The Complexities of Sex Offender Registries

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For more than two decades, states and the federal government have struggled with how to best protect the public from sexual predators. Requiring states to register and publicize the names and addresses of convicted sex offenders has been thought to help protect the public by keeping citizens informed. However, who should register and which information can be made public has been an area of contention between the states and the federal government.

Congress passed House Resolution 324, the Wetterling Act, requiring all states to establish sex offender registries, in 1994. Until that time, only a few states had registries. The act was amended in 1996 by House Resolution 2137, Megan's Law, which required states to make information about sex offenders deemed relevant to public safety available to the public. Prior to Megan's Law, community notification had been discretionary. Under the new federal mandate, states were required to decide which information was necessary for public safety.

Subsequently, multiple pieces of federal legislation attempted to improve sex offender registration laws, culminating in the passage of House Resolution 4472, known as the Adam Walsh Act, in 2006. Title I of the resolution, the Sex Offender Registration and Notification Act (SORNA), establishes, among other things, a national standard for which crimes should be registrable offenses and which registered offenders’ information should be available to the public.

Did You Know?

• In 1947, California became the first state to establish a sex offender registry.
• In some states, sex offenders can’t legally wear costumes or pass out candy on Halloween.
• The U.S. Supreme Court ruled that restricting sex offenders from using social media is unconstitutional.
State Action

Since the passage of the Sex Offender Registration and Notification Act, states have grappled with how to alter their sex offender registries to comply with the federal statute. The minimum requirements are rigid and leave little room for agency interpretation through regulation, making it difficult to comply. States lose 10 percent of their federal Byrne/JAG justice funding for each year they remain noncompliant.

More than 10 years and over 1000 bills later, 32 states are still not considered substantially compliant.

Some states are intentionally noncompliant. New York, for example, issued a letter citing the excessive cost of implementation and claimed the law would not increase public safety. Instead of SORNA's crime-based tier system, New York claims that its reliance on a risk assessment that estimates an individual sex offender's likelihood of reoffending better protects the public. Texas has cited similar reasons for noncompliance.

Other states have attempted to comply with SORNA, only to be met by judicial opposition. Ohio's recategorization of sex offenders was held unconstitutional by the Ohio Supreme Court. Massachusetts faced similar challenges when its use of classifications for registration was also ruled unconstitutional. Courts in both cases found that retroactive registering of offenders (as required by SORNA) was at least part of what led to the illegality of the states' registries.

One of the biggest impediments to substantial compliance with SORNA has been the law's requirement to include juvenile offenders in the registries. Many states have opposed these requirements, citing a higher likelihood for rehabilitation of juveniles. Other states have implemented SORNA's juvenile requirements, only to have those actions struck down by courts.

Almost 25 years after the first federal mandate to establish sex offender registries, sex offender policy remains on legislative agendas as states try to innovate and discover the best ways to maintain public safety and manage sex offender populations beyond SORNA's requirements.

Regulation of occupational licensing for sex offenders, for example, has long been a concern of lawmakers, but new industries and technology have spurred even more regulations. For example, since 2014, at least 20 states have prohibited sex offenders from participating in newer tech industries, such as ride-hailing apps including Uber and Lyft.

Evolving technology has also required states to address sex offenders' use of social media sites. At least seven states have passed laws controlling offenders' access to social media since 2014. Continued legislation is likely in light of a recent U.S. Supreme Court case striking down a North Carolina law making it a felony for registered sex offenders to access social networking sites where minors can create profiles.

Federal Action

The U.S. Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office) is responsible for oversight of SORNA. Since most states are not substantially compliant, the SMART Office issued two sets of supplemental guidelines to increase states' flexibility.

The 2011 supplemental guidelines (page 1631) gave states discretion to exempt juvenile offender information from public webpages. The guidelines also gave states additional latitude by only requiring registration of people who have left the justice system if they are later convicted of a new felony.

In 2016, the SMART Office issued another set of supplemental guidelines focused on juveniles. These guidelines give states more flexibility in their treatment of juveniles and permit the SMART Office to consider a series of factors when determining whether a jurisdiction is in substantial compliance with SORNA. These include examining registration requirements for juveniles who commit serious sex offenses, whether juveniles are prosecuted as adults, and whether the jurisdiction is tracking identifying and monitoring juveniles who commit serious sex offenses. Even with this increase in state flexibility, these regulations have not brought many states into substantial compliance with SORNA.