Implementing the Adam Walsh Act's Sex Offender Registration and Notification Provisions: A Survey of the States

Andrew J. Harris and Christopher Lobanov-Rostovsky

Criminal Justice Policy Review 2010 21: 202 originally published online 22 September 2009
DOI: 10.1177/0887403409346118

Criminal Justice Policy Review
21(2) 202–222

DOI: 10.1177/0887403409346118
http://cjp.sagepub.com

Implementing the Adam Walsh Act's Sex Offender Registration and Notification Provisions: A Survey of the States

Andrew J. Harris[1] and Christopher Lobanov-Rostovsky[2]

Abstract

With the 2006 passage of the Adam Walsh Child Protection and Safety Act (AWA), the United States Congress established a range of requirements for sex offender registration and notification (R&N) systems operated by states, tribal jurisdictions, and U.S. territories. In the years since the law's passage, these congressional mandates have generated concern within some covered jurisdictions and among national organizations over matters such as the perceived undermining of jurisdictional autonomy, the variance between the law and emerging "best practices," and perceived threats to the viability of state-based sex offender management efforts. To examine these concerns, a national survey was conducted in the fall of 2008 to evaluate the consistency between AWA requirements and existing state policies and practices, and to assess state-based barriers to AWA implementation. The survey results identified several areas of inconsistency between AWA mandates and state practices, particularly those relating to inclusion of juveniles, classification methods, and retroactive application of R&N requirements. The study revealed the barriers to AWA implementation within many states to be multifaceted and complex, suggesting the potential need for a recalibration of federal policy governing registration and notification. Implications for the respective roles of federal and state governments in the shaping of sex offender policy are discussed.

[1]University of Massachusetts–Lowell
[2]Colorado Division of Criminal Justice

Corresponding Author:
Andrew J. Harris, PhD, Department of Criminal Justice and Criminology, 870 Broadway Street, No. 225, Lowell, MA 01854
Email: Andrew_harris@uml.edu

Keywords

sex offenders, sex offender policy, sex offender registration and notification

In the realm of sex offender management, few policies are more ubiquitous than those related to sex offender registration and community notification (R&N). Although state-based registration laws date back to the 1930s (Sample & Evans, 2009), R&N policies have gained particular traction and attention during the past two decades, concurrent with a progression of associated federal legislation beginning in the mid-1990s. Between 1994 and 2006, the United States Congress passed a sequence of laws expanding the breadth and reach of the federal government's role in controlling state-based R&N systems (Logan, 2008). This legislative sequence culminated with the 2006 passage of the Sex Offender Registration and Notification Act (SORNA), which set forth a range of R&N standards and requirements with the ostensible aim of establishing greater consistency across the nation's R&N jurisdictional systems.

In the years since SORNA's passage, this increasing federal role has generated concern within some covered jurisdictions and among practitioners over issues such as the perceived undermining of jurisdictional autonomy, the variance between the law and emerging "best practices," unfunded federal mandates, and perceived threats to the viability of state-based sex offender management efforts (National Conference of State Legislatures, 2006; National Congress of American Indians, 2007; Federal Advisory Committee on Juvenile Justice, 2007; Council of State Governments, 2008; California Sex Offender Management Board, 2009). Moreover, although registration and notification systems have generally been validated by the courts, several jurisdictions have encountered significant legal obstacles to implementing key SORNA provisions (*United States v. Hilton-Thomas*, 2009; *United States v. Powers*, 2008; *United States v. Valverde*, 2009; *United States v. Waybright*, 2008). Although the initial legislation stipulated that jurisdictions come into compliance with SORNA by July 2009, no states had received a compliance designation by the spring of that year, prompting the United States Attorney General to issue a blanket 1-year extension of the deadline in May 2009 (Office of the Attorney General, 2009).[1]

In the context of these issues, this article presents the results of a multistate survey conducted in 2008 to evaluate the consistency between SORNA and existing state policies and to examine the operational, legal, fiscal, and practical issues associated with achieving SORNA compliance. We begin with a general examination of the issues related to SORNA compliance, including a brief review of the evolution of federal policy regarding registration and notification, and an examination of SORNA implementation issues as delineated by existing literature and case law. Following this review, we describe the methodology and results of the aforementioned survey and conclude by examining the implications for both state and federal sex offender management policy.

Issue Background

While the first laws governing the registration of criminal offenders date to the 1930s, contemporary registration and notification policies emerged during the 1980s and early 1990s, as several states moved to expand the scope and breadth of their registration systems (Sample & Evans, 2009). In 1990, Washington's Community Protection Act established the nation's first system for public dissemination of sex offender information, paving the way for the passage of similar community notification laws in other states, most prominently "Megan's Law" adopted by New Jersey in 1994.

Throughout this period, R&N policies had remained the exclusive domain of state governments—a situation that changed with the 1994 passage of the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act) in which the U.S. Congress mandated the development of registration systems for potentially dangerous sexual offenders. Over the ensuing decade, federal lawmakers passed a steady stream of amendments to the Wetterling Act, including the federal Megan's Law (1996), which required states to develop community notification systems for certain sex offenders; the Pam Lychner Sexual Offender Tracking and Identification Act (1996), which mandated the establishment of a federal database to track sex offenders, and required lifetime registration for recidivists and offenders who commit certain aggravated offenses; Departments of Commerce, Justice, and State, Judiciary, and Related Agencies Appropriation Act (CJSA; 1998), which required registration of federal and military offenders, and nonresident workers and students, as well as directed states to participate in the national sex offender registry; the Campus Sex Crimes Prevention Act (2000), which extended registration jurisdictions to college campuses; and the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act (2003), which included provisions requiring states to operate internet Web sites containing registry information and required the Department of Justice to establish a federal internet "portal" linking state registration and notification systems.

A watershed moment in federal involvement in R&N systems, however, arrived with the 2006 passage of the Adam Walsh Child Protection and Safety Act (AWA), which repealed the R&N requirements of Wetterling and its amendments and replaced them with a new set of standards. Ostensibly designed to eliminate interjurisdictional practice variation, Title I of the AWA—designated as the Sex Offender Registration and Notification Act (SORNA)—greatly expanded federal authority concerning registration and notification. Among its provisions, SORNA extended federal mandates to tribal jurisdictions and foreign convictions; extended R&N requirements to juveniles adjudicated delinquent for certain offenses; expanded the range of covered offenses subject to mandatory registration; and set forth minimum requirements relating to such matters as how offenders should be classified, how long they must remain on public registries, the frequencies with which they must reregister, the data to be maintained, and methods of public notification. Furthermore, SORNA and its ensuing

guidelines issues through the U.S. Department of Justice set forth a retroactivity provision requiring registration of previously convicted or adjudicated sex offenders on conviction of a new crime, even if that crime is of a nonsexual nature.

The SORNA legislation established a deadline of July 2009 for states to comply with the new federal guidelines or be subject to a 10% annual reduction in their Byrne/Justice Assistance grant formula funding. Congress also authorized the establishment of a new office within the Department of Justice to oversee the law's implementation, certify jurisdictional "substantial compliance," and assume primary responsibility for federal sex offender management policy. As one of its initial tasks, this office—the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART)—developed and released a series of draft guidelines for covered jurisdictions to follow in pursuit of SORNA compliance.

Following the release of these guidelines in the Spring of 2007, the Department of Justice received over 275 comments, constituting 876 pages of documentation from law enforcement authorities, tribal jurisdictions, juvenile justice and social service agencies, state-based sex offender management boards, state legislatures, victim advocacy groups, and other concerned agencies and individuals. This level of commentary reflected a considerable level of concern with the SORNA guidelines, particularly compared to prior federal guidelines pertaining to federal registration and notification. In contrast with the more than 275 comments received following the release of the SORNA guidelines, the 1999 release of the Megan's law, Lychner Act, and CJSA guidelines had yielded only 9 such comments (Federal Register, 1999).

In the months following the completion of the initial comment period for the AWA, several national organizations weighed in with concerns over SORNA and its provisions. In a 2006 policy statement, the National Conference of State Legislatures (NCSL) concurred with the general public safety goals of the AWA, but raised significant concerns about SORNA's reach:

> NCSL objects to the Adam Walsh Act's one-size-fits all approach to classifying, registering and, in some circumstances, sentencing sex offenders. These provisions preempt many state laws and create an unfunded mandate for states because there are no appropriations in the Act or in any appropriations bill. Many of the provisions of the Adam Walsh Act were crafted without state input or consideration of current state practices. The mandates imposed by the Adam Walsh Act are inflexible and, in some instances, not able to be implemented. (National Conference of State Legislatures, 2006, para. 2)

At its core, the NCSL position called into question SORNA's overly prescriptive nature and suggested that the federal government may have violated federalist doctrine by overstepping its bounds in dictating state policy and practice. These concerns were echoed—if not surpassed—by tribal jurisdictions asserting that the circumstances surrounding SORNA's passage represented, in the words of a 2007 resolution passed by the National Congress of American Indians (NCAI), "an affront to tribal sovereignty."

The NCAI resolution directly called for a repeal of the tribal provisions contained within SORNA (National Congress of American Indians, 2007).

As noted in the NCSL statement, covered jurisdictions also expressed concerns over the more pragmatic matter of the costs of SORNA implementation. State fiscal analyses identified a wide range of SORNA-related costs including system development, reclassification, expanded enforcement personnel, judicial and correctional costs, and legal costs related to prosecution, defense, and litigation. Although jurisdictions remained eligible to cover some initial start-up costs through Department of Justice grant programs authorized by AWA, these analyses suggested substantial ongoing operational costs, primarily local law enforcement-related expenses associated with the "widened net" of individuals and the expansion of reporting requirements (Justice Policy Institute, 2008).

The fiscal calculus of compliance was further complicated by ongoing uncertainty over the levels of federal Byrne Grant formula funding, which was cut significantly in the federal fiscal year 2008 budget (Pyke & Cropper, 2009). With FY08 Byrne funds reduced to approximately one third of their prior levels, many states simply found the costs of the noncompliance penalty to be significantly lower than the costs of bringing their policies into SORNA compliance.[2]

Beyond the broader policy issues of governance and cost, the draft SORNA guidelines also elicited a range of substantive concerns related to sex offender management practice. Notably, SORNA's provision requiring the registration of juveniles adjudicated delinquent for certain offenses represented a particularly contentious point of deviation from many state laws and practices. In a 2007 position statement, the Federal Advisory Committee on Juvenile Justice called on Congress to revisit SORNA's requirements related to juveniles, contending that the provisions undermine the core principles of juvenile justice (Federal Advisory Committee on Juvenile Justice, 2007). These sentiments were echoed in a subsequent position statement issued by the Council of State Governments suggesting that federal policy in this area contravened existing evidence and carried potentially negative public safety consequences (Council of State Governments, 2008).

Amidst these concerns, the Department of Justice issued the final SORNA guidelines in the summer of 2008, approximately 1 year prior to the initial statutory compliance deadline of July 2009. In the ensuing months, a succession of rulings from both state and federal courts challenged state-based attempts to implement key SORNA provisions.[3] On the state legislative front, action remained limited, as states continued to weigh the costs and benefits of SORNA compliance.

By the spring of 2009, with the compliance deadline approaching, the Department of Justice had not deemed any states to be in "substantial compliance" with SORNA requirements. In March, a subcommittee of the House Judiciary Committee held a hearing to consider the state of SORNA implementation and to contemplate potential courses of action (Congressional Record, 2009). In the wake of this hearing, a letter cosigned by the Chairpersons and Ranking Minority Members of the Senate and House Judiciary Committees and Senate asked the U.S. Attorney General to exercise

his statutory authority to extend the compliance deadline to July 2010, citing "unforeseen difficulties in implementing the law and significant added costs" (Leahy, Specter, Conyers, & Smith, 2009). The Attorney General issued such an extension order on May 26, 2009 (Office of the Attorney General, 2009).

Study Overview

Considering the broad range of SORNA-related concerns among states, tribal jurisdictions, and the sex offender management and juvenile justice practitioner community, the present study was undertaken in the Summer of 2008 to evaluate the nature and magnitude of implementation challenges facing states as they chart their course of action related to SORNA requirements. Specifically, the study was designed with a threefold purpose—to evaluate the level of consistency between state practice and federal mandates; to assess the extent and nature of the barriers to SORNA implementation; and to establish a prognosis for SORNA as currently framed and in turn inform relevant areas of state and federal policy. Two primary research questions framed the inquiry:

Research Question 1: How extensively, and in what areas, does SORNA deviate from existing state laws, policies, and practices?
Research Question 2: What is the extent of and nature of the barriers to state-level implementation of SORNA requirements?

Method

Between September and November of 2008, researchers administered an online survey to state registry officials, sex offender policy board representatives, gubernatorial liaisons, and others involved in SORNA compliance initiatives within their jurisdictions. The survey was developed and refined through a three-stage process—an exploratory assessment aimed at identifying specific SORNA provisions eliciting concern within the states; development, pilot administration, and refinement of a draft survey; and survey administration.

Exploratory Assessment and Variable Identification

The variables and questions for the survey were informed by an exploratory assessment conducted through the Sex Offender Management Coalition (SOMC), a group consisting of sex offender management officials and professionals from across the United States. The SOMC had already engaged in extensive discussion regarding SORNA implementation on a dedicated group listserv, regular conference calls, and two coalition meetings. To that end, the SOMC conducted an initial survey of SORNA state-level implementation and created an informational document for state use, which demonstrated a number of concerns related to SORNA compliance (Lobanov-Rostovsky & Heil, 2008).

Although the SOMC assessment identified a broad range of issues and concerns, eight specific SORNA provision areas were identified for this study as warranting further investigation:

1. The range of "covered offenses" requiring registration: Although earlier federal laws had set forth a limited range of offenses subject to mandatory registration, SORNA included a greatly expanded list of "covered offenses," including attempted sexual assault, simple possession of child pornography, and sexual-related misdemeanors.
2. Juvenile registration/notification: Whereas prior legislation had granted broad state discretion on whether to register juveniles, under what circumstances juveniles would be registered, if at all, and how accessible the registration information would be to the public, SORNA called for mandatory registration of juveniles aged above 14 who are adjudicated delinquent for certain offenses.
3. Requirements for offense-based classification systems: Prior to SORNA, states were granted fairly broad latitude in the methods used to differentiate offender management levels. Whereas many states adopted the use of structured "risk-based" classification to distinguish "high risk" from "low risk" individuals, SORNA mandated that such distinctions be made solely on the basis of the governing offense, subject of course to plea agreement, and without regard to other variables that might affect the overall risk picture.
4. Retroactive application of registration requirements for designated offenders: SORNA requires that states must apply the provisions of the Act to all of those currently required to register, as well as retroactively register any offender convicted of a new criminal offense (whether sexual or not) if that offender has a history of sexual offense conviction or adjudication.
5. Required data elements to be captured in the registry: SORNA sets forth a significant range of required data elements for state registration systems, including work and school addresses, and internet identifiers. This requirement would also significantly expand information technology needs for both states and where applicable, local registration jurisdictions, at a considerable unfunded cost.
6. Public access to registry information: Previous legislation—notably Megan's Law, required community notification for certain classes of offenders, generally leaving the means of notification to jurisdictions. SORNA, by contrast, requires publicly accessible (internet) information on most registrants (all Tier II and III adults, and Tier III juveniles), and affirmative e-mail notification within 3 days to wide range of agencies and to all citizens requesting such notifications. This provision will make obsolete current state laws regarding notification by such mechanisms as town-hall style meeting or neighborhood flyers on only those deemed by the state to be at highest risk.
7. Requirements related to the duration of registration: SORNA sets forth a minimum "baseline" for the duration of offender registration, ranging from

a mandatory 15-year period for lower-tiered offenders to lifetime registration for those in the highest tier.

8. Requirements related to the mandated frequency of registration updates: SORNA sets forth a minimum "baseline" for the frequency with which offenders must report to law enforcement to update their registration information, ranging from annually for lower tier offenders to four times per year for those in the highest tier.

Survey Development

These eight issue areas formed the foundation for a draft survey, designed to evaluate each of these areas across two dimensions—the level of consistency between SORNA and state policies, and the potential obstacles to implementation. This draft survey was circulated for completion among select members of the SOMC group, who were asked for feedback and modifications.

Based on this feedback, the final survey instrument consisted of two rating matrices. The first asked respondents to objectively assess consistency between SORNA requirements and both current state law and current state practice. The second called for a critical assessment of the specific implementation challenges associated with achieving SORNA compliance, across four implementation domains—a legal domain, management/operational domain, a financial domain, and a practical domain.[4] Table 1 summarizes the survey's evaluation domains and rating criteria.

Beyond the rating matrices, the survey also inquired about state actions to date and probable future actions regarding SORNA compliance. Throughout all items on the survey, the online survey prompted respondents to provide clarifying comments where appropriate.

Sampling Framework

Survey participants were selected based on their familiarity with the AWA SORNA provisions and involvement in their respective states' current systems of registration & notification. Respondents were identified through multiple sources, including the SOMC network, the attendee list from the SMART National Symposium on Sex Offender Management held in Baltimore in July 2008, and from official state Web sites.

In most instances, respondents represented official state agencies directly involved in evaluating and/or coordinating their states' response to SORNA. In cases where such a representative was not accessible or identifiable, surveys were completed by legal or treatment professionals actively engaged in SORNA-related activity within their states. Potential respondents were approached directly via e-mail and provided with links to the online survey and to the supplementary information site. Additional follow-up e-mails and phone calls were made when necessary. Some survey respondents were identified via secondary referrals from the initial round of contacts.

Table 1. Survey Evaluation Domains and Rating Criteria

	Consistency with state policy	Implementation challenges & concerns
Evaluation domains	Legal/statutory domain: Consistency between SORNA provisions and existing state law (i.e., the extent to which legislative changes would be necessary to achieve compliance with the provision). Administrative/regulatory domain: Consistency between SORNA provisions and existing practice (i.e., the extent to which changes to registration systems, agency responsibilities, or administrative procedures would be necessary to achieve compliance with the provision)	Legal domain: Implementation may be constrained by legal (i.e., state or federal constitutional) challenges Management/operational domain: Implementation may be constrained by operational factors such as agency roles, capacity of information systems, and standing policies and procedures Financial domain: Implementation may be constrained by costs and unmet resource demands Practical domain: Implementation may produce adverse collateral public safety consequences
Rating criteria	Highly inconsistent: Directly contradicts existing policy Moderately inconsistent: Substantively deviates from existing policy Partially consistent: Partially reflects existing policy Consistent: Reflects or closely approximates existing policy	Very significant concern: Major implementation barriers Significant concern: Substantial, but potentially surmountable, implementation barriers Minimally significant concern: Limited and surmountable implementation barriers No concerns: Minimal or no implementation barriers Uncertain (N/A): Respondent does not have the appropriate knowledge or information to assess implementation barriers

At least one representative of all 50 states was contacted for survey participation. A total of 37 responses were received, representing 35 states.[5] Several survey respondents indicated in communications with researchers that their responses were "team efforts" completed pursuant to consultation between several officials within a given state.

Of the 15 states not participating, representatives from two states explicitly declined to participate, citing confidentiality and political concerns. The remaining 13 states did not respond to either initial or follow-up contacts prior to the closure of the survey. For these 15 states not included on the survey sample, data regarding their systems of registration were gathered from a review of relevant statutes and from information posted on the state registry Web site. Although not included in the aggregate survey

results, these data provided benchmarks for evaluating potential differences between responding and nonresponding states.

Of the 35 respondents included in the final results,

- 18 (51.4%) represented agencies directly involved in management of their state's sex offender registry,[6]
- 13 (37.1%) represented independent sex offender management or policy boards,
- 7 (20%) represented the state Attorney General,
- 5 (14.3%) were based within the Governor's office or part of a gubernatorial task force charged with SORNA implementation, and
- 4 (11.4%) were not affiliated with a state agency directly involved with SORNA implementation.[7]

Survey Administration

The survey was administered between September and November of 2008 via Survey Gizmo, an online survey tool. A companion Web site was set up to provide respondents with survey-related information including a printable copy of the survey questions and links to detailed information on the SORNA provisions referenced within the survey. Links to this Web site were set up within the survey to provide "one click" supplementary information access for respondents during online survey administration.

From the outset, the researchers were keenly aware that the issues addressed in the survey, particularly those involving assessment of implementation barriers, represented politically sensitive matters. Hence, as a means of improving response rates and quality of responses, survey participants were provided with assurances of confidentiality. Participants were asked for certain identifying information that was used for internal research purposes such as validation and follow-up clarification of survey responses. This information was removed from the data prior to analysis, and respondents were assured that it would not be disclosed in any publicly disseminated results or research findings. For this reason, neither individuals nor states are identified in these or any other reported results.

Survey Results

Consistency with State Law and Practice

The first rating scale was designed to ascertain the relative consistency between SORNA requirements and existing state law and practice for each of the eight provision areas. As such, these data provided an indicator of the overall variation between SORNA and state policy, which provisions present potential "trouble areas" for the states, and which areas may be less problematic.

Table 2. Consistency Between SORNA and Existing State Practice (*N* = 35)

	Cumulative measures[a]		Percentage distribution			
	Mean	Median	Highly inconsistent	Somewhat inconsistent	Partially consistent	Consistent
Covered offenses	1.20	1.20	11.4	22.9	40.0	25.7
Juveniles	2.06	2.06	51.4	14.3	22.9	11.4
Classification	1.54	1.54	31.4	25.7	8.6	34.3
Retroactivity	2.14	2.14	57.1	17.1	8.6	17.1
Data required	1.14	1.14	8.6	17.1	54.3	20.0
Public disclosure	1.34	1.34	11.4	28.6	42.9	17.1
Duration	1.37	1.37	22.9	22.9	22.9	31.4
Update frequency	1.43	1.43	25.7	14.3	37.1	22.9

[a]0 = *consistent*; 3 = *highly inconsistent*.

To obtain aggregate measures of policy consistency, responses were assigned values of zero to three, with zero representing general consistency between SORNA and existing state policy, and a rating of three indicating a high level of inconsistency. Derived from these ratings, the mean and median consistency scores presented in Table 2 provide aggregate consistency ratings for each of the eight SORNA provision areas.

The data in Table 2 suggest that, on a comparative basis, SORNA's juvenile provisions and retroactivity provisions present the highest average rates of inconsistency, with the range of covered offenses and the scope of required registry information rated as the most consistent. Figure 1, depicting the distribution of legal and practice consistency ratings for the eight provision areas, identifies an additional significant point of divergence between SORNA and state practice—namely, SORNA's offense-based classification requirements. While SORNA's juvenile and retroactivity provisions deviate from state policy in a fairly uniform fashion, the findings related to offense-based classification are highly polarized, with 11 states rating these requirements as "highly inconsistent" and another 11 rating the requirements as "consistent." These findings suggest that the SORNA mandates in this area, while representing a minimal problem for states already classifying individuals solely on the basis of offense, call for a substantial revision of practice in many states—notably those that currently establish sex offender management levels through empirically validated risk assessment protocols.

The road to substantial compliance may be further understood by examining the number of provisions that states must address to meet SORNA standards. The data presented in Table 3 indicate that 89% of the states—all but four—identified at least one of the eight provisions as highly inconsistent with existing practice, more than half (54%) identified two or more such areas, and more than one third (37%) identified

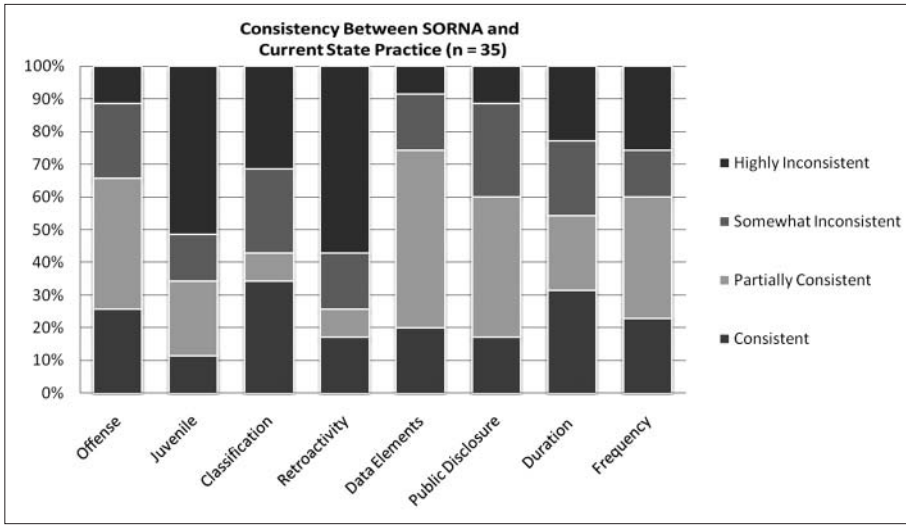

Figure 1. Distribution of practice consistency ratings

three or more. Including ratings of "somewhat inconsistent" in the analysis, all responding states identified at least one inconsistent provision area, and over three quarters (77%) identified three or more such areas.

Implementation Barriers

With the survey's first rating scale having considered the general levels of consistency between SORNA and state policies, the second scale addressed the potential impediments to achieving compliance. This scale was designed to answer one fundamental question related to SORNA's implementation prospects—namely, what are the primary areas of concern that have precluded (or may preclude) states from undertaking the necessary statutory and policy revisions to achieve compliance with SORNA?

Tables 4 and 5 provide mean ratings across these four domains for each of the eight provision areas. Table 4 includes aggregate ratings for all valid responses (responses of "uncertain" were excluded from the analysis), while the figures in table 5 reflect only the responses from states rating the particular provision as either "somewhat inconsistent" or "highly inconsistent" with existing state practice. Beyond respondent ratings, supplemental comments provided in tandem with this rating scale shed additional light on the nature of the barriers to SORNA implementation.

Legal barriers. Concerns over actual or potential legal impediments to SORNA implementation were prominent across multiple provision areas. Four of these areas—the expansion of covered offenses, the inclusion of certain classes of juveniles, the reclassification of individuals into offense-based tiers—share a common thread, in that all directly relate to the "widening of the net" of individuals subject to

Table 3. Number of SORNA Provisions per State Designated as Inconsistent with Existing Practice

	Highly inconsistent			Highly or somewhat inconsistent (combined)		
No. ranked inconsistent	No. of states	Percentage	Cumulative percentage	No. of states	Percentage	Cumulative percentage
8 Provisions	0	0	0	2	6	6
7 Provisions	0	0	0	0	0	6
6 Provisions	1	3	3	5	14	20
5 Provisions	3	9	12	8	23	43
4 Provisions	5	14	26	2	6	49
3 Provisions	4	11	37	10	29	77
2 Provisions	6	17	54	2	6	83
1 Provision	12	34	89	6	17	100
None	4	11	100	0	0	100

Table 4. Mean Implementation Barrier Ratings (All Valid Responses)

	Legal concerns	Operational concerns	Financial concerns	Practical concerns
Covered offenses	1.62	1.59	1.94	1.24
Juveniles	2.16	1.73	1.72	1.97
Classification	1.61	1.36	1.59	1.62
Retroactivity	2.12	2.28	2.22	1.79
Data required	1.29	1.30	1.59	1.24
Public disclosure	1.33	1.09	1.29	1.39
Duration	1.12	1.03	1.12	1.18
Update frequency	0.97	1.32	1.65	1.26

0 = *no concerns*, 3 = *very significant concern.*

registration/notification. This, in turn, has led to significant concern among states regarding conflicts with state constitutional provisions and with potential federal and state legal challenges related to alleged ex post facto, equal protection, and due process violations. One state that was moving toward compliance stated, "We currently have a tier system that we plan to modify to come into SORNA compliance, however if it is applied retroactively, we expect a severe legal backlash." Another state indicated that "the entire SOR (sex offender registry) is being challenged at our highest court level. The SOR could be thrown out on State Constitutional grounds thereby rendering application of the federal law impossible."

Operational barriers. Respondents—particularly those directly involved in their state registration systems—expressed concern regarding potentially significant operational impediments in several provision areas. One particularly prominent operational

Table 5. Mean Implementation Barrier Ratings (Inconsistent States Only)

	Legal concerns	Operational concerns	Financial concerns	Practical concerns
Covered offenses	2.36	1.80	2.40	1.45
Juveniles	2.24	2.09	1.95	2.15
Classification	2.37	2.11	2.33	2.40
Retroactivity	2.58	2.58	2.52	2.12
Data required	2.22	2.33	2.56	2.13
Public disclosure	1.64	1.38	1.60	1.69
Duration	1.75	1.47	1.53	1.47
Update frequency	1.50	2.08	2.46	1.77

concern involved states' lack of capacity to adapt to SORNA's retroactivity provisions, specifically those requiring the identification and registration of individuals who enter the criminal justice system on a nonsexual offense, but who had previous sexual offense convictions or adjudications. Several states provided comments indicating that such information is not readily available within their information systems, making compliance particularly problematic. Other areas of operational concern relate to the demands associated with transitioning from risk-based to offense-based systems, information technology enhancements related to expanded data requirements, and the adaptation of registration update systems and personnel to respond to increased workloads.

Financial barriers. Closely related to both operational and legal demands, resource requirements emerge as a vital theme across several provision areas. Several states noted that they had completed detailed fiscal analyses that have identified a wide range of SORNA-related costs including system development, reclassification, expanded enforcement personnel, judicial and correctional costs, and legal costs related to prosecution, defense, and potential litigation. While jurisdictions remain eligible to cover some initial start-up costs through Department of Justice grant programs authorized by AWA, state analyses have suggested substantial ongoing operational costs, primarily local law enforcement-related expenses associated with the "widened net" of individuals and the expansion of reporting requirements. Commenting on an anticipated expansion of the number of offenders in the higher tiers, one registry official indicated that "sheriff's departments will not be able to cope with the increased burden, and with no funding available it is likely that offenders will become noncompliant on a massive scale."

Practical barriers. In this final domain, respondents were asked to evaluate the potential adverse public safety impacts of modifying their existing state policies to meet SORNA requirements. Two provision areas emerged as particularly problematic—the inclusion of adjudicated juveniles and the requirements for offense-based classification. Regarding the former, states expressed concern that registration of and notification

on juveniles undermines the concepts of juvenile justice and significantly compromises the potential for these youth to effectively and safely integrate into society.[8] As for the latter, states currently differentiating registration and notification levels according to standardized and empirically validated risk assessment instruments have expressed significant concern that differentiating offenders based solely on the crime of conviction dramatically compromises the ability to focus enforcement resources on the most dangerous offenders.

Analysis of Nonresponding States

As noted earlier, survey results captured the perspectives of 35 of the 50 states—a response rate of 70%. While this response rate is generally favorable, questions remain as to whether responding states differed in any substantive way from nonresponding states. In response to these concerns, secondary data sources were consulted to evaluate consistency with selected SORNA requirements, particularly in those areas revealed by survey responses to be inconsistent with many state policies. This analysis evaluated two areas in particular—state provisions related to juvenile registration and methodologies employed in the classification of offenders. Information was gathered from a detailed review of each state's registration and notification statutes, supplemental information contained on each state's internet registry site, and, in a limited number of cases, direct communications with registry personnel.

Regarding systems of classification, the data summarized in Table 6 indicate that 6 of the 15 states—40% of the total—utilize "risk-based" systems (i.e., systems employing structured risk assessment considering factors other than governing offense to inform sex offender management levels). For purposes of comparison, these states were deemed to have systems deemed "highly inconsistent" with SORNA requirements. An additional 4 states—approximately 27% of the total—utilized classification systems that were "blended" (i.e., primarily offense based, but augmented with a special "sexual predator" category for extremely high-risk offenders, established pursuant to some form of risk assessment). These states were designated as having systems that were "somewhat or partially inconsistent" with SORNA requirements. The remaining five states (33% of the total)—those separating registrants solely on the basis of offense history, and those operating "one-tier" systems that do not distinguish between sex offenders—were designated as "generally consistent" with SORNA requirements.[9] These rates of consistency align fairly closely with the patterns found in the 35 responding states.

Regarding juvenile registration provisions, determining consistency levels between SORNA and current practice was complicated by the wide variation in statutory provisions related to the inclusion of juveniles in state registration and notification. Five of the 15 states were ranked as "highly inconsistent" due to statutory provisions that specifically exclude juveniles from the registry, permit registration solely on the basis of judicial discretion, or required purging the names of juveniles from the registry at age 21. An additional six states were ranked as "somewhat inconsistent" with SORNA

Table 6. Characteristics of Nonresponding States

	N	Percentage
Consistency with SORNA classification requirements		
Highly inconsistent	6	40
Somewhat inconsistent	4	27
Mostly or generally consistent	5	33
Consistency with SORNA juvenile requirements		
Highly inconsistent	5	33
Somewhat inconsistent	6	40
Mostly or generally consistent	4	27

juvenile provisions. Laws in these states included adjudicated juvenile in the covered groups for registration, but either contained restrictions on community notification and/or public disclosure of information on juveniles or operated systems that would otherwise limit the population of juveniles subject to registration/notification (e.g., through the use of "risk-based" classification systems). The remaining four states were designated as "generally consistent" with SORNA juvenile requirements due to statutory language that did not suggest differential treatment of juveniles and adults.

The apparent idiosyncrasies of each state's laws related to juveniles, coupled with the distinction between law and actual practice, significantly complicated direct comparisons between responding and nonresponding states in this area. It should be noted, however, that 73% of nonresponding states ranked as highly or somewhat inconsistent with SORNA-related juvenile provisions, compared to 71% of the responding states, and there is little to suggest substantive differences between these two groups.

Data Limitations

While the findings set forth in this report provide a sound foundation for understanding the range of issues confronted by state policymakers and sex offender management practitioners as they contemplate SORNA compliance, certain potential limitations of the data should be noted. The first is temporal in nature. At both the state and federal levels, sex offender policy remains in a consistent state of flux, with new legislative developments regularly unfolding. As such, the reported results represent a "snapshot" of state compliance with SORNA, rather than a static state of affairs. It should be noted, however, that the broader issues raised concerning the conceptual and operational inconsistencies between state practice and the general direction of federal sex offender policy remains a vital concern for policymakers.

A second caveat pertains to the relatively diverse nature of the respondent pool, and the associated potential for response bias, particularly in the assessment of implementation barriers. For example, respondents within law agencies (e.g., Attorneys General) may be more attuned to potential legal impediments, while those working directly

within sex offender registries might more readily identify potential operational barriers. While no such discernible patterns were found within the data, while a significant number of responses were completed pursuant to multidisciplinary consultation, and while considerable efforts were made to tie descriptions to the rating scales, it remains possible that respondent background may have affected some responses.

Regarding the 15 states that did not respond to the survey, the potential remains that these states may have been qualitatively different than those that did respond. As noted, however, secondary data suggests that nonresponding states, as a group, appear to have a similar "SORNA consistency profile" as responding states, at least across the critical dimensions of classification systems and juvenile registration.

Discussion and Conclusions

This study indicates that, approximately two and half years following SORNA's passage, substantial gaps remained between its core requirements and existing state law and practice. Further, the results suggest that the impediments associated with bridging these gaps are extensive and multidimensional. Considering these factors, it is hardly surprising that, by the initial statutory compliance deadline of July 2009, no states had been designated by the Department of Justice as achieving substantial compliance with SORNA.

These circumstances might be explained, at least in part, through critical historical distinctions between SORNA and the prior generation of federal registration and notification legislation. When Congress passed the Jacob Wetterling Act in 1994 and Megan's Law in 1996, state registration and notification laws and systems were in their relative infancy. In contrast with SORNA's highly prescriptive nature, these laws set forth broad requirements for registration and notification, leaving the states to determine how best to implement their systems. Over the ensuing decade, states invested considerable resources and energy adapting their systems to respond to their jurisdiction's unique public safety demands, emerging research evidence, and their respective state constitutions.

With SORNA, states have found this evolutionary trajectory significantly interrupted, with many perceiving the new law and guidelines as "turning the clock back" on over a decade of progress. States utilizing "risk-based" offender classification have been asked to transition to a uniform "offense-based" system that, some have argued, may compromise public safety through its reduced discriminatory value. SORNA's provisions requiring the registration of and notification on juveniles adjudicated delinquent for certain offenses remain another key point of contention, with critics contending that the provisions undermine the core principles of juvenile justice. SORNA also requires that many states make major revisions to their laws and policies in areas such as retroactive application of registration, public/internet notification, and the range of covered offenses.

Fiscal and legal realities within the states appear to have further hamstrung movement toward SORNA compliance. On the financial front, while the funding sufficiency

has always been a challenge to the successful operation of R&N systems, the contraction of state revenues associated with the 2008-2009 economic downturn has frozen new spending in many states. This, in turn, has limited states' capacity to address the significant system modifications, expanded enforcement tasks, and potential litigation stemming from overhauled R&N systems.

In the legal arena, consistent with respondents' concerns related to SORNA's legal viability, a stream of rulings emanating from state and federal courts have continued to impede SORNA implementation. One federal district court ruling out of Nevada placed a permanent injunction on the implementation of that state's SORNA-driven legislation, calling into question both its SORNA-driven reclassification system and its retroactive application (ACLU of Nevada v. Masto, 2008). In South Dakota, the state's Supreme Court upheld due process and equal protection challenges to juvenile registration, indicating that adjudicated juveniles could not be subject to the same registration requirements as those afforded adversarial criminal proceedings (In Re Z. B., 2008). Additionally, the enforcement authority granted by SORNA to federally prosecute "failure to register" cases, ostensibly on the basis of the Commerce Clause, has been successfully challenged in several federal rulings (U.S. v.Valverde, 2009; U.S. v. Powers, 2008; U.S. v. Hilton-Thomas; U.S. v. Waybright, 2008). These and similar rulings indicate that, in addition to the direct costs of SORNA implementation, state and federal governments seeking SORNA compliance remain likely to encounter an ongoing series of legal obstacles and associated litigation demands.

Reflecting several of the financial, operational, and practical concerns explored through this study (notably those related to juveniles, risk assessment, expansion of covered offenses, and cost), a January 2009 statement from the California Sex Offender Management Board suggested that complying with SORNA would compromise the state's capacity to effectively prevent sexual violence:

"The California State Legislature, Governor and citizens should elect not to come into compliance with the Adam Walsh Act. Current effective California state law and practice related to offender risk assessment, juvenile registration and sex offender monitoring is more consistent with evidence-based practice that can demonstrate real public safety outcomes." (California Sex Offender Management Board, 2009 **[AQ]**)

The results from this study suggest that the California Sex Offender Management Board is far from alone in its considerable concern regarding SORNA's potentially negative effects on state-based efforts to prevent sexual victimization. It is therefore hardly surprising that state-level SORNA compliance activity has moved at a relatively slow pace. The survey suggests that a majority of states remain significantly out of synch with certain SORNA requirements, and provides insights as to why no states had come into substantial compliance by the July 2009 statutory deadline. While debates continue at the state legislative level, these data suggest that most states continue to assume a "wait and see" approach to SORNA compliance.

Considering this confluence of factors—continued (and extensive) discrepancies between SORNA guidelines and existing state policies; a multifaceted array of implementation barriers; mounting legal challenges in state and federal courts; a shifting

and uncertain fiscal landscape; rising voices of concern regarding SORNA's potential collateral public safety consequences; and limited state action on the "substantial compliance" front—the future of SORNA as currently framed remains uncertain. Whether through Congressional legislative amendment, modification of DOJ policies and guidelines, or a combination of the two, additional federal action in this arena seems likely.

Regardless of SORNA's future, however, the broader issue of the federal government's role in the shaping of state-based sex offender management policy remains a matter of significant concern. Through a succession of increasingly prescriptive mandates, the U.S. Congress has exerted growing influence on sex offender management practice. Yet with implementation responsibility remaining with state and local governments, this increased federal role has produced a potential "disconnect" between policies and the day-to-day challenges associated with the safe and effective management of sex offenders within the community—a situation that may potentially carry a range of negative consequences, including the inefficient allocation of resources and potentially compromised public safety.

Authors' Note

The findings and opinions expressed in this manuscript reflect solely the views of the authors and are in no way endorsed by the Colorado Division or Board named above, and do not represent government policy or views.

Declaration of Conflicting Interests

The authors declared that they had no conflicts of interests with respect to their authorship or the publication of this article.

Funding

The authors declared that they received no financial support for their research and/or authorship of this article.

Notes

1. SORNA authorized the Attorney General to grant covered jurisdictions up to two 1-year extensions of the initial statutory deadline.
2. Byrne grant funding has remained a topic of annual budget debate in Congress, and was reinstated to its pre-2008 levels during the Fiscal 2009 budget cycle. It remains a critical variable in the SORNA compliance picture for many states.
3. See, for example, *ACLU of Nevada v. Masto* (2008), which precluded implementation of Nevada's new SORNA-driven classification system; In re: Z.B. (2008), a ruling limiting South Dakota's efforts to require juvenile registration; and Doe v. Shurtleff (2008), which challenged Utah's efforts to include internet identifiers on its public notification system.
4. A fifth area—the political/legislative domain—was also identified in the draft survey instrument, but was omitted from the final survey pursuant to focus group feedback.

5. In the two instances of dual responses, the response from the agency or individual most directly involved in SORNA policy and/or implementation was utilized for the final analysis purposes.
6. Many involved with their state registries also had another organizational affiliation. Hence, the percentages cited here are not additive.
7. These included one public defender, two state public policy representatives from the Association for the Treatment of Sexual Abusers, and one private attorney, all of whom have been actively engaged in SORNA activity within their states.
8. This is compounded by concerns that most adjudicated juveniles covered under SORNA will end up in the "Tier III" category, which involves lifetime registration.
9. SORNA guidelines specify that the standards for classifying offenders represent a "floor" and not a "ceiling." The standards therefore do not preclude states from operating one-tier systems, as long as the uniform reporting and registration requirements comport with other SORNA standards (e.g., lifetime registration and quarterly registration updates for all registrants).

References

ACLU of Nevada v. Masto, 2:2008cv00822. (D. Nev., Oct. 7, 2008).

Adam Walsh Child Protection and Safety Act of 2006. (42 USC 16901 et seq.).

Campus Sex Crimes Prevention Act, Pub. L. No.106-386, Div. B, Tit. VI, sec. 1601 (d), 114 Stat. (2000).

Congressional Record. (2009). *Congressional Record Daily Digest*. March 10, 2009, p. D241.

Council of State Governments. (2008). *Resolution in opposition of the Sex Offender Registration and Notification Act as it applies to juvenile offenders*. Adopted December 6, 2008, at the CSG Annual Meeting, Omaha, Nebraska.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, H.R. 2267, 105th Congress (1998).

Federal Advisory Committee on Juvenile Justice. (2007). *Resolution concerning comment on proposed regulations implementing the Sex Offender Registration and Notification Act*. In Federal Advisory Committee on Juvenile Justice 2007: Annual Recommendations Report to the President and Congress of the United States. Washington, DC.

In re: Z.B., 2008 S.D. LEXIS 147 (November 5, 2008).

Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act (1994) 42 U.S.C. § 14071 (1994 & Supp. IV 1998).

Justice Policy Institute. (2008). *What will it cost states to comply with the Sex Offender Registration and Notification Act?* Available from http://www.justicepolicy.org

Leahy, P., Specter, A., Conyers, J., Jr., & Smith, L. (2009, March 19). *Letter to Attorney General Eric Holder*. Retrieved June 18, 2009, from http://judiciary.senate.gov/resources/documents/111thCongress/upload/031909Leahy-Specter-Conyers-SmithToHolder.pdf

Logan, W. (2008). Criminal justice federalism and national sex offender policy. *Ohio State Journal of Criminal Law, 6*, 51-123.

Lobanov-Rostovsky, C., & Heil, P. (October, 2008). *State implementation of federal sex offender legislation: Strategies and challenges*. Paper presented at the Association for the Treatment of Sexual Abusers 27th Annual Research and Treatment Conference, Atlanta, GA.

Megan's Law final guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as amended (1999). *Federal Register, 64*, 572-587.

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

National Congress of American Indians. (2007). *Resolution #ECWS-07-003. Title: Urging Congress to Amend Section 127 of the Adam Walsh Act*. Adopted February 26-28, 2007, Washington, DC.

National Conference of State Legislatures. (2006). *Adam Walsh Act Policy Statement*. Retrieved August 23, 2008, from http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh

Office of the Attorney General. (2009, May 26). *One year extension of deadline for jurisdictions to implement the Sex Offender Registration and Notification Act. Order No. 3081-2009*. Washington, DC.

Pam Lychner Sexual Offender Tracking and Identification Act of 1995, Pub. L. No. 104-236, 110 Stat. 3093-94 (1996).

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Public Law No. 108–21 117 STAT. 650 (2003).

Pyke, E., & Cropper, C. (2009). *Inside the Beltway*. Presentation to the National Criminal Justice Association 2009 National Forum, August 2009. Bellevue, Washington.

Sample, L., & Evans, M. (2009). Sex offender registration and community notification. In Wright, R. (Ed.), *Sex Offender Laws: Failed Policies, New Directions* (pp. 211-242). New York: Springer.

Sex Offender Registration and Notification Act (SORNA): Barriers to Timely Compliance by States: Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, 111th Congress (2009, March 10).

Bios

Andrew J. Harris, PhD, is an assistant professor of criminal justice at the University of Massachusetts–Lowell. He has over two decades of experience developing and managing innovative public sector policies and programs in both the criminal justice and human service arenas, and has served as a consultant to state policy boards, public behavioral health agencies, community-based service providers, and state and municipal correctional systems. His policy research focuses on the intersection between criminal justice and human services, covering topics including substance abuse, behavioral health, prisoner reentry, correctional health care, and sex offender management.

Christopher Lobanov-Rostovsky serves as the program director for the Colorado Sex Offender Management Board (SOMB), operated under auspices of the Colorado Division of Criminal Justice. Prior to his appointment to this position, he provided sex offender evaluation and treatment services for 17 years in outpatient and residential settings. He serves on the Board of Directors for the Association for the Treatment of Sexual Abusers (ATSA) and is cochair of ATSA's public policy committee.