THERE GOES THE NEIGHBORHOOD: NOTIFYING THE PUBLIC WHEN A CONVICTED CHILD MOLESTER IS RELEASED INTO THE COMMUNITY

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When convicted child rapist Joseph Gallardo was released from prison in July 1993, he received an unusually warm welcome from his new neighbors in Snohomish County, Washington.

The day before his release, about 300 angry residents rallied on the front lawn of the modest home where Gallardo planned to live. Hours later, the house was burned to the ground.[1]

At the time of the Gallardo incident, laws in most states allowed convicted child molesters to slip back into the community unnoticed and unheralded. The Washington legislature, however, tried a different tactic in 1990 following the sexual mutilation of a seven-year-old boy in their state.

Washington's Community Protection Act of 1990 authorizes a public law enforcement agency to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection.[2] The type of information released and the method of dissemination is left to the discretion of local law enforcement officials.[3] These officials are granted immunity from civil liability for releasing or failing to release sex-offender information.[4]

Gallardo was convicted of raping the ten-year-old daughter of a family friend.[5] Five days before his parole, the Snohomish County sheriff's office delivered 1000 pamphlets door-to-door featuring a mug shot of Gallardo, a description of his crime, and the fact that he did not receive any treatment in prison.[6]

Based on drawings found in Gallardo's prison cell, the pamphlet called him an "extremely dangerous untreated sex offender with a very high probability for re-offense,"[7]

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1. Doug Conner, *Did Flyer on Sex Offenders Release Invite Vigilantism?*, L.A. TIMES, July 22, 1993, at A5.

2. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

3. *Id. See* Mary Anne Kircher, *Registration of Sex Offenders: Would Washington's Scarlet Letter Approach Benefit Minnesota?* 13 HAMLINE J. PUB. L. & POL'Y 163 (1992). The author provides an overview of community notification procedures employed by local law enforcement agencies in Washington state prior to the Gallardo notification. *Id.*

4. WASH. REV. CODE ANN. § 4.24.550 (granting immunity for any discretionary decision to release relevant and necessary information, unless the official, employee, or agency acted with gross negligence or in bad faith).

5. Conner, *supra* note 1.

6. Larry Pynn, *Taking Things Too Far: Washington's Sex Offender Law Reveals Serious Pitfalls*, VANCOUVER SUN, July 23, 1993, at B3.

7. Conner, *supra* note 1.

and described the first-time offender as having "sadistic and deviant sexual fantasies of torture, human sacrifice, bondage, and murder involving children."[8]

The vigilantism sparked by Gallardo's release fanned the flames of the continuing controversy over how the public should be notified when a convicted child molester is living in its midst. At the end of 1993, only two states, Washington[9] and Louisiana,[10] had laws on their books that provided for widespread, proactive community notification when a person convicted of sex crimes against a child is released from custody, placed on probation, or granted parole.[11] By mid-1994, five more states had adopted measures which opened sex offender registries to public scrutiny,[12] and Congress had enacted legislation that authorized law enforcement officials in every state to release information that is necessary to protect the public from child sex offenders.[13]

As reports of sexual abuse and violence against children continue to climb and prison populations swell to capacity, policy-makers will be forced to grapple with the issue of how the public should be put on notice when a potentially dangerous child molester is released from prison or placed on probation. This Note will examine the pragmatic and legal issues raised by community notification statutes. Part I provides an overview of state and federal legislative solutions to tracking child sex offenders. Part II sketches the Washington, Louisiana and federal statutory approaches to community notification. Part III analyzes community notification statutes in light of potential constraints, including the Ex Post Facto Clause, the Eighth Amendment, the Due Process Clause, and the right to privacy. Finally, Part IV of this Note proposes a statutory scheme for public notification.

I. AN OVERVIEW OF LEGISLATIVE SOLUTIONS

The *Journal of the American Medical Association* has defined child molesters as "older persons whose conscious sexual desires or responses are directed, at least in part, toward dependent, developmentally immature children and adolescents who do not fully comprehend these actions and are unable to give informed consent."[14] Each year in the

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8. Pynn, *supra* note 6.

9. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

10. LA. REV. STAT. ANN. §§ 15:540-:549 (West Supp. 1994).

11. Other states allowed public disclosure under limited circumstances. Maine requires that persons convicted of gross sexual assault against victims under the age of 16 to register with the state; however, criminal history information on persons who have been released from the criminal justice system is only available in response to a specific inquiry that includes a name, date, and charge. ME. REV. STAT. ANN. tit. 16, § 612 (West 1983) & tit. 34-A, § 11001 (West Supp. 1993). The Montana statute does not expressly prohibit public access. MONT. CODE ANN. §§ 46-18-254, 46-23-501 to -507 (1993). The North Dakota registry is open to the public; however, the statute does not provide for any form of proactive community notification. N.D. CENT. CODE § 12.1-32-15 (Supp. 1993).

12. ALASKA STAT. §§ 11.56.840, 12.63.010, 12.63.020, 12.63.100, 18.65.087, 28.05.048, 33.30.012, 33.30.035, 33.30.901 (1994); GA. CODE ANN. § 42-9-44.1 (1994); IND. CODE ANN. §§ 5-2-12-1 to -13 (West 1994); KAN. STAT. ANN. §§ 22-4901 to -4910 (Supp. 1993); 1994 Tenn. Pub. Acts 976 (to be codified at TENN. CODE ANN. §§ 40-39-101 to -108).

13. 42 U.S.C.A. § 14071 (West 1994).

14. A. Kenneth Fuller, M.D., *Child Molestation and Pedophilia: An Overview for the Physician*, 261

United States, between 100,000 and 500,000 children are sexually molested;[15] however, research indicates that as few as six percent of child molestations are ever reported.[16] Acts of abuse are rarely a one-time occurrence; an individual child molester may "commit hundreds of sexual acts on a staggering number of children."[17] While the majority of sex crimes against children are committed by relatives, such as parents or siblings, a substantial portion of offenders have either established a relationship with the child for the sole purpose of molesting or are strangers to their victims.[18]

Child molesters are everywhere—in churches, schools, neighborhoods, and homes. In recent years, state legislatures across the country have struggled with ways to increase community protection while keeping costs down and meeting federal mandates for prison population size. One popular approach has been to strengthen existing laws by requiring released sex offenders to register with law enforcement officials or state agencies.[19] Thirty-nine states have laws that require persons convicted of certain sex offenses to register.[20] All but five of these statutes have been adopted during the past decade, with

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JAMA 602, 602 (1989) (footnote omitted). The article also describes pedophilia as "recurrent, intense sexual urges and . . . fantasies that involve sexual activity with prepubescent children (generally age 13 or younger). In addition, the pedophile . . . either must have acted on these urges or must be markedly distressed by them." *Id.* For purposes of this Note, the term "child molester" will be used to denote both child molesters and pedophiles.

15. *Id.*

16. *Id.* at 603.

17. *Id.*

18. DIVISION OF FAMILY AND CHILDREN, INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, DEMOGRAPHIC TREND REPORT 186 (1993). During fiscal year 1993, 49.8% of perpetrators in substantiated and indicated cases of child sexual abuse were related to their victims. Over a quarter of all perpetrators—27.3%—were natural parents, adoptive parents or step-parents. Conversely, 35.8% of all perpetrators did not have an established relationship with the child.

19. ROXANNE LIEB ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SEX OFFENDER REGISTRATION: A REVIEW OF STATE LAWS 2 (Feb. 1994). States' approaches are varied, but generally the registries include at a minimum the name, address and a law enforcement identification number. Some states collect detailed information, which may include blood samples, employment information, residence history and vehicle registration numbers. Offenders who do not comply are penalized. *Id.* The time-frame for registering ranges from immediately upon release to 30 days; the duration of the requirement varies from five years to life, and is typically 10 years or longer. *Id.* at 8, 15-18. Some states register only child molesters; some register only repeat offenders or the most serious categories of offenders; and some register all sex offenders, regardless of the seriousness of the crime or the age of the victim. *Id.* at 2-3, 15-18.

20. ALA. CODE §§ 13A-11-200 to -203 (1994); ALASKA STAT. §§ 11.56.840, 12.63.010, 12.63.020, 12.63.100, 18.65.087, 28.05.048, 33.30.012, 33.30.035, 33.30.901 (1994); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3824 (1989 & SUPP. 1993); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie Supp. 1993); CAL. PENAL CODE §§ 290, 290.1, 290.5 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1994); DEL. CODE ANN. tit. 11, § 4120 (1994); FLA. STAT. ANN. §§ 775.13, 775.21-.23 (West 1992 & Supp. 1994); GA. CODE ANN. § 42-9-44.1 (1994); IDAHO CODE §§ 18-8301 to -8311 (Supp. 1994); ILL. ANN. STAT. ch. 730, para. 150/1-/10 (Smith-Hurd 1992 & Supp. 1994); IND. CODE ANN. §§ 5-2-12-1 to -13 (West Supp. 1994); KAN. STAT. ANN. §§ 22-4901 to -4910 (Supp. 1993); KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994); LA. REV. STAT. ANN. §§15:540-:549 (West Supp. 1994); ME. REV. STAT. ANN. tit. 34-A, §§ 11001 - 11004 (West Supp. 1993); 1994

fifteen states enacting sex offender registries in the last year alone. The recently enacted federal crime bill requires each state to establish a sex offender registry or face a ten percent cut in federal anti-crime dollars.[21]

In conjunction with registration laws, state legislatures have adopted other measures aimed at protecting communities from convicted child molesters, including criminal history background checks and notification programs.[22] Five different audiences may be targeted with proactive notification programs: victims and witnesses connected to specific offenders,[23] law enforcement agencies,[24] school districts and child care facilities,[25] volunteer organizations serving children,[26] and citizens in a particular neighborhood or community.[27] In addition, some states have opened their registries to the public, allowing any citizen to check and see if their next door neighbor or youth group leader has a record of sex offenses against children.[28]

Washington and Louisiana were the first states to adopt proactive legislation aimed at fostering widespread public awareness when persons convicted of sex offenses against a child are released into the community. In providing for community notification, the legislatures in Washington and Louisiana used nearly identical language to explain their rationale.

> The legislature finds that sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that

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Mich. Pub. Acts 295; MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1994); 1994 Miss. Laws 514; 1994 Mo. Legis. Serv. 693 (Vernon); MONT. CODE ANN. §§ 46-18-254, 46-23-501 to -507 (1993); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1992 & Supp. 1993); N.H. REV. STAT. ANN. §§ 632-A:11-:19 (Supp. 1993); N.D. CENT. CODE § 12.1-32-15 (Supp. 1993); 1994 N.J. Sess. Law Serv. 128 (West); OHIO REV. CODE ANN.§§ 2950.01-.08 (Anderson 1993); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1991 & Supp. 1994); OR. REV. STAT. §§ 181.507-.519 (1991 & Supp. 1994); R.I. GEN. LAWS § 11-37-16 (Supp. 1993); 1994 S.C. Acts 497 (to be codified at S.C. CODE ANN. §§ 23-3-400 to -490 (Law. Co-op.)); 1994 S.D. Laws 1349; 1994 Tenn. Pub. Acts 976 (to be codified at TENN. CODE ANN. §§ 40-39-101 to -108); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1994); UTAH CODE ANN. § 77-27-21.5 (1990 & Supp. 1994); VA. CODE ANN. §§ 19.2-298.1 to 298.3, 19.2-390.1, 53.1-116.1 (Michie 1994); WASH. REV. CODE ANN. §§ 9A.44-130, 9A.44.140 (West Supp. 1994); W. VA. CODE §§ 61-8F-1 to -8 (Supp. 1994); WIS. STAT. ANN. § 175.45 (West Supp. 1994); WYO. STAT. §§ 7-19-301 to -306 (Supp. 1994).

21. 42 U.S.C.A. § 14071 (West 1994).

22. ROXANNE LIEB & BARBARA E.M. FELVER, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SEX OFFENDER REGISTRATION, A REVIEW OF STATE LAWS 5 (May 1992).

23. *See, e.g.*, OR. REV. STAT. § 181.519 (1991 & Supp. 1994). However, a victim's access to the notification program is revoked if the information is made public.

24. *See* sources cited in *supra* note 20. All states with sex offender registries provide access to law enforcement.

25. *See, e.g.*, ILL. REV. STAT. ch. 730, para. 150/1-/9 (Smith-Hurd 1992 & Supp. 1994); NEV. REV. STAT. ANN. §§ 207.155-.157 (Michie 1992 & Supp. 1993).

26. *See, e.g.*, IND. CODE ANN. § 5-2-12-11 (West Supp. 1994).

27. LA. REV. STAT. ANN. §15:540 (West Supp. 1994); WASH. REV. CODE ANN. §§ 9A.44-130, 9A.44.140 (West Supp. 1993).

28. *See, e.g.*, GA. CODE ANN. § 42-9-44.1 (1994).

> protection of the public from sex offenders is a paramount governmental interest . . . . [R]estrictive confidentiality and liability laws governing the release of information about sexual predators have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety. Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sexual predators to public agencies, and under limited circumstances, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of these goals.[29]

Whether widespread community notification furthers the stated goal of public safety remains unanswered. Disclosure has helped to prevent some child molesters from striking;[30] at the same time, however, community notification has resulted in scattered instances of vigilantism and harassment against offenders and members of their family.[31] Hounded by an angry public, released offenders may find themselves evicted and unemployed.[32] In order to integrate into society, some child molesters have been forced to go underground or relocate to a community or state where they can live in anonymity.[33]

Thus, public notification can be self-defeating if it drives offenders from a community that knows about their criminal history into territory where they are anonymous. Pedophilia is believed to be a lifelong affliction;[34] however, after a child molester's period of probation or parole ends, he or she may simply relocate to a state that closes its sex offender registry to the public or has not adopted proactive community

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29. WASH. REV. CODE ANN. § 4.24.550 note (West Supp. 1994) (Historical and Statutory Notes). *See also* LA. REV. STAT. ANN. § 15:540 (West Supp. 1994). The Louisiana statute replaces the word "predator" with "offender."

30. Katherine Seligman, *Molesters' "Scarlet Letter" Bill: Is Public Disclosure an Invasion of Privacy?*, S.F. EXAMINER, March 6, 1994, at A1.

31. WASPC SEX OFFENDER AD HOC COMMITTEE, WASHINGTON ASSOCIATION OF SHERIFFS & POLICE CHIEFS, PRELIMINARY REPORT 6 (1992). Of the 52 law enforcement agencies that had implemented community notification, 14 said that community reaction resulted in safety problems for either the offender or his family. A survey conducted by the Washington Institute for Public Policy yielded similar results. *See* SHEILA DONNELLY & ROXANNE LIEB, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMMUNITY NOTIFICATION: A SURVEY OF LAW ENFORCEMENT 7 (1993). A total of 14 cases of harassment were reported in 12 jurisdictions; 30 jurisdictions reported no instances of harassment. In half of the 14 cases, the harassment extended to members of the offender's family or people living with the offender. *Id.* Both surveys were conducted prior to the Gallardo notification.

32. Conner, *supra* note 1.

33. Daniel Golden, *Sex-Cons*, BOSTON GLOBE, April 4, 1993 (Magazine), at 12. The Washington Institute for Public Policy also reports that "offenders subject to notification frequently leave the community, and sometimes the state." DONNELLY & LIEB, *supra* note 31, at 7.

34. *See supra* text accompanying note 14.

notification. Interstate agreements even make it possible for offenders to move to another state while on probation or parole.[35]

In 1992, a felony sex offender from Arkansas wanted to move to a state where there was no law requiring him to tell police where he lived and worked. His brother encouraged the offender to move to Kentucky after authorities told him the state did not have a sex offender registry.[36] Upon hearing this story, the co-chairman of the Kentucky Attorney General's Task Force on Child Sexual Abuse was quoted as saying, "There's a lot of things we want our state known for. A safe haven for sex offenders isn't one of them."[37]

Apparently, officials in other states share this view, with an increasing number of legislatures adopting registries. Until recently, however, the fervor for notification was not as strong; most existing state registries limited disclosure to law enforcement agencies[38] or organizations and agencies responsible for the care and custody of children.[39] A few state registry laws even imposed criminal penalties on persons who released information.[40]

The recently enacted Violent Crime Control and Law Enforcement Act of 1994 changed the landscape, however, by authorizing limited community notification in states complying with the registration provisions of the law.[41] Under this permissive language, states that currently do not have community notification are not required to change their

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35. NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE 397-98 (1983). The Interstate Compact for the Supervision of Parolees and Probationers allows persons convicted and placed on probation or parole in one state to reside in another state and have their parole or probation supervised by authorities there. If offenders are residents or have family in the receiving state and are able to obtain employment, the receiving state is obligated to accept supervision. Even if the offender is not a resident and does not have a family member who is a resident, the receiving state may still consent to the move. All states have entered into the compact. *Id.* at 397-99.

36. Valarie Honeycutt, *Task Force Pushing Sex Abuser Registry*, LEXINGTON HERALD-LEADER, Oct. 19, 1992, at B1.

37. *Id.* The Kentucky legislature adopted a sex offender registry in 1994. KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994).

38. ALA. CODE § 13A-11-202 (1994); ARIZ. REV. STAT. ANN. § 13-3823 (1989); ARK. CODE ANN. § 12-12-909 (Michie Supp. 1993); CAL. PENAL CODE § 290 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1994); FLA. STAT. ANN. § 775.22 (West 1992 & Supp. 1994); ILL. ANN. STAT. ch. 730, para. 150/9 (Smith-Hurd 1992 & Supp. 1994); KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994); 1994 Mich. Pub. Acts 295; MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1994); 1994 Miss. Laws 514; 1994 Mo. Legis. Serv. 693 (Vernon); N.H. REV. STAT. ANN. § 632-A:17 (Supp. 1993); OHIO REV. CODE ANN. § 2950.08 (Anderson 1993); OKLA. STAT. ANN. tit. 54, § 24A.8 (West 1991 & Supp. 1994); R.I. GEN. LAWS § 11-37-16 (Supp. 1993); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1994); W. VA. CODE § 61-8F-5 (1994); WIS. STAT. ANN. § 175.45 (West Supp. 1994); WYO. STAT. §§ 7-19-303 (Supp. 1994).

39. DEL. CODE ANN. tit. 11, § 4120 (1994); NEV. REV. STAT. ANN. § 207.155 (Michie 1992 & Supp. 1993); 1994 S.D. Laws 1349; UTAH CODE ANN. § 77-27-21.5 (1990 & Supp. 1994); VA. CODE ANN. § 19.2-390.1 (Michie 1994).

40. ILL. ANN. STAT. ch. 730, para. 150/9 (Smith-Hurd 1992 & Supp. 1994); KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1994).

41. 42 U.S.C.A. § 14071 (West 1994).

policies. States with broad notification provisions, however, may be forced to narrow their laws or face cuts in federal funding.[42] Because the concept of public notification is gaining popularity, many state legislatures will debate the issue in the near future as they create sex offender registries or tailor existing registries to meet the requirements of the federal law. The Washington and Louisiana approaches can provide a useful blueprint for avoiding constitutional pitfalls and crafting a notification program that protects the public.

II. STATUTORY APPROACHES

A. Washington's Community Protection Act

Washington's community notification law was adopted in 1990 following a series of violent sexual assaults which fueled public outrage that the criminal justice and mental health systems did not adequately protect citizens from sex offenders.[43] The notification provision was included in the Community Protection Act of 1990, a sweeping measure that provides for civil commitment of sexual offenders who are deemed to be violent predators, registration of adult and juvenile sex offenders, state services to victims, offender treatment programs, and community notification when a sex offender or violent criminal is released from prison.[44]

Decisions regarding community notification are made by local law enforcement agencies when an offender registers or when a "Special Bulletin" is received from the Department of Corrections. Special Bulletins are issued about two weeks before an offender is released from a state correctional or mental health facility,[45] and contain the address where the offender intends to live upon release, if known, a photograph, and a detailed psychological and criminal profile.[46]

The decision to issue Special Bulletins is made by the End-of-Sentence Review Committee, a seven-member panel comprised of representatives from Community Corrections; the Indeterminate Sentencing Review Board; and the state divisions of Prisons, Offender Programs, Mental Health, Developmental Disabilities, and Child Protective Services.[47] The committee surveys the records of all sex offenders about to be released from state institutions and issues Special Bulletins on those offenders deemed to pose a serious public safety risk.[48] In the three years following passage of the Community

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42. *Id.*

43. LIEB & FELVER, *supra* note 22, at 8. Following the 1988 rape and murder of a Seattle woman by a twice-convicted sex offender on work release from prison, and the 1989 abduction and sexual mutilation of a seven-year-old Tacoma boy by a man with a long history of violent assaults on children, the governor appointed a Task Force on Community Protection that recommended a comprehensive law relating to community protection from sex offenders.

44. 1990 Wash. Laws 3.

45. Telephone Interview with Maureen Ashley, Correctional Program Manager, Washington Department of Corrections (Nov. 10, 1993).

46. WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, THE 1990 COMMUNITY PROTECTION ACT: TWO YEARS LATER 17 (1992).

47. *Id.*

48. DONNELLY & LIEB, *supra* note 31, at 3.

Protection Act, 2216 sex offenders were released from Washington's prisons; 415 of these offenders, or twenty percent, were the subject of Special Bulletins.[49] Under guidelines adopted by the committee following the Gallardo release, Special Bulletins are generally limited to convicted child sex offenders who fit the statutory definition of a sexually violent predator: any person who suffers from a mental abnormality or personality disorder, which makes the offender likely to engage in acts of sexual violence toward strangers or children with whom a relationship has been established for the primary purpose of victimization.[50]

Local law enforcement officials are granted discretion to release the information contained in Special Bulletins and the sex offender registry to other agencies, groups or persons in the community.[51] To help encourage departments to adopt a community notification policy, the Washington Association of Sheriffs and Police Chiefs (WASPC) developed a voluntary three-tiered system to regulate dissemination of sex offender information.[52]

Under the WASPC guidelines, Level I notification is used when the risk of re-offense is the lowest.[53] The information is maintained within the police department and disseminated to other appropriate law enforcement agencies. A photograph of the offender may be included in a Level I notification.[54] Level II, which is implemented when the offender poses a moderate risk of re-offense, includes the actions within Level I, and in addition, schools and neighborhood groups may be notified.[55] These groups are responsible for distributing the information to their constituencies. Level III, reserved for the highest-risk offenders, broadens the scope of notification to include press releases.[56]

Most law enforcement agencies have adopted the recommended policies verbatim, while others use the guidelines as a starting point for discussion.[57] In some counties,

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49. DONNELLY & LIEB, *supra* note 31, at 3. This represented about six percent of the total number of adult sex offenders registered in Washington state during that time period. As of August 1993, 6982 adult sex offenders had registered, with an overall compliance rate of 80%. Based on Department of Corrections' records, 1719 adult sex offenders who were released from prison did not meet their statutory obligation to register. DONNELLY & LIEB, *supra* note 31, at 2.

50. Telephone Interview with Maureen Ashley, Correctional Program Manager, Washington Department of Corrections (Aug. 24, 1994). *See* WASH. REV. CODE ANN. § 71.09.020 (West 1992 & Supp. 1994).

51. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994) (authorizing public agencies to release relevant and necessary information regarding sex offenders when the release of the information is necessary for public protection).

52. Memorandum from the Washington Association of Sheriffs & Police Chiefs (May 21, 1990) (on file with the author).

53. DONNELLY & LIEB, *supra* note 31, at 3.

54. DONNELLY & LIEB, *supra* note 31, at 3.

55. DONNELLY & LIEB, *supra* note 31, at 3.

56. DONNELLY & LIEB, *supra* note 31, at 3. From February 1990 to March 1993, law enforcement agencies using the WASPC guidelines identified 2947 Level I offenders, 98 Level II offenders, and 78 Level III offenders. DONNELLY & LIEB, *supra* note 31, at 4.

57. ROXANNE LIEB ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMMUNITY NOTIFICATION PRESS REVIEW 1 (1992). *See also* WASPC SEX OFFENDER AD HOC COMMITTEE, *supra* note 31,

newspaper editorial boards set policies governing publication of sex offender information.[58] Because no requirement compels local agencies to notify the public when a sex offender is released, and no clear-cut statutory guidelines govern notification, results vary widely from community to community.[59] How offenders fare upon release may depend on whether they set up residence in a small town or slip into the anonymity of a larger city.[60]

Nine months after the Gallardo incident, the Washington Supreme Court had the opportunity to consider the 1990 notification language in *State v. Ward*,[61] a challenge to the sex offender registration law. Stressing that the legislature imposed "significant limits" on whether an agency may release registrant information, what it may disclose, and where it may target the release of information,[62] the court held that disclosure is only justified if there is evidence of an offender's future dangerousness.[63] This requirement, combined with the legislature's primary goal of protecting the public, "obligates the disclosing agency to gauge the public's potential for violence and draft the warning accordingly. An agency must disclose only that information relevant to and necessary for counteracting an offender's dangerousness."[64] The court added that the "scope of the disclosure must relate to the scope of the danger" and that the content of the warning depends on the offender's proximity.[65] Thus, an agency may decide to limit notification to schools and day care centers, or it may provide the offender's next-door neighbors with a warning that is more detailed than the warnings provided to persons less at risk. Opening the entire registry for examination by the public, as some counties were doing,[66] is clearly prohibited by the restrictive language of *Ward*.

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at 5. WASPC conducted a mail-in survey of police chiefs and sheriffs from July 24, 1992 to September 17, 1992. Of the 80 agencies responding (40% response rate), 47 said they used the WASPC three-tiered system. *But see* DONNELLY & LIEB, *supra* note 31, at 4. In March 1993, the Washington Institute for Public Policy surveyed sheriffs in all 39 counties and the police chiefs of the state's 10 largest cities. Of the 42 jurisdictions responding, 93% said they used the WASPC guidelines.

58. LIEB ET AL., *supra* note 57. This report compiles the press clippings of eight offenders in the state of Washington who were subject to Level III notification. *See also* Golden, *supra* note 33, at 12. Golden reports that the *Bellingham Herald* prints the offender's name, address, photo and license plate number, while the *Valley Daily News,* in Kent, does not identify the offender. In Seattle, police stopped releasing addresses after a sex offender was assaulted at his home, and now divulge only the block where the offender lives. Whenever the department does issue a news release, it is usually ignored by the media.

59. WASPC SEX OFFENDER AD HOC COMMITTEE, *supra* note 31, at 5. Only 52 of the 80 agencies responding to the 1992 survey said they had notified the community of specific sex offenders. *See also* Kircher, *supra* note 3, and DONNELLY & LIEB, *supra* note 31, at 13-16 (giving specific examples of implementation policies in Washington).

60. *See supra* text accompanying note 58.

61. 869 P.2d 1062 (Wash. 1994).

62. *Id.* at 1069-70.

63. *Id.* at 1070.

64. *Id.*

65. *Id.* at 1071.

66. Christy Scattarella, *Release of Sex-Offender Date Varies by Jurisdiction,* SEATTLE TIMES, Feb. 20, 1991, at F1.

The legislature also acted swiftly to tighten the notification language in the wake of the Gallardo release. Noting that the public may be alarmed to learn that a released sex offender is moving into the neighborhood, lawmakers found that if adequate notice and information is provided, "the community can develop constructive plans to prepare themselves and their children for the offender's release."[67] An amendment to the 1990 measure requires local law enforcement agencies to make a good faith effort to launch any community notification effort at least fourteen days before the offender is released.[68] In addition, the new language calls for the state Department of Corrections to notify local law enforcement at least thirty days before a sex offender's parole, release, community placement, or work release;[69] previously, only ten days notice was required.[70] According to the legislative findings, the additional time between notification and release will allow communities "to meet with law enforcement. . . , to establish block watches, to obtain information about the rights and responsibilities of the community and the offender, and to provide education and counseling to their children."[71]

B. Louisiana's "Scarlet Letter" Law

A few months before Joseph Gallardo's neighbors-to-be in Washington state received the frightening flyers, residents of Lafayette, Louisiana, were getting a surprise of their own. "Under Act 962 of the 1992 Legislature," the postcards read, "I am required to inform you that I have been convicted of sexual battery. I live at 425 Herbert Rd. and my name is Wilfred Bouton."[72]

In Louisiana, community notification is governed under two companion measures adopted by the 1992 legislature.[73] Act 388 created a sex offender registry.[74] Law enforcement officials are empowered to release relevant and necessary information and are granted immunity from civil liability for damages if they do so, provided the officials did not act with gross negligence or in bad faith.[75] Instead of leaving notification policy to the discretion of the individual communities, as in Washington,[76] the Louisiana law required the Board of Parole to hold public hearings in each of the state's larger cities and to promulgate rules governing notification.[77]

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67. 1994 Wash. Legis. Serv. 129 (West).

68. *Id.*

69. *Id.*

70. To meet this statutory requirement, the Department of Corrections issues teletype dispatches to local law enforcement 30 days before an offender is scheduled to be released. Special Bulletins are usually issued closer to the release date, when the offender's planned destination is known. Telephone Interview with Maureen Ashley, Correctional Program Manager, Washington Department of Corrections (Aug. 24, 1994).

71. 1994 Wash. Legis. Serv. 129 (West).

72. Tracey Tyler, *Law Forces Sex Offenders Out in the Open,* TORONTO STAR, March 27, 1993, at A1.

73. 1992 La. Acts 388 and 1992 La. Acts 962.

74. LA. REV. STAT. ANN. § 15:542 (West Supp. 1994).

75. LA. REV. STAT. ANN. § 15:546 (West Supp. 1994).

76. *See supra* note 51 and accompanying text.

77. LA. REV. STAT. ANN. § 15:547 (West Supp. 1994).

Act 962 specifically targeted sex offenders whose victims were under the age of eighteen.[78] Unlike the Washington statute, which relies on law enforcement agencies, the media, or community groups to notify the public when a child molester moves to town, this law places the burden of community notification on the offender.[79]

Child molesters[80] released on probation[81] or parole[82] are required to mail notices to their neighbors within thirty days of release or establishing residence.[83] Offenders must also publish, at their expense, two notices in the community newspaper that detail their crime, name, and address.[84] In addition, released offenders must contact the superintendent of the school district where they plan to live. The superintendent then has the discretion to notify area principals.[85] A novel provision grants judges and the Board of Parole specific authority to require other forms of notice, including signs, handbills, bumper stickers, or identifying clothing.[86]

As required by statute, the Board of Parole promulgated rules to implement both Acts.[87] Unlike the Washington statute, which vests notification decisions with local law enforcement officials,[88] the Louisiana rules empower only the Board of Parole to release

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78. 1992 La. Acts 962.

79. *Id.*

80. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994). The notification requirement applies to offenders whose victims are under the age of 18 and who have committed the following offenses or an equivalent offense in another jurisdiction: abetting in bigamy, forcible rape, aggravated crimes against nature, incest, aggravated oral sexual battery, indecent behavior with a juvenile, intentional exposure to AIDS, molestation of a juvenile, aggravated sexual battery, oral sexual battery, bigamy, pornography involving a juvenile, carnal knowledge of a juvenile, sexual battery, crimes against nature, and simple rape. *Id.*

81. *Id.*

82. LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1993).

83. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN § 15:574.4 (West Supp. 1993) (requires offenders to give notice by mail of the crime for which they were convicted, their name, and their address to neighbors who live within a one-mile radius in a rural area and within three-square blocks in a urban or suburban area).

84. LA. CODE CRIM. PROC. ANN. art. 895; LA. REV. STAT. ANN. § 15:574.4.

85. LA. CODE CRIM. PROC. ANN. art. 895; LA. REV. STAT. ANN. § 15:574.4.

86. LA. CODE CRIM. PROC. ANN. art. 895; LA. REV. STAT. ANN. § 15:574.4. In other states, judges have imposed probationary sentences requiring child molesters to post yard signs and affix bumper strips to their vehicles that announce their crimes. *See* State v. Bateman, 771 P.2d 314 (Or. Ct. App. 1989), *review denied,* 777 P.2d 410 (Or. 1989) (A convicted sex abuser was required, as a condition of probation, to post signs on his residence and on any vehicle he was operating reading "Dangerous Sex Offender."). *See also Molester Sign Violates Rights, ICLU Claims,* THE INDIANAPOLIS STAR, September 22, 1993, at B1 (A judge sentenced a child molester to 10 years in prison and required him to post signs in his yard for six years after his release, which read, "Warning: No children permitted. A convicted child molester resides in this home.").

87. 19 La. Reg. 1245-47 (1994) (to be codified at LA. ADMIN. CODE tit. 22, § XI).

88. *See supra* note 51 and accompanying text.

sex offender information.[89] No guidance is offered explaining how the release of information should be handled.[90]

While the statute and regulations grant the Board almost complete discretion regarding release of sex offender information, the duty to mail postcards and place classified advertisements applies unilaterally to all child molesters, regardless of the offender's relationship to his victim or extenuating circumstances, such as treatment received while in custody.[91] The offender must locate the addresses of all households within the prescribed mailing area, and bear the cost of mailing the postcards and placing the newspaper advertisements.[92]

C. The Violent Crime Control and Law Enforcement Act of 1994

The Violent Crime Control and Law Enforcement Act of 1994 requires states to enact sex offender registries by August 1997 in compliance with guidelines established by the United States Attorney General.[93] All persons convicted of sex crimes against children are required to register for ten years after they are released from prison or placed on parole or probation.[94] In addition, offenders who are designated as sexually violent predators by the sentencing court are required to register until a determination is made that they no longer suffer from a mental abnormality or personality defect which would make them likely to sexually abuse children whom they either do not know or have befriended for the primary purpose of victimization.[95]

Information collected in approved state registries will be treated as private data, but it may be disclosed to law enforcement agencies for law enforcement purposes or to government agencies conducting confidential background checks. In addition, law enforcement agencies are authorized to release relevant information concerning a specific registrant that is necessary to protect the public. Law enforcement agencies and employees, as well as state officials, are granted immunity from liability if they act in good faith.[96]

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89. 19 La. Reg. 1247 (stating that the Board may release the following information to the general public: name, address, crime convicted, date of conviction, date of release, and any other information that may be necessary and relevant for public protection).

90. *Id.*

91. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1993). Ironically, an offender may petition the court to be relieved of the lesser duty to register. *See* LA. REV. STAT. ANN. § 15:544 (West Supp. 1994) (The court shall consider the nature of the sex offense, the criminal and relevant non-criminal behavior both before and after conviction, and other factors.).

92. Tyler, *supra* note 72, at A1.

93. 42 U.S.C.A. § 14071 (West 1994).

94. *Id.* The registration requirement applies to any criminal offense that consists of the following: kidnapping and false imprisonment of a minor, except by a parent; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct or practice prostitution; use of a minor in a sexual performance; any conduct that by its nature is a sexual offense against a minor; or an attempt to commit the listed offenses if made criminal by the state. *Id.*

95. *Id.*

96. *Id.*

The federal language was modeled loosely after the Washington community notification statute. House-Senate conferees who drafted the provision have indicated that they intended it to be given the same interpretation that the Washington Supreme Court gave to its state statute in *State v. Ward.*[97] Under this view, participating states would be prohibited from conducting across-the-board notification on all child sex offenders or from opening the registries to public scrutiny. Disclosure would be limited to relevant information about offenders who pose a threat to public safety.

III. State and Federal Constitutional and Common Law Constraints

A. Potential Eighth Amendment and Ex Post Facto Problems

> But the point which drew all eyes, and, as it were, transfigured the wearer . . . was that SCARLET LETTER, so fantastically embroidered and illuminated up on her bosom. It had the effect of a spell, taking her out of ordinary relations with humanity, and enclosing her in a sphere by herself.[98]

In *The Scarlet Letter,* Nathaniel Hawthorne tells the tale of Hester Prynne, the fictional adulteress forced to wear a scarlet "A" on her chest. Scorned and segregated from society, Hester Prynne was subjected to the early practice of punishment by humiliation.[99]

Like Hester Prynne, child molesters are singled out when public attention is called to their criminal acts. The stated goal of these so-called "scarlet letter" laws is not punishment nor humiliation,[100] regardless of how punishing or humiliating the effects may prove to be. Instead, the stated goal is community protection—to alert an unwitting public that a potential predator is in its midst.[101]

When the public is put on watch, however, the released child molester may face adverse consequences.[102] Whether community notification will withstand constitutional scrutiny hinges primarily on whether the courts construe these consequences as punishment.[103]

1. Is Community Notification Punishment?—The concept of punishment is central to the interpretation of the Eighth Amendment, which proscribes "cruel and unusual

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97. 140 Cong. Rec. H8957 (daily ed. August 21, 1994) (statement of Rep. Derrick).

98. Nathaniel Hawthorne, The Scarlet Letter 53 (Bantam Classic ed., 1986) (1850).

99. Christopher Harding & Richard W. Ireland, Punishment: Rhetoric, Rule, and Practice 198 (1989). The targeting of reputation, self-esteem, and community standing is a pervasive penal practice. Penalties of degradation widely employed at different times in western legal systems include the pillory, the stool of repentance, and the enforced wearing of large symbolic letters or inscriptions. *Id.* at 199.

100. *See supra* text accompanying note 29.

101. *See supra* text accompanying note 29.

102. *See supra* notes 31-33 and accompanying text.

103. *See generally* Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment,* 80 Colum. L. Rev. 1667 (1980). Courts have approached the definition of punishment by focusing on three different factors: the character of the punisher's intent, the effects suffered by the punished individual, and the power of the punisher. *Id.*

punishments,"[104] and the Ex Post Facto Clause,[105] which prohibits punishments that are imposed retroactively.[106] Statutes creating sex offender registries have been challenged on both bases.[107] Since community notification is a statutory expansion of the sex offender registration concept, analysis of the courts' treatment of such registries is useful in determining whether a court would define community notification as punishment.

a. Registration and notification as punishment.—Although courts in Louisiana[108] and California[109] have found registration to be punitive, the majority of cases upholding mandatory registration of sex offenders conclude that registration is not a form of punishment.[110] Two recent cases typify state courts' analysis in this area.

In *State v. Noble,*[111] a convicted child molester who committed his crimes prior to the enactment of Arizona's sex offender registry challenged the retrospective application of the statute. Acknowledging that the registration requirement altered Noble's situation to his disadvantage, the state's high court nonetheless determined that it was not punishment.[112] The Washington Supreme Court reached a similar conclusion in *State v.*

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104. U.S. CONST. amend. VIII. Although originally the Bill of Rights was held to apply only to the federal government, in 1962 the U.S. Supreme Court applied the Cruel and Unusual Punishment Clause to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962), *reh'g denied,* 371 U.S. 905 (1962).

105. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

106. Although the Clause does not employ the term "punishment," courts have generally applied its prohibitions to punishments. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (Ex Post Facto Clause prohibits every change in the law that inflicts a greater punishment than the law annexed to the crime at the time it was committed).

107. *See* State v. Noble, 829 P.2d 1217, 1218 (Ariz. 1992); *In re* Reed, 663 P.2d 216, 217 (Cal. 1983). These cases involved challenges under state constitutions; however, the high courts of both states adopted the U.S. Supreme Court's interpretation of federal constitutional language in interpreting parallel clauses in their own states' constitutions. Courts have adopted several different models in analyzing parallel constitutional provisions. *See* Mark A. Silverstein, Note, *Privacy Rights in State Constitutions: Models for Illinois?,* 1989 U. ILL. L. REV. 215. Under the primacy approach, state courts decide state claims first, and if the state constitution provides the requested relief, the state court need not consider the federal constitutional claim. Under the supplemental approach, state courts first analyze federal constitutional law, and if the Constitution does not provide the requested relief, the court turns to the state constitution as a potential supplement. Some courts follow a dual approach, analyzing state and federal claims together and necessarily adopting the Supreme Court's interpretation as authority. *Id.* at 217. For purposes of discussion, this Note generally follows the dual approach.

108. State v. Payne, 633 So. 2d 701, 703 (La. Ct. App. 1993), *cert. denied,* 637 So. 2d 497 (La. 1994).

109. *In re* Reed, 663 P.2d 216, 220 (Cal. 1983).

110. NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, THE CONSTITUTIONALITY OF STATUTES REQUIRING CONVICTED SEX OFFENDERS TO REGISTER WITH LAW ENFORCEMENT (1993).

111. State v. Noble, 829 P.2d 1217 (Ariz. 1992).

112. *Id.* at 1224. *See also* People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991) (holding that registration as a sex offender is not punishment for purposes of Eighth Amendment analysis); State v. Costello, 643 A.2d 531, 532 (N.H. 1994).

Ward,[113] where a convicted statutory rapist unsuccessfully challenged Washington's registration statute as an ex post facto law.

The threshold inquiry adopted by both courts was whether the legislature intended the registry to be a means of punishing sex offenders or merely a tool to regulate their activities.[114] The punishment versus regulation analysis has been used by the United States Supreme Court to both uphold[115] and strike[116] statutes that were challenged under the federal Constitution. The inquiry is "whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation."[117]

If the legislative aim is punitive, the registration requirement is treated as punishment.[118] If the legislature indicates a non-punitive purpose, the court must inquire whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention."[119] If no conclusive evidence of legislative intent is available, however, courts considering registration statutes have generally turned to the factors enumerated by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*:[120]

> 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 are all relevant to the inquiry, and may often point in differing directions.[121]

Noble, Ward and *State v. Taylor*[122] illustrate the interplay between application of the *Mendoza-Martinez* factors and a conclusive finding of legislative intent. In *Noble*, the Arizona high court applied the *Mendoza-Martinez* factors after ascertaining that the

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113. 869 P.2d 1062 (Wash. 1994).

114. *Noble*, 829 P.2d at 1221; *Ward*, 869 P.2d at 1068.

115. De Veau v. Braisted, 363 U.S. 144, 158 (1960), *reh'g denied*, 364 U.S. 856 (1960) (provision of New York Waterfront Commission Act that disqualifies ex-felons from union office is a legitimate means for regulating the waterfront and is not an ex post facto law).

116. Trop v. Dulles, 356 U.S. 86, 97 (1958) (plurality opinion) (denationalization of a soldier for one day's desertion is cruel and unusual punishment and is not even claimed as a means of solving international problems).

117. *De Veau*, 363 U.S. at 160.

118. *Noble*, 829 P.2d at 1221.

119. *Id.* (quoting United States v. Ward, 448 U.S. 242, 250 (1980)). *See also* State v. Ward, 869 P.2d 1962, 1068 (Wash. 1994).

120. 372 U.S. 144, 168-69 (1963). *See also* State v. Noble, 829 P.2d 1217, 1221 (Ariz. 1992); *In re* Reed, 663 P.2d 216, 218 (Cal. 1983); People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991); State v. Ward, 869 P.2d 1062, 1068 (Wash. 1994); State v. Taylor, 835 P.2d 245, 248 (Wash. Ct. App. 1992), *review denied*, 877 P.2d 695 (Wash. 1994).

121. *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted).

122. 835 P.2d 245 (Wash. Ct. App. 1992), *review denied*, 877 P.2d 695 (Wash. 1994).

legislative history did not indicate whether the statute was intended to be punitive or regulatory. The court acknowledged that while Arizona's sex-offender registration statute has both punitive and regulatory effects, its task was not simply to count the factors on each side, but to weigh them.[123] Pointing toward punishment was the court's conclusion that registration has traditionally been regarded as punitive[124] and that the registration requirement serves at least one of the traditional goals of punishment—deterrence.[125] Factors which indicated a non-punitive construction were the court's determination that registration does not affirmatively inhibit or restrain an offender's activities[126] and that the requirement is not excessive in relation to the statute's non-punitive purpose of aiding law enforcement.[127]

Stressing that its decision was "close," the court concluded that the overriding purpose of the registry was to facilitate the location of child molesters by law enforcement personnel, a purpose unrelated to punishment for past offenses.[128] Critical to this finding, however, was the fact that "[r]egistrants are not forced to display a scarlet letter to the world; outside of a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statute is kept confidential."[129] The provisions in the statute limiting access to the registration information significantly dampen its stigmatic, and thus punitive, effect.[130]

In *Taylor,* the Washington Court of Appeals looked to the legislature's official findings and determined that the registration statute was primarily regulatory in purpose.[131] As such, the *Mendoza-Martinez* factors had no application. The court's inquiry did not end there, however; additional consideration was needed to determine whether the punitive aspects were so burdensome as to amount to a violation of the ex post facto prohibition.[132]

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123. *Noble,* 829 P.2d at 1224.

124. *Id.* at 1222.

125. *Id.* at 1223.

126. *Id.* at 1222.

127. *Id.* at 1223.

128. *Id.* at 1224.

129. *Id.* The information may be released to: non-criminal justice agencies for evaluating prospective employees, public officials, or volunteers; governmental licensing agencies for evaluating prospective licensees; prospective employers and volunteer youth-service agencies whose activities involve regular contact with minors; and the department of economic security and the superior court for determining the fitness of prospective custodians of juveniles. *Id.* at 1222 n.8.

130. *Id.* at 1223. *See also* People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991) (The existence of a stigma requires that knowledge of a registrant's past transgressions be conveyed to the general public, which is unlikely since the statute imposes criminal sanctions on law enforcement officials who disseminate registry information to the public.).

131. State v. Taylor, 835 P.2d 245, 246 (Wash. Ct. App. 1992), *review denied,* 877 P.2d 695 (Wash. 1994). *See* WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1993) (noting the legislature's finding that law enforcement's efforts to protect their communities from sex offenders are impaired by the lack of information about convicted sex offenders who live within an agency's jurisdiction).

132. *Taylor,* 835 P.2d at 248.

Acknowledging that the community notification component of Washington's registration statute could restrict change of residence—diminishing chances of employment—and impose a stigma on the offender, the court nonetheless held that these disadvantages were relatively minor and not sufficient to make the statute punitive in its overall effect.[133] Central to the court's analysis was that much of the data in the registry was public information generally available to interested persons who make a reasonable effort to obtain it.[134] In a strongly worded dissent, Judge Agid noted that the "mere fact that bits and pieces of the information appear in various public records does not answer the concern that . . . a sex offender is denied privacy rights such as an unlisted telephone number and address that other convicted felons enjoy."[135] The dissent also noted that groups wishing to find and publicize the location of convicted sex offenders would have ready access to the information, which would add immeasurably to the stigma.[136]

Two years later, the majority view in *Taylor* was reinforced by the Washington Supreme Court in *State v. Ward*.[137] Noting that the *Mendoza-Martinez* factors should be used when a conclusive finding of legislative intent is unavailable,[138] the court nevertheless applied the test to determine whether the registration statute was so punitive as to negate the legislature's clear regulatory intent.[139]

The *Ward* court disagreed with the Arizona Supreme Court's finding in *Noble,* and held that registration has not traditionally been regarded as punitive.[140] Any deterrent effect of registration was secondary to the goal of protecting the public.[141] In addition, neither the requirement of registration nor the potential for public disclosure involved an affirmative disability or restraint because offenders could move freely throughout the state.[142]

Although the *Ward* defendants had not been subject to disclosure, the state's high court embraced the opportunity to interpret the community notification provisions. The court found that because the legislature limited disclosure to instances in which the offender posed a threat to the community, the statutory registration and notification scheme did not impose additional punishment.[143] This limit "ensures that disclosure

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133. *Id.* at 249.

134. *Id.* However, such information is seldom readily available. The fact that government funds are spent to prepare, index, and maintain criminal history files demonstrates that the individual items of information would not otherwise be freely available. United States Dep't of Justice v. Reporters Comm., 489 U.S. 749, 764 (1989).

135. *Taylor*, 835 P.2d at 250 (Agid, J., dissenting).

136. *Id.* Such efforts have been launched in Washington. *See* Karen Alexander, *Sex Offender Map Stirs Controversy,* SEATTLE TIMES, Sept. 24, 1993, at B1.

137. 869 P.2d 1062 (Wash. 1994).

138. *Id.* at 1069.

139. *Id.* at 1068.

140. *Id.* at 1072-73.

141. *Id.* at 1073.

142. *Id.* at 1069.

143. *Id.* at 1069-70. *Contra* Artway v. Attorney Gen. of New Jersey, No. 94-6287, 1995 U.S. Dist. Lexis 2403, at *91 (D. N.J. Feb. 28, 1995) (holding that the public notification provisions of New Jersey's "Megan's Law" constitute more a form of punishment than a regulatory scheme).

occurs to prevent future harm, not to punish past offenses."[144] In addition, "[a]ny publicity or other burdens which may result from disclosure arise from the offender's future dangerousness, and not as punishment for past crimes."[145]

Acknowledging that high courts in other states, like the court in *Noble,* have held that any punitive effect of registration was mitigated by confidentiality,[146] the *Ward* court nonetheless said that the *Noble* decision supported its holding. In *Noble,* the decisive factor was that the overriding purpose of the registry was to enable law enforcement officials to track down child sex offenders, a purpose unrelated to punishment.[147] Similarly, the overriding purpose of the Washington statute was to protect the public.[148]

A federal district court in New Jersey, however, recently held that the notification provisions of a newly enacted state statute similar to the Washington law[149] constituted more a form of punishment than a regulatory scheme.[150] "Megan's Law" was hastily adopted in late 1994 by the New Jersey legislature following the brutal rape and murder of seven-year-old Megan Kanka by a twice-convicted sex offender who lived across the street from Megan's home, unbeknownst to the child or her parents.[151] Although registration information itself is not open to public inspection under the statute, law enforcement agencies are authorized to release relevant and necessary information concerning specific sex offenders in order to protect the public. County prosecutors are charged with the responsibility of determining whether a registrant poses a low, moderate, or high risk. The breadth of community notification is based on the offender's risk classification.[152]

Applying the *Martinez-Mendoza* factors to the notification provisions of "Megan's Law," the court concluded that the legislature's stated regulatory intent was outweighed by the punitive aspects of community notification.[153] In particular, the court noted that Megan's Law far exceeded all previous provisions for public access to an individual's criminal history.[154] Rather than lying potentionally dormant in a courthouse record room, sex offenders' records would remain with them for as long as they live in New Jersey, potentially affecting their ability to return to a normal, private law-abiding life in the community.[155]

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144. *Ward*, 869 P.2d at 1070.

145. *Id.* at 1071.

146. *Id.*

147. *Id.* (citing *Noble,* 829 P.2d 1217 (Ariz. 1992)).

148. *Id.* The court also distinguished its holding from People v. Adams, 581 N.E.2d 637 (Ill. 1991), noting that stigma arises not from disclosure, but from private reactions to the crime by members of the general public. *Ward,* 869 P.2d at 1072.

149. 1994 N.J. Sess. Law Serv. 128 (West).

150. Artway v. Attorney Gen. of New Jersey, No. 94-6287, 1995 U.S. Dist. LEXIS 2403, at *92 (D. N.J. Feb. 28, 1995).

151. *Id.* at *4-5.

152. *Id.* at *5-6 (citing 1994 N.J. Sess. Law Serv. 128 (West)).

153. *Id.* at *91.

154. *Id.* at *80.

155. *Id.* at *79-81.

While the *Mendoza-Martinez* factors have been widely employed in challenges to registration statutes, the Louisiana Court of Appeals used a different analysis to find that registration a was punitive measure. In *State v. Payne,*[156] the court struck the registration requirement as applied to a former church worker who molested five young boys prior to the enactment of the law. Registration could not be imposed as a condition of probation because the legislation authorizing such a condition was not in place at the time the defendant committed his crimes.[157] Nor could it be imposed under the registration statute because the defendant would be sanctioned if he failed to comply.[158] As a result, registration exposed the offender to additional penalties for his criminal conduct, which is prohibited under the Ex Post Facto Clause.[159]

Legislatures considering the adoption of community notification, either in conjunction with the Violent Crime Control and Law Enforcement Act of 1994 or through more aggressive means such as public sex offender registries or Louisiana's "scarlet letter" conditions,[160] have no clear guidance as to whether the courts of their state will deem the provisions punitive and thus subject to Eighth Amendment and ex post facto scrutiny. The handful of courts that have ruled directly on a registration statute that grants immunity to law enforcement officials who disclose information about sex offenders are split. The Louisiana Court of Appeals found its state's registration and notification scheme to be punitive;[161] the Washington Supreme Court held the converse to be true of its state's statute.[162] A federal court in New Jersey recently held that the registration component of a sex offender notification scheme was non-penal, but barred retrospective application of the notification provisions because it found them to be punitive.[163] The high courts of three other states—Arizona,[164] Illinois,[165] and New Hampshire[166]—have deemed their respective states' sex offender registries non-punitive partly because the information is, with few exceptions, kept confidential. One state—California—concluded more than a decade ago that the registration requirements alone imposed punishment under the *Mendoza-Martinez* factors.[167] To date, no state courts have had the opportunity to rule on the punitive effect of a sex offender registry that is open to the general public.

Merely labeling a statute as regulatory will not automatically remove it from punishment analysis.[168] The United States Supreme Court noted in *Trop v. Dulles,* that

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156. State v. Payne, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied,* 637 So. 2d 497 (La. 1994).

157. *Id.* at 703.

158. *Id.*

159. *Id.* at 702-03.

160. *See supra* Part II.

161. State v. Babin, 637 So. 2d 814 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 649 (La. 1994); State v. Payne, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

162. State v. Ward, 869 P.2d 1062 (Wash. 1994).

163. Artway v. Attorney Gen. of New Jersey, No. 94-6287, 1995 U.S. Dist. LEXIS 2403, at *92 (D. N.J. Feb. 28, 1995).

164. State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992).

165. People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991).

166. State v. Costello, 643 A.2d 531, 533 (N.H. 1994).

167. *In re* Reed, 663 P.2d 216, 220 (Cal. 1983).

168. *See* Foscarinis, *supra* note 103, at 1672, for a discussion of the problems inherent in applying the

"even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute."[169]

Thus, a statute that opens the sex offender registry to the public or grants immunity to officials who spread the word about released sex offenders will be analyzed for punitive effect regardless of the label or legislative history. If public access to sex offender registries and public release of sex offender information is found to be punitive, as *Noble*[170] and other cases[171] have implied, such provisions would be ripe for Eighth Amendment and ex post facto analysis.

b. Parole and probation conditions as punishment.—In addition to granting public access to the sex offender registry, the Louisiana legislature also required as a condition of parole or probation that convicted child molesters notify the community through postcards and classified advertisements.[172] Judges and the parole board were granted the express authority to impose additional "scarlet letter" conditions, such as requiring released offenders to post signs or wear special clothing.[173] As with other forms of community notification, these conditions would be vulnerable to Eighth Amendment and ex post facto challenges if the goal and effect is found to be punitive.

In *State v. Babin*,[174] the Louisiana Court of Appeals held that applying notification requirements to a defendant who committed his crimes prior to the enactment of the law was an unconstitutional violation of the state and federal Ex Post Facto Clauses. Greg Babin molested his stepdaughter over a period of several years, beginning when the child was in third grade. He was sentenced to four years hard labor, suspended, and placed on supervised probation for five years subject to special conditions. As mandated by statute,[175] these conditions required Babin to mail postcards to his neighbors and contact

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"express punitive intent" test. The author notes that the same statute might be found to impose punishment if passed by a legislature that showed evidence of actual punitive intent and not to impose punishment if passed by a legislature not evidencing such a motive. Foscarinis, *supra* note 103, at 1672.

169. Trop v. Dulles, 356 U.S. 86, 95 (1958) (plurality opinion). For example, the penal effect of a statute imposing the penalty of imprisonment on convicted bank robbers would not be altered by labeling it a regulation of banks. *Id.*

170. State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992) ("[P]otentially punitive aspects of the statute have been mitigated. Registrants are not forced to display a scarlet letter to the world.").

171. *See, e.g.*, People v. Adams, 581 N.E. 2d 637, 641 (Ill. 1991) ("The existence of a 'stigma' requires that . . . the registrant's past transgressions be conveyed to the general public.").

172. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1994).

173. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1994). Judges in other states have imposed similar probation conditions absent express statutory authority. *See* State v. Bateman, 771 P.2d 314 (Or. Ct. App. 1989), *review denied*, 777 P.2d 410 (Or. 1989). *See also Molester Sign Violates Rights, ICLU Claims, supra* note 86. Some commentators have argued that such conditions amount to judicial legislation and are improper if imposed in the absence of express statutory authorization. *See* Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357 (1989); Rosalind K. Kelley, Comment, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759 (1989).

174. State v. Babin, 637 So. 2d 814 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 649 (La. 1994).

175. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994).

area schools with information concerning his crime and release. Citing *State v. Payne*,[176] the court struck the notification requirement as applied to the defendant.[177] Implicit in its holding was the conclusion that such conditions were punitive.

Parole and probation have traditionally been considered acts of grace allowing offenders to avoid punishment as long as they adhere to certain conditions.[178] Under this approach, a probationer or parolee who finds the conditions of release to be too tough may elect to take the traditional sentence.[179]

Most states, either by statute[180] or judicial decision,[181] specify that rehabilitation is one of the goals to be served by imposing probation conditions. Virtually no statutes describe the goals of parole conditions; the few that include stated goals generally focus on some aspect of rehabilitation.[182] Protection of the public is also considered a legitimate goal of parole and probation.[183] Disagreement exists, however, as to whether parole or probation conditions may be used to inflict punishment.[184]

Under a traditional legislative intent test,[185] parole and probation conditions would be considered non-punitive in jurisdictions where the goal is rehabilitation or community

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176. 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied,* 637 So. 2d 497 (La. 1994).

177. *Babin,* 637 So. 2d at 814.

178. COHEN & GOBERT, *supra* note 35, at 161-78.

179. *Id.* The theory of parole as an act of grace ameliorating punishment is no longer valid in states with determinate sentencing structures, where an offender has no choice of accepting or rejecting parole after his statutorily-determined sentence has been served. Over the past 20 years, most jurisdictions have adopted determinate sentencing schemes. *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform,* 81 CAL. L. REV. 61 (1993). This theory also lacks vitality in the area of probation, where a convicted child molester might be willing to accept almost any condition in order to avoid the physical abuse that invariably awaits such offenders in prison. *See* James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates,* 56 U. CIN. L. REV. 91, 102 (1987).

180. *See, e.g.,* ARK. CODE. ANN. § 5-4-303(a) (Michie 1993) ("assist the defendant in leading a law-abiding life"); CONN. GEN. STAT. ANN. § 53a-30(a)(12) (West Supp. 1993) (any conditions reasonably related to his rehabilitation); IOWA CODE ANN. § 907.7 (West 1994) ("provide the maximum opportunity for rehabilitation of the defendant"); ME. REV. STAT. ANN. tit. 17-A, §1204-2-m (West 1983) ("reasonably related to . . . rehabilitation"); N.M. STAT. ANN. § 31-20-6(F) (Michie 1994) ("reasonably related to . . . rehabilitation"); OHIO REV. CODE ANN. § 2951.02(c) (Anderson 1993) (rehabilitate offender).

181. *See, e.g.,* People v. Keller, 143 Cal. Rptr. 184, 187 (Cal. Ct. App. 1978), *overruled on other grounds sub nom.,* People v. Welch, 19 Cal. Rptr. 2d 520, 526 (Cal. 1993); Hines v. State, 358 So. 2d 183, 185 (Fla. 1978); State v. Mummert, 566 P.2d 1110, 1112 (Idaho 1977).

182. IND. CODE § 11-13-3-4 (1993) (successful reintegration into the community).

183. COHEN & GOBERT, *supra* note 35, at 183. *See also* United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975) (The only permissible probation conditions are those that contribute significantly *both* to the rehabilitation of the convicted person and the protection of the public.) (emphasis added).

184. COHEN & GOBERT, *supra* note 35, at 184. Courts have concluded that while probation conditions may have an incidental punitive effect, punishment may not be the primary purpose. *E.g.,* Higdon v. United States, 627 F.2d 893, 898 (9th Cir. 1980).

185. *See* Foscarinis, *supra* note 103, at 1670-75, for a thorough description of the expressed and inferred legislative intent tests.

protection.[186] However, courts have shown an increased willingness to allow Eighth Amendment challenges if the actual effect of the condition is punitive.[187] States that allow such harsh conditions like those imposed by the Louisiana statute[188] should be prepared to face ex post facto and Eighth Amendment challenges.

2. Ex Post Facto.—In *Calder v. Bull*, the United States Supreme Court held that the Ex Post Facto Clause prohibited "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."[189] The purpose of the Clause is to assure that penal statutes provide "fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[190] Two elements must be present for a penal law to be ex post facto: "it must be retrospective, and it must disadvantage the offender affected by it."[191] No ex post facto violation occurs if the statute merely changes the procedures under which a criminal case is adjudicated as opposed to changing the substantive law.[192]

Several cases have addressed the retrospective application of sex offender registration and community notification. The Louisiana Court of Appeals, finding registration and notification to be punitive, has barred the application of these requirements to defendants

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186. *See supra* notes 180-81 and accompanying text. *See also* Springer v. United States, 148 F.2d 411 (9th Cir. 1945) (dictum):

> The conditions of probation are not punitive in character and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution of the United States does not arise for reason that the Constitution applies only to punishment. These conditions of probation are intended to be an amelioration of the punishment prescribed by law for the given offense.

Id. at 415.

187. Sweeney v. United States, 353 F.2d 10, 11 (7th Cir. 1965) (requirement that alcoholic refrain from drinking held invalid); Dear Wing Jung v. United States, 312 F.2d 73, 75-76 (9th Cir. 1962) (requirement that defendant leave the country held invalid); Maggard v. Moore, 613 F. Supp. 150, 152 (W.D. Mo. 1985) (parole eligibility constitutes part of punishment); Goldschmitt v. State, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986), *review denied,* 496 So. 2d 142 (Fla. 1986) (requiring offender to affix "CONVICTED DUI" bumper sticker on his car heightens the deterrent, and thus the rehabilitative, effect of punishment); Bienz v. State, 343 So. 2d 913, 915 (Fla. Dist. Ct. App. 1977) (requiring adult male to wear diapers in public as condition of probation held so harsh as to counteract the concept of rehabilitation). There have been relatively few challenges of probation or parole conditions under state constitutions, even though most state constitutions carry the same guarantees as the federal Constitution. COHEN & GOBERT, *supra* note 35, at 212. Cohen and Gobert attribute this trend to weak state constitutions, a preference for the federal forum, or a tactical decision to employ the federal Constitution so that decisions on point from other jurisdictions can be used more persuasively. COHEN & GOBERT, *supra* note 35, at 212.

188. *See supra* notes 172-77 and accompanying text.

189. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). The clause applies to both the severity and the mode of punishment. *See* Beazell v. Ohio, 269 U.S. 167, 170 (1925) ("[T]he nature or amount of the punishment . . . should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.").

190. Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

191. *Id.* at 29.

192. Collins v. Youngblood, 497 U.S. 37, 45 (1990).

who committed their crimes prior to the legislative enactment.[193] Conversely, the high courts of Washington,[194] Arizona,[195] and New Hampshire[196] have held that registration is regulatory, not penal, and thus does not violate the state or federal prohibition against ex post facto laws. Critical to the Arizona and New Hampshire courts' decisions in *Noble* and *Costello,* however, was the fact that the information contained in the registry was not accessible to the general public.[197] Although the challenged Washington statute provided for widespread community notification, the Washington Supreme Court stressed that the law imposed "significant limits" on the information that could be disclosed.[198]

Construing a New Jersey statute similar to the Washington law, however, a federal district court recently held that community notification violated Ex Post Facto Clause of the U.S. Constitution.[199] The court did allow retrospective application of the state's sex offender registration requirement, provided that the information was not disseminated to the public and was only made available to law enforcement agencies.[200]

In light of this reasoning, ex post facto challenges could pose a serious problem to states that open sex offender registries to the public. As of 1991, more than 66,000 sex offenders were serving time in state prisons.[201] If unrestricted public access to registries is found to be punitive, as *Noble*,[202] *Artway*,[203] and other cases[204] have implied, then states would not be able to apply the registration requirement to the thousands of offenders who committed their crimes prior to the legislative enactment. Retroactive application would also be barred in jurisdictions that find the registration requirements, standing alone, to be punitive.[205]

Some community notification statutes also grant immunity to law enforcement officials who release information about specific offenders, regardless of whether the information was obtained from the registry.[206] While not directly "annexed to the

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193. State v. Babin, 637 So. 2d 814 (La. Ct. App. 1994), *cert. denied,* 644 So. 2d 649 (La. 1994); State v. Payne, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

194. State v. Ward, 869 P.2d 1062, 1069 (Wash. 1994). *See also* State v. Taylor, 835 P.2d 245, 249 (Wash. Ct. App. 1992), *review denied,* 877 P.2d 695 (Wash. 1994); State v. Estavillo, 848 P.2d 1335, 1337 (Wash. Ct. App. 1993), *review denied*, 859 P.2d 602 (Wash. 1993).

195. State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992).

196. State v. Costello, 643 A.2d 531, 533 (N.H. 1994).

197. *Noble*, 829 P.2d at 1224; *Costello*, 643 A.2d at 533.

198. *Ward*, 869 P.2d at 1069-70.

199. *Artway*, 1995 U.S. Dist. LEXIS 2403, at *92.

200. *Id.*

201. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES 4 (1991) (includes sex offenses against women, children, and men).

202. *Noble,* 829 P.2d at 1224 ("[P]otentially punitive aspects of the statute have been mitigated. Registrants are not forced to display a scarlet letter to the world . . . .").

203. *Artway*, 1995 U.S. Dist. LEXIS 2403, at *92.

204. *See, e.g.,* People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991).

205. *In re* Reed, 663 P.2d 216, 217 (Cal. 1983); State v. Payne, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied,* 637 So. 2d 497 (La. 1994).

206. 42 U.S.C.A. § 14071 (West 1994); LA. REV. STAT. ANN. § 15:546 (West Supp. 1994); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

crime,"[207] the effect of this immunity nonetheless makes community notification under this provision vulnerable to ex post facto challenges. In *Weaver v. Graham*,[208] the United States Supreme Court held that a change in Florida's "gain time for good conduct" statute was a violation of the Ex Post Facto Clause, regardless of whether it was "in some technical sense part of the sentence."[209] The critical question was whether the statute altered the effective sentence to the offender's disadvantage.[210]

The practical effect of a child molester's sentence will be altered if law enforcement officials are allowed to publicize the offender's criminal history and address upon release. Recognizing that prisons are dangerous places for child molesters,[211] defendants may plea bargain in order to obtain an early release. If the public is notified prior to release, the conditions upon release will likely be very different than those for which they bargained.

As the Supreme Court noted in *Cummings v. Missouri*,[212] the "Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."[213]

3. Cruel and Unusual Punishment.—The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[214] This prohibition, which has been applied to the states through the Fourteenth Amendment,[215] circumscribes both the types[216] and severity[217] of punishment that may be imposed by the legislature[218] for crimes. Reviewing courts should grant substantial deference to the legislature's broad authority, but no penalty is per se constitutional.[219]

Judicial review of penal statutes is complicated by the failure of the courts to develop a single definition of "cruel and unusual."[220] The United States Supreme Court recognized that the phrase is not static, but must "draw its meaning from the evolving standards of

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207. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). *See also* Weaver v. Graham, 403 U.S. 24, 31 (1981).

208. 450 U.S. 24 (1981).

209. *Id.* at 32.

210. *Id.* at 34. The Court noted that such provisions play an integral role in whether a defendant opts to plea bargain. *Id.* at 32. *See supra* text accompanying note 191.

211. Robertson, *supra* note 179.

212. 4 71 U.S. 277, 325 (1866).

213. *Id.* at 325.

214. U.S. CONST. amend. VIII.

215. Robinson v. California, 370 U.S. 660, 675 (1962).

216. Ingraham v. Wright, 430 U.S. 651, 664 (1977) (Eighth Amendment imposes parallel limitations on bails, fines and other punishments.).

217. Solem v. Helm, 463 U.S. 277, 284 (1983).

218. *See* Harmelin v. Michigan, 111 S. Ct. 2680, 2691 (1991). Justice Scalia explains that because there were no common-law crimes in the federal system at the time the Constitution was adopted, the prohibition was meant as a check upon the legislature, not the courts. *Id.*

219. *Solem*, 463 U.S. at 290.

220. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

decency that mark the progress of a maturing society."[221] In non-capital cases, the Court has generally interpreted the Clause as forbidding either the unnecessary and wanton infliction of pain[222] or sentences that are grossly disproportionate to the crime.[223]

In recent years, state courts have had the opportunity to interpret the federal Clause[224] or similar guarantees in their own state constitutions[225] during the course of challenges to sex offender registries. A long line of cases has developed in California, where the high court ruled more than a decade ago that sex offender registration constitutes punishment and is therefore subject to Eighth Amendment scrutiny.[226] A review of these cases lends an analytical framework to potential Eighth Amendment and state constitutional challenges of community notification programs.

In *In re Reed*, the California Supreme Court held that mandatory lifetime registration of a sex offender convicted under the misdemeanor disorderly conduct statute violated the California Constitution's prohibition against cruel and unusual punishment.[227] Allen Eugene Reed's offense consisted of exposing himself in a public restroom and masturbating briefly in the presence of an undercover police officer.[228] Reed was steadily employed and had no prior arrest history.[229]

Drawing on the United States Supreme Court's decision in *Trop v. Dulles,*[230] the California high court adopted the view that, under the state constitution, punishment should be evaluated in light of "evolving standards of decency."[231] The court went on to say that implicit in this flexible definition "is the notion that punishment may not be grossly disproportionate to the offense."[232]

The proportionality test employed by the California court involved three inquiries: 1) an examination of the nature of the offense and the offender, with particular regard to the potential danger to society; 2) a comparison of the registration requirement with other

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221. *Id.* at 101.

222. Furman v. Georgia, 408 U.S. 238, 392-93 (1972) (Burger, C. J., dissenting). This restriction also includes mental pain. *See Trop,* 356 U.S. at 101-02 (Although denationalization involves no physical mistreatment, it subjects an individual to a fate of ever increasing fear and distress.).

223. *Solem,* 463 U.S. at 284. A requirement of proportionality applies to both the length and the severity of the punishment. Weems v. United States, 217 U.S. 349, 371 (1910).

224. State v. Lammie, 793 P.2d 134, 139 (Ariz. Ct. App. 1990); People v. Adams, 581 N.E.2d 637, 640 (Ill. 1991). In *Lammie,* the Arizona Court of Appeals determined that the registration provision was not cruel and unusual punishment without answering the threshold question of whether it was punishment. 793 P.2d at 383. Two years later, in State v. Noble, 829 P.2d 1217, (Ariz. 1992), the state's high court finally answered the question and held that registration was not punishment. *Id.* at 1221-24. In *Adams,* the Illinois Supreme Court held that the sex offender registration was not punishment, but expressed the view in dicta that if it were punishment, it would not be cruel or unusual. 581 N.E.2d at 641.

225. *Lammie,* 793 P.2d at 139; *In re* Reed, 663 P.2d 216, 218 (Cal. 1983); *Adams,* 581 N.E.2d at 640.

226. *In re Reed,* 663 P.2d 216.

227. *Id.* at 222.

228. *Id.* at 221.

229. *Id.*

230. 356 U.S. 86 (1958) (plurality opinion).

231. *Id.* at 101.

232. *In re Reed,* 663 P.2d at 220.

penalties imposed in the same jurisdiction for more serious crimes; and 3) a comparison of the registration requirement with other penalties imposed for the same offense in other jurisdictions.[233] As applied to Reed, the registration requirement was found to be disproportionate in all three areas and thus constitutionally prohibited.[234]

While *Reed* has set the stage for subsequent challenges to California's sex offender registry, the case has proven to be an anomaly. To date, only misdemeanants convicted of indecent exposure have been successful in avoiding the registration requirement through a cruel and unusual challenge.[235]

The test used by California courts is similar to the three-prong proportionality analysis developed by the United States Supreme Court in *Solem v. Helm.*[236] In *Solem,* the respondent was convicted in a South Dakota state court of issuing a "no account" check for $100.[237] Although the maximum punishment for the crime was five years imprisonment and a $5000 fine, the respondent was sentenced to life imprisonment without possibility of parole under the state's recidivist statute because of his six prior convictions for non-violent felonies.[238]

In overturning the sentence, the Court held five to four[239] that "as a matter of principle[,] . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[240] However, the Court noted that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare."[241]

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233. *Id.* at 220. The test was first articulated in *In re* Lynch, 503 P.2d. 921, 931 (Cal. 1972), and had been previously used by the California Court of Appeals to uphold the registration requirement against a challenge by an offender found guilty of lewd and lascivious conduct toward a child under the age of 14. People v. Mills, 146 Cal. Rptr. 411 (Cal. Ct. App. 1978).

234. The court noted that Reed did not pose a threat to society, that California did not require registration for other sex-related misdemeanors, and that only five states required sex offenders to register. *In re Reed,* 663 P.2d at 221, 222.

235. *See, e.g., In re* DeBeque, 260 Cal. Rptr. 441, 445 (Cal. Ct. App. 1989); People v. Monroe, 215 Cal. Rptr. 51, 58 (Cal. Ct. App. 1985). The court noted in both cases that deference is paid to legislation designed to protect children and that requiring the defendants to register did not shock the conscience nor offend fundamental notions of human dignity. *In re DeBeque,* 260 Cal. Rptr. at 448; *Monroe,* 215 Cal. Rptr at 58.

236. 463 U.S. 277 (1983). The Court held that the criteria to be used in proportionality analysis included: 1) the gravity of the offense and the harshness of the penalty; 2) other sentences imposed in the same jurisdiction; and 3) sentences imposed for the same crime in different jurisdictions. *Id.* at 292. While the Court did not explicitly require the analysis to include the potential danger to society, this element has been factored in with the gravity of the offense prong. *See, e.g.,* Harmelin v. Michigan, 111 S. Ct. 2680, 2706 (1991) (Kennedy, J., concurring) (life sentence without parole for possessing 672 ounces of cocaine not grossly disproportionate because the crime threatens grave harm to society).

237. 463 U.S. at 281.

238. *Id.* at 282.

239. Justice Powell delivered the opinion of the Court in which Justice Brennan, Justice Marshall, Justice Blackmun and Justice Stevens joined. Chief Justice Burger filed a dissenting opinion, joined by Justice White, Justice Rehnquist, and Justice O'Connor.

240. *Solem,* 463 U.S. at 290.

241. *Id.* at 289-90 (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

In light of the Court's 1991 decision in *Harmelin v. Michigan*,[242] proportionality challenges under the Eighth Amendment may never succeed. In *Harmelin,* a badly fractured Court upheld a controversial life sentence without parole for Ronald Harmelin, a 45-year-old Michigan man convicted of possessing 672 grams of cocaine.[243] Five justices agreed that a court, when imposing punishment, need not consider mitigating factors unless it is a death penalty case.[244] Justice Scalia, in an opinion joined by Chief Justice Rehnquist, concluded that the Cruel and Unusual Clause was aimed at particular modes of punishment, and does not include a guarantee of proportionality in sentencing.[245] Justice Kennedy, joined by Justice O'Connor and Justice Souter, recognized a narrow proportionality guarantee but interpreted *Solem* as "best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review."[246] Instead, the threshold test is whether the sentence is grossly disproportionate to the gravity of the offense.[247] According to Justice Kennedy, intra- and inter-jurisdictional analysis is appropriate only to validate a rare initial inference of gross disproportionality.[248]

While *Harmelin* may have called the validity of a federal proportionality guarantee into question,[249] a number of state constitutions contain express guarantees that punishment must be proportionate to the crime.[250] Other states have long held that their constitution's "cruel and unusual clause" includes a proportionality guarantee.[251] The majority of state courts that have assessed the validity of *Solem* in the wake of *Harmelin,* however, have adopted Justice Kennedy's narrow standard in interpreting both state and federal constitutional guarantees.[252]

Under the tighter *Harmelin* standard, a child molester would face an uphill battle to convince a court that community notification is cruel and unusual punishment. Requiring a convicted child molester to sign up with a public registry, place a notice in the newspaper, or mail postcards to his new neighbors is not nearly as onerous as the constitutionally valid sentence of life imprisonment for the "victimless" crime of cocaine possession. Employing *Solem's* intra- and inter-jurisdictional analysis, an offender might

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242. 111 S. Ct. 2680.

243. *Id.*

244. Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Scalia, and Justice Souter.

245. *Harmelin,* 111 S. Ct. at 2685-86 (Scalia, J., concurring).

246. *Id.* at 2707.

247. *Id.*

248. *Id.*

249. *E.g.,* People v. Knott, 586 N.E.2d 479, 497 (Ill. App. Ct. 1991) (stating that *Solem* was expressly overruled in *Harmelin*), *vacated as moot,* 621 N.E.2d 611 (Ill. 1993); State v. Tyler, 840 P.2d 413, 434 (Kan. 1992) (holding that the Eighth Amendment contains no proportionality guarantee).

250. IND. CONST., art. I, § 16; ME. CONST., art. I, § 9; NEB. CONST., art. 1, § 15; N.H. CONST., Part I, art. 18; OR. CONST., art. I, § 16; W. VA. CONST., art. III, § 5.

251. State v. Bartlett, 830 P.2d 823, 832 (Ariz. 1992), *cert. denied,* 113 S. Ct. 511 (1992); State v. Brown, 825 P.2d 482, 491 (Idaho 1992); People v. Bullock, 485 N.W.2d 866, 873-74 (Mich. 1992), *reh'g denied,* 486 N.W.2d 744 (Mich. 1992); State v. Harris, 844 S.W.2d 601, 603 (Tenn. 1992).

252. *Bartlett*, 830 P.2d at 826; *Brown*, 825 P.2d at 491; *Harris*, 844 S.W.2d at 603. *Contra Bullock*, 485 N.W.2d at 874 (holding that *Solem* is the appropriate standard in interpreting Michigan constitution).

have prevailed by showing the "unusualness" of the community notification requirement.[253] By shifting *Solem* so that the threshold inquiry is the gravity of the offense, however, *Harmelin* forces offenders to prove that child molesting is less serious than drug possession before they can point out that their state is only one of a handful which require them to announce their arrival in the community.

An offender could argue that proportionality analysis is inapplicable because community notification is a mode of punishment, not a term of years.[254] In reviewing modes of punishment, the United States Supreme Court has generally looked to "evolving standards of decency."[255] These standards are not gauged by public opinion polls,[256] but are instead measured by what the Court has called the most reliable indicator of national consensus—the pattern of enacted laws.[257]

By mid-1994, the pattern of enacted laws in the United States gave no clear indication as to whether a convicted child molester's criminal history background should be released to the general public. The majority of state statutes creating sex offender registries call for the data to be private, with some imposing penalties on officials who release the information.[258] A growing number of state laws and a new federal statute, however, allow for varying degrees of community notification.[259] A convicted child molester could build an argument around the pattern of laws that limited release of information; however, the offender would bear the burden of showing a consensus[260] and substantial deference would be granted to the legislature's judgment.[261]

4. Are "Scarlet Letter" Conditions Invalid under Stated Goals of Probation and Parole?—Not only may parole and probation conditions be overturned if they violate the Constitution, they are also vulnerable to challenge if they serve no acceptable goal of

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253. *See In re* Reed, 663 P.2d 216, 222 (Cal. 1983) (disproportionality indicated by fact that only a handful of states required registration). *But see* State v. Lammie, 793 P.2d 134 (Ariz. Ct. App. 1990):

> Assuming arguendo that no other state required lifetime registration for sex offenses, this alone would not be sufficient to make the law unconstitutional. To hold otherwise would make it virtually impossible for a state to be on the leading edge in passing laws increasing punishment for criminal offenses. Such a holding would require simultaneous passage of similar laws in more than one state. This would be improbable.

Id. at 140.

254. *See supra* note 224 and accompanying text; however, a requirement of proportionality has been held to apply to both the length and the severity of the punishment. Weems v. United States, 217 U.S. 349, 372-73 (1910).

255. Trop v. Dulles, 356 U.S. 86, 101 (1958).

256. Stanford v. Kentucky, 492 U.S. 361, 377 (1989).

257. *Id.* at 373. In *Stanford,* the Court held that although 27 of the 37 states allowing capital punishment declined to impose it on persons under the age of 18, this did not establish the degree of national consensus sufficient to label such executions cruel and unusual. *Id.* at 370-71.

258. *See supra* notes 38-40 and accompanying text.

259. *See supra* notes 38-40 and accompanying text.

260. *Stanford,* 492 U.S. at 373.

261. *Id.* at 369-70 (citing Gregg v. Georgia, 428 U.S. 153, 176 (1976)).

parole or probation.[262] Thus, defining the goals in a particular jurisdiction is critical in determining whether scarlet letter conditions will stand.

In *State v. Carey*,[263] a poorly educated mother of seven earning $528 per month was ordered by the trial court to pay fifty dollars per week in restitution as a condition of her probation. The Louisiana Supreme Court struck the condition, holding that in Louisiana, the "purpose of probation is to promote the defendant's rehabilitation by allowing . . . her to reintegrate into society without confinement."[264] Probation "holds no promise and serves no purpose if the conditions are so harsh that the probationer is destined for failure at the outset."[265]

The purpose of Louisiana's "scarlet letter" conditions is not to reintegrate, but to segregate the offender from at least that portion of society which is under the age of eighteen. The practical effect, however, may be to segregate the offender from society as a whole. Since the state of Washington enacted its discretionary community notification policy in 1990, some offenders have been driven from their jobs and communities, harassed by vigilantes, and forced to flee to large cities or other states where they are not known.[266] Such a result is even more probable in Louisiana, where the concept of community notification has been expanded to require *all* released child molesters to mail postcards and place advertisements.

While many people would respond, "Who cares what happens to child molesters?," the fact is that ostracization and its ensuing problems might increase the chance of re-offense.[267] The risk is exacerbated among a certain type of child molester who victimizes primarily during periods of high stress.[268] Because Louisiana's "scarlet letter" conditions apply across-the-board, these factors cannot be taken into consideration. Such offenders might be "destined for failure," which would violate Louisiana's goal of probation as stated in *Carey*.[269]

Courts should recognize that no matter what the stated goal, the practical effect of Louisiana's "scarlet letter" probation and parole conditions is punishment.[270] While

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262. COHEN & GOBERT, *supra* note 35, at 342.

263. 392 So. 2d 443 (La. 1981) (per curiam).

264. *Id.* at 444.

265. *Id.*

266. *See supra* notes 31-33 and accompanying text.

267. Fuller, *supra* note 14, at 603. Predisposing factors include stress, dysfunctional home situations, familial violence, substance abuse, interpersonal deficits, failure of the incest taboo, anti-social mores, and distorted beliefs. Fuller, *supra* note 14, at 603.

268. L.M. Lothstein, *Can a Sexually Addicted Priest Return to Ministry after Treatment? Psychological Issues and Possible Forensic Solutions*, 34 CATH. LAW. 89 (1991). Two types of pedophiles have been recognized: fixated and regressed. Fixated pedophiles "have a primary sexual interest in children or teens and rarely, if ever, engage in sex with age-appropriate peers." Regressed pedophiles are described as "individuals with a primary sexual orientation toward age-appropriate adults of the opposite sex who *under conditions of extreme stress* may psychologically regress and episodically engage in sex with children." *Id.* at 101 (emphasis added).

269. 392 So. 2d at 444.

270. COHEN & GOBERT, *supra* note 35, at 184-85. Cohen and Gobert argue that instead of deeming harsh conditions to be "rehabilitative," courts should recognize that punishment, like rehabilitation, can be a valid

Louisiana's "scarlet letter" conditions arguably violate state probation policy, such conditions could be upheld in jurisdictions where punishment is an accepted goal.

B. Due Process

When convicted child rapist Joseph Gallardo was discharged from prison in July 1993, local law enforcement officials in Washington state did more than simply release his name and conviction data to the public. They also circulated a flyer describing him as "an extremely dangerous sex offender with a high probability for re-offense."[271]

The issue of whether such allegations of future criminal behavior implicate liberty or property interests protected under the Fourteenth Amendment Due Process Clause was addressed by the United States Supreme Court in *Paul v. Davis*.[272] *Paul* involved a flyer distributed to 800 merchants in Louisville, Kentucky featuring the names and mug shots of persons arrested for shoplifting.[273] Entitled "Active Shoplifters,"[274] the flyer had been prepared and distributed by area police to alert local merchants to possible shoplifters who might be operating during the Christmas season.[275]

One of the featured "Active Shoplifters," Edward Davis, had previously been arrested for shoplifting; however, the charges were dismissed shortly after the flyer was distributed. Davis then brought an action under 42 U.S.C. section 1983,[276] charging that the flyer deprived him of his constitutional rights.[277]

The Court disagreed, holding that Davis's interest in reputation alone was not the type of liberty or property interest sufficient to invoke the procedural guarantees contained in the Fourteenth Amendment Due Process Clause.[278] In previous "stigma" cases where the Court granted relief, a right or status recognized by state law was distinctly altered or extinguished.[279] The applicable state law did not extend any legal guarantee to present enjoyment of reputation.[280] According to the Court, if Davis's view prevailed, arrested persons would have a cognizable claim under section 1983 if law enforcement officials merely proclaimed a belief that the alleged offenders were guilty.[281]

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rationale for imposing parole and probation conditions.

271. *See supra* note 7 and accompanying text.

272. Paul v. Davis, 424 U.S. 693 (1976).

273. *Id.* at 695.

274. *Id.*

275. *Id.* at 694-95.

276. 42 U.S.C. § 1983 (1988). The statute reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

Id.

277. *Paul*, 424 U.S. at 696.

278. *Id.* at 712.

279. *Id.* at 711. *See also* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (holding that the state-granted right to purchase liquor cannot be taken away without due process).

280. *Paul*, 424 U.S. at 711.

281. *Id.* at 698.

Under the Court's holding in *Paul,* convicted child molesters who are stigmatized as the result of information distributed by law enforcement officials would be unable to bring a section 1983 action. Relief would be unavailable even if the charges were dismissed or if the person were acquitted. The Court did note that imputing criminal behavior to an individual is considered defamatory per se in the courts of virtually every state.[282] Because Washington law grants immunity to law enforcement officials who release "relevant and necessary" information in good faith and without gross negligence, however, Gallardo would not have a cognizable defamation claim against the police who distributed the flyers.[283]

C. Privacy Implications

The law of privacy provides another potential basis for challenging community notification provisions.[284] The "right to be let alone" is grounded both in the common law[285] and in state and federal constitutional jurisprudence.[286] Because decisions regarding a federal Constitutional right to privacy have hinged on the Fourth Amendment's protection against warrantless searches and seizures and the Fourteenth Amendment's implicit guarantee of fundamental decision privacy,[287] and state

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282. *Id.* at 697.

283. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994). Private groups who distribute flyers imputing future criminal behavior could still be liable under the common law tort of defamation. To address this potential liability, the Washington Association of Sheriffs and Police Chiefs has proposed that the Community Protection Act be amended to extend immunity to news media, schools, and church and youth groups. Memorandum from the WASPC Committee on Sex Offenders (on file with the author) [hereinafter "Memorandum"].

284. *See* State v. Payne, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994). A convicted sex offender challenged Louisiana's community notification statute on both ex post facto and privacy bases. Because the court held that the statute, as applied to Payne, was an unconstitutional ex post facto law, it did not reach the issue of whether the law was a facially invalid invasion of privacy. *Id.* at 702-03.

285. A common-law right to privacy was first advocated by Samuel Warren and Louis Brandeis, who argued in an influential 1890 article that tort law should provide some protection against an increasingly intrusive press. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

286. Ken Gormley, *One Hundred Years of Privacy,* 1992 WIS. L. REV. 1335 (1992). Gormley posits that over the past century, legal privacy has developed into several interrelated species: tort privacy; Fourth Amendment protection from warrantless search and seizure; fundamental-decision privacy grounded in the Due Process Clause of the Fourteenth Amendment; First Amendment privacy addressing the conflict between one individual's free speech and another's freedom of thought and solitude; and state constitutional privacy.

287. *See* Paul v. Davis, 424 U.S. 693, 712-713 (1976). The Court noted that publicizing the official record of Davis' arrest was not akin to other areas where "zones of privacy" had been recognized. Previous right of privacy cases involved either evidence seized in an unreasonable search or substantive state regulation of matters relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* For further discussion of *Paul*, see *supra* text accompanying notes 272-283.

constitutional law has generally paralleled this trend,[288] this Note focuses on privacy rights under the common law.

The tort of publication of private facts protects a common law right of privacy that was first advocated by Samuel Warren and Louis Brandeis in an influential 1890 article.[289] Concerned about the advent of "instantaneous photographs," the duo warned that "numerous mechanical devices threaten . . . that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[290] The rapid growth of computerized sex offender registries has lent an air of prescience to Warren and Brandeis' words.

The majority of American jurisdictions have recognized the private facts tort.[291] Under the formulation adopted in the *Restatement (Second) of Torts,* one who publicizes private facts about another is liable for invasion of privacy if the publication would be highly offensive to a reasonable person and is not of legitimate public concern.[292] Claims under this tort are usually directed at the news media, because the communication must reach the general public before liability may be imposed.[293] Newspaper and magazine articles, radio and television broadcasts, speeches before large audiences, and widely distributed handbills are the types of media that may invade a plaintiff's privacy under this tort.[294]

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288. While state constitutions may offer greater protection to an individual's right of privacy than the federal Constitution, state constitutional jurisprudence has tended to focus on fundamental decision privacy and search and seizure privacy. *See generally* Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279 (1992). *But see* People v. Hackler, 16 Cal. Rptr.2d 681, 686-87 (Cal. Ct. App. 1993) (Requiring a probationer who stole two 12-packs of beer to wear in public a T-shirt with the words, "I am on felony probation for theft" violated the offender's state constitutional right to privacy because it had only an incidental impact on his future criminality.). This would probably not apply to child molesters; in an earlier case, the same court held that anyone who sexually molests a child has waived any right to privacy. People v. Mills, 146 Cal. Rptr. 411, 417 (Cal. Ct. App. 1978). The implications of the growing body of state constitutional jurisprudence on community notification is beyond the scope of this Note; for a thorough overview of state privacy cases, see Silverstein, *supra* note 107.

289. Warren & Brandeis, *supra* note 285. The right to privacy is protected by four separate torts: intrusion upon seclusion; appropriation of name or likeness; false light publicity; and publication of private facts. RESTATEMENT (SECOND) OF TORTS § 652A-1 (1977) [hereinafter RESTATEMENT].

290. Warren & Brandeis, *supra* note 285, at 195.

291. Thirty-six states have adopted the publication of private facts tort. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort,* 68 CORNELL L. REV. 291, 365-66 (1983). Only four states—Nebraska, New York, Utah and Virginia—have expressly rejected the tort. *Id.* at 366-67.

292. RESTATEMENT, *supra* note 289, § 652D.

293. RESTATEMENT, *supra* note 289, § 652D, cmt. a. Unlike the tort of defamation, where liability may be predicated on a private communication made by the defendant to a third party, the tort of publication of private facts requires a communication that reaches the public at large. To communicate a fact concerning the plaintiff's private life to a single person or even a small group of persons is not an invasion of the right of privacy. RESTATEMENT, *supra* note 289, § 652D, cmt. a.

294. RESTATEMENT, *supra* note 289, § 652D, cmt. a.

By design, computerized sex offender registries provide instant access to a wealth of information that was previously inaccessible or difficult to obtain.[295] In addition to containing conviction data, which is a matter of public record,[296] most registries also include other identifying information such as the offender's current address and place of employment.[297] Four statutory approaches have been used to govern public access to this information. Under one approach, officials who release "relevant and necessary" information contained in the registry are granted immunity from civil liability.[298] Some states open their entire registries to the public;[299] in others, the use of the information is restricted to law enforcement personnel,[300] with some statutes imposing criminal liability for unauthorized release.[301] In a handful of states, release is governed by the applicable Freedom of Information Act (FOIA) or court records statutes.[302]

1. Government defendants.—The United States Supreme Court has recognized an individual's privacy interest in his computerized criminal history. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[303] members of the news media sought disclosure under FOIA of an organized crime figure's "rap sheet." Compiled by the Federal Bureau of Investigation, rap sheets contain descriptive information such as the suspect's date of birth, physical characteristics, and history of arrests, charges, convictions and incarcerations. Rap sheets are normally maintained until the subject reaches the age of eighty.[304]

The Court held that rap sheets were categorically exempt from disclosure under section 552(b)(7)(c) of FOIA,[305] which excludes records compiled for law enforcement purposes "but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[306] Although most of the information contained in the rap sheet was already a matter of public record, the issue was "whether the compilation of otherwise hard-to-obtain information

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295. As the Court noted in United States Dep't of Justice v. Reporters Comm., "There is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." 489 U.S. 749, 764 (1989).

296. Every court keeps a record of events occurring in that court, including arraignments, adjudications and sentences. As a matter of constitutional right, statute, or court rule, these records are open to public inspection in every state. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUBLIC ACCESS TO CRIMINAL HISTORY RECORD INFORMATION 3 (1988).

297. *See* sources cited in *supra* note 20.

298. LA. REV. STAT. ANN. § 15:546 (West Supp. 1994); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

299. GA. CODE ANN. § 42-9-44.1 (1994).

300. *See* sources cited in *supra* note 38.

301. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1994).

302. *See supra* note 11 and accompanying text.

303. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

304. *Id.* at 752.

305. *Id.* at 777.

306. *Id.* at 755-56 (quoting 5 U.S.C. § 552(b)(7)(C)).

alters the privacy interest implicated by disclosure of that information."[307] The Court stressed that absent the computerized index, tracking down an offender's criminal history would require a "diligent search of courthouse files, county archives, and local police stations throughout the country."[308]

In holding that disclosure was exempt under FOIA, the Court noted that the power of a computerized compilation to affect personal privacy outstrips the combined power of the bits of information it contains.[309] The central purpose of FOIA is to "ensure that the *Government's* activities be opened to the sharp eye of public scrutiny," not that information about private citizens that happens to be in the government's warehouse be disclosed.[310] "[A]s a categorical matter . . . a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy . . . ."[311] Such an invasion is unwarranted when an individual seeks no official information about a government agency, but merely hopes to obtain records that the government happens to be storing.[312]

Under *Reporters Committee,* release of computerized criminal history information to the general public could expose a government entity to liability in those jurisdictions that prohibit release of such information and extend a damage remedy for unauthorized disclosure. While *Reporters Committee* did recognize that offenders have an inherent privacy interest in their computerized criminal history, it is important to note that the Court was discussing personal privacy only as defined by the law enforcement exception of FOIA.[313] Thus, the Court's holding would not affect those jurisdictions where the statutes expressly provide for public disclosure and the provisions of FOIA are inapplicable.[314]

2. Media defendants.—Merely reporting a child molester's name and conviction data will not subject the media to liability under the private facts tort if this information is already a matter of public record.[315] Under a line of cases developed by the United States Supreme Court, it would also appear that liability may not be imposed on the news media

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307. *Id.* at 764.

308. *Id.*

309. *Id.* at 765.

310. *Id.* at 774 (emphasis in original).

311. *Id.* at 780.

312. *Id.*

313. *Id.* at 762. All states have adopted a version of FOIA. *See* Casenote, *Administrative Law: Freedom of Information Act,* 62 U. DET. L. REV. 363, 369 (1985).

314. LA. REV. STAT. ANN. § 15:546 (West Supp. 1994); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

315. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (Publishing a rape victim's name that was obtained from indictments open to public inspection did not state a cause of action for invasion of privacy.). The Court noted that publication of the "contents of public records [is] simply not within the reach of these kinds of privacy actions." *Id.* at 494. *But see* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 (Cal. 1971) (Publishing information about rehabilitated criminal 11 years after plaintiff's involvement in criminal activity stated a cause of action for invasion of privacy.).

for publishing other information lawfully obtained from a child molester registry, even if the registry is closed to public inspection.[316]

In *The Florida Star v. B.J.F.*,[317] a reporter-trainee obtained a rape victim's name from a report posted in the pressroom at the sheriff's office. The victim won a jury verdict against the newspaper when her name was published in violation of a Florida statute. The Court reversed, holding that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when *narrowly tailored to a state interest of the highest order.*"[318]

B.J.F.'s attorneys argued that protection of a rape victim's anonymity met the highest interest test. Three related interests were involved: the privacy of the victims of sex offenses; the physical safety of such victims; and the goal of encouraging victims to report sex crimes.[319] While the case did not reach the adequacy of the victim's interest,[320] the Court's treatment suggests that protecting the anonymity of rape victims was not a state interest of the highest order.[321]

Couts could use the *Florida Star* standard to find that protecting the anonymity of child molesters meets the highest interest test, although revealing their names and crimes may implicate their victims, as in the case of incest. News media that lawfully obtain the information may be allowed to publish it with impunity. Even in the states that expressly prohibit public use of the information, the press may not be punished if the information was obtained lawfully, albeit improperly. The United States Supreme Court has recognized as lawful such routine reporting techniques as interviewing sources and monitoring police band radios.[322]

3. Private defendants.—In *Florida Star*, the Court noted that in truthful publication cases, individual privacy interests had never prevailed over the media's First Amendment rights.[323] Whether individual privacy interests would prevail in a case involving handbills distributed by community groups depends on the content of the flyers, the timeliness of the crime, and the nature of the remedy, if any, afforded by state law.

Flyers that merely list the offender's criminal history would probably not be considered an invasion of privacy; as the United States Supreme Court has noted, privacy

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316. The Florida Star v. B.J.F., 491 U.S. 524 (1989); *Reporters Comm.*, 489 U.S. 749; Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); *Cox Broadcasting Co.*, 420 U.S. 469.

317. 491 U.S. 524.

318. *Id.* at 541 (emphasis added).

319. *Id.* at 537.

320. The Court held that whatever the interest in protecting the anonymity of rape victims, imposing liability on the media did not advance that interest. The Florida statute prohibiting the publication of rape victims' names in an "instrument of mass communication" was facially underinclusive and would not apply to the "backyard gossip who tells 50 people that don't have to know." *Id.* at 540.

321. Commentators have suggested that the Court's holding in *Florida Star* has reduced the utility of the tort of publication of private facts. *See* Jacqueline R. Rolfs, Note, The Florida Star v. B.J.F.: *The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107. "If a rape victim's name does not compel protection, it is difficult to imagine what type of information will." *Id.* at 1117.

322. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103-04 (1979).

323. *Florida Star*, 491 U.S. at 530.

interests fade once the information has appeared on the public record.[324] Courts in California have carved out an exception and allowed a privacy action to proceed when the crime occurred in the distant past and the offender has been rehabilitated.[325] However, since probationers and parolees have a reduced expectation of privacy,[326] this exception would not apply to them. In states where the registration requirements exceed the term of probation and parole, it is doubtful such an argument would prove persuasive in light of the high recidivism rate among child molesters.[327]

Flyers that include additional information such as an offender's address and place of employment would invoke liability only if the information were highly offensive to a reasonable person and not a matter of legitimate public concern.[328] As interpreted by the Court in *Florida Star,* the public concern test is a threshold inquiry that applies only to the nature of the underlying event.[329] If the underlying event were found to be a matter of public significance, the fact that the information may be offensive is irrelevant.[330]

The commission and investigation of a violent crime which has been reported to authorities is a matter of "paramount public import."[331] The *Florida Star* Court found that inclusion of the rape victim's name was incidental; the "article generally, as opposed to the specific identity contained within it," involved a matter of public significance.[332] Since the purpose of community notification is to publicize an offender's "specific identity," offenders might be able to argue that publication of their name and address is not protected by the Court's holding in *Florida Star.* However, such an argument would not be persuasive in Washington or Louisiana, where the legislature has acknowledged in adopting community notification that "protection of the public from sex offenders is a paramount governmental interest."[333] Further, even if a child molester could show that publication of his name and address was not a matter of public significance, the offender would only be allowed recovery if the information were highly offensive to a reasonable person.[334] A jury would be unlikely to find such information offensive in light of the low public regard for child molesters and the high public concern for children's safety.

IV. A WORKABLE LEGISLATIVE APPROACH

In recent years, an Oregon judge who was frustrated with the criminal justice system said, "One time, I thought of dyeing all [child molesters] green and telling children to stay

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324. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975).

325. Conklin v. Sloss, 150 Cal. Rptr. 121, 124 (Cal. Ct. App. 1978); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 (Cal. 1971).

326. *See* State v. Malone, 403 So. 2d 1234, 1239 (La. 1981).

327. Reuben A. Lang et al., *Treatment of Incest and Pedophilic Offenders: A Pilot Study,* 6 BEHAV. SCI. & L., 239, 242 (1988).

328. RESTATEMENT, *supra* note 289, § 652D.

329. *Florida Star,* 491 U.S. at 536-37.

330. *Id.*

331. *Id.*

332. *Id.*

333. *See supra* note 29 and accompanying text.

334. RESTATEMENT, *supra* note 289, § 652D.

away from green people."[335] Although the majority of statutes close sex offender registries to the public or limit disclosure to dangerous offenders,[336] there is no doubt that many Americans share the judge's view that all child molesters should be singled out.

The concept of community notification is here to stay. Legislators have two choices: either craft a state-wide approach to community notification, or allow the law to be developed piecemeal by judges who are frustrated with releasing child molesters into the community.[337] The picture is further complicated by the grim fact that states that delay adopting community notification may become safe havens for pedophiles, while states that are too aggressive could exceed the limits of the new federal law and lose federal funding.[338] In addition, the protective value of any community notification program will be illusory at best unless the program can be applied retroactively to offenders who are already in the system.[339]

This Note proposes that state legislatures develop an approach to community notification that is flexible enough to safeguard the community from potentially dangerous offenders while allowing persons with a low risk of reoffense to reintegrate into the community. Such flexibility is desirable in light of the recently approved Violent Crime Control and Law Enforcement Act of 1994,[340] which requires states to develop a child molester registry that meets certain federal mandates. States that fail to comply with the law within three years of its passage will lose ten percent of their funding under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968.[341] One provision limits community notification to relevant information that is necessary to protect the public from a specific offender.[342]

In some states, community notification consists merely of public access to the sex-offender registry. Members of the general public may go to the sheriff's office and peruse the registry, which includes name, address, and conviction data on all registrants.[343] This form of notification, if continued after the federal law goes into effect, could cost these states a hefty share of their federal crimefighting dollars[344]—a high price tag at a time when the public is clamoring for law and order. In addition, such broad access could

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335. Brilliant, *supra* note 173, at 1366 (alteration in original).

336. *See supra* notes 38-39 and accompanying text.

337. *See supra* note 86 and accompanying text.

338. *See supra* notes 96-97 and accompanying text.

339. *See supra* notes 201-04 and accompanying text.

340. H.R. 3355, 103rd Cong., 2nd Sess. (1994).

341. *Id.* (referring to 42 U.S.C. 3756 (1988)).

342. 42 U.S.C.A. § 14071 (West 1994).

343. *See, e.g.,* GA. CODE ANN. § 42-9-44.1 (1994).

344. States which do not comply would lose 10% of their dollars allocated under 42 U.S.C. § 3756. *See* 42 U.S.C.A. § 14071 (West 1994). Funding under this section is used to assist states in carrying out programs which improve the criminal justice system, with special emphasis on a nationwide drug control strategy. Eligible programs include multijurisdictional task forces, neighborhood anti-crime programs, anti-terrorism efforts, prison industry, substance abuse rehabilitation, community corrections, and domestic violence programs. 42 U.S.C. §3751 (1988). Indiana receives between $7 million and $9 million a year under these so-called Byrne grants. Interview with Catherine O'Connor, Director, Indiana Criminal Justice Institute (Aug. 29, 1994).

also be deemed punitive, which would limit the registration requirement to those offenders who committed their crimes after the law was enacted.

Other states, however, also have notification provisions which operate independently of public access to registry. In Washington, the Department of Corrections directly releases information on ex-offenders it deems to be dangerous, usually several weeks before an offender is required by law to register. Local law enforcement officials then have the discretion to release this information to community groups, the news media, or the general public.[345] Government officials are immune from liability for releasing sex offender information; a proposed amendment would extend this immunity to community groups and the news media, as well.[346]

In Louisiana, all child molesters released on parole or probation are required by law to notify the public through postcards and classified advertisements.[347] The inflexibility of the Louisiana approach lends itself to pragmatic as well as legal problems. The risk of reoffense varies depending on the offender's particular sexual anomaly and whether that offender has received treatment.[348] Incestuous males, for example, seldom repeat their behavior once they have been caught, whereas homosexual pedophiles generally have a recidivism rate of ten percent or higher.[349] Certain types of child molesters have an increased likelihood of recidivism under periods of extreme stress and isolation,[350] which are likely to result soon after the offender's new neighbors receive the postcards. The statute fails to recognize these distinctions and applies the notification requirements across the board, regardless of the risk of reoffense.[351] Deeming the requirements punitive, courts have refused to impose the "scarlet letter" conditions on defendants who committed their crimes prior to the law's effective date.[352]

Washington's approach is much more flexible and, with some modification, presents a good working model for other states to follow as they implement the provisions of the Violent Crime Control and Law Enforcement Act of 1994. The Special Bulletins issued by the state Department of Corrections, combined with the guidelines adopted by local law enforcement agencies, have the potential to recognize each community's unique needs and each child molester's unique risk of reoffense. Because the Louisiana program looks only to the offender's past conduct,[353] it is more likely to be classified as punishment than the Washington plan, which considers current factors such as the community where the offender plans to reside and whether the offender received treatment while incarcerated.

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345. DONNELLY & LIEB, *supra* note 31, at 5. The type of information generally released in Washington includes the offender's approximate or exact address, physical description, photograph, criminal history, method of approaching victims, place of employment, and vehicle model. DONNELLY & LIEB, *supra* note 31, at 5.

346. *See* Memorandum, *supra* note 283.

347. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1994).

348. Lang et al., *supra* note 327, at 253.

349. Lang et al., *supra* note 327, at 253.

350. Lothstein, *supra* note 268.

351. *See supra* note 80 and accompanying text.

352. State v. Babin, 637 So. 2d 814, 824-25 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 649 (La. 1994).

353. *See* De Veau v. Braisted, 363 U.S. 144, 160 (1960), *reh'g denied*, 364 U.S. 856 (1960).

This built-in flexibility is vital if the program is to be deemed a "regulation of a present situation"[354] and thus exempt from ex post facto challenges.

The breadth of the flexibility, however, has raised concerns among some law enforcement officials in Washington who maintain that the WASPC guidelines which classify offenders according to the risk of reoffense are unclear.[355] Another complaint is that the current law vests too much responsibility with local law enforcement agencies to make decisions regarding an offender's risk of reoffense and mental health.[356] However, this broad grant of discretion was designed to ensure that decisions regarding community notification are made by those who live in the community. Several local law enforcement agencies have effectively utilized this discretion to adopt detailed classification schemes that consider such individual factors as substance abuse, therapy, victim preference, and mental health.[357]

If community notification is to operate effectively, there must be a mechanism to enable law enforcement officials to track ex-offenders as they move from town to town. Under the new federal law, verification forms would be mailed every ninety days to offenders deemed "sexually violent predators" and annually to the remainder of the registrants.[358] A more aggressive approach, which was recently enacted in Indiana,[359] allows released child molesters to be placed on extended periods of probation or parole. Judges and the parole board are granted express statutory authority to require, as a condition of release, that offenders participate in a treatment program and avoid all contacts with children that have not been previously approved by the court until the treatment is completed.[360] In addition, offenders are required to register for ten years following their release from prison or placement on parole or probation.[361] Unlike the federal approach, which will limit verification to an annual postcard in the vast majority

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354. *Id.* However, such flexibility did not save New Jersey's "Megan's Law" from being deemed punitive. *See* Artway v. Attorney Gen. of New Jersey, No. 94-6287, 1995 U.S. Dist. LEXIS 2403, at *92 (D.N.J. Feb. 28, 1995).

355. DONNELLY & LIEB, *supra* note 31, at 8.

356. DONNELLY & LIEB, *supra* note 31, at 8. For other potential problems with this type of notification scheme, *see* Kelly Richmond, *State Defends Megan's Law in Federal Appeals Court*, BERGEN (N.J.) RECORD, Feb. 2, 1995, at A7. In January, 1995, a federal district court judge in Newark issued a preliminary injunction barring community notification in the case of a released rapist. In his ruling, the judge expressed concern that the offender's due process rights could be violated because the law lacks a provision for persons subject to community notification to appeal the risk level assigned to them. *Id.* Under New Jersey's newly enacted community notification statute, prosecutors are responsible for determining an offender's risk level pursuant to guidelines developed by the state attorney general. The statute prescribes three risk levels similar to those followed voluntarily in Washington state and mandates the form of notification which is to be followed for each level. 1994 N.J. Sess. Law Serv. 128 (West).

357. DONNELLY & LIEB, *supra* note 31, at 13-16.

358. 42 U.S.C.A. § 14071 (West 1994).

359. 1994 Ind. Acts 11.

360. *Id.* Persons convicted of sex crimes against children after the measure's effective date could be placed on probation or parole for up to 10 years.

361. S. 363, 109th Leg., 1st Reg. Sess. (Effective July 1, 1995).

of cases, the Indiana approach should boost compliance and enhance tracking by clearing the way for registrants to be under continuous supervision.

Although longer periods of supervision may be more costly to implement, the advantages of such an approach are numerous. In Washington state, one out of five released adult sex offenders fails to register.[362] By linking notification with offenders who are still in the criminal justice system, however, the problems with voluntary compliance will be mitigated. Should the offender relocate, law enforcement officials would be informed and would then be able to decide, based on the needs of the community and the risk of reoffense, whether the public should be notified.

In addition, persons on probation and parole have a reduced expectation of privacy,[363] and thus do not have the same freedom from governmental intrusion as an ordinary citizen.[364] Law enforcement and government officials, immunized by statute, would be able to release relevant and necessary information on offenders with a high risk of reoffense in order to protect the public.[365] At the same time, parole and probation officials, employing the discretion granted under the Indiana law,[366] would be able to tailor conditions of supervision which minimize the risk of reoffense and thus foster rehabilitation.

Almost every person who is behind bars for molesting a child will someday be released from prison. The current patchwork quilt of registration-notification laws has put certain states at risk of becoming a dumping ground for released offenders. A child in Ohio is as vulnerable as a child in Washington. State laws which merely ship child molesters to another part of the country do not really further the goal of public safety.

With the passage of the Violent Crime Control and Law Enforcement Act of 1994, states have a unique opportunity to develop a targeted notification scheme which will protect children throughout the country by ensuring that dangerous offenders are not allowed to slip into anonymity. Because most people do not want a child molester for a neighbor, this protection will always carry the threat of vigilantism. Such threats can be minimized, however, by releasing the relevant information in an accurate, responsible and responsive manner.

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362. *See supra* note 49 and accompanying text.

363. *See supra* text accompanying note 29.

364. *See* State v. Malone, 403 So. 2d 1234, 1239 (La. 1981).

365. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

366. 1994 Ind. Acts 11.