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Complicit Bias: Sex-Offender Registration as a Penalty for Obstructing Sex-Trafficking Prosecutions

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Blanche Cook*

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TABLE OF CONTENTS

I. Introduction	139
II. Case Synopsis	145
III. The Federalization of Human Sex Trafficking.....	147
IV. The Canons of Statutory Interpretation.....	152
A. Plain Language of §§ 1591 and 16911.....	152
B. The Legislative History.....	160
1. Section 1591's Legislative History.....	160
2. The Use of the T-Visa in Discouraging Obstruction.....	166
3. The Legislative History of the Sex Offender Registration and Notification Act	170
a. The History and Purpose of National Sex Offender Registries	170
b. Sex Trafficking as an Offense Under SORNA.....	176
c. The Rule of Lenity	178
V. Doctrinal and Theoretical Framework	179
A. Theories of Conspiracy: The Inappropriateness of Group Culpability	180
B. Theories of Punishment	181
VI. Judicial and Legislative Intervention	186

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A.	Until Congress Intervenes, the District Courts Are Perfectly Situated to Make the Registry Decision After a Sentencing Hearing Where the Issue is Fully Vetted	187
B.	Sex Offender Registry as a Penalty for Obstruction Under § 1591.....	192
C.	The Consequences of Sex-Offender Registration for Sex-Trafficking Crimes	194
D.	Legislative Intervention Needed	195
E.	Practical Considerations	195
VII.	Conclusion	196

I. INTRODUCTION

As a matter of statutory interpretation, it is unclear whether criminal defendants who obstruct federal sex-trafficking prosecutions must register as sexual deviants on the national sex offender registry when the defendants do not directly engage in sex trafficking. This unresolved legal question presents a tangled web of statutory construction. At best, the anomaly results from a congressional drafting oversight in the Sex Offender Registration and Notification Act (SORNA).¹ At worst, requiring defendants to register as sex offenders where they have solely engaged in obstruction may reflect a legislative and prosecutorial overzealousness emblematic of the War on Crime and the War on Drugs,² which have made the United States the most carceral nation in history³ and which may undermine the very pur-

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1. Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16901–16929 (2012).
 2. See generally, e.g., David Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241–55 (2001) (discussing the history, purpose, and implications of the War on Drugs).
 3. In the last thirty years, U.S. prison populations rose from 300,000 to 2.3 million, which some have argued was in response to civil-rights demands in housing, education, and employment. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 11 (2010); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 15 (Spiegel & Grau 2015). Counting individuals who are on probation or parole, more than 7 million men and women are under legal supervision—numbers equal to the population of Israel. J. M. Balkin & Sanford Levinson, *Law as Performance*, in 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES 279 (Michael Freeman & Andrew D.E. Lewis eds., Oxford Univ. Press 1999). It should also be noted that, unlike the cases involving Michael Brown, Tamir Rice, and Eric Garner—to name a few—prosecutors had no problems obtaining indictments and convictions against the black bodies that comprise the mass incarceration that has transpired since the 1970s. Cf. Lauren Gambino, *Eric Garner: Grand Jury Declines to Indict NYPD Officer over Chokehold Death*, GUARDIAN, Dec. 3, 2014, <https://www.theguardian.com/us-news/2014/dec/03/eric-garner-grand-jury-declines-indict-nypd-chokehold-death> [<https://perma.unl.edu/5FHY-A2P6>]; Ashley Fantz et al., *Tamir Rice Shooting: No Charges for Officers*, CNN (Dec. 28, 2015), <http://www.cnn.com/2015/12/28/us/tamir-rice-shooting> [<https://perma.unl.edu/NPS9-2MV9>]; Eyder Peralta & Bill

poses of SORNA. The overuse and abuse of SORNA, embodied in mandating obstructionist registration, unmoors SORNA from its legitimate concerns, purposes, and justifications. No court has addressed the issue. Ultimately, congressional intervention is fundamentally necessary to address the anomaly of obstructionist sex-offender registration.

The crux of the problem lies at the intersection of SORNA and the federal sex-trafficking statute, 18 U.S.C. § 1591.⁴ In its plain language, SORNA mandated sex-offender registration for anyone who violates § 1591.⁵ Section 1591, however, has two prohibitions: (1) a sex-trafficking provision under § 1591(a) and (2) its own obstruction provision under § 1591(d).⁶ Consequently, SORNA's plain language mandates that a defendant who is guilty of obstructing a federal sex-trafficking prosecution but has not engaged in actual sex trafficking or even a sexual offense must register as a sex offender under the national sex offender registry.

The legislative history of SORNA further complicates the anomaly of obstructionist registration. In 2006, when Congress enacted SORNA and when SORNA mandated registration for a § 1591 conviction, § 1591 only encompassed sex trafficking. In 2008, Congress expanded the scope of criminal liability under § 1591 beyond sex trafficking to include obstruction by enacting § 1591(d). Congress, however, has never amended SORNA to clarify whether registration is mandated when a defendant merely engages in obstructive conduct. This uncertainty can be resolved by two possible arguments. On the one hand, Congress may have been aware of SORNA's registration requirement when it enacted § 1591(d); therefore, Congress might have intended in the statute's plain language to mandate obstructionist re-

Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown's Death*, NPR (Nov. 24, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case>.

4. 18 U.S.C. § 1591 (2012).

5. 42 U.S.C. § 16901 (2012).

6. The Department of Justice (DOJ) keeps statistical information about the number of individuals charged with a § 1591 violation. Offices of the U.S. Attorneys, *Obscenity, Sexual Exploitation, Sexual Abuse, and Related Offenses*, U.S. DEP'T JUST., <https://www.justice.gov/usam/usam-9-75000-obscenity-sexual-exploitation-sexual-abuse-and-related-offenses#9-75.001> [<https://perma.unl.edu/S2F6-MYHZ>] (last updated Nov. 2000). The DOJ does not, however, quantitatively capture the number of "obstruction" prosecutions under § 1591(d) alone. Thus, it cannot be determined how many individuals, including victims of sex trafficking, have been charged with a § 1591(d) violation and subjected to the mandatory sexual registry scheme. As of the time of writing, no court has decided the issue. As a result, it is impossible to point to exact numbers about how many prosecutors are threatening defendants charged with § 1591(d) violations. Nevertheless, the problem of statutory interpretation remains, and prosecutors, defendants, defense attorneys, judges, probation officers, and legislators must make themselves aware of this lurking problem.

gistration. Put differently, when Congress enacted § 1591(d), it might have been fully aware of SORNA's registration requirements and deliberately failed to amend SORNA because it intended to subject pure obstructionists to registration. On the other hand, because SORNA's mandatory registration under § 1591 originally applied to criminals actively engaged in sex trafficking only, Congress may have inadvertently overlooked the penal consequences of enacting § 1591(d) unconditionally into SORNA. This provision, which did not exist when Congress required mandatory registration for § 1591(a) sex-trafficking violators, is now included in the mandatory-registration requirements. Therefore, regardless of the possible due process and overlapping-enactment issues, the plain language of SORNA mandates obstructionist registration. If plain language prevails, registration is mandatory and not discretionary at sentencing.

Requiring obstructionist registration, however, creates an absurdity. Such penalty undermines the basic purposes of the sex offender registry, specifically the desire to protect the community from the compulsive nature of certain sexual offenders, reducing recidivism, and subjecting defendants guilty of offensive sexual conduct to public shaming.⁷ Mandating that pure obstructionists register as sex offenders is a dire consequence for defendants who have not engaged in any sexually offensive behavior, let alone trafficking, and yet must nationally identify as sexual offenders. Moreover, irrational consequences flow from mandating obstructionist registration. Abuses of prosecutorial discretion are a primary example of such irrationality.⁸ Such registration can empower an overzealous prosecutor to threaten certain sex-trafficking victims with sex registration when they obstruct prosecutions by refusing to testify against their traffickers or "pimps."⁹ In other words, mandating obstructionist registration can create an occurrence where a sex-trafficking victim refuses to testify

7. Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 855, 899 (1995) ("[T]he main purpose of registration laws is to provide police with information for use in subsequent investigations of sex offenses.").

8. Rebecca Krauss, Note, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 12 ("In criminal procedure, the Court has not developed comparable safeguards against abuse by federal prosecutors." (citing Rachel E. Barkow, *Separation of Powers in Criminal Law*, 58 STAN. L. REV. 989, 991–93 (2006))).

9. "Pimp" is defined as "an adult who negotiates sexual encounters between the prostituted person and a buyer." Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1292 n.55 (2015) [hereinafter Butler, *Bridge Over Troubled Water*] (citing Megan Annitto, *Consent, Coercion, and Compassion: Emerging Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 13 (2011)); see also H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 80–81 (2014) (demonstrating the issues surrounding prosecutorial abuse in America with the prosecution of Senator

or release information about sex trafficking, is subsequently charged and convicted of obstruction, and then has to register on a national registry of sex offenders. This result may ultimately undermine the integrity of both the federal sex-trafficking statute and SORNA by subjecting each to scathing criticisms, which are laced with gender bias, both explicit and implicit, for overreaching and misuse.

Moreover, mandating registration for sex-trafficking victims who fail to cooperate in sex-trafficking investigations or prosecutions contravenes the legislative history of § 1591(d)'s obstruction provision. Section 1591(d) clearly reflects Congress's preoccupation with protecting sex-trafficking victims from retaliation from their pimps and traffickers when victims cooperate in sex-trafficking prosecutions. Therefore, it is unlikely that Congress intended to arm prosecutors with the potential weaponry of sex-offender registration to coerce sex-trafficking victims into cooperating in prosecutions, thereby forcing victims to trade their sex traffickers for new pimps—the prosecutors themselves.

This Article argues that SORNA's plain language as it applies to § 1591 creates, at best, a congressional oversight or, at worst, an irrational overzealousness. In order to protect the integrity of both SORNA and the federal sex-trafficking statute, and to adhere to the canons of statutory construction, pure obstructionists should not be compelled to register as sex offenders. Although facially SORNA's plain language may dictate a mandatory registration scheme for pure obstructionists, this result contravenes a basic premise of statutory construction—that is, the precept that requires courts to read an ambiguous statute as a whole within its full structural context. The full context of both SORNA and § 1591 mitigates against obstructionist registration. Courts may well reject mandating registration for pure obstructionists after finding ambiguity in SORNA and therefore refuse to impose registration at sentencing. As another interim solution, however, and until Congress intervenes, the sentencing court is in a privileged position to weigh the evidence, which is often nuanced, in order to make case-by-case determinations about whether an obstructionist has engaged in a sexual offense within the meaning of SORNA. In keeping with the *United States v. Booker*¹⁰ trend, bestowing

Ted Stevens, a case where federal prosecutors failed to provide Sen. Stevens's defense team with exculpatory evidence, leading to their suspension).

10. 543 U.S. 220 (2005). As explained *infra* section IV.A, SORNA's obstructionist registration is mandatory and extends to the plain language of the statute; however, a court may find persuasive other rules of statutory construction, thereby seizing upon an ambiguity in the statute to exercise discretion. In *Booker*, the Supreme Court held that the U.S. Sentencing Guidelines were no longer mandatory, but discretionary. *Booker*, 543 U.S. at 249–58. See generally William H. Danne, Jr., Annotation, *Comment Note: Construction and Application of United States Supreme Court Holding of U.S. v. Booker*, 542 U.S. 220, 125 S. Ct.

greater sentencing discretion on the courts, sentencing courts can sift through often nuanced evidence and determine whether obstructionists have actually engaged in conduct worthy of sex-offender registration as a penalty or protection for the community. Furthermore, prosecutors who want to penalize obstructionists with registration should consider charging them with conspiracy. The Racketeer Influenced and Corrupt Organizations Act (RICO) provides another alternative in which the evidence supports the charges.¹¹ Ultimately, the doctrinal anomaly SORNA creates for pure obstructionists under § 1591(d) demands legislative intervention by amending SORNA to make clear that defendants who engage only in obstruction are not required to register.

At its core, this problem encompasses numerous questions about the meaning of a “sexual offense” under SORNA, the purpose of the sex offender registry, whether sex-trafficking obstructionists are sex offenders, whether sex-trafficking obstructions fit within the rationale behind the registry, and whether refusing to testify in a sex-trafficking prosecution or to cooperate in an investigation furthers the sex trafficking—in other words, whether complicity furthers the trade in human beings. This Article contributes to the existing field of sex-trafficking scholarship by addressing this novel question in its statutory and doctrinal context, and providing much-needed guidance for courts and practitioners alike. In order to deconstruct the complexities of culpability necessitating obstructionist registration, Part II introduces a case study based on *United States v. Farah*.¹² The case study presents a close case for registration where it may be argued that a pure obstructionist’s complicity in a sex-trafficking conspiracy may further the goals of sex trafficking and may therefore warrant registration. Although a defendant may not engage in a sexual offense, obstructionist conduct enables the conspiracy to persist and perhaps remain undetected for purposes of prosecution; thus, sentencing judges may well be in a privileged position to sift through the nuances of evidence in order to determine the appropriateness of registration on a case-by-case basis. Part III establishes the groundwork and historical context

738, 160 L. Ed. 2d 621 (2005), *Rendering U.S. Sentencing Guidelines Advisory*, 10 A.L.R. Fed. 2d 1 (2006) (providing a collection and discussion of *Booker* and its federal offspring). Although *Booker* applies to the sentencing guidelines and not to statutorily mandated sentences, *Booker*’s reasoning and its progeny may be used to support courts who find obstructionist registration objectionable and congressionally unintended.

11. Section 901(a) of the Organized Crime Control Act of 1970 enacted RICO. Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961–68 (2006)). RICO criminalizes organized crime—for example, racketeering by an ongoing criminal enterprise. 18 U.S.C. § 1962 (2006). Such activity may be construed to include activities such as human trafficking, illegal gambling, or drug distribution.

12. 766 F.3d 599 (6th Cir. 2014).

for the federalization of sex trafficking. Part IV argues that obstructionist registration offends the canons of statutory interpretation, particularly the statutory schemes, legislative histories, and congressional purposes of the federal sex-trafficking and registration statutes. Part V provides a doctrinal framework for probing the anomaly SORNA has created in obstructionist registration. Specifically, it addresses the concern that requiring obstructionists to register nationally as sexual deviants in instances where they have only engaged in obstruction reflects antiquated notions about criminal culpability in concerted illegal activity, keeping true to the phrase “in for a penny, in for a pound.” Moreover, abuses of prosecutorial discretion when charging defendants reflects the overzealous, unrestrained, and irrational impetus that has made the United States the most carceral nation in history.¹³ Part VI argues that in the absence of legislative history, clear congressional language, case opinion, or other guidance, judges should determine on a case-by-case basis whether individuals convicted of obstruction should have to register as sex offenders. Such an approach would allow skilled adjudicators to weigh the evidence and determine whether registry is warranted, discuss the potential repercussions for defendants convicted under § 1591(d), and analyze whether a factual scenario exists in which a defendant convicted of obstruction should be required to register as a sex offender. Part VI also offers prosecutors a cautionary warning to first charge their obstructionists with either conspiracy or a Racketeer Influenced and Corrupt Organizations Act (RICO) violation, or both, to ensure that obstructionists have the same exposure for registration as traffickers. Doing so provides prosecutors a distinct advantage during plea negotiations.¹⁴ Equally important, defense attorneys must be aware of this anomaly and bargain for clear language, supporting facts, and dismissal of charges in plea agreements negating the prospect of obstructionist registration. Defense attorneys must also carefully weigh the prospect of obstructionist registration should they proceed to trial and suffer conviction.

13. ALEXANDER, *supra* note 3, and accompanying text.

14. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

II. CASE SYNOPSIS¹⁵

Thirty members of the Somali Outlaws and Somali Mafia,¹⁶ two street gangs, operated a large-scale sex-trafficking ring spanning nine cities in four states over ten years, from January 2000 until July 2010.¹⁷ Allegedly, at least one of the victims was only twelve years old.¹⁸ With few exceptions, the vast majority of the sex-trafficking victims were from Somalia.¹⁹

Before the case proceeded to trial, Abdullahi Farah (Grey Goose), a member of the Somali Outlaws, struck a deal with federal prosecutors and agreed to cooperate with the investigation and prosecution of the

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15. The following case synopsis is based on *United States v. Farah*, 766 F.3d 599 (6th Cir. 2014). For organizational purposes, this section will be referred to *infra* as “Case Synopsis.” Obstructionist registration presents several difficult questions, not the least of which is whether complicity furthers sex trafficking, and thus, whether registration is warranted. Complicity encompasses the defendant who has not engaged in sex trafficking, but has instead refused to cooperate in a sex-trafficking investigation or prosecution. The easier case involves denouncing prosecutors who might threaten sex-trafficking victims with registration in order to coerce cooperation and testimony. The latter may garner unequivocal disapproval, whereas a case involving complicity only may present an analysis that is more difficult and bodes toward registration. The following case study is presented in order to explore and highlight the more difficult case analysis.
 16. To be clear, the use of “Somali Outlaws” or “Somali Mafia” is not done to give shape or rise to any discriminatory animus; rather, the terms reference what the members called themselves. Allie Shah, *3 Twin Cities Somalis Guilty of Sex Trafficking*, STAR TRIB., May 5, 2012, at 1B.
 17. Third Superseding Indictment at 4–5, *United States v. Adan*, 2012 U.S. Dist. LEXIS 27497 (M.D. Tenn. Mar. 1, 2012), No. 3:10-CR-00260.
 18. Shah, *supra* note 16. In the context of sex-trafficking discourse, the use of the word “victim” remains a contested issue. Several activists and advocates argue that the term is much too essentialist and reductionist because the term reduces human beings subjected to a form of torture to victimhood by implying a lack of agency. Some critics argue that media reports and imagery of trafficked individuals reinforce stereotypes, particularly of trafficking victims from developing countries, by painting them as easily manipulated and passive. See BARBARA ANN BARNETT, SEX TRAFFICKING IN MASS MEDIA: GENDER, POWER, AND PERSONAL ECONOMIES (2014), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/publications/gamag_research_agenda_annbarnet.pdf [<https://perma.unl.edu/U226-UCF7>]; see also Michelle M. Lazar, *Politicizing Gender in Discourse: Feminist Critical Discourse Analysis as Political Perspective and Praxis*, in FEMINIST CRITICAL DISCOURSE ANALYSIS: GENDER, POWER, AND IDEOLOGY IN DISCOURSE 16 (2003) (arguing that it is an exercise in essentialism to present women as victims because doing so assumes that all women are relatively the same, which thus ignores the individual needs and conditions of nonwhite, non-Western, and economically disadvantaged women worldwide). While it is true that the use of the term remains contested, this piece deliberately posits the term “victim” for the sake of clarity and consistency in the field of sex-trafficking scholarship. In addition, this piece reclaims the term, but also acknowledges that victims of sex trafficking have been subject to torture; however, the term, as used in this piece, does not eliminate their agency, resilience, and ability to thrive.
 19. See Shah, *supra* note 16.

sex-trafficking ring in exchange for immunity from prosecution.²⁰ As part of his cooperation, Farah identified fellow Somali Outlaws accused of sex trafficking, provided information about the location of these defendants, and testified before the grand jury.²¹ After receiving the benefit of his bargain, Farah claimed Somali Outlaws and Somali Mafia members assaulted him and threatened his family. Consequently, he refused to continue assisting the government in its ongoing prosecution.²² In response, police arrested Farah and detained him as a material witness.²³ At a hearing regarding his refusal to continue cooperating with the federal prosecution, Farah told the presiding judge that he not only refused to testify in the sex-trafficking trial, but that he would not provide any other assistance to the government.²⁴ He claimed that law enforcement had coerced and pressured him to testify, and that testifying jeopardized his safety.²⁵ He failed, however, to notify the court of any prior assaults on him or his family.²⁶

After steadfast refusals to testify,²⁷ four months in prison for contempt,²⁸ and a jury trial addressing his obstructionist conduct, a jury convicted Farah of three counts: (1) willfully misbehaving in the presence of the district judge in violation of 18 U.S.C. § 401(1); (2) disobeying and resisting an order to testify in violation of 18 U.S.C. § 401(3); and, most importantly for purposes of this Article, (3) interfering with the enforcement of a child sex trafficking law in violation of 18 U.S.C. § 1591(d).²⁹ The district court sentenced Farah to fifteen months in prison for the second and third charges regarding his refusal to comply with an order to testify and obstruction of the enforcement of § 1591(d).³⁰ On Farah's appeal, the Sixth Circuit refused to overturn Farah's § 1591(d) conviction, stating that he "was fully aware that he was a material witness and the Government's ability to establish its conspiracy . . . was dependent on his cooperation."³¹ At

20. *United States v. Farah*, 643 F. App'x 480, 481 (6th Cir. 2016). Transactional immunity is the broadest form of prosecutorial immunity. When an individual is granted transactional immunity, he or she cannot be prosecuted for the transaction being investigated. *See* F. Clinton Broden, *Fifth Amendment Right Against Self Incrimination*, CRIM. L. NEWSL. (Am. Ass'n for Justice, D.C.), Mar. 2, 2017, <https://www.justice.org/sections/newsletters/articles/fifth-amendment-right-against-self-incrimination>.

21. *United States v. Farah*, 766 F.3d 599, 599 (6th Cir. 2014).

22. *Id.* at 602.

23. *Id.*

24. *Id.*

25. *Id.* at 603.

26. *Id.*

27. *Id.*

28. *Id.* at 605.

29. *Id.*; *see* 18 U.S.C. § 401(1), (3) (2002); 18 U.S.C. § 1591(d) (2012).

30. *Farah*, 766 F.3d at 606.

31. *Id.* at 614.

sentencing, the government did not raise the issue of whether the obstruction charge under § 1591(d) required Farah to register as a sex offender, particularly when the government had not submitted any evidence or even accused Farah of engaging in sex trafficking. Consequently, neither the sentencing judge nor the Sixth Circuit has addressed the issue.³²

III. THE FEDERALIZATION OF HUMAN SEX TRAFFICKING

Where there is labor exploitation, there will be sexual exploitation.³³ Where the means for creating vulnerability for purposes of labor exploitation exist, some will capitalize on the seemingly insatiable appetite for vulnerable human flesh and exploit sexually. Trafficking in human flesh for purposes of both labor and sex is “the third largest source of income for organized crime (exceeded only by arms and drugs trafficking), and is the fastest growing form of international

32. The preceding case study presents two radically different forms of obstruction and their concomitant circumstances. The first involves Farah, a gang member who refuses to testify against his fellow gang members. The second, hypothetically for purposes of analysis in this Article, involves actual sex trafficking victims who may refuse to testify against their pimps and traffickers. As will be argued *infra*, Congress must intervene in order to clarify that obstructionists are not subject to the mandatory registration regime. See § 1591(d). In the interim, sentencing courts are in a privileged position to determine the subtleties and nuances of evidence, particularly in conspiracy schemes. See generally *United States v. Booker*, 543 U.S. 220, 243 (2005) (explaining that the judicial branch has power to interpret and use the *Federal Rules of Evidence* as a necessary component of its decision-making power). It may be, for example, and as argued *infra*, that the Government can submit proof during the sentencing hearing that Farah received benefits from the sex-trafficking enterprise of his gang members, like access to illicit substances, including drugs made possible through the gang’s sex-trafficking activity, access to the sex-trafficking victims themselves, or enhanced social cachet because Farah was associated with an enterprise that had access to and trafficked in flesh. Although this Article ultimately argues that obstructionist registration is inharmonious with the statutory scheme of SORNA, the legislative histories of the federal sex-trafficking and registration statutes and the general principles of law applicable to the circumstances of the statutes as an interim measure demonstrate that the sentencing courts should determine whether obstructionist registration is mandated after a full vetting and weighing of all evidence presented during the sentencing hearing. This Article’s case study presents two forms of obstruction that highlight the nuanced difficulties in deciding the appropriateness of obstruction registration.

33. For example, “A recent study found that more than thirty percent of unauthorized migrant laborers in San Diego County were victims of trafficking violations, most inflicted by employers at the workplace—not smugglers.” *Human Trafficking and Sexual Exploitation: The Statistics Behind the Stories*, WORLD WITHOUT EXPLOITATION [hereinafter *Behind the Stories*], <https://www.worldwithoutexploitation.org/stats> [https://perma.unl.edu/CJF8-SWB7]. Moreover, “965 cases of human trafficking were reported to state law enforcement agencies in 2015. Of these cases, 77% involved commercial sex trafficking and 22% involved labor trafficking.” *Id.*

crime.”³⁴ As of 2012, the International Labor Organization (ILO) states that 4.5 million people worldwide who have been victims of human trafficking and forced labor are also victims of sex trafficking.³⁵ The ILO also claims that internationally, women and children constitute fifty-five percent of the forced-labor trade.³⁶ In 2015, one study estimated fourteen to be the average age of entry for girls in the sex trade.³⁷ In another study, the average age of first exploitation was eleven or younger.³⁸ With regard to trafficking across international borders, women and minors constitute seventy percent of trafficking victims.³⁹ Domestically, an estimated 200,000 to 300,000 minors are commercially traded for sex in the United States each year.⁴⁰

As early as the late 1980s, the sheer enormity of human trafficking, recently branded as “modern slavery,” reached the congressional radar.⁴¹ Since the late 1990s, Congress has been actively legislating to

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34. GLOB. INITIATIVE TO FIGHT HUMAN TRAFFICKING, HUMAN TRAFFICKING—QUESTIONS & ANSWERS, https://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_BACKGROUND_BRIEFING_NOTE_-_final.pdf [<https://perma.unl.edu/3QU8-U6RJ>]. Human trafficking affects countries all over the world. While this Article will only address law in the United States, the fact remains that trafficking exists on a global level and is an economically beneficial enterprise. *Id.*
35. *New ILO Global Estimate of Forced Labour: 20.9 Million Victims*, INT’L LABOUR ORG. (June 1, 2012), http://www.ilo.org/global/topics/forced-labour/news/WCMS_182109/lang—en/index.htm [<https://perma.unl.edu/BBX9-QRCL>].
36. *Id.* Methodology and the spread of moral panic are two of a number of reasons why claims surrounding the prevalence of sex trafficking are vexed, troubling, and contested. This Article is more interested in exploitation panic. Studies are not generalizable. It also bears noting that the empirical information and statistics cited here are not to incentivize a “moral panic”; rather, they are used to insight exploitation panic. Put differently, this Article aims to set the scale and stage for our society’s insatiable appetite for vulnerable human flesh. Such cravings are historical and consistent, tracing their genesis to the slave trade.
37. *Behind the Stories*, *supra* note 33 (citing AMI CARPENTER & JAMIE GATES, THE NATURE AND EXTENT OF GANG INVOLVEMENT IN SEX TRAFFICKING IN SAN DIEGO COUNTY (2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/249857.pdf> [<https://perma.unl.edu/AU95-WKW5>]).
38. *Id.* (citing FRANCES GRAGG ET AL., NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN (2007), <http://www.ocfs.state.ny.us/main/reports/csec-2007.pdf> [<https://perma.unl.edu/Y4T8-XXZF>]).
39. *New ILO Global Estimate of Forced Labour*, *supra* note 35.
40. S. Res. 340, 113th Cong. (2014); S. 1518, 113th Cong. (2013); Butler, *Bridge Over Troubled Water*, *supra* note 9 (citing INST. OF MED. & NAT’L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 42 (Ellen Wright Clayton et al. eds., 2013) [hereinafter NAT’L RESEARCH COUNCIL REPORT]; LINDA A. SMITH, SAMANTHA HEALY VARDAMAN & MELISSA A. SNOW, SHARED HOPE INT’L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING 4).
41. Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99 (2006). Modern slavery is an umbrella term for “the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or

turn back the momentum of trafficking in human flesh.⁴² During this period, Congress, the courts, practitioners, and legal scholars highlighted the utter inadequacies of older, antiquated peonage statutes to address the peculiarities of modern slavery.⁴³ By way of illustration, *United States v. Kozminski* provides a paradigmatic example of the antiquated and narrow definition of involuntary servitude under 18 U.S.C. § 1584, the anti-slavery and peonage statute.⁴⁴ The *Kozminski* Court ruled that involuntary servitude only occurred if a defendant used violence or threats of force to coerce the labor or services of another.⁴⁵ The emphasis on force or threats of force completely elided the psychological coercion pimps and traffickers effectively deploy to groom, socialize, control, and imprison sex-trafficking victims⁴⁶—let alone the heightened detection these same individuals employ to profile their victims and identify preexisting vulnerability and precarity for purposes of unmitigated manipulation.⁴⁷

Recognizing the pervasiveness of human trafficking, the limitations of antiquated peonage statutes to eradicate the problem, and the empirically supported abuses inflicted on trafficking victims, Congress stepped into the fray of the international and national flesh trade.⁴⁸ In 2000, Congress federalized human trafficking through the passage

coercion.” *What is Modern Slavery?*, U.S. DEP’T OF ST., <https://www.state.gov/j/tip/what> [https://perma.unl.edu/R7GN-3T3F].

42. ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 9* (2012).
43. See 22 U.S.C. § 7101(b)(13) (2000) (noting that with regard to U.S. Supreme Court decisions, federal law that criminalizes involuntary servitude should be interpreted narrowly).
44. 18 U.S.C. § 1584 (2012); *United States v. Kozminski*, 487 U.S. 931, 931–76 (1988).
45. *Kozminski*, 487 U.S. at 952.
46. *Id.* at 931. Many feminist scholars suggest that solely thinking of coercion in terms of physical force does not place enough significant emphasis on the various nonphysical tactics that can be just as coercive as physical abuse, if not more so. Framing coercion as physical force undermines the ability of the justice system to address issues such as sex trafficking and domestic violence. Without recognition that isolation, intimidation, and controlling or possessive behaviors play a fundamental role in victimization, the courts hear one side of the victim’s story only. By taking nonphysical forms of coercion into consideration, the legal system could improve its ability to effectively prosecute domestic violence and sex-trafficking cases, among other crimes involving a perpetrator and a victim. See generally Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* 743 (2005); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much*, 22 *BERKELEY J. GENDER L. & JUST.* 2 (2007).
47. Eighty-five percent of prostituted children in one New York study report having been victims of child abuse and neglect. GRAGG ET AL., *supra* note 38, at 42.
48. H.R. REP. NO. 106-487, pt. 2 (2000).

of the Trafficking Victims Protection Act (TVPA)⁴⁹ and reauthorized the TVPA as the Trafficking Victims Protection Reauthorization Act (TVPRA) in 2003,⁵⁰ 2006,⁵¹ 2008,⁵² and most recently in 2013⁵³ (collectively the TVPRA).⁵⁴ The legislative history of the TVPRA specifically recognizes that at the beginning of the twenty-first century modern slavery was ubiquitous worldwide.⁵⁵ In 2008, in response to

49. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466–91 (codified as amended in scattered sections of 22 U.S.C.).

50. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (codified as amended in scattered sections of 18 and 22 U.S.C.).

51. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005) (codified as amended in scattered sections of 18 and 22 U.S.C.).

52. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified as amended in scattered sections the U.S.C.).

53. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of the U.S.C.).

54. At the outset, it is important to note that the TVPA was passed during an era of increased attention toward victims' rights. After decades of being ignored, silenced, and marginalized, crime victims politically mobilized and pressured Congress to pass the 2004 Crime Victims' Rights Act (CVRA). Blanche Bong Cook, *Stepping into the Gap: Violent Crime Victims, the Right to Closure, and a Discursive Shift Away from Zero Sum Resolutions*, 101 KY. L.J. 671, 721 (2013) [hereinafter Cook, *Stepping into the Gap*] (citing Crime Victims' Rights Act, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261–62 (2004) (codified as amended at 18 U.S.C. § 3771 (2006))). The Crime Victims' Rights Act provides victims of violent crimes with several enumerated rights:

(1) the right to be reasonably protected from the accused; (2) the right to notification of public court and parole proceedings and of any release of the accused; (3) the right not to be excluded from public court proceedings under most circumstances; (4) the right to be heard in public court proceedings relating to bail, the acceptance of a plea bargain, sentencing, or parole; (5) the right to confer with the prosecutor; (6) the right to restitution under the law; (7) the right to proceedings free from unwarranted delays; (8) the right to be treated fairly and with respect to one's dignity and privacy; (9) the right to be informed in a timely manner of any plea bargain or deferred prosecution agreement; and (10) the right to be informed of the statutory rights and services to which one is entitled.

§ 3771.

55. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466–91 (codified as amended in scattered sections of 22 U.S.C.). The data on sex-trafficking numbers continues to vary; however, it is estimated that between 200,000 and 300,000 minors are victims of commercial sexual exploitation in the United States each year. S. Res. 340, 113th Cong. (2014); S. 1518, 113th Cong. (2013). For such reports, see NAT'L RESEARCH COUNCIL REPORT, *supra* note 40, at 42 (noting one estimate that the number of minors at risk is between 244,000 and 325,000); SMITH ET AL., *supra* note 40, at 4; Butler, *Bridge Over Troubled Water*, *supra* note 9, at 1338. The Center for Missing Children states that at least 100,000 native minors are prostituted each year in the United States. Joe Markman, *52 Children Rescued in Nationwide Sex-Trafficking*

this epidemic, the TVPRA federalized sex-trafficking prosecutions under 18 U.S.C. § 1591(a).⁵⁶ Additionally, and in order to provide traction for the prosecutorial strength of sex-trafficking prosecutions, TVPRA enacted a number of specific obstruction provisions designed to prevent individuals from tampering and interfering with sex-trafficking prosecutions. Section 1591(d) has its own obstruction provision, providing for imprisonment up to twenty years for impeding a sex-trafficking prosecution.⁵⁷

Recognizing the recidivist tendencies associated with sex crimes, the need to protect the community, and the added penal interest in public shaming, Congress passed the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901–02.⁵⁸ SORNA mandates that anyone convicted of sex trafficking under § 1591, which includes § 1591(a), sex trafficking, and § 1591(d) (obstructing a sex trafficking prosecution), must register as a sex offender in the national sex offender registry.⁵⁹ It is clear that sex traffickers must register as sex offenders; however, it is unclear whether those convicted of obstruction in a sex-trafficking prosecution under § 1591(d) are also required to register.

Raids, L.A. TIMES, Oct. 27, 2009, <http://articles.latimes.com/2009/oct/27/nation/na-child-prostitution27> [<https://perma.unl.edu/5E3Z-9XMR>] (noting an estimate by Ernie Allen, President and CEO of the National Center for Missing and Exploited Children, that roughly “100,000 children are still involved in sex trafficking in the U.S. [and] that the problem is growing”).

56. 18 U.S.C. § 1591(a) (2012).

57. § 1591(d).

58. 42 U.S.C. §§ 16901–02 (2012); H.R. Rep. 109-218(I) (daily ed. Sept. 9, 2005) (Statement of Rep. Sensenbrenner).

59. 42 U.S.C. § 16911(3)(A)(i) (2012); *SORNA: Sex Offenses Under SORNA*, OFF. OF SEX OFFENDERS, MONITORING, APPREHENDING, REGISTERING, AND TRACKING [hereinafter *Sex Offenses Under SORNA*], <https://www.smart.gov/sorna.htm> [<https://perma.unl.edu/5WAM-Q7KQ>]. The following federal offenses also require sex-offender registration under 18 U.S.C. §§ 2241–52, 2260, 2421–25 (2012): aggravated sexual abuse; sexual abuse; sexual abuse of a minor or ward; abusive sexual contact; offenses resulting in death; sexual exploitation of children; selling or buying children; material involving the sexual exploitation of minors; material containing child pornography; misleading domain names on the internet; misleading words or digital images on the internet; production of sexually explicit depictions of a minor for import into the United States; transporting minors for illegal sexual activity; coercion and enticement of a minor for illegal sexual activity; travel with the intent to engage in illicit sexual conduct with a minor; engaging in illicit sexual conduct in foreign places; failing to file factual statements about an alien individual; and transmitting information about a minor to further criminal sexual conduct.

IV. THE CANONS OF STATUTORY INTERPRETATION

A. Plain Language of §§ 1591 and 16911

The question of whether federal sex-trafficking obstructionists should register under the sex offender registry involves the statutory interpretation of several key federal statutes: (1) 18 U.S.C. § 1591(a), which prohibits sex trafficking; (2) 18 U.S.C. § 1591(d), which prohibits obstructing a sex-trafficking prosecution; and (3) 42 U.S.C.A. § 16911, which provides the relevant provisions of SORNA that mandate sex-offender registration. The relevant portion of each of these provisions is provided below.

Section 1591 provides:

(a)Whoever knowingly—

- (1) in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or
- (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e) (2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).⁶⁰

In summary, § 1591(a) criminalizes two basic forms of sex trafficking: (1) sex trafficking of adults through force or fraud, and (2) sex trafficking of children.⁶¹ As for the first form, force and fraud, it is a crime for anyone to recruit or entice a person to engage in a commercial sex act “knowing or in reckless disregard of the fact, that means of force, threats of force, fraud, [or] coercion . . . will be used to cause the [victimized] person to engage” in such an act.⁶² Significantly, this portion of the statute does not limit the definition of the trafficked person to individuals under 18 years of age.⁶³ As for the second form, child or minor trafficking, § 1591(a) prohibits anyone from recruiting or enticing a person, “knowing or in reckless disregard of the fact . . . that the [victimized] person has not attained the age of 18 years and will be caused to engage in a commercial sex act.”⁶⁴ In contrast to the earlier prong of the statute, here, the recruitment or enticement into commercial sex specifically references a minor and is not limited to situations where force, fraud, or coercion plays a part; thus, as a legal matter,

60. § 1591(a). The term “commercial sex act” means any sex act for which anything of value is given to or received by any person. *See* 22 U.S.C. § 7102 (2012).

61. *See generally* § 1591(a) (explaining the types of sex trafficking that are criminalized by SORNA).

62. Pub. L. No. 114–22, tit. I, § 109, 129 Stat. 239 (2015).

63. § 1591(a).

64. *Id.*

under federal sex-trafficking law, minors cannot consent to sex trafficking.⁶⁵ Consequently, proof of force, fraud, or coercion is not required to prosecute child sex trafficking.⁶⁶ The converse is true for persons over the age of 18—evidence of force, fraud, or coercion is required.⁶⁷

Section 1591(b) provides the mandatory minimums for violations of § 1591(a). Section 1591(b) states:

- (b) The punishment for an offense under subsection (a) is—
- (1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or
 - (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.⁶⁸

In summary, § 1591(b) provides for a fifteen-year-to-life sentence for an offense involving force, fraud, or coercion, or an offense involving a minor under fourteen years old without regard to force, fraud, or coercion. It also establishes a ten-year-to-life sentence involving a minor over fourteen years of age but less than eighteen years of age where no force, fraud, or coercion is implicated.⁶⁹ Congress clearly affirmed in § 1591(b) that two separate crimes are delineated in § 1591(a) by providing separate punishments for each. One is an offense “effected by means of force, threats of force, fraud, or coercion” or the victim had not attained the age of fourteen, and the other is an offense where a person who was at least fourteen, but younger than eighteen, was recruited or enticed into a commercial sex act.⁷⁰ It is imperative to note this delineation because the obstruction provision in § 1591(d) also

65. *See* *United States v. Campbell*, 764 F.3d 880 (8th Cir. 2014) (finding evidence of other acts of prostitution to be immaterial in a prosecution for sex trafficking of a minor and would have served only to show that other people may have been guilty of the same offense because minors cannot consent to prostitution or sex trafficking); *United States v. Robinson*, 508 F. App'x 867, 870 (11th Cir. 2013) (finding that the defendant's assertion that a minor sex-trafficking victim was not forced could not stand because “minors cannot consent to prostitution”); *United States v. Brooks*, 610 F.3d 1186 (9th Cir. 2010) (holding that a minor's consent is insufficient to defend against sexual offenses like sex trafficking or child molestation).

66. *Campbell*, 764 F.3d at 888.

67. *Id.*

68. § 1591(b).

69. § 1591(b)(2).

70. AMY O'NEIL RICHARD, CTR. FOR STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME (1999), <http://www.cia.gov/csi/monograph/women/trafficking.pdf> [<https://perma.unl.edu/VC5K-UHXL>].

has its own penalty provision,⁷¹ signaling Congress's intent to make § 1591(d) a crime distinct from sex trafficking, and therefore, as argued *infra*, impervious to the same punishments as sex trafficking, particularly sex-offender registration.

The plain language of the sex-trafficking obstruction provision in § 1591(d) simply states: "Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both."⁷² Section 1591(d) has its own penalty provision within the text of the subsection itself and it does not cross-reference the "sex trafficking" contemplated in § 1591(a).⁷³ This distinction is imperative to note when determining whether obstructionists must register because it indicates that Congress clearly distinguished obstruction from sex trafficking. Section 1591(d) is not entangled with the age and force elements that undergird § 1591(a).⁷⁴ Moreover, § 1591(d) has its own penalty provision separate and apart from § 1591(b), further indicating Congress's intent to draw a clear distinction between sex trafficking and obstruction. This distinction is particularly salient because it signals that Congress did not expect obstructionists would be sanctioned as sex traffickers.

Section 1591 does not itself reference sex-offender registration; rather, obstructionist registration comes from the text of SORNA.⁷⁵ SORNA states: "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student."⁷⁶ In its definitional section, SORNA defines "sex offender" as "an individual who was convicted of a sex offense."⁷⁷ Under the first prong of the section defining "sex offense," SORNA states that "sex offense" "has an

71. § 1591(d).

72. 42 U.S.C. § 16911 (2012) states the following:

The term 'tier II sex offender' means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and . . . is comparable to or more severe than [sex trafficking (among other enumerated offenses)], when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor.

No court has specifically defined obstruction under § 1591(d). In general, the obstruction provision in this section tends to follow the definitions for obstruction given in broad federal statutes addressing obstruction.

73. § 1591(d).

74. Compare § 1591(d), with § 1591(a).

75. For relevant definitions, including the Amie Zyla expansion of sex offender definition and expanded inclusion of child predators, see 42 U.S.C. § 16911 (2012).

76. 42 U.S.C. § 16913(a) (2006).

77. § 16911(1). The Amie Zyla expansion of the "sex offender" definition states that "the term 'sex offender' means . . . (i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is specified against a minor; [and] (iii) a Federal offense . . . under section 1591, or chapter 109A, 110 . . . , or 117, of Title 18." § 16911(5)(A)(i)-(iii).

element involving a sexual act or sexual contact with another.”⁷⁸ In its third prong, SORNA’s definition of a sex offense also includes a violation of § 1591 in its entirety⁷⁹ without drawing a distinction between sex trafficking in § 1591(a) and pure obstruction in § 1591(d). Although a § 1591(d) conviction would fall within the plain language of SORNA, such a conviction would not necessarily involve a sexual act or contact as described in SORNA or in § 1591(a).

In our case study, for example, it could be argued that Farah did not engage in any sexual act, but rather purely obstructive conduct.⁸⁰ After all, the government did not charge Farah in the sex-trafficking conspiracy or separately under § 1591(a) or (b), thereby signaling that Farah had no culpability for sex trafficking per se, at least not legally cognizable culpability. Hypothetically it could be argued, however, that Farah derived a benefit from the sex-trafficking conspiracy if he were able to partake in illicit drugs or alcohol made possible by the profits of the sex-trafficking conspiracy or that he had sexual access to the sex-trafficking victims by virtue of his membership in the Somali Outlaws or Somali Mafia. In any case, the government did not make these claims. Farah’s case, however, presented a factual situation that prosecutors may find compelling, particularly those keen on mandating registration for pure obstructionists. It could be argued that Farah furthered the conspiracy by refusing to cooperate. His refusal may have allowed the sex-trafficking conspiracy to thrive, escape detection, and withstand prosecution. Unlike Farah’s case, mandating sex-offender registration for an uncooperative sex-trafficking victim charged with obstruction presents a less compelling case. In either scenario, however, mandating registration for pure obstructionists under the plain language of SORNA is absurd.⁸¹ Although statutory construction must start with the plain meaning, the reasoning behind mandatory obstructionist registration has several strands. It begins, as indeed it must, with the text, full context, and legislative history of both SORNA as well as § 1591.

78. § 16911(5)(A)(i). Unfortunately, however, § 16911(5)(A)(iii) goes on to include the whole of § 1591 within the definition of “sex offense,” which leads inquiry back to whether obstructionists convicted under § 1591(d) must register.

79. § 16911(5)(A)(iii); OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION (2008) [hereinafter *SEX OFFENDER GUIDELINES*], https://www.smart.gov/pdfs/final_sornaguidelines.pdf [<https://perma.unl.edu/WP2S-HYZM>].

80. *See supra* Case Synopsis.

81. It is interesting to note that when designating the tiers of sex offenders, Congress expressly designated Tier II sex offenders to include those convicted of “sex trafficking” under § 1591. This clearly indicates that Congress is aware of the other provisions within § 1591, including the obstruction provision in § 1591(d), which does not reference sex trafficking.

By its terms, § 1591 does not cross-reference SORNA or indicate how it should mesh its obstruction scheme under § 1591(d) with analogous provisions in preexisting statutes defining sex trafficking. Moreover, neither the legislative histories of § 1591 nor SORNA directly addresses the issue of obstructionist registration. Still further, SORNA mandated registration in 2006 when § 1591 only had a sex-trafficking provision,⁸² thus, indicating that Congress only contemplated registration for traffickers, not obstructionists. However, in 2008 when Congress added the obstructionist provision of § 1591(d), it did not amend SORNA to clarify that only traffickers had to register, thus indicating its intent to subject both traffickers and obstructionist to registration.

To resolve the issues, the starting point in statutory interpretation is the statute's plain meaning, if it has one.⁸³ When the intent of Congress is clear in the language of the statute, the inquiry of the courts ends there.⁸⁴ If, however, the statutory language lends itself to more than one reasonable interpretation, the courts must find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.⁸⁵ When a statute is ambiguous, the court may seek guidance in the statutory structure, relevant legislative history, congressional purposes expressed in the pertinent act, and general principles of law applicable to the circumstances of the statute to determine the appropriate interpretation.⁸⁶

82. See 18 U.S.C. § 1591 (2006); 42 U.S.C. §§ 16912, 16913 (2006).

83. Statutory interpretation questions are reviewed by courts de novo. See *United States v. Rettelle*, 165 F.3d 489, 491 (6th Cir. 1999). The language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *United States v. Choice*, 201 F.3d 837, 840 (6th Cir. 2000). However, the Sixth Circuit also looks to "the language and design of the statute as a whole" in interpreting the plain meaning of statutory language. *United States v. Meyers*, 952 F.2d 914, 918 (6th Cir. 1992). Finally, we may look to the legislative history of a statute if the statutory language is unclear. See *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999). If the statute remains ambiguous after consideration of its plain meaning, structure, and legislative history, we apply the rule of lenity in favor of criminal defendants. See *United States v. Hill*, 55 F.3d 1197, 1206 (6th Cir. 1995).

84. *United States v. Koyomejian*, 946 F.2d 1450, 1453 (9th Cir. 1991) (citations omitted).

85. *Id.* (citations omitted).

86. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). Courts will also construe an ambiguous statute to avoid serious constitutional problems. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979)).

“[P]lain meaning, like beauty, is sometimes in the eye of the beholder.”⁸⁷ The plain language of SORNA’s § 16911(5)(A)(iii) includes the whole of § 1591 within the definition of “sex offense.”⁸⁸ As a matter of pure plain language, if convicted under any provision of § 1591, sex-offender registration is statutorily mandated and is not discretionary at sentencing. However, whether a statutory term is unambiguous does not turn solely on dictionary definitions of its component words.⁸⁹ Rather, “[t]he plainness or ambiguity of statutory language is determined not only by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.”⁹⁰ Courts must also “consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. ‘[T]he meaning of statutory language, plain or not, depends on context.’”⁹¹ “[A] statute is to be considered in all its parts when construing any one of them.”⁹² Purely obstructionist conduct does not fall within sexual acts or conduct that makes up the bulk of SORNA’s statutory scheme. A defendant solely guilty of obstruction may not have engaged in a sexual act or conduct, which is required under the first prongs of § 16911(5)(A)(i).⁹³ Under *United States v. Berry*, a defendant’s tier determination under SORNA should utilize the federal definitions of “sexual act” and “sexual contact” set forth in 18 U.S.C. § 2246.⁹⁴ Section 2246 defines “sexual act” as follows:

- (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse,

87. *Fla. Power & Light Co.*, 470 U.S. at 737.

88. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 114-119, 130 Stat. 15 (defining “sex offender” as “an individual who is a sex offender by reason of having been convicted of a sex offense against a minor.”).

89. *Yates v. United States*, 135 S. Ct. 1074, 1081–82 (2015) (holding that a fish is not a “tangible object” within the meaning of FED. R. CRIM. P. 16).

90. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) (“[It is a] fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”).

91. *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

92. *Lexecon Inc. v. Milberg*, 523 U.S. 26 (1998).

93. 42 U.S.C. § 16911(5)(A)(i) (2012).

94. *United States v. Berry*, 814 F.3d 192, 195, 200 (4th Cir. 2016).

humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.⁹⁵

Section 2246(3) defines “sexual contact” as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”⁹⁶ As applied to the case study of this Article, the government made no accusation that Farah had engaged in any conduct falling within the plain language definitions of sexual acts or contact.⁹⁷ One may speculate that had Farah engaged in actual sexual acts, it is conceivable that the government would have charged him as part of the sex trafficking conspiracy. However, such absence of allegation, conduct, and charges may be exactly why Farah should not be required to register as a sexual deviant.

To require registration where the defendant has not engaged in conduct remotely akin to sexual activity contravenes the statutory structure of SORNA. That scheme is reflected in the opening gambit, or first prong, of the definitional structure defining “sexual offense” as “a sexual act or sexual contact with another.”⁹⁸ The meaning of doubtful terms or phrases may be determined by reference to their relationship with other associated words or phrases (*noscitur a sociis*). SORNA’s definitional section begins with defining the sexual act.⁹⁹ It sets the stage. It is the frame. It becomes a possible associated term. Farah’s refusal to testify and to continue his cooperation with the Government¹⁰⁰ does not fit within the definition of a sexual offense that would trigger registration.¹⁰¹

95. 18 U.S.C. § 2246 (2012) (providing definitions for the chapter).

96. § 2246(3).

97. *See generally* United States v. Farah, 766 F.3d 599, 601–05 (6th Cir. 2014).

98. 42 U.S.C. § 16911(5)(A)(i)–(iii) (2012).

99. § 2246.

100. *See generally* Farah, 766 F.3d at 601–05.

101. SORNA requires registration for “sex offenders.” Section 16911(1) defines “sex offender” as “an individual who was convicted of a sex offense.” “Sex offense” is in turn defined in § 16911(5) and related provisions. A “sex offender” as defined in § 16911(1) is a person who was “convicted” of a sex offense; consequently, a sex offense “conviction” is required in order to determine whether a defendant is within the minimum categories for which SORNA requires registration. Section 16911(5)(A)(ii) defines “sex offense” to include a conviction under § 1591 as well as “a specified offense against a minor” under § 16911(5)(A)(ii). Section 16911(A)(ii) and (iii) define “a specified offense against a minor” to include kidnapping and false imprisonment. Although kidnapping and false imprisonment may not involve sexual conduct or contact, they are often attendant circumstances surrounding sexual offenses. Moreover, as discussed *infra*, the legislative purpose behind SORNA contemplates sexual contact as part of the scheme of sexual offenses. Thus, the inclusion of false imprisonment and kidnapping are not dispositive as to whether SORNA contemplates nonsexual activity within its statutory scheme.

Moreover, Farah's conduct does not fall within a categorical approach to the meaning of "sexual offense." The Ninth Circuit stated in dicta that a categorical approach should be used to determine whether a criminal offense is a sex offense within the meaning of SORNA.¹⁰² The categorical approach requires a court to examine the elements of the predicate offense instead of the underlying circumstances of the crime to determine whether it fits the definition of a "sexual offense." In so doing, a court may interpret the predicate offense elements using the "ordinary, contemporary, and common meaning" of the statutory words.¹⁰³ If the elements of the predicate sex offense "are the same as, or narrower than" the SORNA offense, the two offenses should be considered a categorical match.¹⁰⁴ Regardless of the approach taken to the definition of sexual act or contact, purely obstructionist conduct does not fall within the ambit of a sexual act or contact within the contemplation of SORNA.¹⁰⁵ Section 1591(d) considers interference with the enforcement of the federal sex trafficking provision. Thus, no element of § 1591(d) fits within the term "sexual offense."

SORNA's statutory structure bodes against obstructionist registration. In addition, the legislative histories of both SORNA and § 1591 reflect a congressional preoccupation with protecting sex-trafficking victims. Equipping prosecutors with the means to threaten not only

102. *United States v. Mi Kyung Byun*, 539 F.3d 982, 991 (9th Cir. 2008); *United States v. Westerman*, No. CR 15-14-H-CCL, 2016 WL 843255, at *2 (D. Mont. Mar. 1, 2016).

103. *United States v. Lopez-Solis*, 447 F.3d 1201, 1207 (9th Cir. 2006) (quoting *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1143 (9th Cir. 2001)).

104. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).

105. No definition of "obstruction" is listed in 18 U.S.C. § 1591 (2012). However, 18 U.S.C. § 1510 (2012), the general federal obstruction provision, articulates "obstruction" as follows:

Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.

Under § 1510, a person obstructs justice when they have a specific intent to obstruct or interfere with a judicial proceeding. For a person to be convicted of obstructing justice, they must not only have the specific intent to obstruct the proceeding, but (1) the person must know that a proceeding was actually pending at the time, (2) there must be a nexus between the defendant's endeavor to obstruct justice and the proceeding, and (3) the defendant must have knowledge of this nexus. *Id.* Regardless of whether one is prosecuted under § 1591(d) or § 1510, an individual convicted under § 1591 generally can be given an enhanced sentence for any potential involvement in the obstruction of a sex-trafficking prosecution. § 1591(d) ("Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both."); *see also Farah*, 766 F.3d 599 (affirming a witness's conviction for attempting to obstruct the enforcement of § 1591(a) based on the witness's refusal to testify).

obstruction prosecution, but also mandatory registration for those sex-trafficking victims that refuse to cooperate against their traffickers, would undermine this concern.¹⁰⁶ Although the legislative histories of SORNA and § 1591 do not directly address obstructionist registration, such mandated registration is clearly at odds with the legislative purposes of SORNA and § 1591. Moreover, this view is fully consistent with two tools of statutory interpretation. The first is the oft-cited rule that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”¹⁰⁷ Each of these components is discussed in further detail below.

B. The Legislative History

Unfortunately, the legislative histories of § 1591 and SORNA do not squarely address the issue of obstructionist registration. Consequently, a detailed analysis of the available legislative history is necessary in order to glean the congressional purposes undergirding both statutes and to contextualize them. The protection of sex-trafficking victims and the recidivist nature of some sexual offenses saturated the congressional preoccupations underlying § 1591 and SORNA.¹⁰⁸ Obstructionist registration does not serve any of these congressional purposes.

1. Section 1591’s Legislative History¹⁰⁹

As of 2013, all fifty states had criminalized human trafficking, including both forced labor and commercial sex trafficking.¹¹⁰ The Trafficking Victims Protection Act of 2000 (TVPA) exemplifies concerted

106. The instant Article addresses the problems and inconsistencies of requiring registration for purely obstructive conduct under § 1591(d). Mandatory registration is problematic for several reasons, not the least of which is the possibility of forcing sex-trafficking victims who refuse to cooperate in a prosecution to register as offenders after receiving a conviction under § 1591(d). This Article argues that such a result is highly problematic and at odds with both SORNA and § 1591 generally. A separate question saved for another day is whether sex-trafficking victims should ever be charged with obstruction where they refuse to participate and cooperate in the sex-trafficking prosecution.

107. *United States v. Bass*, 404 U.S. 336, 347 (1971).

108. Jennifer Iacono, Note, *The Sex Offender Registration and Notification Act and Its Commerce Clause Implications*, 17 WIDENER L. REV. 227, 251 (2011) (discussing the protective purposes of SORNA).

109. When the plain-language rule and canons of statutory interpretation fail to resolve statutory ambiguity, we will resort to legislative history. *See, e.g.*, *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999).

110. Kelly Heinrich & Kavitha Sreeharsha, *The State of State Human-Trafficking Laws*, JUDGES’ J., Winter 2013, http://www.americanbar.org/publications/judges_journal/2013/winter/the_state_of_state_humantrafficking_laws.html [https://perma.unl.edu/3C2Y-JXHK]. For a definition of “commercial sex act,” see 22 U.S.C. § 7102 (2010) and *supra* note 60. No state sex-trafficking statute has a specific obstruction provision that mirrors the provision in § 1591. Therefore, no

effort between both the state and federal sectors to eradicate human trafficking.¹¹¹

In 2000, Congress federalized sex trafficking by passing 18 U.S.C. § 1591.¹¹² The TVPA and its subsequent reformulations expanded prosecutorial authority to stem the flow of human trafficking in the United States, including forced labor and sex trafficking.¹¹³ In the legislative history accompanying the TVPA, Congress noted both that the number of human-trafficking crimes was expanding exponentially and that this form of modern slavery affected the lives of millions of women, men, and children internationally.¹¹⁴ The congressional history also recognized the dearth of resources available to trafficking victims such as housing, victim's services, and physical and mental healthcare resources.¹¹⁵

Congress passed the TVPA in the midst of international activism and public outcries demanding the best practices to eradicate trafficking in persons globally.¹¹⁶ More specifically, when feminist-based political activism began to gain traction, and as the broader public became increasingly aware of the prevalence and brutal nature of trafficking for both sexual and domestic labor, the United States responded with internationally concerted efforts.¹¹⁷ In the late 1990s, the Clinton administration began to prioritize the eradication of sex trafficking.¹¹⁸ Immediately before attending the United Nations Fourth World Conference on Women, President Clinton established the first Interagency Council on Women to operationalize trafficking

state case law currently exists to address whether obstruction of a sex-trafficking investigation or prosecution is an offense that requires sex-offender registration.

111. Trafficking Victims Protection Reauthorization Act of 2011, S. 1301, 112th Cong. (2011).
112. 18 U.S.C. § 1591 (2012).
113. See H.R. REP. NO. 106-487, pt. 2, at 16 (2000) (providing an example of legislation used to target sex trafficking).
114. *Id.* at 2.
115. *Id.* at 3.
116. *Id.* Some of these practices included economic incentives to prevent trafficking in foreign countries, such as skills training and job counseling; victim assistance programs abroad and in the U.S.; the development of minimum standards for the elimination of trafficking and assistance to foreign countries to meet the minimum standards; and the compilation of data and statistics about trafficking in persons in the U.S. and worldwide. *Id.* at 7.
117. Marisa Silenzi Cianciarulo, *What Is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 U. SAINT THOMAS L.J. 54 (2008).
118. See Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 985 n.63 (2001) ("The United States initially led the move to reject the inclusion of non-coerced sex work into the trafficking definitions although its support wavered occasionally, apparently in response to domestic pressures.").

prohibitions gleaned from the conference.¹¹⁹ Later, in 1997 the United States, in collaboration with the European Union, jointly engaged an effort to combat sex trafficking in women and girls worldwide.¹²⁰ By 1998, Congress and the State Department specifically prioritized the eradication of human trafficking as an expressly enumerated priority.¹²¹ President Clinton's Interagency Council on Women worked to develop strategies to eradicate trafficking, provide assistance for and protection to trafficking victims, and to increase the authority of prosecutors to charge and convict traffickers.¹²² Consequently, Congress noted that a law should be passed to help combat trafficking in persons for purposes of labor and sex.¹²³ Although the initial bill exclusively addressed sex trafficking of women and children, Representative Christopher Smith and Senator Sam Brownback prudently expanded the bill to encompass both sex and labor trafficking of boys and men.¹²⁴

In 2000, after two years of refining, the original Trafficking Victims Protection Act (TVPA) made sex trafficking a federal crime.¹²⁵ In

119. *Welcome to the President's Interagency Council on Women*, U.S. DEP'T. OF ST., <http://secretary.state.gov/www/picw> [<https://perma.unl.edu/UBX3-GR7X>].

120. FRANCIS T. MIKO, *TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE*, at CRS-14 (2004), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1059&context=key_workplace.

121. *See id.* at CRS-8 to CRS-9 (discussing President Clinton's International Crime Control Strategy).

122. *See id.* at CRS-9.

123. H.R. REP. NO. 106-487, pt. 2, at 2 (2000).

124. *Id.* ("Trafficking in persons is not limited to sex trafficking, but often involves forced labor and other violations of internationally recognized human rights. The worldwide trafficking of persons is a growing transnational crime, migration, economics, labor, public health, and human rights problem that is significant on nearly every continent."); *see also* Elizabeth Bewley, Note, *A New Form of "Ideological Capture": Abortion Politics and the Trafficking Victims Protection Act*, 8 HARV. L. & POL'Y REV. 229, 239 (2014) ("Smith and Brownback ultimately accepted a broader definition that encompassed sex trafficking and trafficking into other sectors . . ."); Laura J. Lederer, *Trafficking: A Women's Issue*, U.S. DEP'T ST. ARCHIVE (Mar. 19, 2004), <https://2001-2009.state.gov/g/tip/rls/rm/48308.htm> [<https://perma.unl.edu/S6VF-4HWH>] (noting that President Bush acknowledged that prostitution, which fuels sex trafficking, is not only inherently dangerous to women, but also men and children).

125. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT (2010)* [hereinafter *REPORT ON THE TENTH ANNIVERSARY OF TVPA*], <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/tvpaanniversaryreport.pdf> [<https://perma.unl.edu/T7YB-VMQ4>]. It is also important to note that the legislative history of 18 U.S.C. § 1591 (2012) appears to reflect Congress's acknowledgment of the effectiveness of feminist activism in making the case that (1) traditional paradigms of understanding sex trafficking as mere "prostitution" oversimplified the international dimensions of sex trafficking and (2) that sex trafficking had to be contextualized within the broader frame work of commercialized sex operations and within the broader schema of human trafficking and exploitation. John Elrod, Note, *Filling the Gap:*

the Senate, the bipartisan efforts of Senators Paul Wellstone and Sam Brownback lead to the TVPA.¹²⁶ According to the TVPA's legislative history, the massive amount of human trafficking occurring both internationally and domestically dominated Congress's preoccupation.¹²⁷ As part of its legislative findings, Congress noted all of the following: at the beginning of the 21st century, slavery was a worldwide epidemic;¹²⁸ trafficking victimized at least 700,000 people within or across international borders, with 50,000 of that number trafficked into the United States each year;¹²⁹ victims were primarily women and children;¹³⁰ and resources such as housing, victim's services, and physical and mental health care resources were scarce for exited trafficking victims.¹³¹ As a result of these congressional findings, the TVPA became a comprehensive network of statutes designed to increase government authority to eradicate labor and sex trafficking.¹³² The laws encompassed in the TVPA and the following incarnations under the TVPRA helped expand the reach of prosecutorial attempts to stem the flow of sex trafficking in the United States.¹³³ The TVPA included victim protection and prevention programs, and broadly expanded the scope of criminal anti-trafficking laws.¹³⁴

Congress reauthorized the TVPA as the William Wilberforce Trafficking Victims Protection Reauthorization Act three times—in 2003, 2005, and 2008.¹³⁵ In 2008 Congress added § 1591(d) to the statute, providing an extra layer of protection for witnesses involved in sex-trafficking prosecutions.¹³⁶ Senator Joe Biden was the sponsor of Sen-

Refining Sex Trafficking Legislation to Address the Problem of Pimping, 68 VAND. L. REV. 961, 964–67 (2015).

126. REPORT ON THE TENTH ANNIVERSARY OF TVPA, *supra* note 125.

127. H.R. REP. NO. 106-939 (2000) (Conf. Rep.).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 4; see Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 165–67 (2011) (providing background information regarding the network of the Trafficking Victim Protection Act, including its reauthorizations).

133. H.R. REP. NO. 106-939 (2000) (Conf. Rep.).

134. *Id.*

135. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I–III, 122 Stat. 5044, 5044–87 (2008); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003). To “authorize” a bill means to allocate funding for it for a number of years or indefinitely. Reauthorization of an act extends or modifies existing programs and agencies for a future timeframe. See *generally Glossary*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/appropriation.htm [<https://perma.unl.edu/36BP-57Q9>].

136. 154 CONG. REC. H10888-01 (daily ed. Dec. 10, 2008) (statement of Rep. Berman) (regarding the William Wilberforce Trafficking Victims Protection Reauthoriza-

ate Bill 3061, the Senate version of the 2008 reauthorization of the TVPA, and with bipartisan support, four Democratic and two Republican Senators cosponsored the bill.¹³⁷ In the House of Representatives, Tom Lantos sponsored House Bill 3887 with a bipartisan group of forty-two additional representatives supporting.¹³⁸ This version passed in the House of Representatives by an overwhelming majority, receiving only two votes against it.¹³⁹ Congress determined that the best course of action would be to proceed with a clean bill, House Bill 7311, which Congress signed into law as the William Wilberforce Victims of Trafficking Protection Reauthorization Act of 2008.¹⁴⁰

The Senate version of the 2008 reauthorization bill was the only one of the two versions from the House and Senate to include an obstruction provision in 18 U.S.C. § 1591 from its inception.¹⁴¹ The inclusion of an obstruction provision within the text of § 1591 presented an irony because obstructing and tampering with federal prosecutions are federal crimes in and of themselves and can be prosecuted separately under 18 U.S.C. §§ 1501, 1503, 1505, 1512, and 1513, which can result in a fine and imprisonment for up to one year.¹⁴² Section

tion Act of 2008's hearing before the House Commission on Foreign Affairs, Energy and Commerce).

137. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, S. 3061, 110th Cong. (2008). Democratic Senators Dianne Feinstein, Richard Durbin, Benjamin Cardin, and Arlen Specter, and Republican Senators Samuel Brownback and Orrin Hatch were the bipartisan sponsors of this bill. *Id.*
138. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (2007).
139. *Id.* The bill received 405 votes in its favor in the House of Representatives. Two House Republicans, Jeff Flake and Paul Broun, voted against the passage of the bill. This was statistically notable, meaning that the votes were the "most surprising, or least predictable, given how other members of each voter's party voted and other factors." See *H.R. 3887 (110th): William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007*, GovTRACK, <https://www.govtrack.us/congress/votes/110-2007/h1124> [<https://perma.unl.edu/YE2Y-2H43>].
140. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008). According to the U.S. Senate's glossary of terms, a clean bill is a bill assembled out of changes made in committee and the original portions of the bill that are put together and produced as a clean bill, which can serve to speed up Senate action because it allows the bill to avoid floor consideration of each separate amendment made in committee. *Glossary*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/clean_bill.htm [<https://perma.unl.edu/BN3V-ZWZX>].
141. Memorandum from Alison Siskin, Specialist in Immigration Policy, Domestic Social Policy Division, & Clare Ribando Seelke, Analyst in Latin American Affairs, Foreign Affairs, Defense, and Trade Division, at CRS-9 (June 24, 2008), <http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-TVPRASelectDifferences-06.24.08.pdf> [<https://perma.unl.edu/H895-7X9C>].
142. 18 U.S.C. §§ 1501–21 (2012). Some of the most general obstruction provisions already illegalize the obstruction of judicial proceedings, § 1503, witness tampering, § 1512, witness retaliation, § 1513, and contempt, which is a crime that has developed out of a combination of statutory and common law. CHARLES DOYLE,

1591(d) makes the obstruction and attempted obstruction of a sex-trafficking prosecution illegal and punishable by not more than twenty years in prison, up to a \$250,000 fine, or both.¹⁴³ Regardless of whether one is prosecuted under § 1591(d), an individual convicted under § 1591 generally can be given an enhanced sentence for obstructing a sex trafficking prosecution.¹⁴⁴

Prior to the passage of the 2008 reauthorization of the Wilberforce Act, the only statute to contain a specific obstruction provision was 18 U.S.C. § 1581, which prohibits peonage.¹⁴⁵ Following the 2008 reauthorization, Congress added an obstruction provision to 18 U.S.C. §§ 1583 (enticement to slavery), 1584 (holding another in involuntary servitude), 1590 (trafficking with respect to peonage, slavery, involuntary servitude, and forced labor), 1591 (sex trafficking by force, fraud, or coercion or sex trafficking a minor), and 1592 (document abuse related to peonage, slavery, involuntary servitude, and forced labor).¹⁴⁶

While the legislative history does not provide the rationale for adding such specific provisions to these statutes, there are several reasons to do so. Primarily, these specific obstruction provisions broaden and enhance the power of prosecutors to charge individuals for obstruction-related crimes.¹⁴⁷ Section 1591(d)'s specific obstruction provision enables the government to charge a defendant with obstruction for lying to or otherwise obstructing an investigation by federal agents or state and local law-enforcement officials.¹⁴⁸ Because sex-trafficking cases often begin either on the state and local level or in conjunction with federal agents and task forces, this is an added boon to prosecutors because it lessens the evidentiary burden on the prosecution.¹⁴⁹ In addition, these obstruction provisions may reflect Congress's recog-

CONG. RESEARCH SERV., OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME OF THE FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES (2014) [hereinafter DOYLE, OBSTRUCTION OF JUSTICE], <https://fas.org/sgp/crs/misc/RL34303.pdf> [<https://perma.unl.edu/DDM8-2JJQ>].

143. DOYLE, OBSTRUCTION OF JUSTICE, *supra* note 142.

144. *Id.* at 12.

145. See 18 U.S.C. § 1581 (2012) (“Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section shall be liable . . .”).

146. CHARLES DOYLE, CONG. RESEARCH SERV., THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 (P.L. 110-457): CRIMINAL LAW PROVISIONS (2009), <http://library.niwap.org/wp-content/uploads/2015/IMM-Man-TVPRACRSReport-01.29.09.pdf> [<https://perma.unl.edu/K556-7YH6>]; see also 18 U.S.C. §§ 1583, 1584, 1590–92 (2012) (providing examples of obstructionist statutes included directly in the sections sanctioning sex trafficking).

147. Pamela Chen & Monica Ryan, *Federal Prosecution of Human Traffickers*, in THE LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 271–82 (Jill Goodman & Dorchen Leidholdt eds., 2011).

148. *Id.*

149. HEATHER J. CLAWSON, NICOLE DUTCH & MEGAN CUMMINGS, CALIBER, LAW ENFORCEMENT RESPONSE TO HUMAN TRAFFICKING AND THE IMPLICATIONS FOR VIC-

dition that trafficking victims remain vulnerable to the retaliatory conduct of their former traffickers and the sometimes backlash responses—in the form of victim blaming, for example—that victims endure when they cooperate in prosecutions. These obstruction provisions remain much-needed protection to an already vulnerable and precarious population. Lessening the government’s evidentiary load further evinced Congress’s expressed intent to protect victims of sex trafficking, which was further demonstrated by the inclusion of a T-Visa for exited and cooperating trafficking victims.¹⁵⁰

2. *The Use of the T-Visa in Discouraging Obstruction*

Along with much-needed resource allocation to trafficking victims, through the passage of the TVPRA, Congress sought to protect trafficking victims by giving them opportunities to obtain temporary and eventually permanent residence via a T-Visa.¹⁵¹ In tandem with the obstruction provision in § 1591(d), the T-Visa incentivizes trafficking victims to cooperate in sex-trafficking investigations and prosecutions.¹⁵² Congress understood that the victim’s lack of citizenship or documented status created a precarity in smuggled trafficking victims that increased their susceptibility to threats of force and coercion—particularly their vulnerability as undocumented workers to threats of deportation as a means of trapping them in the sex trade.¹⁵³ In an effort to entrap victims in the sex trade, traffickers often convince victims that contacting law enforcement would result in their imprisonment and eventual deportation.¹⁵⁴ In response to the plight and precarity of trafficking victims, Congress created the T-Visa.¹⁵⁵

Although Congress created the T-Visa as a partial solution to the threat of deportation for victims, it also predicated the victim’s obtaining a T-Visa on the victim’s ongoing cooperation with investigations and prosecutions.¹⁵⁶ Thus, in order to obtain a T-Visa and to

TIMS: CURRENT PRACTICES AND LESSONS LEARNED (2006), <http://www.ncjrs.gov/pdffiles1/nij/grants/216547.pdf> [<https://perma.unl.edu/PX3Y-GNU6>].

150. *See infra* subsection IV.B.2.

151. *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> [<https://perma.unl.edu/Q9Q7-B2CX>] (last updated Oct. 3, 2011).

152. HOMELAND SEC., U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE 9 (2011), https://www.dhs.gov/sites/default/files/publications/PM_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%202011.pdf [<https://perma.unl.edu/NVY9-8CV2>].

153. *Id.* *See generally* 18 U.S.C. § 1101 (2012) (providing definitions for the Immigration and Nationality chapter or 8 U.S.C.); 8 U.S.C. § 1184 (2012) (providing rules for admission of nonimmigrants).

154. CLAWSON ET AL., *supra* note 149, at 33.

155. *Id.* at 6.

156. *Id.*

avoid deportation, sex-trafficking victims must cooperate with the prosecution of their traffickers or any other trafficking operations known to them.¹⁵⁷ Minor sex-trafficking victims under the age of fifteen, however, are exempt from this requirement.¹⁵⁸ Many critics have argued that the T-Visa is problematic because it is contingent upon a sex-trafficking victim's continued cooperation with the government, requiring them to participate actively in the investigation and prosecution of their traffickers. While victims are not required to testify in sex-trafficking prosecutions, they essentially cannot refuse to do so where the request to testify is reasonable.¹⁵⁹ If the victim unreasonably refuses to testify, the government may withdraw the T-Visa.¹⁶⁰ Some scholars and activists have argued that the quid pro quo of the T-Visa forces trafficking victims to trade their traffickers for prosecutors, each with the power and weaponry to order their lives and to coerce their conduct.¹⁶¹ The coercive capacity of the T-Visa may have led Congress to include a specific obstruction provision in the TVPA when Congress reauthorized the TVPA in 2008. By adding both a positive incentive in the form of a T-Visa, which provides a path to citizenship, and a negative consequence through an obstruction provision, Congress sought to protect victims from their potentially retaliatory traffickers and to incentivize sex-trafficking victims to cooperate with investigations and prosecutions.

The unwillingness of many sex-trafficking victims to testify against their traffickers is particularly problematic because the strength of the government's case often rests on the testimony of those victims.¹⁶² Although corroborating evidence serves as additional solid-

157. *Id.*

158. *Id.* In addition to the requirement that individuals comply with any requests from prosecutors or law enforcement officers in the investigation and prosecution of sex traffickers, eligibility for a T-Visa is also contingent on a showing that the trafficking victim was lured into performing commercial sex acts by "force, fraud, or coercion," or other means of deception. *Id.* at 24.

159. U.S. DEP'T OF HOMELAND SEC., U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE, https://www.dhs.gov/sites/default/files/publications/PM_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%202011.pdf [<https://perma.unl.edu/R4D9-ZZLV>]. But note, the refusal to testify may make the victim vulnerable to contempt charges.

160. *Id.* at 13.

161. Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 917 (2015). *But see* 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (2012) (requiring foreign trafficking victims who seek a T-Visa to cooperate with prosecutors unless a statutory exceptions applies even though there are no mechanisms to enforce the cooperation of victims with prosecutors or investigators).

162. Victims who are reluctant or unwilling to testify can be highly problematic for prosecutors. If a victim does not want to testify or refuses to do so where the case relies heavily on that victim's testimony, the prosecutor can either motivate the witness or allow the case to move forward without the necessary evidence, which will almost certainly end in a loss or a dismissal. There are many tools prosecu-

ity, the thrust of the evidence is the testimony of the actual victims themselves. Sex-trafficking victims, however, are often problematic witnesses because they are prey to layers of trauma,¹⁶³ including sexual and emotional abuse, often from immediate family members that predate the sex trafficking, which also makes them enticing and vulnerable to traffickers in the first instance.¹⁶⁴ Aside from a history of sexual abuse, the sex trafficking itself, along with its attendant manipulations, is a form of torture.¹⁶⁵ In addition to these waves of trauma, cooperating with law enforcement and sharing the most intimate, and perhaps embarrassing, details of their lives—including sexual histories—with strangers—including jurors, investigators, prosecutors, and judges—presents even more trauma.¹⁶⁶ Prosecution-induced trauma may also include protracted proceedings that eviscerate a victim's ability to gain closure and to put the incident behind her or him,¹⁶⁷ violations of privacy rights, public exposure, and anxiety from unresolved prosecutions and anticipated testimony. Lacking any representation in the courtroom, victims are vulnerable to the defendant, the prosecution, and the courts.¹⁶⁸ Sexually violated victims,

tors can use to motivate the victim to testify, including the promise of a T-Visa. Some tools for motivation are not positive, however. Prosecutors can also use contempt orders and the threat of obstruction charges to convince victims to testify. *See generally* Stacy Caplow, *What If There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 *CLINICAL L. REV.* 1, 12 (1998).

163. As Cheryl Butler has pointed out, victims of sex trafficking are often persons made vulnerable to exploitation through structural racism and inequality, and are disproportionately women of color. Butler also argues that state-sanctioned structural racism and sexism have also made people of color vulnerable to physical and emotional abuse and hence, poor health. Forcing these victims in particular to register would be yet another layer of trauma inflicted on the already traumatized. Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 *UCLA L. REV.* 1464, 1476–77 (2015).
164. KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, *THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA* 21 (2012) ("Many domestic victims of sex trafficking are underage runaways and/or come from backgrounds of sexual or physical abuse, incest, poverty, or addiction."); *see also* Butler, *Bridge Over Troubled Water*, *supra* note 9, at 1291 ("Prior sexual assaults groom minors for prostitution. . . . [A] history of child sexual abuse lowers a child's self-esteem to the point where he or she is made vulnerable for subsequent abuse. Kids who flee incest or other forms of abuse in their homes often become runaways or throwaways, the perfect prey for sexually exploitative adults.").
165. *See generally* OFFICE OF THE SPECIAL REPRESENTATIVE AND CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUMAN BEINGS, *TRAFFICKING IN HUMAN BEINGS AMOUNTING TO TORTURE AND OTHER FORMS OF ILL-TREATMENT* (2013), <https://www.osce.org/cthb/103085?download=true> [<https://perma.unl.edu/CJA9-TQRQ>].
166. Cook, *Stepping into the Gap*, *supra* note 54, at 690.
167. *Id.* at 672.
168. *Id.* Sex-trafficking victims are rarely persons of means. Furthermore, victims do not have the right to counsel. For victims, this combination of disadvantages creates a formula for vulnerability throughout the criminal-justice process, as well as an opening for a second wave of traumatization. *See* Lynette M. Parker, *In-*

like sex-trafficking victims, are uniquely vulnerable to the defendants, the former pimps, and traffickers. Victims have sometimes shared “intimate” relationships with their former traffickers and pimps, an intimacy dependent upon exploitation and sometimes reminiscent of an overidentification with their victimizers akin to a Stockholm syndrome.¹⁶⁹ Similarly, victims are vulnerable to the prosecution, particularly where the prosecution may coerce the victims to testify using the coercive methods at their disposal.¹⁷⁰

In conclusion, equipping prosecutors with the weaponry to coerce sex-trafficking victims into testifying against their traffickers and cooperating with the prosecution by waving the evil specter of obstruction registration contravenes Congress’s clear intent to protect

creasing Law Students’ Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center, 21 GEO. IMMIGR. L.J. 163, 176 (2007) (“Researchers and scholars have noted that for many traumatized clients litigation and the legal process can result in re-traumatization.”). However, as Parker points out, if the legal process is handled correctly, it may be therapeutic. *Id.* at 165 As an example, Parker cites Yael Danieli, discussing the importance of “public witnessing and giving testimony,” as well as a “judgment by the court” acknowledging the harm done to the survivor, and the “generat[ion] of records” documenting the harm committed against the survivor. *Id.* at 176 n.48 (quoting Yael Danieli, *Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law*, 27 CARDOZO L. REV. 1633, 1640 (2006)). See generally Roger K. Pitman et al., *Legal Issues in Posttraumatic Stress Disorder*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 378, 378–97 (B.A. van der Kolk ed., 1996); James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1274 (2004) (noting that the effect of the legal process on sexual assault victims “has been referred to as the ‘second injury’ or ‘second wound’”); Edward J. Hickling et al., *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAS*, 55 DEPAUL L. REV. 617, 630 (2006); Jennifer L. Wright, *Therapeutic Jurisprudence in an Interprofessional Practice at the University of St. Thomas Interprofessional Center for Counseling and Legal Services*, 17 SAINT THOMAS L. REV. 509, 509 n.11 (2005) (“The risk of re-traumatization of clients who have to repeat and relive their experiences of abuse, first in the lawyer’s office and then in court, is serious.”); George K. Goodhue, Comment, *Maryland v. Craig: Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26 NEW ENG. L. REV. 497, 498 (2001) (“An extensive body of professional research clearly demonstrates that many victimized children, when forced to testify in open court in the presence of the accused, suffer a second victimization and traumatization.”).

169. Stockholm syndrome is a “psychological response wherein a captive begins to identify closely with his or her captors, as well as with [the captors’] agenda and demands.” Laura Lambert, Encyclopædia Britannica, *Stockholm Syndrome*, BRITANNICA.COM, <https://www.britannica.com/topic/Stockholm-syndrome> [https://perma.unl.edu/58GS-HMAB] (last updated Nov. 27, 2016). See generally *id.*
170. Caldwell, *supra* note 9 (illustrating the serious concerns regarding abuse of prosecutorial discretion by explaining that sometimes, like in the case of Senator Ted Stevens, prosecutors will purposefully fail to cooperate in order to achieve their desired convictions).

victims. International pressures, feminist activism, the victims' rights movement, and increased overcriminalization led Congress to attempt to eradicate human trafficking, particularly sex trafficking, by federalizing sex-trafficking offenses.¹⁷¹ The legislative intent behind § 1591 is the eradication of commercialized sex of children and adults through force and fraud. Congress passed the obstruction provision of § 1591(d) to provide an extra layer of protection to victims of sex trafficking with an understanding that traffickers thwart the efforts of their victims to avail themselves of law enforcement through both psychological and physical coercion. Congress further demonstrated its twofold interest in protecting sex-trafficking victims and liberating them from the coercive threats and realities of their traffickers through the passage of the T-Visa. At once, the T-Visa provided further protection to sex-trafficking victims by eliminating their precarious susceptibility and vulnerability to deportation while at the same time incentivizing them to cooperate in prosecutions. Unlike obstructionist registration, the T-Visa is an incentive, as opposed to an irrational punishment at odds with Congress's clear intent to protect victims. Similarly, SORNA is aimed at sexual conduct, particularly sexual deviancy. Subjecting victims of sex trafficking to the pain and humiliation of registration is at odds with the congressional intent to address sexual deviancy and to protect victims.

3. *The Legislative History of the Sex Offender Registration and Notification Act*

a. *The History and Purpose of National Sex Offender Registries*

Criminal registry systems originated in the 1940s.¹⁷² SORNA is the first title of the Adam Walsh Child Protection and Safety Act of 2006.¹⁷³ Additionally, all fifty states have sex offender registries that comply with SORNA.¹⁷⁴ From the outset, law enforcement used the earliest sex offender registries as an investigatory tool to locate sus-

171. While § 1592 is explicitly inapplicable to the actual victims of sex trafficking, § 1591 contains no such provision. However, considering the ills of many states that criminalize sex workers, prostitutes, and victims of sex trafficking while paying little attention to the demand side or market incentives, like "pimps" and "johns," "[n]o prosecutor is likely to bring, no jury is likely to convict, and no judge is likely to sustain" a case against a victim. CHARLES DOYLE, CONG. RESEARCH SERV., *SEX TRAFFICKING: AN OVERVIEW OF FEDERAL CRIMINAL LAW* 5 (2015), <https://fas.org/sgp/crs/misc/R43597.pdf> [<https://perma.unl.edu/RW3H-YXK2>].

172. Terra R. Lord, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute's Purpose*, 62 OKLA. L. REV. 273, 276 (2010).

173. See SEX OFFENDER GUIDELINES, *supra* note 79, at 3. Also, 18 U.S.C. § 1591 (2012) is listed as a qualifying offense in 42 U.S.C. § 16911(3)(A)(1) (2012).

174. Lord, *supra* note 172, at 275.

pects.¹⁷⁵ Although the registries were not available to the public originally, a number of highly publicized attacks on children in the 1990s incentivized states to grant public access to registries.¹⁷⁶ Through the expansion of sex offender laws and public access to registries, Congress intended to protect the community from sexually offensive conduct.¹⁷⁷

Prior to the enactment of SORNA, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 (the Wetterling Act) regulated the surveillance of sex offenders.¹⁷⁸ The Wetterling Act incentivized states to adopt sex-offender registration laws and maintain sex offender registries that aligned with the Department of Justice general guidelines.¹⁷⁹ Although there was some success with this effort, differing sex offender laws in each state led to a striking lack of interstate uniformity between registries.¹⁸⁰ By moving to different states, sex offenders evaded registration by capitalizing on the disjointed and misaligned state systems.¹⁸¹ Prior to the creation of a federal system, sex offenders only had to register in the state in which the offense occurred, and if they moved out of state, no notification was required, which made the tracking of offenders across state borders problematic, if not impossible.¹⁸² As a result, according to a statement released by the National Center for Missing and Exploited Children, over 100,000 out of a total of 603,000 sex offenders required to register had vanished from the system alto-

175. *Id.* at 276–77.

176. *Id.* at 277. See generally Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003).

177. Garfinkle, *supra* note 176, at 165. The state of Washington, for example, was the first state to pass a sex-offender-registration law that involved a community notification component in the wake of two highly publicized and gruesome sex offender cases. *Id.* In 1989, Westley Dodd molested two young boys, killing both of them and one other boy. *Id.* Upon arrest, Dodd claimed that if police released him, he would sexually assault more children and enjoy it. *Id.* As a result, the state of Washington convicted and executed the man. *Id.* A year later, police found a young boy who had been physically and sexually assaulted by Earl Shriner. *Id.* These cases sparked outrage in communities statewide. *Id.* The state law in Washington set an example for other states to try out their own community-notification provisions. *Id.*

178. SEX OFFENDER GUIDELINES, *supra* note 79, at 4.

179. Lord, *supra* note 172, at 278.

180. *Id.* at 280.

181. *Id.*

182. See *id.* at 280–81.

gether.¹⁸³ The absence of uniformity in state registry laws led Congress to exact nationwide uniformity in the sex offender registry.¹⁸⁴

The subsequent Adam Walsh Act of 2006 made SORNA the first national sex offender registry.¹⁸⁵ In its wide breadth, SORNA accomplished all of the following: it replaced the Wetterling Act standards with a comprehensive set of rules and regulations addressing the specific crimes that require sex-offender registration;¹⁸⁶ expanded the classes of crimes for which regulation is required and mandated that registrants provide more in-depth personal information;¹⁸⁷ required sex offenders to periodically make in-person appearances with their probation or other regulatory offices or officers;¹⁸⁸ classified sex crimes that require registration into different tiers based on a number of factors, including the age of the victim and the severity of the offense;¹⁸⁹ and solidified the concerted efforts of both state and federal governments because it provided a uniformity of information and data collection between the two entities, thereby incentivizing cooperation between the two entities and maximizing protection to the public from sexual abuse and exploitation.¹⁹⁰ Currently, sex offender registries exist both in the federal government as well as all fifty states and the District of Columbia.¹⁹¹

Critics of SORNA argue that the negative consequences of SORNA greatly outweigh its benefits.¹⁹² According to critics, registration

183. *Id.* at 280 (citing Press Release, Nat'l Ctr. for Missing & Exploited Children, National Center for Missing and Exploited Children Creates New Unit to Help Find 100,000 Missing Sex Offenders and Calls for States to Do Their Part, at para. 1 (Feb. 28, 2007)).

184. *Id.* at 281.

185. *See* SEX OFFENDER GUIDELINES, *supra* note 79, at 3.

186. OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION (2007), https://www.justice.gov/archive/tribal/docs/fv_tjs/session_3/session3_presentations/Sex_Offender_Guidelines.pdf [<https://perma.unl.edu/D9G8-6HNL>].

187. *Id.*

188. 42 U.S.C. § 16916 (2012).

189. 42 U.S.C. § 16911(2)–(4) (2012).

190. Lori McPherson, *SORNA—Basic History and Provisions*, 44 PROSECUTOR 24, 24 (2010) (“[SORNA] is designed to create a seamless system of sex offender registration and notification across the country.”); *see also* Matthew S. Miner, *The Adam Walsh Act’s Sex Offender Registration and Notification Requirements and the Commerce Clause: A Defense of Congress’s Power to Check the Interstate Movement of Unregistered Sex Offenders*, 56 VILL. L. REV. 51, 64 (2011) (“By the time the Adam Walsh Act was nearing passage in the Senate one year later, the two lead Senate sponsors of the Act cited a[] . . . large[] number—150,000—of known, but unregistered sex offenders who had fallen through gaps in the state-by-state registry system. In sum, when Congress enacted the SORNA provisions of the Adam Walsh Act, it was clear a federal solution was needed.”).

191. SEX OFFENDER GUIDELINES, *supra* note 79, at 3.

192. *See, e.g.,* Brittany Enniss, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 717.

makes the registrants vulnerable to harassment, general alienation, ostracization, difficulty integrating in the community, community and law enforcement surveillance, lack of employment, isolation, targeting, profiling, and possible violence.¹⁹³ These critics argue that those who have served their sentence in prison or are on probation deserve to live in peace, so long as they abide by the law, and believe that placing offenders on a publicly accessible national registry is abusive and overreaching, and constitutes indefinite punishment far beyond the original sentence.¹⁹⁴

In response to SORNA's critics, it is worth noting that the purpose of SORNA and national sex-offender registration is primarily to provide increased public safety, particularly by informing the community of the presence of individuals who may be inclined to recidivate.¹⁹⁵ SORNA creates a registry that assists law enforcement in tracking the whereabouts of sex offenders who may be implicated in other sexually abusive crimes.¹⁹⁶ Furthermore, it does in fact serve a somewhat punitive purpose by revoking the individual's privacy rights following the commission of a sex crime and subjecting that person to public shaming.¹⁹⁷ Critics may dissent; however, SORNA established a greatly needed uniformity between state and federal sex offender registries, particularly where Congress found that many convicted sex

But see John G. Malcolm, *The Sex Offender Registration and Notification Act: A Sensible and Workable Law that Helps Keep Us Safe*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 53 (2012).

193. *No Easy Answers: Sex Offender Laws in the U.S.*, HUM. RTS. WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us> [<https://perma.unl.edu/U7ND-FS9L>].

194. *See* Roger N. Lancaster, *Panic Leads to Bad Policy on Sex Offenders*, N.Y. TIMES, Feb. 20, 2013, <https://www.nytimes.com/roomfordebate/2013/02/20/too-many-restrictions-on-sex-offenders-or-too-few/panic-leads-to-bad-policy-on-sex-offenders> [<https://perma.unl.edu/BTN8-6ML6>]; *No Easy Answers: Sex Offender Laws in the U.S.*, *supra* note 193. The nature of sex crimes, issues with underreporting of sexual offenses, and variation in the methods used by researchers to calculate rates of recidivism make reliable statistics on this issue difficult to determine. In one study of 9691 male sex offenders released from prison in fifteen different states, researchers found a recidivism rate for sex crimes of 5.3% in the three years following release. Violent crimes were committed by 17.1%, and 43% overall were arrested for another nonsexual crime. Almost four in ten (38.6%) of the participants returned to prison within those three years because of the commission of a new crime or for violating release conditions. ROGER PRZYBYLSKI, NAT'L CRIMINAL JUSTICE ASS'N, RECIDIVISM OF ADULT SEXUAL OFFENDERS (2015), <http://www.Smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf> [<https://perma.unl.edu/2N5Z-GTRL>].

195. *See* SEX OFFENDER GUIDELINES, *supra* note 79, at 3.

196. *Id.*

197. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1109 (2012) (noting the punitive nature of sex-offender registrations, including public shaming and banishment undertones).

offenders exploited lax state laws in order to immunize themselves from detection by leaving the state in which they were originally registered.¹⁹⁸ Critics of SORNA have no satisfactory response for how the former system of state registry laws was adequate or why the existence of such major loopholes was justified or acceptable.¹⁹⁹

Mixed data surrounds the impact of registries on recidivism. Some studies suggest that federal registration requirements are limited in their effectiveness in reducing recidivism, while others conclude that the federal system of registration does reduce rates of recidivism.²⁰⁰ Regardless, some studies demonstrate that national sex-offender registration enables law enforcement to monitor, and in some cases apprehend, sex offenders.²⁰¹

Along with mixed data about the effectiveness of SORNA in reducing recidivism rates, the evidence that SORNA serves as a deterrent is also mixed. SORNA is fraught with complications. The goal of sex offender laws, both on the state and federal level, was to focus society's attention on offenders who were most likely to reoffend.²⁰² However, many of these laws, including SORNA, reflect an inadequate comprehension of the prevailing dynamics of sexually offensive conduct. For instance, SORNA did not adequately recognize the context in which most sex offenses occur.²⁰³ Sex-offender-registration laws are overwhelmingly based on the demonization of the sex offender as a stranger although incest and familial sexual offenses are the most common forms of sexual transgressions.²⁰⁴

Because sex offender laws do not fully apprehend where sex offenses are prevalent, such as between family members or acquaintances, such laws were predicated on the "stranger in the bushes" profile. Skewed empirical data that used "risk determinative" instru-

198. Malcom, *supra* note 192, at 55.

199. *Id.*

200. *Id.* Studies do not typically differentiate among classes of sex offenders to determine whether one class is more likely to offend than another when analyzing recidivism rates. Overall, while recidivism rates are generally low on a short-term basis, on a long-term basis of fifteen or more years, most studies demonstrate that 25% to 30% of offenders become recidivists. For example, one study of approximately 43,000 sex offenders who were placed either on probation (23%) or supervised release following prison (77%) in 2005 found that 35% of the sex offenders studied were arrested again within three years, and 43% were arrested again within five years. JOSHUA A. MARKMAN ET. AL., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF OFFENDERS PLACED ON FEDERAL COMMUNITY SUPERVISION IN 2005: PATTERNS FROM 2005 TO 2010 (2016), <http://www.bjs.gov/content/pub/pdf/ropfcs05p0510.pdf> [<https://perma.unl.edu/5PQ8-MP6R>].

201. Malcom, *supra* note 192, at 55.

202. Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & C.R.L. REV. 1, 7 (2012).

203. *Id.*

204. *Id.* at 7–8.

ments and unreliable methods to gather data supported this profile.²⁰⁵ The studies and statistics regarding risk of offender recidivism thus yielded inaccurate results when applied to individual offenders evaluated for the likelihood of recidivism.²⁰⁶ Researchers needed different methodologies that accounted for situational context, specifically the relationship between perpetrator and victim.²⁰⁷ Overall, studies regarding the risk of offender recidivism yield different and often inaccurate results for a variety of reasons, especially where the current statutory scheme of sex-offender-registration laws remains highly contested.²⁰⁸ Despite the mixed data, it is nearly indisputable that sex offender laws reduce recidivism by keeping some offenders incarcerated, either indefinitely or temporarily.²⁰⁹ A sex offender has no opportunity to offend in the community while in prison, in contrast with their presence in the community, which could lead to re-offenses.²¹⁰

However, in spite of the belief that most individuals convicted of sex crimes are bound to reoffend, some empirical research suggests that only a small number actually do recidivate. One meta-analysis of seventy-three studies found a sexual offense recidivism rate of 13.7% after five to six years.²¹¹ Another study that took into account mental health issues among sex offenders examined the recidivism rates of 135 offenders who were recommended for civil commitment to a mental health institution and found that twenty-three percent were convicted of another felonious sex crime.²¹²

A number of factors make it difficult to capture whether sex-offender-registration laws actually deter and reduce recidivism. Studies typically base documented recidivism rates on officially recorded information, including arrests or criminal convictions.²¹³ However, this methodology can dilute the measure of the registry's effectiveness because this type of methodology results in statistics that only reflect offenses that resulted in charges or convictions, as opposed to the number of unreported sex offenses or transgressions that remain unreported and unindicted.²¹⁴ Only one in four people typically report

205. *Id.* at 8.

206. *Id.* at 8–9.

207. *Id.* at 9–10.

208. *Id.* at 9.

209. Cynthia Calkins et.al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 PSYCHOL. PUB. POL'Y & L. 443, 449 (2014).

210. *Id.*

211. *Id.*

212. *Id.*

213. Roger Przybylski, *Chapter 5: Adult Sex Offender Recidivism*, SEX OFFENDER MGMT. & PLAN. INITIATIVE, http://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html#_ednref6 [<https://perma.unl.edu/NE94-HEJJ>].

214. *Id.* In 2009 and 2010, only about thirty-two percent of sex crimes were reported to the police. MICHAEL PLANTY & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS,

sexual assault to the police.²¹⁵ Given those statistics, it is likely that the number of individuals who would qualify as sex offenders is higher than studies suggest.²¹⁶

Empirical results also vary depending on the length of time between the date of the offense and the follow-up period; the individual's status as a prisoner, parolee, probationer, or person under supervised release; and the methods used by the individual study.²¹⁷ Additionally, these statistics generally only address broad categories of sexual offenses, such as rape, child molestation, and exhibitionism, rather than categories that would include sex trafficking or obstruction of sex-trafficking prosecutions.²¹⁸ The latter category appears to have played a minimal role in the impetus behind the creation of SORNA and sex-offender-registration laws generally.²¹⁹

b. Sex Trafficking as an Offense Under SORNA

As part of the Adam Walsh Act of 2006, SORNA made sex trafficking and attempted sex trafficking of minors or recidivist sex trafficking tier II crimes.²²⁰ Tier II offenders must keep their information updated on the sex offender registry for twenty-five years.²²¹ The Children's Safety Act of 2005, a precursor to the Adam Walsh Act of 2006, recognized the need for statutes that protect children to mandate comprehensive sex-offender registration, including the registration of sex traffickers under § 1591.²²² In the mid-2000s, a number of highly publicized cases incentivized Congress to focus increased attention on sexual crimes against children.²²³ Congress found that the

FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, at 6 (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [<https://perma.unl.edu/7MMH-34HQ>].

215. Przybylski, *supra* note 213.

216. *Id.*

217. *Id.*

218. *See id.*

219. *Id.*

220. SEX OFFENDER GUIDELINES, *supra* note 79; *see* 42 U.S.C. § 16911(3)(A)(i) (2012); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (codified as amended in scattered sections of 18 and 22 U.S.C.).

221. Memorandum from Amy Barons-Evans & Sara E. Noonan to Defenders 9 (Nov. 20, 2006), <https://paw.fd.org/pdf/Adam-Walsh-Part02.pdf> [<https://perma.unl.edu/AG56-WBHV>].

222. H.R. REP. NO. 109-218(I) (2005).

223. *Id.* at 20 (“Recently, public attention has been focused on several tragic attacks in which young children have been murdered, kidnapped, and sexually assaulted by sexual offenders and career criminals, including: (1) the abduction, rape and killing of 9-year-old Jessica Lunsford who was buried alive in Florida; (2) the slaying of 13-year-old Sarah Lunde in Florida; (3) the murder of Jetseta Marie Gage by a sex offender in Iowa; and (4) the kidnapping of Ashta and Dylan Grohne, and murder of Dylan and their family members in Idaho. These tragic events have

sexual victimization of children remained underreported.²²⁴ At that time, statistics cited in SORNA'S legislative history noted that one in five girls and one in ten boys were sexually violated, but less than thirty-five percent of sex crimes against children were reported to law enforcement.²²⁵ Congress further found that the internet exacerbated the underreporting problem and directly attributed to the exponential rise in sexual solicitations of children online, which amounted to one in seven minors between the ages of seven and ten.²²⁶ Congress added sex trafficking to the list of crimes that require sex-offender registration in order to protect children and other similarly situated, vulnerable individuals from sexual violence.²²⁷ Congress included sex trafficking as a partner crime to the creation and dissemination of child pornography, which was, and continued to be, a growing market in 2005 and 2006 as a result of the burgeoning popularity of the internet, chat rooms, forums, and other forms of social media.²²⁸ Given the nature of the internet at the time, the relative anonymity afforded by electronic information exchanges, and the growth in the child-pornography industry, individual crimes were developing into commercial operations that implicated child sex trafficking.²²⁹

Because Congress understood the ever-expanding threat of sex trafficking, it enacted SORNA and enlarged the categories of crimes that qualified for mandatory sex-offender registration. This was particularly true in cases that involved moving minors across state lines or adults traveling to engage in commercial sex with minors.²³⁰ Additionally, Congress was becoming increasingly aware of technology and the internet's ability to expand child predators' access to victims and to proliferate sex and child-pornography exchanges.²³¹ This knowledge, along with an increased awareness of the myriad ways that predators abuse children, led Congress to broaden federal laws. Because the transportation of minors both nationally and internationally

underscored the continuing epidemic of violence against children, and the need to reexamine existing laws intended to protect children . . . ”).

224. *Id.* at 22. The crime-victims'-rights movement also likely contributed to the increased amount of attention paid to sex-offender registration in the United States and the focus on protecting victims and marginalized individuals from sexually violent crimes. See Cook, *Stepping into the Gap*, *supra* note 54, at 690–702.

225. H.R. REP. NO. 109-218(I), at 34–35 (2005); see also DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, HIGHLIGHTS OF THE YOUTH INTERNET SAFETY SURVEY (2001), <https://www.ncjrs.gov/pdffiles1/ojdp/fs200104.pdf> [<https://perma.unl.edu/YN3B-B3ZQ>] (finding that few of the sexual solicitations, exposures, and harassments of children on the internet were reported to authorities).

226. H.R. REP. NO. 109-218(I), at 33–34 (2005).

227. *See id.*

228. *Id.* at 23 (discussing how the internet has led to an “explosive growth in the trade of child pornography due to the ease and speed of distribution”).

229. *See id.*

230. *Id.* at 23–24.

231. *Id.* at 23.

implicated interstate commerce, Congress drew from its Commerce Clause authority to alter the requirements, mandating registration of sex offenders of all types, including sex traffickers.²³²

The concerns of SORNA, therefore, center around sexual conduct, particularly the protection of children from sexualized violence.²³³ The text of SORNA itself clearly states its purpose, in relevant part, as follows: “In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders.”²³⁴

Persons engaged in purely obstructionist conduct, therefore, are beyond the stated purpose of SORNA, which is to protect the public from sex offenders and offenders targeting children.²³⁵ These categories do not include purely obstructive conduct. SORNA’s legislative history and its historical context are preoccupied with the recidivism of sexual offenders, their presence in communities,²³⁶ and efforts to coordinate and make uniform nationwide surveillance.²³⁷ These are laudable goals unrelated to obstructing sex-trafficking prosecutions or questions involving whether complicity may further sex-trafficking organizations and activity. Given the criticisms of SORNA, obstructionist registration may reflect the kind of prosecutorial overzealousness that undermines the basic preoccupations and goals of SORNA by exposing it to additional layers of already-weighty criticism.

c. The Rule of Lenity

In addition to being at odds with the legislative concerns of both SORNA and § 1591, obstructionist registration offends the rule of lenity. The rule mandates that the courts construe ambiguity in favor of the defendant.²³⁸ According to the rule of lenity, a court cannot interpret a federal criminal statute so as to increase the penalty that it places on a defendant when such an interpretation can be based on no

232. *See id.* at 27.

233. 42 U.S.C. § 16901 (2012).

234. *Id.*

235. *Id.* (stating that the purpose of SORNA is to create a “comprehensive national system for the registration of [sex] offenders”).

236. Daniel L. Feldman, *The “Scarlet Letter Laws” of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1104–06 (1997) (discussing recidivism and community safety as common rationales for sex-offender registration laws).

237. Miner, *supra* note 190, at 63–64.

238. *Simpson v. United States*, 435 U.S. 6, 14 (1978) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971))). *See generally* Lawrence M. Solan, *Law, Language, and Lenity*, 57 WM. & MARY. L. REV. 57 (1998).

more than a hunch as to what Congress intended.²³⁹ Due process requires that a criminal statute “give fair warning of the conduct that it makes a crime.”²⁴⁰ “[B]efore a man can be punished as a criminal under the Federal law, his case must be ‘plainly and unmistakably’ within the provisions of some statute.”²⁴¹ The rule of lenity springs from this fair-warning requirement. “In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant’s favor.”²⁴² This expedient “ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”²⁴³ Thus, defendants convicted of obstruction and confronted with mandatory registration could possibly argue that the statutory structure and legislative histories of SORNA and § 1591 bode against obstructionist registration entirely. Additionally, obstructionist defendants confronted with registration could argue that the rule of lenity mandates that the courts construe any ambiguity regarding the application of SORNA to § 1591(d) in their favor and eliminate mandatory registration from the judgment.

V. DOCTRINAL AND THEORETICAL FRAMEWORK

Aside from reflecting an overzealousness for criminal prosecution born out of a hysteria during the War on Drugs and the War on Crime,²⁴⁴ mandating obstructionist registration may stem from antiquated notions of criminality, namely theories involving group and criminal-enterprise accountability, typified in the rationale behind conspiracy liability.²⁴⁵ Moreover, mandating obstructionist registration does not serve any of the justifications for punishment.

239. *United States v. Speakman*, 330 F.3d 1080, 1083 (8th Cir. 2003) (quoting *United States v. R.L.C.*, 915 F.2d 320, 325 (8th Cir. 1990)).

240. *Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964).

241. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)).

242. *Id.*; see also *United States v. Velastegui*, 199 F.3d 590, 593 (2d Cir. 1999) (“If we find that the ambit of the criminal statute is ambiguous, the ambiguity should be resolved in favor of lenity.”).

243. *United States v. Lanier*, 520 U.S. 259, 266 (1997).

244. ALEXANDER, *supra* note 3, at 11 (discussing the hysteria of the War on Drugs).

245. See *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 922, 923–24 (1959) (“The heart of this rationale lies in the fact—or at least the assumption—that collective action towards an antisocial end involves a greater risk to society than individual action toward the same end.”).

A. Theories of Conspiracy: The Inappropriateness of Group Culpability

Obstructionist registration relies on what may be antiquated notions of criminal responsibility.²⁴⁶ If it is true that Congress intended to mandate registration for pure obstructionists, such requirements may reflect what several legal scholars have recognized as archaic understandings of criminal culpability. As with theories supporting conspiracy prosecutions, obstructionist registration reflects a theory of group culpability that makes defendants liable for the activity of the entire conspiracy as opposed to merely their own individual responsibility—in for a penny, in for a pound. Advancements in legal scholarship have argued that punishing the defendant for the scope of an entire conspiracy distorts the actual culpability of the individual.²⁴⁷ For example, some may argue that it works a severe injustice to make a drug “mule” or courier responsible for the murders of victims of drug-trafficking conspiracies.

Those critical of charging criminals with the crime of conspiracy have argued that such a charge is dangerous because it is such a broad method of finding culpability that a “creative prosecutor might apply it to activity that should not be made criminal.”²⁴⁸ Comparatively then, penalizing obstructionists with registration for their associations is overly broad. Some may argue that such a requirement is also antiquated. However, conspiracy laws equip prosecutors with the authority to threaten low-level conspirators with prison or other severe repercussions for failing to cooperate with an investigation and subsequently offer sentence reductions in exchange for information about conspirators or organizational members in the upper echelons of the criminal hierarchy.²⁴⁹ Some commentators, on the other hand, argue that the use of conspiracy charges provides prosecutors with much-needed leverage over low-level conspirators to reveal information

246. See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 103 (1985) (“The common law is wedded to the concept of personal, rather than vicarious, responsibility for crimes.”); Francis Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702 (1930) (stating the “fundamental, intensely personal, basis of criminal liability” is part of “the most deep-rooted traditions of criminal law”).

247. See, e.g., Sarah Baumgartel, *The Crime of Associating with Criminals: An Argument for Extending the Reves “Operation or Management” Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1 (2006); Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585 (2008); Amanda Seals Bersinger, Note, *Grossly Disproportional to Whose Offense? Why the (Mis)application of Constitutional Jurisprudence on Proceeds Forfeiture Matters*, 45 GA. L. REV. 841 (2011).

248. Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, CRIM. L. BULL., July–Aug. 2007.

249. *Id.*

about coconspirators, a means to climb the hierarchy by “flipping” members of the conspiracy both horizontally and vertically.²⁵⁰

The question that remains, however, is whether the use of conspiracy laws on minor criminals, such as those who obstruct sex-trafficking prosecutions, outweighs the cost of imposing serious punitive consequences on individuals who have not personally participated in the underlying criminal prosecution upon which their testimony relies.²⁵¹ On the one hand, it could be argued that complicity furthers sex trafficking. On the other hand, obstruction alone is not an act in the furtherance of a conspiracy. Modern approaches to criminal culpability repudiate conspiratorial approaches and instead make the individual criminally responsible only for individual conduct.²⁵² A frequent misperception that occurs in criminal law is the representation of a conspiracy as an entity or one single concerted action.²⁵³ However, a conspiracy is not fundamentally a cohesive entity wherein every member is equally culpable.²⁵⁴ Notwithstanding *Pinkerton*, differentiation between levels of criminality amongst individuals involved in a conspiracy is vital.²⁵⁵ After all, people in their individual capacities commit crimes of various degrees of severity, and the emphasis must be on those individual actions, not on the actions of the group as a whole.²⁵⁶

B. Theories of Punishment

The overzealousness reflected in this particular over-abuse of penalty—namely mandating obstructionist registration—illustrates the unrestrained and irrational impetus that has made the United States the most carceral nation in history. The sentences imposed on criminals in the United States are much more severe than those im-

250. *Id.*

251. *Id.*

252. On this point, it is interesting to note:

If Professor Katyal truly wishes to enhance information extraction, there is a direct way to do it. If a person who is not otherwise deserving of criminal punishment has valuable information about others' criminal activities, the government need not indict him for conspiracy. . . . If one wants to use the criminal law to advance the goal of gaining information about criminal activity, then the statutes that are addressed specifically to information-gathering—misprision, obstruction, contempt—are the appropriate ones to use. Their unpopularity and the prospect that “juries may not convict” is not a reason to abandon them and use instead completely unrelated law for an unintended purpose.”

Id.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

posed by similarly situated, industrialized nations.²⁵⁷ The United States imposes sentences on a routine basis that are far greater than any other Western country, which rarely impose prison sentences of more than two years.²⁵⁸ In the United States, conversely, the average prison sentence for felony defendants is five and a half years, with many prisoners serving much longer sentences than that.²⁵⁹ Over the last forty years, America's criminal justice system has been growing at an alarming rate.²⁶⁰ A "culture of punishment" exists in the United States, which essentially implies that America's legal system and its social customs place a premium on "tough on crime" policies.²⁶¹ For example, movements such as the ubiquitous War on Drugs embody these policies²⁶² and aim to eliminate social ills through harshly punitive laws that disproportionately affect people of color and individuals living in poverty.²⁶³

Broadly, punishment enhances societal harmony and efficiency by encouraging socially acceptable behavior and discouraging non-normative, nonconforming conduct.²⁶⁴ Obstructionist registration, however, serves none of the following theories of punishment: deterrence, incapacitation, retribution, or rehabilitation.²⁶⁵ There are two types of deterrence: general and specific.²⁶⁶ Discouraging others from committing the same crime is the rationale behind general deterrence, whereas averting an individual from repeating the same crime again is the rationale behind specific deterrence.²⁶⁷

Mandating registration when the obstructionist is a sex-trafficking victim does little to satisfy these theories of punishment. In sex-trafficking cases, victims who refuse to cooperate in the prosecution of their traffickers are often weighing a sliding scale of cost-benefit anal-

257. David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455 (2001).

258. *Id.* at 458.

259. *Id.*

260. Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL'Y 1 (2016).

261. *Id.*

262. ALEXANDER, *supra* note 3, at 11 (discussing the War on Drugs).

263. *See* Porter, *supra* note 260.

264. WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.5 (2d ed. 2006).

265. *Id.* Although a more detailed explanation of each theory of punishment is described in the body of this section, a brief note on how this paper defines the aforementioned theories of punishment. Deterrence is a method that aims either to deter the individual from recidivating or to deter others from committing crime. *Id.* Incapacitation aims to remove the criminal from society, thus eliminating the danger to society that his or her actions caused. *Id.* The retributive theory of punishment is used to exact revenge upon the criminal for their actions. *Id.* Rehabilitative theories of punishment focus on rehabilitating the criminal and returning them to society. *Id.*

266. *Id.*

267. *Id.*

ysis associated with “snitching.” In these equations, the victims consider their fear of threats to their personal wellbeing or the health and safety of their families with the potential punishment for obstruction.²⁶⁸ The real fear victims experience often outweighs any deterrent effect associated with the punishment for obstruction.²⁶⁹ Turning to our case study, the threat of prosecution made real through indictment, conviction, and imprisonment did nothing to prompt Farah’s cooperation.²⁷⁰ Instead, Farah remained steadfast and undaunted in the face of prosecution and consistently refused to cooperate even under threat of further prosecution for failure to cooperate in an ongoing investigation.²⁷¹

Similarly, many victims of sex trafficking, particularly victims from insular communities like the Somali community of Minneapolis, Minnesota,²⁷² the home of the vast majority of the victims in the case study, are largely dependent on their community for a sense of belonging through shared culture, religion, and language. Thus, these victims may often opt for the threat of punishment rather than face complete alienation from their communities. Obstructionist registration, therefore, takes on the form of demagoguery and excessive punishment is at odds with the congressional purposes of protecting victims. Similarly, it is an anathema to force obstructionists to register as sexual deviants where they have not engaged in any sexual conduct. Such punishment in either scenario amounts to overreaching and abuse, which may prove disastrous to the integrity and sustainability of both § 1591 and SORNA.

Furthermore, the threat of mandating sex-offender registration would likely fail to deter others from obstruction for many of the same reasons. Consider again *Farah*.²⁷³ Farah refused to cooperate with investigators after allegedly facing assault and threats toward his family.²⁷⁴ Regardless of the lack of clarity in § 1591(d) regarding the potential punishment of mandatory sex offender registration, Farah staunchly refused to testify.²⁷⁵ His continued refusal to testify or help further the investigation subsequently led to his conviction.²⁷⁶ Thus,

268. A snitch is “a person who tells someone in authority (such as the police or a teacher) about something wrong that someone has done: someone who snitches.” *Snitch*, MERRIAM-WEBSTER LEARNER’S DICTIONARY, <http://learnersdictionary.com/definition/snitch> [<https://perma.unl.edu/3EGM-UFKN>].

269. April Rieger, Note, *Missing the Mark: Why the TVPA Fails to Protect Victims in the United States*, 30 HARV. J.L. & GENDER 231, 241 (2007) (citing RICHARD, *supra* note 70).

270. *United States v. Farah*, 766 F.3d 599, 604 (6th Cir. 2014).

271. *Id.*

272. Shah, *supra* note 16, at 1B.

273. *See supra* Case Synopsis.

274. *Farah*, 766 F.3d at 602.

275. *Id.* at 602–03.

276. *Id.* at 603.

the deterrent capacity of the obstruction provision did not prove useful and may not in the future for others facing violence because of their cooperation with police and prosecutors. To the extent that various communities, including the Somali community, distrusted the efforts of law enforcement in the first instance, such overreaching would solidify preexisting distrust and create mistrust anew, particularly spread rampant in an insular community.

None of the other theories of punishment tend to support mandated obstructionist registration. Incapacitation involves the incarceration of a criminal to remove the individual from society;²⁷⁷ however, obstructionist registration does not physically remove an individual from society, let alone for remedial purposes. Instead, registration for obstructionists would achieve the very realities that critics of SORNA cite, namely an indefinite punishment and alienation for defendants who have served their sentence.²⁷⁸ Such consequences would provide much fodder for SORNA critiques, perhaps rightfully so.

Retribution, one of the oldest justifications for punishment, is designed to inflict revenge or pure punishment on the criminal, which some posit is in exchange for the victim's suffering—the proverbial eye for an eye.²⁷⁹ Obstructionist registration, however, lacks proportionality because it bears no resemblance to the offense. This is because defendants who engage in obstructive conduct, but nothing remotely akin to sexual violence, are forced to present themselves nationally as sexual deviants. Finally, rehabilitation theories posit that the provision of education, vocational training, and rehabilitation programs mitigates recidivism.²⁸⁰ Obstructionist registration for an offense that did not involve sexual conduct presents no opportunity for rehabilitation, particularly where any rehabilitation offered for sex offenders would only be useful to a person convicted of a sex crime, not obstruction.

Moreover, the threat of registration for victims of sex trafficking who refuse to testify amounts to an unjustifiable layer of victimization and intrusion in a situation where the victim has already been exponentially traumatized. Such victimization is detrimental both to those who sex traffickers have already abused and to the integrity of the evidence in the prosecution.²⁸¹ As an illustration, some victims may experience psychological ramifications common among those held in bondage. Trauma bonding, or trauma-coerced attachment, provides an

277. Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 2006 U. SAINT THOMAS L.J., 536, 539.

278. See generally Malcom, *supra* note 192.

279. LAFAYE, *supra* note 264, at § 1.5.

280. See *id.*

281. See Chitra Raghavan & Kendra Dovchak, *Trauma-Coerced Bonding and Victims of Sex Trafficking: Where Do We Go from Here?*, 17 INT'L J. EMERGENCY MENTAL HEALTH & HUM. RESILIENCE 583, 584 (2015).

example.²⁸² It is a state wherein victims form strong emotional attachments to an abuser because of a complex dynamic between abusive control tactics, power imbalances, and intermittent punishments and rewards given by the abuser, a form of Stockholm syndrome.²⁸³ These dynamics add to the difficulty of persuading victims to cooperate against their traffickers. Prosecutorial coercion, particularly through the threat of registration, adds another layer of psychological force against victims, turning prosecutors into another form of pimp. Coercing unwilling victims to tell and retell the most embarrassing intimate details of their sexual histories to sundry strangers, including investigators, judges, and jurors, erodes the quality of the testimony and may undermine the integrity of the prosecution before both juror and judge. Such coercion may solidify psychological damage to the victim as well as any testimony the victim might render. Furthermore, such coercive tactics provide plenty of fodder for cross-examination and the rule established by *Giglio*,²⁸⁴ which arms defense attorneys with a sound opportunity to undermine the credibility of victims by informing the jury that their testimony was obtained by force because they faced threats of prosecution and deportation.²⁸⁵

Hypothetically, and to illustrate the point, obstructionist registration would be particularly unconscionable in cases involving child victims who are already vulnerable and highly traumatized. Although the prosecution frequently relies on the testimony of children, particularly in cases involving child sex trafficking, in some cases law enforcement has already alienated these victims by viewing and treating them as criminals (prostitutes) through the course of the investigation. This leaves these victims in a conundrum, choosing between hostile law enforcement and abusers upon whom they may still be psychologically dependent. In addition, law enforcement can detain children as material witnesses, and prosecutors may request that child victims who are expected to testify be held against their will until trial via a “courtesy hold,” holding child victims in juvenile deten-

282. *Id.* at 583 (“*Trauma-coerced attachment* is hypothesized to be a dynamic, cyclical state in which victims form a powerful emotional attachment to their abusive partners.”).

283. *Id.*

284. *See generally* *Giglio v. United States*, 405 U.S. 150 (1972) (holding that prosecutors are required to inform jury members if any witnesses are testifying in exchange for immunity from prosecution).

285. In *Giglio*, the Supreme Court held that the prosecution’s failure to inform the jury of an agreement promising immunity from prosecution in exchange for one witness’s testimony constituted a failure on behalf of the prosecution to fulfill its duty to present exculpatory materials to the jury. *Id.* at 150. *Giglio* was an extension of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecution to timely disclose any exculpatory material evidence to the defense. *Id.* at 91.

tion centers pending trial.²⁸⁶ Consequently, the prosecution has the discretion and power to escalate the emotional trauma inflicted on minor sex-trafficking victims well before the child places one foot in the courtroom—this can occur by coercing their testimony and providing inadequate support or incentives to testify. Mandating registration for a sex-trafficking-obstructionist minor would amount to a wholly unjust abuse of power in an already troubled field of coercion, trauma, and power dynamics. This provides yet another example of how obstructionist registration would serve no justifiable purpose as a method of punishment because purely obstructionist behavior does not involve sexual conduct.

VI. JUDICIAL AND LEGISLATIVE INTERVENTION

Human-trafficking crimes, including those punishable under § 1591(a), remain the only crimes requiring sex-offender registration that include their own specific obstruction provision.²⁸⁷ While the obstruction of other crimes may be punishable under a general obstruction statute, only the peonage statute included its own specific obstruction provisions in statutory language prior to the passage of the TVPRA of 2008.²⁸⁸ Section 1591 is unique both in that its obstruction provision is included in the statute and because it can result in a longer prison sentence or a large fine.²⁸⁹ It does not appear that Congress intended for an obstruction conviction under § 1591(d) to result in sex-offender registration given the statutory interpretations discussed *supra*. Nevertheless, in the interest of exhaustive analysis and because sex-trafficking cases often embrace a myriad of complexity, there may exist a set of facts warranting sex-offender registration for purely obstructive conduct, particularly where the defendant's conduct may not directly rise to the occasion of sex trafficking but may yet encompass sex-trafficking operations or facilitations.

In its plain language, SORNA mandates sex-offender registration for individuals convicted of sex-trafficking offenses under § 1591 in its entirety.²⁹⁰ Unfortunately, SORNA does not clarify whether mandatory sex-offender registration applies only to sex-trafficking offenses under § 1591(a) or obstruction under § 1591(d) as well.²⁹¹ Fur-

286. Leslie Klaassen, *Breaking the Victimization Cycle: Domestic Minor Trafficking in Kansas*, 52 WASHBURN L.J. 581, 604 (2013) ("Finally, the prosecutor can ask the court for a material witness warrant, which simply allows the prosecutor to hold the victim through the trafficker's trial."); see Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471 (2008).

287. See *Sex Offenses Under SORNA*, *supra* note 59.

288. See *supra* Part III.

289. 18 U.S.C. § 1591 (2012).

290. *Sex Offenses Under SORNA*, *supra* note 59.

291. See *id.*

thermore, the legislative history of § 1591 does little to clarify the ambiguities that remain as to whether SORNA mandates registration where the conviction is only for a violation of § 1591(d). Therefore, taking into consideration the lack of specificity, and of case law or explanatory guidance, the question of whether § 1591(d) may require sex-offender registration remains an unresolved legal issue. Congress has not directly spoken to the precise question at issue. No court has addressed the issue. The anomaly that SORNA creates for pure obstructionists mandates clarification from Congress; however, in the interim until Congress acts, one might argue that because Congress has not directly spoken to the precise question at issue, the courts possess the ability to clarify the ambiguity. In keeping with the *Booker* trend toward greater judicial sentencing discretion, the courts are in a privileged position to determine whether a particular obstructionist should register.²⁹²

A. Until Congress Intervenes, the District Courts Are Perfectly Situated to Make the Registry Decision After a Sentencing Hearing Where the Issue is Fully Vetted

In *United States v. Booker*, the Supreme Court transformed the federal sentencing guidelines from a mandatory sentencing regime to a purely advisory one.²⁹³ In *Booker*, the Court orchestrated a landmark shift in sentencing by liberating judges from the mandatory-sentencing-guideline shackles and affording them greater discretion and power to fashion sentences reflective of the principles underlying 18 U.S.C. § 3553(a) on a case-by-case basis, which, according to the Court, was more in line with Congress's intent.²⁹⁴ The Court was particularly concerned with the plain language of § 3553(a), which stated that the sentencing court, without the opinion of the jury, should have discretion to consider "the nature and circumstances

292. *Booker* involved sentencing guidelines as opposed to statutory sentencing. *United States v. Booker*, 543 U.S. 220, 332 (2005). However, the argument here is that the spirit of *Booker* or greater sentencing discretion would allow courts to make case-by-case determinations on obstructionist registration where the court finds ambiguity. See *infra* section VI.A (analyzing this argument).

293. *Booker*, 543 U.S. at 220.

294. *Id.* at 249. A number of cases following *Booker* also support the assertion that case-by-case discretion in sentencing aligns with the congressional intent behind the Federal Sentencing Act. See, e.g., *Peugh v. United States*, 133 S. Ct. 2072 (2013) (affirming the Court's intent in *Booker* to move sentencing in the direction intended by Congress through avoiding unnecessarily long sentences and providing flexibility for judges to individualize sentences when needed); *Kimbrough v. United States*, 552 U.S. 85 (2007) (extending judicial discretion to crack and crack-cocaine sentencing guidelines, and holding that the lower court properly considered the defendant's history, characteristics, and the nature of the crime in accordance with *Booker*).

of the offense and the history and characteristics of the defendant.”²⁹⁵ The Court further stated that Congress also intended to create a system that diminished sentencing disparity and that an advisory sentencing system would enable judges nationwide to base their sentencing decisions on the underlying circumstances of each individual case.²⁹⁶ The decision struck down two provisions, one that required courts to give out sentences that fall within the range of the federal sentencing guidelines and another that granted all appellate courts de novo review of departures from the guidelines.²⁹⁷

Following *Booker*, in *Gall v. United States*, the Court further delineated the post-*Booker* sentencing procedure.²⁹⁸ Under *Gall*, the sentencing court must first determine the correct sentencing range and then consider the arguments of both parties regarding the appropriate sentence.²⁹⁹ In reaching the appropriate sentence, the court must consider the § 3553(a) sentencing factors.³⁰⁰ Finally, the court must assess the individual defendant based on the facts presented, including the presentence report, and determine whether a sentence that falls outside the guidelines is appropriate.³⁰¹ If the court does decide that a deviation from the guidelines is suitable, then it must justify that decision on the record.³⁰² Therefore, after *Booker* and *Gall*, a judge may deviate from the guidelines, but the guidelines “remain firmly entrenched in federal sentencing practice.”³⁰³

295. *Booker*, 543 U.S. at 249 (quoting 18 U.S.C. § 3553(a)(1) (2012)). The factors to be used in determining a reasonable sentence are as follows:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed . . . ;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for [the category of offense committed];
- (5) any pertinent policy statement . . . ;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2012).

296. *Booker*, 543 U.S. at 250; see also *Pepper v. United States*, 562 U.S. 476, 490 (2011) (“Preliminarily, Congress could not have been clearer in directing that ‘[n]o limitation . . . be placed on the information concerning the background, character, and conduct’ of a person convicted of an offense which a court of the United States may . . . consider” (quoting 18 U.S.C. § 3577 (1970))).

297. *Booker*, 543 U.S. at 259.

298. See *Gall v. United States*, 552 U.S. 38 (2007).

299. *Id.* at 49–50.

300. *Id.* at 49; see also 18 U.S.C. § 3553(a)(2) (2012) (outlining the factors the judge must consider).

301. *Gall*, 552 U.S. at 49.

302. *Id.* at 50.

303. Zane A. Umsted, *Deterring Racial Bias in Criminal Justice Through Sentencing*, 100 IOWA L. REV. 431 (2014).

In the wake of *Booker*, many commentators and critics predicted that the abandonment of a mandatory-sentencing regime would increase already-disparate sentences.³⁰⁴ Some argued that implicit bias

304. See, e.g., Robert C. Scott, *Booker is the Fix*, 24 FED. SENT'G REP. 340 (2012). In 1984, Congress passed the Sentencing Guidelines and Policy Statements of the Sentencing Reform Act ("SRA"). David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 285 (2001). The SRA was designed to "eliminate sentencing disparities and state[s] explicitly that race, gender, ethnicity, and income should not affect the sentence length." *Id.* at 285–86. Since the promulgation of sentencing guidelines, there has been increased scholarly scrutiny of racial, gender, and social class disparities in criminal sentencing. *Id.* at 286. In a study promulgated by the U.S. Sentencing Commission, it was found that mandatory minimums actually worked against the most important goal of determinate sentencing. U.S. SENTENCING COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 345 (2011) [hereinafter MANDATORY MINIMUM PENALTIES] ("[C]ertain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute. This has led to inconsistencies in application of certain mandatory minimum penalties, as shown by the Commission's data analyses and confirmed by interviews of prosecutors and defense attorneys who practice in 13 district courts."). The Commission found that sentence enhancements actually promoted sentence disparity instead of alleviating it. *Id.* at 34546 ("These analyses and interviews indicate that different charging and plea practices have developed in various districts that result in the disparate application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length."). This is because sentence enhancements do not eliminate discretion in sentencing; they merely shift the discretion from the judge to the prosecutor. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 JUDICATURE 6, 40 (2010) ("In examining the effects of mandatory sentencing since the 1950s, sentencing scholar Michael Tonry concludes that 'Evaluated in terms of their stated substantive objectives, mandatory penalties do not work. The record is clear . . . that mandatory penalty laws shift power from judges to prosecutors . . .'" (emphasis added) (quoting MICHAEL TONRY, SENTENCING MATTERS (Oxford Univ. Press 1996))). If the prosecutor decides to pursue an enhancing factor and proves her case, the mandatory nature of the sentencing scheme means that the judge is bound to apply the enhancement. MANDATORY MINIMUM PENALTIES, *supra*, at 347 ("The Supreme Court has stated that '[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark' in sentencing." (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007))). But the prosecutor often will not pursue the enhancement, or will only use it as a bargaining chip in plea bargaining. *Id.* at 108–09 (discussing the prosecutorial practice of charge bargaining). More damning, the study also found that sentence disparity under mandatory enhancement schemes was correlated with the race of the defendant. Sentences of white defendants were more likely to fall below mandatory minimums than those of black or Hispanic defendants. See generally *id.* at 101–201. Shawn D. Bushway and Anne Morrison Piehl, in a study of punishments under Maryland's sentencing guidelines, found that African Americans had twenty percent longer sentences than whites. Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & SOC'Y REV. 733, 733 (2001) ("We find more judicial discretion and greater racial disparity than is generally found in the literature.").

would affect sentencing along race, gender, and class lines, which prompted sentencing guidelines in the first instance.³⁰⁵ Indeed, the Sentencing Reform Act found strong sponsorship from liberal members of Congress such as Senator Edward Kennedy and a number of left-leaning interest groups.³⁰⁶ The structured scheme of the federal sentencing guidelines aimed to reduce racial disparity in sentencing.³⁰⁷ Remarkably, although the holding in *Booker* provided judges with the required discretion, authority, and power to do so, according to the data, few sentencing judges have departed or varied from the sentencing guidelines.³⁰⁸ Data from the United States Sentencing Commission confirms that in 2014, 2.2% of cases nationwide received sentences above the guideline range.³⁰⁹ In nearly eighty percent of cases, sentencing courts meted out sentences within or below the guideline range.³¹⁰ However, statistics about disparities based on race

Similarly, David B. Mustard found that “blacks, males, and offenders with low levels of education and income receive substantially longer sentences” than whites, females, and educated offenders. Mustard, *supra*, at 285. If the studies are correct, and if these punishments are meant to send a message, it is, among other things, a troubling message of racial, gender, and economic inequality. If punishment expresses condemnation, it says that African Americans and Latinos are more worthy of condemnation than whites even when their behavior is the same. Punishment offers an education in morals. As Jean Hampton argues, it teaches a morality of racial, social, economic, and gender hierarchies. *See generally* Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984). Of course, some punishments send the opposite message, as when Martha Stewart was convicted and one of the jurors said that the verdict “sends a message to bigwigs in corporations. . . . They have to abide by the law. No one is above the law.” Alex Berenson, *Juries Sending Message to Execs*, LEDGER, Mar. 8, 2004, <http://www.theledger.com/news/20040308/juries-sending-message-to-execs> [<https://perma.unl.edu/9MDU-XL79>] (quoting juror Chappell Hartridge). My point here is not that punishments are always unequal and unjust. It is simply that in the aggregate, because of the complexity of the messages that punishments impart, such punishments send messages that most of us would not endorse. The complexity of punishment’s social messages means that the messages are less predictable and coherent than we would like.

305. Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 729 (2012).
306. *Id.*
307. *Id.*
308. *See* Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Law*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014).
309. U.S. SENTENCING COMM’N, NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/TableN.pdf> [<https://perma.unl.edu/HH77-XY9H>].
310. U.S. SENTENCING COMM’N, PRELIMINARY QUARTERLY DATA REPORT tbl.1 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2015_3rd_Quarterly_Report.pdf [<https://perma.unl.edu/4X9E-4EEY>].

and other factors vary across the board. Some sources state that the racial disparity in sentencing between black and white males has skyrocketed from 4.5% before *Booker* to 15% following the decision, although the Department of Justice states that on average, sentences are 4.9% higher for black defendants as opposed to white defendants generally.³¹¹

Despite the varied data concerning the impact of race, class, and gender on disparate sentencing post-*Booker*, the elimination of mandatory sentencing has enhanced the sentencing court's ability to humanize defendants and to contextualize them as individuals.³¹² *Booker* and its progeny enabled judges to recognize the particularities of individual defendants; the idiosyncrasies of various crimes; and the need to avoid unwarranted disparities and uniformities, or situations where defendants who are not similarly situated are treated the same.³¹³ In sex-trafficking-obstruction cases, this particularization is singularly important. Providing for case-by-case determinations allows judges, particularly in § 1591(d) prosecutions, to differentiate between defendants and their conduct based upon their actual commission of a crime, their circumstances, any aggravating or mitigating factors, and the appropriateness of a particular sentence for a given transgression. For example, in a sex-trafficking conspiracy, one obstructionist may be involved more directly in the act of sex trafficking, while another may be completely uninvolved. Given these two starkly different situations, mandatory registration would work an anathema. Whatever the ability of implicit bias to impact sentencing, it may be argued that the liberalization of judicial discretion in sentencing in the wake of *Booker* has allowed the sentencing court to determine the appropriateness of obstructionist registration in any given case in the absence of clear Congressional action and intervention, even in cases involving statutorily prescribed punishment. Although *Booker* and its progeny applied to the guidelines, if a court found that obstructionist registration presented a statutory ambiguity, and therefore allowed for sentencing discretion, the spirit of

311. U.S. DEP'T OF JUSTICE, FACT SHEET: THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2006), https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf [<https://perma.unl.edu/3LMJ-7288>]; Sonja Starr, *Did Booker Increase Disparity? Why the Evidence is Unpersuasive*, 25 FED. SENT'G REP. 323, 323–26 (2013).

312. *Pepper v. United States*, 562 U.S. 476, 482 (2011) (“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996))).

313. *Gall v. United States*, 552 U.S. 38 (2007) (accepting the lower court's treatment of coconspirators who were not similarly situated as different from each other).

Booker further solidifies the court's authority to make individually tailored sentencing decisions within the scope of § 3553(a).

B. Sex Offender Registry as a Penalty for Obstruction Under § 1591

In sum, cases involving pure obstructionist behavior, such as that of *United States v. Farah*,³¹⁴ should not warrant sex-offender registration. When individuals that have no other involvement in sex-trafficking operations except personal knowledge yet obstruct prosecution by refusing to cooperate, it is an egregious abuse of authority to force them to register as a sexual deviant on a public, national registry. This result would be absurd and subject the defendant to unwarranted ridicule, scorn, isolation, harassment, and in some cases, the threat of danger and assault. SORNA requires the registration of those who have committed sexual offenses.³¹⁵ Its guidelines specifically define a "sex offender" as "an individual who was convicted of a sex offense."³¹⁶ SORNA states that a "sex offense" "has an element involving a sexual act or sexual contact with another."³¹⁷ Although the obstruction charge would fall under § 1591, obstruction is not a sexual offense. Both subsections 2246(1) and (3) contemplate sexual contact and acts that involve the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.³¹⁸ Pure obstructionist conduct stands outside this contemplation.

Despite these results, a set of circumstances might exist where a defendant convicted under § 1591(d) should also be required to register as a sex offender even though the government has not charged him or her with § 1591(a) sex trafficking. It could be argued, for example, that *Farah* should be subject to registration. As a member of the Somali Outlaws, *Farah* had knowledge of sex trafficking and may have been complicit in sex trafficking by refusing to testify or cooperate in the investigation or prosecution. There is an argument that his refusal to continue cooperating reflects a certain complicity with the business and enterprise of the Outlaws. He had engaged in a quid pro quo exchange by agreeing to testify in exchange for immunity from prosecu-

314. *See generally supra* Part II.

315. *See* SEX OFFENDER GUIDELINES, *supra* note 79, at 15.

316. *Id.*

317. 42 U.S.C. § 16911(5)(A)(i) (2012). Unfortunately, however, § 16911(5)(A)(iii) goes on to include the whole of 18 U.S.C. § 1591 (2012) within the definition of "sex offense," which leads back to whether obstructionists convicted under § 1591(d) must register.

318. 18 U.S.C. § 2246(2)–(3) (2012).

tion.³¹⁹ He derived a benefit in exchange for his continued cooperation; however, after reaping that benefit, he refused to continue assisting the government. Suppose that his involvement did not rise to the level of direct sex trafficking under § 1591(a) but that he received a benefit as a member of the Somali Outlaws from the Outlaws' sex-trafficking operations. Such a benefit, for example, may have hypothetically included access to both women and girls, and the social cache of having access to "sexual trade" bragging rights. Hypothetically, he might receive greater access to illicit substances including drugs or alcohol as a member of the Outlaws, made possible by the sex-trafficking profits. Arguably, mandated registration in such circumstances might serve the functions of SORNA by increasing public safety, discouraging recidivism, and possibly thwarting gang expansion and retention of gang members through public shaming. Moreover, it could be argued that Farah's access to victims and the privileges derived from sex trafficking are forms of culpable sexual conduct.³²⁰

On the other hand, another potential scenario involves former sex-trafficking victims turned sex traffickers themselves, the so-called Bottom Bitch or "the girl or woman who has the longest history with the pimp or who is favored by him," to recruit other prostitutes or to exact punishments.³²¹ Consider the paradigmatic example of Wendy Barnes, a former sex-trafficking victim who did not intervene when her trafficker continued to traffic other girls after she had attained the age of majority.³²² Ms. Barnes was involved in an abusive and manipulative relationship with a man named Greg who forced her into prostitution and used her children as tools of coercion.³²³ For twelve years, Greg forced Ms. Barnes into commercial sex. Ms. Barnes was eventu-

319. *United States v. Farah*, 766 F.3d 599, 602 (6th Cir. 2014).

320. It should be noted that § 1591(a) criminalizes the commercialization of sex of minors or adults through force or fraud by the exchange of "something of value." I will argue in a forthcoming piece that social cache and bragging rights should be recognized as "something of value" within the meaning of § 1591(a) for several reasons. First, one refusing to acknowledge social cache, particularly in the context of street gang activity, may inadvertently immunize poorer forms of sex trafficking where gang members may not have access to money and materials for trading but their social standing within the gang is increased through their trafficking of victims and making victims accessible to other gang members. Second, a refusal to acknowledge social cache as a form of value within sex trafficking reflects elitist and classist notions about the way sex trafficking works on the ground.

321. Butler, *Bridge Over Troubled Water*, *supra* note 9, at 1338.

322. Holly Austin Smith, *Sex Trafficking: Should All Perpetrators Be Sentenced as Sex Offenders?* HUFFINGTON POST, https://www.huffingtonpost.com/holly-austin-smith/sex-trafficking-should-all-perpetrators-be-sentenced-as-sex-offenders_b_7069342.html [<https://perma.unl.edu/F5J9-3XMC>] (last updated June 16, 2015).

323. *Id.*

ally arrested and charged along with Greg.³²⁴ She was convicted of prostituting minors and given a twenty-three month sentence, which required her to register as a sex offender.³²⁵ Ms. Barnes did not challenge her prison sentence, using it instead as a vehicle to receive counseling and to escape her abuser.³²⁶

In the case involving Ms. Barnes, like the sex-trafficking victims in the case study, it could be argued that requiring her to register as a sex offender transgresses the purposes of SORNA if in fact she did not directly engage in sex trafficking. Because Ms. Barnes probably did not participate in a sexual act or conduct within the meaning of SORNA, requiring her national registration may actually offend the purposes of SORNA where she herself is a victim of psychological coercion.³²⁷ In the case study of this article, if hypothetically the sex-trafficking victims refused to cooperate and the prosecution elected to charge them with obstruction, they would have been exposed to registration. However, allowing the prosecution to make real registration for those witnesses reluctant to testify, but who did not engage in trafficking, particularly minors, is at odds with both § 1591 and SORNA. Allowing the courts to make these nuanced determinations is in keeping with the spirit of *Booker* and its progeny³²⁸ until Congress intervenes.

C. The Consequences of Sex-Offender Registration for Sex-Trafficking Crimes

Mandatory sex-offender registration is not a sanction to be discounted. As in the case involving Defendant Barnes,³²⁹ registration can have serious, disastrous, deleterious, and long-lasting consequences. Sex offenders are reminded daily of the crime they committed and are often stigmatized and harassed as a result.³³⁰ While sex-offender registration serves its purpose, it can also result in aliena-

324. *Id.*

325. *Id.*

326. *Id.*

327. WENDY BARNES, AS MY LIFE CONTINUES: SEX TRAFFICKING AND MY JOURNEY TO FREEDOM 250–57 (2015). The court charged Ms. Barnes with thirteen counts of promoting prostitution and thirteen counts of compelling prostitution, which required her to register as a sex offender for life. *Id.* In spite of the fact that the judge was made aware that Ms. Barnes had been subjected to psychological trauma, as well as physical, sexual, and emotional abuse, the court still opined that her action or lack thereof while under the severe physically and emotionally coercive control of her abuser warranted a prison sentence and lifetime registration as a sex offender. *Id.*

328. *See supra* section VI.A.

329. BARNES, *supra* note 327, at 250–57; *see supra* section VI.B.

330. Erika Davis Frenzel et. al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, JUST. POL'Y J., Fall 2014, at 1–2.

tion; unemployment; failure to secure housing; problems with family, friends, and intimate partners; and an inability to participate in important events with children due to the nature of the restrictions on sex offenders.³³¹

The consequences of sex-offender registration are primarily a result of social stigmatization.³³² Many registrants rightfully fear for themselves and their families, and are unable to live normal lives without the constant threat that someone will discover that they are on the registry.³³³ These punitive side effects may be warranted in cases of egregious harm, but when it affects pure obstructionists, a case-by-case analysis is necessary in order to avoid inflicting unnecessary, unreasonable, and overreaching punishments resulting from a mandatory sex-offender-registration scheme. If extended too broadly and without coherent reasoning, SORNA will lose its already-beleaguered integrity. If the courts require registration too cavalierly, the purposes and goals of SORNA will be severely undermined, providing ammunition for its opponents. Ultimately, however, congressional clarification is absolutely necessary.

D. Legislative Intervention Needed

The anomaly Congress created in SORNA mandates legislative correction. Specifically, Congress should amend SORNA to clarify that defendants solely convicted under § 1591(d) are not subject to the mandatory registration scheme. Requiring registration for obstructionists creates an overly broad statutory application that negatives the legislative purposes of both SORNA and § 1591(d). Such overreaching necessitates clear congressional clarification.

E. Practical Considerations

The threat of registration for obstructionists is an ominous burden at a minimum. Both prosecutors and defense attorneys must be aware of this lurking anomaly during the charging decisions, plea negotiations, possible trial outcomes, and sentencing. Defense attorneys, particularly given their vulnerability to ineffective-assistance-of-counsel claims, must realize this lurking dilemma. For prosecutors who want to ensure registration for obstructionist defendants, prosecutors must weigh the benefits and evidence of charging the obstructionist under a sex-trafficking conspiracy or RICO,³³⁴ or both. If obstructionist defendants are convicted under § 1591(a), whether as conspirators or

331. *Id.* at 4.

332. *Id.*

333. *Id.* at 5.

334. *See generally* Caldwell, *supra* note 9 (illustrating the serious concerns regarding abuse of prosecutorial discretion); *supra* section VI.C.

RICO participants, some sentencing courts may find that § 1591(a) statutorily mandates registration in a clear and unambiguous manner, leaving no room for discretion. During plea negotiations, defense attorneys should explicitly require clear language in the plea agreement immunizing their obstructionist clients from registration, along with facts to support the concession and agreement. In particular, defense attorneys should bargain for a dismissal of obstruction charges under § 1591(d) and instead acquiesce to pleading to obstruction under 18 U.S.C. § 1503,³³⁵ which does not fall within SORNA's wingspan.

Defense attorneys should also consider *Federal Rule of Criminal Procedure* 11(c)(1)(C) pleas, where the parties can state the explicit terms of the plea agreement, and those terms are binding on the sentencing court if the court accepts the agreement. Although the government cannot put in writing that it will not oppose a statutory requirement, the defendant will not appeal a Rule 11(c)(1)(C) agreement because he stipulated to its terms. All parties should be aware that a court may read SORNA, however, to mandate registration as a nondiscretionary issue that the parties cannot bargain away under § 1591(d). As a result, the defendant runs the risk of being subjected to registration after a plea or a trial unless they proceed in a Rule 11(c)(1)(C) posture. Moreover, the defendant is truly in a catch-22 because the defendant cannot raise an interlocutory appeal or request an advisory opinion from the court of appeals. This quandary presents the need for Congressional intervention squarely.³³⁶ In the interim, defense attorneys would do well to convince the government to dismiss the § 1591(d) charges in lieu of pleading to § 1503.

VII. CONCLUSION

The brutality of sex trafficking impacts millions of men, women, and children worldwide. Advances in federal legislation made real in the Trafficking Victims Protection Reauthorization Act (TVPRA) and the Sex Offender Registration and Notification Act (SORNA) have done much to provide tools and resources to judges, prosecutors, law enforcement officers, and victims to eradicate the trafficking of human flesh. In spite of these advancements, loopholes still remain in statutory language and in case law that raise questions about the potential pitfalls that exist in sex-trafficking prosecutions. Discussion of the overlap between SORNA and the TVPRA, specifically § 1591(d), has yet to take place in a courtroom or in the halls of Congress.

335. 18 U.S.C. § 1503 (2012).

336. *Basic v. United States*, 446 U.S. 398, 404 (1980) ("If corrective action is needed, it is Congress that must provide it."); *TVA v. Hill*, 437 U.S. 153, 186 (1978) ("It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.").

In the absence of congressional intervention, whether an obstructionist convicted under a sex-trafficking statute should be required to register as a sex offender requires nuanced evidentiary determinations for which sentencing courts are perfectly suited. In some circumstances, it might be sensible; in others it might be unreasonable. In the absence of case law or legislative guidance, this Article explored four possibilities: (1) § 1591 obstructionists must be mandated to register as sex offenders under the plain language of SORNA; (2) § 1591 obstructionists should not be required to register as sex offenders because the inclusion of § 1591(d) is either a drafting error at best or irrational, overcriminalization overzealousness at worst, and is inconsistent with congressional intent; (3) judges should be able to exercise discretion and determine whether obligatory sex-offender registration is warranted on a case-by-case basis; and (4) Congress must intervene to correct and make clear its intent. Mandatory and discretionary sex-offender registration for §1591(d) obstruction have positive and negative effects. But given the often complicated and convoluted nature of sex-trafficking prosecutions and the ambiguities that exist in current legislation, judicial discretion in determining which obstruction crimes warrant sex-offender registration is of paramount importance until Congress clearly acts. On this issue, Congress must clearly act. Corrective action is greatly needed, and it is Congress that must provide it.