

## TREATMENT UNDER RAZOR WIRE: CONDITIONS OF CONFINEMENT AT THE MOOSE LAKE SEX OFFENDER TREATMENT FACILITY

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This Note examines the recent, burgeoning practice of subjecting convicted sex offenders to indefinite civil commitment. Given the Supreme Court's current position and prior holdings, this Note will center on conditions of confinement in sex offender treatment facilities as the basis for an as-applied constitutional challenge to these civil commitment regimes. Minnesota will be the focus of this examination, both as one of the earliest enacting states and as proprietor of perhaps the most infamous treatment facility for committed offenders, the Minnesota Sex Offender Program ("MSOP") at Moose Lake. Part I contains an overview of the current legal ramifications and potential penalties that inhere for those who have been adjudicated "sexually violent" or "sexually dangerous" persons. Section A highlights the public fear and revulsion surrounding sex offenders, a driving source of the political will behind such legislation. Section B describes how and why these statutes have withstood constitutional challenges. Part II begins the examination of a particular case study of the Minnesota Sexually Dangerous Persons Act ("SDPA"), both in terms of legislative intent and its actual impact on convicted sex offenders. Finally, Part III details the conditions of confinement for those who have been civilly committed under this statute. Section A begins with an examination of the state's failure to meet its obligations under the SDPA, while Section B describes the resultant institution (Moose Lake), as one that is definitively punitive. This Note will demonstrate that the conditions at Moose Lake violate inmate-patients' due process rights under the Fourteenth Amendment, as they tend to be more punitive than treatment-oriented in nature and, as such, constitute a substantial departure from accepted professional judgment.

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I. PERPETUAL PUNISHMENT AT THE MARGINS: SEX OFFENDER EXCEPTIONALISM  
IN THE ERA OF THE ADAM WALSH ACT

*America is the land of second chance, and when the gates of the prison open,  
the path ahead should lead to a better life.*<sup>1</sup>

At the start of his second term as President of the United States, George W. Bush urged upon Congress the manifold, historic goals of American incarceration: punishment and incapacitation, met with rehabilitation and the “second chance” for self-betterment. Roughly two years later, on July 27, 2006, the President signed the Adam Walsh Act (“AWA”) into law. The AWA established, inter alia, a national sex offender registry,<sup>2</sup> a new version of the Bail Reform Act (with stricter release requirements for sex offenders),<sup>3</sup> and made failure to register a federal crime.<sup>4</sup> Most notably, though, the Act established a post-incarceration, indefinite civil commitment regime for convicted sex offenders.<sup>5</sup> All told, the entire enactment signified “the most expansive and punitive sex offender law ever initiated by the federal government.”<sup>6</sup> The AWA produced an extensive mode of incomparable punishment for sex offenses. The results have been far-reaching, but specific in their targeting of this group as a purportedly risk-laden sub-class of criminal. As such, sex offenders continue to face collateral consequences unheard of in other areas of the criminal justice system: indefinite registration requirements, heightened penalties (including incarceration) for seemingly minor acts, and the potential to be confined indefinitely through civil commitment.

A surge of constitutional challenges has befallen the judiciary since the AWA’s passage. One of the earliest, successful petitions came in *United States v. Karper*. David Karper brought a facial challenge to one of the more controversial provisions of the AWA, which created an exception to the Bail Reform Act.<sup>7</sup> Under the new version of the law, in any case involving child pornography or offenses against a minor, judges were required to impose (at a minimum) a condition of electronic monitoring on all releasees.<sup>8</sup> The district court held that the provision violated the Due Process Clause of the Fifth Amendment, as Karper’s fundamental right to freedom of movement and to the presumption of innocence at trial were

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1. George W. Bush, President of the United States, State of the Union Address to Joint Session of Congress (Jan. 20, 2004).

2. 42 U.S.C. § 16901 (2006).

3. 18 U.S.C. § 3142 (2006) (“In any case that involves a minor victim under section . . . 2252A(a)(2) . . . or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring.”).

4. 42 U.S.C. § 16913 (2006).

5. *Id.*

6. John Fabian, *The Adam Walsh Child Protection and Safety Act: Legal and Psychological Aspects of the New Civil Commitment Law for Federal Sex Offenders*, 60 CLEV. ST. L. REV. 307, 307 (2012).

7. *United States v. Karper*, 847 F. Supp. 2d 350, 356 (N.D.N.Y. 2011).

8. *Id.* at 355.

infringed by the requirement.<sup>9</sup> The court also found the provision violative of the Eighth Amendment's prohibition against excessive bail, since it mandated onerous conditions of release despite a defendant's lack of dangerousness to the community.<sup>10</sup> Although the constitutional challenge brought in *Karper* proved successful, other claims have been struck down by the Supreme Court, supporting the AWA's validity and ongoing application to past and present sex offenders.<sup>11</sup>

The AWA's provision allowing for the civil commitment of "sexually dangerous persons" stands out as one of the most pervasive and controversial features of the Act. Under this portion of the law, the Attorney General and the Bureau of Prisons are granted broad authority to certify that a particular incarcerated individual is a "sexually dangerous person."<sup>12</sup> A hearing is then held, at which the government must prove by clear and convincing evidence that the person is "sexually dangerous."<sup>13</sup> If such a finding is made, the person will be civilly committed and removed to a state facility (if that person's domicile assumes responsibility for his or her custody, care, and treatment) or, as is more often the case, he or she will be placed in a federal sex offender treatment facility.<sup>14</sup> The individual will then be held indefinitely; release is contingent upon a finding that s/he "is no longer sexually dangerous to others," or that the person meets the requirements for a less restrictive program of ongoing treatment or care.<sup>15</sup> While the accompanying statute does provide a definition for sexual dangerousness,<sup>16</sup> it is notably silent in defining the terms "serious mental illness," "abnormality," and "disorder."<sup>17</sup> Moreover, the statute does not require the person to actually have been convicted of a sex crime; in such scenarios, the Government can still "attempt to prove acts

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9. *Id.* at 360.

10. *Id.* at 362.

11. *See, e.g.*, *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505 (2013) (upholding the application of federal sex offender registration requirements as constitutional under the Military Regulation Clause and Necessary and Proper Clause); *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012) (reiterating the constitutionality of the Sex Offender Registration and Notification Act, a portion of the Adam Walsh Act establishing a federal sex offender registry, as accurately reflecting the intent and aim of Congress to make a uniform and effective nationwide registry); *United States v. Comstock*, 560 U.S. 126 (2010) (finding the provision of the Adam Walsh Act allowing district courts to order the civil commitment of sexually dangerous federal prisoners, beyond their actual release date from prison, constitutional under the Necessary and Proper Clause).

12. 18 U.S.C. § 4248(a) (2012).

13. *Id.*

14. *Id.* § 4248(d).

15. *Id.* § 4248(e).

16. The definition of a sexually dangerous person is one who "has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others and suffers from a serious mental illness, abnormality, or disorder as a result;" sexual dangerousness is further defined as indicating that a person "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. §§ 4247(a)(5) & (6) (2012).

17. Fabian, *supra* note 6, at 310–11.

for which the designated person was often neither charged nor convicted.”<sup>18</sup>

The broad construction of the AWA has opened the gate for district courts to make findings of sexual dangerousness amongst a wide variety of defendants, subjecting each to indefinite terms of confinement *after* completion of an underlying or prior conviction. Eric Janus critiques the narratives implemented in these decisions, which typically presume that preventive detention is principled and does not breach the accepted division between criminal prosecution and mental health intervention.<sup>19</sup> The opinions justifying sex offender commitment have become almost formulaic; each begins with stories of sexual violence justifying the law’s existence, the defendant’s past crimes, predictions that such sexual violence is “highly likely to recur,” and that the state interest in protecting its citizens against such future acts is therefore compelling.<sup>20</sup> Federal district courts have applied similarly mechanistic analyses in rubber-stamping commitment petitions filed by the Bureau of Prisons and the Attorney General.<sup>21</sup> The trend in federal commitments indicates a strong governmental interest in applying a second term of incarceration under these loosened standards; while not dispositive, it is notable that in 2010 (at the time *United States v. Comstock*<sup>22</sup> was decided), over ninety-eight percent of those designated by the government as “sexually dangerous persons” were at the end of their prison sentences and otherwise would have been released.<sup>23</sup> Once committed, discharge from a sex offender program is extraordinarily rare and, in many cases, becomes an effective sentence to lifelong confinement.<sup>24</sup>

The motives purportedly justifying the AWA are not new to the American legal landscape. Laws subjecting individuals to indefinite commitment based upon perceived sexual proclivities and pathologies have been in place, in one form or another, across various jurisdictions for a number of decades. Most grew out of state mental health laws, which allowed for the involuntary commitment of mentally ill persons who posed a danger to themselves or others; a similar, public safety rationale underpinned these early statutes, most commonly referred to as “Sexual Psychopath Laws.”<sup>25</sup> Most state legislatures had a form of this civil commitment statute on their books by the 1960s.<sup>26</sup> The main goal of this first

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18. Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 987 (2011).

19. See Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL’Y REV. 71, 71–72 (1997).

20. *Id.* at 73.

21. See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 16 (2003).

22. 560 U.S. 126, 149–50 (2010) (upholding the constitutionality of the new federal civil commitment scheme for sexually dangerous federal prisoners established under the Adam Walsh Act); see discussion *infra* Part I.B.

23. Yung, *supra* note 18, at 985–86.

24. *Id.* at 986.

25. Anita Schlank & Rick Harry, *Essay: The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years*, 29 WM. MITCHELL L. REV. 1221, 1221–22 (2003).

26. *Id.* at 1222.

generation of commitment laws was to divert relevant individuals from prisons to hospitals, mostly in the hopes of providing treatment in a humane manner to those too sick to deserve (or be capable of handling) formal punishment through incarceration.<sup>27</sup> The emphasis was on remunerative, treatment-based efforts to “cure” sexual pathology. The statutes themselves reflected this emphasis, distinguishing criminal culpability (acts resulting from individual intent or malice, thereby justifying incarceration), from mental illness or fallibility (acts performed without actual intent or ill-will, thereby justifying civil commitment for treatment purposes).

Contemporary civil commitment statutes have blurred the distinction between these spheres of confinement (the prison as punishment-oriented, the commitment ward as health and safety-oriented). Beginning in the late 1980s, states began repealing their civil commitment statutes, the focus of treatment shifting to the development of prison-based programs and community outpatient therapy.<sup>28</sup> The laws outlining these new regimes tested the boundaries of traditional civil commitment, using preventive detention to accomplish a purpose that historically had been reserved to criminal codes.<sup>29</sup> This has allowed for the ongoing incapacitation of lawbreakers under the rationale of crime prevention.<sup>30</sup> These civil commitment laws, commonly known as Sexually Violent Predator (“SVP”) or Sexually Dangerous Persons (“SDP”) acts, do not target the mentally ill (as traditionally defined), nor do their statutory requirements align with the legal processes and justifications underlying involuntary commitment. As Eric Janus observes, it is as if the new sex offender commitment schemes “were enacted precisely because standard civil commitment laws were not broad enough to cover sex offenders.”<sup>31</sup> Thus, under the purported goal of treatment, the AWA and other similar, state SVP systems have created an exceptional process for sex offenders who, in many instances, end up facing a perpetual regime of punishment, confinement, and restricted liberties in the wake of conviction.

#### A. *Fear as Policy: The Public Safety Rationale*

The shift from earlier, treatment-oriented approaches in civil commitment to the contemporary focus on prison-based programming and confinement developed alongside other similar movements in the American approach to incarceration. The 1980s and 90s saw an unprecedented marshaling of federal and state resources in combating crime nationwide. A “tough on crime” ethos pervaded the politics of the day, resulting in the passage of increasingly harsh criminal penalties and sentencing policies. Democrats and Republicans seized on heightened fears amongst the

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27. Janus, *supra* note 19, at 71.

28. Schlank & Harry, *supra* note 25, at 1223.

29. Janus, *supra* note 19, at 72.

30. *Id.*

31. *Id.*

public, sensationalizing individual accounts of particularly violent and heinous crimes to muster support for this legislative agenda. The Willie Horton example, which largely swung the 1988 election in favor of the Republican Party, is emblematic in this regard.<sup>32</sup> Aside from the racial undertones of the incident, Willie Horton elicited public outrage for two main reasons: first, because the crime was committed by a convicted felon and, second, because of the notion that the crime could have been prevented by the government.<sup>33</sup> Crime prevention through prolonged incarceration thus became a focal point in the breadth of legislation that followed. Three-strikes laws, mandatory minimums, and supermax isolation units became the normative applications of this penological purpose, largely justified and democratically supported by a newly intensified, fear-driven public safety rationale.

The passage of the AWA and other state SVP laws occurred amidst this environment of public fear and outrage, in response to remarkably similar circumstances. The first law allowing for the indefinite commitment of sexually violent predators was passed by the Washington state legislature in 1990, in response to immense public pressure following a rash of high profile crimes committed by sex offenders who had been released from prison.<sup>34</sup> Public indignation reached a fever pitch after a particularly horrifying attack by a mentally impaired parolee whose prior convictions included kidnapping, rape, and murder.<sup>35</sup> In 1994, Kansas passed its own version of the law in reaction to a widely broadcast incident involving the rape and murder of a college student by an ex-felon.<sup>36</sup> The assailant had just been released from prison after serving ten years for the rape and sodomy of another female college student.<sup>37</sup> The AWA itself was named after, and signed on the anniversary of, the abduction and murder of six-year-old Adam Walsh by an ex-convict, who was later discovered to be a notorious serial killer.<sup>38</sup> A number of states followed Washington, Kansas, and the federal government in lockstep, passing SVP statutes largely in response to heightened fears in the wake of rare, but exceptionally heinous crimes; as a result,

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32. George H.W. Bush capitalized on this incident in his campaign against then-Governor of Massachusetts, Michael Dukakis. “[T]he Willie Horton case captured the fears of the middle class. Horton, who was convicted of first-degree murder and sentenced to life in prison without the possibility of parole, committed a heinous crime while on furlough from prison.” Robert S. Blanco, *Mixing Politics and Crime*, 59 *FED. PROBATION* 91, 91 (1995).

33. *Id.*

34. Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 *U. PA. J. CONST. L.* 391, 391 (2011).

35. *Id.*

36. Adam D. Hirtz, *Lock ‘Em Up and Throw Away the Key: Supreme Court Upholds Kansas’ Sexually Violent Predator Act in Kansas v. Hendricks*, 42 *ST. LOUIS U. L.J.* 545, 559–60 (1998).

37. *Id.* at 559.

38. Lee Davidson, *Bush Signs, Hatch Praises New Child Protection Act*, *DESERET NEWS* (July 28, 2006), <http://www.deseretnews.com/article/640198190/Bush-signs-Hatch-praises-new-Child-Protection-Act.html>.

nearly twenty states now have laws addressing the civil commitment of sexually violent predators.<sup>39</sup>

### B. *The Constitutionalization of Indefinite Commitment*

The Supreme Court has upheld the constitutionality of SVP civil commitment regimes on a number of occasions, beginning with *Kansas v. Hendricks*. Hendricks challenged the Kansas commitment statute on due process grounds, arguing that indefinite commitment based on an undefined category of “mental abnormality” was overly vague.<sup>40</sup> The Supreme Court reversed, holding that the statute’s definition of “mental abnormality” satisfied due process requirements, and finding that involuntary commitment was not punitive, effectively defeating any claim of double jeopardy or an ex post facto violation.<sup>41</sup> Importantly, the Court upheld Kansas’ SVP act by characterizing the confinement of sex offenders as civil, rather than criminal in nature.<sup>42</sup> Based on the Court’s determination, the Kansas statute became the model for other states’ versions and, ultimately, the federal commitment provisions found in the Adam Walsh Act.<sup>43</sup>

The Kansas Sexually Violent Predator Act came under judicial scrutiny again in *Kansas v. Crane*. Crane had successfully challenged his civil commitment as a “sexually violent predator.”<sup>44</sup> In doing so, the Supreme Court of Kansas applied *Hendricks*, determining that civil commitment under the statute would violate Mr. Crane’s right to due process absent a finding that he was actually unable to control his behavior.<sup>45</sup> The State of Kansas sought certiorari, arguing that the Kansas Sexually Violent Predator Act does not require the state to prove that a dangerous person is completely unable to control his behavior.<sup>46</sup> The Court reaffirmed the constitutionality of Kansas’ SVP statute, holding that the state need not prove the offender’s complete lack of control over his or her dangerousness, but that the Constitution mandated at least *some* finding of volitional impairment where civil commitment is ordered.<sup>47</sup> This ruling is significant because it sets the baseline for findings of (future) dangerousness; the state need not prove that an individual poses an “imminent” threat to himself or others but, rather, that it is merely

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39. John Matthew Fabian, *To Catch a Predator, and Then Commit Him for Life: Sexual Offender Risk Assessment—Part Two*, 33 CHAMPION, Mar. 2009, at 32.

40. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

41. *Id.*

42. *Id.* at 369.

43. See generally Cynthia A. King, Note, *Fighting the Devil We Don’t Know: Kansas v. Hendricks, a Case Study Exploring the Civilization of Criminal Punishment and its Ineffectiveness in Preventing Child Sexual Abuse*, 40 WM. & MARY L. REV. 1427 (1999).

44. *In re Crane*, 7 P.3d 285 (Kan. 2000).

45. *Id.* at 290.

46. *Kansas v. Crane*, 534 U.S. 407, 411 (2002).

47. *Id.* at 411–12.

“difficult” for the purportedly dangerous person to control his or her behavior.<sup>48</sup> Although some state statutes have heightened this requirement to an “imminence” standard,<sup>49</sup> the threshold set by *Crane* allows for much more deference to be imparted upon the state in conducting hearings and establishing findings of sexual dangerousness. *Hendricks* and *Crane* combined to constitutionalize, for the first time in American jurisprudential history, the indefinite civil commitment of individuals on a basis other than mental health, through the purported interest of preventing future crime.

These rulings were based on challenges to state civil commitment regimes, but also largely precipitated and encouraged the establishment of the civil commitment provisions of the Adam Walsh Act. The Court recently upheld the AWA in *United States v. Comstock*. The case did not visit or consider the petitioner’s rights under the Constitution; rather, the Court’s reasoning turned solely on the question of whether Congress had sufficient authority under the Necessary and Proper Clause to enact the law’s civil commitment requirement.<sup>50</sup> The Court found that it did, reasoning that Congress possesses broad authority with respect to the imprisoned, especially those who may be affected by the incarceration of others and, furthermore, that the Act does not “[invade] . . . an area typically left to state control.”<sup>51</sup> In his majority opinion, Justice Breyer makes frequent mention of the fact that, in deciding *Comstock*, the Court does “not reach . . . any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution.”<sup>52</sup> As some legal scholars have noted,<sup>53</sup> Justice Breyer may be attempting to set the stage for future challenges on other constitutional grounds.<sup>54</sup> Until then, though, the legality of SVP commitment regimes is well-established by Supreme Court precedent. The minimal threshold guidelines fashioned in both *Hendricks* and *Crane* have given states ample leverage and capacity to indefinitely commit sex offenders, sexually dangerous persons, and sexually violent predators, as determined in each case by application of the statute.

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48. Lave, *supra* note 34, at 402.

49. *Id.*

50. *United States v. Comstock*, 560 U.S. 126, 133 (2010).

51. *Id.* at 141–44.

52. *Id.* at 149–50.

53. Tucker Culbertson, *After Comstock: Equal Protection Challenges to the Civil Commitment Provisions of the Adam Walsh Child Protection and Safety Act*, 61 SYRACUSE L. REV. 427, 428 (2011).

54. As of the date of this Note’s publication, no challenges to the law have yet proven successful. Circuit Courts continue to uphold the civil commitment provisions of the Adam Walsh Act, with the Supreme Court denying requests for further review. *See, e.g.*, *United States v. Timms*, 664 F.3d 436 (4th Cir.) (finding that the Act’s provision permitting civil commitment of sexually dangerous persons did not violate the Equal Protection Clause) *cert. denied*, 133 S. Ct. 189 (2012); *United States v. Volungus*, 595 F.3d 1 (1st Cir. 2010) (overturning a district court’s finding that the Adam Walsh Act was unconstitutional; the Act’s provision for civil commitment of sexually dangerous persons falls within the power of Congress under the Necessary and Proper clause, and the Act does not impermissibly infringe on areas of traditional state power).

The exceptions created by the federal government in this developing area of law have thus mirrored a burgeoning practice amongst a number of states to indefinitely confine and punish a particular sub-class of criminals. The sweeping civil commitment reforms that began during the 1990s, and spread to the federal government by 2006, occurred in the context of fear-based politicking and reactionary lawmaking in the aftermath of rare, but particularly shocking crimes. These laws emerged concurrent with larger, national policy agendas. But unlike the War on Drugs (the failure of which has been well-documented and analyzed), the evolving War on Sex Offenders has not been subject to much, if any, criticism or social backlash.<sup>55</sup> SVP laws largely grew out of the same, still-pervasive tenets of a “tough-on-crime” ideology. Here, though, the misguided analytic underlying SVP legislation has only been allowed to expand, unchecked by the judiciary and condoned by the public. As applied to the post-conviction, post-sentence, post-incarceration confinement of “sexually dangerous persons,” these civil commitment laws effectively eliminate the path ahead of the prison gates that President Bush described to Congress in 2004. Sex offenders are the exception to the rule. For this particular class of ex-criminal, the road forward is different, and a “second chance at a better life” simply does not apply.

## II. THE STATE REGIME AT WORK: MINNESOTA’S SEX OFFENDER COMMITMENT LAW IN THEORY AND IN PRACTICE

### A. *The Minnesota Sexually Dangerous Persons Act*

*He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate . . . He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.*<sup>56</sup>

Minnesota’s Sexually Dangerous Persons Act (“SDPA”), like other such statutes,<sup>57</sup> has had the effect of sentencing hundreds of former inmates to indefinite terms of confinement through its transformation of the civil commitment process. The first version of the SDPA was codified in 1995, as an amendment to the state’s earlier psychopathic personality statutes.<sup>58</sup> The constitutionality of the law was

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55. Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 435–37 (2010).

56. *Weems v. United States*, 217 U.S. 349, 366 (1910) (McKenna, J.) (holding that indefinite terms of probation and parole, post-conviction, violate fundamental rights including the Eighth Amendment’s prohibition of cruel and unusual punishment).

57. See discussion *supra* Part I.B.

58. Recent Cases, *Constitutional Law—Due Process (Excused)—Minnesota Supreme Court Upholds Minnesota Sexually Dangerous Persons Act—In Re Linehan*, 594 N.W.2D 867 (Minn. 1999), 113 HARV. L. REV. 1228, 1228–29 (2000).

challenged and subsequently upheld by the Minnesota Supreme Court in *Linehan*; applying the guidelines established by *Hendricks*, the court interpreted the SDPA as allowing the “civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction does not allow them to adequately control their sexual impulses, making it *highly likely* that they will engage in harmful sexual acts in the future.”<sup>59</sup> The “highly likely” grounds for findings of potential future dangerousness satisfied the baseline determinations established by *Hendricks*, with the court declining to go so far as to define “mental abnormality” or “personality disorder.”<sup>60</sup>

As it stands today, Minnesota’s SDPA is analogous, in large part, to Kansas’ SVP statute and the federal civil commitment scheme established under the Adam Walsh Act. In relevant parts, the Minnesota statute defines a “Sexually Dangerous Person” as one who “(1) has engaged in a course of harmful sexual conduct . . . ; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct . . . .”<sup>61</sup> Notably, this portion of the statute also carries a subdivision asserting that, in making a finding of sexual dangerousness, it is not necessary for the state “to prove that the person has an inability to control [his or her] sexual impulses.”<sup>62</sup>

Under the law, facts may be submitted to the district attorney of the relevant county and, if “good cause” is found, that attorney will prepare a petition to institute a civil commitment hearing.<sup>63</sup> These county attorneys have been charged by the legislature with the duty of identifying possible candidates for the civil commitment program; additionally, the Minnesota Department of Corrections has been utilizing a referral procedure since 1991, whereby county attorneys are further notified of potential candidates at or near the end of their term of incarceration.<sup>64</sup>

Once a petition has been filed, the committed person’s right to counsel is triggered,<sup>65</sup> and a hearing is held. The standard of proof at the civil commitment hearing is by clear and convincing evidence; once the government has established

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59. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (emphasis added).

60. *See id.*

61. MINN. STAT. ANN. § 253D.02(16) (West 2014).

62. *Id.* This is contrary to the standard set forth in *Hendricks*. However, the Minnesota Supreme Court has adopted a narrow reading of this portion of the statute, keeping it in line with Supreme Court precedent. The law requires, at minimum, a showing that the offender’s disorder prevents him or her from exercising “adequate control” over sexual impulses; such a finding must be based on expert opinion tying an alleged lack of adequate control to a diagnosed disorder or mental abnormality. *In re Linehan*, 594 N.W.2d at 876–78.

63. MINN. STAT. ANN. § 253D.07(1) (West 2014).

64. Caroline Palmer & Bradley Prowant, *Re-Thinking Minnesota’s Criminal Justice Response to Sexual Violence Using a Prevention Lens*, 39 WM. MITCHELL L. REV. 1584, 1594–95 (2013).

65. MINN. STAT. ANN. § 253D.20 (West 2013) (“A committed person has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the committed person if neither the committed person nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed.”).

by this low threshold that the person is “sexually dangerous,” the court will order that individual’s commitment for an indeterminate period of time.<sup>66</sup> The individual is then transferred to a secure facility for ongoing, mandated treatment.<sup>67</sup> Once treatment has progressed, the committed person has the right to petition for discharge or “reduction in custody,” subject to a review board’s decision, which is governed by several factors.<sup>68</sup> These include the person’s clinical treatment progress, the need for security to accomplish ongoing treatment, the need for institutionalization, and whether transfer (either out of a secure facility or into a less restrictive facility) can be accomplished while maintaining a reasonable degree of public safety.<sup>69</sup> Although some portions of the Minnesota SDPA may be contrary to Supreme Court precedent, the statute has withstood both facial and as-applied constitutional challenges, and has been found to be in line with the standards set forth in *Hendricks* and *Crane*.<sup>70</sup>

### B. The SDPA in Practice

*“This is much like Guantanamo Bay,” Gustafson said, referring to the U.S. detention facility for terrorism suspects in Cuba. “It’s easy to have the political will to put someone in, but it’s hard to let them out.”<sup>71</sup>*

When Charles R. Stone first petitioned the Court of Appeals of Minnesota for his transfer out of Moose Lake, he was over fifty years of age.<sup>72</sup> He did not seek permanent release; rather, he requested movement to a non-secure facility for ongoing treatment.<sup>73</sup> Like many offenders, Stone was himself the product of years of sexual abuse and personal neglect. Records indicate that he was molested from as early as age nine, and was subjected to ongoing emotional and physical abuse by his parents throughout his childhood; then, in 1981, at the age of nineteen, Stone committed his first sex offense, assaulting two underage girls.<sup>74</sup> In 1983, as the result of a guilty plea on two counts of second-degree criminal sexual conduct, Stone was sentenced to thirty-six months of incarceration; prior to his release from prison, a petition was filed to commit him as a psychopathic personality.<sup>75</sup> Stone has since remained in the custody of the Minnesota Department of Human Services, a civilly committed patient in the Minnesota Sex Offender Program.<sup>76</sup>

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66. MINN. STAT. ANN. § 253B.10 (West 2014).

67. *Id.*

68. MINN. STAT. ANN. § 253D.27 (West 2014).

69. MINN. STAT. ANN. § 253D.29 (West 2014).

70. *See supra* text accompanying note 62.

71. Dan Browning, *Facing Lawsuit, Minnesota Asks: When Are Sex Offenders Safe for Release?* MINN. STAR TRIB. (Nov. 2, 2013), <http://www.startribune.com/local/229407401.html>.

72. *Stone v. Jesson*, No. A12-0874, 2012 WL 5381915, at \*1 (Minn. Ct. App. Nov. 5, 2012).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

Despite these twenty-eight years of additional confinement to MSOP, in reviewing the judicial appeal panel's decision, the Court of Appeals of Minnesota denied Stone's petition for transfer, finding no clear error in the panel's initial determination.<sup>77</sup> This is despite the fact that Stone was committed before the broadening of Minnesota's civil commitment laws to encompass findings of "sexual dangerousness."<sup>78</sup> These amendments clarified, but also shifted the burden of persuasion in petitions for reduction in custody; as noted by the court, even in a request for transfer (not release), "the statute plainly states that Stone bears a burden of persuasion."<sup>79</sup> Stone was placed at Moose Lake in 1996, around the time of the facility's initial construction as a secure facility within MSOP.<sup>80</sup> Following his placement, Stone's status was repeatedly demoted, as he was purportedly unable to advance through the facility's treatment plan.<sup>81</sup>

Stone's story is typical of many offenders who find themselves held under MSOP custody. Based on the standards of review, statutory limitations, and broad deference granted at initial hearings,<sup>82</sup> it is no surprise, then, that Moose Lake has become a domestic Guantanamo of sorts, where some of the most feared and publicly reviled sex offenders are subjected to indefinite confinement, bereft of the limiting principles and safeguards characteristic of criminal adjudication.

In practice, Minnesota's SDPA has resulted in exceptionally high rates of confinement, extremely low instances of custody reduction or release, and a harsh, much-maligned facility for commitment and treatment in Moose Lake. A recent legal challenge brought by one inmate-patient of Moose Lake highlights another important facet of the SDPA: it does not require existence of a prior arrest or conviction for a sex offense in making a finding of sexual dangerousness.<sup>83</sup> The petitioner in that case was deemed a sexually dangerous person in 2010 despite having no convictions for sexual offenses on his record; he had been incarcerated for burglary and was known to have struggled with addictions to alcohol and marijuana.<sup>84</sup> Eric Eischens, a developmentally disabled nineteen-year-old, was

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77. *Id.*

78. See *supra* text accompanying notes 61 and 62.

79. *Stone*, 2012 WL 5381915, at \*3.

80. *Id.* at \*2.

81. *Id.*

82. Reviewing courts will not reverse findings of fact unless clearly erroneous. See *In re Monson*, 478 N.W.2d 785, 788 (Minn. Ct. App. 1991). Since civil commitment hearings are largely based on findings of fact and not law, these decisions are rarely overturned on appellate review.

83. Although the 2013 amendments to the statute refer to individuals housed at Moose Lake as "committed persons," the term "inmate-patients," will be implemented throughout this article for two reasons: first, to emphasize the prior, more longstanding verbiage contained in older versions of the SDPA, which consistently referred to such individuals as "patients," and second, to highlight the punitive nature of confinement at Moose Lake, discussed further *infra*. See Sexually Dangerous Persons—Civil Commitments, 2013 Minn. Sess. Law Serv. Ch. 49 (H.F. 947) (West).

84. Smallwood worked for ten years as a door-to-door salesman, during which he allegedly groped and fondled several women. He was charged with sexual offenses based on at least two of these incidents, but no convictions resulted. *Smallwood v. Jesson*, No. 13-CV-00063, 2013 WL 4781021, at \*1 (D. Minn. Sept. 5, 2013).

also indefinitely committed to MSOP despite never having been convicted as an adult.<sup>85</sup> State records indicate that as many as 52 of the 698 offenders at Moose Lake fall within this category, facing lifetime confinement based on acts they committed as juveniles.<sup>86</sup> Other cases brought by inmate-patients highlight the agedness of the population at Moose Lake. One petitioner brought a challenge when he was seventy years old; despite his age, he was refused transfer or reduction in the restrictiveness of his custody level.<sup>87</sup> These examples are individualized as a matter of course, but overall, they evince the severe practical effects and predominant applications of Minnesota's Sexually Dangerous Persons Act.

Considerable data support this contention: that, as-applied, Minnesota's sex offender commitment scheme is especially harsh and ineffective. MSOP currently houses over 700 residents at its two facilities: St. Peters and Moose Lake.<sup>88</sup> While other states, such as California,<sup>89</sup> carry larger overall populations, the rate of sex offender commitment in Minnesota is exceptionally high. Minnesota has approximately four times the number of civilly committed sex offenders per capita as compared to the average of *all* other state civil commitment programs (nineteen in all); in 2010, it had the highest number of civilly committed sex offenders per capita across the nation.<sup>90</sup> As of 2010, approximately 5,300 sex offenders were being held in civil commitment facilities across the country; Minnesota ranked third, after California and Florida, in the total number of committed sex offenders.<sup>91</sup> The state with the next highest number of committed persons, as of 2007, was New Jersey, with 342.<sup>92</sup> Releases, conditional or otherwise, are exceedingly rare at MSOP, particularly in comparison to other states' commitment facilities. Since its inception in 1994, only two individuals have been released from MSOP; one remains on "provisional discharge" status with intensive supervision and GPS

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85. Chris Serres, *Minnesota Sex Offenders: Are They Really the 'Worst of the Worst'?*, MINN. STAR TRIB. (Dec. 2, 2013), <http://www.startribune.com/local/233945281.html>.

86. *Id.*

87. *In re Krueger*, No. C3-96-2503, 1997 WL 206802, at \*1 (Minn. Ct. App. Apr. 29, 1997).

88. Dan Browning, *Facing Lawsuit, Minnesota Asks: When Are Sex Offenders Safe for Release?*, MINN. STAR TRIB. (Nov. 2, 2013), <http://www.startribune.com/local/229407401.html>. St. Peters is a less restrictive unit run by MSOP, neighboring the larger and more populous facility at Moose Lake. In order to qualify for placement at St. Peters, inmate-patients must graduate through MSOP's three-phase treatment program. The first two phases of this program are implemented solely at Moose Lake; Phase Three, which is focused on community integration, is provided at the St. Peter Facility. OFFICE OF THE LEGISLATIVE AUDITOR, EVALUATION REPORT: CIVIL COMMITMENT OF SEX OFFENDERS 55 (2011). Very few offenders ever reach Phase III; as such, this Note focuses on the conditions of confinement and treatment at Moose Lake, which houses a vast majority (approximately eighty-eight percent) of MSOP's civilly committed sex offenders. See discussion *infra* Part III.A.

89. *A Profile of Civil Commitment Around the Country*, N.Y. TIMES (Mar. 3, 2007), [http://www.nytimes.com/imagepages/2007/03/03/us/20070304\\_CIVIL\\_GRAPHIC.html](http://www.nytimes.com/imagepages/2007/03/03/us/20070304_CIVIL_GRAPHIC.html).

90. OFFICE OF THE LEGISLATIVE AUDITOR, EVALUATION REPORT: CIVIL COMMITMENT OF SEX OFFENDERS 18 (2011).

91. *Id.* at 17–18.

92. *A Profile of Civil Commitment Around the Country*, *supra* note 89.

monitoring within his community,<sup>93</sup> the other was subsequently returned to MSOP due to technical violations of his release conditions, and later passed away while in custody.<sup>94</sup> While other states with similar civil commitment programs share comparably modest release rates, a number of states have conditionally released between eight and seventeen percent of their populations.<sup>95</sup> Other states with less restrictive outpatient programs (such as Texas and New York) enjoy both lower costs per resident and higher release rates overall.<sup>96</sup>

The practical impossibility of release has exacted feelings of hopelessness and despair at Moose Lake, which in turn have exacerbated poor conditions, costs, and mental illness amongst the population. One inmate-patient actually escaped from Moose Lake in 2006, but was later apprehended and returned to confinement at the facility.<sup>97</sup> Another inmate-patient committed suicide in August 2013, the first and only documented suicide in the program's history.<sup>98</sup> More offenders exit Moose Lake as a result of illness or death than through successful application of the facility's treatment plan. DHS Deputy Commissioner Anne Barry admitted as much in a recent interview with Minnesota Public Radio, stating, "We have natural deaths, we have people who have died of cancers and other diseases but this . . . is the only suicide in the [MSOP's] history . . ." <sup>99</sup> Inmate-patients emphasize the relative frequency of incidents of self-injury or attempted suicide, claiming to witness "a handful of attempts every week."<sup>100</sup> The feelings of hopelessness and frustration fostered by the treatment programming have only aggravated this problem.<sup>101</sup> Wallace Beaulieu, who has been confined to Moose Lake since 2006, acknowledges that he has attempted suicide on two previous occasions and that the legislature's failure to act or intervene has sent morale to a new low at the facility.<sup>102</sup>

Although Minnesota's Sexually Dangerous Persons Act has withstood constitutional scrutiny, its impact raises important concerns and lays the groundwork for potential future legal challenges. As a method of preventive detention, the law obscures from public view both the offender and the state action at issue (effective treatment as a result of court-ordered commitment). Given the broad reach of the

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93. Browning, *supra* note 71.

94. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90, at 19.

95. *Id.*

96. *Id.* at 16–17.

97. Tom Lyden, *Sex Offender Release? Panel Recommends Freeing Two*, KMSP/MYFOX9 (Aug. 20, 2013), <http://www.myfoxtwincities.com/story/23201210/sex-offender-release-panel-recommends-freeing-2>.

98. Rupa Shenoy, *Minn. Reports First-Ever Suicide at Sex Offender Facility*, MPR NEWS, MINN. PUB. RADIO (Aug. 5, 2013), <http://minnesota.publicradio.org/display/web/2013/08/05/news/suicide-moose-lake-sex-offender-facility>.

99. *Id.*

100. *Id.*

101. Treatment methodologies and programming implemented by MSOP are discussed at length *infra* Part III.A.

102. Shenoy, *supra* note 98.

statute and the malleability of its terms, Minnesota has witnessed a surge in the population of indefinitely confined inmate-patients at Moose Lake.<sup>103</sup> While treatment initially served as the primary justification for the law, in practice, the process is ineffective. Given the facility's rising (and aging) population, low rate of release, and reputation for inducing hopelessness in its wards, the reality of the SDPA, in practice, has shown to be even more troubling than the tenuous constitutional grounds upon which the law was first established.

### III. CONDITIONS OF CONFINEMENT AT MOOSE LAKE: A HOSPITAL UNDER RAZOR WIRE

*There is no treatment. There never was any treatment . . . I'm locked up in a prison that has a hospital sign over it, but someday, we may be able to rip that sign off.*<sup>104</sup>

Given its tenuous legal background and troubling application, a high volume of litigation has resulted since the SDPA's passage, much of which has involved the actual conditions, standards of treatment, and regulatory practices put in place at Moose Lake. The complaints filed in these proceedings describe conditions of confinement and a lack of treatment that highlight (a) the utter failure of MSOP to meet its statutory obligations, placing the facility in violation of both state and federal law, and (b) the creation of an environment that is unconstitutionally punitive and fails in all aspects of its purported methodology of treatment.

#### *A. Moose Lake is in Violation of the SDPA and the Federal Constitution in Failing to Provide Treatment to its Inmate-Patient Population*

Inmate-patients at Moose Lake do not receive adequate treatment. Under the Due Process Clause of the Fourteenth Amendment, civilly committed persons are entitled to treatment or other "training" to ensure their own safety and freedom from undue restraint.<sup>105</sup> The SDPA similarly mandates that persons found to be sexually dangerous be committed to facilities designated for secure treatment; inmate-patients' rights may be limited only as necessary to maintain a "therapeutic environment" at the facility.<sup>106</sup> The Minnesota Supreme Court, in determining the substantive rights of civilly committed sex offenders, has held that civil commit-

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103. Palmer & Prowant, *supra* note 64, at 1595–96 (“[Between 2003 and 2008], the Department of Corrections referred 157 sex offenders per year to county attorneys; in the previous twelve years, the Department of Corrections had referred a total of 333 sex offenders for civil commitment. The procedural and substantive changes implemented by 2003 resulted in two-thirds of current ‘clients’ of the Minnesota Sex Offender Program being committed between 2004 and 2012.”).

104. Lyden, *supra* note 97.

105. *Youngberg v. Romeo*, 457 U.S. 307, 316–19 (1982) (establishing constitutional standards based on the Due Process Clause of the Fourteenth Amendment for persons involuntarily committed to state institutions).

106. MINN. STAT. ANN. §§ 253.B.10, 253D.19 (West 2013).

ment must be “programmed to provide treatment and periodic review.”<sup>107</sup> Any design or application otherwise would constitute a violation of due process.<sup>108</sup> Despite these clear requirements, the administrators and staff at Moose Lake have repeatedly failed to provide adequate sex offender treatment.<sup>109</sup>

MSOP’s treatment program is divided into three phases; during Phase I and Phase II, offenders are housed at Moose Lake.<sup>110</sup> Treatment consists primarily of group therapy, but only for six hours per week; individual therapy is not provided.<sup>111</sup> External evaluators have found that MSOP generally delivers less treatment than civil commitment programs in other states, noting that the number of per-week treatment hours is “on the low end” in comparison to analogous facilities outside of Minnesota.<sup>112</sup> Overall, the amount of treatment delivered by MSOP is lower than that of any other adult inpatient sex offender program in the state.<sup>113</sup>

Part of the reason for this is the obstructive nature of the three-phase program itself. Phase I is the most restrictive. Inmate-patients at this level must learn how to comply with the facility’s rules and learn basic concepts of therapy; no sex offender-specific treatment is provided at this stage.<sup>114</sup> The focus of Phase I is not on the behaviors or sexual proclivities of the inmate-patient, but rather, on “preparing clients for treatment by asking clients to demonstrate that they can follow rules and learn how to participate in treatment groups.”<sup>115</sup> Treatment at this stage neither explores underlying causes for abnormal behavior, nor does it assist inmate-patients in developing tools to prevent re-offending.<sup>116</sup> Moreover, the rules

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107. *In re* Blodgett, 510 N.W.2d 910, 916 (Minn. 1994) (upholding the constitutionality of Minnesota’s sex offender commitment program due to the availability of periodic review, warning that treatment regimes developed in the interest of public safety can be problematic).

108. *Id.*

109. MSOP is under a statutory mandate to provide proper care and treatment to its wards. MINN. STAT. ANN. § 253B.03(7) (West 2013). Once an order for commitment has been entered, the burden is on the committed person to establish by clear and convincing evidence that “a less restrictive treatment program is available,” is willing to accept the committed person, and meets both the individual’s treatment needs and the need for public safety. *In re* Civil Commitment of Miles, No. A14-0795, 2014 WL 4798954, at \*5 (Minn. Ct. App. 2014) (interpreting MINN. STAT. ANN. § 253D.07(3) (West 2013)); *In re* Kindschy, 634 N.W.2d 723, 731 (Minn. Ct. App. 2001) (“Under the current statute, patients have the *opportunity* to prove that a less-restrictive treatment program is available, but they do not have the *right* to be assigned to it.”). Moreover, under the statute, any proposed alternative must be within a “secure treatment facility,” meaning the MSOP facility at Moose Lake or any other secure site operated by MSOP; allowable alternatives do *not* include “services or programs administered by the [MSOP] outside a secure environment.” *In re* Civil Commitment of Cooper, No. A13-1211, 2013 WL 6050493, at \*6 (Minn. Ct. App. 2013). Outside of the pending outcome in *Karsjens v. Jesson* (discussed *infra*), no successful claims have yet been brought in challenging the adequacy of treatment at MSOP.

110. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90, at 55.

111. *Id.* at 62.

112. *Id.* at 64.

113. *Id.* at 62.

114. Second Amended Complaint at 21, *Karsjens v. Jesson*, No. 11-CV-03659 (D. Minn. Aug. 8, 2013).

115. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90, at 64.

116. *Id.*

with which inmate-patients must demonstrate compliance are confusing, over-broad, and arbitrarily enforced.<sup>117</sup> The program was designed to move offenders through the three phases on a projected four-year timeline; the reality, though, is that most patients stay, or regress to Phase I, where they remain housed at Moose Lake indefinitely.<sup>118</sup> As of January 1, 2012, sixty-four percent of inmate-patients were held in Phase I, twenty-four percent in Phase II, and twelve percent were housed in Phase III at Moose Lake's neighboring, less restrictive facility (St. Peters).<sup>119</sup> MSOP's policies have thus created a system in which a majority of inmate-patients are held in the strictest possible settings, with the least amount of treatment. Furthermore, what little therapy is provided is not actually specific to sex offenders (the very reason underlying and justifying their civil commitment). The three-phase system operated by MSOP, while enacted under the mandate of establishing a therapeutic environment, instead demonstrates the administration's repeated failure to provide actual, effective treatment to its wards.

The program at Moose Lake has also been marred by staffing problems, inconsistencies, and poor administration. In a recent class action filed on behalf of all inmate-patients at Moose Lake, the complainants allege, inter alia, that inmate-patients have been allowed to draft their own treatment plans for approval (rather than clinicians), receive as little as one hour per week in group therapy (as the sole form of treatment), and that requests for more frequent or intensive therapy are routinely denied by the administration.<sup>120</sup> Moose Lake provides neither psychiatrists nor licensed clinical psychologists trained or qualified to provide "meaningful treatment" to inmate-patients.<sup>121</sup> A large number of clinicians lack even a basic background in therapy; some of these clinical staff members include former "security staff, with backgrounds in criminal justice, [and] [s]ome have only a high school diploma."<sup>122</sup> There have been repeated problems in staffing Moose Lake, resulting in high turnover, "burn-out," and frequent changes in leadership.<sup>123</sup> These factors have also contributed to a "dearth of clinical supervisors," inconsistent therapeutic practices, weak documentation in clinicians' files, and uncharacteristically high clinician caseloads.<sup>124</sup>

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117. Behaviors that are banned under the MSOP Behavioral Expectations Handbook include signing up for an activity and failing to attend, attending an activity but failing to sign up in advance, "dress code violations, loitering in the halls or other common areas, or leaving the lights on in a cell." Second Amended Complaint, *supra* note 114, at 35. Staff members have been alleged to apply the various provisions of the Handbook inconsistently amongst inmate-patients, making it that much more difficult for them to demonstrate compliance and understanding of the facility's rules. *Id.*

118. *Id.* at 22.

119. *Id.*

120. *Id.* at 25.

121. *Id.* at 26.

122. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90, at 61.

123. *Id.* at 58–61.

124. *Id.* at 60.

In a particularly damning example of the inadequacy of treatment at Moose Lake, insurance companies have refused to cover costs at the facility. As one of its provisions, the SDPA apportions financial responsibility for the cost of commitment between the state and the committed person in equal shares (fifty percent to each).<sup>125</sup> However, for patients who have health insurance coverage, the facility's per diem billing procedure is ineffective, in part because MSOP is not accredited and does not meet recognized standards of mental health care.<sup>126</sup> Under this program, inmate-patients "are receiving such deficient treatment, under such poor conditions, that it cannot be paid for through health insurance coverage."<sup>127</sup> This sub-standard level of supposed treatment was thoroughly documented and analyzed in a report composed by the Minnesota State Legislative Auditor. The authors found that, compared to a standardized range of "best practices" for sex offender civil commitment programs, Moose Lake is "at the low end."<sup>128</sup> Moreover, Moose Lake is not governed by the same regulatory obligations as other similarly situated facilities;<sup>129</sup> rather, MSOP is subject only to a Department of Human Services administrative rule which does not mandate a minimum level of treatment.<sup>130</sup> Programs operating under this rule do not need to be accredited by an outside agency.<sup>131</sup> Given the level of exceptionalism lent to Moose Lake and the lack of regulatory oversight, it is unfortunate, yet unsurprising, that the facility has failed to achieve basic standards of treatment, regardless of whether that standard is defined by external accreditation, insurance companies' actuarial measures, or Minnesota's own regulatory guidelines.

In its failure to ensure reasonable standards of treatment at Moose Lake, the Minnesota Sex Offender Program currently violates the statutory mandates of the SDPA and has potentially abrogated inmate-patients' constitutional rights. While sex offender treatment literature suggests that high-risk offenders should receive the highest level of treatment, Moose Lake has adopted the inverse approach, providing the least amount to those most in need of it.<sup>132</sup> The impact and

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125. MINN. STAT. ANN. § 253D.12(2) (West 2013).

126. Second Amended Complaint, *supra* note 114, at 34.

127. *Id.*

128. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90, at 64.

129. Because MSOP is housed under the state's Department of Human Services, it is not subject to the same regulatory requirements for similar treatment programs housed under the Department of Corrections. Following the passage of Minnesota's SDPA, the Department of Human Services began promulgating rules under its statutory mandate, codified at MINN. STAT. ANN. § 246B.04(1). The ensuing regulations applied only to "residential treatment programs operated by the commissioner primarily for persons committed as sexual psychopathic personalities or as sexually dangerous." MINN. R. 9515.3010 (2015); *see* MINN. R. 9515.3000-9515.3110 (2015). These rules are more permissive compared to those promulgated by the Department of Corrections. Under DOC regulations, treatment hours are counted differently, more hours of treatment are required, and more group therapy and psychoeducational classes are provided to inmates undergoing sex offender treatment in prison. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90, at 63.

130. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90, at 63.

131. *Id.*

132. *Id.* at 63-64.

results of this policy—low morale, low release rates, unqualified staff, and a lack of inmate-patient advancement—signify a protracted failure that is known to MSOP officials and administrators alike.

*B. The Environment and Conditions at Moose Lake are Unconstitutionally Punitive*

After decades of failure to effectively treat sex offender inmate-patients, the environment at Moose Lake has converted to one focused purely on confinement and punishment. Under the Fourteenth Amendment, civilly committed persons may be subjected to liberty restrictions that are reasonably related to legitimate government purposes and “not tantamount to punishment.”<sup>133</sup> The atmosphere at Moose Lake is neither accidental, nor a remote effect of a legitimate practice; rather, the conditions there are the product of policies, practices, and regulations that, by their very nature, are intended to be disciplinary. As such, the environment at Moose Lake is unconstitutionally punitive in its application to civilly committed sex offenders.

Numerous complaints, allegations, and claims have been filed against MSOP and its agents for conditions and incidents at Moose Lake, highlighting the punitive nature of the facility. As one example, Moose Lake currently maintains a policy restricting inmate-patients’ access to news and media outlets that is harsher than that implemented by state prison administrators. The MSOP media policy allows for the review of any item by a “Media Review Team,” consisting of MSOP staff, to determine whether the material contains prohibited or “counter-therapeutic material.”<sup>134</sup> In one inmate-patient’s legal challenge to the policy, it was shown that MSOP’s determinations of contraband have resulted in the confiscation of magazines, t-shirts, and various catalogs published by Christie’s auction house.<sup>135</sup> In August of 2013, the MSOP media policy was updated to include a ban on all local newspapers, under the asserted purpose of protecting staff members and their families; this is in contrast to an analogous policy implemented by the Minnesota Department of Corrections, which in fact *does* allow inmates access to local news outlets.<sup>136</sup> The differences belie the true nature of MSOP’s policy, which is needlessly punitive and counterintuitive to a therapeutic environment. In a sadly ironic twist, then, many inmate-patients at Moose Lake serve terms of imprisonment under less harsh and more hopeful conditions than they will ever encounter during their time in MSOP.

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133. *Serna v. Goodno*, 567 F.3d 944, 949 (8th Cir. 2009) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 320–21 (1982)).

134. *Banks v. Ludeman*, No. 08-CV-5792, 2010 WL 4822892, at \*3 (D. Minn. Oct. 4, 2010).

135. *Id.* at \*11, \*14.

136. Dan Linehan, *Sex Offenders Can’t Read Local Newspapers*, MANKATO FREE PRESS (Nov. 29, 2013), <http://www.mankatofreepress.com/local/x517506281/Sex-offenders-cant-read-local-newspapers>.

Inmate-patients at Moose Lake are subject to strip searches, administrative isolation, shackling, and other disciplinary measures that evince a punishment-oriented atmosphere. Subsequent to an Eighth Circuit decision, and despite the prior absence of such methods, administrators at Moose Lake are now allowed to conduct facility-wide body cavity searches of all inmate-patients whenever they harbor a “generalized suspicion” of contraband.<sup>137</sup> This policy has been upheld, regardless of the facts underlying its challenge, which showed that the use of facility-wide strip searches actually failed to reveal the existence of any contraband.<sup>138</sup> Other inmate-patients have claimed that strip searches are leveraged in a strategically punitive method by the staff at Moose Lake. One resident of MSOP, Robert Kunshier, was told by an MSOP staffer that he was required to consent to a strip search before being allowed to shower.<sup>139</sup> Kunshier refused, and was placed in protective isolation thereafter.<sup>140</sup> Although inmate-patients were not subject to this practice in the past, it has become a regular exercise at Moose Lake in recent years, and is most often coupled with other arbitrarily punitive measures.<sup>141</sup> As another example, inmate-patients are now subject to strip searches upon entry into certain high-security wings of Moose Lake, even if there is no underlying disciplinary reason or suspicion involved.<sup>142</sup> If the inmate-patient refuses to comply, staff members “will forcibly cut off his clothing and physically inspect his groin area and buttocks.”<sup>143</sup> The use of such search methods is overly restrictive, arbitrary in application, and supports the notion that Moose Lake has become more punitive than therapeutic through the course of its existence.

Inmate-patients at Moose Lake are subject to further punishment through other disciplinary tools, which primarily operate through the use of Behavior Expectation Reports (“BERs”). These reports are generated by staff following any incidents or behavioral violations within the facility, and can result in restrictions on access to the outer yard, gym, library, (paid) work assignments, visits with family or friends, access to common areas, group therapy, and restriction (lock-down) to one’s cell.<sup>144</sup> BERs are often generated for relatively benign infractions, including signing up but failing to attend an activity, violations of dress code, loitering in common areas, or leaving the lights on in one’s cell.<sup>145</sup> These violations can cause inmate-patients to regress in treatment and, in some circum-

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137. *Serna*, 567 F.3d at 947.

138. *Id.* at 947–48.

139. *Kunshier v. Minn. Sex Offender Program*, No. A09-0133, 2009 WL 3364217, at \*1 (Minn. Ct. App. Oct. 20, 2009).

140. *Id.*

141. Second Amended Complaint, *supra* note 114, at 42–43.

142. *Id.* at 42.

143. *Id.* at 42–43.

144. *Id.* at 35.

145. *Id.*

stances, to be placed in increasingly isolative settings and conditions within the facility.

Transfer to more restrictive units within the facility is also used as a method of punishment at Moose Lake. One of these units is known as the High Security Area (“HSA”), and is essentially a form of solitary confinement, where individuals are housed in cells for twenty-three hours per day.<sup>146</sup> MSOP staff may hold individuals in HSA as a way of reasserting “behavioral control;” however, it has been alleged that many individuals are held in HSA much longer than necessary, and that the unit serves as a device for punishment rather than behavioral control.<sup>147</sup> Other complainants have unsuccessfully challenged MSOP’s use of protective isolation, by which some inmates are held in indefinite solitary confinement.<sup>148</sup> Some incidents have also evidenced the arbitrary use of HSA transfers. Without asserting any factual grounds or official charges, MSOP has transferred a number of inmate-patients to HSA pending investigations for alleged escape attempts.<sup>149</sup> One plaintiff claimed that he had been subject to a strip search and HSA transfer on at least four prior occasions, in each instance on the basis of false accusations; the most recent resulted in three days of confinement in HSA, after which the inmate-patient was returned without any comment or explanation from MSOP administrators.<sup>150</sup> Another inmate-patient described the conditions he endured while in isolation, alleging that staff did not allow him to shower and did not provide clean clothing over the course of eleven days.<sup>151</sup> These allegations and other similar complaints highlight the lack of review, punitive conditions, and general arbitrary authority inherent in MSOP behavioral and transfer policies, which are designed and implemented as a mode of discipline rather than treatment.

The construction and functional environment of Moose Lake further suggest the facility’s intentionally punitive design. In 2010, a new, larger wing of Moose Lake opened for use. The firm contracted by the state to design the facility was BWBR Architects, Inc.; this is the same firm that was hired to construct two medium-security prisons for the Minnesota Department of Corrections at Faribault and Lino Lakes in 2008 and 2004, respectively.<sup>152</sup> BWBR’s website boasts of the MSOP, 400-bed campus expansion at Moose Lake, which provides a “maximum-

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146. *Id.* at 37.

147. *Id.*

148. *See Chamberlain v. Erskine*, No. 08-CV-00040, 2009 WL 2568657, at \*1 (D. Minn. Aug. 18, 2009).

149. *Complaint for Violation of Civil Rights Under 42 U.S.C. § 1983, Yazzie v. Moser*, No. 12-CV-00399, (D. Minn. Feb. 15, 2012).

150. *Id.* at 9.

151. *Holly v. Anderson*, No. 04-CV-01489, 2008 WL 1773093, at \*3 (D. Minn. Apr. 15, 2008).

152. BWBR Architects, Inc., *Secure Environments*, BWBW, <http://www.bwbr.com/work/secure-environments> (last visited Mar. 14, 2015).

security environment for these extremely dangerous individuals.”<sup>153</sup> In its portfolio describing a host of construction projects for the state, nowhere else does BWBR highlight the “dangerousness” of the inmate population it deigns to serve. A glimpse inside the facility is demonstrative in this regard. The layout of Moose Lake is precisely analogous to that of other state prisons in Minnesota, with rows of housing units radiating from an internal monitoring area where inmates are observed from a central tower or station.<sup>154</sup> The housing units at Moose Lake are comprised of secure cells, highly similar to prison cells and reflecting such carceral design factors.<sup>155</sup>

The remarkable similarity between MSOP-Moose Lake and Minnesota’s prisons is readily apparent in the physical capital, built infrastructure, and design implications of each. MSOP has also obtained waivers from the Department of Health, which allow the facility to circumvent the statutory standards of care established for mental health facilities; as a result, Moose Lake can use springless beds, double-bunk patients in undersized cells with smaller, inoperable windows, and generally establish a more prison-like facility.<sup>156</sup> The functional goals of the environment at Moose Lake are thus exactly what its creators purport them to be: preventive detention and punitive confinement of the “extremely dangerous.”

Staff members at Moose Lake have become the front line in this constructed regime of disciplinary detention. Despite a statutory charge to foster and create a therapeutic atmosphere at Moose Lake, staff members are given “police-style uniforms.”<sup>157</sup> Footage from an evidentiary video following an incident of property destruction provides a rare glimpse inside the facility, depicting the presence of employees who more closely resemble prison guards than therapeutic staff.<sup>158</sup>

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153. BWBR Architects, Inc., *Minnesota Department of Human Services, Minnesota Sex Offender Facility—Moose Lake: Project Details*, BWBR, <http://www.bwbr.com/work/health-care/minnesota-department-of-human-services-minnesota-sex-offender-facilitymoose> (last visited Mar. 14, 2015).

154. Second Amended Complaint, *supra* note 114, at 39. Pictures of the interior of Moose Lake and the state prison at MCF-Lino Lakes demonstrate the marked similarities in design structure and implementation. *Compare* BWBR Architects, Inc., *Minnesota Department of Human Services, Minnesota Sex Offender Facility—Moose Lake*, BWBR, <http://www.bwbr.com/work/health-care/minnesota-department-of-human-services-minnesota-sex-offender-facilitymoose> (last visited Mar. 14, 2015) (depicting the control tower at Moose Lake), *with* BWBR Architects, Inc., *Minnesota Correctional Facility—Lino Lakes*, BWBR, <http://www.bwbr.com/work/secure-environments/minnesota-correctional-facilitylino-lakes> (last visited Mar. 14, 2015) (depicting the interior of the control tower at MCF-Lino Lakes).

155. *Compare* BWBR Architects, Inc., *Minnesota Department of Human Services, Minnesota Sex Offender Facility—Moose Lake*, BWBR, <http://www.bwbr.com/work/health-care/minnesota-department-of-human-services-minnesota-sex-offender-facilitymoose> (last visited Mar. 14, 2015) (depicting cells on a housing unit at Moose Lake), *with* BWBR Architects, Inc., *Minnesota Correctional Facility—Faribault*, BWBR, <http://www.bwbr.com/work/secure-environments/minnesota-correctional-facilityfaribault> (last visited Jan. 30, 2015) (showing cells inside a housing unit at MCI-Faribault, a prison also designed by BWBR Architects, Inc.).

156. Second Amended Complaint, *supra* note 114, at 40–41.

157. *Id.* at 39.

158. Once Fallen, *Chris Krych Evidence Video Nov. 2, 2011, Moose Lake Civil Commitment Center*, YouTube (Oct. 29, 2012), <http://www.youtube.com/watch?v=-Ya253o0Sak> (depicting uniformed MSOP staff members responding to an incident at Moose Lake).

Reports of staff abuse, neglect, and corruption have been asserted by the residents of Moose Lake.<sup>159</sup> In one incident, a counselor at Moose Lake was charged with two counts of introducing contraband and sexual misconduct involving an inmate-patient at the facility.<sup>160</sup> The counselor entered a guilty plea, but was initially charged with criminal-sexual-conduct, which may actually require her to register as a sex offender under Minnesota law.<sup>161</sup> As of 2008, MSOP has also adopted a shackling policy requiring staff to severely restrict inmate-patient movement, in line with practices at maximum security prisons.<sup>162</sup> Whenever individuals leave Moose Lake, they are shackled with handcuffs, a black box, leg irons, and a waist-chain, after which the inmate is moved via wheelchair to a small cage inside a transport vehicle; these same restraints must be applied despite the nature or reason for movement, and apply even in medical emergencies.<sup>163</sup>

These practices do not serve a therapeutic purpose. They represent a series of policy implementations that have converged and hastened Moose Lake's establishment as a hospital under razor wire. Moose Lake has thus become a facility that claims to be founded on treatment-based principles, but whose practical reality is specifically and purposefully attuned towards the goals of incapacitation, punishment, and indefinite confinement.

#### CONCLUSION: SHEDDING LIGHT ON THE BLACK BOX

*[T]here was no appetite in the Legislature for letting anyone out. They'd rather spend millions of dollars keeping people locked up than take the chance of something bad happening.*<sup>164</sup>

The problems at Moose Lake are manifold. Given the lack of political will, the extent of public misconception and general revulsion toward sex offenders, reform outside the judiciary is unlikely. Corey Rayburn Yung likens this scenario to the same "policy lock" that the War on Drugs facilitated; political inertia, institutional incentives, and the presence of an undefeatable criminal "enemy" combine to create immense pressure to follow established practices and generate increasingly hardline responses to social problems, even as underlying policies seem to be failing.<sup>165</sup> Litigation has opened the door somewhat, but to a large extent, Moose Lake remains a black box. Its inmates, conditions, and practices are kept in the dark, hidden from public scrutiny.

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159. See generally *Karsjens v. Jesson*, 283 F.R.D. 514 (D. Minn. 2012).

160. *State v. Hoover*, No. A12-1626, 2013 WL 1859098, at \*1 (Minn. Ct. App. May 6, 2013).

161. *Id.* at \*3.

162. Second Amended Complaint, *supra* note 114, at 45.

163. *Id.*

164. Larry Oakes, *Minnesota Must Change Sex Offender Program, Judge Orders*, MINN. STAR TRIB. (Aug. 17, 2012), <http://www.startribune.com/local/166497216.html> (quoting State Rep. Tony Cornish, R-Good Thunder).

165. Yung, *supra* note 55, at 472–73.

A number of individuals and institutions, however, are beginning to take notice of Moose Lake and are advocating for its reform. Litigation on behalf of a certified class of MSOP inmates is currently pending before a federal district court in Minnesota.<sup>166</sup> The judge in that case ordered a task force to convene and investigate sex offender commitment statewide.<sup>167</sup> In its final report, the Sex Offender Civil Commitment Advisory Task Force was unanimous in its conclusion that “serious problems” exist in MSOP, recommending that the Minnesota legislature act swiftly to “(1) rationalize the process [of civil commitment], (2) make it more objective, and (3) eliminate to the greatest extent possible the influence of politics on commitment.”<sup>168</sup> In terms of treatment, the Task Force made recommendations for funding less secure residential facilities, group homes, and other alternative programs.<sup>169</sup> The state legislature has also conducted internal investigations of Moose Lake and sex offender commitment generally.<sup>170</sup> These investigatory efforts have shed some light on the facility and the policies that have led to its expansion. MSOP has also come under intense international scrutiny. England reviewed Minnesota’s sex offender commitment regime in *Sullivan v. Government of the United States*, finding that Minnesota’s criteria for commitment were so broad and unsound that it would be a “flagrant denial” of the defendant’s rights to subject him to such a determination.<sup>171</sup> As a result, the England and Wales High Court ruled that Sullivan should not be extradited to the United States, despite his alleged commission of three sexual offenses.<sup>172</sup> Even as these actions and investigations have led to further revelations of the practices in place at Moose Lake, until lawmakers act or the SDPA is struck down, matters will likely remain unchanged at the facility.

As it currently exists, the Minnesota Sex Offender Program at Moose Lake operates in violation of both the U.S. Constitution and the state’s own mandates

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166. *Karsjens v. Jesson*, No. 11-cv-03659 (D. Minn. Dec. 21, 2011). The case has withstood a motion for summary judgment and is still awaiting final disposition as of the date of this Note’s publication. *Karsjens v. Jesson*, 6 F. Supp. 3d 916 (D. Minn. 2014). Legislation to reform MSOP has been introduced by Sen. Kathy Sheran (DFL-Mankato) during the past two sessions, but no bills have yet passed, despite encouragement by the federal district court judge presiding in *Karsjens* and numerous task force recommendations. Amy Forliti, *After Failing to Act, Minnesota Lawmakers Under Pressure to Alter Sex Offender Commitment Law*, MINN. STAR TRIB. (Dec. 27, 2014), <http://m.startribune.com/local/286924621.html>.

167. Order, *Karsjens v. Jesson*, No. 11-cv-03659 (D. Minn. Dec. 21, 2011), ECF No. 208.

168. Memorandum from Hon. Eric J. Magnuson, Hon. Jason Rosenbaum, & Sex Offender Civil Commitment Advisory Task Force, to Lucinda Jesson, Comm’r of Human Servs. 1 (Dec. 2, 2013), available at <https://edocs.dhs.state.mn.us/lfservlet/Public/DHS-6641B-ENG>.

169. *Id.* at 3. The Task Force also urged the adoption of legislation that would encourage the “development of new programs or enhancement of existing programs to provide safe options for the housing, supervision, and treatment of civilly committed sex offenders *outside of a secure treatment facility*.” *Id.* (emphasis added). Many of these recommendations echo the “less restrictive alternatives” that have routinely been rejected by the court system. See *supra* note 109 and accompanying text.

170. See generally OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 90.

171. *Sullivan v. United States*, [2012] EWHC (Admin) 1680, [33] (Eng.).

172. *Id.*

under the Sexually Dangerous Persons Act. Although the SDPA has withstood constitutional challenge, as applied, the law has resulted in the indefinite confinement of hundreds of individuals in a facility that fails to treat its wards, serving instead as a punitive, functional equivalent of incarceration. MSOP has been unsuccessful in treating its population at Moose Lake and offers little hope for release amongst the 698 inmate-patients currently housed there. Conditions have worsened as the facility has become increasingly dangerous to patients and personnel alike.

Despite mounting critique, Moose Lake remains a reality hidden from view, justified through public safety rationales, perpetuated as the state's only hospital existing under razor wire. The institution mimics the black box that holds the hands of its inmates each time they are shackled: an instrument of preventive incapacitation, absurd in its everyday application, hiding from open view that which it falsely professes to help.