The Pit & the Pendulum: Sex Offender Laws

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Introduction

For centuries the criminal justice system has struggled to define the methodology of and the justifications for social control of sexual behavior that does not conform to community mores. This poster compares and contrasts the historical and contemporary attempts in the United States, Canada, Belgium, the United Kingdom, and Germany to address the risk created by individuals who engage in behaviors broadly characterized as sexually deviant. Where available, we consider the rationale for sentencing, and the earliest attempts to bring "treatment" into the criminal dispositional formula for sexual based prosecution. We also consider the impact that the choice of societal response has on risk assessment and evaluation in the various systems, including where available, the assessment and commitment of juvenile offenders. The current practice of civil commitment for a person deemed to be a sexually violent predator (SVP) is discussed highlighting the U.S. Supreme Court decision in Kansas v. Hendricks. This practice will then be compared and contrasted with the approach of designating an offender as a Dangerous Offender (DO) or a Long-Term Offender (LTO) under the criminal law. We also highlight sex offender registries where applicable. This poster is intended as an overview of the law as it exists, and not as a defense or a critique of any specific model.

Historic Development

Under English Common Law, for a period of time until the middle of 17th century, crimes against morality (such as adultery, bigamy, incest, assault with intent to ravish, and blasphemy) were addressed by concurrent jurisdiction of the ecclesiastic courts and the Court of High Commission. An offender's economic and social rank often determined the venue. Penalties in the Court of High Commission actually proved to be more severe than those meted out by the ecclesiastic courts. Sanctions from both bodies however ignored the sentencing concept of proportionality (the concept that the punishment fit the crime) and lacked connection to the prevalence of the acts or to the harmfulness of the offense.

Penrose first demonstrated a relationship between the law and psychiatry in terms of effect on social control efforts. He identified European countries where low numbers of persons committed to the mental health system corresponded to high numbers of persons committed to the prison system and vice versa. The "hydraulic theory" as he termed it, suggests that the size of a jurisdiction's correctional and psychiatric institutional populations vary inversely, so when the rate at which one of these social control agents is used declines, the utilization of the other will increase, thereby maintaining a social control homeostasis.

Addressing the proliferation of sexual psychopath laws in the U.S., Sutherland observed that, "For a century or more two rival policies have been used in criminal justice. One is the punitive policy; the other is the treatment policy." The trend toward one and away from the other is generally based on cultural change in the society. Brakel and Cavanaugh observed that, "It is old news that the field of law known as mental health law is especially susceptible to these pendulum-like swings." The "vagaries of science…whose theories are not always easy to grasp by outsiders and whose relevance to legal methods and objectives is not always clear," may lead to a "tendency to lurch from one positional extreme to the other."

The concept of relief from responsibility for criminal conduct is premised on the idea that not only does a treatable psychiatric disorder exist, but that the disorder is directly related to the particular type of criminal behavior. Social control turns to the medical model when we come to believe that advances in treatment will provide a reduction in crime. The alternative is to identify habitual offenders at the time of sentence completion and send them to places of safe keeping until recovery is established. The growth of sexually violent person commitment laws appears to have been premised on the idea that by forcing a connection between the defendant and a treatment facility and then supervising that connection for a reasonable time period, the court could promote treatment. This treatment engagement was then expected to reduce criminal behaviors.

Community Protection Model

The community protection model also reflects the concerns of victim rights groups, crime prevention advocates, and the general public that sex offending, especially against children, is a serious problem necessitating strict and comprehensive measures of control. According to this model, the best approach to the management of the high risk sex offenders is a combination of social controls including longer sentences and stricter limits on parole, intensive community supervision, sex offender registration, community notification, orders restricting freedom of movement and association, mandatory anti-androgen treatment as a parole condition, and criminal and civil statutes providing for indeterminate confinement based on findings of dangerousness and severe personality disorder. We see varying degrees of each of these elements in the nations represented here.

The United States

The United States has 21 jurisdictions with post criminal sentence civil commitment laws for sexually violent predators. There is no national commitment statute.

- Sexually Violent Person acts contain the following central features: (1) their stated purpose is to detain, in fact, to continue to detain, sex offenders who are already in custody and who are likely to reoffend if set free, and (2) their continued detention objective is accomplished via civil commitment to a treatment facility.
- In Kansas v. Hendricks the United States Supreme Court case that upheld the Constitutionality of SVP laws, the Court noted that, "It remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low." The treatment rationale however remains a distinguishing feature that helps support a civil rather than criminal analysis of the interference with liberty.
- Nationally, the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248) requires states to report the names and identities of all persons, including juveniles who have been convicted of the index "sex offenses," to a national registry. The data base created is accessible by law enforcement agencies, but the law further instructs the Attorney General to issue regulations for a national data base and web site that will post pictures of all offenders regardless of the level of risk they pose or the rules of the reporting states regarding dissemination of the defendants identity. Registrants have no additional reporting requirements beyond those imposed by the reporting state agencies.
- All 50 states have some form of sex offender registry requiring persons (including in most instances juveniles) convicted of a series of indexed "sexual crimes," to register their names, addresses, and other identifying information with an agency charged with protecting public safety. For those persons deemed most likely to reoffend, some acts require public notification. Registrants are usually assigned to a risk pool based on a variety of factors, and required to report based on the level of risk assigned.

Belgium

- Penal law system, including courts and prisons administered by the federal government. Health care delivery is a mixed responsibility of the federal government and three communities – Wallonia, Flanders, and Brussels.
- Rape redefined to be gender and type of act neutral in 1989. Statutory rape age set at 14, and consent redefined to include use of force or trick and physical and mental deficiency of the victim.
- In 1995 pedosexual offenses require advice regarding counseling and treatment and extend statute of limitations.
- Debate regarding legal evolution has not involved metal health professionals, and has been driven by public opinion interested in protecting safety and not at all interested in the treatment of abusers.
- Treatment may be provided in prisons, psychiatric hospitals, outpatient facilities, and community residential support facilities – mainly at the Centre de Recherche-Action en Sexuo-Criminologie and the Universitair Forensisch Centrum.
- Sexual offenders in prisons are described as on remand, or condemned, or interned (Belgian term for patients declared not guilty by reason of mental illness.
- Belgium has no specific sexual psychopathy laws, but when a defendant presents with a psychiatric disorder, the judge may pronounce a safety measure referred to as internment to provide for treatment rather than punishment.
- A Tarasoff like obligation referred to as a "fault," may impose liability on a therapist treating a high–risk sexual abuser for a departure from the conduct expected of a careful physician.

Canada

- The Dangerous Offender legislation enacted on August 1, 1997, limited the judge's discretion to sentence by requiring that a sentence of detention in a penitentiary for an indeterminate period be imposed upon finding an offender to be a dangerous offender. Although the new law applied to all offenders, in practice most people so designated are under custody for sexual offenses.
- The Dangerous Offender provisions allow courts to remove so-called "dangerous offenders" from society on the basis of a future prediction (not punishment for a past crime) and impose an indeterminate sentence of preventive detention.
- Treatment for sex offenders occurs within the penal system in Canada, either at the detention facility or at one of the specially designated treatment facilities that specialize in the treatment of persons convicted of sex offenses who have underlying diagnosis that meets criteria for admission to the facility.
- The Sex Offender Information Registration Act places responsibility for administering the national sex offender registry with the Royal Canadian Mounted Police. Access to the data base is restricted to police agencies. All registrants are required to report on an annual basis for a period of time that coincides with the nature of the offense convicted of, and the sentence received. Ontario and Manitoba have separate provincial reporting statutes in addition to the national registry. The Manitoba law established a specific protocol for community notification for persons deemed to be at high risk. Ontario and Alberta have since followed suit. While blanket notification is not permitted, community forums and notification to particular institutions such as schools or recreation centers, as well as press releases are permitted. Alberta also has an internet site allowing certain information to be disseminated.

The United Kingdom

- England and Wales provide for statutory Multiagency Public Protection Arrangements (MAPPA). These name three agencies as the "responsible authority" (police, probation, prisons) in the management of sexual and violent offenders, and a number of "duty to cooperate" agencies, which includes health. Offenders are divided into 5 categories: Category 1 (registered sex offenders), Category 2 (violent or other sex offenders), and Category 3 (other offenders thought to be a risk). They are also divided into 3 levels of risk: Level 1 offenders are managed by a single agency, Level 2 by more than one agency, and Level 3, which are the "critical few" which require input from a senior level. The aim is to ensure sharing of information and coordinated risk management strategies.
- Additional statutory measures include Imprisonment for Public Protection (referred to as IPPs). These are indefinite sentences for putative high risk offenders who are in front of the court for offences that do not attract life sentences, and may in fact have been of a very low level of seriousness. Thus, someone with a past history of serious offending but who on this occasion may have committed an indecent assault can receive an IPP but with a short tarrif (sentence) that is based on what would have been the length of the determinate sentence, which means he or she remains in prison until risk is thought to have been reduced. There is concern that the way in which the law is structured means that many offenders who are not high risk have been caught in the IPP net.

Germany

- Current German law regarding sex offenders falls under the German Penal Code (StGB; Chapter 13: §§ 174-184c)
- In Germany, a guilt oriented law (§ 46 StGB) traces its origins to "Prussian General Law" (1794). This was updated by the Act Against Habitual Offenders (1933) and most recently by "Laws against sexual delinquency and other dangerous delinquency" (1998).
- If in the prosecution of an offense, there are reasons for the presumption of a mental disorder and/or that the offender acted in a condition of decrease or loss in responsibility there is a preliminary forensic psychiatric expert statement, then an expert report: regarding the relation between offense, possible mental disorders, responsibility and prognosis for further offences. The Court then decides the degree of criminal responsibility:
  a. Full responsibility sentence on probation with juridical orders or prison or optional in prison:
     - Social therapy (§9 STVollzG); e.g., with Sex Offender treatment Program
     - Detoxification and alcohol/drug treatment centre (§64 StGB); maximum 2 years
     - Preventive detention (§66 StGB) Parole supervision after release Juridical order
  b. Limited responsibility and danger to the public:
     - Admittance to a forensic psychiatric hospital (§§21, 634, 64 StPO)
     - Parole supervision after release
     - Juridical orders (e.g., Specific Therapy)
  c. Lack of responsibility and danger to the public:
     - Admittance to a forensic psychiatric hospital as above (§§20, 633, 64 StPO)
     - No further danger to the public
     - Acquittal