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# The Emerging Criminal War on Sex Offenders

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## ABSTRACT

*This article addresses four central questions. First, what is the difference between normal law enforcement policy and a “war” on crime? Second, assuming such a line can be discerned, has the enactment of the Adam Walsh Child Protection and Safety Act (“AWA”) in combination with other sex offender laws triggered a transition to a criminal war on sex criminals? Third, if such a criminal war is emerging, what will be the likely effects of such a transition? Fourth, if such a criminal war is emerging with substantial negative consequences, how can it be stopped?*

*By reviewing America’s history of criminal wars, primarily the War on Drugs, the article identifies three essential characteristics of a criminal war: marshalling of resources, myth creation, and exception making. It concludes that the federalization of sex offender policy brought about by the AWA has turned what was conventional law enforcement into a nascent criminal war on sex crimes. This change can have repercussions as substantial as the drug war has had on American criminal justice and society.*

## INTRODUCTION

In 1971, Richard Nixon officially declared the War on Drugs in America.<sup>1</sup> However, laws enabling that criminal war were enacted years before Nixon’s speech formally initiated the new conflict. In 1968, Lyndon Johnson established the Bureau of Narcotics and Dangerous Drugs, which came to be known as the Drug Enforcement Agency (“DEA”),<sup>2</sup> to lead the charge against domestic drug use and distribution.<sup>3</sup> The next year, efforts to limit drug smuggling from Mexico culminated in Operation Intercept, which nearly led to a complete closing of the southern border of the United States.<sup>4</sup> When Nixon took over the Presidency, he signed into law the Comprehensive Drug Abuse Prevention and Control Act,<sup>5</sup> which established the categorization system for regulating drugs.<sup>6</sup> At the same time, the National

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<sup>1</sup> Claudia Kalb et al., *And Now, Back in the Real World . . . : A Report from the Front in the Never-Ending War on Drugs*, NEWSWEEK, Mar. 3, 2008, at 41.

<sup>2</sup> *Growing Army of Sleuths for Government – Why?*, U.S. NEWS & WORLD REP., Jul. 21, 1975, at 36 [hereinafter *Sleuth Army*].

<sup>3</sup> See Patricia Brennan, *Politics, Policy and Pot: A ‘Frontline’ Report Assesses America’s War Against Drugs*, WASH. POST, Oct. 8, 2000, at Y06.

<sup>4</sup> See Richard B. Craig, *Illicit Drug Traffic and U.S.-Latin American Relations*, WASH. Q., Fall 1985, at 105, 118–21.

<sup>5</sup> Pub. L. No. 91–513, 84 Stat. 1236 (1970).

<sup>6</sup> George S. Yacoubian, Jr., *Assessing the Relationship between Marijuana Availability and Marijuana Use: A Legal and Sociological Comparison between the United States and the Netherlands*, J. OF ALCOHOL & DRUG ED., Dec. 1, 2007, at 17, 22.

Organization for the Reform of Marijuana Laws (“NORML”), was founded to counter the shifting policy priorities of the criminal justice system.<sup>7</sup> By the time of Nixon’s official declaration, the War on Drugs was substantially underway.

As it was in the years before Nixon’s famous speech, America finds itself laying the groundwork for another large-scale criminal war. This time, however, the target is neither drugs nor drug users. Instead, there is a nascent criminal war against sex offenders. For some time, sex offender regulation was primarily the province of state governments.<sup>8</sup> In that regard, states were aggressive in developing new ways to regulate and punish offenders particularly after release from prison.<sup>9</sup> However, the near-monopoly of states in regulating sex offenders ended when, on the twenty-fifth anniversary of the abduction of Adam Walsh from a shopping mall in Florida, President George W. Bush signed into law<sup>10</sup> the Adam Walsh Child Protection and Safety Act of 2006.<sup>11</sup> The law was not the first federal statute concerning child molesters and other sex offenders. However, the provisions of the AWA substantially departed from prior federal efforts to regulate and punish sex offenses.<sup>12</sup> The AWA changes fundamentally altered assumptions about the operation of the federal criminal justice system.<sup>13</sup> This sea change elevated sex crime policy from mere political posturing to the beginning of a criminal war on sex offenders.

The last great criminal war, the War on Drugs, resulted in an erosion of civil liberties, mass incarceration, and a fundamental reorientation of American criminal justice.<sup>14</sup> As criminal justice priorities shift, there is an opportunity for a war against sex offenders to replace the War on Drugs.<sup>15</sup> If such an eventuality takes place based only upon the body of laws currently targeting sex offenders, the likely social effects will be similar to the War on Drugs. If, as occurred during the drug war, the laws are expanded to further restrict sex offenders, the social and financial costs to America could be enormous.

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<sup>7</sup> See Peter Carlson, *Exhale, State Left: At 61, Longtime Marijuana Lobby Leader Keith Stroup is Finally Leaving the Joint*, WASH. POST, Jan. 4, 2005, at C1.

<sup>8</sup> See Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6 (2006) [hereinafter “Logan I”].

<sup>9</sup> *Id.*

<sup>10</sup> Kris Axtman, *Exclusions Zones: Efforts Grow to Keep Tabs on Sex Offenders*, CHRISTIAN SCIENCE MONITOR, Jul. 28, 2006, at 1.

<sup>11</sup> Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. § 16901-16991 (2006)).

<sup>12</sup> See Corey Rayburn Yung, *One of These Laws is not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 378 (2009) [hereinafter “Yung I”].

<sup>13</sup> *Id.* at 370–71.

<sup>14</sup> See generally Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

<sup>15</sup> See Editorial, *The “War on Drugs” is Over*, L.A. TIMES, May 16, 2009, at A28; see also Moisés Naím, *Wasted: The American Prohibition on Thinking Smart in the Drug War*, FOREIGN POLICY, May 1, 2009, at 168.

In this article, I address four central questions in the order listed below. First, what is the difference between normal law enforcement policy and a “war” on crime? Second, assuming such a line can be discerned, has the enactment of the AWA in combination with other sex offender laws triggered a transition to a criminal war on sex criminals? Third, if such a criminal war is emerging, what will be the likely effects of such a transition? Fourth, if such a criminal war is emerging with substantial negative consequences, how can it be stopped?

## I. WHEN DOES CRIME FIGHTING BECOME WAR FIGHTING?

There is almost no theoretical work concerning when ordinary law enforcement escalates into a criminal war. While many scholars have written about the War on Drugs,<sup>16</sup> a general war on crime,<sup>17</sup> or other specific criminal wars,<sup>18</sup> the definition of a “criminal war” has largely been taken for granted. This has likely led to some overuse of the phrase since “criminal wars” have been relative rarities in the United States. It might even be contended that the difference between a “criminal war” and general law enforcement is based only upon form, not substance. However, the American experience with the War on Drugs illustrates how a criminal war should be distinguished from even the most heightened levels of ordinary law enforcement.

### A. Drug War History

While there have been other crime-fighting efforts called “wars,”<sup>19</sup> the War on Drugs stands out as the quintessential example of a war on crime in the United States.<sup>20</sup> As news of heavy drug use among American soldiers in

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<sup>16</sup> See, e.g., Wisotsky, *supra* note 14.

<sup>17</sup> See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

<sup>18</sup> See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) (discussing the embrace of harsh criminalization policies by domestic violence reformers).

<sup>19</sup> Among criminal wars in American history, the most notable are the fight against alcohol during America’s Prohibition period and the modern “War on Terror.” I chose not to focus on these two examples because they are very unusual in certain respects. Prohibition criminalized a legal activity, and therefore lacks the phenomenon of escalation present in the war on sex offenders. Furthermore, prohibition was short-lived and, importantly, occurred before the modern expansion of federal criminal law and the development of mass media. As to the “War on Terror,” there is a substantial problem in separating the actual military war from the criminal war. This distinction is even more problematic because the Bush administration largely tried to move the battle away from the criminal law environment. As a consequence of the unique characteristics of the “War on Terror” and alcohol prohibition, I have chosen to focus on the drug war as a lodestar for comparison.

<sup>20</sup> See Wisotsky, *supra* note 14, at 890 (describing “the paramilitary march of the War on Drugs”).

Vietnam reached the United States, so began the War on Drugs.<sup>21</sup> Like the War on Poverty<sup>22</sup> and other domestic wars, the War on Drugs had no specific enemy—it targeted a “noun.”<sup>23</sup> As the War unfolded, the emphasis on treatment for drug users disappeared, replaced with increased criminal penalties.<sup>24</sup> As time passed, the War on Drugs became much bigger than its relatively modest beginnings.

Even in hindsight, it is still difficult to see how America reached the present point in the drug war. In all, \$2.5 trillion government dollars have been spent and 19.9 million Americans are currently incarcerated as a result.<sup>25</sup> With recent drug violence in Mexico reaching American borders,<sup>26</sup> the United States seems to be in a worse position than when it launched Operation Intercept in 1969 to stanch the flow of drugs across the border.<sup>27</sup> Drug violence in Mexico is so prevalent that the Mexican authorities had to declare that the nation was not a “failed state,”<sup>28</sup> perhaps the surest sign that country may well be.

To understand how America arrived at this moment in the War on Drugs, it is helpful to review a few key historical points in the conflict. While the official start date of the War on Drugs was Nixon’s declaration in 1971, the war became an “all-out” conflict in 1973 when the DEA was formed out of the Bureau of Narcotics and Dangerous Drugs.<sup>29</sup> The DEA became the primary vehicle for investigating and controlling the domestic drug trade. Under President Reagan, the drug war reached new heights.<sup>30</sup> As the war expanded, the costs in personnel, money, and other resources became a substantial burden on the United States government.<sup>31</sup> To maintain public support for the effort, the government inflamed the public fears of drug use by tapping already existing myths.<sup>32</sup> In 1986, the Anti-Drug Abuse

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<sup>21</sup> Richard Moran, *Finding Fault with the War on Drugs*, CHI. TRIB., Aug. 11, 1996, at 10 (“As difficult as it may be to believe, Nixon launched America’s war on drugs after a 10- to 15-minute briefing on the use of drugs by soldiers in Vietnam.”).

<sup>22</sup> See generally DAVID ZAREFSKY, *PRESIDENT JOHNSON’S WAR ON POVERTY: RHETORIC AND HISTORY* (1986).

<sup>23</sup> Claire Suddath, *A Brief History of the War on Drugs*, TIME ONLINE, Mar. 25, 2009, available at <http://www.time.com/time/world/article/0,8599,1887488,00.html>.

<sup>24</sup> See Edward M. Shepard and Paul R. Blackley, *Drug Enforcement and Crime: Recent Evidence from New York State*, 86 SOC. SCI. Q. 2 323, 323–24 (2005).

<sup>25</sup> Suddath, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> See Naím, *supra* note 15.

<sup>28</sup> See Stephen Dinan, *Mexican Leader to Press Obama on Drug War: Emphasizes Element of U.S. Blame*, WASH. TIMES, Apr. 16, 2009, at A06.

<sup>29</sup> Suddath, *supra* note 23.

<sup>30</sup> See Erik Eckholm, *Reports Find Persistent Racial Gap in Drug Arrests*, N.Y. TIMES, May 6, 2008, at A21.

<sup>31</sup> See, e.g., Barbara Bradley, *U.S. Agents Target Foreign Outlaws, Porous Borders, and Seller-User Network at Home*, CHRISTIAN SCIENCE MONITOR, Mar. 7, 1988, at 1.

<sup>32</sup> See William Johnson, *Reagan Harnesses National Hysteria for War on Drugs*, THE GLOBE AND MAIL (Can.), Sep. 20, 1986, at D3.

Act<sup>33</sup> allocated \$1.7 billion for the conflict while establishing the system of mandatory minimum penalties for drug crimes.<sup>34</sup>

The Reagan administration also started an anti-drug propaganda campaign largely popularized by First Lady Nancy Reagan.<sup>35</sup> In particular, Mrs. Reagan's "Just Say No" slogan had societal resonance and became a rallying call for supporters of the War on Drugs.<sup>36</sup> Other private and public entities joined the Reagan propaganda campaign. The Drug Abuse Resistance Education ("D.A.R.E.") program, which started in Los Angeles, grew into a national organization.<sup>37</sup> Perhaps the most famous message disseminated during the era appeared in a commercial by the Partnership for a Drug-Free America that showed a frying egg and told viewers that the image depicted "your brain on drugs."<sup>38</sup> Despite mounting evidence that the propaganda and drug-education programs did little or nothing to abate drug use,<sup>39</sup> the efforts were deemed successful because they increased public support for the War on Drugs.<sup>40</sup>

The first Bush presidency continued Reagan-era policies.<sup>41</sup> With the end of the Cold War, the War on Drugs provided an alternative focus for some of the resources that had previously targeted the Soviet Union.<sup>42</sup> President Bush also established the Office of National Drug Control Policy and appointed as its head William Bennett, America's first "drug czar."<sup>43</sup>

The Clinton years kept the drug war on track as some of the harshest punishments for drug offenders, including use of the death penalty in non-homicide cases, were signed into law.<sup>44</sup> In 1995, the United States Sentencing Commission recommended that mandatory minimums be adjusted to diminish or eliminate what was known as the crack/cocaine disparity.<sup>45</sup> However, because of the fervor still surrounding the War on Drugs, Con-

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<sup>33</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986).

<sup>34</sup> See *Drug Wars Past and Present*, WASH. POST, Sep. 5, 1989, at A17.

<sup>35</sup> See Suddath, *supra* note 23.

<sup>36</sup> WILLIAM N. ELWOOD, *RHETORIC IN THE WAR ON DRUGS: THE TRIUMPHS AND TRAGEDIES OF PUBLIC RELATIONS 1* (1994) ("Nancy Reagan's famous utterance and Nike's equally familiar sentence that begins with the same word are perhaps the most popular slogans in the United States today.").

<sup>37</sup> Suddath, *supra* note 23.

<sup>38</sup> *Id.*

<sup>39</sup> See generally DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* (1996).

<sup>40</sup> See ELWOOD, *supra* note 36, at 3.

<sup>41</sup> See Patrick Cockburn, *Crime Plan May Bust Crowded U.S. Jails; A Crackdown on Offenders Will Only Add to Record Inmate Figures*, THE INDEPENDENT (LONDON), Apr. 7, 1994, at 14.

<sup>42</sup> Cecilia Rodriguez, *In Latin America, U.S. Drug "War" Looks Like American Hypocrisy*, L.A. TIMES, Sept. 2, 1990, at M2 ("Following the Panama invasion and the end of the Cold War with the Soviet Union, the war against drugs seemed to be a viable alternative for an American military in search of a new role.").

<sup>43</sup> Will Englund, *Will Army Of Czars March Or Meander?*, NAT. J., Feb. 14, 2009, at 1.

<sup>44</sup> 18 U.S.C. § 3591(b) (2006).

<sup>45</sup> Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 250 (2007).

gress, for the first time, rejected the Commission's recommendation.<sup>46</sup> The Clinton administration claimed many successes in the War on Drugs, but statistical evidence did not support those conclusions.<sup>47</sup> Nonetheless, federal efforts in support of the criminal war were expanded based upon those supposed victories.<sup>48</sup>

While the War on Terror became the highest priority for the second Bush presidency, investment in the failing drug war continued.<sup>49</sup> President Bush pledged to decrease drug use among Americans by 25%.<sup>50</sup> While marijuana use declined by 6%, use of the other major drugs increased during the same period.<sup>51</sup> National drug policy forged ahead, despite the lack of data available to evaluate its effectiveness.<sup>52</sup> As with many other reports before, the government did not alter its course.

### B. *Characteristics of Criminal Wars*

The War on Drugs presents nearly forty years of policy, public reaction, and law to examine. From the drug war experience, three essential elements of a criminal war emerge: marshalling of resources, myth creation, and exception making. The first two are prerequisites for the war to begin, and the third is an inevitable result. They are each discussed below in turn.

#### 1. *Marshalling of Resources*

One of the clearest signs that a war has truly begun is that the government provides a substantial budget, seeks to employ persons to fight, and attempts to find political support for the use of these resources. This is as true in fighting an international war as it is in fighting a criminal war. The direct cost of the War on Drugs, estimated at \$2.5 trillion, paints only part of the picture.<sup>53</sup> One record places the cost of the War on Drugs at \$600 per

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<sup>46</sup> Christopher S. Wren, *Study Questions Cost of Shift to Harsh Cocaine Sentences*, N.Y. TIMES, May 13, 1997, at A14.

<sup>47</sup> See MATTHEW B. ROBINSON & RENEE G. SCHERLEN, LIES, DAMNED LIES, AND DRUG WAR STATISTICS: A CRITICAL ANALYSIS OF CLAIMS MADE BY THE OFFICE OF NATIONAL DRUG CONTROL POLICY 198 (2007) ("Taken together, all these findings suggest the Office of National Drug Control Policy (ONDCP) failed from 1989 to 1998 to achieve its goals of reducing drug use, healing drug users, disrupting drug markets, and reducing health and social costs to the public. Yet during this same time period, funding for the drug war grew tremendously and costs of the drug war expanded as well.").

<sup>48</sup> *Id.*

<sup>49</sup> Reynolds Holding, *Taking the Rap for Drug-Taking Grandson*, S.F. CHRON., Feb. 17, 2002, at D3 ("The drug war is one of the Bush administration's defining policies . . .").

<sup>50</sup> Suddath, *supra* note 23.

<sup>51</sup> *Id.*

<sup>52</sup> See NAT'L RESEARCH COUNCIL, INFORMING AMERICA'S POLICY ON ILLEGAL DRUGS: WHAT WE DON'T KNOW KEEPS HURTING US 276 (Charles F. Manski et al. eds., 2001) ("Throughout this report, the committee has repeatedly concluded that essential policy-relevant data are missing or inadequate.").

<sup>53</sup> Suddath, *supra* note 23.

second in 2003.<sup>54</sup> America's prisons are filled with persons captured as part of the war.<sup>55</sup> Indeed, without the drug war, America would not have the ignominious label of being the country with the most persons incarcerated per capita.<sup>56</sup> Someone in the United States is arrested for a drug crime every twenty seconds.<sup>57</sup> Nearly two million people are arrested for non-violent drug crimes every year.<sup>58</sup>

The drug war largely began when the Nixon Administration decided to make it a high priority item through the allocation of government resources.<sup>59</sup> The Reagan administration escalated the conflict again through the allocation of more resources to the effort.<sup>60</sup> Without this intentional diversion of resources, no criminal war can occur. The money and other capital provide the means for turning law enforcement into a war-fighting effort.

The marshalling of resources is also found in the way the legal regime surrounding the criminal war is constructed. In the War on Drugs, the establishment of an agency, the Bureau of Narcotics and Dangerous Drugs, was significant because the agency hired a substantial number of law enforcement agents to focus solely on drug investigations and arrests.<sup>61</sup> The federalization of drug laws with the passage of the Comprehensive Drug Abuse Prevention and Control Act replaced the disorganized, piecemeal approaches that made a criminal war unsustainable.<sup>62</sup> Although there have been amendments and supplements to the main War on Drugs statutes, the basic legal architecture for the conflict was in place even before the formal declaration of war.

## 2. *Myth Creation*

The drug war has featured the creation of substantial myths about the danger of procuring and using various illegal drugs. The myths have been supported by rhetoric that in turn has constructed both the contours and de-

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<sup>54</sup> Indeed, one can view a "Drug War Clock" that counts the allocations to the conflict on a per second basis (*available at* <http://www.drugsense.org/wodclock.htm>).

<sup>55</sup> Kristof, *infra* note 81. ("The United States now incarcerates people at a rate nearly five times the world average. In part, that's because the number of people in prison for drug offenses rose roughly from 41,000 in 1980 to 500,000 today. Until the war on drugs, our incarceration rate was roughly the same as that of other countries.").

<sup>56</sup> *Letterman vs. Palin: Spies Hiding Among Us?* (CNN television broadcast Jun. 11, 2009) ("We rank first in the world in per capita incarceration of fellow citizens. The drug war is what's driving this.").

<sup>57</sup> Timothy Lynch, *War No More: The Folly and Futility of Drug Prohibition*, NAT. REV., Feb. 5, 2001, at 40 (quoting Timothy Egan, *War on Crack Retreats, Still Taking Prisoners*, N.Y. TIMES, Feb. 28, 1999, at 1).

<sup>58</sup> Kimberley A.C. Wilson, *New Drug Czar Says War on Drugs a National Health Issue*, THE OREGONIAN (Portland, Or.), May 26, 2009.

<sup>59</sup> See Kalb, *supra* note 1.

<sup>60</sup> See Eckholm, *supra* note 30.

<sup>61</sup> See *Sleuth Army*, *supra* note 3.

<sup>62</sup> See Yacoubian, *supra* note 6, at 22.

tails of a criminal war.<sup>63</sup> They were disseminated through a variety of media and created an environment that fueled continued support for the allocation of substantial government resources to the War on Drugs.<sup>64</sup> Whether this propaganda effort was warranted is beside the point—the key issue is that government went above and beyond traditional crime-fighting techniques when it utilized propaganda as part of law enforcement.

A variety of advertising campaigns created a series of myths about drugs, including a recent campaign which stated that purchasers of marijuana were facilitating terrorism around the world.<sup>65</sup> This connection is tenuous at best.<sup>66</sup> Further, a powerful argument by legalization advocates has been that the War on Drugs creates drug-sponsored terrorism, which would not exist absent the aggressive U.S. campaign against illegal drugs.<sup>67</sup>

These government facilitated myths, encouraged the demonization of drug suppliers and, in many cases, users.<sup>68</sup> This propaganda bears some similarities to efforts by the government in international military conflicts. In those cases, demonization of the enemy, exaggeration of harms, and misstatements about the state of the world are common. The same characteristics can be identified in criminal wars.

For example, after President Nixon made his initial declaration of war, he stated that drugs were “public enemy [number] 1.”<sup>69</sup> The entire campaign of the War on Drugs was filled with language more commonly found during armed conflicts.<sup>70</sup> This language has repeatedly served to reinforce the assumptions of the war in the public’s mind while creating the reality of the criminal war itself. William Elwood explained that:

One rhetorical idea that applies to . . . the War on Drugs is *condensation symbols*: names, words, phrases, or maxims that evoke discrete, vivid impressions in each listener’s mind and also involve the listener’s most basic values . . . . *War* is a potent condensation symbol that connotes heroes and enemies, battles and battlefields,

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<sup>63</sup> CURTIS MAREZ, *DRUG WARS: THE POLITICAL ECONOMY OF NARCOTICS* 8 (2004) (“[T]he war on drugs is inseparable from its mass mediation. . . . [T]he media helps to construct the war on drugs by representing it.”).

<sup>64</sup> *Id.* at 3 (“[M]yriad forms of mass and popular culture helped to construct the war on drugs as an object of broad public interest . . . . The pervasiveness of the war on drugs across a variety of media has helped make drug enforcement a taken-for-granted part of social reality.”).

<sup>65</sup> Matt Welch, *Obama Loses His “Cool”: With His Glib Dismissal of Pot Legalization, the President Looks Less Like the Man, and More Like The Man*, REASON, Jun. 1, 2009, at 2, 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Cf. Focus on Impact of Drugs*, COURIER MAIL, Dec. 3, 2001, at 3.

<sup>68</sup> ELWOOD, *supra* note 36, at 15.

<sup>69</sup> James M. Markham, *President Calls For ‘Total War’ on U.S. Addiction*, N.Y. TIMES, Mar. 21, 1972, at 1.

<sup>70</sup> See, e.g., ELWOOD, *supra* note 36, at 26–27 (describing the use of war rhetoric in the drug context by both President Reagan and President George H.W. Bush).

and war-sized allocation of resources to guarantee ultimate victory over the enemy.<sup>71</sup>

War rhetoric in particular involves a multi-faceted public discourse wherein the population is exposed to the warrants for the conflict through a variety of mediums. For example, television advertisements, television episodes, movies, news reports from various sources, local activist groups, and bumper stickers combine to send messages justifying a war.<sup>72</sup>

Politicians and the media have not been the only sources for drug war myths and rhetoric. Notably, the Supreme Court has adopted the idea that the War on Drugs creates special circumstances which warrant different rules. The majority opinion in *Board of Education v. Earls*, held that drug testing of students participating in extracurricular activities was constitutional because the “drug epidemic makes the war against drugs a pressing concern in every school.”<sup>73</sup> In *Morse v. Frederick*, the Court held that there was no infringement of a student’s right to free speech based upon his suspension for displaying a banner reading “BONG HITS 4 JESUS” due to Congress’ decision to give unique status to the war on drugs.<sup>74</sup> Similar reasoning led Justice John Paul Stevens to write, “[n]o impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary . . . this Court has become a loyal foot soldier in the Executive’s fight against crime.”<sup>75</sup>

The tone, messages, and effects of war rhetoric differ from that used in ordinary law enforcement which is not explained to the public in the same manner. The purpose of these rhetorical techniques in the drug war context is to maintain public consent, if not active support, for the conflict.<sup>76</sup> As one commentator recently noted, the policy effects of drug war rhetoric have been substantial:

Rhetoric matters. The *drug war* imagery started by Nixon, subdued by Carter, then ratcheted up again in the Reagan administration (and remaining basically level since) has had significant

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<sup>71</sup> *Id.* at 4–5 (emphasis in original).

<sup>72</sup> *See id.* at 8 (“In one day, a television viewer might see a Partnership for a Drug-Free America public service announcement juxtaposed with a news clip of Nancy Reagan saying ‘no’ while she visits a drug bust, a sidebar on airline pilots and cocaine use, and a community service announcement regarding a schedule of Alcoholics Anonymous meetings.”).

<sup>73</sup> 536 U.S. 822, 834 (2002).

<sup>74</sup> 551 U.S. 393, 408 (2007) (“Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs . . . . The special characteristics of the school environment and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.” (internal citations omitted)).

<sup>75</sup> *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

<sup>76</sup> ELWOOD, *supra* note 36, at 10 (“[T]he definition of *public relations* that emanates from this work is, the strategic use of rhetoric to engineer people’s consent to issues and to the influence such issues and policymakers have on society.”) (emphasis in original).

repercussions on the way drug policy is enforced, from policymakers on down to street-level cops. [It is] war rhetoric that gave us the Pentagon giveaway program, where millions of pieces of surplus military equipment (such as tanks) have been transferred to local police departments. War imagery set the stage for the approximately 1,200 percent rise in the use of SWAT teams since the early 1980s, and has fostered the militaristic, “us vs. them” mentality too prevalent in too many police departments today. War implies a threat so existential, so dire to our way of life, that we citizens should be ready to sign over some of our basic rights, be expected to make significant sacrifices, and endure collateral damage in order to defeat it.<sup>77</sup>

An empirical study showed that Presidential rhetoric in particular had “real and substantial” effects on the priorities of law enforcement and directly resulted in more drug arrests.<sup>78</sup> Further, the government continued to claim victories in the ongoing conflict by distorting and misrepresenting evidence.<sup>79</sup> The media often served to reinforce the messages of the government, enabling the criminal war to grow.<sup>80</sup>

Notably, the new “drug czar” in the Obama administration has rejected the use of “war” rhetoric, and many have seen this as a sign that the conflict is finally deescalating.<sup>81</sup> Without the underlying rhetoric and myths being propagated, the attempts to diminish drug use in the United States can return to the domain of ordinary law enforcement.

### 3. *Exception Making*

As in international wars, criminal wars are marked by deviations from normal codes of conduct. With the recent international War on Terror, there have been debates about the permissibility of torture, inapplicability of the Geneva Conventions, application of the Foreign Intelligence Surveillance Act, and the utilization of private corporations in acquiring personal infor-

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<sup>77</sup> Radley Balko, *More on Drug Czar’s Bid To End War on Drugs*, REASON HIT & RUN, May 14, 2009, available at <http://reason.com/blog/show/133496.html>.

<sup>78</sup> Jeff Yates & Andrew Whitford, *Race in the War on Drugs: The Social Consequences of Presidential Rhetoric* 26, 31 (3rd Annual Conference on Empirical Legal Studies Papers), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120063](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120063).

<sup>79</sup> ROBINSON & SCHERLEN, *supra* note 47, at 186 (“ONDCP ignores clear evidence of substitution from some illicit drugs to others when claiming declines in drug use . . . . ONDCP selectively uses statistics to prove a point, even when examination of all drug use statistics (and especially the most relevant) does not warrant the conclusion.”).

<sup>80</sup> ELWOOD, *supra* note 36, at 130 (“news media scarcely question the presidential portrayal of the drug war.”); see also MAREZ, *supra* note 63, at 2.

<sup>81</sup> Nicholas D. Kristof, *Drugs Won the War*, N.Y. TIMES, Jun. 14, 2009, at WK10 (“President Obama’s new drug czar, Gil Kerlikowske, told the Wall Street Journal that he wants to banish the war on drugs phraseology, while shifting more toward treatment over imprisonment.”).

mation of citizens.<sup>82</sup> The mentality of exception making in the War on Terror culminated in the oft-stated belief that “the Constitution is not a suicide pact.”<sup>83</sup> Thus, constitutional guarantees of liberty were to be sacrificed when policymakers perceived a threat to national security.

Similarly, in criminal wars, exceptions are crafted into normal law enforcement rules. In the constitutional context, it has been argued extensively that the War on Drugs has created a substantial set of exceptions to the Fourth,<sup>84</sup> Fifth,<sup>85</sup> Sixth,<sup>86</sup> Eighth,<sup>87</sup> and Fourteenth Amendments.<sup>88</sup> However, the First Amendment’s protections for speech<sup>89</sup> and free exercise of religion<sup>90</sup> have also been subject to unusual exceptions due to the drug war. Even the

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<sup>82</sup> See generally Dan Froomkin, *The Outlaw Presidency*, WASH. POST., Jul. 14, 2008, available at [http://busharchive.froomkin.com/BL2008071401091\\_pf.htm](http://busharchive.froomkin.com/BL2008071401091_pf.htm).

<sup>83</sup> See generally, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (discussing marginal adjustments made to civil liberties when they come into conflict with equally important values such as public safety during a time of national emergency).

<sup>84</sup> Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U.L. REV. 557, 603–05 (1998) (“The impact of the drug war on the scope of Fourth Amendment protection from unreasonable search and seizure has been dramatic. Intensified law enforcement efforts involving wiretaps, as well as innovations in search and seizure such as police saturation patrols and street sweeps, drug courier profiles, aerial surveillance, drug testing, thermal surveillance, and the demise of the ‘knock and announce’ rule, all justified by the exigencies of the War on Drugs, have significantly encroached on Fourth Amendment protections of personal privacy.”); see also Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search any Car at any Time*, 47 VILL. L. REV. 815 (2002); Michael J. Reed, Jr., *Florida v. Bostick: The Fourth Amendment Takes a Back Seat to the Drug War*, 27 NEW ENG. L. REV. 825 (1993).

<sup>85</sup> Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2612 (1994) (“the property rights acknowledged by the Fifth Amendment have been greatly undermined by civil asset forfeitures. When the drug war finally ends, these rights and freedoms will only be regained with great struggle.”).

<sup>86</sup> Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665, 668 (2003) (“Sixth Amendment rights have also been whittled down to fight the War on Drugs. Those accused of selling drugs have no right to confront their accuser, presumably to protect informants, even though the Sixth Amendment clearly states that ‘the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him.’”).

<sup>87</sup> *Id.* at 668–69 (“Traditionally, the Eighth Amendment’s ban on ‘cruel and unusual punishments’ has been used to require that any punishment is proportional to the crime committed. Mandatory minimums have taken away judicial discretion in sentencing and mock the idea of proportional punishment. In 1997, a low-level crack dealer on a first offense charge would have served ten years and six months, while a weapons charge would have earned seven years and seven months and rape would have earned a mere six years and five months.”).

<sup>88</sup> Robert Michael Dykes, *Cache and Prizes: Drug Asset Forfeiture in California*, 20 W. ST. U. L. REV. 633, 646 (1993) (“Our cornerstone of legal rights, the Constitution, particularly the Fourth, Fifth, Sixth and Fourteenth Amendments, has suffered serious erosion in the name of the ‘War on Drugs.’”).

<sup>89</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (limiting student speech rights when certain drug speech is involved).

<sup>90</sup> *Tom C. Rawlings, Employment Division, Department of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567, 593 (1991).

right to bear arms under the Second Amendment has not been unscathed by the War on Drugs.<sup>91</sup>

The drug war also expanded to federal criminal jurisdiction in ways that required another exception to federalism doctrines.<sup>92</sup> Outside of the constitutional context, law enforcement was given a variety of weapons unique to the drug war context. The emergence of heavily armed SWAT teams, inter-departmental and inter-governmental coordination, aerial surveillance, and extensive sting operations are the result of the War on Drugs.<sup>93</sup> Further, the growth of federal criminal law can largely be attributed to the desire to stamp out drug distribution and use in the United States.<sup>94</sup>

This exception-making attribute of criminal wars has long-term effects beyond the immediate scenarios which were used to justify the exceptions. Once the government gained the exceptional tools used in the drug war, it was able to use those tools in other contexts as well. The constitutional and non-constitutional exceptions eventually became rules. Now, SWAT teams are utilized in a variety of situations, the Fourth Amendment has lost its force in many cases, the federal government is free to pass criminal laws with little concern about overreaching under the Commerce Clause, and undercover operations are used for any high-priority law enforcement project. What started as exceptions supported by “unique” circumstances have become tools available outside of the drug war context. With signs that the War on Drugs might be abating, some are already wondering who or what the next war will target.<sup>95</sup>

## II. IS THERE AN EMERGING WAR ON SEX OFFENDERS?

Is the growing regime of laws, resources, and myths aimed at sex offenders similar to the War on Drugs? The parallels are striking in many regards.<sup>96</sup> The significance of the AWA’s changes in sex offender restrictions

<sup>91</sup> Robert J. Cottrol, *Criminal Justice and Other Programs: Submission is not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1032 n.8 (1998).

<sup>92</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that there was federal jurisdiction under the Commerce Clause to regulate marijuana that had not and would not enter an interstate market).

<sup>93</sup> See generally Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383 (2003) (noting that, to fight the war on drugs, Congress “encouraged greater interface between the military and law enforcement . . .”).

<sup>94</sup> See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 39 (2003).

<sup>95</sup> See, e.g., Simple Justice, <http://blog.simplejustice.us/2009/05/16/who-will-be-the-next-enemy.aspx> (May 16, 2009).

<sup>96</sup> There are certainly differences as well. As mentioned above, linguistically, the War on Drugs was a war on things whereas an arguable War on Sex Offenders would be a conflict against people. This distinction, however, is not terribly important as the War on Drugs has become, in many respects, a criminal war on certain portions of the population. See generally Cooper, *supra* note 84. The War on Drugs also had a greater foreign component than any attempt to crackdown on sex offenders, although attempts to regulate child pornography may

cannot be overstated. While the state and local efforts severely limited the lives of sex offenders, the federal government's entry parallels its actions in the years leading up to the War on Drugs. Based upon a review of the federal, state, and local law, all three elements of a criminal war are present. Notably, the campaign against sex offenders is already further along in many respects than was the drug war before Nixon's declaration of war.

### A. *Marshalling of Resources*

The legal architecture for a War on Sex Offenders far exceeds what was present at the advent of the War on Drugs. The laws supporting the crack-down on sex offenders are administered and enforced by a nationwide array of law enforcement officers and prosecutors.<sup>97</sup> A recent appropriations bill allocated funds to hire 150 deputy U.S. Marshals who will be solely dedicated to enforcing the Sex Offender Registration and Notification Act ("SORNA").<sup>98</sup> Given that this may only be the starting point for resource allocation, a War on Sex Offenders could easily cost more than the War on Drugs. The federal criminal justice system, as a result of the War on Drugs, has largely been oriented toward prosecuting drug users and distributors.<sup>99</sup> Until the 1990s, sex crimes and sex offender monitoring had been the province of state and local governments, and not the federal government.<sup>100</sup> The result has been an amalgam of laws that have increasingly punished certain sex-related crimes and drastically increased post-incarceration regulation of sex offenders.<sup>101</sup>

#### 1. *State and Local Laws*

The degree to which the lower-level governments have targeted sex offenders, as distinct from other criminals, is notable. There is a vast array of regulations on sex offenders in different states and localities. Every state has

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diminish that difference. Press Release, Dep't of Justice, Department of Justice Announces Ongoing Global Enforcement Effort Targeting Child Pornographers (Dec. 12, 2008) (*available at* <http://www.justice.gov/opa/pr/2008/December/08-crm-1095.html>). To appreciate the similarities between the War on Drugs and the present crackdown on sex offenders, it is helpful to fully understand the incredible number of laws and punishments aimed at a relatively small portion of America's population—sex offenders.

<sup>97</sup> See Wayne Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 4, 15 (2008) [hereinafter "Logan II"].

<sup>98</sup> 42 U.S.C. § 16911 *et seq.* (2006); Press Release, U.S. Senator Barbara Mikulski, Sen. Mikulski Announces Final Senate Passage of Bill Putting Funds in Federal Checkbook to Improve Community Security (Dec. 18, 2009) (*available at* <http://mikulski.senate.gov/record.cfm?id=320810>).

<sup>99</sup> See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 80 n.165 (1998).

<sup>100</sup> Logan II, *supra* note 97, at 4–5.

<sup>101</sup> See *id.* at 5–8.

a sex offender registration system in place.<sup>102</sup> These registration provisions are supplemented with community notification when sex offenders move into neighborhoods.<sup>103</sup> In some places, a person can sign up for email notification so that the community knows the moment a sex offender has moved into the area.<sup>104</sup> In thirty states, sex offenders are limited as to where they may live through residency restrictions.<sup>105</sup> Those restrictions are supplemented with Global Positioning System (“GPS”) monitoring in several jurisdictions.<sup>106</sup> Residency restrictions prevent offenders from living near a variety of locations, including: parks, daycare centers, schools, and other locations where children might gather.<sup>107</sup> Several residency restrictions also contain provisions which prohibit sex offenders from even travelling near some of the above-listed locations.<sup>108</sup> In the aggregate, such residency restrictions often result in homelessness<sup>109</sup> and amount to banishment.<sup>110</sup>

At least twenty states have created provisions allowing sex offenders to be sent to civil facilities for “treatment” after release from prison.<sup>111</sup> Release from the facilities is rare and placement within the facilities typically amounts to a lifetime sentence.<sup>112</sup> Many states have simply removed the need for post-release regulation by making sex crimes punishment extremely harsh.<sup>113</sup> Until the United States Supreme Court, in *Kennedy v. Louisiana*,<sup>114</sup> held the practice unconstitutional, several states had enacted laws to make child rape a capital crime.<sup>115</sup> Other states have drastically increased prison

<sup>102</sup> *Smith v. Doe*, 538 U.S. 84, 90 (2003).

<sup>103</sup> HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S.* 50 (2007) [hereinafter “NO EASY ANSWERS”].

<sup>104</sup> *See id.*, at n.155.

<sup>105</sup> Paula Reed, *Residency Restrictions for Sex Offenders Popular, but Ineffective*, PITTSBURGH POST-GAZETTE, Oct. 26, 2008, at B1.

<sup>106</sup> Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 124 (2007) [hereinafter “Yung II”].

<sup>107</sup> NO EASY ANSWERS, *supra* note 103, at 100.

<sup>108</sup> *See id.* at 139–41.

<sup>109</sup> *See id.* at 8, 102.

<sup>110</sup> *See, e.g., Yung II, supra* note 106, at 124 n.189.

<sup>111</sup> Meaghan Kelly, *Lock Them Up – And Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT’L L. 551, 552–53 (“Today 20 states have [Sexually Violent Predator] laws, providing for the indefinite detention of about 2,700 offenders.”).

<sup>112</sup> *Id.* at 560 (“The soundness of SVP laws depends on accurate risk predictions, especially because of the amount at stake—very few of those committed are released, thus amounting to lifetime confinement.”).

<sup>113</sup> *See* Michael O’Hear, *Perpetual Panic*, 21 FED. SENT’G REP. 69, 71 (2008).

<sup>114</sup> 128 S. Ct. 2641 (2008).

<sup>115</sup> *Id.* at 2651 (“Five States have since followed Louisiana’s lead [in imposing the death penalty for rape of a child]: Georgia, *see* GA. CODE ANN. § 16-6-1 (2007) (enacted 1999); Montana, *see* MONT. CODE ANN. § 45-5-503 (2007) (enacted 1997); Oklahoma, *see* OKLA. STAT., TIT. 10, § 7115(K) (West 2007 Supp.) (enacted 2006); South Carolina, *see* S.C. CODE ANN. § 16-3-655(C)(1) (Supp. 2007) (enacted 2006); and Texas, *see* TEX. PENAL CODE ANN. § 12.42(c)(3) (West Supp. 2007) (enacted 2007); *see also* TEX. PENAL CODE ANN. § 22.021(a) (West Supp. 2007).”).

sentences on certain sex crimes.<sup>116</sup> Arizona, for example, requires that someone who possesses child pornography serve a mandatory minimum of ten years in prison for each illegal image possessed.<sup>117</sup> Notably, because each ten-year term must be served consecutively, such criminals will almost universally serve life sentences regardless of the particular circumstances involved in their cases.<sup>118</sup> At least eight states have revived the use of chemical castration as part of their sentencing schemes.<sup>119</sup>

While registration, residency restrictions, civil commitment, and harsh sentences have received the most attention, those regulations and punishments are just some examples of the policies that have been debated and adopted across the country. In Florida, some localities have barred sex offenders from hurricane shelters during a natural disaster.<sup>120</sup> Some governments have considered requiring specially-colored license plates to identify sex offenders on the road.<sup>121</sup> Other proposals would create criminal liability for third parties who facilitate sex offenders in some manner.<sup>122</sup> Sex offenders have had their online privacy and communication significantly curtailed. For a term of life, some jurisdictions require sex offenders to disclose their email addresses and any other online identifications to government authorities.<sup>123</sup> Their every online move and communication can be fully surveyed for the rest of their lives. In response to pressure by state prosecutors, online

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<sup>116</sup> John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 410–11 (1999) (“Most states have increased criminal sentences for convicted sex offenders and more sex offenders are actually serving longer prison terms. Some states have passed mandatory life sentences for certain sex offenders.”).

<sup>117</sup> Amir Efrati, *Making Punishments Fit the Most Offensive Crimes*, ASSOCIATED PRESS FINANCIAL WIRE, Oct. 23, 2008 (describing how a teacher with no prior criminal record was sentenced to 200 years in prison for twenty counts of possession). For a fuller discussion of the problems associated with child pornography sentences, see Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH U. L. REV. (forthcoming 2010).

<sup>118</sup> See Efrati, *supra* note 117.

<sup>119</sup> John Gramlich, *Lawsuits Test Crackdown on Sex Criminals*, STATELINE.ORG, Apr. 18, 2008, available at <http://www.stateline.org/live/details/story?contentId=302066>.

<sup>120</sup> NO EASY ANSWERS, *supra* note 103, at 104.

<sup>121</sup> Reginald Fields, *Device Would Send Alert if Sex Offender Nears User*, CLEV. PLAIN DEALER, Dec. 5, 2007, at A1 (“He noted that a bill that would force sex offenders to display bright green license plates on their cars lost momentum this year . . .”); Daniel Thompson, Letter to the Editor, *Requiring Sex Offender License Plates is Cruel and Unusual Punishment*, THE CAPITAL TIMES (Madison, Wis.), May 14, 2007, at A9.

<sup>122</sup> Susannah Bryan, *Davie Law Targets Landlords Renting to Sex Offenders*, SOUTH FLA. SUN-SENTINEL, Jan. 21, 2009, available at [http://articles.sun-sentinel.com/2009-01-21/news/0901200422\\_1\\_sarah-lunde-offenders-and-predators-landlords](http://articles.sun-sentinel.com/2009-01-21/news/0901200422_1_sarah-lunde-offenders-and-predators-landlords) (“A proposed town law would allow property owners to be fined or jailed if they rent to convicted sex offenders and predators in violation of residency restrictions.”); Robert Morgan, *Jindal Continues Efforts Against “Sex Offenders”*, DAILY TOWN TALK (Alexandria, La.), Jan. 31, 2009, at 8A (“Jindal told an audience in Shreveport that he would make it a crime for a day care owner to knowingly allow a sex offender onto the premises of the facility.”).

<sup>123</sup> See, e.g., UTAH CODE ANN. §§ 77-27-21.5(1)(j), 77-27-21.5(14)(i) (2008).

social networking sites have purged sex offenders entirely.<sup>124</sup> In some cases, sex offenders have been barred any access to computers.<sup>125</sup>

Enabled by an angry public and legislators, judges and police have supplemented local laws with a variety of innovative punishments and regulations. Sex offenders have been forced to wear signs or clothing designating their criminal history.<sup>126</sup> Other offenders have had to place signs disclosing their crimes on the side of their houses.<sup>127</sup> It has become common practice across America to put sex offenders under a complete lockdown every year on Halloween.<sup>128</sup>

Importantly, while sexual violence continues to be a problem around the world, only the United States has enacted such laws and ordinances.<sup>129</sup> Only a small handful of nations have adopted registration requirements (normally without corresponding community notification provisions).<sup>130</sup> None of the other laws and policies discussed above has been emulated in other countries.<sup>131</sup>

## 2. *The AWA and Other Federal Laws*

The state and local laws have illustrated the political popularity of sex offender restrictions.<sup>132</sup> It should not, then, have been surprising that federal legislators followed the lead of their state counterparts. The first significant federal sex offender restriction legislation was the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act, enacted in

<sup>124</sup> Verne Kopytoff & Ryan Kim, *The Tech Chronicles*, S.F. CHRON., Feb. 4, 2009, at C4 (describing efforts by MySpace and Facebook).

<sup>125</sup> See, e.g., Tamara Race, *Guilty Verdict in Child Porn Case*, THE PATRIOT LEDGER (Quincy, MA), Jan. 10, 2009, at 10.

<sup>126</sup> See, e.g., Susannah A. Nesmith, *Judge Lets Signs Spell Sex Crimes*, PALM BEACH POST, Nov. 9, 1996, at 1B.

<sup>127</sup> See, e.g., Pat Reavy, *Seminar's Focus: Recent Gang Trends*, DESERET NEWS (Salt Lake City, Utah), Apr. 22, 2003, at B04 ("Poe has been featured on '20/20,' '60 Minutes' and 'Dateline' for his unique sentencing techniques such as . . . forcing convicted sex offenders to put signs on their houses telling of their convictions.").

<sup>128</sup> See, e.g., Beth Walton, *Halloween Safety No. 1 Priority*, LAS VEGAS REVIEW-JOURNAL, Oct. 28, 2007, at 1B (describing efforts in Las Vegas, which included preventing level 2 and 3 sex offenders from accompanying even their own children while trick-or-treating).

<sup>129</sup> See NO EASY ANSWERS, *supra* note 103, at 10.

<sup>130</sup> *Id.* ("To our knowledge, six other countries (Australia, Canada, France, Ireland, Japan, and the United Kingdom) have sex offender registration laws, but the period required for registration is usually short and the information remains with the police. South Korea is the only country other than the United States that has community notification laws.").

<sup>131</sup> *Id.*

<sup>132</sup> Lee Rood, *Culver's Offender Plan Spurs Legality Doubts*, DES MOINES REGISTER, Apr. 8, 2009, at 1A ("More and more stringent restrictions on sex offenders have become increasingly popular in the last decade.").

1994.<sup>133</sup> The law conditioned law enforcement funding to states upon having a registration system in place.<sup>134</sup>

However, it was in 2006, with the passage of the AWA, that the federal government assumed a prominent role in sex offender policy. The AWA, as passed, was formed from a conglomeration of bills that were before Congress at the time.<sup>135</sup> Most notable among the Act's various provisions were the establishment of the new crime of failure to register,<sup>136</sup> a requirement that the Attorney General establish a national registry,<sup>137</sup> a new civil commitment system at the federal level,<sup>138</sup> increased sentences for a variety of crimes,<sup>139</sup> severe limitations on bail for certain sex offenders,<sup>140</sup> and new discovery rules in child pornography cases.<sup>141</sup> Each of these measures was a substantial departure from prior federal policy.

Title I of the AWA, also known as "SORNA," contains the federal registration requirements of the AWA. SORNA requires registration of every sex offender, defined as "an individual who was convicted of a sex offense," in the United States.<sup>142</sup> Offenders are further divided into a tiered structure based upon the severity of offenses committed. The AWA also required the creation of a national registry of sex offenders by 2009.<sup>143</sup>

The registration obligations of SORNA are explicitly detailed at 42 U.S.C. § 16913 which states that a sex offender must register in any jurisdiction where she resides, works, or is a student.<sup>144</sup> Within three business days of any change in name, residence, employment, or student status, the sex offender must appear in person to change the relevant registry information.<sup>145</sup> If an offender fails to keep his or her registration accurate and current, she could be prosecuted under the new crime of failure to register at 18 U.S.C. § 2250(a) with a maximum penalty of ten years imprisonment. When the Act was passed, it was unclear if the registration requirements would extend to sex offenders who committed crimes before the passage of

<sup>133</sup> Violent Crime Control And Law Enforcement Act Of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2038-42 (1994) (codified at 42 U.S.C. § 14071 (2006)).

<sup>134</sup> Wayne Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 280 (2005) [hereinafter "Logan III"].

<sup>135</sup> Press Release, White House Office of the Press Sec'y, Fact Sheet: The Adam Walsh Child Protection And Safety Act Of 2006 (July 27, 2006) (available at <http://georgewbushwhitehouse.archives.gov/news/releases/2006/07/20060727-7.html>).

<sup>136</sup> 18 U.S.C. § 2250(a) (2006).

<sup>137</sup> 42 U.S.C. § 16920 (2006).

<sup>138</sup> 18 U.S.C. § 4248(a) (2006).

<sup>139</sup> 18 U.S.C. § 3559(f)(1) (2006); 18 U.S.C. § 1591(b)(1) (2006); 18 U.S.C. § 2241(c) (2006); 18 U.S.C. § 2242 (2006); 18 U.S.C. § 2243(b) (2006); 18 U.S.C. § 2244(a)(5) (2006); 18 U.S.C. §§ 2422(b), 2423(a) (2006); 18 U.S.C. § 2251(e) (2006); 18 U.S.C. § 2252B (2006); 18 U.S.C. § 2260(c)(1) (2006); 18 U.S.C. § 2258 (2006).

<sup>140</sup> 18 U.S.C. § 3142 (2006).

<sup>141</sup> 18 U.S.C. § 3509(m)(1)-(2) (2006).

<sup>142</sup> 42 U.S.C. § 16911(1) (2006).

<sup>143</sup> 42 U.S.C. § 16919 (2006).

<sup>144</sup> 42 U.S.C. § 16913(a) (2006).

<sup>145</sup> 42 U.S.C. § 16913(c) (2006).

the Act. However, in February 2007, the Attorney General issued a rule applying the requirements retroactively. Further, the Act created the Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking Office ("SMART") which was charged with administering SORNA and issuing guidelines to be used in the implementation of SORNA.<sup>146</sup>

Beyond the new crime of failure to register, the AWA also added several other new crimes and increased punishments for existing crimes. Under the Act, the crime of Child Exploitation Enterprise, with a mandatory minimum of twenty years imprisonment, applies to persons who, "as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim . . . commits those offenses in concert with three or more other persons."<sup>147</sup> While it is unclear how prosecutors will use the statute, it seemingly provides a RICO analogue specific to sex crimes. Another provision provides substantial criminal penalties for someone who embeds a website to trick a person into viewing obscene material.<sup>148</sup>

In the bill, the federal crime of kidnapping was expanded to include all instances where a defendant crossed state lines or used any instrumentality of interstate commerce during the commission or in furtherance of the kidnapping.<sup>149</sup> Obscenity prohibitions were similarly expanded to cover more intrastate conduct.<sup>150</sup> Thus, even in instances where the illicit conduct was wholly within one state, the federal government could assert jurisdiction. In Indian Country, child abuse and neglect became a federal crime.<sup>151</sup>

As noted above, the AWA has also created an executive branch organization, SMART, to enforce and administer parts of the statute. While it is far smaller than the current DEA, there is reason to expect that SMART's funding and influence might grow in the future. Consider that in the initial economic stimulus package proposed last year there was \$50 million budgeted for enforcing the SORNA provisions of the AWA.<sup>152</sup> As the package was eventually cut back to remove "pork," the AWA funds were not ultimately allocated. However, even in these dire economic times, the Obama administration has proposed a new allocation of \$381 million so that fifty United States Marshals can be hired to enforce the AWA.<sup>153</sup> Thus far, key members of Congress have been inclined to allocate funds to hire twice as

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<sup>146</sup> 28 C.F.R. § 72.3 (2007) (The rule stated that, "[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act.").

<sup>147</sup> 18 U.S.C. § 2252A(g) (2006).

<sup>148</sup> 18 U.S.C. § 2252C(a) (2006).

<sup>149</sup> 18 U.S.C. § 1201(a)(1) (2006).

<sup>150</sup> 18 U.S.C. §§ 1465, 1466 (2006).

<sup>151</sup> 18 U.S.C. § 1153(a) (2006).

<sup>152</sup> *Law Enforcement, Crime Victims Programs Funded in Stimulus Package*, U.S. FED. NEWS, Feb. 12, 2009.

<sup>153</sup> *2010 Budget: Agency by Agency*, FED. TIMES, May 11, 2009, at 12 ("[Attorney General Eric Holder] also said the \$381 million budgeted to help Justice enact provisions of the Adam Walsh Act would allow the department to hire another 50 deputy marshals to help stop sexual predators.")

many Marshals as proposed by the administration.<sup>154</sup> Even if no increases in the AWA budget are made, the resources presently allocated to the crack-down on sex offenders exceed those that existed in the time period leading up to Nixon's declaration in the drug war.

### B. *Myth Creation*

As was the case with the War on Drugs, certain myths about sex offenders have already gained acceptance in the general population. In particular, some myths such as stranger danger, unusually high post-release recidivism, sex offender homogeneity, that rape is a fate worse than death, and enemy creation have served as cornerstones to America's sex offender policy. Together, the myths support political efforts to vilify and restrict the liberties of sex offenders even when such policies are ultimately counterproductive.

Perhaps the most prominent myth concerning sex offenders is the concept of "stranger danger." The idea of the rapist lurking in the bushes waiting to attack as the primary rape threat was long ago attacked by feminist rape reformers.<sup>155</sup> Despite clear evidence that rape is a crime primarily committed by persons known to the victim, the stranger danger myth for rape is still widely held in America.<sup>156</sup>

The stranger danger myth has also been replicated with regard to child molestation. As Eric Janus has noted:

Sexual predators are rare, atypical sex offenders. But because of the intense focus of the media and these new laws, predators have become archetypical. In the headlines, and in these laws, sexual predators have come to symbolize the essence of the problem of sexual violence.<sup>157</sup>

Children are taught from a very early age to be afraid of strangers. Americans worry about the creepy stranger abducting and molesting their child.<sup>158</sup> The statistics are quite clear, however, that over 90% of molestations are

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<sup>154</sup> Sen. Mikulski Makes Community Security a Priority in Federal Checkbook, U.S. FED. NEWS, Jun. 25, 2009 (outlining a proposal to allocate "\$1.15 billion for the U.S. Marshals Service including funding to support 100 new Deputy U.S. Marshals to address the increased workload associated with implementation of the Adam Walsh Child Protection and Safety Act . . . .").

<sup>155</sup> See, e.g., SUSAN ESTRICH, REAL RAPE 3–4 (1987).

<sup>156</sup> Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, n.31 (2005) ("The 2002 National Crime Victimization Survey revealed that nonstrangers commit 69% of all sexual assaults.").

<sup>157</sup> ERIC JANUS, FAILURE TO PROTECT 3 (2006). Cf. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF RAPE AND SEXUAL ASSAULT 11 (1997) ("For nearly 90% of the youngest victims of rape, those younger than 12, the offender was someone known to them.").

<sup>158</sup> Ellen Perlman, *Where Will Sex Offenders Live?*, GOVERNING MAG., Jun. 2006, at 56.

committed by someone the victim knows.<sup>159</sup> Nonetheless, child victim policy has focused on stranger danger.<sup>160</sup>

Another established myth about sex offenders concerns post-release recidivism. Americans believe that sex offenders are “incurable” and will undoubtedly commit sex crimes upon release.<sup>161</sup> This myth is so pervasive that the Supreme Court and federal appellate courts have relied on faulty figures in rendering decisions about sex offender laws. In *Smith v. Doe*, the Supreme Court found that Alaska’s registration statute would help reduce the “frightening and high” risk of recidivism by sex offenders.<sup>162</sup> The Eighth Circuit, in *Doe v. Miller*, relied on the factual finding that sex offender recidivism “is between 20 and 25 percent.”<sup>163</sup> The Fifth Circuit upheld special conditions on supervised release in *United States v. Emerson* based, in part, upon the testimony of a U.S. Probations Officer who stated that in his “professional experience . . . sex offenders . . . have a recidivism rate of approximately 70% . . . .”<sup>164</sup>

On the question of post-release recidivism, the best available study was issued in 2003 by the Department of Justice (“DOJ”).<sup>165</sup> The DOJ study examined the criminal records of the 9691 rapists, child molesters, statutory rapists, and perpetrators of sexual assault released in fifteen states since 1994. The key finding of the study was that recidivism rates for commission of post-release sex crimes were far lower than previously believed.<sup>166</sup> The DOJ study found that:

Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime. Within the first 3 years following their release from prison in 1994, 5.3% (517 of the 9,691) of released sex offenders were rearrested for a sex crime. The rate for the 262,420 released non-sex offenders was lower, 1.3% (3,328 of 262,420).<sup>167</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> See Sarah Geraghty, *Conversation: Residency Restrictions on Sex Offenders: Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 526 (2007).

<sup>161</sup> Eilene Zimmerman, *Churches Slam Doors on Sex Offenders*, SALON.COM, Apr. 26, 2007, [http://www.salon.com/life/feature/2007/04/26/sexoffenders\\_church](http://www.salon.com/life/feature/2007/04/26/sexoffenders_church) (“The Rev. Kenneth Munson . . . holds a weekly Bible study at a halfway house in Buffalo, N.Y., for those recently released from prison. Munson said Christ was, indeed, a friend to those considered sinners . . . . But he also says sex offenders aren’t like other sinners because the public believes they are incurable. ‘To be honest,’ he says, ‘it would probably be easier for a congregation to accept a former murderer.’”).

<sup>162</sup> 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

<sup>163</sup> 405 F.3d 700, 707 (2005).

<sup>164</sup> *United States v. Emerson*, 231 Fed. Appx. 349, 352 (2007).

<sup>165</sup> PATRICK A. LANGHAN, ET AL., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1–2 (2003).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1.

The recidivism rate of only 5.3% for the critical first three years after release, while still higher for sex offenders than for other criminals, is notable because every legislature and court analyzing exclusion laws has relied on much higher figures. Importantly, the study found that among rearrests for all crimes, and not just sex crimes, the sex offender recidivism rate was almost thirty-seven percentage points lower than the rate for non-sex offenders.<sup>168</sup> The study also indicated that of persons released from the studied prisons, non-sex offenders committed over six times as many sex crimes as did sex offenders. Yet, because of the prevalence of the recidivism and stranger danger myths, the overwhelming majority of law enforcement resources for child molestation target past offenders who commit but a small fraction of the future crimes.

In addition to the established sex offender myths, new myths are starting to take hold. Perhaps the most significant myth concerns sex offender homogeneity. Sex offenders are treated as a uniform population even though they are an incredibly diverse group representing different dangers and risk levels. There are, of course, rapists, child molesters, and child pornographers as some of the focal populations. However, many other crimes are substantially represented on sex offender registries, including flashers, gropers, voyeurs, prostitutes, persons who have engaged in an adult incest relationship,<sup>169</sup> stalkers,<sup>170</sup> and those who have committed bestiality.

Even that extensive list only tells part of the story. For example, many persons are currently on sex offender registries for consensual sodomy even though such statutes are presumptively unconstitutional after *Lawrence v. Texas*.<sup>171</sup> Producers of obscene videos can also be considered sex offenders.<sup>172</sup> It is possible that random searching of state databases might reveal registrants convicted of no sex crimes at all. However, since sex offender registries cannot be searched through web search engines and the overwhelming majority of states do not allow searching by convicted crime, it is difficult to capture the full picture of who is listed.

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<sup>168</sup> *Id.* at 2. (“Compared to non-sex offenders released from State prison, sex offenders had a lower overall rearrest rate. When rearrests for any type of crime (not just sex crimes) were counted, the study found that 43% (4,163 of 9,691) of the 9,691 released sex offenders were rearrested. The overall rearrest rate for the 262,420 released non-sex offenders was higher, 68% (179,391 of 262,420).”).

<sup>169</sup> See, e.g., UTAH CODE ANN. § 77-27-21.5 (2009) (listing incest as one of the crimes that leads to mandatory listing on the sex offender registry).

<sup>170</sup> See, e.g., N.Y. PENAL LAW § 130.91 (2009) (listing stalking as an offense for which a conviction can lead to a registry listing).

<sup>171</sup> 539 U.S. 558 (2003). Since direct links are disabled for sex offender registry listings, the examples in this section of the article do not include a specific website link. However, a search of the relevant sex offender registry for the listed names will turn up the information cited. For example, see Mercedes Bishop on the Virginia registry for a 1993 conviction for crimes against nature.

<sup>172</sup> Cynthia Dutton is on the Oklahoma sex offender registry for violating the state’s ban on the creation of obscene materials. See [http://docapp8.doc.state.ok.us/servlet/page?\\_pageid=190&\\_dad=portal30&\\_schema=PORTAL30](http://docapp8.doc.state.ok.us/servlet/page?_pageid=190&_dad=portal30&_schema=PORTAL30).

There are, however, many other sex offenders reported in the media who further illustrate that the sex offender population is far from homogeneous. In many states, public urination is prosecuted as public indecency, meaning that those persons so convicted are categorized with flashers.<sup>173</sup> For example, Janet Allison was a mother who, after trying to stop her fifteen-year-old daughter's relationship, allowed her daughter's boyfriend to move in with the family. She was prosecuted as an accessory to statutory rape and is subject to the full range of sex offender requirements and restrictions in her state.<sup>174</sup> Other crimes are so strange as to defy categorization.<sup>175</sup> A recent survey found that 20% of teens engage in "sexting" which is the transmission of images that might be deemed child pornography.<sup>176</sup> Already, some prosecutors have sought to charge such teens with distribution of child pornography for "sexting."<sup>177</sup>

The sex offender population is so diverse that treating the population as a monolith, as almost all modern sex offender laws have, is foolish. The one-size-fits-all approach to regulating and punishing sex offenders has been based upon a homogeneity myth that cannot survive even limited scrutiny. Yet the myth has become the touchstone for the complete range of sex offender laws. The homogeneity myth has similarities with the War on Drugs treating all drugs as dangerous (except of course wholly legal ones like alcohol, tobacco, and caffeine). The argument that even "soft" drugs might form a gateway to "hard" drugs is analogous to the idea that even petty sex offenders are a risk to children.

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<sup>173</sup> See, e.g., Pauline Vu, *Worth Noting*, STATELINE.ORG, Oct. 5, 2007, available at <http://www.stateline.org/live/details/story?contentId=246188> (noting that in New Hampshire, a lawmaker was proposing to make public urination a separate offense so that persons committing it would no longer be listed on the state's registry for indecent exposure); Mary Nevans-Pederson, *City Will Stabilize Damaged Bluff*, TELEGRAPH HERALD (Dubuque, Ia.), Oct. 16, 2007, at A1 (noting that a city council in an Iowa town changed its public urination offense so that persons convicted of violating it would no longer be listed on the Iowa sex offender registry).

<sup>174</sup> See Maureen Downey, *Registry without Reason*, ATLANTA JOURNAL-CONSTITUTION, Nov. 4, 2007, at 6B.

<sup>175</sup> Examples include a man who had sex with a car wash vacuum. George Hunter, *Swan Creek Township Man Gets 90 Days in Vacuum Sex Act Case*, DETROIT NEWS, Mar. 26, 2009. Another had relations with a picnic table. *Weektypedia*, THE INDEPENDENT ON SUNDAY, Apr. 6, 2008, at 48. Yet another had sex with dead animals (and argued the law against bestiality did not apply because the animals were dead). *Wisconsin v. Hathaway*, 747 N.W.2d 529, 529 (Wis. Ct. App. 2008).

<sup>176</sup> Bella English, *Delivering Advice to Parents on Teen Sex*, BOSTON GLOBE, Apr. 19, 2009, at 4 ("According to one national survey, about 20 percent of teens admit to 'sexting.'").

<sup>177</sup> Kara Rowland, *"Sexting" is a Thorny Legal Issue*, WASH. TIMES, Jun. 23, 2009, at B01 ("In some states, however, prosecutors have decided that filing criminal charges against teens who engage in sexting is the best means of prevention. New Jersey police earlier this year arrested a 14-year-old girl for posting nude pictures of herself on a social-networking network. Prosecutors charged her with distribution of child pornography. In Ohio, a 15-year-old girl agreed to a curfew, the loss of her cell phone and supervised Internet usage to avoid being charged with a felony. In Pennsylvania, lawyers for the American Civil Liberties Union intervened on behalf of three teenage girls threatened with felony charges over suggestive cell-phone photos.").

The emphasis on punishing sex offenders is based in part on another myth: the idea that being raped or molested is a “fate worse than death.”<sup>178</sup> This myth is based upon patriarchal notions of innocence and virginity and encourages persons being sexually assaulted to risk their lives rather than be violated.<sup>179</sup> When that myth is used to support policy, the result is over-punishment that creates incentives for perpetrators to kill their victims.<sup>180</sup>

These sex offender myths have allowed the media and politicians to label sex offenders as an enemy that should be the target of a criminal war. In 2003, former presidential candidate and then Governor of New Mexico, Bill Richardson became the first governor to make an official pronouncement using war rhetoric aimed at sex offenders. Governor Richardson held a press conference to announce that, “[t]oday, New Mexico is declaring war against sexual predators.”<sup>181</sup> Since that declaration, government officials in states across the nation have joined New Mexico by issuing similar statements.<sup>182</sup> In 2004, John Ashcroft bragged that a tool of the War on Terror, the Patriot Act,<sup>183</sup> had been used “to catch predatory child molesters and pornographers.”<sup>184</sup> In March of 2009, Marc Lunsford, father of Jessica Lunsford for whom Jessica’s Laws are named, testified before Congress to ask the federal government to join states and localities in a war on sex offenders.<sup>185</sup> He told Congress that his “job now is to declare war on child sex offenders and predators and to get [Congress] to join [him]. Instead of them stalking our kids, we will stalk them. And instead of them being our wors[t] nightmare we become theirs.”<sup>186</sup>

The mass media has fanned the flames by using similar war rhetoric in discussing the crackdown on sex offenders.<sup>187</sup> Early in the second Bush ad-

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<sup>178</sup> See generally Corey Rayburn [Yung], *Better Dead than R(aped): The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN’S L. REV. 1119 (2004) (hereinafter “Yung III”).

<sup>179</sup> *Id.* at 1152–63.

<sup>180</sup> *Id.* at 1159–63.

<sup>181</sup> Chris Vogel, *Gov. Going after Child Rapists*, ALBUQUERQUE JOURNAL, Aug. 15, 2003, at A1 (quoting New Mexico Governor Bill Richardson).

<sup>182</sup> See Alvin Brenn, *Mom Talks about Near-Abduction*, THE MONTGOMERY ADVERTISER (Ala.), Oct. 16, 2007 (“We have declared war on child molesters in Dallas County and have sent a lot of them to prison . . .”) (quoting Dallas County District Attorney Michael Jackson); Nancy Badertscher, *Bill Would Imprison Predators 25 years*, ATLANTA JOURNAL-CONSTITUTION, Feb. 3, 2006, at 1E (“The Georgia House declared war Thursday on sex offenders who prey on children, passing mandatory 25-year sentences for some crimes and requiring lifetime electronic monitoring for the worst violators.”); Kevin Rothstein, *Stacked Against Them*, BOSTON HERALD, Aug. 13, 2005, at 2 (“[Boston Mayor Thomas M. Menino] has declared war on sex offenders who use the city’s libraries, providing staffs with mugshots of the worst offenders and instructing police to help librarians boot them.”).

<sup>183</sup> Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>184</sup> John Ashcroft, *Press Conference with Attorney General John Ashcroft*, FED. NEWS SERV., Jul. 13, 2004.

<sup>185</sup> Mark Lunsford, *Sex Offender Registration*, CQ CONGRESSIONAL TESTIMONY, Mar. 10, 2009.

<sup>186</sup> *Id.*

<sup>187</sup> See, e.g., Mark Donald, *Hello My Name is Pervert*, DALLAS OBSERVER, Jan. 11, 2001 (“Among their numbers is an even smaller percentage who kidnap and maim and murder and

ministration, CNN featured a rape counselor who called for an aggressive war on sex offenders.<sup>188</sup> In 2006 when John Walsh, Adam Walsh's father, said that his show, *America's Most Wanted*, was starting a "war" on sex offenders, Fox News personalities Sean Hannity, Alan Colmes, and Bill O'Reilly offered their support for such a mission.<sup>189</sup> Some members of the media proved to have substantial power to redirect sex offender policy. When Bill O'Reilly started a segment on his Fox News show that exposed states with "weak" sex offender laws, one of his early targets was Alabama. Because of the O'Reilly segment, the Governor called a special session of the legislature which met one week later and passed new harsh sex offender restrictions unanimously.<sup>190</sup> When the leader of the National Association to Protect Children called for an all-out war on sex offenders, Nancy Grace quickly echoed the call and analogized such a hypothetical conflict to the War on Terror.<sup>191</sup>

The crackdown on sex offenders has an ally that the War on Drugs could have only dreamed of: a prime-time television show entirely dedicated to stranger sex offenders attempting to molest minors. *To Catch a Predator*, hosted by Chris Hansen, has provided a form of private propaganda that perpetuates the myths and rhetoric embodied in the emerging war on sex offenders.<sup>192</sup> Notably, the show has reportedly had a very poor success rate in leading to convictions of persons caught in the filmed sting oper-

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who set the harsh tone of the war against all sex offenders."); Brian Friel, *The War on Kiddie Porn*, NAT'L J., Mar. 25, 2006 ("No matter what happens in Congress, law enforcement officials expect child porn – and the war on porn – to continue expanding."); Dave Johnston, *Proposed Sex-Criminal Law Reaches Too Far*, U. WIRE, Mar. 13, 2007 ("Americans have a growing cache of weapons in the war on sexual predators."); Lisa McPherson, *Team Formed to Keep Track of Sex Offenders*, THE PRESS ENTERPRISE (Riverside, Cal.), Jan. 20, 2006, at B08a ("This is a pandemic issue that we can't take serious enough," she said. "This is a war.") (quoting activist Erin Rynnion); U.S. NEWSWIRE, *Tough Child Sex Crimes Bill Now Law in California; Loopholes for Child Rapists Closed*, Oct. 4, 2005 ("This is the real battleground in the war against child molesters," said PROTECT executive director, Grier Weeks. "For every child abducted by a stranger, there are tens of thousands who are prisoners in their own homes. Today, we won a major victory for these children."); Maria Vogel-Short, *Rarely Seen, Always There*, N.J. LAW., Dec. 23, 2002, at 1 ("It's a plain, nondescript room on the fifth floor of Trenton's Justice Complex, where handpicked cops who can work computers with the same ease that others work radar or stakeouts, quietly wage war on child molesters and others who can be nailed via the computer.");

<sup>188</sup> The counselor stated: "in the same way that we've decided we're going to have a war on drugs or we're going to have a war on drunk drivers, that we need a war on sex offenders . . . ." *Colorado Sex Offenders Released from Custody Today*, (CNN television broadcast LIVE THIS MORNING, Jul. 25, 2001 (quoting Marte McNally)).

<sup>189</sup> *Hannity & Colmes: Interview with Arthur Aidala* (Fox News television broadcast Apr. 28, 2006) ("John Walsh of 'America's Most Wanted' has launched a war against sex offenders. He'll be here with the details and the remarkable video.").

<sup>190</sup> *Recent Legislation: Criminal Law—Sex Offender Notification Statute—Alabama Strengthens Restrictions on Sex Offenders*, 119 HARV. L. REV. 939, 942 (2005).

<sup>191</sup> *Nancy Grace: Young People Subjected to Sexual Predators* (CNN television broadcast May 3, 2006).

<sup>192</sup> *To Catch a Predator* (NBC).

ations.<sup>193</sup> However, the show likely increases propaganda success, which is not necessarily measured by decreasing crime, but rather by increasing public support for the criminal war.

### C. Exception Making

The broad range of sex offender laws has been challenged as unconstitutional on a variety of grounds. Based upon court decisions reviewing those challenges, there is already notable slippage in defining the rights embodied in certain constitutional provisions. Given that the War on Drugs did not create serious exceptions to constitutional doctrine until later in the conflict, that the crackdown on sex offenders has already had significant doctrinal effects is notable. Among the various constitutional rights that have been affected by the recent wave of sex offender laws, a few examples stand out among the rest. The most significant constitutional protections that have suffered in sex offender law cases are probably the guarantee against ex post facto punishment, limitations on federal authority under the Commerce Clause, the right to confront the evidence against a defendant, and the due process right to notice of criminal regulation.

#### 1. Ex Post Facto Clause

“No Bill of Attainder or ex post facto law shall be passed.”<sup>194</sup> Because almost all sex offender laws have been applied to convictions before the passage of those laws, Ex Post Facto Clause challenges have been made to virtually every type of statute.<sup>195</sup> Among those challenges, the only one to have reached the United States Supreme Court concerned whether listing on the Alaska sex offender registry for crimes prior to the passage of the state law constituted retroactive punishment. In *Smith v. Doe*,<sup>196</sup> the Court followed its established process for reviewing the Ex Post Facto Clause. In *Weaver v. Graham*, the Supreme Court outlined the “critical elements” to demonstrate that a statute violates the Clause: (1) “it must be retrospective, that is, it must apply to events occurring before its enactment”; and (2) “it must disadvantage the offender affected by it.”<sup>197</sup> The “disadvantage” can be based upon two possible findings by the Court: (1) if the legislature intended the statute to be civil and non-punitive; or (2) if the statute was not

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<sup>193</sup> The show *To Catch a Predator* relies on a cooperative relationship with the non-profit organization Perverted Justice. In the arrangement, Perverted Justice volunteers engage in the online chats that lead to the on-television stings. These stings have often had trouble in leading to convictions. Patricia C. McCarter, *Vigilante Justice Rarely Works to Catch Predators*, HUNTSVILLE TIMES (Ala.), Mar. 26, 2009, at 1A.

<sup>194</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>195</sup> See Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1349, 1358, 1379–80 (2008).

<sup>196</sup> *Smith v. Doe*, 538 U.S. 84 (2003).

<sup>197</sup> 450 U.S. 24, 29 (1981).

intended to be punitive, its effects were “‘so punitive . . . as to negate [the State’s] intention’ to deem it ‘civil.’”<sup>198</sup> If the Court finds for the person challenging the statute on either of those determinations, the statute is considered to be punitive for Ex Post Facto Clause purposes. Notably, the Court found the statute to be retrospective, but found it to be intended to be regulatory, and not punitive, because of the placement of the law outside of the criminal code.<sup>199</sup>

As in previous cases, the Court analyzed the seven factors in *Kennedy v. Mendoza-Martinez*<sup>200</sup> to determine if the Alaska statute was punitive in effect.<sup>201</sup> A great deal of the Court’s reasoning in analyzing the factors concerned whether registry listing would have been considered punishment historically or by analyzing its effects upon offenders. As to whether the statute included provisions that were historically regarded as punishment, the Court held that the recent origin of sex offender registry laws weighed against such a finding.<sup>202</sup> The Court rejected the argument that registration and notification was analogous to traditional shaming punishments.<sup>203</sup> The Court distinguished shaming punishments because the registry information was public record and available through other legal means.<sup>204</sup> The online registry was found to be a more efficient means of accessing that information.<sup>205</sup> Of importance, the Court limited its holding as follows:

A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual’s original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion.<sup>206</sup>

Despite that explicit limitation, other courts reviewing various sex offender restrictions have construed *Smith*’s holding broadly and largely precluded any challenges under the Ex Post Facto Clause.<sup>207</sup>

A similar pattern has emerged in challenges to residency restrictions. The Eighth Circuit was the first federal appellate court to review residency restrictions on sex offenders through the lens of the Ex Post Facto Clause. In *Doe v. Miller*, which is still the leading case on the subject, the court held

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<sup>198</sup> *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

<sup>199</sup> *See Smith*, 538 U.S. at 93.

<sup>200</sup> 372 U.S. 144, 168–169 (1963).

<sup>201</sup> *Smith*, 538 U.S. at 97–99.

<sup>202</sup> *Id.* at 97 (“[T]he sex offender registration and notification statutes ‘are of fairly recent origin’ which suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing.” (internal citation omitted) (quoting *Doe v. Otte*, 259 F.3d 979, 989 (9th Cir. 2001))).

<sup>203</sup> *Smith*, 538 U.S. at 97–98.

<sup>204</sup> *Id.* at 98.

<sup>205</sup> *Id.* at 98–99.

<sup>206</sup> *Id.* at 101–02.

<sup>207</sup> Yung I, *supra* note 12, at 386–400.

that Iowa's residency restrictions did not violate the Clause.<sup>208</sup> Similar to the Court's holding in *Smith*, the Eighth Circuit did not seriously entertain arguments that the statute was punitive in intent or that it was retrospective.<sup>209</sup> Thus, the focus again turned to the application of the *Kennedy v. Mendoza-Martinez* factors to determine if the restrictions were so punitive in effect as to override the civil intent of the legislature.

Despite the offenders' argument that the statute amounted to a punitive banishing of offenders from whole towns and communities, the majority opinion rejected the analogy.<sup>210</sup> The court found that whereas the Iowa law restricted where a sex offender could establish residence, that reality was not the same as banishment.<sup>211</sup> A sex offender could still enter the 2,000 foot radius exclusion zone even if he or she could not live there.<sup>212</sup>

Judge Melloy dissented on the ex post facto issue because of the factual findings made by the district court about the punitive effects of the statute.<sup>213</sup> The district court findings, that the appellate court stated it was accepting under a deferential standard of review, made clear that the effect of the Iowa statute was to banish offenders. As the district court stated:

Sex offenders are completely banned from living in a number of Iowa's smaller towns and cities. In the state's major communities, offenders are relegated to living in industrial areas, in some of the cities' most expensive developments, or on the very outskirts of town where available housing is limited.<sup>214</sup>

In larger cities such as Des Moines and Iowa City, the maps show that the two thousand foot circles cover virtually the entire city area. The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods.<sup>215</sup>

Since the Eighth Circuit's holding in *Doe v. Miller*, other courts have extended the exception-making process for residency restrictions to much more restrictive laws. In Georgia, even though whole counties were made uninhabitable to sex offenders, the court again rejected arguments that the residency restrictions were analogous to historical punishments of banishment.<sup>216</sup> Other states upheld laws that eviscerated the rationale for the majority holding in *Doe v. Miller* by upholding residency restrictions that also

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<sup>208</sup> *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) [hereinafter "Miller I"].

<sup>209</sup> *Id.* at 718–19.

<sup>210</sup> *Id.* at 719–20.

<sup>211</sup> *Id.* at 719.

<sup>212</sup> IA. CODE § 692A.2A (2009).

<sup>213</sup> *Miller I*, 405 F.3d at 724 (Melloy, J., dissenting).

<sup>214</sup> *Doe v. Miller*, 298 F. Supp. 2d 844, 869 (S.D. Iowa 2004) [hereinafter "Miller II"].

<sup>215</sup> *Id.* at 851.

<sup>216</sup> *Mann v. State*, 603 S.E.2d 283 (Ga. 2004).

contained loitering and travel restrictions that prevented offenders from entering the exclusion zones.<sup>217</sup>

When reviewing challenges to prosecutions for failure to register under SORNA, federal courts have used even more dubious rationales to reject Ex Post Facto Clause arguments. Despite the fact that the *Smith* Court did not take seriously any argument that the statute was retrospective, a large number of courts reviewing SORNA have found the statute not to be retrospective.<sup>218</sup> Even more astonishing, some courts have found the statute not be retrospective when one of the elements of the crime, travel between states, occurred years before the passage of the Act.<sup>219</sup>

When reviewing arguments that SORNA was intended to be punitive, and not regulatory, courts have used “superficial” and “mechanical” applications of *Smith* which ignore substantial differences between the posture of that case and statutes involved.<sup>220</sup> Notably, unlike the law in *Smith*, the failure to register provisions were codified entirely within the criminal code and allowed for punishment up to ten years of imprisonment.<sup>221</sup> It is harder to imagine a clearer signal of punitive intent. Further, the Court in *Smith* was reviewing a civil challenge to listing under the registry and specifically stated that its holding did not apply to a subsequent prosecution if an offender failed to register.<sup>222</sup> Nonetheless, the majority of courts reviewing the issue have found that the crime of failing to register under SORNA was not intended to be punitive.<sup>223</sup>

As a result of mishandling the punitive intent issue, most courts end up considering whether SORNA was so punitive as to override a civil intent by Congress. Again, the courts have largely cited *Smith* without looking at the underlying differences in the cases. Most courts have held that even though failure to register includes a substantial prison penalty the statute neither serves the aims of punishment nor is analogous to historical forms of punishment.<sup>224</sup> The mental gymnastics required to hold that prison is not punishment demonstrate that a large exception to the Ex Post Facto Clause is being

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<sup>217</sup> See *ACLU of N.M. v. City of Albuquerque*, 137 P.3d 1215 (N.M. Ct. App. 2006); *Nasal v. Dover*, 862 N.E.2d 571 (Ohio Ct. App. 2006); *Boyd v. State*, 960 So. 2d 717 (Ala. Crim. App. 2006).

<sup>218</sup> See, e.g., *United States v. Gould*, 526 F. Supp. 2d 538, 548 (D. Md. 2007) (“Indeed, only upon an offender’s failure to register under SORNA, a new offense, do the enhanced penalties apply. Accordingly, SORNA does not violate the Ex Post Facto Clause.” (internal citation omitted)).

<sup>219</sup> See, e.g., *United States v. Pitts*, 2007 U.S. Dist. LEXIS 82632, at \*5–\*6 (M.D. La. Nov. 7, 2007).

<sup>220</sup> Yung I, *supra* note 12, at 396.

<sup>221</sup> 18 U.S.C. § 2250(a) (2006).

<sup>222</sup> *Smith*, 538 U.S. at 101–02 (“A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual’s original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion.”).

<sup>223</sup> Yung I, *supra* note 12, at 392–96.

<sup>224</sup> *Id.* at 396–400.

carved out to accommodate the new wave of sex offender laws. It seems as though the judges deciding these cases have largely internalized the various myths about sex offenders discussed herein to reach their desired policy results.

## 2. *Commerce Clause*

In order for the various provisions of the AWA to be held constitutional, a showing of proper federal jurisdiction must be made. The basis for that jurisdiction is asserted to be the Commerce Clause.<sup>225</sup> The Commerce Clause allows Congress “[t]o regulate Commerce . . . among the several States.”<sup>226</sup> Defendants have repeatedly challenged AWA provisions on Commerce Clause grounds, but few have been successful.<sup>227</sup> Various provisions of the AWA raise slightly different Commerce Clause issues, but all of the challenges follow the same basic process of analysis first articulated in *United States v. Lopez*.<sup>228</sup>

In *Lopez*, the Court struck down the Gun-Free School Zones Act (“GF-SZA”).<sup>229</sup> In *Lopez*, the Court described the three areas under which Congress could act under the Commerce Clause: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “activities that substantially affect interstate commerce.”<sup>230</sup> Soon after, the Court struck down portions of the Violence Against Women Act in *United States v. Morrison*.<sup>231</sup> The majority opinion utilized the *Lopez* framework, but added a “substantial effects” test for statutes justified under the third *Lopez* category. To show that the activity regulated by the challenged statute was justified under the third *Lopez* factor, a court needed to consider whether: (i) an activity was economic in nature, (ii) there was jurisdictional language limiting the scope of the statute, (iii) Congress issued legislative findings in support of a substantial effect finding, and (iv) a nexus existed between the regulated activity and interstate commerce.<sup>232</sup>

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<sup>225</sup> As will be discussed below, the government in the *Comstock* case repeatedly tried to argue that the Necessary and Proper Clause alone provided jurisdiction for the civil commitment provisions of the AWA, but at oral argument before the Fourth Circuit, the government finally conceded that the Necessary and Proper Clause alone could not provide jurisdiction and that a showing of Commerce Clause jurisdiction was necessary. See *infra* notes 245–248 and accompanying text.

<sup>226</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>227</sup> *Yung I*, *supra* note 12, at 410–22.

<sup>228</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 558–59.

<sup>231</sup> 529 U.S. 598 (2000).

<sup>232</sup> *Id.* at 611–12.

In *Gonzalez v. Raich*,<sup>233</sup> the Court reversed directions and upheld the Controlled Substances Act (“CSA”) and held that it overrode California’s Compassionate Use Act,<sup>234</sup> which provided that possession and use of marijuana was permissible for medicinal purposes. The majority relied upon *Wickard v. Filburn*,<sup>235</sup> to find that intrastate marijuana possession had substantial interstate economic effects.<sup>236</sup>

The first portion of the AWA to be challenged on Commerce Clause grounds was the crime of failing to register as part of SORNA. There are two types of prosecutions for failure to register: those under § 2250(a)(2)(A) and those under § 2250(a)(2)(B). Each subsection presents a slightly different Commerce Clause issue, with Subsection B presenting more complicated arguments as to federal jurisdiction. Subsection A will not be discussed in this paper. Subsection B prosecutions require a showing by the government that a person “travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.”<sup>237</sup> While this limitation facially sounds similar to part (ii) of the substantial effects test in *Morrison*, there are significant reasons why the limitation is constitutionally inadequate.

First, federal courts of appeals and district courts have primarily found Subsection B prosecutions to be supported by a showing under the second *Lopez* category—instrumentalities of commerce or persons and things in interstate commerce—and not the third *Lopez* category of substantial effect. Therefore these courts have chosen to use only part of the substantial effects test as enumerated in *Morrison*, and even then only to determine whether a SORNA prosecution falls into the second *Lopez* category. By doing this, courts have avoided engaging in any discussion of the other three parts of the *Morrison* substantial effects test. A full application of the test would require a court to consider if there is economic good involved (clearly, there is not), whether Congress made the requisite legislative findings (it did not,<sup>238</sup> despite being enacted *after* the decision in *Morrison*), and whether there is a nexus between the activity regulated and interstate commerce (connecting sex offender registration with interstate commerce seems like a stretch even under *Raich*). To pick the one factor that cuts against the defendant without considering the others is a sign that the courts might be creating new law to accommodate sex offender prosecutions.

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<sup>233</sup> 545 U.S. 1 (2005).

<sup>234</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (2005).

<sup>235</sup> 317 U.S. 111 (1942).

<sup>236</sup> *Raich*, 545 U.S. at 10–11.

<sup>237</sup> 18 U.S.C. § 2250(a)(2)(B) (2006).

<sup>238</sup> *United States v. Valverde*, 2009 U.S. Dist. LEXIS 35195, at 27 n.9 (E.D. Cal. Feb. 10, 2009) (noting that the only legislative findings related to the AWA concerned child pornography which were not relevant to SORNA).

Second, prosecutions that have been upheld illustrate how little limitation is provided by the Subsection B language. As I have argued elsewhere in discussing a recent Eleventh Circuit case:

In [*United States v. Ambert*], the defendant became a resident of Florida before the enactment of SORNA, and he failed to register in that state. On July 6, 2007, the State issued a warrant for his arrest for violation of Florida registration law. On July 9, 2007, Ambert took a brief trip to California and returned to Florida two days later. He did not have any new obligation to change his registration status based upon that brief trip. Nonetheless, that three-day excursion, which was wholly unrelated to Ambert's failure to register, served as the sole basis for alleged travel in interstate commerce needed to support his indictment. . . . This means any crime can be federalized simply by adding an interstate travel element and waiting for any alleged criminal to cross state lines, if even for a moment. From that point on, the alleged criminal is beholden to federal law. This view of the Commerce Clause is unending and inconsistent with both *Morrison* and *Lopez*.<sup>239</sup>

The Eleventh Circuit rejected the defendant's Commerce Clause challenge in the case. The *Ambert* holding is not unusual. A district court opinion in *United States v. Pitts*<sup>240</sup> demonstrates another expansion of Commerce Clause jurisdiction under a Subsection B prosecution. In that case, the only alleged interstate travel by the defendant was between 1998 and 2001, years before the enactment of the AWA.<sup>241</sup> Nonetheless, the court allowed the prosecution to proceed.<sup>242</sup>

Third, it seems almost impossible to reconcile the holdings in *Lopez* and *Morrison* under the broad view of the Commerce Clause adopted by courts reviewing challenges to SORNA. After all, if all that was needed to support Commerce Clause jurisdiction was a showing that someone involved in the case had travelled in interstate commerce, a facial challenge against the statutes in *Morrison* and *Lopez* could not have succeeded. There would have been no need to hassle with the contours of the third *Lopez* category if interstate travel could have supported the statutes at issue under the first two categories.

Prosecutions under Subsection A are even more problematic since, unlike those under Subsection B, there is no jurisdictional limitation language at all. The government need only show that the defendant had a sex offender conviction at some prior date by the federal government.<sup>243</sup> Courts have uni-

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<sup>239</sup> Yung I, *supra* note 12, at 416.

<sup>240</sup> *Pitts*, 2007 U.S. Dist. LEXIS 82632 at \*5–\*6.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at \*26–\*27.

<sup>243</sup> Yung I, *supra* note 12, at 411–12.

versally upheld such prosecutions without much discussion.<sup>244</sup> Ostensibly, the rationale for such a holding is that the prior federal jurisdiction under the Commerce Clause transfers to the failure to register prosecution even if the prior crime was decades old. Courts so holding turn the Commerce Clause into a “spider web” whereby any person who enters federal jurisdiction at one point is stuck there for life. This, again, expands the Commerce Clause in new directions to allow for prosecutions of sex offenders.

A problem similar to that under Subsection A prosecutions has arisen in regards to the civil commitment provisions of the AWA. As with Subsection A, the civil commitment authorization contains no jurisdictional limitation. The statute authorizes the government to seek indefinite detention of anyone in the Bureau of Prisons’ custody if they are deemed “sexually dangerous predators.” The Fourth Circuit, in *United States v. Comstock*, upheld a district court judgment finding that the civil commitment provisions were not a proper exercise of federal jurisdiction.<sup>245</sup> However, other district and circuit courts have reached the opposite conclusion.<sup>246</sup> Notably, in arguing the cases, the government has not asserted that there is a new basis for Commerce Clause jurisdiction. Rather, the government has relied entirely upon the prior jurisdiction and stated that the Necessary and Proper Clause provides the basis for the civil commitment diversion. The respondents in *Comstock*, including Comstock himself, were still in custody two years after their release dates.<sup>247</sup> Subsequently, the Court issued a writ of certiorari and heard argument on January 12, 2010.<sup>248</sup>

Also of significance, one of the respondents has never been found guilty under federal jurisdiction.<sup>249</sup> Instead, he was found incompetent to stand trial and the government sought to divert him into civil commitment under the AWA.<sup>250</sup> In that case, the government never had the burden of establishing federal jurisdiction in a prior prosecution.<sup>251</sup> In a separate case,

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<sup>244</sup> *Id.*

<sup>245</sup> *United States v. Comstock*, 551 F.3d 274, 279–80 (4th Cir. 2009).

<sup>246</sup> *United States v. Tom*, 565 F.3d 497, 507 (8th Cir. 2009) (and opinions cited therein).

<sup>247</sup> Brief in Opposition at 2, *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009) (No. 08-1224). (“Respondents Comstock, Matherly, Revland and Vigil have been held in custody in a medium-security facility at FCI-Butner for over two years past their respective release dates.”).

<sup>248</sup> *United States v. Comstock*, 129 S.Ct. 2828, 2828 (2009) (granting certiorari); Adam Liptak, *Supreme Court Weighs Authority, Not Legality, of Civil Confinements*, N.Y. TIMES, Jan. 13, 2010 at A15 (hearing argument).

<sup>249</sup> Brief in Opposition at 2, *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009) (No. 08-1224) (“As for Mr. Catron, after he was found not competent and not restorable, the government filed a ‘Certificate of Mental Disease or Defect and Dangerousness’ under 18 U.S.C. § 4246. Two months later, the government withdrew the § 4246 certificate to certify him pursuant to § 4248. Throughout his § 4246 certification and during the initial period of his § 4248 certification, Mr. Catron was housed at the Federal Medical Center in Butner, North Carolina. Today, he remains incarcerated in the segregated housing unit of the FCI-Butner medium-security prison.”).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

the government sought to divert someone being held for immigration violations under the AWA.<sup>252</sup> Thus, the civil commitment holdings have taken the “spider web” theory of the Commerce Clause to a new level allowing the government to take hold of a citizen for an unrelated reason without showing proper jurisdiction and then bootstrap that into a civil commitment diversion.

In each of the above examples, the Commerce Clause is being moved in new directions. While it was once wholly unserious to consider limits to the Commerce Clause, the holdings of *Lopez* and *Morrison* changed that. While *Raich* represented a retrenchment of sorts, that case is simply not applicable to the AWA context because there is no economic good involved. Further, *Raich* illustrates how the War on Drugs created an exception to the Commerce Clause revolution led by former Chief Justice Rehnquist.<sup>253</sup> America might be witnessing a new set of exceptions being made to allow the federal government to take an aggressive role in punishing and regulating sex offenders.

### 3. Confrontation Clause

The Sixth Amendment guarantees a criminal defendant’s right “to be confronted with the witnesses against him.”<sup>254</sup> The AWA, however, limits defense access to child pornography evidence in federal cases.<sup>255</sup> Certain evidence in such cases must remain in federal custody at all times as long as “reasonable access” is afforded to the defendants. The child pornography evidence issues of the AWA were the subject of most of the early litigation under the statute.<sup>256</sup> Thus far, courts have consistently ruled that the AWA’s limitations are facially constitutional.<sup>257</sup>

Most of the opinions have focused on what constitutes “reasonable access” and how much access must be afforded under the Confrontation Clause. Universally, courts have made clear that in order to have success in such a case, the defendant must show an actual denial in access as opposed to a hypothetical one. That requires a defendant to hire an expert, have them attempt to examine the evidence while under government control, and then have that access unreasonably limited. Further, the fact that reasonable access can substantially raise the cost of hiring an expert to review the evidence to the point that such cost is prohibitive has repeatedly been held not to raise a constitutional issue. This last issue is especially problematic in many child pornography cases. One of the defenses in such cases that rely

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<sup>252</sup> *Id.*

<sup>253</sup> See *supra* notes 229–232 and accompanying text.

<sup>254</sup> U.S. CONST. amend VI.

<sup>255</sup> 18 U.S.C. § 3509(m) (2006).

<sup>256</sup> See *generally* United States v. Johnson, 456 F. Supp. 2d 1016 (N.D. Iowa, 2006).

<sup>257</sup> See *generally* United States v. Butts, 2006 U.S. Dist. LEXIS 90165 (D. Ariz. Dec. 6, 2006).

heavily on expert testimony is that the defendant's computer was infected by a virus or other malware that acted to download the child pornography, probably for use by some third party.<sup>258</sup> This defense is very difficult to mount even with full access since it requires significant work by experts to determine if the defense is supported by evidence. This expense increases when experts must perform their work exclusively at a government facility.<sup>259</sup>

In every case, the courts have held that a defendant does not have a right to inexpensive expert services, so cost should not factor into its constitutional analysis. This, of course, ignores that government policy has created the high cost that prices such defenses out of the budget for court-subsidized experts.<sup>260</sup> Thus defendants have been left unable to hire experts to support important aspects of their case.<sup>261</sup> This narrowing of defense access to evidence such that certain defenses are barred is unusual in American law. While the law only affects a limited body of defendants, the rule established by such cases upholding the AWA restrictions will allow substantial evidence restrictions in other cases.

#### 4. *Due Process*

There are several different issues concerning sex offender laws that fit under the broad area of due process law. The core due process claims that have been made in federal cases concern the right to notice, burdens of proof

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<sup>258</sup> *United States v. Cordy*, 2007 U.S. Dist. LEXIS 37355, at \*3–\*4 (D. Neb. Mar. 5, 2007) (“The government was awaiting receipt of a computer program that would determine whether a virus might have inserted child pornographic images into Cordy’s computer without his knowledge. This investigation was prompted by the possibility that the defense would obtain an expert to testify that the images in question were unknowingly placed in Cordy’s computer.”).

<sup>259</sup> *United States v. Knellinger*, 471 F. Supp. 2d 640, 647 (E.D. Va. 2007) (“Knellinger’s final two witnesses were the types of digital video experts who could conduct the analysis described by Sirkin as ‘absolutely essential’ in a case like Knellinger’s. Both described the great cost and effort that would be required to conduct their analyses in a Government facility. Tom Owen, the third witness, testified that he would normally charge approximately \$135,000 to analyze the child pornography in this case, but that he would charge approximately \$540,000 if he had to analyze those materials away from his offices in a Government facility. That figure does not include the cost of transporting the quite extensive collection of equipment that is necessary to his analysis, which would take approximately one week and three men to move, and which would require ‘a box truck . . . 20 feet long and 10 feet wide.’” (internal citation omitted)).

<sup>260</sup> *United States v. Winslow*, 2008 U.S. Dist. LEXIS 66855, at \*36 (D. Alaska Jan. 28, 2008) (“The Walsh Act greatly increases the inconvenience, difficulty, and expense connected with both the prosecution and defense of child pornography offenses.”).

<sup>261</sup> *See, e.g., United States v. Battaglia*, 2007 U.S. Dist. LEXIS 45773, at \*15–\*16 (N.D. Ohio June 25, 2007) (“Defendant has only presented a letter from a potential expert in which the expert indicated that the cost would be significantly higher. Although there is no indication that the costs in this case would increase as significantly as those in the *Knellinger* case, it seems that higher discovery costs were an obvious result of the passage of § 3059(m). That argument, therefore, is one that would have been appropriate to make to Congress when it was crafting the statute, but not to the Court at this stage.”).

in civil commitment proceedings, and rights involved in bail determinations. Each of these claims has arisen as a result of specific provisions in the AWA.

One of the most significant challenges concerns the issue of notice under the AWA. In *Lambert v. California*, the Court held that a statute requiring a felon to register with the City of Los Angeles, when applied to a person without actual knowledge of her duty to register, violated the Due Process Clause of the Fourteenth Amendment.<sup>262</sup> The majority crafted an exception to the rule that ignorance of the law is no defense in situations where a defendant's conduct is wholly passive and no notice was given.<sup>263</sup> The scenario in *Lambert* mirrors what has occurred under modern sex offender registries. Despite the similarities, however, courts across the country have rejected due process *Lambert* challenges to prosecutions for failing to register.<sup>264</sup> This despite the AWA's mandate that the Attorney General ensure that all sex offenders subject to SORNA receive notice of their obligation to register.<sup>265</sup>

Most courts reviewing such notice claims fail to mention *Lambert*. Among those courts that have engaged the due process claim, the primary reason for rejecting such challenges based upon *Lambert* is essentially that sex offenders have constructive notice.<sup>266</sup> As one district court noted:

In this case, Samuels was well aware of his duty to update his registration in New York for ten years. Thus, when he moved to Kentucky and failed to register or update his registration, his prior knowledge of a duty to register under state law qualified as effective notice under SORNA. Samuels' notice of his registration requirements under New York law is sufficient to support a charge that he knowingly violated SORNA.<sup>267</sup>

In other words, because the sex offender knows or should know about state registration requirements, he or she is presumed to also have notice of federal restrictions. This reasoning is odd; it assumes that because a person has notice of entirely different law enacted by a different sovereign government,

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<sup>262</sup> 355 U.S. 225 (1957).

<sup>263</sup> *Id.* at 228.

<sup>264</sup> See, e.g., *United States v. LeTourneau*, 534 F. Supp. 2d 718, 722–23 (S.D. Tex. 2008) (“The issue of notice in SORNA is different from the situation presented to the United States Supreme Court in *Lambert v. California*, where a conviction for failure to register was overturned because the defendant had no actual knowledge of a duty to register as a felon . . . . *Lambert* is inapplicable to the vast majority of cases under SORNA because most defendants have been shown to be well aware of their duty to keep their registration current and to update their registration upon moving to a new state.” (internal citations omitted)).

<sup>265</sup> 42 U.S.C. §§ 16917(b), 16913(d) (2006).

<sup>266</sup> *United States v. Gould*, 526 F. Supp. 2d 538, 544 (D. Md. 2007) (“*Lambert* is inapplicable to this case. Gould was well aware of his duty to update his registration in Pennsylvania, and he had previously been convicted of failing to provide necessary registration information in West Virginia.”).

<sup>267</sup> *United States v. Samuels*, 543 F. Supp. 2d 669, 674 (E.D. Ky. 2008). Other courts have used very similar rationales, all the while pronouncing the vitality of *Lambert*. See, e.g., *LeTourneau*, 534 F. Supp. 2d at 723 n.4.

he or she has notice of the law in question. The rationale of such courts also ignores the enormous differences between state registration laws and SORNA, including: the criminal penalties, frequency of registration, information required, and classification scheme.<sup>268</sup> For most offenders, complying with state law would not meet the requirements under SORNA and a federal prosecution could still proceed.<sup>269</sup> Some offenders have been prosecuted under SORNA even when they had no such obligations in the state in which they resided.<sup>270</sup> The application of SORNA in effect, strips sex offenders of their due process right to notice because so many of their other liberties have already been curtailed.

A different due process problem has arisen with regard to the AWA's civil commitment provisions. When a prisoner is classified as a "sexually dangerous person" under the civil commitment provisions of the AWA, there are concerns about the use of evidence to support such a finding.<sup>271</sup> Since prisons encourage and offer incentives for participation in treatment programs, offenders have historically joined such programs. In some cases, treatment programs are ordered by law.<sup>272</sup> However, to engage in treatment, an offender needs to confess past acts and present temptation.<sup>273</sup> As part of AWA "sexually dangerous person" hearings, the government has sought to use treatment reports to prove an offender is dangerous. The first court to address this complicated problem, in *United States v. Zehnter*, held that the legitimate reasons for the Bureau of Prisons to have access to the report outweighed any concern that it would be used to support civil commitment of the defendant.<sup>274</sup> Already, commentators have noted that offenders' reluc-

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<sup>268</sup> See *United States v. Barnes*, 2007 U.S. Dist. LEXIS 53245, at \*10–\*17 (S.D.N.Y. July 23, 2007).

<sup>269</sup> See, e.g., *id.* at \*11.

<sup>270</sup> See, e.g., *United States v. Husted*, 2007 U.S. Dist. LEXIS 56662 (W.D. Okla. June 29, 2007), *rev'd on other grounds*, 545 F.3d 1240 (10th Cir. 2008).

<sup>271</sup> *United States v. Zehnter*, 2007 U.S. Dist. LEXIS 4700, at \*2–\*3 (N.D.N.Y. Jan. 23, 2007) ("Defendant, nevertheless, contends that the report [of his participation in a mental health treatment program that was a condition of release] also needs to be excluded from use by the Bureau of Prisons because the Bureau of Prisons may use information in the report to determine that he is a sexually dangerous person within the meaning of the Adam Walsh Act and, therefore, be subjected to civil commitment under that Act." (internal citation omitted)).

<sup>272</sup> Seth A. Grossman, *A Thin Line between Concurrence and Dissent: Rehabilitating Sex Offenders in the Wake of Mckune v. Lile*, 25 CARDOZO L. REV. 1111, 1116 (2004) ("In an effort to more successfully rehabilitate sex offenders, a majority of state legislatures as well as the federal government have begun mandating sex offender treatment programs within prison and probationary settings.").

<sup>273</sup> Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Offenders after Prison*, N.Y. TIMES, Mar. 4, 2007, at 1 ("Admitting to previous crimes is a crucial piece of a broad band of treatment, known as relapse prevention, that is used in at least 15 states and has been the most widely accepted model for about 20 years.").

<sup>274</sup> *Zehnter*, 2007 U.S. Dist. LEXIS 4700, at \*3 ("[T]he report could be extremely important to the BOP for purposes of identifying appropriate programs for Defendant or otherwise classifying him. For this reason, the Court finds that the report should be provided to the Bureau of Prisons, but that Defendant retains the right to assert his *Fifth Amendment* right if he is subjected to the possibility of a penalty.").

tance to participate in prison treatment programs has increased in states with programs similar to the federal one.<sup>275</sup>

Given that there are substantial doubts about whether the burden of proof standard in civil commitment hearings of clear and convincing evidence is sufficient to guarantee due process,<sup>276</sup> the access to treatment notes by the government is notable. Such evidence can be used to meet the low burden of proof and put an offender in a civil facility for life. The move to a clear and convincing standard despite the liberty interests lost by a person in indefinite civil detention should raise substantial worries about due process, but courts have allowed commitment hearings to proceed using that standard.<sup>277</sup>

Of all the provisions of the AWA, the one that has created the most court opposition is the mandatory bail rules. This is where unusual AWA restrictions raise due process concerns. The AWA includes provisions which require that every person charged with certain sex offenses, and/or failure to register, be subject to certain bail restrictions including electronic monitoring.<sup>278</sup> In the very first AWA case on the issue, *U.S. v. Crowell*, the district court held that the Act violated the procedural due process requirements of the Fifth Amendment by making the restrictions mandatory for certain classes of defendants. The court also held that the AWA bail provisions violated the separation of powers doctrine by removing judicial discretion in bail determinations, and violated the Eighth Amendment's prohibition of excessive bail by virtue of the severity of the restrictions imposed on the defendant.<sup>279</sup> Since *Crowell*, however, many courts have upheld the bail restrictions in the AWA.<sup>280</sup> As with other AWA provisions, there is no other instance under American law where bail determination is statutorily restricted based entirely upon the crime charged. Nonetheless, since *Crowell*,

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<sup>275</sup> Davey & Goodnough, *supra* note 273 (“But many of those committed get no treatment at all for sex offending, mainly by their own choice. In California, three-quarters of civilly committed sex offenders do not attend therapy. Many say their lawyers tell them to avoid it because admission of past misdeeds during therapy could make getting out impossible, or worse, lead to new criminal charges.”).

<sup>276</sup> See *United States v. Comstock*, 507 F. Supp. 2d 522, 559 (E.D.N.C. 2007) (“For the foregoing reasons, § 4248’s failure to require a court to find beyond a reasonable doubt that a person has engaged or attempted to engage in sexually violent conduct or child molestation prior to permitting the individual’s indefinite involuntary civil commitment as a sexually dangerous person constitutes a violation of due process.”).

<sup>277</sup> See, e.g., *United States v. Shields*, 522 F. Supp. 2d 317, 331 (D. Mass. 2007) (“On the other hand, the Supreme Court’s decision in *Addington* establishes that Section 4248’s standard of ‘clear and convincing evidence’ for a court’s second, forward-looking, determination that a person is ‘sexually dangerous to others’ passes constitutional muster.”).

<sup>278</sup> 18 U.S.C. § 3142(c)(1) (2006).

<sup>279</sup> 2006 U.S. Dist. LEXIS 88489, at \*39 (W.D.N.Y. Dec. 7, 2006).

<sup>280</sup> See, e.g., *United States v. Gardner*, 523 F. Supp. 2d 1025, 1032 (N.D. Cal. 2007) (“The question is whether this incremental restriction implicates a protected liberty interest within the meaning of the Due Process Clause. The Court finds that electronic monitoring alone does not.”).

courts have been willing to overlook the constitutional issues raised by such restrictions in regards to sex offenders.

Among the various constitutional exceptions discussed above, due process claims have received the least attention by courts and scholars. Challenges have largely failed, and important exceptions to due process rules have been made.

### III. WHAT ARE THE DANGERS OF A WAR ON SEX OFFENDERS?

The fact that there may be an emerging War on Sex Offenders does not necessarily mean it should be avoided. Simply because the War on Drugs has been filled with failure does not necessitate that all future criminal wars be abandoned. However, there are reasons both from the drug war experience and sex offender policy in particular that should give substantial reason to fear the advent of a criminal war on sex offenders. The chief concerns, discussed below, are policy lock, erosion of civil liberties, collateral damage, and exceptions becoming rules.

#### A. Policy Lock

Once the War on Drugs began, the policies that served as its foundation did not change much in the next forty years. The only major reforms served to add more punishment and greater regulation. Even when the techniques used in the War on Drugs proved ineffective, little was done to reorient them.

Policy lock occurs for a variety of reasons in a criminal war. First, the myths and rhetoric underlying the conflict justify certain hard-line responses even when they fail. The public simply cannot be sold on a criminal war that uses treatment and rehabilitation as its weapons. Second, when bureaucracies are created to administer a criminal war, inertia and institutional incentives keep missions consistent over time. Incentives to protect organizational jobs and turf give inertia to policy choices.<sup>281</sup> Third, in the criminal arena, public appreciation for alternative strategies is typically low.<sup>282</sup> Consequently, political pressure to stick with past policies, even if failing, is great. Fourth, criminal wars have enemies that cannot be defeated. When a

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<sup>281</sup> Cf. David A. Slansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 685 (2006) ("Meanwhile criminal process has taken on some of the less attractive features of government bureaucracies, including a pronounced institutional inertia . . .").

<sup>282</sup> See Gerald V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105, 115-16 (1999) ("The federal sentencing guidelines reject rehabilitation as an end or goal of punishment. Being 'tough on crime,' which is to say, being very tough in sentencing convicted criminals, is now the common aim of both major political parties. This seismic swing in moral aspirations and in policy decisions is reflected in the staggering number of inmates in our prisons. The public enthusiastically supports long terms of imprisonment, even if it is reluctant, though not wholly unwilling, to tax itself for the necessary prison and jail construction.").

nation is an enemy, surrender is possible. Drugs cannot give up. Sex offenders will continue to exist regardless of the new wave of laws restricting their liberties. As a result, the measures of “success” in criminal wars are difficult to articulate. This uncertainty works to ensure that policymakers can continue to support past policies because objective measurement is problematic. Fifth, existing criminal laws are not given much attention by legislatures on a regular basis.<sup>283</sup> Laws last for decades or centuries without reform. Very few interest groups focus on criminal law reform so there are not substantial political incentives for politicians to tinker with existing policy.

The net result of policy lock is not just a continuation of failure. It also means that the negative effects associated with the criminal war are more severe. As there is little hope of course correction in criminal wars, the substantial negative consequences continue without abatement. There are also significant opportunity cost issues as the criminal war expands. Resources will go to a failing criminal war that is staying the course rather than being allocated to other potentially beneficial policies.

### *B. Erosion of Civil Liberties*

Perhaps the central threat represented by any criminal war is the loss of basic civil liberties. While basic law enforcement can create disputes as to the proper scope of criminal and defendant rights, the exception making mentality of criminal war-fighting can leave persons wholly unprotected from a loss of liberty. And the persons who are the targets of the criminal law are unlikely to find any recourse in the public sphere.

For sex offenders, the loss of liberty is already being felt. A person convicted of a single count of public indecency might be subject to a lifetime of extensive registration requirements that carry hefty prison terms for a single violation. The information required in the registry, including the offender’s residential address, email address, and phone number, will be listed on a publicly available database for anyone to view. The convict might be subject to residency restrictions such that he or she can no longer live in large portions of the state in which he or she resides. This can result in physical separation from family (including a spouse) and the only friends that the offender might have ever known.

If the offender decides to move, he or she will have to comply with a new set of local restrictions that may bar that move altogether. Any person might be able to sign up for email notifications about the offender moving into their neighborhood. With such a system, private opposition to the relo-

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<sup>283</sup> See Gerard E. Lynch, *Model Penal Code Second: Good or Bad Idea?: Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 220 (2003) (“This wave of law reform came to an end in the late 1970s with the failure of the federal criminal code reform effort.”).

cation of the offender can effectively bar the convict from living in the neighborhood even if the public law would allow it.<sup>284</sup> Notification can often facilitate vigilante attacks against sex offenders as well.<sup>285</sup>

Even if the offender finds a legal place to live where community opposition does not drive the offender out, the offender will have to be careful travelling around the neighborhood. Many jurisdictions bar offenders from even being in proximity to any playground, school, or other place where children might congregate.<sup>286</sup> A simple trip to the grocery store might become like travelling through a maze. The virtual world might not provide any escape for the offender as access to any social networking sites is likely impossible for an offender.

If the offender hopes to live, he or she will have to find some form of employment. However, the offender will be barred from working in entire industries. Even if an offender's professional interests align with legal alternatives, any potential employer will have access to the state and national sex offender registry. A simple online search of the applicant's name will show that the applicant is a sex offender. In a competitive job market, the sex offender is unlikely to find any gainful employment. The offender will have to fight for low-paying, unskilled labor jobs. Even if the offender decides to better himself through education, the registry will likely follow the offender throughout his or her professional life.

For an offender inclined to seek treatment or counseling for their condition, access might be problematic if the facility is in an area barred by state, county, or municipal provisions.<sup>287</sup> Even if access is technically available, travel from a safe residential location may make treatment prohibitive.<sup>288</sup> In the treatment program, the offender might later find that any statements the offender makes might be used to further restrict his or her liberty.

Whenever the offender comes in contact with the criminal justice system, he or she can expect a substantial curtailment of certain basic rights

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<sup>284</sup> Yung II, *supra* note 106, at 128 ("Supplementing state and local exclusion zones, an increasing number of private communities are adopting their own rules excluding sex offenders from their borders.").

<sup>285</sup> Chuck Haga, *Police Less Likely to Hold Sex Offender Notification Hearings*, GRAND FORKS HERALD, Jan. 11, 2009 ("At least four homicides had been attributed to 'vigilantes' who killed men who were on sex offender registries, according to [Human Rights Watch]."); Murphy, *supra* note 195, at 1391 ("[T]he harms suffered by those required to register publicly as sex offenders have been well documented. Perhaps most dramatic and notorious is the murder of two sex offenders by a vigilante in Maine in 2006.").

<sup>286</sup> See Yung II, *supra* note 106, at 143 ("With some localities adding loitering or travel restrictions, a sex offender must be aware of the boundaries of every exclusion zone that he or she may breach in daily travel.").

<sup>287</sup> Beyond a strict bar from accessing a treatment facility, residency restrictions can create feelings of isolation that will discourage the seeking of treatment. See John Ingold, *Lyons Trustees Decide Against Residency Rule on Sex Offenders*, DENVER POST, Apr. 17, 2007, at 3B; see also Deena Winter, *City to Look at Offender Restrictions*, LINCOLN J. STAR (Neb.), May 16, 2006, at B1 ("Some experts say residency restrictions drive sex offenders underground, where they're less likely to get support and treatment . . .").

<sup>288</sup> Yung II, *supra* note 106, at 144-45.

including due process rights,<sup>289</sup> the right against retroactive punishment,<sup>290</sup> and the right to confront witnesses and evidence.<sup>291</sup> These restrictions add to the loss of rights experienced by other criminals including loss of legal access to a firearm<sup>292</sup> and voting rights.<sup>293</sup> Since the offender likely will have little money due to limited employment opportunities, any lawsuit against the restrictions will have to be undertaken pro bono. Even if such a suit is brought, the odds of success are low before an unsympathetic judiciary.

Beyond these well publicized restrictions on liberty, jurisdictions are increasingly innovating limitations on the freedom of sex offenders. As discussed above, the offender might be subject to a specially marked driver's license, a pink license plate branding the offender wherever he or she might travel, signs labeling the offender's house as the residence of a sex offender, or complete denial of online access. If instead of a simple public indecency conviction, the offender had been convicted of a more serious offense, the offender might be subject to institutionalization at the federal or state level through a designation as a "sexually violent predator." Once in an institutional environment, the offender will likely never leave.<sup>294</sup>

The life of a sex offender is already quite limited in the areas of core liberties. However, with the likely escalation of the War on Sex Offenders, more restrictive laws are likely to limit these liberties even further.

### C. Collateral Damage

The rights of sex offenders are not likely to be of serious concern to many. However, in any war, there is collateral damage. In a criminal war, the victims of "friendly fire" fall into two major categories: (1) persons who are legal targets of the criminal war who should not be; and (2) bystanders to the conflict who accidentally suffer the effects of the criminal war. Both of these groups are discussed below.

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<sup>289</sup> See *supra* Part II.C.4.

<sup>290</sup> See *supra* Part II.C.1.

<sup>291</sup> See *supra* Part II.C.3.

<sup>292</sup> 18 U.S.C. §§ 921–931 (2006).

<sup>293</sup> See Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CON. 283, 433 (2007) ("The authors speculated that sex offenders elicited the least support for the extension of voting rights because of the 'special stigma or perceived threat associated with sex offenders.'" (quoting Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUBLIC OPINION QUARTERLY 275, 283 (2004))).

<sup>294</sup> See Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungsverwahrung*, 30 FORDHAM URB. L.J. 1621, 1640 (2003) ("[F]or most it seems that civil commitment as a sex offender has turned into lifetime confinement.").

### 1. *The Intentional Collateral Damage*

As the case of a person convicted of public indecency illustrates, the reach of the restrictions on sex offenders is quite broad. There are many persons who are branded sex offenders who have committed crimes that cannot possibly justify the punishments and restrictions to which they are subjected. Persons convicted for consensual sodomy (under laws which are no longer constitutional), public urination (as public indecency), prostitution, statutory rape, obscene movie distribution, false imprisonment, and adult incest are often treated the same as serial rapists and child molesters. That the laws are horribly over-inclusive has been known to state and federal legislators for some time, but only Iowa<sup>295</sup> has shown any inclination to narrow its statute to respond to such concerns. Even Iowa's new statute was passed only through a compromise that greatly expanded the reach of sex offender laws in other regards.<sup>296</sup> Even with the highly unusual instance of police and prosecutors testifying against the state's residency restriction law, the result was a mixed bag for the civil liberties of sex offenders.

The public pressure because of myths regarding sex offenders is so great that governments show little inclination to respond to the broad reach of statutes. The fact that most sex offender statutes are passed with neither dissent nor debate makes any evidence-based policy reform unlikely to take hold. Prosecutors have pushed the envelope even further than the already broad statutes. In Georgia, the state convicted a homeless sex offender for failure to give an address on his registration form even though it was impossible for him to comply, according to the state.<sup>297</sup> Only by virtue of a 6-1 decision before the state supreme court was the conviction quashed.<sup>298</sup> The fact that three teenage girls in Pennsylvania faced charges for possessing mere "suggestive" images<sup>299</sup> again shows that much of the collateral damage of sex offender laws is either intentional or recklessly allowed.

### 2. *The Innocent Bystanders*

The second category of collateral damage concerns persons who are wholly innocent, but still become victims of the criminal war. In the drug war, there have been many casualties over many years. Many of the worst

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<sup>295</sup> Adam Belz, *Sex Offenders Look forward to End of Exile*, THE GAZETTE (Cedar Rapids, Iowa), Jun. 28, 2009.

<sup>296</sup> *Id.* ("The new legislation tightens restrictions on where sex offenders can go, by establishing safety zones—schools, day cares, libraries, parks, swimming pools—that are off limits without special permission . . . . The safety zones include a 300-foot 'no loitering' cushion where police can arrest convicted sex offenders on reasonable suspicion they are attempting a sex crime. The law also prohibits sex offenders from working or volunteering at fairs, schools, libraries, beaches or swimming pools.").

<sup>297</sup> See Bill Rankin, *Justices Strike Sex Offender Provision; State High Court Agrees Law Unfair to the Homeless*, ATLANTA JOURNAL-CONSTITUTION, Oct. 28, 2008, at 1B.

<sup>298</sup> *Id.*

<sup>299</sup> Rowland, *supra* note 177.

instances have been based upon faulty or plainly incorrect warrants used to support paramilitary intrusions into private homes of innocent persons.<sup>300</sup> With a War on Sex Offenders, there might be similar instances based upon a variety of liberty restrictions. Among the states that have conducted audits of their sex offender registries, error rates have been unacceptably high.<sup>301</sup> In New York, the state determined that 25% of the registry entries had mistakes.<sup>302</sup> Since the registry listings do not appear in normal search engines, such persons may only find out their registry status once they have been incorrectly outed as a sex offender.

The story of Christopher Noles, a man found guilty of statutory rape against his future wife, illustrates a prime example of collateral effects.<sup>303</sup> Because of his state's residency restrictions, he and his family have had to repeatedly move to comply with the exclusion zone requirements under Georgia law.<sup>304</sup> The frequent moves have eliminated any sense of stability for the family. Because of his listing on the state registry, Noles has been unemployed for most of the time since the registry went into effect.<sup>305</sup> He has not been able to attend his daughter's functions at church.<sup>306</sup> Many sex offenders have families who have been similarly affected. Past rehabilitation and reintegration into society are often lost in the discovery of past crimes facilitated by the listings through state registries.

#### *D. Exceptions Become Rules*

From a long-term perspective, the greatest danger from a criminal war might be the institutionalization of exceptions that the war creates. Once an

<sup>300</sup> See, e.g., *Three Former Atlanta Police Officers Sentenced to Prison in Fatal Shooting of Elderly Atlanta Woman*, P.R. NEWSWIRE, Feb. 24, 2009 ("In a news conference after the sentencing hearings, U.S. Attorney David E. Nahmias said in part, 'As Atlanta police narcotics officers, these three defendants repeatedly failed to follow proper procedures and then lied under oath to obtain search warrants. Their routine violations of the Fourth Amendment led to the death of an innocent citizen. The death of Kathryn Johnson in a police shooting was a terrible tragedy for a law-abiding elderly woman, her family and our entire community.'").

<sup>301</sup> See, e.g., Michele McPhee, *The Beat: Oft-Missing Mitt Lets Cons Run Free*, BOSTON HERALD, Nov. 26, 2007, at 5 ("Also in 2006, the state ordered an audit of the sex offender registry board, with startling results: The audit found that 2,929 of the 15,828 sex offenders in the database were not registered."); Tim Fox, *Fox Would Upgrade Sex Offender Registry*, GREAT FALLS TRIBUNE, Oct. 15, 2008, at 6A ("In January, I conducted an audit of the registry and discovered an incredible amount of information was missing . . .").

<sup>302</sup> Erik German, *State Shows Problems in Sex Offender Registry*, NEWSDAY (N.Y.), Jan. 16, 2008, at A18 ("State Comptroller Thomas DiNapoli released an audit yesterday of the state sex offender registry that, while generally positive, found 'significant' flaws with its administration. According to the findings, one-fourth of the records investigators surveyed had mismatched driver's license information and, in some cases, license details for the wrong people were given out as those of offenders.").

<sup>303</sup> See Stephanie Chen, *After Prison, Few Places for Sex Offenders to Live*, WALL ST. J., Feb. 19, 2009, at A16.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

agency like the DEA is set up, removal is politically difficult. *Stare decisis* operates to ensure that doctrinal exceptions made to one group of defendants will eventually apply to others. When society begins to tolerate or even expect the police to be armed like soldiers, the exception becomes the rule.

The militarization of police forces in the War on Drugs, once notable, has become the norm in police departments across the country.<sup>307</sup> Life sentences for drug crimes were once unheard of, but now do not even make for interesting news. The idea that luggage could be searched by a trained dog once seemed like an invasion of privacy, but is now the cost of traveling. “No knock” warrants were once rarities, but are now regularly issued in drug raids.

The danger of normalizing exceptions cannot be understated. Bureaucratic agencies seek larger budgets from legislatures. The perversion of legal doctrine can have effects centuries later. Given the depth of exception making that has already occurred, society might become increasingly accepting of similar restrictions for other “undesirable” populations. When exceptions created by criminal wars become rules, all of society loses.

#### IV. HOW CAN WE ABORT THE WAR ON SEX OFFENDERS?

In the War on Drugs, by the time of Nixon’s declaration it was almost certainly too late to reverse course. But in the War on Sex Offenders, there may still be time to reverse course before the War gains too much momentum. This section will identify several possible ways to stop the War on Sex Offenders.

Perhaps the most obvious way is for courts to recognize constitutional limits on the government’s conduct of the War. Although several constitutional problems with sex offender laws have been discussed herein, rulings grounded in the Commerce and Ex Post Facto Clauses have the potential to provide obstacles so significant that a criminal war probably could not overcome them.

Because of the recent enactment of most of the sex offender restrictions, the persons to whom the laws apply are mostly those who committed crimes before the laws went into effect. If courts were willing to restore the meaning of the Ex Post Facto Clause by recognizing that many of the sex offender laws and prosecutions are, in fact, punitive in intent and/or effect and therefore in violation of the Ex Post Facto Clause, the result would cripple many of the harshest restrictions on sex offenders. For example, registries would be void of most of their entries and residency restrictions would apply only to a small population.

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<sup>307</sup> Rafeal Hermoso, *Police Brutality an Endemic, not Isolated Problem*, THE ORANGE COUNTY REGISTER, Sept. 28, 1999 (“The ‘police state’ behavior that apparently took place in Los Angeles, he said, is largely the result of the increased militarization of police forces throughout the country. This philosophy, driven by the drug war, is imposed on local departments by the federal government.”).

Similarly, a definitive Commerce Clause ruling against portions of the AWA could effectively knock the federal government out of sex offender regulation altogether. States would be free to continue to regulate sex offenders in an ad hoc fashion. The prerequisites for a criminal war, however, are not met without federal involvement. For those who believe that the various sex offender regulations do serve a positive law enforcement function, but fear the negative effects of a criminal war, a Commerce Clause ruling against the AWA is probably the ideal solution. It would balance law enforcement and liberty interests by limiting the role of the federal government.

While court action may only delay the effects of such laws, there is reason to think that the passage of time might have a greater effect. A criminal war requires a certain coincidence of strong public support, available resources, and a supportive judiciary. Since there is evidence that early hysteria over sex offenders was a response to specific, publicized sex crimes in the 1980s and 1990s,<sup>308</sup> public support for sex offender laws today might dissipate before the tools of the War on Sex Offenders can be used to their greatest effect. Economic malaise might force the shifting of these resources to other priorities. The judiciary is also prone to shifts as different appointing Presidents come and go.

Another possibility for meaningful change could occur at the state level. A number of states have chosen not to comply with some AWA requirements. The penalty for noncompliance for any fiscal year is that a state will lose 10% of funds authorized under the Omnibus Crime Control and Safe Streets Act of 1968.<sup>309</sup> Because such funds have become less of a federal budget priority, the “stick” of withholding 10% of those funds has less persuasive value than it once had.<sup>310</sup> Interestingly, every state that has studied the costs of compliance has determined that noncompliance is substantially cheaper. Further, some states have genuine ethical problems with certain components of the AWA.

Chief among those concerns is that the federal government requires listing of juvenile sex offenders, in some cases for the duration of their lives.<sup>311</sup> Even in Illinois, which has adopted a full array of sex offender restrictions, lifetime listing of juveniles is highly controversial.<sup>312</sup> The Illinois legislature

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<sup>308</sup> JANUS, *supra* note 157, at 115.

<sup>309</sup> 42 U.S.C. § 16925(a) (2006).

<sup>310</sup> Amy Borrer, *Sex Offender Registration*, CQ CONGRESSIONAL TESTIMONY, Mar. 10, 2009 (“And, compared to the estimated \$12.5 million Virginia would have to expend to implement the Adam Walsh Act, it risks losing only \$394,304, were it to choose to not comply with the federal Act.”).

<sup>311</sup> See Felisa Cardona, *Sex-Convict Database Perplexes*, DENVER POST, Sept. 22, 2008, at A1. A juvenile classified as a Tier III sex offender is subject to lifetime registration. See 42 U.S.C. § 16915(a) (2006).

<sup>312</sup> Sarah Tofte, *Protect Children from Sexual Violence: Don’t Adopt the Adam Walsh Act*, SALT LAKE TRIB., Jan. 17, 2008 (“Thus the Illinois legislature, knowing it was acting in conflict with the Adam Walsh Act, recently overrode the governor’s veto of a law exempting child offenders from online registration.”).

recently overrode the Governor's veto of a law allowing juveniles to remove their names from the state sex offender registry in some circumstances.<sup>313</sup> This means Illinois is not currently in compliance with the AWA. Other states have decided that lifetime listing of a juvenile is unacceptable.<sup>314</sup>

At the present time, no state has been ruled to be in full compliance with the Act, and the deadline for state compliance has been extended from July 2009 to July 2010.<sup>315</sup> The Attorney General is authorized to extend the deadline further if there is a need.<sup>316</sup> Given the state of the American economy, state noncompliance presents a reasonable scenario for an undermining of the growing federal war. However, the political pressures on state governments to crack down on sex offenders might be too much to resist, particularly if more states comply.

Another possible solution would be to give judges greater discretion in sentencing. One of the most significant legacies of the War on Drugs was the shift away from judicial control of sentencing.<sup>317</sup> Instead, Congress provided strict limits on judicial discretion.<sup>318</sup> This pattern is already being replicated with regard to sex offenders. As a result, lack of discretion has greatly increased the negative consequences of the crackdown on sex offenders. Further, even in instances where defendants have pled guilty to non-sexual offenses to avoid registry listing, the current trend of courts is to interpret the AWA non-categorically such that the underlying facts and not the actual statutory crime determine the person's obligations.<sup>319</sup>

If judges at the state and federal level were allowed to implement all of the punishments under the current set of laws according to findings in particular cases, it might allow the punishments and regulations to be better tailored to defendants. Thus, if there is reason to think a particular sex offender will be tempted to repeat by being near a park, he or she could be barred from being near such locations for a period of time. Further, the registry could be pruned of persons who have committed low-risk crimes and/or crimes that occurred decades ago.

The judicial discretion solution, however, is not without problems. Affording judges the ability to decide which sex offenders will receive lenient

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<sup>313</sup> *Id.*

<sup>314</sup> See, e.g., Jay F. Marks, *Act Says Sex Offender Registry Must Include Juveniles*, OKLAHOMAN, Jul. 13, 2009, at 1A.

<sup>315</sup> Att'y Gen. Order No. 3081-2009 (May 26, 2009), available at <http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf>.

<sup>316</sup> 42 U.S.C. § 16924(b) (2006).

<sup>317</sup> William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249 (1996) ("In the 1980s, however, with the advent of President Ronald Reagan's War on Drugs, Congress shifted back to its pre-1970 position and again made determinate sentencing the center of federal sentencing policy.").

<sup>318</sup> *Id.*

<sup>319</sup> See, e.g., *United States v. Byun*, 539 F.3d 982, 984 (9th Cir. 2008) (reasoning that a guilty plea for alien smuggling for purposes of prostitution—a crime not categorized as a sex offense—required the defendant to register under SORNA because the defendant knew that at least one of the smuggled aliens was a minor).

sentencing—and which will not—could create sentencing disparities among similarly situated persons. Nor is there any guarantee that judges will use their discretion to provide more reasonable punishment, instead of replicating the punishments now prescribed by legislatures.

### CONCLUSION

America wages a War on Sex Offenders at its peril. Based upon a careful examination of the history of the War on Drugs, there are strong parallels to the period leading up to the declaration of the drug war and the present situation of sex offenders. Once the conflict becomes institutionalized, American policy may become ossified. The costs of a War on Sex Offenders would be significant not just for the targeted populations, but for all Americans.

At the end of this argument, one might still wonder if a War on Sex Offenders is worthwhile. After all, some sex offenders are among the most heinous and deplorable criminals. Perhaps society should be willing to sacrifice in the ways described above in order to aggressively combat sexual violence. Nothing written here should be construed to argue for a lessening of enforcement and punishment of sex crimes, nor a less active stance in fighting sexual violence. In that broad category, there are some of the most heinous crimes imaginable. Nonetheless, just as someone can argue against the War on Drugs without favoring drug legalization, this article contends that there are unique dangers associated with a shift to a criminal-war-fighting strategy. It is also unclear if the elevation from ordinary law enforcement actually results in a decrease in the targeted offenses. Certainly, if the drug war is used as the example, success for criminal wars does not seem attainable even with decades of effort. Thus, a move to a criminal war may only carry the drawbacks of such a shift without achieving any of the promised benefits.

If, in 1968, scholars, activists, commentators, and the general public were shown the financial and social costs that would result from the War on Drugs with little to no benefit achieved, it seems unlikely that they would support the American course. The United States has a chance to prevent a repeat of the damage that the drug war has wrought.

