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Searching for a Solution: How to Punish, Restrain and Treat Sex Offenders

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More than perhaps any other crime, sex offenses have caught the attention of American legislators, the media and the public. With accelerating speed, state legislatures and Congress in recent years have criminalized new sexually motivated behavior and passed legislation that allows for heightened sentences. They have also taken additional steps which increase the *de facto*, post-incarceration impact of a conviction for a sex offense by imposing prolonged incapacitation and increased social controls, which may lead to the perpetrator being ostracized by the community. Legislative proposals are often a reaction to the specific and explicit demand of victims' families. Sometimes, however, legislators act in response to the diffuse public fear of sexual offenders, which is primarily based on the media description of particularly gruesome, sexually motivated murders, especially of young children.

Two of our foreign contributors, Hans-Jörg Albrecht and David A. Thomas, indicate that sex offender sentencing is also a hot topic in Europe. Public hysteria about a few widely publicized sex crimes and highly articulate and vociferous victims' rights lobby groups have also driven the passage of new legislation abroad. Even though U.S. sentences continue to remain substantially longer than those in European countries, legislative changes there have also increased sentence lengths dramatically. In FSR's Canada issue earlier this year, Michael Jackson pointed to a similar development across our Northern border where widely publicized sex crimes fueled the demand for preventive detention, which is similar to our habitual offender laws, during the 1980s.[1] On both continents, sexual offenses committed against children have triggered the most powerful public responses. A number of legislative proposals are even popularly referred to by the first names of child victims – Megan's Law in the United States, Natalie's Law in Germany.

I. The Purpose of Today's Sex Offender Sentencing: Incapacitation—and More Incapacitation

The public considers sex offenders mentally or at least biologically stunted individuals who act upon uncontrollable urges, and therefore present a continuing, unmanageable and amorphous threat. The widely popular term "sexual predator" relegates these perpetrators to the image of instinct-driven, dangerous animals. Sexual offenders are set apart not only from the general population but even from other criminals.

While the public empathizes with the victims and their families, its fear of "sexual predators" stems from the difficulty of detecting them, concern about their re-offending and the perceived impossibility of curing them. As a consequence of the conceptualization of sexual offenders as "predators," desert-based sentencing becomes largely irrelevant. Even though retributory ideals and the proportionality principle are thought to dominate most modern sentencing regimes, punishment does not play a large part in the present discourse over what to do with sexual offenders. Instead incapacitation is at the heart of the presumed solution because sexual offenders are perceived as a persistent threat. While incapacitation implies primarily long-term imprisonment or indeterminate civil commitment, often combined with ineffective or almost non-existent treatment programs, proposals to mandate biological and/or chemical castration stem from the same desire to prevent recidivism.

The articles in this Issue outline the responses of some states and the federal system to

sex offenses and support the perception that legislators and the public view incapacitation as the sole viable option for sex offenders. Anne Wall and Roxann Lieb and Scott Matson demonstrate how the states of Minnesota and Washington, respectively, have steadily increased the length of presumptive prison sentences for sex offenders. The same holds true, as Pamela Montgomery shows, for federal sex crimes. Minnesota also permits life imprisonment for certain repeat offenders. However, so far that provision has been used rarely. In England, David Thomas reports, persistent offenders who constitute an ongoing danger may be statutorily imprisoned "'for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.'" The Crime (Sentences) Act of 1997 mandates that the court impose a life sentence on any adult offender who commits a serious crime if he has a prior conviction for another such offense.

Despite their extended length, none of these sentence increases, ultimately, presents a "solution." As Chris Clarkson and Rod Morgan once put it so bluntly, "[s]ince in many of the cases the psychiatric reports indicate that the offender would remain a serious risk indefinitely, the extra time is little more than a sop to public opinion and postpones rather than solves the problem of what to do with these offenders."[2] After all, in most cases the offender will eventually be released back into society.

States have resorted to a panoply of additional measures to remove offenders from society permanently, or to label them social outcasts so as to maximize community supervision in an effort to prevent them from re-offending. Generally, courts impose longer supervisory periods on sexual offenders than other convicted criminals. Minnesota, for example, requires not only that certain more serious sexual offenders and recidivists be under supervised release upon their release from prison but also that they serve additional time under mandatory supervision. Canada and England have also imposed long supervisory terms on certain sexual offenders. During this time period offenders are supposed to re-integrate into society while being treated and monitored intensely.

Governments go yet further in their continued efforts to monitor sexual offenders. Registration and community notification laws are designed to help law-enforcement agencies keep track of sexual offenders. Washington state pioneered community notification statutes which, as of October 1997, have been passed by 47 states and the federal government.[3] Eric Lotke points out that this legislation "increases the *de facto* sentence by adding a negative collateral consequence to the conviction," and his article describes how it fails to serve its intended purposes.

Civil commitment proceedings constitute another possible way of removing sexual offenders from society for an indeterminate period of time. In 1997, the U.S. Supreme Court upheld the Kansas civil commitment statute that permits the state to commit persons who suffer from a "mental abnormality" or a "personality disorder" and therefore are likely to engage in "predatory acts of sexual violence."[4] It found that the proceedings established in the act satisfied "substantive due process" requirements and did not amount to a second criminal prosecution since the confinement does not serve a penal purpose.

Generally, civil commitment proceedings may be instituted either prior to trial and/or sentencing in cases where the offender lacks competence to stand trial or is found insane, or prior to an offender's impending release from imprisonment, as in the *Hendricks* case. In Minnesota, the Department of Corrections screens all inmates prior to their release for possible referral to county attorneys for commitment proceedings. Anne Wall writes that the sharp increase in the number of civilly committed sexual offenders since 1991 has been "primarily [] a way to confine dangerous sex offenders after they have completed their prison terms." It has been an expensive solution since it required the state not only to expand the state security hospital but also to build a new 100-bed facility. Ultimately, civil commitment reflects the public's desire to remove offenders from the community for good. Together with life imprisonment, it constitutes a modern form of exile.

II. At Cross-Purposes: Unanticipated Consequences of Sex Offender Legislation

Because of the urgency legislatures have displayed in passing laws that impose more social controls on sexual offenders, such legislation has often been drafted poorly. As David

Thomas bemoans, the English Crime (Sentences) Act of 1997 fails to provide adequately for some dangerous and persistent sex offenders. Moreover, the statutes have frequently been enacted without sufficient empirical basis, as is particularly true for community notification laws. Most distressingly, some legislation operates at cross-purposes by creating unanticipated and unintended consequences, and ultimately fails to protect the public effectively.

Longer sentences and the lack of treatment may cause victims not to report sexual offenses, especially those committed within the family. Washington state attempts to prevent such underreporting with the Special Sex Offender Sentencing Alternative (SSOSA) which permits less dangerous offenders to serve a suspended sentence, possibly with a short jail term, while requiring them to undergo inpatient or outpatient treatment.

The federal guidelines for sexual abuse offenses do not only mandate long prison sentences but also affect especially the insulated communities of Native Americans who live on reservations. While the number of federal sex offense sentences imposed is below 300 per year, over three quarters of the sexual abuse offenders convicted are Native Americans. However, the disparate impact of federal sex convictions is only one of several problems created by federal sentencing.

Michael Gordon and Jon Sands charge that the cross-reference section under the federal guidelines makes a pre-trial assessment of the potential sentence difficult, if not impossible. The provision permits the application of a substantially higher severity level should the offense of conviction understate the seriousness of the actual offense behavior. To prevent such a dramatic sentence increase, Gordon and Sands believe that a greater number of defendants might, reluctantly, opt to stand trial despite all the disadvantages of this choice for the defendant, the state, the court system, and the victim(s). If plea bargains are entered, defense counsel will turn sentencing hearings into mini-trials to prevent courts from relying on alleged actual conduct to impose a higher guideline sentence under the cross-reference provision. *United States v. Dawn*, 129 F.3d 878 (7th Cir. 1997), which is reprinted after the Gordon/Sands article, illuminates a sentence increase caused by cross-referencing. In that case, the court held that the production of child pornography will be factored into a sentence for possession of such material even if the pornographic film was made outside the United States.

Eric Lotke, who surveys the drawbacks of community notification statutes, notes that these laws will not only cause burdensome and potentially expensive administrative problems but may also give neighborhoods "a false sense of security [while creating] an artificial spread of terror." In his opinion this legislation will make it more difficult for offenders to normalize their lives—a concern which has been borne out by the problems some states have encountered in locating housing for sexual offenders. However, isolated and ostracized offenders might constitute a greater danger than those integrated into a community since they will give up hope of ever leading a "normal" life. In addition, Lotke fears that community notification statutes might divert the public's attention from treatment, even though it promises greater long-term protection than notification.

Sex offender legislation also impacts the relationship between the courts and the legislature, and between the judiciary and the mental health community. Mandatory minimum sentences and mandatory departures restrict the courts' sentencing discretion, sometimes in inappropriate ways. As David Thomas remarks with respect to the automatic life sentence in England, "[i]t does not enable courts to pass any sentence which they are at present unable to impose; it merely requires them to pass a sentence which they would not otherwise impose."

Some state legislation, on the other hand, has increased the discretionary power of courts, and may ultimately lead to more widespread and extensive disparity in the sentencing and disposition of sexual offenders. Moreover, in the federal system, departures are relatively frequent in sexual abuse cases. Pamela Montgomery points to the large number of downward departures under certain guideline provisions which might be explained by the significant period of incarceration required, the fact that many of the offenders suffer either from substance abuse and/or mental illness, and the relationship between the victim and the offender. In FSR's Canada issue, Michael Jackson pointed to the regional disparity that has resulted from the "preventive detention" of offenders who are perceived as future dangers.[5]

Sentences based on the future danger that an offender poses may augment the discretionary power of the court while at the same time placing more influence in the hands of the mental

health community which will frequently be called upon to make determinations of future dangerousness. It was also Michael Jackson who concluded that the assessment of a defendant's future dangerousness by a "neutral" multi-disciplinary resource team will lead Canadian courts to delegate "the judicial adjudicative role to psychiatrists and psychologists."[6]

The dislocations created by the existing legislation and concern about the future of dealing with sexual offenders have inspired some of our contributors to conceptualize alternatives to the current framework.

III. Conceiving Alternatives

Some of our authors charge that the assumptions underlying the present approach to sex offenders are flawed. They do not view *all* such wrongdoers as widely different from the rest of the population or other criminals. The terms "sex offenses" and "sex offenders" cover a vast array of behavior which masks rather than reveals differences between the types of offenses and the perpetrators. The generic grouping leads to a false perception of sexual crimes and of the danger that emanates from sexual offenders generally. Since the public considers all perpetrators an on-going, serious risk which cannot be remedied, apparently the only feasible solution, short of the death penalty, becomes permanent exile – in the form of long-term, possibly life-long incapacitation, either in a prison or a mental institution.

While some sex offenders probably are not amenable to any form of treatment and will constitute a permanent threat, most likely that group comprises a very small percentage of all sexually motivated offenders. As Eric Lotke demonstrates, studies on the recidivism rate of sex offenders do not support popular claims of high re-offense rates once the offender is caught and punished for the first time. He, Ralph Hendrix and Brent Warberg seem to agree that the offender's internal shock upon being discovered might be the first and most effective step on the way to prevent re-offending. The sub-set of sexual offenders which is not likely to re-offend must be identified and then provided with appropriate treatment options.

Professor van de Marle, the psychiatric advisor to the Ministry of Justice in the Netherlands, describes the Dutch approach to assessing the danger presented by sexual offenders. Despite some shortcomings, he points to the apparent effectiveness of a longer term institutionalized review process prior to trial and sentencing which provides the judge with sufficient information to impose an appropriate treatment-based sentence. Michael Gordon and Jon Sands fear a potential self-incrimination problem were pre- or even post-sentencing counseling and treatment instituted in the United States. They argue that the Fifth Amendment might cause offenders, upon advice of counsel, to thwart effective treatment options in order to protect themselves from future indictments. While Gordon and Sands do not present a solution, the Fifth Amendment issue must be addressed to allow offenders to take full advantage of post-sentence treatment.

Even if we were able to isolate those sex offenders who can be prevented from re-offending from those who are not treatable, that determination leaves us with the need to construct effective treatment and supervisory mechanisms. Studies based on existing, sophisticated treatment options indicate that treatment can be successful. In many cases, it will have to include therapy as well as medication. However, more studies, on a national and international basis, will be needed to determine appropriate methods, confirm results, and define "success". As van de Marle opines, such assessments will be particularly important to justify the high cost of individualized treatment to legislatures and the public, and to assure their continued support for therapeutic solutions.

Ralph Hendrix, Brent Warberg and H.J.C. van de Marle outline two different models that fuse the criminal justice and the social service/mental health systems. Both constructs are based on the dissemination of rewards and sanctions to bring about behavioral modification in the offender. Such a regime presupposes frequent monitoring so as to prevent the offender from falling into dysfunctional patterns. Hendrix and Warberg propose to model sex offender courts after the existing drug treatment courts which allow judges to review the offender's progress continuously, to impose intermediate sanctions, and to guarantee certain punishment for misbehavior. In that way the criminal justice system would retain ultimate

control over the management of the offender. In addition, Hendrix and Warberg emphasize the importance of community mentors in assisting the perpetrator during the reintegration process. Ultimately, the goal cannot be cure but rather, in the words of Hendrix and Warberg, the "management of the compulsive behaviors, retention in treatment and relapse prevention" after the offender is released from prison or another incapacitative setting.

IV. Conclusion

Recent legislative developments with respect to the disposition of sexual offenders have been driven by the desire to guarantee public safety. They have shifted the balance "away from the adjudication of demonstrated blameworthiness and due process in favor of the prediction of future dangerousness and crime control."[7] Often this has implied a focus on symbolic action at the expense of constructing an overarching treatment framework.

Despite different sentencing practices and procedures, the similarity of the problem constellation in the United States, Canada, and Europe makes sex offender treatment a fruitful area for cross-national collaboration. Rather than relying on impressionistic accounts of experiences abroad, as occurred in the German and California debates surrounding castration, we should participate in systematic and empirically based comparisons in the mental health and criminal justice areas to help devise better reasoned approaches to the question what to do with sexual offenders.

Notes

[1] Michael Jackson, *The Sentencing of Dangerous and Habitual Offenders in Canada*, 9 FED. SENT. R. 256, 259 (1997).

[2] Chris Clarkson & Rod Morgan, *Sentencing Violent and Sexual Offenders in England and Wales*, 7 FED. SENT. R. 288, 291 (1995).

[3] *See* Scott Matson & Roxann Lieb, *Megan's Law: A Review of State and Federal Legislation* (Washington State Institute for Public Policy, Oct. 1997).

[4] *Hendricks v. Kansas*, 521 U.S. —, 117 S. Ct. 2072 (1997).

[5] Jackson, *supra* note 1, at 258.

[6] *Id.* at 260.

[7] *Id.* at 261.