

MENTAL HEALTH AMERICA

Position Statement 55: Confining Sexual Predators in the Mental Health System Policy

[Home](#)> [About Us](#)> [What We Believe](#)> [Position Statements](#)> Position Statement 55: Confining Sexual Predators in the Mental Health System

At least seventeen states have passed various versions of what has come to be called "sexual predator" legislation. These laws provide for indefinite involuntary commitment of sex offenders to mental health treatment facilities after they complete prison terms for serious sex offenses. The impetus for this legislation was the repeal of the indeterminate sentencing laws under which serious sex offenders previously were confined in prison until prison officials were satisfied that they were no longer dangerous and the highly publicized accounts of a number of people who, upon release from prison for sex crimes, committed additional heinous crimes, in some cases against children. The United States Supreme Court narrowly approved sexual predator laws in a 1997 decision, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Mental Health America (MHA) believes that these laws do not constitute sound public policy. They focus on punishment rather than treatment, deal with people who often do not have a treatable mental illness, increase stigma, distort civil commitment, risk the safety of other persons in mental health facilities, divert resources from mental health care and inappropriately burden the mental health system with a criminal justice function for which it is not funded or equipped.

**Background: Mental Health America Concerns**

Sexual crimes, especially against children, are an unspeakable tragedy and among the most horrible forms of violence imaginable. Among the many interests to be served in this complex situation, the protection of children and the prevention of violence are the most important goals. In the case of sexual predators who prove themselves not to be amenable to treatment and who remain a threat to the community, continued separation from society in the interest of public safety is necessary. However, involuntary commitment of sex offenders to mental health treatment facilities after they complete prison terms for serious sex offenses is an inappropriate response to this problem.

**1. The Mental Health System is for Treatment, not Punishment.** The mental health

system is not the appropriate place for long-term confinement of sexual predators. Sexual predator statutes usually state that the continued confinement of sex offenders in mental health systems is for the safety of the public, not the treatment of the offender. The dissent in the *Hendricks* case agreed with the Kansas Supreme Court that the purpose of the Kansas statute was punishment. While public safety is an appropriate societal goal, the purpose of the mental health system is treatment. Sexual predator laws disrupt the state's ability to provide treatment to people who need it and can benefit from it and undermine the mission and the integrity of the mental health system. If the societal goal of sexual predator laws is incapacitation and incarceration of potentially dangerous offenders, the criminal justice system is the appropriate place to pursue that goal. If current criminal justice statutes do not allow for sufficient periods of incarceration because of the widespread repeal of indeterminate sentencing laws, then those statutes should be changed.

**2. Sex Offenders Often Do Not Have a Treatable Mental Illness.** Many sexual predator statutes refer generically to sex offenders as having a mental illness. In fact, many sex offenders do not have a mental illness that can be treated under our current understanding and available evidence. Rather, the sex offenses under which sexual predators are convicted are a manifestation of what the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-IV) refers to as "Antisocial Personality Disorder," that is not amenable to currently available treatments.<sup>1</sup> Thus, mental health professionals have difficulty determining which sex offenders are likely to be dangerous if not committed and what if any treatment should be provided. This means that courts, which must rely on professional expertise, will regularly make mistakes in deciding who should be committed or released, with serious consequences for both the public and the offender.

**3. Sexual Predator Legislation Increases Stigma.** Linking mental illness with sexually predatory behavior in the public consciousness and in sexual predator statutes fuels the stigma attached to mental illness and to treatment in the mental health system. People with mental health conditions, their families, and advocates

have worked for decades to dispel the notion that people with mental illness are violent or dangerous. By associating sexually violent behavior with mental illness, these statutes threaten gains that have been made in the perception, understanding, acceptance, and non-discriminatory treatment of people with mental health conditions.

**4. Sexual Predator Legislation Distorts Civil Commitment.** Sexual predator statutes distort the meaning and practice of civil commitment. Involuntary civil commitment is very controversial among people with mental health conditions and their families, with some people seeing it as inherently illegitimate because of its coercive nature, and others seeing it as an undesirable but sometimes necessary last resort. MHA shares the latter view. See Mental Health America Policy P-36, "Involuntary Treatment." Involuntary civil commitment may be necessary in some cases as a last resort to protect the health and safety of a person with a mental illness or those in contact with him/her. But the basic rationale of involuntary confinement is that the person is found to be dangerous to self or others at the time of the commitment, that he or she receives treatment and that the confinement is time-limited and paired with a course of treatment. None of these essential elements is present in the case of a sex offender committed after serving a prison sentence. Thus, sexual predator commitments are an abuse of civil commitment.

**5. Confining Sex Offenders with Persons with Serious Mental Illnesses is Unconscionable.** To detain potentially violent sexual offenders in mental health facilities puts other people with mental health conditions in mental health facilities at risk. Even secure forensic units have a treatment purpose. To use such units for the detention of offenders who do not have a treatable mental health condition is a threat to the safety and viability of the mental health system and a waste of precious treatment resources.

**6. Sexual Predator Legislation is Criminal Justice Legislation in Disguise.** Sexual predator laws blur the line between the mental health and criminal justice systems in ways that confuse policy makers, including judges, mislead

the public and are unfair even to those who, due to their behavior, may be deserving of long-term incarceration. The criminal justice system is intended to punish only those persons who commit crimes of their own free will. Thus, all but five states provide some form of an insanity defense for those whose crimes are closely related to serious mental illness. Other provisions in the criminal law requiring proof of a specific mental state also contribute to this important protection. Thus, only those persons who choose to commit a sex offense should be convicted and punished for these offenses. The United States Supreme Court has determined that only those sexual predators who are unable to control their sexually violent behavior may be committed under sexual predator laws. *Seling v. Young*, 531 U.S. 250 (2001). Conversely, sexual predator laws are only applied to persons who have already been convicted and served a term of imprisonment, having been found criminally responsible for their sexually violent behavior. It is unfair to first punish someone (find him/her at fault) for a crime and then commit the person because his/her criminal behavior is caused by a mental illness and, therefore, not his/her fault. Given this contradiction, it is not surprising that these laws were upheld by the Supreme Court by only a one-vote margin in *Kansas v. Hendricks*, 521 U.S. 346 (1997). Moreover, the Court remains badly divided over these laws. In *Kansas v. Crane*, 534 U.S. 407 (2002), the Court could not reach a consensus on what evidence was needed to establish that someone could not control him/herself and rejected the Kansas Supreme Court's interpretation of that state's statute. The confusion over whether sex offenders are deserving of punishment as criminals or entitled to treatment due to an illness often carries over to the terms of their incarceration. In some states, sexual predators must be cared for in facilities operated by the state mental health authority in a building which is located inside a prison operated by the state correctional authority. This split of authority further confuses employees, detainees and the public about the purpose of these statutes. The United States Supreme Court has demonstrated its own ambivalence about whether these laws are civil or criminal. In upholding the power of the federal government to enact a sex offender commitment law in *United States v. Comstock*, \_\_\_ U.S. \_\_\_, 130 Sup. Ct. 1949 (2010), the Court held that the law was justified as part of the power of the federal government under the "necessary and proper" clause of the United

States Constitution to criminalize conduct.

**Sexual Predator Legislation Diverts Already Inadequate Resources from Mental Health to Criminal Justice. Public mental health systems in most states and localities are financially stressed and in many cases inadequately funded to meet the mental health treatment needs of non-offenders with serious emotional disturbances and serious mental illnesses. Because most sex offenders do not have a diagnosable mental health condition relating to their offense, it is extremely difficult to determine which persons who have committed sex offenses should be committed, to provide effective treatment for those who are committed and to determine whether, when and under what conditions a committed sex offender should be released. Thus, states have been forced to spend substantial funds in enforcing these laws. To divert funding to incarceration of sexual predators who will require enormous resources for very long periods of stay diverts scarce resources from mental health systems already experiencing a financial crisis.**

**Action Steps**

1. **Research.** States should increase research on sexual disorders and sex offenders to more clearly differentiate between those offenders who are amenable to treatment and those who are not. This will enable a more targeted and appropriate mix of incarceration and treatment that will increase the chances of preventing recurrence and will more appropriately use the tools of both the criminal justice system and the mental health system.
2. **Revise Sentencing Laws and Guidelines.** States should address statutes and policies regarding sentencing and incarceration of sex offenders. If the new determinate sentences for sex offenders are seen by communities as inadequate, then sentencing guidelines and laws should be revised. The mental health system should not be used as a dumping ground for criminal offenders who have served their time but are still seen as dangerous.
3. **Begin Treatment in Prison.** To the extent that some sex offenders have a treatable mental illness, prisons should begin providing treatment for that illness as soon as the offender is incarcerated. Treatment, including where appropriate involuntary commitment under the ordinary civil commitment standards and procedures, may be continued at the end of any prison sentence.
4. **Early Intervention.** States should provide comprehensive diagnostic and treatment

services in juvenile corrections systems and all other child-serving systems to identify potential predators early. There is substantial evidence that "sexual predators" quite frequently were themselves victims of sexual violence in childhood or adolescence. It is in everyone's interest to identify and treat at-risk adolescents before they become sexual predators.

5. **Study.** Affiliates and advocates should study the problems of sexual abuse and the criminal justice and mental health response in their states. The effects of new initiatives like sex offender registration and sexual predator legislation need to be documented, and new approaches need to be developed to protect the public, persons within the mental health system and persons convicted of sex offenses alike.

**Effective Period**

The Mental Health America Board of Directors approved this policy on March 5, 2011. It will remain in effect for five (5) years and is reviewed as required by the Mental Health America Public Policy Committee.

**Expiration:** December 31, 2016

1. *The Hendricks Court rejected the position taken in briefs amicus curiae from both the American Psychiatric Association and the American Psychological Association that the Kansas statute allowed the commitment of persons who were not mentally ill. The majority held that the Hendricks must be mentally ill solely because he could not control himself.*

*See, for example, the Illinois law, 725 ILCS 207/50*

**LEAST-RESTRICTIVE-MEANS TEST**

The rule that a law or governmental regulation, even when based on a legitimate governmental interest, should be crafted in a way that will protect individual civil liberties as much as possible, and should be only as restrictive as is necessary to accomplish a legitimate governmental purpose.

Black's Law Dictionary (8th ed. 2004)

*This is the test that is supposed to be applied to any law, regulation or rule used to govern our detention.*

*Make sure your attorney is aware of it.*

Monday, August 15, 2011

**Pretrial Civil Detention of Sex Offenders Unlawful, Judge Rules**

A New York law mandating that sex offenders be confined while awaiting civil commitment trials is unconstitutional, a judge has ruled. But the ruling may not make much difference to most sex offenders whom the state wants to civilly detain, because they are waiving away their rights to a trial.

Supreme Court Justice Colleen Duffy ruled that New York’s 2007 Sex Offender Management and Treatment Act is unconstitutional because it does not allow for any less restrictive remedy such as supervised release. Under the law, if a court finds probable cause that a convicted sex offender remains a danger, the individual must be confined until a civil trial, which can take a year or more.

Ironically, if the sex offender is ultimately found to suffer from a “mental abnormality” that renders him potentially dangerous to the public, the court then has the option of ordering intensive community supervision rather than involuntarily confinement in a mental institution.

In the case at hand, the judge noted that the state’s Office of Mental Health had already determined that “Enrique T.” would be a good candidate for strict, outpatient supervision rather than confinement. She ordered the immediate release of the detainee:

**“Respondent is faced with a Morton’s Fork – he must either choose to enforce his right to a jury trial and continue to be detained for an unknown period of time in a psychiatric facility awaiting trial on this matter or surrender his right to trial and consent to a finding of mental abnormality so that he may be immediately released back to the community under [strict and intensive supervision and treatment]. Due process cannot countenance a statute that mandates such a choice.”**

Her decision follows a federal court decision earlier this year that came to the same conclusion, according to a report by John Caher in the *New York Law Journal*.

**Sex Offenders Choosing Not to Fight Commitment**

Unless these rulings result in complete scrapping of the state’s civil commitment scheme, which is unlikely, it is unclear how many sex offenders whom the state seeks to detain will end up benefitting. For reasons that experts call “inexplicable,” the majority of

offenders are waiving their right to a jury trial, according to a separate report in the *New York Law Journal*. Reports John Caher:

**Shortly after the Sex Offender Management and Treatment Act took effect in April 2007, authorities detected an unexpected and inexplicable phenomenon: Sex offenders targeted for civil confinement after serving their prison sentences were overwhelmingly waiving their right to a jury trial and consenting to confinement. Nearly 92 percent, 33 of 36 of the sex offenders civilly confined during the first year of the law’s enactment had agreed to placement in a mental institution following release from prison. And while those numbers have tapered off in the last three years, a large portion of the sex offenders targeted for civil management continue to forego their right to a trial and consent to confinement, even though the most serious consequence of going to trial is confinement...**

**No one is sure why sex offenders are consenting to confinement and giving up their liberty when... they seemingly have nothing to lose. At trial after they have served a criminal sentence, the state has to prove by the high standard of clear and convincing evidence that the respondent suffers from a “mental abnormality” that predisposes him or her to commit sex crimes. A unanimous verdict is required, and if a unanimous verdict is not reached, the offender will likely go free since most have served the maximum sentence and are not on parole.**

**The success rate when offenders go to trial is fairly high, about 15 percent overall and more than 20 percent when they opt for a jury rather than a bench trial.**

Theories offered by an assortment of experts and state officials to explain this unexpected trend include:

Sex offenders believe that confinement is inevitable so choose to avoid the added humiliation and angst of trial.

Sex offenders know they are dangerous and need help in order to not reoffend.

Some offenders cannot find any doctor willing to testify on their behalf.

Some offenders are so marginalized and despised that they have no options for employment or housing in the community.

“A great deal of these folks have no social safety net,” said defense attorney Thomas Callaghan. “Many of them are estranged from their families. Very few are married.

They realize they can fight, but they really have no place to go.”

Lesley M. DeLia, another legal services attorney, echoed this observation. She said some clients were initially eager to go to court, but balked as their trial date loomed closer:

**“They know it is not a friendly world out there if they get out. They are scared about what life will be like... and some of them just don’t want to deal with it. There is no housing for them. They can’t get jobs. Others are just so institutionalized they are afraid to go. We did have one fellow who said he knows his is not ready and does not want to get out and do it again.”**

*Karen Franklin, Ph.D. is a forensic psychologist and adjunct professor at Alliant University in Northern California. She is a former criminal investigator and legal affairs reporter. This blog features news and commentary pertaining to forensic psychology, criminology, and psychology-law. If you find it useful, you may subscribe to the newsletter. See Dr. Franklin’s website for more information.*

**9-11 (Ten Years Later)**

*The world as we had known it ended on September 11, 2011 when four airliners in the United States were hijacked and used as weapons against our country. For the first time, terrorists had struck a blow against the interior of the United States in multiple locations.*

*Heroically, the passengers on Flight 93 caused their aircraft to crash in Pennsylvania; saving the lives of a untold number of people that would have died on the ground if that plane had hit its target.*

*When the smoke cleared, the United States had changed forever. Many of our citizens had died in the Pennsylvania field, the Twin Towers, and the Pentagon. The passengers of four airliners had been murdered as well.*

***As a nation we will always remember those that died on 9-11.***

Sadly, something else died that day. The concept of “freedom for all” as written into all our founding fathers’ ideas of what this country was to be.

Farewell then, to Freedom.

SEPTEMBER 2011

**The Insider** (in all its forms) is being produced to present news related to the Sexually Violent Predator Act, conditions of confinement here at Coalinga State Hospital, and daily events. It is also here to give every member of this population (6600 or 2972) and a chance to have their voice heard somewhere other than in these halls. We are inviting everyone to contribute something.

**The Insider** is available monthly in JPEG format for viewing on your DVD players within the hospital. For your connections outside, **The Insider Online** is at [www.defenseforsvp.com](http://www.defenseforsvp.com). There is also a four page edition, **The Insider Outreach** that is being produced and sent to other institutions with SVP Detainees.

**GUIDELINES FOR PUBLICATION IN THE INSIDER**

All submissions to **The Insider** are subject to editing for proper grammar, punctuation, length, language, and clarity. They may not include hate-speech, inciting or inflammatory language, or unnecessary profanity. Submissions may be returned to the individual author for revision or rejected outright.

\*\*\*\*\*

**The Insider** is produced at Coalinga State Hospital, in Coalinga, California. Material published in this electronic paper is written, edited, and published entirely by hospital residents without input or editing by staff.

The ideas and opinions expressed herein do not reflect the opinions of the hospital's staff or its administration, unless otherwise noted.

**The Insider** is dedicated to fair, unbiased and impartial reporting of information, current events and news that is of interest to civil detainees and others who are interested in finding out about the real people here. Any questions and correspondence can be submitted by mail to:

William Hester  
CO#532-2/Unit 4  
P.O. Box 5003  
Coalinga, CA 93210-5003

California Department of Mental Health

1600 9<sup>th</sup> Street, Sacramento, CA 95814

(916) 651-1843

Date: July 5, 2011  
To: SVP Clinical Evaluators  
From: Sex Offender Commitment Program  
Subject: **EVALUATOR INFORMATION  
NOTICE No. 2011-01**

[ *Information Notices convey information to clinical evaluators in the Sexually Violent Predator (SVP) civil commitment program (WIC 6600, et seq) about assessments and evaluations. Information Notices will be made available to District Attorneys and defense attorneys. Evaluators are encouraged to keep these notices for future reference. ]*

The Department of Mental Health will regularly issue information notices to clarify and reiterate evaluation issues. The Department issues this information notice to discuss the requirements of Welfare and Institutions Code (WIC) Section 6600 (c).

WIC 6600(c) states:

*Diagnosed mental disorder includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.*

The statutory language requires evaluators to determine whether a diagnosed mental disorder is present. The statute does not limit the term "congenital or acquired conditions" to any subcategory of conditions or diagnoses. Specifically, the statute does not limit the condition to paraphilias (those disorders characterized by recurrent, intense sexually arousing fantasies, sexual urges, or behavior). Likewise, the statutory language does not qualify or limit the term "predisposes" to paraphilic predisposition.

In the context of WIC 6600(c), "congenital or acquired condition" designates by plain language that any condition, whether congenital (present at birth) or acquired (post birth) fulfills the requirements of the statute. Best practice indicates that a congenital or acquired condition is a condition recognized and listed in the contemporary edition of the Diagnostic and Statistical Manual (DSM) of the American Psychiatric Association. In plain English the word "predispose" is not

read to contain *paraphilia* or *paraphilic*.

Evaluators must consider whether or not other conditions predispose the person to the commission of the criminal sexual acts to the degree and of the kind described in the WIC 6600(c). Considering only paraphilic conditions or only paraphilic predisposition is insufficient.

A condition that predisposes as described in WIC 6600(c) must also "affect the emotion or volitional capacity" in order to complete the finding of "diagnosed mental disorder."

An evaluator exercises independent judgment regarding the diagnoses of mental conditions. Evaluators must correctly understand and apply the criteria in WIC 6600(c) in their reports so that is understandable by readers of reasonable intelligence with no special education or knowledge in the fields of psychiatry, psychology, or the law.

If you have questions regarding this notice please contact Ron Mihordin, M.D., J.D., M.S.P., Acting Clinical Director of Forensic Evaluation Services, Department of Mental Health at 916-654-3414 or [Ronald.mihordin@dmh.ca.gov](mailto:Ronald.mihordin@dmh.ca.gov).

California Department of Mental Health  
1600 9<sup>th</sup> Street, Sacramento, CA 95814  
(916) 651-1843

Date: February 16, 2010  
To: Steve McManus  
From: Department of Mental Health  
Sex Offender Commitment Program

**Subject: Assignment of New Evaluations pursuant to Ronje**

Per our discussion with our legal office we will be utilizing the following process when scheduling new evaluations court ordered pursuant to Ronje:

1. Evaluators currently on the case will be assigned, unless the court orders us to assign new evaluators.
2. In instances in which more than two evaluators are on a case, only the evaluators who have found the person positive will be scheduled to complete new evaluations. Evaluators who have opined that the person does not meet criteria will not be assigned new evaluations as the outcome of the negative evaluation(s) is unlikely to change.

Robert Lucas  
Chief  
Sex Offender Commitment Program