



# In the Community

Sex Offender Community Containment  
Implications for ID/DD population

# Danny's story

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Early 20's with a cognitive disability

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Danny's neighbor and her 7 year old son see Danny gardening in his backyard without any pants on.

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Police are called and they arrest Danny at his home

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Danny is convicted of indecent exposure in the presence of a minor and is subject to registration and notification requirements

# Issues to consider

Does Danny live in a state that has substantially complied with SORNA?

Differences in requirements under state statute and federal oversight

Tier levels- hardships associated

Risk assessment – how is risk assessed- if at all

Housing/ residence complications

# Broader questions to consider, 2

Quality of representation at criminal stage?

Has Danny been recently evaluated for risk factors?

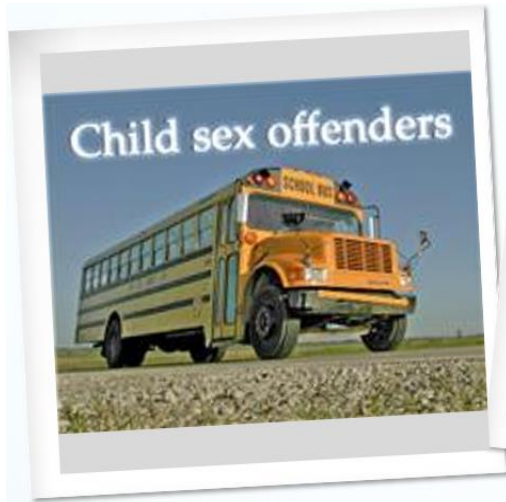
Likelihood of compliance

Likelihood of seeking out assistance

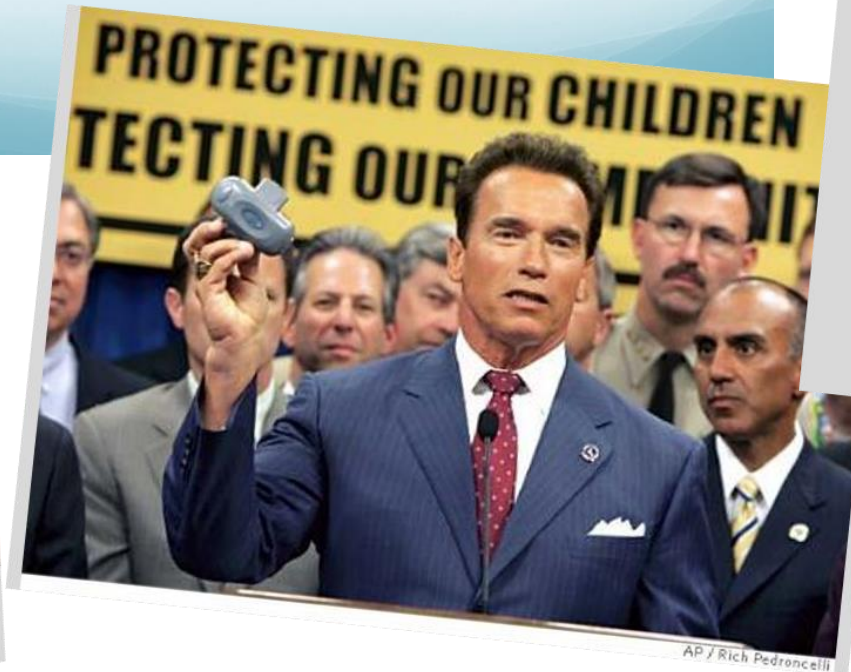
Parole/probation

# Media Hype

Community fears



## Notification and Registration



# Community Containment

- Fueled by politicians and public outrage, legislators created laws attempting to track offenders and keep the community notified of their whereabouts:
  - Community notification and registration
  - Residency restrictions
  - G.P.S. and Electronic Monitoring

# Two paths: SORNA and SORA

Development of a  
Federal community  
containment statute  
and state community  
containment statutes

By 2006 all states had  
some form of state  
registration and  
notification laws

Federal SORNA has  
evolved to encompass  
a wider swath of  
offenders

# SORA: the Supreme Court, a 2003 Trilogy

In 2003, the Supreme court considered the issue of community containment statutes in the cases of *Smith v. Doe*, *Connecticut Department of Public Safety v. Doe* and *Stogner v. California*.

Under *Smith and Conn. Dept. of Safety*, The Court found both statutes to be non-punitive, and gave little weight to the consequential stigma and potential negative impact of these laws.

In *Stogner*, the Court found that the statute violated ex post facto when it extended the time to prosecute sexual crimes.



# Smith v. Doe: Majority Opinion

- Where a legislative restriction ‘is an incident of the State's power to protect the health and safety of its citizens,’ it will be considered ‘as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.’
  - the State's expressed purpose to protect the public from dangerous sex offenders was a legitimate, non-punitive governmental aim
  - Sex offenders have high recidivism rates.
  - Civil intent of statute
  - Stigma was not sufficient to be found punitive
  - Supreme Court reliance on statements about sex offender danger

# Connecticut Department of Public Safety v. Doe

- Sex offenders are a serious threat in this Nation. . . . [W]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.

# Myths and realities

- Rationale: The majority of sex offenses involve stranger victims:
  - ? Media influence
  - 90% involve interfamilial and acquaintance situations.
- Rationale: An offender's proximity to a school increases recidivism:
  - Social not residential.
- Rationale: High rate of recidivism
  - Studies show this population has one of the lowest rates of recidivism compared with other criminals.

# Purpose and Effect

- Study of NJ Megan's Law tracked 550 randomly selected sex offenders released between 1990 and 2000
- Compared re-offense and offending rates from 10 years before enactment and 10 years after.
  - The authors found no reduction in re-offending, no reduction in the number of victims, and an exponentially increasing cost of US\$3.9m per year by 2007.
- Response: Megan's mother (Maureen Kanka) informed the Star Ledger (NJ) that the "purpose of the law was to provide an awareness to parents...Five million people have gone to the state website. It's doing what it was supposed to do...we never said it would stop them from re-offending or wandering to another town"

# Recent caselaw on state SORAs

Does #1–5 v. Snyder, 834 F.3d 696 (6th Cir. 2016)

- In late 2016, U.S. Court of Appeals for the Sixth Circuit's concluded in Does #1–5 v. Snyder that Michigan's sex offender registry and residency restriction law constituted an ex post facto punishment in violation of the constitution. In its decision, the Sixth Circuit engaged with scientific evidence that refutes moralized judgments about sex offenders, specifically that they pose a unique and substantial risk of recidivism.

Millard v. Rankin, 265 F.Supp.3d 1211 (2017), *reversed* Millard v. Camper, 971 F.3d 1174, 1177 (10th Cir. 2020)

- A Colorado district court recognized that the punitive impact of the state's SORA far outweighed any value it might have in protecting the public. The district judge held that Colorado's registration statute violates the 8th Amendment by imposing cruel and unusual punishment and violates a registrant's 14th Amendment procedural and substantive due process rights.

Commonwealth v. Muniz, 164 A.3d 1189 (July 19, 2017),

- Pennsylvania Supreme Court determined in a majority decision that SORNA or "Megan's Law IV" registration requirements are "punishment" and violate the ex post facto clauses of both the State and Federal Constitutions.

# Reasoning behind shift

- Inability to predict future dangerousness;
- Risk is not measured;
- Blanket restrictions without consideration of the specifics of the offense;
- Ineffective;
- Unconstitutional;
  - Violations of freedom of speech, freedom of association, right to privacy, right to work, the takings clause.
- But--shift back as of recent (*Millard* reversal)

# Adam Walsh Act 42 U.S.C. § 16911

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act. This legislation contains the Sex Offender Notification and Registration Act (SORNA)

SORNA aims to close potential gaps and loopholes that existed under prior laws, and to strengthen the nationwide network of sex offender registrations.

# Results of SORNA

The pool of individuals required to register by defining a sex offense as a “criminal offense that has an element involving a sexual act or sexual contact with another was increased;

The length of time of registration was increased;

Juvenile offenders were subjected to registration. (42 U.S.C. § 16911 (2006) (no exceptions for minors convicted in criminal court)).

There is no distinguishing between different levels of risk for offenders.



# Legislation Overview

The law defines and requires a three-tier classification system for sex offenders, based on offense committed, replacing the older system based on risk of re-offence.

The AWA defines a “sexual offense” as one that involves “a sexual act or sexual contact with another.”

Offenders age 14 or older must register as sex offenders, but does exempt consensual sex if the victim is at least 13 years old and the offender is no more than four years older.

# Juvenile registration, 1

Prior to 2006, federal law did not specify whether juveniles adjudicated delinquent were subject to sex offender registration, and the states decided themselves whether such juveniles were subject to registration.

SORNA requires mandatory registration for any juvenile over fourteen adjudicated delinquent for certain sex offenses.

For certain sex offenses, SORNA permits, but does not require, states to make juveniles' personal information publicly available on the Internet.

# Juvenile registration case example

- L.B.C. v. Forrest Cty. Youth Ct., No. 2016-CA-01672-SCT, 2017 WL 5897905 (Miss. Nov. 30, 2017):
- Juvenile's alleged mental retardation or intellectual disability did not render sex offender registration requirement cruel and unusual punishment following delinquency adjudication for sexual battery.

# Retroactive application

- In 2007, retroactive application of SORNA was administratively authorized in order to successfully develop a “comprehensive” system that would be effective in protecting the public with a wider scope and inclusion of all offenders --regardless of *when* they were convicted

# Registration requirements

- Registration requirements are defined by the type of offense the person was convicted.
- Convictions are classified into three tiers.
- Tier 3 offenders register for life.
  - People convicted of the most serious sexual offenses (such as rape, sexual assault, and child molestation) must register every three months for life
- Tier 2 offenders register for at least 25 years after conviction.
- Tier 1 offenders register for ten to fifteen years after release.
  - Tier I registrants may be excluded from internet database, with exemption of those convicted of "specified offense against a minor.

# Compliance

- Registering offenders must supply the following:
  - The name of the sex offender, including any aliases;
  - The address of each residence, employment location or academic institution where the offender currently is or will be.
  - The license plate number and a description of any vehicle owned or operated;
  - A physical description of the sex offender and a current photograph; and
  - An enumeration of any sex offense convictions.

# 18 U.S.C. § 2250- Failure to register

- It is a federal offense to knowingly fail to register or update a registration as required.
- State-convicted sex offenders may also be prosecuted under this statute if the sex offender knowingly engages in interstate travel, foreign travel, or enters, leaves, or resides on an Indian reservation.
- Penalties include fines and up to 10 years in prison.

# Public Access

- Much of the personal information is accessible via the Internet.
- The Dru Sjodin National Sex Offender Public website provides links to all public registries and users can search particular names or access a map that indicates the residences of registered sex offenders.
  - Nat'l Sex Offender Pub. Website, U.S. Dep't of Just.,  
<http://www.nsopw.gov/>



# Compliance with SORNA

- As of June 2020, twenty-two states were considered substantially in compliance with SORNA.
- Federal officials report that requiring juveniles to register is the “most significant barrier” to compliance.
  - “New York has a long standing public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and re-integration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy.”
  - The State of Washington abolished child sex offender registration completely.

# As applied to persons with ID/DD

People v. Durst, 2019 IL App (4th) 170759-U, ¶ 13, appeal denied, 154 N.E.3d 760 (Ill. 2020)

- The court found defendant's intellectual disability was a mitigating factor.
- As to aggravating factors, the court noted defendant's criminal history involved children and sexual issues.
- It also noted the sentence was necessary to deter others from committing the same crime.
- Moreover, the court found defendant's failure to disclose his e-mail address on his sex offender registration form was indicative of his understanding the wrongfulness of what he was doing.

People v. Pelaez, 112 A.D.3d 684, 976 N.Y.S.2d 226 (2013)

- Assessment of 20 points under risk factor for offenses directed at stranger or person with whom relationship had been established or promoted for primary purpose of victimization was inappropriate in designating defendant level two sex offender under Sex Offender Registration Act (SORA).
- Defendant, who was 19 years old on date of subject sex offenses, was developmentally disabled, functioning at level of 13-year-old
- Initial contact between defendant and the then-12-year-old complainant occurred inadvertently when complainant picked up cell phone of her older sister and answered call defendant was making to sister, over subsequent period of at least three weeks, defendant and complainant communicated frequently on telephone and Internet and, thus, they were not strangers, and thereafter, on first day they met in person, they engaged in sexual conduct upon which defendant's conviction was based.

# As applied to persons with ID/DD, 2

- People v. Parrish, 159 A.D.3d 1238, 1238–39, 74 N.Y.S.3d 111, 112 (2018)
  - In 2016, defendant pleaded guilty to one count of sexual abuse in the first degree and was sentenced to a 10–year term of probation.
  - The underlying charge stemmed from an incident wherein defendant, while employed at a group home for developmentally disabled adults, entered a female resident's room and forced his fingers into her vagina.
  - In anticipation of defendant's risk level classification hearing, a risk assessment instrument was prepared that presumptively classified defendant as a risk level two sex offender (80 points) under the Sex Offender Registration Act.
  - At the hearing that followed, defendant contested some of the points assessed under risk factors 1 and 2 and sought a downward departure to a risk level one classification.
  - The Supreme Court, Appellate Division, upheld the County Court and rejected defendant's arguments, denied his request for a downward departure and classified him as a risk level two sexually violent sex offender.

# As applied to persons with ID/DD, 3

- Commonwealth v. Saunders, No. 1679 EDA 2019, 2021 WL 1087300, at \*2 (Pa. Super. Ct. Mar. 22, 2021)
  - Insufficient evidence in the record for court to rule on registrant's arguments:
    - that the registration provisions of SORNA as applied to him result in a violation of his constitutional rights due to his intellectual disabilities,
    - that application of SORNA results in due process and equal protection violations, and
    - his disabilities unintentionally will prevent him from complying with SORNA registration requirements.

# On competency to plead to the underlying charge

- State v. Burner, 2020-Ohio-2930, ¶ 11, appeal not allowed, 2020-Ohio-4388, ¶ 11, 159 Ohio St. 3d 1519, 152 N.E.3d 321
  - Mr. Burner maintained that his IQ test scores between 2005 (when in high school) and 2018, **his failure to understand his sex offender registration requirements**, and the incident where he provided his probation officer with an incorrect street address all demonstrate his incompetency in the 2016 criminal conviction.
  - The court found such points to fall short of establishing the legal standard for incompetency: because of the defendant's mental condition, he or she is “incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense.”
    - “Yes, he exhibited some signs of confusion, but this, standing alone, generally will not suffice to establish incompetency.”

- A developmentally disabled, wheelchair-bound man, previously convicted of charges related to exposing himself to a child, called the sheriff's office reporting that he wanted to kill himself. He made the call after fliers were posted in his neighborhood identifying him and his conviction. He was found dead the next day, apparently due to suicide. These anecdotes describe the effects of restrictive measures on convicted sex offenders living in the community; the stigma and isolation are even more extreme for those who are civilly committed.

- Tanya Kessler, "Purgatory Cannot Be Worse Than Hell" : The First Amendment Rights of Civilly Committed Sex Offenders, 12 N.Y. City L. Rev. 283, 285 (2009)

## Hardships in compliance

# Residency Restrictions

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# Context

- Residency restrictions prevent individuals from living within specific proximities to schools, parks and other areas where children congregate.
- These ordinances are aimed at prohibiting offenders from residing within particular areas and inevitably within particular cities.
- A number of scholarly articles refer to this as the modern equivalent of the medieval sanction of banishment.
- Residency restrictions apply to the individual regardless of the prior crime or offending history.
- Therefore, someone whose crime did not include children and who has no history of interest in or attraction to children is still subjected to ordinances preventing him from living within a specified distance from where children may be.



# Perceived Truths

Community containment laws based on:

- Convicted sex offenders pose a greater danger to the public when they reside near places where children frequent;
  - A New Jersey study sampling 268 sexual offenders found that: (1) the strict residency restrictions caused a housing shortage for tracked offenders; and (2) offenders who targeted adults were more likely to live closer to children than those who offended against children.
- We can dispose of the problem by limiting their housing options in our municipalities;
- Sex offenders coming out of prison or sex offender civil commitment have a high re-offense rate for contact sexual crimes.

# Achieving the Undesirable Result?

Hardships serve to break down protective measures, increase stressors thus causing offenders to slowly deteriorate and move towards relapse

Harsh mandates deter individuals from complying

High-risk stressors lead to lack of dignity, hopelessness, feeling unworthy, less than human

Lack of meaningful employment

Alienation from society contributing to further isolation

Stigma from the state-mandated branding of registration

Often corralled into poor, minority-dense neighborhoods and placed in boarding houses to reside solely with other sex offenders.

Uprooted and forced to move from established residences,

Unable to return home after prison, thus further disabling the family unit and removing the needed support of family members.

May be prevented from residing with their own children,

# Restrictions without education

- In April 2004, Roger Einspahr, a former resident of the Lincoln (Nebraska) Regional Center's sex offender unit, “dragged a boy from his bicycle, took the boy into his bedroom [at a group home] and stabbed him with a knife.”
- Within eighteen months, Joseph Siems, Jr., another former resident of the Lincoln Regional Center, sexually assaulted a five-year-old boy.
- The Einspahr and Siems incidents spurred a series of community and governmental responses.
  - Marc W. Pearce, Civilly Committing Criminals: An Analysis of the Expressive Function of Nebraska's "Dangerous Sex Offender" Commitment Procedure, 85 Neb. L. Rev. 575, 607–08 (2007)

# Restrictions without education, 2

- Marc W. Pearce, Civilly CEinspahr's assault provoked outrage from residents living near his group home and led directly to the creation of a new program at the Hastings (Nebraska) Regional Center to provide a “more structured, secure environment” for adults with developmental disabilities.
- After the Siems assault, Legislative Bill 1199, was passed by the legislature without a dissenting vote and was signed by Nebraska Governor Dave Heineman on April 13, 2006.
  - The bill amended the criminal code to redefine sexual offenses against children; increased “the penalty for a second conviction for failing to comply with the [sex offender] registration requirements”; “[e]xpand[ed] the list of offenses that . . . require registration under [Nebraska's] Sex Offender Registration Act”; lengthened the post-release supervision of certain sex offenders; authorized municipalities to impose residency restrictions on sex offenders; and directed the creation of a working group to study “sex offender treatment and management.”
    - ommitting Criminals: An Analysis of the Expressive Function of Nebraska's "Dangerous Sex Offender" Commitment Procedure, 85 Neb. L. Rev. 575, 607–08 (2007)

# GPS Monitoring

4<sup>th</sup> amendment violation?

# Global Positioning System (GPS),<sup>1</sup>

- More than 40 states have passed laws in the last decade that call for some type of global positioning system monitoring (GPS) of sex offenders, including eight states that monitor them for life. Some states have expanded their programs to include other crimes; California, for instance, monitors gang members along with more than 9,000 sex offenders. At least 13 states monitor domestic abusers.

# Global Positioning System (GPS),2

- The device is used to draw a map of the person's whereabouts throughout the day so that the police would be alerted to the need to conduct an investigation if the person was present at any place where a sex crime was committed.

# Fourth Amendment challenge

- The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”



## *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016)

- Wisconsin statute required child sexual offenders who were no longer under any form of court-ordered supervision, to wear global position tracking devices (GPS) for the rest of their lives.
- Fourth Amendment was not violated and loss of privacy was limited.
- The statute was not an ex post facto violation, because it did not impose any form of punishment.

*Belleau v. Wall*, 811 F.3d 929, 937 (7th Cir.2016)

“Having to wear [a GPS] monitor is a bother, an inconvenience, an annoyance, but no more is punishment than being stopped by a police officer on the highway and asked to show your driver's license is punishment, or being placed on a sex offender registry.”

The loss of privacy for a person wearing the device was very slight compared to the societal gain of deterring future sex offenses by making the person aware that he was being monitored.


# The Aftermath



# Significance of counsel and advocacy

Special skills needed in representing and counseling persons with disabilities

The general ethical and practice standards for attorneys are unsatisfactory and incomplete



Model Rules  
of  
Professional  
Conduct

## 1.14- Client with Diminished Capacity

- a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

# Communication

- The fact that a client may be disabled does not diminish the lawyer's obligation to treat the client with attention and respect.
- Even if a client already has a guardian or other legal representative, the lawyer still has a duty to maintain communication with the client.
- Ethically obligated to follow wishes of client

# Acknowledging the disability

Be aware of the disability and how it influences behavior

Identify the source of the defects in sexual behavior

Consider the defect as it relates to the charged crime

Expert assistance

Risk assessment

Communication

Sex education

Moral reasoning

Amenability/ copycat behaviors

Recognizing  
basic skills  
deficits that  
may impact  
client in  
community



## Issues to consider

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Does Danny live in a state that has substantially complied with SORNA?

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Differences in requirements under state statute and federal oversight

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Tier levels- hardships associated

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Risk assessment – how is risk assessed- if at all

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Parole/probation

# Questions to consider: GPS

Does permanently wearing a GPS device cause physical pain or irritation to the skin or body?

Does the GPS device require the client to be plugged into a wall for hours a day to recharge the GPS device's battery?

Does the GPS device prevent the client from going to certain locations because satellite monitoring is not available in all areas?

Does the GPS device prevent daily activities like work, sleep, or hygiene?

Will the GPS device subject the client to public humiliation, threats or danger?

# Questions to consider: GPS, 2

- Is GPS monitoring warranted by the nature and circumstances of the client's offense?
- Is GPS monitoring warranted considering the client's physical characteristics, condition, or age?
  - It may be less reasonable to require monitoring of an elderly, disabled client confined to a bed than a mobile, healthy client.
- Is GPS monitoring warranted considering the age of the offense and the client's subsequent history?
  - It may be less reasonable to monitor a client who was convicted decades ago with good behavior since, than a client with a more recent conviction.

# Summary

- Legal rights are not implicitly self-executing
- Significance moral, social and political issues surrounding this population.
- Counsel must understand the unique dynamics in working with ID/DD clients
- Necessity of expert assistance and understanding level/deficits in functioning
- Need for counsel to serve an educative function for the client and overseeing authorities