COMMENTARY

SORNA IN THE POST-DEADLINE ERA: WHAT'S THE NEXT MOVE?

by Andrew J. Harris

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On July 27, 2011, U.S. states, territories, and covered tribal jurisdictions faced the final deadline to implement national standards for sex offender registration and notification established pursuant to the Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006 (AWA). Jurisdictions not meeting the deadline faced a 10% reduction in their federal law enforcement formula funding under the Edward Byrne Memorial Justice Assistance Grant program.

As of the deadline, a total of 24 jurisdictions -- 14 states, 9 tribal jurisdictions, and 1 U.S. territory, had been deemed by the U.S. Department of Justice as having substantially implemented SORNA's provisions (see accompanying inset entitled "Under the Wire"). Additionally, the DOJ's Office of Sex Offender Monitoring, Apprehension, Registration, Monitoring, and Tracking (SMART), reported that it was continuing to work closely with remaining states, tribes, and territories, and reports that many jurisdictions have made significant progress toward SORNA compliance. (Department of Justice Office of Justice Programs, "Press Release: Justice Department Finds 24 Jurisdictions Have Substantially Implemented SORNA Requirements," July 28, 2011.)

Five years following the AWA's passage, however, a majority of states and tribes have been either unable or unwilling to sufficiently modify their laws and practices to meet the SORNA "substantial implementation" threshold set by the Department of Justice. Among the 36 states that had not substantially implemented SORNA by the deadline were California, New York, and Texas – three states that account for more than one quarter of the nation's registered sex offenders (National Center for Missing and Exploited Children, "Map of Registered Sex Offenders in the United States," June 17, 2011). Moreover, as reflected in this issue's article by Amy Borror and colleagues, even Ohio – the first state deemed by DOJ as having substantially implemented SORNA – now faces legal obstacles that raise significant questions about that state's ability to effectively meet federal requirements, at least for the foreseeable future.

Some have implicitly attributed the lack of movement on SORNA to intransigence on the part of non-compliant jurisdictions, and have called on Congress the "hold the line" on the existing set of standards (see, for example,

Charles Stimson and Myra Noronha, "Get SMART: Complying with Federal Sex Offender Registration Standards," Heritage Foundation, July 12, 2011. Retrieved 7/31/11 from http://www.heritage.org/research/reports/2011/07/get-smart-complying-with-federal-sex-offender-registration-standards). This characterization, however, represents a gross oversimplification that ignores the legal and operational realities of SORNA compliance. Surveys of state registry officials have found the implementation barriers to diverse and complex, with jurisdictions expressing a range of legal, fiscal, and practical concerns and remaining wary of the law's unintended collateral public safety impacts. Some states appear to have made affirmative decisions to absorb the potential reduction in federal Byrne grant funding, deeming the costs of SORNA implementation to be a far greater fiscal liability. In Indian country, concerns over tribal sovereignty have continued to impede progress, despite significant Department of Justice technical support and incentives to promote tribal compliance. (see M. Brent Leonhard, "The Adam Walsh Act and the Tribes: One Lawyer's Perspective," Sex Offender Law Report, April/May 2011.)

Certainly, a subset of jurisdictions operating systems that are broadly inclusive and make few distinctions across the registered sex offender (RSO) population are likely to find their way into compliance with relatively few operational or legal impediments. Yet for those with policies and processes that diverge significantly from SORNA's mandates (e.g. states that calibrate registration requirements on the basis of risk assessment, those that limit public internet disclosure to higher risk offenders, or those that categorically exclude adjudicated juveniles from the registries), major implementation barriers will remain. Indeed, the experience of Ohio has shown that mere political will and passage of enabling legislation is not enough, and that SORNA implementation may present a complex set of legal and operational hurdles.

There are few indications that Congress anticipated the current state of affairs when SORNA was initially passed. The law had set an initial compliance deadline of July 2009, and authorized the Department of Justice to grant jurisdictions up to two one-year extensions, suggesting that federal lawmakers anticipated that the law would be largely implemented by July 2011. The fact that this has not occurred raises some important questions about SORNA and its future – Can SORNA be realistically implemented in its current form? What accounts for the apparent miscalculation by federal lawmakers of the extent of SORNA's implementation challenges? How can the experiences of the past five years inform development of a more viable national policy?

As we enter SORNA's post-deadline era, my view is that nationwide adoption of SORNA in its current form will remain an elusive goal. This column takes a critical look at what the rocky road to implementation has taught us, and presents some ideas on how law and policy might be recalibrated to create a more responsive and viable series of national standards.

HOW DID WE GET HERE?

SORNA's implementation difficulties may be at least partially rooted in the circumstances and processes leading to the law's development during the 109th Congress. Following a decade of increasing federal government involvement in the issue of sex offender registration and notification beginning with the Jacob Wetterling Act of 1994, the years immediately preceding AWA/SORNA's passage witnessed an increasing number of news reports focused on the problem of missing sex offenders and registry operational problems. Based on these reports and on testimony provided to Congress, a fairly cohesive and compelling narrative emerged – namely that the nation's sex offender registries were plagued by lax standards that could easily be exploited by sexual predators seeking to prey on children. (Jill Levenson and Andrew Harris, "100,000 Sex Offenders Missing – or are they? Deconstruction of an Urban Legend," Criminal Justice Policy Review, published online July 14, 2011, DOI 10.1177/0887403411415398.)

In this context, a Congressional committee convened a hearing in June 2005 to discuss needed changes to the nation's sex offender registries (House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, "Protecting our nation's children from sexual predators and violent criminals: what needs to be done?," 109th Congress, June 9, 2005). While this hearing pre-dated the AWA's passage by a full year, the hearing transcripts – particularly the opening statement by Wisconsin Representative Mark Green, suggest that the elements of SORNA had already begun to take shape.

The record suggests that SORNA was driven by a limited circle of stakeholders holding fairly narrow assumptions about the nature of sexual offending, the problems with the nation's registries, and the recipe for addressing those problems. Information provided by clinical experts, such as testimony concerning the diverse nature of the sex offender population and recidivism risk, was met with relative hostility during congressional hearings, and was largely disregarded in the final legislation. While some input may have been sought from states and tribal jurisdictions, there are no indications in the official record indicating that state registry officials or legislators were consulted in any systematic way, nor are there any indications of any serious attempt to analyze and understand the precise nature of the problems with the registries, the scope of potential barriers to the proposed law, or the relative efficacy of alternative approaches.

The lack of attunement to SORNA's ramifications for the states is further reflected in Congressional Budget Office analyses of the pending legislation. In its analysis of H.R. 4472 (the precursor legislation that would eventually form the basis for the AWA/SORNA), the CBO reported to Congress that costs of implementation would be covered by contemplated federal grants, and was silent on additional costs (Congressional Budget Office, "Cost Estimate: H.R. 4472: Children's Safety and Violent Crime Reduction Act of 2005", March 8,

2006). Another CBO analysis evaluating Senate Bill 1086 (the companion bill to H.R. 4472) concluded that 40 states would need to hire two additional staff at $50,000 annually to meet the standards, but failed to account for any additional impacts beyond this (Congressional Budget Office, "Cost Estimate: S.B. 1086: A bill to improve the national program to register and monitor individuals who commit crimes against children or sex offenses," December 15, 2005). As the SORNA compliance picture has unfolded and as states have evaluated their cost impacts, these CBO assessments have proven to be gross underestimations of SORNA's impact and underscore the limited attention that went into assessing the law's implications for state, local, and tribal governments.

SORNA AND REGISTRY QUALITY: A TENUOUS CONNECTION

It is generally acknowledged – by SORNA supporters and critics alike – that significant variation exists across state registration systems. Over the past two decades, states have made varied choices regarding matters such as the means of classifying offenders for registration purposes, registration duration and reporting requirements, parameters of public notification and/or internet disclosure, and the inclusion of adjudicated juveniles. These choices, in turn, have been driven by a complex array of variables, including legal and organizational constraints, fiscal efficiency considerations, and the division of responsibilities among units and levels of government – factors that may be highly idiosyncratic from one state to the next.

Yet while the ***existence*** of these differences is readily apparent, the ***relevance*** of these differences in terms of effectiveness, quality, and reliability of the nation's sex offender registries is less clear. Does a jurisdiction's level of compliance with SORNA denote a more effective and reliable registry system? Does deviation from SORNA necessarily imply an inferior system? More broadly, do SORNA standards produce a better, more effective national system of sex offender registration and notification?

SORNA's de facto position (yes, yes, and yes to the above questions) is that registry systems that place greater restrictions on larger groups of offenders are implicitly better and more effective than those that are more selective. This position follows logically from SORNA's foundational narrative that states choosing more selective standards had established themselves as "safe havens" for sex offenders, and therefore needed to have their ways corrected through federal action. The persistent reminder that SORNA does not mandate a "one-size fits all" approach, but rather represents a baseline minimum standard that states are free to exceed, sends a simple and straightforward message: ***More is Better***. To this point, many of the states that have been deemed to have substantially implemented SORNA exceed various standards set forth in SORNA by including provisions such as broad-based lifetime registration, universal internet disclosure, or subjecting all juveniles to full registration and notification requirements.

While it may be that state systems casting a wider net generate greater public safety outcomes than those using more refined approaches, no research evidence produced to date has supported this assertion. In fact, there is an equally compelling argument that the opposite may be true, and that identifying smaller pool of high risk offenders helps the public and law enforcement focus their attention on the more dangerous individuals. We simply do not know.

Moreover, there is no evidence to support the notion that states with systems adhering more closely to SORNA standards are any more immune to administrative and operational problems than those with systems that deviate from SORNA. A July 2011 investigation by the Detroit Free Press uncovered substantial data integrity problems with the sex offender registry in Michigan – one of a handful of states to be granted "substantial implementation" status before the July 2011 deadline. Cited problems stemming from this investigation included large numbers of cases erroneously flagged as "non-compliant" and a lack of systems to remove deceased registrants from the registry. (Brian Dickerson, "Nonviolent sex offenders ensnared in state's red tape," Detroit Free Press, July 22, 2011)

While it would be imprudent to draw general conclusions from individual instances (a practice commonly employed in the policy discourse surrounding sex offender policy), the problems cited in Michigan are consistent with more broad-based findings. Department of Justice audits, including those conducted through the FBI and through the DOJ's Office of the Inspector General, have highlighted significant data integrity problems in state-based public registries. Cited problems in these audits include high rates of duplicate and contradictory records both within and across state registries, disparate and inconsistent use of key terminology, high rates of incomplete or missing data, and the failure to purge extraneous records. The OIG audit notes that AWA/SORNA and its attendant guidelines stand to address some of these data integrity problems, but that many other remain unaddressed. The report concludes that SORNA "should improve the quality of data in the sex offender public registries, but the guidelines will not correct all of the problems we noted. As a result, members of the public will not have the information they need to assess the threat posed by sex offenders in their communities." (U.S. Department of Justice, Office of the Inspector General, "Review of the Department of Justice's Implementation of the Sex Offender Registration and Notification Act," Report # I-2009-001, December 2008)

A similar range of data integrity issues were identified in a 2011 analysis of the information contained on public sex offender registries. (Alissa Ackerman, Andrew Harris, Jill Levenson, and Kristen Zgoba, "Who Are the People in Your Neighborhood? A Descriptive Analysis of Individuals on Public Sex Offender Registries," International Journal of Law and Psychiatry, 34(3): 149-159) Citing a range of data integrity and data consistency issues, the authors noted the significant variability in the scope, content, and format of information contained

within state registries – a factor that complicated inter-jurisdictional comparisons and challenged the effort to develop a comprehensive descriptive portrait of the nation's RSO population. States that had implemented SORNA were no more immune to these problems that those that had not.

The study also identified wide-ranging terminology utilized in the registries to denote offender status – a finding that carries direct implications for SORNA's ostensible purpose of instilling greater uniformity across the nation's sex offender registries. This confirms prior findings in the OIG audit suggesting that as many as 15 different terms may be used to denote RSOs who are missing, non-compliant, or have their whereabouts unknown. This ambiguity, coupled with the fact that certain combinations of these terms are often used interchangeably within the media and policy discourse, suggests the need for greater definitional clarity and consistency. Despite SORNA's intent to instill uniformity, the law and guidelines as currently framed simply do not address these types of critical definitional issues that relate directly to the utility of registry information for law enforcement and the general public.

Beyond these definitional issues, there are other critical factors that will continue to compromise SORNA's vision of a seamless and uniform web of state registries. First, the positioning of the guidelines as "minimum" rather than "absolute" standards will mean that there will continue to be some states that operate with more onerous registration requirements than others. In turn, RSO designations (for example, tier or risk level status) will continue to have different meanings across jurisdictions. Second, and perhaps more critically, we have seen a marked policy shift in recent years related to the criteria applied in determining whether jurisdictions have met SORNA requirements. Implicitly recognizing the unique aspects of each jurisdiction's legal and operational landscape, the Department of Justice has shifted from a fairly rigid approach (termed "substantial compliance") to a more flexible standard ("substantial implementation"). While this shift, presumably reflecting DOJ's increasing attunement to the barriers to state compliance, represents a perfectly sensible approach, it has also underscored the difficulties in establishing a uniform national system.

In sum, it is far from established that SORNA standards will uniformly improve the public safety utility of individual state registries. Certainly, there will likely be jurisdictions for which implementing SORNA will substantively improve their existing systems. But there may also be others for which attempts at SORNA implementation could disrupt and compromise an otherwise well-functioning system. Additionally, the quest for uniformity as envisioned in the initial SORNA legislation has emerged as an increasingly untenable goal.

THE DEMAND FOR POLICY-RELEVANT RESEARCH

Given the amount of policy attention to sex offender registration and notification laws, one might expect that data reflecting the registries themselves and the

scope and composition of the nation's registered sex offender (RSO) population is abundant and has been subject to rigorous empirical inquiry. This, however, is hardly the case – in fact, there has been remarkably little systematic analysis of the structure and content of the registries and the diversity of individuals contained within them. While recent years have seen an emerging base of policy-focused research regarding sex offender registration and notification, this research has generally focused on evaluating the general impacts of registration and notification laws and, to some extent, its political context. Far less attention has been paid to understanding the scope of the RSO population and the operational registries' operational dimensions. This knowledge gap may explain, in part, the apparent miscalculation by federal lawmakers over state-level resistance to implementing certain key SORNA provisions.

In a key respect, the root of SORNA's implementation difficulties has been the limited evidence base in support of its core assumptions. The law is based on a series of presumed "truths" about the nature of sexual offending, the motivations and behaviors of known sex offenders, and the extent and etiology of problems with the nation's sex offender registries. While some of these underlying assumptions may have an empirical basis, offered evidence has more often taken the form of isolated case examples and sound-bite statistics rather than results generated from systematic research. While aggregate numbers (such as the claim of 100,000 missing sex offenders) may be effective in promoting policies calling for increasingly expansive controls, they lack the capacity to improve our systems of monitoring and strategically target our resources.

Development of effective national sex offender policy requires that the claims driving those policies be put forth as testable research questions, not as "self evident" statements. Do registered sex offenders systematically engage in "jurisdiction shopping" and migrate to places with less onerous registration restrictions? How is non-compliance with registration associated with increased risk? Do states with more expansive registration laws produce better public safety outcomes? How might the contours of sex offender registration laws affect plea bargaining and other legal case processing factors? What is the composition of the RSO population? What proportion is living in the community, and what proportion are incarcerated, residing out of state, deported, or otherwise inactive? Who is under active parole or probation supervision, and who is not? What types of offenses have they committed, and how many are repeat offenders? How is this population distributed across offense types, risk levels, and other salient variables?

Empirically examining and answering these and similar questions -- all of which relate in some way to SORNA's potential efficacy as a public policy – can help to inform the development of a national sex offender registration policy that is driven more by data than by conjecture and rhetoric. Congress appeared to recognize this in the Adam Walsh Act, when it included a provision for the National Institute of Justice to conduct a comprehensive study of SORNA's

impacts. To date, however, no such study has been completed.

THE FUTURE OF SORNA: SOME RECOMMENDATIONS AND CONSIDERATIONS

There is little question that many state registry systems are in need of improvements. Yet if Congress is to continue to assert its role in the nation's sex offender policy matters, it needs to take a fresh look at SORNA and its attendant assumptions, informed by the experience of the past five years.

As a start, federal lawmakers must acknowledge the lingering gap between SORNA's vision of the optimal system of registration and the vision held by key stakeholders in many covered jurisdictions. State and practitioner concerns about federal intervention cannot be simply tossed aside and attributed to a simple lack of will to make needed changes – they need to be more carefully understood and integrated into cohesive national strategies.

Second, we need a more open national dialogue over the characteristics of a quality system of sex offender registration and notification. Under the existing paradigm, systems have been judged solely on the basis of whether they meet a set of standards established by Congress based the input of a narrowly selected group of stakeholders. There is little reason to believe, and little evidence to suggest, that jurisdictions complying with SORNA are any more efficient in their operations or more effective at meeting public safety goals than those that are not compliant. Developing meaningful and viable national standards requires a more inclusive, comprehensive process involving input from law enforcement and supervision professionals, state legislative representatives, researchers, and a broadly representative cross-section of the victim advocacy community. These standards should include audit and quality assurance provisions that ensure the integrity of data available to law enforcement and the general public.

Third, we need to work toward greater clarity regarding the goals of registration and notification and the rationale for federal intervention. Notably, an ongoing debate between SORNA's supporters and its critics has focused on the question of whether the law is intended to reduce the recidivism rate of registered offenders, or whether it is designed to achieve alternative purposes. Regardless of one's position on this matter, the policy's intended outcomes need to be clearly specified in a way that permits data-driven assessment of both the effectiveness of state registries and the impact of federal laws. This, in turn, requires a direct and honest dialogue between federal and state policymakers, researchers, and those involved directly in sex offender management regarding exactly what we are trying to achieve.

Fourth, we need to work on developing our knowledge base through expanded investment in research that is insulated from political pressures, and that improves understanding of such issues as the characteristics of the registered sex offender population, the operational dimensions of the nation's state sex

offender registries, and the public safety outcomes associated with SORNA and its guidelines. While Congress apparently recognized this need when the AWA/SORNA was adopted, a comprehensive and objective assessment of the law's impact has never been undertaken. In the absence of reliable policy-relevant research and assessment, the debates over SORNA and its future will continue to be dominated by anecdote and unsupported rhetoric.

SORNA will not be implemented through mere force of will on the part of the federal government – it will only happen by building an effective consensus across stakeholder groups. Moreover, relentless pursuit of compliance with the current standards will neither produce the desired goal of national uniformity nor address the data integrity issues that plague the nation's registries. Given this, we need to work toward developing more consistent, reliable, and readily available data, and toward promoting more extensive investment in policy-focused research. Through these steps, we can begin to move toward a more cohesive, rational, and realistically-implemented national sex offender registration policy.

Under the Wire

As of July 27, 2011, the extended statutory deadline for SORNA compliance, the following jurisdictions had been deemed by the U.S. Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) to have substantially implemented SORNA requirements:

States: Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, South Dakota, and Wyoming

Tribal Jurisdictions: Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, Grand Traverse Band of Ottawa and Chippewa Indians, Iowa Tribe of Oklahoma, Kootenai Tribe of Idaho, Little Traverse Bay Bands of Odawa Indians, Pueblo of Isleta, Tohono O'odham Nation, Upper Skagit Indian Tribe

U.S. Territories: Guam