
Rethinking the Criminal Justice System's New and Ineffective War

The last several decades have seen an explosion in America's prison population. According to the U.S. Department of Justice, America's prison population reached nearly 2.3 million by 2009.¹ The popular notion is that much of this massive increase in prisoners has been due to both the federal and state wars on drugs. Yet, the war on drugs on its own does not give us a full picture of why America now has the highest incarceration rate in the developed world. Recent drug law changes have relaxed some of the pressure on overcrowded prisons, but a new war is producing a fresh wave of prisoners, many with decades-long sentences.

While America's war on drugs began to decline towards the end of the 1990s, a new war began to take shape. This war began slowly, without a defining event to mark its beginning. As policy-makers answered public outcries against racially-motivated and excessively long drug sentences, Congress began passing new policies targeting another population in America—sex offenders. Television shows like "America's Most Wanted" highlighted atrocious crimes, stirred up public outrage, and fueled fear in the hearts of America's public. Violent, and sometimes deadly, sex crimes gained national attention, and Congress answered in 1996 with Megan's Law.² This law established a public registry of all offenders convicted of a sexual crime. Even offenders convicted of peeing behind a bar after a night of drinking often found themselves listed alongside violent sexual predators on the public registry for all to see. Other offenders with non-sexual crimes, such as unlawful imprisonment in some states, have found themselves labeled as sex offenders and publically listed with convicted pedophiles.

America's Changing Prison and Community Landscapes

Despite a drop in the recorded number of sexual offenses between 1995 and 2008,³ the average sentence length for sex crimes has nearly doubled in the same time. Combined with lower drug sentences, this has meant a higher percentage of sex offenders in prison. New laws, including mandatory minimum sentences, and aggressive prosecution have both added to this increase in sex offender sentences. In addition to rising sentence lengths for sex offenses, sex offenders are increasingly placed under costly community control after completing their prison sentences.

Community control often includes GPS tether monitoring, sometimes for the natural lifetime of the offender, and very tough parole and probation requirements. Additionally, updates to Megan's Law requires all sex offenders to register with the public registry and to maintain a very long list of conditions, including reporting all email and social media accounts. State and federal courts have traditionally held that the sex offender registry is a collateral consequence. This means that courts are not required to inform defendants, prior to a plea agreement, that they must register. Furthermore, state and federal governments have the right to change reporting rules at any time. Nevertheless, some court cases have recently challenged the registry changes as an "*ex post facto*" (after the fact) punishment. A few courts are even starting to define some sex offender restrictions as punishments rather than as a "community control."

Current Policies Do Not Make Communities Safer

While the sex offender registry was originally designed to alert communities to the presence of sex offenders, it has now become a form of toxic shaming.⁴ Offenders who have served their prison sentences and returned to their communities are still being punished. The public registry lists offenders and their convicted offenses, but the general public often cannot distinguish between crimes. Offenders with felony and sometimes misdemeanor offenses for indecent exposure (considered a "sex offense") and others with first-degree sex offenses for molesting children often look the same on the list. The registry ends up stigmatizing all sex offenders who have served their time, including offenders who are not a danger to their communities.

Sex crimes are horribly destructive, especially to child victims, and these crimes must be punished. But like any crime where an offender is convicted and sentenced to prison, sex offenders should be afforded a pathway to redemption. While many crimes violate relationships, nearly three-quarters of all sex offenses are committed by family members or friends and acquaintances. Oftentimes, the stigma and restrictions sex offenders face make it nearly impossible for them to make right the relationships they have damaged by their crimes. Ostracizing and destructively shaming offenders for the rest of their lives keeps them from returning to society as productive citizens again. It also keeps them from healing the relationships they have damaged. Without a pathway to redemption, these offenders have little incentive to voluntarily participate in rehabilitative programming and therapies that will reduce their likelihood of reoffending in the future. Instead, the labels they are branded with may become self-fulfilling prophecies, resulting in more victims.

Sex Offenders' Treatment Delayed

Unfortunately, most prison systems design their rehabilitative programming for those who are nearing their release dates. This means that most sex offenders do not have access to rehabilitative programming until they are within a year of being released from prison. Destructive habits and patterns of criminal thinking and behavior that contributed to offenders committing sex crimes have often remained with them throughout their incarceration. Very few have the motivation to find resources on their own that would help them begin self-directed rehabilitation. For many offenders, knowing where to start with self-directed rehabilitation is very difficult. This difficulty is further worsened by the stigmatization that exists within prison against offenders who have committed sex crimes. Having access to a personalized assessment and professional help from the beginning of one's sentence would help many offenders begin healing from their brokenness right away. Long before they return back to society, these offenders can begin the difficult work of changing toxic thinking and behavior patterns that led to their crimes.

If sex offenders were evaluated individually the moment they stepped into prison, they could be given treatment plans with progress targets to aim for. These targets would then serve as a measurement tool for psychological evaluations prior to an offender's release from prison. Progress markers could also be used for eventual reintegration into society and release from community control. Rather than keeping sex offenders under permanent community control, treatment plans would provide offenders with a pathway to redemption. They can choose to participate in their own

rehabilitation if they are serious about never reoffending again. Offenders who refuse to take their rehab seriously would remain under community control.

Solution #1: Shrink the Sex Offender Net

While compelling arguments have been made for eliminating the sex offender registry entirely, a good start is to limit the scope of the list. Too many people are currently scooped up in the net of the sex offender registry. Therefore, before we can establish a pathway to redemption for sex offenders, we must begin with redefining who is considered a sex offender. The easiest and most logical place to start begins with reducing the number of people required to register. Legislation can accomplish this by reducing the number of listed crimes that qualify an offender for the registry. Offenders convicted of crimes where sexually deviant behavior is not explicit ought to be excluded from the list. When someone is convicted of indecent exposure because they were drunk or high, they should not be required to register as a sex offender. Others, such as those convicted of Romeo and Juliet offenses, should also be excluded. Let's stop punishing teenagers for behavior to which both parties willingly consented.

In addition to reducing the reach of the sex offender registry, let's also begin to hold prosecutors accountable for over-charging defendants and for prosecutorial misconduct. Rather than using excessive or enhanced charges as a sledgehammer to force a plea agreement, prosecutors should be held accountable for every charge they bring against a person. If prosecutors do not have evidence of a crime, they should not be allowed to charge a person for it. A simple accusation is not enough to charge someone for other crimes, so it should not be enough for charges of sexual misconduct. Even circumstantial cases at least have strong circumstantial evidence of a person's guilt.

In the criminal justice system of today, when a person is charged with a sex crime, he often faces a steep mandatory minimum sentence if convicted. This allows prosecutors to threaten him with a twenty-five-year minimum (or more) if he refuses to plead guilty. Long mandatory minimums and the court's ability to convict without evidence force some people accused of sex crimes to plead out to avoid serving so much time in prison. As a result, some people who are no danger to anyone end up listed on the sex offender registry next to potentially dangerous predators. Holding prosecutors accountable, including eliminating prosecutorial immunity, requires them to pursue justice over convictions. It also reduces the number of people vulnerable to the sex offender registry.

Solution #2: Offer a Pathway to Redemption

America currently treats sex offenses much differently than they do any other offenses, including the crime of murder. Part of the reason for this sentiment is based on flawed and outdated psychological "research" that suggests sex offenders are incurable. Current research shows otherwise. Similar to drug use offenses, some sex offenses, even against children, are the results of sexual addictions; however, unlike drug addicts, sex addicts are not treated as addicts. They are not provided help to address their addiction issues. Instead, they are treated as hopeless deviants, sentenced to long terms of imprisonment, and placed under lifetime community supervision and control. Nevertheless, many of these offenders *are* redeemable. They are not disposable citizens, regardless of the depravity of their crimes. Additionally, many of these offenders will return to their communities. Without the

help many of them need for their sexual addiction, some will likely remain a risk to the communities to which they return.

Notwithstanding the hysteria that television shows like "America's Most Wanted" and twenty-four-hour news cycles foster, many people who are guilty of sex crimes do not want to reoffend again. Many of these offenders are horrified at their own crimes and want to be safe citizens again within their communities. The criminal justice system must recognize that many sex offenders are redeemable and begin to offer them a pathway to redemption. Offering sex offenders early access to the help they need and empowering them to actively participate in their rehabilitation will help to restore these offenders to wholeness again. It will also reduce the number of future victims by helping offenders become safe citizens before they return to their communities.

When sex offenders willingly participate in therapy and rehabilitation programs, they are empowered to take responsibility for their own recovery and reentry back to society. Having a pathway to redemption gives offenders hope for healing rather than despair over destructive labels and shaming. Plans for progressive release from custody and freedom from community supervision and control will keep these offenders accountable as they transition back into society. It will reward them along the way as they prove the success of their rehabilitative efforts. Sex offenders who meet pre-defined milestones of success can be released from GPS tether requirements and the sex offender registry. Offenders who refuse to participate in therapy or to actively engage with their rehabilitation plans can remain under community control and supervision. This would free those who monitor these offenders to direct their efforts towards those who are more likely to remain a danger to their communities.

Solution #3: Develop Individualized Assessments and Rehabilitation Plans

Not all sex offenders are the same. For example, some offenders are driven by power and the need to control, and others are motivated by a distorted vision of pleasure. Yet, these motivations are vastly different and require a completely different approach to therapy and very different rehabilitation plans. While a person's crime may give the criminal justice system clues as to his particular needs, developing truly effective rehabilitation plans, where each offender can wholeheartedly engage in the processes of healing, requires individualized assessments. An offender who was convicted of raping an adult woman, for example, may disengage from the process of rehabilitation if he is lumped into therapy with child molesters. Additionally, peeping toms require a different type of treatment than those convicted of possessing child pornography. Nevertheless, the current system treats all sex offenders the same, requiring the same therapies and similar collateral consequences.

Individualized assessments would take into account an offender's history, including past trauma and abuse, and include therapy for that trauma in the offender's rehabilitation plan. These evaluations would also consider all of the circumstances surrounding an offense, even encouraging stakeholders, such as the victim, family members, and community members to give input. By opening up an offender's assessment to include other stakeholders, psychologists or trained assessors will gain a clearer picture of an offender's true needs. Furthermore, individualized assessments can be used to tailor personalized rehabilitation plans. Cookie cutter treatments are ineffective, but plans that

specifically address the circumstances and needs of each offender can include progress markers to measure his engagement with the rehabilitation process.

What About the Cost?

Undoubtedly, personalizing assessments and plans for every offender will require additional resources Departments of Corrections do not currently have. Nevertheless, reducing the scope of sex offenses and focusing on those who truly are sex offenders, the number of offenders who need personalized assessments and plans can be reduced. This will also reduce the number of offenders who require permanent community supervision and control, and it will reduce the currently overburdened sex offender registry. Additionally, by providing a pathway for redemption to sex offenders, county and state governments can save administrative costs. The money that is used for supervision and control, and monitoring compliance with the sex offender registry, can be focused, instead, on offenders who truly need such attention.

If states and the federal government conduct individualized assessments and establish rehabilitation plans early in an offender's prison sentence, the criminal justice system can reduce sex offenders' rates of recidivism. This will serve the most important function of saving potential victims from sexual abuse and assault. It will also save counties and states money from prosecuting repeat offenders and housing them in prisons for long sentences. The money saved from using individualized assessments and rehabilitation plans can be redirected towards preventative and restorative approaches to criminal justice.

War strategies have changed over time, becoming smarter. It is time for the criminal justice system to also recognize its need to change how it fights its wars. The war on drugs did not work, and the current war on sex offenders will not work either. If the public wants safer communities, not a new explosion in government spending on ineffective corrections policies, it must demand a smarter approach. We must hold our policy makers accountable for ineffective criminal justice policies that do nothing to make our communities safer. Americans must begin to recognize that incarcerating citizens for long periods of time has not and will not make communities safer. It's time for a preventative and restorative approach to criminal justice in America.

Endnotes:

1. Lauren E. Glaze, "Correctional Populations in the United States, 2009," NCJ 231681 Bureau of Justice Statistics Bulletin, December 2010, US Department of Justice, Bureaus of Justice Statistics, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf>
2. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).
3. As a mean percentage per 10,000 individuals. See U.S. Department of Commerce *Statistical Abstract of the United States, 2011-2012, The National Data Book, 130th ed.*, NY: Skyhorse Publishing.
4. See John Braithwaite, "Crime, Shame, and Reintegration" 54-97 (1989) for more information on the harm of disintegrative shaming and the benefits of reintegrative shaming.