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## ACLU of New Mexico v. City of Albuquerque: Does Current Equal Protection Adequately Protest Some of the Most Hated Members of Our Society

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# ACLU OF NEW MEXICO V. CITY OF ALBUQUERQUE: DOES CURRENT EQUAL PROTECTION ADEQUATELY PROTECT SOME OF THE MOST HATED MEMBERS OF OUR SOCIETY?

JEREMY K. HARRISON\*

## I. INTRODUCTION

Every year at least a half million inmates are released from prisons across the nation.<sup>1</sup> The vast majority are allowed to return to a fairly normal life. They can return home, find a job, find a place to live, visit friends and family members, and essentially reintegrate into society, putting their crimes behind them. This reflects a general belief that prisoners can enter the corrections system and emerge having fulfilled an obligation to society and return to a rather normal life. This, however, is not true for all released prisoners. For the thousands of sex offenders released each year, there is no return to normal life. Instead, they return to a world that ostracizes them; forces them to register with and be scrutinized by local police departments; and requires them to inform the police of every change of address, every new vehicle, and every job that they obtain.<sup>2</sup> In addition, these offenders cannot hide their convictions from the community. Instead, their offenses are displayed for the entire world to see on sex offender registration websites created under laws like the Albuquerque Sex Offender Registration and Notification Act.<sup>3</sup> The sex offender registration and notification laws that impose these obligations upon sex offenders brand them as a danger to our communities, in a manner not unlike the scarlet letter “A” that the adulteress Hester Prynne was forced to wear in Nathaniel Hawthorne’s *The Scarlet Letter*.<sup>4</sup> For thousands of individuals across the nation, the scarlet letter has been replaced by a webpage with a photograph of the offender, descriptions of workplaces, home addresses, vehicles, identifying features, and any other information that state and local governments believe will assist the public in identifying the sex offenders among us.<sup>5</sup>

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1. See TIMOTHY HUGHES & DORIS JAMES WILSON, U.S. DEP’T OF JUSTICE, REENTRY TRENDS IN THE UNITED STATES 7 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/reentry.pdf>.

2. On a recent Halloween night, for example, deputies of the Bernalillo County Sheriff’s Department “made surprise visits to about 100 registered sex offenders in an effort to make Halloween a little safer for kids.” *Sex Offender Back in Trouble*, ALBUQUERQUE J., Nov. 3, 2005, at C2. This additional scrutiny certainly has a benefit as one of the sex offenders visited that night was found to be in violation of his probation by having “a new computer with Internet access” and a “photograph of a young girl he referred to as his ‘friend.’” *Id.* This violated a term of his probation that “barred [him] from using the Internet in any way” and prohibited him from having a computer in his home. *Id.*

3. ALBUQUERQUE, N.M., CODE §§ 11-12-2-1 to -99 (2007).

4. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1850).

5. See, e.g., ALBUQUERQUE, N.M., CODE §§ 11-12-2-1 to -99.

Despite the burden that registration laws impose upon sex offenders,<sup>6</sup> the laws are justified by the need to protect communities from the horrors of sexual abuse of children.<sup>7</sup> Sex offender registration laws ensure that communities are aware of sex offenders residing nearby and enable parents to warn their children to stay away from the offenders who may pose a danger to them. In addition to helping to prevent sex crimes, sex offender registries also serve to help law enforcement officials quickly find and question sex offenders residing in the vicinity of an abducted child. For the parents of a recently kidnapped child, quickly locating the sex offender who has their child is an unimaginably valuable tool.

In an effort to help protect its citizens, the City of Albuquerque recently enacted the Albuquerque Sex Offender Registration and Notification Act (ASORNA),<sup>8</sup> which details strict guidelines that convicted sex offenders must follow, including providing a DNA sample to the Albuquerque Police Department, and creates a sex offender website through which the public can locate sex offenders living in their area.<sup>9</sup> As beneficial as ASORNA may appear, the American Civil Liberties Union (ACLU) and a number of John Does brought suit challenging the ordinance as violative of the state and federal constitutional guarantees of equal protection and due process and as an unconstitutional infringement upon the privacy of the individuals affected.<sup>10</sup> At trial, the district court struck down several provisions of ASORNA but ultimately allowed the bulk of the ordinance to go into effect; the plaintiffs appealed.<sup>11</sup>

The New Mexico Court of Appeals heard the case in *ACLU of New Mexico v. City of Albuquerque* and ultimately determined that ASORNA could go into effect.<sup>12</sup> The court applied a rational basis review to the appellants' constitutional challenges<sup>13</sup> and determined that most of the ordinance was rationally related to the City of Albuquerque's purpose of protecting children from dangerous sex offenders<sup>14</sup> and could be upheld.<sup>15</sup> In upholding the district court's decision, the appellate court struck several portions of the ordinance, including provisions that the district court had not found to be unconstitutional.<sup>16</sup> In particular, the court determined that ASORNA's inclusion of individuals convicted of kidnapping<sup>17</sup> and

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6. The burden that registration imposes upon offenders can be great. In Florida, for example, some sex offenders are forced to live under a bridge, sleeping on chairs so as to avoid being nibbled at by rodents, because a law preventing them from living within 2,500 feet of places where children gather makes it nearly impossible to find a suitable residence. See John Zarrella & Patrick Oppmann, *Florida Housing Sex Offenders Under Bridge*, Apr. 6, 2007, <http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/index.html>. One offender noted that he had a job, a car, and an apartment but, because children congregate at the apartment's swimming pool, he was forced to leave. *Id.*

7. See ALBUQUERQUE, N.M., CODE § 11-12-2-1.

8. *Id.* §§ 11-12-2-1 to -99.

9. *Id.* §§ 11-12-2-5(E), -6.

10. ACLU of N.M. v. City of Albuquerque, 2006-NMCA-078, ¶¶ 9, 16, 137 P.3d 1215, 1222-23.

11. *Id.* ¶ 9, 137 P.3d at 1222.

12. *Id.* ¶ 51, 137 P.3d at 1232.

13. *Id.* ¶ 21, 137 P.3d at 1225.

14. *Id.* ¶ 25, 137 P.3d at 1226.

15. *Id.* ¶ 51, 137 P.3d at 1232.

16. *Id.* ¶ 1, 137 P.3d at 1215.

17. Kidnapping is defined in New Mexico as:

the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or

false imprisonment,<sup>18</sup> crimes without a sexual component, violated federal substantive due process<sup>19</sup> and that ASORNA's compulsory DNA sampling requirement violated the U.S. Constitution's Fourth Amendment.<sup>20</sup>

This Note, in Part II, will first explain the background of sex offender registration laws and then briefly review some of the statistical support for our treatment of sex offenders.<sup>21</sup> Part III will review the rationale of the New Mexico Court of Appeals and its determination that certain provisions of ASORNA are invalid.<sup>22</sup> Part IV of this Note will then analyze the *ACLU of New Mexico* court's decision in light of established federal equal protection jurisprudence to determine whether the court, while purportedly applying a deferential federal rational basis test to the constitutional challenges, actually applied a heightened form of scrutiny to invalidate provisions of ASORNA that may have been upheld under the traditional federal rational basis test.<sup>23</sup> In addition, this Note will argue that current three-tiered equal protection jurisprudence should be abandoned in favor of a balancing approach that more appropriately weighs the interests of individuals and the government.<sup>24</sup> Finally, Part V will analyze the effect that the *ACLU of New Mexico* court's conclusions will have on two New Mexico statutes, the DNA Identification Act<sup>25</sup> and the Sex Offender Registration and Notification Act,<sup>26</sup> both of which appear to be partially invalidated by the decision.<sup>27</sup>

## II. BACKGROUND

This section will briefly describe the backdrop against which the New Mexico Legislature enacted the Sex Offender Registration and Notification Act (SORNA).<sup>28</sup> It will then explain the origins of ASORNA, focusing on the City of Albuquerque's attempt to provide additional protection to its citizens not provided by SORNA. Finally, this section will discuss a number of studies regarding the statistical support, or lack thereof, for our fear of sex offenders.

### A. The Purpose of Sex Offender Registration Laws

In the wake of the tragic New Jersey story of seven-year-old Megan Kanka, who was abducted, raped, and murdered by a twice-convicted sex offender living across

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deception, with intent:

- (1) that the victim be held for ransom;
- (2) that the victim be held as a hostage or shield and confined against his will;
- (3) that the victim be held to service against the victim's will; or
- (4) to inflict death, physical injury or a sexual offense on the victim.

NMSA 1978, § 30-4-1(A) (2003).

18. False Imprisonment is defined in New Mexico as "intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so." *Id.* § 30-4-3 (1963).

19. *ACLU of N.M.*, 2006-NMCA-078, ¶ 25, 137 P.3d at 1226.

20. *Id.* ¶ 45, 137 P.3d at 1231; see also U.S. CONST. amend. IV.

21. See *infra* Part II.

22. See *infra* Part III.

23. See *infra* Part IV.A.

24. See *infra* Part IV.B.

25. NMSA 1978, §§ 29-16-1 to -13 (2006).

26. *Id.* §§ 29-11A-1 to -10 (2007).

27. See *infra* Part V.A-B.

28. NMSA 1978, §§ 29-11A-1 to -10.

the street from her family home,<sup>29</sup> the 104th U.S. Congress passed Public Law 104-145, which is commonly referred to as "Megan's Law."<sup>30</sup> This law modified the Jacob Wetterling Act<sup>31</sup> by allowing states to disclose information collected under a state sex offender registration program "for any purpose permitted under the laws of the State."<sup>32</sup> Megan's Law also allowed state law enforcement agencies to "release relevant information that is necessary to protect the public concerning a specific person required to register" as a sex offender.<sup>33</sup> By 1996, in response to the Jacob Wetterling Act and Megan's Law, every state had adopted some form of sex offender registration and notification law.<sup>34</sup>

The New Mexico Legislature's response to Megan's Law and the Jacob Wetterling Act was the enactment of the Sex Offender Registration and Notification Act.<sup>35</sup> SORNA was predicated on a legislative finding that "(1) sex offenders pose a significant risk of recidivism" and "(2) the efforts of law enforcement agencies to protect their communities from sex offenders are impaired by the lack of information available concerning convicted sex offenders who live within the agencies' jurisdiction."<sup>36</sup> SORNA requires all sex offenders who are convicted or released from the custody of any correctional facility or program (such as probation or parole) after July 1, 1995 to register with the county sheriff in the county in which they reside.<sup>37</sup>

To comply with SORNA, a convicted sex offender must provide his community sheriff with his name and aliases; date of birth; social security number; current address; place of employment; and the date, place, and type of sex offense for which he was convicted.<sup>38</sup> Additionally, SORNA requires the sheriff to obtain:

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29. Megan Kanka was lured into the sex offender's house with hopes of seeing a puppy that the offender claimed to have. Tragically, this decision cost her her life. Megan's killer had been "convicted of attempted sexual contact in 1981 and of aggravated assault and attempted sexual assault of a child in 1982, for which he received a 10-year prison sentence." *Suspect Confessed in the Murder of a 7-Year-Old, Prosecutors Say*, N.Y. TIMES, Aug. 2, 1994, at B2. At the time of her murder, Megan's killer was living with two other convicted sex offenders who he had met in prison, yet no one in the community was aware that these predators were in their midst. Jan Hoffman, *New Law Is Urged on Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1. Had Megan's parents known that their neighbor had been convicted of these crimes against children, they could have warned their daughter to stay away from the man that ultimately took her life. *See id.* The public reaction to this and similar crimes was outrage. *Id.* In response, legislatures across the nation felt pressure to pass laws that they believed would help to prevent tragic events such as the story of Megan Kanka from happening again. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2001 & Supp. 2007); NMSA 1978, §§ 29-11A-1 to -10; *Smith v. Doe*, 538 U.S. 84, 89-91 (2003) (describing Alaska's response to Megan's law).

30. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e) (2000)).

31. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071.

32. *Id.* § 14071(e)(1).

33. *Id.* § 14071(e)(2).

34. *Smith*, 538 U.S. at 90.

35. *See* NMSA 1978, §§ 29-11A-1 to -10 (2007).

36. *Id.* § 29-11A-2(A) (1999).

37. *Id.* § 29-11A-4 (2005). SORNA went into effect on July 1, 1995. Therefore, it only applies to sex offenders released or convicted after that date. *See* ACLU of N.M. v. City of Albuquerque, 2006-NMCA-078, ¶ 49, 137 P.3d 1215, 1232.

38. NMSA 1978, § 29-11A-4(B)(1)-(7).

- (1) a photograph of the sex offender and a complete set of the sex offender's fingerprints;
- (2) a description of any tattoos, scars or other distinguishing features on the sex offender's body that would assist in identifying the sex offender; and
- (3) a sample of his DNA for inclusion in the sex offender DNA identification system pursuant to the provisions of the DNA Identification Act.<sup>39</sup>

By enacting SORNA, the New Mexico Legislature attempted to create a comprehensive registration and notification program that would meet the requirements of the Jacob Wetterling Act and protect the citizens of New Mexico from convicted sex offenders.

*B. The Adoption of the Albuquerque Sex Offender Registration and Notification Act*

While SORNA appeared to provide fairly comprehensive protection against the perceived danger posed by convicted sex offenders, not everyone agreed.<sup>40</sup> The City of Albuquerque believed that SORNA, by limiting registered sex offenders to those convicted after 1995, would not do enough to protect its citizens.<sup>41</sup> The Albuquerque Sex Offender Registration and Notification Act was intended to be a "more comprehensive local counterpart of [SORNA]" that would "help prevent [sex] offender exploitation of exceptions in existing laws and provide additional safety for Albuquerque inhabitants."<sup>42</sup> In particular, the City Council was concerned that "statewide offenders move to Albuquerque from smaller towns and rural areas in New Mexico to seek treatment, housing, employment and the solace of anonymity available in a larger population."<sup>43</sup> In addition, the City Council was concerned with protecting the children of Albuquerque because while SORNA required the

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39. *Id.* § 29-11A-4(E). New Mexico's DNA Identification Act is intended to "facilitate the use of DNA records by local, state and federal law enforcement agencies in the: (1) identification, detection or exclusion of persons in connection with criminal investigations; and (2) registration of sex offenders required to register pursuant to the provisions of [SORNA]." *Id.* § 29-16-2(B) (2006). The DNA Identification Act requires offenders covered by the Act who have been convicted, incarcerated, or placed on probation or parole on or after July 1, 1997 to provide DNA samples to the corrections department immediately upon request "as long as the request is made before release from any correctional facility, or...before the end of any period of probation or other supervised release." *Id.* § 29-16-6(A)(1) (2006). The DNA Identification Act also requires "covered" offenders to "provide a [DNA] sample immediately upon request to the county sheriff located in any county in which the sex offender is required to register" when registering or renewing registration pursuant to SORNA. *Id.* § 29-16-6(A)(4).

40. *See* Albuquerque, N.M., Ordinance 43-2003, § 1 (Oct. 22, 2003) (finding that "the protection of the victims and potential victims of sex offenders in Albuquerque [was] a matter of unique local concern not fully and adequately addressed by [SORNA]."). Earlier in 2003, prior to enacting this ordinance, Albuquerque's City Council enacted the Sex Offender Alert Program (SOAP). Albuquerque, N.M., Ordinance 19-2003 (Apr. 21, 2003). The City Council later repealed SOAP and enacted the October ordinance in an attempt to overcome constitutional issues in SOAP raised by the ACLU in an earlier lawsuit. *ACLU of N.M.*, 2006-NMCA-078, ¶ 3, 137 P.3d at 1221. The ACLU challenged both SOAP and the October ordinance, but the New Mexico Court of Appeals held that any controversy regarding SOAP was moot because (1) that ordinance had been repealed and (2) an amendment to SORNA prevented the City Council from reenacting it. *Id.* ¶¶ 6-8, 137 P.3d at 1221-22.

41. *See* Albuquerque, N.M., Ordinance 43-2003, § 1.

42. *Id.*

43. *Id.*

registration of sex offenders who committed crimes against both adults and children,<sup>44</sup> ASORNA focused solely on offenses against children.<sup>45</sup>

ASORNA was intended to close perceived loopholes in New Mexico's SORNA by covering a broader range of offenders and subjecting those offenders to stricter requirements than the state act. Most significantly, while SORNA only applies to individuals convicted after its 1995 enactment, ASORNA requires the registration of any offender convicted after January 1, 1970.<sup>46</sup> Furthermore, unlike SORNA, ASORNA imposed restrictions upon where sex offenders could reside;<sup>47</sup> required them to provide more personal information,<sup>48</sup> including information about any vehicles to which the offender had access;<sup>49</sup> and required all offenders to provide a DNA sample and dental imprints to the Albuquerque Police Department (APD).<sup>50</sup> Finally, while SORNA only publishes information about sex offenders who have committed specific types of sex crimes,<sup>51</sup> ASORNA required the publication of information about all sex offenders who registered with the City of Albuquerque.<sup>52</sup>

By broadening the range of sex offenders required to register to those who were convicted at any time after 1970, and by increasing the amount of information that those registrants had to provide, ASORNA created a comprehensive ordinance that purported to provide the residents of Albuquerque with greater protection from sex offenders.<sup>53</sup> As originally enacted, ASORNA was intended to ensure that nearly every convicted sex offender living in Albuquerque who was not registered under SORNA and who met the criteria of the ordinance would be known to both APD and the general population of the city.<sup>54</sup> Despite the City Council's findings that sex offenders pose such a danger to Albuquerque that ASORNA's imposition on these individuals' lives is justified, it is not clear that sex offenders are as great a threat as many people perceive.

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44. See NMSA 1978, § 29-11A-3(E) (2005).

45. Albuquerque, N.M., Ordinance 43-2003, § 3 ("SEX OFFENSE. Shall have the same meaning the term has under § 29-11A-3(B) NMSA 1978 (Repl. Pam. 2001) except that ASORNA includes only offenses against Children and not offenses against Adults.").

46. *Id.* § 4(A) ("Sex Offenders who were convicted after January 1, 1970 must register with [the Albuquerque Police Department].").

47. *Id.* § 8(D) ("Sex Offenders shall not acquire, mortgage or newly occupy any real property, occupy or acquire any real property by lease or otherwise or establish a place of lodging within 1000 feet of a School.").

48. A sex offender was required to provide the Albuquerque Police Department with his name, date of birth, social security number, current address, address of any other residence owned or rented (including storage buildings), address of any residence where the offender intended to stay or stayed at for more than three consecutive days, place of employment, and contact information for someone who knew where the offender was at all times during work hours, drivers license number, license plate number, vehicle identification number, and the make and model of all vehicles to which the offender had access. *Id.* § 4(B)(1)–(6).

49. *Id.* § 4(B)(6).

50. *Id.* § 6(E) ("When a Sex Offender registers under ASORNA, APD shall take and retain their photograph and a set of fingerprints. Additionally, APD may record and retain the person's shoe size, a DNA sample, dental imprints and a description of tattoos, scars and other identifying features that would assist in identifying the Sex Offender.").

51. NMSA 1978, § 29-11A-5.1(A)(1)–(5), (E) (2005) (providing public access only to information about offenders convicted of criminal sexual penetration, criminal sexual contact of a minor, sexual exploitation of children, sexual exploitation of children by prostitution, or the attempted commission of any of these crimes).

52. Albuquerque, N.M., Ordinance 43-2003, § 7 (requiring posting on the Internet of the names and information of all sex offenders registered under the ordinance).

53. See *id.* § 1.

54. See *id.*

### C. Recidivism Data on Sex Offenders

There is no doubt that some sex offenders pose a serious threat to society.<sup>55</sup> Because of this threat, sex offender registration laws are present in every state<sup>56</sup> and are premised on the notion that sex offenders are so likely to recommit sex offenses that state and local governments must take extraordinary measures to protect their citizens.<sup>57</sup> Despite this belief, sex offenders may not be as dangerous as the public perceives them to be.

While some studies show relatively high rates of recidivism,<sup>58</sup> others show that sex offenders are not much more likely to recidivate than other common criminals.<sup>59</sup> The Bureau of Justice Statistics of the Department of Justice (DOJ), for example, studied the recidivism rates of 9,691 sex offenders from fifteen states who were released from incarceration in 1994 after a sentence of at least one year.<sup>60</sup> Of these 9,691 released offenders, the DOJ classified 4,295 as child molesters.<sup>61</sup>

The DOJ study found that while 39.4 percent of the 4,295 child molesters were rearrested for committing any type of crime,<sup>62</sup> only 5.1 percent were rearrested for a new sex crime within three years of their release, and only 3.5 percent were actually convicted of that new sex crime.<sup>63</sup> So while a large number of convicted sex offenders recommitted some type of crime, only a small percentage of them committed a new *sex offense* after their initial release from prison.<sup>64</sup>

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55. *E.g.*, Erica Cordova, *Woman Recalls July Attack*, ALBUQUERQUE J., Oct. 6, 2006, at A1 (describing a woman who was attacked in her home by her neighbor, a registered sex offender who had pled guilty to criminal sexual contact and attempted criminal sexual contact in 1982); *see also Suspect Confessed*, *supra* note 29, at B2 (describing the murder of Megan Kanka).

56. *See* Smith v. Doe, 538 U.S. 84, 90 (2003) (noting that “[b]y 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan’s Law”).

57. *See, e.g.*, ALBUQUERQUE, N.M., CODE § 11-12-2-1(A) (2007) (finding that “sex offenders pose a significant risk to the health and safety of inhabitants of the City of Albuquerque” and that “these offenders will likely re-offend”); *see also* NMSA 1978, § 29-11A-2(A)(1) (1999) (finding that “sex offenders pose a significant risk of recidivism”). This justification has led to sex offender registration laws across the nation, some going so far as to restrict sex offenders’ ability to open their doors on Halloween, stay out past certain hours of the night, and freely change residences without notifying local law enforcement agencies. *See, e.g.*, People v. Bell, 778 N.Y.S.2d 837, 844 (Sup. Ct. 2003) (describing the New York sex offender statute that imposes a nine o’clock curfew on registrants and prevents offenders from leaving their homes on “child-focused holidays”).

58. *E.g.*, ANDREW J.R. HARRIS & R. KARL HANSON, PUB. SAFETY & EMERGENCY PREPAREDNESS CAN., SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 2004–03, at 7, 8 tbl.2 (2004), available at [http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200403-2\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200403-2_e.pdf) (finding a sexual recidivism rate of twenty-four percent for all types of sex offenders during the fifteen-year period following release from custody, but finding wide variations in recidivism rates depending on the nature of the original crime).

59. *See e.g.*, PATRICK A. LANGAN ET AL., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

60. *Id.* at 1.

61. *Id.* at 4. For purposes of the study, the DOJ defined child molesters as individuals who had committed “forcible intercourse with a child,” committed statutory rape (i.e., non-forcible intercourse with a child), or engaged in “any other type of sexual contact with a child” with or without force. *Id.* Of the 4,295 child molesters in the study, at least 443 were statutory rapists who had not committed a violent act against a child. *Id.*

62. *Id.* at 15 tbl.8. The DOJ used three measures of recidivism: (1) rearrest, which was measured using both state and FBI arrest records; (2) reconviction, which “pertain[ed] to State and Federal convictions in any State” based upon state and federal law enforcement records; and (3) return to prison, which referred to offenders who returned to prison for new convictions or for such “technical” violations as violating parole or probation. *Id.* at 5–6. The DOJ noted that rearrest is the recidivism measure least likely to show that “someone is not committing crimes when he actually is.” *Id.* at 6. Consequently, this Note will focus primarily on the rearrest rates of sex offenders.

63. *Id.* at 24 tbl.22.

64. *See id.*



The DOJ statistics for all sex offenders (including those whose offenses did not involve children) were similar, with 5.3 percent being rearrested for a new sex crime within three years and 3.5 percent being convicted of a new sex crime within three years.<sup>65</sup> The DOJ also noted that of the 262,420 non-sex offenders released from prisons in the fifteen states participating in the study, only 1.3 percent were rearrested for a sex crime within three years.<sup>66</sup>

Finally, the DOJ found that 2.2 percent of the 9,691 sex offenders released in 1994, whether they had previously been convicted of an offense against a child or an adult, were arrested for molesting a child within three years.<sup>67</sup> Assuming that the recidivism rate found in the DOJ study holds true over a longer period of time, at least ninety percent of the individuals placed on state and local sex offender registries are not likely to recommit a sex offense.<sup>68</sup> Instead, the vast majority of sex offenders are labeled and publicly held out to be dangerous sex predators despite the fact that they may pose little or no future threat to society.

Given that some studies show that sex offenders have fairly low recidivism rates, it is questionable whether the public's reaction to sex offenders and the accompanying governmental intrusions upon their lives are justifiable.<sup>69</sup> Instead, the treatment of sex offenders may be based more on the intense moral and emotional reactions to the despicable crimes that these offenders have committed than the relative threat that they pose when they are released from prison.

Regardless, the true justification for the treatment of sex offenders does not really matter because under the rational basis review currently applied to sex offender registration laws it is not necessary that there be conclusive data that sex offenders

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65. *Id.* at 24 tbl.21.

66. *Id.* at 24.

67. *Id.* at 30 tbl.34.

68. The DOJ study only tracked the recidivism of sex offenders for three years after their release from prison. A similar Canadian study showed a much higher sexual recidivism rate fifteen years after offenders were released. See HARRIS & HANSON, *supra* note 58. It is possible that over time U.S. sex offender recidivism rates would reach levels similar to those seen in Canada. The Canadian study showed a fifteen-year recidivism rate of 16.3 percent for offenders with female children as their victims and 35.4 percent for offenders with male children as their victims. *Id.* app. II, at 23. The "girl child" recidivism rate came from a sample of 1,572 offenders, and the "boy child" rate came from a sample of 706 offenders. *Id.* Even if, over time, the U.S. sex offender recidivism rates matched those found in Canada, sex offender registration laws would still require all sex offenders to register despite the fact that sixty-five percent of them—or more, since other offenders besides those who molested boys had lower recidivism rates—pose no threat to our communities.

69. If sex offenders were the only ex-convicts in society that were likely to re-offend, then perhaps a more invasive post-release treatment of such individuals—as compared to the noninvasive treatment of other non-sex ex-offenders—would be more justified. Sex offenders are not, however, the only recidivists in our society. See generally PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1994* (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>. In a general study on recidivism rates, the DOJ looked at the recidivism rates of 272,111 individuals who were released from prisons in fifteen states in 1994. *Id.* at 1. The study showed that 67.5 percent of the prisoners were rearrested within three years of their release, 46.9 percent were reconvicted, and 25.4 percent returned to prison for a new offense. *Id.* In another study of individuals released from prison in 1983, the DOJ found that 6.6 percent of individuals released from prison for murder, which included negligent manslaughter, were rearrested for a new homicide, which included murder, negligent manslaughter, and non-negligent manslaughter, within three years of their release. ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983*, at 6 tbl.9 (1989), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf>. In comparison, 7.7 percent of the individuals released who were originally punished for rape were rearrested for committing a new rape. *Id.* Assuming again that these numbers remain similar over time, only 1.1 percent more rapists, who are closely watched as registered sex offenders, would recommit a rape than murderers who would recommit a homicide. See *id.*

pose such a high risk to society.<sup>70</sup> Instead, all that must be shown is that a governmental entity, like the Albuquerque City Council, has some rational reason—which could include any study showing that sex offenders have high recidivism rates—to enact strict and intrusive registration laws.<sup>71</sup> Believing that ASORNA imposed restrictions on sex offenders that were not justified by the threat that the offenders may pose, the New Mexico Chapter of the American Civil Liberties Union (ACLU) and a number of John Does challenged the ordinance in New Mexico district court.

### III. STATEMENT OF THE CASE

In *ACLU of New Mexico v. City of Albuquerque*, the appellants (the ACLU plaintiffs) challenged the validity of ASORNA and argued that (1) various aspects of the ordinance violated the equal protection, due process, and search and seizure protections provided by both the New Mexico and federal constitutions;<sup>72</sup> (2) parts of the ordinance were ex post facto laws that constituted cruel and unusual punishment;<sup>73</sup> and (3) ASORNA's treatment of convicted sex offenders constituted double jeopardy.<sup>74</sup> During the initial stage of the lawsuit, the district court found a number of ASORNA's provisions to be unconstitutional, struck those provisions, and allowed the ordinance to go into effect.<sup>75</sup> On appeal, the New Mexico Court of Appeals reconsidered the constitutionality of each of the provisions of ASORNA.<sup>76</sup>

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70. See *infra* Parts III.A.2, IV.B.

71. See *infra* Part IV.B.

72. 2006-NMCA-078, ¶ 9, 137 P.3d 1215, 1222.

73. *Id.* The court summarily dismissed the ex post facto, double jeopardy, and cruel and unusual punishment claims, noting that each constitutional argument revolved around the punitive nature of the legislation. *Id.* ¶ 47, 137 P.3d at 1231. The court relied on a number of cases and found that sex offender registration laws were not punitive and therefore could not violate the ex post facto law prohibition in the U.S. Constitution or constitute double jeopardy. *Id.* The court cited a number of examples from several courts, all of which held that sex offender registration laws are not punitive in nature. See *id.*

74. See *id.* ¶ 9, 137 P.3d at 1222. The ACLU also argued that ASORNA was preempted by state law because, during the course of the litigation over ASORNA, SORNA had been amended to expressly preempt the field of sex offender registration and prohibit cities from enacting new sex offender registration laws. See *id.* ¶ 4, 137 P.3d at 1220–21 (citing NMSA 1978, § 29-11A-9(A) (2005)). The new clause, however, allows existing municipal sex offender laws to remain in effect as long as they only apply to offenders not required to register under SORNA. NMSA 1978, § 29-11A-9(B).

The ACLU of New Mexico court reasoned that when SORNA was amended to preempt any new registration laws, the state legislature was aware that ASORNA existed and consciously chose not to preempt the requirements that ASORNA imposed upon sex offenders. 2006-NMCA-078, ¶ 13, 137 P.3d at 1222. Had the State chosen to preempt local sex offender laws like ASORNA, the court reasoned, it would not have allowed existing municipal sex offender laws to remain in effect when it revised SORNA to preempt all new registration laws. *Id.* ¶ 13, 137 P.3d at 1223. As for the appellants' claim that ASORNA conflicted with the state law, the court determined that, while ASORNA was notably more strict than SORNA, there was no conflict between the two laws because "[o]ffenders required to register under the state law are not required to register under ASORNA." *Id.* ¶ 14, 137 P.3d at 1223.

75. The district court found that (1) ASORNA was not preempted by state law, (2) the requirements for non-New Mexico residents along with ASORNA's provision preventing a sex offender from being alone with children violated equal protection, and (3) ASORNA's provision preventing sex offenders from living near a school violated due process. *ACLU of N.M.*, 2006-NMCA-078, ¶ 3, 137 P.3d at 1220.

76. See *id.* ¶ 5, 137 P.3d at 1221.

### A. ASORNA's Violations of Equal Protection and Due Process

The ACLU appellants argued that ASORNA violated both federal and state substantive and procedural due process guarantees.<sup>77</sup> The New Mexico Court of Appeals, however, only addressed the substantive due process and equal protection claims brought under the Federal Constitution, noting that the procedural due process claim was foreclosed by decisions in previous cases challenging sex offender registration laws<sup>78</sup> and that the conditions for raising independent state constitutional claims had not been met because the appellants had not shown that New Mexico's equal protection jurisprudence had diverged from federal precedent.<sup>79</sup>

Once restricted to Fourteenth Amendment equal protection and due process precedent, the New Mexico Court of Appeals faced the challenge of determining

77. See *id.* ¶ 17, 137 P.3d at 1223. Federal due process is guaranteed by the U.S. Constitution. U.S. CONST. amend. XIV, § 1 (mandating that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Due process is also guaranteed by the New Mexico state constitution. N.M. CONST. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."). Procedural due process "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases" and protects "two central concerns[.]...the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

78. *ACLU of N.M.*, 2006-NMCA-078, ¶ 17, 137 P.3d at 1223 ("We address only the substantive due process and equal protection arguments raised by the ACLU because its procedural due process arguments have been foreclosed by the holdings [of the U.S. Supreme Court and the New Mexico Court of Appeals]."). In *Connecticut Department of Public Safety v. Doe*, the U.S. Supreme Court responded to a claim that a requirement that all sex offenders, whether actually dangerous or not, register as sex offenders was a violation of due process. 538 U.S. 1, 4 (2003). The *Connecticut Department of Public Safety* court explained that "States are not barred by principles of 'procedural due process' from drawing such classifications. Such claims 'must ultimately be analyzed' in terms of substantive, not procedural, due process." *Id.* at 8 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120–21 (1989) (plurality opinion)). The *Connecticut Department of Public Safety* majority also noted that "due process does not entitle [a person] to a hearing to establish a fact that is not material under the...statute" and "the fact that [the] respondent [sought] to prove—that he is not currently dangerous—[was] of no consequence under" the State's sex offender registration law. *Id.* at 7; see also *State v. Drukenis*, 2004-NMCA-032, ¶ 49, 86 P.3d 1050, 1066. In *State v. Drukenis*, the New Mexico Court of Appeals held that procedural due process is not the correct test for a classification based solely on whether an offender had been convicted rather than how dangerous he or she was. *Drukenis*, 2004-NMCA-032, ¶ 49, 86 P.3d at 1066. Because ASORNA requires sex offenders to register solely because they have been convicted of a sex offense, there is nothing that an offender could prove in a hearing that would prevent him or her from registering. See ALBUQUERQUE, N.M., CODE § 11-12-2-4 (2007). Therefore, procedural due process is not implicated in sex offender registration.

79. *ACLU of N.M.*, 2006-NMCA-078, ¶ 18, 137 P.3d at 1223–24. New Mexico has adopted an interstitial approach to questions that could be analyzed under both the state and the federal constitutions. *State v. Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d 1, 7 ("We today specifically adopt the interstitial in preference to the primacy approach...."). The *Gomez* court rejected an alternative approach, the primacy approach, which requires state courts to analyze constitutional rights and apply state law when rights are protected under state law and federal law when there is no state law protection. See *id.* ¶ 18, 932 P.2d at 7. Under the interstitial approach, in order to compel the court to analyze a constitutional issue under the state constitution rather than the Federal Constitution, it is necessary to demonstrate that there is "'a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics'" that would warrant deviating from federal precedent. *Id.* ¶ 19, 932 P.2d at 7 (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1359 (1982)). The interstitial approach helps to achieve "national uniformity in [the] development and application of fundamental rights guaranteed by our state and federal constitutions." *Id.* ¶ 21, 932 P.2d at 7–8 (quoting *State v. Gutierrez*, 116 N.M. 431, 436, 863 P.2d 1052, 1057 (1993)). For a thorough review of the *Gomez* court's decision to adopt the interstitial approach and the consequences of this approach, see Michael B. Browde, *State v. Gomez and the Continuing Conversation over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387 (1998).

what level of scrutiny to apply to its analysis of ASORNA.<sup>80</sup> Relying on precedent set forth in *State v. Druktenis*,<sup>81</sup> the court determined that rational basis was the correct level of scrutiny because the requirements that ASORNA imposed on sex offenders did not implicate any fundamental rights, and sex offenders were not a suspect class that required heightened scrutiny.<sup>82</sup> Having determined the appropriate level of scrutiny, the court then moved on to address each challenged provision of ASORNA.<sup>83</sup>

In addressing the constitutional claims that the ACLU appellants raised regarding ASORNA, the court “address[ed] the substantive due process and equal protection claims together because the ‘substantive due process attack implicitly and necessarily include[d] an equal protection attack.’”<sup>84</sup> Because the court blurred the line between equal protection and due process review, this Note, along with its later analysis of the court’s application of equal protection and due process, will do the same.<sup>85</sup>

### 1. The Inclusion of Kidnappers and False Imprisoners

The first provision that the court addressed was ASORNA’s definition of “sex offense,” which included both kidnapping and false imprisonment.<sup>86</sup> The court

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80. *ACLU of N.M.*, 2006-NMCA-078, ¶ 19, 137 P.3d at 1224. New Mexico courts currently recognize three levels of scrutiny that can be applied when the constitutionality of a statute is challenged. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶¶ 14–16, 965 P.2d 305, 310. The first and most lenient level of scrutiny is rational basis, which applies when “social and economic legislation is challenged on equal protection grounds.” *Id.* ¶ 14, 965 P.2d at 310. When that type of legislation is challenged, it is typically “considered presumptively valid and is subjected to the rational basis test.” *Id.* To validate the legislation, the government need only have a legitimate interest in the matter that it is regulating, and the “plaintiff is required to show that the statute’s classification is not rationally related to the legislative goal.” *Id.*

Intermediate scrutiny requires a stronger relationship between the government’s interest and the means that it chooses to fulfill that interest. *Id.* ¶ 15, 962 P.2d at 310. To survive intermediate scrutiny, “the government must demonstrate that the classification is substantially related to an important government interest.” *Id.* A New Mexico court will apply intermediate scrutiny when a sensitive class or an important right is involved, such as gender or illegitimacy. *Id.*

The highest level of scrutiny is strict scrutiny, which will only be applied in New Mexico if the statute in question involves “a fundamental right or a suspect classification such as race or ancestry.” *Id.* ¶ 16, 965 P.2d at 310. This level of scrutiny requires the government to show that it has a compelling interest in the matter that it is regulating and that the means chosen to fulfill that interest are the most narrowly tailored means available for fulfilling the government’s objective. *See id.*; *see also ACLU of N.M.*, 2006-NMCA-078, ¶ 19, 137 P.3d at 1224.

81. 2004-NMCA-032, ¶¶ 89, 99, 86 P.3d at 1076, 1079.

82. *ACLU of N.M.*, 2006-NMCA-078, ¶ 21, 137 P.3d at 1225.

83. *Id.* In an apparent attempt to withstand strict scrutiny on a constitutional challenge, the Albuquerque City Council characterized ASORNA as a “remedial Ordinance designed to protect occupants of the City of Albuquerque” and explained that it was the “most narrowly tailored means of furthering compelling governmental interests.” Albuquerque, N.M., Ordinance 43-2003, § 1 (Oct. 22, 2003).

84. *ACLU of N.M.*, 2006-NMCA-078, ¶ 17, 137 P.3d at 1223 (quoting *Druktenis*, 2004-NMCA-032, ¶ 53, 86 P.3d at 1067).

85. *See infra* Part IV.

86. *See* Albuquerque, N.M., Ordinance 43-2003, § 3. Under ASORNA, “sex offense” was defined by reference to SORNA except that ASORNA included “only offenses against Children and not offenses against Adults.” *Id.* SORNA’s definition, and therefore ASORNA’s, includes both kidnapping and false imprisonment “when the victim is less than eighteen years of age and the offender is not a parent of the victim.” NMSA 1978, § 29-11A-3(E)(6)–(7) (2007). SORNA also includes (1) criminal sexual penetration, (2) criminal sexual contact, (3) criminal sexual contact of a minor, (4) sexual exploitation of children, (5) sexual exploitation of children by prostitution, (6) aggravated indecent exposure, (7) enticement of child, (8) incest, and (9) solicitation to commit criminal sexual contact of a minor. *Id.* § 29-11A-3(E).

concluded that ASORNA's definition of "sex offense" was overly broad and would unconstitutionally include kidnappers who had no sexual motivation when they abducted their victims.<sup>87</sup> The court relied on precedent from other jurisdictions that had held similar provisions to be unconstitutional<sup>88</sup> and determined that the kidnapping and false imprisonment aspects of ASORNA were unconstitutional because they were overbroad.<sup>89</sup> The kidnapping and false imprisonment provisions failed the rational basis test because the registration of kidnappers and false imprisoners was not rationally related to the City's stated purpose of protecting its citizens from dangerous sex offenders when there is no sexual component to those crimes.<sup>90</sup> Therefore, the court held that the inclusion of kidnappers and false imprisoners in ASORNA was a violation of the U.S. Constitution and struck down that portion of the ordinance.<sup>91</sup>

## 2. Non-Resident Sex Offender Registration

The fact that ASORNA's registration requirements affected New Mexico residents differently than non-residents was also found to be unconstitutional.<sup>92</sup> ASORNA has two registration requirements: the first applies to sex offenders who are residents of Albuquerque, and the second applies to individuals who are non-residents.<sup>93</sup> Non-residents are defined as sex offenders who (1) were convicted of a sex offense outside of New Mexico, (2) are either employed or attending school anywhere in New Mexico, and (3) are in Albuquerque for at least three consecutive days or ten aggregate days per year.<sup>94</sup> Thus, all Albuquerque residents who have been convicted of sex crimes and all individuals who have been convicted outside of New Mexico who spend three or more days in the city must register under ASORNA. Because non-resident sex offenders are defined as individuals with convictions outside of New Mexico, however, a person with a New Mexico conviction who resides in a neighboring town, such as nearby Rio Rancho or Los Lunas, yet works 365 days a year in Albuquerque would not be required to register because such an individual would neither be a resident of Albuquerque nor an individual with an out-of-state conviction.<sup>95</sup>

The New Mexico Court of Appeals, upholding the district court's decision, held that the different application of ASORNA to residents and non-residents violated the Equal Protection Clause of the U.S. Constitution.<sup>96</sup> The court noted that treating

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87. *ACLU of N.M.*, 2006-NMCA-078, ¶ 24, 137 P.3d at 1226.

88. *Id.* ¶¶ 24–25, 137 P.3d at 1226 (citing *Doe v. Moore*, 410 F.3d 1337, 1340 n.1 (11th Cir. 2005) (noting that there must be a sexual component to a crime to label someone as a sex offender); *Raines v. State*, 805 So. 2d 999, 1003 (Fla. Dist. Ct. App. 2001) (holding that the inclusion of false imprisonment with no sexual component in Florida's sex offender law was a violation of equal protection); *State v. Small*, 833 N.E.2d 774, 782–83 (Ohio Ct. App. 2005) (holding that there is no rational basis to require defendants convicted solely of kidnapping to register as sex offenders)).

89. *Id.*

90. *Id.* ¶ 25, 137 P.3d at 1226.

91. *Id.*

92. *Id.* ¶ 29, 137 P.3d at 1227.

93. Albuquerque, N.M., Ordinance 43-2003, § 5 (Oct. 22, 2003).

94. *Id.*

95. *ACLU of N.M.*, 2006-NMCA-078, ¶¶ 28–29, 137 P.3d at 1227.

96. *Id.* ¶ 29, 137 P.3d at 1227.

residents and non-residents who spend a significant amount of time within the city differently was unconstitutional because it was “not rationally related to the City’s interest in protecting citizens from sex offenders.”<sup>97</sup>

### 3. ASORNA’s Notification Provisions Requiring the Publication of Sex Offender Information

The court next applied the rational basis test to the notification provision of the ordinance.<sup>98</sup> The court determined that the notification provision of the ordinance was constitutional,<sup>99</sup> reasoning that because criminal conviction records are already available to the general public,<sup>100</sup> sex offenders did not have any rights that could be violated by further publication of the information.<sup>101</sup>

Furthermore, the court found that ASORNA’s notification provisions were rationally related to the City’s “interest in allowing the public and authorities to identify sex offenders accurately, and to know their whereabouts.”<sup>102</sup> Because there was a rational relationship between the City’s chosen method of disseminating sex offender information to the public and its interest in protecting the public from sex offenders, the notification provisions were upheld despite the fact that the publication of the information burdens sex offenders’ ability to keep their convictions from public scrutiny.<sup>103</sup>

### 4. ASORNA’s Restrictions on Where Sex Offenders Can Reside

As originally drafted, ASORNA prevented sex offenders from acquiring, mortgaging, or newly occupying any real property within 1,000 feet of a school.<sup>104</sup> That provision prevented sex offenders who owned property near a school from

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97. *Id.* ¶¶ 28–29, 137 P.3d at 1227.

98. In addition to requiring sex offenders to register, ASORNA also required the City of Albuquerque to publish sex offender registration information on its website. Albuquerque, N.M., Ordinance 43-2003, § 7. The City’s website allows users to view the registered sex offenders living in a particular zip code. Albuquerque Official City Website, <http://www.cabq.gov/police/asorna/> (last visited June 19, 2007). Once users select the zip code they want to view, they are presented with the photographs, addresses, identifying information, dates of conviction, and offenses of all registered sex offenders in that area. *See id.* The website can be easily accessed by the public to enable people to determine if a sex offender lives in their neighborhood and to identify that offender. *See id.* ASORNA also requires the City to publish a disclaimer on its website stating that the information is published only to make the information more readily available, not because of any specific threat that the offenders pose. Albuquerque, N.M., Ordinance 43-2003, § 7. The ordinance states the following:

The website will conspicuously include the following statement: “The City’s decision to post Sex Offenders on this website is based on the fact that the Sex Offender was convicted of a Sex Offense in the past. The City of Albuquerque has not assessed the specific risk posed by any particular individual Sex Offender or class of Sex Offenders and has made no determination regarding the current dangerousness or degree of dangerousness of any individual Sex Offender or class of Sex Offenders. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.”

*Id.* This disclaimer is currently published on the City’s ASORNA website. *See* Albuquerque Official City Website, *supra*.

99. *ACLU of N.M.*, 2006-NMCA-078, ¶ 32, 137 P.3d at 1227–28.

100. *Id.*; *see also* NMSA 1978, § 14-2-1(A) (2005) (providing the right of “every person” to inspect public records).

101. *ACLU of N.M.*, 2006-NMCA-078, ¶ 32, 137 P.3d at 1227–28.

102. *Id.* ¶ 32, 137 P.3d at 1228.

103. *See id.*

104. Albuquerque, N.M., Ordinance 43-2003, § 8(D) (Oct. 22, 2003).

obtaining a second mortgage on their home and could possibly have required them to relocate.<sup>105</sup> The district court found that this was unconstitutional and severed the language that would prevent current owners from living or obtaining a mortgage near a school.<sup>106</sup> The New Mexico Court of Appeals upheld the district court's findings and noted that the restrictions on living near a school, as modified by the district court, were constitutional because they were rationally related to the City's interest in protecting children from sex offenders.<sup>107</sup>

#### 5. ASORNA's Prohibition on Sex Offenders Being Alone with Children

The ACLU appellants' final equal protection argument arose from a provision of ASORNA that prevented sex offenders from being alone with children who were not their own children or grandchildren.<sup>108</sup> In finding this provision unconstitutional, the court reasoned that there was no rational basis to treat parents and grandparents differently than other similarly situated individuals.<sup>109</sup> The court, adopting the district court's illustration of the problem, noted that a grandparent convicted of molesting his grandchild would be allowed to be alone with the child, but that child's twenty-one-year-old sister could not be alone with the child if she had been convicted of molesting a sixteen-year-old male.<sup>110</sup> The court reasoned that this violated the Equal Protection Clause of the U.S. Constitution because it impermissibly created two classes of sex offenders by putting parents and grandparents in one group and all other sex offenders in the other.<sup>111</sup> Because the court could not find, and the City could not give, any rational basis to treat grandparents and parents differently from other similarly situated sex offenders, it upheld the district court's finding that ASORNA's prohibition on sex offenders being alone with children was unconstitutional.<sup>112</sup>

#### B. ASORNA's Violation of the Protection Against Unreasonable Searches and Seizures

Next, the court turned to a provision of ASORNA that allowed the APD to obtain DNA samples and dental imprints from sex offenders upon registration.<sup>113</sup> The ACLU appellants argued that requiring offenders to provide DNA samples and dental imprints without any determination that a new crime had been or would be committed was an unconstitutional search and seizure under both the federal and

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105. *ACLU of N.M.*, 2006-NMCA-078, ¶ 33, 137 P.3d at 1228. By preventing a sex offender from acquiring a mortgage on a home within 1000 feet of a school, the court indicated that the ordinance could force a sex offender out of his home or, at a minimum, could prevent the offender from obtaining a second mortgage. *See id.*

106. *Id.* ¶¶ 33–34, 137 P.3d at 1228.

107. *Id.* ¶ 35, 137 P.3d at 1228.

108. *Id.* ¶ 36, 137 P.3d at 1228–29. The original version of ASORNA stated that “Sex Offenders and Homeless Adult Sex Offenders may not be Alone With a Child.” Albuquerque, N.M., Ordinance 43-2003, § 8(C). Being alone with a child was defined as being “(1) present in the same room or in a vehicle with a Child other than their Ward, their own biological or legally adopted Child or their own biological grandchild when no Responsible Adult is present or, (2) if outdoors, within a 30 yard radius of a Child.” *Id.* § 3.

109. *ACLU of N.M.*, 2006-NMCA-078, ¶ 37, 137 P.3d at 1229.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* ¶ 38, 137 P.3d at 1229.

state constitutions.<sup>114</sup> The court acknowledged that New Mexico's constitution provided greater protection than its federal counterpart but noted that it was not necessary to analyze the claim under the state constitution because the DNA sampling requirement violated the Fourth Amendment of the U.S. Constitution.<sup>115</sup>

In finding that the DNA sampling was unconstitutional, the court reasoned that "[t]he compulsory administration of a blood test 'plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment'" and that DNA "testing procedures plainly constitute searches of persons, and depend antecedently upon seizures of persons within the meaning of that Amendment."<sup>116</sup> The court recognized a line of precedent from the Federal Tenth Circuit Court of Appeals establishing the constitutionality of obtaining DNA samples from convicted offenders who are still incarcerated or under the supervision of the State but refused to extend the rules of those cases to offenders covered by ASORNA who are no longer under state supervision.<sup>117</sup>

The City of Albuquerque then argued that the ACLU's challenges regarding DNA testing were an implicit attack on the New Mexico DNA Identification Act.<sup>118</sup> The court rejected that argument, noting that the DNA Identification Act, unlike ASORNA's DNA testing requirements, did not allow for retroactive testing.<sup>119</sup> The court cited two provisions of the DNA Identification Act that require offenders that are "currently incarcerated, on probation, or parole, or some type of supervised release" to provide a DNA sample upon the request of the corrections department.<sup>120</sup> The court then distinguished the DNA Identification Act's provision for sampling currently incarcerated offenders' DNA from the retroactive DNA collection program in ASORNA that requires offenders no longer under state supervision to provide a DNA sample.<sup>121</sup> Because of this distinction, the court noted that the ACLU's arguments did not affect the DNA Identification Act.<sup>122</sup> However, the court determined that ASORNA's DNA sampling provision violated the Fourth Amendment because compulsory DNA testing of an individual not currently in the custody of the corrections department is an unreasonable, and therefore unconstitutional, search of the person.<sup>123</sup>

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114. *Id.*

115. *Id.* ¶ 39, 137 P.3d at 1230 ("[S]ince we hold that the challenged provisions violate the Fourth Amendment, we need not reach the possibly broader protections afforded under the state constitution.").

116. *Id.* ¶ 40, 137 P.3d at 1230 (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966) (internal quotation marks omitted)).

117. *Id.* ¶ 41, 137 P.3d at 1230 (citing *United States v. Kimler*, 335 F.3d 1132, 1146–47 & n.14 (10th Cir. 2003) (holding that DNA sampling "is a reasonable search and seizure" when conducted upon a felon's release from incarceration); *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998) (holding that DNA sampling of inmates is reasonable due to their diminished privacy rights)).

118. *Id.* ¶ 44, 137 P.3d at 1230–31 (citing NMSA 1978, § 29-16-6(A) (2005)).

119. *Id.* Retroactive testing is DNA testing that occurs after an individual is released from the corrections system. *See id.*

120. *Id.* (citing 1978 NMSA, § 29-16-6(A)(1)–(2)).

121. *Id.*

122. *Id.*

123. *Id.* ¶ 45, 137 P.3d at 1231.



### C. *The Current State of ASORNA*

After analyzing each provision of ASORNA, the New Mexico Court of Appeals allowed the majority of the ordinance to remain in effect but severed the provisions that it found to be unconstitutional.<sup>124</sup> Following this decision, ASORNA no longer includes kidnappers and false prisoners in its definition of sex offenders,<sup>125</sup> the requirements for non-resident offenders are no longer present,<sup>126</sup> the word “mortgage” has been removed from the residence restrictions,<sup>127</sup> the restrictions on being alone with children have been removed,<sup>128</sup> and the APD is no longer able to obtain DNA samples or dental imprints from sex offenders.<sup>129</sup> Following *ACLU of New Mexico*, ASORNA is currently in full force and effect in the City of Albuquerque.<sup>130</sup> The City has an active website listing the identifying information of all the sex offenders currently living within the city limits, and the information is publicly available.<sup>131</sup>

## IV. ANALYSIS

This Note analyzes a number of questions created by the New Mexico Court of Appeals’ decision in *ACLU of New Mexico*: (1) whether the court applied a true rational basis review or a heightened version of the rational basis test and whether the application of true rational basis would have created a different result and (2) whether the tiered scrutiny approach applied by the court should be abandoned in favor of a sliding scale or balancing approach that places a greater emphasis on the effect that a challenged law has on an individual.

The first portion of this analysis, regarding the rational basis review, will argue that the provisions that the court found to be unconstitutional should not have been struck. Instead, ASORNA should have been allowed to go into effect as drafted by the Albuquerque City Council in early 2003. The second part of this analysis will argue that if the tiered approach to constitutional review were abandoned, ASORNA would not have survived constitutional scrutiny to the extent that it did in *ACLU of New Mexico*. Under the balancing approach suggested by this article, the City of Albuquerque would have to show that ASORNA *actually* protected the citizens of Albuquerque from dangerous sex offenders rather than merely demonstrating a rational relationship between the means and the ends of the ordinance.

### A. *Rational Basis Review Historically*

When confronted with constitutional challenges that implicate equal protection or due process, courts generally attempt to fit the challenge into one of three levels of constitutional review: strict, intermediate, and rational basis.<sup>132</sup> In current U.S.

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124. *Id.* ¶ 51, 137 P.3d at 1232.

125. *Id.* ¶ 25, 137 P.3d at 1226.

126. *Id.* ¶ 29, 137 P.3d at 1227.

127. *Id.* ¶¶ 33–34, 137 P.3d at 1228.

128. *Id.* ¶ 37, 137 P.3d at 1229.

129. *Id.* ¶ 45, 137 P.3d at 1231.

130. See ALBUQUERQUE, N.M., CODE §§ 11-12-2-1 to -99 (2007).

131. See Albuquerque Official City Website, *supra* note 98.

132. E.g., *ACLU of N.M.*, 2006-NMCA-078, ¶ 19, 137 P.3d at 1224.

jurisprudence, strict scrutiny is reserved for laws that burden suspect classes (such as those based on race, alienage, and national origin) and laws that implicate fundamental rights (such as the rights to marry and to procreate).<sup>133</sup> Intermediate scrutiny is reserved for classifications and deprivations involving “important but not fundamental rights, or...sensitive but not suspect classes” (such as gender and illegitimacy).<sup>134</sup> If a court finds that a classification does not implicate suspect or sensitive classes, and if a statute does not affect important or fundamental rights, then a rational basis review will be applied.<sup>135</sup>

In analyzing ASORNA, the *ACLU of New Mexico* court applied rational basis review, relying on its earlier acceptance of the rights implicated by sex offender registration laws in a 2004 case that it decided.<sup>136</sup> In *State v. Druktenis*, the New Mexico Court of Appeals focused solely on whether sex offender registration involved any fundamental rights and declined to address whether sex offenders constituted a suspect class.<sup>137</sup> The *Druktenis* court noted that the suspect class category was reserved for discrete groups “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>138</sup> The *Druktenis* court then determined that no fundamental rights were implicated in sex offender registration because the privacy rights asserted by convicted sex offenders did not emanate from natural law or involve interests historically considered to be essential to democracy, such as the right to vote.<sup>139</sup> Because no fundamental rights were implicated, the court determined that strict scrutiny was not required in reviewing the state sex offender registration law.<sup>140</sup> The court reached a similar conclusion with respect to intermediate scrutiny and held that even if the liberty interests affected by sex offender registration were important, intermediate scrutiny was not required because sex offenders were not a “sensitive class,” which is typically limited to gender and illegitimacy.<sup>141</sup> The *Druktenis* court therefore determined that rational basis was the correct level of review for SORNA, and the *ACLU of New Mexico* court adopted this reasoning in determining how to approach its review of ASORNA.<sup>142</sup>

#### B. The ACLU of New Mexico Court’s Application of Rational Basis

While the *ACLU of New Mexico* court claimed to be applying a rational basis review, it did not apply the traditional rational basis review as it has been articulated by the U.S. Supreme Court. By departing from the traditional rational basis review,

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133. *Id.*

134. *Id.*; see also *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *State v. Druktenis*, 2004-NMCA-032, ¶¶ 98–99, 86 P.3d 1050, 1079.

135. *ACLU of N.M.*, 2006-NMCA-078, ¶ 19, 137 P.3d at 1224.

136. *Id.* ¶¶ 20–21, 137 P.3d at 1224–25 (citing *Druktenis*, 2004-NMCA-032, 86 P.3d 1050).

137. *Druktenis*, 2004-NMCA-032, ¶ 89 n.9, 86 P.3d at 1076 n.9 (citing *Richardson v. Carnegie Library Rest.*, Inc., 107 N.M. 688, 696, 763 P.2d 1153, 1161 (1988)).

138. *Id.* (quoting *Richardson*, 107 N.M. at 696, 763 P.2d at 1161).

139. *Id.* ¶ 91, 86 P.3d at 1077.

140. *Id.* ¶ 90, 86 P.3d at 1077.

141. *Id.* ¶¶ 98–99, 86 P.3d at 1079.

142. *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 21, 137 P.3d 1215, 1225.

the court reached a result that it would not have obtained under a true rational basis review. Under a true rational basis review, the court could have upheld the ordinance in its entirety rather than striking down the various provisions of the ordinance that were ultimately severed.

Generally, rational basis review only requires the court to find that the challenged legislation is rationally related to any conceivable legitimate government interest.<sup>143</sup> In the classic rational basis review case of *Williamson v. Lee Optical of Oklahoma, Inc.*, the U.S. Supreme Court upheld a statute that prevented opticians from making lenses without a prescription from an ophthalmologist because "[t]he legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify [the] regulation of the fitting of eyeglasses."<sup>144</sup> The Court noted that the state legislature could have had an alternative interest in mind when enacting the legislation by stating that "the legislature *may* have concluded that eye examinations were so critical...that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert."<sup>145</sup> Having identified *some* rational end that the legislature sought to correct, the Court noted that "[i]t is enough that there is an evil at hand for correction, and that it *might* be thought that the particular legislative measure was a rational way to correct it."<sup>146</sup>

Under a traditional rational basis review, courts are not only free to conceive of any rational reason that a legislature may have had to enact a law, but legislatures are also free to determine whether they want to solve an entire problem or only a portion of that problem. For example, in *Railway Express Agency, Inc. v. New York*, a regulation that prevented businesses from advertising on vehicles unless the vehicles were used primarily for another business purpose was challenged on equal protection grounds.<sup>147</sup> The appellants argued that equal protection was violated because vehicles used solely for advertising caused no less of a traffic safety hazard than vehicles with advertisements that were being used for other business purposes.<sup>148</sup> The Court rejected this argument and noted that "[t]he local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem [as trucks that carry advertisements for other businesses] in view of the nature or extent of the advertising which they use."<sup>149</sup> The *Railway Express* Court noted that under a rational basis review, "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."<sup>150</sup>

Not all rational basis review, however, is as lenient as that articulated in *Lee Optical* and *Railway Express*. In a later case, the U.S. Supreme Court applied a heightened level of rational basis review that departed from the traditional rational

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143. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

144. *Id.* at 487 (emphasis added).

145. *Id.* (emphasis added).

146. *Id.* at 488 (emphasis added).

147. 336 U.S. 106, 108 (1949).

148. *Id.* at 109–10.

149. *Id.* at 110.

150. *Id.*

basis analysis.<sup>151</sup> *City of Cleburne v. Cleburne Living Center, Inc.* involved a challenge to a city council's refusal to grant a special use permit to a home for the mentally disabled.<sup>152</sup> In denying the permit, the City noted several concerns that it had, including the home's close proximity to a school and its location on a 500-year flood plain.<sup>153</sup> The Court scrutinized the City's stated purposes for denying the permit and determined that the denial was not rationally related to the City's interest in protecting the residents of the home from a 500-year flood or avoiding harassment by nearby schoolchildren.<sup>154</sup> The Court's analysis was a departure from the traditional rational basis review because rather than looking at whether the City could have had any rational reason for denying the permit, the Court looked at the specific reasons that the City gave for denying the permit and determined that they were not valid.<sup>155</sup>

Like the U.S. Supreme Court's application of the rational basis test in *City of Cleburne*, the New Mexico Court of Appeals' analysis in *ACLU of New Mexico v. City of Albuquerque* was not the traditional form of rational basis as articulated in *Lee Optical* and *Railway Express*.<sup>156</sup> Instead of determining whether the City could have had any conceivable purpose in requiring individuals convicted of kidnapping and false imprisonment to register under ASORNA, the *ACLU of New Mexico* court looked at the City's stated purpose offered to justify the ordinance's enactment and examined the proximity of the fit between that purpose and the means that were chosen to meet it.<sup>157</sup> Finding that the City's purpose of protecting victims and potential victims of sex offenders "is not furthered by the inclusion of crimes [such as kidnapping and false imprisonment] that are not sexually motivated," the court held that due process was violated.<sup>158</sup> Under a pure rational basis review, like the one applied in *Lee Optical*, these provisions of ASORNA would not likely have been struck down. Instead, the court could have found *some* purpose, such as protecting children in Albuquerque from dangerous criminals, and upheld the ordinance. In fact, given that ASORNA only applies to individuals convicted of crimes against children, the court would not have had to reach very far to find that including kidnappers and false imprisoners in ASORNA was rationally related to the City's legitimate interest in protecting children in general (not specifically from sex offenders).

The court's departure from a traditional rational basis review is also evidenced by its determination that the provision of ASORNA that prevented all sex offenders except parents and grandparents from being alone with children was unconstitutional.<sup>159</sup> The court noted that the City had no rational reason for allowing parents and grandparents to be alone with children but not siblings or other

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151. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

152. *Id.* at 435-38.

153. *Id.* at 449.

154. *Id.*

155. *Id.*

156. *Compare Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), and *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), with *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, 137 P.3d 1215.

157. *See ACLU of N.M.*, 2006-NMCA-078, ¶ 25, 137 P.3d at 1226.

158. *Id.*

159. *See id.* ¶ 37, 137 P.3d at 1229.

individuals.<sup>160</sup> Under the rational basis review articulated in *Lee Optical*, the court could have determined that the City had some rational reason, such as protecting the relationship between parents and children, when it decided that only parents and grandparents could be alone with their children.

Not only could the *ACLU of New Mexico* court have found some rational reason behind ASORNA, but also, as the U.S. Supreme Court made clear in *Railway Express*, it could have articulated that the City is not stuck with the choice between either (1) fixing all of the evils posed by sex offenders or (2) doing nothing.<sup>161</sup> The Court in *Railway Express* noted that the City of New York may have believed that trucks used solely for advertising posed more of a traffic hazard than trucks used for business purposes that also happened to display advertisements.<sup>162</sup> Similarly, the City of Albuquerque could have determined that parents and grandparents posed less of a danger to children than other sex offenders, even if the other offender happened to be a sibling. In addition, just as the City in *Railway Express* could have concluded that it was more efficient to only eradicate some advertising trucks rather than all of them, the City of Albuquerque could have concluded that it was better to protect children from most sex offenders than not to protect them from any. Alternatively, the City could have determined that the social cost of preventing parents and grandparents from being alone with their children outweighed the risk of harm to those children, which, rather than opting to allow all sex offenders to be alone with children, led it to choose to leave parents and grandparents out of that provision of the ordinance.

There may be a reason, however, that the *ACLU of New Mexico* court departed from the traditional rational basis review. One explanation for the court's failure to apply a traditional rational basis review is the fact that in an earlier case, *Trujillo v. City of Albuquerque*, the New Mexico Supreme Court characterized *City of Cleburne* as a rational basis case and explicitly rejected a fourth tier of constitutional scrutiny.<sup>163</sup> In overruling lower court opinions that recognized a fourth tier, the *Trujillo* court explained that "the rational basis test that we articulate today subsumes that fourth tier and addresses the concerns that caused the Court of Appeals to adopt a fourth tier of review."<sup>164</sup> Specifically, the court rejected the idea that rational basis review would be "toothless" or a "virtual rubber stamp" of challenged legislation,<sup>165</sup> noting that its articulation of the rational basis standard requires a rational relationship between the *stated* legislative goal and the legitimate government interest.<sup>166</sup> Later New Mexico decisions recognize the *Trujillo* court's

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160. *Id.*

161. *See Ry. Express Agency, Inc.*, 336 U.S. at 110.

162. *Id.*

163. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶¶ 31–32, 965 P.2d 305, 314.

164. *Id.* ¶ 32, 965 P.2d at 314. The "fourth tier" of review has been defined as a "heightened" rational basis analysis. *Id.* This "heightened" rational basis is essentially the same type of review that was applied by the U.S. Supreme Court in *City of Cleburne* in which the Court looked at the stated purpose of legislation rather than looking to any conceivable purpose that the legislature may have had. *See id.* By adopting a rational basis review that "subsumes that fourth tier" of review, the *Trujillo* court essentially rejected the rational basis review in which the court is free to conceive of any possible rational relationship between a statute and its goal. *See id.*

165. *Id.* ¶ 30, 965 P.2d at 314.

166. *See id.* ¶¶ 30–32, 965 P.2d at 314.

articulation of New Mexico's rational basis review and note that it should be applied to constitutional challenges under the New Mexico Constitution.<sup>167</sup>

While New Mexico's rejection of the "toothless" traditional rational basis review seems to vindicate the *ACLU of New Mexico* court's decision to ensure that ASORNA had a rational relationship to the City of Albuquerque's stated purpose in enacting the ordinance, this is not the case because the rational basis review articulated in *Trujillo* appears only to be required when analyzing questions arising under the New Mexico Constitution.<sup>168</sup> In *ACLU of New Mexico*, the court specifically stated that it would not analyze ASORNA under the New Mexico Constitution but would instead only look at the U.S. Constitution.<sup>169</sup> Because the court was not analyzing ASORNA under the New Mexico Constitution, the federal rational basis standard that it claimed to be applying should have allowed for ASORNA to survive a due process and equal protection challenge.

### *C. Abandonment of the Three-Tiered Approach to Constitutional Review of Equal Protection and Due Process*

While it is clear that the *ACLU of New Mexico* court applied a heightened form of rational basis review, the question is raised whether the tiered approach to constitutional review is even appropriate at all. Requiring courts to pigeonhole a newly challenged right into one of these levels of scrutiny puts courts in an awkward situation of either applying heightened scrutiny, which requires equating sex offenders—the pariahs of the twenty-first century—with such cherished classes as race and alienage, which are reserved for strict scrutiny, or gender and illegitimacy, which are reserved for intermediate scrutiny, or applying a rational basis review, which allows nearly unchecked legislative discretion. While most courts are unwilling to make this equation, a small minority have found that some fundamental interest is implicated in sex offender registration laws and have applied heightened scrutiny.<sup>170</sup>

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167. *E.g.*, *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 11, 120 P.3d 413, 418.

168. The *Breen* court cited *Trujillo* for the proposition that "[t]here are three levels of equal protection review based on the *New Mexico* Constitution." *Id.* (emphasis added). The *Breen* court also noted that cases analyzing the Equal Protection Clause of the U.S. Constitution "do not control" the development of the tiers of scrutiny "based on the *New Mexico* Constitution." *Id.* ¶ 14, 120 P.3d at 418. In contrast, in *State v. Druktenis*, the New Mexico Court of Appeals noted that the *Trujillo* standards should be applied "in evaluating a due process or equal protection claim under the Federal or State Constitutions." 2004-NMCA-032, ¶ 88, 86 P.3d 1050, 1076 (quoting *Marrujo v. N.M. State Highway Transp. Dep't*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994)). The *Marrujo* decision cited in *Druktenis*, however, was decided four years before the *Trujillo* court's articulation of the New Mexico standard for judicial review and, therefore, cannot stand for the proposition that the *Trujillo* court's rejection of "toothless" rational basis review applies to an analysis under both the state and federal constitutions.

169. *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 18, 137 P.3d 1215, 1224.

170. *Compare Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (per curiam) (holding that sex offenders do not have a fundamental right to be free from sex offender registration requirements), *State v. Druktenis*, 2004-NMCA-032, ¶¶ 90, 100, 86 P.3d 1050, 1076, 1079 (2004) (holding that no fundamental rights are implicated by SORNA and that it is not "appropriate to attempt a heightened scrutiny coverage"), and *Ohio v. Small*, 833 N.E.2d 774, 779 (Ohio Ct. App. 2005) (holding that classification as a sex offender does not implicate any fundamental rights and applying rational basis review), with *People v. David W.*, 733 N.E.2d 206, 211 (N.Y. 2000) (holding that classification as a sex offender "implicated defendant's liberty interest and triggered due process safeguards"), and *People v. Bell*, 778 N.Y.S.2d 837, 845 (Sup. Ct. 2003) (applying strict scrutiny to a sex offender registration law after finding that the law implicated a fundamental right).

In *People v. Bell*, for example, a New York trial court found that an individual required to register under a state sex offender registration law had a liberty interest that would be violated by registering.<sup>171</sup> The *Bell* court applied a two-part test that required a showing of harm to a reputational interest plus a showing of “demonstrable harm to a person’s ‘more tangible interests such as employment’” before a finding that a liberty interest deserving of due process protection was involved.<sup>172</sup> The court then reiterated that “[t]he ramifications of being classified [as a sex offender] and having that information disseminated fall squarely within those cases that recognize a liberty interest where there is some stigma to one’s good name, reputation or integrity.”<sup>173</sup> This reputational interest, in combination with requirements that the offender maintain a 9:00 P.M. curfew, stay in his house after dark, and provide registration information to authorities, was enough to meet the requirements of reputation plus some other tangible interest.<sup>174</sup> Finding that this right existed, the court applied strict scrutiny and determined that, as applied to the case at hand, the registration provisions were not narrowly tailored to the legislative goal of protecting the public from sex offenders when the only offense was kidnapping a child.<sup>175</sup>

Clearly the *ACLU of New Mexico* court did not believe that the reputational interests affected by registering as a sex offender were so fundamental that heightened scrutiny should be applied. If it had, it would not have applied rational basis review. In fact, the court noted that a reputational injury *cannot* occur when it is based on already public information like the conviction records of sex offenders.<sup>176</sup> Accordingly, it was impossible for the *ACLU of New Mexico* court to apply anything but a rational basis review since the liberty interests that the ACLU appellants argued were affected by ASORNA simply did not fit within either of the two heightened scrutiny tiers of review. Unwilling and unable to apply heightened scrutiny, the court was forced to fit ASORNA into the least stringent tier of judicial review: rational basis.

Abandonment of the tiered approach would provide the court with the flexibility to more fairly evaluate competing interests in difficult cases such as those involving sex offenders. Justices of the U.S. Supreme Court have been advocating for the abandonment of the tiered approach for a number of years. For example, in a dissenting opinion in *San Antonio Independent School District v. Rodriguez*, Justice Marshall voiced his disagreement with the typical equal protection approach of forcing a constitutional analysis into one of the tiers of judicial review.<sup>177</sup> Justice Marshall’s criticism of the tiered approach focused on the unfairness that is inherent in attempting to classify a constitutional right into one of the predetermined limited areas of review.<sup>178</sup> Justice Marshall advocated for a type of balancing approach, or a sliding scale, in which “concentration [is] placed upon the character of the

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171. *Bell*, 778 N.Y.S.2d at 844–45.

172. *Id.* at 843 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

173. *Id.* (quoting *David W.*, 733 N.E.2d at 210).

174. *Id.* at 844–45.

175. *Id.* at 845–47.

176. *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 32, 137 P.3d 1215, 1227–28.

177. 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

178. *Id.*

classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”<sup>179</sup> Under a sliding scale form of review, the focus would be on the “constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.”<sup>180</sup> This aspect of the balancing approach draws from the famous fourth footnote of *United States v. Carolene Products Co.* in which the U.S. Supreme Court noted that a “more searching judicial inquiry” may be required when a statute “prejudice[s] against discrete and insular minorities” who are not protected by “the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>181</sup> Justice Marshall also specifically rejected the notion that strict scrutiny should only be applied to “established rights which [the court is] somehow bound to recognize from the text of the Constitution itself,”<sup>182</sup> arguing that courts should instead look at the nexus between constitutional guarantees and non-constitutional interests.<sup>183</sup> As the nexus between the two interests increases, Justice Marshall argued that the “degree of judicial scrutiny...must be adjusted accordingly.”<sup>184</sup>

Justice Marshall is not the only member of the U.S. Supreme Court to question the continuing viability of the tiered approach to judicial review. Justice Stevens also argued for a sliding scale of judicial review in his concurring opinion in *Craig v. Boren* by stating that “[t]here is only one Equal Protection Clause” and that it “does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”<sup>185</sup> In his concurrence, Justice Stevens stated that the tiered method of deciding cases is not “completely logical” and that it may be more important to state the particular reasons for deciding an issue rather than trying to fit a decision into one of the tiers of scrutiny.<sup>186</sup>

The constitutional challenge in *Craig* regarded a state statute that allowed eighteen-year-old females to purchase 3.2 percent beer but prevented males from purchasing the same product until they turned twenty-one.<sup>187</sup> The majority, applying intermediate scrutiny, struck down the statute because (1) the “relationship between gender and [the State’s interest in] traffic safety” was “far too tenuous” and (2) the statute “invidiously discriminate[d] against males 18–20 years of age.”<sup>188</sup> The Court also noted that “the principles embodied in the Equal Protection Clause are not to

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179. *Id.* at 99 (alteration in original) (quoting *Dandridge v. Williams*, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting)). Justice Marshall also argued that not only is a sliding scale of review more appropriate than the tiered analysis, but also that the court had been applying, without acknowledging, this form of review for years. *Id.* at 98–99. He noted that the U.S. Supreme Court’s “decisions in the field of equal protection...reveal[] that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.” *Id.*

180. *Id.* at 99.

181. 304 U.S. 144, 153 n.4 (1938).

182. *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting).

183. *Id.* at 102.

184. *Id.* at 103.

185. 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).

186. *Id.*

187. *Id.* at 197 (majority opinion).

188. *Id.* at 204.



be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups."<sup>189</sup>

Justice Stevens explained his concurrence by noting that the law "impose[d] a restraint on 100% of the males in the class [of people between eighteen and twenty-one years of age who were prohibited from purchasing alcohol] allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcoholic beverages."<sup>190</sup> He went on to write that "even assuming" that the law had some benefit, it did not seem "that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%."<sup>191</sup> While Justice Stevens ultimately agreed with the decision to strike down the law, he indicated that the tiered approach of judicial review should be abandoned.<sup>192</sup>

Justice Stevens reiterated the notion of a continuum of judicial review in his concurring opinion in *City of Cleburne v. Cleburne Living Center, Inc.* in which he stated that courts must ask "certain basic questions," including (1) whether the class "is harmed by the legislation" and whether it has "been subjected to a tradition of disfavor by our laws," (2) what "the public purpose that is being served by the law" is, and (3) whether there is a "characteristic of the disadvantaged class that justifies the disparate treatment."<sup>193</sup> Justice Stevens noted that in *City of Cleburne* the decision not to grant a special use permit to a home for the mentally disabled was based on "the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside" in the home.<sup>194</sup>

Justice Marshall, separately concurring in part in *City of Cleburne*, applied his sliding scale equal protection analysis.<sup>195</sup> He noted that "[b]y invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment."<sup>196</sup> In a footnote, Justice Marshall noted that while "[n]o single talisman can define those groups" that require heightened scrutiny, the "political powerlessness of a group and the immutability of its defining trait" may be relevant in the application of a more searching review under the Fourteenth Amendment.<sup>197</sup> Such factors are "relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs."<sup>198</sup> In addition, Justice Marshall noted that "[t]he discreteness and insularity warranting a 'more searching judicial inquiry' must therefore be viewed from a social and cultural perspective as well as a political one"<sup>199</sup> and that a more searching inquiry may be appropriate when "society is likely to stigmatize individuals as members of

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189. *Id.* at 208-09.

190. *Id.* at 214 (Stevens, J., concurring).

191. *Id.*

192. *See id.*

193. 473 U.S. 432, 453 (1985) (Stevens, J., concurring) (internal quotation marks omitted).

194. *Id.* at 455.

195. *Id.* at 460 (Marshall, J., concurring in part and dissenting in part).

196. *Id.* at 472.

197. *Id.* at 472 n.24.

198. *Id.*

199. *Id.* at 473 n.24 (citation omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

an inferior caste or view them as not belonging to the community.”<sup>200</sup> The opinions of Justices Marshall and Stevens demonstrate that there is a federal concern that the tiered approach to equal protection and due process review is both unfair and unworkable.

When applied to a case such as *ACLU of New Mexico v. City of Albuquerque*, the balancing approach would have allowed the New Mexico Court of Appeals to avoid the awkward task of attempting to equate sex offenders with cherished classes such as race or gender. In addition, a balancing approach would allow litigants to focus on exactly how they have been affected by a particular law rather than on how the way they have been affected compares to other rights that have deserved heightened scrutiny. This balancing would enable courts to merely look at the burden imposed by society on sex offenders, for example, and the benefits that the State obtains from the restrictions that are imposed. As the *ACLU of New Mexico* court acknowledged, there is a great burden imposed upon sex offenders when they are required to register and have their personal information displayed on the city website for all to see.<sup>201</sup> Under the tiered approach to judicial review, this burden is not sufficient to allow heightened scrutiny to be applied to sex offender registration laws. Under a balancing approach, however, heightened scrutiny would be required, and the City would have to demonstrate a much clearer relationship between ASORNA and its purpose of protecting children from sex offenders.

To determine whether heightened scrutiny should be applied, the court would first have to look to the way in which ASORNA affected those individuals required to register. One important factor would be whether there was a nexus between a fundamental right and the right affected by the ordinance. As the New York court in *People v. Bell* recognized, there is a liberty interest involved when an individual's reputation is harmed, and that interest becomes fundamental when coupled with some other form of injury.<sup>202</sup> While this reputational harm was not enough for the *ACLU of New Mexico* court to apply heightened scrutiny under the traditional approach, it certainly demonstrates that there is a nexus between a recognized liberty interest and the interests affected by ASORNA.

In addition to the reputational interests affected by ASORNA, the ordinance also affects sex offenders' ability to (1) freely purchase property, since they cannot live near a school;<sup>203</sup> (2) easily obtain employment, as their supervisors must be notified that they are sex offenders and must be able to account for the offenders' whereabouts at all times; and (3) live peacefully and privately, as they are subjected to harassment by neighbors who do not want sex offenders living in their midst.<sup>204</sup> Under a balancing approach, all of these factors begin to suggest that the requirements that ASORNA imposes upon sex offenders have a close nexus to

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200. *Id.*

201. See *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 25, 137 P.3d 1215, 1226 (“[W]e note that the hardship imposed on an offender convicted of kidnapping or false imprisonment to be labeled a sex offender, absent any evidence of a sexual motivation for the crime, is great.”).

202. *People v. Bell*, 778 N.Y.S.2d 837, 844–45 (Sup. Ct. 2003).

203. For an example of a law that essentially prevents sex offenders from living anywhere within a city's limits due to its requirement that they cannot live within 2,500 feet of a school, park, or place where children might gather, see Zarrella & Oppmann, *supra* note 6.

204. See *supra* Part II.

established rights that would require courts to more closely scrutinize the City's stated purpose in enacting ASORNA.

Second, under Justice Marshall's approach, the court would look to the "invidiousness of the basis upon which the particular classification is drawn."<sup>205</sup> While sex offenders are clearly not a "discrete and insular minority" as conceived of by the Court in *United States v. Carolene Products Co.*,<sup>206</sup> there is more than likely a failure "of those political processes ordinarily to be relied upon" to protect sex offenders against unlawful governmental action.<sup>207</sup> Sex offenders are hardly a politically popular group. There are no sex offender lobbyists advocating for sex offenders' rights, and any legislator or city councilor that fights for the rights of sex offenders would face virtual political suicide. Without the protection of the political process, courts' duty to closely scrutinize ASORNA becomes more evident because they cannot defer to the protection ordinarily provided by the political process.

Furthermore, as Justice Marshall stated in *City of Cleburne*, the "immutability of the trait at issue" is important in determining whether to apply heightened scrutiny under a sliding scale approach to judicial review.<sup>208</sup> Being a sex offender, of course, is not an immutable characteristic such as gender or race. The way in which we treat sex offenders, however, implies a belief that being an offender is an immutable characteristic. Sex offender registration laws like ASORNA are founded on the belief that sex offenders are incurable and that, because they will never change, we must closely monitor them for the rest of their lives. In addition, sex offenders are subject to "social and cultural isolation that gives the majority little reason to respect or be concerned with [their] interests and needs."<sup>209</sup> Sex offenders, therefore, are subject to just the type of stigmatization that Justice Marshall believed deserved heightened review. Not only are sex offenders viewed as "members of an inferior caste or...not belonging to the community,"<sup>210</sup> but communities actively try to exclude sex offenders by enacting laws like ASORNA. The lack of political protection for sex offenders, the actual or perceived immutability of their criminal nature, and the intense social stigmatization that sex offenders are subjected to all weigh heavily in favor of applying greater scrutiny to sex offender registration laws.

The next step in reviewing ASORNA under Justice Marshall's balancing test would require looking at the nature of the interest that the City has in protecting the children of Albuquerque. Undoubtedly, this is an important interest, and the City has the authority to take measures to protect the children residing within its limits. In balancing that interest, however, it appears that the infringement upon sex offenders' lives, and the lack of political protection of sex offenders when ASORNA was enacted, would require the court to closely scrutinize the reasons that the City provided when it created the sex offender registry.

Under the heightened scrutiny mandated by the balancing approaches of Justices Stevens and Marshall, it may well be that the provisions of ASORNA would not

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205. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

206. 304 U.S. 144, 153 n.4 (1938).

207. *Id.*

208. 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part).

209. *Id.*

210. *Id.* at 473 n.24.

survive a constitutional challenge as they did in *ACLU of New Mexico v. City of Albuquerque*.<sup>211</sup> Under heightened review, the City would have had to demonstrate that its treatment of sex offenders *actually* served the purpose of protecting the children of Albuquerque from the allegedly dangerous offenders. In doing this, the City would have to show that the sex offenders registered under ASORNA actually posed a significant danger to the community. With statistics showing that as few as five percent of registered offenders recidivate,<sup>212</sup> it is highly unlikely that the City could meet this burden. In fact, the U.S. Supreme Court, in *Craig v. Boren*, specifically noted that “the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities.”<sup>213</sup> While the Court’s statement was based on the differing treatment of men and women with regard to alcohol purchases, the same may hold true with sex offenders. The treatment of sex offenders should be justified by something other than loose-fitting statistical generalities that show that sex offenders may recommit a sex offense.<sup>214</sup> Just as imputing the “sins of the 2% on the 98%” was an insult to all of the young men in *Craig*,<sup>215</sup> imputing the potential recidivism of only a few sex offenders to the entire class of convicted offenders should also be a violation of equal protection and due process. Rather than being based on the reality that sex offenders are so likely to recidivate that cities must do everything in their power to protect their children from them, the decision to enact ordinances like ASORNA may be impermissibly based on the “irrational fears” of city councilors and individuals living near sex offenders.<sup>216</sup>

Of course, *some* convicted sex offenders *do* pose a significant danger to children. However, because far less than a majority of sex offenders may actually pose a real danger, changes are needed that would provide them with an opportunity to avoid the unfairness of being subjected to registration laws despite the fact that they pose no actual danger. Unfortunately, as long as the tiered approach to equal protection and due process continues to be applied, courts will be unable to mandate the changes needed to ensure that offenders who do not pose a danger can avoid the stigmatization associated with being a registered sex offender. By abandoning the tiered approach and adopting the balancing approach argued for above, it would be possible to ensure that equal protection and due process are more fairly provided. Such a result would lead to much more narrowly tailored laws that both protect our communities and allow non-dangerous sex offenders to return to society in the same manner as all other convicted felons.<sup>217</sup>

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211. 2006-NMCA-078, ¶ 23, 137 P.3d 1215, 1225.

212. *See supra* Part II.C.

213. 429 U.S. 190, 208–09 (1976).

214. *See supra* Part II.C.

215. 429 U.S. at 214 (Stevens, J., concurring).

216. *See supra* Part II.C. Of course, stories like that of Megan Kanka give good reason to fear the danger posed by sex offenders, so these fears are not entirely “irrational.” *See supra* note 29.

217. An administrative hearing or psychological evaluation may be useful in determining whether an offender actually poses a future danger.

## V. IMPLICATIONS

Despite the possibility that a different result might have been reached in *ACLU of New Mexico* had the court conducted a different form of constitutional review—either a true rational basis review or a balancing approach—the decision continues to stand. The decision does not impact just the City of Albuquerque and ASORNA. Instead, it may have a lasting impact on the law in New Mexico. Implications of the court’s decision include (1) the effect that the court’s decision has on the constitutionality of SORNA, (2) the effect that it may have on the constitutionality of New Mexico’s DNA Identification Act, and (3) the effect that SORNA’s preemption of sex offender registration will have on New Mexico communities.

### A. *ACLU of New Mexico v. City of Albuquerque’s Impact on New Mexico’s Sex Offender Registration and Notification Act*

By holding that ASORNA’s inclusion of kidnappers and false imprisoners is an unconstitutional violation of due process, the New Mexico Court of Appeals implicitly held that New Mexico’s state sex offender statute, SORNA, is unconstitutional in the same manner. The reason for this is that ASORNA defined “sex offender” by referencing the State’s definition of “sex offender” in SORNA.<sup>218</sup> By holding that ASORNA’s inclusion of kidnappers was unconstitutional, the court necessarily held that SORNA’s inclusion of these same offenders is also unconstitutional because both statutes require kidnappers and false imprisoners to register as sex offenders.<sup>219</sup> The result is that any person required to register as a sex offender under SORNA whose only offense was kidnapping or falsely imprisoning a minor would have grounds to challenge their registration as a sex offender under the precedent set in *ACLU of New Mexico v. City of Albuquerque*.<sup>220</sup>

There may be a way to save SORNA, however, because one distinction between the two sex offender laws that could prevent the decision in *ACLU of New Mexico* from invalidating SORNA is that SORNA treats kidnappers and false imprisoners differently from other sex offenders.<sup>221</sup> ASORNA, on the other hand, treated all sex offenders the same and did not differentiate between the specific types of crimes that the ordinance included.<sup>222</sup>

As mandated by the Jacob Wetterling Act,<sup>223</sup> SORNA requires the registration of all individuals convicted of kidnapping or the false imprisonment of a victim under

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218. Albuquerque, N.M., Ordinance 43-2003, § 3 (Oct. 22, 2003).

219. Compare *id.*, with NMSA 1978, § 29-11A-3(E) (2005). Since ASORNA defined “sex offense” in the same way that SORNA does, any definition in ASORNA that was unconstitutional would also be unconstitutional in SORNA.

220. See 2006-NMCA-078, ¶¶ 24–25, 137 P.3d 1215, 1226.

221. See NMSA 1978, § 29-11A-5.1 (2005) (requiring public access to registration information of offenders convicted of criminal sexual penetration, sexual contact of a minor, exploitation of children, sexual exploitation of children by prostitution, and attempt to commit any of the above offenses, but not requiring public access to registration information of offenders convicted of other offenses defined as sex offenses under the statute, including kidnapping and false imprisonment).

222. See Albuquerque, N.M., Ordinance 43-2003, § 3 (requiring the publication of all sex offenders’ information regardless of the type of sex offense for which they were convicted).

223. 42 U.S.C. § 14071(g)(2)(A) (2000) (conditioning a state’s receipt of federal funds upon the creation of a sex offender registry).

the age of eighteen if the offender is not the parent of the victim.<sup>224</sup> SORNA does not, however, allow the registration information provided by kidnappers and false prisoners to be published on the state website or disseminated by local authorities.<sup>225</sup> ASORNA, on the other hand, required kidnappers and false prisoners to register *and* to comply with the notification provisions of the ordinance, which caused their photographs and other relevant information to be released to the general public.<sup>226</sup> This is a vital distinction since the act of registering as a sex offender, without the consequence of public notification, may not be enough to implicate the due process concerns that the *ACLU of New Mexico* court identified when it struck down the kidnapping portion of ASORNA.<sup>227</sup>

Despite the distinctions between ASORNA and SORNA, it may still be necessary for the New Mexico Legislature to amend SORNA so that individuals who were only convicted of false imprisonment or kidnapping are no longer required to register as sex offenders. The *ACLU of New Mexico* court properly noted that “the hardship imposed on an offender convicted of kidnapping or false imprisonment to be labeled a sex offender, absent any evidence of a sexual motivation for the crime, is great.”<sup>228</sup> While individuals convicted solely of kidnapping are not publicly displayed on the State of New Mexico’s webpage like other sex offenders, they must still register as sex offenders and, at least in the law enforcement community, are labeled as sex offenders despite the fact that their crimes were not sexually motivated.<sup>229</sup> In order to comply with both the Jacob Wetterling Act and the *ACLU of New Mexico* decision, the New Mexico Legislature could simply give these two types of offenders a different name that does not imply that their crimes included sexual elements. By doing this, the legislature would be able to continue to collect information about individuals convicted of kidnapping children as mandated by the Jacob Wetterling Act and could, at the same time, avoid the further stigmatization of convicted kidnappers as sex offenders.<sup>230</sup>

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224. NMSA 1978, § 29-11A-3(E)(6)–(7). The Jacob Wetterling Act requires the attorney general of a state to “establish guidelines for State programs that require” one “who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in [the Act].” 42 U.S.C. § 14071(a)(1). In the Act, “[t]he term ‘criminal offense against a victim who is a minor’” is defined to include kidnapping and false imprisonment, except when those crimes are committed by the victim’s parents. *Id.* § 14071(a)(3)(A)(i)–(ii). If the State fails to set up such a program, it “shall not receive 10 percent of the funds that would otherwise be allocated” to it under the statute. *Id.* § 14071(g)(2)(A).

225. NMSA 1978, § 29-11A-5.1.

226. Albuquerque, N.M., Ordinance 43-2003, § 7.

227. See *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 25, 137 P.3d 1215, 1226.

228. *Id.*

229. See NMSA 1978, § 29-11A-5 (2005). Individuals convicted of these two crimes must register under SORNA and, therefore, are labeled as sex offenders. *Id.*

230. Interestingly, Governor Bill Richardson recently pressured the New Mexico Public Safety Department to include the information of a sex offender who had raped a woman in her twenties and attempted to kidnap a young girl on the State’s sex offender webpage. Miguel Navrot, *Rapist’s Name Is Back on Sex Offender List*, ALBUQUERQUE J., Feb. 10, 2007, at A1. The offender had been removed from the sex offender website when public officials realized that his convictions stemmed from the rape of a twenty-year-old woman and the kidnapping of a young girl. *Id.* Despite the heinous nature of these crimes, the kidnapping conviction did not trigger reporting on the sex offender website. See NMSA 1978, § 29-1A-5.1. The conviction in the rape case was for “criminal sexual conduct,” which the Department had concluded was not a conviction that warranted reporting on the website. Navrot, *supra*, at A1. Since the rape victim was an adult, SORNA only required reporting for a conviction of criminal sexual penetration or attempted criminal sexual penetration. NMSA 1978, § 29-11A-5.1(A)(1), (5). The

*B. ACLU of New Mexico v. City of Albuquerque's Effect on New Mexico's DNA Identification Act*

A portion of the *ACLU of New Mexico* decision appears to be in direct conflict with a new provision of New Mexico's DNA Identification Act since the court held that the compulsory DNA testing of individuals who are not currently incarcerated violates their Fourth Amendment right to be free from unreasonable searches and seizures.<sup>231</sup> The DNA Identification Act, however, requires the compulsory sampling of offenders who are no longer in the custody of the correctional system.<sup>232</sup> The City of Albuquerque raised this issue in *ACLU of New Mexico*, noting that the ACLU's attack on ASORNA would implicitly overturn the DNA Identification Act.<sup>233</sup> The court, however, determined that its decision would have no effect on the Act.<sup>234</sup> It noted that the DNA Identification Act "only allows collection of DNA samples from covered offenders under limited circumstances,"<sup>235</sup> including (1) those convicted "on or after July 1, 1997...so long as the request is made before release from any correctional facility or...before the end of any period of probation or other supervised release" and (2) those "incarcerated on or after July 1, 1997...so long as the request [to take the DNA sample] is made before release from any correctional facility."<sup>236</sup> The court held that the DNA Identification Act, unlike ASORNA, was "not retroactive" and allowed "for compulsory testing only of those individuals that are currently incarcerated, on probation, or parole, or some type of supervised release."<sup>237</sup>

In making this determination, the court cited two subsections of the pertinent section of the DNA Identification Act.<sup>238</sup> The court, however, appears to have overlooked another subsection, a 2005 addition to the DNA Identification Act, mandating that sex offenders who are "required to register or renew" their registration under SORNA "shall provide a [DNA] sample immediately upon request to the county sheriff located in any county in which the sex offender is required to register."<sup>239</sup> This applies to individuals who are not currently "incarcerated, on probation, or parole, or some type of supervised release."<sup>240</sup> On the contrary, these individuals must provide a DNA sample when they register or re-register under SORNA if they did not provide one while in the State's custody.<sup>241</sup>

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Department initially concluded that "criminal sexual conduct" was not sufficiently similar to "criminal sexual penetration" to warrant reporting but later reversed its decision at the urging of Governor Richardson. Navrot, *supra*, at A1.

231. *ACLU of N.M.*, 2006-NMCA-078, ¶ 45, 137 P.3d at 1231.

232. NMSA 1978, § 29-16-6(A)(4) (2006).

233. *ACLU of N.M.*, 2006-NMCA-078, ¶ 44, 137 P.3d at 1230-31.

234. *Id.*

235. *Id.*

236. *Id.* (quoting NMSA 1978, § 29-16-6(A)(1)-(2)).

237. *Id.*

238. *Id.* (citing NMSA 1978, § 29-16-6(A)(1)-(2)).

239. NMSA 1978, § 29-16-6(A)(4).

240. *ACLU of N.M.*, 2006-NMCA-078, ¶ 44, 137 P.3d at 1230.

241. NMSA 1978, § 29-16-6(A)(4). This provision requires "covered offender[s]," defined as "any person convicted of a felony offense as an adult...or a sex offender required to register pursuant to the provisions of [SORNA]," *id.* § 29-16-3(D) (2005), to

This provision is nearly identical to the provision of ASORNA that allowed the Albuquerque Police Department to obtain DNA samples from sex offenders, which the New Mexico Court of Appeals held to be a violation of the constitutional right to be free from unreasonable searches and seizures.<sup>242</sup> The sex offenders required to register under section 29-16-6(A)(4) are no longer under state supervision, yet they are required to provide a DNA sample “immediately upon request by the county sheriff.”<sup>243</sup> In accordance with the *ACLU of New Mexico* court’s decision, the DNA Identification Act should be amended to ensure that it does not allow the State to unconstitutionally obtain DNA samples from offenders who are not currently in custody.

### C. *ACLU of New Mexico v. City of Albuquerque’s Effect on Neighboring Communities*

As the concurring opinion of Judge Robinson in *ACLU of New Mexico v. City of Albuquerque* points out, there could be severe unintended consequences stemming from the fact that SORNA prevents cities, other than those that already have an ordinance, from creating their own sex offender ordinances.<sup>244</sup> Because Albuquerque now has an ordinance that is stricter than the state act, offenders wishing to move to the Albuquerque area could simply choose to live in a neighboring city, such as Rio Rancho or Los Lunas, in order to avoid the stringent requirements imposed by ASORNA.<sup>245</sup> In fact, a sex offender convicted before 1995 would not have to register at all if he or she simply chose to live a few minutes outside of the Albuquerque city limits. As Judge Robinson pointed out, the smaller towns to which sex offenders may move have fewer resources to monitor and track sex offenders, which may end up endangering the citizens of these small communities.<sup>246</sup>

Judge Robinson’s concurrence also suggests that SORNA may conflict with section 3-17-1(B) of the New Mexico Statutes Annotated, which allows communities to adopt ordinances stricter than state laws in order to protect the safety of their residents.<sup>247</sup> If there is such a conflict and communities are allowed to each create their own sex offender registration schemes, communities across the state

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provide a sample immediately upon request to the county sheriff located in any county in which the sex offender is required to register, unless the sex offender provided a sample while in the custody of the corrections department or to the county sheriff of another county in New Mexico in which the sex offender is registered.

*Id.* § 29-16-6(A)(4).

242. See *ACLU of N.M.*, 2006-NMCA-078, ¶ 45, 137 P.3d at 1231.

243. NMSA 1978, § 29-16-6(A)(4). In addition, the distinction between allowing DNA testing while in custody but not while out of custody raises a question that is beyond the scope of this Note. The question becomes, what is the distinction that makes a DNA test conducted on the day before being released from prison any different from a test conducted the day after being released from prison? The court’s analysis of ASORNA’s DNA testing requirements causes one to envision an intrusive needle prick and blood draw. DNA testing, however, can be done by simply swabbing the inner cheek of an offender, which is a far less intrusive procedure than blood testing. If sex offenders truly pose such a danger of recidivism that state and local governments can intrude upon every aspect of their lives, it is not unreasonable to require that they be subjected to a brief and non-intrusive test that will help to link them to past or future crimes.

244. *ACLU of N.M.*, 2006-NMCA-078, ¶ 55, 137 P.3d at 1232–33 (Robinson, J., specially concurring).

245. *Id.*

246. *Id.*

247. *Id.* ¶ 57, 137 P.3d at 1233 (citing NMSA 1978, § 3-17-1(B) (1993)).



could be placed in a situation in which they are forced to create the strictest possible ordinances to keep sex offenders out of their towns. These ordinances, if each is stricter than the last, would create constitutional challenges that could flood the courts of New Mexico. Rather than allow communities to enact their own registration laws, the State should preempt *all* sex offender registration laws so that each city, town, and community can equally share in the burden of monitoring and tracking convicted sex offenders.

As demonstrated above, the *ACLU of New Mexico* court's decision reaches far beyond the City of Albuquerque's offender registration ordinance. Instead, the decision affects the constitutionality of other New Mexico statutes and provides a basis upon which offenders required to register under SORNA, or required to provide DNA samples under the DNA Identification Act, could challenge these laws. In addition, while the *ACLU of New Mexico* court may have allowed Albuquerque to become a hostile environment for sex offenders, the offenders may simply have been pushed into neighboring communities and may now be free to roam the streets of Albuquerque without being forced to register.

## VI. CONCLUSION

By upholding most of the registration and notification requirements of ASORNA, the New Mexico Court of Appeals has followed in the footsteps of many jurisdictions across the nation that have been faced with similar challenges. Legally, the decision conforms to current precedent across the nation.<sup>248</sup> The consequences of following these footsteps, however, could be great. Today, states and municipalities are allowed to impose strict registration and notification provisions on convicted sex offenders so that the public can be protected against a group of people seen as threat. As the New Mexico Court of Appeals acknowledged in *State v. Druktenis*, there is uncertainty about the likelihood that sex offenders will actually recidivate.<sup>249</sup> This doubt has been statistically confirmed by studies of sex offender recidivism rates.<sup>250</sup> If all that is required to subject a convicted offender to such close public scrutiny is a fear that he is dangerous, then the days when all criminals are subjected to increased scrutiny are not very far in the future. By rejecting the traditional rational basis review applied to constitutional claims and by adopting the balancing approach suggested in this Note, perhaps the day when such intrusions become a reality could be avoided.

Under the precedent set by *ACLU of New Mexico v. City of Albuquerque*,<sup>251</sup> *State v. Druktenis*,<sup>252</sup> *Smith v. Doe*,<sup>253</sup> and every other case concluding that sex offender registration laws are an effective way to protect our communities from dangerous criminals, one could envision a day when it would be possible to go online and see the photographs of all of our neighbors who have ever been convicted of *any*

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248. See, e.g., *Smith v. Doe*, 538 U.S. 84 (2003); *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004); *State v. Druktenis*, 2004-NMCA-032, 137 P.3d 1050.

249. 2004-NMCA-032, ¶¶ 60–61, 86 P.3d 1050, 1068–69.

250. See *supra* Part II.C.

251. 2006-NMCA-078, 136 P.3d 1215.

252. 2004-NMCA-032, 86 P.3d 1050.

253. 538 U.S. 84.

crime.<sup>254</sup> Under the precedent set by these cases, bank robbers could be forbidden from using banks, armed robbers forbidden from living near stores, and car thieves prevented from residing near parking garages. All of these intrusions would be justified by the same fears and loose fitting statistics that courts currently use to uphold sex offender registration law. Whether society is prepared to accept increasing intrusions upon privacy, however, is questionable.

With federal procedural due process claims foreclosed by the holding in *Connecticut Department of Public Safety v. Doe*<sup>255</sup> and ex post facto, double jeopardy, and cruel and unusual punishment claims foreclosed by the decision in *Smith v. Doe*,<sup>256</sup> any future challenges to New Mexico state or local sex offender registration laws would best be brought under the state constitution. Given that it will be necessary to establish a divergence from federal law under state precedent, this may be an insurmountable challenge.<sup>257</sup> Without grounds to challenge these laws, the State and its municipalities will be free to enact strict laws monitoring all types of felons if they can simply communicate some reason that their community will become slightly safer due to the privacy intrusion.

Because sex offenders have no fundamental privacy interest in preventing the public from having such easy access to their conviction records and other identifying information, perhaps we are not far from the day when a city, state, or small town takes the next step forward. Why require the public to go to a webpage to make themselves aware of the sex offenders among them? Instead, perhaps it would be easier, more efficient, and certainly more effective to protect the children of our communities by returning to the days of Hester Prynne and applying a scarlet "S" to every convicted sex offender. What better way to prevent sex crimes is there than to ensure that every child knows that when they see someone branded with an "S" coming they should run?

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254. This day is not too far in the future. For example, the City of Albuquerque recently passed an ordinance that requires that the photographs of all convicted DWI (Driving While Intoxicated) offenders be published in the city's local newspapers. ALBUQUERQUE, N.M., CODE § 11-13-1 (2007). Rather than placing the offenders' photographs on a webpage, the photographs of these offenders are disseminated across the state so that anyone who picks up a local newspaper can know who has been convicted of a DWI. *Id.*; see also Peter Rice, *DWI Picture Plan Still in the Works*, ALBUQUERQUE TRIB., Sept. 16, 2006, at A3.

255. 538 U.S. 1, 8 (2003).

256. 538 U.S. at 105–06 (finding that Alaska's sex offender registration and notification law was non-punitive in nature and foreclosing an Ex Post Facto Clause challenge). If the provisions of a sex offender statute are non-punitive, then they cannot be said to violate the Ex Post Facto, Double Jeopardy, or Cruel and Unusual Punishment Clauses.

257. ACLU of N.M. v. City of Albuquerque, 2006-NMCA-078, ¶ 18, 137 P.3d 1215, 1223–24.