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NOTE: SELING v. YOUNG: CONSTITUTIONALLY PROTECTED BUT UNJUST CIVIL COMMITMENT FOR SEXUALLY VIOLENT PREDATORS

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SUMMARY:

... This unit, known as the Special Commitment Center (SCC), is run by the Department of Social and Health Services rather than the Department of Corrections. ... Part V of this Note further discusses the mental health treatment necessary with regard to sexually violent predators and the fact that those persons confined under a civil commitment scheme are not receiving such treatment. ... V. Statutorily and Constitutionally Required Mental Health Treatment ... At least ten states, including Washington State, have enacted similar statutes requiring civil commitment of, and mental health treatment for, sexually violent predators. ... Young, like others committed under the statute, is receiving inadequate mental health treatment. ... A federal jury found that the SCC failed to provide constitutionally adequate mental health treatment for the residents of the SCC. ... In order for mental health treatment to be successful, several factors must be taken into consideration. ... Many mental health treatment regimes involve some form of pharmacotherapy. ... Many mental health experts argue that sex offender treatment can bring about significant reductions in recidivism. ... The Mental Health Profession's View of Involuntary Civil Commitment ... Many mental health professionals are not supportive of the civil commitment of sexually violent predators. ...

TEXT:

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Introduction

Andre Brigham Young is considered a predator. His repeated acts of sexual violence have qualified him for status as a sexually violent predator. His first series of rapes began in the fall of 1962 when he broke into four different homes and forced the female inhabitants to engage in sexual intercourse. n1 Young threatened his victims with a knife in at least two of these encounters. n2 In another incident, Young raped a young mother with a five-week old infant nearby. n3 He was convicted of these crimes in 1963, but was released on appeal. n4 After his release Young attempted to rape another woman. n5 He was never prosecuted for this offense because he was found to be incompetent to stand trial. n6 Five years after he

was released on parole for the 1963 conviction, Young was again convicted of rape. n7 Once more, in 1980, Young was released, only to [*512] break into another woman's apartment and rape her in front of her three small children. n8

Pursuant to Washington State law, n9 prosecutors filed a petition alleging that Young was a "sexually violent predator." n10 Under the Washington State Community Protection Act of 1990, n11 a "sexually violent predator" is a person who has been convicted of or charged with a crime of sexual violence and who has a "mental abnormality" or a "personality disorder" that makes it likely that the individual will persist in committing crimes of sexual violence if not confined. n12 The statute requires that sexually violent predators be contained in a special unit at a state prison. n13 This unit, known as the Special Commitment Center (SCC), is run by the Department of Social and Health Services rather than the Department of Corrections. Residents in the unit are separated from the prison population. n14

Upon finding probable cause that Young is a sexually violent predator, a Washington State trial judge ordered Young transferred to the SCC in Monroe, Washington. n15 In 1991, a jury heard expert testimony that Young suffered from "(1) a severe personality disorder not otherwise specified, with primarily paranoid and anti-social features, (2) a severe paraphilia, which would be classified as either paraphilia sexual sadism or paraphilia not otherwise specified (rape)" and that "the severe paraphilia constituted a 'mental abnormality' under the sex predator commitment Statute." n16 The expert testimony further indicated that Young's condition and "the length of time spanning Young's crimes, his recidivism record, his use of weapons, his persistent denial of the crimes and his lack of empathy or remorse for his victims made it more likely than not that Young 'would commit further sexually violent acts.'" n17 The jury concluded, beyond a [*513] reasonable doubt, that Young was a sexually violent predator. n18

The court committed Young to the Special Commitment Center for an indefinite length of time. n19 Young challenged this involuntary civil commitment on double jeopardy and ex post facto grounds. Young argued that the effects of the statute are punitive in nature, thus offering a commitment no different than his criminal incarceration. Further, the statute was enacted after his criminal sentence was imposed and therefore retroactively changed the length of the commitment he would receive for his criminal acts.

Young argued that the divide between the SCC and the prison is only theoretical because the Department of Corrections staff members are actively involved in the supervision of not only the prison inmates, but of the SCC residents as well. n20 Young challenged his confinement in the SCC arguing that the statute under which he was confined was an unconstitutional violation of the ex post facto clause n21 and the double jeopardy clause n22 of the Fifth Amendment. n23 Young stipulated that the statute is civil in design, but that courts should inquire as to whether the statutory scheme was so punitive either in purpose or effect as to negate [*514] its civil intention. n24 If such a judicial inquiry were to result in a finding that the civil intention is negated, then the effect of the statute would be criminal and thus a violation of the double jeopardy clause of the Fifth Amendment of the Constitution. The Supreme Court of Washington, however, held that the Act was constitutional and did not violate either the prohibition against ex post facto or the double jeopardy clause. n25 Further, the court affirmed the sex predator determination and remanded the case for consideration of less restrictive alternatives. n26

Young then petitioned the United States District Court for the Western District of Washington for a writ of habeas corpus, arguing that his confinement was and continued to be unconstitutional. n27 The District Court reversed the Supreme Court of Washington and held the Community Protection Act violated the substantive due process component of the Fourteenth Amendment, the ex post facto clause, and the double jeopardy clause. n28 The State appealed to the United States Court of Appeals for the Ninth Circuit. n29 While the appeal was pending, the U.S. Supreme Court decided *Kansas v. Hendricks*. n30 The Court held that a Kansas statute, almost identical to the Washington statute, did not violate the substantive due process, ex post facto, or double jeopardy clauses of the United States Constitution. n31 Consequently, the Ninth Circuit remanded Young's case to the District Court to be reconsidered in light of *Hendricks*. n32 On remand, the District Court denied Young's petition and Young again appealed to the Ninth Circuit. n33 The Ninth Circuit held that the statute was unconstitutional. n34 Finally, the State appealed to the U.S. Supreme

Court, which granted certiorari. n35 In February 2001, the U.S. Supreme Court reversed the Ninth Circuit's [*515] decision in *Seling v. Young*. n36

Part I of this Note explains the working of the Washington Sexually Violent Predator Act. Part II discusses the difference between the "facial" and "as applied" tests regarding the civil versus criminal nature of statutory interpretation. Part III analyzes why the U.S. Supreme Court erred when it upheld the constitutionality of Washington's Community Protection Act. Further, this Note contends that civil commitments of sexually violent predators under the statute did not violate the double jeopardy and ex post facto clauses of the Constitution. This Note explains the provisions of the Community Protection Act and why it survived a properly applied facial attack. Part V of this Note further discusses the mental health treatment necessary with regard to sexually violent predators and the fact that those persons confined under a civil commitment scheme are not receiving such treatment. It illustrates that the practical effect of the statute is to deprive committed persons of their Constitutional right to liberty while legislators and those enforcing the statute are hiding behind a legal finding that the statute is civil on its face.

I. The Washington Sexually Violent Predator Act

The Washington legislature adopted the Washington Community Protection Act in 1990 because it found that a small but extremely dangerous group of people exists that have "antisocial personality features, [which] render them likely to engage in sexually violent behavior." n37 Due to these personality features, such persons are not suited to short-term civil commitments which are appropriate for others with mental disorders. n38 The legislature concluded that the prognosis for curing these sexually violent offenders is poor and long-term treatment is necessary. n39

The Act defines civil commitment as "the process by which individuals with mental illness or mental impairments are compelled to receive care and treatment either in inpatient or outpatient settings." n40 The Act [*516] defines a sexually violent predator as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." n41 The Act defines mental abnormality as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." n42 Predatory acts are "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." n43

After a sexually violent offender has served his criminal sentence, and if it appears that the person may be a sexually violent predator, under the Act the state prosecutor may file a petition alleging facts that support that accusation. n44 Upon the filing of such a petition, a judge determines whether probable cause exists to hold the person over for trial. n45 An evaluation of the individual will then be conducted by a professionally qualified individual pursuant to the rules of the Department of Social and Health Services. n46 The Act also includes myriad procedural safeguards to protect those individuals subject to its terms. A trial must be conducted within forty-five days of the probable cause hearing and the individual may have an examination by experts of his own choosing. n47 Any person subject to the provisions of the Act is also entitled to counsel and a trial by jury. n48

If the court or jury finds beyond a reasonable doubt that the person is a sexually violent predator, the person is committed to the custody of the Department of Social and Health Services until such time as "(a) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative . . . is in the best interest of the person . . ." n49 [*517] At this stage in the commitment process, procedural safeguards continue to protect the person charged as a sexually violent predator. Each committed person is required to be given an annual examination to consider the possibility of a less restrictive alternative that will aid the offender in overcoming his sexually violent tendencies while adequately protecting the community. n50 The Act allows the individual to petition the court for conditional discharge to a less restrictive environment or

unconditional release. n51 It also states that the individual may exercise certain rights for "the purpose of obtaining release from confinement, including the right to petition for a writ of habeas corpus." n52 If it is determined by mental health examiners that the person's mental abnormality or disorder has changed in such a way that he or she

no longer meets the definition of a sexually violent predator; or conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. n53

Then the prosecuting attorney general must prove beyond a reasonable doubt that the petitioner's status is such that he or she is not safe to be at large and will likely revert to "predatory acts of sexual violence." n54

II. Civil vs. Criminal Determination: The Arguments for "Facial" and "As Applied" Tests

On appeal to the U.S. Supreme Court, the Petitioner and the Respondent in *Seling v. Young* differed not only in their opinions as to Young's treatment under the Washington statute, but they also differed as to how the civil or criminal nature of the statute should be interpreted. The State contended the Act was passed with civil intent and functions as a civil statute. n55 It argued that the U.S. Supreme Court, historically, has evaluated statutes by applying a "facial test." Under the facial test, the Court examines the legislative intent and effect of the statute by [*518] examining it on its face. n56 This means the Court looks at the actual language of the statute to determine whether the legislature intended the statute to be civil or criminal in nature. Young's argument was that a facial test does not work in this case because, although the statute is civil on its face, it is punitive as applied to his particular case. n57 Case law supports both positions. However, in *Seling v. Young*, the Supreme Court applied the facial test. In fact, the Court rejected the "as applied" test consistently in cases where it has been asked to consider a statute on an "as applied" basis.

A. Constitutional Basis for a Facial Analysis

The Washington Community Protection Act for the civil commitment of sexually violent predators served as the model for a similar act passed in Kansas, which the U.S. Supreme Court upheld in *Kansas v. Hendricks*. n58 The Washington and Kansas statutes are identical except that the Washington Act authorizes the treatment of persons committed under its terms in less restrictive settings than total confinement. n59

Young argued that the statute should be interpreted as criminal in nature because the double jeopardy and ex post facto constitutional protections apply exclusively to criminal proceedings and punishments and not to civil proceedings or remedies. n60 The U.S. Supreme Court developed a two-part test to determine whether a particular proceeding or sanction is civil or criminal. The test, which stems from *Hudson v. United States*, begins by asking "whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." n61 If the legislature intended for the statute to be civil, the Court then looks to see "whether the statutory scheme was so punitive either in purpose or effect as to "transform what was clearly intended as a civil remedy into a criminal penalty." n62 The Court applies this test to the double jeopardy and ex post facto clause [*519] challenges. n63

In applying this test, the Hudson Court considered seven factors enunciated in *Kennedy v. Mendoza-Martinez*. n64 These factors are:

(1) whether the sanction [imposed by the statute] involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment - retribution and

deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. n65

The Court states that these factors "must be considered in relation to the statute on its face and only the clearest proof will override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." n66 The Mendoza Court further held that absent any indication that a criminal purpose was intended, the legislature's stated civil goals enunciated by the statute control the finding of the reviewing court. n67

The Washington State Supreme Court applied Hudson's two-part test and held that the Washington statute contained a civil scheme for committing sexually violent predators. n68 The Washington court found that "the language and history of the statute so indicate, as do its purposes and effect." n69 The Ninth Circuit concluded the statute was civil on its face and in this regard satisfies double jeopardy and ex post facto protections. Nevertheless, the court held the statute unconstitutional because of its application to Young by analyzing the statute on an "as applied" basis. n70 The only question left after the Ninth Circuit holding was whether the statute should be analyzed facially or on an "as applied basis." Kennedy-Mendoza, Hudson, and Hendricks all hold that a facial inquiry is the [*520] appropriate approach to determining whether a statute is civil or criminal in nature. Hudson flatly rejected the "as applied" test regarding the double jeopardy clause. The Court in Hudson held that in determining the purpose and effect of the statute it "must be considered in relation to the statute on its face." n71 The Ninth Circuit attempted to distinguish Hudson by stating that "Hudson involved monetary penalties and occupational disbarment [whereas] this case involves confinement." n72 This factual difference does not affect the legal conclusion. The approach taken in Hudson regarding the consideration of the statute on its face is not limited to the factual scenario in that case. *Kansas v. Hendricks* is the first case the U.S. Supreme Court decided on the subject of civil commitment of sexually violent predators.

B. *Kansas v. Hendricks*

In response to growing public concern regarding the criminal justice system's inadequate prevention of repeated crimes by sex offenders, Kansas passed the Sexually Violent Predator Act in 1994. n73 The Act was modeled after Washington's Community Protection Act. The Kansas statute and Hendricks case became the testing ground for determining whether a statute providing for the civil commitment of sexually violent predators was, in fact, civil in nature.

Kansas v. Hendricks is the clearest authority for an application of the facial test to the Washington statute. In that case, Hendricks argued that the Kansas Act was punitive because it did not offer legitimate treatment, n74 just as Young argued in the instant case. The Court, however, held that the Act was civil by examining the statute on its face. The Court held:

Where 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 [*521] cannot say that it acted with punitive intent. n75

The same can be said for the Washington State Sexually Violent Predator Act. All of the factors noted by the Hendricks Court are included and provided for in the Washington Act. n76

C. *Hudson v. United States*

In *Hudson v. United States*, the U.S. Supreme Court reaffirmed the principle that determining the civil or punitive nature of an act must begin with reference to both Hudson's test and the Act's legislative history.

n77 The Court's decision expressly disapproved of evaluating the civil nature of an act by considering the effect the act has on a single individual. Instead, the Court stated that the act must be evaluated by a variety of factors "considered in relation to the statute on its face." n78

However, Young's position is very contrary to the position taken by the Court in Hudson. Young wanted the Court to consider his individual position and treatment to determine that the act was punitive as applied to him. Young further wanted the Court to disregard the civil nature of the statute and consider it on a situational basis. The precedent set by Hendricks and Hudson illustrates that Young's proposed approach was not the proper approach and that a facial test is appropriate.

III. The Supreme Court Holding in *Seling v. Young*

The U.S. Supreme Court followed precedent in its analysis of facial approaches to statutory interpretation in deciding *Seling v. Young*. The flaw with this analysis, however, is that it ignores the practical effect the statute has on persons in a civil commitment. In order for a civil statute to remain civil in its effect, there must be factors that set the conditions of the confinement apart from criminal incarceration. In Young's case the Court began its analysis with the understanding that the Washington Act was civil in nature. n79 The Court reiterated its finding in Hendricks that the question whether an Act is civil or punitive is initially one of statutory [*522] construction. n80 A court must decide if the legislature intended the statute to establish civil proceedings and a court will only reject such interpretation when a challenging party provides "the clearest proof" that the scheme is so punitive that it negates the legislature's intent. n81

The Court agreed with the State of Washington's approach in evaluating the Washington State Community Protection Act. It determined that an "as applied" analysis would prove unworkable. n82 The Court explained that such an analysis would never allow for a final resolution regarding the overall nature of a particular scheme, but would only evaluate the scheme for particular individuals. The only time courts would have an opportunity to evaluate the effect of the statute would be when a person brings the issue to court. Frequent case-by-case analysis of the statutory scheme wastes meager resources. A one time final evaluation would definitively answer lingering questions. The Court held that the civil nature of a statute is not altered or divested of its civil nature simply because there are differences in the way a particular statute is implemented. n83 In sum, the Court held that "an 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." n84

The Court held that persons civilly committed under the Act have a remedy if particular commitment conditions violate the Act. According to the Court, the appropriate remedy is a determination by Washington courts as to whether the SCC was operating in accordance with state law; if not, the state must provide a remedy. n85 Although recognizing that the civil confinement scheme arose under the Federal Constitution, the Court held that state courts are as competent as federal courts to adjudicate and remedy any challenges to such schemes. n86 Further, the Court noted that persons committed under this Act also have an additional remedy under 42 U.S.C. 1983, which provides that when a person has been deprived of "any rights, privileges, or immunities secured by the Constitution," he has [*523] the right to bring an action against state actions. n87

The Court's holding, although supported by precedent, fails to address the reality of Young's situation. Moreover, it affords neither Young nor those similarly situated the protection provided by the Constitution.

IV. *Kansas v. Crane* - The Latest Limitation on Individual Liberty

In the recent case of *Kansas v. Crane*, the U.S. Supreme Court upheld the decision in Hendricks while clarifying the commitment requirements. n88 In *Crane*, the Court held that Hendricks does not require a "total or complete lack of control" to qualify for civil confinement, only that an individual must simply have difficulty controlling his dangerous behavior. n89 The holding further indicates that the Court was concerned that an "absolutist approach" would "risk barring the civil commitment of highly dangerous

persons suffering severe mental abnormalities." n90 The decision demonstrates that the Court prefers to catch more people in the net of civil commitment rather than committing less in an attempt to preserve individual liberty. Further, in an attempt to make the Kansas requirements for confinement clearer, the Supreme Court manages to lessen the precision under which a state can order appropriate confinements. The effect of this ruling is to broaden the possibility for individuals to qualify for civil confinement and effectively expand criminal punishments by labeling someone as dangerous. A genuine concern arises from this loose standard with regard to other types of offenders who also may be likely to commit future offenses. With its decision in Crane, the Court set the stage for offenders such as thieves, drunk or reckless drivers, and drug dealers also to be indefinitely committed to a state institution that provides little treatment or jail like conditions.

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V. Statutorily and Constitutionally Required Mental Health Treatment

A. Washington State's Statutory Requirements

The Washington State Code requires that those persons deemed to be sexually violent predators be committed for "control, care, and treatment." n91 Persons committed under the statute are afforded the right to adequate care, individualized treatment and an annual examination of their mental condition. n92 At least ten states, including Washington State, have enacted similar statutes requiring civil commitment of, and mental health treatment for, sexually violent predators. n93 The Washington statute appears to represent the state's attempt to simultaneously protect the community while providing mental health treatment for sex offenders. A problem arises, however, when the treatment is not provided, as in Young's case. Young, like others committed under the statute, is receiving inadequate mental health treatment. As a result, his confinement is more similar to criminal incarceration than it is to civil commitment.

B. Constitutional Requirements for Civil Detention

The U.S. Supreme Court has never held that the Constitution prevents a state from civilly detaining those for whom treatment is available, but who nevertheless pose a danger to others. n94 The Court has held that a state could not be viewed as furthering a "punitive" purpose by confining dangerously insane persons for whom no acceptable treatment exists. n95 However, even if the legislature intended to protect the community from these persons by enacting the statute, it is possible that the legislature also intended to provide treatment. In fact, the Washington statute [*525] specifically provides for treatment for sexually violent predators. n96 Washington has other provisions in place that indicate the legislature's overall interest in providing adequate services for sex offenders. For example, mental health professionals (MHPs) must be certified for sex offender evaluation and treatment and regulations contain several categories of certification depending on the professional's ability to meet all of the requirements. n97 In addition, no evidence exists that sex offenders cannot be responsive to treatment, although caution must be exercised and each patient must be considered individually. In order for a civil statute to remain civil in its effect there must be factors that set the conditions of the confinement apart from criminal incarceration. There is ample evidence that the conditions of confinement under the Washington Community Protection Act are no different than those for a criminal sentence. These conditions are documented through the numerous preliminary court proceedings that are part of Young's procedural posture.

VI. The Turay Proceeding

In 1991, shortly after the enactment of the Washington Act, another resident of the SCC, Richard Turay, brought suit under 42 U.S.C. 1983, alleging unconstitutional conditions of confinement and inadequate treatment at the SCC. n98 A federal jury found that the SCC failed to provide constitutionally adequate mental health treatment for the residents of the SCC. n99 In June 1994, the federal district court entered an injunction requiring the SCC to bring its treatment program into compliance with constitutional standards. Noting that the Constitution requires the state to provide a person civilly committed "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," the injunction directed the SCC to improve the mental health treatment [*526] of its residents. This included hiring competent therapists, implementing a therapy program and providing a psychologist or psychiatrist expert in diagnosis and treatment of sex offenders. n100

A Special Master completed reports regarding Turay's confinement. These reports, as well as the Court's findings during the years since Turay filed his complaint, reflected the state's ongoing failure to provide constitutionally adequate treatment. n101 In 1997, the clinical director of the SCC admitted that the conditions of Turay's confinement were "certainly more restrictive than a state hospital" and were similar to incarceration. n102

In November 1999, the district court held the SCC in contempt for failure to take all reasonable steps to comply with the injunction. n103 The court ordered coercive monetary sanctions, to commence May 1, 2000, unless compliance was achieved before that date. n104 Prior to this contempt order, the Washington state legislature took no action to improve the conditions at the SCC.

The SCC has housed sexually violent predators since 1990 and has taken no action to comply with constitutionally required and statutorily mandated conditions, including much needed mental health treatment. The Supreme Court suggested that the availability of state level remedies and civil actions under 42 U.S.C. 1983 has proven undependable. n105 This is evidenced by the results of the Turay proceedings. Turay filed state actions and a claim under 42 U.S.C. 1983, but court orders have been ignored and conditions have not improved. As a result, Young and his fellow residents are being confined in a prison-like environment without receiving any treatment that would distinguish this confinement from their previous criminal incarcerations. Despite the legislature's intent that the Washington statute be civil in nature, the statute violates the double jeopardy clause of the Fifth Amendment because the conditions of confinement are no different than those of a criminal incarceration. Moreover, neither Washington state nor federal law provided for the possibility of civil commitment at the time of Young's convictions, which led to his characterization as a sexually violent predator. Furthermore, [*527] the decision in Young violates the ex post facto clause n106 because the statute was enacted after he committed his acts of violence and began his criminal sentence.

VII. Approaches to Treatment for Sexually Violent Predators

A. The Historical Development of Treatment

Researcher Richard Hamill notes that convincing the public and various legislatures that sex offenders can change their behavior is difficult because studies of recidivism rates n107 and the effectiveness of therapeutic models have yielded uneven results. n108 The uneven results are partially explained by the fact that researchers must base their results on reported crimes and a significant number of sex crimes go unreported. n109 According to Hamill, studies are also hampered by incompatible methods of data collection and interpretation. n110 Investigators have yet to identify a standardized measurement technique that can reliably and validly measure the frequency of sex offenses. n111 However, Hamill states that there are increased efforts to improve the accuracy of studies regarding criminal offenders. n112

Mental health professionals have become more effective in treating offenders since the 1970s. Prior to this time, the problem of sexual offense had not been completely recognized. n113 Treatment methods and strategies were largely limited and ineffective. It was believed that if sex offenders came to understand why they acted as they did they would [*528] stop. n114 This approach, however, had little impact on recidivism, and offenders continued to engage in their deviant acts.

The mid-1980s ushered in new strategies to address the treatment of sex offenders. n115 Ineffective treatments were abandoned as newer studies showed that recidivism could be reduced by sixty percent through the implementation of state-of-the-art techniques. n116 Today, when adults and adolescents act out

in a sexually inappropriate manner, they are referred for specialized evaluations before they have a hearing to address their disposition. n117

B. Defining Sexual Disorders: The First Step Toward Achieving a Reduction in Recidivism

In order to understand the various approaches to mental health treatment, one must first understand how sexual disorders are defined. Researcher Aviel Goodman defines sexual addiction as a condition in which some form of sexual behavior follows a pattern that is characterized by two features:

(1) recurrent failure to control the sexual behavior, and

(2) continuation of the sexual behavior despite significant harmful consequences. n118

Goodman explains that a sexual addiction is determined by the relationship between a pattern of sexual behavior and an individual's life. n119 Key features that distinguish sexual addiction from other patterns of sexual behavior are the inability of the offender to control his behavior and significant harmful consequences that fail to stop a person from engaging in the behavior. n120

Paraphilias are sexual impulse disorders characterized by intensely arousing, recurrent sexual fantasies, urges and behaviors that are considered deviant with respect to cultural norms. These impulses produce clinically significant distress or impairment in social, occupational [*529] or other important areas of psychosocial functioning. n121 Early sexual psychopath laws were targeted at persons with sexual deviations or paraphilias. n122 Most rapists did not qualify for such a diagnosis until recent years. Thus, they were not included under older laws, but are likely to be committed under recent sexually violent predator commitment laws. n123 Treatment for all persons covered by these laws is most likely to be successful when it involves a range of approaches, is individually tailored and evolves as the patient progresses. n124

1. Considerations Relating to Therapeutic Approaches

In order for mental health treatment to be successful, several factors must be taken into consideration. First, multiple studies indicate that ethnic and gender differences should be considered when a sex offender is assigned to a therapist. n125 Individuals from ethnic and racial minority groups have been reported to underutilize mental health services when compared with those from the majority group. n126 Furthermore, minorities have been found to average fewer treatment sessions and to drop out of therapy at much higher rates. n127 This is significant because sex offenders who complete treatment programs have much lower recidivism rates than those who drop out of programs. n128 For example, one recent study tracked sexual offenders for five years after their release from incarceration. n129 Those who completed treatment had a recidivism rate of 3.8 percent compared to 24 percent for those who received partial treatment and 26.1 [*530] percent for persons who did not receive treatment at all. n130

Another study of high risk recidivism examined age, mental status and income as predictors of persons most likely to complete their treatment program. n131 The study found that seventy-five percent of the men age forty to forty-nine completed treatment, whereas only fourteen percent of offenders age twenty to twenty-four, seventeen percent of those age twenty-six to thirty, and sixty-one percent of those age thirty-one to thirty-nine completed treatment. n132 In addition, seventy-five percent of the married or divorced participants completed the program, while only forty-five percent of the single men completed it. n133 Finally, nearly seventy percent of the men who earned at least eleven dollars per hour finished the program and only twenty-six percent of unemployed participants completed the program. n134

Researcher Joseph Flaherty indicates that efforts have been made within the mental health system to make services more attractive to men and minority group members who chose to, or are able to, access the system. He points out that "most training programs now include instruction in culturally competent counseling," n135 and that "many clinics have implemented gender-sensitive or ethnicity-sensitive treatments." n136 Some clinics are beginning to match the race and sex of the therapist to that of the client. n137 Mental health experts maintain that this practice increases offenders' acceptance of such treatment services. n138

Therapists continue to be aware of the differences between people and their comfort levels when discussing sex. Because of the extremely personal nature of therapy related to sexual deviance, successful treatment depends on the therapist putting aside his personal sexual value system and becoming "both empathic and knowledgeable about human [*531] sexuality in order to be of assistance." n139 The way sexual material is expressed during therapy depends on the gender and age of the patient and, to some extent, the therapist. n140 Sensitivity to gender, ethnic background and sexual material facilitates all aspects of the therapeutic process. When therapists take these factors into consideration, they can better assess a patient's ability to receive treatment and the likelihood of their returning to a deviant lifestyles.

2. Factors to Consider When Assessing the Possibility of Recidivism

Early analyses of sex offenders revealed that the frequency of offending and the likelihood of recidivism are strongly related to the relationship between the offender and the victim, as well as the type of victim. n141 The probability of recidivism is positively related to the number and frequency of past offenses. n142 Offenders have a tendency to recommit the same types of offenses instead of switching among them. Researcher Edward Zamble found that "among the best commonly available predictors are youthfulness and number of previous arrests." n143 Age, first arrest, alcohol abuse, substance abuse and low educational levels are also related to recidivism rates. n144 When these factors are taken into consideration, experts can better predict which individuals are likely to commit future crimes and which individuals are likely to be good candidates for treatment. Not all sex offenders have the same likelihood of recidivism. Because treatment resources are limited, risk assessments, taking into account all predictors of recidivism, "allow for optimal allocation of treatment and supervision resources, as well as maximum safety for the community." n145

3. Drug Related Therapy

Many mental health treatment regimes involve some form of pharmacotherapy. Traditionally, therapists have used potent [*532] tranquilizers to suppress a patient's sexual drive. n146 Though temporary, this therapy acts to immediately reduce the patient's drives in general. n147 Two different classes of drugs - antiandrogens and serotonergic antidepressants - are available for the treatment of sexual deviance. n148 In multiple studies, both types of drugs were shown to reduce recidivism rates in male sexual aggressors, the group most commonly prescribed these drugs. n149 Patients exhibit the effects of the drugs within two to four weeks after the initiation of the treatment. n150 Monitoring patients' intake of these drugs provides a means to assure compliance of sexual predators, persons for whom the court mandates treatment or those incapable of taking oral medications reliably. n151 These drugs also can be used to treat motivated individuals with paraphilia-related disorders. n152 Further, serotonergic antidepressants n153 can treat sexual disorders by preserving "normative" sexual desire and behaviors. n154 While these drugs have proven effective, an individual may not respond to one drug, but may fare better with a different drug of the same class. n155

4. Psychological Treatment

The treatment of sexual offenders demands ongoing assessment of a patient's deviant urges and behaviors. n156 The goals of behavioral treatment are to normalize sexual preferences and enhance social functioning. n157 Sexual offenders typically are reluctant to report their true feelings and actions for fear of legal consequences. Therefore, therapists [*533] regularly will use acquired information for the purpose of

further treatment without obtaining specific information from the patient. n158 Techniques for assessing the patient include aversion therapy, n159 orgasmic reconditioning, n160 cognitive restructuring, n161 social skills training n162 and phallometric studies. n163 Therapists will also consider whether the offender becomes depressed or abuses alcohol after his arrest. n164

Many therapists recommend that treatment for sexual addiction address both the addictive sexual behavior and the underlying addictive process. n165 Treatment includes relapse prevention, n166 psychotherapy, group counseling and pharmacotherapy. n167 Therapy also seeks to induce behavior that will help patients meet their own needs while achieving and [*534] maintaining a healthy lifestyle. n168

In sum, therapists can take an unlimited number of approaches to the treatment alternatives for sex offenders. It is, nevertheless, important that the treatment is tailored for the individual patient and provided in a clinically accepted manner with appropriate frequency. Many mental health experts argue that sex offender treatment can bring about significant reductions in recidivism. n169 However, there are equally strong arguments that there is no guarantee that sex offenders can be successfully treated.

VIII. The Mental Health Profession's View of Involuntary Civil Commitment

Many mental health professional groups and civil rights organizations oppose the Sexual Predator Act including the National Association of State Mental Health Program Directors (NASMHPD), the American Civil Liberties Union (ACLU) and the Washington State Psychiatric Association (WSPA). n170 After the Hendricks decision, NASMHPD issued a statement insisting that the U.S. Supreme Court allows the states too much discretion in defining mental abnormalities and determining whether sex offenders pose continuing dangers to the community after serving their criminal sentences. n171 NASMHPD further stated that statutes for the civil commitment of persons with sexual disorders could have severe and negative consequences for the mentally ill and the public mental health system. n172 They cited several significant risks that could arise from the civil commitment of dangerous sex offenders who do not have a mental illness. First, NASMHPD was concerned that these laws were principally punitive or for the purpose of continuing confinement, rather than for providing treatment. n173 As such, the laws disrupt a state's ability to provide services to patients with treatable illnesses. n174 In [*535] addition, this situation would undermine the integrity of the public mental health system. n175 Further risks include a misallocation of necessary and scarce resources as well as endangering the safety of treatable patients in the facilities. n176

NASMHPD's official position regarding the confinement of violent sex offenders urges the criminal justice system to address the problem through sentencing or other means. n177 However, they stress that if civil commitment processes are adopted, states should consider drafting statutes that clearly distinguish between dangerous sex offenders who do not have a mental illness and those with mental illness. n178 Further, NASMHPD recommends that facilities and treatment programs should be funded from outside the state mental health agency to maintain the integrity of the public mental health system because confinement and treatment of dangerous sex offenders are beyond the scope of traditional practices of state mental health agencies. n179 Finally, they urge states to recognize that treatment programs need to be tailored for dangerous, mentally ill sex offenders and that facilities for their confinement should be separate from facilities for the commitment of other criminal offenders. n180

The ACLU and WSPA view the law as "pure preventive detention masquerading as indeterminate psychiatric treatment." n181 These organizations cite the fact that sexual predation by itself is not indicative of mental illness. n182 Further, they argue that sex offenders make up a group of people, some of whom have mental disorders and some of whom act without such an influence. n183

The ACLU and WSPA also argue that because sex offenders do not necessarily have a mental illness, there is no treatment available for their behavior, therefore these individuals will likely be detained for the duration of their life. n184 The U.S. Supreme Court holds that civil [*536] commitment to a mental institution requires that an individual be both mentally ill and dangerous to himself or others. n185 Mental health professionals are concerned about the distinction between "mental illness" and "mental disorder" that

appears in the Washington Community Protection Act. The presence of deviant sexual behavior is not necessarily indicative of a mental disorder. n186 The problem with these two classifications of persons is that, in order to determine whether a person meets a legal definition, a mental health professional must diagnose and assess the degree of a person's impairment. n187 The potential for an incorrect diagnosis is high when combining legal terms with mental health terms and when combining legal professionals with mental health professionals. Members of both fields must cooperate to make sure that terms are not being used interchangeably and that individuals are receiving the proper treatment and/or the appropriate confinement. Mental health professionals need to be honest and not assist in "the perpetration of a fraud" that occurs when the real goal behind the confinement is continued incarceration and the false promise of treatment. n188

Finally, because future behavior cannot be predicted with one hundred percent accuracy, the result will be that sexual predators confined under Washington's law will generally be unable to prove that they no longer present a danger to society and therefore will not be released. n189 This, in effect, results in preventative detention that is no different from criminal incarceration. Further, many mental health experts argue that individuals involuntarily confined are not likely to respond to the treatment provided. n190 This is because those confined will not believe that treatment will help them achieve freedom. In addition, individuals without mental illness will not respond to treatment geared to the mentally ill.

Opponents of sex offender laws argue that the criminal justice system would better deal with sex offenders. Individuals with this view contend that deterrence, retribution and incapacitation would be better achieved [*537] through confinement in the criminal justice system than by placing the offender in a state mental health facility. n191 The prevailing opinion regarding civil commitment of sex offenders is that the law "offends the prohibitions against ex post facto laws and double jeopardy by masquerading as a civil commitment law when its purpose is penal." n192 If a sex offender is truly a threat to the public, this can be taken into consideration at the time of the initial criminal sentence. n193 Waiting until an incarcerated sex offender is at or near the end of his sentence and then initiating a civil commitment proceeding is, according to researcher Rudolph Alexander, "dishonest public policy." n194 Such practices allow the state legislature to circumvent the criminal justice system's sentencing guidelines and keep dangerous persons away from the community at large while failing to protect the rights of sex offenders. In his research, Adam Falk concluded that "indeterminate and lifetime criminal sentences provide the flexibility of indefinite civil commitment without sacrificing the fundamental right of Americans to be free from physical restraint." n195 Additionally, with a longer criminal sanction, the public would be satisfied that an individual was confined based on criminal culpability and not questionable mental diagnoses. n196

The American Psychological Association (APA) actively opposes the civil commitment of sex offenders after prison. Accordingly, the APA filed an amicus brief on behalf of Hendricks in *Kansas v. Hendricks*. The APA publically opposed post-release civil commitment laws, noting that the State's "asserted interest in treatment is not strong enough to overcome the predominantly criminal character of this confinement." n197 In fact, the Director of the confinement facility where Hendricks was imprisoned testified that he had "no knowledge or experience in treating sex offenders." n198 The APA argues "that there is no legal basis for indefinitely and involuntarily confining a mentally competent individual [*538] outside the criminal justice system on the basis of "a psychiatrically invalid classification category," because the laws create a new category called "mental abnormality." n199 In support of its position, Richard Ciccone, M.D., chair of the APA's Commission on Judicial Action, stated that "it's understandable that states are searching for a way to deal with a serious problem that voters are very concerned about," but legislators could resolve the issue by lengthening prison terms for convicted sex offenders. n200 Nonetheless, the APA is concerned that "psychiatry [is] being used to preventively detain a class of people for whom confinement rather than treatment [is] the real goal." n201 Other groups feel that civil commitment is pursued solely for political purposes and involves extensive civil rights violations. n202

Another reason for opposition to the civil commitment laws is an overall lack of resources. Sex offender commitment programs are very expensive and, according to Eric Janus, "may divert already scarce resources from community and correctional programs." n203 Opponents of civil commitment laws argue that providing treatment during prison and supervision after release will reduce the rate of recidivism more

than will civil commitment schemes. n204 State officials in charge of providing these mental health services are concerned that sex offender commitment programs are going to drain resources from current programs that often are inadequate. n205

Many mental health professionals are not supportive of the civil commitment of sexually violent predators. A clear message is sent when the individuals and groups in charge of administering the commitment [*539] programs are opposed to the very existence of the program.

Conclusion

The U.S. Supreme Court's holding that the civil commitment of dangerous sex offenders who do not have a mental illness is constitutional does not necessarily mean that such laws represent good policy. Civil commitment schemes for sexually violent predators, such as the Washington State Community Protection Act, do not afford adequate constitutional protection to committed persons. These statutes give legislators and members of the community piece of mind and some additional safety, but at a high price. Piece of mind cannot be provided solely at the expense of another's liberty. In many of the cases that addressed the constitutionality of such confinement, there were forceful dissents questioning the validity of such a program and its constitutionality. For example, Justice Gardebring of the Minnesota Supreme Court in his dissent in *In re Linehan* stated:

To allow the state to first choose the criminal sanction, which requires a finding of a specific state of mind, and when that sanction is completed, to choose another sanction which requires a finding of the opposite state of mind, is a mockery of justice which places both the criminal and civil systems for dealing with sexual predators in disrepute. n206

In addition, in his dissent in *In re Young*, Justice Johnson further condemned civil commitment statutes stating:

By committing individuals based solely on perceived dangerousness, the Statute in effect sets up an Orwellian "dangerousness court," a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution. n207

Despite these strong dissents, the U.S. Supreme Court through *Kansas v. Hendricks* and *Seling v. Young*, broadened the constitutional standard for civil commitment, reflecting less concern for individual liberties and more concern for public safety.

Some studies and findings indicate that sex offenders can be treated. Other studies show that treatment has not developed enough to treat the [*540] most serious offenders and those that derive sexual pleasure from their offenses. Effective intervention in sexual offending requires close cooperation between mental health and legal system professionals. Sex offenders must be provided with high-quality, sex-offense-specific evaluations so that courts can facilitate the most effective interventions and maximize the safety of the community. Civil commitment schemes, such as the one in Washington, have not yet shown to be helpful in this regard. In fact, the evidence regarding *Young's* particular commitment is showing just the opposite - individuals committed at the SCC are not receiving the treatment necessary for them ever to be released from confinement. The practical effect of the civil commitment law is to keep the offender off the street and protect the community with little to no regard for the future and well being of the offender himself. These civil institutions have not proven to differ much from criminal institutions with the exception of their label. Prisons are not designed nor intended to be therapeutic environments. Similar institutions, without proper personnel and resources, cannot function as therapeutic environments. It would seem that society has unintentionally shifted the burden of caring for many mentally ill individuals from the mental health system to the criminal justice system by enacting civil commitment schemes that do not differ from criminal incarceration on a practical level. Falk notes that this standard "undermines the moral foundations of criminal law and the moral neutrality of the mental health system." n208

A former governor of Virginia expressed dismay that he was "forced to authorize the confinement of persons with mental illnesses in the Williamsburg jail, against both his conscience and the law," because of the lack of appropriate services. n209 That was in 1773. n210 Over two hundred years have passed and America is still facing similar problems. If the mentally ill do not belong in prison, than they also do not belong in environments that substantively are no different from prison.

Some studies indicate that clinicians are increasingly better able to evaluate and treat sex offenders. Research continues to be refined, producing more successful evaluation and treatment techniques. Because sex offenders who successfully complete treatment have a substantially [*541] lower recidivism rate, positive intervention relies on the cooperation of legal and mental health professionals. By working together, the legal and mental health professions can provide sex offenders with necessary treatment, protect the offenders' Constitutional rights and enhance community safety. However, for those individuals who cannot be treated, the future is grim. These persons have little hope of ever being released from their confinement because they are not capable of being treated for their deviancy and still pose a potential threat to the community. State legislatures instead should consider handling this problem through the criminal justice system with increased sentences for sex offenders. Criminals should not be stripped of their constitutional protections in order to ease the fears of the community.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law
Bill of Rights
Fundamental Rights
Procedural Due Process
Scope of Protection
Criminal Law & Procedure
Postconviction Proceedings
Sex Offenders
Criminal Law & Procedure
Counsel
Right to Counsel
Trials

FOOTNOTES:

n1. In re Young, 857 P.2d 989, 994 (Wash. 1993).

n2. See id.

n3. See id.

n4. See id.

n5. See id.

n6. See id.

n7. See id.

n8. See id.

n9. Wash. Rev. Code 71.09.03 (2002).

n10. In re Young, 857 P.2d at 994-95.

n11. Wash. Rev. Code 71.09.030 (2002). This statute was enacted to allow for civil confinement of those deemed to be sexually violent predators.

n12. Id.

n13. Petitioner's Brief at 6, *Seling v. Young*, 531 U.S. 250 (2001).

n14. See id.

n15. See *In re Young*, 857 P.2d at 994.

n16. Id. at 994-95.

n17. Id. at 995.

n18. See id. at 995.

n19. Wash. Rev. Code 71.90.060 (2002). The statute provides for care and treatment "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative."

Id.

n20. Respondent's Brief at 3, *Seling v. Young*, 531 U.S. 250 (2001). Since the inception of the civil commitment, the Department of Corrections staff's role increased to daily security "walk throughs," continued responsibility for medical care, meals and enforcement of requirements that residents be shackled and dressed in prison jumpsuits when taken to the Washington State Reformatory infirmary. See *Young v. Weston*, 192 F.3d 870, 875 (9th Cir. 1999).

n21. The Washington State Community Protection Act was enacted after *Young* committed the acts for which he was incarcerated. The law, he contends, changes the punishment or inflicts a greater punishment than the law provided for when the acts were committed. Thus the law acts as an unconstitutional ex post facto law.

n22. U.S. Const. amend V. The Fifth Amendment provides: "Nor shall any person ... be subject for the same offense to be twice put in jeopardy of life or limb ... "

n23. See *In re Young*, 857 P.2d at 992.

n24. Respondent's Brief at 10, *Seling v. Young*, 531 U.S. 250 (2001).

n25. See *In re Young*, 857 P.2d at 1018.

n26. See id.

n27. See *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

n28. See id. at 754.

- n29. See *Young v. Weston*, 192 F.3d 870, 872 (9th Cir, 1999).
- n30. See *Kansas v. Hendricks*, 521 U.S. 346 (1997).
- n31. See *id.*
- n32. See *Young v. Weston*, 122 F.3d 38 (9th Cir. 1997).
- n33. See *Young v. Weston*, 898 F.Supp. 744, 754 (W.D. Wash. 1995).
- n34. See *Young*, 192 F.3d at 877.
- n35. See *Seling v. Young*, 531 U.S. 250 (2001).
- n36. *Id.*
- n37. Wash. Rev. Code 71.09.010 (2002).
- n38. See *id.*
- n39. See *id.*
- n40. Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 *Am. J.L. & Med.* 117, 117 (1999).
- n41. Wash. Rev. Code 71.09.020 (2002).
- n42. *Id.*
- n43. *Id.*
- n44. See Wash. Rev. Code 71.09.030 (2002).
- n45. Wash. Rev. Code 71.09.040 (2002).
- n46. *Id.*
- n47. Wash. Rev. Code 71.09.050 (2002).
- n48. *Id.*
- n49. Wash. Rev. Code 71.90.060 (2002).
- n50. Wash. Rev. Code 71.09.070 (2002).

n51. See Wash. Rev. Code 71.09.090 (2002).

n52. Wash. Rev. Code 71.09.080 (2002).

n53. Wash. Rev. Code 71.09.090 (2002).

n54. Id.

n55. See Petitioner's Brief at 12, *Seling v. Young*, 531 U.S. 250 (2001).

n56. See id.

n57. See Respondent's Brief at 3, *Seling v. Young*, 531 U.S. 250 (2001).

n58. See *Kansas v. Hendricks*, 521 U.S. 346, 387 (1997).

n59. See Wash. Rev. Code 71.09.090 (2002).

n60. See *Hendricks*, 521 U.S. at 369.

n61. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

n62. Id.

n63. See e.g., *Hendricks*, 521 U.S. at 361.

n64. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

n65. *Hudson*, 522 U.S. at 99 (quoting *Kennedy*, 372 U.S. at 144).

n66. Id. at 100.

n67. See *Kennedy*, 372 U.S. at 168-69.

n68. See *In re Young*, 857 P.2d at 999.

n69. See id.

n70. See *Young v. Weston*, 192 F.3d 870, 874 (9th Cir. 1999).

n71. *Hudson*, 522 U.S. at 100.

n72. *Young*, 192 F.3d at 874 n.4.

n73. See *Falk*, supra note 40, at 128.

- n74. See *Kansas v. Hendricks*, 521 U.S. at 346, 365 (1997).
- n75. See *id.* at 368-69.
- n76. Wash. Rev. Code 71.09 (2002).
- n77. See *Hudson v. United States*, 522 U.S. 93 (1997).
- n78. *Id.* at 100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)).
- n79. See *Seling v. Young*, 531 U.S. 250, 260 (2001).
- n80. See *id.* at 261.
- n81. See *id.*
- n82. See *id.* at 263.
- n83. See *id.*
- n84. *Id.* at 267.
- n85. See *id.* at 265.
- n86. See *id.*
- n87. See *id.*; See also 42 U.S.C. 1983 (1994).
- n88. *Kansas v. Crane*, 122 S. Ct. 867 (2002).
- n89. See *id.* at 870.
- n90. *Id.*
- n91. Wash. Rev. Code 71.09.060 (2002) (emphasis added).
- n92. Wash. Rev. Code 71.09.070-080 (2002).
- n93. See Cal. Welf. & Inst. Code 6600 et seq. (2000); Fla. Stat ch. 394.910 (2000); Iowa Code 229A.1 (1999); Kan. Prob. Code Ann. 59-29a01 (1999); Mo. Rev. Stat. 632.480 (1999); N.J. Rev. Stat. 30:4-27.25 (2000); S.C. Code Ann. 44-48-20 (2000); Tex. Health & Safety Code Ann. 841.001 (Vernon 2000); Va. Code Ann. (Michie 2000); Wash. Rev. Code 71.09.010 (2000).
- n94. See *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).
- n95. See *id.* at 366.

n96. See Wash. Rev. Code 71.09.060 (2002).

n97. See G. Andrew H. Benjamin et al., Law and Mental Health Professionals, Washington 5D.25(A) (1995). The certification process applies to any evaluation and treatment provider who provides services to adult offenders under the Sex Offender Sentencing Alternative, Wash. Rev. Code 9.94A.120(7), or to juvenile sex offenders under Wash. Rev. Code 12.40.160. Id.

n98. See *Turay v. Seling*, 108 F.Supp. 2d 1148, 1151 (W.D. Wash. 1994).

n99. See *id.* at 1151-52.

n100. *Id.* at 1151.

n101. *Id.* at 1153.

n102. Respondent's Brief at 5, *Seling v. Young*, 531 U.S. 250 (2001).

n103. See Petitioner's Brief at 9, *Seling v. Young*, 531 U.S. 250 (2001).

n104. *Id.*

n105. See *Seling v. Young*, 531 U.S. at 257.

n106. U.S. Const. art. I, 9, cl. 3.

n107. Recidivism rates measure the rates at which offenders repeat their acts or crimes.

n108. Richard Hamill, Recidivism of Sex Offenders: What you Need to Know, *Criminal Justice*, A.B.A. J., Winter 2001, 24.

n109. See *id.*

n110. See *id.*

n111. See Linda S. Grossman et al., Are Sex Offenders Treatable? A Research Overview, 50 *Psychiatric Services* 349, 350 (1999).

n112. See generally U.S. Dept. of Justice, State and Federal Corrections Information Systems, An Inventory of Data Elements and an Assessment of Reporting Capabilities (1998).

n113. Hamill, *supra* note 107, at 25.

n114. *Id.*

n115. See *id.* at 26.

n116. See *id.*

n117. See *id.* at 29.

n118. Aviel Goodman, *Sexual Addiction: Diagnosis and Treatment*, *Psychiatric Times*, Oct. 1998, at 1.

n119. See *id.*

n120. See *id.*

n121. Martin P. Kafka, *Therapy for Sexual Impulsivity: The Paraphilias and Paraphilia-Related Disorders*, *Psychiatric Times*, June 1996, at 1.

n122. See Vernon L. Quinsey et al., *Violent Offenders: Appraising and Managing Risk* 120 (1998).

n123. See *id.*

n124. See Kafka, *supra* note 120, at 2; see also Goodman, *supra* note 117, at 4.

n125. See Joseph A. Flaherty et al., *Therapist-Patient Race and Sex Matching: Predictors of Treatment Duration*, *Psychiatric Times*, Jan. 1998, at 1. See also Richard C. Friedman et al., *Discussing Sex in the Psychotherapeutic Relationship*, *Psychiatric Times*, July 2000.

n126. See Flaherty, *supra* note 124, at 1.

n127. *Id.*

n128. See Hamill, *supra* note 107, at 31.

n129. *Id.* The study was called "The Vermont Treatment Program for Sexual Aggressors." *Id.*

n130. *Id.*

n131. S. Sleek, *Research May Help Identify Sex Offenders Most Likely to be Successfully Treated*, *APA Monitor Online* (Feb. 1999), at <http://www.apa.org/monitor/feb99/offend.html>.

n132. *Id.*

n133. *Id.*

n134. *Id.*

n135. Flaherty, *supra* note 124, at 1.

n136. *Id.*

n137. *Id.*

n138. Id.

n139. Friedman, *supra* note 124, at 1.

n140. Id.

n141. See Quinsey, *supra* note 121, at 120.

n142. See *id.*

n143. Edward Zamble et al., *The Criminal Recidivism Process* 1 (1997).

n144. Id.

n145. Hamill, *supra* note 107, at 29.

n146. Gene G. Abel et al., *Behavioral Approaches to Treatment of the Violent Sex Offender*, in *Clinical Treatment of the Violent Person* 95, 113 (Loren H. Roth ed., 1987).

n147. See *id.*

n148. See Kafka, *supra* note 120, at 2.

n149. Id.

n150. Id. at 3.

n151. Id. at 3-4.

n152. Id.

n153. Id. at 4.

n154. Id.

n155. Id.

n156. See Abel, *supra* note 144, at 106.

n157. Arthur L. Brody et al., *Washington State's Unscientific Approach to the Problem of Repeat Sex Offenders*, 22 *Bull. Am. Acad. Psychiatry L.* 343, 346 (1994).

n158. Id.

n159. See *id.* In aversion therapy, the patient is conditioned to associate negative stimuli with deviant sexual feelings. One negative stimulus used is painful electrical shocks. Id.

n160. See *id.* at 347. Orgasmic reconditioning consists of two phases. First, the patient masturbates to orgasm while using socially acceptable fantasies. Then they are instructed to masturbate for thirty to sixty minutes while verbalizing their deviant fantasies. This technique allows for patients to begin to associate sexual satisfaction with appropriate sexual themes and minimal pleasure with deviant themes. *Id.*

n161. See *id.* This form of treatment is designed to help the patient recognize decisions and events leading up to his deviant sexual behavior. *id.*

n162. See *id.* at 346. Social skills training teaches the sex offender conversational skills, normal levels of assertiveness, and reduction in social anxiety. *Id.*

n163. See Quinsey, *supra* note 121, at 121. Phallometry involves the measurement of male sexual arousal by monitoring changes in penis size while stimuli are presented in a controlled fashion. *Id.*

n164. See Brody, *supra* note 155.

n165. See Goodman, *supra* note 117, at 4.

n166. *Id.*

Relapse prevention strategies help individuals who use sexual behavior addictively to recognize factors and situations that are associated with an increased risk of acting out sexually, to cope more effectively with sexual urges, to recover rapidly from episodes of symptomatic behavior and to use such "slips" as opportunities to learn about how their recovery plans can be improved.

Id.

n167. *Id.*

n168. *Id.* at 5.

n169. See Hamill, *supra* note 107, at 31.

n170. See Brody, *supra* note 155, at 344.

n171. See Position Statement on Laws Providing for the Civil Commitment of Sexually Violent Criminal Offenders, National Association of State Mental Health Program Directors, at <http://www.nasmhpd.org/sexpred.htm> (last visited Apr. 6, 2001).

n172. *Id.*

n173. *Id.*

n174. *Id.*

n175. *Id.*

n176. Id.

n177. Id.

n178. Id.

n179. Id.

n180. Id.

n181. Brody, *supra* note 155, at 344.

n182. See *id.*

n183. *Id.* at 344-345.

n184. *Id.* at 345.

n185. *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992).

n186. See Rudolph Alexander, *Civil Commitment of Sex Offenders to Mental Institutions: Should the Standard Be Based on Serious Mental Illness or Mental Disorder?*, 11 *J. Health Soc. Pol'y* 67 (2000).

n187. *Id.* at 72.

n188. *Id.* at 76.

n189. Brody, *supra* note 155, at 353.

n190. *Id.*

n191. *Id.* at 346.

n192. *Id.* (quoting *In re Young*, 857 P.2d 989, 1019 (Wash. 1993) (Johnson, J., dissenting)).

n193. Alexander, *supra* note 184, at 76.

n194. *Id.* at 77.

n195. Falk, *supra* note 40, at 147.

n196. *Id.*

n197. APA Opposes Penal Use of Commitment Statutes, *Psychiatric News*, available at <http://www.psych.org/pnews/97-01-03/penal.html> (Jan. 3, 1997).

n198. Id.

n199. Kansas Law on Sexual Offenders Unconstitutional, APA Comments, Psychiatric News, available at <http://www.psych.org/pnews/96-10-04/kansas.html> (Oct. 18, 1996).

n200. Court Ruling Opens Door to Abuse of Mental Health Systems, Psychiatric News, available at <http://www.psych.org/pnews/97-07-18/court.html> (July 18, 1997).

n201. APA Opposes Civil Commitment of Sex Offenders After Prison, Psychiatric News, available at <http://www.psych.org/pnews/98-08-21/civil.html> (Aug. 21, 1998).

n202. See Alexander, *supra* note 184, at 76.

n203. Eric S. Janus, Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences, 18 Behav. Sci. Law 5, 18 (2000).

n204. See *id.*

n205. See *id.* at 19.

n206. In re Linehan, 518 N.W.2d 609, 616 (Minn. 1994) (Gardebring, J., dissenting).

n207. In re Young, 857 P.2d 989, 1019 (Wash. 1993) (Johnson, J., dissenting).

n208. Falk, *supra* note 40, at 147.

n209. Representative Ted Strickland, Mentally Ill Don't Belong in Prison, Psychiatric News, available at <http://www.psych.org/pnews/99-12-17/prison.html> (Dec. 17, 1999).

n210. See *id.*

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