BACKGROUND PAPER: FEDERAL AND STATE SEX OFFENDER REGISTRATION AND NOTIFICATION ACTS (SORNAS)

DAVID G. POST[1]

I. Statutory Background

The legal regime governing the rights and obligations of persons previously convicted for sex-related offenses is quite complex, involving a sometimes bewildering array of federal and state statutes. While sex offender registration, and regulation of sex offender conduct, is largely a matter of local (State) law, the federal government does play a critical organizing, and coordinating, role, as follows.

FEDERAL LAW The federal Sex Offender Registration and Notification Act of 2006[2] (SORNA) imposes obligations both on the activities of States[3] and individual sex offenders.

A. State obligations SORNA provides that each State "shall maintain a jurisdiction-wide sex offender registry (SOR) conforming to the requirements of this title."[4] Each State "shall ensure" that the registry includes certain specified pieces of information for each registrant, including name, physical description, arrest and conviction history, fingerprints, a DNA sample, and "any other information required by the Attorney General."[5]

---

[1] Email: david.g.post@gmail.com

[2] 42 USCA §16901 *et seq*, available here: http://www.ojp.usdoj.gov/smart/pdfs/42_usc_index.pdf, was enacted on July 27, 2006 as Title I of the Adam Walsh Child Protection and Safety Act of 2006, and is the most recent of many congressional efforts to set 'minimum standards' for jurisdictions to implement in their sex offender registration or notification systems. See DOJ, "Sex Offender Registration and Notification in the United States: Current Case Law and Issues," (Sept. 2014), available at http://www.smart.gov/caselaw/handbook_sept2014.pdf.

[3] SORNA imposes these obligations on DC, Guam, Puerto Rico, Guam, and federally-recognized Indian tribes as well as on States; I will refer to all of these jurisdictions as "States" for convenience in this memo. See 42 USC § 16911 (10).

[4] 42 USC § 16912(a).

[5] 42 USC § 16914(b) gives the full list:

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

Each State "shall make" information contained in its registry database "available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public," and it must "maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user."[6]

Additionally, SORNA's "notification" provisions provide that whenever a sex offender registers or updates an entry in a State SOR database, State officials *must* provide that information to:

- the Attorney General (for inclusion in the National Sex Offender Registry database),
- "law enforcement agencies, and each school and public housing agency, in each area in which the individual resides, is an employee or is a student,"
- "any agency responsible for conducting employment-related background checks under the National Child Protection Act of 1993,"
- "social service entities responsible for protecting minors in the child welfare system,"
- "volunteer organizations in which contact with minors or other vulnerable individuals might occur," and
- "any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction."[7]

Finally, States must penalize any failure of a sex offender to comply with SORNA's registration requirements (discussed in part B, below) with a "a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year."[8]

The Carrot: States that fail to "substantially implement" these provisions "shall not receive 10 percent of the funds that would otherwise be allocated" under the Omnibus Crime Control and Safe Streets Act of 1968."[9]

All 50 States have implemented some version of a SOR database and public notification scheme, though not all such schemes have been deemed compliant with SORNA.[10] Each State scheme has its own nuances and distinct features, and, because

[6] 42 USC § 16918.

[7] 42 USC § 16921.

[8] 42 USC 16913(e).

[9] 42 USC § 16925.

[10] For the current list of "implemented jurisdictions," see http://www.smart.gov/newsroom_jurisdictions_sorna.htm. Official reports detailing the systems of each

SORNA only sets forth *minimum* standards, each State is free to make its own determinations about who will be required to register, what information those offenders must provide, which offenders will be posted on the jurisdiction's public registry website, etc. (See "State Law," below)

B. Individual obligations The basic obligation imposed by SORNA on "sex offenders" (as defined – see below) is that they register "in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student," and that they keep their registration current.

The information that must be disclosed is, largely, a mirror of the information that SORNA requires States to maintain in the registry:

> "The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:
> (1) The name of the sex offender (including any alias used by the individual).
> (2) The Social Security number of the sex offender.
> (3) The address of each residence at which the sex offender resides or will reside.
> (4) The name and address of any place where the sex offender is an employee or will be an employee.
> (5) The name and address of any place where the sex offender is a student or will be a student.
> (6) The license plate number and a description of any vehicle owned or operated by the sex offender.
> (7) Any other information required by the Attorney General.[11]

In addition, pursuant to the Keeping the Internet Devoid of Sexual Predators (KIDS) Act of 2008,[12] sex offenders must also provide all "Internet identifiers" – defined as "electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting"[13] – that the sex offender "uses or will use."[14]

---

jurisdiction which has substantially implemented SORNA are available on the SMART Office web site. http://www.smart.gov/sorna.htm.

[11] 42 USC § 16914.

[12] 42 USC §16915a-16915b; available here: http://www.ojp.usdoj.gov/smart/pdfs/kids_act_2008.pdf.

[13] 42 USCA § 16915a(e)(2).

[14] SORNA directs the Attorney General (AG) to issue guidelines and regulations to interpret and implement SORNA. In 2008, the Attorney General issued The National Guidelines For Sex Offender Registration and Notification (the "Guidelines") "The National Guidelines For Sex Offender Registration and Notification," 73 Federal Register 128 (July 2, 2008), pp.38030-38070, available at http://www.ojp.usdoj.gov/smart/pdfs/fr_2008_07_02.pdf. The Guidelines explain that "the name and aliases … include … any designations or monikers used for self-identification in Internet communications or postings Id, at 38050. The Guidelines further require that sex offenders must report "all designations used by sex offenders for purposes of routing or self-identification in Internet communications or

The Stick. In addition to the mandatory (see above) State law punishment for failing to comply with the registration requirement, 18 USC § 2250 provides that failure to comply with the SORNA registration requirements is a criminal offense under federal law:

"Whoever
(1) is required to register under the Sex Offender Registration and Notification Act; [and]
(2)
(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act *by reason of a conviction under Federal law . . . or*
(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country;
and
(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both."

SORNA defines a "sex offender" as anyone who has been "convicted of a sex offense" under federal, State, territorial, or tribal law. A "sex offense" is in turn defined as "a criminal offense that has an element involving a sexual act or sexual contact with another." The statutory definition excludes offenses "involving consensual sexual

---

postings" to the sex offender registry, including "e-mail and instant messaging addresses Id. , as an exercise of the Attorney General's authority under 42 USC §16914(a)(7). The sex offenders must immediately report changes of such Internet identifiers to the jurisdictions *Id*. at 38066.

The KIDS Act directs the Attorney General to exempt these Internet identifiers from *mandatory* public disclosure on the state registry database website, 42 USCA § 16915a(c). The DOJ's Guidelines, see "The Supplemental Guidelines For Sex Offender Registration and Notification," 76 Federal Register 7 (January 11, 2011), pp.1630-1640, available at http://www.ojp.usdoj.gov/smart/pdfs/SORNAFinalSuppGuidelines01_11_11.pdf, take the position that this does not limit "jurisdictions' retention and use of sex offenders' Internet identifier information for purposes other than public disclosure, including submission of the information to the national (non-public) databases of sex offender information, sharing of the information with law enforcement and supervision agencies, and sharing of the information with registration authorities in other jurisdictions," nor does it limit "the discretion of jurisdictions to include on their public Web sites functions by which members of the public can ascertain whether a specified e-mail address or other Internet identifier is reported as that of a registered sex offender," or to "disclose Internet identifier information to any one by means other than public Web site posting." The Supplemental Guidelines also explained that "[a] sex offender's use of his name or an alias to identify himself or for other purposes in Internet communications or postings does not exempt the name or alias from public Web site disclosure" under the SORNA requirements.

conduct . . . if the victim was an adult," or if the victim "was at least 13 years old and the offender was not more than 4 years older than the victim."[15]

STATE LAW. While federal law thus requires that each State set up a sex offender registry and notification system, its requirements are just *minimum* standards; each State is free to impose additional registration requirements and additional notification procedures, such as

(a) expanding the category of offenses deemed to require registration. According to a 2007 Human Rights Watch survey[16], at least five States require registration for adult prostitution-related offenses[17]; thirteen States require registration for public urination[18]; at least 29 states require registration for consensual sex between teenagers[19]; and at least 32 States require registration for exposing genitals in public[20].

---

[15] 42 USC § 16911 (5)(C).

[16] "No Easy Answers: Sex Offender Laws in the United States," available at https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us. See also the NIC/WCL study "Fifty State Survey of Adult Sex Offender Registration Requirements," available at http://www.csom.org/pubs/50%20state%20survey%20adult%20registries.pdf, and "The Ridiculous Laws that Put People on the Sex Offender List for Ridiculous Reasons," http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/mapped_sex_offender_registry_laws_on_statutory_rape_public_urination_and.html.

[17] Alabama, Ala. Code §13A-200(b); Michigan, Mich. Comp. Laws §28.722 & §750.455; Oregon, Or. Rev. Stat. §181.594, 595; Tennessee, Tenn. Code Ann §40-39-202, 203; West Virginia, W. Va. Code §15-12-2, §61-8-6, §61-8-7.

[18] Arizona, Ariz. Rev. Stat. §13-3821 (if the individual has more than one previous conviction for public urination—two if exposed to a person under 15, three if exposed to a person over 15); California, Cal. Penal Code §314(1)-(2), 290; Connecticut, Conn. Gen. Stat. §53a-186, §54-250, §54-251 (if the victim was under 18); Georgia, O.C.G.A. §42-1-12, 16-6-8 (if done in view of a minor); Idaho, Idaho Code Ann. §18-4116, 8306, 8304; Kentucky, Ky. Rev. Stat. Ann. §510.148, §17.520, 500, §510.150; Massachusetts, Mass. Gen. Laws ch. 272 §16, ALM GL ch. 6 §178G, 178C; Michigan, Mich. Comp. Laws §167(1)(f), §28.722, 723; New Hampshire, N.H. Rev. Stat. Ann. §651-B:1, RSA 651-B:2, 645:1(II), (III); Oklahoma, 57 Okl.St. §582.21, §1021; South Carolina, S.C. Code Ann. §23-3-430; Utah, Utah Code Ann. §77-27-21.5, §76-9-702.5; Vermont, Vt. Stat. Ann. Tit. 13, §2601, §5407, 5401.

[19] Alabama, Ala. Code §13A-6-63, §13A-11-200; Alaska, Alaska Stat. S11.41.434, §12.63.010, 100; Arizona, A.R.S. §13-1405, 3821; Arkansas, Ark. Code Ann §12-12-903, 905, §5-14-110; Colorado, Colo. Rev. Stat. §16-22-103, §18-3-402, 411; Connecticut, Conn. Gen. Stat. § 54-250, § 54-251, § 53a-70; Florida, Fla. Stat. Ann. §775.21, § 794.011; Indiana, Burns Ind. Code Ann § 11-8-8-7, § 11-8-8-5; Louisiana, La. R.S. 15:542, 15: 541, 14:92(A)(7); Maine, 34-A M.R.S. § 11222, 34-A M.R.S. § 11203, 17-A M.R.S. § 254; Maryland, Md. Criminal Procedure Code Ann. § 11-704, 11-701, 3-308; Massachusetts, ALM GL ch. 6, § 178C, 178D, ALM GL ch. 272, § 35A; Michigan, MCLS § 28.723, 28.722, 750.520e; Minnesota, Minn. Stat. § 243.166, Subd. 1b(a)(1)(iii), 609.345 (2006); Missouri, 589.400 R.S.Mo., § 566.032 R.S.Mo.; New Hampshire, N.H. Rev. Stat. Ann. §651-B:1, RSA 651-B:2, RSA 632-A:2; New Jersey, N.J. Stat. Ann. §2c 14-2, § 2C:7-2, 2C:14-3b; North Carolina, N.C. Gen. Stat. § 14-208.7, 14-208.6, 14-27.7A; North Dakota, N.D. Cent. Code § 12.1-32-15, 12.1-20-07; Oklahoma, 57 Okl. St. § 582, 21 Okl. St. § 1123; Rhode Island, R.I. Gen. Laws § 11-37.1-3, 11-37.1-2; South Carolina, S.C. Code Ann. § 23-3-430, § 16-3-655; South Dakota, S.D. Codified Laws § 22-24B-2, 22-24B-1, 22-22-7; Tennessee, Tenn. Code Ann. § 40-39-202, 40-39-203, 39-13-506; Texas, Tex.

(b) increasing the amount of time that individuals are required to remain on the registry,[21] and

(c) enlarging the scope of personal information that registrants are required to disclose and update.[22]

In addition, and far more troubling, while federal law imposes no additional disabilities on registrants (other than the duty to register), States are free to do so, and virtually all have done so – with a vengeance. Depending on the State in question, registered sex offenders may be (a) subject to a "civil confinement" regime that can keep them in custody at a "treatment facility" upon the recommendation of a State-

---

Code Crim. Proc. art. 62.002, 62.001, Tex. Penal Code §21.11; Utah, Utah Code Ann. § 77-27-21.5, § 76-5-401, 76-5-401.2; Washington, Rev. Code Wash. (ARCW) § 9A.44.130, § 9A.44.096; West Virginia, W.Va. Code § 15-12-2, § 61-8B-9; Wisconsin, Wis. Stat. §301.45, §948.02 (2006).

[20] Alabama: Code of Ala. § 13A-11-200, 13A-6-68; Arizona: A.R.S. § 13-3821, § 13-1402; Arkansas: A.C.A. § 12-12-905, § 12-12-903, § 5-14-112; California: Cal Pen Code § 290, § 314; Colorado: C.R.S. 16-22-103 (2006), 18-3-411 (2006), 18-7-302 (2006);Connecticut: Conn. Gen. Stat. § 54-250, 54-251, 53a-186; Idaho: Idaho Code § 18-8304, 18-4116 ;Illinois: 730 ILCS 150/3, 730 ILCS 150/2, 720 ILCS 5/11-9; Iowa: Iowa Code § 692A.2, 692A.1, 709.9 (2006); Kansas: K.S.A. § 22-4904, 22-4902, 21-3508 (2006); Kentucky: KRS §17.510, 17.500, 510.148, 510.150 (2006); Louisiana: La. R.S. 15:542, 15:541, 14:81; Massachusetts: ALM GL ch. 6, § 178E, 178C, ALM GL ch. 272, § 16; Michigan: MCLS § 28.723, 28.722, 750.335a; Minnesota: Minn. Stat. § 243.166, 617.23 (2006); Montana: Mont. Code Anno. § 46-23-504, 46-23-502, 45-5-504 (2005); Nevada: Nev. Rev. Stat. Ann. § 179D.450, 179D.400, 179D.410, 201.220; New Mexico: N.M. Stat. Ann. § 29-11A-4, 29-11A-3, 30-9-14.3; North Dakota: N.D. Cent. Code § 12.1-32-15, 12.1-20-12.1; South Carolina: S.C. Code Ann. § 23-3-430, 16-15-130 (2006); South Dakota: S.D. Codified Laws § 22-24B-2, 22-24B-1, 22-24-1.2; Tennessee: Tenn. Code Ann. § 40-39-203, 40-39-202, 39-13-511; Texas: Tex. Code Crim. Proc. art. 62.051, 62.001, Tex. Penal Code § 21.08; Vermont: 13 V.S.A. § 5407, 5401, 2601; West Virginia: W.Va. Code § 15-12-2, 61-8-9.

[21] According to the Human Rights Watch survey, see note 15, seventeen States currently require lifetime registration for *all* registrants—from the most minor offenders to the most serious, and two - Alabama and South Carolina - provide no means by which a registrant might secure release from the registry requirement. In Alabama, for example, a man convicted of soliciting an adult prostitute must register for life, with no way to obtain a release from the registration requirements. The other 15 states allow some registrants to petition a court for removal from registration requirements after living in the community offense-free for a specific number of years.

[22] *E.g.*, Alaska requires registrants to disclose "the description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to, regardless of whether that access is regular or not . . . any identifying features of the sex offender or child kidnapper, anticipated changes of address, [and] a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter"); Connecticut requires "documentation of any treatment received for mental abnormality or personality disorder"; Hawaii requires "The actual address and telephone number where the covered offender is staying for a period of more than ten days, if other than the stated residence; Names and, if known, actual business addresses of current and known future employers and the starting and ending dates of any such employment; names and actual addresses of current and known future educational institutions with which the covered offender is affiliated in any way; [and] the year, make, model, color, and license number of all vehicles currently owned or operated by the covered offender."

employed psychiatrist or psychologist[23]; (b) prohibited from residing or working – or, in some States, from merely setting foot[24] – in, or within specified distances from, schools, public parks, daycare facilities, libraries, churches, or "areas where minors congregate"[25]; (c) prohibited from using the Internet, or accessing/using specific Internet resources (*e.g.,* social networking sites, instant messaging systems, etc.)[26]; and (d) prohibited in working in a long list of jobs, from working in schools or child-care centers where they might have regular contact with minors, to a "chaotic mess of penalties that just seems crazy and random":

> "For instance, Massachusetts forbids sex offenders from being ice cream truck vendors. Delaware doesn't allow felony sex offenders to be plumbers. Alaska forbids felony sex offenders from being hearing aid dealers within five years of an offense. In Kentucky, for 10 years after a felony sex offense, an offender can't be a land surveyor. And for certain sexual offenses, New Hampshire forbids working at an 'end stage renal disease dialysis center'."[27]

II. Legal Issues

Over 800,000 people are now on the national sex offender registry database. The regime described above imposes crushing, life-altering disabilities on them, destroying any hope they might have of re-integrating themselves into ordinary society and re-establishing themselves in the communities in which they live and work.

Various components of the overall scheme have been successfully challenged on constitutional grounds; the most promising lines of attack, in my opinion, are:

Due Process In holding Minnesota's civil commitment statute unconstitutional, district court judge Donovan Frank wrote:

> It is fundamental to our notions of a free society that we do not imprison citizens because we fear that they might commit a crime in the future. Although the

---

[23] See the compilation "Civil Commitment of Sex Offenders" at http://www.ndaa.org/pdf/Sex%20Offender%20Civil%20Commitment-April%202012.pdf.

[24] See Illinois 720 I.L.C.S. 5/11-9.3 (West 2008).

[25] See "Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders," 25 A.L.R.6th 227 (collecting cases).

[26] See "Validity, Construction, and Application of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence," 89 A.L.R.6th 261 (collecting cases).

[27] "Not Wanted: Sex Offenders," available at http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/several_states_ban_people_in_the_sex_offender_registry_from_a_bizarre_list.html. See also Human Rights Watch report, *supra* note 15, at 81-90 (discussing employment restrictions).

public might be safer if the government, using the latest "scientific" methods of predicting human behavior, locked up potential murderers, rapists, robbers, and, of course, sex offenders, our system of justice, enshrined in rights guaranteed by our Constitution, prohibits the imposition of preventive detention except in very limited circumstances. This strikes at the very heart of what it means to be a free society where liberty is a primary value of our heritage.

A number of recent cases have upheld due process challenges to state civil commitment and/or residency restrictions.[28]

First Amendment Courts have been sympathetic, in a number of high-profile recent cases, to the argument that *both* the requirement to disclose all "Internet identifiers," and the various Internet-related prohibitions for SORs (regarding social networking, instant messaging, and the like) constitute unconstitutional abridgements of free speech rights.[29] These cases are establishing a number of very important First Amendment principles, notably that the First Amendment protects a right of Internet access, and a right to speak anonymously.[30] (I suspect that the federal identifier-disclosure requirement, see note 11 *supra,* which has not yet been challenged on these grounds, could well be vulnerable).

Ex Post Facto Many individuals in the SOR database were convicted of the underlying sex offense prior to enactment of the federal or State SORNA; they have mounted numerous challenges to the latter provisions on the grounds that they

---

[28] *See, e.g., Karsjens v. Jesson*, No. 11-3659 (D Minn., 6/15/15) (Minn. civil confinement statute violates due process); *Van Orden v. Shafer*, No 4:09CV00971 AGF W.D. Mo 9-11-2015 (Missouri civil confinement statute violates due process); *Doe v. Snyder*, No 12-11194 (E.D. Mich 3/31.15) (Mich. geographic exclusion zones unconstitutional); *In re Taylor* (CA 3/2/2015) (CA residency restrictions unconstitutional); *Doe v. City of Lynn* (MA 6/28/2015) (Mass. town ordinance restricting SOR residence violates State constitution). See also *Brown v. Montoya*, 662 F.3d 1152 (10th Cir. 2011) (being ordered to register as a sex offender triggers the protections of procedural due process); publishing information about an offender's "primary and secondary targets" violates due process; *State v. Briggs*, 199 P.3d 935 (Utah 2008) (being ordered to register as a parole condition violates due process when the underlying convictions are not sexual in nature); *Doe v. Jindal*, 851 F. Supp.2d 995 (E.D. La. 2012) (requiring registration for a conviction for solicitation, and not prostitution, when each offense had the same elements, violates due process).

[29] *Doe v. Harris*, (9th Cir. 11/18/2014) (CA statute); *Doe v. Prosecutor, Marion County*, 705 F.3d 694 (7th Cir. 2013) (Indiana statute); *Doe v. State*, 898 F.Supp.2d 1086 (D. Ne. 2012) (Neb. statute); *Doe v. Jindal*, 853 F. Supp. 2d 596 (D. LA 2012); *Harris v. State*, 985 N.E.2d 767 (Ind. Ct. App. 2013) (Ind. statute) *Doe v. Shurtleff*, 2008 U.S. Dist. LEXIS 73787 (D. Utah Sept. 25, 2008); *Doe v. Snyder*, No. 12–11194, 2015 WL 1497852 (E.D. Mich. Mar. 31, 2015); *White v. Baker* (N.D. Ga. 2010). *See generally "*Validity, Construction, and Application of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence," 89 A.L.R.6th 261 (collecting cases).

[30] I have worked as an expert witness for the challengers in a number of these cases involving the Internet-related provisions of various State SORNAs, including the successful challenges to the CA and NE statutes (*Doe v. Harris*, (9th Cir. 11/18/2014) and *Doe v. State*, 898 F.Supp.2d 1086 (D. Ne. 2012)), as well as on ongoing challenges to statutes in Kentucky, New Hampshire, and Florida.

constitute imposition of punishment *ex post facto.* In 2003, the Supreme Court held that Alaska's SORNA statute – which involved only registration and community notification – could be constitutionally applied to persons whose convictions predated the statute's enactment; the Court found the statutory scheme to be "nonpunitive," and thus did not "subject [sex offenders] to an affirmative disability or restraint." *Smith v. Doe*, 538 US 84 (2003). In a number of cases post-Smith, however – including, interestingly, the same Alaska statute at issue in *Smith v. Doe,* see *Doe v. State*, 189 P.3d 999, 1004-05 (Alaska 2008) (holding statute unconstitutional under Alaska constitution) – courts have found that SORNA provisions involving prohibitions or disabilities (over and above mere registration and notification) *were* punitive and could not be applied retroactively.[31]

Commerce Clause

[31] *See Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (Kentucky's residency restrictions exceeded the nonpunitive purpose of public safety and thus violated the ex post facto clause); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (finding, under state ex post facto clause, (a) "significant and intrusive . . . affirmative obligations," and "aggressive notification" subjecting registered persons to lost housing and employment opportunities as well as vigilantism, and (b) excessiveness with relation to the non-punitive purpose because the act made no distinction among offenders with regard to relative risk, "even on the clearest proof of rehabilitation. . ."); *State v. Myers*, 923 P.2d 1024 (Kan. 1996) (federal ex post facto clause violated by retroactive application of amendment eliminating confidentiality of sex offender registration, and allowing unrestricted public access, thereby subjecting registrants to stigma, ostracism and potential vigilantism: penal effects excessive with respect to non-punitive intent); *State v. Letalien*, 2009 ME 130 (law violated state and federal ex post facto clauses: because reporting requirement was punitive as it "places substantial restrictions on movements of lifetime registrants and may work an impractical impediment that amounts to an affirmative disability. . .that is neither minor nor indirect," and government had produced "[n]o statistics" that "a substantial majority of the registered offenders will pose a substantial risk of re-offending long after they have completed their sentences and probation, including any required treatment," and requirements "impair the opportunity for rehabilitated offenders to reintegrate and become productive members of society"); *Doe v. Department of Public Safety and Correctional Services*, 62 A.3d 123 (Md. 2013) (retroactive application of blanket registration, and reclassification of offense to most severe designation requiring lifetime registration violated state ex post facto clause); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (state *ex post facto* violation in more onerous version of the law than one previously upheld against such challenge, in that new law (a) required broader and more intrusive disclosure; provided for Internet notification; required in-person reporting for multiple events within 5 days of relevant event; with violation now a felony and significant housing disadvantages; (b) resembled shaming, with the internet as "our town square," "hold[ing registrants] out for others to shame or shun;" and (c) because law applied regardless of real risk, it was excessive in relation to regulatory purpose: "If in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive"); *State v. Williams* 129 Ohio St. 3d 344, 2011-Ohio-3374, 952 N.E.2d 1108 (having twice previously upheld less onerous versions of its registration statute against state ex post facto challenges, holding new version in which risk classification was inalterably based on conviction "without regard to [ ] future dangerousness" and duration expanded from ten to 25 years," violated state constitution; *Starkey v. Oklahoma,* 2013 OK 43, 305 P.3d 1004 ((a) affirmative obligations neither "minor" nor "indirect," violating state constitution).

See generally "Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions," 63 A.L.R.6th 351 (collecting cases).

The Second Circuit has considered, but has not yet had to decide, whether the federal SORNA statute exceeds Congress' power under the Commerce Clause (as interpreted in the "Obamacare" case, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The Second Circuit summarized the argument as follows:

> [The challenger] derives four relevant propositions from the opinion of Chief Justice Roberts, read in tandem with parallel arguments made in the jointly authored dissent. *See NFIB*, 132 S. Ct. at 2642-50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). First, the Commerce Clause does not give Congress the power to regulate inactivity. Second, Congress cannot regulate conduct today based on activity predicted tomorrow. Third, the federal government does not have '[a]ny police power to regulate individuals as such, as opposed to their activities.' *NFIB*, 7 132 S. Ct. at 2591 (Roberts, C.J.). Fourth, the Necessary and Proper Clause does not add any 'great substantive and independent' federal powers to those enumerated in the Constitution. *Id*. at 2591 (quoting McCulloch v. Maryland, 17 10 U.S. (4 Wheat.) 316, 411 (1819)).

United States v. Robbins, 729 F.3d 131, 135 (2d Cir. 2013). The court "decline[d] Robbins' invitation" to address the question,

> "not because his arguments all lack force, nor because the constitutionality of SORNA — particularly when applied within the states — is beyond question, *see United States v. Kebodeaux*, 570 U.S. ___, No. 12-418, slip op. at 5 (U.S. June 24, 2013) (Roberts, C.J., concurring in the judgment) ("The fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's *purely intrastate conduct*") . . .

However, the offense for which Robbins had been charged was, the court held, "triggered by *activity*: his change of residence and travel across state lines. As applied to Robbins, then, §§ 16913 and 2250(a) not only regulate activity, but activity that directly employs the channels of interstate commerce." Thus, "the constitutionality of SORNA *as applied to Robbins* would be unaffected by any limitations on Congress's Commerce Clause power that may be found in *NFIB*." *Id.*

The court thus left open – and appeared to invite – a challenge from someone to whom SORNA had been applied who had *not* travelled across State lines or "employed the channels of interstate commerce."[32]

[32] As noted above, see p.4, 18 USC § 2250 criminalizes the failure to comply with SORNA registration requirements by persons who either "is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act *by reason of a conviction under Federal law* . . . *or* travels in interstate or foreign commerce." (emphasis added)

Right to Travel Internationally

The Department of Homeland Security has instituted a program – "Operation Angel Watch"[33] – under which it apparently[34] searches its international airline passenger databases looking for individuals travelling abroad whose names also appear on the SOR database, and pre-emptively informs border officials in the country to which the sex offender is traveling. The scheme is, I believe, vulnerable to attack both on the grounds that DHS has no statutory authority to undertake these tasks,[35] and that DHS' actions unconstitutionally abridge the constitutional right to travel internationally.

* * * * * * * * *

One additional consideration is relevant to much of the constitutional analysis of these statutes. This entire superstructure is built, fundamentally, on a single premise: that sex offenders pose a unique danger[36] to the community in which they live or work as a consequence, as the Supreme Court has put it, of the "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class," *McKune v. Lile*, 536 U.S. 24, 33 (2002), the "frightening and high risk of recidivism [that] has been estimated to be as high as 80%." *Smith v. Doe*, 538 U.S. 84 (2003).

But as Prof. Ira Ellmann convincingly demonstrates in a recent paper[37], however, this assertion had, at the time it was made, no support in the criminology literature whatsoever.[38] There is now considerable data about recidivism rates, and the picture

---

[33] See http://www.dhs.gov/news/2012/03/08/written-testimony-us-immigration-and-customs-enforcement-ice-director-house.

[34] It is quite difficult to obtain public information about the activities DHS is actually undertaking as part of Operation Angel Watch, and a couple of months ago I filed a FOIA request for any statistics, reports, legal memos, etc. regarding the program.

[35] "International Megan's Law" has been introduced in Congress. See http://www.gop.gov/bill/h-r-4573-the-international-megans-law-to-prevent-demand-for-child-sex-trafficking/. It would give DHS explicit statutory authority to undertake the program – as the bill's sponsors put it, it would "formally recognize" Operation Angel Watch and "codify its activities" – which looks to me a lot like an admission that the program is currently operating *ultra vires.*

[36] A glance at the astonishing ABA Collateral Consequences database [http://www.abacollateralconsequences.org/map/] shows that felons of all kinds – not just sex offenders – face a bewildering array of prohibitions and disabilities, so the treatment of sex offenders can, in that sense, be seen as part of a dispiriting trend in the law. But I think it is fair to say that the combination of required disclosure to law enforcement, mandatory "community notification," geographical limits on residence, and prohibitions on communications with others, makes the sex offender regime *sui generis.*

[37] See Ellman & Ellman, "'Frightening and High': The Supreme Court's Crucial Mistake About Sex Crime Statistics," Constitutional Commentary (Fall 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616429.

[38] Ellman & Ellman write:

they paint is a considerably more nuanced and complex (and at times contradictory) one. Without going into the details, three conclusions appear to be well established in the literature: that the vast majority of sex offenses are perpetrated by family members without any prior conviction history; that the recidivism rates for sex offenders are considerably lower than generally believed; and that the rates vary enormously across different categories of sex offenses. Because of the expansive definitions employed in most State registry laws, large numbers of individuals – probably a majority – in the SOR database pose no more risk of future criminal activity than any other members of the community.

Ordinarily, of course, legislatures are free to base their regulatory efforts on information of dubious veracity. But not where, as here, constitutional rights are at stake, and heightened judicial scrutiny requires a more careful tailoring of their efforts.

III. Public Opinion and Public Debate

There has recently been an increasing drumbeat of public criticism of the entire SORNA regime from across the political spectrum, with increasing recognition that it is both brutally unfair and almost entirely ineffective at preventing criminal activity.[39] Sex

---

McKune provides *a single citation to support its statement* "that the recidivism rate of untreated offenders has been estimated to be as high as 80%": the U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988). Justice Kennedy likely found that reference in the amicus brief supporting Kansas filed by the Solicitor General, then Ted Olson, as the SG's brief also cites it for the claim that sex offenders have this astonishingly high recidivism rate. *This Practitioner's Guide itself provides but one source for the claim*, an article published in 1986 in Psychology Today, a mass market magazine aimed at a lay audience. That article has this sentence: "Most untreated sex offenders released from prison go on to commit more offenses–indeed, as many as 80% do." But the sentence is a bare assertion: the article contains *no supporting reference* for it. . . . [T]he cited article is not [even] about recidivism statistics. It's about a counseling program for sex offenders he then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported assertion about the lower recidivism rate for those who complete his program.

[39] See especially the outstanding front-page article in the NY Times, "Teenager's Jailing Brings a Call to Fix Sex Offender Registry Statutes" http://www.nytimes.com/2015/07/05/us/teenagers-jailing-brings-a-call-to-fix-sex-offender-registries.html, and the two recent Times editorials ("The Pointless Banishment of Sex Offenders," http://www.nytimes.com/2015/09/08/opinion/the-pointless-banishment-of-sex-offenders.html (criticizing residency restrictions) and "Sex Offenders Locked Up on a Hunch," http://www.nytimes.com/2015/08/16/opinion/sunday/sex-offenders-locked-up-on-a-hunch.html ("The essence of the American criminal justice system is reactive, not predictive: You are punished for the crime you committed. You can't be punished simply because you might commit one someday. You certainly can't be held indefinitely to prevent that possibility. And yet that is exactly what is happening to about 5,000 people convicted of sex crimes around the country . . .").

Slate's five-part series ("Sex Offender Laws Have Gone Too Far"), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registry_laws_have_our_policies_gone_too_far.html, and Human Rights Watch's White Paper ("No Easy Answers: Sex

offenders, of course, are as despised a minority as one can point to in our culture at the moment, and the political process is probably incapable of delivering anything resembling a balanced preventive program that is effective while respecting the constitutional rights of individuals within this group. As with other despised minorities (*e.g.,* Jehovah's Witnesses[40]), it is not easy to stand up in their defense, but our constitutional rights will rest on a stronger foundation if we do.

Offender Laws in the U.S."), available at https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us, also contain very powerful indictments of current SORNA practices and procedures.

See also the recent L.A. Times editorial ("State Laws on Sex Offenders Should Not be Crafted by Emotion"), available at http://www.latimes.com/opinion/editorials/la-ed-sex-offender-registry-20150329-story.html, Jacob Sullum's article on Reason.com ("Out of 747,408 Registered Sex Offenders, How Many Are Actually Dangerous?), available at https://reason.com/blog/2012/01/23/out-of-747408-registered-sex-offenders-h, Galen Baughan's article in Cato Unbound on civil commitment, available at http://www.cato-unbound.org/2015/06/01/galen-baughman/questionable-commitments, and the ABA Journal's article ("Courts are Reconsidering Residency Restrictions on Sex Offenders"), available at http://www.abajournal.com/magazine/article/courts_are_reconsidering_residency_restrictions_for_sex_offenders.

I have attempted to add my voice to this chorus in a series of blog postings at the Volokh Conspiracy:

"More fuel for the movement to reform sex offender laws," available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/18/more-fuel-for-the-movement-to-reform-sex-offender-laws/

"Civil commitment under attack," available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/21/civil-commitment-under-attack/

"The heat is turned up – one hopes – against sex offender confinement statutes," available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/07/the-heat-is-turned-up-one-hopes-against-sex-offender-registry-statutes/

"Minnesota's egregious sex offender confinement statute held unconstitutional," available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/minnesotas-egregious-sex-offender-confinement-statute-held-unconstitutional/

"First Amendment alive and well in Nebraska," available at http://www.volokh.com/2012/10/18/first-amendment-alive-and-well-in-nebraska/

"Convicted sex offenders, Jehovah's Witnesses, and the First Amendment," available at http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/19/convicted-sex-offenders-jehovahs-witnesses-and-the-first-amendment/

On the ineffectiveness of SORNA laws, see Amanda Agan, "Sex Offender Registries: Fear Without Function," 54 J. Law and Econ. 207 (2012), available at http://www.jstor.org/stable/pdfplus/10.1086/658483 (analyzing three separate data sets pertaining to the effectiveness of SORNA laws and finding that the data "do not support the hypothesis that sex offender registries are effective tools for increasing public safety").

[40] See my blog posting on "Convicted Sex Offenders, Jehovah's Witnesses, and the First Amendment," available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/19/convicted-sex-offenders-jehovahs-witnesses-and-the-first-amendment/.