Sex Cells: An Analysis of the Civil Commitment of Sexually Violent Predators in the Eighth Circuit and Recommendations for South Dakota's Future

Matthew De Jong

Follow this and additional works at: https://red.library.usd.edu/sdlrev

Recommended Citation

This Student Comment/Note is brought to you for free and open access by USD RED. It has been accepted for inclusion in South Dakota Law Review by an authorized editor of USD RED. For more information, please contact dloftus@usd.edu.
SEX CELLS: AN ANALYSIS OF THE CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS IN THE EIGHTH CIRCUIT AND RECOMMENDATIONS FOR SOUTH DAKOTA’S FUTURE

MATTHEW DE JONG†

"A nation’s success or failure in achieving democracy is judged in part by how well it responds to those at the bottom, and the margins, of the social order."¹
- Justice Sandra Day O’Connor

"The Court must emphasize that politics or political pressures cannot trump the fundamental rights of Class Members who, pursuant to state law, have been civilly committed to receive treatment. The Constitution protects individual rights even when they are unpopular."²
- Judge Donovan W. Frank

The recent Eighth Circuit Court of Appeals decision, Karsjens v. Piper, brought attention to the civil commitment of sex offenders once again. The civil commitment of sexually violent predators has seen a surge in popularity. While these programs may be experiencing more acceptance among the states, there are serious concerns on both sides of the debate that must be considered. Proponents stress the public’s safety and treatment of the offenders; opponents suggest the constitutional and political considerations outweigh public safety concerns. South Dakota must consider these factors as well as the civil rights of the individuals and the public safety concerns should it choose to implement the civil commitment program recommended by this comment.

I. INTRODUCTION

“What did I do wrong?”³ This is the haunting question Jacob Wetterling asked his kidnapper, Danny Heinrich, before he was sexually assaulted and executed.⁴ Danny Heinrich was driving down a road when he observed several

⁴ Id.
children on their bicycles. After passing the children, he turned his car around and waited for them to come back. Heinrich exited his car, approached the children with his revolver, and ordered them to stand in the ditch. Heinrich then took Jacob to his vehicle, handcuffed him, and drove him out of town. Once they were out of town, Heinrich took Jacob into a wooded area and sexually assaulted him. Heinrich shot Jacob twice and placed his body in a shallow grave.

The story of Jacob Wetterling pulls at our heartstrings and demonstrates the importance of the civil commitment of sexual predators. Civil commitment is “the involuntary detention of a convicted felon beyond the specified release date.” There are competing interests that define the significance of the civil commitment of sexually violent predators. Advocates for these programs point to public safety and public policy concerns because the state has a duty to protect the public. Advocates also identify providing treatment to the offenders as a benefit of civil commitment programs because offenders would not normally have access to the sophisticated treatment provided by these programs. Nonetheless, there are constitutional and public policy concerns regarding sexual civil commitment programs. Specifically, civil commitment programs have procedural and Substantive Due Process, Equal Protection, Ex Post Facto, and Double Jeopardy concerns.

The reason these concerns have materialized is because sexual civil commitment laws vary from other civil commitment statutes. Typically, an

5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. See id. (demonstrating a case of sexual assault by a sexually violent predator). The story of Dru Sjodin, a young adult, is another example of the importance of the topic of civilly committing sex offenders. Lucy Massopust & Raina Borrelli, “A Perfect Storm”: Minnesota’s Sex Offender Program—More Than Twenty Years Without Successful Reintegration, 41 WM. MITCHELL L. REV. 706, 712 (2015). Dru Sjodin was kidnapped, raped, and murdered by a released sex offender. Id. Even though the perpetrator could have been referred to the civil commitment program, Alfonso Rodriguez, Jr. was not referred. Id.
12. Civil Commitment, BLACK’S LAW DICTIONARY 299 (10th ed. 2014). This typically applies to sex offenders. Id. Civil commitment can also be defined as a “residential program characterized by intense and strict supervision of sex offenders who have completed their prison sentences but who have completed their prison sentences but whose recidivism is determined to be likely.” Id.
14. Id.
15. Id.
16. Id.
18. Compare Philip Hickey, Involuntary Mental Health Commitments, BEHAVIORISM AND MENTAL HEALTH (Mar. 20, 2014), http://behaviorismandmentalhealth.com/2014/03/20/involuntary-mental-health-commitments/ (demonstrating that other civil commitment laws tend to permit a seventy-two hour or a
involuntary commitment is statutorily permitted for seventy-two hours to three months.\textsuperscript{19} However, the civil commitment of sex offenders is indefinite.\textsuperscript{20} Laws enacted to civilly commit sexually violent predators tend to be custom-made for a small group of sex offenders after they complete their prison sentence if it is proven that they are likely to commit another act.\textsuperscript{21} Generally, these statutes require that the offender have a mental abnormality, have committed at least one sexually violent offense, and have a high risk of committing another future offense.\textsuperscript{22} Once an individual is admitted to the program, they remain in the program until they meet the requirements set forth in the statute to be released.\textsuperscript{23}

The latest annual report on crime in South Dakota shows an overall decrease in violent crime.\textsuperscript{24} Even with this decrease, South Dakota still ranks second nationally in rape and sexual assault cases.\textsuperscript{25} There were ninety-seven rapes in 2015 and one-hundred seven in 2016 in Sioux Falls, South Dakota.\textsuperscript{26} As stated in one news report, "[t]hose numbers are higher than the national average per capita and they [do not] include incest or statutory rape cases."\textsuperscript{27} South Dakota has a sex crime issue affecting the state and South Dakota must improve its national

\begin{itemize}
\item three-month involuntary commitment, with infra Part II.0 (demonstrating that the civil commitment of some sex offenders is indefinite).
\item Hickey, supra note 18.
\item Compare IOWA CODE ANN. § 229A (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators), and MINN. STAT. ANN. § 253D (West 2017) (showing the requirements for the civil commitment of sexually violent predators in Minnesota), and MO. ANN. STAT. § 632 (West 2017) (illustrating Missouri's requirements for the civil commitment of sexually violent predators), and NEB. REV. STAT. ANN. § 83-174 (West 2017) (providing the requirements for the civil commitment of sexually violent predators), and N.D. CENT. CODE ANN. § 25-03.3 (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators in North Dakota), with Hickey, supra note 18 (demonstrating that other civil commitment laws tend to permit a seventy-two hour or a three-month involuntary commitment).
\item See infra Part II.0; Part III.0 (discussing statutory compilations).
\item See generally IOWA CODE ANN. § 229A (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03.3 (West 2017) (same).
\item See generally IOWA CODE ANN. § 229A (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03.3 (West 2017) (same).
\item South Dakota report shows violent crime rate dropped in 2016, KOTA TERRITORY NEWS (Mar. 20, 2017), http://www.kotav.com/content/news/South-Dakota-report-shows-violent-crime-rate-dropped-in-2016-416633743.html. The crime statistics do not note how many burglaries, murders, kidnappings, or arson cases were fueled to satisfy one's sexual gratification. See id. (showing that the report did not take motive into account). This is necessary because a sexually violent crime could be categorized as one of the previous crimes listed. See infra Part II.0 (discussing the requirements of sexually violent predator laws).
\item Jorgensen, supra note 25.
\item Id.
\end{itemize}
standing. While many of the states surrounding South Dakota have a civil commitment program for sex offenders, South Dakota does not. South Dakota needs a sexually violent predator act, like those of neighboring states, in order to civilly commit sex offenders.

This comment will analyze civil commitment programs for sexually violent predators within the Eighth Circuit. To begin, this comment will examine the history of sex offender civil commitment laws, and then discuss Supreme Court precedent on sexual civil commitment laws. This comment will then examine the statutory construction of the programs adopted by states within the Eighth Circuit: Iowa, Minnesota, Missouri, Nebraska, and North Dakota. Finally, this comment will offer recommendations for South Dakota’s future regarding a civil commitment program.

II. BACKGROUND

A. HISTORY OF CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS IN THE UNITED STATES

Beginning in 1911, legislation determined that sex offenders were “defective delinquents” and “criminal psychopaths.” This led to sex offenders being treated more as people with mental disorders rather than criminals. This shift in treatment from incarceration to rehabilitation began in Michigan in 1937 when Michigan was the first state to pass a “sexual psychopathic personality statute.”

28. See ATSA, supra note 13 (stating that advocates “argue that such provisions offer an important community protection safeguard by incapacitating a high risk subgroup of sex offenders”); Jorgensen, supra note 25 (illustrating that South Dakota ranks second in the nation for rape and sexual assault cases).

29. ATSA, supra note 13. “Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin” are the states that currently have legislation to civilly commit sexual offenders. Id. (emphasis added).

30. See ATSA, supra note 13 (listing South Dakota’s neighboring states with a sex offender civil commitment law); Jorgensen, supra note 25 (demonstrating South Dakota’s rape and sexual assault issue).

31. Specifically, it will analyze Iowa, Minnesota, Missouri, Nebraska, and North Dakota as Arkansas and South Dakota do not have a civil commitment program for sex offenders. ATSA, supra note 13. See Geographic Boundaries of United States Courts of Appeals and United States District Courts, http://www.uscourts.gov/sites/default/files/u.s._federalCourts_circuit_map_1.pdf (demonstrating the states that are in the Eighth Circuit).

32. See infra Part II.0, II.0 (discussing the history and precedent of sexually violent predator laws).

33. See infra Part II.0 (illustrating the sexually violent predator laws within the Eighth Circuit).

34. See infra Part III (analyzing recommendations for South Dakota’s future). This will include discussion on statutory language, avoiding constitutional law issues, and recommending a treatment program for South Dakota to enact. Id.


Michigan passed this law as a political reaction to the murder of a girl by a man that was previously committed for sex crimes.  

Even though Michigan’s statute was found unconstitutional, Illinois, California, and Minnesota enacted similar statutes by 1939. Many states ultimately enacted sexual psychopathic personality statutes. The statutes went unused, however, despite the fact that they were “touted as a scientific, enlightened response to dangerous sex offenders that would achieve two goals: remove the sex offender from the community, and treat the underlying mental condition.”

Civil commitment of sex offenders did not begin to increase in popularity until the 1990s. In 1990, Washington passed the first legislation regarding civilly committing sexually violent predators. Earl K. Shriner’s sex crimes sparked a political reaction leading to the passage of legislation. After Washington passed a civil commitment program for sexually violent predators, Arizona, California, Kansas, and Wisconsin passed comparable legislation in the following years. Today, twenty states plus the District of Columbia have enacted a statute allowing for the civil commitment of sexually violent predators. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act. This statute enabled the federal government to civilly commit federal sex offenders. Even though the federal government and nearly half of

38. Woolman & Anderson, supra note 37, at 1374.
39. Id. See generally People v. Frontczak, 281 N.W. 534 (Mich. 1938) (holding that Michigan’s civil commitment law was unconstitutional because it was criminal in nature).
40. Woolman & Anderson, supra note 37, at 1374 (citing Roxanne Lieb et al., Sexual Predators and Social Policy, 23 CRIME & JUST. 43, 55 (1998)).
41. Id.
42. See id. at 1374-75 (identifying that the “second wave” of civil commitment laws were used more than those first enacted by the states).
44. Lieb, supra note 43, at 1. See Barry Siegel, Locking Up ‘Sexual Predators’: A public outcry in Washington state targeted repeat violent sex criminals. A new preventive law would keep them in jail indefinitely, L.A. TIMES (May 10, 1990), http://articles.latimes.com/1990-05-10/news/mn-1433_1_sexual-predator/2 (describing the graphic details of the sexual crimes giving rise to the political reaction to pass sexually violent predators legislation). Earl Shriner had a twenty-four-year record of assaults. Id. In his twenties, he kidnapped two teenage girls; as a result, he was locked up. Id. He also had “unusual sadistic fantasies and plans to carry them out.” Id. For example, he told his cellmate that he wanted a vehicle with “cages so he could pick up children, sexually abuse them and kill them.” Id.
45. Lieb, supra note 43, at vi.
46. ATSA, supra note 13. “Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin” are the states that currently have legislation to civilly commit sexual offenders. Id. See MINN. DEP’T OF HUM. SERVS., COMPILATION OF SEX OFFENDER CIVIL COMMITMENT STATUTES (2012), https://mn.gov/dhs/assets/Sex-offender-civil-commitment-statutes_tcm1053-165419.pdf (illustrating the states that have enacted sex offender civil commitment statutes).
47. 18 U.S.C. § 4248 (2006); ATSA, supra note 13.
the states have enacted some form of a sexually violent predator law, these statutes continue to be controversial among legal and clinical professionals alike.49

Despite the fact that these statutes are controversial, the United States Supreme Court held civil commitment of sex offenders was constitutional in Kansas v. Hendricks.50 The Court came to that conclusion by relying on a textual analysis of the state’s statute.51 Several years later, the Court determined that these statutes must be narrowly tailored to a subset of sex offenders that suffer from “mental abnormalities” causing them to be a high risk to reoffend due to a lack of control.52 States that have enacted such laws generally provide that three elements must be met.53 First, the individual being civilly committed must have a mental abnormality.54 Second, the defendant must have committed at least one sexually violent crime.55 Third, the person to be committed must be found to have a high risk of committing another sexually violent crime in the future.56

Sexually violent predator laws contain three important legal terms of art: “mental abnormality,” “sexually violent offense,” and “sexually violent person.”57 A “mental abnormality” is a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”58 The Supreme Court considers the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) when determining what constitutes a “mental abnormality.”59 “Sexually violent offense[s]” consist of sex crimes and sexually motivated crimes.60 “Sexually violent predator” is another legal term of art that is central to these statutes.61 The Court defined a “sexually violent

49. ATSA, supra note 13. See, e.g., 18 U.S.C. § 4248; IOWA CODE ANN. § 229A (West 2017) (illustrating the civil commitment programs for sex offenders that are enacted); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03.3 (West 2017) (same).
51. See id. at 351-52 (“As a result, the legislature found it necessary to establish a civil commitment procedure for the long-term care and treatment of the sexually violent predator.”). Furthermore, the Kansas statute at issue in this case was found to be constitutional because it identified a small group of individuals that were “extremely dangerous” and had a high probability of committing another act. Id. at 351-52, 371.
52. See generally Kansas v. Crane, 534 U.S. 407 (2002) (discussing that “mental abnormality” is to be read liberally and this group of individuals must be distinguished from other sex offenders).
53. See infra Part II.0.1-5 (addressing the requirements of a sexually violent predator act).
54. Id.
55. Id.
56. Id.
57. Id.
60. IOWA CODE ANN. § 229A.2 (West 2017); MINN. STAT. ANN. § 253D.02 (West 2017); MO. ANN. STAT. § 632.480 (West 2017); NEB. REV. STAT. ANN. § 83-174.01 (West 2017); N.D. CENT. CODE ANN. § 25-03.3-01 (West 2017).
61. IOWA CODE ANN. § 229A.2 (West 2017); MINN. STAT. ANN. § 253D.02 (West 2017); MO. ANN. STAT. § 632.480 (West 2017); NEB. REV. STAT. ANN. § 83-174.01 (West 2017); N.D. CENT. CODE ANN.
"predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." 62

B. TREATMENT PROGRAMS ADMINISTERED BY STATES UNDER SEXUALLY VIOLENT PREDATOR STATUTES

States with civil commitment programs for sexually violent predators have sophisticated treatment plans including both in-patient and out-patient programs. 63 The goal of these programs is to allow those civilly committed to be released into the community. 64 While the goal of the treatment is consistent in the various jurisdictions, the programs themselves vary. 65 For instance, some programs have conditional release, or a "halfway" house, while others do not have that intermediate step. 66

The treatment plans for the civil commitment programs are largely based on two theories, Risk-Need-Responsivity and cognitive-behavioral. 67 To effectuate these theories, treatment programs use "sex offender process groups, dynamic factor risk management, self-regulation, organized milieu/therapeutic community, motivational interviewing, dialectical behavior therapy, and strength-based approaches." 68 In order to provide effective treatment, assessments of the individual must be completed. 69 These evaluations include considering various risk factors such as sexual history, alcohol and substance abuse, and client's mental health. 70

Treatment programs share many common elements jurisdiction to jurisdiction, but they must also be specially tailored to the population they serve to meet specific needs. 71 Individuals in these programs receive rigorous long-term

§ 25-03.3-01 (West 2017). See infra Part II.0 (discussing the requirements of a sex offender civil commitment program).

65. Id.
66. Id.
67. See id. (finding that sixty-five percent of programs use Risk-Need-Responsivity and forty-seven percent use cognitive-behavioral).
68. Id. at 26.
69. Id.
70. Id. "Such evaluations typically include static risk factors (using actuarial risk assessment instruments—ARAls), dynamic risk factors (or criminogenic needs), sexual history and relationships, cognitive functioning, personality structure, general mental health, physical health, alcohol and substance abuse, social supports, and other psychologically meaningful variables." Id.
71. Id. at 27.
interventions. These interventions take on a holistic approach to the individual.

Throughout the intervention, there are typically four phases. Phase One tackles the individual’s motivation to change and develop problem-solving skills by therapists who utilize psychoeducational practices. When an individual moves to Phase Two of treatment, the focus shifts to the offender’s sexual history. In this phase, committed persons may be subjected to polygraph evaluations to “increase awareness of deficits in emotional coping and specific problematic feeling states, acknowledgement and reduction of deviant sexual arousal/interest, and verbalization of events and behaviors that comprised sexual offenses—ultimately leading to the development of self-awareness interventions and new coping strategies.”

Phase Three works to develop a new way of thinking and behaving. During this phase, it is important that the therapist tailor the treatment to the client’s weaknesses. The goal of Phase Three is to teach clients to regulate their risk factors while enhancing their protective factors. Additionally, throughout Phase Three, clients emphasize the advancement of pro-social and relational skills as well as emotional awareness. The goal is that “[b]y the end of Phase Three, clients are expected to have identified personal and environmental contributors to risk and to have devised and rehearsed means by which to address these concerns in pro-social ways, emphasizing the development of balanced and self-determined lifestyles.”

Finally, during Phase Four, the maintenance phase, clients seek to continue learning new skills as well as preparing for integration into the community. To complete this phase, the client must create contacts within the community and develop a release plan to create stability upon release into the community.

72. Id.
73. See id. at 27-28 (stating that “[t]he types of interventions considered to be ‘treatment’ . . . varied from program to program, with all programs including ‘core’ groups (i.e., sexual behavior process treatment), with other facets including psychoeducational modules (13 of 16 programs reporting), individual therapy (11/16), community meetings (9/15), recreation and vocation (9/16), and educational (5/16”).
74. Id. at 28; Woolman & Anderson, supra note 37, at 1390.
76. Id. at 29; Woolman & Anderson, supra note 37, at 1390.
77. Expert Report and Recommendations, supra note 63, at 29. Moreover, these activities help develop self-awareness in the patients. Id.
78. Id.
79. See id. (“Phase Three typically focuses on the development of new ways of thinking and behaving, keeping in mind former vulnerabilities and patterns of thought and behavior.”).
80. Id.; Woolman & Anderson, supra note 37, at 1391.
82. Id.
83. Id.
84. See id. (“Clients finalize their release plans and develop contacts with community treatment professionals, social service agencies, and individuals who will assist them in establishing stable lives in the community.”).
Traditionally, the success of these programs was determined by rates of reoffending.85 The modern view has changed slightly.86 Today, program success is determined by the incremental improvements made by clients while progressing through the phase treatment plan.87 In order to measure a client’s progress in treatment, therapists use goal attainment scaling, dynamic risk scales, and other scaling devices the specific program utilizes.88 Civil commitment treatment programs use this information to tailor a client’s treatment plan.89 These updates are completed annually, biannually, or quarterly.90 Therapists use these reviews in their assessment of the client’s progress.91 Clinical judgment is the most common method to assess progress, however, other checklists and standardized assessment tools can be used as well.92 Client progress is measured by a variety of factors:

Treatment progress reviews tend to focus on observable changes in behavior (100% of 16 programs reporting), performance on assignments and reaching learning objectives (93.7%), reductions in known dynamic risk factors (81.3%; using Stable/Acute-2007, SOTIPS, VRS:SO, or stages of change), evolution using polygraph (62.5%), and attention to sexual arousal and interest (ranging from 37.5% to 56.3% via either penile plethysmography [PPG], behavior modification, or use of antiandrogen medications).93 The methods each program uses to gauge progress varies from jurisdiction to jurisdiction.94 In-treatment progress reports are separate from the forensic evaluations that many jurisdictions utilize, which are conducted to prove the individual is still an appropriate candidate for civil commitment or to contest commitment.95

Determining that a committed individual is no longer fit for civil commitment and has completed the treatment is contentious.96 This is due partly to the fact that there is no set standard to determine when one is done with treatment.97 While the lack of a set standard seems to be part of the difficulty, it is also political.98

85. Id. at 32. Lower rates of reoffending meaning that the program was a success. Id.
86. Id.
87. Id. “[I]ncremental changes on psychologically meaningful risk factors measured at frequent intervals while clients are in programming provide an important running commentary on how well clients are attending to the curricula and whether or not they are able to incorporate new learning into their daily lives.” Id.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. See id. (illustrating the percentages of each jurisdiction that use the most common assessment tools).
95. Id. at 33.
96. Id. at 36.
97. Id.
98. Id.
Few officials are willing to state definitively that a committed person completed treatment because the consequences of re-offense by a released patient would have considerable impact on the public. Additionally, determining that a client completed treatment is difficult because of behavioral and psychological complexities. Generally, in order to complete treatment an individual will have to admit their sexual offense history, which is typically determined by the individual passing a polygraph regarding disclosure. Once a civilly committed person completes these phases, they can be determined to have completed treatment.

C. SUPREME COURT PRECEDENT REGARDING MENTAL ILLNESS, CIVIL COMMITMENT, AND SEXUALLY VIOLENT PREDATORS

In the years leading up to the civil commitment of sexually violent predators Supreme Court decisions, the Court decided numerous civil commitment and mental impairment cases. In 1972, the Supreme Court held that a mentally ill defendant deemed to be incompetent to stand trial could not be committed based on that finding alone. The Court also held that if an individual was to be civilly committed the “nature and duration of [civil] commitment bear a reasonable relation to the purpose for which the individual is committed.”

99. See id. 36-37 (showing that medical conclusions involving sound treatment are easier than psychological conclusions that can be more complex).

100. Id.

101. Id. at 37. This means that the disclosures must match public records on the same individual. Id. Not only must they admit charged offenses, but they are required to disclose sexual offenses that were not charged. Id.

102. Id. These treatment programs do have beneficial results on recidivism. Megan Testa & Sara G. West, Civil Commitment in the United States, 7 PSYCHIATRY 30, 36 (2010) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3392176/. Testa and West state that “existing hormonal and behavioral treatments for sex offenders were effective in decreasing recidivism by [thirty] percent over a seven-year follow-up period.” Id. This demonstrates that these treatment programs are effective and do help further protect the public from sexually violent predators. Id. The thirty percent decrease is specifically for high risk offenders; those that civil commitment programs should be committing. See Jessica DaSilva, Questionable Statistic Pervades High Court Sex Offender Cases, BLOOMBERG NEWS (Mar. 8, 2017), https://www.bna.com/questionable-statistic-pervades-n57982084922/ (demonstrating recidivism rate is higher for high risk offenders). The recidivism rate for sex offenders and related statistics vary based on the classification of the offender. See id. (illustrating the differences in statistics).

103. See Mary Ann Bernard, Supreme Court Mental Health Precedent and Its Implications, MENTAL ILLNESS POL’Y ORG., https://mentalillnesspolicy.org/legal/mental-illness-supreme-court.html (last visited Dec. 19, 2017) (demonstrating the progression of civil commitment case law). See generally Jackson v. Indiana, 406 U.S. 715 (1972) (concluding there must be more at issue than merely a mental illness to be deemed incompetent to withstand trial); O’Connor v. Donaldson, 422 U.S. 563 (1975) (holding that the state cannot civilly commit an individual because they cannot take care of themselves); Addington v. Texas, 441 U.S. 418 (1979) (ruling that jury instructions must include evidentiary standards); Youngberg v. Romeo, 457 U.S. 307 (1982) (stating that the state is required to provide “minimally adequate or reasonable training to ensure safety” and not burden the right to liberty); Jones v. U.S., 463 U.S. 354 (1983) (changing the evidentiary standard the court utilizes to evaluate mental illness); Fouca v. Louisiana, 504 U.S. 71 (1992) (finding that a state cannot civilly commit an insanity acquittee if they are not a danger to others).

104. Jackson, 406 U.S. at 716; Bernard, supra note 103.

105. See Jackson, 406 U.S. at 738 (holding that there must be a reasonable relation between the individual and the commitment).
later, the Court considered a case in which an individual alleged he did not receive any treatment for fifteen years while civilly committed. Justice Stewart held that the state could not civilly commit a non-dangerous individual without cause if that person could survive on their own.

Moreover, the Court determined that jury instructions had to include a requirement that there be “clear and convincing” evidence that the individual is a danger to themselves or the public to be indefinitely committed. In 1982, the Court found “there is a constitutional right to the minimally adequate training/habilitation that an appropriate professional would consider reasonable to ensure safety and freedom from undue restraint.” The next year, in Jones v. United States, the Court held that the preponderance of the evidence is the correct standard to use when civilly committing an individual after being found not guilty by reason of insanity. After several years had passed, the Court determined that prison officials could force mentally ill persons to take their medications if it would reduce their dangerousness.

In 1997, the Supreme Court decided Kansas v. Hendricks, a case concerning the civil commitment of a pedophile. Historically, Hendricks lacked the capacity to control his pedophilia when he was stressed. Kansas enacted a sexually violent predator act and Hendricks was subject to this act upon his release from prison. This act allowed for the civil commitment of persons with mental abnormalities if they were likely to commit a sexually violent crime again. Hendricks argued that the act infringed on his due process rights and also asserted Double Jeopardy and Ex Post Facto violations. The Court held that the sexually violent predator act’s definition of “mental abnormality” met the requirements of Substantive Due Process. As long as the statute requires some evidence of

---

106. O’Connor, 422 U.S. at 563; Bernard, supra note 103.
107. O’Connor, 422 U.S. at 576; Bernard, supra note 103.
108. Addington, 441 U.S. at 426, 433; Bernard, supra note 103.
109. Bernard, supra note 103. See also Youngberg v. Romeo, 457 U.S. 307, 319 (1982) (stating that the State is required to provide “minimally adequate or reasonable training to ensure safety” and not burden the right to liberty).
111. Bernard, supra note 103. See generally Washington v. Harper, 494 U.S. 210 (1990) (holding that prisons can require inmates to take their medication against their will and it does not violate the Due Process Clause).
114. Id. at 350, 355. Hendricks even admitted that when “he ‘get[s] stressed out,’ he ‘can’t control the urge’ to molest children.” Id. at 355.
117. Id.
118. Id. at 356. “Although freedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,’ that liberty interest is not absolute.” Id. (quoting Fouche v. Louisiana, 504 U.S. 71, 80 (1992).
dangerousness, the Court has upheld civil commitment statutes. The Court then analyzed how the statute was constructed. When determining the intent of an act, the Court generally defers to the legislative body’s intent. The Court only disregards the legislature’s intent if the challenging party 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.’” Here, the Court found that the act was civil in nature, not criminal. Additionally, the Court stated that civil commitment under the sexually violent predator act did not amount to punishment. These acts are civil because they do not involve the policy considerations of retribution or deterrence. The intent behind the act is to provide treatment not to punish. Justice Thomas reasoned that if the act is merely “tied to criminal activity” it is “insufficient to render the statut[e] punitive.” Because the Court determined the act to be civil in nature and not punitive, it held that the statute did not violate Double Jeopardy or the Ex Post Facto Clauses in the United States Constitution.

Five years later, in 2002, the Supreme Court heard the case of Kansas v. Crane. The Court responded to another challenge to the Kansas sexually violent predator act because the Kansas Supreme Court determined that Hendricks required the State to prove that the offender could not control their dangerous behavior. Michael Crane was diagnosed with exhibitionism and antisocial personality disorder. Crane was civilly committed after a jury trial. The Court held that Hendricks did not require that the offender was unable to control themselves. Rather, the Court stated that the individual must have difficulty in controlling their behavior. Therefore, the State must show at least some lack

119. See Hendricks, 521 U.S. at 346-47 (“[T]his Court has sustained a commitment statute if it couples proof of dangerousness with proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality,’ for these additional requirements serve to limit confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.”) (internal citation omitted). The Court found that Hendricks’ inability to control his actions along with his mental abnormality sufficiently distinguished him from other dangerous persons. Id. at 360.
120. Id. at 361.
121. Id.
122. Id. (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).
123. Id at 361-62.
124. Id. at 347.
125. Id. at 361-62. The policy considerations of retribution and deterrence are objectives of criminal statutes. Id.
126. Id. at 362. “The Act’s purpose is not retributive because it does not affix culpability for prior criminal conduct.” Id. Additionally, having a criminal record is not a requirement because those cleared of charges can still be subjected to the statute. Id.
127. Id. (quoting United States v. Ursery, 518 U.S. 267, 292 (1996)).
128. Id. at 370-71.
130. Id. at 409-10.
131. Id. at 410-11.
132. Id. at 411.
133. Id.
134. Id.
of control in order to civilly commit an individual. Additionally, Justice Breyer noted that "the Constitution’s safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules."

In 2010, the Supreme Court addressed United States v. Comstock, a case concerning the constitutionality of the federal sexually violent predator act. The five offenders in this case alleged that the federal government did not have the authority to civilly commit them after their prison sentences under Article I of the Constitution. The Court held the federal government has the power to civilly commit sexually violent predators after their prison sentence under the Necessary and Proper Clause of the United States Constitution.

D. STATUTORY CONSTRUCTION OF PROGRAMS CIVILLY COMMITTING SEXUALLY VIOLENT PREDATORS

As stated, civil commitment statutes for sexually violent predators generally have three requirements: the defendant has a mental abnormality, the defendant must have committed at least one sexually violent crime, and the defendant is at a high risk of committing another sexually violent crime. Furthermore, the Supreme Court has found civil commitment statutes are constitutional when there are set procedures, consistent evidentiary standards, and the individual is found to be dangerous to themselves or others and have a mental abnormality. The civil commitment programs in the Eighth Circuit meet those requirements.

1. Iowa

When an offender that is currently in prison meets the requirements to be a sexually violent predator, the attorney general is notified. A prosecutorial

135. Id. at 412.
136. Id. at 413.
137. 560 U.S. 126 (2010).
140. See Comstock, 560 U.S. at 133-34 (demonstrating that the Court analyzes this case under the Necessary and Proper Clause). Justice Kennedy noted in his concurrence that this statute is very similar to those enacted at the state level under the police powers. Comstock, 560 U.S. at 164 (Kennedy, J., concurring). The Necessary and Proper Clause gives Congress the authority to enact laws that enables the government to carry out their enumerated powers. U.S. CONST. art. I § 8, cl. 18; Comstock, 560 U.S. at 133-34. In Comstock, the Court found the legislature was carrying out their enumerated powers. Comstock, 560 U.S. at 133-34.
141. See supra Part 0 (discussing the general requirements of sexually violent predator programs).
143. See generally IOWA CODE ANN. § 229A (West 2017) (demonstrating the state’s program meets the requirements); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. §§ 632.480-525 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03.3 (West 2017) (same).
144. IOWA CODE ANN. § 229A.3 (West 2017).
review committee is put together to review the case.\textsuperscript{145} The offender must have been charged with a sexually violent offense, have a mental abnormality, and be likely to reoffend.\textsuperscript{146} A petition alleging these facts is filed with the court once this determination is made.\textsuperscript{147}

After the prosecutor files the petition, the court must determine “whether probable cause exists to believe that the person named in the petition is a sexually violent predator.”\textsuperscript{148} The sexually violent predator must then undergo an evaluation by a professional.\textsuperscript{149} Then, the court holds a trial to determine whether or not the individual is a sexually violent predator.\textsuperscript{150} This determination must be made beyond a reasonable doubt.\textsuperscript{151} Individuals deemed to be sexually violent predators are required to have an annual examination of their mental abnormality; this information is presented at a hearing to determine that the individual still meets the requirements to stay in the program.\textsuperscript{152} Additionally, an individual’s risk of reoffending in the program may be lowered to qualify for transitional release.\textsuperscript{153}

As stated above, if an individual is held involuntarily, they must be a sexually violent predator.\textsuperscript{154} The Iowa Legislature defines a sexually violent predator as an individual that “has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses . . . .”\textsuperscript{155} In order to be convicted of a sexually violent offense, one must have committed a sexually motivated crime.\textsuperscript{156} Then, to involuntarily commit an individual, they must also have a mental abnormality, defined as “a congenital or acquired condition affecting the emotional or volitional capacity of a person and predisposing that person to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others.”\textsuperscript{157}

\begin{flushright}
\begin{footnotesize}
145. \textit{Id.} This review committee will determine if an individual meets the requirements of a sexually violent predator. \textit{Id.}
146. \textit{Id.} at \S \textsuperscript{229A.2.}
147. \textit{Id.} at \S \textsuperscript{229A.4.}
148. \textit{Id.} at \S \textsuperscript{229A.5.}
149. \textit{Id.} Furthermore, the defendant has the right to retain their own expert and the court will approve the expense. \textit{Id.} at \S \textsuperscript{229A.6.}
150. \textit{Id.} at \S \textsuperscript{229A.7.}
151. \textit{Id.}
152. \textit{Id.} at \S \textsuperscript{229A.8.}
153. \textit{Id.} at \S \textsuperscript{229A.8A.}
154. \textit{Id.} at \S \textsuperscript{229A.7.}
155. \textit{Id.} at \S \textsuperscript{229A.2.}
156. \textit{Id.} Even crimes such as murder, kidnapping, burglary, and child endangerment constitute a sexually violent offense if they are sexually motivated. \textit{Id.}
157. \textit{Id.}
\end{footnotesize}
\end{flushright}
2. Minnesota

In Minnesota, the commitment proceeding begins with a prosecutor filing a petition alleging that the individual is a sexually violent predator. Once the court makes the determination that the individual is a sexually violent predator, the individual is committed to a secure treatment facility. The committed individual will remain in treatment indefinitely. The Minnesota Supreme Court appoints district court judges to serve terms presiding over commitment hearings. Before these hearings can be held, there has to be an investigation into the individual’s mental health, medications, and criminal history. During this hearing, witnesses and evidence are presented to provide proof that the individual is a sexually dangerous person.

Experts conduct evaluations of the offenders to determine their sexual psychopathic personality. Provided that civilly committed offenders improve and work through their treatments, a transfer to a less secure facility is a possibility. If the individual continues to improve, they can then be approved for a provisional discharge before being fully discharged.

The Minnesota Legislature defines a sexually dangerous person as one who has engaged in a sexual offense, has a sexual, personality or other mental illness, and is at a high risk of causing harm to the public. The legislature provides an extensive definition on disorders that constitute a sexual psychopathic personality:

“Sexual psychopathic personality” means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person’s sexual impulses and, as a result, is dangerous to other persons.

Finally, in order to determine that an individual is a sexually dangerous person, they must also have committed a sexual crime in addition to being diagnosed with

158. MINN. STAT. ANN. § 253D.07 (West 2017).
159. Id.
160. Id.
161. Id. at § 253D.11.
162. Id. at § 253B.07.
163. Id. at § 253B.08.
164. See infra Part II.0 (discussing the treatment programs administered by states).
165. See MINN. STAT. ANN. § 253D.29 (illustrating the factors necessary for a transfer).
166. Id. at § 253D.30; § 253D.31.
167. Id. at § 253D.02. It is also important to note that the code recognizes that it is not necessary to provide evidence of the individual’s lack of control over their urges. Id.
168. Id.
one of the conditions previously listed.\textsuperscript{169} Harmful sexual conduct is a crime that may produce serious physical or emotional harm to the victim.\textsuperscript{170}

3. Missouri

In order to be civilly committed in Missouri, one must be a sexually violent predator.\textsuperscript{171} An individual who has a mental abnormality, is likely to commit a sexual crime again, and has committed a sexually violent offense in the past is a sexually violent predator.\textsuperscript{172} A mental abnormality is a “condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses . . . .”\textsuperscript{173} Sexually violent offenses include sex crimes in addition to other sexually motivated crimes.\textsuperscript{174}

The Missouri Legislature requires the agency with jurisdiction to give the attorney general written notice of an individual who meets the requirements of sexually violent predator.\textsuperscript{175} Then a prosecutorial review committee makes the determination of whether the individual meets the requirements of a sexually violent predator.\textsuperscript{176} Once this determination is made, the individual is placed in a secure facility to undergo an evaluation by an expert psychiatrist or psychologist.\textsuperscript{177} After this investigation takes place and the committee determines the individual to be a sexually violent predator, the prosecutor must file a petition with the court making this allegation.\textsuperscript{178}

The filing of the petition requires a judge to rule whether there is probable cause to believe the individual is a sexually violent predator.\textsuperscript{179} If the judge concludes there is probable cause, the offender is placed in a secure facility and is examined by an expert psychiatrist or psychologist.\textsuperscript{180} Upon completion of the examination, a trial is held to decide whether the individual is a sexually violent predator by clear and convincing evidence.\textsuperscript{181} Once the defendant is found guilty, they are civilly committed until their mental abnormality subsides and they are no longer a high risk to the public.\textsuperscript{182} After being civilly committed, the offender

\textsuperscript{169} Id.
\textsuperscript{170} Id. Similar to Iowa, Minnesota lists several other crimes that constitute harmful sexual conduct if it is sexually motivated. Compare id. (demonstrating crimes such as manslaughter, kidnapping, and burglary constitute harmful sexual conduct if they are sexually motivated), with infra Part II.D.1 (same).
\textsuperscript{171} MO. ANN. STAT. § 632.480 (West 2017).
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. Sex crimes include rape, forced sodomy, child molestation, sex abuse, and sexual assault. Id. Sexually motivated crimes are other felonies that have elements of sex crimes involved. See id. (stating that “any felony offense that contains elements substantially similar to the offense listed above”).
\textsuperscript{175} Id. at § 632.483.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at § 632.484.
\textsuperscript{178} Id. at § 632.486.
\textsuperscript{179} Id. at § 632.489.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at §§ 632.492, 632.495.
\textsuperscript{182} Id. at § 632.495.
undergoes an annual examination and evidence is presented to the court in a
hearing to determine that the individual is still fit for the program.\textsuperscript{183} If it is found
that the individual's mental abnormality has subsided, the court can be petitioned
to release the individual or conditionally release them.\textsuperscript{184}

\textbf{4. Nebraska}

To be civilly committed in Nebraska, one must be deemed to be a dangerous
sex offender.\textsuperscript{185} Dangerous sex offenders must have a mental illness, be likely to
commit future sex offenses, and must be convicted of a sexual offense.\textsuperscript{186} The
Nebraska Legislature defines mental illness as a "psychiatric disorder" that
impacts a person’s ability to live or puts the public at risk.\textsuperscript{187} When Nebraska is
initiating a civil commitment proceeding, an evaluation of the individual is
required.\textsuperscript{188} Once the evaluation is complete, a certificate is provided to a
prosecutor.\textsuperscript{189} After the certificate is received, the prosecutor files a petition with
the district court.\textsuperscript{190}

Later a hearing is held by a mental health board to ensure that there is clear
and convincing evidence of the facts alleged in the petition.\textsuperscript{191} If the board
concludes that the individual is a dangerous sex offender, it will decide which
treatment facility the offender is committed to by issuing a warrant.\textsuperscript{192} The
offender is held until they are found no longer dangerous at a hearing.\textsuperscript{193}

\textbf{5. North Dakota}

In North Dakota, a sexually dangerous individual is one who has participated
in sexually predatory conduct, has a mental disorder, and is likely to commit future
predatory acts because of their disorder.\textsuperscript{194} A sexually dangerous individual is
considered to have a mental disability when such disability is found in the
Diagnostic and Statistical Manual of Mental Disorders.\textsuperscript{195} The individual’s
mental disorder must make it more likely than not that they will commit sexually

\begin{itemize}
\item \textsuperscript{183} \textit{Id.} at § 632.498.
\item \textsuperscript{184} \textit{Id.} at §§ 632.501, 632.505.
\item \textsuperscript{185} \textit{Nebraska Rev. Stat. Ann.} § 83-174.01 (West 2017).
\item \textsuperscript{186} \textit{Id.} Sex offenses are those that require individuals to register as a sex offender. \textit{Id.; Id.} at § 29-
4003. This list consists of sex crimes and those that are sexually motivated, such as kidnapping, false
imprisonment, and child endangerment. \textit{Id.}
\item \textsuperscript{187} \textit{Id.} at § 71-907.
\item \textsuperscript{188} \textit{Id.} at § 83-174.02.
\item \textsuperscript{189} \textit{Id.} at § 71-1204.
\item \textsuperscript{190} \textit{Id.} at § 71-1205(1)-(2).
\item \textsuperscript{191} \textit{Id.} at § 71-1208.
\item \textsuperscript{192} \textit{Id.} at § 71-1211.
\item \textsuperscript{193} \textit{Id.} at § 71-1221.
\item \textsuperscript{194} \textit{N.D. Cent. Code Ann.} § 25-03.3-01(8) (West 2017).
\item \textsuperscript{195} \textit{Id.} at § 25-03.3-01(3).
\end{itemize}
SEX CELLS

predatory conduct. Sexually predatory conduct is any sex act or sexual contact with another individual.

If an individual meets the above definitions, the prosecutor will file a petition with the court alleging that the person is a sexually dangerous individual. If there is cause to believe the individual meets the requirements, the court orders that they be taken into custody and placed in a treatment facility. Once the individual is taken into custody, they are given notice of their right to a preliminary hearing to determine whether there is probable cause to detain the individual. A person with a mental disability is then subject to an evaluation conducted by an expert. The findings are then presented to the court at a hearing. The individual determined to be sexually dangerous is then civilly committed until they are found to be safe for the public. An annual examination is conducted to ensure that those within the program meet the requirements to be civilly committed. Finally, once the court finds that the individual is no longer dangerous, it orders release from the program or to a less restrictive setting.

III. ANALYSIS

The South Dakota Legislature should adopt a sexually violent predator act. South Dakota should pass this legislation to protect the public and to provide sexually violent persons with treatment they would not otherwise receive. This statute should be a hybrid of the other programs enacted within the Eighth Circuit. Creating a hybrid program would help protect the public, provide state of the art treatment, and ensure that citizen’s civil rights are not infringed on.

196. Id. at § 25-03.3-01(8)-(9).
197. Id. at § 25-03.3-01(9).
198. Id. at § 25-03.3-03(1).
199. Id. at § 25-03.3-08(1).
200. Id. at § 25-03.3-10-11.
201. Id. at § 25-03.3-12.
202. Id. at § 25-03.3-13.
203. Id. at § 25-03.3-17(1).
204. Id. at § 25-03.3-17(2).
205. Id. at § 25-03.3-17(5)(6).
206. See generally IOWA CODE ANN. § 229A (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174.01-02 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03-.3 (West 2017) (same); see supra Part II.0 (discussing sexually violent predator acts within the Eighth Circuit).
207. ATSA, supra note 13.
208. See supra Part II.0 (discussing the various programs within the Eighth Circuit).
209. ATSA, supra note 13; Jorgensen, supra note 25. See generally IOWA CODE ANN. § 229A (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174.01-02 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03-.3 (West 2017) (same).
A. RECOMMENDATIONS FOR THE STATUTORY CONSTRUCTION OF RELEVANT PORTIONS OF SOUTH DAKOTA’S SEXUALLY VIOLENT PREDATOR ACT

1. Defining Key Terms for a Sexually Violent Predator Act

There are three terms that are pertinent to a sexually violent predator act: sexually violent predator, mental abnormality, and sexually violent crime. South Dakota should define these terms in a similar fashion to its neighboring states. The South Dakota Legislature should define a “sexually violent predator” as a person convicted or charged with a sexually violent crime who is diagnosed with a mental abnormality that may cause the individual to commit sexually violent offenses in the future. South Dakota should also include language requiring the offender be convicted of “one or more sex offenses.” By including this explicit provision, there could be little or no confusion on the number of convictions or charges required. Providing a more specific definition would protect the rights of potential mentally ill subjects and help ensure that South Dakota was civilly committing dangerous individuals.

How the South Dakota Legislature defines a “mental abnormality” would be essential to creating a fair statute. The term “mental abnormality” tends to be defined in a broad manner to ensure that the statute covers all forms of a mental disability leading to sexually violent acts. Generally, legislatures have defined a mental abnormality as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”

210. See generally IOWA CODE ANN. § 229A (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174.01-.02 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03-.3 (West 2017) (same); supra Part II.0 (discussing the three core elements to a sex offender civil commitment program).

211. IOWA CODE ANN. § 229A.2(12) (West 2017); NEB. REV. STAT. ANN. § 83-174.01(1) (West 2017); N.D. CENT. CODE ANN. § 25-03.3-01(8) (West 2017).

212. IOWA CODE ANN. § 229A.2(12) (West 2017); NEB. REV. STAT. ANN. § 83-174.01(1) (West 2017); N.D. CENT. CODE ANN. § 25-03.3-01(8) (West 2017).

213. NEB. REV. STAT. ANN. § 83-174.01(1). The Nebraska Legislature includes this language in its statute and it would serve as a good model for South Dakota to follow. Id.


216. IOWA CODE ANN. § 229A.2(12) (West 2017); NEB. REV. STAT. ANN. § 83-174.01(1) (West 2017); N.D. CENT. CODE ANN. § 25-03.3-01(8) (West 2017).

217. See generally IOWA CODE ANN. § 229A (West 2017) (demonstrating the requirements for the civil commitment of sexually violent predators); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174.01-.02 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03-.3 (West 2017) (same); Kansas v. Hendricks, 521 U.S. 346 (1997) (deciding that the term “mental abnormality” as defined by the Kansas Legislature meets Constitutional requirements).
The South Dakota Legislature should define a mental abnormality in the same way because it meets due process requirements set out by the United States Supreme Court. Furthermore, it is imperative that South Dakota defines “mental abnormality” to include an illness where it is more likely the diagnosed person will commit sexually violent offenses. Specifically, the legislature needs to make this classification to differentiate the violent mentally disabled from other mentally ill persons.

Finally, South Dakota should enact a broad definition of “sexually violent offense.” The states within the Eighth Circuit that have a civil commitment program for sexually violent predators generally have broad definitions of “sexually violent offense.” South Dakota lawmakers should list out several crimes that constitute a sexually violent offense. The South Dakota Legislature

218. See, e.g., IOWA CODE ANN. § 229A.2(6) (West 2017). This definition is the same one the Kansas Legislature had enacted when Kansas v. Hendricks was appealed to the Supreme Court. Hendricks, 521 U.S. at 356-59.

219. Id.; see supra Part II.0, II.0 (discussing treatment programs for sexually violent predators and statutory compilations of sexually violent predator acts).

220. See supra Part II.0 (discussing the treatment programs and FSOP).

221. See infra Part III.C (showing the treatment programs administered to civilly committed sex offenders). This classification protects the civil commitment program for sexually violent predators from a Constitutional Equal Protection claim by the offenders. See infra Part III.C (illustrating the treatment program for sexually violent predators).

222. See generally IOWA CODE ANN. § 229A.2 (West 2017) (demonstrating that the term sexually violent offense has a generic definition); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174.01-.02 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03-.3 (West 2017) (same).

223. See generally IOWA CODE ANN. § 229A.2 (West 2017) (demonstrating that the term sexually violent offense has a generic definition); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174.01-.02 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03-.3 (West 2017) (same).

224. See generally IOWA CODE ANN. § 229A.2 (West 2017) (demonstrating that the term sexually violent offense has a generic definition); MINN. STAT. ANN. § 253D (West 2017) (same); MO. ANN. STAT. § 632 (West 2017) (same); NEB. REV. STAT. ANN. § 83-174.01-.02 (West 2017) (same); N.D. CENT. CODE ANN. § 25-03-.3 (West 2017) (same).

The South Dakota Legislature

“Sexually violent offense” means:

a. A violation of any provision of chapter 709.

b. A violation of any of the following if the offense involves sexual abuse, attempted sexual abuse, or intent to commit sexual abuse:

(1) Murder as defined in section 707.1.

(2) Kidnapping as defined in section 710.1.

(3) Burglary as defined in section 713.1.

(4) Child endangerment under section 726.6, subsection 1, paragraph “e”.

c. Sexual exploitation of a minor in violation of section 728.12, subsection 1.

d. Pandering involving a minor in violation of section 725.3, subsection 2.
should include one other vital provision. South Dakota lawmakers should include language defining sexually motivated as “[a]ny act which, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated.” Additionally, in the definition for “sexually motivated,” South Dakota’s provision should contain language providing “one of the purposes for commission of a crime is the purpose of sexual gratification of the perpetrator of the crime.” The provision including crimes that are sexually motivated is crucial in a sexually violent predators act. If South Dakota defines these three essential terms as described, the sexually violent predators act would be drafted in such a way to protect the public, the offenders, and itself from potential lawsuits.

2. Requiring Annual Reviews in the South Dakota Sexually Violent Predators Act

South Dakota should have a requirement for an annual review in its sexually violent predators act. The annual review should be conducted in court and evidence should be presented. While not every state within the Eighth Circuit conducts annual reviews in this manner, this method provides more protections for those that are civilly committed. This review determines whether the

e. An offense involving an attempt or conspiracy to commit any offense referred to in this subsection.

f. An offense under prior law of this state or an offense committed in another jurisdiction which would constitute an equivalent offense under paragraphs “a” through “e”.

g. Any act which, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated.

Id. at § 229A.2(11).

225. Id. at § 229A.2(10).
226. Id. at § 229A.2(11)(g).
227. Id. at § 229A.2(10).
228. Id.
229. See supra Part II.0, II.0, II.0 (discussing the history, precedent, and statutory compilations of sexually violent predator acts).

230. See supra Part II.0 (demonstrating the procedures other states follow).

231. IOWA CODE ANN. § 229A.8 (West 2017); MO. ANN. STAT. § 632.498 (West 2017).

232. Compare IOWA CODE ANN. § 229A.8 (requiring an annual review for those sexually violent predators that are civilly committed), and MO. ANN. STAT. § 632.498 (same), with Woolman & Anderson, supra note 37, 1394-95 (discussing requiring annual reviews in the civil commitment of sexually violent predators), and Massopust & Borrelli, supra note 11, at 730 (demonstrating that Iowa and Missouri conduct annual reviews in the court, whereas Minnesota has no statutory requirements of an annual review). For instance, Minnesota and Nebraska have annual reviews but the reviews are conducted by treatment professionals and not before the court. NEB. REV. STAT. ANN. § 83-1,103.03 (West 2017); Massopust & Borrelli, supra note 11, at 730. The treatment providers in these programs do not consider whether the individuals meet legal requirements for some form of a discharge. NEB. REV. STAT. ANN § 83-1,103.03; Massopust & Borrelli, supra note 11, at 730. On the other hand, in Iowa and Missouri, the legislature has required that civilly committed offenders be given an annual review before the court. IOWA CODE ANN. § 229A.8; MO. ANN. STAT. § 632.498. South Dakota should follow the model set by Iowa or Missouri rather than Nebraska or Minnesota. See IOWA CODE ANN. § 229A.8 (illustrating a civil
offender requires a hearing to conclude whether they are still suitable for civil commitment. In order for the court to make this decision, an expert should examine civilly committed patients. South Dakota should require prosecutors to present this examination at a hearing to prove the individual is still affected by their mental abnormality. If a patient could prove to the court they are a lower risk and have “no major disciplinary reports for six months and a relapse prevention plan approved by a treatment provider” then the patient would be provisionally or permanently released.

South Dakota would protect the civil liberties of patients by requiring an annual review. Even though this recommendation of a hybrid civil commitment program limits possible infringement on the offender’s rights, it does not cure the issue completely because the sexually violent predators will still be civilly committed. An annual review is especially necessary when the individual is indefinitely civilly committed in South Dakota. Moreover, by requiring an annual review, the determination of whether a patient meets the requirements to be in the program will be made by a legally trained individual rather than a treatment provider.

commitment program that utilizes annual reviews conducted by the court); Mo. Ann. Stat. § 632.498 (explaining the requirements of an annual review for civil commitment program in Missouri).

233. IOWA CODE ANN. § 229A.8(1); Mo. ANN. STAT. § 632.498(1). This hearing comes after the annual review and is meant to determine whether the individual should remain committed. IOWA CODE ANN. § 229A.8(1); Mo. ANN. STAT. § 632.498(1).

234. IOWA CODE ANN. § 229A.8(2), (5)(d); Mo. ANN. STAT. § 632.498(2).

235. See IOWA CODE ANN. § 229A.8(5)(e) (demonstrating the requirements of Iowa’s sexually violent predator statute). To continue civilly committing an offender, the prosecutor must prove with the evidence presented that they are still a risk to the public. Id.


237. IOWA CODE ANN. § 229A.8.

238. See supra Part II.0 (showing the Supreme Court precedent for the civil commitment of sex offenders); infra Part II.B (illustrating treatment programs offered by states). Cf. Massopust & Borrelli, supra note 11, at 730 (illustrating Minnesota’s program that does not require annual review hearings).

239. See supra Part III.0, III.0, III.0 (addressing the requirements of a sexually violent predator program, the precedent of these programs, and how states construct their statutes).

240. See supra Part I-II.0, II.0, II.0 (demonstrating the requirements and protections other states provide).

241. Massopust & Borrelli, supra note 11, at 730; see supra Part II.0, II.0 (illustrating the treatment programs and statutory compilation of sexually violent predator programs). While treatment providers are extremely knowledgeable in the areas of psychology and social work to help provide therapy to those civilly committed, they do not have legal training. Massopust & Borrelli, supra note 11, at 730. Legal training can be helpful when analyzing statutes and case law to conclude if a patient is fit to remain in the civil commitment program. See supra Part II.B, II.C, II.D (illustrating the Supreme Court precedent for sexually violent predators and the statutory formation of these programs); Massopust & Borrelli, supra note 11, at 730 (providing that treatment providers do not “consider whether or not the individual satisfies the requirements for provisional or full discharge, nor do they provide a risk assessment of the committed individual”).
B. HOW SOUTH DAKOTA CAN PROTECT ITS SEXUALLY VIOLENT PREDATOR ACT FROM CONSTITUTIONAL VIOLATIONS

1. Compelling State Interest

South Dakota’s sexually violent predator act must serve a compelling state interest.\(^2\) Due to the fact that a fundamental right is infringed with this program, the law must be narrowly tailored and serve a compelling state interest.\(^2\) South Dakota should be clear about what its intent is with this program by including it in the codified law.\(^2\)\(^4\) It is important for lawmakers to note that this program is meant for a subgroup of mentally ill persons.\(^2\)\(^4\) Additionally, legislators should specify that civilly committing sexually violent predators provides higher quality treatment that is custom-made to the needs of the population.\(^2\)\(^4\) Finally, the legislature should establish that this program is also to protect the public and to have sexually violent predators partake in treatment.\(^2\)\(^7\)

2. Procedural Due Process

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."\(^2\)\(^8\)

In order to state a claim for a violation of one’s Procedural Due Process rights, one must first prove that a liberty interest is at stake.\(^2\)\(^9\) Then, an individual

\(^{242}\) See Karsjens v. Piper, 845 F.3d 394, 409 (8th Cir. 2017) (discussing the standard of review and the need for Minnesota’s sexually violent predators act to have a compelling state interest).

\(^{243}\) Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1166-67 (D. Minn. 2015). Our fundamental liberty interest is the fundamental right impacted by a civil commitment program for sex offenders. Id.

\(^{244}\) Kansas v. Hendricks, 521 U.S. 346, 361 (1997). See also IOWA CODE ANN. § 229A.1 (West 2017) (demonstrating codification of the state’s interest in a similar program); NEB. REV. STAT. ANN. § 83-187.01 (West 2017) (same).

\(^{245}\) See IOWA CODE ANN. § 229A.1 (stating that the general assembly found that this Iowa Code section applies to a “small but extremely dangerous group of sexually violent predators”).

\(^{246}\) See id. (stating that “The general assembly further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, because the treatment needs of this population are very long-term, and the treatment modalities for this population are very different from the traditional treatment modalities available in a prison setting . . .”)

\(^{247}\) Id.; Karsjens, 845 F.3d at 409. “No one can reasonably dispute that Minnesota has a real, legitimate interest in protecting its citizens from harm caused by sexually dangerous persons . . .” Id. (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)). The Supreme Court has stated that “the state . . . has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.” Addingtion, 441 U.S. at 426.

\(^{248}\) U.S. CONST. amend. XIV, § 1. See also IOWA CONST. art. I, § 9 (“no person shall be deprived of life, liberty, or property, without due process of law”); MINN. CONST. art. I, § 7 (“nor be deprived of life, liberty, or property without due process of law”); MO. CONST. art. I, § 10 (“no person shall be deprived of life, liberty or property without due process of law”); NEB. CONST. art. 1, § 3 (“no person shall be deprived of life, liberty, or property, without due process of law”); N.D. CONST. art. I, § 12 (“nor be deprived of life, liberty or property without due process of law”).

must demonstrate that the government deprived them of this interest without due process.\textsuperscript{250} The required process varies case-by-case; hence, the concept of Procedural Due Process is malleable.\textsuperscript{251} If a court determines that a liberty interest has been implicated, the court must evaluate the procedure granted to the individual.\textsuperscript{252} In order to make that determination, the court uses a three-factor test:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail.\textsuperscript{253}

While various procedural protections are necessary, the foundational consideration of due process is allowing the individual the “opportunity to be heard at a meaningful time and in a meaningful manner.”\textsuperscript{254} Finally, because sexually violent predator statutes implicate the fundamental right of freedom, ensuring proper procedure is essential.\textsuperscript{255}

In order to avoid allegations that the civil commitment of sexually violent predators violates Procedural Due Process, South Dakota should ensure that this

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{251} 60 Morrissey v. Brewer, 408 U.S. 421, 460 (Mo. 1986) (quoting Zinermon, 494 U.S. at 127 (1990)); Schmidt, 562 U.S. at 562 U.S. 113, 127 (1990); Seering, 701 N.W.2d at 665 (citing Bowers, 638 N.W.2d at 690); Sawh, 823 N.W.2d at 632 (quoting Swarthout, 562 U.S. at 219); Jamison, 218 S.W.3d at 405 (citing Ky. Dep’t of Corrections, 490 U.S. at 460); Norman, 808 N.W.2d at 60 (citing Slansky, 268 N.W.2d at 384); Loomer, 2008 ND 69, ¶ 6, 747 N.W.2d 115, 115 (citing Whitecalfe v. N.D. Dep’t of Transp., 2007 ND 32, ¶ 20, 727 N.W.2d 779, 787).
\item \textsuperscript{252} 250 Swarthout, 562 U.S. at 219 (citing Thompson, 490 U.S. at 460); Schmidt, 655 F.3d at 817 (quoting Gordon, 168 F.3d at 1114); Seering, 701 N.W.2d at 665 (citing Bowers, 638 N.W.2d at 690); Sawh, 823 N.W.2d at 632 (quoting Swarthout, 562 U.S. at 219); Jamison, 218 S.W.3d at 405 (citing Ky. Dep’t of Corrections, 490 U.S. at 460); Norman, 808 N.W.2d at 60 (citing Slansky, 268 N.W.2d at 384); Loomer, 2008 ND 69, ¶ 6, 747 N.W.2d at 115 (citing Whitecalfe, 2007 ND 32, ¶ 20, 727 N.W.2d at 787).
\item \textsuperscript{253} 251 Zinermon v. Burch, 494 U.S. 113, 127 (1990); Schmidt, 655 F.3d at 817; Jones v. Univ. of Iowa, 836 N.W.2d 127, 145 (Iowa 2013); Minnesota v. Grigsby, 818 N.W.2d 511, 518 (Minn. 2012) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)); Jamison, 218 S.W.3d at 405; Norman, 808 N.W.2d at 60 (quoting Mathews, 424 U.S. at 334); Gray v. N.D. Game & Fish Dep’t, 2005 ND 204, ¶ 28, 706 N.W.2d 614, 624 (citing Wahl v. Morton Cty. Soc. Servs., 1998 ND 48, ¶ 6, 574 N.W.2d 859, 862).
\item \textsuperscript{254} 252 Zinermon, 494 U.S. at 127; Schmidt, 655 F.3d at 817; Jones, 836 N.W.2d at 145-46; Sawh, 823 N.W.2d at 632 (quoting Swarthout, 562 U.S. at 219); Jamison, 218 S.W.3d at 405; Norman, 808 N.W.2d at 60; Loomer, 2008 ND 69, ¶ 6, 747 N.W.2d at 115.
\item \textsuperscript{255} 253 Mathew v. Eldridge, 424 U.S. 319, 335 (1976); Mickelson v. Cty. of Ramsey, 823 F.3d 918, 924 (8th Cir. 1998)); Seering, 701 N.W.2d at 665; Sawh, 823 N.W.2d at 632; Futrell v. Missouri, 667 S.W.2d 404, 406 (Mo. 1984); White v. Busboom, 901 N.W.2d 294, 306 (Neb. 2017); In re N.A., 2016 ND 91, ¶ 11, 879 N.W.2d 82, 85.\item \textsuperscript{256} 254 Mathew, 424 U.S. 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). See also Schmidt, 655 F.3d at 817-18 (demonstrating other jurisdictions requirement for a meaningful opportunity to be heard); Seering, 701 N.W.2d at 666 (same); Sawh, 823 N.W.2d at 632 (same); Jamison, 218 S.W.3d at 405 (Mo. 2007) (quoting Mathews, 424 U.S. at 333) (same); Norman, 808 N.W.2d at 60 (citing Slansky, 685 N.W.2d 335 (2004)) (same); In re G.R.H., 2006 ND 56, ¶ 24, 711 N.W.2d 587, 596 (same).
\item \textsuperscript{255} See, e.g., Kansas v. Hendricks, 521 U.S. 346, 356-57 (2001) (demonstrating sex offenders have an interest in their liberty or freedom).
\end{itemize}
\end{footnotesize}

program meets proper procedural requirements.\textsuperscript{256} South Dakota would avoid Procedural Due Process issues if it follows a similar procedure to neighboring states.\textsuperscript{257} South Dakota should require the state’s attorney where the offender was convicted to notify the attorney general to trigger the civil commitment process.\textsuperscript{258} This notice would form a prosecutorial review committee.\textsuperscript{259} Then, this committee would determine whether the offender meets the requirements of a “sexually violent predator.”\textsuperscript{260} Once that step was completed, a prosecutor would file a petition with the court.\textsuperscript{261} After an expert completed an evaluation of the offender, the court would have to determine whether there was probable cause.\textsuperscript{262} South Dakota would hold a civil trial to prove that the offender was a “sexually violent predator.”\textsuperscript{263} If the individual was committed, South Dakota should hold annual reviews as recommended above; once the individual no longer meets the requirements, South Dakota could begin transitioning them out of civil commitment.\textsuperscript{264}

3. Substantive Due Process

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”\textsuperscript{265}

The Due Process Clause found in the United States Constitution and state constitutions not only applies to procedural matters but also to matters of substantive law.\textsuperscript{266} When an individual alleges that their Substantive Due Process

\textsuperscript{256} See supra Part III.B.2. See also supra Part II.0 (demonstrating the statutory procedures implemented by other Eighth Circuit states that satisfies the Due Process Clause).
\textsuperscript{257} See supra Part II.0 (illustrating the procedures followed by Iowa, Minnesota, Missouri, Nebraska, and North Dakota).
\textsuperscript{258} IOWA CODE ANN. § 229A.3 (West 2017); MO. ANN. STAT. § 632.483 (West 2017); N.D. CENT. CODE ANN. § 25-03.3-03(1) (West 2017).
\textsuperscript{259} IOWA CODE ANN. § 229A.3; MO. ANN. STAT. § 632.483.
\textsuperscript{260} See supra Part II.0 (showing that surrounding states form committees and form an opinion whether an offender meets the requirements to be a “sexually violent predator”).
\textsuperscript{261} IOWA CODE ANN. § 229A.5 (West 2017); MO. ANN. STAT. § 632.486 (West 2017); NEB. REV. STAT. ANN. § 71-1205(1)-(2) (West 2017); see supra Part II.0 (showing the statutory formation for the civil commitment of sex offenders in the Eighth Circuit).
\textsuperscript{262} IOWA CODE ANN. § 229A.5; MO. ANN. STAT. § 632.489 (West 2017); N.D. CENT. CODE ANN. § 25-03.3-11 (West 2017); see supra Part II.0 (identifying the procedures followed by sex offender civil commitment programs).
\textsuperscript{263} See IOWA CODE ANN. § 229A.7 (West 2017); MO. ANN. STAT. §§ 632.492, 632.495 (West 2017). See also supra Part II.0 (illustrating the procedure of sex offender civil commitment programs).
\textsuperscript{264} See IOWA CODE ANN. § 229A.8 (West 2017); MO. ANN. STAT. § 632.498 (West 2017); N.D. CENT. CODE ANN. § 25-03.3-17(2) (West 2017).
\textsuperscript{265} U.S. CONST. amend. XIV, § 1. See also IOWA CONST. art. I, § 9 (“no person shall be deprived of life, liberty, or property, without due process of law”); MINN. CONST. art. I, § 7 (“nor be deprived of life, liberty, or property without due process of law”); MO. CONST. art. I, § 10 (“no person shall be deprived of life, liberty or property without due process of law”); NEB. CONST. art. I, § 3 (“[n]o person shall be deprived of life, liberty, or property, without due process of law”); N.D. CONST. art. I, § 12 (“nor be deprived of life, liberty or property without due process of law”).
rights are being violated, the court first analyzes what right is being violated. If the right is fundamental, the court applies strict scrutiny. Strict scrutiny requires that the government must have a compelling state interest and utilize the least restrictive alternative. Otherwise, if the right is not fundamental, the law must survive the rational basis test, meaning there must be a reasonable relation between the state’s interest and the law used to carry out that interest. The states within the Eighth Circuit with a civil commitment program for sexually violent predators apply strict scrutiny because these programs infringe on an individual’s right of freedom. Because a fundamental right is involved, South Dakota would be required to have a compelling state interest and utilize the least restrictive alternative. Assuming the South Dakota Legislature follows the above recommendation to state its compelling interest within its statute, it would be clear to the court that South Dakota’s compelling state interest is protecting the public from sexually violent predators. Limiting the individuals considered for


268. Flores, 507 U.S. at 301-02; Karsjens, 845 F.3d at 407; Cubbage, 671 N.W.2d at 446 (quoting State v. Hernandez-Lopez, 639 N.W.2d 226, 238 (Iowa 2002)); In re Linehan, 594 N.W.2d 867, 872-73 (Minn. 1999); Roe, 408 S.W.3d at 766-67; Loyuk, 857 N.W.2d at 842-43; Hoff, 1999 ND 115, ¶ 13, 595 N.W.2d at 290. Fundamental rights are those that are “implicit in the concept of ordered liberty.” United States v. Salerno, 481 U.S. 739, 746 (1987).

269. Flores, 507 U.S. at 301-02; Karsjens, 845 F.3d at 407 (quoting Flores, 507 U.S. at 302); Cubbage, 671 N.W.2d at 446 (quoting Hernandez-Lopez, 639 N.W.2d at 238); In re Linehan, 594 N.W.2d at 872; Roe, 408 S.W.3d at 767; Loyuk, 857 N.W.2d at 842; Hoff, 1999 ND 115, ¶ 13, 595 N.W.2d at 290.

270. FCC v. Beach Comm’n, Inc., 508 U.S. 307, 314-15 (1993); Karsjens, 845 F.3d at 409; Cubbage, 671 N.W.2d at 446 (quoting Hernandez-Lopez, 639 N.W.2d at 238); In re Blodgett, 510 N.W.2d 910, 925 (Minn. 1994); Roe, 408 S.W.3d at 766-67; Loyuk, 857 N.W.2d at 842-43; Hoff, 1999 ND 115, ¶ 13, 595 N.W.2d at 290.

271. Foucha v. Louisiana, 504 U.S. 71, 86 (1992); Karsjens, 845 F.3d at 407. See In re Det. of Selby, 710 N.W.2d 249, 253-55 (Iowa Ct. App. 2005) (discussing that strict scrutiny is to be applied by the court because an individual’s fundamental right is infringed on when involuntarily civilly committed); In re Linehan, 594 N.W.2d at 872-73 (stating that “[i]n determining whether a civil commitment law violates Substantive Due Process, a court will subject the law to strict scrutiny, placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest”); In re Care & Treatment of Norton, 123 S.W.3d 170, 173 (Mo. 2003) (stating that “[w]hile sexually violent predators are not members of a suspect class, civil commitment of persons so classified impinges on the fundamental right of liberty”); In re S.J., 810 N.W.2d 720, 725 (Neb. 2012) (finding that the civil commitment of an individual survived a Substantive Due Process claim because it was narrowly tailored and the state had a compelling interest); In re G.R.H., 2006 ND 56, ¶ 27, 711 N.W.2d 587, 597 (holding that civilly committing a sexually violent predator does not violate their Substantive Due Process rights because the statute protects the individual’s liberty interest).

272. See, e.g., Flores, 507 U.S. at 301-02 (holding that an individual’s right to freedom is a fundamental right).

273. IOWA CODE ANN. § 229A.1 (West 2017) (illustrating a state that explicitly states in their code their compelling state interest); Karsjens, 845 F.3d 394, 409 (demonstrating that a state needs to have a compelling state interest). “No one can reasonably dispute that Minnesota has a real, legitimate interest in protecting its citizens from harm caused by sexually dangerous persons . . . .” Id. (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)). The Supreme Court has stated that “the state . . . has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.” Addington, 441 U.S. at 426.
civil commitment and requiring specific procedures, the statute would meet the least restrictive alternative requirement.274

4. Equal Protection

"[N]or deny to any person within its jurisdiction the Equal Protection of the laws."

The Fourteenth Amendment to the United States Constitution provides individuals Equal Protection under the laws.276 The Equal Protection Clause requires all similarly situated people be treated the same.277 The United States Supreme Court has recognized that this principle must balance with the fact that laws generally classify individuals into different groups.278 In order to balance competing interests, the Court has recognized two wings to the Equal Protection Clause: suspect class and fundamental rights.279 Legislation is analyzed under the rational basis test if it does not target a suspect class or implicate a fundamental right.280 However, if the legislation does involve a suspect class or a fundamental right, then it is analyzed under strict scrutiny.281 While civilly committed sex

274. Kansas v. Hendricks, 521 U.S. 346, 357 (1997) (noting situations in which civil commitment has been upheld); Karsjes, 845 F.3d at 409-10 (finding that the Minnesota sex offender program survives the least restrictive alternative).


276. Id. Iowa, Minnesota, Missouri, Nebraska, and North Dakota provide the same protection in their state constitutions. IOWA CONST. art. I, § 6 ("All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."); MINN. CONST. art. I, § 2 ("No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen . . . ."); MO. CONST. art. I, § 2 (stating that "all persons are created equal and are entitled to equal rights and opportunity under the law"); NEB. CONST. art. I, § 3 (stating "nor be denied Equal Protection of the laws"); N.D. CONST. art. I, § 21 (stating "nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens").

277. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); Bogren v. Minnesota, 236 F.3d 399, 408 (8th Cir. 2000); In re Det. of Williams, 628 N.W.2d 447, 452 (Iowa 2001); Minnesota v. Cox, 798 N.W.2d 517, 521 (Minn. 2011); Bernat v. Missouri, 194 S.W.3d 863, 867 (quoting Ex parte Wilson, 48 S.W.2d 919, 921 (Mo. 1932)); In re Interest of J.R., 762 N.W.2d 305, 322 (Neb. 2009); In re P.F., 2008 ND 37, ¶¶ 14-15, 744 N.W.2d 724, 730-31.

278. See Romer v. Evans, 517 U.S. 620, 631 (1996) (demonstrating both the fundamental right and suspect class wings of Equal Protection).

279. Romer, 517 U.S. at 631; Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 815 (8th Cir. 2008); In re Det. of Williams, 628 N.W.2d at 452-53; Kolton v. Cty. Of Anoka, 645 N.W.2d 403, 411 (Minn. 2002); In re Care & Treatment of Norton, 123 S.W.3d 170, 173 (Mo. 2003); In re Interest of J.R., 762 N.W.2d at 323; In re P.F., 2008 ND 37, ¶ 15, 744 N.W.2d at 731 (quoting Gange v. Clerk of Burleigh Cty. Dist. Court, 429 N.W.2d 429, 433 (N.D. 1988)).

280. Heller v. Doe, 509 U.S. 312, 319-20 (1993); Gavin v. Branstad, 122 F.3d 1081, 1089-90 (8th Cir. 1997); In re Det. of Williams, 628 N.W.2d at 452; In re Blodgett, 510 N.W.2d 910, 917 (Minn. 1994); In re Care & Treatment of Norton, 123 S.W.3d at 173; In re Interest of J.R., 762 N.W.2d at 323; In re P.F., 2008 ND 37, ¶ 15, 744 N.W.2d at 731 (quoting Gange, 429 N.W.2d at 433).

281. City of Cleburne, 473 U.S. at 440, 443; Gavin, 122 F.3d at 1089-90; In re Det. of Garren, 620 N.W.2d 275, 286 (Iowa 2000); Matter of Linehan, 557 N.W.2d 171, 181 (Minn. 1996); In re Care & Treatment of Norton, 123 S.W.3d at 173; Pick v. Nelson, 528 N.W.2d 309, 318 (quoting Robotham v. State, 488 N.W.2d 533, 539 (Neb. 1992)); In re P.F., 2008 ND 37, ¶ 15, 744 N.W.2d at 731 (quoting Gange, 429 N.W.2d at 433).
offenders do not qualify as a suspect class, these statutes implicate their fundamental right of liberty.\textsuperscript{282} This means that South Dakota would need to have a compelling state interest and use the least restrictive alternative.\textsuperscript{283} South Dakota’s interest in protecting the public would satisfy the compelling interest requirement of strict scrutiny.\textsuperscript{284} Furthermore, narrowly tailoring statutory language and limiting those considered for civil commitment would meet strict scrutiny’s obligation to use the least restrictive alternative.\textsuperscript{285} Finally, narrowly tailoring the statutory definition of a “sexually violent predator” creates a subgroup of dangerous individuals with a mental disability meaning they are not similarly situated to other mentally ill individuals.\textsuperscript{286}

5. Ex Post Facto Laws

“No State shall . . . make any . . . Ex Post Facto Law . . . .”\textsuperscript{287}

An Ex Post Facto law is prohibited under the United States Constitution as well as the constitutions of Iowa, Minnesota, Missouri, Nebraska, and North Dakota.\textsuperscript{288} This prohibition prevents legislative bodies from enacting a law that punishes an act that was not illegal at the time it was committed or increases the punishment prescribed.\textsuperscript{289} The Ex Post Facto Clause applies only to penal

\textsuperscript{282} See, e.g., Reno v. Flores, 507 U.S. 292, 301-02 (demonstrating that one’s right to liberty is fundamental).
\textsuperscript{283} See supra Part III.B.1 (explaining strict scrutiny).
\textsuperscript{284} See IOWA CODE ANN. § 229A.1 (West 2017) (illustrating a state that explicitly states in their code their compelling state interest); Karsjens v. Piper, 845 F.3d 394, 409 (8th Cir. 2017) (demonstrating that a state needs to have a compelling state interest).
\textsuperscript{285} Karsjens, 845 F.3d at 409-10. See Kansas v. Hendricks, 521 U.S. 346, 357-60 (1997) (noting situations in which civil commitment has been upheld).
\textsuperscript{286} IOWA CODE ANN. § 229A.2(12) (West 2017); NEB. REV. STAT. ANN. § 83-174.01(1) (West 2017); N.D. CENT. CODE ANN. § 25-03.3-01(8) (West 2017). See Hamilton, supra note 215, at 703-07 (discussing sexually violent predator statutes and the requirements). This difference cannot be on dangerousness alone, but rather the fact that these individuals suffer from a mental health condition making it more likely they will reoffend. Hendricks, 521 U.S. at 357-58; Marna J. Johnson, Minnesota’s Sexual Psychopathic Personality and Sexually Dangerous Person Statute: Throwing Away the Key, 21 WM. MITCHELL L. REV. 1139, 1161-62 (1996).
\textsuperscript{287} U.S. CONST. art. I, § 10, cl. 1.
\textsuperscript{288} Id. See also IOWA CONST. art. I, § 21 (“No bill of attainder, Ex Post Facto law, or law impairing the obligation of contracts, shall ever be passed.”); MINN. CONST. art. I, § 11 (“No bill of attainder, Ex Post Facto law, or any law impairing the obligation of contracts shall be passed . . . .”); MO. CONST. art. I, § 13 (“That no Ex Post Facto law . . . can be enacted.”); NEB. CONST. art. I, § 16 (“No bill of attainder, Ex Post Facto law, . . . shall be passed.”); N.D. CONST. art. I, § 18 (“No bill of attainder, Ex Post Facto law, or law impairing the obligations of contracts shall ever be passed.”).
There are two elements that the court considers when evaluating a claim that legislation violates the Ex Post Facto Clause. First, the legislation must be retrospective. Second, the legislation must disadvantage the individual affected by it. Because the United States Supreme Court determined that the sexually violent predator acts are civil in nature, the Ex Post Facto Clause does not apply. South Dakota’s sexually violent predator act would withstand an Ex Post Facto Clause challenge provided the legislature follows the statutory construction recommendations and provides treatment.

6. Double Jeopardy

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."296

The United States Constitution prohibits prosecuting an individual for the same offense more than once. The Double Jeopardy Clause acts as protection against prosecution for the same crime twice and successive punishment for the same crime.298 The United States Supreme Court has established that "where the same act or transaction constitutes a violation of two distinct statutory provisions, . . . it must be retrospective."


291. Weaver, 450 U.S. at 29 (citing Lindsey v. Washington, 301 U.S. 397, 401 (1937)); Williams, 33 F.3d at 1012; Linehan, 557 N.W.2d at 187; Cooper v. Mo. Board of Prob. & Parole, 866 S.W.2d 135, 137-38 (Mo. 1993); Nebraska v. Urbano, 589 N.W.2d 144, 154 (Neb. 1999); North Dakota v. Monson, 518 N.W.2d 171, 172 (N.D. 1994).

292. Weaver, 450 U.S. at 29 (citing Lindsey, 301 U.S. at 401); Williams, 33 F.3d at 1012; Linehan, 557 N.W.2d at 187; Cooper, 866 S.W.2d at 137-38; Urbano, 589 N.W.2d at 154; Monson, 518 N.W.2d at 172.

293. Weaver, 450 U.S. at 29 (citing Lindsey, 301 U.S. at 401); Williams, 33 F.3d at 1012; Linehan, 557 N.W.2d at 187; Cooper, 866 S.W.2d at 137-38; Urbano, 589 N.W.2d at 154; Monson, 518 N.W.2d at 172.

294. See, e.g., Hendricks, 521 U.S. at 361-69 (holding that sexually violent predator acts are not criminal and therefore do not violate the Ex Post Facto clause).

295. See id. at 362-68 (describing why the Kansas statute was civil in nature and not criminal leading to the courts holding that it did not violate the Ex Post Facto clause of the Constitution).

296. U.S. CONST. amend. V.

297. Id. See also IOWA CONST. art. I, § 12 (“No person shall after acquittal, be tried for the same offense.”); MINN. CONST. art. I, § 7 (“[N]o person shall be put twice in jeopardy of punishment for the same offense . . . .”); MO. CONST. art. I, § 19 ([N]or shall any person be put again in jeopardy of life or liberty for the same offense . . . .”); NEB. CONST. art. I, § 12 (“No person shall be twice put in jeopardy for the same offense.”); N.D. CONST. art. I, § 12 (“No person shall be twice put in jeopardy for the same offense.”).

the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.\(^{299}\) Additionally, when an act is civil in nature and not criminal, the subsequent consequences do not amount to a second prosecution.\(^{300}\) As stated, the Supreme Court has determined that sexually violent predator acts are civil, not criminal.\(^{301}\) Because this statute would be civil, a court should find for the state if an individual alleges a violation of Double Jeopardy.\(^{302}\)

C. SOUTH DAKOTA MUST PROVIDE STATE OF THE ART TREATMENT TO THE CIVILLY COMMITTED SEXUALLY VIOLENT PREDATORS

Currently, South Dakota does provide limited treatment of sex offenders who are incarcerated; it does not include, however, a civil commitment program similar to other states in the Eighth Circuit.\(^{303}\) Treatment in South Dakota includes “therapy, educational treatment and relapse prevention.”\(^{304}\) When an offender fails to complete part of the treatment program there are consequences.\(^{305}\) These consequences include delaying parole and negatively impacting an individual’s

---

299. Blockburger v. United States, 284 U. S. 299, 304 (1932); United States v. Grimes, 702 F. 3d 460, 467 (8th Cir. 2012) (quoting Blockburger, 284 U. S. at 304); Iowa v. Lindell, 828 N. W. 2d 1, 6 (Iowa 2013) (quoting Blockburger, 284 U. S. at 304); Alexander, 290 N. W. 2d at 748 (quoting Blockburger, 284 U. S. at 304); Missouri v. Smith, 456 S. W. 3d 849, 853 (Mo. 2015) (citing Blockburger, 284 U. S. at 304); Nebraska v. Ballew, 867 N. W. 2d 571, 581 (Neb. 2015) (citing Blockburger, 284 U. S. at 304); North Dakota v. Salveson, 2006 ND 169, ¶ 22, 719 N. W. 2d 747, 754.

300. See Hendricks, 521 U.S. at 369 (stating that “[b]ecause we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution’’); Doe v. Miller, 405 F. 3d 700, 720-21 (8th Cir. 2005) (stating that “[a]t the same time, civil commitment of the mentally ill, though extremely restrictive and disabling to those who are committed, does not necessarily impose punishment because it bears a reasonable relationship to a ‘legitimate nonpunitive object, namely protecting the public from mentally unstable individuals’’); In re Det. of Garren, 620 N. W. 2d 275, 283-84 (Iowa 2000) (stating that “[s]ince we have already held that chapter 229A is civil in nature, not criminal, initiation of commitment proceedings under the statute does not constitute a second prosecution for purposes of double jeopardy’’); In re Linehan, 557 N. W. 2d 171, 188 (Minn. 1996) (stating that “[t]he Court concluded that the [civil commitment] Act did not violate Double Jeopardy because the commitment was for the purpose of treatment’’); In re Care & Treatment of Norton, 123 S. W. 3d 170, 176 (Mo. 1981) (stating that “[h]ut, these are civil commitments. The purposes of civil commitments are incapacitation . . . and treatment. The idea behind such confinements is that a patient is ‘sick’ and dangerous, that he must be locked up to be treated . . . ’’); In re Interest of J.R., 762 N. W. 2d at 321-22 (stating that “[h]aving already concluded in our Ex Post Facto analysis that [Sex Offender Commitment Act] constitutes a nonpunitive civil regulatory scheme, we similarly conclude that SOCA does not violate the Double Jeopardy Clause, because commitment under SOCA is not punishment’’); In re G.R.H., 2006 ND 56, ¶ 20, 711 N. W. 2d 587, 595 (citing In re M.D., 1999 ND 160, ¶¶ 24-31, 598 N. W. 2d 799, 805-06) (stating that “this Court held N.D.C.C. ch. 25-03.3 creates a civil procedure for involuntary commitment of sexually dangerous individuals and does not violate Double Jeopardy’’).

301. See, e.g., Hendricks, 521 U.S. at 361-69 (holding that sexually violent predator acts are civil and not criminal statutes, meaning the Double Jeopardy Clause is not in issue).


304. Id.

305. Id.
classification. Sex offenders are subjected to “assessments, Admissions [and] Orientation psychosexual screens, [Special Treatment of Perpetrators] programming, psychosexual reports, community release planning, assistance in community supervision, development and promotion of a community treatment provider network, and sex offender community treatment and supervision standards.” Finally, once released, the offender will have to register as a sex offender.

South Dakota must implement a state of the art treatment program for civilly committed sex offenders. Therapists would utilize multiple treatment plans and tailor their services to the individual client. Social workers and psychologists working in this program would carry out treatment using sex offender group therapy, risk management training, self-regulation, therapeutic community, motivational interviewing, behavior therapy, and strength-based exercises. Throughout treatment therapists would conduct evaluations of their clients analyzing their static and dynamic risk factors.

South Dakota’s treatment program should be similar to other jurisdictions and consist of a four-phase program. In Phase One, therapists would work with the individual’s motivation to change and develop their problem-solving skills. Once the therapist conquered Phase One, they would begin to work on the client’s sexual history in Phase Two. During this phase, therapists could use polygraph evaluations to work on emotional awareness and coping, decreasing deviant sexual arousal or interest, having the client verbalize specific events and behaviors that were made of deviant sexual activity. Phase Three would develop a new form of thinking and behaving in the client. Treatment plans would become personalized for each client in this phase. Committed individuals in South Dakota’s program would work on their weaknesses by learning how to regulate their risk factors and enhancing their supports. Finally, clients would enter Phase Four and continue working on new skills. The goal here would be to eventually integrate the client back into South Dakota.

306. *Id.* When an offender refuses to complete treatment, there are more severe consequences. *Id.*

For instance, restricted visits, higher classification, and delayed parole. *Id.*

307. *Id.*

308. *Id.*


311. *Id.*

312. *Id.* These risk factors are issues such as “sexual history and relationships, cognitive functioning, personality structure, general mental health, physical health, alcohol and substance abuse, social supports, and other psychological meaningful variables.” *Id.*


314. *Id.*

315. *Id.* at 29.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*
jurisdiction utilizes an intermediate release program, South Dakota should follow that model because it slowly releases committed persons into the community and allows them time to land on their feet.\textsuperscript{322} Once the client was fully released, treatment would be complete.\textsuperscript{323}

IV. CONCLUSION

South Dakota should enact a sexually violent predator act because South Dakota is ranked second nationally in rape and sexual assault cases. While many of its neighboring states have passed a sex offender civil commitment program, South Dakota has not. Legislators need to consider the concerns on both sides of civilly committing sex offenders. Lawmakers have a duty to protect the public and to protect the civil liberties of their citizens, even if those citizens are sex offenders. Because of these competing interests, South Dakota should adopt a hybrid program from neighboring sex offender civil commitment programs.

The civil commitment program South Dakota enacts must meet constitutional requirements for treatment. There are many facets of a program of this nature that the legislature will need to address. Lawmakers need to be specific when drafting the language used in this statute, narrowly tailoring the language to a specific subgroup. Moreover, South Dakota will need to set up a sophisticated treatment program for those that are civilly committed. If South Dakota lawmakers follow the recommendations, narrowly tailor the legislation, and provide treatment, the program will not violate the United States Constitution or the South Dakota Constitution. Specifically, the program will not violate the Due Process, Equal Protection, Ex Post Facto Laws, or Double Jeopardy Clauses. Finally, lawmakers need to be mindful of how this program can become a political tool. Legislators must balance the public safety with sex offender’s civil liberties.
