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The Minnesota Sex Offender Program: Federal Intervention Part 1 – The Challenges

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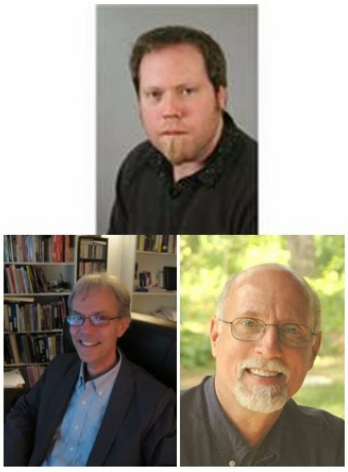
This opinion piece is the first of a three-part series on the Minnesota Sex Offender Program (MSOP). On February 9, 2015, at the US District Courthouse in St. Paul, a federal trial is scheduled to begin to determine the constitutionality of MSOP. Part 1 discusses some of the issues and concerns that led to the federal trial. Part 2 reviews the 2014 report from a team of experts appointed by the federal court to examine the program. After the conclusion of the trial, and the court has issued its ruling, Part 3 will review the decision and discuss implications.



SAJRT Bloggers' Profile
Chief Blogger Kieran McCartan, Ph.D. and Associate Bloggers David S. Prescott, LICSW and Jon Brandt, MSW, LICSW are longtime members of ATSA. We are dedicated to furthering the causes of evidenced-based practice, understanding, and prevention in the field of sexual abuse.

Three years ago, a group of clients at the Minnesota Sex Offender Program (MSOP) petitioned the US District Court for Minnesota for relief from conditions of incarceration that they claimed were unconstitutional. A central concern was that the program had then been operating for 17 years, had received more than 700 "sexually violent persons" (SVPs), and not one individual had been able to fully complete the program. Federal Judge Donovan Frank believed the petition had merit, appointed counsel to represent the plaintiffs, added all MSOP clients as a class, and set into motion a review of both MSOP, as a program, and sexual offender civil commitment (SOCC) in Minnesota, as a system.

Also three years ago, this blog called attention to "Doubts about SVP Programs," raising questions about the legitimacy of SOCC, as least as it has been implemented in Minnesota. In a federal ruling (2/20/14) Judge Frank wrote that SOCC in Minnesota is "clearly broken," and suggested that MSOP might be "one of the most draconian sex offender programs in existence." Now, a year later, on February 9, 2015, at the US District Courthouse in St. Paul, a federal trial is scheduled to begin to determine whether MSOP and SOCC in Minnesota is unconstitutional.

The authors want readers to know that our motivation in writing this blog is to advocate for the highest standards of practice and policy. We believe advocating for credible and effective treatment for those who have sexually offended, and supporting those who have been victims of sexual abuse, is a not a

zero-sum proposition. We further believe that the issues addressed herein are in the public interest and of importance to all professionals in our field. Ultimately, a successful recovery for offenders does not come at the expense of victims – it honors victims. Mandating effective treatment to offenders and protecting everyone's rights can help to ensure a beneficial outcome for the many stakeholders of sexual abuse: offenders, victims, their families, friends, and society at large. However, to be credible and constitutional, treatment for offenders must have an end point. The authors are aware of no bona fide form of treatment for sexual offending that requires twenty years or more to complete.

Given that society considers sexual violations as one of the most despicable crimes against a person, civil liberties for sexual offenders might be among the most unpopular civil rights causes of our time – perhaps of all time. Since the US Supreme Court ruled, just seven years ago, that sex offenders cannot be subject to capital punishment, the State of Minnesota has effectively accomplished what a vengeful segment of society has long demanded as an alternative to the death penalty – lock up sex offenders and throw away the key.

Since Minnesota reconstituted SOCC 20 years ago, some 740 individuals have been committed to MSOP (including approximately 30 who have died during incarceration). Only two clients have achieved and survived a conditional release, and no one has been fully discharged. Effectively, MSOP has a one-way door.

The criteria for release from MSOP has essentially been: completion of treatment, establishment of an aftercare plan, recommendations from MSOP staff and the Special Review Board (SRB), and final approval by the Supreme Court Appeal Panel (SCAP). Unless a client is released by court order, administrative releases can be politicallyblocked by the governor.

Most clients and staff at MSOP understand the intellectual dishonesty of treatment goals that no one has ever completed. Clients have the impossible choice of "consenting" to participate in treatment and having less than a 1% chance of release, or withdrawing from treatment and having no chance of release. Staff have the impossible job of trying to maintain client motivation for unending treatment. To the credit of many, according toMSOP reports, more than 80% of clients participate in treatment.

By all accounts, most clients at MSOP sincerely regret their sexual transgressions, are willing to diligently work on attainable treatment goals, and express their desire to be contributing members of society. They also recognize that, no matter how great their efforts or successful their recovery, they will never escape the state label of "sexually violent person" (SVP) or "the worst of the worst." While it is easy to be suspicious of statements by sex offenders that they regret their actions, two studies have found that SOCC treatment clients truly believe that treatment is important (Levenson, et. al., 2009, 2014). However, as it currently exists, MSOP and SOCC in Minnesota is not a level playing field for clients who earnestly want to achieve their release.

In Judge Frank's 2/20/14 ruling, he warned that if, "Plaintiffs are able to demonstrate that the commitment statutes are systematically applied in such a way as to indefinitely commit individual class members who are no longer dangerous, or that MSOP is administered as a punitive system despite its statutory treatment purpose, Plaintiffs will likely prove up their claims." (p.20)

The perilous challenges of "preventive detention," are well understood by Eric Janus, President and Dean of William Mitchell College of Law. The promises to balance civil liberties with public safety, and the use of preventive detention under the guise of treatment are discussed in Janus' intelligent, well-researched book, *Failure to Protect; American's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006). Janus reveals the often-deceptive appeal of SOCC, explains the complexity (and failure) of existing public policies to effectively abate sexual offending, and outlines several measures as prudent alternatives to the problematic and constitutionally compromised use of preventive detention.

It is not the case that the State doesn't know what to do with MSOP; it is a lack of professional courage and absence of political will. In 2011, the Minnesota Office of the Legislative Auditor published a detailed review of MSOP and a list of recommendations. In 2012 the Federal Court directed a SOCC Task Force to be convened and make recommendations. The Task Force released their final report in 2013. In 2014, a panel of sex offender treatment experts thoroughly reviewed the program and issued their report in November, 2014.

SOCC in Minnesota, and 19 other states, are driven by justifiable public outrage over an unacceptable level of sexual violence in the US. But sexual predator laws in the US are also rooted in antipathy toward "sex offenders" and pervasive myths about sexual offending - chief among them: that sexual offenders are a homogeneous group of people that can be readily identified, that most sex offenders will reoffend, that treatment doesn't work, and that experts can accurately identify which individuals are "highly likely" to reoffend – one standard which must be met for SOCC (Brandt, Wilson, & Prescott, in press).

In recent years there is a growing body of literature that creates further doubts about what it means to be "highly likely" to reoffend. In 2013, Dr. Grant Duwe, Director of Research for the Minnesota Department of Corrections published research which concludes that the majority of clients at MSOP are likely to NOT reoffend, even when actuarial research is extrapolated to "lifetime." In 2014, Dr. Karl Hanson and colleagues released their latest research on one of the most prevalent actuarial tool used for SVP assessments – the Static 99R. Their research strongly supports Duwe's findings - that sexual re-offending, even among offenders considered at high-risk, has been overstated, and that the correlation between desistance and time/aging is even stronger than previously believed. Further, Hanson and his colleagues found that re-offense rates decreased with time that offenders lived in the community (as opposed to in institutions). It seems that the same actuarial research that is used to put many clients under SOCC, now indicates that most MSOP clients will not reoffend. Whether or not this new research supports a finding that MSOP is operating in an unconstitutional manner, it is clear that SOCC as applied in Minnesota is greatly overreaching.

With no MSOP clients having been released via completion of treatment, many clients are pinning their hopes on a judicial release. Indeed those hopes may not be misplaced. In 2014, there was actually one release from MSOP which got little attention, because it was out "the back door." For one client at MSOP, a powerful dissenting opinion in the Minnesota Court of Appeals set-up an appeal to the Minnesota Supreme Court. As a result, his case was remanded to district court. After splitting hairs on the differences between "likely" and "highly likely" to reoffend, the district court ordered the client released, as not meeting criteria for commitment.

Judge Frank wrote in his preliminary ruling that the court will not allow clients to remain at MSOP if they do not meet legislative and/or constitutional criteria for confinement. While the trial has not yet begun,

there is much evidence already in record to support the need for a major overhaul at MSOP. What is soon to be determined is whether SOCC in Minnesota, as applied, is unconstitutional.

Despite the Federal Court's admonishment to state leadership to take immediate actionto 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. A few courageous lawmakers have tried to take up the cause, but two legislative sessions have passed without enacting necessary reforms.

Going into the third legislative session since the Federal Court put Minnesota on notice, the Minnesota legislature has capitulated to a faux chicken-egg dilemma: the federal court has indicated that the state legislature is the best political body to enact reforms, but reforming MSOP is too politically explosive for elected lawmakers, who would prefer to take political refuge in explicit directives from the federal court. Metaphorically, Minnesota seems to have approached SOCC with the same lack of foresight of grabbing a wolf by the ears – don't want to hold on, too scared to let go.

In a 8/11/14 Federal Ruling, when Judge Frank could have acted but demonstrated extraordinary judicial restraint, he wrote that, "It is obvious that but for this litigation [clients] would likely have languished for years in the prison-like environment of MSOP-Moose Lake, without any realistic hope of gaining [release]." (p.34) Several other states with SOCC have a simple criteria for release, consistent with numerous court rulings – clients who no longer meet criteria for commitment must be released. It appears there may be hundreds of clients at MSOP whose confinements are not supported by squishy criteria for commitment or virtually unattainable standards for release. By growing indications, it appears that many clients at MSOP could be safely and unconditionally released, and many more clients could be treated successfully in the community.

Judge Frank wrote in his February 2014 ruling, "To be clear, should plaintiff's prove up their claims, the statutes as applied and implemented are not likely to survive constitutional scrutiny." (p.21) After 20 years of failed attempts at reforms by the State, putting MSOP under the supervision of the Federal Courts is only controversial to those who accept status quo, or believe that "lock them up and throw away the key," is acceptable public policy. There is precedence for the Federal Courts to assume control of SVP programs that have run afoul of the US Constitution. In 1994, the Federal Courts put Washington's State SOCC program under federal supervision for 13 years. This federal lawsuit has now made Minnesota ground-zero for the debate about SOCC. To redirect all three branches of State government, and coordinate all the moving parts of SOCC in Minnesota, it now seems likely that meaningful reforms will require the courage of a Federal Judge and no less than the power of the Federal Courts.

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Blog Note: Part 2 of this three-part series will discuss the 2014 report prepared by four sex offender treatment experts appointed by the Federal Court to review MSOP to try to determine why Minnesota has the highest per capita rate of SOCC in the US.

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