

Invoking Civil Remedies to Prevent the Commission of Future Crimes by Sex Offenders

Michael P. Seng

The John Marshall Law School, Chicago, 60604, Illinois, United States

Copyright©2017 by authors, all rights reserved. Authors agree that this article remains permanently open access under the terms of the Creative Commons Attribution License 4.0 International License

Abstract Sex offenders pose special problems for the criminal justice system. A traditional criminal case could not commence before a criminal act occurred. However, it is argued that criminal prosecutions do not effectively protect the public from future violations by sex offenders. Consequently, legislators have looked to civil remedies to prevent irreparable anti-social conduct before it occurs. These remedies have included sterilization, preventive detention, registration of offenders, and denying access to the internet. Each of these remedies poses serious treats to individual freedom. Psychologists and lawyers bear a heavy responsibility to ensure that these remedies can be justified.

Keywords Internet Access, Preventive Detention, Registration of Offenders, Sex Offenders, Sterilization

1. The Problem

The criminal law is built on the supposition that an alleged offender has committed a criminal act. Every law student knows that a basic element of every criminal case is proof of a *corpus delicti*. One cannot be punished in anticipation of a crime. Even the laws of attempt and conspiracy require some overt act in commission of a crime. Outside the criminal courts, traditional courts of equity would not enjoin a crime.

Sex offenders are perceived as persons who cannot control their urges. Some, but not all, sex offenders may be diagnosed as sociopaths who, by definition, cannot control their behavior. But not all sex offenders are sociopaths. Regular criminal protections against sociopaths, it is argued, are not effective because the protections come into play only after a crime has been committed. Sociopaths are not deterred by threats of punishment. The solution then is to intervene to prevent sociopaths from committing the offense in the first place. Applying this reasoning to sex offenders who have not been diagnosed as sociopaths is

even more troubling. A recent analogy is the perceived need to detain suspected terrorists without a criminal trial in order to prevent them from committing heinous acts to innocent populations.

A civil remedy has many advantages. It prevents injury to victims and society. It does not require proof beyond a reasonable doubt.

However, civil remedies to deter criminal conduct involve a serious loss of liberty. In addition to flying against the tradition of equity, civil remedies imposed to prevent criminal acts fly against strong philosophical arguments and our common law and constitutional tradition that one should not be punished unless first convicted of a crime. Whether or not these remedies amount to punishment is the issue that generally is presented to the courts in reviewing these measures. However, even if not considered to be punishment, due process of law requires some sort of notice and hearing before taking away someone's liberty. An equally serious concern is that preventive measures are seldom enacted after a dispassionate dialogue. More often they are enacted during periods of public outrage or fear after a heinous crime has been committed.

I will outline some of the most common civil remedies that legislatures have imposed to deter criminal actions by sex offenders and discuss briefly the danger to civil liberties that they present. I will focus primarily upon the decisions of the United States Supreme Court.

2. Sterilization – An Early Non-Criminal Remedy

In 1927, the United States Supreme Court held that society can sterilize those with inherited mental defects. Justice Holmes' summary opinion in *Buck v. Bell* [1] rejected any serious analysis and compared sterilization to vaccination. He ended his justification with his famous declaration that 'three generations of imbeciles are enough' [p. 207].

The Supreme Court did not limit its holding to persons who were dangerous to themselves or to others; indeed, no allegation was made that Carrie Buck was a dangerous person, only that she was ‘feeble minded’ [p. 205].” Justice Holmes specifically noted that once sterilized she ‘might be discharged with safety’ [p. 206]. The only benefits to society identified by Justice Holmes were that she might become ‘self-supporting’ [p. 206], which is highly speculative, and that sterilization would prevent her from becoming the ‘probable potential parent of socially inadequate offspring’ [p. 207].

Buck v. Bell [1] does not read well today. Perhaps most damaging to *Buck v. Bell* [1] was the Nazi experience of mass sterilization. Although never formally overruled, *Buck v. Bell* [1] runs counter to a large number of modern cases that uphold the fundamental right of procreation. In 1947 in *Skinner v. Oklahoma* [2], the Supreme Court relied on equal protection to invalidate a statute that restricted the right to procreate, which the Court described as ‘fundamental to the very existence and survival of the race’ [p. 541]. The case involved the sterilization of selected felons who had been convicted two or more times of crimes involving moral turpitude, but not necessarily sex offences. The Supreme Court observed that someone who stole chickens three times could be sterilized, but someone who embezzled large sums of money could not [p. 539]. The Court further recognized that: ‘In evil or reckless hands [forced sterilization] can cause races or types which are inimical to the dominant group to wither and disappear’ [p. 541].

Buck v. Bell [1] is not included in conventional constitutional law casebooks, perhaps because it is so counter to our modern conceptions of liberty and privacy. Nonetheless, it should be included because it is important that we not forget its lessons. *Buck* [1] was grounded on a view held by many educated persons in the early Twentieth Century that mental defects were genetic. This decision should caution us to be skeptical when relying on prevailing scientific ideas that go counter to traditional notions of individual rights and freedoms. In such cases, courts should strictly scrutinize the theory against not only American but against universal notions of privacy and self-determination.

3. Preventive Detention for an Indefinite Period

Perhaps the most common civil remedy used against sex offenders today is not sterilization but preventive detention. Obviously if a dangerous person is locked up, the danger that person poses to society is eliminated or at least severely contained. Preventive detention can be used against those who are found to be incompetent to stand trial, those that have served their sentence, and, more rarely, those persons who need to be taken off the streets but who

have been neither accused nor convicted of a past crime but whom the state considers too dangerous to operate freely in society. This remedy on its face contradicts traditional values of human freedom and self-determination.

In *Greenwood v. United States* [3], the United States Supreme Court upheld the indefinite detention of an accused who was found mentally incompetent to stand trial. The District Court had found that the accused ‘would probably endanger the safety of the officers, property, or other interests of the United States, and that no suitable arrangements for custody and care, other than commitment to the custody of the Attorney General, were available’ [p. 372].

More recently in *United States v. Comstock* [4], the Supreme Court affirmed Congress’ power to civilly commit a prisoner who was found to be sexually dangerous beyond the term of his sentence. The Court emphasized that it was only deciding the question of Congressional power and not ‘any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution’ [p. 149-50].

In *O’Connor v. Donaldson* [5], the Court held that a state must show that the person suffers both from a mental illness and is dangerous to themselves or to others in order to be committed to a mental institution. For instance, the government cannot civilly detain someone who is mentally ill and has a tendency to indecently expose himself if he is not dangerous to himself or others, even though his conduct can be criminally punished [6].

However, the Supreme Court has diluted the mental illness requirement in recent cases that involve sex offenders. In *Kansas v. Hendricks* [7], the Supreme Court allowed detention for a ‘mental abnormality’ or ‘personality disorder’ for persons likely to engage in predatory acts of sexual violence [p. 358]. The Court did state that a finding of future dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment [p. 358].

The Supreme Court also rejected Hendricks argument that the Kansas law was punitive because the State failed to offer him any legitimate ‘treatment’ [p. 365]. The Court stated that it had never held that ‘the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nonetheless pose a danger to others’ [p. 366]. Nonetheless, the Court interpreted the Kansas Supreme Court’s opinion to mean that Hendricks’ condition was treatable but that no treatment was being provided. [p. 366-67]. Although Kansas law created an obligation to treatment, the Court found that Hendricks was the first person committed under the Act and accepted Kansas’ representation that currently persons detained under the Act are receiving treatment [p. 367-69]. The Court therefore concluded that: ‘Where the State has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals;

provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent' [p. 368-69].

The Court also held that because the purpose of the statute was not punitive, proceedings under the Act did not constitute a second prosecution that would violate the double jeopardy or *ex post facto* clauses of the Constitution [p. 369-71].

Hendricks [7] was further explained in *Kansas v. Crane* [8], where the Court held that the state does not have to prove the sex offender's total or complete lack of control. The Court warned, however, that the state must show that the person has some serious difficulty in controlling his behavior. The Court also distinguished 'volitional, emotional, and cognitive impairments' and commented that *Hendricks* [7] limited its discussion to volitional disabilities and left open whether a state could civilly confine a person solely because of an "emotional" abnormality [p. 414-15].

Due process requires that persons be given basic procedural due process protections before they are detained and periodically after they are detained to determine their mental state or degree of dangerousness [9]. However, the elements of due process are flexible. For instance, the Illinois Appellate Court recently rejected an argument that it violated due process to require a person found not guilty by reason of insanity to prove by clear and convincing evidence that he no longer suffered from a mental illness [10]. Apart from what procedures are due in the abstract, the Supreme Court has held that the same procedural protections must be applied to those who are committed at the end of their sentences as are applied to all other persons who are civilly committed [11].

In *Washington v. Harper* [12], the Supreme Court held that detained persons have a right to avoid the unwanted administration of antipsychotic drugs that would alter the chemical balance in their brains. But this liberty is not absolute and gives way if there is a medical finding that the person has a mental disorder likely to cause harm to him or others unless he is treated with an anti-psychotic drug [p. 227, 231].

In *Shall v. Martin* [13], decided in 1984, the Supreme Court held that juveniles can be subject to preventive detention just like adults. The object is 'to protect the child and society from the consequences of his criminal acts' [p. 264]. However, more recent decisions recognize that the minds of children are not fully developed and that assumptions made about adults that they will not change cannot be automatically transferred over to children [14, 15 and 16]. These more recent cases arguably require that the special circumstances of children be considered before imposing a preventive detention remedy.

Civil commitment, at present, thus has significant protections: the person must be suffering from a mental illness (although the Supreme Court has left open whether an "emotional" abnormality is sufficient, the requirement of a mental illness is basic) and the person is entitled to procedural due process and, when possible, to treatment unless refused. Nonetheless, in achieving the balance required by procedural due process [17], preventive detention is a remedy that should be given close scrutiny by the courts in each individual case.

4. Registration Requirements – An Alternative to Incarceration

Because preventive detention is so intrusive into individual freedom, a remedy that is becoming even more popular is registration, especially the registration of sex offenders. The individual is required to register as an offender and report periodically to law enforcement authorities. The offenders must provide the authorities with their personal information and their movement is often restricted. Sometimes they cannot leave the state or a particular geographic area without prior notification to law enforcement authorities, or they are restricted from being present near schools or parks or other areas where children are likely to be present.

While allowing an individual more freedom than preventive detention, this remedy severely restricts the movement and privacy of persons subject to registration requirements. The requirements affect whether the person can get employment, where the person can live, and often affects basic family ties that are important to cultivate if the person is going to recover and not revert to more primitive anti-social behavior because he or she sees no realistic alternative. The registration requirements frequently last a lifetime. Furthermore, unlike preventive detention, which is limited to those persons who suffer from a mental illness and are dangerous, registration requirements are not limited to persons who are mentally ill or even to those persons who are potentially dangerous. The teenager convicted of statutory rape for having sex with an underage female is equally covered by the law as is a serial offender.

Nonetheless, the United States Supreme Court has upheld the power of Congress, as well as the states, to impose registration requirements on convicts deemed likely to commit future sex crimes. In *United States v. Kebodeaux* [18], the Supreme Court held that Congress has power to civilly commit a sex offender who fails to register after he was convicted by a court-martial of a federal sex offense and served his sentence. Justice Breyer stated that Congress acted reasonably because the law helped protect the public from federal sex offenders and thereby alleviated public safety. He relied on studies that recidivism rates for sex offenders were higher than for other types of criminals [p. 2503].

In *Smith v. Doe* [19], the United States Supreme Court

rejected argument that registration requirements retroactively target convicted sex offenders and thus are invalid *ex post facto* laws. The aim of these laws is not punishment, the Court held; the laws are part of a non-punitive regulatory scheme. The Court of Appeals had held that the law was punitive because it made the person virtually unemployable or unable to obtain housing, but the Supreme Court rejected this argument as mere ‘conjecture’ [p. 100]. In a dissenting opinion, Justice Ginsburg analogized registration to shaming punishments once used ‘to mark an offender as someone to be shunned’ [p. 117].

Because registration requirements affect most basic individual liberties and hurt not only ex-offenders, but their families, they should be carefully scrutinized to be sure that they do not impose punishment and that the limitations that they impose are related to public safety. As a result of their severe restrictions on the liberty of an individual, some state courts have reached results contrary to the US Supreme Court based on state constitutional law. For instance, the Supreme Court of Alaska in *Doe v. State* [20] expressly held that the Alaska Constitution provides more protection than the Supreme Court’s interpretation of the United States Constitution in *Smith v. Doe* [19] and that because of the severe impact of the Alaska registration requirement on ex-offenders and their families, the Alaska law really was a form of punishment that violated the Alaska Constitution’s prohibition against *ex post facto* laws.

Looked at from a drafting perspective, many registration requirements appear to be overbroad. At the very least, registration should not be imposed on those who do not have a mental illness or, at least who show no propensity for being a repeat offender. The United States Department of Housing and Urban Development has recognized that overbroad criminal background checks have a disparate impact on the ability of racial and ethnic minorities and on persons with disabilities to secure housing and that these overbroad restrictions may violate the Fair Housing Act [21]. The guidance urges housing providers to make individualized decisions before denying someone a dwelling covered by the Fair Housing Act.

Restricting the Internet – a collision with the First Amendment

Restrictions on sex offenders can also impair valuable First Amendment interests under the United States Constitution. Not only do the restrictions impair the exercise of the fundamental rights of familial privacy and association, they can also impair freedom of expression.

In *Packingham v. North Carolina* [22], the Supreme Court invalidated as a violation of the First Amendment freedom of speech a North Carolina statute that barred most convicted sex offenders from using virtually all websites that were also accessible to children. The Court commented that the law applied to about 20,000 persons in

North Carolina, and that the state had prosecuted over 1,000 persons for violating it [p. 1734]. The petitioner before the Supreme Court was a 21-year-old college student who had sex with a 13-year-old girl. He was convicted of having sex with a minor, and the requirement that he register as a sex offender could endure for 30 years or more. He was later indicted and convicted under the North Carolina statute barring sex-offenders access to the internet when, after the dismissal of a traffic ticket, he logged onto Facebook and posted a statement thanking God for the dismissal.

The Court found the North Carolina statute barring sex-offenders access to the internet to be substantially overbroad, noting that social media allowed persons to engage in a wide array of First Amendment protected activity. Nonetheless, the Court did caution that a narrowly tailored law that prohibited a sex offender from engaging in conduct that often presages a sexual crime, such as contacting a minor or collecting information about the minor on a website, could be lawfully proscribed [p. 1737].

The Supreme Court commented that ‘[o]f importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court’ [p. 1737]. In a separate concurring opinion, Justice Alito emphasized that, while he agreed that this law was overbroad, ‘[b]ecause protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens’ [p. 1740].

5. Conclusion-- Act with Caution

The advantage of the traditional criminal approach in prosecuting those persons suspected of a crime is that the state acts only after an individual has committed a criminal act and that the individual has been proven guilty beyond a reasonable doubt by a jury of his peers. Thus, there is no speculation about whether the dangerous conduct did occur and about whether the accused is responsible.

However, there is a clear societal benefit if the harm can be prevented before it occurs. In a few cases it may be relatively easy based on past behavior to predict that an individual will commit an anti-social act again. But predictions can be wrong, and there is a real injustice in curtailing the liberties of someone on the speculative belief that he or she may misbehave in the future. Scientific and psychological predictability is not always accurate and public policy can be driven by fear or even mass hysteria. Justice Brandeis’ warning in his famous concurrence in *Whitney v. California* [23] that fear breeds repression and that ‘Men feared witches and burnt women’ [p. 376] is especially true when the subject involves sexual predators,

and particularly sexual predators of children. The discredited opinion of Justice Holmes in *Buck v. Bell* [1] should be an additional warning why we must proceed with caution.

The harm produced by sex offenders, particularly those that might be classified as sociopaths, is real. But we must be very careful before we deprive someone of personal liberties based on speculation about what might happen in the future.

Laws detaining convicted persons after they have served their sentences or that require them to register for the rest of their lives, thereby restricting their movement may be ripe for reexamination by the United States Supreme Court. The Supreme Court in *United States v. Comstock* [4] specifically stated that it was not deciding whether the federal preventive detention law complied with due process and equal protection requirements [p. 149-50]. Further, the Supreme Court in *Packingham v. North Carolina* [22] observed that it was troubling that ‘the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system’ [p. 1737], but left that issue for another day.

We should be especially sensitive to the civil rights issues involved in surveillance and registration. Computers make us all more vulnerable and provide many opportunities for abuse. Computers provide opportunities to sex offenders to exploit youth and other vulnerable persons. But computers and other forms of modern surveillance also make it more difficult for those who want to transform their lives and put their past mistakes aside, especially those mistakes committed in their youth. As recognized by the Alaska Supreme Court in *Doe v. State* [20], a criminal record has ramifications for years to come on every aspect of a person’s life. Surveillance, whether it be by registration and periodic reporting requirements or by electronic means, is a serious infringement upon individual liberty for anyone.

When these issues are presented before the courts, the testimony of medical experts will no doubt be crucial in establishing whether such restrictions can be justified. Both the legal profession and the medical profession bear a heavy responsibility in ensuring that the courts reach the right answer. We should take our cue from the unfortunate result in *Buck v. Bell* [1] and require our courts and legislatures to produce strong individualized evidence that a person is suffering from a mental defect that causes the person to be a danger, or at the very least that the person cannot control his or her behavior and is likely to pose a future danger to society. Broad generalizations such as used by Justice Breyer in *United States v. Kebodeaux* [18]

are not sufficient without an individualized showing that this particular individual is dangerous. Policies involving the taking of individual liberties should not be the result of kneejerk reaction by the public or by politicians after a particularly shocking crime has occurred. The careful consideration given by the majority justices to the First Amendment issue in *Packingham v. North Carolina* [22], should be the norm, not only in First Amendment cases, but in all cases where fundamental liberties are at stake.

REFERENCES

- [1] *Buck v. Bell*, 274 U.S. 200 (1927).
- [2] *Skinner v. Oklahoma*, 316 U.S. 536 (1942).
- [3] *Greenwood v. United States*, 350 U.S. 366 (1956).
- [4] *United States v. Comstock*, 560 U.S. 126 (2010).
- [5] *O’Connor v. Donaldson*, 522 U.S. 563 (1975).
- [6] *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).
- [7] *Kansas v. Hendricks*, 521 U.S. 346 (1997).
- [8] *Kansas v. Crane*, 534 U.S. 407 (2002).
- [9] *Minnesota v. Probate Court*, 309 U.S. 270 (1940).
- [10] *People v. Gunderson*, 2017 IL App. (1st) 153533 (1st Dist., June 20, 1017) (Unpublished opinion).
- [11] *Baxstrom v. Herold*, 383 U.S. 107 (1966).
- [12] *Washington v. Harper*, 494 U.S. 210 (1990).
- [13] *Shall v. Martin*, 467 U.S. 253, 264 (1984).
- [14] *Miller v. Alabama*, 567 U.S. 460 (2012).
- [15] *Graham v. Florida*, 560 U.S. 48 (2010).
- [16] *Roper v. Simmons*, 543 U.S. 551 (2005).
- [17] *Mathews v. Eldridge*, 424 U.S. 319 (1976).
- [18] *United States v. Kebodeaux*, 133 S.Ct. 2496 (2013).
- [19] *Smith v. Doe*, 538 U.S. 84 (2003).
- [20] *Doe v. State*, 189 P.3d 999 (Alaska 2008).
- [21] HUD General Counsel’s Guidance on the Use of Criminal Background Checks (4 April 2016) https://www.hud.gov/sites/documents/HUD_OGCGUIDAP_PFHASTANDCR.PDF.
- [22] *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).
- [23] *Whitney v. California*, 274 U.S.357 (1927).