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Safety Net or Trap? A Policy-Oriented Analysis of the Public Sex Offender Registry as Compelled Speech

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I. INTRODUCTION

The scourge of sexual abuse of children defies justification. In the face of heinous crimes, legislatures have ensured public awareness of sex offenders living in our communities to protect our children from harm. We presume lawmakers have provided a great service to their constituents. We feel safer. What could possibly be wrong with this?

But what if these laws aren't accomplishing their intended results? What if we really aren't safer? And what if these laws not only fail to protect us, but harm society?

Over twenty-five years ago, lawmakers nationwide passed sex offender laws in response to high-profile cases involving sexual offenses, abduction, and murder of children.[1] Individuals convicted of sexual offenses are now required to provide specific personal information upon completion of their prison sentences. Keeping this information current is mandated by law. Foreseeably, this has significant impact on the lives of those on the registry and their ability to function in society. The purpose of this paper is to consider these laws in light of the First Amendment's prohibition against government-compelled speech. The framework of the New Haven School of Jurisprudence is an interdisciplinary process of addressing societal problems rather than a singular focus on legal analysis.[2] This unique policy-oriented approach "looks at possible outcomes of the decision making process on a particular issue and recommends choosing the decision that would maximise access by all to the things humans want

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1. Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 50, 55 (Richard G. Wright ed., 2d ed. 2015).

2. Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PAC. L. REV. 45 (2010).

out of life."[3] The concept is one of human dignity which allows access by all people to key human values, not just the privileged.[4]

II. DELIMITATION OF THE PROBLEM

There is a universal desire to shield those most vulnerable. Everyone—especially children—need and deserve protection from those who would sexually abuse them. After horrific crimes of child abductions, assault, and murder, massive media attention "fueled widespread fears that children are at high risk of assault by repeat sex offenders."[5] Lawmakers responded by enacting legislation requiring states to maintain a registry of sex offenders. The registries were first available to law enforcement officials and later made available to the general public through subsequent legislation.[6] These laws were based on assumptions that "sex offenders as a whole pose a distinct and ongoing risk to our communities when compared with many other kinds of criminal offenders."[7] Common assumptions about sex offenders are, "they inevitably reoffend, they have a propensity to kill their victims, they most frequently choose children as victims, and they are often strangers to their victims."[8] It is also assumed that sex offenders have higher recidivism rates than other criminals,[9] that "a registration system improves the ability of law enforcement to supervise

3. *Id.* at 51.

4. *Id.* at 51–52. *See* W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, Commentary, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 576 (2007) ("A public order of human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude."). Using this approach, this paper will first set forth a delimitation of problems presented by sex offender legislation and then consider conflicting claims of interested persons and groups. A look at past responses of the legal system to these various claims will be followed by a prediction of likely future decisions. Lastly, I appraise these responses and assert recommendations in furtherance of "a public order of human dignity."

5. Sarah Tofte, *No Easy Answers: Sex Offender Laws in the US*, 19 HUM. RTS. WATCH 1, 2 (2007), https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us.

6. Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. L. & ECON. 207, 210 (2011). *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997, 42 U.S.C. §§ 14071–73 (repealed 2006) [hereinafter Wetterling Act].

7. Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 744 (2016).

8. Mary K. Evans, Robert Lytle & Lisa L. Sample, *Sex Offender Registration and Community Notification*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS, *supra* note 1, at 142, 153.

9. Francis M. Williams, *The Problem of Sexual Assault*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS, *supra* note 1, at 13, 31.

such offenders and investigate new offenses,"[10] and that "community notification enables members of the public to specifically protect themselves and their families from risks in their communities."[11]

To address the piecemeal approach of federal legislation, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, which includes the Sex Offender Registration and Notification Act (SORNA).[12] The clearly stated purpose of SORNA is "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below."[13] The law specifically mentions seventeen individuals, aged 5 to 31, who were victims of heinous crimes.[14]

A sex offender is defined as anyone who has been convicted of a sex crime.[15] A three-tier system is designated for sex offenders under SORNA.[16] Tier I is for lower level offenses (including misdemeanors and possession of child pornography), Tier II for moderate level (generally dealing with child sexual exploitation offenses), and Tier III for highest level offenses (including forcible penetration convictions or offenses against children under 13).[17] "Sex offender" also includes juveniles who are 14 years of age or older and have been convicted of a sex crime.[18] "The tier of the sex offender's conviction will determine how long and how often that offender must register."[19]

10. McPherson, *supra* note 7, at 745.

11. *Id.*

12. Adam Walsh Child Protection and Safety Act of 2006, 34 U.S.C. §§ 20901–20932 [hereinafter Walsh Act].

13. *Id.* at § 20901.

14. *Id.* at § 20901(1)–(17). Individuals named are Jacob Wetterling, age 11; Megan Nicole Kanka, age 7; Pam Lychner, age 31; Jetseta Gage, age 10; Dru Sjodin, age 22, Jessica Lunsford, age 9; Sarah Lunde, age 13; Amie Zyla, age 8; Christy Ann Fornoff, age 13; Alexandra Nicole Zapp, age 30; Polly Klaas, age 12; Jimmy Ryce, age 9; Carlie Brucia, age 11; Amanda Brown, age 7; Elizabeth Smart, age 14; Molly Bish, age 16; and Samantha Runnion, age 5.

15. Agan, *supra* note 6, at 210.

16. Kelly K. Bonnar-Kidd, *Sex Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 413 (2010).

17. McPherson, *supra* note 7, at 760.

18. Walsh Act, 34 U.S.C. § 20911(8).

19. McPherson, *supra* note 7, at 760–61.

SORNA Tier Classification Definitions[20]

Tier I *15 years (10 with a "clean record")*	**Tier II** *25 years*	**Tier III** *Lifetime*
A sex offender other than a Tier II or Tier III sex offender. 34 U.S.C. §20911(2).	Defined in 34 U.S.C. §20911(3) as an offense punishable by Imprisonment for more than one year and: A. Comparable to more severe than the following offenses, which committed against a minor (or an attempt or conspiracy to commit them): 1. Sex trafficking as defined in 18 U.S.C. § 1591; 2. Coercion & enticement under 18 U.S.C. § 2422(b); 3. Transportation with intent to engage in criminal sexual activity under 18 U.S.C. § 2423(a); or 4. Abusive sexual contact under 18 U.S.C. § 2244 committed against a minor 13 years old or older. OR B. That involves: 1. Use of a minor in a sexual performance; 2. Solicitation of a minor to practice prostitution; or 3. Production or distribution of child pornography. OR C. That occurs after the offender becomes a Tier I offender.	Defined in 34 U.S.C. §20911(4) as an offense punishable by Imprisonment for more than one year and: A. Comparable to more severe than the following offenses, which committed against a minor (or an attempt or conspiracy to commit them): 1. Aggravated sexual abuse under 18 U.S.C. § 2241 or sexual abuse under 18 U.S.C. § 2241 or sexual abuse under 18 U.S.C. § 2242. 2. Abusive sexual contact under 18 U.S.C. § 2244 committed against a minor 13 years old or older. OR B. Involve kidnapping of a minor (unless committed by a parent or guardian). OR C. That occurs after the offender becomes a Tier II offender.

While SORNA does not establish a federal sex offender registry, it does create a new federal felony offense for failure to register.[21] It also

20. *SORNA Tier Classification Definitions*, UNIV. OF N.C. SCH. OF GOV'T, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/SORNA%20tier%20chart.pdf (last visited May 12, 2020). [should be noted that the original chart is from 2017; statute numbers have been updated to reflect current legislation]

21. Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, 20 UPDATE (Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), nos. 9 & 10, 2007, at 1. *See* Walsh Act, 34 U.S.C. § 20913(e).

establishes minimum national standards for sex offender registries, but jurisdictions may enact more stringent requirements.[22] Sex offender registries currently exist in all states, but because SORNA is only a baseline, laws differ on many aspects of registration.[23]

Under SORNA, each jurisdiction must maintain a registry of sex offenders and a notification program.[24] Sex offenders must register prior to completion of a prison sentence.[25] If imprisonment was not ordered for the offender, registration must occur within three days of sentencing.[26]

SORNA requires that registry information be kept current.[27] This requirement compels an offender to continually make ongoing statements about his or her crime. Very specific and detailed information must be provided by the offender, including the individual's name, Social Security number, address of each residence, name and address of employment, name and address of school (if a student), license plate number and vehicle description, travel information, and "[a]ny other information required by the Attorney General."[28] Additional information to be provided by the jurisdiction in which the individual was convicted includes the individual's physical description, complete criminal history, current photograph, fingerprints, DNA sample, photocopy of driver's license or identification card, and "[a]ny other information required by the Attorney General."[29] This information must be updated by every offender for a minimum of 15 years but up to the life of the offender, depending on the offense.[30] A reduction of 5 years is possible for maintenance of a "clean record."[31]

Federal mandates require law enforcement to notify communities of offenders who have been released from custody after they register or update their registry information.[32] Each state's registry is available on the internet, a national database for all sex offenders is maintained, and social networking sites have access to this information.[33] Law enforcement may

22. *Id.*
23. Sarah Hammond, *Sex Offender Law Strains States*, ST. LEGISLATURES, June 2010, at 16.
24. Walsh Act, 34 U.S.C. § 20912(a).
25. *Id.* § 20913(b)(1).
26. *Id.* § 20913(b)(2).
27. *Id.* § 20913(c).
28. *Id.* § 20914(a).
29. *Id.* § 20914(b).
30. *Id.* § 20915(a).
31. *Id.* § 20915(b)(3).
32. Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program, 34 U.S.C. § 20923.
33. 34 U.S.C. § 20920(a) and § 20917(a).

also notify communities directly.[34] Most states fail to provide guidance as to specific methods of notification.[35]

Individuals face significant detrimental consequences from being listed on the sex offender registry. A person who is placed on the registry, regardless of their underlying criminal activity, frequently faces a myriad of factors that inhibit successful reintegration into society. Registrants frequently experience hardships and extreme difficulties in the areas of employment, residence, relationships, harassment, and stigmatization.[36] Many Americans staunchly oppugn why this is even a concern. Any negative consequences an offender may experience and an inability to reintegrate in society are considered deserved. The presumption that a person is a danger to society, and especially to our children, tends to delegitimize the perceived value of anyone on the registry. They simply become disposable. But considering all offenders as the same, painting everyone with the same brush, ignores the unintended but pernicious consequences of SORNA not just to the offender but to society as a whole.

III. CONFLICTING CLAIMS AND CLAIMANTS

Each of the disparate claims and claimants—especially those directly affected by the issues presented here—raise issues of great importance. These claims are not mutually exclusive, and the validity of each perspective needs to be respectfully considered. Claimants should not be pitted against one another. The underlying desire to understand each claim leads to recommendations that contribute to addressing the needs of both the affected individuals and society.

The various supporters of SORNA laws are intertwined by a desire to do good and bring meaning out of tragedy. Political pressure often causes lawmakers to pass legislation in the names of victims, stating a desire to protect the public from sex offenders. Families of victims have sought changes in laws with the belief that the existence of such laws would have

34. Tofte, *supra* note 5, at 50.

35. *Id.* ("Some police departments and sheriff's offices hang posters in community centers and libraries, or send letters or postcards to homes within a certain distance of the registrant. Others publish notices in the local newspaper or broadcast pictures and addresses of the registrants on television. Some law enforcement officials fund non-governmental non-profits to inform the community about released registrants.") (footnotes omitted).

36. Erika Davis Frenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUST. POL'Y J. 1, 4 (2014), http://www.cjcj.org/uploads/cjcj/documents/frenzel_et_al_collateral_consequences_final_formatted.pdf.

prevented their own personal tragedy.[37] Law enforcement officials want to protect their communities. These laws have an intuitive appeal. There is a pervasive premise that the public is better able to protect itself when it is provided registry information.[38] Even though this is unsubstantiated by research and facts, supporters "believe that if sex offenders were tracked and if the public was more aware of the presence of convicted sex offenders, then sex crimes could be prevented."[39] Advocates for community notification of sex offenders believe this information needs to be placed directly in the hands of the public. By doing so, they believe they are better enabled to take steps to protect their children or themselves from convicted sex offenders who are presumed to be dangerous and strangers.[40] Various surveys have documented that people think the existence of the registry makes them safer, with those responding making comments like, "'[t]hank God that this service exists' and 'what a wonderful public service.'"[41] However, "stranger danger," a concept taught to American children for decades, has been debunked by the National Center for Missing and Exploited Children, as children are more likely to be harmed by someone they know.[42]

Public safety and protection are cited by government officials as the reasons for having sex offender registration and notification laws.[43] In a 1996 statement regarding Megan's Law, President Bill Clinton said:

> Nothing is more threatening to our families and communities and more destructive of our basic values than sex offenders who victimize children and families. Study after study tells us that they often repeat the same crimes. That's why we have to stop sex offenders before they commit their next crime, to make our children safe and give their parents piece [sic] of mind.[44]

And in 2004, Katherine Harris, a U.S. representative from Florida, introduced "Carlie's Law" to expand the grounds for mandatory revocation

37. Tofte, *supra* note 5, at 47 (Megan had been abducted, sexually assaulted, and murdered by a neighbor who was a convicted sex offender. Her mother said, "We knew nothing about him. If we had been aware of his record, my daughter would be alive today.").

38. *Id.* at 48.

39. Frenzel, *supra* note 36, at 2.

40. Tofte, *supra* note 5, at 49.

41. Frenzel, *supra* note 36, at 3.

42. *Experts Warn Against Teaching the Phrase "Stranger Danger"*, ABC NEWS (Mar. 31, 2017, 6:11 AM), https://abcnews.go.com/Lifestyle/experts-warn-teaching-phrase-stranger-danger/story?id=46427626.

43. Agan, *supra* note 6, at 211.

44. Tofte, *supra* note 5, at 47.

of probation or parole for a federal convict.[45] Harris stated, "We must act now to protect our children from the criminal repeat offenders who would use society's second chances to commit more acts of violence."[46]

Those in opposition to the registry requirements of SORNA contend that the law is overly broad in both scope and duration.[47] SORNA casts a wide net. The application of the law is not limited to violent sex offenders, but includes non-violent offenders, first-time offenders, and juvenile offenders.[48] All are subject to the registry and notification requirements. All on the registry face the same consequences and effects of SORNA's notification requirements regardless of the crime they committed. Unlike those convicted of other crimes, those who wind up on the sex offender registry face continued punishment long after their sentence has been served. Reintegration into society upon completion of a prison sentence can be difficult for anyone, but public knowledge of those on the sex offender registry makes their reintegration exceptionally challenging.[49] The information on the registry is not just available to law enforcement. All states make the required information available on the internet which anyone can access.[50] Some states place the entire contents of registries online.[51]

Obtaining employment in order to financially support oneself is also difficult as many employers are simply unwilling to hire someone on the sex offender registry. Even when a potential employer is willing, other circumstances often keep them from hiring an otherwise qualified applicant. Because SORNA requires that an employer's address be posted on the registry, many employers fear public notification of this information would result in lost business or income.[52] For many potential employers, hiring a registered sex offender, regardless of the circumstances of the underlying offense, is not worth the potential harm or loss of income.

45. Cory Reiss, *'Carlie's Law' Would Raise Federal Penalties,* SARASOTA HERALD-TRIB. (Mar. 31, 2004, 7:30 AM), https://www.heraldtribune.com/article/LK/20040331/News/605249947/SH.

46. *Id.*

47. *See* Rachel Marshall, *I'm a Public Defender. My Clients Would Rather Go to Jail Than Register as Sex Offenders.* VOX (July 5, 2016, 8:00 AM), https://www.vox.com/2016/7/5/12059448/sex-offender-registry.

48. *See Sex Offender Registration and Notification Act: Substantial Implementation Checklist*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/checklist_suppguidelines.pdf (last visited Feb. 25, 2021).

49. Frenzel, *supra* note 36, at 3–4.

50. 34 U.S.C. § 20920(a).

51. Agan, *supra* note 6, at 210 (noting "Alabama, Florida, Idaho, North Carolina, and Texas" are among the states placing entire contents of the registry online).

52. McPherson, *supra* note 7, at 779–80.

Affordable housing for sex offenders is difficult if not impossible to find. Many offenders are unable to reside, even on a temporary basis, with family or friends.[53] Because their address would be included in the registry, these family or friends fear facing "discrimination, harm, and financial burdens" as well.[54] State and community laws include residency restrictions which create additional shortage of available housing alternatives for sex offenders. Offenders are restricted from living in proximity of "schools, day care centers, parks, or other places that are densely populated by children."[55] These restrictions increase the likelihood of transience and homelessness and can lead offenders to move further from supportive environments. They may be relegated to isolated areas that lack services, employment opportunities, or adequate social support.[56] Homeless shelters are not available to them as residency restrictions can preclude this option for registered sex offenders.[57] Restrictions can be so severe that they have nowhere to live within city limits.[58]

These offenders are more likely to experience higher levels of social stigmatization and isolation and to be harassed by members of the community.[59] Offenders also report verbal and physical harassment and property damage caused by citizens living near them.[60] For those who are parents and endeavoring to function as a family, it is difficult to take part in expected parental duties, such as attending school functions.[61] Family

53. *See* Jill Levenson, Kristen Zgoba & Richard Tewksbury, *Sex Offender Residency Restrictions: Sensible Crime Policy or Flawed Logic?*, 71 FED. PROB. J. 2, 4 (Dec. 2007).

54. Medina v. Cuomo, No. 7:15-CV-01283, 2015 WL 13744627, at *3 (N.D.N.Y. Nov. 9, 2015), *report and recommendation adopted*, 2016 WL 756539 (N.D.N.Y. Feb. 25, 2016).

55. Terry & Ackerman, *supra* note 1, at 62–63 (noting residency restrictions typically bar offenders from living within 1,000–2,500 feet of areas where children congregate).

56. *Id.* at 63.

57. Tofte, *supra* note 5, at 103 ("I was homeless—I went to two homeless shelters—told them the truth—I was a registered sex offender—I could not stay. No one helps sex offenders I was told. The 3rd shelter I went to—I did not tell them. I was allowed to stay, November 2002 I was to register again—my birthday. If I told them I lived at a shelter—I would be thrown out—if I stayed on the streets I would not have a [sic] address to give—violation. So I registered under my old address—the empty house, which was too close to a school. Someone called the police—told them I did not live at that address anymore—! I was locked up, March 2003. I was given a 10-year sentence for failure to register as a sex offender.").

58. Bonnar-Kidd, *supra* note 16, at 415 (describing how strict residency restrictions in Miami, Florida meant the only housing approved by probation officers was an unofficial encampment of homeless individuals under the Julia Tuttle Causeway, a bridge connecting Miami to Miami Beach).

59. Frenzel, *supra* note 36, at 4.

60. *Id.* at 4–5.

61. *Id.* at 4.

members also share in the stigma experienced by offenders as they experience guilt by association.[62]

Non-compliance with SORNA, regardless of the reason, subjects offenders to serious penalties. Offenders who fail to comply with registry requirements, either by a failure to register or update a registration, face additional penalties including up to ten years in prison.[63]

Discretion afforded to law enforcement officials in the apprehension of offenders for failure to register leads to arbitrary application of the law. Research shows that understanding the reasons for noncompliance is important to most law enforcement officers, and many differentiate between purposeful non-compliance and an inadvertent failure to register.[64] However, actions an individual officer chooses may depend upon how that officer defines non-compliance and culpability.[65] This lack of uniformity raises a concern for arbitrary enforcement based solely on the personal views of an individual officer. Some officers "routinely accounted for situational factors" while others "conveyed less flexibility" when determining whether to arrest an individual or issue a warrant.[66] Failure to register is generally assumed to occur because offenders desire to evade detection or find new victims.[67] However, there are many reasons for non-compliance, with many violations occurring "inadvertently or due to extenuating circumstances."[68] Failure to update a registry can be intentional or unintentional, and has occurred for reasons such as:

- Embarrassment experienced by the individual for being on the registry, as well as embarrassment experienced by family members who find their address on the registry and who others recognize as being related to a sex offender;[69]
- Not updated where one resides because one would be forced to move, e.g., public housing;[70]

62. *Id.* ("Essentially, family members of [registered sex offenders] experience a 'courtesy' stigma . . . 'the loyal spouse of the mental patient, the daughter of the ex-con . . . are all obliged to share some of the discredit of the stigmatized person to whom they are related.'") (first ellipses added) (citation omitted).

63. Walsh Act, 34 U.S.C. § 20913(e); 18 U.S.C. § 2250(a).

64. Scott M. Walfield et al., *Law Enforcement Views on Sex Offender Compliance with Registration Mandates*, 42 AM. J. CRIM. JUST. 807, 828 (2017), https://www.academia.edu/30975316/Law_Enforcement_Views_on_Sex_Offender_Compliance_with_Registration_Mandates.

65. *Id.*

66. *Id.* at 824.

67. *Id.* at 809.

68. *Id.*

69. *Id.* at 818.

70. *Id.*

- Financial burden and time required with updating the registry;[71]
- Not comprehending registry requirements, either from lack of understanding or lack of proper education by authorities;[72]
- Intellectual limitation, lack of education, mental health issues;[73]
- Extenuating circumstances, e.g., hospitalization or admission to mental health facility;[74]
- Administrative, system or technological errors.[75]

Specific concerns are raised by SORNA as it applies to juveniles. Prior to the enactment of SORNA, juveniles were not required to register on the sex offender registry unless they had been tried as an adult.[76] SORNA requires that a juvenile, who may be as young as 14, register as an offender if adjudicated delinquent of certain offenses.[77] SORNA imposes the same mandatory compliance requirements on these juveniles as it does on adult offenders.[78]

IV. PAST TRENDS IN DECISIONS

A. Legislative History of Federal Sex Offender Laws

The first of the national laws governing sex offender registration was the 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, named after eleven-year-old Jacob Wetterling, who was abducted from his Minnesota neighborhood in 1989.[79] It

71. *Id.* at 819. For example, with each change of address, one must pay for a new driver's license to be issued. Many offenders are without jobs and financial resources to cover costs. *Id*.

72. *Id.* at 820–21. For example, offenders must register annually by their birthday, and they must update the registry if they move. This means that if they registered by their birthday, then moved a month later, they must update the registry again. In another example, an offender moved and provided his new address to officials in the new jurisdiction, without realizing he was in violation for not updating the registry in the jurisdiction he left. *Id*.

73. *Id.* at 821.

74. *Id.* If an offender is late in updating the registry and does not notify authorities of an extenuating circumstance, an arrest warrant can be issued. *Id*.

75. *Id.*

76. Ashley R. Brost & Annick-Marie S. Jordan, *Punishment That Does Not Fit the Crime: The Unconstitutional Practice of Placing Youth on Sex Offender Registries*, 62 S.D. L. REV. 806, 810 (2017).

77. 34 U.S.C. § 20911(8).

78. McPherson, *supra* note 7, at 764–66.

79. Wetterling Act, 42 U.S.C. §§ 14071–73 (repealed 2006). The Wetterling Act was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

was twenty-seven years before his abductor was apprehended and confessed to the assault and murder of Jacob.[80] This Act required states to establish a "sex offender and crimes against children registry."[81] All sexually violent perpetrators were required to register for life, while others are required to register for ten years.[82] Public notification was discretionary.[83] The following is a brief summary of the major federal sex offender legislation.[84]

- 1994 – Jacob Wetterling Act – established minimum state standards for registration of sex offenders and included discretionary public notification procedures to be used when necessary to protect the public.[85]
- 1996 – Megan's Law – mandated release of relevant information necessary to protect the public concerning a specific sexually violent predator.[86]
- 1996 – Pam Lychner Act – established a law-enforcement-only National Sex Offender Registry (NSOR) at the FBI, with requirement for states to transmit registration information for the Registry; allowed information of violent sexual offenders be provided to state and local agencies for law enforcement and community notification purposes.[87]
- 1997 – Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (CJSA) – modified release, parole, supervised release and probation requirements for sex offenders; expanded the list of agencies and officials responsible for notifying sex offenders of registry requirements; included additional registration requirements for persons working or attending school in a state; required notification to state agencies of released or paroled federal offenders.[88]

80. *In the Dark: The Jacob Wetterling Investigation Timeline of Events*, AM. PUB. MEDIA, https://features.apmreports.org/in-the-dark/jacob-wetterling-investigation-timeline/ (last visited Jan. 30, 2021).

81. Wetterling Act, 42 U.S.C. § 14071(a) (repealed 2006).

82. Wetterling Act, 42 U.S.C. § 14071(b)(6).

83. Wetterling Act, 42 U.S.C. § 14071(e) (repealed 2006).

84. *Legislative History of Federal Sex Offender Registration and Notification*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, https://smart.ojp.gov/sorna-archived/legislative-history-federal-sex-offender-registration-and-notification (last visited Jan. 30, 2021).

85. Wetterling Act, 42 U.S.C. §§ 14071–73 (repealed 2006).

86. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

87. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996).

88. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, Pub. L. No. 105-119 § 115, 111 Stat. 2440, 2461–67 (1998).

- 1998 – Protection of Children from Sexual Predators Act of 1998 – added a grant program to assist states in compliance with registration.[89]
- 2000 – Campus Sex Crimes Prevention Act – added notification requirements for sex offenders who study or work at institutions of higher education; required institutions to provide notice of how to obtain information about registered sex offenders.[90]
- 2003 – Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act or "PROTECT Act" – required states and the Department of Justice to maintain websites with registry information.[91]
- 2006 – Adam Walsh Child Protection and Safety Act and the Sex Offender Registration and Notification Act (SORNA) – addressed a comprehensive set of issues related to child protection, including new minimum standards for sex offender registration, standards for notification and registration, and the establishment of a national sex offender public website that allowed access to all state, tribal and territory websites.[92]
- 2008 – Keeping the Internet Devoid of Sexual Predators Act – required sex offenders to provide internet-related information to registries; addressed issues of online safety.[93]
- 2015 – Military Sex Offender Reporting Act – required the Department of Defense to submit information on any sex offender convicted via court-martial to the National Sex Offender Public Website.[94]
- 2016 – International Megan's Law – mandated advance notice of international travel by sex offenders.[95]

As previously mentioned, the 2006 Adam Walsh Act is the most significant and comprehensive sex offender legislation in the United States.

89. Protection of Children From Sexual Predators Act of 1998, Pub. L. 105-314, 112 Stat. 2974 (1998).

90. Campus Sex Crimes Prevention Act, Pub. L. No. 106-386 § 1601, 114 Stat. 1464, 1537–38 (2000).

91. PROTECT Act, Pub. L. No. 108-21 § 604, 117 Stat. 650, 688 (2003).

92. Walsh Act, Pub. L. No. 109-248, 120 Stat. 587 (2006).

93. Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (2008).

94. Military Sex Offender Reporting Act of 2015, Pub. L. No. 114-22 §§ 501–02, 129 Stat. 227, 258 (2015).

95. International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (2016).

It was written to make "more uniform and effective" what was "a patchwork of federal and 50 individual state registration systems."[96] SORNA is included in Title 1 of this Act. The requirements of SORNA serve as a minimum baseline for sex offender laws. All states have enacted sex offender laws, while 18 states, 4 territories, and 135 tribes meet minimum requirements of SORNA.[97] States in non-compliance with SORNA face financial repercussions.[98] Because the costs of implementing the Adam Walsh Act can exceed the financial loss incurred by a reduction in federal grants for non-implementation, many states implement their own variation of sex offender registry and notification laws.

B. The Compelled Speech Doctrine

An individual's right to freedom of speech is guaranteed under the First Amendment of the U.S. Constitution, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[99]

Freedom of speech is staunchly protected as a fundamental right. The First Amendment is primarily thought of as protecting an individual's freedom of speech by prohibiting government censorship. But another aspect of free speech is the prohibition of the government requiring speech. In what has become known as the compelled speech doctrine, freedom of speech includes the freedom to not speak.[100] The basis of this doctrine is found in *West Virginia State Board of Education v. Barnette*, which held that students could not be compelled to salute the flag or recite the pledge of allegiance.[101] A motive of national unity was the basis for the requirement by the school board, but the Court found this to be insufficient

96. Reynolds v. United States, 565 U.S. 432, 435 (2012) ("It does so by . . . setting forth comprehensive registration-system standards; by making federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's registration requirements.").

97. *Sex Offender Registration and Notification Act* (*SORNA) State and Territory Implementation Progress Check*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING (Sep. 30, 2020), https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/sorna-progress-check.pdf.

98. Walsh Act, 34 U.S.C. § 20927(a).

99. U.S. CONST. amend. I.

100. W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943).

101. *Id.* at 642.

grounds to compel an individual's speech.[102] "But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[103] The Court again addressed the issue of compelled speech in *Wooley v. Maynard*, finding that a state could not require an individual to display the state motto on a license plate.[104] "The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[105] The Supreme Court set forth a two-prong test for upholding compelled speech.[106] First, there must be a compelling state interest that is "legitimate and substantial."[107] Second, the restriction cannot be overly broad. As stated by the Court,

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[108]

In summary, for the government to write a law that compels speech, the law must serve a legitimate and substantial government purpose and must be narrowly tailored, written in the least restrictive means.

C. Legal Challenges to Sex Offender Registries

While the U.S. Supreme Court has addressed the constitutionality of sex offender registry laws on other grounds, it has not yet addressed the reporting requirements of SORNA and sex offender registries as a violation of the First Amendment's prohibition of compelled speech.[109] This issue has, however, come before several lower courts by appeal from convicted sex offenders. The basis for each of these courts to deny the claims was a finding of a legitimate government purpose in the legislation.

102. *Id.* at 662.

103. *Id.* at 639.

104. Wooley v. Maynard, 430 U.S. 705, 713 (1977).

105. *Id.* at 714.

106. *Id*. at 716.

107. *Id.* at 716 ("We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.").

108. *Id.* at 716–17 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

109. *See* Smith v. Doe, 538 U.S. 84, 102 (2003) (finding reporting requirements do not violate the Ex Post Facto Clause); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003) (finding no due process violation for posting sex offender information on public registry website).

The first of these cases addressing the requirements of SORNA as a violation of the First Amendment's prohibition of compelled speech is *US v. Arnold*, a 2014 case from Mississippi.[110] The Fifth Circuit held that the registration requirements of SORNA did not unlawfully compel speech.[111] The court considered the congressional intent behind the legislation and found SORNA to be constitutional because the registry "conducts an essential operation of the government."[112] Citing Arnold, the magistrate judge in *Medina v.* Cuomo concluded the offender had no First Amendment claim for compelled speech.[113]

A challenge to the International Megan's Law as compelled speech was heard in 2016 by a California court in *Doe v. Kerry*.[114] The International Megan's Law establishes a passport identifier requirement for covered sex offenders.[115] "The unique identifier is defined as 'any visual designation affixed to a conspicuous location on the passport indicating that the individual is a covered sex offender.'"[116] Because the passport identifier requirement had not yet been implemented, the California case was dismissed for lack of subject matter jurisdiction.[117] However, the court noted the stated purpose of the law is to "protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism."[118] It found the plaintiffs failed to establish a likelihood of success that the requirement is facially unconstitutional.[119]

110. United States v. Arnold, 740 F.3d 1032 (5th Cir. 2014).

111. *Id.* at 1033 ("We have not addressed whether SORNA's registration requirements violate the First Amendment's prohibition of compelled speech.").

112. *Id.* at 1035 ("In fact, it appears that Congress enacted SORNA as a means to protect the public from sex offenders by providing a uniform mechanism to identify those convicted of certain crimes.").

113. Medina v. Cuomo, No. 7:15-CV-01283, 2015 WL 13744627 (N.D.N.Y. Nov. 9, 2015), *report and recommendation adopted*, 2016 WL 756539 (N.D.N.Y. Feb. 25, 2016).

114. Doe v. Kerry, 2016 U.S. Dist. LEXIS 49912 (N.D. Cal. Apr. 13, 2016).

115. 22 U.S.C. § 212b(b)(1).

116. Daniel Cull, *International Megan's Law and the Identifier Provision - An Efficacy Analysis*, 17 WASH. U. GLOBAL STUD. L. REV. 181, 185 (2018).

117. *Doe,* 2016 WL 1446772, at *2.

118. *Id.* at *1 (quoting International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (2016)).

119. *Id.* at *9.

In 2017, a California court also denied a compelled speech challenge in *People v. Ruiz*.[120] The appellant in this case had been convicted of possession of child pornography.[121] Under California law, while all sex offenders must register, some offenses are excluded from public notification.[122] Of particular interest is the distinction the court made that the public would not have access to the information in the registry,[123] which is not the case for the majority of sex offender registries. The court also followed previous opinions regarding a legitimate government purpose, stating that "any infringement on Ruiz's constitutional right to freedom of speech is warranted by the state's interest in protecting children."[124]

Three cases were heard in Kansas in 2018 and 2019,[125] with each plaintiff arguing that SORNA forces a non-violent offender to communicate a message that he is "dangerous," in spite of this being a message with which he disagreed. The judges in all three cases dismissed these claims. The first of the Kansas cases is *United States v. Fox*, where the court stated, "[A] law satisfies strict scrutiny when the government proves that the law is narrowly tailored to serve compelling governmental interests."[126] The court determined SORNA to be narrowly written, stating, "The only speech compelled by SORNA is facts that provide the public and state law enforcement officials with the necessary information to track them effectively."[127] In making this decision, the court dismissed the claimant's argument that the law is overly broad.[128] Even though the law applies to both "non-violent sex offenders as well as violent predators," the court found the law to not be overly broad because it "does not label sex offenders as dangerous—it labels them as convicted sex offenders."[129] Also, the court "easily" concluded "that SORNA serves a compelling state purpose" in that it

120. People v. Ruiz, No. F074673, 2017 WL 4682707 (Cal. Ct. App. Oct. 19, 2017).

121. *Id.* at *1.

122. Cal. Penal Code § 290.46 (West).

123. *Ruiz*, 2017 WL 4682707, at *2 ("Moreover, Ruiz's inclusion in the sex offender registry is not a public communication and will not be displayed to the public.").

124. *Id.*

125. United States v. Fox, 286 F. Supp. 3d 1219 (D. Kan. 2018); United States v. Doby, No. 18-CR-40057-HLT, 2019 WL 5825064 (D. Kan. Nov. 7, 2019); Davis v. Thompson, No. 19-3051-SAC, 2019 U.S. Dist. LEXIS 205152 (D. Kan. Nov. 26, 2019). The defendants in these three cases were represented by the same public defender.

126. *Fox*, 286 F. Supp. 3d at 1223.

127. *Id.* at 1224.

128. *Id.*

129. *Id.*

> protects the public by allowing the general public and law enforcement to track sex offenders who move from another state . . . by compiling information from every state about convicted sex offenders into a national database, creating national minimum standards for the type of information states must collect, and requiring convicted sex offenders to provide that information to state officials when they move to a new state.[130]

The judge in *United States v. Doby*, the second of the Kansas cases, dismissed the defendant's claim that the law compels him to state he is dangerous. The court acknowledges that although that some people may make an interpretation of dangerousness from the registry, "there is no suggestion that the government has actually labeled Doby as dangerous or potentially dangerous."[131] The judge also cited the strict scrutiny analysis in *United States v. Fox*, agreeing that "SORNA is narrowly tailored to serve [compelling governmental] interest[s] because it merely compiles the necessary information that allows the public and law enforcement to track sex offenders from state to state."[132] The court reiterated that "SORNA's goal is not limited to protection against violent offenders" but is "protect the public from sex offenders and offenders against children."[133]

The third of the Kansas cases, *Davis v. Thompson*, also followed the reasoning in *Fox*, simply stating that "the law serves a compelling government interest and does so in a narrowly tailored fashion."[134]

United States v. Fox has also been cited and followed in two recent Michigan cases.[135] Of particular interest are two 2019 cases where courts found sex offender registration and notification laws in violation of the First Amendment. The first is an Alabama case, decided in February of 2019. In *Doe v. Marshall*, the branding-identification requirements of the Alabama Sex Offender Registration and Community Notification Act (ASCORCNA) were challenged as compelled speech.[136] In its analysis of

130. *Id.* at 1223–24 ("Here, Congress declared SORNA's purpose explicitly. It protects the public 'from sex offenders and offenders against children, and in response to the vicious attacks by violent predators False'").

131. *Doby*, 2019 WL 5825064, at *9.

132. *Id.* at *4.

133. *Id*. at *5.

134. Davis v. Thompson, 2019 U.S. Dist. LEXIS 2015152, at *7.

135. Prater v. Linderman, No. 1:18-cv-992, 2019 WL 6711561, at *9 (W.D. Mich. Dec. 10, 2019); Willman v. U.S. Off. of Att'y Gen., No. 19-10360, 2019 WL 4809592, at *6 (E.D. Mich. Oct. 1, 2019).

136. Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1318 (M.D. Ala. 2019).

the challenged statute, the court stated, "The Alabama Sex Offender Registration and Community Notification Act (ASORNA) is the most comprehensive and debilitating sex-offender scheme in the nation. No other state's system comes close."[137]

It applies to adults convicted of any of thirty-three "sex offenses," applies retroactively, applies to anyone convicted in another jurisdiction, and applies for life unless one is able to prove a medical need or meet one of the Act's few and narrow exceptions.[138] The branding-identification requirements stipulate that an offender must always have in their possession a driver's license or identification card "branded with 'CRIMINAL SEX OFFENDER' in bold, red letters."[139]

The court used a four-pronged test to analyze the challenged statute. Under that test, "[t]here must be (1) speech; (2) to which the plaintiff object; (3) that is compelled; and (4) that is readily associated with the plaintiff".[140] These four criteria were met.[141] Regarding the First Amendment violation, the court found "the branded-identification requirement compels speech, and it is not the least restrictive means of advancing a compelling state interest."[142] The court considered the practical implications and purpose of identification, being that it is a "virtual necessity," with identification needed to cash checks, enter certain buildings and businesses, buy certain items, get a job, and more.[143]Additionally, the message "CRIMINAL SEX OFFENDER" that is branded on the license is "readily associated" with the plaintiffs because it is *about* the plaintiffs.

> The ID cards are chock-full of Plaintiffs' personal information: their full name, photograph, date of birth, home address, sex, height, weight, hair color, eye color, and signature False When people see the brand on Plaintiffs' IDs, they associate it with Plaintiffs. The dirty looks that Plaintiffs get are not directed at the State.[144]

The court determined this requirement went "beyond what is necessary to achieve [the State's] asserted interest."[145]

137. *Id.*
138. *Id.* at 1319–20.
139. *Id.* at 1318.
140. *Id.* at 1324.
141. *Id.* at 1327.
142. *Id.* at 1324.
143. *Id.* at 1325.
144. *Id*. at 1326.
145. *Id.*

The second case is *Reed v. Long,* decided in October of 2019.[146] Here a Georgia sheriff posted lawn signs at the homes of several registered sex offenders prior to Halloween, "announcing to the public that their homes are dangerous for children."[147] The applicable law does not require or authorize the posting of such signs,[148] but the plaintiffs faced arrest if they removed the signs.[149] The court noted that even though they "had paid their debts to society," "are rehabilitated," and "live productive, law-abiding lives," they are "subject to Georgia's lifelong requirement that they register with their local sheriff."[150] The court found that the sheriff's actions, in compelling speech by posting lawn signs, were undertaken in furtherance of a legitimate government interest.[151] However, the sheriff violated the First Amendment rights of the plaintiffs by failing to use the least restrictive means, and the court granted the emergency motion for a temporary injunction.[152] One year later, the court considered the plaintiff's request for a permanent injunction barring the placement of lawn signs by the sheriff.[153] In denying the plaintiffs compelled speech claims, the court stated that the speech must appear to be endorsed by the plaintiffs.[154] The court reasoned there was no risk of such perceived endorsement because the sign clearly stated that the message was from the sheriff and that "no reasonable observer could now conclude the resident agreed with the sign's message: that trick-or-treating at their residence was dangerous."[155] Additionally, the plaintiffs were free to post competing yard signs disagreeing with the sheriff's message.[156]

146. Reed v. Long, 420 F. Supp. 3d 1365 (M.D. Ga. 2019).

147. *Id.* at 1368. The lawn signs were posted on the front lawn and read, "STOP WARNING! STOP NO TRICK-OR-TREATING AT THIS ADDRESS!! A COMMUNITY SAFETY MESSAGE FROM BUTTS COUNTY SHERIFF GARY LONG."

148. *Id*. at 1372–73.

149. *Id.* at 1370, 1377.

150. *Id*. at 1367–68.

151. *Id.* at 1377.

152. *Id.* at 1378. In fact, the sheriff articulated other less restrictive means that were used in the past which were effective. *Id.*

153. Reed v. Long, 2020 U.S. Dist. LEXIS 199103 (Oct. 27, 2020).

154. *Id* at 26.

155. *Id*. at 27.

156. *Id*.

V. FUTURE DECISIONS IN LIGHT OF CHANGED OR CHANGING CIRCUMSTANCES

The assumptions that prompted the enactment of SORNA and sex offender registry and notification statutes—that these laws will protect us and our children—live on. Because legislative actions are not research-based, the trend has been for laws to be amended so that they are even *more* restrictive and *more* broadly applied.[157] Modification of laws so that they are more narrowly tailored, in conjunction with research-based evidence, will not take place unless and until there is public pressure to do so. Lawmakers are unwilling to expurgate legislation that is popular with their constituents, no matter how misguided or uninformed those constituents and laws may be. So long as the public believes that sex offender registries keep us safe, regardless of their pernicious scope and duration, the laws will remain unchanged or continue defying available knowledge.

Case law has evolved incrementally, state by state, since the passage of the Adam Walsh Act.[158] In general, the trend is that state and federal courts uphold the application and enforcement of sex offender registry laws.[159] The primary focus of the courts in addressing First Amendment challenges to these laws has been the recognition of the existence of a legitimate and compelling government interest. Most of these courts have overlooked whether the law was narrowly tailored except in a few egregious situations.[160] None of the courts addressed the issue of whether the intent of the law is actually furthered by implementation of the law.

The disconnect between the laws, their purposes, and their effects is illuminated by research undertaken since the implementation of SORNA.[161] All of these issues are profoundly complex and require more than a simplistic approach to law making and policy. We understand better sex offenders, recidivism, victimization, and risk. This research indicates

157. Doe 1, *supra* note 136, at 1319.

158. McPherson, *supra* note 7, at 796.

159. *Id.* at 795–96.

160. *See, e.g.,* Reed v. Long, 420 F. Supp. 3d 1365 (M.D. Ga. 2019) (granting a preliminary injunction enjoining sheriff from placing warning signs on the lawn of non-violent offenders on Halloween), Reed v. Long, 2020 U.S. Dist. LEXIS 199103 (M.D. Ga. 2020) (dismissing plaintiff's compelled speech claim without prejudice); Commonwealth v. Leonard 172 A. 3d 628 (Pa. 2017) (vacating trial court judgement requiring a non-Tier III offender to register for life); B.J.B. v. State, 805 N.E.2d 870 (Ind. Ct. App. 2004) (reversing trial court decision requiring a juvenile register without an evidentiary hearing).

161. Agan, *supra* note 6, at 208.

that the sex offender laws enacted to protect children in actuality have had little impact on recidivism rates.[162]

Challenges to these laws on First Amendment grounds will continue to be made as more realize that the "legitimate government purpose" of these laws is not being met. Additionally, more cases will arise if restrictive legislation continues to be passed, as indicated by past trends.

VI. EVALUATION, APPRAISAL, AND RECOMMENDATIONS

A. Evaluation of Legislation

Sex offender notification and registration laws do little to address the most common situations and causes of sexual violence against children. It is difficult to ascertain whether legislative actions stem from a sincere belief that these laws are in the best interest of the community or whether they are an attempt to score political points with constituents. Much of legislators' understanding of sex offender laws is "driven by the demonization of offenders, the devastating grief experienced by a subset of victims, exaggerated claims by law enforcement and prosecutors, and media depictions of the most extreme and heinous sexual assaults."[163] In fact, courts have recognized that SORNA was passed by Congress "[i]n response to several high profile and horrific incidents committed by individuals previously convicted of sex crimes."[164]

The Center for Sex Offender Management describes this trend:

> [M]yths about sex offenders and victims, inflated recidivism rates, claims that sex offender treatment is ineffective, and highly publicized cases involving predatory offenders fuel negative public sentiment and exacerbate concerns by policymakers and the public alike about the return of sex offenders to local communities. Furthermore, the proliferation of legislation that specifically targets the sex offender population—including longer minimum mandatory sentences for certain sex crimes, expanded registration and community notification policies, and the creation of "sex offender free" zones that restrict residency, employment, or travel within prescribed areas in many communities—can inadvertently but significantly hamper reintegration efforts.[165]

162. Bonnar-Kidd, *supra* note 16, at 418.

163. Terry & Ackerman, *supra* note 1, at 3.

164. United States v. Fox, 286 F. Supp. 3d 1219, 1221 (D. Kan. 2018).

165. Bonnar-Kidd, *supra* note 16, at 419 (citation omitted).

Legislators, like the community members they represent, often accept inaccurate depictions of the causes and motivations of sex offenders.[166] Sex offender laws are routinely introduced with little debate and little opposition. Those who promote moderation are often considered "soft on pedophiles."[167] Lawmakers are "disproportionately influenced by isolated high-profile cases of sexual assault committed by strangers." They ignore that most sexual violence is committed by "known and familiar family, friends and acquaintances."[168]

Confusion over the enactment of these laws, their purpose, and their effects is illustrated in the passage of Megan's Law, which mandated community notification of registered sex offenders and is now incorporated in SORNA.[169] Seven-year-old Megan was killed in 1994 by a neighbor who, unbeknownst to her parents, had served six years in prison for aggravated assault and attempted sexual assault on a child. Megan's Law was quickly passed by the New Jersey State Legislature only eighty-nine days after Megan's murder.[170] This was a profoundly heinous crime, and the desire to prevent future victimization is clearly understandable. But the information provided on the website of the Megan Nicole Kanka Foundation elucidates common, but erroneous, assumptions about sex offenders. Consider these statements from the website of the Foundation:

> Every parent should have the right to know if a **dangerous sexual predator** moves into their neighborhood.[171]
>
> A law that would require notification when a **convicted sex offender** moves into a neighborhood. A law to protect our children.[172]
>
> At the very least, any convicted ***pedophile*** released from prison can not [sic] be allowed to reside in neighborhoods without the knowledge of the parents and children in that neighborhood. This simple statement is the essence of **MEGAN'S LAW**.[173]

166. Wright, *supra* note 144, at 5.

167. *Id.* at 3.

168. *Id.* at 3. *See also* Bonnar-Kidd, *supra* note 16, at 416 ("Most abuse happens in homes or with family or close friends.").

169. 34 U.S.C. § 20923(b).

170. *Our Mission*, MEGAN NICOLE KANKA FOUND., http://www.megannicolekankafoundation.org/mission.htm (last visited Feb. 1, 2021).

171. *Id.* (emphasis added).

172. *Id.* (emphasis added).

173. *The Right to Know*, MEGAN NICOLE KANKA FOUND., http://www.megannicolekankafoundation.org/rtk.htm (last visited Feb. 1, 2021).

These statements illustrate how these terms—"dangerous sexual predator," "convicted sex offender," and "pedophile"—are commonly used interchangeably. But they are not interchangeable, and laws can and should be drafted to reflect these differences.

The term "sex offender" for purposes of the sex offender registry casts a wide net. The public often views sex offenders as a homogenous group, but they are "a diverse mixture of individuals who have committed an array of illegal acts, ranging from noncontact offenses such as exhibitionism to violent sexual assaults."[174] Registries are intended to protect children, but they also apply to those who pose minimal risk, if any. This "one-size-fits all" approach "imposes substantial criminal penalties and other collateral consequences on *all* sex offenders," not just those who pose risk.[175] Certain offenses are not included under SORNA, but because SORNA is merely a baseline, some states have included additional offenses which subject convicted persons to the reporting requirements of sex offender registries.[176] Jurisdictions have included offenses such as consensual sex between teenagers,[177] a teenager sending a text message with a sexually explicit photo of himself,[178] and public urination in the presence of a minor.[179]

The duration of SORNA requirements is also treated as "one-size-fits all." As previously mentioned, the minimum registration period of Tier 1 offenders is 15 years, with a possible 5-year reduction if a clean record is maintained for 10 years.[180] Tier II and Tier III offenders must register for 25 years or the rest of their lives, respectively,[181] "regardless of how long they live offense-free or present other evidence of rehabilitation."[182] In two states, Alabama and South Carolina, registrants have no means by which they might secure release from the registry requirement.[183] An example of

174. Roger Przybylski, *Chapter 5: Recidivism of Adult Sexual Offenders*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, https://smart.gov/SOMAPI/sec1/ch5_recidivism.html (last visited Feb. 1, 2021).

175. Terry & Ackerman, *supra* note 1, at 63 (emphasis added).

176. McPherson, *supra* note 7, at 759.

177. Tofte, *supra* note 5, at 5.

178. Madeleine Baran & Jennifer Vogel, *Sex-Offender Registries: How the Wetterling Abduction Changed the Country,* APM REPS. (Oct. 4, 2016), https://www.apmreports.org/story/2016/10/04/sex-offender-registries-wetterling-abduction.

179. *Id.*

180. 34 U.S.C. § 20915(a) and (b).

181. *Id.* at § 20195(b).

182. Tofte, *supra* note 5, at 4. "Under this law, for example, a man who sexually abused a child in his family but has been living in the community offense-free for 20 years would nonetheless be required to continue to register until he dies." *Id.* at 42.

183. *Id.* at 41.

the application of this law is that of a man convicted of soliciting an adult prostitute. In Alabama, he would be required to "register for life, with no way to obtain a release from the registration requirements."[184]

This proliferation of registrants is not without problems for law enforcement. Having so many low-risk individuals on the registry, the inclusion of more offenses, and longer durations of registration—combined with insufficient resources—can bog down the system. The ability of law enforcement to adequately monitor high-risk offenders—those from whom the community is most seeking protection—can be compromised. As described by those tasked with monitoring:

> Lawmakers have no idea the kind of burden they put on law enforcement when they increase the number of offenders who must register.[185] The volume of registrants is such that law enforcement officials cannot even make sure that those who are supposed to register are doing so.[186]
>
> What we've found is we need to prioritize . . . we don't need to be filing cases on someone who forgot to come in on their annual if they're a low risk person, we need to focus on the ones that are high risk, or they've absconded from supervision.[187]

As has happened with other sex offender legislation, juvenile sex offender laws were "passed hastily in reaction to a few horrific" crimes.[188] Recently however, there is perturbation over SORNA requirements being applied to juvenile sex offenders as young as fourteen. Existing legislation ignores research that shows the offenses committed by juveniles tend to be "based on impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation," rather than based on sexual desires.[189] Juveniles have less than a 2% recidivist rate, and yet are included under the mandatory registration requirements.[190] This means that the 98% of

184. *Id.*

185. *Id.* at 44 (statement made to Human Rights Watch by the chief probation officer of Arizona County).

186. *Id.*

187. Walfield, *supra* note 64, at 18 (statement made by a California law enforcement officer).

188. Donna Vandiver & Mark Stafford, *End Juvenile Sex-Offender Registration: It's Ineffective and Based on Rare Cases*, JUVENILE JUSTICE INFO. EXCH. (Aug. 23, 2017), https://jjie.org/2017/08/23/end-juvenile-sex-offender-registration-its-ineffective-and-based-on-rare-cases/. Amie Zyla spoke before a U.S. House subcommittee of her assault by a teenager when she was 8. *Id.* Her testimony led to expanding sex-offender registration requirements to juvenile offenders. *Id.*

189. Brost & Jordan, *supra* note 76, at 809 (quoting Amy Halbrook, *Juvenile Pariahs*, 65 HASTINGS L. J. 1, 11–12 (2013).

190. *Id.*

juveniles who most likely will never reoffend face the same deleterious consequences as violent adult offenders.[191]

In treating juvenile sex offenders in an identical manner as adult sex offenders, the "long-standing goals of rehabilitation originally inherent in the creation of the juvenile justice system" is negated.[192] This can produce a "permanent class of sex offenders, whose behaviors were established in their youth and may become firmly entrenched by institutional procedures of public notification."[193]

Application and enforcement of sex offender registry laws vary across jurisdictions. This can create confusion as to reporting requirements when "adjudicated delinquent in one jurisdiction" but later move to another.[194]

> 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. 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. Some jurisdictions have mandatory registration provisions for certain juveniles, some are discretionary, and some have a hybrid approach.[195]

Additional restrictions within sex offender laws are also problematic. For example, in Alabama, sex offenders are precluded from employment "within 2,000 feet of a school or childcare facility" regardless of whether their offense involved a minor.[196] Residency restrictions, common in legislation, conflict with research showing that treatment in conjunction with community-based supervision is effective in the reduction of recidivism. These laws "are not effective, as they may increase offender risk by undermining offender stability and the ability to obtain housing, work and family support."[197]

> We've taken stable people who have committed a sex crime and cast them out of their homes, away from their jobs, away from treatment, and

191. *Id.*

192. Evans, Lytle & Sample, *supra* note 8, at 159.

193. *Id.*

194. McPherson, *supra* note 7, at 775.

195. *Id.* at 774–75.

196. Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1321 (M.D. Ala. 2019).

197. *Key Things to Know About Adults Who Sexually Offend*, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING (May 2017), https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/adultswhosexuallyoffend.pdf.

> away from public transportation. It's just absolutely absurd what these laws have done, and the communities are at greater risk because of it.[198]

Community notification laws have created unintended or latent consequences for offenders."[199] As previously mentioned, community notification laws were first passed after the murder of young Megan Kanka by a neighbor. Notification was intended to protect a community through awareness of violent sex offenders within close proximity. But without proper care in determining the best methods by which to notify a community, "law enforcement officials may inadvertently expand the scope of community notification beyond what is necessary to protect public safety, mislead the public about the actual risk a sex offender poses, and inflame community hostility and fear."[200] When a community is notified of the presence of a registrant through newspaper or television announcements, for example, the notification is expanded to an audience far beyond those within close proximity of the offender.[201]

Lack of guidance as to methods of community notification also results in arbitrary and creative application. For example, a Georgia sheriff took it upon himself to post signs on the front lawn of registered sex offenders prior to Halloween in violation of the offenders First Amendment rights.[202] In another instance, a person who was placed on the sex offender registry when he was sixteen was forced to hang a sign in his window stating, "Sex Offender Lives Here."[203]

These laws may also mislead the public about actual risk.[204] Because the public doesn't generally distinguish between "low" or "high" risk, anyone on the registry is generally deemed dangerous. By including minimal risk individuals, the community sees a greater number as dangerous than is warranted by actual circumstances. The community is also harmed by community notification laws that are unnecessarily expansive, as these "may drive more and more offenders underground, away from supportive services like sex offender treatment, and away from the supervision and monitoring of law enforcement."[205]

In summary, the goals of registration and community notification of SORNA are in contradiction with research-based evidence. Sex offender

198. Tofte, *supra* note 5, at 103.
199. Evans, Lytle & Sample, *supra* note 8, at 158.
200. Tofte, *supra* note 5, at 51.
201. *Id.*
202. Reed v. Long, 420 F. Supp. 3d 1365 (M.D. Ga. 2019).
203. Brost & Jordan, *supra* note 76, at 822.
204. Tofte, *supra* note 5, at 52.
205. *Id.* at 79.

laws fail to satisfy the legitimate government purpose because they (1) "do not reflect scientific research on sexual victimization, offending, and risk"; (2) "are driven by . . . horrific" and extreme cases; (3) "are politically popular [but] overly broad[] and simplistic"; and (4) "provide a superficial reassurance to the public on a profoundly complex, deeply vulnerable, and personal fear (that of rape and sexual victimization)."[206]

The viewpoint of one individual is particularly compelling. Patty Wetterling is the mother of Jacob Wetterling who was murdered in 1989 when he was eleven years old.[207] Mrs. Wetterling is the co-founder of the Jacob Wetterling Foundation and current Board Member and past Chairman of the National Center for Missing and Exploited Children.[208] As the mother of a murdered child, her support of the sex offender registry would be understandable based on her experience and heartache. She states she initially believed a centralized sex offender register to be a "well-intentioned tool to help law enforcement find children quickly," but she has since come to other conclusions.[209] She perspicaciously expresses concern and urges caution, stating that the use and effectiveness of laws that have been passed need to be looked at.[210] "What we really want is no more victims . . . So, how can we get there? Locking them up forever, labeling them, and not allowing them community support doesn't work. I've turned 180 (degrees) from where I was."[211] Ms. Wetterling's perspective is uniquely persuasive, stemming from her role as a mother of a murdered son, her tireless advocacy for child safety, her twenty-seven-year pursuit of justice for her son, and her experience working with experts in the areas of law enforcement, child welfare, and sex offender research:

> First of all, they don't understand the problem. Second of all, they usually propose legislation after another really horrific crime. So they've got public sentiment and demand: People demanding that they do something. These are people who have to get reelected, and the goal is to look like they are the toughest on crime, that they've done the most to go after these bad boys. They name the laws that are either compelling, compassionate, like after the child, or the PROTECT Act. The Adam Walsh Act

206. Terry & Ackerman, *supra* note 1, at 2.

207. *In the Dark*, supra note 80.

208. *Leadership*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, https://www.missingkids.org/footer/about/leadership (last visited Feb. 28, 2021).

209. Matt Mellema, Chenakya Sethi & Jane Shim, *Sex Offender Laws Have Gone Too Far*, SLATE (Aug. 11, 2014, 12:20 PM), https://slate.com/news-and-politics/2014/08/sex-offender-registry-laws-have-our-policies-gone-too-far.html.

210. APM Reports, *Patty Wetterling on Sex Offender Registries*, YOUTUBE (Oct. 3, 2016), https://www.youtube.com/watch?v=YXUSjY6DIhw.

211. Baran & Vogel, *supra* note 178.

> is named after a child. There are so many named after children, Dru's Law, Jessica's Law. It gives the sense that this is compassionate and caring and that it will make the world safer. Often, it doesn't . . . I'm not soft on these guys, but I just know that they're not all the same. They're not all the same and we can't treat them as such.[212]

B. Evaluation of Case Law

All courts agree the sex offender registry and notification laws have a legitimate government purpose.[213] The problem is that courts have wrongly assumed that the legislation as enacted fulfills this purpose. It does not.

Numerous court opinions have expressed a lack of understanding regarding the effects of public access to the sex offender registry. In *Smith v. Doe*, the United States Supreme Court considered a challenge to the Alaska Sex Offender Registration Act as to whether it was a retroactive punishment prohibited by the *Ex Post Facto* Clause of the Constitution.[214] Although the issue before the Court was not the compelled speech doctrine, the opinion is worth considering here. In its opinion, the Court minimized the consequence to sex offenders of public internet access to the sex offender registry. Acknowledging the unlimited geographic reach of the internet, the Court reasoned "a lasting and painful impact" on an offender is not due to the registration requirements of the law but rather from the conviction itself being a matter of public record.[215] According to the court, public access to the internet, which "makes the document search more efficient, cost effective, and convenient," is analogous to access to archived public records.[216] The Court's specious reasoning equates the ease of opening a laptop and doing a quick "google" search with the time and effort it takes to do an in-person criminal records search at a courthouse. Given the increased ease and public adeptness at using the internet

212. Terry & Ackerman, *supra* note 1, at 75–76.

213. *See, e.g.* Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1318 (M.D. Ala. 2019), Reed v. Long, 420 F. Supp. 3d 1365 (M.D. Ga. 2019), Doe v. Kerry, 2016 U.S. Dist. LEXIS 49912 (N.D. Cal. Apr. 13, 2016).

214. Smith v. Doe, 538 U.S. 84, 89 (2003).

215. *Id.* at 101.

216. *Id.* at 99 ("An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality.").

since the time of this 2002 opinion, it is surprising this is still considered "good law."

In *United States v. Fox*, the appellate court explicitly stated that SORNA is not limited in its purpose to applying to only violent sex offenders, but specifically states "its expressed goal is to protect the public 'from sex offenders *and* offenders against children.'"[217] The Court dismissed the claim its application to non-violent offenders infringed upon First Amendment rights and was not overly broad, citing the explicit goals of the legislation as sufficient.[218] The Court made several incongruous assertions regarding the public nature of the registry. In dismissing the argument that SORNA is overly broad, the Court approved the inclusion of non-violent offenders within the mandatory registration and notification requirements of the law same as those convicted of violent offenses. In doing so, the Court made an illusory distinction. The Court said, "SORNA does not label sex offenders as dangerous—it labels them as convicted sex offenders."[219] This assumes one looking at the registry makes this same distinction, when, as we have already seen, most equate being on the registry as being dangerous, or even worse, as being a pedophile.[220]

Additionally, the Court found that even though sex offenders are required "to disclose information to states who, in turn, publish that information in a database[,] [i]t does not require sex offenders to declare their status to every person they meet."[221] This ignores the reality that everyone they meet has access to this personal information they are compelled to provide. An offender cannot choose to whom this speech is made, as everyone is a potential "hearer."

The primary issue which must be addressed is whether what is acknowledged to be a legitimate government purpose is actually fulfilled by this legislation. The Supreme Court in *Packingham v. North Carolina* held that a legitimate government interest "cannot, in every context, be

217. United States v. Fox, 286 F. Supp. 3d 1219, 1224 (D. Kan. 2018) (citing 34 U.S.C. § 20901).

218. *Id.* ("The court concludes that SORNA provides law enforcement officials and the public with information about sex offenders to further these goals directly.").

219. *Id.*

220. Tofte, *supra* note 5, at 6 (email communication from Jameel N. to Human Rights Watch, June 4, 2005) ("When people see my picture on the state sex offender registry they assume I am a pedophile . . . What the registry doesn't tell people is that I was convicted at age 17 of sex with my 14-year-old girlfriend, that I have been offense-free for over a decade, that I have completed my therapy, and that the judge and my probation officer didn't even think I was at risk of reoffending. My life is in ruins, not because I had sex as a teenager, and not because I was convicted, but because of how my neighbors have reacted to the information on the internet.").

221. United States v. Fox, 286 F. Supp. 3d 1219, 1224 (D. Kan. 2018).

insulated from all constitutional protections."[222] The case law regarding sex offender registration and notification wrongly *assumes* the purpose is fulfilled by the law. Research shows this assumption simply does not coincide with reality, especially as it is applied to *all* sex offenders.[223] Consider the court opinion in *Doe v. Marshall,* the recently decided Alabama case previously discussed.[224] The issue before the court was mandatory branding on a driver's license, an aspect of registration not found in SORNA, but required in the Alabama Sex Offender Registration and Community Notification Act.[225] The court opinion provides compelling reasoning that can be applied to other SORNA cases. Not all creative methods, simply because there is a legitimate purpose, can be used unless they are the least restrictive means to achieve the goal.

C. Recommendations

Two goals must clearly be set forth in the consideration of recommendations: (1) the protection of individuals, and (2) the respecting of sex offenders' First Amendment rights.

Recommendations are made with the aim to satisfy both goals, as they both reflect the highest values within our society. Of utmost importance is the recognition that "[p]rotecting the community and limiting unnecessary harm to former offenders are not mutually incompatible goals. To the contrary, one enhances and reinforces the other."[226] The rights of some do not carelessly need to be sacrificed for the protection of others. As the Alabama court so clearly stated, protecting children is a compelling state interest, but "sex offenders are not second-class citizens. The Constitution protects their liberty and dignity just as it protects everyone else's."[227]

For these goals to be accomplished, the "one-size-fits-all" mentality that has dictated our laws and policies must be abandoned and replaced by those which are research-based. "Despite the intuitive value of using sci-

222. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (quoting Stanley v. Georgia, 394 U.S. 557, 563 (1969)). The Supreme Court found a North Carolina law overly broad that "makes it a felony for a registered sex offender to 'access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.'" *Id.* at 1738 (Alito, J., concurring) (quoting N.C. Gen. Stat. Ann. §§ 14-202.5(a), (e) (2015)).

223. *See* Agan, *supra* note 6.

224. Doe 1 v. Marshall, 367 F. Supp. 3d 1310 (M.D. Ala. 2019).

225. *Id.* at 1318.

226. Tofte, *supra* note 5, at 11.

227. Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1318 (M.D. Ala. 2019).

ence to guide decision-making, laws and policies designed to combat sexual offending are often introduced or enacted in the absence of empirical support."[228] Many are enacted without "evidence supporting their effectiveness in promoting public safety or preventing sexual victimization."[229] Rather than continue the enactment and enforcement of legislation that reinforces misplaced assumptions, a more advantageous approach includes examining existing laws, reviewing empirical evidence, and conducting further research on causes of behavior with thorough analysis of information.[230]

Since different types of sex offenders have different propensities to reoffend,[231] laws must be tailored that reflect these differences. Identification of the very serious sex offenders —those who are violent, those who commit crimes against minors, those at risk of repeat offending—is of immediate concern.[232] Laws requiring compliance of these individuals with sex offender registry and notification are appropriate. Those that do not fall within this category should not be subject to the same restrictions in the same manner. Registration should be limited to individuals "who have been individually determined to pose a high or medium risk to the community."[233] Risk can be more accurately determined by consideration of the type of offense committed, the length of the individual's offense-free time, and the presence of other relevant factors that are "statistically correlated with the likelihood of reoffending."[234]

The duration of one's mandated compliance with the sex offender registry should also be evaluated and tailored to the level of risk. Compliance obligations can be imposed for a shorter duration on a case-by-case basis or as a condition of parole.[235] "If the goal of sex offender registries is to enhance community safety, then the law should require registration for only so long as a former offender can reasonably be deemed to pose a meaningful risk of committing another sexually violent offense."[236]

228. Chris Lobanov-Rostovsky, *Sex Offender Management Strategies, Office of Justice Programs*, U.S. Department of Justice, https://smart.ojp.gov/somapi/chapter-8-sex-offender-management-strategies (last visited Mar. 6, 2021).

229. *Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction*, CTR. FOR SEX OFFENDER MGMT. (Dec. 2008), at 44.

230. *See* Evans, Lytle & Sample, *supra* note 8.

231. Przybylski, *supra* note 174.

232. Terry & Ackerman, *supra* note 1, at 63–64.

233. *Id.* at 45.

234. Tofte, *supra* note 5, at 46.

235. *Id.* at 11–12.

236. *Id.* at 41.

A collateral benefit in reducing the number of individuals included on the sex offender registry to those that most require monitoring is that it allows for the reallocation of resources to uses shown to be more effective. When research-based evidence of effectiveness guides sex offender management strategies, "there is little question that both public safety and the efficient use of public resources [are] enhanced."[237] Millions of dollars are spent on registration and community notification programs that do not address the "real causes of child sexual abuse and adult sexual violence."[238] The reallocation of resources would allow more "money spent on prevention, education, and awareness programs for children and adults, counseling for victims of sexual violence, and programs that facilitate treatment and the transition back to society for convicted sex offenders."[239] Communities are safer when a previously convicted sex offender succeeds in living in the community.[240] By removing those from the registry with a low rate of recidivism, the financial resources of states could be reallocated to "prevent sexual offenses, support services for victims of sexual crimes, and monitor people who are actually at high risk of reoffending . . . instead [of] squander[ing it] to monitor people unlikely to commit crimes in the future."[241]

Fortunately, some states have successfully implemented narrowly tailored legislation which can serve as a blueprint for other jurisdictions.[242] Provisions within these laws include consultations with child safety and women's rights advocates, case-by-case evaluations, risk assessment, community notification on a need-to-know basis, and individual residency restriction considerations.[243] The goal of this approach is the prevention of sexual violence by successful reintegration into society of former sex offenders.[244] As explained in a Human Rights Watch report, Minnesota's approach reflects research-based evidence:

> In Minnesota, state legislators and government officials, in consultation with child safety and women's rights advocates, have constructed carefully tailored evidence-based laws that aim to prevent sexual violence by safely integrating former sex offenders into the community, restricting

237. Lobanov-Rostovsky, *supra* note 228.

238. Tofte, *supra* note 5, at 10 (quoting a telephone interview by Human Rights Watch with Alison Feigh, a child safety specialist with the Jacob Wetterling Foundation on September 8, 2006).

239. *Id.*

240. *Id.*

241. Brost & Jordan, *supra* note 76, at 829 (citation omitted).

242. *See Twenty Strategies*, *supra* note 229, at 46 and Tofte, *supra* note 5, at 62–63.

243. Tofte, *supra* note 5, at 11.

244. *Id.*

> their rights only to the extent necessary to achieve that goal. Before they are released from prison, convicted sex offenders in Minnesota are assessed by a panel of experts, who determine whether an individual should be subject to registration and community notification, and if so for how long. The panel has the authority to periodically reassess the convicted sex offender's level of dangerousness and adjust his or her registration and community notification requirements accordingly. Community notification is on a need-to-know basis. As the Minnesota community notification law states, "The extent of the information disclosed and the community to whom disclosure is made must be related to the level of danger posed by the offender, to the offender's pattern of offending behavior, and to the need of community members for information to enhance their individual and collective safety." Minnesota has not adopted universal residency restriction legislation. Instead, law enforcement and the assessment panel jointly assess whether an individual on probation or parole should be subject to residency restrictions and what those restrictions should be.[245]

The registration and notification system of Vermont provides another specific example for consideration of an approach that protects both individuals and First Amendment rights:

> Vermont has a carefully tailored community notification law that limits notification to individuals who pose a high risk to the community, only for so long as they pose that risk, and on a need-to-know basis.
>
> The online registry contains only offenders who have committed sexually violent crimes and "sexual predators," defined as offenders determined through an independent court proceeding to have a certain degree of compulsion to commit sexual crimes. At present, only 282 out of 24,000 registered offenders in Vermont are listed on the state's sex offender website. According to an official with the Vermont Department of Public Safety, "By limiting the number of offenders who are subject to uncontrolled disclosure, the state hopes to make it easier for members of the public to identify the individuals who pose the most significant risk, and to support offender treatment and reintegration into society." . . . Unlike other states, which have had a difficult time keeping track of individuals required to register by law, Vermont officials say that 97 percent of offenders were in compliance with their registration requirement.[246]

The protection of both individuals and the rights of sex offenders can be furthered by the following proposals:

245. *Id.*
246. *Id.* at 62.

- Protect the community by *appropriately* targeting high risk, violent sex offenders[247]
- Protect the community by limiting registrants on the registry so that law enforcement does not lose sight of the most dangerous offenders[248]
- Assist sex offenders who have completed their sentences and pose a minimal risk to the community to more ably reintegrate into society
- Protect and uphold the First Amendment rights of all citizens

These recommendations reflect upon and uphold the inherent human dignity of all persons while furthering a legitimate government interest. Our communities deserve both.

247. Terry & Ackerman, *supra* note 1, at 63.
248. *Id.* at 64.