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## THE ONLY WAY TO GET OUT IS TO DIE: MENTAL HEALTH, PUBLIC SAFETY, AND LEGAL IMPLICATIONS OF SEX OFFENDER CIVIL COMMITMENT IN TEXAS

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### INTRODUCTION

In the United States, there are few crimes more abhorred than sexually violent offenses, and by extension, few people more reviled than those who commit them. In popular media, people accused of sexually violent crimes are variously called “monsters,” “scum,” or “the worst of the worst.” The Texas criminal justice system, along with a number of other state systems, have officially labeled these individuals “sexually violent predators” or SVPs (Texas Department of Health and Human Services 2009).

It is certainly difficult to feel sympathy for people who have committed terrible crimes against others, but the way we address sex crimes in this country has long been based on fear instead of evidence. The vast majority of people who commit sex crimes, regardless of severity, are placed on the sex offender registry upon their release from confinement. They are required to follow a host of rules and requirements that make it next to impossible to secure resources proven to reduce recidivism, such as stable

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housing or a job (La Vigne et al. 2009). People labeled as SVPs, however, are often never given the chance to reintegrate into society, even after completing their prison sentences. Many of these individuals are deemed too dangerous to be released, even with all of the restrictions in place for people convicted of sex offenses. Instead, upon completion of a prison sentence, some people convicted of sexually violent crimes are transferred to a civil commitment center, where they are held indefinitely—until they can prove that they are rehabilitated.

Like the criminal justice system more broadly, the stated goals of civil commitment are to provide treatment and rehabilitation for those who have committed serious crimes and to protect the public from possible future crimes they might commit. The criminal justice system has evolved to serve a multi-purpose role of rehabilitation, incapacitation, and punishment. The distinctions between these roles and their relative importance to each other, however, is not always clear. Many individuals are released from prison without having received any rehabilitative programming. Many more are held in prison long after they cease to be dangerous. The civil commitment system suffers from these challenges as well. Even after recent improvements, the practice of civil commitment in Texas raises concerns about its mental health, public safety, and legal implications. Specifically, the level of treatment Texas provides in civil commitment is insufficient, particularly for general mental health and trauma-informed care. The evidence for how much civil commitment improves public safety is not compelling, and Texas could open itself up to legal challenges on the constitutionality of the practice. This article examines the implications of civil commitment in more detail and makes recommendations to improve the practice of civil commitment in Texas and across the country.

### **A Note on Language**

Following the lead of top scholars and advocates, I use person-first language whenever possible to refer to those involved in the criminal justice system (La Vigne 2016). Referring to people by the terms “sex offender” or “sexually violent predator” reduces them to their worst mistakes rather than acknowledging their humanity, even when flawed. In some cases, however, I am unable to easily adjust the language used by the system, so I do not attempt to do so.

I also use the term “civil commitment” to refer specifically to civil commitment for those convicted of sex offenses, and not to its broader context describing the involuntary commitment of other groups of people through the civil court system.

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## CIVIL COMMITMENT IN TEXAS AND NATIONALLY

Civil commitment, as it applies to those finishing prison sentences for sex crimes, refers to the indefinite confinement of people under the assumption that they are at enough risk of reoffending that it is irresponsible to release them into society. It is not a punishment for something they have already done and for which they have completed a sentence, but rather a preventative detention for something they might do in the future. Texas requires that someone have committed at least two sexually violent offenses to be considered for civil commitment and then relies on an actuarial risk assessment and/or the clinical judgment of a practitioner to determine whether the person should be civilly committed. A judge in a civil court makes the final decision.

Twenty states have laws that allow for the use of civil commitment for people convicted of sex crimes. Between these states and the federal government, there are approximately 5,400 people being held in civil commitment across the country (Stephoe and Goldet 2016). In Texas, the number is around 215, which is less than one tenth of one percent of the total number of people on the sex offender registry in the state (Rafique 2016). Civil commitment is most prevalent in California, Minnesota, New Jersey, and Florida, but is also practiced in Wisconsin, Illinois, New York, Kansas, Virginia, Washington, Massachusetts, Iowa, Nevada, Missouri, South Carolina, North Dakota, New Hampshire, Pennsylvania, and Arizona (Stephoe and Goldet 2016).

Texas residents who are civilly committed are held at the 382-bed Texas Civil Commitment Center in Littlefield, about 40 miles northwest of Lubbock. The facility is a former prison, so it looks and feels like one, with residents living in small rooms with metal bunks and toilets side by side. The Texas Civil Commitment Center is under the supervision of the Texas Civil Commitment Office but is run by Correct Care Recovery Solutions, a private company that operates 12 state hospitals and civil commitment centers in the United States and Australia (Correct Care Recovery Solutions 2016).

In Texas, as in many other states, there is a tiered system of privileges that people in civil commitment can access as they move through the levels of treatment successfully. Texas has a five-tiered system: the first four tiers involve inpatient treatment at the Littlefield facility, and the fifth tier is outpatient, in which program participants return to their communities under strict regulation and surveillance. Texas's civil commitment program was established in 1999 as an entirely outpatient program, the only one of

its kind in the country, with residents scattered at halfway houses across the state (Rafique 2016; Blaney 2016). However, the program included hundreds of rules, and by 2015 nearly half of the approximately 350 people civilly committed since 1999 had been reincarcerated due to rule violations. Not a single person had graduated from the program (Mitchell 2016). As other states began to face lawsuits about the lack of releases from their civil commitment programs, and Texas faced lawsuits about insufficient treatment and punitive conditions in its own program, the state decided to revamp the civil commitment program. In 2015, the Texas State Legislature passed Senate Bill 746, which made a number of management changes and implemented the tiered system (Whitmire 2015). Then the state hired Correct Care Recovery Solutions and transferred all its civilly committed individuals to the Littlefield facility (Rafique 2016).

## MENTAL HEALTH IMPLICATIONS

In addition to violent sex offending behavior, most states with civil commitment laws require someone to have a “mental disorder or abnormality” to be eligible for civil commitment. A mental abnormality is commonly defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent acts” (Jackson and Hess 2007). In practice, this often refers to a paraphilic disorder, but an individual need not have an official diagnosis to be civilly committed.

According to the current edition of the Diagnostic Statistical Manual (DSM-5), the nationally recognized resource for diagnosing mental illness, people are diagnosable with a paraphilic disorder if they “have a sexual desire or behavior that involves another person’s psychological distress, injury, or death, or a desire for sexual behaviors involving unwilling persons or persons unable to give legal consent” (American Psychiatric Association 2013). Among civilly committed individuals, paraphilic disorders are the most commonly diagnosed mental illness, followed by borderline personality disorder and substance use disorders (Jackson and Hess 2007). Research has also shown that large proportions of people who commit sex offenses have experienced sexual trauma or abuse themselves (Jespersen et al. 2009). Neither childhood trauma nor a diagnosed paraphilic disorder excuses criminal behavior, but understanding the root cause of the behavior is an important step toward developing effective treatment for those who commit sex offenses, which is the first stated goal of civil commitment.

The Texas Department of Criminal Justice (TDCJ) reports that it provides people in civil commitment with the Sex Offender Civil Com-

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mitment Treatment Program (SOTP-CC) within 18 months of transfer from prison to the Texas Civil Commitment Center (Texas Department of Criminal Justice n.d.). The SOTP-CC is a more intensive version of what TDCJ provides in prison, which includes 4 to 18 months of treatment, depending on risk level. Given that many sentences for sex crimes are measured in decades, this represents a very small proportion of time in prison spent in treatment. Texas's treatment program uses evidence-based cognitive behavioral methods, but there is no data available on what percentage of eligible individuals participate in or complete treatment while in prison (National Parole Resource Center 2014). Evidence is also not fully conclusive on what elements of treatment are most effective and for what kinds of people (Przybylski n.d.). Traditional sex offender treatments have focused on disclosure of crimes and deviant arousal, but more emphasis must be placed on healing trauma as well. In addition, the stresses of civil commitment can contribute to ongoing mental health problems, such as depression and anxiety, which should be addressed as part of treatment. A federal judge in Minnesota declared that there was "an emotional climate of despair" in the state's civil commitment program after one resident commented, "The only way to get out is to die" (Chammah 2017).

The basic question that underlies the practice of civil commitment is whether a propensity to commit violent sex offenses is something one can recover from. The existence of civil commitment centers in the first place seems to indicate that the answer is no—otherwise people should be sufficiently rehabilitated after receiving treatment in prison. If the issue is that there is not adequate treatment for those with sex offense histories available in prison, or that they are not completing it during their sentences, then the solution should be to increase the availability of and requirements for treatment in prison, not to implement civil commitment as a secondary sentence in order to provide treatment. However, the premise that anyone will ever be released from civil commitment depends on a belief that people can be rehabilitated. The courts have indicated that the ability of civil commitment centers to safely release residents is essential to the legality of those centers, as well as to the day-to-day mental health of residents held in civil commitment.

## PUBLIC SAFETY IMPLICATIONS

The second stated goal of civil commitment is to protect the public from future offending, but it is very difficult to tell how much civil commitment actually improves public safety. Since very few people nationally have ever been released from civil commitment programs, there is no way to calculate

an accurate recidivism rate. However, the recidivism rate for sex offenses in general is often misreported and overblown. In a 2002 decision, Justice Anthony Kennedy, citing an unfounded magazine article, wrote that “the rate of recidivism of untreated offenders has been estimated to be as high as 80 percent” (Chammah 2017), when in fact research has shown recidivism rates for sex offenses between 3 and 14 percent, a number much lower than the recidivism rate for other crimes (Langan et al. 2003).

Of course, supporters of civil commitment would argue that its goal is to identify those 3 to 14 percent who will recidivate and keep them confined to prevent any further harm to the public. According to an American Psychiatric Association Task Force report, “The tolerance for recidivism is zero” when it comes to public perceptions of sexual offending (Steptoe and Goldet 2016). As if to reinforce the danger of the “sexually violent” individuals in its program, Minnesota reported nearly 50 “assaults, threats, and instances of criminal sexual conduct” toward staff in its civil commitment program between 2010 and 2014. However, in a program of over 700 of the state’s “most dangerous” individuals, this is fewer than 10 incidents per year—many fewer than occur per capita in prisons (Chammah 2017). Texas does not release statistics about incidents in its program.

One way to assess the public safety benefits of civil commitment would be to compare sexual recidivism rates of states that have civil commitment programs and states in which people who commit sex offenses are released to the community with supervision and registration requirements. Using appropriate statistical controls, researchers could potentially isolate the effect of civil commitment on these rates, but this research has not yet been conducted. Most research on civil commitment is focused on avoided crime using predicted rates of recidivism from risk assessments. One study of 105 people civilly committed in Minnesota between 2004 and 2006 found that the Minnesota Sex Offender Screening Tool (MnSOST) predicted that nine percent of people who were civilly committed would reoffend within four years if released to the community. Put another way, the civil commitment of those 105 people reduced the overall sexual recidivism rate by 12 percent. The study’s author argued that this small reduction is not worth the cost to the state of civil commitment and the money used for civil commitment could be better invested in intermediate community programs that might protect the public equally well (Duwe 2014).

Several other studies have compared people selected for civil commitment with those who were eligible but not selected. The civil commitment process relies heavily on actuarial risk assessments, such as the MnSOST and the STATIC-99, another common risk assessment for sex offenses.

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While one study found that people selected for civil commitment are at higher risk of reoffending based on MnSOST and STATIC-99 scores (Calkins Mercado et al. 2011; Levenson 2004), another found that neither of these assessments has been shown to strongly predict sexually violent recidivism at all (Boccaccini et al. 2009). Texas uses both of these assessments as well as the Personality Assessment Inventory (PAI), which was also found to be a weak predictor of sexually violent recidivism (Boccaccini et al. 2010). It is difficult to argue that civil commitment prevents sexually violent recidivism when the evidence is not even clear how to predict it.

## LEGAL IMPLICATIONS

Some of the strongest arguments against civil commitment have to do with its constitutionality. Legal scholars across the political spectrum have raised concerns related to double jeopardy, lack of due process, and the possibility of lifetime commitment based on a projection of future danger (Yung 2013). However, the U.S. Supreme Court upheld the constitutionality of civil commitment three times between 1997 and 2010 (Calkins Mercado 2011). The legality of civil commitment hinges on its use as a rehabilitative function rather than a punitive one. In its 1997 *Kansas v. Hendricks* decision, the U.S. Supreme Court warned that using the guise of treatment to continue to punish people after they have completed their sentences is a violation of their due process rights (Sullem 2017). Just before its 2015 reorganization, Texas's civil commitment program was on shaky constitutional ground itself, having not released anyone since its inception. This made it difficult to argue that the program was rehabilitative rather than punitive and directly led to the efforts to reform it.

In September 2017, the Supreme Court declined to hear a Minnesota case that alleged the state was violating due process by holding people in its civil commitment program indefinitely. The program had fully released 1 person in 23 years, leading to de facto life sentences for everyone else. This point is especially relevant for people who committed their crimes as juveniles, for whom the Supreme Court has struck down life imprisonment as unconstitutional (Rovner 2017). Thirteen states allow civil commitment for people who committed their crimes as juveniles, including Texas (Stephoe and Goldet 2016).

Civil commitment of people who have committed serious sex offenses has caught international attention as well. In October 2015, two high court judges in Britain refused to extradite someone to California because the possibility that he would be civilly committed was a “flagrant denial of his rights under the European Convention of Human Rights” (Stephoe

and Goldet 2016). By continuing to hold people in civil commitment without clear timelines for progression through treatment and eventual release, Texas is opening itself up to potential lawsuits. SB 746 requires a tiered program that “provide[s] for the seamless transition of a committed person from a total confinement facility to less restrictive housing and supervision and eventually to release from civil commitment,” but it does not specify any timelines to do so.

## POLICY RECOMMENDATIONS

Without a Supreme Court ruling striking down civil commitment as unconstitutional, the 20 states with civil commitment laws will likely continue the practice. However, these states should take guidance from other states about ways to reduce their reliance on civil commitment. The fact that many countries outside the United States view civil commitment as a human rights violation indicates that alternatives are possible while still maintaining public safety. The following policy recommendations assume the continued existence of civil commitment but provide a roadmap for improving and reducing its use. By implementing these recommendations, policymakers in Texas and across the country could improve the mental health of people who are civilly committed, maintain public safety for people in the community, and reduce the possibility of legal challenges.

### Mental Health

- 1) *States should reallocate funding from civil commitment to provide comprehensive and ongoing sex offender treatment while people are in prison, reducing the need for later civil commitment.* Comprehensive and appropriate sex offender treatment is necessary in prison systems whether or not civil commitment is also used. For states such as Texas that face frequent budget shortfalls, shifting funding from civil commitment to treatment provision in prison is a reasonable tradeoff that places emphasis on the rehabilitative goals of the criminal justice system.
- 2) States should provide comprehensive mental health services in civil commitment to treat underlying trauma as well as depression and anxiety associated with ongoing confinement. Because courts have determined that civil commitment programs must have an eventual goal of releasing people back to the community, providing appropriate mental health services within civil commitment centers is a public safety issue as well as a mental health issue. In order to be safely released, people under civil commitment must have the

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opportunity to process underlying trauma and develop coping mechanisms for living back in the community after years of confinement. This recommendation should not require large amounts of funding, especially if the number of people under civil commitment is reduced.

## Public Safety

- 3) *The federal government should fund rigorous research comparing sex offense recidivism rates for states with civil commitment laws and those without in order to determine the efficacy of civil commitment in preventing reoffending.* Although criminal justice decisions usually occur at the state level, the most rigorous research is often conducted nationally, especially when examining differences between states. The federal government is in a unique position to fund rigorous research comparing sexual recidivism rates in states with and without civil commitment laws, and should make this a priority.
- 4) *The federal government should fund continued research on the predictive validity of sex offense risk assessments and strategies to improve risk prediction.* The fact that civil commitment decisions often hinge on the results of risk assessments that have not been validated to predict sexually violent reoffending does not support the stated goal of civil commitment as a mechanism to increase public safety. The federal government should fund research partnerships between practitioners and academics to continue developing, testing, and refining risk assessment instruments, as well as evaluating the instruments for bias.

## Legal

- 5) *States should implement defined timelines for civil commitment residents to progress through treatment and be released, preventing hopelessness and reducing the possibility of lawsuits.* The Texas State Legislature took important steps in 2015 to recommend that people in civil commitment move steadily toward release. However, because SB 746 did not include associated timelines, it lacked an enforcement mechanism. Texas should pass a bill that amends this process and provides recommended timelines for each tier of the civil commitment program. Other states that have struggled with releasing anyone from civil commitment, such as Minnesota, may need to create similar timelines. Otherwise, challenges to civil commitment laws will likely continue to appear in court.

- 6) *States should prohibit the use of civil commitment for people who committed their crimes as juveniles in order to avoid the unconstitutionality of de facto life sentence for these individuals.* The 13 states that allow civil commitment for people convicted of crimes as juveniles are especially susceptible to lawsuits challenging the constitutionality of this practice. Coupled with scientific knowledge about the brain development of adolescents, confining young people indefinitely for crimes they committed before the age of 18 is neither appropriate nor legal. This policy change would affect only a small number of people, but policymakers would likely be more receptive to the case for outlawing civil commitment for juveniles than the cases for other reductions in civil commitment.

## CONCLUSION

Civil commitment is used in 20 states to provide additional treatment to those who have committed the most serious sex crimes while preventing them from committing further crimes in the community. However, the use of civil commitment raises significant concerns about the availability of in-prison treatment and the mental health of those held indefinitely without hope of release. Civil commitment has not been shown to significantly improve public safety, and it raises legal concerns as well. Although Texas took important strides in 2015 to restructure its civil commitment program, there is still significant work to be done. Other states face similar challenges. Based on further research and recommendations from other countries, the ultimate goal may be to eliminate use of civil commitment entirely. In the meantime, the policy recommendations above outline next steps for improving its use. If Texas and other states plan to maintain their use of the practice, states should implement the recommended reforms in order to address the mental health, public safety, and legal concerns related to civil commitment.

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