



JUST FUTURE PROJECT

Shadow Prisons in the United States

Shadow prisons are carceral settings where people are indefinitely confined under civil law *after* completing a prison sentence.

These facilities violate a fundamental principle of our society. When someone has completed their prison sentence and repaid their debt to society, they get to come home. No one should be imprisoned *for what they might do in the future*. And yet, that is the lived experience of the over 6,100 shadow prisoners throughout the United States.¹ Shadow prisoners are detained based on unfounded claims² about who is “likely” to reoffend in the future.³ Given that our legal system often isn’t very good at figuring out who committed crimes in the past,⁴ how can it be expected to accurately or reliably predict who will commit future crime? The answer is it cannot.

Many of the protections afforded under criminal law are absent for shadow prisoners. Because shadow prisons putatively operate under ‘civil’ law, they exist outside the hardwon due process protections and other rights afforded under criminal law. One federal district court judge concluded, “The overwhelming evidence at trial established that Minnesota’s civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system...”⁵ The UK High Court has called these American laws a “flagrant” violation of international human rights standards.⁶

Shadow prisons have a controversial history. Washington State became the first jurisdiction in the U.S. to enact a law allowing for the indefinite detention of some persons following their criminal sentence — in reaction to a very high-profile crime by someone on parole. Between 1990 and 2007, twenty states and the federal government instituted indefinite, post-sentence ‘civil’ confinement schemes specifically targeting persons with sex-related convictions.⁷ These legislative schemes *pretend* to follow the traditional medical model of involuntary psychiatric commitment to prospectively confine “for treatment” persons with serious mental disorders who are a danger to themselves or others.⁸ However, the American Psychiatric Association “vigorously oppose[s]” these laws and says they are a “misuse of psychiatry.”⁹ Advocates describe these laws as pre-crime preventative detention systems, incarcerating for future crime.

At best these laws are constitutionally dubious. A narrow 5-4 decision from the United States Supreme Court in 1997 upheld the constitutionality of these laws — *in theory*. However, Justice Kennedy warned that what the state promised it was doing in *Kansas v. Hendricks* might not be the case in practice. Indefinite post-sentence civil confinement schemes seek to create a backdoor around the Constitutional protections against double jeopardy and to impose a *de facto* life sentence on persons who have already completed their prison sentences. Legal scholars have vehemently criticized this

¹ Trevor Hoppe, et al., “Civil Commitment of People Convicted of Sex Offenses in the United States,” *The Williams Institute* (October 2020); Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2024,” *Prison Policy Initiative* (March 14, 2024).

² David S. Prescott, “Our Deeply Flawed Civil Commitment System,” *Cato Unbound* (June 2015).

³ Leon Neyfakh, “It’s Worse Than Prison,” *Slate* (October 09, 2015 10:52 am); Kerry Kotler, “Civil Commitment in New York is Worse Than Prison,” *Just Future Project* (September 11, 2019).

⁴ Adam Benforado “The Unsettling Truth About Our Legal System,” *American Bar Association*; The National Registry of Exonerations, “Exonerations by Year,” *University of Michigan* (retrieved June 12, 2024).

⁵ *Karsjens et al. v. Jesson*, Civil No. 11-3659 (DWF/JJK) (D. Minn. June 17, 2015). Findings of Fact, Conclusions, Law, and Order, p.4.

⁶ Leon Neyfakh, “England Refuses to Extradite Alleged Sex Offender,” *Slate* (October 21, 2015).

⁷ Tamara Rice Lave and Franklin E. Zimring, “Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla’s Dangerous Data,” *55 American Criminal Law Review* (2018), p. 705.

⁸ Jacob Sullum, “Civil Commitment of Sex Offenders Pretends Prisoners are Patients,” *Reason Foundation* (February 10, 2021).

⁹ American Psychiatric Association Task Force on Sexually Dangerous Offenders, “Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association,” *American Psychiatric Association* (Washington, DC: 1999).

abandonment of key legal principles in pursuit of a “shadow jurisprudence” that applies only to the most marginalized persons in our society.¹⁰ This is sometimes referred to as “sex offender exceptionalism.”¹¹

No one really knows how many people are impacted by these laws. There are 24 shadow prisons in the United States.¹² Twenty states and the federal government have laws that allow the state to indefinitely detain some persons past their release date.¹³ No study has published reliable data on the total number of shadow prisoners and the US DOJ’s Bureau of Justice statistics does not currently track these facilities.¹⁴

If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it”

— Justice Kennedy, *Kansas v. Hendricks* (1997)

These laws have zero impact on public safety. Thirty states do not have systems of pre-crime preventative detention. Those states do not have higher rates of sexual violence or sex-related recidivism¹⁵ — which begs the question whether shadow prisons are actually detaining prospective recidivists.

The odds of getting out are always slim, but vary widely by jurisdiction. They are held indefinitely, often for the rest of their lives. In some states, a shadow prisoner is 5 to 9 times more likely to die in custody than to ever be released.¹⁶ Shadow prisoners are subjected to a “system with ‘chutes-and-ladders’-type mechanisms for impeding progression, without periodic review of progress, which has the effect of confinement to the MSOP facilities for life.”¹⁷ In Minnesota, only 21 of the 946 shadow prisoners have ever been released — at least 94 have died while being “treated.”¹⁸ New York is exceptional in that it currently has the highest rate of unconditional release of any of the 21 systems of pre-crime preventative detention in the U.S. at 25 percent.¹⁹

Shadow prisons are exorbitantly expensive. The reported cost to indefinitely detain one shadow prisoner in New York State was \$894.37 per day in FY2016 (or \$326,445.05 per year).²⁰ Unlike regular prison, shadow prisons have to pretend to provide psychological treatment to justify their existence.²¹ These \$100+ million annual pricetags are massive wastes of resources desperately needed to provide victim services and primary prevention, which are woefully underfunded.²²

Hopelessness is the most common feeling for people held in these “treatment” facilities. In some instances, people will commit a new crime in the shadow prison as a way to get sent back to regular prison, which speaks to the terrible nature of these carceral settings.²³ The most psychologically debilitating element of shadow prisons is that while every single one of these people had a release date while they were in prison, none of the shadow prisoners have a release date.

¹⁰ Eric Janus, “The Rise of the Preventive State,” *Cato Unbound* (June 5, 2015).

¹¹ Corey Rayburn Yung, “Sex Offender Exceptionalism and Preventative Detention,” 101 *Journal of Crime & Criminology* 969 (2011); Aya Gruber, “Sex Exceptionalism in Criminal Law,” 75 *Stanford Law Review* 755 (2023).

¹² John Powers, “United States Map of Pre-crime Preventative Detention Systems in 2018,” *Just Future Project* (2020).

¹³ National District Attorneys Association (NDAA), “Civil Commitment of Sex Offenders,” (April 2012); Tamara Rice Lave, “Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments too Far?” 14 *Journal of Constitutional Law* 2 (2011), 391.

¹⁴ Galen Baughman, “How many are held under ‘sex offender civil commitment’ laws?” *Just Future Project* (November 26, 2019).

¹⁵ Tamara Rice Lave and Justin McCrary, “Do Sexually Violent Predator Laws Violate Double Jeopardy or Substantive Due Process? An Empirical Inquiry,” 78 *Brooklyn Law Review* 4 (2013).

¹⁶ Janus 2024; Brad Cooper and Tony Rizzo, “Sex offender treatment programs are under scrutiny,” *Wichita Eagle* (September 16, 2013 9:14 pm). (“In the program’s nearly 20-year history, it has been more likely that a resident will leave in a hearse than walk out to rejoin society. So far, only three have earned their freedom; 22 have died.”)

¹⁷ Jacob Sullum, “Minnesota’s Indefinite Detention of Sex Offenders Is Ineffective As Well As Unjust,” *Reason* (May 06, 2024)

¹⁸ Eric Janus, et al., “Sex Offense Civil Commitment: Minnesota’s Failed Investment and the \$100 Million Opportunity to Stop Sexual Violence,” *Sex Offense Litigation and Policy Resource Center (SOLPRC) at Mitchell Hamline School of Law* (April 16, 2024).

¹⁹ Office of Mental Health, “2020 Annual Report on the Implementation of Mental Hygiene Law Article 10 Sex Offender Management and Treatment Act of 2007,” *New York State* (January 2021).

²⁰ OMH Response to FOIA Request by Charles Gerena. On file with Just Future Project. See also Barbara Koepfel, “Modern Day Gulag in the Golden State,” *The Washington Spectator* (June 4, 2019). (“In New York, it cost taxpayers \$117 million in 2017 alone for 359 SVPs.” That’s about \$325,905.29 per person per year. By comparison, to hold a regular prisoner costs about one tenth of that.)

²¹ Jeslyn A. Miller, “Sex Offender Civil Commitment: The Treatment Paradox,” 98 *California Law Review* 2093 (2010). (“These schemes survive constitutional scrutiny on the grounds that they are not a second prison sentence, but rather serve the non-criminal ends of protecting society and helping treat violent sex offenders. The underlying legislation confirms the treatment objective by elaborating statutory guidelines for treatment programs. This Comment argues that treatment — although guaranteed by statute, legislative findings, case law, and the constitution — is an empty promise. Indeed, participation in treatment harms the very offender that it purports to help.”)

²² Janus 2024

²³ Melissa Hamilton, “Risk-Needs Assessment: Constitutional and Ethical Challenges,” 52 *Am. Crim. L. Rev.* 231 (2015)