THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) AT 10 YEARS: HISTORY, IMPLEMENTATION, AND THE FUTURE

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ABSTRACT

July 27, 2016, marked ten years since the passage of the Sex Offender Registration and Notification Act (SORNA). As we cross the threshold into SORNA's second decade, the time is opportune to take stock of how the field of sex offender registration and notification has developed, the progress that has been made in implementing SORNA, and where these systems are likely headed in the future.

This Article discusses the successes and challenges surrounding the implementation of SORNA, from its empowerment of certain federally-recognized tribes to establish standalone registration systems, to the legal issues presented by offenders living and working on federal enclaves such as military installations. In addition, it presents a full legal analysis of all of SORNA's

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provisions up to and including amendments mandated by International Megan's Law to Prevent Child Sexual Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, which passed in early February 2016.

By anchoring itself on the rock of a very detailed legal history of both state and federal provisions governing sex offender registration, this Article posits that SORNA's standards are likely here to stay, amended only gradually and piecemeal by minor statutory changes, as well as periodic restrictions on its terms as imposed by state or federal courts.

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I. INTRODUCTION

Sex offender registration and notification systems have become a prevalent part of the criminal justice landscape in the United States over the last few decades.[1] Beginning with small sets of information shared only by law enforcement officials, these systems have grown to encompass dozens of pieces of information about sex offenders and disclose a significant amount of information about offenders on publicly searchable websites.[2] The positive and negative repercussions of these policies continue to reverberate

1. *See infra* Part II.
2. *See infra* Part III.

within our communities.[3]

The predicate assumption behind registration systems is that sex offenders as a whole pose a distinct and ongoing risk to our communities when compared with many other kinds of criminal offenders.[4] Victimization surveys indicate that a significant percentage of children are subjected to sexual abuse, and it is clear that prosecution in the criminal justice system has only scratched the surface of the offending population.[5] In addition, while offense rates for forcible sexual assaults against teenagers and adults have decreased over the last 20 years, there are still over 280,000 such crimes committed every year.[6] Because of the potentially devastating long-term emotional, psychological, physical, and spiritual effects of sexual assault,[7] sex offenses have rightfully garnered a significant amount of attention in the criminal justice field.[8] As one person stated, sex offenses are "high impact"

3. *See infra* Parts III, V.

4. *See infra* Part II.

5. Estimates vary on the prevalence of child sexual assault. One reliable study shows that nine to 32 percent of adult women indicate that they were sexually abused or assaulted as children, and that approximately five to 10 percent of men indicate that they were so abused. Emily M. Douglas & David Finkelhor, *Childhood Sexual Abuse Fact Sheet*, U.N.H. 5, http://www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf (last visited June 15, 2016).

6. Estimates of the annual rate of violent sexual assault on persons over 12 years old (including adults) are well over 280,000. JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DOJ, PROD. NO. NCJ 248973, CRIMINAL VICTIMIZATION, 2014, at 2 (2015), http://www.bjs.gov/content/pub/pdf/cv14.pdf (noting 284,350 rape and sexual assault cases in 2014). This estimate is based on a comprehensive victimization survey, which includes offenses regardless of whether they were reported to the police. *Id.* According to the Bureau of Justice Statistics' National Criminal Victimization Survey, the number of rape of persons over the age of 12 was reported at 346,830 in 2012. *See* JENNIFER TRUMAN ET AL., U.S. DOJ, PROD. NO. NCJ 243389, CRIMINAL VICTIMIZATION, 2012, at 2 (2013), http://www.bjs.gov/content/pub/pdf/cv12.pdf; *see also* Sexual Abuse Statistics in *Raising Awareness About Sexual Abuse: Facts and Statistics*, NSOPW, http://www.nsopw.gov/en/Education/FactsStatistics#Sexualabuse (last visited July 11, 2016) [hereinafter Sexual Abuse Statistics].

7. Leah Irish et al., *Long-Term Physical Health Consequences of Childhood Sexual Abuse: A Meta-Analytic Review*, 35 J. PEDIATRIC PSYCHOL. 450, 450–51 (2010) (discussing how a history of child sexual abuse affects six health outcomes: general health, GI health, gynecologic or reproductive health, pain, cardiopulmonary symptoms, and obesity); Robert Maniglio, *The Impact of Child Sexual Abuse on Health: A Systematic Review of Reviews*, 29 CLINICAL PSYCHOL. REV. 647, 650–53 (2009) (reporting that childhood sexual abuse survivors suffer risk of a wide array of medical, psychological, behavioral, and sexual disorders).

8. NCJA & SMART, U.S. DOJ, PROD. NO. NCJ 247059, SEX OFFENDER

crimes.[9]

The rationale behind sex offender registration and notification is simple and two-fold. First, by creating a continually updated database of information regarding convicted sex offenders, a registration system improves the ability of law enforcement to supervise such offenders and investigate new offenses.[10] Second, community notification enables members of the public to specifically protect themselves and their families from risks in their communities.[11] From these basic premises a host of issues—legal, policy, and otherwise—have arisen as registration and notification systems have developed over the years.[12]

This Article paints in broad strokes the legal infrastructure of sex offender registration and notification systems in the United States, the legal and practical problems inherent within them, and a prediction of where these systems might be headed in the coming years. Part II tracks in detail the development of sex offender registration and notification systems from the early 20th century to 2005. Part III discusses the federal Sex Offender Registration and Notification Act (SORNA) in detail, describes the differences between its provisions and the prior federal law, and addresses the improvements and challenges that SORNA has brought. Part IV engages the question of what gaps still exist in federal law regarding sex offender registration and notification systems. Part V discusses collateral consequences of sex offense convictions other than registration and notification, which—if left without clarification—can create confusing legal and policy arguments. Part VI concludes the Article with a discussion of

MANAGEMENT ASSESSMENT PLANNING INITIATIVE, at xxiii (2014) [hereinafter SEX OFFENDER MANAGEMENT ASSESSMENT PLANNING INITIATIVE], http://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

9. A colleague whose name is long-forgotten used this term years ago, and it has stuck with me ever since.

10. *See* Alison M. Siskin & David Teasley, *Sex Offender Registration: Issues and Legislation*, *in* CRIMINAL JUSTICE AND LAW ENFORCEMENT ISSUES 59, 68 (Katherine A. Neumann ed., 2002).

11. *See id.* To illustrate: Assume your niece and nephew live in another state and you go to babysit them for a few days. They ask if they can go play at neighbor X's house. You go online and do a quick search and find out that neighbor X is a registered sex offender based on a conviction for abusing a minor. Neighbor X might very well find another child to offend against, but the public notification provisions have made it possible for you to be sure that it's not *your* niece and nephew that fall victim to him or her.

12. *See id.* at 70–71.

recent state court decisions regarding ex post facto concerns and the consequences of those opinions.

II. THE HISTORY OF SEX OFFENDER REGISTRATION AND NOTIFICATION SYSTEMS

The use of registration systems to track criminal offenders once they have been released to the community dates back to the 1920s.[13] In 1947, California became the first state to enact a registration system for sex offenders.[14] In the 1950s and 1960s, four additional states enacted sex

13. Former sections 52.38(a) and 52.39 of the Los Angeles Municipal Code provided that any person who was in Los Angeles for more than five days "subsequent to January 1, 1921," had to register with the city if they had previously been convicted of any felony offense. Lambert v. California, 355 U.S. 225, 226 (1957) (quoting L.A., CAL., MUNICIPAL Code § 52.38(a) (1946) (citing L.A., CAL., MUNICIPAL Code § 52.39)). Similarly, Florida enacted a general felony registration statute in 1957, but did not expand registration specifically for sex offenders until 1993. SCOTT MATSON & ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, SEX OFFENDER REGISTRATION: A REVIEW OF STATE LAWS 5 (1996). Although beyond the scope of this Article, registration systems have been—and are being—used for crimes other than sex offenses as well. Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 738 (2013).

14. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 900 (1995). For details on the case that drove the California registration law to be enacted, see Joel A. Sherwin, Comment, *Are Bills of Attainder the New Currency? Challenging the Constitutionality of Sex Offender Regulations that Inflict Punishment Without the "Safeguard of a Judicial Trial"*, 37 PEPP. L. REV. 1301, 1323 (2010). The California law provided as follows:

> SECTION 1. Section 290 is added to the Penal Code, to read:
>
> 290. Any person who, since the first day of July, 1944, has been or is hereafter convicted in the State of California of any offense [in certain enumerated code sections, including] . . . any offense involving lewd and lascivious conduct . . . , or has been [or is] . . . convicted in any other state of any [equivalent] offense . . . shall within 30 days after the effective date of this section or within 30 days of his coming into any county in which he resides or is temporarily domiciled for such length of time register with the sheriff of or a chief of police in such county.
>
> Such registration shall consist of (a) a statement in writing signed by such person, giving such information as may be required by the State Bureau of Criminal Identification, and (b) the fingerprints and photograph of such person. Within three days thereafter the sheriff or chief of police shall forward such statement, fingerprints and photograph to the State Bureau of

offender registration systems: Arizona (1951), Nevada (1961), Ohio (1963), and Alabama (1967).[15] Between 1984 and 1996, all other states enacted sex offender registrations statutes,[16] although these distinct state systems varied

> Criminal Identification and Investigation.
>
> Any person required hereby to register shall upon changing his address within the county in which he is required to register promptly inform the sheriff or chief of police in writing of his new address, and such sheriff or chief of police shall within three days after receipt of such information forward it to the State Bureau of Criminal Identification and Investigation.
>
> Any person required to register under the provisions of this section who shall violate any of the provisions thereof is guilty of a misdemeanor.
>
> The statements, photographs and fingerprints herein required shall not be open to inspection by the public or by any person other than a regularly employed peace or other law enforcement officer.

Act of July 7, 1947, ch. 1124, sec. 1, § 290, 1947 Cal. Stat. 2562, *repealed by its own terms on Jan. 1, 1988*, Act of Oct. 2, 1985, ch. 1474, sec. 1, § 290(m), 1985 Cal. Stat. 5403, 5406.

15. Act No. 507, 1967 Ala. Laws 1222; Act of July 5, 1963, 1963 Ohio Laws 669, 1475; Act of Mar. 24, 1961, ch. 147, 1961 Nev. Stat. 197; Act of Mar. 28, 1951, ch. 105, 1951 Ariz. Sess. Laws 252; Bedarf, *supra* note 14, at 887 n.4.

16. The remaining states (along with the District of Columbia) enacted their initial sex offender registration laws in the following sequence, though some of the initial laws have been repealed or modified since enactment: Utah (Act of Mar. 30, 1983, ch. 88, § 42, 1983 Utah Laws 427); Illinois (Habitual Child Sex Offender Registration Act, Pub. Act 84-1279, 1986 Ill. Laws 1467 (Aug. 15, 1986)); Arkansas (Habitual Child Sex Offender Registration Act, Act 587, 1987 Ark. Acts 1286 (Apr. 4, 1987)); Montana (Sex Offender Registration Act, ch. 293, 1989 Mont. Laws 631 (Mar. 24, 1989)); Oklahoma (Sex Offenders Registration Act, ch. 212, §§ 1–7, 1989 Okla. Sess. Laws 556 (May 9, 1989)); Oregon (Act of Aug. 3, 1989, ch. 984, 1989 Or. Laws 1937); Washington (Community Protection Act, ch. 3, §§ 401–09, 1990 Wash. Sess. Laws 12, 49–53 (Feb. 28, 1990)); North Dakota (Sexual Offender Registration Act, ch. 124, 1991 N.D. Laws 367 (Apr. 2, 1991), Offense Against Children Registration Act, ch. 136, 1991 N.D. Laws 390 (Apr. 5, 1991)); Minnesota (Act of June 1, 1991, ch. 286, § 3, 1991 Minn. Laws 1324, 1325–26); Colorado (Act of Apr. 17, 1991, ch. 69, 1991 Colo. Sess. Laws 393); Texas (Act of June 15, 1991, ch. 572, 1991 Tex. Gen. Laws 2029); New Hampshire (Act of May 12, 1992, ch. 213, 1992 N.H. Laws 264); Louisisana (Act of June 18, 1992, Act No. 388, 1992 La. Acts 1177); Maine (Act effective June 30, 1992, ch. 809, 1991 Me. Laws 1909); Rhode Island (Act of July 21, 1992, ch. 196, 1992 R.I. Pub. Laws 916); Idaho (Sex Offender Registration Act, ch. 83, 1993 Idaho Sess. Laws 392 (Mar. 25, 1993)); West Virginia (Sex Offender Registration Act, ch. 35, 1993 W. Va. Acts 139 (Apr. 10, 1993)); Kansas (Act of Apr. 22, 1993, ch. 253, 1993 Kan. Sess. Laws 1179); Florida (The Florida Sexual Predators Act, ch. 93-277, 1993 Fla. Laws 2620 (May 15, 1993)); Wisconsin (Act of Dec. 10, 1993, Wis. Act. No. 98, § 116, 1993 Wis. Sess. Laws 640, 656–57); Indiana (Act of Mar. 2, 1994, Pub. L. No. 11-1994, 1994 Ind. Acts 301); South Dakota (Act of Mar. 4, 1994, ch.

in many respects and did not always require the transmission of information about registered sex offenders to other states.[17]

In the midst of the enactment of these state laws, the U.S. Congress started considering measures that would encourage the implementation of sex offender registration programs in the remaining states, as well as the standardization of registration programs across the country.[18] The first such federal law to address these issues was passed in 1994 and is commonly

174, §§ 1–8, 1994 S.D. Sess. Laws 209, 209–11); Wyoming (Act of Mar. 22, 1994, ch. 60, 1994 Wyo. Sess. Laws 181); Georgia (Act of Apr. 5, 1994, Act No. 1036, 1994 Ga. Laws 791); Virginia (Act of Apr. 6, 1994, ch. 362, 1994 Va. Acts 514); Kentucky (Act of Apr. 11, 1994, ch. 392, 1994 Ky. Acts 1165); Tennessee (Sexual Offender Registration and Monitoring Act, ch. 976, 1994 Tenn. Pub. Acts 975 (May 10, 1994)); Alaska (Act of May 12, 1994, vol. 1, ch. 41, 1994 Alaska Sess. Laws 1); Connecticut (Act of June 9, 1994, Pub. Act. No. 94-246, 1994 Conn. Acts 1138 (Reg. Sess.)); Delaware (Act of June 27, 1994, ch. 282, LXIX Del. Laws 583); South Carolina (Act of June 29, 1994, Act No. 497, § 112, 1194 S.C. Acts 5129, 5794–99); Michigan (Sex Offenders Registration Act, Act No. 295, 1994 Mich. Pub. Acts 1522 (July 13, 1994)); Missouri (Act of July 14, 1994, 1994 Mo. Laws 1131); New Jersey (Act of Oct. 31, 1994, ch. 133, 1994 N.J. Laws 1152); New Mexico (Sex Offender Registration Act, ch. 106, 1995 N.M. Laws 827 (Apr. 5, 1995)); Iowa (Act of May 3, 1995, ch. 146, 1995 Iowa Acts 265); Maryland (Act of May 9, 1995, ch. 142, 1995 Md. Laws 1820); Hawai'i (Act of June 14, 1995, Act No. 160, 1995 Haw. Sess. Laws 257); New York (Act of July 25, 1995, ch. 192, 1995 N.Y. Laws 2870); North Carolina (Amy Jackson Law, ch. 545, 1995 N.C. Sess. Laws 2046 (July 29, 1995)); Pennsylvania (Act of Oct. 24, 1995, Act No. 1995-24 (SS1), 1995 Pa. Laws 1079); Nebraska (Sex Offender Registration Act, Legislative Bill No. 645, §§ 1–13, 1996 Neb. Laws 184, 184–86 (Apr. 3, 1996)); Vermont (Act of Apr. 25, 1996, Pub. Act No. 124, 1996 Vt. Acts & Resolves 140); Massachusetts (Act of Aug. 5, 1996, ch. 239, 1996 Mass. Acts 1118); District of Columbia, Sex Offender Registration Act of 1996, D.C. Act No. 11-510, 44 D.C. Reg. 1232 (Mar. 7, 1997).

17. The National Sex Offender Registry (NSOR), operated by the FBI and requiring States with "minimally sufficient sexual offender registration program[s]" to notify other states and the FBI of change of a sex offender's address, was not authorized by Congress until 1996 and did not become operational until 1997. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2(a), 110 Stat. 3093, 3095 [hereinafter Pam Lyncher Act], *repealed by* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, § 129(a), 120 Stat. 587, 600–01 (2006) [hereinafter SORNA]; OFFICE OF THE INSPECTOR GEN., U.S. DOJ, REPORT NO. I-2009-001, REVIEW OF THE DEPARTMENT OF JUSTICE'S IMPLEMENTATION OF THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT 48 (2008) [hereinafter IG REPORT], https://oig.justice.gov/reports/plus/e0901/final.pdf.

18. *See* HOUSE COMM. ON THE JUDICIARY, *Chairman Henry J. Hyde 1995–2001*, *in* A HISTORY OF THE COMMITTEE ON THE JUDICIARY 1813–2006, H.R. DOC. NO. 109-153, at 77, 81 (2006).

referred to as the Wetterling Act.[19] It began a long and complicated path of federal legislation and regulations leading to the current landscape of sex offender registration and notification laws in the United States.[20]

A. *The Wetterling Act (1994)*

The Wetterling Act established a statutory "baseline" standard and enabled the Attorney General to establish guidelines governing state programs that register the addresses of persons convicted of a "criminal offense against a . . . minor" or a "sexually violent offense," as well as persons determined to be a "sexually violent predator."[21] In addition, the Wetterling Act required offenders to register within 10 days of release from incarceration, sentencing, or establishing residence in a state.[22] Registration information was required to be transferred to a designated state-level law enforcement agency within three days.[23] Conviction data and fingerprints were to be immediately transferred to the FBI.[24]

States were required to verify the address of any registered offender either every 90 days (for sexually violent predators) or annually (for all other offenders).[25] Offenders were required to update their addresses and to register for 10 years or life, depending on their designation.[26] There was minimal permission granted for community notification, allowing only for the release of relevant registration information "necessary to protect the public."[27] States had three years from the date of enactment of the Wetterling Act to implement its terms or else face the prospect of a

19. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038–42 (1994) [hereinafter Jacob Wetterling Act], *repealed by* SORNA § 129(a).

20. *See* SMART, U.S. DOJ, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 1 (2015) [hereinafter CASE LAW UPDATE], http://www.smart.gov/caselaw/handbook_dec2015.pdf.

21. Jacob Wetterling Act § 170101(a)(1).

22. *Id.* § 170101(b)(1)(A). The statute also required that notice be provided to the offender, and that the registration agency gather the offender's fingerprints, photograph, name, identifying factors, anticipated future residence, offense history, and treatment documentation. *Id.*

23. *Id.* § 170101(b)(2).

24. *Id.*

25. *Id.* § 170101(b)(3).

26. *Id.* § 170101(b)(4)–(6).

27. *Id.* § 170101(d)(3).

reduction of federal grant funds.[28]

B. *Final Guidelines (1996)*

The first set of final administrative guidelines regarding the Wetterling Act was published in April of 1996.[29] They specified that the Wetterling Act established "a floor for state registration systems, not a ceiling," that the provisions of the Wetterling Act did not operate retroactively, and that the five principal U.S. territories were also included in its provisions.[30] Other notable provisions of the 1996 Guidelines were the mandate that states must

28. The Wetterling Act called for the reduction of a percentage of federal grant funds for non-implementation. *Id.* § 170101(f)(2). States were entitled to an additional two years if they were making "good faith efforts to implement" the Wetterling Act's terms. *Id.* § 170101(f)(1). This "3 years-2 years" formula was repeated in the SORNA, Pub. L. No. 109-248, § 124, 120 Stat. 587, 598 (2006) (codified at 42 U.S.C. § 16924 (2012)).

29. In all, there were five sets of final guidelines, one set of proposed guidelines (never finalized), and one proposed regulation (never finalized) issued to address the Wetterling Act and its progeny. In chronological order, these were: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15,110 (Apr. 4, 1996) [hereinafter 1996 Guidelines]; Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009 (July 21, 1997) [hereinafter 1997 Guidelines]; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 63 Fed. Reg. 69,652 (Dec. 17, 1998); Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 Fed. Reg. 572 (Jan. 5, 1999) [hereinafter 1999 Guidelines] (a republication, in their entirety, of the 1998 Guidelines, due to typesetting errors in the original publication); Regulations Under the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, as Amended, 64 Fed. Reg. 7,562 (proposed Feb. 16, 1999) [hereinafter NSOR Proposed Regulation] (to be codified at 28 C.F.R. pt. 25); Guidelines for the Campus Sex Crimes Prevention Act Amendment to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 67 Fed. Reg. 65,598 (Oct. 25, 2002) [hereinafter 2002 Guidelines]; Guidelines for the PROTECT Act Amendments to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 70 Fed. Reg. 12,721 (proposed Mar. 15, 2005) [hereinafter 2005 Proposed Guidelines] (proposed guidelines). For an excellent overview of the legislative history during this period of time, see Siskin & Teasley, *supra* note 10, at 61–66.

30. Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands were included. 1996 Guidelines, 61 Fed. Reg. at 15,112. Their inclusion is driven by the definition of "'state' for purposes of eligibility for Byrne Formula Grant funding" in title 42 of the U.S. Code. *Id.* (citing 42 U.S.C. § 3791(a)(2) (2012)).

register juveniles prosecuted and convicted as adults [31] and the recommendation that states include attempted offenses, production of child pornography offenses, and convictions from federal and military courts.[32]

C. *Megan's Law (1996)*

Megan's Law was passed in May 1996 and converted the Wetterling Act's discretionary public notification procedures to a mandatory release of information when necessary to protect the public.[33] Up until this time, only a handful of states released information about registered sex offenders to the general public.[34] Shortly after the passage of Megan's Law, states began creating public registry websites to display information about registered sex offenders.[35] In 1998, six states had such websites; in 1999, 15 did; and by early 2001, there were 29 states (and the District of Columbia) with such sites.[36] These sites were not collectively searchable in any official way until 2005, when the National Sex Offender Public Registry (NSOPR) was administratively created by the U.S. Department of Justice (DOJ), initially linking 22 states to a single search engine operated by the site.[37] Only a year

31. *Id.* at 15,114.

32. *Id.* at 15,113. The 1996 Guidelines also recommended that states "participate in the FBI's Combined DNA Index System (CODIS)." *Id.* at 15,115.

33. Megan's Law, Pub. L. No. 104-145, sec. 2, § 170101(d), 110 Stat. 1345, 1345 (1996), *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006).

34. Disclosure was effected through different means, such as community meetings (Arizona), a toll-free number (California), newspaper publication (Delaware, Florida, Texas), sex-offender generated mailed-notice (Louisiana), or upon written request (Alaska). MATSON & LIEB, *supra* note 13, at 31–33, 36.

35. Alaska, Florida, and Indiana were the first states to institute public registry websites. VIRGINIA B. BALDAU, U.S. DOJ, SUMMARY OF STATE SEX OFFENDER REGISTRIES: AUTOMATION AND OPERATION, 1998 (BJS/U.S. DOJ, Summary of State Sex Offender Registries Series Prod. No. NCJ 177621, 1999), http://bjs.ojp.usdoj.gov/content/pub/pdf/sssorao.pdf; Nicholas Riccardi & Jeff Leeds, *Internet Posting Lifts Lid Off Sex Offender List*, L.A. TIMES (Aug. 15, 1997), http://articles.latimes.com/1997/aug/15/news/mn-22604; *FDLE and Law Enforcement Partners Launch Sex Offender Alert System*, FLA. DEP'T L. ENFORCEMENT (Mar. 27, 2008), http://www.fdle.state.fl.us/cms/News/2008/March/FDLE-and-Law-Enforcement-Partners-Launch-Sex-Offen.aspx.

36. DEVON B. ADAMS, U.S. DOJ, BUREAU OF JUSTICE STATISTICS FACT SHEET: SUMMARY OF STATE SEX OFFENDER REGISTRIES, 2001, at 3 (BJS/U.S. DOJ, Summary of State Sex Offender Registries Series Prod. No. NCJ 192265, 2002), http://www.bjs.gov/content/pub/pdf/sssor01.pdf.

37. *See* Press Release, OJP, U.S. DOJ, All 50 States Linked to Department of Justice National Sex Offender Public Registry Web Site (July 3, 2006), http://www.ojp.gov/newsroom/pressreleases/2006/BJA06041.htm.

later, on July 1, 2006, the 49th and 50th states were added to NSOPR.[38] SORNA changed the name of NSOPR to the Dru Sjodin National Sex Offender Public Website (NSOPW), and currently all 50 states, the District of Columbia, all five principal U.S. Territories, and over 100 federally-recognized Indian tribes participate.[39]

D. *Pam Lychner Act (1996)*

Pam Lychner was a victims' rights advocate who was killed in the Trans World Airlines 800 crash in the summer of 1996.[40] The Pam Lychner Act[41] established the law-enforcement-only National Sex Offender Registry (NSOR) at the FBI and required that states immediately transmit registration information for inclusion in that database.[42] The Lychner Act also contemplated a federally operated registration system that would step in if any states failed to establish their own registries as outlined in the Wetterling Act and Megan's Law.[43] It vested in the FBI the duties to register, verify addresses of, receive address updates for, and provide community notification about sex offenders who reside in states that have not established systems in accordance with the Wetterling Act and Megan's Law.[44] The Lychner Act also adjusted the length of registration for certain offenses and, in some instances, the manner in which such time was calculated.[45] The effective date of the entire Act was October 3, 1997.[46]

The direct registration capacity of the FBI was never developed, and the direct registration system envisioned in the Lychner Act—except for the creation and maintenance of the NSOR database—was never

38. *Id.*

39. For the most recent count of jurisdictions participating in NSOPW, see *National Sex Offender Search*, NSOPW, http://www.nsopw.gov/en/Registry/allregistries (last visited June 16, 2016).

40. 142 CONG. REC. 19,246 (1996) (statement of Senator Gramm). Mrs. Lychner had assisted in the drafting of the language of the Act which was to later bear her name. *Megan's Law Website*, History of the Law and Federal Facts, PA. ST. POLICE, http://www.pameganslaw.state.pa.us/History.aspx?dt= (last visited June 16, 2016).

41. Pam Lyncher Act, Pub. L. No. 104-236, 110 Stat. 3093, *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006).

42. *Id.* sec. 2, § 170102(f)(5)(C)(i). The Pam Lychner Act expanded community notification to include 42 U.S.C. § 5119a agencies. *Id.* sec. 2, § 170102(j)(2).

43. *See id.* § 10(c).

44. *Id.* sec. 2, § 170102(e)–(g).

45. *Id.* § 3.

46. *Id.* § 10.

implemented.[47]

E. *1997 Guidelines*

The 1997 guidelines were issued to incorporate conforming changes brought about by the passage of Megan's Law in 1996.[48] These guidelines made it clear that there is no requirement that states apply their community notification provisions retroactively and recommended that states incorporate persons convicted in tribal courts into their registry schemes.[49]

F. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (CJSA) of 1998*

The registration and notification provisions of the Wetterling Act and its progeny were amended, once again, in late November of 1997.[50] A large bill of its own accord, one section of the CJSA specifically included all state offenses comparable to those listed in the Wetterling Act, as well as federal and military offenders, added registration requirements for persons working or attending school in a state, eliminated certain notice provisions, and provided more flexibility to states by the address verification process.[51]

G. *Protection of Children from Sexual Predators Act (PROTECT Act) of 1998*

The PROTECT Act of 1998 added a grant program known as the Sex Offender Management Assistance Program that was designed to offset costs

47. At the time of the publication of the 1999 Guidelines, the date upon which NSOR was supposed to begin operating as a direct registration system was October 2, 1999. 1999 Guidelines, 64 Fed. Reg. 572, 585–86 (Jan. 5, 1999). Generally speaking, the implementation deadlines at the time of the issuance of the 1999 Guidelines were the following (assuming a two-year extension of time for good faith efforts): (1) Jacob Wetterling Act: September 12, 1999; (2) Megan's Law: September 12, 1999; (3) Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1153, 119 Stat. 2960, 3114 (2006), *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006) (extending the practical deadline for implementation until approximately 2011).

48. 1997 Guidelines, 62 Fed. Reg. 39,009, 39,010 (July 21, 1997).

49. *Id.* at 39,014, 39,019.

50. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, sec. 115, §§ 170101, 170102, 111 Stat. 2440, 2461–67 (1997), *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006).

51. *See id.*

associated with implementing sex offender registration and notification programs in accordance with the Wetterling Act and its progeny.[52] The prerequisite for the receipt of those discretionary grant funds was a state's compliance, or good faith effort to comply, with the existing standards under the Wetterling Act.[53]

H. *1999 Guidelines*

Another set of final guidelines addressing the Wetterling Act was published on January 5, 1999.[54] In large part these restated the provisions of the 1997 Guidelines and clarified that the NSOR's provisions regarding direct registration with the FBI were still not operational.[55]

I. *Proposed Rule: National Sex Offender Registry (1999)*

This proposed rule, which was never finalized, described the envisioned operation of the federally-operated registration system outlined in the Lychner Act and explained the obligations of sex offenders to notify a local FBI office when they move from one state to another.[56]

J. *Campus Sex Crimes Prevention Act (2000)*

This legislation added provisions to the Wetterling Act regarding the enrollment or employment of sex offenders at institutions of higher

52. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, sec. 607(a)(2), § 170101(i)(1)(A), 112 Stat. 2974, 2985–86, *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006).

53. *Id.* sec. 607(a)(2), § (i)(2)(A). Twenty-five million dollars were authorized to be appropriated for both fiscal year 1999 and fiscal year 2000. *Id.* sec. 607(a)(2), § (i)(3).

54. 1999 Guidelines, 64 Fed. Reg. 572 (Jan. 5, 1999).

55. *See generally id.* Other notable provisions from the 1999 Guidelines include: (1) providing more flexibility regarding the inclusion of offenses by the states in their registry programs; (2) ensuring that information is "promptly" transferred within a state (to the appropriate local or state agency), which was defined as within five days; (3) providing that any address change information be provided within 10 days after moving; (4) ensuring that notice is "promptly" made to any state where an offender intends to relocate; (5) not requiring in-person periodic address verification; (6) encouraging the use of risk assessment for the purposes of community notification. *Id.* at 578, 579, 580, 581, 582.

56. NSOR Proposed Regulation, 64 Fed. Reg. 7,562 (proposed Feb. 16, 1999) (to be codified at 28 C.F.R. pt. 25). For additional discussion of this system, see *supra* Part II.D.

education, with an effective date of October 28, 2002.[57] Sex offenders were required to provide information regarding any institution of higher education at which they were enrolled or employed.[58]

K. *PROTECT Act of 2003*

The PROTECT Act of 2003 mandated the creation of public sex offender registry websites by states and specifically included offenses involving production and distribution of child pornography in the Wetterling Act's standards.[59] States had until April 30, 2006, to establish their websites and were eligible for an additional two-year extension.[60] The 2003 PROTECT Act also called for the creation of a webpage to be managed by the DOJ to provide a link to any state which set up a public sex offender registry website.[61] There was no national search capacity with this webpage, and each state had to be searched separately.

L. *Proposed Guidelines (2005)*

More proposed guidelines regarding the Wetterling Act and its progeny were published in March of 2005.[62] They made clear that states had the discretion to decide to what extent they would publicly disclose

57. Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, sec. 1601(b), § 170101, 114 Stat. 1464, 1537 (2000), *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006).

58. It was left up to the states how to collect this information, though they were required to develop procedures to ensure that the "law enforcement agency having jurisdiction where such institution is located" was promptly notified of any such information. *Id.* sec. 1601(b)(1), § 170101(j)(1)(B). The Campus Sex Crimes Prevention Act (CSCP) also amended relevant portions of the Higher Education Act of 1965 (codified as amended at 20 U.S.C. § 1092(f)(1) (2012)) and the General Education Provisions Act (codified at 20 U.S.C. § 1232g(b) (2012)). *Id.* sec. 1601(c)(1), § 485(f)(1); *id.* sec. 1601(d), § 444(b). The final guidelines for CSCP were published later in 2002. 2002 Guidelines, 67 Fed. Reg. 65,598 (Oct. 25, 2002).

59. PROTECT Act, Pub. L. No. 108-21, sec. 604, § 170101(e)(2), sec. 605, § 170101, sec. 606, § 170101(i)(3), 117 Stat. 650, 688 (2003), *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006).

60. *See id.* § 604(b).

61. The PROTECT Act required the FBI to maintain a web page with links to all of the jurisdictions' public sex offender registry websites. *Id.* § 604(c). Even though this provision was repealed by SORNA, the FBI still maintains this page. *Sex Offender Registry Websites*, FBI, http://www.fbi.gov/scams-safety/registry (last visited June 16, 2016).

62. 2005 Proposed Guidelines, 70 Fed. Reg. 12,721 (proposed Mar. 15, 2005).

information about sex offenders through the Internet and were free to limit the disclosure to certain types of registrants.[63]

M. *National Sex Offender Public Registry Website (2005)*

The National Sex Offender Public Registry Website (NSOPW) was administratively created within the DOJ in 2005.[64] The website was populated by the voluntary participation of states with existing public sex offender registry websites.[65] The original website and its current iteration (NSOPW) were constructed in such a way that they operate much like a search engine; the federal government does not maintain or otherwise administer any of the information received from the states.[66] Either by file upload or web service, each jurisdiction's public registry websites are connected to NSOPW so that their contents are searchable, and any results retrieved are displayed directly from the individual jurisdiction's website.[67]

III. SEX OFFENDER REGISTRATION AND NOTIFICATION ACT[68]

In 2005, a series of sex offender registration bills began to wind their way through Congress, all seeking to address different portions of the sex offender registration and notification system established by the Wetterling Act and its progeny.[69] There were multiple occasions at which these

63. *Id.* at 12,721–22.

64. *About NSOPW*, NSOPW, https://www.nsopw.gov/en/Home/About (last visited June 16, 2016). A somewhat dated analysis of the records accessible through NSOPW as compared to those contained in NSOR can be found in IG REPORT, *supra* note 17.

65. *About NSOPW*, *supra* note 64.

66. *See id.*

67. *Id.*

68. *See, e.g.*, SORNA, Pub. L. No. 109-248, §§ 101–55, 120 Stat. 587, 590–611 (2006) (codified at 42 U.S.C. § 16901 *et seq.* (2012)).

69. Sex Offender Registration and Notification Act, H.R. 4905, 109th Cong. (2006) (including within SORNA kidnapping (18 U.S.C. § 1201 (2012)) and all juvenile adjudications; establishing registration requirements with the duration of 20 years, 30 years, or the offender's lifetime; requiring in-person verification of the registration every one, three, or six months; and implementing the tracking offenders released from foreign imprisonment, a risk assessment effectiveness study, and creation of an "Office on Sexual Violence and Crimes Against Children" to administer registration standards); Sex Offender Registration and Notification Act, S. 1086, 109th Cong. (as reported to Senate, Oct. 20, 2005) (requiring a three-tier system of registration; allowing federally-recognized Indian tribes to elect to create their own registration systems; providing for 10-year, 20-year, or lifetime registration and three-month, six-month, or annual appearances; excluding juvenile adjudications; limiting website displays to tier II and III

measures were debated,[70] and one full hearing was held regarding their provisions.[71] Formally introduced in December of 2005, the Adam Walsh

offenders; and not imposing Byrne JAG reduction for non-implementation); Children's Safety Act of 2005, H.R. 3132, 109th Cong. § 4248 (2005) (authorizing the FBI to register offenders not registerable by jurisdictions); Dru's Law, S. 792, 109th Cong. (2005); Sex Offender Registration and Notification Act, H.R. 3133, 109th Cong. §§ 101(2), 103(b)(1), (3), 105, 106, 119(c) (2005) (including all federally-recognized Indian tribes as registration jurisdictions; requiring registration within five days of conviction if no prison is imposed; establishing duration of registration as 20 years or life; requiring biannual registration verification for all offenders; establishing a two-year implementation deadline; and incorporating the provisions of the Aime Zyla Act of 2005, H.R. 2797, 109th Cong. (2005), regarding juvenile registration); Amie Zyla Act of 2005, H.R. 2797, 109th Cong. § 2(3)(C) (requiring states to register all juveniles who have been adjudicated delinquent of a sex offense); Dru's Law, H.R. 95, 109th Cong. § 3(a), (b)(2) (2005) (creating a public registry website directly linked to the FBI's NSOR database, including geographic radius search capacity and posting of an offender's date of birth).

70. The House of Representatives issued a report making extensive changes to Children's Safety Act of 2005, H.R. 3132, 109th Cong. § 4248 (2005). H.R. REP. NO. 109-218, pt. 1 (2005). In addition, the 278-page-long Congressional Record detailed the legislative history of the bill, the rationale behind its provisions along with dissenting views, and the markup transcript from the House Judiciary Committee session on July 27, 2005. *See* 152 CONG. REC. 15,712–22 (2006). Part 2 of the report is an incorporation of the Children's Safety and Violent Crime Reduction Act of 2005 report into the official report. H.R. REP. NO. 109-218, pt. 2 (2005). For additional record of the debate surrounding all of these bills, see 152 Cong. Rec. 15695–721 (2006) (debate regarding Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. (as amended by Senate and considered in House, July 21, 2006)); 152 Cong. Rec. 15325–45 (2006) (debate regarding Children's Safety and Violent Crime Reduction Act of 2006, H.R. 4472, 109th Cong. (as placed on Senate calendar, Mar. 27, 2006)); 152 Cong. Rec. 7139–51 (2006) (debate regarding Sex Offender Notification and Registration Act, S. 1086); 152 Cong. Rec. 2954–89 (2006) (debate regarding Children's Safety and Violent Crime Act of 2006, H.R. 4472, 109th Cong. (as engrossed in House, Mar. 8, 2006)); 151 Cong. Rec. 20,190, 20,230 (2005) (debate regarding Children's Safety Act of 2005, H.R. 3132).

71. *Protection Against Sexual Exploitation of Children Act of 2005, and the Prevention and Deterrence of Crimes Against Children Act of 2005: Hearing on H.R. 2318 and H.R. 2388 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. (2005). The Congressional Budget Office issued two cost estimates in conjunction with these proposed bills. CONG. BUDGET OFFICE, COST ESTIMATE H.R. 4472: CHILDREN'S SAFETY AND VIOLENT CRIME REDUCTION ACT OF 2005, at 2 (2006) (estimating cost of $1.5 billion from 2006 to 2011); CONG. BUDGET OFFICE, COST ESTIMATE: S. 1086, A BILL TO IMPROVE THE NATIONAL PROGRAM TO REGISTER AND MONITOR INDIVIDUALS WHO COMMIT CRIMES AGAINST CHILDREN OR SEX OFFENSES, at 1 (2005) (estimating cost of $530 million from 2006 to 2010); CONG. BUDGET OFFICE, COST ESTIMATE H.R. 3132: CHILDREN'S SAFETY ACT OF 2005, at 1 (2005) (estimating cost of $500 million from 2006 to 2010).

Child Protection and Safety Act (Adam Walsh Act) was a compendium of these pending bills.[72]

The Adam Walsh Act was signed into law on July 27, 2006, and addressed a comprehensive set of issues related to child protection.[73] There were a total of seven titles in the Act.[74] Included among these provisions were requirements regarding criminal sentencing, discovery in child pornography cases, and others.[75] Title I of the Adam Walsh Act is the Sex Offender Registration and Notification Act (SORNA).[76]

Like the Wetterling Act and similar acts, SORNA sets a baseline standard for sex offender registration systems that jurisdictions are required to implement.[77] Like the Wetterling Act, the motivation of states and territories to implement SORNA is incentive-based: a failure to implement results in the reduction of federal grant funds.[78] A federal office within the DOJ, the SMART Office, was created by SORNA to provide implementation assistance to the jurisdictions.[79]

72. *See* Children's Safety and Violent Crime Reduction Act of 2005, H.R. 4472, 109th Cong. (as introduced in House, Dec. 8, 2005). As introduced, the bill had many provisions different from its final version, including: nearly all adjudicated juveniles required to register; a five-day initial registration period; 90-day mandatory minimum sentence for a jurisdiction-level failure to register; providing a statement of facts (regarding the underlying offense) in the registry; 20-year, 30-year, and lifetime registration; and requiring DOJ to carry out registration duties when a jurisdiction does not meet SORNA's standards. *Compare id.*, *with* Children's Safety and Violent Crime Reduction Act of 2006, H.R. 4472, 109th Cong. (as placed on Senate calendar, Mar. 27, 2006).

73. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 [hereinafter Adam Walsh Act] (codified at 42 U.S.C. § 16901 *et seq.* (2012)); *see also H.R. 4472 (109th): Adam Walsh Child Protection and Safety Act of 2006*, GOVTRACK.US, https://www.govtrack.us/congress/bills/109/hr4472 (last visited June 16, 2016). SORNA provided for the repeal of all of the sex offender registration and notification-related code provisions listed in Part II. SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 590, 600–01 (repealing 42 U.S.C. §§ 14071–73, effective July 27, 2009). One of the overlooked and perhaps unintended consequences of this provision is that the terms of the Campus Sex Crimes Prevention Act were also repealed. *See id.*; *supra* Part II.J.

74. *See* Adam Walsh Act, Pub. L. No. 109-248, 120 Stat. 587.

75. *See id.* §§ 141(b), 143(b)(3).

76. *Id.* § 101.

77. *Id.* § 112.

78. *Id.* § 125.

79. *Id.* § 146(a).

A. *Basic Provisions of SORNA*

SORNA operates by setting a baseline set of standards that jurisdictions must substantially implement.[80] Failure to do so results in a predetermined penalty, by statute.[81] For states and territories, the penalty is a reduction of their annual Byrne JAG Grant funding.[82] For a federally-recognized Indian tribe that has elected to become a SORNA jurisdiction, the penalty is a delegation of sex offender registration and notification responsibilities to the state in which the tribe is located, an outcome that many tribes see as a targeted loss of sovereignty.[83] Jurisdictions are free to choose not to substantially implement SORNA, though they will suffer the predetermined penalty for doing so.[84] What follows is written with that caveat in mind—that the SORNA "requirements" are ones that jurisdictions may legally choose to ignore, if they so desire, so long as they are willing to accept the consequences.

The SORNA standards require that jurisdictions register any person "convicted"[85] of a "sex offense"[86] (i.e., a "sex offender"[87]) as SORNA defines those terms. There are some common misunderstandings about who is required to register under SORNA, which merit brief discussion.[88] Chief among these misunderstandings is that convictions involving activities such as "public urination," "sexting,"[89] or consensual teenage sexual contact are

80. *Id.* § 125.

81. *Id.*

82. *Id.* § 125(a).

83. 42 U.S.C. § 16927(a)(2)(C) (2012). Tribal implementation of SORNA merits its own section and full discussion, see *infra* Part III.H.1.

84. 42 U.S.C. § 16925(b)(4).

85. *Id.* § 16911(8) (defining "convicted" as it applies to juvenile adjudications of delinquency); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,040 (July 2, 2008) [hereinafter Final Guidelines].

86. 42 U.S.C. § 16911(5)(A); Final Guidelines, 73 Fed. Reg. at 38,051–52.

87. 42 U.S.C. § 16911(1).

88. Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849, 81,851 (Dec. 29, 2010) [hereinafter Applicability of SORNA] (codified at 28 C.F.R. § 72.3 (2015)).

89. "Sexting," the act of transmitting sexually explicit images of a person to another, is usually prosecuted as a distribution, production, or possession of child pornography offense when the individual photographed is under 18-years-old. Joseph Paravecchia, Note, *Sexting and Subsidiarity: How Increased Participation and Education from Private Entities May Deter the Production, Distribution, and Possession of Child Pornography Among Minors*, 10 AVE MARIA L. REV. 235, 236 (2011). The prevalence of sexting behavior among minors and the rate of prosecution for such activities are

sex offenses under SORNA and therefore are required to be registered.[90] While certain jurisdictions may require persons convicted of offenses such as these to be registered as sex offenders under their own laws, SORNA does not require jurisdictions to do so.[91]

If a person is a sex offender, jurisdictions must register that person in accordance with SORNA's terms.[92] In an ideal SORNA-implementing jurisdiction, after determining that an offender is required to register, the jurisdiction would then determine into which tier an offender's conviction falls.[93] Under SORNA, Tier I offenses include misdemeanors and possession of child pornography,[94] Tier II offenses generally deal with child sexual exploitation offenses,[95] and Tier III is reserved for the most serious convictions, including forcible penetration convictions or offenses against children under 13.[96] The tier of the sex offender's conviction will determine

discussed in two recent articles in *Pediatrics.* Kimberly J. Mitchell et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, PEDIATRICS, Jan. 2012, at 1, 7 (approximately seven percent of youth had received nude or nearly nude images of others, while only 2.5 percent of youth had created or appeared in such images); Janis Wolak et al., *How Often are Teens Arrested for Sexting? Data from a National Sample of Police Cases*, PEDIATRICS, Jan. 2012, at 4, 7–9.

90. *See Prod. No. NCJ 249581*, *The Sex Offender Registration and Notification Act (SORNA): A Guide on SORNA Implementation in Indian Country*, SMART 22, http://www.smart.gov/pdfs/SORNA-IC-Guide.pdf (last visited May 19, 2016) [hereinafter *SORNA Guide*].

91. To be registerable under SORNA, an offense must meet the statutory definition of "sex offense" as it is expanded upon in the Final Guidelines. *See* Final Guidelines, 73 Fed. Reg. at 38,051–52; *supra* text accompanying note 86. Because "public urination" is not a contact-based sexual offense, it would only be registerable under SORNA if it met the definition of "specified offense against a minor" included in the definition of sex offense found at 42 U.S.C. § 16911(7). *See* 42 U.S.C. § 16911(5)(A), (7); *see also* Final Guidelines, 73 Fed. Reg. at 38,051–52. Unless the elements of the public urination offense meet that definition, the offense will generally not be required to be registered under SORNA. *See* Final Guidelines, 73 Fed. Reg. at 38,051–52. In addition, the often-cited situation of consensual sexual conduct between teenagers is specifically *excluded* from the definition of sex offense in 42 U.S.C. § 16911(5)(C); therefore, SORNA does not require registration for any offenses meeting the definition contained therein. 42 U.S.C. § 16911(5)(C) (Consensual sexual conduct when the victim is 13 or older and the defendant is no more than four years older than the victim *is not* a sex offense under SORNA.).

92. *See* 42 U.S.C. § 16914(b).

93. *See id.* § 16911(2)–(4).

94. *See id.* § 16911(2); Final Guidelines, 73 Fed. Reg. at 38,053.

95. *See* 42 U.S.C. § 16911(3); Final Guidelines, 73 Fed. Reg. at 38,053.

96. *See* 42 U.S.C. § 16911(4); Final Guidelines, 73 Fed. Reg. at 38,053–54.

how long and how often that offender must register.[97]

Once this determination is made, the jurisdiction would then ensure that certain pieces of information are gathered from the sex offender.[98] There are approximately 22 items of information required to be collected, including biometric identifiers such as fingerprints, palm prints, and DNA.[99] Once collected, all of this information must be submitted to the appropriate FBI databases.[100]

In addition, certain pieces of registration information are required to be displayed on the jurisdiction's public registry website.[101] The jurisdiction's public registry website must connect to NSOPW.[102] This is the only official nationwide source for public sex offender registry data.[103] Jurisdictions must also have a thorough community notification system in place so that other law enforcement agencies, community organizations, and the public at large are aware of any new or changed registrations.[104]

Jurisdictions are also required to have procedures in place for conducting regular registration appearances and ensuring that sex offenders immediately update important registration information in the interim.[105] If a sex offender fails to appear for registration or absconds from his or her registration responsibilities, a jurisdiction must have a mechanism to investigate, apprehend, and prosecute the offender, where appropriate.[106]

This seemingly straightforward approach to sex offender registration and notification has generated many issues in its implementation.[107] Instead

97. 42 U.S.C. §§ 16915(a), 16916; *see* Final Guidelines, 73 Fed. Reg. at 38,067–69.

98. *See* 42 U.S.C. § 16914; Final Guidelines, 73 Fed. Reg. at 38,055–58.

99. *See* 42 U.S.C. § 16914; Final Guidelines, 73 Fed. Reg. at 38,055–58.

100. The relevant federal databases are: National Sex Offender Registry (NSOR); Combined DNA Index System (CODIS); Next Generation Identification (NGI), which houses fingerprints; and National Palm Print System (NPPS), which houses palm prints. *See* 42 U.S.C. § 16921(b)(1); CASE LAW UPDATE, *supra* note 20, at 3.

101. 42 U.S.C. § 16918(a); Final Guidelines, 73 Fed. Reg. at 38,042.

102. *See* 42 U.S.C. § 16920(b).

103. *See About NSOPW*, *supra* note 64. Other websites purporting to offer any kind of national search of sex offender information (such as www.familywatchdog.us or similar websites) are unofficial, privately operated, and not subject to the strict updating requirements of NSOPW. *See id.*

104. 42 U.S.C. § 16921(b)(3); Final Guidelines, 73 Fed. Reg. at 38,060–61.

105. 42 U.S.C. § 16913(c), (e); Final Guidelines, 73 Fed. Reg. at 38,065.

106. *See* 42 U.S.C. § 16922; Final Guidelines, 73 Fed. Reg. at 38,069.

107. *See SORNA Guide*, *supra* note 90, at 5.

of addressing each issue individually as dozens of commenters have already done,[108] this Article will conduct a broader policy overview. In SORNA, Congress effectively reversed or substantially revised a significant number of federal policies regarding sex offender registration that had existed for many years under the Wetterling Act and its progeny.[109] It is this wholesale policy shift that has created the most difficulty for jurisdictions in implementing SORNA. These changes are discussed below in Part III.G.

B. *Final Guidelines (2008)*

Soon after its passage, questions arose about how to implement SORNA on the state, tribal, and local level.[110] SORNA required the Attorney General to issue guidelines to interpret and implement its terms, and the DOJ issued proposed guidelines for SORNA implementation in May of 2007.[111] With some minor revisions, these guidelines were finalized in June of 2008.[112]

C. *KIDS Act of 2008*

The first statutory amendment to SORNA was a result of the KIDS

108. *See, e.g.*, Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 OHIO ST. J. CRIM. L. 3, 11 (2008) (focusing on Indian reservations); *see also* Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 1002–03 (2010); J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 164 (2011); Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 393 (2009) (discussing constitutional issues). For another broad discussion, see SMART, U.S. DOJ, GLOBAL OVERVIEW OF SEX OFFENDER REGISTRATION AND NOTIFICATION SYSTEMS 6, 24 (2014), http://www.smart.gov/pdfs/GlobalOverview.pdf.

109. *See* Final Guidelines, 73 Fed. Reg. at 38,030.

110. *See* SMART Watch, *SORNA Implementation Update*, SMART (2010), http://www.smart.gov/smartwatch/10_summer/update.html.

111. 42 U.S.C. § 16912(b); National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210 (proposed May 30, 2007).

112. Final Guidelines, 73 Fed. Reg. at 38,030. Beginning in 2009, the SMART Office issued a number of "implementation documents" which detail certain policies in SORNA implementation that were not addressed by the statute itself or the Final (or, later, the Supplemental) Guidelines. To date there are 15 implementation documents, all of which are available on the SMART Office website, smart.gov; these address a host of implementation issues, including fingerprint submissions, tribal considerations, and community notification. *SORNA Implementation Documents*, SMART, http://www.smart.gov/pdfs/SORNA_ImplementationDocuments.pdf (last visited June 16, 2016).

Act, which was passed in the fall of 2008.[113] This bill codified the requirement—previously found in the 2008 Final Guidelines—that jurisdictions collect Internet identifiers from registered sex offenders and prohibit the disclosure of such identifiers on public registry websites.[114]

D. *Supplemental Guidelines (2011)*

In January 2011, the Supplemental Guidelines for SORNA were issued, addressing a handful of controversial issues that had lingered for the previous five years.[115] Under these guidelines, jurisdictions may keep juveniles adjudicated delinquent for sex offenses off their public registry websites.[116] Further, jurisdictions must collect international travel information from sex offenders to facilitate international tracking of registered sex offenders, as mandated by SORNA.[117]

E. *Military Sex Offender Reporting Act (2015)*

"Prior to 2015, there had been no provision of federal law (since the passage of SORNA) which enabled or permitted federal authorities to register sex offenders such that the information from those registrations would be connected to any national databases."[118] However, in May 2015, Congress amended SORNA to require the Department of Defense (DoD) to submit registration information to NSOR and NSOPW on any sex offender who is convicted by martial courts or released from a military corrections facility.[119]

113. KIDS Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (codified at 42 U.S.C. §§ 16901 *et seq.*).

114. *Id.* § 2(a). The KIDS Act also requires that the Attorney General "establish and maintain a secure system that permits social networking websites to compare the information contained in [NSOR] with the Internet identifiers of users of the social networking websites." *Id.* § 3(a)(1).

115. *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1,630, 1,630 (Jan. 11, 2011) [hereinafter Supplemental Guidelines].

116. *Id.* at 1,636–37.

117. *Id.* at 1,637–38. The proposed system for tracking such offenders is described in a white paper issued by the SMART Office. INT'L TRACKING OF SEX OFFENDERS WORKING GRP., INTERNATIONAL TRACKING OF SEX OFFENDERS WORKING GROUP WHITE PAPER (2010), http://www.ojp.usdoj.gov/smart/pdfs/InternationalTrackingofSexOffendersWorkingGroup.pdf.

118. CASE LAW UPDATE, *supra* note 20, at 5.

119. Military Sex Offender Reporting Act of 2015, Pub. L. No. 114-22, sec. 502(a), § 128A, 129 Stat. 227, 258 (to be codified at 42 U.S.C. § 16928a). The registration and tracking of military sex offenders is discussed in more detail *infra* Part IV.B.

F. *International Megan's Law (2016)*

International Megan's Law (IML) is the most recent statutory amendment to SORNA.[120] In addition to authorizing certain agencies to share information with foreign governments about sex offenders travelling internationally, it partially codifies the requirement that offenders provide notice of intended international travel.[121] Further, IML requires the U.S. Department of State to place a unique identifier on the individual passports of any person currently required to register as a sex offender based on a conviction for a sex offense against a minor.[122] IML also amends 18 U.S.C. § 2250 in an effort overcome the statutory issues which have hampered the ability to prosecute individuals for failure to update their registration information upon leaving the United States.[123]

G. *Changes to Previous Federal Policy*

As described above, every state had a sex offender registration system and website in place prior to SORNA's enactment in 2006.[124] Many of these states had tailored their registration systems to the standards of the Wetterling Act and its progeny.[125] Therefore, once SORNA was enacted, there were some striking contrasts between the state systems enacted based on the preceding federal standards under the Wetterling Act, as compared to the new SORNA standards. The chart below illustrates these differences:

120. International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119 (Feb. 8, 2016) (future location 130 Stat. 15), https://www.congress.gov/114/bills/hr515/BILLS-114hr515enr.pdf.

121. *Id.* § 6.

122. *Id.* § 8.

123. *See* United States v. Nichols, 136 S. Ct. 1113 *passim* (2016).

124. *See* CASE LAW UPDATE, *supra* note 20, at 9.

125. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS 15 (2013), http://www.gao.gov/assets/660/652032.pdf [hereinafter SORNA REPORT, GAO-13-211], http://www.gao.gov/assets/660/652032.pdf.

	Wetterling Act	SORNA
Address Verification	*Annually,*[126] *or every 90 days for "sexually violent predators,"*[127] *and no in-person appearance required*[128]	*Tiered in-person appearances required at 3 months, 6 months or annually*[129]
Determining Registration and Notification Responsibilities	*Risk Assessment permitted for community notification purposes*[130]	*Conviction-based*[131]
Duration of Registration	*10 years or Life*[132]	*15 years, 25 years, or Life*[133]
Electronic Sharing of Information	*Not Required*[134]	*Required*[135]

126. Jacob Wetterling Act, Pub. L. No. 103-322, § 170101(b)(3)(A), 108 Stat. 1796, 2038 (1994), *repealed by* SORNA, Pub. L. No. 109-248, § 129(a), 120 Stat. 587, 600–01.

127. *Id.* § 170101(b)(3)(B). "Sexually violent predator" was defined in § 170101(a)(3)(C), and Wetterling mandated that the determination as to whether a person was a sexually violent predator was to be made by the sentencing court. *Id.* § 170101(a)(2). For further discussion, see 1996 Guidelines, 61 Fed. Reg. 15,110, 15,111 (Apr. 4, 1996); *supra* text accompanying note 29.

128. *See* 1999 Guidelines, 64 Fed. Reg. 572, 581 (Jan. 5, 1999).

129. 42 U.S.C. § 16916 (2012).

130. 1999 Guidelines, 64 Fed. Reg. at 582.

131. 42 U.S.C. § 16911(1).

132. Jacob Wetterling Act of 1994, Pub. L. No. 103-322, § 170101(b)(6), 108 Stat. 1796, 2041 (1994), *repealed by* SORNA, Pub. L. No. 109-248, § 129(a), 120 Stat. 587, 600–01.

133. 42 U.S.C. § 16915(a).

134. *See* 1999 Guidelines, 64 Fed. Reg. at 580–81 (remaining silent as to method of communication of information).

135. 42 U.S.C. § 16919(b); Final Guidelines, 73 Fed. Reg. 38,030, 38,065 (July 2, 2008).

Items Required to be Registered	*8*[136]	*22*[137]
Juveniles	*Not required to be registered unless tried as an adult*[138]	*Certain juveniles adjudicated delinquent required to register*[139]
Offenders Required to be Listed on Public Registry Website	*Mandated only when necessary to protect the public*[140]	*Mandated for almost all adult offenders*[141]
Public Registry Website	*Not required until 2003*[142]	*Jurisdiction website required, with particular information*[143]

136. Jacob Wetterling Act § 170101(b)(1) (requiring residence address, anticipated future residence, fingerprints, photograph, identifying factors, name, offense history, and treatment documentation).

137. 42 U.S.C. § 16914; Supplemental Guidelines, 76 Fed. Reg. 1,630, 1,637–38 (Jan. 11, 2011) (international travel information and notice/acknowledgement form); Final Guidelines, 73 Fed. Reg. at 38,055–58 (requiring name, social security number, address [current and future], name and address of employers, other employment information, name and addresses of schools, license plate and description of vehicle, physical description, text of the law, criminal history, finger and palm prints, DNA sample, current photograph, driver's license, Internet identifiers, phone numbers, other residential information, temporary lodging information, travel and immigration documents, professional licenses, date of birth, and residential lodging and travel information).

138. *See* 1996 Guidelines, 61 Fed. Reg. 15,110, 15,114 (Apr. 4, 1996).

139. 42 U.S.C. § 16911(8); Final Guidelines, 73 Fed. Reg. at 38,050.

140. Public disclosure of registration information was contemplated, but not required, by the Wetterling Act of 1994. 1996 Guidelines, 61 Fed. Reg. at 15,111–12. The passage of Megan's Law mandated that certain information be released when necessary to protect the public. Megan's Law, Pub. L. No. 104-145, sec. 2, § 170101(d), 110 Stat. 1345, 1345 (1996), *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006).

141. Sex offender information must be posted on a jurisdiction's public registry website, except for information regarding persons required to register based on a Tier I offense where the victim was an adult or in the case of a juvenile delinquency adjudication. 42 U.S.C. § 16918; Supplemental Guidelines, 76 Fed. Reg. at 1,636–37; Final Guidelines, 73 Fed. Reg. at 38,050, 38,059.

142. PROTECT Act, Pub. L. No. 108-21, sec. 604, § 170101(e)(2), 117 Stat. 650, 688 (2003), *repealed by* SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600–01 (2006); 2005 Proposed Guidelines, 70 Fed. Reg. 12,720, 12,721–22 (proposed Mar. 15, 2005). There were no requirements on website contents under the PROTECT Act.

143. 42 U.S.C. § 16918(a); Final Guidelines, 73 Fed. Reg. at 38,058–60.

Retroactivity	*Not retroactive*[144]	*Retroactive*[145]
Tier Levels	*Two: Sexually violent offenses*[146] *and Criminal offenses against a minor victim;* [147] *"sexually violent predators"*[148]	*Three: Tier I,*[149] *Tier II,*[150] *and Tier III*[151]
Tribal Offenders	*Not included*[152]	*Included*[153]

For at least a decade prior to SORNA's passage, if not longer, states had created and invested in a criminal justice infrastructure that supported the Wetterling Act's standards.[154] When faced with SORNA's new standards, in many cases requiring a more expanded infrastructure and capacity—along with significant policy changes—many jurisdictions resisted.[155] That resistance has continued in some places yet has been alleviated in many others.[156]

The changes to federal policy reflected in SORNA were designed to enhance the sex offender registration and notification process nationwide,

144. 1996 Guidelines, 61 Fed. Reg. at 15,112.

145. SORNA itself was silent as to its retroactive effect, see 42 U.S.C. § 16913(d), but subsequent rules and guidelines make clear that it is to be applied to certain offenders convicted prior to SORNA's effective date. *See* Applicability of SORNA, 75 Fed. Reg. 81,849, 81,850–51 (Dec. 29, 2010) (codified at 28 C.F.R. § 72.3 (2015)) (final rule); Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,896 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72 (2015)) (interim rule); Supplemental Guidelines, 76 Fed. Reg. at 1,639; Final Guidelines, 73 Fed. Reg. at 38,046–47.

146. Jacob Wetterling Act, Pub. L. No. 103-322, § 170101(a)(3)(B), 108 Stat. 1796, 2039 (1994), *repealed by* SORNA, Pub. L. No. 109-248, § 129(a), 120 Stat. 587, 600–01.

147. *Id.* § 170101(a)(3)(A).

148. *See supra* text accompanying note 127.

149. 42 U.S.C. § 16911(2).

150. *Id.* § 16911(3).

151. *Id.* § 16911(4).

152. The Wetterling Act itself did not specify which types of "criminal offenses" would require registration; it did not answer the question as to whether state, federal, military, tribal, territorial, or foreign convictions were included in its terms. *See* Jacob Wetterling Act § 170101. In 1996, territories were specifically directed to implement the standards of Wetterling and its progeny. *See* 1996 Guidelines, 61 Fed. Reg. 15,110, 15,112 (Apr. 4, 1996).

153. 42 U.S.C. § 16911(10).

154. *See* CASE LAW UPDATE, *supra* note 20, at 9.

155. *See* SORNA REPORT, GAO-13-211, *supra* note 125.

156. *See id.*

so law enforcement and the general public have accurate information about sex offenders in their communities.[157] With this in mind, a discussion of the significant improvements contained in SORNA is in order.

H. *Enhancements to Previous Federal Policy*

1. *Tribal Registration*

Prior to the passage of SORNA, federally-recognized Indian tribes were not required to be registration jurisdictions, nor were tribal sex offense convictions required to be registered.[158] While a handful of tribes had sex offender registration programs prior to SORNA's passage,[159] most did not. SORNA created a scheme wherein tribes that did not fall within the definition of Public Law 280 were considered to be SORNA registration jurisdictions.[160] There were originally 212 tribes that met this definition, and 198 of those tribes chose to pursue implementation of SORNA.[161] As of 2015, there are more than 160 federally-recognized tribes operating as SORNA registration jurisdictions.[162] This means that they either have

157. *See Frequently Asked Questions: Using the NSOPW*, NSOPW, https://www.nsopw.gov/en/Home/FAQ (last visited June 16, 2016).

158. Lori McPherson, *New Developments in SORNA*, U.S. ATTORNEYS' BULL., July 2015, at 2–3.

159. Examples of federally-recognized tribes that had implemented sex offender registration laws prior to the passage of SORNA include Menominee Indian Tribe of Wisconsin, Navajo Nation, Rosebud Sioux Tribe, and Tohono O'odham Nation. *Tracking Sex Offenders in Indian Country: Trial Implementation of the Adam Walsh Act: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 14 (2008) [hereinafter *Tribal Implementation Hearing*] (statement of Honorable Robert Moore, Tribal Councilman, Rosebud Sioux Tribe); Marley Shebala, *Pressure on to Upgrade Sex Offender Registry*, NAVAJO TIMES (Mar. 22, 2012), http://navajotimes.com/news/2012/0312/032212reg.php; *Sex Offenders Registration Network*, MENOMINEE TRIBAL POLICE LAW ENF'T CTR., http://metp.menominee-nsn.gov/SORN/Disclaimer.aspx (last visited June 16, 2016).

160. *See* 42 U.S.C. § 16927(b)(2)(A) (2012); Act of Aug. 15, 1993, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012)); *see also Frequently Asked Questions About Public Law 83-280*, OFFICES U.S. ATT'Y, https://www.justice.gov/usao-mn/Public-Law%2083-280 (last visited June 16, 2016) (describing generally Public Law 280).

161. SMART, U.S. DOJ, TRIBAL RESOLUTIONS PURSUANT TO THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006, at 1 (2008), http://www.smart.gov/pdfs/tribal_govt_elections.pdf.

162. CASE LAW UPDATE, *supra* note 20, at 14. For the current list of implemented jurisdictions, see *Jurisdictions that Have Substantially Implemented SORNA*, SMART, http://www.smart.gov/newsroom_jurisdictions_sorna.htm (last visited June 16, 2016).

established, or are in the process of establishing, a sex offender registration and notification program; 100 of those tribes had substantially implemented SORNA as of July 1, 2016.[163]

Tribes have had multiple issues with full implementation of SORNA that are quite different from those of their state counterparts.[164] As an example, at the time of the passage of SORNA, very few tribes had direct access to criminal justice databases involved in sex offender registration and hosted by the FBI, such as NSOR, Next Generation Identification (NGI), and Combined DNA Index System (CODIS).[165] In addition, many tribal criminal justice systems did not have a robust process for investigating, prosecuting, sentencing, and supervising sex offenders.[166] A final major issue, the most controversial one over time, is the penalty for tribal non-implementation of SORNA.[167] As opposed to the states and territories that are only subject to a reduction of a percentage of their Byrne JAG grant funds, tribes that fail to substantially implement SORNA are subject to an involuntary delegation of their registration and enforcement responsibilities to the state within which they are located.[168] This potential loss of sovereignty, an approach unique in federal criminal justice legislation,

163. *Id.*

164. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-23, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: ADDITIONAL OUTREACH AND NOTIFICATION OF TRIBES ABOUT OFFENDERS WHO ARE RELEASED FROM PRISON NEEDED 17–18 (2014) [hereinafter SORNA REPORT, GAO-15-23].

165. *See* 42 U.S.C. § 16921(b)(1); CASE LAW UPDATE, *supra* note 20, at 3; *infra* Part III.H.2. NSOR hosts sex offender registration data; NGI holds fingerprint and palm print information; and CODIS holds DNA information. CASE LAW UPDATE, *supra* note 20, at 3. Where a tribe does not have direct access to the biometric databases (i.e., NGI or CODIS), the DOJ has developed manual workarounds for SORNA-eligible tribes to submit such information directly to these FBI databases. *DNA Submission by SORNA Tribal Jurisdictions*, SMART, http://www.smart.gov/pdfs/factsheet_dna.pdf (last visited June 16, 2016). In addition, the DOJ has recently launched the Tribal Access Program (TAP), which enables certain federally-recognized tribes to directly submit data to all of the required FBI databases under SORNA. For more information about TAP, see *Tribal Access Program (TAP)*, U.S. DOJ, https://www.justice.gov/tribal/tribal-access-program-tap (last visited June 16, 2016). For additional information about SORNA and Indian Country, see *Indian Country*, SMART, http://www.smart.gov/indiancountry.htm (last visited June 16, 2016.).

166. *See Indian Country Accomplishments of the Justice Department*, U.S. DOJ, https://www.justice.gov/tribal/accomplishments (last visited June 16, 2016).

167. *See Byrne JAG Grant Reductions Under SORNA*, SMART, http://www.smart.gov/byrneJAG_grant_reductions.htm (last visited June 16, 2016).

168. 42 U.S.C. § 16927(a)(2)(C); *Byrne JAG Grant Reductions*, *supra* note 167.

remains very contentious.[169]

a. SORNA implementation in Indian Country. While most tribes adhere to SORNA when implementing its terms, often that adherence creates a gap between the tribe's registration requirements and the requirements of the state(s) within which their territory lies.[170]

> In some cases there are tribes that have *more rigorous* registration requirements than the states in which they are located, particularly those tribes located in states that have not substantially implemented SORNA. For example, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) was one of the first tribes to substantially implement SORNA and meet all of SORNA's requirements in doing so. CTUIR is located entirely within the State of Oregon, which falls short of many of SORNA's provisions.[171]

b. Validity of tribal court convictions. There are legal issues unique to Indian Country that impact the registration of tribal sex offenders and the enforcement of sex offender registration requirements against persons who either reside on tribal lands or were convicted by tribal courts.[172] For example, because of the different standards regarding the right to counsel in some tribal courts as compared to state or federal courts, it is sometimes argued that prosecuting a person based in part on an underlying tribal conviction (e.g., failure to register based on an underlying tribal sex offense conviction) could violate the Sixth Amendment of the U.S. Constitution.[173]

169. *See Adam Walsh Act*, NAT'L CONGRESS AM. INDIANS, http://www.ncai.org/policy-issues/tribal-governance/adam-walsh-act (last visited June 16, 2016). There are numerous other issues surrounding SORNA and Indian Country that tribal advocates contend are problematic. *Tribal Implementation Hearing*, *supra* note 159 (statement of the National Congress of American Indians); *Adam Walsh Act Implementation*, NAT'L CONGRESS AM. INDIANS (Dec. 2010), http://files.ncai.org/3c_-_Adam_Walsh_Act_Implementation_-_FINAL.pdf; Matthew Brent Leonhard, *The Adam Walsh Act and Tribes: One Lawyer's Perspective*, SSRN (June 16, 2012), http://www.ssrn.com/abstract=1838650.

170. McPherson, *supra* note 158, at 3.

171. *Id.* (citing Maxine Bernstein, *Sex Offenders in Oregon: State Fails to Track Hundreds*, OREGONIAN (Oct. 2, 2013), http://www.oregonlive.com/sexoffenders/special-presentation/ (Oregon only posts 2.5 percent of its registered sex offenders on its public sex offender registry website)). GAO issued a comprehensive report regarding SORNA implementation in Indian Country. *See* SORNA REPORT, GAO-15-23, *supra* note 163.

172. *See* SORNA REPORT, GAO-15-23, *supra* note 164, at 3.

173. *See* United States v. Bryant, 769 F.3d 671 (9th Cir. 2014), *rev'd*, 136 S. Ct. 1954 (2016).

United States v. Bryant, decided in 2016, held that tribal court convictions obtained in proceedings that comply with the Indian Civil Rights Act (ICRA) may be used as predicate convictions in a subsequent federal prosecution.[174]

c. Tribal registration vs. state registration. Another issue in Indian Country is whether offenders living, working, and attending school exclusively on tribal lands also have to register with the state within which the tribe is located.[175] While a plain reading of SORNA goes against an affirmative answer, this question of dual-registration has formed the basis of litigation, particularly in the southwest.

"For example, in New Mexico, the State cannot impose a duty to register on enrolled tribal members living on tribal land who have been convicted of federal sex offenses."[176] However, in neighboring Arizona, there is a split between the federal and state courts regarding the responsibilities of sex offenders in Indian Country.[177] In a case arising out of Arizona, the Ninth Circuit held that "persons living in Indian Country are required to keep their registration current with both the state and the tribe" (i.e., dual-register), or else run the risk of a federal prosecution for failure to register under 18 U.S.C. § 2250.[178] However, Arizona's state courts have concluded that "a tribal member in Arizona residing on tribal land" is not required to dual-register, and "*cannot* be prosecuted under state law for failure to register unless a tribe's registration responsibilities have been delegated to the state via SORNA's delegation procedure."[179]

174. *Bryant*, 136 S. Ct. at 1964–65; Indian Civil Rights Act (ICRA), 25 U.S.C. §1301 *et. seq.* Prior to the Supreme Court's decision in *United States v. Bryant*, there had been a circuit split regarding the question of whether convictions in tribal court can form the basis of a federal prosecution which is based, in part, on that underlying conviction. *Bryant*, 769 F.3d 671; United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2011); United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011); *see* SMART Watch Digest, *Case Digest: United States vs. Michael Bryant, Jr.*, SMART (Dec. 2014), http://www.smart.gov/pdfs/SMARTWatchDispatch_Dec2014.pdf.

175. CASE LAW UPDATE, *supra* note 20, at 14–15.

176. *Id.* at 15 (citing State v. Atcitty, 215 P.3d 90, 96 (N.M. 2009)).

177. *See id.*

178. *Id*. (citing United States v. Begay, 622 F.3d 1187 (9th Cir. 2010), *abrogated on other grounds by* United States v. DeJarnette, 741 F.3d 971 (9th Cir. 2013)).

179. *Id*. (emphasis added) (citing State v. John, 308 P.3d 1208, 1211 (Ariz. Ct. App. 2013)).

2. *Information Sharing*

Another ground-breaking initiative in SORNA is its focus on sharing information about registered sex offenders—not only with the public, but also from jurisdiction to jurisdiction.[180] SORNA seeks to create a system whereby a registered sex offender cannot simply "go off the grid" by moving from one jurisdiction to another, or otherwise find safe haven in a jurisdiction that does not have an appropriate registration system.[181] To ensure the most effective monitoring of registered sex offenders across state lines, SORNA requires that jurisdictions immediately share information with a jurisdiction where an offender might be relocating.[182] This is effected through traditional means such as phone calls, mail, e-mail, and faxes, as well as more advanced mechanisms such as automatic notification through the SORNA Exchange Panel and via NSOR when an offender registers in a new jurisdiction.[183]

There are additional information sharing requirements within SORNA that do not receive as much attention as those just mentioned, yet remain critical in the day-to-day functioning of law enforcement.[184] Whenever a sex offender initially registers or changes his or her registration information, a jurisdiction must immediately communicate that information to four destinations: (1) any other jurisdiction where the offender is registered, (2) the jurisdiction's administrative sex offender registry database, (3) the jurisdiction's public sex offender registry website, and (4) NSOR.[185]

180. *See SORNA Exchange Portal*, SMART, http://ojp.gov/smart/pdfs/SORNA_Portalfactsheet.pdf (last visited June 16, 2016).

181. *See id.*

182. *Id.*

183. *See* SORNA Exchange Portal in *SORNA Tools*, SMART, http://www.smart.gov/sorna_tools.htm (last visited June 16, 2016).

184. *See* Christina Horst, *The 2006 Sex Offender Registration and Notification Act: What Does It Mean for Your Law Enforcement Agency?*, POLICECHIEF (Nov. 2007), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1317&issue_id=112007.

185. Final Guidelines, 73 Fed. Reg. 38,030, 38,060 (July 2, 2008). Other entities that must have access to any new or changed information include: appropriate law enforcement agencies, probation agencies, school and public housing agencies, any agency responsible for 42 U.S.C. § 5119a background checks, social service agencies, volunteer organizations serving minors or other vulnerable persons, and any person or organization requesting such notifications. 42 U.S.C. § 16921(b) (2012); Final Guidelines, 73 Fed. Reg. at 38,060–61 (detailing the methods which jurisdictions may use to effect such notifications).

In addition, jurisdictions collect biometric information which must be submitted to the appropriate FBI database: DNA must be submitted to CODIS, and fingerprints and palm prints must be submitted to NGI.[186] Within the FBI database systems, an offender's fingerprint records in NGI are linked to his or her NSOR entry, so that law enforcement can more easily detect when an individual is a registered sex offender.[187]

I. *Challenges to Implementing SORNA's Provisions*

Notwithstanding the progress of the last 10 years, there are a handful of legitimate policy concerns that remain wedged between SORNA's standards and some states' long-time practices and current concerns.[188] Chief among these are SORNA's juvenile registration provisions, retroactive application, and requirement to post the address of an offender's employer on a jurisdiction's public sex offender registry website.[189]

1. *Juvenile Registration*

> State juvenile justice systems . . . have handled juvenile sex offender registration in different ways. For example, at the time of SORNA's passage, 36 states required certain juveniles adjudicated delinquent of sex offenses to register as sex offenders . . . . SORNA's minimum standards do require registration for certain juvenile offenders adjudicated delinquent of serious sex offenses. Moreover, SORNA does *not* require jurisdictions to disclose information about juveniles adjudicated delinquent on their public registry websites.[190]

186. Final Guidelines, 73 Fed. Reg. at 38,057 (CODIS); SMART, U.S. DOJ, SORNA: FINGERPRINTS AND PALM PRINTS (2012), *reprinted in SORNA Implementation Documents*, SMART, at Doc #9 (rev.), http://www.smart.gov/pdfs/sorna/SORNAImplementationDocs6252013.pdf (last visited June 16, 2016).

187. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-326, LONG-TERM CARE FACILITIES: INFORMATION ON RESIDENTS WHO ARE REGISTERED SEX OFFENDERS OR ARE PAROLED FOR OTHER CRIMES 10 n.16 (2006), http://www.gao.gov/new.items/d06326.pdf.

188. Donna Lyons, *Sex Offender Law: Down to the Wire: June 2011*, NCSL, http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-law-down-to-the-wire.aspx (last visited June 16, 2016).

189. *Id.*

190. CASE LAW UPDATE, *supra* note 20, at 7–8 (citing Supplemental Guidelines, 76 Fed. Reg. 1,630, 1,036–37 (Jan. 11, 2011)).

> SORNA's minimum standards require that jurisdictions register juveniles

Additionally, a jurisdiction that chooses not to post publicly such information may still be found to have substantially implemented SORNA.[191] In addition, the SMART Office has recently issued Proposed Supplemental Guidelines which expand the factors that may be considered in determining whether jurisdictions have substantially implemented the juvenile registration portion of SORNA's provisions.[192]

Despite SORNA's requirement that a juvenile adjudicated delinquent of certain offenses register as a sex offender, the implementation of this provision varies across jurisdictions.[193] Some jurisdictions do not register any juveniles at all; some limit the ages of the offenders who might be registered; some limit the offenses for which they might be registered; and others limit the duration, frequency, or public availability of registration information.[194] Some jurisdictions have mandatory registration provisions for certain

> who were at least 14 years old at the time of the offense and who have been adjudicated delinquent for committing (or attempting or conspiring to commit) a sexual act with another by force, by the threat of serious violence, or by rendering unconscious or drugging the victim. "Sexual Act" is defined in 18 U.S.C. § 2246.

Id. at 7 n.55. There are fewer than 2,000 juveniles who currently have records listed in the National Sex Offender Registry (NSOR). David L. Harlow, Deputy Dir., U.S. Marshals' Serv., Remarks on the 10-Year Commemoration of the Adam Walsh Act (July 27, 2016), http://www.smart.gov/pdfs/USMS-Deputy-Director-Harlow-Remarks-for-the-SMART-Symposium.pdf.

191. The Supplemental Guidelines give jurisdictions full discretion over whether they will post information about juveniles adjudicated delinquent of sex offenses on their public registry website. Supplemental Guidelines, 76 Fed. Reg. at 1,636–37.

192. Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 21,397 (proposed Apr. 11, 2016).

193. For a survey of the varying juvenile registration responsibilities imposed by each state, see NICOLE PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 31–42 (2011), http://www.njjn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf.

194. *Id.*; *see, e.g.*, Clark v. State, No. 585, 2007, 2008 WL 3906890, at *4 (Del. Aug. 26, 2008) (citations omitted) (finding lifetime registration requirement for juvenile not contravened by requirement to consider the "best interests of a child" in fashioning a disposition). Some states go beyond SORNA's requirements. *See, e.g.*, State v. I.C.S., 145 So. 3d 350, 352 (La. 2014) (requiring registration of defendants who committed sex offenses prior to age 14, were not transferrable to adult court at that age, and whose offenses did not require registration upon a juvenile adjudication of delinquency when those defendants were prosecuted in adult court in their twenties for those offenses); People *ex rel.* J.L., 800 N.W.2d 720, 721 (S.D. 2011) (ordering lifetime registration of 14-year-old boy adjudicated delinquent for consensual sex with his 12-year-old girlfriend).

juveniles, some are discretionary, and some have a hybrid approach.[195]

Because of the varying nature of juvenile justice systems across jurisdictions, it is sometimes unclear if juveniles are required to register when they are adjudicated delinquent in one jurisdiction and then move to another.[196] For example, Nebraska and Kentucky require registration for juveniles adjudicated delinquent for a sex offense when the offender is convicted outside of the state and moves into the state, even though they do not require registration for juveniles adjudicated in-state.[197] There are also some constitutional issues that receive unique consideration when a case involves a juvenile court delinquency matter.[198] For example, in two states,

195. *See, e.g.*, N.V. v. State, No. CA 07-972, 2008 WL 588627, at *1 (Ark. Ct. App. Mar. 5, 2008) (requiring due process hearing prior to juvenile offender being required to register); N.L. v. State, 989 N.E.2d 773, 776 (Ind. 2013) (permitting registration of adjudicated juvenile offender only after an evidentiary hearing, using the "clear and convincing" standard). For a complete summary of juvenile registration schemes across the United States, see SMART, U.S. DOJ, SMART SUMMARY: PROSECUTION, TRANSFER, AND REGISTRATION OF SERIOUS JUVENILE SEX OFFENDERS 10–12 (2015), http://www.smart.gov/pdfs/SMARTSummary.pdf.

196. *See, e.g.*, *In re* Crockett, 71 Cal. Rptr. 3d 632, 636 (Ct. App. 2008) (holding juvenile adjudicated delinquent of sex offense in Texas was not required to register when he moved to California); Murphy v. Commonwealth, No. 2013-CA-001517-MR, 2015 Ky. App. Unpub. LEXIS 275, at *3–4 (Apr. 24, 2015) (requiring juvenile adjudicated delinquent in Michigan to register in Kentucky, even though Kentucky-adjudicated juveniles were not required to register), *discretionary review granted*, 2015 Ky. LEXIS 1975 (Oct. 21, 2015).

197. *See* Smith v. Commonwealth, Nos. 2012-CA-001811-MR, 2013-CA-000364-MR, 2014 WL 4521235, at *1 (Ky. Ct. App. Sept. 12, 2014) (requiring registration of Illinois-adjudicated offender in Kentucky because he was required to register in Illinois), *discretionary review denied*, No. 2014-SC-000730-D (Ky. Oct. 21, 2015); *Frequently Asked Questions*, NEB. SEX OFFENDER REGISTRY, https://sor.nebraska.gov/FAQ (last visited June 16, 2016). Nebraska's registration requirements for juveniles adjudicated delinquent of a sex offense in another state have been subject to ongoing litigation. A.W. v. Peterson, 2016 U.S. Dist. LEXIS 36077 (D. Neb. Mar. 21, 2016) (interpreting Nebraska's statutes and regulations governing sex offender registration not to require registration for a juvenile residing in Nebraska at the time they were adjudicated delinquent of a sex offense in Minnesota which required them to register in Minnesota); A.W. v. Nebraska, 2015 U.S. Dist. LEXIS 48287 (D. Neb. Apr. 13, 2015) (refusing to certify the question of the constitutionality of requiring an out-of-state adjudicated juvenile to be subject to public notification in Nebraska to the Nebraska Supreme Court).

198. *See* PITTMAN & NGUYEN, *supra* note 193, at 11–14; *see also* Doe *ex rel.* A.W. v. Nebraska, No. 8:14CV256, 2015 WL 4249845, at *3 (D. Neb. July 13, 2015) (refusing to certify the question of the constitutionality of requiring an out-of-state adjudicated juvenile to be subject to public notification in Nebraska to the Nebraska Supreme

an automatic lifetime registration requirement as applied to adjudicated juveniles was held to violate due process rights and the prohibition against cruel and unusual punishment.[199] Yet, other courts have held that registration requirements as applied to juveniles adjudicated delinquent of a sex offense *does not* violate the Eighth Amendment.[200]

There are also particular issues that arise when a person is ordered to register by a federal court because of a federal adjudication of delinquency for a sex offense.[201] In particular, multiple courts have held that it is *not* a contravention of the Federal Juvenile Delinquency Act's confidentiality provisions to require such individuals to register as sex offenders.[202]

2. *Retroactive Application*

One of the first issues to be litigated as sex offender registration systems were established across the country was whether or not an offender who had been convicted prior to the passage of the laws requiring registration could be required to register.[203] "Numerous challenges to the

Court).

199. *In re* C.P., 967 N.E.2d 729, 732 (Ohio 2012) (due process and the prohibition against cruel and unusual punishment); *In re* J.B., 107 A.3d 1, 2 (Pa. 2014) (procedural due process).

200. United States v. Under Seal, 709 F.3d 257, 262 (4th Cir. 2013); *see also* People v. J.O., 2015 Colo. App. LEXIS 1319 (Aug. 27, 2015); *In re* Justin B., 747 S.E.2d 774, 776 (S.C. 2013) (holding lifetime GPS monitoring of a juvenile adjudicated delinquent of a sex offense does not violate the Eighth Amendment).

201. In 2010, the Supreme Court granted certiorari in a case where the Ninth Circuit had held that the juvenile registration provisions of SORNA were unconstitutional when applied retroactively. United States v. Juvenile Male, 581 F.3d 977 (9th Cir. 2009), *cert. granted, judgement vacated, and remanded*, 564 U.S. 932 (2011), *appeal dismissed as moot*, 653 F.3d 1081 (9th Cir. 2011). The Supreme Court, however, decided that Juvenile Male's challenge was moot and therefore did not in any way address the question of the constitutionality of the retroactive application of SORNA's requirement that certain adjudicated juveniles register as sex offenders. *See Juvenile Male*, 564 U.S. at 937.

202. *Under Seal*, 709 F.3d at 262; United States v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012). The Federal Juvenile Delinquency Act is found at 18 U.S.C. § 5031 *et. seq.* (2012).

203. SORNA requires that jurisdictions register "sex offenders whose predicate convictions predate the enactment of SORNA or the jurisdiction's implementation of . . . SORNA" when an offender is: (1) "incarcerated or under supervision, either for the predicate sex offense or for some other crime;" (2) "already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or" (3) "reenter the jurisdiction's justice system because of [a subsequent felony] conviction for some other crime (whether or not a sex offense)." Final Guidelines, 73 Fed. Reg. 38,030,

retroactive application of registration laws were heard throughout the 1990s and 2000s."[204]

In 2003, the Supreme Court seemingly settled the issue in the case of *Smith v. Doe*, a challenge from a sex offender in Alaska who argued that the imposition of registration requirements on him violated the Ex Post Facto Clause of the Constitution.[205] The Court held that registration and notification—under the specific facts of that case—were not punitive and could therefore be retroactively imposed as regulatory actions.[206]

The *Smith v. Doe* case settled the matter for a time, but litigation started once again after a few years based on increasing stringency of sex offender registration and notification requirements in most jurisdictions.[207] As previously discussed in Part III.G, even the most cursory review of the differences in the federal standards under the Wetterling Act as compared to those under SORNA reveal a notable increase in the burden of registration and notification duties.[208] That being said, concerns about the retroactive application of sex offender registration and notification laws are necessarily time-limited; as the population of registrants convicted after the implementation of a jurisdiction's laws—or after significant amendments to those laws to conform with SORNA—continues to grow, the impact of decisions governing retroactivity will be lessened.[209]

While the Supreme Court has had the opportunity to address the issue of retroactivity of sex offender registration requirements a number of times in recent years, it has declined to do so.[210] While most state courts have stood by the reasoning of *Smith v. Doe* in affirming the retroactivity of their own

38,046 (July 2, 2008); *see* Supplemental Guidelines, 76 Fed. Reg. 1,630, 1,639 (Jan. 11, 2011).

204. CASE LAW UPDATE, *supra* note 20, at 9.

205. Smith v. Doe, 538 U.S. 84, 91 (2003).

206. *Id.* at 105–06.

207. *See, e.g.*, Jensen v. State, 905 N.E.2d 384, 395 (Ind. 2009) (holding offender convicted after the initial passage of the law could be required to comply with amended requirements).

208. *See supra* Part III.G and accompanying notes.

209. *See* United States v. Juvenile Male, 581 F.3d 977, 979 (9th Cir. 2009), *cert. granted, judgment vacated, and remanded*, 564 U.S. 932 (2011), *appeal dismissed as moot*, 653 F.3d 1081 (9th Cir. 2011).

210. *See* United States v. Reynolds, 132 S. Ct. 975, 978 (2012); Carr v. United States, 130 S. Ct. 2229, 2242 (2010); *Juvenile Male*, 581 F.3d at 982. Another recently-decided case, *United States v. Nichols*, 136 S. Ct. 1113 (2016), did not address the issue of retroactivity.

registration laws,[211] seven state supreme courts have held retroactive application of their sex offender registration and notification laws violate their respective state constitutions.[212] The New Hampshire Supreme Court held that requiring lifetime registration without the opportunity for review

211. *E.g.*, Lee v. State, 895 So. 2d 1038, 1041 (Ala. Crim. App. 2004); State v. Henry, 228 P.3d 900, 906 (Ariz. Ct. App. 2010); *In re* Alva, 92 P.3d 311, 313 (Cal. 2004); People v. Tuffo, 209 P.3d 1226, 1230 (Colo. App. 2009); State v. Waterman, 825 A.2d 63, 70–71 (Conn. 2003); *In re* W.M., 851 A.2d 431, 435 (D.C. 2004); Givens v. State, 851 So. 2d 813, 814 (Fla. Dist. Ct. App. 2003); Frazier v. State, 668 S.E.2d 646, 647 (Ga. 2008); State v. Guidry, 96 P.3d 242, 255 (Haw. 2004); State v. Gragg, 137 P.3d 461, 463 (Idaho 2005); People v. Cornelius, 821 N.E.2d 288, 301 (Ill. 2004); State v. Pickens, 558 N.W.2d 396, 400 (Iowa 1997); State v. Petersen-Beard, 2016 Kan. LEXIS 241 (Apr. 22, 2016); Buck v. Commonwealth, 308 S.W.3d 661, 666 (Ky. 2010); Smith v. State, 84 So. 3d 487, 498 (La. 2012); Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 305 n.14 (Mass. 2008); People v. Golba, 729 N.W.2d 916, 924–25 (Mich. Ct. App. 2007); State v. Manning, 532 N.W.2d 244, 248 (Minn. 1995); Garrison v. State, 950 So. 2d 990, 992–93 (Miss. 2006); Doe v. Lee, No. ED 90404, 2009 WL 21097, at *4 (Mo. Ct. App. Jan. 6, 2009), *sustained and cause ordered transferred,* (Mar. 30, 2009), *retransferred*, (Sept. 1, 2009), *opinion on retransfer*, 296 S.W.3d 498 (2009); State v. Mount, 78 P.3d 829, 835 (Mont. 2003); State v. Harris, 817 N.W.2d 258, 273 (Neb. 2012); State v. Eighth Judicial Dist. Court, 306 P.3d 369, 385 (Nev. 2013); State v. Costello, 643 A.2d 531, 533 (N.H. 1994); Doe v. Poritz, 662 A.2d 367, 388 (N.J. 1995); State v. Druktenis, 86 P.3d 1050, 1059 (N.M. Ct. App. 2004); Doe v. Div. of Prob. & Corr. Alts., 654 N.Y.S.2d 268, 270 (Sup. Ct. 1997); State v. Sakobie, 598 S.E.2d 615, 618 (N.C. Ct. App. 2004); State v. Burr, 598 N.W.2d 147, 152 (N.D. 1999); State v. MacNab, 51 P.3d 1249, 1256 (Or. 2012) (en banc); Commonwealth v. Lee, 935 A.2d 865, 877 (Pa. 2007); State v. Germane, 971 A.2d 555, 593 (R.I. 2009); State v. Walls, 558 S.E.2d 524, 526 (S.C. 2002); Meinders v. Weber, 604 N.W.2d 248, 255–56 (S.D. 2000); State v. Gibson, No. E2003-02102-CCA-R3-CD, 2004 WL 2827000, at *5 (Tenn. Crim. App. Dec. 9, 2004); Rodriguez v. State, 93 S.W.3d 60, 69–70 (Tex. Ct. Crim. App. 2002); State v. Briggs, 199 P.3d 935, 943–44 (Utah 2008); State v. Thompson, 807 A.2d 454, 459 n.3 (Vt. 2002); Kitze v. Commonwealth, 475 S.E.2d 830, 832 (Va. Ct. App. 1996); State v. Ward, 869 P.2d 1062, 1068 (Wash. 1994) (en banc); Hensler v. Cross, 558 S.E.2d 330, 335 (W. Va. 2001); State v. Sturdevant, No. 2006AP3185, 2008 Wisc. App. LEXIS 1055, at *1 (Wis. Ct. App. Apr. 17, 2008); Kammerer v. State, 322 P.3d 827, 832 (Wyo. 2014).

212. In reverse chronological order, the states are Oklahoma, Maryland, Ohio, Indiana, Maine, Alaska, and Missouri. Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1035–36 (Okla. 2013) (detailing all case law from state courts regarding retroactive application of sex offender registration and notification statutes); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123, 149 (Md. 2013); State v. Williams, 952 N.E.2d 1108, 1113 (Ohio 2011); Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009); State v. Letalien, 985 A.2d 4, 31 (Me. 2009); Doe v. State, 189 P.3d 999, 1019 (Alaska 2008) (same plaintiff as in *Smith v. Doe*, 538 U.S. 84 (2003)). Missouri's case, *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006) (en banc), has subsequently been rendered moot, *Doe v. Lee*, 2009 WL 21097, at *4.

violates the ex post facto provisions of the state's constitution.[213] Similarly, in a recent Pennsylvania case, the retroactive application of a requirement to appear in-person to update any changes to an offender's registration information was held to violate the Ex Post Facto Clause.[214] Although most challenges to retroactive application come from offenders seeking relief from a requirement to register, sometimes the retroactive application of registration laws has worked to an offender's benefit. For example, Massachusetts requires a due process hearing before any offender is ordered to comply with its full registration requirements.[215]

3. *Employer Address Posting*

SORNA requires that jurisdictions post the address of a registered sex offender's employer on the jurisdiction's public sex offender registry website.[216] This provision has drawn some concern from the business community and reentry advocates in various jurisdictions, who argue that it serves as a barrier to reentry.[217] For instance, if an employer knows that hiring an otherwise qualified applicant who is a registered sex offender would result in the business's address and the employment being posted on a public website, that employer might not proceed with that candidate.[218] Such unwillingness to hire registered sex offenders because of public notification could make it more difficult for offenders to obtain employment,

213. Doe v. State, 111 A.3d 1077, 1101 (N.H. 2015) (allowing retrospective application of registration requirements "only if [the offender] is promptly given an opportunity for either a court hearing, or an administrative hearing subject to judicial review, at which he is permitted to demonstrate that he no longer poses a risk sufficient to justify continued registration. . . . [The offender] must be afforded periodic opportunities for further hearings, at reasonable intervals, to revisit whether registration continues to be necessary to protect the public.").

214. Coppolino v. Noonan, 102 A.3d 1254, 1278 (Pa. Commw. Ct. 2014). *But see* Commonwealth v. Perez, 97 A.3d 747, 760 (Pa. Super. Ct. 2014) (holding retroactive application of new registration scheme did not violate the Ex Post Facto Clause).

215. 803 MASS. CODE REGS. 1.04(1)–(4) (LexisNexis 2016) (establishing procedures for Board's finding of an offender's risk of re-offense and degree of dangerousness posed to the public before requiring registration). Other offenders have been able to be removed from the registry when the statute is changed in a way which inures to their benefit. *See* Flanders v. State, 955 N.E.2d 732, 752 (Ind. Ct. App. 2011); State v. Jedlicka, 747 N.W.2d 580, 584 (Minn. Ct. App. 2008).

216. 42 U.S.C. § 16914(a)(4) (2012).

217. *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 81–82 (2007), https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf.

218. *See id.*

which is a demonstrated key factor in successful reentry and recidivism prevention.[219] Some states have found creative ways to implement this portion of SORNA's standards,[220] while others have taken a clear legislative position that they will not do so.[221]

IV. GAPS IN THE EXISTING LAW

Despite the comprehensive nature of SORNA, there remain gaps that sex offenders can "fall through"—or exploit—so as to evade registration requirements.[222] These gaps stem from jurisdictional issues—especially the interplay of federal, tribal, and state civil regulatory authority vis-à-vis law enforcement jurisdiction.[223]

A. *Federal Enclaves*

While much attention has been given to jurisdictional issues in Indian Country, a less-discussed issue arises on other federal lands—the so-called "federal enclaves."[224] Federal enclaves are lands that are either in whole or in part under the law enforcement jurisdiction of the U.S. Government.[225]

219. *See* Kevin Baldwin, *Sex Offender Risk Assessment*, *in* SEX OFFENDER MANAGEMENT ASSESSMENT PLANNING INITIATIVE, *supra* note 8, at 111.

220. *See, e.g.*, *SORNA Substantial Implementation Review: State of South Dakota*, SMART 9 n.7, http://www.smart.gov/pdfs/sorna/SouthDakota.pdf (last visited June 16, 2016) (discussing the procedure adopted by South Dakota).

221. IDAHO CODE ANN. § 18-8323(f) (West 2016) (prohibiting any kind of disclosure of information about the identity of an offender's employer); *SORNA Substantial Implementation Review*, *supra* note 220, at 8–9 (describing alternate procedures for employer address disclosure in South Dakota).

222. *See Sex Offender Registration*, SENECA-CAYUGA NATION, http://www.sctribe.com/service/sex-offender-resgistration/ (last visited Apr. 24, 2016).

223. *Id.*

224. *See* CASE LAW UPDATE, *supra* note 20, at 4.

225. *See* U.S. CONST. art. I, § 8, cl. 17 ("[The Congress shall have Power] [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."); 40 U.S.C. § 3112(a), (b) (2012) ("Exclusive jurisdiction not required"; "Acquisition and acceptance of jurisdiction").

The most common federal enclaves are military bases,[226] national parks,[227] or unique installations such as Redstone Arsenal in northern Alabama.[228] It is important to note that Indian reservations are not federal enclaves in the classic sense of the term and are subject to a maze of jurisdictional and property laws which are beyond the scope of this Article.[229] Because each of the land tracts considered as a federal enclave have been ceded to the U.S. Government by a state through mechanisms that vary widely,[230] each federal enclave will have its own set of rules determining law enforcement jurisdiction.[231]

This jurisdictional maze matters in the world of sex offender registration because nearly all registration functions are carried out by state and local registry officials.[232] Depending on the nature of the cession of a land tract to the U.S. Government, a federal enclave may or may not be subject to the law enforcement jurisdiction of the state within which it

226. *See* Paul v. United States, 371 U.S. 245, 264 (1963) (discussing cession of land from the State of California to the Federal Government for military purposes); Palmer v. Barrett, 162 U.S. 399, 403 (1896) (discussing cession of land in Brooklyn, New York for a Navy Yard and Naval Hospital); U.S. DEP'T OF ARMY, ARMY REGULATION 405-20, FEDERAL LEGISLATIVE JURISDICTION ¶ 5 (1974), http://www.apd.army.mil/pdffiles/r405_20.pdf; Major Alison Martin, *How Far Can They Go: Should Commanders Be Able to Treat Hotel Rooms Like an Extension of the Barracks for Search and Seizure Purposes?*, ARMY LAW., June 2004, at 1, 15.

227. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 527 (1938) (discussing cession of land from the State of California to the federal government to establish Yosemite National Park); Yellowstone Park Transp. Co. v. Gallatin Cty., 31 F.2d 644, 645 (9th Cir. 1929) (discussing cession of land from the State of Montana to establish Yellowstone National Park).

228. *See* Mathis v. Gen. Elec. Corp., 580 F.2d 192, 194 (5th Cir. 1978).

229. *See* Carcieri v. Norton, 398 F.3d 22, 34 (1st Cir. 2005) ("[Reservations] represent land owned by the United States for public purposes. 'Such ownership and use without more do not withdraw the lands from the jurisdiction of the state,' . . . and State consent [to federal acquisition and consent pursuant to the Enclave Clause] is therefore not required." (quoting Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930))).

230. *See* GA. CODE ANN. § 50-2-23 (West 2016) (noting exclusive jurisdiction ceded in and over lands acquired by the United States).

231. United States v. Cornell, 25 F. Cas. 646, 648 (D.R.I. 1819) ("[A]lthough the United States may well purchase and hold lands for public purposes, within the territorial limits of a state, this does not of itself oust the jurisdiction of sovereignty of such state over the lands so purchased. It remains until the state has relinquished its authority over the land either expressly or by necessary implication.").

232. CASE LAW UPDATE, *supra* note 20, at 1.

resides.[233] In other words, the sheriff of Liberty County, Georgia, may have no authority to go on the grounds of Fort Stewart to compel registration of an offender living on base; Park County, Wyoming, may not have the authority to require a seasonal worker at Yellowstone Park to register with the state; but these local authorities may have such authority—it all depends on the nature of the cession of the land from the state to the federal government.

Were the federal registration system established under the Lychner Act in place, it would have resolved these issues.[234] Unfortunately, those provisions were repealed wholesale with the passage of SORNA, and there has been no other mechanism authorized by Congress to register such offenders—except for offenders who live, work, or attend school on military installations, as described below.[235] For non-military installations, federal enclave issues are sometimes solved by way of memoranda of understanding between the appropriate federal agency and local law enforcement in determining how and under what circumstances offenders on the federal enclave can be registered and monitored.[236] For military installations, an entire set of statutes and regulations have been developed in an attempt to tackle the problem.[237]

B. *Military Personnel, Bases, and Contractors*

SORNA requires persons convicted by military tribunals of registerable sex offenses to register with any jurisdiction where they live, work, or go to school.[238] However many, if not most, military bases are also

233. *See* Allison v. Boeing Laser Tech. Servs., 689 F.3d 1234, 1237–38 (10th Cir. 2012).

234. *See* Pam Lyncher Act, Pub. L. No. 104-236 § 2(a), 110 Stat. 3093, 3095 (establishing an FBI database where data is collected), *repealed by* SORNA, Pub. L. No. 109-248, § 129(a), 120 Stat. 587, 600–01 (2006).

235. *See infra* Part IV.B.

236. CASE LAW UPDATE, *supra* note 20, at 5 n.31.

237. *See, e.g.*, U.S. DEP'T OF DEF., INSTRUCTION NO. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY 78 (2013) [hereinafter MILITARY CORRECTIONAL FACILITIES], http://www.dtic.mil/whs/directives/corres/pdf/132507.pdf.

238. *See* United States v. Kebodeaux, 133 S. Ct. 2496, 2499 (2013). Through a series of statutory and administrative cross-references, SORNA requires that a person register as a sex offender when convicted of a Uniform Code of Military Justice (UCMJ) offense listed in Department of Defense Instruction 1325.7, which was revised in 2013. SMART, U.S. DOJ, INCLUSION OF MILITARY CONVICTIONS UNDER SORNA (2010), *reprinted in*

federal enclaves.[239] In some locations, there may be sex offenders present on military bases who would not be required to register with the state within which the installation is located because they live, work, and attend school solely on land considered to be a federal enclave.[240]

The Department of Defense worked to address this issue since the passage of SORNA.[241] These efforts culminated, over the last few years, in a number of notable statutory and regulatory provisions. In 2013, Congress enacted a provision that prohibits any person convicted of a felony sex offense from enlisting or being commissioned as an officer in the Armed Forces.[242] Branch policies generally require that any person convicted of a sex offense under the Uniform Code of Military Justice (UCMJ) be processed for administrative separation from the military if their sentence did not involve discharge or dismissal.[243] In 2014, the Inspector General of the DoD issued a report regarding the DoD's compliance with SORNA.[244] In 2015, the DoD issued a directive requiring all installations to identify any affiliated personnel that are required to register as sex offenders, notify state sex offender registries of the presence of those offenders, monitor the offenders while they are on the installation, and report any intended

SORNA Implementation Documents, *supra* note 186, at Doc #8; *see* MILITARY CORRECTIONAL FACILITIES, *supra* note 235, at 78. Although the United States Coast Guard is technically a part of the Department of Homeland Security, this instruction also governs their proceedings. MILITARY CORRECTIONAL FACILITIES, *supra* note 237, at 2.

239. *See* Emily S. Miller, *The Strongest Defense You've Never Heard Of: The Constitution's Federal Enclave Doctrine and Its Effect on Litigants, States, and Congress*, 29 HOFSTRA LAB. & EMP. L.J. 73, 73 (2011) (explaining enclaves include military bases, national parks, post offices, and federal courthouses).

240. *See id.* (citations omitted) (noting that the enclave doctrine "renders certain state and common law claims inapplicable within areas of land ceded by a state to a federal government").

241. *See* INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. DODIG-2014-103, EVALUATION OF DOD COMPLIANCE WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, at iv (2014) [hereinafter DOD COMPLIANCE REPORT], http://www.dodig.mil/pubs/documents/DODIG-2014-103.pdf.

242. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 523, 126 Stat. 1632, 1723 (to be codified at 10 U.S.C. § 504). This general prohibition also extends to federal convictions, juvenile adjudications, and situations where "the disposition [of the case] requires the person to register as a sex offender," regardless of the offense of conviction. 32 C.F.R. § 66.6(b)(8)(iii) (2015).

243. Memorandum from John M. McHugh, Sec'y of the Army, to Principal Officials of Headquarters et al. (Nov. 7, 2013).

244. DOD COMPLIANCE REPORT, *supra* note 241.

international travel to the U.S. Marshals Service.[245] Finally, later in 2015, Congress amended SORNA to require the DoD to submit registration information to NSOR and NSOPW on any sex offender who is adjudged by martial courts or released from a military corrections facility.[246]

Certain components of the DoD have also adopted new policies and procedures independently to track and monitor sex offenders who are active duty members, civilian employees, contractors, or dependents of active duty members located on U.S. military installations at home and abroad.[247] For example, the Department of the Army now requires all sex offenders who reside or are employed on an Army installation (including those outside of the continental United States) to register with the installation provost marshal.[248]

245. Directive-Type Memorandum from Jessica L. Wright, Under Sec'y of Def., to Sec'ys of the Military Dep'ts 2 (Mar. 26, 2015), http://www.dtic.mil/whs/directives/corres/pdf/DTM15003.pdf.

246. Military Sex Offender Reporting Act of 2015, Pub. L. No. 114-22, § 502, 129 Stat. 227, 258 (to be codified at 42 U.S.C. § 16928a).

247. *See, e.g.*, 32 C.F.R. § 635.6(a), (b)(1).

248. *Id.* at § 635.6(c). Provost marshal officials have also been directed to seek to establish memoranda of understanding with state and local sex offender registration officials to facilitate the flow of information regarding sex offenders (along with other criminal justice information). *Id.* at § 635.20(a). For the activities of other branches, see U.S. DEP'T OF THE NAVY, PROVIDING U.S. MARSHALS SERVICE WITH NOTICE OF RELEASE OF MILITARY OFFENDERS CONVICTED OF SEX OFFENSES OR CRIMES AGAINST MINORS, SER. NO. 00D1/035 (Mar. 10, 2011); M.E. FERGUSON, III, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, OPNAVINST 1752.3, POLICY FOR SEX OFFENDER TRACKING, ASSIGNMENT AND ACCESS RESTRICTIONS WITHIN THE NAVY 1 (2009) ("[S]ex offenders are to be identified and prohibited from accessing Navy facilities."); WILLIAM A. NAVAS, JR., OFFICE OF THE SEC'Y OF THE NAVY, SECNAVINST 5800.14A, NOTICE OF RELEASE OF MILITARY OFFENDERS CONVICTED OF SEX OFFENSES OR CRIMES AGAINST MINORS (2005); Policy Letter from E.G. Usher, III, Commandant of the Marine Corps to Distribution List (Dec. 31, 2008); U.S. DEP'T OF THE NAVY, LETTER, NOTICE OF RELEASE OF MILITARY OFFENDERS CONVICTED OF SEX OFFENSES OR CRIMES AGAINST MINORS, SER. 84/078 (Apr. 28, 2000) (establishing notification program for military offenders convicted of sex offenses); *AF Form 4422*, *Sex Offender Disclosure and Acknowledgement*, A.F. (indicating that registered sex offenders can be barred from Air Force housing); Diane Betzler, *New Regulation Requires Disclosure of Registered Sex Offenders in Base Housing*, EDWARDS A.F. BASE (Jan. 12, 2011), http://www.edwards.af.mil/news/story.asp?id=123238010; *Installation Access Control Policy*, MARINES (Sept. 22, 2008), http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/113050/installation-access-control-policy.aspx (restricting access to Marine Corps bases or stations if an individual is a registered sex offender); Jennifer H. Svan, *USAFE Keeps Track of Registered Sex Offenders on Base*, STARS &

V. OTHER COLLATERAL CONSEQUENCES OF SEX OFFENSE CONVICTIONS

Being required to register as a sex offender is itself a collateral consequence of a criminal conviction.[249] However, there are other collateral consequences—either based on the fact of a criminal conviction, or based on the fact of a requirement to register as a sex offender—which can accrue to an individual.[250] Because some local, state, and federal collateral consequences are so closely tied to an offender's status of being a registered sex offender, they are discussed herein.[251]

A. *What SORNA Does Not Address: State and Local Collateral Consequences*

It is important to be legally precise when discussing the collateral consequences of a conviction for a sex offense, because so many issues intertwine in the world of sex offender registration and notification that inaccuracies abound.[252] First up for discussion are collateral consequences at the state and local level—other than sex offender registration—which might flow from a sex offense conviction.[253]

1. *Residency Restrictions*

SORNA does not impose residency restrictions on registered sex offenders.[254] Residency restrictions have been passed at the state and local

STRIPES (June 26, 2012), http://www.stripes.com/news/usafe-keeps-track-of-registered-sex-offenders-on-base-1.181399; *Policy for Sex Offender Discharges*, MARINES (May 20, 2009), http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/112596/policy-for-sex-offender-discharges.aspx.

249. *See* NICCC, *Search*, ABA, http://www.abacollateralconsequences.org/ (follow hyperlink to "Search Multiple Jurisdictions"; then select "Sex offense" under the "Offenses" drop-down box) (last visited June 16, 2016) [hereinafter *Survey of Collateral Consequences*].

250. *See* NICCC, *User Guide Frequently Asked Questions: What are Collateral Consequences?*, ABA, http://www.abacollateralconsequences.org/user_guide/#q01 (last visited May 21, 2016) [hereinafter *What Are Collateral Consequences?*].

251. *See Survey of Collateral Consequences*, *supra* note 249.

252. *See What are Collateral Consequences?*, *supra* note 250.

253. A survey of the collateral consequences listed for "sex offenses" in the ABA Collateral Consequences database, *Survey of Collateral Consequences*, *supra* note 248, reveals more than 2,000 federal and state statutory provisions imposing some kind of restriction or consequence on persons who have been convicted of a sex offense.

254. SORNA authorized a study regarding the efficacy of residency restrictions. Adam Walsh Act, Pub. L. No. 109-248, § 638, 120 Stat. 587, 646. Although not directly

levels for over a decade and limit the "zone" within which a registered sex offender may reside, usually a set distance from a place where children normally congregate, such as schools, parks, and day care centers.[255] The efficacy of residency restrictions in a locality's efforts to manage sex offenders has been criticized in many quarters.[256] While the pace of passage of residency restrictions has slowed over recent years, there are a large number that still remain on the books across the country.[257]

In 2015, local residency restrictions in California were held unconstitutional as applied on due process grounds,[258] although such restrictions were not found to be "impermissibly punitive."[259] In New York and some other states, municipal residency restrictions have been invalidated because they were preempted by state law.[260] On occasion,

related to this authorization in SORNA, the National Institute of Justice has published a number of studies regarding residency restrictions. *Sex Offender Registration, Notification and Residency Restrictions*, NIJ (Aug. 19, 2014), http://www.nij.gov/topics/corrections/community/sex-offenders/Pages/registration-notification.aspx.

255. *See, e.g.*, IDAHO CODE ANN. § 18-8329 (West 2016); OKLA. STAT. ANN. tit. 57, § 590 (West 2016).

256. For further discussion of the topic of residency restrictions, see, for example, John Kip Cornwell, *Sex Offender Residency Restrictions: Government Regulation of Public Health, Safety, and Morality*, 24 WM. & MARY BILL RTS. J. 1, 5 (2015); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 103–04 (2007); Michelle Olson, Comment, *Putting the Brakes on the Preventative State: Challenging Residency Restrictions on Child Sex Offenders in Illinois Under the Ex Post Facto Clause*, 5 NW. J. L. & SOC. POL'Y 403, 403 (2010); Elissa Zlatkovich, Note, *The Constitutionality of Sex Offender Residency Restrictions: A Takings Analysis*, 29 REV. LITIG. 219, 219–20 (2009).

257. *See, e.g.*, *Sex Offender Enactments Database*, NCSL (Nov. 16, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx (under "TOPICS," select "Residence Restrictions," and select "ALL" from the "YEAR" drop-down box).

258. *In re* Taylor, 343 P.3d 867, 869 (Cal. 2015).

259. People v. Mosley, 344 P.3d 788, 791 (Cal. 2015).

260. G.H. v. Twp. of Galloway, 951 A.2d 221, 225 (N.J. Super. Ct. App. Div. 2008) (holding New Jersey law preempted municipal residency restrictions); People v. Diack, 26 N.E.3d 1151, 1159 (N.Y. 2015) (holding New York state law preempts local residency restriction provisions); People v. Oberlander, No. 02-354, 2009 WL 415558, at *4 (N.Y. Sup. Ct. Jan. 22, 2009) (holding Rockland County residency restriction preempted by New York state law); People v. Blair, 873 N.Y.S.2d 890, 897 (Albany City Ct. 2009) (holding Albany County residency restriction preempted by New York state law). *Contra* United States v. King, No. CR-09-219-M, 2009 WL 3271280, at *4 (W.D. Okla. Oct. 9, 2009) (holding Oklahoma's residency restrictions did not present an obstacle to complying with federal sex offender registration requirements). *But see* Ryals v. City of

residency restrictions have been deemed to be punitive and therefore not retroactively applicable.[261] Other courts have upheld locally mandated provisions.[262]

2. *GPS Monitoring*

Like residency restrictions, SORNA did not impose or mandate electronic monitoring for any registered sex offenders in the community.[263] However, location monitoring of sex offenders through GPS technology has been utilized by state and local law enforcement in recent years.[264] There are

Englewood, 2016 Colo. LEXIS 74 (Jan. 25, 2016) (local ordinance not preempted by state law).

261. *See* Commonwealth v. Baker, 295 S.W.3d 437, 439 (Ky. 2009) (finding Kentucky's residency restrictions exceeded the nonpunitive purpose of public safety and thus violated the Ex Post Facto Clause). *But see* McAteer v. Riley, No. 2:07-CV-692-WKW, 2008 WL 898932, at *4 (M.D. Ala. Mar. 31, 2008) ("The court expresses no opinion today on whether McAteer could present evidence and arguments to establish by the clearest proof that the residency and employment restrictions violate the *ex post facto* clause and leaves that question for another day.").

262. *See, e.g.*, State v. Stark, 802 N.W.2d 165, 171 (S.D. 2011) (discussing constitutionality of state-level loitering and safety zone provisions).

263. SORNA authorized a study regarding the efficacy of electronic monitoring of sex offenders. *See* 42 U.S.C. § 16981(b) (2012) (establishing a pilot program for monitoring sexual offenders). Although not directly related to this authorization, the National Institute of Justice published a report in 2013 that included a discussion about the impact of residency restrictions on sex offender recidivism. BETH M. HUEBNER ET AL., AN EVALUATION OF SEX OFFENDER RESIDENCY RESTRICTIONS IN MICHIGAN AND MISSOURI 1 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf; Philip Bulman, *Prod. No. NCJ 240700*, *Sex Offenders Monitored by GPS Found to Commit Fewer Crimes*, NIJ 1 (Feb. 27, 2013), http://www.nij.gov/journals/271/pages/gps-monitoring.aspx. Section 216 of the Adam Walsh Act amended the Bail Reform Act to mandate electronic monitoring for any person released on bail in federal court for nearly all of the offenses registerable by SORNA. Adam Walsh Act, Pub. L. No. 109-248, § 216, 120 Stat. 587, 617, *amending* 18 U.S.C. § 3142. This measure has been met with mixed results in the courts. *See* Bryan Dearinger, *The Mandatory Pretrial Release Provision of the Adam Walsh Act Amendments: How "Mandatory" Is It, and Is It Constitutional?*, 85 ST. JOHN'S L. REV. 1343, 1365 (2011); Michael R. Handler, Comment, *A Law of Passion, Not of Principle, Nor Even Purpose: A Call to Repeal or Revise the Adam Walsh Act Amendments to the Bail Reform Act of 1984*, 101 J. CRIM. L. & CRIMINOLOGY 279, 288 (2011).

264. INT'L ASS'N OF CHIEFS OF POLICE, TRACKING SEX OFFENDERS WITH ELECTRONIC MONITORING TECHNOLOGY: IMPLICATIONS AND PRACTICAL USES FOR LAW ENFORCEMENT 3 (2008), http://www.ovsom.texas.gov/docs/Tracking-Sex-Offender-with-EM-2008.pdf; *see* Eric M. Dante, Comment, *Tracking the Constitution—The Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 SETON HALL

different kinds of monitoring, with varying effectiveness.[265] Criticisms of GPS monitoring of sex offenders have increased since the well-publicized case of Phillip Garrido, a convicted sex offender in California who abducted a child and held her for 18 years on his property, subjecting her to repeated sexual assaults, because Garrido had been subject to GPS monitoring for nearly 18 months immediately prior to his arrest.[266]

GPS monitoring of sex offenders drew the attention of the Supreme Court in *Grady v. North Carolina*, a case involving a man convicted of two sex offenses (approximately 10 years apart) who challenged a court order to submit to GPS monitoring as a recidivist sex offender under a North Carolina statute. [267] He based his challenge on *United States v. Jones*, which held that the installation and monitoring of a GPS device on a suspect's car constituted a "search" under the Fourth Amendment.[268] However, because of deficiencies in the factual record in Mr. Grady's case, the case was remanded to the trial court for further proceedings, and it has not yet surfaced again in the appellate courts of North Carolina.[269]

L. REV. 1169, 1170 (2012); *State Statutes Related to Jessica's Law*, NCSL (Aug. 2008), http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf (reporting 39 states have passed GPS restrictions on sex offenders).

265. As an example, a thorough report on the efficacy of GPS monitoring of sex offenders in California was finalized in 2012. STEPHEN V. GIES ET AL., DOCUMENT NO. 23848, MONITORING HIGH-RISK SEX OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM, FINAL REPORT 5-1 (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf.

266. DAVID R. SHAW, OFFICE OF THE INSPECTOR GEN., SPECIAL REPORT: THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S SUPERVISION OF PAROLEE PHILLIP GARRIDO 1–2 (2009), http://www.calcasa.org/wp-content/uploads/2009/11/Special-Report-on-CDCRs-Supervision-of-Parolee-Phillip-Garrido.pdf; Sarah Shekhter, Note, *Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 HASTINGS CONST. L.Q. 1085, 1085–86 (2011). Mr. Garrido was subjected to GPS monitoring based on Jessica's Law, a law enacted in many states, passed by citizen referendum in 2006 as Proposition 83. CAL. PENAL CODE § 3004(b) (West 2016) (requiring every paroled felony sex offender in California be subject to lifetime GPS monitoring); *Proposition 83: Sex Offenders. Sexually Violent Predators. Punishment, Residence Restrictions and Monitoring. Initiative Statute.*, LEGIS. ANALYST'S OFF. (Nov. 2006), http://www.lao.ca.gov/ballot/2006/83_11_2006.htm.

267. Grady v. North Carolina, 135 S. Ct. 1368, 1369, 1371 (2015) (per curiam) (remanding case for further factual determinations).

268. *Id.* at 1369; United States v. Jones, 132 S. Ct. 945, 949 (2012).

269. *Grady*, 135 S. Ct. at 1371 (remanding to North Carolina Court of Appeals). The case was remanded to the New Hanover County Superior Court on November 6, 2015.

3. *Banning Offenders from Internet Use*

The last decade has seen a notable increase in the importance of the Internet in the daily lives of many people within the United States.[270] It is normal today for people to conduct some, if not all, of their shopping, bill paying, and job hunting online.[271] In addition, the rise of social media (as currently exemplified by Facebook, Twitter, and Kik) has created an environment where interacting with others online is normal. [272] Unfortunately, many sex offenders have used these now-common tools of communication as a means to commit or facilitate their crimes.[273]

SORNA does not require limitations on Internet use for registered sex offenders.[274] However, some jurisdictions have sought to limit or prohibit the use of the Internet by persons who are registered sex offenders.[275] Other state statutes restricting sex offenders' use of the Internet or social media have been held unconstitutional.[276] In addition, sex offenders on federal supervised probation are routinely subjected to certain limitations on their Internet use.[277] These limitations have been the subject of First Amendment

Docket Sheet State v. Grady, *No. 13-958*, N.C. CT. APPEALS 1–4, https://appellate.nccourts.org/dockets.php?court=2&docket=2-2013-0958-001&pdf=1&a=0&dev=1 (last visited June 16, 2016).

270. *See* Mark Skilton, *What the Internet of Things Will Mean?*, HUFFINGTON POST: THE BLOG (Apr. 22, 2016, 6:04 PM), http://www.huffingtonpost.com/professor-mark-skilton/what-the-internet-of-thin_1_b_9756694.html.

271. *See id.*

272. *See id.*

273. *See* Michael Seto, *Internet-Facilitated Sexual Offending*, *in* SEX OFFENDER MANAGEMENT ASSESSMENT PLANNING INITIATIVE, *supra* note 8, at 77.

274. *The National Guidelines for Sex Offender Registration and Notification*, SMART 20, http://www.smart.gov/pdfs/final_sornaguidelines.pdf (last visited June 16, 2016).

275. IND. CODE ANN. § 35-42-4-12(b) (West 2016) (banning sex offenders who committed crimes against children from social media websites, including instant messaging); N.C. GEN. STAT. ANN. § 14-202.5(a) (West 2016) (prohibiting registered sex offenders from accessing any commercial social networking websites); Jasmine S. Wynton, Note, *MySpace, Yourspace, but Not Theirspace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1860 (2011).

276. Barnaby Grzaslewicz, Comment, *Banished from the Virtual Sandbox: How State Bans on Sex Offender Social Networking Access Implicates the Freedom of Speech*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 85, 103 (2013).

277. JENNIFER GILG, THE FINE PRINT AND CONVICTED SEX OFFENDERS: STRATEGIES FOR AVOIDING RESTRICTIVE CONDITIONS OF SUPERVISED RELEASE 3 (2011), https://www.fd.org/pdf_lib/WS2011_06/fine_print.pdf; U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 20, 21 (2010),

litigation and ongoing debate as to their propriety and effectiveness.[278]

4. *Employment Restrictions*

SORNA does not impose any restrictions on employment for sex offenders. However, states and localities can—and do—impose limitations on the places where a sex offender may be employed.[279] Some prohibit registered sex offenders from obtaining certain licenses which might bring them into contact with a vulnerable population, while others might outright prohibit the employment of sex offenders in certain fields by statute.[280]

All of these collateral consequences: residency restrictions, GPS monitoring, Internet restrictions, and employment restrictions—are functions of laws passed by state or local governments.[281] They are not a part of SORNA's "minimum standards."[282] While a healthy debate of these collateral consequences might be worthwhile, practitioners should distinguish among the sources of law and policy when doing so.

http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf; STEPHEN E. VANCE, FED. JUDICIAL CTR., SUPERVISING CYBERCRIME OFFENDERS THROUGH COMPUTER-RELATED CONDITIONS: A GUIDE FOR JUDGES 5 (2015), http://www.fjc.gov/public/pdf.nsf/lookup/Supervising-Cybercrime-Offenders.pdf/$file/Supervising-Cybercrime-Offenders.pdf. The same holds true for persons on state probation or parole. Emily Brant, Comment, *Sentencing "Cybersex Offenders": Individual Offenders Require Individualized Conditions When Courts Restrict Their Computer Use and Internet Access*, 58 CATH. U. L. REV. 779, 782 (2009).

278. *Compare* Gabriel Gillett, Note, *A World Without Internet: A New Framework for Analyzing a Supervised Release Condition that Restricts Computer and Internet Access*, 79 FORDHAM L. REV. 217, 263–64 (2010), *with* Laura Tatelman, Note, *Give Me Internet or Give Me Death: Analyzing the Constitutionality of Internet Restrictions as a Condition of Supervised Release for Child Pornography Offenders*, 20 CARDOZO J.L. & GENDER 431, 456–57 (2014) (criticizing Gillett's arguments). *See also* United States v. Accardi, 669 F.3d 340, 348–49 (D.C. Cir. 2012).

279. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-757, CHILD CARE: OVERVIEW OF RELEVANT EMPLOYMENT LAWS AND CASES OF SEX OFFENDERS AT CHILD CARE FACILITIES 6–7 (2011) [hereinafter CHILD CARE, GAO-11-757], http://www.gao.gov/assets/330/322722.pdf; Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 341 (2007).

280. *See* CHILD CARE, GAO-11-757, *supra* note 279, at 6–7.

281. *See supra* Parts V.A.1–4.

282. *See supra* Parts V.A.1–4.

B. *What SORNA Does Not Address: Federal Collateral Consequences*

1. *Public Housing*

One collateral consequence of a state-imposed lifetime sex offender registration requirement is that a person is no longer permitted, pursuant to federal law, to be admitted to any "federally assisted housing."[283] The enforcement of this provision is not retroactive; once a person has been admitted to a program such as Section 8,[284] they cannot be thereafter terminated because of a new, or newly discovered, lifetime sex offender registration requirement.[285] However, a person may be prosecuted for perjury if he or shehad lied on an application for Section 8 housing about the status of a lifetime registered sex offender living in the residence.[286] On one occasion, a beneficiary's assistance was terminated based only on the address displayed on the public sex offender registry website for a jurisdiction.[287]

2. *Immigration*

There are numerous limitations on sex offenders' abilities to enter or remain within the United States.[288] The Adam Walsh Act created a provision

283. 42 U.S.C. § 13663(a) (2012); *see also* 24 C.F.R. § 5.856 (2015); 24 C.F.R. § 5.901 (2015); 24 C.F.R. § 5.905(a)(1) (2015); 24 C.F.R. § 960.204(a)(4) (2015); 24 C.F.R. § 982.553(a)(2)(i) (2015). HUD issued guidance in 2012 describing the duties of owners, agents, and public housing authorities with regards to admitting registered sex offenders. CAROL J. GALANTE & SANDRA B. HENRIQUEZ, U.S. HUD, STATE REGISTERED LIFETIME SEX OFFENDERS IN FEDERALLY ASSISTED HOUSING 2–4 (2012), http://portal.hud.gov/hudportal/documents/huddoc?id=12-28pihn12-11hsgn.pdf. This guidance was drafted in part as a response to an Inspector General's report which had been issued in 2009. *See id.* at 2; RONALD J. HOSKING, OFFICE OF THE INSPECTOR GEN., AUDIT REPORT NO. 2009-KC-0001, HUD SUBSIDIZED AN ESTIMATED 2,094 TO 3,046 HOUSEHOLDS THAT INCLUDED LIFETIME REGISTERED SEX OFFENDERS (2009), http://nhlp.org/files/Audit%20by%20IG.pdf.

284. "Section 8" is the common shorthand reference to the housing assistance provisions contained in the United States Housing Act of 1937, ch. 896, § 8, 50 Stat. 888, 891 (amended 1974) (codified as amended at 42 U.S.C. § 1437f (2012)).

285. Miller v. McCormick, 605 F. Supp. 2d 296, 297 (D. Me. 2009).

286. Johnson v. California, No. EDCV 10-716-DOC (MAN), 2011 WL 3962119, at *1 (C.D. Cal. July 25, 2011).

287. Henley v. Hous. Auth. of New Orleans, Civil Action No. 12-2687, 2013 WL 1856061, at *6 (E.D. La. May 1, 2013) (finding such registration information has a substantial indicia of reliability to be sufficient, even in light of the resident and landlord denying that an offender lived at that address, to deny a motion for summary judgment).

288. *See* SMART Watch, *Resources: International Travel Form*, SMART (2012),

that renders deportable any alien convicted under 18 U.S.C. § 2250.[289] In addition, the bill amended portions "of the Immigration and Nationality Act (INA) to prohibit U.S. citizens and lawful permanent resident aliens who have been convicted of any 'specified offense against a minor'[290] from filing a family-based immigrant petition . . . on behalf of any beneficiary."[291] Section 402 of the Adam Walsh Act also amended the INA "to remove spouses or fiancés of U.S. citizens convicted of [specified offenses against a minor] from eligibility for 'K' nonimmigrant status."[292] "Convictions for a failure to register have triggered subsequent deportation proceedings in some cases."[293] There is a circuit split as to whether a conviction for a state failure to register offense is a crime involving "moral turpitude" under the immigration code such that a person is removable because of that conviction.[294]

3. *Enhanced Penalties for Other Crimes*

The Adam Walsh Act also enacted a sentencing provision whereby additional punishment can result if certain crimes are committed while an offender is required to register as a sex offender.[295] An offender's eligibility for this additional punishment is in no way connected to whether the jurisdiction in which he or she is required to register has substantially

http://www.smart.gov/smartwatch/12_spring/resources-2.html.

289. 8 U.S.C. § 1227(a)(2)(A)(v).

290. As defined in SORNA, 42 U.S.C. § 16911(7) (2012).

291. Interoffice Memorandum from Michael Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship & Immigration Servs. to Reg'l Dirs. et al. 1 (July 28, 2006), http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%20 1998-2008/2006/adamwalshact072806.pdf (providing guidance for Title IV of the Adam Walsh Act); *see* 8 U.S.C. §1154(a)(1)(A)(viii)(I); Struniak v. Lynch, 2016 U.S. Dist. LEXIS 11081 (E.D. Va. Jan. 29, 2016). The prohibition applies "unless the Secretary of Homeland Security…determines that the citizen poses no risk to the alien with respect to whom a petition [is] filed." 8 U.S.C. § 1154(a)(1)(A)(viii)(I).

292. 8 U.S.C. § 1154(a)(1)(A)(vii)(I).

293. CASE LAW UPDATE, *supra* note 20, at 16.

294. Bushra v. Holder, 529 F. App'x 659, 660–61 (6th Cir. 2013) (per curiam) (holding a conviction for failure to register is a crime involving moral turpitude). *Contra* Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014); Plasencia-Ayala v. Mukasey, 516 F.3d 738, 749 (9th Cir. 2008), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009); Efagene v. Holder, 642 F.3d 918, 922 (10th Cir. 2011).

295. 18 U.S.C. § 2260A (2012).

implemented SORNA.[296] Under 18 U.S.C. § 2260A, a person who commits certain offenses against a minor while that person is required to register as a sex offender will be subject to a 10 year mandatory minimum sentence to run consecutively to any other sentences imposed.[297] The retroactive application of these provisions does not violate the Ex Post Facto Clause.[298]

VI. THE FUTURE

The last 20 years have brought a sea of change in how sex offenses are handled within the U.S. criminal justice system.[299] The good news is that the incidence of sexual abuse has dropped dramatically during that time.[300] Whether that drop is coincidental or causal vis-à-vis sex offender registration and notification systems is a debate that will continue to be examined by social science researchers in the coming years.[301] For the purposes of this Article, the important point is that sex offender registration and notification systems in the United States are here to stay.

With that assumption in mind, we turn our eyes to the future. Predicting what is to come is a risky business in any circumstance, and no less so in the world of criminal justice. I contend, first, that there will be minimal statutory changes to SORNA (until and unless there is a wholesale repeal and replacement with something different), and second, that courts will periodically restrict the applicability of sex offender registration and notification statutes but only in limited circumstances. This gradual and piecemeal approach to adjustments in jurisdictions' registration systems, as constitutional circumstances warrant, lends itself to a greater stabilization of registration and notification systems and increased certainty for offenders

296. *See id.*

297. *Id.*; *see* United States v. Walizer, 600 F. App'x 546 (9th Cir. 2015) (addressing statute). In *Alleyne v. United States*, the Supreme Court concluded that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).

298. United States v. Hardeman, 704 F.3d 1266, 1269 (9th Cir. 2013).

299. *See supra* Part II.

300. Sexual Abuse Statistics, *supra* note 6.

301. *See* ELIZABETH J. LETOURNEAU ET AL., DOCUMENT NO. 231989, EVALUATING THE EFFECTIVENESS OF SEX OFFENDER REGISTRATION AND NOTIFICATION POLICIES FOR REDUCING SEXUAL VIOLENCE AGAINST WOMEN 12 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf; J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 12803, 2008), http://www.nber.org/papers/w13803.pdf.

regarding their registration responsibilities.

As described in Part III above, there have been only a handful of minor statutory changes to SORNA over the past 10 years.[302] There have also been a few unsuccessful attempts to amend SORNA's language by way of reauthorization bills over the years.[303] Despite a great deal of advocacy among persons opposed to SORNA's provisions, it is a law that has largely stood the test of time.

Because of the nature of sex offender registration and notification requirements as a collateral consequence of conviction, they have attracted creative legal arguments over the years arguing for a limit or outright rejection of their applicability in certain cases.[304] Some of these arguments have been based on Supreme Court decisions in other nuanced areas of the law, such as the holdings in *Apprendi v. New Jersey*,[305] *Padilla v. Kentucky*,[306] and *NFIB v. Sebelius*.[307] These challenges have been broadly rejected by the courts insofar as expanding their holdings to the realm of sex offender

302. *See supra* Parts III.C, E–F.

303. *See* Adam Walsh Reauthorization Act of 2016, S. 2613, 114th Cong. (as introduced in Senate Mar. 1, 2016); Adam Walsh Reauthorization Act of 2012, H.R. 3796, 112th Cong. (as referred in Senate, Aug. 2, 2012); Adam Walsh Reauthorization Act of 2011, H.R. 2870, 112th Cong. (2011); Adam Walsh Child Protection and Safety Reauthorization Act of 2009, H.R. 1422, 111th Cong. (2009).

304. *See* Virginia Groark, *Sex-Offender Registry Under Debate*, N.Y. TIMES (May 26, 2002), http://www.nytimes.com/2002/05/26/nyregion/sex-offender-registry-under-debate.html.

305. Apprendi v. New Jersey, 530 U.S. 466, 497 (2000).

306. Padilla v. Kentucky, 559 U.S. 356, 374–75 (2010). *Padilla v. Kentucky* held that a counsel's failure to advise a client correctly that a conviction would count as a deportable offense was deficient assistance of counsel under the Sixth Amendment. *Id.* at 388.

307. NFIB v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (Roberts, C.J., with Breyer and Kagan, JJ., plurality opinion).

registration.[308] In addition, in *Bond v. United States*,[309] the Supreme Court granted standing to sex offenders to challenge SORNA on Tenth Amendment grounds, but no challenges on these grounds have yet been successful on the circuit court level.[310]

Although the majority of courts continue to uphold the constitutionality of their jurisdiction's sex offender registration and notification systems, there have been a series of cases in certain states which have limited their reach.[311] Most of the decisions along these lines involve ex post facto arguments and are discussed in Part III.I.2.[312] The remainder of the cases occasionally involve issues unique to sex offender registration, such as courts which have found constitutional violations based on a Bill of Attainder Clause argument,[313] a violation of the First Amendment in the collection of Internet identifiers,[314] and a Due Process Clause violation when a person is required to register even though the underlying conviction is not sexual in nature.[315]

Creative legal arguments such as those just cited are periodically successful.[316] However, the larger trend—again, leaving aside the earlier discussion of retroactive application of the laws—is that state and federal

308. *See, e.g.*, United States v. Robbins, 729 F.3d 131, 136 (2d Cir. 2013) (quoting United States v. Guzman, 591 F.3d 83, 90 (2d Cir. 2010)) (rejecting the argument that an interstate travel prosecution under 18 U.S.C. § 2250 was precluded by the decision in *Sebelius*); Rodriguez-Moreno v. Oregon, Civil No. 08-493-TC, 2011 WL 6980829, at *3–4 (D. Or. Nov. 15, 2011) (citations omitted) (rejecting *Padilla* argument in the context of sex offender registration requirements); People v. Mosley, 344 P.3d 788, 789–90 (Cal. 2015) (first quoting *Apprendi*, 530 U.S. at 490; then citing Sexual Predator Punishment and Control Act: Jessica's Law (Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006)) (rejecting argument seeking to invalidate residency restrictions as a violation of *Apprendi*).

309. Bond v. United States, 131 S. Ct. 2355 (2011), *on remand*, 681 F.3d 149 (3d Cir. 2012).

310. *Id.* at 2367; *see* United States v. Kidd, No. 12-5420, 2013 U.S. App. LEXIS 5032, at *3 (6th Cir. Mar. 11, 2013) (per curiam); United States v. Smith, 504 F. App'x 519, 520 (8th Cir. 2012) (per curiam).

311. *See supra* Part III.I.

312. *See supra* Part III.I.2.

313. Doe v. Anderson, 108 A.3d 378, 388 (Me. 2015) (quoting Smith v. Doe, 538 U.S. 84, 103 (2003)). The Bill of Attainder Clause is found in Article I, Section 9 of the U.S. Constitution. U.S. CONST. art. I, § 9, cl. 3.

314. Doe v. Prosecutor, 705 F.3d 694, 703 (7th Cir. 2013).

315. *Ex parte* Evans, 338 S.W.3d 545, 545–46 (Tex. Crim. App. 2011).

316. *See supra* notes 313–15 and accompanying text.

courts generally uphold the application and enforcement of sex offender registration and notification laws.[317] The two landmark Supreme Court decisions governing the constitutionality of sex offender registration and notification systems, *Smith v. Doe*[318] and *Connecticut Department of Public Safety v. Doe*,[319] dating back more than a decade, still hold. The Court has yet to make any indication that it is interested in taking up the issues resolved in those cases.[320] As with SORNA itself, until and unless the decisions in *Smith v. Doe* or *Connecticut Department of Pulic Safety* are reconsidered by the Court, case law will continue to evolve incrementally, as it has done for the last 10 years.[321]

VII. CONCLUSION

Sex offender registration and notification policies in the United States have gone through numerous iterations over the last few decades. From small beginnings, they have evolved into a comprehensive and valuable resource for both law enforcement and the public. While the debate continues over the details and nuances of the registration and notification system as it is now being operated, it is clear that these systems have become part and parcel of our criminal justice system. Using these systems effectively, smartly, and with due consideration for constitutional restraints will ensure that the registration system is available for years to come. Striking the balance between liberty and justice will be the ongoing challenge to legislators, policy makers, and judicial officials as they continue to implement and enhance registration and notification systems in the United States.

317. SMART, U.S. DOJ, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 4–5 (July 2012) (citations omitted), http://smart.gov/caselaw/handbook_july2012.pdf.

318. *Smith*, 538 U.S. at 105–06 (finding that the sex offender registration requirement does not violate the Ex Post Facto Clause).

319. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7, 8 (2003) (finding no due process violation in posting information about registered sex offenders on a public registry website).

320. CASE LAW UPDATE, *supra* note 20, at 9.

321. *See supra* note 201 and accompanying text.