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Hendricks and the Future of Sex Offender Commitment Laws

Eric S. Janus
Mitchell Hamline School of Law, eric.janus@mitchellhamline.edu

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Hendricks and the Future of Sex Offender Commitment Laws

Abstract
The Supreme Court's decision in Kansas v. Hendricks suggests that few constitutional limitations will be imposed. This article discusses the four elements imposed by the Court in Hendricks, and then discusses the likely implications of the decision, using civil commitment laws currently on the books and actual post-Hendricks decisions. The article concludes that the imbalance between commitments and discharges will cause commitment populations to grow over the foreseeable future. Eventually the huge costs of commitment schemes will force serious assessment of whether the facial logic of these programs hides seriously distorted resource allocation and anti-therapeutic side-effects.

Keywords
sex-offender, civil commitment, systematized risk assessment, Kansas v. Hendricks, mental disorder, In re Linehan, Young v. Weston

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Hendricks and the Future of Sex Offender Commitment Laws

by Eric S. Janus

In its 1997 Hendricks decision, the United States Supreme Court upheld the constitutionality of the Kansas Sexually Violent Predator commitment law. In important ways, the decision gives states the green light to use civil commitment as a tool to address sexual violence. More broadly, the decision answers a number of questions about the constitutional limits on the use of civil commitment. Despite the answers, questions remain, particularly about the practical application of these constitutional limits. During the two years since Hendricks was decided, several important lower court decisions have begun to shed light on these questions. However, the most significant limits on the use of civil commitment will come from legislative and administrative policy decisions.

I. Sex Offender commitments

Sex offender commitments deploy civil-commitment-style confinement to address sexual violence. Beginning in the late 1930's, states began to enact civil commitment laws aimed at mentally disordered sex offenders. Eventually, such laws were enacted in over half the states.

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Eric S. Janus is Professor of Law, William Mitchell College of Law, St. Paul, Minnesota. The author has served as co-counsel in litigation challenging the constitutionality of Minnesota’s Sexually Dangerous Persons Act. Editor’s note: While this issue of Developments is intended to cover relevant 1998 topics, it was published in 1999, and Professor Janus includes some 1999 cases in the discussion.
These laws were conceived of as providing alternatives to imprisonment for sex offenders whose mental conditions rendered them "too sick to deserve punishment." By the mid-1970's, however, a number of influential studies declared these laws to be a failed experiment. The laws were based on the mistaken assumption that sex offenders displayed some medically valid diagnosis. Treatment for detainees was either not provided or had not been shown to be effective. Most states repealed or abandoned these first generation laws.

Since 1989, states have shown a renewed interest in using civil commitment to address sexual violence. The second generation laws differ from the first in a critical respect: instead of providing an alternative to prison, the new laws are specifically intended to extend the incapacitation of convicted sex offenders who are deemed too dangerous to release when their prison terms expire. About 12 states have adopted such laws and an equal number are considering them.

Sex offender commitment laws follow a uniform pattern, though there is some state-by-state variation. All of the laws are denominated "civil," rather than criminal. Civil laws are not subject to the strict constitutional constraints of the criminal law. This is an important feature of the laws, since the laws are designed to extend the incarceration of convicted sex offenders who have completed their penal sentences. Normal rules of criminal procedure prohibit lengthening a sentence beyond its expiration date and imprisoning an individual based on a prediction of future criminal activity.

Typically, the commitment laws require proof of four elements: (1) A past course of sexually harmful conduct. All contemporary commitment schemes aim at individuals who have been convicted of, and have served prison time for, past crimes of sexual violence. (2) A current mental disorder or "abnormality." The Kansas law, for example, requires proof of a "mental abnormality or personality disorder," and defines "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity." Minnesota law requires proof of a "sexual, personality, or other mental disorder or dysfunction." (3) A finding of risk of future sexually harmful conduct. The Kansas law requires a finding that the person is "predisposed" to "commit sexually violent offenses . . . in a degree constituting such person a menace to the health and safety of others." The Minnesota law requires a finding that the individual "is likely to engage in acts of harmful sexual conduct." (4) Finally, the laws require some form of connection between the mental abnormality and the danger. The Kansas law requires a showing that the mental abnormality "predisposes" the individual to commit sexually violent crimes. The Minnesota law states that the past history and the current mental disorder must "result in" the likelihood of future harmful behavior. California law holds that the diagnosed mental disorder "makes" it likely that future sexually violent criminal behavior will occur.
A key feature of contemporary sex offender commitment laws is their reliance on systematized risk assessment. For example, in Minnesota, the Department of Corrections is required to make risk determinations for all sex offenders about to be released from prison. Those assessed as “high risk” must be further assessed for appropriateness for sex offender commitments. A similar screening requirement is used in California. Both states use “structured screening instruments” as part of the screening process.

Currently, Minnesota’s commitment program detains about 150 individuals in highly secure treatment facilities. By comparison, the sex offender population in Minnesota prisons is about 1100. About 350 sex offenders are released from prison each year. Of these, about 10% are referred for possible commitment, and half of those (15 to 18 annually) are civilly committed.

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