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## Dial 1-900-PERVERT and Other Statutory Measures That Provide Public Notification of Sex Offenders

Tracy L. Silva

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# DIAL "1-900-PERVERT"\* AND OTHER STATUTORY MEASURES THAT PROVIDE PUBLIC NOTIFICATION OF SEX OFFENDERS

Tracy L. Silva

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\* In an editorial supporting California's Child Protective Act of 1994, which allows for public identification of sex offenders via a 1-900 telephone service, the writer suggested that "1-900-PERVERT" be used for the number. Debra J. Saunders, *The Public's Right to Know*, S.F. CHRON., Apr. 6, 1994, at A17.

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"There is no den in the wide world to hide a rogue. . . . Commit a crime, and the earth is made of glass."<sup>1</sup>

## I. INTRODUCTION

On July 29, 1994, a seven-year-old New Jersey girl named Megan Kanka was raped and murdered by her neighbor, Jesse Timmendequas, a twice-convicted child molester.<sup>2</sup> Timmendequas, who had been released in 1988 from a prison for sex offenders, was living with two other sex offenders across the street from the Kanka home.<sup>3</sup> The three offenders' criminal pasts were unknown to their neighbors, as New Jersey was one of the vast majority of states at the time that did not require public notification of the release and location of sex offenders.<sup>4</sup>

1. RALPH WALDO EMERSON, *ESSAYS: FIRST SERIES* (1841).

2. Anthony Gnoffo Jr., *Megan's Law Gets Quick Approval in N.J. Senate; The 10 Bills Had No Opposition. They Seek Tougher Penalties on Sex Abusers of Children*, PHILA. INQUIRER, Oct. 4, 1994, at A1. According to police, Timmendequas confessed to the crime. *Slaying of Girl Revives Debate on Felon Rights*, COM. APPEAL (N.J.), Aug. 4, 1994, at A5.

3. Jim Hooker, *Megan's Death Has a Harsh Prototype; How Statute Works in Another State*, RECORD (N.J.), Oct. 10, 1994, at A1.

4. Although most states have enacted laws that require convicted sex offenders to register with local authorities as a condition of parole or probation, only recently have states enacted laws providing for public notification of these sex offenders. As of October 1993, only two states (Washington, first, in 1990, followed by Louisiana in 1992) had laws that required sex offenders to register their identities and whereabouts with local authorities as well as notify the public. See WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994); LA. CODE CRIM. PROC. ANN. art. 895(H) (West Supp. 1994); Barbara Kessler, *States' Notification Laws for Offenders Questioned; Some See Washington, Louisiana Statutes as Intrusive*, DALLAS MORNING NEWS, Oct. 17, 1993, at A27. Another sign that the issue of notification statutes is still evolving is that both Washington and Louisiana amended their original notification statutes as recently as June 9, 1994, and July 7, 1994, respectively.

Megan's death prompted New Jersey residents and lawmakers to call for measures that notify the public when a convicted sex offender moves into a community.<sup>5</sup> A bill that came to be known as "Megan's Law" was introduced within two weeks of her death.<sup>6</sup> It called for registration and community notification of convicted sex offenders upon their release from prison.<sup>7</sup> The bill was enacted into law on October 31, 1994, only three months after Megan's slaying.<sup>8</sup> However, on January 3, 1995, just two days after the law took effect, a federal district judge issued a preliminary injunction to prevent law enforcement officials from enforcing Megan's Law against a recently released convicted rapist.<sup>9</sup> The temporary injunction against the notification statute was applied only to one specific offender—who happened to be the first to challenge the law.<sup>10</sup>

This early challenge to Megan's Law was only the beginning of a series of challenges made in the several months since the law's enactment. On May 2, 1995, approximately five months after the initial challenge to Megan's Law, the New Jersey Supreme Court heard oral arguments regarding an unrelated challenge to the statute.<sup>11</sup> The lower court's decision, by New Jersey Superior Court Judge Harold B. Wells, was that sex offenders are entitled to judicial hearings so that they may challenge the law's notification classifications as applied to them individually prior to any public notification being made.<sup>12</sup> In addition to the case currently before New Jersey's Supreme Court, on February 20, 1995, a federal judge ruled that Megan's Law constituted *ex post facto* punishment and therefore violated the United States Constitution with respect to those sex offenders who committed their crimes prior to the enactment of the law.<sup>13</sup> As discussed later in this Comment, the challenges made to Megan's Law within the first six months of its enactment underscore the

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WASH. LEGIS. SERV. 129 (West 1994); LA. SESS. LAW SERV., 3d Exec. Sess., Act 58 (S.B. 113) (West 1994); LA. SESS. LAW SERV., 3d Exec. Sess., H. Con. Res. 23 (West 1994).

5. Megan's death was not the only recent sexual assault and slaying of a young girl in New Jersey by a neighbor previously convicted of sexual offenses. Amanda Wengert, a six-year-old, was raped and murdered in March 1994. A neighbor with a history of sexual assaults was charged with her murder. Joseph F. Sullivan, *Lawmakers' Bills Get Tough on Sex Offenders*, N.Y. TIMES, Aug. 10, 1994, at B4.

6. See Act of Oct. 31, 1994, ch. 128, 1994 N.J. Laws 14 (codified at N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-5 (West Supp. 1995)).

7. *Id.* New Jersey's Megan's Law sets forth a three-tiered scheme by which the sex offender's risk of re-offense is ranked. *Id.* Different levels of community notification are provided based upon the sex offender's rating. *Id.*

8. See *id.*

9. Steve Inskip, *NPR Morning Edition: New Jersey Sex Offender Law Challenged in Court*, (National Public Radio broadcast, Jan. 4, 1995) (transcript #1513-13 available in LEXIS, News Library).

10. *Judge Blocks 'Megan's Law' AP-Megan's-Law*, ASSOCIATED PRESS ONLINE, Jan. 4, 1995, available in LEXIS, News Library.

11. *Id.*

12. See Russ Bleemer, *Justices May Be Willing to Uphold Megan's Law*, N.J. L.J., May 8, 1995, at 5. As of the date of publication, the New Jersey Supreme Court has not issued its decision in this matter.

13. *U.S. Seeking Right to Defend Megan's Law*, RECORD (N.J.), Apr. 6, 1995, at A3.

constantly changing nature of the law in this area and the difficulties encountered when enacting public notification schemes.<sup>14</sup>

The status of notification laws has been in a constant state of flux since their inception in 1990, when Washington was the first state to pass such a law.<sup>15</sup> Since October 1993, when Washington and Louisiana were the only states having public notification provisions,<sup>16</sup> several states have passed statutes that provide for some sort of publication of the whereabouts of sex offenders.<sup>17</sup> In 1994 alone, at least five states, including New Jersey, California, Kansas, Oregon, and Delaware, enacted some version of these notification laws.<sup>18</sup> Many states are currently considering, or will consider in the future, similar statutory measures.<sup>19</sup> Public notification is accomplished in a variety of ways, ranging from the practical to the implausible.<sup>20</sup> One implausible measure, which Texas lawmakers considered in 1995, was a bill that provided for a means of "brand[ing]" convicted child molesters<sup>21</sup> that is reminiscent of the "Scarlet Letter" punishment applied in Nathaniel Hawthorne's book of the same title, albeit with a few differences: the scarlet letter will be an 'S' not an 'A', and

14. See *infra* Part IV.D.

15. See *supra* note 4.

16. *Id.*

17. See, e.g., IDAHO CODE § 18-8309 (Supp. 1994) (public can obtain the name and nature of the crime of any person registered as a sex offender by submitting a written request that provides the name, date of birth, and social security number of a potential sex offender); ME. REV. STAT. ANN. tit. 34A, § 11004 (West Supp. 1994) (citizens can determine whether a potential sex offender is on Maine's sex offender registry by providing a written request containing the potential offender's name, charged offense, and date of the offense); N.D. CENT. CODE § 12.1-32-15 (Supp. 1994) (public can inspect photographs, fingerprints, and statements required under the registration provisions).

18. Mark Smith, *Public v. Private; Debate Rages Over Ex-Cons' Rights, Community Safety*, HOUS. CHRON., Nov. 6, 1994, at State section, 1. See, e.g., Child Protective Act of 1994, ch. 867, 1994 Cal. Legis. Serv. 867 (A.B. 2500) (West) (Sept. 26, 1994) (to amend and be codified as CAL. PENAL CODE § 290) (1-900 telephone number and public directory of worst sex offenders). See also *infra* note 20.

19. Texas enacted its notification law in 1995. Dubbed "Ashley's Law," the statute requires registration with law enforcement agencies and notification of the superintendent of the school district in which the offender intends to reside. TEX. REV. CIV. STAT. ANN. art. 6252 (Vernon Supp. 1995).

20. See, e.g., LA. CODE CRIM. PROC. ANN. art. 895(H) (West Supp. 1994) (offender must mail a notice to all neighbors within a one-mile radius in rural areas and a three-block radius in urban areas, and the offender must run the information in a local newspaper for two days); Act of Oct. 31, 1994, ch. 128, 1994 N.J. LAWS 14 (codified at N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-5 (West Supp. 1995)) (a three-tiered scheme ranking the sex offenders' risk of re-offense and varying the level of community notification based upon their ranking); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994) (authorizes public agencies "to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection."); 1994 Kan. Sess. Laws 107 (to amend and be codified at KAN. STAT. ANN. §§ 22-4909 and 45-221(a)(29)(C)) (lists made available to the public). In addition, some jurisdictions specifically grant courts the discretion to order other forms of notice deemed appropriate, including signs, bumper stickers, handbills, or labeled clothing. See, e.g., LA. CODE CRIM. PROC. ANN. art. 895(H)(2) (West 1993).

21. According to Texas State Senator Jane Nelson, "if we're going to release child molesters back into society, there must be a method of letting the public know of their presence. Putting an 'S' on [a child molesters'] driver's license will brand them." *Bill Filed to "Brand" Child Molesters*, UPI, Austin, Texas, Nov. 16, 1994.

the branding will be on the offender's driver's license, rather than on his clothing.<sup>22</sup>

The proliferation of notification statutes not only raises a number of legal issues but also highlights a number of undercurrents that profoundly affect public policy towards sex offenders. These undercurrents include: differing perceptions, especially over time, of whether certain types of sexual offenders can be successfully treated; public reluctance to spend money on treating sex offenders; and, the unstated premise that because public authorities cannot protect the public from most sex crimes, community notification of sex offenders will allow an informed public to protect itself. Because the statutory schemes to this effect are being added or changed almost monthly, it is impossible to provide a comprehensive and timely analysis of the various existing and proposed statutes. Thus, the intent of this Comment is to describe the context for the sex offender notification statutes, to discuss the challenges faced by these schemes in the courts, to evaluate the conditions which will make many of these schemes ultimately unsuccessful, and to suggest potential alternatives to current public notification laws.

Part II of this Comment focuses on the factors that gave rise to the proliferation of sex offender notification statutes. Part III provides an overview of several existing and proposed statutes, while Part IV analyzes the relatively sparse case law on constitutional challenges against existing sex offender statutes. Criticisms of the notification statutes are covered in Part V, while alternatives are discussed in Part VI. Part VII provides summary comments and conclusions.

## II. WHY PUBLIC NOTIFICATION?

"What man was ever content with one crime?"<sup>23</sup>

Commentators and proponents of legislation that requires public notification of the identities and residences of convicted sex offenders have cited numerous reasons that these laws are necessary. Among these justifications are the growing number of sex offenders released from prison<sup>24</sup> and the high rate of recidivism of sex offenders. However, it is difficult to determine whether sex crime recidivism is higher than the recidivism

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22. Texas State Senator Jane Nelson argues branding the driver's licenses of child molesters will help "educate the public on the presence of [child molesters] in our midst. Parents must be better able to better identify these criminals in our schools and communities so we can better protect our children." *Id.* How a "brand" on an offender's driver's license will help parents accomplish this is unclear. How often is it that we see our neighbors', colleagues', acquaintances', children's friends' parents', or other suspected child molesters' driver's licenses? The bill, TEX. S.B. 63, 74th Leg., R.S. (1995) was defeated, and the Texas Legislature ultimately enacted a far more conventional registration/notification act. TEX. REV. CIV. STAT. ANN. art. 6252 (Vernon Supp. 1995).

23. JUVENAL, SATIRES.

24. For example, in California approximately 325 sex offenders per month are released from prison. *Sex Offenders Must Register for Rest of Their Lives*, S.F. CHRON., Apr. 4, 1994, at A8. The average sex offender has served 38 months in prison, and more than 50% of these criminals are repeat offenders. *Id.*

rates for other crimes.<sup>25</sup> A 1989 study conducted by the Department of Justice, concluded that recidivism rates for burglars, drug offenders, and violent robbers were much higher than for sex offenders.<sup>26</sup> One comprehensive analysis of the various recidivism studies conducted concluded that, "[t]he differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants."<sup>27</sup>

The perceived ineffectiveness of treatment or therapy for sex offenders is another reason given for sex offender notification.<sup>28</sup> In addition, because sex offenders, in certain situations, have been held not to have the same constitutional protections as other criminals,<sup>29</sup> it has been argued that this limitation should extend to their right to privacy as well. For example, the Supreme Court held that those accused of being sexually dangerous under the Illinois Sexually Dangerous Person Act<sup>30</sup> do not have the same constitutional protections, such as against compulsory self-incrimination, as other criminal defendants.<sup>31</sup> The Court reasoned that the Illinois statute's aim was to provide treatment, not punishment; therefore, the statute was not considered to be "criminal" in nature.<sup>32</sup> Thus, sexually dangerous persons governed by the statute do not have the same constitutional protections that they would if the Illinois Sexually Dangerous Person Act had been held to be a "criminal" statute.<sup>33</sup>

The need to protect children from the growing number of child molesters is one of the major reasons many of the notification statutes have been passed. In 1990, the Department of Justice published the results of

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25. David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 780 MINN. L. REV. 529, 572-73 (1994). "Studies of sex offenders . . . have shown both higher and lower recidivism rates for certain populations of sex offenders, but no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major offenders." *Id.*

26. *Id.* at 572 (citing Allen J. Beck, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 6 (1989)). That study showed that the recidivism rate of rapists was 7.7%, compared with 31.9% for burglars, 24.8% for drug offenders, and 19.6% for robbers. *Id.* However, the Washington State Institute for Public Policy studied the rate of recidivism of sex offenders convicted between 1985 and 1991 and predicted that 24% will be arrested again. Gayle M.B. Hanson, *Experts Vexed at What To Do With Sex Offenders; Authorities Try New Methods For Tracking Them*, WASH. TIMES, June 6, 1994, at A8.

27. Bryden & Park, *supra* note 25, at 583 n.184 (quoting Lita Furby et al., *Sex Offender Recidivism: A Review*, 195 PSYCHOL. BULL. 3, 27 (1989)).

28. In the 1970s sex offenders were considered to be "largely incurable" by mental health professionals. Rogers Worthington, *Legal Dilemma Over Sexual Predators; Paroling Potentially Dangerous Offenders Challenges System*, CHI. TRIB., Sept. 11, 1994, at 6. Today, however, professionals consider treatment of sex offenders effective. *Id.* See also *infra* Part VI.C. for a discussion of treatment as an alternative to notification statutes.

29. See, e.g., *Allen v. Illinois*, 478 U.S. 364, 375 (1986).

30. ILL. REV. STAT., ch. 38, para. 105-1.01 *et. seq.* (1987).

31. *Allen*, 478 U.S. at 369, 374.

32. *Id.*

33. *Id.* at 375.

its first comprehensive study covering missing children in America.<sup>34</sup> Among the findings were: "Yearly abductions by outsiders: 114,600 attempted abductions of children; 4,600 abductions reported to police; 300 abductions in which children were gone for long periods of time or were murdered."<sup>35</sup> In addition, according to the National Committee to Prevent Child Abuse, there were almost 200,000 confirmed cases of child sex abuse in 1992.<sup>36</sup> Furthermore, many experts believe that the actual abuse rate is close to 1.4 million per year, much greater than reported figures, because of the tendency for sexual crimes to go unreported.<sup>37</sup>

Another reason for the recent proliferation of sex offender notification statutes is that the traditional form of punishment—incarceration—appears to have failed in its goals of deterrence and rehabilitation.<sup>38</sup> "The underlying problem is the public has no confidence in what happens to people while they are in prison—the ability of an inmate to be rehabilitated, to be able to be successful upon release [does not appear to be accomplished by our current prison system]."<sup>39</sup> While the standard formula of incarceration and early release does not appear to be effective in reducing the incidence of sex crimes, alternatives to public notification statutes, which may be more effective in actually reducing the rate of recidivism among these offenders, should be considered.<sup>40</sup>

Many legislatures that have passed registration and/or notification statutes have specifically designed the statutes in an effort to create an additional method whereby states can protect children from the increasing incidence of sexual abuse and assault.<sup>41</sup> However, while most states have laws requiring sex offenders to *register* with local authorities (but not notify the public), the effectiveness of these registration programs has been questioned.<sup>42</sup> For example, many studies show a tremendous number of offenders do not register.<sup>43</sup> The inefficiency and ineffectiveness of the registration systems, including the equipment and resources used, may be

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34. Cheryl Wetzstein, *Finding Missing Kids Is Made Easier, Not Perfect*, WASH. TIMES, Sept. 11, 1994, at A12 (citing U.S. DEPT. OF JUSTICE, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY AND THROWAWAY CHILDREN IN AMERICA (1990)).

35. *Id.*

36. Barbara Kessler, *Sex-offenders Programs Get Start in State Prisons; Texas' Effort Stymied By Money, Perceptions*, DALLAS MORNING NEWS, Oct. 17, 1993, at A1.

37. *Id.*

38. Smith, *supra*, note 18, at State section, 1 (quoting Linda Marin, Texas director of Citizens United for Rehabilitation of Errants).

39. *Id.*

40. See *infra* Part VI.

41. For example, the Illinois Sex Offender Registration Act requires child sex offenders to register with law enforcement authorities and inform them of any change of address within 10 days. See ILL. ANN. STAT., ch. 730, paras. 3-10 (Smith-Hurd 1992); See *People v. Adams*, 581 N.E.2d 637 (Ill. 1991) for a discussion of the legislative purpose of the Illinois Sex Offender Registration Act.

42. See, e.g., Aurelio Rojas & Thail Walker, *Sex Offender Registration System Failing; Police Say It's Outdated, Ignored — and Little Hindrance*, S.F. CHRON., Apr. 4, 1994, at A1.

43. According to one report by California Department of Justice officials, the state's forty-seven-year-old registration law is "routinely ignored by nearly 80 percent of offenders." *Id.*



another reason legislators favor what they see as a more permanent and effective solution, namely, public notification statutes.

### III. CURRENT LEGISLATION

#### A. FEDERAL LEGISLATION: THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

##### 1. *Federal Sex Offender Registration Requirements*

On September 12, 1994, the Violent Crime Control and Law Enforcement Act of 1994<sup>44</sup> was enacted. Title XVII of the Federal Crime Act requires people who are convicted of criminal offenses against minors or other sexually violent offenses to register with state law enforcement agencies.<sup>45</sup> These offenders must register upon release from prison, or as a condition of parole, supervised release, or probation.<sup>46</sup> Child molesters must register for ten years from the time they are released from prison.<sup>47</sup> Sexually violent predators<sup>48</sup> must register for life, unless they are found to no longer suffer from the mental or personality disorder that would make them commit sexually violent offenses.<sup>49</sup> Registration is subject to annual verification for those convicted of crimes against children<sup>50</sup> and quarterly verification for sexually violent predators.<sup>51</sup>

##### 2. *Federal Public Notification Provisions*

The Federal Crime Act sets forth guidelines for release of the information collected by the sex offender registration program.<sup>52</sup> Although the information is to be treated as "private data,"<sup>53</sup> the statute allows for the following:

- (1) such information may be disclosed to law enforcement agencies for law enforcement purposes; and

44. Pub. L. No. 103-322, 108 Stat. 1796 (1994) [hereinafter "Federal Crime Act"].

45. Title XVII, subtitle A, of the Federal Crime Act.

46. *Id.* § 170101(b). Of particular note is the fact that the Federal Crime Act requires registration of sex offenders who are released from prison regardless of whether they are on parole. Thus, even if an offender has served his full sentence and 'paid his dues' to society, federal law still requires that he register as a convicted sex offender and possibly be subjected to public notification under § 170101(d) of the Federal Crime Act. This provision may give rise to double jeopardy claims. *But cf.* LA. CODE CRIM PROC. ANN. art. 895(H) (West Supp. 1994) (state notification statute that applies only to those offenders on probation or parole).

47. Federal Crime Act § 170101(b)(6)(A).

48. A person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory, sexually violent offenses. *Id.* § 170101(a)(3)(C). The statute defines "predatory" as "an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization." *Id.* § 170101(a)(3)(E).

49. *Id.* §§ 170101(a)(1)(B), 170101(b)(6)(B).

50. *Id.* § 170101(b)(3)(B).

51. Federal Crime Act § 170101(b)(3)(B).

52. *Id.* § 170101(d).

53. *Id.*

- (2) such information may be disclosed to government agencies conducting confidential background checks; and
- (3) the designated State law enforcement agency . . . *may release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.*<sup>54</sup>

The broad, non-specific power allowing law enforcement agencies to disclose information regarding registered offenders in order to protect the public is similar to Washington's notification statute.<sup>55</sup> However, while Washington law enforcement officials have developed classifications and suggested guidelines for individual counties to use regarding public notification of sex offenders,<sup>56</sup> the Federal Crime Act provides no such guidelines. Washington's guidelines provide for a three-tiered ranking of offenders based upon their likelihood of re-offense.<sup>57</sup> The level and degree of notification to be made to the public is based upon the individual offender's rating.<sup>58</sup>

In the absence of similar classifications or guidelines, the potential for abuse and disparate treatment of various offenders when it comes to public notification is much greater under the Federal Crime Act than under Washington's statute, thereby making the Federal Crime Act more vulnerable to judicial challenge. As one commentator noted,

[a] uniformly enacted, three-level system, under which information is *released only on those offenders who have refused all treatment and do not acknowledge their problems*, allows communities to receive the information they need while still providing offenders who recognize their need for treatment with the opportunity for a 'fresh start.'<sup>59</sup>

The Federal Crime Act also provides immunity for "law enforcement agencies, employees of law enforcement agencies, and State officials" who act in good faith with regard to the release of information.<sup>60</sup> An immunity provision similar to the one in the Federal Crime Act is also in many of the state notification statutes.<sup>61</sup> Why is it necessary to provide this immunity to officials—unless, the legislators enacting these community notification statutes anticipate that the release of this information will harm someone?

Finally, all states must implement the registration program set forth in the Federal Crime Act within three years from the date of its enact-

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54. *Id.* § 170101(d)(1)-(3) (emphasis added).

55. *See supra* note 20.

56. *See infra* note 82.

57. *Id.*

58. *Id.*

59. Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War On Crime*, 28 GA. L. REV. 729, 746 (1994) (emphasis added).

60. Federal Crime Act § 170101(e).

61. *See, e.g.*, WASH. REV. CODE ANN. § 4.24.550(3) (West Supp. 1994).

ment.<sup>62</sup> Any state that fails to comply with the provisions will be ineligible for ten percent of funds that it would normally receive under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>63</sup> Those monies that are not distributed for failure to comply with the statute will be redistributed to states that do comply.<sup>64</sup>

## B. STATE LEGISLATION

### 1. Registration Statutes

Most states have already enacted provisions for registration of sex offenders.<sup>65</sup> Some of these laws have been on the books for decades.<sup>66</sup> An example of a fairly typical registration statute is California's Sex Offender Registration Act of 1947.<sup>67</sup>

#### a. California's Registration Act

The California Registration Act applies to anyone convicted of any sexual offense, including rape and child molestation.<sup>68</sup> Convicted sex offenders have fourteen days from the time of their release from prison to register with the police.<sup>69</sup> Sex offenders must re-register every year within ten days of their birthday.<sup>70</sup> Registration is for life, and if the offender's duty to register is based on a misdemeanor conviction, failure to register is a misdemeanor punishable by up to one year in jail.<sup>71</sup> If an offender's duty to register is based upon a felony, his failure to register makes him "guilty of a felony punishable by imprisonment in the state prison for 16 months, or two or three years."<sup>72</sup> Juvenile sex offenders must register under this statute until age twenty-five.<sup>73</sup>

Several states, including California, that have enacted statutes requiring sex offender registration have amended their statutes to fix perceived problems, respond to public pressure, and repair schemes that have been challenged in court.<sup>74</sup> This process is on-going and has begun to include the adoption of public notification provisions.

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62. Federal Crime Act § 170101(f)(1).

63. *Id.* § 170101(f)(2)(A). *See also* 42 U.S.C. 3765 (Omnibus Crime Control and Safe Streets Act of 1968).

64. Federal Crime Act § 170101(f)(2)(B).

65. At least 25 states have registration acts and 16 others have considered or are currently considering such legislation. Houston, *supra* note 59, at 731 and nn.43-44 (lists enacted and pending state statutes).

66. *See, e.g.*, CAL. PENAL CODE § 290 (West 1988 & Supp. 1994) (originally enacted in 1947) [hereinafter "California Registration Act"].

67. *Id.*

68. *Id.* § 290(a).

69. *Id.*

70. *Id.*

71. CAL. PENAL CODE §§ 290(a) and (g)(1) (West 1988 & Supp. 1994).

72. *Id.* § 290(g).

73. *Id.* § 290(d)(6).

74. *See, e.g., supra* note 4 and *infra* notes 83-85 and accompanying text.

## 2. Notification Statutes

### a. California's Notification Provisions

Until 1994, California's sex offender registration law was fairly typical of other states' registration laws in that it did not provide for disclosure of information obtained in the registration program to the general public. However, on September 26, 1994, the governor of California approved a revision of section 290 that requires the state's Department of Justice to operate a 1-900 telephone number service whereby people can call to inquire whether a particular person is a registered child molester by providing the name of the suspected individual.<sup>75</sup> The law also provides that directories of the worst habitual sexual offenders be made available to the public by sheriff and police stations.<sup>76</sup> The revenue from the 1-900 service will pay for public directories that will contain photographs and other information pertaining to registered sex offenders.<sup>77</sup> Addresses are not provided by the phone service or the public directory.<sup>78</sup> California's 1-900 number is only one example of notification statutes that are currently in effect or are being considered for passage.<sup>79</sup>

### b. Washington State's Sexual Predator Legislation

Washington pioneered the public notification laws in 1990, in large part in response to the brutal attack by Earl Shriver on a seven-year-old boy.<sup>80</sup> The Washington statute provides that "[p]ublic agencies are authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection."<sup>81</sup> The law allows for varying degrees of notification based on an elaborate system of rating sex offenders.<sup>82</sup>

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75. Child Protective Act of 1994, ch. 867, 1994 Cal. Legis. Serv. 867 (A.B. 2500) (West) (Sept. 26, 1994) (to amend and be codified as CAL. PENAL CODE § 290.4).

76. *Id.* § 290.4(b)(3).

77. *Id.* § 290.4(a)(4)(A).

78. *Id.* §§ 290(a)(2) and (b)(5).

79. *See, e.g., supra* notes 17, 19, & 20.

80. The boy was riding his bike through the woods near his home when Shriver attacked him. The child survived to accuse Shriver despite being raped, stabbed, choked, and sexually mutilated. Shriver had been in prison for over a decade for the kidnapping and rape of two 16-year-old girls and had a "24-year history of sexual violence." Gayle M.B. Hanson, *Experts Vexed at What To Do With Sex Offenders; Authorities Try New Methods For Tracking Them*, WASH. TIMES, June 6, 1994, at A8.

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

82. Under the law, each police department decides what information to release and to whom. The Washington Association of Sheriffs and Police Chiefs developed a proposed guide that sets rules by which most departments abide. The guide provides that Level 1 offenders, who are determined to be the least likely to re-offend, can be the subject of internal bulletins to police departments. Schools and community groups are notified as to Level 2 offenders, who are judged to be at a higher risk of re-offense, and Level 3 offenders, judged to be the most dangerous offenders, are subject to full public notification to whole neighborhoods and the local media. *See* Mary Anne Kircher, *Current Public Law and Policy Issues - Registration of Sexual Offenders: Would Washington's Scarlet Letter Approach Benefit Minnesota?*, 13 HAMLIN J. PUB. L. & POL'Y 163 (1992). *See generally* Hanson, *supra* note 80, at A8.

It is important to note that in 1994 Washington revised its pioneering notification statute in response to problems and public concern with the timing of the public notification regarding the release of sex offenders:<sup>83</sup>

The legislature finds that members of the public may be alarmed when law enforcement officers notify them that a sex offender who is about to be released from custody will live in or near their neighborhood. The legislature also finds that if the public is provided with adequate notice and information, the community can develop constructive plans to prepare themselves and their children for the offender's release.<sup>84</sup>

Thus, Washington now provides that if police choose to notify the public about the impending release of a convicted sex offender, they must do so at least fourteen days before the offender's release.<sup>85</sup> This additional time requirement appears to promote sex offender dumping—the notion that if given enough time, a community can attempt to keep the offender from coming to their neighborhood, thereby forcing the released offender to go to some other community, namely, places with less stringent notification laws.

### c. Louisiana's Sex Offender Legislation

Louisiana requires registration and public notification of sex offenders.<sup>86</sup> The law provides some of the most liberal provisions in the country regarding public access to sex offender registration information, however, the notification provisions only apply to offenders on probation or parole.<sup>87</sup> The notification portion sets forth specific steps to be taken by the sexual offender, including placing an ad in a local newspaper.<sup>88</sup> In addition, the offender must mail a notice to all neighbors within a one-mile radius in rural areas and a three-block radius in urban areas.<sup>89</sup> Furthermore, the law specifically empowers courts to use their discretion and order other forms of notice, including signs, bumper stickers, handbills, or labeled clothing.<sup>90</sup>

### d. New Jersey's Megan's Law

New Jersey's law, enacted on October 31, 1994, requires registration and public notification of sex offenders.<sup>91</sup> The law is similar to Washington's notification statute<sup>92</sup> in that both set forth a three-tiered system of notification based on an analysis of the sex offender's risk and likelihood

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83. 1994 Wash. Legis. Serv. Ch. 129 (S.H.B. 2440) (West 1994).

84. *Id.* § 1.

85. *Id.*

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

87. *Id.* at art. 895(H).

88. *Id.*

89. *Id.*

90. *Id.* at art. 895(H)(2) (West 1993).

91. Act of Oct. 31, 1994, ch. 128, 1994 N.J. S.B. 14.

92. *See supra* note 82.

of re-offense.<sup>93</sup> The statute provides that the Attorney General, after consultation with an advisory council, shall develop "guidelines and procedures for the notification required pursuant to the provisions of the [law]."<sup>94</sup> The guidelines will also include the identification of factors that are relevant to determining the risk of re-offense.<sup>95</sup> Deborah Poritz, New Jersey's Attorney General, announced on December 21, 1994, that the law will require registration of "both current or formerly convicted sex offenders" and that police will notify neighbors of only those sex offenders deemed to be at high risk for re-offense.<sup>96</sup> However, in what has been called a "surprise," even sex offenders designated as moderate risks, a much larger group than those designated as high risk, will be subject to notification of school officials and church and community group leaders.<sup>97</sup> Only law enforcement officials will be notified of low risk offenders.<sup>98</sup>

It is important to note that New Jersey's notification law has been criticized for the speed in which it was passed<sup>99</sup> and has already been the subject of court challenges.<sup>100</sup> Only two days after the law went into effect, a judge granted an injunction against the application of the law as to one particular offender.<sup>101</sup>

#### IV. RECENT COURT DECISIONS REGARDING CONSTITUTIONALITY OF SEX OFFENDER STATUTES

The constitutional challenges being made to public notification statutes include: claims that the newly enacted statutes are a form of *ex post facto* punishment, constitute cruel and unusual punishment, deny equal protection, and violate due process rights. Because many state constitutions contain express rights to privacy, challenges on this ground also appear likely.

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93. New Jersey's statute explicitly sets forth factors that the Attorney General should consider when determining which sex offenders shall be subjected to public notification, while Washington's classification system was developed solely by law enforcement officials. See Act of Oct. 31, 1994, ch. 128, 1994 N.J. S.B. 14 § 3.a. - 3.e.

94. *Id.*

95. *Id.* The statute sets forth several factors to include in, but not limit, the evaluation of the likelihood of re-offense. *Id.* § 3.b. Among these factors are whether the offender is released on probation or parole; whether he is receiving counseling, treatment, or therapy; the physical condition of the offender, such as advanced age or illness; whether the offender served the maximum term; whether a weapon was used in the offense; the relationship between the victim and the offender; whether the offender's behavior is characterized as repetitive or compulsive; the number of sexual offenses the offender has been convicted of; and the offender's recent behavior or intent to commit additional crimes. *Id.*

96. *Strict Rules Released on Registering Sex Offenders*, N.Y. TIMES, Dec. 21, 1994, at B6.

97. *Id.*

98. Act of Oct. 31, 1994, ch. 128, 1994 N.J. S.B. 14, § 3.c.(1).

99. See *infra* discussion at Part IV.D.

100. *Id.*

101. *Id.* See also *supra* notes 9-13 and accompanying text.

A. *STATE V. WARD*: WASHINGTON'S STATUTE REQUIRING SEX OFFENDERS TO REGISTER IS CONSTITUTIONAL

In *State v. Ward*<sup>102</sup> the Washington Supreme Court held the state's sex offender registration statute<sup>103</sup> and public notification statute<sup>104</sup> were constitutional.<sup>105</sup> The court reviewed the legislative purpose of the statutes and found that it was regulatory and not punitive.<sup>106</sup> Because the laws are not punitive, the court held that they did not violate *ex post facto* principles as applied to persons who committed offenses before the laws' enactment.<sup>107</sup> Furthermore, while the laws may be "burdensome" on offenders,<sup>108</sup> they do not violate sex offenders' due process or equal protection rights.<sup>109</sup>

B. CASES CONCERNING STATUTES THAT REQUIRE REGISTRATION ONLY

Not only did the Washington Supreme Court hold in *Ward* that the state's sexual predator statute did not violate constitutional provisions,<sup>110</sup> two other state supreme courts have held the same.<sup>111</sup> However, these two cases differ from *Ward* in that they deal with statutes that explicitly limit disclosure of information to the public regarding sex offenders.<sup>112</sup>

In *State v. Noble*<sup>113</sup> the Arizona Supreme Court reviewed the question of whether Arizona's statute requiring sex offenders to register<sup>114</sup> violates the *ex post facto* clause of the United States and Arizona Constitutions. In Arizona, the registration information is available to employers and social service agencies in certain circumstances where a clearly regulatory purpose is served.<sup>115</sup> These situations are specifically set forth by statute.<sup>116</sup>

102. 869 P.2d 1062 (Wash. 1994).

103. WASH. REV. CODE ANN. § 9A.44.130-.140.

104. *See id.* § 4.24.550.

105. *Ward*, 869 P.2d at 1064.

106. *Id.* at 1065-69.

107. *Id.* at 1066-72.

108. *Id.* at 1068.

109. *Id.* at 1076-77.

110. *Ward*, 869 P.2d at 1077.

111. *State v. Noble*, 829 P.2d 1217 (Ariz. 1992); *People v. Adams*, 581 N.E.2d 637 (Ill. 1991) (both holding that sex offender registration laws do not "punish" for purposes of determining constitutional violations).

112. *See, e.g.*, ARIZ. REV. STAT. ANN § 41-1750(b)(8)-(9), (11), (13) (1994) (information regarding convicted sex offenders may be released to: governmental licensing agencies for evaluating licensees; non-criminal justice agencies for evaluating prospective employees, public officials, or volunteers; the department of economic security and the superior court for determining the fitness of prospective custodians of juveniles; and prospective employers and volunteer youth service agencies whose activities involve regular contact with minors).

113. 829 P.2d 1217 (Ariz. 1992).

114. ARIZ. REV. STAT. ANN. § 13-3821 became effective on July 27, 1983.

115. *Noble*, 829 P.2d at 1222; *see also* ARIZ. REV. STAT. ANN. § 41-1750(B).

116. *See supra* note 112.

The *Noble* court decided that, although registration of sex offenders has *traditionally* been seen as punitive, "the provisions in the statute limiting access to the registration information significantly dampen its stigmatic effect."<sup>117</sup> The court states that the registration requirement serves the "traditional deterrent function of punishment" in that a convicted sex offender may be less likely to reoffend because he knows that law enforcement officials can easily determine his whereabouts.<sup>118</sup> However, the "overriding purpose" of the registration statute, to facilitate the location of child molesters by police, is regulatory in nature and is unrelated to punishment for past offenses.<sup>119</sup> The potentially punitive effects of the statute are mitigated as "[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*."<sup>120</sup> Although the decision was "close", the Arizona Supreme Court held that the registration requirement is not punishment and, consequently, "retrospective application of the statute . . . does not violate the ex post facto clause of the United States or Arizona Constitution."<sup>121</sup>

In *People v. Adams*<sup>122</sup> the Illinois Supreme Court held that registration under the Illinois Habitual Child Sex Offender Registration Act<sup>123</sup> does not violate the Eighth Amendment,<sup>124</sup> due process,<sup>125</sup> or equal protection rights under the state and federal constitutions.<sup>126</sup> To determine whether a statute imposes cruel and unusual punishment in violation of the Eighth Amendment, the court first determined that the duty to register required by the statute is not punitive in nature, and therefore, does not constitute punishment under the Eighth Amendment.<sup>127</sup>

The *Adams* court relied on the Supreme Court's determination in *Trop v. Dulles*<sup>128</sup> that the "severity of the disability as well as all the circumstances surrounding the legislative enactment may also be relevant factors in concluding whether a disability is penal."<sup>129</sup> The court found that

117. *Noble*, 829 P.2d at 1222-23 (emphasis added).

118. *Id.* at 1223.

119. *Id.*

120. *Id.* (emphasis added). This phrase hints that the court's decision might be different if the statute required public disclosure.

121. *Noble*, 829 P.2d at 1223.

122. 581 N.E.2d 637 (Ill. 1991).

123. ILL. REV. STAT., ch. 38, para. 221 *et seq.* (1987).

124. *Adams*, 581 N.E.2d at 640.

125. *Id.* at 642.

126. *Id.*

127. *Id.* at 640-41.

128. 356 U.S. 86 (1958).

129. *People v. Adams*, 581 N.E.2d 637, 640 (Ill. 1991) (citing *Trop v. Dulles*, 356 U.S. 86, 96 (1958)). In the context of Fifth and Sixth Amendment violations, the Supreme Court applies various tests to determine if a law is regulatory or penal in nature. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). However, the *Adams* court pointed out that the *Kennedy* tests were only used when "conclusive evidence of legislative intent is unavailable." *Adams*, 581 N.E.2d at 641. Because the legislative intent behind the Illinois registration act was "clearly nonpenal in nature," the *Adams* court held that the *Kennedy* tests did not apply. *Id.*



the registration requirement "[fell] short of being [a] severe" disability and was "an innocuous duty compared to the potential alternative of spending an extended period of years in prison."<sup>130</sup> Furthermore, "the circumstances surrounding the enactment of the statute" revealed "a legislature deeply concerned with the proliferation of sex offenses against children."<sup>131</sup> The court went on to note that the legislature made no effort to correct the behavior of pedophiles and did not include any provisions requiring remedial measures, such as counseling.<sup>132</sup> The "absence of such corrective measures . . . while not controlling, further [impelled the court] to conclude" that the enactment of the statute was nonpenal in nature.<sup>133</sup>

Of particular note is the *Adams* court's finding that even if the registration requirement did constitute punishment, it does not rise to the level of cruel and unusual punishment because of the fact that the "law enforcement community is *prohibited from disseminating the information to the public at large* on the pain of criminal sanctions."<sup>134</sup> The court goes on to say that "[t]he existence of a 'stigma' requires that the knowledge of the registrant's past transgressions be conveyed to the general public."<sup>135</sup>

The *Adams* court further held that the Illinois registration statute did not violate child sex offenders' rights to due process.<sup>136</sup> The basis for this holding was the court's determination that a rational relationship existed between the disability imposed by the statute, registration of sex offenders, and the desired objective of the statute—to protect children.<sup>137</sup>

Finally, in response to the defendant's claim that the Illinois registration statute violated principles of equal protection, the *Adams* court pointed out that the legislature intended to "[protect] children from habitual child molesters" or to prevent the "*direct* victimization of children."<sup>138</sup> Thus, the fact that offenders whose "motive[s] may be profit-oriented rather than sex-oriented," such as child pornographers or panderers were not covered by the statute, did not give rise to an equal protection violation.<sup>139</sup>

130. 581 N.E.2d at 640-41.

131. *Id.* at 641.

132. *Id.*

133. *Id.*

134. *Id.* (emphasis added).

135. *Adams*, 581 N.E.2d at 641. By making the point that disclosure under the Illinois registration statute is restricted from the public, and thus does not create a "stigma" that may rise to the level of cruel and unusual punishment, it appears as though the *Adams* court may have held differently if the Illinois statute contained public notification provisions.

136. *Id.* at 642.

137. *Id.* "When a statute bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective, it will be upheld." *Id.* (citing *People v. Lindler*, 535 N.E.2d 829, 835 (Ill. 1989)).

138. *Id.* (emphasis added).

139. *Adams*, 581 N.E.2d at 642. The court points out that if the actions of child pornographers or panderers rise to the "narrowly tailored category of child molester," then they too would fall under the Illinois registration statute. *Id.*

### C. COMMITMENT STATUTE FOUND UNCONSTITUTIONAL

An alternative to releasing child molesters is extended incarceration through various methods, including longer prison sentences and civil commitment. The latter method may not withstand judicial scrutiny. For example, on July 21, 1994, Circuit Judge Frankel in Madison, Wisconsin, held that Wisconsin's new sexual predator statute, which requires civil commitment of certain sex offenders once they have served their prison sentence, was unconstitutional because it punishes offenders for a crime they are likely to commit, not one that they actually committed.<sup>140</sup>

### D. CHALLENGES AND OPPOSITION TO NOTIFICATION LAWS

Only two days after Megan's Law<sup>141</sup> became effective, a federal district judge ordered a temporary injunction to prevent the enforcement of a central part of the law—public disclosure—as applied to a convicted rapist.<sup>142</sup> The convicted rapist, who had been released on January 1, 1995, the day the law became effective, was the first to challenge New Jersey's registration and notification statute.<sup>143</sup> Although District Court Judge John W. Bissell "expressed no misgivings" about the registration requirement, he thought the notification provisions of the law could have a "punitive impact" upon the released offender<sup>144</sup> and would subject the offender to "stigma and ostracism."<sup>145</sup> The judge also felt that disclosure of the information would harm the released offender more than non-disclosure would harm the community.<sup>146</sup>

In addition to his concerns regarding the punitive effects of the notification law on offenders who had already been punished,<sup>147</sup> Judge Bissell was disturbed by the quasi-judicial nature of the guidelines and procedures that New Jersey's county prosecutors use to determine which of-

140. Rogers Worthington, *States Move to Commit Sex Offenders After Jail Terms Served*, DALLAS MORNING NEWS, Sept. 18, 1994, at A9.

141. Act of Oct. 31, 1994, ch. 128, 1994 N.J. S.B. 14. See *supra* Parts I and III.B.2.d.

142. *Convicted Rapist Wins Right to Privacy in New Jersey* (CNN television broadcast, Jan. 3, 1995) (transcript #1040-4 available in LEXIS, News library). The offender was convicted of kidnapping and raping a 20-year-old woman and served 11 years of a 20-year sentence for those crimes. *Id.* According to his attorney, Ronald Chen, the offender has no history of abusing children. *Id.*

143. *Id.*; *Judge Blocks 'Megan's Law' AP-Megan's Law*, *supra* note 10. See *supra* notes 9-13 and accompanying text for a discussion of the challenges to the law.

144. Robert Hanley, *Judge Curbs Law on Sex Offenders*, N.Y. TIMES, Jan. 4, 1995, at A1.

145. *Nationline*, USA TODAY, Jan. 4, 1995, at 6; *Judge Blocks 'Megan's Law' AP-Megan's-Law*, *supra* note 10.

146. *Id.*; Hanley, *supra* note 144, at A1. Judge Bissell, a father himself, sympathized with the intentions of the legislature in passing the notification statute; however, his concern with ensuring the constitutionality of crime measures was just as important. Inskip, *supra* note 9.

147. Hanley, *supra* note 144, at A1. According to Judge Bissell, the disclosure of information, including the offender's name, address, physical description, photograph, place of employment, car's license plate number, and nature of his crime, could stigmatize the offender, and, thus, "could be viewed as unconstitutional 'ex post facto' punishment because [the offender] had already served his full sentence . . ." *Id.*

fenders will be subjected to public disclosure and by the breadth of the information's dissemination.<sup>148</sup> He felt that because of the quasi-judicial nature of prosecutors' classification of convicted sex-offenders, an alleged offender had a constitutional right to a hearing in order to question the prosecutor's determination in his case.<sup>149</sup>

Judge Bissell's recent decision raises at least three issues regarding Megan's Law. First, does the law apply to offenders whose victims were not children?<sup>150</sup> Second, is the law an unconstitutional *ex post facto* punishment? Third, due to the quasi-judicial nature of the sex offender classification scheme in effect in New Jersey, are released offenders entitled to a hearing on the findings of the county prosecutors?

Another lawsuit has been filed in New Jersey challenging Megan's Law on behalf of several other sex offenders who are currently "living in communities without incident" after serving their sentences.<sup>151</sup> According to attorney John Furlong, who represents these individuals, "[w]e have a fundamental problem in America with punishing people twice for the same crime, and that issue seems to be lost on the proponents of Megan's Law."<sup>152</sup>

In addition, the American Civil Liberties Union has opposed the laws in both Washington and Louisiana. Denise Le Boeuf of the Louisiana ACLU believes that the notification laws imply "there is a certain kind of criminal who is unredeemable[.] It's the mark-of-Cain notion. We generally don't punish classes of people because we have the notion that people can reform."<sup>153</sup>

Disagreement over whether reform by sex offenders is either possible, or even consistently identifiable when it does exist, lies at the heart of the debate between those in favor of notification statutes and those opposed to them. Legislative enactments thus far have failed to address this issue

148. *Id.* Act of Oct. 31, 1994, ch. 128, 1994 N.J. S.B. 14. In New Jersey, the county prosecutors determine whether the released offender is at a low, moderate, or high risk to commit another sexual offense and distribute information based on that assessment. *Id.* See also *supra* Part III.B.2.d.

149. Hanley, *supra* note 144. In this case, the offender was classified as a moderate risk by the Passaic, New Jersey, County Prosecutor. *Id.* Thus, information would go to "the police, the victim, educational officials, and to any community or civic groups that formally ask the police for it." *Id.* See also Act of Oct. 31, 1994 ch. 128, 1994 N.J. S.B. 14.

150. It should be kept in mind that Megan's Law was rushed through in response to the public's outcry over recent molestations and murders of children in New Jersey. See *supra* Part I. According to one report:

Some critics claim it's the way the legislature drafted it that causes all the trouble. Megan's Law was hastily passed in an election season by lawmakers who declared it an emergency measure. When critics called [it] unconstitutional, the State Assembly Speaker, who happened to be running for the U.S. Senate, simply said he would fix any problems later.

Inskip, *supra* note 9. It appears as if the time to fix those problems time came quickly, only two days after the law was passed.

151. *CNN News*, *supra* note 142.

152. *Id.* See *supra* notes 9-13 for a discussion of recent challenges to Megan's Law, including one that has reached New Jersey's Supreme Court.

153. Katherine Seligman, *Molesters' "Scarlet Letter" Bill; Is Public Disclosure Invasion of Privacy?*, S.F. CHRON., Mar. 6, 1994, at A1.

and, in doing so, may have opened a Pandora's box of unintended consequences.

## V. ANALYSIS AND CONSTRUCTIVE CRITICISM OF STATUTES

### A. THE EFFECT OF NOTIFICATION LAWS ON PREVENTING SEX CRIMES: DO THEY PROMOTE A FALSE SENSE OF SECURITY?

There is no solid evidence that notification laws actually help lower the crime rate, in fact they may do just the opposite.<sup>154</sup> Furthermore, these laws, which appear to be the product of public hysteria and lawmakers' need for political survival,<sup>155</sup> may also promote a false sense of security.<sup>156</sup>

Prior to the passage of Megan's Law,<sup>157</sup> the state's attorney general, Deborah T. Poritz, spoke before a state senate committee hearing on a number of bills aimed at cracking down on sex offenders, including the bill that would require registration and community notification of convicted sex offenders.<sup>158</sup> After praising both the senate and assembly for their action in advancing the measures, Poritz voiced some words of caution regarding the bill's potential effects on lowering the incidence of sexual crimes: "The system cannot guarantee protection[.] We do not want to send a message that gives a false sense of security."<sup>159</sup>

Robert Sheley, a Tulane University criminologist, referred to the registration and notification laws as symbolic "reassurance laws."<sup>160</sup> Although they focus attention on child molestation, they may promote a false sense of security and will probably have little actual impact on the incidence of child abuse.<sup>161</sup> At this time, there is no solid research on whether the notification laws in Washington or Louisiana prevent recidivism or pro-

154. A common sentiment among experts is that "[t]he stress of being branded a pariah' might drive some offenders to commit more crimes, [t]hus, we may unwittingly [be] increasing the likelihood that some offenders reoffend.'" Frank Reeves, *Assault Victims Ask: Register Sex Offenders Federal Crime Law May Replace Proposed Pennsylvania Statute*, PITTSBURGH POST-GAZETTE, Sept. 14, 1994, at B4 (quoting Robert Prentky, the clinical director of Joseph J. Peters Institute, a mental health agency that treats sex offenders and their victims).

155. For example, the New Jersey legislator who declared an emergency and scheduled the vote on the passage of New Jersey's notification law within weeks of its introduction—without time for the usual committee hearings to be held—was running for the U.S. Senate at the time. See *infra* notes 167-72 and accompanying text.

156. Even some police and prosecutors are concerned that parents will view these laws as "automatic protection for children." Steve Wheeler, *Sex Laws Protection Not Automatic*, SUNDAY ADVOCATE (Baton Rouge, La.), Nov. 6, 1994, at B1. Louisiana chief sex crimes prosecutor Sue Bernie says the registration and notification law "may give a false sense of security." *Id.*

157. Act of Oct. 31, 1994, ch. 128, 1994 N.J. S.B. 14 (codified at N.J. Stat. Ann. §§ 2C:7-1 to 2C:7-5 (West Supp. 1995)).

158. Kimberly J. McLarlin, *Trenton Races to Pass Bills on Sex Abuse*, N.Y. TIMES, Aug. 30, 1994, at B1.

159. *Id.* (internal quotation marks omitted).

160. Seligman, *supra* note 153, at A1.

161. *Id.*

tect the public.<sup>162</sup> Ann Cohn Donnelley, head of the National Committee for the Prevention of Child Abuse, says that, although the laws are not a bad idea, "most molesters are never found guilty. Therefore, they're never in jail. [The laws] may prevent a few cases, but in terms of the big picture, it won't help."<sup>163</sup>

Another concern is that notification requirements may cause sex offenders considering a guilty plea to demand a trial instead in an attempt to avoid the difficulties they will face as a publicly known sex offender.<sup>164</sup> Victims would be affected in that more would have to testify against their attackers at trial.<sup>165</sup> It is not uncommon for many victims to drop the charges against their assailants rather than face the publicity and difficulties of trial, including taking the witness stand. Thus, fewer convictions for sex offenses may result.

#### B. QUESTIONS ARISE REGARDING THE SPEED IN WHICH MANY OF THE BILLS ARE BEING PASSED

In New Jersey, the package of bills, which included Megan's Law, that toughened laws regarding sex offenders was passed by the state assembly without customary committee hearings on the bills.<sup>166</sup> Several legislators, concerned with the constitutionality of the bills and other potential problems that were not tested and discussed, criticized the lack of hearings and debate on the bills.<sup>167</sup> Public furor over Megan Kanka's rape and murder led the assembly to approve the bills exactly one month after Megan's death,<sup>168</sup> and the bill was enacted into law only two months later.<sup>169</sup> In response to criticisms that the law was passed too quickly, New Jersey Assembly Speaker Chuck Haytaian<sup>170</sup> said, "I do not think you can ever move quickly enough when it comes to the safety of our children."<sup>171</sup>

Critics in Kansas have the same questions and concerns—that the law was passed too quickly—over their state's new notification law, which makes a file containing the names and addresses of released sex offenders

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162. *Id.* (quoting Robert Sheley, Tulane University criminologist).

163. *Id.*

164. Wheeler, *supra* note 156, at B1 (quoting Louisiana prosecutor Sue Bernie).

165. *Id.*

166. McLarlin, *supra* note 158, at B1.

167. *Id.*

168. *Id.*

169. *See supra* Part III.B.2.d.

170. Haytaian declared a "legislative emergency" in August 1994, when the package of bills was introduced. *Megan's Law Signed By Governor*, RECORD (N.J.), Nov. 1, 1994, at A1. In addition, he scheduled the bills for a vote in late August 1994, without scheduling time to hold standard committee hearings on the bills. *Id.* Because Haytaian was running for the U.S. Senate at the time, he may have been politically motivated to push the law through quickly. *Id.*

171. *Id.* This statement was made on October 31, 1994, only days before the U.S. Senate elections were held. *See id.*

public.<sup>172</sup> The notification law was passed in conjunction with another law that requires mandatory civil commitment of dangerous sexual predators upon their release from prison.<sup>173</sup> Critics assert that the legislature pushed the laws through on a “wave of emotion” after a young woman was murdered by a convicted rapist.<sup>174</sup> The speed with which the law was passed resulted in a vaguely drafted law that has created numerous problems. Confusion has arisen under the new law as to who must register, because the crimes for which registration is required are not listed.<sup>175</sup> Even more critical is the fact that the law does not require disclosure of the circumstances for which each offender was convicted.<sup>176</sup> Thus, a young man who had consensual sex with someone under age is not differentiated from a child molester who rapes and murders his victims.<sup>177</sup>

### C. FAIRNESS ISSUES

Kansas’s new notification law is one of the harshest in effect. Although it was modeled after Washington’s law, Kansas’s law is now more restrictive on whose names are disclosed.<sup>178</sup> In Kansas *anyone* who is convicted of a felony sex crime after April 1994—not just those who are considered predatory or dangerous—must register, and their name will be placed on a list made available to the public.<sup>179</sup> Because of the nature of the list, a “20-year-old who has *consensual* sex with someone underage” is indistinguishable from a convicted child molester who raped and murdered his victim.<sup>180</sup>

Jack Britton was that twenty-year-old. He met his ‘victim’ at a bar. She was drinking beer, so he never thought to ask her age. She turned

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172. Tony Rizzo, *Relatives Fall Victim to Sex Laws; Offenders’ Families Have Been Harassed By Taunts and Hate Mail*, KANSAS CITY STAR, Nov. 1, 1994, at A1. Kansas’s law is different from other notification laws in that *anyone* convicted of a felony sex crime after April, 1994, must register—not just those who are considered predatory or dangerous. The offender’s name is then kept on a list that is made available to the public for 10 years for one-time offenders, and for the lifetime of repeat offenders. *Id.* Some news organizations even publish the list of names. *Id.* See 1994 Kan. Sess. Laws 107 (to amend and be codified at KAN. STAT. ANN. §§ 22-4904, 22-4906(a)-(b), and 45-221(a)(29)(C)).

173. Rizzo, *supra* note 172, at A1.

174. *Id.*

175. *Id.* One man, whose family has since been harassed and received hate mail, registered—even though, as it turned out, he did not have to because he was convicted before the law took effect. *Id.* Although his name was eventually removed from the list, it had already been made public. *Id.*

176. Rizzo, *supra* note 172, at A1.

177. *See id.*

178. *Id.*

179. *See supra* notes 172 and accompanying text. Even the National Center for Missing and Exploited Children, which advocates lifetime registration for sex offenders, opposes laws like the one in Kansas that allow for direct public inspection of the registration list. *See Molester I.D., More States Join Crusade to Register and Track Sex Offenders*, CINCINNATI ENQUIRER, May 10, 1994, at A6. The Center does support laws, such as the one in Washington, where police officials decide which offenders are subject to public notification. *Id.*

180. Rizzo, *supra* note 172, at A1 (emphasis added).

out to be fifteen, and Britton was convicted of taking "indecent liberties with a child."<sup>181</sup> Britton does not appear to be alone. "[M]ost offenders who have signed up so far [under Kansas's registration and notification law] are lower-level offenders *who received probation rather than prison* after they were convicted."<sup>182</sup> Their names will go on the list, along with violent sexual predators who possibly raped, mutilated, and murdered their victims. Anyone who sees the lists published by the newspapers will not be able to tell the Jack Brittons from the violent sexual predators.

In Louisiana, a Baton Rouge newspaper reports that a man pled guilty to one count of pornography involving juveniles and to one count of molestation of a juvenile before he realized that he would be subject to Louisiana's stringent notification laws.<sup>183</sup> The man, a professional photographer, was accused in the pornography count of taking "sexually suggestive photographs" of a sixteen-year-old girl.<sup>184</sup> The molestation count was for showing photographs of nude men and women to a fifteen-year-old. The man tried to retract his guilty pleas, claiming that he did not know that he would be subject to the state's sex offender registration laws and that by pleading guilty he had "thrown [his] life away."<sup>185</sup> Louisiana State District Judge Linda Holliday did not allow him to change his plea and said that he was not informed of the notification laws because he had not been sentenced yet.<sup>186</sup> Thus, the man will be treated the same under Louisiana's stringent registration and notification laws as a violent sex offender.

In New Jersey, a group of sex offenders came forward claiming that not all sex offenders are like Jesse Timmendequas, the man charged with Megan Kanka's rape and murder.<sup>187</sup> The men call themselves "recovering" sex offenders who have cooperated with state treatment centers, gone through group and individual therapy sessions, and have learned to control their deviant impulses.<sup>188</sup> They hold jobs and live anonymously as to their crimes at this time. They have served their sentences; many of them have successfully completed their parole period and are considered no longer dangerous by their therapists and parole boards. To them, the notification statutes are a "betrayal."<sup>189</sup> However, even these men feel that offenders like Timmendequas, who did not take advantage of the

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181. *Id.* " 'I'm not one of those sickos who look for children to abuse,' said Britton, who was granted probation and recently registered [to be on Kansas' sex offender list] after serving three months in jail. 'In my situation, I think it's all screwed up.' " *Id.*

182. *Id.*

183. Tim Talley, *Request To Change Plea Denied*, *ADVOCATE* (Baton Rouge, La.) Sept. 21, 1994, at A18.

184. *Id.*

185. *Id.*

186. *Id.*

187. Michelle Ruess, *Offenders Fear Vigilantism; Say Megan's Law Would Do More Harm Than Good*, *RECORD* (N.J.), Sept. 18, 1994, at A4.

188. *Id.*

189. *Id.*

treatment programs or therapy offered, should be subject to registration and notification statutes because they still pose a threat of recidivism.<sup>190</sup>

#### D. WHEN VIGILANCE BECOMES VIGILANTISM

Notification laws, in essence, publically “brand” individuals as sex offenders. By “creating these Scarlet Letter people with brands on them [we are] encouraging a vigilante mentality against them.”<sup>191</sup> A 1993 study by the Institute for Public Policy in Olympia, Washington, “showed that 26 percent of the sex offenders who’d come under the community notification law had been harassed. In 73 percent of the cases where there was harassment, the sex offender’s family also was harassed.”<sup>192</sup>

In Seattle, Washington, sex offender Joseph Gallardo’s house was burned down after his community was notified of his criminal history.<sup>193</sup> Mr. Gallardo was ranked as a “level 3 offender” under Washington’s community notification law.<sup>194</sup> The Sheriff’s Department distributed approximately 1,000 flyers with a photo of Gallardo that a researcher at the Institute for Public Policy in Olympia, Washington, “describes as so scary that it made Gallardo look surprisingly like Charles Manson.”<sup>195</sup> Three days after the flyers went out, Gallardo’s house was burned down.<sup>196</sup> The arsonist has not been caught.<sup>197</sup>

In Texas, Raul Meza was convicted of the rape and murder of an eight-year-old girl.<sup>198</sup> He was sentenced to thirty years in prison but served only eleven due to mandatory early release which is based on actual time served and “good time” gained for good behavior.<sup>199</sup> Upon his release from prison, Meza was run out of six towns by hostile citizens before finally ending up in Austin,<sup>200</sup> where he lived with his mother.<sup>201</sup> Only fourteen months after his release, Meza violated his parole by leaving his house one evening without permission and was returned to prison.<sup>202</sup> Ac-

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190. *Id.*

191. Smith, *supra* note 18, at State section, 1 (quoting Debbie Perkey, regional director for the American Civil Liberties Union, in response to State District Judge Ted Poe’s order that an accused child molester put a sign on the front door of his home warning children to stay away).

192. Seligman, *supra* note 153, at A1. There was one incidence of physical injury to a sex offender in Washington in 1993. *Id.*

193. *Id.*

194. *Id.* See *supra* notes 81-82 and accompanying text.

195. Seligman, *supra* note 153, at A1.

196. In this three-day period, someone enlarged the flyers, making posters, which were then put on telephone poles. The day before Gallardo’s house was set on fire, a community meeting was held by residents, legislators, and psychologists. *Id.*

197. *Id.*

198. Smith, *supra* note 18, at State section, 1.

199. *Id.*

200. *Id.*

201. Fred Bayles, *Supporters of Law Want Sex Crime Records Disclosed*, COM. APPEAL (N.J.), Aug. 8, 1994, at A5.

202. Smith, *supra* note 18, at State section, 1.



ording to his family, Meza became a "caged animal" because of the constant haranguing of victims' rights groups and the media.<sup>203</sup>

A New Jersey man, released from prison on August 29, 1994, was moved to three different locations in less than a month because of protests and demonstrations by local residents.<sup>204</sup> As of September 21, 1994, the parole board had moved him to an undisclosed location. As a result, the local township, where the man originally resided after his release from prison, introduced an ordinance requiring convicted sex offenders to register with the police. All this occurred *prior* to the passage of New Jersey's registration and public notification laws.<sup>205</sup> Unless New Jersey amends its notification statute to provide protection from and punishment for vigilantism, it is likely that released offenders will continue to be driven from one community to another—until they are either caught committing another crime or they quit registering and the system loses track of them.<sup>206</sup>

In Kansas, the family of a man who registered under the state's new notification law was harassed and sent hate mail.<sup>207</sup> According to police, his children were also harrassed and teased by other children. As it turned out, due to the fact that the law, as drafted, was vague, the man was not even required to register under the law.<sup>208</sup> Kansas's Attorney General Bob Stephan said that the laws are a "good start," although not perfect, and that "[i]f our laws are too inconvenient and too tough let [the sex offenders] go somewhere else. If they think Kansas is too mean then they can leave."<sup>209</sup>

This type of mentality will not reduce the recidivism rate of sex offenders. Rather, it makes it more difficult for them to comply with the very laws that have been enacted. Released offenders have to live and work somewhere if there is any hope of lowering the chances of recidivism and avoiding driving the offenders under-ground.

Some states have taken statutory measures to prevent vigilantism from occurring as a result of public notification laws. For example, California's Child Protection Act of 1994<sup>210</sup> requires an automatic five-year enhancement to the sentence of anyone who uses information obtained from the notification services provided by the statute to commit felony vigilan-

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203. *Id.*

204. Michael Casey & Jan Barry, *2 Towns Propose Meagan [sic] Laws; Clifton, Wanaque Target Sex Offenders*, RECORD (N.J.), at C1.

205. See N.J. S.B. 14, 206th Leg., 1st Sess. (1994).

206. California has already taken such preventive measures. See *infra* notes 210-12 and accompanying text.

207. The unsigned note in their mail said, "[w]e are passing the word that you are in the neighborhood. Get out you perverted scum bag." Rizzo, *supra* note 172, at A1.

208. See *id.*

209. *Id.*

210. Child Protective Act of 1994, ch. 867, 1994 Cal. Legis. Serv. 867 (A.B. 2500) (West) (Sept. 26, 1994) (amending CAL. PENAL CODE § 290) (provides for a 1-900 service and public directory as a means of notifying the public of convicted child molesters). See also *supra* Part III.B.2.a.

tism.<sup>211</sup> If the information is used to commit a misdemeanor, the law provides that a fine will be imposed in addition to any other fine or penalty handed down.<sup>212</sup> While the anti-vigilante provisions attempt to ameliorate the potential for vengeance created by informing the public that sexual molesters are in their midst, some law enforcement officials may not be particularly sympathetic to sex offenders' claims of harassment.

#### E. TREATMENT VERSUS BRANDING SEX OFFENDERS

Although sex offenders are likely to have numerous victims and a high recidivism rate, experts still feel that if the right treatment is provided and accepted, many pedophiles are treatable.<sup>213</sup> Ironically, one unintended consequence of public notification laws may be that many offenders who might have been helped through therapy will forego that option.<sup>214</sup> Notification may cause many offenders to avoid treatment, as the price of treatment seems to be registration and possible stigmatization. Furthermore, many offenders will move where registration is perceived to be less onerous. And finally, untreated offenders appear to be more likely to commit new crimes and may, indeed, be driven to do so.

#### F. POTENTIAL COLLATERAL EFFECTS

Notification statutes may have many collateral effects on our society. The dumping of sex offenders into certain communities or states is only the beginning.<sup>215</sup> Concern for the potential for devaluation in property has been voiced by commentators across the nation.<sup>216</sup> In Louisiana, the State Attorney General's Office released an opinion in September 1994,

211. Child Protective Act of 1994, § 290.4(c)(1).

212. *Id.* § 290.4(c)(2).

213. According to Dr. Michael Spodak, a Towson, Maryland, psychiatrist with 20 years experience treating pedophiles, "[t]he general thought is that of 100 child molesters, 15 to 25 percent are on a revolving door where they are very driven and focused on child molesting." Seligman, *supra* note 153, at A1. Spodak goes on to say that although this group gets the most publicity and is the most intractable, other sex offenders may respond to treatment, including testosterone lowering drugs or group therapy. *Id.*

214. The founder of the sexual disorders clinic at Johns Hopkins School of Medicine, Dr. Fred Berlin, is concerned that offenders may be driven away from treatment by publicly branding them: "You don't want to drive them underground[.] They'd just be more dangerous and desperate." *Id.*

215. As notification laws proliferate, one obvious effect will be that sex offenders will leave those states that require public notification for states that do not. Indeed, this seems to be the goal of some state officials. See *supra* note 209 and accompanying text for Kansas's Attorney General's comment that offenders should leave if they do not like the harsh, new notification law.

216. See, e.g., Ed Anderson, *If Asked, Homeowner, Realtor Can't Deny Sex Offender in Area*, TIMES-PICAYUNE (La.), Sept. 27, 1994, at B3 (Louisiana couple unable to sell home because sex offender lives in neighborhood). The consensus among New Jersey real estate agents is that a homeowner trying to sell a home near a known sex offender's residence will have to lower his price in order to get a buyer. Rocco Cammarere, *Megan's Laws Could Snafu Home Sales*, N.J. LAWYER, Oct. 24, 1994, at 1. This sentiment echos the statement made by one realtor in Teaneck, New Jersey, who said, "[t]o get rid of that house on the block, they definitely have to go down in price. Who would want to buy that house? I wouldn't." *Id.*

that said that although the state's registration and notification statutes contain no provisions "which obligate a homeowner to disclose the presence of a registered sex offender to prospective homebuyers . . . [i]f asked if a sex offender lives in the neighborhood, you must reply honestly because to do otherwise would be fraudulent."<sup>217</sup> Louisiana's notification statute requires, among other things, that child molesters mail notices to all residents within three blocks of their home.<sup>218</sup> However, according to Louisiana's Assistant Attorney General Greg Murphy there is no provision in the statute for any form of public notification when the child molester moves out of the neighborhood.<sup>219</sup> Thus, the stigma created by the newspaper announcements, signs, billboards, or notices sent to residents as required by the statute can remain even if the offender has moved. Finally, the Attorney General's opinion stated that residents will not be compensated for losses in property values stemming from the state's sex offender registration and public notification laws.<sup>220</sup>

The potential for third party liability in real estate, landlord-tenant, and employer-employee contexts may be a side effect that many in our society will be unwilling to bear.<sup>221</sup> Third party liability is already emerging in the real estate area. In *Sanchez v. Guerrero*<sup>222</sup> a realtor was held liable for failure to disclose that an accused child molester had previously occupied the house that was for sale.<sup>223</sup> Prior to buying the home, the Guerreros asked Sanchez, the realtor, who the previous owner of the home was. The realtor responded that he did not know. On the evening of the closing, the Guerreros saw a television news program about a woman who was tried and acquitted of child molestation. The woman had been accused of molesting several children in her home, the same home that the Guerreros had bought. The next day, the Guerreros called the realtor to try to cancel the purchase of the house. The sale was not cancelled, but the realtor was held liable for not disclosing the information regarding the previous owner, information that the realtor was found to know.<sup>224</sup>

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217. Doug Myers, *Home Buyers Must Ask About Area Sex Offenders*, ADVOCATE (Baton Rouge, La.), Sept. 8, 1994, at A10. The opinion was requested by Louisiana Rep. Suzanne Mayfield Krieger on behalf of constituents who, because a registered child molester lived in their area, had problems selling their home. *Id.* The couple had purchased a new home, before discovering that a sex offender was living near their existing home. Anderson, *supra* note 216, at B3. According to Krieger, the couple is "stuck with two homes now" because "[t]he real estate people didn't want to touch it." *Id.* In New Jersey, a computer program that will provide "up-to-the-minute information about the whereabouts of sex offenders within the geographical boundaries of every real estate office in the state" is being prepared. Cammarere, *supra* note 216, at 1.

218. *Id.*; see also LA. CODE CRIM. PROC. ANN. art. 895(H) (West Supp. 1994).

219. Myers, *supra* note 217, at A10.

220. *Id.*

221. For example, an informal survey of New Jersey real estate agents revealed that realtors' fear that the sex offender notification legislation might expose them to lawsuits. Cammarere, *supra* note 216, at 1. Situations may arise where the agent is unaware that a registered sex offender resides in the area or where the seller does not disclose this information to the agent. *Id.*

222. 885 S.W.2d 487 (Tex. App.—El Paso, 1994, no writ).

223. *Id.*

224. *Id.* at 492.

Although the realtor's liability in *Sanchez* stemmed from the Texas Deceptive Trade Practices Act—Consumer Protection Act,<sup>225</sup> rather than a sex offender notification statute, it reflects the effect that information regarding known sex offenders can have on the real estate market.<sup>226</sup>

Is the potential for third party liability arising from the existence of notification statutes something our society is willing to bear? Will landlords become liable for failing to disclose to their tenants that a sex offender lives in the building? If so, what effect will it have on a landlord's ability to rent his property or a homeowner's ability to sell her property, let alone the possibilities of foreclosure and bankruptcy?<sup>227</sup> Should, and if so, how, will homeowners or landlords be compensated for the decrease in value of their property?<sup>228</sup>

The potential for third party liability and the difficulty of fashioning remedies that are both cost effective and politically palatable serve to underscore the need to rethink public notification laws. Innocent property owners face the potential for diminution in the value of their property<sup>229</sup> and the potential for liability,<sup>230</sup> irrespective of the severity of the sex offender's crime.

## VI. ALTERNATIVES TO NOTIFICATION STATUTES

### A. NOTIFY PUBLIC OF ONLY HIGH RISK OFFENDERS

One alternative is to notify the public of only the most violent offenders. Governor Christine Whitman of New Jersey suggested that the public only be notified of those offenders who are "true threats."<sup>231</sup> Such offenders would be distinguished from those who have cooperated with

225. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1994).

226. For example, in *Sanchez*, the alleged child molester had previously occupied the house that was up for sale, but there is no mention that she currently lived in the same neighborhood as the prospective residence. Although she could no longer be considered a threat to the children in the neighborhood, the home purchasers still did not want the home. *Sanchez*, 885 S.W.2d at 489.

227. One New Jersey legislator who sponsored the bill that would require public notification of sex offenders admitted that "he was not overly concerned" about the effect on property values and another said that the anticipated drop in property values was not "[his] main concern." Cammarere, *supra* note 216, at 1.

228. See *supra* notes 217-20 and accompanying text for a discussion of Louisiana Attorney General Office Opinion which states, among other things, that Louisiana state law does not provide for compensation of devaluation in property caused by the state's sex offender registration and notification statutes.

229. The Louisiana Attorney General's Opinion that the state need not compensate for diminution in property values is not the last word in Louisiana. The courts in that state may be asked to address the issue. Inverse condemnation actions in other states may afford property owners their only potential relief.

230. Just who would bear the cost of third party liability is, of course, beyond the scope of this Comment. No doubt courts will have to address the issues of whether any third party liability would be potentially covered by Homeowner's Liability or Real Estate Agents' Errors and Omissions insurance policies and, if so, whether such liability might be the subject of exclusions.

231. Ruess, *supra* note 187, at A4. In fact, Megan's Law provides just that. Only the worst offenders are subject to public notification. See *supra* Part III.B.2.d. for a discussion of New Jersey sex offender registration and notification laws.

the state treatment centers, successfully worked through therapy, and learned to control their deviant urges.<sup>232</sup>

Other lines should be drawn as well, such as one that recognizes a difference between sexual predators and sex offenders.<sup>233</sup> Distinctions of this type are typically made in sentencing; for example, aggravated rapists usually receive longer sentences than offenders convicted of indecent exposure. The same type of distinction should be made when deciding which criminals should be subjected to community notification—only the most egregious and violent sexual predators should be subjected to public notification.<sup>234</sup> Although some states already provide for such limitations on their notification laws,<sup>235</sup> others do not.<sup>236</sup>

## B. LONGER PRISON SENTENCES AND 'FEWER STRIKES, YOU'RE OUT'

Although "three-strikes-you're-out" was adopted as part of the Federal Crime Act and has been considered by many state legislatures, some states have passed laws which include an even tougher "one strike" sentencing law for violent sexual predators.<sup>237</sup> Another option is to increase the amount of time that a sex offender must serve before he is paroled.<sup>238</sup> This type of harsher sentencing is likely to be a greater deterrent and have fewer side effects than the threat of community notification upon release from prison. Furthermore, it solves the problem of protecting children against the most egregious sexual predators who also have very high rates of recidivism. Strict parole guidelines, coupled with longer sentences and one-, two-, or three-strikes-you're-out sentences, would reduce recidivism among sexual predators and lower the assault rates.

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232. *Id.*

233. *See, e.g., infra* notes 234-35.

234. This approach has even been advanced by civil liberties activists. For example, New York Civil Liberties Union's Barbara Bernstein does not reject public notification laws; however, she feels that "both the rights of the individual and the safety of society can be satisfied by a community notification law that is narrowly drawn." Sid Cassese, *Schools Told of Sex-Case Paroles; State Quietly Notifying Districts; 30 on Long Island Advised Under New Policy*, NEWSDAY, Dec. 27, 1994, at A7. Bernstein advocates that distinctions must be made so that only major offenders are subjected to public notification. *Id.*

235. For example, Megan's Law provides that certain factors be considered in evaluating the sex offender's likelihood of re-offending, which is part of the three-tiered notification analysis provided for by the statute. *See supra* Part III.B.2.d.

236. *See, e.g.,* LA. CODE CRIM. PROC. ANN. art. 895(H) (West Supp. 1994).

237. *See, e.g.,* California SB 26X (by Senator Bergeson), enacted on November 30, 1994 (providing that child molesters or perpetrators of aggravated rape (e.g., involving kidnapping) face prison sentences of 25 years to life upon a single conviction; those convicted of less violent sex offenses can be sentenced to 15 years to life for first-time offenses).

238. For example, the Texas legislature recently amended statutes to require that violent sex offenders serve at least half of their sentences before becoming eligible for parole. TEX. GOV'T CODE ANN. § 498.003(b)(1)(d) (Vernon Supp. 1995). Although this law still allows for the parole of sexual offenders, it at least ensures longer prison time served than in the past.

C. INCREASE THE AVAILABILITY OF TREATMENT OR THERAPY FOR  
SEX OFFENDERS

Another alternative is to increase the availability of treatment programs or intensive therapy to sexual offenders while they are incarcerated.<sup>239</sup> One example of such a program is a pilot program in Texas that offers sex offender therapy while in prison.<sup>240</sup> The Texas program is offered at three prisons and is larger than those in Minnesota, Washington, and Vermont, states with some of the most respected programs in the country.<sup>241</sup> A major problem is that, although Texas has more incarcerated sex offenders than those three states combined, only 200 prisoners are enrolled in its sex offender therapy program.<sup>242</sup> Approximately 10,000 prisoners in Texas could enroll in the program.<sup>243</sup> Studies from actual treatment programs show that when sex offenders receive intensive therapy for their sexually deviant tendencies, their recidivism rate is much lower.<sup>244</sup>

Treating sex offenders is not a new proposition. From 1930 to 1960, approximately half of the states had laws that sent sex offenders to mental institutions instead of prisons.<sup>245</sup> However, in the 1970s most of these laws were repealed.<sup>246</sup> Mental health professionals at the time "criticized [the laws] for trying to make a medical problem—one they had concluded was largely incurable—out of a criminal justice problem."<sup>247</sup> Today, treatment is once again considered to be effective and the way critics of the new laws view sex offenders has come full circle.<sup>248</sup> For example, Jerome Miller, a national authority on alternative programs and clinical work with violent juvenile and adult sex offenders,<sup>249</sup> recently wrote:

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239. It has been reported that only 2% of the incarcerated sex offenders in Texas receive any formal treatment or therapy for their behavior. Barbara Kessler, *Sex-offenders Programs Get Start in State Prisons; Texas' Effort Stymied by Money, Perceptions*, DALLAS MORNING NEWS, Oct. 17, 1993, at A1.

240. Kessler, *supra* note 239.

241. *Id.*

242. *Id.*

243. Budget constraints, the public's view of treatment of sex offenders as "coddling," and lawmakers' lack of interest have all been blamed for the low number of treatment programs for imprisoned sex offenders. Kessler, *supra* note 239, at A1.

244. For example, 75% of the juvenile sex offenders who were given intensive group therapy at the Giddings State Home and School near Austin, Texas, have not committed crimes in the three years that they have been monitored since exiting the program. *Id.* The problem, however, is that as of October, 1993, Texas has only funded 32 spaces for the in-patient treatment program. *Id.* This means that the majority of the youth sex offenders in Texas receive no rehabilitative treatment and will eventually be back on the street without any preventative treatment or therapy.

245. Rogers Worthington, *Legal Dilemma Over Sexual Predators; Paroling Potentially Dangerous Offenders Challenges System*, CHI. TRIB., Sept. 11, 1994, at 6. In the 1960s, sex offenders were thought to be ill and in need of therapy or treatment. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Jerome Miller is also the clinical director of the Augustus Institute in Alexandria, Virginia.

[D]espite the popular view that sex offenders are untreatable, research shows otherwise. Studies done in Canada, California and Vermont demonstrate that appropriate treatment can substantially cut the chances of a sex offender re-offending. Unfortunately, in the current national hysteria, a troubled pedophile dare not talk much about himself or his past without a high probability of his therapist reporting him to the authorities.<sup>250</sup>

#### D. CHEMICAL CASTRATION

Chemical castration is the term used for the treatment of paraphilic sex offenders<sup>251</sup> by injecting Depo-Provera, which is the trade-name for a synthetic female hormone, progesterone.<sup>252</sup> Depo-Provera, by reducing the production and effects of testosterone, diminishes the paraphiliac's sex drive, thereby reducing compulsive sexual fantasies and the threat of sexually dangerous behavior.<sup>253</sup> Drugs such as Depo-Provera and the antidepressant Prozac<sup>254</sup> are effective in treating violent sex offenders.<sup>255</sup> Although this treatment is sometimes referred to as chemical castration, the effects are not the same as those of surgical castration. For example, chemical castration does not result in sterility or in actual castration.<sup>256</sup> Furthermore, while the production of sperm, erection, and ejaculation are reduced as a result of the use of Depo-Provera, the drug does not cause total impotence.<sup>257</sup> Although there has been some concern voiced over the potential side effects of chemical castration,<sup>258</sup> "[i]t must be

250. Jerome Miller, *Public Hysterical Despite Effectiveness of Treatment*, DALLAS MORNING NEWS, Nov. 13, 1994, at J5.

251. Paraphiliacs are persons who are compelled to commit sex crimes in order to act out incessant deviant sexual fantasies. Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 2 (1990). Paraphilias are recognized sexual deviation disorders that include bestiality, pedophilia, erotic sadism, erotic masochism, voyeurism, transvestism, exhibitionism, and "other psychosexual disorders including some forms of rape." *Id.* at 4. See also *id.* at 60 n.9.

252. Also known as medroxyprogesterone acetate (MPA). PHYSICIAN'S DESK REFERENCE 2123-24 (42d ed. 1988).

253. Fitzgerald, *supra* note 251, at 3-4; Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 312 (1993). See also Fitzgerald, *supra* note 251, at 6-10, for a detailed discussion of how chemical castration, by the use of the drug MPA, reduces compulsive sexual behavior by paraphiliacs.

254. Antidepressants, such as Prozac, which alter a brain chemical called serotonin, have been used successfully in treating compulsive behavioral disorders. Erica Goode, *Battling Deviant Behavior*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 74, 76. Because paraphiliacs have compulsive qualities, Prozac is being used on these sex offenders with "promising results". *Id.*

255. *Id.*; Peters, *supra* note 253, at 312.

256. *People v. Gauntlett*, 325 N.W. 2d 310, 315 (Mich. App. 1984) (holding that a trial judge's imposition of a probationary sentence conditioned on the convicted rapist's receipt of regular injections of Depo-Provera was an illegal probation condition).

257. Comment, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 567 (1985). "[Chemical castration] subjects can still have erections, and many successfully impregnate their wives." *At Issue: Is Castration an Acceptable Punishment?*, 78 A.B.A.J., July 1992, at 42.

258. Reported side effects include the potential for weight gain, irregular gallbladder functioning, fatigue, testicular atrophy, hot and cold flashes, headaches, and the loss of

noted that any time a drug is used for a new purpose, all possible side effects are registered. Most of the side effects are extremely rare."<sup>259</sup>

Research indicates that surgical castration is more effective in lowering recidivism rates than chemical castration.<sup>260</sup> However, the permanency of surgical castration is often seen as a detriment.<sup>261</sup> Moreover, forced surgical castration of repeat felons whose crimes involved "moral turpitude" was struck down by the Supreme Court in 1942.<sup>262</sup>

Another concern with the use of chemical castration is the possibility that society will view it as a total solution to the high rate of sex offenses in the country so that incarceration will no longer be necessary.<sup>263</sup> Depo-Provera should be used in conjunction with other psychological and behavioral treatment.<sup>264</sup> Treated in this manner, some repeat offenders may be stopped.<sup>265</sup>

One of the biggest problems with chemical castration is its lack of acceptance in our society as a feasible addition to the traditional form of deterrence—incarceration. The government spends far less money on investigating sexual paraphilias, than on the "more acceptable ills such as depression, anxiety disorders and substance abuse."<sup>266</sup> Experts argue that the "public's moral outrage over sex crimes" has kept both the government and scientists from succeeding in efforts to understand some of the basic questions regarding sexual deviancy and from developing treatments for these disorders.<sup>267</sup>

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body hair. Fitzgerald, *supra* note 251, at 7. Studies indicate that there is no change in blood pressure, body chemistry, or in the breasts. *Id.*

259. "All of the side effects are reversible once the treatment ceases. Erection and ejaculation return [to normal] within 7-10 days, along with the subjective awareness of the sex drive." *Id.*

260. Pamela K. Hicks, Commentary, *Castration of Sexual Offenders, Legal and Ethical Issues*, 14 J. LEGAL MED. 641, at nn.53-55 and accompanying text. There is little doubt that surgical castration works to reduce recidivism among sex offenders.

Clinical data, published in Europe during the 1960's and 1970's, largely supports [the use of castration to deter habitual sex offenders]. Researchers there studied thousands of castrated sex offenders for up to 30 years, concluding that fewer than 8 percent reoffend after surgery. The reoffense rate among uncastrated sex offenders ranged from 43 percent to 84 percent.

Bryan Denson, *Drastic Measures; Parlor to Prison, Debate Continues*, Hous. Post, June 5, 1994, at A1.

261. *Id.* On the other hand, there is concern that offenders will stop taking the drug therapy that is essential for chemical castration to be effective; thus, from this point of view, the permanency of surgical castration is an advantage over chemical castration. *See id.*

262. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

263. Anthony Schmitz, *A Shot in the Dark; Hormone Injection to Treat Sex Offenders*, HEALTH, Jan. 1993, at 22 (quoting Fred Berlin, director of the National Institute for the Study, Prevention, and Treatment of Sexual Trauma).

264. *See id.*

265. *Id.*

266. Goode, *supra* note 254, at 74, 76.

267. *Id.* In fiscal year 1993, the National Institute of Mental Health spent \$125.3 million on depression but only \$1.2 million on sex offender research. *Id.*



Although several European countries currently have statutes that provide for the use of surgical castration as a treatment for sex offenders,<sup>268</sup> surgical castration has traditionally been disfavored in the United States as a means of dealing with the high recidivism rates of sex offenders.<sup>269</sup> However, a few states have recently attempted to pass bills allowing for judicially imposed chemical castration.<sup>270</sup> The Florida Senate passed a bill on March 30, 1994, that requires a sex offender to be castrated if he is convicted of a sexual battery involving injury, the use of a deadly weapon, or the use of physical force.<sup>271</sup> In Michigan the house passed a measure on May 11, 1994, that would allow judges to order chemical castration as a condition of parole for any two-time sexual offender convicted of first-degree sexual assault.<sup>272</sup> The chemical castration proposal was appended to Michigan's "three-strikes" crime bill, which provides for life sentences with no parole for three-time offenders of crimes such as rape, murder, or robbery.<sup>273</sup>

Two of the strongest arguments for developing effective treatment of sexual paraphilias are prison overcrowding and the high costs of long-term incarceration. Prison overcrowding has reached such a chronic level that many dangerous criminals, including repeat sexual offenders, are given early releases to make room for other criminals.<sup>274</sup> Treatment of offenders, including chemical castration, should be developed in order to lessen prison overcrowding<sup>275</sup> and also to provide long-term cost savings over incarcerating these individuals for long periods of time.<sup>276</sup>

An argument for developing effective treatment for these offenders that is even more compelling than the problems associated with incarceration is the high rate of recidivism among violent sex offenders.<sup>277</sup> Until a policy of "one-strike-you're-out" is instituted, most sex offenders will eventually return to society and many will commit additional sexual assu-

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268. "Denmark was the first country to legalize castration as a medical treatment in 1929. Other countries that have legalized castration are: Germany (1933, 1935, 1969), Norway (1934), Finland (1935, amended 1950), Estonia (1937), Iceland (1938), Latvia (1938) and Sweden (1944)." Peters, *supra* note 253, at n.12 (1993) (citing Nickolaus Heim & Carolyn J. Hirsch, *Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature*, 8 ARCHIVES OF SEXUAL BEHAVIOR 281, 282 (1979)). See also *id.* at n.14 (quoting text from most recent German statute permitting castration for chronic sex offenders).

269. See generally *id.* at nn.15-18.

270. Although some chemical castration bills have met with limited success, California's proposed bill was introduced on January 31, 1994, and rejected only ten days later as unconstitutional. Cal. A.B. 189, 1993-94 Reg. Sess.

271. Fla. S.B. 1984, 13th Leg., 2d Sess. (1994). The bill also provides that the offender be sentenced to death on the third offense. *Id.*

272. *Lawmaker: Castration Bill Will Pass*, UPI, May 12, 1994, at Regional News Section, available in LEXIS, News library.

273. *Id.*

274. See Hicks, *supra* note 260, at nn.9-28 and accompanying text.

275. See *id.*

276. *Id.*

277. *Id.* at nn.29-32 and accompanying text.

alts.<sup>278</sup> Thus, "it seems that therapy should be attempted."<sup>279</sup> Finally, chemical castration could be considered in lieu of or in addition to traditional punishment by incarceration.<sup>280</sup>

Chemical castration is not as severe or irreversible as surgical castration.<sup>281</sup> Although it will not work for every sex offender,<sup>282</sup> it should be considered as a means of treating the cause of sexual assaults—the offenders themselves. This is preferable to so-called solutions—such as public notification statutes—which merely treat the symptoms and fan the flames of public hysteria, thereby serving to promote recidivism rather than deter it.<sup>283</sup>

#### E. INCREASE EDUCATION AND AWARENESS OF CHILDREN

Another alternative, or (at the least) addition, to notification statutes is to formally educate children regarding the dangers and characteristics of potential child molestation situations. Increasing children's awareness may be an effective way to decrease the number of instances of child molestation or abuse. One court called "education of the children themselves" to be the most logical alternative available to the legislatures.<sup>284</sup>

### VII. CONCLUSION

Providing statutory measures by which citizens are notified that a convicted sex offender is moving into their community is on its face beneficial to society, however, many downfalls are apparent.

By publicly branding these offenders, it becomes nearly impossible for them to live and work in our society once they have served their time. By putting life's necessities out of reach of released offenders, we may inevitably drive them underground, away from treatment, and away from any hope of rehabilitation and normal functioning within society. As one commentator said:

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278. See *supra* notes 25-27 and accompanying text for a discussion of the perceived high rate of recidivism of sex offenders.

279. Hicks, *supra* note 260, at n.32 and accompanying text (quoting Dr. Richard Maier, associate professor of psychology at Loyola University, cited in Riesenber, *Motivations Studied and Treatment Devised in Attempt to Change Rapisits' Behavior*, 257 J.A.M.A. 899, 899 (1987)).

280. See Hicks, *supra* note 260, at nn.33-37 and accompanying text. Creative sentencing has already become "widely accepted" for minor offenses because the traditional forms of punishment fail to deter and rehabilitate criminals. *Id.*

281. See *supra* notes 256-59 and accompanying text.

282. The offender must be inclined to take the injections or the calming effects of Depo-Provera on acting out his deviant sexual fantasies will not be realized. Once an offender discontinues treatment, the effects of the drug wear off.

283. See generally Daniel L. Icenogle, M.D., J.D., *Sentencing Male Sex Offenders to the Use of Biological Treatments, A Constitutional Analysis*, 15 J. LEGAL MED. 279 (1994); Fitzgerald, *supra* note 251; Hicks, *supra* note 260; Peters, *supra* note 253.

284. *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991). The court noted that second to educating children was the ability "to monitor the movements of the perpetrators by allowing ready access to crucial information." *Id.*

In the end, all the hot lines, leaflets, talk-show kitsch and vigilantism won't slow the rate of sexual abuse. Precisely the reverse. As troubled individuals are tagged and driven from families and friends and slip into that nether world of isolation and trance that feeds perverse fantasy, sexual offending can only grow more dangerous and egregious.<sup>285</sup>

Notification laws result in the puritanical punishment of publicly branding offenders. This only serves to increase society's paranoia and the potential for vigilantism. Increased paranoia has already given rise to a collateral effect of property devaluation. The increase in vigilantism leaves many offenders the Hobson's choice of going back to prison or joining the legions of homeless, where they may still find their way back to prison. The potential for third-party liability claims in real estate, landlord-tenant, and employment contexts may also be looming.

Although not necessarily a popular consideration, we cannot forget about the offenders' rights.<sup>286</sup> The United States Constitution provides certain rights to its citizens, among them the right against cruel and unusual punishment. We must keep in mind that "[t]here is a point beyond which even justice, becomes unjust."<sup>287</sup>

In providing legislative measures that allow the public to know the identities and residences of convicted sex offenders who have served their time and paid their debt to society, we are opening a virtual Pandora's box of future litigation, public hysteria, and the potential for higher rates of recidivism among the very offenders we are trying to defend against.

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285. Miller, *supra* note 250, at J5.

286. "I am the inferior of any man whose rights I trample under foot." ROBERT G. INGERSOLL, LIBERTY.

287. SOPHOCLES, ELECTRA.