THE EMERGING CRIMINAL WAR ON SEX OFFENDERS

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INTRODUCTION

In 1971, Richard Nixon officially declared the War on Drugs in America.[1] However, the laws enabling that criminal war had been enacted years before Nixon's speech formally initiated the new conflict. By 1968, Lyndon Johnson had established the Bureau of Narcotics and Dangerous Drugs, which came to be known as the Drug Enforcement Agency ("DEA"),[2] to lead the charge against domestic drug use and distribution.[3] 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.[4] When Nixon took over the Presidency, he signed into law the Comprehensive Drug Abuse Prevention and Control Act[5] which established the categorization system for regulating drugs.[6] Perhaps the clearest sign that something was afoot even before Nixon's speech was that the anti-drug-war group, The National Organization for the Reform of Marijuana Laws ("NORML"), was founded to counter the shifting policy priorities of the criminal justice system.[7] By the time of Nixon's official declaration, the War on Drugs was already 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,

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[1] Claudia Kalb, *And Now, Back in the Real World ...*, NEWSWEEK, Mar. 3, 2008, at 41.

[2] Patricia Brennan, *Politics, Policy and Pot; A 'Frontline' Report Assesses America's War Against Drugs*, WASH. POST, Oct. 8, 2000, at Y06.

[3] *Growing Army of Sleuths for Government – Why?*, U.S. NEWS & WORLD REP., Jul. 21, 1975, at 36.

[4] Richard B. Craig, *Illicit Drug Traffic and U.S.-Latin American Relations*, WASH. Q., Fall 1985, at 105.

[5] PUB. L. NO. 91-513, 84 STAT. 1236 (1970).

[6] 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.

[7] Peter Carlson, *Longtime Marijuana Lobby Leader Keith Stroup Is Finally Leaving the Joint*, WASH. POST, Jan. 4, 2005, at C1.

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.[8] In that regard, states were aggressive in developing new ways to regulate and punish offenders particularly after release from prison.[9] 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[10] the Adam Walsh Child Protection and Safety Act of 2006 ("AWA").[11] 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.[12] The changes in the AWA fundamentally altered assumptions about the operation of the federal criminal justice system.[13] 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.[14] As the War on Drugs loses momentum,[15] there is an opportunity for a war against sex offenders to replace it. 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.

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

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[8] Wayne Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 5-8 (2006) [hereinafter "Logan I"].

[9] *Id.*

[10] Kris Axtman, *Efforts Grow to Keep Tabs on Sex Offenders*, CHRISTIAN SCIENCE MONITOR, Jul. 28, 2008, at 1.

[11] PUB. L. NO. 109-248, 120 STAT. 587 (2006) (codified at 42 U.S.C. § 16901-16991 (2006)).

[12] Corey Rayburn Yung, *One of These Laws is not Like the Others: Why the Federal Sex Offender and Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 378-83 (2009) [hereinafter "Yung I"].

[13] *Id*. at 370-71.

[14] *See generally*, Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

[15] Moisis Naim, *Wasted: The American Prohibition on Thinking Smart in the Drug War*, FOREIGN POLICY, May 1, 2009, at 168; *The "War on Drugs" is Over*, LOS ANGELES TIMES, May 16, 2009, at A28.

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 CRIME FIGHTING BECOMES 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,[16] a general war on crime,[17] or other specific criminal wars,[18] it has been largely taken for granted what a "criminal war" is. This has probably led to some overuse of the phrase since "criminal wars" have been relatively rarities in the United States. It might even be contended the difference between a "criminal war" and general law enforcement is only based upon form, not substance. However, the United States experience with the War on Drugs illustrates how a criminal war should be distinguished from even the most heightened levels of ordinary law enforcement.[19]

A. Drug War History

While there have been other crime fighting efforts called "wars,"[20] the "War on Drugs" stands out as the quintessential example of a war on crime in the United States.[21] The War on Drugs started as reports of heavy drug

[16] *See, e.g.*, Wisotsky, *supra* note 14.

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

[18] *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

[19] *See generally*, MICHAEL HARDT AND ANTONIO NEGRI, MULTITUDE (2005).

[20] 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. When the U.S. decided to begin a war on alcohol, the government made a previously legal activity illegal. Thus, there was no escalation of an already illegal activity. The war against alcohol was short-lived and does not offer much information because of its brief duration. Also, Prohibition was before the modern expansion of federal criminal law and development of mass media and is not applicable to the present environment. 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.

[21] Wisotsky, *supra* note 14, at 890-91.

use by Vietnam soldiers reach the United States.[22] Like the War on Poverty[23] and other domestic wars, the War on Drugs had no specific enemy – it targeted a "noun."[24] When the war started, the emphasis on treatment for drug users disappeared and was replaced with increased prison penalties.[25] As time passed, the War on Drugs became much bigger than its relatively modest beginnings.

In hindsight, it is still difficult to see how America has 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 in prisons and jails as a result.[26] With the recent violence in Mexico,[27] the United States seems to be in a worse position than when it launched Operation Intercept in 1969 to stem the flow of drugs across the border.[28] Things have become so bad in Mexico that the government had to hold a press conference to declare that the nation was not a "failed state,"[29] perhaps the surest sign that country might well be.

To understand how America has arrived at this moment in the War on Drugs, it is helpful to go over a few key historical points in the conflict. While the official start date of the War on Drugs was when Nixon made the 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.[30] The DEA became the primary vehicle for investigating and controlling the domestic trade. However, as the 1970's went on, America came to recognize the role of cocaine cartels in Columbia as a significant source of drugs entering the United States.[31] That led to greater use of interdiction strategies to impede the supply of drugs.[32]

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[22] Richard Moran, *Finding Fault with the War on Drugs*, CHIC. 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.").

[23] *See generally*, David Zarefsky, PRESIDENT JOHNSON'S WAR ON POVERTY: RHETORIC AND HISTORY (2005).

[24] 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.

[25] Edward M. Shepard and Paul R. Blackley, *Drug Enforcement and Crime: Recent Evidence from New York State*, SOC. SCI. Q., Jun. 1, 2005, at 323.

[26] Suddah, *supra* note 24.

[27] *Id*.

[28] Naim, *supra* note 15.

[29] Stephen Dinan, *Mexican Leader to Press Obama on Drug War*, WASH. TIMES, Apr. 16, 2009, at A6.

[30] Suddath, *supra* note 24.

[31] Bruce M. Bagley, *Colombia and the War on Drugs*, FOREIGN AFFAIRS, Fall 1988, at 70.

[32] *Id*. at 72.

Interestingly, Jimmy Carter campaigned with a platform plank advocating marijuana decriminalization.[33] Unlike his predecessors, President Carter did not have the same desire to ramp up the drug war.[34] Nonetheless, President Carter was able to do little to slow the conflict because of increasing power of interest groups against decriminalization.[35] Thus, by the Reagan presidency, the War on Drugs was still going strong.

Under President Reagan, the drug war reached new heights.[36] As the war had expanded, the costs in personnel, money, and other resources became a substantial burden on the United States government.[37] To maintain public support for the effort, the government flamed the public fears of drug by tapping already existing myths about drugs.[38] In 1986, the Anti-Drug Abuse Act[39] was enacted which allocated $1.7 billion for the conflict while establishing the system of mandatory minimum penalties for drug crimes.[40]

The Reagan administration also started an anti-drug propaganda campaign largely led by first lady Nancy Reagan.[41] In particular, Mrs. Reagan's "Just Say No" slogan had societal resonance and became a rallying call for supporters of the War on Drugs.[42] Other private and public entities joined the Reagan propaganda campaign. The Drug Abuse Resistance Education ("D.A.R.E") program started in Los Angeles grew into a national organization.[43] Perhaps the most famous message disseminated during the era was in a commercial by the Partnership for a

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[33] Jean Seligmann and Lucy Howard, *Easting the Pot Laws*, NEWSWEEK, Mar. 28, 1977, at 76 ("During the 1976 Presidential campaign, Jimmy Carter supported the removal of criminal penalties for possession of small amounts of marijuana - on a state-by-state basis.").

[34] *Id.*

[35] Sheryl McCarthy, *Drug Problem Becomes a Campaign Victim,* NEWSDAY (NEW YORK), Sep. 5, 1996, at A44 ("Under President Jimmy Carter, the Democrats tried to step back a little from the war on drugs - through some tentative efforts to decriminalize marijuana. But, like the Cold War, the drug war was too politically valuable.").

[36] Erik Eckholm, *Reports Find Persistent Racial Gap in Drug Arrests*, N.Y. TIMES, May 6, 2008, at A21.

[37] Barbara Bradley, *From School Yards to High Seas, U.S. Wages War on Drugs*, CHRISTIAN SCIENCE MONITOR, Mar. 7, 1988, at 1.

[38] William Johnson, *Reagan Harnesses National Hysteria for War on Drugs*, THE GLOBE AND MAIL (CANADA), Sep. 20, 1986, at D3.

[39] PUB L. NO. 99-570, 100 STAT. 3207 (1986).

[40] *Drug Wars Past and Present*, WASH. POST, Sep. 5, 1989, at A17.

[41] Timothy McNulty, *Bush Rides Drug Issue into National Crusade*, CHIC. TRIB., Sep. 11, 1989, at 12.

[42] WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS 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.").

[43] Suddath, *supra* note 24.

Drug-Free America that showed a frying egg and told viewers that the image depicted "your brain on drugs."[44] Despite mounting evidence that the propaganda and drug-education programs did little or nothing to abate drug use,[45] the efforts were "successful" because they increased public support for the War on Drugs.[46]

The first Bush presidency continued the Reagan era policies.[47] 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.[48] In Operation Just Cause, the United States invaded Panama to arrest the nation's leader Manuel Noriega because of his involvement in the drug trade.[49] President Bush also established the Office of National Drug Control Policy which was headed by William Bennett, America's first "drug czar."[50]

The Clinton years kept the drug war on track as some of the harshest punishments for drug offenders, including the use of the death penalty in non-homicide cases, were signed into law.[51] In 1995, the Sentencing Commission recommended that mandatory minimums be adjusted to diminish or eliminate what had come to be known as the crack/cocaine disparity.[52] However, because of the fervor still surrounding the War on Drugs, Congress, for the first time, rejected the recommendation of the Commission.[53] The Clinton administration claimed many successes in the War on Drugs, but the statistical evidence did not support those conclusions.[54] Nonetheless, federal efforts in support of the criminal war were expanded based upon those claimed victories.[55]

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[44] *Id.*

[45] *See generally*, DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE (1996).

[46] ELWOOD, *supra* note 42, at 1-4.

[47] 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.

[48] Cecilia Rodriguez, *In Latin America, U.S. Drug "War" Looks Like American Hypocrisy*, L.A. TIMES, Sep. 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.").

[49] *Id.*

[50] Will Englund, *Will Army Of Czars March Or Meander?*, NAT. J., Feb. 14, 2009, at 1.

[51] 18 U.S.C. § 3591(b).

[52] Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUMAN RIGHTS L. REV. 233, 250 (2007).

[53] Christopher S. Wren, *Study Questions Cost of Shift to Harsh Cocaine Sentences*, N.Y. TIMES, May 13, 1997, at A14.

[54] MATTHEW B. ROBINSON & RENEE G. SCHERLEN, LIES, DAMNED LIES, AND DRUG WAR STATISTICS: A CRITICAL ANALYSIS OF CLAIMS MADE BY THE OFFICE OF NATIONAL

While the War on Terror became the highest priority for the second Bush presidency, there were also more efforts put into the failing drug war.[56] President Bush pledged to decrease drug use among teens by 25%.[57] While marijuana use declined by 6%, use of the other major drugs increased during the same period.[58] In 2001, the National Research Council issued a damning report that questioned the continuation of the failing War on Drugs.[59] As with many other reports before, the government did not alter its course. With the new Obama administration there are signs that the War on Drugs may finally be running out of steam, but there have been no definitive moves by the government to substantiate that belief.[60]

B. Characteristics of Criminal Wars

With the War on Drugs, there is a record of nearly forty years of policy, public reaction, and law to examine. From the drug war experience, there emerge three essential elements of a criminal war. The first two are prerequisites for the war to begin and the third is an inevitable result. They are discussed below in turn.

1. Marshalling of Resources

To fight a war, a country needs money – lots of it. This is as much true in fighting an international war as it is in fighting a criminal one. And that money pays for people, weapons, and facilities. The estimated $2.2 trillion that the War on Drugs has cost the United States government only paints part of the picture.[61] One report put the amount of money the drug war costs

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DRUG CONTROL POLICY 198 (2007) ("Taken together, all those 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.").

[55] *Id.*

[56] 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…").

[57] Suddath, *supra* note 24.

[58] *Id.*

[59] CHARLES F. MANSKI, JOHN PEPPER, AND CAROL PETRIE, INFORMING AMERICA'S POLICY ON ILLEGAL DRUGS (2001).

[60] 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.").

[61] Suddath, *supra* note 24.

at $600 per second.[62] America's prisons are filled with persons captured as part of the war.[63] Indeed, without the drug war, America would not have the ignominious label of being first in persons incarcerated per capita.[64] Someone in the United States is arrested for a drug crime every twenty seconds.[65] Nearly two million people are arrested for non-violent drug crimes every year.[66]

One of the clearest signs that a war has really begun is that the government outlays a substantial budget for the undertaking, seeks to employ persons to fight that war, and attempts to find political support for the use of those resources. The drug war largely began when the Nixon administration decided to make the drug war a high priority item through the allocation of government resources.[67] Previously, the efforts were largely dispersed and the amount of capital allocated was relatively modest.[68] The Reagan administration escalated the conflict again through the allocation of more resources to the effort.[69] 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 it staffed a substantial portion of law enforcement to focus solely on drug investigations and arrests.[70] Also, the move to federalize 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.[71] Although there have

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[62] 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).

[63] Kristof, *supra* note 60 ("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.").

[64] Ethan Nadelmann, *Letterman vs. Palin; Spies Hiding Among Us?*, CNN, Jun. 11, 2009, no page ("We rank first in the world in per capita incarceration of fellow citizens. The drug war is what's driving this.").

[65] Timothy Lynch, *War No More: The Folly and Futility of Drug Prohibition*, NAT. REV., Feb. 5, 2001, no page.

[66] Kimberley A.C. Wilson, *New Drug Czar Says War on Drugs a National Health Issue*, THE OREGONIAN (PORTLAND, OREGON), May 26, 2009, no page.

[67] Kalb, *supra* note 1.

[68] *Id.*

[69] Eckholm, *supra* note 36.

[70] Sleuth Army, *supra* note 3.

[71] Yacoubian, *supra* note 6.

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 were based upon a rhetoric that constructed the contours and details of the criminal war.[72] Those myths were disseminated through a variety of media and created an environment that continued support for the allocation of substantial government resources toward the War on Drugs.[73]

One of the earliest famous examples of propaganda creating myths about drugs was the movie *Reefer Madness*.[74] In the movie, a variety of unusual and disastrous consequences resulted from the protagonist's choice to use marijuana.[75] Ultimately, the main character was driven completely insane through his use of the drug.[76]

A variety of advertising campaigns also created a series of myths about drugs including a recent campaign which stated that purchasers of marijuana were facilitating terrorism around the world.[77] While narco-terrorism has been a real concern of the U.S. government for some time,[78] the connection from buying marijuana to that terrorism that is the intended target of the War on Terror is beyond strained.[79] 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.[80]

These myths, facilitated by government propaganda, encouraged demonization of drug suppliers and, in many cases, users. Whether such

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[72] CURTIS MAREZ, DRUG WARS: THE POLITICAL ECONOMY OF NARCOTICS 8 (2004) ("... the war on drugs is inseparable from its mass mediation…. [T]he media helps to construct the war on drugs by representing it.").

[73] *Id*. at 3 ("myriad 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.").

[74] TELL YOUR CHILDREN (a/k/a REEFER MADNESS) (USA 1938).

[75] *Id.*

[76] *Id.*

[77] 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.

[78] *Id.*

[79] *Id.*

[80] *Focus on Impact of Drugs*, COURIER MAIL, Dec. 3, 2001, at 3.

attacks are warranted is beside the point – the key issue is that the government goes above and beyond traditional crime-fighting techniques when it utilizes propaganda as part of law enforcement. This propaganda bears striking similarities to efforts by the government in international military conflicts.[81] In those cases, demonization of the enemy, exaggeration of harms, and misstatements about the state of the world are common. And so, in criminal wars, the same characteristics can be identified.

For example, when President Nixon made his initial declaration of war, he stated that drugs were "public enemy number one."[82] The entire campaign of the War on Drugs was filled with language more commonly found during armed conflicts.[83] 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, and war-sized allocation of resources to guarantee ultimate victory over the enemy.[84]

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 spots, television episodes, movies, news reports from various sources, local activist groups, and even mediums of limited rhetoric like bumper stickers combine to send messages justifying a war.[85]

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."[86] In *Morse v. Frederick*, the Court held that there was no infringement of a student's right to free speech based upon

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[81] ELWOOD, *supra* note 42, at 15.

[82] Kalb, *supra* note 1.

[83] *See generally*, ELWOOD, *supra* note 42.

[84] *Id*. at 5-6.

[85] *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 on cocaine use, and a community service announcement regarding a schedule of Alcoholics Anonymous meetings.").

[86] 536 U.S. 822, 834 (2002).

his suspension for displaying a banner reading "BONG HiTS 4 JESUS" based upon the Congress' decision to give unique status to the war on drugs.[87] Decisions like *Earls* and *Frederick* led Justice Byron White to write that "No 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."[88]

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.[89] 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 repercussions on the way drug policy is enforced, from policymakers on down to street-level cops. [Its] 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.[90]

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.[91] Further, the government continued to claim victories in the ongoing conflict by distorting and misrepresenting

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[87] 551 U.S. 393 (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).

[88] California v. Acevedo, 500 U.S. 565, 601 (1991) (White, J., dissenting).

[89] *Id*. at 10 ("… the 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).

[90] 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.

[91] Jeff Yates & Andrew Whitford, *Race in the War on Drugs: The Social Consequences of Presidential Rhetoric*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120063.

evidence.[92] The media often served to reinforce the messages of the government enabling the criminal war to grow.[93]

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.[94] Without this rhetoric, it does not mean that the United States will legalize narcotics. Rather, 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. With signs that the War on Drugs might be abating, some are already wondering who or what the next war will target.[95]

3. Exception Making

Just 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 information of citizens.[96] The mentality of exception making in the War on Terror culminated in the oft-stated belief that "the Constitution is not a suicide pact."[97] 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,[98] Fifth,[99] Sixth,[100] Eighth,[101] and Fourteenth

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[92] ROBINSON & SCHERLEN, *supra* note 54, 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.")

[93] ELWOOD, *supra* note 42, at 130 ("… news media scarcely question the presidential portrayal of the drug war."); MAREZ, *supra* note 72, at 2 (noting that television and movies served as a powerful enabling force for expansions of the War on Drugs).

[94] Kristof, *supra* note 60.

[95] Scott H. Greenfield, *Who Will Be The Next Enemy?*, SIMPLE JUSTICE, May 16, 2009, available at: http://blog.simplejustice.us/2009/05/16/who-will-be-the-next-enemy.aspx.

[96] Dan Froomkin, *The Outlaw Presidency*, WASH. POST., Jul. 14, 2008, no page.

[97] *See generally*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

[98] 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

Amendments.[102] However, the First Amendment's protections for speech[103] and free exercise of religion[104] have also been subject to unusual exceptions due to the drug war. Even the right to bear arms under the Second Amendment has not been unscathed by the War on Drugs.[105] The drug war also expanded federal criminal jurisdiction in ways that required another

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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*, 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); David A. Moran, *New Voices on the War on Drugs: The New Fourth Amendment Vehicle Doctrine: Stop and Search any Car at any Time*, 47 VILL. L. REV. 815 (2002); 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).

[99] 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.").

[100] 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.'").

[101] *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.").

[102] Robert Michael Dykes, *Cache and Prizes: Drug Asset Forfeiture in California*, 20 W. ST. U. L. REV. 633, 646 (2003) ("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.'").

[103] Morse v. Frederick, 551 U.S. 393 (2007) (limiting student speech rights when certain drug speech is involved).

[104] Tom C. Rawlings, Employment Division, Department of Human Resources v. Smith: *The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567 (1991)

[105] 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 n.8 (1998).

exception to the new federalism that emerged to temporarily revive the Commerce Clause as a means to limit federal jurisdiction.[106]

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.[107] 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.[108]

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 the rule. 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 without any concern about 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.

II. THE EMERGING WAR ON SEX OFFENDERS

So, 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.[109] The significance of the AWA cannot be understated in how it

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[106] 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).

[107] *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).

[108] Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 39 (2003).

[109] However, 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 truly 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 98. The War on Drugs also had a greater foreign component than any attempt to crackdown on sex offenders (although the attempts to regulate child pornography may diminish that difference). *Department of Justice Announces Ongoing Global Enforcement Effort Targeting Child Pornographers*, US FED NEWS, Dec. 12, 2008, no page. However, while the War on Drugs ultimately developed a foreign, military aspect, that was not present in the early years. And so, to appreciate the similarities between the War on Drugs and the present crackdown on sex

has changed the overall picture in regards to sex offender restrictions. While the state and local efforts had severely limited the lives of sex offenders, the entry of the federal government parallels the actions in the years leading up to Nixon's formal declaration of the War on Drugs. Based upon a review of the federal, state and local law, there seems to be all three elements of a criminal war. 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 crackdown on sex offenders are administered and enforced by an incredible number of law enforcement officers and prosecutors.[110] 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.[111] Until very recently, sex crimes and sex offenders have been an afterthought.[112] Instead, the states and localities have been responsible for punishing sex crimes and regulating sex offenders.[113] The result has been an amalgam of laws that have increasingly punished certain sex-related crimes and have drastically increased post-incarceration regulation of sex offenders.[114]

1. State and Local Laws

The degree to which the lower-level governments have targeted sex offenders, as distinct from other criminals, is notable. The sheer array of regulations upon sex offenders in different states and localities is mind-boggling. Every state has a sex offender registration system in place.[115]

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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.

[110] Wayne Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2007) [hereinafter "Logan II"].

[111] Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 n.165 (1998).

[112] Logan II, *supra* note 110, at 3.

[113] Yung I, *supra* note 12, at 372-73.

[114] *Id.*

[115] Smith v. Doe, 538 U.S. 84, 90 (2003).

These registration provisions are supplemented with community notification when sex offenders move into neighborhoods.[116] In many places, a person can sign up for email notification so that the community knows the moment a sex offender has moved into the area.[117] In thirty states, sex offenders are limited as to where they may live through residency restrictions.[118] Those restrictions are supplemented with lifetime Global Positioning System ("GPS") monitoring in many jurisdictions.[119] The residency restrictions prevent offenders from living near a variety of locations including: parks, daycare centers, schools, bus stops, beaches, playgrounds, city halls, churches, libraries, and other locations where children might gather.[120] Many residency restrictions also contain provisions which prohibit sex offenders from even travelling near some of the above-listed locations.[121] In aggregate, such residency restrictions often result in homelessness[122] and amount to banishment.[123]

At least twenty states have created provisions allowing sex offenders to be sent to civil facilities for "treatment" after release from prison.[124] Release from the facilities is rare and placement within the facilities typically amounts to a lifetime sentence.[125] Many states have simply removed the need for post-release regulation by making sex crimes punishment extremely harsh.[126] Until the United States Supreme Court, in *Kennedy v. Louisiana*,[127] held the practice unconstitutional, several states had enacted laws to make child rape a capital crime.[128] Other states have drastically

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[116] HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 39 (2007) [hereinafter "No Easy Answers"].

[117] *Id.*

[118] Paula Reed, *Residency Restrictions for Sex Offenders Popular, but Ineffective*, PITTSBURGH POST-GAZETTE (PENNSYLVANIA), Oct. 26, 2008, at B1.

[119] Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 124 (2007) [hereinafter "Yung II"].

[120] No Easy Answers, *supra* note 116, at 110-11.

[121] *Id*. at 139-41.

[122] *Id*. at 8.

[123] *See generally*, Yung II, *supra* note 119, at 124.

[124] 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 SVP laws, providing for the indefinite detention of about 2,700 offenders.").

[125] *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.").

[126] Michael O'Hear, *Perpetual Panic*, 21 FED. SENT'G REP. 69, 69 (2008).

[127] 128 S. Ct. 2641.

[128] *Id*. at 2651 ("Five States have since followed Louisiana's lead: 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.)

increased prison sentences on certain sex crimes.[129] Arizona, for example, requires that someone who possesses child pornography serve a mandatory minimum of ten years in prison for each illegal image possessed.[130] 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.[131] At least eight states have revived the use of castration (chemical and physical) as part of their sentencing schemes.[132]

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.[133] Several states have marked driver's licenses with a special "sex offender" stamp.[134] Some governments have considered supplementing such measures with required pink or green license plates.[135] Other proposals would create criminal liability for third parties who facilitate sex offenders in some manner.[136] Sex

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(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).").

[129] 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.").

[130] Amir Efrati, *Making Punishments Fit the Most Offensive Crimes*, ASSOCIATED PRESS FINANCIAL WIRE, Oct. 23, 2008, no page ("In Arizona, the minimum mandatory sentence for one count of possessing child pornography is 10 years. Several years ago, a former teacher with no prior criminal record who was convicted on 20 counts of possession was sentenced to 200 years in prison."). For a fuller discussion of the problems associated with child pornography sentences, *see* Carissa Byrne Hessick, *Punishing Kiddie Porn*, presented at Junior Criminal Law Professor Workshop at George Washington University Law School.

[131] *Id.*

[132] John Gramlich, *Lawsuits Test Crackdown on Sex Criminals*, STATELINE.ORG, Apr. 18, 2008, no page.

[133] No Easy Answers, *supra* note 116, at 103-04.

[134] *Sex Offenders*, DAILY WORLD, Dec. 7, 2007, no page.

[135] Reginald Fields, *Device Would Send Alert if Sex Offender Nears User*, CLEVELAND 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, *Requiring Sex Offender License Plates is Cruel and Unusual Punishment*, THE CAPITAL TIMES (MADISON, WISCONSIN), May 14, 2007, at A9.

[136] Susannah Bryan, *Davie Law Targets Landlords Renting to Sex Offenders*, SOUTH FLORIDA SUN-SENTINEL, Jan. 21, 2009, no page ("A proposed town law would allow property owners to be fined or jailed if they rent to convicted sex offenders and predators in

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, any online identifications, and corresponding passwords to government authorities.[137] Their every online move and communication can be fully surveyed for the rest of their lives. In response to pressure by state prosecutors, online social networking sites have purged sex offenders entirely.[138] In some cases, sex offenders have been barred any access to computers.[139]

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 designating their criminal history.[140] Other offenders have had to paint their crimes on the side of their houses.[141] It has become common practice across America to put sex offenders into a complete lockdown every year on Halloween.[142]

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violation of residency restrictions."); Robert Morgan, *Jindal Continues Efforts Against "Sex Offenders"*, DAILY TOWN TALK (ALEXANDRIA, LOUISIANA), 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.").

[137] *See, e.g.*, UTAH CODE ANN. § 77-27-21.5(1)(j) (2008).

[138] Verne Kopytoff & Ryan Kim, *The Tech Chronicles*, SAN FRANCISCO CHRON., Feb. 4, 2009, at C4 ("MySpace has purged 90,000 registered sex offenders, the social networking site told law enforcement officials Tuesday. The No. 2 online social network said it identified and removed the offenders following an agreement struck last year with state attorneys general to improve child safety and crack down on threats to minors…. Facebook, which signed a similar agreement with the AGs, told Bloomberg that it is actively searching for sex offenders and working with law enforcement to identify and remove them.").

[139] *See, e.g.*, Tamara Race, *Guilty Verdict in Child Porn Case*, THE PATRIOT LEDGER (QUINCY, MA), Jan. 10, 2009, at 10 ("In addition to wearing an electronic monitoring bracelet, Norris cannot access a computer or go on the Internet and is barred from possessing pornography.").

[140] *See, e.g.*, Susannah A. Nesmith, *Judge Lets Signs Spell Sex Crimes*, PALM BEACH POST, Nov. 9, 1996, at 1B ("The day after Dvorsetz's hearing, Schack said he plans to go a step further with another man accused of fondling a child. He told Larry Kath, 50, he would have to put up a similar sign, and that he would have to wear a shirt saying he is a convicted sex offender whenever he leaves his home.").

[141] *See, e.g.*, Pat Reavy, *Seminar's Focus: Recent Gang Trends*, DESERET NEWS (SALT LAKE CITY), Apr. 22, 2003 ("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.").

[142] *See, e.g.*, Beth Walton, *Halloween Safety No. 1 Priority*, LAS VEGAS REVIEW-JOURNAL (NEVADA), Oct. 28, 2007, at 1B ("Meanwhile, parole and probation officers will be ringing the doorbells of registered sex offenders on Halloween as part of the Nevada Department of Public Safety's Parole and Probation Division's third annual 'Operation Scarecrow.' The operation is aimed at preventing high-level sex offenders from using Halloween as a way to have contact with children. The division has set forth specific Halloween rules for Tier 2 and Tier 3 sex offenders under their watch. The offenders are

Importantly, while sexual violence continues to be a problem around the world, only the United States has enacted such laws and ordinances.[143] Only a small handful of nations have adopted registration requirements (normally without corresponding community notification provisions).[144] None of the other laws and policies discussed above has been modeled in other countries.[145]

2. The AWA and Other Federal Laws

The state and local laws illustrated the political popularity of sex offender restrictions.[146] 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 1994.[147] The law conditioned law enforcement funding to states upon having a registration system in place.[148]

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

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prohibited from answering their doors to trick-or-treaters. They can't be at a home where candy is being handed out, and they can't attend any festivities where children are present, even if they have permission from a judge or the parole board to do so. They are even banned from transporting or accompanying their own children to any Halloween event or trick-or-treat activity.").

[143] No Easy Answers, *supra* note 116, at 10 ("Sexual violence and abuse against children are, unfortunately, a worldwide problem. Yet the United States is the only country in the world that has such a panoply of measures governing the lives of former sex offenders. It is the only country Human Rights Watch knows of with blanket laws prohibiting people with prior convictions for sex crimes from living within designated areas.").

[144] *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.").

[145] *Id.*

[146] 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.").

[147] PUB. L. NO. 103-322, tit. XVII, subtit. A, 108 STAT. 1796, 2038–42 (1994) (codified at 42 U.S.C. § 14071 (2006)).

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

Congress at the time.[149] Most notable among the Act's various provisions were the establishment of the new crime of failure to register,[150] requirements on the states to form a national registry,[151] a new civil commitment system at the federal level,[152] increased sentences for a variety of crimes,[153] severe limitations on bail for certain sex offenders,[154] and new discovery rules in child pornography cases.[155] Each of these measures was a substantial departure from prior federal policy.

Title I of the AWA is also known as the Sex Offender Registration and Notification Act ("SORNA") and 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.[156] Offenders are further divided into a tiered structure based upon the severity of offenses committed. The AWA also requires the creation of a national registry of sex offenders in 2009.[157]

The registration obligations of the SORNA are explicitly detailed at 42 U.S.C. § 16913 which states that a sex offender must register in any jurisdiction where he or she resides, works, or is a student.[158] 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.[159] If an offender fails to keep his or her registry accurate and current, he or 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.[160] When the Act was passed, it was unclear if the

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[149] 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.

[150] 18 U.S.C. § 2250(a).

[151] 42 U.S.C. § 16920.

[152] 18 U.S.C. § 4248(a).

[153] 18 U.S.C. § 3559(f)(1); 18 U.S.C. § 1591(b)(1); 18 U.S.C. § 2241(c); 18 U.S.C. § 2242; 18 U.S.C.§ 2243(b); 18 U.S.C.§ 2244(a)(5); 18 U.S.C.§§ 2422(b), 2423(a); 18 U.S.C. § 2251(e); 18 U.S.C. § 2252B; 18 U.S.C. § 2260(c)(1); 18 U.S.C. §2258; Baron-Evans, *supra* note __, at 5-6.

[154] 18 U.S.C. § 3142.

[155] 18 U.S.C. § 3509(m)(1)-(2).

[156] 42 U.S.C. § 16911(1).

[157] 42 U.S.C. § 16920.

[158] 42 U.S.C. § 16913(a).

[159] 42 U.S.C. § 16913(c).

[160] The crime is defined as:

> (a) In General. – Whoever –
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

registration requirements would extend to sex offenders who committed crimes before the passage of the Act. However, In February 2007, the Attorney General issued a rule applying the requirements retrospectively. 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.[161]

Beyond the new crime of failure to register, the AWA also added several other new crimes and increased punishments on existing crimes. Under the Act, the crime of Child Exploitation Enterprise, with a mandatory minimum of twenty years imprisonment, applied 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."[162] 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.[163]

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.[164] Obscenity prohibitions were similarly expanded to cover more intrastate conduct.[165] Thus, even in instances where the illicit conduct was wholly interstate, the federal government could assert jurisdiction. In Indian Country, child abuse and neglect became a federal crime.[166]

The AWA has also created an executive organization, SMART, to enforce and administer parts of the statute. While it is far smaller than the present DEA, past precedent indicates that executive agencies and organizations that have been set up to target particular crimes have only grown after creation. Consider that in the initial economic stimulus package

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> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a).

[161] 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.").

[162] 18 U.S.C. § 2252A(g)

[163] 18 U.S.C. § 2252C(a).

[164] 18 U.S.C. § 1201(a)(1).

[165] 18 U.S.C. §§ 1465, 1466.

[166] 18 U.S.C. § 1153(a).

proposed last year, there was $50 million allocated for enforcing the SORNA provisions of the AWA.[167] 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 50 United States Marshals can be hired to enforce the AWA.[168] Thus far, key members of Congress have been inclined to allocate funds to hire twice as many Marshals as proposed by the administration.[169] Even if no increases in the AWA budget are made, the resources presently allocated to the crackdown on sex offenders exceeds 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. Perhaps most prominently, the concept of stranger danger is embedded in American society and has been the cornerstone myth in misdirecting sex offender policy. 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.[170] However, despite clear evidence that rape is crime primarily committed by persons known to the victim, the stranger danger myth for rape is still widely held in America.[171]

The stranger danger myth has also been replicated in regards to child molestation.[172] As Eric Janus has noted:

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[167] *Law Enforcement, Crime Victims Programs Funded in Stimulus Package*, US FED NEWS, Feb. 12, 2009, no page.

[168] *2010 Budget: Agency by Agency*, FEDERAL 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.")

[169] *Sen. Mikulski Makes Community Security a Priority in Federal Checkbook*, US FED NEWS, Jun. 25, 2009, no page (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…").

[170] *See, e.g.*, SUSAN ESTRICH, REAL RAPE 3-4 (1987).

[171] 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, 57% of which are committed by a friend or acquaintance, 10% by an intimate partner, and 2% by some other relative.").

[172] LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS 2 (1997).

> 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.[173]

Children are taught from a very early age to be afraid of strangers. Americans worry about the creepy stranger abducting and molesting their child.[174] The statistics are quite clear, however, that over ninety percent of molestations are committed by a friend or family member.[175] Nonetheless, the emphasis on stranger danger has been the policy focus of sex crime law related to child victims.[176]

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.[177] 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 served the interested of preventing the "frightening and high" risk of recidivism by sex offenders.[178] The Eighth Circuit, in *Doe v. Miller*, relied on the factual finding that sex offender recidivism "is between 20 and 25 percent."[179] The Fifth Circuit upheld special conditions on supervised release in *United States v. Emerson* based, in part, upon the testimony of U.S. Probations Officer who stated that in his "professional experience … sex offenders … have a recidivism rate of approximately 70%...."[180]

On the question of post-release recidivism, the best available study was issued in 2003 by the Department of Justice ("DOJ").[181] The DOJ study examined the criminal records of the 9,691 sex offenders released in fifteen states since 1994. The key finding of the study was that recidivism rates

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[173] ERIC JANUS, FAILURE TO PROTECT 3 (2006).

[174] Ellen Perlman, *Where Will Sex Offenders Live?*, GOVERNING MAG., Jun. 2006, at 56.

[175] *Id.*

[176] Sarah Geraghty, *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).

[177] Eilene Zimmerman, *Churches Slam Doors on Sex Offenders*, SALON.COM, Apr. 26, 2007, no page ("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.'").

[178] 538 U.S. at 103 (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)).

[179] 405 F.3d 700, 707 (2005).

[180] 231 Fed. Appx. 349, 352 (2007).

[181] LAWRENCE A. GREENFELD, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003).

among sex offenders were far lower than previously believed.[182] 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).[183]

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 figures much higher. 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. Also of note is that only 5% of molestation cases were committed by persons subject to sex offender registries.[184] 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 singular 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 those who have committed bestiality, flashers, gropers, voyeurs, prostitutes, persons who have engaged in an adult incest relationship,[185] and stalkers.[186]

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 were declared unconstitutional in *Lawrence v. Texas*.[187] Producers of obscene videos are also considered sex offenders.[188]

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[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *See, e.g.*, UTAH CODE ANN. § 77-27-21.5 (listing incest as one of the crimes that leads to mandatory listing on the sex offender registry).

[186] *See, e.g.*, N.Y. PENAL LAW § 130.91 (listing stalking as an offense for which a conviction can lead to a registry listing.

[187] 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. *See, e.g.*, Mercedes Bishop on the Virginia registry for a 1993 conviction for crimes against nature.

Similarly, those who made consensual sexual home videos deemed obscene appear on registries.[189] There are some people on sex offender registries that are almost beyond explanation. Donald Jackson, for example, is on the Iowa sex offender registry and the only listed conviction is from 1992 for second degree burglary.[190] The above examples are probably far from the most egregious since they were found based upon random searches of state registries. 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.

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 the same as flashers.[191] Janet Allison was a mother who, after to trying to stop the relationship, allowed her fifteen year-old daughter's boyfriend to move in with the family.[192] 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.[193] Other crimes are so strange as to easy defy categorization. Examples include a man who had sex with a car wash vacuum,[194] another

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[188] *See, e.g.*, Christian Clevenger on the Oklahoma registry for a conviction of distributing obscenity. http://docapp8.doc.state.ok.us/servlet/page?_pageid=190&_dad=portal30&_schema=PORTAL30.

[189] *See, e.g.*, Cynthia Dutton on the Oklahoma registry. http://docapp8.doc.state.ok.us/servlet/page?_pageid=190&_dad=portal30&_schema=PORTAL30.

[190] http://www.iowasexoffender.com/search.php.

[191] Pauline Vu, *Worth Noting*, STATELINE.ORG, Oct. 5, 2007, no page (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).

[192] Maureen Downey, *Registry without Reason*, ATLANTA JOURNAL-CONSTITUTION, Nov. 4, 2007, at 6B ("…White County Superior Court pronounced [Janet Allison] a sex offender after she pled guilty in 2002 to being a party to the crimes of statutory rape and child molestation…. Allison is now one of the 14,572 people on the Georgia sex-offender registry, which prevents her from living or working near places where children are likely to congregate, including churches and schools.").

[193] *Id.*

[194] George Hunter, *Swan Creek Township Man Gets 90 Days in Vacuum Sex Act Case*, DETROIT NEWS, Mar. 26, 2009, no page ("A man who was sentenced Wednesday to 90 days in jail for performing a sex act with a car wash vacuum needs psychological help, a relative said…. Savage pleaded no contest to indecent exposure last month.").

had relations with a picnic table,[195] and yet another had sex with dead animals (and argued the law against bestiality did not apply because the animals were dead).[196] A recent survey found that 20% of teens engage in "sexting" which is the transmission of images that might be deemed child pornography.[197] Already, some prosecutors have sought to charge such teens with distribution of child pornography for "sexting."[198]

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 the homogeneity myth that cannot even survive limited scrutiny. Yet, given that most sex offender laws are passed unanimously with no debate,[199] 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.

Another myth that has recently emerged actually has very old roots. The emphasis on punishing sex offenders is based in part on the idea that being raped or molested is a "fate worse than death."[200] As I have argued elsewhere, that myth sends pernicious messages to sex crime victims, is

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[195] *Weeklypedia*, THE INDEPENDENT ON SUNDAY, Apr. 6, 2008, at 48 ("Art Price Jr, … was spotted in Bellevue, Ohio, attempting sex with a picnic table on four separate occasions. Each time he was naked. He faces several charges of public indecency….").

[196] Wisconsin v. Hathaway, 747 N.W.2d 529, *2- (Wi. Ct. of App. Dist 3, Feb. 19, 2008) ("Hathaway stated he had sex with a dead deer he found by the side of the road…. Hathaway was charged with committing an act of sexual gratification with an animal in violation of WIS. STAT. § 944.17(2)(c). He moved to dismiss the complaint, arguing the statute did not apply to dead animals.").

[197] 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.'").

[198] 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.").

[199] Logan III, *supra* note 148, at 280.

[200] *See generally*, Corey Rayburn [Yung], *Better Dead than R(ap)ed: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119 (2004) (hereinafter "Yung III").

based upon historical patriarchal notions of innocence and virginity, and encourages persons being sexually assaulted to risk their lives rather than be violated.[201] When that myth is used to support policy, the result is over-punishment that creates incentives for perpetrators to kill their victims.[202]

The myths of sex offenders 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."[203] Since that declaration, government officials in states across the nation have joined New Mexico by issuing similar statements.[204] In 2004, John Ashcroft bragged that a tool of the War on Terror, the Patriot Act,[205] had been used "to catch predatory child molesters and pornographers."[206] 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 in localities in a war on sex offenders.[207] 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."[208]

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[201] *Id*. at 1152-63.

[202] *Id*. at 1159-63.

[203] Chris Vogel, *Gov. Going after Child Rapists*, ALBUQUERQUE JOURNAL, Aug. 15, 2003, at A1 (quoting New Mexico Governor Bill Richardson).

[204] Alvin Brenn, *Mom Talks about Near-Abduction*, THE MONTGOMERY ADVERTISER (ALABAMA), Oct. 16, 2007, no page ("'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. Mernino 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.").

[205] PUB.L. 107-56.

[206] John Ashcroft, *Press Conference with Attorney General John Ashcroft*, FED. NEWS SERV., Jul 13, 2004, no page.

[207] Mark Lunsford, *Sex Offender Registration*, CQ CONGRESSIONAL TESTIMONY, Mar. 10, 2009, no page.

[208] *Id.*

The mass media have fanned the flames by using similar war rhetoric in discussing the crackdown on sex offenders.[209] Early in the second Bush administration, CNN featured a rape counselor who called for an aggressive war on sex offenders.[210] In 2006, John Walsh, when 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 with such a mission.[211] 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 and without debate.[212] When the leader of the National Association to Protect Children called on an all-out war on sex

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[209] Dave Johnston, *Proposed Sex-Criminal Law Reaches too Far*, UNIVERSITY WIRE, Mar. 13, 2007, no page ("Americans have a growing cache of weapons in the war on sexual predators."); Brian Friel, *The War on Kiddie Porn*, THE NATIONAL JOURNAL, Mar. 25, 2006, no page ("No matter what happens in Congress, law enforcement officials expect child porn -- and the war on porn -- to continue expanding."); Lisa McPheron, *Team Formed to Keep Track of Sex Offenders*, THE PRESS ENTERPRISE (RIVERSIDE, CA.), Jan. 20, 2006, p. B08a ("This is a pandemic issue that we can't take serious enough,' she said. 'This is a war.'") (quoting Erin Runnion, activist); U.S. NEWSWIRE, *Tough Child Sex Crimes Bill Now Law in California; Loopholes for Child Rapists Closed*, Oct. 4, 2005, no page ("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*, NEW JERSEY LAWYER, Dec. 23, 2002, p. 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."); Mark Donald, *Hello My Name is Pervert*, DALLAS OBSERVER, Jan. 11, 2001, no page ("Among their numbers is an even smaller percentage who kidnap and maim and murder and who set the harsh tone of the war against all sex offenders.").

[210] The counselor stated that, "[w]ell, I think that the problem is a bigger problem, and it has to do with sort of society's denial of how series this crime is and how it devastates human lives, and that 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 and it needs to be taken absolutely seriously and judges need to be monitored and that when laws are written and we're absolutely sure that they are good laws and laws that are going to stand up." *Colorado Sex Offenders Released from Custody Today*, CNN LIVE THIS MORNING, Jul. 25, 2001, no page (quoting Marte McNally).

[211] Alan Colmes, *Interview with Arthur Aidala*, FOX HANNITY & COLMES, Apr. 28, 2006, no page ("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.").

[212] *Recent Legislation: Criminal Law - Sex Offender Notification Statute - Alabama Strengthens Restrictions on Sex Offenders*, 119 HARV. L. REV. 939, 942 (2005).

offenders, Nancy Grace quickly echoed the call and analogized such a hypothetical conflict to the War on Terror.[213]

The crackdown on sex offenders has a private entity 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.[214] Notably, the show has reportedly had a very poor success rate in leading to convictions of persons caught in the filmed sting operations.[215] However, just like the propaganda "success" is not necessarily measured by decreasing crime, but rather by increasing public support for the criminal war, and, in this case, television ratings.

C. Exception Making

[213] David Keith and Nancy Grace, *Young People Subjected to Sexual Predators*, CNN, May 3, 2006, no page ("David Keith, National Association to Protect Children: I think that everyone understands how horrific this problem is. What they don't understand is that it's a forest fire. I've been working with Protect to try to fight this in states, state by state, legislation by legislation, but the only thing that we can do now is to have a national war on child molesters. We need it nationally, a national strategy. It needs to be federally funded. We have to have boots on the ground, train people in the field, and declare war on child molesters, just like we've declared a war on terrorists. [Nancy] Grace: I couldn't agree more, and we hear about the war on terrorism all of the time -- and I agree with that -- but what about the war here in our own homes?").

[214] *To Catch a Predator* (NBC).

[215] 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 (ALABAMA), Mar. 26, 2009, at 1A ("While the cyber vigilante group Perverted Justice partnership with 'Dateline NBC's' 'To Catch a Predator' drew attention to the issue of underage Internet users being lured by potential pedophiles, some child protection workers recommend against such collaborations. Because good intentions can sometimes lead to bad outcomes, attendees at the National Children's Advocacy Center symposium on child abuse were discouraged from participating in sting operations instigated by the media or vigilante groups…. Much more often than not, vigilante-run stings do not end in convictions."); Sandra Stokley, *Sex-Stings Tactics Criticized*, THE PRESS ENTERPRISE (RIVERSIDE, CA), Sep. 28, 2001, p. A01 ("But cases that initially seemed like slam-dunk convictions - the men were seen on camera crying, pleading or even confessing - have yielded uneven results both in Riverside County and other 'Predator' sting locations."). In addition to the legal problems with the stings initiated by Perverted Justice, the organization has had volunteers engage in illegal activity to shutdown criticism of the organization. *FBI Arrest Pennsy Man Charged in Web Attacks*, JERSEY JOURNAL, Jul. 1, 2009, at D20.

The broad range of sex offender laws have 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

Article I, Section 9, subsection (3) of the United States Constitution provides, that "No Bill of Attainder or ex post facto law shall be passed." 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.[216] 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*,[217] the Court followed its established process for reviewing 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."[218] 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 intended to be punitive, its effects were "so punitive … as to negate [the State's] intention to deem it 'civil.'"[219] 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

[216] Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1349, 1358, 1380 (2008)
[217] *Smith*, 538 U.S. 84.
[218] 450 U.S. 24, 29 (1981).
[219] *Smith*, 538 U.S. at 92 (quoting Kansas v. Hendricks, 521 U.S. 346 (1997)).

intended to be regulatory, and not punitive, because of the placement of the law outside of the criminal code. [220]

As in previous cases, the Court analyzed the seven factors in *Kennedy v. Mendoza-Martinez*[221] to determine if the Alaska statute was punitive in effects.[222] 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.[223] The Court rejected the argument that registration and notification was analogous to traditional shaming punishments.[224] The Court distinguished shaming punishments because the registry information was public record and available through other legal means.[225] The online registry was found to be a more efficient means of accessing that information.[226] 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.[227]

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.[228]

A similar pattern has emerged in challenges to residency restrictions. The first federal appellate court to review residency restrictions on sex offenders in regards to the Ex Post Facto Clause was the Eighth Circuit of Appeals. In *Doe v. Miller*, which is still the leading case on the subject, the court held that Iowa's residency restrictions did not violate the Clause.[229] 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 not

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[220] *Smith*, 538 U.S. at 93.

[221] 372 U.S. 144, 168-169 (1963).

[222] *Smith*, 538 U.S. at 97.

[223] *Id*. ("The 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)).

[224] *Smith*, 538 U.S. at 97-98.

[225] *Id*. at 98.

[226] *Id*. at 98-99.

[227] *Id.* at 101-02.

[228] Yung I, *supra* note 12, at 386-400.

[229] *Miller*, 405 F.3d 700 [hereinafter "Miller I"].

retrospective.[230] 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 substantial evidence in the record that the Iowa law had the effect of banishing offenders from whole towns and communities, the majority opinion rejected the analogy to the historical punishment of banishment.[231] The court found that whereas the Iowa law restricted where a sex offender could establish residence, that reality was not the same as banishment.[232] A sex offender could still enter the 2,000 foot radius exclusion zone even if he or she could not live there.[233]

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.[234] The district court findings, which 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 small 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…. 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.[235]

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.[236] Other states upheld laws that eviscerated the rationale for the majority holding in *Doe v. Miller* by upholding residency restrictions that also contained loitering and travel restrictions that prevented offenders from entering the exclusion zones.[237]

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[230] *Id.* at 718-19.
[231] *Id.* at 719–20.
[232] *Id.* at 719.
[233] IA. CODE § 692A.2A.
[234] *Id.* at 724 (Melloy, M., dissenting).
[235] Doe v. Miller, 298 F. Supp. 2d 844, 851 (S.D. Iowa 2004) [hereinafter "Miller II"].
[236] Mann v. State, 603 S.E.2d 283 (Ga. 2004).
[237] ACLU of N.M. v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215; Nasal v. Dover, 169 Ohio App. 3d 262, 2006-Ohio-5584, 862 N.E.2d 571; Boyd v. State, No. CR-04-0936, 2006 Ala. Crim. App. LEXIS 18 (Ala. Crim. App. Feb. 3, 2006).

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.[238] 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.[239]

When reviewing arguments that the SORNA was intended to 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.[240] 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.[241] 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.[242] 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.[243]

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.[244] The mental gymnastics required to hold that prison is not punishment demonstrate that a large exception to the Ex Post Facto Clause is being carved out to accommodate the new wave of sex offender laws. It

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[238] *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)).

[239] *See, e.g.*, United States v. Pitts, 2007 U.S. Dist. LEXIS 82632, at *5-*6 (M.D. La. 2007).

[240] Yung I, *supra* note 12, at 396.

[241] 18 U.S.C. § 2250(a).

[242] *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.").

[243] Yung I, *supra* note 12, at 392-96.

[244] *Id*. at 396-400.

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 has been asserted to be the Commerce Clause.[245] The Commerce Clause allows Congress "[t]o regulate Commerce … among the several States."[246] Defendants have repeatedly challenged AWA provisions on Commerce Clause grounds but few have been successful.[247] 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*.[248]

In *Lopez*, the Court struck down the Gun-Free School Zones Act ("GFSZA").[249] 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."[250] Soon after, the Court struck down portions of the Violence Against Women Act in *U.S. v. Morrison*.[251] 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: 1) an activity was economic in nature; 2) there was jurisdictional language limiting the scope of the statute; 3) Congress issued legislative findings in support of a substantial effect

[245] 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 the a showing of Commerce Clause jurisdiction was necessary. *See infra* notes 264 to 269 and accompanying text.

[246] U.S. CONST. art. I, § 8, cl. 3.

[247] Yung I, *supra* note 12, at 410-22.

[248] U.S. v. Lopez, 514 U.S. 549 (1995).

[249] *Id.*

[250] *Id*. at 558-59.

[251] 529 U.S. 598 (2000).

finding; and 4) a nexus existed between the regulated activity and interstate commerce.[252]

In *Gonzalez v. Raich*,[253] the Court reversed directions and upheld the Controlled Substances Act ("CSA") and held that it overrode California's Compassionate Use Act,[254] which provided that possession and use of marijuana was permissible for medicinal purposes. The majority relied upon *Wickard v. Filburn*,[255] to find that intrastate marijuana possession had substantial interstate economic effects.[256]

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 section presents a slightly different Commerce Clause issue with Subsection B presenting more complicated arguments as to federal jurisdiction. 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."[257] While this limitation facially sounds similar to one part of the substantial effects test in *Morrison*, there are significant reasons why the limitation is constitutionally inadequate.

First, lower courts have primarily found Subsection B prosecutions to be supported by the second *Lopez* category. To then selectively use a test which is only coherent for the third factor is odd. After all, the substantial effects test requires to a court to consider if there is economic good involved (clearly, there is not), whether Congress made the requisite legislative findings (it did not despite the legislation being passed after the decision in *Morrison*), and whether there is 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.

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. Amber*], the defendant, Ambert, became a resident of Florida before the enactment of SORNA. He failed to register in that state. On July 6, 2007, a state arrest warrant for violation of Florida registration law was

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[252] *Id*. at 612-13.
[253] 545 U.S. 1 (2005).
[254] CAL. HEALTH & SAFETY CODE § 11362.5 (2005).
[255] Wickard v. Filburn, 317 U.S. 111 (1942).
[256] *Raich*, 545 U.S. at 10-11.
[257] 18 U.S.C. § 2250(a)(2)(B).

> issued for Ambert. On July 9, 2007, Ambert took a brief trip to California and returned to Florida on July 11, 2007. 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 entire basis for alleged travel in interstate commerce needed to support his indictment…. In our modern [society] that 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*.[258]

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*[259] 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.[260] Nonetheless, the court allowed the prosecution to proceed.[261]

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.[262] Courts have universally upheld such prosecutions without much discussion.[263] 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,

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[258] Yung I, *supra* note 12, at 416
[259] *Pitts*, 2007 U.S. Dist. LEXIS 82632, at *5.
[260] *Id*. at *5-*6.
[261] *Id.*
[262] Yung I, *supra* note 12, at 411-12
[263] *Id.*

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 of the failure to register crimes, the civil commitment authorization contains no jurisdictional limitation. The statute authorizes the government to seek indefinite detention of anyone in 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.[264] However, other district and circuit courts have reached the opposite conclusion.[265] 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.

Further, the government sought a writ of certiorari in *Comstock* and Chief Justice Roberts made the unusual move of barring Comstock's release, and those similarly situated, from custody until the certiorari decision was made based only upon an ex parte motion by the government.[266] Because of the Chief Justice's order, many prisoners remained in custody after their release date based solely based upon the order issued with no opportunity for the prisoners to counter the government's argument.[267] The respondents in *Comstock*, including Comstock himself, were still in custody two years after their release dates.[268] Subsequently, the Court issued a writ of certiorari and will hear arguments in the case in late 2009 or early 2010.[269]

Also of significance, one of the respondents has never been found guilty under federal jurisdiction.[270] Instead, he was found incompetent to stand

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[264] United States v. Comstock, 551 F.3d 274, 279-80 (4th Cir. 2009) [hereinafter "Comstock II"].

[265] United States v. Tom, 565 F.3d 497 (8th Cir. 2009).

[266] United States v. Comstock, No. 08A863 (08-1224) (Apr. 3, 2009).

[267] United States v. Comstock, 08-1224, Brief in Opposition, 2 (May 20, 2009) ("Currently, 76 men remain incarcerated in the Eastern District of North Carolina under § 4248 certification; the vast majority are well past their BOP 'release dates.'") [hereinafter "Opposition Brief"].

[268] *Id.* ("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.").

[269] United States v. Comstock, 08-1224, Certiorari – Summary Disposition (Jun. 22, 2009).

[270] Opposition Brief at 2 ("As for Mr. Catron, after he was found not competent and not restorable, the government filed a "Certificate of Mental Disease or Defect and

trial and the government sought to divert him into civil commitment under the AWA.[271] In that case, the government never had the burden of establishing federal jurisdiction in a prior prosecution.[272] In a separate case, the government sought to divert someone being held for immigration violations under the AWA.[273] 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.[274] 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 AWA limits defense access to child pornography evidence in federal cases.[275] 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.[276] Thus far, courts have consistently ruled that the AWA's limitations are facially constitutional.[277]

Most of the opinions have focused on what constitutes "reasonable access" and how much access must be afforded under the Confrontation

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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.").

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *See supra* notes 248 to 252 and accompanying text.

[275] 18 U.S.C. § 3509(m).

[276] *See, e.g.*, United States v. Johnson, 456 F. Supp. 2d 1016 (N.D. Ia. 2006).

[277] *See, e.g.*, United States v. Butts, 2006 U.S. Dist. LEXIS 90165 (D. Az. 2006).

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 relies 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.[278] 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.[279] Even though experts have stated that their costs radically and substantially increase if they have to move all of their equipment and work exclusively at a government facility.[280] In every case, the courts have held that a defendant does not have a right to a cheap expert 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.[281] Thus, in such cases where a defendant has argued a Confrontation Clause argument, the court has denied the challenge, and the

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[278] United States v. Cordy, 2007 U.S. Dist. LEXIS 37355, *3-*4 (D. Neb. 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.").

[279] *Id.*

[280] 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)).

[281] United States v. Winslow, 2008 U.S. Dist. LEXIS 66855, *35 (D. Ak. 2008) ("The Walsh Act greatly increases the inconvenience, difficulty, and expense connected with both the prosecution and defense of child pornography offenses.").

defendant was unable to hire the expert.[282] 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. 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 without actual notice violated the Due Process Clause of the Fourteenth Amendment.[283] 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.[284] 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 challenges to registries based upon *Lambert* notice rules.[285] In regards to the AWA, this might seem especially shocking given that the Act mandates the Attorney General to notify all sex offenders subject to SORNA and no such notice has been given to offenders outside of federal custody.[286]

Most courts reviewing such notice claims have failed to mention *Lambert* at all. Among those courts that have engaged the due process claim, the primary reason that courts have rejected such challenges based

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[282] *See, e.g.*, United States v. Battaglia, 2007 U.S. Dist. LEXIS 45773, *15-*16 (N.D. Ohio 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.").

[283] 355 U.S. 225 (1957).

[284] *Id.* at 228.

[285] *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)).

[286] 42 U.S.C. §§ 16917(b), 16913(d).

upon *Lambert* is essentially that sex offenders have some form of constructive notice.[287] 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.[288]

In other words, because the sex offender knows or should know about the state registration requirements, he or she is presumed to also have notice of federal restrictions. This reasoning is odd that because a person has notice of entirely different law enacted by a different sovereign government, he or she is assumed to have 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.[289] For most offenders, complying with state law would not meet the requirements under SORNA and a federal prosecution could still proceed.[290] Some offenders have been prosecuted under SORNA even when they had no such obligations in the state in which they resided.[291] Yet, due process challenges were similarly rejected because sex offenders as a class supposedly should have a heightened awareness because of the various restrictions upon them.[292] So, sex offenders lose their due process right to notice because so many of their other liberties have already been curtailed.

A different due process problem has arisen in regards 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.[293]

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[287] *Gould*, 526 F. Supp. 2d at 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.").

[288] United States v. Samuels, 543 F. Supp. 2d 669, 674 (E.D. Ky. 2008). Other courts have used very similar rationales while fully appreciating the holding in *Lambert.* LeTourneau, 534 F. Supp. 2d at 722–23.

[289] United States v. Barnes, No. 07 Cr. 187, 2007 U.S. Dist. LEXIS 53245, at *10-*17 (S.D.N.Y. July 23, 2007).

[290] *Id.*

[291] *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).

[292] Samuels, 543 F. Supp. 2d at 674.

[293] United States v. Zehnter, 2007 U.S. Dist. LEXIS 4700, *2-*3 (N.D.N.Y. Jan. 23, 2007) ("Defendant, nevertheless, contends that the report 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

Since prisons encourage and offer incentives for participation in treatment programs, offenders have historically joined in such programs. In some cases, treatment programs are court ordered.[294] However, to engage in treatment an offender needs to confess past acts and present temptation.[295] 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 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.[296] Already, commentators have noted that offenders' reluctance to participate in prison treatment programs has increased in states with programs similar to the federal one.[297]

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,[298] 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

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Walsh Act and, therefore, be subjected to civil commitment under that Act." (internal citation omitted)).

[294] 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.").

[295] 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.").

[296] *Zehnter*, 2007 U.S. Dist. LEXIS 4700, *3 ("the 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.").

[297] Davey & Goodnough, *supra* note 295, at 1 ("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.").

[298] United States v. Comstock, 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.") [hereinafter "Comstock I"].

due process, but most courts have allowed commitment hearings to proceed using that standard.[299]

Another area where due process concerns arise involves the unusual AWA restrictions on sex offender bail. The AWA includes provisions which require every person charged with certain sex offenses and/or failure to register be subject to certain bail restrictions including electronic monitoring.[300] Of all the provisions of the AWA, the one that has created the most court opposition is the mandatory bail rules. In the very first AWA case on the issue, *US 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, separation of powers doctrine by removing judicial discretion in bail determinations, and the Eighth Amendment's prohibition of excessive bail by virtue of the severity of the restrictions imposed on the defendant.[301] Since *Crowell*, however, many courts have upheld the bail restrictions in the AWA.[302] Again, there is no other instance under American law where bail determination is removed from judicial hands such that certain restrictions are placed upon a defendant based entirely upon the crime charged. Nonetheless, since *Crowell*, 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 common due process rules have been made.

III. 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

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[299] *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.").

[300] 18 U.S.C. § 3142(c)(1).

[301] 2006 U.S. Dist. LEXIS 88489 (W.D.N.Y. Dec. 7, 2006).

[302] *See, e.g.*, United States v. Gardner, 523 F. Supp. 2d 1025, 1032 (N.D. Ca. 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.").

experience and sex offender policy in particular that should give substantial reason to fear the advent of a criminal war on sex offenders.

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, institutional incentives keep missions consistent over time.[303] Incentives to protect organizational jobs and turf give inertia to policy choices.[304] Third, in the criminal arena, public appreciation for alternative strategies is typically low.[305] Consequently, political pressure to stick with past policies, even if failing, is great.[306] Fourth, criminal wars have enemies that simply cannot be defeated. When a 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 uncertainly effect 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.[307] Laws last for

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[303] ELWOOD, *supra* note 42, at 1-4.

[304] 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….").

[305] 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.").

[306] ELWOOD, *supra* note 42, at 4.

[307] Gerald 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

decades or centuries without reform. Very few interest groups focus on criminal law reform so there is 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 most 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 target of the criminal law are unlikely to find any recourse in the public sphere as the political forces unite against their interests.

For sex offenders, the loss of liberty has already been 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 they cannot live in large portions of the state in which he or she resides. This can mean physical separation from family (including a spouse) and the only friends that the offender might have ever known. In some jurisdictions, an offender might be wholly unable to find housing and end up living under a bridge.

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 of the offender moving into their neighborhood. With such a system, private opposition to the relocation of the offender can effectively bar the convict from living in the

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law reform came to an end in the late 1970s with the failure of the federal criminal code reform effort.").

neighborhood even would public law would allow it.[308] Notification can often facilitate vigilante attacks against sex offenders as well.[309]

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.[310] 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. The offender might be denied access to the local beach, library, town hall, and/or courthouse.

If the offender hopes to live, he or she will surely have to find some form of employment. However, the offender will not be able to work in many industries entirely. 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 search, 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 themselves through education, the registry will follow the offender throughout the 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.[311] Even if access is technically available, travel from a safe residential location may make such a trip prohibitive.[312] In the treatment program, the offender might later find that

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[308] Yung II, supra note 119, 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.").

[309] Chuck Haga, *Police Less Likely to Hold Sex Offender Notification Hearings*, GRAND FORKS HERALD (NORTH DAKOTA), Jan. 11, 2009, no page ("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 216, at 1391 ("Online indexes also have an alarming tendency to contain outdated or inaccurate information. And the 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.").

[310] *Id.* 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.").

[311] John Ingold, *Lyons Trustees Decide Against Residency Rule on Sex Offenders*, DENVER POST, Apr. 17, 2007, at B03; Deena Winter, *City to Look at Offender Restrictions*, LINCOLN J. STAR (NEB.), May 16, 2006, at B1.

[312] Yung III, *supra* note 200, at 144-45.

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 including due process rights, the right against retroactive punishment, and the right to confront witnesses and evidence.[313] These restrictions might be in addition to the loss of rights experienced by other criminals including loss of legal access to a firearm[314] and voting rights.[315] Since the offender likely will have little money due to limited employment opportunities, any lawsuit against various restrictions will have to be undertaken pro bono. Even if such a suit is brought, the odds of success in a hostile judiciary are low.

Beyond these well publicized restrictions on liberty, jurisdictions are increasingly innovating new ways to limit 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, complete denial of online access.[316] 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.[317]

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, there will surely be newer, more restrictive statutes passed. As it is likely that the original War on Drugs did not embody many of the substantial losses of liberty decades later, a similar pattern is likely to emerge in regards to sex offenders. And since the sex offender war can build upon those restrictions enabled by the War on Drugs, the loss of liberty will be even greater.

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[313] *See supra* notes __ to __ and accompanying text.

[314] 18 U.S.C. 921-930 (2000).

[315] Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 N.E. J. ON CRIM. & CIV. CON. 283, 433 (2007) (quoting Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUBLIC OPINION QUARTERLY 275, 276 (2004)) ("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.'").

[316] *See supra* notes 216 to 302 and accompanying text.

[317] Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungverwahrung*, 30 FORDHAM URB. L.J. 1621, 1640 (2003) ("As a result, for most it seems that civil commitment as a sex offender has turned into lifetime confinement.").

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. Each of those groups is discussed below.

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[318] 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.[319] 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 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

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[318] Adam Belz, *Sex Offenders Look forward to End of Exile*, THE GAZETTE (CEDAR RAPIDS, IOWA), Jun. 28, 2009, no page.

[319] *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.").

impossible for him to comply according to the state.[320] Only by virtue of a split decision before the state supreme court was the conviction quashed.[321] The recent story of a prosecutor who tried to prosecute teens for child pornography distribution for clothed pictures[322] again shows that a lot 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 instances have been based upon faulty or just incorrect warrants used to support paramilitary intrusions into private homes of innocent persons.[323] 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.[324] In New York, the state determined that 25% of the registry entries had mistakes.[325] Persons have regularly been listed for non-sexual crimes.[326] Since the registry listings do not appear in normal search engines, such

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[320] Bill Rankin, *Justices Strike Sex Offender Provision; State High Court Agrees Law Unfair to the Homeless*, ATLANTA JOURNAL-CONSTITUTION, Oct. 28, 2008, at 1B.

[321] *Id.*

[322] Rowland, *supra* note 198, at B01.

[323] *See, e.g.*, *Three Former Atlanta Police Officers Sentenced to Prison in Fatal Shooting of Elderly Atlanta Woman*, PR NEWSWIRE, Feb. 24, 2009, no page ("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.'").

[324] *See, e.g.*, Michele McPhee, *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 (MONTANA), Oct. 15, 2008, at 6A ("In January, I conducted an audit of the registry and discovered an incredible amount of information was missing….").

[325] Erik German, *State Shows Problems in Sex Offender Registry*, NEWSDAY (NEW YORK), 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.").

[326] *See supra* note 190 and accompanying text.

persons may only find out when they have been outed as a sex offender (even though they are not).

The story of Christopher Noles, a man found guilty of statutory rape against his future wife, illustrates a prime example of collateral effects.[327] 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.[328] The frequent moves have eliminated any sense of stability for the family.[329] Because of his listing on the state registry, Noles has been unemployed for most of the time since the registry went into effect.[330] He has not been able to attend his daughter's functions at church or school.[331] Many sex offenders have families who have been similarly affected.

Because the restrictions apply to crimes from many decades ago, many offenders have been become upstanding citizens in their local communities. However, when the news of their criminal history has emerged, the offenders and their families become victims of the resultant uproar. 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 the exceptions that the war creates. Once an agency like the DEA is set up, it is difficult for politicians to remove it. 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 military soldiers, the exception has become the rule.

The militarization of police forces in the War on Drugs, once notable, has become the norm in police departments across the country.[332] 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

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[327] Stephanie Chen, *After Prison, Few Places for Sex Offenders to Live*, WALL STREET J., Feb. 19, 2009, A16.

[328] *Id.*

[329] *Id.*

[330] *Id.*

[331] *Id.*

[332] Rafeal Hermoso, *Police Brutality an Endemic, not Isolated Problem*, THE ORANGE COUNTY REGISTER, Sept. 28, 1999, no page ("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.").

travelling. "No knock" warrants were once rarities, but are now regularly issued in drug raids.

The danger of normalizing exceptions cannot be understated. Bureaucratic agencies develop mission creep and seek larger budgets from legislatures. And 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 the exceptions created by criminal wars become rules, all of society loses.

IV. ABORTING THE WAR ON SEX OFFENDERS

As the War on Drugs illustrated, by the time of Nixon's declaration of war, it was almost certainly too late to reverse course. Thus, it is certainly not too early to consider ways to abort the War on Sex Offenders before it gains more momentum and a change of direction becomes increasingly difficult.

Perhaps the most obvious way for the War on Sex Offenders to be stopped is for courts to reverse course in regards to a couple of constitutional issues. Although several constitutional problems with sex offender laws have been discussed herein, two stand out as representing obstacles so significant that a criminal war probably could not overcome them. If the federal appellate and district courts are not inclined to change directions, a decision by the United States Supreme Court opinion would certainly accomplish the same end.

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 effects, that result would severely cripple such regimes. Registries would be void of most of their entries. Residency restrictions would similarly apply to a small population.

Similarly, a strong, definitive Commerce Clause ruling against portions of the AWA could effectively knock the federal government out of sex offender regulation. States would be free to continue to regulate sex offenders in an ad hoc fashion. However, without federal involvement, the prerequisites for a criminal war are not likely to be met. 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 keeping the role of the federal government limited.

While court action may only delay the effects of such laws, there is reason to think time passing 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 hysteria over sex offenders is cyclical,[333] public support may dissipate by the time the tools of the War on Sex Offenders are ready to use effectively. Because of the current economic malaise, the resources for a criminal war might not be available years from now – they might be shifted to another priority. And the judiciary is prone to significant shifts based upon the appointments by the Presidents in the interim.

Another possibility for meaningful change could occur at the state level. One of the more interesting developments concerning the AWA is that a number of states have chosen not to comply with some its requirements. The penalty for noncompliance for any fiscal year is that a state will lose ten percent of funds authorized under the Omnibus Crime Control and Safe Streets Act of 1968.[334] Because such funds are become less of a federal budgetary priority, the "stick" of withholding ten percent of those funds has less persuasive value than it once had been.[335] 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 with the AWA.

Chief among those concerns is that the federal government requires lifetime listing of persons who committed sex offenses as juveniles.[336] Even in states, such as Illinois, that have adopted a full array of sex offender

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[333] JANUS, *supra* note 173, at 11.

[334] "For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this title shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.)." 42 U.S.C. § 16925(a).

[335] Amy Borror, *Sex Offender Registration*, CQ CONGRESSIONAL TESTIMONY, Mar. 10, 2009, no page ("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. Using the Virginia cost estimates, the Justice Policy Institute estimated the cost of implementation for all 50 states and the District of Columbia, based on population, and compared those numbers to the amount of money states would lose in Bryne Grant funds if they chose to not comply with the requirements of the federal Adam Walsh Act. Other states show a similar disparity between costs incurred to implement the Act and the potential financial penalty for non-compliance.").

[336] Felisa Cardona, *Sex-Convict Database Perplexes*, DENVER POST, Sep. 22, 2008, at A1.

restrictions, lifetime listing of juveniles is highly controversial.[337] As a result, the Illinois legislature overrode the Governor's veto of a bill so that juveniles would have the ability to have their name removed from the state sex offender registry in some circumstances.[338] This means Illinois is not currently in compliance with the AWA. Other states have decided that lifetime juvenile listing is unacceptable.[339] At the present time, no state has been ruled to be in full compliance with the Act.

Another possible solution would be to give greater discretion to sentencing judges. One of the most significant legacies of the War on Drugs was the shift away from judicial control of sentencing.[340] Instead, Congress provided strict limits on judicial discretion.[341] This pattern is already being replicated with regard to sex offenders. Even in the cases, such as when a person's only sex offense was public urination, the judge cannot excuse the person from registry listing, residency restrictions, and other applicable laws. This 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, such as tax evasion, 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.[342]

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. One of the strong arguments for the move to determinate sentencing was to

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[337] Sarah Tofte, *Protect Children from Sexual Violence: Don't Adopt the Adam Walsh Act*, SALT LAKE TRIB., Jan. 17, 2008, no page ("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.").

[338] Id.

[339] *See, e.g.*, Jay F. Marks, *Act Says Sex Offender Registry Must Include Juveniles*, THE OKLAHOMAN, Jul. 13, 2009, at 1A.

[340] 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.").

[341] *Id.*

[342] *See, e.g.*, United States v. Byun, 539 F.3d 982, 984 (9th Cir. 2008).

increase fairness and consistency in punishment. Affording judges the ability to decide which sex offenders will be subject to the various laws could create enormous disparities among similarly situated persons. Further, at the federal and state levels, most of the courts have been all too willing to uphold the sex offender laws even when applied in seemingly absurd cases. Thus, increasing judicial discretion may simply replicate the current status for sex offenders even if decision making is shifted away from legislatures.

CONCLUSION

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 war in that conflict and the present situation in regard to sex offenders. America risks a War on Sex Offenders at its peril. Once the conflict becomes institutionalized, America's policy may be irreversible. Even after mounds of evidence were presented against the War on Drugs, nothing was changed in policy. 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 would be worth it. 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. 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 benefits. It is important to note that nothing written herein should be taken to argue for a less active stance fighting sexual violence which is not something the United States has done particularly well at any time in its history.

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 benefits achieved, it seems unlikely that they would support the course that America has taken. With the benefit of hindsight, the War on Drugs is exposed as a disastrous period in criminal justice. Drawing from that experience, the United States has a chance to prevent a repeat of

the damage that the drug war has brought. By looking at the history of our last criminal war and focusing on the long-term implications of sex offender policy today, the War on Sex Offenders should be stopped now before it is too late.

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