

“More Dangerous than Hitmen”: Judicial Perceptions of Sexual Offenders

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Abstract

This paper explores the structural and cultural effects of legal and criminal justice processes through judicial perceptions of sexual offenders, using a law and society theoretical framework. The researchers conducted face-to-face interviews with judges from California and Texas. Initial findings suggest judicial actors share negative public sentiments towards sex offenders and felt these offenders were much different and worse than other criminals and in some instances worse than murderers. However, judges face an inherent conflict: they must remain neutral appliers of the law while satisfying public demands for justice, thus highlighting the friction between “law on the books” and the “law in action.” Some California judges have used punitive measures under the pretext of treatment to circumvent this conflict and punish offenders beyond mandates, in many instances indefinitely. The ramifications and realities of restrictive and punitive policies, including Megan’s and Jessica’s Laws, have resulted in costly state-funded solutions for offenders.

Introduction

Sexual offenders have drawn considerable attention in recent years from the general public, academia, and criminal justice community. Popular television shows, such as *To Catch a Predator*, highlight the prevalence and diversity of individuals who prey on children. One common theme in the popular media is clear: sex offenders who target children are a universally despised population. The public desire to punish child predators has created a growing pressure for an overpopulated criminal justice system to incarcerate and monitor these individuals. Currently, there are over 63,000 registered sex offenders in California alone (State of California Department of Justice). Many criminologists have attempted to resolve this problem by examining the social impact of legislative sanctions, such as offender registration under Megan’s Law (Petrosino & Petrosino, 1999; Hughes, 2002; Levenson & Cotter, 2005) and location monitoring under Jessica’s Law (Mortensen, 2006; Peckenpaugh, 2006). Using face-to-face interviews, our study explores legal and criminal justice processes from the point of view of judges in California and Texas. Judicial perceptions of sexual offenders reveal cultural and structural frictions between the punitive mandates that reflect the negative general sentiments toward such offenders and the ideology of due process and fairness under the law. This friction plays out through judicial discretion in sentencing,

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which reveals personal negative sentiments towards sex offenders often result in punishments that go beyond those mandated by law. These observations do not mean that judges use the law in illegal or inappropriate ways; rather, the researchers are pointing out the unintended financial and social costs of using laws and legal procedures intended for “treatment” in order to mete additional punishment.

An assessment of judicial attitudes towards sexual offenders is important for several reasons. First, empirical evidence that personal attitudes affect legal outcomes may lend credence to the *law and society* perspective that draws attention to a disjuncture between the written “law on the books” and the law as it operates “in action.” This *legal realist* approach to examining the law allows socio-legal scholars to question the legitimacy of late nineteenth century Harvard Law School Dean Christopher Columbus Langdell’s (1871) paradigm of ‘legal science,’ which applies the law in a positivistic manner rather than in abstract moral terms. Using this theoretical framework, this paper seeks to add to the growing body of work that considers judicial decision-making permeable to outside influences, ranging from the effects of collegiality (Edwards, 2003) to a judge’s race (Steffensmeier & Britt, 2001). These judicial discretionary decisions to apply additional punishment in the name of treatment is based on extra-legal factors and sentiments of disdain towards child sex offenders shared with the general public results in very expensive potentially *indefinite* incarceration until the offender is “treated” or “cured.”

We present this paper as follows. First, we review the current legal and theoretical literature and research on sexual offenders, focusing on child sex offenders (adult offenders who target children) who were sentenced by criminal justice actors. Next, we discuss the methodology used in this study. The following sections examine five general areas we found to be relevant to judicial attitudes. First, we examine the language of the laws that govern sex offenders in order to reveal attitudes held by judicial actors. Second, judges’ attitudes reveal that they perceive sex offenders as being fundamentally different from other offenders. Third, these attitudes cause a disjuncture between the criminal justice and legal system’s goal of corrections and public demands for retribution. This disconnect is especially prevalent in California, where judges use legal maneuvers to circumvent custody limitations in order to punish offenders beyond legal limitations. Fourth, the consequences of punitive outcomes have resulted in placement policies that are expensive and difficult to sustain. Finally, the judicial perceptions of sex offenders expose an ideological conflict between legal jurisprudence (judges as impartial legal actors) and the legal realities of punishment (disproportionate punishment as a response to public demands for justice and judges’ own biases towards sex offenders).

In investigating these phenomena, we focus on adult sex offenders who target children. Given the exploratory nature of the study and vast variations of sex crimes and classifications, we asked judges open-ended questions to get at their assessment of the most significant problems in dealing with sex offenders. Patterns became clear throughout the interviews, as judges consistently focused on child molesters and crimes involving child victims. The judges rarely discussed other sex crimes or classifications, such as statutory rape, and exclusively focused on the child victims. This open-ended approach was consistent with the law and society-oriented goal of the paper: to question whether judges’ attitudes have systematic and structural ramifications for convicted offenders. Any influences that affect legal outcomes would validate *legal realism*, that is, the theory that the law “on the books” does not equate to the law “in action.” Our goal, in this case, is to assess the effect of judges’ decisions to enhance sentencing by not using more punitive “sexually violent predator” (SVP) classifications that have more stringent requirements and instead, using legal options meant for treatment as further punishment. To make this comparison, we first examine legal developments governing sexual offenders.

Legal Developments

The increasingly punitive laws designed to make ex-offenders more visible have drawn considerable controversy. Offender registration and notification requirements have become publicly accessible with online databases that track and disclose offenders’ locations. Ex-offender privacy rights are often limited, resulting in many instances of neighborhood threats, harassment, and verbal or physical assaults.

Furthermore, many states now impose strict residency restrictions. In essence, convicted offenders return to increasingly hostile communities, where they face a lifetime of formal and informal retribution.

A number of high profile cases have resulted in key child sex offender legislation. The *Jacob Wetterling Crimes against Children and Sexually Violent Offender Act*, or “Wetterling Act,” required states to operate a sex offender and crimes against children registry in response to a 1994 incident of a kidnapping and sexual assault by a stranger. When a sex offender on her street raped and killed seven-year-old Megan Kanka, “Megan’s Law” amended the Wetterling Act by including a community notification system. In 2005, a stranger abducted, raped, and murdered nine-year-old Jessica Lunsford in her Florida home. The subsequent legislation, known as the “Jessica Lunsford Act” or “Jessica’s Law,” required minimum mandatory sentences and electronic monitoring for individuals who repeatedly fail to register. Punitive legislation has raised some concerns.

Offender registration and monitoring laws received criticism for being too punitive (Wright, 2009). Zevitz and Farkas (2000, p. 375) found that notification laws in Wisconsin have adversely impacted offenders’ ability to reintegrate and questioned whether the state is effectively managing recidivism or merely “exact[ing] further vengeance.” Zevitz (2006) found no significant effects of extensive community notification on recidivism rates.

Texas penal code categorizes sex offenses against young children as felonies. The Texas penal code Chapter 21 Section 2 defines several categories of sexual offenses under “acts of sexual abuse” for persons less than 14 years of age to include aggravated kidnapping with the intent of sexual abuse, indecency defined by touching, sexual assault, aggravated sexual assault, and burglary with the intent of sexual assault. These acts are first degree felonies, and convicted offenders can face a maximum of life imprisonment. There are no sentencing guidelines for judges, who can proscribe sentences that range from 25 to 99 years of incarceration and include treatment options during and post-release. Furthermore, Texas judges have the option of civil commitments to further detain offenders who pose a greater risk to the community after the court-ordered term of incarceration. Judges can request testing to classify a sex offender as an SVP with enhanced monitoring, treatment, and possibly more incarceration. We will discuss this topic in further detail later.

California judges also have a wide punitive range of sentencing options for persons convicted of felony child sex offense laws. In 2010, after the rape and murder of 17-year-old Chelsea King by a convicted sex offender, California passed Assembly Bill 1844, known as “Chelsea’s Law.” The law gave judges very punitive sentencing options, such as one-strike life without parole for sexual offenses against children under 14 years of age. However, in a fiscally constrained state, judges have been reluctant to apply sentencing based on extremely punitive laws such as Chelsea’s Law that can further impact an overcrowded prison system. Moreover, many have criticized the law for being too “one-size-fits all,” which results in many paroled inmates ending up homeless for life (Smiley, 2010).

As a whole, sex offender laws have gained significant federal support despite concerns over their punitive intent. National registries, such as the FBI’s National Sex Offender Registry and the Office of Justice Programs’ (OJP) Dru Sjodin National Sex Offender Public Registry (NSOPR) (U.S. Department of Justice, 2008), have been growing in popularity. Moreover, the Supreme Court has recently ruled that federal officials can hold “sexually dangerous” inmates convicted of the 2006 Adam Walsh Child Protection and Safety Act beyond their sentence *indefinitely*, a ruling that has drawn sharp criticism for undercutting civil rights (Holland, 2010). Moreover, these laws intended to protect the public often undermine the possibility of community reintegration by this growing offender population.

Reoffending and Recidivism

High sex offender recidivism rates have been the driving force behind the aforementioned legal developments. Figuring out how to reduce recidivism and reoffending has become one of the main goals for lawmakers, police departments, victims and victims’ families, and the justice system. Research has found that offenders who target children outside the immediate family are recidivism risks (Durkin

& Gigianantonio, 2007; Doren, 1998, Bartol & Bartol, 2008). Almost two-thirds of members of the Association for the Treatment of Sexual Abusers (ATSA) expressed little hope for the sex offenders to be cured and almost 90% feared recidivism after treatment (Engle, McFalls & Gallagher III, 2007). Practitioners' lack of faith in a treatment-based 'cure' reveals their belief that sex offenders remain dangerous after treatment and punitive sanctions.

Whether sex offenders differ from each other or form a homogenous group in terms of recidivism and re-arrest patterns is another central issue. Sample and Bray (2006) looked at this issue among sex offenders in Illinois. Since community notification laws and registration apply to all sex offenders, regardless of their offense, Sample and Bray sought to determine if these offenders exhibit the same re-arrest patterns or whether certain types of offenders have higher rates of recidivism. The data examined by Sample and Bray (2006) indicate that reoffending patterns vary across categories of sex offenders. Those higher in the child molestation, rape, and paraphilia categories had significantly higher rates of re-arrest for any offense than did those in the child pornography and pedophilia categories. The increased number of sex offenders has made it more and more difficult to keep track of sex offenders, especially high risk ones. The lumping together of all sex offenders has further constricted already limited supervision and monitoring resources. Similarly, Zgoba and Levenson's (2008) six-year follow-up study in New Jersey found that rapists classified as compulsive and repetitive had the highest sexual recidivism rates. Harris and Hanson (2004) also find that rapists have the highest rates of recidivism, along with pedophiles who target boy victims. These high recidivism rates lend empirical backing to widely held sentiments that sexual offending cannot be "treated" and suggests rehabilitative strategies may be futile and wasteful.

Legal Realism

The theoretical basis for this paper stems from the sociological analysis of law. The empirical analysis of law emerged from legal scholars in the early twentieth century who began to question the validity of American law, which was undergoing professionalization. The heart of legal professionalization was based on the ideals of then-Dean of Harvard Law School Christopher Columbus Langdell, who articulated law to be a *hard science*, based on a positivistic application of *stare decisis* (Langdell, 1871; Speziale, 1980). Under these principles, law's legitimacy rests on the fairness created by an amoral, insulated, and "gapless" system of truth finding. However, the application of social sciences to legal scholarship began to lay the grounds for legal empiricism and the *legal realist* movement (Heise, 2002). Early legal realists, such as Yale Law School Dean Karl Llewellyn, contextualized law and the legal system as being permeable to extralegal factors (Twining, 1973). The sociological critique suggests that judges' discretion threatens to undermine the law's legitimacy, based on fairness under the Langdellian paradigm. For example, an empirical examination of the impact of a judge's race on sentencing outcomes in Pennsylvania found that black judges were more punitive than their white colleagues (Steffenmeier & Britt, 2001).

Legal realism falls under the larger *law and society* movement by legal sociologists, anthropologists, and political scientists, which has gained momentum since the social backdrop of the 1960s and 1970s. This movement, heavily influenced by Marxist thought, questioned legitimacy of the law in its real application, and its theorist cited numerous disparities created by legal outcomes (Friedman, 1986). Consequently, this counter-paradigm of legal thought highlights a dichotomy between "law-on-the-books," based on impartiality and even application of the law for everyone, versus "law-in-action," or the realities of selective application and enforcement or non-enforcement of certain laws for certain individuals and groups. In other words, the "talk" of the law often does not match the "walk" of the law (Calavita, 2010, p. 94). Law and society scholars often cite the social movements that have permeated the closed legal system as the impetus for legal change, and for the use of law as a tool that stifles social change (Barkan, 2009). The influences of judges' personal viewpoints on sexual offenders on the legal outcomes for sex offenders are the primary focus of this paper.

Method of Inquiry

Our study makes use of data collected from in-depth face-to-face qualitative interviews with eleven judges (n=11) and one judicial sexual offender specialist (n=1) from California and Texas. We conducted these interviews from December 2009 to March 2011. Each interview lasted approximately one hour, depending on the availability of the judicial actor. Interviews occurred during normal court hours, which meant that some judges were frequently interrupted by courtroom responsibilities. However, interviews proceeded once the judge returned. All interviews took place inside the judges' chambers in several criminal courthouses in California and Texas, with the exception of two interviews in California that took place in a state mental health court.

We began with a convenience sample of known judges in California and Texas. These judges served as gatekeepers to subsequent subjects, which allowed for snowball sampling. The main criterion for selection was judicial experience in handling criminal child sexual offense cases. This criterion allowed for experience-based answers with less speculative responses.

The researchers chose a sample of judges from the population of California and Texas for several reasons. We believed that judges serve a unique role in the criminal justice system as impartial triers of facts in criminal cases, giving them a holistic view of legal processes. Our study adds to the growing body of literature on judicial perceptions of sex offenders, including Bumbly and Maddox's (1999) quantitative study, which found that the majority of the judges felt convicted sex offenders should receive mandatory treatment that can lower recidivism rates. This study supplements these findings by adding richer qualitative data that identifies cultural and structural issues. We drew our sample from California and Texas due to these states' large inmate populations and number of sexual offenders under supervision.

Subjects were asked semi-structured thematic questions:

1. What is the legal outlook or "scene" of child sexual offenders in your jurisdiction?
2. Do you perceive sexual offenders as different from other types of offenders?
3. Do you feel the punishments in laws are adequate?
4. Do you feel sexual offenders can be rehabilitated?

Each subject was then allowed to elaborate on answers. Follow-up questions were then asked, depending on responses. In-depth questions and answers allowed for "rich" and "thick" descriptions of the data as part of an emergent process consistent with qualitative research design (Lofland & Lofland, 1995). We deemed qualitative design as appropriate for the exploratory nature of the study and small sample size (n=12) relative to this population of judicial actors.

The sample size in this study was limited by access to judges and time constraints. Prospective judges were often very reluctant to discuss judicial discretion. Judges were accessible only in instances where a known and trusted gatekeeper could vouch for the intent of the research. Many judges turned down our request for research regardless of a known gatekeeper. Despite the small number of judges interviewed, we felt that the number of judges interviewed was adequate considering the elite nature of the population and sensitive topic. It took the researchers over a year to gain access to and schedule the interviews. In addition, it was difficult to schedule visitations with judges, who have extremely busy calendars. The interviews, while often lasting approximately one hour, would take several hours to conduct, as bench duties judges frequently interrupted the judges. This time constraint was a limiting factor for judges in California.

While a quantitative methodology would yield a possibility of generalizable results, we deemed it to be virtually impossible from initial informal talks with prospective participants. As one Texas judge pointedly stated, "If a survey came across my desk, unless I was required by law to answer it, I would toss it in the trash." However, we believe our qualitative-based study produced very in-depth and frank answers.

The researchers immediately shared and analyzed written interview notes taken. One researcher would conduct the interview while the other two would take notes. The judges did not allow audio and video equipment to be used due to the sensitive nature of the topics. After the interview stage, the researchers identified and grouped patterns in answers. All three researchers verified extracted themes and reported the findings.

Findings and Discussion

An initial assessment of judicial perceptions of sex offenders reveals complex structural and cultural tensions as to how to punish, treat, and reintegrate sex offenders. First, an assessment of the language used in laws and by the judicial actors in both states shows a deliberate attempt to associate sexual offenders with extreme harm that warrants severe punishment. Secondly, judges in both states indicated they perceived sexual offenders as being fundamentally different than other offenders. This belief has produced a friction between the core principles of law, namely its fairness "on the books," and the realistic implementation "in action." An examination of the implementation of treatment and punishment will reveal this difference.

The language used by judges and the law reflects a deep fear and resentment towards child sex offenders. California and Texas laws differentiate between sexual offenders and SVPs. In 1996, California passed the Sexually Violent Predator Act (1996), which classified "a small group of extremely dangerous sexual offenders...who have diagnosable mental disorders" and deemed them "not safe to reside at-large in the community and represent a danger to the health and safety of others if they are released" (California High Risk Sex Offender and Sexually Violent Predator Task Force, 2006). To be classified as an SVP, sex offenders must satisfy three requirements: (1) Be convicted of a sexually violent offense under California law, (2) Harm one or more victim as result of the sexually violent offense under Jessica's Law, and (3) Be diagnosed with a disorder that makes him likely to commit future sexually violent predatory acts. Offenders are diagnosed by Department of Mental Health evaluators. The vast majority of convicted sex offenders in California are not classified as SVPs. This law classifies individual "predators" for crimes against a stranger, casual acquaintance, or person with whom a relationship is initiated for the purpose of victimization. Labeling sex offenders as "predators" connotes a sense of real danger that courts deliberately use to elicit public support for punishment. One California Judge explains

There was a case, a young man 30 years old, with young boys. He would lure them to his car and perform sexual acts with them. He picked up on a vulnerable population. Does he fit in that "predator" category? We purposely use *predator* because it connotes something bad versus *offender*.

The narrative of public safety against extremely dangerous persons can be used to achieve more punitive outcomes and positive reputation for criminal justice actors. Moreover, personified laws named after victims that elicit strong support often enhance this narrative.

Despite public safety and punitive intentions of sex offender laws, applying these laws involves a complex myriad of decisions. According to one Texas judge, "registration laws are not a great idea because [offenders] need to be identified. It's a bad idea to have a sign on the front lawn. The practical gets ignored in attempts to follow the laws." Another Texas judge elaborates on the same idea

The laws are strict. If there is a 14-year-old girl at a club and there is a 21-year-old man who has sex with this girl, someone is going to jail. People use that as a defense a lot of the time, “she was in the club and said that she was 18.” On the flip side, if you sell alcohol to a minor, no one will go to jail if they showed you a license. The seller is operating under the thought that the minor was of age.

Despite strong support for strict laws protecting against child molestations, public sentiments often permeate the legal discourse, which conflicts with fundamental legal principles of due process. For example, a Gallup poll from 2005 found 94% of Americans are in favor of laws requiring people convicted of child molestation to register as sex offenders (Saad, 2005). This same poll found 65% of Americans believe rehabilitation for child molesters is not possible and 77% said that people who sexually molest children are less likely to be successfully rehabilitated than other types of serious criminals (Saad, 2005). These polls are just a few examples of the the strict and punitive public attitudes toward sex offenders and the unwillingness to believe they will ever stop. The judges interviewed in both California and Texas shared these sentiments, which often conflicts with their role as impartial judges.

Judicial Perceptions: “*Many a man that needed killin’, no child that needed a molestin’.*”

Many judges share similar views about sex offenders with the public. One particular view is the inability to understand or empathize with child molesters. As the title of the paper suggests, many feel they are worse than murderers due to this lack of comprehension for their actions. One judge explains that while she does not condone murder, she can understand why someone may kill another person and perhaps justifiably so. In contrast, she expresses her inability to justify any circumstance in which a child deserves to be molested with a Texas saying, “*Many a man that needed killin’, no child that needed a molestin’.*” Consequently, child molesters are not given any level of favorability and may receive harsher punishment. Similarly, researchers have found police officers to be more likely to mete “street justice” to individuals exhibiting disrespectful or criminal behavior that the police deem to be incomprehensible (Van Maanen, 1978).

As discussed earlier, legal reasoning in theory rests on the *Langdellian* paradigm of law, which considers the legal system closed and “gapless” and only uses a scientific application of internal logic (Speziale, 1980). This legal jurisprudence viewpoint operates under the principle that the law’s legitimacy stems from its fair application of a positivist approach to truth finding. Sociologists under the *sociology of law* perspective would criticize this perspective for delineating legal thought from its inherent “historically-specific socio-economic relations” (Milovanovic, 1994, p. 4). These dichotomous viewpoints often create friction, as exemplified by Ninth Circuit Judge Alex Kozinski (1993), who criticize legal realists’ “silly idea” and “illogical conclusion” that personal factors such as a good breakfast or indigestion can affect legal outcomes. He concludes his presentation by describing legal realism as “horse manure” due to a system of internal checks ranging from a judges’ own self-respect to appellate judicial review (Kozinski, 1993). These opposing viewpoints have created conflict on a judge’s duty to render justice impartially (apply sentencing based on predefined legal guidelines) and his or her personal desires for social justice (applying additional sentencing).

Judges’ personal views are often in line with public sentiments. Several predominant views were prevalent amongst most judges interviewed. First, the judges we interviewed differentiated between sexual offenders and other offenders.

Q: Do you consider sex offenders different than other offenders?

CA Judge: As a prosecutor, you’re going to find that there is a rhyme or reason why people commit crime. Murderers, I can understand why they did it. Even when people beat their wives, I can understand. When you deal with sexual offenders, they’re wired differently. It’s an impulse control problem. It’s very violent, rape, sexual assault. Sex offenders are more

dangerous than hitmen. It's more personal. They have demons that they can't control. They're *true predators*.

TX Judge 1: Yes, [it's a] mental illness. They can't control their urge. They're mental diseases like pedophilia and paraphilia. They couldn't control their sexual desire at that time.

TX Judge 2: I think they are. I'm not an expert. My take from professionals and supervising, most of them are. Most people classify them as hard wired and opportunistic. I think they're drawn to children because they're attracted to them or it's a power and control crime. It's some sexual satisfaction and those things are linked together in an unhealthy way, just like rapists.

This "hard wired" attraction towards children limits the effectiveness of rehabilitation, according to the judges. Several judges interviewed expressed that treatment for offenders was likened to alcoholism, where it not a matter of "curing" individuals, but controlling and limiting opportunities.

CA Judge 1: Can they be cured? I don't know. One of the psychs say it's like homosexuality. That's how they are. Some males are attracted to females and some males are attracted to males. That's how it is. If that's how it is, he has an attraction to six year old girls, can he control his urges? Are they going to follow through with their urges?

CA Judge 2: I don't think they can be rehabilitated. It's like an alcoholic; they're always fighting these urges. I don't know, but as a judge do I want to take a chance on this?

TX Judge 1: I don't think they can be cured. I think they can potentially retrain their thinking so that they will not reoffend if they continue if they're supposed to be doing every day. It's like an exercise regimen. They can learn to control their impulses, but their impulses will not go away.

TX Judge 2: A true definition of a pedophile is they're attracted to children. Some people are heterosexual, some are homosexual. All the therapy in the world is not going to make someone be attracted to the same sex.

TX Judge 3: It's like a recovering alcoholic; they'll never say they're cured. Every day they wake up and say I'm not going to drink today. They can apply their bag of tricks that they've learned. That's the same thing with sex offenders but the stakes are much, much, higher. I don't think they're ever cured.

Judicial sentiments often create a conflict between due process and punishment under the law. The friction exists between judges' professional responsibility to uphold due process procedures, and the realities of trying to satisfy public and perhaps personal demands for retribution. This conflict requires judicial actors to navigate the legal landscape carefully. Differential legal outcomes based on anything but impartiality can undermine the legitimacy of the legal system itself. One Texas judge expresses the often contentious balance between the legal ideology of fairness and justice, stating

The legal scene is very complex. You need to take three things into consideration. First, you have public safety issues. This should always be on the front burner. Second, you have the victim, which should also be on the front burner. Finally, you have practical reality, which you try to achieve while keeping one and two consistent.

Another California judge echoed this opinion, stating, "Judges, by law, we aren't allowed to [treat sexual offenders differently]. We must treat everyone equally and fairly when you release someone."

However, the question arises as to whether sex offender laws can adequately punish offenders. Adequate punishments can diffuse any possibility of the influence of personal opinion of the bench. Judges interviewed indicated they believed that the laws were not adequate.

Q: Do you feel the laws that govern sex offenders are adequate?

TX Judge 1: Punishment ranges are adequate. I think sex offenders don't get so much more. If we get a videotape or physical evidence, they would've been sent to life in prison if they can prove it.

Even with adequate punishments on the books in some areas, prosecuting sex offenders remains difficult. As a Texas judge explains, the lack of physical evidence from often delayed reporting contributes to prosecutorial willingness to accept probation pleas over imprisonment. As the judge says,

I think that they're more likely to get probation than a murderer is. They're more difficult to prosecute with less physical evidence. Probation is more desirable than a not guilty. We'd rather have half a loaf than none at all because of the nature of the case. The public very much dislikes sex offenders being on probation.

Opinions and attitudes, in the model of legal jurisprudence, are not supposed to factor into or influence decision-making and legal outcomes. However, the reality of sexual offender cases is that these external sentiments can permeate this ideologically closed space. One way judges have addressed the friction between maintaining unbiased sentencing procedures and applying justice beyond the allowable limits of the law, while satisfying their personal punitive views, is by using legal maneuvers by using technically legal maneuvers never intended for use as punishments.

Structural Issues

One way to enhance punishment legally is to define a sex offender as a sexually violent predator. In 1997, the Supreme Court decided that any person diagnosed with a mental disorder who commits predatory sexual acts of violence can be held indefinitely under civil commitment in *Kansas v Hendricks* (1997). In this case, the state of Kansas was granted an indefinite civil commitment when a psychiatrist diagnosed convicted child sex offenders Leroy Hendricks and Tim Quinn with uncontrollable desires for children, which fit the classification of sexually violent predators. This controversial decision, however, did not make it easier for judges assign the SVP classification. Instead, it triggered a legal backlash that has resulted in only very small percentages of sex offenders qualifying under SVP classification guidelines.

The difficulties of legally classifying sex offenders as SVPs have resulted in some judges finding alternative means of holding sex offenders indefinitely. In order to classify an offender as an SVP in Texas, the court must show a pattern of repeat sexual offenses that are violent using a multidisciplinary team using the guidelines defined under the Texas Department of Mental Health and Mental Retardation under Texas Health and Safety Code Title 11, Chapter 841. This process can be very difficult, resource intensive, and time consuming, which results in very few sex offenders being classified. For example, if a Texas judge classifies an offender as an SVP, the offender is subject to treatment under civil commitment, which consists of GPS monitoring, polygraph and penile plethysmograph tests of sexual urges, and individual and group therapy (Nieto, 2004). Consequently, only 14 total inmates were committed to the SVP outpatient program in 2007 out of the 3,410 TDCJ inmates incarcerated with a sex conviction (Texas Department of Criminal Justice Statistical Report, 2007). The dearth of SVP classifications is consistent with the Supreme Court's decision under *Kansas v Crane* (2002), which purposely set substantial limitations on SVP classifications that allow for indefinite detention under *Kansas v. Hendricks* by requiring tests of an offender's degree of self-control in order to avoid systematic discretionary abuses.

Consequently, the judges interviewed resorted to maneuvers that were legal, but not intended for punishment, in order to circumvent such stringent classification requirements.

Judges often assign supplementary punishment of sex offenders under the guise of *treatment*. In California, sex offenders often receive psychological evaluations to determine safety in the community after serving their terms. Judges have discretion to deem someone a potential danger to society and hold him or her *indefinitely* in a detention facility in the name of treatment. In California, “treatment” is administered in a county jail. One California judge proposes a more effective method to detain individuals but explains the reality of California’s system as of the time of this writing

If in these cases we can give life and leave it up to a commission, it would be a better system than where the sentence for rape is ten years, and then later on treat him for mental illness. We should leave it up to a commission. They can end up in the process. But *treatment is punishment* in our current system. He’s already done his time, why is he still in prison? Well he’s being treated.... You are not free, even though you’re being treated.

For this particular area of California, county jail is the de facto largest mental health facility. Inmates can be detained for treatment indefinitely at a jail or prison facility. Another California judge backs this opinion, stating, “In prison you don’t get the treatment that you need to be rehabilitated. You keep them away from the general population.” Further structural issues in California undermine the treatment process. California’s state prison system does not offer in-prison specialized offender treatment programs that are found throughout the country. The California Department of Corrections (CDC) argues that identifying inmates as sex offenders puts them at risk to violence from other inmates (Nieto, 2004).

The biggest concern among judges interviewed was the possibility of reoffending. The ramifications of this belief are that offenders, by default, are dealt with harshly, with penalties ranging from community supervision to lengthy detention. According to one Texas judge, “the Scout motto is ‘*Be prepared*’. When we talk about this type of stuff, the motto is: ‘*Be paranoid*.’” Another California Judge echoes this opinion, stating,

Laws should be *more* harsh. [Offenders] should be incarcerated longer....SVPs serve their time but really, it’s just we need to crank up the time. SVPs only, for example, forcible rape does not qualify for indefinite detention....The reality is you want to keep these guys in custody.

However, permanent incarceration threatens to erode the legitimacy of an advertised “fair” system. Laws designed for latent punishment, such as the registration requirements of Megan’s Law, can be difficult to justify under this legal jurisprudence discourse. A California judge highlights this friction and the dilemma the criminal justice system faces, stating

I have no problem with registration or a website. We need to protect the community but we don’t do that for murderers, robbers, *et cetera*. What does that tell you about sexual offenders? You’re trying to be just, but how much time is justified?

Texas administers additional punishment to SVPs, who are subject to indefinite sentencing and civil litigation filed by the district attorney. One Texas judge explains the process, stating:

The DA chooses to file for SVP depending on an eligible offense. The Department of Mental Health determines the likelihood of recidivism and sends the report to the D.A.’s office. There is a panel that decides this. SVP doctors determine mental illness.

It is clear that both California and Texas judges have sentencing discretion and often exercise further punishment using legal options. However, the reality of implementation may mitigate the harsh sentences that reflect an ideology of punishment.

The Realities of Punishment

Scholars have documented the consequences of the punitive nature of laws governing sex offenders. Sex offender registration programs under Megan's Law and its derivatives cause social stigma, negative relationships, unemployment, housing complications, and both verbal and physical assaults for registrants (Tewksbury, 2005). Judges interviewed in this study underscored the consequences of punitive sentences that stem from an emotional voting public's rash responses. One California judge explains:

It's an emotional issue when voters hear these things. They don't read the fine print. The legislation is challenging to enforce. You should remove all the emotions and look for something better for society in general. We should take a look at the real world. To give you an example, an SVP costs \$90,000 per year. Then \$20,000 annually for monitoring costs when they are out, maybe more. However, I follow the laws as they give it to me.

Another California judge in a different courthouse shares the same opinion on the realities of punishment

Registration helps the public in that you, as a citizen, having children or even a woman. You have a right as a citizen. The problem is some [laws] are too punitive. The problem is [sex offenders] are not going to be going anywhere. It's hard to monitor. You can either congregate and monitor them or have to keep moving them around and around.

Unfortunately, the state ultimately pays for this desire for punishment. Structural and legal requirements create additional instances where taxpayers foot the bill on illegal immigrants classified as SVPs. One California judge expresses his frustration with the rigidity of the system, stating

What if you're illegal or an undocumented alien? We're going to "treat" this guy indefinitely even though he's going to be deported. There is no distinction in the law....If they think you're an SVP, they can create procedures to keep you there indefinitely even though you should be deported. It's a huge waste of resources for people who are just on an immigration hold. He's being "treated" but if he were released he would be deported. If you don't deport him, he's back on the street and he's a danger. He can come back.

The state also pays for the many restrictions Megan's and Jessica's Laws place on sex offenders with respect to possible residences. Landlords compound this issue by being unwilling to rent to offenders. A California judge describes a messy situation that arose in one case:

I had a case where they couldn't find a place for the guy to live. When we found a place that met all the criteria for distance and school, *et cetera*, the landlord wouldn't rent....He ended up living in an RV parked in an industrial area. That's a huge burden and resource issue because the state has to pay for the RV, buy the land, his electricity, and supervision.

This example shows the friction between the desire for justice and its costly reality. The general public, however, remains fixated on an insatiable desire to punish child sex offenders while remaining largely uninformed about the social and economic costs of punishment.

Limitations and Conclusion

We acknowledge the limited conclusions drawn in this exploratory study reflect only a small sample size and limitations associated with qualitative methodologies. However, we stress that direct insight from judges on judicial discretion is very difficult to obtain. In addition to the difficulties in gaining access to this population, many judges minimized or did not acknowledge the existence of judicial discretion.

Moreover, every judge we approached rejected the idea of filling out a survey. Despite the limitations, this study serves as a good empirical and theoretical starting point for future studies.

Judges and legal actors operate in a world of legal jurisprudence and due process, where the legitimacy of the law stems from its systematic and fair application of legal principles. Legal realists and other scholars have argued that the law does not operate in a vacuum and often diverges from this ideal. Sexual offenders, we have shown, typify this dichotomous discord. On the one hand, the judges we interviewed share the public's strong sentiment that child molesters are abhorrent and, more importantly, cannot be rehabilitated or "cured." These ideals have permeated the legal system explicitly, with harsher penalties beyond the typical sentencing such as lifetime registration and monitoring, and more insidiously, such as using legal procedures that were never designed for supplemental punishment. As discussed, judges often assigned offenders who have served their full sentence to "treatment" in detention facilities. In essence, incapacitating and punishing offenders indefinitely. On the other hand, judges are not supposed to allow personal feelings to influence sentencing and the judicial decision-making process.

Blurring the lines between the ideals of fairness and the realities of punishment, in addition to eroding the legitimacy of the system, have economic and structural ramifications. For example, well-intentioned laws designed for mass public appeal using victims' names, such as Megan's Law, have resulted in ex-offenders being subject to housing discrimination and ultimately becoming reliant on the state. The authors did not intend to build sympathy for ex-offenders, but to introduce and present a two-tiered analysis: the ideological disparities of the "law on the books" versus the "law in action" and the practical ramifications of this conflict.

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