Promises to Keep: The Continued Denial of Constitutional Rights to Sexually Violent Predators

[*Seling v. Young*, 531 U.S. 250 (2001)]

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I. Introduction

Sexually violent crimes inevitably evoke fear and disgust. The offensive nature of a crime, however, should not justify the deprivation of constitutional rights.[1] In 1990, the Washington legislature passed several laws designed to both protect the community from sex offenders and treat individuals convicted of sexually violent crimes.[2] The most controversial of these, the Washington Sexually Violent Predators Act ("Washington SVP Act"), authorizes the civil commitment of sexually violent predators.[3]

Some scholars have questioned the constitutionality of the Washington SVP Act.[4] Nevertheless, the United States Supreme Court recently upheld the statute in *Seling v. Young*.[5] In *Young*, the Court relied on its prior decisions using the plain meaning of a statute to find similar acts to be civil.[6] However, the Court failed to recognize that the facts presented in *Young* required further consideration. By doing so, the Court ignored appropriate case precedent and important legislative history, misinterpreted Young's claim, and misapplied distinguishable case precedent.

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1. *See* John Q. La Fond, *Washington's Sexually Violent Predator Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. Puget Sound L. Rev. 755, 756 (1992) [hereinafter *Law or Lottery*].

2. These laws were passed as part of the Community Protection Act, 1990 Wash. Laws ch. 3. John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. Puget Sound L. Rev. 655, 703 n.1 (1992) [hereinafter *Deliberate Misuse*].

3. Wash. Rev. Code § 71.09.010 (1992 & Supp. 2002); *see also Deliberate Misuse*, *supra* note 2, at 655 (discussing the controversial nature of this law).

4. *See Law or Lottery*, *supra* note 1, at 756; *see also* Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 710 (1992) (discussing the many criticisms that have been made of the Sexually Violent Predator Act, and commenting that one of the most common critiques is based on an argument that the Act violates the Double Jeopardy Clause).

5. 531 U.S. 250 (2001).

6. *See* Seling v. Young, 531 U.S. 250 (2001).

II. Case Description

Andre Young received six separate rape convictions over a thirty-year period.[7] Just one day before his scheduled release from prison for his most recent conviction, the State of Washington filed a petition alleging that Young was a sexually violent predator under the Washington SVP Act.[8] Accordingly, the State claimed that Young should be civilly confined.[9]

At a commitment hearing, a jury found Young to be a sexually violent predator as defined by the Washington SVP Act.[10] Young was then committed to the Special Commitment Center ("Center").[11] Young appealed the determination he was a sexual predator;[12] the Washington Supreme Court affirmed.[13]

Subsequently, Young filed a habeas corpus action under 28 U.S.C. § 2254, arguing that the Washington SVP Act was unconstitutional "both facially and as applied."[14] The U.S. District Court for the Western District of Washington held the Washington SVP Act unconstitutional on ex post facto, double jeopardy, and substantive due process grounds.[15] The State appealed to the U.S. Court of Appeals for the Ninth Circuit.[16] While the State's appeal was pending, the U.S. Supreme Court issued its decision in *Kansas v. Hendricks*,[17] in which it found a similar statute to be civil.[18] The Ninth Circuit entered an order remanding Young's case to the district court in consideration of *Hendricks*.[19] On remand, the district court found the Washington SVP Act to be constitutional under *Hendricks*.[20] The court rejected Young's claims and dismissed his petition.[21]

On appeal, the Ninth Circuit held that the Washington SVP Act did not facially violate the Ex Post Facto and Double Jeopardy Clauses.[22] Nonetheless, the court found that Young was not precluded from challenging the Washington SVP Act as being punitive "as applied" and therefore unconstitutional.[23] The Ninth Circuit noted that Young had alleged facts that, "if proved, . . . would entitle

7. *Id.* at 255; *see also In re* Young, 857 P.2d 989, 994 (Wash. 1993).
8. *Young*, 531 U.S. at 255.
9. *Id.* at 255-56.
10. *Id.* at 256.
11. *Id.* at 253.
12. *See In re* Young, 857 P.2d 989 (Wash. 1993) (en banc).
13. *See id.*
14. *Young*, 531 U.S. at 258; *see also* Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).
15. *Weston*, 898 F. Supp. at 754.
16. *Young*, 531 U.S. at 258.
17. Kansas v. Hendricks, 521 U.S. 346 (1997).
18. *Young*, 531 U.S. at 258.
19. *Id.*
20. *Id.*
21. *Id.*
22. Young v. Weston, 192 F.3d 870 (9th Cir. 1999).
23. *Id.*

him to relief."[24] Accordingly, the court remanded the case to the district court for a determination of whether the Washington SVP Act was punitive as applied.[25]

The State appealed to the U.S. Supreme Court.[26] The Court granted certiorari to resolve the issue of whether a statute, found by a lower court to be civil, could be considered punitive as applied to an individual, in either purpose or effect.[27]

III. Background

The Washington Sexually Violent Predator Act authorizes the civil commitment of sexually violent predators.[28] The Act defines a sexually violent predator as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."[29]

The definition of civil commitment, in contrast, is not statutory. Instead, it has evolved through judicial interpretation.[30] The Supreme Court has created a distinction between civil and criminal commitment.[31] A civil commitment is the confinement of a person who is mentally ill, incompetent, or the like.[32] The reason behind civil commitment is not punishment of past deeds but instead, that the individual is dangerous to either himself or others and is in need of confined therapy.[33] In contrast, a criminal commitment is focused on punishment.[34] The very heart of Young's claim embodied the distinction between civil, treatment-centered commitment, and criminal, punitive commitment. The Court has considered this distinction on several occasions.[35]

24. *Id.* at 874-75.
25. *See id.* at 876.
26. Seling v. Young, 529 U.S. 1017 (2000); *see also Young*, 531 U.S. 250.
27. Seling v. Young, 529 U.S. 1017 (2000).
28. Wash. Rev. Code § 71.09.010 (1992 & Supp. 2002).
29. *Id.* at § 71.09.020.
30. *See* Addington v. Texas, 441 U.S. 418 (1979); Allen v. Illinois, 478 U.S. 364 (1986).
31. *See Allen*, 478 U.S. 364.
32. *See Addington*, 441 U.S. at 420; *Allen*, 478 U.S. at 370.
33. *See Addington*, 441 U.S. at 420; *Allen*, 478 U.S. at 370.
34. *See Allen*, 478 U.S. at 370.
35. *E.g.*, *id.* at 370. It is also important to note that the U.S. Supreme Court recently decided *United States v. Crane*, No. 00-957, 2002 WL 75609 (Jan. 22, 2002). Crane was committed under the Sexually Violent Predator Act in Kansas. *Id.* The Kansas Supreme Court ordered a new trial because the trial court had failed to instruct the jury that in order to civilly commit Crane under the Act, it had to find that he could not control his dangerous behavior. *Id.* The U.S. Supreme Court held that the Kansas statute did not require the State to prove that the offender had a total lack of control over his dangerous sexual behavior; however, civil commitment under the statute was not constitutionally allowed without a determination of some lack of control. *Id.* By not requiring a showing of total lack of control in order for individuals to be civilly committed, the U.S. Supreme Court passed up an opportunity to place a limitation on the number of individuals subjected to sexually violent predator statutes. *See id.*

A. *History of the Washington Sexually Violent Predators Act*

Washington established the Washington SVP Act in response to public outrage resulting from a few highly publicized occurrences of sexual violence in the state.[36] One such incident involved Earl Shriner, a mentally retarded man, who, on May 20, 1989, "raped, stabbed, and sexually mutilated a seven-year-old boy."[37] The resulting public outcry was tremendous, likely due to both the shocking nature of Shriner's crime and his lengthy history of sexual violence.[38] Within a week, a spokesperson for Governor Booth Gardner reported that the office had received more than 1000 letters and telephone calls about the Shriner incident.[39] On June 15, the Governor formed the Governor's Task Force on Community Protection ("Task Force").[40]

The Task Force consisted of twenty-four members, including "professionals in the criminal justice system, legislators, treatment professionals, academics, and three representatives of victims."[41] The governor assigned the Task Force to examine Washington's current laws and policies and determine how they could be improved to effectively safeguard against repeat sex offenders.[42] The Task Force eventually recommended the Washington SVP Act as this preventative measure.[43]

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36. Brian G. Bodine, *Washington's New Violent Sexual Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 105-06 (1990); *see also* John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 381 (1999) [hereinafter *Therapeutic Jurisprudence*]. Legislatures frequently enact laws promising the public that a certain type of case will not recur. *Deliberate Misuse*, *supra* note 2, at 677. "The predator commitment law is precisely this type of misguided law revision." *Id*.

37. Brooks, *supra* note 4, at 711; *see also* Bodine, *supra* note 36, at 141 n.1.

38. David Boerner, *Confronting Violence: In the Act and in the World*, 15 U. PUGET SOUND L. REV. 525, 526-27 (1992). Boerner, a former prosecutor and current Professor of Law at Seattle University, was a member of the Task Force. *Id.* at 538.

39. *Id.* at 534.

40. *Id.* at 538 (citing Exec. Order No. 89-04, Wash. St. Reg. 89-13-055 (1989)).

41. *Id.* at 538.

42. *See* Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators – A Due Process Analysis*, 82 CORNELL L. REV. 594, 611 (1997); *Deliberate Misuse*, *supra* note 2, at 673; Bodine, *supra* note 36, at 105. The Task Force had the following responsibilities:

> 1. Review the current criminal justice system and the mental health civil involuntary commitment process to measure their effectiveness in confining persons who are not safe to be at large in the community[;]
> 2. Assess the relationship between these criminal and mental health systems to identify the shortcomings[;]
> 3. Research the feasibility of creating a specialized, secure facility for certain categories of people who represent the most risk to society[;] [and]
> 4. Consider research and approaches to enhancing our ability to accurately predict future behavior of individuals who have committed or who have threatened to commit violent criminal acts and establish legal criteria for confining them.

Boerner, *supra* note 38, at 538.

43. Boerner, *supra* note 38, at 572.

B. *Supreme Court Treatment*

The U.S. Supreme Court examined a statute similar to the Washington SVP Act in *Allen v. Illinois*.[44] In *Allen*, the petitioner was charged with being a sexually violent predator under the Illinois Sexually Violent Persons Act.[45] The definition of a "sexually dangerous person" under the Illinois Act[46] differs slightly from the Washington definition; yet both statutes have the same effect. The charged individual is civilly committed.[47] In *Allen*, the Court held that the petitioner had not proven that the effect of the statute was punitive; therefore, the statute was civil and constitutionally sound.[48] This was most likely because the individuals committed in Illinois, unlike those in Washington, were actually given treatment and later released if they could show that they were no longer dangerous.[49]

In *Allen*, the Court also recognized its responsibility to consider conditions of confinement and weigh them against the statute's purpose.[50] The Court upheld the Illinois Sexually Dangerous Persons Act because it required the State to *either* convict the accused and punish him for the criminal behavior *or* civilly commit the individual and provide treatment.[51] The Washington SVP Act, in contrast, allows commitment and treatment to follow a criminal conviction and punishment.[52]

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44. *Allen v. Illinois*, 478 U.S. 364, 365 (1986).
45. *Id.*
46. The Illinois statute defines sexually dangerous persons as:

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

725 Ill. Comp. Stat. Ann. 205/1.01 (West 1992).

47. *Allen*, 478 U.S. at 366.
48. *See id.* at 370.
49. *Id.*
50. *Id.* at 374.
51. *See id.* at 373-74.
52. Wash. Rev. Code § 71.09.030 (1992 & Supp. 2002). The Washington statute states that a petition may be filed

> [w]hen it appears that:
> (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990;
> (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990;
> (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to *RCW 10.77.090(3);
> (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW **10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or
> (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator . . . .

In *Hudson v. United States*,[53] the Court examined the Double Jeopardy Clause as it related to a statute dealing with money penalties and debarment sanctions.[54] The Court relied on the statute's plain meaning to determine legislative intent.[55] However, the Court noted that even in cases in which a legislature apparently intended a civil penalty, it has inquired "whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty."[56] The Court has followed this approach in several cases, strongly recommending that courts look first to legislative intent, and that such intent should be rejected only with a showing of "the clearest proof that the statutory scheme [is] so punitive either in purpose or effect as to negate the State's intention."[57]

In *Hudson*, the Court also recognized the factors it formulated in *Kennedy v. Mendoza-Martinez*[58] served as useful guideposts in determining whether a state's intent is outweighed by the punitive effect of a statute.[59] Those factors are:

> (1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[60]

A state's intent has consequently become important in the Court's analysis of the constitutionality of a statute.

In *Kansas v. Hendricks*, the Court examined the Kansas sexually violent predator statute, which was modeled after the Washington SVP Act.[61] The Court found that the Kansas statute was not punitive because the State had attempted to provide some amount of treatment to individuals committed under the statute.[62] Consequently, the Kansas statute did not violate the Double Jeopardy Clause even

Id.

53. 522 U.S. 93 (1997).

54. Hudson v. United States, 522 U.S. 93 (1997) (describing a situation in which bank officers received punishment from the Office of Comptroller of Currency for misapplying bank funds and were later indicted for the same incident).

55. *Id.* at 99.

56. *Id.*

57. Allen v. Illinois, 478 U.S. 364, 369 (1986) (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)); *see also* Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

58. 372 U.S. 144 (1963).

59. *Hudson*, 522 U.S. at 99.

60. *Id.* at 99-100 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).

61. *Hendricks*, 521 U.S. at 387.

62. *Id*. at 368-69.

though commitment could occur after incarceration.[63] Furthermore, the Court held that the Kansas statute did not violate the Ex Post Facto Clause because it did not impose punishment, did not "criminalize conduct legal before its enactment, nor deprive [an inmate] of any defense that was available to him at the time of his crimes."[64]

These U.S. Supreme Court cases indicate that for sexually violent predator commitment statutes to be civil, the facilities must provide adequate treatment. Without adequate treatment, the statute would be punitive and thus, unconstitutional. The Washington SVP Act does provide for treatment; however, a Washington district court, in *Turay v. Seling*,[65] found that the Special Commitment Center, the Center in which Young was being held, had failed to provide adequate treatment.[66] The district court ordered the Center to conform to constitutional standards and appointed a Special Master to monitor the institution's progress.[67] However, in May 2000, the court again found that officials at the Center had "failed to make constitutionally adequate mental health treatment available to . . . residents, and . . . departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not . . . based on their professional judgment."[68]

IV. Analysis

The issue in *Seling v. Young* was whether a statute, found by a lower court to be civil, may be considered punitive as applied, in either purpose or effect; and if so, whether that statute then violated the Ex Post Facto and Double Jeopardy Clauses of the Constitution.[69]

A. *Parties' Arguments*

Young argued that the terms of his confinement were punitive in effect because they were overly restrictive, incompatible with the State's interest of treatment, and resulted in indefinite confinement.[70] Young alleged that "residents were abused, confined to their rooms, subjected to random searches of their rooms and units, and placed under excessive security."[71] Additionally, because the Center was located inside a prison, it relied on the Department of Corrections for

63. *Id.* at 369; *see also* Kan. Stat. Ann. § 59-29a02(a) (1994).
64. *Hendricks*, 521 U.S. at 371.
65. 108 F. Supp.2d 1148 (W.D. Wash. 2000).
66. *See id.*
67. Seling v. Young, 531 U.S. 250, 257 (2001).
68. Turay v. Seling, 108 F. Supp.2d 1148, 1158-59 (W.D. Wash. 2000).
69. *Young*, 531 U.S. at 258-60.
70. *Id.* at 259-60.
71. *Id.* at 259.

many of its basic services, such as food, medical care, and security.[72] Essentially, Young believed individuals who were civilly confined under the Washington SVP Act were being treated in the same manner as those being incarcerated, if not worse.[73] Furthermore, Young asserted that the Ninth Circuit correctly applied the "clearest proof" requirement in finding that the punitive effect of the Washington SVP Act negated the State's intent to treat individuals committed under the Act.[74]

The State asserted that the question of whether a particular statutorily defined penalty was civil or criminal was a matter of statutory construction and that the plain meaning of the Washington SVP Act favored a civil interpretation.[75] The State also argued that the Court should follow *Hudson* and reject the "as applied" method of determining whether a statute was civil or criminal in nature.[76] Furthermore, the "as applied" approach would prove unworkable, because conditions of confinement are subject to change.[77] Finally, the State urged the Court to focus on its decision in *Kansas v. Hendricks*, in which it found a statute that was almost identical to the Washington SVP Act to be civil.[78]

B. *Majority & Concurring Opinions*

The Court held that the Washington SVP Act was civil, and Young could not use the "as applied" method to challenge the statute's constitutionality.[79] The Court followed *Hendricks* and found that a statute determined by a court to be civil could not be considered punitive.[80]

In his concurring opinion, Justice Scalia noted that the majority did not address the determination of whether the statute was civil or punitive for itself, but rather relied on prior decisions.[81] Justice Scalia felt that this omission by the majority might be interpreted as leaving that determination as an open question.[82] For Justice Scalia, there was no question; the Washington SVP Act was civil.[83] He based his opin-

72. *Id.*
73. *Id.*; *Therapeutic Jurisprudence*, *supra* note 36, at 386.
74. Respondent's Brief at 10, *Seling v. Young*, 531 U.S. 250 (2001) (No. 99-1185); *see also* Hudson v. United States, 522 U.S. 93, 99 (1997); Kansas v. Hendricks, 521 U.S. 346, 361 (1997); United States v. Ward, 448 U.S. 242 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
75. Petitioner's Brief at 16, *Seling v. Young*, 531 U.S. 250 (2001) (No. 99-1185).
76. *Id.* at 19.
77. *Id.* at 30; *Young*, 531 U.S. at 263.
78. *Hendricks*, 521 U.S. 346; Petitioner's Brief at 10, *Young* (No. 99-1185).
79. *Young*, 531 U.S. at 263. The Court's decision was 8-1.
80. *Id.* at 262-63.
81. *Id.* at 267 (Scalia, J., concurring). The Court stated that "[a]s the Washington Supreme Court held and the Ninth Circuit acknowledged, we proceed on the understanding that the Washington Act is civil in nature." *Id.* at 260.
82. *Id.* at 267 (Scalia, J., concurring).
83. *Id.* at 267-68 (Scalia, J., concurring).

ion on the Court's rejection of a similar challenge in *Hudson*, in which the Court held that a statute found to be civil could not be deemed punitive as applied.[84]

Interpreting the language and effect of the Washington SVP Act was problematic for Justice Thomas. In his concurring opinion, he stated that Young's challenge was not truly an "as applied" challenge because Young did not claim that the Washington SVP Act "by its own terms [was] unconstitutional as applied . . . but rather that the statute [was] not being applied according to its terms at all."[85] Justice Thomas reasoned that Young's claim was instead that the Washington SVP Act might very well be constitutional by its own terms, but that the effect of the statute was "punitive and incompatible with the Act's treatment purpose."[86]

C. *Dissenting Opinion*

In his dissent, Justice Stevens criticized the majority for failing to go beyond statutory construction.[87] He recognized that, as a practical matter, if the conditions surrounding the confinement were "such that a detainee has been punished twice in violation of the Double Jeopardy Clause, it is irrelevant that the scheme has been previously labeled as civil without full knowledge of the effects of the statute."[88] Justice Stevens also argued that Young's allegations of system-wide conditions should have been considered because if they were confirmed, the Washington SVP Act should have been characterized as a criminal law for purposes of constitutional claims.[89] Justice Stevens based this argument on precedent[90] that stated a statute will be found criminal, regardless of legislative intent, where a party challenging the statute provides "the clearest proof that the statutory scheme [is] so punitive either in purpose *or effect* as to negate [the state's] intention."[91]

D. *Commentary*

In *Young*, the Court ignored precedent that stated a statute is criminal if there is clear proof that the punitive effects of the statute

84. *Id.* at 268 (Scalia, J., concurring).
85. *Id.* at 271 (Thomas, J., concurring).
86. *Id.* (Thomas, J., concurring).
87. *Id.* at 276 (Stevens, J., dissenting).
88. *Id.* at 277 (Stevens, J., dissenting).
89. *Id.* (Stevens, J., dissenting).
90. *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997); United States v. Ward, 448 U.S. 242, 248-49 (1980).
91. *Young*, 531 U.S. at 275 (Stevens, J., dissenting) (alterations in original) (quoting Allen v. Illinois, 478 U.S. 364, 369 (1986)) (citations omitted); *see also Hendricks*, 521 U.S. at 361.

negate the State's intent.[92] Young alleged sufficient facts that, if proved, should have constituted this clear proof.[93] Consequently, the Washington SVP Act should have been considered criminal. The confinement of an individual first for a criminal conviction and then pursuant to the Washington SVP Act without a new offense, would violate the Ex Post Facto and Double Jeopardy Clauses.

Instead of dealing with this constitutional question, the Court misinterpreted Young's claim as an individual complaint and failed to consider the system-wide complaints Young alleged. This allowed the Court to apply distinguishable case precedent and dismiss the case without addressing the constitutional issues presented.

1. *Ex Post Facto and Double Jeopardy*

The U.S. Constitution prohibits states from enacting ex post facto laws.[94] An ex post facto law is any "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed."[95] The Ex Post Facto Clause restricts the government from enacting arbitrary legislation in retaliation of a crime already committed.[96] Furthermore, it ensures that individuals are given fair warning of legislation and its effect.[97]

The Double Jeopardy Clause states that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."[98] Specifically, it protects individuals from being prosecuted or punished twice for the same offense.[99]

A statute may only violate the Ex Post Facto and Double Jeopardy Clauses of the Constitution if (1) the statute is criminal, or (2) the statute is civil, but its effect renders it more punitive than civil in nature.[100] In determining whether a statute is civil or criminal, a court looks first to the plain meaning of the statute and legislative intent.[101] If a court determines that the legislature intended the statute to be civil, the court then considers whether the statute's purpose or effect is so punitive that it negates the legislature's intention.[102]

92. *Allen*, 478 U.S. at 369 (quoting *Ward*, 448 U.S. at 248-49); *see also* Hudson v. United States, 522 U.S. 93, 100 (1997).
93. *See supra* notes 69-72 and accompanying text.
94. U.S. CONST. art. I, § 10.
95. Calder v. Bull, 3 U.S. 386, 390 (1798).
96. Nathaniel L. Taylor, *Abuse of Judicial Review: The Unwarranted Demise of the Sexually Violent Predators Statute by* Young v. Weston, 71 WASH. L. REV. 543, 552 (1996).
97. *Id.*
98. U.S. CONST. amend. V.
99. *See* United States v. Halper, 490 U.S. 435, 440 (1989).
100. *In re* Young, 857 P.2d 989, 996 (Wash. 1993).
101. Seling v. Young, 531 U.S. 250, 261 (2001); Kansas v. Hendricks, 521 U.S. 346, 361 (1997); Allen v. Illinois, 478 U.S. 364, 368 (1986).
102. *Young*, 531 U.S. at 261; *Hendricks*, 521 U.S. at 361; United States v. Ward, 448 U.S. 242, 248-49 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963).

In *Young*, the Court presumed the Washington SVP Act was civil and stopped short of the second level of analysis. It failed to consider the punitive effects of the Act.[103] The Court should have considered Young's allegations and then made a determination of whether the punitive effects of the Washington SVP Act negated the State's expressed intent to protect the community and treat the individual.[104] However, the State failed to provide adequate treatment to the individuals committed under the Washington SVP Act.[105] Therefore, the only aspect of the State's intent that remained was to protect the community.

Had the Court considered this analysis, it likely would have found the punitive effects of the Washington SVP Act negated the State's intent to treat individuals because the State was not providing adequate treatment.[106] Furthermore, confining an individual indefinitely to the abusive conditions of a prison without treatment or any hope of release, far outweighs the State's interest in protecting the community from the *mere possibility* that the individual *might* commit a crime at some point in the future. This is especially true when the individual has already served a sentence for the past crime. For the Court to come to any other conclusion would essentially mean that it would support the indefinite confinement of every individual who has committed any crime merely because recidivism rates indicate there is a possibility that those individuals might re-offend if released.

Once the Court had determined the punitive effects of the Washington SVP Act negated the State's intent, the Act would have been considered criminal and the Ex Post Facto and Double Jeopardy Clauses would have applied.[107] Consequently, the Washington SVP Act would have been found to violate both Clauses because it punished an individual twice for the same offense and inflicted a greater punishment for that offense than the law attached to the crime at the time it was committed.[108]

Instead of considering this second level of analysis, the Court misinterpreted Young's claim as an individual complaint and applied *Hudson v. United States*.[109] In *Hudson*, the Court held that a statute could not be found unconstitutional as applied to an individual.[110] However, in addition to allegations of abuse, Young also alleged gen-

103. *See generally Young*, 531 U.S. 250.
104. *Id.* at 257.
105. *See supra* notes 66-68 and accompanying text.
106. *See supra* notes 66-68 and accompanying text.
107. Allen v. Illinois, 478 U.S. 364, 368-69 (1986) (quoting *Ward*, 448 U.S. at 248-49); Hudson v. United States, 522 U.S. 93, 100 (1997).
108. *See* Calder v. Bull, 3 U.S. 386, 390 (1798); United States v. Halper, 490 U.S. 435, 440 (1989).
109. 522 U.S. 93 (1997); *see Young*, 531 U.S. 250.
110. *Young*, 531 U.S. at 262.

eral, system-wide conditions of confinement that were punitive.[111] Young claimed that conditions of confinement for individuals committed under the Washington SVP Act ran counter to the State's interest of "treating" the individuals and protecting the community.[112] These claims were system-wide complaints, not individual, and should have been considered by the Court.

The Court, however, chose to categorize all of Young's claims as individual complaints regardless of the fact that Young's complaints were not specific to him. Young complained about the general, harsh conditions endured by all individuals committed under the Washington SVP Act.[113] This allowed the Court to respond to Young's complaint without addressing the constitutional issues it presented. The Court simply relied on *Hudson* and made a similar conclusion. The Court should have examined all of Young's complaints and, at the very least, considered the system-wide complaints in making its determination.

By failing to consider the punitive effect of the Washington SVP Act, and focusing only on its plain language, the Court ignored Young's constitutional challenge and the possible constitutional violations of the Act. Furthermore, by not completing the constitutional analysis, the Court continued reasoning under the assumption that the Washington SVP Act was civil. Accordingly, the Court applied distinguishable and misleading case precedent.

2. *Case Precedent*

The facts presented in *Young* are substantially distinguishable from the case precedent upon which the Court relied. In *Kansas v. Hendricks*, the Court found the Kansas Commitment of Sexually Violent Predators Act to be civil and not punitive.[114] In *Young*, the Court relied on *Hendricks* as justification for finding the Washington SVP Act civil.[115] The Court determined both statutes were civil on their face because both states intended the statutes to be for treatment, not punishment.[116]

In *Hendricks*, the State's intention was not negated by the law's effect.[117] The Kansas Legislature not only had the requisite intent to protect the community and treat the individuals, but treatment was

111. *See supra* notes 70-73 and accompanying text.
112. *See supra* notes 70-73 and accompanying text.
113. *See Young*, 531 U.S. at 259-60.
114. *See supra* notes 61-64 and accompanying text.
115. *See Young*, 531 U.S. at 260-61.
116. Kansas v. Hendricks, 521 U.S. 346, 365-66 (1997); *Young*, 531 U.S. at 257.
117. *See Hendricks*, 521 U.S. 346 (explaining that treatment was provided to individuals committed under a similar statute in Kansas). *But cf. Young*, 531 U.S. 250 (explaining that Washington did not provide treatment to individuals committed under the statute).

actually provided.[118] In contrast, evidence demonstrated by the findings in *Turay v. Seling*[119] indicated that the Center in Washington did not provide constitutionally adequate treatment to its residents.[120]

In determining whether the Washington SVP Act was civil or criminal, the Court should have considered the factors set forth in *Kennedy v. Mendoza-Martinez* and utilized by the Court in *Hudson*.[121] In *Hudson*, the Court stated the factors should serve as a guide in determining whether a statute was civil or criminal.[122] Even though the *Young* Court relied heavily on *Hudson*, it did not consider the *Mendoza-Martinez* factors.[123]

When civilly committed under the Washington SVP Act, Young essentially was confined in prison.[124] Prison confinement qualifies as a restraint, and has historically been regarded as punishment.[125] The traditional aims of punishment are retribution and deterrence.[126] In *Young*, one of the main purposes for civil commitment under the Washington SVP Act was public safety.[127] The purpose was to prevent or deter offenders from committing similar crimes in the future.[128] The affirmative restraint in *Young* was punitive because it entailed a total loss of freedom indefinitely.[129] Therefore, the commitment fit the criteria of the first two factors set forth in *Mendoza-Martinez*.[130]

A finding of scienter was not necessary for civil commitment under the Washington SVP Act.[131] The State claimed that Young was "more likely than not to commit an unspecified crime of sexual violence in the indefinite future;"[132] therefore, it was necessary for him to be committed.[133] This did not necessarily equate to a showing that Young had the specific intent to commit these crimes or even had full knowledge of his actions.[134] Furthermore, under the Washington SVP

118. *See Hendricks*, 521 U.S. at 367.
119. 108 F. Supp.2d 1148 (W.D. Wash. 2000).
120. *Turay v. Seling*, 108 F. Supp.2d 1148, 1158-59 (W.D. Wash. 2000); *Young*, 531 U.S. at 257; Petitioner's Brief at 8-9, *Young*, 531 U.S. 250 (No. 99-1185).
121. Hudson v. United States, 522 U.S. 93, 99 (1997).
122. *Id.*
123. *See Young*, 531 U.S. at 251.
124. *Id.* at 259.
125. Young v. Weston, 898 F. Supp. 744, 752 (W.D. Wash. 1995).
126. *Id.* In *United States v. Halper*, the Court held that a "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . . ." 490 U.S. 435, 449 (1989).
127. *Young*, 531 U.S. at 257.
128. *See id.*
129. *Weston*, 898 F. Supp. at 752.
130. 372 U.S. 144, 168 (1963). The first factor was whether the "sanction involves an affirmative disability or restraint" and the second was "whether it has historically been regarded as a punishment." *Id.*
131. *See* WASH. REV. CODE § 71.09.010 (1992 & Supp. 2002); *Young*, 531 U.S. 250.
132. Respondent's Brief at 8, *Young*, 531 U.S. 250 (No. 99-1185).
133. *See id.*
134. *See id.*

Act, the State was required to prove that Young had a mental disability.[135] The presence of a mental disability, however, would make it difficult to prove that Young had specific knowledge of what he was doing and that his punishment resulted from an intentional act. This fulfilled the third *Mendoza-Martinez* factor.[136]

Young's commitment under the Washington SVP Act attached to a sexually violent act, which was a crime.[137] Furthermore, it was a crime for which Young had already been imprisoned.[138] Accordingly, the fourth *Mendoza-Martinez* factor was easily satisfied.[139]

The State could have argued that in addition to protecting the community from sexually violent offenses through punishment and retribution, the Washington SVP Act was also intended to treat the individuals confined by it.[140] The State, therefore, appears to have satisfied the fifth factor from *Mendoza-Martinez* in theory.[141] However, in practice, Washington did not provide adequate, if any, treatment to individuals committed under the Washington SVP Act.[142] Consequently, the most likely alternative — treatment — was not present in the Washington SVP Act.[143]

Even if the State had established an alternative purpose, confining a person indefinitely is excessive, especially when the individual has not committed a new crime. Thus, the facts in *Young* meet the criteria for the final factor of the *Mendoza-Martinez* test.[144]

The presence of these factors should have persuaded the Court to consider the punitive nature of the commitment permitted by the Washington SVP Act when deciding whether the statute was civil or criminal. In *Young*, where the factors had been satisfied, the Court should have found the Washington SVP Act to be criminal in nature.

3. *Clear Proof Argument*

The Supreme Court has recognized that a statute must be considered criminal if clear proof is demonstrated to show that statute is "so punitive either in purpose *or effect* as to negate [the State's] intention

135. *See Young*, 531 U.S. 250; WASH. REV. CODE § 71.09.010.

136. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). The third factor was whether the Act "comes into play only on a finding of scienter." *Id.*

137. *See Young*, 531 U.S. at 255.

138. *Id.*

139. *Mendoza-Martinez*, 372 U.S. at 168. The fourth factor was "whether the behavior to which [the statute] applies is already a crime." *Id.*

140. *Young*, 531 U.S. at 257.

141. *Mendoza-Martinez*, 372 U.S. at 168. The fifth factor was "whether an alternative purpose to which [the statute] may rationally be connected is assignable for it." *Id.*

142. *See supra* notes 66-68 and accompanying text.

143. *See supra* notes 66-68 and accompanying text.

144. *Mendoza-Martinez*, 372 U.S. at 168. The final factor was "whether [the effect of the statute] appears excessive in relation to the alternative purpose assigned." *Id.*

that the proceeding be civil."[145] Accordingly, the Court should have considered evidence of the Washington SVP Act's punitive effect in order to determine whether that evidence negated the State's intent to treat individuals confined under the Act.

According to the Supreme Court, the Due Process Clause of the Fourteenth Amendment requires state officials to provide an individual who is civilly committed "such individual treatment as will give each of them 'a realistic opportunity to be cured or to improve his or her mental condition.'"[146] Therefore, individuals who are civilly committed cannot simply be incarcerated; they must receive adequate treatment.[147] They are entitled by law to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[148]

In *Turay v. Seling*,[149] the U.S. District Court for the Western District of Washington determined that the Center did not provide constitutionally adequate treatment to its residents.[150] The Center's staff lacked the necessary certification to provide sex offender treatment, the units in which residents were housed were not appropriate for individuals who needed mental health treatment, and obtaining release from the Center was not possible.[151] A court-appointed resident advocate and psychologist concluded that because the conditions at the Center had not changed over a substantial number of years, he suspected that the Center was "designed and managed, either overtly or covertly, to punish and confine [individuals] to a life sentence without any hope of release to a less restrictive setting."[152] The conditions of the Center were punitive and unrelated to treatment; thus, they were criminal rather than civil in nature.

Young alleged sufficient facts that, if proved, constituted "clear proof" that the Washington SVP Act was punitive.[153] Consequently, the Court should have considered Young's allegations as well as other

145. Allen v. Illinois, 478 U.S. 364, 369 (1986) (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)); *see also* Hudson v. United States, 522 U.S. 93, 100 (1997).

146. Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1980).

147. *See id.*

148. Youngberg v. Romeo, 457 U.S. 307, 322 (1982); *see Allen*, 478 U.S. at 369; *In re* Brock, 99 Wash. App. 722 (2000) (stating that the civil commitment of sexually violent predators must be other than total confinement at a secure facility).

149. 108 F. Supp.2d 1148 (W.D. Wash. 2000).

150. Seling v. Young, 531 U.S. 250, 257 (2001) (citing Turay v. Seling, 108 F. Supp.2d 1148 (W.D. Wash. 2000)).

151. Young v. Weston, 192 F.3d 870, 875 (9th Cir. 1999).

152. *Id.* "Each year since 1990, approximately twenty-five convicted sex offenders set for release from prison are committed to the [Center] involuntarily, with little chance of ever leaving." Sarah E. Spierling, Notes and Comments, *Lock Them Up and Throw Away the Key: How Washington's Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL'Y 879, 920 (2001). Only five of the Center's residents committed under the statute have ever been released. *Id.* at 920-21. All five were under strict conditions. *Id.*

153. *See supra* notes 69-74 and accompanying text.

relevant expert testimony concerning conditions at the Center. The Court would then have the necessary information to determine whether the "clearest proof" was demonstrated that the punitive effect of the Washington SVP Act negated the State's intention to treat individuals confined under the statute.

4. *History of the Act*

In placing so much importance on the plain meaning of the language in the Washington SVP Act and the intent of the legislature, the Court should have also placed a significant emphasis on the history of this statute. The Task Force was created to respond to the public outrage resulting from highly publicized incidences of sexual violence and to evaluate and improve the existing laws.[154]

The Task Force's conclusions were questionable at best because many members of the Task Force were experts with personal or professional biases and vested interests in the issues to be resolved.[155] Additionally, its members did not thoroughly consider competing opinions before making their proposal.[156] The Task Force "held a series of public hearings; however, most of the stories told were ones of anger and fear."[157] The opinions of defense attorneys and sex offenders and their families were not heard by the Task Force.[158] Further, there were no psychiatrists on the Task Force to inform the group about the mental health aspects of this issue.[159]

By the time the Task Force was established, states had moved away from statutes that used civil commitment to treat sexual offenders.[160] This was because many experts in the field of psychiatry claimed that sex offenders were not necessarily mentally ill.[161] They also felt that involuntary treatment was not the best solution as it did not reduce recidivism rates.[162]

Due to the public outrage that erupted in Washington, the Task Force chose to put the public's mind at ease by reviving civil commit-

154. *See supra* notes 36-40 and accompanying text.

155. *Deliberate Misuse*, *supra* note 2, at 674. Some Task Force members ran programs that treated sex offenders and other members ran treatment programs for victims of sex offenses. *Id.* at 675. Their programs would be dramatically affected by the outcome of the law and were heavily funded by the legislature. *Id.*

156. *Id.* at 674.

157. *Id.*

158. *Id.* The Governor appointed twenty-four members to the Task Force. Only these individuals were allowed to participate in the actual decision-making. *Id.*

159. James D. Reardon, M.D., *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 849 (1992).

160. *See* Beth Keiko Fujimoto, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 880-81 (1992).

161. *See id.*

162. *See id.*

ment.[163] The legislature, under intense public pressure, simply deferred to the Task Force rather than thoroughly examining the practical effects the law would have.[164] This allowed the legislators to avoid public criticism while benefiting from immediate public satisfaction with the steps being taken.[165]

If the desired result was to keep sexual predators confined for life to protect the community against the chance that they might re-offend, the legislature could have increased sentences for such crimes or revised sentencing guidelines. The Constitution might allow that type of reform as long as it is reasonable, but it does not allow the court to sentence an individual twice for the same offense.

V. Conclusion

Andre Young served out his sentence for each conviction he received; however, he is still confined indefinitely in a prison.[166] The *Young* decision illustrates the Court's willingness to ignore unpleasant facts. This is especially interesting in light of the Court's prior decisions, in which it recognized the state's obligation to treat individuals who are civilly confined.[167] In *Young*, the Court had judicial findings that adequate treatment was not being provided at the Center.[168] The decision in *Young* begs the question of what it will take for the Court to determine that the punitive effects of a statute negate the state's intention.

The Court failed to answer this question in *Young*. Instead it chose to turn a blind eye on a flawed system in order to avoid potentially making it easier for "sexual predators" to be released after incarceration. Fear and disgust can apparently effect decisions of the Supreme Court. Constitutional rights, however, were designed to protect every individual, regardless how offensive his crime.

163. *See id.* at 881.
164. Boerner, *supra* note 38, at 552-53.

> The Governor created the Task Force, and the legislators deferred to the Task Force because it provided a windbreak to protect them from the raw force of the public passion. Had the Governor and legislature wanted to lead by running in front of the political wind, the Task Force would not have been created.

Id.
165. *See id.*
166. Seling v. Young, 531 U.S. 250 (2001).
167. Youngberg v. Romeo, 457 U.S. 307, 324 (1982); Allen v. Illinois, 478 U.S. 364, 369 (1986).
168. Turay v. Seling, 108 F. Supp.2d 1148 (W.D. Wash. 2000).