UIC Law Review

Volume 28 | Issue 4

Article 7

Summer 1995

Are the Children of Illinois Protected from Sex Offenders, 28 J. Marshall L. Rev. 883 (1995)

Matthew J. Herman

Follow this and additional works at: https://repository.law.uic.edu/lawreview

Part of the Criminal Law Commons, Juvenile Law Commons, Law Enforcement and Corrections Commons, and the State and Local Government Law Commons

Recommended Citation

Matthew J. Herman, Are the Children of Illinois Protected from Sex Offenders, 28 J. Marshall L. Rev. 883 (1995)

https://repository.law.uic.edu/lawreview/vol28/iss4/7

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

NOTES

ARE THE CHILDREN OF ILLINOIS PROTECTED FROM SEX OFFENDERS?

INTRODUCTION

On July 29, 1994, Megan Kanka, a seven-year-old New Jersey girl, accepted an adult neighbor's invitation into his home to see a puppy.¹ The neighbor, Jesse Timmendequas, a twice-convicted sex offender, molested and killed the young girl.² Even though Mr. Timmendequas shared a home with two other sex offenders for almost two years, none of the neighbors knew of his past.³ As a result of the murder, New Jersey launched a legislative attack on sex offenders.⁴ Within two months of Megan Kanka's death, the New Jersey Assembly passed a number of bills dealing with sex offenders.⁵ The "sex offender package" passed by the Assembly requires sex offenders to register with the police⁶ and allows the police to notify members of the community when convicted sex offenders move into a neighborhood.⁷ The package also provides for the civil commitment of sexually dangerous persons to mental health facilities.⁸

Unfortunately, it often takes just such a tragic event and the resulting public outcry to initiate a change by the legislature. For instance, the public's response to violent attacks by convicted sex offenders in Washington prompted the adoption of the Community Protection Act of 1990.⁹ If New Jersey had acknowledged and

1. Gail Ferguson Jones et al., Sex Offender Admits Molesting, Killing Girl, STAR LEDGER (New Jersey), Aug. 2, 1994, at 1, 6.

3. James Popkin & John Simons, Natural Born Predators, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 64, 66.

4. Ivette Mendez, Sex Offender Legislation Gains in the Senate, STAR LEDGER (New Jersey), Aug. 23, 1994, at 1, 6.

5. Ron Marsico, 'Megan's Law,' Domestic Abuse Bills Are Advanced by the Legislature, STAR LEDGER (New Jersey), Sept. 13, 1994, at 1, 9.

6. A.B. 84, N.J. 206th Leg. 1st Sess. (1994). New Jersey Governor Christine Todd Whitman signed this bill October 31, 1994.

7. A.B. 85, N.J. 206th Leg. 1st Sess. (1994). The New Jersey Senate combined this bill with S.B. 14, N.J. 206th Leg. 1st Sess. (1994), which Governor Whitman signed on October 31, 1994. The media commonly refers to this provision, which allows community notification, as "Megan's Law." Predictably, a convicted sex offender challenged "Megan's Law." See *infra* note 100 for a discussion of Artway v. Attorney Gen. of New Jersey, 876 F. Supp. 666 (D.N.J. 1995) which held that retroactive application of Megan's Law was unconstitutional.

8. A.B. 86, N.J. 206th Leg. 1st Sess. (1994). Governor Whitman signed the bill on October 31, 1994.

9. In re Young, 857 P.2d 989, 992 (Wash. 1993). The public's response to the

^{2.} Id.

analyzed the measures taken by Washington in 1990, perhaps Megan Kanka would still be alive today and New Jersey's new sex offender law would not be known as "Megan's Law." Accordingly, it is imperative to analyze Illinois' current sex offender statutes before a similar tragedy forces legislative change in Illinois.

Illinois currently has two sex offender laws: the Child Sex Offender Registration Act¹⁰ (Registration Act) and the Sexually Dangerous Persons Act¹¹ (SDP Act). In general, the Registration Act requires a child sex offender to register with the police in the county in which he resides.¹² Additionally, the SDP Act allows the State to have a sexually dangerous person committed to a mental health facility.¹³ However, the mere presence of the Registration Act and the SDP Act does not ensure that Illinois citizens are sufficiently protected from sex offenders.

Particular aspects of Illinois' legislation are problematic. For example, under the Registration Act, only law enforcement officials are able to view the registration information.¹⁴ As a result, the registration information is not utilized as an effective *preventive* tool. Likewise, the SDP Act also has deficiencies. First, the State must prove that a person has had a mental disorder for more than one year in order to justify civil commitment.¹⁵ Second, the SDP Act only provides for civil commitment in lieu of criminal punishment.¹⁶ Thus, the State is unable to seek the civil commitment and treatment of sexually dangerous persons upon release from prison.

This Note argues that Illinois' current sex offender statutes are insufficient to protect its citizens, particularly children, and are in need of reform. Part I discusses the current Illinois sex

10. 730 ILCS 150 (1994).

12. 730 ILCS 150/3 (1994).

15. 725 ILCS 205/1.01 (1994). This section states:

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with the criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

Id.

16. See *infra* notes 53-64 and accompanying text for a discussion of the purpose and applicability of the SDP Act.

murder of a Seattle woman by an offender on work release and the violent sexual attack on a boy from Tacoma prompted a task force investigation leading to the passage of the Community Protection Act of 1990. *Id.*

^{11. 725} ILCS 205 (1994).

^{13. 725} ILCS 205/8 (1994).

^{14. 730} ILCS 150/9 (1994). This section states: "The statements or any other information required by this Article shall not be open to inspection by the public, or by any person other than by a law enforcement officer or other individual as may be authorized by law." Id.

offender laws and their constitutionality. Part II addresses sex offender registration statutes outside of Illinois and examines how other states, most notably Virginia, Georgia, Louisiana, and Washington, handle the dissemination of sex offender registration data. Part III discusses the involuntary civil commitment of sex offenders and focuses, in particular, on the purpose and constitutionality of Washington's statute which allows civil commitment upon release from prison. Based upon a combination of statutes in effect in other states, Part IV proposes to modify the Illinois Registration Act in order to utilize the current sex offender registry as a preventive tool. Similarly, Part IV proposes to alter the definition of a "sexually dangerous person" and to expand the scope of the SDP Act to ensure the treatment and commitment of sexually dangerous persons upon release from prison.

I. THE CURRENT ILLINOIS APPROACH

A. Child Sex Offender Registration Act

In June of 1986, the Illinois General Assembly passed the Registration Act in response to "an epidemic in sex crimes against our children."¹⁷ The Registration Act requires the mandatory registration of convicted child sex offenders.¹⁸ A child sex offender¹⁹ must register with the local chief of police thirty days before moving into the community.²⁰ The convicted child sex offender

Id.

^{17.} S.B. 2292, 84th Ill. Gen. Ass'y, 1st Sess. (June 23, 1986).

^{18. 730} ILCS 150/3 (1994).

^{19.} Id. Section 150/2 sets forth the definition of a "child sex offender" and provides as follows:

⁽A) "Child sex offender" includes any person who, after July 1, 1986, is convicted a second or subsequent time for any of the sex offenses or attempts to commit any of the offenses set forth in subsection (B) of this Section or any person who after the effective date of this amendatory Act of 1992 is convicted for any of the sex offenses or attempts to commit any of the offenses set forth in subsection (B) of this section...

⁽B) As used in this Section, "sex offense" means:

⁽¹⁾ A violation of any of the following Sections of the Criminal Code of 1961 when the victim is under 18 years of age:

^{11-20.1 (}child pornography),

^{12-13 (}criminal sexual assault),

^{12-14 (}aggravated criminal sexual assault),

^{12-15 (}criminal sexual abuse when the offense is a felony),

^{12-16 (}aggravated criminal sexual abuse).

⁽²⁾ A violation of any former law of this State substantially equivalent to any offense listed in subsection (B)(1) of this Section.

⁽C) A conviction for an offense of federal law or the law of another state that is substantially equivalent to any offense listed in subsection (B)(1) of this Section shall constitute a conviction for the purpose of this Article.

^{20.} Id. § 150/3. The statute states in part: "Any child sex offender shall within

learns of his obligation to register from one of two sources. The facility that releases or paroles a child sex offender must inform the offender of his duty to register.²¹ Similarly, the court that convicted the sex offender must inform him of his duty to register if the offender is released on probation or upon the payment of a fine.²² This registration requirement expires in ten years if the offender does not commit another sex offense.²³

The purpose of the Registration Act is to assist law enforcement in the protection of children.²⁴ However, the public cannot obtain or view the information contained in the police department's sex offender registry.²⁵ In fact, it is a crime in Illinois for the police to release such information to the public.²⁶ While the Registration Act may assist law enforcement officials in apprehending a suspect, the failure to release registration information does not allow parents, neighbors, and schools to protect children from sex offenders in the area. Although the information obtained under the Registration Act is confidential and only accessible to law enforcement personnel, the constitutionality of the Registration Act has been challenged.

21. Id. § 150/4. This section states in part:

Any child sex offender, as defined by this Article, who is discharged or paroled from a prison, hospital or other institution or facility where he was confined because of a conviction of one of the offenses defined in subsection (B) of Section 2 of this Article, shall prior to discharge, parole or release, be informed of his duty to register under this Article, by the facility in which he was confined.

Id.

22. Id. § 150/5. This section states:

Any child sex offender, as defined by this Article, who is released on probation or discharged upon payment of a fine because of the commission or attempt to commit one of the offenses defined in subsection (B) of Section 2 of this Article, shall, prior to such release be informed of his duty to register under this Article by the Court in which he was convicted.

Id.

23. 730 ILCS 150/7 (1994). This statute provides:

Any person required to register under this Article shall be required to register for a period of 10 years after conviction if not confined to a penal institution, hospital or any other institution or facility, and if confined, for a period of 10 years after parole, discharge or release from any such facility.

Id.

24. People v. Adams, 581 N.E.2d 637, 640 (Ill. 1991).

25. 730 ILCS 150/9 (1994).

26. Id. This section declares that it is "a Class B misdemeanor to permit the unauthorized release of any information required by this Article." Id.

³⁰ days of his coming into any county in which he resides or is temporarily domiciled for more than 30 days, register with the chief of police of the municipality in which he resides,..." *Id.* The failure to register is a Class A misdemeanor. *Id.* § 150/10.

B. Constitutionality of the Registration Act

Shortly after the Registration Act became law in 1986, questions arose regarding its constitutionality. *People v. Adams*²⁷ involved the first challenge of the Registration Act on constitutional grounds. On December 2, 1987, Daniel Adams pled guilty to criminal sexual assault against his twelve-year-old daughter.²⁸ Adams also had a 1985 conviction for aggravated criminal sexual abuse against the same daughter.²⁹ In August of 1988, the trial court certified Adams as a habitual child sex offender³⁰ and advised him of his duty to register as such.³¹ The defendant proceeded to challenge the constitutionality of the Registration Act in an effort to avoid registering as a sex offender.

Adams attacked the Registration Act on three grounds: (1) it constituted cruel and unusual punishment, (2) it denied him due process, and (3) it denied him equal protection of the law.³² First, Adams argued that the Registration Act was cruel and unusual punishment in violation of the Eighth Amendment³³ to the United States Constitution, in that compliance with the Registration Act would subject him to unwarranted police harassment.³⁴ However, the Illinois Supreme Court held that the mandatory registration requirement was not a form of punishment because its purpose was to assist law enforcement officials in the protection of children.³⁵ The court also held that even if the Registration Act

32. Id. at 640.

33. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

34. Adams, 581 N.E.2d at 641.

35. Id. Based upon an analysis of Trop v. Dulles, 356 U.S. 86 (1958), the Illinois Supreme Court held that it was necessary to evaluate the purpose of the statute in determining whether it was civil or penal in nature. Adams, 581 N.E.2d at 640. The defendant believed Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), set forth the factors for consideration when determining whether a statute was civil or penal in nature. Adams, 581 N.E.2d at 641. Those factors are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative pur-

^{27. 581} N.E.2d 637 (Ill. 1991).

^{28.} Id. at 639.

^{29.} Id.

^{30.} In 1986, the current Registration Act was known as the Habitual Child Sex Offender Registration Act. ILL. REV. STAT. ch. 38, para. 221 (1987). The Habitual Child Sex Offender Registration Act stated: "Habitual child sex offender' includes any person who, after July 1, 1986, is convicted a second or subsequent time for any of the sex offenses or attempts to commit any of the offenses set forth in subsection (B) of this Section." *Id.* para. 222.

^{31.} Adams, 581 N.E.2d at 639.

was a form of punishment, the inconvenience imposed by the Registration Act was not severe enough to constitute cruel and unusual punishment.³⁶

Second, the defendant claimed that the Registration Act was arbitrary and denied him due process of the law under the Fourteenth Amendment.³⁷ In Adams, the Illinois Supreme Court held that a statute does not violate due process requirements if the statute bears a rational relationship to a legitimate public interest and if the means utilized are reasonable in accomplishing the statute's objective.³⁸ The Adams court then held that the Registration Act served the legitimate public interest of assisting law enforcement in the protection of children by providing easy access to information concerning known child sex offenders.³⁹ Additionally, the court found the Registration Act's method rational, not arbitrary, in serving its purpose.⁴⁰ Therefore, the court held that the Registration Act did not violate the Due Process Clause.⁴¹

Finally, Adams argued that the Registration Act violated the Equal Protection Clause⁴² of the Fourteenth Amendment.⁴³ Ad-

36. Adams, 581 N.E.2d at 641. The California courts consider the registration requirement a form of punishment and determine whether it is cruel and unusual punishment on a case-by-case basis. See In re Reed, 663 P.2d 216 (Cal. 1983) (hold-ing that the mandatory registration of a sex offender convicted of disorderly conduct for soliciting "lewd and dissolute conduct," a misdemeanor, is cruel and unusual punishment); People v. King, 20 Cal. Rptr. 2d 220 (Cal. Ct. App. 1993) (hold-ing that enforcing the registration requirement is a form of punishment, but not cruel and unusual punishment, for the misdemeanor offense of indecent exposure).

37. U.S. CONST. amend. XIV. The Fourteenth Amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;..." Id.

38. Adams, 581 N.E.2d at 642 (citing People v. Linder, 535 N.E.2d 829 (Ill. 1989)). In *Linder*, the Illinois Supreme Court held that a statute requiring the revocation of sex offenders' drivers' licenses was unconstitutional. *Linder*, 535 N.E.2d at 833. The *Linder* court held that there was not a rational relationship between the legitimate state purpose of promoting safe driving and revocation of sex offenders' drivers' licenses. *Id.* Thus, the statute failed to satisfy due process requirements. *Id.*

39. Adams, 581 N.E.2d at 642.

40. *Id.* The *Adams* court stated: "There is a direct relationship between the disability, the registration of child sex offenders, and the purpose served by the statute, the protection of children." *Id.*

41. Id.

42. The Fourteenth Amendment provides that no state shall "deny to any per-

pose to which it may rationally be connected is assignable for it, and wheth-

er it appears excessive in relation to the alternative purpose assigned.... Kennedy, 372 U.S. at 168-69.

However, the Adams court held that it was unnecessary to consider the afore-

mentioned factors when the legislative intent is clear. Adams, 581 N.E.2d at 641; see State v. Noble, 829 P.2d 1217 (Ariz. 1992) (utilizing the factors enumerated in *Kennedy* and holding that Arizona's sex offender registration statute was civil in nature).

ams maintained that the Registration Act was underinclusive because it did not require similarly situated sex offenders, such as child pornographers, to register.⁴⁴ Adams' argument relied on the basic constitutional law principle that a statute which irrationally differentiates between similarly situated persons violates the Equal Protection Clause of the Fourteenth Amendment.⁴⁵

The Adams court held that Equal Protection Clause analysis, like Due Process Clause analysis, involves a "rational basis" test.⁴⁶ The Adams court then held that the legislature may tailor a statute in order to solve a specific problem — in this instance, the direct victimization of children.47 The court reasoned that while child molesters and child pornographers both victimize children, their motivations may differ.⁴⁸ Child pornographers are often motivated by profit, whereas a child molester's motivation is primarily sexual.⁴⁹ As a result, while child molesters directly victimize children, child pornographers might indirectly victimize children.⁵⁰ The court held that since the legislature legitimately tailored the statute to combat the direct victimization of children, the limited scope of the statute, which excluded child pornographers, was rationally related to its purpose.⁵¹ Accordingly, the Adams court held that the Registration Act did not violate the Equal Protection Clause.⁵²

The Registration Act is not the only Illinois legislation designed to protect children from sex offenders. Illinois has also

43. Adams, 581 N.E.2d at 642.

(B) As used in this Section, "sex offense" means:

(1) A violation of any of the follow ing Sections of the Criminal Code of 1961 when the victim is under 18 years of age:

12-13 (criminal sexual assault),

12-14 (aggravated criminal sexual assault),

12-15 (criminal sexual abuse when the offense is a felony),

12-16 (aggravated criminal sexual abuse).

ILL. REV. STAT. ch. 38, para. 222 (1987).

45. Adams, 581 N.E.2d at 642 (citing Jenkins v. Wu, 468 N.E.2d 1162 (Ill. 1984)).

46. Id. at 642.

47. Id. The court stated: "When the legislature creates a statute, it is not required to solve all the evils of a particular wrong in one fell swoop. The legislature may tailor a statute to the particular problem it is seeking to solve." Id.

48. Id.

49. Id.

50. Id.

51. Id.

son within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

^{44.} Id. When the court notified Adams of his duty to register under the Habitual Child Sex Offender Registration Act, the Act did not include child pornography as an offense that required registration. The act provided:

enacted the Sexually Dangerous Persons Act (SDP Act) in an effort to treat sex offenders and protect citizens. However, in its present form, the SDP Act also significantly underprotects children in Illinois.

C. Sexually Dangerous Persons Act

The Illinois legislature first created a civil commitment statute for sex offenders, known as the Criminal Sexual Psychopathic Persons Act, in 1938.⁵³ The current version of the 1938 Act is known as the Sexually Dangerous Persons Act.⁵⁴ Despite the change in the name of the Act, the legislative objective has remained unchanged: to prevent persons suffering from mental disorders from being punished for crimes they commit while suffering from such mental ailments.⁵⁵

The SDP Act accomplishes this goal by allowing commitment of a sexually dangerous person to a treatment center in lieu of imprisonment.⁵⁶ Under the SDP Act, a person suffering from a mental disorder for more than a year, coupled with a criminal propensity to commit sex offenses, is a "sexually dangerous person."⁵⁷ If a person has any criminal charges pending, the State's Attorney or Attorney General can petition the court to initiate proceedings to have the person committed under the SDP Act.⁵⁸

Id.

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

Id. Since this section requires that a person must have criminal charges pending in order for the Attorney General to initiate proceedings under the SDP Act, the SDP Act will not apply to a person leaving the prison system except in unique circumstances.

58. Id. § 205/3. This section states:

When any person is charged with a criminal offense and it shall appear to the Attorney General or to the State's Attorney of the county wherein such person is so charged, that such person is a sexually dangerous person, within the meaning of this Act, then the Attorney General or State's Attorney of such county may file with the clerk of the court in the same proceeding

^{53.} ILL. REV. STAT. ch. 38, para. 820 (1938). This statute stated:

All persons suffering from a mental disorder, and not insane or feebleminded, which mental disorder has existed for a period of not less than one (1) year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, are hereby declared to be criminal sexual psychopathic persons.

^{54. 725} ILCS 205.

^{55.} People v. Sims, 47 N.E.2d 703 (Ill. 1943).

^{56.} People v. P.T., 599 N.E.2d 79 (Ill. App. Ct. 1992).

^{57. 725} ILCS 205/1.01. This section provides as follows:

Upon accepting the petition, the court appoints two qualified psychiatrists⁵⁹ to determine whether the accused is, in fact, a sexually dangerous person.⁶⁰

The burden of proof required to commit a person to confinement under the SDP Act is proof beyond a reasonable doubt.⁶¹ However, despite utilizing the burden of proof associated with criminal proceedings, the SDP Act defines the proceedings as civil in nature.⁶² If the court declares a person to be sexually dangerous, that person is committed to a treatment center until he is deemed no longer dangerous.⁶³ The Director of Corrections, as the guardian of sexually dangerous persons, has a statutory duty to provide care and treatment designed to effect recovery.⁶⁴ As with the Registration Act, litigation regarding the constitutionality of the SDP Act predictably ensued following enactment.

wherein such person stands charged with criminal offense, a petition in writing setting forth facts tending to show that the person named is a sexually dangerous person.

Id.

59. Id. § 205/4.01. This section defines a "qualified psychiatrist" as "a reputable physician licensed in Illinois to practice medicine in all its branches, who has specialized in the diagnosis and treatment of mental and nervous disorders for a period of not less than 5 years." Id.

60. Id. § 205/4. This section provides:

After the filing of the petition, the court shall appoint two qualified psychiatrists to make a personal examination of such alleged sexually dangerous person, to ascertain whether such person is sexually dangerous, and the psychiatrists shall file with the court a report in writing of the result of their examination, a copy of which shall be delivered to the respondent.

Id.

Id.

61. Id. § 205/3.01. This section states: "The proceedings under this Act shall be civil in nature, however, the burden of proof required to commit a defendant to confinement as a sexually dangerous person shall be the standard of proof required in a criminal proceedings [sic] of proof beyond a reasonable doubt." Id.

62. Id.

63. Id. § 205/9. This section provides that "[I]f the patient is found to be no longer dangerous, the court shall order that he be discharged." Id. The defendant has the burden of showing by a preponderance of the evidence that he is no longer dangerous. People v. Rogers, 574 N.E.2d 1374, 1376 (Ill. App. Ct. 1991).

64. 725 ILCS 205/8. This section provides:

If the respondent is found to be a sexually dangerous person then the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand committed to the custody of such guardian. The Director of Corrections as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery.

D. Constitutionality of the SDP Act

Controversy surrounding the commitment of sex offenders to treatment centers against their will is not new. In the 1950s, the Criminal Sexual Psychopathic Persons Act withstood constitutional challenges in *People v. Ross*⁶⁵ and *People ex rel. Turnbaugh v. Bibb.*⁶⁶ More recently, the United States Supreme Court addressed the constitutionality of the SDP Act in *Allen v. Illinois.*⁶⁷

After the State charged Terry Allen with committing unlawful restraint and deviate sexual assault, the Attorney General of Illinois petitioned the court to declare Allen a sexually dangerous person.⁶⁸ Pursuant to the SDP Act, two psychiatrists examined Allen.⁶⁹ At the bench trial on the petition, the State presented the testimony of the two psychiatrists.⁷⁰ Allen challenged the constitutionality of the SDP Act, arguing that the State presented the psychiatrists' testimony in violation of his Fifth Amendment privilege against self-incrimination.⁷¹

The United States Supreme Court has held that the Fifth Amendment⁷² privilege against self-incrimination provides that a person does not have to answer questions in any proceeding if such answers might incriminate him in a criminal proceeding.⁷³ During the course of their examinations, the court-appointed psychiatrists elicited a multitude of information from Mr. Allen.⁷⁴ Allen argued that the State could not use this incriminating information against him at trial in order to prove he was a sexually dangerous person.⁷⁵ Thus, the United States Supreme Court first had to determine whether proceedings under the SDP Act were criminal or civil in nature.⁷⁶ If such proceedings were criminal, the Fifth Amendment privilege against self-incrimination would apply, rendering the psychiatrists' testimony inadmissible.⁷⁷

The SDP Act expressly provides that the proceedings are civil in nature.⁷⁸ However, the United States Supreme Court has held

69. Id.

73. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

74. Allen, 478 U.S. at 365.

- 76. Id. at 366.
- 77. Id. at 367-68.

78. See *supra* notes 61-62 and accompanying text for a discussion of the nature of the proceedings under the SDP Act.

^{65. 101} N.E.2d 112 (Ill. App. Ct. 1951).

^{66. 252} F.2d 217 (7th Cir. 1958).

^{67.} Allen v. Illinois, 478 U.S. 364 (1986).

^{68.} Id. at 366.

^{70.} Id.

^{71.} Id.

^{72.} U.S. CONST. amend V. The Fifth Amendment states: "No person shall . . . be compelled in any criminal case to be a witness against himself," Id.

^{75.} Id.

that a civil label is not always dispositive of the true nature of the proceedings.⁷⁹ The Court has held that if a defendant can provide the clearest proof that the statutory scheme is punitive in purpose or effect, the court must declare the proceeding criminal, despite the civil label.⁸⁰

Focusing on the State's statutory obligation to provide care and treatment for sexually dangerous persons, the Supreme Court of the United States held in *Allen* that the SDP Act promoted neither of "the traditional aims of punishment — retribution and deterrence."⁸¹ Hence, the Court found that proceedings under the SDP Act were civil and, thus, not subject to the Fifth Amendment privilege against compulsory self-incrimination.⁸²

Clearly, as discussed, the Registration Act and the SDP Act are constitutional as they presently stand. Though the Registration Act and the SDP Act are constitutionally adequate, there are more effective means available to protect Illinois' children, and society as a whole, from sex offenders. Parts II and III of this Note focus on the different approaches employed by other states to prevent sex offenses through the use of: (1) sex offender registration statutes and (2) civil commitment statutes.

II. STATE SEX OFFENDER REGISTRATION STATUTES

Thirty-seven states currently require sex offenders to register with police departments.⁸³ Most states classify the sex offender

82. Id. at 368.

^{79.} Allen, 478 U.S. at 369.

^{80.} United States v. Ward, 448 U.S. 242, 248 (1980).

^{81.} Allen, 478 U.S. at 370 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

^{83.} The following statutes require the registration of convicted sex offenders: ALASKA STAT. § 12.63.010 (Supp. 1994); ALA. CODE § 13A-11-200 (1994); ARIZ. REV. STAT. ANN. § 13-3821 (1990); ARK. CODE ANN. § 12-12-904 (Michie Supp. 1993); CAL. PENAL CODE § 290 (West 1988); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1994); CONN. GEN. STAT. ANN. § 54-102r(b) (1995); DEL. CODE ANN. tit. 11 § 4120 (Supp. 1994); FLA. STAT. ANN. § 775.22 (West Supp. 1994); GA. CODE. ANN. § 42-9-44.1 (Supp. 1994); IDAHO CODE § 18-8301 (Supp. 1994); 730 ILCS 150 (1994); IND. CODE ANN. § 5-2-12-11 (West Supp. 1994); KAN. STAT. ANN. § 22-4901 (Supp. 1993); KY. REV. STAT. ANN. § 17.510(2) (Michie/Bobbs-Merrill 1995); LA. REV. STAT. ANN. § 15:540 (West Supp. 1994); ME. REV. STAT. ANN. tit. 34-A, § 11001 (West Supp. 1993); MINN. STAT. ANN. § 243.166 (West 1992); MO. ANN. STAT. § 566.600(2) (West Supp. 1995); MONT. CODE ANN. § 46-23-501 (1993); NEV. REV. STAT. ANN. § 207.151 (1991); N.H. REV. STAT. ANN. § 632-A:12 (Supp. 1993); 1994 N.J. Laws ch. 133 §2.b; N.D. CENT. CODE § 12.1-32-15 (Supp. 1993); OHIO REV. CODE ANN. § 2950.02 (Anderson 1993); OKLA. STAT. ANN. tit. 57 § 581 (West 1992); OR. REV. STAT. § 181.518 (1993); R.I. GEN. LAWS § 11-37-16 (1994); S.C. CODE ANN. § 23-3-400 (Law. Co-op 1994); S.D. CODIFIED LAWS ANN. § 22-22-31 (Supp. 1994); TEX. CODE ANN. § 6252-13c.1 (Supp. 1994); UTAH CODE ANN. § 77-27-21.5 (Supp. 1994); VA. CODE ANN. § 19.2-390.1 (Michie Supp. 1994); WASH. REV. CODE ANN. §

registration information as private.⁸⁴ However, some states diverge from this approach.⁸⁵ Part II of this Note discusses the different methods of handling the release of sex offender registration information and examines how Virginia, Georgia, Louisiana, and Washington utilize this information in an attempt to prevent sex offenses.

There are three distinctive methods of handling the dissemination of information obtained under sex offender registration statutes. The first approach classifies the information as confidential. The second approach allows the release of sex offender registration information to select agencies. The final approach allows dissemination of the information to the public when it is considered necessary to protect the community.

A. The First Approach — Classification as Confidential

Illinois and a majority of states follow the first approach and classify sex offender registration information as confidential.⁸⁶ As a result, only law enforcement personnel can view the data.⁸⁷ Thus, the information obtained under the Registration Act, and similar acts, is only of value after a sex offense occurs.⁸⁸ In other

⁹A.44.130 (West Supp. 1995); W. VA. CODE § 61-8F-2 (Supp. 1994); WIS. STAT. ANN. § 175.45 (West Supp. 1994); WYO. STAT. § 7-19-302 (1994).

^{84.} The following sex offender registration statutes classify the sex offender registration information as private and prohibit the dissemination of the information to any segment of the public: ALA. CODE § 13A-11-201; ARIZ. REV. STAT. ANN. § 13-3823); ARK. CODE ANN. § 12-12-909 (Michie 1993); CAL. PENAL CODE § 290(i); COLO. REV. STAT. ANN. § 18-3-412.5(6); CONN. GEN. STAT. ANN. §54-102r(g) (1995); DEL. CODE ANN. tit. 11 § 4120; FLA. STAT. ANN. § 775.22(3); IDAHO CODE § 9-340(11f) (1994); 730 ILCS 150/9 (1994); KAN. STAT. ANN. § 22-4909; KY. REV. STAT. ANN. § 17.510(11) (Michie/Bobbs-Merrill 1995); ME. REV. STAT. ANN. tit. 16 § 611 (Supp. 1993); MINN. STAT. ANN. § 243.166(7); MO. ANN. STAT. § 566.617 (West Supp. 1995); N.H. REV. STAT. ANN. § 632-A:17; OHIO REV. CODE ANN. § 2950.08; OKLA. STAT. ANN. tit. 57 § 584; R.I. GEN. LAWS § 11-37-16(i); TEX. CODE ANN. § 6252-13c.1; UTAH CODE ANN. § 77-27-21.11; W. VA. CODE § 61-8F-5; WIS. STAT. ANN. § 175.45(7); WYO. STAT. § 7-19-303.

^{85.} The following statutes do not classify the sex offender registration information as confidential: ALASKA STAT. § 18.65.087 (West Supp. 1994); DEL. CODE ANN. tit. 11 § 4120; GA. CODE ANN. § 42-9-44.1(e); IND. CODE ANN. § 5-2-12-11; LA. REV. STAT. ANN. § 15:546 (West Supp. 1994); N.D. CENT. CODE § 12.1-32-15(8); 1994 N.J. Laws ch. 133 §§ 4-6; VA. CODE ANN. § 19.2-390.1; WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

^{86.} See *supra* note 14 for an example of a statute that classifies the registration information as confidential.

^{87.} See *supra* note 14 for an example of a statute that allows only law enforcement officials to view the registration information.

^{88.} Idaho's statute explains the need for a sex offender registry, and more importantly, the usefulness of a registry that classifies the information as confidential:

The legislature finds that sex offenders present a high risk of reoffense and that efforts of law enforcement agencies to protect their communities, con-

words, the sex offender registry is used as a reactive tool — unless a sex offense occurs, the police do not have a need to inspect the registration information.

Obviously, this approach is the most restrictive of the three approaches. Even so, statutes utilizing the first approach have been constitutionally challenged.⁸⁹ However, as illustrated by *People v. Adams*,⁹⁰ a sex offender registration statute which utilizes this approach is constitutional.⁹¹

B. The Second Approach — Release to Select Agencies

The second approach allows the release of sex offender registration information to select agencies. Virginia is an example of a state which utilizes this approach.⁹² The purpose of Virginia's Sex Offender Registry is "to assist the efforts of law enforcement agencies to protect their communities from repeat sex offenders and to protect children from becoming the victims of repeat sex offenders by helping to prevent such individuals from being hired or allowed to volunteer to work directly with children."⁹³ As a result, the Sex Offender Registry information is disseminated, upon request, to employees of criminal justice agencies, public and private schools, child-welfare agencies, and small family day care homes.⁹⁴ In essence, Virginia provides its registration data in an

duct investigations and quickly apprehend offenders who commit sex offenses are impaired by the lack of information available about individuals who have pled guilty to or have been found guilty of sex offenses who live within their jurisdiction. Therefore, this state's policy is to assist efforts of local law enforcement agencies to protect their communities by requiring sex offenders to register with local law enforcement agencies as provided in this chapter.

IDAHO CODE § 18-8302 (Supp. 1994) (emphasis added). Similarly, Florida's statute provides: "[I]n order to . . . enhance law enforcement's ability to react when violent or repeat sex offenses are committed, . . . it is essential to require state wide registration of sexual predators." FLA. STAT. ANN. § 775.22 (West Supp. 1994).

89. See, e.g., People v. Adams, 581 N.E.2d 637 (Ill. 1991) (upholding Illinois' sex offender law).

93. Id.

^{90.} Id.

^{91.} See *supra* notes 27-52 and accompanying text for a discussion of the constitutionality of the Registration Act, which classifies the obtained information as confidential.

^{92.} VA. CODE ANN. § 19.2-390.1 (Michie Supp. 1994). Indiana is another example of a state which utilizes this approach. IND. CODE ANN. §5-2-12-11 (West Supp. 1994).

^{94.} Id. § 19.2-390.1(B). Indiana also provides sex offender registration information on a similar basis. Under Indiana's registration statute, the institution that maintains the registry must send updates of the registry to all school corporations, nonpublic schools, state agencies that license individuals who work with children, the state personnel department which screens individuals who may be hired to work with children, and all child care facilities licensed by or registered in the state. IND. CODE ANN. § 5-2-12-11 (West Supp. 1994). Any other entity that pro-

effort to ensure that sex offenders are not employed to supervise children.⁹⁵

As of July 1, 1995, a court has never held that the release of sex offender registration information to select agencies, or the public as a whole, is unconstitutional. However, like the broader provisions of the third approach discussed below, one court has held that a statute which authorizes the release of such information to any segment of the public is a form of punishment, and thus, if applied retroactively, violates the ex post facto clause.⁹⁶

C. The Third Approach — Liberal Dissemination

The third approach allows varying degrees of public disclosure. Georgia, for example, allows members of the public to inspect the sex offender registry at the police station.⁹⁷ Conversely, Louisiana and Washington permit criminal justice agencies to actively notify community members that a sex offender lives in the area, provided that the release of the information is necessary for public protection.⁹⁶

The purpose of releasing sex offender registration information to the public is to further the governmental interest in public safety.⁹⁹ Sex offender registration statutes that allow law enforcement agencies to release such information have met and withstood constitutional challenges.¹⁰⁰ Nevertheless, some have

99. LA. REV. CODE ANN. § 15:540. This statute states:

Restrictive confidentiality and liability laws governing the release of information about sexual offenders have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety.... Release of information about sex offenders to public agencies, and under limited circumstances the general public, will further the governmental interests of public safety....

Id.

100. E.g., State v. Ward, 869 P.2d 1062 (Wash. 1994). Ward and Doe argued that

vides services to children and requests the registry will also receive a copy. Id. Furthermore, each copy of the registry must include the following language: "A person whose name appears on this registry has been convicted of a sex offense against a child. Continuing to employ a person whose name appears on this registry may result in civil liability for the employer." Id. § 5-2-12-12.

^{95.} See *supra* notes 92-94 and accompanying text for a discussion of sex offender registration statutes that provide registry information to select agencies.

^{96.} See *infra* note 100 for a discussion of the constitutionality of a sex offender registration statute that allows public disclosure.

^{97.} GA. CODE ANN. § 42-9-44.1(e) (Supp. 1994).

^{98.} LA. REV. CODE ANN. § 15:546 (West Supp. 1994); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994). Both statutes contain virtually identical provisions stating: "An elected official, public employee, public agency, or criminal justice agency shall be immune from civil liability for damages for any discretionary decision to release relevant and necessary information, unless it is shown that the official, employee, or agency acted with gross negligence or in bad faith." LA. REV. CODE ANN. § 15:546.

criticized the effects of distributing sex offender registration information to the public.¹⁰¹ Despite this criticism, support for such

Washington's sex offender registration statute, applied retroactively, violated the prohibition against ex post facto laws under the federal and state constitutions. Id. at 1066. When Ward and Doe committed their crimes, the sex offender registration statute did not exist. Id. However, upon release from prison, the Department of Corrections notified them of their duty to register as convicted sex offenders, Id. at 1065-66. In Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), the United States Supreme Court held that a law violates the ex post facto prohibition if it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Id. at 390. However, the Washington Supreme Court held that the registration requirement and the dissemination of relevant and necessary information are not forms of punishment. Ward, 869 P.2d at 1071. Accordingly, the Washington Supreme Court held that enforcement of the sex offender registration statute did not violate the prohibition against ex post facto laws. Id. at 1077. However, a United States District Court in New Jersey recently confronted a similar issue and reached a different conclusion. In Artway v. Attorney Gen. of New Jersey, 876 F. Supp. 666 (D.N.J. 1995), the plaintiff challenged the constitutionality of Megan's Law, which allows for community notification when a sex offender enters a municipality. Id. at 676. The plaintiff claimed Megan's Law violated: (1) the ex post facto clause; (2) the Eighth Amendment prohibition against cruel and unusual punishment; (3) the constitutional right to privacy; (4) the prohibition against Bills of Attainder; and (5) the Double Jeopardy Clause. Id. The Artway court concluded that of the challenges raised, the ex post facto clause was the dispositive issue. Id. at 671. Utilizing the factors set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), (see supra note 35 for those factors), the Artway court held that any form of public notification constituted punishment. Id. at 692. As a result, the retroactive application of Megan's Law violated the ex post facto clause of the United States Constitution. Id. It is important to note that the Artway court only held that the retroactive application of Megan's Law was unconstitutional. The Artway court did not conclude that Megan's Law was cruel and unusual punishment or invaded any constitutional right to privacy.

101. Jolayne Houtz, When Do You Unmask a Sexual Predator?, SEATTLE TIMES, Aug. 30, 1990, at B2. Chad Dold, a public defender, believes that as a result of notifying the community when sex offenders move into a neighborhood, the sex offenders become "social pariahs" and have difficulty assimilating into the community. Id. For example, after the police notified the residents of Timberlane, Washington, that a convicted rapist had moved into the area, the residents threw eggs at the rapist's home and made threatening telephone calls. Linda Keene, Warning Signs - A New State Law Alerts Parents to Predators in the Neighborhood and the Struggle to Cope Begins, SEATTLE TIMES, Sept. 15, 1991, at Pacific 17-18. However, after the police intervened, community representatives met with the rapist and agreed to stop the harassment and help the sex offender find a job. Id. at 24. One might also believe that informing the community when a sex offender moves into the area infringes upon the sex offender's right to privacy. However, the publication of public records, such as criminal convictions, and matters of legitimate public interest do not invade upon a person's right to privacy. Cox Broadcasting v. Cohen, 420 U.S. 469, 485 (1975). In fact, after acknowledging a registrant's criminal history is part of the public record, the court in Artway v. Attorney Gen. of New Jersey, 876 F. Supp. 666 (D.N.J. 1995), stated: "Indeed, it appears from the relevant precedent that if plaintiff's challenge rested on privacy concerns alone, it would founder on the rocks created by the modern constitutional ebb resultant from the Supreme Court's retreat from the expansions of Roe." Id. at 682. See Mary Anne Kircher, Comment, Registration of Sexual Offenders: Would dissemination continues, even at the federal level.

The United States Congress and President Clinton also endorse the distribution of sex offender registration information to the public in order to further public safety. On September 13, 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994,¹⁰² commonly referred to as the "Crime Bill." As part of the Crime Bill, the United States Attorney General will provide guidelines for state programs that require sex offenders to register with state law enforcement agencies.¹⁰³ As discussed, most states already have such statutes¹⁰⁴ and classify the information obtained under these statutes as private.¹⁰⁵ However, under the guidelines provided in the Crime Bill, state law enforcement agencies may release registration information to the public if it is necessary for public protection.¹⁰⁶ While Congress cannot force the states to enact legislation which adheres to its guidelines,¹⁰⁷ a state that fails

Washington's Scarlet Letter Approach Benefit Minnesota?, 13 HAMLINE J. PUB. L. & POL'Y 163 (1992) (addressing the privacy issues involved with the dissemination of sex offender registration information).

103. Violent Crime Control and Law Enforcement Act of 1994 § 170101, 42 U.S.C.A. § 14071 (1994). This statute provides:

(1) STATE GUIDELINES. — The Attorney General shall establish guidelines for State programs that require —

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency for the time period specified . . . and

(B) a person who is a sexually violent predator to register a current address with a designated State law enforcement agency unless such a requirement is terminated....

Id.

104. See *supra* note 83 for statutes that require the registration of sex offenders. 105. See *supra* note 84 for sex offender registration statutes that classify the information contained in their registries as confidential.

106. 42 U.S.C.A. § 14071. This statute provides as follows:

(d) RELEASE OF INFORMATION. — The information collected under a State registration program shall be treated as private data except that —

(1) such information may be disclosed to law enforcement agencies for law enforcement purposes;

(2) such information may be disclosed to government agencies conducting confidential background checks; and

(3) the designated State law enforcement agency and any local law enforcement agency authorized by the State agency may release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

Id.

^{102.} Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2038-42 (codified as amended in scattered sections of 42 U.S.C.A.).

^{107.} New York v. United States, 112 S. Ct. 2408 (1992). In New York, the Court

to adopt provisions in accordance with Congress' suggestions will lose some federal funding.¹⁰⁸

While other states disseminate their sex offender registration information in an effort to *prevent* a sex offense by a convicted sex offender, Illinois continues to employ a restrictive use of the information, which is only of value *after* the commission of a sex offense. There is evidence suggesting that some members of the Illinois General Assembly believed that, as with the third approach, citizens would receive notification when a child sex offender entered the community.¹⁰⁹ Although amending the Registration Act is critical to provide more protection to the children of Illinois, it is not the only necessary step. In order to effectively treat sex offenders and protect children, Illinois also needs to reform the

(f) COMPLIANCE. ---

(1) COMPLIANCE DATE. — Each state shall have not more than 3 years from the date of enactment of this Act in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section.

(2) INELIGIBILITY FOR FUNDS. —

(A) A state that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 506 of the Omnibus Crime Control and Safe Streets Act of 1986 (42 U.S.C.

§ 3765).

(B) REALLOCATION OF FUNDS. — Any funds that are not allocated for failure to comply with this section shall be reallocated to States that comply with this section.

Id.

109. On June 23, 1986, the day the Illinois General Assembly passed the Registration Act, the following dialogue occurred during the Illinois House of Representatives floor debates:

Regan: "Thank you, Mr. Speaker, Members of the House. In regards to the last comment, we must remember that pedophiles are compulsive and repetitive. They have never been cured. The objectivity in this [the Registration Act] is to make them file with the local police department so your neighbors and you know that in your community, there is someone that's going to do it again and again and again. I would say a green vote certainly for this Bill is well in order."

S.B. 2292, 84th Ill. Gen. Ass'y, 1st Sess. (June 23, 1986) (emphasis added).

"Leverenz: 'And who would have the list of offenders? Who would keep the list and . . . cause it to be published so I would know in my neighborhood who the bad people are?' Parke: 'The local law enforcement, the chief of the local law enforcement agency.'" *Id.*

stated: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *Id.* at 2421. However, the Court also stated: "[T]his is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices." *Id.* at 2423.

^{108. 42} U.S.C.A. § 14071. This statute provides as follows:

SDP Act. Therefore, a review of other civil commitment statutes will provide the necessary insight to improve the SDP Act.

III. CIVIL COMMITMENT STATUTES

A number of states, including Illinois, expressly provide for the civil commitment of sexually dangerous persons.¹¹⁰ However, Washington's civil commitment statute (Predator Statute) is the most notable and has recently survived constitutional challenges.¹¹¹ Accordingly, Part III of this Note discusses Washington's statutory scheme, which allows the civil commitment of a person after that person finishes his criminal sentence. A discussion of the constitutionality of this practice and the validity of the use of "dangerousness" predictions in civil commitment proceedings follows.

A. Washington's Civil Commitment Statute

The most controversial aspect of Washington's statutory scheme allows the involuntary commitment of persons deemed "sexual predators"¹¹² to mental health care facilities after the completion of their criminal sentences.¹¹³ Unlike the SDP Act in Illinois, the Predator Statute does not require the State to *substitute* treatment for punishment, but instead permits civil commitment and treatment *after* the completion of punishment.¹¹⁴ Washington enacted the Predator Statute to treat, and someday cure, those whose mental conditions cause them to commit sexually violent acts.¹¹⁵ However, the immediate purpose of the Pred-

^{110.} This Note shall use the terms "sexually dangerous person," "sexual psychopath," and "sexual predator" synonymously for the purpose of identifying statutes that provide for the civil commitment of sex offenders. The following statutes provide for the civil commitment of sexual predators: COLO. REV. STAT. §§ 16-13-201 to 16-13-216 (1986); CONN. GEN. STAT. ANN. §§ 17a-561 to 17a-572 (West 1992); 725 ILCS 205 (1994); MASS. ANN. LAWS ch. 123A §§ 1-10 (Law. Co-op. 1989); MINN. STAT. ANN. §§ 526.09-.11 (West Supp. 1994); OR. REV. STAT. §§ 426.510, 426.650, 426.670, 426.675, 426.680 (1987); TENN. CODE. ANN. § 33-6-302 (1992); UTAH CODE ANN. §§ 77-16-1 to 77-16-5 (1990); WASH. REV. CODE ANN. § 71.06.006 (1994). The District of Columbia also has a sexual psychopath statute. D.C. CODE ANN. §§ 22-3501 to 22-3511 (Michie 1989).

^{111.} In re Young, 857 P.2d 989 (Wash. 1993).

^{112.} WASH. REV. CODE ANN. § 71.09.020(1). The statute 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." *Id.*

^{113.} Id. § 71.09.060.

^{114.} See infra note 120 for the text of the applicable provisions.

^{115.} In re Young, 857 P.2d 989, 992 (Wash. 1993). The Washington statute states:

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that ren-

ator Statute is to ensure the commitment of sexually violent predators in order to protect society.¹¹⁶

A sexually violent predator is 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."¹¹⁷ The Predator Statute defines a "mental abnormality" as a condition which predisposes a person to commit criminal sexual acts.¹¹⁸ "Predatory" acts are those acts directed at strangers or "individuals with whom a relationship has been established or promoted for the primary purpose of victimization."¹¹⁹

Under the Predator Statute, the State may file a petition alleging that a person is a sexually violent predator when the person's prison sentence for a sexually violent offense is about to expire.¹²⁰ A judge then determines whether probable cause exists to believe that the person named is a sexually violent predator.¹²¹ Upon such a determination, an evaluation ensues pursuant to the rules developed by Washington's Department of Social and Health Services (DSHS).¹²² A trial must follow within fortyfive days to determine whether the person is a sexually violent predator.¹²³

The burden is on the State to prove beyond a reasonable doubt that the detainee is a sexually violent predator.¹²⁴ If

116. Young, 857 P.2d at 992.

117. WASH. REV. CODE. ANN. § 71.09.020(1).

Id.

123. Id.

ders them appropriate for the existing involuntary treatment act.... [S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness modalities and those features render them likely to engage in sexually violent behavior.... The legislature further finds that the prognosis for curing sexually violent predators is poor, the treatment needs of this population are very long term...." WASH. REV. CODE ANN. § 71.09.010.

^{118.} Id. § 71.09.020(2). This section states: "Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such a person a menace to the health and safety of others." Id.

^{119.} Id. § 71.09.020(3).

^{120.} Id. § 71.09.030. This section provides as follows:

When it appears that: (1) The term of total confinement of a person who has been convicted of a sexually violent offense is about to expire; . . . and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

^{121.} Id. § 71.09.040.

^{122.} Id. § 71.09.050.

^{124.} Id. § 71.09.060(1). This section states: "[T]he state must prove beyond a

found to be a sexually violent predator, the person enters a health care facility "for control, care, and treatment" until he is "safe to be at large."¹²⁵ The detainee submits to an examination at least once a year in order to determine his mental condition.¹²⁶ If it appears that the person is no longer a sexually violent predator, the secretary of the DSHS authorizes the detainee to petition the court for release.¹²⁷ A hearing then follows in which, contrary to the Illinois procedure,¹²⁸ the burden remains on the State to prove beyond a reasonable doubt that the detainee is still not "safe to be at large."¹²⁹

125. Id. This section provides:

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.

Id.

126. Id. § 71.09.070. "Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year.... The periodic report shall be provided to the court that committed the person under this chapter." Id.

127. Id. § 71.09.090(1). This statute provides:

If the secretary of the department of social and health services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release.

Id.

A person can also petition the court for discharge without the secretary's approval. Id. § 71.09.090(2). "Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection." Id.

128. Under the SDP Act, the defendant has the burden of showing by a preponderance of the evidence that he is no longer dangerous. People v. Rogers, 574 N.E.2d 1374, 1376 (Ill. App. Ct. 1991).

129. WASH. REV. CODE ANN. § 71.09.090(1). This section provides:

The burden of proof shall be upon the prosecution attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.

Id.

reasonable doubt that the alleged sexually violent act was sexually motivated. . . ." Id.

B. Constitutionality of Washington's Predator Statute

Lord Justice Denning once said, "It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do."¹³⁰ Some have claimed that Washington's Predator Statute defies this principle and is, therefore, unconstitutional.¹³¹ However, in *In re Young*,¹³² the Washington Supreme Court considered the appeals of Andre Young and Vance Cunningham, two men committed under the Predator Statute, and determined that the Predator Statute was constitutional.¹³³

Andre Young's criminal history included six violent felony rapes of adult females.¹³⁴ Pursuant to the Predator Statute, the State, alleging Young was a sexually violent predator, filed a commitment petition prior to Young's release from prison.¹³⁵ At the trial, a doctor testified that Young suffered from a severe paraphilia¹³⁶ and "would commit further sexually violent acts."¹³⁷ Young's commitment as a sexually violent predator followed a unanimous jury verdict.¹³⁸

Vance Russell Cunningham raped three females within a tenyear period.¹³⁹ About four and one-half months after

131. Brian G. Bodine, Comment, Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice, 14 U. PUGET SOUND L. REV. 105 (1990); Alexander D. Brooks, The Constitutionality and Morality of Civilly Committing Violent Sexual Predators, 15 U. PUGET SOUND L. REV. 709 (1992); Amicus Curiae Brief of the American Civil Liberties Union of Washington in Support of Petitioners, In re Young, 857 P.2d 989 (Wash. 1993) (No. 57837-1).

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

133. Id. at 1000.

135. Id.

136. According to the American Psychiatric Association, the essential characteristics of a paraphilic mental illness are "recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) non-human objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting persons." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 279 (3d rev. ed. 1987).

137. Young, 857 P.2d at 995.

138. Id.

139. In 1984, Cunningham raped a woman hitchhiker and received 31 months in

^{130.} Everett v. Ribbands, 2 Q.B. 198, 206 (C.A. 1952). See Alan Dershowitz, The Origins of Preventive Confinement in Anglo-American Law-Part I: The English Experience, 43 U. CIN. L. REV. 1 (1974) (discussing the history of preventive confinement in Anglo-American law); John Q. La Fond, An Examination of the Purposes of Involuntary Civil Commitment, 30 BUFF. L. REV. 499 (1981) (discussing the objectives of involuntary civil commitment).

^{134.} In the fall of 1962, Young broke into the homes of four different women and forced them to engage in sexual intercourse. *Id.* at 994. A conviction on four counts of first-degree rape followed in October of 1963. *Id.* Young received parole in January of 1972. *Id.* Five years later, he raped another woman and pled guilty to third-degree rape. *Id.* After gaining release from prison in 1980, Young raped another woman in 1985 and was convicted of first-degree rape. *Id.*

Cunningham completed his most recent prison sentence, the State filed a petition to declare Cunningham a sexually violent predator.¹⁴⁰ At Cunningham's civil commitment trial, a doctor testified that Cunningham suffered from a severe paraphilia and, in her opinion, "Mr. Cunningham is more likely than not to engage in predatory acts of sexual violence if out in the community."¹⁴¹ Cunningham's commitment to a health care facility followed an eleven-to-one jury verdict declaring him a sexually violent predator.¹⁴²

Both Young and Cunningham challenged their commitments to the mental health care facilities. They argued that the Predator Statute was unconstitutional for the following reasons: (1) it violated the Double Jeopardy Clause,¹⁴³ (2) as applied to them, it violated the prohibition against ex post facto laws,¹⁴⁴ and (3) it violated due process requirements.¹⁴⁵ The Washington Supreme Court addressed the appellants' arguments regarding the Double Jeopardy Clause and the prohibition against ex post facto laws together, because both of these principles only apply to criminal matters.¹⁴⁶ Thus, if the Predator Statute was civil in nature, the Double Jeopardy Clause and the prohibition against ex post facto laws would be inapplicable. The Washington Supreme Court utilized the rationale espoused in Allen v. Illinois¹⁴⁷ and determined that the Predator Statute was civil in nature.¹⁴⁸ Therefore, the Washington Supreme Court held that enforcement of the statute did not violate the Double Jeopardy Clause or the prohibi-

145. Young, 857 P.2d at 1000.

prison for second-degree rape. *Id.* at 995. Three months after his release from prison, Cunningham forced a woman to have anal intercourse with him. *Id.* Two months later, Cunningham assaulted another woman in a similar manner, and a jury found him guilty of second-degree rape. *Id.*

^{140.} Id.

^{141.} Id. at 989.

^{142.} Id. at 996. The Young court held that, although the statute did not mention the issue of jury unanimity, the statutory scheme required a unanimous verdict. Id. at 1012. See *infra* note 163 and accompanying text for a discussion of the reversal of Cunningham's commitment as a sexual predator.

^{143.} The Fifth Amendment provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In essence, the Double Jeopardy Clause of the Fifth Amendment prohibits multiple punishments for the same offense. United States v. Halper, 490 U.S. 435, 440 (1989).

^{144.} Article I provides: "No state shall . . . pass any Bill of Attainder [or] ex post facto Law. . . ." U.S. CONST. art. I, § 10.

^{146.} Id. at 996.

^{147. 478} U.S. 364 (1986). See supra notes 67-82 and accompanying text for a discussion of Allen v. Illinois.

^{148.} Young, 857 P.2d at 999. The Young court held that the purpose, effect, language, and history of the Predator Statute indicated that it was civil in nature. Id.

tion against ex post facto laws.¹⁴⁹

Petitioners Cunningham and Young also argued that the statute violated due process requirements for the following reasons: (1) the statute did not serve a legitimate state purpose, (2) petitioners were not mentally ill and, therefore, the Predator Statute authorized unconstitutional preventive detention, and (3) evidence of a recent overt act was required to prove dangerousness and the State did not introduce such evidence.¹⁵⁰ The court first addressed the petitioners' claim that the statute did not serve a valid state purpose. The court relied on Addington v. Texas,¹⁵¹ in which the United States Supreme Court held that a state has a compelling interest in treating sexual predators and in protecting society from their actions.¹⁵² As a result, the Washington Supreme Court held that the Predator Statute clearly served a legitimate state purpose.¹⁵³

The Washington Supreme Court next addressed the petitioners' claim that the United States Supreme Court's decision in *Foucha v. Louisiana*¹⁵⁴ forbids the civil commitment of sexually violent predators because such commitment is unconstitutional preventive detention. In *Foucha*, the Court addressed the issue of whether a state could continue the civil commitment of a person based solely upon proof that the person was dangerous.¹⁵⁵ Foucha had an "antisocial personality," a condition not recognized as a mental illness.¹⁵⁶ Yet Foucha remained committed in a state mental institution due to the State's assertion that he was dangerous.¹⁵⁷ In *Foucha*, the Court held that, "absent a determination of current mental illness *and* dangerousness, continued confinement under the Louisiana scheme was impermissible."¹⁵⁸ Because the State had failed to show that Foucha suffered from a

Id.

^{149.} Id.

^{150.} Id. at 1000.

^{151.} Addington v. Texas, 441 U.S. 418 (1979).

^{152.} Id. at 426. The Court stated:

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

^{153.} Young, 857 P.2d at 1000.

^{154.} Foucha v. Louisiana, 112 S. Ct. 1780 (1992).

^{155.} Id. at 1788. See James W. Ellis, Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of Foucha v. Louisiana, 15 U. PUGET SOUND L. REV. 635 (1992) for a discussion of the ramifications of the Supreme Court's decision in Foucha.

^{156.} Foucha, 112 S. Ct. at 1785.

^{157.} Id. at 1783.

^{158.} Id. at 1788-89 (emphasis added).

mental illness, the Court ordered Foucha's release.¹⁵⁹

In direct contrast to the facts in *Foucha*, Young and Cunningham suffered from a recognized mental illness.¹⁶⁰ In addition, the Predator Statute requires the State to prove that an individual is both mentally ill and dangerous in order to commit a person.¹⁶¹ As a result, the Washington Supreme Court held that the Predator Statute comports with *Foucha*'s definition of constitutional civil commitment.¹⁶²

Finally, the Washington Supreme Court addressed the petitioners' argument that evidence of a recent overt act is required to prove dangerousness. The court agreed that evidence of an overt act is necessary to prove dangerousness whenever an individual is not incarcerated at the time the Attorney General files the sexual predator petition.¹⁶³ As a result, the Washington Supreme Court affirmed Young's commitment as a sexual predator but reversed the commitment of Cunningham.¹⁶⁴ Overall, the Washington Supreme Court concluded that "there are no substantive constitutional impediments to the sexually violent predator scheme."¹⁶⁵

160. In re Young, 857 P.2d 989, 1007 n.12 (Wash. 1993).

164. Id.

165. Id. at 1000; see In re Blodgett, 510 N.W.2d 910 (Minn. 1994) (holding that Minnesota's Sexual Predator Statute, which also allows civil commitment upon release from prison, does not violate due process or equal protection requirements),

^{159.} Id. Under Louisiana law, when a defendant is found not guilty be reason of insanity, the State commits the person to a mental institution unless the person can prove he is not dangerous. Id. at 1781. On October 12, 1984, a trial court found Foucha not guilty by reason of insanity of burglary and the illegal discharge of a firearm. Id. at 1782. Foucha could not prove he was not dangerous, and, as a result, the State committed Foucha to East Feliciana Forensic Facility. Id. In 1988, the superintendent of Feliciana recommended Foucha's discharge. Id. A hearing ensued, in which the State admitted Foucha did not suffer from a mental illness but did contend that Foucha was dangerous to himself and others. Id. The court ordered Foucha's return to the mental institution. Id. Upon appeal, the United States Supreme Court held that "due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." Id. at 1785. Since Foucha was not mentally ill, his confinement in a mental institution as a mentally ill person violated due process requirements. Id. As a result, the Court held that the statute which prompted Foucha's confinement was unconstitutional because it lacked "constitutionally adequate procedures to establish the grounds for confinement." Id.

^{161.} Id. at 1007.

^{162.} Id.

^{163.} Id. at 1008 (relying on In re Harris, 654 P.2d 109 (Wash. 1982)). The Washington Supreme Court held that proof of a recent overt act was not required for incarcerated individuals because such a requirement would be impossible to meet. Id. at 1008 (relying on In re LaBelle, 728 P.2d 138 (Wash. 1986)); People v. Martin, 107 Cal. App. 3d 714 (1980)). Cunningham was free in the community for four and one-half months before the state filed the sexual predator petition. Id. at 995. The State did not provide evidence of a recent overt act in the sexual predator trial. Id. As a result, the Young court reversed Cunningham's commitment as a sexually violent predator. Id. at 1009.

While the Washington Predator Statute stands on firm constitutional ground, some believe the practical effectiveness of the

statute and others like it may be thwarted by shortcomings in dangerousness predictions. It is clear that in order to commit a person under a sexual predator statute, the State must prove that a person is mentally ill and dangerous.¹⁶⁶ Obviously, mental health professionals provide the most useful testimony regarding a person's mental status. If psychologists and psychiatrists are unable to predict a person's future dangerousness with any degree of certainty, the effectiveness of sexual predator-type statutes will be diminished.¹⁶⁷ However, suggested shortcomings in the ability to accurately predict dangerousness should not stand in the way of toughening Illinois' sex offender laws.

C. Predictions of Dangerousness

The are two types of "dangerousness" predictions: clinical¹⁶⁸ and actuarial.¹⁶⁹ Courts usually rely on clinical predictions made by mental health professionals.¹⁷⁰ In order to understand the argument that clinical predictions are unreliable, it is necessary to examine studies which purportedly support this contention. Though there are a number of commonly cited studies on the accuracy of clinical predictions of dangerousness,¹⁷¹ a study by

170. Id. at 109.

cert. denied, 115 S. Ct. 146 (1994).

^{166.} Addington v. Texas, 441 U.S. 418, 433 (1979). In Addington, the United States Supreme Court held that proof beyond a reasonable doubt is not required to commit an individual to a mental institution in a civil commitment proceeding. *Id.* However, the Supreme Court also held that proof by a preponderance of the evidence does not satisfy due process requirements. *Id.* Thus, the Court concluded that due process requires the State to prove by clear and convincing evidence that a person is mentally ill and dangerous. *Id.*

^{167.} Christopher Slobogin, Dangerousness and Expertise, 133 U. PA. L. REV. 97, 104 (1984). Contra Marc Miller & Norval Morris, Predictions of Dangerousness: Ethical Concerns and Proposed Limits, 2 NOTRE DAME J. L. ETHICS & PUB. POL'Y 393, 424 (1986). Miller and Morris argue that there is a fundamental difference between society's definition of dangerousness and the standard of proof required to establish a person's dangerousness. Id. at 424. "We reject on logical grounds any tie between standard of proof and the level of prediction necessary to justify preventive detention.... The confusion of the standard of proof with levels of prediction has been the greatest barrier to a sensitive consideration of the jurisprudence of dangerousness in American courts...." Id.

^{168.} Slobogin, *supra* note 167, at 109. Clinical predictions usually involve a personal interview and psychological tests in which a clinician tries to determine the current mental status of the individual whose dangerousness is at issue. *Id.*

^{169.} *Id.* at 110. Actuarial predictions of dangerousness assign a numerical probability to predict the likelihood of future acts based upon an individual's particular characteristics. *Id.*

^{171.} HENRY J. STEADMAN & JOSEPH J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE (1974); TERENCE P. THORNBERRY & JOSEPH E. JACOBY, THE CRIMINALLY

Dr. Harry Kozol and his associates 172 effectively demonstrates why there is concern surrounding predictions of a person's dangerousness.

In Dr. Kozol's study, at least five clinicians examined male offenders and performed a number of psychological tests in order to predict their dangerousness.¹⁷³ Thereafter, 435 offenders participating in the study re-entered society after serving their time.¹⁷⁴ Dr. Kozol and his associates considered 386 of the 435 offenders to be "non-dangerous."¹⁷⁵ Of this non-dangerous group, only thirty-one offenders (8%) committed a serious assaultive act during the follow-up period.¹⁷⁶ However, of the forty-nine offenders Dr. Kozol considered dangerous, seventeen (35%) committed a serious assaultive act.¹⁷⁷ One could interpret this data to indicate that of those whom Dr. Kozol classified as dangerous, 65% were actually not dangerous and thus false positives. In fact, due to this study and others like it, many people believe that only one out of three clinical predictions of dangerousness is correct.¹⁷⁸

However, there is at least one serious methodological flaw in Dr. Kozol's study which undoubtedly inflated the false positive percentage.¹⁷⁹ As is common practice, Dr. Kozol relied on arrest records to determine whether an individual committed a serious assaultive act.¹⁸⁰ Yet it is well documented that many sex offenses are not reported.¹⁸¹ A recent "self-reporting" study illus-

173. Id. at 383.

174. Id.

175. Id.

- 176. Id.
- 177. Id.

178. JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981). "[P]sychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several year period among institutionalized populations that had both committed violence in the past (and thus had high base rates for it) and who were diagnosed as mentally ill." *Id.* at 47. Monahan based his statement on an analysis of the following studies: Thornberry & Jacoby, *supra* note 171 (reporting an 86% false positive rate); Steadman & Cocozza, *supra* note 171 (reporting an 80% false positive rate); Steadman, *supra* note 171 (reporting a 58.7% false positive rate); Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976) (reporting an 86% false positive rate); Kozol, *supra* note 172 (reporting a 65.3% false positive rate).

179. Slobogin, supra note 167, at 116.

180. Id.

181. Gene G. Abel et al., Self-Reported Sex Crimes of Nonincarcerate

INSANE: A COMMUNITY FOLLOW-UP OF MENTALLY ILL OFFENDERS (1979); Diana Sepejak et al., Clinical Predictions of Dangerousness: Two-Year Follow-Up of 408 Pre-Trial Forensic Cases, 11 BULL. AM. ACAD. PSYCHIATRY & L. 171 (1983); Henry J. Steadman, A New Look at Recidivism Among Patuxent Inmates, 5 BULL. AM. ACAD. PSYCHIATRY & L. 200 (1977).

^{172.} Harry L. Kozol et al., The Diagnosis and Treatment of Dangerousness, 18 CRIME & DELINQ. 371 (1972).

trates the magnitude of unreported sex offenses.¹⁸²

In 1991, a number of Washington sex offenders anonymously provided information regarding their criminal acts.¹⁸³ Law enforcement records revealed a mean of 1.8 rape victims per offender and a total of 66 charged sex offenses for the group interviewed.¹⁸⁴ However, the interviewed sex offenders reported a mean of 11.7 victims per offender and a total of 433 actual rapes.¹⁸⁵ Information provided by child molesters showed an even larger disparity between the number of offenses reported to the police and the actual number of offenses that occurred.¹⁸⁶

Consequently, one cannot confidently assert that because sixty-five percent of the people that Dr. Kozol classified as dangerous were not arrested for a serious assaultive act, they did not commit such an act. Similarly, one cannot assume that ninety-two percent of the group that Dr. Kozol classified as non-dangerous were in fact non-dangerous. Nonetheless, it is evident from Dr. Kozol's study that a person classified as dangerous is four to five times more likely to be arrested for committing a serious offense than a person classified as non-dangerous.

If one views the data in this manner, it is apparent that psychiatrists possess the requisite expertise to predict dangerousness with a reasonable degree of accuracy. Despite proclamations by the American Psychiatric Association¹⁸⁷ and the Ameri-

185. Id.

Paraphiliacs, 2 J. INTERPERSONAL VIOLENCE 3, 25 (1987); A. Nicolas Groth et al., Undetected Recidivism Among Rapists and Child Molesters, 28 CRIME & DELINQ. 450-58 (1982).

^{182.} Mark R. Weinrott & Maureen Saylor, Self-Report of Crimes Committed by Sex Offenders, 6 J. INTERPERSONAL VIOLENCE 286, 291 (1991).

^{183.} Id. The sex offenders who participated in the study had been committed under the Washington Sexual Predator Statute. Id.

^{184.} Id.

^{186.} Id. Law enforcement records showed that the group of interviewed child molesters had molested 135 different victims. Id. However, the molesters admitted to molesting 959 different victims. Id. In another self-reporting survey, 207 men reported 796 attempted or completed rapes against adult females, a mean of 3.9 victims per offender. Gene G. Abel et al., Behavioral Approaches to Treatment of the Violent Sex Offender, in CLINICAL TREATMENT OF THE VIOLENT PERSON 95-96 (Loren H. Roth ed., 1987). The same group of 207 offenders reported 14,950 attempted or completed child molestations, a mean of 72.2 child victims per offender. Id.

^{187.} In Barefoot v. Estelle, 463 U.S. 880 (1983), the American Psychiatric Association submitted an amicus curiae brief which stated:

Although psychiatric assessments may permit short-term predictions of violent or assaultive behavior, medical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy. The large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.

Amicus Curiae Brief for the American Psychiatric Association at 8, Barefoot v.

can Psychological Association¹⁸⁸ that predictions of dangerousness are highly inaccurate, the United States Supreme Court authorizes the use of such predictions in a number of circumstances.¹⁸⁹ The Court has approved the use of predictions of dangerousness in hearings regarding: (1) involuntary civil commitment,¹⁹⁰ (2) the imposition of the death penalty,¹⁹¹ (3) pretrial detention of juveniles,¹⁹² (4) parole decisions,¹⁹³ and

189. See Marie A. Bochnewich, Prediction of Dangerousness and Washington's Sexually Violent Predator Statute, 29 CAL. W. L. REV 227 (1992) (explaining the Supreme Court's approval of the use of dangerousness predictions in a variety of contexts).

190. In Jones v. United States, 463 U.S. 354, 365 (1983), the United States Supreme Court rejected the petitioner's argument that the government cannot rely upon predictive data concerning dangerousness.

191. In Barefoot v. Estelle, 463 U.S. 880, 884 (1983), the petitioner claimed the use of predictions of dangerousness in deciding whether to impose the death penalty was unconstitutional because psychiatrists were incompetent in making such predictions. The Supreme Court of the United States dismissed the petitioner's argument and provided a detailed explanation of why the use of predictions of dangerousness is allowed:

All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury.... Such disputes are within the province of the jury to resolve. Indeed it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false... and, when called upon to do so, give the greater credence to one party's expert witness than another's. Id. at 901-02.

192. In Schall v. Martin, 467 U.S. 253, 287 (1984), the United States Supreme Court considered whether due process requirements prohibited the pretrial detention of juveniles based upon a prediction of future dangerousness. The Court upheld the use of predictions of dangerousness and stated, "[f]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct." *Id.*

193. In Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979), Nebraska prison inmates, in a class action suit, argued that the Parole Board's procedures for deciding whether to grant parole violated due process requirements because of the reliance on inaccurate predictions of dangerousness. The United States Supreme Court stated:

No ideal, error-free way to make parole-release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior. Our system of federalism encourages this state experimentation.

Id. Accordingly, the Court upheld the use of dangerousness predictions in parole decisions. Id.

Estelle, 463 U.S. 880 (1983) (No. 82-6080).

^{188. &}quot;[T]he validity of psychological predictions of violent behavior, at least in the sentencing and release situations we are considering, is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments." Report of the Task Force on the Role of Psychology in the Criminal Justice System, 33 AM. PSYCHOLO-GIST 1099, 1110 (1978).

(5) pretrial detention under the Bail Reform Act.¹⁹⁴ Given the United States Supreme Court's willingness to accept dangerousness predictions and the fact that inaccuracies in dangerousness predictions are overstated, Illinois should feel secure in utilizing dangerousness predictions to strengthen its sex offender laws.

IV. PROPOSAL

In order to more effectively protect the citizens of Illinois from sex offenders, the Registration Act and SDP Act need reform. With only minor alterations to each act, the citizens of Illinois, and children in particular, would gain an enhanced level of protection from sex offenders. First, this section addresses proposed modifications to the Registration Act, followed by suggested alterations to the SDP Act.

A. A Modified Registration Act

It is commendable that the Illinois General Assembly enacted a sex offender registration act in 1986. However, the Illinois General Assembly limited the effectiveness of the act by classifying registration information as confidential. Despite the fact that the purpose of the Registration Act is to protect children from sex offenders,¹⁹⁵ those people who are in constant contact with children and able to protect them on a daily basis (i.e., parents, teachers, neighbors, etc.) are not provided with the sex offender registration information.

Thus, in order to protect children more fully from convicted sex offenders, the Illinois General Assembly should: (1) repeal 730 ILCS 150/9, which classifies the registration data as confidential, and (2) adopt a provision which (a) provides sex offender registration information to agencies that employ adults as supervisors of children, and (b) allows the police to notify the community when a sex offender enters a neighborhood if the release of information is necessary to protect the public.¹⁹⁶

^{194.} The Bail Reform Act of 1984 allows pretrial detention if the Government can prove by clear and convincing evidence that any conditions of the arrestee's release will not reasonably ensure the safety of the community. 18 U.S.C. § 3142(e) (1989). In United States v. Salerno, 481 U.S. 739, 755 (1987), the Supreme Court of the United States held that the use of a prediction of dangerousness is constitutional when making a decision to detain under the Bail Reform Act of 1984.

^{195.} See *supra* notes 17-24 and accompanying text for a discussion of the purpose of the Registration Act.

^{196.} See infra Appendix A for a suggested proposal.

B. A Modified Sexually Dangerous Persons Act

Like the Registration Act, the SDP Act needs alterations in order to protect Illinois citizens more effectively. There are two basic shortcomings in the current SDP Act. First, the SDP Act requires that, in order to declare a person sexually dangerous, the State must allege and prove that a person had a mental abnormality for at least one year.¹⁹⁷ Second, sexually dangerous persons that are currently serving time in prison are not subject to proceedings under the SDP Act.¹⁹⁸ Accordingly, it is necessary to address both issues to improve the SDP Act.

First, the main issue in a proceeding under the SDP Act should be whether the person before the court is sexually dangerous at the present time. Yet under the current SDP Act, the State must prove the existence of a mental disorder one year prior to the current proceeding.¹⁹⁹ As a result, if the State's Attorney does not have evidence concerning the duration of a person's mental illness, he is unable to initiate proceedings under the SDP Act even if he believes the person committed the sex offense due to his current mental abnormality and is otherwise "sexually dangerous." Even if the State obtains a criminal conviction, the "sexually dangerous person" enters prison instead of receiving treatment and, perhaps more importantly, will re-enter society after the completion of his sentence still in need of treatment and still "sexually dangerous." This illustration demonstrates the second shortcoming of the SDP Act — sexually dangerous persons that serve prison time are not subject to proceedings under the SDP Act. 200

It is important to note that the State's Attorney is not required to initiate proceedings under the SDP Act, even if he believes a person is sexually dangerous as defined by the SDP Act.²⁰¹ Thus, for whatever reasons, the State's Attorney may decide to seek punishment rather than civil commitment.²⁰² Again, a sexually dangerous person will undoubtedly leave prison in need of treatment. However, the State will be unable to have such a person committed because the State's Attorney can only

^{197.} See supra note 57, which sets forth the definition of a sexually dangerous person.

^{198.} Id.

^{199.} Id.

^{200.} See supra note 58 for the text of the applicable statute.

^{201.} For the text of the statute giving prosecutors discretion, see supra note 58.

^{202.} Some commentators believe punishment for violent sex offenses is always preferable to civil commitment. See, e.g., Bodine, supra note 131, at 152. "Instead of being committed for treatment, violent sexual offenders should be subjected to the full force of the criminal law.... Processing sex offenders through the criminal justice system recognizes a sexual offense for what it is: a crime." Id.

1995]

initiate proceedings under the SDP Act if a person has criminal charges pending.²⁰³

The Illinois General Assembly can rectify these problems with minor alterations to the SDP Act. First, the General Assembly should modify the definition of a "sexually dangerous person" by removing the requirement of a mental disorder which has existed for more than one year.²⁰⁴ Second, the General Assembly should allow the State to initiate proceedings under the SDP Act when a person who has committed a sexually violent offense is released from prison.²⁰⁵

CONCLUSION

Although sex offenses will continue to occur throughout the nation, the proposed modifications to the Registration Act and the SDP Act will decrease the likelihood of a tragedy similar to Megan Kanka's. This Note has outlined the different methods states employ in an effort to protect society and prevent sex offenses. While Illinois currently follows the most common approach, it is apparent that this approach is no longer adequate.

This Note provides a constitutional method to enhance the level of protection Illinois affords its citizens with respect to convicted sex offenders. It should not take a gruesome and sensational crime, such as the murder of Megan Kanka, to provide the impetus for legislative change in Illinois. If the Illinois General Assembly does not act now, which unfortunate little girl in Illinois will lend her name to this legislation in the future?

APPENDIX A: MODEL LEGISLATION

CHAPTER 730. CRIMINAL PROCEDURE

ACT 150. CHILD SEX OFFENDER REGISTRATION ACT

150/9. Release of information.

§ 9. Sex Offender Registry information shall be disseminated to: 206

(1) public schools,

(2) private schools,

(3) a state agency that licenses individuals who work with children,

(4) all child care facilities licensed by or registered in the

^{203. 725} ILCS 205/3 (1994). For the exact text of the statute, see supra note 58.

^{204.} See infra Appendix B for such a proposal.

^{205.} See infra Appendix B for the text of a proposal effectuating these changes.

^{206.} Much of the wording for this proposal is taken from IND. CODE. ANN. § 5-2-12-11 (West 1994).

state of Illinois,

(5) other entities that:

(A) provide services to children; and

(B) request the information,

(6) the public when the local police department considers the release of information necessary for public protection.²⁰⁷

APPENDIX B: MODEL LEGISLATION

CHAPTER 725. CRIMINAL PROCEDURE

ACT 205. SEXUALLY DANGEROUS PERSONS ACT

205/1.01 Sexually dangerous persons — Definition

§ 1.01. As used in this Act: 208

All persons suffering from a mental disorder, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

205/3. Petition — Contents

§ 3. The Attorney General or State's Attorney may file with the clerk of the court, a petition in writing setting forth facts tending to show that the person named is a sexually dangerous person when:

(1) A person is charged with a criminal offense and it shall appear to the Attorney General or to the State's Attorney of the county wherein such person is so charged, that such person is a sexually dangerous person, within the meaning of this Act, or

(2) The term of total confinement for a person who has been convicted of a sexually violent offense is about to expire and it appears to the Attorney General or to the State's Attorney that such person is a sexually dangerous person, within the meaning of this Act.²⁰⁹

Matthew J. Herman

^{207.} Much of the wording for this proposal is taken from WASH. REV. CODE. ANN. 4.24.550 (West Supp. 1995).

^{208.} Much of the wording for this proposal is taken from 725 ILCS 205/1.01 (1994).

^{209.} Much of the wording for this proposal is taken from WASH. REV. CODE ANN. § 71.09.030 (West Supp. 1995).