The Evolution of Wisconsin's Sexual Predator Law

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I. INTRODUCTION

On May 26, 1994, the Wisconsin State Assembly enacted chapter 980 of the Wisconsin Criminal Code, entitled "Sexually Violent Person Commitments." This statute, which has been labeled the "sexual predator law," permits the State to classify persons as sexually violent and commit them indefinitely to a civil treatment facility after they have served their criminal sentences.

Civil commitment for sex offenders is not a new concept. Many states, including Wisconsin, at one time committed sex offenders under "sexual psychopath statutes." However, these commitments were in lieu of incarceration, and many states have since repealed such laws.

Today, the trend is once again toward committing sex offenders, only now it is accomplished under a new procedure that commits them after they have served their criminal sentences. Washington State pioneered this procedure, and its effort has received a great deal of public support.

Washington's law began as a grass-roots campaign led by Mrs. Ida Ballasiotes in response to the 1988 rape and murder of her daughter, Dianne, by repeat sex offender Gene Raymond Kane. However, Mrs. Ballasiotes's struggle received little notice from the Washington legislature until the horrific kidnapping, rape, and castration of a seven-year-old boy by repeat offender Earl K. Shriner. Shriner's crime incited the Washington legislature, and on July 1, 1990, it enacted section 71.09 of the Washington Code entitled "Sexually Violent Predators."

1. WIS. STAT. § 980 (1994).
3. Id. See, e.g., WIS. STAT. § 975 (1977).
4. McCaffrey, supra note 2, at 889. Wisconsin's original sex crimes law, chapter 975, became ineffective July 1, 1980.
7. Id. After his arrest for this offense, it was also discovered that while in prison for a prior offense, Shriner told a cellmate that he wanted a van equipped with cages so he could capture children and sexually abuse and murder them. Id.
8. WASH. REV. CODE ANN. § 71.09.010 (West 1994).
Wisconsin, also outraged by repeat sex offenders, was impressed by Washington’s effort and decided to follow Washington’s lead.

Part II of this Comment describes Wisconsin’s version of the Washington law and illustrates the method by which a sexual predator is committed. Part III outlines the constitutional issues implicated by the sexual predator law, as those issues were addressed by the parties in an appeal involving the Wisconsin law. Part IV discusses both the Washington State Supreme Court decision that upheld Washington’s sexual predator law, and the subsequent district court opinion overruling that decision. Part V discusses the Wisconsin Supreme Court’s ruling on the Wisconsin statutory scheme. Part VI addresses other issues future courts should resolve when analyzing sexual predator statutes.

II. THE WISCONSIN STATUTE

Chapter 980 begins by defining several terms critical to the implementation of the statute. These terms include “mental disorder,” “sexually motivated,” “sexually violent offense,” and “sexually violent person.”

The statute then describes the procedure by which a person is labeled a sexually violent person and committed under the statute. First, the agency with jurisdiction over the custody of a sex offender notifies the Wisconsin Department of Justice and the local district attorney’s office three months prior to the anticipated release of a sexually violent person. Second, a petition is filed by the Department of Justice alleging that the person has been convicted of a sexually violent offense, found delinquent for a sexually violent offense, or found not guilty of a

10. “‘Mental disorder’ means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.” Id. § 980.01(2).
11. “‘Sexually motivated’ means that one of the purposes for an act is for the actor’s sexual arousal or gratification.” Id. § 980.01(5).
12. “‘Sexually violent offense’ means any crime specified . . . or any crime that is determined, in a proceeding under § 980.05(3)(b), to have been sexually motivated.” Id. § 980.01(6).
13. “Sexually violent person” means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness, and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.
14. Id. § 980.015(2).
sexually violent offense by reason of mental disease or defect. The petition must also allege that the person has a mental disorder, and that the person is dangerous to others because of the risk that he or she will engage in future sexually violent acts.

The person subject to such a petition has the right to a probable cause hearing within seventy-two hours of the filing of the petition. If the court does not find probable cause, the petition is dismissed. Otherwise, the person is ordered to an appropriate facility for evaluation.

No later than forty-five days after the probable cause hearing, a trial must commence to determine if the person subject to the petition is sexually violent. At the trial, all rules of evidence and all constitutional rights apply. Either party may request a jury of twelve, and the State has the burden to prove beyond a reasonable doubt that the defendant is a sexually violent person. If a unanimous jury, or the court in a bench trial, determines that the defendant is sexually violent, the defendant is committed into custody for control, care, and treatment until the defendant is no longer sexually violent. Such custody may mean commitment in a mental health unit or supervised release. Supervised release is subject to conditions set by the court, and any violation results in revocation of the release and recommitment of the defendant. If the defendant is placed in a mental health unit, periodic reexaminations by the health unit are required to determine if the defendant has made enough progress to be released. The first examination must occur within six months of the initial commitment, with reexaminations occurring at least every twelve months thereafter. The defendant is also permitted to petition the court for supervised release or discharge, and the State must prove by clear and convincing evidence that the defendant is still sexually violent.

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15. Id. § 980.02(2)(a).
16. Id. § 980.02(2)(c).
17. Id. § 980.04(2).
18. Id. § 980.04(3).
19. Id. § 980.05(1).
20. Id. § 980.05(1m).
21. Id. §§ 980.05(2)-(3).
22. Id. § 980.05(1).
23. Id. § 980.06(2)(b).
24. Id. § 980.06(2)(d).
25. Id. § 980.07(1).
26. Id.
27. Id. §§ 980.08, 980.09(b).
On July 21, 1994, Dane County Circuit Court Judge Mark Frankel became the first judge to find Wisconsin's sexual predator statute unconstitutional. After Judge Frankel's ruling, many other circuit court judges also found the statute unconstitutional. The State appealed four of those decisions in a consolidated appeal. That appeal bypassed the Wisconsin Court of Appeals and was certified directly to the Wisconsin Supreme Court, which issued a decision on December 8, 1995.

III. THE WISCONSIN APPEAL

A. The Parties

The Wisconsin appeal was based on the consolidation of four cases, State v. Carpenter, Appeal No. 94-1898, State v. Schmidt, Appeal No. 94-2024, State v. Post, Appeal No. 94-2356, and State v. Oldakowski, Appeal No. 94-2357. The following is a description of the facts of each case.

1. William Carpenter

Carpenter was convicted of sexually assaulting a seven-year-old girl in 1984. He was sentenced to twelve years in prison, but his sentence was stayed and he was placed on probation for ten years. After repeated probation violations, Carpenter’s probation was revoked and he was incarcerated. In 1993, Carpenter was paroled; however, in early 1994, he was reincarcerated based on the “Turner decision” in which the Wisconsin Court of Appeals reinterpreted the good-time diminution of criminal sentences to be one month for every twelve months instead of one month for every eleven. A short time later, the Turner decision

29. Id.
30. Id.
31. Certification by Court of Appeals of Wisconsin District IV, State v. Carpenter, No. 94-1898 (Wis. filed Dec. 30, 1994) [hereinafter Appeal Certification]. For more information regarding the criteria for bypass, see DAVID L. WALther, PATRICIA L. GROVE, & MICHAEL S. HEFFERNAN, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 24 (1986). See also WIS. STAT. § 809.61 (1995).
33. State ex rel. Parker v. Fielder, 180 Wis. 2d 438, 459-62, 509 N.W.2d 440, 448-50 (Ct. App. 1993). This case is called the “Turner decision” because the respondent was Gerald M. Turner, Jr. Turner sexually molested and murdered a nine-year-old girl in 1973 while the girl was trick-or-treating on Halloween night.
was reversed by the Wisconsin Supreme Court and all prisoners incarcerated under it, including Carpenter, were supposed to be released. Instead of releasing Carpenter, the Dane County district attorney filed a chapter 980 petition.

2. William Schmidt

Schmidt was convicted of fourth-degree sexual assault in 1992 and was placed on three years probation. Eight months later, he was charged with first-degree sexual assault and was sentenced to three years in prison. Schmidt became eligible for release in June 1994, but the Wisconsin Department of Justice filed a chapter 980 petition.

3. Samuel Post

Post, in two separate incidents, abducted women from shopping mall parking lots at gun point and raped and robbed them. He was convicted of the crimes in 1976, and in 1977 was committed to the custody of the Wisconsin Department of Health and Social Services under Wisconsin's former sex crimes law, chapter 975. Post was paroled in 1990 but was recommitted in 1992 for allegedly fondling his minor stepdaughter. He was to be released on July 15, 1994, but the Wisconsin Department of Justice filed a chapter 980 petition.

4. Ben Oldakowski

Oldakowski was convicted of rape in 1972 and was committed under former chapter 975. Subsequently, he was paroled and recommitted three times for sexual assault, exposure, and lewd and lascivious behavior. Like Post, Oldakowski was supposed to be released July 15, 1994, but the Wisconsin Department of Justice filed a chapter 980 petition.

In all four cases, the criminal defendants moved to dismiss the chapter 980 petitions, citing equal protection, double jeopardy, ex post facto, and due process violations. At each defendant's hearing, the trial judge found probable cause to believe that the defendants met the statutory criteria to be detained for trial; however, each judge also found chapter 980 to be unconstitutional. The State appealed the trial court judges' conclusion that chapter 980 is unconstitutional. The next section

34. State ex rel. Parker v. Sullivan, 184 Wis. 2d 668, 517 N.W.2d 449 (1994).
35. Appeal Certification at 3.
36. Id. at 13. Despite the unconstitutionality findings, the defendants remained detained pending resolution of the appeal by virtue of a stay issued by the court of appeals. Id. n. 40.
outlines the constitutional issues as they were addressed by the parties in the appeal.

B. Constitutional Issues

1. Equal Protection

Equal protection of the laws is guaranteed by the United States and Wisconsin Constitutions. To determine whether equal protection has been violated by a statute, a court must first decide whether the statute governs classes of persons within a similarly situated group. In their briefs, both parties compared those persons committed under chapter 980 to those committed for mental illness under chapter 51. Therefore, there is an implied agreement that the similarly situated group is made up of people subject to involuntary civil commitment.

After a similarly situated group has been identified, the court must next decide the standard of review to apply to a statute that treats members of that group differently. If the classification affects a fundamental liberty or is a suspect classification, the highest level of scrutiny must be applied; otherwise, the state only needs to show a rational basis for the classification.

The State's position in the Wisconsin appeal was that "no fundamental liberty is implicated, nor is a suspect classification established," and therefore a rational basis standard should apply. The State further argued that a rational basis exists to treat the mentally ill differently than the sexually violent because the sexually violent endanger the public much more than the mentally ill. The State also argued that the rational basis test is met by the greater procedural protection given to those committed under chapter 980. To be committed under chapter 51, the State needs only five of six jurors to vote for commitment based on clear and convincing evidence. Under chapter 980, the State needs a unanimous jury to be convinced beyond a reasonable doubt.

37. U.S. CONST. amend. XIV, § 1; WIS. CONST. art. I, § 1.
38. Appellant's Brief at 13; Respondent's Brief at 37, State v. Post, 197 Wis. 2d 279, 541 N.W. 2d 115 (1995) (No. 94-2356) (comparing WIS. STAT. § 51 (1987)).
40. Appeal Certification at 16.
41. Id. at 17.
42. Id.
44. WIS. STAT. § 980.03(3) (1994).
The criminal defendants, however, argued that because nothing is more fundamental than freedom from commitment, the court must apply the strict scrutiny test to chapter 980. Under strict scrutiny, the defendants argued, the statute would thus fail because the standards for release are too stringent. Unlike chapter 51, those committed under chapter 980 do not have to be found treatable, and requiring someone who is untreatable to be held until treatment has cured them is "impossible by definition." The defendants also argued that while those committed under chapter 51 never carry the burden of proof to obtain release, those committed under chapter 980, under some circumstances, do.

2. Double Jeopardy

Both the United States and the Wisconsin Constitutions protect citizens from being tried twice for the same crime. However, this protection does not extend to civil statutes.

The parties in the Wisconsin appeal disagreed as to whether chapter 980 is criminal or civil. The State set forth seven reasons for believing that chapter 980 is a civil statute. First, commitment is not to the Department of Corrections, but rather to the Department of Health and Human Services. Second, treatment, not punishment, is the goal of the commitment. Third, the person committed may request release at any time. Fourth, the statute specifically uses the term "civil commitments," which indicates the legislature's intent to create a civil statute. Fifth, the fact that the statute incapacitates sex offenders is only incidental. Sixth, the statute's criminal safeguards do not make it a criminal law. Seventh, the statute cannot be inferred to have a punitive intent simply because of the nature of its penalty.

The criminal defendants had a different view. They contended that custody with Health and Human Services rather than Corrections is not persuasive, that the goal of treatment is "a sham," and that the civil label is not dispositive because the punitive intent makes the statute crimi-
They also cited the legislative history to show that incapacitation based on future dangerousness, and not treatment, is the primary goal of the statute, and that the criminal procedural protections, such as trial by jury and the beyond a reasonable doubt requirement, prove the statute is criminal.  

3. Ex Post Facto

An ex post facto law is one that is passed after the commission of an act which retrospectively changes the legal consequences of that act. Ex post facto laws are prohibited by both the United States and Wisconsin Constitutions. That prohibition, however, applies only to criminal laws. Therefore, resolution of this issue is dependant upon the determination of whether chapter 980 is criminal or civil.

4. Substantive Due Process

No person shall be deprived of life, liberty, or property without due process. Therefore, if involuntary commitment is a deprivation of liberty, the State must have a compelling reason for the deprivation and the legislation must be narrowly drawn to fit that reason.

In the appeal, the State conceded that, for purposes of substantive due process, chapter 980 does implicate a fundamental right. However, the State also argued that its compelling interest in community safety outweighs a sexual predator’s right to liberty. To support this position, the State compared civil commitment under chapter 980 to commitment under the Bail Reform Act. In United States v. Salerno, the United States Supreme Court held that a state can hold dangerous defendants prior to trial in order to protect the community. The State interpreted this holding as establishing that public safety is a

52. Id. at 22-23.
53. Id.
59. Appeal Certification at 28.
60. Id. at 29.
61. Id. The Bail Reform Act permits the denial of bail to criminal defendants who pose a serious threat to the community if released on bail. See United States v. Salerno, 481 U.S. 739 (1987).
63. Id.
justification for deprivation of liberty and thus a justification for commitment under chapter 980.64

Alternatively, the criminal defendants argued that although the State may have a compelling interest in protecting the community, chapter 980 is not drawn narrowly enough to achieve that interest and is, therefore, unconstitutional.65 The main problem the defendants cited is the definition of "mental disorder."66 Chapter 980 defines mental disorder as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."67 The defendants argued that because the power to form intent sufficient for criminal liability assumes the capacity to make choices, someone possessing the mens rea necessary to be convicted of a sexual crime could not fall under the definition of "mental disorder."68

The defendants also argued that the term "mental disorder" is unconstitutionally broad based on the requirements of Foucha v. Louisiana.69 The Supreme Court in Foucha held that proof of both "mental illness" and dangerousness is required for continued civil commitment.70 The defendants suggested that Foucha required a narrow reading of mental illness which would not include all of those who fall under the definition of mental disorder.71

Most of the issues presented by the parties in the Wisconsin appeal were addressed by the Washington State Supreme Court in the case of In re Young.72 The following section provides an analysis of the case.

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64. Appeal Certification at 29. The defendants counter the State's argument by reasoning that Salerno only passed constitutional muster because the length of confinement under the Bail Reform Act is naturally limited by the right to a speedy trial. Id. at 31.
65. Id. at 30.
66. Id.
67. WIS. STAT. § 980.01(2) (1994).
68. Appeal Certification at 32.
70. Id. at 80.
71. Appeal Certification at 31.
72. 857 P.2d 989 (Wash. 1993). In re Young involved an appeal based on the constitutionality of Washington's sexual predator law. The court's holding is significant as Wisconsin's statute is based almost entirely upon the Washington statute. The Washington State Supreme Court held that: (1) the commitment described in the statute was civil and thus not violative of ex post facto or double jeopardy, (2) a provision must be included in the law to permit the detainee to appear in court within 72 hours to contest probable cause, (3) the statute is not void for vagueness, (4) the state must prove dangerousness of unincarcerated detainees through evidence of recent overt acts, and (5) the statute must require jury unanimity. Id. at 1018.
IV. IN RE YOUNG AND ITS AFTERMATH

In re Young is based on the appeal of the commitments of two men, Andre Brigham Young and Vance Russell Cunningham. Andre Young was convicted of six felony rapes. Prior to release for the most recent rape, a sexual predator petition was filed against Young. A trial court, in an ex parte ruling, found probable cause for the petition and ordered Young to submit to psychological testing. At trial, both sides called multiple experts and Young's victims were allowed to testify against him. In a unanimous verdict, the jury found Young to be a sexually violent predator.

Vance Russel Cunningham was convicted three times for rape. After completing his last prison sentence, a jury found Cunningham to be a sexual predator.

In the majority opinion, the Washington Supreme Court first addressed the issues involving the ex post facto and double jeopardy guarantees by resolving the threshold question of whether the Washington statute is criminal or civil. The court looked at the statute’s construction and concluded that, based upon the language of the statute and its legislative history, the legislature had “a clear intent to create a civil scheme.” The court found it persuasive that the legislature used the term “civil commitment” in the statute and that persons committed under the statute were to be placed in the custody of social services. The court also looked at the impact of the statute because a “civil label is not always dispositive . . . [when] ‘the statutory scheme [is] so punitive’

73. Id. at 992.
74. Young's first series of rapes occurred in 1962. He broke into the respective homes of four victims, threatened to kill two of them with a knife, and raped a third with her five-week old infant nearby. Young was released in 1972 and five years later he was convicted of raping a fifth victim. He was released for that rape in 1980 and raped his sixth victim in 1985. Id. at 994.
75. Id.
76. Id.
77. Id. at 994-95.
78. Id. at 995.
79. Id. In 1984, Cunningham raped a woman hitchhiker and threatened to kill her. He pled guilty and was sentenced to 31 months in prison. Three months after his release, Cunningham committed another brutal rape, and two months later he committed his third. Id.
80. Id. at 996.
81. Id.
82. Id.
83. Id. at 997.
... it must be considered criminal..."84 The court also compared the Washington statute to an Illinois statute that provides for the commitment of sexually violent persons in lieu of a prison sentence.85 The Illinois statute was labeled a civil statute by the United States Supreme Court in *Allen v. Illinois.*86 Both the Washington and the Illinois statutes require that a person possess a mental disorder which causes him or her to commit violent sex offenses. They also require that the sex offender receive care and treatment from a psychiatric facility.87 Because the Washington Supreme Court found the statute to be civil, ex post facto and double jeopardy guarantees were held not to apply.

The next issue the majority addressed was substantive due process. The court recognized that since an individual's liberty is protected by the United States Constitution, a state law that impinges upon a fundamental liberty must further a compelling state interest, and be narrowly drawn to serve that interest.88 Applying this strict scrutiny test, the court found that the state has a "compelling interest both in treating sex predators and protecting society from their actions."89 The court also found the statute to be narrowly drawn by suggesting that psychologists are just as able to identify sexual psychopaths as they are able to identify people with other mental abnormalities.90 Both defendants in this case were identified as having "paraphilia," a sexual disorder with specific characteristics.91 The court also addressed the issue of treating sexual predators and concluded that "the mere fact that an illness is difficult to treat does not mean that it is not an illness."92

Finally, the majority also addressed equal protection within a procedural due process analysis. The court found that the statute satisfies equal protection because "there are good reasons to [procedurally] treat mentally ill people differently than violent sex offenders."93 Sexually violent predators are not similarly situated with the mentally ill.

84. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248 (1980)).
88. *Id.* at 1000.
89. *Id.* (citing *Addington v. Texas,* 441 U.S. 418, 426 (1979)).
90. See *id.* at 1002.
91. The characteristics of a paraphilia are sexual arousal and urges involving non-human objects, suffering and humiliation of oneself and others, and the sexual attraction to children. *Id.*
92. *Id.* at 1003. The court used schizophrenia as an example of another disorder that is difficult to treat. *Id.*
93. *Id.* at 1010.
in regard to treatment method and "no constitutional right is violated when persons who suffer from severe mental disorders are treated differently from persons with less serious disorders . . . ."\textsuperscript{94} The court also reasoned that the "beyond a reasonable doubt" standard used for sexual predators prevents them from being treated more harshly than the mentally ill, who can be committed by the lower standard of "clear and convincing evidence."\textsuperscript{95}

\textit{In re Young} was an important opinion for proponents of sexual predator laws. It was especially important for the proponents of Wisconsin's law because it supported all of the constitutional arguments raised by the State in the Wisconsin appeal. That support, however, was dealt a substantial blow on August 25, 1995, when U.S. District Court Judge John C. Coughenour overruled \textit{In re Young} and declared Washington's sexual predator law unconstitutional.\textsuperscript{96}

In \textit{Young v. Weston}, Judge Coughenour first focused on substantive due process and concluded that freedom from bodily restraint is "[a]t the heart of the liberty interests protected from arbitrary government actions."\textsuperscript{97} For this reason, Judge Coughenour theorized, the United States Supreme Court has "carefully circumscribed the instances in which a state may, for non-punitive reasons, detain or incarcerate an individual."\textsuperscript{98} Two such instances are: the detention of dangerous individuals pending trial, and traditional civil commitment schemes for dangerous individuals who are also mentally ill.\textsuperscript{99}

Judge Coughenour then held that Washington's sexual predator statute does not fit into the pretrial detention category because pretrial detention is only for "stringently limited periods" while commitment pursuant to the predator law is indefinite.\textsuperscript{100} He also held that the sexual predator law is unlike traditional civil commitment schemes because "[t]he essential component [is] missing from the Sexually Violent Predator Statute . . . the requirement that the detainee be mentally ill."\textsuperscript{101} Like the scheme rejected in \textit{Foucha v. Louisiana}, the sexual predator law does not fit into the category of commitment for non-punitive reasons.

\textsuperscript{94} Id. at 1014 (explaining Bailey v. Gardebring, 940 F.2d 1150, 1153 (8th Cir. 1991), cert. denied, 503 U.S. 952 (1992)).
\textsuperscript{95} Id. at 1014-15.
\textsuperscript{96} Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).
\textsuperscript{97} Id. at 748. (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).
\textsuperscript{98} Id. at 748-49.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 749.
\textsuperscript{101} Id. (citing Foucha v. Louisiana, 504 U.S. 71, 82 (1992)).
predator statute "permits indefinite incarceration based on little more than a showing of potential future dangerousness."\(^{102}\)

Judge Coughenour next addressed the ex post facto clause and concluded that because the predator statute applies to behavior that is criminal, and applies only to persons who have been convicted of a crime, the statute is criminal.\(^{103}\) He also noted that the State can only initiate proceedings after the sentence of the convicted offender is about to expire or has expired.\(^{104}\) Therefore, despite the State’s claim that it intended to provide treatment, the statute "evinces a keen interest in punishment" because it forecloses the possibility that offenders will be evaluated and treated before punishment.\(^{105}\)

Finally, Judge Coughenour analyzed the double jeopardy clause using the same criminal-civil analysis he applied to the ex post facto issue. In doing so, Judge Coughenour concluded that double jeopardy is violated because the sanction "serves the traditional aims of punishment—retribution and deterrence."\(^{106}\)

The release of Judge Coughenour’s decision created serious questions about the fate of Wisconsin’s sexual predator law. However, the Wisconsin Supreme Court answered those questions on December 8, 1995, when it held, seven to one, that chapter 980 does not violate the United States or Wisconsin Constitutions. An analysis of that decision follows.

V. THE WISCONSIN SUPREME COURT

In *State v. Carpenter*,\(^{107}\) and its companion case *State v. Post*,\(^{108}\) the Wisconsin Supreme Court addressed all of the constitutional issues presented by the parties to the appeal. Although the opinions were issued separately, this Comment will analyze them as one opinion.

\(^{102}\) *Id.*
\(^{103}\) *Id.* at 752.
\(^{104}\) *Id.*
\(^{105}\) *Id.* at 752-53.
\(^{106}\) *Id.* at 753-54 (citation omitted).
\(^{107}\) 197 Wis. 2d 252, 541 N.W.2d 105 (1995).
\(^{108}\) 197 Wis. 2d 279, 541 N.W.2d 115 (1995).
A. The Majority

1. Double Jeopardy & Ex Post Facto

The court first addressed the double jeopardy and ex post facto issues in *State v. Carpenter*.

The court found that chapter 980 does not violate double jeopardy or ex post facto guarantees because the sanction involved does not constitute punishment.

The court rejected the criminal defendants' argument that the treatment component of chapter 980 is merely a pretense for punishment. The court instead held that "the emphasis on treatment in chapter 980 is evident from its plain language." As examples, the court cited specific sections of chapter 980, which it concluded prove that the statute is "aimed primarily at treating the sexually violent person, not punishing the individual."

2. Substantive Due Process

The court addressed substantive due process in the companion case *State v. Post*. First, the court pronounced that freedom from physical restraint is a liberty interest protected by the Due Process Clause, which requires a strict scrutiny analysis. The court then elucidated that chapter 980 satisfies strict scrutiny because the State has a compelling interest in both protecting the community from the "dangerously mentally disordered" and in providing care and treatment to those with mental disorders. These "dual interests" have been recognized by the United States Supreme Court as legitimate, the first under a state's police powers, and the latter under a state's *parens patriae* powers.

Next, the majority held that the term "mental disorder" as defined by chapter 980 satisfies substantive due process. The court explained that "mental illness" is not required by the federal or state constitutions.

109. 197 Wis. 2d 252, 541 N.W.2d 105 (1995).
110. Id. at 226, 541 N.W.2d at 110.
111. Id.
112. Id. at 267, 541 N.W.2d at 111. The court cited §§ 980.015(3)(b), 980.06(1), 980.06(2)(b), and 980.06(2)(c).
113. 197 Wis. 2d 279, 541 N.W.2d 115 (1995).
114. Id. at 302, 541 N.W.2d at 122.
115. Id.
116. Id. (citing Addington v. Texas, 441 U.S. 418, 426 (1979)). "Parens patriae originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities . . . ." BLACK’S LAW DICTIONARY 769 (6th ed. 1990).
117. Post, 197 Wis. 2d at 303, 541 N.W.2d at 122.
Furthermore, the United States Supreme Court has “declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary [civil] commitment.” Therefore, it is up to the states to formulate their own procedural mechanisms for civil commitment, particularly in areas “‘fraught with medical and scientific uncertainties.’”

Finally, the court discussed problems with predicting future dangerousness. In doing so, the court held that “although predictions of future dangerousness may be difficult, they are still an attainable, in fact essential, part of our judicial process.”

3. Equal Protection

The court began its equal protection analysis by accepting the proposition that persons committed under chapter 51 and chapter 980 are “similarly situated for purposes of an equal protection comparison.” Next, the court outlined the three levels of scrutiny that can be applied to equal protection cases: strict, intermediate, and rational basis. However, the court did not decide which level of scrutiny should be applied to chapter 980. The Court instead concluded that it was unnecessary to select the appropriate level of scrutiny because chapter 980 passes even the highest level of scrutiny. In concluding chapter 980 passes the highest level of scrutiny, the court deferred to the state legislature’s determination that classes of persons predisposed to sexual violence pose a higher level of danger to the community than do other classes of mentally ill persons. The court agreed that this higher level of dangerousness, along with the unique treatment needs of sexually violent persons, “justif[i]es distinct legislative approaches to further the compelling government purpose of protection of the public.”

118. Id. at 304, 541 N.W.2d at 123.
119. Id. (quoting Jones v. United States, 463 U.S. 354, 370 (1983)).
120. Id. at 306, 541 N.W.2d at 124.
121. Id. at 312, 541 N.W.2d at 126 (citing Barefoot v. Estelle, 463 U.S. 880, 897 (1983)).
122. Id. at 319, 541 N.W.2d at 129.
123. Id. at 319-20, 541 N.W.2d at 129.
124. Id. at 320, 541 N.W.2d at 130.
125. Id. at 321, 541 N.W.2d at 130.
126. Id. at 322-23, 541 N.W.2d at 130.
The court then addressed the specific differences between chapter 980 and chapter 51. In doing so, it concluded that all but one of those differences is justified under a strict scrutiny analysis. The one difference the court determined to be in violation of equal protection is that chapter 980 does not provide for jury trials at discharge hearings, while chapter 51 does. The court found that there was no justification for this distinction and "equal protection demands that a right to a jury trial be made available at this important stage." The court, therefore, held that chapter 980 must now be construed to afford the right to request a jury at discharge hearings under section 980.09 and section 980.10.

B. The Dissent

While Justice Shirley Abrahamson was the only Justice to dissent, she claimed to have found "overwhelming evidence" in chapter 980's legislative history, purpose, and effect to prove that the scheme has a "principally punitive purpose." First she explained that references to treatment do not make a statute civil. As an example, she cited chapter 302, which, she said, is arguably the most punitive of Wisconsin's statutes and nevertheless refers to treatment thirty times. Second, Justice Abrahamson pointed out that chapter 980 does not even refer to its own commitment scheme as "civil commitment." In fact the word "civil" appears only once in chapter 980, in the section referring to "immunity from civil liability." Third, Justice Abrahamson relayed statements from Wisconsin Governor Tommy Thompson and chapter 980 sponsor Legislator Lolita Schneiders, which she said made clear that chapter 980's primary purpose is punishment. Fourth, Justice

127. Id. at 323, 541 N.W.2d at 130. For example, chapter 51 requires that committees be "proper subject[s] for treatment," while chapter 980 does not have such a requirement. Id. at 323, 541 N.W.2d at 130. The court found that "[b]ecause sexually violent persons pose specialized treatment problems . . . the legislature is justified in not requiring a showing of amenability to treatment." Id. at 324, 541 N.W.2d at 131.

128. Id. at 328, 541 N.W.2d at 132.

129. Id. at 328-29, 541 N.W.2d at 132-33.

130. Id. at 329, 541 N.W.2d at 133.

131. Id. at 338, 541 N.W.2d at 136 (Abrahamson, J., dissenting).

132. Id. at 339, 541 N.W.2d at 137.


134. Post, 197 Wis. 2d at 340, 541 N.W.2d at 137.

135. Id. at 340 n.9, 541 N.W.2d at 138 n.9. See also Wis. Stat. § 980.015(4).

136. Post, 197 Wis. 2d at 343, 541 N.W.2d at 139. (Governor Thompson said, "[w]e might be able to use this civil commitment procedure to keep them [i.e., convicted sex offenders] in jail." (Alternation in original). Id. (Legislator Schneiders said that the bill
Abrahamson pointed out that chapter 980 is "placed squarely within the criminal portion of the Wisconsin statutes," and the position of a statute is "very persuasive as to its intent." Finally, Justice Abrahamson asked the thought provoking question, "[w]hy would a legislature with a principal interest in treatment create a statute deliberately delaying the promised treatment and thereby exacerbating the alleged ills which it is designed to cure?"

Substantive due process was the next issue addressed by Justice Abrahamson. She concluded that "[b]ecause chapter 980 allows the commitment of individuals who are not both mentally ill and dangerous . . . it violates substantive due process guarantees of the Wisconsin and federal constitutions." Justice Abrahamson argued that the "mental condition component" of a civil commitment statute cannot be defined however the state pleases. If it could, it would have no core meaning and could mean everything, and if it means everything, it means nothing. Furthermore, mental disorder is a broad category of disorders that all of us could fall under. Therefore, the only component of chapter 980's definition which separates sexual predators from everyone else is the predisposition to engage in acts of sexual violence, and a violent predisposition is not sufficient to justify commitment.

Equal protection was the last constitutional issue Justice Abrahamson reviewed. She contended that "the distinctions separating chapter 980 from chapter 51 have no rational basis . . . ." Sex offenders being freed at the end of their prison terms "should be entitled to the same protections granted other citizens."

"seeks to place further restrictions on the most heinous of repeat sexual offenders by insuring that the prison stay [would] be lengthened.") *Id.* at 344, 541 N.W.2d at 139.

137. *Id.* at 346, 541 N.W.2d at 140.
138. *Id.* at 346-47, 541 N.W.2d at 140.
139. *Id.* at 351, 541 N.W.2d at 142.
140. *Id.* at 352, 541 N.W.2d at 142.
141. *Id.* at 354, 541 N.W.2d at 143 (mental disorders include common problems such as insomnia and caffeine-induced anxiety). *Id.* at 354-55, 541 N.W.2d at 143.
142. *Id.* at 356, 541 N.W.2d at 144. Justice Abrahamson calls chapter 980's definition of mental disorder "entirely circular" because she says "a prospective committee's 'mental disorder' is derived from past sexual offenses which, in turn, are used to establish a predisposition to commit future sexual offenses." *Id.* at 355, 541 N.W.2d at 143-44.
143. *Id.* at 359, 541 N.W.2d at 145.
144. *Id.* at 361, 541 N.W.2d at 146 (citation omitted).
VI. FUTURE CONSIDERATIONS

The debate over the constitutionality of sexual predator laws is far from over. Assistant State Public Defender Ken Casey, who represented two of the four criminal defendants in the Wisconsin appeal said, "[w]e are going to ask the United States Supreme Court to review the decision." Likewise, Washington plans to appeal the District Court decision that overruled their Supreme Court.

There are still a number of unresolved questions in the sexual predator debate that future courts will be asked to answer. For example: what level of equal protection scrutiny should apply to sexual predator statutes? The Wisconsin Supreme Court disposed of the equal protection issue simply by holding that chapter 980 satisfied strict scrutiny. However, sexual predator statutes may not need to satisfy strict scrutiny to pass an equal protection challenge.

The United States Supreme Court has clearly indicated its reluctance to afford strict scrutiny to any additional equal protection classifications. Moreover, the High Court has explicitly refused to apply strict scrutiny to classifications involving the mentally retarded and the mentally ill. Therefore, it is unlikely sexual predators laws will need to pass anything other than minimum rationality to satisfy equal protection.

Even if sexual predator laws are subject to only minimum rationality for equal protection purposes, it is likely they will still be subject to strict scrutiny for substantive due process purposes. Therefore, substantive due process is the most vulnerable of the constitutional issues implicated by sexual predator laws.

Both the Washington and Wisconsin Supreme Courts concluded that sexual predators have a diagnosable condition and, therefore, the statutes are narrow enough to further the state's interest in treatment. This conclusion, however, is contrary to the opinion of many people in the psychiatry field. Psychiatrists argue that many of the symptoms displayed by sex offenders are not unique to them, and a failure to

consider environmental factors like unemployment and drug abuse during diagnosis creates the likelihood of a false positive diagnosis.\textsuperscript{149} To reduce the likelihood of a false diagnosis, statutory guidelines should be set to ensure that the evaluations are sufficiently extensive. In addition, specialized training and experience should be required of the evaluators. Considering the magnitude of harm that could result from a false diagnosis, basic medical ethics should demand that the evaluation process be stringently regulated.\textsuperscript{150}

Once a sexual predator is committed, treatment problems can arise that may affect substantive due process. For example funding limitations can prevent adequate, individualized treatment, which in turn can effect the length of confinement. Wisconsin Department of Corrections Secretary Michael Sullivan estimated that it costs $60,000 per year per patient to treat sexual predators; and there are currently 2,700 prisoners in the system who will eventually be screened under the law.\textsuperscript{151} However, the maximum prison sentences for the most serious sexual assaults have been increased to 40 years, which means many of the newly incarcerated sex offenders will not live to see a mandatory release date let alone a chapter 980 petition.\textsuperscript{152}

Another controversial aspect of sexual predator statutes is the problem of predicting future dangerousness.\textsuperscript{153} Some commentators argue that it is impossible to predict future dangerousness.\textsuperscript{154} However, general predictions of dangerousness have been upheld by the U.S. Supreme Court. For example, in \textit{Jurek v. Texas},\textsuperscript{155} the Court said a jury can be asked to impose the death penalty if it finds a probability that the defendant would commit future violent acts.\textsuperscript{156}

Finally, a future court will have to determine the exact applicability of the holding in \textit{Foucha v. Louisiana}.\textsuperscript{157} \textit{Foucha} recognized that an individual can be involuntarily confined through civil commitment

\begin{itemize}
\item [150.] There is no nationally practiced credentialing or licensing policy for individuals who claim expertise in evaluating and treating sex offenders. \textit{Id.} at 611.
\item [151.] Miller, \textit{supra} note 145.
\item [152.] \textit{Id.}
\item [153.] Chapter 980 requires the State to prove that a substantial probability exists that the offender will engage in future acts of sexual violence. WIS. STAT. § 980.01(7) (1994).
\item [155.] 428 U.S. 262 (1976), \textit{hold’g ltd.}, 492 U.S. 302 (1989).
\item [156.] \textit{Id.} at 274-75.
\item [157.] 504 U.S. 71 (1992).
\end{itemize}
proceedings if the State can show by clear and convincing evidence that
the individual is mentally ill and dangerous.\textsuperscript{158} Chapter 980 does not
require a mental illness as defined by \textit{Foucha}. The probable reason for
not requiring mental illness is to allow for a person to be criminally
culpable for the crime as well as to allow for civil commitment later.\textsuperscript{159}

Although chapter 980 does not require a mental illness, it does
require a narrowly defined mental disorder, which may be enough to
satisfy \textit{Foucha}. In Justice O'Connor's concurrence in \textit{Foucha} she
stressed that the Court's holding "addresses only [the unconstitutionality
of] the specific statutory scheme before us, which broadly permits
indefinite confinement of sane insanity acquittees in psychiatric facilities.
This case does not require us to pass judgement on more narrowly drawn
laws . . . ."\textsuperscript{160}

\section{VI. Conclusion}

Despite the substantive due process concerns, Wisconsin's sexual
predator law is a very effective method for reducing sexually violent
crimes. Some opponents argue that the criminal justice system is the
only way to deal with serious offenders.\textsuperscript{161} That reasoning, however,
ignores the reality of the criminal justice system. Prison is a breeding
ground for violence and mental illness.\textsuperscript{162} Many offenders are released
early or refuse or are denied treatment.\textsuperscript{163} The treatment provisions
of chapter 980 can give some sex offenders a second chance. Medical
therapy, such as use of the drug Depo-Provera, has been successful at
decreasing sex offenders' physical urges.\textsuperscript{164} Behavioral and cognitive
therapy can help the offender learn to express emotion and deal with
relationships.\textsuperscript{165} Ideally, if an offender can be cured through treatment,
he may spend less time in civil commitment than he would in jail had he
offended again.

\begin{itemize}
\item \textsuperscript{158} \textit{Id.} at 80.
\item \textsuperscript{159} A fine line can exist between criminal culpability and mental disability. One author
calls this the "Twilight Zone." NATHANIEL J. PALLONE, \textsc{Rehabilitating Criminal Sexual
\item \textsuperscript{160} \textit{Foucha}, 504 U.S. at 86-87 (O'Connor, J., concurring).
\item \textsuperscript{161} \textit{But see} McCaffrey, \textit{supra} note 2, at 912.
\item \textsuperscript{162} Bochnewich, \textit{supra} note 6, at 303.
\item \textsuperscript{163} Virginia Governor George Allen recently announced his intention to end funding
for prison sex offender treatment programs, citing as his reason his belief that treatment does
not work. Jerome G. Miller, \textit{The Folly of Not Treating Sex Offenders}, \textsc{The Washington
\item \textsuperscript{164} RONALD M. HOLMES, \textsc{Sex Crimes} 113 (1991).
\item \textsuperscript{165} \textit{Id.} at 112.
\end{itemize}
With crime increasing at an alarming rate, state legislatures are forced to take drastic measures to ensure the safety of law-abiding citizens. The Wisconsin legislature has the authority under its *parens patriae* power to provide care for its mentally disordered citizens. Furthermore, it has the authority under its police power to protect the community from dangerous sex offenders. Chapter 980 is a constitutional use of both of these powers and should be upheld by future courts.

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