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Should Sex Offenders Be Permitted to Access Pornography?

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18 USC 2256(2) defines “sexually explicit conduct” as “actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse; lascivious exhibition of the anus, genitals, or pubic area of any person. Special conditions prohibiting the possession and/or access to sexually explicit conduct was fairly standard for individuals convicted of sex offenses. But in some cases, higher courts have vacated these

conditions for various reasons. The question remains whether an individual convicted of a sex offense should be permitted to possess and/or access/view material (photos, videos, etc) containing sexually explicit conduct while under community supervision.

While a number of federal circuit courts have weighed in on this issue, I believe the 7th Circuit said it best in their decision in the case of *US v Taylor* (777 F.3d 434, 437 (7th Cir.2015)):

“...there is no finding or suggestion in the record that Taylor would engage in similar conduct or reoffend if he simply viewed legal adult pornography, which is what the condition bars him from doing. See Shannon, 743 F.3d at 502 (vacating condition barring the viewing of adult pornography in light of vagueness concerns and because the “sentencing court did not point to anything in the record suggesting that viewing sexually explicit material involving only adults would cause Shannon to reoffend”); United States v Perazza-Mercado, 553 F.3d 65, 78 (1st Cir. 2009) (“[T]he imposition of the ban on the possession of adult pornography as a condition of supervised release, without any explanation and without any apparent basis in the record, constitutes an error that is plain.”). We are not saying a court could never impose a special condition prohibiting the possession of even legal adult pornography; there may be times when a sentencing court is justified in imposing such a condition. See Shannon, 743 F.3d at 502 (collecting cases). Here, however, the record does not justify the ban.”

The overall consensus is that the Courts can impose prohibitions on sexually explicit conduct material, but must cite specific reasons for imposing such a restriction. We can also look at the Third Circuit's decision in *US v Voelker* (No. 05-2858 Decided: June 05, 2007), which stated: *"...the prohibition on possessing sexually explicit material still sweeps within its reach some legal adult pornography as well as illegal child pornography. Thus, in attempting to avoid the problems the court encountered in Loy, it ignored our caution that "the deprivation of liberty can be no greater than necessary to meet [the] goals [of 18 U.S.C. § 3583(2)]." Loy I, 191 F.3d at 371. Furthermore, the court once again failed to provide an analysis or explanation to support this broad restriction. We realize that the court attempted to justify the prohibition of adult pornography on remand in Loy by relying upon the asserted difficulty of knowing whether persons depicted in pornography are minors. 237 F.3d at 255. However, that justification does not appear anywhere on this record. We will not scour the jurisprudence of a sentencing judge in an attempt to divine the justification for a sentence based upon similar sentences that the judge may have explained in a similar case years before, especially since § 3583 requires sentencing courts to explain the sentences they impose. Moreover, even if we were to reach beyond this record and assume the court was relying upon the same justification it furnished in Loy, the instant condition would still be problematic because it includes legal pornography depicting individuals who are clearly not minors. Accordingly, we will also vacate this condition of special release."*

Again, it appears that a special condition prohibiting the possession of sexually explicit conduct material could be imposed if the sentencing Court provided justification to support it. From both a supervision and treatment perspective, there are concerns within “allowable” sexually explicit conduct material, such as deviant violence (i.e. simulated rape, BDSM); problematic/concerning fetish (i.e. incest); “barely legal” pornography; and material that could be considered obscene under 18 USC Chapter 17, such as anime/cartoon/computer-generated CSAM (child sex abuse material).

Another such concern is bestiality content. While the actual acts would fall under local animal abuse laws, there may be an interpretation of illegality for the content (photos/videos) under federal obscenity laws, or possibility under the Animal Crush Video Prohibition Act of 2010 (18 USC 48). As per statute, the term ‘animal crushing’ means actual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242). 18 USC 1365 - serious bodily injury” means bodily injury which involves—(A)a substantial risk of death;(B)extreme physical pain;(C)protracted and obvious disfigurement; or (D)protracted loss or impairment of the function of a bodily member, organ, or mental faculty. In at least one case with

the federal Courts I was able to locate, bestiality was charged under this statute (see US v. Vincent 21-CR-00010 ND/GA).

From a treatment perspective, there is also concern from allowing an individual arrested and/or convicted of a sex offense carte blanche access to sexually explicit conduct material. See sources below:

1) Cybersex Unplugged: Finding Sexual Health in an Electronic World (Living a Life I Love)-2011 by Weston M Edwards PhD (Author), David Delmonico PhD (Author), Elizabeth Griffin MA (Author): *"research suggests that spending 11 or more hours a week viewing Internet pornography is one warning sign of Internet sexual compulsivity."*

2) Internet Sex Offenders-2013 By Michael C. Seto, PhD: *"Another way pornography can influence behavior is in the effect of arousal states on information processing, a sex-induced myopia akin to the cognitive myopia that can occur as a result of anxiety or alcohol intoxication (Abbey, Zawacki, & McAuslan, 2000; Seto, 1992; Steele & Joseph, 1990). For example, viewing pornography and becoming sexually aroused may cause someone to focus on sexual cues that are present but not on cues of non-consent, fear, or distress. This may explain phallometric study findings on the effects of preexposure to explicit sexual content and may also explain the findings on the arousal responses of nonoffending men to stories about rape once they have been primed by watching a pornography clip (see Barbaree & Marshall, 1991). In these studies, preexposure to mainstream pornography and sexual responding to depictions of rape, suggesting increased*

subsequent sexual responding to depictions of rape, suggesting increased sexual arousal can reduce inhibitions or facilitate response to socially sanctioned content.”

If a person under supervision is to be allowed to use computers/Internet to access/view legal pornography, it would be beneficial to set not only appropriate use parameters. but also a time/day limit on such activity, for example: 1 hour per day; 4x per week max; no access between 10pm-5am. These parameters should be approved and ordered by the Court.

On the technical side, artificial intelligence processes (nudity detection, age estimators, etc), keywords and other automated tools are often unable to determine the difference between legal and illegal pornography.

Removing/disabling some or all of these functions could result in concerning and/or illegal content not being properly flagged. Agencies and officers should be trained and well-versed on the functionality of computer & Internet monitoring technologies to assure they are using the features to their fullest capacity. IPPC Technologies continues to strive towards predictive and proactive solutions so officers can intervene early, address areas of concern and change behavior. For more information on IPPC's services such as Spotlight, please call IPPC at (888)-WEB-IPPC or contact me directly at bkelly@ippctech.net or by calling (516)341-4201.



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