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Preventive Incarceration

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Preventive incarceration has had a range of meanings. It could refer to the pretrial imprisonment, without the right to bail, of a person accused of a serious crime **[p. 1173 ↓]** usually because a judge determines that the person is dangerous to society. It could refer to civil proceedings to commit a person to state custody based on mental illness, again because the individual is a threat to herself or others. Its purpose is not supposed to be punishment, but rather isolation from society. Although preventive incarceration or detention statutes date from about 1900, for instance in India and the United States, their use has more recently been discussed in the context of terrorist threats based on intelligence gathering.

A specific example of this type of incarceration, at least in the United States, concerns sexual offenders and involuntary civil commitment. This can serve as an illustration of some of the legal and psychological issues involved. In the 1990s, public outrage over habitual sexual offenders prompted some states to enact sexual predator statutes. These statutes empower officials to involuntarily confine and treat sexual offenders indefinitely upon completion of a criminal sentence. The legislative rational for these statutes is that states must protect their citizenry from persons who have a history of sexual deviance pursuant to the government's *parens patriae* and police powers duties. The legislation provides for the civil commitment of dangerous sexual offenders who are highly likely to reoffend with a sex crime upon their release from prison.

In 1990, Washington became the first state to enact a sexual predator statute. Since then, many other states have enacted statutes that provide for the involuntary civil commitment of sex offenders, including Arizona, California, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin. The statutes presume that sexual predators have a mental abnormality or disability and that they are persons who lack the ability to control their sexual deviancy.

These civil commitment statutes have similar procedural processes governing the post-prison confinement of sexual predator offenders. A local prosecutor will be notified that a sexual offender is about to be released from prison. If a prosecutor decides to pursue civil commitment, she will begin an involuntary civil commitment hearing or

trial to determine if the offender is too dangerous to be released. The commitment proceeding can be held before a judge or jury. Depending upon the burden of proof required by state law, if the prosecutor proves beyond a reasonable doubt or by clear and convincing evidence that the offender is a sexual predator, then the offender will be committed to a secure facility. The commitment can be indefinite and the offender will be held until it is shown that the offender is no longer a threat to the community.

Constitutional challenges to sexual predator statutes have questioned whether the statutes satisfy the U.S. Constitution's due process clause. *Substantive* due process prohibits a state from limiting an individual's fundamental rights unless the state has a compelling state interest. In addition, the legislature should narrowly tailor the state statute to achieve that interest. Concerning sexual predator statutes, states argue that they must protect the community from the substantial harm that a sexual predator can inflict upon victims of rape and sexual assault, particularly when the offender has been deemed a pedophile or sexual psychopath.

Opponents of sexual predator statutes argue that the statute's presumption is not based upon a showing of a mental illness or defect, the traditional focus of civil commitment laws, but upon a showing of a mental “abnormality,” an overbroad characterization. In addition, opponents argue that an individual's *procedural* due process rights are violated when fact finders presume habitual offending propensities based upon past conduct without adequate procedural protections to ensure that such commitments are not indefinite. States have traditionally used civil commitment based upon the need to confine and treat persons who suffer from a mental illness and then to release persons when they are no longer a danger to themselves or others. Because civil confinement of sexual offenders does not depend on the ability of the state to provide treatment, opponents of sexual predator laws argue that the statutes do not comport with the expanded rights of the mentally ill that have occurred over the past thirty years. Opponents have also challenged sexual predator statutes under the Constitution's double jeopardy and ex post facto provisions. They argue that an individual should not continue to be “punished” upon completion of a prison sentence. Since the statutes were enacted **[p. 1174 ↓]** after many sex offenders had already committed their offenses, opponents also argue that the laws cannot be applied to these individuals.

The U.S. Supreme Court upheld the constitutionality of Kansas's Sexually Violent Predator Act in two cases. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), a divided court found that because the statute is “civil” and not part of the criminal law system the statutes cannot violate the Constitution's double jeopardy and ex post facto clauses. In *Kansas v. Crane*, 534 U.S. 407 (2002), the Court clarified the definition of a sexual predator and held that involuntary civil commitment of a sexual offender is permissible if a sex offender is shown to lack control over his behavior. The Court stated that a finding of “total” lack of control is not required, but the state cannot commit a person without a showing that the individual suffers from a volitional impairment (such as pedophilia) and has serious problems with controlling his behavior.

Sexual predator statutes that provide for the civil commitment of sexual offenders who cannot control their sexual offending behavior are, in general, constitutional. These statutes must provide substantive and procedural processes that establish that an offender suffers from a mental abnormality and lacks control over the deviant sexual behavior. States cannot automatically transfer sexual offenders without their consent to a secure facility at the expiration of a prison sentence without due process. Nonetheless, because these statutes are civil in nature, other constitutional concerns that might exist if the statutes were part of the criminal law do not apply.

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See also

- Mental Disorders
- Prisons and Jails, Criminology of
- Punishment and Sentencing Alternatives
- Rape and Sexual Offenses
- Sex Offenders
- Terrorism

Further Readings

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