMES, Aug. 18, 2000, at B1 [hereinafter *Rapist Must Remain*].

Brigham Young was the first to challenge his commitment to the SCC as unconstitutional.¹⁵⁷ Between 1960 and 1990, Young had been convicted of six rapes, and served approximately twenty-seven years in prison for those convictions. One day prior to release for his most recent conviction in October 1990, Washington State filed to have him civilly committed.¹⁵⁸ After being committed, Young appealed, arguing that the Act under which he was committed violated the Due Process, Double Jeopardy, Ex Post Facto and Equal Protection Clauses. Young lost the appeal, and remained at the SCC throughout a number of subsequent challenges to the Act.¹⁵⁹ On October 31, 2000, the Supreme Court heard arguments on the issue of whether the SCC constitutes double punishment for the same offense in violation of double jeopardy clause, and whether the Washington statute should apply to Young because it was passed after he was convicted of his crime in violation of the ex post facto doctrine.¹⁶⁰ The Court ultimately determined whether Young could “challenge the statute as being punitive ‘as-applied’ to him in violation of the Double Jeopardy and Ex Post Facto clauses.”¹⁶¹

In spite of the *Hendricks* analysis, Young asked the Court to find that even though the statute is not unconstitutional on its face, it is unconstitutional “as-applied” to him because the SCC cannot provide adequate mental health treatment as mandated in the statute, and therefore results in double punishment for a crime for which he already served time in prison.¹⁶² But the Court disagreed with this analysis, and found that the statute could not be challenged “as-applied.”¹⁶³

On January 17, 2001, in an 8-1 decision, the Supreme Court

¹⁵⁷ *In re Young*, 857 P.2d 989 (Wash. 1993) (holding that “RCW 71.09 is civil rather than criminal, and does not violate either the prohibition against ex post facto laws or the double jeopardy clause,” and further holding “that the basic statutory scheme implicates no substantive due process concerns”).

¹⁵⁸ *Young*, 121 S. Ct. at 731.

¹⁵⁹ *See id.*, 121 S. Ct. at 732.

¹⁶⁰ Sarah Duran, *Offender's Day in Court; Constitutional? U.S. Supreme Court to Review Sex Predator Law*, NEWS TRIBUNE, Oct. 29, 2000, at A1.

¹⁶¹ *Young*, 121 S. Ct. at 730.

¹⁶² *Id.* at 731.

¹⁶³ *Id.* at 737.

affirmed the constitutionality of Washington's statute, holding that Young could not "obtain release through an 'as-applied' challenge . . . [because] an 'as-applied' analysis would prove unworkable."¹⁶⁴ While Justice Stevens, the sole dissenter, disagreed with the holding, the majority came to its conclusion by assuming the civil nature of Washington's statute, and determining that the proper remedy for Young would be more appropriately brought through state challenges.¹⁶⁵ Justice O'Connor, writing for the majority, explained that Washington's Act was civil on its face, as supported by the Court's decision in *Hendricks*, where the Court determined that Kansas' statute, modeled after Washington's, was civil and not criminal in nature.¹⁶⁶ Based on this reasoning, Justice O'Connor noted that "[a]n Act, found to be civil, cannot be deemed punitive 'as-applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses and provide cause for release."¹⁶⁷

While attorneys for Young did not expect a miracle, they acknowledged that a win would not necessarily mean that Young would leave the SCC.¹⁶⁸ Instead, they hoped for a ruling that would force the state to use other means to deal with convicted sex

¹⁶⁴ *Id.* at 735.

¹⁶⁵ *Id.* at 736 (determining that "State courts, in addition to federal courts, remain competent to adjudicate and remedy challenges to civil confinement schemes arising under the Federal Constitution" and that the Washington Supreme Court has already held that the Washington Act is civil in nature").

¹⁶⁶ *Id.* at 734. Justice O'Connor, discussing the reasoning behind *Hendricks*, noted several factors which led to the conclusion that the Act was civil and not criminal in nature.

The Act did not implicate retribution or deterrence; prior criminal convictions were used as evidence in the commitment proceedings, but were not a prerequisite to confinement; the Act required no finding of scienter to commit a person; the Act was not intended to function as a deterrent; and although the procedural safeguards were similar to those in the criminal context, they did not alter the character of the scheme.

Id. (citing 521 U.S. at 361-365).

¹⁶⁷ *Id.* at 737.

¹⁶⁸ Duran, *supra* note 160, at A1. "The odds are we will have opinion from the court next spring, we'll go to [Washington Federal Court] in the summer, and it will be 11 years of incarceration." Duran, *supra* note 160, at A1.

offenders, including passing longer criminal sentences or committing them to mental hospitals rather than the SCC.¹⁶⁹ Despite losing their Supreme Court challenge in January, Young's attorneys appear to have received what they asked for. In its decision, the majority specifically noted that "it is for the Washington courts to determine whether the SCC is operating in accordance with state laws and provide a remedy."¹⁷⁰ Furthermore, the Court noted that state courts are competent to adjudicate and remedy challenges of this type, and the current injunction against DSHS appears to be providing an adequate remedy.¹⁷¹

In his quest to be released, Young had several favorable judgments on his side. Convicted of six rapes in three different counties, Young served twenty-seven years in prison from 1963 to 1990.¹⁷² He was sent to the SCC in March of 1991, just shortly after the new Community Protection Act was passed in 1990.¹⁷³ After losing his case in Washington State Supreme Court,¹⁷⁴ Young challenged the constitutionality of the SCC in a federal lawsuit in 1994.¹⁷⁵ That was the same year that Judge Dwyer imposed an injunction on DSHS, ordering the department to make improvements to the SCC or face large fines.¹⁷⁶ In 1995, Young won his federal suit in front of Judge John Coughenour in the District Court for the Western District of Washington, but was not released because of a pending appeal.¹⁷⁷ In June of 1997, the Supreme Court decided *Kansas v. Hendricks*, and the Ninth Circuit Court of Appeals sent Young's case back to federal district court. In 1998, Judge Coughenour held that Young's commitment was

¹⁶⁹ Duran, *supra* note 160, at A1. While longer criminal sentences may mean longer jail time, it also means a definite release date, something that current SCC residents do not enjoy.

¹⁷⁰ Young, 121 S. Ct. at 736.

¹⁷¹ *Id.* at 736-37.

¹⁷² Sarah Duran, *Sidebar: The Case History*, THE NEWS TRIBUNE, Oct. 29, 2000, at A1.

¹⁷³ *Id.*

¹⁷⁴ *In re Young*, 857 P.2d 989 (Wash. 1993).

¹⁷⁵ Duran, *supra* note 172, at A1 (discussing 1994 federal challenge).

¹⁷⁶ Turay, 108 F. Supp. 2d. at 1148.

¹⁷⁷ Young, 898 F. Supp. at 744.

constitutional based on the *Hendricks* decision.¹⁷⁸ In 1999, the Ninth Circuit Court of Appeals ruled that Young should have been granted a hearing about the specific conditions in Washington, and ordered a hearing in federal district court.¹⁷⁹ In March of 2000, the Supreme Court granted *certiorari*.¹⁸⁰

Prior to the *Hendricks* decision, Judge Coughenour gave a thorough constitutional analysis of the Washington State statute in his 1995 opinion.¹⁸¹ He explained that Young's commitment did not meet constitutional standards because the statute does not require that he be mentally ill in order to detain him.¹⁸² "The essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill. Like the scheme rejected in *Foucha*, the [s]tatute here permits indefinite incarceration based on little more than a showing of potential future dangerousness."¹⁸³ Judge Coughenour went on to point out that the absence of a requirement of mental illness is apparent in reading the statute itself, as well as in the legislative history.¹⁸⁴ The absence of the requirement of a mental illness, according to Judge Coughenour, violated the substantive protections of the Due Process Clause.¹⁸⁵

Judge Coughenour further decided that the statute could not be classified as civil, as Washington State had claimed, but must be classified as criminal based on several factors. First, he determined

¹⁷⁸ Duran, *supra* note 172, at A1.

¹⁷⁹ Young v. Weston, 192 F.3d 870 (9th Cir. 1999).

¹⁸⁰ Seling v. Young, 120 S. Ct. 1416 (2000); Duran, *supra* note 172, at A1.

¹⁸¹ Young, 898 F. Supp. at 744.

¹⁸² *Id.* at 749.

¹⁸³ Young, 898 F. Supp. at 749 (referring to *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992), where the Supreme Court held that due process rights are violated where release from a mental institution is denied even though the confined person is no longer mentally ill and prosecution has failed to present clear and convincing evidence of danger to society).

¹⁸⁴ *Id.* at 750. "The Governor's Task Force on Community Protection, whose proposed bill was substantially similar to that enacted, plainly intended to craft legislation to permit the involuntary commitment of persons who are not mentally ill." (citing Task Force on Community Protection, Final Report to Booth Gardner, Governor, State of Washington, II-21 (1989)). *Id.*

¹⁸⁵ *Id.* at 751.

that the statute "subjects individuals to an affirmative restraint. The statute entails a complete loss of freedom for an indefinite period of time."¹⁸⁶ Furthermore, Washington's statute did not provide for conditional release of offenders who have not been determined with certainty to be dangerous, resulting in longer terms of confinement.¹⁸⁷ Second, Judge Coughenour pointed out that the statute only applies to behavior that is already criminal, in that it is only applied to those individuals who have already been charged with a crime.¹⁸⁸ Finally, Judge Coughenour explored the idea that the Statute will promote retribution and deterrence, the traditional aims of punishment, as opposed to the goal of treatment necessary for civil commitments.¹⁸⁹ He contrasted the decision in *Allen*,¹⁹⁰ explaining that "[i]n *Allen* the Supreme Court determined that because Illinois disavowed any interest in punishment and was focused solely on providing treatment to mentally disordered sex offenders, its commitment statute was civil, rather than criminal."¹⁹¹ Because of these reasons, the statute was found to be in violation of the ex post facto prohibition of the Constitution.¹⁹²

Additionally, Judge Coughenour found the statute to be in violation of the Constitution's Double Jeopardy Clause. He stated that, "[h]aving once been punished for the commission of a violent sexual offense, the offender [was] subject to further incarceration under the statute's commitment scheme. The punishment imperative embodied in the statutory approach . . . render[ed] the Statute unconstitutional."¹⁹³

Justice Kennedy's concurring opinion in *Hendricks* further supports these arguments by reminding the parties that civil commitment cannot be used to punish.¹⁹⁴ "If the object or pur-

¹⁸⁶ *Id.* at 752.

¹⁸⁷ *Id.* at 752; *see also supra* Part II.B.4.

¹⁸⁸ *Young*, 898 F. Supp. at 752.

¹⁸⁹ *Id.* at 752-753.

¹⁹⁰ *Allen*, 478 U.S. at 364.

¹⁹¹ *Id.* at 752. (citation omitted).

¹⁹² *Id.* at 753 (holding that "there is no dispute, as to *Young*, the Statute is retroactive and disadvantageous").

¹⁹³ *Id.* at 754.

¹⁹⁴ *Hendricks*, 521 U.S. at 371-373.

pose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish.”¹⁹⁵ This is exactly the problem Washington has as it struggles to prove that the SCC is providing constitutionally adequate mental health treatment.¹⁹⁶

In his dissenting opinion in *Young*, Justice Stevens asserted that it was the lack of adequate mental health treatment that should allow detainees of the SCC to challenge the statute “as-applied” to themselves.¹⁹⁷ He noted that the majority incorrectly assumed that the statute at issue was civil in nature, not criminal. “If conditions of confinement are such that a detainee has been punished twice in violation of the Double Jeopardy Clause, it is irrelevant that the scheme has been previously labeled as civil without full knowledge of the effects of the statute.”¹⁹⁸ While supporters of Washington’s law disagree as to whether there are inherent weaknesses in Washington’s sexual offender program, the general consensus seems to be that:

[o]n a practical level, a civil commitment law cannot be both a civil and criminal law because they are two different legal systems. . . . Nor does a law’s status in one or the other change depending on how effectively a program is implemented. . . . [A judge should] decide that based on the statute on its face, not as it’s applied.¹⁹⁹

Another flaw in *Young* is the Court’s failure to address the lack of opportunity in Washington’s SCC for cure and release into the community, which directly violates the provisions of the Washington statute.²⁰⁰ This also contradicts prior reasoning found in

¹⁹⁵ *Id.* at 371.

¹⁹⁶ See James G. Wright, *Center for Sex Offenders Still Flawed, Says Judge*, SEATTLE P.I., Dec. 20, 2000, at B1. Judge Dwyer has continued to hold DSHS in contempt of court for failing to provide adequate mental health treatment to SCC residents. *Id.*

¹⁹⁷ See *Young*, 121 S. Ct. at 741 (Stevens, J., dissenting).

¹⁹⁸ *Id.* at 742.

¹⁹⁹ *Id.*

²⁰⁰ See WASH. REV. CODE § 71.09.010-.09.092 (2000).

Supreme Court decisions such as *Jackson v. Indiana*,²⁰¹ as well as district and circuit court decisions in *Turay v. Seling*,²⁰² and *Sharp v. Seling*,²⁰³ respectively.

In *Turay*, the district court specifically addressed the issue of adequate treatment. In denying relief to the state from an injunction imposed by him ordering the state to improve treatment conditions, Judge Dwyer stated:

The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly committed persons . . . with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. This rule applies to sex offenders, and the 'lack of funds, staff or facilities cannot justify the State's failure to provide [those confined] with that treatment necessary for rehabilitation.'²⁰⁴

Judge Dwyer went on to note that those offenders civilly committed under the statute are not prisoners, and therefore "they are entitled by law to 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are

²⁰¹ 406 U.S. 715 (1972).

²⁰² *Turay*, 108 F. Supp. 2d at 1148. Prior to this proceeding, a group of civilly-committed sex offenders brought an action against the SCC's superintendent and clinical director, for alleged constitutional violations regarding their conditions of confinement. An injunction was issued in 1994 that had required the State to take all reasonable steps within their power to provide SCC residents with constitutionally adequate mental health treatment. The court subsequently held the State in contempt for failing to comply with the injunction and ordered it to pay into the court's registry fifty dollars per day per resident until the injunction's requirements were complete or substantially complete. In this case, the State moved to dissolve the injunction and the residents of the SCC moved for the imposition of sanctions. The court noted that the test for contempt was whether defendants performed all reasonable steps within their power to insure compliance with a court order. The court held that defendants' efforts justified a modification of the contempt order but did not justify dropping the sanction or dissolving the injunction since the goal of providing adequate mental health treatment was still not completely cured. *Id.*

²⁰³ 233 F.3d 1166 (9th Cir. 1999).

²⁰⁴ *Id.* at 1151 (citations omitted).

designed to punish.”²⁰⁵

The Ninth Circuit Court of Appeals recently upheld this reasoning in the appeal of Judge Dwyer’s injunction.²⁰⁶ The court held that Judge Dwyer properly found that the SCC had failed to remedy several specific areas, including providing adequate mental health treatment.²⁰⁷ In his decision, Judge Hawkins explained:

The appropriate legal standard for analyzing the constitutionality of SCC’s treatment program is set forth in *Ohlinger v. Watson*. In *Ohlinger*, we held that the Fourteenth Amendment Due Process Clause requires states to provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released.²⁰⁸

The Supreme Court has also supported this reasoning in *Jackson*.²⁰⁹ The Court addressed the question of whether an incompetent person could be committed pre-trial, in order to make him competent for trial, if no effective treatment existed to accomplish this goal. The Court held that the accused’s commitment violated the Due Process Clause because there was a substantial probability that no available treatment would ever make him competent to stand trial.²¹⁰

Jackson was a twenty-seven-year-old, mentally retarded deaf-mute, with the mental capacity of a pre-school child. He could not read or write, nor could he communicate in any effective manner, except through a very limited level of sign language.²¹¹ As required by the Indiana statute,²¹² Jackson was examined by two psychiatrists, both of whom found that it was “extremely unlikely that [he] could ever learn to read or write . . . [or] even had the ability to develop any proficiency in sign language,” and that

²⁰⁵ *Id.* (citation omitted).

²⁰⁶ *Sharp*, 233 F.3d at 166.

²⁰⁷ *Id.*

²⁰⁸ *Sharp*, 233 F.3d at 1172 (citing *Ohlinger v. Watson*, 652 F.2d 775,778 (9th Cir. 1980)).

²⁰⁹ 406 U.S. 715 (1972).

²¹⁰ *Id.* at 738.

²¹¹ *Id.* at 717.

²¹² IND. CODE § 35-5-3-2 (1971).

“Indiana had no facilities that could help someone as badly off as Jackson to learn minimal communication skills.”²¹³ The Supreme Court used this evidence, in part, to determine that Jackson’s commitment was therefore in violation of the Equal Protection Clause.²¹⁴ It explained that because there is little likelihood that Jackson will ever improve, “his commitment ‘until sane’ is not really an indeterminate one,” and, therefore, “is permanent in practical effect.”²¹⁵

The failure by the *Young* Court to address the effect of permanent confinement due to inadequate mental health treatment highlights the flaw in reasoning that continues to manifest from *Hendricks*, again providing a break in logic, and illustrating that these statutes are punitive and not civil in nature.

C. *Turay v. Weston*

Although numerous cases have been brought challenging the constitutionality of Washington’s statute, none were as successful as *Turay*.²¹⁶ As a result of *Turay*’s action in 1994, United States District Judge William Dwyer, issued a remedial injunction, finding that some conditions at the SCC were unconstitutional, and ordering the state to remedy the situation or find some other means than civil commitment to treat sex offenders.²¹⁷ In the injunction, Judge Dwyer ordered the State Department of Social and Health Services (“DSHS”), which oversees the administration of the SCC, to find alternative methods of treating those committed.²¹⁸ In addition, Judge Dwyer ordered the state to pay large fines if full compliance with the statute had not been met by May 5, 2000.²¹⁹

²¹³ *Jackson*, 406 U.S. at 719.

²¹⁴ *Id.* at 730.

²¹⁵ *Id.* at 726-27.

²¹⁶ 108 F. Supp. 2d 1148 (W.D. Wash. 2000).

²¹⁷ *Turay v. Weston*, No. C91-664WD, 2000 U.S. Dist. LEXIS (W.D. Wash. June 3, 1994). In particular, the Court determined that the SCC had failed to provide constitutionally adequate mental health treatment, and issued an injunction which required the Department of Social and Health Services (DSHS) to take all reasonable steps within their power to change their methods. *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

The fines would begin to accrue on May 8, 2000.²²⁰ A subsequent ruling modified this order, citing the fact that DSHS has made substantial progress toward full compliance, and thus, the compliance date was extended until December 5, 2000.²²¹

On December 20, 2000, Judge Dwyer delivered another blow to DSHS when he declined to lift his six-year injunction.²²² While DSHS would have preferred to have satisfied its obligations under the earlier court order, and have the injunction lifted completely, it at least does not need to pay its fines up front. Although the fines currently total in excess of one million dollars,

²²⁰ *Turay v. Seling*, 108 F. Supp. 2d 1148, 1160 (W.D. Wash. 2000). In his May 5, 2000 order, Judge Dwyer imposed

[a] sanction amount of \$50 per day per resident confined at the SCC on that day will accrue for each day commencing May 8, 2000. Beginning on June 15, 2000, and on the fifteenth of each month thereafter until the sanction is removed, the defendants will serve and file an accounting for the preceding month showing the names of the SCC residents, the number of days each was confined during the month, and the sanction amount accrued. The accrued total will be canceled, or ordered paid to the residents or into the registry of the court for their benefit, depending on whether the defendants have completed or substantially completed their compliance with the injunction at or before the time of the next hearing.

Id.; *see also In re Campbell*, 139 Wash. 2d 341, 345 (1999).

²²¹ *Turay*, 108 F. Supp. 2d at 1148. In an effort to bring the SCC into compliance with the injunction, and to build a model civil commitment program, DSHS began taking several steps:

Ongoing management consultation was provided in order to develop an extensive 'Injunction Response Report,' a comprehensive and well-organized presentation of the program's goals, objectives, action plans, and achievements[; s]ubstantial resources were made available to expand SCC's management team, increase clinical and residential staffing, improve the facility and conditions, and provide the Superintendent and Clinical Director with the expertise and personnel needed to accomplish the program improvements required by the Court[; and c]onsultants and new staff were brought in to address specific program needs such as training, treatment planning, adaptation of the curriculum for individuals with special needs, policy review, and development of a strategic plan for SCC.

Id. at 1154.

²²² Wright, *supra* note 196, at B1.

Judge Dwyer ruled that the state has earned a reprieve, because the state "has made a genuine and sustained effort to comply with the injunction."²²³

Despite improved conditions at the SCC, Judge Dwyer recognized that many aspects of the SCC still fail to meet constitutional standards, namely whether the SCC is offering adequate mental health treatment.²²⁴ Judge Dwyer stated that "[m]ental health treatment, if it is to be anything more than a sham, must give the confined person the hope that if he gets well enough to be safely released, he will be transferred to some less restrictive alternative."²²⁵ Unfortunately, Washington currently offers none of these alternatives.²²⁶ Although its statute includes provisions for conditional release to a less restrictive alternative, there is no less restrictive alternative available to move rehabilitated offenders, rendering this provision of the statute moot at this time.²²⁷

Young is not the only sex offender who has been successful at attacking the constitutionality of the Washington statute with an "as-applied" analysis. In *In re Detention of Campbell*,²²⁸ Campbell made a similar argument. Campbell asserted that because there were certain conditions at the SCC that were unconstitutional, namely there being no access to effective treatment, the Washington State statute should be deemed unconstitutional as well, and that he should be released as a result.²²⁹ While the court agreed with Campbell that some conditions were, in fact, unconstitutional,

²²³ Wright, *supra* note 196, at B1.

²²⁴ Wright, *supra* note 196, at B1.

²²⁵ Wright, *supra* note 196, at B1.

²²⁶ Eli Sanders & Mike Carter, *Community Revolts Over State Plan for Rapist*, SEATTLE TIMES, July 18, 2000, at B1. "The DSHS has been desperately but quietly trying to find a residential transition site for inmates graduating from the Special Commitment Center (SCC) on McNeil Island." *Id.*

²²⁷ Sanders & Carter, *supra* note 226, at B1. U.S. District Judge William Dwyer has been holding the State in contempt of court for not providing SCC residents with constitutional treatment, including the chance to ever get out.

²²⁸ 986 P.2d 771 (Wash. Sup. Ct. 1999).

²²⁹ *Id.* Campbell cited to the U.S. District Court for the Western District of Washington's decision in *Turay*, in which Judge Dwyer determined that some of the SCC confinement conditions did not meet constitutional requirements. *Id.* at 773.

it did not agree that he should be released as a result.²³⁰ In fact, the court determined that the statute was still constitutional on its face, and therefore, the remedial actions already in effect under Judge Dwyer's order provided satisfactory relief for Campbell.²³¹

In his dissent, Judge Richard Sanders found this to be a bizarre result.²³² He noted that the court has failed to acknowledge the following: "(1) a facially valid statute may nevertheless be unconstitutionally applied and (2) where unconstitutional conditions of confinement render the confinement itself unconstitutional, and there is no alternative constitutional confinement, the habeas corpus remedy is release."²³³ This is further supported, he wrote, by the fact that "both *Hendricks* and *Young* considered only a facial challenge to the statute, expressly reserving an as-applied challenge."²³⁴ Additionally, Judge Sanders noted that *Allen* supported Campbell's arguments because, like Allen, Campbell proved that his confinement was punitive in nature, thereby violating his constitutional rights.²³⁵ This proof, according to Judge Sanders, was the fact that residents who want and receive treatment are housed with those residents who choose not to receive treatment, which is contradictory to therapeutic goals.²³⁶ Furthermore, "[t]here are no state certified sexual offender treatment providers on the SCC staff . . . [and] [n]o treatment manual exists."²³⁷ In her concurring dissent, Judge Barbara A. Madsen agreed that "[s]uch conditions cannot be the 'adequate care' to which [Camp-

²³⁰ *Id.* at 781. In an *en banc* opinion, Judge Charles W. Johnson wrote that because Campbell failed to provide support for "his profusion of claims" he would not be released. *Id.*

²³¹ *Id.* at 775. The Court then determined that "the question is not simply whether the conditions of confinement are constitutionally inadequate in certain respects, but whether these constitutional infirmities transform Campbell's civil detention into 'punishment,' thereby rendering the statute 'criminal' as applied." *Id.*

²³² *Id.* at 781.

²³³ *Id.*

²³⁴ *Id.* at 782 (citations omitted).

²³⁵ *Id.* at 783.

²³⁶ *Id.* at 784.

²³⁷ *Id.*

bell] is statutorily entitled.”²³⁸

In a recent action brought by the state of Washington,²³⁹ the Ninth Circuit Court of Appeals was asked to defer to the professional judgments of the SCC superintendent and clinical director, in determining whether its treatment program is effective.²⁴⁰ Washington asserted that “courts should show deference to the judgment exercised by a qualified professional.”²⁴¹ The majority rejected this request, stating that the “SCC still does not provide the type of treatment program that is constitutionally required for civilly-committed persons – one that gives residents a realistic opportunity to be cured or improve the mental condition for which they were confined.”²⁴² Similarly, in *Turay*,²⁴³ the court noted that the state “[has] not brought family members sufficiently into the treatment process, and some family members have never been contacted by SCC or informed of opportunities for family counseling. [DSHS] must take all reasonable steps to provide this universally-recognized element of treatment.”²⁴⁴ This was upheld on appeal by the Ninth Circuit Court of Appeals in November 2000.²⁴⁵

In his most recent appeal,²⁴⁶ Young again argued that because his confinement was indefinite, due to a lack of quality treatment to help him get better, the Washington statute imposed a punitive measure, making the statute criminal and not civil in nature.²⁴⁷ The Court, however, quickly dismissed his claims. In his majority opinion, Judge Pregerson noted that *Hendricks* “foreclose[d] the claim that the Washington statute, on its face,” was punitive.²⁴⁸

²³⁸ *Id.* at 790.

²³⁹ *Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000).

²⁴⁰ *Id.* at 1171.

²⁴¹ *Id.*

²⁴² *Id.* at 1172.

²⁴³ *Turay*, 108 F. Supp. 2d at 1148.

²⁴⁴ *Id.* at 1156.

²⁴⁵ *Sharp*, 233 F.3d at 1174.

²⁴⁶ *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999).

²⁴⁷ *Id.* at 873.

²⁴⁸ *Id.* at 874. Judge Pregerson said “[i]n *Hendricks*, the Supreme Court held that, because involuntary confinement pursuant to Kansas’s civil commitment statute is *not* punitive, that statute’s operation does not raise ex post facto or

Despite valid arguments such as those raised by Young, Turay and Campbell, the Supreme Court has again chosen to affirm its opinion in *Hendricks*. Such a decision is less costly, and it does satisfy public opinion. Moreover, the *Young* decision has provided additional support for the Court's former assertion that:

[w]here the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent . . . [and] thus removes an essential prerequisite for both . . . double jeopardy and ex post facto claims.²⁴⁹

III. THE FUTURE OF SEX OFFENDER LEGISLATION

Each year since 1990, approximately twenty-five convicted sex offenders set for release from prison are committed to the SCC involuntarily, with little chance of ever leaving.²⁵⁰ In fact, only

double jeopardy concerns," and also reminded appellants that this held true for Washington as well, since Kansas's statute was modeled on, and is substantially similar to, Washington's. *Id.* at 873-874 (emphasis in original).

²⁴⁹ *Hendricks*, 521 U.S. at 368-69.

²⁵⁰ See Nancy Bartley, *Jury to Decide Treatment for Predator*, SEATTLE TIMES, Feb. 15, 2000, at B1. In February 2000, a Washington jury heard testimony from Charles Skinner, who would have become the sixth person treated outside the SCC, in his petition to be released after serving ten years in prison for several rape and attempted rape convictions. *Id.* Part of the trouble with releasing him is finding an appropriate treatment facility in the community. *Planned Facility for Sex Offenders Dropped*, SEATTLE TIMES, July 28, 2000, at B3 [hereinafter *Planned Facility*]. The state has hit many obstacles in communities who work together to outbid the state and buy property intended to become sites for halfway houses to treat sex offenders. The state now faces the further problem that there no alternatives for those to whom it grants release from the SCC. One hundred and seven sex offenders remain at the SCC. Sanders & Carter, *supra* note 226, at B1.

five SCC residents have been released through court action,²⁵¹ while two have undergone successful treatment and are expected to be released sometime in the near future.²⁵² Despite this low number of release, it seems inevitable that sex offender legislation will remain unchanged, especially since the Supreme Court has deemed the statutory schemes to be constitutional. Now, the only obstacle facing states such as Washington is providing the proper means to be able to enforce its statutory provisions. This may be accomplished through the state relief cited by the Supreme Court in *Young*, or it may come through the enactment of alternative provisions in the statutory scheme. Whichever way it occurs, it is not likely that states will be compelled to abandon civil commitment, regardless of any finding of unconstitutional application.

With the Supreme Court holding that the proper relief to be given to challengers should be sought through court orders such as that currently in force in Washington State,²⁵³ nonlegal problems may prevent the states from ever being able to comply with such injunctive relief. For example, despite the recent improvements in staffing and programming, the state continues to struggle with overwhelming financial issues:

- (1) the SCC must be removed from a prison environment

²⁵¹ Thomas Shapley, *Predator Goes Home on a Short Leash: Tight Rules May Be Model for Reducing Risks*, SEATTLE P.I., May 14, 1999, at C1. Since 1996, only five inmates have been released from the SCC, all under strict conditions. The first inmate to be released was Dennis Peterson, who was released to a residence in Arlington, WA. Kane Gillespie was released to a group home in South Carolina. Steven Twining was released to the same residence in Arlington, WA as Peterson. Joseph Aqui was released to his family, as was Donald Hendrickson. *Id.*

²⁵² Sanders & Carter, *supra* note 226, at B1.

²⁵³ *Young*, 121 S. Ct. at 736 (holding that "if the Center fails to fulfill its statutory duty, those confined may have a state law cause of action"); *see also* Sharp v. Seling, 233 F.3d 1166 (2000). In 1994, Judge Dwyer ordered DSHS to provide adequate treatment to sex offenders as constitutionally required. Mike Carter, *Crucial Hearing Today for Sex-Predator Center*, SEATTLE TIMES, Apr. 18, 2000, at B3. The court gave the state until May of 2000 to come into substantial compliance with the order or face fines of nearly \$38,000 a week. In May this deadline was extended until December 2000, and in December it was extended again. Mike Carter, *Sex-Offender Center Receives Reprieve from Fines*, SEATTLE TIMES, May 6, 2000, at A14.

- and relocated to a more treatment-oriented facility;²⁵⁴
- (2) legal costs continue to skyrocket as the state defends and settles lawsuits brought by residents, with the bulk of this burden felt by the State's taxpayers;²⁵⁵
- (3) the SCC is subject to a substantial staff turnover, and is facing difficulty replacing its nationally-renowned clinical director;²⁵⁶
- (4) despite receiving the money to build a facility separate from the McNeil Island prison, (Governor Gary Locke has appropriated \$14 million to build this²⁵⁷) there does not seem to be anywhere to place it.²⁵⁸

Any possible solutions to these problems will be costly.²⁵⁹ Moreover, the State already pays hundreds of thousands of dollars per year to support the current residents of the SCC, and that may not be enough to cover costs in a new facility.²⁶⁰

Washington may benefit from the experiences of other states. Kansas, Minnesota and Arizona, among others, managed to start and run commitment programs without all the legal troubles that plague Washington, because those states have programs that

²⁵⁴ See Carter, *supra* note 148, at A1.

²⁵⁵ See Carter, *supra* note 148, at A1.

²⁵⁶ See Carter, *supra* note 148, at A1.

²⁵⁷ See Carter, *supra* note 148, at A1.

²⁵⁸ See *Planned Facility*, *supra* note 245, at B3. Faced with overwhelming opposition from neighbors and residents, the state has been forced to abandoned plans for halfway homes and treatment centers in Thurston County, Lacey and Indian Ridge Youth Camp near Arlington. Sanders & Carter, *supra* note 226, at B1. In some cases, developers have joined with residents to buy out the land the State buys for many times its value in order to prevent these new facilities. Diane Brooks, *Indian Ridge Won't Get Sex Felons; Distance Rules Out Site as Halfway House*, SEATTLE TIMES, Apr. 27, 2000, at B1.

²⁵⁹ Carter, *supra* note 148, at A1. The cost to Washington State taxpayers to build a new facility will be approximately \$81 million, and just holding the sex offenders in a special facility costs nearly triple that of a prison inmate at \$130,000 a year versus \$25,000 for the inmate. Additionally, with new residents entering each year and very few leaving, a new center would require an operating budget of more than \$72 million per year. Carter, *supra* note 148, at A1.

²⁶⁰ Carter, *supra* note 148, at A1.

demonstrate a serious effort toward treatment.²⁶¹

Arizona, for instance, utilizes a secure commitment center, but before a sex offender is committed, the state must consider less restrictive alternatives such as home confinement, electronic monitoring or release into a halfway house.²⁶² Minnesota also runs a center, but there is not the same “indefinite” commitment as has been effectuated in Washington. There, residents are allowed to earn privileges such as supervised community release as they advance through treatment.²⁶³ Texas has passed a civil-commitment law, as well, but it does not utilize a secure facility.²⁶⁴ Instead, it releases offenders back into the community with specific orders for treatment. If any of these orders are violated, the offenders are sent back to prison.²⁶⁵ States have also managed to show a commitment to treatment simply by placing the facility

²⁶¹ See ARIZ. REV. STAT. § 36-710(A) (2000); MINN. STAT. § 241.67(b) (2000); TEX. HEALTH & SAFETY CODE § 841.081 (2000).

²⁶² ARIZ. REV. STAT. § 36-3710(A) (2001). “If the court determines that conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community and the court determines that the minimum conditions under section 36-3711 are met, the court shall enter judgment and order the person’s conditional release to a less restrictive alternative.” *Id.*

²⁶³ MINN. STAT. § 241.67(b). “The commissioner shall provide for residential and outpatient sex offender programming and aftercare when required for conditional release.” *Id.*

²⁶⁴ See Mark Babineck, *Civil Commitment Yet to Be Used; No Sex Offenders Sent to Treatment Because Legal Wrangling Delayed Trials*, DAL. MORN. NEWS, July 24, 2000, at 21A. Under Texas’ 1999 Civil Commitment Act, a judge or jury can order violent sexual offenders to go to outpatient counseling or to be placed under full-time electronic surveillance after their prison terms have ended. *Id.*

²⁶⁵ TEX. HEALTH & SAFETY CODE § 841.081.

If at a trial conducted under Subchapter D the judge or jury determines that the person is a sexually violent predator, the judge shall commit the person for outpatient treatment and supervision to be coordinated by the case manager. The outpatient treatment and supervision must begin on the person’s release from a secure correctional facility or discharge from a state hospital and must continue until the person’s behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.

Id.

outside the prison setting.²⁶⁶

Building a new facility for the placement of the SCC could begin to solve some of the remaining issues necessary to fix before the injunction is lifted. At the least, it would move residents away from a prison-like environment, and provide a more treatment-oriented site. In fact, in an effort to persuade Judge Dwyer to lift the injunction, the state had proposed to convert a prison work camp on McNeil Island into a replacement for the SCC,²⁶⁷ because Dwyer had previously ruled that a new facility apart from the McNeil Islands Corrections Center is a necessary step in conforming with constitutional standards.²⁶⁸ Additionally, in compliance with its earlier Court order, DSHS has presented plans to create a site for its first halfway house in Walla Walla, Washington.²⁶⁹ The house had been scheduled to open in March, but residents of Walla Walla have put up resistance, and have threatened to sue the state for failing to comply with local regulations.²⁷⁰ In addition to the basic problem of finding a site for the new facility, however budget problems may prevent the facility from ever being built. According to projections by DSHS, the new commitment center would be completed in 2005, but full to capacity by 2013.²⁷¹ At today's cost per resident, the State would require more than \$72 million per year to operate the facility, not

²⁶⁶ See, e.g., Minnesota, which requires its secure facility to be located at a separate cite in Moose Lake. MINN. STAT. § 253B.02 (2000).

²⁶⁷ Associated Press, *Proposal: Convert McNeil Camp Into Sex-Offender Facility*, SEATTLE TIMES, Dec. 8, 2000 [hereinafter *Proposal*].

²⁶⁸ *Id.*; see also Sharp, 233 F.3d. at 1166.

²⁶⁹ See Katherine Long, *Sex Offender Ruling Cites State; Judge Notes Progress Made by DSHS, but Calls for More Improvement in Program*, SEATTLE TIMES, Dec. 21, 2000 at B1; Wright, *supra* note 196, at B1.

²⁷⁰ *Proposal*, *supra* note 267. The Walla Walla City Council has voted to sue DSHS, contending that "the agency failed to follow public processes in choosing the site. The council also approved a moratorium and interim zoning ordinance to temporarily block the agency's application for a building permit." *Proposal*, *supra* note 267. Walla Walla specifically cited the fact that DSHS failed to hold public hearings with residents prior to proposing the city as a possible site. Sarah Duran, *Sex Center Fines Left Intact; Judge: State Has Improved Conditions at Center, But More Progress Is Needed*, NEWS TRIBUNE, Dec. 21, 2000, at B1.

²⁷¹ Carter, *supra* note 148, at A1.

including the legal costs involved in defending the commitments.²⁷²

New criminal laws may provide additional solutions to confinement challenges. In 1998, Washington passed a “two-strikes law”²⁷³ that mandates life sentences for twice-convicted sex offenders.²⁷⁴ In 2000, the State legislature attempted to pass a law that would allow longer sentences for first-time sex offenders,²⁷⁵ but the Bill did not pass.²⁷⁶ Washington has only just begun to consider the less restrictive alternatives utilized by other states.²⁷⁷ Producing the means for SCC residents to be released into a less restrictive alternative, such as twenty-four-hour monitoring in a halfway house, may provide another necessary step to lift the current injunction on the SCC.²⁷⁸

The Washington law already provides that residents who are civilly committed are entitled to a yearly review of their treatment progress,²⁷⁹ and if the resident has sufficiently advanced in response, then the court may order a transfer to a less restrictive alternative.²⁸⁰ Currently DSHS is planning for this less restrictive

²⁷² Carter, *supra* note 148, at A1. “Eric Janus, a professor of mental-health law in St. Paul, Minn., predicts that ‘the money will get so big that, eventually, states will simply stop doing it.’” Carter, *supra* note 148, at A1.

²⁷³ WASH. REV. CODE § 9.94A.120(A) (2000). Codified as the Persistent Offender Accountability Act (POAA).

²⁷⁴ *Id.* “The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” *Id.*

²⁷⁵ Carter, *supra* note 148, at A1.

²⁷⁶ Carter, *supra* note 148, at A1.

²⁷⁷ See Brooks, *supra* note 258, at B1; *Planned Facility*, *supra* note 250, at B3; Sanders & Carter, *supra* note 220, at B1.

²⁷⁸ *Turay*, 108 F. Supp. 2d at 1156. In his May 2000 review, Judge Dwyer ordered that “arrangements must be made for the community transition of qualified residents, under supervision, when they are ready for a less restrictive alternative . . . [or] the constitutional requirement of treatment leading, if successful, to cure and release cannot fully be met.” *Id.*

²⁷⁹ WASH. REV. CODE ANN. § 71.09.070 (West 2000). “Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year.” *Id.*

²⁸⁰ *Id.* “The annual report shall include consideration of whether conditional release to a less restrictive alternative is in the best interest of the person and will

alternative in order to prove it is meeting the treatment necessary for the law to remain constitutional.²⁸¹ There are three basic steps that DSHS predicts residents who qualify for a less restrictive alternative of treatment will follow in the future:

When a court orders a less restrictive alternative, a resident would move from the Commitment Center on McNeil Island to a Secure Residential Treatment Facility. . . . The next step in the treatment path would be for a resident to transition to Secure Community Housing with no more than three residents - each of them subject to 24-hour-a-day, line-of-sight supervision. The final step in the treatment path would be a transition to private housing.²⁸²

Perhaps following Iowa's example would aid Washington in creating a more effective treatment program. Iowa is one of fifteen states with laws modeled after Washington State's that could have been affected by the Supreme Court decision in *Young*.²⁸³ Yet, Iowa is not yet experiencing challenges to the treatment aspect of its statute.²⁸⁴ In fact, according to Iowa Attorney General Tom Miller, "[t]he treatment program that is offered is intense and diverse, and the high staff-to-patient ratio increases the likelihood of success."²⁸⁵ Most of this self-proclaimed success is attributed to the fact that Iowa has a high compliance rate, with all of the offenders "involved and making progress."²⁸⁶ The Iowa program was passed in 1998 and is modeled after the Kansas statute (which

adequately protect the community." *Id.*

²⁸¹ *Proposal*, *supra* note 267. DSHS has already presented Judge Dwyer with a preliminary plan for the conversion of a prison work camp into a new facility that would help bring the SCC's treatment program up to constitutional standards. *Proposal*, *supra* note 267.

²⁸² *DSHS Proposes Siting Criteria and Public Involvement for Placing Former Sex Offenders in Secure Residential Treatment when Courts Rule Them Eligible*, PR NEWSWIRE, Sept. 1, 2000, at 2.

²⁸³ See Sam Skolnik, *State's Predator Law on Trial; High Court Will Hear Arguments that Confining Offenders After Prison Release Is Double Jeopardy*, SEATTLE P.I., Oct. 31, 2000, at B1.

²⁸⁴ See Petroski, *supra* note 99, at 1.

²⁸⁵ See Petroski, *supra* note 99, at 1.

²⁸⁶ See Petroski, *supra* note 99, at 1.

was directly modeled after Washington's).²⁸⁷ However Washington chooses to cope with the injunction ordered upon it, there are many states whose programs provide viable models that comport with the *Young* decision, which appears to have changed the face of traditional civil commitment.

CONCLUSION

This Note examined the challenges that Washington will need to overcome with its violent sexual predator statute, namely that it continues to violate constitutional standards until adequate mental health treatment can be provided to SCC residents. In response, this Note supported existing alternatives, concluding that by building a new mental health facility geographically separated from the SCC's current location at the McNeil Island Correctional Facility, Washington can begin to establish a constitutionally adequate mental health treatment program for SCC residents.

This Note also raised the question of whether Washington can ever satisfy constitutional treatment standards, if no known sex offender treatment exists. This does not appear to be an issue as far as the Supreme Court is concerned, as reflected in the *Young* decision.²⁸⁸ The SCC, however, will continue to operate under a court-ordered injunction, as long as treatment issues remain unaddressed.²⁸⁹ At some point, this could mean that Washington will need to pay million of dollars in fines to SCC residents, if it cannot offer adequate treatment to them.

It is clear that, although statutes that provide for the civil commitment of sex offenders have overcome the constitutional

²⁸⁷ IOWA CODE § 229A (1999). This statute was passed based on legislative findings which determined that civil commitment is intended to "provide short-term treatment to persons with serious mental disorders and then return them to the community." IC § 229A.1 (1999).

²⁸⁸ *Young*, 121 S. Ct. at 737. Citing its decision in *Hendricks*, the Supreme Court recognized in its recent *Young* holding that "not all mental conditions [are] treatable. For those individuals with untreatable conditions, however, [the Court] explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions." *Id.*

²⁸⁹ Wright, *supra* note 196, at B1.

challenges raised for consideration in the Supreme Court, state courts now have the burden of looking beyond those decisions and must formulate more stringent tests.²⁹⁰ They must be the arbiters of punishment for the crimes committed with the protection of constitutional rights. Only when the state courts begin to consider the policies behind the criminal justice system and the ramifications of a system of involuntary commitments they have condoned, will the courts be able to return to the original intention of treatment by civil commitment, and abandon its use as indefinite punishment.

²⁹⁰ See, e.g., *Sharp*, 233 F.3d at 1166.