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Registration without Representation: Treatment of Foreign Sex Offense Convictions under the Sex Offender Registration and Notification Act

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NOTE

REGISTRATION WITHOUT REPRESENTATION: TREATMENT OF FOREIGN SEX OFFENSE CONVICTIONS UNDER THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT

Tom Morris[†]

TABLE OF CONTENTS

ABSTRACT.....	72
I. INTRODUCTION	73
II. BACKGROUND.....	75
A. SORNA	75
B. <i>Federal Rule of Evidence 609</i>	78
III. THE LACK OF DUE PROCESS FOR SEX OFFENDERS: A CALL TO REEVALUATE.....	80
A. <i>The SORNA Final Guidelines Due Process Requirements</i>	80
1. Class 1 Jurisdictions	80
2. Class 2 Jurisdictions	82
3. Class 3 Jurisdictions	84
B. <i>Registration Without Representation</i>	85
1. Registration for Domestic Sex Offense Convictions	85
2. Registration for Foreign Convictions	87
3. <i>McCarty v. Roos</i>	89
a. <i>Unconstitutional Vagueness</i>	90
b. <i>Procedural due process</i>	91
C. <i>Foreign Convictions and Federal Rule of Evidence 609</i>	94
IV. LOOKING TO THE UCCJEA AS A WAY FORWARD	97
A. <i>In Re Marriage of Donboli</i>	97

[†] *Student Development Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 12. J.D. Candidate, Liberty University School of Law (2018). Words cannot express the depth of gratitude and appreciation I have towards my loving wife and children for their endless support and encouragement as I undertook the burden of Law Review and Law School in general. Without them, none of this would have been possible. Many thanks to my parents and family who have all been endlessly supportive of my pursuit of a law degree. Finally, I would be remiss to not recognize the contributions of Professor Barbara Mouly, who gave me the inspiration for this topic, and Professor Caren Harp, who patiently took the time to discuss SORNA specifically, and the positive and negative impacts of sex offender registry laws generally.

B. <i>Applying Donboli to SORNA</i>	99
V. CONCLUSION.....	103

ABSTRACT

There are few things more stigmatizing or damaging to an individual's reputation and ability to carry on day-to-day activities than being branded and forced to register as a sex offender. Studies have shown that the registration of sex offenders may actually cause more harm than good. In light of these dual harms, one would hope that any legislation which imposes additional registration requirements would be narrowly tailored to effect a specific legislative goal. Unfortunately, the Adam Walsh Act and the Sex Offender Registry and Notification Act ("SORNA") contained therein have proven to be anything but narrowly tailored.

SORNA provided the minimum reporting requirements that states must apply to maintain their funding. As part of those reporting requirements, convicted of sex offenses in foreign jurisdictions must also register upon their return to the United States.

Along with the reporting requirements, SORNA also established the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, or the SMART Office. SMART is responsible for proffering the Final Guidelines—the regulatory scheme through which SORNA is implemented. This Note will discuss the near total lack of due process afforded to those convicted of sex offenses in foreign jurisdictions as a result of the Final Guidelines.

Under the Final Guidelines, foreign jurisdictions are divided into three categories. The first category is comprised of four countries that share the English Common Law tradition with the United States: Great Britain, Australia, New Zealand, and Canada. The second category includes those countries that the United States Department of State has determined generally enforced principles of fairness and due process within the year of the conviction. The third category contains all other jurisdictions.

The issue with SORNA arises in its prohibition of judicial review in the United States to determine if an individual with a foreign sex offense conviction was actually granted due process and fundamental fairness in his conviction. The Final Guidelines effectively create a *per se* rule that foreign convictions were attained properly and, therefore, registration is required. This prohibition against judicial oversight, coupled with a complete abrogation of any duty to protect the due process rights of United States citizens, results in a fundamentally unfair, unconstitutional legal framework that is capable of permanently stigmatizing individuals who have committed no wrong.

This Note will explore the deficiencies of SORNA and its Final Guidelines, and demonstrate just one of the real world consequences caused by those deficiencies, as seen through Federal Rule of Evidence 609. In addition, this Note will propose an easily adapted solution to the problems with SORNA, and advocate for an approach already utilized by American courts under the Uniform Child Custody and Jurisdiction Enforcement Act.

I. INTRODUCTION

There are rarely, if ever, large public outcries to increase the protections of fundamental fairness and due process afforded to sex offenders. The public disdain for sex offenders is so great that there is even an entire “tv trope” dedicated to the terrible treatment they receive in prison,¹ a trope that is based in reality:²

In prison, there is no creature lower than a sex offender. Even snitches get a pass before these guys. SOs, chomos, pedophiles—the nicknames all mean the same thing, and they help average convicts differentiate themselves from those they like to believe are the *real* monsters.

. . . . [I]nmates in the California state prison system are getting killed at twice the national average, with sex offenders disproportionately likely to meet their demise inside—which is awful, but not too surprising given how much hatred is directed at those inmates.³

The level of open abhorrence towards these offenders is somewhat understandable, and can even prove cathartic. After all, these offenders were convicted of taking advantage of innocents in their most vulnerable state. However, the U.S. Constitution does not, and should not, vary its guarantees of protection and fairness towards prisoners based on the despicability of a crime. Even Dzhokhar Tsarnaev, the perpetrator of the 2013 Boston Marathon bombing,⁴ was as protected by the due process

1. *Pariah Prisoner*, TVTROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/PariahPrisoner> (last visited Aug. 29, 2017).

2. Seth Ferranti, *Why Are So Many Sex Offenders Getting Murdered in California's Prisons?*, VICE (Feb. 18, 2015), <http://www.vice.com/read/why-sex-offenders-are-getting-slaughtered-in-california-prisons-218>.

3. *Id.*

4. *United States v. Tsarnaev*, 2015 WL 3945832 (D. Mass.) (Trial Order).

guarantees of the Constitution, just as someone who commits petit larceny would be protected.

Unfortunately, this equality of protection appears to have been unimportant to Congress when the Adam Walsh Act was passed in 2006.⁵ The Adam Walsh Act includes the Sex Offender Registration and Notification Act, or SORNA.⁶ Among other things, SORNA requires the registration of sex offenders convicted of sex offenses in foreign jurisdictions, without requiring even minimum standards of due process to validate the foreign convictions.⁷ Furthermore, there is no provision in the Act that allows an individual convicted of a sex offense in a foreign jurisdiction to protest the registration requirement prior to being registered.⁸

This Note will explore this complete lack of protections for the subset of sex offenders required to register under SORNA due to their conviction in a foreign jurisdiction. Part III of the Note will give a detailed examination of the lack of due process protections, as well as the unavailability of judicial relief for those offenders. Part IV will examine just one of the many potential negative effects of SORNA, and the effect that registration without a guarantee of due process can have on third parties under Federal Rule of Evidence (“FRE”) 609. Finally, Part V will provide a potential judicially implemented solution by comparing the requirements of SORNA to the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”).⁹

5. Adam Walsh Act, 34 U.S.C. § 20901 (2006).

6. Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20911, 20961-62 (2006).

7. This will be discussed and documented thoroughly in Part III. A citation to a specific section of SORNA is unhelpful, because an analysis of the law as a whole must be undertaken.

8. This will be discussed and documented thoroughly in Part III. A citation to a specific section of SORNA is unhelpful, because an analysis of the law as a whole must be undertaken.

9. UNI. CHILD CUSTODY JURISDICTION AND ENF'T ACT (NAT'L CONFERENCE OF COMM'RS ON UNI. STATE LS. 1997). The UCCJEA has been approved in 49 states and the U.S. Virgin Islands. The only state to not yet implement the UCCJEA is Massachusetts; however, it was introduced in 2016 as HB36/SB2392. Puerto Rico has not adopted the UCCJEA. *Child Custody Jurisdiction and Enforcement Act*, UNI. L. COMM'N, <http://www.uniformlaws.org/Default.aspx> (last visited Oct. 20, 2017).

II. BACKGROUND

A. SORNA

Title I of the Adam Walsh Act of 2006¹⁰ is the Sex Offender Registration and Notification Act, commonly referred to as SORNA.¹¹ The Adam Walsh Act was passed with the purpose of replacing the Jacob Wetterling¹² sex offender registration requirements, which had been enacted during the 1990s.¹³ The Wetterling Act established a baseline for sex offender registration requirements, including the public notification provision, “Megan’s Law.”¹⁴ By the late 1990s, every state was in compliance with the Wetterling Act.¹⁵

SORNA was enacted “[i]n response to a number of high-profile cases,” in which despicable crimes were committed by individuals with prior sex crime convictions, who had, nevertheless, not been forced to register under the Wetterling Act.¹⁶ This motivation is revealed in SORNA’s stated purpose, which is “to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below . . . establish[] a comprehensive national system for the registration of those offenders.”¹⁷ Following the stated purpose is a list of the seventeen victims for whom SORNA was enacted, along with a short description of what happened to them.¹⁸ This inclusion of the victims and their stories reveals the inherently politicized nature of SORNA and the Adam Walsh Act as a whole, as evidenced by the fact that

10. The act was named the Adam Walsh Act in memory of Adam Walsh, son of John and Revé Walsh, who was abducted and slain on July 27, 1981 in Hollywood Florida. After Adam’s tragic death, his parents “dedicated themselves to protecting children from child predators, preventing attacks on our children, and bringing child predators to justice.” Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 2, 120 Stat 587, 590 (2006).

11. Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20911, 20961-62 (2006).

12. Wetterling Act, 42 U.S.C. §§ 14071-73 (repealed 2006).

13. Lori McPherson, *Practitioner’s Guide to the Adam Walsh Act*, NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE (2007).

14. *Id.*

15. *Id.*

16. *Id.*

17. 34 U.S.C. § 20901 (2006).

18. *Id.*

“[d]ozens of states have declined to comply with this federal mandate, citing both federalism and cost concerns.”¹⁹

The inherently political nature of the Adam Walsh Act has caused a variety of problems, some of which will be discussed later in this Note. The particularly heinous nature of sex crimes, and the perceived political value in a politician being deemed “tough on crime,” creates incentives for politicians of all political persuasions to pass laws strongly condemning these crimes.²⁰ Sex offenders are easy targets for these laws for the simple reason that relatively few people are overly (or, for that matter, even slightly) concerned with protecting the rights of sex offenders.²¹ Nonetheless, SORNA is not immune from criticism for its lack of protections for the constitutional rights of sex offenders.²²

The primary treatment of foreign sex offense convictions is found in the definition section of SORNA. “A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 20912 of this title.”²³ A careful reading of this section compels an immediate question: what constitutes “sufficient safeguards for fundamental fairness and due process?”²⁴ The section directs the reader to section 20912, which states, in relevant part, “[t]he Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.”²⁵ Unfortunately, this only raises more questions, some of which will be discussed in a later section of this Note.

The government agency responsible for implementing SORNA is the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering,

19. *Scarlet Letters and Federal Mandates: Reconsidering Juvenile Sex Offender Registration and the Adam Walsh Act*, THE FEDERALIST SOC'Y, <http://www.fed-soc.org/multimedia/detail/scarlet-letters-and-federal-mandates-reconsidering-juvenile-sex-offender-registration-and-the-adam-walsh-act> (last visited Oct. 16, 2016).

20. As an example, the Adam Walsh Act was passed by a voice vote, indicating strong bipartisan support for the bill. *H.R. 4472 (109th): Adam Walsh Child Protection and Safety Act of 2006*, GOVTRACK, <https://www.govtrack.us/congress/bills/109/hr4472> (last visited Oct. 16, 2006).

21. Julia T. Rickert, Comment, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY 213, 217 (2010).

22. See *McCarty v. Roos*, 998 F. Supp. 2d 950 (D. Nev. 2014).

23. 34 U.S.C. § 20911 (2006).

24. *Id.*

25. 34 U.S.C. § 20912 (2006).

and Tracking, or the SMART office.²⁶ The SMART office promulgates the Final Guidelines, which provide the rules for the implementation of SORNA.²⁷ These guidelines are comprehensive, controlling everything from the “covered jurisdictions”²⁸ to the “enforcement of registration requirements.”²⁹ Section IV, Subsection B of the Final Guidelines addresses how foreign convictions are treated.³⁰ “Section 111(5)(B) of SORNA instructs that registration need not be required on the basis of a foreign conviction if the conviction ‘was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established [by the Attorney General].’”³¹

The Guidelines establish three categories of countries with regard to their safeguards for fundamental fairness and due process.³² The first category—encompassing Canada, the United Kingdom, Australia, and New Zealand—is deemed to have “sufficient safeguards for fundamental fairness and due process” as a matter of law.³³ As such, any sex conviction obtained under the laws of those countries requires the convicted person to register under SORNA.³⁴ The second category includes “convictions under the laws of any foreign country . . . if the U.S. State Department, in its Country Reports on Human Rights Practices, has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial in that country during the year in which the conviction occurred.”³⁵ Such convictions also require the offender to register under SORNA.³⁶

26. *Id.* at § 20945.

27. *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030 (July 2, 2008) [hereinafter *Final Guidelines*]. For ease of reference, all citations to the Final Guidelines will be made in reference to the PDF version of the guidelines available on the SMART website at https://ojp.gov/smart/pdfs/final_sornaguidelines.pdf.

28. *Final Guidelines*, *supra* note 27, § III.

29. *Id.* at § XIII.

30. *Id.* at § IV (B).

31. *Id.*

32. *Id.*

33. *Final Guidelines*, *supra* note 27, § IV (B). While neither the text of SORNA nor the Final Guidelines offers an explanation for the blanket acceptance of convictions from these countries, it is most likely due to the strong Common Law tradition they share with the United States. This will be further explained in Part III.

34. *Id.*

35. *Id.*

36. *Id.*

The third and final category carries the most potential for abuse. The third category encompasses convictions that do not fit into Category One or Two.³⁷ For Category Three convictions,

a jurisdiction is not required to register the convicted person if the jurisdiction determines—*through whatever process or procedure it may choose* to adopt—that the conviction does not constitute a reliable indication of factual guilt because of the lack of an impartial tribunal, because of denial of the right to respond to the evidence against the person or to present exculpatory evidence, or because of denial of the right to the assistance of counsel.³⁸

This catch-all provision allows a jurisdiction to exercise its discretion whether to require registration for certain foreign sex offense convictions. Such discretion opens the door for disparate treatment of offenders depending on locale. As if the third category of convictions were not troubling enough, the Final Guidelines' section on Foreign Convictions ends by allowing jurisdictions total discretion to choose to ignore these categories completely.³⁹

B. Federal Rule of Evidence 609

Federal Rule of Evidence (“FRE”) 609 allows for the impeachment of a witness through the introduction of evidence of a past criminal conviction.⁴⁰ For a past criminal conviction to be admissible, the conviction must have been for a crime that was punishable by death or imprisonment for more than one year in the convicting jurisdiction; it must be admitted in accordance with FRE 403; and, in a criminal case, the witness must not be a defendant.⁴¹ However, if the witness is a defendant, the evidence must be admitted “if the probative value of the evidence outweighs its prejudicial

37. *Id.*

38. *Final Guidelines, supra* note 27, § IV (B) (emphasis added).

39. *Id.*

The foregoing standards do not mean that jurisdictions must incorporate these particular criteria or procedures into their registration systems. Jurisdictions may wish to register all foreign sex offense convicts, or to register such convicts *with fewer qualifications or limitations* than those allowed [in the three categories] [J]urisdictions are free to require registration more broadly than the SORNA minimum.

Id. (emphasis added).

40. Fed. R. Evid. 609.

41. Fed. R. Evid. § (a)(1)(A).

effect to that defendant.”⁴² Additionally, “the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”⁴³

A further limit exists on the admissibility of previous convictions “if more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later.”⁴⁴ If more than ten years have passed from either the date of conviction or the release from confinement, then the conviction is admissible only if its probative value substantially outweighs any prejudicial effect; and the person offering the conviction as evidence give the other party reasonable written notice that the conviction will be offered as evidence.⁴⁵ These limitations to the use of prior convictions for impeachment purposes can be summed up into three major exceptions:

First, a court may not allow such prior conviction evidence if the prejudicial effect of the evidence outweighs its probative value. Second, only convictions within the last ten years may be used to impeach the defendant’s credibility. Third, only felony convictions or [those] misdemeanor convictions which involved dishonesty or false statements may be used.⁴⁶

Although not explicitly mentioned, FRE 609 also regulates the admissibility of foreign convictions.⁴⁷ This absence of an explicit mention of the treatment of foreign convictions may be due to the relatively recent development of state law explicitly concerned with foreign convictions.⁴⁸ However, due to the increasingly global society we live in, more Americans have the opportunity to be convicted of foreign sex crimes, and there is an

42. Fed. R. Evid. § (a)(1)(B).

43. Fed. R. Evid. § (a)(2).

44. Fed. R. Evid. § (b).

45. Fed. R. Evid. 609 § (b)(1)-(2).

46. Robert D. Dodson, *What Went Wrong With Federal Rule Of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 2 (1999).

47. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 568 (2014).

48. Martha Kimes, Note, *The Effect of Foreign Criminal Convictions under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT’L L. 503, 505 (1997); see also A. Kenneth Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 UMKC L. REV. 114, 116 (1964).

increase in the number of visitors coming to the United States who may have sex offense convictions from other countries.⁴⁹

It is difficult to determine exactly how many witnesses have been impeached through the admission of evidence of foreign sex convictions. However, given the increase in the rate of “sex tourism,” particularly child sex tourism, it is inevitable that there will be an increase in foreign sex convictions, which logically would lead to an increase in the availability of FRE 609 as a method of impeachment.⁵⁰

III. THE LACK OF DUE PROCESS FOR SEX OFFENDERS: A CALL TO REEVALUATE

A. *The SORNA Final Guidelines Due Process Requirements*

1. Class 1 Jurisdictions⁵¹

Convictions within a Class 1 jurisdiction are *per se* registrable under the Final Guidelines. In other words, they were “obtained with sufficient safeguards for fundamental fairness and due process for the accused.”⁵² There are four countries which fall into Class 1: Canada, the United Kingdom, Australia, and New Zealand.⁵³ Notably, the Final Guidelines go beyond stating that Class 1 jurisdictions satisfy the fundamental fairness and due process requirements to specify that “registration must be required for such convictions on the same footing as domestic convictions.”⁵⁴ This requirement means that even if a state were to undertake an inquiry into the fairness of a conviction from Canada, and determine that there was a lack of fundamental fairness, the state is barred from protecting its citizen from an unjust registration requirement.

Admittedly, the likelihood of an unjust conviction under the laws of Canada, or the other three Class 1 jurisdictions, does not appear to be great. The four nations which comprise Class 1 jurisdictions all enjoy the same

49. Kimes, *supra* note 48, at 505.

50. *Extraterritorial Sexual Exploitation of Children*, U.S. DEPT. OF JUSTICE CHILD EXPLOITATION AND OBSCENITY SECTION, <https://www.justice.gov/criminal-ceos/extraterritorial-sexual-exploitation-children> (Jan. 25, 2016).

51. While SORNA does not explicitly refer to the various jurisdictions as Class 1, 2, or 3, it does implicitly recognize three distinct categories of foreign jurisdictions. The Class 1, 2, and 3 Jurisdiction nomenclature is of my own design, and is intended for ease of understanding. It will be used throughout this Note.

52. *Final Guidelines*, *supra* note 27, § IV(B).

53. *Id.*

54. *Id.*

common-law tradition as the United States, derived from English common law.⁵⁵ As such, certain fundamental concepts such as the rule of law and due process are cornerstones of the legal systems of the four nations. However, the presence of a common-law tradition, with its inherent protections, is what makes the extra stipulation in the Final Guidelines so peculiar and disturbing. Assuming there is merely a miniscule risk of an individual having their due process rights violated by a Class 1 jurisdiction, what harm could possibly arise by allowing a state to allow judicial inquiry into whether such a violation occurred?⁵⁶

An individual convicted of a sex offense within the United States is entitled to challenge his or her conviction and have it overturned, if there was not sufficient safeguards for fundamental fairness and due process.⁵⁷ Yet, the current enforcement measures of SORNA do not afford a U.S.

55. This English common law tradition of the four Class 1 jurisdictions as well as the United States is unsurprising, as all were established as British colonies. While the United States, Australia, Canada, and New Zealand have all severed ties to the United Kingdom to varying degrees, they have all maintained their respective judicial systems which were built upon the English common law.

56. Undoubtedly this question would be answered by both courts and the SMART office by stating the need for judicial economy, and the undesirability of retrying a case which was tried in a judicial system presumably very similar to ours. Admittedly, the likelihood of serious violations of due process and fundamental fairness are rare from Class 1 jurisdictions. In light of that, a solution which should satisfy those concerned for judicial economy is already in place. A motion to dismiss after the complaint is filed would provide ample opportunity for the registering jurisdiction and the court to dispose of false claims of due process violations. In all likelihood, the majority of filings would be dismissed, thus preserving the court's time, as well as providing a method for judicial relief for any unfortunate individual who may be convicted without due process in a Class 1 jurisdiction.

57. All U.S. citizens are entitled to sue their respective states for violations of the due process guarantees of the Fourteenth Amendment under 42 U.S.C. § 1983, which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id. Additionally, federally convicted prisoners may petition to have their sentence overturned for a number of reasons, such as ineffective assistance of counsel or gross misapplications of the United States Sentencing Guidelines. *See* 28 U.S.C. § 2255 (2012).

citizen who is convicted in a Class 1 jurisdiction that same right, leading to the bizarre implication that the U.S. government has more faith in the ability the judicial systems of other countries to provide sufficient safeguards for due process and fundamental fairness than it does in the U.S. judicial system. In reality, the more likely reason for this flaw in the law is the U.S. government's lack of care for the rights of convicted sex offenders.

2. Class 2 Jurisdictions

Similar to Class 1 jurisdictions, convictions from a Class 2 jurisdiction require registration. However, unlike the four Class 1 jurisdictions, Class 2 jurisdictions are defined by the U.S. State Department. They also are not necessarily common law nations.

Sex offense convictions under the laws of any foreign country are deemed to have been obtained with sufficient safeguards for fundamental fairness and due process if the U.S. State Department, in its Country Reports on Human Rights Practices, has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial in that country during the year in which the conviction occurred.⁵⁸

There are several particularly troubling implications from the definition of a Class 2 jurisdiction. First, the State Department must only have determined that a nation's independent judiciary "*generally* (or vigorously) enforced the right to a fair trial."⁵⁹ The fact that a nation generally enforces the right to a fair trial is surely of little comfort to a defendant who is denied due process or a fundamental fairness in his particular trial. Yet, despite the lack of a determination that each particular trial was actually fair, a conviction from a Class 2 jurisdiction requires registration on par with a Class 1 jurisdiction.

Another issue with the treatment of a conviction from a Class 2 jurisdiction is that such a conviction is given parity equal to a domestic conviction, as well as a conviction from a Class 1 jurisdiction.⁶⁰ While a Class 1 jurisdiction is at least a common-law nation with a legal tradition similar to that of the United States, a Class 2 jurisdiction could follow any

58. *Final Guidelines*, *supra* note 27, § IV(B).

59. *Id.* (emphasis added).

60. *See supra* Part III.A.1.

schema of law. One such country that would require automatic registration as a Class 2 jurisdiction is Colombia.⁶¹

According to the Reports on Human Rights Practices for 2015, Colombia generally respected judicial independence and provided for a fair public trial, making it a Class 2 jurisdiction.⁶² The report noted that defendants are presumed innocent until proven guilty, that they have the right to present their own evidence, and have an attorney present.⁶³ However, Colombia's criminal system does not give defendants a right to a jury.⁶⁴ Granted, the lack of a jury is arguably insufficient to undermine the fairness or due process of a trial. Yet, what makes the report particularly troubling is that in it, the State Department noted that "[m]uch of the judicial system was overburdened and inefficient, and subornation and intimidation of judges, prosecutors, and witnesses hindered judicial functioning."⁶⁵ This rather shocking finding means that the State Department considers a country where the judges are subject to "subornation and intimidation," and who are "overburdened and inefficient" to be a country that generally enforces the right to a fair trial.⁶⁶ This is an especially questionable assessment since Colombia has no juries to counterbalance the ineffectiveness of these judges.⁶⁷

Hypothetically, an individual could be falsely accused of a sex offense in Colombia, prosecuted by a bribed prosecutor, and declared guilty of the sex offense by a judge who has been intimidated. Upon entering the United States that individual would have to register as a sex offender, even if he could provide the registering jurisdiction with concrete, absolute proof of the corrupt nature of the judicial proceeding. The U.S. court would be bound because the Final Guidelines do not allow a state to investigate the fairness of a conviction from a Class 2 jurisdiction.⁶⁸ Such a conviction is placed on the same footing as a domestic conviction. This constitutes an

61. Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices for 2015 for Colombia*, U.S. DEPT. OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/2015/wha/253001.htm>.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices for 2015 for Colombia*, U.S. DEPT. OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/2015/wha/253001.htm>.

67. *Id.*

68. *Final Guidelines*, *supra* note 27, § IV(B).

absolute abrogation of any duty a state has to protect the due process rights of its citizens.

3. Class 3 Jurisdictions

Any jurisdiction which does not fall into either Class 1 or 2 is by default a Class 3 jurisdiction. When confronted with a conviction from a Class 3 jurisdiction, the local state registry is

not required to register the convicted person if the jurisdiction determines—through whatever process or procedure it may choose to adopt—that the conviction does not constitute a reliable indication of factual guilt because of the lack of an impartial tribunal, because of denial of the right to respond to the evidence against the person or to present exculpatory evidence, or because of denial of the right to the assistance of counsel.⁶⁹

A state is at least allowed to make an inquiry into the procedure of a conviction from a Class 3 jurisdiction, but there remain several insufficient aspects of the treatment of Class 3 convictions. First, there is no actual protection afforded to defendants convicted in Class 3 jurisdictions, despite language that purportedly offers some protections. The language, “a jurisdiction is *not required* to register,”⁷⁰ does not mean that a state cannot register a convicted sex offender if there was no due process. Instead, it simply allows a state to choose whether to register the offender. Nowhere is there a *prohibition* on registering a convicted offender, even if the state undertakes a thorough investigation and determines the individual was railroaded by a kangaroo court in a sham trial.⁷¹

Furthermore, a state may elect a rigorous investigation into the fairness of a trial, a precursory investigation, or presumably no investigation at all.⁷² A country is considered a Class 3 jurisdiction if it does not follow the common-law tradition shared by the Class 1 jurisdictions. Additionally, the country does not qualify as a Class 2 jurisdiction, meaning the US Department of State has looked at the country and determined that within

69. *Id.*

70. *Id.* (emphasis added).

71. *Id.*

72. *Id.* (stating that a state may utilize “whatever process or procedure it may choose to adopt”).

the last year, it has not even *generally* upheld and guaranteed due process and fundamental fairness principles in its tribunals.⁷³

The United States Constitution grants specific protections for due process rights,⁷⁴ such as the right to a fair trial,⁷⁵ the right for the accused to confront his accuser,⁷⁶ and the right for the accused to be judged by a jury of her peers.⁷⁷ There is no adequate reason offered by either SORNA or the Final Guidelines to allow states such leeway in choosing whether to protect the rights guaranteed to U.S. citizens, even those convicted of heinous crimes.

B. *Registration Without Representation*

In order to gain a comprehensive understanding of the predicament in which those convicted of sex offenses in foreign jurisdictions find themselves, the process through which registration occurs must be evaluated. First, the process for those convicted in the United States of sex crimes requiring registration will be discussed. Then, that process will be contrasted with the one required for those convicted in foreign jurisdictions.

1. Registration for Domestic Sex Offense Convictions

The procedure for initial registration for domestic sex offenders is laid out in Section IX of the Final Guidelines.⁷⁸ For an incarcerated sex offender, the jurisdiction must require registration prior to release from incarceration.⁷⁹ Traditionally, the sentencing court will forward the required information to the registration office,⁸⁰ making the registration process automatic with no effort from the offender. For an offender who was given a non-imprisonment sentence, the offender must register within three business days of sentencing.⁸¹ This is also often done automatically.⁸²

73. *Final Guidelines*, *supra* note 27, § IV(B); *see also*, *supra* Part III.A.2.

74. U.S. CONST. amend. IV, V, XIV.

75. U.S. CONST. amend. VI.

76. U.S. CONST. amend. VI.

77. U.S. CONST. amend. VI.

78. *Final Guidelines*, *supra* note 27, § IX. The Guidelines refer to §§ 113(b) and 117(a) of SORNA as the legislative authority for determining initial registration.

79. *Id.*

80. Interview with Caren Harp, Associate Professor, Liberty University School of Law, in Lynchburg, VA (Oct. 27, 2016).

81. *Final Guidelines*, *supra* note 27, § IX.

The Final Guidelines provide a helpful three-step registration procedure, which envisions the registering agency doing the following:

- Informing the sex offender of his or her duties under SORNA and explaining those duties[;] . . .
- Requiring the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement[; and finally]
- Ensuring that the sex offender is registered—i.e., obtaining the required registration information for the sex offender and submitting that information for inclusion in the registry.⁸³

Once the initial registration information is entered into the registry, the “initial registration jurisdiction must immediately forward the registration information to all other jurisdictions in which the sex offender is required to register.”⁸⁴ The required information that must be made publicly available includes the following:

- The name of the sex offender, including any aliases;
- The address of each residence at which the sex offender resides or will reside . . . ;
- The address of any place where the sex offender is an employee or will be an employee . . . ;
- The address of any place where the sex offender is . . . or will be a student;
- The license plate number and a description of any vehicle owned or operated by the sex offender;
- A physical description of the sex offender;
- The sex offense for which the sex offender is registered and any other sex offense for which the sex offender has been convicted;
- A current photograph of the sex offender.⁸⁵

The offender must “register and keep the registration current in each jurisdiction in which the sex offender resides, is an employee, or is a

82. Interview with Caren Harp, Associate Professor, Liberty University School of Law, in Lynchburg, VA (Oct. 27, 2016).

83. *Final Guidelines*, *supra* note 27, § IX.

84. *Id.*

85. *Final Guidelines*, *supra* note 27, § VII (“Discretionary Exemptions and Required Inclusions”).

student.”⁸⁶ Additionally, for the initial registration, the “offender must also register in the jurisdiction in which convicted if it is different from the jurisdiction of residence.”⁸⁷

2. Registration for Foreign Convictions

Under § 128 of SORNA, “the Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, [must] establish a system for informing the relevant jurisdictions about persons entering the United States who are required to register under SORNA.”⁸⁸ As the Guidelines point out, because the foreign offender is convicted and imprisoned in a foreign country, there would be no domestic jurisdiction in place to register the offender prior to his release from incarceration.⁸⁹ Thus, the Guidelines set the following procedure for foreign convicted offenders to follow for registration:

A jurisdiction must require a person with a foreign conviction for which registration is required under SORNA to appear in person to register within three business days of entering the jurisdiction to reside or commencing employment or school attendance in the jurisdiction. If the sex offender has not previously been registered by another jurisdiction, the jurisdiction must carry out the initial registration procedure . . . when the sex offender appears. The jurisdiction must immediately forward the registration information to any other jurisdiction in which the sex offender is required to register under SORNA. If a jurisdiction is notified . . . that a sex offender is entering the United States and is expected to be locating in the jurisdiction, but the sex offender fails to appear and register as required, the jurisdiction must follow the procedures discussed in [Section XII of the Final Guidelines] for cases involving possible violation of registration requirements.⁹⁰

The key distinction between registration resulting from conviction in a foreign jurisdiction and conviction domestically is the shifting burden of who must register the offender. While in both cases the ultimate responsibility lies with the offender, for those with domestic convictions,

86. *Id.* at § VIII.

87. *Id.*

88. *Id.* at § X, Registrants Based on Foreign Convictions.

89. *Id.* at IX.

90. *Final Guidelines*, *supra* note 27, § IX.

the registration is handled by the sentencing court.⁹¹ For those with foreign convictions, the burden is on the offender to present himself for registration upon entering the United States.⁹² This shifting burden is important because of the potential consequences a non-registering offender faces.

In the case of an individual who was wrongly convicted in a foreign jurisdiction, or who was convicted without any due process or fundamental fairness, the individual is faced with a Morton's Fork: either register for an offense, which he should not have been convicted of, thereby branding himself as a sex offender; or not register at all, and face both federal and state criminal charges.⁹³ It is in this situation that the previously described lack of protections for due process become so critical. The only way for any judicial review of a foreign conviction would be if the individual failed to register, was arrested, and then asserted that the conviction should not require registration. There is no method for the individual to seek a pre-registration judicial review. Such a review is unnecessary for domestic convictions because the offender will have had ample opportunity both in the trial phase, as well as at the appellate level, to challenge the conviction. Those same options are not available to an individual who was denied any semblance of due process in a foreign tribunal.⁹⁴

Furthermore, as noted above in Part III.A., it is doubtful that judicial review would even be effective. States are free to forego any inquiry at all into the fundamental fairness of foreign tribunal proceedings, and are free to require registration regardless of the lack of any due process protections. Even if a judge were to choose to review a registration requirement, it is unclear whether the judge would be able to provide any relief. This is illustrated clearly in *McCarty v. Roos*,⁹⁵ a Nevada case dealing with a sex conviction from Japan.

91. *Id.* at § IX.

92. *Id.* at § IX ("Registrants Based on Foreign Convictions).

93. SMART, *Sex Offender Registration and Failure to Register FAQs*, OFFICE OF JUSTICE PROGRAMS, http://ojp.gov/smart/faqs/faq_registration.htm#12 (last visited Nov. 12, 2016).

If a sex offender convicted or adjudicated delinquent in a jurisdiction's court is required to register under SORNA, and knowingly fails to register or update a registration as required, and the sex offender engages in interstate or international travel or enter or leaves or resides in Indian country, then the offender can be prosecuted under 18 U.S.C. §2250, the federal failure-to-register offense.

Id.

94. Thankfully, there is an easily effected solution to this problem which will be discussed *infra* in Part IV.

95. *McCarty v. Roos*, 998 F. Supp. 2d 950 (D. Nev. 2014).

3. *McCarty v. Roos*

In 2003, U.S. citizen Robert McCarty was convicted of “Quasi Indecent Assault” in Japan.⁹⁶ The Japanese court found that McCarty was guilty of “inappropriately touch[ing] three underage students on a number of occasions.”⁹⁷ At some point later, McCarty returned to the United States where he was forced to register as a sex offender under SORNA.⁹⁸ McCarty sued for injunctive relief, “including (1) a declaration that he was denied due process and thus cannot be made to register as a sex offender; (2) expungement of federal and state files relating to his designation as a sex offender; and (3) a full name and identity change.”⁹⁹ He further sought damages of \$650,000.¹⁰⁰ McCarty claimed he was entitled to this relief because “the Japanese conviction was obtained in a judicial system that is deficient of constitutional safeguards, including substantive and procedural due process.”¹⁰¹

The district court correctly noted that McCarty was convicted in a Class 2 jurisdiction,¹⁰² and that the State Department found that Japan “generally respected in practice the constitutional provisions for the right to a speedy and public trial by an impartial tribunal in all criminal cases.”¹⁰³ In all the various decisions issued by the court, the same result was found—McCarty had not suffered any wrong—and, therefore, no judicial remedy was available to him.¹⁰⁴ The same court analyzed, among other claims, McCarty’s claims that SORNA’s foreign conviction provision is unconstitutionally vague, and that it violates procedural due process rights.¹⁰⁵

96. *McCarty v. Roos*, No. 2:11-CV-1538 JCM (RJJ), 2012 WL 6138313 *1 (D. Nev. Dec. 7, 2012). Westlaw reveals a total of twelve separate court opinions, each with separate Westlaw references, which make up of the totality of litigation between McCarty and Roos. Unfortunately, no one case provides the entire factual background. When possible, citations will be made to the case found at 998 F. Supp. 2d 950 as that is the only published decision.

97. *McCarty v. Roos*, No. 2:11-CV-1538 JCM (NJK), 2014 WL 4829013 *3 (D. Nev. Sept. 30, 2014).

98. *McCarty*, 2012 WL 6138313 at *1.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at *2. For a description of Class 2 Jurisdictions, see *supra* Part III.A.2.

103. *McCarty*, 2012 WL 6138313 at *3.

104. *See id.*; *see also* *McCarty v. Roos*, 998 F. Supp. 2d 950, 957 (D. Nev. 2014).

105. *McCarty*, 2012 WL 6138313 at *4.

a. Unconstitutional Vagueness

The court noted that a two-part test is used to determine if a statute is void for vagueness: first, the court will “determine whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited;” second, the court must consider “whether the law provides explicit standards for those who apply it.”¹⁰⁶ The court determined that SORNA, and the accompanying guidelines, satisfy the first test.¹⁰⁷ Specifically, the court noted that “a person of ordinary intelligence [has] express notice that to be considered a sex offense requiring registration under SORNA, a foreign conviction must meet standards for fairness and due process that are established by specific guidelines.”¹⁰⁸

This determination was in error. While it is true that SORNA does require that a foreign conviction meet standards for fairness and due process, the guidelines that set out those standards are themselves vague.¹⁰⁹ Unfortunately, while the court properly looked to whether there were guidelines in place, its analysis stopped too soon.

The court ignored the fact that, while the statute references guidelines and regulations, it did not look into the regulations themselves. It is unjust to find a statute contains the requisite specificity because it refers to guidelines and regulations, when those clarifying regulations themselves do not provide the requisite specificity. The purpose of requiring specificity in a statute is to “give[] the person of ordinary intelligence a reasonable opportunity to know what is prohibited.”¹¹⁰ Yet, a person of even extraordinary intelligence cannot have a reasonable opportunity to know what is prohibited or required if a state is free to arbitrarily select any standard of fairness and due process it so desires.

The court also found that SORNA passed the second prong of the vagueness test, stating “[t]he standards outlined in the SORNA Guidelines explicitly state how courts should treat foreign convictions depending on

106. *Id.* (quoting *Pest Comm. v. Miller*, 626 F.3d 1097, 1111 (9th Cir. 2010)).

107. *Id.*

108. *Id.*

109. This vagueness is discussed in detail *supra* in Part III.A. Essentially, while the Final Guidelines establish a list of jurisdictions from which convictions are always deemed to have met standards of fairness and due process, nowhere do the guidelines establish what actually constitutes that fairness and due process. Additionally, if a registering state so chooses, it may treat every conviction as having been obtained with fairness and due process, without any investigation whatsoever.

110. *McCarty*, 2012 WL 6138313 at *4.

the country of origination.”¹¹¹ The court here was correct, albeit for an unjust reason. Courts are explicitly told how to treat foreign convictions; they are told to register all offenders from certain countries, regardless of whether those countries actually impose safeguards for fairness and due process generally, and regardless of whether those safeguards were present in any particular case.¹¹²

b. Procedural due process

The court next turned to a procedural due process analysis of SORNA’s application to McCarty.¹¹³ It did so by applying the Ninth Circuit’s two-step inquiry when evaluating procedural due process, which “first asks whether there exists a liberty or property interest which has been interfered with by the State; [and second,] examines whether the procedures attendant upon that deprivation were constitutionally sufficient.”¹¹⁴ The court first refused to acknowledge that McCarty had any sort of liberty interest in not being forced to register as a sex offender, thereby rendering any procedural due process claim moot.¹¹⁵ Then, the court continued its analysis to say that even if there was a protected liberty interest, it was not violated.¹¹⁶

The court rested its conclusion on Ninth Circuit precedent which stated that “because SORNA’s registration requirements ‘turn on an offender’s conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest—no additional process is required for due process.’”¹¹⁷ There are two issues with the court’s reliance on *Juvenile Male* in this case. First, the Ninth Circuit expressly depended on the offender having had an opportunity to contest his conviction in a procedurally safeguarded hearing.¹¹⁸ However, McCarty alleged that he was deprived of due process in his conviction, even alleging that his conviction

111. *Id.*

112. Of course, as discussed in Part III.A, *supra*, there is a semblance of a safeguard in that, by definition, Category 2 Jurisdictions must have been found by the U.S. Department of State to have generally provided safeguards for fairness and due process. Part III.A.2, *supra*, explains why that nominal protection is inadequate.

113. *McCarty*, 2012 WL 6138313 at *5.

114. *Id.* (quoting *United States v. Juvenile Male*, 670 F.3d 999, 1013 (9th Cir. 2012)).

115. *Id.* (relying on a Supreme Court of the United States decision which held that sex offenders do not have a liberty interest in being free from adverse publicity or reputational harm); see also *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003).

116. *McCarty*, 2012 WL 6138313 at *5.

117. *Id.* (quoting *United States v. Juvenile Male*, 670 F.3d 999, 1014 (9th Cir. 2012)).

118. *Juvenile Male*, 670 F.3d at 1014.

was “obtained as a result of ‘undisputed Japanese torture.’”¹¹⁹ While the court was not obligated to believe McCarty’s allegation, general principles of fairness and due process would dictate that the court at least acknowledge such an allegation, even if to state that it finds it inadequate. The court did not do so in McCarty’s case.¹²⁰

The second issue with the court’s reliance on *Juvenile Male* is that the precedent itself is flawed. The court in *Juvenile Male* asserted that a convicted offender has had a procedurally safeguarded opportunity to contest his potential conviction. Yet, under SORNA’s foreign conviction registration requirements, that is incorrect because the standard for a Class 2 Jurisdiction is that the State Department finds the jurisdiction generally upheld principles of fairness and due process.¹²¹ There is no requirement that the defendant actually received due process in an individual trial. By relying on *Juvenile Male*, the *McCarty* court approved the flawed circular logic that because the trial results in a conviction and a conviction is what triggers the registration requirement, due process is satisfied, even when no due process is received.

The court next listed several deficiencies in the Japanese criminal process before summarily dismissing them with citations to the Japan Country Reports from the State Department.¹²² Those deficiencies include “the absence of a trial by jury, issues relating to obtaining qualified interpreters for foreign defendants, and issues relating to defendants’ access to police records and other evidence.”¹²³ The court noted that the State Department acknowledged these deficiencies, but ultimately found Japan “generally respected in practice the constitutional provisions for the right to a speedy and public trial by an impartial tribunal in all criminal cases.”¹²⁴ The State Department reports also found that “a criminal defendant in Japan was presumed innocent, assured a public trial by an independent civilian court with defense counsel, had the right to cross-examination . . . [and] had access to private counsel.”¹²⁵ Relying on the fact that McCarty did not point to any authority that would show the reports are inaccurate, the court found

119. *McCarty v. Roos*, No. 2:11-CV-1538 JCM (NJK), 2014 WL 4829013, *3 (2014).

120. The court does, however, reference McCarty’s allegation that his trial was not fair two paragraphs later but it does so only to say that even if McCarty’s allegations were true, he was still not entitled to additional process. Referring to the allegations in that context does not provide a justification for the court’s reliance on *Juvenile Male*.

121. *Final Guidelines*, *supra* note 27, § IV(B).

122. *McCarty*, 2012 WL 6138313 at *5-6.

123. *Id.* at *5.

124. *Id.* (referencing the 2002 and 2003 Japan Country Reports).

125. *Id.* at *6.

that there was nothing to indicate “that the process provided by SORNA is inadequate.”¹²⁶

What the court failed to recognize is that the mere availability of those rights does not guarantee due process, if the rights cannot effectively be used. For example, the court noted approvingly that the accused in Japan was entitled to private defense counsel. However, that defense counsel cannot be considered effective when a foreign accused cannot obtain a qualified interpreter. The accused is also entitled to cross-examine opposing witnesses, but cannot do so properly without full access to police records and other evidence. These competing realities highlight two issues. First, it highlights why a finding that a country *generally* guarantees fairness and due process can result in a complete lack of due process for the individual. Second, it shows why it is so vital that courts be empowered to independently evaluate whether due process was actually afforded on an individual level.

McCarty is but one example of the harmful potential of SORNA. While the lack of guaranteed due process is problematic in and of itself, it becomes more so in light of the Sex Offender Management Assessment and Planning Initiative (“SOMAPI”) report. SOMAPI is a report filed by the SMART office which reports on the methods and efficacy of SORNA.¹²⁷ The report found that

[s]ome studies find lower rates of sex crimes following SORN implementation, while others do not. Studies based on a comparison of outcomes for sex offenders subject and not subject to SORN also produced mixed findings. An arguable lack of sufficient scientific rigor may further cloud the import of studies in this area. Therefore, the results of SORN research undertaken to date continue to leave open questions about the

126. *Id.* As of Sept. 30, 2016, *McCarty* still has not been able to attain judicial relief, or even review, of the actual presence of due process in his trial. His counsel filed an appeal on Oct. 7, 2014 with the Ninth Circuit Court of Appeals which has not yet been heard. *McCarty v. Roos*, No. 14-16934 (9th Cir. Oct. 7, 2014).

127. OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, SEX OFFENDER MGMT. ASSESSMENT & PLAN. INITIATIVE (2014). Due to the federal government’s proclivity for distilling all of its actions into a veritable alphabet soup of agencies and acts, a brief review of the above-mentioned agencies follows. The SMART office is the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, and, in addition to filing the SOMAPI report, it is responsible for promulgating the Final Guidelines used to implement SORNA, the Sex Offender Registration and Notification Act.

effects of registration and community notification requirements.¹²⁸

This report highlights two key problems with the current treatment of foreign sex offenders. First, by SMART's own admission, it is unclear whether the registration of sex offenders in general has any positive effect on society. Second, there has been insufficient research regarding whether the goals of SORNA are actually being realized through the methods implemented by the Final Guidelines. What SMART has put into place through the Final Guidelines is a system of uncertain efficacy that allows for the denial of due process rights of United States citizens without allowing them a means of judicial redressability. While it is a basic principal of Constitutional law that fundamental rights such as due process may be infringed upon by the State for matters of great necessity, the infringement here cannot be justified when the State itself admits it is unsure whether there is any value to its actions.

C. *Foreign Convictions and Federal Rule of Evidence 609*

Federal Rule of Evidence 609 allows for the impeachment of witnesses through the admission of evidence of foreign convictions. While the rule itself is one which has been derided and subject to impassioned calls for its recession,¹²⁹ this Section will focus on the potential for abuse of the rule which is made possible by the Final Guidelines.

FRE 609 was enacted by Congress amidst much debate.¹³⁰ In the House of Representatives, the debate focused on two competing concerns: a desire for fairness for both the prosecution and the defense. In fact, the record of the debate occupies more pages in the Congressional Record than that occupied by the rest of the Federal Rules of Evidence combined.¹³¹ The concerns for the defendant are particularly relevant, due to the extremely prejudicial nature of any prior conviction, let alone one for a sex offense. As Senator Ted Kennedy stated,

Mr. President, all authorities agree that the greatest source of prejudice to a defendant is a prior felony conviction. Thus, many

128. *Id.* at 161.

129. See, e.g., Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A look at How Jurors Really Misuse Prior Evidence Conviction Evidence*, 48 DRAKE L. REV. 1 (1999).

130. *Id.* at 7.

131. Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2302-03 (1994).

innocent defendants will not take the stand to testify in their own defense, if a prior felony conviction can be used against them. Jurors may conclude that the defendant is guilty because he has not taken the stand. On the other hand, if the defendant does testify, the jury may base its verdict on his prior conviction, rather than solely the evidence before it.¹³²

As Senator Kennedy noted, under FRE 609, a defendant with a previous felony conviction is faced with two unappealing options. The defendant may take the stand in his own defense (a right that all defendants possess), and as a result allow the prosecution to introduce evidence of his prior conviction, which could color the jury's opinion of the defendant. Alternatively, the defendant could refuse to take the stand, which again can negatively color the jury's opinion under a belief that any innocent person would choose to testify on his own behalf. Herein lies the problem for a defendant forced to register under SORNA because of a foreign conviction.

The issue here can best be illustrated through a hypothetical. Assume John is a man who is currently the defendant in a sexual assault case. Three years prior, John was convicted of felony rape in a Category 2 jurisdiction. In fact, John committed no rape. However, John did not receive anything resembling due process in the foreign court. He was denied access to an attorney, could not present evidence in his favor, and was summarily sentenced by the judge after only a five-minute argument presented by the prosecutor. By any measure, he was denied all due process and fundamental fairness.¹³³ After his two-year incarceration, he returned to the United States where he was forced to register as a sex offender under SORNA.¹³⁴

132. *Id.* at 2305 n.57 (citing 120 Cong. Rec. 37,080 (1974)).

133. As described *supra* in Part III.A.2, a Category 2 jurisdiction must only have *generally* enforced the right to a fair trial, as determined by the United States Department of State. In fact, several countries, such as Colombia, were found to have generally enforced the right to a fair trial even while the State Department noted several significant and troubling deviations from both due process and fundamental fairness. The situation presented in this hypothetical is entirely plausible in Colombia according to the State Department's findings.

134. This is assuming John would actually comply with the law and register. It is entirely plausible that John would have no reason to suspect he is required to register as he was innocent of the crime for which he was unjustly convicted. Additionally, unless the foreign state has an agreement with the United States which provides that the foreign state will report any convictions of United States citizens to the United States, John may decide that it is better to not register and report his conviction to avoid the consequences of being placed on the registry. John must therefore choose between registering himself as a sex offender for a crime he did not commit, or risk the consequences of his non-registration if his conviction were somehow discovered.

During the current trial, John is faced with a difficult decision. He knows that if he can testify on his own behalf, he can show that he is completely innocent of the current sexual assault charge. Or, he can refuse to testify on his own behalf and risk the jury believing that only a guilty man does not defend himself. However, the prosecutor knows that John is a registered sex offender. If John were to take the stand, the prosecutor could seek to admit John's status as a sex offender as evidence of his foreign conviction.¹³⁵ Under FRE 609, this evidence must be admitted. It is a crime that was punishable in the convicting jurisdiction by imprisonment for more than one year,¹³⁶ and it is highly probative since John is currently on trial for the same offense.¹³⁷ Additionally, the conviction was within the last ten years,¹³⁸ there was no pardon, annulment, or certificate of rehabilitation,¹³⁹ and it was not a juvenile adjudication.¹⁴⁰

Of course, the evidence of the conviction could only be admitted under the guise of discrediting John's testimony, but the common inherent disdain of sex offenders would almost certainly color the juror's opinion of John, as well as the evidence presented against him.¹⁴¹ Assuming John is innocent of the current rape charge as well, it is entirely possible that John could be convicted based solely on a jury's predilection to believe a sex offender will commit additional sex offenses.¹⁴²

135. The argument would likely flow as follows: only those convicted of sex offenses must register under SORNA, John is a registered sex offender; therefore, John has been convicted of a sex offense.

136. FED R. EVID. 609(a)(1).

137. FED R. EVID. 609(a)(1)(B).

138. FED R. EVID. 609(b). Arguably the evidence would be admissible under FED R. EVID 609(b) even if the conviction had been from longer than ten years ago due to the similarity of the offenses.

139. FED R. EVID. 609(c).

140. FED R. EVID. 609(d).

141. For an excellent argument in favor of never allowing previous sex crime convictions as impeachment evidence due to the overwhelmingly prejudicial nature which always surpasses any probative value of the convictions, see Julia T. Rickert, Comment, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY 213, 217 (2010),

142. Notwithstanding John's innocence here, a predilection to believe that sex offenders will offend again is reasonably well founded, as "[r]esearch has demonstrated that repeat offenders account for a disproportionate amount of crime and that offenders released from prison are arrested at rates 30 to 45 times higher than the general population." OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, SEX OFFENDER MGMT. ASSESSMENT & PLAN. INITIATIVE (2014) (internal citation omitted) (noting

The end result for John is that he is injured multiple times. First, he is the victim of a corrupt foreign judicial system which, in a sham trial, convicted him of a crime of which he is innocent. Then, the laws of his country, SORNA and the Final Guidelines, injure him by forcing him to register as a sex offender, under penalty of imprisonment, for a crime he never committed, without allowing him any judicial redressability to challenge the unjust conviction. Finally, he is forced to choose between participating in his own defense or accepting the stigmas and prejudices that are associated with being a registered sex offender. This is the reality for an individual who is in John's shoes.

IV. LOOKING TO THE UCCJEA AS A WAY FORWARD

It is clear that the current system under SORNA cannot be allowed to continue. However, rather than scrapping the current treatment of foreign convictions entirely, an easily applied alternative may be derived from the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"),¹⁴³ and its application by a Washington State court in *In Re Marriage of Donboli*.¹⁴⁴

A. In Re Marriage of Donboli

In *Donboli*, the Washington Court of Appeals had to decide whether to enforce a child custody determination given by an Iranian Court.¹⁴⁵ Bita Donboli ("Wife") filed suit for the divorce of her husband, Nader Donboli ("Husband") in Washington.¹⁴⁶ Both Husband and Wife were dual citizens of the United States and Iran.¹⁴⁷ After the birth of their son, Wife travelled to Iran to receive help raising the child from her mother, and Husband later joined her in Iran.¹⁴⁸ Upon Husband's arrival in Iran, he violently beat Wife to the point that she required hospitalization for two weeks and subsequent

that true sex offense recidivism rates for sex offenders are likely higher than reported due to the high number of unreported sex offenses which occur).

143. UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1997).

144. *In re Marriage of Donboli*, 128 Wash. App. 1039 (2005) (case internally paginated beginning at *1).

145. *Id.* at *1.

146. *Id.*

147. *Id.*

148. *Id.* at *2.

physical therapy.¹⁴⁹ After a great deal of trouble circumventing Husband's attempts to stop her, Wife was able to return to the United States.¹⁵⁰

The case contains a voluminous timeline of events, as both parties filed for divorce, Husband in Iran, and Wife in Washington.¹⁵¹ What is most relevant for this discussion is the treatment of the child custody award given by the Iranian court, which was entered before the Washington court gave a child custody award.¹⁵² The Iranian court had entered an award granting full custody of the child to Husband.¹⁵³ Under the UCCJEA, which Washington has adopted, "a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA] must be recognized and enforced."¹⁵⁴ Unless the court could find some justification not to, it would have to grant comity to the Iranian custody award.

After looking to both its own precedent and conflict of laws principles, the court decided that the UCCJEA only required enforcement of foreign custody awards that utilized similar substantive law to Washington.¹⁵⁵ Washington utilized the best interest of the child standard, while Iran automatically awards custody of all children over the age of two to the father.¹⁵⁶ The court held that because the Iranian procedures did not comport with Washington's strong public policy and substantive law, the Iranian custody award would not be given any effect and the court could enter its own award in favor of Wife.¹⁵⁷

149. *Donboli*, 128 Wash. App. at *2-3

150. *Id.* at *2.

151. *Id.* at *3-5.

152. *Id.* at *4.

153. *Id.*

154. UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT § 105 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1997).

155. *Donboli*, 128 Wash. App. at *15-16. The court did not say that it could not, or would not, ever enforce a foreign custody award derived from laws not substantially similar to the State of Washington's law. Instead, the court only recognized that it was not *required* to enforce such foreign custody awards. *Id.*

156. *Id.* at *16.

157. *Id.* at *21.

B. *Applying Donboli to SORNA*

The basic similarity between the UCCJEA and the foreign convictions provision of SORNA is that they both codify a grant of comity¹⁵⁸ to the judgments of foreign states. The distinction is whether or not that comity is required or preferred. Where SORNA requires that comity be granted to the foreign conviction, the UCCJEA recognizes that foreign judgments and orders must be evaluated on a case-by-case basis. The UCCJEA also has the advantage of being in-line with Supreme Court precedent.

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹⁵⁹

One positive of SORNA is that the flaw discussed here is easily fixable, and would not require Congressional action. Rather, the SMART office need only alter its Final Guidelines. This could be done in several ways. First, at a minimum, a provision entitling those who would be forced to register due to a foreign sex conviction to petition a court in the registering jurisdiction. This is the approach Michigan courts have taken for considering foreign convictions for impeachment purposes.¹⁶⁰ In *Wallach*, the Michigan Court of Appeals chose to allow the introduction of foreign convictions on a case-by-case basis, subject to a judicial review of the procedural safeguards in place to determine if the foreign procedure provided fundamental fairness.¹⁶¹

Notably, a Michigan court earlier held that it constitutes manifest unfairness to enhance a defendant’s sentence on the basis of his foreign conviction.¹⁶² The foreign conviction occurred in Canada, and the appellate court concluded that “[s]ince many foreign jurisdictions do not provide due process rights equivalent to those existing in the United States, it would be

158. Comity is defined as “[a] practice among political entities (as countries, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” *Comity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

159. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

160. *People v. Wallach*, 312 N.W.2d 387 (Mich. Ct. App. 1981), *vacated on other grounds*, 331 N.W.2d 730 (Mich. 1983).

161. *Id.* at 403.

162. *People v. Braithwaite*, 240 N.W.2d 293, 294 (Mich. Ct. App. 1976) (per curiam).

manifestly unfair to allow foreign convictions to [be] considered in sentencing a defendant convicted of a crime in this country.”¹⁶³ This raises the interesting question of what Michigan would do with an individual convicted of a sex crime felony in Canada, who would be forced to register as a sex offender upon moving to Michigan. Under SORNA, Canada is a Class 1 Jurisdiction.¹⁶⁴ A conviction from a Class 1 jurisdiction requires the registration of the offender, without allowing an inquiry into whether any due process was actually provided on a case-by-case basis.¹⁶⁵ Yet, under Michigan Court of Appeals precedent, foreign countries—including Canada—may not “provide due process rights equivalent to those existing in the United States, [and] it would be manifestly unfair to allow foreign convictions to be considered” for sentencing purposes. It seems illogical that it would suddenly become fair or just to allow those foreign convictions to be considered for registration purposes, especially if demonstrable evidence of violations of due process and fundamental fairness is available.

Following the Michigan trend and allowing a foreign convicted sex offender to challenge the requirement of his registration preserves the constitutional rights of the would-be registrant. However, an easily foreseeable criticism of this case-by-case review is that such a review would dramatically increase the workload of an already overburdened court system. But, if there is an issue with overburdened courts, the answer cannot be to erode fundamental rights guaranteed by the Constitution. Rather, the solution would be to streamline the legal process in a constitutional fashion, such as to create and fund more courts or to even reduce the number of crimes, thereby reducing the number of people involved in the judicial system.

Any time the judgment of another country is to be applied by the United States against a United States citizen, due process demands a case-by-case review. As Melissa Kimes points out:

Even if it were possible to point to foreign countries that theoretically provide the same protections that our system does, it is necessary to look beyond the printed word and into actual practice.¹⁶⁶ In determining whether a foreign system provides fair trials to criminal defendants, it is necessary to look at the country’s entire criminal process—actual practice as well as law

163. *Id.* at 294.

164. *Final Guidelines*, *supra* note 27, § IV(B).

165. *See supra* Part III.A.1.

166. Kimes, *supra* note 48, at 521 (citing Rudolf B. Schlesinger et al., *COMPARATIVE LAW* 880–90 (5th ed. 1988)).

in the books must be considered. Political realities in many countries affect the functioning of the judicial systems, and it is possible that, although constitutional and statutory law may seem to provide some semblance of due process rights, the actual practice is to the contrary.¹⁶⁷

Additionally:

[a]lthough other countries have due process clauses in their constitutions and many countries provide criminal defendants with most of the same safeguards that the United States provides, no other system truly matches the rules that have been deemed necessary in the United States to protect both individual fairness and reliability of convictions, nor have such protections necessarily been interpreted to the same extent or in the same manner as they have been in the United States.¹⁶⁸

While general principles of comity do not require that every procedural safeguard be provided to defendants in foreign courts in order for them to be enforced in the United States, a minimum standard should be observed. What qualifies as minimum due process requirements has always been within the purview of the courts, and should remain so. By enacting the Final Guidelines—which do not allow for any judicial review of what constitutes due process, but instead shift that role to the United States Department of State,¹⁶⁹—the SMART office has performed an end-run around judicial scrutiny of the regulatory scheme. Due process, fundamental fairness, and the Constitution demand more.

The fix to the Final Guidelines is simple, and does not require a wholesale reworking of either SORNA or the Final Guidelines. It can be done as easily as having the SMART office add one simple provision to the Final Guidelines. Such a provision would allow anyone required to register as a sex offender under the foreign conviction provision of SORNA to have the opportunity to challenge its application. Additionally, in order to preserve the strong public policy in favor of registering sex offenders, the

167. Kimes, *supra* note 48, at 521-22 (citing *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 906-08 (S.D.N.Y. 1968)) (refusing to enforce an East German decision regarding trademark rights after reviewing the administration of justice and the lack of judicial independence in that country and determining that the prior decision was lacking in objectivity and therefore unreliable).

168. *Id.* at 521 (internal citation omitted); see, e.g., Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500, 1506-10 (1977).

169. *Final Guidelines, supra* note 27, § IV(B).

Guidelines could still allow for a presumption of fundamental fairness in foreign convictions, as well as maintain the tripartite class divisions.

If the current jurisdictional classifications are retained, Class 1 jurisdictions would impose the highest burden of proof upon the challenger to demonstrate a lack of due process and fundamental fairness, perhaps requiring a showing that the challenger was actually harmed by the procedural deficiencies. A Class 2 jurisdiction would require a less burdensome evidentiary requirement for the challenger, and a Class 3 would require less than that. Ideally, a Class 3 jurisdiction conviction would shift the burden to the Federal government to show that the conviction was obtained in compliance with principles of fundamental fairness and due process.

This shifting of the burden to the government is just, particularly in light of the fact that the United States Department of State has already determined that a Class 3 jurisdiction has not even *generally* upheld standards of due process and fundamental fairness within the past three years.¹⁷⁰ The Guidelines also do not compel registration of those with Class 3 jurisdiction sex offense convictions, instead leaving it up the state to register those convicts if they so choose.¹⁷¹ That registration can occur with or without an inquiry into the level of due process granted.¹⁷²

The other benefit to this proposed solution is that it is already envisioned within the Final Guidelines. When a conviction comes from a Class 3 jurisdiction, the registering jurisdiction is

not required to register the convicted person if the jurisdiction determines—through whatever process or procedure it may choose to adopt—that the conviction does not constitute a reliable indication of factual guilt because of the lack of an impartial tribunal, because of denial of the right to respond to the evidence against the person or to present exculpatory evidence, or because of denial of the right to the assistance of counsel.¹⁷³

The availability of review for Class 3 jurisdictions should be expanded to include all three Classes. Additionally, the language should be altered to read accordingly: the registering jurisdiction is “not required to register the convicted person if the jurisdiction determines—through whatever process

170. *Final Guidelines*, *supra* note 27, § IV(B).

171. *Id.*

172. *Id.*

173. *Id.*

or procedure it may choose to adopt—[or upon a judicial determination upon the application of the convicted person,] that the conviction was not obtained through a means which guaranteed fundamental fairness and due process to the accused.” This preserves the intent of Congress in enacting SORNA, of the SMART office in enacting the Final Guidelines, and the Constitution in protecting due process rights.

V. CONCLUSION

Congress enacted the Sex Offender Registration and Notification Act in order to promote the public welfare through the registration of sex offenders.¹⁷⁴ Included in that registration scheme is a provision which requires those who were convicted of felony sex offenses in foreign jurisdictions to register. However, those forced to register as a result of a foreign sex offense have no relief if the foreign conviction was obtained without any semblance of due process or fundamental fairness. Not only do the Final Guidelines, which implement SORNA, fail to provide any manner of judicial review for convictions from certain jurisdictions, but the Guidelines also actively prohibit a registering jurisdiction from undertaking such a review. In light of the serious consequences, both socially and legally, for an individual who has the status of registered sex offender, the availability of some form of review of those convictions is demanded by the Constitution.

The clear and easy solution to this denial of due process is to amend the Final Guidelines. Such an amendment would be simple, and it would be in line with what is already contemplated by the Guidelines. By allowing a would-be-registrant to challenge the registration requirement as applied to him, on the grounds that the conviction was obtained without due process or fundamental fairness, both the individual’s and the government’s interests can be satisfied. Such a provision could be added to the Final Guidelines by the SMART Office under its authority to promulgate regulations to implement SORNA. Requiring that a foreign conviction satisfy a minimum standard of fundamental fairness on a case-by-case basis is a requirement that should be appealing to all, including both the convicted individual and the government which is sworn to uphold Constitutional rights and protections.

174. This goal of protecting the public from sex offenders is a laudable one—one which all governments should pursue wholeheartedly. The critique presented in this Note is not directed at the goal of protecting the public, nor at SORNA as a whole. The criticism is directed solely at the overly-broad guidelines which can have a life-altering negative impact on any innocents who have been wrongly convicted.

