

**SEXUALLY VIOLENT PREDATOR LEGISLATION AND
THE SEXUAL PSYCHOPATH ACT:
Will New York “Police” Their Sexual Predators via Civil Commitment?**

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Introduction

Megan Kanka, for whom Megan’s Law is named in honor, was seven years old when she was abducted, sexually assaulted, and murdered by three convicted (and released) sex offenders who lived in her neighborhood.² Megan was lured into the house by the men with the promise of seeing a puppy.³

In another unfortunate example, Earl Shriver, another convicted (and released) sexual offender, abducted a boy in Seattle, whom he sexually assaulted.⁴ After the assault the offender cut off the boy’s penis and left him to die.⁵ The boy was seven years old.⁶ The boy survived and was known in the press as “The Little Tacoma Boy” in an effort to safeguard his privacy; it was not until recently, upon his death, that the boy’s name was released as Ryan Hade.⁷

Yet another child, Jacob Wetterling – who is the namesake of the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act⁸ – is still missing.⁹ Jacob Wetterling disappeared in Minnesota in 1989.¹⁰ Jacob, his brother, and a friend were riding their bikes home when

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² Jonathan Simon, *Sex Offenders and the New Penology*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 307 (Bruce J. Winick & John Q. LaFond eds., 2003) [hereinafter Simon, PROTECTING SOCIETY].

³ See Project Safekids, at <http://www.projectsafekids.org/pedo/megan.htm> (last visited Mar. 13, 2006).

⁴ Roxanne Lieb, *State Policy Perspectives on Sexual Predator Laws*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 43 (Bruce J. Winick & John Q. La Fond eds., 2003) [hereinafter Lieb, PROTECTING SOCIETY].

⁵ *Id.*

⁶ *Id.*

⁷ Bryan Johnson, ‘Little Tacoma Boy’ Was Upbeat, Despite Horrors He Survived, Komo 1000 News, June 23, 2005, at <http://www.komotv.com/news/story.asp?ID=37575> (last visited Mar. 13, 2006) (For 16 years his identity was kept secret and it was only recently revealed after his death at the age of 23).

⁸ 42 U.S.C. §4071 (1994).

⁹ See Project Safekids, *supra* note 3.

¹⁰ *Id.*

they were surprised by an armed masked man.¹¹ They were told to run into the woods or they would be shot.¹² As they all took off running, the man grabbed Jacob and they both disappeared.¹³

The list of atrocities committed against children by recidivist convicted and released offenders continues. It is the combined energy of these horrendous crimes and criminal justice responses (i.e., Megan's Law) that leads to new legislation such as the Sexually Violent Predator Legislation.¹⁴ Such legislation is a response to the outcry of the public.¹⁵

Recent events in New York, like the violent attack on Concetta Russo-Carriero in June 2005,¹⁶ have resulted in New Yorkers calling for Albany to adopt Sexually Violent Predator (SVP) legislation to protect the public from sexually violent predators. This paper will explore the likelihood that New York will adopt a form of SVP legislation allowing for civil commitment of sexually violent predators. Such a determination will be based upon an analysis of the general and state specific¹⁷ policies of SVP legislation and its precursor, the Sexual Psychopath Act,¹⁸ as well as a brief analysis of controversial cases on the matter. This exploration will lead to the conclusion that New York will likely adopt SVP legislation due to the clamor of the public, the status of New Jersey as a big proponent of such legislation, and the fact that the New York Senate has already passed a bill to civilly commit New York's sex offenders upon release from prison.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Bruce J. Winick & John Q. La Fond, *Introduction*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 3 (Bruce J. Winick & John Q. La Fond eds., 2003).

¹⁵ *Id.*

¹⁶ Danny Hakim, *Debate Pits Public Safety Against Sex Felons' Rights*, *The New York Times*, Nov. 19, 2005, at B3. (Concetta Russo-Carriero was allegedly attacked and stabbed to death by a Level 3 (the highest risk level for sex offenders) sex offender who had previously been convicted of raping a Bronx woman in 1980. The offender was released from prison in 2003 "after spending nearly 24 years in prison for rape and being repeatedly denied parole.")

¹⁷ The state specific analyses will include Washington and New Jersey. Washington, D.C. will also be analyzed.

¹⁸ The Sexual Psychopath Act is a remnant of the 1960s and is currently only in effect in Washington, D.C., although they rarely use it. Washington State also has a Sexual Psychopath Act on the books, but it only applies to acts before July 1, 1984.

Part I provides background on the evolution of the idea of the “sexually violent predator.” Part II provides statistics that show that sex offender legislation is for the protection of all races and both genders. Part III offers a discussion of the birth of the new wave of sex offender legislation. Part IV provides a brief discussion¹⁹ of the sexually violent predator legislation and sexual psychopath legislation of Washington State, New Jersey’s sexually violent predator legislation, and Washington, D.C.’s Sexual Psychopath Act. Part V will include an analysis of controversial cases on point. Finally, the conclusion explores the likelihood that New York will adopt a form of SVP legislation allowing for civil commitment of sexually violent predators.

I. The Evolution of the “Sexually Violent Predator”

In the late 1800s and the early 1900s, Cesare Lombroso’s theory²⁰ of the born criminal was the dominant explanation of sexual offenders. This theory posited that some criminals were nothing more than “genetic throwbacks,”²¹ modern cavemen. Under Lombroso’s theory, criminals were primitive people who acted like cavemen because that was their natural state. There was no cure for these modern cavemen.

In the late 1930s, there was the emergence of the *sexual psychopath* as exemplified by the actions of Albert Fish.²² There was a shift in thinking during this time from Lombroso’s born criminal theory to a biological theory.²³ In 1940,

¹⁹ Be advised that all of the legislation described herein will only be briefly discussed. The legislation itself is quite extensive. For the purposes of this paper, only the pertinent portions of the legislation are touched upon.

²⁰ Lombroso published his theory in 1876 in his book *l’Uomo Delinquente (Criminal Man)*. He was a doctor who studied the features of Italian convicts (their arms, lips, cheekbones, etc.). It was this observation period that led Lombroso to his theory of the born criminal. FRANCIS T. CULLEN & ROBERT AGNEW, *CRIMINOLOGICAL THEORY: PAST TO PRESENT 2* (Cullen & Agnew eds., 1999).

²¹ *Id.*

²² Albert Fish committed murder in order to have sex with the dead bodies of his victims. In the 1930s, such an offender would be viewed in terms of the sexual psychopath laws. Under such laws, if Fish met the criteria for a “psychopathic personality,” he would be viewed as an offender but would be hospitalized rather than imprisoned. He would be seen as ill, and the predominate thought of the time was that psychiatrists could cure him. AMERICAN PSYCHIATRIC ASSOCIATION, *DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 12-13* (Howard Zonana et al. eds., 1999) [hereinafter APA, *DANGEROUS SEX OFFENDERS*].

²³ Some theorists “claimed that different biological factors determined the likelihood that an individual would engage in a life of crime.” The theory would posit that since the criminal acts were the result of biological factors, criminals were a medical matter to be cured. STEPHEN T.

biological theorist William Sheldon proposed that there was a link between the physical attributes of a person's body and their personality – in turn, it was one's personality that led them to act out violently.²⁴ At this point in the spectrum of history, sex offenders were seen as a class of offenders for the first time.

In the 1980s there was yet another shift in thinking.²⁵ Psychosocial models offer the view that sex offenders are a social problem because they have been socialized to be violent.²⁶ Psychological models posit that it is one's personality and identity mixed with their environment that fuels their aberrant behavior.²⁷ Psychiatric models, although they recognize that the environment plays some role in behavior formation, proclaim that the offender's aberrant behavior is the result of a split in their personality and social development – it is this split that “leads them to not understand why they desire or engage in” their aberrant behavior.²⁸

Beginning in the 1990s, in response to this social problem of sex offenders, a minority of states,²⁹ attempted to provide protection via SVP legislation. This legislation labeled certain sex offenders as “sexually violent predators.” With the new view of sex offenders as “sexually violent predators” came the development of “special” commitment laws, or sexual predator laws.

II. Statistics: Sexual Offenders Reach All Races and Both Genders

According to the Rain, Abuse & Incest National Network (RAINN) website,³⁰ 9 out of every 10 rape victims are female.³¹ On the other hand, 1 out

HOLMES & RONALD M. HOLMES, *SEX CRIMES: PATTERNS AND BEHAVIORS* 37 (Sage Publications 2 ed. 2002).

²⁴ HOLMES & HOLMES, *supra* note 23, at 39.

²⁵ This time the view of sex offenders drifted from one of biological motivation of the behavior to one of psychological and social motivation of the offender.

²⁶ The social learning model “proposes that individuals learn criminal acts and deeds, and acquire motivations to commit crime, from those things and people around them.” HOLMES & HOLMES, *supra* note 23, at 32.

²⁷ *Id.* at 29.

²⁸ *Id.* at 32.

²⁹ Sixteen states and Washington, D.C. have civil commitment laws. The states include (as of July 2005): Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, South Carolina, Texas, Virginia, Washington, and Wisconsin.

³⁰ See RAINN: The Victims of Sexual Assault, at <http://www.rainn.org/statistics/victims-of-sexual-assault.html?PHPSESSID=7fec5e9e00582b7e725f92c4c9699927> (last visited Mar. 13, 2006).

³¹ *Id.*

of every 10 rape victims is male.³² Clearly, women are more likely to be the victim of a rape than men. However, when it comes to the sexual assault of children, the gender gap is not so extreme. For example, according to the 1995 Child Maltreatment Study of the US Department of Health and Human Services, Administration for Children and Families, out of the 126,000 children who were “victims of either substantiated or indicated sexual abuse,” 75% were girls.³³

In terms of race, 80% of all rape victims are white.³⁴ However, minorities are more likely to be violently attacked.³⁵ According to the Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women, “American Indian and Alaska Native women and men report more violent victimization than do women and men of other racial backgrounds.”³⁶ In fact, American Indian and Alaska Native women “were significantly more likely than white women, African-American women, or mixed-race women to report they were raped” or stalked.³⁷ In addition, American Indian and Alaska Native men “were significantly more likely than Asian men to report they were physically assaulted.”³⁸ Furthermore, Hispanic women were “significantly less likely than non-Hispanic women to report they were raped at some time in their life.”³⁹

Although most reported statistics on sexual offenders are presented in terms of who the victims were, it has been asserted that “most sexual assaults are committed by someone of the same race as the victim.”⁴⁰ In terms of gender, though, it is not always so that sex offenders offend against their same sex.⁴¹ In

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Violent attacks occur in 17.7% of White victim attacks, 18.8% of Black victim attacks, 6.8% Asian/Pacific Islander victim attacks, 34.1% of American Indian/Alaskan victim attacks, and in 24.4% Mixed Race victim attacks. *Id.*

³⁶ See Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey 6* (Nov. 2000), available at <http://www.rainn.org/docs/statistics/fullnvawsurvey.pdf> (last visited Mar. 13, 2006).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Facts About Sex Offenders, at <http://www.westchestergov.com/ptk/Facts.htm> (last visited Mar. 13, 2006) (This website does mention an exception in terms of Native Americans. Namely, that the offenders that prey on Native Americans tend not to be Native American themselves.). See also, Megan’s Law: Facts About Sex Offenders, at <http://www.meganslaw.ca.gov/facts.htm> (last visited Mar. 13, 2006) (Same sentiment as in the prior website, except in this case they cite the information to a report of the Bureau of Justice Statistics entitled American Indians and Crime (1999)).

⁴¹ Professor K. Terry, Personal Communication, Spring 2003.

fact, the gender (and age) of the victim depends on the type of sex offender doing the offending.⁴² Very little has been written on the female sexual offender.⁴³ Although female sexual offenders do exist, they account for a very small percentage of sex offenders. In 2002, Vandiver and Walker wrote an article on the subject of female sex offenders in which they assert that “females make up approximately one percent to two percent of all sex offenders.”⁴⁴

III. The Birth of New Sex Offender Legislation

According to the Klaas Kids website,⁴⁵ Washington State’s Community Protection Act of 1990 was the first act to authorize “public notification when dangerous sex offenders are released into the community.”⁴⁶ In addition, Washington State’s CPA of 1990⁴⁷ included legislation on the civil commitment of sexually violent predators that acts as “the model for legislation nationally” for such legislation.

The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 required each state to register those sex offenders who victimized children,⁴⁸ not to mention other sexually violent offenders.⁴⁹

⁴² *Id.* In terms of pedophiles (those offenders interested in victims who have not yet reached puberty) and hebephiles (those offenders who would only be interested in any victim that had reached puberty), gender and age are very important selective criteria. There are 4 types of sex offenders: the mysoped, the regressed child offender, the fixated offender, and the naïve offender. Each offender type has a particular typology. HOLMES & HOLMES, *supra* note 23, at 101-108. In terms of rapists, their typology appears to be more dependent on the motivation of anger and power, rather than on age and gender as in pedophiles and hebephiles. Rapists can be categorized into 4 groups: the power reassurance rapist, the anger retaliation rapist, the power assertive rapist, and the sadistic rapist. Holmes & Holmes, *supra*, at 186-194.

⁴³ Donna M. Vandiver & Jeffery T. Walker, *Female Sex Offenders: An Overview and Analysis of 40 Cases*, 27 CRIM. JUST. REV. 284 (2002).

⁴⁴ *Id.* at 284.

⁴⁵ The Klaas Kids Foundation, at <http://www.klaaskids.org/pg-legmeg.htm> (last visited Mar. 13, 2006). The Klaas Kids Foundation, of which this is their website, was named for Polly Klaas who was kidnapped and murdered in 1993.

⁴⁶ *Id.*

⁴⁷ W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 28 (Bruce J. Winick & John Q. La Fond eds., 2003) [hereinafter Fitch & Hammen, PROTECTING SOCIETY].

⁴⁸ See The Klaas Kids Foundation, *supra* note 45.

⁴⁹ See The National Sex Offender Registry, at <http://www.nsor.net/wetterling-act.htm> (last visited Mar. 13, 2006).

In 1994, New Jersey enacted a new piece of legislation named Megan's Law.⁵⁰ Megan's Law of 1994 was a response to the rape and murder of Megan Kanka by a known sexual offender.⁵¹ New Jersey's Megan's Law, like other sex offender legislation, relied on those acts that had come before it, namely Washington State's Community Protection Act (CPA) of 1990 and the Jacob Wetterling Act of 1994 with an added twist – *active* community notification.⁵²

In 1996, faced with the inadequacy of the Jacob Wetterling Act of 1994, the federal government responded with its own Megan's Law. The federal version of Megan's Law was signed into action on May 17, 1996 by then President Bill Clinton.⁵³ Megan's Law goes beyond the Jacob Wetterling Act in that it requires that every state institute some form of sex offender registration and community notification.⁵⁴ However, unlike New Jersey's Megan's Law, active community notification is not required – sex offender information need only be released by the State when “it [is] necessary to protect their safety” – the information merely must be accessible to the public.⁵⁵

Megan's Law of 1996, Washington State's CPA of 1990, and the Jacob Wetterling Act of 1994 were an active response on part of the government to appease the public following a number of unfortunate recidivist sex offender acts perpetrated against children. Such atrocities have since become well known tales. The tales of Megan Kanka, Ryan Hade, and Jacob Wetterling will never be forgotten.

IV. Sexually Violent Predator Legislation & Sexual Psychopath Legislation

The following state statutes do not represent the sum total of all SVP and Sexual Psychopath legislation. These statutes were very carefully selected for very specific reasons. Washington State's statutes were selected because Washington State is heralded as the birthplace of such legislation and, as such, was often used as a model for such statutes when other states formed their particular state statute. New Jersey's statute was selected because not only is the

⁵⁰ See Project Safekids, *supra* note 3.

⁵¹ *Id.* Megan Kanka was a seven year old girl who was raped and murdered by a neighbor and two other men, all of which were convicted and released sex offenders. The community had no idea that there were known dangerous sex offenders in their midst. Simon, PROTECTING SOCIETY, *supra* note 2, at 307.

⁵² See Parents For Megan's Law: Commonly Asked Questions, at <http://www.parentsformeganslaw.com/html/questions.lasso> (last visited Mar. 13, 2006).

⁵³ See The Klaas Kids Foundation, *supra* note 45.

⁵⁴ *Id.*

⁵⁵ See Parents For Megan's Law: Commonly Asked Questions, *supra* note 52.

New Jersey court close to New York, but it is a court that is seen as very influential towards the rest of the country's formation of policy. Washington, D.C.'s statute was selected because it is the oldest Sexual Psychopath statute in the country and is distinctive in its own right.

A) Washington State

According to Washington's SVP legislation, a sexually violent predator is defined as "any person who has been convicted of or charged with a crime of sexual violence and *who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.*"⁵⁶ In other words, SVP legislation is applied to any sexual offender who is assessed to have a mental or personality disorder and who is also assessed to be dangerous. Such an assessment occurs 1) shortly before the scheduled release of the sexual offender who is serving their criminal sentence (adult or juvenile), 2) if the sexual offender was determined to be incompetent to stand trial, 3) if the sexual offender has been found not guilty by reason of insanity, or 4) if the convicted and released sexual offender has recidivated.⁵⁷ If a sexual offender is deemed to be a sexually violent predator, he or she can be committed to a mental hospital or other secure facility until such time as he or she is assessed to either no longer meet the definition of a sexually violent predator or that it would be in his or her best interest (and the community could be adequately protected) to be granted a "conditional release to a less restrictive alternative."⁵⁸

Washington also has sexual psychopath legislation.⁵⁹ A sexual psychopath is defined as "any person who is *affected in a form of psychoneurosis or in a form of psychopathic personality*, which form predisposes such person to the commission of sexual offenses in a degree constituting him a menace to the health or safety of others."⁶⁰ Sex offenders thought to be sexual psychopaths would be tried on their criminal charge and then tried on the matter of their sexual psychopathy.⁶¹ If they were found to be a sexual psychopath, they would be institutionalized until such time as mental health professionals and the courts decide that they no longer belong in the mental institution either because they are deemed to be safe or they have received all the treatment benefit possible or they

⁵⁶ WASH. REV. CODE ANN. §71.09.020(16) (West 2005) (emphasis added).

⁵⁷ *Id.* at §71.09.030(1)-(5).

⁵⁸ *Id.* at §71.09.060(1).

⁵⁹ WASH. REV. CODE ANN. §71.06 (West 2002).

⁶⁰ *Id.* at §71.06.010 (emphasis added).

⁶¹ *Id.* at §71.06.030.

have refused treatment.⁶² When the sexual psychopath is released from the institution, he serves his prison sentence or can be paroled under probation terms.⁶³ Although Washington still has this legislation on the books, in terms of sexual psychopaths, it applies “only to crimes or offenses committed before July 1, 1984.”⁶⁴

B) New Jersey

According to the New Jersey Sexually Violent Predator Act,⁶⁵ a sexually violent predator is defined as

a person who has been *convicted, adjudicated delinquent, or found not guilty by reason of insanity* for commission of a sexually violent offense, or has been charged with a sexually violent offense but found to be *incompetent to stand trial, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined* in a secure facility for control, care, and treatment.⁶⁶

If a sex offender is thought to be a sexually violent predator by the “agency with jurisdiction,”⁶⁷ be it a prison or the Department of Human Services, then the Attorney General can petition for the involuntary commitment of the predator.⁶⁸ The Attorney General can petition for a hearing to find either a convicted criminal near the end of his sentence or a patient in a psychiatric facility or hospital to be a sexually violent predator.⁶⁹ If the offender is determined to be a sexually violent predator as defined in the act, then he will be involuntarily committed for an indefinite period of time with periodic reviews.⁷⁰

C) Washington, D.C.

Washington, D.C. does not have Sexually Violent Predator legislation. The District of Columbia, however, does have legislation regarding sexual

⁶² *Id.* at §71.06.091.

⁶³ *Id.*

⁶⁴ *Id.* at §71.06.005.

⁶⁵ N.J. STAT. ANN. §30:4-27.24 (West 2005).

⁶⁶ *Id.* at §30:4-27.26 (emphasis added).

⁶⁷ *Id.* at §30:4-27.27.

⁶⁸ *Id.* at §30:4-27.28(a).

⁶⁹ *Id.*

⁷⁰ *Id.* at §30:4-27.35.

psychopaths, although it is rarely used.⁷¹ According to Washington, DC law,⁷² the term sexual psychopath refers to

a person, *not insane*, who by a course of *repeated misconduct in sexual matters* has evidenced such *lack of power to control his or her sexual impulses* as to be dangerous to other persons because he or she is likely to attack or otherwise inflict injury, loss, pain, or other evil *on the objects of his or her desire*.⁷³

If either the court or the United States Attorney for the District of Columbia believes the defendant to be a sexual psychopath, they can file with the court either before trial, before sentencing, or before completion of probation but not during a trial to be assessed as a possible sexual psychopath.⁷⁴ At that time, the defendant would be assessed by two separate qualified psychiatrists.⁷⁵ If deemed to be a sexual psychopath the defendant would be committed by the court to an institution⁷⁶ until such time that he can be deemed “sufficiently recovered” to the point where he will no longer pose a threat to the public.⁷⁷ According to the 1958 case of *Plummer v. United States*,⁷⁸ “important considerations of public policy suggest that a compulsive sex offender who requires and can possibly be benefited by psychiatric treatment should be committed to a mental hospital for such treatment rather than confined in an ordinary penal institution.”

Even though the court or the U.S. Attorney for the District of Columbia may believe that a particular defendant is a sexual psychopath under the Sexual Psychopath Act (SPA), they may be unable to invoke the SPA inquiry. The designation of sexual psychopath is unavailable to those that are charged with first degree sexual abuse, second degree sexual abuse, or assault with intent to commit first or second degree sexual abuse.⁷⁹ However, if an individual is determined to be a sexual psychopath, he will still be held responsible for any pending charges.⁸⁰ A criminal proceeding is only stayed until the defendant is either found to not be a sexual psychopath, if the motion for assessment is dismissed or

⁷¹ Fitch & Hammen, PROTECTING SOCIETY, *supra* note 47, at 28.

⁷² D.C. CODE ANN. §22-3800 (2001).

⁷³ *Id.* at §22-3803(1) (emphasis added).

⁷⁴ *Id.* at §22-3804.

⁷⁵ *Id.* at §22-3806(a).

⁷⁶ *Id.* at §22-3808.

⁷⁷ *Id.* at §22-3809.

⁷⁸ *Plummer v. United States*, 260 F.2d 729, 104 U.S. App. D.C. 211 (1958).

⁷⁹ D.C. CODE ANN. §22-3804(e) (2001).

⁸⁰ *Id.* at §22-3810.

withdrawn, or if the defendant is discharged from the institution after being confined as a sexual psychopath.⁸¹

V. Legal Issues Raised by SVP legislation

As Washington State's SVP legislation became the unofficial outline for future states drafting their SVP legislation,⁸² it is only natural that its SVP legislation has been controversial since its inception.⁸³ In 1993, the Washington Supreme Court heard the case of *In re Young*.⁸⁴ In that case, the court held that Washington's SVP law was constitutional.⁸⁵ The court's opinion joined the case of *Andre Young and Vance Cunningham*.⁸⁶

Young and Cunningham challenged their commitment under the statute on constitutional grounds arguing that their commitment would violate their 5th Amendment protection against double jeopardy and ex post facto law making and violated their due process rights since the state could commit someone without proving dangerousness or mental illness, and that their commitments under the statute were invalid since the state failed to show recent evidence of their dangerousness in the form of an overt act.⁸⁷ The court responded by stating that double jeopardy did not apply because the commitment was civil in nature rather than criminal, the act as written does consider and include an assessment of dangerousness and mental illness, and an overt act of dangerousness did not need to be proven for commitment of an individual currently incarcerated but did need to be proven to civilly commit someone that is currently out in society.⁸⁸ In these cases, the civil standard of proof was satisfied and civil commitment resulted.

The Supreme Court of the United States has also faced this issue of constitutionality in terms of sexually violent predator legislation. In 1997, the Supreme Court decided the case of *Kansas v. Hendricks*.⁸⁹ In this case the Court stated that "Kansas's Sexually Violent Predator Act was constitutional, at least as applied in the commitment of Leroy Hendricks."⁹⁰

⁸¹ *Id.* at §22-3810(1)-(3).

⁸² Fitch & Hammen, PROTECTING SOCIETY, *supra* note 47, at 28-9.

⁸³ APA, DANGEROUS SEX OFFENDERS, *supra* note 22, at 19.

⁸⁴ *In re Young*, 122 Wash.2d 1, 857 P.2d 989 (Wash 1993).

⁸⁵ APA, DANGEROUS SEX OFFENDERS, *supra* note 22, at 19.

⁸⁶ *Id.*

⁸⁷ *Id.* at 20-1.

⁸⁸ *Id.* at 20-1.

⁸⁹ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁹⁰ APA, DANGEROUS SEX OFFENDERS, *supra* note 22, at 29.

Hendricks had argued that the act was unconstitutional for the same reasons that Young and Cunningham had argued against the constitutionality of the Washington State Sexually Violent Predator Act – the act violated substantive due process by not requiring a showing of mental illness and the act violated the 5th amendment double jeopardy / ex post facto law making ban.⁹¹ Justice Thomas rejected both of these arguments in much the same way as the court in *In re Young*. Thomas dismissed the argument that the statute must require a finding of a mental illness rather than a mental abnormality by stating that “we [the United States Supreme Court] have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes.”⁹² Thomas also rejected the double jeopardy / ex post facto law making argument by stating that they only apply to laws that are “punitive” and “retributive” in nature rather than this act that is a civil remedy.⁹³

Conclusion: What Path Will New York Take?

As of 2005, New York’s only legislation regarding sex offenders is the Sex Offender Registration Act (SORA).⁹⁴ SORA defines a sexual predator as “a sex offender who has been convicted of a sexually violent offense... and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses.”⁹⁵ SORA only allows for the registration of the sex offender in the New York Sex Offender Registry⁹⁶ and the possible notification of the community depending upon the offender’s risk level and is silent on the civil commitment of such offenders.⁹⁷ However, it should be noted that the New York Senate passed a bill to civilly commit sex offenders upon their release from prison five years ago.⁹⁸ It has only to be voted on by the State Assembly.⁹⁹

⁹¹ *Id.*

⁹² *Id.* at 30.

⁹³ *Id.*

⁹⁴ N.Y. CORRECT. LAW §168 (McKinney 2005).

⁹⁵ *Id.* at §168-a(7)(a).

⁹⁶ The New York Sex Offender Registry can be found online, at <http://criminaljustice.state.ny.us/nsor/index.htm> (last visited Dec. 2, 2005). Be advised, you can only search the Level 3 Subdirectory from the website and in order to access the database to search for level 3 offenders, you must fill in your personal identifying information and read and accept a disclaimer. A level 3 offender is the high-risk offender. *Id.*

⁹⁷ N.Y. CORRECT. LAW §168-d (McKinney 2005).

⁹⁸ Jonathan Bandler & Richard Liebson, *Slaying Spurs call to hold sex offenders after release*, The Journal News, July 12, 2005, at 1B.

⁹⁹ *Id.*

On November 29, 2005 New York State Director of Criminal Justice Chauncey G. Parker appeared before the New York City Council Public Safety Committee where he testified in part:

We know that there is an extremely dangerous group of sexually violent predators that are an immediate threat to public safety should they be released from prison. Since 1998, Governor Pataki has proposed civil commitment legislation which would enable New York State to civilly commit sexually violent predators, if a jury of 12 individuals unanimously agree beyond a reasonable doubt that the individual has a mental abnormality and presents a substantial risk to the safety of the community. The Governor's Program Bill was modeled after a United States Supreme Court decision and is similar to laws in 16 other states (including New Jersey, Massachusetts and Virginia) and the District of Columbia. For seven years, the State Assembly leadership has refused to bring this legislation to the floor for a vote despite overwhelming bipartisan support for this legislation in the State Senate. The closest vote was 58 to 2.¹⁰⁰

Mr. Parker's testimony mentions that there have been attempts in New York to commit sexually violent predators upon their release from prison using existing mental illness laws as a tool, but to no avail.¹⁰¹ Such attempts were ruled inappropriate by the New York County Supreme Court on November 15, 2005.¹⁰² As of March 13, 2006, there are a grand total 22,642 registered sex offenders throughout New York State.¹⁰³

¹⁰⁰ This excerpt and the full text of Mr. Parker's testimony can be found online, at <http://criminaljustice.state.ny.us/pio/2005-1129testimony.htm> (last visited Dec. 2, 2005).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ These figures can be found online at the NYS Division of Criminal Justice Services website, at http://criminaljustice.state.ny.us/nsor/stats_by_county.htm (last visited Mar. 13, 2006). The grand total figure includes 7835 Level 1 offenders, 8322 Level 2 offenders, 5582 Level 3 offenders, and 903 offenders pending risk-level determination. Level 1 offenders are those offenders determined to have a low risk of recidivism. Level 2 offenders are those offenders determined to be at moderate risk of recidivism. Level 3 offenders are those offenders that are at high risk of re-offending. *Id.*

New Jersey is a strong proponent of Sexually Violent Predator legislation as evidenced by the sheer number of offenders they have committed under the legislation.¹⁰⁴ New Jersey's Supreme Court is an extremely influential court on the rest of the United States.¹⁰⁵ The press has revved up the citizens of New York so that they are clamoring for retribution against the sex offenders that have been recidivating and terrorizing their communities.¹⁰⁶ The New York Senate passed a bill to civilly commit sex offenders upon their release from prison five years ago.¹⁰⁷ All considered, it is likely that New York will follow New Jersey and take the leap to civilly commit their sexually violent predators due to the insistence of the State's citizens, the status of New Jersey as a big proponent of such legislation, and the fact that the New York Senate has already passed a bill to civilly commit New York's sex offenders upon release from prison.

¹⁰⁴ Lieb, PROTECTING SOCIETY, *supra* note 4, at 45. (As of a Spring 2002 survey, New Jersey had 212 persons civilly committed under the NJ SVP legislation).

¹⁰⁵ Various professors, Personal communication, 2003-2006.

¹⁰⁶ As judged from the various articles written on the subject.

¹⁰⁷ Bandler & Liebson, *supra* note 98.