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Kathy Sheran

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MSOP: A MINNESOTA STATE SENATOR'S PERSPECTIVE

Senator Kathy Sheran[†]

By federal court order, a Sex Offender Civil Commitment Advisory Task Force was charged with examining three aspects of Minnesota's civil commitment law and making recommendations to the Department of Human Services (DHS) and the legislature.¹ It was the court's first strong suggestion that Minnesota's current use of civil commitment after incarceration might be failing, at least operationally, to respect constitutional rights of offenders. Through the use of this Task Force, the court offered a window into its concerns about our current law, and it provided time to legislatively address the problem and improve the treatment of sex offenders. I became the chief author of this legislation in the Minnesota Senate.

Under the leadership of the Honorable Eric J. Magnuson and the Honorable James M. Rosenbaum, a team of experts was assembled: officials from the county courts, correctional facilities, and police departments; law and psychology professionals; sexual-abuse specialists; and mental-health and disability representatives. This team met in twenty public meetings over a fourteen-month period.² They addressed three issues of concern to the federal judge:

[†] Senator Kathy Sheran, Senate District 19 (Mankato and St. Peter), was elected in November 2006. She currently serves as the Chair of the Health, Human Services, and Housing Policy Committee in the Minnesota Senate, and is also on the Health and Human Services, Judiciary, and Higher Education Finance Committees. Previously, she served sixteen years as Mayor Pro Tem in Mankato. Prior to election she taught nursing at Minnesota State University in Mankato. Additionally, Senator Sheran is currently a partner in her husband's business, SMR Management, which manages and develops commercial real estate.

1. *Karsjens v. Jesson*, No. 11-3659, at 2-3 (D. Minn. Aug. 15, 2012) (order directing the Minnesota Commissioner of Human Services to create the Sex Offender Civil Commitment Advisory Task Force).

2. *See Sex Offender Civil Commitment Advisory Task Force Meeting Agendas and Minutes*, MINN. DEP'T HUM. SERVICES, http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=

- (1) The civil commitment and referral process for sex offenders;
- (2) Sex offender civil commitment options that are less restrictive than placement in a secure treatment facility; and
- (3) The standards and processes for the reduction in custody for civilly committed sex offenders.³

This highly qualified group⁴ prepared recommendations to improve the processes and operations of the existing system. These reforms were intended to respond to the court's concern that after commitment there be an authentic opportunity for patients to have their needs for commitment reviewed and treatment programs refined.⁵ The Task Force recognized the need to develop alternatives to treat sex offenders differently based on the outcomes of ongoing risk assessments.⁶ The Task Force was focused on the need to have a system that provided for completion of a program and reintegration into the community.⁷ It found Minnesota to have the highest per capita number of civilly committed offenders of any state that employs civil commitment.⁸ Minnesota was also found to have the lowest rate of release from commitment.⁹

Interestingly, studies for reform and recommendations to achieve needed reform were offered over several legislative sessions. In 2004, Governor Pawlenty appointed a Commission on Sex Offenders following the public's horror over the vicious rape

LatestReleased&dDocName=dhs16_174570# (last updated Jan. 16, 2014) (providing a resource to access the agenda and minutes for each of these meetings).

3. HON. ERIC J. MAGNUSON & HON. JAMES ROSENBAUM, SEX OFFENDER CIVIL COMMITMENT ADVISORY TASK FORCE, FINAL REPORT (2013) [hereinafter FINAL TASK FORCE REPORT], available at <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6641B-ENG>; see also *Sex Offender Civil Commitment Advisory Task Force*, MINN. DEP'T HUM. SERVICES, http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_171337 (last updated Feb. 20, 2014) (providing various resources related to the Task Force including reports, court orders, meeting minutes, and links to legislation).

4. For a list of the Task Force's members, see FINAL TASK FORCE REPORT, *supra* note 3, at 17–18.

5. See *id.* at 1–4.

6. See *id.* at 7, 16.

7. *Id.* at 15.

8. *Id.* at 1.

9. *Id.*

and murder of a young woman, Dru Sjodin, by a person released from corrections.¹⁰ In 2011, recommendations were made by the Office of the Legislative Auditor¹¹ after DHS, in January of that year, examined and made recommendations to curb the growth and cost of the Minnesota Sex Offender Program (MSOP).¹² The truth is that the legislature has been encouraged on multiple occasions to improve its civil commitment proceedings. The reasons for reform have changed from assuring the public that the horrific murder of Dru Sjodin would be an anomaly,¹³ to reducing the cost of treatment in a secure facility that far outpaces the cost of incarceration,¹⁴ to responding to the legal assertion that our use of civil commitment post-incarceration is really an extension of a punishment based on fear of future criminal behavior.¹⁵ These reports provided opportunities to improve the law. The legislature has failed to act regardless of the repeated series of reports on the need for reform.

In 2013, I offered legislative reform by introducing Minnesota Senate File 1014 (Sheran, Lourey),¹⁶ which actually passed the Senate.¹⁷ This legislation, based on Task Force recommendations, provided for the development of less restrictive yet highly secure alternatives to the Moose Lake and St. Peter facilities.¹⁸ Under the current system, when a person is committed by the court, there is

10. See GOVERNOR'S COMMISSION ON SEX OFFENDER POLICY, FINAL REPORT 7 (2005) [hereinafter GOVERNOR'S FINAL REPORT], available at <http://stmedia.startribune.com/documents/govcommission.pdf>; see also Libby Sander, *Judge Imposes Death in Killing of North Dakota Student*, N.Y. TIMES, Feb. 9, 2007, at A15, available at LEXIS.

11. OFFICE OF THE LEGISLATIVE AUDITOR, CIVIL COMMITMENT OF SEX OFFENDERS EVALUATION REPORT 93–94 (2011), available at <http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf>.

12. MINN. DEP'T OF HUMAN SERVS., OPTIONS FOR MANAGING THE GROWTH AND COST OF THE MINNESOTA SEX OFFENDER PROGRAM: FACILITY STUDY (2011) [hereinafter DHS FACILITY STUDY], available at <http://archive.leg.state.mn.us/docs/2011/mandated/110064.pdf>.

13. See GOVERNOR'S FINAL REPORT, *supra* note 10, at 7.

14. See generally DHS FACILITY STUDY, *supra* note 12.

15. See generally FINAL TASK FORCE REPORT, *supra* note 3.

16. S.F. 1014, 88th Leg., Reg. Sess. (Minn. 2013).

17. See S. JOURNAL, 88th Leg., Reg. Sess., at 3592 (Minn. 2013) (noting the passage of Minnesota Senate File 1014 by a vote of forty-four to twenty-one).

18. See Minn. S.F. 1014 art. 1, § 1, art. 2, §§ 3–4; see also *Sex Offender Treatment*, MINN. DEP'T HUM. SERVICES, <http://mn.gov/dhs/people-we-serve/adults/services/sex-offender-treatment/> (last updated Dec. 8, 2014).

only one option for placement—the highly secure facility at Moose Lake.¹⁹ Minnesota Senate File 1014 legislative reform, if signed into law, would provide a continuum of placement options to the district court based on a comprehensive risk assessment at the time of commitment.²⁰ It would also provide geographically distributed treatment facilities to move patients transitioning through the treatment program after commitment.²¹ The legislation articulated how to securely manage persons in alternative placements²² and would improve the process for patients to have their commitment conditions reviewed for reduction in custody.²³

The movement of this bill completely stalled in the House of Representatives,²⁴ despite Representative Tina Liebling's effort to persuade her colleagues to address the issue.²⁵ Representative Liebling and I, along with our staff of lawyers and specialists, were in frequent communication to craft similar legislation and discuss progress in each house. We both knew that without legislative action signed by the Governor, the legislature would face the potential lack of community preparedness once the court ruled on *Karsjens v. Jesson*, which challenged the constitutionality of the program and its operations.²⁶ The court would answer a variety of questions about the rights of the committed offenders.²⁷ These questions will be answered during the class action lawsuit with arguments on elements of the lawsuit divided into two phases, one starting in February 2015, and the second later in the year.

The court cannot order anything that would violate state statute; thus, it appears the court cannot order offenders to be provisionally or fully discharged. The court could, however, make

19. For an overview of the Moose Lake facility, see DHS FACILITY STUDY, *supra* note 12, at 16 (“The St. Peter site houses approximately 150 individuals and provides assessment and intake services as well as the transition preparation portions of the program. The Moose Lake facility has approximately 450 individuals and provides the primary treatment components.”).

20. Minn. S.F. 1014 art. 2, § 3.

21. *Id.* art. 2, § 9.

22. *Id.* §§ 8–10.

23. *Id.* §§ 2, 17–19.

24. See Abby Simons, *Reform on Sex Offenders Stalls*, STAR TRIB. (Minneapolis), Apr. 15, 2014, at 1B, available at LEXIS.

25. See S. JOURNAL, 88th Leg., Reg. Sess., at 601 (Minn. 2013) (noting introduction of bill by Representative Liebling).

26. 6 F. Supp. 3d 916, 952–56 (D. Minn. 2014).

27. See *id.* at 927–41.

orders related to programmatic provisions of MSOP. It could, for example, order the state to file petitions for discharge for some or all offenders. It could also order all or some offenders into Phase 3 of treatment, or into Community Preparation Services. It could order the state to build facilities in the community. And it could order deadlines for any action it requires the state to take. Programmatically, the court can be very creative in what it could order for the release of offenders if the current treatment was found to violate those persons' rights.²⁸ The development of a model of civil commitment that responds to the court's concerns about civil rights, which *also* provides alternative programs that protect public safety, is up to the legislature. Failure to develop such a model leaves us in a reactive position regarding management of these offenders—rather than having a planned program with elements of safety ingrained. The Senate acted, but the House leadership was unwilling to ask its members to vote on an issue that would not have bipartisan support and might be manipulated for political points.²⁹

Before the 2014 session began, Governor Dayton called the leaders of the House and Senate together to discuss the court's concerns and lack of movement in the House on Minnesota Senate File 1014 and to determine the political requirements for action to be taken in 2014. The House leadership continued to feel strongly that bipartisan support was needed to reduce manipulation of this vote in the upcoming election. Unfortunately, this environment of bipartisan appreciation and support for reform could not be achieved in the House.

Nevertheless, in 2014 I introduced supplemental legislation, Minnesota Senate File 2548,³⁰ in the Senate. In this bill, the final recommendations of the Task Force were to be added to the earlier Senate reform.³¹ The bill would create a screening unit to advise the county attorneys on the merits and the terms of a proposed civil commitment including placement.³² The screening unit recommendations would not bind county attorneys but could be used in court by the defendant.³³ This unit would develop "clear,

28. *See id.* at 946–50.

29. *See* Simons, *supra* note 24.

30. S.F. 2548, 88th Leg., Reg. Sess. (Minn. 2014).

31. *See id.* §§ 4–5, 12.

32. *Id.* § 4, subdivs. 1–3.

33. *Id.* § 4, subdiv. 3.

consistent, and scientifically based standards” for screening and placement.³⁴ Also, a Sex Offender Civil Commitment Defense Office would be established to represent respondents and committed persons and provide for investigative and professional resources.³⁵ This was my effort to get the proposed reforms into legislative language even though it would not be heard or voted on in either house during an election year.

For the 2015 session I have introduced a new bill that will affect two general sex offender populations. One set of reforms will address those persons convicted under current law, and currently serving their sentences, as well as those who have been civilly committed to Moose Lake or St. Peter. For this population, the language will include the Task Force recommendations articulated in Minnesota Senate Files 1014³⁶ and 2548.³⁷

The second part of this new bill will focus on future perpetrators of sex crimes. In this portion of the bill, increased use of treatment will occur within corrections while the person is incarcerated. Sentences may become indeterminate, requiring successful treatment while in jail, and extending probation with strict and intensive supervision for most of this population. Civil commitment may become unnecessary, but if pursued it would be reserved for the most seriously dangerous and high-risk population, for which a less restrictive alternative within corrections is demonstrated to be a threat to public safety.

Right now, the court’s only options for the placement of a committed person are the Moose Lake and St. Peter facilities.³⁸ Yet there are many offenders still needing highly supervised conditions that can be treated in a different setting.³⁹ The Task Force identified several populations who, based on their risk assessments, might actually have better outcomes in alternative settings. These groups include youth, individuals with cognitive impairments, or senior citizens in late stages of life.

34. *Id.* § 4, subd. 5.

35. *Id.* § 12, subd. 1.

36. *See* S.F. 1014, 88th Leg., Reg. Sess. art. 1, § 3 (Minn. 2013).

37. *See* Minn. S.F. 2548 §§ 4–5, 12.

38. *See* *Karsjens v. Jesson*, 6 F. Supp. 3d 916, 951 (D. Minn. 2014) (“Without a current assessment of each of the class members to determine the exact need for facilities alternative to Moose Lake and St. Peter, the Court has no way of establishing the specific parameters of such less restrictive facilities . . .”).

39. *See id.* at 925.

There is no guarantee that the legislature will act on these reforms in the upcoming 2015 session. Neither political party wants to give their opponents the opportunity to use the public's fear of sex offenders to defeat them in an election. While the House is most sensitive to this, the Senate is not immune and, unlike in 2013, when the Senate passed reform, the Senate is now closer to an election cycle.

To understand the political anxiety about appearing to be soft on sex offenders, and to appreciate the absolute lack of empathy on the part of the public for sex offenders, one only has to attend a community notification hearing. These hearings are designed to discuss placement of an offender out of the corrections system into the community. Despite strict and intensive supervision for these parolees, despite the ability to track offenders with electronic monitoring, despite the fact that these persons were not deemed appropriate for commitment, and despite the reality that these persons had done their time, the public's appetite and tolerance for a safety risk is zero. Cities, knowing the federal court is likely to rule soon on the needed changes for current sex offenders, have begun writing restrictive housing ordinances, increasing the difficulty for corrections to create a positive post-incarceration or post-treatment outcome.⁴⁰

Legislators know of this public anxiety and will avoid a vote that could be manipulated in a future election. This is a failure on the part of legislators to honor their oath of office to act in a manner that upholds the constitutional rights of all people,⁴¹ including sex offenders. It is a decision to place self-preservation ahead of the rights of the 700 persons currently civilly committed.⁴² The public will not confront this legislative inaction, because they share the desire to maintain their sense of safety at the expense of others' rights. The truth is, the most serious public safety threat is the unknown perpetrator yet to be arrested or the offender released from prison who is homeless because we failed to provide community placement, support, and supervision.

40. See Brandon Stahl & Maya Rao, *Sex Offenders Up, Down the Street*, STAR TRIB. (Minneapolis), Apr. 15, 2013, at A1, available at LEXIS.

41. See MINN. CONST. art. V, § 6.

42. See Esme Murphy, *The Process Has Begun to Release Civilly-Committed Sex Offenders*, CBS MINN. (July 16, 2014, 7:16 PM), <http://minnesota.cbslocal.com/2014/07/16/if-one-sex-offender-is-released-its-likely-others-will-be-too/>.

To keep movement on this issue at bay, some legislators will say they will not support reform because there is not an adequate assurance of public safety. This is a safe position. Who can argue with a legislator who wants to be certain the public is safe? Yet no one can be fully assured of a safe life journey. What our legislators need to do is lead an informed conversation about where public safety risks really exist. Leadership means differentiating between the level of risk posed by those under supervision from that posed by perpetrators unknown to us or by offenders unable to find supportive and highly supervised housing.

Other legislators will try to limit the discussion to future sentencing and treatment of sex offenders, completely avoiding the issues being addressed by the court for the existing 700 committed persons who have completed their sentences. An informed public will see this dodge, but many people will be diverted by discussions of future reforms that may have merit but do not fix the current problem. That is in part why the 2015 legislation contains language to address both existing civilly committed offenders who are the subject of the class action lawsuit as well as the desires of some to manage future sex offenders more effectively in the law.

Some members of the legislature are willing to sit back and react only after the court takes the action it believes is necessary. In this way a legislator can say, "The judge made me do it." Unfortunately this political safety net for legislators creates a safety threat for the public left without a planned and developed community infrastructure for persons moving out of a secure facility. Only the legislature, in partnership with DHS, can create this infrastructure. Without action on the legislature's part, we will be left reacting to a situation in which offenders may be released into the community without the development of adequate services. That is a real public safety risk.

The court has warned us.⁴³ Politics, stigma, and ignorance cannot be used as justification for trampling the constitutional rights of the members of our society who are civilly committed. The federal courts will act with or without the state taking on its

43. See, e.g., *Karsjens*, 6 F. Supp. 3d at 955 ("The time for legislative action is now. Time and again, professional assessments have identified grave deficiencies in the program. Regardless of the claims raised in this case, and irrespective of the court's ultimate rulings on any constitutional questions with which it is presented, the interests of justice require that substantial changes be made to Minnesota's sex offender civil commitment scheme.").

responsibility to develop policies and laws that protect public safety and preserve the rights of the committed. The courts will take strong remedial action to protect the rights of the civilly committed. It is the legislature that is responsible for reforming the system so those rights are protected while also providing for public safety.

Before the end of the 2015 session, it is likely there will be rulings and actions by the court in the interest of justice for offenders. These rulings will further inform us of the need for legislative action to create a system that respects offenders' rights while providing infrastructure that protects public safety. While in principle we know politics and stigma ought not to impede legislative reform of a system the court described as "draconian,"⁴⁴ it will be interesting to see if the legislature has the ability to act.

44. *Id.* at 956.