Changing SORNA to SOMA: Economic, Operational, and Constitutional Arguments for Revising the Federal Statute to Make It More Effective

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INTRODUCTION

The Sex Offender Registration and Notification Act ("SORNA"), the federal statute that aims "to protect the public from sex offenders and offenders against children,"[1] should be replaced with a Sex Offender Management Act ("SOMA") to improve overall efficacy and efficiency.

[1] 34 U.S.C. § 20901 states: "In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders[.]" The statute then goes on to list 17 victims, aged 5 to 31 years old.

When it was enacted in 2006, SORNA was born of frustration and fear stemming from a recent spate of widely-publicized sex-related crimes against children.[2] The statute aimed to standardize "sex offender" registration and notification ("R&N") systems among jurisdictions[3] and required offenders convicted of a broad array of crimes—most sex-related but some with no sexual components at all—to register.[4] But in the sixteen years since its implementation, SORNA has fallen short of meeting its goals.

For at least the last twenty-five years, though, numerous criminal law, social science, and community stakeholders have championed alternative approaches—all-encompassing, multi-disciplinary methods for sex offender management ("SOM").[5] One such inclusive approach, known as the Comprehensive Approach to Sex Offender Management, is made up of six specific factors, addressed concurrently and engineered to synergistically enhance the safety of victims and the community.[6] R&N is only one factor of the six, and its current status as the only federally mandated SOM strategy necessarily causes local jurisdictions to devote resources to that one SOM strategy, to the detriment of other methods. The Comprehensive Approach to Sex Offender Management not only allows for flexibility to address the individual needs of diverse situations, but also forces conscientious allocation of limited resources throughout

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[2] *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 53–55 (2009).

[3] *See* § 20901; s*ee also* Office of the Attorney General: The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38030 (July 2, 2008) ("The SORNA reforms are generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public, and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations.").

[4] *See* 34 U.S.C. § 20911(5)(A). This subsection defines the term "sex offense" to mean, among other things, "(i) a criminal offense that has an element involving a sexual act or sexual contact with another;" and "(ii) a criminal offense that is a specified offense against a minor." *See also* 34 U.S.C. § 20911(7), which "expan[ds] . . . [the] definition of 'specified offense against a minor' to include . . . an offense against a minor that involves any of the following: (A) An offense . . . involving kidnapping. (B) An offense . . . involving false imprisonment. . . . (I) Any conduct that by its nature is a sex offense against a minor."

[5] *See* KIM ENGLISH ET AL., MANAGING ADULT SEX OFFENDERS IN THE COMMUNITY – A CONTAINMENT APPROACH, RESEARCH IN BRIEF 3 (National Institute of Justice, Jan. 1997); PETER FINN, SEX OFFENDER COMMUNITY NOTIFICATION, RESEARCH IN ACTION 16 (National Institute of Justice, Feb. 1997).

[6] *See* CTR. FOR SEX OFFENDER MGMT., THE COMPREHENSIVE APPROACH TO SEX OFFENDER MANAGEMENT 1 (Nov. 2008).

the SOM system. The successes and shortcomings of SORNA that have become evident over the last sixteen years confirm both the circumscribed usefulness of R&N and the need for a multi-faceted SOM program to best meet the country's public safety needs.

Evidence abounds of the toll that the broad application of registration, notification, and collateral control regulations can take on Registered Sex Offenders ("RSOs") and their families. Frank R. in Texas is registered for life because, at 19, he had sex with his girlfriend of almost a year who was just under the age of consent.[7] Fifteen years later, Frank R. and his "victim" are still married with four daughters, struggling to maintain normal home- and school-lives while navigating the treacherous waters of having a parent on the registry.[8] Then there was the high school senior in Oklahoma who flashed a group of freshmen on the way to the restroom; he pled guilty to indecent exposure and was required to register as a "sex offender."[9][10] After dropping out of high school and struggling to find work, he was found dead of an apparent suicide just before his twentieth birthday.[11] Seventeen-year-olds who engaged in consensual and reciprocal private sexting both faced charges stemming from possession of child pornography and subsequently were required to register as "sex offenders."[12] A study reported in 2008 that approximately half of RSOs surveyed related losing jobs or being subject to physical threats or harassment, and over 40% had lost friends or close relationships or had

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[7] Abigail Pesta, *The Accidental Sex Offender*, MARIE CLAIRE (July 28, 2011), http://www.marieclaire.com/culture/news/a6294/teen-sex-offender/.

[8] *Id*.

[9] Curtis Killman, *Sex Offenders Struggle to Find Jobs*, TULSA WORLD (July 10, 2005, updated Feb. 23, 2019), https://tulsaworld.com/archive/sex-offenders-struggle-to-find-jobs/article_7002d083-020b-5b67-970a-1ea6075d6203.html.

[10] Throughout this Comment, I use the terms "sex offender" and "sex offender registry" in quotation marks when referencing such registries and one's status on a registry. This use also serves to emphasize the dehumanizing public label imposed on members of this population by the registration and notification regimes that regulate their lives. When context permits, I use the more precise term "people convicted of sexual offenses" (and similar) to emphasize the appropriate legal status of the humans who are affected by SORNA.

[11] Killman, *Sex Offenders Struggle to Find Jobs*, *supra* note 9. It is worth noting that, due to the purported non-punitive nature of SORNA and its progeny, the isolation and economic challenges that this young man faced—while particularly unjust given his conviction offense—would still be unreasonable and counterproductive if imposed on a person convicted of a more grievous offense.

[12] Robby Soaves, *These Teens Kept Their Sexting Private, But Cops Found Out. Now They Face Sex Offender Registry, Jail.*, REASON: HIT & RUN BLOG (Sept. 1, 2015, 2:40 PM), https://reason.com/2015/09/01/these-teens-kept-their-sexting-private-b/.

less hope for the future, as a result of R&N policies.[13] Despite thousands of similar experiences throughout the country, the impact of R&N on the lives of RSOs has not been able to induce R&N reform. Any empathy that the public might feel because of the hardships faced by RSOs is often short-lived and quickly overwhelmed by the disgust associated with the term "sex offender." The public will also generally take the position that the "sex offender" should not have broken the law in the first place—suggesting that a single criminal act revokes all an individual's civil rights.[14] It is, therefore, necessary to abjure emotional appeals to empathy when urging R&N reform; arguments based on fiscal needs, operational effectiveness, and constitutional concerns are more likely to find support amongst the public.

From the early criminal registries of 1930s Los Angeles County to the broad state-level statutes of the early 21st century, the nation's R&N regimes have consistently broadened their reach and scope.[15] With the enactment of SORNA in 2006, states that lagged behind were encouraged to catch up to the more rigorous R&N schemes already in place in other states.[16] This "more is better" approach has satisfied the impulse and impetus to keep track of "sex offenders" released into the community, theoretically enabling personal protective measures and proactive law enforcement practices.[17] SORNA's passage also served to further cement the centralized position that R&N had claimed in the public conception of the "sex offender management" toolbox.[18] Modern quantitative and

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[13] Cynthia Calkins Mercado et al., *The Impact of Specialized Sex Offender Legislation on Community Reentry*, 20 SEXUAL ABUSE: J. RSCH & TREATMENT 188, 195–96 (2008).

[14] This is precisely the draconian viewpoint that the Constitution mandates the American criminal legal system avoid.

[15] *See* LOGAN, *supra* note 2, at 28–29.

[16] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38045 (July 2, 2008); *see also* Andrew J. Harris et al., *States' SORNA Implementation Journeys: Lessons Learned and Policy Implications*, 23 NEW CRIM. L.R. 315, 322. (2020) (describing SORNA's enactment in response to the perception that States with less rigorous requirements could create "safe havens" for people convicted of sex offenses).

[17] *See* LOGAN, *supra* note 2, at 22.

[18] Registration and notification schemes began to gain primacy as a means of controlling sexual predators during the outraged reaction to the 1989 abduction and horrific abuse of a 7-year-old boy in Washington State. The Governor's Task Force on Community Protection, created in response, recommended both civil commitment and registration to place a firmer government hand around the wrists of those who fell under the newly-coined term of "sexual predator." This registration scheme, for the first time, officially permitted public dissemination of registered sex offenders' identifying information. *See* LOGAN, *supra* note 2, at 49–51.

qualitative data, however, demonstrate that such expansive R&N practices are not necessarily effective public safety policies and may, indeed, cause harm to the very communities they are intended to protect.[19]

Before SORNA's enactment, less extensive R&N legislation received judicial approval as operating within constitutional bounds. In 2003, the Supreme Court held in *Smith v. Doe* that the Alaskan "sex offender" registration statute at the time ("ASORA") was regulatory and not punitive and, therefore, did not violate the constitutional prohibition against *ex post facto* punitive laws when applied to people who were convicted of committing crimes before ASORA was enacted.[20] This decision, favoring retroactive application, laid the groundwork for the implementation of more extensive R&N schemes—at both the federal and state levels—as the Court had thereby signaled its willingness to accept restrictions on RSOs, as long as they were reasonable means of achieving a "nonpunitive objective."[21] Despite having the opportunity to reconsider the issue multiple times since 2003—including in *Does v. Snyder*[22] in 2016—the Supreme Court has not yet granted certiorari to any case that challenges the purportedly regulatory nature of the more rigorous R&N schemes now in place. Therefore, the interpretation that RSO regulations are *per se* non-punitive remains the—albeit rebuttably—presumptive judicial position. When SORNA was enacted in 2006, however, the minimum standards it set forth contradicted features the Court had specifically cited as justification for upholding ASORA in *Smith v. Doe* just three years earlier.[23]

When the federal government enacted SORNA and set these

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[19] *See, e.g.,* Andrew J. Harris & Arthur J. Lurigio, *Introduction to Special Issue on Sex Offenses and Offenders: Toward Evidence-Based Public Policy*, 37 CRIM. JUST. & BEHAV. 477, 478 (2010); CHRISTOPHER LOBANOV-ROSTOVSKY, ADULT SEX OFFENDER MGMT., SOMAPI RSCH. BRIEF 4 (July 2015); Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, 43 J. SOCIO. & SOC. WELFARE 3, 9 (2016); Wayne A. Logan, *Challenging the Punitiveness of "New-Generation" SORN Laws*, 21 NEW CRIM. L. REV. 426, 427–28 (2018); Bobbie Ticknor & Jessica J. Warner, *Evaluating the Accuracy of SORNA: Testing for Classification Errors and Racial Bias*, 31 CRIM. JUST. POL'Y REV. 3, 17 (2020).

[20] 538 U.S. 84, 105–06 (2003).

[21] *Id*. at 105.

[22] Does #1–5 v. Snyder, 834 F.3d 696 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub. nom.*, Snyder v. Does #1–5, 138 S. Ct. 55 (Oct. 2, 2017).

[23] *Contrast Smith*, 538 U.S. at 101 (citing the Court of Appeals' mistaken understanding that ASORA required in-person reporting by registrants as one reason to overturn that court's finding that the statute "imposed an affirmative disability") with 34 U.S.C. § 20918 (SORNA section requiring "[p]eriodic in person verification," ranging from yearly to quarterly, depending on the tier assignment of the registrant).

minimum requirements for states' R&N statutes, it created a "floor" that local statutes could not sink below.[24] Without the "ceiling" of political pressure from constituents that usually works to balance such federal minima,[25] however, there has been little to restrain states from imposing increasingly harsh R&N requirements and collateral control measures on RSOs. Indeed, such broader and more stringent measures are explicitly permitted, if not actively encouraged, by the Attorney General of the United States.[26] This has resulted in what could be termed a "race to the top," as state legislators pass more restrictive R&N regulations. Additionally, because the minimum R&N standards are imposed at the federal level, but all other aspects of each jurisdiction's SOM scheme are determined by local officials, there are two sources of inefficiency built into the system. Firstly, because political and financial accountability for each jurisdiction's SOM scheme is split between Congress and the local legislature, effective internal moderation and resource allocation are difficult to achieve. Secondly, Congress has not yet acknowledged that supportive and educational measures are equally as important to community and victim care and protection as control measures are. If SORNA is exchanged for a more comprehensive SOMA that provides nationwide standards for a complete SOM policy, the goal of a "comprehensive national system" that would "protect the public from sex offenders and offenders against children"[27] would be far more achievable.

But attempts at SOM policy reform evoke strong emotional opposition from victims, victim advocates, community members, and legislative officials, making successful reform extremely challenging.[28]

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[24] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (July 2, 2008).

[25] In other instances where there are federally mandated minimums, political pressure usually keeps local regulations from swinging too far in the other direction. Consider the federal minimum wage or safety standards promulgated by the Occupational Safety and Health Administration. Local political pressure will keep the minimum wage low and the safety standards permissive. This pressure is not present when it comes to moderating the regulations imposed as part of a SOM regime.

[26] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (July 2, 2008) (After listing six specific ways that jurisdictions might exceed SORNA's requirements, the National Guidelines state that "the general purpose of SORNA is to protect the public from sex offenders and offenders against children through effective sex offender registration and notification, and it is not intended to preclude or limit jurisdictions' discretion to adopt more extensive or additional registration and notification requirements to that end. . . . [J]urisdictions' discretion to go further than the SORNA minimum is not limited.").

[27] 34 U.S.C. § 20901.

[28] *See, e.g.,* The National Center for Missing and Exploited Children, *Proposed Changes*

Legislators must overcome this intense resistance from "penal populism"[29] to craft policies that maximize public safety while allocating scarce resources to achieve these goals.[30] If federal lawmakers can gather enough political will to enact a federal statute that mandates jurisdictions to create well-balanced and effective SOM policies—complete with financial support and incentives similar to those enacted in SORNA—local legislators will be shielded from some of the inevitable opposition from their constituents. Sometimes, it is beneficial to be able to pass the buck.

Sufficient time has passed since SORNA was enacted to understand the benefits and shortcomings of this important piece of legislation. Congress now has a responsibility to learn from the last sixteen years and craft a more effective and financially responsible national SOM framework. Part I of this Comment will describe the legislative history that preceded, and the emotional atmosphere that accompanied, SORNA's passage in 2006. Part II will outline the provisions and effects of SORNA, both immediately after its passage and in the years since. Part III will examine the successes, shortcomings, and opportunities for improvement of SORNA. Part IV will explore the obstacles to SORNA reform and the compelling reasons to overcome these obstacles. Part V will incorporate input from law enforcement officers, empirical evidence, and research from academic studies to arrive at concrete suggestions for revisions to SORNA that can minimize financial waste, improve public safety, and help strengthen communities. Finally, this Comment will review the specific reasons for, and methods of, reforming the federal SORNA statute into a SOMA statute to better achieve public safety goals, while allocating scarce resources where they can have the greatest benefit.

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to State Criminal Law Could Put Child Safety at Risk, MISSING KIDS: LOSING GROUND IN CHILD PROTECTION (Oct. 12, 2021), https://www.missingkids.org/blog/2021/losing-ground#collapse101221OriginalBlogProposedChangestoState CriminalLawCouldPutChildSafetyatRisk202201141523 (last visited Jan. 16, 2022); Letter from National Association of Attorneys General to The American Law Institute (Dec. 9, 2021), https://www.missingkids.org/content/dam/missingkids/pdfs/ALI-NAAG-Letter-Final.pdf.

[29] RACHEL ELISE BARKOW, PRISONERS OF POLITICS; BREAKING THE CYCLE OF MASS INCARCERATION 5 (2019) (describing "penal populism" as the "setting of public policy based on the emotional response of the public . . . moved by 'feelings and intuitions' rather than evidence") (quoting JOHN PRATT, PENAL POPULISM 12 (2007)).

[30] *Id.* at 3.

I. THE TRADITIONS AND EMOTIONS THAT LED TO SORNA

1. Offender Registries Have an Extensive Legal Tradition

Registries of people convicted of crimes have been used in various forms in America and Europe since at least the mid-nineteenth century.[31] Registries first appeared in their modern form in 1930s Los Angeles County, purportedly in response to the threat of criminal elements moving into the area from the organized crime hotbeds of Chicago and New York.[32] Despite this stated goal of keeping track of newly arrived offenders, the registration statutes in place required registry by people convicted of crimes who were already present in the Los Angeles area.[33] Thus, even in the early twentieth century, the disconnect between the stated goals of criminal registries and their effects was evident.[34] Additional registration statutes continued to develop throughout the country,[35] and by the mid-twentieth century, neighboring communities were coordinating their registration schemes to create uniformity within particular geographic areas.[36] This shows an awareness that variations in the harshness of registration schemes could create havens and loopholes through which people convicted of crimes could slip.[37]

Registration schemes aimed specifically at people convicted of sex offenses, with community notification provisions attached, began in Washington State in 1990[38] and quickly spread throughout the country in response to a wave of highly publicized crimes against children.[39] In 1993, Congress passed the Jacob Wetterling Act to create nationwide "sex offender" registration standards,[40] thus beginning the heart-rending practice of naming such control legislation after young victims of sexual predators—a practice that reflects and amplifies the emotional impulse behind such legislation.[41] In 1996, Congress followed up with the federal Megan's Law to promulgate nationwide community notification requirements which Congress deemed as "necessary to protect the

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[31] *See* LOGAN, *supra* note 2, at 5.
[32] *See id*. at 22.
[33] *See id.* at 22–23.
[34] *See id*. at 29.
[35] *See id*. at 28.
[36] *See id*. at 28–29.
[37] *See id.* at 34.
[38] *See supra* note 18.
[39] *See* LOGAN, *supra* note 2, at 53.
[40] Pub. L. No. 103-322, 108 Stat. 2038 (codified at 42 U.S.C. § 14071)
[41] *See* LOGAN, *supra* note 2, at 49, 94.

public."[42] Over the ensuing decade, Congress made minor legislative adjustments to the federal R&N requirements to enhance safety on college campuses[43] and online[44], among other things.[45] In 2006, Congress addressed crimes against children with the broadest strokes yet by passing the Adam Walsh Act ("AWA").[46] SORNA was Title One of the AWA,[47] which also included provisions for civil commitment of certain "sex offenders," immigration law reform, laws relating to the use of the internet in crimes against children, and a number of other precautions.[48]

2. The Emotional Impact of Jacob Wetterling, Megan Kanka, and Adam Walsh

From the early 1990s through the early 2000s, outrage persisted over widely publicized accounts of victimized children. Jacob Wetterling was an eleven-year-old boy in Minnesota who was abducted at gunpoint while riding his bike.[49] His remains were found nearly 27 years later.[50] Megan Kanka was a seven-year-old New Jersey girl, abducted and murdered by a man twice-convicted of sexual offenses who lived across the street from her family.[51] Adam Walsh was only six years old when he was abducted from a shopping mall in Florida; his severed head was later found in a canal 120 miles away.[52] Given these horrific stories, it is no wonder that family, friends, and the public at large demanded legislative action—if not to directly protect themselves from "sex offenders" who had been released back into the community, then to at least publicize

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[42] Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (codified at 42 U.S.C. § 13701).

[43] Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1464 (codified at 42 U.S.C. § 14071).

[44] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified at 18 U.S.C. § 1).

[45] Pam Lychner Sex Offender Tracking and Notification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (codified at 42 U.S.C. § 14072); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974.

[46] *See* § 20901 (codified at 18 U.S.C. § 117).

[47] *Id*. tit. I, at 590–610 (codified as amended at 34 U.S.C. § 20901).

[48] *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. 2–5, 120 Stat 587, 611–31 (codified as amended in scattered sections of 18 U.S.C. and 21 U.S.C.).

[49] *See* LOGAN, *supra* note 2, at 53.

[50] Ralph Ellis & Ray Sanchez, *Jacob Wetterling: Remains of Missing Minnesota Boy Found, Authorities Say*, CNN (Sept. 4, 2016, 5:17 PM EDT), https://www.cnn.com/2016/09/03/us/jacob-wetterling-remains-found/index.html.

[51] *See* LOGAN, *supra* note 2, at 54.

[52] Susan Candiotti, *Adam Walsh Murder Back in the Headlines*, CNN (Feb. 18, 1996, 11:30 PM EST), http://edition.cnn.com/US/9602/adam_walsh/.

information about "sex offenders'" whereabouts.[53]

The causes of the public outcry were numerous. First and foremost, the victims were children.[54] Second, some of the most visible perpetrators (in the cases with known perpetrators) had been convicted previously of violent sexual offenses.[55] The fact that these "sexual predators" had once been in custody, but then released back into the community, added insult to injury.[56] The public was outraged by lurid stories of the most innocent being targeted by the most vicious, all because some faceless bureaucrat had decided these "sexual predators" should re-enter public life. The injustice of this dynamic incited emotional displays by parents across the country that were echoed on the floors of state and federal legislatures.[57] An overwhelming feeling of helplessness in the face of such a threat made the public, and subsequently their legislators, push for something—anything—to control the most visible source of danger: "sex offenders."[58] Afterall, one cannot be a repeat offender without having first offended once.

A further consequence of the victimization of children was that there were heartbroken parents and families left behind who vehemently pushed for harsher laws. They were understandably some of the most passionate advocates for the continued control and management of "sex offenders" after the ends of their sentenced periods of incarceration. Patty Wetterling pushed for the establishment of "sex offender registries"—both locally in Minnesota and nationally—and went on to work with both the National Center for Missing & Exploited Children and the Sexual Violence Prevention Program at the Minnesota Department of Health.[59] Megan Kanka's mother's public assertion that if she and her husband "had known there was a pedophile living on our street, [Megan] would be alive today" resonated with the outraged public who demanded of authorities:

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[53] *See* LOGAN, *supra* note 2, at 55.

[54] *See id*. at 54.

[55] *See id*.

[56] *See id*.

[57] *See id.* at 57–58; *see also infra* note 78.

[58] *See* LOGAN, *supra* note 2, at 55–57; Chrysanthi Leon, *The Contexts and Politics of Evidence-Based Sex Offender Policy*, 10 CRIMINOLOGY & PUB. POL'Y 421, 422 (2011) (suggesting that "lawmakers who passed sex offender laws in the early 20th century might have known that the new laws were not likely to address the sex crime problem, but they could not resist the public pressure to do something, demonstrating the kind of arousal and soothing . . . described as a feature of symbolic politics").

[59] *See* Sarah Stillman, *The List*, NEW YORKER (Mar. 6, 2016), https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes.

"let us know."[60] John Walsh was highly visible as the host of the TV show "America's Most Wanted" and loudly advocated for the law that bears his son Adam's name.[61] These vocal proponents of change gave faces to the suffering caused by the perceived lapses of the criminal punishment system that allowed convicted "predators" to move through their communities unsupervised so that they could attack again.

To bolster these emotionally charged demands for legislative action, advocates provided numerous sources that suggested—or outright stated—that "sex offenders" re-offended with "frightening and high" frequency.[62] The implicit logic behind registration and notification is, after all, that a person convicted of a sex offense is more likely to commit a sex offense than someone who has not been convicted. In support of that presumption, multiple influential court opinions and Department of Justice publications cited an article in the magazine *Psychology Today*, entitled "Changing a Lifetime of Sexual Crime."[63] This article stated, "[m]ost untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do."[64] Statistics released by the Department of Justice indicated, "[r]eleased rapists were 10.5 times more likely than nonrapists to be rearrested for rape[.]"[65] With shocking numbers like these on their side, the vocal advocates lobbying for restrictive measures to control and track released "sex offenders" faced little opposition.[66] The initial state-level version of Megan's Law was enacted by the New Jersey General Assembly a mere 93 days after Megan Kanka was murdered.[67] Lawmakers could not oppose, or even moderate, the effects of the popular vitriol for fear of being branded as "soft on crime" or "cuddling up to criminals."[68] And the worst kind of "criminal"

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[60] *See* LOGAN, *supra* note 2, at 54–55.
[61] Stillman, *supra* note 59.
[62] *See* Smith v. Doe, 538 U.S. 84, 103 (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)); *see also McKune*, 536 U.S. at 33 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.") (citing U.S. DEP'T. OF JUST., BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS 27 (1997)); ALLEN J. BECK, U.S. DEP'T. OF JUST., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 6 (1989)).
[63] Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497–98 (2015).
[64] *Id*. at 498.
[65] BECK, *supra* note 62, at 2.
[66] *See* LOGAN, *supra* note 2, at 55 ("Speaker of the Assembly Garabed 'Chuck' Haytaian, running for the U.S. Senate, declared a legislative emergency, bypassing customary committee debate and forcing proposals to move directly to the floor for consideration.").
[67] *Id*.
[68] *See* BARKOW, *supra* note 29, at 6–7, 39.

at that.

Further, the terms "sexual predator" and "sex offender" contributed to and grew out of the emotional momentum surrounding the issue of "sex offenders." The early 90's saw the evocative term "sexual predator" move from the vivid pages of "crime fiction and true crime" to debates over appropriate legislative action.[69] Then, as now, the term "sex offenders" conjured images of rapists, lurking behind shrubs to snatch small children off the street as soon as their parents' backs were turned.[70] On the contrary, though, such brutality was evidenced by an exceedingly small portion of the "sex offender" population as a whole.[71] One term uses an emotionally charged word; the other term became emotionally charged through its common usage. Both terms perpetuated the horror and disgust in the public consciousness.

In addition to the vocabulary used to refer to the perceived threat from sexual offenses, the manner of the threat discouraged nuanced consideration. Although popular American society has certain hyper-sexualized aspects, it also has rather adolescent emotional maturity regarding the implications of sexual activity. The American public can be remarkably prudish, in that the popular consciousness has been unwilling, or unable, to recognize nuance regarding practically any action having to do with genitals, even whether it actually has a sexual component.[72] Thus, the blanket term "sex offense" refers equally to offenses ranging from relatively rare predatory attacks by strangers, to the patronizing of prostitutes, to public urination.[73] The heightened emotions surrounding this subject, coupled with a certain willful myopia, have made it both easy to make broad generalizations and difficult to discern nuance within the overall category.[74] As a result, few people can distinguish the relative culpability of a pedophile who grooms and targets a teenager versus an

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[69] LOGAN, *supra* note 2, at 51 n.8 (quoting PHILLIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 193 (1999)).

[70] *See* BARKOW, *supra* note 29, at 20.

[71] *See id.* at 21.

[72] For instance, the last decade saw a handful of laws enacted to restrict transgender individuals to using public bathrooms only for the gender they were assigned at birth. Proponents of these bills tried to justify them by claiming they would protect women from being attacked in restrooms by male sexual predators posing as women, thus unnecessarily tying gender identity and a basic biological function to sexual fear. *See e.g.* Marcie Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, MIC (Apr. 2, 2015), https://www.mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms.

[73] *See* BARKOW, *supra* note 29, at 21; Leon, *supra* note 58, at 423–24.

[74] *See* BARKOW, *supra* note 29, at 21.

adult who mistakenly believes a teenager is another adult and engages in "consensual" sex. Such a nuance as the difference in culpability, however, is an important indication of the risk of either offender's reoffending and, therefore, their threat to public safety. Both offenders may be convicted of the same crime and should be punished accordingly. One is highly unlikely to make the same choice again, however, and the community would likely not benefit from the expenditure of resources on tracking and controlling that one. This lack of attention to—indeed the unwillingness to even acknowledge—such nuance has reinforced the overall press to impose control measures across the board, regardless of whether such measures would, in fact, improve public safety.[75]

As the "tough on crime" mindset continued to spread throughout the country in the early 1990s, legislators began to prefer control measures over treatment and support measures for the management of "sex offenders."[76] This intentional shift was couched in fiscal responsibility and turned legislative attention away from methods that could reduce or eliminate a "sex offender's" drive to re-offend. Legislators and the public instead favored heavy-handed methods that tried to restrain people convicted of sexual offenses or were intended to assist in quick arrests after re-offenses. Advocates argued that this reliance on post-incarceration control instead of treatment was the more economically sound choice.[77] Legislators rejected spending limited budgets on methods not guaranteed to work and perceived to benefit "sex offenders" (i.e. treatment and re-entry support), and rather chose to focus on methods purported to benefit the community and perceived to have a better chance of enhancing public safety (i.e. registration and notification).[78] The latter approach also satisfied the public's implicit desire to continually burden people convicted of sex offenses—even after the end of their court-

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[75] *See* BARKOW, *supra* note 29, at 21–22.

[76] See LOGAN, *supra* note 2, at 50–51; Patrick Lussier & Arjan Blokland, *Policing Sex Offenders, Past and Present*, *in* SEX OFFENDERS: A CRIMINAL CAREER APPROACH 405, 412 (2015).

[77] *See* Levenson et al., *supra* note 19, at 25.

[78] *See* H.R. Rep. No. 109-218, pt. 1, at 3–4 (2005) (opening statement of Rep. Green) ("When considering what needs to be done, we must be mindful that Congress has to provide needed resources to the States. . . . Some might say that we need to treat sex offenders and to rehabilitate them; that we must address the problem by throwing money at sex offenders to break their . . . perverse behavior. . . . My view is quite the opposite. . . I'm not willing to cross my fingers and hope the problem does not occur again and again. To me, a sex offender who commits one of these heinous offenses has forfeited the right to live with the freedoms enjoyed by law-abiding citizens.").

imposed sentences.[79]

The circumstances surrounding the state and federal R&N legislation built to the mountain of support behind SORNA's enactment in 2006. Intense emotions from constituents and legislators ran the gamut from outrage to helplessness. Vocally bereaved parents functioned as both fuel and focal points for popular sympathy. Statistics lent legitimacy to the distrust and disgust the populace intuitively felt toward "sexual predators" and "sex offenders"—evocative, but imprecise, labels that broadcast venom at a loosely defined and over-inclusive group. With a tidal wave of public outrage supported by such undercurrents, it is unsurprising that R&N schemes throughout the United States underwent a complete overhaul in under fifteen years.

II. SORNA'S PROVISIONS AND EFFECTS

1. SORNA's Ambitious Goals

With the passage of SORNA in 2006, Congress aimed to create a uniform national R&N structure for all states, territories, and tribal jurisdictions to implement.[80] Prior existing differences among local R&N schemes indicated to lawmakers that there may be "loopholes" through which RSOs may slip or "havens" where RSOs may cluster in order to avoid harsh regulations.[81] Differing methods of coding offenses and formats of registries also hampered the effective sharing of information among law enforcement entities.[82] By establishing a statutory floor below which states' schemes could not sink, the federal framework aimed to close these loopholes and abolish such havens, while making it easier for law enforcement departments to transfer information and track "sex offenders" that may move around the country.[83] In addition, SORNA

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[79] *See* BARKOW, *supra* note 29, at 21.

[80] *See* 34 U.S.C. § 20901; 34 U.S.C. § 20911(10) (defines "jurisdiction" to mean "(A) A State. (B) The District of Columbia. (C) The Commonwealth of Puerto Rico. (D) Guam. (E) American Samoa. (F) The Northern Mariana Islands. (G) The United States Virgin Islands. (H) To the extent provided and subject to the requirements of section 20929 of this title, a federally recognized Indian tribe.").

[81] *See* LOGAN, *supra* note 2, at 60–62; U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS 1 & 7 (2013) [hereinafter GAO REPORT]; Harris et al., *supra* note 16, at 322.

[82] *See* Harris et al., *supra* note 16, at 322–23.

[83] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38045 (July 2, 2008).

provided for the creation and support of uniform software (Sex Offender Registry Tool ("SORT")) and an internet-based platform (SORNA Exchange Portal) states could use to maintain and share their registries.[84] SORNA directed the Department of Justice to establish an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking ("SMART Office") to coordinate and support states' efforts.[85] To ensure Congress would be able to evaluate the effectiveness of SORNA's provisions, the Act included instructions to the National Institute of Justice ("NIJ") "to study SORNA's effectiveness in increasing compliance with requirements and the effect of these requirements on increasing public safety."[86]

As Congress directed in the Act, the Attorney General promulgated rules outlining the implementation of SORNA on July 2, 2008.[87] Regarding the uniform R&N regimes, any jurisdiction determined not to have "substantially complied" with SORNA's requirements by July 2011[88] would have funding provided by the federal Byrne Justice Assistance Grant reduced by 10%.[89] Around 2011, however, the SMART Office relaxed the threshold required to maintain full funding from a fairly literal "substantial compliance" with SORNA's standards to a more liberal "substantial implementation" of SORNA's requirements.[90] The SMART Office determined whether the R&N scheme of a given jurisdiction was "substantially implemented" by examining if it "met or did not disserve" SORNA's standards in fourteen distinct areas.[91] These

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[84] 34 U.S.C. § 20925.

[85] 34 U.S.C. § 20945.

[86] *See* GAO REPORT, *supra* note 81, at front matter "What GAO Found" & 24; *see also* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 634, 120 Stat. 587, 643–44 (2006).

[87] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38030 (July 2, 2008).

[88] Initially, the deadline for "substantial compliance" was three years after the Act's passage, or July 2009. Since no jurisdictions had substantially complied with SORNA's requirements by then, however, the Attorney General authorized two one-year extensions, making the new deadline July 2011. *See* Harris et al., *supra* note 16, at 327.

[89] The funds withheld from non-compliant jurisdictions may be reallocated either to jurisdictions that have "not failed to substantially implement" SORNA or back to that non-compliant jurisdiction "to be used solely for the purpose of implementing" SORNA. 34 U.S.C. § 20927(c); U.S. DEP'T. OF JUST., SMART OFFICE, SORNA IMPLEMENTATION DOC. NO. 2: BYRNE JAG GRANT REDUCTIONS UNDER SORNA (Dec. 2017), https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/sornaimplementationdocs.pdf.

[90] *See* Harris et al., *supra* note 16, at 326–27.

[91] GAO REPORT, *supra* note 81, at 40–41; U.S. DEP'T. OF JUST., *supra* note 89.

fourteen areas included enhanced reporting requirements (within three days to their own registry, the federal registry, and other affected registries);[92] additional information that must be collected upon registration and kept up-to-date (including name, aliases, address, date of birth, social security number, telephone number, vehicle type and plate number, employment location, school location, and numerous other details);[93] strengthened registry website and community notification protocols;[94] and penalties for offenders who failed to register.[95] These requirements reflected significant enhancements to the prior minimum standards set by the Jacob Wetterling Act and Megan's Law.[96]

2. Other Federal Programs and Offices Created by the AWA and Since

In addition to creating the SMART Office, SORT software, and the SORNA Exchange Portal, SORNA established the Dru Sjodin National Sex Offender Public Website;[97] the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program;[98] the National Sex Offender Registry;[99] the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program;[100] and the Sex Offender Management Assistance Program.[101] The AWA also charged the U.S. Marshals Service with supporting local jurisdictions in investigating violations of the Act and apprehending violators.[102] Additional federal legislation enacted since 2006 has built upon the formidable framework created by SORNA. The KIDS (Keeping the Internet Devoid of Sexual Predators) Act of 2008 added the requirement that RSOs register their "electronic mail addresses and other designations used for self-identification or routing in Internet

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[92] 34 U.S.C. § 20923(b)(1)–(3); § 20923(c).
[93] 34 U.S.C. § 20914(a).
[94] 34 U.S.C. § 20923(b)(4)–(7); § 20923(c).
[95] 34 U.S.C. § 20913(e).
[96] GAO REPORT, *supra* note 81, at 8 tbl.1.
[97] 34 U.S.C. § 20922(a).
[98] 34 U.S.C. § 20902.
[99] Established by 34 U.S.C. § 20921, the NSOR is a database of information on people convicted of sex offenses that is operated by the FBI and is only accessible to law enforcement officials. *See* GAO REPORT, *supra* note 81, at 11.
[100] 34 U.S.C. § 20923(a).
[101] 34 U.S.C. § 20928. Despite the expansive name of this program that refers broadly to "management," the program was designed to provide grants to jurisdictions to offset the costs of implementing SORNA. 34 U.S.C. § 20928(a).
[102] GAO REPORT, *supra* note 81, at 11–12.

communication or posting."[103] The International Megan's Law of 2016 requires RSOs to have identifying markers on their passports and to provide notice to officials before travelling internationally.[104] The federal legislature is not the only body to have enhanced the effects of SORNA in the years since its passage; state legislatures have done so as well.

3. State-level Registration and Notification Schemes Have Grown Beyond SORNA

When the Supreme Court decided in 2003 that ASORA was non-punitive, and could therefore be applied retroactively, it provided a blueprint that allowed state legislatures to enact increasingly harsh collateral conditions accompanying registration, as long as they could be justified administratively.[105] In 2008, the Attorney General added more fuel to this fire by encouraging states to exceed SORNA's minimum requirements "to protect the public from sex offenders and offenders against children through effective sex offender registration and notification."[106] Indeed, after listing seven specific examples of how a jurisdiction might choose to do so, he outright stated, "jurisdictions' discretion to go further than the SORNA minimum is not limited."[107] States have since promulgated collateral regulations, above and beyond the basic registration and notification requirements of SORNA, in response to continued popular concerns about the dangers posed by "sex offenders" released into the community.[108] Such collateral control regulations can include restrictions on residency, presence, and employment.[109] States have also expanded the number of offenses that require registration, the registration burdens themselves, and the scope of notification requirements.[110] Some States even require RSOs to wear GPS

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[103] 34 U.S.C. § 20916 ("Section was enacted as part of the Keeping the Internet Devoid of Sexual Predators Act of 2008, also known as the KIDS Act of 2008, and not as part of the Sex Offender Registration and Notification Act which comprises this subchapter, or as part of the Adam Walsh Child Protection and Safety Act of 2006 which comprises this chapter.").

[104] International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (codified at 34 U.S.C. § 20914(a) and 18 U.S.C. § 2250).

[105] *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1075 (2011).

[106] National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (July 2, 2018).

[107] *Id.*

[108] Carpenter & Beverlin, *supra* note 105, at 1079.

[109] *Id.* at 1080–81.

[110] *Id.* at 1081–96.

monitoring systems and then bill them for the service.[111]

III. SORNA'S SUCCESSES AND SHORTCOMINGS

Although SORNA was passed in mid-2006, its effects were not evident until well after 2008, when the Attorney General finally produced National Guidelines to steer states' implementation of SORNA.[112] Once the National Guidelines for Sex Offender Registration and Notification were published in July 2008, states could take specific steps toward satisfying SORNA's requirements. In the following years, there were few attempts to track the effects of SORNA, even though provisions for such studies were included within the legislation itself.[113] Section 634(a) of the AWA required the Department of Justice's National Institute of Justice to "conduct a comprehensive study to examine the control, prosecution, treatment, and monitoring of sex offenders, with a particular focus on—[among other things] (2) the effectiveness of sex offender registration and notification requirements in increasing public safety, and the costs and burdens associated with such requirements[.]"[114] The statute further stipulated "[t]he study described in subsection (a) shall include recommendations for reducing the number of sex crimes against children and adults and increasing the effectiveness of registration requirements."[115] This demonstrates that Congress initially intended to reassess the effectiveness and efficiency of SORNA based on comprehensive research. Evidence-based policy decisions have been championed by numerous stakeholders for years, including the Sex Offender Management Assessment and Planning Initiative ("SOMAPI") of the SMART Office.[116] These efforts have aimed at improving SOM policies within the framework of SORNA, though. Now Congress has sufficient information, from both NIJ-sponsored and independently run

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[111] *Id.* at 1098–1100.

[112] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38044 (July 2, 2018).

[113] *See* GAO REPORT, *supra* note 81, at front matter "What GAO Found" & 24; *see also* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 634, 120 Stat. 587, 643–44 (2006).

[114] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 634(a), 120 Stat. 587, 643–44 (2006).

[115] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 634(b), 120 Stat. 587, 644 (2006).

[116] *See* Levenson et al., *supra* note 19, at 22; Leon, *supra* note 58, at 422; Madeline Carter et al., *Promoting Offender Accountability and Community Safety Through the Comprehensive Approach to Sex Offender Management*, 32 SETON HALL L. REV. 1273, 1297 (2004).

studies, to completely reform SORNA into an all-encompassing SOMA for the good of the public.

1. The Logistical Effects of SORNA

The positive impact of SORNA has been most evident in the streamlining of registry operations. Law enforcement officials have reported that, following SORNA's enactment, "their efforts to track sex offenders have improved through increased information sharing, frequency of registration, and collaboration."[117] The online SORNA Exchange Portal has made it possible for jurisdictions to transmit information to other affected jurisdictions using a simple tool called the Offender Relocation Task.[118] The involvement of the U.S. Marshals Service has increased the effectiveness of local jurisdictions in tracking and holding accountable people convicted of sex offenses who fail to fulfill their registration requirements. This, in turn, reinforces the effectiveness of the registry as a deterrent tool because RSOs know they are being closely tracked.[119] Thus, the initial steps SORNA dictated toward creating a logistically uniform nationwide registry system seem to be succeeding, at least among those jurisdictions that implemented the software standardization. These efforts have improved the efficiency and effectiveness of information sharing among jurisdictions and the use of such information to better track and control RSOs.

Beyond such logistical considerations, though, the expansive nature of SORNA's mandates has caused specific harms to the community over the past decade and a half. These harms have resulted not only from the affirmative statutory requirements, but also from SORNA's permissiveness regarding the collateral regulations jurisdictions may impose on RSOs. SORNA's enhanced registration requirements have stressed local budgets by causing the number of RSOs on local registries to rapidly balloon and by requiring investment in new technology.[120] The larger registries dilute law enforcement and public attention across a greater number of RSOs, most of whom do not pose a public risk.[121] The harsher collateral conditions that SORNA allows—if not encourages—local jurisdictions to impose create unnecessary barriers

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[117] GAO REPORT, *supra* note 81, at 23; *see also* Andrew J. Harris et al., *Law Enforcement Perspectives on Sex Offender Registration and Notification: Effectiveness, Challenges, and Policy Priorities*, 29 CRIM. JUST. POL'Y. REV. 391, 401–02 (2018).
[118] GAO REPORT, *supra* note 81, at 27.
[119] *See id.* at 28.
[120] Harris et al., *supra* note 16, at 358–59.
[121] *Id*. at 359.

to RSO rehabilitation and reintegration into their communities, increasing the potential for re-offenses.[122] These are specific areas that should be targeted for reform in a SOMA statute to remove obstacles hindering the overall success of the SOM effort.

A. Limited Benefits to Public Safety and Increased Threats to the Community

The overall purpose of SORNA is to enhance public safety, both by supporting law enforcement efforts to protect the public—primarily through the registration prong of the scheme—and by enabling the public to take steps to protect themselves—primarily through the notification prong. Unfortunately, there has been little direct research on the effects of SORNA on public safety.[123] Some studies have found that SORNA had moderate-to-no effects on the incidence of sexual assaults,[124] but such studies have been both too broad and too narrow to provide the type of insight needed for the discussion in this Comment.[125] Quantifying SORNA's true effects on public safety can only occur with research that examines the effectiveness of registration policies separate from notification policies and that considers additional threats that socially isolated RSOs may pose to public safety besides sexual offenses, including vagrancy, larceny, and drug-related offenses.[126]

The very measures enacted to protect the public contribute to some of these unconsidered public safety risks. Residency restrictions impose limitations on where RSOs are permitted to live relative to

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[122] *See, e.g.,* Levenson et al., *supra* note 19, at 11–12.

[123] *See* Harris et al., *supra* note 117, at 394; GAO REPORT, *supra* note 80, at 23; Paul A. Zandbergen et al., *Residential Proximity to Schools and Daycares; An Empirical Analysis of Sex Offense Recidivism*, 37 CRIM. JUST. & BEHAV. 482, 483–85 (2010).

[124] *See* Harris et al., *supra* note 117, at 394 (citing numerous studies from 2005 to 2015); *see also* Richard Tewksbury & Wesley G. Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37 CRIM. JUST. & BEHAV. 570, 570 (2010).

[125] Studies are too broad when they study the effects of both registration and notification at the same time, without differentiating between the two; stakeholders have distinguished these two practices in terms of usefulness. Studies are too narrow when they look only at the incidence of sexual assaults and do not consider other potential threats to public safety. Harris et al., *supra* note 117, at 394–95.

[126] It is important to distinguish these indirect threats to public safety from criminal convictions that directly result from violations of R&N and collateral statutes. Violation convictions present no inherent threat to public safety—they only reflect an individual's failure to meet the R&N statutory requirements. The unintentional effects that result from RSOs' impeded reintegration into society may result in recidivistic behavior present actual threats to public safety.

specific locations within a jurisdiction where children are likely to congregate.[127] Such collateral conditions severely restrict the number of places within a given jurisdiction where RSOs can live, sometimes requiring them to be separated from their families and other support systems. Residency restrictions sometimes even force RSOs to seek shelter in practically uninhabitable conditions.[128] For example, around 2005, residency restrictions in Miami-Dade County, Florida, that prohibited RSOs from living within 2500 feet of schools, daycare centers, or playgrounds forced all RSOs in the county to live in one location: an officially-sanctioned tent community under the Julia Tuttle Causeway.[129] The RSO residency restrictions were relaxed slightly in 2010, to restricting RSO residency within 2500 feet of only schools and within 1000 feet of the other locations, but the problem of severely limited housing options in the county—and the resulting problem of unhoused RSOs—remained until at least 2018.[130] Aside from creating sanitation and safety issues, such social and physical marginalization of RSOs isolates them from the resources and support they need to be effectively rehabilitated and reintegrated into the community. Without ready access to such support networks, some RSOs are more likely to recidivate, which is precisely the result SORNA is meant to avoid.[131] To add insult to injury, available empirical data does not indicate that residential restrictions accomplish the intended goal. Studies of matched recidivist and non-

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[127] Zandbergen et al., *supra* note 123, at 482.
[128] *Id.* at 485.
[129] *See* Isabella Vi Gomes, *Hundreds of Miami Sex Offenders Live in a Squalid Tent City near Hialeah*, MIAMI NEW TIMES (Aug. 8, 2017, 8:00 AM), http://www.miaminewtimes.com/news/miami-dade-laws-force-sex-offenders-into-homelessness-and-squalor-9559894; *see also* Greg Allen, *Bridge Still Home for Miami Sex Offenders*, NPR (July 21, 2009, 11:42 AM), https://www.npr.org/templates/story/story.php?stoyId=106689642&ft=1&f=1001 (People convicted of sexual offenses were issued driver's licenses upon release from prison that listed their addresses as the Julia Tuttle Causeway. They were told by probation officers their only residency option was to live under the Causeway.); John Zarrella & Patrick Oppmann, *Florida Housing Sex Offenders Under Bridge*, CNN (Apr. 6, 2007, 1:16 AM), http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/index.html ("Nearly every day a state probation officer makes a predawn visit to the causeway," enforcing the "terms of the offenders' probation which mandates that they occupy a residence from 10 p.m. to 6 a.m.".).
[130] Derek W. Logue, *From "Bookville" to "Lauren's Kingdom": Ron Book, Lauren Book, the City of Miami, and the Ongoing Homeless "Sex Offender" Crisis*, ONCE FALLEN (Nov. 22, 2019), https://oncefallen.com/bookville/.
[131] *See* GAO REPORT, *supra* note 81, at 31; Leon, *supra* note 58, at 422; Carter et al., *supra* note 116, at 1290–91.

recidivist populations have shown that residential proximity to schools and daycares "explains virtually none of the variation in sexual recidivism."[132]

Similar contraindications exist for control practices mandated by the federal statute as well. In arguing against public notification, the American Law Institute noted that multiple studies have reported an extensive list of its negative effects on registrants. These negative impacts—including social isolation, high rates of under- and unemployment, and residential instability—add to a constellation of obstacles RSOs face in attempting to reintegrate into society that may contribute to a likelihood of recidivism. [133] The public that calls for punishment and collateral controls for "sex offenders" often forgets that the vast majority of them will someday rejoin their communities, and public safety is harmed when RSOs face unnecessary challenges to once again becoming productive members of society.[134] If the goal of SORNA is to increase public safety, then it should prevent the imposition of additional burdens that threaten public safety by increasing recidivism.

B. Scarce Resources are Wasted by Unnecessarily Broad Statutes

The heightened requirements dictated by SORNA have imposed economic hardships on many jurisdictions that have had to make major capital investments to implement the statute's standards. Some states have had to invest in new technology and the associated training, in order to comply with SORNA's requirements.[135] In addition, under SORNA's mandates, all jurisdictions have faced a significant increase in the amount of administrative bandwidth their registries require.[136] The administrative workload has ballooned under SORNA because the number of RSOs has increased—due to the expanded lists of registerable offenses and extended terms of registration—and verification and communication are required more frequently.[137] The benefits of more frequent information verification and communication with RSOs have already been

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[132] Zandbergen et al., *supra* note 123, at 498.
[133] MODEL PENAL CODE § 213.11 Executive Summary, at 578 (AM. L. INST., Tentative Draft 5 approved, subject to six amendments to § 213.11, in June 2021).
[134] *See* BARKOW, *supra* note 29, at 57.
[135] *See* GAO REPORT, *supra* note 81, at 19; Harris et al., *supra* note 16, at 358–59.
[136] *See* Harris et al., *supra* note 16, at 359.
[137] The number of RSOs on registration lists will only increase the longer that SORNA remains in place, as more names are added every year, but few registrants have the opportunity to have their names removed. *See id*.

discussed,[138] but the cost of such frequency needs to likewise be considered. Managing the number of RSOs that are swept in under SORNA's expansive registration requirements severely taxes the officials responsible for maintaining local registries.[139] Additionally, the number of RSOs included in the registry, many of whom pose little or no risk of recidivating,[140] dilutes the efforts of law enforcement officials to manage the relatively few RSOs who do pose a risk of reoffending.[141] This problem unnecessarily compounds over time, as studies indicate that the vast majority of people convicted of sex offenses are less likely to recidivate as they age.[142] With RSOs unable to get off the registries, even as they become less and less likely to reoffend as time passes, resources will continuously be spread thinner and thinner.

C. SORNA's Blunt Conviction-based Tiering System vs. More Nuanced Individual Risk Assessment

SORNA's conviction-based tiering system has been a major obstacle to "substantial implementation" for many jurisdictions.[143] This system assigns RSOs to Tier I, Tier II, or Tier III, based on the severity of the registerable offense of which they have been convicted.[144] Each successive tier corresponds to more severe convictions with more restrictive penalties prescribed.[145] RSOs convicted of the least severe offenses are assigned to Tier I and required to appear in person once a year for fifteen years to verify their registration information.[146] Tier I RSOs can seek removal from the registry after ten years with a "clean

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[138] *See supra* Part III(1).

[139] Harris et al., *supra* note 16, at 358; GAO REPORT, *supra* note 81, at 29–30 (reporting that "one state registry had four out of five staff members . . . devote most of their time to tiering offenders moving to the jurisdiction from another state" and that "[f]or one police department, the increase in the number of times the department had to register or update a registration for a sex offender was greater than the increase in the actual number of sex offenders").

[140] *See* GAO REPORT, *supra* note 81, at 29.

[141] *Id.*; Harris et al., *supra* note 16, at 359.

[142] *See, e.g.,* R. Karl Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCH., PUB. POL'Y, & L. 48, 57 (2018); Arjan Blokland & Victor van der Geest, *Life-Course Transitions and Desistance in Sex Offenders; An Event History Analysis*, *in* SEX OFFENDERS: A CRIMINAL CAREER APPROACH 257, 259 (Arjan Blokland & Patrick Lussier, eds., 2015).

[143] *See* Harris et al., *supra* note 16, at 361; *see also* GAO REPORT, *supra* note 81, at 19.

[144] 34 U.S.C. § 20911(2)–(4).

[145] 34 U.S.C. § 20915; 34 U.S.C. § 20918.

[146] 34 U.S.C. § 20915(a)(1); 34 U.S.C. § 20918(1).

record."[147] Tier II registrants must appear in-person twice a year for twenty-five years.[148] Tier III RSOs must verify their registration information in person every three months for life.[149] Tier II and Tier III RSOs may not seek reduction of their required registration periods.[150] The only exception for RSOs at Tier III are those who are subject to registration due to a juvenile adjudication of guilt and who have maintained a "clean record" for twenty-five years—these RSOs may seek termination of their registration requirements.[151]

Jurisdictions have raised numerous objections to SORNA's conviction-based tiering system; the primary argument, though, is that the severity of one's conviction offense does not necessarily correlate with one's risk of re-offending.[152] Some states objected to conviction-based tiering to such an extent that they decided to forego seeking the "substantial implementation" designation altogether, despite the threatened reduction in federal funding.[153] For instance, Washington has a R&N framework in place that long predates SORNA. This framework includes a risk assessment protocol that local stakeholders have found to be an effective means of allocating their law enforcement resources to managing RSOs with the highest risk of reoffending.[154] On the other hand, the conviction-based tiering system mandated by SORNA requires increased expenditure of scarce resources on RSOs assigned to higher tiers, regardless of whether they are likely to reoffend.[155] Studies have found that tier assignments based on offense of conviction have limited accuracy at predicting risk of recidivism.[156] Use of SORNA's conviction-based tiering system can, therefore, lead to the over-inclusion of low-risk offenders in the harshest tier with the longest-lasting requirements.

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[147] 34 U.S.C. § 20915(b)(1); (b)(2)(A); (b)(3)(A).
[148] 34 U.S.C. § 20915(a)(2); 34 U.S.C. § 20918(2).
[149] 34 U.S.C. § 20915(a)(3); 34 U.S.C. § 20918(3).
[150] 34 U.S.C. § 20915(b).
[151] 34 U.S.C. § 20915(b)(1); (b)(2)(B); (b)(3)(B).
[152] *See* GAO REPORT, *supra* note 81, at 29.
[153] *See* Harris et al., *supra* note 16, at 351–57.
[154] *See id*. at 355 ("Specifically, the risk assessment process is viewed as the primary means through which local law enforcement agencies allocate and prioritize their resources, and target their efforts surrounding compliance enforcement and community notification to those deemed highest risk to recidivate.").
[155] *See supra* text accompanying notes 71–75.
[156] *See, e.g.,* Kristen M. Zgoba et al., *Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 SEXUAL ABUSE: J. RSCH. & TREATMENT 722, 737 (2016); Kristen M. Zgoba et al., A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC 2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT 25–26 (2012).

Counterintuitively, this same study indicated that Tier 2 offenders could have a higher incidence of recidivism than those in the presumably-higher-risk Tier 3.[157] Although there have been concerns in the past over the accuracy of individual risk assessment methods, newer methods that blend actuarial modeling with individual risk-factor assessment have been developed in recent years that exhibit better predictive reliability.[158] SORNA's conviction-based tiering system, therefore, mandates how local jurisdictions use their law enforcement resources, with no regard for whether such expenditures actually improve public safety.

Plea bargains may also distort the effects of assigning registration tiers based solely on conviction offense. For instance, if an individual who has a history of violent offenses is able plead down to a minor registerable offense, they will be subject to the less restrictive R&N policies. On the other hand, an individual with no prior police contacts or concerning indications who pleads to "a charge of unlawful sexual contact" will automatically be subjected to the more burdensome requirements of a higher tier assignment.[159] The mechanical reliance on conviction offense for assigning registration tiers introduces too many unnecessary variables that obscure the primary goal of R&N frameworks, while also removing the opportunity for the judicial exercise of discretion.[160] Although the Attorney General specifically stated that jurisdictions are permitted to utilize individualized risk assessment in their tier assignment protocols, the National Guidelines stipulate that such methods may only be used to impose harsher restrictions above and beyond those dictated by §§ 20915 and 20918 of SORNA described above.[161] SORNA's strict devotion to this conviction-based standard is preventing the nationwide implementation of a comprehensive, uniform registration scheme. Conviction-based tiering would impose severe costs and burdens on local

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[157] *See id*.

[158] *See* CTR. FOR SEX OFFENDER MGMT., THE IMPORTANCE OF ASSESSMENT IN SEX OFFENDER MANAGEMENT: AN OVERVIEW OF KEY PRINCIPLES AND PRACTICES 5 (July 2007); KRISTEN M. ZGOBA ET AL., A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC 2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT 14 (Research report submitted to National Institute of Justice 2012).

[159] Leon, *supra* note 58, at 424.

[160] *See* GAO REPORT, *supra* note 81, at 29; Levenson et al., *supra* note 19, at 21–22.

[161] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38053 (July 2, 2008) ("For example, suppose that a jurisdiction decides to subject all sex offenders to lifetime registration, quarterly verification appearances, and full website posting . . . . That would meet the SORNA requirements with respect to sex offenders satisfying the 'tier III' criteria, and exceed the minimum required by SORNA with respect to sex offenders satisfying the 'tier II' or 'tier I' criteria.").

jurisdictions, so numerous states have chosen not to comply with this SORNA requirement. They choose instead to utilize other tiering methods that provide more benefits to public safety with a more moderate and considered allocation of resources.

2. SORNA's Implementation Shortcomings

SORNA has fallen short of achieving its stated goal of creating a "comprehensive national system for [sex offender] registration." Although SORNA was enacted over sixteen years ago, only eighteen states have "substantially implemented" the statute's requirements, as of January 25, 2022.[162] Even the phrase "substantial implementation" indicates that such states are not in strict compliance with SORNA but rather that their local legislation "meets *or does not disserve*" the categorical requirements set forth in the statute.[163] Numerous states have failed to conform with the statute,[164] despite the Congressional threat of reducing their federal crime grant by 10% for each year they remain non-compliant,[165] partially because this de-funding threat lacks teeth. The withheld 10% can be reallocated to the same non-compliant jurisdiction if it agrees to use the funds "solely for the purpose of implementing [SORNA]."[166] In 2021, twenty-one states and Puerto Rico applied for reallocation of these funds, despite their continued non-compliance with the statute.[167]

Three broad areas of enforcement are consistently problematic in

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[162] U.S. DEP'T OF JUST., SUBSTANTIALLY IMPLEMENTED, SMART OFFICE, https://smart.ojp.gov/sorna/substantially-implemented (last visited Oct. 15, 2022). For details, *see* U.S. DEP'T. OF JUST., SORNA STATE AND TERRITORY IMPLEMENTATION PROGRESS CHECK, SMART OFFICE 2–3 (Jan. 25, 2022) [hereinafter Implementation Progress Check].
[163] Harris et al., *supra* note 16, at 327 (emphasis added).
[164] *See* GAO REPORT, *supra* note 81, at 18–20.
[165] *See* U.S.C. § 20937(c).
[166] *Id.*
[167] U.S. DEP'T OF JUST., SUBSTANTIAL IMPLEMENTATION, SMART OFFICE, https://smart.ojp.gov/sorna/substantial-implementation (last visited Oct. 15, 2022) ("The following jurisdictions applied for reallocation of the funding penalty in 2021 to work solely toward furthering SORNA implementation activities and efforts: Alaska, Arizona, Arkansas, California, Connecticut, Hawaii, Iowa, Idaho, Illinois, Indiana, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Washington, West Virginia and Wisconsin."). Eighteen of these jurisdictions have received a reallocation of their Byrne funding for six of the nine years for which data is readily available. *See* data collected from PAST FUNDING, BUREAU OF JUSTICE ASSISTANCE, https://bja.ojp.gov/funding/expired (last visited Oct. 11, 2022) (data spreadsheet on file with author).

local jurisdictions' efforts to "substantially implement" SORNA: juvenile registration, posting all required information on public websites, and tier assignment based on conviction offense.[168] Congress enacted SORNA to address precisely these types of operational variations. So long as various jurisdictions have different requirements as to who is required to register and what regulations they encounter when they do register, there remains the possibility of "loopholes" and "havens" that can allow RSOs to avoid close monitoring.[169] Almost as problematic as such registration "havens" are jurisdictions that enact significantly harsher burdens on RSOs. Variations in R&N regulations at both extremes cause problems within the wider national community that the federal statute is intended to protect.[170]

As of January 25, 2022, twenty-eight states had not met the minimum—or, in some instances, any—of SORNA's requirements with regard to "[o]ffense-based tiering and required duration of registration and frequency of reporting."[171] By that same time, seventeen states, the District of Columbia, and Puerto Rico had not met the minimum requirements for including required juvenile offenses in their registries[172] and twenty-four states and the District of Columbia had not met the minimum requirements regarding the local public registry website and the information posted on it.[173] SORNA's incomplete nationwide implementation and the resulting hodgepodge of federal, state, and local regulations can make it challenging for RSOs to comply with all the conditions imposed on them. Various reporting requirements are triggered by different conditions that may or may not pre-empt other reporting requirements imposed by overlapping jurisdictions. Such Byzantine regulations can make it extremely challenging for RSOs to get the information or appointments with officials they require to fully comply with all regulations, despite their willingness to do so.

The incomplete, patchwork implementation of SORNA demonstrates that it has failed to achieve its major statutory goal of "establish[ing] a uniform comprehensive system for the registration of

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[168] *See* Implementation Progress Check, *supra* note 162, at 4–31.

[169] *See* LOGAN, *supra* note 2, at 60–62; GAO REPORT, *supra* note 81, at 1 (2013); Harris et al., *supra* note 16, at 322.

[170] *See supra* Part III(2).

[171] Implementation Progress Check, *supra* note 162, at 4–31.

[172] *Id*.

[173] *Id.* One common deviation from SORNA standards comes from a state's refusal to publicize the address of an RSO's employer, sometimes for fear of causing the RSO to lose their job. *See* GAO REPORT, *supra* note 81, at 31.

[sex] offenders." In spite of this lack of uniformity, SORNA's shortcomings as a means of "protect[ing] the public from sex offenders and offenders against children" are still readily apparent. The challenges faced by RSOs and the community under SORNA suggest revisions that Congress should make to improve its effectiveness and efficiency, but such reform efforts face numerous impediments.

IV. OBSTACLES TO SORNA REFORM AND THE REASONS TO OVERCOME THEM

1. Resistance to SORNA Reform Echoes the Emotional Impetus for Its Enactment

Some critics of R&N schemes advocate for the complete elimination of "sex offender registries," but there are multiple reasons why that is not the best option.[174] Perhaps most importantly, the registries provide a valuable tool to law enforcement agencies as they manage RSOs and work to increase public safety.[175] Improving public safety is the primary goal of maintaining "sex offender registries," and SORNA has facilitated significant progress toward that objective.[176] In addition, registration is so deeply ingrained in the public consciousness as a primary tool of "sex offender management" that the public would be very unlikely to accept its complete elimination. Therefore, it is unwise to even suggest eliminating "sex offender registries" because such a suggestion would be certain to cause emotions to flare in opposition, possibly blocking even more moderate reform.[177] Just as there were intense emotions surrounding the advent of modern R&N statutes, any intimation that registration and notification burdens might be lightened for "sex offenders" is met with immediate ire and indignation.[178] Therefore, any suggested reforms to SORNA that lessen restrictions on people convicted of sex offenses must be rooted in practical, logical, empirical considerations.[179] The arguments for such reform have monumental

[174] *See* MODEL PENAL CODE § 213.11 Executive Summary, at 488 (AM. L. INST., Tentative Draft 5 approved, subject to six amendments to § 213.11, in June 2021).
[175] *See* Harris et al., *supra* note 117, at 413–14.
[176] *See id.*
[177] *See* MODEL PENAL CODE § 213.11 Executive Summary, at 488 (AM. L. INST., Tentative Draft 5 approved, subject to six amendments to § 213.11, in June 2021).
[178] *See, e.g.,* The National Center for Missing and Exploited Children, *supra* note 28; Letter from National Association of Attorneys General to The American Law Institute, *supra* note 28.
[179] *See* MODEL PENAL CODE § 213.11 Executive Summary, at 490 (AM. L. INST., Tentative Draft 5 approved, subject to six amendments to § 213.11, in June 2021).

obstacles to overcome, so they must be built—stone upon stone—on a strong foundation.

As mentioned, the primary obstacle to effectuating SORNA reform is the intense emotional response from opponents of such reform.[180] Fear is one immediate response: fear of increased danger from convicted "sex offenders," fear of making a mistake that allows children to be harmed, fear of being seen as soft on crime or a friend of "sex offenders."[181] Understandably, no one wants to be responsible for making a decision that permits harm to even one child. To assuage that fear, legislators often choose to maintain or increase control requirements for RSOs, despite the associated costs.[182] The notion of moderating reform will also evoke outrage and a desire for retribution.[183] To be sure, these are not emotions unique to R&N reform; they arise to an extent in response to any criminal law reform.[184] But the volume of the protests elicited by R&N reform is deafening, due to the presumed heinous nature of the related offenses and the disgust directed toward RSOs.

Unfortunately, legislators—those charged with creating the policy that dictates the efficiency of the criminal legal system—are just as susceptible to such emotional responses as the general public, if not more so. Not only do politicians have to manage their own inherent emotional reactions, but they often stand at the focal point of the vociferous protests of their constituents.[185] Under these circumstances, it takes a formidable personal constitution to resist taking the vengeful path, in favor of following a moderate, logical, economically responsible path.[186] If constituents view such reforms as putting savings over safety, the legislator runs the risk of paying the price at the ballot box. Thus, normal human emotions are compounded in elected officials who are assailed also by the fear of not getting re-elected.[187]

2. Compelling Economic, Legal, and Public Safety Reasons for SORNA Reform

Despite intense popular resistance to SORNA reform, there are numerous compelling reasons for pursuing such revisions. The first

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[180] *See* BARKOW, *supra* note 29, at 106–09.
[181] *See* LOGAN, *supra* note 2, at 166–69.
[182] *See id*. at 166.
[183] *See id*. at 168–69.
[184] *See* BARKOW, *supra* note 29, at 106.
[185] *See id.* at 5–6.
[186] *See id*. at 111.
[187] *See id*. at 110–12.

reason was mentioned earlier: "sex offender registries" provide a valuable service to law enforcement officials aimed at enhancing public safety. Therefore, it is important that legislators do all they can to support them in this endeavor by crafting the most effective and efficient registration statute possible, without unnecessary—or even counterproductive—provisions. It makes sense to impose some special burdens on people convicted of sex offenses who pose a particular risk to the community at large. It does not make sense, however, to enforce provisions so broadly that they dilute public attention, waste limited law enforcement resources, hinder reintegration efforts, and, therefore, increase the threat to public safety.

A. New Information Shows Gaps in Registration Effectiveness and Efficiency

Despite Congress's best intentions, more than sixteen years after SORNA's implementation, the SMART Office[188] has designated only eighteen states as having "substantially implemented" the statute's requirements.[189] Even the relaxation of the standard in 2011 from "substantial compliance" to "substantial implementation" was not enough to increase the compliance of states above 40%.[190] If a goal of SORNA is to create a "comprehensive system," then Congress should take steps to determine standards that most jurisdictions are willing and able to meet. States' reluctance—or outright refusal—to comply with SORNA requirements, even when facing the threat of foregoing 10% of their Byrne JAG funding,[191] should indicate to Congress the enormity of states' objections to SORNA.

A key aspect of our Federalist governmental structure is to allow states the freedom to experiment and find what policies work best for their localities; that is precisely what states have done with their R&N statutes, and many are unwilling to relinquish their specific solutions.[192] For years, Washington State has used a hybrid tiering model, which bases the *duration of registration* on the conviction offense but *other burdens* on individualized risk assessment, to balance optimized public safety with efficient use of limited law enforcement resources.[193] Another distinctive

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[188] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking at the Department of Justice.
[189] *See* Implementation Progress Check, *supra* note 162 and accompanying text.
[190] *See id.*
[191] *See supra* note 167 and accompanying text.
[192] *See* Harris et al., *supra* note 16, at 361.
[193] *Id.* at 354.

feature of Washington's R&N scheme involves "field-based verification" in which local law enforcement officials travel to the address registered by the RSO to confirm the accuracy of information.[194] This method supports law enforcement's attempts to focus their resources on RSOs who pose the highest risk to the community.[195] Legislators in Washington know that full adoption of SORNA's conviction-based tier assignment system will cause their registry to balloon into an exceedingly expensive and unwieldy behemoth, which will make their effective "field-based verification" system impractical and unsustainable.[196] It is precisely this kind of localized innovation that is lost with the imposition of an overly harsh and imbalanced statute like SORNA. When federal legislation focuses on only one aspect of management, it disadvantages other effective but non-mandated aspects. In this case, the non-compliant jurisdiction is essentially punished with the withholding of federal funds for doing what its constituents have decided is best.

Numerous studies have also shown negative effects from provisions that are intended to enhance public safety, with little-to-no indication that these provisions have balancing positive effects.[197] For instance, public notification has always been intended to allow members of the community to protect themselves and their children from any RSOs who live in their areas. Instead, such public dissemination of information has been shown to skew the public's perception in dangerous ways. It can contribute to a false sense of security as, sadly, far more children are sexually assaulted by family members and acquaintances than by previously convicted strangers.[198] Public notification can also dilute protective efforts because the unnuanced information provided by registries makes it difficult for members of the public to judge which

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[194] *Id.*
[195] *Id.* at 355.
[196] *Id.*
[197] *See e.g.* Zandbergen et al., *supra* note 123, at 501; Kristen Zgoba et al., *An Analysis of the Effectiveness of Community Notification and Registration: Do the Best Intentions Predict the Best Practices?*, 27 JUST. Q. 667, 689 (2010); Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 62 (2005); Mercado et al., *supra* note 13, at 202; Richard Tewksbury & Kristen M. Zgoba, *Perceptions and Coping with Punishment; How Registered Sex Offenders Respond to Stress, Internet Restrictions, and the Collateral Consequences of Registration*, 54 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 537, 548–49 (2010).
[198] *See* Harris et al., *supra* note 117, at 413; Tewksbury & Jennings, *supra* note 124, at 580.

RSOs present the most risk and therefore require more precautions.[199] This can ultimately lead to a disproportional sense of fear as, again, bloated registries lead parents to believe there are far more potentially dangerous recidivists in their communities than there actually are.[200]

B. Prior Justifications Rebutted

In addition to all the information now available that shows the concrete effects of sixteen years under SORNA, some justifications that facilitated the initial passage of the Adam Walsh Act and its predecessors can now be rebutted.

The striking statistics used to justify post-release tracking of RSOs were, quite simply, mistaken. The article that posited "80% of sex offenders" recidivate was discredited long ago as the musings of a social scientist who worked with people convicted of sexual offenses but who had no research to back up his numbers.[201] Similarly, the statement that released rapists are 10.5 times more likely to be rearrested for rape than other released felons is a false comparison. This ratio suggests that, if we want to protect ourselves and our children from rape, we have 10.5 times more reason to register people convicted of sex offenses than we have to register those convicted of other major offenses. That is a flashy, high number, but it does not support the contention that repeat "sex offenders" are responsible for an outstanding number of sexual assaults. For one thing, if, using the same data set, we compare the percentage of those convicted of rape who are released and subsequently rearrested for rape (7.7%) with the percentage of those convicted of robbery who are released and subsequently rearrested for robbery (19.6%), a different narrative arises.[202] The irrelevance of the "10.5 times" figure is further illustrated when one considers the quantitative importance of such percentages. 2214 convicted rapists were released in 1983, which indicates that approximately 170 were rearrested for rape within three years of release.[203] On the other hand, 19,815 convicted robbers were released, meaning that approximately 3883 were rearrested for robbery within three

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[199] *See* Harris et al., *supra* note 117, at 413.
[200] *See id.*
[201] *See* Ellman & Ellman, *supra* note 63, at 497–99; Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N. Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html.
[202] BECK, *supra* note 62, at 6.
[203] *Id.*

years.[204] It would seem, then, that released robbers are responsible for almost 23 times more repeat offenses than are released rapists. This comparison is not meant to suggest that one violent crime is less significant than the other; it is rather meant to highlight that the concern borne from this particular dataset is misplaced—even though it has been used as justification and support for regulations that directly affect the lives of almost one million Americans and indirectly affect many more. Furthermore, recent studies have supported the contention that people convicted of sex offenses recidivate at lower rates than those convicted of other offenses.[205]

Additionally, the fear of recidivism that undergirds the logic behind SORNA limits the extent of protection that SORNA can possibly provide relative to the overall incidence of sexual offenses. SORNA can only protect the public from recidivistic behavior. Yet, available data suggests that the vast majority—perhaps as many as 95%—of arrests for registerable offenses are of people who have never been previously convicted of a sexual offense.[206] Evidence indicates, therefore, that most sexual offenses are perpetrated by people who are not—and definitionally cannot be—subject to the R&N schemes that SORNA mandates across the country. SORNA is structured to reach only a small percentage of the total sex offenses and offenses against children committed in the country. The amount of attention and resources that SORNA receives is vastly disproportionate to the percentage of sexual offenses that it is designed to address.

SORNA's provisions do not only affect the perpetrators of horrific crimes like those widely publicized around the time of SORNA's enactment; they also impose significant burdens on numerous offenders who pose no more risk to society than do members of the general public. This over-inclusiveness stems from an un-nuanced understanding of "sex offense," that imputes intense popular disgust to the "sex offender" population as a whole, regardless of the severity of an individual's offense and their likelihood of re-offending. As satisfying and cathartic as

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[204] *Id.*

[205] *See* Tewksbury & Jennings, *supra* note 124, at 571. Although there is widespread acceptance that sexual assaults are likely vastly under-reported, that would be true across the board, whether they are committed by repeat offenders or not. *See* CTR. FOR SEX OFFENDER MGMT., FACT SHEET: WHAT YOU NEED TO KNOW ABOUT SEX OFFENDERS 1–2.

[206] Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCH. PUB. POL'Y & LAW 284, 297 (2008).

SORNA's harsh regulations may be, legislators must rise above the popular turmoil to maximize public safety by considering empirical data and rigorous research in addition to the needs of victims and the community.[207] The criminal punishment system must be built "to maximize public safety and [spend] our limited resources most effectively,"[208] not to legislate for the worst possible 1% of cases.[209] When the policies pushed by public outrage have limited effectiveness, legislators must synthesize information from multiple sources to achieve the public's goal of improved safety, even if it is not in the specific manner the public desires. As Rachel Elise Barkow wrote in *Prisoners of Politics*, "We can get better outcomes if we think about the long-term goal of public safety, instead of short-term emotional catharsis, and if we let experts look at the entire set of crimes and people committing them, instead of just focusing on the grisliest crimes that make headlines."[210]

In addition to the fact that the criminal punishment system needs to rely on evidence-based policies, and not simply on reactions and intuitions, all RSOs have—by SORNA's very design—already completed their court-imposed sentences by the time this legislation affects their lives. Each RSO is only required to register at the end of any resulting prison sentence or at the time of conviction if a prison sentence is not imposed.[211] R&N regimes are—and have always been—purported to be non-punitive;[212] they are intended merely as management and tracking tools to maximize public safety. If R&N policies are to remain non-punitive—and, therefore, constitutional—vindictiveness and a desire for retribution cannot enter into the legal conversation at all. If SOM schemes are legislatively intended to inflict further punishment on members of this ostracized population, then they need to be defined and administered accordingly, under the standards that the Constitution states should apply to punitive measures.

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[207] *See* BARKOW, *supra* note 29, at 3–4.
[208] *Id*. at 6.
[209] *See id.* Although the Massachusetts prison weekend furlough program had a success rate greater than 99%, in 1987, Willie Horton became the symbol of its failure when he raped a woman and assaulted her fiancé after absconding from his furlough. Michael Dukakis later lost his presidential bid due in great part to the public's disgust with the fact that Willie Horton had been free to commit these crimes.
[210] *Id.* at 15.
[211] 34 U.S.C. § 20913(b).
[212] *See* Smith v. Doe, 538 U.S. 84, 94 (2003).

C. Concerns over Constitutionality

On March 5, 2003, the United States Supreme Court published two opinions that have had far-reaching effects in the years since, and not necessarily in ways that stand up to rigorous legal analysis. *Smith v. Doe* held that Alaska's RSO management scheme ("ASORA") was regulatory and non-punitive in nature and could therefore be applied retroactively.[213] *Connecticut Department of Public Safety v. Doe* found that the Connecticut Department of Public Safety was not required to afford Doe, and other similarly situated individuals, a "hearing to determine whether they are likely to be 'currently dangerous'" before publishing their registry information on publicly accessible websites.[214] Both of these cases were established precedent by the time that SORNA was enacted in 2006, and they have each been referenced often in support of the "new-generation" R&N statutes.[215] Unfortunately, they are often referenced in defense of arguments that they do not actually support.

a. The Ex Post Facto Issue: Regulatory versus Punitive Provisions

Smith v. Doe is the case that set the precedent classifying R&N regimes as regulatory and non-punitive practices. In making this determination, the Supreme Court "ascertain[ed] whether the legislature meant the statute to establish 'civil' proceedings,"[216] and then—once it determined the legislature intended a civil and non-criminal scheme—the Court considered whether the effects of the scheme were, nonetheless, punitive.[217] To do this, the Court weighed five of the seven widely accepted *Mendoza-Martinez* factors[218] and ultimately determined ASORA to be non-punitive.[219] This single determination, which pre-dates SORNA by three years, has been referenced repeatedly as a talisman to justify the expansive application of SORNA and local R&N regimes. The holding suggested that the "rational connection to a non-punitive

[213] *Id.* at 105–06.
[214] 538 U.S. 1, 4 (2003).
[215] *See* Logan, *supra* note 19, at 440.
[216] *Smith*, 538 U.S. at 92 (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).
[217] *Id*. at 96–97.
[218] *Id*. at 97. ("The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.").
[219] *Id*. at 105–06.

purpose"[220] of R&N regimes will balance in favor of protecting the public from the threat of repeat "sex offenders" under all but the most extreme regimes. This tendency has begun to change in some state and lower federal courts,[221] but the Supreme Court has thus far declined to directly reconsider the question.

The ramifications of the ruling in *Smith v. Doe* were among the first effects of SORNA. The one interim rule that Attorney General Alberto R. Gonzalez published relatively soon after SORNA's enactment—bypassing the standard public notice and comment period—addressed only the retroactive application of SORNA.[222] This rule stated: "The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[223] In the supplementary information to this rule, the Attorney General referenced *Smith v. Doe* in asserting that there was not an "*ex post facto* problem in applying the SORNA requirements to such offenders because the . . . requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes . . . ."[224] In relying on *Smith v. Doe* to assert SORNA's non-punitive nature, the Attorney General ignored the relevance of the second analytical step the Court took in *Smith v. Doe*, which would require weighing the effects of SORNA against the public interest being protected.[225] When he issued the final guidelines in 2008, the Attorney General reaffirmed SORNA's retroactive application by citing to his reasoning included in the Interim Rule that relied on *Smith v. Doe*.[226] But the SORNA regulations were not the R&N regime the Court examined in *Smith v. Doe*. There, ASORA was the statute upheld. And we have already seen that SORNA exceeded the provisions of ASORA the moment it was enacted.[227] This fundamental argument in favor of

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[220] *Id*. at 102.
[221] *See* Logan, *supra* note 19, at 429–30.
[222] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (to be codified at 78 C.F.R. pt. 72).
[223] *Id.*
[224] *Id.* at 8896.
[225] *Compare id. with* Smith v. Doe, 538 U.S. 84, 96–97 (2003) (describing the Court's detailed consideration of the *Mendoza-Martinez* factors before deciding ASORA is non-punitive).
[226] National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (July 2, 2008) (citing Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007)).
[227] *See supra* note 23 (contrasting the Court's finding of ASORA as non-punitive based partly on the fact that in-person reporting is not required with SORNA's provisions that

retroactive application of SORNA proposed in the Attorney General's interim rule is contrary to the Supreme Court's *actual* holding in *Smith v. Doe*.

Since 2007, new generation R&N laws have continued to build on this false equivalency and have far surpassed the restrictions found to be non-punitive in *Smith v. Doe*. States pile collateral burdens on RSOs under the guise of public safety, restricting where they can live and work. The Court specifically noted these two restrictions as being absent in the Alaska state statute analyzed in *Smith v. Doe*, though, and used their absence as justification for finding that specific statute non-punitive.[228] In the 2016 decision in *Does v. Snyder*, on the other hand, the Sixth Circuit relied in part on these two distinguishing features between Michigan's state SORN statute and the Alaska state statute to determine that the Michigan statute was punitive and, therefore, violated the federal prohibition on *ex post facto* laws.[229] As States continue to add collateral burdens, from expanded notification requirements to GPS monitoring systems, the constitutional challenges in state courts—some successful and some unsuccessful—continue to mount.[230] This melee of state court decisions, combined with a few federal court decisions,[231] has muddied

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require in-person reporting between one and four times per year).

[228] *Smith*, 538 U.S. at 100 ("The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment . . . The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.").

[229] The Supreme Court declined to consider this determination when it denied certiorari to this case in late 2017. Does #1–5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub. nom.,* Snyder v. Does #1–5, 138 S. Ct. 55 (Oct. 2, 2017).

[230] *See* Wallace v. State, 905 N.E.2d 371, 375–77, 379 (Ind. 2009) (finding amended law violated State's ex post facto clause: "The short answer is that the Act imposes significant affirmative obligations and a severe stigma on every person to whom it applies."); State v. Letalien, 985 A.2d 4, 26 (Me. 2009) (holding amended state law was punitive, based on federal and state ex post facto clauses); State v. Williams, 952 N.E.2d 1108, 1112 (Ohio 2011) (stating "all doubt has been removed" about the law's punitive nature); Commonwealth v. Muniz, 164 A.3d 1189, 1193 (Pa. 2017) (finding statute punitive on basis of federal and state ex post facto clauses). *But see* People *ex rel.* Birkett v. Konetski, 909 N.E.2d 783, 801 (Ill. 2009) (upholding statute against ex post facto claim); Smith v. Commonwealth, 743 S.E.2d 146, 150–51 (Va. 2013) (upholding statute against procedural due process and takings claims); Vaughn v. State, 391 P.3d 1086, 1101 (Wyo. 2017) (upholding statute against ex post facto claim).

[231] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (overturning on First Amendment grounds a North Carolina state law that prohibited RSOs from accessing social media websites); Does #1–5 v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016) (striking down on federal *ex post facto* grounds Michigan's restrictive R&N laws that required in-person verification and imposed limits on where RSOs could live and work).

the waters regarding the appropriate extent of collateral burdens for RSOs. But the Supreme Court has thus far refused to revisit the underlying issue of R&N practices. Combined with the public safety costs associated with harsh collateral burdens, this confusion and uneven R&N application make it all the more urgent for Congress to provide clarifying federal guidance and better engineer a "comprehensive national system" rationally designed "to protect the public from sex offenders and offenders against children."[232]

b. Limitations of Procedural Due Process Challenges

The same day that the Supreme Court issued the decision in *Smith v. Doe*, it issued another, equally important, decision first: *Connecticut Department of Public Safety v. Doe*.[233] In this case, the Court upheld a Connecticut statute against a claim by the defendant that the State had violated his right to due process when he was assigned to a tier and that tier was publicized without his first having had a hearing to argue his reduced risk of recidivating. Although the petitioners urged the Court to find that "respondent ha[d] failed to establish that petitioners have deprived him of a liberty interest[,]" the Court refused to even consider that question, deciding the case instead on procedural due process grounds:[234] the applicable statute did not require an individual risk assessment hearing, so the defendant had not been deprived of one. All the procedures defined by the statute had been followed; the defendant's assignment to a tier was therefore not procedurally deficient. The majority opinion, however, as well as the concurrences, all asserted that the statute may still have been vulnerable to a substantive due process challenge. But the question before the Court in *Connecticut Department of Public Safety v. Doe* was answered simply on the premise that the statute didn't require a hearing, so the defendant was not owed a hearing. Jurisdictions have taken this to mean that individual risk assessment hearings are not constitutionally required, even though this question was specifically not asked of the Court.[235] And it has been neither asked nor answered since.

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[232] *See supra* note 1 and accompanying text.
[233] 538 U.S. 1 (2003).
[234] *Id*. at 7.
[235] *Id*. at 8 ("Because the question is not properly before us, we express no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process.").

c. The Changing Substantive Due Process Landscape

Even though the majority opinion and concurrences in *Connecticut Department of Public Safety v. Doe* left the door wide open for a challenge of the statute on substantive due process grounds, the defendant in that case had specifically foresworn arguing his case on that basis.[236] The argument does seem like a difficult one to make, especially in light of the Court's decision in *Smith v. Doe*, which explicitly found that ASORA was not "excessive in relation to its regulatory purpose."[237] The Court had also emphasized that the statute "impose[d] no . . . affirmative disability or restraint,"[238] so an argument that Connecticut's law had "deprived [the defendant] of a liberty interest" seemed likely to be a losing proposition.[239]

Times have changed, however, and R&N statutes have changed right along with them. In a seeming acknowledgement of the expansion of the "new generation" R&N regimes, Justice Gorsuch repeatedly asserted that such statutes "restrict[] . . . liberty" in his dissent to the recent case *Gundy v. United States*.[240] In arguing that it was improper for Congress to delegate the specifics of SORNA implementation to the Attorney General, Justice Gorsuch asserted that "only the people's elected representatives may adopt new federal laws restricting liberty,"[241] and "the people had vested the power to prescribe rules limiting their liberties in Congress alone."[242] He also referenced James Madison's warning that "the new federal government's most dangerous power was the power to enact laws restricting the people's liberty."[243] Although Justice Gorsuch was writing in dissent and arguing against the delegation of legislative power to the Attorney General, this offhand language is remarkable because it highlights his contention that current R&N statutes under SORNA "restrict[] . . . liberty." The Court had previously stayed far away from making such a loaded acknowledgment, until *Gundy*.

Justice Gorsuch was only partly correct in his assessment, though.

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[236] *Id*. ("Nonetheless, respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections, Brief for Respondent 44–45, and maintains, as he did below, that his challenge is strictly a procedural one.").
[237] 538 U.S. 84, 103 (2003).
[238] *Id.* at 100.
[239] *See Conn. Dep't of Pub. Safety*, 538 U.S. at 7.
[240] 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).
[241] *Id*.
[242] *Id*. at 2133.
[243] *Id*. at 2134 (citing THE FEDERALIST NO. 48, at 309–312 (James Madison)).

Congress did delegate away too much legislative power when they enacted SORNA without including guidance regarding how regulations may restrict registrants. But delegating power to the Attorney General was not the problem; delegating excessive power to the states was. SORNA's failure to define boundaries circumscribing states' R&N regulations and collateral consequences has led to a hodge-podge of laws that "restrict[] . . . liberty" in a variety of potentially unconstitutional ways. The most direct way to fix this permissiveness is by reforming SORNA into SOMA to provide a "ceiling" as well as a "floor" to define appropriate SOM strategies.

3. But Why Reform the Federal Statute?

Reforming the federal SORNA statute into SOMA will be the most efficient, effective, and clear means of creating the desired "comprehensive national system" designed "to protect the public from sex offenders and offenders against children." Recent changes to the Model Penal Code ("MPC") implement more effective SOM practices, but they will likely have limited effects while SORNA remains in place.[244] During the process of revising Section 213.11 of the MPC, the American Law Institute ("ALI") came to many of the same conclusions as those explored in this Article. But while the ALI promulgates the MPC as a suggestion to states of criminal law standards they should adopt, jurisdictions are under no obligation to follow through.[245] In fact, since the release of the original Model Penal Code in 1962, no single state has adopted the MPC in its entirety.[246] Even if no states initially implement the MPC revisions that touch on R&N and collateral controls, these provisions create persuasive authority with the significant weight of the ALI behind them; indeed, courts may look to them when crafting opinions.

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[244] One of the amendments to Tentative Draft 6 the membership of the ALI passed in May 2022 includes language intended to circumvent the harshest of SORNA's requirements. This provision prohibits state registration authorities from registering individuals or collecting registration information not required by state law. Such a prohibition creates an "impossibility defense" for individuals who might otherwise be subject to prosecution for failing to register under the federal statute, even if the state law does not require them to register. Ira Ellman, *Following Delays, American Law Institute Gives Final Approval to Model Penal Code Revisions Regarding Sex Offense Registries*, Sex Offense Litigation and Policy Resource Center: Mitchell Hamline School of Law (June 3, 2022), https://mitchellhamline.edu/sex-offense-litigation-policy/2022/06/03/following-delays-american-law-institute-gives-final-approval-to-model-penal-code-revisions-regarding-sex-offense-registries/.

[245] *See* MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 5 (Oxford Academic, 2nd ed. 2015).

[246] *Id*. at 5–6.

Just as the ALI acknowledged the necessity to rework R&N policies in the MPC revisions, the SMART Office has been receptive to adjusting its enforcement of SORNA's requirements over the last fifteen years,[247] and officials there acknowledge that more changes would make universal adoption of SORNA's standards possible.[248] But the SMART Office has reached the limit of the concessions it can make without congressional action.[249] Even the Attorney General has disavowed any ability to make substantive changes to the national R&N framework by emphasizing the limits of Congress' edict to him to "'interpret and implement' SORNA's standards . . . not to second-guess the legislative policies they embody."[250] The Executive branch has reached the limits of its authority to adjust the federal R&N framework under SORNA and has explicitly stated that only Congress has the power to make more substantial changes.

Furthermore, the Judicial branch is very unlikely to step into the breach to significantly challenge SORNA's provisions. The Supreme Court continues to be reluctant to use its jurisdictional discretion to address this topic, emphasizing that nationwide reconsideration is unlikely to come from that quarter. Some state and lower federal court cases have invalidated local R&N laws but, even when local statutes are limited by those fora, the practical effects may be mitigated by SORNA's supremacy.

For example, two recent decisions in Pennsylvania state courts have determined that Pennsylvania's SORNA violated both the state and federal constitutions. In *Commonwealth v. Muniz*, the Supreme Court of Pennsylvania held that Pennsylvania's SORNA's retroactive application violated both the federal and state *ex post facto* clauses.[251] In an opinion issued in *Commonwealth v. Torsilieri* during August 2022, the Court of Common Pleas in Chester County, Pennsylvania, decided on remand from the state's Supreme Court that the state statute's irrebuttable presumption that all sex offenders have a high risk of reoffending violated the state constitution[252] and that the R&N provisions are punitive and, therefore,

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[247] GAO REPORT, *supra* note 81, at 40–41.
[248] *Id.* at 23.
[249] *Id.* ("Officials from the SMART Office stated that they have addressed all the barriers to implementation that the office currently has the authority to address in the existing legislation and that further changes would take legislative action.").
[250] *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38036 (July 2, 2018) (citing statute later codified as 34 U.S.C. § 20912(b)).
[251] 164 A.3d 1189, 1193 (Pa. 2017).
[252] No. 15-CR-0001570-2016 13 (Pa. Ct. Com. Pl. Aug. 22, 2022).

unconstitutional.[253] The Third Circuit, however, decided in 2020[254]—and affirmed in 2022[255]—that individuals may still be compelled to register under federal SORNA's R&N requirements, even if they are exempted from registering under the state's statute. Thus, the predominance of federal SORNA and the steadfast refusal of the U.S. Supreme Court to re-examine the constitutionality of the "new generation" R&N policies circumscribe what practical effect state court decisions can have, even when they undermine state SORNA statutes. The intensive ongoing litigation in state and lower federal courts would need to have widespread and immense success to achieve the kind of restructuring of the nation's SOM framework that Congress could achieve with just a single piece of legislation.

Finally, advocacy groups work to mitigate the burdens and constitutional infirmities of R&N policies throughout the nation. The National Association for Rational Sexual Offense Laws ("NARSOL") and the Alliance for Constitutional Sex Offense Laws ("ACSOL") use education, litigation, and legislative efforts to advocate for sex offense laws that are rational and based on sound research, rather than on fear or paranoia.[256] The organizations primarily focus their efforts toward litigation and lobbying state legislatures, but they do hope to influence nationwide policy as well.[257] Most attention is spent, however, reacting to the implementation of new burdensome laws, leaving little resources to address the highly effort-intensive work of lobbying for laws that re-structure the entire federal framework. Again, absent a most astonishing upheaval at the federal level, the passionate efforts of the advocacy groups will likely be most successful in local jurisdictions, where relationships have been built and years of effort have already been invested. The most direct, effective, efficient, and authoritative option to address these wide-ranging issues is for Congress to summon the political will to make the statutory changes that are best for the community at large. Congress should heed years of research and data and input from stakeholders and

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[253] *Id.* at 27.

[254] Thomas v. Blocker, 799 F. App'x 131, 135 (3d Cir. 2020).

[255] Thomas v. Blocker, No. 21-1943, 2022 U.S. App. LEXIS 20099, at 7-10 (3d Cir. July 21, 2022).

[256] *See Vision, Mission & Goals*, NARSOL, https://narsol.org/vision-mission-and-goals/ (last visited Oct. 15, 2022); *About Us*, ACSOL, https://all4consolaws.org/about-us/ (last visited Oct. 15, 2022).

[257] *See History: From RSOL to NARSOL*, NARSOL, https://narsol.org/history/ (last visited Oct. 15, 2022); *Major ACSOL Accomplishments and Plans*, ACSOL, https://all4consolaws.org/major-acsol-accomplishments-and-plans/ (last visited Oct. 15, 2022).

change SORNA to SOMA to provide the support the nation's law enforcement officers deserve and the guidance the nation's RSOs require.

V. SUGGESTED REFORMS TO IMPROVE SORNA'S EFFECTIVENESS AND EFFICIENCY

Support for SORNA reform has been gaining momentum in recent years, endorsed by social scientists, lawyers, law enforcement officials, RSOs' advocates, and even victims' advocates.[258] SORNA is unable to achieve the "comprehensive national system" that it initially aimed to create, so adjustments must be made. Numerous authorities have suggested adjustments, but, up until now, these policy recommendations have been intended primarily for implementation by local jurisdictions, within the federal framework of SORNA.[259] Reform of that nationwide framework, though, would alleviate obstacles that local legislators—representatives who tend to be more proximate to their constituents and their opinions—face in implementing such policy recommendations. A new SOMA statute would not only create clear boundaries and expectations for states to implement, but it would also provide political cover for local legislators. These officials would then be able to enact beneficial SOM practices, but then blame the requirements of the federal statute if their constituents protested. The new SOMA statute should combine provisions from the numerous recommendations that have been made over the years to address the shortcomings evident in SORNA.

1. The Reforms Promoted by the Revised Model Penal Code

The ALI included many significant reforms in their recent revisions to Section 213 of the Model Penal Code.[260] In Tentative Drafts

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[258] *See* Stillman, *supra* note 59, at 24 ("[Patty] Wetterling had watched the registry evolve into something very different from what she'd fought to create. . . . It also imposed a costly burden on law enforcement—time and money that might have gone for supervision of the highest-risk offenders and the training of officers in preventive measures."); s*ee also* MODEL PENAL CODE § 213.11 Executive Summary, at 482 n.6 (AM. L. INST., Tentative Draft 5 approved, subject to six amendments to § 213.11, in June 2021) (Patty Wetterling wrote in a Feb. 2021 letter to Minnesota legislators that "[a]ny statutory analysis of the criminal statutes is woefully incomplete without considering the effectiveness, cost, and collateral and material consequences the [sex-offense] Registry poses.").

[259] *See e.g.* LOBANOV-ROSTOVSKY, *supra* note 19, at 4. (suggesting local jurisdictions reduce residence restrictions and increase specialized supervision and rehabilitation to improve SOM outcomes).

[260] *See* MODEL PENAL CODE § 213.11 Executive Summary, at 488–90 (AM. L. INST., Tentative Draft 5 approved, subject to six amendments to § 213.11, in June 2021) *and* MODEL PENAL CODE § 213.11A(1)(d) (AM. L. INST., Tentative Draft 6 approved, subject

5 and 6, which were approved with certain amendments in June 2021 and May 2022, respectively, the ALI proposed:

- Drastically reducing the number and kind of offenses that trigger registration requirements;
- Limiting access to sex offense registries primarily to law enforcement agencies, with very limited exceptions to provide for victim notification and employment-related background checks and strict parameters around the use and sharing of registrant information;
- Permitting additional methods for registrants to update their information, obviating the need for in-person appearances more often than once per year;
- Reducing the required duration of registration and providing "standards and procedures by which registrants can petition for early relief" from their duty to register; and
- Restricting or eliminating the use of "other burdens and restrictions . . . [such as] GPS monitoring, residency restrictions, limits on Internet access, and the like . . . ."[261]

The highly abbreviated list of registerable offenses that the ALI has chosen to leave in place[262] would return the scope of registerable offenses to slightly broader than that in the Jacob Wetterling Act of 1993[263] and resulted from extensive discussions with concerned stakeholders including the National Center for Missing & Exploited Children and the Department of Justice's Office of Legal Policy.[264] The list of offenses that trigger registration certainly needs to be trimmed, but an analysis of those specific revisions is outside the scope of this Comment.

The remainder of the ALI's recommendations—limiting registry access, permitting additional reporting methods, reducing registration requirements, increasing opportunities to petition for an end to

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to certain amendments, in May 2022).

[261] *See* MODEL PENAL CODE § 213.11 Executive Summary, at 490–92 (AM. L. INST., Tentative Draft 5 approved, subject to six amendments to § 213.11, in June 2021) *and* Reporter's Memorandum from Stephen J. Schulhofer, Reporter, Model Penal Code: Sexual Assault, Am. L. Inst., on Model Penal Code: Sexual Assault and Related Offenses Tentative Draft 6 (Apr. 15, 2022), https://www.thealiadviser.org/sexual-assault/reporters-memorandum-for-model-penal-code-sexual-assault-and-related-offenses-tentative-draft-no-6/.

[262] MODEL PENAL CODE § 213.11A(1)(d) (AM. L. INST., Tentative Draft 6 approved, subject to five amendments to §§ 213.11, 213.11A & 213.11D, in May 2022).

[263] *Compare id. with* GAO REPORT, *supra* note 81, at 8 tbl.1.

[264] Schulhofer, *supra* note 261.

registration duties, and strictly curbing the imposition of collateral burdens—address the overarching shortcomings of SORNA highlighted in this Comment. These reforms would support and clarify the contention that R&N statutes are regulatory and non-punitive, eliminating *ex post facto* and due process claims from dockets across the country. These reforms would also reduce burdens on law enforcement officials nationwide, allowing them to focus on people convicted of sex offenses that pose a threat to public safety without having to spread their attention and resources to those who were convicted once but pose no heightened continuing threat to the community.

One major reform that the ALI has included without specifically naming it is the complete abolition of the tier system—not just eliminating the ***conviction-based*** tier system but removing the tier system ***entirely***. By reducing the number of registerable offenses and imposing a blanket 15-year maximum registration period, the ALI has effectively placed all RSOs in the same tier. Even so, the new MPC § 213.11I allows for judicious imposition of additional registration burdens, on a case-by-case basis, that an official may deem "manifestly required in the interest of public safety."[265] The decision to impose such conditions on an RSO must be based on careful consideration of all aspects of the case, including "the nature of the offense; . . . the person's prior record; and . . . the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person's family, and on the person's prospects for rehabilitation and reintegration into society."[266]

The consideration for the welfare and prospects of the RSO and their family that is expressed in this subsection is astonishing when compared with the harshness of many current collateral registration burdens that practically banish the offender with no regard for their well-being or future. Partly for this reason, many of the ALI-endorsed reforms have already encountered strong resistance in state legislatures and local communities. The National Center for Missing and Exploited Children, the National District Attorneys Association, and the National Association of Attorneys General have already teamed up to advocate against the new § 213.11.[267] Indeed, Tentative Draft 6 was delayed to accommodate

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[265] MODEL PENAL CODE § 213.11I(3)(b) (AM. L. INST., Tentative Draft 6 approved, subject to five amendments to §§ 213.11, 213.11A & 213.11D, in May 2022). The revised text of the MPC calls for notice to the affected person and an opportunity to respond, which lays the basis for due process claims with respect to these collateral consequences.
[266] *Id.* at § 213.11(3)(d)(i).
[267] NDAA and NCMEC, "Revisions to Model Penal Code Present Child Safety Risks Recording" (Nov. 3, 2021), NATIONAL DISTRICT ATTORNEYS ASSOCIATION,

intensive conversations with such groups and has incorporated changes based on these discussions.[268] It is now up to Congress to step fully into its responsibility by enacting these revisions in a new and more inclusive statute, SOMA, to provide guidance and political cover to local legislators.

2. Comprehensive Approaches to "Sex Offender Management" Allocate Resources More Effectively

The Comprehensive Approach to Sex Offender Management was championed by the Center for Sex Offender Management ("CSOM") before it closed in 2019.[269] Similarly, the SMART Office's SOMAPI continually emphasizes the need for a variety of SOM policies, targeting the needs of individualized offenders.[270] Both projects agreed that any "one size fits all" model will not work as a SOM strategy, since measures that may prevent recidivism for some individuals may encourage it for others.[271] They also agreed that SOM policies need to be evidence-based to reduce the influence of the strong emotions these offenses elicit. In fact, SOMAPI went one step further and recommended that new policies be designed to gather evidence during their operation to track their own effectiveness.[272]

The Comprehensive Approach to Sex Offender Management serves five fundamental principles by means of six aspects of "sex offender management."[273] The principles that drive the Comprehensive Approach are: (1) victim-centeredness, (2) specialized knowledge/training, (3) public education, (4) monitoring and evaluation, and (5) collaboration. These principles are addressed through the components of: (i) investigation, prosecution, and disposition; (ii) assessment; (iii) supervision; (iv) treatment; (v) reentry; and (vi) registration and notification.[274] This broad approach is truly comprehensive in that it begins at the point of criminal investigation, before a person is convicted, or—potentially—even arrested.[275] If an

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https://ndaa.org/training/revisions-to-model-penal-code-present-child-safety-risks/.

[268] Schulhofer, *supra* note 261.

[269] *See* CTR. FOR SEX OFFENDER MGMT., *supra* note 6, at 1.

[270] *See* Christopher Lobanov-Rostovsky, *Chapter 8: Sex Offender Management Strategies*, *in* SEX OFFENDER MGMT. ASSESSMENT AND PLANNING INITIATIVE 181, 206 (Mar. 2017).

[271] *See id.*; CTR. FOR SEX OFFENDER MGMT., *supra* note 6, at 4.

[272] *See* LOBANOV-ROSTOVSKY, *supra* note 19, at 5.

[273] *See* CTR. FOR SEX OFFENDER MGMT., *supra* note 6, at 2.

[274] *Id.* at 2–6.

[275] *Id.*

official involved in a sex-related criminal investigation has specialized training and knowledge and goes about her work with a victim-centered mindset, collaborating with other stakeholders, the overall outcome of the encounter with law enforcement will be improved for all involved.[276] The overriding ethos behind this comprehensive approach is that none of these components is more central than any of the others, and they must function together as a whole to address the overwhelmingly complex problem of SOM.[277]

This is clearly counter to the current R&N-centric mindset endorsed by the federal government and is a large reason why SORNA has not been more successful. SORNA incentivizes jurisdictions to focus time, energy, and money on R&N, to the diminishment of other aspects of their SOM schemes. When the federal government requires one factor but not others, local attention necessarily turns to the federally favored aspect. A revised federal statute should make provisions for all six components of the Comprehensive Approach while focusing on the five fundamental principles, but it should also allow jurisdictions enough freedom to craft their own SOM schemes based on their local needs. RSOs form a classic "discrete and insular minorit[y]" that lacks reasonable access to the "political processes ordinarily to be relied upon to protect minorities."[278] They therefore require specific legal protection because they cannot protect themselves. The federal government has a responsibility to protect all citizens of the United States—people convicted of sex offenses as well as the public at large.

3. Improve Administrative Efficiency and Logistical Considerations

In addition to integrating the suggestions outlined above from the ALI and the Comprehensive Approach to Sex Offender Management, a new SOMA statute should include other provisions to address practical issues. For instance, SOMA should require the SMART Office—or another appropriate executive authority—to administer one centralized website that collects all federal, state, and local R&N regulations in an easy to interpret format. It could utilize drop down menus and graphical calendar and map overlays to clarify reporting requirements for a variety of situations, from a change of employer to a change of residence to an

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[276] *Id.*

[277] *See* Carter et al., *supra* note 116, at 1274.

[278] United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). The RSO population is especially "insular" in jurisdictions that disenfranchise those convicted of felonies.

upcoming vacation. RSOs should not be confronted with unnecessary confusion and difficulties when they are willing to comply with R&N requirements. If online registration is integrated by local jurisdictions, then this centralized website could become a two-way street for information, allowing law enforcement officials to communicate what is required while also allowing RSOs to easily comply. There is no reason that compliance should be challenging—unless the actual goal of the labyrinthine regulations is to create violations and pull RSOs back under active supervision.

As with any management statute, accountability will play an important part in SOMA's success. States must be accountable for their SOM policies' success at promoting public safety. The Federal government must be accountable for the success of the nationwide SOM system at integrating the numerous local systems. Because SOMA will allow states flexibility to craft their own comprehensive SOM regimes, it must incorporate provisions to discourage states from choosing harsher protocols in an attempt to drive RSOs from their borders. One possible solution would be to create a system of fiscal "credits," such that individuals convicted of sexual offenses are recorded in the state where they are convicted, but then "traded" to any new jurisdiction where they relocate. Then, the Byrne JAG funding for the state of conviction would be reduced by the amount of one "credit," and the Byrne JAG funding for the state of relocation would be increased by the same amount.[279] Such a "credit trading" system would disincentivize the creation of overly-punitive regimes and help defray the costs assumed by the state of relocation when it takes on management of the newly-arrived RSO. There may be other solutions, but this is an eventuality that must be considered and addressed.

Finally, it is of the utmost importance that Congress takes steps, when crafting a new SOMA statute, to prevent its undergoing the same kinds of mutations and growths that changed SORNA over the years. For example, SORNA's lack of a "ceiling" has allowed local laws and regulations to increase drastically, controlled only by the willingness of the judicial branch to consider their constitutionality. SOMA, therefore, must include strict limits on the harshness of the regulations and laws that states may impose on RSOs. The articulation of these limits will take careful and deliberate definition of SOMA's terms and intentions, and a strict adherence to these definitions throughout the legislative process and

[279] The appropriate amount of one RSO "credit" could be determined in consultation with stakeholders.

in judicial interpretations as well.[280] One of the many lessons learned from SORNA is how easy it is to disrupt the delicate balance between protecting the public and protecting the rights of RSOs. SOMA must, therefore, explicitly guard against similar disturbances by firmly delineating a broad framework within which local jurisdictions can have flexibility to maximize their effectiveness. And only Congress can achieve such a dramatic, but necessary overhaul.

CONCLUSION

When SORNA was enacted in 2006, its lofty goal was to create a uniform, comprehensive nationwide registry for people convicted of sex offenses that would enhance law enforcement efforts and provide comfort and information to the public at large. Empirical studies and extensive surveys in the sixteen years since have shown the SORNA framework to have mixed success. Better communication among official agencies has improved the efficiency of the registries as a law enforcement tool. On the other hand, the tendency toward harsh R&N and collateral regulations discourage RSOs' reintegration with society and therefore promote recidivism without notable advantages. The administrative function of "sex offender registries" should be supported and the harsher burdens on RSOs should be mitigated in favor of treatment and support.

SORNA reform is a unique opportunity to use empirical evidence and extensive policy research to revise an important public safety statute to both improve outcomes and use resources more responsibly, while also achieving the public's goal of enhanced safety. To do that, Congress needs to clarify the public's overall goal as one that requires an holistic approach to management of people convicted of sexual offenses—one that leaves room for nuance and meets individualized needs. Replacing the imbalanced SORNA legislation with an all-encompassing, moderate SOMA statute will result in enhanced public safety with less bureaucratic waste. Only Congress can take the next steps in the decades-long process of creating a "comprehensive national system" that will "protect the public from sex offenders and offenders against children," and now is the time to start.

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[280] An in-depth discussion of the interests that can converge to achieve SORNA reform and the potential pitfalls that may hinder the process is forthcoming in another article by the author. *See* Carmen I. Abrazado, SORNA and Interest Convergence; Different Reasons for the Same Goal (Oct. 2022) (on file with the author).