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Civil Commitment: Another program is found unconstitutional

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On Friday, September 11, 2015, the Missouri civil commitment program (known as SORTS) was [declared unconstitutional](#), the [second such instance](#) since the start of this summer. For readers unfamiliar with the US civil commitment laws (AKA “SVP” laws), the short version is that 20 states and the federal government have laws that allow states to indefinitely confine sex offenders who are assessed as having a mental diagnosis that predisposes them to acts of sexual violence and meet statutory criteria of risk for future re-offense. There are controversies at every possible turn in these laws, their processes, and subsequent programs, and the US Supreme Court rulings allowing civil commitment have passed by as little as one vote. Because the author was an expert witness in the Missouri case, this blog post looks more at the big-picture issues rather than at that specific case. What seems clear is that there is an evolving consensus in the courts that civil commitment as it is practiced in many areas is unconstitutional and that governments and programs must work together closely to keep it lawful.

As in the Minnesota case decided earlier this summer (see an earlier series of blogs on this case – part [1](#), [2](#) and [3](#)), the Missouri case involved a treatment program in operation for many years (roughly 15 in Missouri’s case and 20 in Minnesota’s) from which few have been released and no one has ever been fully discharged. On one hand it is clear that there are some people who are civilly committed and are truly dangerous (the author has worked with people openly determined to re-offend). On the other hand, there is no bona fide form of treatment that takes a minimum of 15 years to complete. Add to this concerns that these programs were not assessing risk in a timely manner, and that each exist in a political climate that is uncondusive at best, and the dye for these outcomes was cast long, long ago. At what point does our field step back and say, “This is unacceptable”?

For all our advances in assessment and treatment, we seem to be



SAJRT Bloggers’ Profile

Chief Blogger Kieran McCartan, Ph.D. and Associate Bloggers David S. Prescott, LICSW and Jon Brandt, MSW, LICSW are longtime members of ATSA. We are dedicated to furthering the causes of evidenced-based practice, understanding, and prevention in the field of sexual abuse.

The Association for the Treatment of Sexual Abusers is an international, multi-disciplinary organization dedicated to preventing sexual abuse. Through research, education, and shared learning ATSA promotes evidence based practice, public policy and community strategies that lead to the effective assessment, treatment and management of individuals who have sexually abused or are risk to abuse.

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producing no improved outcomes in the civil commitment arena whatsoever. A study that has not garnered the amount of discussion that it deserves is Grant Duwe's 2014 [study](#) of the effects of civil commitment. Among his findings was that only 28% of his sample would likely have re-offended again in their lifetime, raising further questions as to whether states have simply cast their nets too [wide](#). Where "Blackstone's Formulation" that, "*It is better that ten guilty persons escape than that one innocent suffer*" has been taught in schools throughout much of American history, the idea that that some people are held indefinitely beyond the expiration of their sentences really ought to give anyone pause. In fact, the principle behind Blackstone's Formulation goes back to antiquity. For example, in the Bible, Genesis 18:23-24 states, "Then Abraham approached him and said: "Will you sweep away the righteous with the wicked? What if there are fifty righteous people in the city? Will you really sweep it away and not spare the place for the sake of the fifty righteous people in it?" What are the implications for civil commitment?

Closer to street level, two particular cases, apparently among many, made the news last year. The first was a young man who had sexually abused others at an early age. From a [media account](#):

The four court-appointed experts argued that T's early sexual offenses as a juvenile were influenced by his own sexual victimization, and that his behavior was likely exacerbated by his attention deficit hyperactivity disorder (ADHD) and untreated trauma. The experts also noted that most juveniles who act out sexually do not continue to offend as adults. "There is little evidence to suggest that T is a dangerous sexual offender who poses a significant risk to public safety," the experts wrote.

After considerable legal debate, it seemed that T would be placed on some form of supervised release, but by all appearances, that has not happened a year after his case was before the judge.

Another case involved the only woman civilly committed as a sex offender in that state. From a different [media account](#):

B's case has proven to be even more vexing for the state. As the only woman ever civilly committed to MSOP, it's clear officials had little idea what to do or how to treat her. ... she suffered a traumatic upbringing: abused by her father, brother and two of her uncles starting as early as 5 years old and continuing through young adulthood. She had a child at 14, and as an adult, sexually abused two boys.

(A)nother of the court-appointed experts ... characterized B's offenses as "reactive" to her trauma as a child. As an adult, B is "flirtatious" and "forward" and easily stimulated in discussions of sexual activities. All of which means that treating her in an all-male program, with group therapy sessions, might have actually made things worse, W said. "She is in a group with men, focusing on issues of men and living with men."

Like the earlier example, there are no reports that this woman has been moved to more conducive circumstances after more than a year since that hearing. Similar cases (such as

this [juvenile-only example](#) or this [65-year-old](#) man who reports 24 therapists in his 20-plus years of commitment) have been reported in the media, and yet the status quo continues.

Clearly, each of these cases involve people who are difficult to treat on a good day. For a sense of scale, though, the woman described above was civilly committed during Bill Clinton's first year in office, 22 years ago (although others have been committed longer). Likewise, World War II lasted roughly six years while people are not deemed as being below the statutory threshold for civil commitment despite participation in treatment for two and three times that amount of time. One commentator described the lack of outcry around these circumstances as having the same emotional valence as fishermen noting that they sometimes get dolphins caught in their tuna nets (and it is worth remembering that these programs typically house hundreds of residents). At what point is remaining silent about the judicial findings, and the many task force reports and outside evaluations they are based on, no longer acceptable?

Sadly, the people working at the front lines are often directed by policy and supervisors not to discuss these issues openly. In the author's experience, some people care more deeply than others about balancing the rights and welfare of the community with the beneficence and rights of the client in treatment. There is no question that there are good people at the front lines trying to do the right thing and wrestling with deeply personal questions about the way forward. Still, given that two exercises of civil commitment statutes have been deemed unconstitutional – and in the eyes of many that is another way of saying fundamentally un-American – questions emerge for all practitioners:

At what point do professionals in these circumstances openly acknowledge to them/ourselves that we are participating in systems that are openly unconstitutional and therefore unlawful according to the standards of much of the western world? Even beyond American law, consider the case of [Shawn Sullivan](#), who fled the US and was on Interpol's most-wanted list. One of the UK's highest courts found that the state's program to commit sex offenders indefinitely to treatment violates European human rights law. From the article:

On Wednesday, Lord Justice Alan Moses said returning Sullivan for trial with the possibility of later being placed in the sex offender system would be a "flagrant denial of his rights" under European law.

With that in mind, professionals might also want to ask at what point we are violating [basic human rights](#) when we are providing treatment that no one can complete and not providing empirically based risk assessments and taking action based on the results.

Meanwhile, some programs do appear to be working in general, such as Wisconsin's program at Sand Ridge and New York's system involving intensive community supervision. However, even these programs, like the [formerly all-outpatient](#) Texas civil commitment program, are seeing their constitutionality threatened by broad residency restrictions and policies that restrict where resident can be discharged to; for some residents in Wisconsin, for example, the process can and does take years. Texas, of course, has recently moved to a more inpatient model.

As a profession, we have the research, the tools, and the templates for prompt and adequate treatment and yet find ourselves in political climates where we can't use them. We can reduce the harm of sexual abuse, but we tend to forget that in the interest of political expedience. At what point do we as individual professionals, or as professional organizations take a stand against practices that are clearly not working to anyone's long-term benefit? One need only look

at the recent experiences of the [American Psychological Association and its involvement with torture](#) to see how collective inaction can bring disgrace to a profession.

Personally, my belief is that we all need to talk about these issues much more than we do. Legal action and journal articles are one matter, public dialog is something else. Critical self-examination takes courage. Perhaps it starts with all of us when we say to ourselves: *All sexual abuse is unacceptable, but I will not violate the rights of others in the name of reducing harm. It is time to take a stand for the rights of all human beings.*