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SEX OFFENDER CIVIL COMMITMENT TO PRISON POST-*KINGSLEY*

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ABSTRACT—Today, an estimated 5400 people are civilly committed under state and federal sex offender programs. This Note surveys these civil commitment regimes and finds that seventeen jurisdictions (sixteen states and the federal government) have enacted legislative schemes that authorize the indefinite civil detention of people charged with, or previously convicted of, sex offenses to prisons or prison-like facilities—often for their entire lives. By charting the pervasiveness of sex offender civil commitment to prison, this Note provides new evidence that these sex offender civil commitment statutes are, in fact, punitive and, therefore, unconstitutional. Moreover, this Note argues that the Supreme Court's decision in *Kingsley v. Hendrickson* calls into question the Court's logic in upholding sex offender civil commitment regimes in prior cases. Traditionally, civil commitment jurisprudence has turned on whether the legislature intends to punish—not merely confine—sex offenders. *Kingsley*, however, suggests that confinement may be found punitive based solely on the objective harshness of the conditions of incarceration, regardless of whether any state actor intended for the conditions to be punitive. If incarceration conditions may now constitute punishment regardless of governmental intent, it follows that the government may be punishing thousands of sex offenders without authorization. Indeed, as this Note shows, convicted prisoners and committed sex offenders commonly experience identical conditions of confinement.

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INTRODUCTION

In October 1982, Illinois brought criminal charges against Terry B. Allen for "unlawful restraint" and "deviate sexual assault" of a woman.[1] After a preliminary hearing, the charges were dismissed for lack of probable cause.[2] Nevertheless, Illinois subsequently filed a petition to declare Allen a "sexually dangerous person" and civilly commit him under its Sexually Dangerous Persons Act (SDPA).[3] The trial court found Allen sexually

[1] People v. Allen, 481 N.E.2d 690, 692–93, 698 (Ill. 1985) (affirming the trial court's determination that Allen met the definition of a sexually dangerous person beyond a reasonable doubt on the basis of his incriminating statements made to two psychiatrists and his alleged victim's testimony that he entered her car after a work shift without permission and forced her to perform oral sex in an airport parking lot).

[2] Allen v. Illinois, 478 U.S. 364, 366 (1986).

[3] *Id.* at 365–66. The SDPA permits the State of Illinois to indefinitely confine all persons "suffering from a mental disorder" that has existed for at least one year prior, who have "criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children." Sexually Dangerous Persons Act, 725 ILL. COMP. STAT. ANN. 205/1.01 (West 2017). Other states that also permit the indefinite civil commitment of sex offenders on the basis of charges alone—without a criminal conviction or adjudication of not guilty for reason of insanity or a finding of incompetence to stand trial—include Iowa and Kansas, which define "sexually violent predator" as someone "who has been convicted of *or charged with* a sexually violent offense,"

dangerous and committed him for an indeterminate period to the Menard Psychiatric Center, a mental health unit located inside a maximum-security prison.[4]

Allen challenged the constitutionality of his indefinite "civil" detention in a maximum-security prison, arguing that such conditions amounted to criminal punishment and that the court violated his Fifth Amendment right against self-incrimination when it relied upon the testimony of his examining psychiatrist, who had elicited incriminating information from him.[5] Ultimately, the Supreme Court held in a 5–4 decision that because the legislature intended to "treat" Allen rather than "punish[]" him, the proceedings against Allen were civil and not criminal, his Fifth Amendment rights were not violated, and his commitment was therefore constitutional.[6]

Since *Allen*, federal courts have repeatedly upheld the constitutionality of sex offender civil commitment schemes on the basis that they are nonpunitive[7]—even when the civil committees in question find themselves, like Allen does, in prison indefinitely. Today, over thirty years after his case testing the constitutionality of sex offender civil commitment reached the Supreme Court, Terry Allen, a man who has never been criminally convicted of a sex crime, is still imprisoned in Illinois as a "Sexually Dangerous Person," with no projected discharge date.[8] He is nearly sixty.[9]

An estimated 5400 people are civilly committed under state and federal sex offender programs.[10] Twenty states, plus the District of Columbia and

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KAN. STAT. ANN. § 59-29a02 (2008) (emphasis added); *accord* IOWA CODE ANN. § 229A.4 (2014). See *infra* note 21 for a brief discussion of the post-conviction civil commitment statute that Illinois also employs.

[4] *See Allen*, 478 U.S. at 366, 372.

[5] *See id.* at 366.

[6] *See id.* at 370, 373–75; *see also* Glen Elsasser, *'Sexually Dangerous' Rule is Upheld*, CHI. TRIBUNE (July 2, 1986), http://articles.chicagotribune.com/1986-07-02/news/8602170059_1_illinois-supreme-court-sexual-assault-justices-byron-white [https://perma.cc/52CL-SG4B] (characterizing the Court's decision in *Allen* as principally based on the rationale that because the State's chief interest was the treatment, rather than punishment, of sex offenders, the Fifth Amendment does not apply to these proceedings).

[7] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 360–71 (1997) (holding that civil commitment, even if "predicated upon past conduct for which [the offender] has already been convicted and forced to serve a prison sentence," does not constitute a second punishment in violation of the Constitution's Double Jeopardy Clause); Matherly v. Andrews, 859 F.3d 264, 276 (4th Cir. 2017) (finding that conditions of civil committee in federal prison did not amount to impermissible punishment and thus did not "make out a constitutional violation").

[8] *See* ILL. DEP'T OF CORR., *N31905 - Allen, Terry B.*, INMATE SEARCH, http://www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=N31905 [https://perma.cc/C6By-8349] (indicating that Allen is incarcerated at Big Muddy Correctional Center in Illinois as a Sexually Dangerous Person).

[9] *See id.*

[10] George Steptoe & Antoine Goldet, *Why Some Young Sex Offenders Are Held Indefinitely*, MARSHALL PROJECT (Jan. 27, 2016, 7:15 AM), https://www.themarshallproject.org/2016/01/27/why-

the federal government, have enacted legislation to confine "sexually dangerous" or "sexually violent" "persons," "predators," or "offenders."[11] Although many provisions vary across jurisdictions, all of the legislative schemes authorize the indefinite civil detention of people charged with, or previously convicted of, sex offenses—often for their entire lives.[12] Because sex offenders are a highly stigmatized group of people, the restrictive conditions under which many are civilly detained trigger little sympathy among most members of the public.[13] And although sex offender civil committees are not the only type of civil committees that have been sent to prison—tuberculosis patients and drug addicts have also occasionally been

some-young-sex-offenders-are-held-indefinitely [https://perma.cc/23CG-J5WE]. This statistic is likely an underestimate of the total population nationwide, as it only includes those people confined under "sexually violent predator programs," which generally target post-conviction sex offenders, thus excluding "sexually dangerous persons" programs that generally target pre-conviction sex offenders. *Id.* See *infra* notes 20–28 and accompanying text for a discussion of this distinction.

[11] Steptoe & Goldet, *supra* note 10 (citing 2015 program data from the State Civil Commitment Program Administrators, Society of Civil Commitment Professionals Network, and court data); *see also Civil Commitment of Sexually Violent Predators*, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS (Aug. 17, 2010), http://www.atsa.com/civil-commitment-sexually-violent-predators [https://perma.cc/R78H-DZU6]. Jurisdictions that have such systems include: Arizona, California, District of Columbia, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, Wisconsin, and the federal government. Steptoe & Goldet, *supra*.

[12] Commentators and courts alike have noted that although civilly committed sex offenders have a right to be released upon a subsequent court finding of nondangerousness, the actual rates of release are so low that commitment often functions as a de facto life sentence. *See, e.g.*, Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015) (noting that the Minnesota sex offender civil commitment program "has developed into indefinite and lifetime detention" because, "[s]ince the program's inception in 1994, no committed individual has ever been fully discharged"), *rev'd sub. nom.*, Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017), *reh'g en banc denied*, No. 15-3485 (Feb. 22, 2017), *cert. denied*, 138 S. Ct. 106 (2017); Anthony V. Salerno & Elana Goldstein, *Predators' Net*, L.A. LAW., June 2009, at 32, 36 ("Although committed offenders have the right to request a review of their commitment every 180 days, a civil commitment actually is akin to a life sentence because it is very difficult for offenders to be removed from the program.").

[13] The social stigma that convicted sex offenders face is widely documented. Even those that committed nonviolent offenses or have been assessed to be "low risk" are, by virtue of their legal status as a sex offender, often considered by the public to be "violent, dangerous, child molesters," and consequently experience difficulty finding housing, employment, and forming social relationships. *See* Douglas N. Evans & Michelle A. Cubellis, *Coping with Stigma: How Registered Sex Offenders Manage Their Public Identities*, 40 AM. J. CRIM. JUST. 593, 594–95 (2015). This stigma is enhanced by mandatory public registration. *Id.* Media coverage of sex offenders often reflects this stigmatization; it is not difficult to find references to sex offenders describing them as "some of the nation's most reviled citizens." *See* Richard Wolf, *Supreme Court Says Sex Offenders Can Access Social Media*, USA TODAY (June 20, 2017, 6:24 AM), https://www.usatoday.com/story/news/politics/2017/06/19/supreme-court-says-sex-offenders-can-access-social-media/103006410 [https://perma.cc/5ZNL-ABYG].

committed to jails and prisons—they are the group of civil committees most likely to be detained there.[14]

Drawing on the fundamental "police power" of states to protect public health and safety,[15] sex offender civil commitment programs ostensibly repudiate any punitive purpose in restraining a detainee's liberty and instead predicate commitment on the dual goals of public safety from people found to be dangerous sexual predators and treatment of the offender.[16] Although sex offender commitment programs are universally designated as being "civil" (as opposed to "criminal") in nature—thereby avoiding the constitutional requirements attendant to criminal trials and sentences[17]—people confined under these statutes are frequently committed to the long-

[14] Civil commitment to prison has been successfully challenged in the infectious disease and drug addiction contexts. Massachusetts, for example, sent civilly committed drug addicted women to prison for drug treatment instead of to a hospital facility for decades but recently passed a law banning this practice after the ACLU of Massachusetts filed a lawsuit. *See* Shira Schoenberg, *Massachusetts Stops Sending Women Civilly Committed for Drug Abuse to Prison*, MASSLIVE.COM (Jan. 25, 2016, 4:35 PM), http://www.masslive.com/politics/index.ssf/2016/01/massachusetts_stops_sending_wo.html [https://perma.cc/WZ2Y-MSYC]. Moreover, in 2007, the ACLU of Arizona sued Maricopa County for detaining a noncontagious tuberculosis patient in jail for over a year, triggering his eventual transfer to a specialized hospital in Denver for treatment. *See* Press Release, ACLU, ACLU of Arizona Lawsuit Triggers Transfer of TB Patient to Denver Hospital (July 17, 2007), https://www.aclu.org/news/aclu-arizona-lawsuit-triggers-transfer-tb-patient-denver-hospital [https://perma.cc/G7LY-ETGB].

[15] This power was famously articulated in 1905 by the Supreme Court in *Jacobson v. Massachusetts*: "According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." 197 U.S. 11, 25 (1905).

[16] *See* Ross A. Brennan, Note, *Keeping the Dangerous Behind Bars: Redefining What a Sexually Violent Person Is in Illinois*, 45 VAL. U. L. REV. 551, 558 (2011) (describing state's pursuit of these two goals as together protecting society from dangerous individuals until they can be rehabilitated and released).

[17] In many states, people facing sex offender civil commitment are entitled to some of the same procedural protections as criminal defendants, such as court-appointed counsel and a trial by jury. *See, e.g.*, WASH. REV. CODE ANN. § 71.09.050 (West 2014) ("[A]ny person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent . . . the court . . . shall appoint office of public defense contracted counsel to assist him or her."); WIS. STAT. ANN. §§ 980.04–.05 (West 2007) ("If the person named in the petition claims or appears to be indigent, the court shall, prior to the probable cause hearing . . . refer the person to the authority for indigency determinations . . . and, if applicable, the appointment of counsel."). But, that is not the case in all states. For example, many states do not require that the state prove beyond a reasonable doubt that the person is "sexually dangerous" or "a sexually violent person." *See, e.g.*, MO. ANN. STAT. § 632.495 (West 2014) (defining a "clear and convincing evidence" standard for sex offender civil commitment, as opposed to the "beyond a reasonable doubt" standard for criminal convictions).

term custody of prisons,[18] or to secure standalone treatment facilities.[19] Thus, many civilly committed sex offenders are detained in conditions that appear to be identical to those serving criminal sentences, but as a result of civil commitment proceedings that lack all the protections that accompany a criminal trial, and for conduct that would not always result in a criminal conviction.

Most states aim to commit convicted sex offenders who are nearing the end of their criminal prison sentences;[20] however, some states do not require a criminal conviction for commitment and instead seek to involuntarily commit people in lieu of criminal prosecution.[21] As scholars have long recognized, both pre-conviction and post-conviction regimes raise thorny constitutional issues.[22] Pre-conviction civil commitment has the potential to put a person in prison for life without a jury ever finding beyond a reasonable doubt that the alleged sex offenses took place at all.[23] Indeed, the state may

[18] *See, e.g.*, N.J. STAT. ANN. § 30:4-27.34 (West 2016) ("The Department of Corrections shall be responsible for the operation of any facility designated for the custody, care and treatment of sexually violent predators, and shall provide or arrange for custodial care of persons committed pursuant to this act."); *see also infra* Section I.B.1.

[19] *See, e.g.*, S.C. CODE ANN. § 44–48–100 (2018) ("At all times, a person committed for control, care, and treatment by the Department of Mental Health pursuant to this chapter must be kept in a secure facility, and the person must be segregated at all times from other patients under the supervision of the Department of Mental Health."); *see also infra* Section I.B.2.

[20] *See, e.g.*, N.H. REV. STAT. ANN. § 135-E:11 (West 2015) ("If the court or jury determines that the person is a sexually violent predator, upon the expiration of the incarcerative portion of all criminal sentences . . . the person shall be committed to the custody of the department of corrections for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person no longer poses a potentially serious likelihood of danger to others.").

[21] *See* Brennan, *supra* note 16, at 557–58. Some states, such as Illinois, use both statutory regimes. The Illinois Sexually Dangerous Persons Act applies to those who have been *charged* with a sex offense. *See* 725 ILL. COMP. STAT. 205/1.01–12 (West 2017). In contrast, the Illinois Sexually Violent Persons Commitment Act applies to those who have been convicted of a sex-related offense and are about to be released from prison. *See* 725 ILL. COMP. STAT. 207/1–99 (West 2017). For additional examples, see *supra* note 3.

[22] *See, e.g.*, Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL'Y REV. 71, 72 (1997) (arguing that sex offender civil commitment regimes "push the boundaries of standard civil commitment" and allow states to circumvent constitutional limitations of criminal incarceration and indefinitely, preventatively detain those who the state fears could commit future crimes); Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1205–11 (summarizing the expansive scholarly critique of the Court's decision in *Hendricks* on the grounds that Kansas's statute did, in fact, violate substantive due process in its ambiguous criteria for commitment and raising novel equal protection concerns about sex offender civil commitment).

[23] In some states, however, a jury would have to find "beyond a reasonable doubt" that the person is a "sexually dangerous person" or "sexually violent person." *See, e.g.*, CAL. WELF. & INST. CODE § 6604 (2018) ("The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator."); KAN. STAT. ANN. § 59-29a07 (West 2008) (same). In other states, a jury need only find that the person is a sexually violent predator by "clear and convincing evidence." *See, e.g.*, FLA. STAT. ANN. § 394.917 (West 2018).

elect to initiate civil commitment proceedings against alleged sex offenders because it lacks enough evidence to criminally convict them. Post-conviction civil commitment, on the other hand, often constitutes a second, indefinite prison term that committees undergo after having already completed their criminal sentences.[24]

The Supreme Court, however, has not been receptive to any challenges to the constitutionality of sex offender civil commitment regimes to date. In *Allen v. Illinois*,[25] a pre-conviction statute survived a challenge that it "civilly" committed sex offenders to facilities with conditions that may amount to criminal punishment without providing all the safeguards attendant to a criminal trial.[26] In *Kansas v. Hendricks*,[27] a post-conviction statute withstood challenges that it violated the Constitution's guarantees of due process and its prohibition against double jeopardy and ex post facto laws.[28] Time and again, the linchpin of the statutes' continued constitutionality in federal court has been the holding that the legislative regimes are properly classified as nonpunitive.[29] The courts have done so in part by finding that a committee's detention in prison or prison-like facilities is comparable to that experienced by "any involuntarily committed patient in the state mental institution"[30] or that of a "pretrial detainee[]."[31]

Legal scholars have frequently interrogated the constitutionality of state sex offender civil commitment regimes on several bases—from the questionable medical criteria and substantive legal standards under which sex offenders may be committed,[32] to the failure to provide meaningful

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[24] Post-conviction statutes are thus uniquely vulnerable to double jeopardy and ex post facto challenges, to the extent that the civil commitment statutes arguably impose second criminal sentences and apply to people criminally convicted prior to their enactment.

[25] 478 U.S. 364 (1986); *see also supra* notes 1–6 and accompanying text.

[26] *See Allen*, 478 U.S. at 375.

[27] 521 U.S. 346 (1997).

[28] *See id.* at 360–71 (holding that civil commitment, even if "predicated upon past conduct for which [the offender] has already been convicted and forced to serve a prison sentence" and freshly imposed on a crime "already consummated," does not constitute a second punishment in violation of the Constitution's Double Jeopardy or Equal Protection Clauses).

[29] *See infra* Part II.

[30] *Hendricks*, 521 U.S. at 363.

[31] Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003).

[32] *See, e.g.*, Janus, *supra* note 22, at 72 ("The questionable constitutionality of [sex offender civil commitment laws'] inadequately defined limits demands special justification or legitimization. . . . Sex offender commitments possess many of the qualities that elicit condemnation of 'preventative detention.'"); Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 265 (1998) ("Either most sexual predators are responsible and deserve punishment or most are not responsible and should not be punished. The concept of 'mental abnormality' the Court approved [in *Hendricks*] is so broad and vague that it sets no limit on the State's ability to confine in the absence of culpability."); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal*

treatment.[33] And although many scholars and jurists have questioned whether sex offender civil commitment is truly "civil" rather than "criminal,"[34] there has been little work that squarely addresses the actual conditions under which sex offenders are civilly detained and the constitutional consequences of these arrangements.[35] This Note contributes to the extant literature on sex offender civil commitment first by systematically examining the statutory landscape of sex offender civil commitment to prison and prison-like facilities in the United States, and second, by interrogating how the Court's 2015 decision in *Kingsley v. Hendrickson*[36] makes the objective conditions of sex offender civil commitment more constitutionally relevant than ever before.

This Note argues that, because long-term incarceration in prison is the paradigmatic *criminal* sentence in the United States, sex offender civil commitment statutes that commit detainees to the custody of prison systems or treatment facilities that are so prison-like as to be essentially indistinguishable from prisons are, in fact, punitive. In other words, confining civilly committed sex offenders to prison and prison-like facilities is punishment—regardless of legislative intent—when the conditions of confinement are indistinguishable from the typical conditions of criminal incarceration (i.e., long-term confinement to a secure prison facility). And because such civil commitment schemes are punitive, they are illegal. Civilly

Distinction, with Particular Reference to Sexually Violent Predator Laws, 7 J. CONTEMP. LEGAL ISSUES 69, 94–95 (1996) ("SVP commitments should be impermissible in the absence of proof of mental illness . . . . [I]ndefinite regulatory confinement should never extend to individuals who are able to make choices and to decide whether to respond to sanctions. Preventative incapacitation of such individuals, as a substitute for reliance on the criminal process, is inconsistent with the core commitments of a free society . . . .").

[33] *See, e.g.*, Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 78 (1999) ("Detention without the provision of realistic treatment opportunities and without the narrow tailoring that would promote as much liberty as possible indicates that this form of commitment is really nothing more than a fancy substitute for imprisonment."); Jeslyn A. Miller, Note, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093 *passim* (2010) (arguing that civilly committed sex offenders have a statutory and constitutional right to treatment, but that in reality treatment is inadequate).

[34] *See, e.g.*, *Hendricks*, 521 U.S. at 373, 379 (Breyer, J., dissenting) (arguing that Kansas is not in fact "civilly" confining its sex offenders but instead inflicting criminal punishment, due, in large part, to lack of treatment and the commitment of sex offenders to a psychiatric wing of a prison hospital); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 236 (English language ed. 2009) (claiming that although sex offender civil committees are nominally "patients," they are, in actuality, "subject to the state correctional authority and live under severe penitentiary regimens"); *see also supra* notes 32–33 and accompanying text.

[35] *But see, e.g.*, Cynthia A. Frezzo, Note, *Treatment Under Razor Wire: Conditions of Confinement at the Moose Lake Sex Offender Treatment Facility*, 52 AM. CRIM. L. REV. 653, 671–75 (2015) (detailing the punitive conditions of Minnesota's sex offender civil commitment program and arguing that these conditions violate the Constitution's Due Process Clause).

[36] 135 S. Ct. 2466 (2015).

committed sex offenders languish in prison before they have ever been convicted of a crime or after their criminal sentences have expired. This ongoing criminal punishment is imposed through civil proceedings that deprive sex offenders of the constitutional protections that must precede criminal punishment—including substantive due process, the privilege against self-incrimination, and the prohibition of double jeopardy.

Moreover, this Note contends that the logic of *Kingsley v. Hendrickson*,[37] a recent Supreme Court decision concerning the rights of pretrial detainees, ought to be a game changer for civil commitment jurisprudence. The Supreme Court has long held that sex offenders may be detained indefinitely without criminal process, even in conditions identical to convicted criminals, so long as they receive some civil process protections and so long as the legislature intends their incarceration to serve the interests of treatment and incapacitation, not punishment.[38] Under this jurisprudence, courts have traditionally looked to the purpose of the incarceration—and not the conditions of incarceration—to decide whether the incarceration constitutes punishment.[39] This logic dictates that if a civilly committed sex offender and a convicted prisoner are housed in the same prison under identical conditions, the civil committee is not being punished as long as the legislature did not intend for the civil commitment regime to constitute punishment.

Kingsley, however, departs from this logic, and suggests that the objective conditions experienced by a prisoner can rise to the level of punishment even if no government actor intended to inflict punishment. In *Kingsley*, the Court held that the subjective standard applied to prisoners' excessive force claims should not apply to those awaiting trial in jail; instead, a pretrial detainee "must show only that the force purposely or knowingly used against him was *objectively* unreasonable."[40] In effect, by lowering the standard of proof in excessive force cases, the Court in *Kingsley* took a harder look at the conditions to which those jailed before trial were subjected and added teeth to the longstanding rule that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[41]

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[37] *Id.*

[38] *See supra* notes 30–34 and accompanying text.

[39] *See, e.g.*, *Hendricks*, 521 U.S. at 361 ("The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.' [Allen v. Illinois, 478 U.S. 364, 368 (1986)]. We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings. If so, we ordinarily defer to the legislature's stated intent.").

[40] *Kingsley*, 135 S. Ct. at 2473 (emphasis added).

[41] Bell v. Wolfish, 441 U.S. 520, 535 (1979).

If applied to sex offender civil commitment, the logic of *Kingsley* would suggest that a sex offender who experiences conditions of confinement tantamount to criminal incarceration is being punished even if the legislature has disclaimed the intent to inflict punishment through the civil commitment regime. In turn, the conclusion that incarceration in prison-like conditions constitutes punishment would result in the wholesale invalidation of many civil commitment statutes. This is because these statutes, as this Note's legislative survey demonstrates, inflict prison-like incarceration without full-blown criminal process, and it is well settled that criminal punishment without all the trappings of constitutional criminal procedure is unlawful.[42]

This Note proceeds in three Parts. Part I surveys the nation's sex offender civil commitment statutes, with a focus on those that permit the commitment of sex offenders to state departments of corrections. Through an analysis of lower court cases, it also examines the prison-like conditions at secure treatment facilities run by state health departments. Next, Part II presents an overview of the sex offender and civil commitment standards articulated by the Supreme Court, demonstrating that a critical assumption of this jurisprudence is that civil commitment is not punishment unless the government intends it as punishment. Finally, Part III discusses *Kingsley* and the circuit court cases following it[43] as important recent developments in prisoners' rights law that undermine that assumption.

I. BEHIND PRISON WALLS: SEX OFFENDER CIVIL COMMITMENT IN PRACTICE

Civil commitment is defined in large part by what it is not: a criminal sentence. *Black's Law Dictionary*, for example, defines civil commitment as "[a] court-ordered commitment of a person who is ill, incompetent, drug-addicted, or the like, *as contrasted with a criminal sentence*."[44] In addition, it notes that "*[u]nlike a criminal commitment*, the length of a civil commitment is indefinite because it depends on the person's recovery."[45] Given the dictionary definition of civil commitment, and the constitutional jurisprudence surrounding it, it is oxymoronic that over half of those jurisdictions with sex offender civil commitment regimes permit

[42] For a helpful analysis and summary of those distinctive constitutional protections attendant to criminal trials, see Schulhofer, *supra* note 32, at 81–82.

[43] *See, e.g.*, Castro v. County of Los Angeles, 833 F.3d 1060, 1068–76 (9th Cir. 2016) (holding that an objective standard applies to a pretrial detainee's failure-to-protect claim against county jail).

[44] *Civil Commitment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

[45] *Id.* (emphasis added).

commitment to the same type of facility that defines criminal punishment in the United States: *prison*.[46]

This Part proceeds first by summarizing the results of a fifty-state survey that charts the legislative scope of sex offender civil commitment to prison. Second, this Part explores a typology that emerged from this survey of the types of facilities that state commitment statutes utilize for sex offender civil committees: 1) prison, 2) secure treatment centers, and 3) psychiatric programs. Using facts developed through litigation in various states, this Part also contends that standalone secure treatment centers are so punitive and prison-like as to also raise questions about their constitutionality.

A. National Survey of Sex Offender Civil Commitment Statutes

Socio-legal scholarship on sex offender laws has mainly focused on registration, notification, and other collateral consequences associated with a sex offense conviction.[47] This is in large part because all states are required

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[46] Imprisonment has been the central mode of American criminal punishment since the early 1800s. *See* David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 100, 100 (Norval Morris & David J. Rothman eds., 1998). The prison is generally considered to be a "modern" phenomenon, in that it has emerged relatively recently, *see, e.g.*, JOHN W. ROBERTS, REFORM AND RETRIBUTION: AN ILLUSTRATED HISTORY OF AMERICAN PRISONS 1 (1997) ("Imprisonment as a means of punishment is a relatively modern practice. Before the eighteenth century, offenders typically were sentenced to death, mutilation, branding, flogging, or banishment to a colonial territory—but they were seldom sentenced to confinement in a prison as punishment for their crimes."), and is archetypical of modernity's "political anatomy," *see* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 208 (Alan Sheridan trans., 2d Vintage Books ed. 1995) (1977) (describing the decline of torture-as-spectacle, and the birth of the prison, as coextensive with the rise of a disciplinary mode of societal power relations). Nevertheless, prisons do have ancient roots. *See* ROBERTS, *supra*, at 2; Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, *in* THE OXFORD HISTORY OF THE PRISON, *supra*, at 3, 3–21.

[47] *See, e.g.*, DIANA RICKARD, SEX OFFENDERS, STIGMA, AND SOCIAL CONTROL 5–9 (2016) (focusing on community-dwelling child sex offenders' management of stigma and other collateral consequences of their convictions, notably registration and community notifications requirements); Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1132 (2011) (arguing that increasingly harsh state registration and notification laws are indeed punitive and thus unconstitutional); Bob Edward Vásquez, Sean Maddan & Jeffery T. Walker, *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQUENCY 175, 185–89 (2008) (examining the impact of sex offender registration and notification systems on the incidence of forcible rapes). *But see* Mona Lynch, *Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 537 (2002) (noting that post-conviction civil commitment schemes constitute even more restrictive legislative measures than the expansive surveillance methods accompanying registration and notification databases); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452, 456–59 (1998) (discussing how, in addition to registration and notification requirements, the Supreme Court's decision in *Kansas v. Hendricks*, which authorized sex offender civil commitment

to have sex offender registries and notification laws pursuant to the federal Adam Walsh Act.[48] Less attention has been paid to cross-state comparisons of state *civil commitment* schemes that are implemented against sex offenders.

Nevertheless, there have been some important studies that survey sex offender civil commitment statutes and programs nationwide.[49] Researchers have identified different types of facilities that sex offenders are committed to in various states: state hospitals, freestanding treatment facilities, and programs within prisons.[50] The potential legal implications of such practices have been raised but not fully explored.[51] This Note systematically examines the legislative landscape of sex offender civil commitment to prisons in the United States through a nationwide survey of commitment statutes.[52] The results of this survey are presented in Table 1 in the Appendix.

The survey confirmed that only twenty-two jurisdictions (twenty states, the federal government, and the District of Columbia) have specialized civil commitment statutes for "sexually dangerous" or "sexually violent" persons.[53] Of these, the results demonstrate that five states—Illinois, Massachusetts, New Hampshire, New Jersey, and North Dakota—explicitly

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to prison on the basis of mental abnormality versus mental illness, reflects a broader penological transition from a focus on individual "transformation" to "management" of high-risk, "monstrous" populations).

[48] Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 34 U.S.C and 42 U.S.C.). Congress passed the Adam Walsh Act in 2006, and the law requires each jurisdiction of the United States to maintain a sex offender registry. 34 U.S.C. § 20912 (2012). The Act was in some ways redundant legislation; it followed two earlier federal statutes, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which withheld federal money from states that did not create sex offender registries, and "Megan's Law," which amended the previous law to require state registration systems in 1996. *See* Lynch, *supra* note 47, at 538, 541–42.

[49] *See, e.g.*, Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439 (2008) (summarizing available survey data on sex offender civil commitment programs); Miller, *supra* note 33, at 2128 (surveying varying procedural protections in state sex offender civil commitment statutes).

[50] *See* Deming, *supra* note 49, at 444–45.

[51] *Id.* at 445.

[52] Although other sex offender civil commitment statutory surveys have been conducted, this was the first to focus specifically on whether state statutes authorize sex offender civil commitment to prison. To begin, preexisting compilations of state statutory civil commitment schemes were consulted. *See* NAT'L DIST. ATTORNEYS ASS'N, CIVIL COMMITMENT OF SEX OFFENDERS (2012). Second, Westlaw's annotated state statutory compilations for each state were searched using the terms: ("sex offense" AND "civil commitment") and ("sexually violent") and ("sexually dangerous") in August 2017 to locate any and all state (including the District of Columbia) and federal civil commitment statutes. Each statute was then analyzed to assess the type of facility to which sex offenders were committed.

[53] *See infra* Appendix tbl.1; *see also* Steptoe & Goldet, *supra* note 10. All fifty states have some kind of general civil commitment statute providing for the involuntary hospitalization of the dangerously mentally ill. *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1202 (1974) (collecting state statutes). In addition, because of federal law, all states have sex offender registration laws. *See supra* note 48.

authorize sex offender civil commitment to their respective departments of corrections.[54] In addition, although the federal government's statute does not specify which type of facility is permissible for the detainment of its civil committees, court documents reveal that those committed under the Adam Walsh Act are committed to a special unit of a federal prison in North Carolina.[55]

Eight additional states—Florida, Iowa, Kansas, Missouri, New York, South Carolina, Virginia, and Wisconsin—commit sex offenders to state health or human services departments but authorize these agencies to contract with their respective departments of corrections or private companies to detain committees.[56] Although some statutes that directly commit or permit commitment to prison contain language requiring civil committees be kept separate or segregated from criminally convicted inmates except for incidental contact,[57] none appear to specify that civil committees must receive more comfortable or less restrictive treatment than their criminally convicted counterparts.[58] Furthermore, Minnesota, Illinois, Washington, and Texas authorize commitment of some sex offenders to secure treatment centers separate from both their health departments and their departments of corrections.[59]

There are, however, five jurisdictions with sex offender civil commitment statutes that do take, at least facially, a more traditional civil commitment approach. Arizona, for example, commits sex offenders to a state hospital or to a less restrictive alternative.[60] California, Washington,

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[54] *See infra* Appendix tbl.1 (citing 725 ILL. COMP. STAT. 205/8 (West 2017); MASS. GEN. LAWS ch. 123A, § 2 (West 2017); N.H. REV. STAT. ANN § 135-E:11 (West 2015); N.J. STAT. ANN. § 30:4-27.34 (West 2016); and N.D. CENT. CODE ANN. §§ 25-03.3-13–14 (West 2008)).

[55] *See* Matherly v. Andrews, 859 F.3d 264, 269 (4th Cir. 2017) (describing civil committees' interactions with criminal prisoners, subjection to strip searches, lack of rehabilitation opportunities, and mail inspection).

[56] *See infra* Appendix tbl.1 (citing FLA. STAT. ANN. § 394.917 (West 2018); IOWA CODE ANN. § 229A.7 (West 2018); KAN. STAT. ANN. § 59-29a07 (West 2008); MO. ANN. STAT. § 632.495 (West 2014); N.Y. MENTAL HYG. LAW § 10.10 (McKinney 2011); S.C. CODE ANN. § 44-48-100 (2018); VA. CODE ANN. § 37.2-909 (West 2018); and WIS. STAT. ANN. §§ 980.06–.065 (West 2007)).

[57] For example, the Virginia statute states: "At all times, respondents committed for control, care, and treatment by the Department pursuant to this chapter shall be kept in a secure facility. Respondents committed under this chapter shall be segregated by sight and sound at all times from prisoners in the custody of a correctional facility." VA. CODE ANN. § 37.2-909.

[58] This standard, that civil committees are owed "more considerate treatment" than their criminally convicted counterparts, comes from an early Supreme Court civil commitment case, *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982), which is discussed *infra* Section II.A.

[59] *See infra* Appendix tbl.1 (citing 725 ILL. COMP. STAT. 207/40 (West 2017); MINN. STAT. § 253D.07 (West 2015); and WASH. REV. CODE § 71.09.060 (West 2014)). Texas has a system with tiered options of restrictiveness, from total confinement to outpatient civil commitment. *See id.* (citing TEX. HEALTH & SAFETY CODE § 841.0831 (West 2017)).

[60] *See id.* (citing ARIZ. REV. STAT. ANN. § 36-3707 (2016)).

D.C., and Nebraska commit their sex offenders to state hospital systems.[61] Pennsylvania commits its detainees to an inpatient treatment facility operated by the Department of Public Welfare.[62]

In sum, seventeen of the twenty-two jurisdictions with specialized civil commitment statutes for sex offenders permit civil commitment to prison or prison-like facilities.[63] On one end of the restrictiveness spectrum, there are statutes that commit civil detainees to prison (or explicitly authorize such an arrangement). On the other end of the spectrum are more traditional civil commitment arrangements, in hospital or outpatient settings. In the middle are statutes that authorize civil commitment to separate secure treatment facilities. The next Section examines each type in turn.

B. Prisons, Secure Treatment Facilities, and Psychiatric Programs

This Section explores what these three general types of facilities—prisons, secure treatment centers, and mental health facilities—look like in practice through the eyes of district and appellate courts that have considered challenges from sex offender civil committees.[64]

1. Prisons

Numerous civilly committed sex offenders in the United States are confined to a state or federal prison—facilities traditionally reserved for the punitive confinement of those adjudicated guilty by a criminal court.[65] And there is little doubt that prison conditions are highly punitive. Scholars studying mass incarceration have concluded that with the dramatic rise in prison populations since the 1970s, there has also been a substantial increase in the punitive nature of prison policy.[66] The basic restrictions on freedom of

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[61] *See id.* (citing CAL. WELF. & INST. CODE § 6604 (2018); D.C. CODE ANN. § 22-3808 (West 2017); and NEB. REV. STAT. ANN. § 71-1209 (West 2009)).

[62] *See id.* (citing 42 PA. STAT. AND CONS. STAT. ANN. § 6403 (West 2018)).

[63] An important note about these counts is that this survey assessed the statutory authorization for commitment to various facility types. The extent to which each jurisdiction actually utilizes the full breadth of its statutory authority to commit sex offenders to prison-like facilities requires further research. In addition, Illinois is listed twice above because it has two separate civil commitment statutes, one for pre-conviction and one for post-conviction sex offenders, but it is counted just once here because both programs can be classified as being either "prison" or "prison-like." *See infra* note 153 (providing a description of Illinois's two regimes of sex offender civil commitment).

[64] The facts from the below cases provide a small window into life inside the various types of facilities civilly committed sex offenders find themselves in. Nevertheless, whether civil commitment to prison, secure treatment centers, and mental hospitals can be meaningfully distinguished with regard to the facilities' actual punitiveness remains an open empirical question.

[65] Quantifying how many sex offender civil committees are confined in each type of facility is outside the scope of this Note but is an important avenue for future research.

[66] *See, e.g.*, MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 3 (2010) (noting that contemporary prisons "aim to punish more deeply than the sentence

movement, information, and association that prisoners face in such "closed institutions" must be emphasized.[67] Today, prisons are chronically overcrowded, rape and forced sexual conduct are commonplace, and prisoner healthcare is often grossly inadequate.[68] Furthermore, for a subset of these committees, this arrangement means they are receiving sex offender treatment from mental health staff who treat criminally convicted inmates as well.[69] This raises the critical question of whether it is possible to create a treatment atmosphere that is meaningfully oriented toward recovery and release within an institution that has no such general mandate.[70]

Civilly committed prisoners often do not experience fewer restrictions than their criminally convicted counterparts, even if they are housed in separate units. Indeed, they may even experience harsher conditions of confinement. For example, Thomas Matherly, a sex offender civil committee incarcerated in a federal prison in North Carolina, challenged his confinement by pointing out the similarities in treatment that he received to those prisoners serving criminal sentences and the ways in which his treatment was more harsh.[71] Like its treatment of his criminally sentenced counterparts, the state confined Matherly to a double-bunked cell, forced him to wear the prison uniform, restricted his purchases to only select items from the prison commissary, restricted the television programs he could watch, and screened all of his incoming and outgoing mail.[72] He and the other civil committees were also, like other prisoners, subject to invasive strip-searches

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of imprisonment itself" with the rise of hard labor requirements, return of chain gangs, expanded use of solitary confinement, removal of recreation, and elimination of inmate programs); Jonathan Simon, *Rise of the Carceral State*, 74 SOC. RES. 471, 494 (2007) (describing the rise of the carceral state and its corollary "warehouse prison" since the 1980s, where "incapacitation" has replaced rehabilitation as the primary rationale for punishment). *But see* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 L. & SOC'Y REV. 33, 55–56 (2011) (arguing that although penal rhetoric became more punitive in the 1970s, rehabilitative programming in prisons did not begin to decline until the 1990s, and even then, it did not result in total elimination of programming).

[67] *See* Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME & JUST. 503, 503–04 (2010) ("Prisons are closed institutions. They are established and funded by governments to hold people against their will. In the case of sentenced prisoners at least, this loss of liberty is a deliberately inflicted punishment. . . . In the process of imprisonment the prison authorities exercise direct and enormous power over those who are imprisoned.").

[68] Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887–88 (2009).

[69] As discussed *infra* in Part II, sex offender treatment is constitutionally mandated.

[70] Sex offender treatment standards recommend that therapy be treatment-oriented and nonpunitive, which requires a "treatment environment with adequate space, staff behavior that is therapeutic and professional, [and] facility policies that reflect a therapeutic stance toward residents" that may be difficult, or impossible, to find in even the mental health wards of state prisons. *See* Deming, *supra* note 49, at 445.

[71] *See* Matherly v. Andrews, 859 F.3d 264, 269 (4th Cir. 2017).

[72] *Id.*

and cell shake-downs.[73] However, Matherly faced additional stigmatization as a sex offender in prison in the form of harassment upon interaction with other prisoners.[74] Moreover, unlike the other prisoners, he was not given access to rehabilitative groups, such as Alcoholics Anonymous and vocational programs.[75] Similar conditions have been emphasized by plaintiffs challenging the conditions of their civil commitment to state prison in other states, such as in Illinois.[76]

2. Secure Treatment Centers

Sex offenders committed to secure treatment facilities often do not fare much better. Many of the sex offenders who avoid civil commitment to prison nevertheless find themselves in prison-like secure treatment facilities. For example, in *Hargett v. Adams*,[77] the ACLU of Illinois represented a class of sex offenders detained under the state's post-conviction civil commitment statute challenging the constitutionality of the prison-like conditions at a state health department-run secure treatment facility.[78] The plaintiffs argued that their substantive due process rights were violated because their conditions of confinement constituted a punitive "prison-like environment" that was "counter-therapeutic," in that they sustained "excessive restrictions on personal movement," and their treatment was inadequate.[79]

The *Hargett* court described similarities between the treatment facility and high-security prisons, including: numerous guard and observation posts, a central security system, continually-locked doors, small prison-like rooms, invasive searches, and significant restrictions on movement.[80] The court even found that "[m]any of the practices pertaining to restrictions on movement . . . were imported wholesale from practices established through the Department of Corrections."[81] And yet, although the court acknowledged that the "level of restrictions may [have been] excessive in light of this patient population," the court held that because the restrictions "[were] not substantial departures from accepted professional judgment and standards,"

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[73] *Id.* at 269, 271.

[74] *Id.* For a vivid description of the violence that sex offenders may be subjected to on account of being housed with pretrial criminal defendants, see King v. County of Los Angeles, 885 F.3d 548, 554–55 (9th Cir. 2018).

[75] *Matherly*, 859 F.3d at 269, 272.

[76] See, for example, *Allison v. Snyder*, 332 F.3d 1076 (7th Cir. 2003), which is discussed *infra* in Section II.D, for an account of another unsuccessful challenge to the conditions of sex offender civil commitment in prison.

[77] No. 02 C 1456, 2005 WL 399300 (N.D. Ill. Jan. 14, 2005).

[78] *See id.* at *1.

[79] *Id.* at *1–2.

[80] *Id.* at *2.

[81] *Id.*

they were constitutional.[82] Critical to the court's holding that the conditions of confinement were nonpunitive, and therefore constitutional, was the assumption that restrictions the court found to be objectively "excessive" did not amount to impermissible punishment.

Thus, the "high-security, prison-like"[83] nature of Illinois's treatment facility could be considered even more restrictive than the environment at some minimum-security prisons. In fact, some of the more egregious civil commitment systems, such as Minnesota's system, utilized secure treatment facilities and did not house its detainees in state prisons.[84] The plaintiffs in a recent Minnesota case, *Karsjens v. Jesson*,[85] in which the district court found the civil commitment system unconstitutional, alleged that the executive director of the state sex offender program implemented policies of a maximum-security prison facility.[86] These policies included: "restricted visitation, restricted property rights, censored mail, monitored calls, restricted personal physical movement, unreasonable searches, and discipline without due process of law."[87] Together, the plaintiffs claimed, these practices went "beyond the scope of what is necessary for treating Plaintiffs and Class members in a therapeutic manner" or "to maintain control or security of the facility," and instead created a "hostile environment that encourage[d] a sense of hopelessness, powerlessness, and fear."[88] After subjecting Minnesota's statutory scheme to strict scrutiny, the district court found the statute unconstitutional[89]—a decision recently overturned, however, by the Eighth Circuit.[90] Because it is difficult, if not impossible, to

[82] *Id.* at *16. Although the court noted that "[p]ersons who have been involuntarily committed are entitled to 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish,'" it also emphasized that only minimal standards of care, rather than optimal standards of care, are constitutionally required. *Id.* at *13.

[83] *Id.* at *2.

[84] *See* Karsjens v. Jesson, 109 F. Supp. 3d 1139 (D. Minn. 2015), *rev'd sub. nom.*, Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017), *reh'g en banc denied*, No. 15-3485 (Feb. 22, 2017), *cert. denied*, 138 S. Ct. 106 (2017). One commentator has described Minnesota's secure treatment facility, Moose Lake, as a "domestic Guantanamo," given its harsh conditions and extremely low rate of release. Frezzo, *supra* note 35, at 664.

[85] 109 F. Supp. 3d 1139.

[86] Third Amended Complaint at 23, *Karsjens*, 109 F. Supp. 3d 1139 (No. 11-cv-03659-DWF-JJK).

[87] *See id.*

[88] *Id.*

[89] The district court's rationale was not based on the notion that the civil committees were unconstitutionally subject to punishment, but instead that the State's program was not narrowly tailored to achieve its compelling state interests, in large part because it failed to conduct periodic risk assessments that would permit some committees to be released. *See Karsjens*, 109 F. Supp. 3d at 1168.

[90] *See* Karsjens v. Piper, 845 F.3d 394, 407–08 (8th Cir. 2017) (disagreeing with the district court's application of the strict scrutiny standard and finding that the proper standard is whether the act "bears a rational relationship to a legitimate government purpose").

distinguish the inherently punitive nature of prisons from prison-like facilities, such as those at issue in *Hargett* and *Karsjens*, statutes that commit civil detainees to secure treatment facilities are likely vulnerable to the same constitutional challenge as those that commit detainees expressly to prisons.

3. Psychiatric Programs

There are alternatives to sex offender civil commitment to prison. Some states' civil commitment statutes prohibit commitment to both prisons and prison-like facilities. California, for example, commits its "sexually violent predators" to the Coalinga state mental hospital, where they reside alongside other psychiatric patients in a treatment-oriented institutional setting.[91] Historically, Texas utilized exclusively psychiatric outpatient commitment as part of its commitment scheme, although in recent years it has primarily confined its committees to a secure facility.[92] The *Hargett* court even acknowledged the existence of other types of treatment facilities, like one that "provided a significantly less-restrictive environment" than Illinois's, without suffering from "significantly greater assaultive behavior from its patients."[93]

Moreover, the thirty states that do not have sex offender civil commitment statutes at all presumably use involuntary psychiatric hospitalization for those offenders meeting the general civil commitment statutory criteria. These civil commitment regimes more closely resemble the type of civil commitment used for those committed under involuntary psychiatric hospitalization statutes and are also more in line with what the Association for the Treatment of Sexual Abusers, an international organization of over 2000 sex offender treatment providers and researchers, recommends.[94] However, whether it is wise to draw a firm distinction

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[91] *See* CAL. WELF. & INST. CODE § 6604 (2018); *Department of State Hospitals – Coalinga*, CA.GOV, http://www.dsh.ca.gov/coalinga [https://perma.cc/8XUX-H5XE] (listing the patient population of the state hospital); *see also* King v. County of Los Angeles, 885 F.3d 548, 555–56 (9th Cir. 2018) (describing the relatively favorable conditions at Coalinga).

[92] *See* TEX. HEALTH & SAFETY CODE ANN. § 841.0831 (West 2017). Now, however, Texas also does use inpatient sex offender commitment to a secure facility. *See* Betsy Blaney, *Texas Trying Revamped Sex Offender Treatment Program*, STATESMAN (updated May 30, 2016), http://www.statesman.com/news/state--regional/texas-trying-revamped-sex-offender-treatment-program/ajJjpwcrUlPmbXZCLEKMLM [https://perma.cc/XXP7-XC3A] (describing the state's overhaul of its sex offender civil commitment regime in the wake of an investigation that found its prior program had been both ineffective and poorly managed, with not a single committee reentering the broader community).

[93] Hargett v. Adams, No. 02 C 1456, 2005 WL 399300, at *3 (N.D. Ill. Jan. 14, 2005). Ironically, the *Hargett* court cited the sex offender treatment program in Minnesota at issue in *Karsjens v. Jesson* as an example of a substantially less-restrictive alternative.

[94] ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, *supra* note 11 ("If a state chooses to enact a civil commitment law, the resulting civil commitment treatment program should be housed in a treatment-

between prison-like confinement and psychiatric confinement in terms of levels of restrictiveness, or even social causes or effects, will depend on further empirical research.[95]

II. CONSTITUTIONAL CONSTRAINTS ON THE CONDITIONS OF SEX OFFENDER CIVIL COMMITMENT

Every day, state and federal authorities detain people who are not convicted criminals—undocumented immigrants, pretrial detainees, and civil committees—for extensive periods of time in secure facilities. This Part begins with a discussion of the existing legal architecture that constrains civil commitment and other civil detention schemes more generally. Next, it delves into three of the major Supreme Court cases that have considered the constitutionality of sex offender civil commitment statutes: *Allen v. Illinois*,[96] *Kansas v. Hendricks*,[97] and *Seling v. Young*.[98] Finally, it considers how the Ninth Circuit, Seventh Circuit, and Fourth Circuit have diverged with respect to whether sex offender civil commitment to prison might be found to be punitive and thus unconstitutional.

A. Civil Detention, Civil Commitment, and the State's "Nonpunitive" Purpose

The Supreme Court has repeatedly approved civil detention schemes in the pretrial and civil commitment contexts, so long as an important constitutional precondition is met: that the significant restraint of personal liberty that civil detention entails is imposed with a "nonpunitive" governmental purpose.[99] After all, civil detention may, in some cases, be

oriented facility that is structurally similar, but physically separate, from other programs for the mentally ill.").

[95] For example, an empirical study by Professor Bernard Harcourt that analyzed rates of mental hospitalization and imprisonment over the latter half of the twentieth century demonstrates the analytical leverage obtained by operationalizing both types of confinement together as one rate of societal "institutionalization." *See* Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1776 (2006) (finding that when "hospitalization and prison rates are aggregated" it becomes clear that the United States "is only now beginning to reach the levels of institutionalization that were commonplace from the mid-1930s to the mid-1950s"). He argues that both psychiatric commitment and imprisonment are forms of "institutional incapacitation" that have the function of spatial exclusion and confinement of marginal populations. *Id.* at 1784.

[96] 478 U.S. 364 (1986).

[97] 521 U.S. 346 (1997).

[98] 531 U.S. 250 (2000).

[99] *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (finding that psychiatric civil committees must not be punished); Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (finding that mentally retarded civil committees may not be held in conditions that amount to punishment); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (finding that pretrial detention must not amount to punishment of the detainee and restrictions on detainee liberty must have a nonpunitive purpose).

indefinite and effected without many of the substantive and procedural protections that must precede the imposition of criminal sentences.[100] What sets civil commitment apart from other forms of civil detention is that the requisite nonpunitive governmental purpose is to protect the public, or the individual, from the potential harm imposed by an individual's mental abnormality,[101] and the detention promises to provide treatment or care to promote recovery where possible.[102] In the United States, individuals may be civilly committed to a hospital or other facility if they are found to be dangerously mentally ill and to pose a threat to themselves or others, are sexually dangerous, are mentally incompetent and unable to care for themselves, or even, more recently, if they are addicted to certain substances.[103] The involuntary institutionalization of the mentally ill in psychiatric hospitals is the classic civil commitment case that most often draws the public's attention and concern.[104]

In *Bell v. Wolfish*,[105] a landmark case considering the rights of pretrial detainees, the Court articulated a clear principle to assess whether pretrial detention conditions comport with the Fifth and Fourteenth Amendments' protection against the deprivation of liberty without due process of law: "whether those conditions amount to punishment of the detainee."[106] At the same time, the Court carved out a sizeable exception: institutional security.[107]

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[100] *See supra* notes 23–24 and accompanying text.

[101] *See* Kansas v. Hendricks, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.' . . . The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness." (citations omitted)).

[102] *Cf. id.* at 366 ("While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, see [Allen v. Illinois, 478 U.S. 364 (1986)], we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.").

[103] Christopher Moraff, *New Laws Force Drug Users into Rehab Against Their Will*, DAILY BEAST (May 19, 2017, 1:00 AM), http://www.thedailybeast.com/new-laws-force-drug-users-into-rehab-against-their-will [https://perma.cc/CCE2-W9QS]. Over thirty states have laws that permit brief civil detainment of drug users, but more recently, in at least eight states, including Pennsylvania, Michigan, and New Jersey, lawmakers are hoping to expand the drug user civil commitment to ninety days. *Id.*

[104] The deinstitutionalization movement of the 1960s and 1970s in the United States culminated in a massive reduction in state mental hospitals and state institutions for people with developmental disabilities and garnered significant public attention. *See* Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 7 (2012).

[105] 441 U.S. 520 (1979).

[106] *Id.* at 535.

[107] *See id.* at 540 ("Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting

The Court suggested in *Bell* that, barring an express intent to punish, courts should look at whether the restriction on a civil detainee bears any reasonable relation to a legitimate (i.e., nonpunitive) goal, such as maintaining jail security.[108] Thus, while *Bell* affirmed that pretrial detainees cannot constitutionally be subjected to punishment, it also left room open for excessive restrictions on civil detainees based on a reasonable relation standard.

Civil commitment cases outside of the sex offender context that have reached the Supreme Court also emphasize the mandatorily nonpunitive nature of commitment. In *Youngberg v. Romeo*,[109] the Court articulated the substantive rights, in addition to adequate food, shelter, clothing, and medical care, that a civil committee is entitled to under the Due Process Clause: safety and freedom from unnecessary bodily restraints.[110] Although the detainee in *Youngberg* was a developmentally disabled adult man,[111] the Court's holdings were not limited to this type of case, and it spoke in broad terms about the constitutionally mandated conditions the State must secure for involuntarily committed people when it stated that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[112] At the same time, *Youngberg* tempered its strong statement of the rights of civil committees when it adopted a "professional judgment" standard wherein restrictions on civil committees are considered presumptively "reasonable," and thus constitutional, when they are supported by the exercise of professional judgment.[113]

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and are restrictions that the detainee would not have experienced had he been released while awaiting trial.").

[108] *Id.* at 539 ("[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." (citation omitted) (emphasis in original)).

[109] 457 U.S. 307 (1982).

[110] *See id.* at 324.

[111] *See id.* at 309.

[112] *See id.* at 321–22. Intriguingly, the Court came to this position in part by recognizing the rights of criminally convicted prisoners. The Court stated, "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id.* at 315–16. This statement suggests that prisoners' rights litigation will occasionally presage the declaration of substantive due process rights for civil committees of various kinds. Further, it may lend support to this Note's argument: that *Kingsley v. Hendrickson*, a pretrial detainee case, could have a bearing on sex offender civil commitment cases.

[113] *Id.* at 321–23.

In *Foucha v. Louisiana*,[114] another leading civil commitment case, the Court reiterated the rule that, if a plaintiff has not been convicted of any crime, "he may not be punished."[115] It then went on to emphasize that, to be consistent with the Due Process Clause, the nature of commitment must "bear some reasonable relation to the purpose for which the individual is committed."[116] Together, *Bell*, *Foucha*, and *Youngberg* make clear a constitutional imperative: civil detainees of all stripes may not be punished and the conditions in which they are held must be reasonably related to a nonpunitive state objective.

B. Legislative Intent and the Questionable Constitutionality of Sex Offender Civil Commitment

This Section delves into several of the Supreme Court's major sex offender civil commitment decisions to demonstrate how in each case, beginning with *Allen*,[117] the Court has narrowly upheld the commitment statutes as "nonpunitive" (despite actual evidence to the contrary). The Court has done so by employing a narrow focus on legislative intent instead of a focus on the actual, objective conditions of civil committee confinement.

In *Allen v. Illinois*, as discussed in the Introduction, a divided Supreme Court upheld the Illinois Sexually Dangerous Persons Act (SDPA) from a constitutional challenge that it amounted to unconstitutional criminal punishment in circumvention of the procedural protections guaranteed to criminal defendants.[118] Justice William Rehnquist, writing for the Court, held that the ostensibly "civil" proceedings created under SDPA—which are triggered by criminal charges and nonetheless result in incarceration in prison—should indeed be considered truly nonpunitive, and noncriminal.

The Court cited four reasons. First, that in the language of the Act, which required the state to care for and treat sexually dangerous persons,[119] "the State has disavowed any interest in punishment."[120] Second, that despite

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[114] 504 U.S. 71 (1992).

[115] *Id.* at 80.

[116] *See id.* at 79 (citations omitted).

[117] 478 U.S. 364 (1986).

[118] *See supra* notes 1–6 and accompanying text.

[119] *See* 725 ILL. COMP. STAT. ANN. 205/8 (West 2017) ("If the respondent is found to be a sexually dangerous person then the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous . . . . The Director of Corrections as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery.").

[120] *Allen*, 478 U.S. at 370. The Court went on to further specify that the Act did not appear to promote what it characterized as the two "traditional aims of punishment—retribution and deterrence." *Id.*

the requirement that at least one act of sexual assault be proved as an antecedent to commitment, this factual finding was sought not to punish past misdeeds, but to help the court predict future behavior.[121] Third, that the procedural safeguards of SDPA resemble those of a criminal proceeding, such as the right to counsel, the right to confront and cross-examine witnesses, and the burden of persuasion being "beyond a reasonable doubt."[122] And fourth, the Court brushed aside any serious consideration of the objective conditions of Allen's confinement—namely their identity with those of his criminally convicted counterparts—by stating that Allen's incarceration in a prison did "not transform the State's intent to treat into an intent to punish" because sexually dangerous persons were treated like other felons with a need for psychiatric care, not as "ordinary prisoners."[123]

Since deciding *Allen*, the Supreme Court has also upheld the state sex offender civil commitment statutes of Kansas and Washington against challenges that they violate constitutional prohibitions against double jeopardy and ex post facto laws and constitutional guarantees of substantive due process for civil commitment.[124] In these cases, as in *Allen*, the Court upheld each civil commitment regime it found to impose "civil" restraints rather than criminal punishment. For instance, in *Kansas v. Hendricks*, the Court found that the Kansas statute was nonpunitive because the state disavowed a punitive intent, limited its application to only particularly dangerous individuals, provided strict procedural safeguards, kept detainees segregated from the general prison population and afforded the same status as others who have been civilly committed, provided treatment if possible,

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However, the Court has considered incapacitation and treatment to both be legitimate aims of civil confinement, as well as criminal punishment. *See* Kansas v. Hendricks, 521 U.S. 346, 365–66 (1997).

[121] *Allen*, 478 U.S. at 371.

[122] *Id.* at 371–72.

[123] *Id.* at 373–74. The dissenting Justices, in an opinion authored by Justice John Paul Stevens, recounted the same facts and came to an opposite conclusion:

> Thus, the Illinois "sexually dangerous person" proceeding may only be triggered by a criminal incident; may only be initiated by the sovereign State's prosecuting authorities; may only be established with the burden of proof applicable to the criminal law; may only proceed if a criminal offense is established; and has the consequence of incarceration in the State's prison system—in this case, Illinois' maximum-security prison at Menard. It seems quite clear to me, in view of the consequences of conviction and the heavy reliance on the criminal justice system—for its definition of the prohibited conduct, for the discretion of the prosecutor, for the standard of proof, and for the Director of Corrections as custodian—that the proceeding must be considered 'criminal' for purposes of the Fifth Amendment.

Id. at 379 (Stevens, J., dissenting).

[124] *See* Kansas v. Crane, 534 U.S. 407, 413 (2002) (holding that Kansas's civil commitment statute comports with the requirements of substantive due process so long as there is a determination that the offender has some lack of control over his or her behavior); Seling v. Young, 531 U.S. 250, 267 (2001) (holding that Washington's commitment statute, once found to be civil, "cannot be deemed punitive 'as applied'" to an individual); *Hendricks*, 521 U.S. at 369 (holding that Kansas's civil commitment statute was nonpunitive, which precluded plaintiff's double jeopardy and ex post facto claims).

and permitted immediate release if the detainee was shown to be nondangerous.[125] Again, as in *Allen*, the Court's determination that the proceedings engendered by the Kansas statute were indeed civil (and not criminal) disposed of the plaintiff's constitutional double jeopardy and ex post facto claims.[126] In *Seling v. Young*,[127] a case challenging Washington's sex offender civil commitment statute on double jeopardy grounds, the Supreme Court later emphasized that "[w]hether a confinement scheme is punitive has been the threshold question for some constitutional challenges" to civil commitment schemes.[128] This pronouncement includes due process, double jeopardy, ex post facto, and self-incrimination challenges.[129]

In answering this threshold question of whether the civil commitment system at hand was punitive, the Court in both *Allen* and *Hendricks* considered the conditions of confinement imposed but ultimately gave scant consideration to the fact that the petitioners in both cases were incarcerated in prisons (albeit in units segregated from the general population).[130] Whether, and to what extent, the Court should assess the actual conditions of confinement imposed by a civil commitment statute when deciding whether the statute was in fact punitive was the subject of debate among several Justices in *Seling*.

Justice Clarence Thomas, in his concurrence, stated that the Court's precedent "precludes implementation-based challenges at any time."[131] He thus argued that only conditions of confinement that are "actually provided for on the face of the statute" should be permitted to factor into an analysis of whether the statute is punitive.[132] In sharp contrast, Justice John Paul Stevens in dissent argued that "the question [of] whether a statute is in fact punitive cannot always be answered solely by reference to the text of the statute" and argued that the Court's precedent permits it to take into account whether the statute has a punitive effect when deciding whether it is criminal

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[125] *Hendricks*, 521 U.S. at 368–69.

[126] *Id.* at 369.

[127] 531 U.S. 250.

[128] *Id.* at 266.

[129] *See id.*

[130] *See Hendricks*, 521 U.S. at 368 ("What is significant, however, is that Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals."); Allen v. Illinois, 478 U.S. 364, 373 (1986) ("Petitioner has not demonstrated, and the record does not suggest, that 'sexually dangerous persons' in Illinois are confined under conditions incompatible with the State's asserted interest in treatment.").

[131] *See Seling*, 531 U.S. at 273 (Thomas, J., concurring) (citing Hudson v. United States, 522 U.S. 93, 101 (1997) (holding that the Double Jeopardy Clause did not apply to civil penalties in a banking regulations case)).

[132] *Id.*

or civil in nature.[133] Ultimately, the majority left open the possibility that in a "first instance determination" of the civil or criminal nature of a commitment statute, the Court might look to conditions of confinement.[134] And as described in Part I, a closer look at the actual conditions of sex offender civil commitment in states using prison or prison-like facilities might well require the Court to reconsider its presumption that such schemes are civil.

C. The Treatment Mandate and Other Constraints

In the sex offender civil commitment context, then, the Supreme Court has consistently declined to find the statutes punitive—a stance scholars have roundly critiqued.[135] Instead, the Court has emphasized the legislature's treatment and incapacitation goals. This Section considers the constraints courts *have* placed on sex offender civil commitment regimes.

To begin, the clearest affirmative requirement that lower courts have imposed on state sex offender civil commitment programs is that, if treatment is possible, it is constitutionally required.[136] However, as one critical observer of sex offender litigation notes, "[T]he Court has not formulated specific requirements for a constitutionally adequate treatment program for civilly committed individuals."[137] The lack of a clear standard for treatment has left many sex offender civil committees languishing in prison conditions without any hope for release[138] and suggests that sex

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[133] *Id.* at 275–76 (Stevens, J., dissenting).

[134] *See id.* at 267 (O'Connor, J., majority opinion). The Court refused to do so in *Seling*, however, because it rejected the "as applied" challenge entirely. *Id.*

[135] *See supra* notes 32–34 and accompanying text.

[136] *See* Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1423 (2008); *see also* Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000) (affirming that the Due Process Clause requires that states "provide civilly-committed persons with . . . treatment that gives them a realistic opportunity to be cured and released"). *But see* Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012) (stating that the Eighth Circuit has not adopted the perspective that the Due Process Clause requires that states provide "appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement").

[137] Smith, *supra* note 136, at 1384. Therefore, this general treatment mandate often goes unfulfilled in practice. For example, looking to the decades-long litigation in Washington over its civil commitment program, *see* Turay v. Richards, No. 07-35309, 2009 WL 229838, at *1 (9th Cir. 2009) (affirming the district court's dissolution of a court-imposed injunction requiring that Washington provide constitutionally adequate sex offender treatment), although specific treatment mandates were developed by the Washington courts, they never achieved compliance with the court-ordered injunction. Smith, *supra* note 136, at 1399–1400, 1407.

[138] *See supra* note 12 and accompanying text.

offender civil commitment functions more as punishment rather than as a form of rehabilitation or treatment.[139]

Furthermore, other commentators have argued that the concept of "treatment" for civilly committed sex offenders rises to the level of paradox, because the same admissions that can help with treatment often extend a detainee's confinement.[140] As the Court in *Allen* made clear, sex offender civil commitment proceedings are not subject to the Fifth Amendment privilege against self-incrimination.[141] In addition, because a civil committee's statutory privacy protections are also diminished, a sex offender's psychological treatment records may be disclosed in proceedings to renew commitment.[142] The potential for courtroom disclosure creates perverse incentives for civilly committed sex offenders to refuse treatment in custody because most treatment programs require participants to "confess to additional crimes or admit guilt to sexual transgressions."[143] Indeed, treating psychologists may even test the accuracy of participant disclosures regarding their past acts and transgressive arousals using polygraph tests.[144] The use of these disclosures in re-commitment hearings thus undermines the potential for meaningful treatment behind bars and provides further support for the punitive nature of sex offender civil commitment.

Federal appellate courts have also wrestled with whether certain custodial conditions, such as lengthy solitary confinement, violate a civil committee's due process rights. In the Eighth Circuit, for example, the constitutionality of solitary confinement practices in a civil commitment were challenged on the basis that the placement of a sex offender in isolation because of rule infractions violated his procedural due process rights.[145] The court found the practice constitutional because the plaintiff was given a notice and a hearing.[146]

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[139] *But see* Kansas v. Hendricks, 521 U.S. 346, 365–68 (1997) (stating that even if the treatment provided by a state civil commitment program was "incidental" or "meager," that this did not threaten the constitutionality of the statutory regime).

[140] *See generally* Miller, *supra* note 33, at 2093 (arguing that sex offender treatment, although mandated statutorily and constitutionally, remains an "empty promise" in practice because of the perverse incentives it engenders).

[141] *See* Allen v. Illinois, 478 U.S. 364, 375 (1986).

[142] Miller, *supra* note 33, at 2108.

[143] *Id.* at 2114; *see also* JOHN HOWARD ASS'N OF ILL., MONITORING VISIT TO BIG MUDDY RIVER CORRECTIONAL CENTER 4–5 (2013), http://www.thejha.org/sites/default/files/Big%20Muddy%20Correctional%20Center%20Report%202013.pdf [https://perma.cc/6J9E-7DTB] (finding that sex offenders at a facility in Illinois were avoiding disclosing information necessary for their treatment because of fear that such disclosure might result in a later civil commitment hearing).

[144] Miller, *supra* note 33, at 2115.

[145] Senty-Haugen v. Goodno, 462 F.3d 876, 888 (8th Cir. 2006).

[146] *Id.*

But, the Seventh Circuit, in *West v. Schwebke*,[147] held that civilly committed sex offenders provided evidence sufficient to demonstrate that an issue of material fact existed regarding whether employees of the Wisconsin Resource Center violated detainees' substantive due process rights when the Center used "therapeutic seclusion" for as many as eighty-two consecutive days, or whether it could be reasonably justified on security or treatment grounds.[148] *West* gives some indication that the courts may scrutinize extreme restrictions on sex offender civil committee liberty. In other words, it suggests that some courts are able to countenance that some restrictions on civil committees could exceed what can be justified under treatment or security rationales.[149]

Nevertheless, the federal courts have largely failed to provide meaningful guidance as to when restrictions on sex offender civil committees cross the line and become unconstitutionally punitive. In particular, whether sex offender civil commitment to prison crosses the "punitive" line is the subject of continuing disagreement among the circuit courts and is taken up in the next Section.

D. Civil Commitment to Prison and Jails

This Section examines three instructive cases from three federal appellate courts as to whether civil commitment to prison and jails may amount to constitutionally prohibited punitive conditions: *Allison v. Snyder*,[150] *Jones v. Blanas*,[151] and *Matherly v. Andrews*.[152] These cases reveal a divergence in the circuit courts concerning whether civil commitment to prison might be found to be objectively punitive, and thus unconstitutional.

In *Allison*, a class of sex offenders civilly confined in an Illinois state prison, Big Muddy River Correctional Center,[153] sued state officials for

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[147] 333 F.3d 745 (7th Cir. 2003).

[148] *See id.* at 749.

[149] *See id.* ("Taken in the light most favorable to the plaintiffs, the record in this case shows that defendants kept plaintiffs in seclusion for periods far exceeding what could be justified by considerations of either security or treatment. Now maybe plaintiffs' experts are wrong, but it will take a trial to sort matters out.").

[150] 332 F.3d 1076 (7th Cir. 2003).

[151] 393 F.3d 918 (9th Cir. 2004).

[152] 859 F.3d 264 (4th Cir. 2017).

[153] In 1993, after the Supreme Court decided *Allen*, the Illinois Department of Corrections designated Big Muddy River Correctional Center, a medium-security correctional center, as the unit to house male pre-conviction Sexually Dangerous Persons instead of the maximum-security mental health unit at Menard Correctional Center discussed in *Allen*. *See* JOHN HOWARD ASS'N OF ILL., *supra* note 143, at 2. Women confined under the Illinois Sexual Dangerous Persons Act are held at the main women's prison in Illinois, Logan Correctional Center. As of 2010, sex offenders composed more than half of Big Muddy's total population of 1,900 inmates. *Id.* The facility is dramatically overcrowded: it was only

violation of their substantive due process rights.[154] The plaintiffs argued that the same Illinois pre-conviction civil commitment statute upheld in *Allen*, the SDPA, was being implemented unconstitutionally in three ways: first, committees were confined to a wing of a state prison where they were double-celled and mingled with convicts at meals and in other settings; second, their treatment involved self-incriminating testimony; and third, their therapy was conducted in groups rather than individually.[155] The plaintiffs did not allege that being confined in prison was unconstitutional per se, but instead that they had a right to be placed in the "least restrictive environment" consistent with the objectives of SDPA, which required that detainees be housed in facilities segregated from the general prison population.[156] The Seventh Circuit held that while it could not enforce a state law provision as the plaintiffs requested, there was relevant federal law in play: namely, substantive due process.[157] The court affirmed the rule that "detainees may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others, even though they may not be punished."[158]

Nevertheless, the court found for the defendants, holding, in relevant part, that "placement in a prison, subject to the institution's usual rules of conduct" does not signify punishment.[159] The court based its decision on *Bell v. Wolfish*,[160] finding that civil committees, like pretrial jail detainees in *Bell*, "may be held for security reasons but not punished, [and] may be assigned to prisons and covered by the usual institutional rules, which are designed to assure safety and security."[161] The court emphasized that the plaintiffs "were not assigned to high-security institutions, solitary, lockdown, or otherwise onerous confinement."[162]

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designed to hold 952 inmates total. *Id.* Sexually Dangerous Persons comprised 173 of the 974 sex offenders confined at Big Muddy in 2013. *Id.* at 4. In contrast, Illinois's post-conviction sex offender civil detainees are confined in a "Treatment and Detention Facility" in Rushville, operated by the Department of Human Services' Division of Mental Health Services. DIV. OF MENTAL HEALTH SERVS., *2008 Program Review and Evaluation*, http://www.dhs.state.il.us/page.aspx?item=42716 [https://perma.cc/2EHA-5N2F]. Illinois has thus created a peculiar dual-system of civil commitment that confines post-conviction sex offenders to a "secure treatment facility" operated by the state's mental health department and commits pre-conviction detainees to prison.

154 *Allison*, 332 F.3d at 1076–77.

155 *See id.* at 1078.

156 *See id.*

157 *See id.* at 1078–80.

158 *Id.* at 1079.

159 *See id.*

160 441 U.S. 520, 538–39 (1979).

161 *See Allison*, 332 F.3d at 1079.

162 *See id.*

In sum, the court rejected their claims and found that "[p]laintiffs do not assert that their situation is worse in any material way than the situation in which ordinary pretrial detainees find themselves."[163] The implicit logic of the *Allison* court is that jails, after all, are often indistinguishable from prisons in terms of their physical plant and restrictiveness. As such, civil commitment to prison does not appear to be any more punitive than the conditions that ordinary pretrial detainees find themselves in. However, the court largely overlooked one distinguishing factor: sex offender civil committees, unlike pretrial detainees, may find themselves in prison-like conditions for extremely long periods of time—in some cases, for life.[164]

In *Allison*, the Seventh Circuit drew heavily on *Bell* for support that ordinary detention in prison does not constitute punishment.[165] But the facility at issue in *Bell* was a short-term custodial center primarily designed to house pretrial detainees.[166] Moreover, the Supreme Court in *Bell* elided any significant distinction regarding conditions of confinement depending on whether an individual was a convicted prisoner or a pretrial detainee.[167] The *Allison* court's failure to recognize a distinction between conditions requirements in jails versus in prisons in these cases suggests an opening for the future: if increased scrutiny begins to be applied to conditions endured by pretrial detainees, increased scrutiny could be applied to conditions experienced by civil committees as well, because neither can be punished.

In *Jones v. Blanas*,[168] the Ninth Circuit came to a different conclusion as it held that the pretrial civil commitment detention of a sex offender in county jail for two years may have violated his substantive due process rights.[169] Applying the rules from *Bell* and *Youngberg*, the Ninth Circuit held in *Jones* that when a sex offender civil detainee is "confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment.'"[170] Applying this standard to the facts in *Jones*, the court found

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[163] *Id.*

[164] *See supra* note 12 and accompanying text.

[165] *See supra* notes 159–63 and accompanying text.

[166] *See Bell*, 441 U.S. at 524.

[167] *Id.* at 537 ("Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain.").

[168] 393 F.3d 918 (9th Cir. 2004).

[169] *Id.* at 934. Pretrial civil commitment detention refers to when detainees are held ahead of a civil commitment proceeding. *See id.* at 923 (describing the pretrial detention of Jones prior to his civil commitment proceeding under California's Sexually Violent Predator Act).

[170] *Id.* at 932 (citing Sharp v. Weston, 233 F.3d 1166, 1172–73 (9th Cir. 2000)). In addition, because Jones was still awaiting his civil commitment proceedings, the court stated that the conditions he experienced in custody pre-commitment must not be worse than the conditions he would experience post-commitment. *Id.* at 932–33 ("[P]urgatory cannot be worse than hell."). The Ninth Circuit has recently

both that the year the civil detainee spent held alongside the general criminal population and his year spent in administrative segregation—in which he incurred "significant limitations on, or total denials of, recreational activities, exercise, phone calls, visitation privileges, out-of-cell time, access to religious services, and access to the law library"—presumptively amounted to unconstitutional punishment.[171]

Unlike in *Allison*, the Ninth Circuit in *Jones* thus affirmed that the status of pre-adjudication civil committees as *noncriminal* detainees is critical in determining the constitutional parameters of permissible conditions of confinement.[172] In this way, *Jones* appears to provide a strong basis for sex offenders civilly committed to prison to challenge the conditions of their confinement. Indeed, that is exactly what a pro se sex offender civil committee (who was detained in a federal prison in North Carolina after serving a sentence on a child pornography conviction) recently argued in the Fourth Circuit.[173] He asked the Fourth Circuit to follow the *Jones* presumption that when civilly committed individuals are detained in conditions identical or similar to criminally sentenced prisoners, the conditions amount to punishment and are thus unconstitutional.[174] The court declined to follow *Jones*'s central holding, positing that, if "[r]ead literally and applied to post-adjudication civil detainees," *Jones* would create a presumption of punishment and would "place[] too great of a burden on prison administrators to justify their every move."[175] Such a framework, the Fourth Circuit said, would "expand[] the judiciary's involvement with decisions better left to the experts and place[] too much emphasis on superficial comparisons between conditions of confinement for civil detainees and prisoners."[176] Thus, the circuit courts appear to be torn between

referred to this as the "second" *Jones* presumption. *See* King v. County of Los Angeles, 885 F.3d 548, 557 (9th Cir. 2018).

171 *Jones*, 393 F.3d at 934.

172 *See id.* at 931 (critiquing the district court's application of an Eighth Amendment standard instead of the "more protective" Fourteenth Amendment standard that governs conditions of confinement cases for pretrial detainees).

173 *See* Matherly v. Andrews, 859 F.3d 264 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 399 (2017); *see also supra* notes 71–75 and accompanying text (discussing the conditions Matherly is subject to in federal prison).

174 *Matherly*, 859 F.3d at 275.

175 *Id.*

176 *Id.* at 276. The Fourth Circuit's reasoning here reflects a decades-long trend in the federal judiciary: deference to prison bureaucrats' expert judgment. *See* David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 124 (2016). Such deference has been frequently critiqued by legal scholars and prisoner rights advocates, who fear that the courts have abdicated their constitutional responsibility to safeguard individual rights and to reign in the excesses of the carceral state. *See, e.g.*, LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS,

a mandate to protect civil committees from unconstitutional punishment and their interest in maintaining maximal bureaucratic discretion for prison administrators.

With the exception of the Ninth Circuit in *Jones*, federal courts in conditions cases have tended to err on the side of prison officials, at the expense of civil committees. However, the Supreme Court's landmark decision in *Kingsley*, which the next Part takes up, may necessitate a change in the deference that state prison officials receive when it comes to the conditions under which civil detainees—including civilly committed sex offenders—may be held.

III. THE NEW FRONTIER: *KINGSLEY* AND ITS IMPLICATIONS FOR SEX OFFENDERS

In rejecting the Ninth Circuit's *Jones* presumption, the Fourth Circuit in *Matherly* assumed that the most recent Supreme Court case bearing on this issue was *Seling*.[177] However, in doing so, it overlooked the Court's 2015 decision in *Kingsley v. Hendrickson*.[178] *Kingsley* arguably adopted a *Jones*-like take on the importance of the civil or criminal status of the detainee.

This Part examines the Court's holding in *Kingsley* and explores its potential implications for the constitutionality of civil commitment to prison. First, it recalls the facts of *Kingsley* and the Court's central holding. Next, it explores the implications of *Kingsley*'s "objective turn" away from an intent-based punishment test to an objective test for pretrial detainees. Finally, it examines how advocates for sex offender civil commitment reform may be able to leverage *Kingsley* in future litigation.

A. Kingsley*: The Facts and Holding*

The facts of *Kingsley* arose from the experience of a pretrial detainee held in a Wisconsin jail. Petitioner Michael Kingsley refused to remove a piece of paper covering the light in his cell and, as a consequence, was repeatedly tasered in the back by Wisconsin county jail officials while handcuffed and lying face down on a bunk.[179] Kingsley brought a § 1983 action against the officials, arguing that the tasering amounted to excessive force in violation of his substantive due process rights.[180]

AND SYMBOLIC CIVIL RIGHTS 235 (2016) (summarizing how Supreme Court doctrine reflects a tendency to defer to prisons' symbolic compliance with legal standards at the cost, sometimes, of prisoner rights).

[177] *See Matherly*, 859 F.3d at 275 (citing Seling v. Young, 531 U.S. 250 (2001)).

[178] Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015).

[179] *Id.* at 2470.

[180] *Id.* at 2470–71.

At trial, the district court instructed the jury that the standard for excessive force was a subjective one: it must determine whether force was "applied recklessly" and that it was "unreasonable in light of the facts and circumstances of the time."[181] On appeal, the Seventh Circuit held that the law required "a subjective inquiry into the officer's state of mind" and a finding that the officer had "an actual intent" to violate a pretrial detainee's rights.[182]

At issue in the Supreme Court was whether the proper standard governing excessive force claims brought by pretrial detainees should be different than the subjective standard of excessive force governing claims brought by criminally convicted prisoners.[183] In other words, the question was whether the Court should adopt an objective standard of unreasonableness on account of the different status (criminal or civil) of the detainee. In a majority opinion authored by Justice Stephen Breyer, the Court overturned the lower courts in holding that the subjective standard applied to prisoners' excessive force claims should not apply to those awaiting trial in jail; instead, a pretrial detainee must "show only that the force purposely or knowingly used against him was objectively unreasonable."[184]

Prisoners' rights litigator and clinical professor David Shapiro cheered the Court's decision in *Kingsley* for "lower[ing] the standard for excessive force claims brought by pretrial detainees and signal[ing] that current law may set the bar too high for other claims as well."[185] He contended, moreover, that the impact of *Kingsley* went beyond making it easier for pretrial detainees to bring successful excessive force claims: it may extend to jail conditions cases as well.[186] Already, *Kingsley*'s holding has expanded to pretrial failure-to-protect cases and conditions cases, where the Ninth Circuit[187] and Second Circuit[188] have found that an objective standard applies in those respective circumstances as well.[189]

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[181] *Id.* at 2471 (emphasis omitted).

[182] *Id.* (internal quotations omitted).

[183] *See id.* at 2470.

[184] *Id.* at 2473.

[185] *See* Shapiro, *supra* note 176, at 125.

[186] *Id.* at 132 ("*Kingsley* suggests that much of the lower court jurisprudence regarding pretrial conditions is wrong because those decisions borrow heavily from Supreme Court precedent regarding post-conviction prisoners.").

[187] Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016).

[188] Darnell v. Pineiro, 849 F.3d 17 (2d Cir. 2017).

[189] *See* Shapiro, *supra* note 176, at 133. Failure-to-protect cases refer to government liability for failure to protect incarcerated persons in prison or jails from the violence of other inmates. *See Castro*, 833 F.3d at 1068. In *Castro*, the plaintiff suffered brain damage after he was beaten unconscious while in a Los Angeles jail cell. *Id.* at 1065. Conditions cases refer to government liability for deliberate indifference to substantial risk of harm due to inadequate medical care or living conditions. *See Darnell*,

Other scholars have also argued that *Kingsley* has implications for Eighth Amendment jurisprudence, in that the subjective intent requirement for officers should be dispensed when analyzing whether a punishment is cruel.[190] The expansion of *Kingsley*'s objective standard to analogous areas of law provides strong support that the Court's holding should not be read narrowly.

B. Kingsley*'s Objective Turn*

The doctrinal turn that *Kingsley* represents may very well reach beyond the more typical prisoner conditions cases. The *Kingsley* Court stated that to demonstrate a due process rights violation, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective *or that it is excessive in relation to that purpose*."[191] *Kingsley* therefore rejects a reading of *Bell* that suggests "proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated."[192]

Instead, *Kingsley* invites lower courts to focus on the "objective" conditions that may or may not constitute punishment, with an eye toward those restrictions on detainee liberty that may be "excessive" in relation to the legitimate security concerns of state institutions. Moreover, courts post-*Kingsley* will need to distinguish more clearly between governmental action in pretrial versus post-conviction settings because they must now apply different standards in the different contexts.

In this way, *Kingsley*'s logic may necessitate revisiting holdings governing the legality of sex offender civil commitment regimes. For example, *Kingsley* may require courts to no longer give such broad deference to the legislature's "intent" in determining whether a civil commitment scheme is punitive or not. Historically, the Court has held that where a state has expressly proclaimed that commitment proceedings are "civil" versus

849 F.3d at 20. In *Darnell*, twenty state pretrial detainees brought suit for appalling conditions experienced in Brooklyn Central Booking post-arrest. *Id.*

190 *See* John F. Stinneford, *The Original Meaning of Cruel*, 105 GEO. L.J. 441, 494 n.314 (2017) (arguing that post-*Kingsley*, "[t]here is no requirement that the official have any particular state of mind concerning the excessiveness of the force. Similarly, there is no requirement under the original meaning of the Cruel and Unusual Punishments Clause that a public official have a particular state of mind concerning the cruelty of a punishment.").

191 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473–74 (2015) (citation omitted) (emphasis added).

192 *See id.* at 2473. Indeed, in dissent, Justice Antonin Scalia forcefully stated that there was an intent-to-punish requirement for Fourteenth Amendment substantive due process claims. *See id.* at 2477 (Scalia, J., dissenting) ("Conditions amount to punishment, we explained, when they are 'imposed for the purpose of punishment.'" (citing Bell v. Wolfish, 441 U.S. 520, 538 (1979))).

"criminal," a plaintiff is required to provide "the clearest proof that the statutory scheme is so punitive either in purpose or effect" to overcome the strong presumption that the statute is in fact civil.[193] The Court has consistently left open the possibility that the actual conditions of detention could be so punitive as to provide adequate evidence of the legislature's punitive intent, but no plaintiff has yet satisfied this "heavy burden."[194] In effect, *Kingsley* may lower the burden for sex offender civil committees to prove that their confinement is unconstitutionally punitive by shifting the attention away from punitive intent and toward an objective test of punitive conditions.

C. Implications for Future Civil Commitment Litigation

Kingsley's doctrinal turn opens up a new avenue for sex offender civil commitment litigation and an opportunity to bolster ongoing cases in two main ways. First, *Kingsley*'s emphasis on analyzing the "challenged governmental action" primarily, rather than on the existence of a state "intent" to punish,[195] suggests that courts could sidestep the issue of the legislature's intent entirely.[196] The logic of *Kingsley* instructs courts to instead focus directly on the question of whether the actual conditions of confinement are so restrictive as to be "excessive" in light of their non-penological purpose as to render the detainment scheme unconstitutional.[197] In other words, *Kingsley*'s logic dictates that conditions of confinement are no longer only relevant to the extent that they shed light on a hidden legislative punitive purpose; rather, conditions may simply be so punitive as to themselves be unconstitutional.

Thus, the *Kingsley* holding implies that when challenging conditions of civil confinement, the most relevant question is whether such restrictions are excessive with regard to the security rationale. The case highlights the notion that most restrictive conditions that civil detainees find themselves in may almost always have a "rational" relation to a non-penological purpose (i.e., institutional security) but nevertheless may be excessively (and thus unconstitutionally) restrictive. It is difficult to imagine the post-*Kingsley*

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193 *See* Allen v. Illinois, 478 U.S. 364, 369 (1986) (citations and internal quotation marks omitted).

194 *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 361 (1997) ("Although we recognize that a civil label is not always dispositive, we will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to deem it civil." (internal quotation marks and citations omitted)).

195 *Kingsley*, 135 S. Ct. at 2473–74.

196 Although *legislative intent* was not at issue in *Kingsley*, but rather *executive intent* in the application of force to prisoners, the inquiry is analogous.

197 *Kingsley*, 135 S. Ct. at 2473–74.

Court affirming a decision like that in *Hargett*, where the court stated in a single breath that restrictions—from locked cell doors to invasive searches—on sex offender civil committees may indeed be "excessive" given the patient population, but nevertheless were constitutional because they did not represent a substantial departure from accepted professional judgment.[198]

Second, *Kingsley* affirms a long-standing principle that conditions of pretrial confinement should be meaningfully distinguished from those of criminal incarceration. A lower court considering a case like *Allison* in a post-*Kingsley* universe may no longer be able to hold that there is no constitutional problem with pretrial detainees living out indefinite sentences in conditions identical to those of post-conviction prisoners if such high-security conditions are not rationally related to a legitimate, nonpunitive, governmental purpose or if they are excessive in relation to that purpose. If *Kingsley* stands for the general proposition that post-conviction conditions of confinement are no longer constitutionally equal to pre-conviction conditions of confinement, then there may be a strong argument that civilly committed sex offenders cannot, as a matter of law, be committed to state prison facilities. Such conditions may be per se punitive and thus per se unconstitutional.[199] This line of reasoning is bolstered by Eighth Amendment jurisprudence more generally, which has long recognized that incarceration in prisons is a central vehicle whereby society punishes court-adjudicated criminals.[200] As a matter of principle, this assertion may be better founded than ever before thanks to the Court's holding in *Kingsley*.

Framing sex offender civil detainees as primarily "pretrial detainees" rather than as "patients" may—although somewhat counterintuitively—be strategic for advocates. Although *Youngberg*'s declaration of substantive rights for civil committees[201] appears on the surface to be a more promising doctrine in which to flesh out greater protections for sex offenders than *Bell*'s

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[198] Hargett v. Adams, No. 02 C 1456, 2005 WL 399300, at *15–16 (N.D. Ill. Jan. 14, 2005). For an extended discussion of *Hargett*, see *supra* Section I.B.2.

[199] At the very least, such commitment schemes would appear to be *presumptively* punitive and thus unconstitutional under a *Jones*-like standard applied to the conditions of commitment (rather than of pretrial detention).

[200] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("These elementary principles establish the government's obligation to provide medical care *for those whom it is punishing by incarceration*." (emphasis added)).

[201] *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) ("We repeat that the State concedes a duty to provide adequate food, shelter, clothing, and medical care. . . . The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training.").

prohibition on punishment of pretrial detainees,[202] there is no parallel opening in Supreme Court doctrine in the civil commitment context comparable to that of *Kingsley*. When challenges are brought under *Youngberg* and its progeny, such as in *Hargett*, lower courts seem willing to bend over backwards to find that even the most extreme restrictions on detainees are supported by "professional judgment."[203]

On the other hand, *Bell* and its lineage, which includes *Kingsley*, focus judicial oversight on the question of whether custodial restrictions are rationally connected to a nonpunitive purpose and whether such restrictions appear to be excessive in relation to the alternative purpose supporting them.[204] Asking courts to overturn decades of their own precedent upholding the (albeit questionable) constitutionality of both pre- and post-conviction sex offender civil commitment-to-prison regimes is no small request. Yet, bolstered by fresh precedent by the Supreme Court itself, as well as the logic of Ninth and Second Circuits' cases like *Jones*, *Castro*, and *Darnell*, such challenges may stand a chance.

The *Kingsley* opening is crucial because court-based challenges to punitive civil commitment regimes may be the only viable route to constitutional reform. Despite the availability of potential alternative methods of protecting the public and respecting the constitutional rights of sex offenders (e.g., through nonpunitive civil treatment programs),[205] because sex offenders tend to be categorically reviled in popular culture, it is not likely that state legislatures will undergo such reform efforts

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[202] *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

[203] See *supra* Sections I.B.2 and II.D for a discussion of the lower courts' deference to prison officials' professional judgment.

[204] *See Bell*, 441 U.S. at 538 ("A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." (internal quotation marks and citations omitted)).

[205] Although the civil institutions that involuntarily confine the mentally ill or intellectually disabled are not without their own constitutional problems, *see, e.g.*, Foucha v. Louisiana, 504 U.S. 71 (1992) (holding unconstitutional a Louisiana statute that permitted the continued confinement of an insanity acquittee even after the hospital review committee found no lasting evidence of mental illness); O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding unconstitutional the continued civil commitment of a mental patient who was capable of living safely in the community by himself or with the help of willing and responsible family or friends), they do not run as great of a risk of constituting impermissible *punishment* as state civil commitment to prison does because hospital conditions do not as closely resemble the conditions of criminal punishment.

voluntarily.[206] Counter-majoritarian constitutional litigation will remain a key element of the battle to make sex offender civil commitment conform to longstanding legal principles that prohibit preventative detention, double jeopardy, and loss of liberty without due process of law. Given how piecemeal reform litigation can be and the opening that *Kingsley* has provided, advocates may do well to consider attacking the constitutionality of civil commitment to prison as a credible first step.

CONCLUSION

This Note began by charting the current punitive landscape of sex offender civil commitment detention conditions by conducting a nationwide survey of commitment statutes. The survey revealed that over a dozen states either explicitly commit sex offender civil committees to prison or authorize such an agreement. Moreover, by looking at class action litigation at the district court level, this Note revealed that the line between prisons and non-prison "secure treatment facilities" is neither a clear nor necessarily defensible one. Reviewing the Supreme Court's civil commitment, pretrial detention, and sex offender jurisprudence, the Note highlighted how such clearly punitive detention schemes have been upheld as "civil" by the Court because of its focus on legislative intent as opposed to the objective conditions of confinement. Finally, the Note argues that the Court's recent decision in *Kingsley v. Hendrickson* offers a chance to shift the focus away from legislative intent and toward the objective reality that sex offender civil committees find themselves in when they are detained behind bars, in prisons, for indefinite periods of time.

Fundamentally, this Note argues that civil commitment to prison is a practice that impermissibly muddles the foundational division in constitutional law between civil proceedings and criminal proceedings and between treatment and punishment. To the extent that this Note sheds light on the existence of this phenomenon, it does so in the hope that the courts might be ready—after years of refusing to consider the actual punitive reality of confinement of the many sex offender civil committees who find themselves behind bars—to examine state and federal sex offender civil commitment regimes more closely. If the opening that *Kingsley* provides is indeed big enough to bring light—and scrutiny—to this dark corner of our penal system, it is an opportunity that advocates should not overlook.

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[206] *See* RICKARD, *supra* note 47, at 2 ("Like crime in general, child sex abuse has been described as a 'valence issue' in that there is no pro-crime or pro-sex offender lobby." (citation omitted)).

APPENDIX

TABLE 1: RESULTS OF NATIONAL SURVEY OF SEX OFFENDER CIVIL COMMITMENT STATUTES

State	Sex Offender Civil Commitment Statute	Facility Type
Alabama	none	n/a
Alaska	none	n/a
Arizona	Arizona Sexually Violent Persons Act ARIZ. REV. STAT. ANN. § 36-3707 (2014)	state hospital or least restrictive alternative
Arkansas	none	n/a
California	California Sexually Violent Predators Act CAL. WELF. & INST. CODE § 6604 (West 2018)	secure state hospital facility on the grounds of Department of Corrections
Colorado[207]	none	n/a
Connecticut	none	n/a
Delaware	none	n/a
Florida	Jimmy Ryce Involuntary Civil Commitment for Sexual Violent Predators' Treatment and Care Act FLA. STAT. ANN. § 394.917 (West 2018)	secure facility operated by Department of Children and Families authority; inter-agency and private contracts authorized; requirement that sex offenders be segregated from other patients
Georgia	none	n/a
Hawaii	none	n/a
Idaho[208]	none	n/a
Illinois	Illinois Sexually Dangerous Persons Act (pre-conviction) 725 ILL. COMP. STAT. ANN. 205/8 (West 2017) Illinois Sexually Violent Persons Act (post-conviction) 725 ILL. COMP. STAT. ANN. 207/40 (West 2017)	prison operated by Department of Corrections; may place person in custody of other department or agency with consent of other agency (pre-conviction)

[207] Colorado does permit, however, the imposition of an indeterminate, lifetime criminal sentence to certain sex offenders. *See* COLO. REV. STAT. ANN. § 18-1.3-904 (West 2013).

[208] Although Idaho does not have a separate sex offender civil commitment statute, it does put limitations on the ability of those convicted of sex offenses to be paroled without an additional psychological examination. *See* IDAHO CODE ANN. § 20-223(4) (West 2016).

		secure treatment center operated by Department of Human Services or least restrictive alternative (post-conviction)
Indiana	none	n/a
Iowa	Iowa Sexually Violent Predators Act IOWA CODE ANN. § 229A.7 (West 2014)	secure facility operated by Department of Human Services; inter-agency and private contracts authorized; requirement that sex offenders be segregated from other patients
Kansas	Kansas Sexually Violent Predator Act KAN. STAT. ANN. § 59-29a07 (West 2008)	secure facility operated by the Department for Aging and Disability Services; inter-agency contract with Department of Corrections authorized; requirement that sex offenders be segregated from other patients
Kentucky	none	n/a
Louisiana	none	n/a
Maine	none	n/a
Maryland	none	n/a
Massachusetts	Care, Treatment and Rehabilitation of Sexually Dangerous Persons Act MASS. GEN. LAWS ANN. ch. 123A, § 2 (West 2017)	secure treatment center operated by Department of Correction
Michigan	none	n/a
Minnesota[209]	Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities	secure treatment facility operated by state Sex Offender Program

[209] Because of ongoing class action litigation challenging the constitutionality of its sex offender civil commitment program, Minnesota's commitment scheme is in currently in flux. *See* Karsjens v. Jesson, 109 F. Supp. 3d (D. Minn. 2015), *rev'd sub. nom.*, Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017), *reh'g en banc denied*, No. 15-3485 (Feb. 22, 2017), *cert. denied*, 138 S. Ct. 106 (2017). Although Minnesota's sex offender civil commitment program was initially held unconstitutional in federal district court, the Eighth Circuit reversed and withdrew an injunction on the program.

	MINN. STAT. ANN. § 253D.07 (West 2015)	
Mississippi	None	n/a
Missouri	Sexually Violent Predators—Registration—Civil Commitment MO. ANN. STAT. § 632.495 (West 2014)	secure treatment facility operated by the Department of Mental Health; inter-agency contract with the Department of Corrections authorized; requirement that sex offenders be segregated from other patients
Montana	none	n/a
Nebraska	Sexual Offender Commitment Act NEB. REV. STAT. ANN. § 71-1209 (West 2009)	state hospital or least restrictive alternative
Nevada	None	n/a
New Hampshire	Involuntary Civil Commitment of Sexually Violent Predators Act N.H. REV. STAT. ANN §§ 135-E:8, 135-E:11 (West 2015)	secure psychiatric unit of prison operated by the Department of Corrections; inter-agency and private contracts authorized
New Jersey	New Jersey Sexually Violent Predator Act N.J. STAT. ANN. § 30:4-27.34 (West 2016)	secure facility operated by the Department of Corrections
New Mexico	none	n/a
New York	Sex Offenders Requiring Civil Commitment or Supervision N.Y. MENT. HYG. LAW § 10.10 (McKinney 2011)	secure treatment facility operated by commissioner of mental health, commissioner of corrections, or other government entity; inter-agency contract with the Department of Corrections and Community Supervision authorized
North Carolina	none	n/a
North Dakota	Civil Commitment of Sexually Dangerous Individuals N.D. CENT. CODE ANN. §§ 25-03.3-13–14 (West 2008)	least restrictive available treatment facility operated by Department of Human Services; if previously

		in prison, may be committed to the Department of Corrections and Rehabilitation
Ohio	none	n/a
Oklahoma	none	n/a
Oregon[210]	none	n/a
Pennsylvania[211]	Court-Ordered Involuntary Treatment of Certain Sexually Violent Persons 42 PA. STAT. AND CONS. STAT. ANN. § 6403 (West 2013)	inpatient treatment facility designated by Department of Public Welfare
Rhode Island	none	n/a
South Carolina	Sexually Violent Predator Act S.C. CODE ANN. § 44–48–100 (2018)	secure facility operated by Department of Mental Health; inter-agency contract with the Department of Corrections authorized; requirement that sex offenders be segregated from other patients
South Dakota	none	n/a
Tennessee	none	n/a
Texas	Civil Commitment of Sexually Violent Predators TEX. HEALTH & SAFETY CODE ANN. § 841.0831 (West 2017)	tiered treatment program from total confinement to less restrictive housing operated by Civil Commitment Office
Utah	none	n/a
Vermont[212]	none	n/a
Virginia	Civil Commitment of Sexually Violent Predators VA. CODE ANN. § 37.2-909 (West 2018)	secure facility operated by Department of Behavioral Health and Developmental Services; inter-agency

[210] Oregon has a statue permitting the treatment of "sexually dangerous persons" in the Department of Corrections, but it is limited to criminally convicted sex offenders serving sentences. *See* OR. REV. STAT. ANN. § 426.675 (West 2011).

[211] Pennsylvania's statute is limited to juveniles. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 6401 (2013).

[212] Vermont requires, however, indeterminate life sentences, with release conditional upon completing sex offender treatment for those convicted of sex offenses. *See* VT. STAT. ANN. tit. 13, § 3271 (West 2007).

		and private contracts authorized; requirement of segregation from prisoners in custody of the Department of Corrections
Washington	Sexually Violent Predators WASH. REV. CODE ANN. § 71.09.060 (West 2014)	secure facility operated by Department of Social and Health Services; requirement that sex offenders not be placed, even temporarily, in state mental health facilities
West Virginia	none	n/a
Wisconsin	Sexually Violent Person Commitments WIS. STAT. ANN. §§ 980.06–.065 (West 2007)	secure mental health facility provided by Department of Health Services or by Department of Corrections; inter-agency contract with Department of Corrections authorized
Wyoming	none	n/a
D.C.	Sexual Psychopaths D.C. CODE ANN. § 22-3808 (West 2017)	state hospital[213]
United States[214]	Adam Walsh Child Protection and Safety Act Civil Commitment of a Sexually Dangerous Person 18 U.S.C. § 4248 (2012)	custody of Attorney General; suitable facility for treatment in State in which a person was domiciled[215]

[213] The relevant D.C. commitment statute is ambiguous with regard to facility type, specifying only that commitment may be to "an institution," D.C. CODE ANN. § 22-3808 (2017), but subsequent court decisions reveal that in practice commitment under this statute was to "mental hospitals," *see* Shelton v. United States, 721 A.2d 603, 608 (D.C. Cir. 1998), or to a "hospital," *see* Malone v. Overholzer, 93 F. Supp. 647, 647 (D.D.C. 1950).

[214] The authority of the federal government to enact this civil commitment scheme was upheld in *United States v. Comstock*, 560 U.S. 126, 149 (2010).

[215] The U.S. Department of Justice, however, houses its Sex Offender Commitment and Treatment Program at FCI Butner in North Carolina, a prison psychiatric facility that also houses other criminally sentenced prisoners. *See* DEP'T OF JUSTICE, FEDERAL CORRECTIONAL COMPLEX, BUTNER, NORTH CAROLINA, DOCTORAL PSYCHOLOGY INTERNSHIP 2018/2019 8 (Jul. 28, 2017). The United States' civil commitment of sex offenders to prison was recently challenged on the basis that conditions were "more restrictive than, identical to, or similar to conditions applicable to prisoners housed at FCI Butner," but was upheld in *Matherly v. Andrews*, 859 F.3d 264, 269 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 399 (2017).