

PUNITIVE EXCESS: SEX OFFENDER LAWS

Pornography offenses are defined by a non-specific lexicon, a terminology touted to inflame public hysteria and outrage and to drive crude legislative initiatives through Congress. This terminology is used indiscriminately without constitutional relevancy or definition and with little regard for the particulars of each individual case. It is supercharged with negative connotations in our society and, as in witch trials of another era, its very vagueness conspires to provoke the excessively punitive and unwarranted actions of lawmakers, judges and prosecutors and justify them in the minds of the public. 'Sex offender', 'child pornography', 'sexually explicit conduct', 'sexual exploitation' and the like are used to drive a 'one-size-fits-all' legal strategy. As a prosecutor told the jury in a recent child pornography case: 'The U.S. Government makes NO DISTINCTION between the suggestive picture of a fully clothed seventeen-year old girl and a picture of a naked five-year old being raped.' (From a case brought by the U.S. Government against internet modeling site 'Webeweb'.)

Public perception is firmly rooted in the constant usage of this terminology. 'Sex offender' calls up an immediate negative reaction in those unacquainted with the legal system and the increasingly wide parameters that the term has been forced to encompass. Like 'pedophile' the term has become synonymous with 'child rapist' even when the definition does not apply. This unspecific language is particularly crucial to prosecutions in the federal legal system where so many 'sex offender' cases are now ending up. State laws are sometimes more lenient (or more reliant on substantial evidence) and state legislators are less willing to take up the crusade for endless incarcerations, or even for post-incarceration registry enforcement. The deep pockets of our federal government feed this and other areas of extremely punitive and non-specific 'sex offender' law.

First, there is a vast gulf between 'pornography (or fantasy) offenders' and 'contact offenders' and even with pornography cases there is a vast gray area within what is being currently prosecuted as 'production'. Sometimes a single picture of a naked underaged person is labeled as 'child pornography' depicting 'sexually explicit conduct' and qualifying the image-taker as a 'sex offender' engaging in 'sexual exploitation' even when there is no sexual contact or even the intention or possibility of sexual contact of any kind. In fact, taking a single picture of a naked underaged person can

be defined as an act of 'violent abuse' and charged as such by a zealous prosecutor. This may damn the 'image taker' as a danger to public safety for life. As one example there is the case of a high school swim coach who photoshopped a picture of the girl's swim team by removing heads and legs from the original. The resulting image focused on the pubic area (clothed in swimsuits). He posted the picture with a suggestive title and was given a fifteen year sentence for 'production'. The Federal Sentencing Guidelines make it very easy for prosecutors to define a 'sex' case in any way they please, and to use innuendo, false testimony (even by police and government agents) as well as inflamed rhetoric to make it stick. The cases of single pictures, fantasy photoshopped images or even 'candid pictures' taken surreptitiously flood the BOP's institutions. In a case from Florida (US. vs. Deverso) a single picture of a seventeen-year old girl emerging from the shower and weaving at the camera was sufficient to earn the defendant an 18 year sentence. (Incidentally, such cases are automatically defeated in the appeal process, although such failed appeals are symptomatic of almost every case now in the federal system as a whole.) There is a panicked anticipation by lawmakers and law enforcement that the public will perceive them as 'soft' and ineffective if they do not deal with each and every 'sex' case in the harshest possible manner. This seems particularly ironic in a time when depictions of nudity and sexuality and sex-as-commercial-exploitation seem rampant in our society.

There are glimmers of hope and sanity. Recently an important case concerning possession of 'child pornography' was heard by an appeals court in the second circuit (US vs. Jenkins, 2017 BL 12467, 2nd Cir. N°14-1295 cr. 4/7/17). It is the first time an appeals court turns back a case of this kind for excessive sentencing (19 years). The appeals court further admonished district courts to stop giving less time to offenders who rape victims as opposed to 'fantay' offenders. This case may finally open the door to redefining and narrowing sentencing parameters and disparities. Another interesting feature of this case is that the accused claimed the porn was for his 'private use' and didn't include anyone else (i.e. no 'distribution'). There is no record of courts previously considering such distinctions. There is the possibility that such distinctions may affect the outcomes of thousands of cases.

Unfortunately, there is still the matter of public perception.

'Sex offender' and 'child pornography' laws have followed a pattern of

escalating punishment since the late 1970's and early 1980's. In the U.S. much of the punitive history begins, as with much of the mass incarceration movement, in the right wing backlash of the Reagan era. Some, such as writer Richard Beck ('We Believe the Children'- Public Affairs Press - 2015), pinpoint the beginning of the hysteria to the days of the McMartin Daycare case in California which brought about an 'epidemic' of daycare abuse and child rape allegations and trials all across the nation. It also opened the door for the extreme right and its moral crusaders to lobby for harsher laws and less restrictive criteria. The roots of these laws go further back however, to the moralistic Prohibition era where censorship, anti-pornography and 'decency' legislation first seized the public mind.

The ingrained public perception fed by the constant litany of unspecific terms used by the legal system is that 'sex offenders' are incapable of reform and unrepentant about their actions, animals who, like rabid dogs, need to be 'put down'. There is no awareness of how the larger sense of recent sexual permissiveness in society and the availability of extreme sexual behaviors and violent fantasy content on the internet has shaped delusional sexuality and aggressiveness in the past twenty years. The public has been conditioned to think of 21st century 'sex offenses' in 20th century terms. The central idea of 'community standards', for example, as a criteria for defining 'obscenity'. Can any court now seriously continue to use 'community standards of decency' as a guidepost when the internet is no longer a local community, or even a single community but a pluralistic conglomerate of almost every conceivable moral and immoral attitude on the planet? The concept of 'pornographic addiction' too is a hard sell because for most people porn is a passing entertainment, not an obsession as it becomes for thousands of men, a mind-altering pleasure mechanism that rivals narcotics for its ability to provide psychological escape without any of the attending physical side effects.

The second element in this perfect storm of public-sponsored constitutional violation derives from the actions of Congress. Finding themselves ever more pressed to find a consensus as the political parties have drawn further and further apart, as our national politics have become ever more divisive and contentious, ANY ground for agreement is treasured. Thus there has been, in the past years (specially after 9/11 and the Patriot Act) a steady and brutal conveyor belt of 'anti-terrorism', 'human trafficking', 'child exploitation',

'illegal immigration', and now even 'animal cruelty (bestiality)' laws, legal efforts that are more about bringing opposing factions together than actually addressing the real world social and criminal problems they purport to address in any sane or substantive fashion. These are laws no politician will DARE oppose because they are driven by the witch-hunt terminology of 'populist' sentiment in their constituencies, a problem that leads directly to the education of the public, and inexorably to the issue of public perception.

The last piece of this fatal puzzle is in the mechanics of the Department of Justice itself. This issue is well analyzed in John F. Pfaff's book, 'Locked In' (Basic, 2017). Simply put, the federal government has hired an overabundance of U.S. Attorneys. This army of prosecutors has a wide latitude to impose inhuman and draconian sentences based on Congress's free-wheeling legislations without much restriction or oversight (or any qualms concerning the wastefulness and social destruction they cause). This army of prosecutors pins its future only on the number of convictions each U.S. Attorney can deliver, quantity and not quality. Since the budget of the prosecutors has nothing to do with the budget of prisons (the BOP) there is no real financial (or moral) impediment to incarcerating as many people as possible. Also, the skill level of these U.S. Attorneys, this labor pool, is of an inferior quality when compared to the quality of private sector attorneys. U.S. prosecutors rarely go to trial, rarely have to deal with evidentiary issues, they have little litigation experience. Most federal prosecutions (97%) end in plea bargain deals. For these attorneys sex cases are a godsend, bread-and-butter to keep the wheels churning and the promotions coming. The accused are easy to track down using the high tech capabilities of Federal agencies, easy to indict since 'child pornography' is a 'strict liability' issue (if the accused has 'child porn' as defined by the prosecutor he's guilty), easy to convict because the accused never put up a legal fight, and easy to incarcerate and warehouse because 'sex offenders' are model prisoners for the most part and don't cause trouble or make waves. Most of them, the vast majority, were law-abiding citizens on the outside with no previous criminal charges, with family and jobs and even respected positions in their communities. This, of course, doesn't include the hard cases, the habitual offenders and/or rapists, who by virtue of their deeds drive the entire negative hypothetical narrative. 'Sex offenders' are judged by the worst-case scenarios, even if those are

a minority. And the irony here is that such hard core offenders are the ones who often get less time in prison and are often harder to convict. Without visual imagery to prove the case true offenders are difficult to prosecute successfully. Such cases take more time investment and they burden the resources of the court.

A review of Mr. Pfaff's book appeared in New Yorker magazine (April 10, 2017). The reviewer, Adam Gropnik, makes this key statement which links 'sex offenders' to the mass population of Americans (mostly male) now under some kind of 'correctional' supervision, 6.7 million persons. Mr. Gropnik says: 'Like lifelong 'sex offenders', violent recidivists are rarer than you might think.'

Unfortunately, the federal legal system doesn't go by those kinds of statistics. That would actually reduce the numbers of incarcerated persons and is not in the system's best interest. A public information campaign such as the one that raised awareness of smoking as a health issue would have far more of an impact on our society's sexual misconceptions than the current cruel and inhuman policies of long incarcerations and post-incarceration registries. Our laws were not intended to 'send a message' or to 'stomp out vices'. They were meant to protect society from violent offenders. We've tragically misused and twisted our laws. We've tried to legislate against fantasy and delusion. Banishment from society and isolation may actually exacerbate psychological issues that contribute to sexual delusional behaviors. In this way prison is actually helping to foster and create more crime and more dissension in society. We need to redefine just what sexual abuse and exploitation REALLY is, to educate men about their aggressive sexuality and not sweep the issue under the carpet with a broom of shame and a whitewash of ill-conceived and ill-defined non-specific terminologies and legislation.

For those that are brutally incarcerated, stripped of all rights, obliterated socially and snatched from the arms of loved ones and the pursuit of successful careers just for delusional sexual thoughts and fantasies and not for any actual hands-on offense or REAL abuse, prison is not the answer and never will be. Any system that expects remorse and repentance, much less 'rehabilitation', from any person handed such a senseless, dehumanizing sentence (usually for life) should seriously question its own decency, morality and compassion - if not its very sanity.
