



Summer 2016

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### Recommended Citation

Ricardo F. Roybal, *Let's Talk About Sex: Defining 'Sexually Oriented or Sexually Stimulating' Material in Sex Offender Behavioral Contracts*, 46 N.M. L. Rev. 411 (2016).

Available at: <https://digitalrepository.unm.edu/nmlr/vol46/iss2/6>

# LET'S TALK ABOUT SEX: DEFINING 'SEXUALLY ORIENTED OR SEXUALLY STIMULATING' MATERIAL IN SEX OFFENDER BEHAVIORAL CONTRACTS

Ricardo F. Roybal\*

## INTRODUCTION

Sex offenders are perceived to be the “scourge of modern America, the irredeemable monsters that prey on the innocent.”<sup>1</sup> As this quote indicates, sex offenders are painted by society with a single, rough brush. This view, facilitated by a handful of high-profile sexual assaults involving children in the early 1990's, led to legislative action.<sup>2</sup>

In New Mexico, the Sex Offender Registration and Notification Act (“SORNA”)<sup>3</sup> requires individuals convicted of a sex crime to comply with various restrictions specified in “Sex Offender Supervision Behavioral Contracts.”<sup>4</sup> Among the limitations in these sex offender contracts is a ban on viewing or possessing any “sexually oriented or sexually stimulating” materials.<sup>5</sup>

In *State of New Mexico v. Dinapoli*,<sup>6</sup> the New Mexico Court of Appeals addressed the constitutionality of this provision in a sex offender contract. In the case, the sex offender, Robert Dinapoli, was deemed to have violated this provision because he possessed three mainstream DVDs—the American and Swedish versions of *The Girl with the Dragon Tattoo*, and a third film titled *I Spit on Your Grave*.

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\* University of New Mexico School of Law, Class of 2017. Thank you Professor Dawinder Sidhu for the thoughtful feedback and invaluable instruction you provided. My thanks also extend to Corinne Mack, Felecia Cantwell, and the rest of the New Mexico Law Review staff and board members for their insightful comments that enabled this Note to serve its purpose to resolve an issue within a sensitive area of law. In particular, a special thanks to Dominic A. Martinez for the countless and continuous contributions he provided to maximize the quality of this Note. Above all, I would like to thank my family for the tremendous guidance and never ending support that they have supplied at throughout my educational career.

1. See Wayne A. Logan, *Liberty Interested in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1167 (1999).

2. See generally Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, & Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2008), <http://www.nesl.edu/userfiles/file/nejccc/vol34/1/logan.pdf>.

3. See *State v. Druktenis*, 2004-NMCA-032, ¶ 6, 86 P.3d 1050; see also NMSA 1978 § 29-11(A)-1 (1995) (amended 1999) (explaining that that the statute “may be cited as the ‘Sex Offender Registration and Notification Act’”).

4. See *Sex Offender Supervision Behavioral Contract*, in N.M. CORRS. DEP'T, PPD SEX OFFENDER REGISTRATION, TRACKING AND SUPERVISION, [hereinafter *Behavioral Contract*], <http://cd.nm.gov/policies/docs/CD-053200.pdf> (last visited Apr. 7, 2016).

5. See *Behavioral Contract*, *supra* note 4, § 3(A). This Note separates the terms “sexually oriented” and “sexually stimulating” because the court interprets the terms independently.

6. 2015-NMCA-066, ¶ 1, 350 P.3d 1259.

Dinapoli objected on the grounds that he was deprived of notice due to the broad and vague structure of the violated term.<sup>7</sup> The Court of Appeals rejected this argument and accordingly ruled that Dinapoli was afforded proper notice and dismissed the contention that the condition was overly broad or vague.<sup>8</sup> This Note focuses on this issue and aims to resolve it.

This Note argues that the provision prohibiting “sexually oriented or sexually stimulating” materials in Section 6(A) of the New Mexico sex offender contract is overbroad and impermissibly vague.<sup>9</sup> As a result, this provision is prone to arbitrary and biased decision-making, and fails to provide proper notice to the offender as to what conduct it prohibits.

Part I provides an overview of specialized conditions of release, sex offender contracts, and the “sexually stimulating or sexually stimulating” provision. The history and development of sex offender sentences will be discussed. It also analyzes the purpose of specialized conditions of release, namely to promote public safety and reduce offender recidivism. This part will conclude by analyzing *New Mexico v. Green*,<sup>10</sup> the state’s seminal case regarding specialized conditions of release.

Part II closely examines the recent case of *New Mexico v. Dinapoli*.<sup>11</sup> In particular, it summarizes the facts of the case, the District Court’s decision, and the Court of Appeals’ ruling.

Part III argues that the phrase “sexually oriented or sexually stimulating” is over-inclusive and is subject to arbitrary enforcement. To prevent cases like *Dinapoli*, courts should provide a more definite standard to apply to specialized conditions than the reasonableness standard employed in *Dinapoli*. Accordingly, this Note aims to achieve two ends (1) to propose a definition that separates and individually defines “sexually oriented” and “sexually stimulating”; and (2) to supply probation officers with a guideline to that can be used to make enforcement of the condition more efficient and consistent.

This Note identifies the notice and enforcement issues that were raised in *Dinapoli* and introduces a solution that will prevent similar issues from occurring in the future. The solution separates the terms “sexually oriented” and “sexually stimulating” to provide clear notice of its effect but it also narrows the wide range of materials it previously covered. Most importantly, the definition furthers the purpose behind specialized conditions of release at no expense to the strength of intended practice of the prohibition clauses. Alternatively, this definition will ensure that offenders are not unjustly stripped of their probation sentence because notice was not provided. Finally, and importantly, this definition prevents sex offenders from exploiting the uncertainty and gray area that the existing condition contains. Thus, the proposed definition will protect the public and provide the offender with a full and fair opportunity to rehabilitate and reintegrate back into society.

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7. *Id.* ¶¶ 28, 33.

8. *Id.* ¶¶ 1, 8.

9. See *Behavioral Contract*, *supra* note 4, § 6(A) (“I will not purchase, possess or subscribe to any sexually oriented or sexually stimulating material. This includes, but is not limited to: Sexual devices, books, magazines, video/audio tapes, pictures, DVDs, CD ROMs, and Internet websites.”).

10. 2015-NMCA-007, 341 P.3d 10.

11. 2015-NMCA-066, ¶ 1.

## I. UNDERSTANDING SEX OFFENDER SENTENCING IN NEW MEXICO: SUPERVISED RELEASE CONDITIONS AND SEX OFFENDER CONTRACTS

### A. New Mexico's Implementation of the Sex Offender Registration and Notification Act

In the early 1990's, a series of high-profile sex crimes put sex offenders at the forefront of policy change.<sup>12</sup> A 1994 New Jersey case fueled this change.<sup>13</sup> This gruesome case involved a repeat sex offender who abducted, sexually abused, and murdered 7-year old Megan Kanka.<sup>14</sup> In short order, Congress enacted the Jacob Wetterling Crimes Against Children Act and Sexually Violent Offender Registration Act, which provided federal guidelines and incentives for States to develop and implement sex offender registration programs.<sup>15</sup> Two years later, Congress amended this statute and renamed it "Megan's Law."<sup>16</sup> Under this law, states are required to provide community notification of sex offenders that are registered in their state.<sup>17</sup>

New Mexico adopted its version of Megan's Law in 1995, which is now titled the "Sex Offender Registration and Notification Act" (SORNA).<sup>18</sup> SORNA's purpose is to "assist law enforcement agencies' efforts to protect their communities."<sup>19</sup> Under SORNA, criminals convicted of a sex crime are obligated to register as sex offenders in the state and comply with notification laws that inform the public of their status.<sup>20</sup> Upon being released from a deferred sentence, sex offenders receive specialized conditions of release that serve to carry out the purpose of SORNA.

### B. Specialized Conditions of Release and Sex Offender Behavioral Contracts

Specialized conditions of release are imposed when the probationer is released from prison.<sup>21</sup> If a district court defers imposition of a sentence for a sex offender, or suspends all or any portion of a sentence for a sex offender, the sex offender is required to serve an indeterminate period of supervised probation for not less than five years and up to the natural life of the offender.<sup>22</sup> Before being placed on probation, the district court provides the sex offender with a hearing to determine

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12. Logan, *supra* note 2, at 5.

13. *Id.*

14. *Id.*

15. See 42 U.S.C.A. § 14071 (1994); see also 42 U.S.C.A § 16902 (2006) (amending the Wetterling Act and establishing the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program).

16. *Megan's Law*, LEGAL DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Megan's+Law> (last visited Mar. 3, 2016).

17. Logan, *supra* note 2, at 5.

18. NMSA 1978, § 29-11A-1 (1995).

19. NMSA 1978, § 29-11A-2(B) (1995).

20. See *Druktenis*, 2004-NMCA-032, ¶¶ 19, 21.

21. See *generally* NMSA 1978, § 31-21-10.1 (2007).

22. See § NMSA 1978, 31-21-10.1(A) (2007).

the terms and conditions required to complete the term of supervised probation.<sup>23</sup> During the hearing, the district court may consider factors such as the “nature and circumstances of the offense” for which the offender was convicted, the “nature and circumstance of a prior sex offense,” if any, “efforts engaged in by the sex offender,” and the “danger to the community” posed by the sex offender.<sup>24</sup> Ultimately, the district court is able to subject the sex offender to reasonable terms and conditions of probation. Two of these conditions include “being subject to intensive supervision by a probation officer of the corrections department” and “participating in an outpatient or inpatient sex offender treatment program.”<sup>25</sup>

The New Mexico Corrections Department requires the offender to sign a Sex Offender Behavioral Contract (sex offender contract), which is composed of specialized conditions of release.<sup>26</sup> The probation officer is charged with ensuring that the sex offender complies with obligations within the sex offender contract. This contract includes eight sections that require the offender to maintain continual communication with the department, while also restricting his conduct.<sup>27</sup> These conditions are not always clear and sometimes lead to courtroom disputes about constitutionality as evidenced by the following case.

In a case decided before *Dinapoli*, the New Mexico Court of Appeals interpreted constitutional issues arising from language within sex offender behavioral contracts. In *State v. Green*,<sup>28</sup> the defendant was released from prison after serving five years in prison and was subsequently put on probation. The defendant was originally sentenced to nineteen years in prison but the rest of the term was suspended by the district court.<sup>29</sup> Within months of his release, however, the trial court ordered the defendant to serve the rest of his sentence in prison, which included a one-year habitual offender enhancement.<sup>30</sup> The probation violation report contained multiple infractions, including one that directly prohibited the possession of sexual images on his laptop.<sup>31</sup> The violation occurred after the defendant’s probation officer visited his home and found a photo of a nude woman, as well other nude images, on the defendant’s computer.<sup>32</sup>

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23. See § NMSA 1978, 31-21-10.1(B) (2007).

24. *Id.*

25. See NMSA 1978, § 31-21-10.1(D)(1–2) (2007).

26. The sex offender behavioral contract was implemented by the New Mexico Corrections Department as an attempt to better protect the public and rehabilitate sex offenders. See *State v. Green*, 2015-NMCA-007, 341, ¶ 11, P.3d 10 (providing an analysis of how sex offender behavioral contracts are mandated in New Mexico); see also John Bigelow, *Increasing Public Safety in New Mexico, During and After Incarceration: New Directions for Reform in New Mexico Corrections*, GOVERNOR RICHARDSON’S TASK FORCE ON PRISON REFORM, 1 (2008), <http://www.bhc.state.nm.us/pdf/200808/PrisonReformTaskForceFinalReproductiontoCD.pdf> (describing the rationale for changing sentencing schemes in New Mexico due to population increases in New Mexico).

27. See *Behavioral Contract*, *supra* note 4, § 3(B).

28. 2015-NMCA-007, 341 P.3d 10.

29. *Id.* ¶ 1.

30. *Id.*

31. *Id.* ¶ 21.

32. *Id.* ¶ 24.

On appeal, the defendant argued that there was insufficient evidence from the record to support his probation being revoked.<sup>33</sup> Specifically, the defendant contended that this condition (prohibiting the possession of sexual images) was overly vague such that a “reasonable person would not have known that the nude images would be considered pornography.”<sup>34</sup> The court held that the State met its burden of showing that a reasonable and impartial mind would believe that the defendant violated the terms of probation, and that the district court did not abuse its discretion.<sup>35</sup> The court reasoned that when the defendant signed the sex offender contract he acknowledged that he read and understood these additional supervision conditions.<sup>36</sup> This included a condition that prohibited the defendant from possessing any “sexually oriented or sexually stimulating material.”<sup>37</sup> The defendant’s probation officer testified that he reviewed the conditions with the defendant and specifically informed him that probation officers would monitor his computer and can search it at any time for “pornography” or “sexually explicit material.”<sup>38</sup> Moreover, the court noted that “sexually explicit exhibition” has been defined as a “graphic and unequivocal display or portrayal of nudity or sexual activity.”<sup>39</sup> Similarly, the State’s Legislature has defined “sexual conduct” to include “act[s] of masturbation . . . physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person be female, breasts.”<sup>40</sup> Accordingly, the court concluded that these terms all fall within the scope of the term “sexually oriented” in Section 6(A) of the sex offender contract.<sup>41</sup> The court’s decision was the first to interpret specialized conditions of release that are included in a sex offender contract.<sup>42</sup> Equally important, it was the State’s first case regarding sex offender probationary release to approach the issue of defining the phrase “sexually oriented or sexually stimulating” material.

## II. STATEMENT OF THE CASE: *STATE V. DINAPOLI*

### A. Factual Background and Court Opinion

Robert J. Dinapoli was on probation for two sex crimes that he pleaded guilty to in the early 1990’s. The first sex crime took place on June 30, 1990, when Dinapoli, while armed with a firearm, broke into the home of two women and sexually assaulted them.<sup>43</sup> Dinapoli pleaded guilty, and as a result, he was sentenced

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33. *Id.* ¶ 21.

34. *Id.* ¶¶ 8, 21.

35. *Id.* ¶ 22.

36. *Id.* ¶ 23.

37. Brief of Defendant-Appellant at 4, *State v. Dinapoli*, 2015-NMCA-066, 350 P.3d 1259 (No. 33,004).

38. *Green*, 2015-NMCA-007, ¶ 23.

39. *Id.* ¶ 25.

40. *Id.*

41. *Id.*

42. To the best of my knowledge, New Mexico is the only state that uses the term “sex offender behavioral contract” to describe the explicit agreement to adhere to specialized conditions of release.

43. *Dinapoli*, 2015-NMCA-066, ¶ 2.

to thirty years imprisonment followed by five years of probation, and was compelled to participate in inpatient and outpatient treatment.<sup>44</sup>

The second sex crime occurred on October 3, 1991, before Dinapoli was charged with the first offense.<sup>45</sup> Dinapoli was charged with sexual assault of a woman, attempted criminal sexually penetration, kidnapping, and false imprisonment.<sup>46</sup> As part of a plea and disposition agreement,<sup>47</sup> Dinapoli was sentenced to serve 364 days in custody followed by five years' probation.<sup>48</sup> Dinapoli began his sentence for both crimes in 1994.<sup>49</sup>

Upon serving 14 years in prison, Dinapoli was released into the care of the New Mexico Behavioral Health Institute in Las Vegas, New Mexico.<sup>50</sup> Dinapoli was unconvinced that this rehabilitative program was appropriate for him and quit after two days.<sup>51</sup> Dinapoli insisted that he was not fit for the rehabilitation program and could not be around the other people at the Institute.<sup>52</sup> Dinapoli communicated to his probation officer that he was responsible for raping two women and should be in prison.<sup>53</sup> Dinapoli was certain that he would not be able to function outside of prison.<sup>54</sup> The district court was then forced to revoke Dinapoli's probation and consequently sent him back to prison to serve six years in prison followed by five years of probation.<sup>55</sup>

Dinapoli was released from prison three years, but this time he was permitted to live at his mother's house due to a degenerative neurological disorder.<sup>56</sup> Dinapoli also signed a sex offender behavioral contract on December 2, 2011.<sup>57</sup> Three months later, Dinapoli was arrested for violating two conditions under this sex offender contract.<sup>58</sup> The first was a violation of Section 6(D), which prohibited Dinapoli from accessing electronic devices for sexually stimulating material, pornography, adult websites, and social networking sites.<sup>59</sup> Dinapoli's probation

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44. *Id.* ¶ 3.

45. *Id.* ¶ 2.

46. *Id.*

47. Rule 9-408 NMRA.

48. *Dinapoli*, 2015-NMCA-066, ¶ 3.

49. *Id.* ¶ 2.

50. *Id.* ¶ 4.

51. *Id.*

52. *See id.* ¶ 4 (providing Dinapoli's statement that "treatment was of no value to him and [he] wished to be returned to prison where he did not have to put up with anyone asking questions about his past behavior").

53. *Id.*

54. *Id.*

55. *Id.* ¶ 4.

56. *Id.* ¶ 5.

57. *Id.*

58. *Id.*

59. *Id.* *See also Behavioral Contract*, *supra* note 4, § 6(D) ("I understand that any computer, camera, computer tablet, cell phone, thumb drive (USB drive), memory or any other electronic device I have access to, including the hard drive and removable drives may be examined for inappropriate content at any time. Inappropriate content includes, but is not limited to: Sexually stimulating material, *Pornography (adult or child)*, *adult websites*, *social networking sites*, such as, but not limited to *Facebook*, *MySpace* and *Mocospace*, *dating websites*, and *personal ads to include cell phone application*.").

officer stated that he accessed websites that depicted rape victims and rapists because “he wanted to learn more about what kind of rapist he was.”<sup>60</sup>

The second violation occurred because Dinapoli was asked to leave his treatment meeting for being disruptive.<sup>61</sup> The State filed a motion to revoke his probation and held a probation meeting on April 5, 2012.<sup>62</sup> The district court, however, reinstated Dinapoli’s probation with an additional condition that prohibited him from accessing the Internet with his cell phone.<sup>63</sup>

Dinapoli was found to be in possession of three prohibited DVDs only four months later, which threatened to revoke his probation revocation.<sup>64</sup> The DVDs were discovered by his probation officer and were found in Dinapoli’s bedroom.<sup>65</sup> The DVDs included the American and Swedish versions of *The Girl with the Dragon Tattoo*, as well as *I spit on your Grave*.<sup>66</sup> Dinapoli’s probation officer, discovered the DVDs and considered them to be “extremely violent and sexually graphic in nature, and portray women being raped.”<sup>67</sup> Dinapoli’s probation officer determined that the DVDs were prohibited under Section 6(A) of the sex offender contract.<sup>68</sup> Section 6(A) reads as follows:

I will not purchase, possess or subscribe to any sexually oriented or sexually stimulating material. This includes, but is not limited to: Sexual devices, books, magazines, video/audio tapes, pictures, DVDs, CD ROMs, and Internet websites.<sup>69</sup>

The State received a report of these findings and accordingly filed a motion to revoke Dinapoli’s probation.<sup>70</sup> Ultimately, the district court found that Dinapoli violated Section 6(A) of the sex offender contract and revoked his probation. The district court then committed Dinapoli to the Department of Corrections for a term of five years and tacked on another five years of probation to follow upon his release.<sup>71</sup>

In making its decision, the district court was shown clips from the three DVDs that were found in Dinapoli’s possession.<sup>72</sup> The State played scenes from both versions of *The Girl with the Dragon Tattoo*.<sup>73</sup> Dinapoli’s probation officer testified in court and described the scenes in the Swedish version depicting a woman being anally raped, and an oral sex scene that takes place in an office setting.<sup>74</sup> The

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60. *Dinapoli*, 2015-NMCA-066, ¶ 5.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* ¶ 6.

65. *Id.* ¶¶ 6, 9.

66. *Id.*

67. *Id.* ¶ 6.

68. *Id.*

69. *See Behavioral Contract*, *supra* note 4, § 6(a).

70. *Dinapoli*, 2015-NMCA-066, ¶ 6.

71. *Id.*

72. *Id.* ¶ 9.

73. *Id.* ¶ 10.

74. *Id.*



probation officer also stated that the American version included an oral sex scene and was very similar to the Swedish version.<sup>75</sup>

Additionally, the State viewed print content on the DVD covers. On the back of the American version of *The Girl with the Dragon Tattoo* the cover read “Rated R for brutal, violent content, including rape and torture, strong sexuality, and graphic nudity.”<sup>76</sup> *I Spit on your Grave*, summarized the movie as “A group of local lowlifes subject the star of the movie to a nightmare of degradation, rape, and violence.”<sup>77</sup>

Dinapoli explained that he watched the movies because of the revenge that the rape victims were able to impose upon their rapists.<sup>78</sup> He testified that he did not receive any type of sexual satisfaction from watching the movies and that he believed the sex offender contract to solely prohibited pornography.<sup>79</sup> Dinapoli explained that he was not cautioned to avoid scenes that were found in these types of mainstream videos.<sup>80</sup>

On appeal, Dinapoli put forth multiple arguments about why his probation should not be revoked, but the Court of Appeals did not find any of them to be persuasive. First, Dinapoli argued that he did not have sufficient notice from the sex offender contract or the February violation that possession of the DVDs would violate the terms of his probation.<sup>81</sup> Section 6(A) of the sex offender contract prohibited Dinapoli from possessing any “sexually oriented or sexually stimulating” material. The court explained that the relevant inquiry was whether the DVDs were either “sexually oriented or sexually stimulating.”<sup>82</sup> The court looked to see whether a reasonable person would determine that the DVDs fell into the “sexually oriented or sexually oriented” category.<sup>83</sup> In short order, the court dismissed Dinapoli’s subjective point that he did not receive any sexual gratification from the movies. The court determined that the text on the DVD covers coupled with the graphic scenes that were presented, would put a reasonable person on notice that the DVDs were “sexually oriented or sexually stimulating” in violation of Section 6(A) of the sex offender contract.<sup>84</sup> The court found no value or relevance in regard to the DVDs’ mainstream nature and availability.<sup>85</sup>

Second, Dinapoli contended that Section 6(A) was limited to “adult” or “pornographic” material when read in conjunction with other provisions of the sex offender contract.<sup>86</sup> The court noted that Section 6(D) of the contract prohibits

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75. *Id.*

76. *Id.*

77. *Id.* ¶ 9.

78. *Id.* ¶ 11.

79. *Id.*

80. *Id.*

81. *Id.* ¶ 7.

82. *Id.* ¶ 14.

83. *Id.* ¶ 15.

84. *Id.* ¶ 17.

85. *Id.* ¶ 18.

86. *See id.* ¶ 19 (providing other provisions of the contract, including the following:

I understand that any computer, camera, computer tablet, cell phone, thumb drive (USB drive), memory or any other electronic device I have access to, including the hard drive and removable drives may be examined for inappropriate content at any time.

Dinapoli from accessing “inappropriate content” on “any electronic device.”<sup>87</sup> However, this condition was not defined in the contract.<sup>88</sup> The court determined that “inappropriate content” encompasses “sexually stimulating” material.<sup>89</sup> Through the application of the *ejusdem generis*,<sup>90</sup> the sex offender contract intends to embrace “pornography” and the other listed items in the same manner as “stimulating material.”<sup>91</sup> The court concluded that by use of *ejusdem generis*, the term “inappropriate material” stated in Section 6(D) of the sex offender contract clearly includes “sexually oriented” material in its scope.<sup>92</sup> The term “sexually oriented or sexually stimulating” is synonymous in the context of the sex offender contract and are treated in a similar fashion.<sup>93</sup> The court, however, noted that Section 6(D)’s incorporation of “sexually stimulating” and “pornography” did not intend to make the terms interchangeable, but noted that the two could overlap.<sup>94</sup> Using this line of reasoning, the court held that Section 6(A) of the sex offender contract is not limited to “adult” or “pornographic” material when read in conjunction with other provisions of the sex offender contract.<sup>95</sup>

Third, Dinapoli argued that the conditions within the sex offender contract were vague and overly broad because they did not provide sufficient notice that the possession of mainstream movies was prohibited and in effect, gave rise to the risk of arbitrary enforcement by probation officers.<sup>96</sup> The court contended that the sex offender contract was necessarily broad to accomplish its purpose, which is to prevent the Defendant from possessing material that may lead to recurring criminal activity

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Inappropriate content includes, but is not limited to: *Sexually stimulating material, Pornography (adult or child), adult websites, social networking sites, such as, but not limited to Facebook, Myspace and Mocospace, dating websites, and personal ads to include cell phone applications.*

Section 6(D)

I will not patronize any establishment in which sexually oriented material or entertainment is available. Including, but not limited to: *adult book/video stores, and topless/nude clubs.*

Section 6(F)

I understand that I may be asked to provide my telephone, satellite television, or cable bill for examination. Prohibited charges on these bills include: *calls to adult hotlines, and adult channels.*

Section 6(G).

87. *Id.* ¶ 20.

88. *Id.*

89. *Id.*

90. *Ejusdem Generis*, BLACK’S LAW DICTIONARY (9th ed. 2009) (“[Latin “of the same kind or class”] A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).

91. See *Dinapoli*, 2015-NMCA-066, ¶ 20 (stating that, under the statutory construction principle of *ejusdem generis*, when words with a general meaning follow words with a more specific meaning, “the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind of class as those specifically mentioned.”) (quoting *State v. Nick R.*, 2009-NMSC-050, ¶ 21, 147 N.M. 182, 218, P.3d 868).

92. *Id.*

93. *Id.*

94. *Id.* ¶ 22.

95. *Id.* ¶ 19.

96. *Id.* ¶ 28.

or hinder his rehabilitation.<sup>97</sup> The court held that the sex offender contract was not impermissibly vague such as to have denied Dinapoli notice.<sup>98</sup> The court explained that the phrase “sexually oriented or sexually stimulating” could be gleaned from case law and statute.<sup>99</sup> The court also found that Dinapoli had additional notice of the prohibited conduct by virtue of his hearing in February.<sup>100</sup>

Fourth, Dinapoli argued that the sex offender contract violated his First Amendment rights.<sup>101</sup> The court held that by “prohibiting the Defendant from possessing sexually oriented material, the sex offender contract addressed both the need to deter [him] from reoffending and the effort to bolster his rehabilitation.”<sup>102</sup> The court declared that probation is an act of clemency or leniency, and the conditions therein are meant to serve the public.<sup>103</sup> Adding that “probation is not a matter of right,” but rather, it is a criminal sanction and the district court may impose reasonable conditions that constrain some freedoms normally enjoyed by law-abiding citizens.<sup>104</sup>

Finally, Dinapoli argued that the district court should have watched the movies in their entirety so that the scenes selected by the State could be interpreted in context.<sup>105</sup> The court first dismissed Dinapoli’s attempt to bring both Rule 11-106 and the constitutional test for obscenity, noting that neither of the two apply to probation hearings.<sup>106</sup> Instead, the court reiterated the purpose of probation, which is to both prevent an offender from engaging in additional criminal activity and to rehabilitate the offender.<sup>107</sup> Further, the court reasoned that it is irrelevant whether other portions of the DVDs did not contain “sexually oriented” materials or that the DVDs taken as a whole could be considered “sexually oriented.”<sup>108</sup> Thus, the court held that the district court did not abuse its discretion or violate Dinapoli’s due process rights by finding that the DVDs met the standard based on the clips of the movies that were shown in court.<sup>109</sup>

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* ¶ 28.

101. *Id.* ¶ 29.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* ¶¶ 31–34; *see also* Rule 11-106 NMRA (stating that “if a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time).

107. *Dinapoli*, 2015-NMCA-066, ¶ 34.

108. *Id.* ¶ 35.

109. *Id.*

## B. Critique of the Court's Analysis in *State v. Dinapoli*

Within the past decade, sex offenders have seen their rights become severely limited.<sup>110</sup> These restraints seek to protect the community, but they also aim to rehabilitate the offender to ensure successful reintegration back into their community.<sup>111</sup> Critics of these restraints question their effectiveness<sup>112</sup> and their one-size-fits-all approach, arguing that they push sex offenders to the fringes of society regardless of the degree of the sex crime, which could range from molestation of a child to public urination.<sup>113</sup> “Not all people who have been convicted of sex offenses pose a risk to children, if they pose any risk at all. Blanket residency-restriction laws disregard that reality.”<sup>114</sup> This Note finds itself alongside these arguments by pointing out the notice and enforcement issues.

This was the primary issue in *State v. Dinapoli*,<sup>115</sup> which decided that the phrase “sexually oriented or sexually stimulating material” provides the offender with sufficient notice as to what conduct would fall under its reach.<sup>116</sup> This Note argues that *Dinapoli*<sup>117</sup> inadequately addressed the notice and enforcement issues and puts forth a simple but effective solution that first separates the terms and then provides a detailed definition for each. This approach will resolve the notice issue by providing the offender with a comprehensive list of definitions that better articulates what type of conduct is prohibited. Likewise, these definitions serve as a guideline for probation officers to ensure that the condition is applied fairly and consistently in the future.

### I. Notice

Without proper notice, a sex offender might be unable to determine the exact limitations that the probation conditions provide and his or her liberties may be severely limited as a result.<sup>118</sup> Notice is particularly important at the bargaining stage, when the offender is presented with the conditions and is asked to fully comprehend their impact. The prospect of freedom can cloud an offender's ability to acknowledge the inherent value of the liberties that the contract waives upon

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110. See LISA BROIDY ET AL., PAROLE REVOCATION IN NEW MEXICO, JUSTICE RESEARCH STATISTICS ASSOCIATION 11, 12 (2010) (explaining that the statute requirement made to NMSA 1978, Section 31-21-10.1 in 2004 will impact sex offenders going forward and that offenders eligible for inclusion under this criteria are just beginning to be released to parole).

111. See Bigelow, *supra* note 27 (suggesting that policy changes put forth in 2008 aimed at making a prison sentence a path away from a life of crime, at making our communities safer and at making the inmate's first sentence his last).

112. Editorial, *The Pointless Banishment of Sex Offenders*, N.Y. TIMES, Sept. 8, 2015, <http://www.nytimes.com/2015/09/08/opinion/the-pointless-banishment-of-sex-offenders.html> (last visited Apr. 7, 2016).

113. *Id.*

114. *Id.*

115. *Dinapoli*, 2015-NMCA-066, ¶ 1.

116. *Id.* ¶¶ 1, 7.

117. *Id.* ¶ 1.

118. See Gabriel Gillett, *A World Without Internet: A New Framework for Analyzing a Supervised Release Condition that Restricts Computer and Internet Access*, 79 FORDHAM L. REV. 217, 248 (2010) (stating that a prisoner's rights are best protected when he or she is “fully informed and understands the potential long-term impacts of any agreement”).

release.<sup>119</sup> Additionally, the large number of conditions within the contract can present notice issues.<sup>120</sup> This is particularly true for people who face mental health challenges, or lack education.<sup>121</sup>

The current approach assumes that an average sex offender is able to understand the conditions well enough to determine what conduct is and is not prohibited by the contract without a proper definition. Because the sex offender in Dinapoli's position is unable to determine what constitutes a violation of his probation, his protected interest in his probationary status is violated.<sup>122</sup> As the United States Supreme Court has previously noted:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.<sup>123</sup>

In *State v. Dinapoli*,<sup>124</sup> the Court of Appeals spent a large portion of the opinion discussing notice. Dinapoli contended that his probation officer did not tell him he could not possess the type of movies he had. He testified, for example, that he "assumed, foolishly, that that statement was referring to pornographic films . . . and pornographic magazines."<sup>125</sup>

The court found that a reasonable person would have been on notice that possession of the three mainstream DVDs would have fallen into the "sexually oriented or sexually stimulating" category prohibited by the sex offender contract.<sup>126</sup> In doing so, the court dismissed Dinapoli's contention that Section 6(A) of the contract is limited to "adult" or "pornographic" material when read in conjunction with other provisions of the contract.<sup>127</sup> The court reasoned that Section 6(D) of the contract defines "inappropriate content" to include both "sexually stimulating" material and "pornography," but this does not evidence that the two terms are

119. *Id.* at 258–59.

120. See Cecelia Klingele, *What are we Hoping For? Defining Purpose in Deterrence-Based Correctional Programs*, 99 MINN. L. REV. 1631, 1639 (2014) (expressing that with the amount of supervised conditions present, it is not a surprise that there are so many violations); see also Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1035 (2013) (providing a probation officers statement, "[M]ost of our violations are technical. . . . I mean, if you can't write up a report, and cite at least a technical violation, you're not really struggling very hard, because there are so many conditions. There's got to be something that the guy didn't do right, right?").

121. See Klingele, *supra* note 116, at 1639 (explaining that the "sheer number of requirements makes compliance with all of them nearly impossible for many probationers, especially those whose ability to follow directions is already compromised by learning difficulties, mental health challenges, and poor education").

122. See *State v. Doe*, 1986-NMCA-019, ¶ 4, 104 N.M. 107, 717 P.2d 83 (acknowledging that "it is an essential component of due process that individuals be given fair warning of acts which may lead to loss of liberty").

123. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

124. *Dinapoli*, 2015-NMCA-066, ¶ 15.

125. See Brief of Defendant-Appellant, *supra* note 38, at 12.

126. *Dinapoli*, 2015-NMCA-066, ¶ 17.

127. *Id.* ¶ 22.

interchangeable.<sup>128</sup> The court admits that the two terms might overlap, but it would be unreasonable to assume that the two are full inclusive. Citing older NM case law, the court explained, “If the intent were to equate sexually stimulating material with pornography, there would be no reason to list both items.”<sup>129</sup>

Essentially, Dinapoli’s argument that he, a sex offender, believed that “sexually oriented or sexually stimulating” material was synonymous with “pornography,” was rejected because of prior case law and common knowledge of contract construction. Sex offenders should not be held to the standard of legal practitioners when determining whether the offender understood the meaning of a contract provision.

## 2. *Arbitrary Enforcement*

The conditions within the contract in *State v. Dinapoli*,<sup>130</sup> afford probation officers with broad discretion to determine what conduct is and is not a violation of probation. For example, Dinapoli’s probation officer testified, “Whether something falls within the prohibition [“sexually oriented or sexually stimulating”] is entirely up to the discretion of the probation officer.”<sup>131</sup> Furthermore, in describing what conduct would lead to a probation violation Dinapoli’s probation officer testified, “For me, it’s black and white. If it has any kind of sex scene in it, they should not have it. That’s a violation. That’s the way we’re trained and that’s the way we see it. They shouldn’t have it.”<sup>132</sup> This testimony illustrates the unilateral attempt by the probation officer to define the term because this “black and white” standard was not communicated to Dinapoli himself.<sup>133</sup> In fact, Dinapoli’s probation officer testified that the probation officers in her unit regularly share with one another the titles of popular movies that they believe to be prohibited under Section 6 of the contract, which apparently includes any number of R-rated mainstream movies containing “any kind of sex scene.”<sup>134</sup> These statements demonstrate that Dinapoli was not afforded proper notice which denied him the opportunity to comply with the “sexually oriented or sexually stimulating” condition. This testimony also indicates that the probation officers also have trouble interpreting the condition.

Upon release from prison, Sex offenders are required to serve an indeterminate probation sentence of least five years - without a violation.<sup>135</sup> This creates a perpetual sentencing scheme, under which, a offender might never escape because the five year requirement resets itself each time an offender’s probation is revoked. Thusly, arbitrary enforcement, coupled with indeterminate sentences, eliminates the offender’s ability to control his freedom, and, with that, any trust he may have had in the justice system. Essentially, the current approach favors the

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128. *Id.*

129. *Id.* (citing Pub. Serv. Co. of N.M. v. Diamond Constr. Co. 2001-NMCA-082, ¶ 19, 131 N.M. 100, 33 P.3d 651 (“[W]e view the contract as a harmonious whole, give meaning to every provision, and accord each part of the contract its significance in light of other provisions.”)).

130. *Dinapoli*, 2015-NMCA-066, ¶ 1.

131. See Brief of Defendant-Appellant, *supra* note 38, at 22.

132. *Id.*

133. *Id.*

134. *Id.*

135. See § NMSA 1978, 31-21-10.1(A) (2007).

justice system, and it might protect the public, but at the expense of sex offender's rights.

### III. A SIMPLE BUT EFFECTIVE RESOLUTION TO ELIMINATE NOTICE ISSUES AND ENSURE FAIR AND CONSISTENT ENFORCEMENT

#### A. Previous Scholarship that Falls Short of Providing a Workable Solution

Other scholars have addressed the issue of notice that arose in *Dinapoli*, but the proposed solutions do not eradicate the underlying problem and focus primarily on the vague nature of the term "pornography." For example, one scholar proposes a tailored approach that aims to fashion the specialized conditions of release to the individual in an attempt to eliminate the disputes over notice.<sup>136</sup> The State of New Mexico already attempts to individualize the specialized conditions of release to the individual sex offender.<sup>137</sup> In spite of these individualized conditions, the notice issue remains problematic because all sex offenders must comply with the prohibition of "sexually oriented" or "sexually stimulating" material. The tailored approach would not resolve the notice issue that this Note is concerned with.

Another proposal is to reconstruct the language within these specialized conditions of release.<sup>138</sup> The justification for this approach is that a sufficiently specific definition furthers the goal of transitioning a convict from a rigid and restrictive prison life back into society, where the offender can live a more productive life.<sup>139</sup> A proposed definition for "pornography" reads as follows:

(a)(1) Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct; or (2) any textual material describing sexually explicit conduct accompanied by visual depictions of the naked human body, such accompaniment to be taken from the publication as a whole; and

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136. See Laura A. Napoli, *Demystifying "Pornography": Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression*, 11 N.H. L. REV., 69, 90 (2013) (examining the design of special release conditions and the problems that arise when such conditions do not comport with constitutional standards).

137. See Description of Community Corrections Program, N.M. CORR. DEP'T PROBATION & PAROLE, *Supervision Conditions & Special Programs*, <http://cd.nm.gov/ppd/ppd.html> (last visited Apr. 7, 2016) ("Community Corrections Programs primarily serve offenders in the community based on the risk level and the needs of the offender. These offenders often have greater treatment needs. The Department works together with the behavioral health collaborative to provide the most suitable behavioral health services these offenders. Community Corrections programs also serve as a diversionary program for probation/parole violators who would otherwise likely be incarcerated.").

138. Michael Smith, *Barely Legal: Vagueness and the Prohibition of Pornography as a Condition of Supervised Release*, 84 ST. JOHN'S L. REV. 727, 729 (2010) (arguing that a judge violates a probationer's right to sufficiently specific conditions of supervised release that provide fair warning and curtail arbitrary and discriminatory application when he or she imposes a ban on viewing or possessing pornography because the term lacks a specific legal definition).

139. *Id.* at 748.

(b) That a reasonable person could believe is intended to arouse sexual excitement. (c) “Sexually explicit conduct” is defined as actual or simulated (1)sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genitals or pubic area of any person.<sup>140</sup>

This definition effectively defines conduct that would fall within the reach of “pornography,” but does not provide a solution for what conduct falls into the “sexually oriented or sexually stimulating” category that is used in New Mexico’s sex offender contracts. The court in *State v. Dinapoli* ruled that the term “pornography” and the phrase “sexually oriented and sexually stimulating” are not synonymous.<sup>141</sup> Thus, the question of what conduct falls under the reach of “sexually oriented and sexually stimulating” material remains.

#### **B. Providing Separate Definitions for the Terms “Sexually Oriented” and “Sexually Stimulating” by Using Existing New Mexico Statutes**

With the shortcomings of the two previous proposals in mind, this Note meticulously defines the “sexually oriented or sexually stimulating” condition to prevent future notice and enforcement issues that will continue to arise if no changes are made. The proposed solution begins by separating the condition to become “sexually oriented” and “sexually stimulating” to allow for a functional approach to identifying the clear boundaries for both the offender and probation officer.

The court in *State v. Green* used existing statutes and ruled that sexually oriented and sexually stimulating material is sufficiently clear to provide notice that an image of a naked woman would constitute as a violation of probation.<sup>142</sup> Relying on the *Green* court’s use of existing case law, the court in *Dinapoli* also held that “sexually oriented or sexually stimulating” under 6(A) was sufficiently clear as to have provided *Dinapoli* with notice as to what conduct was prohibited. However, the standard used by this group of probation officers, deprives the offender, like *Dinapoli*, the opportunity to comply with the numerous conditions within the sex offender contract. Leaving the problem that probation officers are afforded with a broad discretion to find a violation on what they “think” is a violation as opposed to what the probationer was notified and understands the condition to mean.

History has revealed that sex offenders are perceived to be by many to be the epitome of evil and not without justification. Nonetheless, the offender, by virtue of being charged with a sex offense, is branded a monster and is required to comply with an innumerable amount of post release conditions. That being the case, specialized conditions of release function to protect the public and rehabilitate and eventually reintegrate the offender back into society. Reintegration is only attainable if the offender is aware of the boundaries that these conditions provide.

This Note puts forth an intelligible proposal to reconstruct and define the language under Section 6(A) of the sex offender contract. This definition and the

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140. *Id.* at 754–55.

141. *Dinapoli*, 2015-NMCA-066, ¶ 22.

142. *State v. Green*, 2015-NMCA-007, ¶ 25, 341 P.3d 10.



language therein, is influenced by definitions for terms in New Mexico's Sexual Exploitation of Children Act.<sup>143</sup> The proposed definition reads as follows:

(Section 6) Computers/Electronics/Entertainment

A. I will not "knowingly" purchase, possess or subscribe to material that is substantially "sexually oriented" or substantially "sexually stimulating."

B. Conduct of this type is prohibited in both "visual" and "print" mediums.

i. "Knowingly" means having general knowledge of, or reason to know, or reasonable ground for belief in which warrants further inspection or inquiry or both, of the character and content of any material described herein, which is reasonably subject to examination by the defendant;

ii. "Nudity" meaning the showing of the male or female genitals, pubic area or buttocks, or if such person be female, breasts.

iii. For purposes of this condition, a "visual" medium is defined as: any film, photography, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery.

iv. For purposes of this condition, a "print" medium is defined as: any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photography, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery.

v. "Sexually oriented" encompasses the following: Nudity, sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex, bestiality, masturbation, sadomasochistic abuse, or sexual exhibition with a focus on the genitals or pubic area of any person.

vi. "Sexually Stimulating" means to cause the offender to be sexually excited, aroused, or provoked to act on a sexual desire triggered by the prohibited item regardless of how obscure or odd the desire. This condition is subjective and narrow, and should only be used when:

a. A court or probation officer has prohibited a specific item or source of material, as opposed to a general or categorical ban;

b. The prohibition is a result of a unique characteristic that the offender possesses demonstrating a strong likelihood that he or she will be sexually excited, aroused, or tempted to act in a sexual manner, when the prohibited item is present;

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143. NMSA 1978, § 30-6A-2 (2015). However, the definition that this Note provides incorporates a unique organizational scheme and does not adopt the exact terminology found in the cited statutes. This ensures that the definition is precise and functions as it was originally intended.

- c. The offender is found to be in possession of the prohibited item; and
- d. The offender was notified in advance that this particular item was prohibited.

This definition resolves the notice issue that was discussed in *State v. Dinapoli*,<sup>144</sup> for three reasons. First, the proposed definition provides bright lines that would communicate to the sex offender what conduct would lead to a violation of probation. Similarly, this definition separates the terms “sexually oriented” and “sexually stimulating” to allow the offender to understand that the former serves as a general ban and includes the obvious kinds of materials that are prohibited regardless of the offender. Alternatively, the offender is informed that the latter (sexually stimulating) prohibits particular items and materials unique to the particular profile of the offender.

Second, probation officers will not have broad discretion to self-regulate the terms of the contract. As a result, arbitrary rulings will be reduced. This will lead to more and more offenders trusting the justice system. In effect, trust in the justice system provides an incentive to comply with the conditions of release, because the offender believes that he is in control of his own fate.

Third, this definition does away with the “any” quantifier that went immediately before “sexually oriented or sexually stimulating” material. In its place the word “substantially” is inserted. This further limits the opportunity for arbitrary enforcement and seeks to prevent unintentional probation violations. Section 6(A) includes a wide range of materials (i.e., books, magazines, photographs) and when coupled with the “any” quantifier, it creates a blanket prohibition those materials. For example, if a literary work because one page contains a sentence discussing sexual intercourse, or a movie contains a two second showing of a woman’s breasts, then the prior version of the condition could lead to a probation violation. In contrast, the “substantial” requirement would not find a violation in a situation where the nudity was not foreseen and not the purpose for possessing it.

In *Dinapoli*’s case, applying this standard, a violation would have been upheld. *Dinapoli* would have been put on notice that these DVDs would constitute as a violation of probation because the conduct falls under Section 6(A)(B), as a “visual medium” that includes “sexually oriented” material including “sodomasochistic abuse” and “genital-anal conduct.” The possession of the three mainstream DVDs would have been a violation of the proposed condition.

1. *Prohibited vs. non-prohibited materials: putting the proposed definition of “sexually oriented and sexually stimulating” to use*

This section provides illustrations of scenarios where the proposed definition effectively dichotomizes prohibited and non-prohibited materials. Admittedly, this demonstration is not exhaustive, but it does demonstrate how this definition would improve the ability to determine whether a particular item is prohibited.

First scenario: *Playboy the magazine vs. Sports Illustrated, the Swimsuit Edition*. Here, *Playboy the Magazine* would be prohibited under the proposed

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144. 2015-NMCA-066, ¶ 1.

definition because it projects images of nude women and contains discussions about sexual intercourse. This would serve as “sexually oriented” under Section (6)(A)(B) as a “print form” (magazine) showing images of “nudity” (female genitals and breasts) and discusses sexual intercourse. In contrast, *Sports Illustrated, the Swimsuit Edition*, would not be prohibited under the proposed definition. Although the magazine includes women in swimsuits, it does not show the woman’s unclothed genitals or breasts. The magazine is a general sports magazine and does not devote articles to sexual intercourse.

That being said, the probation officer does have the ability to prohibit particular items under the “sexually stimulating” portion of the condition. For example, if a sex offender was convicted of molesting women in bathing suits at the beach, then the probation officer could be justified in prohibiting the *Swimsuit Magazine*. This would be a justifiable prohibition because the *Swimsuit Magazine* depicts women that identify with the offenders criminal profile and victim choice.

Second scenario: *Fifty Shades of Grey* (book)<sup>145</sup> vs. *A Game of Thrones* (book).<sup>146</sup> The former would be prohibited under the proposed definition because it contains “sexually oriented” material in the “print form.” *Fifty Shades of Grey* contains in-depth descriptions about “sexual intercourse,” “between persons of the opposite sex.” This serves as an example in which the “substantial” requirement is satisfied. In contrast, *A Game of Thrones* devotes very little of its text to discussing and describing “sexual intercourse.” This would not satisfy the “substantial” requirement.

Third scenario: Nude Poster vs. Nude Painting or drawing. This example demonstrates the difference between the mediums that are included in this section. The nude poster would be covered as an “other form of publication” exhibiting “nudity” and would be prohibited. But the nude painting, or drawing, would not be covered by the definition. It would be up to the probation officer or the New Mexico Corrections Department to craft a condition that prohibits nude paintings or drawings.

Fourth scenario: A movie containing nudity found in a common living area vs. a movie with nudity found amongst in an area completely controlled by a sex offender. This scenario attempts to provide an example about how the intent element “knowingly” is used. If, for example, a probation officer were to find a copy of “*The Girl with the Dragon Tattoo*” in a sex offenders house, but it was shelved alongside fifty other movies in a common living area shared by other non-sex offenders, then it is very unlikely that the offender had “knowledge” that the movie was “possessed” by the sex offender, as is intended by the definition. In contrast, if the probation officer found the same movie in the sex offender’s bedroom and it was amongst thirty others, it would constitute as “knowledge” of possession because the offender has control over the area in question.

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145. E. L. JAMES, *FIFTY SHADES OF GREY* (Vintage Books Ed. 2012).

146. GEORGE R.R. MARTIN, *A GAME OF THRONES* (1996).

## CONCLUSION

This Note argues that the condition prohibiting “sexually oriented and sexually stimulating” material is impermissibly broad and vague; as a result, it creates notice and enforcement issues. This Note accordingly proposes that the “sexually oriented or sexually stimulating” condition be separated and properly defined. This proposal achieves two goals: (1) to properly define “sexually oriented” and “sexually stimulating” material to provide sex offenders with notice and a comprehensive understanding of the prohibition; and (2) to supply probation officers with a guideline that ensures fairly and consistently enforced.

Sex offenders have unquestionably earned the negative reception from the public and the resulting restrictions resulting from their actions. However, when an offender, like Robert Dinapoli, is unaware that his actions are prohibited, it defeats the purpose that specialized conditions of release. For rehabilitation to be effective, the offender needs to be cognizant of his actions in relation to the conduct prohibited by the various conditions. Only then can a sex offender acknowledge that he is on the right side of the line, which will aid his decision-making when he is released back into society.

Although it can be argued that creating a bright line definition, as proposed here, will allow the sex offender to acknowledge the boundaries and “tip-toe” around them, finding ways to continue their predatory agendas, the reality is that the proposed definition is more restrictive in many ways than the existing condition. For example, Dinapoli’s possession of the three mainstream DVDs would not have been permissible. Unlike the existing standard, under the proposed definition, Dinapoli would be unable to argue that notice was not provided. Probation officers will not be granted the broad decision to enforce the condition, and instead will be limited to the clear and bright lines within the proposed definition. This eliminates the use of arbitrary enforcement. The offender does inherent a more restrictive standard to abide by, but in exchange, the offender receives notice and the assurance that the condition will be fairly and consistently enforced.

Admittedly, Section 6(A) is merely a portion of the Sex Offender Behavioral Contract. Nevertheless, the definition proposed by this Note can influence the construction of future conditions. More importantly, this proposal can shed light on the severe consequences and lack of justice that sex offenders face when they are forced to comply with broad and vague conditions.