NGRI and Megan's Law: No Exit?

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Megan's Law, an effort to enhance community safety by requiring sex offenders to register and to notify their communities, often for life, has been enacted in all jurisdictions of the United States. Although the ostensible intent of the law is nonpunitive, many registrants feel it infringes on their freedom. Nevertheless, the law has passed constitutional scrutiny. Megan's Law pertains principally to convicted sex offenders, including those adults and juveniles who have entered guilty pleas. This article reveals that many jurisdictions require individuals found not guilty by reason of insanity (NGRI) to register if the offense in question falls under Megan's Law. Thus, insanity acquittees run the risk of interminable supervision. We discuss a recent challenge to the Arkansas registration law and the decision's implications for planning forensic mental health testimony.

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Since the 1994 Jacob Wetterling Act,[1] it has been a national requirement that states provide public information about sex offenders in the community; the law was named for the 11-year-old victim of a 1989 unsolved crime in Minnesota. The Wetterling Act mandates sex-offender registration and tracking. Community-notification initiatives accelerated after the notorious sexual assault and murder of 7-year-old Megan Kanka in New Jersey. The incident gave impetus to the hastily constructed Megan's Law in 1994,[2] followed by President Clinton's endorsement of Megan's Laws in all jurisdictions in 1996. In practice, sex offenders who fall under its registration provisions must notify law-enforcement authorities of their location and other details, as required, upon release from detention. We say detention because many sexually violent predators (SVPs) have been civilly committed after serving full criminal sentences. Their re-entry into the community may be from hospitals. Offenders deemed higher risks appear on publicly accessible registries, for example, Internet websites. Various issues within the states' versions of the law have been litigated. The constitutionality of SVP commitment statutes has been extensively reviewed and discussed in the *Journal*.[3] Overall, SVP laws have passed constitutional challenges and have been construed by courts to be noncriminal and nonpunitive.[2,3]

It appears that registration and notification requirements have been tightened, although it is questionable that community notification has actually led to a reduction in sex offenses.[3,4] The most recent iteration of federal controls on sex offenders is the Sex Offender Registration and Notification Act[5] (SORNA), signed into law by President Bush in 2006, with regulations promulgated by the Department of Justice[6]; the compliance deadline is in July 2009, with federal funding tied to it. The best-known portion of SORNA is the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248), named for the 6-year-old victim of a 1981 abduction and murder in Florida. The law provides for classification and registration of sex offenders, including many juveniles. In addition to Internet websites published by individual jurisdictions or locales, SORNA mandates a national registry, the Dru Sjodin National Sex Offender Public Website, named for the 22-year-old North Dakota victim.[7]

From the offenders' point of view, despite its stated intent, Megan's Law is punitive, as it appears to infringe on their privacy and freedom of movement, and it unfairly distinguishes them from other types of offenders. Although popular, the law has come under attack from many quarters. It has been argued, for example, that registration and community-notification laws impose an "affirmative disability" on the subjects.[8] A recent analysis from a feminist perspective takes a dim view of Megan's Law for a different reason: it distracts us from the more im-

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portant sources of sexual violence in society.[9] Legal arguments based on denial of due process and equal protection within SVP statutes have failed.[3] A small exception is that criminal defendants who want to enter guilty pleas to sex offenses may have the right to be apprised that one of the consequences could be lifetime registration, a matter litigated in New Jersey[10] and elsewhere, with at least one decision favorable[11] and several unfavorable[12–15] to the defendant. In our view, whether or not the guilty verdict would trigger a Megan's Law obligation should be material to a defendant's decision to enter into a plea agreement. One would expect that defense counsel would be ethically required to discuss the ramifications with the client.

Insanity Acquittal and Megan's Law

In reviewing the states' Megan's Laws, we have learned that in some jurisdictions there is a class of individuals who must register under Megan's Law without having been convicted of a sex offense: those adjudicated not guilty by reason of insanity (NGRI) or its variants. Some states actually incorporate NGRI acquittees into their definitions of "convicted." Scott and Gerbasi[3] touched on this matter in their discussion of Connecticut's registration requirements. Although in these cases the state would not have proven *mens rea*, proof of *actus reus* was sufficient to trigger Megan's Law registration. That is, dangerousness is presumed by virtue of the NGRI verdict, but the offender's obligation may be substantially longer than would be required for post-NGRI supervision for non-sex offenses.

States' Megan's Laws: A Snapshot

Because of the impending compliance deadline for SORNA, the count of states requiring insanity acquittees to register is a moving target. Instead of attempting to list all jurisdictions in tabular form, we have chosen to provide readers with information on the variations we have seen in dealing with this population. The jurisdictions whose statutes or regulations include NGRI acquittees among Megan's Law registrants as of mid-2007 are: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Oregon, Utah, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia.[16]

The current situation will not necessarily change under SORNA. Per the SORNA *Guidelines*, states may opt for greater inclusiveness than federal law requires:

> Hence, for example, a jurisdiction may have a system that requires registration by broader classes of convicted sex offenders than those identified in SORNA, or that requires, in addition, registration by certain classes of non-convicts (such as persons acquitted on the ground of insanity of sexually violent crimes or child molestation offenses, or persons released following civil commitment as sexually dangerous persons) [Ref. 6, p 7].

Because some states are in transition from their individual statutes to SORNA compliance, there is no way to know how many will include insanity acquittees by 2009.

In addition to our examining the states' Megan's Laws on klaaskids.org and on the states' websites, we called representatives in all states and the District of Columbia for verification of the procedures, if any, for dealing with insanity acquittees. It was apparent that some states had not yet considered adding wording to their laws to include this group, whereas others intended to include it before the SORNA compliance deadline. It was common for states that require a conviction or guilty plea for Megan's Law registration to respond that "not guilty means not guilty," in that insanity acquittees were invisible to the sex-offender system. Indeed, some officials responded with incredulity that a state would register nonconvicted persons, although that may be the policy of a neighboring jurisdiction. In several instances, the definition of conviction included being found guilty at trial, pleading guilty or *nolo contendere*, or being found not criminally responsible due to mental disease or retardation. In the case of Georgia, which does not register insanity acquittees, if an offender moves there from a state that does register them, for example, neighboring Florida, that individual must continue to register in Georgia. This is a typical, but not universal, interstate procedure. Based on the activity level in state legislatures, the list of states including insanity acquittees among registrants would be expected to grow.

In addition to state laws including insanity acquittees, we noted some variations in approach. In Colorado and Delaware, for example, we were told that the requirement to register after an insanity verdict could be at the discretion of the judge, though the legal authority was given by their legislatures. In Alaska, a guardian may be appointed to help with registration and compliance. Iowa, which requires

registration, appears to have closed a plea-bargain loophole, that pleading guilty to a lesser offense does not change the predicate offense for which registration is required. Thus, neither an insanity defense nor a plea bargain would be treated differently from a conviction in terms of registration. In our survey, some of the states' law enforcement officials were not aware of any instances of post-NGRI Megan's Law registrants. New Jersey estimated that it had 20 such cases, but they were not tracked by the state police. To our knowledge, states without an insanity defense and those with guilty but mentally ill verdicts treat all sex offenders uniformly. Similarly, in a jurisdiction with a bifurcated trial (guilt phase and insanity phase), the Megan's Law requirement would be met at the guilt phase.

Litigation in Arkansas: The Case of Jeremy Bailey

In an opinion delivered on January 25, 2007, the Supreme Court of Arkansas ruled on a constitutional challenge to the state's Sex Offender Registration Act (Ark. Code Ann. § 12-12-901 *et seq*.),[17] reversing a circuit court decision. The issue was whether the Department of Correction could require Jeremy Bailey, who in 2002 was declared not guilty by reason of mental disease (schizoaffective disorder) of a 2000 violent sexual assault and kidnapping, to register. After his arrest and incarceration, Mr. Bailey entered Arkansas State Hospital in late 2001. Following the insanity acquittal, he improved sufficiently to be found no longer dangerous but still mentally ill. On May 7, 2003, he was conditionally released. Mr. Bailey was sent to Little Rock under the Arkansas Partnership Program. Shortly thereafter, the Department of Correction conducted a sex-offender risk assessment, finding him a Level 3 offender (Level 4 being the highest risk). A letter informed him that he could ask for review if he believed the assessment was flawed; otherwise, he could have his risk level assessed in five years. Mr. Bailey chose to appeal. As Associate Justice Glaze summarized:

> In his request for review, he argued that he had never been convicted of having committed rape, nor had he had an opportunity to fully test the State's charges against him. Bailey further contended that his classification was a violation of his substantive due-process rights, asserting that he had been labeled a sex offender without having ever been convicted of any charge [Ref. 17, p 522].

The assessment committee denied his request, citing Arkansas's code requiring registration of a person "who is committed following an acquittal. . .on the grounds of mental disease or defect for a sex offense" (Ark. Code Ann. § 12-12-905(a)(3), Repl. 2003 & Supp. 2005). Moreover, the committee said, Mr. Bailey should have anticipated a Level 3 rating based on the facts of his case.

In his Pulaski County Circuit Court petition for review, Mr. Bailey asserted that the state's registration act was unconstitutional, asking for a reversal of his Level 3 classification. The arguments took place on July 21, 2005, after which the circuit court ruled that the registration act violated Mr. Bailey's federal and state due process rights, and reversed the classification. Specifically, it concluded that his rights were violated because the registration law permitted his post-NGRI classification without a hearing.

The Department of Correction appealed to the Arkansas Supreme Court. In arriving at a decision, the Court noted the presumption that the state's laws were framed constitutionally and that its due process integrity had been tested. The opinion characterized Mr. Bailey's argument as that he had been acquitted, the rape charges were never proven, and he had never confessed to the offense or conceded that the crime occurred. Disagreeing with this logic, the Court pointed out that Mr. Bailey had entered a plea of not guilty by reason of mental disease or defect,[18] an affirmative defense distinguished from failure of proof. Indeed, "proof" of *actus reus* can be found in the premise of the defense: that the defendant lacked capacity at the time he engaged in the conduct charged. Further, Mr. Bailey's psychologist at the state hospital concluded that Mr. Bailey's mental disease met the statutory definition, thus forming an excuse. The premise of an excuse is not to deny that the conduct itself was wrong; only that the defendant "is excused from that wrongful conduct because he lacked the capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" (Ref. 17, p 526).

The Court relied on the United States Supreme Court's opinions in two cases, *Jones v. United States*[19] and *Foucha v. Louisiana*,[20] both supporting the states' detaining post-insanity acquittees, so long as the confinement was not due to dangerousness alone. (Mr. Foucha, not an SVP but an insanity acquittee, successfully challenged the state's ability to detain him by virtue of dangerousness [antisocial personality] alone.) Using the reasoning in *Jones*, the Arkansas Court noted that, since Mr. Bailey himself had raised

the issue of mental disease, he had conceded engaging in the conduct charged. Accordingly, the Court rejected his argument that his due process rights were violated. Moreover, while *Jones* supported civil commitment of insanity acquittees to protect society, the Arkansas sex-offender statute "is a lesser deprivation of liberty than civil commitment and is for the protection of society and not for punishment" (Ref. 17, p 528), thus comporting with due process. After disposing of historical challenges to the statute, the Court concluded by affirming the decision of the Sex Offender Assessment Committee, stating that "the assessment requirement for one who is acquitted of a sex offense by reason of mental disease or defect is rationally related to the State's high and legitimate interest in protecting society from repeat sex offenders" (Ref. 17, p 534).

Discussion

Sex offender classification, registration, and community notification have grown in acceptance by citizens and legislators, although the overall efficacy of Megan's Law and its progeny has yet to be demonstrated.[21] The scientific basis for these laws has been criticized as non-evidence-based, more a product of myth than reality,[22] and irrational.[23] There have been a variety of legal challenges to sex-offender laws.[3] Generally these challenges have focused on due process rights, equal protection, and the Constitution's *ex post facto* clause. In the latter case, offenders have argued that criminal sanctions cannot legally be imposed on them by action of the legislature after their conviction. As the U.S. Supreme Court pointed out however, in *Smith v. Doe*,[24] a statute such as Alaska's is nonpunitive and would not fall under the *ex post facto* analysis of a criminal proceeding. Similarly, the public-safety concerns appear to override the individual-liberty concerns in regard to the legitimate interests of government; hence, the proliferation of post-release commitment laws following the Supreme Court's 1997 decision in *Kansas v. Hendricks*.[25] (This decision addressed substantive due process, not the double jeopardy or *ex post facto* areas. Citing *Jones*, the decision left the definition of "mental abnormality" to the states.) In a subsequent case, *Kansas v. Crane*,[26] the Court gave latitude to the states' assessment of volitional, cognitive and emotional dimensions of dangerousness. Such definitions, in our experience, tend to be watered-down commitment laws that cause discomfort among mental health professionals asked to apply them clinically.

Insanity defenses are rarely used in criminal cases; even less, we believe, with sex offenses. Thus, the absolute number of insanity acquittees on state registries is small; the numbers cannot be captured because the respective websites may list only higher-tier offenders. It may concern mental health professionals that juvenile offenders, not a homogeneous group, are written into Megan's Laws and SORNA. On several occasions, we received spontaneous concerns from state agencies that the requirement of SORNA to register juvenile offenders, sometimes for life, had the potential to do more harm (to the offender) than good (to protect society). One state attorney said it was "throwing out the baby with the bathwater." This matter was brought into focus in a recent *New York Times Magazine* cover story.[27] We await further backlash as the situation evolves.

Individuals with psychotic illness and/or developmental disability may engage in various sex offenses, although not all are SVPs, stalkers, pedophiles, or murderers, a distinction possibly lost on the framers of SORNA. The pressure to register and notify has taken on a frenzied momentum, as various stakeholders rush to protect citizens. As Perlin[28] points out in his critique of the *Hendricks* decision, the sex offender has replaced the criminally insane as the current "demon" in our society. Nevertheless, raising mental health issues does not lead to happy outcomes with regard to defendants' liberty. Indeed, as we have seen in *Bailey* and from the legislative intent in many states, it is the commission of the criminal act, rather than the mentality behind it, that relegates the insanity acquittee to sex-offender status, on par with convicts for registration or classification purposes. Thus, while insanity acquittees are supposed to be detained until no longer dangerous, sex-offender statutes have added complexity and indeterminacy to the equation.[29] Convicts and insanity acquittees must consider "collateral consequences"[30] before deciding on a course of action. Accordingly, there are implications for forensic mental health professionals as they consult with attorneys and defendants on the advisability of insanity defenses in sex-offense cases.

Recent research and commentary published in the *Journal* have called attention to a related facet of this issue: the reliability of the clinical basis of NGRI claims in sex-offense cases.[31,32] In studying the small number of sex offenders (42) among 458 insanity

acquittees hospitalized at Napa State Hospital during 2002 and 2003, Novak *et al.*[31] found that, among other Axis I and Axis II disorders, schizophrenia or schizoaffective disorder was present in about two-thirds. This contrasts with the lower rates of psychosis found in other studies. The authors suggest that their higher-than-expected rate may reflect their more severely ill hospitalized sample, problems with diagnosing, or inclusion of substance-induced psychotic disorders. That is, some of the insanity acquittees may not have been classically insane (psychotic) at the time of the index offense. In the commentary on the study by Novak *et al.*, O'Shaughnessy[32] observes that findings in European studies support a high rate of psychotic conditions among sex offenders. Despite the diagnostic uncertainty in the current literature, he suggests that the small core group of psychotic sex offenders represent clinical and legal challenges worthy of further study.

Just as we have called attention to the problem of a potentially interminable Megan's Law obligation among insanity acquittees, Novak *et al.*[31] frame a related public-policy concern: "Policy makers and the legal system may be faced with a dilemma: should sex offenders have the same legal rights as other NGRI acquittees and be transitioned back into the community, or should they be held longer under SVP laws for further treatment and to protect society?" (Ref. 31, p 449). Individuals who had malingered mental illness but were found NGRI would have a difficult time circumventing the SVP commitment laws. This outcome should be considered by defendants, attorneys, and expert witnesses planning a defense strategy.

Expert witnesses should be aware of applicable statutes governing registration and community notification requirements when mental health defenses are contemplated, because, as the SORNA *Guidelines* note, the states have some discretion in whether to register nonconvicts. In our experience, many mentally ill defendants have the misguided notion that an insanity adjudication will shield them from truly negative consequences. In assessing their competence to proceed, the expert witness (in relevant jurisdictions) is advised to ensure that each defendant understands that having been adjudicated NGRI may not circumvent the Megan's Law consequences. In some instances the better course is a plea negotiation, whereby the offense of record is of lesser degree, thus reducing the extent or length of the Megan's Law burden (not in Iowa, as noted). Because (as we saw in Arkansas's *Bailey* case) the fact of criminal behavior is implied in the insanity plea itself, one might consider a pure *mens rea* defense (diminished capacity). Not considered either an affirmative defense or an excuse, the *mens rea* defense would be akin to a failure of proof, whereby commission of the act (perhaps) is not conceded, or at least the burden of proof does not shift to the defendant. It is also our experience that defendants with chronic mental illness and those with developmental disabilities are likely to have difficulty complying with registration or reporting requirements, thus putting them at risk for further charges (failure to register). Therefore, before entering a plea of insanity, defendants must be apprised of alternatives, including placing themselves at risk for a prison sentence. However, having chosen a guilty plea, the mentally disordered offender is still subject to civil commitment at the end of the sentence, as well as to applicable community registration and notification requirements upon release.

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