What To Do With Violent Sex Offenders

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If someone finishes a prison sentence for a violent sexual crime, but might still be dangerous, should he be released? How do you know if he's dangerous? And when does it violate his rights to hold him?

On Monday, the Supreme Court is considering whether to hear a case that stems from these questions, a challenge to a Minnesota "civil commitment" program that holds people convicted of sexual crimes long after their sentences, ostensibly for treatment. Roughly 20 programs have arisen around the country since 1990, and at first they appeared similar to the hospitals for the mentally disabled on which they were modeled. When the Minnesota program was created in 1994, patients could bring their own computer or television or game console or aquarium, they could leave with a staff escort, visiting hours lasted eight hours a day, and if their families brought groceries, they could cook in the facility, according to the original lawsuit. In theory, once you completed treatment, you would be released.

But the laws governing the program were amended, and by 2012 the two Minnesota facilities, among others around the country, looked suspiciously like prisons. Surrounded by double-razor wire and bunked in two-man cells, more than 700 "patients," as they were still called, now wore handcuffs and leg irons when transported. Visits were limited, personal computers and televisions were no longer allowed in, and strip searches became common.

By January 2017, just one person had been fully discharged, according to the Minneapolis Star Tribune. At a hearing, one resident said he believed "the only way to get out is to die," leading federal district judge Donovan Frank to declare "there is an emotional climate of despair among the facilities' residents."

Judge Frank ruled the laws governing the program unconstitutional two years ago, but he was overruled by the 8th Circuit Court of Appeals, setting up the current challenge. The legal fight is over how to interpret the constitutional right to not be deprived of "life, liberty, or property, without due process of law." Even if the court declines to hear the case, their interest has already sparked attention from scholars and doctors, liberals and libertarians, whose briefs to the court offer a snapshot of where debates on the rights of sex offenders are likely to go in the coming years. Beyond the roughly 5,400 people committed in similar programs across the country, a ruling could have ramifications for thousands more convicted of sex offenses, who have faced increasing restrictions on where they can work, live, and travel. (The court is also considering on Monday whether to take a broad challenge to a sex offender registry law in Michigan).

“All of these cases represent a willingness of courts to examine these laws by looking through and behind the face of the laws, and examine how they are being implemented” said Eric Janus, a professor at Mitchell Hamline School of Law in Minneapolis who has written amicus briefs in support of the plaintiffs. “After 20 years we can’t rely on the fact that the sign on the front door says ‘treatment center’ and not ‘prison.’”

Deciding how to treat people based on what they might do, but haven’t yet done, may sound dystopian, but it is a theme that runs across the U.S. criminal justice system, from “risk assessment” scores in Kentucky bail hearings to Texas death penalty trials, where jurors decide whether a defendant will pose a “continuing threat to society.” The difference is that programs like the one in Minnesota are “civil,” blurring the line between punishment and treatment. (The Marshall Project looked into a New Jersey program last year.)

Janus and other scholars argue, as a legal matter, that the burden is on the state to defend why it is holding people beyond what the criminal courts have ordered. “If for no other reason than to protect the moral legitimacy of the criminal justice system, the boundaries of this ‘alternate justice system’ must be vigilantly patrolled,” he wrote to the district court judge in a brief. The emphasis on liberty has pulled in libertarian groups like the Cato Institute and Reason Foundation, who have also filed a brief stating that “sex-offender laws have bored a hole in the nation’s constitutional fabric.”

The medical community also sees this case as a broader opportunity for the justices to correct a misconception about sex offenders: though their crimes are offensive to the public, they are not, it turns out, particularly likely to commit new crimes. In 2002, Justice Anthony Kennedy wrote that "the rate of recidivism of untreated offenders has been estimated to be as high as 80 percent," and said this number was “frightening and high.” But the percentage was presented by a counselor in the magazine Psychology Today with no research to back it up, and the counselor has since said he’s “appalled” that his words were used as the basis for numerous court decisions upholding stringent sex offender policies.

A more accurate number might be gleaned from a U.S. Department of Justice study, which found that of nearly 10,000 people convicted of sexual crimes and released from state prisons in 1994 — the year the Minnesota program began — 5.3 percent were arrested for a new sexual crime within three years. If the court were to revisit this basic claim about sex offenders, it might look differently at the myriad restrictions on housing and work that states have enacted, and which are increasingly being challenged successfully in lower courts.

Minnesota has argued that states are allowed to limit due process when public safety is at stake, and points to the Supreme Court’s own 1905 declaration that “there are manifold restraints to which every person is necessarily subject for the common good.” The state notes that the population of the program is both very small and very dangerous, full of people who committed multiple rapes and molested numerous children. There were nearly 50 assaults, threats, and instances of “criminal sexual conduct” towards staff between from 2010 through 2014. The program “employs experienced clinical professionals who exercise good-faith judgment” and standard treatment practices, the state’s lawyers wrote to the court, “even if they do not attain perfection in what everyone agrees is an extremely challenging field.”

If the court rules against the program, the much more difficult task will lie ahead: drawing lines between which civil commitment programs are acceptable and which are not. It’s an argument

that is not unique to the U.S.; German and Australian courts have struggled to decide on the fairness of analogous programs.

David Prescott, former president of the Association for the Treatment of Sexual Abusers, notes that some states, like Wisconsin and New York, have managed to create civil commitment programs that do let people out, which further suggests that Minnesota is an outlier in the other direction. “There are some very dangerous people out there,” said Prescott. “We have to find the balance of healthy lives and safe communities, and I don’t believe we’re doing a very good job.”