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Sex Offender Registration and Notification Laws at Home and Abroad: Is an International Megan's Law Good Policy?

Christopher King
Drexel University

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SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS AT HOME AND ABROAD: IS AN INTERNATIONAL MEGAN’S LAW GOOD POLICY?

Christopher King[†]

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INTRODUCTION

Egregious crimes tend to spur swift—or as some would argue, rash—legislative responses.¹ And so it has been in the sex offender arena: enter sex offender registration and notification laws.² Although the subject of much criticism and debate, registration and notification laws exist and endure in all fifty states per federal mandates.³ As such, for better or worse, they appear here to stay.⁴

But has the registration and notification fervor spread beyond

[†] Student, J.D.-Ph.D. Program in Law and Clinical Psychology, Drexel University. I would like to thank Dr. Donald Bersoff and the editors of the City University of New York Law Review for their helpful comments on earlier drafts of this Note.

¹ See Wayne A. Logan, *Megan’s Law As a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 371 (2011). See also Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 2–3 (2010) (terming the phenomenon “legislative epidemics” and noting that they can be sometimes appropriate, sometimes concerning).

² See Carpenter, *supra* note 1, at 18–34; Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008).

³ See *infra* Part II.

⁴ Logan, *supra* note 1; Kelsie Tregilgas, *Sex Offender Treatment in the United States: The Current Climate and an Unexpected Opportunity for Change*, 84 TUL. L. REV. 729, 730–31 (2010).

U.S. borders, or should the United States attempt to see that it does? While much has been written to date regarding domestic registration and notification laws,⁵ scant attention has been paid to comparable laws at the foreign and international levels.⁶ However, given the developmental pattern of sex offender laws (what one author referred to as a *legislative epidemic*⁷), recent instances of international sex slavery and abuse⁸ suggest that the time is ripe for comparative reviews of foreign laws. Moreover, discussions of their international implication are sorely needed in light of the International Megan's Law⁹ proposal that has now been proposed in Congress four times.

To address these needs, this article has two aims: (1) to explore sex offender registration and notification laws adopted by countries throughout the world; and (2) to weigh in on the International Megan's Law proposal. Part I provides an introduction to domestic registration and notification laws, with coverage being

⁵ E.g., WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA (2009); PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY (Bruce J. Winick et al. eds., 2003) [hereinafter PROTECTING SOCIETY]; SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS (Richard G. Wright ed., 2009) [hereinafter FAILED POLICIES]; HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDERS LAWS IN THE US (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

⁶ When I began work on this Note, my search of the legal literature revealed only two articles on the topic: one contained dated material and the other limited its scope to two countries. Alison G. Carpenter, *Belgium, Germany, England, Denmark and the United States: The Implementation of Registration and Castration Laws as Protection Against Habitual Sex Offenders*, 16 DICK. J. INT'L L. 435 (1998); Meaghan Kelly, *Lock Them Up – and Throw Away the Key: The Preventative Detention of Sex Offenders in the United States and Germany*, 39 GEO J. INT'L L. 551 (2008). A report released by Human Rights Watch in 2007 also briefly discussed foreign registration and notification laws, but only cursorily. See HUMAN RIGHTS WATCH, *supra* note 5, at 10. However, the International Megan's Law proposal itself is indeed beginning to draw some scholarly attention to this area. See John A. Hall, *Sex Offenders and Child Sex Tourism: The Case for Passport Revocation*, 18 VA. J. SOC. POL'Y & L. 153 (2011); Wayne A. Logan, *Prospects for the International Migration of U.S. Sex Offender Registration and Community Notification Laws*, 34 INT'L J.L. & PSYCHIATRY 233 (2011); Karne Newburn, *The Prospect of an International Sex Offender Registry: Why an International System Modeled After United States Sex Offender Laws Is Not an Effective Solution to Stop Child Sexual Abuse*, 28 WIS. INT'L L.J. 547 (2011). To further the discussion on points where this work and prior works overlap, I have attempted to delve deeper into the specifics of foreign laws and the International Megan's Law proposal, hopefully resulting in a more precise analysis.

⁷ Carpenter, *supra* note 1.

⁸ See Deena Guzder, *A Move to Register Sex Offenders Globally*, TIME.COM (Sept. 7, 2009), <http://www.time.com/time/world/article/0,8599,1920911,00.html>.

⁹ International Megan's Law of 2011, H.R. 3253, 112th Cong. (2011); International Megan's Law of 2010, H.R. 5138, 111th Cong. (2010); International Megan's Law of 2009, H.R. 1623, 111th Cong. (2009); International Megan's Law of 2008, H.R. 5722, 110th Cong. (2008).

primarily at the federal level. I then explore comparable laws in foreign jurisdictions in Part II. Sex-offender-specific laws (or proposals for such laws) were found to exist in Australia, Austria, Canada, France, Ireland, Japan, Kenya, New Zealand, Singapore, the European Union, the Republic of Korea, and the United Kingdom. I specifically examine whether each jurisdiction has adopted registration, community notification, retroactive application, and/or international travel reporting.

Next, in Part III, I assess the value and implications of an international registration and notification law. I begin by describing the purposes and general provisions of the International Megan's Law proposed in Congress in 2010 and 2011. An analysis of the bill is then undertaken, in which I highlight various strengths and weaknesses of the proposal. In light of the bill's shortcomings, I urge that more work must be done before an international registration and notification law can be considered good policy.

Part IV then offers suggestions for improving the bill; among them being postponement, a posteriori development (i.e., development guided by empirical evidence rather than rhetoric), and greatly increased definitional and operational clarity. A more cost-effective alternative is also set forth: legislative authorization for the denial of passports to all high-risk sex offenders. I conclude that only after the concerns set forth in this article are addressed should an International Megan's Law be considered for adoption.

I. REVIEW OF DOMESTIC REGISTRATION AND NOTIFICATION LAWS

Sex offender registration and notification laws in the United States have been a commonplace topic of scholarship over the past two decades.¹⁰ Because these laws have been extensively detailed and critiqued elsewhere,¹¹ an abbreviated review is provided here. What follows is a summary of the developmental history of domestic, federal sex offender registration and notification laws.¹² Also worth noting is the societal and political atmosphere—panic, punitiveness, victim-personalization, offender-dehumanization, a focus on aggregate risk, nonempiricism, information entitlement, and federal involvement—that has bred an International Megan's Law

¹⁰ See, e.g., Symposium, *Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1 (1996); LOGAN, *supra* note 5; PROTECTING SOCIETY, *supra* note 5.

¹¹ For detailed discussions of the topic, see sources cited *supra* note 5.

¹² With federal laws serving only as minimum standards, the following review is not wholly representative of the States where legislative efforts have resulted in a wider array of laws. For a review of varying State practices, see LOGAN, *supra* note 5, at 66–80.

proposal.¹³

Although the origins of registration and notification laws can be traced back to the 1930s (and earlier),¹⁴ contemporary registration and notification laws really began to take hold in the early 1990s. The zeitgeist was incited by several notorious and highly publicized crimes involving child victims,¹⁵ in addition to reports of unprecedented recidivism rates evinced by sex offenders.¹⁶

The first of a series of high-profile crimes that would result in federal legislation was the 1989 abduction of Jacob Wetterling, an eleven-year-old child from Minnesota.¹⁷ In an eventual response to the abduction, Congress passed the first federal sex offender registration law in 1994: the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act.¹⁸ The law required states to adopt registration laws for sexually violent offenders, sexually violent predators, and offenders who perpetrated certain crimes against children.¹⁹ State compliance was compelled

¹³ See *id.* at 85–108 (discussing social and political catalysts of registration and notification laws).

¹⁴ Propelled by concerns of criminals concealing themselves amidst swelling populations (aided by advances in transportation), the notion of registering specific classes of criminals arose at both local and state levels in the 1930s. Logan, *supra* note 2, at 4. In 1937, Florida became the first state to implement a registration law, requiring certain felons living in the most populated counties of the state to register. *Id.* at 5. The first state-wide registration law was enacted ten years later in California, and was specifically directed at sex offenders. *Id.* By 1989, (only) 12 states had adopted some type of registration law. *Id.* Sex offenders had also yet to become the nearly exclusive target of these laws. *Id.*

¹⁵ *Id.* at 5.

¹⁶ Some legislators cited sex offender recidivism rates (without evidence) as high as 90%. See HUMAN RIGHTS WATCH, *supra* note 5, at 25 n.38. However, the empirical literature has consistently revealed far lower recidivism rates. R. Karl Hanson et al., *Sexual Offender Recidivism Risk: What We Know and What We Need to Know*, 989 ANNALS N.Y. ACAD. SCI. 154, 163 (2003) (“between 10% and 15% after 5 years and approximately 20% after 10 years”); R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998) (“On average, the sex offense recidivism rate was 13.4% ($n = 23,393$; 18.9% for 1,839 rapists and 12.7% for 9,603 child molesters)”); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 6 (2009) (“The observed sexual recidivism rate was 11.5% ($n = 28,757$, 100 samples) . . .”).

¹⁷ Logan, *supra* note 2, at 5. Noteworthy, however, was the absence of evidence that Jacob had been sexually abused; his abductors and body were never found. LOGAN, *supra* note 5, at 56. Nonetheless, it was believed that had law enforcement been privy to the whereabouts of local sex offenders, such information would have been invaluable to the investigation. *Id.*

¹⁸ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, subtit. A, § 170101, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)).

¹⁹ Although the Jacob Wetterling Act was originally intended to target only child

by threat of a 10% reduction in federal grant funds²⁰ for state crime prevention expenditures if adequate laws were not adopted within three years.²¹

By the 1997 cut-off date, all fifty states—aided by Attorney General issued guidelines²²—had adopted registration laws satisfying the minimum standards set forth in the Jacob Wetterling Act.²³ These standards addressed who was to be registered,²⁴ what information was to be collected,²⁵ how long the information was to be maintained,²⁶ and how frequently the information was to be verified.²⁷ Being only minimum standards, however, states were free to

molesters, the adopted Act also included adult-victim sex offenders within its scope. Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 66–68 (2008).

²⁰ Specifically, funds derived from The Edward Byrne Memorial State and Local Law Enforcement Assistance Grant Program [Byrne Formula Grant Program]. For more about the Byrne Formula Grant Program, see *Edward Byrne Memorial State and Local Law Enforcement Assistance Discretionary Grants Program*, CATALOG OF FED. DOMESTIC ASSISTANCE, <https://www.cfda.gov/index?s=program&mode=form&tab=step1&id=3d276ab3f9c82b29165800485531c0ac> (last visited Jan. 1, 2012).

²¹ § 170101(a)(1)(A)–(B), (f)(1)–(2). The Jacob Wetterling Act would have permitted a two-year extension for states that failed to adopt a satisfactory registration law by the cut-off date, but evinced a good faith effort to have done so. *Id.* § 170101(f)(1).

²² Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15110 (Apr. 4, 1996).

²³ LOGAN, *supra* note 5, at 59; Logan, *supra* note 2, at 6.

²⁴ § 170101(a)(1)(A)–(B) (“The Attorney General shall establish guidelines for State programs that require . . . a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency for the time period specified in [another subsection] and . . . a person who is a sexually violent predator to register a current address with a designated State law enforcement agency unless such requirement is terminated under [a procedure laid out in another subsection] . . .”).

²⁵ § 170101(a)(1)(A), (b)(1)(A)(iv) (For sexually violent offenders and child-victim offenders: “a current address” and “fingerprints and a photograph . . . if these have not already been obtained in connection with the offense that triggers registration”; for sexually violent predators (in addition to the aforementioned information): “identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder . . .”).

²⁶ § 170101(b)(6)(A)–(B) (The requirement of a sexually violent offender or child-victim offender to register “shall continue . . . until 10 years have elapsed since the person was released from prison, placed on parole, supervised release, or probation”; “[t]he requirement of a [sexually violent predator] . . . to register . . . shall terminate upon a determination . . . that the person no longer suffers from a mental abnormality or personality disorder that would make the person likely to engage in a predatory sexually violent offense.”).

²⁷ § 170101(b)(3)(A)–(B) (For sexually violent offenders and child-victim offenders: “on each anniversary of the person’s initial registration date”; for sexually violent predators: “every 90 days after the date of the initial release or commencement of parole.”).

adopt more demanding registration schemes.²⁸ While the Jacob Wetterling Act did not require community notification, it permitted laws providing for such.²⁹

Meanwhile, at the state level, community notification laws were beginning to take hold. The first jurisdiction to adopt a sex offender law that included provisions permitting community notification was Washington State in 1990.³⁰ It was New Jersey's 1994 Megan's Law, however, that would provide both the impetus and model for community notification laws across the country.³¹ The law was named after Megan Kanka, a seven-year-old girl who was raped and murdered by a previously convicted sex offender who, unbeknownst to the Kankas, was living across the street.³² New Jersey's Megan's Law was pivotal, for it no longer merely permitted community notification, as was the practice in other states.³³ Rather, for registrants deemed most likely to recidivate, it required it.³⁴

Mandatory community notification soon became required of all states. In 1996, a federal version of Megan's Law was passed by Congress, which succinctly amended the Jacob Wetterling Act.³⁵ Being only an amendment, State compliance was still compelled by threat of a ten percent reduction in criminal justice grant funding.³⁶ Also, because the federal Megan's Law was but two sentences in length, the Attorney General issued new guidelines clarifying what sorts of community notification schemes would and would not be deemed satisfactory.³⁷

²⁸ LOGAN, *supra* note 5, at 59.

²⁹ *Id.* at 59–60.

³⁰ *Id.* at 49–53.

³¹ See Logan, *supra* note 2, at 5–6; HUMAN RIGHTS WATCH, *supra* note 5, at 48–49.

³² LOGAN, *supra* note 5, at 54.

³³ *Id.* at 55.

³⁴ *Id.*

³⁵ Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2006)) (“(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State. (2) The state or any agency authorized by the State *shall* release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.” (emphasis added)).

³⁶ See Logan, *supra* note 2, at 6.

³⁷ Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009 (July 21, 1997). The guidelines first provided examples of schemes that would be deemed noncompliant:

(1) “releasing registration information only to law enforcement agencies, to other governmental or non-governmental agencies or organiza-

That same year, Congress also passed the Pam Lychner Sexual Offender Tracking and Identification Act of 1996.³⁸ The law mandated the creation of a national sex offender registry at the Federal Bureau of Investigation to assist law enforcement agencies at the federal, state, and local levels in tracking registrants.³⁹ Between 1997 and 2005, a string of federal laws were passed that variously and moderately revised the general scheme established by the Jacob Wetterling Act, Megan's Law, and Pam Lychner Act.⁴⁰ During this time period, the Supreme Court also upheld state registration and community notification laws against constitutional challenges.⁴¹ Significant changes, however, came about in 2006, when

tions, to prospective employers, or to the victims of registrants' offenses"; and

(2) "having purely permissive or discretionary authority for officials to release registration information."

Id. at 39,019. The following schemes were then offered as compliant examples:

(1) "[performing] particularized risk assessments of registered offenders, . . . [and designating] differing degrees of information release based on the degree of risk" (e.g., limiting notice to law enforcement for low risk offenders, to schools and comparable establishments for medium risk offenders, and to neighbors for high risk offenders);

(2) "provid[ing] information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories" (based upon judgments about the degree of risk different offenders classes pose); and

(3) "mak[ing] information accessible to members of the public on request" (e.g., by publishing registration lists, establishing hotlines numbers community members can call to obtain registration information, or responding to written requests).

Id. The guidelines did not specify what information needed to be provided to the public, nor the precise means by which such information was to be communicated. LOGAN, *supra* note 5, at 61.

³⁸ Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. §§ 14071-73 (2006)).

³⁹ *Id.*

⁴⁰ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 115(a), 111 Stat. 2440, 2461-2470 (1997) (codified as amended in scattered sections of 42 U.S.C.); Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (codified as amended at 42 U.S.C. § 14071 (2006)); Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1464, 1537 (2000) (codified as amended at 42 U.S.C. § 14071 (2006)); Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, §§ 604-606, 117 Stat. 650, 688 (codified as amended at 42 U.S.C. § 14071 (2006)); Dru Sjoedin National Sex Offender Public Database Act of 2005, 145 S. 792, 109th Cong. (codified as amended at 42 U.S.C. § 14071 (2006)). For highlights coverage of these laws, see *Federal Sex Offender Legislation*, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <http://www.ojp.usdoj.gov/smart/legislation.htm> (last visited Jan. 1, 2012) and Logan, *supra* note 2, at 5-7.

⁴¹ *Smith v. Doe*, 538 U.S. 84 (2003) (holding that Alaska's retrospective registration and community notification scheme was nonpunitive and hence not in violation

Congress passed the Adam Walsh Child Protection and Safety Act of 2006.⁴²

Named in honor of Adam Walsh,⁴³ a six-year-old abductee who was murdered in 1981,⁴⁴ the Adam Walsh Act constituted a complete overhaul of the country's registration and community notification scheme.⁴⁵ Among the reforms were:

- The expansion of the list of registrable sex offenses to include virtually all sex offenses.⁴⁶
- The widening of jurisdictional scope.⁴⁷
- The collection of more information from registrants.⁴⁸
- The registration of juvenile sex offenders in many circumstances.⁴⁹
- Increased public access to information on all registrants facil-

of the Ex Post Facto Clause); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (holding that Connecticut's conviction-based registration and notification scheme did not run afoul of the Due Process Clause because proper procedural safeguards existed prior to conviction and because current dangerousness was not a material consideration in the state's scheme).

⁴² Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901-62).

⁴³ Adam's father, John Walsh, is the well-known host of the *America's Most Wanted* television program. *About John Walsh*, AMERICA'S MOST WANTED, http://www.amw.com/about_amw/john_walsh.cfm (last visited Jan. 1, 2012). Since Adam's murder, the Walshs (John and his wife) have advocated extensively on behalf of child victims. *See id.*; LOGAN, *supra* note 5, at 62.

⁴⁴ The case remained unsolved until 2008 when Ottis Toole, a serial killer who had died in prison in 1996, was definitively named as the perpetrator. *About John Walsh*, *supra* note 43.

⁴⁵ Title I of the Adam Walsh Act is known as the Sex Offender Registration and Notification Act (SORNA). §§16901-16962. For simplicity's sake, I refer to the Adam Walsh Act throughout this Note, rather than SORNA specifically.

⁴⁶ *See* 42 U.S.C. §§ 16911(1), (5) (2006).

⁴⁷ 42 U.S.C. §§ 16911(10), 16927 (expanding jurisdictional coverage to include the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands, and most federally recognized Indian tribes).

⁴⁸ 42 U.S.C. § 16914 (2006). Jurisdictions are directed to collect the following information from registrants: name and aliases; Social Security number; address of each residence, place of employment, and attended school; license plate number and vehicle description; and any other information required by the Attorney General. *Id.* § 16914(a). Jurisdictional registries are then to include the following information: physical description; text of convicted offense; criminal history; current photograph; fingerprints and palm prints; DNA sample; photocopy of an identification card; and any other information required by the Attorney General. *Id.* § 16914(b).

⁴⁹ *See* 42 U.S.C. § 16911(8) (Juveniles who are "adjudicated delinquent [for a sex offense must register] . . . but only if the offender . . . [was] 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . or was an attempt or conspiracy to commit such an offense.").

itated by both a state and national website.⁵⁰

- The creation of a new federal crime: *failure to register*.⁵¹
- The creation of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) within the Department of Justice to administer national standards, coordinate grant programs, and provide trainings and technical assistance.⁵²

The Adam Walsh Act also elected a tier system in which registrants are classified into one of three tiers (with tier III being the most severe) based solely upon their committed offense (i.e., the use of individualized risk assessments as is the practice in some

⁵⁰ 42 U.S.C. § 16920 (2006). The national website is the Dru Sjodin National Sex Offender Public Website, which is located at <http://www.nsopw.gov/Core/Portal.aspx>. For the citation to the law first establishing the website, see LOGAN, *supra* note 5, at 220 n.86.

⁵¹ 18 U.S.C. § 2250 (2006).

(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

(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.

...

(c) Crime of violence. —

(1) In general.—An individual described in subsection (a) who commits a crime of violence 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 shall be imprisoned for not less than 5 years and not more than 30 years.

(2) Additional punishment.—The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).

Id. However, some have questioned the legality of this new crime. See Logan, *supra* note 2, at 7–10; Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 371–72 (2009). The Supreme Court recently avoided answering whether the federal *failure to register* crime runs awry of the Ex Post Facto Clause. Carr v. United States, 130 S. Ct. 2229 (2010) (holding that the crime does not apply to sex offenders whose interstate travel preceded the Adam Walsh Act's effective date, obviating the need to decide on the constitutionality of the offense generally).

⁵² 42 U.S.C. § 16945 (2006).

states was to be abandoned).⁵³ Each tier imposes varying registration requirements on registrants.⁵⁴

⁵³ 42 U.S.C. § 16911. Specifically, the tier provisions provide:

(2) TIER I SEX OFFENDER.—The term “tier I sex offender” means a sex offender other than a tier II or tier III sex offender.

(3) TIER II SEX OFFENDER.—The term “tier II sex offender” means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i) sex trafficking . . . ;
- (ii) coercion and enticement . . . ;
- (iii) transportation with intent to engage in criminal sexual activity . . . ;
- (iv) abusive sexual contact . . . ;

(B) involves—

- (i) use of a minor in a sexual performance;
- (ii) solicitation of a minor to practice prostitution; or
- (iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) TIER III SEX OFFENDER.—The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

- (i) aggravated sexual abuse or sexual abuse . . . ; or
- (ii) abusive sexual contact . . . against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

Id.

⁵⁴ 42 U.S.C. §§ 16915–16, 16918 (2006). Relevant provisions provide:

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under [a section listing reduction-worthy positive behaviors]. The full registration period is—

- (1) 15 years, if the offender is a tier I sex offender;
- (2) 25 years, if the offender is a tier II sex offender; and
- (3) the life of the offender, if the offender is a tier III sex offender.

. . .

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than—

- (1) each year, if the offender is a tier I sex offender;
- (2) every 6 months, if the offender is a tier II sex offender; and
- (3) every 3 months, if the offender is a tier III sex offender.

. . .

A jurisdiction may exempt from disclosure—

- (1) any information about a tier I sex offender convicted of an offense other than a specified offense against a minor . . .

Unfortunately, the breadth of the Adam Walsh Act resulted in considerable vagueness throughout; additional guidelines were thus necessary to clarify many applicative aspects. Consequently, a subsequent federal regulation clarified that the registration and notification provisions of the Adam Walsh Act applied retroactively.⁵⁵ It was also later clarified that registrants who planned to be absent from their place of residence for seven or more days would need to report information pertaining to the location and duration of their trip (effectively creating, however, a six-day travel window for which reporting was not required).⁵⁶ Subsequent to the Adam

Id.

⁵⁵ 28 C.F.R. § 72.3 (2007) (deciding whether and how to apply the law retroactively was granted to the Attorney General). Final guidelines issued by the Attorney General provided that “jurisdictions are specifically required to register . . . sex offenders if they remain in the system as prisoners, supervisees, or registrants, or if they later reenter the system because of conviction for some other crime (whether or not the new crime is a sex offense).” The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,063 (July 2, 2008). However, some limitations on retroactive reach were explicated:

SORNA requires minimum registration periods of varying length for sex offenders in different categories, defined by criteria relating to the nature of their sex offenses and their history of recidivism. This means that a sex offender with a pre-SORNA conviction may have been in the community for a greater amount of time than the registration period required by SORNA.

. . .

So the guidelines do not require a jurisdiction to register in conformity with SORNA sex offenders who have fully left the system and merged into the general population at the time the jurisdiction implements SORNA, if they do not reoffend. A further limitation permitted by the guidelines is that a jurisdiction may credit a sex offender with a pre-SORNA conviction with the time elapsed from his release (or the time elapsed from sentencing, in case of a nonincarcerative sentence) in determining what, if any, remaining registration time is required. To the extent that a jurisdiction exercises this option, the effect of retroactive application on sex offenders with pre-SORNA convictions may be further reduced.

Id. at 38036, 38046–47.

⁵⁶ Still, though, the precision of travel information to be reported was not made particularly clear, nor was the timing of when such reporting need take place:

The authority under SORNA § 114(a)(7) is accordingly exercised to provide that jurisdictions must require sex offenders to provide information about any place in which the sex offender is staying when away from his residence for seven or more days, including identifying the place and the period of time the sex offender is staying there. The benefits of having this information include facilitating the successful investigation of crimes committed by sex offenders while away from their normal places of residence, employment, or school attendance, and decreasing the attractiveness to sex offenders of committing crimes in such circumstances.

The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg.

Walsh Act, only one other sex offender law has been passed by Congress.⁵⁷ It requires registrants to provide their *internet identifiers* to authorities, but does not allow for public access to the information.⁵⁸

Noteworthy is that as of September 2010, the U.S. Department of Justice judged only six jurisdictions to be in compliance with the mandates of the Adam Walsh Act: South Dakota; Ohio; Delaware; Florida; the Confederated Tribes of the Umatilla Indian Reservation; and the Confederated Tribes and Bands of the Yakama Nation.⁵⁹ This means that a supermajority of jurisdictions continue to remain in noncompliance with the initial 2009 implementation deadline.⁶⁰ Indeed, many states are persuaded against implementation by the fact that noncompliance will cost them less than compliance.⁶¹

II. REVIEW OF FOREIGN REGISTRATION–NOTIFICATION LAWS⁶²

Turning now abroad, sex offender registries have thus far

at 38,056. What was clear, however, was that a registrant's failure to abide by whatever was intended carried the potential for severe consequences:

Section 141(a) of SORNA enacted 18 U.S.C. 2250, a new federal failure-to-register offense, which provides federal criminal penalties of up to 10 years of imprisonment for sex offenders required to register under SORNA who knowingly fail to register or update a registration as required where circumstances supporting federal jurisdiction exist, such as interstate or international travel by a sex offender, or conviction of a federal sex offense for which registration is required.

Id. at 38,069.

⁵⁷ Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (codified as amended at 42 U.S.C. § 16915).

⁵⁸ *Id.* § 2(a), (c).

⁵⁹ Press Release, Dep't of Justice, Justice Department Announces Sixth Jurisdiction to Implement Sex Offender Registration and Notification Act (Sept. 10, 2010), *available at*

<http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/SMART10120.htm>.

⁶⁰ 42 U.S.C. §§ 16924, 16924(b) (2006). The deadline provisions permitted the Attorney General to issue "up to two 1-year extensions of the deadline." *Id.*

⁶¹ The Congressional Budget Office estimated the total cost of implementation of the Adam Walsh Act (before it was named so) to be \$1.5 billion over five years. CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 4472, CHILDREN'S SAFETY AND VIOLENT CRIME REDUCTION ACT OF 2005 1 (2006), <http://www.cbo.gov/ftpdocs/70xx/doc7061/hr4472.pdf>. Much—although not all—of that figure is related to sex offender provisions (roughly \$900 million). *Id.* at 2. See also Abigail Goldman, *Sex Offender Act Might Not Be Worth Its Cost to Nevada*, LAS VEGAS SUN (Feb. 15, 2009, 2:00 AM), <http://www.lasvegassun.com/news/2009/feb/15/sex-offender-act-might-not-be-worth-its-cost/> (discussing some states' fiscal concerns and citing implementation costs for various states).

⁶² This review utilized primary sources whenever possible; when primary sources could not be located (specifically, for Austria, France, Japan, and the Republic of Korea) secondary sources were relied upon. Also, because secondary sources were relied upon for Austria, France, Japan, and the Republic of Korea, it could not be

been adopted in Australia,⁶³ Austria,⁶⁴ Canada,⁶⁵ France,⁶⁶ Japan,⁶⁷ Ireland,⁶⁸ Kenya,⁶⁹ the Republic of Korea,⁷⁰ and the United Kingdom.⁷¹ The European Union, New Zealand, and Singapore have also been reported as having expressed interest in adopting registries, but have yet to do so.⁷² One scholar observed that in comparison to U.S. practices, many of these registries are far smaller, target fewer types of sex crimes, and are less burdensome on registrants.⁷³

determined whether those countries' registration laws apply retroactively or if they require reporting of future international travel plans.

⁶³ See Logan, *supra* note 6; *Offender Registers: Australia*, CASLON ANALYTICS, <http://www.caslon.com.au/offendersnote2.htm> (last visited Jan. 1, 2012); *Australian National Child Offender Register (ANCOR)*, CRIMTRAC, http://www.crimtrac.gov.au/our_services/ChildProtectionServices.html (last visited Jan. 1, 2012).

⁶⁴ See Georgia Harlem, *Sex Laws: Unjust and Ineffective*, THE ECONOMIST, Aug. 6, 2009, available at http://www.economist.com/node/14164614?story_id=14164614.

⁶⁵ Sex Offender Information Registration Act, S.C. 2004, c. 10 (Can.).

⁶⁶ See Harlem, *supra* note 64; Nicole Atwill, *European Court of Human Rights / France: Registration in French National Sex Offender Database Does Not Violate Rights*, LIBRARY OF CONG. (Jan. 27, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401799_text.

⁶⁷ See Logan, *supra* note 6; Mathew Rusling, *Would a US-style 'Megan's Law' Work in Japan?*, THE CHRISTIAN SCIENCE MONITOR, Apr. 13, 2005, <http://www.csmonitor.com/2005/0413/p15s01-woap.html>.

⁶⁸ Sex Offenders Act 2001 (Act No. 18/2001) (Ir.), <http://www.irishstatutebook.ie/pdf/2001/en.act.2001.0018.pdf>. See also *Monitoring Sex Offenders in Ireland*, CITIZENS INFORMATION, http://www.citizensinformation.ie/en/justice/law_enforcement/monitoring_sex_offenders_in_ireland.html (last updated Sept. 17, 2010).

⁶⁹ The Sexual Offences Act, (2006) Cap. 3 § 39(13) (Kenya); The Sexual Offences Regulations, (2008) § 7 (Kenya).

⁷⁰ See Logan, *supra* note 6; DONG KEUN LEE, U.N. ASIA AND FAR EAST INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *Country Report – Korea*, in, ANNUAL REPORT FOR 2006 AND RESOURCE MATERIAL SERIES NO. 72 107, 113–14 (2007).

⁷¹ Sexual Offences Act, 2003, c. 42, pt. 2 (U.K.).

⁷² See Logan, *supra* note 6; *Offender Registers: Overseas Regimes, New Zealand*, CASLON ANALYTICS, <http://www.caslon.com.au/offendersnote3.htm#nz> (last visited Jan. 1, 2012); Sex Offenders Registry Bill 2003 36-1 (N.Z.), available at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/7/f/5/00DBHOH_BILL5306_1-Sex-Offenders-Registry-Bill.htm; *MEPs 'Want EU Sex Offender List'*, BBC NEWS (Aug. 22, 2007, 23:37 GMT), http://news.bbc.co.uk/2/hi/uk_news/6958807.stm. Interesting is that the practice of registration (of offenders generally) originated in Europe rather than the United States. Logan, *supra* note 6.

⁷³ Logan, *supra* note 6. A statistic worthy of reflection is that as of December 17, 2010, the United States has 728,435 registered sex offenders. See *Map of Registered Sex Offenders in the United States*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/sex-offender-map.pdf. This number can be contrasted with the 19,000 registrants in Canada and 44,700 registrants in England and Wales as of April 2009. Logan, *supra* note 6. If one divides population estimates of the United States, Canada, England, and Wales by the size of their respective registries (United States: 311,313,400/728,435 = 427; Canada: 34,444,150/19,000 = 1,813; England and Wales: 54,809,000/44,000 = 1,246) the U.S. registry appears (proportionally) four times larger than the registry in Canada and three times larger than the

Community notification, in turn, is much less common outside of the United States,⁷⁴ having only been adopted in a manner approaching U.S. practices⁷⁵ by six provinces in Canada⁷⁶ and the Republic of Korea.⁷⁷

Although not as extreme as the nearly-perpetual retroactive applicability adopted by the United States with the Adam Walsh Act,⁷⁸ sex offender laws in Canada⁷⁹ and the United Kingdom⁸⁰ are

registry in England and Wales. See *Canada's Population Clock*, STATISTICS CANADA, <http://www.statcan.gc.ca/ig-gi/pop-ca-eng.htm> (last visited Jan. 1, 2012) (Canada estimate); *Population Estimates for UK, England and Wales, Scotland and Northern Ireland, Mid 2009*, OFFICE FOR NAT'L STATISTICS (June 24, 2010), <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk—england-and-wales—scotland-and-northern-ireland/2009/index.html> (England and Wales estimate); *U.S. POPClock Projection*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/popclockus.html> (US estimate) (last visited Jan. 1, 2012).

⁷⁴ Most of the countries in this review only allow law enforcement and certain other interested parties (e.g., child-care workers or those who can otherwise prove they are reasonably interested parties) to access registrant information. Also, some countries (e.g., the United Kingdom) have considered and expressly rejected public access provisions. See HOME OFFICE, PROTECTING THE PUBLIC: STRENGTHENING PROTECTION AGAINST SEX OFFENDERS AND REFORMING THE LAW ON SEXUAL OFFENCES, 2002, CM. 5668, at 12 (U.K.), <http://www.archive2.officialdocuments.co.uk/document/cm56/5668/5668.pdf>. As an example, although England and Wales have recently implemented a program (termed *Sarah's Law*) allowing for caregivers to be informed (via request) whether someone with access to their children is a registered sex offender, program materials specifically provide that "[i]t is not an aim of this scheme to introduce a U.S.-style Megan's Law or automatic disclosure of child sexual offender details to the general public, which could encourage offenders to go missing and therefore put children at greater risk of harm." HOME OFFICE, THE CHILD SEX OFFENDER (CSO) DISCLOSURE SCHEME GUIDANCE DOCUMENT 2 (2010), <http://www.homeoffice.gov.uk/publications/crime/disclosure-scheme-guidance/disclosure-scheme-guidance?view=binary>. See also *Child Sex Offender Disclosure Scheme*, HOME OFFICE, <http://www.homeoffice.gov.uk/crime/child-sex-offender-disclosure/> (last visited Jan. 1, 2012); *Review Says No to UK Megan's Law*, BBC NEWS (Apr. 10, 2007, 18:00 GMT), http://news.bbc.co.uk/2/hi/uk_news/6540749.stm; *Sex Offender Disclosure Scheme to Go Nationwide*, BBC NEWS (Mar. 3, 2010, 1:16 GMT), <http://news.bbc.co.uk/2/hi/8546126.stm>.

⁷⁵ Professor Logan observed that community notification practices in Canada and the Republic of Korea are more limited than U.S. practices. Logan, *supra* note 6. For example, the Korean community notification scheme only posts identifying information of individuals convicted of certain child-victim sex offenses for six months on a government website and for one month on government bulletin boards. *Id.*

⁷⁶ The six providences are Manitoba, British Columbia, Alberta, Newfoundland, Saskatchewan, and Ontario. Michael Petrunik et al., *American and Canadian Approaches to Sex Offenders: A Study in the Politics of Dangerousness*, 21 FED. SENT'G REP. 111, 118 (2008).

⁷⁷ Lee, *supra* note 70, at 113–14; Logan, *supra* note 6.

⁷⁸ See *supra* note 55.

⁷⁹ Criminal Act, R.S.C. 1985, c. C-46, s. 490.02 (Can.); National Defense Act, R.S.C. 1985, c. N-5, s. 227.06 (Can.); Sex Offender Information Registration Act, S.C. 2004, c. 10, s. 3 (Can.).

somewhat retrospective (ranging back to 2001 and 1997, respectively, while also covering all sex offenders that were under some form of correctional supervision when the registries were adopted). Australia's and Ireland's schemes apply retroactively only to sex offenders who were still under some form of correctional supervision at the time their respective registration laws went into effect.⁸¹ Kenya's law is too vague to determine whether it applies retroactively.⁸²

Additionally, Australia,⁸³ Canada,⁸⁴ Ireland,⁸⁵ Kenya,⁸⁶ and the United Kingdom⁸⁷ require reporting of international travel (although the requirement is not often expressly phrased as such). However, none expressly provide for information sharing with other nations. An interesting development in the United Kingdom is that magistrate judges have the power to issue *foreign travel orders* to prevent sex offenders (even non-citizens) from traveling outside of the United Kingdom, "for the purpose of protecting children generally or any child from serious sexual harm from the defendant outside the United Kingdom."⁸⁸

In a similar review, it was noted that recent developments abroad might be increasing the likelihood of foreign migrations of U.S. practices.⁸⁹ For instance, other countries are shifting towards increased punitiveness, approval of shaming practices, and reception of the victims' rights movement (i.e., greater concern for victims).⁹⁰ However, the same review identified some potential impediments to such migrations, including: (1) other countries are less individualistic and their citizens are less distrustful of the government; (2) other nations place more value in rehabilitation and information-privacy; (3) sex offender policy debates in other

⁸⁰ Sexual Offences Act, 2003, c. 42, pt. 2, § 81 (U.K.).

⁸¹ *Child Protection (Offenders Registration) Act 2000* (NSW) ss 3–3A (Austl.); Sex Offenders Act 2001 § 7 (Act No. 18/2001) (Ir.), <http://www.irishstatutebook.ie/pdf/2001/en.act.2001.0018.pdf>.

⁸² See The Sexual Offences Act, (2006) § 48 (Kenya).

⁸³ *Child Protection (Offenders Registration) Act 2000* (NSW) s 11A (Austl.). See also *Australian National Child Offender Register (ANCOR)*, *supra* note 63.

⁸⁴ Sex Offender Information Registration Act, S.C. 2004, c. 10, ss 4, 6 (Can.).

⁸⁵ Sex Offenders Act 2001 § 10(3)–(5) (Act No. 18/2001) (Ir.), <http://www.irishstatutebook.ie/pdf/2001/en.act.2001.0018.pdf>.

⁸⁶ The Sexual Offences Regulations, (2008) § 7(4)(c)–(5) (Kenya).

⁸⁷ Sexual Offences Act, 2003, c. 42, pt. 2, § 86 (U.K.).

⁸⁸ *Id.* §§ 114–22. A chief officer of police applies to a magistrate judge for the order. *Id.* § 114. The duration of the order is six months and the order is renewable. *Id.* § 117. Violating the order is a punishable criminal offense. *Id.* § 122.

⁸⁹ See Logan, *supra* note 6.

⁹⁰ *Id.*

countries are marked by less vehement rhetoric; and (4) foreign courts appear more willing to rule that broad registration laws unreasonably infringe on basic human rights.⁹¹ However, as discussed in the following section, the United States is looking to overcome these obstacles and export (or, more cynically, impose) its practices elsewhere.⁹²

III. THE INTERNATIONAL MEGAN'S LAW PROPOSAL

The circumstances and forces surrounding the International Megan's Law proposal are indeed familiar to those precipitating the adoption of previous sex offender laws.⁹³ Evidence of the efficacy of current sex offender policy remains ambiguous,⁹⁴ but the reality of sexual recidivism is clear. A new development begins with the report of a horrendous crime involving a convicted sex offender in a novel factual scenario.⁹⁵ Without pause, officials unremittently urge expanding current policy.⁹⁶ It is claimed that a particular new strategy would have gone far to prevent the tragedy.⁹⁷ When legislation is introduced, it is named in memory of the victim and endorsed by the surviving family.⁹⁸ Any opposition to the new bill is condemned as soft on crime, and the new initiative

⁹¹ *Id.*

⁹² See *infra* notes 108–09 and accompanying text; cf. *id.* at 17 (“[T]he fear and hatred of convicted sex offenders, in an increasingly borderless world, struggling with how to pay for brick-and-mortar penalty, will exert continued pressure to add U.S.-style registration and community notification, to at least some degree, to the already long list of the nation’s exports.”).

⁹³ The parallels are depicted in notes 80–85.

⁹⁴ See, e.g., Logan, *supra* note 6 (reviewing studies bearing on the issue of efficacy and related issues).

⁹⁵ Indeed, one finding included at the beginning of the International Megan's Law of 2010 is that:

Media reports indicate that known sex offenders who have committed crimes against children are traveling internationally, and that the criminal background of such individuals may not be known to local law enforcement prior to their arrival. For example, in April 2008, a United States registered sex offender received a prison sentence for engaging in illicit sexual activity with a 15-year-old United States citizen girl in Ciudad Juarez, Chihuahua, Mexico in exchange for money and crack cocaine.

H.R. 5138 § 2(a)(10).

⁹⁶ See Guzder, *supra* note 8. See also *infra* Part III.A.

⁹⁷ See Erin Duffy, *Going Global – House Advances International Megan's Law*, NJ.COM (July 28, 2010, 2:10 AM), http://www.nj.com/mercer/index.ssf/2010/07/going_global_-_house_advances.html (quoting New Jersey Representative Chris Smith: “[w]e dotted every ‘i’ and crossed every ‘t’ to create a program that will significantly protect children overseas and will help create Megan's Laws all over the world”).

⁹⁸ *Id.* (“[T]he bill bears the name of Megan Kanka, the 7-year-old girl from Hamil-

inches closer and closer to becoming law.⁹⁹

Such has been the fairly consistent thread goading the passage of each new instance of sex offender legislation.¹⁰⁰ The International Megan's Law proposal is no different: the 2008 and 2009 versions failed in the House but the 2010 version reached the Senate (the 2011 version remains active in Congress at the time of this writing). The proposal thus appears to be enjoying a positive serial legislative trajectory, not unlike the legislative path of the Jacob Wetterling Act.¹⁰¹ As such, it would not be unreasonable to predict that Megan's Law may soon be going international.¹⁰²

But contemporary sex offender policy is not without its critics; common criticisms include issues related to justification, cost, scope, efficacy, and criminogenic effects.¹⁰³ Also noteworthy is that the vast majority of states and other U.S. jurisdictions have yet to conform to the requirements of the Adam Walsh Act.¹⁰⁴ In short, registration and notification laws, among other sex-offender specific laws, remain controversial and in a state of flux.

Nonetheless, registration and community notification laws are unlikely candidates for repeal,¹⁰⁵ and time may thus be better spent identifying ways "to minimize their anti-therapeutic effects, and . . . maximize their therapeutic potential. . . ."¹⁰⁶ With that in mind, the following reflection on the International Megan's Law of 2010 (hereinafter referred to as House Bill 5138) begins with a brief description of recent legislative action taken pursuant to the

ton whose 1994 rape and murder at the hands of a repeat sex offender spurred the original Megan's Law legislation.").

⁹⁹ See *infra* Part III.A.

¹⁰⁰ E.g., FAILED POLICIES, *supra* note 5, at 5.

¹⁰¹ Eventually passed in 1994, the Jacob Wetterling Act was the result of three years of legislative efforts, beginning with the introduction of the Crimes Against Children Registration Act. Logan, *supra* note 19, at 62–66.

¹⁰² This conclusion has been arrived at elsewhere, albeit by a different analysis. See *supra* notes 90–93 and accompanying text.

¹⁰³ An expanded list of challenges and criticisms that have been directed at registration and notification laws include issues pertaining to: protected liberty interests; double jeopardy; right to travel; equal protection; due process; ex post facto; the Commerce Clause; overbroad; lengthy duration; fiscal and practical burdens; inability of officials to monitor the large number of registered sex offenders; juvenile applicability; community shunning and retribution; employment difficulties; ineffectiveness; iatrogenic effects; inaccurate portrayal of recidivism rates; and the suggested unconstitutionality of the Adam Walsh Act's new crime of failing to register. See FAILED POLICIES, *supra* note 5; PROTECTING SOCIETY, *supra* note 5; Tregilgas, *supra* note 4, at 731–37; Yung, *supra* note 51, at 370–71. The number of registrants is simply impressive: one out of every 427 Americans. See *supra* note 73.

¹⁰⁴ See *supra* text accompanying notes 60–62.

¹⁰⁵ E.g., PROTECTING SOCIETY, *supra* note 5, at 213, 221.

¹⁰⁶ *Id.*

proposal.¹⁰⁷ A description of the bill's purpose and provisions is then explicated, followed by an analysis of its most notable strengths and weaknesses.¹⁰⁸ Then, appreciating that the proposal could conceivably become law in coming years, suggestions for increasing its positive aspects and minimizing its deficits are offered.¹⁰⁹ An alternative option is also presented.¹¹⁰

A. *Legislative History*

The architect and sponsor of House Bill 5138 is Christopher H. Smith, a Republican representative for New Jersey's Fourth District.¹¹¹ Representative Smith, a supporter of initiatives to reduce human trafficking,¹¹² had previously sponsored the International Megan's Law of 2008 and the International Megan's Law of 2009, but these bills never made it past House subcommittee referrals.¹¹³ His efforts fared better in 2010 when House Bill 5138 passed the House by voice vote and moved onto the Senate; there, the bill was referred to the Senate Committee on Foreign Relations, where it ultimately died.¹¹⁴ The International Megan's Law of 2011 is currently under consideration in the 112th session of Congress.¹¹⁵

¹⁰⁷ See *infra* Part III.A.

¹⁰⁸ See *infra* Part III.B–C.

¹⁰⁹ See *infra* Part IV.

¹¹⁰ *Id.*

¹¹¹ *Congressman Chris Smith—Biography*, THE U.S. HOUSE OF REPRESENTATIVES, <http://chrissmith.house.gov/Biography> (last updated Oct. 2011).

¹¹² Representative Smith authored and sponsored the Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. (enacted), the Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (enacted), and the Trafficking Victims Protection Reauthorization Act of 2005, H.R. 972, 109th Cong. (enacted).

¹¹³ See *Bill Summary & Status*, THOMAS, <http://www.thomas.gov> (follow “Try the Advanced Search” hyperlink; then follow “110” hyperlink; then search “International Megan’s Law”; then follow “All Congressional Actions” hyperlink) (last visited Jan. 1, 2012); *Bill Summary & Status*, THOMAS, <http://www.thomas.gov> (follow “Try the Advanced Search” hyperlink; then follow “111” hyperlink; then search “International Megan’s Law”; then follow “H.R.1623” hyperlink; then follow “All Congressional Actions” hyperlink) (last visited Jan. 1, 2012).

¹¹⁴ See *Bill Summary & Status*, THOMAS, <http://www.thomas.gov> (follow “Try the Advanced Search” hyperlink; then follow “111” hyperlink; then search “International Megan’s Law”; then follow “H.R.5138” hyperlink; then follow “All Congressional Actions” hyperlink) (last visited Jan. 1, 2012).

¹¹⁵ See *Bill Summary & Status*, THOMAS, <http://www.thomas.gov> (follow “Try the Advanced Search” hyperlink; then follow “112” hyperlink; then search “International Megan’s Law”; then follow “All Congressional Actions” hyperlink) (last visited Jan. 1, 2012). An International Megan’s Law of 2011 was introduced in the 112th session of Congress subsequent to the writing of much of this Note. H.R. 3253. I compared the text of that bill with the 2010 version using an open source PDF comparison program, DiffPDF. DiffPDF, <http://www.qtrac.eu/diffpdf.html> (last visited Mar. 10, 2012). The

B. Purpose and Provisions

Broadly speaking, Representative Smith is reported as having offered the following comments regarding the purpose of House Bill 5138:

We're trying to make it global in terms of Megan's Law . . . but that also protects our kids, because we have sex tourism visitors coming to our country from Germany—a whole slew of countries—to abuse little children, and our Immigration and Customs Enforcement people don't have a clue what their M.O. is when they arrive at JFK or Newark International or wherever it might be.

. . .

This would encourage a whole global movement to enact Megan's Laws domestically and then share that information internationally.¹¹⁶

. . .

The International Megan's Law would establish the model needed for our administration to pressure other countries to take action to stop child sex tourism originating within their borders and threatening children in the United States and elsewhere.¹¹⁷

bills are virtually identical (the only differences between the two are that the 2011 version includes updated dates and lacks a budget compliance section). Therefore, my description and critique of the 2010 version applies in equal force to the 2011 version.

¹¹⁶ Accord H.R. 5138 § 6(g).

(g) CONSULTATIONS.—The Center *shall* engage in ongoing consultations with—

(1) NCMEC, ECPAT–USA, Inc., World Vision, and other nongovernmental organizations that have experience and expertise in identifying and preventing child sex tourism and rescuing and rehabilitating minor victims of international sexual exploitation;

(2) the governments of countries interested in cooperating in the creation of an international sex offender travel notification system or that are primary destination or source countries for international sex tourism; and

(3) Internet service and software providers regarding available and potential technology to facilitate the implementation of an international sex offender travel notification system, both in the United States and in other countries.

Id. (emphasis added). Note the use of the word *shall*. The desire to nudge other countries into adopting U.S.-style sex offender policies is a prominent undercurrent throughout the bill. But as is argued in this Note, the wisdom of our domestic sex offender policies is not yet certain. Accordingly, prodding other countries into adopting our questionable policies carries with it an air of hastiness and American exceptionalism.

¹¹⁷ Sulaiman Abdur-Rahman, *House OKs Rep. Smith's 'International Megan's Law' to Protect All Kids from Perverts*, TRENTONIAN, July 28, 2010,

The stated justification for House Bill 5138 is the prevention or reduction of child sex tourism.¹¹⁸ Based on Immigration and Customs Enforcement (ICE) information, the Congressional Budget Office “expects” that about 10,000 child-victim sex offenders will travel internationally “most” years.¹¹⁹ The limited research that exists on child sex tourism suggests that at least some—although seemingly a tiny proportion of—registered sex offenders engage in child sex tourism abroad.¹²⁰ Hence, that a history of child-victim sexual offenses might in a very small number of cases be predictive of engaging in child sex tourism seems at least facially valid.

Primary aims of House Bill 5138 include: (1) alerting destination countries of traveling *high interest* child-victim sex offenders; (2) encouraging other countries to provide reciprocal notification, regardless of risk level; (3) assisting foreign countries with the development of identification and travel notification systems; (4) granting the Secretary of State with the power to revoke or limit the duration of passports of foreign child-victim sex offenders or *high interest registered sex offenders*; (5) maintaining non-public registries of all U.S. citizen sex offenders living abroad; and (6) assessing whether countries are combating human trafficking pursuant to minimum standards set forth elsewhere.¹²¹ A Sex Offender Travel Center would be created to help carry out these objectives.¹²² In the following section, select portions of the bill are more closely reviewed and commented upon. The analysis is premised

<http://www.trentonian.com/articles/2010/07/28/news/doc4c4fa96cc91a5432893315.txt?viewmode=fullstory>.

¹¹⁸ *Child sex tourism* being defined “as the commercial sexual exploitation of children by people who travel from one place to another and there engage in sexual acts with minors.” H.R. 5138 § 2(a)(7).

¹¹⁹ CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 5138, INTERNATIONAL MEGAN’S LAW OF 2010 3 (2010) [hereinafter H.R. 5138 COST ESTIMATE]. How the Congressional Budget Office arrived at their estimate is not reported, which raises concerns about the credibility of the statistic.

¹²⁰ See THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM: SCOPE OF THE PROBLEM AND COMPARATIVE CASE STUDIES 24–26, 39–41 (2007); U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS app. D (2010). But see eAdvocate, *International Megans Law EXPOSED! Now, Hear the Truth About HR 5138*, CONG., COURTS AND SEX OFFENDERS (July 31, 2010), http://congress-courts-legislation.blogspot.com/2010/07/international-megans-law-exposed-now_31.html (last visited Dec. 23, 2011) (questioning the credibility of the data reported by the U.S. Department of Justice).

¹²¹ See H.R. 5138 § 2(b).

¹²² H.R. 5138 § 6. The creation of the International Sex Offender Travel Center would seem analogous to the Adam Walsh Act’s creation of the SMART Office. See *supra* note 52 and accompanying text.

on the perpetuation of domestic registration and notification policies as they currently appear.¹²³

C. Analysis

First, it should be noted that the International Megan's Law moniker is somewhat deceiving. House Bill 5138, in lacking community notification provisions (i.e., notification is limited to law enforcement officers and certain child-services personnel), is really more akin to the Jacob Wetterling Act.¹²⁴ The name thus entails the risk of misleading the public.

Second, the proposal would be limited to child-victim sex offenders.¹²⁵ It would also only apply to juvenile offenders if they had attained the age of 14 at the time of committing an offense that was comparable or more severe than aggravated sexual abuse (thus

¹²³ See Logan, *supra* note 1, at 211–39 (speculating as to why contemporary registration and notifications laws have persisted and expanded despite empirical evidence suggestive of their ineffectiveness).

¹²⁴ See *supra* notes 18–29 and accompanying text.

¹²⁵ H.R. 5138 § 3(8)–(9). This section provides:

(A) IN GENERAL.—The term “sex offense” means a criminal offense against a minor, including any Federal offense, that is punishable by statute by more than one year of imprisonment and involves any of the following:

- (i) Solicitation to engage in sexual conduct.
- (ii) Use in a sexual performance.
- (iii) Solicitation to practice prostitution (whether for financial or other forms of remuneration).
- (iv) Video voyeurism as described in section 1801 of title 18, United States Code.
- (v) Possession, production, or distribution of child pornography.
- (vi) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
- (vii) Conduct that would violate section 1591 (relating to sex trafficking of children or by force, fraud, or coercion) of title 18, United States Code, if the conduct had involved interstate or foreign commerce and where the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 18 years at the time of the conduct.

(viii) Any other conduct that by its nature is a sex offense against a minor.

(B) EXCEPTIONS.—The term “sex offense” does not include—

- (i) a foreign conviction, unless the conviction was obtained with sufficient safeguards for fundamental fairness and due process for the accused; or
- (ii) an offense involving consensual sexual conduct if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

Id. § 3(9).

paralleling the treatment of juveniles in the Adam Walsh Act).¹²⁶ The bill therefore avoids some of the problems associated with being overly inclusive (e.g., needlessly including adult-victim sex offenders when the proposal is predicated on preventing child-victim offending). However, by including juvenile sex offenders, the proposal invites the same criticisms that have been launched at the Adam Walsh Act's inclusion of juveniles.¹²⁷

Third, while all child-victim sex offenders would be required to report domestically before traveling—and at to-be-established diplomatic or consular missions abroad if remaining in the destination country for more than 30 days within a six month timespan—notification of international travel would only apply to *high interest registered sex offenders*.¹²⁸ However, the provided definition of a *high interest registered sex offender* is not sufficiently clear, nor is the process for classifying an individual as such. The bill only calls for a belief based on “reasonable grounds” and a consideration of the “totality of the circumstances.”¹²⁹ Moreover, while an appeals process for those determined to be *high interest registered sex offenders* is built in, how the review panel would operate is not specified.¹³⁰ The bill only dictates the agencies from which panel members would be drawn, and establishes that panel members would be independent from those who perform the initial assessments.¹³¹

Fourth, the term *travel* is left undefined. While the common sense definition of the word would not seem to carry a duration qualifier, guidelines for the Adam Walsh Act currently permit a six-

¹²⁶ H.R. 5138 § 3(3); *see also supra* note 49 and accompanying text.

¹²⁷ *E.g.*, FAILED POLICIES, *supra* note 5, at 7, 236 (“Chaffin argued that the enactment of the Walsh Act’s requirement that states subject juveniles over the age of 14 to the same registration and notification mandates as adults is directly contradictory to the research findings, which point to improvements in treatments and recidivism of juvenile sex offenders [Moreover,] [j]uvenile sex offenders will likely face the many unintended consequences that scholars have found. Stigmatization at school, inability to secure employment or higher education, harassment, and social isolation are just as likely for the juvenile offender as for the adult. Furthermore, the requirements of registration for juveniles may actually prevent parents from coming forward to report intrafamilial sexual assaults due to fear that their child will have to register.”).

¹²⁸ *See* H.R. 5138 §§ 4–5.

¹²⁹ H.R. 5138 § 3(4); *see also id.* § 7(a) (“Not later than 180 days after the date of the enactment of this Act, the Center shall issue the Center Sex Offender Travel Guidelines for the assessment of sex offenders . . . (1) who report international travel from the United States to another country . . . or (2) . . . for purposes of determining whether such sex offenders are considered high interest registered sex offenders by United States law enforcement.”).

¹³⁰ *See* H.R. 5138 § 6(d)(5).

¹³¹ *See id.*

day window for registered sex offenders to travel without reporting.¹³² Thus, jurisdictions have no guidance as to whether the proposal intends to eliminate that exemption.

Fifth, whereas the United States would only provide notification to foreign jurisdictions of travel by *high interest registered sex offenders*, the bill indicates that the United States expects to be notified of all foreign child-victim sex offenders who intend to travel to the United States, regardless of whether they are deemed *high interest*.¹³³ If the true intention of the proposal is to prevent child sex tourism, providing for relaxed reciprocal notification standards when the United States is not primarily a destination country (but rather an origin country)¹³⁴ seems disingenuous.

Sixth, flexibility is built in (i.e., a system is to be devised post hoc) for child-victim sex offenders who regularly transit across the U.S./Canada and U.S./Mexico borders, and for those whom the 30-day notice rule would prove impractical (e.g., needing to travel quickly for a personal or business exigency).¹³⁵ The bill thus recognizes that registered sex offenders may engage in legitimate and regular international travel, and that having to report each time would prove problematic. However, only providing flexibility for travel to Canada and Mexico, when legitimate travel can occur to any country, seems illogical. Moreover, as is the case throughout much of the bill, how the system would function is unknown.¹³⁶

Seventh, the bill would adopt and amend the new crime of *failing to register* first introduced in the Adam Walsh Act.¹³⁷ How-

¹³² See *supra* note 56 and accompanying text.

¹³³ See H.R. 5138 § 2(b)(1), (2).

¹³⁴ See THE PROTECTION PROJECT, *supra* note 120, at 24–26, 70 (discussing that at the time the report was issued, only a single foreign individual had been charged (the case was still pending) for child sex tourism with the United States being the destination country).

¹³⁵ See H.R. 5138 § 4(f).

¹³⁶ See *id.* § 4(f)(1). An internet posting suggested the following system (for repeated business travel, but also for travel in general):

It should be a one time application and clearance for travel abroad, unless a new offence or evidence-based reason to suspect a problem occurs. Or their application/approval is valid for 2 or 3 years and then they reapply when it expires. Having to submit each and every time for those who travel abroad regularly for work or for family can only be thought of as harassment and would only serve to waste valuable resources that could be used to target true threats.

Posting #244 – *The Actual Costs of the International Megan's Law*, REFORM SEX OFFENDER LAWS OF VIRGINIA (Aug. 1, 2010) [hereinafter RSOL OF VIRGINIA], <http://www.rsolvirginia.org/news/bulletin-board/posting-244-%E2%80%93-the-actual-costs-of-the-international-megan%E2%80%99s-law/> (last visited Dec. 23, 2011).

¹³⁷ See H.R. 5138 § 4(d)(1) (“Whoever knowingly fails to register with United States

ever, scholars have noted that the original offense may raise some constitutional concerns.¹³⁸ The offense as written may prove unenforceable if courts adopt the position of critics that the original offense violates the Fifth Amendment Due Process Clause, the Ex Post Facto Clause, and the Commerce Clause.¹³⁹

Eighth, multiple reports are to be furnished to Congress over the course of three years for evaluative purposes.¹⁴⁰ These include two initial reports to be issued not more than one year after the date of adoption, three annual reports to be issued by the president, and a report to be issued by the Inspectors General of the Department of Justice and the Department of State not more than three years after the date of adoption.¹⁴¹ The call for evaluative reports is a positive aspect of the bill.

Finally, the bill would cost an estimated \$252 million over a four-year period.¹⁴² No estimate is provided for how much foreign assistance might cost. Notwithstanding estimates, the bill is not actually constrained by any budgetary limit, so long as it comports to the mandates of the Statutory Pay-As-You-Go Act of 2010.¹⁴³ The cost of the proposal is therefore significantly more than what it currently costs ICE to detect and investigate instances of child sex tourism.¹⁴⁴

officials in a foreign country or to report his or her travel to or from a foreign country, as required by the International Megan's Law of 2010, after being duly notified of the requirements shall be fined under this title or imprisoned not more than 10 years, or both."').

¹³⁸ See Logan, *supra* note 2, at 7–10; Yung, *supra* note 51.

¹³⁹ Yung, *supra* note 51, at 370–71.

¹⁴⁰ See H.R. 5138 §§ 12, 14.

¹⁴¹ *Id.*

¹⁴² H.R. 5138 COST ESTIMATE, *supra* note 119, at 1.

¹⁴³ Pub. L. No. 111-139, 124 Stat. 8 (codified in scattered sections of 2 U.S.C.). See also H.R. 5138 §§ 15–16.

¹⁴⁴ This is directly contrary to what House Bill 5138 stipulates. The bill provides:

(12) Between 2003 and 2009, ICE obtained 73 convictions of individuals from the United States charged with committing sexual crimes against minors in other countries.

(13) While necessary to protect children and rescue victims, the detection and investigation of child sex predators overseas is costly. Such an undercover operation can cost approximately \$250,000. A system that would aid in the prevention of such crimes is needed to safeguard vulnerable populations and to reduce the cost burden of addressing crimes after they are committed.

H.R. 5138 § 2(a)(12)–(13). But if \$250,000 times 73 convictions divided across 7 years equals a yearly cost of \$2,607,143, that amount is significantly less than the estimated \$50,400,000 (i.e., \$252,000,000 divided across 5 years) yearly cost of House Bill 5138.

IV. SUGGESTIONS FOR IMPROVING THE PROPOSAL AND AN ALTERNATIVE OPTION

In light of the foregoing discussion, a list of suggestions for improving the International Megan's Law proposal is hereby offered:¹⁴⁵

- The name of future proposals should be changed to something that does not include the moniker *Megan's Law*, so as not to mislead the public.
- Congress should await state compliance with the requirements of the Adam Walsh Act before attempting to expand the current system exponentially. The calling for more complex registration and notification infrastructures is currently outpacing the speed at which these systems can be built. Moreover, the cost of these systems coupled with their unproven efficacy should caution against further expansion.¹⁴⁶
- Congress should pass a bill requiring that studies be undertaken to answer beforehand many of the questions that House Bill 5138 would seek to answer post hoc.¹⁴⁷ Additional research on child sex tourism should also be stimulated by way of federal grants. The point here is that public policy should be driven by evidence-based data.¹⁴⁸ That is, unless absolutely unfeasible, the flow of public policy should be from data to legislation (and not the other way around). This temporal order is, quite obviously, most conducive to informed decisions. Indeed, how best to deal¹⁴⁹ with the

¹⁴⁵ The suggestions offered are not presented in any particular order.

¹⁴⁶ As to both of these points, see *supra* notes 59–61 and accompanying text for support.

¹⁴⁷ See H.R. 5138 § 12(a) (providing a list of questions to be answered post hoc once the bill is adopted).

¹⁴⁸ Jill S. Levenson & David A. D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIM. JUST. POL'Y REV. 168 (2007); Lynn professor refutes claim of 100,000 missing sex offenders in new study, LYNN UNIVERSITY (July 10, 2011), <http://www.lynn.edu/about-lynn/news-and-events/news/lynn-professor-refutes-claim-of-100-000-missing-sex-offenders-in-new-study>.

¹⁴⁹ A recent search of legal literature revealed numerous discussions and proposals of strategies for reducing child sex tourism. See, e.g., Geneva Brown, *Women and Children Last: The Prosecution of Sex Traffickers As Sex Offenders and the Need for a Sex Trafficker Registry*, 31 B.C. THIRD WORLD L.J. 1 (2011) (discussing European, Asian, and U.S. efforts and advocating for the adoption of an international registry of individuals convicted of sex trafficking); Kelly M. Cotter, *Combating Child Sex Tourism in Southeast Asia*, 37 DENV. J. INT'L L. & POL'Y 493 (2009) (discussing U.S. and various international efforts); Kalen Fredette, *International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation*, 32 B.C. INT'L & COMP. L. REV. 1 (2009) (discussing approaches utilized in both source and destination countries and offering the Council of Europe's Convention on the Protection of Children Against Sexual Exploitation and Abuse as representative of current best efforts); Timothy R. Spaulding, *Moving Beyond Treating Cancer with a Band-Aid:*

problem¹⁵⁰ of child sex trafficking and tourism is an important human rights concern in need of empirical insight rather than haphazard legislation.

- Operational frameworks should also be delineated prior to passage (as opposed to calling for the Attorney General to do so after the fact), so that a better estimate can be made about the necessary resources investment (e.g., cost and manpower) and to guide implementation. Relying on the issuance of post hoc guidelines¹⁵¹ will entail the same implementation problems¹⁵² currently facing the Adam Walsh Act. Moreover, the need for clearly defined operational guidelines is even more important here, in that the jurisdictional scope would be massively expanded from that of the Adam Walsh Act.
- Less burdensome travel-reporting requirements would be appropriate for the vast majority of registrants.¹⁵³ Absent new

Addressing the Domestic Hindrances to Eradicating Child Sex Tourism & Child Prostitution in Cambodia, GONZ. J.L. INT'L L. (2011) (discussing Cambodian social problems that obstruct efforts to end child sex tourism there); Amy Fraley, Note, *Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?*, 79 ST. JOHN'S L. REV. 445 (2005) (discussing U.S., Australian, German, Japanese, and Swedish efforts and offering various recommendations for improvement).

¹⁵⁰ The 73 convictions cited in footnote 145 are unlikely to be indicative of the scope of the problem; that figure, of course, does not account for instances of child sex tourism that do not come to the attention of authorities. *Cf.* PROTECTING SOCIETY, *supra* note 5, at 46–47 (“[O]bserved recidivism rates are underestimates of the actual rates because many sexual offenses are never detected.”).

¹⁵¹ See, e.g., H.R. 5138 §§ 4(b), 4(f)(1), 5(b)(4), 6(a), 7(a), 14(a).

¹⁵² An impassioned and critical internet posting raised some interesting practical problems that could arise depending on how the interface between the Adam Walsh Act and House Bill 5138 is handled. See eAdvocate, *supra* note 120. Because the bill does not specify the details of how reporting would work abroad nor how it would be incorporated with the Adam Walsh Act, the potentially-problematic hypotheticals posed by the author of the internet posting cannot be assessed. Nonetheless, some interesting practical problems raised include:

- If each country is only to have a single diplomatic or consular mission, an in-person reporting requirement would prove to be a significant practical and financial burden on registrants visiting large countries (e.g., China, Russia).
- Will reporting requirements proscribed by the International Megan’s Law comport well with state reporting requirements (remembering that the Adam Walsh Act places only a federal minimum standard on state reporting and notification practices; states are free to adopt tougher policies)?
- Would the International Megan’s Law apply retroactively as does the Adam Walsh Act?
- Travel plans can change rapidly after destination arrival. How will the International Megan’s Law handle spur-of-the-moment changes in travel plans?

See eAdvocate, *supra* note 120.

¹⁵³ See *supra* note 128.

offenses or other credible evidence to suggest to the contrary, applicants should only have to apply for permission to travel (i.e., report) once, or otherwise once every few years.¹⁵⁴

- Future proposals should define the word *travel*, specifically, whether the definition includes a seven-day duration requirement, as does the Adam Walsh Act. Any such proposals should also more thoroughly define what a *high interest registered sex offender* is and delineate how such a designation is to be made (e.g., by use of best practices in the risk/threat assessment fields or a tiered system).

A triggering-offenses system (e.g., the tier system adopted by the Adam Walsh Act) would be the simplest and most straightforward approach.¹⁵⁵ An individualized risk assessment system, in turn, would prove more complex. This is so because while actuarial assessment tools exist to gauge risk of sexual recidivism generally,¹⁵⁶ none assess for the specific target behavior of engaging in child sex tourism.¹⁵⁷ Hence, actuarial risk assessment techniques would only prove marginally helpful, if at all, in determining the likelihood that an individual will engage in child sex tourism. Actuarial results, if they could even be used, would have to be incorporated with anamnestic (a more traditional, individualized clinical assessment using applied behavioral analysis principles)¹⁵⁸ or threat (an approach used to assess risk of *targeted* violence developed by the U.S. Secret Service)¹⁵⁹ assessment approaches that while allowing for individualized assessment,

¹⁵⁴ See *supra* note 136.

¹⁵⁵ See *supra* note 53 and accompanying text. However, adoption of the Adam Walsh Act's tier system—specifically, defining high risk registered sex offenders as tier III offenders—would present two problems in light of the stated aim of House Bill 5138 (preventing child sex tourism). First, sex trafficking is only a tier II offense (and would thus be excluded from a tier III-triggering system). Second, tier III is overly-inclusive in this context, in that it is not limited to child-victim sex offenders. It has been suggested that the bill should only apply to individuals “who have been convicted of forced rape upon a child (not someone who was a girlfriend or boyfriend), or someone who has been convicted of sex tourism or human trafficking.” RSOL OF VIRGINIA, *supra* note 136. As such, limiting triggering-offenses to relevant offenses, rather than entire tiers, would be a more befitting solution.

¹⁵⁶ See generally HANDBOOK OF VIOLENCE RISK ASSESSMENT (Randy K. Otto & Kevin S. Douglas eds., 2010) (providing extensive coverage of a variety of actuarial tools used to assess risk of sexual recidivism).

¹⁵⁷ For an analogous discussion of this issue (but pertaining instead to violence risk), see Randy Borum et al., *Threat Assessment: Defining an Approach for Evaluating Risk of Targeted Violence*, 17 BEHAV. SCI. & L. 323, 325–26 (1999).

¹⁵⁸ See GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 307 (3d ed. 2007).

¹⁵⁹ See Borum et al., *supra* note 157.

are inherently more speculative and less reliable than purely actuarial methods. Also, false positives are sure to abound given that engaging in child sex tourism is presumably a rare behavior, as compared to, for instance, “any reoffense of a sexual nature.” The latter is a far more encompassing criterion variable (the outcome to be predicted) commonly employed by actuarial risk assessment instruments. That is, the narrow offense of child sex tourism—necessarily measured by official charges or convictions—likely has a low rate of occurrence (relatively speaking), which makes prediction difficult and increases the risk of false positives.

- Congress might amend the new crime of *failing to register* to assure that it complies with constitutional standards.¹⁶⁰

An alternative proposal would be for Congress to pass legislation allowing for the revocation or restriction of passports and visas¹⁶¹ issued to domestic child-victim sex offenders¹⁶² deemed to be high-risk by use of (1) best practices in the risk/threat assessment fields or (2) relevant triggering offenses.¹⁶³ Notification

¹⁶⁰ See Yung, *supra* note 51, at 400, 407, 423 (offering solutions to supposed conflicts between the federal *failure to register* crime and the Fifth Amendment Due Process Clause, the Ex Post Facto Clause, and the Commerce Clause).

¹⁶¹ Professor John Hall also recently arrived at this solution. See Hall, *supra* note 6 (providing a helpful review of passport revocation jurisprudence). Federal laws allow for the revocation of passports for a variety of reasons; for a listing, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-643, PASSPORT ISSUANCE: CURRENT SITUATION RESULTS IN THOUSANDS OF PASSPORTS ISSUED TO REGISTERED SEX OFFENDERS 4–5 (2010). One such law permits the Secretary of State to deny or revoke passports to persons convicted of child sex tourism during the time they are imprisoned or under correctional supervision. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 236, 122 Stat. 5044, 5082 (codified at 22 U.S.C. § 212a (Supp. IV 2010)). Another law permits the Department of State to refuse to issue a passport to a person subject to a criminal court order, condition of probation, or condition of parole. 22 C.F.R. § 51.60(b)(2) (2010). Based on his analysis, Professor Hall concluded that revoking the passports of most child-victim sex offenders would be constitutional. Hall, *supra* note 6, at 155–56, 184–202.

¹⁶² House Bill 5138 only included provisions that would have authorized the Secretary of State to revoke or limit the passports issued to U.S. citizen sex offenders *convicted in foreign countries* and not visas issued to foreign nationals (but in no case would the Secretary of State be allowed to do so to preclude a U.S. citizen convicted of a sex offense in a foreign country from returning to the United States). H.R. 5138 § 8(a)–(b). The ability to restrict *domestic* registered sex offenders' passports was proposed in Congress in 2010. H.R. 5870, 111th Cong. (2010) (“The Secretary of State may revoke, restrict, or limit a passport issued to an individual who is a sex offender . . .”). Two points are notable about this bill: first, it would have allowed the Secretary of State the power to revoke or restrict *passports* issued to all sex offenders (not just child-victim sex offenders); and second, the Secretary of State would not have the power under the bill to revoke or restrict *visas* issued to foreign-citizen sex offenders.

¹⁶³ Again though, the problems with relying upon the Adam Walsh Act's tier system in this context are (1) that sex trafficking is not a tier III offense (but rather a tier II offense) and (2) that tier III includes adult-victim offenses (rather than just child-

would be unnecessary in such a system because high-risk child-victim sex offenders would be denied the right to travel internationally.¹⁶⁴ Those that might be permitted to travel due to exigent circumstances—likely to be a small number annually—could then be monitored by ICE in cooperation with law enforcement of destination countries.

Such a system, given its simplicity, could be expected to result in substantial budgetary savings. The saved resources could then be spent—perhaps more effectively—on assisting other efforts to combat child sex tourism in destination countries.¹⁶⁵ Those who are caught partaking in the child sex tourism industry should, of course, continue to be prosecuted under federal criminal law.¹⁶⁶

victim offenses). A better solution would be to prescribe context-relevant triggering offenses (e.g., forcible rape against a child, engagement in child sex tourism, and sex trafficking of minors). *See* RSOL OF VIRGINIA, *supra* note 136.

¹⁶⁴ While the Supreme Court has long recognized a constitutional right to travel domestically, *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 857–868 (3d ed. 2006), no such right exists for international travel, *see generally id.* at 868–871. Restrictions on international travel are instead subject to a rational basis test. *Id.*

¹⁶⁵ *See, e.g.,* Fredette, *supra* note 149.

¹⁶⁶ 18 U.S.C. § 2423 (2006). The statute provides in pertinent part:

(a) Transportation with intent to engage in criminal sexual activity.—A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

(b) Travel with intent to engage in illicit sexual conduct.—A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(c) Engaging in illicit sexual conduct in foreign places.—Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(d) Ancillary offenses.—Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.

Id.

CONCLUSION

A review of foreign jurisdictions confirms that the United States leads the world in sex-offender-centric policies. While registration has become relatively commonplace abroad (albeit in a more restrained manner than in the United States), community notification has not been as readily received outside of the United States. Moreover, unlike the perpetual retrospective application adopted by the United States, foreign jurisdictions that provide for retroactive applicability do so in a much more restrained manner. In short, international consensus does not yet exist regarding appropriate sex offender policy.

One of the few practices that the United States has not led the way in adopting is international travel reporting.¹⁶⁷ Strict requirements have been strangely absent from U.S. policy consideration until recently with the introduction of the International Megan's Law proposals. At least three foreign jurisdictions currently require sex offenders to alert officials of intended international travel, and the United Kingdom uniquely allows for a limited denial of a registrant's right to travel if he or she is deemed to pose an unacceptable risk to children abroad.

The International Megan's Law proposal would seek to, among other things, implement international travel reporting requirements for domestic sex offenders. But it seeks to go further by attempting to incite a worldwide system of sex offender registries and information sharing.¹⁶⁸ I argue, however, that the current

¹⁶⁷ See *supra* note 56 and accompanying text.

¹⁶⁸ A stirring if not somewhat lofty argument is that an International Megan's Law is at odds with various Articles of the United Nations' Universal Declaration of Human Rights. See eAdvocate, *supra* note 120. Articles 7, 9, 11–15, and 30 of The Universal Declaration of Human Rights provide:

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

...

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

...

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor

iteration of the proposal is unacceptably vague and lacking in relevant research for such an expansive (and expensive) undertaking. Nor does the proposal's justification seem entirely genuine in light of the inequality introduced regarding reciprocal notification.

Because the wisdom of U.S. registration and notification laws remains uncertain, it would seem prudent to postpone international advocacy until the soundness of our own policies is first ensured. Combating child sex tourism certainly requires international cooperation, but such a cooperative need should not be seen as an invitation to goad foreign nations into allowing our questionable practices to expand exponentially.

shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

...

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). For an analysis of contemporary sex offender policy in light of other assorted international and domestic human rights codes, *see generally* Astrid Birgden & Heather Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics, and Human Rights*, 23 *SEXUAL ABUSE: J. RES. & PRAC.* 295 (2011).