THE SCARLET LETTER BRANDING: A CONSTITUTIONAL ANALYSIS OF COMMUNITY NOTIFICATION PROVISIONS IN SEX OFFENDER STATUTES

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I. INTRODUCTION

"Not in my back yard" is the mentality of most communities when notified that former inmates, classified as sexual offenders, are moving into their neighborhoods.[1] One Wisconsin woman suggested sending sex offenders to Alaska—anywhere but her neighborhood.[2] Released sex offenders have been living in neighborhoods for years, but new laws permitting community notification have dramatically increased public awareness, making it even more difficult for officials to place offenders in communities without the communities driving them out.[3]

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1. *Officials Find Freed Sex Offenders Hard to Place*, TELEGRAPH HERALD, Oct. 20, 1997, at 10A [hereinafter *Officials*].

2. *Id.*

3. *Id.* For example, a New York Assemblyman stated:

> [T]he result of this [legislation] is the fact that a sex offender who is going to come out after serving his time might rethink as to where he is going to relocate, and I think that one of the results of this legislation might be that this guy is going to go out of town, out of state, and that's very good for us.

Doe v. Pataki, 940 F. Supp. 603, 621 (S.D.N.Y. 1996) (quoting Assemblyman Weisenberg, N.Y. Assembly Minutes, 388-89 (June 28, 1995)), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997).

For instance, a New Jersey man fled from his community after the Guardian Angels distributed "wanted" posters and reporters staked out his house day and night.[4] A released offender's home was burned to the ground in the state of Washington.[5] In California, a car belonging to a released sex offender was firebombed after state officials distributed his name.[6] Similarly, in New Jersey, two men broke into a house where police had notified the community that a sex offender lived.[7] Mistakenly, they beat up and seriously injured a visitor in the house whom they believed to be the sex offender.[8] In Waterloo, Iowa, a released eighteen-year-old sex offender (he was fifteen years old at the time of the incident) moved back home with his mother who lived fifty yards from an elementary school.[9] School officials locked all but the main entrance to the school and distributed "bright pink warning notices," while family members carried baseball bats when picking up their children from school.[10]

"Megan's Law," enacted in October 1994, was sparked by public outrage concerning the sexual assault and murder of seven-year-old Megan Kanka by a twice-convicted sex offender living across the street from the victim's family.[11] The law necessitates the registration of convicted sex offenders upon release from incarceration.[12] It further requires community notification by law enforcement officials as to the location and identity of the offenders deemed likely to reoffend.[13]

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4. Doe v. Pataki, 940 F. Supp. at 609. Also, in this incident, community leaders and local politicians publicly condemned the individual and his family, and objected to their presence in the community. *Id.* The individual's mother fled the home with her son as a result of the harassment. *Id.*

5. *Id.* at 610. After the fire, this individual moved to New Mexico, but he was forced to move again when the Washington police notified the New Mexico community of his presence. *Id.*

6. Lynn Okamoto, *Iowans Are Comparatively Calm*, DES MOINES REG., Nov. 22, 1998, at 4A.

7. Doe v. Pataki, 940 F. Supp. at 609.

8. *Id.* The visitor sustained injuries to his shoulder, neck, and back, and as a result of the publicity and mistaken belief that he was a sex offender, he lost his business and his children and fiancée were harassed. *Id.*

9. *Sex Offender Living by School Worries Parents*, TELEGRAPH HERALD, Oct. 9, 1997, at 5A.

10. *Id.*

11. Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. PUB. INT. L.J. 29, 30-31 (1996).

12. *Id.* at 31.

13. *Id.*

By now, all fifty states have enacted sex offender registration laws of varying scope.[14] Not all of these, however, allow law enforcement officials to notify the community of the presence of released sex offenders.[15] This community notification aspect has raised complex constitutional concerns, including issues of ex post facto, double jeopardy, right to privacy, and cruel and unusual punishment. Versions of Megan's Law have been challenged in both state and federal courts.[16] The United States Supreme Court, however, has yet to address a challenge to a sex offender registration law—thus, the constitutionality of such laws remains in doubt.

This Note critiques the constitutionality of the current community notification provisions in various sex offender statutes. Part II analyzes the ex post facto and double jeopardy issues. Part III outlines the range of sex offender statutes currently in force in several states. Part IV analyzes Iowa's sex offender statute. Part V discusses ways to improve community notification laws in order to provide released sex offenders an adequate level of due process, reduce vigilantism, and educate and safeguard the public. This Note maintains that, to prevent ex post facto and double jeopardy violations involving community notification of released sex offenders, each community needs to adopt a record system that prevents public access or disclosure of registered sex offenders.

II. CONSTITUTIONAL CONCERNS: EX POST FACTO AND DOUBLE JEOPARDY

A. *Ex Post Facto*

The United States Constitution prohibits the passing of any ex post facto law.[17] An ex post facto law is a "law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed."[18] Therefore, the Ex Post Facto Clause is implicated when the government tries to retroactively apply legislation that inflicts a greater punishment than the law originally attached to the crime at the time the crime was committed.[19] The core principle underlying the Ex Post Facto Clause

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14. John Gibeaut, *Defining Punishment: Courts Split on Notification Provisions of Sex Offender Laws*, A.B.A. J., Mar. 1997, at 36. See *People v. Ross*, 646 N.Y.S.2d 249, 250 n.1 (Sup. Ct. 1996) for a list of all the sex offender registration statutes enacted by each state.

15. G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1633 (1995).

16. Martin, *supra* note 11, at 32.

17. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. 1, § 10 ("No State shall . . . pass any . . . ex post facto Law.").

18. BLACK'S LAW DICTIONARY 402 (6th ed. 1991).

19. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

is that of "fair warning."[20] James Madison emphasized the fundamental role of the Ex Post Facto Clause in our Constitution:

> Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted. Very properly therefore have the Convention added this constitutional bulwark in favor of personal security and private rights . . . .[21]

Sex offender laws offend the Ex Post Facto Clause because sex offenders who served their sentences are now being ordered to register, and communities are being notified about unknown offenders who have been peacefully living among them.[22] The question, therefore, regarding community notification and the Ex Post Facto Clause is whether this retroactivity applies an additional punitive measure after the originally imposed sentence has been served.[23] "It will be said, of course, that sex offenders deserve the sanctions imposed . . . and more. That belief is understandable but it cannot override the Ex Post Facto Clause. Constitutional claims are often asserted by litigants who arouse little sympathy; when those claims are valid they must be honored."[24]

B. *Double Jeopardy*

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."[25] Thus, the Double Jeopardy Clause prevents both "successive punishments" and "succes-

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20. Miller v. Florida, 482 U.S. 423, 430 (1987); *see also* Landgraf v. USI Film Prod., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ."); Weaver v. Graham, 450 U.S. 24, 30 (1981) ("Critical to relief under the *Ex Post Facto Clause* is not an individual's right to less punishment, but the lack of fair notice and governmental restraint . . . .").

21. THE FEDERALIST No. 44, at 227 (James Madison) (Garry Wills ed., 1982).

22. *See Officials*, *supra* note 1, at 10A.

23. Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 439 (1997).

24. Doe v. Gregoire, 960 F. Supp. 1478, 1487 (W.D. Wash. 1997).

25. U.S. CONST. amend. V.

sive prosecutions."[26] Under the double jeopardy argument, access to, or dissemination of, a released sex offender's information, as prescribed by community notification provisions, constitutes additional punishment.[27] "These laws mark a significant break from the idea that once a person 'pays his debt to society' he should be free to reintegrate himself into that society."[28] "These are towering constitutional provisions of great importance to individual dignity, freedom, and liberty."[29]

C. *Analysis*

Both the Ex Post Facto Clause and the Double Jeopardy Clause place "formidable constraints on each state's ability to *punish* its citizens."[30] For a violation of either the Ex Post Facto Clause or the Double Jeopardy Clause to exist, the registration or community notification requirements of the sex offender statutes must be deemed "punishment."[31] If the provisions do not constitute punishment, they are merely regulatory, and do not violate these clauses. Therefore, the courts must decide whether the statute is punitive, inflicting punishment or penalty, or regulatory.[32]

No universal test exists for determining whether state action constitutes punishment as applied to constitutional theories of ex post facto and double jeopardy.[33] However, the Supreme Court's decision in *United States v. Ursery*,[34] serves as a starting point for deriving the appropriate test. In *Ursery*, the Supreme Court held that in rem civil forfeitures are neither "'punishment' nor criminal for purposes of the Double Jeopardy Clause."[35] The Court applied a two-pronged test to determine whether a civil forfeiture proceeding constituted a second punishment that is impermissible under the Double Jeopardy Clause.[36] The reviewing court must ask, first, whether the legislature intended the law to

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26. United States v. Ursery, 518 U.S. 267, 273 (1996); *see also Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.").

27. McAllister, *supra* note 23, at 437.

28. Rafshoon, *supra* note 15, at 1635.

29. Doe v. Poritz, 662 A.2d 367, 388 (N.J. 1995).

30. *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1716 (1996) [hereinafter *Prevention*].

31. Doe v. Weld, 954 F. Supp. 425, 431 (D. Mass. 1996).

32. Doe v. Pataki, 919 F. Supp. 691, 698-99 (S.D.N.Y. 1996).

33. Artway v. Attorney General, 81 F.3d 1235, 1242 (3d Cir. 1996) ("[T]he law on 'punishment' is complicated and in some disarray.").

34. United States v. Ursery, 518 U.S. 267 (1996).

35. *Id.* at 292.

36. *Id.* at 288-90.

be civil or criminal.[37] Secondly, the reviewing court must ask whether the law is so punitive in effect that it may not legitimately be viewed as civil, despite Congress's intent.[38] In evaluating the second prong, the Court looked at various considerations, including the importance of the nonpunitive goals of forfeiture proceedings, the historical characterization of forfeiture, and the fact that scienter is not required.[39] Although reversed on appeal on other grounds, at least one federal court found that the *Ursery* test controls the determination of whether registration and community notification laws impose punishment on sex offenders.[40]

Two post-*Ursery* decisions have developed other multiple-factor tests for determining the issue of punishment. One method used by some states to determine whether a sex offender registration statute constitutes punishment involves application of the seven factor test set forth in *Kennedy v. Mendoza-Martinez*.[41] These factors are:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .[42]

Still, great disagreement remains about when and how to apply the *Kennedy* factors in analyzing sex offender laws.[43] For example, the Third Circuit described the seven *Kennedy* factors as a "grab bag of many individual tests" which are not dispositive or controlling.[44] Instead of implementing the *Kennedy* analysis, some courts have selected other means to characterize sex offender laws.[45] Although subsequently reversed on appeal, the United States District

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37. *Id.* at 288-89.
38. *Id.* at 290.
39. *Id.* at 291-92.
40. W.P. v. Poritz, 931 F. Supp. 1199, 1208 (D.N.J. 1996), *rev'd sub nom.* E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997).
41. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). See also *State v. Myers*, 923 P.2d 1024, 1033 (Kan. 1996), *cert. denied*, 117 S.Ct. 2508 (1997) for an example of a court applying the factors in determining the constitutionality of a sex offender registration statute.
42. Kennedy v. Mendoza-Martinez, 372 U.S. at 168-69 (citations omitted).
43. *Prevention*, *supra* note 30, at 1717.
44. Artway v. Attorney General, 81 F.3d 1235, 1262-63 (3d Cir. 1996).
45. *Prevention*, *supra* note 30, at 1717.

Court for the Southern District of New York, in *Doe v. Pataki*,[46] concluded that the court must look to the totality of the circumstances.[47] The court analyzed the New York sex offender statute by grouping the circumstances into the following four areas: (1) intent; (2) design; (3) history; and (4) effects.[48]

First, in looking at the legislature's intent, the district judge concluded that the community notification provisions were intended to punish sex offenders, even though the legislature's stated purpose was to protect.[49] Members of the New York state legislature called sex offenders "depraved," "the lowest of the low," "animals," and "the human equivalent of toxic waste."[50] One member stated, "We are coming out to get them."[51] Second, the court held that the design of the statute is also punitive because it is overly inclusive, covering a broad group of individuals and offenses, and permitting uncontrolled disclosure.[52] Third, the history surrounding the statute suggests a punitive motive.[53] Historically, methods such as branding and public shaming were used to punish wrongdoers.[54] Community notification is the present day equivalent of public shaming.[55] The New York legislature clearly intended this form of public

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46. Doe v. Pataki, 940 F. Supp. 603 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997).

47. *Id.* at 620.

48. *Id.*; *see also* Doe v. Kelley, 961 F. Supp. 1105 (W.D. Mich. 1997) (applying the *Pataki* analysis).

49. Doe v. Pataki, 940 F. Supp. at 604-05.

50. *Id.* (quoting N.Y. Assembly Minutes, 360-61, 393, 417 (June 28, 1995)).

51. *Id.* Another observed, "I have listened to some of my colleagues talk about the constitutionality of the retroactive provisions. I have listened to people say, "Well, these people are wrongly criticized, will they be wrongfully abused in their neighborhoods? You know what? I don't care." *Id.* at 622 (quoting Assemblywoman Wirth, N.Y. Assembly Minutes, 389-90 (June 28, 1995)) (emphasis omitted)). Yet another commented, "And I will tell you personally, I think these people have no rights . . . ." *Id.* (quoting Assemblyman Manning, N.Y. Assembly Minutes, 392-93 (June 28, 1995)) (emphasis omitted)).

52. *Id.* at 605.

53. *Id.*

54. *Id.* In colonial America, there are numerous examples of branding and shaming. Under a 1648 Massachusetts statute, the letter "B" was to be branded on the forehead of burglars. Lawrence M. Friedman, *Notes Toward a History of American Justice*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 13, 13 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988). A 1701 New Hampshire adultery statute provided that a man and woman who committed adultery were to be put in the gallows for an hour with a rope around their necks, followed by a severe whipping, and they would have to wear an "A" on their arm or back for the rest of their lives. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 40 (1993). "The message was that *this* offender was not likely to mend his ways; disgrace would and should last until death." *Id.*

55. Doe v. Pataki, 940 F. Supp. at 605. In *Doe v. Pataki*, the court stated:

> [T]oday's lawmakers—like their colonial counterparts—are counting on "the invisible whip of public opinion" to deter the sex offender from future wrongdoing. Moreover, just as the message of branding was that "*this* offender

shaming, as exemplified by one member's statement in support of the Act, in which he declared that the statute would force sex offenders "out of town, out of state."[56] Finally, the district court looked to the effect of the community notification provision.[57] The judge, again, concluded that the effect of the statute was punitive because it interfered with rehabilitation of the sex offender, thereby placing a restraint or disability not only on the sex offender but also upon his or her family.[58]

On appeal, the Second Circuit utilized a different test, and concluded that the retroactive application of the New York Sex Offender Registration Act did not constitute punishment.[59] The Second Circuit applied a two-part analysis.[60] First, the court looked at the legislative intent, focusing on the extent of notification, control of notification, and protection against misuse of information.[61] Second, the court determined whether notification constituted punishment "in fact."[62] Under this prong, the court applied the following factors: (1) effects of notification; (2) relation of notification to the criminal activity; (3) excessiveness of notification; (4) notification and the goals of criminal law; and (5) historical analogues.[63]

These conflicting cases are illustrative of the difficulties courts have had in defining punishment as applied to sex offender registration laws. Because there is no universal definition of punishment, courts will continue to utilize different tests to determine whether community notification provisions constitute punishment. It seems clear, however, that to prevail on an ex post facto and double jeopardy challenge to a sex offender statute, the plaintiff must demonstrate a probability of success in proving that the community notification provision is so punitive that it constitutes punishment regardless of the legislature's regulatory intent.[64]

> Indeed, any balancing of the rights of children and others to be free from rape, murder, and sexual abuse against the rights of those convicted of

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was not likely to mend his ways," the premise underlying the Act is the belief that once someone is a sex offender, he or she will always be a sex offender.

Id. at 625 (citation and footnote omitted).

56. *Id.* at 605 (quoting N.Y. Assembly Minutes, at 388-89 (June 28, 1995)).
57. *Id.* at 626.
58. *Id.* at 627-28.
59. Doe v. Pataki, 120 F.3d 1263, 1285 (2d Cir. 1997).
60. *Id.* at 1276.
61. *Id.* at 1276-78.
62. *Id.* at 1278.
63. *Id.* at 1279-84.
64. Doe v. Weld, 954 F. Supp. 425, 433 (D. Mass. 1996).

> committing those crimes will always result in a decisive tipping of the scales of justice in favor of the former.
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> Our Constitution, however, does not call for such a balancing in these circumstances. To the contrary, the Ex Post Facto Clause forbids all laws that increase punishment after the fact; there is no exception for laws that are based on good intentions or that seek to protect our children. If a law increases punishment, it cannot be applied retroactively even if it would also prevent further acts of violence and abuse.[65]

III. RANGE OF SEX OFFENDER STATUTES IN VARIOUS STATES

The sex offender registration laws, enacted by the states, were encouraged by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act (Jacob Wetterling Act).[66] The Jacob Wetterling Act requires states to implement registration programs for sex offenders against children in order for the state to be eligible for certain federal funds for drug control.[67] Funds for those states that do not comply with the Act are re-allocated to states that do comply.[68] This Act authorizes the release of information collected under any state registration program for sexual offenders to law enforcement agencies where the released offender is to reside.[69] The states must immediately transmit the data to the Federal Bureau of Investigation.[70] This Act, however, does not require retroactive application of the sex-offender registration laws.[71]

As originally enacted, the Jacob Wetterling Act permitted community notification, but did not require it.[72] In May 1996, however, Congress amended the Jacob Wetterling Act to require neighborhood notification when sex offenders move into a community.[73] With the addition of mandatory neighbor-

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65. Doe v. Pataki, 940 F. Supp. at 605.

66. 42 U.S.C. § 14071 (1994). This Act was enacted as part of the federal Violent Crime Control and Law Enforcement Act of 1994. State v. Myers, 923 P.2d 1024, 1028 (Kan. 1996), *cert. denied*, 117 S.Ct. 2508 (1997).

67. *See* 42 U.S.C. § 14071(f)(2)(A).

68. *Id.* § 14071(f)(2)(B).

69. *Id.* § 14071(b)(2).

70. *Id.*

71. *Id.*

72. *See id.* § 14071(d)(3). "[T]he designated state law enforcement agency and any local law enforcement agency authorized by the state agency *may* release relevant information that is necessary to protect the public concerning a specific person required to register under this section . . . ." *Id.* (emphasis added).

73. *See id.* § 14071(d)(2) (Supp. 1996). "The designated state law enforcement agency and any local law enforcement agency authorized by the state agency *shall* release relevant information that is necessary to protect the public concerning a specific person required to register under

hood notification, the Jacob Wetterling Act became a federal version of Megan's Law modeled after the New Jersey sex offender statute.[74] The spirit of the Jacob Wetterling Act was made evident by President Clinton, who upon signing the amendment into law, declared, "If you dare to prey on our children, the law will follow you wherever you go—state to state, town to town."[75]

Sex offender registration laws vary from state to state. The laws can require convicted sex offenders to supply local law enforcement officials with information such as photographs, fingerprints, physical characteristics, home addresses, telephone numbers, social security numbers, driver's license numbers, dates and places of birth, crimes, and dates and places of conviction.[76] Some states also require DNA samples[77] and employment information.[78] An offender will remain registered anywhere from ten years to a lifetime.[79] Furthermore, offenders usually need to notify law enforcement officials of a change in address.[80] The local law enforcement agency then forwards this information to a

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this section . . . ." *Id.* (emphasis added). *See generally* Linda Kleindienst, *Clinton Signs Tougher Megan's Law*, SUN-SENTINEL, May 18, 1996, at 3A.

74. *See supra* notes 11-13 and accompanying text.

75. Kleindienst, *supra* note 73, at 3A.

76. *Prevention*, *supra* note 30, at 1713. *See, e.g.*, IOWA CODE § 692A.9 (1999) (requiring a sex offender to provide a social security number, current address, telephone number, fingerprints, and photograph); N.Y. Correct. LAW § 168-b(1)(a)-(c) (McKinney 1987 & Supp. 1997-98) (requiring a sex offender to provide name, alias, date of birth, sex, race, height, weight, eye color, driver's license number, home address, description of the offense, date of conviction, sentence imposed, photograph, and fingerprints); N.C. GEN STAT. § 14-208.7(b)(1)-(4) (Supp. 1997) (requiring a sex offender to provide full name, alias, date of birth, sex, race, height, weight, eye color, hair color, driver's license number, home address, type of offense committed, date of conviction, sentence imposed, current photograph, and fingerprints).

77. *See, e.g.*, ALA. CODE § 36-18-25 (Supp. 1998); ARIZ. REV. STAT. ANN. § 13-4438 (West Supp. 1998); CONN. GEN. STAT. ANN. § 54-102g (West Supp. 1998); MINN. STAT. ANN. § 609.3461 (West Supp. 1999).

78. *See, e.g.*, LA. REV. STAT. ANN. § 542B (West Supp. 1999).

79. Under the Jacob Wetterling Act, the minimum required period of registration is ten years. 42 U.S.C. § 14071(b)(6)(A) (1994). A few states mandate registration for life. *See, e.g.*, KAN. STAT. ANN. § 22-4906(a)(2) (1995) (requiring lifetime registration upon second conviction). Still others require an offender to petition the court to relieve them of the duty to register. *See, e.g.*, VT. STAT. ANN. tit. 13, § 5405(f) (1998) (providing that after ten years the classified sex offender may petition the court to remove the designation). If the court finds he or she is no longer a sexually violent predator the court shall remove the designation, otherwise the classified sex offender may not petition the court for removal of the designation for five years. *Id.* At least one state does not provide for a time limit at all. NEB. REV. STAT. ANN. § 207.152 (Michie 1995).

80. *See, e.g.*, N.C. GEN. STAT. § 14-208.9 (Supp. 1997) (stating that sex offenders must provide written notice of new address within ten days of a change of address); VT. STAT. ANN. tit. 13, § 5407(b) (1998) (stating that sex offender must notify the department of new address and register with the new state within three days).

state agency that oversees the program to create a list of potential suspects they can pursue when a child is sexually assaulted or missing.[81]

In addition to making the information available to the public, community notification provisions allow law enforcement officials to take affirmative steps to distribute the information.[82] The Jacob Wetterling Act mandates the release of "relevant information that is necessary to protect the public concerning a specific person required to register."[83] Officials have utilized a variety of means to notify residents of the presence of sex criminals, including front-page newspaper articles, community meetings, bright-colored fliers, and wanted posters.[84] Police have even posted signs informing neighbors and have gone door-to-door notifying the neighborhood that a sex offender is present in their area.[85] Without clearly defined limitations, local authorities are free to notify neighbors in whatever method they feel appropriate.[86] This leaves the offender "subject to the whims of government officials."[87]

California has taken a unique approach to community notification. The California Department of Justice compiles the information of the released sex offenders and operates a "900" telephone number that the public may call to inquire whether an individual is listed.[88] The caller must furnish the individual's name, including middle initial.[89] The department will provide the caller with known aliases of the registrant, a photograph, a physical description, gender, race, date of birth, description of the specific crimes for which the registrant was required to register, and zip code area in which the registrant resides.[90]

Innovative ways have certainly been used to notify the community of the presence of a released sex offender.[91] So-called "scarlet letter" sanctions requir-

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81. *See, e.g.*, 730 ILL. COMP. STAT. ANN. 150/8 (West 1997) (stating that registration information must be forwarded by the registering law enforcement agency to the Department of the State Police within three days, and the Department in turn enters the information into the Law Enforcement Agencies Data System for missing children).

82. Rafshoon, *supra* note 15, at 1638. *See, e.g.*, WASH. REV. CODE ANN. § 4.24.550(1), (2) (West Supp. 1999) (allowing the release of the sex offender's information when it is "necessary to protect the public"). The local law enforcement must make a "good faith effort" to notify residents at least fourteen days before the sex offender is released. *Id.* § 4.24.550(4)(c).

83. 42 U.S.C. § 14071(d)(2) (Supp. 1996).

84. Rafshoon, *supra* note 15, at 1640.

85. *Id.* at 1641.

86. *Id.* at 1662.

87. *Id.*

88. CAL. PENAL CODE § 290.4(a)(1), (3) (West Supp. 1999).

89. *Id.* § 290.4(3).

90. *Id.* § 290.4(2)-(3).

91. Some states are discussing the creation of Web sites that would include information on those sex offenders required to register with law enforcement. *See, e.g.*, *Molesters on the Web; Notification Goes High-Tech*, ARIZ. REPUBLIC, Jan. 30, 1998, at B4, *available in* 1998 WL

ing offenders to announce their misdeeds in some public fashion have been utilized. For example, the Court of Appeals of Oregon required, as a condition of probation, that a sex offender post signs on his residence and on any vehicle that he was operating reading: "Dangerous Sex Offender—No Children Allowed."[92] In Manchester, New Hampshire, a child molester was forced to take out ads in the newspaper confessing his crimes and urging other molesters to seek treatment.[93] In Massachusetts, a judge ordered a child molester to stay on his property for eight years and to wear an electronic monitor that was activated if he wandered more than 150 feet from his home.[94] In many ways, these sanctions resemble long-abandoned punishments designed to humiliate and shame offenders in their communities.

Louisiana has taken an unusual approach to community notification.[95] In addition to registration, the state requires those convicted of sex offenses to send notice of their name, address, and crime to a person at each residence or business within a one-mile radius in a rural area and a three-square block area in a suburban or urban area, as well as to the superintendent of the school district.[96] Some Louisiana agencies actually accept donations to help offenders purchase stamps to help minimize the financial burden associated with informing all the people they are required to under the statute.[97] Additionally, courts are permitted to order other forms of notice, including signs, handbills, bumper stickers, or even labeled clothing.[98]

Community notification provisions of sex offender laws were designed to protect future victims from violent sex offenders with a high likelihood to reoffend.[99] Critics worry that humiliation will only reinforce the offenders'

7747213. One concern with this proposal is the possibility that victims of incest will be harassed by their classmates who discover a parent's name and photograph on the Web site. *Id.* One man in Illinois has been collecting released sex offender lists from various Illinois counties and is creating his own Web site. Keith Gottschalk, *Man Requesting Sex Offender Names for Web*, STATE J.-REG., Jan. 18, 1998, at 11, *available in* 1998 WL 5553222. His website is located at http://www.chillicothe.com. *Id.*

92. State v. Bateman, 771 P.2d 314, 316-19 (Or. Ct. App. 1989).

93. Michael Grunwald, *Shame Makes Comeback in Court: Judge Likes to Impose Public Punishment for Crime*, ARIZ. REPUBLIC, Jan. 11, 1998, at A8, *available in* 1998 WL 7742935.

94. Daniel Golden, *Sex-Cons*, BOSTON GLOBE, Apr. 4, 1993, at 12.

95. LA. REV. STAT. ANN. § 15:542 (West Supp. 1999).

96. *Id.* § 15:542(B)(1)(a)-(b).

97. Claire M. Kimball, Note, *A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders Are Released into the Community*, 12 GA. ST. U. L. REV. 1187, 1203 (1996).

98. LA. REV. STAT. ANN. § 15:542(B)(3).

99. Kimball, *supra* note 97, at 1188. For example, the Virginia statute provides:

> The purpose of the [Sex Offender] Registry shall be to assist the efforts of law-enforcement agencies to protect their communities from criminal offenders and to protect children from becoming the victims of repeat sex offenders by help-

feelings of worthlessness that steer them towards crime, and that offenders will punish their victims out of their own shame.[100] Jenni Gainsborough, a policy director for the National Prison Project of the American Civil Liberties Union, said, "'If an offender is already hostile to society, it can do a lot more harm than good. Shaming is punitive justice; we'd rather see restorative justice.'"[101] Critics also contend that some of the statutes "do not spell out in enough detail who would be notified."[102] Others say that the notification rules do not consider the knowledge of educators and professionals in child abuse who can help prevent re-occurrence.[103] Another problem is that each state is defining "sex offender" very differently, developing a sort of "I know it when I see it" mentality.[104]

Most state statutes designate each sex offender into a level of notification depending on the likelihood of re-offense.[105] Based on the sex offender's risk level, notification is either made to law enforcement agencies only or to the

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ing to prevent such individuals from being hired or allowed to volunteer to work directly with children.

VA. CODE ANN. § 19.2-390.1(A) (Michie Supp. 1998).

100. Grunwald, *supra* note 93, at A8.

101. *Id.*

102. Shirley Salemy, *Notification Proposals Catch Flak*, DES MOINES REG., July 24, 1997, at 6M; *see also* Doe v. Gregoire, 960 F. Supp. 1478, 1481 (W.D. Wash. 1997) ("Whether public notification should be made, who among the public should be notified, and what information is deemed 'necessary,' are left to the discretion of local law enforcement agencies. On the face of the statute, all information provided by the registrant (including his address and place of employment) could be publicized. No notice or hearing is required, and no guidelines are provided to the local agencies.").

103. Salemy, *supra* note 102, at 6M.

104. Iowa's definition of "*sexually violent offense*" is broad. *See* IOWA CODE § 692A.1(7) (1999). As a result, this broad definition covered a mildly retarded seventeen-year-old boy who touched an eighteen-year-old girl's breasts and buttocks at school for 30 seconds. Margaret O'Brien, *Sex Offender Drops Out of High School*, DES MOINES REG., Sept. 2, 1998, at 1B. The boy's touch did not go underneath the girl's clothing. Jeff Hansel, *Young Offender Receives Threats*, DES MOINES REG., Aug. 29, 1998, at 1M. A teacher's aid observed the incident and told the boy to stop. O'Brien, *supra*, at 1B. The girl reported that the boy continued to harass her and brought charges against him. *Id.* Officials sent out public notices that the boy was at risk to re-offend before the school was able to inform parents about the nature of the incident. Hansel, *supra*, at 1M. Notification resulted in the boy dropping out of school due to the harassment. O'Brien, *supra*, at 1B. "'My idea of a sex offender is not somebody who just hugs somebody, or steals a kiss from somebody,'" said a family friend. *Id.* Furthermore, "the public is not told the difference between a child molester and a[n offender] who had illegal sex with someone closer to [their] age." Lynn Okamoto, *Releasing More Information Could Prevent Vigilantism*, DES MOINES REG., Nov. 24, 1998, at 1A.

105. Doe v. Pataki, 940 F. Supp. 603, 607 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997).

community.[106] If the risk of re-offense is low, the sex offender is assigned to level one, and only the arresting law enforcement agencies are notified.[107] If the re-offense risk is moderate, then the offender is classified as a level two, and the police may notify "vulnerable populations" of an approximate address, photograph, and background information.[108] If the re-offense risk is high, then the offender is classified as a level three, and the police may notify the entire community of the offender's exact address.[109] As a result of the pressure to notify the public, however, a vast majority of sex offenders are classified into the highest range.[110] These notification requirements also place a significant strain on police resources to implement this "sweeping legislation."[111] Not only does community notification provide additional work for police officials; there are extra burdens for the courts.[112] Most of the laws leave it up to county prosecutors to classify the offenders.[113] Funding is also a concern. The Jacob Wetterling Act mandates that states establish a central registry for certain offenses, but provides no specific funding for that purpose.[114]

If all the time and resources invested in notifying communities produced constructive results, there would be some gratification to the situation despite the

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106. *See id.*

107. *Id. See, e.g.*, N.Y. CORRECT. LAW § 168-l (6)(a) (McKinney 1987 & Supp. 1999). Some states have varied this approach. For example, in Alabama, communities are notified of *any* person convicted of *any* criminal sexual offense. ALA. CODE § 15-20-22(a) (1996). Notification varies, however, depending on the city in which the offender resides. *Id.* In Birmingham, Mobile, Huntsville, and Montgomery, the Chief of Police must notify all persons with a legal residence within 1000 feet of the offender's residence. *Id.* § 15-20-22(a)(1). In all other cities with a population of 5000 or more, persons with a legal residence within 1500 feet are notified. *Id.* § 15-20-22(a)(2). In cities with a population of less than 5000, persons within 2000 feet are notified. *Id.* § 15-20-22(a)(3). In all cases, name, address, sex, date of birth, physical description, current photograph, statement of the sex crime for which the offender has completed his or her sentence, and the date of release is provided. *Id.* § 15-20-21(a)(2).

108. Doe v. Pataki, 940 F. Supp. at 607. *See, e.g.*, N.Y. CORRECT. LAW § 168-l (6)(b).

109. Doe v. Pataki, 940 F. Supp. at 607. *See, e.g.*, N.Y. CORRECT. LAW § 168-l (6)(c).

110. In Iowa, in a six-week period, 82% of risk assessments resulted in high-risk designations. Thomas A. Fogarty, *Sex Felon Registry Is Near Useless*, DES MOINES REG., Aug. 7, 1998, at 1A.

111. Mel L. Greenberg, *Just Deserts in an Unjust Society: Limitations on Law as a Method of Social Control*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 333, 339 (1997). In Iowa, offenders' profiles in public files contain scant information because of a tremendous backlog of risk assessments. Fogarty, *supra* note 110, at 1A. As a result, it could be a long time before Iowans have access to a large volume of information on sex offenders in their communities. *See id.* When officials do publicize a released sex offender's information, the police department's telephone "rings off the hook for four days." Okamoto, *supra* note 104, at 1A.

112. Greenberg, *supra* note 111, at 339.

113. *See Judge Upholds Central Issue of Megan's Law*, DES MOINES REG., July 2, 1996, at 5A.

114. *See* 42 U.S.C. § 14071 (1994).

costs.[115] It is debatable, however, whether community notification actually deters crime.[116] "No one can seriously suggest that registration actually deters the kind of compulsive behavior that characterizes several predators."[117] Little protection is offered in community notification against the underlying compulsive behavioral problems.[118] The "psychological problems of a sex offender may be too deep to fix with a public branding."[119] Some offenders do not care what others think and may take their humiliation out on future victims.[120] For example, a released child rapist "went on a rampage, trying to entice one boy after another into his car" within hours of the local television broadcast notifying the public of his release.[121] He eventually picked up a twelve-year-old boy outside a bowling alley.[122] Fortunately, two witnesses dragged the boy from the car just as it was about to pull away.[123] The offender is now back in prison after an attempted kidnapping conviction.[124]

"[I]t is not unusual these days for laws to be proposed and passed which are the product of some tragic event which catches public attention through saturated news coverage by both print and electronic media outlets."[125] Although the current wave of sex offender registration laws passed across the country appeal to our "popular sensibilities," they violate some of the most basic principles of the United States Constitution.[126] The legislatures, in an attempt to quickly please the public, have ignored the fact that incest is the most likely source of sexual abuse on children.[127] While sex crimes against family members are indeed serious, "they are not considered to be potential high-risk offenders in the community."[128]

As a result of the community notification provisions, the released sex offender often experiences harassment and physical abuse by the community,

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115. Greenberg, *supra* note 111, at 340.
116. *Id.* at 338.
117. *Id.* at 340.
118. *Id.* at 338.
119. Grunwald, *supra* note 93, at A8.
120. *Id.*
121. Golden, *supra* note 94, at 12.
122. *Id.*
123. *Id.*
124. *Id.*
125. Greenberg, *supra* note 111, at 337.
126. *Id.*
127. *Id.* at 340; *see also Study: Most Sex Offenders Pick Children as Victims*, DES MOINES REG., Mar. 4, 1996, at 3A (Relying on "the largest survey ever of state prison inmates," the Justice Department reported that "[a] third of child molesters had attacked their own child or stepchild. Another half of the molesters were a friend, acquaintance or relative of their victim. Only one in seven molested a child who was a stranger.").
128. *Officials*, *supra* note 1, at 10A.

loss of employment, and loss of housing.[129] For example, in New York, a mass mailing was sent to residents of a school district notifying them that a sex offender had recently moved into the community.[130] The mailing specifically identified the sex offender by name and street address.[131] Subsequent to the mailing, the individual was fired from his job, his family was harassed, and an attempt was made to break into his brother's house.[132] An individual in New Jersey had his name and photograph circulated by law enforcement officials stating he was a "danger to children."[133] He was locked out of his apartment after his neighbors began calling him a "child molester."[134] In addition to suffering these indignities, the individual was physically assaulted on three separate occasions.[135]

Obviously, notification by leaflets, personal or written notifications, media releases, and posting notices encourages a "lynch-mob attitude."[136] After seeing a poster, one man knocked on a classified sex offender's door, called him a "pervert," and punched him in the mouth.[137] Notification results in a higher rate of assault.[138] "[I]n our zeal to protect ourselves and our children, we should not enact measures that do more harm than good."[139] While community notification was designed to reduce assault and decrease violence, community notification in fact results in far more assaults and further violence. According to a director of the Bureau of Offender Programs with the Wisconsin Department of Corrections, "sex offenders need stability in their lives and when they are harassed, the chances to re-offend increase."[140] Furthermore, once the public is notified, they either lock themselves in their homes or drive the offender to the

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129. McAllister, *supra* note 23, at 441.

130. Doe v. Pataki, 940 F. Supp. 603, 609 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997).

131. *Id.*

132. *Id.* A Washington sex offender was evicted from his residence in a trailer park because of harassment. *Id.* at 610. He moved to another community after fliers were posted with his photograph. *Id.* He was fired from three jobs before moving permanently from the state of Washington. *Id.*

133. *Id.* at 609.

134. *Id.*

135. *Id.*

136. Salemy, *supra* note 102, at 6M.

137. Doe v. Pataki, 940 F. Supp. at 610.

138. Salemy, *supra* note 102, at 6M.

139. Greenberg, *supra* note 111, at 337.

140. *Officials*, *supra* note 1, at 10A.

next community.[141] This just moves the problem around and does not solve anything.[142]

Fear of harassment can also persuade the offender not to register.[143] Most states provide that a failure to register is a misdemeanor.[144] "Fear of misdemeanor punishment is an inadequate incentive to register compared to the potential harassment" an offender or his family may suffer.[145] Furthermore, the fear of being detected may prevent offenders from seeking professional help which may only encourage future crimes.[146] "The notification laws create a false sense of security."[147] Because communities will be notified, the general public incorrectly assumes they will be informed about every released sex offender who enters their community.[148] This is not true,[149] especially if the sex offender does not register.

Public safety includes the safety of the released sex offenders. One released sex offender shot himself two days after law enforcement officials notified his neighbors that he was a convicted sex offender.[150] "The public's

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141. Kimball, *supra* note 97, at 1201.

142. *Id.* Often the released sex offenders end up living "in low-income apartments, homeless shelters, or houses run by social service agencies." Vanessa Ho, *Sex Offenders Often Have No Choice but to Cluster in Poorer Neighborhoods, There's No Welcome Committee for Them*, SEATTLE POST-INTELLIGENCER, Feb. 5, 1998, at A1. It is difficult for released sex offenders to find housing because it is common for landlords to ask for criminal histories. *Id.*

143. Kimball, *supra* note 97, at 1201.

144. *See, e.g.*, N.Y. CORRECT. LAW § 168-t (McKinney Supp. 1999) (class A misdemeanor); VT. STAT. ANN. tit. 13, § 5409 (Supp. 1996) (an offense punishable "for not more than two years or fined not more than $1,000.00, or both"). *But see, e.g.*, N.C. GEN. STAT. § 14-208.11 (Supp. 1997) (failure to register a class F felony).

145. Kimball, *supra* note 97, at 1201.

146. Rafshoon, *supra* note 15, at 1674.

147. Kimball, *supra* note 97, at 1197 (citation omitted).

148. *Id.* In Iowa, although hundreds of released sex offenders have been classified as high risk to re-offend, the public has only been told about 38 offenders. Lynn Okamoto, *Offender Law Won't Change Soon*, DES MOINES REG., Dec. 14, 1998, at 1M. Furthermore, some sheriff department workers are unaware of their "obligation to provide the public such information." Fogarty, *supra* note 110, at 1A. And, the Iowa Sex Offender Registry lists only offenders who were released after July 1, 1995. Lynn Okamoto, *Are Sex Criminals Unfairly Labeled by Notification Law?*, DES MOINES REG., Nov. 23, 1998, at 1A; *see also* IOWA CODE § 692A.16(1) (1999).

149. *See supra* notes 105-09 and accompanying text.

150. *Maine Man Commits Suicide over Notification Law; Authorities Told Neighbors He Was a Sex Offender*, BALTIMORE SUN, Feb. 16, 1998, at 3A. This was the first time the police department in this case took the "extreme step of informing the public." *Id.* It did so because the ages of the sex offender's two victims were nine years old and because he had no ties to the community he lived in after he was released from prison. *Id.* The released sex offender worked on a construction site and rented a one-bedroom garage apartment. *Id.* He learned about the notifications from his landlord and immediately bought "a 12-gauge shotgun and a bottle of rum." *Id.* He

rage against sexual predators is more than understandable."[151] However, as one law enforcement officer stated, "We have an obligation to protect everybody and sexual offenders have served their debts to society."[152]

IV. AN ANALYSIS OF IOWA'S SEX OFFENDER STATUTE

As with many states, there was a rush by Iowa lawmakers to enact a form of Megan's Law in 1995.[153] Now that Iowa has had time to see what other states are doing and how courts are responding, Iowa lawmakers have begun strengthening the present law.[154] State officials began questioning the effectiveness of the originally enacted law in May 1997, after an incident in Coralville, Iowa, where a released sex offender was "accused of kidnapping [a young] boy and performing oral sex on him."[155] The offender pled guilty to second-degree sexual abuse.[156] The offender had been released from prison for a previous sex crime six weeks prior to the attack.[157] After this attack, revisions to Iowa's statute were made which resulted in Iowa authorities publicly notifying seven Iowa communities of released sex offenders classified as high risk.[158]

Waterloo, Iowa, was the first community to be notified of a released sex offender moving into the community.[159] When eighteen-year-old Richard Dale Abrahamson was discharged from the Eldora State Training School for delinquent boys and was moving back home with his mother across the street from an elementary school, local authorities dispersed bright-pink fliers alerting Waterloo residents of Abrahamson's entrance into their community.[160] The fliers contained Abrahamson's picture and physical description.[161] News agencies and school districts were also notified in Waterloo and Cedar Falls.[162] Abrahamson had been convicted in juvenile court of second-degree sexual abuse

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left a tape-recorded suicide note on his landlord's door that stated he could not "live in a world where there was no possibility of forgiveness." *Id.*

151. Greenberg, *supra* note 111, at 337.

152. *Officials*, *supra* note 1, at 10A.

153. *Iowa Fine-Tunes Sex Offender Registry; Sex-Predator Proposals in Iowa*, OMAHA WORLD HERALD, Feb. 8, 1998, at 1B [hereinafter *Iowa Fine-Tunes*].

154. *Id. See generally* 1998 Iowa Acts 1169 (revising Iowa's sex offender registry provisions provided in Iowa Code section 629A).

155. *Iowa Fine-Tunes*, *supra* note 153, at 1B.

156. *Id.*

157. *Id.*

158. *Id.*

159. Charles Bullard & Shirley Salemy, *Sex-predator Alert Jars Waterloo*, DES MOINES REG., Oct. 9, 1997, at 1A.

160. *Id.*

161. *Id.*

162. *Id.*

after he abducted a ten-year-old child at knifepoint.[163] The Iowa Division of Criminal Investigation determined that Abrahamson was likely to re-offend.[164] Released sex offenders typically have fourteen days to appeal public notification, but state officials can waive that period.[165] The fourteen-day period was waived in Abrahamson's case because state officials felt that it was more important for the community to be notified.[166]

As a result of the notification, parents no longer allowed their children to walk home from the neighboring elementary school.[167] Older siblings carried baseball bats as they picked up their brothers and sisters from school.[168] One teenager admitted to having carried a pool cue with him as he picked up his younger sister from school.[169] A spokeswoman for the Waterloo school district stated that school absences were running slightly higher than average.[170] One parent even insisted on transferring her child to a school farther away.[171]

"[P]olice officers served Abrahamson with letters from area school districts informing him he [was] not allowed on any school property."[172] Although local authorities warned the community that anyone who harassed Abrahamson or his family risked being arrested, Abrahamson and his mother received death threats and both stated they were frightened to walk the streets alone.[173] Cars drove by their home and the people inside the cars shouted profanities at the family.[174]

In Iowa, any person convicted of a "criminal offense against a minor, sexual exploitation, . . . or a sexually violent offense," must register for ten years following release from custody.[175] The released sex offender has ten days after release from custody to register with the sheriff in the offender's county of residence,[176] otherwise the individual will be charged with an aggravated misde-

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163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Iowa Fine-Tunes*, *supra* note 153, at 1B.
168. Bullard & Salemy, *supra* note 159, at 1A.
169. *Iowa Fine-Tunes*, *supra* note 153, at 1B.
170. Jonathan Roos & Shirley Salemy, *Legislators Eye Ways to Control Sex Offenders*, DES MOINES REG., Oct. 10, 1997, at 3M.
171. *Id.*
172. *Id.*
173. Bullard & Salemy, *supra* note 159, at 1A.
174. *Iowa Fine-Tunes*, *supra* note 153, at 1B.
175. IOWA CODE § 692A.2(1) (1999).
176. *Id.* § 692A.3(3).

meanor.[177] Subsequent failures to register are a class "D" felony.[178] If the released sex offender does not register and commits a criminal offense against a minor, it is a class "C" felony.[179] Any change in address or telephone number also needs to be reported to the sheriff of the new county and the sheriff of the old county within ten days of the change.[180]

The released sex offender must provide his or her social security number, current address, telephone number, fingerprints, photograph, other identifying factors, anticipated future places of residence, offense history, and documentation of any treatment received by the person for a mental abnormality or personality disorder.[181] However, the statute provides that registration is not limited to these items.[182] As of November 1998, Iowa's sex offender registry had collected 2630 names—2559 men and 71 women.[183] The statute provides that the information in the sex offender registry is "confidential."[184] However, the sheriff must release information regarding a registered offender to members of the general public if the person submits a written request with the name of the person about whom the information is sought and either the person's date of birth, social security number, or address.[185] This would be the only way the general public would be able to find out about the presence of a low-risk offender on the Iowa Sex Offender Registry.[186]

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177. *Id.* § 692A.7(1). The maximum sentence for an aggravated misdemeanor is no more than two years, and in addition a fine of at least five hundred dollars but not more than five thousand dollars. *Id.* § 903.1(2). *See, e.g.*, *Inmate Discovered Dead in Cell*, DES MOINES REG., Aug. 15, 1998, at 8M (discussing an incident where a Davenport man was found dead in his cell of an apparent suicide by hanging after serving five and a half months of his two-year sentence for failing to register as a sex offender).

178. IOWA CODE § 692A.7(1). The maximum sentence for a class "D" felon is "no more than five years, and in addition . . . a fine of at least five hundred dollars but not more than seven thousand five hundred dollars." *Id.* § 902.9(4).

179. *Id.* § 692A.7(1). The maximum sentence for a class "C" felon is "no more than ten years, and in addition a fine of at least five hundred dollars but not more than ten thousand dollars." *Id.* § 902.9(3).

180. *Id.* § 692A.3(3). *See, e.g.*, *Teen-ager Charged over Address*, DES MOINES REG., Aug. 15, 1998, at 8M (discussing an incident where a Johnson County teenager was charged with failing to update his address after he and his mother were evicted from their Coralville residence and were living with an Iowa City family).

181. IOWA CODE § 692A.9; *see also id.* § 692A.5(1)(a).

182. *Id.* § 692A.9.

183. Lynn Okamoto, *Public Notification Is Rare*, DES MOINES REG., Nov. 22, 1998, at 1A. According to these statistics, it is estimated that between 900-1000 of those on the registry have broken the law by failing to register after moving. *Id.*

184. IOWA CODE § 692A.13.

185. *Id.* § 692A.13(3).

186. Fogarty, *supra* note 110, at 1A.

All sheriffs' offices and police departments must also provide a county-wide list of "at risk" individuals available upon request.[187] To determine risk, Iowa officials[188] use a point system developed by Kim English, the Colorado Division of Criminal Justice research director, consisting of several factors.[189] These factors include use of violence, victim's age, offender's criminal background, and extent of sexual contact between offender and victim.[190] An offender is automatically high risk if the offender had a previous sex-crime conviction, seriously injured or murdered the victim, recently threatened to re-offend, or has a mental abnormality decreasing the ability to control impulsive sexual behavior.[191] Law enforcement officials may disseminate information regarding high-risk offenders as widely and aggressively as they deem appropriate.[192]

Recently, the Iowa General Assembly enacted a new law providing for involuntary civil confinement for sex offenders considered violent sexual predators.[193] In 1994, Iowa passed a similar law aimed at keeping sex offenders in an extended period of civil commitment in a secure hospital after serving a prison sentence.[194] Because the law's constitutionality and future repercussions raised serious questions, it was subsequently repealed.[195] Since then, the United States Supreme Court upheld a Kansas law that permitted an extended confinement of sex criminals who suffer from mental abnormalities and who are likely to repeat their crimes.[196] In light of this decision, Iowa reconsidered the 1994 proposal and enacted a similar one in 1998.[197]

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187. IOWA CODE § 692A.13(3).

188. Depending on the status of the sex offender, the risk assessment is conducted either by the Department of Corrections, the Department of Human Services, or the Department of Public Safety. Okamoto, *supra* note 148, at 1A.

189. *Id.*

190. *Id.*

191. *Id.*

192. Fogarty, *supra* note 110, at 1A; *see also* IOWA CODE § 692A.13(3).

193. *See* IOWA CODE § 229A. The sex offender commitment laws have four necessary elements. Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 348 (1997). The state must prove (1) a history of sexually violent acts; (2) a current mental disorder; (3) a likelihood of future sexually harmful acts; and (4) a nexus between the first two elements and the third. *Id.* at 348-49. The state's level of burden of proof is at least clear and convincing, and in some situations, beyond a reasonable doubt. *Id.* at 349. Some state laws require a trial by jury, but others do not. *Id.* All provide for continuous confinement until the sex offender shows he or she is no longer dangerous by reason of a mental disorder or abnormality. *Id.*

194. Roos & Salemy, *supra* note 170, at 3M.

195. *Id.*

196. Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

197. *See* IOWA CODE § 229A.

Critics, specifically civil liberty groups, warn that the fundamental rights of sex offenders could be compromised given the state's rush in enacting sex offender legislation.[198] Ben Stone, Executive Director of the Iowa Civil Liberties Union, stated, "We are right as a people to be diligent in doing what we can to promote children. But we need to avoid falling into the trap of becoming hysterical."[199]

Legislation was also recently passed in Iowa that provides mandatory hormone treatments to reduce the sex drive of repeat sex offenders.[200] The Iowa legislature appropriated $500,000 in the fiscal year 1999 for hormonal treatment of sex offenders.[201] Licensed mental-health counselor and certified criminal lifestyles cognitive-behavioral therapist, Toni R. Bell, warns that criminal thinking is not properly addressed with hormonal therapy.[202] She claims that lifestyle changes are necessary for sexual offenders because their offenses involve their core belief system.[203] Bell contends that hormonal therapy should not be considered as an isolated treatment approach.[204] Treatment also needs to include challenging and restructuring the offender's core belief system.[205] The hormonal therapy only reduces the intensity and frequency of "aberrant sexual fantasies, impulses and behaviors," but it does not eliminate an offender's sexual response.[206] Ms. Bell argues that "[t]he decision to use hormonal therapy should be decided within the mental-health arena, not the legal arena."[207]

V. How to Improve Community Notification Laws

At best, community notification is ineffective; at worst, it is counterproductive. However, despite the constitutional and practical problems of community notification of sex offenders, it is likely that lawmakers will continue to pass such legislation.[208] It is imperative that lawmakers make an attempt to protect the constitutional rights of offenders and to reduce the likelihood of harassment.[209] With the deeply moving emotional atmosphere

198. Roos and Salemy, *supra* note 170, at 3M.
199. *Id.*
200. *See* Iowa Code § 903B.1.
201. 1998 Iowa Legis. Serv. 1222, § 5 (West).
202. Toni R. Bell, *Drugs Alone Won't Stop Sex Abusers*, Des Moines Reg., Feb. 28, 1997, at 14A.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. Rafshoon, *supra* note 15, at 1674.
209. *Id.*

surrounding the issue of sexual abuse, this will not be an easy task. If measures are enacted to cautiously balance the rights of the offender with the rights of the community, however, fair and adequate legislation can be enacted.

First, lawmakers should ensure an adequate level of due process.[210] Released offenders should be afforded an opportunity to be heard—"to explain why they should not be subject to notification."[211] As in the Abrahamson case in Waterloo, Iowa, local authorities should not be permitted to waive the fourteen-day period in which the released sex offender can appeal a decision of community notification.[212] A hearing would further limit the amount of discretion provided to local law enforcement officials and diminish the chance of unfounded community hysteria.[213]

Second, local law enforcement officials should notify the community in ways that would decrease panic reactions by residents.[214] Passing bright-pink "wanted" posters to residents, as done in Waterloo, Iowa, sends the wrong message.[215] Officials are giving just enough information to residents to pique their curiosity and inflame their anxieties. Distributing flyers and making door-to-door warnings ignite the already volatile emotions of a community, which truly does not have a complete understanding of all the issues surrounding sexual abuse. Police should attempt to make the residents feel safe by making it clear that the released sex offender has served a lengthy sentence and has the right to live in the community.[216] Local law enforcement officials could provide a town meeting in which residents would have an opportunity to ask questions.[217] In Waterloo, Iowa, neighbors who knew the Abrahamson family, who knew the eighteen-year-old was continuing to receive treatment, and who knew about sexual abuse were less fearful and more inclined to give Abrahamson a second chance to prove himself.[218]

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210. *Id.* For example, offenders were successful on due process claims in federal district court in New York. *See* Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998).

211. Rafshoon, *supra* note 15, at 1674.

212. *See supra* text accompanying notes 165-66.

213. Rafshoon, *supra* note 15, at 1674-75.

214. *Id.* at 1675.

215. *See supra* text accompanying notes 160-61.

216. Rafshoon, *supra* note 15, at 1675.

217. For example, in Seattle, Washington, monthly community meetings are held. Okamoto, *supra* note 104, at 1A. "At the meetings, local law enforcement officers . . . explain the community-notification law, release any new sex offenders' names, and answer any questions . . . ." *Id.* Officials further explain that vigilante-type action is inappropriate. *Id.* A Seattle police detective stated, "'We can't expect people to handle this information without law enforcement helping them in the process' . . . 'People don't know what to do or what all this means.'" *Id.*

218. Bullard, *supra* note 159, at 1A.

Third, we should generally warn children about unwanted contact. Comprehensive programs should be provided which educate parents and children through their homes and schools. Many sex offenders are not strangers to their victims, but are often people whom either the child or the parents know.[219] Our only meaningful protection is for parents and children to be on their guard for people exhibiting this type of conduct.

Fourth, in dealing with violent sex offenders with a high risk of recidivism, we should treat and incarcerate, not release and indefinitely brand the offender. It is more productive to work within the criminal justice system by extending incarceration periods and rehabilitating the offender during that time. Community notification is counterproductive because it results in driving released sex offenders away from the job-support structure and family-support structure that they need to rehabilitate and reduce the likelihood of re-offending.

These suggestions are simple and in no way will eliminate the many problems surrounding community notification laws. These laws are being passed during a time when parents are frustrated and lawmakers are angry. The laws are satisfying a public demand to be stricter on sex offenders and are creating scapegoats for politicians to claim they are protecting our children. Constitutional issues such as ex post facto, due process, double jeopardy, and right to privacy are fundamental to a democratic society. Registration is potentially useful and may provide officials a resource when looking for a criminal. Notification is another matter. It has not proven itself to provide residents with a safer community, but has successfully angered residents, shamed offenders, and given law enforcement officials discretion to make decisions that should properly be made in the courtroom.[220]

VI. CONCLUSION

For the first time since the Colonial era, shame is making a comeback in the legal world through the community notification provisions of so-called Megan's Laws. Megan's Law, the first statute to require notification of released sex offenders, has raised complex constitutional considerations. Lawmakers designed this law to serve as a shield, allowing the public to take precautionary steps to decrease the possibility that other children will be sexually assaulted. In

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219. For example, a forty-five-year-old Des Moines man convicted on two counts of third-degree sexual abuse involving two twelve-year-old boys integrated himself with a parent of one of the children giving him unsupervised access to the child. Tom Alex, *Molester Narrowly Misses Sex Registry List; Is Arrested Again*, DES MOINES REG., Mar. 18, 1998, at 3M. That child then introduced him to his friend. *Id.* The parents of the second child had no idea that their son was seeing this man or any other adult in an unsupervised situation. *Id.*

220. Rafshoon, *supra* note 15, at 1676.

order to function effectively, however, the law must apply retroactively. If it does not apply to previous offenders, notification would provide little protection. This need for retroactive application has been a tremendous impediment for Megan's Law.

In balancing the rights of our children against the rights of a released sex offender, of course, there is no doubt the children's protection comes first. We, however, live in a country where everyone possesses certain fundamental rights. A balancing test, therefore, is inappropriate when dealing with such absolute rights of ex post facto and double jeopardy. No matter how repulsed society is concerning sex offenders, we cannot place offenders in a unique, separate class bereft of constitutional rights. If America loses sight of the basic principles of freedom, then no one, not just released sex offenders, will be free.

One thing is certain: sex offenders should be punished for their crimes, and they do serve lengthy sentences, in which their freedom is taken away for a substantial period of time. This is the appropriate way to deal with sex offenders—through prosecution and punishment within the full extent of the law. However, once offenders are released, they have paid their debt to society and have the constitutional right to re-integrate into society. This may not be an easy concept to swallow, but it is a freedom our Founding Fathers believed was fundamental to the makeup of our society as a whole. Registering with the police is an appropriate measure and is a procedure common to all felons to aid the police in monitoring.[221] Community notification, on the other hand, is a call for vigilante justice. Notification does nothing more than give communities a false sense of security and divert available resources away from productive measures. Nowhere in our system of justice is the government granted the power to single out and brand individuals as potential criminals. As one Des Moines, Iowa lieutenant stated, "'It is the only crime I know of that we don't let people get over.'"[222]

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221. Registering is an appropriate measure as long as the police verify that they have the correct information. For example, in Des Moines, Iowa, corrections officials released the incorrect address of a released sex offender and residents of the apartment building criticized the landlord for renting to such a person and threatened to picket the building.property. Tom Alex, *Sex Offender Warning Alarms Neighbors at D.M. Apartments*, DES MOINES REG., Oct. 7, 1998, at 8M.

222. Okamoto, *supra* note 104, at 1A.