

## The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century

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*Reforming sex offender laws will not be easy. At a time when national polls indicate that Americans fear sex offenders more than terrorists, legislators will have to show they have the intelligence and courage to create a society that is safe yet still protects the human rights of everyone.*<sup>1</sup>

### I. INTRODUCTION

Police arrested Evan B.,<sup>2</sup> a high school student in Salina, Oklahoma, for exposing himself to several female students on his way to the restroom.<sup>3</sup> Although Evan's mother told the local media her son's behavior was just a "high school thing," a court charged Evan with indecent exposure, and Evan served four months in prison before receiving a five-year suspended sentence and community service.<sup>4</sup> Additionally, his "high school thing" required him to register as a sex offender in Oklahoma.<sup>5</sup>

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1. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 12 (2007), available at <http://hrw.org/reports/2007/us0907/us0907web.pdf>. NO EASY ANSWERS is the first comprehensive study in the United States regarding sex offender policies, their impact on public safety, and their effect on former offenders. Human Rights Watch, Sex Offender Laws May Do More Harm Than Good (2007), available at <http://hrw.org/english/docs/2007/09/06/usdom16819.htm>. The Human Rights Watch released the 146-page report on September 12, 2007. *Id.* In the report, the Human Rights Watch urges reform of the Adam Walsh Child Protection and Safety Act of 2006 (AWA), and recommends that states refuse to change their registration and community notification laws to meet the AWA's requirements. *Id.*

The AWA was enacted on July 27, 2006. 42 U.S.C. § 16901 (2006). The AWA established a national sex offender registry law; made significant changes to sexual abuse, exploitation, and transportation crimes; created new substantive crimes; expanded federal jurisdiction over existing crimes; and increased statutory minimum and maximum sentences. *See id.* §§ 16901, 16911.

2. Evan B.'s arrest took place in 1999. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 40. The media did not disclose Evan B.'s real name. *Id.* at 40 n.114.

3. *Id.* at 40.

4. *Id.* at 41.

5. *Id.* at 40-41. Under Oklahoma law, any type of public exposure (no matter whether the offender had sexual or lascivious motivation or intent at the time of exposure) automatically triggers ten years on the sex offender registry. *Id.* at 40. Oklahoma's web site contains nearly 600 sex offenders registered for indecent exposure. *Id.*

Unfortunately, the stigma of being a registered sex offender propelled Evan's life into a downward spiral, driving him out of his community and away from his family.<sup>6</sup> After dropping out of school and moving to Tulsa, Evan struggled to find and maintain employment.<sup>7</sup> Less than a year later, Evan committed suicide.<sup>8</sup> He shot himself only one month shy of his twentieth birthday.<sup>9</sup>

According to his mother, it seemed like Evan stopped caring about school and his future after the incident and his sentencing.<sup>10</sup> To her, Evan was a normal kid, but registering as a sex offender turned his life upside down.<sup>11</sup> She believed that "some considerations should be given to sex offender registration requirements when the charge stems from a nonviolent act."<sup>12</sup>

In recent years, the words "sex offender" have transformed into a loosely and frequently used term.<sup>13</sup> Congress and state legislatures have enacted sex offender laws because of highly publicized, horrific crimes, particularly those committed against children.<sup>14</sup> As federal and state governments introduce stricter punishments, requirements, and prohibitions for sex offenders, the offenders become branded by the negative stigma associated with their status.<sup>15</sup> While many sex offenders commit heinous crimes, experts and officials question whether the strict laws imposed against *all* sex offenders, including non-violent offenders like Evan B., actually increase the safety of those the laws seek to protect.<sup>16</sup>

This Note will argue that the most recent development in this area of law, the Adam Walsh Child Protection and Safety Act of 2006 (AWA), contains over-inclusive sex offender registration requirements

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6. *Id.* at 41. Many states have laws restricting where sex offenders can live in communities. *Id.* at 7. These laws are among the most arbitrary laws imposed on sex offenders, restricting the offenders from living certain distances from schools and other public places. *Id.* These laws can, in effect, drive the offenders away from their families or force the offenders to live in isolated rural areas. *Id.* In the many states with residency restriction laws, the laws vary across the board. *Id.* at 38-39, 139-41.

7. *Id.* at 41.

8. Evan committed suicide in November 2000. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* In Louisiana, a public urination ticket would require you to register as a sex offender, and in Rhode Island, sexual conduct between a person who is eighteen or older with a person under sixteen is a sex offense. Memorandum from Amy Baron-Evans & Sara Noonan on The Adam Walsh Child Protection and Safety Act of 2006 at 11, 17 (Nov. 20, 2006), available at [http://www.fd.org/pdf\\_lib/adam%20walsh%20part%20ii.pdf](http://www.fd.org/pdf_lib/adam%20walsh%20part%20ii.pdf); see also Yvonne Bynoe, *Is that 4-Year-Old Really a Sex Offender?*, WASHINGTON POST, Oct. 21, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101901544.html> (discussing children accused of sexual harassment in schools for arguably harmless conduct).

13. For purposes of this Note, the term "sex offender" broadly refers to people who commit offenses (violent, sexual, or otherwise) against adults and children. 42 U.S.C. § 16901 (2006) (referring to "sex offenders and offenders against children, and . . . violent predators").

14. For example, lawmakers created Jessica's Law and Megan's Law because of crimes against young girls, nine-year-old Jessica Lunsford and seven-year-old Megan Nicole Kanka. See *id.*

15. See, e.g., Mark Martin, *California's Most Unwanted*, S.F. CHRONICLE, June 2, 2006, available at <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/06/02/MNGOJJ6JOJ1.DTL>.

16. See *id.*

and punishments. Implementation of the AWA will undoubtedly cause problems for state governments, law enforcement, non-violent sex offenders, and citizens, both as taxpayers and intended beneficiaries of the AWA. Specifically, the AWA is an unfunded mandate that places severe and unfair registration requirements and punishments on sex offenders, and requires offenders to register without distinguishing between violent and non-violent offenders or evaluating the likelihood of recidivism.

Part II of this Note examines the development of sex offender registration requirements in the federal and state governments. It addresses the transformation from the initial freedom left with the states to determine their own standards to the recent, more expansive, and mandatory federal requirements under the AWA. Part III of this Note discusses the purpose of the sex offender requirements under the AWA and reasons why the AWA's over-inclusiveness hinders achievement of that purpose. Part IV concludes with a call for reform of the AWA, in order to better achieve the AWA's purpose.

## II. BACKGROUND ON SEX OFFENDER REGISTRATION REQUIREMENTS

### A. *Federal Laws and Statutes*

Congress has enacted sex offender registration requirements because of reportedly high recidivism rates among convicted sex offenders and because of a desire to protect public safety. Initially, Congress created sex offender laws with the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act) to allow law enforcement officials to gather information about sex offenders to use in sex offender data banks.<sup>17</sup> These laws provided a national baseline for state sex offender registration programs, and required sex offenders to register with the state and to keep their registration information current.<sup>18</sup> Later, Megan's Law required law enforcement officials to release information about sex offenders through data banks, which alerted communities to their residences and places of employment.<sup>19</sup> Statutes mandated community notification of sex offenders, and in most states, laws prohibited sex offenders from living and working certain distances away from schools, parks, and other public places.<sup>20</sup> Finally, with the Dru Sjojin National Sex Offender

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17. 42 U.S.C. § 14072(b)(1) (2006) ("The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of . . . each person who has been convicted of a criminal offense against a victim who is a minor . . .").

18. 42 U.S.C. § 14071 (2006).

19. *Id.* § 14071(e)(2). Congress enacted Megan's Law as an amendment to the Wetterling Act. *See id.*

20. *See, e.g.,* Martin, *supra* note 15; Meghan Sil Towers, *Protectionism, Punishment and Pari-*

Public Registry, Congress established a national sex offender web site, which provides immediate access to each state's sex offender registry.<sup>21</sup>

In the past two decades, the amount of federal registration laws and requirements and the stringency of those requirements on sex offenders have dramatically increased.<sup>22</sup> This heightened awareness of sex offenders began after several highly publicized tragedies involving children.<sup>23</sup>

### 1. The Wetterling Act

In 1989, an unknown gunman abducted eleven-year-old Jacob Wetterling.<sup>24</sup> The gunman came out of a ditch and approached Jacob, his younger brother, and a friend as they rode their bicycles home on a country road after riding to a store to rent a movie.<sup>25</sup> He showed his gun and ordered the boys off their bicycles.<sup>26</sup> The gunman then demanded Jacob's brother and the friend to run away and not look back or he would shoot them.<sup>27</sup> The boys did as the gunman told them, but eventually looked back, in time to see the man grab Jacob's arm.<sup>28</sup> No one has seen Jacob since that day, and police have not found his body.<sup>29</sup>

In 1994, Congress enacted the Wetterling Act.<sup>30</sup> With the Wetterling Act, "Congress provided a recommended national baseline for [state] sex offender registration programs."<sup>31</sup> This recommended baseline addressed the crimes for which offenders were required to register, how long offenders were required to register, verification of the registering offenders' addresses, new registration when offenders relocate to a different state, and community notification.<sup>32</sup>

The Wetterling Act was the first of many laws that have initiated

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*ahs: Sex Offenders and Residence Restrictions*, 15 J. L. & POL'Y 291, 295 (2007) (discussing disclosure laws that require law enforcement officials to inform and notify schools and other interested parties when sex offenders live nearby). More recently than Megan's Law, section 146 of the AWA created a new office entitled the Sentencing, Monitoring, Apprehension, Registration, and Tracking Office—the SMART Office. Laura L. Rogers, *The SMART Office: Open for Business*, 41 JUN PROSECUTOR 10 (2007). In 2006, President Bush appointed Laura L. Rogers to be the director of the SMART Office. *Id.*

21. Rogers, *supra* note 20, at 11.

22. *Id.* at 10-12.

23. Towers, *supra* note 20, at 292 (recognizing that congressional acts, "named after brutally murdered little girls [and boys]," and that regime "a strict system of registering and monitoring . . . sex offenders", have been almost universally supported by the judiciary and the public).

24. Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 325-26 (2006).

25. Steve Irsay, *The Search for Jacob*, COURT TV, 2002, available at [http://www.courtstv.com/news/hiddentraces/wetterling/wetterling\\_page1.html](http://www.courtstv.com/news/hiddentraces/wetterling/wetterling_page1.html).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. 42 U.S.C. § 14071 (2006).

31. Rogers, *supra* note 20, at 10.

32. *Id.*

and developed the states' sex offender registration programs.<sup>33</sup> As part of the Federal 1994 Omnibus Crime Bill, Congress enacted the Wetterling Act, the first federal act that mandated standards states must meet to protect against sex offenders.<sup>34</sup> Under this Bill, the states were required to adopt the Wetterling Act within three years or lose federal funding.<sup>35</sup> Unfortunately, following the enactment of the Wetterling Act, tragedies involving children continued to occur.

## 2. Megan's Law

In 1994, a neighbor sexually assaulted and murdered seven-year-old Megan Nicole Kanka.<sup>36</sup> The neighbor had prior convictions for sexual assault against children.<sup>37</sup> Megan's parents were unaware they lived next door to a sex offender.<sup>38</sup> Lawmakers deemed this to be a loophole in existing sex offender laws, and in 1996, Congress enacted Megan's Law, amending section (e) of the Wetterling Act.<sup>39</sup> Megan's Law mandated that the states implement community notification procedures.<sup>40</sup> Before Megan's Law, lawmakers' focus was on informing law enforcement officials about sex offenders.<sup>41</sup> With the enactment of Megan's Law, lawmakers recognized the need to alert the community to sex offenders' residences and places of employment.<sup>42</sup>

## 3. The Dru Sjodin National Sex Offender Public Registry

In 2003, another highly publicized tragedy was the murder of twenty-two-year-old college student, Dru Sjodin.<sup>43</sup> The man who murdered Dru was a convicted sex offender who had recently finished a twenty-three year sentence and was not on a sex offender registry.<sup>44</sup> His

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33. *Id.*

34. Carpenter, *supra* note 24, at 326; Rogers, *supra* note 20, at 10.

35. 42 U.S.C. § 14071(g)(1)-(g)(2)(A).

36. Christina Locke & Dr. Bill F. Chamberlin, *Safe From Sex Offenders? Legislating Internet Publication of Sex Offender Registries*, 39 URB. LAW. 1, 1 (2007); Lori A. Polonchak, *Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers*, 102 DICK. L. REV. 169, 173 (1997).

37. Locke & Chamberlin, *supra* note 36, at 1; Polonchak, *supra* note 36, at 173.

38. Locke & Chamberlin, *supra* note 36, at 1; Polonchak, *supra* note 36, at 173-74.

39. 42 U.S.C. § 14071(e)(2); Suzanna Hartzell-Baird, *When Sex Doesn't Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 REAL EST. L.J. 353, 356 (2006); Rogers, *supra* note 20, at 10.

40. 42 U.S.C. § 14071(e)(2); Rogers, *supra* note 20, at 10; Maureen Hopbell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331, 337 (2004).

41. Carpenter, *supra* note 24, at 327.

42. *Id.* ("Community notification has been deemed a justifiable intrusion into the registrant's expectation of privacy because of the public's interest in safety." (internal quotation omitted)).

43. Rachel Bell, *The Murder of Dru Sjodin*, TRU TV CRIME LIBRARY, [http://www.crimelibrary.com/notorious\\_murders/classics/dru\\_sjodin/1\\_index.html](http://www.crimelibrary.com/notorious_murders/classics/dru_sjodin/1_index.html) (last visited Jan. 21, 2008).

44. *Id.*

release from prison was only six months before he abducted Dru from a parking lot outside the mall where she worked.<sup>45</sup> The man raped, tortured, and murdered Dru.<sup>46</sup> Police did not discover her body for over half a year.<sup>47</sup>

In 2005, the Department of Justice created a national sex offender database on the Internet.<sup>48</sup> In 2006, legislators renamed this web site the Dru Sjodin National Sex Offender Public Registry.<sup>49</sup> The purpose of this web site is to provide quicker and easier access to the states' individual searchable databases.<sup>50</sup>

### B. State Laws and Statutes

Presently, every state, as well as the District of Columbia, has enacted sex offender community notification and registration requirement statutes.<sup>51</sup> The federal acts that guided, and eventually mandated action from the states, left the states with much discretion in determining their own statutory schemes.<sup>52</sup> Under the federal acts, the states determine which crimes trigger sex offender registration and which punishments each registrant receives for the crimes.<sup>53</sup> Over the years, the states have developed a wide array of residency and employment requirements.<sup>54</sup> Overall, however, the states have arrived at very similar registration requirements.<sup>55</sup>

#### 1. Registration Requirements

Although the law requires the 603,000 sex offenders residing in the United States today to register, of that number, over 100,000 sex offenders failed to register, and law enforcement officials do not know

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45. *Id.*

46. *Id.*

47. *Id.*

48. Rogers, *supra* note 20, at 11; *see also* Bell, *supra* note 43.

49. Rogers, *supra* note 20, at 11.

50. *Id.*

51. Carpenter, *supra* note 24, at 327. As for the registration requirements:

Federal guidelines require that each registrant provide local law enforcement with: name, address, a photograph, and fingerprints, and in some states, the offender must also supply a biological specimen. The offender must register in the state where employed or attending school, report any change in address, and must also notify proper authorities of the intention to move to another state.

*Id.* at 332-33. Furthermore, as for the community notification requirement, the PROTECT Act amendment, passed in 2003, "required that community notification include the maintenance of publicly accessible sex offender web sites in all jurisdictions." Rogers, *supra* note 20, at 11.

52. NAT'L CTR FOR MISSING AND EXPLOITED CHILDREN, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN CREATES NEW UNIT TO HELP FIND 100,000 MISSING SEX OFFENDERS AND CALLS FOR STATES TO DO THEIR PART para. 2 (2007), [http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_US&PageId=3081](http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=3081).

53. Hartzell-Baird, *supra* note 39, at 355.

54. NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, *supra* note 52, para. 2.

55. Carpenter, *supra* note 24, at 327-28.

their whereabouts.<sup>56</sup> As the National Center for Missing and Exploited Children notes, one reason for this high level of noncompliance lies in the states' inconsistent methods for tracking sex offenders, which enable the sex offenders "to manipulate the system and relocate to more lenient states."<sup>57</sup>

Noncompliance remains a problem even after nationwide implementation of sex offender registries. The states, guided by the federal Wetterling Act, created registration requirements. State registration statutes generally "require a sex offender to provide local law enforcement with such information as photographs, fingerprints, home addresses, social security numbers, birthdates, crimes committed, and the time and place of prior convictions."<sup>58</sup> State laws regarding enforcement of the registration requirements, however, vary across the country.<sup>59</sup>

The following variances are examples of inadequate and inconsistent state laws: (1) twenty-five states treat noncompliance with one or more registration duties as only a misdemeanor;<sup>60</sup> (2) four states place the responsibility to notify the state solely on the offender when moving to another state;<sup>61</sup> (3) eight states have ambiguous laws as to whether the state or the sex offender must notify the new state when the offender moves to another state;<sup>62</sup> and (4) only seven states revoke mandatory parole and require the sex offender to return to prison when the offender fails to register.<sup>63</sup>

## 2. Community Notification

Methods of community notification have varied from state to state since the enactment of Megan's Law in 1996.<sup>64</sup> Although Megan's Law requires all states to conduct some sort of community notification, it

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56. NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, *supra* note 52, para. 1; see Jim C. Klepper, *Adam Walsh: Child Protection & Safety Act*, DRIVING FORCE, June 6, 2007, [http://www.drivingforcemag.com/artman2/publish/Company\\_Drivers\\_Legal\\_Lane/Adam\\_Walsh\\_Child\\_Protection\\_Safety\\_Act.php](http://www.drivingforcemag.com/artman2/publish/Company_Drivers_Legal_Lane/Adam_Walsh_Child_Protection_Safety_Act.php) (estimating that up to 125,000 sex offenders have failed to register nationwide).

57. NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, *supra* note 52, para. 2.

58. Brett Jackson Coppage, *Balancing Community Interests and Offender Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood*, 38 URB. LAW. 309, 311 (2006). Additionally, "some state statutes also require the sex offender to submit to DNA testing in order to put the offender's DNA information on file." *Id.*

59. See NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, *supra* note 52, para. 2 (detailing registered sex offenders by state on a map of the United States).

60. Alaska, California, Colorado, District of Columbia, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oregon, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.*

61. Delaware, District of Columbia, Kansas, and Utah. *Id.*

62. California, Kentucky, Montana, New Jersey, North Dakota, South Carolina, South Dakota, and Tennessee. *Id.*

63. California, Idaho, Illinois, Iowa, Michigan, North Dakota, and West Virginia. *Id.*

64. Hartzell-Baird, *supra* note 39, at 361.

does not contain specific requirements or methods, other than the creation of web sites containing state sex offender information.<sup>65</sup> Therefore, the states have broad discretion to design and implement their own community notification policies.<sup>66</sup>

Furthermore, since lawmakers initially realized the importance of sex offender community notification, information dissemination regarding community sex offenders has varied, from early notification methods such as billboards and signs in front of sex offenders' residences to the more recent, easily accessible web site registries.<sup>67</sup> Because state notification procedures drastically vary, non-state listings, such as the Family Watchdog web site, may provide citizens with more accessible sex offender information.<sup>68</sup> These web sites are growing in popularity and often have more consistent information nationwide than state registries.<sup>69</sup>

### 3. Sex Offender Classification

States also have discretion to determine the level of risk a sex offender must pose before public notification of the offender's presence.<sup>70</sup> For example, some states delegate to a separate state agency complete authority to conduct notification and determine which offenders are subject to notification, and classification results vary greatly.<sup>71</sup> Most

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65. *Id.* at 354-55.

66. *Id.*; NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, *supra* note 52, para. 2.

67. Locke & Chamberlin, *supra* note 36, at 2. Researchers and legislators classify community notification methods as either "passive" or "active." *Id.* Passive community notification methods include those "where the government makes information available to citizens who wish to seek it out." *Id.* Active community notification methods include "sending . . . officers door-to-door or calling to notify residents that a sex offender has moved into [the] neighborhood." *Id.*

States vary in terms of whether their communities use passive or active community notification methods, or a combination of both. See Hartzell-Baird, *supra* note 39, at 361; SCOTT MATSON, CTR. FOR SEX OFFENDER MGMT, COMMUNITY NOTIFICATION AND EDUCATION 4-9 (2001), available at <http://www.csom.org/pubs/notedu.pdf>. A federally funded project designed to improve the management of sex offenders in the community recorded the following results:

[N]ineteen states conduct broad notification (information is widely released to the public), fourteen states conduct notification to those deemed at risk from a particular offender (*i.e.*, child care centers, religious organizations, schools, and other groups that serve children or vulnerable populations), and the remaining seventeen states utilize passive notification (*i.e.*, information is available at local law enforcement offices should citizens wish to obtain it). Hartzell-Baird, *supra* note 39, at 361; see MATSON, *supra* at 4-9.

The nineteen states requiring broad notification are Alabama, Arizona, California, Delaware, Florida, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Washington, Wisconsin, and Wyoming. MATSON, *supra* at 5. The fourteen states that conduct notification to those deemed at risk from a particular offender are Arkansas, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, and West Virginia. *Id.* The seventeen states utilizing passive notification are Alaska, Colorado, Hawaii, Idaho, Kansas, Michigan, Mississippi, Missouri, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Vermont and Virginia. *Id.*

68. See, *e.g.*, The Family Watchdog, <http://www.familywatchdog.com> (last visited Jan. 21, 2008).

69. Hartzell-Baird, *supra* note 39, at 353.

70. See *id.*, at 355.

71. Dep't of Just. Bureau of Just. Statistics, Nat'l Conf. on Sex Offender Registries, <http://www.ojp.usdoj.gov/bjs/pub/ascii/ncsor.txt>. (last visited Jan. 21, 2008). For example, community notification in Illinois is carried out in three phases: (1) law enforcement is required to notify every

states require community notification in cases in which the offender has committed a violent sex offense against a minor.<sup>72</sup> These states generally consider a sex offender to be “[o]ne who engages or attempts to engage in a sexual act with a minor, or who commits or attempts to commit aggravated sexual battery against a person of any age.”<sup>73</sup>

States classify sex offenders in other ways, too. Many states classify people convicted of possessing child pornography and statutory rapists as sex offenders.<sup>74</sup> Specifically, at least five states require registration for adult prostitution-related offenses; at least thirteen states require registration for public urination; at least twenty-nine require registration for consensual sex between teenagers; and at least thirty-two states require registration for exposing genitals in public.<sup>75</sup> Furthermore, many states allow state officials to arbitrarily identify “dangerous sex offenders” and pursue civil proceedings to have such a person involuntarily committed, similar to a mentally incompetent person.<sup>76</sup>

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school and child-care facility about sex offenders; but (2) law enforcement has the *discretion* to provide information to any other group that may encounter the sex offender; and (3) any individual deemed *authorized* to view the online registry may do so at the police department. *Id.* New York also uses a risk assessment scale to determine the level of community notification for sex offenders. *Id.* Specifically, New York considers factors such as number of victims, victim age, and prior felony convictions to assess the risk that a particular sex offender will recidivate. *Id.* When the sex offender is more likely to recidivate, then the community is better notified and informed of that offender. *Id.* In Florida, residents must actively seek information to learn about sex offenders, regardless of their offense. *Id.* Florida residents can find out about sex offenders living in their area by calling 1-888-FL-PREDATOR, or by searching the Florida registry web site by city, county, or the offender’s last name. *Id.*

72. Hartzell-Baird, *supra* note 39, at 361.

73. Adam Shajnfeld & Richard B. Krueger, *Reforming (purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 82 (2006).

74. *Id.* at 82-83.

75. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 39-40.

76. Coppage, *supra* note 58, at 311 (citing WASH. REV. CODE ANN. § 71.09.010 (West 2002)). For example, a Washington state statute allows that “when upon a petition by the prosecuting attorney of the county or the attorney general, a person deemed a ‘sexually violent predator’ can be committed to a state run facility after a preliminary hearing and trial.” *Id.* at 311 n.23 (citing WASH. REV. CODE ANN. § 71.09.010 (West 2002)); see also *United States v. Zehntner*, No. 1:06-cr-0219, 2007 WL 201106 (N.D.N.Y. Jan. 23, 2007). In January 2007, the United States District Court for the Northern District of New York, in *Zehntner*, first addressed the AWA’s civil commitment provision, 18 U.S.C. § 4248 (2006). *Zehntner*, 2007 WL 201106, slip op. at \*1. The Civil Commitment of Sexually Dangerous Persons provision of the AWA, 18 U.S.C. § 4248, provides:

[The federal government may] initiate commitment proceedings with respect to federal prisoners whose sentences are about to expire, persons committed to the custody of the Attorney General under § 4241(d) based on incompetence to stand trial, and persons against whom all criminal charges have been dismissed solely for reasons relating to their mental condition, and, pursuant to court order, to commit indefinitely those prisoners found to be “sexually dangerous persons.” To initiate civil commitment proceedings under § 4248(a), the Bureau of Prisons (BoP) may certify any of the foregoing individuals as a “sexually dangerous person” and effectively stay the release of that individual for the duration of the § 4248 proceedings. A certified individual is entitled to a hearing, and if the court finds “by clear and convincing evidence that the person is a sexually dangerous person,” the court must commit the individual to the custody of the Attorney General for care and treatment until a state will assume responsibility or until “the person’s condition is such that he is no longer sexually dangerous to others” or will not be sexually dangerous to others if released under an appropriate regimen of care or treatment.

*United States v. Comstock*, 507 F. Supp. 2d 522, 527 (E.D.N.C. 2007) (quoting and explaining 18 U.S.C. § 4248).

Thus, with full discretion left to the states, there is no universally applied classification of sex offender, nor are there uniform state determinations of which sex offenders are subject to notification.

### C. *The Adam Walsh Child Protection and Safety Act of 2006*

Twenty-five years ago, someone abducted and murdered six-year-old Adam Walsh.<sup>77</sup> Since their son's disappearance, Adam's parents, John and Reve Walsh, fought for tougher punishments for sex offenders and stricter requirements for sex offender registration.<sup>78</sup> John Walsh is the host of the television show *America's Most Wanted*, which increased the publicity surrounding Adam's tragic abduction and murder.<sup>79</sup>

Congress enacted the AWA on July 27, 2006.<sup>80</sup> Generally speaking, the AWA expands upon the earlier federal sex offender statute, the Wetterling Act, and makes more explicit registration requirements that previously were under the discretion of the states.<sup>81</sup> The AWA serves several purposes: to reformulate "the federal standards for sex offender registration in state, territorial and tribal sex offender registries, . . . to make the system more uniform, more inclusive, more informative and more readily available to the public online;" and to amend "federal criminal law and procedure, featuring a federal procedure for the civil commitment of sex offenders, . . . a number of new federal crimes, and sentencing enhancements for existing federal offenses."<sup>82</sup>

Specifically, Title I of the AWA contains the Sex Offender Registration and Notification Act (SORNA).<sup>83</sup> The AWA, under the SORNA, compiles a complete revision of the "national standards for sex offender registration and [community] notification."<sup>84</sup> In particular,

77. Adam Walsh Act Becomes Law, *America's Most Wanted*, [http://www.amw.com/features/feature\\_story\\_detail.cfm?id=1206](http://www.amw.com/features/feature_story_detail.cfm?id=1206) (last visited Jan. 21, 2008).

78. *See id.* Police never found Adam's body, only his severed head, and no one knows whether the murderer sexually abused Adam. *Suspect Scrutinized in Slaying of Adam Walsh*, N.Y. TIMES, June 15, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE2DA1531F936A25755C0A963958260&scp=6&sq=%22adam+walsh%22&st=nyt>.

79. *See generally* Adam Walsh Act Becomes Law, *supra* note 77.

80. 42 U.S.C. § 16901 (2006).

81. CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, ADAM WALSH CHILD PROTECTION AND SAFETY ACT: A SKETCH 1 (2007), available at [http://assets.opencrs.com/rpts/RS22646\\_20070417.pdf](http://assets.opencrs.com/rpts/RS22646_20070417.pdf).

82. *Id.*; The Adam Walsh Child Act Resource Page, [http://www.fd.org/odstb\\_AdamWalsh.htm](http://www.fd.org/odstb_AdamWalsh.htm) (last visited Jan. 21, 2008). Other purposes of the AWA include the following: to create, amend, or revive "several grant programs designed to reinforce private, state, local, tribal and territorial prevention; law enforcement; and treatment efforts in the case of crimes committed against children;" and to call "for a variety of administrative or regulatory initiatives in the interest of child safety, such as the creation of the National Child Abuse Registry." DOYLE, *supra* note 81, at 1.

83. 42 U.S.C. § 16901.

84. Applicability of the Sex Offender Registration and Notification Act, 72 FED. REG. 8,894, 8,895 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72). This Note will refer to the requirements under Title I of the AWA, or the SORNA, generally as the "AWA requirements."

The AWA requirements apply to all non-federal jurisdictions. *See* 42 U.S.C. 16911(10) (2006). Non-federal jurisdictions include: the states, the District of Columbia, the principal territories, and Indian tribes. *See id.* This Note, however, will refer to the non-federal jurisdictions gener-

this revision aims to eliminate loopholes and gaps created by inconsistent state laws and statutes.<sup>85</sup>

### 1. The AWA's Increased Registration Requirements and Sex Offender Classification

The AWA contains requirements for sex offender registration under federal law.<sup>86</sup> The AWA further mandates federal enforcement of the sex offender requirements in situations supporting federal jurisdiction.<sup>87</sup> These requirements include sex offender registration and keeping the registration information current in each state the offender resides, works, or attends school.<sup>88</sup> If the offender lives or goes to school in a different state, the offender must register in both states.<sup>89</sup>

The AWA greatly increases “the requirements of those who must register as a sex offender.”<sup>90</sup> The AWA defines a sex offense as a “criminal offense that has an element involving a sexual act or sexual contact with another.”<sup>91</sup> Under the AWA, non-violent offenders are required to register.<sup>92</sup> The AWA further requires juveniles to register if they were fourteen or older at the time they committed specified of-

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ally as “the states.”

85. Applicability of the Sex Offender Registration and Notification Act, *supra* note 84, at 8,895. As former Attorney General Alberto Gonzales explains:

In a federal union like the United States with a mobile population, sex offender registration could not be effective if registered sex offenders could simply disappear from the purview of the registration authorities by moving from one jurisdiction to another, or if registration and notification requirements could be evaded by moving from a jurisdiction with an effective program to a nearby jurisdiction that required little or nothing in terms of registration and notification.

The National Guidelines for Sex Offender Registration and Notification, 72 FED. REG. 30,210, 30,211 (May 30, 2007) (proposed guidelines).

86. Applicability of the Sex Offender Registration and Notification Act, *supra* note 84, at 8,895.

87. *Id.*

88. *Id.* The information the sex offender is required to provide for the jurisdiction's registry includes the offender's (1) name and any alias, (2) social security number, (3) address, (4) name and address of employer, (5) name and address of school, (6) license plate number and “description of any vehicle owned or operated,” and (7) “any other information [that may be] required by the Attorney General.” 42 U.S.C. § 16914(a) (2006). Furthermore, the jurisdiction must include the following more personal information in its registry:

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

*Id.* § 16914(b).

89. Applicability of the Sex Offender Registration and Notification Act, *supra* note 84, at 8,895.

90. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 37.

91. 42 U.S.C. § 16911(5)(A)(i) (2006). Previously, most states defined a sex offender to be “[o]ne who engages or attempts to engage in a sexual act with a minor, or who commits or attempts to commit aggravated sexual battery against a person of any age.” Shajnfeld & Krueger, *supra* note 73, at 82; see *supra* Part II.B.3.

92. See *infra* notes 122-124.

fenses.<sup>93</sup>

The AWA creates three tiers of registrants, with Tier I being the least serious offender and Tier III being the most serious offender.<sup>94</sup> The gravity of the sex offender's crime determines the offender's tier.<sup>95</sup> The duration of time the offender is required to register varies according to his tier.<sup>96</sup> The AWA further requires that offenders have specified in-person verification of registration information and photograph times, and the frequency of those verification times also varies depending on the offender's tier.<sup>97</sup>

The AWA requires a sex offender to register *before* completing a prison sentence for the offense, or no more than three days after sentencing, if the court does not sentence the offender to prison.<sup>98</sup> Shortly before the offender's release from prison, or if not sentenced to prison, immediately after the offender's sentencing, a law enforcement official must explain the offender's duties under the AWA, require the offender to sign a form acknowledging that the offender understands the registra-

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93. 42 U.S.C. § 16911(8). The AWA exempts consensual sex when the victim is "at least [thirteen] years old and the offender [is] not more than four years older than the victim." *Id.* § 16911(5)(C).

94. *See id.* § 16911(2)-(4).

95. *Id.* A Tier III offender is a sex offender who committed a crime punishable by imprisonment for more than one year. *Id.* The crime must also be comparable to, or more severe than, the following: aggravated sexual abuse; abusive sexual conduct with a minor under thirteen years old; kidnapping by someone other than a guardian; or any sex crime occurring after the offender became a Tier II offender. *Id.* § 16911(4).

A Tier II offender is "a sex offender other than a [T]ier III sex offender" who committed a crime against a minor, and the crime is punishable by imprisonment for more than one year. *Id.* § 16911(3). The crime must also be comparable to, or more severe than, the following: sex trafficking; coercion and enticement; "transportation with the intent to engage in criminal sexual activity;" abusive sexual conduct; "use of a minor in a sexual performance;" solicitation to practice prostitution; "production or distribution of child pornography;" or any sex crime occurring after the offender became a Tier I offender. *Id.*

A Tier I offender is a "sex offender other than a Tier II or Tier III sex offender." *Id.* § 16911(2).

96. *Id.* § 16915(a)(1)-(3). Tier III offenders are required to register for life, Tier II offenders are required to register for twenty-five years, and Tier I offenders are required to register for fifteen years. *Id.*

97. *Id.* § 16916(1)-(3). Tier I offenders must verify the registration information once every year, Tier II offenders must verify once every six months, and Tier III offenders must verify once every three months. *Id.* If a sex offender moves, changes employment, or changes student status, the offender must notify the offender's registration jurisdiction within three days after the change. *Id.* § 16913(c); U.S. DEP'T OF JUSTICE, FACT SHEET: THE PROPOSED GUIDELINES FOR THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT 2 (2007), available at [http://www.ojp.usdoj.gov/smart/pdfs/sorna\\_factsheet.pdf](http://www.ojp.usdoj.gov/smart/pdfs/sorna_factsheet.pdf). The offender must notify the jurisdiction in person, and the jurisdiction may change the offender's photograph at any of these verification times. 42 U.S.C. § 16916(1)-(3).

98. *See id.* § 16913(b)(1)-(2). The AWA gives authority to the Attorney General to decide whether the AWA's requirements are applied retroactively to a person convicted prior to July 27, 2006, and "if so, to promulgate regulations to ensure that they and anyone else who cannot receive notice of their duties under SORNA and be registered by an 'appropriate official' before completion of sentence or within three days of sentencing, does receive notice and is registered." Memorandum from Amy Baron-Evans on The Adam Walsh Child Protection and Safety Act of 2006 at 1 (2007), available at [http://www.fd.org/pdf\\_lib/Adam%20Walsh%20II%20Supplement.pdf](http://www.fd.org/pdf_lib/Adam%20Walsh%20II%20Supplement.pdf). The Attorney General issued an "interim rule" on February 28, 2007. Applicability of the Sex Offender Registration and Notification Act, *supra* note 84, at 8,894-97; Baron-Evans, *supra*.

tion requirement, and ensure the sex offender is registered.<sup>99</sup> An offender convicted under any state law and required to register under the AWA is subject to federal criminal culpability if the offender knowingly fails to register or fails to keep the registration information updated.<sup>100</sup> This applies even if a properly registered offender travels to a different state and fails to register in the new state.<sup>101</sup>

The AWA enhances federal investigation and prosecution efforts to help the states enforce their new sex offender laws.<sup>102</sup> The AWA requires the federal government to be actively involved in the enforcement of the states' sex offender registration and notification requirements.<sup>103</sup> It is therefore mandatory that states comply with the AWA

99. 42 U.S.C. § 16917(a)(1)-(3).

100. 18 U.S.C. § 2250 (2006). However, with regard to the AWA's potential retroactive application, several United States District Courts have addressed the Attorney General's interim rule and the rule's lack of guidelines. See *supra* note 76; see, e.g., *United States v. Madera*, 474 F. Supp. 2d 1257, 1262-63 (M.D. Fla. 2007); *United States v. Manning*, No. 06-20055, 2007 WL 624037, at \*1 (W.D. Ark. Feb. 23, 2007); *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481, at \*4-5 (W.D. Okla. Feb. 7, 2007). While the rule instructs the states to apply the AWA retroactively to anyone convicted of an offense listed in the AWA at any time, the rule does not provide any guidance for registration of such offenders. See *Applicability of the Sex Offender Registration and Notification Act*, *supra* note 84, at 8,894-97; *Baron-Evans*, *supra* note 98, at 1. Furthermore, the language of the Attorney General's interim rule leaves legitimate room for argument on behalf of a convicted sex offender:

Nevertheless, sex offenders with predicate convictions predating [the AWA] who do not wish to be subject to the [AWA] registration requirements, or who wish to avoid being held to account for having violated those requirements, have not been barred from attempting to devise arguments that [the AWA] is inapplicable to them, e.g., because a rule confirming [the AWA's] applicability has not been issued.

*Applicability of the Sex Offender Registration and Notification Act*, *supra* note 84, at 8,896. So far, however, the courts have recognized this issue: in all these cases, the courts indicted the defendants for failure to register under the AWA. See *Madera*, 474 F. Supp. 2d at 1265; see also *Manning*, 2007 WL 624037, at \*2; *Templeton*, 2007 WL 445481, at \*5-6.

One common element in these cases is that each defendant argued that the registration requirements should not apply to him because he was sentenced prior to enactment of the AWA. See *Madera*, 474 F. Supp. 2d at 1262; *Manning*, 2007 WL 624037, at \*1; *Templeton*, 2007 WL 445481, at \*4. Thus, the defendants claimed, the registration requirement's retroactive application violated the ex post facto clause. *Madera*, 474 F. Supp. 2d at 1262; *Manning*, 2007 WL 624037, at \*1; see *Templeton*, 2007 WL 445481, at \*5. However, the courts agreed that, under the Supreme Court precedent of *Smith v. Doe*, 538 U.S. 84 (2003) (determining that non-punitive, regulatory measures adopted for public safety reasons may be validly applied against offenders whose convictions occurred prior to the creation or enactment of the requirements), no ex post facto clause issues existed. See *Madera*, 474 F. Supp. 2d at 1263-64; *Manning*, 2007 WL 624037, at \*1; *Templeton*, 2007 WL 445481, at \*5.

101. See *Applicability of the Sex Offender Registration and Notification Act*, *supra* note 84, at 8,895; 18 U.S.C. § 2250.

102. In particular, AWA established the SMART Office. The National Guidelines for Sex Offender Registration and Notification, *supra* note 85, at 30,210; *Rogers*, *supra* note 20, at 10. The SMART Office administers the national standards for sex offender registration and assists the states with questions throughout the implementation process. The National Guidelines for Sex Offender Registration and Notification, *supra* note 85; *Rogers*, *supra* note 20, at 10. The AWA required all jurisdictions to submit compliance packets to the SMART Office establishing substantial compliance with the AWA requirements by April 27, 2009. U.S. DEP'T OF JUSTICE, FACT SHEET, *supra* note 97, at 1.

103. The National Guidelines for Sex Offender Registration and Notification, *supra* note 85, at 30,211; *Applicability of the Sex Offender Registration and Notification Act*, *supra* note 84, at 8,895. The Federal Bureau of Prisons and federal probation offices enforces these requirements. See 18 U.S.C. 4042 (2006). When agencies release sex offenders from their custody or the offenders begin their probation sentences, the agencies inform offenders that they must comply with the AWA requirements as conditions of their supervision. *Id.* The agencies also inform state and local authori-

requirements.<sup>104</sup>

## 2. The AWA's Increased Community Notification Requirements

The AWA authorizes a national sex offender registry that will incorporate the information from each state's registry.<sup>105</sup> Specifically, the AWA establishes a national sex offender database and a national sex offender web site.<sup>106</sup> The new database will compile information obtained through the states' sex offender registration requirements and make the information available on the web site.<sup>107</sup> The AWA requires this compiled information to be readily available through the web site to both law enforcement and the public on a national level.<sup>108</sup>

The AWA further requires the United States Attorney General to develop software to enable the states to achieve consistent and conforming sex offender registries and web sites.<sup>109</sup> This software must be available by July 27, 2008.<sup>110</sup> If the Attorney General meets the deadline and makes the software available by that date, then the states must implement the software and compile the offenders' registry information by July 27, 2009.<sup>111</sup> Once law enforcement compiles the states' web sites, they will add the web sites to the national database, the Dru Sjodin National Sex Offender Public Registry.<sup>112</sup>

As the AWA demands more information in states' sex offender registries, the amount of sex offender information readily available to the public through the Internet will also increase.<sup>113</sup> The AWA's more stringent three-tiered sex offender classification scheme will make information available about entire groups that were not even previously required to register. Information about non-violent offenders will be accessible to the public. Additionally, the AWA now requires states to include juveniles who were fourteen or older when they committed of-

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ties of the release of such offenders to their areas. *Id.*

104. See *infra* text accompanying notes 188-190. Federally recognized Indian tribes must have elected by July 27, 2007, whether to comply with the AWA registration requirements or whether to delegate the tribes' compliance with the AWA requirements to the states in which the tribes' land is located. U.S. DEP'T OF JUSTICE, FACT SHEET, *supra* note 97, at 2. Tribes not electing to comply autonomously by July 27, 2007, were automatically delegated to the duties of the states. *Id.*

105. See 42 U.S.C. §§ 16918-20 (2006).

106. See *id.*

107. See *id.*

108. The National Guidelines for Sex Offender Registration and Notification, *supra* note 85, at 30,211.

109. 42 U.S.C. § 16923(a).

110. *Id.* § 16923(c).

111. *Id.* § 16924.

112. *Id.* § 16920(b).

113. States have authority to increase the information sex offenders must provide for the state registry. The AWA's proposed guidelines also recommend states to include the offender's home telephone number and e-mail address. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 54. Several states include the offender's make, model, and license plate number in the offender's registration information. *Id.*

fenses in their online registries.<sup>114</sup>

The AWA further requires the national sex offender web site to list offenders for an extended duration. The AWA's three-tiered sex offender classification determines how long the offender's information must remain on the web site: fifteen years, twenty-five years, or life, depending on the offender's tier.<sup>115</sup> If any of the web site and registry requirements under the AWA are less stringent than the states' current requirements, the states may exceed the AWA standards.<sup>116</sup> To receive full federal funds, however, states must meet the AWA standards.<sup>117</sup>

### III. ANALYSIS

#### A. *The Purpose of the AWA—Laudable, but Over-Inclusive*

Highly publicized tragedies dealing with the abduction, rape, abuse, and murder of young children have led federal and state governments to introduce stricter punishments, requirements, and prohibitions for sex

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114. 42 U.S.C. § 16911(1), (8)-(9). Under the AWA provisions, “[y]outh who are adjudicated delinquent who are 14 years of age or older and who have committed an offense comparable to or more severe than [18 U.S.C. § 2241]” are deemed sex offenders. NAT’L JUVENILE JUSTICE NETWORK, NEW REGISTRATION REQUIREMENTS FOR JUVENILE SEX OFFENDERS 1 (2007), available at [http://njjn.org/media/resources/public/resource\\_413.pdf](http://njjn.org/media/resources/public/resource_413.pdf). The juvenile sex offender is subject to the same registration and notification requirements as are adults under the AWA. *Id.*

Critics disagree with the AWA's new juvenile registration requirements. See E-mail from Denise A. Cardman, Deputy Director, American Bar Association Governmental Affairs Office, to David J. Karp, Senior Counsel, Office of Legal Policy (Apr. 30, 2007), available at [http://www.abanet.org/poladv/letters/crimlaw/2007apr30\\_adamwalsh\\_1.pdf](http://www.abanet.org/poladv/letters/crimlaw/2007apr30_adamwalsh_1.pdf). Specifically, the American Bar Association (ABA) argues that retroactive application of the AWA requirements to juvenile offenders disregards the goals of the ABA's juvenile justice policy. *Id.*

The ABA claims that juvenile standards must “give fair warning about prohibited conduct” and must “recognize the ‘unique physical, psychological, and social features of young persons.’” *Id.* Furthermore, the ABA recognized that potential lifetime registration requirements for juveniles are detrimental to both recuperation and future crime deterrence. *Id.* The ABA argues the states' compliance with the AWA's new juvenile registration requirements is both controversial and risky. See *id.*

115. The AWA does not recognize the significance of living offense-free, either. Tier II offenders must register for twenty-five years and Tier III offenders must register for life, regardless of how much evidence they present of rehabilitation or how long they live offense-free. 42 U.S.C. § 16915(a)(2)-(3). Tier I offenders are allowed to petition for removal from the registry after ten years if they live offense-free for those ten years. *Id.* § 16915(b)(1)-(3). Furthermore, the AWA allows Tier III offenders convicted as juveniles to petition for removal from the registry if they live offense-free for twenty-five years. *Id.* § 16915(b)(1)-(3).

116. Currently, seventeen states require *all* offenders to register for life, including even the most minor offenders. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 42. Of those states, Alabama and South Carolina do not allow any offender to petition for removal from lifetime registration. *Id.* The remaining fifteen states allow some registrants to petition for removal from lifetime registration, but only after living offense-free for a certain number of years. *Id.*

117. U.S. DEP'T OF JUSTICE, FACT SHEET, *supra* note 97, at 1. Currently, thirty-three states require *some* offenders to register for life. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 43. Those states usually reserve lifetime registry for offenders convicted of more serious crimes. *Id.* Six of those states allow lifetime registrants to petition for removal from the registry. *Id.* The AWA, however, may eliminate that option for most of those registrants. *Id.*

offenders.<sup>118</sup> Increasingly rigorous and over-inclusive requirements for sex offenders are almost universally accepted and easy for legislators and politicians to support because such measures are popular among the general public.<sup>119</sup> As Congress passes act after act cracking down on sex offenders, experts and officials should be wondering whether the requirements of those acts even work to achieve the goals of legislators.<sup>120</sup> The most recent act, the AWA, poses its own challenges as Congress again expands punishments and requirements of sex offenders, and brands many non-violent offenders who are unlikely to recidivate and pose little threat to public safety.

The AWA contains over-inclusive sex offender registration requirements and punishments, and implementation of the AWA will undoubtedly cause problems for state governments, law enforcement, non-violent sex offenders, and citizens, both as taxpayers and as intended beneficiaries of the AWA.<sup>121</sup> Specifically, the AWA is an unfunded mandate that unduly burdens the state governments and places severe and unfair requirements and punishments on sex offenders. Furthermore, the AWA does not differentiate between violent and non-violent crimes when determining whether an offender must register as a sex offender, stigmatizing many non-violent offenders who are unlikely to recidivate but are required to register.

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118. See, e.g., Lauren FitzPatrick, *Violent Attacks Lead to Tougher Laws*, ROCKFORD REGISTER STAR, Aug. 26, 2007, available at [http://www.rstar.com/opinions/x875778351/ index.html?printview=true](http://www.rstar.com/opinions/x875778351/in dex.html?printview=true) (analyzing sex offender laws created after publicized tragedies to children).

119. For example, Megan's Law passed unanimously in both the United States House of Representatives and the United States Senate. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 48. Megan's Law also passed unanimously in Florida, Illinois, Virginia, and Washington. *Id.* at 49.

120. There is little evidence suggesting that laws have actually reduced sex offense threats against children:

Sex offender laws are based on preventing the horrific crimes that inspired them—but the abduction, rape, and murder of a child by a stranger who is a previously convicted sex offender is a rare event. The laws offer scant protection for children from the serious risk of sexual abuse that they face from family members or acquaintances. Indeed, people children know and trust are responsible for over 90 percent of sex crimes against them.

*Id.* at 4. Furthermore, there is no evidence that restricting where former offenders live and work protects children from sexual violence. *Id.* at 7 (“Indeed, the limited research to date suggests the contrary: a child molester who does offend again is as likely to victimize a child found far from his home as he is one who lives or plays nearby.”); see also Martin, *supra* note 15; Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1 (“Politicians didn’t do their homework before enacting these sex offender laws. Instead they have perpetuated myths about sex offenders and failed to deal with the complex realities of sexual violence against children.”).

121. The AWA’s “guidelines compound the burdensome, preemptive scheme of the underlying law they seek to clarify, . . . promote a burdensome, preemptive scheme for the states, . . . and its implementation guidelines represent a large unfunded mandate for states.” Letter from Carl Tubbesing, Deputy Executive Director of National Conference of State Legislatures, to Laura L. Rogers, Director of SMART Office (July 30, 2007), available at <http://www.ncsl.org/statefed/sexOffReg.htm>. “Required changes to state policy in areas traditionally within the purview of states will be likely in all states and extensive in some.” *Id.*

*B. Criticisms of the AWA—Potential Problems With Its Requirements*

1. The Requirements Do Not Distinguish Between Violent and Non-Violent Offenders

Under the AWA sex offender classifications, even low-level offenses require an individual to register as a sex offender.<sup>122</sup> Specifically, anyone convicted of an “offense that has an element involving a sexual act or sexual contact with another,” whether that offense is child rape or teenage consensual sex, is a sex offender under the AWA.<sup>123</sup> This means that non-violent offenders, such as individuals who urinate in public, teenagers who expose themselves or “play doctor,” and adults who sell sex to other adults, are required to register as sex offenders.<sup>124</sup>

The AWA requires the states to add a proliferation of offenders to their registries for even non-violent crimes, making it difficult for law enforcement officials to determine which offenders necessitate careful supervision.<sup>125</sup> Not only are law enforcement officials unable to identify which sex offenders pose the greatest risk to the public, but law enforcement is also unable to keep track of the vast amount of offenders required to register.<sup>126</sup> Law enforcement officials already recognize that the law enforcement system is not designed to “track down” sex offenders.<sup>127</sup> Rather, it is made for the sex offenders to “come to them,” as required under the AWA.<sup>128</sup>

Unfortunately, overworked and under-funded law enforcement agencies have problems keeping up with the offenders who are properly registering and keeping their information up to date.<sup>129</sup> State and local law enforcement agencies do not have enough officers to verify sex offender addresses or enough funds to hire more officers.<sup>130</sup> In short, law

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122. See Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1.

123. 42 U.S.C. § 16911(5)(A)(i) (2006).

124. See *id.* § 16911; HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 5; see also Bynoe, *supra* note 12 (noting that across the nation, children not even old enough to pronounce the word “harassment” are being accused of sexual harassment and are being suspended from schools or taken to jail).

125. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 9; Peter Whoriskey, *Some Curbs on Sex Offenders Called Ineffective, Inhumane*, WASH. POST, Nov. 22, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/21/AR2006112101468.html> (recognizing that sex offender laws are overbroad and apply “not only to sexual predators but to all people registered for sexual crimes . . .” (emphasis added)).

126. See, e.g., HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 9-10; Hector Castro, *Keeping Tabs on Sex Offenders is Daunting Task*, SEATTLE POST-INTELLIGENCER, July 19, 2007, available at [http://seattlepi.nwsourc.com/local/324399\\_sexoffenders20.html](http://seattlepi.nwsourc.com/local/324399_sexoffenders20.html); Martin, *supra* note 15; Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1.

127. Castro, *supra* note 126.

128. *Id.*

129. See, e.g., *id.*; Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1.

130. See, e.g., HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S.,

enforcement officials are overwhelmed and as a result, sex offenders slip through the cracks.<sup>131</sup>

The AWA exemplifies this problem in another way, too. Many states already classify sex offenders by their level of dangerousness and risk to the community.<sup>132</sup> The states that do not already classify offenders will soon enough, as such classification is required under the AWA.<sup>133</sup> Sex offender classification *should* allow law enforcement officials to give high-level offenders more priority. The AWA, however, still requires *all* offenders to register—even the most low-level offenders must register for at least ten years.<sup>134</sup> Thus, law enforcement officials cannot focus their money, attention, and effort on the most dangerous offenders because the AWA requires the same treatment of all registered offenders.<sup>135</sup>

Varying recidivism rates of sex offenders, however, show that not all offenders should be treated the same.<sup>136</sup> Recidivism rates vary with the specific characteristics of sex offenders and the offenses they commit.<sup>137</sup> The sex offenders convicted of the most severe offenses are those most likely to re-offend.<sup>138</sup> If the states assessed and differentiated between violent and non-violent offenders, the states could then focus on supervision of the offenders that pose the greatest threat to the public.

The AWA does not require individualized risk assessments of sex offenders. The AWA's uniform requirements for all levels of sex offenders do not acknowledge recidivism statistics.<sup>139</sup> Currently, only a few states require law enforcement officials to perform individualized risk assessments on former offenders.<sup>140</sup> These states determine how

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*supra* note 1, at 9-10; Castro, *supra* note 126; Mallory McGowin, *Audrain County Sex Offender Issues*, KRCG ONLINE, Oct. 26, 2007, available at [http://www.krcg.com/news/news\\_story.aspx?id=60153](http://www.krcg.com/news/news_story.aspx?id=60153); Human Rights Watch, *Sex Offender Laws May Do More Harm Than Good*, *supra* note 1.

131. See, e.g., Castro, *supra* note 126.

132. See HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S.*, *supra* note 1, at 11.

133. See *supra* notes 113-117 and accompanying text.

134. 42 U.S.C. § 16915(b)(1)-(3) (2006); see *supra* note 115.

135. For example, there are 19,700 registered sex offenders in the state of Washington. Castro, *supra* note 126. However, law enforcement officials cannot verify the addresses for 1338 of those offenders. *Id.* Washington divides the offenders into three levels: Level I offenders are the “least likely to strike again” to Level III offenders, who are “considered the most dangerous.” *Id.*

While Washington law enforcement officials are aware that some offenders are more dangerous, police are still supposed to keep track of all the offenders, no matter their level. See *id.* The law enforcement officials cannot keep track of all the offenders, which means that many Level 3 sex offenders, the most dangerous offenders, escape the system. See *id.*

136. HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S.*, *supra* note 1, at 16.

137. Human Rights Watch, *Sex Offender Laws May Do More Harm Than Good*, *supra* note 1.

138. *Id.*

139. *Id.*

140. See, e.g., MINN. STAT. ANN. § 243.166, 244.052 (West Supp. 2008); HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S.*, *supra* note 1, at 5, 63-64; Human Rights Watch, *Sex Offender Laws May Do More Harm Than Good*, *supra* note 1. For example, in Minne-

much risk an offender poses to the community before requiring or continuing to require the offender to register.<sup>141</sup> Per the AWA requirements, however, these states will no longer be able to impose risk assessments as a prerequisite for sex offender registration.<sup>142</sup>

Furthermore, the AWA offers little chance for low-level adult offenders to remove themselves from the registry.<sup>143</sup> One exception is that Tier I offenders can petition for removal from the registry after ten years if they have maintained a clean record.<sup>144</sup> Tier II and III adult offenders, however, cannot petition for removal from the registry, and must register for the required twenty-five years or life, respectively.<sup>145</sup> Many of the sex offenders required to register may be living in the community offense-free for many years, but will still be required to register as sex offenders until death.<sup>146</sup>

The varying characteristics of sex offenders call for different treatment.<sup>147</sup> Specifically, the assessment and diagnosis of sex offenders for treatment is complicated because the rate of recidivism is variable and dependent on many factors.<sup>148</sup> Such variable factors include the offenders' criminal histories, personal characteristics, reasons for offending, and life experiences.<sup>149</sup> Limited law enforcement resources, however, will allow law enforcement officials to monitor carefully only the most

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sota, a panel of experts (including law enforcement officials and treatment providers) assesses sex offenders before their release from custody to determine if they will register, and for how long. MINN. STAT. ANN. § 244.052(2)-(3) (West Supp. 2008). Furthermore, sex offenders requiring registration may appeal that status every two years. *Id.* § 244.052(3)(i).

141. *See, e.g.*, HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 11, 62-63 (discussing Minnesota's and Vermont's risk assessment procedures). For example, in Vermont, sex offenders go through an independent court proceeding to determine whether the offenders have a certain degree of compulsion to commit sexual crimes. *Id.* (citing VT. STAT. ANN. tit. 13, § 5411(c)-(d) (2003)). This practice enables Vermont to keep track of ninety-seven percent of offenders required to register. *Id.* at 63. Under the AWA requirements, however, Vermont will not have its individualized risk assessments. *See supra* note 133.

142. *See supra* Part II.C.1.

143. 42 U.S.C. § 16915(a)(1)-(3) (2006); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 42.

144. 42 U.S.C. § 16915(b)(1)-(3); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 42.

145. 42 U.S.C. § 16915(a)(2)-(3); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 42.

146. Currently, six states (Massachusetts, Michigan, New York, Ohio, Texas, and Wyoming) allow lifetime registrants to petition for early removal from the registry. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 43. The AWA, however, will soon eliminate that option for the lifetime registrants in those states. *Id.*

147. Law enforcement officials re-arrest non-sex offenders twice as often as sex offenders, after both groups' release from prison. DR. KURT BUMBY, TOM TALBOT & MADELINE CARTER, CTR. FOR SEX OFFENDER MGMT, MANAGING THE CHALLENGES OF SEX OFFENDER REENTRY 2 (2007), [http://www.csom.org/pubs/reentry\\_brief.pdf](http://www.csom.org/pubs/reentry_brief.pdf). This demonstrates the unique nature of sex offenses. *See id.* Considering also the "negative public sentiment, sex offense-specific legislation, increasing numbers of imprisoned and released sex offenders, comparatively longer periods of confinement, housing and employment challenges" accompanying sex-related offenses, one can identify the need for a specific strategy for sex offender re-entry into society after prison. *Id.*

148. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 33.

149. *Id.*

dangerous offenders.<sup>150</sup>

As for the remaining majority of sex offenders, upon release from prison, law enforcement officials should authorize treatment and allow the offenders to reintegrate into society.<sup>151</sup> Studies show that treatment reduces sex offender recidivism rates by over fifty percent.<sup>152</sup> Law enforcement officials should allow offenders to rehabilitate, live in communities, and receive job placement assistance if needed.<sup>153</sup> The AWA's stringent requirements, however, are punitive rather than rehabilitative.<sup>154</sup> Other than sex offenders, no offenders in the criminal justice system face national lifetime registries.<sup>155</sup> Once convicted, even low-level, non-violent sex offenders enter a black hole with little to no hope of return.<sup>156</sup>

For these reasons, the AWA requirements are overlong in duration

150. See, e.g., Castro, *supra* note 126 (noting that in some Washington counties, detectives attempt to verify addresses for the most dangerous offenders).

151. Some sex offenders may leave prison without any supervision or treatment. Aaron Chambers, *Treatment, Supervision Often Missing*, ROCKFORD REGISTER STAR, Aug. 26, 2007, available at <http://www.rstar.com/opinions/x433775215/index.html?printview=true>. A trend in the Illinois system exemplifies this problem. See *id.* As Illinois residency restrictions allow sex offenders fewer places to live after their release from prison, the offenders are required to stay in prison even after their sentences. *Id.* The result, therefore, is that the offenders stay in prison through their parole terms. *Id.* The average parole term for sex offenders is three to five years. *Id.*

When sex offenders serve parole in society, parole officers monitor the offenders to "help ensure the sex offenders register and comply with mandated treatment." *Id.* In contrast, when sex offenders serve parole in prison, treatment is optional. *Id.* Law enforcement officials release sex offenders from prison after having served their parole terms, and their transition back into society is unsupervised. *Id.* Parole agents do not mandate treatment or registry. *Id.* Currently, approximately 540 sex offenders in Illinois are serving parole in prison. *Id.* Soon, Illinois law enforcement officials will release these sex offenders; many will fail to register, and the state will not know their location. *Id.*

152. Baron-Evans & Noonan, *supra* note 12, at 41, 41 n.13 (analyzing four different studies over the past ten years noting that treatment of sex offenders cuts their recidivism rates by more than half).

153. See *infra* Part III.D.

154. See *infra* Part III.B.2.

155. Bureau of Justice Statistics: Criminal Record Systems Statistics, <http://www.ojp.usdoj.gov/bjs/crs.htm> (last visited Jan. 26, 2008).

156. Another problem arises when states attempt to treat all sex offenders by creating privately run treatment centers for the offenders upon their release from prison. See Abby Goodnough & Monica Davey, *Locked Away, A Record Failure at a Center for Sex Offenders*, N.Y. TIMES, Mar. 5, 2007, available at <http://www.nytimes.com/2007/03/05/us/05civil.html>. Take, for example, a treatment facility in Arcadia, Florida. *Id.* Facility officials sweep the offenders away to the treatment facility immediately upon their release from prison. See *id.* The treatment facility is a "\$19 million partnership between the state and a [privately held] company" designed to "meet a central purpose: treating sex offenders so they would be well enough to return to society." *Id.* Unfortunately, one is left to wonder whether this treatment facility—where sex offenders "are supposed to reflect on their crimes and learn to control their sexual urges"—is a failure. *Id.* According to a mental health counselor who treats some former residents of the facility, it is a "cesspool of despair and depression and drug abuse—of people being lost." *Id.* (quoting Don Sweeney, a mental health counselor from St. Petersburg, Florida). As some sex offenders take their shirts off, rub each other's backs, and hold hands, other sex offenders secretly brew and sell homemade liquor, and female employees regularly leave their jobs after having sex with the offenders. *Id.*

Although "Florida spends less than \$42,000 a year per resident, one of the lowest rates in the country," outside experts question whether the lack of funding is to blame for the treatment facility's failure. *Id.* Thus, the question remains unanswered as to whether privately run treatment facilities are helping or further burdening the sex offender re-entry problem. See Monica Davey & Abby Goodnough, *Locked Away, Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, available at <http://www.nytimes.com/2007/03/04/us/04civil.html>.

and overbroad in scope.<sup>157</sup> They call for former offenders to register when these offenders do not have a risk of future dangerousness.<sup>158</sup> Furthermore, while the AWA requirements apply to all convicted sex offenders without regard to their threat to public safety, the requirements are also limitless as to the public's access to the offenders' information.<sup>159</sup> Public notification without any sort of risk assessment or treatment of the offenders hinders rather than advances public safety.<sup>160</sup>

## 2. The Severity of the Requirements Impose an Unrealistic Burden on the Offender

Congress intended the AWA's registration and notification requirements to be non-punitive, regulatory measures.<sup>161</sup> Unfortunately, the requirements of the AWA do not have a rational connection to the non-punitive purpose of offender rehabilitation and public safety.<sup>162</sup>

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157. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 3. "[T]he length of time during which a former offender must register and be included in online registries is set arbitrarily, based on the nature of the crime of conviction and not on any assessment of the likelihood that the former offender continues to pose a safety threat." *Id.* at 5.

158. *Id.* at 3.

159. Baron-Evans & Noonan, *supra* note 12, at 41.

160. *See infra* Part III.B.2.

161. *See* Baron-Evans & Noonan, *supra* note 12, at 41 (quoting *Smith v. Doe*, 538 U.S. 84, 102-03 (2003)) (noting that the AWA is *intended* to have "a rational connection to the non-punitive purpose of public safety, which [is] advanced by alerting the public to the 'risk of sex offenders in their community'" (emphasis added)).

162. *See* Baron-Evans & Noonan, *supra* note 12, at 41. One reason the AWA does not advance that purpose is because its requirements are not risk-based, but conviction-offense based—the AWA is not narrowly drawn and does not allow offenders to rehabilitate. *Id.* at 41; *see infra* Part III.B.2. For example, the AWA's civil commitment provision allows indefinite commitment of sex offenders deemed "sexually dangerous persons" even after they have completed their prison sentences. *See* 18 U.S.C. § 4248(d) (2006). In *Zehntner*, the defendant challenged the Bureau of Prisons' (BoP) use of a treatment report made pursuant to a court-ordered mental health program, arguing that the court might use the report to support a finding that the defendant was a sexually dangerous person and would be subject to civil commitment upon completion of his sentence. *United States v. Zehntner*, No. 1:06-cr-0219, 2007 WL 201106, at \*1 (N.D.N.Y. Jan. 23, 2007). The court held that the legitimate reasons for the BoP to have access to the report outweighed any concern that the report enhanced the civil commitment of the defendant. *Id.*

The United States District Court for the Eastern District of North Carolina interpreted the AWA's civil commitment provision differently. In *United States v. Comstock*, the defendant pled guilty to a single count of receipt by computer of materials depicting a minor engaging in sexually explicit conduct. *United States v. Comstock*, 507 F. Supp. 2d 525, 526 (2007) (consolidating four cases filing virtually identical motions raising questions as to the constitutionality of 18 U.S.C. § 4248). The court sentenced the defendant to a thirty-seven-month prison term and to three years of supervised release. *Id.* The defendant was not released because the government certified him as a "sexually dangerous person" under 18 U.S.C. § 4248. *Id.*

The defendant questioned "whether the federal government has the constitutional authority to seek the indefinite commitment of a person to prevent criminal conduct that is almost exclusively proscribed by the [s]tates, without requiring a nexus between the commitment and an identifiable federal interest." *Id.* The defendant further questioned "whether [18 U.S.C. § 4248,] requiring a factual finding of criminal conduct as a prerequisite to [further civil] commitment [can] permit such commitment where that conduct is not proven beyond a reasonable doubt." *Id.* Ultimately, the court determined that the provision "is not a necessary and proper exercise of [c]ongressional authority and that the use of a clear and convincing burden of proof violates the substantive due process rights of those subject to commitment under the statute." *Id.* The drastically different decisions from New York and North Carolina show that the question of sexual offender re-entry rights remains unanswered. And it is unknown whether treatment facilities are helping or hurting the sex offender re-entry problem. *See* Davey & Goodnough, *supra* note 156. With other civil commitment cases on the

Upon release from prison, the AWA's requirements lead to tremendous occupational and housing difficulties for offenders.<sup>163</sup> Regardless of their risk to the community, offenders are not free to change jobs or residences.<sup>164</sup> Moreover, the stigma and harassment of offenders stemming from community notification through Internet sex offender registries substantially increases the instability of offenders and increases their rate of recidivism.<sup>165</sup>

False statistics on sex offender recidivism has prompted both politicians and society to believe that more stringent sex offender requirements are necessary to ensure the protection of our society.<sup>166</sup> To gain support for proposed sex offender laws, politicians often cite offender recidivism rates that are as high as eighty to ninety percent.<sup>167</sup> Evidence actually shows, however, that recidivism rates for sex offenders are only around twenty-five percent.<sup>168</sup> In fact, some studies show that as many as ninety-five percent of all new sex offenses are committed by individuals not required to be on any type of registry.<sup>169</sup> Ninety percent of sex offenses against children are by family members or acquaintances.<sup>170</sup> The sexual abuse of a child by a stranger previously convicted of a sex offense, therefore, is a rare event.<sup>171</sup>

Community notification of sex offenders through public Internet registries gives the community a "false sense of security."<sup>172</sup> Non-

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docket, this question promises to be further confused before answers are apparent.

163. See Baron-Evans & Noonan, *supra* note 12, at 40; HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 3.

164. See HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 3.

165. Baron-Evans & Noonan, *supra* note 12, at 40.

166. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 4.

167. *Id.*

168. *Id.*

169. Posting of Linda4justice to Life & Times Blog, [http://www.kcet.org/lifeandtimes/blog/index.php?p=219&kcet\\_speed=lo&kcet\\_play=1](http://www.kcet.org/lifeandtimes/blog/index.php?p=219&kcet_speed=lo&kcet_play=1) (Oct. 16, 2007, 05:44 EST). Sex offenders represent ten to thirty percent of states' prison populations. Bumby, Talbot & Carter, *supra* note 147, at 2. From 1980 to 1994, convicted sex offenders in prisons increased more than 300%, far outpacing the expansion of the prison population generally. *Id.* Between 10,000-20,000 sex offenders leave prisons each year. *Id.* These sex offenders, on average, have served three to five years in prison—nearly twice as much time as those prisoners convicted of non-sex offenses. *Id.* These large numbers alone create challenges with the sex offender population re-entering society upon serving prison sentences. *Id.*

Within three years from their release, law enforcement officials re-arrested almost half of the sex offenders for new crimes and over one-third returned to prison. *Id.* Specifically, over one-third of those new arrests occurred within six months of the sex offender's release, and well over half of the new arrests occurred during the first year. *Id.* Courts convicted only 3.5% of those sex offenders returning to prison for another sex crime. *Id.* The majority (71%) returned to prison for technical violations of release conditions and most of the remainder (23.9%) returned to prison to serve sentences for non-sex offenses. *Id.*

170. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 4; see *supra* note 120.

171. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 4.

172. Castro, *supra* note 126. Furthermore, the AWA does not regulate sex offender residency restrictions, although many states have residency restrictions limiting where sex offenders can live and work in communities. Martin, *supra* note 15. These restrictions, however, do nothing to increase

registered individuals commit ninety-five percent of all sex offenses.<sup>173</sup> Registration requirements, therefore, have the potential to prevent only a very small fraction of future sex offenses.<sup>174</sup>

Community notification allows any individual, corporation, or organization access to sex offender registration information.<sup>175</sup> In many cases, activists discover offenders' addresses through Internet sex offender registries.<sup>176</sup> Offenders receive threatening mail and phone calls.<sup>177</sup> Even worse, activists burn and vandalize offenders' homes.<sup>178</sup> Some offenders move and fail to update their registry information and vigilantes mistakenly target innocent homeowners because their addresses appear on the registry.<sup>179</sup>

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public safety. See Lauren FitzPatrick, *Actual, Hidden Costs of Laws Grow*, ROCKFORD REGISTER STAR, Aug. 26, 2007, available at <http://www.rstar.com/opinions/x1359809001/index.html?printview=true> (analyzing state residency restrictions); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 8 (noting that the sex offenders "who do pose a threat to public safety . . . should be able to reside in communities where they can receive the supervision and treatment they need, rather than be forced to move to isolated rural areas or become homeless"). In contrast, the restrictions actually make communities more dangerous and are harmful to former offenders. See generally Martin, *supra* note 15.

173. See Posting of Linda4justice, *supra* note 169.

174. See *id.* Furthermore, residency restrictions hinder law enforcement supervision of former offenders. See Catherine Saillant, *Sex Offender is Free—And Reduced to a Riverbed*, L.A. TIMES, Sept. 8, 2007, available at <http://www.latimes.com/news/local/la-me-mental9,0,3896403.story?coll=la-home-local>. Residency restrictions exclude former offenders from living in entire communities and force them to live far away from their families, jobs, treatment, and other supportive networks. See *id.*

Residency restrictions force the offenders to move far away to rural areas, become homeless, or fail to register and continue living in the community. Baron-Evans & Noonan, *supra* note 12, at 40. Even if the offenders continue to register, law enforcement has trouble keeping track of the offenders when they live in such remote areas. *Id.* Thus, the "banishment" of offenders through residency requirements only hinders the ability of law enforcement to monitor the offenders and keep the public safe. *Id.*

175. Baron-Evans & Noonan, *supra* note 12, at 40.

176. See HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 78-99.

177. *Id.* Only fourteen states and the District of Columbia have statutes prohibiting the use of sex offender registration information to harass, discriminate, or terrorize convicted offenders: California, Connecticut, Idaho, Hawaii, Kentucky, Massachusetts, Mississippi, New Jersey, New York, Pennsylvania, South Carolina, Utah, Vermont, and Virginia. *Id.* at 90, 90 n.308.

178. *Id.* at 7. In 1986, Richard R. molested his step-daughter, a crime for which he served time in a New Jersey prison until 1999. *Id.* at 86. Two weeks after his release from prison, notification went out to his community. *Id.* Neighbors threw garbage in his yard, rang his doorbell and ran away, drove by his house and yelled obscenities like, "Stop fucking little girls! I'm going to kill you!" *Id.* On one occasion, a man with a mask knocked on his door then crouched down. Richard R. opened the door and the man pointed a gun at him, threatening, "If you don't get out of this neighborhood I'm going to kill you." *Id.* The man fled, but a few days later, Richard R. moved away from the community. *Id.*

William E.'s story is more tragic. Maine required William E. to register as a sex offender for having consensual sex with his fifteen-year-old girlfriend when he was nineteen-years-old, a crime for which he served two years in a state prison. *Id.* at 91. William E. moved to a trailer out in the woods upon his release from prison. *Id.* Soon after, a man came to William E.'s doorstep, and when William E. opened the door, the man shot him in the face. *Id.* at 91-92. The man looked up William E.'s address on the Maine online registry and killed him because he thought he was a pedophile. *Id.* at 91. William E. was one of two convicted sex offenders on Maine's online registry that the man shot before he killed himself. *Id.* William E.'s mother spoke to the Human Rights Watch about her son: "Without the registry, he would still be alive today. . . . He was not a violent person, but he was killed because someone thought he was." *Id.* at 91-92.

179. Baron-Evans & Noonan, *supra* note 12, at 41.

Furthermore, readily available personal information about former offenders allows neighbors, colleagues, classmates, employers, and others to shun and ostracize the offenders.<sup>180</sup> Offenders cannot find employment and, when they do, employers fire them when the employers discover their employees are former offenders.<sup>181</sup> Homelessness and joblessness not only makes the offenders more difficult for law enforcement to supervise, but also create recidivism and threaten public safety.<sup>182</sup> The stigma and harassment of former offenders diminish the likelihood of a successful transition back into society.<sup>183</sup>

For these reasons, the AWA's registration and community notification requirements do not have a rational connection to the non-punitive purpose of offender rehabilitation and public safety. Thus, the severity of the AWA's requirements unduly burden non-violent sex offenders who are unlikely to recidivate but who are included in registries and community notification information.

### 3. AWA is an Unfunded Mandate

The AWA mandates that states completely revamp their law enforcement systems to comply with its requirements, but provides no money to the states to fulfill those requirements.<sup>184</sup> The states, therefore, bear full responsibility to pay for the implementation of the AWA.<sup>185</sup> Moreover, the states do not receive any additional federal

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180. Saillant, *supra* note 174 (discussing how "a tangle of sex offender laws, court orders and public fear can produce unintended consequences"). Walter D.'s story is a good example of how sex offender laws can produce unintended consequences. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 80. In 1986, "Walter D. unknowingly solicited an underage prostitute," a crime for which Walter D. served time in a Washington state prison until 1992. *Id.* Walter D. now registers as a sex offender and his picture appears on Washington's online registry, and as Walter D. confessed to the Human Rights Watch, "I will never be given a second chance. It doesn't matter how long I don't reoffend, I will always be a sex offender in everyone else's eyes." *Id.* Specifically, at least four different employers have fired Walter D. from his job as a computer technician after his colleagues discovered his profile on Washington's online registry. *Id.* Furthermore, most landlords will not rent to him when they find out he is a registered sex offender, and when Walter D. does find a place to rent, flyers with his registration information appear in his new neighborhood within weeks. *Id.*

181. Baron-Evans & Noonan, *supra* note 12, at 40.

182. See Richard Roesler, *Sex Offenders Without Addresses Throw Notification Systems for a Loop*, SPOKESMAN REVIEW, Sept. 6, 2005, available at [http://www.spokesmanreview.com/tools/story\\_pf.asp?ID=88953](http://www.spokesmanreview.com/tools/story_pf.asp?ID=88953). An Oregon sheriff spent several months searching for a landlord to rent to Bruce E., a convicted sex offender. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 95. When the sheriff was unsuccessful, Bruce E. began living in a tent in a yard behind the jail he just left, homeless and without a job. *Id.* at 95-96.

183. Baron-Evans & Noonan, *supra* note 12, at 40.

184. See 42 U.S.C. § 16925 (2006). State and local officials consider any federal law, statute, or regulation that requires them to spend their own funds as an unfunded mandate. National Conference of State Legislatures Mandate Monitor, <http://www.ncsl.org/standcomm/scbudg/manmon.htm> (last visited Jan. 26, 2008). Referring specifically to the AWA in a letter to the SMART Director, Laura Rogers, the Deputy Director of the National Conference of State Legislatures wrote, "without the appropriations of funds authorized, the [AWA] and its implementation guidelines represent a large unfunded mandate for the states." Letter from Carl Tubbesing, *supra* note 121.

185. See FitzPatrick, *supra* note 172. The states then delegate the responsibility of the AWA compliance to the local governments, making local government officials feel that the AWA is an un-

funding *even if* they do comply with the AWA.<sup>186</sup> Rather, upon substantial implementation of the AWA, states do not face a *loss* in the federal funds they were already designated to receive.<sup>187</sup>

Specifically, the states must incorporate the AWA registration and notification requirements through their own sex offender programs by July 27, 2009.<sup>188</sup> If a state does not substantially implement the AWA by that date, the state will lose ten percent in Byrne Grant<sup>189</sup> (federal justice assistance) funding.<sup>190</sup> States that have complied with the AWA will receive full Byrne Grant funds and may also receive reallocated funds from non-complying states.<sup>191</sup>

Legislators passed the AWA with the intent to increase sex offender registration and notification requirements and to strengthen sex offender law uniformity throughout the states to prevent offenders from recidivating and manipulating the system.<sup>192</sup> States are already beginning to complain, however, that the AWA is too costly and its standards usurp state and local control of sex offender laws.<sup>193</sup> States are considering opting out of the AWA and maintaining their current laws.<sup>194</sup> States that opt out will lose ten percent of their Byrne Grant funding, but the changes states are required to make under the AWA are far more costly

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funded mandate from the state governments. *See, e.g.,* Castro, *supra* note 126 (“[I]t’s an obvious unfunded mandate . . . .” (internal quotation marks omitted)).

186. *See* 42 U.S.C. § 16925.

187. *See id.*

188. *Id.* § 16924(a).

189. Byrne Grant funds are those that a state receives annually under the Omnibus Crime Control and Safe Streets Act of 1968. *See* 42 U.S.C. § 16925(a).

190. *Id.* § 16925(a); U.S. DEP’T OF JUSTICE, FACT SHEET, *supra* note 97, at 1.

191. *Id.* § 16925(c). The SMART Office will make the final determination of whether the jurisdictions have substantially implemented the AWA requirements in order to avoid a reduction in Byrne Grant funding. U.S. DEP’T OF JUSTICE, FACT SHEET, *supra* note 97, at 1. States, as represented by the National Conference of State Legislatures (NCSL), have already objected to the SMART Office’s unilateral decision-making regarding AWA implementation:

[The] guidelines implementing the minimum sex offender registration standards being imposed on states were prepared absent any current federally funded analysis as to what extent each jurisdiction has policies and procedures that comply with Title I of [AWA], and the amount and kinds of adjustments to state policy and practice that will be required in order to comply and avoid a 10 percent reduction to Byrne law enforcement assistance grants. . . . NCSL, as a representative of the entities for which these guidelines apply to, is deeply concerned by the refusal of the SMART office to include them in the drafting and decision-making process. The drafting process should be a dialogue between the SMART office personnel and the impacted stakeholders, such as NCSL, and not the product of unelected government officials’ unilateral decisions.

Letter to Carl Tubbesing, *supra* note 121. NCSL further recommended that “a group of advisors, consisting of those entities and organizations with a stake in the outcome of the drafting process, should be in place to assist the SMART office in determining the best and least preemptive impact on the 50 state legislatures.” *Id.*

192. *See supra* Part III.A.

193. *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 12; *cf.* John Walsh, *Let’s Call on Congress to Fund the Adam Walsh Act*, AMW SAFETY CENTER, Sept. 27, 2007, available at <http://www.amw.com/safety/?p=305> (rallying constituents to support full federal funding of the AWA).

194. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 12.

than the amount they will lose if they do not comply.<sup>195</sup>

Congress may have underestimated the actual costs involved with fully implementing the AWA requirements.<sup>196</sup> The AWA's creation of a national registry added a "\$47 million federal request to the taxpayers' 2007" burden.<sup>197</sup> Furthermore, according to its budget for 2008, the U.S. Marshals Service "requested an additional \$7.8 million and 54 more employees . . . to track down sex offenders who drop off the registry."<sup>198</sup> With such high costs, states will not likely comply substantially with the AWA, and therefore, will not likely achieve the purpose of the AWA.<sup>199</sup>

Implementation of the AWA includes underlying costs that Congress and legislators may not have even considered. For example, more

195. *Id.* States consider the AWA an unfunded mandate. *Id.* Unfunded mandates include laws that: (1) establish a condition of federal grants, (2) expand existing federal mandates, (3) establish durational goals to comply with federal laws with the caveat that failure to comply means a loss of federal funds, (4) compel coverage of a certain population under a current program without providing full funding for the added coverage, and (5) create under-funded national expectations. Conference of State Legislatures Mandate Monitor, *supra* note 184. All five of those definitions of unfunded mandates are accurate descriptions of the AWA.

The No Child Left Behind Act (NCLB) of 2001, 20 U.S.C. §§ 6301-6311 (2006), has similar intergovernmental implications. CONG. BUDGET OFFICE, IDENTIFYING INTERGOVERNMENTAL MANDATES 1 (2005), <http://www.cbo.gov/ftpdocs/60xx/doc6052/01-06-IntergovernmentalMandates.pdf>. Other federal acts that state and local governments view as burdensome are the Individuals with Disabilities Education Act, the Help America Vote Act, the Clean Water Act, the Clean Air Act, the Homeland Security Act, the State Criminal Alien Assistance Program, and Medicaid. *Id.*; Megan McIlroy, *Local Governments Struggle with Unfunded Federal Mandates*, CAPITAL NEWS SERVICE, Mar. 31, 2005, available at <http://www.wtopnews.com/?sid=441088&nid=25>.

The NCLB is an often-cited example of how new conditions on existing grant programs place a burden not unlike a mandate on states to comply with the new requirements. CONG. BUDGET OFFICE, IDENTIFYING INTERGOVERNMENTAL MANDATES, *supra*. Congress passed the NCLB in 2001, "with the intent to raise academic achievement for all students and close . . . [academic] gaps in achievement" between students of different economic and cultural backgrounds. Kavan Peterson, *No Letup in Unrest over Bush School Law*, STATELINE.ORG, July 7, 2005, available at <http://www.stateline.org/live/printable/story?contentId=41610>; see UNITED STATES GEN. ACCOUNTING OFFICE, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE 22 (2004), <http://gao.gov/new.items/d04637.pdf>. Like the AWA, the federal government does not fully fund the NCLB; rather, states are required to implement the NCLB's requirements in order to receive their full federal education grants. See UNITED STATES GEN. ACCOUNTING OFFICE, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE, *supra*; Peterson, *supra*.

In 2005, the National Education Association estimated that in the three years since the NCLB's enactment, there was a "\$27 billion shortfall in what Congress should have provided" the states to comply with the NCLB's requirements. Peterson, *supra*. State taxpayers had the burden of making up this shortfall, and state and local governments argued that the NCLB was an unfunded mandate and challenged its legality. See McIlroy, *supra*; Peterson, *supra*. For example: fifteen states (Arizona, Colorado, Connecticut, Georgia, Hawaii, Illinois, Louisiana, Maine, Minnesota, Nevada, New Mexico, North Dakota, Texas, Vermont, and Wyoming) considered opting out of the NCLB and taking a hit in federal education funds; four states (Maine, New Hampshire, Vermont, and Wisconsin) "considered bills . . . prohibit[ing] the use of any state money to comply with the NCLB;" and at least three states (Texas, Georgia, and Minnesota) attempted to implement the NCLB and were sanctioned for not meeting the NCLB's deadlines. See Peterson, *supra*. Since the NCLB's enactment, many states have not complied with its requirements, and states that have attempted to comply have experienced a significant financial burden. See *id.* Most importantly, the NCLB has not achieved its goal of education uniformity among the states.

196. See, e.g., FitzPatrick, *supra* note 172.

197. *Id.*

198. *Id.*

199. See Castro, *supra* note 126; Posting of Mike Westmoreland to Life & Times Blog, [http://www.kcet.org/lifeandtimes/blog/index.php?p=219&kcet\\_speed=lo&kcet\\_play=1](http://www.kcet.org/lifeandtimes/blog/index.php?p=219&kcet_speed=lo&kcet_play=1) (Oct. 5, 2007, 23:45 EST).

than twenty states require GPS devices to track certain sex offenders, and six of those states require sex offenders to wear ankle bracelets for life.<sup>200</sup> In California alone, one of the states that requires law enforcement officials to use GPS devices to track sex offenders, monitoring sex offenders will cost \$88.4 million per year.<sup>201</sup> California officials estimate that cost to rise to over \$100 million per year in just ten years.<sup>202</sup>

States implementing mandatory treatment programs for all sex offenders will spend nearly \$450 million on them in 2007.<sup>203</sup> On average, it costs over \$100,000 per year to treat a sex offender, compared to about \$26,000 per year to keep someone in prison.<sup>204</sup> The price difference is due to the higher costs of constant supervision for sex offenders in treatment facilities, including “programs, treatment and supervised freedom.”<sup>205</sup>

These statistics do not even begin to enumerate the financial burden states will face in implementing the AWA’s requirements.<sup>206</sup> In states choosing to implement the AWA, local taxpayers will see rising taxes related to the AWA’s rigorous requirements.<sup>207</sup> Furthermore, it will be nearly impossible for states to integrate the AWA’s requirements completely into local law enforcement agencies by the July 27, 2009 deadline. Without full federal funding and considering the impending deadline, many states will opt out of the AWA’s requirements and maintain their current laws.<sup>208</sup> The AWA will not achieve its purpose of uniformity among state sex offender registration and notification requirements.

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200. FitzPatrick, *supra* note 172.

201. *Id.*

202. *Id.*

203. Davey & Goodnough, *supra* note 156. Currently, nineteen states have civil commitment programs. *Id.* In these states, such civil commitment programs create treatment facilities, which cost taxpayers an average of “four times more than keeping the offenders in prison.” *See id.* Furthermore, in March 2007, New York proposed a “civil commitment law [that] would ‘become a national model’ and go well beyond confining the most violent predators to also include mental health treatment and intensive supervised release for offenders.” *Id.*

204. *Id.* For example, in Kansas, Leroy H., a convicted sex offender, completed his prison sentence thirteen years ago. *Id.* Leroy H., however, remains in prison, at an annual cost of \$185,000. *Id.* Kansas taxpayers are paying more than eight times the amount to keep a sex offender in prison thirteen years after completing his sentence as they are to keep a non-sex offender in prison. *Id.* Perhaps the most dangerous sex offenders should have constant supervision, but is keeping the offender in prison or banishing *all* sex offenders to treatment facilities really the most cost-effective way to minimize the risk the high-level offenders pose to society?

205. *Id.*; Saillant, *supra* note 174. After the definition expanded who should be treated for sex offenses, monthly referrals to California’s state-run sexually violent predator treatment facility have grown from fifty to seven hundred offenders. Saillant, *supra* note 174.

206. Even the cost accompanying verification of sex offenders will be high. *See supra* note 88 (noting the offenders’ required registration information). Sex offenders must verify their registration information once every year, once every six months, or once every three months, depending on their tier. 42 U.S.C. § 16916 (2006). The offender must verify the information in person and get a photograph taken. *See supra* note 88.

207. FitzPatrick, *supra* note 172.

208. *See supra* notes 206-207 and accompanying text.

### C. *Compromise—The AWA Reformation*

As this Note suggests, over-inclusive sex offender laws cause harm to both society and offenders. The AWA, the most recent and expansive sex offender law, will only magnify these problems. Politicians and other proponents of these laws continue to emphasize sex offender law enforcement, but are unable to find conclusive evidence that the public gains any safety benefits from the broad laws they are supporting.<sup>209</sup>

The only evidence regarding sex offender laws suggests that they contribute to recidivism, make offenders more difficult to supervise, compromise offender rehabilitation, and financially burden the states.<sup>210</sup> Despite that evidence, it is hard to argue that parents should not have a right to know whether a convicted rapist lives next door.<sup>211</sup> Assuming sex offender laws *can* produce some public safety benefit, lawmakers should reform the laws to reduce their negative effects without compromising that benefit.<sup>212</sup>

The AWA serves a laudable purpose, but is over-inclusive. The AWA applies to many offenders who are not dangerous, not likely to recidivate, and who committed non-violent crimes.<sup>213</sup> The AWA does not have any safeguards to identify low-level offenders who do not pose a risk to public safety.<sup>214</sup> Law enforcement officials should focus only on those offenders who committed severe offenses and who are likely to recidivate.<sup>215</sup> Unfortunately, too many harmless former offenders fall under the umbrella of registered sex offenders that law enforcement officials are required to monitor.<sup>216</sup> For this reason, the AWA's requirements drain public resources and unnecessarily deprive offenders of their liberty.<sup>217</sup>

Lawmakers should reform the AWA to allow law enforcement of-

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209. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 10. In a world inflicted with sexual violence against children, the United States is the only country with so many rigorous laws governing the lives of former offenders. *Id.* Only six other countries (Australia, Canada, France, Ireland, Japan, and the United Kingdom) have sex offender registration laws, but the registration period is short and the information is not available to the public. *Id.* Only one other country (South Korea) has community notification laws; three countries (Australia, Ireland, and the United Kingdom) have explicitly rejected such laws. *Id.* ("After reviewing the experience of the United States, they concluded that there is little evidence that community notification protects the public from sex crimes, and that such laws are often accompanied by vigilante violence against registrants.") Furthermore, no other countries have adopted blanket residency restriction laws against former offenders. *Id.*

210. *See supra* Part III.

211. *See* Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1.

212. *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 3, 15 (recommending repeal and reform of the AWA).

213. *See supra* notes 143-160 and accompanying text.

214. *See supra* Part III.B.1.

215. *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 11.

216. *See supra* notes 157-158 and accompanying text.

217. *See supra* Part III.B.2.

officials to focus on offenders convicted of violent crimes, lower the cost for the states to implement the AWA, and limit the burden on non-violent offenders. In a specific example, while many states have difficulty keeping track of offenders, Vermont officials report that ninety-seven percent of offenders comply with registration requirements.<sup>218</sup> Sex offender laws in Vermont are a good example of the potential for success achieved by narrowly tailored sex offender laws.<sup>219</sup>

Out of the 24,000 registered sex offenders in Vermont, the state's online registry only lists 282 of the offenders.<sup>220</sup> The listed offenders include only "sexual predators"—those who committed sexually violent crimes and those determined by an independent court to have a certain degree of propensity to commit sexual crimes.<sup>221</sup> Furthermore, the online registry lists the offenders for only as long as they continue to pose a high risk to the community.<sup>222</sup> Vermont's laws restrict unlimited disclosure of offender registration information to only those offenders convicted of committing a violent crime or those most likely to recidivate.<sup>223</sup>

Similarly, lawmakers should reform the AWA to require registration for only offenders convicted of violent crimes, or those with a strong compulsion to re-offend. In Vermont, all offenders register, but the state's online registry lists only one percent of the offenders—the state's sexually violent offenders.<sup>224</sup> If other states require registration for only violent offenders, a significantly lower number of offenders would require registration.

Narrowing the number of required registering offenders to only violent or compulsive offenders could benefit the states in several ways. First, states would minimize the costs of sex offender management. Law enforcement officials could focus on keeping track of fewer sex offenders, and states could actually spend more money on the offenders specified as violent or compulsive. States could also spend more money to determine whether an offender must register.<sup>225</sup> Then, if an offender must register, states could focus their spending on treating that offender.<sup>226</sup>

Therefore, even if states determined half of the convicted offenders

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218. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 63.

219. *Id.* at 62-63.

220. *Id.* at 62.

221. *Id.*

222. *Id.*

223. *Id.* at 62-63.

224. *See id.*

225. *See id.* Minnesota also uses an independent determination for whether a convicted offender will be required to register. *Id.* at 63. Minnesota's determination is made by a panel of experts, including experts on sex offender management, law enforcement officials, and victims' rights groups. *Id.* at 63-64.

226. *See supra* note 71 and accompanying text.

are violent, likely to recidivate, and must register, the costs for managing *those* offenders (as compared to managing *all* offenders) would be reduced by half. States could double their expenditures on treating those offenders and their total sex offender expenditures would be less than current sex offender expenditures in many states, without considering the added burden the states will face in implementing the AWA.

Cost reductions would come from many different areas, too. For example, law enforcement officials will take fewer photographs, update fewer profiles, track down fewer non-complying offenders, notify fewer neighborhoods, and arrange treatment for fewer offenders.<sup>227</sup> States could implement the reformed AWA and not fear an unfunded mandate.<sup>228</sup>

Furthermore, states would see more success with reformed sex offender laws. Tracking non-violent offenders overwhelms law enforcement officials and does little to protect society. Community notification of all convicted offenders does little to help residents identify the offenders who pose the most risk. Over-inclusive registration requirements burden non-violent offenders and do not support offender treatment and reintegration into society.

If the AWA required only violent offenders likely to recidivate to register, then non-violent offenders could serve their punishment and rehabilitate. Upon release from prison, non-violent offenders could find homes and jobs, and become active and prosperous members of society.<sup>229</sup> Colleagues, neighbors, employers, and others would not shun them because of their past.<sup>230</sup> They would not endure another punishment of uncontrolled disclosure in the online registry *after* serving their prison sentence. Non-violent offenders would be less likely to feel isolated, disempowered, hopeless, depressed, or forced to engage in other criminal activity.<sup>231</sup> Allowing non-violent offenders to maintain their identity as functional, successful, rehabilitated individuals is beneficial to both the offenders and society as a whole.

There are two factors that the AWA should consider when determining whether a sex offender should be required to register: (1) the nature and severity of the offense committed, and (2) the likelihood of recidivism.<sup>232</sup> A panel of experts should first consider whether the offender committed a violent or severe offense, and only if the offense meets a certain standard in nature or severity should the offender be

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227. See *supra* note 97.

228. See *supra* note 195.

229. Cf. *supra* notes 175-183 and accompanying text.

230. Cf. *supra* notes 175-178 and accompanying text.

231. See HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 62 (questioning whether overbroad community notification is counterproductive).

232. See, e.g., Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1.

subject to evaluation of the second factor.<sup>233</sup> In evaluating the second factor, experts should test the offenders to determine their likelihood of committing another sexual offense. Only then, if the experts conclude through individualized recidivism and risk assessment tests that the offender is likely to recidivate, should the offender be required to register.

As mentioned above, assuming that the purpose of the AWA is to protect public safety and create uniformity throughout the states, this reform could help the AWA achieve that goal. Upon the AWA's reform, law enforcement officials could focus their attention and resources on determining and monitoring the most serious offenders. High-risk offenders represent a very small portion of those required to register under the AWA.<sup>234</sup> Thus, law enforcement officials will adequately supervise the offenders if states are able to spend the bulk of their money monitoring high-risk offenders.<sup>235</sup>

Furthermore, sex offender registration would not give communities a false sense of security.<sup>236</sup> While parents do have a legitimate desire to know whether dangerous sex offenders live next door, law enforcement officials should only notify parents if a *high-risk* offender lives in the parents' neighborhood. This notification should come directly from law enforcement officials so the parents can have their questions answered and be educated on what to watch out for and how to protect their children.<sup>237</sup> The threat to public safety would be reduced if sex offender registrants were limited to those who present a real danger to the community.

Under such a system, law enforcement officials would be able to accurately monitor a manageable amount of offenders, and residents would be able to focus their concern on only the dangerous offenders. Furthermore, the liberty interests of non-violent former offenders would be protected because their private information would not be readily accessible to everyone in the country, and they would be given a chance to reintegrate into society.<sup>238</sup>

A reform of the AWA could make it successful.<sup>239</sup> If a sex offender

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233. Thus, evaluation of the first factor would disqualify offenders convicted of low-level, non-violent crimes from the possibility of registration. *See id.*

234. *See supra* notes 169-173 and accompanying text.

235. *See* Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1.

236. *See supra* notes 172-174 and accompanying text.

237. Parents should not just receive a frightening, confusing flier in the mail or look up their address on the Internet and discover that five sex offenders live on their street. Roesler, *supra* note 182.

238. Human Rights Watch, Sex Offender Laws May Do More Harm Than Good, *supra* note 1. Low-risk offenders should receive treatment and parole, and be allowed to reintegrate into society. Posting of Linda4justice, *supra* note 169.

239. *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., *supra* note 1, at 41 ("If the goal of sex offender registries is to enhance community safety, then the law should require registration for only so long as a former offender can reasonably be deemed to pose a meaningful risk of committing another sexually violent offense.").

commits a heinous offense, is truly sexually violent, and is likely to recidivate, then the AWA should require the offender to register. However, if the sex offender is not dangerous, not violent, and not likely to recidivate, then the AWA should not brand the offender with a scarlet letter and require registration for life as a sex offender.

#### IV. CONCLUSION

Over the past two decades, federal and state governments have introduced stricter punishments, requirements, and prohibitions for sex offenders. The most recent development in this area of law, the Adam Walsh Child Protection and Safety Act of 2006, contains over-inclusive sex offender registration requirements and punishments. Implementation of the AWA will undoubtedly cause problems for state governments, law enforcement, non-violent sex offenders, and citizens, both as taxpayers and intended beneficiaries of the AWA. If the AWA is not reformed, its requirements will drain public resources, unnecessarily deprive sex offenders of their liberty, and produce few public safety gains.

The AWA's requirements are over-inclusive. The AWA does not differentiate between violent and non-violent offenders. The AWA also does not individually evaluate the likelihood of offender recidivism. Therefore, the AWA does not allow law enforcement officials to focus on the small number of sex offenders who actually need monitoring—offenders who committed severe offenses and are likely to recidivate. Rather, under the AWA, law enforcement officials must attempt to supervise all sex offenders, a daunting task that police have neither the funds nor officers to adequately achieve. As a result, unsupervised sex offenders—both violent and non-violent—slip through the system and the dangerous offenders continue to threaten public safety.

A reformed AWA could prevent tragedies like Evan B.'s from occurring. There was no need to require Evan B., a non-violent offender with little risk for recidivism, to register as a sex offender. Evan B. was a high school boy who made an innocent mistake. Unfortunately, over-inclusive sex offender registration requirements did not allow Evan B. to serve his sentence and resume his life. Rather, Evan B.'s life headed in an ominous downward spiral—his community shunned him; he dropped out of school; he could not find employment; he moved away from his friends and family; he became depressed; and he killed himself.

Lawmakers should reform the AWA to require *only* violent offenders who are *likely* to recidivate to register. Therefore, non-violent offenders unlikely to recidivate will not be branded as sex offenders—a scarlet letter that may stigmatize them for life. Furthermore, law enforcement officials will be able to focus on only dangerous offenders necessitating supervision and registration. Law enforcement officials will

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notify community members about violent and dangerous sex offenders that live nearby and will educate them about how to keep their children safe. If reformed, the AWA will successfully serve its purpose as a method of public safety.