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INTERNATIONAL MEGAN’S LAW AND THE IDENTIFIER PROVISION – AN EFFICACY ANALYSIS

INTRODUCTION

Sex offender laws play an important role in protecting our communities, deterring sexual misbehavior, and in keeping an eye on high-risk individuals. However, as in any law, we want to guarantee the law is well-directed, proportional, and efficacious. A good problem should be met with the right solution. The most recent Congress has set out to stop sex trafficking and sex tourism by passing International Megan’s Law.

This note will provide the legal context for International Megan’s Law in three regards: sex offender laws, sex trafficking and tourism laws, and passport laws. From there, it will argue International Megan’s Law’s passport identifier requirement is not well suited to the aims of the law while taking an aggressive step away from the usual functions of the passport.

There are three problems International Megan’s Law faces. First, by using the passport to communicate things other than purely identificatory information, the United States moves away from near-universal international passport standards which other countries may use as precedent for improper purposes. Second, the impact of International Megan’s Law only replicates existing policy or creates effects that are better serviced through alternatives. Third, because International Megan’s Law impacts more than just offenders likely to engage in sex trafficking or sex tourism, the law places negative consequences on parties who were not the aim of the legislation’s goals.

BACKGROUND ON SEX OFFENDER LAWS

The federal government first legislated sex offender registration in 1994 with the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (hereinafter “Wetterling Act”).¹ The Wetterling

• Note: there is no expectation by the author that the change in administration of the Presidency will impact this law.

1. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act § 170101, 42 U.S.C. § 14071 (1994), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 129, 120 Stat. 600-01.

Act encouraged states to establish registration and tracking standards.² The federal government then passed federal Megan’s Law in 1996.³ Megan’s Law required states to “release relevant information that is necessary to protect the public concerning a specific person required to register.”⁴ All fifty U.S. States and all U.S. territories responded by enacting local laws to meet these requirements.⁵

Soon after, the federal government passed the Pam Lychner Sex Offender Tracking and Identification Act of 1996 (hereinafter “Lychner Act”).⁶ The Lychner Act required the FBI to establish a national database to track convicted sex offenders against minors, convicted sexually violent sexual offenders, and sexually violent predators.⁷ Mirroring Megan’s Law, the Lychner Act empowered the FBI to “release relevant information concerning a person required to register . . . that is necessary to protect the public.”⁸

In 2006, the federal government passed the Sex Offender Registration and Notification Act (hereinafter “SORNA”).⁹ SORNA acted to create “a comprehensive national system for the registration of . . . offenders.”¹⁰ SORNA sought to standardize state registration and notification to settle “gaps and problems with existing Federal and State laws.”¹¹ Strangely, the Office of Sex Offender Sentencing, Monitoring, Apprehending,

2. This was done through statutory notification requirements which were better facilitated through a registration framework. Specifically, any person required to register had to inform the State law enforcement agency of the jurisdiction where they resided. *See* Wetterling Act § 14071(b)(4). If that person changed their residence out-of-state, then the previous jurisdiction’s law enforcement agency would inform the new state’s law enforcement agency, provided that both states had a registration requirement. *Id.* § 14071(b)(5). The registrant himself or herself also had to notify the new state of their new address, provided the new state had a registration requirement. *Id.* The registrant had ten days to do this after moving. *See id.* (amended 1997). Failure to do so created criminal liability in each state with registration requirements. *Id.* § 14071(d). This registration framework provided multiple avenues for tracking sex offenders. Because there were multiple avenues for tracking, the system was more robust, and it was more difficult for registrants to slip through the system.

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

4. *Id.* § 2.

5. *See* 162 CONG. REC. H390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith) (“Today all 50 States and all U.S. territories have a Megan’s Law. Because of this law, parents, guardians, universities, school officials, sports coaches, law enforcement, and the public at large are now empowered with the critical information they need to mitigate harm to children.”).

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

7. *Id.* § 2(a).

8. *Id.*

9. Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 (Supp. V 2017).

10. *Id.*

11. H.R. REP. NO. 109-218, at 23 (2005).

Registering, and Tracking claims thirty-one states have failed to implement SORNA's requirements adequately even ten years later.¹²

Of particular interest, SORNA requires registered sex offenders, by criminal penalty, to update their registration when they travel in "interstate or foreign commerce."¹³ SORNA-qualifying travelers are required to provide a heavy load of personal information any time they travel internationally.¹⁴ SORNA also federally requires the establishment of "a system for informing the relevant jurisdictions about persons entering the United States who are required to register."¹⁵

BACKGROUND ON SEX TOURISM & TRAFFICKING LAWS

A frequent priority of Congress is the elimination of sex trafficking and sex tourism. To this end, federal law criminalizes the interstate and foreign transportation for sex trafficking purposes.¹⁶ Additionally, federal law criminalizes travel "with intent to engage in illicit sexual conduct" via interstate or foreign commerce.¹⁷ To prevent sex trafficking and tourism, in 2007 the Department of Homeland Security created Operation Angel Watch to notify foreign jurisdictions of travel by child sex offenders.¹⁸

12. The states listed as inadequately meeting SORNA's standards are: Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, Utah, Vermont, Washington, West Virginia, and Wisconsin. OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING [SMART], SORNA STATE AND TERRITORY IMPLEMENTATION PROGRESS CHECK (Aug. 31, 2017), available at <https://smart.gov/pdfs/SORNA-progress-check.pdf> (last visited Sept. 20, 2017). This determination "reviews jurisdictional laws, policies and procedures across 14 SORNA categories, detailing if a jurisdiction has or has not met the standards. These SORNA substantial implementation reviews are available at <https://smart.gov/sorna-map.htm>. . . [and are] meant to summarize jurisdictions' SORNA implementation status." *Id.*

13. 18 U.S.C. § 2250(a) (2006), amended by Sex Offender Registration and Notification Act, Pub. L. No. 109-248, § 141, 120 Stat. 601-02.

14. For SORNA international travelers, the Attorney General Guidelines for Sex Offender Registration and Notification requires twenty-one days of notice before travel with all the requested information. OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, *International Tracking of Sex Offenders*, SMART, https://smart.gov/international_tracking.htm (last visited Sept. 20, 2017). Offenders are required to give names, aliases, date of birth, sex, citizenship, passport information, the purpose of their travel, the dates of their travel, the location of their travel, information on their criminal record including dates of convictions, sex offenses convicted of, victim information, and registry information. SMART, NOTIFICATION OF INTERNATIONAL TRAVEL OF SEX OFFENDER FORM, available at <https://smart.gov/pdfs/International-Travel-Form-and-instruction.pdf> (last visited Sept. 20, 2017).

15. Sex Offender Registration and Notification Act, 34 U.S.C. § 20930 (Supp. V 2017).

16. 18 U.S.C. § 2423(a) (2012).

17. *Id.* § 2423(b).

18. The Department of Homeland Security established the program in the Los Angeles office of Homeland Security Investigations. See *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 U.S. Dist. LEXIS

Representative Christopher Smith of New Jersey claims he had an idea for a law that mandated international reciprocal information sharing on travelling sex offenders in 2007.¹⁹ Rep. Smith first introduced International Megan’s Law in 2008, with the bill passing through the House three times in 2010, 2014, and 2015.²⁰ In January 2015, the bill passed the House by a voice vote.²¹ In December 2015, the bill passed the Senate by Unanimous Consent.²² In February 2016, International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders was passed into law (“International Megan’s Law”).²³ International Megan’s Law is comprised of two major sections for combating sex trafficking and tourism.

First, International Megan’s Law establishes the Angel Watch Center.²⁴ The Angel Watch Center scans foreign travelers on the National Sex Offender Registry,²⁵ receives notifications of sex offenders entering the United States,²⁶ and transmits relevant information to destination countries.²⁷ In Representative Smith’s words, the Angel Watch Center would “codify and streamline” the work of Operation Angel Watch.²⁸

130788, at *11 (N.D. Cal. Sept. 23, 2016) (citing Decl. of Acting Deputy Assistant Dir. of DHS Cyber Crimes Div. Patrick J. Lechleitner). It focused primarily on individuals traveling from Los Angeles International Airport to Southeast Asian countries where sex tourism was prevalent. *Id.* When these individuals traveled, the officials would notify law enforcement and border security in the country the individual was traveling to. *Id.* at *11-12.

19. Representative Smith recounts the idea for International Megan’s Law came to him during a meeting with a delegation from Thailand. 161 CONG. REC. H545 (daily ed. Jan. 26, 2015) (statement of Rep. Smith). Rep. Smith asked the officials what they would do if the United States were to notify them of travel plans by convicted pedophiles from the United States. *Id.* All twelve officials said they would bar that traveler from entry into Thailand. *Id.* This meeting inspired Rep. Smith to push for International Megan’s Law’s passage. *Id.*

20. “I first introduced International Megan’s Law back in 2008. It has passed the House three times—2010, 2014, 2015—and, thankfully, passed the United States Senate in December.” 162 Cong. Rec. H390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith).

21. *H.R.515 - International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders*, Actions Overview H.R.515 — 114th Congress (2015-2016), CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/515/actions> (last visited Sept. 20, 2017).

22. *Id.*

23. International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, 34 U.S.C. § 21502 (Supp. V 2017) (codified in scattered titles of the U.S.C.) [hereinafter International Megan’s Law].

24. *Id.* § 34 U.S.C. § 21503 (Supp. V 2017).

25. *Id.* § 34 U.S.C. § 21503(e)(1)(A) (Supp. V 2017).

26. *Id.* § 34 U.S.C. § 21503(b)(1) (Supp. V 2017).

27. *Id.* § 21503(e)(3)(A)-(C) (Supp. V 2017).

28. International Megan’s Law “codif[ies] and streamline[s]” Operation Angel Watch into the Angel Watch Center. 161 Cong. Rec. H542, 545 (daily ed. Jan 26, 2015) (statement of Rep. Smith). Rep. Smith focuses his statement on streamlining the program, “ensuring that actionable information

Second, International Megan's Law establishes a passport identifier requirement for covered sex offenders.²⁹ 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."³⁰ Covered sex offenders include anyone who is required to register under any jurisdiction's sex offender program³¹ and is included in a registry based on an "offense against a minor."³² This term includes any criminal offense with a minor involving kidnapping,³³ false imprisonment,³⁴ sexual conduct,³⁵ solicitation to engage in sexual conduct,³⁶ sexual performance,³⁷ solicitation to practice prostitution,³⁸ video voyeurism,³⁹ child pornography crimes,⁴⁰ or "[a]ny conduct that by its nature is a sex offense against a minor."⁴¹

Congress passed International Megan's Law to stop sex tourism and sex trafficking.⁴² Congress found that sex offenders travel internationally from the United States,⁴³ and an estimated 18,000,000 children are victims of sex trafficking.⁴⁴ In 2008, the Government Accountability Office found that sex offenders were issued at least 4,500 passports.⁴⁵ Federal law does not allow for denial of a passport based on sex offender registration,⁴⁶ but this

about child sex offender travel actually gets to the destination country in time . . . [to] allow entry, deny entry or a visa, monitor travel, or limit travel." *Id.*

29. International Megan's Law, Pub. L. No. 114-119, § 8, 130 Stat. 24 (2016).

30. 22 U.S.C. § 212b(c)(2) (2012).

31. *Id.* § 212b(c)(1)(B) (2012).

32. A "specified offense against a minor" refers to a statutorily defined subset of sex crimes. International Megan's Law, 34 U.S.C. § 21502(10)(A) (Supp. V 2017). To define this subset, International Megan's Law cross-references 34 U.S.C. § 20911, the 2006 Adam Walsh Child Protection and Safety Act [hereinafter Adam Walsh Act]. See 34 U.S.C. § 21502(10)(A) (Supp. V 2017); Section 20911(7)(A)-(I) of the Adam Walsh Act lists nine definitions that populate "specified offense[s] against a minor." Adam Walsh Act, 34 U.S.C. § 20911(7)(A)-(I) (Supp. V 2017).

33. *Id.* § 20911(7)(A) (Supp. V 2017).

34. *Id.* § 20911(7)(B).

35. *Id.* § 20911(7)(H).

36. *Id.* § 20911(7)(C).

37. *Id.* § 20911(7)(D).

38. *Id.* § 20911(7)(E).

39. *Id.* § 20911(7)(F). Video voyeurism refers to the capturing of "an image of a private area of an individual without their consent . . ." Video Voyeurism Act of 2004, 18 U.S.C. § 1801(a) (2012).

40. 34 U.S.C. § 20911(7)(G) (Supp. V 2017).

41. *Id.* § 20911(7)(I).

42. The synopsis of International Megan's Law states the law's purpose is "[t]o protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism . . ." Pub. L. No. 114-119, 130 Stat. 15 (2016).

43. 34 U.S.C. § 21501(4) (Supp. V 2017).

44. *Id.* § 21501(5). Original text in statute states "1,8000,000 [*sic*] children." *Id.*

45. U.S. GOV'T ACCOUNTABILITY OFFICE., GAO-10-643, PASSPORT ISSUANCE: CURRENT SITUATION RESULTS IN THOUSANDS OF PASSPORTS ISSUED TO REGISTERED SEX OFFENDERS 5 (2010).

46. *Id.* at 7.

information still was heavily cited by proponents of International Megan's Law.⁴⁷

California Reform Sex Offender Laws challenged International Megan's Law in court as unconstitutional in violation of the First Amendment,⁴⁸ Fifth Amendment,⁴⁹ and the Ex Post Facto Clause.⁵⁰ The challenge failed on all points.⁵¹ This case has been appealed to the 9th U.S. Circuit Court of Appeals and is currently pending.⁵²

BACKGROUND ON PASSPORTS

The International Civil Aviation Organization ("ICAO") is a specialized agency within the United Nations.⁵³ The ICAO's authority stems from the Chicago Convention in 1944⁵⁴ and now manages 191 Member States.⁵⁵

One of the ICAO's early duties was collecting and making available information on local customs airports for foreign entry.⁵⁶ Members of the ICAO are entitled to their own "regulations relating to entry, clearance,

47. See, e.g., 161 Cong. Rec. H. 542, 545 (daily ed. Jan 26, 2015) (statement of Rep. Smith) (calling the GAO report "deeply disturbing").

48. California Reform Sex Offender Laws (currently renamed the Alliance for Constitutional Sex Offense Laws) argued requiring a passport identifier is compelled speech in violation of the First Amendment. *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 U.S. Dist. LEXIS 130788, at *45 (N.D. Ca. Sept. 23, 2016). The court ruled the passport identifier is government speech limited to factual information. *Id.* at *51. The identifier acts in no way to spread an ideological or political statement. *Id.* at *52. Because the passport does "not suggest or imply that the passport-holder has adopted or is sponsoring an ideological or political point of view," there is no claim to unconstitutional compelled speech. *Id.* at *53.

49. California Reform Sex Offender Laws argued the notification and passport identifier requirements violated substantive due process because the provisions are motivated only by malice and bear no rational relationship to protecting the public. *Id.* at *53-54. The court ruled Congress had important government objectives in protecting children, raising awareness of the whereabouts of sex offenders who cross international borders, and to encourage reciprocal notifications of traveling sex offenders. *Id.* at *65. The court then ruled International Megan's Law was rationally related to those objectives, and therefore, International Megan's Law was ruled not in violation of the Fifth Amendment. *Id.* at *65-66.

50. California Reform Sex Offender Laws argued the passport identifier violates the Ex Post Facto Clause. *Id.* at *73. However, the Supreme Court previously held that sex offender registration and notification requirements are not punitive or excessive. See *Smith v. Doe*, 538 U.S. 84 (2003). The court ruled the requirements here are analogous to those in *Smith* and therefore not punitive, and not in violation of the Ex Post Facto Clause. *Kerry*, 2016 LEXIS 130788 at *76.

51. *Kerry*, 2016 LEXIS 130788 at *76 ("[A]ll causes of action fail to state a claim").

52. Pat Murphy, *Defense Lawyers Wary of International Megan's Law*, MASS. LAW. WKLY., Jan. 19, 2017.

53. Int'l Civil Aviation Org., *About ICAO*, ICAO, <http://www.icao.int/about-icao/Pages/default.aspx> (last visited Sept. 24, 2017).

54. Int'l Civil Aviation Org., [ICAO], *Convention on International Civil Aviation*, at pmb1., ICAO Doc. 7300/9 (9th ed. Jan. 1, 2006) [hereinafter *Convention on International Civil Aviation*].

55. See *About ICAO*, *supra* note 53.

56. See *Convention on International Civil Aviation*, *supra* note 54, at art. 10.

immigration, passports, customs, and quarantine.”⁵⁷ However, contracting states also agree “to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization . . . in all matters in which such uniformity will facilitate and improve air navigation.”⁵⁸ Additionally, the ICAO exists itself to help provide “safe, regular, efficient and economical air transport.”⁵⁹

As necessary, the ICAO puts out “international standards and recommended practices and procedures”⁶⁰ for customs procedures.⁶¹ Although not binding, states looking to deviate from these standards must notify the ICAO within sixty days.⁶² The ICAO then disseminates this information to all Member States.⁶³

In 1968, the ICAO’s Air Transport Committee of the Council created the Panel on Passport Cards.⁶⁴ The Panel “develop[ed] recommendations for a standardized passport book.”⁶⁵ These standards were first published in 1980⁶⁶ and have been updated six times since.⁶⁷ In 2005, 188 Member States approved a new machine-readable standard for passports, to be implemented by 2010.⁶⁸

The current machine-readable standard mandates passports contain fields for the issuing state, document name, document type, issuing state code, passport number, first name, last name, nationality, date of birth, personal number, sex, place of birth, date of issue, authority or issuing office, date of expiry, signature, and portrait.⁶⁹ Within this standard, space exists for optional personal data elements⁷⁰ and optional document data elements.⁷¹ Countries have the ability to choose the design and color of the fronts of their passports.⁷²

57. *Id.* art. 13.

58. *Id.* art. 37.

59. *Id.* art. 44(d).

60. *Id.* art. 37.

61. *Id.* art. 37(j).

62. *Id.* art. 38.

63. *Id.*

64. Int’l Civil Aviation Org., *Machine Readable Travel Documents*, at pt. 1, art. 1, ICAO Doc. 9303 (7th ed. 2015) [hereinafter *Machine Readable*].

65. *Id.*

66. *Id.*

67. *Id.* pt. 1, art 2.

68. *Id.* pt.1, art 3.1.

69. *Id.* pt. 4, art. 3.2.2.

70. *Id.*

71. *Id.*

72. Becky Pemberton, *Not All Passports Are Equal: Why Passports Come in Different Colours and How Countries Choose Them*, THE DAILY MAIL (Feb. 8, 2016, 1:21 PM),

Although not directly passport-related, a few miscellaneous databases need background information. The Consular Lookout and Support System (CLASS) is a database used by the State Department to sort through persons wishing to enter the United States via immigrant and non-immigrant visas.⁷³ Additionally, during a passport application, a namecheck is run through the CLASS, and any wanted sex offender on the list will be noted and the information shared with other governmental agencies.⁷⁴

TECS is a database operated by U.S. Customs and Border Protection to conduct enforcement checks on individuals looking to enter or exit the United States, and cross-checks in real-time information from twenty federal agencies.⁷⁵ The National Sex Offender Registry (NSOR) aggregates biographic data on registered sex offenders from across the country stocked by state and local registry agents, and is accessible for law enforcement purposes only.⁷⁶

Finally, the United States has an extensive communications network with INTERPOL used to notify foreign countries that a sex offender is planning on travelling to that country.⁷⁷ Additionally, SMART suggests co-integration of registries with other countries that possess them.⁷⁸

ANALYSIS

Modern countries should aim to create robust systems to fight sex tourism and sex trafficking. The continued existence of these crimes is rightfully treated as unacceptable. However, it does not logically follow that the continued existence of a loathsome problem means all efforts to combat it are effective or wise. To this end, this note will argue the identifier provision of International Megan's Law represents bad policy.

This argument follows in three parts. First, in using the passport to communicate sex offender status, the United States moves away from a highly uniform international standard in providing more than purely

http://www.dailymail.co.uk/travel/travel_news/article-3437455/Not-passports-equal-travel-documents-come-different-colours-countries-choose-them.html.

73. OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING 2, INTERNATIONAL TRACKING OF SEX OFFENDERS WORKING GROUP WHITE PAPER (2010) [hereinafter White Paper].

74. *Id.* at 4.

75. *Id.* at 3.

76. *Id.*

77. *Id.* at 5.

78. *Id.* at 6 (“[T]here are approximately eight foreign countries that operate their own sex offender registries, and SMART will work . . . to develop systems so that appropriate information can be shared . . . between domestic . . . and foreign sex offender registries.”).

identifying information. This is an error that will allow the passport to be co-opted for political purposes. Second, the identifier provision provides minimal utility in preventing sex tourism and sex trafficking compared to other existing and non-existing legal steps. Third, the identifier provision acts as a cudgel, impacting both those likely to engage in sex trafficking or tourism and those who are not.

I.

The identifier provision of International Megan's Law moves the United States away from the highly uniform international standard for passports. Generally, variance in passports exists only in a few locations: the cover,⁷⁹ layout,⁸⁰ and optional data fields.⁸¹ The ICAO's report titled "Machine Readable Travel Documents" suggests optional data fields to be used for information such as fingerprints,⁸² PINs,⁸³ or occupation.⁸⁴ China, for instance, included profession and marital status in 1997.⁸⁵ By 2012, China had removed profession and marital status from their passports.⁸⁶ This change by China is in line with common usage of mandatory fields toward positive and efficient identification of the traveler. The trend suggests that passport fields are to be used toward identifying who the person is, not what actions they have taken.

Identifying past criminal behavior bucks this trend. It is atypical for passports to deliver information beyond pure identification. While other documents may have more variation in form and function,⁸⁷ the passport has

79. Pemberton, *supra* note 72.

80. *See, e.g.*, Machine Readable, *supra* note 64, pt. 4, art 3.2.4 ("these data elements shall be placed on an adjacent or preceding page").

81. *See id.* pt. 4, art. 3.2.2.

82. *See, e.g., id.* pt. 4, art. 4.1.1.

83. *Id.*

84. *Id.* pt. 4, app. A-1.

85. 2004-8-23 *Cissy Passport*, CLEAR WISDOM, http://www.clearwisdom.net/emh/article_images/2004-8-23-cissypassport.jpg, also available at <http://imgur.com/a/Fer7d> (last visited Sept. 24, 2017).

86. It does not appear from passport images available online that China has continued this passport policy. *See PRC Ordinary Passport 97-2*, WIKIMEDIA COMMONS, [https://upload.wikimedia.org/wikipedia/commons/9/9a/Informatin_Page_of_PRC_Ordinary_Passport_\(97-2_Version\).jpg](https://upload.wikimedia.org/wikipedia/commons/9/9a/Informatin_Page_of_PRC_Ordinary_Passport_(97-2_Version).jpg) (last visited Sept. 24, 2017).

87. As an example, Alabama, Delaware, Florida, and Louisiana require sex offenders to have their offender status on their driver's licenses. *See* 162 Cong. Rec. H. 387, 390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith). Rep. Smith argues additionally that marking the passport prevents sex offenders in these states from avoiding the labeling requirement by using the passport as identification instead. *Id.* However, this falls into the same trap of an over-broad solution. A simpler fix would be for states that actually have these requirements to mandate specific identification standards for sex offenders. Distinctly, driver's licenses are a state function. *See United States v. Tonry*, 605 F.2d 144,

been purely an identifying document in its modern form. Singling out sex offenders is unique, even compared to more heinous acts.⁸⁸

In one of these exceptions, Pakistan marked whether a passport holder was a Muslim.⁸⁹ This had a markedly political twist to it, as calling Ahmadi followers Muslim in Pakistan is considered locally outrageous to the Sunni Muslim majority,⁹⁰ and is illegal.⁹¹ This distinction serves as political speech by the Sunni Muslim majority, claiming Ahmadi Muslims as non-Muslim.⁹² To declare oneself Muslim on a Pakistani passport, a declaration must be signed declaring one's Muslim status and denouncing Ahmadis.⁹³

149 (5th Cir. 1979) (characterizing the issuance of driver's licenses as "an integral state function"). Federal requirements for state driver's licenses are minimal and technically non-mandatory. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 202(b), 119 Stat. 312 (requiring states to place full legal name, date of birth, gender, address, signature, and a digital photograph on their driver's licenses to be usable for federal purposes, but not mandating anything further).

88. To this point, Representative Bobby Scott of Virginia argues "it is simply bad policy to single out one category of offenses for this type of treatment. We do not subject those who murder, who defraud the government or our fellow citizens of millions and billions, or who commit acts of terrorism to these restrictions." 162 Cong. Rec. H. 387, 393 (daily ed. Feb. 1, 2016) (statement of Rep. Scott). Of note, this only means that passports themselves traditionally have not varied across groups. The United States has altogether denied passports to certain groups. *See, e.g.*, 22 U.S.C. § 2714a (denying passports for unpaid taxes); 22 U.S.C. § 2714 (denying passports to drug traffickers); Mo. Rev. Stat. § 454.511 (denying passports for unpaid child support). Other countries take similar steps. For instance, Australia's Foreign Minister Julie Bishop recently proposed legislation to cancel the passports of anyone on their national child sex offender registry. Devon Haynie, *Is It Good Policy to Regulate the Passports of Sex Offenders?*, U.S. NEWS (May 31, 2017, 5:38 PM), <https://www.usnews.com/news/best-countries/articles/2017-05-31/critics-slam-australias-plan-to-revoke-passports-of-child-sex-offenders>.

89. The Pakistani government marks whether a passport holder is a Muslim, a non-Muslim, or a non-Muslim Ahmadi. *See, e.g.*, Immigration and Refugee Bd. of Canada, *Amendment of the Religion Indicated on a Pakistani Passport, Specifically Changing "Islam" or "Muslim" to "Ahmadi,"* PAK33822.E (Mar. 13, 2016), available at https://www.ecoi.net/local_link/190088/308310_de.html. *See also* Shahid Mahmood, *Passport Woes: Does the World Need to Know We Are Muslim?*, EXPRESS TRIBUNE BLOGS (Apr. 20, 2011), <https://blogs.tribune.com.pk/story/5468/passport-woes-does-the-world-need-to-know-we-are-muslim/>.

90. *Zaheeruddin v. State*, (1993) S.C.M.R. 1718, 1765 (Pak.).

91. *See id.* at 1779.

92. *See* Karen Parker, *Religious Persecution in Pakistan: The Ahmadi Case at the Supreme Court* (1993), available at <http://www.guidetoaction.org/parker/ahmadi.html> ("In defending Ordinance XX, then President General Zia-ul-Haq told this author 'Ahmadis offend me because they consider themselves Muslim . . . Ordinance XX may violate human rights but I don't care.'").

93. The declaration of Muslim identity is as follows:

1. I am a Muslim and believe in the absolute and unqualified finality of the Prophethood of Muhammad the last of the Prophets.
2. I do not recognize any one who claims to be a prophet in any sense of the word or any description whatsoever, after Prophet Muhammad or recognize such a claimant as a prophet or a religious reformer as Muslim.
3. I consider Mirza Ghulam Ahmad Qadiani to be an impostor prophet and an infidel and also consider his followers whether belonging to the Lahori, Qadiani or Mirzai groups, to be non-Muslims.

Maintaining the neutrality of the passport is critical because the logic used for sex offender passport identifiers can be used in less reputable ways elsewhere. For instance, International Megan's Law's passport identifier requirements have been touted as necessary generally for protection and safety.⁹⁴ However, these arguments can quickly be co-opted. In the Pakistani passport example, the Pakistani courts forbid Ahmadis from practicing their faith, citing the necessity to prevent violence and to maintain law and order.⁹⁵ The same generic points of logic hold, but the logic has been co-opted to repress religious liberties. Other countries look to the United States as a legal authority.⁹⁶ Maintaining neutrality in line with the

Faiz Lalani, *Pakistan's Absurd Inclusion of Religion on Passports*, AFFAIRES ÉTRANGÈRES (May 3, 2010), <https://affairesetrangeres.wordpress.com/2010/05/03/pakistans-absurd-inclusion-of-religion-on-passports/>.

94. The Northern District of California Court of Appeals ruled Congress properly was protecting children, raising awareness of the whereabouts of sex offenders who cross international borders, and encouraging reciprocal notifications of traveling sex offenders in passing International Megan's Law. *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 U.S. Dist. LEXIS 130788, at *65 (N.D. Ca. Sept. 23, 2016).

95. "Nowhere the practices which are neither essential nor, integral part of the religion are given priority over the public safety and the law and order. Rather, even the essential religious practices have been sacrificed at the altar of public safety and tranquility." *Zaheeruddin*, 1993 S.C.M.R. at 1805. The opinion equates violence that may occur as a responsibility of the provoking Ahmadis. *Id.* at 1803 ("Can [then] anyone blame a Muslim if he loses control of himself on hearing, reading, or seeing such blasphemous material as has been produced by Mirza Sahib?"). *See also* *United States v. White*, 401 U.S. 745, 756-59 (1971) (Douglas, J., dissenting). Justice Douglas discussed the right to privacy from government agents wearing radio wires. *Id.* at 756. Douglas admonished the majority for their focus on judicial tests rather than protections, arguing they are allowing "the Fourth Amendment [to] vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life . . ." *Id.* In a broad sense, Douglas argued benign and desirable ideas are used as pretext to enact improper policy, all while citing to existing policy in the United States. In his argument, Douglas suggested the judicial frameworks that are supposed to protect the rights of Americans have been co-opted to attack them instead. This evidences the pressures that exist within the United States itself to use their case law against the spirit from which the same case law was created. In a system with less civic tradition than the United States, this pressure is probably more difficult to resist. A young United States dealt with this very issue. In *Plessy v. Ferguson*, Justice Harlan said in dissent that "[t]he destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan J., dissenting). Famously, this goal failed; segregation policies were deemed Constitutional "under the preten[s]e of recognizing equality of rights". *Id.* at 561.

96. In *Zaheeruddin*, the Pakistani Supreme Court cited to U.S. law at least four times. *Zaheeruddin v. State*, 1993 S.C.M.R. 1718 (Pak.) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Reynolds v. United States*, 98 U.S. 145 (1879); *Jones v. Opelika*, 316 U.S. 584 (1942); and *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)). In fact, United States law and international law frequently interact in the regions especially targeted by International Megan's Law. *See, e.g.*, *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, 2 SLR 310, 353 (Sing. 1992) (citing United States defamation law); *e.g.* In re Abortion Law Challenge in Colombia, Corte Constitucional, Sentencia C-355/06, 4.1.16 (2006) (citing United States abortion law); *Michael v. The Queen*, No. 112, 2006, Supreme Court of Belize, *available at* http://www.belizejudiciary.org/web/supreme_court/judgements /2006/sc/civil/12_of_2006.pdf (citing United States criminal law).

international standard on passport policy thus provides less of an anchor to tie discriminatory actions to, even where intentions are benign.

II.

The purpose of the International Megan's Law's passport identifier provision is to help deal with a loophole in past sex offender laws. Specifically, the passport identifier prevents travelers from "thwarting International Megan's Law notification procedures by country hopping to an alternative destination not previously disclosed."⁹⁷ The focus of this identifier seems to be on administrative failures to track sex offenders.

However, this identifier only creates duplicative incentives for self-reporting. The traveler already has incentive to communicate their travel to U.S. officials because of the criminal liability associated with not communicating their travel.⁹⁸ For this traveler, the U.S. gains no further utility in tracking, but the traveler is now exposing his past to not only the administrative agencies of the U.S. and the destination country, but also any local official that sees his or her passport.

This might not be problematic in other spheres, but the identifier carries tangible implementation costs. In countries where shakedowns are frequent against foreigners, the stigma of sex offenses⁹⁹ provides huge leverage to

There are too many examples to cite individually as "[m]ost national courts follow the same path of giving comparative law an ever more prominent role as a source of law," with the United States as the largest focus-point. COURTS AND COMPARATIVE LAW 5 (Mads Andenas & Duncan Fairgrieve eds., Oxford University Press 2015). *Cf. Roper v. Simmons*, a famous U.S. death penalty case where the Supreme Court majority found the law of other countries instructive on the death penalty. *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."). *But see Printz v. United States*, where Justice Scalia remarked "comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." *Printz v. United States*, 521 U.S. 898 n.11 (1997).

97. 162 Cong. Rec. H. 387, 390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith).

98. Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 (Supp. V 2017).

99. *Kerry*, 2016 LEXIS 130788, *70 ("[The plaintiffs argue] nothing could be more stigmatizing than communication of information identifying someone as a convicted sex offender."). Attorney Kate Frame argues the passport identifier acts as "government stigmatization," and Catherine Hinton characterizes it as "branding." Murphy, *supra* note 52. *See also, e.g.,* David Post, *The Yellow Star, the Scarlet Letter and "International Megan's Law,"* WASH. POST (Jan. 6, 2016), <http://wapo.st/20JoSxJ> (characterizing the passport identifier as comparable to the yellow star for Jews during Nazi Germany or a scarlet letter); Editorial, *Do Sex Offenders Deserve a Scarlet Letter on Their Passport?*, L.A. TIMES (Feb. 3, 2016), <http://lat.ms/1S3R21B> (characterizing the passport identifier as a scarlet letter).

local officials.¹⁰⁰ In parts of the world where civic bribery is common,¹⁰¹ officials will expect a standard bribe in all encounters and demand a higher bribe as their leverage increases.¹⁰² Because sex offenses are highly stigmatized,¹⁰³ the amount of a bribe a police officer can extract is much higher than for the regular traveler.¹⁰⁴

Even where an offender is statistically likely to re-offend at some point, the passport identifier harms them regardless of the purpose of their trip or the risk associated with the location of their travel. Given the necessity of passports for international identification even in civilian interactions, like proving identity to buy train tickets or liquor, an identifying marker without context creates many opportunities for harm.¹⁰⁵ Especially where the offender is *not* likely to engage in sex trafficking or tourism — because of rehabilitation or the nature of their initial underlying offense — the passport

100. Bribe-seeking by police is extremely common in some parts of the world. The normal amount for the bribe is dependent on location and what the briber has been accused of. ROBERT YOUNG PELTON, *THE WORLD'S MOST DANGEROUS PLACES* 88-91 (4th ed. 2000).

101. In a cross-cultural survey, respondents were asked whether they had been asked to pay a bribe to a police officer. Sanja Kutnjak Ivkovic, *Criminology: To Serve and Collect: Measuring Police Corruption*, 93 J. CRIM. L. & CRIMINOLOGY 593, 611 (2003). Western respondents tended to answer yes at a level below one percent. *Id.* at 612. Typically, Eastern European, Asian, and Latin American respondents answered yes between ten and twenty percent. *Id.* Argentina had the highest rate of respondents saying they had been asked to pay a police bribe at seventy-one percent. *Id.*

102. Salim Rashid argues bribery originally acts to allow persons more willing to pay for better service to receive that better service, but over time bribery is institutionally bureaucratized. Salim Rashid, *Public Utilities in Egalitarian LDC's: The Role of Bribery in Achieving Pareto Efficiency*, 34 KYKLOS: INT'L REV. FOR SOC. SCI. 448, 448-55 (1981). Thus, bribery becomes the norm for receiving any kind of service. Once bribery has been normalized, officials will create scenarios where they can extract more and larger bribes. *Id.* Although this work is in telecommunications, the bribery framework translates intuitively to police services.

103. Sex offenses are considered heinous enough to have some form of registration or notification systems in Argentina, Australia, Bermuda, Canada, France, Germany, Ireland, Jamaica, Jersey, Kenya, Maldives, Malta, Pitcairn Islands, South Africa, South Korea, Taiwan, Trinidad and Tobago, the United Kingdom, and the United States. SMART, *GLOBAL OVERVIEW OF SEX OFFENDER REGISTRATION AND NOTIFICATION SYSTEMS* 1 (Apr. 2014), *available at* smart.gov/pdfs/GlobalOverview.pdf. As of April 2014, Austria, Bahamas, Fiji, Finland, Hong Kong, Israel, Malaysia, New Zealand, Switzerland, the United Arab Emirates, and Zimbabwe have considered such laws. *Id.* Most major democracies and countries on every continent formally track lawbreakers for sex crimes, emphasizing its global detestability.

104. Applying the Rashid model, police officers extract bribes out of travelers as a base cost of travel. Bribery is “flexible and quite receptive to the abilities and needs of particular parties.” Rashid, *supra* note 102 at 453. As such, during interactions with people they have more leverage over, the police officers extract more expensive bribes. Because of the stigma and criminality of sex offenses and their authority specific to criminal enforcement, police officers have extremely strong leverage over traveling sex offenders and may extract very high bribes.

105. See 162 Cong. Rec. H. 387, 393 (daily ed. Feb. 1, 2016) (statement of Rep. Scott) (“[I]f the ‘unique passport identifier’ is . . . obvious to not only law enforcement officials but any member of the general public viewing the passport, this could lead to unintended consequences of persecution and harm to the traveler.”).

identifier has done nothing but harm citizens and transfer capital out of the country by encouraging shakedowns.¹⁰⁶

Dangerously, these labels could *facilitate* rather than eradicate sex trafficking and sex tourism. Representative Brendan Boyle of Pennsylvania testified that while sometimes foreign officials have no idea or turn a blind eye to sex trafficking, officials are sometimes complicit in the crime.¹⁰⁷ In these situations, the stamp of sex offender creates a signal a potential customer is in front of this corrupt trafficking official. A particularly devious official could use the power of their position to pressure the traveler into recidivism, even if that had not been his or her intent in traveling.

The increased utility for the passport identifier allegedly comes from situations where the traveler hops from the disclosed country to another unbeknownst to U.S. authorities.¹⁰⁸ However, the United States has already created tools which better serve the aims of preventing this loophole. The National Sex Offender Registry already exists and collects information on travelers.¹⁰⁹ Furthermore, the United States also already has experience cross-checking sex offender databases in international travel.¹¹⁰

The United States passport follows the machine-reader standards of the ICAO.¹¹¹ By modifying past efforts, the United States could replicate the effects of a passport identifier using machine-reading. A system of cross-checking passports by machine-readers against the National Sex Offender Registry would accomplish the aims of preventing country-hopping without exposing cooperating travelers to local danger. Cross-checking databases are already used to combat sex trafficking and sex tourism domestically.¹¹²

106. See also *id.* (describing the identifier as “especially troubling” because there is no individualized context provided about the underlying reason that led to the identifier).

107. *Id.* at 391 (daily ed. Feb. 1, 2016) (statement of Rep. Boyle). Separately, while describing his aid’s past trip to Cambodia, Representative Royce shared an anecdote where “the local police chief . . . himself was involved in the practice [of child sex trafficking].” *Id.* at 392 (daily ed. Feb. 1, 2016) (statement of Rep. Royce). Their work on previous sex trafficking laws had stopped the practice in this specific precinct. *Id.* However, the fight against civic sex trafficking “is still ongoing.” *Id.*

108. *Id.* at 390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith).

109. International Megan’s Law, 34 U.S.C. § 21503e(1)(A) (Supp. V 2017).

110. Operation Angel Watch compared passenger information received from air carriers via electronic departure manifest with NSOR data to identify sex offenders whose offenses involved child victims traveling to countries where sex trafficking is common. *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 U.S. Dist. LEXIS 130788, at *12-13 (N.D. Ca. Sept. 23, 2016) (citing Decl. of Acting Deputy Assistant Dir. of DHS Cyber Crimes Div. Patrick J. Lechleitner).

111. Machine Readable, *supra* note 64.

112. CLASS allows information to be checked manually once automatic detection occurs. White Paper, *supra* note 73. TECS shows an alternative of automatic cross-checking between federal agencies. *Id.* at 3. Either option would work with automatic machine-readable database checks where reciprocity agreements exist.

The United States could fund this system through reciprocity agreements with different countries. Countries interested in combating sex tourism and sex trafficking should be interested in a system that is quick, effective, targeted, and consistent. Countries uninterested in reciprocity on something like this most likely fail to adequately police their borders against someone with the passport identifier.

Furthermore, the current form of International Megan's Law *already* depends upon the recruitment of reciprocity agreements to function,¹¹³ so no additional cost is incurred by this alternative. With equal reciprocity requirements, machine-readable cross-checking and passport identifiers have equal diplomatic costs to enact. Thus, the comparison is only distinct in efficacy, where the machine-readable database alternative is more appealing.

III.

The passport identifier seeks to prevent sex trafficking and sex tourism. However, the passport identifier is placed against a wide swath of sex offenders. While some of those affected are likely to engage in sex trafficking or tourism, others are unlikely to ever engage in these behaviors. Applying a wide pool of eligibility for this identifier makes travel worse for a group of sex offenders without providing benefit to combating sex trafficking and sex tourism.

International Megan's Law applies to all "covered sex offenders."¹¹⁴ This term refers to anyone required to register in any jurisdiction¹¹⁵ with an offense against a minor.¹¹⁶ An offense against a minor includes ambiguities such as "[c]riminal sexual conduct involving a minor"¹¹⁷ or "[a]ny conduct that by its nature is a sex offense against a minor."¹¹⁸ These statutory definitions result in International Megan's Law using a broad definition for targeting sex offenders.

113. See 161 Cong. Rec. H. 542, 544 (daily ed. Jan. 26, 2015) (statement of Rep. Royce) ("Importantly, our proactive efforts to help countries identify incoming child predators will also encourage them to alert us when those foreigners convicted of sex offenses against children attempt, themselves, to enter into the United States."). See also *id.* at 545 (daily ed. Jan. 26, 2015) (statement of Rep. Smith) (describing International Megan's Law as helping "to include guidance . . . on how other countries can create their own public or private sex offender registries . . . and how we can use these registries to alert the United States The goal is reciprocity.").

114. International Megan's Law, 34 U.S.C. § 21502(3) (Supp. V 2017).

115. *Id.* § 21503(f)(1)-(2).

116. Sex Offender Registration and Notification Act, 34 U.S.C. § 20911(7)(A)-(I) (Supp. V 2017).

117. *Id.* § 16911(7)(H).

118. *Id.* § 16911(7)(I).

International Megan's Law thus impacts a much larger group than simply sex traffickers and sex tourists. In a House debate, Representative Edward Royce of California focused solely on the prevention of the actions of sex tourists and sex traffickers.¹¹⁹ Representative David Cicilline of Rhode Island did the same but additionally argued on the necessity to show a leadership seriousness towards combating sex tourism.¹²⁰ In arguing for the law, Representative Smith cited statistics that some convicted sex offenders recidivate, but still implicitly recognized many do not.¹²¹ Further

119. Representative Royce cites International Megan's Law as a tool that "will strengthen law enforcement efforts to combat this rather horrific crime that damages hundreds of thousands of young children worldwide every year," 161 Cong. Rec. H. 542, 544 (daily ed. Jan. 26, 2015) (statement of Rep. Royce), that combats an "appalling injustice," *id.* at 546, and "[a] growing problem . . . the appalling industry of child sex 'tourism,' in which adults travel overseas to exploit children in other countries. "Unfortunately, significant number of Americans are engaging in this practice and engage in it while the countries of designation lack sufficient resources to deal with the rising number of child predators." *Id.* at 544. International Megan's Law "helps us fight back . . . [b]y better coordinating . . . to help countries identify incoming child predators." *Id.* Representative Royce focuses on this theme repeatedly, arguing that International Megan's Law allows our anti-trafficking agencies to "be much more effective," specifically by "better detect[ion] and report[ing of] the travel of child predators." *Id.* Representative Royce summarizes his support for the law because of the "[b]etter communications among U.S. officials and our foreign counterparts all around this globe means more of these criminals can and will be stopped from exploiting children overseas." *Id.* at 546. Representative Royce's testimony thus touches repeatedly on the actions he wants the law to stop but does not touch at all on whether the law is tailored properly to achieve those ends.

120. In debate, Representative Cicilline stated:

Mr. Speaker, around the world, as many as 27 million people are victims of human trafficking. The United Nations Office on Drugs and Crime reported that among reported incidents of human trafficking, one in three is a child. Many sex offenders target children in regions with extreme poverty and low levels of law enforcement and prosecution. These repulsive acts violate our deepest moral values, and we have a responsibility to respond appropriately.

The International Megan's Law would help prevent child sex offenders and traffickers from exploiting vulnerable children when they cross an international border. The bill would establish an Angel Watch center within Immigration and Customs Enforcement at the Department of Homeland Security that would provide advance notice to foreign countries when a convicted child sex offender travels to that country. The bill also calls on the President to negotiate agreements with foreign governments that would encourage information sharing on known child sex offenders.

Mr. Speaker, it is important to encourage governments around the world to devote their respective resources toward combating this issue. Protecting trafficked children provides timely victim identification, placing victims in a safe environment, and providing them with widespread support services, such as physical and mental health care, educational opportunities, legal assistance, and reintegration with their families and communities.

Unfortunately, a single law cannot abolish child sex tourism or child sex trafficking, but the International Megan's Law represents a huge step in the right direction by protecting victims and potential victims from terrifying harm.

161 Cong. Rec. H. 542, 545 (daily ed. Jan. 26, 2015) (statement of Rep. Cicilline).

Representative Cicilline takes a much narrower approach in his goals for the law, signaling seriousness and specifically targeting sex traffickers, than the actual impact of the law. *Id.*

121. Representative Smith first cites Ernie Allen, CEO of the Center for Missing and Exploited Children and the International Centre for Missing and Exploited Children. 162 Cong. Rec. H. 387, 390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith). Ernie Allen stated "[i]t is clear that there is a

testimony repeatedly hit on the need to stop sex tourism and sex trafficking specifically.¹²²

However, the law captures offenders not at any elevated risk of committing sex trafficking or sex tourism. As a hypothetical, a seventeen-year-old living in Alabama could be charged with and convicted of second degree rape for having sex with his or her fifteen-year-old partner.¹²³ This person would be required to register in Alabama's sex offender registry for ten years.¹²⁴ This person is thus subject to at least one jurisdiction's registration requirements and has a charge of criminal sexual misconduct involving a minor. He or she thus would meet International Megan's Law's requirements and would receive the passport identifier. This is not an

substantial category of offenders who do not offend as a lapse of judgment; they do it as a lifestyle." *Id.* In quoting Allen, Smith implicitly recognizes some offenders offend from judgment errors, not patterned behavior. Intuitively, because these persons offended by lapse of judgment rather than repeated and intentional conduct, these persons are not as likely to recidivate. He continues the quotation from Allen: "[a]nd these are the offenders who are most likely to travel to seek victims in places where the offender is most likely to be anonymous and most likely to avoid identification and apprehension." *Id.* Here, Representative Smith wishes to point out the danger of lifestyle sex offenders but does not seem to realize he implicitly is recognizing offenders who are less likely to travel to seek victims. This acknowledgement of a spectrum of dangerousness is interesting given the one-size-fits-all application of the passport identifier. Representative Smith then cites a 2008 study by Oliver, Wong, & Nicholaichuk, *Id.* citing Oliver, Wong & Nicholaichuk, *Outcome Evaluation of a High-Intensity Inpatient Sex Offender Treatment Program*, 2000 J. INTERPERS. VIOLENCE 522. The study found "that untreated sex offenders were reconvicted for sexual crimes at a rate of 17.7 percent after 3 years, 24.5 percent after 5 years, and 32 percent after 10 years." *Id.* While Rep. Smith uses this to show "for a number of predators, the propensity to recommit these crimes at a later date remains," the data shows even at the ten-year mark, for every single re-offender there are two non-re-offenders. *Id.* These citations implicitly recognize the differences in likelihood of re-offense, but nevertheless the law covers all sex offenders with an offense against a minor uniformly. Representative Smith argues these rates are too low because only convicted re-offenders are counted, but even a fifty percent increase in recidivism to account for this leaves a 1:1 re-offender to non-re-offender ratio. There is simply no way to eliminate the diversity in dangerousness and recidivism among the affected passport registrants.

122. See e.g., 162 Cong. Rec. H. 387, 391 (daily ed. Feb. 1, 2016) (statement of Rep. Boyle) ("We have a responsibility to protect all victims and to crack down on this crime that destabilizes communities, fuels corruption, and undermines the rule of law."); *id.* at 392 (daily ed. Feb. 1, 2016) (statement of Rep. Pittenger) ("It attacks the sickening practice of child sex tourism by requiring the United States to notify other countries when convicted pedophiles travel abroad."); *id.* at 393 (daily ed. Feb. 1, 2016) (statement of Rep. Lee) ("This legislation is important because sex trafficking of children is a displaceable act that we detest and has been an on-going concern for the United States."). The uniformity in reasoning provided for proponents of the law in legislative history is near absolute.

123. Second-degree rape in Alabama occurs when a person sixteen years or older: 1) engages in sexual intercourse with someone between twelve and sixteen years old; and 2) is two or more years older than the member of the opposite sex. Ala. Code § 13A-6-62 (2016).

124. A juvenile sex offender must register either for life or for ten years depending on the severity of their offense. Alabama Sex Offender Registration and Community Notification Act, 2011 AL. S.B. 296 § 3(d). Second degree rape is considered a less severe offense. *Id.* § 5(2). Therefore, the juvenile sex offender convicted of second degree rape would have to register in Alabama as a sex offender for ten years. *Id.*

uncommon situation – twenty-five percent of individuals on sex offender registries are juveniles.¹²⁵

The person in this hypothetical is not any likelier to commit sex trafficking or sex tourism than the general population, and yet he or she would be placed with high-risk sexual offenders. Representative Smith denies this distinction as unmeaningful,¹²⁶ but the distinction nevertheless is important. Representative Scott of Virginia articulates convincingly why this is so:

[T]reating all sexual offenders as one monolithic group ignores reality. While some pose a continued and real risk of reoffending and may be traveling to engage in sex tourism or other illicit acts, not all pose the same risk. Indeed, the failure of this provision to allow for the individualized consideration of the facts and circumstances surrounding the traveler’s criminal history, including how much time has elapsed since his last offense, underscores how this provision is overbroad. Details such as whether the traveler is a serial child rapist versus someone with a decades-old conviction from when he was 19-years-old and his girlfriend was 14, just missing the Romeo and Juliet exception by one year, are significant and would allow law enforcement to more appropriately prioritize their finite resources.¹²⁷

Two persons with highly variant degrees of culpability and susceptibility to recidivism thus receive equal treatment. Where a traveler is denied entry

125. David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (Dec. 2009), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf>.

126. Representative Smith seems to discount the problematic nature of using a registry standard by noting “[t]he passport identifier is only for those who have been found guilty of a sex crime involving a child and have been deemed dangerous enough to be listed on a public sex offender registry.” 162 Cong. Rec. H. 387, 390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith). However, using dangerousness as a threshold here is both inadequate and inaccurate. Because of the variability in state requirements for registration and the expansive definition of a sex offense against a minor, dangerousness as a standard can be met through relatively low-risk offenders. Furthermore, dangerousness itself is not the standard used to place offenders under registration requirements, especially in the specific context of dangerousness to commit sex trafficking or sex tourism crimes. International Megan’s Law, Pub. L. No. 114-119, § 8, 130 Stat. 24. The only mechanism cited that alters the impact of the law by the likelihood of re-offense are registration length requirements – “[when sex offenders] are off the registry—the passport identifier, in like manner, will no longer be required.” 162 Cong. Rec. H. 387, 390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith). However, this is only a blunt differentiation and does nothing to alleviate the burden of someone unlikely to engage in sex trafficking while they are on the registry.

127. *Id.* at 393.

into a country but is at no risk to sex traffic, there is no recourse.¹²⁸ This is a problem of vertical equity and fairness.

This could be fixed in one of two ways. First, the definition of “covered sex offender” could be specifically tailored to make sure it dealt with persons likely to engage in sex trafficking or sex tourism. This is not a costly burden – and in fact has already been done before.¹²⁹ Alternatively, because covered sex offenders are defined by being subject to a jurisdiction’s registration requirements, individual states could moot this problem by carefully tailoring their registration laws to cover those likely to re-offend. However, this is only a piecemeal solution.

CONCLUSION

Sex offenses are a touchy subject. However, the law should still treat those previously convicted of any crime with dignity. Whatever actions are taken should be carefully considered to reach the goals of the legislation. International Megan’s Law fails this standard by acting as a blunt weapon in an area already teeming with statutory remedies.

This note first explained the historical context of federal sex offender law, federal sex trafficking law, and international passport policy. It then argued the passport identifier provision is not a well-constructed tool to reach the aims of the legislation within this landscape. The dangers associated with this policy choice are threefold:

While preliminary signs point to the law being Constitutional, this does not mean the legislation is wise. Naturally, many people would welcome a law that tracked known dangerous sex traffickers and sex tourists on their way out of the country, especially to known high risk locations. However,

128. “[A] traveler does not have any recourse with the foreign destination country if he or she is refused entry solely on the basis of this ‘unique passport identifier.’ While the bill has some due process provisions, those apply only domestically.” *Id.*

129. The Department of Homeland Security used to track certain sex offenders leaving the country. *See Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 U.S. Dist. LEXIS 130788, at *10 (N.D. Cal. Sept. 23, 2016) (citing Decl. of Acting Deputy Assistant Dir. of DHS Cyber Crimes Div. Patrick J. Lechleitner). The criteria they used to determine which persons to track was an equation designed to predict whether the person was likely to be engaged in sex tourism. *Id.* at *12. The typical type of person who would be tracked was someone with a previous sex offense against a minor traveling to a subset of countries, usually in Southeast Asia. *Id.* at *11. *See also* Haynie, *supra* note 88 (“Child sex tourism is a widespread problem in Southeast Asian countries.”). Testimony by Representative Smith on the Department of Homeland Security suggests Central and South American countries may also be included in that subset of countries. 161 Cong. Rec. H. 542, 545 (daily ed. Jan 26, 2015) (statement of Rep. Smith) (“Meanwhile, law enforcement and media reports continue to document Americans on the U.S. sex offender registries who were caught sexually abusing children in East Asia, Central and South America, and elsewhere in the world. It is the same horror movie replayed over and over.”).

in dealing with people's liberty interests, that law must be carefully tailored. International Megan's Law does not meet this standard. To this end, International Megan's Law should be rewritten into a more effective, more tailored, and more intelligent law.

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