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# THE CONSTITUTIONALITY OF CIVIL COMMITMENT AND THE REQUIREMENT OF ADEQUATE TREATMENT

DOUGLAS G. SMITH\*

**Abstract:** This Article examines the constitutional concerns raised by, and compares the costs and benefits associated with, the civil commitment of sexually violent predators. Specifically, it focuses on the State of Washington's civil commitment program, the oldest such program in the United States and the only program in the nation to have its constitutional parameters fully litigated. In large measure, the litigation surrounding Washington's civil commitment program has defined the scope of the constitutional rights of civilly committed individuals to constitutionally adequate treatment. At the same time, it has demonstrated many of the problems associated with such programs and provides an important case study in assessing their costs and benefits. This Article concludes that, in addition to the potential constitutional concerns regarding civil commitment, the costs of civil commitment appear to outweigh its benefits. As a result, increasing criminal penalties for crimes of sexual violence may be a superior alternative.

## INTRODUCTION

In March 2007, the United States District Court for the Western District of Washington dissolved "a history-making injunction" that governed the treatment of "sexually violent predators" who had been civilly committed at Washington's Special Commitment Center ("SCC").<sup>1</sup> The injunction was the product of litigation brought by SCC residents who, more than seventeen years earlier, had alleged that the conditions of their confinement violated their civil rights.<sup>2</sup>

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<sup>1</sup> See *Turay v. Richards (Order Granting Motion to Dissolve Injunction)*, No. C91-0664RSM, 2007 WL 983132, at \*1 (W.D. Wash. Mar. 23, 2007). The author represents one of the SCC residents in his pending appeal to the Ninth Circuit.

<sup>2</sup> See *id.*

The nearly two-decade-long history of the SCC litigation demonstrates the substantial constitutional difficulties associated with the civil commitment of sexually violent predators.<sup>3</sup> Civil commitment laws are motivated by good intentions—to protect the public from individuals who may pose a significant danger.<sup>4</sup> Individuals who are civilly committed, however, receive significant constitutional protections that place government officials in a quandary.<sup>5</sup> On the one hand, there are substantial benefits produced by the continued incarceration of individuals who pose a potential risk to society.<sup>6</sup> On the other hand, there are significant monetary costs in providing sexually violent predators with constitutionally adequate treatment.<sup>7</sup>

The U.S. Supreme Court has made clear, however, that adequate treatment is a fundamental prerequisite to any civil commitment program.<sup>8</sup> Without adequate treatment providing a path to an individual's potential release, civil commitment becomes state-imposed criminal punishment, but a civilly committed individual lacks the procedural protections typically afforded a criminal defendant.<sup>9</sup> Nonetheless, the Court has not formulated specific requirements for a constitutionally adequate treatment program for civilly committed individuals.<sup>10</sup> As a result, lower courts have been forced to develop their own frameworks for evaluating the constitutionality of civil commitment programs.<sup>11</sup>

This Article addresses the constitutional concerns present in a civil commitment program for sexually violent predators, as well as the costs

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<sup>3</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4–5; Turay v. Seling (*Nov. 15, 1999 Order*), No. C91–664WD, slip op. at 6–18 (W.D. Wash. Nov. 15, 1999).

<sup>4</sup> See Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 651–54 (2008) (discussing the legislative motives underlying civil commitment statutes).

<sup>5</sup> See *Seling v. Young*, 531 U.S. 250, 261–62 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 356–58 (1997); *Allen v. Illinois*, 478 U.S. 364, 368–71 (1986).

<sup>6</sup> See Vitiello, *supra* note 4, at 653–54.

<sup>7</sup> See *id.* at 680.

<sup>8</sup> See *Seling*, 531 U.S. at 261–62; *Hendricks*, 521 U.S. at 366.

<sup>9</sup> See *Hendricks*, 521 U.S. at 366; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1329–30 (1991) (discussing the difficulties in identifying the distinction between civil and criminal proceedings); Eric S. Janus, *Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233, 1234–35 (2004) (discussing the criminal procedural safeguards that are lost in civil commitment proceedings).

<sup>10</sup> See *Seling*, 531 U.S. 250; *Hendricks*, 521 U.S. 346; *Allen*, 478 U.S. 364.

<sup>11</sup> See, e.g., *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (citing *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980)); Turay v. Seling (*Nov. 25, 1998 Order*), No. C91–664WD, slip op. at 11–12 (W.D. Wash. Nov. 25, 1998).

and benefits associated with such programs. Specifically, this Article focuses on the State of Washington's civil commitment program, the oldest such program in existence in the United States.<sup>12</sup> It is the only program in the nation in which the constitutional parameters of the treatment program have been fully litigated.<sup>13</sup> From its inception, Washington's civil commitment program has been the subject of significant litigation, and that litigation has defined the scope of a civilly committed individual's right to constitutionally adequate treatment. At the same time, the litigation has demonstrated many of the problems associated with civil commitment programs and provides an important case study in assessing their costs and benefits.<sup>14</sup>

Part I discusses the SCC litigation's lengthy history.<sup>15</sup> Part II analyzes the U.S. Supreme Court's approach to assessing the constitutionality of statutes authorizing civil commitment.<sup>16</sup> Part II also details the conditions under which an individual may be deprived of his liberty without access to usual constitutional protections and examines the Court's jurisprudence restricting states' ability to impose indefinite incarceration.<sup>17</sup> Part III addresses the framework for evaluating whether a treatment program is constitutionally adequate and details the specific elements of a constitutionally adequate treatment program.<sup>18</sup> Part IV first discusses the SCC's continued failure to adhere to court orders, a failure that resulted in the district court citing the SCC for contempt of court.<sup>19</sup> It concludes by discussing the district court's lifting of the contempt sanctions and dissolution of the injunction, despite the SCC's engagement in prohibited "backsliding."<sup>20</sup> Finally, Part V addresses the relationship between constitutional treatment standards and the constitutionality of civil commitment programs generally.<sup>21</sup> It also exam-

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<sup>12</sup> See *infra* notes 138–379 and accompanying text.

<sup>13</sup> See *infra* notes 138–379 and accompanying text.

<sup>14</sup> See *infra* notes 138–379 and accompanying text.

<sup>15</sup> See *infra* notes 24–48 and accompanying text.

<sup>16</sup> See *infra* notes 49–137 and accompanying text.

<sup>17</sup> See *infra* notes 49–137 and accompanying text. The Court's decisions on the constitutionality of civil commitment have been widely cited in assessing the constitutionality of the detention of individuals ranging from the mentally ill to enemy combatants detained in the war on terror. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2003) (Scalia, J., dissenting) (citing *Hendricks*, 521 U.S. at 358); *id.* at 592 (Thomas, J., dissenting) (citing *Hendricks*, 521 U.S. at 358); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 80 (2005); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1054–76 (2002).

<sup>18</sup> See *infra* notes 138–198 and accompanying text.

<sup>19</sup> See *infra* notes 199–250 and accompanying text.

<sup>20</sup> See *infra* notes 251–342 and accompanying text.

<sup>21</sup> See *infra* notes 343–359 and accompanying text.

ines the difficulties in ensuring government compliance in operating constitutionally adequate treatment programs<sup>22</sup> and concludes by discussing increased criminal penalties for sex offenders as an alternative to civil commitment programs.<sup>23</sup>

### I. A HISTORY OF THE SCC LITIGATION

In 1994, a federal jury in the State of Washington found that Washington's Special Commitment Center ("SCC") was not providing residents with constitutionally adequate treatment.<sup>24</sup> As a result, Judge William L. Dwyer issued an injunction (the "Turay Injunction") requiring the SCC to bring its treatment program into compliance with constitutional requirements.<sup>25</sup>

The Turay Injunction imposed broad requirements on the SCC to (1) adopt and implement a plan for hiring and training competent therapists, (2) implement strategies to rectify the lack of trust between the residents and SCC staff, (3) implement a treatment program that involves residents' spouses and family members and contains other generally accepted therapy components, (4) develop individual treatment plans for each resident to measure progress, and (5) provide an expert in sex offender treatment to supervise and consult with SCC staff.<sup>26</sup> Because the SCC was slow to comply with the Turay Injunction, the district court subsequently appointed a special master, Dr. Janice Marques, to oversee the SCC and provide the court with periodic reports regarding the SCC's compliance.<sup>27</sup>

In October 1998, Judge Dwyer conducted an evidentiary hearing to assess the SCC's progress, and in November 1998, he issued an order both finding that the SCC had not complied with the Turay Injunction and identifying a detailed list of unaddressed items.<sup>28</sup> The court demanded that the SCC, among other things, (1) provide additional staff training, (2) develop a coherent and individualized treatment program for each resident, (3) formulate adequate procedures for residents'

<sup>22</sup> See *infra* notes 343-359 and accompanying text.

<sup>23</sup> See *infra* notes 360-379 and accompanying text.

<sup>24</sup> See *Turay v. Weston (Turay Injunction)*, No. C91-664WD, slip op. at 2 (W.D. Wash. June 6, 1994).

<sup>25</sup> See *id.* at 4-5.

<sup>26</sup> *Id.*

<sup>27</sup> *Turay v. Weston (Order Appointing Special Master)*, No. C91-664WD (W.D. Wash. Sept. 22, 1994); *Turay v. Weston (First Supplemental Order Regarding Injunction)*, No. C91-664WD (W.D. Wash. Aug. 22, 1994).

<sup>28</sup> *Turay v. Seling (Nov. 25, 1998 Order)*, No. C91-664WD, slip op. at 3, 10-15 (W.D. Wash. Nov. 25, 1998).

families to participate in treatment, (4) construct a separate treatment-oriented facility, (5) eliminate routine strip searches of SCC residents, (6) eliminate the monitoring of residents' telephone calls and remove its prohibition on outgoing calls, (7) develop improved meal and activity schedules, (8) improve the treatment environment, (9) implement fair and reasonable grievance procedures and behavior management plans, (10) implement an oversight program consisting of an internal review process and an external body, and (11) make a constitutionally adequate program a reality.<sup>29</sup> After noting the SCC's "history of non-compliance with the Turay Injunction," the U.S. Court of Appeals for the Ninth Circuit later affirmed Judge Dwyer's order, holding that the district court correctly found that the SCC was providing residents with constitutionally inadequate treatment.<sup>30</sup>

The SCC, however, continued to provide constitutionally inadequate treatment to residents even after the Ninth Circuit's decision.<sup>31</sup> In November 1999, following another evidentiary hearing, Judge Dwyer held the SCC in contempt for failing to take reasonable steps to comply with the Turay Injunction and his November 1998 order.<sup>32</sup> Over the next several years, the SCC still failed to comply with the district court's orders, and, as a result, contempt sanctions accumulated.<sup>33</sup>

After Judge Dwyer's death in 2000, the case was reassigned to Judge Barbara Rothstein and then-Judge Robert Lasnik.<sup>34</sup> In June 2004, Judge Lasnik dissolved many elements of the Turay Injunction and purged Judge Dwyer's 1999 contempt order.<sup>35</sup> Nonetheless, Judge Lasnik still found that the SCC had failed to satisfy the constitutional requirements regarding "the development and funding of an off-island LRA," or "Less Restrictive Alternative" placement to facilitate residents'

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<sup>29</sup> *Id.* at 12-14.

<sup>30</sup> Sharp v. Weston, 233 F.3d 1166, 1172-74 (9th Cir. 2000).

<sup>31</sup> See, e.g., Turay v. Seling (Nov. 15, 1999 Order), No. C91-664WD, slip op. at 4-5 (W.D. Wash. Nov. 15, 1999) (describing the goal of providing constitutionally adequate treatment as unattained); Turay v. Seling (Order on Renewed Motions for Contempt and Dissolution of Injunction), No. C91-664WD, slip op. at 3 (W.D. Wash. May 27, 1999) (holding that the SCC still failed to meet constitutional minimum requirements for providing mental health treatment).

<sup>32</sup> Nov. 15, 1990 Order, slip op. at 6, 22.

<sup>33</sup> See Turay v. Seling (May 5, 2000 Order), No. C91-664WD, slip op. at 16 (W.D. Wash. May 5, 2000).

<sup>34</sup> See Turay v. Seling (June 10, 2004 Order), No. C91-0664L, slip op. at 2 (W.D. Wash. June 10, 2004) (noting the case's previous presiding judges); Turay v. Seling (Order Transferring Cases), No. C91-664WD, slip op. at 2 (W.D. Wash. Jan. 18, 2002).

<sup>35</sup> June 10, 2004 Order, slip op. at 10.

return to the community upon successful treatment.<sup>36</sup> Judge Lasnik further held that dissolution of the injunction would be conditioned on a lack of significant “backsliding” by the SCC in meeting the Turay Injunction’s original requirements.<sup>37</sup> The Ninth Circuit subsequently affirmed Judge Lasnik’s order.<sup>38</sup>

After the case was reassigned to Judge Ricardo Martinez,<sup>39</sup> the SCC moved to dissolve the Turay Injunction’s remaining provisions.<sup>40</sup> In response, residents submitted extensive evidence demonstrating that the SCC had engaged in the “backsliding” specifically prohibited by Judge Lasnik’s order.<sup>41</sup> This evidence included (1) reports issued by the Inspection of Care Committee (“IOC committee” or “IOCC”), a group comprised of independent experts appointed by the SCC, which found that the facility’s treatment program was inadequate, (2) a declaration from an IOCC expert confirming that the SCC’s treatment program did not meet constitutional requirements, (3) several affidavits from residents documenting SCC violations, and (4) a recommendation by Dr. Janice Marques, the former special master, that the Turay Injunction be maintained.<sup>42</sup>

Despite the evidence presented, the district court denied the plaintiffs’ request for an evidentiary hearing,<sup>43</sup> and on March 23, 2007, the court dissolved the Turay Injunction entirely, abruptly terminating nearly two decades of judicial oversight, despite the SCC’s minimal progress in complying with the terms of the court’s injunction.<sup>44</sup> The district court specifically found that the “plaintiffs have demonstrated that some backsliding has occurred with respect to the treatment program at issue in this case.”<sup>45</sup> Moreover, it observed that “[t]his case has been troublesome to the Court in that there seems to be no right answer, and

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<sup>36</sup> *Id.* at 3, 7–8.

<sup>37</sup> *Id.* at 10.

<sup>38</sup> *Cunningham v. Weston*, 180 Fed. App’x 644, 646 (9th Cir. 2006).

<sup>39</sup> *Turay v. Seling (Reassignment Order)*, No. C91–664RSM (W.D. Wash. July 6, 2004).

<sup>40</sup> *See Turay v. Richards (Order Granting Motion to Dissolve Injunction)*, No. C91–0664RSM, 2007 WL 983132, at \*3 (W.D. Wash. Mar. 23, 2007).

<sup>41</sup> *See id.* at \*3–5.

<sup>42</sup> *Id.*; Transcript of Oral Argument at 13, *Turay v. Richards*, No. C91–664RSM (W.D. Wash. Sept. 18, 2006) [hereinafter Sept. 18, 2006 Transcript]; Declaration of Janice K. Marques § 19, *Turay v. Richards*, No. C91–664RSM (W.D. Wash. Apr. 14, 2006) [hereinafter Marques Declaration].

<sup>43</sup> *Turay v. Richards (July 26, 2006 Order on Scope of Hearing)*, No. C91–0664RSM, slip op. at 2 (W.D. Wash. July 26, 2006).

<sup>44</sup> *See Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*5.

<sup>45</sup> *Id.* at \*3.

no good fix for the situation these plaintiffs face at the SCC.<sup>46</sup> Nonetheless, the court dismissed the residents' objections by summarily stating, without explanation, that the SCC's backsliding did not "rise to the level of a Constitutional violation."<sup>47</sup> The court explained that it dissolved the Turay Injunction because, although the residents disputed that the SCC had implemented an effective LRA protocol, there was "no dispute" that the SCC had constructed an off-island LRA.<sup>48</sup>

## II. THE SUPREME COURT'S CIVIL COMMITMENT JURISPRUDENCE

The Supreme Court has addressed the constitutionality of civil commitment in three cases: *Allen v. Illinois*, *Kansas v. Hendricks*, and *Seling v. Young*.<sup>49</sup> In those cases, the Court has made clear that the Due Process Clause prohibits states from imposing "punishment" under the guise of civil remedies.<sup>50</sup> As a result, in order for civil commitment schemes to pass constitutional muster, states must provide treatment when individuals are treatable,<sup>51</sup> but the Court has not detailed what treatment, exactly, the Constitution requires.<sup>52</sup> Instead, the Court has focused on the criteria used to determine when an individual will be subject to civil commitment.<sup>53</sup> As a result, although it is clear that treatment is an essential element of the due process requirement, the exact parameters of such treatment remain unclear.<sup>54</sup>

### A. *Allen v. Illinois: Determining Whether a Civil Commitment Program Imposes Punishment*

One of the first instances in which the Court evaluated a statutory scheme authorizing civil commitment for sexually violent predators was

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<sup>46</sup> *Id.* at \*5.

<sup>47</sup> *Id.* at \*3-4.

<sup>48</sup> *Id.* at \*2-3, \*5.

<sup>49</sup> See *Seling v. Young*, 531 U.S. 250, 258 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997); *Allen v. Illinois*, 478 U.S. 364, 365 (1986).

<sup>50</sup> See *Seling*, 531 U.S. at 256-57; *Hendricks*, 521 U.S. at 348; *Allen*, 478 U.S. at 373-74.

<sup>51</sup> *Youngberg v. Romeo*, 457 U.S. 307, 326 (1982) (Blackmun, J., concurring). As early as 1982, Justice Blackmun noted in his concurrence in *Youngberg* that there may be situations in which "commitment without any 'treatment' whatsoever would not bear a reasonable relation to the purposes of the person's confinement" and would thereby render it unconstitutional. *Id.* The treatment requirement was later confirmed in decisions such as *Allen*, *Hendricks*, and *Seling*. See *infra* notes 55-137.

<sup>52</sup> See *Seling*, 531 U.S. at 261-62; *Hendricks*, 521 U.S. at 347-48; *Allen*, 478 U.S. at 369-70.

<sup>53</sup> See, e.g., *Hendricks*, 521 U.S. at 280-81 (evaluating Kansas's statutory criteria for committing sexual offenders).

<sup>54</sup> See *Seling*, 531 U.S. at 261-62; *Hendricks*, 521 U.S. at 347-48; *Allen*, 478 U.S. at 369-70.



in *Allen v. Illinois*.<sup>55</sup> In *Allen*, the Court held that the Illinois Sexually Dangerous Persons Act was not a "criminal" statute and that individuals in proceedings under the Act could therefore not invoke the Fifth Amendment's guarantee against compulsory self-incrimination.<sup>56</sup> In determining whether the statute was "criminal" in nature, the Court assessed whether the statute was punitive in either purpose or effect.<sup>57</sup> In making this determination, the Court found it significant that the Act required the State to provide "care and treatment for [persons adjudged sexually dangerous] . . . in a facility set aside to provide psychiatric care" and that "[i]f the patient is found to be no longer dangerous, the court shall order that he be discharged."<sup>58</sup>

The Court, however, did not confine its investigation strictly to the statutory text.<sup>59</sup> The Court also examined the effect of the statute and decided that the record did not demonstrate that individuals had been "confined under conditions incompatible with the State's asserted interest in treatment."<sup>60</sup> The Court, however, was not presented with an opportunity to articulate what constituted sufficient treatment to support a determination that the statute was non-punitive and therefore "civil," as the record contained "little or nothing about the regimen at the psychiatric center."<sup>61</sup> Accordingly, in the absence of contrary evidence, the Court could not "say that the conditions of [the] petitioner's confinement themselves amount to 'punishment' and thus render 'criminal' the proceedings which led to confinement."<sup>62</sup>

The dissent agreed that treatment was a critical factor in assessing whether a statute was punitive and therefore "criminal."<sup>63</sup> It noted that "[t]he Illinois Supreme Court ha[d] stated unambiguously that 'treat-

<sup>55</sup> 478 U.S. at 375.

<sup>56</sup> *Id.* at 364-65.

<sup>57</sup> *Id.* at 369 (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

<sup>58</sup> *Id.* (quoting the Illinois statute in force in 1985); *see id.* at 373 ("[T]he State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment."); *see also* 725 ILL. COMP. STAT. ANN. 205/8 to /9 (LexisNexis 2008) (current amended version of statute in dispute in *Allen*).

<sup>59</sup> *See Allen*, 478 U.S. at 373-74.

<sup>60</sup> *Id.* at 373.

<sup>61</sup> *Id.* at 373-75.

<sup>62</sup> *Id.* at 374. The Court did observe that, during oral argument, "counsel for the State assure[d] [the Court] that under Illinois law sexually dangerous persons must not be treated like ordinary prisoners," which suggested that confinement conditions were non-punitive. *See id.*

<sup>63</sup> *See id.* at 380 (Stevens, J., dissenting).

ment, not punishment, is the aim of the statute.’<sup>64</sup> It further observed, however, that “[a] goal of treatment is not sufficient, in and of itself to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as ‘criminal.’”<sup>65</sup>

In other words, the label applied to a statute by the legislature is not dispositive.<sup>66</sup> Rather, both the majority and dissent agreed that courts must undertake an inquiry into the actual effect of the statute, including whether the stated goal of “treatment” is manifested in practice.<sup>67</sup> Nonetheless, because the record was not well-developed, the Court did not articulate the specific elements of a constitutionally adequate treatment program.<sup>68</sup> Accordingly, lower courts were left to develop the constitutional parameters of the treatment requirement.<sup>69</sup>

### B. *Kansas v. Hendricks: Evaluating the Statutory Standards for Civil Commitment*

In *Kansas v. Hendricks*, the Court addressed the constitutionality of a similar statute, Kansas’s Sexually Violent Predator Act.<sup>70</sup> That statute

<sup>64</sup> *Allen*, 478 U.S. at 380 (Stevens, J., dissenting) (quoting *People v. Allen*, 481 N.E.2d 690, 695 (Ill. 1985)).

<sup>65</sup> *Id.* As the dissent explained:

With respect to a conventional criminal statute, if a State declared that its goal was “treatment” and “rehabilitation,” it is obvious that the Fifth Amendment would still apply. The sexually-dangerous-person proceeding similarly may not escape a characterization as “criminal” simply because a goal is “treatment.” If this were not the case, moreover, nothing would prevent a State from creating an entire corpus of “dangerous person” statutes to shadow its criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and “criminal propensities,” and constitutional protections for criminal defendants would be simply inapplicable.

*Id.*

<sup>66</sup> *See id.* at 373 (majority opinion); *id.* at 380 (Stevens, J., dissenting).

<sup>67</sup> *See id.* at 373–75 (majority opinion).

<sup>68</sup> *See id.*

<sup>69</sup> *See, e.g., Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (citing *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980)); *Turay v. Seling (Nov. 25, 1998 Order)*, No. C91-664WD, slip op. at 11–12 (W.D. Wash. Nov. 25, 1998).

<sup>70</sup> 521 U.S. at 350. The *Hendricks* decision has been the subject of significant academic commentary. *See generally* Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 Nw. U. L. Rev. 1203 (1998); Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. Colo. L. Rev. 73 (1999); Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota’s Sex Offender Commitment Litigation*, 92 Nw. U. L. Rev. 1279 (1998); Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. Ill. L. Rev. 1199; Michael L. Perlin, *“There’s No Success Like Failure/And Failure’s No Success at All”: Exposing the Pretextuality of Kansas v. Hendricks*, 92 Nw. U. L. Rev. 1247

established procedures for the civil commitment of individuals who had a "mental abnormality" or a "personality disorder" that caused them to engage in "predatory acts of sexual violence."<sup>71</sup> The Kansas Supreme Court invalidated the Act by ruling that it violated due process.<sup>72</sup> In particular, the court held that the Act was defective because it did not require a finding of "mental illness" before an individual was subject to commitment, but only required that the individual suffer from a "mental abnormality."<sup>73</sup> The court further held the program violated due process because the state was not providing constitutionally adequate treatment.<sup>74</sup>

A divided U.S. Supreme Court reversed the Kansas Supreme Court's decision and held that the Act was constitutional.<sup>75</sup> In the majority opinion, Justice Thomas observed that "[a]lthough freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' [the] liberty interest is not absolute"<sup>76</sup> and thus, "an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context."<sup>77</sup> Accordingly, the government had the authority in "narrow circumstances" to detain individuals who were unable to control their behavior and consequently posed a danger to public health and safety.<sup>78</sup> The Court also observed that it had "consistently upheld such involuntary commitment statutes provided the confine-

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(1998); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. U. L. REV. 1 (2003); Elizabeth A. Weeks, *The Newly Found "Compassion" for Sexually Violent Predators: Civil Commitment and the Right to Treatment in the Wake of Kansas v. Hendricks*, 32 GA. L. REV. 1261 (1998); Note, *Involuntary Commitment of Violent Sexual Predators*, 111 HARV. L. REV. 259 (1997).

<sup>71</sup> KAN. STAT. ANN. §§ 59-29a01 to -29a22 (1994). The Act defined a "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* § 59-29a02(b).

<sup>72</sup> See *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996), *rev'd sub nom. Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>73</sup> See *id.* at 137-38. The Kansas statute specifically provided that "[t]he involuntary detention or commitment . . . shall conform to constitutional requirements for care and treatment." KAN. STAT. ANN. § 59-29a09. It also provided for periodic review to determine whether an individual's condition had sufficiently improved to warrant release. See *id.* §§ 59-29a08, 59-29a10 to -29a11.

<sup>74</sup> See *In re Hendricks*, 912 P.2d at 136.

<sup>75</sup> See *Hendricks*, 521 U.S. at 370.

<sup>76</sup> *Id.* at 356 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* at 357.

ment takes place pursuant to proper procedures and evidentiary standards.<sup>79</sup>

In particular, the Court made clear that although “[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment,” it had “sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor such as a ‘mental illness’ or ‘mental abnormality.’”<sup>80</sup> The Court also rejected the distinction drawn by the Kansas Supreme Court between “mental illness” and a “mental abnormality,”<sup>81</sup> and found that the Kansas statute survived constitutional scrutiny because it limited civil confinement to individuals who “suffer from a volitional impairment rendering them dangerous beyond their control.”<sup>82</sup>

Likewise, the Court found that the Act, as a whole, was not “punitive” in nature.<sup>83</sup> The majority asserted that “none of the parties argue that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions.”<sup>84</sup> Nonetheless, the Court went on to discuss the general parameters for ascertaining when a civil commitment statute imposes “punishment” that conflicts with the due process requirement.<sup>85</sup> The Court noted that “the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.”<sup>86</sup> The Court added, “The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded.”<sup>87</sup> Although the Court acknowledged that Kansas’s civil commitment statute might lead to prolonged confinement because the commitment’s purpose was “to hold the person until his mental abnormality no longer causes him to be a threat to others,” it was not imposing punishment.<sup>88</sup>

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<sup>79</sup> *Id.* (citing *Foucha*, 504 U.S. at 80; *Addington v. Texas*, 441 U.S. 418, 426–27 (1979)).

<sup>80</sup> *Hendricks*, 521 U.S. at 358 (citing *Heller v. Doe*, 509 U.S. 312, 314–15 (1993); *Allen*, 478 U.S. at 366; *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 271–72 (1940)).

<sup>81</sup> *Id.* at 358–59.

<sup>82</sup> *Id.* at 358.

<sup>83</sup> *Id.* at 369.

<sup>84</sup> *Id.* at 363.

<sup>85</sup> See *Hendricks*, 521 U.S. at 363–64.

<sup>86</sup> *Id.* at 363 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 363–64. The Court later determined that the government need not show that an individual has a total or complete lack of control to satisfy the requirements for civil commitment under *Hendricks*. See *Kansas v. Crane*, 534 U.S. 407, 411 (2002). See generally

The majority also specifically addressed the Kansas Supreme Court's determination that the lack of "any legitimate 'treatment' provided by the State violated the Due Process Clause."<sup>89</sup> The Court again provided little guidance regarding the elements of a constitutionally adequate treatment program.<sup>90</sup> The Kansas Supreme Court had suggested that the plaintiff's condition was in fact "untreatable" and that "[a]bsent a treatable mental illness, . . . [the plaintiff] could not be detained against his will."<sup>91</sup> The Court, however, held that civil confinement was permissible even in cases where the detainee's condition was not treatable, because "incapacitation may be a legitimate end" of a civil commitment statute.<sup>92</sup> The Court held the Constitution merely requires that treatment be provided where a condition is treatable.<sup>93</sup>

The Court further concluded that, to the extent the Kansas Supreme Court found the plaintiff was in fact treatable and that there was a defect in the treatment provided, the Due Process Clause was still satisfied.<sup>94</sup> The Court noted that the Kansas statute specifically required that treatment be provided<sup>95</sup> but suggested in a footnote that

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Steve C. Lee, Recent Developments, *How Little Control?: Volition and the Civil Confinement of Sexually Violent Predators in Kansas v. Crane*, 26 HARV. J.L. & PUB. POL'Y 385 (2002).

<sup>89</sup> See *Hendricks*, 521 U.S. at 365.

<sup>90</sup> See *id.* at 365-68.

<sup>91</sup> *Id.* at 365 (citing *In re Hendricks*, 912 P.2d at 136).

<sup>92</sup> *Id.* at 365-66 (citing *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring); *Greenwood v. United States*, 350 U.S. 366, 375 (1956)). The Court further observed:

While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed.

*Id.* at 366 (citations omitted).

<sup>93</sup> See *id.* at 366. The Court added, "To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions." *Id.*

<sup>94</sup> See *Hendricks*, 521 U.S. at 366-68.

<sup>95</sup> See *id.* at 367 (quoting KAN. STAT. ANN. § 59-29a07(a)). The Court observed that "as in *Allen*, 'the State has a statutory obligation to provide care and treatment for [persons adjudged sexually dangerous] designed to effect recovery.'" *Id.* (quoting *Allen*, 478 U.S. at 369) (internal quotation marks omitted). In particular, the Court pointed to KAN. STAT. ANN. § 59-29a01, which purported to establish a civil commitment procedure "for the long-term care and treatment of the sexually violent predator," as well as § 59-29a09, which re-

“the States enjoy wide latitude in developing treatment regimens.”<sup>96</sup> Additionally, the Court held that, even if there were deficiencies in the State’s treatment program, under the unique circumstances of the case, there was no constitutional violation.<sup>97</sup> The Court reasoned that the plaintiff “was the first person committed under the Act[,]” and, as a result, “the State did not have all of its . . . procedures in place.”<sup>98</sup>

Because the Kansas statute was recently enacted and because the record was undeveloped, the Court did not further articulate any guidelines for determining whether a treatment program is constitutionally adequate.<sup>99</sup> Accordingly, the majority’s decision in *Hendricks* leaves the law much as it existed, and although it is clear that treatment is required, the specific elements of a constitutionally adequate treatment program remain uncertain.<sup>100</sup>

The concurring and dissenting opinions in *Hendricks* likewise provide little guidance.<sup>101</sup> Justice Kennedy filed a separate concurrence to note the unique and challenging circumstances presented by diagnosed pedophiles.<sup>102</sup> He observed that, as a practical matter, the Kansas statute may result in an individual’s lifelong confinement, given that current medical knowledge regarding pedophilia is limited and providing sufficient treatment for pedophiles that would ensure “no serious danger will come from release of the detainee” is inherently difficult.<sup>103</sup> Justice Kennedy did not find this outcome troubling as long as the purpose of commitment was not “simply to impose punishment after the State makes an improvident plea bargain on the criminal side,” given that “incapacitation is a goal common to both the criminal and civil systems of confinement.”<sup>104</sup> Nonetheless, Justice Kennedy recognized that the implementation of the Kansas statute might become un-

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quired confinement to “conform to constitutional requirements for care and treatment.”  
*See id.*

<sup>96</sup> *See id.* at 368 n.4 (citing *Youngberg*, 457 U.S. at 317).

<sup>97</sup> *See id.* at 367–68.

<sup>98</sup> *Id.*

<sup>99</sup> *Hendricks*, 521 U.S. at 367–68. The Court suggested that evidence not in the record would have demonstrated that the State was providing adequate treatment. *See id.* at 368 n.4. Specifically, the Court noted that, in a hearing regarding the plaintiff’s motion for state habeas corpus relief, the trial court had concluded that adequate treatment was being provided. *See id.* at 368 n.5. The dissent, however, noted that reliance on such extra-record materials would be inappropriate and maintained that, in any event, the majority’s conclusion was not warranted. *See id.* at 391–92 (Breyer, J., dissenting).

<sup>100</sup> *See id.* at 365–69 (majority opinion).

<sup>101</sup> *See id.* at 371–97.

<sup>102</sup> *See id.* at 371–73 (Kennedy, J., concurring).

<sup>103</sup> *See id.* at 372.

<sup>104</sup> *See Hendricks*, 521 U.S. at 372–73 (Kennedy, J., concurring).

constitutional if "civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified."<sup>105</sup>

The dissent in *Hendricks* also failed to specifically describe the elements of an adequate treatment program.<sup>106</sup> Although the dissent agreed that the plaintiff's commitment was appropriate because he was "mentally ill" and "dangerous,"<sup>107</sup> the dissent found that the plaintiff was not receiving constitutionally adequate treatment.<sup>108</sup> The dissent disputed the notion that the case involved an "untreatable" detainee.<sup>109</sup> The record, it noted, demonstrated that "pedophilia is an 'abnormality' or 'illness' that can be treated."<sup>110</sup> The dissent, however, argued that the record supported the Kansas Supreme Court's finding that "as of the time of [plaintiff's] commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified treatment staff," which resulted in the plaintiff "receiving 'essentially no treatment.'"<sup>111</sup>

Moreover, the dissent suggested that the lack of treatment was consistent with the intent of Kansas legislators when they enacted the statute—to warehouse, rather than treat, potentially dangerous sexual predators.<sup>112</sup> Because the dissent believed that the record was devoid of any evidence of treatment, however, it also did not have occasion to discuss adequate treatment procedures.<sup>113</sup> Indeed, the only specific requirement mentioned by the dissent was the statute's failure to provide for the possibility of using less restrictive alternatives to confinement, such as post-release supervision or halfway houses, which were required by similar laws in other states.<sup>114</sup>

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<sup>105</sup> See *id.* at 373.

<sup>106</sup> See *id.* at 373–96 (Breyer, J., dissenting).

<sup>107</sup> See *id.* at 375–77.

<sup>108</sup> See *id.* at 394.

<sup>109</sup> See *Hendricks*, 521 U.S. at 378 (Breyer, J., dissenting).

<sup>110</sup> See *id.* at 378; see also Berliner, *supra* note 70, at 1209–10 (discussing the range of expert opinions regarding "the question of whether recidivism among child molesters and rapists can be reduced through treatment").

<sup>111</sup> See *Hendricks*, 521 U.S. at 384 (Breyer, J., dissenting). The dissent maintained that the Kansas statute violated the Due Process Clause because "when a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive." *Id.* at 390.

<sup>112</sup> See *id.* at 384–86 (discussing the Kansas statute's legislative history and statutory provisions).

<sup>113</sup> See *id.* at 384.

<sup>114</sup> See *id.* at 387–88.

C. *Seling v. Young*: An "As Applied" Challenge to Washington's Civil Commitment of Sexually Violent Predators

Finally, in *Seling v. Young*, the Supreme Court resolved an "as applied" challenge to the State of Washington's Community Protection Act, which authorizes the civil commitment of "sexually violent predators."<sup>115</sup> The plaintiff argued that, although the Washington Supreme Court had held that the statute was civil in nature and thus did not violate due process, the statute, as it was applied in his particular case, was punitive and therefore "criminal" in nature.<sup>116</sup> In particular, the plaintiff maintained that the conditions at Washington's Special Commitment Center were incompatible with the statute's treatment purpose.<sup>117</sup> The Ninth Circuit held that under *Hendricks*, the plaintiff could bring an "as applied" challenge even if the statute was facially valid.<sup>118</sup>

The Supreme Court subsequently reversed the Ninth Circuit's decision.<sup>119</sup> At the outset, the majority concurred with the Washington Supreme Court that the statute was facially valid.<sup>120</sup> Indeed, the Court noted that it was "strikingly similar" to the statute at issue in *Hendricks*, which also "provided treatment for sexually violent predators."<sup>121</sup> The Court reiterated that, although "not all mental conditions [are] treatable," where conditions are treatable, constitutionally adequate treatment is required.<sup>122</sup> Nonetheless, the majority concluded that plaintiff's "as applied" challenge was "unworkable," because it "would invite an end run around the Washington Supreme Court's decision that the Act is civil in circumstances where a direct attack on that decision is not before this Court."<sup>123</sup>

The Court underscored that its decision did "not mean that respondent and others committed as sexually violent predators have no remedy for the alleged conditions and treatment regime at the Cen-

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<sup>115</sup> 531 U.S. at 253 (citing WASH. REV. CODE §§ 71.09.010-.902 (1990)); see also, e.g., Joseph Hough, *Seling v. Young: No "As Applied" Challenge to Civil Commitment*, 28 AM. J. CRIM. L. 251 (2001); Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 328-38 (2003).

<sup>116</sup> See *Seling*, 531 U.S. at 259-60.

<sup>117</sup> See *id.* at 260.

<sup>118</sup> See *Young v. Weston*, 192 F.3d 870, 874 (9th Cir. 1999).

<sup>119</sup> See *Seling*, 531 U.S. at 267.

<sup>120</sup> See *id.* at 260.

<sup>121</sup> See *id.* at 260-61 ("In fact, Kansas patterned its Act after Washington's.").

<sup>122</sup> *Id.* at 262-63.

<sup>123</sup> *Id.* at 263-64. The Court added that an "as-applied" challenge would, in effect, preclude a final determination concerning whether a statute was "punitive." See *id.* at 263.



ter."<sup>124</sup> The Court further noted that the statute conferred an express right to treatment, and there was ongoing litigation regarding the constitutionality of the conditions of confinement at the facility.<sup>125</sup> The Court also observed that the procedural posture of the case gave it "no occasion to consider how the civil nature of a confinement scheme relates to other constitutional challenges, such as due process,"<sup>126</sup> or to "consider the extent to which a court may look to actual conditions of confinement and implementation of the statute to determine in the first instance whether a confinement scheme is civil in nature."<sup>127</sup>

Justice Scalia filed a separate concurrence specifically disputing that this was an "open question."<sup>128</sup> Justice Scalia maintained that "any consideration of subsequent implementation in the course of making a 'first instance' determination cannot extend to *all* subsequent implementation, but must be limited to implementation of confinement, and of other impositions that are 'not a fixed event.'"<sup>129</sup>

In his separate concurrence, Justice Thomas went even further, maintaining that "a statute which is civil on its face cannot be divested of its civil nature simply because of the manner in which it is implemented."<sup>130</sup> He wrote that "[a]n implementation-based challenge to a facially civil statute would be as inappropriate in reviewing the statute in the 'first instance.'"<sup>131</sup>

In contrast, Justice Stevens maintained in his dissent that the conditions of confinement could be considered at any time in order to

<sup>124</sup> *Seling*, 531 U.S. at 265.

<sup>125</sup> *See id.* at 265-66. As the Court observed, the Special Commitment Center was

operat[ing] under an injunction that require[d] it to adopt and implement a plan for training and hiring competent sex offender therapists; to improve relations between residents and treatment providers; to implement a treatment program for residents containing elements required by prevailing professional standards; to develop individual treatment programs; and to provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the staff.

*Id.* at 266.

<sup>126</sup> *Id.* at 266.

<sup>127</sup> *Id.* at 266-67 ("We have not squarely addressed the relevance of conditions of confinement to a first instance determination, and that question need not be resolved here.")

<sup>128</sup> *See id.* at 267-70 (Scalia, J., concurring).

<sup>129</sup> *Seling*, 531 U.S. at 268 (Scalia, J., concurring) (citing *Hudson v. United States*, 522 U.S. 93 (1997)).

<sup>130</sup> *See id.* at 270 (Thomas, J., concurring).

<sup>131</sup> *Id.* at 274 ("The Washington Act does not provide on its face for punitive conditions of confinement, and the actual conditions under which the Act is implemented are of no concern to our inquiry.")

gain "full knowledge of the effects of the statute."<sup>132</sup> Justice Stevens contended that the Court had "consistently looked to the conditions of confinement as evidence of both the legislative purpose behind the statute and its actual effect."<sup>133</sup> Moreover, he contended that this issue was properly before the Court even though the Washington Supreme Court had previously decided that the statute was in fact "civil."<sup>134</sup>

Thus, despite the concurrences maintaining that the actual conditions of confinement could play only a limited role or no role at all in assessing the constitutionality of a civil commitment statute,<sup>135</sup> a strong majority of the Court again reaffirmed that, although the plaintiff's "as applied" challenge failed, the conditions of confinement were properly considered in assessing the constitutionality of the statute "in the first instance."<sup>136</sup> The Court again affirmed that treatment was a necessary element to support the constitutionality of civil commitment statutes. And, again, because of the procedural posture of the case, the Court did not have the opportunity to fully articulate the elements of a constitutionally adequate treatment program.<sup>137</sup>

### III. THE FRAMEWORK FOR ASSESSING WHETHER TREATMENT IS CONSTITUTIONALLY ADEQUATE

Because the Supreme Court has failed to articulate the specific elements of a constitutionally adequate treatment program, the lower federal courts have been left to fill the gap.<sup>138</sup> In particular, the seventeen-year litigation over Washington's civil commitment program has helped establish a framework for assessing the constitutionality of such programs.<sup>139</sup> That framework includes basic requirements such as: (1) the right to individualized treatment that provides an avenue to eventual release upon successful treatment, (2) rigorous oversight mecha-

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<sup>132</sup> See *id.* at 277 (Stevens, J., dissenting).

<sup>133</sup> *Id.* at 275 (citing *Hendricks*, 521 U.S. at 361, 367-69; *Allen*, 478 U.S. at 369, 373-74; *Schall v. Martin*, 467 U.S. 253, 269-71 (1984)).

<sup>134</sup> See *Seling*, 531 U.S. at 277 (Stevens, J., dissenting).

<sup>135</sup> See *id.* at 267-74 (concurring and dissenting opinions).

<sup>136</sup> See *id.* at 256-57 (majority opinion); *id.* at 267 (Scalia, J., concurring); *id.* at 275 (Stevens, J., dissenting).

<sup>137</sup> See *id.* at 265-67 (majority opinion).

<sup>138</sup> See *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986); see also *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000); *Turay v. Seling* (*Nov. 25, 1998 Order*), No. C91-664WD, slip op. at 11-12 (W.D. Wash. Nov. 25, 1998).

<sup>139</sup> See, e.g., *Sharp*, 233 F.3d at 1172; *Nov. 25, 1998 Order*, slip op. at 11-12; *Turay v. Weston* (*Order Granting Plaintiffs' Renewed Motion for Injunctive Relief*), No. C91-664WD, slip op. at 3-7 (W.D. Wash. Feb. 4, 1997).

nisms, and (3) the principles governing judicial oversight.<sup>140</sup> These basic principles shape the contours of the states' obligations in administering treatment programs that balance committed individuals' constitutional rights with protecting the general public.<sup>141</sup>

Washington's civil commitment statute, like others around the country,<sup>142</sup> allows the state to indefinitely commit individuals classified as "sexually violent predators" after they have served or are about to complete their prison sentences.<sup>143</sup> The statute defines a "sexually violent predator" as an individual "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."<sup>144</sup> The state bears the burden of proving beyond a reasonable doubt that an individual is a "sexually violent predator."<sup>145</sup> The statute specifically recognizes that committed individuals have a right to "adequate care and individualized treatment."<sup>146</sup>

Under the statute, a committed person is entitled to an annual examination of the individual's mental condition.<sup>147</sup> If the examination indicates that the individual's condition is so changed that he is not likely to engage in predatory acts of sexual violence, state officials must authorize the person to petition the court for conditional release and discharge.<sup>148</sup> In addition, the detainee may independently petition for discharge from confinement.<sup>149</sup> In determining whether the petition

<sup>140</sup> See *infra* notes 156–198 and accompanying text.

<sup>141</sup> See *infra* notes 156–198 and accompanying text.

<sup>142</sup> See, e.g., ARIZ. REV. STAT. ANN. §§ 36-3701 to -3717 (1995); CAL. WELF. & INST. CODE §§ 6600–6667 (West 1995); FLA. STAT. ANN. § 394.910 (West 1998); 725 ILL. COMP. STAT. 207/1 to /99 (West 1998); KAN. STAT. ANN. § 59-29a01 (1994); MASS. GEN. LAWS, ch. 123A (2004); MINN. STAT. ANN. § 253B.09 (West 1982); MO. ANN. STAT. § 632.480–.513 (West 1999); N.J. STAT. ANN. §§ 30:4-27.24 to .38 (West 1999); N.Y. MENTAL HYG. LAW §§ 10.01–.17 (McKinney 2007); N.D. CENT. CODE §§ 25-03.3-1 to -24 (1997); S.C. CODE ANN. § 44-48 (1998); TEX. HEALTH & SAFETY CODE ANN. § 841 (Vernon 1999); VA. CODE ANN. §§ 37.2-900 to -920 (West 2003); WIS. STAT. ANN. § 980 (West 1993).

<sup>143</sup> See WASH. REV. CODE §§ 71.09.010–.902.

<sup>144</sup> See *id.* § 71.09.020(16).

<sup>145</sup> See *id.* § 71.09.060(1). If the state does so, the individual may be committed for control, care, and treatment under the supervision of the Department of Social and Health Services. See *id.* The detainee may also independently petition the court for discharge from confinement. *Id.* § 71.09.090(2). In evaluating the petition, the court will examine whether the individual's mental abnormality or personality disorder has so changed that he is no longer likely to engage in predatory acts of sexual violence. See *id.* § 71.09.090(2)(c).

<sup>146</sup> See *id.* § 71.09.080(2).

<sup>147</sup> See *id.* § 71.09.070.

<sup>148</sup> See WASH. REV. CODE § 71.09.090(1).

<sup>149</sup> *Id.* § 71.09.090(2).

will be granted, the central question is whether the individual's mental abnormality or personality disorder has so changed that he is no longer likely to engage in predatory acts of sexual violence.<sup>150</sup> Accordingly, the statute specifically recognizes that committed individuals have a right to "adequate care and individualized treatment."<sup>151</sup> Courts presiding over Washington's SCC litigation have recognized that, under well-settled Supreme Court precedent, the Due Process Clause similarly requires that states provide civilly-committed individuals access to treatment that "gives them a realistic opportunity to be cured and released."<sup>152</sup> This involves examining whether treatment decisions meet "professionally accepted minimum standards."<sup>153</sup> The courts have noted that "[b]ecause the purpose of confinement is not punitive, the state must also provide the civilly-committed [individuals] with 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'"<sup>154</sup> Lower courts, however, have been left to identify what conditions are sufficiently nonpunitive and also afford residents a "realistic opportunity" to be successfully treated and released.<sup>155</sup>

#### A. *The Elements of Washington's Individualized Treatment Program*

The SCC litigation has done much to flesh out the constitutional requirements for civil commitment treatment programs.<sup>156</sup> Over the litigation's seventeen-year history, the courts received input from experts who provided direction regarding minimally acceptable standards governing such programs.<sup>157</sup> In the process, the courts articulated a variety of guidelines, implemented in the Turay Injunction, requiring the SCC to implement certain treatment procedures in order to provide residents with constitutionally adequate treatment.<sup>158</sup>

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<sup>150</sup> See *id.* § 71.09.090.

<sup>151</sup> See *id.* § 71.09.080.

<sup>152</sup> *Sharp*, 233 F.3d at 1172 (citing *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980)).

<sup>153</sup> *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984).

<sup>154</sup> See *Sharp*, 233 F.3d at 1172 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)).

<sup>155</sup> See, e.g., *id.* (citing *Ohlinger*, 652 F.2d at 778); *Nov. 25, 1998 Order*, slip op. at 11-12.

<sup>156</sup> See, e.g., *Sharp*, 233 F.3d at 1170-72 (citing *Ohlinger*, 652 F.2d at 778); *Nov. 25, 1998 Order*, slip op. at 11-12; *Order Granting Plaintiffs' Renewed Motion for Injunctive Relief*, slip op. at 3.

<sup>157</sup> See, e.g., *Nov. 25, 1998 Order*, slip op. at 11-16 (discussing the generally accepted therapy components the SCC was not providing).

<sup>158</sup> See *Turay v. Weston (Turay Injunction)*, No. C91-664WD, slip op. at 4-5 (W.D. Wash. June 6, 1994).

A cornerstone of a constitutionally adequate civil commitment treatment program is individualized treatment.<sup>159</sup> In the SCC litigation, the district court repeatedly underscored the necessity of an individualized approach to treatment.<sup>160</sup> As the court observed, “[i]ndividualized treatment plans are critical and should provide for systematic measurements of the individual’s progress.”<sup>161</sup> The court added that a successful treatment program should demonstrate “the way to improvement and release” and contain “the components recognized as necessary for maximum treatment potential.”<sup>162</sup>

Quality interaction between residents and staff is also important in constructing a constitutionally adequate treatment program.<sup>163</sup> In the SCC litigation, the courts addressed a range of allegations regarding staff abuse of residents, as well as the generally poor interaction between staff and residents, which undermined successful treatment.<sup>164</sup> Accordingly, the Turay Injunction required the SCC to not only prevent staff abuse, but also “required [the] SCC to take steps to rectify the lack of trust between the residents and staff.”<sup>165</sup> The Ninth Circuit held that such a requirement is necessary to avoid “severely hampering effective treatment.”<sup>166</sup>

The court also found that the SCC lacked “adequate grievance procedures and behavior management plans,” which constitute another “generally accepted component of effective treatment programs.”<sup>167</sup> The district court in the SCC litigation found that “[a]ll parties recognize that the prompt and fair handling of grievances is an

<sup>159</sup> See *Sharp*, 233 F.3d at 1170; *Nov. 25, 1998 Order*, slip op. at 11–12; *Turay Injunction*, slip op. at 5.

<sup>160</sup> See *Sharp*, 233 F.3d at 1170; *Nov. 25, 1998 Order*, slip op. at 11–12; *Turay Injunction*, slip op. at 5. The individualized treatment requirement was derived from standards set forth by the Association for the Treatment of Sexual Abusers. See *Nov. 25, 1998 Order*, slip op. at 11–12.

<sup>161</sup> See *Nov. 25, 1998 Order*, slip op. at 11–12 (quoting standards issued by the Association for the Treatment of Sexual Abusers); see also *Turay v. Seling* (*Feb. 27, 2003 Order*), No. C91-664R, slip op. at 22 (W.D. Wash. Feb. 27, 2003) (ordering the SCC to “[c]orrect the long-standing deficiencies in the treatment program”).

<sup>162</sup> See *Sharp*, 233 F.3d at 1169 n.2; *Nov. 25, 1998 Order*, slip op. at 12.

<sup>163</sup> *Sharp*, 233 F.3d at 1170; *Turay Injunction*, slip op. at 3–4.

<sup>164</sup> *Sharp*, 233 F.3d at 1170; *Turay Injunction*, slip op. at 3–4.

<sup>165</sup> *Sharp*, 233 F.3d at 1170; *Turay Injunction*, slip op. at 4.

<sup>166</sup> *Sharp*, 233 F.3d at 1170; see also *Hydrick v. Hunter*, 500 F.3d 978, 997 (9th Cir. 2007) (observing that plaintiffs have a “clearly established” right to be free from “conditions that amount to punishment”); *Turay v. Seling* (*Nov. 15, 1999 Order*), No. C91-664WD, slip op. at 3, 8 (W.D. Wash. Nov. 19, 1999); *Nov. 25, 1998 Order*, slip op. at 8; *Order Granting Plaintiffs’ Renewed Motion for Injunctive Relief*, slip op. at 4 (discussing required staff behavior).

<sup>167</sup> *Sharp*, 233 F.3d at 1171.

essential part of the treatment environment."<sup>168</sup> Historically, however, the grievance system at the SCC had been "ineffective and failed to result in individualized responses."<sup>169</sup> These deficiencies led to "a general mistrust of the grievance system among residents."<sup>170</sup>

Next, the district court found that the involvement of residents' family members is an essential element of a constitutionally adequate treatment program.<sup>171</sup> When it was created, the SCC program imposed significant barriers to the participation of family members in treatment.<sup>172</sup> The district court directed the SCC to remove those barriers, finding that family participation was another important aspect of successful treatment.<sup>173</sup>

Finally, an essential element of the Turay Injunction required the SCC to establish a less restrictive alternative ("LRA") program that placed residents on a path toward eventual release.<sup>174</sup> Indeed, the district court observed:

[T]his phase [of the treatment program] is required by statute, and confirmed by all experts on both sides as a vital part of the professional minimum standards. Without LRAs, the constitutional requirement of treatment leading, if successful, to cure and release, cannot fully be met. This area is described by the special master as "the most important piece of unfinished business in the SCC program."<sup>175</sup>

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<sup>168</sup> *Turay v. Seling*, 108 F. Supp. 2d 1148, 1157 (W.D. Wash. 2000).

<sup>169</sup> *Turay v. Seling* (*Apr. 17, 2002 Order*), No. C91-664R, slip op. at 24 (W.D. Wash. Apr. 17, 2002).

<sup>170</sup> *Feb. 27, 2003 Order*, slip op. at 13.

<sup>171</sup> *See Turay*, 108 F. Supp. 2d at 1156.

<sup>172</sup> *See id.*; *Turay Injunction*, slip op. at 5.

<sup>173</sup> *See Turay*, 108 F. Supp. 2d at 1156.

<sup>174</sup> *See id.*; *Nov. 15, 1998 Order*, slip op. at 9.

<sup>175</sup> *Turay*, 108 F. Supp. 2d at 1156 (internal citation omitted). The district court noted that "[w]ithout that component, a commitment to the SCC or any similar institution would be exactly what the Constitution forbids: a life sentence to be served in a prison masquerading as a treatment facility." *Turay v. Seling* (*Dec. 20, 2000 Order*), No. C91-664WD, slip op. at 12 (W.D. Wash. Dec. 20, 2000); *see also Turay v. Seling* (*Order Amending Feb. 2003 Findings of Fact*), No. C91-664R, slip op. at 4 (W.D. Wash. Apr. 25, 2003) (describing how minimum professional treatment standards, which include community transition for qualified residents, define the scope of the constitutional right to treatment). As the dissent in *Kansas v. Hendricks* observed, the LRA component was dictated by a long line of Supreme Court precedent that required consideration of "alternative and less harsh methods' to achieve a nonpunitive objective." *See* 521 U.S. 344, 388 (1997) (Breyer, J., dissenting) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

Accordingly, the district court emphasized the need for development of constitutionally and statutorily required LRAs,<sup>176</sup> and, as in other areas of injunction compliance, emphasized that it must monitor the SCC's progress to ensure program changes were effectively implemented.<sup>177</sup>

### B. Constitutionally Adequate Oversight

The district court found that adequate oversight mechanisms were critical to ensuring the provision of constitutionally adequate treatment to SCC residents.<sup>178</sup> Indeed, a key finding supporting the Turay Injunction was that "the SCC program lacked sufficient oversight."<sup>179</sup> During the course of the proceedings, the court developed several potential oversight mechanisms.<sup>180</sup> First, the Inspection of Care Committee (the "IOCC"), a panel of independent experts familiar with the treatment of sexually violent predators, conducted annual inspections and issued reports regarding the SCC's treatment program.<sup>181</sup> Second, the court appointed an ombudsman to observe staff-resident relations at the SCC, respond to complaints, and assist in the resolution of complaints because "residents' complaints of mistreatment by staff have proliferated to a point that jeopardizes the defendants' ability to provide constitutionally adequate mental health treatment as required by the injunction."<sup>182</sup> Finally, a resident advisory council was appointed and tasked with being "fully informed and consulted about important projects."<sup>183</sup>

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<sup>176</sup> See *Turay*, 108 F. Supp. 2d at 1156.

<sup>177</sup> See, e.g., *Feb. 27, 2003 Order*, slip op. at 20. The court added, "Court oversight continues to be essential to ensure the defendants . . . correct the ongoing deficiencies in the treatment program so as to provide SCC residents with a discernable path toward release." *Id.*

<sup>178</sup> *Sharp*, 233 F.3d at 1171.

<sup>179</sup> See *id.*; see also *Nov. 15, 1999 Order*, slip op. at 14; *Nov. 25, 1998 Order*, slip op. at 11; *Order Granting Plaintiffs' Renewed Motion for Injunctive Relief*, slip op. at 5.

<sup>180</sup> See *Sharp*, 233 F.3d at 1171; *Turay*, 108 F. Supp. 2d at 1157-58 (discussing the SCC's failure to comply with oversight mechanisms); *Turay v. Richards (Order Granting Motion to Dissolve Injunction)*, No. C91-0664RSM; 2007 WL 983132, at \*4 (W.D. Wash. Mar. 23, 2007) (discussing oversight by the IOCC).

<sup>181</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4; STATE OF WASHINGTON, DEPT. OF SOCIAL & HEALTH SERVS. ADMIN., INSPECTION OF CARE COMMITTEE REPORT I (Feb. 11, 2005) [hereinafter Feb. 11, 2005 IOCC REPORT] (identifying IOCC members).

<sup>182</sup> See *Turay v. Weston (Order on Turay's Motion for Further Injunctive Relief)*, No. C91-664WD, slip op. at 2-3 (W.D. Wash. Nov. 21, 1995) (discussing the appointment and duties of the ombudsman).

<sup>183</sup> See *Turay*, 108 F. Supp. 2d at 1158.

These additional oversight mechanisms supplemented the oversight provided by the district court and the court-appointed special master.<sup>184</sup>

### *C. Principles Governing Judicial Oversight*

The courts have also formulated guidelines for judicial oversight of treatment programs.<sup>185</sup> For example, the Ninth Circuit made clear that, in evaluating the constitutionality of civil commitment treatment programs, the courts may not simply “defer to the professional judgment of the . . . superintendent and clinical director.”<sup>186</sup> Rather, they must “look[] beyond the . . . administrators’ assertions of compliance” in order to determine whether the state has “fulfilled the requirements” under the Constitution and the court’s injunction.<sup>187</sup>

Indeed, in affirming the Turay Injunction, the Ninth Circuit repeatedly rejected the SCC’s “principal contention” that courts must “defer to the professional judgment of the SCC superintendent and clinical director.”<sup>188</sup> As the court observed, “[A]ccepting such an argument would transfer the safeguarding of constitutional rights from the courts to mental health professionals. Conditions of confinement would be above judicial scrutiny and would depend on who happened to be in charge of a particular program.”<sup>189</sup> In evaluating Washington’s program, the Ninth Circuit held that SCC administrators had “made decisions about the program that [fall] well below professional standards for treatment of sexual offenders, or that [are] not entitled to deference because they were not made in the [SCC’s] professional judgment.”<sup>190</sup>

The district court also emphasized that it would continue to review the SCC’s compliance with the terms of the Turay Injunction in order to ensure that there was no “backsliding.”<sup>191</sup> This monitoring was criti-

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<sup>184</sup> See, e.g., *id.* at 1157–58 (evaluating the SCC’s compliance with previous court orders to improve its treatment programs and facilities). The court-appointed special master prepared a series of reports for the court detailing the SCC’s progress in complying with the terms of the Turay Injunction. See *id.* at 1152.

<sup>185</sup> See *Sharp*, 233 F.3d at 1171–72.

<sup>186</sup> See *id.* at 1171.

<sup>187</sup> *Id.* at 1172.

<sup>188</sup> See *id.* at 1171–72, 1174.

<sup>189</sup> *Id.* at 1171.

<sup>190</sup> See *Sharp*, 233 F.3d at 1172.

<sup>191</sup> See, e.g., *Turay v. Seling* (*Apr. 14, 2005 Order*), No. C91–664RSM, slip op. at 4 (W.D. Wash. Apr. 14, 2005); *Turay v. Seling* (*June 10, 2004 Order*), No. C91–0664L, slip op. at 10 (W.D. Wash. June 10, 2004); *Feb. 27, 2003 Order*, slip op. at 3; *Turay v. Seling* (*Apr. 17, 2002 Order*), No. C91–664R, slip op. at 4 (W.D. Wash. Apr. 17, 2002); *Turay v. Seling* (*Aug. 14, 2001 Order*), No. C91–664WD, slip op. at 8 (W.D. Wash. Aug. 14, 2001); *Dec. 20, 2000 Order*,



cal in ensuring the SCC's continued compliance.<sup>192</sup> Without continuing judicial oversight, the SCC would lack an incentive to maintain the gains that had been achieved through court supervision.<sup>193</sup>

When the Ninth Circuit reviewed the SCC's request to dissolve the Turay Injunction, the court observed, "A history of noncompliance with prior orders can justify greater court involvement than is ordinarily permitted."<sup>194</sup> In order to demonstrate that an injunction should be dissolved, defendants must demonstrate that constitutional requirements are being met and that defendants are unlikely to "return to [their] former ways."<sup>195</sup> These concerns applied in the SCC litigation, where the district court concluded that residents had a "valid concern that without judicial oversight, the SCC and its treatment program will eventually revert back to the very structure that gave rise to this lawsuit in the first place."<sup>196</sup> As the district court observed, the issues in the case were "serious" and the appropriate solutions "appeared difficult at best."<sup>197</sup> Accordingly, judicial supervision was "essential" given the SCC's recalcitrance and repeated failure to comply with its constitutional obligations.<sup>198</sup>

slip op. at 13. The court also noted it would oversee the SCC regarding elements of the Turay Injunction that had been dissolved. *See, e.g., Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*2-3 (evaluating whether the SCC had engaged in prohibited "backsliding" regarding any component of the treatment program).

<sup>192</sup> *See Sharp*, 233 F.3d at 1172.

<sup>193</sup> *See id.*

<sup>194</sup> *Id.* at 1173; *see also* Grubbs v. Bradley, 821 F. Supp. 496, 503 (M.D. Tenn. 1993) ("Compliance with previous court orders, as well as good faith efforts by defendants, are obviously relevant in deciding whether to modify or dissolve a federal court remedial decree." (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247-49 (1991))); *Gluth v. Kangas*, 773 F. Supp. 1309, 1316 (D. Ariz. 1988) ("[T]he Court . . . recognize[s] that future personnel changes are inevitable and departures from present practices are possible. Thus, at the very least, to prevent the Department . . . from slipping back into its old practices, an injunction is necessary—with relief available by petition to the Court if future backsliding occurs.").

<sup>195</sup> *Dowell*, 498 U.S. at 247-49.

<sup>196</sup> *Turay v. Richards* (July 26, 2006 *Order on Scope of Hearing*), No. C91-0664RSM, slip op. at 2 (W.D. Wash. July 26, 2006).

<sup>197</sup> Sept. 18, 2006 Transcript, *supra* note 42, at 33-34.

<sup>198</sup> *See, e.g., Feb. 27, 2003 Order*, slip op. at 20; *Dec. 20, 2000 Order*, slip op. at 13; *Nov. 15, 1999 Order*, slip op. at 20. Indeed, the district court was emphatic on this point:

The Court acknowledges plaintiffs' valid concern that without judicial oversight, the SCC and its treatment program will eventually revert back to the very structure that gave rise to this lawsuit in the first place. The Court recognizes that, historically, remedial action has not occurred at the SCC until defendants have been faced with an imminent status hearing before this Court. The Court, too, is concerned that without judicial oversight, the efforts made by all parties to date may be undone.

#### IV. THE SCC'S NONCOMPLIANCE WITH ITS CONSTITUTIONAL OBLIGATIONS

Although the courts presiding over the SCC litigation have developed specific and well-defined criteria for assessing whether a civil commitment treatment program meets constitutional requirements, compliance with these requirements has been illusive.<sup>199</sup> Indeed, a string of judicial decisions have documented the SCC's long history of failing to provide constitutionally adequate treatment for residents.<sup>200</sup> The Ninth Circuit has highlighted "the state's repeated and documented failures to rectify the constitutional shortcomings of its civil commitment facilities for sex offenders,"<sup>201</sup> and in particular, the SCC's "history of noncompliance with the Turay Injunction."<sup>202</sup> Nonetheless, in 2007, the district court granted the SCC's request to dissolve the Turay Injunction, despite the SCC's "backsliding" with respect to its compliance with constitutional requirements.<sup>203</sup>

##### A. *The SCC's Repeated Requests to Dissolve the Turay Injunction Despite Its Noncompliance*

From the outset of the litigation in 1994, the SCC failed to comply with the district court's orders to improve its treatment program.<sup>204</sup>

*July 26, 2006 Order on Scope of Hearing*, slip op. at 2.

<sup>199</sup> See, e.g., *Sharp v. Weston*, 233 F.3d 1166, 1171-72 (9th Cir. 2000); *Turay v. Seling* (Nov. 15, 1999 Order), No. C91-664WD, slip op. at 6-18 (W.D. Wash. Nov. 15, 1999); *Turay v. Seling* (Nov. 25, 1998 Order), No. C91-664WD, slip op. at 10-15 (W.D. Wash. Nov. 25, 1998); *Turay v. Weston* (*Turay Injunction*), No. C91-664WD, slip op. at 4-5 (W.D. Wash. June 6, 1994).

<sup>200</sup> See, e.g., *Sharp*, 233 F.3d at 1171-72; *Nov. 15, 1999 Order*, slip op. at 6-18; *Nov. 25, 1998 Order*, slip op. at 10-15; *Turay Injunction*, slip op. at 4-5.

<sup>201</sup> *Cunningham v. David Special Commitment Ctr.*, 56 Fed. App'x 393, 394 (9th Cir. 2003).

<sup>202</sup> *Sharp*, 233 F.3d at 1173.

<sup>203</sup> *Turay v. Richards* (*Order Granting Motion to Dissolve Injunction*), No. C91-0664RSM, 2007 WL 983132, at \*4-5 (W.D. Wash. Mar. 23, 2007).

<sup>204</sup> See, e.g., *Sharp*, 233 F.3d at 1173; *Nov. 25, 1998 Order*, slip op. at 7-10; *Turay v. Weston* (*First Supplemental Order Regarding Injunction*), No. C91-664WD, slip op. at 1-3 (W.D. Wash. Aug. 22, 1994). The constitutional shortcomings of Washington's civil commitment treatment program periodically have been the subject of academic commentary. See, e.g., Jennifer M. Connor, *Seling v. Young: Constitutionally Protected but Unjust Civil Commitment for Sexually Violent Predators*, 18 J. CONTEMP. HEALTH L. & POL'Y 511, 525-26 (2002) ("The SCC has . . . taken no action to comply with constitutionally required and statutorily mandated conditions, including much needed mental health treatment."); John Kip Cornwell, *The Right to Community Treatment for Mentally Disordered Sex Offenders*, 34 SETON HALL L. REV. 1213, 1215 (2004) (describing the district court's finding that the SCC has "fail[ed] to provide constitutionally adequate treatment"); Janus & Logan, *supra* note 115, at 374 (writ-

Shortly after the district court issued the Turay Injunction, the court held that the SCC had failed to present a sufficient plan for compliance.<sup>205</sup> As a result, the court entered a supplemental order that clarified the terms of the injunction and appointed a special master to oversee the SCC's compliance.<sup>206</sup>

Over a year later, the SCC still had not complied with the terms of the injunction, and residents moved for contempt sanctions and further injunctive relief.<sup>207</sup> Although the district court denied the request for contempt sanctions, it granted an unopposed portion of the motion seeking the appointment of a full-time ombudsman to internally review the SCC's progress.<sup>208</sup> The court added that "the motion raises serious issues" since the SCC "still [has] not complied adequately" with the court's rulings.<sup>209</sup>

On March 6, 1996, the court held an evidentiary hearing on the residents' renewed request for contempt sanctions as well as the SCC's motion for release from the Turay Injunction.<sup>210</sup> The court denied the SCC's release request, finding that "more remains to be done to achieve full compliance,"<sup>211</sup> and that the "[SCC] must work diligently with the Special Master to achieve full compliance with the injunction."<sup>212</sup>

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ing that "conditions and treatment in the SVP program fell below constitutional standards"); John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 388 (1999) ("The treatment environment at [the] SCC has severely hampered any attempt to meet constitutional standards." (quoting *Nov. 25, 1998 Order*, slip op. at 13)).

<sup>205</sup> See *First Supplemental Order Regarding Injunction*, slip op. at 1-3.

<sup>206</sup> See *Turay v. Weston (Order Appointing Special Master)*, No. C91-664WD, slip op. at 1-2 (W.D. Wash. Sept. 22, 1994).

<sup>207</sup> See *Turay v. Weston (Order on Turay's Motion for Further Injunctive Relief)*, No. C91-664WD, slip op. at 1-2 (W.D. Wash. Nov. 21, 1995).

<sup>208</sup> See *id.* at 2-3.

<sup>209</sup> See *id.* at 3.

<sup>210</sup> See *Turay v. Weston (Order on Plaintiffs' Renewed Motion for Injunctive Relief and Contempt and Defendants' Motion for Release from Injunction)*, No. C91-664WD, slip op. at 1 (W.D. Wash. Apr. 2, 1996).

<sup>211</sup> See *id.* at 2-4.

<sup>212</sup> *Id.* at 3. After holding another evidentiary hearing and visiting the SCC, the district court entered an order on February 4, 1997, that again denied the SCC's motion to dissolve the injunction. *Turay v. Weston (Order Granting Plaintiffs' Renewed Motion for Injunctive Relief)*, No. C91-664WD, slip op. at 3-7 (W.D. Wash. Feb. 4, 1997). The court found that "compliance with the injunction is still not complete" because the SCC was not providing residents with constitutionally adequate treatment. *Id.* at 6. For example, the court noted that the SCC had failed to establish a community transition component, had not adequately integrated family members into the treatment program, and had not provided "a structure for objective, external oversight." *Id.* at 4-5.

After additional evidentiary hearings, the district court entered another order on October 1, 1997, finding that the “[SCC] [has] not yet achieved full compliance with the injunction” and that “[t]he central need is to translate into reality a program that exists on paper.”<sup>213</sup> The court observed that “[w]hat is required is not just a plan but a reality—the genuine providing of adequate mental health treatment to all SCC residents willing to accept it.”<sup>214</sup> The court held that such a fully operational program must include the following components, which were lacking:

[T]hat the staff members understand the treatment model and their roles within it; that the delivery of services be effective and consistent across treatment teams; that residents know what they must do to move toward release and where they are in the treatment process; that there be ongoing monitoring of the treatment process; that measures of progress be correlated to the goals of treatment; that the residents know the program policies; that policy enforcement be consistent; that the residents be treated with respect; and that the program be able to deal with the long-term needs of those not engaged in treatment.<sup>215</sup>

On March 30, 1998, the court entered an order finding that the SCC had improperly attempted to curtail the court-appointed ombudsman’s authority to conduct investigations.<sup>216</sup> The court directed the SCC “to refrain from any further attempts to alter court-ordered requirements without obtaining court approval.”<sup>217</sup>

After another evidentiary hearing and site visit, on November 25, 1998, the court held that the “defendants have not yet made constitutionally adequate mental health treatment available to the plaintiffs.”<sup>218</sup> The court found that “[t]he necessity of keeping the injunction in force has been confirmed by every independent expert who testified or whose opinion otherwise appears in the record, including defendants’

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<sup>213</sup> *Turay v. Seling (Order Denying Plaintiffs’ Renewed Motion for Contempt)*, No. C91-664WD, slip op. at 3–4 (W.D. Wash. Oct. 1, 1997).

<sup>214</sup> *See id.* at 4.

<sup>215</sup> *Id.* at 4–5.

<sup>216</sup> *Turay v. Seling (Order on Plaintiffs’ Motion Re: Authority of Ombudsman)*, No. C91-664WD, slip op. at 2 (W.D. Wash. Mar. 30, 1998).

<sup>217</sup> *See id.* at 3. The court’s approval would formally modify the previously stipulated and ordered definition of the ombudsman’s responsibilities. *See id.* at 2–3.

<sup>218</sup> *Nov. 25, 1998 Order*, slip op. at 4, 11.

expert."<sup>219</sup> The court cited several deficiencies in the SCC's compliance, including "a need for additional staff training," the lack of a "coherent and individualized treatment plan for each resident," "inadequate provision at SCC for participation by residents' families in their rehabilitation," and the lack of "[f]air and reasonable grievance procedures and behavior management plans."<sup>220</sup>

In affirming Judge Dwyer's November 1998 order, the Ninth Circuit agreed that "the district court correctly concluded that the [SCC] had made decisions about the program that fell well below professional standards for treatment of sexual offenders," and that there were "numerous inadequacies" in the SCC's treatment program.<sup>221</sup> As the court observed, "At the time of the 1998 hearing (and at a number of hearings in between the 1994 and 1998 orders), the district court found that few, if any, of its initial requirements had been satisfied and that in some instances progress had actually been set back . . . ."<sup>222</sup>

### B. *The SCC's Citation for Contempt of Court*

In 1999, the district court held additional hearings and once again found that the SCC "intentionally disregarded the injunction's requirements."<sup>223</sup> The court held that the SCC "persistently [has] failed to make constitutionally adequate mental health treatment available to the SCC residents, and [has] departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment."<sup>224</sup> Finally, the court found that the State had treated the SCC "as an unwanted stepchild" for whom it "failed to devote the resources necessary to achieve compliance."<sup>225</sup>

In its ruling, the court relied upon a report issued by the IOCC.<sup>226</sup> The report "made findings of deficiencies similar to those found by the court and the special master" and highlighted "a further serious concern, that of inadequate medical staff and facilities for the

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 12, 14.

<sup>221</sup> See *Sharp*, 233 F.3d at 1172.

<sup>222</sup> *Id.* at 1173.

<sup>223</sup> *Nov. 15, 1999 Order*, slip op. at 4-5, 18. The court specifically noted the SCC's "foot-dragging which has continued for an unconscionable time." *Id.*

<sup>224</sup> *Id.* at 19.

<sup>225</sup> *Id.* at 15-16. The court also found there were still inadequacies in "staffing, staff training, treatment plans and programs, and treatment environment at the SCC." *Id.* at 3.

<sup>226</sup> See *id.* at 6-7.

SCC residents."<sup>227</sup> These failings were so apparent that the SCC "did not contend that injunction compliance has been achieved, and did not seek dissolution of the injunction."<sup>228</sup> The court added, "Instead, [the SCC] recognized through the testimony of managerial employees, and through counsel, that minimum professional standards for treating sex offenders are not fully met and that the goal of providing constitutionally adequate mental health treatment is still unattained."<sup>229</sup>

The district court also found that the SCC had "fallen into a pattern of first denying that anything is amiss at [the] SCC, then engaging in a flurry of activity to make improvements before the next court hearing, then admitting at the hearing that shortfalls of constitutional magnitude still exist, then returning to denial."<sup>230</sup> The court concluded that this "entrenched resistance has impeded prompt and wholehearted compliance with court orders protecting basic liberties."<sup>231</sup> As a result, the court held the SCC in contempt for its willful failure to comply with the court's prior orders, finding that sanctions were "essential" to obtain the SCC's compliance.<sup>232</sup>

As a result of the SCC's continued noncompliance, these sanctions remained in place and continued to accrue for several years.<sup>233</sup> In May 2000, Judge Dwyer issued additional findings after conducting another evidentiary hearing.<sup>234</sup> Judge Dwyer reiterated that the SCC had "failed to make constitutionally adequate mental health treatment available to the SCC residents, and [had] departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment."<sup>235</sup> The court found that "[s]hortfalls continue to exist in every area as the result of earlier failures to take the necessary steps."<sup>236</sup> Ac-

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<sup>227</sup> *Id.*

<sup>228</sup> *Nov. 15, 1999 Order*, slip op. at 4.

<sup>229</sup> *Id.* at 4-5.

<sup>230</sup> *Id.* at 16.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 20-21. The court ruled the sanctions would accrue in the amount of approximately \$5,000 per day (\$50 per day, per resident) and should be paid to the registry of the court for subsequent disbursement. *Id.* at 21.

<sup>233</sup> See *infra* notes 234-250 and accompanying text.

<sup>234</sup> See *Turay v. Seling (May 5, 2000 Order)*, No. C91-664WD, slip op. at 3 (W.D. Wash. May 5, 2000).

<sup>235</sup> See *id.* at 17.

<sup>236</sup> *Id.* at 16. The court further observed that "all parties recognize that injunction compliance is not yet complete." *Id.* at 10.

cordingly, Judge Dwyer denied the SCC's request to dissolve the Turay Injunction and lift the contempt sanctions.<sup>237</sup>

After another site visit and evidentiary hearing, on December 20, 2000, the district court found that "[i]n several respects injunction compliance is still incomplete."<sup>238</sup> The SCC still had not made "constitutionally adequate mental health treatment available to the SCC residents."<sup>239</sup> As a result, Judge Dwyer refused to "dissolv[e] the injunction or drop[] the sanction at this point."<sup>240</sup>

Because of the SCC's continuing noncompliance, in its August 24, 2001, order, the district court again denied the state's request to lift the contempt sanctions.<sup>241</sup> As Judge Dwyer observed, multiple courts and independent observers had concluded that the SCC continued to fail in its duty to provide constitutionally adequate treatment.<sup>242</sup> The court noted,

The finding that the SCC has failed to provide such treatment in the past has been made not just by the jury and the district judge in the present cases, but also by the State of Washington's Inspection of Care ("IOC") Reports, by the Superior Court of the State of Washington for King County, by the special master herein, by other experts including one called by [the] defendants at an earlier hearing, and even by the SCC's former clinical director and current superintendent.<sup>243</sup>

After Judge Dwyer's death, his replacement, Judge Rothstein, also found that the SCC failed to provide constitutionally adequate treatment and that "injunction compliance remains incomplete."<sup>244</sup> Like Judge Dwyer, she found that each impending hearing caused "a flurry of activity occurring in the weeks—or days—prior to the hearing" in order to create the appearance of compliance, but each time, the SCC failed to comply with the district court's orders.<sup>245</sup> In addition, Judge

<sup>237</sup> See *id.* at 19.

<sup>238</sup> Turay v. Seling (*Dec. 20, 2000 Order*), No. C91-664WD, slip op. at 4, 8 (W.D. Wash. Dec. 20, 2000).

<sup>239</sup> *Id.* at 14.

<sup>240</sup> *Id.* at 16.

<sup>241</sup> Turay v. Seling (*Aug. 14, 2001 Order*), No. C91-664WD, slip op. at 8, 10 (W.D. Wash. Aug. 14, 2001).

<sup>242</sup> See *id.* at 5.

<sup>243</sup> *Id.*

<sup>244</sup> Turay v. Seling (*Apr. 17, 2002 Order*), No. C91-664WD, slip op. at 9–10 (W.D. Wash. Apr. 17, 2002).

<sup>245</sup> See *id.*; *Nov. 15, 1999 Order*, slip op. at 16.

Rothstein “caution[ed] [the] [SCC] against interfering with the independence of external oversight mechanisms,”<sup>246</sup> after the SCC intervened in the IOCC review by attempting to add a new member to the committee, which left the IOC committee “constricted and to some extent usurped.”<sup>247</sup>

After additional evidentiary hearings, on February 27, 2003, Judge Rothstein found that “injunction compliance remains incomplete” and that “[s]uch failure demonstrates the need to continue the contempt sanctions issued in November 1999.”<sup>248</sup> The district court also found that the SCC had engaged in prohibited “backsliding.”<sup>249</sup> As a result, the court held that “[c]ourt oversight continues to be essential to ensure that [the SCC] . . . correct[s] the ongoing deficiencies in the treatment program so as to provide SCC residents with a discernible path toward release.”<sup>250</sup>

### *C. The District Court’s Order Purging the Accrued Contempt Sanctions*

Judge Rothstein became Director of the Federal Judicial Center in 2003, and, as a result, the case was reassigned to Judge Robert Lasnik on an interim basis.<sup>251</sup> Judge Lasnik abruptly purged the contempt finding and dissolved several components of the Turay Injunction<sup>252</sup>—components the court had previously found were “essential” in “stimulating [the SCC’s] compliance.”<sup>253</sup> Nonetheless, recognizing the SCC’s history of noncompliance, Judge Lasnik conditioned his dissolution on the requirement that there be “no significant ‘backsliding.’”<sup>254</sup> Moreover, he refused to dissolve the injunction in its entirety, holding that:

<sup>246</sup> *Apr. 17, 2002 Order*, slip op. at 24.

<sup>247</sup> *Id.* (internal quotations omitted).

<sup>248</sup> *Turay v. Seling (Feb. 27, 2003 Order)*, No. C91-664WD, slip op. at 4–5, 20 (W.D. Wash. Feb. 27, 2003).

<sup>249</sup> *See id.* at 17. The court noted that “the IOC [had] concluded that ‘the quality of treatment plans has actually decreased since the last visit.’” *Id.*

<sup>250</sup> *Id.* at 20.

<sup>251</sup> *See Turay v. Seling (June 10, 2004 Order)*, No. C91-0664L, slip op. at 2–3 (W.D. Wash. June 10, 2004) (noting the case’s previous presiding judges); Press Release, Federal Judicial Center, Judge Barbara Rothstein Selected to Head Federal Judicial Center (Mar. 2003), available at <http://www.uscourts.gov/ttb/mar03ttb/judge.html>.

<sup>252</sup> *See June 10, 2004 Order*, slip op. at 9–10.

<sup>253</sup> *See Dec. 20, 2000 Order*, slip op. at 13; *Nov. 15, 1999 Order*, slip op. at 20–21; *see also Feb. 27, 2003 Order*, slip op. at 5 (finding that “improvements [the SCC has] made come, in no small part, in response to the court’s contempt orders and to the accrual of sanctions”); *Apr. 17, 2002 Order*, slip op. at 9 (finding that any “improvements occurred in direct response to the court’s contempt orders and to the accrual of sanctions”).

<sup>254</sup> *See June 10, 2004 Order*, slip op. at 10.



Judicial oversight remains necessary to ensure that [the SCC] develop[s] and fund[s] off-island LRAs in a timely manner and with enough capacity to ensure that the treatment [the] SCC provides is constitutionally adequate. The Court will also monitor how the LRA protocol is administered over time to determine if the Department of Corrections unduly interferes with the professional judgment of SCC staff regarding treatment.<sup>255</sup>

A few weeks after Judge Lasnik entered his order, the case was reassigned to Judge Ricardo Martinez.<sup>256</sup>

#### *D. The SCC's Most Recent "Backsliding" and Continued Failure to Provide Constitutionally Adequate Treatment*

After the threat of accruing contempt sanctions was removed, the SCC's compliance with the Turay Injunction's requirements again waned.<sup>257</sup> Specifically, in 2005 and 2006, the IOCC issued detailed reports listing several ongoing deficiencies in the SCC's treatment program, and the former special master, Dr. Marques, submitted a declaration urging the court to continue judicial oversight of the SCC.<sup>258</sup>

##### 1. The 2005 IOCC Report

In February 2005, the IOCC issued a report finding that there "continue[d] to be concerns regarding many of the same areas cited before," including "continuing difficulty meeting standards regarding the provision of medical/psychiatric care, failure to adequately include nursing staff in treatment planning, lack of consistent progress documentation and division between clinical and residential staff."<sup>259</sup> The report observed, among other things, that "[m]edical goals are still very limited or absent altogether" from the treatment plan<sup>260</sup> and "[a] physi-

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<sup>255</sup> *Id.* at 3, 10.

<sup>256</sup> Turay v. Seling (*Reassignment Order*), No. C91-664RSM (W.D. Wash. July 6, 2004).

<sup>257</sup> See *infra* notes 259-322 and accompanying text.

<sup>258</sup> See *infra* notes 259-322 and accompanying text.

<sup>259</sup> See Feb. 11, 2005 IOCC REPORT, *supra* note 181, at 2. The members of the IOCC that issued the 2005 and 2006 reports were Robert Briody, the former Executive Director of the Florida Civil Commitment Center; Irene Lund, former Public Health Advisor to the State of Washington Department of Social and Health Services ("DSHS"); Nadine Porter, former Institutional Nurse Consultant to the State of Washington DSHS; and Maureen Saylor, Certified Sex Offender Treatment Provider. *Id.* at 1; STATE OF WASHINGTON, DEPT. OF SOCIAL & HEALTH SERVS. ADMIN., INSPECTION OF CARE COMMITTEE REPORT, IOCC FINAL RESPONSE 1 (Jan. 31, 2006) [hereinafter Jan. 31, 2006 IOCC REPORT].

<sup>260</sup> Feb. 11, 2005 IOCC REPORT, *supra* note 181, at 18.

cian medical director is needed.”<sup>261</sup> Additionally, “a significant number [of residents] complained about not knowing what they had to do to advance in levels and phases” in the treatment program.<sup>262</sup> Finally, the report observed that there were still problems with the SCC’s grievance system, noting that “not all residents are treated uniformly.”<sup>263</sup>

IOCC members further remarked that the SCC had significantly interfered with its oversight of the treatment program.<sup>264</sup> Prior to the IOCC’s survey, Dr. Dorcas Dobie, one of the founding members of the IOCC, resigned after she concluded that SCC management was not addressing problems identified by the Committee.<sup>265</sup> In her resignation letter, Dr. Dobie cited the SCC’s “adversarial” approach that “dispute[s] the validity of [the IOCC’s] findings rather than [resolves] the identified problems.”<sup>266</sup> Similarly, Maureen Saylor, another member of the IOCC, observed that because the “SCC pays for [the] IOCC to do its work,” the “SCC tends to want to be in charge of how the survey does its work” and “had shown a definite move to directly control what and how the committee does [its] work.”<sup>267</sup> After the resignations, the SCC appointed two members to the IOCC—both former Washington Department of Safety and Health Services (“DSHS”) employees—without consulting the two remaining IOCC members.<sup>268</sup> The SCC also announced new “standards” governing the IOCC’s work.<sup>269</sup> The IOCC noted that these actions sought to “directly control what and how the committee does it’s [sic] work.”<sup>270</sup> In addition, the IOCC noted problems with the court-appointed ombudsman’s ability to engage in oversight and observed that the “ombudsperson identified problems in ob-

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<sup>261</sup> *Id.* at 51.

<sup>262</sup> *Id.* at 14.

<sup>263</sup> *Id.* at 15, 29.

<sup>264</sup> See, e.g., Letter from Dorcas Dobie, IOCC Member, to Mark Selig 1 (Aug. 21, 2003) (on file with author) (discussing the adversarial relationship between the IOCC and the SCC).

<sup>265</sup> See *id.*

<sup>266</sup> See *id.*; Transcript of Record at 25, 27, Sharp v. Riveland, No. C94-121RSM (W.D. Wash. Oct. 21, 2004).

<sup>267</sup> Letter from Maureen Saylor, IOCC Member, to SCC Management 3 (Feb. 11, 2005) (alternation in original) (on file with author).

<sup>268</sup> *Id.* at 2.

<sup>269</sup> Feb. 11, 2005 IOCC REPORT, *supra* note 181, at 53-54; Letter from Robert Briody, IOCC Member, to Henry Richards, SCC Superintendent 4 (Feb. 11, 2005) (on file with author).

<sup>270</sup> Letter from Maureen Saylor to SCC Management, *supra* note 267, at 3.

taining documentation [from the SCC] necessary for her to fulfill her assigned responsibilities."<sup>271</sup>

This was not the first time that the SCC had interfered with oversight mechanisms.<sup>272</sup> The SCC had repeatedly attempted to silence court-appointed ombudsmen who were critical of the treatment conditions at the SCC.<sup>273</sup> For example, after the SCC unilaterally terminated the court-appointed ombudsman, the district court was forced to issue an order on February 11, 1997, directing that the SCC not take such unilateral action without a court order.<sup>274</sup> In March 1998, after the SCC ordered the ombudsman to cease an investigation of an incident at the SCC, the district court again directed the SCC to refrain from interfering with the ombudsman, holding that the SCC's "attempt to curtail [the ombudsman's] authority . . . cannot be allowed to stand."<sup>275</sup> And, in September 1999, the SCC filed a motion to remove the ombudsman, which the court promptly denied.<sup>276</sup>

## 2. The January 2006 IOCC Report

The IOCC documented further departures from minimally acceptable standards of professional care in its January 2006 submission.<sup>277</sup> It reported that "[s]ince 1999 the IOCC has identified a plethora of serious problems at [the] SCC; many of which have existed for some time and continue to exist."<sup>278</sup> The report concluded that "there are several areas of concern regarding program functioning," and although "the major areas have been addressed and readdressed, suggestions offered, plans proposed and implemented . . . still the problems have persisted."<sup>279</sup>

As Dr. Robert Briody, a senior member of the IOCC, stated in a declaration submitted to the district court, "[t]he IOC Team's conclu-

<sup>271</sup> Feb. 11, 2005 IOCC REPORT, *supra* note 181, at 55. The report noted that the ombudsperson had encountered resistance while trying to make necessary inquiries. *Id.*

<sup>272</sup> See, e.g., Nov. 15, 1999 Order, slip op. at 15 (documenting the SCC's attempts to replace the current ombudsman); *Order on Plaintiffs' Motion Re: Authority of Ombudsman*, slip op. at 2 (discussing the SCC's attempts to curtail the ombudsman's authority).

<sup>273</sup> See, e.g., Nov. 15, 1999 Order, slip op. at 15 (documenting the SCC's attempts to replace the ombudsman); *Order on Plaintiffs' Motion Re: Authority of Ombudsman*, slip op. at 2 (discussing the SCC's attempts to curtail the ombudsman's authority).

<sup>274</sup> *Turay v. Seling (Feb. 11, 1997 Order)*, No. C91-664WD, slip op. at 1 (W.D. Wash. Feb. 11, 1997).

<sup>275</sup> *Order on Plaintiffs' Motion Re: Authority of Ombudsman*, slip op. at 2.

<sup>276</sup> Nov. 15, 1999 Order, slip op. at 15.

<sup>277</sup> See Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 1.

<sup>278</sup> See *id.* at 33.

<sup>279</sup> *Id.* at 1.

sions go to the very heart of providing adequately and constitutionally required care for residents at the SCC.”<sup>280</sup> Dr. Briody observed that although “SCC management has acknowledged many of the problems identified by the IOCC, . . . no real change has occurred.”<sup>281</sup> Moreover, because these problems were “so persistent,” Dr. Briody concluded that “improvement will not occur without external oversight and some form of continued enforcement to require compliance with the oversight body.”<sup>282</sup> Indeed, the IOCC report documented numerous deficiencies in the SCC’s treatment program.<sup>283</sup>

First, the IOCC found that ineffective management and supervision hampered the SCC’s treatment program and its ability to respond to the problems previously identified by the district court and the IOCC.<sup>284</sup> Moreover, the report concluded that there were “pervasive problems in management at the SCC”<sup>285</sup> and that “[s]upervisors at the SCC simply don’t actively supervise line staff.”<sup>286</sup> Moreover, “SCC administration does not grasp the extent of its own management problems.”<sup>287</sup>

Second, the IOCC found that the SCC had failed to address obvious deficiencies in its treatment program and noted, “If the IOCC does not call obvious problems to the attention of SCC managers, obvious problems seem to go unnoticed or are simply ignored.”<sup>288</sup> The report further found that internal review mechanisms at the SCC were “dysfunctional and have consistently failed to identify key areas for required improvement to ensure necessary solutions.”<sup>289</sup> These problems included “use of force, safety violations, and allegations of staff abusing residents and medical errors.”<sup>290</sup> The report concluded that “[s]ince

<sup>280</sup> Declaration of Robert Briody §§ 6–7, *Turay v. Richards*, No. C91–664RSM (W.D. Wash. Mar. 30, 2006) [hereinafter Briody Declaration]. Mr. Briody was Chief of Mental Health Services for the Oklahoma Department of Corrections and the former Director of the Florida Civil Commitment Center. *Id.* § 1.

<sup>281</sup> *Id.* § 2.

<sup>282</sup> *Id.* § 7.

<sup>283</sup> See Jan. 31, 2006 IOCC REPORT, *supra* note 259.

<sup>284</sup> See *id.* at 4–6. The report added, “Supervision is absent or not effective.” *Id.* at 3–4.

<sup>285</sup> *Id.* at 17.

<sup>286</sup> Briody Declaration, *supra* note 280, § 6(f) (citing Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 3–4). The report added, “Thus far training and supervision has not solved this problem. . . . [U]pper-level managers at SCC fail to ensure that mid-level and lower-level managers are actively and responsibly performing their duties as supervisors of direct-care staff.” Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 6.

<sup>287</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 6.

<sup>288</sup> Briody Declaration, *supra* note 280, § 6(c).

<sup>289</sup> *Id.* § 6(g). The Quality Improvement Committee was one such internal review mechanism. See *id.*

<sup>290</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 31.

1999 the IOCC has identified a plethora of serious problems at [the] SCC," but these problems have gone uncorrected "because the Quality Committee and the leadership staff have been less than effective."<sup>291</sup>

Third, the IOCC found that the SCC consistently failed to adequately integrate medical and psychiatric care into the residents' treatment program.<sup>292</sup> The report added that "[c]ollaboration with the treatment team [was] not evident based on [the IOCC's] clinical file review"—an "expected protocol" that "must be initiated."<sup>293</sup> The IOCC found this problem to be especially disconcerting since "all residents have been assigned a DSM III, Axis I and/or II diagnosis and therefore have psychiatric needs."<sup>294</sup>

Fourth, the IOCC identified significant problems in the provision of health care services.<sup>295</sup> Health care services were "disorganized and poorly managed," and there was a "lack of professional nursing practice."<sup>296</sup> The report found that there was "no system to ensure accurate delivery and tracking of medications" and that "[t]he procedure for ensuring patient medication compliance is not acceptable."<sup>297</sup> Moreover, the IOCC found "poor staffing patterns, failure to identify staff assignments and tasks, poor fiscal management, ineffective communication processes and deteriorating staff morale."<sup>298</sup> Accordingly, the IOCC "continue[d] to stress the significance of the deficiencies cited within nursing services at [the] SCC" and emphasized that it "feels strongly that it is the responsibility of SCC administration to ensure that the residents' physical and mental health needs are addressed in keeping with best professional practice."<sup>299</sup>

Fifth, the IOCC identified deficiencies in the SCC's clinical and medical files.<sup>300</sup> The report found that "[t]he frequency of medication

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<sup>291</sup> See *id.* at 33.

<sup>292</sup> Briody Declaration, *supra* note 280, § 6(h). The report noted that "[r]eview of the clinical file and treatment plan revealed that medical personnel rarely participate in the treatment plan development. This particular issue has been noted by the IOCC since 1999." Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 9.

<sup>293</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 29.

<sup>294</sup> See *id.* at 10.

<sup>295</sup> *Id.* at 22. The IOCC wrote, "We have significant concerns about the level of health care services provided by the program." *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 27.

<sup>298</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 22.

<sup>299</sup> *Id.* at 23.

<sup>300</sup> *Id.* at 10. The report added, "Since 1999 the SCC administration has provided excuses for the quality problems and documentation deficiencies in the clinical and medical files. . . . None-the-less, quality of file entries and medical and clinical record keeping continues to be an area of serious and substantial difficulty." *Id.*

error is unreported and occurs at a much greater frequency than the facility's data would indicate and more often than is acceptable given the number of residents receiving meds."<sup>301</sup> In addition, the SCC had ignored "guidelines and resources" that the IOCC recommended the SCC "incorporate[] into the protocols for treatment of SCC patients."<sup>302</sup>

Sixth, the IOCC found that "repetitive and persistent" personal sanitation and safety concerns were ignored.<sup>303</sup> The IOCC believed this finding was evidence of a more pervasive problem, noting that "[t]he persistent problems in the areas of room sanitation, obstructions to emergency egress from rooms, clutter, unauthorized food, patient hygiene, shielded light and obstructed visibility are indicative of the direct care and clinical staff not adequately doing their job."<sup>304</sup> The IOCC underscored that the monitoring of the aging residents' hygiene and health care needs "is clearly a nursing responsibility and function" that "need[s] to be an integral part of resident care."<sup>305</sup> The IOCC found that the SCC's disregard for these problems "demonstrates a lack of appreciation for professional nursing practice and its contribution to the treatment team."<sup>306</sup>

Seventh, the IOCC identified a lack of staff professionalism, including poor interaction between residents and SCC staff.<sup>307</sup> Additionally, the report observed that direct care staff were "not being fair, firm and consistent (according to policy and procedure) in their treatment and supervision of residents,"<sup>308</sup> and that "[c]omplaints of staff abuse" had "increased."<sup>309</sup> The IOCC observed that staff behavior "has been an area of concern to both past and present IOC surveyors" and required further review "in upcoming surveys."<sup>310</sup>

Eighth, the IOCC found that there were significant shortcomings in external and internal oversight mechanisms.<sup>311</sup> In particular, the IOCC reported that the SCC had shown disregard for the IOCC and its

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<sup>301</sup> *Id.* at 27.

<sup>302</sup> Briody Declaration, *supra* note 280, § 6(h).

<sup>303</sup> *Id.* § 6(i). The report noted there has been "no real improvement" in this area. *Id.*

<sup>304</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 14.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 23.

<sup>307</sup> *Id.* at 4-5. The report noted, "The IOCC members have frequently witnessed direct care staff not being attentive to residents in their housing units or on the yard. IOCC members, past and present, have pointed out this non-involvement since at least 2000." *Id.* at 5.

<sup>308</sup> *Id.* at 6.

<sup>309</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 18.

<sup>310</sup> *Id.* at 19.

<sup>311</sup> Briody Declaration, *supra* note 280, at § 6(c), (g).

recommendations.<sup>312</sup> For example, the January 2006 IOCC Report noted that, in response to an earlier IOCC recommendation regarding internal oversight of the program, “the SCC stated that the [Resident Advisory Committee] would be further developed, taken more seriously and would be regularly meeting with the Superintendent. Instead it has been disbanded!”<sup>313</sup> The SCC had not reconstituted the Resident Advisory Committee and, as the IOCC noted, there was “no evidence of an adequate substitute present to address” resident grievances.<sup>314</sup> Indeed, soon after the IOCC issued its highly critical report, the SCC disbanded the IOCC and replaced it with new members selected by the SCC’s superintendent.<sup>315</sup>

Finally, the IOCC found that because of the deficiencies in the SCC’s treatment programs “the number of residents participating in treatment has decreased significantly.”<sup>316</sup> As a result, the IOCC concluded that the SCC was failing to meet its stated goal of providing residents with constitutionally adequate treatment.<sup>317</sup>

### 3. The Former Special Master’s Submission

The former special master, Dr. Janice Marques, also concluded that continued judicial supervision was warranted.<sup>318</sup> Dr. Marques submitted a declaration urging the court to maintain the Turay Injunction until adequate oversight mechanisms were in place.<sup>319</sup> In particular, Dr. Marques noted the “long-term pattern of non-responsiveness of SCC management to problems that have been identified by the IOC.”<sup>320</sup> Dr. Marques declared that the Turay Injunction had been “critical” in compelling the SCC to take any action to improve conditions at the facility.<sup>321</sup> Accordingly, because it was “unclear” that oversight mechanisms

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<sup>312</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 1 (discussing that, despite the IOCC’s past suggestions, the same problems persist).

<sup>313</sup> *Id.* at 21.

<sup>314</sup> *Id.*

<sup>315</sup> Turay v. Richards (*Order Denying Motion to Dissolve Injunction*), No. C91-664RSM, at 2 (W.D. Wash. Apr. 17, 2006) (detailing the SCC’s attempt to appoint new members to the IOCC).

<sup>316</sup> Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 7; Briody Declaration, *supra* note 280, § 6(d).

<sup>317</sup> Briody Declaration, *supra* note 280, § 4.

<sup>318</sup> Marques Declaration, *supra* note 42, § 19. Dr. Marques, a clinical psychologist, is a 28-year veteran of the California Department of Mental Health and former president of the Association for the Treatment of Sexual Abusers. *See id.* § 1.

<sup>319</sup> *See id.* § 19.

<sup>320</sup> *See id.* § 8.

<sup>321</sup> *Id.* § 18.

would be “effective in keeping the program on track and accountable,” Dr. Marques recommended that “judicial supervision should not end until there is a clear demonstration that external oversight of the program is working as the Court intended.”<sup>322</sup>

### E. *The District Court’s Order Dissolving the Turay Injunction*

Despite the SCC’s continued failure to provide constitutionally adequate treatment, in 2007, the district court dissolved the Turay Injunction.<sup>323</sup> The court agreed that residents had submitted substantial evidence demonstrating the SCC’s “backsliding.”<sup>324</sup> During the proceedings before the district court, the SCC even conceded that there were problems with the management and supervision of the SCC’s treatment program:

The IOCC has identified a need for increased supervision of residential staff. Although this has been a goal of the program for quite some time, reaching the goal has been challenging for the SCC . . . . With the active growth of the program, particularly since the move to the new facility, there has been the added difficulty of recruiting and hiring mature individuals within the relatively new classes of supervisors and managers.<sup>325</sup>

The SCC also admitted that “the integration of medical and clinical treatment has been a challenge for the program, as has managing medical services and staff generally,”<sup>326</sup> and it further conceded that the IOCC’s “comments [regarding persistent sanitation and safety problems] raise valid concerns.”<sup>327</sup>

The district court had relied on similar findings in the past in concluding that the SCC was not providing constitutionally adequate treat-

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<sup>322</sup> See *id.* §§ 16, 19.

<sup>323</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*1.

<sup>324</sup> See *id.* at \*5.

<sup>325</sup> See Declaration of Alan McLaughlin at 6, *Turay v. Richards*, No. C91-664RSM (W.D. Wash. Apr. 3, 2006) [hereinafter *McLaughlin Declaration*]. Mr. McLaughlin was a long-term manager at the SCC.

<sup>326</sup> Defendants’ Response Brief to Plaintiffs’ Request for Injunctive Relief on the Theory of Backsliding at 32, *Turay v. Richards*, No. C91-664RSM (W.D. Wash. Apr. 17, 2006) [hereinafter *Defendants’ Response Brief*]; see also *McLaughlin Declaration*, *supra* note 325, at 3-4.

<sup>327</sup> Defendants’ Response Brief, *supra* note 326, at 34.



ment.<sup>328</sup> Indeed, when the IOCC had previously issued similarly critical reports, the SCC had conceded that it failed to meet "minimum professional standards."<sup>329</sup>

Nonetheless, the district court dissolved the injunction and denied the residents' request to present additional evidence during an evidentiary hearing.<sup>330</sup> Eight days before the court dissolved the Turay Injunction, the SCC submitted a mandatory status report to the court stating that the reconstituted IOCC had given a preliminary briefing to the SCC and would issue a final report "within the next thirty days."<sup>331</sup> Nonetheless, the district court did not wait for the new IOCC report.<sup>332</sup> Instead, it promptly dissolved the Turay Injunction, stating, "This case has been troublesome to the Court in that there seems to be no right answer, and no good fix for the situation these plaintiffs face at the SCC."<sup>333</sup> Although the court shared the "sense of frustration obviously felt by . . . the residents"<sup>334</sup> and acknowledged that the issues they raised were "serious," the court still granted the State's motion and dissolved the injunction.<sup>335</sup>

The district court simply asserted, without analysis, that the SCC's backsliding did not "rise to the level of a Constitutional violation."<sup>336</sup> Although the Ninth Circuit had previously held that the district court

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<sup>328</sup> See, e.g., *Turay v. Selig*, 108 F. Supp. 2d 1148, 1151-53, 1159-60 (W.D. Wash. 2000) (citing the 1999 IOCC Report and other evidence demonstrating the SCC's failure to provide adequate treatment in denying the SCC's motion to dissolve the Turay Injunction).

<sup>329</sup> See *id.* at 1153. For example, in its May 2000 findings, the district court observed that such concessions were "inevitable in view of the IOC Report," which contained similar criticisms regarding the deficiencies in the SCC's treatment program. See *id.*; see also *Turay v. Selig* (Feb. 26, 2003 Order), No. C91-664R, slip op. at 17 (W.D. Wash. Feb. 26, 2003) ("The recent IOC report appears to document precisely the kind of backsliding that the contempt was designed to forestall."); Dec. 20, 2000 Order, slip op. at 9 ("The IOC report is of great value in helping the SCC toward the goal of constitutionally adequate mental health treatment."); Nov. 15, 1999 Order, slip op. at 6-7 (observing that the SCC had expressed agreement with the findings and recommendations of both the IOC and the Special Master).

<sup>330</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*1; *Turay v. Richards* (July 26, 2006 Order on Scope of Hearing), No. C91-0664RSM, slip op. at 2 (W.D. Wash. July 26, 2006).

<sup>331</sup> See *Turay v. Richards*, No. C91-664RSM, at 3 (W.D. Wash. Mar. 15, 2007) (SCC's March 2007 Progress Report).

<sup>332</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*1 (ordering the dissolution of the Turay Injunction without considering the latest IOCC Report).

<sup>333</sup> See *id.* at \*5.

<sup>334</sup> See Sept. 18, 2006 Transcript, *supra* note 42, at 33-34.

<sup>335</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*5; Sept. 18, 2006 Transcript, *supra* note 42, at 34.

<sup>336</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*3.

must look "beyond the SCC administrators' assertions of compliance,"<sup>337</sup> and could not "defer to the professional judgment of the SCC superintendent and clinical director," the district court based its conclusions on the assertions of SCC staff regarding "ongoing efforts by the SCC program managers to improve the program."<sup>338</sup> The district court did not address any of the specific findings in the IOCC reports documenting "persistent," "pervasive," and "serious," problems in the SCC's treatment program.<sup>339</sup> The court also did not mention the former special master's recommendation that court oversight should continue given the "long-term pattern of non-responsiveness of SCC management to problems that have been identified by the IOC," and the fact that there had been no "demonstration that external oversight of the program is working as the Court intended."<sup>340</sup> Instead, the district court relied heavily on the length of time the Turay Injunction had been in place and asserted that "injunctions against the state are not intended to operate in perpetuity."<sup>341</sup> Thus, in the final analysis, the district court seems to have simply given up in attempting to secure the SCC's compliance with its constitutional obligations.<sup>342</sup>

#### V. THE RELATIONSHIP BETWEEN THE CONSTITUTIONALLY ADEQUATE TREATMENT REQUIREMENT AND THE CONSTITUTIONALITY OF CIVIL COMMITMENT

Both the U.S. Supreme Court and the Washington Supreme Court have specifically relied on the Turay Injunction to provide sufficient relief to residents challenging the constitutionality of Washington's civil commitment scheme.<sup>343</sup> The Supreme Court has repeatedly held that, where treatment is possible, it is constitutionally required.<sup>344</sup> Otherwise,

<sup>337</sup> *Sharp v. Weston*, 233 F.3d 1166, 1171-72 (9th Cir. 2000).

<sup>338</sup> *Id.*; see *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4-5.

<sup>339</sup> See *id.*; Jan. 31, 2006 IOCC REPORT, *supra* note 259, at 1, 14, 17, 33.

<sup>340</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4-5; Marques Declaration, *supra* note 42, §§ 8, 16, 18-19.

<sup>341</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*5.

<sup>342</sup> See *id.*

<sup>343</sup> See *Seling v. Young*, 531 U.S. 250, 265-66 (2001) ("Our decision today does not mean that respondent [has] no remedy for the alleged conditions and treatment regime at the Center. . . . [W]e note that a § 1983 action against the Center is pending in the Western District of Washington. . . . [and that] [t]he Center operates under an injunction . . . ."); *In re Detention of Campbell*, 986 P.2d 771, 776 (Wash. 1999) ("[The court] agree[s] with the trial court that the proper relief under the circumstances is to remedy any constitutional defects in the administration of the SCC. Remediation is already ongoing under the direction of the federal district court.").

<sup>344</sup> See *Seling*, 531 U.S. at 261-62; *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).

civil commitment becomes punitive and thus criminal in nature, and the potentially indefinite confinement violates the detainees' due process rights.<sup>345</sup> The treatment requirement is therefore fundamental. Nonetheless, the SCC litigation demonstrates the difficult and intractable problems that have arisen in attempting to provide constitutionally adequate treatment.<sup>346</sup>

### A. *The Treatment Dilemma*

The SCC litigation's seventeen-year history demonstrates the inherent difficulty in enforcing government compliance with the treatment requirement.<sup>347</sup> To the extent that enforcing the treatment requirement involves significant costs, civil commitment becomes a less attractive alternative to protect the public from potentially dangerous individuals.<sup>348</sup>

Moreover, the benefits of treatment are far from clear.<sup>349</sup> Does treatment reduce recidivism? Can it reduce the dangerousness of sexually violent predators such that the risks of releasing them into society are acceptable? There is a strong and ongoing scientific debate regarding these questions, and, as a result, there are significant concerns regarding the potential benefits of civil commitment and treatment programs.<sup>350</sup>

Finally, the recalcitrance of government officials to provide constitutionally adequate treatment suggests that, from the beginning, they did not intend to use civil commitment to rehabilitate offenders.<sup>351</sup> Instead, their actions demonstrate a desire to use civil commitment as a

<sup>345</sup> See *Seling*, 531 U.S. at 261–62; *Hendricks*, 521 U.S. at 366.

<sup>346</sup> See, e.g., *Turay v. Richards* (*Order Granting Motion to Dissolve Injunction*), No. C91-0664RSM, 2007 WL 983132, at \*4–5 (W.D. Wash. Mar. 23, 2007); *Turay v. Seling* (*Nov. 15, 1999 Order*), No. C91-664WD, slip op. at 6–18 (W.D. Wash. Nov. 15, 1999).

<sup>347</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4–5; *Nov. 15, 1999 Order*, slip op. at 6–18.

<sup>348</sup> See Friedland, *supra* note 70, at 130–31 (“[T]he available data indicates that the cost of civil commitment will be much higher to a state than the equivalent cost of imprisonment and treatment. . . . [The treatment] programs will be ‘enormously expensive’ and hard to implement.” (quoting Rael Jean Isaac, Editorial, *Put Sex Predators Behind Bars, not on the Couch*, WALL ST. J., May 8, 1998, at A14)); Janus, *supra* note 9, at 1236 (noting that “SVP programs are very expensive”).

<sup>349</sup> See Berliner, *supra* note 70, at 1209–11 (discussing the ongoing debate regarding the effectiveness of treating sex offenders); Weeks, *supra* note 70, at 1291–93 (same).

<sup>350</sup> See Berliner, *supra* note 70, at 1209–11 (summarizing recent studies manifesting “difficulties in confirming treatment effectiveness”); Weeks, *supra* note 70, at 1293 (noting that there has been a “lively dispute on that point among scholars”).

<sup>351</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4–5; *Nov. 15, 1999 Order*, slip op. at 6–18.

means to warehouse potentially dangerous defendants after their criminal sentences have expired.<sup>352</sup> Thus, although the Supreme Court has upheld civil commitment statutes because they typically mandate treatment and thus do not have a solely punitive purpose, in practice, the promise of treatment has not been fulfilled.<sup>353</sup>

The SCC litigation demonstrates the potential drawbacks of relying primarily on the statutory text and legislative history in determining whether a civil commitment scheme meets constitutional requirements.<sup>354</sup> A state's actions, however, often tell a much different story. If the State of Washington were truly interested in providing adequate, statutorily required treatment, court supervision would not have lasted seventeen years.<sup>355</sup> Nor would there still be undisputed problems in the SCC's treatment program—a fact even the district court acknowledged when it dissolved the Turay Injunction.<sup>356</sup>

Thus, the SCC litigation demonstrates that focusing exclusively on the statutory text suffers from significant problems.<sup>357</sup> States may be able to enact statutes that declare treatment as a goal, but in practice, that goal may prove to be a sham.<sup>358</sup> Although statutes may pay lip service to the goal of treatment, they often seem designed solely to further incapacitate and, in some circumstances, punish defendants.<sup>359</sup>

<sup>352</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4–5; *Nov. 15, 1999 Order*, slip op. at 6–18.

<sup>353</sup> See *Seling*, 531 U.S. at 260–61; *Hendricks*, 521 U.S. at 348; *Allen v. Illinois*, 478 U.S. 364, 373–74 (1986).

<sup>354</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4–5; *Nov. 15, 1999 Order*, slip op. at 6–18.

<sup>355</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*1–2.

<sup>356</sup> See *id.* at \*4–5.

<sup>357</sup> This was an approach advocated by Justices Thomas and Scalia in their concurrences in *Seling*. See 531 U.S. at 267–70 (Scalia, J., concurring); *id.* at 271–74 (Thomas, J., concurring).

<sup>358</sup> See Friedland, *supra* note 70, at 115 (arguing that, in the context of the Kansas civil commitment statute upheld in *Hendricks*, “treatment was only a veneer covering the true legislative intent—dressing up a criminal wolf in a civil sheep’s clothing”); Janus & Logan, *supra* note 115, at 321 (arguing that, “in practice, the promised treatment most often goes unredeemed”); Weeks, *supra* note 70, at 1262 (“Given society’s demonstrated abhorrence of sexual deviants, . . . any suggestion that sex offender laws are enacted out of an altruistic interest in ‘care and treatment’ of sexual offenders is inherently insincere.”).

<sup>359</sup> See, e.g., WASH. REV. CODE ANN. § 71.09.010 (West 1990); *Nov. 15, 1999 Order*, slip op. at 6–18 (detailing the SCC’s continued failure to provide constitutionally adequate treatment). Even without this potential problem, many academics have argued that civil commitment statutes for sexually violent predators are unconstitutional. See, e.g., Morris, *supra* note 70, at 1205 (“Despite their popularity with state legislatures, scholars have denounced SVP legislation and have condemned the *Hendricks* decision—especially Justice Thomas’s majority opinion—for upholding their constitutionality.”). The Washington civil commitment statute was criticized soon after its enactment. See John Q. La Fond, *Washing-*

### B. Potential Alternatives

One potential alternative to civil commitment programs is to increase the penalties for crimes involving sexual violence.<sup>360</sup> Although tougher criminal penalties may create less flexibility in dealing with individual violators, they have the advantage of avoiding the extensive costs associated with civil commitment.<sup>361</sup> Indeed, the SCC litigation suggests that civil commitment programs, in many instances, are simply after-the-fact attempts to impose additional punishment.<sup>362</sup> Jurisdictions that impose weak penalties for crimes of sexual violence may seek civil commitment as a backstop to impose additional incarceration and ensure that individuals who are clearly dangerous are not allowed to reenter society.<sup>363</sup> Thus, in a state like Washington, which had historically taken a lax, if not permissive, approach to sexually violent offenses, the statutory scheme has functioned solely to further incapacitate criminal defendants.<sup>364</sup>

Moreover, judicial supervision has proven ineffective in addressing these problems.<sup>365</sup> In Washington, after seventeen years of involvement, the courts have abandoned their efforts to enforce compliance in pro-

ton's *Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992) (arguing that the Washington Civil Commitment Program imposes additional punishment). *But see* Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709 (1992) (arguing that civil commitment presents the best method to deal with sexually violent predators).

<sup>360</sup> See Brian D. Gallagher, *Now That We Know Where They Are, What Do We Do With Them?: The Placement of Sex Offenders in the Age of Megan's Law*, 7 WIDENER J. PUB. L. 39, 61-64 (1997); Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 433 (1997); Vitiello, *supra* note 4, at 651; Sarah E. Agudo, Comment, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 Nw. U. L. REV. 307, 335 (2008).

<sup>361</sup> See Agudo, *supra* note 360, at 337 (discussing the costs associated with civil laws designed to confine or monitor sexual offenders); Peter C. Pfaffenroth, Note, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, 55 STAN. L. REV. 2229, 2262 (2003) (discussing the need to consider the extensive costs of civil commitment programs).

<sup>362</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4-5 (discussing the SCC's continued failure to provide constitutionally adequate treatment); *Nov. 15, 1999 Order*, slip op. at 6-18 (imposing contempt sanctions on the SCC after it repeatedly failed to comply with court orders).

<sup>363</sup> See Vitiello, *supra* note 4, at 682-83 (discussing the civil penalties that states often impose on sex offenders even after the completion of their criminal sentences).

<sup>364</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4-5; *Nov. 15, 1999 Order*, slip op. at 6-18.

<sup>365</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4-5 (dissolving the injunction despite the SCC's failure to provide constitutionally adequate treatment); *Nov. 15, 1999 Order*, slip op. at 6-18.

viding constitutionally adequate treatment, at least in part due to the length of the prior judicial supervision.<sup>366</sup> The courts abandoned their supervision despite the fact that "mere passage of time" is an insufficient basis for dissolving an injunction.<sup>367</sup>

More fundamentally, the primary reason the Turay Injunction was in place for seventeen years was the SCC's repeated and undisputed noncompliance with constitutional requirements.<sup>368</sup> Thus, the district court's dissolution of the injunction threatens to reward the SCC for its willful noncompliance.<sup>369</sup> Indeed, prior noncompliance generally warrants *continued* judicial supervision, not dissolution of a court's injunction.<sup>370</sup> Thus, the litigation's final result has, in effect, produced what the Supreme Court has prohibited: the "warehousing" of detainees whose criminal sentences have expired under the guise of civil commitment.<sup>371</sup>

Under these circumstances, there exists a powerful argument that the costs of civil commitment outweigh the costs associated with increased criminal penalties for sexually violent crimes.<sup>372</sup> Because the state's motivation appears to be incapacitation and further punishment, simply increasing criminal penalties would be preferable to enacting civil commitment schemes.<sup>373</sup> Civil commitment programs inevitably become the subject of extensive litigation, as states are reluctant to pro-

<sup>366</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*5 (citing the length of the Turay Injunction as a reason for its dissolution).

<sup>367</sup> See, e.g., *SEC v. Worthen*, 98 F.3d 480, 482 (9th Cir. 1996) ("The mere passage of time, however, does not constitute a ground for relief from an 'obey the law' injunction . . ."); *Bldg. & Constr. Trades Council of Phila. v. NLRB*, 64 F.3d 880, 889 (3d Cir. 1995) ("[W]e are unwilling to hold . . . that the mere passage of time and temporary compliance are themselves sufficient to constitute the type of changed circumstances that warrant lifting of an injunction . . .").

<sup>368</sup> See *Nov. 15, 1999 Order*, slip op. at 6–18 (documenting the SCC's repeated failures to comply with court orders to improve the treatment program).

<sup>369</sup> See *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*5.

<sup>370</sup> See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247–49 (1991) (holding that defendants must demonstrate that constitutional requirements are being met and that they are unlikely to "return to [their] former ways" before an injunction will be dissolved).

<sup>371</sup> See, e.g., *Seling*, 531 U.S. at 256–57; *Hendricks*, 521 U.S. at 348; *Allen*, 478 U.S. at 373–74; *Turay v. Seling*, 108 F. Supp. 2d 1148, 1151 (W.D. Wash. 2000) ("[T]hese plaintiffs, and others involuntarily confined through civil proceedings, cannot simply be warehoused and put out of sight; they must be afforded adequate treatment.").

<sup>372</sup> See *Nov. 15, 1999 Order*, slip op. at 6–18 (documenting the SCC's repeated failures to comply with court orders to improve the treatment program); Agudo, *supra* note 360, at 337 (discussing the costs associated with civil laws designed to confine or monitor sexual offenders); Pfaffenroth, *supra* note 361, at 2257 & n.173, 2262 (discussing the need to consider the extensive costs of civil commitment programs).

<sup>373</sup> See *Nov. 15, 1999 Order*, slip op. at 6–18 (documenting the SCC's repeated failures to comply with court orders to improve the treatment program).

vide adequate treatment programs that provide a pathway to eventual release.<sup>374</sup>

There are costs associated with such an approach that should not be discounted. Increasing criminal penalties across the board may leave prosecutors less discretion to seek just sentences based on the individual facts and circumstances of each case.<sup>375</sup> Moreover, some argue convictions may be more difficult to obtain if there are stringent mandatory minimum sentences.<sup>376</sup> Finally, there are the obvious costs of lengthier confinements.<sup>377</sup> Nonetheless, given the problems associated with civil commitment,<sup>378</sup> coupled with the deficiencies in treatment programs, these costs arguably pale in comparison to the costs being incurred under the current civil commitment system.<sup>379</sup>

### CONCLUSION

The debate over the costs and benefits of civil commitment and its associated constitutional concerns is likely to continue for many years to come. The experience under Washington's civil commitment program, however, raises significant concerns regarding the utility of civil commitment as a means of protecting society from potentially danger-

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<sup>374</sup> See, e.g., *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000); *Turay*, 108 F. Supp. 2d at 1148; *Nov. 15, 1999 Order*, slip op. at 6-18 (noting the numerous court orders regarding the treatment programs at the SCC).

<sup>375</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 14 (1988) (noting the reduced flexibility given to judges with the creation of strict mandatory minimum sentences).

<sup>376</sup> Compare Norbert L. Kerr, *Severity of Prescribed Penalty and Mock Jurors' Verdicts*, 36 J. PERS. & SOC. PSYCHOL. 1431, 1439 (1978) (concluding that studies showed that an increase in "the severity of the prescribed penalty for an offence" led to "an adjustment of subjects' conviction criteria such that more proof of guilt was required for conviction" and, as a result, there was "a reduced probability of conviction"), with Dennis J. Devine et al., *Jury Decisionmaking*, 7 PSYCHOL. PUB. POL'Y & L. 622, 671 (2001) (summarizing literature showing that "mandatory sentence length (0-2 years vs. 15 or more years) did not affect verdicts" and that there was only "a negligible difference in conviction rates as a function of sentence severity").

<sup>377</sup> See Berliner, *supra* note 70, at 1215 ("The substantial increased costs associated with incarcerating more [sexually violent] criminals for longer periods of time is a price citizens are willing to pay for immediate community safety.").

<sup>378</sup> See, e.g., *Order Granting Motion to Dissolve Injunction*, 2007 WL 983132, at \*4-5 (dissolving the injunction despite the SCC's failure to provide constitutionally adequate treatment); *Nov. 15, 1999 Order*, slip op. at 6-18.

<sup>379</sup> Given the seriousness of these crimes and the potential danger to society, doing nothing is simply not an option. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1456 (2001) ("The inevitable pressure for protection [from potentially dangerous individuals] will express itself in one form or another.").

ous sexual offenders. The litigation imposes significant costs on both states and the judicial system. Washington, though, has persisted in its refusal to comply with its constitutional obligations to provide adequate treatment. This recalcitrance manifests an intent to incapacitate, if not punish, rather than provide the treatment mandated by the applicable Washington statute and the United States Constitution. In essence, the Washington scheme is serving as a highly inefficient means of imposing additional criminal "punishment."

As such, one must ask whether increasing criminal penalties for sexually violent predators would be preferable to the current system. Not only are there significant constitutional concerns associated with civil commitment, but there are also extensive economic costs. Abandoning civil commitment in favor of increased criminal penalties—accompanied by constitutional guarantees found in the criminal system—would arguably mitigate these costs, and, at the same time, avoid many of the constitutional pitfalls associated with civil commitment.