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ASSERTION: CIVIL COMMITMENT AND “SEXUALLY VIOLENT PREDATOR” LAWS HARM INDIVIDUALS, FAMILIES, AND COMMUNITIES

Executive Summary

Currently 20 U.S. states and the District of Columbia indefinitely confine people labeled “Sexually Violent Predators” in mental health facilities. Courts have upheld this form of indefinite detention — called “civil commitment” — by arguing that civil commitment is a non-punitive measure designed to “protect the community” from dangerous people, despite numerous legal challenges alleging that civil commitment violates the due process rights of those committed. Civil commitment is not only a violation of individual rights and applied disproportionately against those with marginalized identities but is also an expensive, ineffective way of dealing with sexual harm.

I. Civil Commitment Background

A. What Is Civil Commitment?

Civil commitment is the practice of a state confining a person to a mental hospital against their will. Twenty states in the U.S. and the District of Columbia have laws that allow the government to indefinitely detain people who have been convicted of “sex crimes” (e.g., “rape,” “fondling,” “indecent exposure”) after the completion of a prison sentence. The goal of civil commitment is allegedly to protect the public by keeping dangerous people confined.

The practice of civil commitment for those with sexual crime convictions dates back to the 1930s when states used civil commitment laws to target lesbian, gay, bisexual, transgender, and queer people (LGBTQ+).¹ In the 1990s, the civil commitment of those convicted of causing sexual harm became more widespread in response to the sexual abuse panic of the 1980s, and in 2006, the Adam Walsh Child Protection and Safety Act authorized civil commitment statutes for federal crimes.²

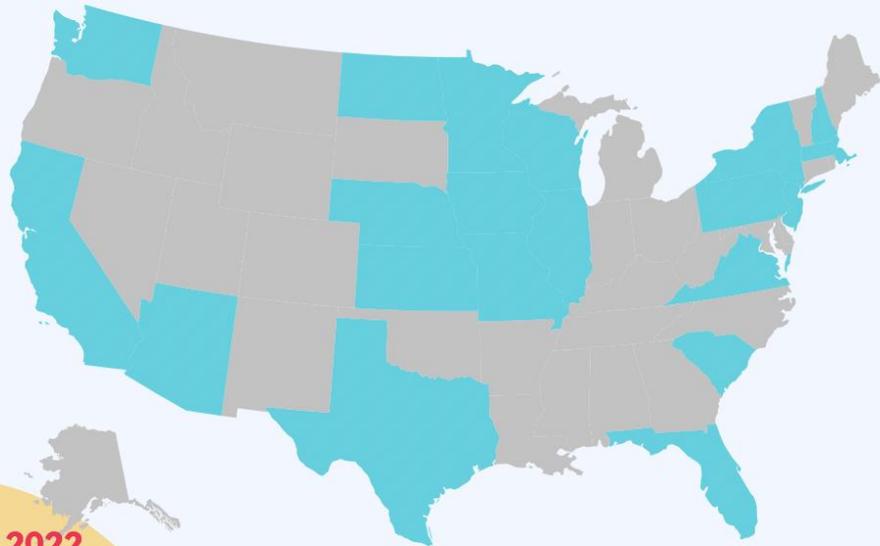
B. How Civil Commitment Works

The first step in state civil commitment is the state labeling a convicted person a “Sexually Violent Predator” or “Sexually Violent Person.” This requires state prosecutors to prove three things:

1. The person has been charged with or convicted of a “sex crime” (defined by the state);
2. The person has been diagnosed with a “mental abnormality” or “personality disorder”;

3. The person is substantially likely to cause future sexual harm and therefore poses an imminent threat to the community.³

U.S. States with Civil Commitment for Those Convicted of "Sex Crimes"



As of **September 2022**, there are **20 states** that civilly commit those convicted of causing sexual harm: **Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, Wisconsin**

Data from the Association for the Treatment and Prevention of Sexual Abuse

The specifics of civil commitment laws vary. For example, some states use flawed tests like the Static-99R to attempt to predict likelihood of a person causing future harm based on their characteristics (e.g., age).⁴ Most state civil commitment laws are broad, so states can commit a wide range of people, including those convicted of non-contact forms of sexual offenses.

II. Consequences of Civil Commitment

A. Consequences of Civil Commitment on Individuals

Civil commitment is far from therapeutic. Civil commitment deprives the people who are committed of freedom, the ability to see their families and friends, economic mobility (e.g.,

gaining employment), and educational opportunities.⁵ Those committed have no clear end goal to work toward because civil commitment is usually indefinite. Therapy, perhaps the most crucial intervention that prevents sexual harm, is also not confidential in civil commitment settings, so those committed who are struggling with unhealthy urges or thoughts about past harmful behavior must censor themselves or risk prolonging their confinement.⁶

B. Legal Issues

Civil commitment of those convicted of causing sexual harm violates individual due process rights by constituting *ex post facto* (retroactive) punishment and violating double jeopardy (prosecuting a person twice for the same offense).⁷ However, the Supreme Court has repeatedly ruled in favor of states' rights to commit those convicted of causing sexual harm to mental health facilities indefinitely based on the dangers of "mental abnormality" or "personality disorder" diagnoses trumping individuals' due process rights.⁸ The Supreme Court has also ruled that civil commitment is not *punitive* because it is "civil," and therefore cannot be considered cruel and unusual *punishment* under the Eighth Amendment of the Constitution, even though the mental health facilities used for civil commitment often resemble jails.⁹

States also use civil commitment disproportionately against those with marginalized identities, particularly Black Indigenous people of color (BIPOC) and LGBTQ+ people. An analysis of people civilly committed in 13 states demonstrated that Black people experienced civil commitment at nearly twice the rate of white people.¹⁰ However, there is no empirical evidence that Black people cause more sexual harm than white people nor are objectively more "sexually violent" than white people. This result aligns with studies that have found similar racial bias in arrest odds for cases involving sexual crime.¹¹

A further analysis of civil commitment states revealed that men who had at least one male victim had up to a 6.3 times greater risk of being civilly committed than men who only had female victims.¹² Like with race, there is no empirical evidence that those who engage in same-sex sexual contact are more likely to cause sexual harm than those who do not engage in same-sex sexual contact. Still, this result is unsurprising given many states' reliance on the Static-99R to determine recidivism risk — the Static-99R gives extra recidivism risk points to men who have had male victims.¹³

C. Consequences of Civil Commitment on Communities

Civil commitment, while purportedly intended to protect the community, has negative community consequences. Civil commitment robs the families and friends of those who have caused sexual harm of the opportunity to interact with their loved ones. While the effect of civil commitment on the children of those who are committed is understudied, results of studies on the effects of parental incarceration on children generally demonstrate that parental incarceration can have disastrous psychological consequences.¹⁴

Civil commitment is also economically costly. One study estimated that the cost of civil commitment per year per person was \$97,000 at the time of the study (\$133,480.59 when adjusted for inflation in 2022).¹⁵

III. Toward Ending Civil Commitment

A. Evidence-Based Clinical Practices

Ending sexual harm requires instituting policies that are empirically grounded; civil commitment is not. States base civil commitment on the premise that indefinitely confining those convicted of causing sexual harm will prevent future sexual harm, implying that those who have caused sexual harm in the past are more dangerous. However, an analysis of recidivism data by the U.S. Department of Justice found that people previously convicted of causing sexual harm are *less* likely than those convicted of other types of offenses to re-offend after release from prison.¹⁶ This result, which has been replicated in numerous other studies, does not support civil commitment.¹⁷ Instead, it indicates that people who cause sexual harm are generally capable of becoming law-abiding citizens when given the chance to receive proper treatment and community support.

Research on successful psychological intervention for those who cause sexual harm also does not support civil commitment. Studies on the efficacy of residential care situations among young adults found such settings are themselves detrimental.¹⁸ Even the rare studies that argue in favor of civil commitment concede civil commitment has diminishing returns and the money used to confine people could be better spent giving them access to less carceral alternatives.¹⁹ Most treatments that studies have found effective among those who cause sexual harm, such as Cognitive-Behavioral Therapy, are common outpatient treatments that do not require confinement.

B. Adequate Representation

Currently, the bar for what qualifies as “effective assistance of counsel” in civil commitment proceedings is tremendously low.²⁰ Low-income people facing civil commitment proceedings are often unable to obtain lawyers with the specialized knowledge required to provide adequate representation. Further, low-income people facing civil commitment often cannot afford to hire expert witnesses to testify in their defense, decreasing their chance of success. The prosecution, in contrast, typically pays for several expert witnesses.²¹

If civil commitment remains an option, states should provide those who are subject to civil commitment hearings with competent legal representation and the financial resources necessary to engage experts on their behalf. This will not only level the playing field for all regardless of socioeconomic status but provide additional testimony that will help judges and juries make informed decisions in each case. If the state’s goal for civil commitment is truly “the safety of the community,” more expert perspectives would only be beneficial.

C. Moving Toward Release

Civil commitment currently does not require states to create treatment plans that have criteria for what a person entering a program needs to do to be released. This leaves those committed with no clear end goal and gives states the freedom to keep people detained indefinitely.

In the interest of fairness and transparency, state authorities should be required to lay out a “clear path home” for each person who is civilly committed so that each committed person is aware of exactly what they must do to obtain release. Further, states should review the cases of those who are currently committed to create clear criteria for their release and work toward reintegrating those who already meet the new criteria back into society.

Researched and written by Amelia Roskin-Fraze

¹ Miller, J.A. (2010). Sex offender civil commitment: the treatment paradox. *California Law Review*, 98(6), 2093-2128.

² H.R. 4472 — 109th Congress: Adam Walsh Child Protection and Safety Act of 2006

³ Hoppe, T., Meyer, I.H., De Orio, S., Vogler, S., & Armstrong, M. (2020). *Civil Commitment of People Convicted of Sex Offenses in the United States*. UCLA School of Law Williams Institute. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SVP-Civil-Commitments-Oct-2020.pdf>

⁴ Vogler, S. (2021). *Sorting Sexualities: Expertise and the Politics of Legal Classification* (First edition). University of Chicago Press.

⁵ *Monton v. Gibson*, 718 F.3d 752 (8th Cir. 2013).

⁶ Miller, J.A. (2010).

⁷ U.S. Const. amend. VIII; U.S. Const. art. I, § 10, cl. 1.

⁸ *Kansas v. Henricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992)

⁹ *Selling v. Young*, 521 U.S. 250 (2001); *Kansas v. Crane*, 534 U.S. 407 (2002); Hoppe et al. (2020); U.S. Const. amend. VIII.

¹⁰ Hoppe et al. (2020).

¹¹ Roskin-Fraze, A. (2022). *Considered Especially Heinous: The Effect of Race and Sex on Sex Crime Arrest Odds*. Manuscript in preparation. University of California, Irvine.

¹² Hoppe et al. (2020).

¹³ UNC School of Government. *Revised Static-99 Coding Form* [PDF]. University of North Carolina. https://www.sog.unc.edu/sites/default/files/course_materials/3.0%20Static-99R-Coding-Form_0.pdf

¹⁴ Turney, K. (2022). Chains of adversity: the time-varying consequences of paternal incarceration for adolescent behavior. *Journal of Quantitative Criminology*, 38(1), 159-196.

¹⁵ Schneider, J. E. (2008). A review of research findings related to the civil commitment of sex offenders. *The Journal of Psychiatry & Law*, 36(3), 463-483.

¹⁶ Aper, M. & Durose, M.R. (2019). *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)* (Report No. NCJ 251773). U.S. Department of Justice Bureau of Justice Statics. <https://bjs.ojp.gov/content/pub/pdf/rsorsp9yfu0514.pdf>

¹⁷ See Dornin (2010), as cited in Cucolo, H. (2012). Preventing sex-offender recidivism through therapeutic jurisprudence approaches and specialized community integration. *Temple Political & Civil Rights Law Review*, 22(1): 1-42.

¹⁸ Freundlich, M. & Avery, R.J. (2005). Planning for permanency for youth in congregate care. *Children and Youth Services Review*, 27(2), 115-134.

¹⁹ Duwe, G. (2014). To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota. *Journal of Criminal Justice*, 42(2), 193-202.

²⁰ Cucolo, H. (2012). Preventing sex-offender recidivism through therapeutic jurisprudence approaches and specialized community integration. *Temple Political & Civil Rights Law Review*, 22(1): 1-42.

²¹ Vogler, S. (2021).