

Sexually Explicit Material as Contraband for Convicted Sex Offenders

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Executive Summary

The statutory goals of probation or parole are essentially two fold; 1) protect the public and 2) prevent future criminal activity. Conditions of supervision must meet two criteria to be held constitutionally valid; 1) they must be reasonably related to the offense and 2) they must impose no greater deprivation of liberty than is reasonably necessary to advance the statutory purposes of supervision.

This paper demonstrates that a condition of supervision which prohibits possessing or viewing any sexually explicit material, even material deemed “legal” and commercially available to the adult population at large, is reasonably related to the offense of any convicted sex offender, protects the public, and is reasonably necessary to advance the purposes of supervision. We argue a prohibition against possessing or viewing any sexually explicit material should be a standard condition of supervision imposed on all convicted sex offenders.

The Core Problem

The greatest obstacle to establishing “reasonable relationship” and “reasonable necessity” of supervision conditions for sex offenders is the general inability for most researchers, the lay public, attorneys, and jurists to grasp the internal world of a sex offender. A majority of the research published on sex offenders (including the work cited in this paper) assumes sex offenders assign the same meaning to external stimuli as do non-offenders. It is an assumption that is difficult to test and is, therefore, seldom examined. This issue is at the core of what constitutes contraband. To overcome this handicap, we have attempted to triangulate through a meta-analysis of the existing work and our direct clinical/forensic experience with thousands of sex offenders since 1970.

Interestingly, the courts have identified this barrier and often overcome it through the admission of expert testimony as a vehicle for helping courts and juries understand complicated behavior that may look innocent on the surface but is not as innocent as it appears (U.S. v. Romero 1999), or to help interpret whether material appeals to the prurient interest of “bizarre deviant groups” where the trier of fact would be plainly inadequate to make such a determination (U.S. v. Cross 1991).

Cognition, Perception, and Sexual Behavior

Cognition, internal mental representation and interpretation, plays an important role in guiding general sexual behavior (Quayle and Taylor 2003; Taylor and Quayle 2003; Ward 2003; Ward 2000; Ward et al. 1998; Ward et al. 1997). Sexual assault, being a specific sexual behavior, does not appear spontaneously, in a vacuum, or without some cognitive predecessors – it is learned behavior (Ryan 2004; Hogben, Byrne, and Hamburger 1996; MacDonald 1995; Scully 1990; Kanin 1984; Simon and Gagnon 1970). More importantly, sexual assault is a specific sexual behavior which cognition can play a role in fostering (Taylor and Quayle 2003; Malamuth et al. 1991; Darke 1990; Abel, Becker, and Cunningham-Rathner 1984; Scully and Marolla 1984).

Cognition is essentially a four step process (Tanner 1999). Take an individual viewing a dog, for example. There will be four steps that rapidly occur as the person “sees” the dog:

- 1) **Reception.** The viewer receives stimuli. This can be in almost any format; auditory, visual, olfactory, tactile, “internal” (e.g., thoughts), etc. In our example, our eyes would detect edges, lines, and general shape and transmit that to the brain.
- 2) **Object.** The incoming information is parsed and the individual recognizes an Object. An Object is simply the internal representation of the stimuli. At this point of cognition, the Object has no meaning, it is simply recognized as familiar or known. In our example, the brain would translate the information sent by the eyes and recognize the Object as a “dog.”
- 3) **Concept.** Upon Object recognition, a generalized meaning is immediately associated with the Object. At this level of cognition, the meaning is broad and conforms to socially established content. In our example, the dog would be recognized as an animal and potentially as a breed (e.g., Poodle).
- 4) **Context.** Immediately after conceptualization, our past life experiences with the Object class are associated with the Object in front of us - we see the Object in the context of our life experiences. In our example, a person who loved dogs might see a warm and friendly animal. A person who was attacked by a dog might see a vicious threat. The actual dog is neutral at this point, the meaning is assigned by the viewer. Subsequent behavior by the dog could begin to change our perception of it. This new behavior would be seen through the contextualization based on our past life experiences and change slowly.

It is in this last stage of cognition, the assignation of our past life experiences to the Object before us, that our day to day meaning is found. As each of us has unique past life experiences, we all interpret Objects differentially. This is where the complication begins when trying to establish ‘reasonable relatedness’ of an image or story to a sex offender’s offense. A sex offender often imputes sexual content where others do not see it or adds deviant overtones to Objects that others may see as only erotic. In short, we can’t know definitively what stimulates a sex offender, but it is a reasonable conclusion that sexually explicit material probably does.

Various models of sexual behavior have been presented to explain sexual deviance (Fisher and Barak 2007; Taylor and Quayle 2003; Laws, Hudson, and Ward 2000; Ward 2000; Ward et al. 1997; Byrne 1976). Most all models incorporate some form of cognitive component in the formulation of sexual misconduct. In fact, cognitive-behavioral approaches to sex offender treatment are regarded as the evidence-based best practice method of treating sex offenders (Center for Sex Offender Management 2000; English, Pullen, and Jones 1996). What a sex offender thinks, how they interpret their environment, and how these thoughts guide their behavior must be carefully considered to promote the goals of supervision: protecting the public and preventing future criminal activity by changing the offender’s behavior.

Stimulating or cathecting the sex-oriented libido of a convicted sex offender in an uncontrolled environment clearly does not serve the public’s best interest nor promote public safety. Moreover, it works against cognitive-behavioral treatment designed to assist the offender in regulating behavior.

Private usage (in uncontrolled settings) of any sexually explicit material by convicted sex offenders is reasonably related to their offense as it serves to stimulate their sexual interest, which is known to be deviant in nature. That the material is not seen as deviant or prurient by others is moot.

Do You See What I See?

Sex offenders have different responses to sexual images and sexual fantasy than do non-offenders (Barbaree, Baxter, and Marshall 1989; Earls 1988; Abel et al. 1977; Goldstein, Kant, and Hartman 1973). In general, offenders perceive more deviant undertones and are more aroused to deviant undertones in pornography than are non-offender populations. When compared to non-offenders, offenders have more frequent fantasy, are more strongly affected by fantasy, and their fantasies tend to foster sex assaults (Vega and Malamuth 2007; Taylor and Quayle 2003; Hazelwood and Burgess 1995; McKenzie-Mohr and Zanna 1990; Wolf 1988; Burgess et al. 1986; Gagnon and Simon 1973; Goldstein, Kant, and Hartman 1973).

To make matters even more complicated, sex offenders attribute sexual constructs to stimuli that the average person would not view as sexual. Anyone doing treatment with sex offenders has encountered “porn” the offender has created out of catalogues, magazines, and “innocent pictures”. During more than 1,200 computer examinations of convicted sex offenders, Tanner found a wide variety of “innocent” websites and images which were subsequently discovered to be associated with deviant sexual fantasies (Tanner 2007a).

Research also indicates when fantasies of sex offenders are compared to non-offenders, a significant difference is that sex offenders tend to lack non-deviant fantasy (Daleiden et al. 1998). Deviant fantasies are established early in adolescence (Howitt 1998), play an important role in sexual scripts (Fisher and Barak 2007; Taylor and Quayle 2003; Byrne 1976; Gagnon and Simon 1973; Goldstein, Kant, and Hartman 1973), and tend to lead to sexual misconduct (Hazelwood and Burgess 1995; Malamuth et al. 1991; McKenzie-Mohr and Zanna 1990; Wolf 1988; Burgess et al. 1986).

In their seminal review of literature on sexual fantasy, Leitenberg & Henning define sexual fantasy as “... almost any mental imagery that is sexually arousing or erotic to the individual”. They indicate having fantasies is not problematic unless “...(a) there is extreme guilt about having sexual fantasies, (b) individuals are so preoccupied with their sexual fantasies that the fantasies interfere with daily functioning, [or] (c) fantasies are acted out in a way that is harmful to the individual or to others, as is the case with many paraphilias and sexual offenses”. More importantly, they conclude “...one needs to be concerned about [deviant fantasies] primarily in those individuals in whom the barrier between thought and action has been broken. Once this has occurred, sexual fantasies often become part of the chain of events leading to recurrent sexual crimes, and then they indeed have to be considered as serious danger signals”. (Leitenberg and Henning 1995)

When viewing any sexually explicit material, sex offenders fantasize more than others, see deviant overtones others do not see, are more aroused by their fantasies, and are more likely to engage in sexual misconduct as a result. Allowing sex offenders to view any sexually explicit material is antithetical to the statutory goals of probation or parole.

What You See Is Not What You Get

A second major misstep concerning “legal” pornography and sex offenders is to assume the presenting problem is the problem in its entirety. To fully discharge the statutory mandate of protecting the public, a supervising officer must know what (s)he is trying to contain. Generally, the sexual behaviors elicited by the Pre-Sentence Investigation and initial psychosexual assessment are only the tip of the iceberg. Recent research has shown convicted sex offenders are far more diverse in their interests and behaviors than previously known. Assuming a child molester has no adult victims is a mistake, as is assuming an offender with a known adult victim has no child victims.

Crossover studies examine offenses and interests known at the time of sentencing with those discovered through treatment and/or polygraph testing. Repeatedly, it is shown that regardless of the demographics of the victim(s) of the sentencing charge, convicted sex offenders crossover between age of victims (adult v. child), and proximity of victims (family v. extra-familial; known v. stranger) (O’Connell 1998; Abel and Osborn 1992; Freeman-Longo 1985).

In one of the most recent and largest studies, it was found that 78% of Colorado inmates convicted of child molestation also had adult victims; most unknown at the time of sentencing (Heil, Ahlmeyer, and Simons 2003). To ignore the effect “legal” pornography would have on these child molesters, their fantasies, and subsequent behavior would be a grievous error.

While many sex offenders appear compliant during supervision, a study conducted by Tanner of 128 convicted sex offenders in the community and in treatment for at least six months revealed that 82% were routinely engaging in “high risk behaviors”, 45% of them were viewing sexually explicit materials, 32% were masturbating to deviant sexual fantasies, and 54% of them were using alcohol and drugs (Tanner 1998). This same study revealed that it took, on average, 735 days before the supervision team fully understood all of the offender’s sexual interests and behaviors. The study was replicated by Brake with similar findings (unpublished report).

Given that research has found 3 out of 4 convicted sex offenders engage in crossover behavior, that it takes two years to fully uncover all of an offender’s deviant interests, and that 4 out of 5 offenders in treatment continue to engage in high risk behaviors, prohibiting access to any sexually explicit material is reasonably necessary to meet the statutory goals of probation or parole.

What Do We Do?

First, we must take a “containment approach” to sex offender management (English, Pullen, and Jones 1996). We must contain the offender’s behavior. Then, and only then, progress can be made toward changing the offender’s behavior. Containment requires a team approach wherein supervising officers, treatment specialists, polygraphers, and computer forensic examiners take a structured approach to helping the offender identify and mitigate their risk factors (Tanner and Brake 2002).

Second, we must establish conditions of supervision which prohibit the possession or use of all sexually explicit materials. The Center for Sex Offender Management lists “best practice” recommendations for containing and treating sex offenders. One of the 10 special conditions of supervision recommended is “...no view, purchase, or possession of adult-oriented materials” (Center for Sex Offender Management 2000). Moreover, in a survey of 732 probation officers

across six states, researchers found officers with experience in managing sex offenders were using prohibitions against possessing or using pornography (English, Pullen, and Jones 1996), demonstrating that these officers clearly understood the relationship of sexually explicit material and its deleterious effect on both treatment progress and public safety.

Third, we must use an informed, policy driven decision process to ensure conditions of supervision are applied consistently and fairly. Suggested guidelines for computer monitoring of convicted sex offenders (Brake and Tanner 2007; Tanner 2007b), and standardized treatment review (Tanner and Brake 2002) are available to assist in this regard.

Can We Do This?

Yes. Conditions of supervision prohibiting possession or use of sexually explicit materials have been upheld upon appeal and satisfy the the “least intrusive” or “minimal deprivation of liberty” tests (U.S. v. Grennan 2007; U.S. v. Vinson 2005; U.S. v. Ristine 2003; U.S. v. Simmons 2003). But, we have to be clear about what is prohibited and care should be taken to craft language that clearly informs the offender what is prohibited (U.S. v. Antelope 2005; U.S. v. Cabot 2003; U.S. v. Guagliardo 2002; U.S. v. Loy 2001). In general, we should prohibit viewing or possessing any material, in any format, when such material depicts or represents nudity or sexual activity. Sample language can be drawn from special conditions in use in Colorado (Tanner 2005).

Summary

We know the following:

1. We are statutorily mandated to protect the public and reduce the likelihood of future offending.
2. When viewing any sexually explicit material, sex offenders fantasize more than others, see deviant overtones others don't, have fewer non-deviant fantasies, are more aroused by their fantasies, and are more likely to engage in sexual misconduct as a result.
3. Research has found 3 out of 4 convicted sex offenders engage in crossover behavior, that it takes two years to fully uncover all of an offender's deviant interests, and that 4 out of 5 offenders in treatment continue to engage in high risk behaviors.
4. Stimulating or cathecting the sex-oriented libido of a convicted sex offender in an uncontrolled environment clearly does not serve the public's best interest nor promote public safety.
5. The Center for Sex Offender Management and experienced officers supervising sex offender populations recommend a prohibition against viewing or possessing any sexually explicit material.
6. Clearly written conditions of supervision which prohibit viewing or possessing sexually explicit materials have routinely been upheld on appeal.

In light of this knowledge, establishing clearly written conditions of supervision which prohibit convicted sex offenders from viewing or possessing sexually explicit materials is reasonably related to their offense, imposes the minimum deprivation of liberty, and is reasonably necessary to discharge our statutory mandate. Establishing such conditions of supervision greatly benefits public as well as the offender by assisting the offender in regulating his behavior and reducing the likelihood of re-offense.

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