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PERENNIAL PUNISHMENT?

WHY THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT NEEDS RECONSIDERATION

*Jacob Frumkin**

Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 (“AWA”)¹ “to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against [an enumerated list of seventeen] victims”² AWA’s first subchapter, the Sex Offender Registration and Notification Act (“SORNA”),³ created a national sex offender registry to track post-conviction offenders and to set a baseline for state registration systems.⁴ The underlying

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¹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. § 16901 *et seq.* (2006)).

² 42 U.S.C. § 16901 (2006). The statute lists each victim’s name, age when attacked, location of attack, and whether he or she was murdered or is currently alive. *Id.*

³ *Id.* §§ 16901-16962.

⁴ *Id.* § 16913. SORNA’s registration requirements are set forth at 42 U.S.C. § 16913:

(a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration. The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

goals of SORNA were to curb recidivism once an initial penalty has been served and to make it easier for law enforcement authorities to track post-conviction offenders.⁵ Nevertheless, this Note will show that funding with respect to sex offenders should be dedicated towards fixing the issues that are already prevalent with sex offender registries—extensive community notification, an unreasonable timeframe for updating one’s registry, and seamless reentry into society—rather than imploring states to use financing on complying with a statute that has numerous apparent pitfalls.⁶

SORNA, its proponents claimed, “authorizes much-needed grants to help local law enforcement agencies establish and

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section. The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply. Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

Id.

⁵ See Reid Praises Adam Walsh Child Protection and Safety Act, U.S. NEWSWIRE, July 20, 2006, at 22:19:18.

⁶ See discussion *infra* Parts I–III (outlining constitutional, statutory, and policy issues with SORNA).

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integrate sex offender registry systems.”⁷ Whatever grants local law enforcement might be receiving,⁸ however, would be used to finance SORNA’s registry requirements and criminal provision, the ramifications of which are quite severe.⁹ For example, a sex offender who fails to register as required by SORNA faces federal felony charges, punishable by up to ten years in prison.¹⁰ Although the goals of both AWA and SORNA are important to the criminal justice system,¹¹ the initial post-implementation effects highlight the need for reform.¹² Recent attempts to reform AWA show that

⁷ *Reid Praises Adam Walsh Child Protection and Safety Act*, *supra* note 5.

⁸ See discussion *infra* Part II.B (discussing how expensive SORNA will be for states to implement).

⁹ See discussion *infra* Parts II.A–D.

¹⁰ 18 U.S.C. § 2250 (2006). The statute provides:

(a) In general.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both. 18 U.S.C. § 2250.

Id.

¹¹ See J.J. Prescott & Jonah E. Rockoff, Nat’l Bureau of Econ. Research, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 13803, 2008), available at <http://www.nber.org/papers/w13803.pdf> (“[R]egistration requirements [are] intended solely to help law enforcement track and apprehend recidivist offenders, [and] notification laws [aim] both at reducing crime through greater public awareness and increasing the likelihood of capture conditional on the commission of a crime.”).

¹² Prior to the enactment of AWA and a related misdemeanor penalty, see *infra* Part II.A, the two most prominent federal mandates addressing sex

registry laws and their associated penalties are becoming stricter, rather than fixing the already existing defects.¹³

In light of post-enactment responses from courts, lawmakers, private and public organizations, as well as media coverage of vigilante violence, it is clear that a more workable sex offender registration system is necessary.¹⁴ First, the Supreme Court must provide guidance, as contradictory circuit decisions are creating unnecessary confusion among post-conviction offenders, lawyers, and judges regarding SORNA's legality and function.¹⁵ Second, the statutory framework needs further revision, as lawmakers already conceded the statute's faults by attempting to re-word the criminal provision as applied to retroactivity.¹⁶ Lastly, by

offenders were the Jacob Wetterling Act and Megan's Law. *See* 42 U.S.C. § 14071 (2000) (initially requiring states to implement a sex offender registry, and later adding a requirement for states to establish a community notification system).

¹³ *See, e.g., Vitter Applauds Passage of Bill to Combat Child Pornography*, STATE NEWS SERV., May 22, 2008 ("The KIDS Act of 2007 amends [SORNA] to require a convicted sex offender to provide emails, instant messaging and other internet communications addresses or identities to the National Sex Offender Registry. It also requires the Attorney General to allow commercial social networking websites to compare their databases of users to the Internet identifiers of persons in the National Sex Offender Registry."); *Hill Cosponsors Sex Offender Mandatory Registration Act*, STATE NEWS SERV., Feb. 26, 2008 (discussing the Sex Offender Mandatory Registration Act, which would make "necessary technical corrections" to AWA, mainly by expanding registry violations to those sex offenders who failed to update the appropriate registry prior to AWA's enactment).

¹⁴ *See* discussion *infra* Part V.

¹⁵ *See, e.g.,* E-mail from National Association of Criminal Defense Lawyers, to David J. Karp, Senior Counsel, Office of Legal Policy, U.S. Dep't of Justice (Apr. 30, 2007) available at [http://www.nacdl.org/public.nsf/legislation/Rules&Reg_attachments/\\$FILE/SORNA.pdf](http://www.nacdl.org/public.nsf/legislation/Rules&Reg_attachments/$FILE/SORNA.pdf) (imploping the Attorney General to repeal an interim rule relating to SORNA's retroactivity because of the instability it would create for convicted offenders trying to successfully reintegrate into society).

¹⁶ *See Hearing on Sex Crimes and the Internet Before the H. Comm. On the Judiciary*, 110th Cong. (2007) (statement of Laurence E. Rothenberg, Deputy Assistant Att'y Gen., Office of Legal Policy U.S. Dep't of Justice) (explaining that use of the word "travels" might create a safe zone for those sex offenders who traveled prior to AWA's enactment).

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comparing SORNA to the registration systems of other countries, it is evident that certain provisions of SORNA are unnecessary.¹⁷

After AWA was enacted, prosecutions based on violations of SORNA's criminal provision have been challenged vigorously in federal district courts.¹⁸ Attorneys defending sex offenders against purported violations of SORNA not only have argued that their clients failed to meet SORNA's mens rea requirement,¹⁹ but also more significantly have successfully raised constitutional arguments challenging the statute itself.²⁰ The principal challenges to AWA's constitutionality are that it violates the Constitution's *Ex Post Facto* Clause,²¹ Commerce Clause,²² the Due Process Clause of the Fifth Amendment,²³ and the Non-Delegation Doctrine.²⁴ *Ex Post Facto* and retroactivity (argued in connection with the Non-Delegation Doctrine) have been the most successful challenges so far, whereas challenges based on the Commerce and Due Process Clauses have been rejected almost unanimously.²⁵

¹⁷ See discussion *infra* Part IV.

¹⁸ See, e.g., *United States v. Barnes*, No. 07 Cr. 187, 2007 WL 2119895 (S.D.N.Y. July 23, 2007); *United States v. Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007); *United States v. Manning*, No. 06-20055, 2007 WL 624037 (W.D. Ark. Feb. 23, 2007).

¹⁹ Many defendants claim not to have been informed of the new federal registration requirement, and thus could not have "knowingly" violated SORNA. See 18 U.S.C. § 2250(3) (2006); see also discussion *infra* Part I.C (analyzing relevant case law).

²⁰ See generally *United States v. Madera*, No. 07-12176, 2008 U.S. App. LEXIS 11078 (11th Cir. May 23, 2008); *United States v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008).

²¹ See *United States v. Cole*, No. 07-cr-30062-DRH, 2007 U.S. Dist. LEXIS 68522, at *9–10 (S.D. Ill. Sept. 17, 2007); *United States v. Sallee*, 2007 U.S. Dist. LEXIS 68350, at *7–10 (W.D. Okla. Aug. 13, 2007).

²² See *United States v. Mason*, 510 F. Supp. 2d 923, 931–32 (M.D. Fla. 2007); *Hinen*, 487 F. Supp. 2d at 757–58.

²³ See *United States v. Markel*, No. 06-2004, 2007 WL 1100416, at *4 (W.D. Ark. Apr. 11, 2007); *Manning*, 2007 WL 624037, at *2.

²⁴ See generally *United States v. Barnes*, No. 07 Cr. 187, 2007 WL 2119895 (S.D.N.Y. July 23, 2007); see also *United States v. Smith*, 528 F. Supp. 2d 615, 619–20 (S.D.W. Va. 2007).

²⁵ See discussion *infra* Parts I.A–D (outlining how courts have addressed SORNA's constitutionality).

AWA sets forth harsh penalties for a sex offender who simply fails to register as required by SORNA.²⁶ First, a conviction for failing to register can result in a statutory maximum of ten years in prison.²⁷ Theoretically, a judge can now sentence an offender to a longer term for failure to register than the term a sex offender served for the sex crime itself.²⁸ Second, for every “change of name, residence, employment, or student status,” a sex offender has only three business days to update his or her registration.²⁹ The pre-existing federal misdemeanor penalty for failure to register as a sex offender allowed for a markedly longer duration: ten business days.³⁰ Third, a sex offender must continue to register for at least fifteen years, even for low-level (Tier I) sex offenses requiring less than a year in jail.³¹ Depending on a sex offender’s classification as

²⁶ United States v. Holt, No. 3:07-cr-0630-JAJ, 2008 U.S. Dist. LEXIS 31523 (S.D. Iowa Apr. 14, 2008) (defendant traveled without updating registry); United States v. Villagomez, No. CR-08-19-D, 2008 U.S. Dist. LEXIS 26814 (W.D. Okla. Apr. 2, 2008) (same).

²⁷ See 18 U.S.C. § 2250(a) (2006). Moreover, this scheme penalizes failure to register as a sex offender in a much stricter fashion than comparatively innocuous state systems. See, e.g., N.Y. CORRECT. LAW § 168-t (2007) (Class A misdemeanor); N.J. STAT. ANN. § 2C:7-2(a)(2) (2008) (Crime in the third degree).

²⁸ See, e.g., N.Y. PENAL LAW § 130.40 (criminal sexual act in the third degree is a class E felony, punishable by up to 4 years in prison); N.Y. PENAL LAW § 130.65 (2001) (sexual abuse in the first degree is a class D felony, punishable by up to seven years in prison) (calculating the terms of imprisonment according to N.Y. PENAL LAW § 70.00(2) (2007), entitled Sentence of imprisonment for felony); see also Corey R. Yung, *One of These Laws is Not Like the Others: Why The Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. (forthcoming 2009) (stating that SORNA’s criminal provision does not serve the purpose of keeping track of offenders who may be lost when moving interstate, rather it “punishes offenders who were already eligible to be punished under state law”).

²⁹ See 42 U.S.C. § 16913(c) (2006).

³⁰ See *id.* § 14072(g).

³¹ See *id.* § 16915(a)(1) (explaining the duration of registration for each tier classification of sex offender); see also *id.* § 16911(1) (defining different sex offender classifications applicable to varying registration requirements). SORNA does, however, provide for a reduction in the total time one must register based upon maintenance of a clean record for a given period of time.

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set forth in SORNA, he or she must verify the registration and provide, among other things, a current photograph, DNA sample, and fingerprints at least once a year (and as much as three times a year for Tier III offenders).³² Fourth, AWA significantly broadens

See id. § 16915(b)(1).

³² *See id.* §§ 16916 (1)–(3). The enumerated list is set forth in 42 U.S.C. § 16914:

Information required in registration

(a) Provided by the offender. The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

- (1) The name of the sex offender (including any alias used by the individual).
- (2) The Social Security number of the sex offender.
- (3) The address of each residence at which the sex offender resides or will reside.
- (4) The name and address of any place where the sex offender is an employee or will be an employee.
- (5) The name and address of any place where the sex offender is a student or will be a student.
- (6) The license plate number and a description of any vehicle owned or operated by the sex offender.
- (7) Any other information required by the Attorney General.

(b) Provided by the jurisdiction. The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

- (1) A physical description of the sex offender.
- (2) The text of the provision of law defining the criminal offense for which the sex offender is registered.
- (3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.
- (4) A current photograph of the sex offender.
- (5) A set of fingerprints and palm prints of the sex offender.
- (6) A DNA sample of the sex offender.
- (7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.
- (8) Any other information required by the Attorney General.

Id. § 16914.

the quantity of required registration information beyond pre-existing statutes.³³ Finally, the scheme allows for optional exemptions that each state may choose to adopt.³⁴ The difficulty of knowing how to address these additional requirements all but ensures registration violations for offenders unfamiliar with the framework of a state where he or she moves, works, or attends school.³⁵ Interestingly, the Second Chance Act³⁶ signed by President Bush in April, aimed at “eas[ing] convicts’ re-entry into society by focusing on rehabilitation,” is inapplicable to sex offenders.³⁷

Because the registries are often published in the public domain, sex offenders are constantly in the public eye.³⁸ Lawmakers try to appease constituents by continuously addressing public outrage against recidivism³⁹—namely sex offenders committing sex crimes

³³ Compare *id.* § 16914 (requiring the sex offender to provide his or her name and aliases, social security number, each residence address, name and address of any employer or educational institution attended, license plate number, physical description, text of relevant sex offense, current photograph, fingerprints, and a DNA sample), with 42 U.S.C. § 14072(c) (1998) (requiring provision of the offender’s address, fingerprints, and a current photograph); see also Laura L. Rogers, *The Smart Office: Open for Business*, PROSECUTOR, May/June 2007 (explaining that AWA’s predecessor, The Wetterling Act, requires residence information and little else).

³⁴ See 42 U.S.C. § 16918(c) (2006) (allowing a state to make available on the Internet the employer or educational institution of each sex offender). This might create a new subset of litigants, namely the employers and schools contesting invasion of privacy.

³⁵ SORNA does, however, require each jurisdiction to designate an appropriate official to discuss registration guidelines with each sex offender. See *id.* § 16917.

³⁶ Second Chance Act of 2007, H.R. 1593, 110th Cong. (2008).

³⁷ Jon Gramlich, *Lawsuits Test Crackdown on Sex Criminals*, STATELINE.ORG, Apr. 18, 2008, available at <http://www.stateline.org/live/Details/story?contentId=302066>.

³⁸ The national sex offender registry appears at: <http://www.nsopr.gov/> (last visited Sept. 12, 2008).

³⁹ See Richard G. Wright, *Parole and Probation: Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008) (“Terrorists, drug dealers, murderers, kidnapers,

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after being previously convicted of a sex offense—while still creating legislation that pushes the limits of the Constitution.⁴⁰ Nevertheless, once a sex offender has served his or her sentence and paid restitution, he or she must integrate back into society. Making the transition back into society includes getting a job, finding housing, and facing possible public repugnance with respect to being a convicted sex offender.⁴¹ Employers might be concerned about subjecting themselves to vigilante violence, and many state statutes make it difficult for sex offenders to find legal living accommodations.⁴² Thus, a sex offender faces a Catch-22 situation: a requirement to register as a sex offender which includes a residence and work address, even though it is difficult, if not impossible, for sex offenders to find a home or an employer.⁴³

Section I analyzes how defendants are attacking the constitutionality of SORNA with the hope that the judge presiding over his or her matter will refuse to apply SORNA's harsh penalties to them.⁴⁴ Sections II and III examine recent criticisms regarding both statutory defects and policy concerns that SORNA provides inadequate guidance for state legislatures, prosecutors, and sex offenders, by failing to adequately distinguish between different levels of sex offenses.⁴⁵ Section IV compares SORNA

mobsters, gangsters, drunk drivers, and white-collar criminals do not elicit the emotions and evoke the political response that sex offenders do.”)

⁴⁰ See discussion *infra* Parts I.A–D (outlining constitutional challenges presented by defendants facing an indictment for violating SORNA).

⁴¹ See generally Kurt Bumby et al., *Managing the Challenges of Sex Offender Reentry* (Center for Sex Offender Management, Silver Spring, Md.) Feb. 2007 at 1 (“Facilitating successful reentry is always a challenging endeavor, but with sex offenders specifically, several unique dynamics and barriers make the transition even more difficult.”).

⁴² See generally Ryan Hawkins, Note, *Human Zoning: The Constitutionality of Sex-Offender Residency Restrictions as Applied to Post-Conviction Offenders*, 5 PIERCE L. REV. 331 (2007).

⁴³ See, e.g., Jennifer Gonnerman, *The House Where They Live*, NEW YORK, Jan. 7, 2008, at 40 (chronicling the post-conviction lives of several sex offenders who have little choice but to live in a house together in Long Island).

⁴⁴ See discussion *infra* Part I.

⁴⁵ See discussion *infra* Parts II–III; see also Lisa Sandberg, *Some Say Sex*

with the sex offender registration systems of other countries and highlights, among other factors, how countries that have curbed community notification of a sex offender's criminal history provides offenders who are trying to reintegrate with society a safer and more efficacious post-custody integration process.⁴⁶ Section V considers recent proposals to amend AWA and SORNA in light of the benefits of post-enactment responses and international registries.⁴⁷

I. CASE LAW TO DATE —INCONSISTENT JUDICIAL RESPONSES TO CONSTITUTIONAL CHALLENGES

In the last several months, federal circuit courts have added new complications to interpreting SORNA.⁴⁸ To the extent that the Supreme Court has not guided lower courts with respect to SORNA's constitutionality, it remains unfair to require compliance by post-conviction sex offenders with aspects of a system that may

Offense Law Goes Too Far, SAN ANTONIO EXPRESS NEWS, Feb. 18, 2008, at 1A (“Scores of prosecutors, victims [sic] rights advocates and normally get-tough lawmakers say provisions of [AWA] are both draconian and costly—and may end up harming the very victims they’re supposed to protect.”).

⁴⁶ See discussion *infra* Part IV.

⁴⁷ See discussion *infra* Part V.

⁴⁸ See, e.g., *United States v. May*, No. 07-3515, 2008 WL 2917766, at *1 (8th Cir. July 31, 2008) (finding that SORNA violates no constitutional provisions); *United States v. Byun*, 2008 WL 2579666 (9th Cir. July 1, 2008) (defendant not subject to SORNA, as specified offense was not covered by AWA); *United States v. Madera*, No. 07-12176, 2008 U.S. App. LEXIS 11078, *16–17 (11th Cir. May 23, 2008) (indictment dismissed because it was issued prior to AG's determination of SORNA's retroactivity); *United States v. Sanchez*, No. 07-30578, 2008 U.S. App. LEXIS 10241 (5th Cir. May 13, 2008) (finding that it was reversible error for the district court to not consider proposed sentencing guidelines when imposing the defendant's sentence). Furthermore, there has been some guidance regarding state sex offender statutes from the Supreme Court. See *Smith v. Doe*, 538 U.S. 84 (2003) (*Ex Post Facto* Clause not violated because Alaska's sex offender registration act was not punitive); *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (sex offenders not entitled to a hearing determining his or her dangerousness prior to community notification, and accordingly due process was not violated).

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turn out to be illegal.⁴⁹ In the meantime, although there is general consensus as to certain challenges, for example, those based on the Commerce and Due Process Clauses, other areas such as retroactivity and *Ex Post Facto* are unresolved and dispositions remain complex and uncertain.

A. Ex Post Facto Challenges

Defendants who were convicted of sex offenses prior to July 27, 2006 may contend that SORNA imposes a punitive or additional penalty because the federal scheme did not exist when they initially registered.⁵⁰ The Constitution explicitly forbids any state from enacting an *Ex Post Facto* law,⁵¹ which either increases the penalty beyond that which was in effect when a defendant committed the crime, or imposes a penalty for conduct that was legal at the time it took place.⁵² Currently, however, federal district courts disagree as to whether SORNA implicates the constitutional ban on *Ex Post Facto* laws.⁵³ Consequently, guidance, either as an

⁴⁹ See Yung, *supra* note 28, at 3 (calling for either appellate court action or modest congressional amendments to SORNA). Although the Supreme Court has twice ruled on sex offender statutes, Yung argues that the state courts that have approved SORNA mistakenly assume that SORNA's statutory framework is similar to those discussed in *Smith v. Doe* and *Connecticut Dep't of Pub. Safety* and that these same courts erroneously interpret each opinion. *Id.*

⁵⁰ See, e.g., *United States v. Torres*, No. 07-50035, 2007 WL 2343884 (W.D. Ark. Aug. 15, 2007); *United States v. Mason*, 510 F. Supp. 2d 923 (M.D. Fla. 2007); *United States v. Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007).

⁵¹ "No state shall . . . pass any . . . ex post facto law . . ." U.S. CONST. art. I, § 10, cl. 1.

⁵² See Chiraag Bains, *Conversation, Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. 483, 484–85 (2007); see also *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481, at *5 (W.D. Okla. Feb. 7, 2007) (relying on *Collins v. Youngblood*, 497 U.S. 37, 52 (1990)) ("A law violates the *Ex Post Facto* Clause only if it (1) punishes as a crime an act that was not criminal when it was committed; (2) makes a crime's punishment greater than when the crime was committed; or (3) deprives a defendant of a defense available at the time the act was committed.")

⁵³ Compare *Torres*, 2007 WL 2343884, at *2 (no *Ex Post Facto* violation), with *United States v. Smith*, 481 F. Supp. 2d 846, 854 (E.D. Mich. 2007) (*Ex*

amendment from Congress or a ruling as to legality by the Supreme Court, is necessary to ensure uniform interpretation and application of the law.⁵⁴

Some federal district courts have held that SORNA does not implicate the *Ex Post Facto* Clause.⁵⁵ These decisions rely on the Supreme Court's opinion in *Smith v. Doe*.⁵⁶ In that case, the Supreme Court held that an Alaskan sex offender registration system was not an *Ex Post Facto* law because it was nonpunitive and was the state's attempt to establish a civil regulatory scheme.⁵⁷ In comparing SORNA to the registration scheme in *Smith v. Doe*, a district court opined that SORNA is constitutional because, among other things, Congress's goal was to create a "civil, nonpunitive regime for the purpose of public safety."⁵⁸ Even if the guidance of *Smith v. Doe* turns out to be correct, the current split requires a definitive answer by the Supreme Court, because SORNA, albeit similar to Alaska's state registration scheme, is a federal statute with many different implications.⁵⁹

Other federal district courts, however, have found SORNA to be a law that violates the *Ex Post Facto* Clause. For example, a district court in Michigan found SORNA to be an *Ex Post Facto* law, because it increases the penalty for a first-time failure to register as a sex offender from a misdemeanor to a felony.⁶⁰

Post Facto violation).

⁵⁴ Admittedly, such challenges will diminish over time, because as more defendants are convicted, they will presumably become aware of SORNA's requirements.

⁵⁵ See, e.g., *Torres*, 2007 WL 2343884; *Mason*, 510 F. Supp. 2d 923; *Hinen*, 487 F. Supp. 2d 747.

⁵⁶ 538 U.S. 84 (2003).

⁵⁷ *Id.* at 105–06.

⁵⁸ *United States v. Hinen*, 487 F. Supp. 2d 747, 756 (W.D. Va. 2007).

⁵⁹ See generally *Yung*, *supra* note 28, at 19–31 (finding distinctions in "jurisdiction, statutory language, and effects of the respective statutes," and specifically discussing that the language in *Smith* is unhelpful in analyzing whether SORNA is retrospective, the legislature's punitive intent, and the relative punitive effects).

⁶⁰ *United States v. Smith*, 481 F. Supp. 2d 846, 853 (E.D. Mich. 2007). Prior to SORNA, the penalty for failing to register and traveling in interstate

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Additionally, a district court in Illinois found SORNA to be an *Ex Post Facto* law as applied to the defendant because at the time he traveled in interstate commerce SORNA did not apply to him, and its application to his travel violated the Constitution.⁶¹ Although not legal precedent, the National Association of Criminal Defense Lawyers (“NACDL”) contends that SORNA is punitive in nature because it inflicts public disgrace and humiliation, and imposes affirmative restraints and disabilities on the offender.⁶² The disagreement among federal district courts regarding the punitive nature of SORNA suggests that guidance from a higher authority is necessary.⁶³

B. Commerce Clause Challenges

Defendants contend that SORNA violates the Commerce Clause⁶⁴ because it applies specifically to the post-custody conduct

commerce was a misdemeanor violation. *Id.* at 851; *see* 42 U.S.C. § 14072(i) (1998).

⁶¹ *See* United States v. Cole, No. 07-cr-30062-DRH, 2007 U.S. Dist. LEXIS 68522, at *9–10 (S.D. Ill. Sept. 17, 2007); *see also* United States v. Aldrich, No. 8:07CR158, 2008 U.S. Dist. LEXIS 11411, at *12–13 (D. Neb. Feb. 12, 2008) (finding SORNA’s ten-year potential jail sentence to be punitive in nature); United States v. Stinson, No. 3:07-00055, 2007 U.S. Dist. LEXIS 66429, at *14–15 (S.D.W. Va. Sept. 7, 2007) (“[H]e cannot be convicted under SORNA because he did not commit the elements of the offense after the statute became applicable to him and a retroactive application of the statute would result in an enhanced penalty in violation of the *Ex Post Facto* Clause.”).

⁶² E-mail from National Association of Criminal Defense Lawyers, to David J. Karp, *supra* note 15; *see also* Memorandum from Amy Baron-Evans to the Office of Defender Services (May 7, 2007) *available at* http://www.fd.org/pdf_lib/Adam%20Walsh%20II%20Supplement.pdf (“[T]he registration and notification requirements of SORNA alone (aside from the criminal provision) are far more punitive than the Alaska law at issue in *Smith v. Doe*.”).

⁶³ *See generally* Yung, *supra* note 28, at 23–26 (positing an especially compelling argument that courts have completely failed to distinguish between the punitive nature of being listed on a state registry in *Smith*, and the punitive nature of being criminally prosecuted for failure to register as a sex offender).

⁶⁴ U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has identified three categories that Congress is authorized to regulate pursuant to this commerce

of offenders convicted of state sex offenses.⁶⁵ These arguments, however, appear to be misplaced, as almost every court considering Commerce Clause challenges has held SORNA to be an appropriate exercise of congressional authority.⁶⁶ Congress anticipated challenges to its Commerce Clause powers, which is reflected in the fact that SORNA's criminal provision contains a jurisdictional element that enables Congress to regulate interstate travel of sex offenders.⁶⁷ The Eighth Circuit recently discussed such a challenge in *United States v. May*,⁶⁸ finding that SORNA

power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

⁶⁵ See, e.g., *United States v. Hinen*, 487 F. Supp. 2d 747, 757 (W.D. Va. 2007); *United States v. Mason*, 510 F. Supp. 923, 931–32 (M.D. Fla. 2007). SORNA does apply to certain federal sex offenses, however such requirements are not discussed here.

⁶⁶ See, e.g., *Hinen*, 487 F. Supp. 2d at 758 ("Congress has established a jurisdictional predicate of interstate or foreign travel[, because SORNA] . . . involves the travel of [a] certain person across state lines."); *Mason*, 510 F. Supp. at 932 ("Congress may regulate those individuals or things that travel in interstate commerce without regard to the reason for their movement."). *But see* *United States v. Waybright*, 561 F. Supp. 2d 1154, 1163 (D. Mont. 2008) (finding that although 18 U.S.C. § 2250(a) (SORNA's criminal provision) does not violate the Commerce Clause, 42 U.S.C. § 16913 (SORNA's registration requirements) of the AWA does violate the clause because "it does not regulate the use of the channels of interstate commerce or the instrumentalities of interstate commerce"); *United States v. Powers*, 544 F. Supp. 2d 1331, 1333–34 (M.D. Fla. 2008) (finding that SORNA violates the Commerce Clause, in part because "the statute in question here makes no effort to regulate the interstate movement of persons who are sex offenders").

⁶⁷ 18 U.S.C. § 2250(a)(2)(B) (2008) ("travels in interstate or foreign commerce"). *But see Powers*, 544 F. Supp. 2d at 1335 ("Upon close examination, however, it becomes apparent that [the jurisdictional element] link is superficial and insufficient to support a finding of substantial affect on interstate commerce."); Yung, *supra* note 28, at 44–53 (arguing that SORNA is unsupported under any Commerce Clause jurisprudence, and that "[i]t cannot be the case that Congress need merely repeat the magic words 'interstate commerce' and an act will be found unconstitutional.").

⁶⁸ *United States v. May*, 353 F.3d 912, 922 (8th Cir. 2008).

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both “contains a sufficient nexus to interstate commerce,” and that it has an “express and clear jurisdictional element.”⁶⁹

C. Due Process: Notice and Provision of a Hearing

Defendants also contend that SORNA violates their constitutional due process rights because they lack notice of SORNA’s criminal provision, which requires a “knowing” failure to register.⁷⁰ Even if defendants knew about their obligation to register under a state provision, this does not translate into knowledge of the federal registration provision.⁷¹ The Due Process Clause of the Fifth Amendment sets forth that “No person shall . . . be deprived of life, liberty, or property, without due process of law.”⁷² In *Lambert v. California*, a case where the defendant was charged with violating a criminal registration provision, the Supreme Court interpreted due process to mean that a defendant must have notice that an act or omission is criminal before he or she can be convicted of the offense.⁷³

Nevertheless, all but a few courts have rejected the argument that there is a lack of notice of SORNA’s criminal provisions.⁷⁴

⁶⁹ *Id.*

⁷⁰ *See, e.g., Hinen*, 487 F. Supp. 2d at 753–54 (“[Defendant] claims that as applied to him the statute violates his right to procedural due process because he was not given actual notice that travel across state lines subjected him to federal criminal penalties”).

⁷¹ *See, e.g., id.*

⁷² U.S. CONST. amend. V.

⁷³ *Lambert v. California*, 355 U.S. 225, 229–30 (1957) (“Where a person [does] not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.”).

⁷⁴ *See, e.g., United States v. Markel*, No. 06-20004, 2007 WL 1100416 (W.D. Ark. Apr. 11, 2007); *United States v. Manning*, No. 06-20055, 2007 WL 624037 (W.D. Ark. Feb. 23, 2007). *But see United States v. Aldrich*, No. 8:07CR158, 2008 U.S. Dist. LEXIS 11411, at *14–15 (finding that the defendant’s violations occurred before SORNA was enacted so he had no notice and could not have knowingly failed to register); Memorandum from Amy Baron-Evans to the Office of Defender Services, *supra* note 62, at 2 (arguing that “other than the [Bureau of Prison’s] obligation to inform persons being released from federal prison, federal Probation Officers’ obligation to inform

For example, an Arkansas federal district court held that “[a] defendant can violate the law by failing to register or update a SORNA imposed registration obligation or a registration obligation imposed by another law.”⁷⁵ The rationale is that each state had a registration system prior to SORNA, and SORNA is not usurping each state’s authority, but is rather creating a comprehensive tracking system.⁷⁶ In other words, in many jurisdictions sex offenders already have notice that failure to register is criminal.⁷⁷ Furthermore, “individuals convicted of certain conduct are placed on constructive notice that they may be subjected to future regulations because of the nature of their criminal conviction.”⁷⁸ States are now required to inform sex offenders that if they move to a different state, they will be required to comply with the new state’s registration requirements.⁷⁹ All that SORNA attempts to do is unify the

persons currently being sentenced to probation; and registration being mandatory for persons currently being placed on supervised release[.]” there is “no mechanism for notifying *any* state offender of the applicability of SORNA to them, or for notifying federal offenders who have already been released from prison and are not being placed on supervised release”) (emphasis in original).

⁷⁵ *United States v. Manning*, 2007 WL 624037, at *2 (W.D. Ark. Feb. 23, 2007); *see also Markel*, 2007 WL 1100416, at *4 (W.D. Ark. Apr. 11, 2007) (“[N]o new duties were imposed by SORNA nor did SORNA impair any rights of the defendant when he failed to register.”).

⁷⁶ *See* 42 U.S.C. § 16901 (2006).

⁷⁷ *See* Lara G. Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 477 (2008) (“(1) twenty-five states treat noncompliance with one or more registration duties as only a misdemeanor; (2) four states place the responsibility to notify the state solely on the offender when moving to another state; (3) eight states have ambiguous laws as to whether the state or the sex offender must notify the new state when the offender moves to another state; and (4) only seven states revoke mandatory parole and require the sex offender to return to prison when the offender fails to register.”) (footnotes omitted).

⁷⁸ *United States v. Hinen*, 487 F. Supp. 2d 747, 754 (W.D. Va. 2007).

⁷⁹ *See, e.g., United States v. Hulen*, No. 07-30004, 2007 WL 2343885, at *2 (W.D. Ark. Aug. 15, 2007) (discussing the law of Arkansas); *United States v. Torres*, No. 07-50035, 2007 WL 2343884, at *2 (discussing the law of Florida); *Markel*, 2007 WL 1100416, at *2 (discussing the law of Oklahoma); *see also* 42

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tracking system of post-custody sex offenders.⁸⁰

Defendants also argue that failure to provide a hearing on the degree of a sex offender's dangerousness prior to registration violates due process.⁸¹ Such a claim, however, has been determined to be without merit by the Supreme Court in *Connecticut Department of Public Safety v. Doe*, which analyzed Connecticut's post-conviction sex offender registration scheme.⁸² In that case, the Court determined that due process was not violated, because the registry requirements stemmed from a previous conviction, not "the fact of dangerousness."⁸³ Additionally, because registration requirements are based on the nature of a sex offender's previous conduct, a registrant's "potential for recidivism or current dangerousness are not material to SORNA."⁸⁴ Particularly because of the Supreme Court's broad guidance in *Connecticut Department of Public Safety v. Doe*, due process claims by a sex offender indicted under SORNA's criminal provision will most likely continue to fail.

U.S.C. § 16917 (2006) (discussing states' obligation to designate an official to explain SORNA to sex offenders).

⁸⁰ See *Hinen*, 487 F. Supp. 2d at 752–53 ("[I]t was Congress's desire to create a comprehensive and uniform registration system among the states to ensure offenders could not evade requirements by simply moving from one state to another. It would be illogical for members of Congress to express concern that thousands of sex offenders who were required to register under state law were evading those registration requirements and then exempt those same offenders from SORNA.").

⁸¹ See *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481, at *5 (W.D. Okla. Feb. 7, 2007).

⁸² *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4–8 (2003) (rejecting a procedural due process claim for a state's failure to provide a sex offender a hearing on his post-custody level of dangerousness). *But see* Yung, *supra* note 28, at 31–38 (arguing that district courts have erroneously relied on *Conn. Dep't of Pub. Safety*, and should instead take guidance from *Lambert v. California*, 355 U.S. 225 (1957), which dealt specifically with fair warning and lack of notice).

⁸³ *Conn. Dep't of Pub. Safety*, 538 U.S. at 4.

⁸⁴ *United States v. Mason*, 510 F. Supp. 2d 923, 930–31 (M.D. Fla. 2007).

D. Retroactivity and Non-Delegation Doctrine Challenges

SORNA delegates the Attorney General to “specify the applicability of the requirements of [SORNA] to sex offenders convicted before July 27, 2006 . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to [comply with the initial registration requirements of SORNA].”⁸⁵ The Attorney General, however, did not promulgate an interim rule until February 28, 2007.⁸⁶ The interim rule stated that “[t]he requirements of [SORNA] apply to all sex offenders . . . , including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act.”⁸⁷ A select group of defendants contend that if they were convicted of the sex offense prior to the enactment of SORNA and indicted for failure to register before the Attorney General promulgated the interim rule, then they are not liable for the felony, because the federal law was not in effect at the time they traveled interstate.⁸⁸ In *United States v. Hinen*, the court held that “[t]he plain language of SORNA requires an offender to register, without regard to any construction of the statute by the Attorney General.”⁸⁹ Conversely, the Southern District of West Virginia held in *United States v. Smith* that SORNA was not retroactive until the date of the Attorney General’s promulgation.⁹⁰ Recently, two separate federal district

⁸⁵ 42 U.S.C. § 16913(d) (2006).

⁸⁶ Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894 (Dep’t of Justice Feb. 28, 2007) (codified at 28 C.F.R. § 72 (2007)).

⁸⁷ *Id.* at 8896.

⁸⁸ *See, e.g., United States v. Smith*, 481 F. Supp. 2d 846, 850 (E.D. Mich. 2007) (“Defendant argues that the statute’s use of the term ‘travels,’ rather than ‘traveled,’ confirms a forward-looking intent”). SORNA’s criminal provision sets forth that anyone who is required to register under the statute and “travels in interstate or foreign commerce” is in violation. 18 U.S.C. § 2250(a)(2)(B) (2006).

⁸⁹ *United States v. Hinen*, 487 F. Supp. 2d 747, 750 (W.D. Va. 2007).

⁹⁰ *United States v. Smith*, 528 F. Supp. 2d 615, 620 (S.D.W. Va. 2007).

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judges in Utah dismissed charges against defendants because they had traveled in interstate commerce prior to AWA's enactment.⁹¹

Lawmakers recognize this flaw in the statutory framework.⁹² In a recent Capitol Hill hearing, Laurence Rothenberg, Deputy Assistant Attorney General, acknowledged that the use of "travels" in SORNA only allows the law to apply to sex offenders traveling interstate after the statute's enactment.⁹³ By changing the statute to "or has traveled" . . . [t]his will help to ensure that sex offenders who have failed to register in conformity with SORNA do not enjoy a windfall immunity to federal criminal liability based on fortuities of timing in their travel among jurisdictions⁹⁴ Practically, this argument only applies to cases involving travel before or during the time SORNA was passed. As time goes by, fewer cases will be affected by this argument because the period between the statute's enactment and the relevant violations will be greater. Nevertheless, the inconsistent legal analysis calls for instruction from the Supreme Court, as the risk of imprisonment for a clause that might be deemed flawed is harsh.⁹⁵

In connection with retroactivity challenges, defendants contend that SORNA violates the Non-Delegation Doctrine⁹⁶ because it gives the Attorney General the power to create legislation. Although rooted in separation of powers principles, the Supreme Court has held that Congress may receive assistance from its coordinate branches where it "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this

⁹¹ See Pamela Manson, *First Defendant In The Nation Charged with Increased Sex Offender Penalty*, SALT LAKE TRIBUNE, Oct. 22, 2007, at LOCAL. Nevertheless, the men might still be on the hook for violating state registration schemes. *Id.*

⁹² See *Hearing on Sex Crimes and the Internet Before the H. Comm. On the Judiciary*, *supra* note 16.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ An appellate court recently found that because the defendant was indicted prior to the Attorney General's determination regarding SORNA's retroactivity, the charges against him must be dismissed. See *United States v. Madera*, 528 F.3d 852, 859 (11th Cir. 2008).

⁹⁶ "All legislative powers herein granted shall be vested in a Congress of the United States" U.S. CONST. art. I, § 1.

delegated authority.”⁹⁷ The court in *Hinen* rejected the claim that SORNA improperly delegates authority outright.⁹⁸ In fact, SORNA only gives the Attorney General “the power to promulgate regulations under the most limited of circumstances.”⁹⁹ Consequently, giving the Attorney General the authority to issue an interim rule does not appear to violate the Non-Delegation Doctrine.

II. STATUTORY DEFECTS

Advocates of SORNA purport that it creates a comprehensive scheme in which tracking and monitoring sex offenders on a national level will be more seamless than the varying state schemes currently in place.¹⁰⁰ Nevertheless, the requirements set forth only *minimum* registration and notification standards.¹⁰¹ The fact that states can set higher standards makes it likely that uninformed sex offenders who are confused by differing state requirements will, in failing to meet additional state disclosure requirements, end up facing an extended sentence for their original sex offense because

⁹⁷ *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (quoting *Am. Power & Light, Co. v. SEC*, 329 U.S. 90, 105 (1946)).

⁹⁸ *See United States v. Hinen*, 487 F. Supp. 2d 747, 751 (W.D. Va. 2007) (“Congress has only delegated authority to the Attorney General to issue a rule covering the limited instance where a person who is classified as a sex offender under SORNA is unable to currently register as such in a jurisdiction where he resides, works, or is a student.”).

⁹⁹ *Id.* at 752.

¹⁰⁰ *See, e.g.*, Press Release, Senator Norm Coleman, Colmean [sic] Applauds Senate Passage of Sex Offender Registry Legislation (May 5, 2006), available at http://coleman.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=0e725d4b-2fb5-4e1a-962b-23ec802d5bed&Month=5&Year=2006 (“This legislation will remove the cloak that offenders have been using to shield themselves by combining all 50 state registries of sex offenders into one national database that the public can access online.”).

¹⁰¹ *See* Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking Frequently Asked Questions, <http://www.ojp.usdoj.gov/smart/faq.htm> (last visited Sept. 12, 2008) (explaining that SORNA sets a floor, rather than a ceiling, for state sex offender registration and notification systems).

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of their failure to comply.¹⁰² Unless Congress amends the statute, SORNA will be continuously opposed and possibly prove unable to curb recidivism.¹⁰³ A recent study shows that although registration and notification has a deterrent effect on future offenders, the same cannot be said for repeat offenders.¹⁰⁴ By closely analyzing the statutory language and implications, it is evident that SORNA needs to be reformed.¹⁰⁵

A. Misdemeanor Penalty

Prior to AWA's enactment, the federal penalty for first-time failure to register as a sex offender was a misdemeanor with a statutory maximum imprisonment of one year.¹⁰⁶ SORNA has not only enhanced the possible penalty to a felony, but has yet to repeal the misdemeanor penalty.¹⁰⁷ The resulting statutory scheme leaves sex offenders subject to heightened prosecutorial discretion, which is subject to abuse.¹⁰⁸ To avoid this more serious

¹⁰² See, e.g., Laura B. Martinez, *Man Sentenced to Prison for Failing to Register as Sex Offender*, BROWNSVILLE HERALD, Aug. 26, 2008, at STATE AND REGIONAL NEWS, available at http://www.brownsvilleherald.com/news/sex_89495__article.html/offender_letourneau.html (discussing a fifty-one month prison sentence for a man convicted of failing to register as a sex offender).

¹⁰³ See discussion *supra* Part I (examining SORNA case law and the lack of consensus amongst the circuits).

¹⁰⁴ Prescott & Rockoff, *supra* note 11, at 4 (describing a “relative utility” effect, and explaining that “convicted sex offenders become more likely to commit crime when their information is made public because the associated psychological, social, or financial costs make crime more attractive”); see also Bumby et al., *supra* note 41, at 10 (noting that the restriction of certain liberties after sex offenders’ release from prison “can actually compromise public safety – rather than increase it – by exacerbating known risk factors for sex offender (e.g., housing and employment instability, loss of community supports, and increased hostility and resentment.)”).

¹⁰⁵ See discussion *infra* Parts II.A–D.

¹⁰⁶ 42 U.S.C. § 14072(i) (2007).

¹⁰⁷ See *id.*

¹⁰⁸ See, e.g., *United States v. Gillette*, 553 F. Supp. 2d 524, 529 (D.V.I. 2008) (“[W]hen [defendant] moved . . . his failure to register was punishable as a misdemeanor under 42 U.S.C. § 14072(i), with a maximum sentence of one

punishment, sex offenders must understand not only SORNA's complicated legal framework but also the registration requirements of every jurisdiction where they each reside, are employed, or go to school.¹⁰⁹ One commentator proposes that Congress should enact a law requiring actual notice to every person required to register under SORNA.¹¹⁰ Such a requirement would alleviate concerns that a defendant could be punished for omission liability without being given notice.¹¹¹

A comparison of SORNA's felony and current misdemeanor provisions reveals important differences between them. The misdemeanor provision requires the lowest level of post-conviction offenders to register until ten years after his or her release from prison or initiation of parole, supervised release, or probation.¹¹² SORNA's felony registration requirements, however, last for at least fifteen years, depending on the relevant classification.¹¹³ Furthermore, the misdemeanor penalty allows a sex offender up to ten days to update the requisite registration system with changes in residence.¹¹⁴ Under the higher felony standard, however, each sex offender has only three days to update the registration for "each

year in prison. That same failure to register is now punishable by up to ten years in prison. Increasing the punishment from a maximum imprisonment of one year to up to ten years, clearly increases the punishment for the crime."); *United States v. Wilson*, No. 2:06-cr-867 TC, 2007 WL 3046290 (D. Utah Oct. 16, 2007) (finding an *Ex Post Facto* violation because at the time the defendant traveled interstate and failed to update his registry he was guilty of the misdemeanor, and now, because he was prosecuted under SORNA, he faced a "ten-fold increase in criminal punishment for conduct which preceded SORNA").

¹⁰⁹ In an effort to foreclose due process and notice arguments, SORNA requires each jurisdiction to have an official inform sex offenders of their registration requirements. *See* 42 U.S.C. § 16917 (2006).

¹¹⁰ *See Yung, supra* note 28, at 38 ("Such a law would cure the concern in *Lambert* that a person could be punished for completely passive conduct with no notice.").

¹¹¹ *Id.*

¹¹² 42 U.S.C. § 14072(d)(1) (1998).

¹¹³ *Id.* § 16915.

¹¹⁴ *Id.* § 14072(g)(3).

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change of name, residence, employment, or student status.”¹¹⁵ Moreover, while the misdemeanor statute states that each person instructed to register provide fingerprints to the state or FBI,¹¹⁶ SORNA’s felony provision exponentially expands on the information required in the registration.¹¹⁷ Under SORNA’s felony provision, the sex offender must provide the name and address of any place of residence, employment, or education, and the license plate number¹¹⁸ and description of any vehicle owned or operated by the sex offender.¹¹⁹ The sex offender must further provide, among other things, a frequently updated photograph, a DNA sample, and a photocopy of any driver’s license or identification card.¹²⁰

Although efficient tracking of post-conviction sex offenders is beneficial to appease the public, the increased penalties and expanded registration requirements create important policy implications. Once AWA was enacted, the misdemeanor statute had a prospective amendment added to it.¹²¹ The amendment calls for the misdemeanor’s repeal either once the three-year window for states to comply with SORNA has passed or a year after

¹¹⁵ *Id.* § 16913(c).

¹¹⁶ *Id.* § 14072(h).

¹¹⁷ *Id.* § 16914 (requiring, among other things, pedigree information, a constantly updated photograph, and a DNA sample). All of the information provided by the sex offender and maintained by each jurisdiction will be “readily accessible to all jurisdictions and to the public” on the internet in connection with participation in the Dru Sjodin National Sex Offender Public Website. *Id.* § 16918.

¹¹⁸ 42 U.S.C. § 16914 (2006). Sex offenders whose license plates appear on public registries are among those who have been subject to continuing vigilante violence. See Libby Lewis, *Murders Put Focus on Sex-Offender Registry Policies*, NAT’L PUB. RADIO (Apr. 21, 2006), available at <http://www.npr.org/templates/story/story.php?storyID=5355980> (discussing how a married man, who was convicted of a sex offense against his current wife when she was fifteen, “get[s] pulled over constantly because [his] license is registered to a sex offender”).

¹¹⁹ 42 U.S.C. § 16914 (2006).

¹²⁰ *Id.*

¹²¹ *Id.* § 14072 (“Repeal of section, effective on later of 3 years after [AWA] enactment or 1 year after date [SORNA] software is available.”).

national registration software is available.¹²² Before either of these events triggers the repeal of the misdemeanor provision, prosecutors can indict a sex offender for failure to register under either SORNA's felony provision or the comparatively innocuous misdemeanor provision. The possibility of these inconsistent results is unfair to post-conviction offenders who might want to change their residence, employment, or educational institutions, and are unaware of SORNA's new implications.¹²³

B. Flexible Compliance Date

AWA gives jurisdictions up to three years to comply with SORNA's guidelines.¹²⁴ This deadline is flexible, however, and can be extended for upwards of two additional years.¹²⁵ If a jurisdiction declines to implement SORNA within the statutory guidelines, that jurisdiction will be subject to a ten percent reduction in funding from the federal government for that fiscal year.¹²⁶ The determination of adequate compliance is made by the Attorney General.¹²⁷

¹²² *Id.* § 16924.

¹²³ *See, e.g.*, E-mail from National Association of Criminal Defense Lawyers, to David J. Karp, *supra* note 15 (arguing that SORNA “will cause widespread confusion and instability in the efforts of many convicted sex offenders to comply with the law and maintain a no-offending lifestyle” and opining that many “[f]ormer offenders will likely be confused as to the application of the new law in their individual situations”).

¹²⁴ 42 U.S.C. § 16924(a)(1) (2006). As part of SORNA, the Attorney General is required to maintain the National Sex Offender Registry at the FBI containing information on each person required to register as a sex offender. *See id.* § 16919. Once this Registry is established, and the software is available, each jurisdiction will have a year to implement SORNA. *See id.* § 16924(a)(2).

¹²⁵ *Id.* § 16924(b).

¹²⁶ *Id.* § 16925(a); *see also* U.S. Dep't of Justice, Frequently Asked Questions: The Sex Offender Registration And Notification Act (SORNA), Proposed Guidelines, May 17, 2007 (“Jurisdictions that fail to substantially implement SORNA by July 27, 2009 are subject to a mandatory 10% reduction in funding under 42 U.S.C. 3750 *et seq.* (‘Byrne Justice Assistance Grant’ Funding).”).

¹²⁷ 42 U.S.C. § 16925(a) (2006).

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As a result of the discretionary nature of compliance, if a state is willing to take the funding cut, it need not comply with any of SORNA's guidelines.¹²⁸ Interestingly, some SORNA opponents suggest this is exactly what the states should do.¹²⁹ An article by the Human Rights Watch opines that “[c]ompliance with the Adam Walsh Act will preclude states from adopting more carefully calibrated and cost-effective registration and community notification policies. At least some states are debating whether the costs of complying with the law outweigh the benefits.”¹³⁰ In fact, a recent study by the Justice Policy Institute focusing on cost-benefit analysis discussed that some “states have found that implementing SORNA in their state is far more costly than the penalties for not being in compliance.”¹³¹ The study points to a further concern that by devoting a majority of resources to maintaining the registry, the goal of targeting serious offenders might be difficult to achieve.¹³²

If even one state decides not to comply with SORNA as a supplement to its state registration system, the very essence of AWA will be in limbo. One of the stated purposes of AWA is the establishment of a “comprehensive national system for the registration of [sex] offenders.”¹³³ The federal registry will fail to

¹²⁸ See *id.* (“For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under part A of subchapter V of chapter 46 of this title.”).

¹²⁹ See, e.g., Human Rights Watch, *US: Sex Offender Laws May Do More Harm than Good, End Registration of Juveniles, Residency Restrictions and Online Registries* (2007), <http://hrw.org/english/docs/2007/09/06/Usdom16819.htm>.

¹³⁰ See *id.*; see also Jesse Fruhwirth, *Utah Steps Up Sex-Offender Law, Still Short of Federal Compliance*, DAILY HERALD, Jan. 28, 2008, available at <http://www.heraldextra.com/content/view/253069/3/> (discussing that Utah has decided that it will probably not fully comply with AWA).

¹³¹ Justice Policy Institute, *What Will it Cost States to Comply with the Sex Offender Registration and Notification Act 1* (2008), http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf.

¹³² *Id.*

¹³³ 42 U.S.C. § 16901 (2006).

be comprehensive if a state decides its current registration system is sufficient to curb recidivism.¹³⁴ Moreover, post-conviction sex offenders will undoubtedly become aware of this statutory flaw, and a state that does not establish SORNA might become a haven for those offenders.¹³⁵ This is what happened at Palace Mobile Home Park in Florida, as a result of the state's residency restrictions.¹³⁶ Nearly fifty percent of Palace's residents are convicted sex offenders, and a remarkable 600 past offenders have lived there in the past several years.¹³⁷ Nevertheless, although only one offender living there has reoffended, some residents remain frustrated about living amongst convicted sex offenders.¹³⁸ It is unlikely that either Congress or the public desires such an outcome.

A separate result of state compliance with the minimum

¹³⁴ See Farley, *supra* note 77, at 494–98 (2008) (arguing that many states will choose to opt out of AWA because it is an unfunded mandate which imposes heavy budget and tax burdens on each state choosing to comply); see also *Clinton Pushes Senate Leadership to Fund Programs to Protect Children From Sexual and Other Violent Crimes*, STATES NEWS SERV., May 2, 2008 (highlighting Senator Hillary Clinton's efforts to get proper funding for AWA, because many monitoring programs are unable to function efficiently, thus impeding the ability to protect children).

¹³⁵ Similarly, as a result of state residency restrictions, areas of certain states have become more heavily populated with sex offenders. See, e.g., Mary Beth Lane, *Sex-Offender Ghettos: Get-Tough Laws Force Predators to Move But Do Little to Make Kids Safer*, COLUMBUS DISPATCH, Oct. 7, 2007, at A1 (“One visible consequence is that when sex offenders cannot live in some places, they cluster in others.”); see also Gregory Korte, *Sex Offender Limits: Too Far?*, CINCINNATI ENQUIRER, July 29, 2007, available at <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20070729/EDIT03/707290301> (“As more areas become off-limits, sex offenders are being concentrated into neighborhoods with few schools and inexpensive housing Even if they're not a threat, a concentration of sex offenders is bad news for property values.”).

¹³⁶ Rich Phillips, *Trailer Park Becomes 'Paradise' for Sex Offenders*, CNN, Oct. 18, 2007, <http://www.cnn.com/2007/US/10/17/trailer.Sexoffender/index.html>.

¹³⁷ *Id.*

¹³⁸ *Id.* One resident rallied against the management for lack of disclosure, and another will not let her grandchildren on the premises. *Id.*

requirements set forth in AWA is legal challenges to the schemes implemented by each state.¹³⁹ Ohio, for example, has chosen to implement AWA's mandate.¹⁴⁰ Nevertheless, an Ohio state court found the implementation to be unconstitutional under both the retroactivity clause of Ohio's Constitution and the *Ex Post Facto* Clause of the United States Constitution.¹⁴¹ Similarly, a judge in Nevada recently ruled that Nevada's implementation of AWA's mandate was unconstitutional as to retroactivity.¹⁴² With challenges so soon after the new scheme was codified, perhaps other related challenges will succeed.

*C. Public Access to Sex Offender Information through the Internet—Community Notification*¹⁴³

When convicted sex offenders register, their personal information is often accessible by the public.¹⁴⁴ The result is sometimes disastrous consequences that call into question the propriety of making personal information publicly available.¹⁴⁵ For

¹³⁹ Such challenges were anticipated by AWA's drafters, as evidenced in the statutory language:

If the jurisdiction is unable to substantially implement this title because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this Act if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this Act.

42 U.S.C. § 16925(b)(3) (2006).

¹⁴⁰ OHIO REV. CODE ANN. § 2950 (2008).

¹⁴¹ *Evans v. Ohio*, Case No. CV-08 646797, 2008 WL 2692514 (Ohio Com. Pl. May 9, 2008).

¹⁴² Associated Press, *Judge Restricts Sex Offender Laws*, LAS VEGAS SUN, Sept. 10, 2008, available at <http://www.lasvegassun.com/news/2008/sep/10/judge-restricts-sex-offender-laws/>.

¹⁴³ 42 U.S.C. § 16918 (2006).

¹⁴⁴ *See id.* (directing jurisdictions to create a sex offender registry that is "readily accessible" to the public).

¹⁴⁵ *See also* Paul Zielbauer, *Posting of Sex Offender Registries on Web Sets Off Both Praise and Criticism*, N.Y. TIMES, May 22, 2000, at B1 (discussing how registries may lead to vigilante violence against sex offenders).

this reason, SORNA should be revised to include more mandatory exceptions to publication, going beyond some of the current permissive exemptions for a convicted sex offender's school or workplace.¹⁴⁶

As part of compliance with SORNA, each jurisdiction must participate in the National Sex Offender Public Registry (NSOPR) Website.¹⁴⁷ This requires those jurisdictions to make certain information about post-conviction sex offenders available to the public.¹⁴⁸ The provided information includes all statutorily-required information given by each registrant, such as current residence address and license plate, and that which is kept on file by the jurisdiction, such as a current photograph and the offender's entire criminal history.¹⁴⁹ Congress, however, permits jurisdictions to exempt from disclosure certain items such as employer and educational institution information.¹⁵⁰ Although this facet might shield employers and schools from potentially harmful exposure, it is only permissive.¹⁵¹ States are free to exploit such entities that are willing to give post-conviction sex offenders a chance. This aspect of SORNA is shocking. Based on perceived biases about sex offenders, businesses and schools might be subject to vandalism and public protest.¹⁵² For example, a nineteen-year old student was

¹⁴⁶ See 42 U.S.C. § 16918(c) (2006) (outlining information that may be exempted from disclosure by jurisdictions).

¹⁴⁷ Also called the Dru Sjodin National Sex Offender Public Website. *Id.*; see also Press Release, Dep't of Justice, All 50 States Linked to Department of Justice National Sex Offender Public Registry Web Site (July 3, 2006) available at <http://www.ojp.gov/newsroom/pressreleases/2006/BJA06041.htm> (stating that all 50 states, the District of Columbia, and Guam are now affiliated with the website).

¹⁴⁸ See generally 42 U.S.C. §§ 16914, 16918 (2006).

¹⁴⁹ *Id.* § 16914.

¹⁵⁰ *Id.* § 16918(c).

¹⁵¹ States have different requirements for the disclosure of sex offender information on the internet, i.e., mandatory, permissive, or it is not mentioned. See Christina Locke & Dr. Bill F. Chamberlin, *Safe From Sex Offenders? Legislating Internet Publication of Sex Offender Registries*, 39 URB. LAW. 1, 10–11 (2007). Furthermore, certain states restrict internet publication to only certain tiers of offenders. *Id.* at 11–12.

¹⁵² See, e.g., Lindsay Tice, *Shadowed by the Past: Should We Care that*

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expelled from a Montana high school after school officials learned he was on the state's sex offender registry.¹⁵³ Similarly, a man in a Seattle suburb who rented rooms to sex offenders decided to stop doing so because of threats against him and his family.¹⁵⁴

These optional exemptions are not enough—they need to be mandatory to protect sex offenders who are reintegrating back into society.¹⁵⁵ Sex offenders who have their names published on websites have been victims of brutal attacks.¹⁵⁶ In April of 2006,

Laws Against Sex Offenders in Maine May Have Gone Too Far? Even Some Law-And-Order Types Are Now Saying Yes, SUN JOURNAL, Oct. 21, 2007, available at http://www.sunjournal.com/story/234971-3/MaineNews/Shadowed_by_the_past/ (explaining how a sex offender, who is now required to register after Maine changes its laws, has been unable to get a job because “once a company finds out he’s on the registry, it doesn’t want him”); see also Zielbauer, *supra* note 145 (“As notification laws become ubiquitous, so have incidents in which ex-offenders were harassed by neighbors, evicted by landlords, fired from new jobs or beaten by revenge-minded mobs.”).

¹⁵³ Associated Press, *Convicted Sex Offender Expelled from Montana High School*, FOX NEWS, Oct. 31, 2007, <http://www.foxnews.com/story/0,2933,306976,00.html>.

¹⁵⁴ Lynn Thompson, *Everett Landlord Won't Rent to More Sex Offenders*, SEATTLE TIMES, Aug. 28, 2008, available at http://seattletimes.nwsources.com/html/localnews/2008143486_sexoffenders28m.html. Consequently, he blamed city officials for “not educating the [public] about the need for sex-offender housing and not coming to his defense.” *Id.*

¹⁵⁵ Community notification schemes can be looked at as either active or passive. See Locke & Chamberlin, *supra* note 151, at 2 (“Examples of active community notification methods include sending law enforcement officers door-to-door or calling to notify residents that a sex offender has moved into their neighborhood. Passive community notification methods refer to those where the government makes information available to citizens who wish to seek it out.”).

¹⁵⁶ *No Easy Answers: Sex Offender Laws in the U.S.*, HUMAN RIGHTS WATCH REPORT (Human Rights Watch, New York, NY), Sept. 2007, at 7, available at <http://www.hrw.org/reports/2007/us0907/us0907web.pdf> (hereinafter “No Easy Answers”) (“Registrants and their families have been hounded from their homes, had rocks thrown through their home windows, and feces left on the front doorsteps. They have been assaulted, stabbed, and had their homes burned by neighbors or strangers who discovered their status as a previously convicted sex offender.”); see also *id.* at 118 (“Lawmakers in the United Kingdom recently considered and rejected adopting community notification laws, noting the United States’ experience with vigilante violence

two convicted sex offenders were killed in separate attacks by a man who logged onto Maine's registration website and found the offenders' addresses.¹⁵⁷ As a response, state authorities "briefly remove[d] the state's online sex-offender registry and revived concerns that such websites may encourage vigilante-style justice."¹⁵⁸ Similarly, in August of 2005, a man found sex offenders' addresses on a Washington State sex offender registry, posed as an FBI agent, and killed two offenders that were living together.¹⁵⁹ In fact, because of Nevada's failure to keep its registration system current, a seventy-one-year-old man who lives in the former apartment of a sex offender has been subject to frequent disturbance.¹⁶⁰ No doubt, these are egregious examples.¹⁶¹ However, as states begin to comply with SORNA, and the national registry begins to take form, the possibility of continuing vigilante attacks is unknown. The National Alliance to End Sexual Violence opines that internet disclosure and community notification should include "comprehensive community education" in order to create a working knowledge of registries and how to deal with reintegration

and the lack of proven effectiveness.").

¹⁵⁷ Nick Sambides, Jr., *One Year Later, in the Wake of a Killer; Two Maine Families Struggle with Aftermath of Sadness and Loss of Easter 2006 Murders*, BANGOR DAILY NEWS, April 14, 2007, at A1.

¹⁵⁸ Emily Bazar, *Suspected Shooter Found Sex Offenders' Homes on Website*, USA TODAY, Apr. 18, 2006, at 5A, available at http://www.usatoday.com/news/nation/2006-04-16-maine-shootings_x.htm.

¹⁵⁹ Jonathan Martin & Maureen O'Hagan, *Killings of 2 Bellingham Sex Offenders May Have Been by Vigilante, Police Say*, SEATTLE TIMES, Aug. 30, 2005, at A1, available at http://seattletimes.nwsourc.com/html/localnews/2002456680_sexoffender30m.html.

¹⁶⁰ See Abigail Goldman, *Flawed Sex Offender Tracking Leads to Wrong Door*, LAS VEGAS SUN, Nov. 18, 2007, available at <http://www.lasvegassun.com/news/2007/nov/18/flawed-sex-offender-tracking-leads-to-wrong-door/>. Only recently, after dealing with several administrative hurdles, has the man's name been removed from the website. *Id.*

¹⁶¹ See also Zielbauer, *supra* note 145 (discussing specific instances of vigilante violence, such as when "two men beat a 59-year-old convicted child molester with a baseball bat in [Florida]," and "a 23-year-old [New Jersey] man, reacting to a flier distributed by the police, fired five bullets from a .45-caliber handgun into the house of a recently paroled rapist").

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of offenders into society.¹⁶² “Public education has the potential to foster effective offender management efforts through the ability to inform, guide, and influence community leaders and policymakers.”¹⁶³

On the other hand, certain registry opponents have argued that access to sex offender information should be limited to law enforcement, and that online registries should be banned altogether for certain sex offenders.¹⁶⁴ Furthermore, sex offender registries are often incomplete.¹⁶⁵ “Of the approximately 600,000 registered sex offenders nationwide, 100,000 are ‘lost,’ or noncompliant.”¹⁶⁶ At a minimum, a delicate balance must be considered, as the constitutional rights of past offenders are in constant tension with the demands of the public.¹⁶⁷ By virtue of SORNA’s permissive

¹⁶² Press Release, The Nat’l Alliance to End Sexual Violence, Legislative Analysis: The Adam Walsh Child Protection and Safety Act of 2006, at 2, available at http://www.naesv.org/Policypapers/Adam_Walsh_SumMarch07.pdf (“Regarding internet disclosure, the community education components should be shown on pages required to be viewed prior to the listing of sex offenders, so that community members are fully apprised prior to seeing the listing.”).

¹⁶³ Bumby et al., *supra* note 41, at 15 (discussing community notification efforts that might be effective such as community meetings and public education).

¹⁶⁴ See, e.g., No Easy Answers, *supra* note 156, at 17–18.

¹⁶⁵ See Locke & Chamberlin, *supra* note 151, at 3 (“[Although] state legislatures have embraced the Internet as a notification model, the model itself will not be effective unless the registry information disseminated is accurate and up-to-date.”).

¹⁶⁶ Nathan J. Comp, *The Sex Offenders Among Us, Why Do We Treat Them The Same Way?*, ISTHMUS, Nov. 9, 2007, <http://www.thedailypage.com/isthmus/article.php?article=13311>; see also *id.* (“Wisconsin’s 19,000 registered sex offenders include more than 1,000 whose whereabouts are unknown.”); Posting of Sarah Tofte to The Huffington Post, http://www.huffingtonpost.com/sarah-tofte/sex-offender-laws-may-do-_b_68261.html (Oct. 12, 2007, 15:19 EST) (“Since the [sex offender registry] law took effect in Iowa, police have lost track of hundreds of former offenders.”).

¹⁶⁷ SORNA does require that certain information be excluded from publicly accessible state sex offender web sites: “victim identity, registrant Social Security Number, registrants’ arrests not resulting in conviction, and passport and immigration information.” S.M.A.R.T. Office, Frequently Asked Questions, <http://www.ojp.usdoj.gov/smart/faq.htm> (last visited July 4, 2008).

exemptions, sex offenders (and their places of employment and education) are currently in a worse position in terms of safety and public exposure than they were prior to AWA's enactment.¹⁶⁸

D. Inequitable Classification and Registration Duration

SORNA categorizes three different tier-levels that govern the applicability of its registration requirements to the various enumerated sex offenses.¹⁶⁹ The tier levels are referenced throughout the scheme, and are particularly relevant to the duration of registration and the frequency with which an offender must provide updated photographs for inclusion on the registry.¹⁷⁰ The lowest level of classification, a Tier I sex offender, requires anyone who has been convicted of a "sex offense" to register as set forth in that individual's state of residence.¹⁷¹ This is extremely broad.¹⁷² Accordingly, SORNA requires post-conviction sex offenders to register, regardless of the crime's egregiousness.¹⁷³

The result of this statutory framework is that someone who has been convicted of *any* offense involving a sexual act or sexual

¹⁶⁸ Low-level offenders might be at no less risk than Tier III offenders. *See, e.g.,* Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 13 (2008) ("Individuals subject to community notification, *apriori*, are thought worthy of criminal recidivist concern, even if the state disclaims or omits any specific designation of current dangerousness."); *see also* discussion *infra* Part II.D (discussing the flawed structure of registration classes).

¹⁶⁹ 42 U.S.C. § 16911 (2006).

¹⁷⁰ *See id.* §§ 16915-16.

¹⁷¹ *Id.* §§ 16911(1)-(2); *see also id.* § 16911(5)(A)(i) (defining the scope of "sex offense" as including "a criminal offense that has an element involving a sexual act or sexual contact with another").

¹⁷² *See* Farley, *supra* note 77, at 487-91 (arguing that AWA does not distinguish between violent and nonviolent offenders, and "[t]hus, law enforcement officials cannot focus their money, attention, and effort on the most dangerous offenders . . .").

¹⁷³ *See* 42 U.S.C. § 16911 (2006) ("(5) Amie Zyla expansion of sex offense definition. (A) Generally . . . the term "sex offense" means—(i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor.").

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contact, and was fourteen or older at the time of the incident,¹⁷⁴ will be subject to SORNA's minimum registration requirements.¹⁷⁵ This subjects an enormous number of post-conviction sex offenders to SORNA's requirements, especially because a state legislature may promulgate whatever constitutionally-permissible criminal code it desires.¹⁷⁶ For example, "[u]nder the Adam Walsh Act, a 35-year-old who has a history of repeatedly raping young girls will be eligible for the public registry, and so will a 14-year-old boy adjudicated as a sex offender for touching an 11-year-old girl's vagina."¹⁷⁷ Thus many low-level offenders are required, at a minimum,¹⁷⁸ to re-register for fifteen years, and provide a photograph at least once a year.¹⁷⁹

The consequences of applying SORNA to so many post-conviction sex offenders create absurd results. "For example, in many states, people who urinate in public, teenagers who have consensual sex with each other, adults who sell sex to other adults, and kids who expose themselves as a prank are required to register as sex offenders."¹⁸⁰ Consequently, if any of these offenders knowingly travels in interstate commerce and fails to register within three days, he or she will be subject to SORNA's felony penalties.

Furthermore, many low-level offenders suffer the same negative treatment and stigma from the public as Tier III offenders who have committed much more atrocious sex crimes.¹⁸¹ As a

¹⁷⁴ See *id.* § 16911(8) (exempting juvenile adjudications for which the incident occurred when the offender was younger than 14).

¹⁷⁵ See generally *id.* § 16911.

¹⁷⁶ See Human Rights Watch, *supra* note 129 ("Most states do not make individualized risk assessments before requiring registration. Nor do they offer former offenders a way to get off the registry upon a showing of rehabilitation or years of lawful behavior.").

¹⁷⁷ Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid With Real Boundary Problems*, N.Y. TIMES MAGAZINE, July 22, 2007, at 6.

¹⁷⁸ Notwithstanding a "clean record" reduction in registration duration. See 42 U.S.C. § 16915(1) (2006).

¹⁷⁹ A jurisdiction can always impose stricter registration requirements. SORNA merely sets the baseline. See *supra* text accompanying note 101.

¹⁸⁰ No Easy Answers, *supra* note 156, at 5.

¹⁸¹ See, e.g., Jones, *supra* note 177, at 6 ("[B]y publishing [juvenile sex

result, low-level offenders are likely to be treated and judged as having committed a more egregious offense than that for which he or she has been convicted.¹⁸²

III. POST-ENACTMENT RESPONSE TO SORNA'S EFFECTIVENESS

The policy implications of SORNA are important to analyze, because ultimately Congress is accountable to the public, and a large number of constituents are unhappy with the current scheme.¹⁸³ Although politicians have worked hard to come up with a functional response to public outcry regarding post-conviction sex offenders, many organizations and individuals have concluded that AWA is not the answer.¹⁸⁴ Some argue that registration laws

offenders'] photographs and addresses on the Internet, community notification suggests that juveniles with sex offenses are in a separate distinct category from other adolescents in the juvenile justice system – more fixed in their traits and more dangerous to the public.”).

¹⁸² Nevertheless, some applaud this classification system, and believe uniform registration requirements create a needed change to the varying schemes across states. *See, e.g.*, Logan, *supra* note 168, at 10–11 (opining that classification “predicated on a single, static factor, prior offense seriousness,” is preferable to the “offense-based” approaches of many states, which reflect individualized assessments of risk or dangerousness).

¹⁸³ *See* discussion *infra* Parts III.A–B.

¹⁸⁴ *See, e.g.*, National Conference of State Legislatures, Adam Walsh Policy (2008-2009), available at <http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh> (“NCSL objects to [AWA’s] one-size-fits all approach to classifying, registering and, in some circumstances, sentencing sex offenders. These provisions preempt many state laws and create an unfunded mandate for states because there are no appropriations in the Act or in any appropriations bill. Many of the provisions of [AWA] were crafted without state input or consideration of current state practices. The mandates imposed by [AWA] are inflexible and, in some instances, not able to be implemented.”); *see also* Press Release, Nat’l Juvenile Justice Network, New Registration Requirements for Juvenile Sex Offenders 2, available at http://njjn.org/media/resources/public/resource_625.doc; Letter from Nancy G. Hornberger, Executive Director, Coalition for Juvenile Justice, to David J. Karp, Senior Counsel, Office of Legal Policy (Apr. 30, 2007), available at <http://www.juvjustice.org/media/fckeditor/comments%20on%20Interim%20Rule%20OAG%20Docket%20No%20117.pdf>.

really do little to curb recidivism,¹⁸⁵ and that they might even *increase* the frequency of sex offenses.¹⁸⁶ Appropriating funding to post-conviction registration might achieve only marginal results, and concentrating efforts on preventing first-time offenses has the potential to be more beneficial to public safety.¹⁸⁷ As the President of the Massachusetts Association for the Treatment of Sexual Abusers urged “[i]f you’re going to lock [the offender] up for life, fine, do that . . . [b]ut if you’re going to let him out and not let him have a job and burn down his house, if he has one, you’re just making us less safe.”¹⁸⁸

A. Appeal for Amendment

The NACDL has published several articles in its journal, *The Champion*, opposing sex offender registration and public notification laws.¹⁸⁹ In February 2007, it issued a sex offender policy statement outlining various concerns.¹⁹⁰ Among the suggestions were that “[i]f employed at all, sex offender registries should classify sex offenders on the basis of risk, with full due

¹⁸⁵ See Tofte, *supra* note 166.

¹⁸⁶ See Zielbauer, *supra* note 145 (“Critics say online registries, while popular with the public, are a ‘quick fix’ to a complex issue and could stigmatize and victimize marginal offenders and ultimately produce more sex crimes than they prevent.”).

¹⁸⁷ See Prescott & Rockoff, *supra* note 11, at 4 (concluding that community notification is likely to deter first-time sex offenders by raising awareness of expected punishment, but may increase recidivism and have the opposite effect on registered sex offenders).

¹⁸⁸ Zielbauer, *supra* note 145.

¹⁸⁹ See, e.g., Norman L. Reimer, *Inside NACDL: Sex Offender Laws Run Amok*, 31 CHAMPION 39 (Apr. 2007); Kyle O’Dowd, *The Scarlet Letter of the Law: The Adam Walsh Child Protection and Safety Act of 2006*, 30 CHAMPION 59 (Nov. 2006); see also NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, REPORT OF THE SEX OFFENDER POLICY TASK FORCE (2007), available at [http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/\\$FILE/sexOffenderPolicy.pdf](http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/$FILE/sexOffenderPolicy.pdf) (recognizing that although pain and suffering by victims’ and their families is important, NACDL believes “this proliferation of ‘one size fits all’ [post-conviction] laws to be unwise, contrary to our traditional notions of liberty and fairness, and ultimately detrimental to public safety”).

¹⁹⁰ Reimer, *supra* note 189.

process of law.”¹⁹¹ Furthermore, “[p]ublic/community notification provisions [such as the websites SORNA provisions fund] should be reserved for ‘High Risk’ sex offenders.”¹⁹² As discussed above, NACDL also brings attention to residency restrictions, which “do not provide effective community protection and threaten offender stability and reintegration into society.”¹⁹³ Although the suggestions set forth in the policy statement might not be adopted, they provide important guidance should Congress choose to amend SORNA’s framework.

Many opponents of AWA argue that SORNA’s applicability to juvenile offenders is particularly faulty.¹⁹⁴ Because SORNA sets only the minimum standard for which states must comply, the National Juvenile Justice Network (“NJJN”) cautions states to ensure that their requirements do not exceed the federal framework.¹⁹⁵ Furthermore, in response to some discretionary requirements of SORNA,¹⁹⁶ the NJJN release urges states not to include the place of employment and name of educational institution associated with a juvenile sex offender.¹⁹⁷ Similarly, as

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See Britney M. Bowater, Note, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Offenders?*, 57 CATH. U. L. REV. 817, 820 (2008) (“The community notification requirement of [AWA], when strictly applied to all juvenile sex offenders, runs counter to the rehabilitative component of the juvenile justice system.”); Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 706–07 (2008) (“There is something in our sense that acknowledges the vulnerability and the differences between juvenile offenders and adult offenders. The glaring problem with [AWA] is that it fails to take into account those differences.”).

¹⁹⁵ See Press Release, Nat’l Juvenile Justice Network, *supra* note 184, at 2. In fact, the release suggests that states “[u]se [AWA] as an opportunity to advocate for a scaling back of your state’s laws in order to comport with the more narrowly defined federal law.” *Id.*

¹⁹⁶ 42 U.S.C. §§ 16918(c)(2)-(3) (2006) (“A jurisdiction may exempt from disclosure . . . the name of an employer . . . [and] educational institution [of the sex offender].”).

¹⁹⁷ Press Release, Nat’l Juvenile Justice Network, *supra* note 184, at 2.

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to the Attorney General's authority to promulgate SORNA's retroactive applicability, the Coalition for Juvenile Justice recommends that it not be applied retroactively to children and youths who are adjudicated for sexual offenses within the juvenile court system.¹⁹⁸ Its rationale is that SORNA does not clearly delineate who should be held accountable when a child violates registration requirements. Furthermore, SORNA "assumes a clear distinction between the children who are abused and children who abuse, which is not always the case."¹⁹⁹

Although registration continues to be an important legislative priority, other arguments focus on SORNA's unbalanced nature resulting from narrow-minded political priorities.²⁰⁰ The National Alliance to End Sexual Violence issued a press release expressing its concern that "political discussion surrounding sex offender management issues, both on the national and state level, has become greatly skewed towards efforts to increase penalties for offenders and create more restrictive offender management programs in lieu of addressing the underlying issues which lead to sex offending behavior."²⁰¹ Accordingly, the release cautions that over-inclusive public notification might preclude identification of the most dangerous offenders, and actually increase the frequency of recidivism.²⁰² In fact, one study notes that notification laws may only reduce crime for potential criminals, rather than curb

¹⁹⁸ Hornberger, *supra* note 184, at 2.

¹⁹⁹ *Id.* at 3.

²⁰⁰ See John Gramlich, *Will States Say 'No' to Adam Walsh Act?*, STATELINE.ORG, Jan. 23, 2008, <http://www.stateline.org/live/details/story?contentId=273887> ("[S]tate legislators across the country have criticized the law as a 'one-size-fits-all approach' that does not give states enough time, money or flexibility to make the changes sought by the federal government.").

²⁰¹ Press Release, The Nat'l Alliance to End Sexual Violence, *supra* note 162; see also *Critics: Sex Offender Registries Don't Protect Anybody*, KSPR NEWS, May 16, 2008, <http://www.kspr.com/news/local/18994139.html> ("[B]ecause of tight budgets probation officers spend most of their time doing clerical work rather than checking on sex offenders' behavior and whereabouts.").

²⁰² Press Release, The Nat'l Alliance to End Sexual Violence, *supra* note 162.

recidivist behavior.²⁰³ The authors suggest that this is because of the social and financial effects of having one's criminal and personal information released to the public.²⁰⁴

B. Recidivism and the Effectiveness of Post-Conviction Compliance

Funding for sex offender registration might be put to better use by initiating community education and sex offender treatment programs rather than trying to attain the goal of curbing recidivism.²⁰⁵ In fact, "87 percent of victims of sexual violence . . . were abused by someone who had no previous sex crime conviction."²⁰⁶ Similarly, efforts to alert potential sex offenders to the ramifications of conviction might be more effective than focusing on post-conviction offenders. The restrictions attached to post-conviction registration are not necessarily the answer. Also worth noting, "[m]ore than 90 percent of child sex abuse is committed by someone the child knows and trusts[.]"²⁰⁷ and because an offender lives far from a potential victim does not mean he or she is effectively prevented from reaching that victim.

Several studies have been undertaken regarding recidivism, evidencing the importance researchers place on emphasizing post-conviction statistics.²⁰⁸ A 2003 study released by the Bureau of

²⁰³ Prescott & Rockoff, *supra* note 11, at 34.

²⁰⁴ *Id.*

²⁰⁵ See Tofte, *supra* note 166 (arguing that registration and notification laws are ineffective as they stand); see also *Lack of Funding Is Reported for Sex-Offender Program*, DESERET NEWS, Nov. 15, 2007, at A4, available at <http://www.deseretnews.com/article/1,5143,695227879,00.html> (discussing that although post-conviction treatment programs are proven to reduce recidivism, limitations in funding have stymied further progress).

²⁰⁶ Tofte, *supra* note 166.

²⁰⁷ *Id.*; see also Zielbauer, *supra* note 145 ("The stranger-danger myth is just way too prevalent," said [Scott] Matson of the Center for Sex Offender Management. "In reality, we should be looking at our uncles, fathers, brothers, neighbors, baseball coaches, teachers, clergy even.").

²⁰⁸ See, e.g., PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (U.S. Dep't of Justice, 2003); ROBERT A.

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Justice Statistics revealed that within the three years following release from prison, only slightly more than five percent of sex offenders committed another sex crime.²⁰⁹ Furthermore, “[c]ompared to non-sex offenders released from State prison, sex offenders had a lower overall rearrest rate” for any type of crime.²¹⁰

A study released by the Department of Justice in 1997, however, says that recidivism rates are often unreliable because of variables such as time in the community, sex offender characteristics, sentencing and parole guidelines, and quality of post-treatment supervision.²¹¹ It cautions that “there is no reliable body of empirically derived data that can inform and guide decision-making about reoffense risk – primarily because of methodological differences in existing studies.”²¹² Accordingly, recidivism figures are important to analyze, but not necessarily instructive.²¹³

IV. A FRESH PERSPECTIVE: INTERNATIONAL SEX OFFENDER REGISTRATION AND NOTIFICATION

The sex offender registration schemes in other countries provide for certain criteria that might be amenable to advocates and adversaries of sex offender laws in the United States. Other than Great Britain, one of the fundamental differences of these

PRENTKY ET AL., CHILD SEXUAL MOLESTATION: RESEARCH ISSUES (U.S. Dep’t of Justice, 1997).

²⁰⁹ LANGAN ET AL., *supra* note 208, at 1.

²¹⁰ *Id.* at 2.

²¹¹ *See* PRENTKY ET AL., *supra* note 208, at 9–10.

²¹² *Id.*

²¹³ *See* TIM BYNUM, CENTER FOR SEX OFFENDER MANAGEMENT (CSOM), RECIDIVISM OF SEX OFFENDERS 8 (2001) (“Studies on sex offender recidivism vary widely in the quality and rigor of the research design, the sample of sex offenders and behaviors included in the study, the length of follow-up, and the criteria for success or failure.”); *see also* The Numbers Guy, <http://blogs.wsj.com/numbersguy/how-likely-are-sex-offenders-to-repeat-their-crimes-258/> (Jan. 24, 2008, 23:35 EST) (“Recidivism rates vary widely depending on which crimes are counted, the timeframe of the studies, and whether repeat offenses are defined by convictions, arrests, or self-reporting.”).

registries to SORNA is that they provide for significantly more than three days to update a registration. Even ten days, which is the requirement under the pre-existing misdemeanor statute,²¹⁴ is significantly more reasonable than SORNA's current requirement. Furthermore, the fact that these registries are not available to the public adds a level of protection for sex offenders. As discussed earlier, public notification has subjected sex offenders to vigilante violence and a dearth of residence and employment opportunities.²¹⁵ By restricting the registry to public officials, the accountability for oversight will remain with law enforcement officials. As it stands now, private citizens are taking the law into their own hands.

When compared with sex offender registration laws in other countries, SORNA has both strengths and weaknesses. Sex offender registration laws exist in at least seven other countries throughout the world,²¹⁶ and South Korea is the only other country known to have community notification provisions.²¹⁷ Despite the similarity in purpose of these registration schemes, the duration of post-conviction registration is usually brief, and the registrants' information is not generally made available to the public, as it is in the United States.²¹⁸ The United Kingdom, for example, "recently considered and rejected adopting community notification laws, noting the United States' experience with vigilante violence and the lack of proven effectiveness."²¹⁹ Other concerns, such as those voiced by Justice Minister Chieko Noono in Japan, are that post-conviction registration "could be a serious infringement on [the] privacy [of sex offenders] and pose a huge obstacle to a former

²¹⁴ 42 U.S.C. § 14072(g)(1) (1998).

²¹⁵ See discussion *supra* Part II.C.

²¹⁶ No Easy Answers, *supra* note 156, at 118.

²¹⁷ *Id.*

²¹⁸ *Id.* at 10.

²¹⁹ *Id.* at 118; see also Matt Davis, *Global Measures Against Sex Offenders*, BBC NEWS, Jan. 19, 2006, http://news.bbc.co.uk/1/hi/uk_politics/4627232.stm ("In Italy there is no national register of sex offenders but [occasional] criminal record checks . . . [and] France is currently setting up a database of sex offenders banned from working in schools.").

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offender's return to society."²²⁰

Great Britain uses a scheme most similar to that of SORNA, however penalties for failure to register are not enforced as methodically as they are in the United States. The Sexual Offences Act of 2003 went into effect on May 1, 2004.²²¹ Its stated purpose is "to strengthen and modernise the law on sexual offences, whilst improving preventative measures and the protection of individuals from sexual offenders."²²² Notification requirements include, among others, date of birth, insurance number, and place of residence.²²³ Similar to SORNA, upon changes in one's registry, the offender has a period of three days to make the requisite alterations.²²⁴ Any offender who has served a prison term of thirty months or less is required to register for at most ten years.²²⁵ The information provided in one's registry is only available to those working for the government. For example, employees of the Secretary of State and police officers are granted access.²²⁶ Failure to register or update an existing registry under this act subjects offenders to a statutory maximum of five years imprisonment.²²⁷ Despite its intended purpose, the scheme has received criticism because the government has advised prosecutors not to effectuate enforcement of all its enumerated sex offenses.²²⁸ One of these critics, Professor Nicola Lacey of the London School of Economics, cautions that "the criminal law is too dangerous a tool

²²⁰ *Sex-offender Tracking Plan Blasted*, JAPAN TIMES, Jan. 8, 2005, <http://search.japantimes.co.jp/cgi-bin/nn20050108a2.html>.

²²¹ The Crown Prosecution Service, http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act/index.html (last visited Oct. 9, 2008).

²²² *Id.*

²²³ Sexual Offences Act, 2003, c. 42, § 83(5) (Eng.).

²²⁴ *Id.* § 84.

²²⁵ Sexual Offences Act, § 82. For children under eighteen, the enumerated registration period is reduced by half. *Id.*

²²⁶ *Id.* §§ 94–95.

²²⁷ *Id.* § 91.

²²⁸ See Giles Wilson, *Teenage Kissing: The New Sex Crime?*, BBC NEWS ONLINE MAGAZINE, Apr. 30, 2004, http://news.bbc.co.uk/2/hi/uk_news/magazine/3672591.stm.

to be used for symbolic purposes.”²²⁹

Canada’s post-conviction scheme is markedly different from SORNA regarding both accessibility to the registry by the public and penalties for failure to register. The Sex Offender Information and Registration Act (“SOIRA”) came into law on December 15, 2004 and its reporting device is known as the National Sex Offender Registry.²³⁰ SOIRA includes basic background information to be provided such as name, address, identifying marks, and relevant sex offense.²³¹ In Canada, a sex offender is allowed up to fifteen days for any change of information, and is required to register for ten years, twenty years, or life, depending on the initial offense.²³² The database is only accessible by accredited police agencies, and does not provide for community notification.²³³ SOIRA punishes first-time failure to register as a sex offender with “a fine of not more than \$10,000, imprisonment of not more than six months, or both.”²³⁴ The components of this scheme are more reasonable than SORNA, because after all, failure to register is not a sex offense itself—rather, the offense is neglecting to update one’s post-conviction profile.

Similar to the United States, sex offender registration requirements in Australia vary by province,²³⁵ which might result

²²⁹ *Id.*

²³⁰ Royal Canadian Mounted Police, Brochure – National Sex Offender Registry: Helping Police Services Investigate Crimes of a Sexual Nature, http://www.rcmp-grc.gc.ca/techops/nsor/nsor_brochure_e.htm. Provinces have their own registration schemes as well, for example, Christopher’s Law in Ontario. See Canwest News Service, *Ontario’s Top Court Rejects Challenge To Sex Offender Registry*, CANADA.COM, Apr. 25, 2008, <http://www.canada.com/topics/news/national/story.html?id=3b4e1adb-f261-4891-9fa2-42248ba5e6f0>.

²³¹ Royal Canadian Mounted Police, *supra* note 230.

²³² *Id.*

²³³ *Id.*; see also Kristy Rich, *Sex Offender Registry Won’t Be Made Public*, CJAD NEWSTALK RADIO, Nov. 21, 2007, <http://www.cjad.com/news/565/625125> (discussing how Quebec authorities have decided to exclude the public from accessing its sex offender registry).

²³⁴ Royal Canadian Mounted Police, *supra* note 230.

²³⁵ Senator Christopher Ellison, *National Register Launched To Track Child Sex Offenders* (2004), http://www.crimtrac.gov.au/Documents/pr_ellison_20040901.pdf.

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in potential confusion and unintended noncompliance. Nevertheless, failure to update a registry is mitigated by comparatively innocuous maximum penalties.²³⁶ In early 2005, the Australian National Child Offender Register (“ANCOR”) went into effect.²³⁷ The act limits the registration to those convicted of sexual or other serious offenses against children.²³⁸ ANCOR is a “police-only information tool,” and each Australian territory must pass legislation based on a common model.²³⁹ An example of a registration system promulgated as a result of ANCOR is South Australia’s Child Sex Offenders Registration Act of 2006, which sets forth an extensive scheme.²⁴⁰ Sex offenders must provide their general pedigree, as well as residence and employment information. However, only in certain instances are they required to provide fingerprints.²⁴¹ Furthermore, sex offenders have up to fourteen days to update the registry upon a change of information.²⁴² Although the scheme sets forth different offense levels, the penalty for failure to register is uniform, providing a maximum penalty of \$10,000 or imprisonment for two years.²⁴³ The information in the registry is “restricted to the greatest extent that is possible without interfering with the purpose of [the] Act,” and can generally only be accessed by police officers and those delegated by the jurisdiction’s Commissioner.²⁴⁴ Like SOIRA in Canada, ANCOR presents a reasonable compromise for post-conviction offenders. Despite efforts to restrict dissemination of such information, at least one private interest group has made information pertaining to specific sex offenders publicly available on the internet.²⁴⁵

²³⁶ See Child Sex Offenders Registration Act, 2006, § 44 (Austl.).

²³⁷ GPS Sex Offender Tracking, <http://www.gps-practice-and-fun.com/offender-tracking.html> (last visited Oct. 9, 2008).

²³⁸ Ellison, *supra* note 235.

²³⁹ *Id.*

²⁴⁰ Child Sex Offenders Registration Act, 2006, § 44 (Austl.).

²⁴¹ *Id.* §§ 13, 26.

²⁴² *Id.* § 16.

²⁴³ *Id.* §§ 4, 44.

²⁴⁴ *Id.* §§ 61, 62.

²⁴⁵ See Mako-Homepage, <http://www.mako.org.au/home.html> (last visited

V. RECONSIDERATION AND RECOMMENDATIONS

In light of the foregoing analysis, it is apparent that focusing funding on amending SORNA, rather than continuing to make the requirements and penalties harsher, will create a more equitable balance between offenders and the public. One of the biggest problems with SORNA, and registration systems generally in the United States, is the extensive community notification.²⁴⁶ Congress should take a cue from other countries and outspoken organizations and diminish community notification. Changes can be made by either granting access only to government officials, or by ensuring that public access is restricted except for information regarding only the most dangerous sex offenders living within a given community.²⁴⁷ At least one state is in the process of creating a workable system based on different levels of accessibility.²⁴⁸ Furthermore, the three-day window to update a registration is prohibitive, and should be amended to comport with the ten-day period existing under the misdemeanor penalty. Finally, funding towards community education should be increased to apprise citizens that sex offenders are not necessarily dangerous or subject

Oct. 9, 2008) (posting sex offenders' pictures, pedigree information, and the nature of specific offenses).

²⁴⁶ See Locke & Chamberlin, *supra* note 151, at 16 (opining that internet notification is not necessarily effective because of lack of public awareness, inaccurate information, creation of a false sense of security, and aggravating former offenders).

²⁴⁷ See Farley, *supra* note 77, at 498 ("Law enforcement officials should focus only on those offenders who committed severe offenses and who are likely to recidivate.").

²⁴⁸ See Eric Russell, *Lawmakers Craft Offender Registry Changes*, BANGOR DAILY NEWS, July 21, 2008, at B1 (highlighting Maine's efforts to create a new tiered registration system and quoting Maine Senator Bill Diamond as conceding, "Increasing restrictions doesn't solve the problem. We can't pretend [sex offenders] don't exist."). The system's lowest tier would be reserved for the lowest-risk offenders and "their names would be on a 'silent' registry accessible only to public safety officials." *Id.* The second tier would be for those who committed nonviolent felony sex crimes, and would only be accessible to the public on request. *Id.* Finally, the third tier's registries could be accessed by anyone at any time, and would be reserved for only the most violent offenders, "child rapists" for example. *Id.*

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to recidivism, and they should not be treated as though they committed more serious crimes.²⁴⁹

Post-conviction remedies exist that, in conjunction with registration, have proven to be quite effective. According to a study released by the Department of Justice, “[t]he most effective intervention to date – cognitive behavior therapy and, when appropriate, antidepressant and antiandrogen medication – has reduced recidivism among child molesters.”²⁵⁰ However, victims’ rights are of the utmost importance as well. There is still an “ongoing and critical need to provide victims with substantive rights, increase funding for direct victim services, increase funding for rape prevention education, and [the pursuit of] other victim and prevention focused policy initiatives.”²⁵¹ Another unique approach is a specialized sex offense court, several of which operate in New York State.²⁵² These courts are “designed to enhance community safety by increasing defendant accountability, improving the provision of services to victims and enhancing coordinated community supervision.”²⁵³ It is the plethora of interests that must be considered, and presumably what Congress had in mind when enacting SORNA’s comprehensive system. Nevertheless, even though the system has been in place for some time, it can still be a work-in-progress.²⁵⁴ “At a minimum, [effective reentry] requires

²⁴⁹ See FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING* 153 (2004) (discussing that because many registration and notification schemes use different criteria for risk and culpability, “the pedophile and the playmate [might be] regarded as equally culpable and equally dangerous”).

²⁵⁰ PRENTKY ET AL., *supra* note 208, at vi.

²⁵¹ Press Release, The Nat’l Alliance to End Sexual Violence, *supra* note 162.

²⁵² See generally, Center for Court Innovation, Sex Offense Court, <http://www.courtinnovation.org> (follow Sex Offense Court hyperlink) (last visited Oct. 20, 2008); see also Joseph Berger, *In Courtroom 102, Focus Is on Sex Offenses*, N.Y. TIMES, May 18, 2008, at WE (explaining the proliferation of sex offense courts in New York State, because of their proven effectiveness).

²⁵³ Center for Court Innovation, Sex Offense Court, *supra* note 252.

²⁵⁴ The S.M.A.R.T. (Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking) website and office are fully functional and constantly issuing updates about new initiatives regarding registration and implementation.

meaningful partnerships between correctional, community supervision, law enforcement, mental health, social services, victim advocacy, educational and vocational, employment, and housing entities, as well as the community at large.”²⁵⁵

Even if SORNA remains in its current form, there is still room for improvement. Congress has made its choice,²⁵⁶ but there are still choices left to the states. As the National Juvenile Justice Network suggests, states can use SORNA as a baseline and come up with creative solutions.²⁵⁷ The balance between victims’ rights, curbing recidivism, and effectuating a smooth integration back into society are the goals that should guide. Although the aim of SORNA is a step in the right direction, the aforementioned obstacles must be navigated before a common ground is achieved.

See <http://www.ojp.usdoj.gov/smart/index.htm> (last visited July 4, 2008); *see also* Press Release, Dep’t of Justice, Department of Justice Announces \$11.8 Million to Help States and Tribal Governments Comply with Adam Walsh Act (Apr. 28, 2008) available at <http://www.ojp.gov/newsroom/pressreleases/2008/smart08015.htm> (discussing the extensive funding available to implement SORNA’s provisions and announcing a symposium planned to address “a wide variety of topics relating to Sex Offender management and the implementation of the AWA”).

²⁵⁵ Bumby et al., *supra* note 41, at 3.

²⁵⁶ SORNA has already become stricter. *See Vitter Applauds Passage of Bill to Combat Child Pornography*, *supra* note 13 (discussing increased registration requirements for sex offenders using online services).

²⁵⁷ *See, e.g.*, Nick Cenegy, *Warning-to-Sex-Offenders-Who-Ignore-The-Law-This-Woman-is-Looking-For-You*, THE ANNISTON STAR, Nov. 13, 2007 (discussing an Alabama Sheriff’s Office implementation of the Sex Offender Registration and Tracking Team (“SORT”), ensures offenders comply with the registration system and checks up on them “like a doctor on terminally ill patients”); Greg Bluestein, *Ga. Court Overturns Sex Offender Law*, Nov. 21, 2007, <http://abcnews.go.com/TheLaw/wireStory?id=3897745> (highlighting a recent Georgia Supreme Court decision which overturned a state law dealing with sex offender residency restrictions); *see also* Steven J. Costigaliacci, Note, *Protecting Our Children From Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 191–92 (2008) (calling on the states to engage in extensive hearings to determine whether including the crimes of kidnapping and false imprisonment under SORNA provisions will actually protect children from sexual predators).