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## **LEGAL RESPONSES TO SEXUAL VIOLENCE IN CUSTODY**

# **Sex Offender Registration Statutes: Impact on Addressing Sexual Abuse in Custodial Settings**

Brenda V. Smith and Mary E. Pavlik

The Project on Addressing Prison Rape

American University, Washington College of Law

[www.wcl.american.edu/endsilence](http://www.wcl.american.edu/endsilence)

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**Custodial Settings**

**AUTHORS:**

Brenda V. Smith  
Professor of Law  
Director

The Project on Addressing Prison Rape  
The Washington College of Law  
4801 Massachusetts Ave NW  
Washington DC, 20016  
Phone: 202-274-4261 Fax: 202-274-4182  
[bvsmith@wcl.american.edu](mailto:bvsmith@wcl.american.edu)

Mary E. Pavlik, Esq.  
Legal Consultant  
The Project on Addressing Prison Rape  
The Washington College of Law  
4801 Massachusetts Ave NW  
Washington DC, 20016

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The Project on Addressing Prison Rape  
American University  
Washington College of Law  
4801 Massachusetts Ave, NW  
Washington, DC 20016

or emailed to:

[endsilence@wcl.american.edu](mailto:endsilence@wcl.american.edu)

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The National Institute of Corrections  
320 First Street, N.W.  
Washington, D.C. 20534  
1-800-995-6423 or 202-307-3995  
Fax: 202-307-3106  
www.nicic.gov

Morris L. Thigpen  
Director

Thomas Beauclair  
Deputy Director

Chris Innes  
Division Chief- Research and Evaluation

Dee Halley  
Correctional Program Specialist

Prof. Brenda V. Smith  
Project Director, The Project on Addressing Prison Rape

Mary E. Pavlik  
Legal Consultant, The Project on Addressing Prison Rape

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This publication builds on important work done by Prof. Brenda V. Smith in researching legal responses to sexual violence in institutional settings. Legal Responses to Sexual Violence in Custody: Sex Offender Registration Statutes: Impact on Addressing Sexual Abuse in Custodial Settings addresses rapidly developing areas of law and practice in the United States. The information in this publication is current as of April 2012. As law and policies rapidly change, we will remain abreast of those changes but encourage readers to contact us with new information as it becomes available.

## **Foreword**

This publication is the second of a series that forms the basis of a toolkit on laws that address sexual violence against persons under correctional supervision. Each publication provides a general overview of a particular set of laws and its history; discusses relevant provisions and how they differ from state to state; and explains its benefits and challenges as a tool to address sexual abuse of individuals in custody. The publication was prepared under the National Institute of Corrections (NIC) Cooperative Agreement 06S20GJ1 with the American University, Washington College of Law. This cooperative agreement is a critical part of NIC's response to its obligation to provide training, education, information and assistance under § 5 of the Prison Rape Elimination Act of 2003. This publication will address sex offender registration and its utility as a tool for addressing sexual violence in correctional institutions. While the publication primarily discusses correctional settings, the issues it raises also apply to other custodial settings, such as nursing homes and facilities for the mentally disabled and mentally retarded.

Chapter 1 provides an overview of sex offender registration laws in the United States. The federal government enacted sex offender registration laws in response to the abduction of two children by convicted sex offenders. These federal laws required states to create sex offender registries to protect the community from sex offenders. As a result, each state developed its own laws governing registrable offenses, information required for registration, duration of registration, community notification and residency, as well as employment restrictions. While information contained in these public registries and the number of offenders required to register continues to grow, evidence suggests that sex

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offender registration laws are sometimes ineffective in protecting the community from abuse. Nonetheless, recent federal changes to these laws, through the Adam Walsh Act, attempt to increase the minimum registration requirements across the nation. States, territories, and certain tribal nations<sup>1</sup> are required to amend their sex offender registration laws to come into compliance with these new standards.

Chapter 2 examines sex offender registration laws' impact and appropriateness for addressing sexual misconduct in custodial settings. The flaws and challenges to the fairness and effectiveness of sex offender registration lists are many. These flaws in the SOR system, combined with the difficulty in bringing staff custodial misconduct cases to trial, leave the corrections community with little to gain from sex offender registration for the large majority of sexual abuse incidents that never make it to trial.

Chapter 3 suggests monitoring offenders for the limited purpose of protecting persons within custodial settings from abuse. The proffered system takes the goals of traditional SOR – notification of law enforcement officers and custodial authorities as well as prevention of recidivism – and combines them with a realistic approach to protecting vulnerable custodial populations.

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**CHAPTER I:**  
**An Overview of Sex Offender Registration**

Sex offender registration is the legal obligation to appear before law enforcement authorities to be listed in a database containing the personal information of persons convicted of a sex crime. Sex offender registration laws have two primary elements – registration and community notification. First, they require persons convicted of sex offenses to register regularly and in-person with law enforcement over a period after their release from custody and to supply law enforcement authorities with information such as their home, work, and email addresses, as well as license plate numbers. Second, the community notification aspect of sex offender registration laws requires jurisdictions to make lists of registered sex offenders available to the public, usually on the Internet and sometimes by sending notices to all persons living close to registered offenders' given addresses.

*A. History of Sex Offender Registration Legislation*

Sex offender legislation is a recent phenomenon. The first sex offender registration legislation passed in California in 1947.<sup>3</sup> It was not until 1990, however, that the State of Washington enacted the first community notification statute in response to the 1989 abduction and disappearance of eleven-year-old Jacob Wetterling.<sup>4</sup> Thereafter, the Wetterlings successfully lobbied states to create sex offender registries; in 1994 the Jacob Wetterling Crimes Against Children and Sex Offender Registration Act was incorporated into the Federal Violent Crime Control and Law Enforcement Act.<sup>5</sup> Under that Act, states were required to create sex offender registries, and offenders were required to register with

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law enforcement for ten years.<sup>6</sup> The law allowed, but did not require, states to release information about the sex offenders on their registries to the public.<sup>7</sup>

Later that year, seven-year-old Megan Kanka was raped and murdered by a neighbor who had just finished serving the maximum sentence<sup>8</sup> for assaulting a five-year-old and another seven-year-old.<sup>9</sup> In response, community members lobbied successfully for passage of federal legislation requiring jurisdictions to relay to the public convicted sex offenders' addresses and other identifying information, as well as details of the crimes for which they were convicted. All states and the District of Columbia passed these community notification laws, which came to be known collectively as "Megan's Law."<sup>10</sup> Further federal legislation created lengthier required registration periods and an FBI database for sex offenders.<sup>11</sup> Most recently, the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)<sup>12</sup> established minimum national requirements for state sex offender registration and notification, and for the first time required juveniles, aged fourteen or older, convicted of certain sex offenses to register as sex offenders.

While passage of these laws was motivated by a desire to ensure public safety and protect children, recent psychological studies have questioned the effectiveness of sex offender registration and community notification, especially for juveniles who often lack the cognitive skills to appreciate the seriousness or consequences of their conduct. Further, recent data and scholarship are inconclusive on recidivism of sexual offenders. Some of the research questions the underlying notion that sex offenders must be continually monitored due to their high risk of future sex offenses, while other research suggests that, because so much of sex offending is underreported, it is difficult to make any conclusive

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statements.<sup>13</sup> Moreover, the public has become concerned about the harassment, violence, and post-incarceration stigma that often accompany registration.<sup>14</sup>

Overall, the approach to sexual offenses and offenders must be one that strikes a balance between ensuring public safety, protecting the civil rights of all persons regardless of conviction status, and providing appropriate levels of supervision and support for those convicted of sex offenses. The current situation is still a work in progress and needs improvement in order to strike that balance. This balance is often difficult to find in the custodial setting. Correctional agencies, in particular, face competing pressures from Congress, the public, and unions while working to protect their jurisdictions and themselves from defamation and negligent hiring suits. Thus, tools that can facilitate credible hiring, firing, and prosecution of correctional staff and protect incarcerated persons from abuse are essential. Adding a closed national registry for correctional administrators to flag staff accused of misconduct and to list staff decertified under their state laws and a separate fund to investigate and prosecute custodial abuse cases could provide that appropriate balance.

*B. The Sex Offender Registration and Notification Act (SORNA)*

The Federal Sex Offender Registration and Notification Act (SORNA)<sup>15</sup> falls within Title I of the Adam Walsh Child Protection and Safety Act of 2006.<sup>16</sup> SORNA mandates a comprehensive set of minimum national requirements for state sex offender registration and notification. All fifty states, the District of Columbia, Indian tribal governments,<sup>17</sup> and the U.S. territories are required to implement these standards. SORNA also includes guidelines for the type of information offenders must disclose and how this

information should be disseminated to the public. Finally, the Act<sup>18</sup> outlines specific technical requirements for the registration process, including the duration of registration, how requirements are enforced, and penalties for non-compliance by registrees.

SORNA covers a broad range of sex offenses, including *sexual act and sexual contact offenses* (all sexual offenses that involve (i) any type or degree of genital, oral, or anal penetration, and (ii) any sexual touching of or contact with a person's body, either directly or through the clothing); *specified offenses against minors*; *specified federal offenses* (most sexual offenses under federal law); *specified military offenses* (offenses under the Uniform Code of Military Justice) and attempts and conspiracies to commit any covered offense.<sup>19</sup>

### *C. The SORNA Tiers of Scrutiny*

SORNA requires the establishment of a nationwide sex offender registry and notification system<sup>20</sup> to assist law enforcement in tracking post-conviction offenders across state lines and curb recidivism. The system ranks sex offenders by the severity of their offenses, establishing different registration periods for each classification and requiring in-person appearances with local authorities. SORNA outlines mandatory levels for registration and community notification according to a three-tier classification scheme that is offense-based rather than risk-based. Thus, while some elements of state-developed judicial discretion systems that use a risk assessment processes may remain in use after jurisdictions substantially implement SORNA, states must ensure that the results of any “discretion” are the same as SORNA requires for the underlying offense.<sup>21</sup>

For example, a tier I sex offender fits within “a residual class that includes all sex

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offenders who do not satisfy the criteria for tier II or tier III” and is subject to registration and community notification requirements for fifteen years.<sup>22</sup> All tier I offenders—including those convicted for sex offenses that require less than one year in jail—must continue to verify their registration in person, annually, for fifteen years.<sup>23</sup> Most offenses against minors result in a tier II classification, which requires that offenders register for twenty-five years and re-register in person every six months.<sup>24</sup>

Tier III sex offenders have been convicted of the most serious offenses, and will remain on the registry and public notification rolls for life.<sup>25</sup> These offenders are required to appear in person every three months with no possibility for early removal from the National Sex Offender Public Registry (NSOPR) website – even with a clean record and successful completion of treatment.<sup>26</sup> Those classified as tier III offenders for offenses committed as juveniles can apply for removal after twenty-five years. However, adults convicted for a third tier offense under SORNA must register for life with no possibility of removal – there are no procedures for early removal based on lack of dangerousness, a low risk of recidivism, or length of time since the offense.

While SORNA mandates the minimum requirements for sex offender registration, states may increase and expand sex offender laws as they see fit. For example, both California and South Carolina have elected to require all sex offenders – tiers I, II, and III – to register for life.<sup>27</sup> Another result of this broad statutory framework is that in all states, an adult or juvenile, fourteen or older, *convicted* of any offense involving a “sexual act” is subject to SORNA's minimum registration requirements.<sup>28</sup>

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The full impact of SORNA on sex offender registration will be difficult to measure for some time. States coming into substantial compliance with SORNA's provisions over the next few years will undoubtedly discover new tensions and problems as they implement the mandatory registration provisions and change over to SORNA's elements-based tiered registration system.

*D. Some Unanticipated Consequences of Registration*

This blanket approach can have unintended consequences. Tiers are determined by the elements of the crime for which an offender is convicted, and each state establishes its own elements and definitions in the state's criminal code. Under current law, many states' definitions of "sexual act" include public urination, consensual sex between teenagers, and pranks such as "flashing" or "mooning." For example, California, Idaho, New Hampshire, and Oklahoma require registration for first time convictions of indecent public exposure, which includes, by definition, public urination and "mooning" pranks.<sup>29</sup> Arizona, Massachusetts, Michigan, and Kentucky require registration for second and subsequent convictions of indecent exposure.<sup>30</sup> Connecticut, Georgia, and Utah require registration for indecent exposure conducted in the presence of a minor.<sup>31</sup> Lastly, Alabama requires registration for simply displaying an obscene sign or bumper sticker in public view.<sup>32</sup> While most readers would agree that public urination and "mooning" offenses are much less dangerous than the serious crimes committed by tier II and tier III offenders, SORNA does not permit states to treat these crimes any less seriously than the tier I minimum standards. SORNA imposes a mandatory fifteen-year registration period on each offender, and with at least ten of those years fulfilled no matter the clean record status of the

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offender.<sup>33</sup> Further, SORNA's broad reach may include, and certainly does nothing to preclude, states from including adjudications of juveniles in their mandatory registration schemes even though many juveniles classified as offenders may be guilty of consensual sex acts or are otherwise highly unlikely to reoffend.<sup>34</sup>

Although not within the scope of this article, SORNA's treatment of juvenile offenders has generated serious criticism.<sup>35</sup> First, SORNA mandates that States include qualifying juvenile offenders in the National Registry system whether or not previous state laws supported such a response. SORNA requires registration of juveniles in two situations: first, if the juvenile is prosecuted for a sex offense as an adult; and second, if the juvenile is 14 years of age or older at the time of the offense and adjudicated delinquent for an offense "comparable to or more severe than aggravated sexual abuse ..., or an attempt or conspiracy to commit such an offense."<sup>36</sup>

Second, SORNA's mandatory provisions eliminate judicial discretion and risk-based assessment used by many states to evaluate the appropriateness of registration for juvenile sex offending. State legislatures often include discretionary elements for sentencing and registration periods based on recognition of the developmental differences between juveniles and adults. Prior to SORNA's enactment, Arkansas required a seven-factored analysis of juvenile offenses, the juvenile offender, and the likelihood of rehabilitation in determining the appropriateness of registration.<sup>37</sup> Some juvenile activities treated less seriously in the past may now fall under the umbrella of mandatory registration. For example, a recent study of juvenile "sexting"<sup>38</sup> under the SORNA registration requirements notes that the combination of photos and statements in "sexts"

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among juveniles over the age of 14 will, in many states, prompt tier III charges of child pornography against both participants.<sup>39</sup>

In all cases, conversations about juvenile registration have been difficult. To date, SORNA Guidelines have given states more discretion than originally anticipated to determine what parts of community notification and publication will apply to juvenile sex offenders. More information about this process is available on the Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (The SMART Office) website.<sup>40</sup> Note that this additional discretion will not apply to juveniles *convicted* of sex offenses as adults, but only those adjudicated delinquent as minors..

Finally, the Adam Walsh Act applies retroactively to some sex offenders convicted prior to the passage of the Act.<sup>41</sup> SORNA's provisions apply to all individuals currently within the criminal system and all who reenter it. This includes individuals currently incarcerated,<sup>42</sup> on probation, or on parole for a sex offense as well as persons who have completed their sentences but reenter the criminal system for a new offense – even if this offense is not a sex offense. According to the SORNA regulations, it is irrelevant under the Act whether these individuals have any current or past registration obligations or how long ago they were convicted. This means that individuals who were never required to register under state law are now required to register nationally as sex offenders.<sup>43</sup>

*E. What Sex Offender Registration Entails*

The Federal Adam Walsh Act significantly broadens the amount and detail of information required for registration beyond preexisting state statutes. Under its



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provisions, all offenders must register in the jurisdictions in which they were convicted and in each jurisdiction where they live, work, visit for more than seven days, or attend school. Offenders must provide, at minimum, their name and any aliases; home, work, and school addresses; telephone number; email-addresses; date of birth; social security number; a current photograph; fingerprints; a DNA sample; a list of identifying features (such as tattoos or scars); residence and travel information (such as passport information); conviction information; driver's license number; vehicle information; and any other information required by the U.S. Attorney General.<sup>44</sup> At a minimum, states must comply with the requirements of the Adam Walsh Act or lose 10% of their Byrne Act funding.<sup>45</sup>

Current state sex offender registries, on the other hand, vary widely in the type and amount of information available to the public. For example, Illinois' sex offender registry allows the public to search by entering the offender's last name, zip code, city, county, and for offender status or type of offense.<sup>46</sup> Offender information listed includes photograph, name, date of birth, height, weight, sex, race, address, age of victim at time crime occurred, county of conviction, and specific offense.<sup>47</sup> Hawaii's sex offender registry permits broad public access to registrees' name, prior names, aliases, nicknames and pseudonyms, year of birth and alias year of births, physical description including scars and tattoos, photograph, residence, temporary and future addresses, personal vehicles(s) driven, street name of employment and volunteer location, college/university affiliation, and crime for which convicted, judgment of conviction, judgment of acquittal, or judicial determination of unfitness to proceed for which the offender is registered, and the provision of law defining the criminal offense.<sup>48</sup> California's registry provides an option to search for sex offenders

who live near parks or schools.<sup>49</sup> Some states also require samples of DNA and fingerprints be placed on file.<sup>50</sup>

Under the Adam Walsh Act's requirements, offenders have three business days to update registration information in the event that it changes. Offenders must verify registration and provide yearly updated information such as photographs, DNA samples, and fingerprints. States have broad discretion in determining punishment for failure to register, although SORNA provides that the maximum prison term for failure to register must be greater than one year.<sup>51</sup>

Meeting SORNA's enhanced registration requirements—which require that an offender update any changed registration information within three business days<sup>52</sup>—may be difficult for some populations. Offenders who are homeless or who have become homeless because they are unable to obtain housing—sometimes because of their status as a sex offender—may have trouble updating their registration since they lack the resources to visit the proper authorities, access telephones or the internet, or even provide an address. The Final SORNA Guidelines have attempted to address this problem, describing how to identify a homeless person's area of residence to complete the form.<sup>53</sup> However, the regulations do not take into consideration the tenuousness of a homeless person's location and the arduous demands of registering an address you do not have.

*F. Keeping the Public Apprised: Community Notification*

“Community notification” refers to the dissemination of identifying information to community members and organizations about members of society convicted of sex offenses. The goal of community notification statutes is to prevent future sexual

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victimization by notifying potential victims that a convicted sex offender lives nearby and to assist law enforcement in tracking the location and activities of sex offenders.

SORNA requires every jurisdiction to make certain information about released sex offenders available to the public through the Dru Sjodin National Sex Offender Public Registry website (NSOPR).<sup>54</sup> Required NSOPR information includes the offender's name; home, work, and school address; a current photograph and physical description of the offender; any vehicle information, and a list of all sex convictions. States have traditionally had broad discretion on whether to disclose certain information such as employment or educational institution specifics, or alternatively, to require additional information.<sup>55</sup> However, having this information available on the NSOPR eliminates the benefit of that discretion, permitting only enhanced publications but prohibiting any reductions in information released for public view.

A persistent critique of community notification has been that publishing personal information about sex offenders to the public has left sex offenders, as well as their families and places of employment and education, vulnerable to threats, protest, vandalism and violence.<sup>56</sup> Offenders themselves are often the victims of brutal attacks, sometimes resulting in death.<sup>57</sup> For example, registered offender William Elliott was reportedly killed by a Canadian man who found Elliott's name and address on the State of Maine's sex offender registry. Elliott served four months in jail after being sentenced for having sex with his girlfriend only days before her sixteenth birthday.<sup>58</sup>

The National Alliance to End Sexual Violence (NAESV), an organization dedicated to public policy and public education to end sexual violence, found that “over-

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inclusive public notification can actually be harmful to public safety by diluting the ability to identify the most dangerous offenders and by disrupting the stability of low-risk offenders in ways that may increase their risk of re-offense.”<sup>59</sup> Thus, organizations whose purpose is preventing sexual assault believe that including too many offenders on the list hampers the efforts of law enforcement to keep communities safe by spreading thin resources over low-risk offenders. The NAESV recommends that educational trainings and materials be developed in collaboration with law enforcement, prison staff, probation and parole officers, as well as advocates and legislatures, and that any internet disclosure or community notification include comprehensive community education.<sup>60</sup>

Further, some argue that the continued social ostracization caused by community notification laws may force offenders down a path toward recidivism. A recent study on the impact of community notification laws found that denial of employment, social, and educational opportunities prevent sex offenders from starting new lives or making new friendships, thus leaving them with few choices other than to continue their prior criminal patterns.<sup>61</sup>

Other critics argue that access to sex offender information provided through community notification statutes should be limited to law enforcement, and that states should ban online registration altogether for certain low-risk sex offenders.<sup>62</sup> Drawbacks to sex offender registration may affect the community at large in ways we do not fully understand. While we often assume that registration and notification affect only the listed sex offender, the community must address any incidental effects, including the effect on sex offenders’ family, employment prospects, and access to needed reintegration supports.

The Department of Justice stands by the SORNA requirements and maintains that public knowledge of sex offenders' pasts encourages common sense public choices that remove the opportunity to re-offend and deters offenders from reoffending because of the likelihood of this conduct being discovered quickly.<sup>63</sup>

*G. Residential and Employment Restrictions*

States' sex offender registration programs become most cumbersome for reintegrated offenders and for society when they add residency and employment restrictions into the mix. While not included in SORNA's enhanced requirements for sex offender registration laws, twenty-six states currently have some form of residence or employment restrictions for those convicted of sex offenses.<sup>64</sup> These restrictions prohibit offenders from living or working within a certain radius of areas where minors congregate, e.g. schools, parks, child-care facilities, public swimming pools, public playgrounds, skating rinks, churches or arcades. States vary greatly in the duration of residential and employment restrictions. Alabama, Arkansas, California, Georgia, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, and Tennessee impose residential restrictions last for the life of the offender.<sup>65</sup>

1. Residency Restrictions

Residency restrictions vary from state-to-state, usually ranging anywhere from 500 to 2,000 feet from the state-specified "safe areas." For example, some states require that sexual offenders not physically reside within 2,000 feet of any public or private school, day care facility, playground, youth center, public swimming pool or freestanding video arcade facility.<sup>66</sup> Alabama, Arkansas, California, Georgia, Iowa, Kentucky, Louisiana, and

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Mississippi, Missouri, Ohio, Oklahoma, and Tennessee specify a minimum restriction of 1,000 feet or greater.<sup>67</sup>

Georgia's sex offender registration law imposes residency restrictions on sex offenders for schools, childcare facilities, churches, school bus stops, and any business that is within 1,000 feet of such facility or anywhere "minors might congregate."<sup>68</sup> When communities have such restrictions, it often leaves very few places for sex offenders to reside, contributing to homelessness and thus making it more difficult to monitor them. In Louisiana, it is a criminal offense for any person who has been convicted of a sex offense to live in, on, or near "any public, private or secondary school or . . . any motor vehicle or other means of conveyance owned, leased, or contracted by such school to transport students to or from school or a school-related activity when persons under the age of eighteen years are present on the school property or in a school vehicle."<sup>69</sup> These prohibitions cause serious problems for youthful offenders who may have to leave their schools in order to comply with residency restrictions.

It is common to have laws that prevent criminal activities – such as possessing narcotics or firearms – from taking place within a certain distance of a school, church, or residential area. What is unique about violations of sex offender restrictions is the lack of the criminal intent or knowledge requirement in the act itself. An individual convicted of a sex offense could be found in violation of the law for going to a grocery store too close to an arcade—even if s/he neither knew nor intended to be near the prohibited space, in this case, the arcade.

2. Employment Restrictions

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Employment restrictions often go hand-in-hand with residency restrictions. Sex offenders are prohibited not only from working at certain places—sometimes laws prohibit them from working near certain locations as well. Ten states, as well as the territory of the Virgin Islands, have enacted employment restrictions that prohibit sex offenders from working in or near certain settings.<sup>70</sup> For example, Alabama prohibits any individual convicted of a sex offense from living within 2,000 feet of a school or childcare facility, and from working within 500 feet of a school, childcare facility, playground, athletic field, or facility for educating minors.<sup>71</sup> In Georgia, sex offenders may not work at any church or business that is located within 1,000 feet of a school or child-related facility.<sup>72</sup>

The legislative intent of these restrictions is to protect children from predators. However, prohibiting offenders from entering specific areas does not keep them out of the presence of children. Thus, the primary thrust of the employment and residency restrictions may not be helpful in protection or prosecution, but merely in providing the community with a sense of security that sex offenders are not present. However, given the underreporting and underprosecution of sex offenses,<sup>73</sup> this is a false sense of security.

*H. State Compliance with the Adam Walsh Act*

In accordance with the Adam Walsh Act, all states were required to implement the provisions of SORNA by July 27, 2009,<sup>74</sup> although states could apply for extensions of up to two years.<sup>75</sup> States not found within substantial compliance with the Act risk losing ten percent of funding from the Edward Byrne Justice Assistance Grant (JAG) funds for each year of noncompliance.<sup>76</sup> JAG is the leading source of federal justice funding to state and local governments and provides those governing bodies with critical funds used to support

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law enforcement, technology improvement, and drug laws.<sup>77</sup> As of the writing of this publication, 15 states, 21 tribes and two territories have reached substantial implementation of the SORNA standards.<sup>78</sup>

While SORNA sets minimum standards for state registration and notification programs, it does not require states to codify these standards in a particular statute or regulation. Rather, the federal government evaluates compliance with SORNA by assessing the totality of state laws, policies, and procedures governing registration and notification of sex offenders. States are free to increase requirements and restrictions but may not waive or reduce registration requirements. Thus, states that take a “judicial discretion” approach to sex offender registration through programs such as “risk assessment” are deemed noncompliant unless these programs are re-written to result in the same results as SORNA’s tiered system.<sup>79</sup>

While states and advocates have criticized SORNA for being unnecessarily rigid, it does provide some flexibility. States can make exceptions to SORNA requirements under certain circumstances or emergencies. For example, the act requires timely in-person appearances by offenders for registration verification. States are able to codify extreme circumstance exceptions such as natural disaster, hospitalization, or family emergency that prevent offenders from making an appearance on the appointed date. However, states must require sex offenders in these situations to notify proper authorities and carry out in-person appearances as soon as possible.<sup>80</sup>

Another significant critique of the Adam Walsh Act is that the cost of compliance is very high. According to one study, the costs of implementing SORNA are substantially



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higher than the potential loss of 10% of the Byrne Grant Funding.<sup>81</sup> For example, this study reported that it could cost the state of California almost \$60,000,000 to implement SORNA by July 2009, the initial deadline. The alternative for California is to risk losing ten percent of Byrne Grant money allotted to the state, which equals a little over \$2,000,000 per year.<sup>82</sup> SORNA does authorize some funding to assist states with the heavy costs of coming into compliance, through the Sex Offender Management Assistance (“SOMA”) grant program.<sup>83</sup> However, while SOMA has been authorized, Congress has not yet appropriated any funds through this program.

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**CHAPTER 2:  
Staff Sexual Misconduct and Sex Offender Registration and Notification**

In 2003, the passage of the Prison Rape Elimination Act<sup>84</sup> brought national recognition of the serious problem of rape and sexual assault in custodial settings. Leading up to its passage, human rights organizations (HROs) pointed to high numbers of incidents where correctional staff allowed, encouraged, or engaged in the sexual assault of offenders.<sup>85</sup> HROs estimated at least 60,500 incidents of abuse per year. More recent data from the Bureau of Justice Statistics suggests that this number may actually be higher, including 88,500 cases of sexual misconduct per year in custodial settings.<sup>86</sup> The majority of these incidents are perpetrated by custodial staff.

Currently, all fifty states, the District of Columbia, most U.S. territories and the federal government have sexual assault laws that specifically apply to correctional staff who abuse those in their care. However, only twenty-eight states, the District of Columbia, and federal law explicitly require persons convicted of custodial sexual misconduct to register as sex offenders.<sup>87</sup> Although sexual interaction between staff and offenders is unlawful in every state, registration and notification requirements do not consistently apply in the same way they would to sexual assaults that occur in the community. Research finds no significant public safety value in sexual offender registration and notification laws.<sup>88</sup> However, no current research has addressed the utility of applying registration and notification laws specifically within correctional contexts.

SORNA's broad coverage of all offenses involving "sexual acts" appears to reach any sexual offense that is criminally within one of the three tiers of registration, including those within incarceration and other custodial settings. Thus, in some cases SORNA will

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require registration for convicted custodial sex offenders. However, we know that sex offenses are underreported, under-investigated, underprosecuted, and rarely result in convictions. Moreover, these offenses may be “pled down” to offenses that do not require registration upon conviction. This is even truer in custodial settings where issues of credibility and capacity abound. Thus, SORNA’s blanket registration provisions will do nothing to protect custodial populations when the bad actors are not convicted on criminal charges that mandate registration. Moreover, in the few cases where such a criminal conviction is reached, it is the conviction itself, and not any registration requirements, that will protect offenders from further exposure to these individuals. This is because standard criminal background checks will alert correctional administrators to a conviction, and convictions that trigger registration will typically preclude the staff from being re-hired in another agency or jurisdiction. Finally, due to the inherent problems with an over-populated and under-monitored list, adding even more persons to an already lengthy list of registered sex offenders that are costly to monitor may be of limited value.

*A. Offenders are Vulnerable Populations*

Within custodial settings – and other settings where persons live within a structure where there are significant power disparities – there is always the potential for staff -- custodians, therapists, or visitors – to abuse vulnerable persons. While some of the characteristics in those settings may differ from those described below, all power-based forced institutional living settings are ripe for abuse.

Despite offenders greatly outnumbering staff in most custodial settings, the balance of power is tipped heavily in favor of correctional staff. Under these circumstances,

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offenders lack the ability to give meaningful consent to sexual acts with staff.<sup>89</sup> In cases where staff and offender perpetrators argue that the sexual conduct was consensual, many would suggest that sex offender registration is not warranted because the underlying conduct was not violent and therefore long-term monitoring of the staff is unnecessary. However, at least in the case of staff perpetrators, the law requires that offenders cannot give meaningful consent to sexual contact in custody;<sup>90</sup> therefore, correctional staff engaging in any type of sexual activity with offenders have performed an act of sexual misconduct and may be subject to registration under SORNA, if convicted. Regardless of whether or not the staff reaches the conviction stage, he has the potential to repeat this conduct elsewhere and future employers should be notified.

There is a strong argument that sanctions for staff sexual predation in custodial settings should be just as high, or even higher, than in other settings. The Supreme Court has recognized that states bear a particular responsibility for offenders' well-being and safety, because of the lack of control offenders have over the most basic aspects of their lives, and the corresponding complete control that correctional institutions and staff have over offenders' lives.<sup>91</sup> In addition to control, correctional staff members also have complete access to offenders, including the areas where they bathe, sleep, and use the bathroom, making offenders a vulnerable population and contributing to a lopsided power dynamic.<sup>92</sup> This unique power imbalance affects the legitimacy of "consent" within custodial settings and reinforces the corresponding need to identify and monitor those who abuse the persons entrusted to their care.

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While security staff commit much of the sexual violence against offenders reported by the media,<sup>93</sup> there are cases of sexual violence committed against offenders by other staff—volunteers and contractors for example.<sup>94</sup> In the context of preventing sexual coercion and abuse by persons in positions of authority, laws should prohibit any person employed by the correctional system, who contracts with the correctional system, or who has contact with offenders from engaging in sex with offenders. This includes security staff transporters and court escorts, as well as correctional administrators, psychologists, doctors, teachers, and others who work, volunteer, or contract with corrections settings. It is also important to include probation officers, parole officers, and other officials who exercise authority over those who may not be imprisoned, but are still under control of the criminal justice system.<sup>95</sup> Probation officers, parole officers, and work release staff all have significant power to impact an offenders fundamental freedoms and ability to remain in the community.

*B. SORNA's Relation to Existing Sanctions for Sexual Assault in Correctional Settings*

SORNA intends to incorporate a “more comprehensive group of sex offenders and sex offenses” across the states, territories, and certain federally recognized tribes.<sup>96</sup> SORNA requires registration for any convictions of “sex offenses” under military, state, territorial, tribal, or local laws, as well as federal law.<sup>97</sup> SORNA’s definition of “sex offenses” is discussed in Chapter 1.<sup>98</sup>

Whether or not SORNA requires registration depends on the elements of the crime upon which the conviction arises.<sup>99</sup> Thus, each jurisdiction’s statutory offenses will determine if and for how long a convicted person must register. Currently, most states

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with specific provisions for custodial sexual misconduct define the crime as “engaging in a sexual act,” which does not require an element of coercion or force. Only Hawaii, Kentucky,<sup>100</sup> Montana, and Wyoming specifically require that the actor subject the imprisoned or detained victim to coercion.<sup>101</sup> Finally, four states (Connecticut, Missouri, Virginia and Washington) limit the conduct to intercourse, whereas the remaining states include additional sexual acts. In Kansas, Minnesota, and Virginia, registration by correctional staff is required only if the victim is a minor.<sup>102</sup>

While sexual violence by correctional staff against offenders can be prosecuted under traditional sexual assault statutes, experience has shown that these prosecutions are often difficult due delays in reporting abuse, staff members’ claims that the sex was consensual, the challenges presented by victims and witnesses who are themselves offenders,<sup>103</sup> and fear of retaliation.<sup>104</sup> Furthermore, it has been especially difficult to prosecute staff who abuse federal inmates in contract facilities because, in the past, federal laws prohibiting abuse of offenders applied only to federally run facilities and excluded the numerous contract facilities throughout the country.<sup>105</sup> This problem motivated states to pass separate laws specifically prohibiting sexual abuse of individuals in custody. Today, the expanded definition of the term “prison” in 18 U.S.C. § 1791(d) attempts to resolve this problem, and federal offenders in contract facilities receive the protections of offenders in other federal facilities.<sup>106</sup>

In cases where prosecutors use traditional rape statutes as the basis for convicting staff members, SORNA registration requirements should reach future custodial employers and they should receive appropriate notification of his past behavior from a simple

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criminal background check. The result when convicted under state custodial abuse statutes may be different. While some states have determined that any sexual contact between custodial staff members and offenders is a criminal offense, there is a great diversity in the statutes regarding the character of that offense and whether that offense requires registration. SORNA's impact on these laws has not yet been seen fully; states have handled sexual misconduct by correctional staff very differently in the past and it is safe to assume they will continue to do so even after substantially implementing SORNA. For instance, in Arkansas, a person employed in corrections and convicted of first, second, or third degree sexual assault must currently register as a sex offender in the state.<sup>107</sup> Under this statute, consent is not a defense and any sexual intercourse or "deviate sexual activity" between a staff member or volunteer and an offender is, at minimum, a third degree sexual assault. Further, any "sexual contact" between a staff member or volunteer and a juvenile offender is at minimum second-degree sexual assault.<sup>108</sup>

Currently, California permits registration of corrections staff, including parole officers and volunteers who work with offenders who conduct "sexual activity"<sup>109</sup> with *consenting* adult offenders or parolees, but *does not require* registration.<sup>110</sup> Colorado, however, has a specific provision penalizing the conduct of a staff member who uses his position of authority to coerce the victim in custody of law to submit to a sexual act, and *requires* registration upon conviction of this crime.<sup>111</sup> As states implement SORNA's requirements these definitions may change, but it is likely that each state will continue to develop standards independently, creating a varied, inconsistent and inequitable registration system.

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State laws also vary in whom they label as custodial staff under protective statutes. For example, only twelve states specifically include parole or probation officers as people who must register if convicted of sexual misconduct against their supervisees.<sup>112</sup> Ten states require registration only for correctional employees, and not other authorized persons in corrections settings like contracted food service employees, medical personnel or education or vocational services providers;<sup>113</sup> another ten states include any actor with supervisory or disciplinary authority over the victim in the scope of the registration requirement,<sup>114</sup> which could arguably include parole and probation officers.

In addition to employees of the Department of Corrections, other states include contractors, consultants, volunteers, suppliers or vendors as potential offenders. As an example, Florida broadened the scope of its sexual battery statute, subject to mandatory registration, to include any actions by law enforcement officers, correctional officers, correctional probation officers, elected officials and any other persons “in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting,” who lead a victim to reasonably believe that the person holds the control or authority of the government.<sup>115</sup> Illinois includes employees of the penal system, any treatment or detention facility, and probation or supervising officers and surveillance agents within its custodial sexual misconduct statute, which is a registrable offense.<sup>116</sup>

The consequences of custodial sexual misconduct also lack professional uniformity across the states. Only Illinois specifically requires that a staff member convicted of sexual assault must immediately forfeit his or her employment.<sup>117</sup> The remaining states



limit sanctions to the penal consequences of the conviction. While many states have rules preventing persons convicted of certain crimes from holding a position as a law enforcement officer, some convictions will not rule out this type of employment.

*C. Why SORNA is not enough to protect imprisoned populations from sexual abuse*

While reportedly of little value in the free world context, there is a strong argument that some type of registry is particularly useful to correctional agencies and other custodial institutions in identifying potential employees whose past conduct suggests they would be at risk for sexually abusing persons under their care and custody. The benefits of registration of correctional staff include better pre-employment screening, insulation for prospective employers from negligent hiring suits, and lower risk of sexual misconduct in both adult and juvenile facilities. Furthermore, because correctional staff may often leave one facility to work in another, recording administrative findings and providing access to such findings to appropriate administrators provide an immeasurable value for all persons depending on custodians for safety, basic needs, and mental or emotional support. While not a criminal sanction, the prospect of registration could serve as a deterrent for sexual misconduct, remove corrupt staff, and serve the public interest by holding individuals accountable for their actions, within and without the correctional environment.

Correctional leaders consistently complain that, notwithstanding findings of wrongdoing administratively and criminally, correctional staff with histories of predatory sexual misconduct in custodial settings are able to move freely and undetected both within jurisdictions and to other jurisdictions and continue abusing individuals in other custodial settings and within other institutionalized populations, including youth, the elderly,

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immigrants, and those with mental disabilities.<sup>118</sup> Having supervision experience is a particularly portable and valuable skill given our increasing reliance on criminal justice and other authoritative or institutional solutions for a range of problems from immigration violations to juvenile delinquency.<sup>119</sup>

However, it is commonplace for administrative and criminal investigations of correctional staff accused of misconduct to halt after the staff person resigns, meaning no attempt at prosecution takes place.<sup>120</sup> In 1998, Congressman John Conyers (D. Mich.) introduced “The Custodial Sexual Abuse Act of 1998” as part of the reauthorization of the Violence Against Women Act.<sup>121</sup> Among other things, the Custodial Sexual Abuse Act established a national registry of staff members found to be involved in sexually abusing individuals in custody.<sup>122</sup> Amid strong opposition from unions, Congress dropped that legislation.<sup>123</sup>

In hearings before the National Prison Rape Commission, however, corrections officials continued to cite registration as an important tool in preventing individuals with histories of predatory behavior from employment as corrections staff.<sup>124</sup> Some states have already created registries for staff found involved in sexual abuse by administrative boards and found them useful.<sup>125</sup> These registries of law enforcement officer decertifications provide many of the same and some additional benefits of sex offender registration without taking on the registration’s attendant problems of registration and community notification. Further, these administrative registries provide valuable information in cases where an abusive officer is neither prosecuted nor convicted. This decertification listing system would give corrections employers and other institutional administrators better tools for

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screening out potentially abusive employees and would limit the potential for predatory and abusive behavior to be transported to other custodial settings.<sup>126</sup> For example, both Washington State and Idaho record law enforcement officers who are decertified due to administrative findings against them. In an article discussing these two states' registries, officials from both states make clear that sexual misconduct – in particular, having sex “on the job” – is a common contributor to these decertifications.<sup>127</sup>

While not within the scope of this publication, it is important to note that offenders who sexually abuse or assault other offenders should be prosecuted and required to register to the same degree as custodial staff.<sup>128</sup> Often, prosecutors take the position that offenders who sexually abuse other offenders are already incarcerated and serving sentences, so there is nothing gained by expending scarce prosecutorial resources for these offenses, especially when administrative sanctions are available.<sup>129</sup> However, the same arguments about notice to correctional authorities, the need for consistent application of the laws, and the deterrent effect of registration apply equally to offender-on-offender assaults and need to be available as legal responses to sexual abuse of persons in custody. Additionally, recent research has indicated that those offenders victimized while in custody are quite likely to victimize others.<sup>130</sup> Therefore, strong enforcement and protection prevents victimization, which in turn reduces the likelihood that those victimized will become victimizers.

Because SORNA's registration requirements trigger the elements of the underlying crime, whether staff sexual misconduct would mandate registration depends on what statute forms the basis of the accused's conviction. States are free to increase or expand

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their registration requirements so long as they meet SORNA's minimum standards. Thus, SORNA could assist some potential employers in ruling out convicted staff members.

However, the fact that most staff are never prosecuted and thus never reach the conviction stage at all makes this likelihood improbable. Accordingly, other tools must be developed and funded to enhance custodial administrator's ability to weed out candidates for employment who have findings of misconduct on their records. Below, we consider the value that a limited access, sex offender registry-type list could provide to achieve this goal as well as other solutions that, when combined with a functioning list, may lead to reduced instances of offender rape and sexual abuse.

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**CHAPTER 3:**  
**Developing an Alternate Strategy for Notifying Custodial Administrators of Potential Employees' Risk for Abuse**

Custodial administrators struggle against the backdrop of pressure from unions,<sup>131</sup> constitutional due process protections,<sup>132</sup> the fear of tort actions based on defamation or negligent hiring, and the bad press of pursuing investigations against officers they hired and supervised. When a challenging fiscal climate and the sometimes confusing interaction of criminal prosecutions and administrative investigations are added to the discussion,<sup>133</sup> it is clear that an agency administrator cannot prevent, discover, investigate, and punish misconduct alone. Thus, before moving into the discussion of a registry-type listing tool, three initial recommendations are appropriate.

**First, administrators should not be solely responsible for recording, investigating, evaluating all claims, and selecting the appropriate punishment for each accusation of officer misconduct.** Identifying the appropriate sanctions for non-penetrative misconduct is sometimes unclear, and requires competing considerations and an objective determination. In cases where an inappropriate action does not rise to the level of *clearly criminal* or does not involve penetration, the DOJ's Proposed Standards permit, but do not require, an administrator to report it to law enforcement authorities or to the relevant licensing body, thus, leaving it to the State to determine the appropriateness of reporting.<sup>134</sup> This continues to place tremendous discretion in the hands of administrators. That discretion, even when exercised with the best of intentions, can appear to be exercised inconsistently and give rise to claims of unfair treatment. Additionally, changes in

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administration can create inconsistencies about which matters rise to the level of a criminal complaint.

The Proposed Standards require an institution to impose “fair and proportional” sanctions against a staff member, taking into account the accused staff member’s actions and disciplinary history as well as prior sanctions imposed on others in similar situations.<sup>135</sup> However, these sanctions must also send a clear message that sexual abuse will not be tolerated.<sup>136</sup> Finding the appropriate balance between these two principals may be difficult, and the appropriate venue for making such a determination is an administrative board. Administrative hearings handled by trained administrative law judges are the appropriate vehicle for resolving this process because they have the information, resources, and independence necessary to make carefully considered and consistent decisions.

**Second, state legislatures should create a separate funding stream for the investigation and processing of accusations of misconduct that is distinct from custodial operations.** In these difficult budgeting times where states may cut staff positions, salaries, or shifts to save dollars, state policies should not force administrators to choose whether to investigate an accused staff while trying to balance other financial needs of the agency. Similar to a client protection fund supported by yearly dues paid by lawyers, states, unions, and institutions should commit funds to the investigation and processing of accusations to evidence the community’s commitment to a zero tolerance approach to sexual misconduct by custodial officers, employees, and volunteers.

**Third, when alleged misconduct is criminal, administrators should report this allegation to law enforcement.** This can be accomplished through a state legislative

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mandate or added as an additional requirement in existing administrative proceedings. The relationship between the criminal investigation and the ongoing administrative investigation of the accusations will vary by state. However, it is essential that all instances of criminal conduct get referred out for prosecution, regardless of the prosecutor's interest in the case. States or custodial administrators should never use an administrative proceeding as a substitute for a just proceeding and a criminal finding of culpability.

With these three preliminary recommendations made, we turn to the situation in today's prisons, jails, and juvenile facilities. Although considerable discussion and efforts were undertaken since the passage of the Prison Rape Elimination Act in 2003, the problem of sexual abuse in custodial settings has not been resolved. According to recent estimates by the Department of Justice, over 200,000 incarcerated persons experienced a form of sexual abuse in 2008 alone,<sup>137</sup> rendering 4.4% of the prison population and 3.1% of the jail population victims of sexual abuse. In some agencies, nearly 9% of prison populations and 8% of jail populations reported abuse that year. Juveniles are abused at an even higher rate, amounting to 12% of the total juvenile population reporting having suffered abuse within the first year of residing at the facility, and with some facilities reporting a rate as high as 36% abused.<sup>138</sup>

However, these staggering statistics are not the norm in every facility or agency – incidents of sexual abuse are often frequent in some systems while drastically less frequent in others.<sup>139</sup> Clearly, correctional leadership and enforcement can reduce or eliminate prison rape. The Department of Justice applauded the efforts many correctional

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administrators had made to develop and implement preventative policies and practices in their jurisdictions,<sup>140</sup> but noted the failures of those who had not taken active steps to protect those incarcerated within other systems, explaining: “Protection from sexual abuse should not depend on where an individual is incarcerated: It must be universal.”<sup>141</sup>

Custodial administrators need a national resource for documenting findings of custodial sexual abuse for hiring and firing decisions, whether or not such accusations result in criminal or civil charges, that protect offenders and provides better information to correctional employers about past abusive behavior. A national database of staff found involved in misconduct available to correctional employers and other custodial employers – schools, nursing homes, mental health clinics and institutions for the mentally disabled– would be an excellent solution and could prompt hiring officers to ask the right questions of prospective employees. A protected vehicle for reporting findings of misconduct removes the heavy burden of tort liability from a former employer to defend against defamation suits based on any statements he or she makes about the custodial officer’s past performance to inquiring future employers.<sup>142</sup> Instead, that burden could shift to the future employer, holding the hiring administration accountable for any negligent hiring decisions made without consulting the national registry.

We know that waiting for traditional sex offender registration to regulate custodial sexual abuse is not a productive or helpful way to protect those in custody. Even ignoring the problems that plague SOR,<sup>143</sup> it is well-known that sexual misconduct in custodial settings is often unreported, that the rare allegations of sexual misconduct are often under-investigated and under-documented, and that criminal convictions of custodial sex



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offenders are rare. Even in clear cases of abuse, prosecutors may refuse to allocate the necessary resources to charge custodial sexual misconduct. Moreover, other conduct, not just sexual abuse, can flag staff who should not be hired in positions of trust or authority. This proposed list, while not a perfect solution because it does not ensure the accuracy of the list's contents or the prosecution of custodial sex offenders, provides a safe place for employers to report their suspicions and an additional, reputable source for potential future employers to verify candidate's former performance.

*A. State Actions that Support this Initiative: The Growth of Decertifications*

Law enforcement officers, including correctional staff in many states, are typically licensed by their respective jurisdictions through a process often called certification. The certification processes vary widely, but often include psychological exams, criminal background checks, and polygraphs along with the typical written exams. When an officer breaches the standards and conduct requirements he has been taught and certified to follow, some states begin a process called decertification. Decertification provides an official record that the officer's conduct is inappropriate and prevents that officer from gaining another position within the same state without first applying for recertification.<sup>144</sup>

Forty-five states currently use a certification process through the state Peace Officer Standards and Training (POST) agency.<sup>145</sup> However, only twenty-three states, or about 45 percent of certifying states, have a certification and decertification process for correctional officers.<sup>146</sup> While rare in the past, many states have strengthened the character and conduct rules governing their custodial staff and other law enforcement officers, and pursue decertifications more frequently. For example, in Texas, there were only thirty-

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three revocations in 1997, while there were 146 revocations in 1999.<sup>147</sup> In 2008, over 1500 law enforcement officers were decertified. This number includes all law enforcement officers –not just correctional staff –and all reasons for decertification or revocation, even those not sexual in nature.<sup>148</sup>

The State of Idaho adopted its decertification process in the 1980s, but has strengthened that process over the last fifteen years. In its early implementation, Idaho required a criminal conviction before beginning decertification processes against an officer, but this is no longer the case. Today, Idaho can decertify an officer who violates any officer codes of conduct, which include lying during an internal investigation, insubordination, mishandling evidence, or having sex on duty.<sup>149</sup> According to Jeffry Black, the executive director of Idaho Peace Officers Standards and Training (IPOST), the most common reason for decertification of officers in Idaho is for having sex while on the job.<sup>150</sup>

Similarly, Washington State's decertification process has become much more common over the last few years. Washington adopted a decertification process in 2002 to reduce incidences of officers leaving one agency to be hired by other agencies within the state. While only 78 officers have been decertified in the state since 2002, a third of that number were decertified in the last year.<sup>151</sup> Thus, it is clear that administrators are taking decertification of officers more seriously. An example of this is Spokane County Sheriff's Detective Gary Grose who was fired in 1984 for falsifying 23 reports to indicate that he had investigated crimes he had not, but went on to serve another six years as Chief in St. Maries, Idaho and Undersheriff in Washington's San Juan County.<sup>152</sup> Today,

decertification would prevent this continued authority in Idaho, but might not reach across Washington's state line. **The Framework for an effective tool: the National Decertification Index**<sup>153</sup>

The International Association of Directors of Law Enforcement Standards and Training (IADLEST) established the Peace Officer Registry Committee, which has the responsibility of creating a nationally accessible database to catalogue persons decertified as law enforcement officers for cause.<sup>154</sup> The National Decertification Index (NDI) is a catalogue of peace officers whose names are submitted to the IADLEST as decertified by a contributing state agency. Grant awards from the Office of Justice Programs currently support the NDI.<sup>155</sup> Not all states report to this list, but even states that do not report may utilize the list for searching purposes.<sup>156</sup> This list provides a benefit greater than state decertification alone, because the list alerts its viewers of decertifications, revocations, and cancellations across all contributing states. According to William Muldoon, the Director of the Nebraska Law Enforcement Training Center and NDI Chairman, "The NDI is a vital tool for maintaining credibility and our public trust in the law enforcement profession[.] Before we had the NDI, we had no way of knowing if an officer had been decertified for cause in another state."<sup>157</sup> The list is a step in the right direction, and it appears that with several improvements this list could become a valuable tool for offender safety and for custodial administrator protection.

The idea of a national registry for peace officers was first proposed by Senator Bob Graham (D-Fla.) and Representative Harry Johnston (D-Fla.) in the Law Enforcement and Correctional Officers Employment Registration Act of 1996.<sup>158</sup> This initiative never

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became law, but the Florida Department of Law Enforcement created a similar pilot program after its Florida's failure to pass legislation.<sup>159</sup> The Florida program was abandoned in 2000 in light of the IADLEST's registry initiatives that began in June 1999.<sup>160</sup> The Bureau of Justice Assistance has provided some support to IADLEST for studying officer certification practices, but has refrained from providing funds for the National Decertification Index (NDI) component of its programming since 2002 due to "unspecified legal concerns."<sup>161</sup>

The NDI is a promising framework for developing a national resource for custodial administrator communications regarding decertified staff. However, there are several drawbacks to the current NDI. For one, even this free service is not utilized to its full potential. Only thirty states participate in the NDI by submitting information, and surveys revealed that these contributions do not always take place regularly. In one extreme case, the Virginia Legislature has prohibited the sharing of revocation information, thus preventing the Virginia Department of Criminal Justice Services from contributing to the IADLEST.<sup>162</sup> Without complete reporting by all states and territories, the NDI will never be a complete source and will not protect administrators from negligent hiring suits or protect offenders from the mistaken hiring of a staff with a known potential for abuse. Further, while any state administrator may view or search the list free of charge, it is not a widespread practice to review the list before making a hiring decision. Over a dozen states and the District of Columbia stated that they never query the list when making hiring decisions, according to a 2009 survey.<sup>163</sup>

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Also, due to IADLEST's corporate and funding structure – non-profit, tax exempt organization, states are not required to participate in the program or to put any resources into the support and maintenance of the list. Unlike a state bar association or medical association that governs individuals within the profession, the IADLEST is not acting as an authority over the POSTs or the correctional employees and thus cannot fund an expansion to the tool with member dues. Currently, even states committed to using the NDI as a method for evaluating prospective employees must further verify information listed on the NDI with the state sponsor.<sup>164</sup> With a steady funding stream, the value of the NDI or a similar tool could be transformed into a tool for listing, verifying, and certifying officer records. If this were the case, custodial administrators could request a certified officer record for a potential employee and depend on that certified record when defending against negligent hiring suits.

Acknowledging these criticisms, it remains clear that the NDI structure works. Eriks Gabliks, Director of the Oregon Department of Public Safety Standards and Training, describes how the process worked for a former Oregon officer, Sean Sullivan, on the IADLEST website. Here, Gabliks explains that after Sullivan surrendered his certification in the state of Oregon, he applied to work as a custodial officer in Alaska and Kansas. Each state discovered Sullivan's history through the IADLEST. When Kansas reviewed the NDI and found Sullivan's name printed there, Sullivan had already begun working as an officer within the Kansas correctional system. Because of this information, the state began appropriate investigations to look into Sullivan's past wrongful conduct as an officer.<sup>165</sup>

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Thus, an effective early warning tool for custodial hiring officials would start with the NDI framework and build out. This framework would include: (a) bi-annual submissions of officer decertifications and revocations from all 50 States, the District of Columbia, and the U.S. Territories; (b) mandatory reviews for all new employees before they are hired and during their yearly reviews for three years; and (c) federally allocated funds for administrative report, filing, and certification processes to professionalize the inquiries.

*B. Mandatory Investigations and Administrative Inquiries, Regardless of Officer's Resignation or Termination*

A list of decertified officers alone, much like a list of sexual offenders in a world where staff sexual misconduct is rarely prosecuted, has little effect where no administrative inquiries occur. We must be certain that accused staff who leave their posts or accept transfers when accused do not “save face” at the expense of the sexual safety and constitutional rights of persons in custody.

In an attempt to solve this problem, the State of Florida adopted a mandatory administrative process for handling sustained accusations and uses that process to decertify law enforcement, correctional, and correctional probation officers involved in inappropriate activities.<sup>166</sup> Florida's Criminal Justice Standards and Training Commission (CJSTC) revokes officer certification when an Administrative Law Judge (ALJ) finds that the officer has failed to comply with Florida Statutes 943.13(4) or (7).<sup>167</sup> Thus, an officer convicted of a felony, convicted of a misdemeanor involving perjury or false statements, or found not to have good moral character, may no longer be able to work as an officer in Florida. This mandatory administrative process will continue whether or not an officer

resigns, thus protecting vulnerable imprisoned populations from repeat custodial offenders.<sup>168</sup>

States across the nation should adopt a similar approach to responding to accusations of staff misconduct. Without a mandatory, funded, and independent investigation, there is no way of knowing if custodial administrators respond appropriately to accusations of various acts of misconduct. Furthermore, this mandatory response should be in place for all staff members as well as law enforcement officers and civilian employees – as both are consistently involved in the abuse of those in custody.

As the Herald-Tribune's recent exposé on Florida's administrative processes for peace officers<sup>169</sup> has revealed, even the most respected criminal justice systems require monitoring and enforcement to be effective. Human actors must be educated and aware of the system in which they operate, and they must be held to existing standards consistently. As administrative processes improve, agencies must continue to educate custodial administrators, staff members, volunteers, and advocates.

### *C. Summary of Recommendations*

A multi-pronged approach is necessary to address staff sexual abuse of persons in custody. First, states must include correctional staff in their certification (and thus, decertification) statutes. States that do not have decertification statutes should create them, following the examples set by the many states currently operating in this manner. In the twenty-seven states that do not currently have these processes in place, efforts should commence to encourage them to adopt a certification scheme for correctional workers.

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Once certification for correctional staff is customary across the nation, the proposed registry list will be able to have a widespread positive impact.

Second, the registry must be updated and reviewed regularly by contributors and hiring officers. State POSTS should submit records from all decertifications twice yearly, along with a certified copy of the administrative finding to verify that information. Correctional hiring staff should review the registry before hiring any potential candidate and should review the registry again, upon each annual review, for the first three years of employment. Thus, any delay by one state in reporting a decertification that fails to prevent a re-hire will be rectified by repeated periodic checks of the registry system during this term.

Third, we must establish a continuum of awareness among all correctional settings that may employ custodial sex offenders. Decertified law enforcement officers could easily use their prior experience with incarcerated populations as a selling point to agency administrators. We must research and develop an appropriate system for sharing this information across all types of custodial and institutional settings.

Finally, federal and state dollars should be designated to professionalize and reinforce these requirements. Similar to the American Medical Association or the American Bar Association's relationship to the state professional organizations, the administration of the registry and the keeping of its files should be funded by the participants in such a way as to keep the costs to a hiring manager low and to maintain the credibility of the list's contents. With support of the widespread state efforts to regulate custodial and law enforcement personnel and a nationwide listing service for all decertified



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custodial and law enforcement officers, all of our correctional settings can be safer for the persons serving sentences within them.

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**CHAPTER 4:**  
**Conclusion**

Custodial staff sex offenders, like those in the community, are elusive. They are difficult to catch, difficult to prosecute, and difficult to convict. Experience has shown that even when evidence of sexual abuse exists against an accused staff member, chances are s/he will plead out to a lesser charge and avoid sex offender registration. Only the most serious violations are prosecuted – the more likely outcome is an administrative resolution. Thus, we must look beyond the boundaries of sex offender registration, which is triggered by criminal convictions, to remedy the rehiring of custodial staff sex offenders. A multi-pronged strategy that includes strong investigation, referral to law enforcement, prosecution and sex offender registration as appropriate, administrative discipline, decertification, and the availability of information on that decertification would be a credible start.

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<sup>1</sup> Section 127 of SORNA mandates that all federally recognized tribes implement SORNA's requirements as a jurisdiction subject to its requirements or delegate this obligation and submit to the authority of a jurisdiction in which the tribe is geographically included. If the Attorney General (AG) determines that a federally recognized tribe has not or cannot substantially implement SORNA, then the tribe will be treated as if its authority was delegated even if it has not made such an election. See *Indian Country*, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, DEPT. OF JUSTICE, <http://www.ojp.usdoj.gov/smart/indiancountry.htm>.

<sup>2</sup> NOTE: We use the term offender to cover: juveniles, inmates in prisons and jails, people on community supervision and people with pretrial status.

<sup>3</sup> See, Freeman-Longo, Robert E. REVISITING MEGAN'S LAW AND SEX OFFENDER REGISTRATION: PREVENTION OR PROBLEM 2 (no date listed) available at <http://www.appa-net.org/eweb/docs/appa/pubs/RML.pdf>

<sup>4</sup> See CTR. FOR SEX OFFENDER MGMT. (CSOM), AN OVERVIEW OF SEX OFFENDER COMMUNITY NOTIFICATION PRACTICES: POLICY IMPLICATIONS AND PROMISING APPROACHES 2 (1997), available at <http://www.nicic.gov/Library/Files/014171.pdf> ("The goals of Washington State's community notification legislation are crime prevention and law enforcement. In pursuit of these goals, practitioners in Washington and elsewhere use notification as an opportunity to educate the community, to secure the support of community in the supervision process, and to reduce the likelihood of acts of vigilantism.").

<sup>5</sup> 42 U.S.C. § 14071; see CTR. FOR SEX OFFENDER MGMT. (CSOM), SEX OFFENDER REGISTRATION: POLICY OVERVIEW AND COMPREHENSIVE PRACTICES 1 (1999), available at <http://www.csom.org/pubs/sexreg.pdf>.

<sup>6</sup> See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Title XVII, Subtitle A, Section 170101(f)(2) (withholding 10% of a non-compliant State's funding under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3765) and reallocating those funds to compliant States).

<sup>7</sup> See Richard L. Frierson, et al., *The mandatory registration of juvenile sex offenders and commitment of juveniles as sexually violent predators, controversies and recommendations*, 30 ADOLESCENT PSYCHIATRY 55, 56 (ed. Lois Flaherty 2008).

<sup>8</sup> Kristen M. Zgoda and Karen Bachar, *Sex Offender Registration and Notification: Limited Effects in New Jersey 1*, in U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, IN SHORT: TOWARD CRIMINAL JUSTICE SOLUTIONS (April 2009), available at <http://www.ncjrs.gov/pdffiles1/nij/225402.pdf> (summarizing the findings from a full study of New Jersey's implementation of Megan's Law).

<sup>9</sup> Frierson, et al., *supra* note 7, at 56.

<sup>10</sup> Zgoda and Bachar, *supra* note 8, at 1.

<sup>11</sup> Frierson, et al., *supra* note 7, at 56.

<sup>12</sup> Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), 42 U.S.C. §§ 16901 *et seq.*, Pub. L. 109-248, 120 Stat. 587.

<sup>13</sup> See generally, Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, NEW CRIMINAL LAW REVIEW 218-220 (2011); Tamara Rice Lave, *Inevitable recidivism—The origin and centrality of an urban legend*, 34 INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 186-194 (2011). But see David Lisak, *Understanding the Predatory Nature of Sexual Violence 1-2*, available at <http://www.middlebury.edu/media/view/240951/original/PredatoryNature.pdf>.

<sup>14</sup> Gitika Ahuja, *Sex Offender Registries: Putting Lives at Risk?*, ABC NEWS, April 18, 2006, <http://abcnews.go.com/US/story?id=1855771&page=1>; Keach Hagey, *Did Sex Offender Listing Lead to Murder?*, CBS EVENING NEWS, February 11, 2009, 3:45 p.m., [http://www.cbsnews.com/stories/2007/12/10/the\\_skinny/main3597422.shtml](http://www.cbsnews.com/stories/2007/12/10/the_skinny/main3597422.shtml).

<sup>15</sup> 42 U.S.C. §§ 16911-29 (2006); 18 U.S.C. § 2250 (2006) (enforcement provision).

<sup>16</sup> 42 U.S.C. §§ 16901 *et seq.*, Pub. L. 109-248, 120 Stat. 587 (2006).

<sup>17</sup> SORNA has special provisions governing the treatment of Indian tribes as registration jurisdictions and the delegation of registration and notification functions to the states. See SORNA, 42 U.S.C. § 16927.

<sup>18</sup> From this point forward, "the Act" refers to the SORNA provisions within Title I of the Adam Walsh Act.

<sup>19</sup> 42 U.S.C. § 16911(5)(A).

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<sup>20</sup> *Id.* § 16912(a) (mandating a jurisdiction-wide registry); § 16919 (authorizing the Attorney General to maintain a national database of the jurisdictional registry information).

<sup>21</sup> *Id.* § 16911. Note that, under SORNA, states whose constitutions prohibit some aspects of SORNA's registration requirements can meet substantial implementation of SORNA by implementing "reasonable alternate procedures" that follow the same substantive principles in classification but incorporate some level of risk-assessment. U.S. DEPT. OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 77 [hereinafter FINAL GUIDELINES], available at [http://www.ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf).

<sup>22</sup> See SORNA, 42 U.S.C. § 16911(2).

<sup>23</sup> *Id.* § 16915(a)(1). The maximum "clean record" reduction for a tier I offender is five years. Thus, a minimum of ten years of registration is required. *Id.* § 16915(b)(3)(A).

<sup>24</sup> See *id.* §§ 16911(3); 16915(a)(2). There is no "clean record" reduction for a tier II offender. *Id.* § 16915(b)(3).

<sup>25</sup> Examples of Tier III offenses include aggravated sexual assault, the kidnapping of a minor, or the sexual assault of a minor. See *id.* § 16911.

<sup>26</sup> *Id.* §§ 16911(4); 16915(a)(3). A "clean record" reduction is only available for juveniles adjudicated delinquent of a tier III offense; there is no reduction for tier III convictions. *Id.* § 16915(b).

<sup>27</sup> CAL. PENAL CODE § 290(a)(1)(A) (2008); S.C. CODE ANN. §§ 23-3-430, 23-3-460 (requiring re-registration every six months).

<sup>28</sup> Note the use of the term "convicted" here. While SORNA includes some kinds of juvenile adjudications in its use of the term convicted, we use the term here to indicate juveniles tried and *convicted* – not adjudicated delinquent – as adults. However, even a child who is fourteen years old when he commits an offense and is adjudicated delinquent for committing, attempting, or conspiring to commit that offense will be required to register if that offense involved a sexual act with another by force, the threat of serious violence, or by rendering unconscious or drugging the victim. See 42 U.S.C. § 16911(8).

<sup>29</sup> CAL. PENAL CODE § 314(1)-(2); IDAHO CODE ANN. § 18-4116; N.H. REV. STAT. ANN. § 645:1-a, 1(II)-(III); OKLA. STAT. tit. 21, § 1021 (2011) (a May 2011 amendment will remove public urination, but not other public exposures, from sex offender registration, taking effect on November 1, 2011); SC ST § 23-3-430 (14) (requiring any person convicted, adjudicated delinquent, pleading nolo contendere, etc., to indecent exposure to register as a sex offender if the court makes a specific finding on the record that registration is appropriate).

<sup>30</sup> Second and subsequent felony offenses for public sexual indecency, ARIZ. REV. STAT. ANN. § 13-1403(B), and public indecent exposure, § 13-1402, require registration in the state of Arizona. See ARIZ. REV. STAT. ANN. § 13-3821. Second and subsequent adjudications or convictions for open and gross lewdness and lascivious behavior, MASS. ANN. LAWS Ch. 272, § 16, require registration in Massachusetts. See *id.* Ch. 6, §§ 178C (defining "sex offense"); 178D (requiring registration of sex offenders). Indecent exposure, MICH. COMP. LAWS SERV. § 750.335(a), requires registration in Michigan when it is a second or subsequent offense of exposure under § 750.335(a)(2)(b) or a third or subsequent offense of exposure under § 750.335(a)(2)(a) (requiring fondling of the sexual organs during the indecent exposure). See MICH. COMP. LAWS SERV. § 28.722(e)(ii) and (iv)(B). Kentucky requires registration for third and subsequent offenses of indecent exposure, KY. REV. STAT. ANN. § 510.148 (2008); § 17.500.

<sup>31</sup> CONN. GEN. STAT. § 54-251 (requiring registration when public indecency, Conn. Gen Stat. § 53a-186, involves a victim under the age of 18); GA. CODE ANN., § 42-1-12 (9)(B)(xi) (requiring registration for "[a]ny conduct which, by its nature, is a sexual offense against a minor"); UTAH CODE ANN. § 77-27-21.5(1)(n)(i)(T) (requiring registration for lewdness involving a child, Utah Code Ann. § 76-9-702.5). Here, imagine a circumstance in which two people are caught and prosecuted for mooning each other.

<sup>32</sup> ALA. CODE §§ 13A-11-200(b); 13A-12-131 (West 2008).

<sup>33</sup> See *supra* note 19 for explanation of the "clean record" reduction for some Tier I and Tier II offenders. This failure to distinguish between offenders has resulted in some tragedies. See, e.g., Gitika Ahuja, *Sex Offender Registries: Putting Lives at Risk?*, ABC NEWS, April 18, 2006, <http://abcnews.go.com/US/story?id=1855771&page=1> (noting that a young man convicted and forced to register because he had sex with his girlfriend just days before her sixteenth birthday was murdered by a

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Canadian man who found his name, address, and other personal information on the Maine Sex Offender Registry). *See also* Keach Hagey, Did Sex Offender Listing Lead to Murder?, CBS EVENING NEWS, February 11, 2009, 3:45 p.m., [http://www.cbsnews.com/stories/2007/12/10/the\\_skinny/main3597422.shtml](http://www.cbsnews.com/stories/2007/12/10/the_skinny/main3597422.shtml) (hypothesizing that the murder of a convicted and registered rapist might have been due to his placement on the registry list, leading to the impression that he had raped children).

<sup>34</sup> For more information on juvenile sex offender registration, see this piece's partner publication on the subject, forthcoming.

<sup>35</sup> *See, e.g.*, Donna Lyons, *Sex Offender Law: Down to the Wire*, <http://www.ncsl.org/issues-research/justice/sex-offender-law-down-to-the-wire.aspx> (noting that issues surrounding juvenile registration were highly controversial and sensitive matters for policymakers and state legislatures).

<sup>36</sup> FINAL GUIDELINES, *supra* note 17, at 16.

<sup>37</sup> *See* ARK. CODE ANN. § 9-27-356(2)(A) (2005).

<sup>38</sup> The term "sexting" is defined as "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones." *Miller v. Skumanick*, 605 F.Supp.2d 634, 637 (M.D. Penn. 2009).

<sup>39</sup> *See* Stephanie Gaylord Forbes, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1733-34 (arguing that broad classification of sexting is inappropriate and that a jury should determine whether the sexts in question rise to the level of a higher-tiered sex offense).

<sup>40</sup> *See Community Notification for Juveniles Adjudicated Delinquent of a Sexual Offense, SORNA IMPLEMENTATION DOCUMENTS 18, available at* [http://www.ojp.usdoj.gov/smart/pdfs/SORNA\\_ImplementationDocuments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/SORNA_ImplementationDocuments.pdf)

<sup>41</sup> According to a recent Supreme Court holding, this retroactivity will not be triggered until the AG specifies that it is being enforced. *See Reynolds v. United States*, No. 10-6549 (Jan. 23, 2012), reversing 390 Fed. Appx. 125 (3<sup>rd</sup> Cir 2010). However, the full framework is already established and awaiting announcement.

<sup>42</sup> Note that first time offenders are not required to register until released, but that once registered, offenders will remain registered during any future periods of incarceration.

<sup>43</sup> For more discussion of the treatment of retroactive classes of offenders, see Part IX of the Guidelines. In general, the length of registration will be related back to the date of conviction/release, thus if a Tier II sex offender under the new SORNA classifications was released from the system in 1985, his 25-year registration obligation expired in 2010 and he will not have to be registered if he enters the system again in 2011.

<sup>44</sup> FINAL GUIDELINES, *supra* note 21.

<sup>45</sup> 42 U.S.C. § 16925(a).

<sup>46</sup> *See* Illinois Sex Offender Registry, <http://www.isp.state.il.us/sor/sor.cfm>.

<sup>47</sup> *Id.*

<sup>48</sup> *See* Hawaii Criminal Justice Data Center, Online Sex Offender Search, <http://sexoffenders.hawaii.gov/sexoffender/search.html>; HAWAII REVISED STAT. ANN. § 846E-3.

<sup>49</sup> *See* California Megan's Law, Sex Offender Registry, <http://www.meganslaw.ca.gov>; CAL. ANN. STAT. § 290.46 (excluding, for example, the name and address of the offender's employer from the public website).

<sup>50</sup> These states include: Connecticut (fingerprints), Kansas (fingerprints and blood, saliva, or other biological samples), Michigan (fingerprints and some DNA samples), New Mexico (fingerprints and DNA), North Dakota (fingerprints and DNA), Oklahoma (fingerprints required, DNA samples only upon request, South Dakota (fingerprints, palmprints, and DNA samples). *See* NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, *Fifty State Survey of Adult Sex Offender Registration Requirements* [hereinafter *Fifty State Survey*], <http://www.wcl.american.edu/nic/documents/fiftystatesurvey1011.pdf?rd=1>.

<sup>51</sup> SORNA, 18 U.S.C. 2250(a)(3); FINAL GUIDELINES, *supra* note 21, at 57.

<sup>52</sup> SORNA, 18 U.S.C. 2250(a)(3); FINAL GUIDELINES, *supra* note 21, at 57.

<sup>53</sup> FINAL GUIDELINES, *supra* note 17.

<sup>54</sup> THE UNITED STATES DEPARTMENT OF JUSTICE, DRU SJODIN NATIONAL SEX OFFENDER PUBLIC WEBSITE, <http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1>.



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<sup>55</sup> Note that one Arizona newspaper publishes notices of sex offenders released and living in the area. See Greg Leuthen, *High Risk Sex Offender Released from Prison*, KSPR (ABC) 33, June 22, 2011, available at [http://articles.kspr.com/2011-06-22/baxter-county\\_29692237](http://articles.kspr.com/2011-06-22/baxter-county_29692237).

<sup>56</sup> See Letter from Public Defender, *supra* note **Error! Bookmark not defined.** (cataloguing such occurrences in the State of New Jersey); see also *supra* note **Error! Bookmark not defined.** and accompanying text (explaining that registration requirements often lead to difficulty maintaining consistent housing and sometimes to homelessness for registered offenders).

<sup>57</sup> See Ahuja, *supra* note 33; Hagey, *supra* note 33.

<sup>58</sup> See Ahuja, *supra* note 33.

<sup>59</sup> NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, COMMUNITY MANAGEMENT OF CONVICTED SEX OFFENDERS: REGISTRATION, ELECTRONIC MONITORING, CIVIL COMMITMENT, MANDATORY MINIMUMS, AND RESIDENCY RESTRICTIONS 3, available at <http://ccoso.org/NAESVPolicy.doc>.

<sup>60</sup> *Id.* at 1.

<sup>61</sup> Hollida Wakefield, *The Villification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, J. SEXUAL OFFENDER CIVIL COMMITMENT: SCIENCE AND THE LAW, 141, 143–45 (2006).

<sup>62</sup> See, e.g., William Pfeifer, Jr., *Too Many Registered Sex Offenders Make Sex Offenders Difficult to Track*, EXAMINER.COM (Sept. 5, 2009 01:44 p.m. EST), <http://www.examiner.com/legal-news-in-national/too-many-registered-sex-offenders-make-dangerous-sex-offenders-difficult-to-track> arguing against monitoring high-risk offenders no more than offenders with a very low rate of recidivism).

<sup>63</sup> FINAL GUIDELINES, *supra* note 21, at 3-4.

<sup>64</sup> Alabama, § 15-20-26; Arkansas, ARK. CODE ANN. § 5-14-128 (West 2010); California, CAL. PENAL CODE § 3003.5(b) (West 2010); Florida, FLA. STAT. ANN. § 775.215 (West 2010); Georgia, GA. CODE ANN. § 42-1-15 (West 2010); Idaho, IDAHO CODE ANN. § 18-8329 (2010); Illinois, 730 ILL. COMP. STAT. ANN. 150/8 (West 2010); Indiana, IND. CODE ANN. § 35-42-4-11 (West 2010); Iowa, IOWA CODE ANN. § 692A.114 (West 2010); Kentucky, KY. REV. STAT. ANN. § 17.545 (West 2010); Louisiana, LA. REV. STAT. ANN. § 14:91.1 (West 2010); Mississippi, MISS. CODE ANN. § 45-33-25(4) (West 2010); Missouri, MO. ANN. STAT. § 566.147 (West 2010); Montana, MONT. CODE ANN. § 46-18-255 (WEST 2010); Nebraska, NEB. REV. ST. § 29-4017 (WEST 2010); New Jersey, N.J. STAT. ANN. § 2C:7-23 (West 2010); New York, NY CORRECT § 168-v (MCKINNEY 2010); North Carolina, N.C. GEN. STAT. ANN. § 14-208.16 (West 2010); Ohio, OHIO REV. CODE ANN § 2950.034 (West 2010); Oklahoma, OKLA. STAT. ANN. tit. 590, § 584 (West 2010); Oregon, O.R.S. § 144.642 (West 2010); South Carolina, S.C. CODE ANN. §§ 23-3-465, 23-3-535 (2010); South Dakota, S.D. CODIFIED LAWS § 22-24B-23 (West 2010); Tennessee, TENN. CODE ANN. § 40-39-211 (West 2010); Utah, UTAH CODE ANN. § 77-27-21.7 (West 2010); Vermont, V.I. CODE ANN. tit. 14, § 1729 (West 2010). See NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS, <http://www.wcl.american.edu/nic/documents/fiftystatesurvey1011.pdf?rd=1>.

<sup>65</sup> See NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS, <http://www.wcl.american.edu/nic/documents/fiftystatesurvey1011.pdf?rd=1>.

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

<sup>67</sup> *Id.*

<sup>68</sup> GA. CODE ANN. § 42-1-15(b) (West 2008).

<sup>69</sup> La. Rev. Stat. Ann. § 14:91.2(a)(1) (2008).

<sup>70</sup> These states are Alabama, Arkansas, Georgia, Florida, Idaho, Kentucky, Michigan, Mississippi, Montana, and Tennessee.

<sup>71</sup> ALA. CODE § 15-20-26 (West 2008).

<sup>72</sup> GA. CODE ANN. § 42-1-15 (West 2008).

<sup>73</sup> See Lisak, *supra* note 10, at 1-2.

<sup>74</sup> 42 U.S.C. § 16924(b) (West 2008).

<sup>75</sup> *Id.* Thus, the final deadline for states who were granted extensions was July 27, 2011.

<sup>76</sup> 42 U.S.C. § 16925(a).

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<sup>77</sup> For information about Byrne JAG distribution, see Bureau of Justice Assistance Programs, <http://www.ojp.usdoj.gov/BJA/grant/jag.html>.

<sup>78</sup> The SMART office updates the list of jurisdictions that have reached substantial implementation regularly. See Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Newsroom*, <http://www.ojp.usdoj.gov/smart/newsroom.htm>.

<sup>79</sup> For example, a state could maintain a “risk assessment” structure while requiring judges to find that, if certain factors are present, SORNA-compatible results are mandated. See FINAL GUIDELINES, *supra* note 17, at 23 (“For example, suppose that a jurisdiction decides to subject all sex offenders to lifetime registration, quarterly verification appearances, and full website posting as described in Part VII of these Guidelines. That would meet the SORNA requirements with respect to sex offenders satisfying the “tier III” criteria, and exceed the minimum required by SORNA with respect to sex offenders satisfying the “tier II” or “tier I” criteria. Hence, such a jurisdiction would be able to implement the SORNA requirements with respect to all sex offenders without any labeling or categorization, and without having to assess individual registrants against the tier criteria in the SORNA definitions.”).

<sup>80</sup> SORNA, 18 U.S.C. § 2250.

<sup>81</sup> Justice Policy Institute, *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?*, available at [http://www.justicepolicy.org/images/upload/08-08\\_FAC\\_SORNAcosts\\_JJ.pdf](http://www.justicepolicy.org/images/upload/08-08_FAC_SORNAcosts_JJ.pdf) (citing studies in Ohio and Virginia and including a table expressing each state’s first-year implementation costs in ratio to their 2006 JAG funding).

<sup>82</sup> *Id.* (California’s estimated implementation costs are \$59,287,817; California’s potential Byrne losses as calculated in 2006 would have been only \$2,187,682).

<sup>83</sup> 42 U.S.C. 16926 (2006). The timing of this funding has been proposed to extend from 2010 to 2014. See 111 H.R. 1422 (2009).

<sup>84</sup> Prison Rape Elimination Act of 2003, Public Law 108-79 (2003).

<sup>85</sup> See, e.g., AMNESTY INTERNATIONAL, *USA: Rights for all: “Not part of my sentence;” Violations of the human rights of women in custody* (1999), available at

<http://www.amnesty.org/en/library/asset/AMR51/001/1999/en/ab8c7840-e363-11dd-937f-a170d47c4a8d/amr510011999en.html>; HUMAN RIGHTS WATCH, *No Escape: Male Rape in U.S. Prisons* (2001), <http://www.hrw.org/legacy/reports/2001/prison/report.html>.

<sup>86</sup> See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SEX VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09* 7 (Aug. 2010).

<sup>87</sup> These states are Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, *FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS*,

<http://www.wcl.american.edu/nic/documents/fiftystatesurvey1011.pdf?rd=1>.

<sup>88</sup> See, e.g., Minnesota Department of Corrections, *Residential Proximity & Sex Offense Recidivism in Minnesota* 24-25 (2007), <http://www.doc.state.mn.us/publications/documents/04-07SexOffenderReport-Proximity.pdf>; Marcus Nieto and David Jung, *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review* (2006), <http://www.library.ca.gov/crb/06/08/06-008.pdf>.

<sup>89</sup> N.Y. PENAL LAW § 130.05(3)(e) (McKinney 2008).

<sup>90</sup> Brenda V. Smith, *Rethinking Prison Sex*, 15 COLUM. J. GENDER & L. 185 (2006). In non-incarceration settings, the terms of consent may vary by State and by individual. For example, the definition of “consent” for developmentally disabled persons varies across the states and is usually dependent on the severity of the disability – something that must be established on a case-by-case basis. See Jamie P. Morano, *Sexual Abuse of the Mentally Retarded Patient: Medical and Legal Analysis for the Primary Care Physician*, 3(3) *Primary Care Companion J. Clin. Psychology* 126 (2000) (describing the evaluations physicians must do when examining potential abusive situations), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC181173/pdf/i1523-5998-003-03-0126.pdf>.

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<sup>91</sup> DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 199-200; D.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F.2d 1364, 1371 (1989); Carrigan v. Davis, 70 F.Supp.2d 448, 459-61 (D. Del. 1999).

<sup>92</sup> Note that this is also particularly true for the caretakers of physically disabled, developmentally disabled, and other persons with little control over their bodily integrity due to their type of residence. See, e.g., Leigh Ann Davis, *People with Mental Retardation & Sexual Abuse*, available at [disability-abuse.com/cando/documents/ABUSEQ&A.rtf](http://disability-abuse.com/cando/documents/ABUSEQ&A.rtf). Davis explains that recent research finds developmentally disabled individuals are two to four times more likely to suffer a sexual abuse in an institutional or residential setting than in the community and that 49.8 percent of this type of sexual abuse occurred in private homes.

<sup>93</sup> See NIC/WCL Project on Addressing Prison Rape, March 2007 Training, Appendix I, available at [http://www.wcl.american.edu/faculty/smith/0307conf/training\\_append.pdf?rd=1](http://www.wcl.american.edu/faculty/smith/0307conf/training_append.pdf?rd=1) (listing dozens of articles noting prison staff sexual assaults from 1995 to 2000).

<sup>94</sup> E.g. Wendy Hundley, *Ex-chaplain Pleads Guilty to Sex Abuse of Female Inmates at Fort Worth Prison*, THE DALLAS MORNING NEWS, Nov. 15, 2007.

<sup>95</sup> Probation and Parole officers work closely with their supervisees, and are often responsible for recommending (or recommending against) sentence and status changes. See Bureau of Labor Statistics, Probation Officers and Correctional Treatment Specialists, available at <http://www.bls.gov/oco/ocos265.htm>.

<sup>96</sup> SORNA FAQs page 3.

<sup>97</sup> SORNA FAQ. at 4.

<sup>98</sup> See *supra* note 15 and accompanying text for further discussion. While up for interpretation, it appears from this definition that SORNA would not mandate the registration of flashing, indecent exposure, or lewd and lascivious behavior that does not involve the touching of another, but that most traditional sex offenses will be covered by its requirements.

<sup>99</sup> See *supra* notes 17–22 and accompanying text.

<sup>100</sup> Despite the fact that Kentucky specifically requires that the actor subjects the victim to coercion, oddly, the actor may prove in exculpation that at the time the offense occurred, he or she and the victim were married to each other. This means that subjecting one's spouse to coercion is not a punishable offense.

<sup>101</sup> See NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (updated Nov. 2010), <http://www.wcl.american.edu/nic/documents/50StateSurveyofSSMLawsFINAL2009Update.pdf?rd=1>.

<sup>102</sup> *Id.*

<sup>103</sup> Credibility barriers are common in all non-stranger sexual assault cases and in sexual assault cases involving children. While the details of these crimes are different, the dynamics of trustworthiness of the victim, any witnesses, and the perpetrator are the same.

<sup>104</sup> U.S. DEPT. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, *Deterring Staff Sexual Abuse of Federal Inmates* 3 (2005) (explaining that fear of retaliation often results in delayed reporting or non-reporting of staff sexual misconduct), available at <http://www.justice.gov/oig/special/0504/final.pdf>.

<sup>105</sup> See *id.* at 1. See, e.g., United States v. Gibson, 880 F.2d 795, 796 (4th Cir. 1989). Due to overcrowding of federal facilities, the federal government began contracting with private, state, or local facilities to house offenders. These non-Federal facilities were not regulated by federal law, and thus were only controlled by the controlling state's regulations. U.S. DEPT. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, *Deterring Staff Sexual Abuse of Federal Inmates* 17-18 (2005), available at <http://www.justice.gov/oig/special/0504/final.pdf>.

<sup>106</sup> 17 U.S.C. § 1791 (2006) (adding “or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General” to the preexisting definition). See DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, THE DEPARTMENT OF JUSTICE'S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES (Sept. 2009), available at <http://www.justice.gov/oig/reports/plus/e0904.pdf>.

<sup>107</sup> Ark. Code Ann. § 12-12-905 (requiring registration for any sex offense); Ark. Code Ann. § 12-12-903 (defining sexual assaults as “sex offenses” for purposes of § 12-12-905).

<sup>108</sup> Ark. Code Ann. § 5-14-125(a)(4)(A).



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<sup>109</sup> California defines “sexual activity” as “sexual intercourse; sodomy; oral copulation; sexual penetration; or the rubbing or touching of the breasts or sexual organs of another, or of oneself in the presence of and with knowledge of another, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of oneself or another. CAL. PENAL § 289.6(d) (West 2008). Consent is not an applicable defense against confined or parolee victims. *Id.* § 289.6(e).

<sup>110</sup> See CAL. PENAL § 290 (enumerating offenses that result in mandatory registration and *not* listing § 289.6); CAL. PENAL § 290.006 (permitting judges to order registration for crimes not listed in § 290). California requires that a party give “actual consent” to sexual intercourse, meaning consent to the interaction actually and freely given without any misapprehension of material fact. See *People v. Giardino*, 82 Cal.App.4th 454 (2000); CAL. PENAL § 261.6.

<sup>111</sup> COLO. REV. STAT. § 18-3-402 (West 2008). See COLO. REV. STAT. § 16-22-103 (mandating registration).

<sup>112</sup> These states are California, Florida, Idaho, Illinois, Kansas, Maine, Missouri, Montana, New Hampshire, New Jersey, Virginia and West Virginia. *Id.*

<sup>113</sup> These states are Alaska, Arkansas, Connecticut, Idaho, Illinois, Missouri, New Hampshire, Pennsylvania, West Virginia and Wisconsin. *Id.*

<sup>114</sup> These states are Colorado, Connecticut, Illinois, Maine, Montana, New Hampshire, New Jersey, North Dakota, Ohio and Tennessee. *Id.*

<sup>115</sup> FLA. STAT. ANN. § 794.011(4)(g) (West 2008).

<sup>116</sup> 720 ILL. COMP. STAT. ANN. 5/11-9.2 (West 2008).

<sup>117</sup> 720 ILL. COMP. STAT. ANN. 5/11-9.2(d) (West 2008).

<sup>118</sup> For example, a guard who allegedly allowed male offenders into the cell of a woman offender to rape her simply “resigned and disappeared,” according to the California Board of Prisons. The BOP spokesperson told a journalist, “He was supposed to come in to give a forwarding address and turn in all his equipment, but he never made it.” See Bobbie Stein, *Sexual abuse: guards let rapists into women's cells*, THE PROGRESSIVE, July 1, 1996, available at

[http://findarticles.com/p/articles/mi\\_m1295/is\\_n7\\_v60/ai\\_18410227/?tag=mantle\\_skin;content](http://findarticles.com/p/articles/mi_m1295/is_n7_v60/ai_18410227/?tag=mantle_skin;content). If this man moves to another jurisdiction and seeks employment as a prison guard, human resources officials may not have record of sexual abuse complaints against him.

<sup>119</sup> For example, contractors have been hired to work in Iraq and Afghanistan alongside the American military operations there – some with catastrophic results. See Scott Higham and Joe Stephens, *New Details of Prison Abuse Emerge*, THE WASHINGTON POST, May 21, 2004, at A1. Further, different levels of security are necessary at a number of institutional settings including nursing homes, group homes for the mentally ill, juvenile facilities, and church or school-led youth activities.

<sup>120</sup> See Testimony of State’s Attorney Kim Worthy 217, Prison Rape Elimination Commission Hearings, Aug. 3, 2006 (stating that due to 2004 budget constraints the state of Michigan would no longer be handling “crimes committed in state institutions by inmates on other inmates or state employees with inmates or state employees as witnesses.”). See also Stephen Dean, *Texas Prison Workers Accused of Romance with Sex Convicts*, HOUSTON PAGE ONE EXAMINER, May 1, 2011, <http://www.examiner.com/page-one-in-houston/texas-prison-workers-accused-of-romance-with-sex-convicts> (noting that no investigation into criminal sexual activity occurred after alleged inappropriate relationships with inmates resulted in the resignations of one staff member and two counselors).

<sup>121</sup> See generally Violence Against Women Act of 1999, H.R. 357, 106th Cong. (1999); see also Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

<sup>122</sup> *Id.*

<sup>123</sup> See Prison Rape Reduction Act of 2003: Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 108th Cong. 144-146 (2003) (letter from Reginald A. Wilkinson, Ed.D., President, Association of State Correctional Administrators and Director, Ohio Department of Rehabilitation and Correction).

<sup>124</sup> See generally *id.*

<sup>125</sup> See, e.g., FLA. STAT. ANN. § 944.35 (West 2008); IDAHO CODE ANN. § 18-6110 (West 2008).

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<sup>126</sup> Stephen Dean, Texas Prison Workers Accused of Romance with Sex Convicts, May 1, 2011, <http://www.examiner.com/page-one-in-houston/texas-prison-workers-accused-of-romance-with-sex-convicts>.

<sup>127</sup> Jody Lawrence-Turner, *Washington, Idaho Officers Decertified*, SPOKESMANREVIEW.COM (March 23, 2008), available at <http://www.spokesmanreview.com/breaking/story.asp?ID=14210>. For further discussion, see *infra* notes 148 -156 and accompanying text.

<sup>128</sup> See *Williams v. Caruso*, 2005 WL 2261602 (W.D. Mich. Sep. 17, 2005)

<sup>129</sup> See Testimony of State's Attorney Kim Worthy, *supra* note 71.

<sup>130</sup> Cf. Janet Warren, et al., *Risk Markers for Sexual Predation and Victimization in Prison*, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/230522.pdf>.

<sup>131</sup> Collective bargaining agreements commonly require mandatory grievance and arbitration proceedings for disciplinary actions or terminations, and may further limit an agency's ability to remove alleged staff abusers from contact with potential victims before or during an investigation. See Professor Susan D. Carle et al., *Labor and Employment Law: Tools for Prevention, Investigation and Discipline of Staff Sexual Misconduct in Custodial Settings* 30, ed. by Professor Brenda V. Smith (Nat'l Inst. of Corrections 2009). See also 76 Fed. Reg. 6248, 6261 (Feb. 3, 2011); Nat'l Prison Rape Elimination Commission, Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails, [hereinafter Proposed Standards] (requiring an agency develop and implement alternative protection measures to prevent this problem from happening in the future).

<sup>132</sup> State employees may be entitled to notice, cause, and a hearing before the agency may terminate or suspend employment. Carle, *supra* note 124, at 30; *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 523, 546 (1985) (requiring only notice of the charges against the officer and an opportunity for him to respond to the evidence on which the charges were based before termination).

<sup>133</sup> One example of this overlap is the Supreme Court's ruling in *Garrity*, which held that an officer who is told he must answer questions or will lose his job is not able to answer questions voluntarily. Thus, he has been forced to incriminate himself in violation of the Fifth Amendment and if a criminal trial is held subsequently, any statements the officer is compelled to make will be excluded. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

<sup>134</sup> Proposed Standards at 47; 76 Fed. Reg. 6248, 6262 (Feb. 3, 2011).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09* (Aug. 2010). This total includes the cross-sectional number covered in BJS surveys plus the number of estimated victims released in the twelve months prior to the survey. For methodology, see Initial Regulatory Impact Analysis (IRIA) at 9, available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_nprm\\_iria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf).

<sup>138</sup> See Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008–09* (Jan. 2010), at 1, 4. This total includes the cross-sectional number covered in BJS surveys plus the number of estimated victims released in the twelve months prior to the survey. It includes adjudicated/committed youth only. For methodology, see IRIA at 9.

<sup>139</sup> See, e.g., *Better Protecting Offenders*, Editorial, NEW YORK TIMES, April 6, 2011, [http://www.nytimes.com/2011/04/07/opinion/07thu2.html?\\_r=1](http://www.nytimes.com/2011/04/07/opinion/07thu2.html?_r=1).

<sup>140</sup> 76 Fed. Reg. 6248, 6250.

<sup>141</sup> *Id.*

<sup>142</sup> As one example of this change, the State of Arizona has established a qualified immunity for information sharing among police agencies and employers where such information is shared in a good faith belief that the information is accurate. ARIZ. REV. STAT. ANN. 41-1828.01(C). This statute requires administrators to report allegations when cause is present and protects administrators who do their jobs.

<sup>143</sup> See *supra* Section II, notes 77 to 126 and accompanying text.

<sup>144</sup> See generally Roger L. Goldman and Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS L.J. 541, 542 (2001). Decertification may also be called "revocation" or "cancellation."

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<sup>145</sup> Matthew J. Hickman, Seattle University, *Peace Officer Certification and the National Decertification Index*, August 2010, at 1.

<sup>146</sup> *Id.* . [Alaska, Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Illinois, Louisiana, Maryland, Maine, Montana, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming certify correctional officers. Even fewer state agencies certify and decertify parole officers or probation officers—states that certify probation and parole officers are: Alaska, Alabama, Arkansas, Florida, Georgia, Idaho, Illinois, Louisiana, Maryland, Maine, Montana, North Carolina, New Hampshire, New Jersey, Nevada, New York, Ohio, Oregon, South Carolina, Texas, Utah, Virginia, and Wyoming.].

<sup>147</sup> Goldman and Puro, *supra* note 144, at 545.

<sup>148</sup> Hickman, *supra* note 145, at 1.

<sup>149</sup> IDAHO CODE 19-5109 (granting Council the power to decertify); Idaho Peace Officers Code of Conduct, <http://www.post.idaho.gov/ProfessionalStandards/documents/Idaho%20Peace%20Officers%20Codes%20of%20Ethics%20and%20Conduct.pdf> (conveying the Code of Conduct).

<sup>150</sup> Jody Lawrence-Turner, *Washington, Idaho Officers Decertified*, SPOKESMANREVIEW.COM (March 23, 2008), available at <http://www.spokesmanreview.com/breaking/story.asp?ID=14210>.

<sup>151</sup> It is important to note that these statistics include *all* law enforcement officers decertified in the state, not just custodial sex offenders.

<sup>152</sup> See *Fired Spokane Deputy Named Police Chief for St. Maries*, SPOKANE CHRONICLE, Saturday, November 17, 1984, Regional Section, page 3.

<sup>153</sup> The IADLEST's National Decertification Index (NDI) discussed here is not a perfect solution, but it appears to be a good framework for building forward. We did not have access to the contents of the list during our research – we requested access, but that request was denied. IADLEST leadership responded that the NDI was not available for research purposes. Thus, we cannot vouch for the quality or organization of the NDI's existing list. Our research relies on articles about the NDI and we acknowledge that those articles were published by interested parties. Independent of this fact, we think that several NDI features would be useful to develop a national system for tracking and monitoring custodial staff offenders.

<sup>154</sup> See Raymond A Franklin, Matthew Hickman, and Marc Hiller, *2009 Survey of POST Agencies Regarding Certification Practices*, Police Officer Certification Revocation Information Sharing: National Public Safety Officer Decertification Database (July 2009), at 3.

<sup>155</sup> See IADLEST, *National Decertification Index FAQs*, [https://www.iadlest.org/Portals/0/Files/NDI/FAQ/ndi\\_faq.html](https://www.iadlest.org/Portals/0/Files/NDI/FAQ/ndi_faq.html) (noting that the OJP awarded one grant in 2005 and a second in 2009).

<sup>156</sup> According to the 2009 Survey of POST Agencies, the following states do not query the current NDI list as of 2008: Alabama, California, District of Columbia, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maine, Mississippi, Montana, North Carolina, New Mexico, Pennsylvania, South Carolina, Virginia, Wisconsin, and Wyoming.

<sup>157</sup> See William Muldoon, *IADLEST National Decertification Index (NDI)*, IADLEST Newsletter at 4, (October 2011), <https://iadlest.org/LinkClick.aspx?fileticket=Pkk5ROBbgRE%3d&tabid=85&mid=419>.

<sup>158</sup> See Raymond A Franklin, Matthew Hickman, and Marc Hiller, *2009 Survey of POST Agencies Regarding Certification Practices*, Police Officer Certification Revocation Information Sharing: National Public Safety Officer Decertification Database (July 2009), at 3 (explaining that while the Florida Department of Law Enforcement and the IACP fully endorsed this bill, it never made it out of committee).

<sup>159</sup> Approximately 129,224 records had been inputted into this database by June of 1999.

<sup>160</sup> See Raymond A Franklin, Matthew Hickman, and Marc Hiller, *2009 Survey of POST Agencies Regarding Certification Practices*, Police Officer Certification Revocation Information Sharing: National Public Safety Officer Decertification Database (July 2009), at 3.

<sup>161</sup> See Raymond A Franklin, Matthew Hickman, and Marc Hiller, *2009 Survey of POST Agencies Regarding Certification Practices*, Police Officer Certification Revocation Information Sharing: National Public Safety Officer Decertification Database (July 2009), at 3-4.

<sup>162</sup> See Franklin, Hickman, and Hiller, *supra* note 157.

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<sup>163</sup> See *id.*

<sup>164</sup> See Criminal Justice Standards and Training Commission, Technical Memorandum 2011-02, available at <http://www.fdle.state.fl.us/Content/getdoc/bba66b19-0ace-42ce-a7f7-88fde3647b31/TM-2011-02.aspx> (noting this requirement for Florida administrators).

<sup>165</sup> See *Oregon Case Shows NDI Works*, IADLEST NEWS, available at <http://www.iadlest.org/news.aspx>.

<sup>166</sup> Allegations “sustained” at the conclusion of an internal affairs investigation must be sent to CJSTC for review, which includes evaluating the internal affairs file, determining probable cause, and holding either a formal or informal hearing. See Anthony Cormier and Matthew Doig, *Unfit for Duty: Flagrant Abuses but Still on the Job*, HERALD-TRIBUNE (Sarasota, Fla. – Dec. 5, 2011), available at [http://www.heraldtribune.com/Assets/pdf/unfitforduty/20111205\\_Abuses.pdf](http://www.heraldtribune.com/Assets/pdf/unfitforduty/20111205_Abuses.pdf).

<sup>167</sup> For more information, see Florida Department of Law Enforcement (FDLE), *Professional Compliance (Disciplinary) FAQs*, <http://www.fdle.state.fl.us/Content/CJST/Menu/General-Information/PC-Process---Frequently-Asked-Questions.aspx>.

<sup>168</sup> But see Anthony Cormier and Matthew Doig, *Unfit for Duty: Police Agencies Undermine System*, HERALD-TRIBUNE (Sarasota, Fla. – Dec. 12, 2011), available at [http://www.heraldtribune.com/Assets/pdf/unfitforduty/20111212\\_Agencies.pdf](http://www.heraldtribune.com/Assets/pdf/unfitforduty/20111212_Agencies.pdf) (noting the different methods available to police agencies to avoid the progressive criminal justice monitoring system the State of Florida has enacted to protect the public, and noting the FDLE’s inability to enforce reporting requirements on agencies to date).

<sup>169</sup> Anthony Cormier and Matthew Doig, *Unfit for Duty* (series), HERALD-TRIBUNE (Sarasota, Fla. 2011), available at <http://cops.htcreative.com/>.