No End in Sight: Failed Treatment in Civil Commitment of Sex Offenders

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Sexually dangerous persons (“SDP”)1 are individuals with mental incapacities considered to pose such a danger to society that their confinement is necessary for public safety.2 Civil commitment programs were created to contain and treat SDPs, but they have not always succeeded in their stated goal of rehabilitation.3 In light of recent successful constitutional challenges, programs that fail to provide a real opportunity for discharge from commitment are essentially punitive and an improper means to try to serve public safety at the expense of others’ fundamental rights.

Current Civil Commitment Programs

Twenty states and the federal government have civil commitment programs that involuntarily detain those who are judged to be dangerous due to a mental illness.4 In order to be committed, a person must have engaged in harmful sexual conduct and have a mental or personality disorder that makes him or her pose a danger of committing further similar acts.5 Programs vary on the specific requirements necessary for a person to be a SDP.6 Most do not require a showing of mental incapacity of a formal diagnosis but rather a finding that a person has difficulty controlling his or her behavior, which makes him or her predisposed to commit a sexual offense.7 In some circumstances, SDPs do not even have to be convicted of a prior sex crime.8 Instead, the government can argue for their commitment on the grounds of a criminal charge alone.9 Often, people will be ordered into civil commitment immediately after serving a prison term for a sexual crime,10 transitioning from one form of confinement to another.

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1 The exact names used by states to refer to sex offenders placed in civil commitment vary, but they refer to the same general type of dangerous person. Minnesota uses “sexually dangerous persons,” while Missouri uses “sexually violent predators.” MINN. STAT. § 253D.02(16) (West 2013); MO. ANN. STAT. § 632.480(5) (West 2014).
2 42 U.S.C.A. § 16971(e)(2) (West 2006) (“The term “sexually dangerous person” means a person suffering from a serious mental illness, abnormality, or disorder, as a result of which the individual would have serious difficulty in refraining from sexually violent conduct or child molestation.”).
4 Id. See also Tanya Kessler, Note, “Purgatory Cannot Be Worse Than Hell”: The First Amendment Rights of Civilly Committed Sex Offenders, 12 N.Y. CITY L. REV. 283, 288 (2009) (defining civil commitment).
5 See, e.g., MINN. STAT. § 253D.02(16) (West 2013).
8 Corey R. Yung, Sex Offender Exceptionalism and Preventive Detention, 101 J. CRIM. L. & CRIMINOLOGY 969, 987 (2011) (“[A] person who unknowingly acquires child pornography (that he or she believes to be legal adult pornography) can be designated as “sexually dangerous” under [the federal law’s] broad definitions without ever being charged, tried, or convicted.”).
9 See Frezzo, supra note 6, at 655–56.
10 Id.
Past Constitutional Challenges to Civil Commitment

Civil commitment programs have withstood a variety of constitutional challenges. In *Kansas v. Hendricks*, the Court upheld an as-applied challenge to Kansas’s civil commitment statute.¹¹ Hendricks, who was involuntarily committed after repeated child molestation, argued that civil commitment immediately after his jail term was a second prosecution and punishment for the same offense.¹² The Court upheld the statute and Hendricks’s sentence as the program was civil, not punitive, in nature, and therefore could not implicate any double jeopardy concerns.¹³ The Court also rejected an *ex post facto* violation argument since commitment determinations were based on a current assessment of a SDP’s mental state and their potential for future danger.¹⁴

In *Kansas v. Crane*, the Court overturned the Kansas Supreme Court’s interpretation of *Hendricks* as requiring a showing that a SDP always has a complete inability to control his behavior.¹⁵ Based on the leeway afforded states to define mental abnormalities and the ever-evolving nature of psychiatry, confinement was held to only require a finding of some volitional impairment that makes it harder for a SDP to control his behavior.¹⁶ However, civil commitment programs continue to pose constitutional problems because committed SDPs may never be discharged.¹⁷

Constitutional Challenges in Minnesota and Missouri

In the last year, Minnesota’s and Missouri’s civil commitment programs were both struck down as unconstitutional. In June 2015, a federal judge upheld both facial and as-applied challenges to the Minnesota Sex Offender Program’s (“MSOP”) constitutionality in *Karsjens v. Jesson*.¹⁸ Substantive due process required that SDPs remain committed only if they are both mentally ill and pose a substantial danger to the public.¹⁹ The court emphasized that it was “fundamental to our notions of a free society that we [did] not imprison citizens because we [feared] that they might commit a crime in the future.”²⁰ Applying a strict scrutiny standard,²¹ *Karsjens* held that Minnesota’s program failed to require periodic risk assessments and did not provide mechanisms for those who satisfied discharge criteria to petition for release.²²

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¹² *Id.* at 354–56, 369–70.
¹³ *Id.* Kansas’s Sexually Violent Predator Act allowed commitment of currently incarcerated SDPs, like Hendricks, who would soon be released if they were found to suffer from a mental illness that made them likely to engage in further sexual predation. *Id.* at 351–53.
¹⁴ *Id.* at 370–71.
¹⁶ *Id.* at 412–13 ("It is enough [for commitment] to say that there must be proof of serious difficulty in controlling behavior.").
¹⁹ *Id.* at *25.
²⁰ *Id.* at *1.
²¹ *Id.* at *26.
²² *Id.* at *27–28.
MSOP also wrongly applied a more stringent standard for release than they did for commitment, requiring SDPs to no longer be dangerous in order to leave confinement instead of no longer being “highly likely to reoffend.” In addition, MSOP has never fully discharged a committed individual since its inception in 1994, showing no meaningful relationship between treatment and custody. MSOP’s continued confinement of people who completed treatment and no longer posed the required risk, made the program punitive since it “indefinitely detain[ed] a class of potentially dangerous individuals without the safeguards of the criminal justice system.”

A federal court in Missouri similarly found that Sex Offender Rehabilitation and Treatment Services (“SORTS”) facilities violated due process in Van Orden v. Schafer. SORTS confined people who no longer met commitment criteria because they had failed to provide risk assessments and release procedures. Similarly to MSOP, no person committed to SORTS had been released, converting civil confinement to punitive lifetime detention. However, the court denied a facial constitutional challenge, finding that the release requirement of a “change in abnormality” did not improperly hold people past a reduction in their dangerousness. These recent rulings may provide a new angle on civil commitment’s constitutionality and raise potential challenges for other states’ programs.

**Implications for Other States**

Though there are differences in how each state authorizes and runs its civil commitment program, Karsjens and Van Orden highlight commonly shared flaws: requiring different thresholds for committing and releasing SDPs, failing to treat and recuperate SDPs, and holding SDPs past a time they no longer pose a threat.

Facially, states like North Dakota and Nebraska, which require a harsher standard for release than commitment, could be found unconstitutional because the programs detain people in facilities after they no longer pose the potential harm that justified their confinement. However, facial challenges to civil commitment statutes have largely failed apart from Karsjens. The greater impact of these recent rulings will likely be felt through as applied challenges.

Courts should take a closer look at the connection between civil commitment’s treatment purpose and its actual success in recuperation. Karsjens and Van Orden found that since no SDP had been successfully treated and released, the programs were unconstitutionally punitive in

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23 Id. at *28.
24 Id. at *31.
25 Id. at *2.
26 No. 4:09CV00971 AGF, 2015 WL 5315753 (E.D. Mo. 2015).
27 Id. at *3
28 Id. at *26, *29.
29 Id. at *23–24.
30 North Dakota commits SVPs who are “likely to engage in further acts of sexually predatory conduct,” but will not allow discharge until “the individual is safe to be at large.” N.D. CENT. CODE ANN. § 25-03.3-01 (West 2013); N.D. CENT. CODE ANN. § 25-03.3-17 (West 2013). Nebraska commits SVPs who are “likely to engage in repeat acts of sexual violence,” but will not allow discharge until the individual “no longer poses a threat to the public.” NEB. REV. STAT. ANN. § 83-174.01 (West 2015); NEB. REV. STAT. ANN. § 71-1219 (West 2015).
As of 2007, Nebraska, North Dakota, Pennsylvania, and Texas had also never fully discharged a committed SDP from their programs. Illinois and Virginia have both only discharged one. The failure to discharge committed SDPs implies these programs are more punitive than rehabilitative.

Van Orden implies that as more time passes, civil commitment programs that fail to rehabilitate and release SDPs will have further weakened constitutional validity. The Van Orden court specifically raised concerns about the growing population of elderly committed men whose “progressive infirmities significantly reduced their risk to the public.” States will likely face more challenges as SDPs continue to age in their confinement and approach a point where they are no longer physically capable of perpetrating the danger that led to their initial commitment.

No one disputes the legitimate concern for public safety that led to civil commitment’s creation. However, states must remember that even though people are “sex offenders, who may indeed be subject to society's opprobrium,[that] does not insulate the criminal and civil justice systems from a fair and probing constitutional inquiry.”

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33 Updated State-by-state civil commitment statistics are hard to find, but both Minnesota and Missouri failed to discharge any SVPs until 2007. A Profile of Civil Commitment Around the Country, supra note 17.
34 Id.
36 Particularly over twenty five percent of California’s and Missouri’s committed population was over sixty years old in 2007. A Profile of Civil Commitment Around the Country, supra note 17.