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## Going Against the Grain of the Status Quo: Hopeful Reforms to Sex Offender Civil Commitment in Minnesota—Karsjens v. Jesson

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**GOING AGAINST THE GRAIN OF THE STATUS QUO:  
HOPEFUL REFORMATIONS TO SEX OFFENDER CIVIL  
COMMITMENT IN MINNESOTA—*KARSJENS V. JESSON***

Joanna Woolman<sup>†</sup> and Jennifer K. Anderson<sup>††</sup>

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*They are [portrayed as] “monsters” and “beasts” . . . [b]ut sexual predators—and our powerful reaction to them—are doing another form of damage as well. We have come to think of these men as archetypical sex offenders and have shaped our public policy responses as if all sex offenders fit this mold. We are blind to the true nature of sexual violence in our society, which is far different from what we think it is . . . . [S]exual predators represent but a small fraction—a thin sliver—of the sexual criminals in our country.<sup>1</sup>*

– Eric Janus<sup>2</sup>

*The Court must emphasize that politics or political pressures cannot trump the fundamental rights of Class Members who, pursuant to state law, have been civilly committed to receive*

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1. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 2 (2006).

2. Eric Janus is a member of the Minnesota Sex Offender Civil Commitment Advisory Task Force.

*treatment. The Constitution protects individual rights even when they are unpopular. As Justice Sandra Day O'Connor sagely observed, "[a] nation's success or failure in achieving democracy is judged in part by how well it responds to those at the bottom and the margins of the social order."*<sup>3</sup>

— Judge Donovan W. Frank

## I. INTRODUCTION

The case of *Karsjens v. Jesson* has brought much needed attention to the Minnesota Sex Offender Program (MSOP). The MSOP, a deeply troubling program set up under Minnesota's Sex Offender and Civil Commitment and Treatment Act (MCTA),<sup>4</sup> has expanded at unprecedented rates since its creation in 1994.<sup>5</sup> Civil commitment is a scheme of involuntary commitment for the purpose of treating an underlying mental illness in order to ensure public safety.<sup>6</sup> Most sex offenders are civilly committed to the MSOP for an indeterminate period of time after they serve their prison sentence.<sup>7</sup> The MSOP consists of high security facilities, designed as prisons, as well as one less-restrictive facility for patients who have progressed through treatment.<sup>8</sup>

Sexual predator civil commitments address only a small sliver of the sexual violence problem in our society<sup>9</sup>—and at a staggering

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3. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1174 (D. Minn. 2015) (quoting Sandra Day O'Connor et al., *The Third Annual William French Smith Memorial Lecture: A Conversation with Retired Justice Sandra Day O'Connor*, 37 PEPP. L. REV. 63, 65 (2009)).

4. MINN. STAT. § 253D (2014 & Supp. 2015).

5. *Infra* Section II.B.1; see, e.g., *Frequently Asked Questions*, MINN. DEP'T HUM. SERVS. [hereinafter *MSOP FAQs*], <http://mn.gov/dhs/people-we-serve/adults/services/sex-offender-treatment/faqs.jsp> (last updated Mar. 15, 2016 3:13 PM).

6. BRIAN STETTIN ET AL., TREATMENT ADVOCACY CTR., MENTAL HEALTH COMMITMENT LAWS: A SURVEY OF THE STATES 5 (2014), <http://tacreports.org/storage/documents/2014-state-survey-abridged.pdf>.

7. CIVIL COMMITMENT TRAINING RES. CTR., SEX OFFENDER CIVIL COMMITMENT FACT SHEET 2 (2010), [http://mn.gov/omhdd/assets/sex-offender-cc-fact-sheet-2010\\_tcm23-27594.pdf](http://mn.gov/omhdd/assets/sex-offender-cc-fact-sheet-2010_tcm23-27594.pdf).

8. Cynthia A. Frezzo, *Treatment Under Razor Wire: Conditions of Confinement at the Moose Lake Sex Offender Treatment Facility*, 52 AM. CRIM. L. REV. 653, 674 (2015).

9. In 2005, the most recent data available, 61,000 children and adults in Minnesota were sexually assaulted. During this same period of time, one in five women reported she had been raped in her lifetime and between eighty and ninety percent of those rapes were committed by someone the survivor knew. *Sexual Violence*, MINN. DEP'T HEALTH, <http://www.health.state.mn.us/injury/topic>

cost of \$120,000 per year per individual housed at the MSOP.<sup>10</sup> Regardless, Minnesota's three branches of government are unwilling to address the program's constitutional concerns:

Despite the Federal Court's admonishment to state leadership to take immediate action to correct course, all three branches of Minnesota's state government remain in paralysis. The last two governors have placed moratoriums on administrative releases from MSOP, and the state courts have repeatedly ignored opportunities to step-up judicial oversight . . . . [T]wo legislative sessions have passed without enacting necessary reforms.<sup>11</sup>

The inability or unwillingness of Minnesota's government to make changes, despite the U.S. District Court for the District of Minnesota's directives, exemplifies the challenge of reforming a state system that has spiraled dangerously out of control.<sup>12</sup> Part of the problem is due to societal fears and political pressure, which renders Minnesota's government powerless to enact needed changes.<sup>13</sup> The *Karsjens* case presents an opportunity to meaningfully reform this draconian system in Minnesota for the betterment of victims, patients, and communities.<sup>14</sup>

This comment begins with a brief overview of some of the underlying theories at play in this case and why it is so important for both individuals and our justice system that civil commitment programs conform to their purported purpose to treat and rehabilitate.<sup>15</sup> Next, it discusses the social considerations at play in the case, as well as a historical discussion of the rise in popularity of sex offender civil commitment nationwide and in Minnesota.<sup>16</sup> Then, it provides some context to help understand the MSOP—a description of the political climate at the time of its creation,

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/svp/sviolence.cfm#scope (last visited Mar. 7, 2016).

10. The annual budget for the MSOP for fiscal year 2016 is \$83.7 million. *MSOP FAQs*, *supra* note 5 (click on "What is the total operating cost of the sex offender treatment program?").

11. Jon Brandt & David S. Prescott, *The Minnesota Sex Offender Program: Federal Intervention Part 1—The Challenges*, SEXUAL ABUSE (Feb. 1, 2015), <http://sajrt.blogspot.com/2015/02/the-minnesota-sex-offender-program.html>.

12. See *Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015), *appeal docketed*, No. 15-3485 (8th Cir. Nov. 2, 2015).

13. *Infra* Section III.A.

14. *Infra* Part V.

15. *Infra* Section II.A.1.

16. *Infra* Section II.A.2.

information about demographics and current policies, and a comparison with other states' sex offender civil commitment (SOCC) programs.<sup>17</sup> Then, it explores the background of the *Karsjens* litigation, Plaintiffs' and Defendants' arguments, Judge Donovan Frank's holding, and the aftermath of the court's decision.<sup>18</sup> Finally, it discusses the next challenge in this case: to provide and implement an effective plan for reform after such a long period of dysfunction.<sup>19</sup>

## II. BACKGROUND

In order to effectively understand how Minnesota got to this point in its civil commitment of sex offenders, it is important to explore the background of the constitutional considerations and societal concerns surrounding the theories of civil commitment and criminal punishment. Also important is a consideration of the rise of civil commitment popularity—in Minnesota and in other states in the nation.

### A. *Theories of Civil Commitment Versus Criminal Punishment*

Civil commitment is an area where constitutional considerations of individual liberties frequently collide with societal outrage and political pressure. A central goal of SOCC is to protect public safety by removing from society individuals who have been determined to be sexually dangerous until they have been sufficiently rehabilitated. One problem with SOCC programs, as seen in *Karsjens*, is the ultimate goal of protecting the public frequently supersedes individuals' rights to effective rehabilitation and a meaningful opportunity for successful treatment.

#### 1. *Constitutional Considerations*

Judge Frank establishes one important tenant for any SOCC—that it must not be punishment. He explains that “while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.”<sup>20</sup> Civil commitment

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17. *Infra* Part III.

18. *Infra* Part IV.

19. *Infra* Part V.

20. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1143 (D. Minn. 2015) (quoting

programs should be therapeutic—a place where individuals rehabilitate constructively with sustainable progress towards an independent and self-reliant way of life.<sup>21</sup> Judge Frank found that “the MSOP has developed into indefinite and lifetime detention. Since the program’s inception in 1994, no committed individual has ever been fully discharged from the MSOP, and only three committed individuals have ever been provisionally discharged from the MSOP.”<sup>22</sup> Further distinguishing civil commitment and criminal punishment, Judge Frank found the following:

[W]here, notwithstanding a “civil label,” a statutory scheme “is so punitive either in purpose or effect as to negate the State’s intention to deem it ‘civil,’” a court will reject a legislature’s “manifest intent” to create a civil proceeding . . . . Moreover, “[i]f the object or purpose” of a civil commitment law is to provide treatment, “but the treatment provisions were adopted as a sham or mere pretext,” such a scheme would indicate “the forbidden purpose to punish.”<sup>23</sup>

Civil commitment systems are constitutionally excluded from punishing individuals.<sup>24</sup> In our justice system, only criminal convictions can lead to punishment.<sup>25</sup> John Rawls, among others, provided a reflection on two distinct justifications for punishment—the retributive view and the utilitarian view.<sup>26</sup> His retributive view is that “punishment is justified on the grounds that wrongdoing merits punishment.”<sup>27</sup> He states, “It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing.”<sup>28</sup> Therefore, punishment follows guilt and the severity of punishment depends on the evil of the crime.<sup>29</sup>

Rehabilitation is “the process of helping a person to readapt to society or to restore someone to a former position or rank.”<sup>30</sup>

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Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring), *appeal docketed*, No. 15-3485 (8th Cir. Nov. 2, 2015) .

21. *Id.*

22. *Id.* at 1147.

23. *Id.* at 1168 (quoting *Hendricks*, 521 U.S. at 361).

24. *Hendricks*, 521 U.S. at 373.

25. *See generally* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 6–7 (1955).

26. *Id.*

27. *Id.* at 4.

28. *Id.* at 4–5.

29. *Id.* at 5.

30. ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 831 (Mary F.

Rehabilitation—as a stated goal—is largely absent from the sentencing phase of the United States criminal justice system.<sup>31</sup> Funding for programs to rehabilitate within prisons has been decreased. State criminal statutes and sentencing guidelines use retribution in some form as their foundational principle so that a person’s criminal history and the severity of his or her crime determine his or her criminal sanction.<sup>32</sup> While rehabilitation has lost popular and political support in the criminal justice system, it is a critical endeavor of a civil commitment system.<sup>33</sup>

In states like Minnesota, where a theory of limiting retributivism—or modified just deserts<sup>34</sup> drives our criminal sentencing guidelines<sup>35</sup>—offenders know the length of time they will be incapacitated for the commission of their crime.<sup>36</sup>

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Bosworth ed., 2005). *See generally* Richard S. Frase, *Punishment Purposes, A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform Purposes*, 58 STAN. L. REV. 67, 70–71 (2005) (discussing rehabilitation and sentencing in the criminal justice system).

31. *See* Frase, *supra* note 30, at 70–71; *see also* Michael Rothfield, *As Rehab Programs Are Cut, Prisons Do Less to Keep Inmates From Returning*, L.A. TIMES (Oct. 17, 2009), <http://articles.latimes.com/2009/oct/17/local/me-rehab17> (stating California approved to cut \$250 million a year from prison rehabilitation services at a time they were “most needed”).

32. *See* Frase, *supra* note 30, at 77–78 (“[I]n practice, modern systems of law enforcement and punishment always function according to a limiting retributive model under which most offenders, in return for their cooperation, receive less severe sanctions than the maximum they deserve.”).

33. *See generally, e.g.*, Eric Janus, *Sexually Violent Predator Laws: Psychiatry in Service to a Morally Dubious Enterprise*, 364 MED. CRIME & PUNISHMENT 50 (2004) (discussing the political implications of the use of psychiatry in sexually violent predator laws).

34. *See* Frase, *supra* note 30, at 76 & n.22 (citing NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 161, 182–87, 196–200 (1982)); MINN. SENTENCING GUIDELINES COMM’N, REPORT TO THE LEGISLATURE 9 (1980) (adopting modified just deserts approach); RICHARD S. FRASE, LIMITING RETRIBUTIVISM, IN THE FUTURE OF IMPRISONMENT 83, 90–104 (Michael Tonry ed., 2004) (discussing widespread support for basic elements of limiting retributivism); Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 365–78 (1997) (summarizing Morris’ theory of punishment and Minnesota’s approach). *See generally* Janus, *supra* note 33, at 50.

35. Frase, *supra* note 30, at 78; Janus, *supra* note 33, at 50; *see* Frase, *supra* note 30, at 76 (“Under this widely endorsed and adopted model, the offender’s desert defines a range of morally justified punishments, setting upper and lower limits on the severity of penalties that may fairly be imposed on a given offender.”).

36. Frase, *supra* note 30, at 76; *see id.* at 73 (“[T]he limiting (negative) version

Minnesota's switch in the early 1980s to determinate sentencing<sup>37</sup> meant, among many things, that offenders know—on the day of their sentencing—the exact amount of time they will serve in prison.<sup>38</sup>

In a well-functioning civil commitment system, some individuals may never be released.<sup>39</sup> But the focus should still be on rehabilitation for the duration of a person's incapacitation in a civil system so that the people housed within the system and employees working at the system understand that it is legitimate—and not a pretext for continued punishment.<sup>40</sup> A central problem with the MSOP is that because no individual has ever been fully released, no one detained within it believes that they will ever get out.<sup>41</sup> This sense of uncertainty and the hopelessness felt by those at the MSOP, combined with the lack of release, is punitive—in some ways worse than prison.<sup>42</sup>

Civil commitment systems in many states struggle to conform to their proper purpose—to treat and rehabilitate.<sup>43</sup> One major difference between criminal justice systems and civil commitment systems is that a criminal system focuses on past behavior and the punishment for a past wrong.<sup>44</sup> We understand we cannot punish dangerousness; we cannot apply criminal sanctions based on future dangerousness.<sup>45</sup> To do so is unconstitutional.<sup>46</sup> Therefore,

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of retributive theory merely sets outer limits on punishment, defining a range of permissible severity for any given case.”).

37. See Janus, *supra* note 33, at 50.

38. Offenders have a due process right to their release date from prison. See Carrillo v. Fabian, 701 N.W.2d 763, 773 (Minn. 2005).

39. Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1144 (D. Minn. 2015).

40. See generally Kansas v. Hendricks, 521 U.S. 346, 371–72 (1997) (Kennedy, J., concurring).

41. See Expert Report and Recommendations at 52, Karsjens v. Jesson, 109 F. Supp. 3d 1139, No. 0:11-cv-03659-DWF-JJK (D. Minn. 2015), ECF No. 658, <http://stmedia.startribune.com/documents/Expert+panel+report+on+sex+offender+program.pdf>.

42. See *id.*; Don Betzold, Commentary, *What the Minnesota Sex Offender Program Was Meant to Be*, STAR TRIB. (Minneapolis) (June 30, 2015), <http://www.startribune.com/what-the-minnesota-sex-offender-program-was-meant-to-be/311061851> (“The sex offender treatment program is like a prison—only worse, because there’s no ‘out’ date.”).

43. JANUS, *supra* note 1, at 2–3.

44. *E.g.*, Karsjens, 109 F. Supp. 3d at 1143–44.

45. *E.g.*, *id.* at 1169.

46. *E.g.*, *id.* at 1173.

Minnesota created a preventative detention system to address future risk of danger.<sup>47</sup> Civil commitment seeks to prevent future harm to society—because it is forward looking.<sup>48</sup>

Civil commitment systems detain (and aim to rehabilitate) individuals for the benefit of keeping society safe.<sup>49</sup> Therefore, the conditions of that individual's detention should not be punitive, but instead should be rehabilitative as the individual moves along a continuum of treatment with the ultimate goal of safe release back to the community.<sup>50</sup> This is where many civil commitment systems fail.<sup>51</sup> They fail in one respect because they do not actually provide meaningful treatment for individuals (including regular reviews of risk assessment).<sup>52</sup> They fail in a greater respect because the actual experience of the individuals housed in these programs is in many cases worse than prison—it looks and feels—within the scope of their daily lives—like punishment.<sup>53</sup>

From the onset, civil commitment systems have been entangled with the criminal justice system.<sup>54</sup> They provide a way to keep dangerous people incapacitated beyond their prison term. Currently, the dangerous individual is not punished but is instead housed (suffering an intrusion on his or her liberty) for the ultimate benefit of society.<sup>55</sup> Many feel safer knowing people who have committed sexually violent crimes will not simply be released from prison—but instead will be housed somewhere far away from the mainstream. Using civil commitment schemes as a pretext for punishment degrades the integrity and morality of our criminal

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47. *E.g., id.*

48. *E.g., id.* at 1143–44; *see also* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Justice as Criminal Justice*, 114 HARV. L. REV. 1429, 1446 (2001) (“Detention for longer than the deserved term of imprisonment is justified as preventing predicted future crimes. Such detention not only punishes an offense for which the detainee has not yet been convicted, but also punishes an offense that he has not yet committed. But the ability to punish the uncommitted crime, and thereby prevent it, is the genius of the current system’s cloaking of preventive detention as criminal justice.”).

49. *See Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring).

50. *See generally Karsjens*, 109 F. Supp. 3d at 1167–68.

51. *Id.* at 1174.

52. *See infra* Section II.C.3.

53. *See infra* notes 267–68.

54. Robinson, *supra* note 48, at 1454 (discussing the relationship between prevention in civil commitment and criminal justice).

55. *Id.* at 1446.

justice system.<sup>56</sup> This unconstitutional use also violates the individual rights of the people it is designed to help, further degrading our sense of rehabilitative justice.

## 2. *Social Considerations*

Society's collective interests in social policy directly influence the legislature and criminal justice system to act in accordance with its wishes.<sup>57</sup> The obvious societal interest at stake in the release of sex offenders from prison is the safety of the public.<sup>58</sup> All sex offenders are deemed the “‘worst of the worst’—violent predators too dangerous for public release.”<sup>59</sup> The image that comes to mind when thinking of a sex offender is naturally the “worst of the worst” within the population of all sex offenders—the most frightening image conceivable.<sup>60</sup> Because of this, the public deeply fears sex offenders will reoffend because of their violent pasts.<sup>61</sup>

It is extremely difficult to predict the rate of recidivism in sex offenders.<sup>62</sup> The rate of recidivism varies between states as well as the length of time between follow-ups.<sup>63</sup> What studies do show, though, is that sex offender treatment results in a reduction in the

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56. See *Kansas v. Hendricks*, 521 U.S. 346, 371–73 (1997) (Kennedy, J., concurring).

57. See generally, e.g., *Karsjens v. Jesson*, 109 F. Supp. 3d, 1139, 1174 (D. Minn. 2015); Expert Report and Recommendations, *supra* note 41, at 25, 72.

58. E.g., NANCY A. JOHNSTON, MINN. DEP'T OF HUMAN SERVS., TREATMENT OVERVIEW: MINNESOTA SEX OFFENDER PROGRAM 1 (2015), [http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16\\_167937.pdf](http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16_167937.pdf); see Betzold, *supra* note 42.

59. Chris Serres, *Minnesota Sex Offenders: Are They Really the 'Worst of the Worst'?*, STAR TRIB. (Minneapolis) (Dec. 2, 2013), <http://www.startribune.com/minnesota-sex-offenders-are-they-really-the-worst-of-the-worst/233945281>; see also Betzold, *supra* note 42.

60. Serres, *supra* note 59.

61. E.g., JANUS, *supra* note 1, at 2; *MSOP FAQs*, *supra* note 5 (click on “How does the program help clients transition to the community?”) (“Public safety is the department’s top priority.”).

62. E.g., Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 712 (2011).

63. See, e.g., Expert Report and Recommendations, *supra* note 41, at 39; Hamilton, *supra* note 62, at 708; *No Easy Answers: Sex Offender Laws in the US*, HUM. RTS. WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us>.

rate of sexual recidivism.<sup>64</sup> One study found that the rate of sexual recidivism in sex offenders who receive treatment is 12.3%, while those who do not receive treatment reoffend at a rate of 16.8%.<sup>65</sup>

*B. Rise in Sex Offender Civil Commitment Popularity*

The origins and rise of SOCC are fairly uniform between Minnesota and other jurisdictions around the nation. Both experienced a first and second wave of SOCC laws, which were heavily influenced by a heightened concern about sexual offenses, heavy media attention, and ultimately, legislative action. The differentiating factor between the two is the case-specific instances in Minnesota and other states alike.

*1. Increase in Popularity Nationwide*

The mid-1930s bore a first wave of hysteria surrounding sex crimes.<sup>66</sup> Sexuality became a respected study and “the influence of psychoanalytic theories on American psychiatry during the 1930s provided an intellectual base for a sexual theory of crime.”<sup>67</sup> The increased relationship between the criminal justice system and psychiatry led to the use of a new term, the sexual psychopath, to explain the patterns of wearisome prisoners, ultimately leading to the creation of a new deviant population.<sup>68</sup> As the study of sexual psychopaths expanded into the late 1930s, writers linked sexual deviances such as “exhibitionists, sadists, masochists, and voyeurs” to the commission of sexual crimes.<sup>69</sup> The chief psychotherapist at a hospital in Washington D.C., Benjamin Karpman, identified sexual psychopaths by their inability to control their sexual impulses

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64. *E.g.*, Expert Report and Recommendations, *supra* note 41, at 32, 38; REAGAN DALY, VERA INST. OF JUSTICE, TREATMENT AND REENTRY PRACTICES FOR SEX OFFENDERS: AN OVERVIEW OF STATES 3–4 (2008), <http://www.csom.org/pubs/Treatment%20and%20Reentry%20for%20SO%20an%20overview%20of%20states.pdf>.

65. *Id.*

66. Estelle B. Freedman, “Uncontrolled Desires”: *The Response to the Sexual Psychopath, 1920–1960*, 74 J. AM. HIST. 83, 84 (1987); Bela August Walker, *Essay: Deciphering Risk: Sex Offender Statutes and Moral Panic in a Risk Society*, 40 U. BAL. L. REV. 183, 188 (2010).

67. Freedman, *supra* note 66, at 88.

68. *See id.* at 88–89.

69. *Id.* at 91 (internal citation omitted).

because these people were “all instinct and impulse.”<sup>70</sup> His vision caught fire because of its connection to the theory of the born criminal and eventuated in intense media attention, and, ultimately, the first wave of sex offender laws—the sexual psychopathic personality statutes.<sup>71</sup>

*a. The First Wave of Sex Offender Civil Commitment Laws*

Michigan passed the first sexual psychopathic personality statute in 1937.<sup>72</sup> The incident that ultimately led to Michigan’s law was the murder and mutilation of a young girl, whose body was found in an apartment by a man who had been committed to a mental institution for sex crimes.<sup>73</sup> The statute was subsequently found unconstitutional, but by 1939, three additional states had passed sexual psychopathic personality statutes—Illinois in 1938, and California and Minnesota in 1939.<sup>74</sup> Eventually, more than half of the states enacted sexual psychopathic personality statutes, which afforded sex offenders special medical and legal treatment.<sup>75</sup> Committees were civilly committed as an alternative to prison sentences.<sup>76</sup> The laws were “touted as a scientific, enlightened response to dangerous sex offenders that would achieve two goals: remove the sex offender from the community, and treat the underlying mental condition.”<sup>77</sup> This trend continued into the 1960s and subsequently went widely unused until the second wave of sex offender civil commitment laws.<sup>78</sup>

*b. The Second Wave of Sex Offender Civil Commitment Laws*

Washington was the first state to reinvigorate sex offender civil commitment laws in 1990.<sup>79</sup> Its new statute was passed as a response to the intense public outcry after recidivist sex offenders committed

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70. *Id.*

71. *See id.*

72. Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 55 (1998).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 55–56.

77. *Id.* at 55 (internal citation omitted).

78. *See id.*

79. *See* WASH. STATE INST. FOR PUB. POLICY, A SUMMARY OF RECENT FINDINGS FROM THE COMMUNITY PROTECTION RESEARCH PROJECT 1 (1994).

a series of sex crimes against women and children.<sup>80</sup> Many states followed shortly thereafter and modeled their statutes after Washington.<sup>81</sup> Today, twenty states and the federal government have SOCC statutes.<sup>82</sup>

The general outline of most statutes for SOCC is that the person has a history of sexual offenses, a mental abnormality or personality disorder, and because of the combination of the two, is deemed likely to sexually reoffend.<sup>83</sup> Unlike the first wave of SOCC laws, sex offenders are now committed near the end of their prison sentence.<sup>84</sup>

Constitutional challenges were brought under the second wave of SOCC laws. The first time the U.S. Supreme Court heard a case that challenged the new wave of SOCC statutes was in *Kansas v. Hendricks*.<sup>85</sup> Leroy Hendricks was civilly committed under Kansas' Sexually Violent Predator Act, which permits commitment of sex offenders who, because of a mental abnormality or personality disorder, are likely to engage in future sex offenses.<sup>86</sup> On appeal, the Kansas Supreme Court ruled the statute unconstitutional because the statutory definition of "mental abnormality" did not satisfy substantive due process.<sup>87</sup> Instead, it overruled Kansas' statute, stating that SOCC must be initiated because of a "mental illness."<sup>88</sup> On appeal, the Supreme Court ruled in the converse:

The Act's definition of "mental abnormality" satisfies "substantive" due process requirements . . . . The Act unambiguously requires a precommitment finding of dangerousness either to one's self or to others, and links

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80. *E.g.*, Marie A. Bochnewich, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 277 (1992) (citing WASH. REV. CODE ANN. § 71.09.010-.902 (West 1975 & Supp. 1991)); *see, e.g.*, Lieb et al., *supra* note 72, at 66.

81. *Id.* at 67.

82. Monica Davey, *A New Look at Sex Offenders and Lockups*, N.Y. TIMES, Oct. 30, 2015, at A1.

83. *See, e.g.*, KAN. STAT. ANN. § 59-29a02, subdiv. (a) (West, Westlaw through 2015 Reg. Sess.); MINN. STAT. § 253D.02, subdiv. 16 (2014 & Supp. 2015); WIS. STAT. ANN. § 980.01, subdiv. 7 (West, Westlaw through 2015); Bochnewich, *supra* note 80, at 277.

84. *See, e.g.*, KAN. STAT. ANN. § 59-29a03, subdiv. (a)(1) (Westlaw); MINN. STAT. § 253D.07, subdiv. 1; WIS. STAT. ANN. § 980.015, subdiv. (2)(a) (Westlaw).

85. 521 U.S. 346, 346 (1997).

86. *Id.*

87. *Id.*

88. *Id.*

that finding to a determination that the person suffers from a “mental abnormality” or “personality disorder.” Generally, this Court has sustained a commitment statute if it couples proof of dangerousness with proof of some additional factor, such as a “mental illness” or “mental abnormality,” . . . for these additional requirements serve to limit confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Act sets forth comparable criteria with its precommitment requirement of “mental abnormality” or “personality disorder.”<sup>89</sup>

The second challenge to the constitutionality during a second wave of SOCC statutes was only a few years later in *Kansas v. Crane*, which challenged the other the lack of control over sexual behavior.<sup>90</sup> The Kansas Supreme Court had ruled that Kansas’ SOCC statute was unconstitutional because it required a showing of the inability to control sexual actions as a prerequisite for civil commitment.<sup>91</sup> Although not formally codified in Kansas’ SOCC statute, the Kansas Supreme Court ruled that the statute contained an implied requirement of the inability to control one’s sexual behavior.<sup>92</sup> Because Crane had some control over his actions, the state supreme court ruled that Crane’s civil commitment was unconstitutional.<sup>93</sup> On appeal, the U.S. Supreme Court overruled the state supreme court’s decision.<sup>94</sup> Instead, the Court relied on *Hendricks* and ruled that there was “no requirement of *total* or *complete* lack of control, but the Constitution does not permit commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination.”<sup>95</sup>

The civil commitment of sex offenders was revitalized in the 1990s due to select heinous sex crimes against women and children, which were subsequently given immense media attention, increased political pressure, and ultimately led to the resurfacing of

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89. *Id.* at 346–47.

90. 534 U.S. 407, 407 (2002).

91. *Id.*

92. *Id.*; John M. Fabian, *Kansas v. Hendricks, Crane and Beyond: “Mental Abnormality” and “Sexual Dangerousness”: Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367, 1399 (2003).

93. *Crane*, 534 U.S. at 407; Fabian, *supra* note 92, at 1400.

94. *Crane*, 534 U.S. at 407.

95. *Id.*

SOCC statutes nationwide. As discussed below, Minnesota follows this pattern of change and implementation.

## 2. *Increase in Popularity in Minnesota*

In order to understand the current design and programming of the MSOP, the historical origins of the civil commitment of sex offenders in Minnesota must be explored. In the 1990s, there was a considerable increase in SOCC followed abruptly by another substantial increase in commitment in the early 2000s. Both increases were due in large part to societal and media influence, which gave rise to what the MSOP is today.

Civil commitment for sex offenders existed in Minnesota long before the MSOP.<sup>96</sup> Unlike the MSOP, civil commitment for sex offenders in Minnesota was historically rooted as an alternative to a criminal charge and conviction.<sup>97</sup> From 1939 to the 1980s, those deemed to have a “psychopathic personality” under Minnesota’s Sexual Psychopathic Personality Statute were civilly committed to the Minnesota State Security Hospital in St. Peter<sup>98</sup> for an indefinite period of time.<sup>99</sup>

Within its first year of enactment, Minnesota’s Sexual Psychopathic Personality Statute’s constitutionality was challenged.<sup>100</sup> The Minnesota Supreme Court upheld the law and the U.S. Supreme Court affirmed, stating that the “sexual psychopathic personality” law was not unconstitutionally uncertain or vague.<sup>101</sup> To satisfy the “psychopathic personality” requirement, sex offenders had to display:

conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any such conditions, . . . render such person irresponsible for personal conduct

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96. JANUS, *supra* note 1, at 22; *see* MINN. STAT. § 253D.02, subd. 15 (2014), *declared unconstitutional by* Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015).

97. *Karsjens*, 109 F. Supp. 3d at 1146; JANUS, *supra* note 1, at 22.

98. *See Karsjens*, 109 F. Supp. 3d at 1146; JANUS, *supra* note 1, at 29.

99. OFFICE OF THE LEGISLATIVE AUDITOR, PSYCHOPATHIC PERSONALITY COMMITMENT LAW 9 (1994) [hereinafter PSYCHOPATHIC COMMITMENT LAW].

100. *State ex rel. Pearson v. Prob. Court*, 205 Minn. 545, 287 N.W. 297 (1939), *aff’d*, 309 U.S. 270 (1940).

101. *Id.*

with respect to sexual matters and thereby dangerous to other persons.<sup>102</sup>

In 1989, the Minnesota Legislature broadened the use of SOCC.<sup>103</sup> During sentencing, judges were required to decide if civil commitment was appropriate for sexual offenders, as opposed to the ad hoc commitment system previously utilized.<sup>104</sup> If appropriate, the judge recommended the sex offender to the county attorney, who initiated proceedings for civil commitment.<sup>105</sup>

SOCC fell into disuse in the 1970s and 1980s.<sup>106</sup> However, in 1992 the Minnesota Legislature enacted a statute to modify the procedural screening process of those imprisoned for sexual offenses.<sup>107</sup> The new statute called for the evaluation of high-risk offenders by the Department of Corrections near the end of their sentence prior to their release from prison.<sup>108</sup> In conjunction with its previous use, sex offenders were civilly committed rather than serving prison sentences.<sup>109</sup> Many states followed suit. The second generation of SOCC statutes across the United States varied, but had central characteristics in common: their specific purpose is to confine and treat offenders determined to have a mental abnormality and are likely or highly likely to reoffend.<sup>110</sup>

In the 1990s, screening was reserved for “repeat sex offenders who either had failed or refused to participate in sex offender treatment while in prison.”<sup>111</sup> Today, the Department of Corrections recommends prisoners to the county attorney in the county of the offense underlying their imprisonment and the county attorney initiates civil commitment proceedings.<sup>112</sup>

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102. JANUS, *supra* note 1, at 29 (quoting *Pearson*, 205 Minn. at 555, 287 N.W. at 302).

103. *See Karsjens*, 109 F. Supp. 3d at 1146.

104. *Id.*

105. *Id.*

106. JANUS, *supra* note 1, at 29; PSYCHOPATHIC COMMITMENT LAW, *supra* note 99.

107. *Karsjens*, 109 F. Supp. 3d at 1146.

108. *Id.*

109. *Id.*

110. Eric S. Janus & Jon Brandt, *Karsjens v. Jesson: Challenging the Un-Civil Commitment of Civil Rights*, ACCESS TO JUST., July 2, 2015, at 4, [http://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/access/summer2015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/litigation_committees/access/summer2015.authcheckdam.pdf).

111. *Karsjens*, 109 F. Supp. 3d 1139, 1146 (D. Minn. 2015).

112. *Id.* at 1146–47.

The evaluation of sex offenders near the end of their prison sentence marked a drastic change in the character of SOCC.<sup>113</sup> Previously, sex offenders were civilly committed as an alternative to serving prison sentences, seeking to care for “those too sick to deserve punishment.”<sup>114</sup> Although “[i]t is fundamental to our notions of a free society that we do not imprison citizens because we fear that they might commit a crime in the future[,]”<sup>115</sup> sex offenders today are civilly committed for an indeterminate period of time,<sup>116</sup> in addition to completing prison sentences in order to ensure public safety.<sup>117</sup>

In 1994, the Minnesota Legislature further broadened SOCC to include individuals found to be a “sexually dangerous person” in addition to the previous Sexual Psychopathic Personality Statute.<sup>118</sup> Today, sex offenders are civilly committed if they possess a “sexual psychopathic personality” and/or are a “sexually dangerous person.”<sup>119</sup>

Civil commitment in Minnesota rose in frequency after the passage of the new screening process in 1992.<sup>120</sup> Civil commitment went from being a prison alternative to a virtual extension of the sex offender’s prison sentence.<sup>121</sup> In 1990, the total population of civilly committed sex offenders was only two people<sup>122</sup> and in 1992, the population was twenty-two.<sup>123</sup> The MSOP was created in 1994 to

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113. JANUS, *supra* note 1, at 22.

114. *Id.* (citation omitted).

115. *Karsjens*, 109 F. Supp. 3d at 1143.

116. MINN. DEP’T OF HUMAN SERVS., MINNESOTA SEX OFFENDER PROGRAM ANNUAL PERFORMANCE REPORT 23 (2012) [hereinafter ANNUAL PERFORMANCE REPORT].

117. *Id.*; JANUS, *supra* note 1, at 22.

118. *Karsjens*, 109 F. Supp. 3d at 1146.

119. MINN. STAT. § 253D.02, subdiv. 4 (2014 & Supp. 2015). Sex offenders may be civilly committed under Minnesota Statutes section 235D.02, subdivisions 15 and 16 or a previous version of such, including section 526.10. MINN. STAT. § 253D.02, subdivs. 15–16; MINN. STAT. § 526.10 (1994).

120. *See Karsjens*, 109 F. Supp. 3d at 1146; PSYCHOPATHIC COMMITMENT LAW, *supra* note 99, at xi (“[T]he number of psychopathic personality commitments has increased sharply, largely because the Department of Corrections now routinely screens soon-to-be-released sex offenders and notifies county attorneys if the department thinks [Psychopathic Personality] commitment may be appropriate.”).

121. *See JANUS*, *supra* note 1, at 22.

122. *Karsjens*, 109 F. Supp. 3d at 1146.

123. *Id.*

deal with the increase in civilly committed sex offenders.<sup>124</sup> By December 2012, the total population of the MSOP was 678 individuals<sup>125</sup> and as of December 31, 2015, 726 sex offenders are confined to the MSOP.<sup>126</sup> To account for the drastic increase in the population of the MSOP, one must explore how changes in public policy are the direct result of voluminous media coverage and intense public outcry.

### III. THE MSOP

In recent years, the MSOP has grown substantially in its number of patients, likely due to two specific cases—Dennis Linehan and Alfonso Rodriguez, Jr.—who had a history of committing sex offenses. Both significantly influenced the civil commitment of sex offenders in Minnesota because of the public outcry associated with their cases and actions. Because of this, current MSOP programming and statistics show that the changes to the system and the statute under which sex offenders are civilly committed was a knee-jerk reaction to a select few heinous cases. As a result, the MSOP is different than other SOCC programs in the nation and greatly lags behind in its effectiveness. This forces us to ask: What has the MSOP become?

#### A. *Growth of the MSOP in Minnesota*

Two very public cases changed the civil commitment of sex offenders in Minnesota. The case of Dennis Linehan directly changed the statute under which sex offenders are civilly committed in Minnesota.<sup>127</sup> The case of Alfonso Rodriguez, Jr., who reoffended when he killed Dru Sjodin after his release from prison for a sex crime,<sup>128</sup> changed the way in which the new statute was implemented.

Dennis Linehan's case is one of swift legislative reform. Linehan had a long history of sexual offenses prior to his release

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124. *See id.* at 1146–47.

125. ANNUAL PERFORMANCE REPORT, *supra* note 116, at 22.

126. MSOP FAQs, *supra* note 5 (click on “How many people are in the Minnesota Sex Offender Program?”).

127. *See, e.g.*, JANUS, *supra* note 1, at 27.

128. *See, e.g.*, Caroline Palmer & Bradley Prowant, *Re-Thinking Minnesota's Criminal Justice Response to Sexual Violence Using a Prevention Lens*, 39 WM. MITCHELL L. REV. 1584, 1596 (2013).

on parole in 1992.<sup>129</sup> In 1965, at the age of twenty-four, he killed a fourteen-year-old girl while sexually assaulting her.<sup>130</sup> Prior to the sexual assault and murder of his 1965 victim, Linehan had sexually assault or attempted to sexually assault seven known victims.<sup>131</sup> After a ten-year prison sentence, Linehan escaped from a minimum-security prison and was arrested a few days later and two states away from Minnesota for trying to sexually assault a twelve-year-old girl.<sup>132</sup>

In 1992, Linehan was paroled for good behavior after a ten-year prison term.<sup>133</sup> He had served a total of twenty-seven years in prison for multiple sex crimes.<sup>134</sup> Although he had completed chemical dependency and sex offender treatment in prison,<sup>135</sup> he became one of the first candidates for sexual predator commitment in Minnesota.<sup>136</sup>

Linehan's civil commitment proceedings were brought under the *Pearson* test, which allowed civil commitment of people who:

by a habitual course of misconduct in sexual matters, have evidenced an *utter lack of power to control* their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.<sup>137</sup>

Because civil commitment went widely unused until the early 1990s,<sup>138</sup> the *Pearson* test was forgotten as well.<sup>139</sup> After years of litigation and appeals, the Minnesota Supreme Court found that the State did not meet its burden of showing Linehan had an “utter

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129. JANUS, *supra* note 1, at 27.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*; see also MINN. STAT. § 243.166, subdiv. 5a (2014 & Supp. 2015).

134. JANUS, *supra* note 1, at 27.

135. *Id.* at 28.

136. *Id.* at 27.

137. *Id.* at 29 (quoting State *ex rel.* Pearson v. Prob. Court, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939)) (emphasis added). Interestingly enough, the *Pearson* test required a lack of power to control, while criminal sex crimes require a form of intent or control. See Larry Oakes, *The New Life Sentence: A Long-Standing, Thorny Issue for Minnesota and the Courts*, STAR TRIB. (Minneapolis), June 8, 2008, at 14A, LEXIS.

138. See *supra* note 112.

139. JANUS, *supra* note 1, at 29.

lack of power to control” himself in sexual matters under the *Pearson* test.<sup>140</sup>

Public outcry after the Minnesota Supreme Court’s decision was instantaneous. Newspapers headlined the court’s decision in anger and political officials and candidates publicly spoke out against the decision.<sup>141</sup> Mike Hatch, then campaigning for state attorney general, urged “the governor to call a special session of the legislature to ‘tighten’ (more accurately, ‘loosen’) the civil commitment law.”<sup>142</sup> Hatch was critical of the *Pearson* test. Instead, he advocated that the legislature look closer at sex offender recidivism and the risk to public safety involved in releasing sex offenders into the community.<sup>143</sup>

In response to public outcry, Governor Arne Carlson called the legislature into special session.<sup>144</sup>

Just eight days before statewide primary elections, the governor officially called for a one-day, one-bill special

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140. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 614 (Minn. 1994) (stating the Ramsey County District Court had failed to provide clear and convincing evidence that Linehan was utterly unable to control his sexual impulses); *In re Linehan*, 503 N.W.2d 142, 148 (Minn. Ct. App. 1993) (finding that (1) Linehan was a person who met the standards for commitment as a psychopathic personality and, (2) the psychopathic personality statute was constitutional).

141. “After this court denied the state’s petition for rehearing in *Linehan I*, the governor announced that the state would move Linehan to an old staff residence just outside the prison and keep him under constant surveillance.” *In re Linehan (Linehan II)*, 557 N.W.2d 171, 198 (Minn. 1996) (Tomjanovich, J., dissenting) (citing Paul Gustafson & Robert Whereatt, *Rapist/Murderer Wins Release—and Tight Surveillance*, STAR TRIB. (Minneapolis), Aug. 16, 1994, at 1A). After, Linehan’s attorney stated his treatment was appalling and the governor responded by saying, “I’d much rather make a mistake on the side of public safety than be overwhelmingly concerned with some attorney’s perception of the civil rights of Mr. Linehan.” *Id.* Meanwhile, the Ramsey County prosecutor stated, “These are dangerous people and we’ve got to protect the women and children in our communities.” *Linehan II*, 557 N.W.2d at 198 (Tomjanovich, J., Dissenting) (quoting Mimi Hall, *A Furor Brews over Release of Sex Offenders*, USA TODAY, Aug. 17, 1994, at 3A). “[An] article quoted State Representative David Bishop, who called Chief Justice A. M. Keith ‘the chief zookeeper of the zoo. . . . Now he’s proposing to let the tigers out one by one to see if they’re dangerous.’” JANUS, *supra* note 1, at 31–32.

142. JANUS, *supra* note 1, at 31.

143. *See id.*

144. *E.g.*, Betzold, *supra* note 42; Jason Hoppin, *Are Sex Offenders Patients or Prisoners?*, ST. PAUL PIONEER PRESS, (Feb. 21, 2010), [http://www.twincities.com/ci\\_14438035](http://www.twincities.com/ci_14438035).

legislative session. The legislature convened one week later and in just 1 hour, 37 minutes passed the SDP Act by a 65–0 margin in the senate and a 133–0 margin in the house. Immediately prior to the session, the bill’s drafters had told their colleagues to avoid speaking about Linehan specifically because, “Whatever we say on the floor will be used against us . . . . It’s going to be used to challenge the bill.”<sup>145</sup>

The legislature unanimously passed the new laws, which included the former “psychopathic personality” act (renamed the Sexual Psychopathic Personality Act (SPP Act)), and adding those who are “sexually dangerous person[s]” as defined in the SDP Act to the restructured laws, collectively called MCTA.<sup>146</sup> As a clear response to Linehan’s case, the legislature wrote, “[I]t is not necessary to prove that the person has an inability to control the person’s sexual impulses” in the reformed SOCC laws.<sup>147</sup>

A few days later, the state filed a petition to civilly commit Linehan under the restructured legislation.<sup>148</sup> Under the new standard, the state sought to commit Linehan under the SDP Act<sup>149</sup> and its new requirements.<sup>150</sup>

During the *Linehan II* proceedings, a psychiatric expert testified that Linehan had antisocial personality disorder and the district court found it highly likely that Linehan would reoffend.<sup>151</sup> The court of appeals and the Minnesota Supreme Court affirmed

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145. *Linehan II*, 557 N.W.2d at 198 (Tomjanovich, J., Dissenting) (citing Donna Halvorsen & Robert Whereatt, *Sexual Predator Bill OK'd, Signed*, STAR TRIB. (Minneapolis), Sept. 1, 1994, at 1A; Robert Whereatt, *Legislators, Carlson Agree to Session; Ground Rules Set with Goal of Avoiding Partisanship*, STAR TRIB. (Minneapolis), Aug. 24, 1994, at 1B).

146. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015).

147. MINN. STAT. § 253B.02, subdiv. 18c(b) (1998); see JANUS, *supra* note 1, at 32.

148. *In re Linehan (Linehan III)*, 594 N.W.2d 867, 870 (Minn. 1999); JANUS, *supra* note 1, at 32.

149. *Linehan III*, 594 N.W.2d at 870.

150. The new laws required the person to have “engaged in a course of harmful sexual conduct[,] . . . manifested a sexual, personality, or other mental disorder or dysfunction[,] and as a result, [be] likely to engage in acts of harmful sexual conduct.” MINN. STAT. § 253B.02 18(a)(1)–(3) (1998).

151. *In re Linehan*, No. P8-94-0382, at \*9–13, 23–24, 26 (Ramsey Cty. Dist. Ct., July 27, 1995).

the district court's ruling.<sup>152</sup> To this day, Linehan is civilly committed to the MSOP.<sup>153</sup>

Dennis Linehan's story is one of heinous sex crimes and quick legislative action resulting from immense outcry from the media, the public, and individual legislators in response to his failed civil commitment under the "psychopathic personality" act after *Linehan I*. Arguably, the media and individual legislators, in conjunction, is the most effective vehicle for notions of social change today. Conversely, legislators and the media are the most effective conduits for influencing societal mindsets regarding a particular social issue. A combination of both forms of influence feeding off one another creates the perfect recipe for change. In the case of Dennis Linehan, the combination of the three quickly changed the way sex offenders are civilly committed in Minnesota.

Sex offenders are now civilly committed under a broadened set of laws implemented directly in response to Linehan's case. Today, Linehan's story remains in the memories of many Minnesotans because of its impact on Minnesota law and its surrounding controversy. In recent months since the *Karsjens* decision, the media is quick to retell the tale of Dennis Linehan,<sup>154</sup> whose case changed the fate of civilly committed sex offenders in Minnesota.<sup>155</sup> Instead of the outcry that followed *Linehan I*, the media is now more likely to question the Minnesota Legislature's hasty revision of sex offender commitment law.<sup>156</sup> Individual legislators have followed suit.<sup>157</sup> After twenty-five years and a ruling of the

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152. *Linehan III*, 594 N.W.2d 867 (Minn. 1999); *In re Linehan*, 544 N.W.2d 308 (Minn. Ct. App. 1996).

153. JANUS, *supra* note 1, at 28.

154. See, e.g., John Croman, *Judge Rules Minnesota Sex Offender Program Unconstitutional*, KARE 11, Aug. 10, 2015, <http://www.kare11.com/story/news/local/2015/06/17/judge-rules-minnesota-sex-offender-program-unconstitutional/28863371/>; Pat Kessler, *Reality Check: Minnesota's Sex Offender Treatment Program*, CBS MINN., June 18, 2015, <http://minnesota.cbslocal.com/2015/06/18/reality-check-minnesotas-sex-offender-treatment-program>; Editorial, *Searching for Answers on Sex Offenders: Can Indefinite Confinement Be the Right Choice for All?*, STAR TRIB. (Minneapolis), June 15, 2008, at 4OP.

155. Compare MINN. STAT. § 253D.02, subdivs. 15–16 (2014 & Supp. 2015), with MINN. STAT. § 526.10 (1994).

156. Compare *Linehan III*, 594 N.W.2d 867 (Minn. 1999), and *In re Linehan*, 544 N.W.2d 308 (Minn. Ct. App. 1996), with JANUS, *supra* note 1, at 27.

157. See, e.g., Kathy Sheran, *MSOP: A Minnesota State Senator's Perspective*, 41 WM. MITCHELL L. REV. 689, 690 (2015).

unconstitutionality of the MSOP, the media, legislators, and the public are finally asking themselves: Did we get it wrong?

Alfonso Rodriguez, Jr.'s case is one of swift change in the implementation of the MSOP. Rodriguez was released from prison in May 2003 after serving a twenty-three-year sentence as a level three repeat sex offender.<sup>158</sup> Reaffirming the public's fears, he reoffended.

Dru Sjodin was a college student that Rodriguez abducted from a shopping center in Grand Forks, North Dakota on November 22, 2003.<sup>159</sup> Her body was later found in Minnesota in April of 2004 after the snow melted.<sup>160</sup> She had been raped, tortured, and murdered.<sup>161</sup>

Ten days after Sjodin's abduction, Rodriguez was arrested and charged with her kidnapping.<sup>162</sup> His charges were later amended to include willfully transporting Sjodin in interstate commerce and murder.<sup>163</sup> Rodriguez's case was tried in federal court where he was sentenced to death.<sup>164</sup> He is currently on death row.<sup>165</sup>

Rodriguez's case garnered significant national attention.<sup>166</sup> He has never been an inmate at the MSOP, but this did not stop his

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158. Sex offender levels are determined by the Minnesota Department of Corrections' policies, which use risk assessments to assign individual offenders a numerical risk value based on the individual's risk of reoffending. Level I offenders have a predicted probability of sexual recidivism of 3.49% or lower, Level II offenders have a predicted probability of sexual recidivism between 3.50% and 9.99%, and Level III offenders have a predicted probability of sexual recidivism at or above 10%. MINN. DEP'T CORR., POLICY 205.220, PREDATORY OFFENDER: REGISTRATION, COMMUNITY NOTIFICATION, VICTIM NOTIFICATION, LEVEL 3 WEBSITE, AND RISK LEVEL REASSESSMENT REQUEST (2013), [http://www.doc.state.mn.us/DocPolicy2/html/DPW\\_Display\\_TOC.asp?Opt=205.220.htm](http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=205.220.htm); JANUS, *supra* note 1, at 1.

159. JANUS, *supra* note 1, at 1.

160. *Id.*

161. *See, e.g.*, Stephen J. Lee, *10 Years Later, Dru Sjodin's Kidnapping, Murder Changed Law and Society*, ST. PAUL PIONEER PRESS, (Nov. 21, 2013), [http://www.twincities.com/localnews/ci\\_24575871/10-years-later-dru-sjodins-kidnapping-murder-changed](http://www.twincities.com/localnews/ci_24575871/10-years-later-dru-sjodins-kidnapping-murder-changed).

162. *Id.*

163. *United States v. Rodriguez*, 389 F. Supp. 2d 1135, 1335 (D.N.D. 2005), *aff'd on other grounds*, 581 F.3d 775 (8th Cir. 2009).

164. Dan Gunderson, *Judge Sentences Alfonso Rodriguez Jr. to Death*, MINN. PUB. RADIO NEWS, Feb. 8, 2007, <http://www.mprnews.org/story/2007/02/08/rodriguezsentence>.

165. *Id.*

166. *See id.*

case from forever changing both the way Minnesotans view the MSOP and the way in which the Department of Corrections implements the referral of inmates to the program. The public was outraged that “officials decided not to take the . . . step of seeking [Rodriguez’s] civil commitment to a secure treatment facility as a ‘sexually dangerous person.’”<sup>167</sup> Countless Minnesota and North Dakota residents searched for Ms. Sjodin when she was abducted—the public had an emotional stake in her case and did not feel she received justice.<sup>168</sup>

As a result of Sjodin’s murder, Congress passed the Adam Walsh Child Protection and Safety Act,<sup>169</sup> which President George W. Bush signed into law on July 27, 2006.<sup>170</sup> A provision of the Act includes the creation of the Dru Sjodin National Sex Offender Public Website (Sjodin Act).<sup>171</sup> The website provides nationwide sex offender data which allows concerned residents to search for sex offenders in their area.<sup>172</sup> The Sjodin Act is an example of public backlash on sex offender policy on a national level.<sup>173</sup>

On the local level, the Minnesota Department of Corrections drastically increased the number of inmate referrals to the MSOP in response to public outcry<sup>174</sup> after Sjodin’s death.<sup>175</sup> Between 1991

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167. JANUS, *supra* note 1, at 1.

168. See, e.g., *Missing N.D. Student Dru Sjodin Found*, FOX NEWS (Apr. 18, 2004), <http://www.foxnews.com/story/2004/04/18/missing-nd-student-dru-sjodin-found.html>.

169. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901–91 (2006)).

170. *The Dru Sjodin Story*, NAT’L SEX OFFENDER PUB. WEBSITE, <https://www.nsopw.gov/en/Home/DruSjodin> (last visited May 19, 2016).

171. Adam Walsh Child Protection and Safety Act § 120, 120 Stat. at 597 (codified at 42 U.S.C. § 16920 (2006)); see *The Dru Sjodin Story*, *supra* note 170.

172. *About NSOPW*, NAT’L SEX OFFENDER PUB. WEBSITE, <https://www.nsopw.gov/en/Home/About> (last visited May 19, 2016).

173. Another example of public backlash on national sex offender policy is Washington State’s enactment of Megan’s Law, which was passed in memory of Megan Kanka, who was raped and murdered by a released sex offender who lived across the street from her. Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1217 (1998) (citing William Glaberson, *At Center of “Megan’s Law” Case, A Man the System Couldn’t Reach*, N.Y. TIMES, May 6, 1996, at C10). Congress later added Washington’s version of Megan’s Law to the Jacob Wetterling Act in 1996. *Id.* Megan’s Law is now in effect in all fifty states. *Id.*

174. “How do you not contemplate the ongoing detention of these offenders, or at least severe restrictions on their activities?” [North Dakota Lieutenant Governor Drew Wrigley] said. ‘Are we to do nothing but react to the next victim? The public is fed up.’ Chuck Haga, *Ten Years After Dru Sjodin’s Abduction*, “*She*

and 2003, prior to Sjodin's murder, the Minnesota Department of Corrections referred about twenty-six offenders per year to county attorneys.<sup>176</sup> In December of 2003 alone, one month after Sjodin's abduction, the Department of Corrections referred 236 inmates to the MSOP.<sup>177</sup> As of 2011, the number of individuals referred to the MSOP each year since Sjodin's death was six times the total number of people referred to the MSOP between 1991 and 2003.<sup>178</sup> "A large increase has followed the substantial increase in DOC referrals since December 2003."<sup>179</sup> The increase in referrals to the MSOP is a direct result of Sjodin's death<sup>180</sup> :

Attorney Thomas Heffelfinger, who worked . . . on [Rodriguez's] case as U.S. attorney for Minnesota, said he saw a rapid shift after Sjodin's murder in public and official sentiment over how to deal with high-risk offenders. "The focus was on getting knowledge and information out to people and keeping sex offenders locked up through civil commitment," he said. "Over here in Minnesota, more pressure was put on county attorneys to review these cases for civil commitment a lot more quickly and more aggressively."<sup>181</sup>

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*Reminds Us Every Day How Precious Life Is*", MINNPOST (Nov. 22, 2013), <https://www.minnpost.com/politics-policy/2013/11/ten-years-after-dru-sjodins-abduction-she-reminds-us-every-day-how-precious->.

175. Palmer & Prowant, *supra* note 128, at 1595–96.

176. SEX OFFENDER CIVIL COMMITMENT ADVISORY TASK FORCE, SELECTED MATERIALS REGARDING THE SEX OFFENDER CIVIL COMMITMENT ADVISORY TASK FORCE 39 (2013), [http://www.senate.mn/committees/2013-2014/1016\\_Committee\\_on\\_Judiciary/SelectedMaterials%20Regarding%20the%20Sex%20Offend\\_3.pdf](http://www.senate.mn/committees/2013-2014/1016_Committee_on_Judiciary/SelectedMaterials%20Regarding%20the%20Sex%20Offend_3.pdf) (citing OFFICE OF THE LEGISLATIVE AUDITOR, EVALUATION REPORT: CIVIL COMMITMENT OF SEX OFFENDERS I (2011)).

177. Mark A. Ostrem, *MSOP: A County Attorney's Perspective*, 41 WM. MITCHELL L. REV. 698, 699 (2015).

178. OFFICE OF THE LEGISLATIVE AUDITOR, EVALUATION REPORT: CIVIL COMMITMENT OF SEX OFFENDERS 28 (2011) [hereinafter OLA EVALUATION REPORT], <http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf>. See generally Lucy Massopust & Raina Borrelli, "A Perfect Storm": Minnesota's Sex Offender Program—More Than Twenty Years Without Successful Reintegration, 41 WM. MITCHELL L. REV. 706 (2015).

179. OLA EVALUATION REPORT, *supra* note 178, at 29.

180. Ostrem, *supra* note 177, at 699; see, e.g., GOVERNOR'S COMM'N ON SEX OFFENDER POLICY, FINAL REPORT 7 (2005), <http://archive.leg.state.mn.us/docs/2005/other/050099.pdf>.

181. Lee, *supra* note 161.

Since Sjodin's murder, SOCC has increased sharply largely because of her murder.<sup>182</sup> The current population of the MSOP is "[d]ue in no small part to the Sjodin case."<sup>183</sup> Today, Minnesota has the highest number of civilly committed sex offenders per capita of any state in the United States<sup>184</sup> and boasts the lowest percentage of release of any other state.<sup>185</sup>

The case of Alfonso Rodriguez, Jr.'s release and subsequent re-offense affirmed the public's fear of released sex offenders. After Rodriguez was released from prison, he kidnapped and murdered Dru Sjodin, an innocent college student.<sup>186</sup> As an obvious result, the public was outraged that he was not civilly committed as a sex offender.<sup>187</sup> Sjodin's murder led to many drastic federal policy changes.<sup>188</sup> Society's outrage after Sjodin's murder also led to Minnesota's drastic changes in the implementation of its SOCC laws and as a direct result, there has been a substantial increase in the number of civilly committed sex offenders since her death.<sup>189</sup>

#### B. Overview of the Current Program

Currently, sex offenders civilly committed in the MSOP encompass a broad range of individuals, varying in age, mental capacity, and life experiences. Despite this fact, the MSOP is a uniform system for all patients. An overview of the current program is needed to gauge the scope of the deficiencies in Minnesota's civil commitment of sex offenders.

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182. *Id.*; see also *supra* notes 178–79.

183. Haga, *supra* note 174.

184. *E.g.*, *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1148 (D. Minn.), *motion to certify appeal denied*, No. CIV. 11-3659, 2015 WL 4478972 (D. Minn. July 22, 2015); ERIC J. MAGNUSON & JAMES ROSENBAUM, SEX OFFENDER CIVIL COMMITMENT ADVISORY TASK FORCE, FINAL REPORT 1 (2013) [hereinafter TASK FORCE FINAL REPORT], <https://cbsminnesota.files.wordpress.com/2013/12/sof-report.pdf>; Haga, *supra* note 174; see also *Sex Offender Civil Commitment Advisory Task Force*, MINN. DEP'T HUM. SERVS., <http://mn.gov/dhs/general-public/about-dhs/advisory-councils-task-forces/sex-offender-task-force.jsp> (providing resources related to the Task Force including reports, court orders, meeting minutes, and links to legislation).

185. *Karsjens*, 109 F. Supp. 3d at 1147.

186. See *supra* notes 162–64.

187. JANUS, *supra* note 1, at 136–37; Lee, *supra* note 161.

188. *United States v. Rodriguez*, 389 F. Supp. 2d 1135, 1335 (D.N.D. 2005) *aff'd on other grounds*, 581 F.3d 775 (8th Cir. 2009); Gunderson, *supra* note 164; Lee, *supra* note 161.

189. See *supra* notes 180–84.

### 1. *Statistics*

In recent years, the MSOP has become larger than life. There are currently 726 individuals civilly committed to the MSOP, costing Minnesota taxpayers \$83.7 million per year.<sup>190</sup> This means that each committee costs taxpayers almost \$120,000 per year. Clients in the MSOP are between the ages of twenty-one and ninety-three, with an average age of forty-eight.<sup>191</sup> As of June 2015, sixty-seven juvenile-only offenders were committed to the MSOP.<sup>192</sup>

For too long, too many people have been civilly committed to the MSOP. To date, five people have been provisionally discharged in the twenty-two year history of the MSOP.<sup>193</sup> In contrast, the same number of people were civilly committed to the MSOP between October 26, 2015 and December 31, 2015—in just over two months.<sup>194</sup>

### 2. *Programming*

The MSOP consists of three phases, each of indeterminate length.<sup>195</sup> Although modules or phases are common amongst jurisdictions with SOCC programs,<sup>196</sup> programming at the MSOP has changed many times since its inception in 1994.<sup>197</sup> The MSOP's Theory Manual states that the most important factor in sex offender treatment is the client's willingness to change.<sup>198</sup> Other important factors include skill acquisition, rehearsal, and

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190. *MSOP FAQs*, *supra* note 5 (click on “What is the total operating cost of the sex offender treatment program?”); see Esme Murphy, *WCCO Investigates Minnesota's Sex Offender Program*, CBS MINN. (Apr. 22, 2015), <http://minnesota.cbslocal.com/2015/04/22/wcco-investigates-minnesotas-sex-offender-program> (“It's outrageous. The taxpayers should be screaming to their politicians about it.”).

191. *MSOP FAQs*, *supra* note 5 (click on “How old are the clients?”).

192. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1152 (D. Minn.), *motion to certify appeal denied*, No. CIV. 11-3659, 2015 WL 4478972 (D. Minn. July 22, 2015).

193. *MSOP FAQs*, *supra* note 5 (click on “Has anyone ever been released from the program?”).

194. As of October 26, 2015, 722 people were civilly committed to the MSOP. By December 31, 2015, that number increased to 726. See *MSOP FAQs*, *supra* note 5.

195. *Karsjens*, 109 F. Supp. 3d. at 1153.

196. Expert Report and Recommendations, *supra* note 41, at 27.

197. *Karsjens*, 109 F. Supp. 3d. at 1153.

198. Expert Report and Recommendations, *supra* note 41, at 28.

implementation, which allow clients to make changes and implement new behaviors.<sup>199</sup>

Although the MSOP's treatment manual permits individuals to begin treatment in different stages of treatment depending on their background and previous sex offender treatment, all committed individuals at the MSOP start in Phase I.<sup>200</sup> While client willingness to change is the most important factor in treatment at the MSOP, clients are not assessed on their willingness to change when determining phase placement upon intake at the MSOP.<sup>201</sup>

In its current programming, Phase I of the MSOP concentrates on rule conformity, engagement in treatment, and emotional regulation.<sup>202</sup> It also serves as a basic introduction to treatment concepts.<sup>203</sup> Clients do not receive any specific sex offender treatment during Phase I.<sup>204</sup>

Civilly committed sex offenders begin actual treatment for sexual offenses in Phase II, which focuses on "addressing patterns of sexually abusive behavior and cycles."<sup>205</sup> This concentrates on the person's sexual offending history, maladaptive patterns, and the person's motives and rationale behind their behavior.<sup>206</sup> The goal of Phase II is the development of coping strategies to avoid recidivism.<sup>207</sup>

Civil committees begin reintegration planning during Phase III.<sup>208</sup> Reintegration planning is available only for individuals in

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199. *Id.*

200. *Karsjens*, 109 F. Supp. 3d. at 1154.

201. Expert Report and Recommendations, *supra* note 41, at 30; *see Karsjens*, 109 F. Supp. 3d 1139, at 1154 ("There are no reports or assessments conducted at the time of admission to determine what phase of treatment a committed individual should be placed in at the MSOP.").

202. *Karsjens*, 109 F. Supp. 3d. at 1153; *see* Expert Report and Recommendations, *supra* note 41, at 30; OLA EVALUATION REPORT, *supra* note 178, at 55.

203. Expert Report and Recommendations, *supra* note 41, at 30; OLA EVALUATION REPORT, *supra* note 178, at 55.

204. *Karsjens*, 109 F. Supp. 3d. at 1153; OLA EVALUATION REPORT, *supra* note 178, at 64.

205. *Karsjens*, 109 F. Supp. 3d. at 1153; *see also* OLA EVALUATION REPORT, *supra* note 178, at 55 ("In Phase Two, clients are expected to disclose their sexual offenses and understand their patterns of sexual abuse.").

206. *Karsjens*, 109 F. Supp. 3d. at 1153.

207. Expert Report and Recommendations, *supra* note 41, at 30.

208. *Karsjens*, 109 F. Supp. 3d. at 1153.

Phase III.<sup>209</sup> Here, clients focus on the application of skills they learned during Phase II by utilizing coping mechanisms.<sup>210</sup> This phase is considered the maintenance stage of treatment.<sup>211</sup> During Phase III, clients continue to “reside in a secure area, but may be allowed supervised access to the community.”<sup>212</sup> Nearly all individuals, regardless of phase, wear electronic monitoring ankle bracelets.<sup>213</sup> In addition to wearing electronic monitoring ankle bracelets, clients in Phase III are monitored by Global Positioning Satellite because they are given more freedom within the community.<sup>214</sup>

Clients at the MSOP receive the vast majority of their treatment in a group setting of eight to ten individuals led by co-facilitators.<sup>215</sup> Little individual therapy is offered to MSOP clients.<sup>216</sup> Although the MCTA requires that civilly committed sex offenders be mentally ill,<sup>217</sup> the MSOP does not have a full-time psychiatrist on staff to serve its population of 726 clients.<sup>218</sup>

### C. *Why Minnesota Is Different than the Rest of the Nation*

Minnesota’s treatment of civilly committed sex offenders differs greatly from the national norm. The MSOP fails to differentiate treatment programming for subgroups of individuals such as those with severe mental illnesses and those with cognitive capacity limitations.<sup>219</sup> It also fails to adequately provide the appropriate number of hours of treatment per week based on national norms and to conduct annual risk assessments.<sup>220</sup> Finally,

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209. *Id.*

210. *Id.*

211. Expert Report and Recommendations, *supra* note 41, at 31.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 27.

216. *See id.*

217. “Substantive due process requires that civil committees may be confined only if they are both mentally ill and pose a substantial danger to the public as the result of that mental illness.” *Karsjens*, 109 F. Supp. at 1166 (citing *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) (noting that a “committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous”); *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995)).

218. Expert Report and Recommendations, *supra* note 41, at 18.

219. *See infra* Section II.C.1.

220. *See infra* Sections II.C.2.–3.

the MSOP fails to provide a reduction in custody or discharge for eligible clients.<sup>221</sup>

*1. Failure to Differentiate Treatment Programming*

The majority of SOCC programs conduct a formal pre-treatment evaluation of each client in order to ascertain treatment goals and targets.<sup>222</sup> Those SOCC programs have different treatment tracks for clients based on a number of factors, including individual intellect, personality, mental health status, and behavioral issues.<sup>223</sup> Essentially, other SOCC programs across the nation differentiate their treatment of civilly committed sex offenders based on individual needs.<sup>224</sup>

Minnesota does no such thing. Psychological assessments are conducted sporadically and have little to no effect on identifying an individualized treatment program based on key factors such as individual intellect.<sup>225</sup> The MSOP is a one-size-fits-all treatment program for all clients regardless of age, cognitive ability, sex, mental illness, or other physical disabilities.<sup>226</sup>

An example of the MSOP's failure to differentiate treatment for subgroups of its clientele is seen in its population of clients with severe mental illnesses such as schizophrenia, major depression, schizo-affective disorder, and other conditions that significantly affect the ability of clients to progress in treatment.<sup>227</sup> As previously stated, the MSOP is inadequate in addressing mental illness in clients.<sup>228</sup> Other nationwide SOCC programs employ a comprehensive approach to mental health issues, which includes clinical training, supervision, and psychiatric services.<sup>229</sup> In contrast, the MSOP narrowly focuses training and treatment upon

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221. See *infra* Section II.C.4.

222. Expert Report and Recommendations, *supra* note 41, at 26.

223. *Id.* at 10.

224. See *id.*

225. See *id.* at 26.

226. See generally *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1154–56 (D. Minn. 2015). “The confinement of the elderly, individuals with substantive physical or intellectual disabilities, and juveniles, who might never succeed in the MSOP’s treatment program or who are otherwise unlikely to reoffend, is of serious concern for the Court and should be for the parties as well.” *Id.* at 1175.

227. Expert Report and Recommendations, *supra* note 41, at 15.

228. *Id.* at 16.

229. *Id.* at 16–17.

problematic sexual behavior, which lends to an environment wherein mental health disorders are not understood by MSOP clinical staff.<sup>230</sup> Because of this, MSOP clients with significant mental illness have severe difficulties in progressing through phases of treatment.<sup>231</sup>

Another example of the MSOP's failure to differentiate the treatment program for a subgroup of its population is in its treatment implementation for clients in the Alternative Program.<sup>232</sup> Clients in this program have "significant barriers to successful participation in the conventional treatment program, most often seen in limited intellectual functioning, but also including clients with cognitive limitations, mental illness, and hearing deficits."<sup>233</sup> Nationwide best practices include providing specialized tracks for subgroups of clients, such as the special needs population.<sup>234</sup> The MSOP does not differentiate treatment for special needs patients.<sup>235</sup> The Final Report of the Rule 706 Expert Report and Recommendations in connection to the *Karsjens* case found:

Interviews with MSOP treatment and supervisory staff indicated that the treatment goals and criteria for phase advancement used for clients in the Alternative Program are the same as those for anyone else in the MSOP . . . . [O]ne report stated, "[T]he client does not appear to understand the treatment, but he tries hard." In spite of this acknowledgement, there was no evidence in the records that staff took steps to modify the program so that clients with special needs could advance in treatment. This represents a fundamental failure to adequately address the treatment responsivity needs of these clients . . . . Some clients were simply unable to read the Matrix Factors pocket cards with which they had been provided, while others could read them but demonstrated a profound lack of understanding of the concepts.<sup>236</sup>

Because of the MSOP's failure to differentiate treatment programming, some patients in the Alternative Program may not

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230. *Id.* at 15. Additionally, the MSOP staff perceives symptoms of severe mental illness as attention seeking behaviors. *Id.* at 15–16.

231. *Id.* at 15.

232. *See id.* at 20.

233. *Id.*

234. *See id.* at 34.

235. *See id.* at 20–21.

236. *Id.* at 20–21.

ever be able to complete treatment because of their cognitive capacity limitations.<sup>237</sup>

2. *Failure to Provide the Appropriate Number of Hours of Treatment Per Week*

The MSOP does not provide its patients with enough time in treatment per week. The national average of the number of hours per week in SOCC programming is sixteen hours.<sup>238</sup> Programming includes educational, recreational and vocational, community meetings, individual therapy on a case-by-case basis, psychoeducational modules, and core groups.<sup>239</sup> The MSOP reported to the Sex Offender Civil Commitment Programs Network that its clients spent an average of eight to eleven hours in treatment per week.<sup>240</sup> In reality, clients in the MSOP spend an average of seven-and-a-half hours per week in treatment,<sup>241</sup> which is on the low end of the number of treatment hours provided to its patients compared to national best practices standards.<sup>242</sup>

3. *Failure to Conduct Valid, Annual Risk Assessments*

Minnesota does not conduct annual risk assessments on its patients to determine if patients meet the statutory requirements for continued treatment.<sup>243</sup> The vast majority of states with SOCC programs require regular risk assessments of their clients.<sup>244</sup> The MSOP was the only SOCC facility that reported to the Sex Offender Civil Commitment Programs Network that it conducts risk

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237. See *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1157 (D. Minn. 2015).

238. Expert Report and Recommendations, *supra* note 41, at 26.

239. See *id.* at 27 (citing SEX OFFENDER CIVIL COMMITMENT PROGRAMS NETWORK, SOCCPN ANNUAL SURVEY OF SEX OFFENDER CIVIL COMMITMENT PROGRAMS 28 (2014) [hereinafter SOCCPN ANNUAL SURVEY], [http://soccpn.org/images/SOCCPN\\_Annual\\_Survey\\_2014\\_revised.pdf](http://soccpn.org/images/SOCCPN_Annual_Survey_2014_revised.pdf)).

240. Expert Report and Recommendations, *supra* note 41, at 27.

241. *Id.* (citing OLA EVALUATION REPORT, *supra* note 178, at 62–63).

242. OLA EVALUATION REPORT, *supra* note 178, at 64.

243. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1159 (D. Minn. 2015); Expert Report and Recommendations, *supra* note 41, at 33.

244. *Karsjens*, 109 F. Supp. 3d at 1159; Expert Report and Recommendations, *supra* note 41, at 33. “In comparison to most other SOCC programs, in which periodic reviews of civil commitment status are conducted on a set periodic basis (e.g., annually), it is unusual and of great concern . . . that assessments of this sort are only completed at MSOP when a client is actually petitioning for release or movement to CPS.”). *Id.*

assessments only upon petition for a reduction in custody or release.<sup>245</sup> Until very recently, the MSOP has not conducted risk assessments on individuals until they petition for a reduction in custody.<sup>246</sup> As of June 2015, the only risk assessment the MSOP has ever conducted outside of the petitioning process was for a class member involved in the *Karsjens* litigation.<sup>247</sup>

The MSOP does not have a manual to standardize risk assessments.<sup>248</sup> In addition, risk assessors at the MSOP do not receive any formal training regarding the constitutional standards for commitment or discharge.<sup>249</sup> Minnesota's legal standard was not incorporated into the language of MSOP risk assessments until June 2014.<sup>250</sup>

#### 4. *Failure to Reduce Custody or Discharge Eligible Patients*

The MSOP's stated goal is "to treat and safely reintegrate committed individuals at the MSOP back into the community."<sup>251</sup> The program is different than others in the nation in its failure to reduce custody or discharge eligible patients due to the lack of treatment progression, the limited less-restrictive options available, the stark fact that some clients no longer benefit from treatment, and the complicated petitioning process for a reduction in custody.<sup>252</sup> The combination of each of these explains why the MSOP is arguably the least effective SOCC treatment program in the nation.

##### a. *Lack of Treatment Progression*

Clients have historically progressed through the treatment phases of the MSOP very slowly, if at all.<sup>253</sup> As of October 2012, the MSOP indicated a range of between six to nine years total in treatment for a model client.<sup>254</sup> In contrast, the nationwide average

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245. SOCCPN ANNUAL SURVEY, *supra* note 239, at 48.

246. *Karsjens*, 109 F. Supp. 3d at 1159.

247. *Id.*

248. *Id.* at 1159.

249. *Id.* at 1161.

250. *Id.*

251. *Id.* at 1153.

252. *Id.* at 1171–72.

253. *Id.* at 1157.

254. *Id.* at 1156.

of years spent in a SOCC program is about five to seven.<sup>255</sup> The MSOP's indication is not reality, though. Clients are held to "stringent and perhaps unrealistic expectations for phase movement."<sup>256</sup> To date, only five individuals have been provisionally discharged from the program.<sup>257</sup> Some clients in the Alternative Program have been in either Phase I or Phase II for over five years.<sup>258</sup> It has been only in recent years that clients have begun progressing through the phases of treatment, likely because of the pending *Karsjens* litigation.<sup>259</sup>

Outside evaluators and assessors have repeatedly voiced concerns about the lack of treatment progression at the MSOP<sup>260</sup>:

Every year since 2006, the Site Visit Auditors have voiced concerns in all of their evaluation reports to the MSOP about the disproportionately high number of committed individuals in Phase I compared to those in Phase III of the treatment program. In 2011 and 2012, the Site Visit Auditors reported that "[s]low movement through the program and the multiple required legislative steps for discharge in Minnesota hampers program effectiveness" and that "[t]he lack of clients 'getting out' can be demoralizing to clients and staff . . . ."<sup>261</sup>

Indeed, clients at the MSOP feel hopeless about their prospects of treatment progression and the ultimate goal of discharge.<sup>262</sup> During the *Karsjens* litigation, an MSOP client testified that he believes that "the only way to get out is to die."<sup>263</sup> One of the *Karsjens* Class Members, Harley Morris, died in the MSOP while on hospice care.<sup>264</sup>

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255. Expert Report and Recommendations, *supra* note 41, at 27.

256. *Id.* at 44; *see Karsjens*, 109 F. Supp. 3d at 1149.

257. *MSOP FAQs*, *supra* note 5 (click on "Has anyone ever been released from the program?"). Another individual was released and subsequently recommitted for noncompliance with the provisional discharge plan, although not for reoffending. *Id.*

258. *Karsjens*, 109 F. Supp. 3d at 1157. Arguably, this is due in part to the MSOP's failure to differentiate treatment programming. *See supra* Section II.C.1.

259. *See Karsjens*, 109 F. Supp. 3d at 1157.

260. *Id.*

261. *Id.* (alterations in original).

262. *Id.* at 1151.

263. *Id.*

264. *Id.* at 1153.

There are some clients in the MSOP who are at the wrong location for treatment<sup>265</sup> or are in the wrong phase of treatment.<sup>266</sup> MSOP clinicians testified during the *Karsjens* litigation that there are some clients who should have been allowed to progress to a later phase of treatment but were not permitted to do so.<sup>267</sup> This could be because the MSOP is the only SOCC program in the nation that uses the Matrix factors to determine phase progression, or because the MSOP has not implemented a system to determine if clinicians are consistently scoring clients based on the Matrix factors.<sup>268</sup>

Additionally, some clients have regressed in treatment phases due to programming changes the MSOP has implemented.<sup>269</sup> One MSOP client progressed to the final phase of treatment and was sent back to the newly implemented Phase I because the MSOP adopted its current three-phase model.<sup>270</sup> “[S]ome individuals have been confined at the MSOP for over twenty years and have completed the treatment program three times, but are currently only in Phase II due to subsequent treatment program changes.”<sup>271</sup> On top of that, MSOP clients do not know what they need to do and what scores they must maintain to progress to the next phase of treatment.<sup>272</sup>

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265. The MSOP has one female patient named Rhonda Bailey. Minnesota is one of only two states that house female patients with its male counterparts. Ms. Bailey is in a unit with twenty-two males. She was committed in 1993 and has been housed in the St. Peter facility since 2008. The MSOP Site Visit Auditors did not even realize she was housed there until 2014. Until recently, she had group therapy with men and was denied other treatments. The Rule 706 Expert Report recommended that Ms. Bailey be transferred or provisionally discharged from the MSOP to a supervised treatment facility and the *Karsjens* Plaintiffs motioned to have Ms. Bailey transferred to a different treatment facility. During the *Karsjens* proceedings, Dr. Haley Fox, Clinical Director of the MSOP St. Peter treatment facility, testified that “it would be optimal if Bailey were placed in a different facility.” Despite this, the MSOP has not taken any action to implement their recommendations. *Id.* at 1151.

266. *Id.* at 1154.

267. *See id.* at 1145.

268. *See id.* at 1156 (“The MSOP did not provide training to all staff on the Matrix factors until 2013 and 2014, and the MSOP did not provide any training on the Matrix scoring until 2014.”).

269. *Id.* at 1158.

270. *Id.*

271. *Id.*

272. *Id.*

*b. Limited Less-Restrictive Options Available*

The MCTA calls for less rights-restrictive options to a maximum-security facility for those in the MSOP, yet few to no such options exist.<sup>273</sup> Because all clients begin treatment in Phase I, and the only sites for Phase I treatment are the maximum-security facilities in Moose Lake and St. Peter,<sup>274</sup> they are not afforded the option available in the MCTA that permits the committing court to place clients in a less-restrictive alternative.<sup>275</sup> Even though many MSOP clinical staff members have stated that some clients in the program could be safely placed in less-restrictive alternatives,<sup>276</sup> the MSOP lacks alternatives such as halfway houses,<sup>277</sup> transitioning housing,<sup>278</sup> and adult foster care.<sup>279</sup>

For those who are actually able to progress to Phase III of the treatment program, clients often wait years at a high-security facility because there is not a bed open in the less-restrictive alternative to which they seek to be transferred.<sup>280</sup> The only less-restrictive alternative is Community Preparation Services (CPS),<sup>281</sup> which takes years to complete.<sup>282</sup> CPS houses a maximum of thirty-eight clients.<sup>283</sup> In addition to the thirty-eight beds at CPS, “the MSOP has less than twenty beds available for less-restrictive alternative placements” through contracted services similar to CPS.<sup>284</sup> Between CPS and the contracted services, there are a maximum of fifty-eight

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273. *Id.* at 1172; *see also* MINN. STAT. § 253D.07, subdiv. 3 (2014 & Supp. 2015).

274. *See supra* note 200 and accompanying text; *see also infra* note 409 and accompanying text.

275. MINN. STAT. § 253D.07, subdiv. 3; *Karsjens*, 109 F. Supp. 3d at 1172.

276. *Karsjens*, 109 F. Supp. 3d at 1152. This includes some of the sixty-seven juvenile-only offenders in the MSOP treatment program. *Id.*

277. *Id.*

278. *Id.* at 1152–53.

279. *Id.*

280. *See id.* at 1150; Expert Report and Recommendations, *supra* note 41, at 44.

281. *Karsjens*, 109 F. Supp. 3d at 1150. Programming includes “community-based treatment and maintenance, building pro-social support networks, participation in support groups, vocational training, budgeting and saving, volunteering, and demonstrating healthy, pro-social lifestyle choices. . . . While on campus, CPS clients participate in facility counts and are subject to room searches and drug testing.” MINN. DEP’T OF HUMAN SERVS., DHS-6316-ENG 1-14, MSOP PROGRAM REINTEGRATION 1 [hereinafter MSOP REINTEGRATION].

282. *See Karsjens*, 109 F. Supp. 3d at 1150.

283. *Id.*

284. *Id.* at 1153.

beds available for 726 MSOP clients.<sup>285</sup> This means that only 7.9% of individuals are permitted to participate in CPS or its contracted counterpart, and that the number of beds available is disproportionate to the population of those who are eligible for transfer to a less-restrictive facility.<sup>286</sup>

*c. Some Clients at the MSOP No Longer Benefit from Treatment*

Some MSOP clients no longer benefit from treatment.<sup>287</sup> Both physicians who testified during the *Karsjens* proceedings and Site Visit Auditors who visited the MSOP identified clients who had reached the maximum benefit of treatment and would no longer benefit from sex offender treatment in a high-security setting.<sup>288</sup> Unlike other states in the nation, the MSOP does not have a classification to express treatment completion.<sup>289</sup>

Other states have created delineated ends to their SOCC programs to signify completion of treatment.<sup>290</sup> Florida created language such as “maximum treatment benefit” in its programming to indicate that its clients have received the full extent of treatment services and no longer benefit from programming.<sup>291</sup> In addition, Wisconsin statutorily defined this objective as “significant progress in treatment” to denote that clients who were sufficiently successful in inpatient treatment be considered for less-restrictive supervised release into the community.<sup>292</sup>

*d. Difficult Petitioning Process for a Reduction in Custody*

Clients at the MSOP are permitted to petition for a reduction in custody to a less-restrictive facility or to be provisionally discharged.<sup>293</sup> The Executive Director of the MSOP may petition for a reduction of custody or a provisional discharge on behalf of a

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285. *Id.* at 1150, 1153. *See generally* MSOP FAQs, *supra* note 5.

286. *Karsjens*, 109 F. Supp. 3d at 1153, 1158.

287. *Id.* at 1158.

288. *See id.*

289. Expert Report and Recommendations, *supra* note 41, at 37.

290. *See id.*

291. *Id.*

292. *Id.*

293. *Karsjens*, 109 F. Supp. 3d at 1161 (citing MINN. STAT. § 253D.27, subdivs. 1–2 (2014 & Supp. 2015)).

client as well.<sup>294</sup> The first step in this process is to file a petition with the Special Review Board (SRB).<sup>295</sup>

MSOP clients must wait six months after their initial commitment to the MSOP to petition the SRB.<sup>296</sup> Clients who previously petitioned to the SRB and were denied a reduction in custody or a provisional discharge must wait until six months has passed since the previous decision until they are permitted to begin the petitioning process again.<sup>297</sup> The same time frame applies to the Executive Director petitioning on behalf of a client.<sup>298</sup>

After the client or the Executive Director petition to the SRB, the MSOP schedules a SRB hearing for the client.<sup>299</sup> The SRB consists of professionals appointed by the Commissioner of the Department of Human Services.<sup>300</sup> The SRB holds up to sixteen hearings per month,<sup>301</sup> which are held in the order they are received.<sup>302</sup> As of June 2014, there were 105 pending SRB petitions.<sup>303</sup> Petitions filed after January 2010 had an average wait time of 224.3 days from when the petition was filed to the date the SRB hearing took place.<sup>304</sup> After the hearing, the SRB must issue a report recommending or denying the client's petition for discharge or a reduction in custody within 30 days.<sup>305</sup>

If the SRB denies the client's petition, the client may petition to the Minnesota Supreme Court Appeals Panel (SCAP) for a rehearing.<sup>306</sup> The SCAP is the only body that has legal authority to grant provisional discharges or a reduction in custody.<sup>307</sup> The SCAP

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294. *Id.* (citing MINN. STAT. § 253D.27, subdvs. 1–2).

295. *Id.* (citing MINN. STAT. § 253D.27, subdvs. 1–2).

296. *Id.* (citing MINN. STAT. § 253D.27, subd. 2); *see also* Expert Report and Recommendations, *supra* note 41, at 38.

297. *Karsjens*, 109 F. Supp. 3d at 1161 (citing MINN. STAT. § 253D.27, subd. 2); *see also* Expert Report and Recommendations, *supra* note 41, at 38.

298. *See Karsjens*, 109 F. Supp. 3d at 1161 (citing MINN. STAT. § 253D.27, subd. 2).

299. *Id.* at 1163.

300. Expert Report and Recommendations, *supra* note 41, at 38.

301. *Karsjens*, 109 F. Supp. 3d at 1163.

302. *Id.* at 1161.

303. *Id.* at 1163; Expert Report and Recommendations, *supra* note 41, at 76.

304. Expert Report and Recommendations, *supra* note 41, at 76.

305. *Karsjens*, 109 F. Supp. 3d at 1161 (citing MINN. STAT. § 253D.27, subdvs. 3–4 (2014 & Supp. 2015)).

306. *Id.* at 1160; Expert Report and Recommendations, *supra* note 41, at 76.

307. *See Karsjens*, 109 F. Supp. 3d at 1161; Expert Report and Recommendations, *supra* note 41, at 76.

hearing is statutorily required to be held “within 180 days of the filing of the petition [with the SCAP] unless an extension is granted for good cause.”<sup>308</sup> If the client or the MSOP does not file for a rehearing with the SCAP within thirty days, the SCAP will adopt the SRB’s recommendations and the client must start the process over.<sup>309</sup>

Unlike the initial civil commitment hearings, the client has the burden of proof at the SCAP rehearing.<sup>310</sup> The client “must establish by a preponderance of the evidence that the transfer is appropriate.”<sup>311</sup> Additional difficulties MSOP clients face during the petitioning process are: discharge criteria that are more stringent and harder to prove than the commitment criteria;<sup>312</sup> the lag in time between a SCAP hearing and a SCAP decision;<sup>313</sup> the MSOP’s failure to provide legal assistance to those who cannot navigate the complex petitioning process;<sup>314</sup> and the reality that clients are required to petition to two boards, the SRB and the SCAP, even though the SRB cannot make any legal determinations regarding a client’s reduction in custody or provisional discharge.<sup>315</sup>

Another factor that makes the petitioning process burdensome is that the MSOP does not actively petition on behalf of clients even though current law permits it.<sup>316</sup> Clients, rather than the MSOP, are

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308. *Karsjens*, 109 F. Supp. 3d at 1161 (citing MINN. STAT. § 253D.28, subdiv. 1(b)).

309. *See id.* at 1161–62.

310. *Id.* at 1162 (citing MINN. STAT. § 253D.28, subdiv. 2(d)); Expert Report and Recommendations, *supra* note 41, at 76.

311. *Karsjens*, 109 F. Supp. 3d at 1162 (citing MINN. STAT. 253D.28, subdiv. 2(e)).

312. *Id.*; Expert Report and Recommendations, *supra* note 41, at 76.

313. Expert Report and Recommendations, *supra* note 41, at 76; *see also Karsjens*, 109 F. Supp. 3d at 1163; Expert Report and Recommendations, *supra* note 41, at 6.

314. Expert Report and Recommendations, *supra* note 41, at 76, 78.

315. *Karsjens*, 109 F. Supp. 3d at 1161; Expert Report and Recommendations, *supra* note 41, at 38, 76.

316. Expert Report and Recommendations, *supra* note 41, at 78.

Taking an active role in petitioning is important for several reasons: (1) some clients may not have the cognitive ability to understand the discharge/petitioning process; (2) current mental health practices require practitioners to ensure clients are treated in the least restrictive environment; (3) MSOP administration has an ethical obligation to release individuals who no longer meet the criteria for SOCC in order to ensure that client civil liberties are protected; and (4) research

burdened with the responsibility of petitioning for release rather than the MSOP petitioning for the release of individuals who are eligible for a reduction in custody or for discharge.<sup>317</sup> Although the MSOP does not play an active role in the petitioning process, it has a strong influence on the process.<sup>318</sup> Very often, the SRB and SCAP will not grant a decrease in custody or a provisional discharge unless the MSOP supports it.<sup>319</sup>

Minnesota's system for reduction in custody differs from that of other SOCC states:

Instead of a bifurcated reduction in custody process, most states require clients to be evaluated on an annual or every two years basis to determine whether clients continue to meet the commitment criteria. A hearing is then held, in which the state typically has the burden to show (usually by clear and convincing evidence) that the client continues to require civil commitment. These hearings are held within reasonable time-frames of the annual reviews as to ensure that clients not meeting commitment criteria are not detained longer than necessary.<sup>320</sup>

In addition, other SOCC programs do not have an SRB or equivalent, and instead have one body for judicial review, such as the SCAP.<sup>321</sup>

*e. The MSOP Lags Behind Other SOCC Treatment Programs in the Nation*

The MSOP is very different from other SOCC treatment programs in the nation by its failure to reduce custody or discharge eligible patients, the limited availability of less-restrictive options, its

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indicates that the intensity and targets of interventions should match the risk and needs of clients—allowing clients to receive too much treatment for too long may actually jeopardize public safety.

*Id.* at 69.

317. *See id.* at 48, 69, 76.

318. *See Karsjens*, 109 F. Supp. 3d at 1162.

319. *See id.*; *see also* Expert Report and Recommendations, *supra* note 41, at 37–38 (“In order for a client at MSOP to be judged as ready for possible release, the client’s clinical team must agree that he/she has achieved consistent mastery on the Matrix Factors, coding of which previous reviewers and evaluators have found to be unreliable.”).

320. Expert Report and Recommendations, *supra* note 41, at 76.

321. *Id.* at 73.

failure to do anything for clients who no longer benefit from treatment, and the difficult petitioning process for a reduction in custody.<sup>322</sup> These deficiencies result in a number of alarming statistics.<sup>323</sup>

First, Minnesota boasts “the highest per-capita population of civilly committed sex offenders in the nation.”<sup>324</sup> Currently, the MSOP has 726 civilly committed patients,<sup>325</sup> which is a rate of approximately 129.4 civilly committed individuals per million residents.<sup>326</sup> Comparatively, Wisconsin, which began its system in 1994 very close to the time when the MSOP began, currently has a population of 362 clients.<sup>327</sup> Wisconsin’s overall commitment rate is approximately 53.7 commitments per million residents, North Dakota’s rate is 77.8 per million, California’s and New York’s rates are 15 per million, and Florida’s rate is 29 per million.<sup>328</sup> As of 2014, Minnesota’s clients made up approximately 15% of the nation’s population of civilly committed sex offenders.<sup>329</sup>

Second, MSOP clients spend more years on average in civil commitment.<sup>330</sup> Although the number of years spent in SOCC treatment programs varies nationwide depending on the program, the average stay is five to seven years.<sup>331</sup> As of October 2012, the phase progression timeline for clients in the MSOP ranged from six to nine years for full completion of Phases I through III.<sup>332</sup> In reality, civil commitment to the MSOP takes much longer to

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322. See *supra* Section III.C.4.e.

323. See *supra* Section III.C.4.e.

324. *Karsjens*, 109 F. Supp. 3d at 1148; see also Expert Report and Recommendations, *supra* note 41, at 74–75 (noting that this is “a number that, per capita, is significantly higher than any other SOCC state”).

325. *MSOP FAQs*, *supra* note 5; see also *Karsjens*, 109 F. Supp. 3d at 1148 (“The state projects that the number of civilly committed sex offenders will grow to 1215 by 2022.”).

326. Cf. Expert Report and Recommendations, *supra* note 41, at 75.

327. *Id.* at 89–90.

328. *Id.* at 75 (citing SOCCPN ANNUAL SURVEY, *supra* note 239, at 6).

329. Of the seventeen programs that responded to the 2014 SOCCPN Survey, Minnesota’s program had the highest overall number of civilly committed individuals. At the time, Minnesota had 697 of the 4658 total sex offenders civilly committed nationwide. SOCCPN ANNUAL SURVEY, *supra* note 239, at 6–7.

330. Compare *Karsjens*, 109 F. Supp. 3d at 1156, with Expert Report and Recommendations, *supra* note 41, at 27.

331. Expert Report and Recommendations, *supra* note 41, at 27.

332. *Karsjens*, 109 F. Supp. 3d at 1156.

complete than the MSOP's stated timeframe. Some clients in the MSOP have been civilly committed for more than twenty years.<sup>333</sup>

Third, the MSOP has the lowest discharge rate of any SOCC program in the nation.<sup>334</sup> To date, the MSOP has conditionally discharged five individuals and has not unconditionally discharged anyone.<sup>335</sup> Unlike Minnesota, Wisconsin has unconditionally discharged 118 individuals<sup>336</sup> and has conditionally released around 135 individuals.<sup>337</sup> There are currently 39 individuals on supervised release in Wisconsin—the others have been fully discharged.<sup>338</sup> New York has unconditionally discharged 30 individuals<sup>339</sup> and has conditionally released 185 individuals,<sup>340</sup> while Washington has conditionally released 70 individuals and has unconditionally discharged 40 people.<sup>341</sup>

#### IV. THE *KARSJENS* CASE

While SOCC has a place in the spectrum of options for combatting sexual violence, Minnesota has failed to provide a system that protects the rights of individuals to receive constitutional treatment and to be free from an overreaching program that captures many but releases none. The *Karsjens* case provides an opportunity to reform our policies—and to bring SOCC back to the size and parameters that it should be to be an effective tool.

##### A. *Background*

There have been many challenges to Minnesota's Sex Offender Civil Commitment laws.<sup>342</sup> In 2012, Judge Davis of the U.S. District Court for the District of Minnesota stayed suits that

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333. *Id.* at 1157; *see also* Expert Report and Recommendations, *supra* note 41, at 47 (“Many clients have been in treatment for 15 years or longer.”).

334. *Karsjens*, 109 F. Supp. 3d at 1147.

335. *E.g.*, *MSOP FAQs*, *supra* note 5; Expert Report and Recommendations, *supra* note 41, at 65; *see also, e.g.*, *Karsjens*, 109 F. Supp. 3d at 1147.

336. Expert Report and Recommendations, *supra* note 41, at 67.

337. *Karsjens*, 109 F. Supp. 3d at 1147.

338. *See* Expert Report and Recommendations, *supra* note 41, at 94.

339. *Karsjens*, 109 F. Supp. 3d at 1147; SOCCPN ANNUAL SURVEY, *supra* note 239, at 14.

340. SOCCPN ANNUAL SURVEY, *supra* note 239, at 13.

341. *Id.* at 13–14.

342. *E.g.*, Janus & Brandt, *supra* note 110.

posed constitutional questions about Minnesota's civil commitment of sex offenders.<sup>343</sup> Shortly thereafter, the firm Gustafson Gluek agreed to represent the MSOP patients pro bono.<sup>344</sup>

The named plaintiffs in the *Karsjens* case are fourteen men currently housed in the MSOP.<sup>345</sup> After Judge Frank certified the class, all clients currently housed at the MSOP were incorporated.<sup>346</sup> The plaintiffs filed suit against Minnesota Department of Human Services personnel in their official capacities.<sup>347</sup> A key point about the *Karsjens* case and its implications is that this case is about the entire system in Minnesota—a much broader challenge than the kinds of individual relief that Minnesota courts have previously addressed in the context of SOCC litigation.

“The court . . . oversaw extensive attempted settlement negotiations,” which were to no avail.<sup>348</sup> It also “denied the majority of a motion to dismiss, [and] appointed an expert panel to review client case files.”<sup>349</sup> Finally, the court ordered that the Minnesota Department of Human Services Commissioner, Lucinda Jesson, create a task force of national experts and stakeholders in the case,<sup>350</sup> which included Professor Eric Janus of Mitchell Hamline School of Law,<sup>351</sup> a county attorney,<sup>352</sup> and a former chief justice of the Minnesota Supreme Court,<sup>353</sup> amongst others. The task force's charge was to:

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343. *Karsjens v. Jesson*, 283 F.R.D. 514, 516 (D. Minn. 2012); Janus & Brandt, *supra* note 110.

344. Janus & Brandt, *supra* note 110.

345. *Karsjens v. Jesson*, 6 F. Supp. 3d 916, 922 (D. Minn. 2014).

346. *Id.* at 924 (citing *Karsjens*, 283 F.R.D. at 520); see Janus & Brandt, *supra* note 110.

347. *Karsjens*, 6 F. Supp. 3d at 916.

348. See Janus & Brandt, *supra* note 110.

349. *Id.*

350. Chris Serres, *Backlash Grows Against Sex Offender Program*, STAR TRIB. (Nov. 18, 2014), <http://www.startribune.com/experts-call-for-expedited-review-of-minn-sex-offender-cases/283057251/>; Janus & Brandt, *supra* note 110; see also *Karsjens*, 6 F. Supp. 3d at 924.

351. See Chris Serres, *Sex Offenders Demand Broad Reforms of Minnesota's Troubled Treatment Program*, STAR TRIB. (Aug. 19, 2015), <http://www.startribune.com/sex-offenders-demand-broad-reforms-of-minnesota-s-troubled-treatment-program/322353341>.

352. See Ostrem, *supra* note 177, at 698.

353. See Eric Magnuson, *Former Chief Justice of Minnesota, Selected for Key Role in Sex Offender Lawsuit*, STAR TRIB. (July 24, 2015), <http://www.startribune.com/former-minnesota-supreme-court-chief-magnuson-picked-for-key-role-in-sex>

“examine and provide recommended legislative proposals to the Commissioner” on each of the following topics: (1) “[t]he civil commitment and referral process for sex offenders”; (2) “[SOCC] options that are less restrictive than placement in a secure treatment facility”; and (3) “[t]he standards and processes for the reduction in custody for civilly committed sex offenders.”<sup>354</sup>

### B. *Arguments*

It is important to understand Defendants’ and Plaintiffs’ arguments for and against the constitutionality of the MCTA and its relation to the MSOP in order to understand concerns at stake for both parties. This case encompasses the dilemma between the questions of constitutionality and the State’s interests in public safety and the status quo of what has been the MSOP for nearly twenty years. The constitutional question of the case was, with over 700 men (and one woman) civilly committed, and only five people having been provisionally discharged in the previous twenty years, was the purpose of Minnesota’s commitment of sex offenders punitive or legitimate?<sup>355</sup>

#### 1. *Plaintiffs’ Arguments*

Plaintiffs answered this constitutional question by arguing that the very statistics of the lack of release were a guiding factor of the constitutionality of the MCTA:

Of course, the key fact that overwhelms all others is that “no one ever gets out.” In the more than [twenty] years since the current statute was enacted, not one single person has been successfully treated for the purpose of “rendering further supervision unnecessary” (i.e. fully discharged from the program) which is the primary requirement of the statute . . . . That is the key issue . . . because this statute and the program that applies it delays,

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-offender-lawsuit/318368841. The Honorable Eric J. Magnuson wrote the task force’s final report and was a part of the task force. *See* TASK FORCE FINAL REPORT, *supra* note 184, at 1.

354. *Karsjens*, 6 F. Supp. 3d at 924. The task force issued its final recommendations on December 3, 2012. *See* TASK FORCE FINAL REPORT, *supra* note 184, at 1.

355. *Janus & Brandt*, *supra* note 110; *see also Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1144 (D. Minn. 2015).

and therefore deprives, Class Members of their liberty . . . a fundamental right under the United States Constitution.<sup>356</sup>

More specifically related to Plaintiffs' facial challenge was evidence offered that regular forensic risk assessments are necessary to determine whether Class Members continue to meet requirements for continued treatment.<sup>357</sup> The statute does not contain a provision requiring annual risk assessments.<sup>358</sup> The only formal risk assessment that is done at MSOP occurs as a part of the petitioning for release process.<sup>359</sup> Because there is no annual risk assessment, the current commitment status of hundreds of Plaintiffs has never been reviewed.<sup>360</sup> Testimony at the trial also established that MSOP knows there are Plaintiffs who meet the reduction-in-custody criteria or no longer meet commitment criteria but who remain confined in the program.<sup>361</sup>

Plaintiffs argued that there is no judicial bypass process to the statutory reduction-in-custody process.<sup>362</sup> There is a single process to obtain transfer, provisional release, or full discharge, which leads to issues with due process, as some clients are committed who no longer should be.<sup>363</sup> The process currently in place is fatally flawed and unconstitutionally implemented.<sup>364</sup> Plaintiffs believe that the process takes too long and denies clients services necessary to navigate the process.<sup>365</sup>

Finally, the Plaintiffs argued that in order to pass constitutional muster by living up to the statutorily stated purpose of commitment, the statute must "require the MSOP to [take affirmative action and] file a petition on behalf of a patient [particularly given the diminished capacity of the Class Members]

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356. *Karsjens*, 109 F. Supp. 3d 1139.

357. *Id.*

358. *Id.* See generally MINN. STAT. § 253D (2014).

359. *Karsjens*, 109 F. Supp. 3d 1139. Most other states have at least annual forensic evaluations of patients, completed to continually assess their treatment needs and readiness for release. OLA EVALUATION REPORT, *supra* note 178, at 85.

360. See Janus, *supra* note 33, at 5.

361. *Id.* at 6.

362. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 10, *Karsjens*, 109 F. Supp. 3d 1139 (No. 11-cv-03659), 2015 WL 3792764.

363. See *id.* at 22–23.

364. *Id.*

365. *Id.*

any time it has a [substantial] reason to believe that the patient meets the criteria for a reduction in custody or no longer meets the commitment criteria.”<sup>366</sup>

In addition, the American Civil Liberties Union of Minnesota and Eric Janus filed an amicus brief in support of Plaintiffs.<sup>367</sup> Their focus on the implementation of the scheme provides authority for the court to make a ruling of facial unconstitutionality.<sup>368</sup> The focus of their argument was whether MSOP is a “bona fide civil commitment program.”<sup>369</sup> They argued that in order to be a bona fide program, the State’s purpose may not be the forbidden purpose of punishment.<sup>370</sup> “The legitimacy of the criminal law requires that its distinctive purposes—to punish and deter—be forbidden to the [S]tate outside of the criminal law. This is the essence of substantive due process.”<sup>371</sup> The amicus brief highlighted for the court that this situation provides a unique and important opportunity for system-wide reform—not just individual relief.<sup>372</sup> The court “has before it two decades of executive and judicial implementation, and legislative acquiesce.”<sup>373</sup> Here, according to the amici brief, the court can look at the “true purpose and character of the MSOP scheme to determine whether the MSOP is a legitimate civil commitment scheme, or is, instead, an elaborate pretext for imposing punishment without the constraints of the criminal justice system.”<sup>374</sup>

## 2. Defendants’ Arguments

Defendants asserted that the MCTA is not unconstitutional because of the holding in an Eighth Circuit case, *Strutton v. Meade*.<sup>375</sup> In that case, the court ruled that individuals in Missouri’s sex offender program did not have a “fundamental right to treatment” because the “professional standards” rubric from

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366. *Id.* at 23.

367. See Brief of Amici Curiae Eric S. Janus and ACLU-MN, *Karsjens*, 109 F. Supp. 3d 1139 (No. 11-cv-03659).

368. *Id.* at 4, 21.

369. *Id.* at 12, 31.

370. *Id.* at 5.

371. *Id.* at 6.

372. See *id.* at 24.

373. *Id.* at 11.

374. *Id.* at 11–12.

375. 668 F.3d 549 (8th Cir. 2012).

*Youngberg v. Romeo* did not apply.<sup>376</sup> Instead, “a ‘shock the conscience’ standard applies for judgment” regarding any “right to treatment claims.”<sup>377</sup> This means that any lack of treatment faced by MSOP patients must be “so arbitrary or egregious as to shock the conscience.”<sup>378</sup> Because of the holding in *Strutton*, Defendants argued that the MCTA does not shock the conscience to a point of unconstitutionality.<sup>379</sup>

### C. Holding

The Karsjens trial began in February of 2015. After six weeks of testimony and arguments, Judge Frank found the MSOP both facially unconstitutional and unconstitutional in its implementation for twelve specific deficiencies in the MCTA itself and its implementation via the MSOP.<sup>380</sup>

#### 1. *Facially Unconstitutional*

On June 15, 2015, Judge Frank ruled that the MCTA, codified as Minnesota Statutes section 253D, is facially unconstitutional.<sup>381</sup> Under the Due Process Clause of the Fourteenth Amendment, substantive due process applies to the Plaintiffs’ claim because the MSOP “interferes with the rights implicit in the concept of ordered liberty.”<sup>382</sup> Substantive due process requires civilly committed sex offenders must be “mentally ill *and* pose a substantial danger to the public as a result of that mental illness.”<sup>383</sup> The court applied strict scrutiny because “Plaintiffs’ fundamental right to live free of

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376. ERIC JANUS, MINN. DEP’T OF HUMAN SERVS., SUMMARY OF POINTS AND AUTHORITIES UNDERLYING THE CLAIMS MADE IN *KARSJENS* (2012), <https://mn.gov/dhs/images/Points-and-authorities.pdf>.

377. *Id.*

378. *Strutton*, 668 F.3d at 558.

379. See Defendants’ Memorandum in Support of Their Motion for Summary Judgment at 44, *Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015) (No. 11-cv-03659), 2014 WL 9910329.

380. E.g. *Karsjens*, 109 F. Supp. 3d at 1173–74; Chris Serres, *Minnesota Sex Offender Program Is Ruled Unconstitutional*, STAR TRIB. (June 17, 2015, 11:43PM), <http://www.startribune.com/judge-expected-to-rule-today-in-lawsuit-challenging-minnesota-s-sex-offender-program/307884871>.

381. *Karsjens*, 109 F. Supp. 3d at 1139.

382. *Id.* at 1166 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

383. *Id.* (emphasis added) (first citing *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992); then citing *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995)).

physical restraint is constrained by the curtailment of their liberty.”<sup>384</sup> The court concluded that the state failed to meet its burden to show that the MCTA is narrowly tailored to achieve the state’s compelling governmental interest in protecting the public.<sup>385</sup>

Judge Frank found the MCTA to be facially unconstitutional for six reasons.<sup>386</sup> First, the MCTA is not narrowly tailored because it does not require periodic assessments to determine if MSOP committees satisfy the statutory requirements for civil commitment.<sup>387</sup> For example, in *Kansas v. Hendricks*, the Supreme Court cited Kansas’ yearly risk assessments required under the Kansas Sexually Violent Predator Act in upholding its constitutionality.<sup>388</sup> Kansas used yearly risk assessments to determine if committees continue to pose a danger to the public, have a mental abnormality, and need continued treatment for a sexual disorder.<sup>389</sup> The MCTA, however, does not require periodic risk assessments to determine if committees continue to satisfy the statutory requirements of the MCTA.<sup>390</sup>

Because the MCTA does not require periodic risk assessments, it cannot determine if MSOP inmates continue to be mentally ill, which, according to the statute, influences whether the individual is likely to reoffend (creating a danger to the public).<sup>391</sup> Substantive due process requires that a civilly committed individual must be mentally ill and pose a substantial danger to the public as the result of that mental illness.<sup>392</sup> The MCTA is therefore not narrowly tailored and violates substantive due process.

Second, the MCTA is facially unconstitutional “because it fails to provide a judicial bypass mechanism to the statutory reduction in custody process.”<sup>393</sup> MSOP civil committees are only allowed to be provisionally or fully discharged by the SRB and SCAP.<sup>394</sup> As

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384. *Id.* at 1167 (citations omitted).

385. *Id.* at 1168.

386. *Id.* at 1168–70.

387. *Id.* at 1168; *supra* Section III.C.3.

388. 521 U.S. 346, 363–64 (1997).

389. *Id.*

390. *Karsjens*, 109 F. Supp. 3d at 1159; *supra* Section III.C.3. This creates questions of constitutionality under *Hendricks*. See 521 U.S. at 363–64.

391. See *supra* Section III.C.4.d.

392. *Karsjens*, 109 F. Supp. 3d at 1159 (first citing *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992); then citing *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995)).

393. *Karsjens*, 109 F. Supp. 3d at 1168–69.

394. MINN. STAT. §§ 253B.18, subdiv. 4c, 253B.19; *Karsjens*, 109 F. Supp. 3d at

previously noted, the process of appealing to the SRB and SCAP is long and cumbersome<sup>395</sup> and frequently takes more than five years.<sup>396</sup>

A judicial bypass option, on the other hand, would permit MSOP patients to be heard more rapidly. Additionally, MSOP patients are not afforded counsel to help them wade the waters of the SRB/SCAP appeals process.<sup>397</sup> Judge Frank ruled that because the MCTA does not include an emergency mechanism to bypass the lengthy SRB/SCAP process, the law is facially unconstitutional because patients are not heard in a “reasonable time.”<sup>398</sup> Because the SRB/SCAP appeals process may take many years, during which time a civilly committed individual may no longer be mentally ill or dangerous yet still deprived of their liberty,<sup>399</sup> the MCTA is facially unconstitutional because it does not provide for a judicial bypass option.<sup>400</sup>

Third, the MCTA is facially unconstitutional because the statutory criteria for release are more stringent than the criteria for commitment.<sup>401</sup> The MCTA requires the offender be “highly likely to reoffend” when committed.<sup>402</sup> Conversely, the release criteria establish a much higher standard—they require the individual to “no longer be dangerous.”<sup>403</sup> If an individual is committed under a statutory standard, that person cannot be committed if they no longer meet that statutory standard without violating substantive due process.<sup>404</sup> Because it is possible for an individual to no longer be “highly likely to reoffend” yet not meet the indisputable standard of “no longer be[ing] dangerous,” the MCTA violates substantive due process, is facially unconstitutional, and results in a punitive effect contrary to the purpose of civil commitment.<sup>405</sup>

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1168.

395. *Karsjens*, 109 F. Supp. 3d at 1168; *see supra* Section III.C.4.d.

396. *Karsjens*, 109 F. Supp. 3d at 1163; *see supra* Section III.C.4.d.

397. *Karsjens*, 109 F. Supp. 3d at 1163; *see supra* Section III.C.4.d.

398. *Karsjens*, 109 F. Supp. 3d at 1168–69; *see supra* Section III.C.4.d.

399. *Karsjens*, 109 F. Supp. 3d at 1163, 1168–69; *see supra* Section III.C.4.d.

400. *Karsjens*, 109 F. Supp. 3d at 1168–69.

401. *Id.* at 1169; *see also* Ostrem, *supra* note 177, at 698 (calling the MSOP “a system with a pretty robust entry point and no realistic exit”).

402. *Karsjens*, 109 F. Supp. 3d at 1169.

403. *Id.*

404. *See id.*

405. *Id.*

Fourth, the MCTA is facially unconstitutional because the SRB/SCAP appeals process requires the offender to maintain the burden in proving that he or she is no longer dangerous or needs treatment for a mental disorder.<sup>406</sup> When a fundamental right is involved, laws are subject to strict scrutiny under Fourteenth Amendment substantive due process, which requires the state to bear the burden of proving that the law is narrowly tailored to serve a compelling state interest.<sup>407</sup> Judge Frank concluded the burden of proof for maintaining commitment should remain on the state from the initial commitment proceedings through the appeals process.<sup>408</sup> The state is required to “demonstrat[e] the justification for continued confinement by clear and convincing evidence . . .” at all times instead of putting the burden on MSOP patients, as the MCTA does.<sup>409</sup> Because the MCTA requires patients to demonstrate they are no longer mentally ill or are no longer a danger to the public, the MCTA is not narrowly tailored and results in a punitive effect contrary to the goal of civil commitment.<sup>410</sup>

Fifth, the MCTA is facially unconstitutional because it provides for less-rights-restrictive treatment centers, yet no such places exist.<sup>411</sup> MSOP has but three facilities: the high security center in Moose Lake, MN; an additional high security center in St. Peter, MN; and the CPS in St. Peter, MN.<sup>412</sup>

The only less-rights-restrictive option available to MSOP patients in either of the two high security centers is the CPS, which is deficient in its capacity to house the number of individuals who

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406. *Id.* For example, during a SCAP rehearing, “[t]he petitioning party seeking discharge or provisional discharge bears the burden of going forward with the evidence . . . to show that the person is entitled to the requested relief.” MINN. STAT. § 253D.28, subdiv. 2(d) (2014 & Supp. 2015).

407. *Karsjens*, 109 F. Supp. 3d at 1166–67 (first citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations and quotations omitted) (“[T]he Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”); then citing *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (internal citations omitted) (noting that, where legislation infringes upon a fundamental right, such legislation “must survive strict scrutiny—the law must be ‘narrowly tailored to serve a compelling state interest’”).

408. *Karsjens*, 109 F. Supp. 3d at 1169.

409. *Id.*

410. *Id.*

411. *Id.*; *see also supra* Section III.C.4.b.

412. *Karsjens*, 109 F. Supp. 3d at 1150; JOHNSTON, *supra* note 58.

likely qualify for transfer to CPS.<sup>413</sup> This certainly does not mean that all MSOP patients should be transferred to less-restrictive facilities; it merely means that the number of beds available should be equivalent to the population of those who are eligible for transfer to a less-restrictive facility. Moreover, the only available less-rights-restrictive alternative, CPS, is located on the same campus as the high security center in St. Peter, MN, and the two are barely separated by barbed wire fences.<sup>414</sup> In addition, CPS programming takes years to complete, and because of the limited number of beds available, some committed offenders wait for years at a time in a unit through which they have previously progressed because there is not a bed open in the less-restrictive building to which they seek to be transferred.<sup>415</sup>

Furthermore, the MCTA requires that individual patients petitioning for provisional discharge to a less-rights-restrictive facility show that they should be transferred to a “facility [that] best meet[s] [their] needs.”<sup>416</sup> This is impossible because only one less-rights-restrictive treatment facility, CPS, exists, and the one that does exist houses only fifty-eight beds.<sup>417</sup> Because of this, the MCTA violates substantive due process, resulting in a punitive effect for civilly committed sex offenders.<sup>418</sup>

Finally, the MCTA is facially unconstitutional because it lacks affirmative action by the state to petition for a committed offender’s release if the offender no longer satisfies the statutory requirements for civil commitment in the MSOP.<sup>419</sup> Despite knowledge that some of its patients no longer satisfy the statutory requirement for civil commitment, “the MSOP has never petitioned on behalf of a committed individual for full discharge.”<sup>420</sup> The MSOP has petitioned on behalf of only seven

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413. See *Karsjens*, 109 F. Supp. 3d at 1150.

414. MSOP REINTEGRATION, *supra* note 281, at 1; see also Briana Bierschbach, *The Minnesota Sex Offender Program, Explained*, MINN. POST (July 22, 2014), <https://www.minnpost.com/politics-policy/2014/07/minnesota-sex-offender-program-explained>.

415. See *Karsjens*, 109 F. Supp. 3d at 1150.

416. MINN. STAT. § 253D.29, subdiv. 1 (2014); *Karsjens*, 109 F. Supp. 3d at 1169; see also *supra* Section III.C.4.b.

417. *Supra* Section III.C.4.b.

418. *Karsjens*, 109 F. Supp. 3d at 1169.

419. *Id.*; see also *supra* Section III.C.4.b.

420. *Karsjens*, 109 F. Supp. 3d at 1164; see also *supra* Section III.C.4.b.

patients for partial discharge.<sup>421</sup> Instead, the vast majority of committed offenders must initiate their own proceedings.<sup>422</sup> Therefore, the MCTA is not narrowly tailored to meet the state's compelling interest because it does not require the MSOP to take affirmative steps to initiate the process for a reduction in custody of civilly committed individuals.<sup>423</sup> Judge Frank called this a "fatal flaw" of the statute—it results in a punitive effect, which is "contrary to the purpose of civil commitment."<sup>424</sup>

Judge Frank's ruling in *Karsjens v. Jesson* cited six reasons why the MCTA is facially unconstitutional.<sup>425</sup> Arguably, the Minnesota Legislature was hasty in its revision of the MCTA in response to the public outcry and significant media attention Linehan's case garnered when the Minnesota Supreme Court ruled in *Linehan I* that he did not meet the statutory requirement for civil commitment under the *Pearson* test.<sup>426</sup> Some of the current defects are in the text itself as written, and some defects are the result of the Minnesota Legislature's failure to include certain provisions in the text of the statute. Each reason demonstrates a fault in the MCTA that desperately needs to be repaired in order to mend the broken system that is the MSOP.

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421. See *Karsjens*, 109 F. Supp. 3d at 1164; see also *supra* Section III.C.4.b. The MSOP petitioned on behalf of six individuals who were supposed to be provisionally released, but whose provisional release never happened, because the facility they were scheduled to be provisionally discharged to was the Cambridge facility, which was never opened. *Karsjens*, 109 F. Supp. 3d at 1164. Governor Mark Dayton halted Cambridge's launch in November of 2013. *Id.* at 1152. In a letter to the Minnesota Department of Human Services Director, Lucinda Jesson, Governor Dayton directed her

to suspend DHS' plans to transfer any sex offenders to a less restrictive facility such as Cambridge until: (1) the Task Force issued its findings and recommendations; (2) the legislature had the opportunity to review existing statutes and make any necessary revisions; and (3) the legislature and the Governor's Administration have agreed to and provided sufficient funding for the additional facilities, programs, and staff necessary for the program's successful implementation.

*Id.* The six individuals were never provisionally discharged, and the Cambridge facility never opened. *Id.* at 1164. So, in reality, the MSOP has *successfully* petitioned for the conditional release of a single patient. See *id.*

422. *Karsjens*, 109 F. Supp. 3d at 1164.

423. *Id.* at 1169.

424. *Id.* at 1168.

425. *Id.* at 1168–70.

426. *Supra* notes 140–41, 145 and accompanying text.

## 2. *Unconstitutional as Applied*

In addition to the number of reasons the MCTA is facially unconstitutional, Judge Frank ruled the statute is unconstitutional as applied (in implementation)<sup>427</sup> for an additional six reasons because “Defendants apply the statute in a manner that results in Plaintiffs being confined to the MSOP beyond such time as they either meet the statutory reduction in custody criteria or no longer satisfy the constitutional threshold for continued commitment.”<sup>428</sup>

First, the MCTA is unconstitutional in its implementation because “Defendants do not conduct periodic risk assessments of civilly committed individuals at the MSOP.”<sup>429</sup> As previously stated, this presents serious issues of constitutionality.<sup>430</sup> During the trial, various MSOP psychologists and defendants stated they were unsure if all of the civilly committed offenders met the statutory criteria for commitment.<sup>431</sup> Although the MCTA does not require periodic risk assessments, the statute also does not prohibit them.<sup>432</sup> Periodic risk assessments are generally valid for only one year,<sup>433</sup> and many offenders have not had a risk assessment completed since their initial proceedings to determine if they continue to be mentally ill and pose a substantial danger to the public because of their mental illness.

In the only case on which the Supreme Court has ruled regarding the conditions of sex offender confinement, it stated that Washington State must “implement a treatment program for residents containing elements required by prevailing professional standards.”<sup>434</sup> As previously discussed, the vast majority of states with SOCC programs conduct annual risk assessments on all offender patients.<sup>435</sup> The American Psychological Association cites annual

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427. See *supra* Section III.A (discussing the change in the implementation of the MCTA because of the case of Alfonso Rodriguez, Jr.).

428. *Karsjens*, 109 F. Supp. 3d at 1170.

429. *Id.*; *supra* notes 384, 387–89 and accompanying text.

430. Compare *supra* Section II.A.1, with *supra* Section II.A.2.

431. *Karsjens*, 109 F. Supp. 3d, at 1159, 1170.

432. *Id.*

433. *Id.* at 1159.

434. *Seling v. Young*, 531 U.S. 250, 266 (2001). Although dicta, this quote is a helpful guidepost in helping states develop constitutionally sound practices in their civil commitment of sex offenders.

435. *Supra* note 244 and accompanying text; see also, e.g., ARIZ. REV. STAT. ANN. § 36-3708 (West, Westlaw through 2015); IOWA CODE ANN. § 229A.8 (West, Westlaw through 2015); KAN. STAT. ANN. § 59-29a08 (West, Westlaw through 2015); *Karsjens*,

psychiatric risk assessments of institutionalized individuals as a best practice for practitioners—a “prevailing professional standard.” Minnesota does not conduct the annual risk assessments<sup>436</sup> as required among the prevailing standards of other states’ civil commitment programs as well as the American Psychological Association prevailing professional standards.

Additionally, psychological standards require the *differentiated* risk assessment of individuals based on the group or groups to which they belong.<sup>437</sup> For example, the MSOP uses the same risk assessment tools for males, its one female patient, adolescents, and individuals with developmental disabilities.<sup>438</sup> Arguably, the MSOP is required to conduct annual risk assessments that mimic the majority of other states because it is the prevailing professional standard outlined in *Seling v. Young*.<sup>439</sup> Because the MSOP does not do so, it results in a punitive effect, which is contrary to the goal of civil commitment and unconstitutional.<sup>440</sup>

Second, the MCTA is unconstitutional in its implementation because the MSOP has not been conducting the risk assessments “in a constitutional manner.”<sup>441</sup> Not only have risk assessors not received any formal training on the MCTA legal standard that must be met for an individual’s continued commitment, but also, they have not been applying the correct legal standard under the MCTA.<sup>442</sup> The correct legal standard is the *Call* standard, which requires that a person be “confined for only so long as he or she

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109 F. Supp. 3d at 1159 (“As of 2011, Minnesota and Massachusetts were the only two states that did not require annual reports to the courts regarding each sex offender’s continuing need to be committed.”); GRANT CUMMINGS, WIS. LEGISLATIVE FISCAL BUREAU, CIVIL COMMITMENT OF SEXUALLY VIOLENT PERSONS: INFORMAL PAPER 6 (2013), [http://legis.wisconsin.gov/lfb/publications/informationalpapers/documents/2013/54\\_civil%20commitment%20of%20sexually%20violent%20persons.pdf](http://legis.wisconsin.gov/lfb/publications/informationalpapers/documents/2013/54_civil%20commitment%20of%20sexually%20violent%20persons.pdf).

436. *Supra* note 243 and accompanying text. Minnesota does not conduct periodic risk assessments of civilly committed sex offenders, even though the statutory scheme for general civil commitment permits it. MINN. STAT. § 253B.03, subdiv. 5 (2014).

437. *See, e.g.*, Anthony Beech, Dawn D. Fisher & David Thornton, *Risk Assessment of Sex Offenders*, 34 PROF. PSYCHOL. RES. & PRAC. 339, 347–48 (2003); *supra* Section III(C)(1).

438. *Karsjens*, 109 F. Supp. 3d at 1160.

439. *See Seling*, 531 U.S. at 266.

440. *Karsjens*, 109 F. Supp. 3d at 1170.

441. *Id.*

442. *Id.*

continues *both* to need further inpatient treatment and supervision for his sexual disorder *and* to pose a danger to the public.”<sup>443</sup> During the *Karsjens* proceedings, a forensic evaluator for the MSOP, Dr. Anne Pascucci,<sup>444</sup> admitted she had previously not used the *Call* standard for patient discharge.<sup>445</sup> MSOP risk assessors did not begin to use this standard until *after* the *Karsjens* case started in 2011.<sup>446</sup> Therefore, the MCTA is unconstitutional in its implementation through the MSOP because it does not apply the correct legal standards set forth in *Call*.<sup>447</sup>

Third, the MCTA is unconstitutional in its implementation because there are some MSOP clients who have completed treatment and remain confined at MSOP,<sup>448</sup> even though they no longer benefit from treatment.<sup>449</sup> This is likely because of the programming changes the MSOP has implemented over the years, in which some patients have had to restart treatment when new programming is implemented.<sup>450</sup> Because the MSOP’s three-phase program has undergone many programming changes in its history, some individuals have completed three different programs, and have not been released.<sup>451</sup> Therefore, the MCTA is unconstitutional as applied because it is not narrowly tailored in its confinement of individuals, some of whom should not remain civilly committed to the MSOP.<sup>452</sup>

Fourth, the MCTA is unconstitutional in its implementation because the discharge process is “not working as [it] should at the MSOP.”<sup>453</sup> As stated previously, the MSOP refuses to “petition on behalf” of individuals who are near the end of treatment.<sup>454</sup> Even after court proceedings in the *Karsjens* suit commenced, Defendants had yet to address the delays in the “reduction-of-custody” process.<sup>455</sup> The court also found the MSOP did not

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443. *Id.* (quoting *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995)).

444. *Id.* at 1159.

445. *Id.* at 1170.

446. *Id.* at 1171.

447. *Id.*

448. *Id.* at 1158, 1171.

449. *Id.* at 1171.

450. *Id.* at 1158.

451. *Id.* at 1171.

452. *Id.*

453. *Id.*

454. *Id.* at 1171–72; *see also supra* Section III.C.2.b.

455. *Karsjens*, 109 F. Supp. 3d at 1171; *see also supra* Section III.C.2.b.

provide discharge and reintegration planning until committed individuals were in Phase III,<sup>456</sup> the final phase of treatment.<sup>457</sup>

Discharge and reintegration services and programming should be given to patients throughout their treatment at the MSOP, because the goal of the program is to provide treatment and successfully reintegrate individuals into the community after their treatment.<sup>458</sup> Because committees are not given the reintegration and discharge tools they need from the beginning of their treatment at the MSOP, if and when individuals are released, their toolbox will be emptier than if they had received the tools from day one. Moreover, the MSOP's failure to equip committees with the proper tools from the beginning of their treatment is contrary to the underlying purpose of the MSOP treatment program—"[t]o promote public safety by providing comprehensive treatment and reintegration opportunities for civilly-committed [sic] sexual abusers."<sup>459</sup>

By refusing to petition on behalf of those who continue to be civilly committed, and who likely should be provisionally discharged, the MSOP has done nothing to remedy this problem. Reintegration and discharge programming is not provided to committees until Phase III of treatment programming, and the resulting delay in provisional discharge means the MCTA is unconstitutional as applied.<sup>460</sup>

Fifth, the MCTA is unconstitutional in its implementation because the MSOP does not provide for less-restrictive alternatives than high-security treatment centers.<sup>461</sup> The statute permits the MSOP to use less-restrictive alternatives, but none exist.<sup>462</sup> Instead, all committed individuals must start in a high-security facility, and gradually progress to a less-restrictive facility.<sup>463</sup> The MSOP lacks

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456. *Karsjens*, 109 F. Supp. 3d at 1171; *see also supra* Section III.B.2.

457. *Karsjens*, 109 F. Supp. 3d at 1153.

458. *See* MSOP REINTEGRATION, *supra* note 281, at 1.

459. SHELBY R. RICHARDSON, MINN. SEX OFFENDER PROGRAM, TREATMENT PROGRESSION 1 (2016), [http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16\\_167938.pdf](http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16_167938.pdf).

460. *Karsjens*, 109 F. Supp. 3d at 1171–72.

461. *See, e.g., id.* at 1169; *see also supra* Section III.C.2.b.

462. *Karsjens*, 109 F. Supp. 3d at 1169; *see also supra* Section III.C.2.b.

463. *Karsjens*, 109 F. Supp. 3d at 1151–52 (“There is no alternative placement option to allow individuals to be placed in a less restrictive facility at the time of their initial commitment to the MSOP.”).

traditional, less-restrictive alternatives, such as halfway houses, for those who began their treatment in a high-security facility.<sup>464</sup>

The sixth and final reason the MCTA is unconstitutional in its implementation is because there is no significant relationship between the treatment that individuals receive and the discharge rate.<sup>465</sup> The aforementioned phases of treatment do not all involve treatment for an underlying mental illness, and some of the phases primarily focus on rule compliance.<sup>466</sup> The extremely low number of individuals who have been provisionally discharged is likely due to the phases' stringent rule-based compliance systems.<sup>467</sup>

Judge Frank wrote that each of the six reasons is an independent reason that the MCTA is itself unconstitutional in implementation.<sup>468</sup> It is clear that the MSOP's treatment progression criteria and programming make it extremely difficult for individuals to progress through treatment. Indeed, in his closing comments, Judge Frank described the current MSOP as "a three-phased treatment system with 'chutes-and-ladders'-type mechanisms for impeding progression."<sup>469</sup>

#### *D. Aftermath*

Along with the June finding of unconstitutionality, the court set a pre-hearing conference for August 10, 2015.<sup>470</sup> Judge Frank ordered the parties to submit remedy proposals and called upon other stakeholders to do the same.<sup>471</sup> Many stakeholders attended this meeting including Governor Dayton.<sup>472</sup> Defendants sought certification for an interlocutory appeal from the district court to appeal the June 17th decision; that request was denied by Judge

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464. *Id.* at 1152; *see supra* Section II.C.2.b.

465. *Karsjens*, 109 F. Supp. 3d at 1172 ("[I]ndividuals get stuck in Phase I of the program, a part of the program where no specific offender-related therapy is provided, only institutional rule compliance training and preparation for therapy.").

466. *Id.* at 1153, 1172.

467. *See id.* at 1147.

468. *Id.* at 1172.

469. *Id.*

470. *Id.* at 1178.

471. *Id.*

472. Chris Serres & Patrick Condon, *Gov. Dayton Unveils Possible Reforms to Troubled Sex Offender Program*, STAR TRIB. (Aug. 10, 2015), <http://www.startribune.com/lawmakers-arrive-at-st-paul-courthouse-as-msop-hearing-begins/321260851/>.

Frank.<sup>473</sup> On October 29, 2015, Judge Frank issued his First Interim Relief Order, which required the following:

a. Defendants must promptly conduct independent risk and phase placement reevaluation of all current patients at the MSOP. . . . Defendants must complete these assessments according to the following time lines:

i. Within 30 days, Defendants shall complete reevaluations of the six individuals in the Alternative Program who were designated for transfer to Cambridge, Eric Terhaar, and Rhonda Bailey.

ii. Within 30 days, Defendants shall submit a detailed plan for approval by the Special Master for the reevaluations of the elderly, individuals with substantive physical or intellectual disabilities, and juvenile-only offenders. . . .

. . . .

b. If the independent risk assessment for any patient concludes that the patient should be fully discharged, transferred, or receive a reduction in custody, the MSOP must seek the release or reduction in custody of that patient to the appropriate placement by immediately filing a petition with the Special Review Board . . . .

c. Defendants must ensure that less restrictive alternatives are available to accommodate all individuals found eligible for a reduction in custody. . . .

d. Following each treatment phase placement reevaluation . . . Defendants shall immediately move any individual who is determined to be in an improper treatment phase into the proper treatment phase. . . .

e. Defendants shall establish a plan to conduct annual, independent risk assessments to determine whether each client still satisfies the civil commitment requirements. . . .

. . . .

2. Special Master former Minnesota Supreme Court Chief Justice Eric J. Magnuson shall have authority to monitor compliance with the remedies identified above.<sup>474</sup>

Defendants filed a Notice of Appeal with the District Court and requested an immediate stay from the October 29th interim

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473. Karsjens v. Jesson, No. 11-3659, 2015 WL 4478972, at \*4 (D. Minn. July 22, 2015).

474. Karsjens v. Jesson, No. 11-3659, 2015 WL 6561712, at \*16–17 (D. Minn. Oct. 29, 2015) (citation omitted), *appeal docketed*, No. 15-3485 (8th Cir. Nov. 2, 2015).

relief order pending their appeal.<sup>475</sup> On November 23, 2015, Judge Frank denied Defendants' request for an injunction.<sup>476</sup> There are four factors to consider when determining whether to grant a request for a stay, including: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the non-moving party; and (4) the public interest."<sup>477</sup> Judge Frank acknowledged that the first two factors of this analysis were most important.<sup>478</sup>

Judge Frank did not find within Defendants' claims a strong likelihood that they would succeed on appeal.<sup>479</sup> He emphasized that Defendants' reliance on experts and the expert report did not bolster their claims of likely success on appeal.<sup>480</sup> The court's conclusion that the MSOP is unconstitutional was based primarily on testimony from Defendants' own employees.<sup>481</sup> Judge Frank found that Defendants did not meet their burden with respect to the irreparable harm that would occur without a stay.<sup>482</sup> Specifically, he found that Defendants' right to appeal will not be impacted by denying their request for a stay.<sup>483</sup> Further, Defendants failed to propose alternative timelines to those set out in the court's October 29th order, which would have provided relief from their immediate concerns about logistics and funding.<sup>484</sup>

On December 15, 2015, the Eighth Circuit Court of Appeals granted Defendants' request for a stay on Judge Frank's October 29th order.<sup>485</sup> On November 2, 2015, Defendants appealed Judge

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475. *Karsjens v. Jesson*, No. 11-3659, 2015 WL 7432333, at \*1 (D. Minn. Nov. 23, 2015).

476. *Id.* at \*7.

477. *Id.* at \*2 (citations omitted).

478. *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)) ("[T]he first two factors are the most critical.").

479. *Id.* at \*5.

480. *Id.* at \*3.

481. *Id.*

482. *Id.* at \*5.

483. *Id.*

484. *Id.* at \*6 ("By failing to [propose how they could remedy the unconstitutional infirmities at the MSOP], Defendants have effectively created their own administrative and financial difficulties by forcing the Court to impose a remedy in the absence of Defendants' own detailed input.").

485. *Karsjens v. Jesson*, No. 11-3659, 2015 WL 6561712 (D. Minn. Oct. 29, 2015) (citation omitted), *appeal docketed*, No. 15-3485 (8th Cir. Nov. 2, 2015).

Frank's finding of the MSOP's unconstitutionality.<sup>486</sup> Oral arguments before the Eighth Circuit Court of Appeals took place on April 12, 2016.<sup>487</sup>

The *Karsjens* case demonstrates the inherently difficult task of balancing sex offenders' personal liberty and the state's compelling interest of keeping communities safe, as this is problematic line to toe.<sup>488</sup> There is only so much a court can do to effect actual change at MSOP. As cases challenging the constitutionality of civil commitment systems have made clear, a "win" in this setting does not result in immediate action.<sup>489</sup> As the case of *Turay v. Seling* illustrates, system change in a long standing and entrenched unconstitutional SOCC program is difficult to achieve.<sup>490</sup> Change comes slowly, and the court can only order Defendants to take action to make changes—the court cannot allocate funds, require MSOP to hire new leadership, or change public opinion about an issue that has proven divisive for decades. The court is limited by separation of powers. The legislature can allocate funding. As executives, the Governor and Commissioner of Health and Human Services make decisions about hiring and leadership.<sup>491</sup> However, even given these limitations, a huge step forward for MSOP would be coming into constitutional compliance—that is, releasing individuals within the program when their risk level falls below

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486. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015), *appeal docketed*, No. 15-3485 (8th Cir. Nov. 2, 2015).

487. *Id.*

488. For a look at a former sex offender's take on civil commitment, see ONCE FALLEN, <http://www.oncefallen.com> (last visited Mar. 16, 2016). Derek Logue is the creator of the website and a former sex offender, and he has been on numerous national television shows to advocate for changes in policies regarding the treatment of sex offenders. *Id.* Mr. Logue, with his endless connections, including men whom he writes to who are currently civilly committed for sexual offenses, did not know a single person who had been released from SOCC. He only knew individuals who are *currently* civilly committed, which says a lot about our current system of SOCC. E-mail from Derek Logue, Reform Advocate & Owner, Once Fallen, to Jennifer Anderson, Author (Nov. 1, 2015, 19:32 CST) (on file with author).

489. Douglas Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1384 (2008).

490. *Id.* at 1383–84.

491. See generally Bierschbach, *supra* note 414 (discussing the differential powers of the federal court, the state, and the legislature on affecting change in the MSOP).

constitutional thresholds for commitment.<sup>492</sup> Next, the court's recommendations and lessons from *Seling* are discussed. This comment then recommends changes that lie beyond the court's reach—namely funding, changing the culture within MSOP and implementing strategies to alter public opinions of sex offenders and MSOP.

*E. The Court's Recommendations*

The court has the power to order named defendants to take certain actions.<sup>493</sup> The court's order in this case largely follows the expert report, a detailed and comprehensive assessment of MSOP by a group of national experts in the field.<sup>494</sup> Like the *Seling* case, discussed below, the court's recommendations focus on providing adequate treatment to individuals at MSOP that meets constitutional muster.<sup>495</sup> Not only did the expert panel in this case spend diligent time at the facilities interviewing patients and staff,<sup>496</sup> the panel brings their own expertise—using research and best practices in the field to inform their recommendations.<sup>497</sup> The report is a road map for change at MSOP—Judge Frank viewed it as such.<sup>498</sup> The court made sound recommendations relating to annual evaluations, the process of moving between phases of treatment, and in requiring that less-restrictive alternatives be made available immediately to all those individuals who no longer meet commitment standards.<sup>499</sup>

Like the court in *Seling*, Judge Frank did not choose to order the immediate release of any named defendants.<sup>500</sup> The expert report in this case advocated for the immediate release of those individuals who no longer met commitment criteria.<sup>501</sup> The experts

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492. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1159 (D. Minn. 2015); Expert Report and Recommendations, *supra* note 41, at 5.

493. *See generally* *Karsjens v. Jesson*, 6 F. Supp. 3d 916 (D. Minn. 2014).

494. Expert Report and Recommendations, *supra* note 41, at 3–6.

495. *See generally* *Karsjens*, 109 F. Supp. 3d 1139.

496. *See* Expert Report and Recommendations, *supra* note 41, at 3–4, 9–10.

497. *Id.* at 61.

498. *Compare* *Karsjens*, 109 F. Supp. 3d at 1149–51, *with* Expert Report and Recommendations, *supra* note 41.

499. *See* *Karsjens*, 109 F. Supp. 3d at 1176–77.

500. *Id.* at 1144.

501. *Id.* at 1151; Expert Report and Recommendations, *supra* note 41, at 11, 61.

focused on four special categories of individuals who may be immediately released or moved into less-restrictive alternatives.<sup>502</sup> They focused on juvenile-only offenders, patients with severe mental illness, patients in assisted living, and clients with disabilities in the alternative program, including one female MSOP patient.<sup>503</sup> The immediate release of certain individuals by the court is likely not the best way to help those individuals or the communities to which they are returning.<sup>504</sup> Some planning needs to be done to facilitate more releases.<sup>505</sup> In particular, alternative monitoring and therapeutic services need to be available in communities where individuals are released to help ensure their long-term success.<sup>506</sup> However, for individuals who no longer meet commitment criteria and the woman who is housed within the all-male MSOP facility, their releases should be given the highest priority and should occur as soon as feasible.<sup>507</sup>

#### V. RECOMMENDATIONS

In addition to ruling on the MCTA's constitutionality, Judge Frank made recommendations to defendants about what should be done about the MSOP.<sup>508</sup> The court's recommendations largely mirror those of the expert report and include: requiring risk assessments and phase evaluation of all individuals as soon as possible to determine whether clients meet treatment criteria; requiring a variety of less-restrictive alternatives; revising discharge process; and requiring MSOP to take affirmative steps in several critical areas, including affirmatively filing petitions for discharge.<sup>509</sup> The court also recommended greater oversight to the commitment process, including a judicial bypass system and qualified training and evaluation of MSOP employees on a regular basis.<sup>510</sup> The court's final recommendation was that a special master be

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502. Expert Report and Recommendations, *supra* note 41, at 9.

503. *Id.*

504. *Karsjens*, 109 F. Supp. 3d at 1144–45.

505. *Id.*

506. Expert Report and Recommendations, *supra* note 41, at 6; *see also Karsjens*, 109 F. Supp. 3d at 1147.

507. *Karsjens*, 109 F. Supp. 3d at 1151; *see also* Expert Report and Recommendations, *supra* note 41, at 22.

508. *Karsjens*, 109 F. Supp. 3d at 1173–75.

509. *Id.*

510. *Id.*

appointed.<sup>511</sup> The court appointed former Minnesota Supreme Court Justice Eric Magnuson to this role.

A. *Lessons from Turay v. Seling*

Other courts have ruled on similar challenges in federal court. For example, in 1994, Washington State decided the case of *Turay v. Seling*.<sup>512</sup> There, plaintiffs did not challenge the constitutionality of the statute, but rather the conditions of treatment.<sup>513</sup> The *Seling* case, however, still provides some basis of comparison to assess Judge Frank's potential remedies and how successful they might be.<sup>514</sup>

In *Seling*, the U.S. district court found that Washington's SOCC program failed to meet professionally reasonable standards for treatment.<sup>515</sup> The court enjoined defendants to take certain steps to make sure adequate mental health treatment was available.<sup>516</sup> When the process was slow, the court ultimately appointed a special master to monitor the state's compliance.<sup>517</sup> After five years and seventeen progress reports, the court issued a contempt order against defendants based on their continuing failure to comply with the injunction.<sup>518</sup> The case lingered in the system for fifteen years before the injunction was eventually lifted.<sup>519</sup> This illustrates the entrenched nature of SOCC programs—and how challenging court-ordered remedies can be to actually implement. The Eighth Circuit injunction pending an appeal has put a halt to any initial steps to implement the court ordered recommendations relating to the adequacy of the MSOP treatment.<sup>520</sup>

B. *Author Recommendations*

The court does not have control over funding and hiring policies that are necessary to affect change in the statutes that

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511. *Id.*

512. *Turay v. Seling*, 108 F. Supp. 2d 1148 (W.D. Wash. 2008).

513. *Id.* at 1149.

514. Smith, *supra* note 489, at 1384; *see also Seling*, 108 F. Supp. 2d at 1149.

515. *See Seling*, 108 F. Supp. 2d at 1158.

516. *Id.*

517. *Id.*

518. *Id.*; JANUS, *supra* note 376, at 5.

519. JANUS, *supra* note 376, at 5.

520. *Karsjens v. Jesson*, No. 11-3659, 2015 WL 6561712 \*1 (D. Minn. Oct. 29, 2015), *appeal docketed*, No. 15-3485 (8th Cir. Nov. 2, 2015).

impact MSOP.<sup>521</sup> Minnesota's Department of Human Services and the state legislature hold a huge amount of power with respect to reforming MSOP.<sup>522</sup> They must allocate increased funding to support recommendations from the court.<sup>523</sup> Judge Frank, even after his initial finding of unconstitutionality, tried to engage state leadership to craft a remedy.<sup>524</sup> These engagement strategies have proven largely unsuccessful and Minnesota, like Washington in *Seling*, may be looking at a long period of protracted litigation, lack of compliance with the court's order, and very few individuals being released.

There are critical steps that could be taken outside of the court's order that would impact how sex offenders are treated in Minnesota—and how the MSOP functions. These strategies include: allocating funding to support staff and resources to provide adequate treatment and less-restrictive alternatives; a change in leadership in MSOP that would facilitate reform in training and a change in the culture of staff and management within the facilities; and engaging volunteers and the media to improve awareness to reframe the public's perspective about sexual offenders.

The Governor and Legislature have had several legislative sessions to address the issues plaguing MSOP during the pendency of the *Karsjens* litigation.<sup>525</sup> The biggest barrier to making necessary changes at MSOP is a lack of state funding to support these changes.<sup>526</sup> Currently, the money that the State of Minnesota is spending on the program is not constitutionally sound. This problem already costs \$120,000 per year per person, but in order to effectuate needed changes and pass constitutional muster more funding may be needed.<sup>527</sup> Specifically, funding is needed to provide staff to conduct regular reviews and to create meaningful, safe, and well-designed less-restrictive alternatives for individuals who are released.<sup>528</sup> This funding is needed to provide additional

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521. See *Seling*, 108 F. Supp. 2d at 1148.

522. See Brandt and Prescott, *supra* note 11.

523. See *id.*

524. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1178 (D. Minn. 2015).

525. Brandt and Prescott, *supra* note 11.

526. See generally Expert Report and Recommendations, *supra* note 41, at 7–10.

527. E.g. Expert Report and Recommendations, *supra* note 41, at 71.

528. *Karsjens*, 109 F. Supp. 3d at 1160; Expert Report and Recommendations, *supra* note 41, at 7–8.

resources and staff at the Moose Lake facility.<sup>529</sup> Resources and staff are also needed within the communities in which individuals are released.<sup>530</sup> However, if individuals were moved to less-restrictive settings in the community, funding that is now being spent on housing people within the commitment programs at Moose Lake and St. Peter would be saved.<sup>531</sup>

The Rule 706 Expert Report details some of the challenges that MSOP has had in finding and retaining qualified staff at its facilities.<sup>532</sup> It notes in its recommendations relating to the Moose Lake facility in particular, “the near impossible challenge of recruiting, hiring, retaining, training, and supervising professional and front line staff for an extremely large facility with a very diverse specialized population in a rural community.”<sup>533</sup> One way to find and retain qualified staff would be to collaborate with nearby colleges or universities that have professors or students in need of clinical supervision hours or internship possibilities. The St. Peter facility is twelve miles from Mankato State University and the Moose Lake facility is forty miles from the University of Minnesota Duluth. Both schools have undergraduate and graduate social work programs and nursing programs, and Duluth has a medical school.

California’s SOCC program has had success with this type of partnership.<sup>534</sup> There the SOCC

hospital is a partner with both West Hills College-Coalinga and Fresno City College. Through its psychiatric technician education program, West Hills College has provided the hospital with hundreds of graduates over the course of many years. Similarly, about 400 registered nurses from Fresno City College have completed clinical rotation in our hospital. DSH-Coalinga is currently forming a new partnership with two California universities to create clinical rotations for medical students.<sup>535</sup>

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529. Expert Report and Recommendations, *supra* note 41, at 58.

530. E.g. Kay Fate, *Local Officials Concerned About Sex Offender Release Funding*, POST-BULL. (June 15, 2015), [http://www.postbulletin.com/news/local/local-officials-concerned-about-sex-offender-release-funding/article\\_294ea2aa-6198-5116-83fa-b16e03a40bd3.html](http://www.postbulletin.com/news/local/local-officials-concerned-about-sex-offender-release-funding/article_294ea2aa-6198-5116-83fa-b16e03a40bd3.html).

531. Expert Report and Recommendations, *supra* note 41, at 71.

532. *Id.* at 56.

533. *Id.*

534. *Department of State Hospitals—Coalinga*, CA DEP’T ST. HOSPS., <http://www.dsh.ca.gov/coalinga> (last visited May 20, 2016).

535. *Id.*

Resources and staff are also needed in the communities where individuals will be released.<sup>536</sup> This includes hiring additional probation agents trained to work with sexual offenders in the community. The expert report recognizes that:

Specialized supervision for people who have sexually offended is necessary because traditional supervision practices do not necessarily address the high-risk factors associated with some people who have sexually offended. For example, traditional supervision officers may not have received specific training that would enhance their understanding of the risk factors and dynamics related to sexual offending, which may impact an officer's ability to intervene with or interpret any pre-offense behaviors. Additionally, it is important to limit the amount of cases each supervision officer receives in order for officers to better manage and monitor people who have sexually offended adjustment to the community.<sup>537</sup>

As the Rule 706 Expert Report highlights, funding is also needed to provide community-based treatment programs and transportation to these programs.<sup>538</sup>

The Expert Report makes specific recommendations with respect to resources, staffing, and training.<sup>539</sup> However, the court cannot make the Legislature pay for court ordered recommendations. The court's proverbial stick is to continue to bring the Department and MSOP back into court if the recommendations are not met.<sup>540</sup> But like *Seling*, this back and forth can last for years.<sup>541</sup> Thus far, the leadership at MSOP has not advocated for this type of funding. A change in culture and leadership at MSOP may be necessary before the kinds of funding, resource, and staff changes discussed above become a reality.

One of the most painful parts of the Expert Report was its documentation of the toxic culture that exists at MSOP.<sup>542</sup> This

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536. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1175 (D. Minn. 2015); Expert Report and Recommendations, *supra* note 41, at 61.

537. Expert Report and Recommendations, *supra* note 41, at 61.

538. *Karsjens*, 109 F. Supp. 3d at 1160; Expert Report and Recommendations, *supra* note 41, at 71.

539. See generally Expert Report and Recommendations, *supra* note 41; see also *Karsjens*, 109 F. Supp. 3d at 1160.

540. See *Turay v. Seling* 108 F. Supp. 2d 1148 (W.D. Wash. 2008).

541. Smith, *supra* note 489, at 1411–13.

542. Expert Report and Recommendations, *supra* note 41, at 52–53; see also

includes the culture among individuals housed within the program and employees. The Expert Report documents the hopelessness of both individuals housed there and the staff.<sup>543</sup> None believe that release is possible.<sup>544</sup> The status quo is too entrenched. This needs to change in order for the program to function in a healthy way. New leadership is needed. As the Expert Report states in its conclusion, “[T]here is a great deal of opportunity in Minnesota for political courage.”<sup>545</sup> MSOP needs someone with that political courage to change this flawed program.

The report finds that in a “healthy” SOCC treatment program, staff within the program identify individuals who are eligible for release based on treatment criteria.<sup>546</sup> The staff are responsible and see it as a part of their role to help clients eligible for release to actually be released.<sup>547</sup> The Expert Report also documents the punitive nature of some aspects of the treatment program that hinder progress.<sup>548</sup> These include punishing people for normal infractions by forcing them to regress in treatment.<sup>549</sup> A better practice would be to not link non-sexually related behavioral offenses to treatment goals or success.<sup>550</sup> MSOP is supposed to be about treatment and not punishment.<sup>551</sup> Staff must be trained in best practices.<sup>552</sup>

The report documents specific trainings that MSOP staff should receive.<sup>553</sup> These include training to work with specialized populations, training in current diagnostic criteria consistent with DSM-5 criteria, training in deviant sexual interests, and training in relevant interventions with problematic clients.<sup>554</sup> Leadership that is willing to demand up-to-date trainings, all-staff participation, and

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*Karsjens*, 109 F. Supp. 3d at 1151.

543. Expert Report and Recommendations, *supra* note 41, at 52–53.

544. *Id.*

545. *Id.* at 54–56, 79.

546. *Id.* at 54–56.

547. *Id.* at 54.

548. *Id.* at 52.

549. *Id.*

550. *Id.*

551. *Id.*

552. *Id.* at 52, 54–57.

553. *Id.*

554. *Id.* at 41, 54.

actualize training into practice is necessary to change the culture at MSOP.<sup>555</sup>

New thinking is needed from the top to the bottom. MSOP cannot change if its leadership does not believe there is a problem.<sup>556</sup> Leadership must address the program's fundamental flaws and be willing to implement changes despite reluctance to do so from the staff and public. Moreover, new leadership may also be able to engage the public and media in efforts to reshape public perception.

In addition, public opinion about the release of sex offenders must shift in order for MSOP to be successful. The public must accept the release of individuals from MSOP into communities as a normal part of the program's trajectory. As local expert Eric Janus has so aptly pointed out, "sexual predator laws give a loud expression to our collective disapproval of sexual violence."<sup>557</sup>

One study of public perception of sex offenders found that:

[T]he public is poorly informed about sex offenders . . . . Specifically, myths of extraordinarily high recidivism rates and "stranger danger" prevail, and the public appears to view all sex offenders as posing a similar threat to communities. These widespread beliefs perpetuate the development of increasingly restrictive policies as politicians endeavor to serve their constituents.<sup>558</sup>

These beliefs exist despite research and literature, which finds that most sex offenders "can and do return to the community without engaging in further sexual violence."<sup>559</sup>

One way to begin shifting public perceptions about the release of sex offenders is to develop Circles of Support and Accountability (CoSA).<sup>560</sup> CoSA is a "model of professionally supported

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555. *Id.*

556. *See, e.g.*, D.J. Tice, *Tough Thing, Isn't It, This 'Due Process'?*, STAR TRIB., Feb. 3, 2014, LEXIS.

557. JANUS, *supra* note 1, at 145.

558. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 137, 155 (2007).

559. Expert Report and Recommendations, *supra* note 41, at 72; *see also* Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1159 (D. Minn. 2015). Fewer than four percent of the public felt that community awareness was more effective than chemical castration to effect recidivism in Florida. Levenson et al., *supra* note 558, at 155. Florida is a state that has released 150 sex offenders from their SOCC system. *Id.*

560. *See* Expert Report and Recommendations, *supra* note 41, at 72.

volunteerism, in which trained community members volunteer to provide support and an accountability framework to a released high-risk/need sexual offender.”<sup>561</sup> This program consists of two concentric circles—the inner circle being the released offender and four to six community volunteers.<sup>562</sup> The outer circle is made up of local professionals (treatment providers, law enforcement, probation staff, and other personnel) who provide support to the inner circle when needed.<sup>563</sup> CoSA has been effective at reducing recidivism among high-risk offenders.<sup>564</sup> The program also educates community members about the realities of sex offenders—such as the affirmation that they can live, work, and contribute without reoffending.<sup>565</sup> This aspect of the program helps dispel some of the myths commonly held about sex offenders and re-offending.

Some states, such as Wisconsin, have effectively utilized community notification meetings and other public relations strategies to assuage public fear and outrage over the release of committed individuals.<sup>566</sup> The benefits of community notification meetings include providing relevant and accurate factual information to community members as well as the media.<sup>567</sup> In this format, citizens can be educated on the likelihood of re-offense, community strategies to prevent sexual violence, and information about sexual offender civil commitment laws and treatment efficacy.<sup>568</sup> The Expert Report points out, “[a]t a person-to-person level, community notification meetings provide concerned citizens with opportunities to interact directly with relevant law enforcement, DHS, DOC and other professionals who become known potential contacts should subsequent questions or problems arise after the meeting or after the community placement.”<sup>569</sup> Often, the media attends community notification meetings and is able to reach a broader audience by reporting on the facts and information presented at these meetings.<sup>570</sup> Thus, the meetings not

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561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. *Id.* at 96.

567. *Id.* at 97.

568. *Id.*

569. *Id.*

570. *Id.*

only provide information to community members, but also serve a public relations purpose through broader media coverage. In many states, leadership within the SOCC program regularly interacts with media and the community to provide accurate information and to help break down fear and stigma.<sup>571</sup>

The media also plays an important role in creating accurate public awareness about sex offenders.

The media should be enlisted as a partner in educating the public about sexual abuse through the dissemination of accurate and research-based information about sexual violence, sexual perpetrators, and victimization. Rather than sensationalistic journalism, the public would benefit from factual information about recidivism rates, the heterogeneity of sex offenders, the signs and symptoms of sexual abuse, and the common types of grooming behaviors used by perpetrators who gain access to victims by using their positions of familiarity, trust, or authority.<sup>572</sup>

The media is very good at inciting fear in the public when it covers violent and rare cases like that of Dru Sjodin. However, if the media provided accurate information about the risk of sex offenders re-offending or the effectiveness of community-based treatment programs even for high-risk offenders, programs like MSOP would have a much easier time releasing individuals safely into communities. The media could be a powerful partner in Minnesota to begin the necessary shift in public awareness about sex offenders. A shift in public opinion would also make legislative change more palatable. Increasing knowledge, sharing accurate information, and presenting images to the public of sex offenders that do not shock us are needed in order to begin swinging the pendulum back to a more balanced place on this issue within the public sphere.

## VI. CONCLUSION

This *Karsjens* case highlights what happens when a system set up to protect the public becomes a political tool—one where public outrage supersedes rehabilitation and due process. The public's propensity to react swiftly through punitive legislation to singular violent crimes does not make sound policy. As discussed,

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571. See *id.* at 97–98.

572. Levenson et al., *supra* note 558, at 156.

the public responded strongly to violent crimes and criminals—such as the rape and murder of Dru Sjodin and the case of Dennis Linehan. Public opinion was inflamed and the Minnesota Legislature reacted swiftly in the statutory criteria for SOCC and the way in which the MCTA is implemented. However, the long-term consequences to this rush to action have proven ineffective and unconstitutional. Having a SOCC system that is unconstitutional is also harmful to the public and erodes our trust in due process and fundamental fairness.

We need to right the balance between fear and fairness. Minnesotans should be horrified to read about the situation at MSOP that has been revealed through the *Karsjens* case. There are individuals who have essentially been in a prison-like facility for more than twenty years who should not be there. They have been robbed of their freedom and an opportunity to contribute in a meaningful way to their communities and families. With the *Karsjens* case, the court began to identify the steps needed to bring our SOCC system back into constitutional compliance.

Thanks to a detailed report by a national panel of experts—the Rule 706 Expert Report—we also have a road map for broader change of the sort that cannot be brought about simply by a court order. This includes a need for additional funding, a change in leadership at MSOP, and community and media assistance to better inform the public. Any change will involve multiple stakeholders, and will take time. But a first step will be the assessment and possible subsequent release of individuals from MSOP who no longer meet the statutory criteria for SOCC. This will signal that change has, in fact, finally come.