



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

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***Boston College Law Review, Forthcoming***

**George Mason University Law and Economics  
Research Paper Series**

**08-22**

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I.	THE SUPREME COURT’S CIVIL COMMITMENT	
	JURISPRUDENCE .....	7
A.	<i>Allen v. Illinois</i> .....	7
B.	<i>Kansas v. Hendricks</i> .....	9
C.	<i>Seling v. Young</i> .....	13
II.	THE FRAMEWORK FOR ASSESSING WHETHER TREATMENT IS CONSTITUTIONALLY ADEQUATE.....	15
A.	<i>Characteristics of the Treatment Program</i> .....	17
B.	<i>Constitutionally Adequate Oversight</i> .....	19
C.	<i>Principles Governing Judicial Oversight</i> .....	19
III.	THE SCC’S NON-COMPLIANCE WITH ITS CONSTITUTIONAL OBLIGATIONS .....	21
A.	<i>The SCC’s Repeated Requests For Dissolution Of The Injunction Despite Its Non-Compliance</i> .....	22
B.	<i>The SCC’s Citation For Contempt of Court</i> .....	24
C.	<i>The District Court’s Order Purging The Accrued Contempt Sanctions</i> .....	27
D.	<i>The SCC’s Most Recent “Backsliding” And Failure To Comply With The Court’s Injunction</i> .....	27
	1. <i>The 2005 IOCC Report</i> .....	28
	2. <i>The January 2006 IOCC Report</i> .....	29
	3. <i>The Former Special Master’s Submission</i> .....	33
E.	<i>The District Court’s Order Dissolving the Turay Injunction</i> .....	34
IV.	THE RELATIONSHIP BETWEEN THE REQUIREMENT OF CONSTITUTIONALLY ADEQUATE TREATMENT AND THE CONSTITUTIONALITY OF CIVIL COMMITMENT.....	36
A.	<i>The Treatment Dilemma</i> .....	36
B.	<i>Potential Alternatives</i> .....	37
V.	CONCLUSION .....	39

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In March 2007, the United States District Court for the Western District of Washington dissolved “a history-making injunction”<sup>1</sup> that governed the treatment of residents who had been civilly committed at Washington’s Special Commitment Center (“SCC”) based on their status as “sexually violent predators.” The injunction resulted from litigation brought by residents over seventeen years earlier who maintained that the conditions of confinement at the SCC violated their civil rights. In 1994, the district court presided over a trial in which a jury found that the SCC was not providing residents with constitutionally adequate treatment. As a result of these proceedings, the Honorable William L. Dwyer issued an injunction requiring the SCC to bring its treatment program into compliance with constitutional requirements (the “Turay Injunction”).<sup>2</sup>

That injunction was “broad”<sup>3</sup> and required defendants to, among other things, adopt and implement a plan for hiring and training competent therapists; implement strategies to rectify the lack of trust between the residents and staff; implement a general treatment program for residents, including involvement of spouses and family members and all other generally accepted therapy components; develop individual treatment plans for each resident to measure progress; and provide an expert in treatment of sex offenders to supervise and consult with treatment staff. Because the SCC was “slow to comply with the Turay Injunction,” the district court subsequently appointed a special master, Dr. Janice Marques, to oversee defendants’ compliance and provide the court with periodic reports regarding the SCC’s progress in complying with the injunction.<sup>4</sup>

In October 1998, Judge Dwyer conducted an evidentiary hearing to assess defendants’ compliance, and in November 1998 issued an order finding that the SCC had not complied with constitutional requirements and setting forth a detailed list of items remaining to be addressed.<sup>5</sup> The court ruled that the SCC must, among other things, provide additional staff training; develop a coherent and individualized treatment program for each resident; make adequate provision for residents’ families to participate in rehabilitation efforts; construct a separate treatment-oriented facility; eliminate routine strip searches of SCC residents; eliminate monitoring of residents’ telephone calls and the SCC’s bar on outgoing calls; obtain better meal and activity schedules; improve the treatment environment; implement fair and reasonable grievance

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<sup>1</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. at 1 (W.D. Wash. Mar. 23, 2007) (order dissolving injunction). The district court’s order is currently on appeal to the Ninth Circuit. The author represents one of the SCC residents in the pending appeal.

<sup>2</sup> Turay v. Richards, No. 2:91-cv-00664-RSM (W.D. Wash. June 6, 1994) (order granting injunction).

<sup>3</sup> Mar. 23, 2007 Order, *supra* note 1, at 2.

<sup>4</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. Aug. 22, 1994) (order regarding injunction); Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. Sept. 22, 1994) (order appointing special master).

<sup>5</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. Nov. 25, 1998) (findings of fact and conclusions of law).

procedures and behavior management plans; implement a program of oversight both by an internal review process and by an external body; and bring a constitutionally adequate program into reality rather than merely describing it on paper.<sup>6</sup> Noting the defendants' "history of noncompliance with the Turay Injunction," the Ninth Circuit affirmed Judge Dwyer's order, holding that the district court correctly found that the SCC was providing constitutionally inadequate treatment.<sup>7</sup>

Defendants continued to provide constitutionally inadequate treatment after the appellate court issued its ruling. In November 1999 following another evidentiary hearing, Judge Dwyer held defendants in contempt for failing to take reasonable steps to comply with the terms of the injunction.<sup>8</sup> Contempt sanctions continued to accrue for the next several years, while defendants continued to fail to comply with the district court's orders.<sup>9</sup>

After Judge Dwyer's death in 2000, the case was reassigned to Judge Barbara Rothstein and then Judge Robert Lasnik.<sup>10</sup> In June 2004, Judge Lasnik dissolved many aspects of the Turay Injunction and purged Judge Dwyer's 1999 contempt order.<sup>11</sup> Nonetheless, he found that defendants had failed to meet constitutional requirements with respect to "the development and funding of an off-island LRA," or "Less Restrictive Alternative" placement to facilitate residents' transition back into the community upon successful treatment.<sup>12</sup> He further held that the dissolution of the other requirements of the injunction was subject to the condition that "there is no significant 'backsliding'" by the SCC in meeting the injunction's original requirements.<sup>13</sup> The Ninth Circuit subsequently affirmed the district court's order.<sup>14</sup>

The district court continued to monitor the SCC's compliance with the Turay Injunction, and in particular its development and implementation of an off-island LRA. After the case was reassigned to Judge Ricardo Martinez,<sup>15</sup> defendants moved for dissolution of the

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<sup>6</sup> *Id.* at 10-14.

<sup>7</sup> Sharp v. Weston, 233 F.3d 1166, 1173 (9th Cir. 2000).

<sup>8</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. May 27, 1999) (order on motions for contempt and dissolution of injunction); Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. Nov. 15, 1999) (findings of fact and conclusions of law).

<sup>9</sup> See Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. May 5, 2000) (findings of fact and conclusions of law).

<sup>10</sup> See Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. Jan. 18, 2002) (reassignment order).

<sup>11</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. June 10, 2004) (findings of fact and conclusions of law).

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> Cunningham v. Weston, 180 Fed. Appx. 644 (9th Cir. May 9, 2006).

<sup>15</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. July 6, 2004) (reassignment order).

injunction. Plaintiffs submitted extensive evidence demonstrating that the SCC had engaged in prohibited “backsliding,” including reports issued by the Inspection of Care Committee (“IOC committee” or “IOCC”) comprised of independent experts appointed by the SCC, which found that the facility’s treatment program was inadequate, a declaration from one of the experts confirming that the SCC’s treatment program did not meet constitutional requirements, several affidavits from residents documenting SCC violations, and a recommendation by Dr. Janice Marques, the former special master, that the injunction be maintained.

Nonetheless, the district court denied plaintiffs’ request for an evidentiary hearing,<sup>16</sup> and on March 23, 2007, the court dissolved the injunction, 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>17</sup> The district court specifically found that “plaintiffs have demonstrated that some backsliding has occurred with respect to the treatment program at issue in this case.”<sup>18</sup> Moreover, it observed that “[t]his 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>19</sup> Nonetheless, it dismissed residents’ objections, summarily stating without explanation that defendants’ backsliding did not “rise to the level of a Constitutional violation” and dissolved the injunction because, while residents disputed that the SCC had implemented an effective LRA protocol, there was “no dispute” that defendants had constructed an off-island LRA.<sup>20</sup> An appeal of that order is now pending.

The nearly two-decade-long history of the Washington litigation demonstrates the significant constitutional difficulties associated with civil commitment for sexually violent predators. Civil commitment laws are motivated by good intentions – to protect the public from individuals who may pose a significant danger. However, because those who are civilly committed are subject to significant constitutional protections that require the incursion of significant costs, government authorities are placed in a quandary. On the one hand, there is significant benefit to continued incarceration of those who pose a potential risk to society. On the other hand, there are significant costs associated with providing residents constitutionally required treatment.

The Supreme Court has made clear, however, that such treatment is a fundamental prerequisite to any civil commitment program. Unless constitutionally adequate treatment is provided to those who are civilly committed, there is no path to release and thus civil commitment becomes criminal punishment imposed by the State without the benefit of

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<sup>16</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. July 26, 2006) (order regarding scope of hearing).

<sup>17</sup> Mar. 23, 2007 Order, *supra* note 1.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 4-5.

the procedural protections typically granted a criminal defendant.<sup>21</sup> Nonetheless, the Court has not had occasion to flesh out the requirements for a constitutionally adequate treatment program. Accordingly, the lower courts have been forced to fill the void.

This article addresses these constitutional concerns and the costs and benefits associated with civil commitment for sexually violent predators. In particular, it focuses on Washington's civil commitment program, the oldest such program in existence in the United States and, indeed, the only program in the nation in which the constitutional parameters of the treatment program have been fully litigated. From the outset, Washington's civil commitment program has been the subject of significant litigation and in large measure that litigation 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 civil commitment programs and provides an important case study in assessing their costs and benefits.

Part I of this article discusses the Supreme Court's approach to assessing the constitutionality of statutes authorizing civil commitment. The Court's jurisprudence in this area has potentially wide-ranging significance. It defines the conditions under which the government may deprive individuals' of their liberty without the usual constitutional guarantees and makes clear that there be some constraints on the State's ability to impose indefinite incarceration. Accordingly, the Court's decisions have been widely cited in assessing the constitutionality of detention of individuals ranging from the mentally ill to enemy combatants detained in the war on terror.<sup>22</sup>

With respect to laws authorizing the civil commitment of sexually violent predators, the Court has made clear that treatment is an essential element necessary to support the constitutionality of such statutes. Absent a constitutionally adequate treatment program, such statutes become "punitive" and thus "criminal" in nature, violating individuals' due process rights through indefinite incarceration without the standard protections afforded criminal defendants. As with any civil commitment regime, where feasible there must be some path to eventual release. Otherwise, the purpose of such statutes can only be punitive in nature. The Court, however, has not had occasion to articulate the standards for assessing the scope of constitutionally-required treatment. Accordingly,

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<sup>21</sup> See 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 procedural safeguards that are lost in civil commitment proceedings); 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).

<sup>22</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (Scalia, J., dissenting) (citing *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)); *id.* at 592 (Thomas, J., dissenting) (same); 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).

it has been left to the lower courts to determine the fundamental elements that must be provided in order to satisfy the constitutionally-mandated requirement for treatment.

Part II addresses some of the constitutional standards for such programs that have emerged from the litigation regarding Washington's civil commitment program, which has largely defined the scope of the right to treatment that must be afforded civilly committed individuals. The courts presiding over the Washington litigation have emphasized that part of the government's obligation in administering such programs is to provide individualized treatment to residents that provides them with a roadmap for potential improvement and release. They have also emphasized the importance of constitutionally-adequate oversight mechanisms: Because the courts cannot be involved in the day-to-day operation of such civil commitment programs, outside monitoring by experts who are familiar with such programs is critical. Finally, the courts have underscored that their role is not simply to defer administrators' representations regarding the adequacy of treatment, but rather to undertake a searching, independent review of the record to ensure that minimally acceptable professional standards are being met.

Part III discusses the history of the litigation regarding the constitutionality of Washington's civil commitment program. This section notes the continuing recalcitrance of government authorities in providing constitutionally required treatment to civilly committed residents. As a result of this recalcitrance, the program has been subject to an injunction that was in place for over seventeen years. The experience under the Washington program demonstrates the perverse incentives government officials have in administering such programs and the constant battle between constitutional requirements and governmental concerns.

Finally, Part IV addresses the relationship between constitutional treatment standards and the constitutionality of civil commitment given the lessons learned from the Washington experience. The constitutionality of civil commitment is premised on the existence of constitutionally adequate treatment. To the extent the standards for such treatment are more stringent, the costs associated with civil commitment increase. These costs must be balanced against competing governmental concerns, such as the strong government interest in protecting the public from potentially dangerous individuals. As these costs increase, civil commitment becomes less attractive. One potential alternative to such programs is to increase the criminal penalties for such violations. While greater criminal penalties would potentially allow less flexibility in dealing with individual violators, they have the advantage of avoiding the costs associated with civil commitment. Indeed, the Washington experience suggests that these civil commitment programs in large measure function in practice more as an after-the-fact attempt to impose additional punishment. Jurisdictions that have miscalculated in imposing criminal sanctions may seek civil commitment as a refuge to impose additional incarceration. However, the Supreme Court has made clear

that such programs cannot simply be used in this fashion to “warehouse” those whose criminal sentences have already expired.<sup>23</sup> Thus, there is a powerful argument that the costs of civil commitment outweigh the costs associated with greater criminal penalties for sexually violent crimes.

#### I. THE SUPREME COURT’S CIVIL COMMITMENT JURISPRUDENCE

The Supreme Court has addressed the constitutionality of civil commitment on several occasions in recent years. While the Court has made clear that the Due Process Clause prohibits states from imposing “punishment” in the guise of civil remedies and that in order for civil commitment schemes to pass constitutional muster they must provide treatment where individuals are treatable,<sup>24</sup> the Court has not elaborated on what constitutes constitutionally acceptable treatment. Instead, the Court has been more concerned with the criteria such schemes impose for subjecting individuals to civil commitment. As a result, while it is clear that treatment is an essential element of the due process requirement, the exact parameters of such treatment remain unclear.

##### A. *Allen v. Illinois*

One of the first instances in which the Court had occasion to address a statutory scheme authorizing civil commitment for sexually violent predators was in *Allen v. Illinois*.<sup>25</sup> In *Allen* the Court addressed whether the Illinois Sexually Dangerous Person Act was a “criminal” statute for purposes of determining whether the Fifth Amendment’s guarantee against compulsory self-incrimination was applicable in proceedings under the Act.<sup>26</sup> In determining whether the statute was criminal in nature, the Court assessed whether the statute was punitive in either purpose or effect.<sup>27</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>28</sup>

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<sup>23</sup> See *Turay v. Seling*, 108 F. Supp. 2d 1148, 1151, 1150 (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>24</sup> As early as 1982, Justice Blackmun noted in his concurrence in *Youngberg v. Romeo* 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,” thereby rendering it unconstitutional. 457 U.S. 307, 326 (1982) (Blackmun, J., concurring). The treatment requirement was later confirmed in decisions such as *Allen*, *Hendricks*, and *Seling*. See *infra* Sections I.A-I.C.

<sup>25</sup> 478 U.S. 364 (1986).

<sup>26</sup> *Id.* at 365.

<sup>27</sup> *Id.* at 369 (citing *United States v. Ward*, 448 U.S. 242, 249-49 (1980)).

<sup>28</sup> *Id.* (quoting Ill. Rev. Stat., ch. 38 ¶¶ 105-8 and 105-9). See also *id.* at 373 (observing that “the State serves its purpose of *treating* rather than punishing sexually dangerous

(Continued...)



However, the Court did not confine itself entirely to the statutory text. Rather, the Court also made an inquiry into the effect of the statute, noting that the record did not demonstrate that individuals had been “confined under conditions incompatible with the State’s asserted interest in treatment.”<sup>29</sup> However, the Court was not presented with an opportunity to articulate what exactly constituted sufficient treatment to support a determination that the statute was non-punitive and therefore “civil” rather than “criminal” because, as the Court observed, the record contained “little or nothing about the regimen at the psychiatric center.”<sup>30</sup> Accordingly, in the absence of any evidence demonstrating to the contrary, the Court could not “say that the conditions of petitioner’s confinement themselves amount to ‘punishment’ and thus render ‘criminal’ the proceedings which led to confinement.”<sup>31</sup>

The dissent agreed that treatment was a critical factor in assessing whether a statute was punitive and therefore “criminal” as opposed to “civil” in nature.<sup>32</sup> The dissent noted that “[t]he Illinois Supreme Court ha[d] stated unambiguously that ‘treatment, not punishment, is the aim of the statute.’”<sup>33</sup> However, it further observed 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>34</sup>

In other words, the label applied to a statute by the legislature is not dispositive. 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. Nonetheless, because the record was not well-developed, the Court in *Allen* did not provide specific guidelines for determining whether the treatment requirement had been met. Accordingly, lower courts were left to develop the constitutional parameters of the treatment requirement.

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persons by committing them to an institution expressly designed to provide psychiatric care and treatment”).

<sup>29</sup> *Id.* at 373.

<sup>30</sup> *Id.* at 374-75.

<sup>31</sup> *Id.* 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,” suggesting that conditions were in fact non-punitive. *See id.* at 374.

<sup>32</sup> *See id.* at 380 (Stevens, J., dissenting).

<sup>33</sup> *Id.* (quoting *People v. Allen*, 481 N.E.2d 690, 695 (1985)).

<sup>34</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.*

B. *Kansas v. Hendricks*

In *Kansas v. Hendricks*,<sup>35</sup> the Court addressed the constitutionality of a similar statute, Kansas's Sexually Violent Predator Act, which 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>36</sup> The Kansas Supreme Court invalidated the Act on the ground that it violated due process. 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 civil commitment, but rather merely that the individual suffer from a "mental abnormality."<sup>37</sup> The Court further held that the program violated due process because the State was not providing constitutionally adequate treatment.<sup>38</sup>

Justice Thomas wrote the opinion for a divided Court, which reversed the decision of the Kansas Supreme Court and held that the Act met constitutional requirements. He 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" and thus "an individual's constitutionally protect interest in avoiding physical restraint may be overridden even in the civil context."<sup>39</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.

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<sup>35</sup> 521 U.S. 346 (1997). The *Hendricks* decision has been the subject of significant academic commentary. See, e.g., 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 N.W. U. L. REV. 1279 (1998); Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199 (2000); 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 (1998); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 62 (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, 269 (1997).

<sup>36</sup> KAN. STAT. ANN. § 59-29a01 *et seq.* 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>37</sup> See *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996). 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 such that the individual could be released. See *id.* §§ 59-29a08, 59-29a10, 59-2a11.

<sup>38</sup> *Hendricks*, 912 P.2d at 136.

<sup>39</sup> *Hendricks*, 521 U.S. at 356 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

The Court observed that it had “consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.”<sup>40</sup>

In particular, the Court made clear that while “[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>41</sup> The Court rejected the distinction drawn by the Kansas Supreme Court between “mental illness” and a “mental abnormality” 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>42</sup>

Likewise, the Court found that the Act as a whole was not “punitive” in nature. Indeed, at one point, the majority asserted that “none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions.”<sup>43</sup> Nonetheless, the Court went on to discuss the general parameters for ascertaining when a civil commitment statute imposed “punishment” that was at odds with the due process requirement. 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>44</sup> “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>45</sup> While the Court acknowledged that Kansas’s civil commitment statute might lead to prolonged confinement, the stated purpose of commitment satisfied the constitutional requirement in that it was only “to hold the person until his mental abnormality no longer causes him to be a threat to others.”<sup>46</sup>

The majority also specifically addressed the Kansas Supreme Court’s determination that the lack of “any legitimate ‘treatment’” provided by

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<sup>40</sup> *Id.* at 357 (citing *Foucha*, 504 U.S. at 80 and *Addington v. Texas*, 441 U.S. 418, 426-27 (1979)).

<sup>41</sup> *Id.* at 358 (citing *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); *Allen v. Illinois*, 478 U.S. 364, 366 (1986); *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty.*, 309 U.S. 270, 271-72 (1940)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 362.

<sup>44</sup> *Id.* at 363 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* 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); Steve C. Lee, *How Little Control?: Volition and the Civil Confinement of Sexually Violent Predators in Kansas v. Crane*, 122 S. Ct. 867, 26 HARV. J.L. & PUB. POL’Y 385 (2002).

the State violated the Due Process Clause.<sup>47</sup> However, here, the Court once again provided little guidance. While recognizing that treatment was a constitutional requirement, it maintained that 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>48</sup> The Court repudiated this suggestion, holding 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>49</sup> The Constitution merely requires that treatment be provided where a condition is treatable. "To conclude otherwise would obligate a State to release confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions."<sup>50</sup>

The Court further concluded that to the extent the Kansas Supreme Court found that plaintiff was in fact treatable and that there was some defect in the treatment being afforded, the Due Process Clause was still satisfied. It noted that the Kansas statute specifically required that treatment be provided,<sup>51</sup> but suggested in a footnote that "the States enjoy wide latitude in developing treatment regimens."<sup>52</sup> Moreover, even if there were deficiencies in the State's treatment program, the Court concluded that under the unique circumstances of the case, there was no constitutional violation. The Court reasoned that plaintiff "was the first person committed under the Act" and "the State did not have all of its procedures in place."<sup>53</sup>

Given the lack of a developed record as a result of the short tenure of the Kansas statute, the Court did not further articulate any guidelines that

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<sup>47</sup> See *Hendricks*, 521 U.S. at 365.

<sup>48</sup> *Id.* (citing *Hendricks*, 912 P.2d at 136).

<sup>49</sup> *Id.* (citing *Greenwood v. United States*, 350 U.S. 366, 375 (1956) and *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975)). "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.

<sup>50</sup> *Id.*

<sup>51</sup> See *id.* at 366-67. 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.* at 367 (citing *Allen*, 478 U.S. at 369). In particular, the Court pointed to Section 59-29a01 of the Kansas statute, which purported to establish a civil commitment procedure "for the long-term care and treatment of the sexually violent predator" as well as Section 59-29a09, which required confinement to "conform to constitutional requirements for care and treatment." See *id.*

<sup>52</sup> *Id.* at 368 n.4 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)).

<sup>53</sup> *Id.* at 367-68.

should be applied in determining whether a treatment program meets constitutional requirements.<sup>54</sup> Accordingly, the majority's decision in *Hendricks* leaves the law much as it existed. While it is clear that treatment is required, the specific parameters remain uncertain.

The concurring and dissenting opinions in *Hendricks* likewise provide little guidance. Justice Kennedy filed a separate concurrence to note the unique and challenging circumstances presented by diagnosed pedophiles. Justice Kennedy observed that the practical effect of the Kansas statute "may be to impose confinement for life" for such individuals given the limitations of current medical knowledge and difficulty in providing sufficient treatment for pedophiles that would ensure "no serious danger will come from release of the detainee."<sup>55</sup> Justice Kennedy did not find this outcome troubling so 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>56</sup> Nonetheless, Justice Kennedy recognized the possibility that the implementation of the Kansas statute might become unconstitutional 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>57</sup>

The dissent in *Hendricks* also failed to describe in detail the scope of the treatment requirement. While the dissent agreed that plaintiff was "mentally ill" and "dangerous" and thus his commitment was appropriate,<sup>58</sup> it found that plaintiff was not receiving constitutionally required treatment. At the outset, the dissent dispelled the notion that this case involved an "untreatable" detainee. The record, it noted, demonstrated that "pedophilia is an 'abnormality' or 'illness' that can be treated."<sup>59</sup> The dissent, however, maintained that the record further demonstrated, and argued that the Kansas Supreme Court found, 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

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<sup>54</sup> The Court suggested that evidence not in the record would have demonstrated that the State was providing adequate treatment. Specifically, in a footnote, the Court noted that in a hearing on plaintiff's motion for state habeas 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 is inappropriate and maintained that, in any event, the majority's conclusion was not warranted. *See id.* at 391 (Breyer, J., dissenting).

<sup>55</sup> *See id.* at 372 (Kennedy, J., concurring).

<sup>56</sup> *Id.* at 373.

<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 376-77 (Breyer, J., dissenting).

<sup>59</sup> *Id.* at 378. *See also* Berliner, *supra* note 35, at 1209 (discussing the range of expert opinion on "the question of whether recidivism among child molesters and rapists can be reduced through treatment").

any, qualified treatment staff,” resulting in plaintiff’s “receiving ‘essentially no treatment.’”<sup>60</sup>

Moreover, the dissent suggested that this result was consistent with the intent of Kansas legislators from the very beginning – *i.e.*, to warehouse, rather than treat, potentially dangerous sexual predators.<sup>61</sup> Because the dissent believed that the record was devoid of any evidence of treatment, however, it too had no occasion to discuss what types of procedures were appropriate. Indeed, the only specific requirement mentioned by the dissent was the failure of the Kansas statute to provide for the possibility of using less restrictive alternatives such as post-release supervision, or halfway houses, which were required by similar laws in other States.<sup>62</sup> Again, the lower courts were left with little guidance.

### C. *Seling v. Young*

Finally, in *Seling v. Young*, the Court resolved a similar challenge to Washington State’s Community Protection Act, which also authorized the civil commitment of “sexually violent predators.”<sup>63</sup> The plaintiff in *Seling* brought an “as applied” challenge to the statute, arguing that while the Washington Supreme Court had held that the statute was civil in nature and thus did not violate due process, as applied in his case the statute was punitive and therefore “criminal” in nature.<sup>64</sup> In particular, plaintiff maintained that the conditions at the SC were incompatible with the statute’s treatment purpose.<sup>65</sup> The Ninth Circuit held that under *Hendricks*, plaintiff could bring such a challenge even if the statute were facially valid, and the State of Washington appealed that ruling.<sup>66</sup>

The Supreme Court reversed. At the outset, the majority concurred with the Washington Supreme Court that the statute on its face was constitutionally valid. Indeed, it noted that it was “strikingly similar” to the statute at issue in *Hendricks*, which likewise “provided treatment for

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<sup>60</sup> *Hendricks*, 521 U.S. at 384 (Breyer, J., dissenting). The dissent maintained that the Kansas statute therefore 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>61</sup> *See id.* at 384-85 (discussing legislative history and statutory provisions).

<sup>62</sup> *See id.* at 387.

<sup>63</sup> 531 U.S. 250, 253 (2001) (citing WASH. REV. CODE § 71.09.010 *et seq.*). *See also*, *e.g.*, Joseph Hough, *Seling v. Young: No “As Applied” Challenge to Civil Commitment*, 28 AM. J. CRIM. L. 251 (2001) (discussing *Seling*); Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 328-38 (2003) (same).

<sup>64</sup> *Seling*, 531 U.S. at 259.

<sup>65</sup> *See id.* at 260.

<sup>66</sup> *Young v. Weston*, 192 F.3d 870, 874 (9th Cir. 1999).

sexually violent predators.”<sup>67</sup> The Court again reiterated that, while “not all mental conditions [are] treatable,” where conditions are treatable, constitutionally adequate treatment is required.<sup>68</sup> Nonetheless, the majority concluded that plaintiff’s “as applied” challenge was “unworkable” because it would in effect preclude a final determination concerning whether a statute was “punitive” and “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>69</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 Center,” noting that the statute conferred an express right to treatment and that there was ongoing litigation regarding the constitutionality of the conditions of confinement at the facility.<sup>70</sup> Moreover, the Court noted 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, 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>71</sup>

Justice Scalia filed a separate concurrence specifically disputing that this was an “open question”. 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>72</sup> Justice Thomas likewise wrote separately and 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>73</sup> He maintained that “[a]n implementation-based challenge to a facially civil

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<sup>67</sup> *Seling*, 531 U.S. at 260-61 (observing that “Kansas patterned its Act after Washington’s”).

<sup>68</sup> *Id.* at 262.

<sup>69</sup> *Id.* at 263-64.

<sup>70</sup> *Id.* at 265. As the court observed, the SCC 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>71</sup> *Id.* at 265; *see also id.* at 267 (“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>72</sup> *Id.* at 268 (Scalia, J., concurring) (emphasis in original) (citing *Hudson v. United States*, 522 U.S. 93 (1997)).

<sup>73</sup> *Id.* at 270 (Thomas, J., concurring).

statute would be as inappropriate in reviewing the statute in the ‘first instance.’”<sup>74</sup>

In contrast, Justice Stevens maintained in his dissent that the conditions of confinement could be considered at any time in order to gain “full knowledge of the effects of the statute.”<sup>75</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>76</sup> Moreover, he maintained that this issue was properly before the Court in *Seling* even though the Washington Supreme Court had previously decided that the statute was in fact “civil”.

Thus, despite the concurrences, which maintained that the actual conditions of confinement could play only a limited, or no, role in assessing the constitutionality of a civil commitment statute, a strong majority of the Court again reaffirmed that, while plaintiff’s “as applied” challenge failed, the conditions of confinement were properly considered in assessing the constitutionality of the statute “in the first instance.” Again, the Court affirmed that treatment was a necessary element to support the constitutionality of such civil commitment statutes. And, again, because of the procedural posture of the case, the Court did not have the opportunity to more fully articulate what the requirement for constitutionally adequate treatment entailed.

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

Because the Supreme Court has failed to articulate the elements of a constitutionally adequate treatment program, the lower federal courts have been left to fill the gap. In particular, the seventeen-year litigation regarding Washington’s civil commitment program has done much to establish the framework for assessing the constitutionality of such programs. It has established basic requirements such as the right to individualized treatment, the importance of rigorous oversight mechanisms, and the requirement that a program provide an avenue for eventual release upon successful treatment. These basic principles shape the contours of the States’ obligations in administering programs that are designed to protect the public while at the same time preserving the constitutional rights of those subject to commitment.

Washington’s civil commitment statute, like others around the country, allows the State to commit sex offenders who have served their prison terms or are about to complete their sentences for an indefinite period of time if they meet the requirements for classification as a “sexually violent predator.” The Act defines a sexually violent predator

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<sup>74</sup> *Id.* at 273 (maintaining that “[t]he 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”).

<sup>75</sup> *Id.* at 277 (Stevens, J., dissenting).

<sup>76</sup> *Id.* at 275 (citing *Hendricks*, 521 U.S. at 361, 367-69; *Schall v. Martin*, 467 U.S. 253, 269-71 (1984); and *Allen*, 478 U.S. at 369, 373-74).



as an individual who has been convicted of, or charged with, a crime of sexual violence who suffers from a mental abnormality or personality disorder making the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.<sup>77</sup> The State bears the burden of proving beyond a reasonable doubt that these requirements are met.<sup>78</sup> If the State satisfies its burden, the individual may be committed for control, care and treatment under the supervision of the department of social and health services.<sup>79</sup>

Under the statute, a committed person is entitled to an annual examination of the individual's mental condition.<sup>80</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>81</sup> In addition, the detainee may independently petition for discharge from confinement.<sup>82</sup> In determining whether the petition 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>83</sup> Accordingly, the statute specifically recognizes that committed individuals have a right to "adequate care and individualized treatment."<sup>84</sup>

The courts presiding over the Washington litigation have recognized that, under well-settled Supreme Court precedent, the Due Process Clause likewise requires that States provide civilly-committed individuals access to treatment that "gives them a realistic opportunity to be cured and released."<sup>85</sup> This standard "determines whether a particular decision has substantially met professionally accepted minimum standards."<sup>86</sup> "Because 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

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<sup>77</sup> WASH. REV. CODE § 71.09.020.

<sup>78</sup> *Id.* § 71.09.060.

<sup>79</sup> *See id.* § 71.09.080.

<sup>80</sup> *Id.* § 71.09.070.

<sup>81</sup> *Id.* § 71.09.090(1).

<sup>82</sup> *Id.* § 71.09.090(2). Other States have similar statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3701; CAL. WELF. & INST. CODE § 6600; FLA. STAT. ANN. § 394.910; 725 ILL. COMP. STAT. 207; KAN. STAT. ANN. § 59-29a01; MASS. GEN. LAWS. ch. 123A; MINN. STAT. § 253B.09; MO. ANN. STAT. § 632.480; N.J. STAT. ANN. § 30:4-27.24; N.D. CENT. CODE § 25-03.3; N.Y. MENTAL HYGIENE LAW § 10.01; S.C. CODE ANN. § 44-48-10; TEX. HEALTH & SAFETY CODE § 841; VA. CODE ANN. § 37.2-900; WIS. STAT. § 980.

<sup>83</sup> WASH. REV. CODE § 71.09.090.

<sup>84</sup> *Id.* § 71.09.080.

<sup>85</sup> *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (citing *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980)).

<sup>86</sup> *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984).

whose conditions of confinement are designed to punish.”<sup>87</sup> Thus, the question arises what conditions are sufficiently non-punitive and afford residents a “realistic opportunity” to be successfully treated and released.

#### A. *Characteristics of the Treatment Program*

The Washington litigation has done much to flesh out the constitutional requirements for civil commitment treatment programs. Over the seventeen-year history of the litigation, the court received input from experts in the field who provided guidance regarding minimally acceptable standards governing such programs. In the process, the courts articulated a variety of guidelines that were implemented in the injunction requiring the SCC to provide detainees with constitutionally adequate treatment.

One of the touchstones for the constitutionality of a civil commitment treatment program articulated by these courts is the requirement of individualized treatment. The district court presiding over the Washington litigation has repeatedly underscored the necessity of an individualized approach to treatment, which is derived from standards set forth by the Association for the Treatment of Sexual Abusers. As the court observed, “[i]ndividualized treatment plans are critical and should provide for systematic measurements of the individual’s progress.”<sup>88</sup> “Experts in the field agree that individualized treatment is a necessary component of a successful treatment program, which ultimately must be the goal if residents are to have a realistic opportunity to be cured and released.”<sup>89</sup>

Likewise important is the quality of interaction among residents and staff. In the Washington 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 experts concluded had undermined successful treatment. Accordingly, the injunction issued in the Washington litigation required not only that the SCC prevent staff abuse, but also “required SCC to take steps to rectify the lack of trust between the residents and staff.”<sup>90</sup> Such a requirement, the Ninth Circuit held, is necessary to avoid “severely hampering effective treatment.”<sup>91</sup>

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<sup>87</sup> *Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)).

<sup>88</sup> Nov. 25, 1998 Findings of Fact and Conclusions of Law, *supra* note 5, at 11-12; *see also* *Turay v. Richards*, No. CV-91-0664-RSM, slip op. at 22 (W.D. Wash. Feb. 27, 2003) (findings of fact and conclusions of law) (ordering SCC to “[c]orrect the long-standing deficiencies in the treatment program”).

<sup>89</sup> *See Sharp*, 233 F.3d at 1172.

<sup>90</sup> *Id.* at 1170.

<sup>91</sup> *Id.* *See, also, e.g.*, *Turay v. Richards*, No. CV-91-0664-RSM, slip op. at 4 (W.D. Wash. Feb. 5, 1997) (order denying motion for contempt); Nov. 25, 1998 Findings of Fact and Conclusions of Law, *supra* note 5, at 9 (same); Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, at 3, 8; *Hydrick v. Hunter*, 500 F.3d 978, 997 (9th Cir. 2007) (plaintiffs have a “clearly established” right to be free from “conditions that amount to punishment,” including abuse from staff and other residents).

Another “generally accepted component[] of effective treatment programs” that the courts found lacking at the SCC consists of “adequate grievance procedures and behavior management plans.”<sup>92</sup> As the district court presiding over the Washington litigation found, “[a]ll parties recognize that the prompt and fair handling of grievances is an essential part of the treatment environment.”<sup>93</sup> However, historically, the grievance system at the SCC had been “ineffective and failed to result in individualized responses.”<sup>94</sup> Moreover, these deficiencies led to “a general mistrust of the grievance system among residents.”<sup>95</sup>

Another critical component of successful treatment identified by the district court is the involvement of residents’ family members in the treatment program. When it was created, the SCC program imposed significant barriers to the participation of family members in treatment. As part of its oversight, the district court directed that such barriers be removed, finding that family participation was another important aspect of successful treatment.<sup>96</sup>

Finally, an essential component of the district court’s injunction was that the SCC establish a less restrictive alternative program that put residents on a path toward eventual release.<sup>97</sup> Indeed, the district court observed that “[t]his phase [of the treatment program] is required by statute (*see* Wash. Rev. Code § 71.09.090), 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>98</sup> Accordingly, the district court emphasized the need for development of constitutionally and statutorily-required LRAs and, as in other areas of injunction compliance,

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<sup>92</sup> *Sharp*, 233 F.3d at 1171.

<sup>93</sup> *Turay*, 108 F. Supp. 2d at 1157.

<sup>94</sup> *Turay v. Richards*, No. CV-91-0664-RSM, slip op. at 24 (W.D. Wash. April 17, 2002) (findings of fact and conclusions of law).

<sup>95</sup> Feb. 27, 2003 Findings of Fact and Conclusions of Law, *supra* note 88, at 13.

<sup>96</sup> *See Turay*, 108 F. Supp. 2d at 1156.

<sup>97</sup> *See, e.g.*, Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, at 9.

<sup>98</sup> *Turay*, 108 F. Supp. 2d at 1156. “Without 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. Richards*, No. CV-91-0664-RSM, slip op. at 12 (W.D. Wash. Dec. 20, 2000) (findings of fact and conclusions of law); *see also Turay v. Richards*, No. CV-91-0664-RSM, slip op. at 4 (W.D. Wash. April 25, 2003) (order granting motion for reconsideration and clarification). As the dissent in *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. at 388 (Breyer, J., dissenting) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

emphasized that it must monitor the SCC's progress to ensure that program changes were effectively implemented.<sup>99</sup>

### B. *Constitutionally Adequate Oversight*

In order to ensure that these and other requirements continued to be met, the district court found that adequate oversight mechanisms were critical. Indeed, a key finding supporting the Turay Injunction was that “the SCC program lacked sufficient oversight.”<sup>100</sup> During the course of the proceedings, several potential mechanisms for oversight were developed. First, the Inspection of Care Committee, 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. 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>101</sup> Finally, a resident advisory council was appointed with the direction that it “be fully informed and consulted about important projects.”<sup>102</sup> These various oversight mechanisms supplemented the oversight provided by the district court and court-appointed special master, who prepared a series of reports for the court detailing the SCC's progress in complying with the terms of the injunction.

### C. *Principles Governing Judicial Oversight*

The courts have also articulated guidelines for the exercise of judicial oversight of the treatment program. The Ninth Circuit made clear, for example, 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>103</sup> Rather, they must “look beyond the . . . administrators' assertions of compliance” in

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<sup>99</sup> See, e.g., Feb. 27, 2003 Findings of Fact and Conclusions of Law, *supra* note 88, at 16 (“[I]t is premature to find that defendants have fully complied with the injunction[’s requirements relating to Special Needs residents] because of the lack of adequate funding for the special needs program and the uncertain efficacy of the Measures of Change tool.”).

<sup>100</sup> *Sharp*, 233 F.3d at 1171. See also Nov. 25, 1998 Findings of Fact and Conclusions of Law, *supra* note 5, at 11; Feb. 5, 1997 Order, *supra* note 91, at 5; Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, at 14.

<sup>101</sup> *Turay v. Richards*, No. CV-91-0664-RSM, slip op. at 3 (W.D. Wash. Nov. 21, 1995) (order denying motion for further injunctive relief).

<sup>102</sup> *Turay*, 108 F. Supp. 2d at 1158.

<sup>103</sup> See *Sharp*, 233 F.3d at 1171.

order to determine whether the State has “fulfilled the requirements” under the Constitution and the court’s injunction.<sup>104</sup>

Indeed, in affirming the Turay Injunction in the face of defendants’ numerous requests for dissolution, the Ninth Circuit repeatedly rejected defendants’ “principal contention” that courts must “defer to the professional judgment of the SCC superintendent and clinical director.”<sup>105</sup> As the court observed in rejecting this argument, “accepting 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>106</sup> Applying this standard, the Ninth Circuit repeatedly 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 [defendants’] professional judgment.”<sup>107</sup>

Likewise, the court underscored that it would continue to review the SCC’s compliance with the terms of the injunction, even where such terms had been dissolved, in order to ensure that there was no “backsliding.”<sup>108</sup> This was critical in ensuring the SCC’s continued compliance. Without this continuing review, the SCC would have no incentive to maintain the gains that had been achieved through judicial supervision.

In order to demonstrate that an injunction should be dissolved, defendants must generally demonstrate that constitutional requirements are being met and that defendants are unlikely to “return to [their] former ways.”<sup>109</sup> Moreover, as the Ninth Circuit observed in reviewing the Turay Injunction, “[a] history of noncompliance with prior orders can justify greater court involvement than is ordinarily permitted.”<sup>110</sup> These

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<sup>104</sup> *Id.* at 1172.

<sup>105</sup> *See id.* at 1171.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1172.

<sup>108</sup> *See, e.g.*, June 10, 2004 Findings of Fact and Conclusions of Law, *supra* note 11, at 10; Feb. 27, 2003 Findings of Fact and Conclusions of Law, *supra* note 88, at 3, 17; April 17, 2002 Findings of Fact and Conclusions of Law, *supra* note 94, at 4; Turay v. Richards, No. CV-91-0664-RSM, slip op. at 8 (W.D. Wash. Aug. 14, 2001) (findings of fact and conclusions of law); Dec. 20, 2000 Findings of Fact and Conclusions of Law, *supra* note 98, at 13; Turay v. Richards, No. CV-91-0664-RSM, slip op. at 4 (W.D. Wash. April 14, 2005) (findings of fact and conclusions of law).

<sup>109</sup> Board of Oklahoma City v. Dowell, 498 U.S. 237, 247-49 (1991).

<sup>110</sup> *Sharp*, 233 F.3d at 1173. *See also* Grubbs v. Bradley, 821 F. Supp. 496, 503 (M.D. Tenn. 1996) (“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 *Dowell*, 498 U.S. at 247-49); 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

(Continued...)

concerns applied in the Washington 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>111</sup> As the district court observed, the SCC had continued to engage in prohibited “backsliding”, a situation the court characterized as “serious” and “troubling”.<sup>112</sup> Accordingly, judicial supervision was “essential” given the SCC’s recalcitrance and repeated failure to comply with its constitutional obligations.<sup>113</sup>

### III. THE SCC’S NON-COMPLIANCE WITH ITS CONSTITUTIONAL OBLIGATIONS

While the courts presiding over the Washington 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. Indeed, the SCC’s long history of non-compliance with its obligation to provide constitutionally adequate treatment has been documented in a string of judicial decisions. On more than one occasion, the Ninth Circuit has noted “the state’s repeated and documented failures to rectify the constitutional shortcomings of its civil commitment facilities for sex offenders,”<sup>114</sup> and in particular the SCC’s “history of noncompliance with the Turay Injunction.”<sup>115</sup> As a result of that history – and in contrast to similar programs located in other States<sup>116</sup> – no resident has ever been successfully treated and released from the SCC in its seventeen years of operation.

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injunction is necessary with relief available by petition to the Court if future backsliding occurs.”).

<sup>111</sup> July 26, 2006 Order, *supra* note 16, at 2.

<sup>112</sup> Mar. 23, 2007 Order, *supra* note 1, at 5-6; September 18, 2006 Transcript, Turay v. Richards, No. CV-91-0664-RSM, at 33-34.

<sup>113</sup> *See, e.g.*, Feb. 27, 2003 Findings of Fact and Conclusions of Law, *supra* note 88, at 20; Dec. 20, 2000 Findings of Fact and Conclusions of Law, *supra* note 98, at 13; Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, 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.” July 26, 2006 Order, *supra* note 16, at 2.

<sup>114</sup> *Cunningham v. David Special Commitment Center*, 56 Fed. Appx. 393, 394 (9th Cir. Feb. 19, 2003).

<sup>115</sup> *Sharp*, 233 F.3d at 1173.

<sup>116</sup> *See* Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability* 7 (April 25, 2003), available at [www.forensicexaminers.com/forensicuse.pdf](http://www.forensicexaminers.com/forensicuse.pdf) (summarizing statistics regarding offender release in similar programs).

A. *The SCC's Repeated Requests For Dissolution Of The Injunction Despite Its Non-Compliance*

From the outset of the litigation over conditions at the SCC, the defendants failed to comply with the district court's orders.<sup>117</sup> Shortly after a jury found that the SCC had failed to provide residents with constitutionally adequate treatment and the district court issued its injunction, the court held that defendants had failed to present a sufficient plan for compliance.<sup>118</sup> Accordingly, the court entered a supplemental order clarifying the terms of the injunction and appointing a special master to oversee compliance.<sup>119</sup>

Over a year later, the SCC still had not complied with the terms of the injunction, and residents moved for further injunctive relief and for contempt sanctions. The district court granted an unopposed part of that motion which sought appointment of a full-time ombudsman to provide internal review of the SCC's progress, and while it denied residents' request for contempt sanctions, it found that "the motion raises serious issues" and that defendants "still have not complied adequately" with the court's rulings.<sup>120</sup>

On March 6, 1996, the court held an evidentiary hearing on residents' renewed motion for contempt and on defendants' motion for release from the injunction. The court denied the SCC's motion for release from the injunction, finding that "more remains to be done to achieve full compliance" and that "defendants must work diligently with the Special Master to achieve full compliance with the injunction."<sup>121</sup> After another evidentiary hearing and visit to the SCC, the district court entered an order on February 6, 1997 denying the SCC's motion to dissolve the injunction.<sup>122</sup> It found that "compliance with the injunction is still not complete," and that, among other things, the SCC had not provided

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<sup>117</sup> 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, 526 (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) (the SCC has "fail[ed] to provide constitutionally adequate treatment"); Janus & Logan, *supra* note 63, at 374 ("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 (1999) ("[t]he treatment environment at SCC has severely hampered any attempt to meet constitutional standards").

<sup>118</sup> Aug. 22, 1994 Order, *supra* note 4.

<sup>119</sup> Sept. 22, 1994 Order, *supra* note 4.

<sup>120</sup> Nov. 21, 1995 Order, *supra* note 101, at 3.

<sup>121</sup> *Turay v. Richards*, No. CV-91-0664-RSM, slip op. (W.D. Wash. April 2, 1996) (order on motion for injunctive relief).

<sup>122</sup> Feb. 5, 1997 Order, *supra* note 91.

constitutionally adequate treatment, had failed to establish a community transition component, and had not adequately integrated family members into the treatment program or provided “a structure for objective, external oversight.”<sup>123</sup>

After additional evidentiary hearings, the district court entered an order on October 1, 1997 finding that “defendants have 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.” 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>124</sup> The court held that such a fully operational program must include the following components, which were lacking: “that 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>125</sup>

On March 30, 1998, the court entered an order finding that defendants had improperly attempted to curtail the court-appointed ombudsman’s authority to conduct investigations without first obtaining an order modifying the previously stipulated and ordered definition of the ombudsman’s responsibilities. The court directed defendants “to refrain from any further attempts to alter court-ordered requirements without obtaining court approval.”<sup>126</sup>

After another evidentiary hearing and site visit, on November 25, 1998, the court held that “defendants have not yet made constitutionally adequate mental health treatment available to the plaintiffs.”<sup>127</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’ expert.”<sup>128</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

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<sup>123</sup> *Id.* at 5.

<sup>124</sup> *Turay v. Richards*, No. CV-91-0664-RSM, slip op. at 4-5 (W.D. Wash. Oct. 1, 1997) (order on motions for contempt and release from injunction).

<sup>125</sup> *Id.*

<sup>126</sup> *Turay v. Richards*, No. CV-91-0664-RSM, slip op. at 3 (W.D. Wash. Mar. 30, 1998).

<sup>127</sup> Nov. 25, 1998 Findings of Fact and Conclusions of Law, *supra* note 5, at 11.

<sup>128</sup> *Id.*



rehabilitation,” and the lack of “[f]air and reasonable grievance procedures and behavior management plans.”<sup>129</sup>

In affirming Judge Dwyer’s November 1998 order, the Ninth Circuit agreed that “the district court correctly concluded that the [defendants] 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>130</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>131</sup>

*B. The SCC’s Citation For Contempt of Court*

A year later, the district court held additional hearings and again found that defendants “have intentionally disregarded the injunction’s requirements,” specifically noting defendants’ “footdragging which has continued for an unconscionable time.”<sup>132</sup> The court found that defendants “persistently have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have 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>133</sup> Finally, it 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>134</sup>

The court held that, among other things, there were still inadequacies in “staffing, staff training, treatment plans and programs, and treatment environment at the SCC.”<sup>135</sup> In doing so, the court relied upon a report issued by the Inspection of Care Committee that “made findings of deficiencies similar to those found by the court and the special master” and added “a further serious concern, that of inadequate medical staff and facilities for the SCC residents.”<sup>136</sup> These failings were so obvious that “defendants did not contend that injunction compliance has been achieved, and did not seek dissolution of the injunction.”<sup>137</sup> “Instead, they recognized through the testimony of managerial employees, and through counsel, that minimum professional standards for treating sex

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<sup>129</sup> *Id.* at 12, 14.

<sup>130</sup> *Sharp*, 233 F.3d at 1172.

<sup>131</sup> *Id.* at 1173.

<sup>132</sup> Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, at 18.

<sup>133</sup> *Id.* at 19.

<sup>134</sup> *Id.* at 15-16.

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *Id.* at 6-7.

<sup>137</sup> *Id.* at 4.

offenders are not fully met and that the goal of providing constitutionally adequate mental health treatment is still unattained.”<sup>138</sup>

The district court found that defendants had “fallen into a pattern of first denying that anything is amiss at 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>139</sup> The court concluded that this “entrenched resistance has impeded prompt and wholehearted compliance with court orders protecting basic liberties.”<sup>140</sup> Accordingly, the court held defendants in contempt for willful failure to comply with the court’s prior orders, finding that sanctions had proven “essential” to obtaining the SCC’s compliance.<sup>141</sup> The court ruled that 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.<sup>142</sup>

As a result of the SCC’s continued non-compliance, these sanctions would remain in place and continue to accrue for several years. In May 2000, Judge Dwyer issued additional findings after conducting another evidentiary hearing. He again found that defendants 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>143</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>144</sup> The court further observed that “all parties recognize that injunction compliance is not yet complete.”<sup>145</sup> Accordingly, Judge Dwyer denied the State’s request to dissolve the injunction and lift the contempt sanctions.<sup>146</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>147</sup> Defendants still had not made “constitutionally adequate mental health treatment available to the SCC

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<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.* at 16.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 20-21.

<sup>142</sup> *Id.* at 21.

<sup>143</sup> *Turay v. Seling*, 108 F. Supp. 2d 1148, 1151, 1158-59 (W.D. Wash. 2000).

<sup>144</sup> *Id.* at 1158.

<sup>145</sup> *Id.* at 1155.

<sup>146</sup> *See id.* at 1158.

<sup>147</sup> Dec. 20, 2000 Findings of Fact and Conclusions of Law, *supra* note 98.

residents.”<sup>148</sup> Accordingly, Judge Dwyer refused to “drop[] the sanction at this point or dissolve[e] the injunction.”<sup>149</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>150</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: “The finding that 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 defendants at an earlier hearing, and even by the SCC’s former clinical director and current superintendent.”<sup>151</sup>

When Judge Rothstein took over after Judge Dwyer’s death, she too found that the SCC failed to provide constitutionally adequate treatment and that “injunction compliance remains incomplete.”<sup>152</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 give the impression of compliance, but that each time, defendants failed to comply with the district court’s orders.<sup>153</sup> Moreover, Judge Rothstein “caution[ed] defendants against interfering with the independence of external oversight mechanisms” after the SCC intervened in the IOC review by attempting to add a new member to the committee, which left the IOC committee “constricted and to some extent usurped.”<sup>154</sup>

After additional evidentiary hearings, on December 28, 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>155</sup> The district court found that the SCC had engaged in “backsliding” and that “the IOC [had] concluded that ‘the quality of treatment plans has actually decreased since the last visit.’”<sup>156</sup> Accordingly, the court held that “[c]ourt oversight continues to be essential to ensure that,” among other things, “defendants . . .

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<sup>148</sup> *Id.* at 14.

<sup>149</sup> *Id.* at 13.

<sup>150</sup> Aug. 14, 2001 Findings of Fact and Conclusions of Law, *supra* note 108, at 8.

<sup>151</sup> *Id.* at 5.

<sup>152</sup> April 17, 2002 Findings of Fact and Conclusions of Law, *supra* note 94, at 9.

<sup>153</sup> *See id.*

<sup>154</sup> *Id.* at 24.

<sup>155</sup> Feb. 27, 2003 Findings of Fact and Conclusions of Law, *supra* note 88, at 5, 20.

<sup>156</sup> *Id.* at 17.

correct the ongoing deficiencies in the treatment program so as to provide SCC residents with a discernible path toward release.”<sup>157</sup>

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

Judge Rothstein became Director of the Federal Judicial Center in 2003, and the case was reassigned to Judge Robert Lasnik on an interim basis. Judge Lasnik abruptly purged the contempt finding and dissolved several components of the injunction<sup>158</sup> – components the court had previously found were “essential” in “stimulating [the SCC’s] compliance.”<sup>159</sup> Nonetheless, in recognition of the SCC’s history of noncompliance, Judge Lasnik made his rulings contingent on the requirement that there be “no significant ‘backsliding’.”<sup>160</sup> Moreover, he refused to dissolve the injunction in its entirety, holding that “[j]udicial oversight remains necessary to ensure that defendants develop and fund off-island LRAs in a timely manner and with enough capacity to ensure that the treatment 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>161</sup> A few weeks after Judge Lasnik entered his order, the litigation, along with other cases over which Judge Rothstein had previously presided, were reassigned to Judge Ricardo Martinez.<sup>162</sup>

D. *The SCC’s Most Recent “Backsliding” And Failure To Comply With The Court’s Injunction*

No longer under the threat of accruing contempt sanctions, the SCC’s compliance with the injunction’s requirements again waned. Specifically, in 2005 and 2006, the IOCC issued detailed reports listing several ongoing deficiencies in the SCC treatment program, and the former special master, Dr. Marques, submitted a declaration urging the court to continue judicial oversight of the SCC.

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<sup>157</sup> *Id.* at 20.

<sup>158</sup> June 10, 2004 Findings of Fact and Conclusions of Law, *supra* note 11.

<sup>159</sup> See Dec. 20, 2000 Findings of Fact and Conclusions of Law, *supra* note 98, at 13; Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, at 20; see also April 17, 2002 Findings of Fact and Conclusions of Law, *supra* note 94, at 9 (any “improvements occurred in direct response to the court’s contempt orders and to the accrual of sanctions”); Feb. 27, 2003 Findings of Fact and Conclusions of Law, *supra* note 88, at 5 (same).

<sup>160</sup> June 10, 2004 Findings of Fact and Conclusions of Law, *supra* note 11, at 10.

<sup>161</sup> *Id.* at 3.

<sup>162</sup> July 6, 2004 Order, *supra* note 15.

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>163</sup> Among other things, the report observed that “[m]edical goals are still very limited or absent altogether” from the treatment plan<sup>164</sup> and that “[a] physician medical director is needed.”<sup>165</sup> Moreover, “a significant number [of residents] complained about not knowing what they had to do to advance in levels and phases.”<sup>166</sup> Finally, the report observed that there were problems with the grievance system at the SCC, noting that “not all residents are treated uniformly.”<sup>167</sup>

The IOCC further observed that there had been significant interference with its oversight of the SCC. Prior to the IOCC’s survey, Dr. Dorcas Dobie, one of the founding members of the IOCC resigned after she concluded that the SCC management was not addressing problems identified by the IOCC. In her resignation letter, Dr. Dobie cited the SCC’s “adversarial” approach that “dispute[s] the validity of [the IOCC’s] findings rather than to resolve the identified problems.”<sup>168</sup> Likewise, Maureen Saylor, another member of the IOCC, observed that because “SCC pays for IOCC to do its work,” “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>169</sup> The SCC subsequently appointed two members to the IOCC who were both former Washington Department of Safety and Health Services employees without consulting the two remaining members<sup>170</sup> and announced new “standards” that the IOCC must follow.<sup>171</sup> The

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<sup>163</sup> Inspection of Care Committee Report at 2 (Feb. 11, 2005). The members of the IOCC Committee 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, Nadine Porter, former Institutional Nurse Consultant to the State of Washington DSHS, and Maureen Saylor, Certified Sex Offender Treatment Provider. *See* Inspection of Care Committee Report (Jan. 31, 2006).

<sup>164</sup> Feb. 11, 2005 IOCC Report, *supra* note 163, at 2.

<sup>165</sup> *Id.* at 51.

<sup>166</sup> *Id.* at 14-15.

<sup>167</sup> *Id.*

<sup>168</sup> Aug. 21, 2003 Dorcas Dobie letter at 1; Oct. 21, 2004 Transcript, Turay v. Richards, No. CV-91-0664-RSM, at 25, 27.

<sup>169</sup> Maureen Saylor, letter at 3 (Feb. 11, 2005).

<sup>170</sup> *Id.* at 2.

<sup>171</sup> Feb. 11, 2005 IOCC Report, *supra* note 163, at 2, 53-54; Richard Briody, letter at 4 (Feb. 11, 2005).

IOCC noted that these actions sought to “directly control what and how the committee does its work.”<sup>172</sup> Likewise, the IOCC noted problems with the court-appointed ombudsman’s ability to engage in oversight, observing that the “ombudsperson identified problems in obtaining documentation [from the SCC] necessary for her to fulfill her assigned responsibilities” and that she had “encountered resistance as she tries to make the inquiries necessary to do her job.”<sup>173</sup>

This was not the first time the SCC had interfered with oversight mechanisms. The SCC had repeatedly attempted to silence court-appointed ombudsmen who were critical of the treatment conditions at the SCC. 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>174</sup> In March 1998, after defendants 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 defendants’ “attempt to curtail [the ombudsman’s] authority . . . cannot be allowed to stand.”<sup>175</sup> And, in September 1999, the SCC filed a motion to remove the ombudsman, which the court promptly denied.<sup>176</sup>

## 2. *The January 2006 IOCC Report*

The IOCC documented further departures from minimally acceptable standards of professional care in its January 2006 submission. It reported that, “[s]ince 1999 the IOCC has identified a plethora of serious problems at SCC; many of which have existed for some time and continue to exist.”<sup>177</sup> The report concluded that “there are several areas of concern regarding program functioning,” and that while “the major areas have been addressed and readdressed, suggestions offered, plans proposed and implemented . . . still the problems have persisted.”<sup>178</sup>

As Dr. Robert Briody, a senior member of the IOC committee and the former Director of the Florida Civil Commitment Center and Chief of Mental Health Services for the Oklahoma Department of Corrections, stated in a declaration submitted to the district court, “[t]he IOC Team’s conclusions go to the very heart of providing adequately and constitutionally required care for residents at the SCC.”<sup>179</sup> Dr. Briody

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<sup>172</sup> Saylor letter, *supra* note 169, at 3.

<sup>173</sup> Feb. 11, 2005 IOCC Report, *supra* note 163, at 55.

<sup>174</sup> Turay v. Richards, No. CV-91-0664-RSM, slip op. (W.D. Wash. Feb. 11, 1997) (order appointing ombudsman).

<sup>175</sup> Mar. 30, 1998 Order, *supra* note 126, at 2.

<sup>176</sup> Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, at 15.

<sup>177</sup> Jan. 31, 2006 IOCC Report, *supra* note 163, at 33.

<sup>178</sup> *Id.* at 1.

<sup>179</sup> Richard Briody Declaration, Turay v. Richards, No. CV-91-0664-RSM, ¶ 6-7.

observed that, while “SCC management has acknowledged many of the problems identified by the IOCC, . . . no real change has occurred.”<sup>180</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>181</sup> Indeed, the IOCC documented numerous deficiencies.

First, the IOCC found that ineffective management and supervision hampered SCC’s treatment program and its ability to respond to the problems previously identified by the district court and the IOCC.<sup>182</sup> “Supervision is absent or not effective” – a concern that is “not new.”<sup>183</sup> Moreover, the report concluded that there were “pervasive problems in management at the SCC”<sup>184</sup> and that “[s]upervisors at the SCC simply don’t actively supervise line staff.”<sup>185</sup> “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.”<sup>186</sup> Moreover, “SCC administration does not grasp the extent of its own management problems.”<sup>187</sup>

Second, the IOCC found that the SCC had failed to address obvious deficiencies in its treatment program: “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>188</sup> The report further found that internal review mechanisms at the SCC, such as the Quality Improvement Committee were “dysfunctional and have consistently failed to identify key areas for required improvement to ensure necessary solutions.”<sup>189</sup> These problems included “use of force, safety violations, and allegations of staff abusing residents and medical errors.”<sup>190</sup> The report concluded that, “[s]ince 1999 the IOCC has identified a *plethora of serious problems* at SCC,” but these problems have gone uncorrected “because the Quality Committee and the leadership staff have been less than effective.”<sup>191</sup>

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<sup>180</sup> *Id.* ¶ 2.

<sup>181</sup> *Id.* ¶ 7.

<sup>182</sup> Jan. 31, 2006 IOCC Report, *supra* note 163, at 4-6.

<sup>183</sup> *Id.* at 3-4.

<sup>184</sup> *Id.* at 17.

<sup>185</sup> Briody Declaration, *supra* note 179, ¶ 6(f) (citing Jan. 31, 2006 IOCC Report, *supra* note 163, at 4).

<sup>186</sup> Jan. 31, 2006 IOCC Report, *supra* note 163, at 6.

<sup>187</sup> *Id.* at 6.

<sup>188</sup> Briody Declaration, *supra* note 179, ¶ 6(c).

<sup>189</sup> *Id.* ¶ 6(g).

<sup>190</sup> Jan. 31, 2006 IOCC Report, *supra* note 163, at 31.

<sup>191</sup> *Id.* at 33 (emphasis added).

Third, the IOCC found that “[a]dequate provision of medical and psychiatric care for this aging population that is integrated with treatment planning has been a persistent problem at the SCC.”<sup>192</sup> “Review 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.”<sup>193</sup> “Collaboration with the treatment team [was] not evident based on [the IOCC’s] clinical file review” – an “expected protocol” that “must be initiated.”<sup>194</sup> The IOCC found that this problem is especially disconcerting given that “all residents have been assigned a DSM III, Axis I and/or II diagnosis and therefore have psychiatric needs.”<sup>195</sup>

Fourth, the IOCC found that there were significant problems in the provision of health care services: “We have significant concerns about the level of health care services provided by the program.”<sup>196</sup> Health care services were “disorganized and poorly managed,” and there was a “lack of professional nursing practice.”<sup>197</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>198</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>199</sup> Accordingly, it “continue[d] to stress the significance of the deficiencies cited within nursing services at 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>200</sup>

Fifth, the IOCC found that there were documentation and other problems relating to the SCC’s clinical and medical files: “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.”<sup>201</sup> Moreover, the report found that the “[t]he frequency of medication 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

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<sup>192</sup> Briody Declaration, *supra* note 179, ¶ 6(h).

<sup>193</sup> Jan. 31, 2006 IOCC Report, *supra* note 163, at 9.

<sup>194</sup> *Id.* at 29.

<sup>195</sup> *Id.* at 10.

<sup>196</sup> *Id.* at 9.

<sup>197</sup> *Id.* at 22.

<sup>198</sup> *Id.* at 27.

<sup>199</sup> *Id.* at 22.

<sup>200</sup> *Id.* at 23.

<sup>201</sup> *Id.* at 10.



of residents receiving meds.”<sup>202</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>203</sup>

Sixth, the IOCC found that “repetitive and persistent” personal sanitation and safety concerns are ignored and that there has been “no real improvement” in this area.<sup>204</sup> The IOCC found that this was evidence of a more pervasive problem: “The persistent problems in the areas of room sanitation, obstructions to emergency egress from rooms, clutter, unauthorized food, personal hygiene, shielded light and obstructed visibility are indicative of the direct care and clinical staff not adequately doing their job.”<sup>205</sup> The IOCC underscored that the monitoring of hygiene and health care needs of the aging resident population “is clearly a nursing responsibility and function” that “needs to be an integral part of resident care.”<sup>206</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>207</sup>

Seventh, the IOCC found that there was a lack of staff professionalism and poor interaction between residents and staff: “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.”<sup>208</sup> Moreover, 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>209</sup> and that “[c]omplaints of staff abuse” had “increased.”<sup>210</sup> The IOCC observed that the behavior of staff “has been an area of concern to both past and present IOCC surveyors” and required further review “in upcoming surveys.”<sup>211</sup>

Eighth, the IOCC found that there were significant shortcomings in external and internal oversight mechanisms. In particular, the IOCC reported that the SCC had shown disregard for the IOCC and its recommendations. For example, the January 2006 report noted that in response to an earlier IOCC recommendation regarding internal oversight of the program, “the SCC stated that the [Resident Advisory Committee]

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<sup>202</sup> *Id.* at 27.

<sup>203</sup> Briody Declaration, *supra* note 179, ¶ 6(h).

<sup>204</sup> *Id.* ¶ 6(i).

<sup>205</sup> *Id.* at 14.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 23.

<sup>208</sup> *Id.* at 5.

<sup>209</sup> *Id.* at 6.

<sup>210</sup> *Id.* at 18.

<sup>211</sup> *Id.* at 19.

would be further developed, taken more seriously and would be regularly meeting with the Superintendent. Instead it has been disbanded!”<sup>212</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>213</sup> Indeed, soon after the IOCC issued its report containing these criticisms of the SCC program, the SCC disbanded the IOC committee and replaced it with new members selected by the SCC’s superintendent.<sup>214</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>215</sup> As a result, the IOCC found that the SCC was failing to meet its stated goal of providing residents with constitutionally adequate treatment.<sup>216</sup>

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

The former special master, Dr. Janice Marques, a clinical psychologist, 28-year veteran of the California Department of Mental Health, and past-President of the Association for the Treatment of Sexual Abusers, likewise concluded that continued judicial supervision was warranted.<sup>217</sup> Dr. Marques submitted a declaration urging the court to maintain the injunction until adequate oversight mechanisms were in place. In particular, Dr. Marques noted the “long-term pattern of non-responsiveness of SCC management to problems that have been identified by the IOC” and that the court’s injunction had been “critical” in compelling the SCC to take any action to improve conditions at the facility.<sup>218</sup> Accordingly, because it was “unclear” that oversight mechanisms 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>219</sup>

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<sup>212</sup> *Id.* at 21.

<sup>213</sup> *Id.*

<sup>214</sup> *Turay v. Richards*, No. CV-91-0664-RSM, at 2 (W.D. Wash. April 17, 2006) (status report to the court).

<sup>215</sup> Jan. 31, 2006 IOCC Report, *supra* note 163, at 7; *see also* Briody Declaration, *supra* note 179, ¶ 6(d).

<sup>216</sup> *See id.*

<sup>217</sup> *Turay v. Richards*, No. CV-91-0664-RSM, ¶¶ 1-2 (W.D. Wash. April 21, 2006) (declaration of Janice Marques).

<sup>218</sup> *Id.* ¶¶ 8, 18.

<sup>219</sup> *Id.* ¶¶ 16, 19.

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

In its final ruling in the litigation regarding the SCC's treatment program, the district court agreed that this and other evidence plaintiffs submitted demonstrated SCC "backsliding".<sup>220</sup> Indeed, many of these findings regarding "serious" and "persistent" problems in the SCC's treatment program were not even disputed. During the proceedings before the district court, the SCC conceded that there were problems with 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>221</sup> It conceded that "the integration of medical and clinical treatment has been a challenge for the program, as has managing medical services and staff generally."<sup>222</sup> And it conceded that the IOCC's "comments [regarding persistent sanitation and safety problems] raise valid concerns."<sup>223</sup>

The district court relied on similar findings in the past in concluding that the SCC was not meeting constitutional requirements.<sup>224</sup> Indeed, the SCC previously conceded a failure to meet "minimum professional standards" where the IOC committee had issued similarly critical reports.<sup>225</sup> Nonetheless, it now dissolved the injunction and denied residents' request to present additional evidence during an evidentiary hearing. Eight days before the court issued its order dissolving the injunction, the SCC submitted a mandatory status report to the court stating that the reconstituted IOC committee had given a preliminary briefing to the SCC and would issue a final report "within the next thirty

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<sup>220</sup> Mar. 23, 2007 Order, *supra* note 1, at 5.

<sup>221</sup> *See* Turay v. Richards, No. CV-91-0664-RSM, at 6 (W.D. Wash. April 3, 2006) (Declaration of Alan McLaughlin).

<sup>222</sup> Turay v. Richards, No. CV-91-0664-RSM, at 32 (W.D. Wash. April 17, 2006) (Defendants' Response Brief to Plaintiffs' Request for Injunctive Relief on the Theory of Backsliding); *see also* McLaughlin Declaration, *supra* note 221, at 3-4.

<sup>223</sup> Defendants' Response Brief, *supra* note 222, at 34.

<sup>224</sup> *See, e.g.,* Turay, 108 F. Supp. 2d at 1151, 1153 (citing 1999 IOCC Report).

<sup>225</sup> *See id.* at 1153. In its May 2000 findings, for example, 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* Dec. 20, 2000 Findings of Fact and Conclusions of Law, *supra* note 98, at 9 ("The IOC report is of great value in helping the SCC toward the goal of constitutionally adequate mental health treatment."); Feb. 27, 2003 Findings of Fact and Conclusions of Law, *supra* note 88, at 17 ("The recent IOC report appears to document precisely the kind of backsliding that the contempt was designed to forestall."); Nov. 15, 1999 Findings of Fact and Conclusions of Law, *supra* note 8, at 6-7.

days.”<sup>226</sup> Nonetheless, the district court did not wait for the new IOCC report. Instead, it promptly dissolved the 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>227</sup> While the court acknowledged that the issues plaintiffs raised were “serious” and that it shared the “sense of frustration so obviously felt by . . . the residents,”<sup>228</sup> nonetheless, it granted the State’s motion and dissolved the injunction.<sup>229</sup>

The district court simply asserted without analysis that the SCC’s backsliding did not “rise to the level of a Constitutional violation.”<sup>230</sup> While the Ninth Circuit had previously held that the district court could not “defer to the professional judgment of the SCC superintendent and clinical director” and must “look[] beyond the SCC administrators’ assertions of compliance,”<sup>231</sup> the district court concluded that there was no constitutional violation based on the assertions of SCC staff regarding “ongoing efforts by the SCC program managers to improve the program.”<sup>232</sup> The district court did not address any of the specific findings of the IOCC Reports documenting “persistent”, “pervasive”, “serious”, and “significant” problems in the SCC’s treatment program;<sup>233</sup> nor did it mention the former special master’s recommendation that court oversight 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>234</sup> Instead, the district court relied heavily on the length of time the injunction had been in place, asserting that “injunctions against the state are not intended to operate in perpetuity.”<sup>235</sup> Thus, in the final analysis the district court seems to have simply given up in attempting to enforce the SCC’s compliance with its constitutional obligations.

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<sup>226</sup> Turay v. Richards, No. CV-91-0664-RSM, at 3 (W.D. Wash. Mar. 15, 2007) (SCC’s March 2007 Progress Report).

<sup>227</sup> Mar. 23, 2007 Order, *supra* note 1, at 8.

<sup>228</sup> September 18, 2006 Transcript, Turay v. Richards, No. CV-91-0664-RSM, at 33-34.

<sup>229</sup> Mar. 23, 2007 Order, *supra* note 1, at 8.

<sup>230</sup> *Id.* at 5.

<sup>231</sup> *Sharp*, 233 F.3d at 1171-72,

<sup>232</sup> Mar. 23, 2007 Order, *supra* note 1, at 6.

<sup>233</sup> Jan. 31, 2006 IOCC Report, *supra* note 163, at 1, 9, 14, 17, 33.

<sup>234</sup> Marques Declaration, *supra* note 217, ¶¶ 8, 16, 18-19.

<sup>235</sup> *See* Mar. 23, 2007 Order, *supra* note 1, at 8.

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

Both the United States 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>236</sup> The Supreme Court has repeatedly affirmed that where treatment is possible, it is constitutionally required. Otherwise, civil commitment becomes punitive and thus criminal in nature, thereby violating detainees' due process rights. The treatment requirement is therefore fundamental. Nonetheless, the experience under the Washington statute demonstrates the difficult and intractable problems that have arisen in attempting to enforce this constitutional requirement.

A. *The Treatment Dilemma*

The seventeen-year history of the litigation regarding Washington's treatment program demonstrates the inherent difficulty in enforcing government compliance with the treatment requirement. To the extent enforcement of the treatment requirement involves significant costs, civil commitment becomes a less attractive alternative to protect the public from potentially dangerous individuals.<sup>237</sup>

Moreover, the benefits of treatment are far from clear. Does treatment reduce recidivism? Can it result in reducing the dangerousness of those subject to civil commitment such that the risks of releasing them into society are acceptable? There is a strong and ongoing scientific debate regarding all of these questions, leading to significant concerns regarding the potential benefits of civil commitment accompanied by treatment.<sup>238</sup>

Finally, the recalcitrance of government officials suggests that from the beginning they have had no interest in civil commitment as a means

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<sup>236</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] [t]he Center operates under an injunction . . . ."); *In re Detention of Campbell*, 139 Wash. 2d 341, 350 (1999) ("We agree 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>237</sup> See Friedland, *supra* note 35, at 130-31 (arguing that "the available data indicates that the cost of civil commitment will be much higher to a state than the equivalent cost of imprisonment and treatment" and that treatment programs "will be 'enormously expensive' and hard to implement"); Janus, *supra* note 21, at 1236 (noting that "SVP programs are very expensive").

<sup>238</sup> See Berliner, *supra* note 35, at 1209-11 (summarizing recent studies manifesting "difficulties in confirming treatment effectiveness"); Weeks, *supra* note 35, at 1293 (noting that there has been a "lively dispute on that point among scholars").

of rehabilitation. Rather, their actions demonstrate an intention to use civil commitment as a means to warehouse potential dangerous defendants after their criminal sentences have expired. Thus, while the Supreme Court has upheld civil commitment statutes because they typically mandate treatment and thus do not have a solely punitive purpose, in practice this statutory promise has not been fulfilled.

The experience in the Washington 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. It is the practice under those statutes that often tells a much different story. If the State of Washington were truly interested in the express statutory goal of treatment, it would not have taken seventeen years to end court supervision. Nor would there still be undisputed problems in the SCC's treatment program, which even the district court acknowledged while dissolving the injunction.<sup>239</sup>

Thus, experience demonstrates that the approach advocated by Justices Thomas and Scalia in their concurrences in *Seling*, which would focus primarily if not exclusively on the statutory text, suffers from significant problems. It runs the risk of allowing States to pass statutes that are in essence nothing but a sham.<sup>240</sup> While paying lip service to the goal of treatment, they often seem designed solely to further incapacitate, and in some circumstances, punish defendants.<sup>241</sup>

### B. *Potential Alternatives*

One potential alternative to such programs is to increase the penalties for crimes involving sexual violence. While greater criminal penalties would potentially allow less flexibility in dealing with individual violators, they have the advantage of avoiding the costs associated with civil commitment. Indeed, the Washington experience suggests that these civil commitment programs in many instances are simply after-the-fact attempts to impose additional punishment. Jurisdictions that have

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<sup>239</sup> See *supra* Section III.E.

<sup>240</sup> See Friedland, *supra* note 35, 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 63, at 321 (“in practice, the promised treatment most often goes unredeemed”); Weeks, *supra* note 35, 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>241</sup> Even without this potential problem, many academics had argued that civil commitment statutes for sexually violent predators were unconstitutional. See Morris, *supra* note 35, 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, e.g., John Q. La Fond, *Washington’s Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992); but see Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709 (1992).

seriously miscalculated in imposing criminal sanctions may seek civil commitment as a backstop to impose additional incarceration and ensure that individuals who are clearly dangerous are not allowed re-entry into society. 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 incapacitate criminal defendants. Indeed, *no detainee* has ever been successfully treated under the Washington program: it is a *de facto* mechanism to warehouse dangerous individuals.<sup>242</sup>

Moreover, judicial supervision has proven ineffective in addressing these problems. After seventeen years, the courts have abandoned their efforts to enforce compliance with the constitutional treatment requirement, at least in part due to the length of the prior judicial supervision.<sup>243</sup> This, despite the fact that “mere passage of time” is an insufficient basis for dissolving an injunction.<sup>244</sup>

More fundamentally, the primary reason the injunction was in place for all these years was the defendants’ repeated and undisputed non-compliance with constitutional requirements. Thus, the district court’s reliance on this factor threatens to reward the SCC for its willful non-compliance. Indeed, prior non-compliance is a factor that generally warrants *continued* judicial supervision, not dissolution of a court’s injunction.<sup>245</sup> Thus, the result of the litigation has in effect been what the Supreme Court has prohibited: the “warehousing” of detainees whose criminal sentences have expired under the guise of civil commitment.<sup>246</sup>

Under these circumstances, there is a powerful argument that the costs of civil commitment outweigh the costs associated with greater criminal penalties for sexually violent crimes. Given that the State’s motivation seems to be incapacitation and perhaps further punishment, simply increasing criminal penalties would be preferable to enacting civil commitment schemes that will inevitably be the subject of extensive litigation given the State’s reluctance to provide a treatment program that would ultimately provide a potential pathway to release of individuals it has determined pose a significant danger to society.

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<sup>242</sup> Cf. Janus, *supra* note 21, at 1237 (noting the “almost non-existent treatment graduation rates in SVP programs across the country”).

<sup>243</sup> See *supra* Section III.E.

<sup>244</sup> See, e.g., S.E.C. 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 Philadelphia v. Nat’l Labor Relations Bd., 64 F.3d 880 (3d Cir. 1995) (“we 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>245</sup> See Board of Oklahoma City v. Dowell, 498 U.S. 237, 247-49 (1991) (defendants must demonstrate that constitutional requirements are being met and that they are unlikely to “return to [their] former ways”).

<sup>246</sup> See Turay v. Seling, 108 F. Supp. 2d 1148, 1151, 1150 (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.”).

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. Moreover, some have argued that convictions may be more difficult to obtain if there are stringent mandatory minimum sentences.<sup>247</sup> In addition, there are the obvious costs of continued confinement.<sup>248</sup> Nonetheless, given the problems associated with civil commitment coupled with a constitutional treatment requirement, these costs arguably pale in comparison to the costs being incurred under the current system.<sup>249</sup>

## V. CONCLUSION

The constitutional concerns and the costs and benefits associated with civil commitment for sexually violent predators are likely to be the subject of debate for many years to come. However, the experience under Washington's civil commitment program raises significant concerns regarding the utility of civil commitment as opposed to increased criminal punishment as a means of protecting society from potentially dangerous sexual offenders. The litigation has imposed significant costs not only on the State but on the judicial system. Yet, the State has persisted in its refusal to comply with its constitutional obligations. This recalcitrance manifests an intent to incapacitate, if not punish, rather than provide the treatment that is mandated under the Washington statute and the 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 also significant economic costs. Abandoning civil commitment in favor of increased criminal penalties accompanied by the constitutional guarantees found in the criminal system would arguably

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<sup>247</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>248</sup> See Berliner, *supra* note 35, at 1215 (observing that "[t]he 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>249</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) (observing that "[t]he inevitable pressure for protection [from potentially dangerous individuals] will express itself in one form or another").



mitigate these costs while at the same time avoiding many of the constitutional pitfalls associated with civil commitment.