

SEX OFFENSES 101

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GENERAL STATISTICS

General Statistics About Sexual Assaults

~1/6 Women will be sexually assaulted.

~1/12 Children will be sexually assaulted.

~1/33 Men will be sexually assaulted.

General Statistics About Sex Offenders

As of 2007, there were over 600,000 registered sex offenders in the nation.

At least 100,000 sex offenders are unaccounted for.

~59% of assaults are committed by a known acquaintance.

~73% of assaults against women are by a known acquaintance.

~34% of assaults are committed by a family member.

Only ~3.5% of assaults are committed by a neighbor.

Each year there are roughly 60,000-70,000 child sex abuse arrests, of which about 115 are committed by strangers.

General Statistics About Recidivism Rates for Sex Offenders

Sexual Offenders have the lowest recidivism rate among felons.

Only ~5-6% of sex offenders will re-offend sexually.

Only ~2.5% of released rapists are re-arrested for rape within 3 years.

Only ~7% of juveniles sexual offenders will re-offend sexually.

THE 4 HARMS OF SEXUAL OFFENSES

IMPRISONMENT

- Is imprisonment an option?
- Is there a mandatory minimum for the crime being charged?
- If the sentence is suspended, what are the terms of probation and suspension?

FELONY CONVICTION

- Is the current charge a felony?
- If it is a felony, what degree or level?
- Is there a means to avoid a felony conviction by pleading to a misdemeanor?
- Will asking the jury to consider lesser included offenses spare a felony conviction?

SEX OFFENDER REGISTRY

- Will the charge being faced require registration?
- If registration is required, is there any means to get on a non-disclosed registry?
- Registration and Notification is governed by the new tier system in SORNA and the Adam Walsh Act.
- Registry might also include community notification and residency restrictions depending on the jurisdiction.

SEX OFFENDER TREATMENT

- Treatment is often required as part of probation and release.
- Treatment often involves personal and sexual admissions to a probation officer or treatment supervisor.

PRIOR HISTORY

Sexual assaults became the subject of legislation at first in the early half of the 20th century. After the prominent trial of Albert Fish, who claimed to have assaulted more than 400 children and killed 6 others between 1910 and 1930, the term “sexual psychopath” was coined. The first legislation came out of Michigan in 1937; the Mentally Disordered Sex Offender laws treated sexual psychopathy as a mental disorder and allowed civil commitment of sex offenders. This thought process continued through the nation until the 1970s.

The 1970s and 1980s saw a change in the attitude toward sex offenses and offenders. Sexual assaults and child sex abuse began to be talked about more openly. The discourse began to refocus society on the reasons for sexual assaults and the reactions of victims, and did away with a lot of the negative stigma that went with sexual assault.

It was not until the 1990s that sexual assault came to the forefront of society. A series of high profile sexual assault cases grasped the nation’s attention and began the moral hysteria that has driven much of the legislation in this area. The Community Protection Act of 1990 was passed in Washington State in response to the 1988-89 series of sex crimes. This law contained 14 sections dealing with the punishment and management of sex offenders, it contained the first community notification statute, and included a provision allowing civil commitment. In 1994 the federal government passed the **Jacob Wetterling Crimes Against Children and Sexually Violent Predator Program** in response to the disappearance of an 11-year old child in Minnesota in 1989. This program required that every state create a registry for sex. In 1996 the federal government passed **Megan’s Law**, as part of the Wetterling program, which requires community notification about sex offenders in the community. Together with the Wetterling Act, these laws are called the **Registration and Community Notification Laws**. They required all states to implement them by 1997 or risk losing law enforcement funding. 1996 also saw the passage of the **Pam Lyncher Sexual Offender Tracking and Identification Act** as part of the Wetterling program. This act established a national sex offender database enabling the FBI to track offenders nationwide. States also were involved in this memorial law hysteria. Minnesota, Wisconsin, Kansas, California, and Florida all passed state laws enabling civil commitment of sexually violent predators in response to either high profile cases or the imminent release of a convicted sex offender. The most memorable of these is the **Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators Treatment and Care Act of 1998**, which was passed in response to the sexual assault and murder by a released sex offender.

The 21st century saw a continuation of this same trend. Memorial laws continued to be passed in the wake of high profile cases. The **Campus Sex Crimes Act of 2000** was passed by the federal government and required that sex offenders provide higher educational institutions with the appropriate information for the state’s registry. The next three pieces of legislation have the most bearing on the present sex offense world. The **PROTECT Act of 2003** was enacted by the federal government to prevent the abduction and sexual exploitation of children. This act increased penalties for offenders, increased statute of limitations, and strengthened laws against child pornography. 2005 saw the passage of the **Jessica Lunsford Act** in Florida, which has been passed in most states since. This act increased penalties for sexual offenses against minors, required GPS monitoring, and increased offender supervision after release. The final major piece of legislation is the **Sexual Offender Registration and Notification Act of 2006**, which includes the **Adam Walsh Act of 2006**.

SORNA – Sexual Offender Registration and Notification Act (42 USC 16901)
Adam Walsh Child Protection and Safety Act of 2006 (42 USC 16981)

THREE TIERS OF SEX OFFENDER

1. Tier I Offenders

- An offender other than Tier II or III.
- Required registration for 15 years, which can be reduced after 10 years.
- Required in-person re-photograph every 1 year.

2. Tier II Offenders

- An offender convicted of a crime punishable by more than 1 year in prison; AND
- An offense comparable to one of the following, when against a minor; AND
 - Sex Trafficking
 - Coercion and Enticement
 - Transportation with intent to engage in criminal sexual activity
 - Abusive sexual contact
- An offense that involves:
 - Use of a minor in a sexual performance
 - Solicitation of a minor for prostitution
 - Production or distribution of child pornography
- Required registration for 25 years, which cannot be reduced.
- Required in-person re-photograph every 6 months.

3. Tier III Offenders

- An offender convicted of a crime punishable by more than 1 year in prison; AND
- An offense comparable to one of the following, when against a minor; AND
 - Aggravated sexual abuse or sexual abuse
 - Abusive sexual contact with a minor who is under 13 years old
- An offense that involves the kidnapping of a minor.
- Required registration for Life, which can be reduced after 25 years.
- Required in-person re-photograph every 3 months.

SORNA – Sexual Offender Registration and Notification Act (42 USC 16901)
Adam Walsh Child Protection and Safety Act of 2006 (42 USC 16981)

OTHER KEY PROVISIONS

- Registry Requirements:
 - Must register at residence, place of work, school, and jurisdiction of crime.
 - Tier I offenders are required to register as well as Tier II and III.
 - Must provide fingerprints and DNA sample.
 - Failure to register or update information is a felony, punishable by up to 10 years.
 - Information must be readily accessible to public online.
- Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program:
 - Registry information must be provided to: National Registry, Law Enforcement, Schools, Social Services, and Public Housing Authority
- Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking:
 - SMART is authorized to:
 - Administer standards for registration and notification
 - Provide technical assistance to states in implementing standards
- Jimmy Ryce State Civil Commitment Programs for Sexually Dangerous Persons:
 - Persons deemed “sexually dangerous” (a person suffering from a serious mental disorder which causes the person to have serious difficulty in refraining from sexually violent conduct) can be civilly committed beyond their sentence until they have completed their treatment or are deemed no longer dangerous.
- Monitoring Program:
 - Provides for the use of electronic GPS monitors for tracking offenders.
- Juvenile Sex Offenders:
 - Juvenile offenders are subject to the same registration requirements as adults.
 - Juveniles over 14 years old with an aggravated offense are subject to community notification provisions.
- Implementation Requirements:
 - All states must implement the national standards or risk losing 10% of funding.

EXPANDING THE DEFINITION OF SEX OFFENSES

When sex offenses are discussed, people immediately think of the worst of the worst offenders. People think of pedophiles and rapists when they hear sex offender, just as they have been trained to do by politicians and the media. Current legislation has increased the scope of sex offender laws and placed the same burdens on low-level and low-risk offenders as those that are actual sexual predators. In addition, many states have begun to expand the crimes that are considered sex offenses and require registration. This homogenous expansion of sex offense laws shows just how out of touch with reality that these laws and those that are behind them really are.

- **At least 5 states include adult prostitution-related offenses as sex offenses and require registration.**
- **At least 13 states include public urination as a sex offense and require registration.**
- **At least 29 states include consensual sexual relations between teens as a sex offense and require registration.**
- **At least 32 states include exposure of genitalia in public as a sex offense and require registration.**
- **The Adam Walsh Act requires juvenile offenders to meet registry and notification requirements.**

REGISTRATION & NOTIFICATION

LEGISLATION

- Wetterling Act – requires all states to create sex offender registries.
- Megan’s Law – makes registry information available to public.
- Lyncher Act – created National Sex Offender Registry.
- Adam Walsh Act – creates a unified national registry and unified standards; includes juveniles in registry.
- SORNA – makes it a felony for failure to register or update registry.

IMPLICATION PROBLEMS

- The Walsh Act is expected to cost ~\$1.5 billion to implement between 2006 and 2011.
- States are left with the burden of dealing with all legal challenges to implementing this act.
- The threat to states of loss of funding is a form of federal coercion.
- The Tier System is conviction-based rather than future risk-based.
- The laws do not account for locating the ~100,000 offenders that are currently not in the system.

LEGISLATIVE ASSUMPTIONS

- Offenders are part of a homogenous group.
- Offenders will inevitably re-offend unless they are stopped.
- Offenders are usually strangers.
- Offenders have a propensity toward children.
- Offenders have a propensity to kill victims.

EMPIRICAL REALITIES

- 80% of mental health professionals believe that these laws will have no effect on child victimization.
- Studies have not shown any significant effects on sexual assault rates from notification or online registries.
- Re-offending for sexual offenders is the lowest compared to other felons at ~5-6%.
- The majority of assaults are committed by a known acquaintance rather than a stranger, ~60%.
- Adults are victims of ~63% of sexual assaults.
- Sexual assaults result in homicide in ~3% of cases.

CIVIL COMMITMENT

LEGISLATION

- 18 USC 4248 allows civil commitment of mentally ill and sexually dangerous federal prisoners beyond the date of their release until the prisoners are no longer considered dangerous.
- At least 17 states have passed various civil commitment laws for Sexually Violent Persons (SVPs).

COMMITMENT

- A hearing must be held as to whether a given prisoner can be labeled as a SVP.
- The determination is based on clear and convincing evidence.
- Criteria:
 - At least 1 qualifying offense (usually a sexually violent offense).
 - A mental disorder that makes it overly difficult to refrain from committing further sexual offenses.
 - Likelihood to be a future risk.
- Post-Commitment Activities:
 - Confinement is required to include treatment, not just prison (*Hendricks*).
 - Transition and Release can be achieved through compliance with treatment or a judicial decision that the prisoner no longer poses a threat.
 - Release determination is based on preponderance of the evidence.
 - Release can be either total or conditionally based on compliance.

IMPLEMENTATION

- Costs for operating facilities for committed SVPs is over \$224 million per year.
- Costs states an average of ~\$72,000 per prisoner and \$13.2 million per year for civil commitment programs.
- The increase in SVP labels has created a significant shortage of available beds and facilities.
- Some states investing in special facilities for SVPs, disproportional to number of SVPs and costs.

PROBLEMS

- Does civil commitment represent a criminal sanction?
 - If it does then it might implicate Double Jeopardy and Ex Post Facto arguments.
- Substantive Due Process concerns over the diagnosis have been dismissed by *Hendricks*.

CIVIL COMMITMENT – *US v. COMSTOCK*

CHALLENGE

- Congress exceeded its powers and the Necessary and Proper Clause did not grant authority for the civil commitment of federal prisoners.
- The federal civil commitment statute violates the 10th Amendment by invading a state-controlled function.

SUPREME COURT DECISION

- The Necessary and Proper Clause does grant Congress sufficient authority under 5 considerations.
 1. Means-End Rationality Test (*Sabri v. U.S.*)
 - Congress has choice of means if they are calculated to attain a legitimate end.
 2. A long history of federal involvement in mental health care for prisoners and civil commitment.
 3. Congress has the constitutional power and custodial interest to act to safeguard the public from the dangers posed by those in federal custody.
 4. There is no violation of the 10th Amendment because there is no invasion of state sovereignty, but rather an accommodation of state interests, and the Necessary and Proper Clause grants broader implementation authority to the federal government.
 5. The statute at issue is narrow in scope and only affects a small percentage of prisoners.

DISSENTING OPINION

- The statute at issue exercises does not exercise an enumerated power. Because the power is not enumerated for Congress, it does not matter whether it is a Necessary and Proper application.
- Congress does not have overarching authority to protect society from every possible evil.
- The Court misapplies the Rational Basis Test because the legitimate goal of the statute is never examined.
 - There is no legitimate connection between this statute and an enumerated power.
 - There is no requirement for a federal court to find a connection between the reasons for civil commitment and the enumerated power criminalizing the conduct.
 - This statute authorizes federal custody after jurisdiction has ended.
 - There is no requirement for a finding of future dangerousness.

RISK ASSESSMENT

APPROACHES TO RISK ASSESSMENT

- Judicial Determination of SVP Status:
 - Courts make classification decisions based on the recommendations of experts.
- Local Law Enforcement Discretion:
 - Local law enforcement makes decisions affecting the scope and extent of notifications.
- Agency-Based Risk Assessment:
 - Executive agencies (Parole Board, DOC, Special Boards) hold the primary discretionary authority.
- Prosecutor-Based Risk Assessment:
 - Prosecutors can make decisions as to risk factors for notification purposes.
- Judge-Based Risk Assessment:
 - Judges make determination alone after a *in-camera* hearing.
- Hybrid Approach to Risk Assessment:
 - Courts make the final determination, but give deference to expert assessments.

MODELS

- Unguided Clinical Judgement:
 - Clinicians review case materials without any assumptions about information obtained.
- Guided Clinical Judgement:
 - Clinicians review materials, but have some assumptions about what information is important.
- Clinical Judgement Based on a Case History Approach:
 - Use offender's history as a means to predict recidivism.
- Research-Guided Clinical Judgement:
 - Use research-supported factors with appropriate weighting for importance to measure risk.
- Clinical Adjusted Actuarial Approach:
 - Use behavior predictors to predict risk with adjustments made for clinical considerations.
- Purely Actuarial Approach:
 - Use behavior predictors alone without clinical considerations.
 - Have been found to be most accurate in predicting future risk

GPS MONITORING

LEGISLATION

- Lunsford Act – required that released sexual offenders be subjected to electronic monitoring.
- This law has been passed in 35 states since its passage in Florida.

IMPLICATION PROBLEMS

- Each system has a per diem cost of between \$10-20 per offender, as well as the additional fees for the system (~\$1 million) and the costs of more law enforcement officers to monitor the systems.
- Specific causes of each violation are not known to law enforcement at time of violation.
- GPS systems have technological restraints.
- Law Enforcement must shoulder the additional burden and stress of monitoring and enforcing violations.
- There is no way to measure the deterrent effect of GPS monitoring.

EMPIRICAL REALITIES

- Deterrent effects are not really able to be measured.
- There is no statistical data supporting GPS monitoring as being effective to reduce recidivism rates.

RESIDENCY RESTRICTIONS

LEGISLATION

- Residency restrictions have been passed locally and vary from state to state.
- ~60% of states have laws that restrict the residency of sex offenders.
- Most restrictions disallow offenders from living between 1000-2500 feet of schools, day care, and parks.
- The worst restrictions have been passed in Iowa, Georgia, and California.

LEGISLATIVE ASSUMPTIONS

- Offenders are usually strangers (“Stranger Danger”).
- Offenders cannot control themselves if they are in close proximity to children.
- Offenders will offend in close proximity to their residence.

EMPIRICAL REALITIES

- Sex offenders are undeterred by residency and proximity to potential victims.
- A concentration of offenders in a single area has shown no increase in offenses in that area.
- Only a small percentage of offenders will re-offend.
- There is no conclusive data supporting any relationship between residence and offense.
- 95% of residences in Orange County, FL are within 1000 feet of a banned location.
- Only 27% of San Diego, CA is open to sex offenders.
- 98% of residences in Newark, NJ are within 2500 feet of banned locations and 65% within 1000 feet.

UNINTENDED CONSEQUENCES

- Residency restrictions leave many offenders isolated, unemployed, homeless, and without familial support.
- Instability and stress lead to a greater chance of re-offending.
- Removing offenders from the community and from family destroys support networks needed to rehabilitate.
- Restrictions destroy community connections.

INTERNET SEX STINGS

STATISTICS

- 20% of 10-17 year olds face at least 1 sexual solicitation per year via the internet.
- Of these about 1/2 come from juveniles.
- Of these about 1/3 turn into actual meetings, and only a small percentage turn into a sexual encounter.

LEGISLATION

- Protection of Children from Sexual Predators Act of 1988
 - Created enticement laws.
 - Created stringent child transportation and child porn laws.
 - Focused the attention of law enforcement on “might” rather than actual.
- Adam Walsh Act of 2006
 - Made enticement a Tier II sex offense with a mandatory minimum of 10 years in prison.
 - Expanded the Internet Crimes Against Children Task Forces
 - Impetus for the FBI to create the Innocent Images Program to combat child porn.

MEDIA IMPACT

- To Catch a Predator (TV Show); Perverted Justice (Advocacy Group); Justin Berry Case; Congressional Hearings (“Sex Crimes and the Internet)
- Media portrayals have popularized images of dangerous predators leading to moral panic and ineffective laws.

LEGAL CONTEXT

- Free Speech – How can we punish speech alone without action?
- Entrapment – Inducement and Predisposition.
- Factual/Legal Impossibility – If no minor is actually involved then how can there be a crime?
- Presumption of Guilt – Assumes that there will be a sexual assault unless the police stepped in.
- No requirement for an act to occur.

COMMON ISSUES IN SEXUAL ASSAULT CASES

CONSTANCY OF ACCUSATION RULE

NEW RULE (CONNECTICUT) – *State v. Troupe*, 237 Conn. 289 (Conn. 1996)

- A witness to whom a sexual assault victim contacted about the alleged assault can testify in court:
 - (1) that the complaint was made,
 - (2) the timing of the complaint, and
 - (3) the ID of the alleged perpetrator.
- Once an “official” complaint has been registered with a “reporter,” subsequent complaints are inadmissible. [*State v. Samuels*, 273 Conn. 541 (Conn. 2005)]
- Witnesses can only testify to the facts and timing of the complaint to corroborate the complaint with the charge. [*State v. Cruz*, 56 Conn. App. 763 (Conn. App. Ct. 2000)]
- Cumulative testimony is allowed so long as it’s corroborative and not used to establish a substantive aspect of the case. [*State v. Kelly*, 256 Conn. 23 (Conn. 2001)]
- The court is to weigh the probative value of each witness’s testimony and the details afforded against the possible prejudice created by the testimony in order to protect against piling on. [*State v. Troupe*, 237 Conn. 289 (Conn. 1996)]
- If the trial court allowed details improperly, the reviewing court must decide whether actual harm was caused. The relevant factors for this determination are: [*State v. Gonzalez*, 272 Conn. 515 (Conn. 2005)]
 - Importance of the testimony to the prosecution’s case.
 - Whether the testimony was cumulative.
 - The presence or absence of evidence corroborating or contradicting the testimony.
 - The extent of cross-examination otherwise permitted.
 - The overall strength of the prosecution's case.
 - The impact of the improperly admitted evidence on the trier of fact and the result of the trial.
 - If the evidence had a tendency to influence the jury, it cannot be considered harmless.

COMMON ISSUES IN SEXUAL ASSAULT CASES

UNCHARGED MISCONDUCT

CONNECTICUT CODE OF EVIDENCE SECTION 4-5

- Evidence of previous conduct (crimes, wrongs or acts) is:
 - Inadmissible for proof of character or tendency. [*State v. Santiago*, 224 Conn. 325 (Conn. 1992)]
 - Admissible for proof of:
 - intent [*State v. Lizzi*, 199 Conn. 462 (1986)]
 - identity [*State v. Pollitt*, 205 Conn. 61 (1987)]
 - malice [*State v. Barlow*, 177 Conn. 391 (1979)]
 - motive [*State v. James*, 211 Conn. 555 (1989)]
 - system of criminal activity [*State v. Vessichio*, 197 Conn. 644 (1985)]
 - common plan or scheme [*State v. Bennett-Gibson*, 84 Conn. App. 48, 65 (Conn. App. Ct. 2004); *State v. Kulmac*, 230 Conn. 43, 62 (Conn. 1994)]
 - Not too remote in time
 - Similar to current charges
 - Similar victims
 - an element of the current crime charged [*State v. Jenkins*, 158 Conn. 149 (1969)]
 - to corroborate crucial prosecution testimony [*State v. Mooney*, 218 Conn. 85 (1991)]
- Test:
 1. Relevance of evidence is for an “acceptable purpose.”
 2. Probative value outweighs prejudicial tendency.
- Evidence of dissimilar acts is less prejudicial than evidence of previous similar acts.
- Prior sexual misconduct is usually prejudicial unless it tends to show a common plan or scheme
- Prior sexual conduct of defendant has a high propensity for prejudice
- Prior sexual conduct of victim is governed by Rape Shield.

COMMON ISSUES IN SEXUAL ASSAULT CASES

RAPE SHIELD STATUTES

CONNECTICUT CODE OF EVIDENCE SECTION 4-11

- No evidence of the sexual conduct of the victim may be admissible unless it is:
 - (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, or pregnancy.
[*State v. Rinaldi*, 220 Conn. 345 (Conn. 1991)]
 - (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct.
[*Olden v. Kentucky*, 488 U.S. 227 (1988)]
 - (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense.
[*State v. Franko*, 199 Conn. 481 (Conn. 1986)]
 - (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights.
[*State v. Rolon*, 257 Conn. 156, 178 (Conn. 2001)]
- Such evidence shall be admissible only after a hearing on a motion to offer such evidence containing an offer of proof.
- Only instances of conduct are allowed, not proof of reputation or personal opinion.

COMMON ISSUES IN CHILD SEXUAL ABUSE CASES

CRAWFORD EXCEPTION

Crawford v. Washington, 541 U.S. 36 (2004)

- Any hearsay that is considered “testimonial” is to be excluded as inadmissible unless the defendant has the opportunity to confront the witness and cross examine him/her. If not, then it would violate the 6th Amendment’s Confrontation Clause.
- “Testimonial” evidence is any solemn declaration or affirmation made for the purpose of establishing or proving some fact. These classes include:
 - (1) ex parte in-court testimony or its functional equivalent;
 - (2) extrajudicial statements contained in formalized testimonial materials;
 - (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use later at trial.

[*State v. Aaron L.*, 272 Conn. 798, 814 (Conn. 2005)]

COMMON ISSUES IN CHILD SEXUAL ABUSE CASES

TENDER YEARS DOCTRINE

CONNECTICUT CODE OF EVIDENCE SECTION 8-10

- Any testimony given by a child 12 years or younger is subject to this exception.
- Hearsay testimony is admissible only if:
 - (1) There is first a hearing without the jury so that the trustworthiness of the testimony can be guaranteed, and
 - (2) The statement was not made in preparation for trial, and
 - (3) The child who testifies is subject to cross examination, or
 - (4) if the child does not testify then there must be either independent corroborative evidence that is admissible, and the statement was made prior to the arrest of the defendant.
- Trustworthiness is determined by:
 - The degree of spontaneity inherent in the making of the statements;
 - The consistent repetition by the declarant;
 - The declarant's mental state;
 - The use of terminology not within the average ken of a child of similar age;
 - The existence of a motive to fabricate or lack thereof.
 - The "unifying principle" underlying the enumerated factors is that they "relate to whether the child declarant was particularly likely to be telling the truth when the statement was made."

[Factors were set out in *Idaho v. Wright*, 497 U.S. 805 (U.S. 1990), and applied in *State v. Merriam*, 264 Conn. 617 (Conn. 2003) and *State v. Aaron L.*, 272 Conn. 798 (Conn. 2005)]
- The exception to presence by a child is controlled by a case-by-case analysis, whereby a trial court must balance the individual defendant's right of confrontation against the interest of the state in obtaining reliable testimony from the particular minor victim in question. [*State v. Bronson*, 55 Conn. App. 717, 731 (Conn. App. Ct. 1999)]

COMMON ISSUES IN CHILD SEXUAL ABUSE CASES

CHILD ALLEGATIONS

ISSUES IN CHILD ALLEGATIONS

- Child witness competence involves:
 - The psychological and emotional development of children;
 - The process of, and legal standards for, the competence determination;
 - The language needed for questioning children;
 - The secondary benefit of the competence inquiry as a discovery tool;
 - The interplay between the competence determination and the right of Confrontation; and
 - The impact of a finding of incompetence on the admissibility of other evidence.
- Children under 10 years old lack adequate knowledge about the legal system and legal terminology.
- Use of “Yes-No” questions in interviews creates inaccurate responses and false denials/assents.
- Suggestive Nature of Interview
 - Suggestive techniques may produce correct reports from silent children, but entail a risk of producing false allegations.
 - Interviewer Agendas
 - Leading children to allegations (Yes/No, Multiple Choice, Disconfirmation Questions)
 - Coercive Questions.

PROBLEMS WITH THE CURRENT SYSTEM

- **FOCUS ON WRONG RISKS (Stranger Danger, SVPs, Child Attackers)**
- **TREAT OFFENDERS AS HOMOGENEOUS GROUP**
- **USE IMPRISONMENT RATHER THAN TREATMENT**
- **DESTABILIZE OFFENDERS CAUSING A HIGHER LIKELIHOOD OF RE-OFFENDING**
- **FOCUS ON OFFENDERS RATHER THAN VICTIMS**
- **LEGISLATION IS NOT BASED ON ACTUAL EMPIRICAL RESEARCH**
- **DETERMINATIONS ARE CONVICTION-BASED RATHER THAN RISK-BASED**
- **POORLY EDUCATE PUBLIC ON ISSUES INVOLVED**
- **PLAY ON PUBLIC'S FEARS AND HYSTERIA TO PASS LEGISLATION**
- **CONDUCT NO FOLLOW-UP RESEARCH TO SEE IF PROGRAMS ARE WORKING**
- **ALLOW NO DEBATE OVER NEW LEGISLATION**
- **LINK RECIDIVISM TO INCORRECT FACTORS**
- **ERODED CONSTITUTIONAL RIGHTS IN FAVOR OF PLACATING A SCARED PUBLIC**

POLICY ALTERNATIVES

MINNESOTA'S APPROACH

- Minnesota has not yet implemented the Adam Walsh Act and does not plan to.
- The recidivism rates in Minnesota have decreased every year for 15 straight years.
- Policies are based on research before the passage of the legislation and are updated.
- Residency restrictions have not been implemented because there has been no showing that it has any effect on recidivism rates.
- GPS monitoring is being currently tested over an 18 month period to determine its usefulness.

3-TIER SYSTEM FOR RISK ASSESSMENT

1. Highest Risk Offenders

- Police inform community groups, schools, and neighbors of offender's location.
- The offender's name, photo, address, and vehicle type are made available online.

2. Moderate Risk Offenders

- Schools and community groups are informed of offender's location.
- Information may be placed online.

3. Low Risk Offenders

- Offender's address is placed on local police website.

POLICY ALTERNATIVES

COLORADO'S APPROACH

- Colorado has not yet implemented the Adam Walsh Act and does not plan to.
- Established the Sex Offender Management Board:
 - Develop standards and conduct ongoing evaluations.
 - Use research to make sure policies reflect best practices
- Recommendations:
 - Shared living accommodations have proven successful for treatment and containment.
 - Residential restrictions have not proven to control or deter offenders.
 - Social and community support is integral for rehabilitation.

5-PART APPROACH TO MANAGING SEX OFFENDERS

- 1. Victim-Centric Philosophy**
 - Victims should take priority.
 - Better allocation of funds to help victims.
- 2. Multi-Disciplinary Collaboration**
 - Create interdisciplinary teams.
- 3. Containment-Focused Management**
 - Intense supervision through the criminal justice system.
 - Force full disclosure by offenders and create a specific treatment plan.
 - Use polygraphs to ensure full disclosure.
- 4. Public Policies**
 - Must base legislation and policies on legitimate research.
 - Must clearly define policies to offenders as well as public.
- 5. Quality Control**
 - Need to ensure that procedures are constantly being made better.
 - Must subjected to policies and procedures to best research.

POLICY ALTERNATIVES

RESTORATIVE JUSTICE

- **Problems with Traditional Approach**

- Does too little for victims.
- Uses pleas and compromises rather than actual justice and healing.
- Legal process has flaws that lead to problems in achieving justice.
- Punishment is doled out without connection to the victim.
- There is no requirement for accountability or responsibility.
- Shame is used as punitive instead of rehabilitative.
- Registration and Notification leads to more shame and instability.

- **Restorative Justice**

- Puts emphasis on the harm and pain caused by the act.
- Forces the offender to take responsibility for the harm caused.
- Reintegrative Shaming – Focus shame on the act done not the person.
- Utilize the community to help in process.
- Restore BOTH victim and offender.

- **Examples**

- Circles of Support and Accountability (COSA)
 - Community must accept the responsibility for caring for both victims and offenders jointly.
- RESTORE
 - 4 stage process to deal with juvenile offenders.
 - Referral
 - Preparation
 - Conference and Plan
 - Monitor and Reintegrate.

POLICY ALTERNATIVES

VICTIM'S FIRST

- **Problems Facing Victims**

- Not enough focus on victims, focus is on offenders and punishment.
- Resources are being disproportionately spent on offenders and reinforce stereotypes.
- Discourse on the subject is skewed and stereotyped.
- Education is focused on the wrong risks (Strangers/SVPs/Children Victims/High Recidivism).
- Legislation is fear-based rather than research-based.
- Creating fear more than helping.

- **Better Meeting Needs of Victims**

- Provide supportive opportunities to disclose where victims have control and are not judged.
- Disclosures need to be made without shame and without blame.
- Family disclosures need to be encouraged.
- Create better awareness and education.
- Create a more accurate perception of risk.
- End the idea of victim hierarchy, which demeans victims.
- Offer both immediate and long-term victim services.
- Provide better services to secondary victims and family.
- Make criminal justice system better at dealing with victims.
- Allocate more funds to helping victims .

LEGAL CHALLENGES TO SEX OFFENDER LAWS

SORNA & ADAM WALSH ACT

- *Separation of Powers*:
 - Allowing the AG to re-classify, the executive branch is violating the separation of powers by revisiting a judicial determination and opening a final judgement of the judiciary.
 - This challenge has been upheld by the Ohio Supreme Court in *Ohio v. Bodyke* (Ohio June 3, 2010). That court severed the reclassification provisions of the Adam Walsh Act as unconstitutional.
- Federal Due Process:
 - Classification of tiers determines a secondary penalty without the opportunity to be heard.
 - A person may be subjected to registration and notification requirements, or prosecuted for failing to register, when he was not convicted of a qualifying “sex offense” in the SORNA.
- State Constitutions:
 - SORNA’s automatic registration and publication aspects conflict with state constitutions.
 - Many states provide due process hearings to determine risk level, an opportunity to petition for relief, and do not publish information for low-risk or family offenders.
- Unauthorized Lawmaking/Unconstitutional Delegation in Violation of Separation of Powers:
 - BOP or Probation may give notice that a person who is *not* required to register under SORNA is required to register, because he is in some “category specified by the Attorney General.”
 - AG’s determination of a sex crime that is not enumerated in statute.
- Non-Delegation:
 - Retroactive application of SORNA has public policy concerns and can lead to recidivism.
 - AG has the power to make the determination as to whether the law should be retroactive or not, but this is a legislative function and cannot be delegated to an executive branch official.
- Ex Post Facto Clause:
 - A court must determine if the law was punitive or civil because only punitive laws can violate *EPF*.
 - *Smith v. Doe*, 538 U.S. 84 (2003) – Alaska sex offender registry law was upheld. Alaska legislature intended to create a civil, nonpunitive regulatory scheme and the effects of the law did not negate that intent. The law had a rational connection to the non-punitive purpose of public safety.
- Improper Coercion of States:
 - By penalizing states for non-compliance by taking away funds, SORNA is not a proper exercise of the spending power through “encouragement,” but an improper exercise of “coercion.”
 - “The Federal Government may not compel the States to enact or administer a federal regulatory program.” [*New York v. United States*, 505 U.S. 144, 188 (1992)]

LEGAL CHALLENGES TO SEX OFFENDER LAWS

CIVIL COMMITMENT

- Necessary and Proper Clause:
 - This is an exercise of an unenumerated power and is not necessary and proper.
- Equal Protection:
 - Sex offenders are not being offered the same protections as other prisoners.
- Double Jeopardy:
 - Offenders can be punished for the same crime after their sentence has run out.
- Ex Post Facto Clause:
 - Commitment comes too far removed and changes the legal consequences for a conviction.
- Due Process:
 - Does not use the Beyond Reasonable Doubt standard for determination of SVP.
 - Future criminality cannot be punished.
 - Applies too broadly to any incarcerated prisoner under AG's petition.
- 6th Amendment:
 - The commitment hearing is another criminal trial and should be treated as such.
- 8th Amendment:
 - Civil commitment by the decision of AG alone is cruel and unusual.
 - Punishment without limits and for future risk violates the 8th Amendment.
- 9th Amendment:
 - Fundamental rights of people are not limited to those enumerated alone.
- 10th Amendment:
 - States cannot hand over authority out of convenience.
 - The federal government cannot overtake states' powers over criminal laws.
- Vagueness:
 - The terms used in the civil commitment statute are too vague and lack definiteness.
- Inaccuracy of Future Risk Assessment:
 - Clinical judgements have been found to be wrong between 72% and 93% of the time.
 - Factors used to determine SVP status are conviction-based and not proven adequate.

LEGAL CHALLENGES TO SEX OFFENDER LAWS

RESIDENCY RESTRICTION

- Ex Post Facto Clause or Double Jeopardy:
 - Convictions of offenders have been made final and now residency restrictions are being imposed as another criminal sanction for the same, final conviction
- 8th Amendment:
 - Might be construed as a cruel and unusual punishment for limiting the right to live or travel.
- Violation of a Basic Right to Live/Travel:
 - If restrictions are considered to be regulatory in nature then they deprive offenders the basic right to freely choose where one lives and to freely travel.
- Failure to Advance a Legitimate State Interest:
 - What legitimate interest is furthered by residency restrictions?
 - What basis does the state form for making these restrictions?
- Conflict Between Local Restrictions and Overarching State Rules:
 - “Dillon’s Rule” states that local governments can only enact laws under those powers specifically enumerated to the locality by the state constitution.
 - A local ordinance cannot be in conflict with any state law.
 - Is there preemption by the state on the specific issue of a local ordinance?

LEGAL CHALLENGES TO SEX OFFENDER LAWS

STATUTE OF LIMITATION EXEMPTION FOR CH. 109A AND 110 OFFENSES

- Ex Post Facto Clause:
- Equal Protection Clause:
 - Statutes of limitations “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.”
[*Toussie v. United States*, 397 U.S. 112,114-15 (1970)]
 - All crimes are subject to statute of limitations.
 - Most serious crimes have limits of 5 and 8 year (terrorism).
 - What justifies there being an exemption for these crimes?
- Due Process:
 - If delay in bringing charges was prejudicial and unjustified.
 - Violates right to speedy trial.

LEGAL CHALLENGES TO SEX OFFENDER LAWS

MANDATORY SENTENCES

- Eighth Amendment:
 - Mandatory Minimum Penalties have become *grossly disproportionate* to the gravity of the crime.
- Separation of Powers:
 - Mandatory minimums encroach on the judiciary's power to sentence.
 - Mandatory sentences are unchecked by judiciary.
 - The prosecutor has the sole power to charge the offense and also to lower the mandatory minimum.
 - In cases involving internet stings (child porn or enticement) the government also creates the offense that it will charge the offender with.

DNA SAMPLES

- Fourth Amendment:
 - The expansion of DNA collection to those people "facing charges" and in custody brings about a dilemma because the AG has not limited the scope of DNA collection to only those convicted.
 - DNA collection has only been upheld after conviction.

LEGAL CHALLENGES TO SEX OFFENDER LAWS

LIMITATIONS ON DISCOVERY - 18 U.S.C. § 3509

(defense counsel cannot obtain a reproduction of suspected child porn pics)

- Due Process: [*Ake v. Oklahoma*, 470 U.S. 68 (1985)]
 - Must be given a fair opportunity to defend against charges.
 - Includes the use of expert testimony.
 - An expert would need to have access to pics at issue.
 - Would unfairly force the defense to use the prosecutor's office and computers to access the information.
 - Unfairly constrains the defense in time and means.
 - Might lead to the prosecution's ability to access the defense's preparations and pre-trial work.
- Confrontation Clause:
 - violates the right to be presented with the charges and evidence against.
- Presumption of Innocence:
 - By disallowing reproduction for the defense, the prosecution is already assuming that the pics are child porn and that the defendant is guilty.
- Right to Assistance of Counsel:
 - Includes the right for counsel to conduct a reasonable investigation.
[*Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)]