

Testimony of

**The Legal Aid Society of the City of New York,
Criminal Defense Division**

**at a joint public hearing on
Criminal Penalties and the Civil Commitment of Sex Offenders
Presented to:**

**Assembly Standing Committee on Codes
Assembly Standing Committee on Correction
Assembly Standing Committee on Mental Health, Mental Retardation
and Developmental Disabilities**

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The Legal Aid Society welcomes the opportunity to testify at this joint hearing of three Assembly Committees seeking to determine the best means by which New York lawmakers can protect the public from sex offenders.

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles about 300,000 cases for poor families and individuals. The services we provide reflect the entire gamut of the needs of our clients, from immigration representation for the newest arrivals, to health care benefits for the oldest New Yorkers. By contract with New York City, the Society serves as the primary defender of poor people prosecuted in the State court system, and as part of our work, our lawyers regularly engage in the challenging, demanding, often emotionally draining task of defending persons accused of sex offenses against adults and children.

As I did this work myself, I have seen the Legislature repeatedly strengthen New York's laws pertaining to sex offenses. Artificial barriers to the prosecution of rapes and crimes against children have been taken down. The Statute of Limitations has been extended. Mandatory prison sentences have been put in place for all sexually violent offenses. The Sexual Assault Reform Act of 2000, revised in 2003, established much tougher sentences, including Life in many cases, for persons who commit a second sexual assault against a child. It doubled the periods of Probation for sex offenders, provided that persons who repeatedly commit sexual abuse as a misdemeanor can be punished as felons, and stipulated that released sex offenders will not be permitted on school grounds.

The Society supports continued efforts to protect children and families from the frightening spectre of predatory sexual offenses. We recognize that many of these crimes cause deeper, longer-lasting damage to the victim than either the victim or the offender may realize at the time. Adequate resources for law enforcement, monitoring, supervision and treatment of released sex offenders are essential. We also believe, however, that additional legislation must be

practical, effective, fair, and constitutional. The proposed bill authorizing “civil commitment” of certain offenders following completion of their prison terms¹ fails this test.

It is beyond doubt that many sex offenders suffer from mental illnesses that predispose them to repeat offenses, and these illnesses make them dangerous to others. New York already has a procedure, under Article 9 of the Mental Hygiene Law, for the involuntary commitment of persons who suffer from a mental illness and who, as a result of this illness, pose a substantial risk of physical harm to other persons. On its face, this statute appears to be applicable to the type of offender that proponents of the proposed “sexually violent predator” law seek to address.² Yet, to our knowledge, no one has sought to invoke Article 9 to commit a sex offender about to be released from prison.

One might suggest that, before finding existing law wanting, we might at least try to use it. It is possible, though, that the reason that law enforcement authorities have not availed themselves of this existing remedy is that they are not interested in providing real treatment to mentally ill sex offenders. Indeed, some of the strongest backers of the proposed “civil commitment” law don’t believe that treatment of sex offenders works at all. What really concerns them is the belief that the offender’s sentence was too short and what they really desire is indefinite confinement whether the individual is treated or not. The experience of states that have enacted “sexual predator” laws, from New Jersey to Kansas to Washington State, is that persons committed under these laws are kept under conditions closely resembling prison conditions. No matter how detailed the statute may be, in directing treatment, the reality is that little meaningful treatment is offered, and very few of the offenders “civilly” committed for “treatment” are ever released from confinement.³

¹ The writer is specifically commenting on Bill # A.3985, adding an “Article 10” to the Mental Hygiene Law, but the following comments would apply to any similar bill, including legislation explicitly tracking the “sexual predator” or “sexually violent persons” laws of other states.

² See M.H.L. §§ 9.01, 9.27, 9.39.

³ See Weitzel, “The Constitutionality of Quasi-Convictions,” 36 Rutgers Law Journal 1029 (Spring 2005). See also discussion in Seling v. Young, 531 U.S. 250 (2001).

The advocates' goal is understandable. Many factors, ranging from limitations in law, to deficiencies in proof, to victims' reluctance to testify, lead to penal sentences shorter than many people would like. This is particularly true when plea bargaining takes place, as it does in most prosecutions including most sex offense prosecutions. The problem here is that the Constitution does not permit the device of "civil commitment" to be used to keep a person in prison after the completion of his sentence, just because he is considered dangerous. "Civil commitment" laws have been upheld by the courts, but only with strict conditions. In its most recent pronouncement on the subject, Kansas v. Crane, 534 U.S. 407 (2002), the Supreme Court emphasized that civil commitment cannot become a mechanism for retribution or deterrence, even if the offender is one of the 40% to 60% of inmates who, according to one study, can be diagnosed with "antisocial personality disorder." There must be a way, the Court said, to distinguish a sex offender whose serious mental illness, abnormality or disorder subjects him to civil commitment from "the dangerous but typical recidivist" who is more properly dealt with exclusively through criminal proceedings. This distinction, as a matter of substantive due process, is that there must be proof that the offender has "serious difficulty in controlling his or her behavior," viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality. The Court held, over a dissent by Justice Scalia, that the "difficulty in controlling behavior" may not simply be inferred from the offense and the diagnosis, but must be proven to the satisfaction of the judge or jury in the civil commitment proceeding. The Supreme Court of New Jersey is one of several state courts that has construed this holding to mean that the State must prove that "it is highly likely that the individual will not control his or her sexually violent behavior and will reoffend." In re W.Z., 173 N.J. 109, 801 A.2d 205 (2002).⁴

The drafting of mental health professionals in the service of essentially penological goals forces these professionals to venture opinions and draw distinctions that the science does not

⁴ See also In re Barnes, 658 N.W.2d 98 (Iowa 2003); In re Ramey, 648 N.W.2d 260 (Minn. Ct. App. 2002), and In re Thomas, 74 S.W.3d 789 (Mo. 2002), but cf. State v. White, 891 So.2d 502 (Fla. 2004) and cases cited therein.

truly equip them to draw. As the American Psychiatric Association, which opposes laws of this type, has said, “The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.”⁵

More generally, the consequence of these and other judicial holdings is that enactment of a “sexual predator” commitment law is an invitation to a proliferation of expensive litigation, draining resources that would be much better spent on treatment and supervision of offenders. Let us take the neighboring state of New Jersey as an example. As of this past March, New Jersey committed 317 offenders under its 1998 statute, which represented, according to the State, only about 5% of those eligible for possible commitment. The New Jersey courts have issued hundreds of opinions under the law. Legal challenges are pending in Federal court, including challenges based on the lack of meaningful treatment that distinguishes “civilly committed” persons from prisoners serving time. The total annual cost of the program, including the constitutionally-mandated costs of providing legal and expert assistance for indigent offenders, has been about \$40 million — four times the estimate given to the Legislature at the time the statute was enacted.⁶

In ruling that as a matter of “fundamental fairness,” a defendant pleading guilty to a sex offense must be informed of the possible civil commitment at the end of his sentence, the New Jersey Supreme Court stated that “Confinement under the [act] is theoretically without end. In that sense, it constitutes a greater liberty deprivation than that imposed upon a criminal defendant who, in all but a handful of cases, is given a maximum release date.”⁷ Surely, one must hesitate to take so drastic a step without proof that it is needed and that it will work. Yet remarkably, although more than 15 states have adopted “civil commitment” laws, and much has

⁵ Quoted in Kansas v. Crane, 534 U.S. at 412.

⁶ “Sex Offender Detention Program is Mired in Litigation and High Costs,” *New Jersey Law Journal*, March 7, 2005.

⁷ State v. Bellamy, 178 NJ 127, 835 A.2d 1231 (2003).

been written about their constitutional implications, no study has demonstrated that these laws actually protect society by reducing the number of sex offenses. Can it not be expected that, before enacting a costly and radical departure from well-established legal procedures, we should demand some evidence that the proposed change will achieve its intended purpose?

In defending dozens of cases involving sex offenses I think I've acquired a balanced view. I've questioned victims and listened to them. I've seen and heard their pain. But I have also come to know many accused persons, and learned that each is a human being with his own distinct background and history. Many were themselves victims of sexual abuse or physical abuse in the past.⁸ Some lack understanding of their offense, but others are eager for treatment so they will not repeat it. If we as a society are serious about treating the psychiatric conditions that lead these persons to offend, we should offer a comprehensive, fully-funded treatment program while they are serving their sentences, instead of waiting to do a mental evaluation as they're completing their sentences, and using the evaluation as a reason to keep them confined. The premise of the "civil commitment" proposal, after all, is that these persons are ill, and if so, they deserve our compassion, not the fear and loathing and dehumanizing name-calling that one hears from the tabloids and from some politicians.

Ultimately, the decision to enact a new law of this type should not depend solely or primarily on a determination of its constitutionality. As Justice Kennedy of the Supreme Court said last year, "Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws."⁹

⁸ See also Lotke, Eric, "Politics and Irrelevance: Community Notification Statutes," in Federal Sentencing Reporter, Vol. 10, #2, Sept.-Oct. 1997, p. 64.

⁹ Speech to American Bar Association, 2004, quoted in Weitzel, supra Note 3.

Although sex offenders as a group are actually a lower risk to re-offend than persons convicted of felonies in general,¹⁰ there are some sex offenders, a fairly small subset of them, who are clearly dangerous and probably not amenable to treatment. When they are identified they must be dealt with honestly through the criminal law, with severe sentences and, when those sentences end, with careful monitoring by law enforcement authorities. We should not, no matter how tempting the thought, misuse the mental health system for the purpose of punishment rather than treatment. As the former Chief Justice of the Arizona Supreme Court has written, discussing the subject at hand,

¹⁰ See studies quoted in New Jersey Law Journal article, supra Note 6. See also Harris & Hanson, “Sex Offender Recidivism: A Simple Question” (2004), available online at www.sgc.gc.ca.

“The practice of warehousing human beings for long fixed prison terms and thereafter attempting to retain them indefinitely in custody for psychiatric treatment is at best wasteful, but arguably offends traditional notions of justice and fair play. Moreover, it threatens to turn the law of civil commitment on its head.

...I cannot help but wonder where this novel approach to crime, punishment and public safety will lead us. How can we be sure...that the Legislature will continue to view only sex offenders as a special and unique class of criminals? If prosecutors are able to find mental health professionals willing to testify that people who commit repetitive assaults of a non-sexual nature have a mental abnormality predisposing them to such violent behavior, will the Legislature pass laws to keep them incarcerated beyond their criminal sentences by the device of civil commitment? How about perpetrators of multiple domestic violence? Chronic drunk drivers? Violent drug offenders? What are the limits of the ‘end run’ around the normal criminal justice process?”¹¹

¹¹ Zlaket, C.J., dissenting, in In re Leon G., 200 Ariz. 298 (2001).

Thank you very much for the opportunity to share our thoughts with your joint Committees. The Legal Aid Society looks forward to continuing to work with you to protect our communities within the bounds of our constitution and our character, with legislation that is reasoned, compassionate, and effective.