Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill

Rachel Blacher

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Criminal Law Commons

Recommended Citation

This Comment is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
I. INTRODUCTION

As an historical analysis, this comment begins with a background of the American criminal process from the pre- and post-Revolutionary eras. Along the way, a transformation regarding the views of criminal law and criminals took place. By means of this historical background, the comment further analyzes how the shifting notions during the seventeenth and eighteenth centuries are reflected in modern day sex offender legislation.

The comment traces the first “sex psychopath” statute in 1930s’ Michigan to the recent federal crime bill that includes legislation for “sexually violent predators.” Although the comment reviews the legal significance of the enactment of sex offender legislation, it also makes note of the recurring theme regarding the emergence of these efforts: The public expresses outrage over brutal crimes sensationalized in the media. Then, legislators and interested groups respond with tailored legislation addressing the cycle of fear sex offenders cause.
The comment ends with a discussion of the recently enacted federal crime bill, which includes a provision for sexually violent predators. The crime bill's language is reminiscent of the first "sexually violent predators" statute enacted in Washington State in 1989.

II. HISTORY

Under English common law, ecclesiastical courts originally exercised a wide jurisdiction over all matters pertaining to morals and the family.¹ These courts—also called "Courts Christian"—assumed jurisdiction with the hope of amelioration in contrast to the harsher penalties exacted under the general criminal jurisdiction.² In addition to offenses specifically punishable at common law, the church claimed authority over acts involving sex.³

During the sixteenth century, however, the upper social classes in England developed an administrative approach for themselves by way of the Court of High Commission.⁴ From 1558 to 1640, the Court of High Commission dealt with unusual sexual and family practices.⁵ "Persons committing acts such as adultery, incest, bigamy, immorality, assault with intent to ravish, swearing desperate oaths, and blasphemy were handled by ... both the system of ecclesiastical courts and the High Commission."⁶

Yet, by the peak of Puritan ascendancy and the English Civil War in the mid-1600s, which led to the abolition of the English monarchy, both bodies had fallen into disuse.⁷ As a result, either by creation of specific statutes or common law assumption of general jurisdiction, the common law courts took charge of offenses within the domain of marital and sexual aberration: During the sixteenth century reign of Henry VIII, a specific statute was created to deal with "unnatural offenses."⁸ Bigamy became a crime in 1603, viewed as behavior in need of legal regulation. Divorces no longer were within the jurisdiction of the ecclesiastical courts when special "divorce courts" were created in 1857.⁹ "Over the last century in England, various sexual offenses acts were enacted based

---

2. Id.
3. Id.
4. Id.
5. Id.
6. Id. at 845-46.
7. Id. at 846.
8. Id.
9. Id.
on different aims that were often in conflict, such as prohibiting sexual
acts believed immoral by way of the criminal law even though the
utilitarian goal of preventing demonstrable harm was not in ques-
tion." 10

A. Shift in Function of American Criminal Process

The focus on the shifting notions of the Anglo-American criminal
process during the pre- and post-Revolutionary eras is valuable because
it gives perspective to recent efforts to control sexually deviant behavior.
Colonial Massachusetts is an illustration of the transformation of
American criminal law during the pre- and post-Revolutionary eras. 11

In early colonial days continuing through the late eighteenth century,
Puritan criminal law was heavily infused with Mosaic law. 12 Sin and
crime were equated, and the sinner was a criminal. Criminal law was
the application of the law of God. No separate ecclesiastical courts were
required because religious notions involving sex were incorporated into
the application of the civil law. The primary goal of criminal law,
therefore, was the enforcement of the people’s religious morality. 13

During the late eighteenth and early nineteenth centuries, American
criminal law transformed significantly. The common pre-Revolutionary
notion of the function of criminal law was to enforce the morals and
religions of the American people. 14 After the war, however, the
predominant view was that the purpose of criminal law was to protect
property and physical security. 15 This ideology reflected the contrasting
function of the criminal process. In addition, the role of government
in criminal cases, “from passive arbiter of contests between private
citizens to active advocate of public order,” 16 shifted accordingly.

1. Criminal Law During Seventeenth Century and Pre-
Revolutionary Era: Prosecutions for Immorality and Crime as Sin.
In the 1600s, there was initially a hesitancy to inflict punishment
for sex offenders without scriptural authority. 17 However, in the “Body

10. Id.
11. The study primarily depended upon for the historical study of the American legal
thought during the Revolutionary era was limited to the trial court records of Middlesex
County, Massachusetts. William E. Nelson, Emerging Notions of Modern Criminal Law
12. Id. at 450-51.
13. Id.
14. Id.
15. Id. at 451.
16. Id. at 450.
17. PSYCHIATRY & SEX, supra note 1, at 849.
of Liberties" of the Massachusetts Bay Colony, although rape was not originally a capital offense, by 1648 it had become one such offense.\textsuperscript{18} Rape was the only capital offense listed without a Biblical citation to justify the punishment. Adultery with a married woman was a capital crime for both parties.\textsuperscript{19} Sexual intercourse between a married man and a single unbetrothed woman, however, was considered no more than fornication.\textsuperscript{20}

A.D. 1285 concluded the culmination of the unfolding history of the treatment of rape in English law. Codified English law defined rape as a felony punishable by death.\textsuperscript{21} Little has changed since then, and this precedent was eventually brought to America. In colonial America, rape was punishable by death once scriptural authority was ignored.\textsuperscript{22}

Originally, the most severe penalty short of death was ordered when the victim was a minor: The penalty may have consisted of the maximum number of lashings permitted, slitting the offender’s nostrils, or condemning him never to appear in public thereafter without a halter about his neck.\textsuperscript{23} Aggravated rape offenders usually were required to continue wearing a rope around the neck.\textsuperscript{24} Although statutes were enacted authorizing punishment by death for statutory rape, in practice, the lives of most transgressors were spared.\textsuperscript{25}

Criminal law of the pre-Revolutionary era “included offenses against God and religion, offenses against government, offenses against public justice, offenses against public trade and health, homicide, offenses against the person, and offenses against habitations and other private property”.\textsuperscript{26} According to research concentrating on the court records of colonial Massachusetts Middlesex county between 1760 and 1774, most cases were within the category of offenses against God and religion.\textsuperscript{27} The majority of cases were for fornication, defined as sexual intercourse between a man and a woman not married to one another.\textsuperscript{28}

Fornication was in fact punished because it offended God, not merely because mothers of illegitimate children burdened the communities with the need for economic support for the children. A man found guilty of

\begin{itemize}
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id. at 850-51.
  \item \textsuperscript{22} Id. at 851.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Nelson, supra note 11, at 452.
  \item \textsuperscript{27} Id. at 452-53.
  \item \textsuperscript{28} Id. at 452.
\end{itemize}
fornication was required to give a bond to the town as a guarantee of his support for the child; thus, economic interests were involved. However, "prosecutions were brought even when no economic interests were at stake, and the same penalties were imposed in those prosecutions as in cases where economic interests may have played a part." Therefore, a woman accused of fornication was punished because her offense against God was the essential evil.

Related to the typical view of crime between 1760 and 1774 was the view of the criminal: an ordinary member of society who had sinned. Thus, "[l]ike sin, crime could strike in any man's family or among any man's neighbors." Court records during this era indicated a convicted criminal was not segregated from the rest of society and placed in prison—penalties were not imposed to sever a criminal's ties with society. The normal punishment imposed for a long duration—the sale into servitude of a convicted thief unable to pay treble damages—affected a criminal, not by segregating him, but by integrating him more fully into society by reorienting him toward normal social contacts.

Although the first decade of the Revolution produced no change in prosecutions regarding a fornication offense, the General Court in 1786 enacted a statute that codified punishment for fornication. The fornication statute permitted a woman guilty of the crime to confess her guilt before a justice of the peace, pay an appropriate fine, and thereby avoid prosecution by way of indictment. This resulted in a significant decline until 1791, when women stopped confessing, as they were aware that even though they did not confess they would not be indicted. As a result, the law's attitude toward adultery changed.

29. Id. at 453 & n.11.
30. Id. at 453.
31. Id. Not all of the recorded cases of colonial Massachusetts related to God and religion. Approximately 14% of the total offenses before Middlesex County included larceny prosecutions and prosecutions for burglary and breaking and entering. These offenses against property adhered to the traditional view of crime as sin against God, which government was obligated to suppress. Id. at 453-54.
32. Id. at 454.
33. Id.
34. Id. at 455.
35. Id.
36. Id. at 455 n.28 (citing An Act for the Punishment of Fornication, and for the Maintenance of Bastard Children, MASS. ACTS & LAWS 1785, ch. 66 (enacted March 15, 1786)).
37. Id. at 455.
38. Id. at 455-56.
39. Id. at 456.
By 1793, though divorces for adultery were regular occurrences, prosecutions disappeared. Thus, the courts were able to publicly acknowledge the existence of sin without prosecuting it.

According to religious leaders of the times, the deemphasis of prosecution for sin was related to a deterioration in morals. They traced the reasons to the Revolution, where "profaneness of language, drunkenness, gambling, and lewdness were exceedingly increased." In addition, morality's deemphasis was traced to social vice and illegitimacy. A modern author, however, does not trace the late eighteenth century's change as to a "deep-seated coarseness or general immorality." Rather, what occurred during the transition period of the pre-Revolutionary era to the Revolution was a relaxation of social customs or public morality.

2. Criminal Law During Post-Revolutionary Era: Prosecutions for Safety of Society. A gradual increase of prosecutions for offenses against habitations and private property occurred after the Revolution. Although a return of prosperity in the 1790's dropped the number of offenses and remained constant until 1806, there was again an increase in crimes against property through 1810. Evidence suggests economic distress apparently caused the increasing numbers of crimes against property during the post-Revolutionary era.

With the gradual emergence of crimes against property came the emergence of hard labor as a punishment, replacing the imposition of penalties used in the pre-Revolutionary era. In 1785, for example, the Massachusetts legislature provided for the imprisonment of thieves at hard labor. The state expected the proceeds of such labor would pay the costs of imprisoning those so punished. Meanwhile, a movement for general reform for prison management and criminal rehabilitation emerged, and by 1805 it was at its height in Middlesex County; state

40. Id. at 457.
41. Id.
42. Id.
43. Id. at 457-58 (quoting T. Dwight, A Discourse on Some Events of the Last Century, delivered January 7, 1801, quoted in V. Stauffer, New England and the Bavarian Illuminati, 82 COLUM. U. STUDIES IN HIST., ECON. & PUB. L. 25 (1918)).
44. Id. at 458 (quoting V. Stauffer, New England and the Bavarian Illuminati, 83 COLUM. U. STUDIES IN HIST., ECON. & PUB. L. 25 (1918)).
45. Id.
46. Id. at 458-59.
47. Id.
48. Id.
49. Id. at 460.
prisons were reopened, and corporal punishment was imposed for the last time.\textsuperscript{50}

The decline in prosecutions for offenses against God and religion, the increase in prosecutions for offenses against habitations and private property, and the use of hard labor as punishment transformed legal and social attitudes toward crime and the criminal.\textsuperscript{51} By 1810, the view of sin equating crime, and that prosecutions were for immorality had vanished.\textsuperscript{52} By 1810, crimes were prosecuted to "insure the peace and safety of society" and to relieve the public from the depredations of notorious offenders . . . .\textsuperscript{53} In 1810, "more than fifty percent of all prosecutions were for theft, and only one-half of one percent for conduct offensive to morality."\textsuperscript{54} In 1810, the criminal was one who preyed upon his fellow citizens.\textsuperscript{55}

By the early 1780s there was an emergence of a new concern with political and economic disorder.\textsuperscript{56} "[M]en came to view criminal law as having a dual function, 'to discourage (both) vice and disorders in society.'\textsuperscript{57} During this decade, a number of attacks upon authority and property occurred. The lower class culminated in open rebellion. Years of violence supported the upper class fear of the lower class attacking their wealth and standing.\textsuperscript{58}

The increase in the incidence of theft contributed to both a strengthening and a modification of the upper class fear.\textsuperscript{59} The security of person and property was at stake. Members of the lower classes used a variety of techniques to disrupt this security. The lower classes "rioted; they attacked courts and tax collectors; they refused to pay debts; they entered men's homes and carried away their possessions."\textsuperscript{60}

The actions of the lower classes could be reduced to two types: There were those who broke the law and infringed property rights directly, like thieves. In addition, there were those who worked indirectly by destroying the institutions of government upon which law enforcement,
and security of property rights, rested. In the late eighteenth century, thus, criminal law primarily functioned first, to punish and deter direct attacks on property. Second, criminal law must preserve the power of government to perform the first function.

Indeed, the theoretic, pre-Revolutionary view of crime was dying rapidly. When men rejected the old religious traditions, they also rejected many of the old moral ones. Among the old religious traditions was the unquestioned assumption that government should enforce morality. Indeed, the theoretic, pre-Revolutionary view of crime was dying rapidly. When men rejected the old religious traditions, they also rejected many of the old moral ones. Among the old religious traditions was the unquestioned assumption that government should enforce morality. Such men... were taking a step toward a modern view of criminal law—a view that its purpose [was] to protect men from unwanted invasions of their rights. Those faithful to old religious traditions, like clergymen, abandoned the idea of theocracy. The end result was criminal law became temporal and secularized. Criminal law's purpose became seen not as the preservation of morality, but rather as the protection of social order. Meanwhile, the criminal was an outcast of society. Prior to the Revolution, all types of men became involved in crime. By 1810, however, the upper classes rarely became involved in criminal law. The poverty of most criminals isolated them from the better elements of society on whom they preyed. Criminals in 1810, unlike the sinners of old, were in fact different from other men.

In the early nineteenth century, long terms of imprisonment did not reform men and enable them to take their place in society. Rather, imprisonment “confirmed them in their criminal ways by giving them an opportunity ‘for corrupting one another.’” By 1810, the criminal kept returning to crime and was forever condemned from the peace and prosperity of the society he challenged.

During the nineteenth century, the rape of a woman or carnal knowledge of a child under age ten continued to be punishable by

61. Id.
62. Id.
63. Id.
64. Id.
65. Id. at 465-66 (quoting P. Miller, From the Covenant to the Revival, 1 Religion in American Life 322, 356 (Smith & Jamison eds. 1961)).
66. Id. at 466.
67. Id.
68. Id.
69. Id. (quoting G. Bradford, State Prisons and the Penitentiary System Vindicated 5, 51 (1821)).
death. Sodomy and bestiality were viewed as behavior "contrary to the light of nature," again relying upon the Biblical injunction that "mankinde lyeth with mankinde." These offenses were punishable by death unless the perpetrator was under the age of fourteen. Nonetheless by 1805, these acts had been removed from the list of capital offenses. These behaviors were not viewed as a reflection of a disturbed personality, but rather predatory behavior like other aggressive acts of taking that the criminal law regulated.

3. Nineteenth and Twentieth Centuries. Colonies varied in their manner of dealing with sexual offenders. Throughout the nineteenth and twentieth centuries, state laws emerged that superseded common law practices and codified criminal behavior. These statutes included classifications of sexual offenses as part of the criminal code. Sexual behavior was not treated any differently from other acts defined as criminal. Accordingly, disposition was made in the same manner as for other criminal acts and was subject to the same available defenses.

III. DISCUSSION OF THE BEGINNING OF SEX PSYCHOPATH LEGISLATION

A. Late 1930s Through 1950s

In terms of dealing with sex offenders, the modern era was heralded by the legislative approach of enacting special "sex psychopath" statutes in the late 1930s. Fear of sexual crimes, particularly those having violent overtones or involving children, often created the atmosphere for the passage of such legislation. Michigan enacted the first sexual psychopath statute in 1937. Sex offenders deemed sexually dangerous or sexual psychopaths were diverted from correctional processes under the criminal justice system to rehabilitative treatment under the mental health system. As a general rule, the sexual psychopath statutes contemplated confinement in two instances: First, an offender was

70. PSYCHIATRY & SEX, supra note 1, at 851.
71. Id.
72. Id.
73. Id.
74. Id. at 853.
75. Id.
confined until full recovery. The other alternative confined the psychopath until no longer considered a menace to others. Each statute contained a special procedure for obtaining release upon such recovery.  

Before the first enactment of sex psychopath legislation, pessimism about the deterrent effects of incapacitation in institutions for sexual crimes per se yielded to another source of pessimism. This equally deep pessimism concerned the ineffectiveness or inadequacy of the type of treatment provided, or the lack of treatment altogether, during the period of confinement. Early optimism involved the effectiveness of identifying and predicting just who would behave in a deviant or dangerous manner. Intimately fused with the clinicians' belief in this ability was the idea that treatments were available to cure and rehabilitate the individuals identified. Accordingly, administration of the sexual psychopath statutes was geared to the objectives of incapacitation, treatment, and prevention.

1. Catalysts of "Sex Psychopath" Legislation. To an extent, the demands of the medical field, legal leaders, and civic groups served as catalysts for passage in many states of sexual psychopath laws since its 1938 birth in Michigan. These groups were convinced sex crimes were usually evidence of mental disorders that should be treated rather than punished. The sexual psychopath laws were viewed as . . . "curative and remedial means of treating the sexually deviated offender by way of psychiatric approach, and the entire theme [of the legislation] was that the individual should be committed to a [s]tate [m]ental [h]ospital where he could receive psychiatric treatment."

From its onset, sexual psychopath legislation established the progressive precedent that mental illness was a condition, even if it did not meet the criteria of the obsolete M'Naughten "right or wrong" rule about insanity. This condition required special treatment somewhat different from the customary penal law enforcement procedure. Thus, many scientists, judges, law enforcement officers, and community groups

79. PSYCHIATRY & SEX, supra note 1, at 853.
80. Id. at 853-54.
81. Id. at 854.
83. Id. at 766 (quoting A. Edward Nichols, former Legal Advisor to the Department of Mental Hygiene of California, unpublished address delivered at Norwalk State Hospital, Norwalk, Cal., May 22, 1952).
84. Id.
positively recognized introduction of this legislation as a major step in rehabilitating mentally disordered offenders.

By the 1930s, the public became increasingly concerned with brutal sex offenses as more sophisticated mass media publicized these crimes. Thus, due to the acute sensitivity of the interests which they threatened, since the 1930s, sex crimes have consistently provoked the most intense public reaction.

Their [sex offense legislation] popularity must be attributed in the main not to any foundation in fact for their adoption, but to the exploitation of the peculiarly intense anxieties about sex crimes that most people feel: the channels of publicity have been receptive mainly to the rabidly distorted declarations of ill-informed, often hysterical prophets of calamity.68

Indeed, one study focused on the legislative efforts of several states by 1950 to protect the public from sexual psychopaths.66 As evidenced in the popular literature of the times, the sexual psychopath statutes implicitly reflected the public’s anxieties about sex crimes.67 The propositions were: Between the 1930s and the 1950s, women and children were in danger because of the prevalence of serious sex crimes.68 The serious sex crimes were committed by sexual psychopaths, who were referred to as “creatures” in one magazine.69 Sexual psychopaths had no control over their impulses. Therefore, they had a mental defect that did not make them responsible for their behavior.90 Because of their inability to control their behavior, the sexual psychopath would continue to commit serious sex crimes throughout his life.91

In addition, the sexual psychopath could be identified before ever committing a sex crime.92 Releasing sex criminals after punishing them was subjecting women and children to a potentially dangerous situation. Therefore, society was failing in its duty to protect the

87. The focus of Edwin H. Sutherland’s article was to refute the propositions as either false or questionable. Id. at 544.
88. Id. at 543-46.
89. Id. at 543, 546-47 (referring to DAVID G. WITTELS, What Can We Do About Sex Crimes? SAT. EVE. POST, 221:30 ff., Dec. 11, 1948).
90. Id. at 544, 547-48.
91. Id.
92. Id. at 544, 548-54.
public. The creation of laws was necessary to keep sexual psychopaths confined until an effective permanent cure of their mental defect. Treating sexual psychopathy as a mental defect required the diagnosis, treatment, and recommendation for release of a sexual psychopath made exclusively by psychiatrists.

Thus, the public demanded more restrictive measures against sex criminals. Ordinary legislation was insufficient to protect communities from the perpetration and repetition of crimes by sex offenders. This interest was frequently generated following instances where well-publicized rapes or other notorious sex offenses committed by mentally unstable individuals had occurred.

a. Illinois' 1938 act: An illustration of the times. In 1938, the Illinois legislature created its first sexually dangerous persons act, in which 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.

The purpose of the act was to prevent persons suffering from mental disorders, excluding legal insanity, from being punished for crimes committed during periods of such suffering. The 1938 act provided an adequate legal procedure from a criminal indictment but before the criminal trial. The procedure involved the treatment of habitual sex offenders, and their indefinite removal from society. Indeed, the legislature employed the act to deal with sex offenders suffering from neurotic disorders that made them potential menaces to society.

As evidenced, for example, by discussion of the 1938 Illinois act before its passage, sex psychopath legislation appeared to have been regarded as the means necessary to satisfy the "urgency" resulting from public hysteria and sensationalism. Proposed and passed sex psychopath laws were regarded as well-reasoned attempts by state legislatures simultaneously to protect the public from brutal sex crimes and rehabilitate the

93. Id. at 544.
94. Id.
95. Id.
96. Hacker & Frym, supra note 82, at 767.
97. Grabowski, supra note 77, at 438.
98. Id. at 439 n.14 (quoting ILL. REV. STAT. ch. 38, § 820 (1938), known as the Criminal Sexual Psychopathic Persons Act).
99. Id. at 438.
100. Id.
offender. In the 1930s, Illinois planned to introduce a crime bill related to sex offenders at a special session of the legislature.\textsuperscript{101}

The object of the bill [was] to give to the prosecuting authorities the power to lock those who might be expected to commit atrocious sex crimes, before the victim is brutally assaulted or killed. The situation which called for the measure [was] well advertised in the press. Some believe[d] that [Illinois was] in a wave of such crimes. \textsuperscript{102}

2. Two-Tiered Objectives. Regardless of what served as the catalyst for their creation (i.e. demands by medical and legal leaders, frequency of sex crimes, growing public concern, or well publicized rapes of women and children) sex psychopath statutes emphasized a recurring two-tiered legislative objective: "(1) to protect society by sequestering the sexual psychopath so long as he remains a menace to others and (2) to subject him to treatment to the end that he might recover from his psychopathic condition and be rehabilitated."\textsuperscript{103} State legislatures introduced their crime bills as "the appropriate measures . . . to protect society more adequately from aggressive sexual offenders . . . [and] that society as well as the individual [sex offender would] benefit."\textsuperscript{104}

The basis of the states' authority for enacting sexual psychopath statutes rested on both the police power of the state and the doctrine of \textit{parens patriae}.\textsuperscript{105} Pursuant to the Tenth Amendment to the Constitution,\textsuperscript{106} the states have authority to: "[M]ake, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."\textsuperscript{107}

Indeed, justified as within a state's police power, a state "may . . . enact a new procedure both curative in purpose and rehabilitating in objective, and which substitute[d] treatment and cure for punishment."\textsuperscript{108} Furthermore, the statute's enactment was justified if " . . . one purpose of the legislation [was] the protection of the public from

\textsuperscript{101} Wm. Scott Stewart, Comment, Concerning Proposed Legislation for the Commitment of Sex Offenders, 3 JOHN MARSHALL L.Q. 407 (1938).
\textsuperscript{102} Id.
\textsuperscript{103} 24 A.L.R.2d at 350; Grabowski, supra note 77, at 438.
\textsuperscript{104} Roche, supra note 85, at 527 (citing N.H. REV. STAT. ANN. § 173:1 (repl. vol. 1964)).
\textsuperscript{105} Id. at 528.
\textsuperscript{106} U.S. CONST. amend X.
\textsuperscript{108} State ex rel. Sweezer v. Green, 360 Mo. 1249, 1256, 232 S.W.2d 897, 902 (1952).
indecent advances or criminal attack by those whom the State ha[d] the power to classify as mentally ill and the right to confine and attempt to cure." Pursuant to the doctrine of parens patriae, the state had a sovereign right and duty of guardianship as to persons found to be criminal sexual psychopaths. These sexual psychopaths were dangerous to the health, morals, and safety of a community's citizens, and also to themselves. Limits did exist, however, to the states' dual powers. "The constitutional guarantees of personal liberty [could not] be unreasonably or arbitrarily invaded." Furthermore, statutes enacted as a result of the police power must have [had] some actual and reasonable relation to the maintenance and promotion of the public health and welfare." This in fact must be the end sought.

3. Early Caselaw and Constitutional Objections. Although sex psychopath statutes generally have been upheld as a valid exercise of the states' police power and parens patriae, from the beginning their constitutionality has been challenged. They have been challenged as denying due process or equal protection; as placing an accused in double jeopardy; and as being ex post facto or retrospective legislation. In addition, the legislation has been constitutionally challenged as providing for self-incrimination; as providing for cruel and unusual punishment; and as depriving an accused of his right to a jury trial. The statutes are held generally to be civil rather than criminal in nature. The statutes are held to provide for civil commitment, not punitive incarceration. Indeed, the various objections to their constitutionality usually have failed.

109. Id.
110. Id.
111. Swanson, supra note 107, at 220.
112. Id.
B. The Trend By The 1960s

By 1960, twenty-six states and the District of Columbia enacted some version of a sexually dangerous person statute. Thus, whereas every state had a civil procedure for committing persons as mentally ill, the smaller group of twenty-seven states had a second civil procedure for committing persons charged with sexual offenses as “sexual psychopaths,” “sexually dangerous,” or other similar labels. The 1960s’ trend emphasized the treatment of sex offenders through involuntary civil commitment procedures rather than punishment after conviction.

1. Definitions Each statute generally defined a “psychopathic” sex offender as a person who lacked the power to control his sexual impulses or who had criminal propensities to commit sex offenses. Pennsylvania and Tennessee, for example, added the requirement the sex offender must be a physical threat to others. However, because of the different definitions used to describe the condition of such a person, the


117. Swanson, supra note 107, at 215.

118. See Pennsylvania’s statute (PA. STA. ANN. tit. 19, § 1166 (1958)) (“[If any such person ... constitutes a threat of bodily harm to members of the public ... the court ... may sentence such person to a state institution.”); Tennessee’s statute (TENN. CODE ANN. §§ 33-1301 (Supp. 1959)) (“[Sex offender’ includes any person ... who ... is likely to attack or otherwise inflict injury, degradation, pain or other evil on the objects of his uncontrollable desires.”).
twenty-seven statutes did not agree in the proper designation of his condition. For example, some statutes labeled the defendant a "sexual psychopath," "sexually dangerous person," or nothing at all.\footnote{119}

2. Basis of Jurisdiction. Amongst the twenty-seven statutes in 1960, there were three views as to what determined the basis for the court's jurisdiction over sexual psychopaths: Sixteen statutes provided the offender must have been convicted of some crime or of a specific sex crime before the court may determine whether to commit him for treatment.\footnote{120} Seven statutes required the alleged offender be charged with some crime, or a sex crime.\footnote{121} The remaining five statutes simply demanded a showing of just cause that the defendant was probably a sexual psychopath.\footnote{122}

3. Discretion in Initiating Proceedings. The majority of the statutes in 1960 provided the state or district attorneys either may or must initiate the sexual psychopath proceedings. Initiation depended upon the statute and basis of jurisdiction.\footnote{123} On the other hand, California and Nebraska, for example, allowed anyone showing cause, or the individual on his own behalf, to request a special hearing.\footnote{124} Many 1960 statutes provided if an alleged sexual psychopath was already on trial for some crime, the trial judge could, using his discretion, retard the proceedings at any point and order a mental examination and special hearing for the defendant.\footnote{125} Other statutes, however, either required or allowed the judge to order such an examination and hearing only upon the conviction of the offender.\footnote{126}


\footnote{120} Swanson, supra note 107, at 216 n.10. See, e.g., OHIO REV. CODE ANN. § 2947.25 (Baldwin 1958) and UTAH CODE ANN. § 77-49-1 (1953).

\footnote{121} Swanson, supra note 107, at 216 & n.11. See, e.g., ILL. REV. STAT. ch. 38, § 822 (1959) and WASH. REV. CODE § 71.06.020 (1957).

\footnote{122} Swanson, supra note 107, at 216 & n.12. See, e.g., MINN. STAT. § 526.10 (1957) and NEB. REV. STAT. § 29.2902 (Supp. 1957).

\footnote{123} Swanson, supra note 107, at 216 & n.13. See, e.g., N.H. REV. STAT. ANN. § 173:3 (1955) and OHIO REV. CODE ANN. § 2947.25 (Baldwin 1958).

\footnote{124} Swanson, supra note 107, at 216 & n.14. See, e.g., CAL. WEL. & INSTNS. CODE § 5501 and NEB. REV. STAT. § 29.2902 (Supp. 1957).

\footnote{125} Swanson, supra note 107, at 216 & n.15. See, e.g., FLA. STAT. ANN. § 917.12(2) (Supp. 1958).

\footnote{126} Swanson, supra note 107, at 216-17 & n.16. See, e.g., PA. STAT. ANN. tit. 19, § 1167 (1958) and VA. CODE ANN. § 53-278.3 (1960).
4. Medical Examination. Every sexual psychopath statute in 1960 contained a discretionary or mandatory provision for medical examination of the alleged sexual psychopath.Usually, the staff of a state public health department or one or more "qualified" doctors examined the individual and then reported their findings to the court for its use in the disposition of the case. Some statutes defined qualified, while others did not. For example, Illinois defined qualified psychiatrist as a reputable physician. He was licensed to practice in Illinois as a specialist in the diagnosis and treatment of mental and nervous disorders for a period of not less than five years.

5. Proceedings. The statutes of 1960 consistently provided for a hearing to determine whether an offender was a sexual psychopath. However, the requirements varied from state to state. In many cases that required a hearing, some or all of the following rights were granted: (1) notice of hearing; (2) personal attendance at hearing; (3) counsel; (4) habeas corpus; (5) bail; (6) presentation of evidence and subpoenaing of witnesses; (7) cross-examination; and (8) appeal. Courts would read these rights into the statutes if they were not explicitly provided for in the statutes. On the other hand, numerous statutes, like Tennessee's and Utah's, simply required the judge, without a special hearing, determine solely on the basis of medical reports whether the offender should be committed for treatment. If the qualified person determined the defendant was not a sexual psychopath, he would be discharged, ordered to face criminal charges, or required to serve out a sentence the criminal court already imposed upon him. On the other hand, if the qualified person determined the defendant was a sexual psychopath, either he would be sent to a state mental hospital to receive special treatment for an indeterminate duration, or he was treated as an out-patient treatment.

127. Swanson, supra note 107, at 217.
128. Id. See, e.g., PA. STAT. ANN. tit. 19, § 1167 (1958) and VA. CODE ANN. § 53-278.3 (1950).
129. ILL. REV. STAT. ch.38, § 823.a (1959).
130. Swanson, supra note 107, at 217.
131. Id. at 218; TENN. CODE ANN. § 33-1301-33-1305 (Supp. 1959) and UTAH CODE ANN. §§ 77-49-1-77-49-8 (1953).
132. Swanson, supra note 107, at 218.
133. Id. See, e.g., WASH. REV. CODE § 71.06.090 (1957) (a sexual psychopath was committed in an institute until the superintendent determined the offender was "safe to be at large . . . "). See, e.g., N.J. REV. STAT. § 2:192-1.16 (Supp. 1951) (the court could place the offender on probation, with the condition that the offender receive out-patient psychiatric treatment prescribed in each individual case.).
6. **Release.** The 1960 statutes required a hearing to consider whether the sexual psychopath was no longer a menace to society. If further treatment was necessary, then the offender would remain in the institution. However, if the offender was found to have recovered sufficiently, then the releasing authority could set the offender free, place him on probation, or place him on parole.\(^{134}\)

IV. **CURRENT SOLUTIONS: RE-EXAMINING DANGEROUS SEXUAL OFFENDER COMMITMENT LAWS**

Throughout the 1980s state legislatures re-examined their dangerous sexual offender commitment laws. Various factors together influenced the trend by 1990, moving away from using dangerous sexual offender commitment systems. These factors included the recognition that not all violent sexual offenders were likely to respond to the same type of therapy; the growing awareness that sex offenders were not mentally ill; the lack of proven treatment methods to reduce recidivism rates; and the rising concern for civil rights.\(^{135}\)

Beginning in the 1980s, numerous states repealed their dangerous sexual offender commitment laws.\(^{136}\) For example, California repealed its sex offender legislation, declaring "[i]n repealing the mentally disordered sex offender commitment, the Legislature recognizes and declares that the commission of sex offenses is not itself the product of mental diseases."\(^{137}\) By 1990 approximately half of the states had their 1960s sexual psychopath procedures abolished.\(^{138}\) In addition,
only five states have actively enforced the current laws in more than a few isolated cases.\textsuperscript{139} Indeed, by 1990, the trend was to punish sex offenders for their crime and to provide them with treatment in prison on a voluntary basis.\textsuperscript{140}

A. Washington State Legislature Begins a New Trend

Every other state and the District of Columbia has a civil procedure for committing persons as mentally ill.\textsuperscript{141} By 1990, after re-examination, a smaller group of states were left with a second civil procedure for committing persons charged with sexual offenses as "sexual psychopaths; such laws permitted states to treat sexual offenders in lieu of punishing them."\textsuperscript{142} In 1990, the Washington State Legislature revived involuntary civil commitment proceedings for a certain class of sex offenders—"sexually violent predators." As a result of publicity related to a trilogy of notoriously violent and cruel sexual crimes, the Washington Legislature enacted its "Sexually Violent Predators Law" within its "Community Protection Act."\textsuperscript{143}

Washington's existing involuntary civil commitment system allows the state to commit mentally ill persons for short-term, crisis-intervention treatment.\textsuperscript{144} However, the civil commitment system is not designed to provide long-term confinement of those who are not mentally ill.\textsuperscript{146} Many violent sexual offenders do not meet the existing involuntary treatment act's requirement of mental illness and cannot be committed under the act.\textsuperscript{146} The inability to commit involuntarily violent sexual offenders was seen as a "gap[] in [the] law and administrative structures [that] allow[] the release of known dangerous offenders who are highly likely to commit very serious crimes."\textsuperscript{147} The Governor's Task Force on Community Protection proposed, and subsequently enacted, legisla-
tion establishing Washington's Violent Sexual Predator Commitment System.\textsuperscript{148}

1. Trilogy of Violent Sexual Crimes and Public Reaction. In Seattle, Washington in September 1988, Gene Raymond Kane was on leave through a state prison release program. At the time of this release, Kane had served a full sentence of thirteen years for attacking two women in 1975. Kane was not treated for his mental problems while in prison because he was considered too dangerous to handle. He was, nevertheless, released into the Seattle community.\textsuperscript{149} Diane Ballasiotes' body was found a week after she left her job for the evening and never returned. Kane had raped and killed Ballasiotes, then dumped her body in another part of the city. Kane had been out of prison for two months and was on leave when he killed Ballasiotes.\textsuperscript{150} Ballasiotes' mother, Ida Ballasiotes, subsequently began a campaign to enact legislation that would prevent or reduce the likelihood of violent sex crimes by repeat sex offenders released into an unsuspecting community.\textsuperscript{151} The response by the Washington legislature was lukewarm.

In the same year, Washington experienced another violent attack by a previous offender. Gary Minnix previously had been found incompetent to stand trial for sexual offenses. When Minnix was released, he subsequently broke into a woman's apartment, raped her, and attacked her with a knife in December 1988.\textsuperscript{152}

It was not until the violent sexual attack on a seven-year-old boy, however, that the initial lukewarm response by the Washington legislature was dramatically kindled into a storm of community shock and outrage. Earl K. Shriner kidnapped a seven-year-old boy who was riding his bicycle near his Tacoma, Washington home. Shriner took the boy into the woods, raped him, strangled him, and severed his penis. Neighbors found the boy alive in the woods later that evening. Although the boy was initially in shock, he later was able to give a description of Earl Shriner, a man known to the Tacoma police.\textsuperscript{153} According to subsequent news articles in the Tacoma newspaper, Shriner had a history of violent crimes. He killed a schoolmate when he was sixteen.

\textsuperscript{148} Bodine, \textit{supra} note 135, at 105.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
After his release from a mental institution, Shriner kidnapped and assaulted two teenage girls. Shriner once told a prison cellmate he wanted a van equipped with cages so he could capture children, sexually abuse them, and then murder them.154

State correction officials attempted to commit Shriner for treatment under Washington's Involuntary Treatment Act because they believed he posed a danger to the community.155 Shriner, however, could not be committed under the involuntary commitment act because he failed to meet the two criteria necessary: Shriner was not mentally ill and he had not performed any overt act during confinement for the assault on the two girls demonstrating dangerousness to himself or others.156

The Tacoma papers printed editorials responding to Shriner’s criminal history and the system’s inadequacy to civilly commit Shriner for indefinite period of time. One editorial stated:

This case makes clear that a class of criminal exists that is beyond reach of rehabilitation because of mental deficiencies. Such people cannot be put to death by a just society.
But justice also demands that society be protected from such people.
The legal system needs to be changed to make it possible to remove the criminally insane from society, quickly and permanently. In such obvious cases as this, the law should err, if it errs at all on the side of protecting the innocent.157

Similar articles focused on the need to tighten Washington's laws in order to avoid allowing offenders, like Shriner, from preying on victims again and again.158

Public concern continued to mount as the media relayed stories about Shriner, the system's failure to protect the public from him, and the seven-year-old's slow recovery. The public bombarded the Governor with a campaign to enact tougher penalties for sex offenders. Protestors gathered on the steps of the Capitol Building demanding the Governor listen to the grass-roots campaign Ballasiotes initially brought in 1988.

156. See generally Bochnewich, supra note 154. Gleb, supra note 154; Boerner, supra note 155, at 525.
158. See Boerner, supra note 155.
Thousands of letters and calls were received in the Governor's office about Shriner and his seven-year-old victim. Public forums were held about child sexual assault and proposed legislation. Indeed, Shriner's vicious crime finally galvanized the Washington legislature to enact a new civil commitment system, the "Sexually Violent Predator Law," to fill in the gaps that Washington's prior sex offender act was unable to fill.


a. Definitions. Washington's new commitment system allows the state to commit involuntarily those persons found to be "sexually violent predators." The act defines a sexually violent predator as a person charged with or convicted of a crime of sexual violence. Because of a "mental abnormality or personality disorder," the sexually violent predator is likely to commit crimes of sexual violence. "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

The commitment process may be initiated if a person falls within one of the following categories: (1) when the prison term of a person convicted of a violent sexual offense nears expiration; (2) when a person found to be incompetent to stand trial for a violent sexual offense is about to be released; (3) when a person found not guilty by reason of insanity of a violent sexual offense is about to be released; or (4) when a person commits certain enumerated crimes with a sexual motivation.

b. Discretion in initiating proceedings. The commitment procedure begins when the prosecuting attorney or the attorney general files a petition alleging that the person is a "sexually violent predator." If a judge finds that reasonable cause exists to support this allegation, the judge may order the person transferred to an appropriate facility. There an evaluation is performed to determine if the person's in fact a sexually

159. See supra note 155.
161. 1190 WASH. LAWS ch. 3, § 1002.
162. Id.
163. See Bodine, supra note 135, at 105; Bochnerich, supra note 154, at 277.
164. Id.
violent predator. The person may then be detained up to forty-five days from the filing of the petition. Finally, a trial is held within the forty-five days to determine whether the person is a sexually violent predator.

c. Proceedings. At trial, the person is entitled to the right to assistance of counsel and the right to demand a jury trial. He also has the right to retain experts or professionals to perform an examination on his behalf. The act, however, does not give the person the right to remain silent or the right to refuse to be examined prior to the trial. The state has the burden of proving beyond a reasonable doubt that the person is a sexually violent predator.

If the court or jury determines that the person is a sexually violent predator, the person will be committed indefinitely to the custody of the state department of social and health services for control, care, and treatment. During this commitment, the sexually violent predator has the right to care and treatment. Additionally, an examination of the sexually violent predator's mental condition must be performed at least once every year, and the court must receive periodic reports concerning that mental condition. The state detains the sexually violent predator "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."

d. Release. Under Washington's Violent Sexual Predator Commitment System, a defined sexually violent predator may be released by one of two methods. First, the Secretary of the State Department of Social and Health Services may determine, if released, the sexually violent predator is no longer likely to commit predatory acts of sexual violence. The sexually violent predator may then petition the court for his release, which the court may grant only after a trial concerning the sexually violent predator's probable dangerousness. Before the trial, however, the state may request that the sexually violent predator undergo an examination to determine if his mental abnormality or personality disorder has so changed that the person is safe to be at large.

165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. Id.
disorder has changed so as to insure that he is no longer likely to commit acts of sexual violence. Either the state or the sexually violent predator may demand that the trial be held before a jury. The court will deny the sexually violent predator's release if at the trial the state can show beyond a reasonable doubt that he is likely again to commit violent sexual offenses.

Second, the sexually violent predator may obtain parole by petitioning the court for the release over the secretary's objection. The sexually violent predator may not petition the court for release, however, if he has previously filed a petition over the secretary's objection. In addition, if either (1) the petition was found to be frivolous, or (2) the sexually violent predator's mental condition was found to be sufficiently unchanged so that he could not be safely at large, the court must refuse to hear a subsequent petition unless "the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing [is] warranted."

e. Differences from dangerous sexual offender commitment systems. The Violent Sexual Predator Commitment System differs from dangerous sexual offender commitment systems of other states in one major aspect. The dangerous sexual offender commitment systems allow the state to commit the dangerous sexual offender in lieu of punishment. Washington's new Violent Sexual Predator Commitment System, however, allows the state to commit involuntarily a person found to be a sexually violent predator in addition to punishing him for the underlying offense. This feature raises many constitutional criticisms.

3. Criticisms of "Dangerousness." In 1993, the Washington Supreme Court upheld the Violent Sexual Predator Commitment System. The state law's premise allowing individuals designated as sexual predators to be committed for psychiatric treatment after they have completed their prison sentence was constitutionally attacked. The challenge to the law was brought by one four-time and one six-time rapist. Similar to the constitutional arguments against dangerous sexual offender commitment systems, the Violent Sexual Predator

174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
statute was challenged as violating double jeopardy, the ex post facto clause, substantive due process guarantees of liberty, as well as procedural aspects.\textsuperscript{180}

One of the most controversial and unique aspects to support the constitutional arguments of the Sexually Violent Predator statute, however, is the law's reliance upon a mental health professional's prediction of the offender's future dangerousness.\textsuperscript{181} The opponents claim that, because of their lack of accuracy, predictions of individual recidivism is so low that it seriously threatens individual freedom and autonomy without adequate justification.\textsuperscript{182} Thus, opponents have argued that the statute violates substantive due process because inaccurate prediction will render the detention merely preventive rather than for treatment.\textsuperscript{183}

Preventive detention without treatment is asserted then to be punitive and thus the invasion of the offender's liberty interest is not justified by the state's \textit{parens patriae} power.\textsuperscript{184} In addition, the alleged offenders who are not suffering from "mental abnormality" may be confined. Critics of the scheme contend such over inclusiveness prevents the statute from being sufficiently narrowly drawn to serve the state's compelling interest in treating the offender and preventing him from re-offending.\textsuperscript{185}

In support of the Washington statute, it is argued that predictions of dangerousness, in fact, are central to law enforcement and the judicial system's mandate to control crime.\textsuperscript{186} They are also considered key to the mental health profession's ability to contribute to the decision of who should be detained involuntarily due to mental disease or abnormality.\textsuperscript{187}

The support of preventive confinement finds force in the following: "[P]reventive confinement of persons predicted to be dangerous has 'always been practiced, to some degree, by every society in history regardless of the jurisprudential rhetoric it has employed . . . it is likely that some forms of preventive confinement will continue to be practiced by every society."\textsuperscript{188}

\textsuperscript{180.} Id. at 106.
\textsuperscript{181.} See Bochnewich, \textit{supra} note 154, at 277.
\textsuperscript{182.} Id.
\textsuperscript{183.} Id.
\textsuperscript{184.} Id.
\textsuperscript{185.} Id.
\textsuperscript{186.} Id.
\textsuperscript{187.} Id.
\textsuperscript{188.} Id. (quoting Alan Dershowitz, \textit{The Origins of Preventive Confinement in Anglo-American Law. Part I: The English Experience}, 43 U. CIN. L. REV. 1, 57 (1974).}
In choosing to adopt the Sexually Violent Predator statute, Washington, proponents argue, chooses public safety from recidivists over the individual liberty interests of the detainee. Thus, where the mental disturbance of the individual accompanies the likelihood of further sex crimes against others, indefinite commitment based upon expert predictions of dangerousness seems to be the best solution.  

4. Other States Make the Move for Civil Commitment. Washington's 1990 Sexually Violent Predator statute signals a new era in anticrime measures. Recently, proposed legislation in various states reflects the popular tough-on-crime movement sweeping the nation and the focus on high-profile criminals. Repeat sex offenders victimizing young women and children shortly after serving prison sentences have become known celebrities in the states. As a result, dozens of crime measures have been submitted in state legislatures, such as Kansas, Alaska, California and Wisconsin.  

Indeed, sponsors of bills claim they are responding to a growing rate of violent crime and a corresponding level of fear in the communities. State legislatures model proposals after Washington's Sexually Violent Predator statute, justifying the "sex predatory" laws as the only means necessary to protect the public from dangerous criminals. Although the proposals have meet the same unconstitutional, emotional and moral arguments that faced Washington's statute, supporters contend Washington's civil commitment statute survives. Therefore, giving lawmakers the confidence that similar measures would withstand the challenges in their states.  

B. Applying Community Notification Laws  

1. Washington State's Community Protection Act. Child molester Joseph Gallardo's picture was distributed in Snohomish County, Washington, after his release from prison. The notice featured

189. Id.  
191. Id.
HISTORICAL PERSPECTIVE

a long-haired, mustachioed Gallardo, with a description: "Viewed as an extremely dangerous untreated sex offender with a very high probability for re-offense . . . has sadistic and deviant sexual fantasies which include torture, sexual assault, human sacrifice, bondage and the murder of young children." Subsequently, residents of Gallardo’s community burnt his home down to prevent his return after an enforced thirty-three-month absence.

In 1991, Gallardo served time in prison for statutorily-raping a ten-year-old in 1986. He was a model prisoner. He did not, however, opt in to a program for sex offenders. In addition, he drew alarming pornographic and violent pictures of children. Regardless, the sexually violent predators provision of Washington’s recent “Community Protection Act” did not apply to him. However, another clause mandates community notice by the sheriff’s department. Approximately thirty-eight states have registries for recently released sex offenders; the offenders are required to notify police of their whereabouts wherever they reside. However, Washington State’s Community Protection Act made sweeping changes in the law regarding sex offenders. In its finding and policy statement for the act, the legislature stated that

... sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is a paramount governmental interest . . . . Therefore, this state’s policy . . . is to require the exchange of relevant information about sexual predators among public agencies and officials and to authorize the release of relevant information about sexual predators to members of the general public."

Indeed, the policy gave local law-enforcement officials a tool they had never known before—the option to inform a community of a convicted sex offender who would be living in their area. The Community Protection Act does not contain specific provisions with respect to how to notify the communities.

2. “Megan’s Law.” On July 29, 1994, seven-year-old Megan Kanka of Hamilton Township, New Jersey was raped and killed by a neighbor. The neighbor, Jesse Timmendequas, a convicted pedophile, allegedly lured Megan into his house. He then sexually assaulted her and strangled her to death with a belt. Timmendequas, a two-time child sex

193. WASH. REV. CODE § 71.09.120.
195. See WASH. REV. CODE §§ 71.06.010-71.06.260.
offender, lived in his house with two other convicted pedophile. Local authorities had not informed the community of Timmendequas' release or that Timmendequas and two other convicted child abusers had moved into a home located across the street from Megan's house.196

In the wake of public outrage over the recent slaying of Megan, national attention in the summer of 1994 focused on the issue of the release of sexual offenders and the rights of communities to notification when the offenders move to or frequent their areas.197 Representative Richard A. Zimmer (R-Flemington) of New Jersey called for federal legislation that would require mandatory notification to communities. Known as Megan's law, it also requires convicted sex offenders report their whereabouts regularly to state law-enforcement authorities for the rest of the offenders' lives.198 Zimmer's proposal would also require states to set up boards to "identify felons who are sexually violent predators."199

C. Federal Anti-Crime Bill

The $30 billion federal measure was approved 235-195 in the House of Representatives on Sunday, August 21, 1994. It was expected and subsequently approved by the Senate, and finally by the President.200 The approved legislation was a compromise of several amendments and suggestions after lawmakers blocked the initial crime bill proposal on August 11.201 Representative Zimmer called the August 11 stipulations a "watered down" version of an earlier, tougher measure. The earlier measure allowed full community notification and required offenders to register their whereabouts every three months for their entire lives or until judged to be no longer a risk.202

197. Id.
198. See Marjorie Valburn, Representative Zimmer Urges Congress To Support Federal 'Megan's Law' He Is Co-Sponsoring Legislation To Inform Communities And Track Sex Offenders For Life, PHILADELPHIA INQUIRER, Aug. 9, 1994, at S03.
199. Id.
200. For discussion on how federal bill's troubles were related to gun control issue see House Approves Crime Bill, PALM BEACH POST, Aug. 22, 1994, at 1A, and Jennifer Buksbaum, N.J. House Members Vote In Favor Of Crime Bill, 11-2, NEW JERSEY, Aug. 22, 1994, at 1A.
201. See House Approves Crime Bill, PALM BEACH POST, Aug. 22, 1994, at 1A; Valbrun, supra note 198, at S03.
202. Id.
1. Registration and Community Notification. From its onset, the purpose of the proposed federal legislation was to encourage states to establish registration and tracking procedures and community notification with respect to released sexually violent predators.\textsuperscript{203} The federal proposal was modeled in part by Washington State's laws, recognized by lawmakers as leading the nation in coping with sex offenders who terrorize playgrounds, parks, and neighborhoods and deemed to prey on the most vulnerable in society.\textsuperscript{204} Proponents contended that the federal measure targets the violent sexual offenders who are released into society after serving time for rape or child molestation, despite the fact that they are a continued threat.\textsuperscript{205} After a determination has been made that the person is a sexually violent predator, law enforcement officials can monitor the person's whereabouts and warn communities where the person may prey.\textsuperscript{206} Indeed, lawmakers supported the federal legislation as giving law enforcement officials the tools to perform their jobs protecting their communities from the most violent and brutal criminals.

As passed, the 1994 anticrime federal legislation provides that people who commit crimes against children, or sex offenses, must be registered for 10 years, subject to annual verification.\textsuperscript{207} Defined sexually violent predators would be subject to lifetime registration and quarterly verification.\textsuperscript{208} More importantly, the federal bill provides that police may notify communities of the presence of the registered offenders.\textsuperscript{209}

2. Indefinite Civil Commitment. During Congressional hearings, lawmakers recognized the model for the proposed federal legislation was Washington State's laws, including its Sexually Violent Predators Act.\textsuperscript{210} The lawmakers acknowledged the inspirations for the passage of Washington's Sexually Violent Predators Act, including the killer of Tacoma's seven-year-old, Earl Shriner.\textsuperscript{211} In its original form, the federal proposal provided for postincarceration, indefinite civil commitment of a small group of sexually violent predators. However, although

\begin{tabular}{l}
\textsuperscript{203} See generally supra notes 191-195. \\
\textsuperscript{204} Id. \\
\textsuperscript{205} Id. \\
\textsuperscript{206} Id. \\
\textsuperscript{207} See H.R. REP. 103-711 (1994). \\
\textsuperscript{208} Id. \\
\textsuperscript{209} Id. \\
\textsuperscript{210} See generally supra notes 191-95. \\
\textsuperscript{211} Id. In their discussions for the federal legislation, lawmakers discussed Earl Shriner's history and Washington State's move for stringent laws. Id.
\end{tabular}
the Washington State Supreme Court recently upheld this provision and several states have since copied Washington's Sexually Violent Predators Act, the lawmakers found the involuntary civil commitment provision to be "at the cutting edge" for federal law.\textsuperscript{212} The civil commitment procedure troubled lawmakers, and ultimately the federal anticrime bill fails to address this. Although Congressional records do not address the exact reasons for deciding against civil commitment, it is understandable when viewed in light of all the controversy surrounding the stringent measure.

Civil libertarians continuously challenge the measure as unconstitutional—"fear[ing] that the drive to secure communities from predators will trample civil rights and possibly hurt a great many innocent people."\textsuperscript{213} Essentially, critics argue that civil commitment is lifetime preventive detention masquerading as involuntary psychiatric treatment. In Wisconsin, where a copycat law took effect in June, three state courts recently ruled that the new civil commitment statute is unconstitutional, violating the protection against double jeopardy.\textsuperscript{214} And, although the state supreme courts in Washington and Minnesota upheld their civil commitment laws as of the summer of 1994, the Supreme Court is expected eventually to decide on the constitutionality of such measures.

3. "Scarlet Letter Laws." The practice of labeling a criminal with symbols or words exposing the offense committed was used in colonial America as a form of punishment by humiliation.\textsuperscript{215} The method was eventually deemed to be an archaic and unacceptable means of dealing with antisocial behavior; the courts then sent criminals to correctional institutions.\textsuperscript{216} Today, faced with the reality of ineffective and overcrowded prisons and moral and constitutional arguments, a move has been made to return to "scarlet letter laws" with the passage of the federal crime bill. Critics named the provision encouraging community notification as the scarlet letter law.\textsuperscript{217}

Critics challenge the community notification provisions in state statutes, and now federal law. Critics fear branding sexual offenders

\begin{thebibliography}{9}
\bibitem{212} Id.
\bibitem{213} U.S. \textit{News} \& \textit{World Report, supra} note 196, at 68.
\bibitem{214} Id. Discusses various examples of whole communities attempting to keep serial rapists and pedophiles from entering their neighborhoods. \textit{E.g.} in Fairfax County, Virginia, a mother passed out fliers to neighbors regarding a "child stalker and sexual assaulter" seen with children. \textit{Id.}
\bibitem{216} Id.
\bibitem{217} U.S. \textit{News} \& \textit{World Report, supra} note 196, at 66.
\end{thebibliography}
might actually do more harm than good. Branding would drive the sexual offenders away from getting help and irretrievably harm released offenders who are truly controlling their dangerous urges. In addition, notifying communities may spark a kind of vigilantism. For example, in Detroit, when rumors swept a community that a new resident was a child molester, neighbors posted signs saying “School Kids! Watch Out” and “Child Molester Lives Here.” The man accused, however, denied having molested children and was only convicted of gross indecency in 1975. Nevertheless, neighbors flooded his newly rented second-floor apartment by stuffing tissues into his bathtub drain. Their efforts were successful; the man moved, and Detroit police say his whereabouts are unknown.  

D. Catalysts For Present Legislation Are Reminiscent Of The Past

The catalysts for recent sexual offense legislation—reports of serious crimes against women and children, sophisticated mass media, public responses, grass-roots campaigns—stem from the post-Revolutionary view that criminal law’s purpose is to weigh individual liberty versus crime control. Criminal law’s purpose indeed is for the protection of social order. The transformation that occurred in the post-Revolutionary era is reflective in the demand by the public and lawmakers to enact what is deemed appropriate legislation to respond to the crimes of today.

Although the 1990s appear to further the post-Revolutionary view of criminal law, the drive toward involuntary civil commitment appears to further pre-Revolutionary objectives. Civil commitment laws allow states to continue indefinitely incarcerating sexually violent predators. Proponents contend that the commitment is to ultimately attempt to integrate the offender more fully into society when he is released. Indeed, whereas community notification laws reflect post-Revolutionary law’s attempt to protect society from the outcasts of society, civil commitment’s goal to reintegrate the sex offender so as to not be a threat in the future reflects popular pre-Revolutionary opinion.

V. Conclusion

Changes occur in piecemeal fashion: legislators respond to practical problems in an ad hoc and pragmatic fashion. As specific deficiencies in the law become evident or new events arise, individual changes designed to cure isolated problems are voted into law. The tremendous increase in sex offenses coupled with the grave effects of sex crimes on the

218. Id. at 73.
219. See generally Nelson, supra note 11.
victims of these offenses justify to the public renewed efforts by states like Washington to craft new and drastic legislation—involuntary civil commitment—to deal with this terrible social evil. 220 In the 1930s, legislation was enacted to deal with a predominantly misunderstood group known as sexual psychopaths.

In the 1990s, on the other hand, federal and state legislation responds to the demands of the media, public, and grass-roots groups narrowly to tailor legislation to address the cycle of fear caused by sexually violent predators who slipped through the cracks of the legislation of the past. Indeed, the 1994 election-year struggle over the federal anticrime bill was part of the national outcry over the brutal crimes of sexual offenders. The furor has led to some very tough solutions on both the state and federal levels.

RAQUEL BLACHER

220. See generally supra note 149.