



12-14-2022

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Sophie Davish

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### Recommended Citation

Sophie Davish, *Too Narrow, Too Bad: A Loophole the Adam Walsh Act Did Not Foresee in United States v. Icker*, 67 Vill. L. Rev. 783 (2022).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol67/iss4/4>

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2022]

## Casebriefs

### TOO NARROW, TOO BAD: A LOOPHOLE THE ADAM WALSH ACT DID NOT FORESEE IN *UNITED STATES v. ICKER*

SOPHIE DAVISH\*

#### I. WHAT CONSTITUTES A SEX OFFENDER? THE THIRD CIRCUIT AND DISTRICT COURT DISAGREE: INTRODUCTION

The Law Enforcement Code of Ethics opens by stating that “[a]s a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception . . . .”<sup>1</sup> An officer that acts contrary to these values shatters the trust of their community.<sup>2</sup> A particularly heinous example is the case of former police officer in Ashley Borough, Pennsylvania: Mark Icker.<sup>3</sup> Icker used his status as a police officer to violate the rights of two women whom he

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\* J.D. Candidate 2023, Villanova University Charles Widger School of Law; B.S. 2020, University of South Carolina. This Casebrief is dedicated to my parents, who have supported me in every step of my life. I would also like to thank the dedicated members of the *Villanova Law Review*. Without their help, this piece would not be possible.

1. INT’L ASS’N OF CHIEFS OF POLICE, LAW ENFORCEMENT CODE OF ETHICS (1957), <https://www.theiacp.org/resources/law-enforcement-code-of-ethics> [<https://perma.cc/PBW4-YN6X>].

2. See AM. C.L. UNION, FIGHTING POLICE ABUSE: A COMMUNITY ACTION MANUAL (1997), <https://www.aclu.org/other/fighting-police-abuse-community-action-manual#some> [<https://perma.cc/H8R9-CQT3>] (discussing the that police misconduct is a significant problem and communities all across the United States have organized to bring change). Further, no police department in the country is completely free of police misconduct. *Id.*

3. See Press Release, U.S. Dep’t of Just., Former Ashley Borough Police Officer Sentenced to 15 Years’ Imprisonment for Sexually Assaulting Two Women (July 27, 2020), <https://www.justice.gov/usao-mdpa/pr/former-ashley-borough-police-officer-sentenced-15-years-imprisonment-sexually> [<https://perma.cc/L2D4-KPPL>] (describing the impact the sexual assaults had on the victims and the community). Special Agent Michael J. Driscoll noted that Mark Icker “betrayed not just his sworn oath, but his community and colleagues. We in law enforcement are granted significant authority in order to do our jobs and Icker misused those powers for his own sick gratification.” *Id.*; see also Chelsea Strub, *Former Officer Mark Icker Sentenced to 15 Years in Federal Prison*, (July 24, 2020, 5:12 PM), WNEP NEWS, <https://www.wnep.com/article/news/local/luzerne-county/former-officer-mark-icker-sentenced-to-15-years-in-federal-prison/523-40041760-e89e-48d8-afb3-cd1ca4f81474> [<https://perma.cc/M94C-U6LN>]. One of the victims shared what her life was like after being assaulted by Icker: “I want him to realize how damaged I am. Everything that he caused me. Everything that he changed, cause [sic] I wasn’t like this a person before. So I wanted him to sit there and look at me and realize how hurt I am. How I’ve changed . . . .” *Id.*

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sexually assaulted while in his custody.<sup>4</sup> Icker entered into a plea agreement that stipulated he plead guilty to two counts of deprivation of rights under color of law.<sup>5</sup> The government and the prosecutor agreed to this plea and a 144-month sentence.<sup>6</sup> At sentencing, the district court judge refused to impose the agreed-upon sentence and instead imposed a 180-month term of imprisonment.<sup>7</sup> He also added Sex Offender Registration and Notification Act (SORNA) registration in the pre-sentence report and the judgment of conviction.<sup>8</sup> SORNA was created in 2006 as part of the Adam Walsh Child Protection and Safety Act (Adam Walsh Act) to create a comprehensive federal registration system to track sexual offenders and notify the public if they live in their area.<sup>9</sup>

On appeal to the Third Circuit, the court remanded the sentence to the district court with instructions to remove all SORNA registration requirements.<sup>10</sup> In making this decision, the Third Circuit improperly construed a statute narrowly and limited the discretion of district court judges in sentencing.

This Casebrief argues that the Third Circuit erred in remanding for removal of Icker's SORNA requirements; these actions not only misconstrued the Adam Walsh Act too narrowly, but they also limited the discretion of district court judges. Part II of this Casebrief will give a brief overview of the sexual offender legislation leading up to the Adam Walsh Act and how SORNA registration works. Part III looks at the facts of *United States v. Icker*<sup>11</sup> and the subsequent appeal. Part IV sheds light on the purpose and policies surrounding the Adam Walsh Act and how the Third

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4. See U.S. Dep't of Just., *supra* note 3.

5. *United States v. Icker*, 13 F.4th 321, 324 (3d Cir. 2021). Icker was charged with deprivation of rights under color of law. See 18 U.S.C. § 242 (2018) (requiring that individuals be imprisoned if they used their status in the law to deprive the constitutional rights of anyone else). Sometimes law enforcement officers are charged under this statute when they allegedly use their power to violate another person's rights under the Constitution. *Deprivation of Rights Under Color of Law*, SIMONS L. OFF., <https://www.jbsimonslaw.com/practice-areas/federal-charges/deprivation-of-rights-under-color-of-law/> [<https://perma.cc/D6A6-ML86>] (last visited Oct. 20, 2022).

6. *Icker*, 13 F.4th at 324. Icker also waived his right to appeal in the plea agreement. *Id.* The agreement read that

[t]he defendant knowingly waives the right to appeal the conviction and sentence. This waiver includes any and all possible grounds for appeal, whether constitutional or non-constitutional, including, but not limited to[:] The manner in which the sentence was determined in light of *United States v. Booker*, 543 U.S. 2020 (2005).

Brief of Appellee at 12, *Icker*, 13 F.4th 321 (No. 20-2632), 2020 WL 7260733, at \*7.

7. *Icker*, 13 F.4th at 325.

8. *Id.*

9. See Adam Walsh Child Protection and Safety Act of 2006, 34 U.S.C. § 20901 (2006) (directing the Attorney General to maintain such registry at the Federal Bureau of Investigations (FBI) and to ensure that updated information about sex offenders is immediately transmitted to all relevant jurisdictions).

10. *Icker*, 13 F.4th at 330–31.

11. 13 F.4th 321 (3d Cir. 2021).

Circuit's interpretation did not align with them. Finally, Part V explores the implication that the *Icker* ruling will have in Third Circuit plea bargains as well as charging sexual offenses.

## II. A LONG TIME COMING: A BRIEF HISTORY OF SEXUAL OFFENDER REGISTRATION IN THE UNITED STATES

In the United States, sex offender registration has evolved throughout the years.<sup>12</sup> The Legislature often makes changes to fix gaps in prior laws. Section A explores the legislation prior to SORNA. Section B discusses SORNA and how district and circuit courts have applied and analyzed the legislation. This background will guide the later discussion of what the legislature intended when it created SORNA, and how it has been misapplied.

### A. Pre-SORNA Legislation

The laws requiring sex offender registration have greatly expanded in the last seventy-five years.<sup>13</sup> Policy makers created these laws with the shared goal of protecting the public from sexual offenses, thereby giving special attention to the notion that individuals who offend once are likely to offend again.<sup>14</sup> This section explores the creation of SORNA and changes in enforcement and implementation with regards to federal registration. Finally, this section will briefly discuss the standard of review the Third Circuit applied in *Icker*.

Prior to the creation of SORNA, states possessed fragmented sex offender registration requirements.<sup>15</sup> California was the first state to create

12. See Terra R. Lord, Comment, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute's Purpose*, 62 OKLA. L. REV. 273, 276–83 (2010) (discussing the evolution of laws regarding sex offender registration and their respective goals).

13. See *id.* (explaining the progression of sexual offender registration laws from disjointed state laws such as Megan's Law to Jacob Wetterling's Law to, finally, the Adam Walsh Act). The first state to implement a sex offender registry was California in 1947. *Id.* at 276. These acts built on one another, each increasing the reach of the federal government for monitoring sexual offenders. See *id.* at 278–80.

14. Roger Przybylski, *Recidivism of Adult Sexual Offenders*, OFF. SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism#recidivism-rates-all-sex-offenders> [<https://perma.cc/FP4B-AT28>] (last visited Oct. 20, 2022) (finding in a 2013 study that the overall recidivism rate for untreated sex offenders is 51.7%). Federal statutes also focus heavily on prevention. See Lord, *supra* note 12, at 277–79. For example, with Megan's Law, offenders are ranked in a three-tier system based on factors such as likelihood of recidivism, offender's response to treatment, and whether the offense was against a child. *Id.* at 277–78. Due to the fact that Megan, who inspired Megan's Law, was killed by a known sex offender residing in her neighborhood, a large goal of the bill was to prevent recidivism. See *id.* at 276–79.

15. See Lord, *supra* note 12, at 277 (discussing the gap between legislation that allowed sexual offenders to slip through the cracks prior to SORNA).

a registry in 1947, and by 1993, about half the states had a similar program.<sup>16</sup> However, this initial sex offender registration focused on internal use: providing police with information to track down potential suspects for sexually based offenses.<sup>17</sup> In the 1990s, a succession of high-profile attacks on children became the catalyst for states to enact more stringent programs.<sup>18</sup> The Jacob Wetterling Act was the first major piece of federal sex offender legislation enacted in 1994, but it only required states to track a sex offender, not to notify the public.<sup>19</sup> New Jersey's Megan's Law, which created the public's "right to know" about sexual offenders, went further than the Jacob Wetterling Act to include a notification requirement to the community living with a sexual offender.<sup>20</sup> Following New Jersey's lead, by 2000 all fifty states had enacted a similar form of registration and required public notification program.<sup>21</sup> While these programs were a step

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16. *Id.* at 276 (explaining how, after California passed the first law creating a registry, many states followed suit). However, it took some time to gain traction: by 1986 only five states had followed suit, but by 1993 about half the states had created a program. *Id.* (citing Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 164 (2003)).

17. *Id.*

18. Garfinkle, *supra* note 16, at 165 (discussing the high-profile cases of brutal attacks on young boys by serial offenders in 1989 and 1999 which led to an increase in prominence of the victim's right movement). One of these attacks was the 1989 killings of two young brothers by Westley Dodd, who went on to molest and kill one other young boy. *Id.* Another horrible attack was the assault of a seven-year-old Tacoma boy by Earl Shriner, a man with a long prior history of sexual offenses and assaults. *Id.*

19. Emily J. Stine, *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DEPAUL L. REV. 1169, 1177–79 (2011) (discussing how the act required sex offenders to check in with the government following their release); see also *Legislative History of Federal Sex Offender Registration and Notification*, U.S. DEP'T OF JUST.: OFF. SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <https://smart.ojp.gov/sorna/current-law/legislative-history> [<https://perma.cc/6MCD-2P82>] (last visited Oct. 20, 2022) ("Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, the Wetterling Act . . . [r]equired address verification every 90 days for [Sexually Violent Predators] and annually for all other offenders."). Many of these laws were a direct reaction to the horrible public murders of children in the early 1990s and the fact that parents wanted to prevent offenders from living in their area. See Garfinkle, *supra* note 16, at 165 ("A scared and outraged public successfully lobbied the Washington legislature for community notification as a citizen's tool for protecting the state's children.").

20. See Lord, *supra* note 12, at 277–78 (discussing several examples but especially the highly publicized case of Megan Kanka in New Jersey). Megan was murdered by a convicted sex offender that lived across the street. *Id.* at 277. Intense lobbying after her death resulted in Megan's Law, which requires the government to notify the public of sex offenders living in the community. *Id.* at 278.

21. See Stine, *supra* note 19, at 1179 (observing that "by the turn of the century, all fifty states had enacted some form of sex offender registration and notification laws").

in the right direction, society developed a need for a more standardized reporting and registration system as travel became more frequent.<sup>22</sup>

### B. *The Adam Walsh Act and SORNA*

SORNA was originally enacted by Congress as part of the Adam Walsh Child Act of 2006.<sup>23</sup> The goal of SORNA was to protect the public from sex offenders by “establish[ing] a comprehensive national system for registration.”<sup>24</sup> Further, it corrected the loopholes caused by the Jacob Wetterling Program and Megan’s Law, which allowed a large portion of sex offenders to go unregistered.<sup>25</sup> SORNA registration is a strict requirement that ensures that sex offenders register *both* in each jurisdiction where they reside *and* initially where the crime took place.<sup>26</sup> Depending on the nature of the crime, there can also be limits on internet access and more stringent check-ins.<sup>27</sup> SORNA was created to streamline then-fragmented registration laws that varied by jurisdiction and prevented federal law enforcement from properly protecting the public from these individuals.<sup>28</sup> Due to the harsh implications of having to register as a sex offender and the requirement to continue to report, many individuals are currently appealing their sentences, seeking to have SORNA requirements removed.<sup>29</sup>

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22. See Lord, *supra* note 12, at 280 (explaining how inconsistencies amongst state laws created enforcement and registration problems). For example, “many sex offenders were able to evade the system by moving from one state to another.” *Id.*

23. *Id.* at 326–27; see also Adam Walsh Child Protection and Safety Act of 2006, 34 U.S.C. § 20901 (2006) (noting that the Adam Walsh Act was created in honor of the listed victims that had died at the hands of sexual predators, and while this list predominantly lists children, the Act was intended to protect all victims of sexual violence).

24. 34 U.S.C. § 20901; see also Lord, *supra* note 12, at 289 (discussing congressional intent of SORNA).

25. See Stine, *supra* note 19, at 1180 (explaining the gaps between the two acts that led to loopholes for sexual offenders to not register).

26. 34 U.S.C. § 20913.

27. *Id.* § 20918 (declaring that a “tier III” sex offender must appear before their jurisdiction every three months, while a “tier I” sex offender must appear only once per year).

28. See *Reynolds v. United States*, 565 U.S. 432, 435 (2012) (observing how SORNA “reflects Congress’ awareness that pre-Act registration law consisted of a patchwork of federal and [fifty] individual state registration systems”); see also *Sex Offender Registration and Notification Act (SORNA)*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna> [<https://perma.cc/9HMG-TH3C>] (last updated Aug. 15, 2022) (citing the goal of reducing the gaps in registration laws).

29. See *United States v. Brown*, 740 F.3d 145, 146–50 (3d Cir. 2014) (discussing how defendant unsuccessfully sought removal of SORNA requirements under an exception excusing an individual from registering if the victim “was at least [thirteen] years old and the offender was not more than [four] years older than the victim”); see also Lord, *supra* note 12, at 280 (noting that prior to creation of Adam Walsh Act, the National Center for Missing and Exploited Children “re-

SORNA registration is required for sexual offenses.<sup>30</sup> The Adam Walsh Act defines these as “a criminal offense that has an element involving a sexual act or sexual contact with another” and enumerates a list of offenses that require SORNA registration, including attempt or conspiracy to commit any of those specific offenses.<sup>31</sup> The largest area of controversy prior to the *Icker* case was the challenges of SORNA’s retroactive applicability to convictions prior to passage of the law.<sup>32</sup>

While SORNA cases fall under different standards of appellate review, the Third Circuit here looked at *Icker* under the plain error standard because the defendant failed to object to a specific condition at sentencing.<sup>33</sup> The Supreme Court established a four-part inquiry for plain error review: (1) an error that (2) is plain and (3) affects substantial rights of the defendant and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.<sup>34</sup> Plain error is a higher standard of review and only allows the appellate court to overrule a district court’s decision if it meets the criteria stated above.<sup>35</sup>

### III. THE CASE OF *UNITED STATES v. ICKER*

#### A. *Icker’s Actions*

From March 2018 until his termination, Icker worked as a part-time uniformed police officer in Luzerne and Lackawanna counties in Pennsylvania.<sup>36</sup> On several occasions, Icker used his badge and his status as a uniformed police officers to “harass, grope, and force oral sex on women.”<sup>37</sup> The facts of the case before the Third Circuit Court of Appeals were that Icker assaulted two women, ages twenty-two and thirty-two known to the record as S.R. and R.V., respectively.<sup>38</sup> In the separate situations, “Icker pulled over and detained the women.”<sup>39</sup> He claimed that

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ported in a press release that, of the 603,000 sex offenders required to register in the United States, over 100,000 had disappeared from the system altogether”).

30. See 34 U.S.C. § 20911(5)(A).

31. *Id.* § 20911(5)(A)(i).

32. While this is not the issue at hand in *Icker*, it is important to note prior controversies and to show how they were handled. See *e.g.*, *United States v. Neel*, 641 F. App’x 782, 794 (10th Cir. 2016) (finding that SORNA’s retroactive application does not violate the federal Ex Post Facto Clause).

33. *United States v. Icker*, 13 F.4th 321, 327 (3d Cir. 2021) (“When, however, a defendant fails to object to a specific condition at sentencing, as is the case here, we review for plain error.”).

34. See *United States v. Williams*, 974 F.3d 320, 340 (3d Cir. 2020) (first quoting *United States v. Olano*, 507 U.S. 725, 732 (1993), then quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

35. FED. R. CRIM. P. 52 (declaring that plain error is a higher standard than harmless error, and plain error warrants reversal, while harmless error does not).

36. *Icker*, 13 F.4th at 324.

37. *Id.* at 323.

38. *Id.* at 324.

39. *Id.*

they appeared intoxicated and when he searched the car he claimed to find evidence of drug use.<sup>40</sup> Icker then told the women that he found the evidence in their cars and that they would face “consequences.”<sup>41</sup> Because both women had prior criminal histories, Icker told them they could face imprisonment.<sup>42</sup> In both instances, Icker transported the victim, in his police vehicle, to a different location.<sup>43</sup> He then coerced both women into performing oral sex on him by asking “[h]ow can you help me help you” or “[w]hat can you do for me to help you?”<sup>44</sup> Three other women were also harassed by Icker.<sup>45</sup>

The state charged Icker with a variety of offenses—including official oppression and sexual assault—from December 2018 to April 2019.<sup>46</sup> Icker later entered into a plea agreement agreeing to plead guilty to two counts of depriving the two mentioned victims of their civil right to bodily integrity under 18 U.S.C. § 242.<sup>47</sup> In the plea agreement, Icker and the prosecution recommended a term of imprisonment of 144 months, and Icker waived his right to direct appeal for all grounds, including the manner in which that sentence was determined.<sup>48</sup> The plea bargain did not require him to register as a sex offender or comply with other SORNA requirements as a special condition to the plea agreement.<sup>49</sup>

#### B. *Sentencing and Appeal*

After making the plea agreement, Icker appeared before the Middle District Court of Pennsylvania for sentencing.<sup>50</sup> At the sentencing hearing, the judge rejected the agreed-upon 144-month term of imprisonment and instead sentenced Icker to imprisonment for 180 months.<sup>51</sup> The

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40. *Id.* (explaining that, in one instance, Icker claimed to smell marijuana and later found it, and in the second case he claimed that the driver appeared intoxicated and he later found a pill bottle).

41. *Id.*

42. *Id.*

43. *Id.* (discussing how the second location was in one case a park, and in the other a police station bathroom).

44. *Id.*

45. *Id.* (explaining how, in these other instances, Icker used his authority as a police officer to grope or harass the women).

46. *Id.*

47. *Id.*; *see also* 18 U.S.C. § 242 (“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . and . . . if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse . . . shall be fined under this title, or imprisoned for any term of years . . .”).

48. *United States v. Booker*, 543 U.S. 220 (2005) (making the United States Sentencing guidelines advisory rather than mandatory and allowing judges to sentence outside the once mandatory requirements); *see also Icker*, 13 F.4th at 324–25.

49. *Icker*, 13 F.4th at 324.

50. *Id.* at 325.

51. *Id.*



hearing pre-sentence report listed SORNA registration as a condition of release.<sup>52</sup> Icker received an opportunity to object to the pre-sentence report but did not.<sup>53</sup> The district court did not mention SORNA during the hearing, but the court did list it twice in the court's judgment of conviction.<sup>54</sup> The district court checked SORNA under the "Mandatory Conditions" section and listed SORNA under the "Additional Supervised Release Terms."<sup>55</sup>

Icker appealed to the Third Circuit Court of Appeals and argued that he should not have to comply with SORNA conditions because it was not in his plea agreement.<sup>56</sup> He also argued that his appeal waiver did not waive this specific issue.<sup>57</sup> The court first looked at whether Icker waived his right to appeal this issue.<sup>58</sup> The court stated that waivers of appeal are generally permissible unless the defendant did not knowingly and voluntarily agree to the appellate waiver.<sup>59</sup> Next, the court looked at the context surrounding the waiver and found that "Icker did not knowingly and voluntarily agree to the waiver of this appeal" because (1) the plea agreement did not make any reference to the SORNA requirements and (2) he did not plead guilty to a "sex offense" under SORNA.<sup>60</sup> Therefore, he could not waive a portion of the plea agreement of which he was unaware.<sup>61</sup>

Next, the court looked at whether Icker could be subjected to SORNA registration due to the nature of his crime.<sup>62</sup> The court concluded that SORNA registration requirements only apply to certain crimes under the Adam Walsh Act, and deprivation of rights under color of law does not fall under that statute's categories.<sup>63</sup> Deprivation of civil rights *could* be a sex offense, the court explained, but under the Adam Walsh Act, the criminal offense must be one that "has an *element* involving a sexual act or sexual contact with another."<sup>64</sup> The government argued that because Icker's conduct was sexual in nature, the court should construe the conviction as

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 325–26.

57. *Id.*

58. *Id.*

59. *Id.* (citing *United States v. Wilson*, 707 F.3d 412,414 (3d Cir. 2013)).

60. *Id.* at 326 n.3 (discussing how, even if the court found that the waiver was entered into knowingly and voluntarily, enforcing the waiver was a miscarriage of justice because SORNA was entered in error and that error creates a burdensome obligation on Icker).

61. *Id.* ("[H]e had no reason to know that he would be subject to SORNA.").

62. *Id.* at 327–30.

63. *Id.*; *see also* 18 U.S.C. § 242 (naming aggravated sexual abuse and attempted aggravated sexual abuse as violations of the statute). The exact language of the statute that Icker was charged under described sexual assault as a crime that could fit this charging instrument.

64. *Icker*, 13 F.4th at 328 n.5 (emphasis added) (quoting 34 U.S.C. § 20911(5)(A)(i)).

a sex offense, but the Third Circuit did not agree.<sup>65</sup> The court said that depriving individuals of their civil rights under color of law does not fall under the scope of SORNA and the district court did not have the discretion to add SORNA to a non-sexual offense.<sup>66</sup> The court came to this conclusion by finding that the imposition of SORNA on a non-sexual offense contradicted the language of the statute.<sup>67</sup>

Finally, the Third Circuit held that while district court judges *do* possess broad discretion in sentencing, the power is limited by statute and SORNA lists the specific crimes and elements of crimes to which the statute applies.<sup>68</sup> The court further held that a district court cannot broaden a statute and its application.<sup>69</sup> Finally, the court concluded that the district court's discretionary imposition of SORNA on a non-sex offender is plainly erroneous and vacated with directions to modify the judgement to remove the SORNA-related conditions.<sup>70</sup>

#### IV. THE PROBLEMS WITH *ICKER*: NO MORE DISCRETION?

The Third Circuit Court of Appeals misconstrued the law regarding SORNA classification, overrode a key factor of judicial discretion, and disrupted sound policy decisions when it remanded for removal of Icker's SORNA requirements.<sup>71</sup> In this Part, section A explores the Third Circuit's incorrect application of statutory interpretation. Section B concludes that district court judges have the discretion to apply SORNA requirements and even more, the drafters of the Adam Walsh Act intended this. Finally, section C analyzes how allowing Icker to fall through this loophole violates the policy reasons for the creation of SORNA. To begin, the ability to apply special considerations when making a sentence is a key function of the judicial branch and the Third Circuit should not abridge this right.<sup>72</sup>

##### A. Statutory Interpretation

The Third Circuit referenced in its opinion that the language in The Adam Walsh Act is clear; SORNA registration applies to sex offenders.<sup>73</sup>

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65. *Id.* at 328.

66. *Id.*; see also 34 U.S.C. § 20911(5)(A) (defining "sex offenses").

67. *Icker*, 13 F.4th at 328.

68. *Id.*

69. *Id.* at 329.

70. *Id.* at 329, 330–31.

71. See Matthew Van Meter, *One Judge Makes the Case for Judgment*, THE ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> [https://perma.cc/K6WK-H5RL] (arguing that judicial discretion in sentencing is key and otherwise it strips the courtroom of nuance). The article raises the very pointed question: "Without discretion, what's the judiciary for?" *Id.*

72. See *id.*

73. *Icker*, 13 F.4th at 330.

While the Act provides a broad definition for sex offender, it does not place limits on a judge's ability to expand the definition of a sex offense.<sup>74</sup> The Third Circuit was correct in evaluating the enumerated offenses, but the court failed to contemplate the likely intentions of the drafters to include offenses outside of the list.<sup>75</sup> Specifically, the Third Circuit erred in its decision by reading the Adam Walsh Act for its plain meaning and not contemplating the importance of judicial discretion during sentencing.<sup>76</sup>

Under the definition section of the SORNA requirements in the Adam Walsh Act, the statutory language of "generally" opens the paragraph that stipulates the definition of what constitutes a sex offense.<sup>77</sup> Specifically, the language is "(A) *Generally* [—] Except as limited by subparagraph (B) or (C), the term 'sex offense' means . . . ."<sup>78</sup> Here, the use of the word "generally" indicates that the preceding list of crimes and elements was not meant to be all-encompassing.<sup>79</sup> The ordinary meaning canon of statutory interpretation states that words are to be understood in their plain meaning.<sup>80</sup> Under this canon, courts are encouraged to interpret the meaning of a word to be what an ordinary or reasonable person would construe it to mean.<sup>81</sup> The basic definition of "generally" as a rule is "usually."<sup>82</sup> Therefore, the Third Circuit should not have ignored the word "generally" as it was likely placed in the statute to show that *usually* these are the types of convictions, but they are not all-encompassing.

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74. See *infra* Section IV.B for a discussion of how the Act does not limit the imposition of SORNA.

75. See Przybylski, *supra* note 14 (stating that a goal of SORNA was to "incorporate[ ] a more comprehensive group of sex offenders and sex offenses for which registration is required").

76. Hon. Thomas A. Zonay, *Judicial Discretion: 10 Guidelines for Its Use*, NAT'L JUD. COLL. (May 21, 2015), <https://www.judges.org/news-and-info/judicial-news-judicial-discretion-guidelines/> [<https://perma.cc/GD6X-8P5W>] (arguing that judicial discretion's "use increases fairness and can help to promote an equitable legal process by allowing the judge to consider individual circumstances when the law is insufficient or silent").

77. 34 U.S.C. § 20911(5)(A).

78. *Id.* (emphasis added).

79. See *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.").

80. CONG. RSCH. SERV., *STATUTORY INTERPRETATION: THEORIES, TOOLS AND TRENDS* 19 (2018), [https://www.everycrsreport.com/files/20180405\\_R45153\\_b948e50e95293cf7d75ef161e417ccd2307610c8.pdf](https://www.everycrsreport.com/files/20180405_R45153_b948e50e95293cf7d75ef161e417ccd2307610c8.pdf) [<https://perma.cc/ML8E-7AJS>] ("Courts often begin by looking for the 'ordinary' or 'plain' meaning of the statutory text. Where a term is not expressly defined in the statute, courts generally assume 'that Congress uses common words in their popular meaning, as used in the common speech of men.'" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) (footnotes omitted))).

81. *Id.* at 14.

82. See *Generally*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/generally> [<https://perma.cc/T4MD-NYD2>] (last visited Oct. 20, 2022).

The Third Circuit declined to consider this construction and determined that the statute was not ambiguous.<sup>83</sup> Looking at past cases, SORNA is notoriously ambiguous and there have been many controversies to determine exactly what Congress intended when it created the Adam Walsh Act.<sup>84</sup> Therefore, courts must make an investigation into the intentions of the statute. Further, in other SORNA cases involving interpretation of the statute, the courts noted that the “question of statutory construction begins with a plain reading of the statute, and that legislative history and policy considerations are irrelevant if the words themselves are clear.”<sup>85</sup> By not engaging in a more searching analysis, the Third Circuit dismissed key canons of statutory interpretation and the wishes of the drafters.

The government argues that the addition of the SORNA requirements on the judgment of convictions did not “mandate a SORNA registration requirement” but instead “impose[d] a conditional directive to comply with SORNA only ‘as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency.’”<sup>86</sup> The government argues that this language means that it is up to a third-party agency to make the final decision on whether to enforce SORNA or not.<sup>87</sup> The Third Circuit is correct to be hesitant about this approach. It cannot be true both that the district court has the discretion to impose SORNA requirements and that district courts can delegate the final decision to third-party agencies. Case law is clear that such a delegation is “an impermissible delegation of Article III powers.”<sup>88</sup> Further, whether to trigger SORNA is a decision best left to the discretion of the sentencing judge—the individual vested with rights to impose conditions of supervised release under 18 U.S.C. § 3583.<sup>89</sup> Delegating to third parties would cause confusion and inconsistent results.<sup>90</sup> However, while the government was wrong

83. *United States v. Icker*, 13 F.4th 321, 328–29 (3d Cir. 2021).

84. *See, e.g.*, Stephanie Gaylord Forbes, Note, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1729–39 (2011) (summarizing the various controversies that have arisen from sexing and juvenile defendants falling under SORNA); *see* Lord, *supra* note 12, at 305 (discussing the various controversies surrounding SORNA application).

85. *See* Lord, *supra* note 12, at 288 (citing *United States v. Smith*, 481 F. Supp. 2d 846, 850 (E.D. Mich. 2007) (finding that SORNA did not apply retroactively because there was no indication that “travels” included past travels)).

86. *Icker*, 13 F.4th at 329–30 (quoting Brief of Appellee at 19, *Icker*, 13 F.4th 321, (No. 20-2632)).

87. *Id.* at 331.

88. *Id.* at 330; *see e.g.*, *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) (holding that delegating a condition of supervised release to the discretion of a probation officer is also an improper delegation of Article III powers).

89. 18 U.S.C. § 3583; *see also Pruden*, 398 F.3d at 251 (differentiating between the ability of the district court to distinguish if an individual is required to undergo mental health intervention but it is permissible to delegate the details and selection of a program once the initial burden is met).

90. *See Pruden*, 398 F.3d at 250 (citing *United States v. Loy*, 237 F.3d 251, 265 (3d Cir. 2001)) (finding that a condition of supervised release banning the defen-

in this approach for SORNA imposition, the government was correct in the original assertion that the district court judge had the authority to mandate SORNA registration under 18 U.S.C. § 3583.<sup>91</sup>

This canon of statutory interpretation not only makes it clear that the current list was not meant to be all encompassing, but it aligns better with the policy of the Adam Walsh Act.<sup>92</sup> The legislature created SORNA with the goals of preventing the gaps that existed with prior legislation.<sup>93</sup> The Third Circuit's ruling allowed a crime to be re-classified as something far more minor to skirt SORNA, thus creating an additional loophole that is likely the drafters did not intend.<sup>94</sup>

### B. *Judicial Discretion*

A district court has broad discretion to impose conditions of supervised release under 18 U.S.C. § 3583.<sup>95</sup> The government correctly argued that the district court had the discretion to impose SORNA registration requirements under both the language of SORNA and 18 U.S.C. § 3583.<sup>96</sup> While the Third Circuit declared that statutes can limit a district court judge's broad discretion in sentencing, the Adam Walsh Act does not limit the discretion of district court judges.<sup>97</sup> As discussed above, the government further alleged that "nothing in SORNA limits registration to *only* those convicted of such offenses."<sup>98</sup> The drafters had the ability to expressly limit the application to specific instances and this decision is not to be taken lightly.<sup>99</sup> Therefore, it is likely that the drafters intended for there to be judicial discretion to allow SORNA classification for individuals

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dant from possessing pornography was confusing because it required the probation officer to decide what materials constituted pornography).

91. *Icker*, 13 F.4th at 330.

92. See Lord, *supra* note 12, at 282 (discussing the goals of the Adam Walsh Act was to eliminate gates "of which sex offenders could attempt to evade registration or the consequences of registration violations" (quoting Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg 8894, 8895 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72))).

93. See *id.*

94. See *supra* Section II.A for a full discussion on the loopholes created by Megan's Law and the Jacob Wetterling Program.

95. See *Icker*, 13 F.4th at 327; see also 18 U.S.C. § 3583.

96. See *Icker*, 13 F.4th at 328 ("However the Government argues that because the conduct of Icker's criminal acts is "reasonably related" to the sexual abuse of women, the District Court did not err by choosing to discretionarily impose SORNA registration requirements." (quoting Brief of Appellee at 23, *Icker*, 13 F.4th 321, (No. 20-2632))).

97. *Id.* ("[W]hile a district court has broad discretion to impose conditions of supervised release pursuant to 18 U.S.C. § 3583, the power is limited by statute.").

98. *Id.*

99. See Zonay, *supra* note 76 (discussing the importance of judicial discretion to fill in gaps).

who committed a very sexually based crime, but prosecutors charged them with a lesser offense, as was the case here.<sup>100</sup>

The district court's exercise of discretion is governed by 18 U.S.C. § 3583 which states, the "district court's conditions must (1) be 'reasonably related' to the sentencing factors of § 3553, (2) 'involve[ ] no greater deprivation of liberty than is reasonably necessary for [those] purposes,' and (3) be 'consistent with any pertinent policy statements issued by the Sentencing Commission.'"<sup>101</sup> While the Third Circuit argues that the next section is the most pertinent, 18 U.S.C. § 3583 gives broad discretion to district court judges in creating special conditions for release.<sup>102</sup> In § 3583(d), the language makes two explicit references to SORNA, saying that "[t]he court shall order . . . for a person *required to register* under [SORNA] that the person comply with the requirements of that Act."<sup>103</sup> The Third Circuit construes this to mean that district courts may only require SORNA registration on individuals whose convictions explicitly fall under SORNA.<sup>104</sup> Rather, this assumption is making a leap. This wording creates a floor, not a ceiling for imposition of SORNA. The language ensures that district court judges impose SORNA action when required by statute, but does not explicitly limit them from imposing the effects in other situations.<sup>105</sup> Rather, the drafters likely deferred to the basic standards set forth by 18 U.S.C. § 3583 of "reasonably related" and "involve[ ] no greater deprivation of liberty than is reasonably necessary."<sup>106</sup> Judicial discretion in sentencing is a key way that district court judges prevent unwanted sentencing disparities amongst similarly situated defendants.<sup>107</sup>

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100. It can also be argued that the victim's constitutional rights were violated by Icker's actions. See Andrew J. Simons, *Being Secure in One's Person: Does Sexual Assault Violate a Constitutionally Protected Right?*, 38 B.C. L. REV. 1011, 1048 (1997) (arguing that the right to be free from bodily restraint is part of the constitutionally protected right to bodily integrity.) Simons further argued that "[t]he right to be free from bodily restraint is implicated when a person is sexually abused or raped." *Id.* The author noted that not all crimes with physical invasions are constitutional violations but "physical invasions that are perpetrated by state actors under color of law and that cannot be rationally justified fall within the scope of the protected right." Further, "sexual assault can never be justified as a legitimate state interest." *Id.* at 1048–49.

101. *Icker*, 13 F.4th at 328 (alterations in original) (quoting 18 U.S.C. § 3583 (d)(1)–(3) (2018)).

102. *Id.*

103. *Id.* (quoting 18 U.S.C. § 3583(d)).

104. *Id.* at 327–29 ("A district court lacks the authority to require a defendant to register under SORNA if he or she has not been convicted of a 'sex offense' as defined by 34 U.S.C. § 20911(5)(A).").

105. See Zonay, *supra* note 76 (emphasizing that judicial discretion is key to applying a statute in areas where the statute is silent).

106. 18 U.S.C. § 3583(d) (2018).

107. Zonay, *supra* note 76 (emphasizing the importance of judicial discretion when as it allows judges to take into account the individual circumstances of the case and defendant before them).

Finally, the fact that SORNA requirements are not punitive in nature supports the idea that district court judges have the right to impose SORNA requirements as a condition of release.<sup>108</sup> In *Commonwealth v. Perez*,<sup>109</sup> the Superior Court of Pennsylvania determined that the policy declarations in the statute show that SORNA was created as part of a civil regulatory scheme and not as a manner to punish criminals.<sup>110</sup> *Perez* emphasized the ability to impose SORNA requirements as circumstances for release due to the requirements' ability to protect the public from future crimes.<sup>111</sup> Therefore this further emphasizes that district court judges should have the discretion to apply SORNA.

### C. Policy Supports Discretion Regarding SORNA Classification

In its ruling to remove Icker's SORNA requirement, the Third Circuit created a loophole that goes against the intentions and hopes for the Adam Walsh Act that created the SORNA requirement.<sup>112</sup> The facts of the case are clear; Icker used his badge to force women to leave their cars, under the guise of the law, and perform oral sex on him.<sup>113</sup> Scholars have consistently mentioned that law enforcement officers have gotten away with crimes by being protected by their fellow officers.<sup>114</sup> It is not surprising that Icker was charged with a lesser offense rather than rape or sexual assault.<sup>115</sup> Few can argue against the idea that these exact facts are the type of situation that qualify as a sex offense, considering it is sexual in nature and sexually motivated.<sup>116</sup> Overall, Congress intended for the

108. See *Commonwealth v. Perez*, 97 A.3d 747, 758 (Pa. Super. Ct. 2014) (ruling that SORNA requirements are not punitive as evaluated by a seven-prong test, mainly because SORNA requirements have the important *policy goals* of protecting the public).

109. 97 A.3d 747 (Pa. Super. Ct. 2014).

110. *Id.* at 758.

111. *Id.*

112. See The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30210, 30211–12 (proposed May 30, 2007) (to be codified at 28 C.F.R. § 72), [https://www.justice.gov/sites/default/files/olp/docs/oag\\_sorna\\_05302007.pdf](https://www.justice.gov/sites/default/files/olp/docs/oag_sorna_05302007.pdf) [<https://perma.cc/V56S-6Z8Y>] (discussing the overall goals for the SORNA act including filling gaps and protecting the public) [hereinafter Proposed SORNA Guidelines].

113. *United States v. Icker*, 13 F.4th 321, 324 (3d Cir. 2021).

114. See Philip M. Stinson, John Liederbach, Steven L. Brewer & Brooke E. Mathna, *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL'Y REV. 665, 683 ("Scholars have long recognized that law enforcement officers are generally exempt from law enforcement because police typically do not arrest other police officers." (citation omitted)).

115. See *id.* at 675 (finding in their study that police charged with a crime on duty were often charged with the lesser offense of assault (4.4%), official misconduct (2.9%) and bribery (1.1%)). The study also found that a large majority of police offenses are internally handled. *Id.*

116. See *Overview of Rape and Sexual Violence*, NAT'L INST. JUST., (Oct. 25, 2010), <https://nij.ojp.gov/topics/articles/overview-rape-and-sexual-violence> [<https://perma.cc/5QE2-MMB4>] (discussing how sexual violence against others can take many forms such as sexual harassment, sexual assault, rape, etc. and charging is

Adam Walsh Act to fix the gaps of Megan's Law and the Jacob Wetterling Program.<sup>117</sup> A narrow reading of the Adam Walsh Act strays from these goals.<sup>118</sup>

The legislature created the public notification portion of SORNA to protect the public, and Icker used his power to exploit members of the public.<sup>119</sup> Thus, the public has a right to know about the existence of this individual in their community.<sup>120</sup> Congress passed the Adam Walsh Act with the purpose of "clos[ing] potential gaps and loopholes under the old law."<sup>121</sup> By allowing Icker to skirt these requirements, the case goes expressly against the goals of the Adam Walsh Act and creates a loophole that it is likely the drafters did not intend to create. Further, it puts the public in danger when Icker gets out of prison and is able to move throughout his community without a warning to those around him.<sup>122</sup>

Further, another goal of SORNA and the Adam Walsh Act was to prevent recidivism.<sup>123</sup> By tagging an individual with SORNA requirements, it also makes them more likely to receive treatment and, thus, less likely to

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based on the elements in a specific jurisdiction). Further, similar cases in Pennsylvania and other states have led to much higher charges than what Icker was charged with. *See Bully v. State*, 849 S.E.2d 271, 277, 280 (Ga. App. 2020) (finding that a probation officer who used a threat of return to custody to receive oral sex from the victim was sufficient for an "aggravated sodomy" conviction); *see also Rhodes v. State*, 651 So.2d 1122, 1123 (Ala. Crim. App. 1994) (finding that coercion to perform sex acts by threatening to withhold food met the standard for forcible sexual assault); *Commonwealth v. Rhodes* 510 A.2d 1217, 1226 (Pa. 1986) (stating that "'forcible compulsion,' as used in section 3121(1) includes not only physical force or violence, but also moral, psychological, or intellectual force used to compel a person to engage in sexual intercourse against that person's will"). The *Rhodes* court looked to the totality of the circumstances to determine whether the evidence supported a finding that the defendant had used forcible compulsion. *Rhodes*, 510 A.2d at 1226.

117. *See Proposed SORNA Guidelines*, *supra* note 112, at 30211 (discussing the goals of SORNA and that the purpose was to close gaps that previously existed with prior laws).

118. *See id.*

119. *See United States v. Icker*, 13 F.4th 321, 324 (3d. Cir. 2021) (discussing how Icker used the power of his badge to trap and harass the two victims).

120. *See Keeping Children Safe from Sexual Offenders*, MEGAN'S LAW, <https://www.meganslaw.com/> [<https://perma.cc/A8SF-9ZVP>] (last visited Oct. 20, 2022) ("On March 5, 2003, the United States Supreme Court ruled that information about potential predators may be publicly posted on the internet.").

121. *See Proposed SORNA Guidelines*, *supra* note 112, at 30211 (discussing the goals of SORNA and that the purpose was to close gaps that previously existed with prior laws).

122. *See supra* note 20 and accompanying text for a full discussion on the case of Megan Kanka who unknowingly lived across the street from a sex offender who later murdered her. This case inspired the "right to know" push that later led to Megan's Law and the Adam Walsh Act.

123. While not an express goal, it is implied from the tier system of SORNA requirements that more dangerous offenders have to comply with more stringent requirements, thus limiting them from reoffending. *See Andrew J. Harris, Kimberly R. Kras, Christopher Lobanov-Rostovsky & Qurat Ann, States' SORNA Implementation Journeys: Lessons Learned and Policy Implications*, 23 NEW CRIM. L. REV.



reoffend.<sup>124</sup> Allowing an individual to slip through the cracks does not further any of these imperative goals.<sup>125</sup> The Third Circuit did not discuss any of these important policy considerations when issuing their opinion and thus cut off some key factors of the argument.<sup>126</sup> In other cases involving SORNA, policy implications were a key factor and therefore the Third Circuit should have taken policy into account when issuing their opinion.<sup>127</sup>

#### V. THE RESULT IN *ICKER* CHANGES THE LANDSCAPE FOR ATTORNEYS

The *Icker* decision will have lasting impacts on both jurisprudence and the action of practitioners in the Third Circuit.<sup>128</sup> Criminal law practitioners, especially, will have to grapple with the implications of both charging decisions and plea bargain decisions. The current decision illustrates the Third Circuit's view that SORNA cannot get attached at any other point of the process and is not up to judicial discretion.<sup>129</sup> On the most basic note, it is likely that criminal law practitioners will be increasingly careful in what they charge or agree to in a plea bargain when a lesser offense may skirt the SORNA requirements even if the district court wants to enforce them. Considering the negative press that this case received, prosecutors

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315, 355 (2020) (discussing how recidivism is taken into account in the offender tier system).

124. See Lord, *supra* note 12, at 282 (discussing the Attorney General's articulation that the purpose of SORNA was to "strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public, and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations." (quoting Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72))).

125. Congress is also permitted to state important policy goals and allow other branches to implement changes surrounding the policy. See Proposed SORNA Guidelines, *supra* note 112.

126. While judges do not have to look at policy, they can reject a reading of a statute based on policy concerns. See CONG. RSCH. SERV., *supra* note 80, at 43 ("If a court believes that the practical consequences of a particular interpretation would undermine the purposes of the statute, the court may reject the reading even if it is the one that seems most consistent with the statutory text." (citing *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's new-found reading of [the disputed statute] 'would produce an absurd and unjust result which Congress could not have intended.'" (alteration in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)))).

127. See *Commonwealth v. Perez*, 97 A.3d 747, 758 (Pa. Super. Ct. 2014) (discussing how policy implications indicate that SORNA registration should be retroactive).

128. See *United States v. Icker*, 13 F.4th 321, 324 (3d Cir. 2021) (deciding that district court judges cannot implement SORNA requirements at sentencing). Therefore, requiring the government to attach those requirements only to offenses outlined explicitly in the Jacob Wetterling Act. *Id.*

129. See *id.*

will likely push for plea bargains to incorporate sexual offenses over offenses that do not require SORNA registration.<sup>130</sup>

On the other hand, criminal defense attorneys will increasingly push for lesser offenses that do not fall under the SORNA requirements, and they will not have to fear the addition of SORNA requirements implemented by a judge at sentencing. Sex offense registration requirements are often changing and while the legislature created SORNA to fix the loopholes of the Jacob Wetterling Act and Megan's Law, perhaps a new amendment is necessary to close the loophole that allowed Icker to escape SORNA's requirements. Another option would be a statement clarifying the intent of the statute by the Attorney General.<sup>131</sup>

Following in line with prior decisions regarding the construction of SORNA, the Third Circuit will continue to apply SORNA as tightly as possible unless the legislature amends the Jacob Wetterling Act. This allows little discretion at any point of the process once the government makes a charging or plea bargain decision. Further, judges may be more careful to explicitly discuss the scope and covered conditions of a supervised release at a sentencing hearing.<sup>132</sup>

#### VI. NO WAY AROUND IT: *ICKER* UNDERMINED THE ADAM WALSH ACT

When the Adam Walsh Act came into effect in 2006, it provided hope for victims of sexual attacks as well as protected the community.<sup>133</sup> The ruling in *Icker* undermines the goals of the Adam Walsh Act and merely gave a slap on the wrist to an offender who used his position of power to

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130. See Joshua Vaughn, *Women Say Pennsylvania Cop Committed Sexual Assaults, Recorded Them on Body Camera* THE APPEAL (Mar. 19, 2019), <https://theappeal.org/women-say-pennsylvania-cop-committed-sexual-assaults-recorded-them-on-body-camera/> [<https://perma.cc/W2U8-FFCR>] (discussing the nature of the crimes Icker committed and the impact they had on his victims). The article further noted that there was a total of thirty-one sexual assault claims against Icker, twenty-three of them were dropped shortly after being made. *Id.*; see also Matt Hater of Space Force (@HailGalvatron), TWITTER, (Jan. 27, 2022, 11:19 PM), <https://twitter.com/hailgalvatron/status/1486916799790682112?s=21> [<https://perma.cc/66S2-54CS>] (arguing that Icker is a convicted rapist and should have to register as a sex offender).

131. In 2007, the Attorney General declared that the law was to be applied retroactively. A similar ruling could be offered in this case. See 28 C.F.R. § 72.3 (2022).

132. See *Icker*, 13 F.4th at 326 n.4 (noting that the district court judge did not discuss any of the special conditions of release during the sentencing hearing, including the imposition of SORNA). While doing so likely would not have changed the Third Circuit holding, the importance of ensuring that a defendant understands everything they are agreeing too is essential. See also Commentary on Proposed Amendment to Criminal Sexual Abuse Sentencing Guidelines, 68 Fed. Reg. 75374 (Dec. 30, 2003) (“[T]he court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.”).

133. See Lord, *supra* note 12, at 275 (discussing the purpose of the Adam Walsh Act).

violate others. Courts should send a message that they will not tolerate Icker's behavior, and his actions should have real consequences.<sup>134</sup>

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134. A final, tragic note on this case is that the victims specifically asked for Icker to register as a sex offender, and the Third Circuit's ruling thereby prevented them from reaching full justice. Both victims testified at his sentencing hearing. See Strub, *supra* note 3 (explaining that in an interview after the sentencing in the district court, the second victim said that "[w]e would not have had justice unless he was on the registry, we both felt like that").