

**Washington's Sexually Violent
Predator Law:**

*Legislative History and
Comparisons With Other States*

by Roxanne Lieb

December 1996

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Document No. 96-12-1101

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The author wishes to thank the following individuals for assistance regarding their state’s laws: Michael Farnsworth, M.D. (Minnesota); Mary Burke (Wisconsin); Carla Stova (Kansas); Joni Hoffman (Arizona); Janice Marques (California); and Miriam Barati (New Jersey). David Boerner, Janie Maki, and Debra Fabritius provided valuable review, and Scott Matson assisted with the research.

EXECUTIVE SUMMARY

In 1990, Washington State enacted a law authorizing civil commitment of individuals found to be “sexually violent predators” at the end of their criminal sentence. Twenty-one individuals have been found to meet this definition and are housed at a Department of Social and Health Services facility inside a prison in Monroe, Washington.

This civil commitment law was part of an omnibus bill, the 1990 Community Protection Act. In order to increase the state’s knowledge about effective strategies with sex offenders, the legislature directed the Washington State Institute for Public Policy to evaluate this law’s effectiveness. The Institute has published numerous reports on the law to date; this publication updates information on the implementation and background of sexual predator laws.

Legal Challenges

Because the sexual predator law authorizes civil commitment of persons following a prison term, it has faced several constitutional challenges. The Washington State Supreme Court found the law constitutional in 1993. In 1995, U.S. District Court Judge John Coughenour found the statute to be criminal in nature and thus in violation of constitutional protections against ex post facto laws and double jeopardy. This ruling has been appealed to the Ninth Circuit Court of Appeals.

The U.S. Supreme Court heard arguments in December 1996 on a similar law from Kansas State, *Hendricks vs. Kansas*. Washington State’s Attorney General filed an amicus brief to the court.

A separate action regarding the treatment conditions at Monroe’s treatment facility caused U.S. District Judge William Dwyer to issue an injunction in 1994. A special master was appointed by the court to oversee the program’s progress toward fulfilling the court’s directions. Janice Marques continues to report to the court in this capacity.

Comparison With Other States

Six states in addition to Washington have statutes that authorize the confinement and treatment of sex offenders following completion of their criminal sentence: Arizona, California, Kansas, Minnesota, New Jersey, and Wisconsin. Illinois’s statute for sexual psychopaths allows confinement and treatment of sex offenders, but only as an alternative to criminal prosecution.

The states’ laws fall into the following three models:

- The Sexual Psychopathy Model: Illinois and Minnesota
Illinois’s sexual psychopath law has existed since 1938 and has been declared constitutional by the U.S. Supreme Court. Here, the state must choose between

criminal prosecution and a sexual psychopath filing. Minnesota's Psychopathic Personality Statute, passed in 1939, was also found constitutional by the U.S. Supreme Court. Since the early 1990s, this law has been used primarily to confine high-risk sex offenders indefinitely, after they have served their prison terms.

- Mental Health Commitment: New Jersey
When New Jersey considered laws for sexual predators in 1994, it elected to rely on its existing mental health commitment laws. The definition of mental illness was slightly amended so psychosis was not required for commitment, and special procedures to review prisoners were established.
- Post-Prison Commitment: Arizona, California, Kansas, Washington, Wisconsin
In 1990, Washington was the first to pass a post-prison commitment law with Arizona, California, Kansas, and Wisconsin passing similar statutes in the following years. Washington's program is located in a mental health facility within the confines of a prison, whereas the Arizona, California, Kansas, and Wisconsin programs are in a hospital setting. (Kansas law specifies only that the program be located in a "secure facility.")

Every state but California specifies that the commitment is for an indefinite duration. California commits individuals for two years, and if the state believes that further confinement of the individual is needed, an additional petition and jury trial are necessary.

SECTION I: WASHINGTON STATE'S 1990 COMMUNITY PROTECTION ACT

In May 1987, Earl K. Shriner, a mentally retarded man with a long criminal record, completed a ten-year sentence in Washington for kidnapping and assaulting two teenage girls. He had a 24-year history of killing, sexual assault, and kidnapping. Prior to his discharge, prison officials learned that he intended to torture children after he was released, and tried vigorously to detain him through the civil commitment laws covering mental illness.¹ Unable to demonstrate the required "recent overt act" to prove dangerousness, the state had no option but to release Shriner. Two years after his release, he raped and strangled a seven-year-old boy in Tacoma, Washington, severed his penis, and left him in the woods to die.

The Shriner case came to public attention one year after a young Seattle businesswoman was kidnapped and murdered by an inmate on work release. Gene Raymond Kane had been placed on work release after serving a 13-year sentence for attacking two women. Kane had been turned down by the state's sexual psychopathy program because the mental hospital considered him "too dangerous to handle."²

In response to these crimes and significant public outcry, then Governor Booth Gardner appointed citizens, professionals, and legislators in May 1989 to a Task Force on Community Protection and asked them to recommend changes to the state law. During the Task Force deliberations, Wesley Allen Dodd was apprehended during an attempted abduction of a six-year-old boy from a movie theater in southwest Washington. Following an investigation, Dodd confessed to the killings of two young boys who had been riding their bikes in a park and the kidnapping and murder of a four-year-old boy he had found playing in a school yard.³

The Task Force held public hearings throughout the state and considered numerous ways to strengthen the state's laws concerning sex offenses. The group's recommendations became an omnibus bill to the 1990 Legislature, outlining sweeping changes in the penalties for sex offenses, enacting a sex offender registry and community notification provisions, and establishing programs to assist victims.

The Task Force's most controversial recommendation called for a new civil commitment statute authorizing the state to confine and treat a small group of sex offenders over whom the state had no existing authority. This civil commitment proposal, and the majority of the other Task Force recommendations, were passed unanimously by both houses of the legislature in February 1990.⁴

Civil Commitment for Sexually Violent Predators

¹ During his last months in prison, Shriner designed plans to maim or kill children and made diary entries that identified apparatus he would use. In a conversation with a cell mate, he said he wanted a van customized with cages so he could pick up children, molest them, and kill them. "System Just Couldn't Keep Suspect," *Tacoma Morning News Tribune*, 23 May 1989.

² David Boerner, "Confronting Violence: In the Act and in the Word," *University of Puget Sound Law Library*, 15:526.

³ Wesley Allen Dodd was later executed for these crimes. He did not contest his death penalty verdict.

⁴ Substitute Senate Bill 6259, 51st Legislature, Regular Session, 1990.

The Task Force focused its attention on remedying the powerlessness that state officials faced in 1987 when Shriner was released. Every proposal for reform was tested against the key question: Would it offer the state the necessary power to contain someone like Shriner, who had reached the end of his maximum criminal sentence, and yet clearly posed extreme risks to the public?⁵

The Task Force's solution, enacted by the legislature, addressed a small group of sex offenders called "sexually violent predators." Individuals in this category were defined as those who have been convicted of or charged with a crime of sexual violence and suffer from a "mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."⁶

The law authorizes prosecutors (or the Attorney General) to initiate civil proceedings for a person whose sentence for a sexually violent offense has expired or is about to expire, and that person:

- has been *convicted* of a sexually violent crime and is *nearing the end* of a criminal sentence;
- has committed a sexually violent offense as a *juvenile* and is about to be *released*;
- has been *charged* with a violent sex offense but has been determined to be *incompetent to stand trial*; or
- has been *found not guilty* of a sex offense by *reason of insanity*.

The procedure is initiated by the state filing a petition alleging that the person is a sexual predator. Following a probable cause hearing, a judge can order a 45-day confinement for the purpose of an evaluation. A trial then determines whether the person meets the statutory definition of a sexually violent predator, with the state having to prove its case beyond a reasonable doubt to a unanimous jury. If convicted, the person is confined for treatment until found by a jury to be safe for release.

Legal Challenges in Washington

The key legal question surrounding the statute is whether it is primarily civil in nature or if it is in essence a criminal statute. Challengers argue that sex offenders do not suffer from a mental disorder and cannot be treated. Furthermore, the argument continues, future dangerousness cannot be predicted accurately and therefore the statute is preventive detention.

Washington's statute was found constitutional by Washington's Supreme Court in August 1993.⁷ The court found the statute civil in purpose and effect and thus not in violation of

⁵ For a thorough discussion of the Task Force's deliberations on the sexually violent predator law, see Boerner, "Confronting Violence," 525-577.

⁶ *Revised Code of Washington*, Chapter 71.09. Sexual violence includes First- and Second-Degree Rape, Indecent Liberties and Child Molestation. Lesser offenses such as Second-Degree Assault and Residential Burglary can meet the definition if the conviction includes findings of sexual motivation.

⁷ *In re Young* 122 Wn.2d 1,23,857 P.2d 989 (1993).

constitutional protections against ex post facto or double jeopardy laws.⁸ In August 1995, U.S. District Judge John Coughenour ruled the law unconstitutional, finding it to be criminal in nature. Coughenour's ruling has been appealed to the Ninth Circuit Court of Appeals.

A separate action regarding the Special Commitment Center's treatment conditions caused U.S. District Court Judge William Dwyer to appoint a special master in 1994. The judge ruled that the facility was making inadequate progress toward a comprehensive treatment program. In his injunction, which ordered the center to correct its problems, Dwyer wrote, "The failure of the program to meet constitutional standards to date has contributed to a belief by residents that they have no chance of ever qualifying for release, i.e., that their confinement amounts to a life sentence."⁹

Judge Dwyer directed the special master to oversee the program's compliance with the following five areas specified in the injunction order:

- Improving staff competence;
- Rectifying the lack of trust and rapport between residents and treatment providers;
- Implementing a treatment program which includes all therapy components recognized as necessary key professional standards in comparable programs;
- Developing and maintaining individual treatment plans for residents with objective benchmarks of improvement; and
- Providing an expert to supervise the clinical work of treatment staff.

The special master, Janice Marques, Ph.D., has submitted nine reports to Judge Dwyer regarding the program's progress with the injunction requirements.¹⁰

In December 1996, the U.S. Supreme Court Review heard arguments concerning the constitutionality of a Kansas statute that was based on Washington's sexual predator law (*Kansas v. Hendricks*). The Kansas Supreme Court previously held that the definition of mental illness in their sexual predator statute violated constitutional standards for substantive due process. Washington State's Attorney General filed an amicus brief on this case, along with Attorneys General from several other states. The court's decision in this case will determine the future of Washington's law.

⁸ The court did find constitutional flaws that provided the basis for the reversal of a second petitioner, Cunningham. These flaws were addressed by the 1995 Legislature in its passage of SB 5088.

⁹ Turay v. Weston, Order and Injunction, 4.

¹⁰ Case No. C91-664WD.

SECTION II: SEXUAL PREDATOR STATUTES IN OTHER STATES

In addition to the Kansas statute, several other states have legislation directed at serious sex offenders. The statutes can be organized into three main categories:

- Sexual psychopathy laws (Illinois, Minnesota);
- Mental health commitment laws (New Jersey);
- Post-release commitment laws (Arizona, California, Kansas, Washington, Wisconsin).

Sexual Psychopathy Laws

Sexual psychopath laws have proliferated in the United States since the 1920s, resting on the assumption that sex offenders were "mad, not bad," should receive treatment, and once cured, could be safely released.

By the late 1960s, over half the states had special statutes authorizing civil commitment for sexual psychopaths. By the 1990s, a number of these statutes had been repealed, including Washington's.¹¹ The arguments for repeal centered around concern for civil rights, the ineffectiveness of treatment, and a desire to have dangerous sex offenders behind bars for significant periods of time. [See Section III for a review of Washington's history with sex offender legislation.]

Illinois's statute was enacted in 1938 and is still operational; the law provides an *alternative* to criminal prosecution. The state must choose to *convict and punish* an offender through the criminal system, *or* to pursue a civil commitment under this statute. If found to be a "sexually dangerous person," the individual is committed to the Department of Corrections until deemed to no longer be dangerous. The statute was found constitutional by the U.S. Supreme Court in 1986 (*Allen v. Illinois*).

Minnesota enacted a "psychopathic personality" statute in 1939, authorizing commitment of persons found to be sexually irresponsible and dangerous to others. The proceedings are civil in nature and decided by a commissioner, with release decisions made by an administrative board. This statute was upheld by the Minnesota Supreme Court in 1939 and affirmed by the U.S. Supreme Court in 1940.¹²

For several decades this law was used infrequently; a total of only 221 individuals were committed under this statute from 1939 through 1969. Then in the late 1980s, dangerous sex offenders became a topic of public attention, and an Attorney General's task force recommended several changes to state law and practice, including greater use of this statute. The 1989 Minnesota Legislature directed that courts consider the appropriateness

¹¹ In 1990, 13 states and the District of Columbia retained sexual psychopathy statutes. See Gary Gleb, "Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness From Civil Commitment Procedures," *UCLA Law Review* 39:215.

¹² State ex rel. Pearson v. Probate Court, 205 Minn. 545, 287 N.W. 297, 302 (1939), affirmed 309 U.S. 270, 60 Supreme Court 523 (1940).

of psychopathic commitment at the time of initial sentencing. By 1992, the Department of Corrections was evaluating all high-risk sex offenders for possible commitment prior to their scheduled release.

The state had some difficulty proving that offenders had “utter lack of power to control” sexual impulses, a required element of the statute, particularly for those who had been confined in a prison setting and had few opportunities to reoffend. As a remedy, in 1994 the legislature enacted a “sexually dangerous persons” statute. This “dangerous persons” statute was heard by the Minnesota Supreme Court in September 1996.¹³ Because its constitutionality is still being litigated, most commitments for sex offenders in Minnesota occur under the psychopathic personality statute.

Mental Health Commitment

When **New Jersey** considered legislation for serious sex offenders in 1994, the legal challenges to Washington’s civil commitment law caused lawmakers to seek another approach. The legislature chose instead to modify its existing civil commitment law to indicate a sexually dangerous person as a *specific type of person* eligible for consideration under the mental health commitment laws.

New Jersey’s statute provides that persons whose conduct is identified by the sentencing court as characterized by a “pattern of repetitive, compulsive behavior,” or who are identified by the Department of Corrections or the Parole Board, be evaluated at the end of their term for potential commitment. Because the legislature determined many sex offenders who pose significant public safety risks are not psychotic, the legislature amended the definition of mental illness to specifically not require a finding of psychosis.

Post-Prison Commitment

The Arizona, California, Kansas, and Wisconsin statutes are modifications of Washington’s statute, authorizing involuntary civil commitment of certain habitual sex predators upon release from prison. California’s statute is distinguished by its two-year limit on duration of commitment. Following this period, the state must renew the petition if additional confinement is viewed as necessary. Under state law, the individual receives all constitutional protections for the subsequent proceedings, including a jury trial.

Program Setting

Washington’s decision to locate its program within a prison has not been followed by other states. The Washington legislature’s decision regarding the facility’s location was significantly influenced by the escape history of Western State Hospital’s sexual psychopath program. [See Section III for further discussion of this history.]

¹³ *In re Matter of Linnahan.*

Most states have located their programs within an established mental health facility serving high-risk individuals with existing rules and procedures governing the therapeutic environment. These facilities have trained staff and an ongoing program, thus persons committed under the statute have entered an environment with an established treatment regime.

In contrast, Washington's program and facility did not exist before the law. Individuals committed under the law were placed in a new program, with new staff, in a newly designated facility. In addition, the law's uncertainty influenced residents' willingness to participate in treatment. An expert in sex offender treatment and research, Vernon Quinsey, Ph.D., visited the program in 1992 and observed that the law's "ambiguous constitutional status" generated "great uncertainty" among the residents. He observed that "many residents are simply waiting to see if the law will be declared to be constitutional."¹⁴ Washington has thus faced some unique challenges in implementing its law.

Figure 1 compares the key elements of the seven state statutes. The Appendix includes a detailed summary of each statute.

¹⁴ Vernon Quinsey, *Review of the Washington State Special Commitment Center Program for Sexually Violent Predators* (Olympia: Washington State Institute for Public Policy, 1992) 3.

Figure 1
Sexual Predator Statutes:
COMPARISON OF KEY ELEMENTS

	Arizona	California	Kansas	Minnesota	New Jersey	Washington	Wisconsin
Managing Department	Health Services	Mental Health	Social and Rehabilitative Services	Human Services	Mental Health	Social and Health Services	Social Services
Setting	Hospital	Hospital	Secure Facility	Hospital	Hospital	Mental Health Facility within the Department of Corrections	Hospital
Standard of Proof	Beyond a reasonable doubt	Beyond a reasonable doubt	Beyond a reasonable doubt	Clear and convincing evidence	Clear and convincing evidence	Beyond a reasonable doubt	Beyond a reasonable doubt
Jury Trial	Yes	Yes; must be unanimous	Yes; must be unanimous	No	No	Yes; must be unanimous	Yes
Duration of Confinement	Indeterminate	2 years; can be extended by court with second petition and trial	Indeterminate	Indeterminate	Indeterminate	Indeterminate	Indeterminate
Release Authority	Court	Court	Court	Commissioner	Court	Court	Court

(The Appendix provides a more detailed review of each state.)

SECTION III: WASHINGTON’S HISTORY WITH SEX OFFENDER LAWS, 1950–1984

The 1990 civil commitment law was not Washington’s first effort to confine and treat sex offenders under civil law. Washington passed a law in the 1950s authorizing treatment in lieu of punishment for sexual psychopaths and psychopathic delinquents.¹⁵ This and similar laws passed in about half the states were based on the rationale that sex offenders suffered from a mental disorder that could be treated, and thus their threat to society eliminated.¹⁶

Washington’s statute defined sexual psychopathy quite broadly. Program administrators in 1963 described this population as: “those who have committed almost all common sexual offenses from rape to incest, from indecent exposure to obscene telephoning, from homosexual behavior to indecent liberties with children, from transvestitism to voyeurism.”¹⁷ Proceedings for a sexual psychopath commitment could be initiated after the person’s guilt or innocence was determined. The court had the option to send an individual to the state mental health hospital for evaluation of two conditions: (1) whether the person met the definition of sexual psychopathy, and (2) whether the person was likely to benefit from the treatment. If both conditions were met, criminal proceedings were suspended and the person was committed to the state hospital until “improved to an extent that he is no longer a menace to the health, lives, or property of himself or others.”¹⁸ Those found by the hospital to not meet both conditions were returned to the court for criminal action.¹⁹

Starting in the late 1950s, Western State Hospital developed a specific treatment approach for sexual offenders. By the 1970s, the program achieved national recognition for its “guided self-help model,” where individuals progressed to higher levels of independence after reaching treatment milestones. Group therapy was used extensively, and offenders were selected to serve as group leaders.²⁰ During each of the three phases of the program (inpatient treatment, work-release, and outpatient treatment), the hospital referred some offenders back to the court for criminal sentencing, either because of behavior difficulties or resistance to treatment. By the late 1970s a second program was established at Eastern State Hospital. Together the programs treated approximately 300 individuals.

The program at Western State became headline news in 1974 when an escaped resident was apprehended for, and later convicted of, a rape of one person and the murders of two teenage girls. Headline attention returned in 1979 when a program graduate, who subsequently worked as a therapist in the program, was found murdered in an isolated

¹⁵ *Revised Code of Washington* 71.060 (1957).

¹⁶ Frederick J. Hacker and Marcel Frym, “The Sexual Psychopath Act in Practice: A Critical Discussion,” *California Law Review*, 43:766, 1955.

¹⁷ Giullio Di Furia and Hayden L. Meeks, 1963, “Dangerous To Be At Large—A Constructive Critique of Washington’s Sexual Psychopath Law,” *Washington Law Review* 38:531, 532.

¹⁸ *Revised Code of Washington* 71.06.020 (1985).

¹⁹ In some cases, courts ordered the hospital to treat the person even though the hospital found the person unamenable and a security risk. See Maureen Saylor, *The Rise and Fall of Sex Offender Programs at Western State Hospital*, Presentation to the Seventh Annual Research and Data Conference Association for the Treatment of Sexual Abuses, 20, September 1988.

²⁰ Legislative Budget Committee, “*Sex Offender Programs At Western and Eastern State Hospitals*,” Report No. 85-16, 1985.

area. He had been shot by a man he was attempting to rape. Other bodies were found in this area, along with the discovery of sadomasochistic items in his apartment.²¹

The Legislative Budget Committee's²² review of the program in 1985 raised substantial questions about the program's effectiveness. The auditor concluded that less than a quarter of the offenders who entered the program were successfully discharged, and the recidivism rate of program graduates was approximately the same as offenders who had been imprisoned without treatment.²³ The program was also found to be more expensive than incarceration, with even higher expenditures necessary to bring the program to "acceptable levels."

During the early 1980s, Washington enacted a determinate sentencing system for adults that was to go into effect in 1984. An independent agency, the Sentencing Guidelines Commission, was given the assignment of recommending standards and ranges for felonies. The Commission devoted extensive attention to sex offenses and methods of incorporating treatment sentences for sex offenders into a determinate sentencing system. In 1984 the Commission ultimately recommended, and the legislature enacted, a prospective repeal of the sexual psychopath statute. Treatment for sex offenders was retained but the context was significantly altered. The new state policy offered some treatment beds for high-risk offenders in a secure setting—prison—while also allowing community-based treatment (Special Sex Offender Sentencing Alternatives) for those judged by experts to pose a low security risk.²⁴

Washington's experiences with this sexual psychopathy program influenced policymakers in the 1990s during their deliberations on the sexual predator law. In particular, the escape history at the Western State Hospital made it politically untenable to consider placing the program in a hospital setting.

Policymakers were also influenced by two previous state reforms—mental health and criminal sentencing. A review of these reforms helps to establish the decision-making context of both the Governor's Task Force and the 1990 Legislature.

Mental Health Reform—1973

Washington State's commitment laws for the mentally ill were significantly reformed in 1973, replacing long-term institutionalization with short-term treatment emphasizing psychotropic medication as a means of stabilization.²⁵ A series of procedural requirements established evaluation and treatment in incremental periods of hours and days for up to a 5-month duration. A finding of "likelihood of serious harm," as well as a threat that was manifested by a recent overt act, was required.

During the Task Force deliberations, the group discussed the option of revising the commitment laws and adopting a statute like Minnesota's. This proposal was rejected due

²¹ Saylor, *Rise and Fall of Sex Offender Programs*, 20.

²² Now the Joint Legislative Audit and Review Committee

²³ Legislative Budget Committee, *Sex Offender Programs*, 6.

²⁴ Boerner, "Confronting Violence," 552.

²⁵ 1973 Washington Laws ch. 142, Washington Rev. Code ch. 71.05 (1989).

to concerns that it would sweep in numerous individuals who did not pose significant risks and thus undermine the mental health reform.²⁶

Sentencing Reform Act—1984

The state radically reformed its adult sentencing system in 1984, replacing an indeterminate system, where release decisions were made by a Parole Board, with a determinate system, where the judge set the sentence using statewide guidelines. With this “up-front” sentencing system, offenders who reached the end of their sentence were released with relatively short periods of supervision.²⁷ A return to an indeterminate sentencing system for all offenders, and more narrowly for sex offenders, offered the state power over offenders for a longer duration.

Washington’s then Attorney General, Ken Eikenberry, recommended such an indeterminate system for sex offenders as a bill to the 1990 Legislature. The principle objection to this bill, voiced during legislative hearings, centered on the significant cost implications and a reluctance to “derail” a significant reform effort.²⁸

Sentence Lengths

The state has always exercised significant control over sex offenders through sentencing decisions. The longer the prison term, the shorter time the person is at risk in the community. In 1990, some people argued that longer sentences offered the states a key mechanism to control sex offenders.

The Task Force spent considerable time reviewing sentence lengths for sex offenses, and in fact recommended a 50 percent increase in the penalties for most of these offenses.²⁹ The group, however, determined that sentence lengths were not a complete answer for several reasons:

- Sentences could only be amended *prospectively* and thus would not solve the state’s powerlessness over persons like Earl Shriner. Unless all sentences for sex offenders were life sentences, the state could once again face the prospect of releasing sex offenders expressing direct threats of harm to other individuals.
- Sex offenders are not a homogeneous group and differ greatly in culpability, risk, and the harm they have done, and their sentences need to reflect these differences. A teenager who molests a neighborhood child is not the same as a three-time rapist who breaks into women’s homes at night. Their sentences should be vastly different. The Task Force rejected a policy approach that would incapacitate all or most sex offenders in order to respond to the very small number of extremely dangerous individuals like Earl Shriner.

²⁶ Boerner, “Confronting Violence,” 544.

²⁷ Under the original sentencing guidelines, there was no supervision after release. Later legislative amendments changed the post-release supervision term to one, two, or three years.

²⁸ Boerner, “Confronting Violence,” 549.

²⁹ *Ibid.*, 573, 574.

- A significant proportion of sex offenses occur within the family. Family members can possess complex views about appropriate sentencing, frequently placing a higher value on treatment provisions than long terms of confinement. Since a high proportion of sex offenses are not reported to authorities, or if reported, do not result in a conviction,³⁰ the Task Force was reluctant to set policy that further discouraged victims from coming forward.
- Through its sentencing guidelines, the state ranked all major felonies with a keen focus on *proportionality*. Sentences that would incapacitate the majority of convicted sex offenders would have to be as long as existing penalties for murder. To increase the penalties for sex offenses would undoubtedly set in motion the need to revise other penalties—those involving loss of life, kidnapping, or assaults that result in extreme and permanent injury.
- And finally, cost considerations played a role. The Sentencing Reform Act included a legislative commitment to pay for the prison cells and correctional resources necessitated by sentencing bills as part of its “truth in sentencing” commitment. Thus the legislative deliberations included an awareness of the price tags for various proposals.

For these reasons, the Task Force chose to create a civil commitment statute specifically designed to confine and treat the most dangerous sex offenders and to authorize this option for use at the end of a criminal sentence.

In 1993, Washington voters passed a “Three Strikes and You’re Out” initiative that results in a lifetime sentence without parole for offenders convicted of their third felony. The 1996 Legislature broadened the law to also apply to sex offenders with two separate convictions of specified sex offenses.³¹ Thus, many repetitive sex offenders now receive lifetime sentences in Washington.

CONCLUSION

Sex offenses will be of concern to the public, and to policymakers, for the indefinite future. Washington’s history of decision making regarding civil commitment for sexually violent predators reveals the forces and considerations that influenced the Governor’s Task Force on Community Protection and the 1990 Legislature. This history may shed some light on future policy options.

³⁰ Task Force on Community Protection, *Final Report*, State of Washington, 1989, iv-2.

³¹ Rape First Degree, Rape Second Degree, Indecent Liberties by Forcible Compulsion; or Murder First Degree, Murder Second Degree, Kidnapping First Degree, Kidnapping Second Degree, Assault First Degree, Assault Second Degree, or Burglary First Degree, with a finding of sexual motivation; or an attempt to commit any of the crimes listed above.

Appendix

SUMMARIES OF STATE STATUTES

Arizona

California

Illinois

Kansas

Minnesota

New Jersey

Washington

Wisconsin

Arizona

Year Enacted	1996
Definitions	<i>Sexually violent predator</i> : person charged with or has been convicted of a sexually violent offense and who suffers from a paraphilia that makes the person likely to engage in predatory acts of sexual violence.
Commitment Procedures	<p>County attorney or attorney general may file petition if the person is going to be released from confinement or custody (those found guilty except insane or incompetent to stand trial).</p> <p>A petition is filed and a probable cause hearing held. If there is probable cause, the person is taken into custody and transferred to an appropriate facility for an evaluation.</p> <p>Within 45 days of the petition, the court shall conduct a trial. The person has right to counsel and can retain expert of choice.</p> <p>The court or jury shall determine beyond a reasonable doubt if the person is a predator.</p> <p>If found to be a predator, the person is committed to the custody of the state Department of Health Services for placement in the state hospital or a licensed behavioral health or mental health inpatient treatment facility. The person shall remain in facility until paraphilia has so changed that the person would not be a threat to public safety.</p>
Location, Number Committed	The law went into effect on July 1, 1966. No one has been committed yet. Placement will be at the forensic wing of the state hospital.
Treatment and Release Provisions	<p>The person shall be examined annually, with a report to the court. The annual report shall state if conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community. The person may retain, if indigent, or have the court appoint a qualified expert.</p> <p>The department director or superintendent can petition the court for release to a less restrictive alternative or for unconditional discharge, with the determination that the person's paraphilia has so changed that the person is not likely to engage in predatory acts of sexual violence. The person can petition to the court without the superintendent's approval. The hospital shall give person annual written notice of the person's right to petition. If the person does not waive the petition right, the court shall set a show cause hearing. The person has right to an attorney, but not to be present. If the court finds probable cause for release, a release hearing is set.</p> <p>The person may be present at release hearing and receives same constitutional protections as applied to initial commitment. County attorney or attorney general may request a jury. Person is examined by expert chosen by the state, and can also retain expert of choice.</p> <p>A jury trial can be requested by state or petitioner. State must prove beyond a reasonable doubt that the person's paraphilia has not changed, the person remains a danger to others, and is likely to engage in predatory acts if released, conditionally or unconditionally.</p> <p>The court's jurisdiction over the person continues until the person is unconditionally discharged.</p> <p>Before the court orders a conditional discharge, conditions can be imposed for treatment, supervision, and housing determined to be necessary to ensure community safety. Following a hearing, the court determines if the conditions for conditional release have been met. The issue can be submitted to a jury. Conditional release cases are reviewed at least annually by the court. If the person does not comply with conditions, the court can revoke the conditional release and commit the person to total confinement.</p>
Legal Status	No court decisions to date.

California

Year Enacted	1996
Definitions	<p><i>Sexually violent predator</i>: a sex offender convicted of specified sex offenses (committed by force, violence, duress, menace or fear of injury of a victim or another person); such offenses committed against two or more victims; and the person is determined to have a diagnosed mental disorder that makes it likely that he/she will engage in sexually violent criminal behavior upon release from the California Department of Corrections.</p>
Commitment Procedures	<p>Department of Corrections and Board of Prison Terms shall review each inmate 6 months prior to release. With probable cause, the person can be held for 45 days after prison release date at Atascadero State Hospital.</p> <p>The Department of Mental Health evaluates the referrals to determine if there is a diagnosed mental disorder which makes it likely that the person will engage in sexually violent criminal behavior upon release. Two department clinicians make this diagnosis.</p> <p>If the department clinicians do not agree, the person is examined by two independent professionals. If they do not concur, the person is released to parole at end of term or unconditionally discharged at end of statutory parole period.</p> <p>If both clinicians concur, the case is referred to the district attorney or county counsel for possible filing. The county superior court hears the matter, and a probable cause hearing is held within 10 days. The person has the right to counsel at the hearing. If probable cause is found, the person is held in a secure facility until the trial. The person can request a jury trial for the commitment hearing, and the jury must unanimously decide, beyond a reasonable doubt, that the person is a predator. Jurors are admonished that they may not find the person a predator, absent relevant evidence of a currently diagnosed mental disorder.</p> <p>The person is committed to the Department of Mental Health for 2 years for treatment in a secure facility.</p>
Location, Number Committed	<p>Atascadero State Hospital</p> <p>2 committed as of September 1996; 12 trials pending.</p>
Treatment and Release Provisions	<p>Person is committed to the Department of Mental Health for 2 years. A person cannot be held for more than 2 years unless the court subsequently extends commitment by granting a new petition. Due process protections from initial commitment hearing apply, potentially including a jury trial.</p> <p>Each person's mental condition is examined annually. The person may retain an expert of choice.</p> <p>With a change in mental disorder and likelihood to engage in sexual violence, the director can petition for an unconditional or conditional release hearing. The person is notified annually of right to petition court for conditional release, and subsequent unconditional discharge.</p> <p>Persons can petition for a conditional release and subsequent unconditional discharge. If time remains on the parole period, the person is supervised for remainder of statutory parole period.</p>
Legal Status	<p>Three California Appellate Districts have heard challenges to the statute and upheld its constitutionality. A fourth case is pending. An appeal to the California Supreme Court is likely.</p>

Illinois

Year Enacted	1938
Definitions	<i>Sexually dangerous person:</i> Someone suffering from a mental disorder continually for at least one year, coupled with criminal propensities to the commission of sex offenses, and who has demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children.
Commitment Procedures	<p>The state can petition the court to initiate commitment proceedings if the person has charges pending for a criminal offense indicating sexual dangerousness. The state can either convict and punish the person accused of a sexual offense <u>or</u> commit and treat the person under this statute.</p> <p>The court appoints two qualified psychiatrists to determine whether person meets criteria. The person has a right to jury trial and counsel. State must prove case beyond a reasonable doubt.</p> <p>If the person is declared sexually dangerous, he or she is committed to a treatment center until deemed no longer dangerous. The Director of Corrections is to provide care and treatment designed to effect recovery. If found not to be sexually dangerous, person can be tried for the crime.</p>
Location, Number Committed	Bid Muddy Correctional Center, 88 individuals
Treatment and Release Provisions	<p>The person can file application showing recovery and petition for release at any time following commitment. By state regulation, a staff psychiatrist must review person's confinement every 6 months.</p> <p>Committing court must hear all applications for release. If found no longer to be dangerous, the court orders discharge and every information and indictment underlying the criminal charge is quashed. Those found to be dangerous remain in the department's custody. When Director determines someone committed under this statute appears to no longer be dangerous, but institutional confinement makes such a conclusion uncertain, the Director can petition the court for conditional release authorization.</p> <p>The court can order the person released under supervision that will protect the public. If the person violates the supervision conditions, the court shall revoke the conditional release and re-commit the person.</p>
Legal Status	<p>Statute withheld challenge in Illinois Court of Appeals (1951) and 7th Circuit (1958).</p> <p>The US Supreme Court upheld statute in 1986 (<i>Allen v. Illinois</i>).</p>

Kansas

Year Enacted	1994
Definitions	<i>Sexually violent predator:</i> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.
Commitment Procedures	<p>Agency with jurisdiction over person shall inform county prosecutor regarding persons who will be released in 60 days who were convicted of sexually violent offense, or found not guilty by reason of insanity. Within 45 days of receiving notice from agency, the prosecutor may file a petition and the judge determines whether there is probable cause to believe the person is a sexually violent predator. The person is transferred for an evaluation by someone who is professionally qualified.</p> <p>Within 45 days, a trial is held. The person has right to an attorney, trial by jury, and examination by expert of choice.</p> <p>The court or jury determines on a unanimous basis whether, beyond a reasonable doubt, the person is a sexually violent predator.</p> <p>If the person is found incompetent to stand trial, a hearing is held where criminal rules of evidence apply. If court finds that the person did the act or acts, a final order is issued and the court considers whether to commit the person.</p> <p>The person is transferred to Social and Rehabilitation Services for care and control treatment in a secure facility until the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.</p>
Location, Number Committed	Individuals are currently housed in the Larned State Hospital, temporarily. They were recently moved from a wing of the Larned Correctional Facility. Nine individuals are committed; an additional 3 or 4 petitions have been filed and the cases await trial.
Treatment and Release Provisions	<p>Each person committed shall be examined once every year regarding their mental condition. The report is delivered to the court, and the court conducts an annual review of the person's status.</p> <p>If the court determines that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large, then the court shall set a hearing. The person has the right to be examined by expert of choice, paid by state if necessary.</p> <p>The state has the burden of proof at the hearing to prove that the committed person's metal abnormality or personality disorder remains such that the person is not safe to be at large and if released, is likely to engage in act of sexual violence.</p> <p>Person can file petitions for discharge. If the person files a petition without departmental approval and the court found a previous petition frivolous, or after a hearing, not to meet the release criteria, the court can deny the petition without a hearing if determined to be a frivolous petition.</p>
Legal Status	The Kansas Supreme Court found the law unconstitutional. An appeal was heard by the U.S. Supreme Court in December 1996 (<i>Kansas v. Hendricks</i>).

Minnesota

<p>Year Enacted</p>	<p>1939 Psychopathic Personality 1994 Sexually Dangerous Persons</p>
<p>Definitions</p>	<p><i>Psychopathic personality:</i> A person exhibiting any or all of the following: emotional instability, impulsiveness of behavior, lack of customary standards of good judgment or a failure to appreciate the consequences of personal acts. These characteristics render the person irresponsible for personal conduct with respect to sexual matters and thereby is dangerous to other persons. Case law further defines the person who, “by habitual course of misconduct in sexual matters, evidences an utter lack of power to control his sexual impulses,” and as a result, is dangerous to others.</p> <p>“Habitual course of misconduct in sexual matters” has been interpreted in case law to be three convictions.</p> <p>Commitment as a psychopathic personality requires evidence of physical harm or intent to harm the victim (1993 decision).</p> <p><i>Sexually dangerous person:</i> (1) has engaged in a course of harmful sexual conduct; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct. Inability to control sexual impulses need <i>not</i> be proven.</p>
<p>Commitment Procedures</p>	<p>The process for both types of commitments follows state’s civil commitment law. County attorney prepares a petition, including statement by court-appointed examiner. Second examiner selected by person and paid for by county. Court hears petition, with the individual given full procedural protections. The state must demonstrate by clear and convincing evidence that the individual meets the criteria.</p> <p>Individuals found to meet the criteria are committed to the Minnesota Sexual Psychopathic Personality Treatment Center or the Minnesota Security Hospital or other designated treatment facility.</p> <p>Following the initial commitment, a written treatment report must be filed with the court within 60 days. A final commitment hearing follows, with those found to meet the definition transferred to the treatment facility for an “indeterminate period of time.”</p>
<p>Location, Number Committed</p>	<p>Minnesota Sexual Psychopathic Treatment Center in Moose Lake has 85 individuals; an additional 10 individuals are housed at the Minnesota Security Hospital in St. Peter.</p>
<p>Treatment and Release Provisions</p>	<p>Individuals have a statutory right to be offered treatment in a mental health rather than a prison setting.</p> <p>Patients can petition for discharge to a 3-member special review board trained in mental illness. Commissioner of Human Services makes discharge decision, based on majority recommendation of the board.</p> <p>The Commissioner’s decision can be appealed to a special appeal panel appointed by the Supreme Court. Further decisions can be appealed to the Appeals Court and the Supreme Court.</p>
<p>Legal Status</p>	<p>The Minnesota Supreme Court upheld the constitutionality of the psychopathic personality statute in 1939 (<i>State ex rel. Pearson v. Probate Court</i>). The US Supreme Court affirmed this decision in 1940.</p> <p>The Minnesota Supreme Court upheld constitutionality of the psychopathic personality statute in 1994. The U.S. Supreme Court refused to review the cases submitted on this statute in October 1994.</p> <p>The Minnesota Supreme Court heard the sexually dangerous person law in September 1996 (<i>In re matter of Linnahan</i>).</p>

New Jersey

Year Enacted	1994
Definitions	<p>The civil commitment law applies to all persons. The only special provisions for offenders are procedural and apply to those offenders who never qualify for parole.</p> <p>Offenders with a conviction of aggravated sexual assault, sexual assault or aggravated criminal sexual contact, if the sentencing court found that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, are evaluated at the end of their term, along with any other inmates when the Department of Corrections or the Parole Board believes they may meet the state's standards of involuntary commitment, including the presence of mental illness. (Mental illness is specifically not limited to finding of "psychosis" or "active psychosis.")</p>
Commitment Procedures	<p>Parole board or the superintendent of facility where the person was held believe the person may be in need of involuntary commitment; the procedures follow the state's overall involuntary commitment laws.</p> <p>The attorney general has principle authority to file petitions for inmates; this can be delegated to county prosecutors. The petition filing must be supported by two clinical certificates from psychiatrists or physicians; psychologists are not acceptable.</p> <p>Persons paroled prior to serving the maximum term are not subject to commitment because the parole standards account for dangerousness. The commitment process occurs while the person is within the jurisdiction of the Department of Corrections.</p> <p>With a finding of probable cause, the person is temporarily committed to a facility for the criminally insane for 20 days. The court makes the required finding on clear and convincing evidence. There is no jury trial.</p> <p>If the court imposes conditions lasting longer than 6 months, a review hearing will be set.</p>
Location, Number Committed	Forensic Psychiatric Hospital in Trenton. As of September 1996, 28 persons were institutionalized and 6 have been released.
Treatment and Release Provisions	<p>No person shall be discharged prior to expiration of the maximum term that would have been served had the person not been committed.</p> <p>If an inmate is committed prior to expiration of term and no longer needs involuntary commitment, the person is returned to appropriate authority to complete any remaining term of incarceration, with credit for time served.</p>
Legal Status	State Supreme Court upheld statute in August 1996 (<i>In the matter of D.C.</i>).

Washington State

<p>Year Enacted</p>	<p>1990</p>
<p>Definitions</p>	<p><i>Sexually violent predator</i>: a sexual offender who has been convicted of at least one crime of sexual violence and suffers from a mental abnormality or personality disorder that makes the person likely to engage in future predatory acts of sexual offense if not confined in a secure facility.</p>
<p>Commitment Procedures</p>	<p>When an offender previously convicted of a sexually violent offense is about to be released from confinement, or has committed a recent overt act since release, the prosecuting attorney may petition for involuntary civil commitment. The court determines if there is probable cause and if so, the person is taken into custody. A hearing is held within 72 hours. The person has the right to counsel, to present evidence and cross-examine witnesses. If probable cause is found, the offender is transferred to an appropriate facility for evaluation.</p> <p>Within 45 days, a trial is held. The person has right to jury trial, a lawyer, and an examination by an expert of choice.</p> <p>The state must prove that the person meets the definition beyond a reasonable doubt. The jury verdict must be unanimous.</p> <p>Persons found to be predators are transferred to a facility until such time as the person's mental abnormality or personality disorder has so changed that the person is either safe to be at large or released to a less restrictive environment.</p>
<p>Location, Number Committed</p>	<p>Committed individuals are housed at the Special Commitment Center, a facility run by the Department of Social and Health Services and located in a state prison.</p> <p>As of September 1996, 21 individuals have been found to be predators.</p>
<p>Treatment and Release Provisions</p>	<p>Each person is examined annually to determine whether he or she is non-dangerous enough for release, and also may be evaluated by an examiner of choice. The reports are provided to the court.</p> <p>If the secretary determines the person has changed such that he/she is not likely to engage in predatory acts of sexual violence, the secretary shall authorize the person to petition the court for conditional release or unconditional discharge. The court shall schedule a hearing within 45 days. The prosecuting attorney or attorney general shall have the right to have the person examined by an expert of choice.</p> <p>The hearing is before a jury if demanded by either side. The state has to prove beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that the person is not safe to be at large and that if conditionally released or unconditionally discharged, is likely to engage in predatory acts of sexual violence.</p> <p>The person can petition the court for discharge without the secretary's approval. The secretary shall provide an annual written notice of the right to petition the court. If the person does not waive the petition right, the court shall set a show cause hearing to determine whether facts exist to warrant a hearing. The person has a right to an attorney at the hearing, but not the right to be present. If the court finds probable cause, a hearing shall be set. The person has a right to attend the hearing and shall receive all constitutional protections afforded at the initial commitment hearing.</p> <p>The state has a right to a jury trial and to have the person examined by an expert of choice. The person has right to an expert's evaluation, paid for by the state if the person is indigent. The burden of proof at the hearing is upon the state to prove beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that the person is likely to engage in predatory acts of sexual violence if conditionally released or unconditionally discharged.</p> <p>Conditional release to a less restrictive alternative is possible. The release can be revoked or modified with a court hearing. Annual reviews of conditional release are necessary, until unconditional discharge occurs.</p>

Washington State, continued

Legal Status

Young v. Weston, a constitutional challenge to the statute, is pending before the 9th Circuit Court of Appeals. The statute was previously found constitutional by the Washington State Supreme Court (1993) and unconstitutional by the U.S. District Court (1995).

A separate action challenging the treatment conditions at the facility (*Turay v. Weston*) caused the federal court to appoint a special master in 1995.

Wisconsin

Year Enacted	1994
Definitions	<p><i>Sexually violent person:</i> a person who has been convicted of a sexually violent offense, (or found not guilty by reason of insanity or mental disease, defect or illness) and who is dangerous because of a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.</p>
Commitment Procedures	<p>When person is within 90 days of discharge or release from a sentence imposed for sexually violent offense, a petition can be filed by the attorney general or a district attorney.</p> <p>If the court finds probable cause, the court orders the person into custody for an evaluation. No longer than 45 days later, a trial is held. The criminal rules of evidence apply to the trial, including proof beyond a reasonable doubt.</p> <p>On the basis of a second hearing, the court specifies either institutional care in a secure mental health facility or supervised release. The department is to arrange for control, care and treatment in the least restrictive manner. The person is committed until he or she is no longer a sexually violent person.</p> <p>Supervised release is administered by the Department of Corrections.</p>
Location, Number Committed	<p>Mendota Mental Health Institute (a state mental institute), or Wisconsin Resource Center (a mental health facility within the Department of Corrections).</p> <p>90 persons are housed at the facility as of August 1996: 41 were found to be sexually violent predators; the remaining await trial.</p> <p>2 persons were committed, then ordered to conditional release. 4 people have been placed on supervised release.</p>
Treatment and Release Provisions	<p>The person is examined within six months of commitment and at least once yearly to determine if he or she has made sufficient progress to be entitled to transfer to a less restrictive facility, supervised release, or discharge. The person can retain or have appointed a qualified expert examiner. The court can also order the person re-examined at any time.</p> <p>Petitions for supervised release are allowed every six months. However, the facility director may petition at any time. The person is entitled to court-appointed counsel.</p> <p>Within 20 days, the court shall appoint one or more expert examiners to evaluate person.</p> <p>The court hears the petition without a jury within 30 days of expert's report.</p> <p>The court shall grant petition unless the state proves by clear and convincing evidence that the person is still sexually violent and it is still substantially probable that the person will engage in acts of sexual violence if not confined in a secure facility. The court may consider the nature and circumstances of behavior alleged in original commitment petition, the person's mental history and present mental condition, where the person will live and support self and access to and participation in treatment.</p> <p>If the person is found appropriate for supervision, a plan for supervision and treatment will be developed.</p> <p>Petitions for discharge: If the DHSS secretary determines the person is no longer sexually violent, the secretary shall authorize the person to petition the committing court for discharge. A hearing is held within 45 days.</p> <p>The prosecutor can have the person examined by an expert of choice. A bench trial is held with a standard of clear and convincing evidence.</p>

Wisconsin, continued

***Treatment and
Release Provisions
(continued)***

The person can petition for discharge without the secretary's approval. The person has a right to an attorney but not to be present at the probable cause hearing. If probable cause is found, the court schedules a hearing. The person has the right to be present and have counsel. The state can have the person evaluated by an expert of choice. The state must prove its case by a clear and convincing standard.

If the state does not meet its burden of proof, the person is discharged from custody or supervision. If the burden is met, the court can modify the existing commitment order.

In addition, the person can petition the court at any time. If the person previously filed for discharge without the secretary's approval and the court determined that the petition was frivolous, or the person was still sexually violent, the court shall deny any subsequent petition without a hearing unless the petition describes a changed condition. If a hearing is warranted, a probable cause hearing will be set.

Legal Status

Statute was found constitutional in December 1995 by the Wisconsin Supreme Court.

4 appeals of commitment are pending before the U.S. Supreme Court.

12 individuals were found not to meet the statutory definition at the trial court level.

