

Punishing Pedophiles: Criminal Commitment or Criminal Imprisonment Rather Than Prison Followed by Outpatient Civil Commitment

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Texas deals with pedophiles in a unique and inappropriate way. Under the state's current statutory scheme, a person found guilty of committing a sexually violent offense against a child is sentenced to prison in accord with the Penal Code.¹ Sixteen months prior to the offender's anticipated date of release from prison, the Texas Department of Criminal Justice may seek to have the person evaluated to determine whether he² is a sexually violent predator ("SVP"), and thus eligible for outpatient sex offender treatment upon release.³ If he is found to be an SVP, outpatient treatment will be required.⁴ Under the Texas civil commitment statute, the pedophile is not confined; rather, he is required to attend treatment sessions at an outpatient facility and comply with certain conditions determined necessary by the judge.⁵ This scheme, incarcerating the pedophile for years without undergoing mandatory treatment only to be released back into society where he is required to initiate treatment defeats the whole purpose for which the statute was created—to protect the children of Texas. To better accomplish its purpose, the statutory scheme addressing SVPs must be substantially altered.⁶ A proposed solution is discussed below.

The Problem

Under *Kansas v. Hendricks*, states are permitted to civilly commit an SVP—following criminal imprisonment—for an indefinite period of time so long as it is determined beyond a reasonable doubt that he is suffering from a mental abnormality or personality

¹ TEX. HEALTH & SAFETY CODE ANN. § 841.002(8) (Vernon Supp. 2007) (listing the penal code sections that constitute a sexually violent offense; these include—among others—aggravated assault, sexual assault, aggravated sexual assault, aggravated kidnapping, burglary with intent to commit any of the four previously listed offenses, and murder or capital murder based on sexually motivated conduct).

² For purposes of this article, pedophiles will be referred to as male because, while female pedophiles exist, most are male.

³ *Id.* § 841.081(a) (Vernon 2003). Texas is the only state that conducts an outpatient treatment program, as opposed to the widely-adopted inpatient commitment scheme. TEXAS DEP'T OF STATE HEALTH SVCS, COUNCIL OF SEX OFFENDER TREATMENT CIVIL COMMITMENT OF THE SEXUALLY VIOLENT PREDATOR, *Inpatient vs. Outpatient SVP Civil Commitment*, http://www.dshs.state.tx.us/csot/csot_ccinout.shtm (last visited Feb. 4, 2011).

⁴ See Generally TEX. HEALTH & SAFETY CODE ANN. Ch. 841: *Civil Commitment of Sexually Violent Predators* (Vernon 2003 & Supp. 2007).

⁵ See *Id.* § 841.082 (setting out the possible judicial conditions to outpatient civil commitment). Notably, only physical, as opposed to chemical, castration is offered. No form of castration, however, is required. See TEX. GOV'T CODE ANN. § 508.061 (Vernon 2004) (delineating the required procedure for offering physical castration to certain sex offenders).

⁶ It is important to note that this statute only deals with pedophiles, not with non-pedophilic men who sexually abuse children opportunistically. It is estimated that "perhaps half of the sex offenders against children are pedophiles." MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION 64–65 (2008).

disorder that makes him likely to engage in repeated predatory acts of sexual violence.⁷ In Texas, the civil commitment procedure begins toward the end of the SVP's criminal sentence. This arrangement is problematic, however, as it begs the question: can a person be punished through the criminal system, and *then* be labeled as incapable of controlling his actions, such that he can be civilly committed for purposes of treatment and incapacitation?

As noted in Justice Kennedy's concurring opinion in *Hendricks*, the idea that someone can be civilly committed *after* being punished through the criminal process certainly raises a red flag.⁸ And, in light of the criminal-like procedures used to commit SVPs, it is fair to question whether civil commitment is simply a way to extend punishment, rather than to treat or incapacitate. While the Supreme Court has held that this is permissible because SVP legislation is not punitive in nature, it is at least inherently unfair and perhaps appropriately labeled as deceitful.

In *Hendricks*, Justice Breyer, writing on behalf of four dissenting justices, spoke of the impermissibility of delaying treatment until the SVP has completed his prison sentence.⁹ Justice Breyer made an excellent point. Why should courts delay evaluation, diagnosis, and commitment proceedings until several months prior to expiration of the SVP's criminal sentence? Assuming that an SVP suffers from a "mental abnormality,"¹⁰ at the time he is initially brought to court, why should assessment of this condition and mandatory treatment be delayed for the duration of his prison term? This delay in treatment creates the likelihood that the offender's mental abnormality will be exacerbated, as he may tend to ruminate obsessively about sexual acts with children for years while in prison without even a minimum form of intervention to deter or halt the same thoughts that initially led him to prey on children.¹¹

Proposed Solution

Because criminal punishment and civil commitment appear to label SVPs simultaneously as responsible for their actions and as unable to control their dangerousness, the best solution is for the Texas Legislature to enact a comprehensive statute for dealing with criminal offenders who—based on the charges and criminal history—appear to be SVPs at the inception of the criminal proceedings. Thereafter, the court should order the accused evaluated by mental health professionals to determine whether he is unable to control his sexually violent actions and likely to engage in future acts of sexual violence, *or* whether he is able to control himself but chooses not to conform his behavior to normative societal roles.

⁷ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁸ *Id.* at 373 (Kennedy, J., concurring).

⁹ *Id.* at 386 (Breyer, J., dissenting).

¹⁰ Pedophilia has been classified as a "mental abnormality." *Id.* at 360.

¹¹ *See, e.g.*, MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION 183 (2008) (noting that "there is some evidence . . . suggest[ing] that criminal sanctions increase the likelihood of new offenses").

If it is determined that the accused being evaluated is unable to control his sexual violence, two possible alternatives follow. First, if the offender is amenable to treatment, criminal commitment proceedings should be initiated. Alternatively, if an offender is found to be “untreatable,” he should be sentenced to life in prison without the possibility of parole.¹² In determining the length of commitment or prison sentence, the Legislature must create new, longer sentences than those currently available under the Penal Code.¹³ If, on the other hand, he is found to have control over his actions and simply chooses not to conform, he should be prosecuted and sentenced under the current Penal Code sections applicable to regular criminals.

While commitment in a mental institution is substantially more expensive than imprisonment,¹⁴ the scheme created for commitment of SVPs should take this problem into account. Akin to criminal sentencing parole laws or halfway-house living, the Legislature should fashion a law that—following rigorous treatment for an extended period of time—allows for the pedophile to be evaluated and considered for an alternate living arrangement at the appropriate time. Under this scheme, unlike regular parole laws, the person would not be released to live anywhere outside specific designated government-run or government-monitored housing. Additionally, unlike halfway homes, this sort of living arrangement is permanent; unless he is deemed cured, he will never live in regular housing, unmonitored or untreated. In order to help with the high costs of implementing this scheme,¹⁵ the SVP will be required to work and pay for his housing, medication, tracking, and other treatment while he is transitioned into this “super intensive supervision program.”¹⁶

¹² The penal code currently allows for a sentence of life in prison *or* five to ninety-nine years for first time first degree felony offenders. TEX. PENAL CODE ANN. § 12.32 (Vernon Supp. 2009). However, sexual assault of a child is a second degree offense, punishable only by two to twenty years in prison. *Id.* § 22.011. A new section applicable only to SVPs should create alternative sentencing rules and require that the courts automatically sentence them to life in prison without the possibility of parole, regardless of whether their offenses amount to first-degree or second-degree offenses per the current definitions. Another section of the Penal Code makes life in prison the automatic sentence for *some* repeat offenders, but in light of the high recidivism rates of pedophiles, there is no reason to wait for them to get caught again after abusing yet another child (or possibly numerous children). *See id.* § 12.42(c)(2).

¹³ Perhaps a new category could be created; for example, “guilty but suffering from a mental abnormality not to the point of incompetence.”

¹⁴ The average cost per inmate for the year 2008 in a Texas prison was \$15,527. National Institute of Corrections, Statistics for the State of Texas, <http://www.nicic.gov/Features/StateStats/?State=TX> (last visited Mar. 5, 2011). The average cost of inpatient treatment varies from approximately \$70,000 to \$166,000 per SVP, per year. TEXAS DEPARTMENT OF STATE HEALTH SERVICES, COUNCIL OF SEX OFFENDER TREATMENT CIVIL COMMITMENT OF THE SEXUALLY VIOLENT PREDATOR, *Cost of Inpatient vs. Outpatient SVP*, http://www.dshs.state.tx.us/csot/csot_ccost.shtm (last visited on Feb. 4, 2011).

¹⁵ While the current civil commitment statute sets out conditions that could be adapted to this criminal commitment structure, a number of changes are necessary to maximize its effectiveness. Among others, I would recommend chemical castration be required—through the use of gonadotropin releasing hormones (GnRH) such as leuprolide acetate (Lupron) to reduce testosterone production and, as a result, sexual arousal—as part of the treatment and would prohibit the SVP from living in any facility outside of select government-approved living facilities.

¹⁶ *See e.g.*, TEXAS BOARD OF PARDONS AND PAROLES, SPECIAL CONDITION SISP (SUPER INTENSIVE SUPERVISION PROGRAM), BPP-POL. 145.260 (2010), http://www.tdcj.state.tx.us/bpp/policies_directives/POL.145.260%20_SISP.pdf (last visited Mar. 17, 2011).

Conclusion

In sum, I propose that, in light of the severity of the societal threat posed by these repeat sexual offenders, outpatient civil commitment following prison sentences is insufficient to adequately protect children in Texas. Inpatient criminal commitment at a high-security facility and life in prison without the possibility of parole are the best ways to protect society. However, because some pedophiles want to be—and can be—rehabilitated, when the route is commitment to a mental institution, they should be treated for the duration of their commitment. If, following years of treatment and confinement in a high-security mental institution, it is determined that the pedophile is both able and determined to avoid risky situations and control his behavior, he should become eligible for relocation to an intensively supervised halfway house-styled living arrangement. Once placed in this environment, the pedophile is to continue treatment and is to be closely monitored for the rest of his life or until cured, whichever is earlier.

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