TOWARD DISPASSIONATE, EFFECTIVE CONTROL OF SEXUAL OFFENDERS

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INTRODUCTION

From now on, every State in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love. Today, America warns: If you dare to prey on our children, the law will follow you wherever you go. State to State, town to town.

Today, America circles the wagon around our children.¹

Now, [registration] has caused me more problems than going to prison. I was evicted from my mother's apartment; left me virtually homeless.... I've been on television. I've been in [the] Overland Park [newspaper] ... every Friday.

I can't live like this and every morning I get up to look at the paper—I'm paranoid. I can't take this. I'm about ready to crack, okay? ... At least in prison I knew I had a place to sleep. I would rather go back to prison. I can't do this.²

Few crimes spark as strong or distinctive an aversion as sexual offenses against children.³ As a society, we seem united in our categorization of these acts as among the most heinous. Those who commit such offenses are outcasts, perverts, or animals, not worthy of the basic human rights our Constitution guarantees. Although this statement seems like an exaggeration, numerous laws prevent this very class of persons, who have been tried, convicted, incarcerated and released from our prison system, from enjoying many of the civil liberties we take for granted. These laws, known as sex offender registra-

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Section and notification statutes, are common to every state. Passed in an effort to combat the alleged epidemic of sex crimes against children, these laws collectively have stretched the constitutional limits of justice to a dangerous extreme. In addition, they have opened the door to so-called "crime prevention measures" that were once considered unthinkable.

This Comment will consider the ongoing public debate surrounding registration and notification laws. Part I traces the development of these laws on a national level, and examines the different requirements states have imposed on convicted sex offenders. Part II discusses the various constitutional challenges raised in the courts concerning registration and notification. Next, Part III responds to the policy arguments on which proponents of these measures rely. Part IV argues that notification laws are not only ineffective, but have prompted the adoption of even more intrusive crime prevention tactics. Finally, Part V offers alternatives to current notification laws that better address the goals of prevention and rehabilitation.

I. HISTORY OF REGISTRATION AND NOTIFICATION STATUTES

A. Development

For many, the explosion of registration and notification laws can be traced to the death of seven-year-old Megan Kanka. In 1994, Megan was brutally raped and murdered by a neighbor, Jesse Tim-

4. Registration laws typically require that, upon release from prison, a convicted sex offender register certain personal information with local law enforcement agencies so that authorities may know of his whereabouts. Notification laws take this action a step further by allowing those authorities to release some or all the information to selected members of the public. For examples of these statutes, see infra Part I.B.

5. See infra notes 14-15 and accompanying text.


7. See infra notes 206-19 and accompanying text (noting radical treatment programs adopted by several states as component of notification statutes).

8. So strong is the connection that registration and notification laws of all states are collectively referred to as "Megan's Laws." See Joe Holleman, Case Highlights Sex-Offender Debate, ST. LOUIS POST-DISPATCH, June 6, 1996, at A1. When President Clinton urged support for a federal version of these laws, he specifically mentioned Megan's name. See Joseph F. Sullivan, Whitman Approves Stringent Restrictions on Sex Criminals, N.Y. TIMES, Nov. 1, 1994, at B1.
mendequas, who, unknown to Megan's parents or the community, had twice been convicted of sexual assaults.9 Within months of this horrific crime, the New Jersey legislature passed what has been called "the most comprehensive and stringent" of all sex offender statutes.10 Although the New Jersey sex offender statute was not the first such U.S. law,11 it has become a model for similar statutes around the country in spite of prominent constitutional challenges.12 Today, all fifty states have registration statutes,13 with an increasing number add-

10. See Boland, supra note 6, at 193-96 (describing New Jersey's notification provisions).
13. See Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (rejecting ex post facto, cruel and unusual punishment, and equal protection claims); see also Artway v. Attorney Gen., 81 F.3d 1235 (5d Cir. 1996) (upholding New Jersey's registration component, but suggesting that notification provisions may be unconstitutional). Although the nationwide push towards adoption of similar statutes has not abated, some states have been more careful in framing their legislation as a result of these challenges. The Massachusetts legislature, for example, submitted proposed bill S.B. 2276 to the state Supreme Judicial Court in an attempt to weed out constitutional infirmities before its passage. See Opinion of the Justices of the Senate, No. SJC-07224, 1996 WL 4062908 (Mass. July 18, 1996).
If Megan Kanka's death and the New Jersey statute lit the spark, then the federal government since has fanned the flames. In 1994, Congress enacted The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the "Act") as a provision of the Violent Crime Control and Law Enforcement Act. Two years later, Congress amended the Act to include a notification provision, instructing local authorities to release "relevant information that is necessary to protect the public." Although the Act's guidelines are vague, its impact is not: the federal statute penalizes states that fail to enact registration and notification laws through reduction of their federal funding. The march towards national notification is well under way.

B. Nature of Registration and Notification Laws

Although the flexibility of the Jacob Wetterling Act has led to diversity among the various state registration and notification statutes, some common elements are apparent. Typically, registration laws

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17. Pub. L. No. 103-322, 108 Stat. 2038 (codified at 42 U.S.C. §§ 13701-14223). The law requires in part that any person "convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" to register with their state authorities. See 42 U.S.C. §§ 14701(a) (1) (A), (f)(2). Criminal offense includes "criminal sexual conduct toward a minor," conduct "that by its nature is a sexual offense toward a minor," kidnapping (except by a parent), and solicitation of sexual conduct or prostitution. See id. § 14071(a)(3)(A). Sexual offense means "any criminal offense that consists of aggravated sexual abuse or sexual abuse" under state or federal law, or the intent, through physical contact, to commit such abuse. See id. § 14071(a)(3)(B). Those affected must register for ten years. See id. § 14071(a)(1)(A), (b)(6)(A). If a court determines that the offender suffers from a mental abnormality, the registration period may be extended. See id. § 14071(a)(2), (a)(3)(B)-(C).


20. See 42 U.S.C. § 14071(f). States had until September 13, 1997, to meet this requirement. See id. The funds so conditioned are those provided under 42 U.S.C. § 3756 for the purpose of aiding local law enforcement.
require a sex offender to provide local law enforcement officers with his name, local address, nature of offense, photograph, fingerprints, and dates of incarceration. Other states require that offenders give notice to local authorities of any intention to move. Still others apply only to repeat offenders or to those who target children. The requirement may last anywhere from a few years to a lifetime, although some states allow offenders to petition the court for release of this duty.

The general purpose of these laws is to provide police with enough information to locate the offender if a crime in his area of residence occurs.

Notification laws offer even greater variety in terms of who is subject to notification, the scope of that notification, and the manner in which this process is carried out. In certain states, the level of required notification depends on the perceived risk that the offender presents to the public. New Jersey, for example, evaluates a sex offender based on the following factors:

21. This Comment will refer to offenders with male pronouns because most sexual perpetrators are men. See GORDON C. NAGAYAMA HALL, THEORY BASED ASSESSMENT, TREATMENT AND PREVENTION OF SEXUAL AGGRESSION 11 (1992) (stating that males constitute vast majority of sexual aggression perpetrators); see also Jerusalem, supra note 18, at 221 (citing Department of Justice Report estimating that female sexual aggressors accounted for less than 10% of sexual offenses in 1992).

22. See Boland, supra note 6, at 190 (describing information offender must usually provide under registration laws). Some states have added to this base of information in unique ways. Connecticut, for example, requires sex offenders to provide a blood sample that can be used in creation of a DNA data bank. See Rachel Gottlieb, Parents' Anxiety Refuels Legal Debate: Right to Privacy vs. Community Safety with Molester Living in Burlington, HARTFORD COURANT, Sept. 6, 1996, at A3 (discussing debate over specific provisions in sex offender and notification law). California obtains blood and saliva samples of offenders for the same purpose. See CAL. PENAL CODE § 290-290.7 (Supp. 1997). New Jersey reserves the right to request any information that the Attorney General finds necessary. See NJ. STAT. ANN. § 2C:7-1 to :7-11 (West 1995 & Supp. 1997). That discretionary information comes in addition to a laundry list of statistics, including the registrant's name, sex, age, date of birth, physical description, Social Security number, address, employment information, date and place of each adjudication, convictions or acquittals, and fingerprints. See id.

23. See, e.g., NEV. REV. STAT. § 207.151 to .157 (1995); N.J. STAT. ANN. § 2C:7-1 to :7-11.


26. For example, Minnesota, Arkansas, Illinois, and Ohio have a ten-year requirement; Maine and Virginia impose a fifteen year requirement; Alabama, Arizona, California, Delaware, and Florida require offenders to provide government officers with this information for the duration of their lives. See supra note 14 (identifying state statutes).

27. For examples, see the Arkansas, California, Colorado, and Maine state statutes, cited supra note 14. The process, however, may be difficult. See infra notes 189-93 and accompanying text (describing typical appeal procedure).

28. The data is intended to provide police with "a ready list of suspects when investigating sex crimes." Holleman, supra note 8, at A1. Some critics have objected to the "wide net" created by registration. See See Offenses, 51 U.S.L.W. 2789, 2789 (U.S. June 14, 1988) (stating that, if successful, registration "presumably means a series of command performance at lineups") (internal citation omitted).

29. See State v. Myers, 923 P.2d 1024, 1036 (Kan. 1996) (discussing trends in the develop-
fender according to his level of risk, and places him in one of three categories. The resulting category dictates who within the community local officials will notify. Some states restrict the recipients of information to organizations dealing with children. Other states simply allow officials to release information to whomever they deem appropriate when necessary for the protection of the public.

Although a number of states will provide information from a central registry on special request, some states have developed more unique methods for delivering information to the public. In California, for example, citizens can access information about specific individuals through use of a “900” number. Louisiana puts the burden of state registration laws), cert. denied, 117 S. Ct. 2508 (1997). For examples of statutes following this approach to notification, see CONN. GEN. STAT. § 54-102r (Supp. 1997); N.J. STAT. ANN. § 2C:7-1 to -7-11 (West 1995 & Supp. 1997); N.Y. CORRECT. LAW § 168 to 168v (McKinney Supp. 1997).

30. Some of the risk factors include: the degree of force and contact with the victim, the age of the victim and manner in which he or she was selected, the number of offenses committed, the time elapsed since the last offense, and the degree of residential support and employment or educational stability available to the offender. See Artway v. Attorney Gen., 81 F.3d 1235, 1244 n.2 (3d Cir. 1996) (citing the “Registrant Risk Assessment Scale” published by the N.J. Attorney General). The prosecutor will attach a risk level of low, moderate, or high to each of these factors, and evaluate the offender accordingly. The offender’s score is then tabulated, and a risk category assigned. The prosecutor may adjust his findings based on other factors, such as the offender’s admission that he will strike again, or the presence of any physical disability that would render the offender relatively harmless. See id.

31. Tier One notification is for low risk offenders; only local law enforcement agencies will be notified. Tier Two is for moderate risk offenders, involving notification of local community groups, schools, and religious and youth organizations. Tier Three is for high-risk offenders, with notification directed to reach any “members of the public likely to encounter the person registered . . . .” N.J. STAT. ANN. § 2C:7-8(c)(1)-(3); see also N.Y. CORRECT. LAW § 168-b (McKinney Supp. 1997) (modeled after New Jersey’s tier notification system).

32. See N.J. STAT. ANN. § 2C:7-8(c)(1)-(3). Although New Jersey asserts three levels of notification, critics and commentators alike have called its provisions mandatory, because even at the lowest level some information is released. See Boland, supra note 6, at 195 (maintaining that notification in New Jersey is mandatory because “all registrants will be subject at the very least to Tier One Notification”).


35. See, e.g., CAL. PENAL CODE § 290-290.7 (Supp. 1997) (allowing public access to habitual sex offender subdirectory); IND. CODE ANN. § 5-2-12-11 (providing information from a central registry to schools and other child care facilities on computer disk); N.C. GEN. STAT. § 14-208.5 to -208.13 (Supp. 1996) (providing information from central registry upon specific request).

36. See CAL. PENAL CODE § 290.4. Callers must identify the complete name of the suspected offender. See id. If a match is found, they can receive information regarding the of-
directly on the offender, requiring him to send postcards, at his own expense, to neighbors announcing his status. Oregon simplifies the process still further by requiring the registrant to place a notice in his window stating “Sex Offender Residence.” Although analogous tactics have been directed at other offenders, measures such as these sit at the heart of the controversy surrounding registration and notification laws.

II. CONSTITUTIONAL CHALLENGES

Following the judicial tradition of legislative deference, courts presume that statutes are constitutional; the burden rests on the parties seeking invalidation to prove otherwise. Although there have been numerous challenges to registration and notification laws throughout the country, the Supreme Court has yet to hear a case on this issue. A review of the various lower court decisions illustrates the need for uniform settlement of the issues raised by these laws.

A. Ex Post Facto

The United States Constitution prohibits the federal government
or any state from enacting ex post facto legislation.43 Several states, however, have chosen to apply their sex offender laws retroactively,44 giving rise to numerous ex post facto challenges in state and federal courts.45 Generally, for a law to withstand ex post facto analysis, two conditions must be met. First, the law must be non-penal in nature; second, if the law is penal, it cannot apply to crimes committed before its enactment.46 The purpose for such restrictions is both to restrain legislatures from enacting "arbitrary or vindictive legislation,"47 and to ensure that the public has fair warning of the consequences that attach to unlawful conduct.48 Because retroactive application of a non-penal law is constitutionally permissible,49 the crux of any ex post facto analysis rests on whether the law in question constitutes punishment.50

Most sex offender registration statutes have withstood constitutional attacks on the grounds that such laws do not entail punishment.51 These holdings support the traditional view that registration

44. The following states apply these laws retroactively: Alaska, Arizona, California, Connecticut, Georgia, Idaho, Illinois, Indiana, Louisiana, Maine, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, and Washington. See supra note 14 for specific statutes. The federal government, in passing the Jacob Wetterling bill, remained silent on the issue of retroactive application. See 42 U.S.C. § 14071 (1994). For some states, the decision centered on the belief that, absent retroactive application, the law would affect so few offenders as to render it relatively useless. See Doe v. Poritz, 662 A.2d 367, 373 (N.J. 1995) (stating that if New Jersey had excused previously convicted offenders, the law "would have applied to no one").
45. See infra notes 51-56 and accompanying text (discussing registration laws that have withstood constitutional challenges).
46. Ex post facto laws were first defined in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). Calder established four categories of laws that violate the ex post facto clause:
1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
2d. Every law that aggravates a crime, or makes it greater than it was, when committed.
3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.
Id. at 390.
48. See id. at 430 (recognizing "lack of fair notice and governmental restraint" as central ex post facto concerns).
49. See generally De Veau v. Braisted, 363 U.S. 144 (1960) (upholding statute prohibiting ex-felons from holding labor union offices); Hawker v. New York, 170 U.S. 189 (1898) (barring felons from practicing medicine); United States v. Huss, 7 F.3d 1444 (9th Cir. 1993) (upholding Oregon law preventing felons from possessing long guns).
50. See Calder, 3 U.S. (3 Dall.) at 388 (stating that the law may not punish innocence).
51. See generally State v. Noble, 829 P.2d 1217 (Ariz. 1992) (holding that registration law's regulatory purpose outweighed its punitive effects); State v. Myers, 923 P.2d 1024 (Kan. 1996) (holding that registration does not violate ex post facto clause), cert. denied, 117 S. Ct. 2508 (1997); State v. Manning, 532 N.W.2d 244 (Minn. Ct. App. 1995) (maintaining that registration laws are non-punitive); Snyder v. State, 912 P.2d 1127 (Wyo. 1996) (finding that registration alone does not violate ex post facto, due process, or cruel and unusual punishment prohibi-
is merely "a regulatory technique with a remedial purpose."52 The situation is less clear concerning those statutes that advocate public notification.53 Courts are split on how to approach an ex post facto analysis. Some courts have based their assessment on factors first articulated in the case of Kennedy v. Mendoza-Martinez,54 discussed below. Other courts have rejected the Mendoza-Martinez factors as inapplicable to an ex post facto analysis, focusing instead on the legislature's intent in enacting the statute, rather than the law's unintended punitive effects.55 Still others have developed a hybrid approach, in an attempt to deal with "the confused state of the law."56 An examination of individual cases demonstrates the different standard of review implicated by these tests.

I. The Mendoza-Martinez test

When a statute is not purely remedial on its face, courts will first consider the legislative intent behind the state action.57 If the legislative intent is unclear, courts must broaden the analysis to determine


53. A number of decisions holding registration as non-punitive have done so on the basis that notification was not an issue in the case. See Myers, 923 P.2d at 1041 (notification provisions violate the ex post facto clause); Manning, 532 N.W.2d at 248 (implying notification laws are punitive in nature); see also Artway, 81 F.3d at 1235 (upholding New Jersey's registration laws, but indicating that consideration of non-ripe notification claims would yield a different result).


55. See Doe v. Poritz, 662 A.2d 367, 402 (N.J. 1995) (referring to the Mendoza-Martinez test as an "abstract approach"); State v. Ward, 869 P.2d 1062, 1069 (Wash. 1994) (finding that Mendoza-Martinez factors should only be used when "conclusive evidence of legislative intent is unavailable"). The Poritz court relied on the Supreme Court's decision in United States v. Halper, 490 U.S. 435 (1989). The Court in Halper specifically rejected use of the Mendoza-Martinez factors when assessing punishment for double jeopardy purposes. The Poritz court concluded that "punishment for ex post facto purposes...is substantially indistinguishable from punishment in the double jeopardy...context..." Poritz, 662 A.2d at 402. But see Myers, 923 P.2d at 1036 (concluding that the Supreme Court endorsed these factors for ex post facto analysis in United States v. Ursery, 116 S. Ct. 2135 (1996)).

56. Artway, 81 F.3d at 1254.

57. The Supreme Court established this standard of review for ex post facto analysis in Trop v. Dulles, 356 U.S. 86 (1957) (plurality opinion). In Trop, the petitioner's citizenship was revoked under the Nationality Act of 1940 after he was convicted of wartime desertion. The desertion occurred before the citizenship revocation sanctions were introduced. The Court determined that the statute was penal in nature and could not be retroactively applied to the petitioner. See id. at 94.
whether the legislation is regulatory or punitive. The Mendoza-Martinez test focuses on several factors in its analysis, including:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned...

In Roe v. Office of Adult Probation, the United States District Court for Connecticut considered a challenge to that state's notification laws. Although the Second Circuit subsequently reversed the decision on appeal, the Roe case illustrates how courts can use the Mendoza-Martinez factors to evaluate notification laws. In 1995, the Connecticut General Assembly amended its registration statute to include a notification requirement. The statute provides for the release of information "to any specific person, if disclosure is deemed necessary... to protect said person from any person subject to the registration [requirement]...." Notification is at the discretion of local law enforcement personnel in accordance with guidelines provided by the Office of Adult Probation. The plaintiff in Roe objected to his classification as a high-risk offender, and sought to enjoin the state from implementing notification procedures.

The Roe court relied on the Mendoza-Martinez factors to conclude that notification entailed punishment and thus violated the ex post

58. See Poitz, 662 A.2d at 404.
60. 938 F. Supp. 1080 (D. Conn. 1996), rev'd, 125 F.3d 47 (2d Cir. 1997).
61. See id. at 1083 (citing CONN. GEN. STAT. § 54-102r).
62. See Roe v. Office of Adult Probation, 125 F.3d 47 (2d Cir. 1997) (reversing lower court's decision that Connecticut's notification statute violated the ex post facto clause).
63. See CONN. GEN. STAT. § 54-102r (Supp. 1997).
64. Id.
65. See Roe, 938 F. Supp. at 1083. The guidelines provide for two levels of risk assessment. Level One involves notification of the victim, his or her immediate family, individuals who share the offender's residence and treatment providers, regardless of whether they are actually treating the offender. Level Two is directed at "extreme cases," and expands notification to neighbors, local school personnel, day care providers, employers, job training programs and any other persons deemed to be "at risk." See id. at 1084.

66. The plaintiff served three years of a twelve-year sentence after pleading nolo contendere to six counts of sexual assault. He spent an additional eight months in prison for probation violations, and was released in 1995. See id. at 1082-83.

67. See id. at 1085. In the plaintiff's case, notification was already underway at the time he filed the action. Thus, the victim's family had already been informed. Upon hearing of this lawsuit, the official in charge of notification also informed the plaintiff's employer, as well as the manager of the apartment building in which the plaintiff lived. See id.
facto clause of the United States Constitution. First, the court found that the stigma created through notification imposed "an affirmative disability or restraint" on the plaintiff. Second, the court cited relevant case law to conclude that notification is traditionally viewed as punishment. Third, the court concluded that the purpose of the notification was deterrence, a "traditional goal of punishment." Fourth, because application of the notification provision is based solely on the plaintiff's past criminal offenses, the court found notification to be necessarily linked "with behavior that is already a crime." Finally, the court concluded that the statute's legitimate alternative purpose of public safety was not tightly served by the broad, punitive means of notification.

2. The Doe v. Poritz test

In Doe v. Poritz, the court synthesized a number of Supreme Court cases to create a test focusing on the goal of sex offender legislation, rather than on its consequential punitive effects. The court concluded that:

[A] statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some inevitable deterrent impact, and even though it may indirectly and adversely affect, sometimes severely, some of those subject to its provisions. Such a law does not become punitive simply because its impact, in part, may be punitive, unless the only explanation for that impact is a punitive purpose: an intent to punish.

The deferential nature of the test enabled the Poritz court to effectively dismiss a number of constitutional challenges to New Jersey's Megan's Law. In its ex post facto analysis, the court found that the
legislative intent of Megan’s Law was “clearly and totally remedial in purpose.” Further, it held that the law’s design was “as carefully tailored as one could expect” in performing its remedial function, thereby minimizing encroachment on the offender’s private life. In addition, the court applauded the risk factors promulgated by the Attorney General as “not only rationally related, but strongly related to the risk of reoffense.” Although Poritz has been limited by subsequent cases, its punishment analysis has generated widespread discussion in other jurisdictions.

3. The Artway test

Artway offers an alternative method for punishment assessment, but does not expressly reject Poritz. Like the latter case, Artway focused on New Jersey’s registration and notification laws. The lower court in Artway upheld New Jersey’s registration requirement, but found that the notification provisions violated the constitution’s ex post facto clause. The court enjoined their application against the

and thus not an infringement of Equal Protection right; and (5) due process concerns required that the registrant be granted a hearing regarding determination of his notification status. See id. at 387-441.

80. See supra note 30 and accompanying text (listing relevant factors in risk analysis).

81. See Artway, 81 F.3d at 1263 (formulating a three-prong analysis to determine whether a measure constitutes punishment).


83. While Artway addressed many of the same issues raised in Poritz, including bill of attainder, double jeopardy, and due process, the court found that these challenges with respect to the plaintiff were not ripe. See Artway, 81 F.3d at 1252. The case therefore focused solely on the registration provisions of the statute. See id. at 1253. The case was subsequently criticized for failing to resolve the constitutional debate surrounding notification. See Hanley, supra note 9, at 23. A defense lawyer representing sex offenders called the decision, “a flat zero for both sides.” Id.

84. Alexander Artway had completed a seventeen-year sentence for sex offenses; at the time of this appeal, he was married, employed, and settled in a community. See Artway, 81 F.3d at 1285. Rather than submit to the registration requirements, he left New Jersey pending settlement of the case. See id.

plaintiff and both sides appealed.\textsuperscript{87}

In considering the plaintiff's ex post facto claims with regard to registration, the court developed a three-prong test\textsuperscript{88} that reviews a statute's actual purpose, objective purpose, and effect.\textsuperscript{89} The \textit{Artway} analysis shows far less deference to legislative intent than \textit{Poritz}. Thus, although the actual and objective purpose may appear non-punitive, "[i]f the negative repercussions regardless of how they are justified are great enough, the measure must be considered punishment."\textsuperscript{90} In the plaintiff's case, the court found that the registration component by itself did not constitute punishment for ex post facto purposes.\textsuperscript{91}

\section*{B. Other Constitutional Challenges}

Although registration and notification statutes have been challenged on other constitutional grounds, such as equal protection,\textsuperscript{92} privacy,\textsuperscript{93} and cruel and unusual punishment,\textsuperscript{94} there is less case law concerning these issues. One reason is that courts often conclude

\begin{itemize}
\item[87.] See id. The Third Circuit was critical of the district court's handling of the case, stating that it made its decision "in the most summary fashion." \textit{Artway}, 81 F.3d at 1245. "[The court] allowed no discovery, heard no testimony, and made no findings of fact. Instead, it ruled as a matter of law on all the complex issues pending before it." \textit{Id.}
\item[88.] The court relied on several Supreme Court decisions in developing this test, including \textit{California Department of Corrections v. Morales}, 514 U.S. 499 (1995), \textit{Department of Revenue v. Kurth Ranch}, 511 U.S. 767 (1994), \textit{Austin v. United States}, 509 U.S. 602 (1993), \textit{United States v. Halper}, 490 U.S. 435 (1989), \textit{Kennedy v. Mendoza-Martinez}, 372 U.S. 144 (1963), and \textit{DeVeau v. Braisted}, 363 U.S. 144 (1960). It summarized its efforts as follows: "We have thus attempted to harmonize a body of doctrine that has caused much disagreement in the federal and state courts. We realize, however, that our synthesis is by no means perfect. Only the Supreme Court knows where all the pieces belong." \textit{Artway}, 81 F.3d at 1263.
\item[89.] See \textit{Artway}, 81 F.3d at 1268. The court distinguished actual purpose—the legislature's intent—from objective purpose—whether the measure at issue has historically been regarded as punishment. \textit{See id.}
\item[90.] \textit{Id.}
\item[91.] \textit{Id.} at 1271. \textit{Artway}'s additional claims—that registration offended constitutional double jeopardy and bill of attainder proscriptions, the equal protection clause, and was unconstitutionally vague—were likewise dismissed. \textit{See id.} The court never reached notification claims, finding these issues unripe, as the plaintiff had left the state before the measure could be applied to him. \textit{See id.} at 1251.
\end{itemize}
these more specific challenges to be unripe.95 Typically, an offender subject to notification will seek to enjoin the action before its execution.96 Thus, courts often find the injury to the plaintiff to be too speculative.97 Another problem arises when a plaintiff also raises an ex post facto challenge. For example, once a court concludes, incident to an ex post facto analysis, that a statute does not constitute punishment, then the plaintiff's secondary claim of cruel and unusual punishment becomes moot.98 Nevertheless, a brief summary of some of these secondary constitutional issues further illustrates the controversy surrounding these laws.

1. Cruel and unusual punishment

The Eighth Amendment to the Constitution prohibits the infliction of cruel and unusual punishments.99 In some respects, the central issue of any Eighth Amendment analysis mirrors that of an ex post facto claim. The court must first determine whether the legislation implicates punishment.100 That punishment, however, must be sufficiently disproportionate to the circumscribed behavior before Eighth Amendment protection will apply.101

In Solem v. Helm,102 the Supreme Court articulated a three-part test for an Eighth Amendment analysis.103 The test considers: (1) the severity of the offense and the "harshness of the penalty";104 (2) the comparison of that penalty to the sentences applied to other crimes within the jurisdiction;105 and (3) the similarity of the penalty to sentences applied in other jurisdictions for the same offense.106 In the

95. See Artway, 81 F.3d at 1252 (finding notification challenges under bill of attainder, double jeopardy, and due process theories unripe for review); State v. Myers, 923 P.2d 1024, 1044 (Kan. 1996) (finding due process concern unripe), cert. denied, 117 S. Ct. 2508 (1997).
96. See Artway, 81 F.3d at 1252 (finding enjoinment of notification not ripe for review because plaintiff had left the state).
97. This conclusion, while perhaps constitutionally sound, may nullify the central purpose of the plaintiff's claim. If, for example, the injury sought to be avoided is the stigma resulting from notification, forcing the plaintiff to submit to that procedure may moot his claim. The injury would have already occurred; enjoining any further notification would offer little to no relief. The plaintiff's only complete escape would be to move to another state, where the same judicial "catch-22" would start anew.
99. See U.S. CONST. amend. VIII.
101. See Weems v. United States, 217 U.S. 349, 367 (1910) ("[P]unishment for [a] crime should be graduated and proportioned to [the] offense.").
103. See id. at 292. But see Boland, supra note 6, at 219 (suggesting that the proportionality test created in Solem may not apply to non-death penalty cases).
104. Solem, 463 U.S. at 292.
105. See id. at 291.
106. See id.
majority of cases, challenges claiming that notification and registration laws impose cruel and unusual punishment have failed. This outcome is predictable in light of the issues raised in ex post facto challenges. Logically speaking, if a statute cannot be considered punitive for ex post facto purposes, then it will not meet the higher standard demanded for Eighth Amendment protection.

2. Equal protection

Challenges to notification on equal protection grounds have proved unsuccessful as well. The Constitution guarantees that similarly situated persons will receive equal treatment under the laws. The Supreme Court has developed different standards of review in determining whether legislation violates Equal Protection. The lowest standard, rational basis review, demands only that the law be reasonably related to a legitimate state interest. The highest level of review, strict scrutiny, applies only to a suspect class. Because sex offenders do not qualify as a traditional suspect class, equal protection challenges rest on a rational basis review.

"[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends." Historically, laws treating released felons differently from the general public have withstood constitutional challenges, even when the link between the state inter-

107. See State v. Zichko, 923 P.2d 966 (Idaho 1996) (finding that Idaho’s registration and notification statute does not exceed acceptable punishments); Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (rejecting claim that New Jersey’s statute represents cruel and unusual punishment); Snyder v. State, 912 P.2d 1127 (Wyo. 1996) (stating that registration statute does not represent cruel and unusual punishment); see also State v. Lammie, 793 P.2d 134 (Ariz. Ct. App. 1992) (holding that enforcing registration is acceptable even where conviction is for attempted sexual offense). But see In re Reed, 663 P.2d 216 (Cal. 1983) (finding that California’s registration statute violated the Eighth Amendment when applied to misdemeanor offenders).

108. In a recent case, the United States District Court for Alaska concluded that "a statute whose punitive effects substantially interfere with the objectives of the original punishment, including the eventual rehabilitation of the offender, is a statute whose effects are excessively punitive." Nitz v. Otte, No. A95-486, 1996 U.S. Dist. LEXIS 4930 (D. Alaska Jan. 24, 1996). The court was considering only an ex post facto challenge. Application of this broader view of punishment, however, could yield more favorable results in Eighth Amendment cases.

109. See supra note 92 and accompanying text (listing equal protection challenges).

110. See U.S. CONST. amend XIV, § 1.


112. See id.

113. The Supreme Court has recognized race, ethnicity, and national origin as suspect classifications. See Boland, supra note 6, at 226 n.145 (citation omitted).

114. See Ward, 869 P.2d at 1077.


117. See DeVeau v. Braisted, 963 U.S. 144 (1986) (upholding statute prohibiting felons from holding labor union offices); Hawker v. New York, 170 U.S. 189 (1898) (barring felons from practicing medicine); United States v. Huss, 7 F.3d 1444 (9th Cir. 1993) (upholding Oregon
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ests and the laws appeared most tenuous.\textsuperscript{118} Released sex offenders thus face a difficult task in fighting registration and notification laws on equal protection grounds. As long as the classification is not arbitrary, the courts are likely to uphold different treatment of sex offenders.\textsuperscript{119}

3. Privacy

The Supreme Court has recognized two types of privacy interests implicit in the Constitution:\textsuperscript{120} "the individual interest in avoiding disclosure of personal matters",\textsuperscript{121} and "the interest in independence in making certain kinds of important decisions."\textsuperscript{122} Notification statutes strain against the first type of privacy right.\textsuperscript{123}

The Supreme Court has held that protection of one's reputation alone is not a constitutionally-recognized privacy interest.\textsuperscript{124} In \textit{Doe v. Poritz},\textsuperscript{125} the court focused its analysis on whether the plaintiff had "a reasonable expectation of privacy in the information disclosed"\textsuperscript{126} under the notification statute. The court concluded that divulgence

law preventing felons from possessing long guns). Additionally, in 1994, Congress amended the Federal Rules of Evidence to allow admission of a defendant's prior offenses in sexual assault and child molestation cases. See Fed. R. Evid. 413, 414; see also Paul Rice, Evidence: Common Law and Federal Rules of Evidence 141 (3d ed. 1996). The rule represents a departure from the standard that past offenses are inadmissible to prove character. See Fed. R. Evid. 404(b). Congress justified this exception because the probative value of sexual offenses outweighs any prejudice to the defendant through its admission. See Rice, supra, at 141.


\textsuperscript{119} Note that felons convicted of arguably more dangerous crimes—including robbery and murder—are not subject to registration. See Sex Offenses, supra note 28, at 2799.

\textsuperscript{120} Although the right of privacy is not explicitly mentioned in the Constitution, the Supreme Court has recognized this privilege in numerous contexts. See, e.g., Roe v. Wade, 410 U.S. 113, 152-54 (1973) (stating that a right to privacy extends to matters relating to marriage, procreation, contraception, and abortion); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that privacy rights prohibit states from banning married couple's use of contraceptives).

\textsuperscript{121} Whalen v. Roe, 429 U.S. 589, 599 (1977).

\textsuperscript{122} Id. at 599-600.

\textsuperscript{123} See ACLU v. Mississippi, 911 F.2d 1066, 1069-70 (5th Cir. 1990) (defining the confidentiality component as "the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern") (quoting Ramey v. City of Hedwig Village, 765 F.2d 490, 492 (5th Cir. 1985)).

\textsuperscript{124} See Paul v. Davis, 424 U.S. 693, 710-12 (1976) (holding that interest in reputation is not protected by Fourteenth Amendment). Davis concerned the police distribution of a flyer displaying the name and photographs of arrested shoplifters. See id. at 695. The plaintiff unsuccessfully challenged the practice, complaining that the list failed to distinguish between those arrested and those convicted. See id. Such tactics are still in practice. For example, one Massachusetts police chief regularly broadcasts the names and photos of people who have been arrested rather than convicted, referring to them as "punk of the week" or "toilet licking maggots." See 20/20 (ABC television broadcast, Oct. 18, 1996).

\textsuperscript{125} 662 A.2d 367 (N.J. 1995).

\textsuperscript{126} Id. at 406.
of the plaintiff's prior offenses, age, automobile information, and photograph and fingerprints did not violate his right to privacy. 127 Although the court did recognize a privacy interest in disclosure of the plaintiff's home address, 128 it found that the state interest in public safety outweighed the invasion of privacy. 129

Other courts have embraced the idea that sexual offenders have a reduced expectation of privacy. In People v. Mills, 130 the California Court of Appeals rejected a privacy claim, stating that the defendant's act of molesting a child effectively renounced his right to privacy. 131 In State v. Ward, 132 the Supreme Court of Washington relied on legislative findings to conclude that sex offenders have a reduced expectation of privacy due to the dual interests of public safety and effective government operation. 133 In Rowe v. Burton, 134 the Alaska federal district court concluded that privacy rights do not apply "to matters already within the public domain." 135 A constitutional challenge based on privacy rights will likely afford the offender little relief.

III. PUBLIC POLICY ISSUES: PUBLIC SAFETY AND THE JUSTIFICATION FOR REGISTRATION AND NOTIFICATION LAWS

Constitutional infirmities are not the only means by which inter-
ested parties may challenge registration and notification laws. The judicial uncertainty pervading these statutes ignores a more pertinent question: are these measures effective?\textsuperscript{136} The answer depends on the purpose for which such legislation is offered.

A. Public Safety

Registration and notification laws often are enacted on the premise that they promote public safety.\textsuperscript{137} Americans describe crime as among their chief concerns;\textsuperscript{138} when that crime is directed at children, their concern is multiplied.\textsuperscript{139} Politicians,\textsuperscript{140} the judiciary,\textsuperscript{141} and the media\textsuperscript{142} all have characterized the laws as balancing devices whose benefit to the public outweighs the burden to offenders. They rely on often controversial arguments to support this conclusion.

I. Recidivism

The strongest argument in support of registration and notification laws is the purportedly high recidivism rate among sexual offenders.\textsuperscript{143} Yet statistics conflict on this issue. Although some sources es-
timate the recidivism rate among sexual offenders to be as great as sixty-five percent, other studies report much lower figures. Comprehensive analysis of empirical studies on the issue has found recidivism rates for pedophilia and rape to be lower than the national average for other crimes. Why then are sexual predators singled out? There are a number of possible explanations.

First, recidivism estimates are only as good as the data behind them. Historically, sexual crimes have been underreported. Both victims and offenders are usually unwilling to admit to these encounters, perhaps because of the shame associated with these crimes. Consequently, some estimates may be inflated to account for undocumented offenses.

Second, the variables among these individual studies are not fixed. Researchers often will employ different methods for obtaining their data. The definition of an "offense" may change, as well as the behaviors that qualify as "reoffense." The period may be restricted to only a few years, or extended over a much longer period of time. In addition, information vital to understanding the results—for example, whether the offenders studied were receiving treatment—is often omitted. The result is a pool of conflicting information that may be manipulated to serve any viewpoint.

144. See David Van Biema, A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters, TIME, Sept. 9, 1996, at 60. But see Jerusalem, supra note 18, at 220 n.5 (stating that estimates more than 60% are largely exaggerated).


146. See RICE, supra note 117, at 141-42 (quoting Professor Thomas Reed as saying that "there is nothing particularly unique about sex offenses" to justify different rules). Additionally, a 1989 study from the Bureau of Justice Statistics found that, among the offenses measured, "only homicide had a lower recidivism rate [than sexual offenses]." Id. at 142 (citation omitted).

147. See L. Furby et al., Sex Offender Recidivism: A Review, PSYCHOL. BULL., Jan. 1989, at 105 (stating that recidivism rates for sexual offenders are difficult to measure because of underreporting); Andrew Vachss, If We Really Want to Protect Our Children, PARADE, Nov. 3, 1996, at 5 ("More cases of child sexual abuse are never reported than are ever tried.").

148. See Vachss, supra note 147, at 5 (noting that children often "stop remembering" to escape the trauma); see also Sampson, supra note 3, at 7 (discussing the reluctance of offenders in admitting their crimes, even after conviction). The public may interpret this denial as a lack of remorse on the part of the offender, strengthening the image of offenders as monsters.

149. See Ball, supra note 6, at 408 (pointing out disparity in statistics).

150. For example, the rate of child molestation is especially difficult to track, in part because molestation may have many interpretations. See id. at 408 n.41 (discussing various definitions of "child molester").

151. One Canadian study examined long-term recidivism rates among nearly two hundred child molesters; it found that 42% reoffended over a period of fifteen years. See R. K. Hanson et al., Long-term Recidivism of Child Molesters, 61 J. CONSULT. CLIN. PSYCHOL., Aug. 1993, at 646-52. By contrast, an earlier Canadian study limited to a three-year period reported recidivism rates of only 11%. See R. A. Lang et al., Treatment of Incest and Pedophilic Offenders: A Pilot Study, BEHAV. SCI. LAW 1988, at 239-55.
Finally, the greatest reason for the disparity may be the nature of the offense itself. Victims of sexual crimes are usually women or children, groups traditionally considered among the most vulnerable within our society. Unlike other crimes that may have a higher recidivism rate, sexual offenses affect the victim in a far more intrusive way. The long term psychological effects of these violations are well documented. Furthermore, society has historically reacted to the threat of sexual offense with panic and fear. The public outrage concerning sexual offenses and their lasting psychological impact may cause further inflation of the data to support special rules.

2. Deterrence

Supporters of registration and notification laws believe that these measures reduce recidivism rates by deterring future criminal behavior. This purported deterrence is two-fold. First, parents of young children will better protect their children once a risk is identified. Second, offenders themselves will be less likely to repeat their crimes if they know that authorities and the public are closely monitoring their activities. Although these arguments have some merit, they contain several logical and factual problems. First, many commenta-

152. See Jerusalem, supra note 18, at 221 n.9 (discussing the importance of protecting children who have been assaulted).

153. For instance, a three-year study found the recidivism rate for rape was 7.7%, while the recidivism rate for burglary was 31.9%. See Rice, supra note 117, at 142 (citing data from the Bureau of Justice Statistics). Certainly burglary, like rape, poses a threat to public safety; it involves the unlawful entry of a building for committing a crime. See Model Penal Code § 221.1(1) (1962). Yet, burglars are not required to notify neighbors of their presence in a community, despite the higher probability that they will reoffend, perhaps putting those same neighbors at risk. The explanation would seem to lie in the public outrage over sexual crime, and its direct effect on children.

154. See Sampson, supra note 3, at xiii ("Sexual crime leaves women, children and men with psychological and physical scars which may never heal.").

155. Documented evidence of panic outbreaks dates back as far as the Middle Ages, when child abuse was linked to devil worship, and friars suspected of the crime were burned at the stake. See id. at xii. In the 16th Century, France was overcome with "anti-rape hysteria" in response to a series of gang rapes. See id. And the aristocracy of 18th Century Europe was "swept with a wave of hysteria about the possibility that their children would be sexually molested by chambermaids and nurses." Id. This last example has a modern counterpart; the recent proliferation of the so-called "nanny cam," which enables parents to spy secretly on their day care providers via tiny concealed video cameras, is further evidence of the scope of these fears. See Ian Katz, World News in Brief: Minding the Child-Minder, Guardian, July 18, 1996, at 15 (reporting large number of "nanny cam" sales).

156. Although recidivism rates are frequently used in support of these laws, some experts have concluded that, "it is virtually impossible to predict future criminal conduct with any degree of accuracy." Doe v. Poritz, 662 A.2d 367, 384 (N.J. 1995) (quoting Schall v. Martin, 467 U.S. 253, 278 (1984)).

157. Note that, although deterrence is one of traditional aims of punishment, courts have repeatedly classified notification laws as non-punitive. See infra Part II.A.

158. "If [an offender] knows we're here and that we know he's there, he's less likely to wander around." Gotteleib, supra note 22, at A3 (internal quotes omitted).
tors argue that notification laws create a false sense of security.\(^{159}\) Only five to ten percent of sex offenders are ever caught; the vast majority is therefore never subject to notification.\(^{160}\) Further, experts estimate that seventy to eighty percent of children are molested by someone they know.\(^{161}\) Thus, in focusing on a particular individual within the community at large, parents may forget that the greatest risk children face from sexual offense comes from within their own circle.\(^{162}\)

The argument that public awareness further restrains sexual offenders is also faulty. First, the offender subjected to notification generally knows which persons in the community have notice of his status. If the statute calls for neighborhood notification, for example, the individual seeking to reoffend need only target victims outside his community.\(^{163}\) Secondly, because the degree of notification varies from state to state, the offender can relocate in an area with less intrusive laws.\(^{164}\) In reality, notification simply serves to change

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159. See Ball, supra note 6, at 442-43 (stating that notification statutes create the impression that society has eliminated the threat of sexual offense); Jerusalem, supra note 18, at 247 (speculating that awareness of a particular threat causes parents to “let their guard down”).


161. See id. Patricia Lemp, director of a New York treatment center for child sexual abuse, states that most children “are abused by someone they and their family know and know well.” Id. Despite such evidence, parents rarely warn their children of the risk posed by intimates. One survey found that less than a third of parents discuss the threat of sexual abuse with their children, and only 22% warn their children that a relative could be a sexual offender. See Ball, supra note 6, at 447 n.289.

162. See HALL, supra note 21, at 3 (stating that most sexual perpetrators “are acquainted with their victims and include husbands and fathers”) (citation omitted). A secondary, negative effect of notification is the fear and anxiety it creates within a community. Parents may overact to a potential threat from an offender in a manner that greatly affects the quality of life of their children. One commentator described the reaction in a Washington community “as if someone had shouted Fire!”; the ensuing panic caused many parents to keep their children indoors from fear of attack. See Jerusalem, supra note 18, at 248 (citation omitted). Child advocates warn of the detrimental effects such panic creates. “To the extent that parents are freaked out, children are freaked out.” Gottleib, supra note 22, at A3 (statement of Judith Hyde, Executive Director, Children’s Law Center).

163. In practice, those subject to notification will often relocate to poorer communities whose resources for tracking sexual offenders are more limited. See Ball, supra note 6, at 454 n.210 (“[L]arge cities and inner city areas have become safe havens for migrating sex offenders.”) (citation omitted).


Congress has recently addressed this problem. In March 1996, Senator Joseph Biden Jr. of Delaware and Senator Phil Gramm of Texas introduced legislation calling for a national registry for sex offenders. See Congressional Press Release, Fed. Doc. Clearinghouse Inc., Mar. 28, 1996. The legislation proposes stiff penalties for offenders who move out of state to escape registration, and provides for a nationwide warning if an offender fails to comply. See id. “[W]e need to build a nationwide system where all movement of sexually violent and child offenders can be traced so that we can do everything possible to make sure none of these predators will fall between the cracks.” Id. (statement of Sen. Biden). President Clinton quickly embraced the idea, ordering Attorney General Janet Reno to develop a national tracking system for sex-
the identity of the victim, rather than the behavior of the offender.

**B. Public Policy**

Closely linked to these public safety arguments is the widespread belief that no viable alternatives to registration and notification laws exist. Lifetime imprisonment is too impractical and expensive to be an effective remedy in dealing with sexual predators. Further, many experts believe that sexual deviants cannot be cured. The result has been a nationwide reduction in prison treatment programs targeted at sexual deviance.

Political motivation is another reason sex offender registration laws are so prevalent. Sexual predators are so universally vilified that few politicians are willing to step forward "on their behalf." This is especially apparent during an election year, when any tendency to appear soft on crime may result in lost votes. The result is a flurry of activity that often has "more political than crime-fighting value."
IV. PRACTICAL EFFECT OF REGISTRATION AND NOTIFICATION LAWS

A. Vigilantism and Rehabilitation

In practice, registration and notification measures implemented to advance public safety may do more harm than good. In the first place, community notification has resulted in a nationwide onslaught of persistent, often violent attacks upon sexual offenders. A Texas offender, released after eleven years in prison, was forced out of six towns and refused admittance to more than 200 halfway houses. In New Jersey, a father and son broke into the home of a former child molester, but inadvertently assaulted the wrong man. A Washington community set fire to the home of a first-time offender upon his early release from prison. Such examples seem to counter hopes that the public will use notification information “only to protect and not to punish.”

A second unintended result of notification is the possibility that such laws may result in fewer offenders being punished. Convictions are difficult in sexual assault cases; the majority of offenders actually incarcerated are sent to prison as a result of agreeing to guilty pleas. It is questionable whether those offenders would have taken

170. The number of actual attacks is difficult to judge, because few state statutes contain provisions by which to track such instances. See Lieberman, supra note 145, at 2. A three-year Washington state study found, however, that eight percent of sex offenders subject to notification had received some type of harassment, including rock throwing and death threats. See The Sex Offender Next Door, supra note 169, at 6B. In Doe v. Poritz, 662 A.2d 367 (N.J. 1995), the New Jersey Supreme Court sidestepped the harassment issue: “[W]e expect that the information disclosed will be used as intended: as a means of protection, not as a means of harassment.” Id. at 409. Further, supporters theorize that because such attacks are committed by private rather than state actors, no government disability is imposed by public notification. See Bruce Fein, Megan’s Law: When a Sex Offender Moves In, Is There a Duty to Warn the Community?, 81 A.B.A.J. 38 (1995).

171. See Rick Hampson, What’s Gone Wrong with Megan’s Law?, USA TODAY, May 14, 1997, at Al.

172. See Poritz, 662 A.2d at 430. Authorities had distributed photographs of the offender and notified local residents of the man’s address only two weeks before the assault. The beating was severe enough to require hospitalization of the victim. See id.

173. See Lieberman, supra note 145, at 2. The offender was convicted of statutory rape and received early release for good behavior. Arson was the last step in a series of community organized protests against his pending release. The offender attempted to relocate in New Mexico, but similar demonstrations there again forced him out of town. See id.

174. Poritz, 662 A.2d at 376. Vigilante attacks affect the offender’s family and friends as well. For example, a Washington community sent death threats to the grandparents of a released offender. See Ball, supra note 6, at 438. New Jersey residents attacked the roommates of Megan Kanka’s assailant. See id.

175. See Lombardi, supra note 36, at WC1 (noting New York State therapist’s belief that only five to ten percent of all sexual offenders actually receive prison sentences).

176. See id. (asserting that most sexual offenders avoid detection or conviction and that those who are detected usually accept plea bargains).
such pleas if community notification had been part of the package.\textsuperscript{177} Notification's greatest potential cost, however, may lie in its indirect encouragement of continued criminal behavior. Released felons are under enormous pressure to "make a fresh start."\textsuperscript{178} Rehabilitation is dependent upon the released offender's ability to reintegrate into society.\textsuperscript{179} Notification laws impinge on that rehabilitation. For example, even if an employer were personally willing to ignore his employee's criminal conviction, public awareness of the crime may make him less willing to risk public disapproval.\textsuperscript{180} Additionally, as notification laws spread to every state,\textsuperscript{181} the stigma of conviction will follow the offender wherever he goes.\textsuperscript{182} The result may be that the offender simply adopts the role society has given him—the brutal, incurable monster—at the expense of future victims.\textsuperscript{183} Furthermore, psychologists have identified anger and lack of stability as the chief catalysts that prompt sexual offenders to attack.\textsuperscript{184} Notification laws may directly antagonize those factors, thus increasing the likelihood that offenders will strike again.

\textbf{B. Practical Impact}

The procedural difficulties inherent in the application of notifica-

\textsuperscript{177} See id. (discussing critic's charges that community notification of sex offender status constitutes an unconstitutional imposition of retroactive punishment on offenders who have already served prison sentences or probation).

\textsuperscript{178} See Mary Lynne Vellinga, Crackdown on Sex Offenders Raises Tough Questions, SACRAMENTO Bee, Feb. 2, 1997, at A1 (discussing concerns over sex offender legislation).


\textsuperscript{180} In addition to hindering a released offender's ability to initially find work, retroactive application of these laws has resulted in the dismissal of a number of parolees already successfully employed. For examples of such incidents, see Doe v. Pataki, 919 F. Supp. 691, 697 (S.D.N.Y. 1996) (describing how parolee lost job after his conviction was publicized through mass mailing), aff'd in part and rev'd in part, 120 F.3d 1263 (2d Cir. 1997); Boland, supra note 6, at 186 (detailing offender's eviction from his home and forced expulsion from vocational training program). Community-wide efforts to force a released offender out of the area are equally difficult to resist due to the inevitable peer pressure to join the mob mentality. See Tracey-Lynn Clough, Neighbors Warned About Sex Offender, DALLAS MORNING NEWS, May 24, 1996, at A1 (describing Texas resident's fear of retaliation from neighbors after objecting to their treatment of released sex offender).

\textsuperscript{181} See supra notes 16-20 and accompanying text (discussing national implementation of The Jacob Wetterling Crime Bill).

\textsuperscript{182} See supra note 164 and accompanying text (detailing legislative proposals for a national registry that would track offenders interstate). The impulse to move has another negative side effect. In escaping to another state to avoid notification, the offender may also be isolating himself from vital tools of rehabilitation such as family and treatment. See Montana, supra note 164, at 580-85 (noting that offender's rejection by community decreases chances for effective treatment).

\textsuperscript{183} "[N]obody can live in a house with a sign out front that says 'Hi! I raped a child.' They'll get out and soon realize that no matter what they do, they're seen as evil, so they may as well be evil." Jerusalem, supra note 18, at 247 (citation omitted).

\textsuperscript{184} See ADELE MAYER, SEX OFFENDERS: APPROACHES TO UNDERSTANDING AND MANAGEMENT 43 (1988) (listing factors indicating high-risk candidates for therapy).
tion laws create additional problems for both offenders and officials. In the first place, many state statutes assign notification levels according to the risk posed by the individual offender. Thus, the official in charge of assigning a risk level must perform a task that many experts believe is impossible: predicting an offender's future criminal behavior. When that official is uncertain, he or she is likely to err on the side of caution and apply a notification level that exceeds the scope of the existing risk. Therefore, "two thirds of the sex offenders will be improperly assessed." Typically, little recourse exists for the offender subjected to improper notification. Although appeal of one's classification is possible, the process is onerous. Often the offender challenging notification has been released from prison only recently, and thus lacks the support and resources necessary to launch an objection. Legal help is expensive as well; an automatic right to court-appointed counsel does not apply because courts often classify notification assessment as an administrative rather than puni-

186. The task of risk assessment generally falls to the local police or prosecutor, individuals lacking psychological expertise. See Ball, supra note 6, at 441. Yet, even trained professionals find the task difficult. In a recent study, a team of psychologists and psychiatrists were asked to predict the likelihood of re-arrest among sexual offenders. See HALL, supra note 21, at 84. They based their analysis on many of the same variables considered by prosecutors and police. See supra note 30 and accompanying text (listing relevant risk factors). Yet, the trained professionals were successful in their predictions only 53% of the time, a figure "which barely exceeds chance." HALL, supra, at 84. But see Jerry Adler & Peter Annin, Too Dangerous to Set Free?, NEWSWEEK, Dec. 9, 1996, at 39 ("[E]xperts can indeed predict which offenders are most likely to get into trouble again . . . ").
187. See HALL, supra note 21, at 76 (asserting that clinicians often have difficulty predicting future sexual aggressiveness). Officials who do err generally are insulated from civil liability, absent evidence of gross negligence or bad faith. See Jerusalem, supra note 18, at 230.
188. Ball, supra note 6, at 441.
189. But see id. at 431 n.182 (noting that Illinois' statute has no provision for appeal of one's notification status). States that include some provision impose tough restrictions. New Jersey, for example, gives the offender only two weeks to file an appeal before notification begins. See N.J. STAT. ANN. § 2C:7. This restriction has been successfully challenged. See In re Registrant A.B., 667 A.2d 200 (N.J. Super. Ct. 1995) (allowing for late filing of notification appeal).
190. In State v. Ross, the court described New York's appeal process:

646 N.Y.S.2d 249, 251-52 (1996). Except for the offender's own testimony, it is unclear what evidence would be sufficient to challenge a finding of lack of remorse. Illinois' standard for appeal is equally difficult: the offender must establish through clear and convincing evidence "that future registration will not serve the purposes of the statute." State v. Ward, 869 P.2d 1062, 1074 (Wash. 1994) (citing People v. Adams, 144 Ill.2d 381, 387 (1991)).
tive function. Furthermore, instigating a public suit provides little relief; even if the offender can win on the merits, he must appear in court in person to avoid forfeiture. The result may be encouragement of the very publicity he seeks to avoid.

The broad language inherent in many notification statutes also ensures that individuals not intended as targets of notification fall within the auspices of such legislation. For example, many of the state statutes fail to distinguish a crime as heinous as molestation from the (usually more benign) situation of consensual statutory rape. Thus, a twenty-year-old male who had a brief affair with a teenage girl might be subjected to some level of intrusive notifica-

191. See Ross, 646 N.Y.S.2d at 249 (stating that assessment will only be reviewed for arbitrariness); Ward, 869 P.2d at 1076 (holding that failure to warn defendant of collateral consequence of notification did not violate due process clause); see also Patricia Tennison & Joseph Sjostrom, Sex Offender Law Hits Snag: Registration Faces Legal, Practical Hurdles, CHI. TRIB., Mar. 17, 1996, at L1 (noting concerns of ACLU that many notification laws lack adequate provisions for hearings and representation by counsel). Attempts to remedy the situation have met with resistance. In Doe v. Poritz, the court held that indigent offenders seeking to challenge notification would be provided with counsel and "strongly suggest[ed] that legislation providing for that representation be adopted." Doe v. Poritz, 662 A.2d 367, 382 (N.J. 1995). Because so many lawyers objected to defending released sex offenders, however, the New Jersey attorney general created a new branch of the public defender service to handle the cases. See Robert Hanley, State Agency to Defend Sex Offenders, N.Y. TIMES, Oct. 31, 1995, at B5.

192. See Matthew Goldstein, Opportunity to Appeal Status Enough Under Offender Law, N.Y. L.J., July 18, 1996, at 1 ("A right to be present may be lost based on public policy when a defendant's conduct unambiguously indicates a defiance of the processes of law and disrupts the court proceeding.").

193. See id. (noting that offender may forfeit rights by failing to appear in court to challenge designation as possible repeat offender under New York's sex offender registration law). At least one federal court has refused to allow offenders to challenge notification under pseudonyms. See Doe v. Burton, No. 94-35734, 1996 U.S. App. LEXIS 12630 (9th Cir. May 13, 1996) (stating that the court cannot assess the pseudonym issue until the information sought to be protected is revealed to the court).

194. In 1997, the state of Wisconsin attracted national attention after prosecuting an 18-year-old boy for sexual assault on his 15-year-old girlfriend. See Roberto Suro, Town Faults Law, Not Boy, In Sex Case, WASH. POST, May 11, 1997, at A1. Authorities became aware of the case only after the girl became pregnant and the couple made plans to marry. Because the law required only that the offender be of age and the partner a minor, the jury was forced to convict. Although the judge had the discretion to reduce or eliminate any jail sentence, up to forty years under statute, the boy's name was automatically entered in the sex offender registry. See id.

In another instance, a 15-year-old New Jersey boy suddenly became subject to 15 years of registration after completing three years of probation for molesting his stepbrother. See Young, supra note 179, at 20. In another case, a 59-year-old offender was targeted for notification after pleading guilty to statutory rape. See id. His conviction arose, however, only after his victim attempted to blackmail him five years after the incident. Authorities then pressured the man to leave his home because of its proximity to an elementary school. One state statute, which contains a lifetime restriction barring released offenders from living with anyone under age 18, unintentionally prevents offenders who target adults from raising their own children. See Anne Schlater, Sex Offender Law Could Separate Parent, Child, MONTGOMERY ADVERTISER, July 27, 1996, at F3.

195. But see ELIZABETH RICE ALLGEIER & ALBERT RICHARD ALLGEIER, SEXUAL INTERACTIONS 659 (1991) (noting that even consensual sex is actionable under statutory rape laws, because a minor is presumed incapable of giving informed consent).
tion, depending on where he lived. Secondly, notification decisions are often left in the hands of the local prosecutors or police. They determine the scope of persons to notify, and the extent of the information to disseminate. This system opens the door for potential abuse, with decisions made not based on actual threats, but on other factors such as sexual orientation, race, or economic status. Further, notification laws abandon traditional goals of rehabilitation with respect to juveniles. As a rule, juvenile records are sealed to increase the offender’s ability to make a fresh start without the stigma generated by past transgressions. Notification defeats that purpose: the fifteen-year-old boy who made a single, grievous error and was later treated now may be subject to years of intrusive notification. Finally, there is always the possibility that the offender has been wrongly convicted. The individual who was convicted of a crime he did not commit will now see that injustice multiplied, perhaps for the remainder of his life.

Ultimately, the success of notification laws depends upon an already flawed premise: that offenders will submit themselves to the burden of notification by registering with authorities in the first place. Registration laws as they currently stand are almost impossible to enforce, and authorities rarely have accurate estimates as to the level of compliance. The financial and practical costs of tracking

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196. Some states such as New York and New Jersey impose at least some level of notification even on low-risk offenders.
197. See Ball, supra note 6, at 441.
198. The ACLU has characterized notification as giving police “one more opportunity to engage in harassment.” Laura A. Kiernan, New Law Tough on Offenders: Those With Sex Violations Must Register With State, BOSTON GLOBE, Aug. 15, 1993, at 27.
200. Many notification laws “fail to distinguish between two teenagers who are petting and a vicious sex pervert or pedophile.” Tennison & Sjostrom, supra note 191, at 11.
201. The possibility of an erroneous conviction may be more prevalent in sex offense cases than with other crimes for two reasons. First, in molestation cases, convictions often turn on the testimony of small children whose statements arguably are less reliable than those of adults. See Susan Seahorn, Child Sex Abuse, 29 CHAMPION 27 (1995) (“[Children] confuse imagination, fantasy, and confabulation with reality ....”) (citation omitted). Further, in seeking information, therapists and attorneys may rely heavily on the use of leading questions that may taint the child’s testimony. See id. (“If suggestive or coercive interview techniques are employed, the child’s memory of the events may be irremediably damaged at every interview.”). Second, the recent controversy surrounding recovered memories—memories of sexual abuse that are suppressed and later recovered through therapy—also presents concerns. See HAll, supra note 21, at 102-03. Many believe that recovered memories are created by therapist suggestion rather than recollection of actual events. See id. at 102. The media publicity surrounding the frequency of sex abuse may also contribute to false memories. See id.
202. Alabama, Arizona, California, Delaware, and Florida impose a lifetime requirement of notification. See supra note 14 for specific statutes.
203. See Tennison & Sjostrom, supra note 191, at L1 (noting that Illinois authorities have no idea who is or is not registered); Bruce Weber, First Arrests in New York Under Sex Offender Law,
offenders who fail to register can be significant.\textsuperscript{204} Because the penalty for non-registration is generally treated as a misdemeanor,\textsuperscript{205} the incentive for offenders in complying is far outweighed by their fear of reprisal if notification is enacted.

C. Radical Solutions

In addition to creating a false sense of security, notification statutes have also led many states to abandon traditional therapies in favor of more radical treatments. For example, in June of 1997, the Supreme Court upheld Kansas' Sexual Violent Predator Act.\textsuperscript{206} The Act contains a civil commitment provision that allows authorities to commit released sex offenders to secure mental hospitals upon completion of their prison term.\textsuperscript{207} The offender remains confined until a court determines that he poses no further risk.\textsuperscript{208} Although only six other states have commitment statutes,\textsuperscript{209} forty-five states submitted briefs to the Court supporting civil commitment.\textsuperscript{210} Based on the Court's decision, similar measures are expected to gain acceptance nationwide.\textsuperscript{211}

\textsuperscript{204} See Miller, supra note 167, at D1 (discussing difficulties in getting offenders to register and reliance of state officials on the public to point out individuals subject to registration).

\textsuperscript{205} Penalties can range from fines to jail time. See Tennison & Sjostrom, supra note 191, at L1.


\textsuperscript{207} See Adler & Annin, supra note 186, at 39 (noting that state officials can indefinitely commit prior sex offenders to mental hospitals under Kansas' sex offender law). Before any offender is so confined, his case is first reviewed by two panels, a judge and a psychologist. See id. at 41. Additionally, he is given a full civil trial in which a twelve person jury must conclude unanimously that the offender is dangerous. To date, juries have confined only nine of the 618 offenders assessed under the provision; none have been released. See id.

\textsuperscript{208} See id. Release from confinement is difficult; committed offenders essentially remain incarcerated until a psychiatric professional will testify to their rehabilitation. In practice, this requires a "mental-health worker willing to put his career on the line if he's wrong." Id.

\textsuperscript{209} See Biskupic, supra note 206, at A1. At the time of the Court's decision, Arizona, California, Minnesota, New Jersey, Washington and Pennsylvania had confinement statutes on record. See Adler & Annin, supra note 186, at 41. Many other states were considering similar measures. See Biskupic, supra, at A1.

\textsuperscript{210} See Biskupic, supra note 206, at A1.

\textsuperscript{211} Commenting on the ruling, one attorney noted that the confinement law "is going to spread like wildfire." Biskupic, supra note 206, at A1; see also Editorial, Sexual Predator Laws: Delicate Balancing Job, PHOENIX GAZETTE, Dec. 14, 1996, at B6. The Court appeared sympathetic to civil commitment statutes from the beginning. In response to opening arguments, Chief Justice William Rehnquist asked, "What is the state supposed to do, just wait until [the of-
A second, equally controversial proposition concerns treatment of sexual deviance via surgical or chemical castration. Such proposals have been rejected in the past as too intrusive, dabbling in human alchemy. Yet, despite evidence that castration is ineffective, California recently adopted a bill requiring weekly hormone injections for all released sex offenders. Similarly, a Texas court recently considered surgical castration for a repeat sexual offender. Though Texas officials ultimately rejected the proposal, public sentiment in favor of castration may foster adoption of such radical, barbaric treatments.

V. RECOMMENDATIONS

The challenges in dealing with sexual predators are serious. If, as many believe, sexual deviance cannot be cured through traditional therapy, then the only solution may be in developing measures to control this behavior. Notification does not meet this challenge. Al-

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fender] goes out and does it again?" Id.

212. Surgical castration involves removal of the testes, the organ that produces the male hormone testosterone. See ALLGEIER & ALLGEIER, supra note 195, at 697-98.


214. See Judge Withdraws OK for Rape Suspect's Castration, JET, Mar. 30, 1992, at 18 (describing Texas judge's repeal of castration sentence after doctors refused to perform the procedure); L.S. Demsky, The Use of Depo-Provera in the Treatment of Sex Offenders: The Legal Issues, 5/2 J. LEGAL MED., 1984, at 295-322 (asserting that mandatory use of chemical treatments violates constitutional ban against cruel and unusual punishment).

215. See William Raspberry, Castration Too Often Not Answer, MONTGOMERYADVERTISER, Apr. 12, 1996, at A10 (noting that up to 85% of surgically castrated offenders reoffend).

216. See Van Biema, supra note 144, at 60. Under the program, even first-time offenders must submit to weekly injections of depo-provera, a sex-drive reducing hormone. See id. Similar measures are under consideration in Michigan, Texas, Florida and Massachusetts. Can States 'Calm Down' Child Molesters?, U.S. NEWS & WORLD REP., Sept. 9, 1996, at 10. Some offenders, however, may require up to a year of treatment before the drug takes effect. See Freeman-Longo & Wall, supra note 213, at 58. Additionally, depo-provera has many negative side effects, including infertility. See Van Biema, supra, at 60. One critic of the California law complained that "[i]n effect, the legislators are practicing medicine without a license." Id.

217. See Raspberry, supra note 215, at A10. The case centered around Larry Don McQuay, an offender who admits to having molested more than 200 children. McQuay asked for the castration procedure upon his parole, claiming that without it he will likely reoffend. Texas officials refused to grant the request. See id.

218. See id. McQuay's incarceration resulted from his conviction for molesting a six-year-old boy. See id.

219. One poll found that 59% of voters support chemical or surgical castration for repeat offenders. See Many Approve Caning, Castration, CAMPAIGNS & ELECTIONS, June 1994, available in LEXIS, News Library, Mags File; see also ALLGEIER & ALLGEIER, supra note 195, at 698 (noting that castration's appeal as a form of treatment is based on the inaccurate premise that male sexual deviance depends on the presence of testosterone).

220. See Charles Krauthammer, Throw Away the Key, WASH. POST, Dec. 13, 1996, at A23 (asserting that pedophilia is incurable).
though parents may feel safer knowing of a potential threat, notification comes at too high a price in terms of individual freedom. At worst, the offender may himself become the victim of violent attacks. At best, he will suffer a punitive level of stigma and ostracism that will never be erased. The acceptance of registration and notification laws that suffer from arguable constitutional infirmities has opened the door to methods that are even more violative of individual rights. A less radical approach, like the one suggested below, should meet the same goals of increasing public safety while avoiding the witch-hunt attributes of current statutes.

A. Maintain Treatment Programs Aimed at Rehabilitation

The ultimate price of notification may be in the abandonment of traditional treatment programs as a means to control sexual deviance. If sexual deviance is regarded as an incurable disease, then protection of potential victims addresses only the symptoms, not the cause. Although an absolute cure may prove impossible, numerous studies demonstrate a marked reduction in recidivism among treated offenders. Offenders should thus be required to participate in some form of standardized treatment, the degree of which may be altered according to the crime committed. Although such continuous supervision may be expensive, the ultimate payoff—long-term reduction of sexual offender recidivism—is worth the price.

B. Implement a Single National Registry

Registration serves a legitimate purpose when employed without the intrusive stigma associated with notification. Authorities can better facilitate an investigation if they have ready access to the addresses and telephone numbers of released sex offenders. Moreover, most sex offenders do not object to simple registration. The current sys-

221. See HALL, supra note 21, at 141 (noting that treatment can cut recidivism rate to 35%); Lieberman, supra note 145, at 2 (comparing 8.4% recidivism rate for treated offenders with an 18.5% rate for non-treated offenders); Freeman-Longo & Wall, supra note 213, at 58 (treatment results in a 55-70% reduction in recidivism rates). Despite such statistics, public perception that treatment is ineffective still persists. See HALL, supra, at 141 (stating that "even a single highly publicized reoffense of a person who has participated in treatment may outweigh strong evidence of treatment effectiveness").

222. For example, a pedophile with a history of attacks on children would require longer and more intense therapy than a one time offender convicted of date rape.

223. Creative solutions can be employed to offset the cost. One possible suggestion is to waive educational loan payments from psychologists and therapists in exchange for free treatment of sex offenders. In addition to helping current offenders, such a system could also provide research needed for development of more effective treatments for sexual abuse and aggression.

224. See Miller, supra note 167, at D1 (finding that many sex offenders do not object to reg-
tem in which the processes and methods of registration vary from state to state, however, is clearly inefficient. A national registry, an idea already gaining wide acceptance, could offer more than just the tracking of offenders from state to state. Adoption of uniform registration standards could eliminate the confusion that officials and offenders presently face. For example, those subject to registration would know the nature and length of the requirement, as well as the proper procedures for compliance. The non-punitive nature of registration would allow retroactive application, without dilution of constitutional rights. To succeed, however, any system must employ innovative measures to track offenders who fail to comply. For example, offenders could be “locked out” from certain activities for avoiding registration, such as obtaining a driver’s license or receiving tax returns unless they are registered. Using such administrative functions as a net to catch unregistered offenders would also reduce the burden on police in enforcing these laws. Additionally, although it is unrealistic to expect complete acquiescence to registration, stiffer penalties might improve the likelihood that offenders will comply. For instance, treating failure to register as a felony, with a mandatory sentence of one year in jail, would encourage compliance with a national registration law. Unlike current notification statutes, the risk of penalty would not outweigh the risk of conformity.

CONCLUSION

The sexual violation of children strikes a deep emotional chord within all of us. Every tragedy such as the murder of Megan Kanka confirms the horrific and inhuman nature of these crimes. Our outrage, however great, should not be channeled into ineffective solutions. No matter how they are justified, notification laws are inherently punitive. The stigmatizing effect of public disclosure does more
than burden offenders; it puts the public at greater risk by making rehabilitation of the offender virtually impossible. A solution built on logic rather than emotion is required before sexual deviance can finally be controlled.