

# WHO ARE THE PEOPLE IN YOUR NEIGHBORHOOD? DUE PROCESS, PUBLIC PROTECTION, AND SEX OFFENDER NOTIFICATION LAWS

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*All fifty states have enacted sex offender registration acts (SORAs). In addition to requiring registration with the state, these laws usually provide for the notification of an individual's status as a sex offender—along with the dissemination of personal information—to law enforcement officials and members of the community. In this Note, Jane Small argues for enhanced due process protections for offenders when they are required to register. Since SORAs are not aimed at punishment but rather community protection, they are civil, not criminal, statutes and the due process standard for civil proceedings, as announced in Mathews v. Eldridge, ought to be applied. That standard requires a court to weigh the risk of depriving an individual of a protected interest against the governmental interest embodied in a particular procedure. Small surveys SORAs' problems, including the inappropriately generalized categorization of sex offenders and the danger notification poses to individual offenders, and outlines recent cases applying the Mathews standard to assess the constitutionality of SORAs. She then evaluates available procedural protections and current notification mechanisms for their compliance with the requirements of Mathews. She concludes that an individualized, fact-specific assessment must be made in every case, and that the proceedings must be narrowly geared to the legitimate aim of SORAs—community protection—in order not to infringe on the individual's interests any more than is necessary to achieve that aim.*

## INTRODUCTION

In the wake of several well-publicized and gruesome sexual assaults on children,<sup>1</sup> legislatures across the country acted quickly to

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<sup>1</sup> Several tragic incidents prompted the passage of many sex offender laws. The list that follows is by no means exhaustive. On July 29, 1994, Megan Kanka was killed by Jesse Timmendequas, who first lured Megan into his house by promising to let her see his puppy, and then strangled and sexually assaulted her. See Ralph Siegel, *Suspect Admits Killing Girl*, *Record (Hackensack, N.J.)*, Aug. 2, 1994, at A1, available in 1994 WL 7763092. Amanda Wengert, a six-year old, was murdered by Kevin Aquino, a convicted sex offender. See Sue Epstein, *Shore Defendant Admits Killing Little Amanda*, *Star-Ledger (Newark, N.J.)*, July 27, 1995, at 20. Seven-year-old Divina Genao was raped and murdered by Conrad Jeffery, who had recently been released from prison. See Colleen Mancino, *Jeffrey's Murder Trial Starting*, *Record (Hackensack, N.J.)*, Sept. 14, 1995, at N1,

pass sex offender registration acts (SORAs).<sup>2</sup> Reacting to public outrage and fear,<sup>3</sup> legislatures hurried to craft far-reaching laws targeting all sex offenders. However, these hastily enacted statutes are fraught with significant problems. The broad scope of many SORAs makes their often onerous provisions applicable to thousands of Americans. Furthermore, the statutes may include in their reach individuals whose crimes are not those that pose a serious risk to the public.<sup>4</sup>

In the wake of newly enacted SORAs, courts have been confronted with cases posing various challenges to the constitutionality of both registration and notification provisions. After finding that SORAs do not violate constitutional prohibitions against *ex post facto* punishment or double jeopardy,<sup>5</sup> some courts have begun to look at

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available in 1995 WL 3480086. Twelve-year-old Polly Klaas was kidnapped, raped, and murdered by a man with a prior conviction for a sex offense. See Dan Reed, *Polly Killing Suspect Booked*, San Francisco Chron., Dec. 6, 1993, at A1. A seven-year-old boy was attacked, molested, and genitally mutilated in 1989 by Earl Shriner, who had a long history of convictions for sexual crimes. See Gayle M.B. Hanson, *Experts Vexed at What to Do with Sex Offenders*, Wash. Times, June 6, 1994, at A8. Zachary Snider, a ten-year old, was sexually abused and murdered in 1993 by a released child sex offender. See Susan Schramm, *Tape Played in Molester's Slaying Trial*, Indianapolis Star, Feb. 7, 1995, at E1. Jacob Wetterling was abducted at gunpoint on his way home from renting a video in 1990. See 137 Cong. Rec. S14,945 (daily ed. Oct. 22, 1991) (statement of Sen. Durenberger). Although it is not known who kidnapped the boy, his abduction created public fervor that resulted in the introduction of a federal sex offender law. See 139 Cong. Rec. S6840 (daily ed. May 28, 1993) (statement of Sen. Durenberger) (introducing bill S. 1069, which requires registration of offenders convicted of crimes against children).

<sup>2</sup> This Note will use the acronym SORA to refer generally to sex offender statutes, including both those statutes that do and do not contain notification provisions, unless otherwise specified.

<sup>3</sup> See Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 New Eng. J. on Crim. & Civ. Confinement 303, 316 (1997) ("[P]oliticians are passing laws that cater to the public's fear of sex crimes, and passing legislation based on emotions is not an appropriate avenue."); see also Symposium, *Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y.L. Sch. J. Hum. Rts., at 42 (1996) [hereinafter *Megan's Law Symposium*] (comments of Linda Fairstein) ("[T]he legislation . . . sometimes gets lost in the hysteria surrounding some of the well-publicized tragedies . . ."); *id.* at 57 (comments of Hon. John J. Gibbons) ("Passion does not always lead to wise reflection . . ."); Michele L. Earl-Hubbard, *Comment, The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 Nw. U. L. Rev. 788, 861 (1996) ("[O]ne can understand the pain and anguish that produced the laws . . . . What one cannot do is allow passion, pain, and anger to cloud reason and judgment."); Louise Palmer, *Megan's Law Often Brands Wrong People: Hundreds Challenge Registry*, Times-Picayune (New Orleans, La.), Oct. 12, 1997, at A10 (quoting New Jersey State Assembly member Loretta Weinberg: "[Megan's Law] was rushed through the Legislature without input. Politicians were so anxious about the PR value."); Michelle Ruess, *Second Thoughts About Megan's Law: Concern Growing over Ripple Effects*, Record (Hackensack, N.J.), Feb. 19, 1996, at A1, available in 1996 WL 6075986 ("Megan's Law was the product of politics and passion.")

<sup>4</sup> See *infra* Part I.A, C.

<sup>5</sup> See discussion *infra* Part II.C.2.

whether or not SORAs provide convicted sex offenders with constitutionally adequate procedural protections.

This Note will discuss the due process implications of SORAs and the conflict between the individual's interest in nondisclosure and the state's interest in community protection. Part I discusses statistics regarding sex offenders, including recidivism statistics, and outlines the need for a better-informed understanding of who should be considered a "sex offender" under SORAs. It goes on to discuss existing notification schemes, including 1-900 numbers and Internet sites. It then considers improper notification and vigilantism—two potential problems of notification—and discusses general policy concerns. Part II addresses how courts have construed notification provisions, mapping the evolving standard of the minimum level of procedure that must be included in a notification scheme. The section first analyzes the interests implicated by SORAs, and then turns to various courts' due process approaches to sex offender statutes. Part III applies the *Mathews v. Eldridge*<sup>6</sup> due process balancing test to specific procedures, including tiered risk classifications, opportunity to contest risk classification in a judicial proceeding, opportunity for review during the duration of registration, dissemination of information limited to that which is deemed substantially likely to help a group the legislature intended to protect, and Internet notification. The Note concludes that, because SORAs are ostensibly civil statutes, the courts that evaluate them should take steps to ensure that the means of notification are narrowly tailored to effectuate a nonpunitive legislative intent; if SORAs are truly public protection measures, notification should be limited to a population that might actually be protected by notification, and notification should be carried out in a manner that imposes the least possible burden on the offender.

## I

### SEX OFFENDERS, SORAs, AND VIGILANTISM

Sex offenses plague our society, arousing great fear and anger in the public.<sup>7</sup> Such concern about sex crimes is understandable and certainly not without statistical support. However, in order to fashion a

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<sup>6</sup> 424 U.S. 319 (1976).

<sup>7</sup> See, e.g., Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 *Psychol. Pub. Pol'y & L.* 505, 506 (1998) ("[S]ex offenders are the pariahs of our society."); Alison Virag Greissman, Note, *The Fate of "Megan's Law" in New York*, 18 *Cardozo L. Rev.* 181, 181 (1996) ("Sexual crimes disgust, anger, and frighten Americans in a way that no other human act does."); see also *Megan's Law Symposium*, *supra* note 3, at 44-45 (comments of Linda Fairstein) (stating that general public is most afraid of stranger rape).

system to deal effectively with sex crimes, we must be careful not to make broad generalizations about sex offenders. It is imperative that we not look at "sex crimes" or "sex offenders" as singular categories. The problem is too broad, too complex, and too varied to be treated with one sweeping brush.<sup>8</sup>

### A. *Sex Crimes: Victims and Offenders*

SORAs did not arise in a vacuum; they were crafted in response to concern about the incidence of sex crimes in America. These concerns are not ill founded. Some statistics indicate that one in five children will be the victim of a sexual offense before the age of eighteen, and one in three women will be the victim of rape.<sup>9</sup> Two recent studies of children found that 25% of adolescent girls and 12% of high school boys reported that they had been sexually or physically abused.<sup>10</sup> In 1995, there was one violent sex offense reported for each 625 United States citizens.<sup>11</sup>

The problem of sexual offense is much more complex than popularly perceived.<sup>12</sup> The commonly held image of a lecherous old man preying on little boys and girls<sup>13</sup> does not accurately reflect the wide spectrum of people the law deems "sex offenders"; though many sex offenders perpetrate crimes that shock the senses, a closer look at sex

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<sup>8</sup> See, e.g., *The Sex Offender 3-1 to 3-31* (Barbara K. Schwartz & Henry R. Cellini eds., 1995) (suggesting various typologies of different types of offenders).

<sup>9</sup> See Freeman-Longo, *supra* note 3, at 308; see also *The Sex Offender*, *supra* note 8, at xi (stating that one in four girls and one in six boys will be victimized before age 18). The U.S. Department of Justice's Bureau of Justice Statistics reported in 1997 that 44% of rape victims in three states were younger than eighteen years old. See Lawrence A. Greenfeld, Bureau of Justice Statistics, U.S. Dep't of Justice, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault (Foreword)* (visited October 13, 1999) <<http://blackstone.ojp.usdoj.gov/bjs/pub/ascii/soo.txt>>.

<sup>10</sup> See Tamar Lewin, *Sexual Abuse Tied to 1 in 4 Girls in Teens*, N.Y. Times, Oct. 1, 1997, at A24 (citing Commonwealth Fund study and Alan Guttmacher Institute study).

<sup>11</sup> See Greenfeld, *supra* note 9 (Highlights). In 1994, there was one rape/sexual assault reported for every 270 females. See *id.* (Measuring the Extent of Sex Offending).

<sup>12</sup> See Freeman-Longo, *supra* note 3, at 311 ("[T]he sexual abuse cases that make national news and headlines do not represent the average sexual abuse cases in America. The sexual abuse that happens each day in America is not newsworthy.")

<sup>13</sup> See Donal E. J. MacNamara & Edward Sagarin, *Sex, Crime, and the Law 70* (1977); see also *Doe v. Poritz*, 662 A.2d 367, 373-74 (N.J. 1995) (citing legislative history of Megan's law as targeting sex offenders who prey on children); *Megan's Law Symposium*, *supra* note 3, at 35-37 (comments of Robert T. Farley) ("[W]e are really targeting pedophiles here. . . . Today's society should not tolerate criminals who prey upon innocent children."); Dale Kueter, *Coralville Case Prompted Change*, *Iowa City Gazette Online* (visited Oct. 12, 1997) <<http://www.gazetteonline.com/ialegis/1997/crime/97cr100.htm>> (discussing problems with notification procedures under Iowa's sex offender registry system).

offenders reveals that they cannot easily be placed in one general category.<sup>14</sup>

Contrary to the popularly held belief that sex crimes are usually committed by sinister strangers, seventy-five percent of all sexual assaults are perpetrated by offenders known to the victim.<sup>15</sup> Also contrary to public perception, same-sex sexual offenses comprise only a small minority of cases when the prison population is excluded from analysis.<sup>16</sup> Although the majority of sex offenders are white males,<sup>17</sup> there is a small but growing number of female offenders.<sup>18</sup> Finally, most sex offenders are not old, rather most are between twenty and forty years old.<sup>19</sup>

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<sup>14</sup> See Megan's Law Symposium, *supra* note 3, at 42 (comments of Linda Fairstein) (stating:

[I]t is important to understand some of the distinctions in kinds of sexual assault cases . . . because not all rapists are alike, and they present . . . very different problems in the criminal justice system and also . . . to society at large.

It is really unfortunate to paint them all with one brush and not understand what the distinctions are.);

Freeman-Longo, *supra* note 3, at 311 ("[T]he public's image of what sexual abuse is and who is a sexual abuser is usually based only upon the most extreme cases that account for less than one percent of sexual abuse and sexual crimes in America."); Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 *U. Puget Sound L. Rev.* 809, 813 (1992) ("[Sex offenders] are a diverse group not readily distinguishable from other criminals."). Another issue is that states differ as to which specific acts are considered criminal. See generally MacNamara & Sagarin, *supra* note 13, at 3 (describing different treatment of sexual acts in various jurisdictions).

<sup>15</sup> See MacNamara & Sagarin, *supra* note 13, at 7; see also Freeman-Longo, *supra* note 3, at 313 (noting that most acts of child sexual abuse are perpetrated by someone child knows); Hon. 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, 340 (1997) ("The fact that most sexual abuse of children involves incest has been largely ignored by legislatures in the press to placate the public by passing registration statutes."); Megan's Law Symposium, *supra* note 3, at 45 (comments of Linda Fairstein) (noting that less than 20% of women are assaulted by strangers); Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 *J.L. & Pol'y* 569, 594 (1995) (noting that most child sex abusers are relatives or friends of child's family).

<sup>16</sup> See Greenfeld, *supra* note 9 (Foreword). It is important to note, however, that same-sex victims may be less likely to report the offenses due to fear of societal opprobrium.

<sup>17</sup> See *id.* (Highlights; Arrests for Forcible Rape and Other Sex Offenses) (stating findings that 99% of offenders are males and 60% are white).

<sup>18</sup> See *id.* (Foreword; Arrests for Forcible Rape and Other Sex Offenses) (noting that eight percent of arrestees for nonrape sex offenses were women in 1995); see also *The Sex Offender*, *supra* note 8, at 3-4 (noting that although conviction rates indicate low numbers of female offenders, several victim-report studies demonstrate higher percentage of female abusers); *id.* at 5-1 to 5-21 (generally discussing female sex offenders); Freeman-Longo, *supra* note 3, at 317 (discussing growing number of female sex offenders). For a discussion of adolescent female sexual offenders, see *The Sex Offender*, *supra* note 8, at 5-17 to 5-18.

<sup>19</sup> See Greenfeld, *supra* note 9 (Characteristics of Rape/Sexual Assault Incidents; Arrests for Forcible Rape and Other Sex Offenses) (discussing ages of offenders and also noting that juveniles perpetrated 16% of rapes and 17% of other sex offenses);

Although SORAs have usually been enacted in the name of child protection, the statutes are often broad in their definition of "sex offender." In most statutes, the term is not limited in application to rapists and child molesters: The nineteen-year old who has consensual sex with his fifteen-year-old girlfriend who claims to be eighteen is labeled a sex offender;<sup>20</sup> a woman convicted of prostitution is labeled a sex offender;<sup>21</sup> a man who engages in consensual sodomy with an adult female is labeled a sex offender;<sup>22</sup> and a man who engages in consensual homosexual acts in a state where such activity is illegal is labeled a sex offender.<sup>23</sup> And for purposes of community notification, consider the relatively low danger to the public at large posed by each of the following: a necrophiliac; a flasher; and an adult arrested for masturbating in an erotic movie theater.

A frequently raised argument in favor of SORAs is that sex offenders have high recidivism rates.<sup>24</sup> However, applying generalized recidivism statistics to all sex offenders is of little value: Individualized assessments of an offender and the crimes committed are necessary to determine the likelihood of reoffense. Further, the general statistics themselves often are inaccurate or misleading. In taking a realistic approach to sex crime it is important to realize that sex offenders in general are not more likely than other criminals to reoffend.<sup>25</sup>

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MacNamara & Sagarin, *supra* note 13, at 70 (noting that average age of offenders was 35); Barry M. Maletzky, *Treating the Sexual Offender* 12 (1991) (discussing ages of offenders). But see *The Sex Offender*, *supra* note 8, at 3-6 to 3-7 (noting that most incest crimes are committed by people between the ages of 36 and 40). There also is a growing number of juvenile offenders. For a discussion of adolescent sex offenders, see *id.* at 6-1 to 6-11.

<sup>20</sup> See Palmer, *supra* note 3, at A10.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See, e.g., Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 *Alb. L. Rev.* 1081, 1105 (1997) (stating that sex offenders have "unusually high rates of recidivism"); Hawke Fracassa & Lama Bakri, *Sex-Offender List Published on Web*, *Detroit News*, Oct. 23, 1997, at 4D (quoting Representative David Jaye as saying: "These perverts have a very high repeat sex-crime rate."); see also Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 *New Eng. J. on Crim. & Civ. Confinement* 405, 407 (1997) (arguing that "[s]ex offenders . . . are unlikely to stop after one incident"); Jessica R. Ball, *Comment, Public Disclosure of "America's Secret Shame: Child Sex Offender Community Notification in Illinois*, 27 *Loy. U. Chi. L.J.* 401, 406-08 (1996) (stating that sex offenders have high recidivism rates); Greissman, *supra* note 7, at 186 (claiming that sex offenders are more likely to reoffend than other criminals).

<sup>25</sup> See Scheingold et al., *supra* note 14, at 812 (citing statistics from 1989 that indicated recidivism rates of 42% for murderers, 51.5% for rapists, 48% for other sex offenders, and 66% for robbers and noting that data do not suggest that sexually violent crimes are increasing at rate faster than other types of crime). There has been much debate about the use of recidivism rates, especially in light of the fact that a statistic can be found to demon-

The Bureau of Justice Statistics, in a three-year follow-up of discharged offenders, found that of violent offenders, sex offenders had lower rearrest and reconviction rates than average.<sup>26</sup> Additionally, the study found that 91.1% of incarcerated sex offenders were one-time offenders; repeat offenders constituted 8.9% of the violent offenders.<sup>27</sup> One-time offenders were much more likely to victimize nonstrangers<sup>28</sup> while repeat offenders were more likely to victimize strangers.<sup>29</sup> From these statistics, it would seem that the individuals posing the greatest risk to the community (multiple offenders who prey on strangers) constitute a very small percentage of all violent sex offenders.<sup>30</sup>

It is important to view recidivism rates in context and to remember that “sex offense” refers to a wider range of crimes than “murder,” “arson,” or “robbery.” Recidivism rates for all crimes are high.<sup>31</sup> When compared with recidivism rates for other crimes, it becomes clear that sex offenders in general are not more likely to repeat offend.<sup>32</sup>

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strate almost any desired outcome. One factor that may skew recidivism rates is that they often are compiled according to rearrest for any crime, not just for a sex crime. For example, in the Greenfeld study, 51.5% of rapists were rearrested within 3 years for a new crime, but only 7.7% were rearrested for rape. See Greenfeld, *supra* note 9 (Recidivism of Violent Sex Offenders). Another criticism of recidivism statistics is that many rely on offender reporting, which may be skewed for any number of reasons. See Joel B. Rudin, *Megan’s Law: Can It Stop Sexual Predators—and at What Cost to Constitutional Rights?*, 11 *Crim. Just.* 3, 7 (1996) (describing problems with overly broad approach to recidivism). Yet another problem with many studies is that they fail to distinguish between multiple offenses against a single victim and multiple offenses against many victims. See *id.* The vast differences in statistics available calls for a narrower approach to an analysis of recidivism. See *id.*

<sup>26</sup> See Greenfeld, *supra* note 9 (Recidivism of Violent Sex Offenders) (finding that violent offenders overall had rearrest rate of 60% while rearrest rate for rapists was 52% and for those convicted of sexual assault was 48%, and that reconviction rates were 42%, 36%, and 33%, respectively).

<sup>27</sup> See *id.* (Characteristics of Rape/Sexual Assault Incidents). This study looked at 10,848,090 violent victimizations, 485,290 of which were rapes and sexual assaults. See *id.* Thus, the study found that 442,099 sex offenders were one-time offenders, while 43,191 were repeat offenders. See *id.*

<sup>28</sup> 73.5% versus 17.6% (356,688 nonstranger offenses versus 85,411 stranger offenses). See *id.*

<sup>29</sup> 2.1% versus 6.8% (10,191 nonstranger offenses versus 33,000 stranger offenses). See *id.*

<sup>30</sup> Offenders in general are most likely to reoffend within one year of release. See *The Sex Offender*, *supra* note 8, at 4-4. This statistic would support the notion that a reduction of risk status for “good behavior” over a period of time after release is appropriate.

<sup>31</sup> See Greenberg, *supra* note 15, at 341 (stating that overall recidivism rates are over 80% in most states).

<sup>32</sup> See, e.g., *Megan’s Law Symposium*, *supra* note 3, at 69 (comments of Hon. John J. Gibbons) (stating that “it is clear that the recidivism rate among sex offenders is no greater than, and in some states lesser than, the recidivism rate among other offenders”).

Recidivism rates also vary significantly depending on the offense in question. Pedophiles and rapists generally have higher rates of recidivism than do other sex offenders, though not necessarily higher than other criminals.<sup>33</sup> As discussed below, this variation also supports the argument for an individualized assessment of offenders: In order truly to protect the community, notification should be limited to those who in fact present a risk to vulnerable groups.<sup>34</sup>

Nevertheless, the SORAs that have been passed rarely have been so narrowly tailored. The next section looks at the registration and notification schemes contained in current SORAs.

### B. Legislative Framework

Contemporary sex offender legislation was fueled by community outrage at a few highly publicized sex crimes against children.<sup>35</sup> Statutes passed in Washington<sup>36</sup> and New Jersey<sup>37</sup> in response to such

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<sup>33</sup> See *id.* at 46 (comments of Linda Fairstein) (“[I]t is child molesters, whether known to the victim or not, who have the highest repeat offense statistics . . . It is a very compulsive kind of conduct . . .”); *id.* at 36 (comments of Robert T. Farley) (arguing that “statistics have demonstrated that recidivism rates are extremely high with [pedophiles]”); Teir & Coy, *supra* note 24, at 407 (arguing that “sexual predators who victimized children were more than twice as likely to have multiple victims as a sex offender who targets adults”).

<sup>34</sup> See discussion *infra* Part III.

<sup>35</sup> See *supra* note 1 and accompanying text.

<sup>36</sup> In 1989, largely in response to a crime committed by Earl Shriner, the Washington State Legislature enacted a provision requiring convicted sex offenders to register with local law enforcement officials. See Hanson, *supra* note 1, at A8 (describing Earl Shriner’s crime); James O. Hacking, III, Comment, *Won’t You be My Neighbor?: Do Community Notification Statutes Violate Sexual Offenders’ Rights Under the Constitution’s Ban on the Passage of Ex Post Facto Laws?*, 41 St. Louis U. L.J. 761, 764 (1997) (describing history of Wash. Rev. Code Ann. § 9A.44.130 (West Supp. 1999); see also 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, 1189 (1996) (same). In 1990, the legislature passed another act which authorized law enforcement officials to notify the public regarding a sex offender when such notification was deemed “necessary for public protection.” Wash. Rev. Code Ann. § 4.24.550(1) (West 1994).

<sup>37</sup> Seventeen days after Megan Kanka’s death in 1994, what has become known as “Megan’s Law” was introduced in the New Jersey legislature. See N.J. Stat. Ann. § 2C:7-1 to -11 (West 1995 & Supp. 1999); see also Hacking, *supra* note 36, at 762 (discussing events surrounding passage of Megan’s Law); Montana, *supra* note 15, at 571-73 (discussing legislative process). The Assembly Speaker, Garabed “Chuck” Haytaian, declared a legislative emergency, and the statute was passed without committee hearings. See Ruess, *supra* note 3, at A1 (describing rapid passage of Megan’s Law); see also Freeman-Longo, *supra* note 3, at 316 (“[N]o public hearings were held, no supportive research exists, and no federal funds were allotted [for Megan’s Law.]”); Megan’s Law Symposium, *supra* note 3, at 57 (comments of Hon. John J. Gibbons) (“The only emergency . . . which led to the suspension of the rules, was a statewide election on November 8th, in which the Speaker of the Assembly, Mr. Haytaian, was a candidate for United States Senate.”). Three months and two days after the murder of Megan Kanka, Governor Whitman signed the statute bearing the little girl’s name into law. See Freeman-Longo, *supra* note 3, at 313; Hacking, *supra* note 36, at 762. The statute provides for the registration of sex offenders and for notification of

crimes began the wave of SORAs that led ultimately to a federal statute, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Jacob Wetterling Act).<sup>38</sup> This Act established guidelines for registration and notification provisions for sexually violent predators and individuals who have been convicted of either a sexually violent offense or a criminal offense against a minor.<sup>39</sup> Congress required all states to adopt laws providing for registration of sex offenders within three years of its enactment.<sup>40</sup>

All fifty states have enacted some form of SORA.<sup>41</sup> The state statutes vary radically in types of notification, procedures, and risk

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community groups and residents. See N.J. Stat. Ann. § 2C:7-6 (West 1995 & Supp. 1999); see also Megan's Law Symposium, *supra* note 3, at 16-19 (comments of Jane Grall) (discussing provisions of New Jersey's Megan's Law); Montana, *supra* note 15, at 572-73 (same).

<sup>38</sup> 42 U.S.C. § 14,071 (1994). Congress enacted the Jacob Wetterling Act on September 13, 1994. See Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 Harv. C.R.-C.L. L. Rev. 89, 94 (1996) (discussing history of Jacob Wetterling Act); Hacking, *supra* note 36, at 771 (same).

<sup>39</sup> The Jacob Wetterling Act recognizes two classes of offenders, those who are "predators" and those who have been convicted of a crime against a minor or a "sexually violent" offense. 42 U.S.C. § 14,071(a)(3)(A)-(C) (1994 & Supp. III 1997); see also Lewis, *supra* note 38, at 94-95 (describing structure of statute).

<sup>40</sup> 42 U.S.C. § 14,071(f)(1) (Supp. III 1997); see also Hacking, *supra* note 36, at 771-73 (discussing provisions of statute). Congress made funds granted to states under the Public Health and Welfare Code contingent upon adoption of sex offender laws. See *id.* at 773.

<sup>41</sup> See Ala. Code §§ 13A-11-200 to -203 (1994); Alaska Stat. §§ 12.63.010 to -100, 18.65.087 (Michie 1995); Ariz. Rev. Stat. Ann. §§ 13-3821 to -3825 (West 1989 & Supp. 1996); Ark. Code Ann. §§ 12-12-901 to -920 (Michie 1995 & Supp. 1997); Cal. Penal Code § 290 (West 1999); Colo. Rev. Stat. § 18-3-412.5 (1998); Conn. Gen. Stat. Ann. §§ 54-250 to -261 (West Supp. 1999); Del. Code Ann. tit. 11, § 4120 (1995 & Supp. 1998); Fla. Stat. Ann. §§ 775.21, 944.606 (West 1996 & Supp. 1999); Ga. Code Ann. § 42-9-44.1 (1997); Haw. Rev. Stat. §§ 707-743 (Supp. 1996); Idaho Code §§ 18-8301 to -8326 (Supp. 1999); 730 Ill. Comp. Stat. Ann. 150/1 to /12 (West Supp. 1999); Ind. Code Ann. §§ 5-2-12-1 to -13 (West Supp. 1998); Iowa Code Ann. § 692A (West Supp. 1999); Kan. Stat. Ann. §§ 22-4901 to -4910 (1995); Ky. Rev. Stat. Ann. §§ 17.500-.540 (Michie 1996); La. Rev. Stat. Ann. §§ 15:540-549 (West Supp. 1999); Me. Rev. Stat. Ann. tit. 34-A, §§ 11,101-11,105, 11,121-11,144 (West Supp. 1998); Md. Ann. Code art. 27, § 792 (1996 & Supp. 1998); Mass. Gen. Laws Ann. ch. 6, §§ 178C-178O (West Supp. 1999); Mich. Stat. Ann. § 4.475 (Law. Coop. 1997); Minn. Stat. Ann. § 243.166 (West Supp. 1999); Miss. Code Ann. §§ 45-33-1 to -19 (West Supp. 1998); Mo. Ann. Stat. §§ 589.400-.425 (West 1999); Mont. Code Ann. §§ 46-23-501 to -511 (1997); Neb. Rev. Stat. §§ 29-4001 to -4013 (Supp. 1998); Nev. Rev. Stat. §§ 179B, 179D (1997); N.H. Rev. Stat. Ann. § 651-B (Supp. 1996); N.J. Stat. Ann. §§ 2C:7-1 to -11 (West 1995 & Supp. 1999); N.M. Stat. Ann. §§ 29-11A-1 to -8 (Michie 1997); N.Y. Correct. Law § 168 (McKinney Supp. 1999); N.C. Gen. Stat. Ann. §§ 14-208.5 to -208.32 (Lexis Supp. 1998); N.D. Cent. Code § 12.1-32-15 (Supp. 1997); Ohio Rev. Code Ann. §§ 2950.01-.99 (West 1996 & Supp. 1997); Okla. Stat. Ann. tit. 57, §§ 581-587 (West Supp. 1997); Or. Rev. Stat. §§ 181.585-.606 (1997); 42 Pa. Cons. Stat. Ann. §§ 9791-9799.6 (West 1998); R.I. Gen. Laws §§ 11-37.1-1 to .1-19 (Supp. 1997); S.C. Code Ann. §§ 23-3-400 to 3-520 (Law. Co-op. Supp. 1998); S.D. Codified Laws §§ 22-22-30 to -22-41 (Michie 1998); Tenn. Code Ann. §§ 40-39-101 to -39-110 (1997); Tex. Crim. P. Code Ann. § 62 (West Supp. 1999); Utah

determination. The legislative measures take several forms: registration and notification statutes; enhanced sentences for sex crimes; and civil commitment for sexually violent predators.<sup>42</sup> Nevertheless, pursuant to the Federal Jacob Wetterling Act, all states must establish a centralized database of the names, fingerprints, and current addresses of sex offenders<sup>43</sup> that includes "identifying factors, . . . offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person."<sup>44</sup> This information is

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Code Ann. § 77-27-21.5 (1998); Vt. Stat. Ann. tit. 13, §§ 5401-5413 (1998); Va. Code Ann. § 19.2-390.1 (Michie 1999); Wash. Rev. Code Ann. §§ 9A.44.130-44.140, 4.24.550 (West Supp. 1999); W. Va. Code §§ 61-8F-1 to -8F-10 (1998); Wis. Stat. Ann. § 301.45 (West 1999); Wyo. Stat. Ann. §§ 7-19-301 to -19-306 (Michie 1995).

<sup>42</sup> Some states are experimenting with more radical measures, including chemical and surgical castration. Although castration may sound like an effective way to deal with sex crimes, there are serious doubts about its effectiveness and constitutionality. For a discussion of chemical castration, see Kay-Frances Brody, *A Constitutional Analysis of California's Chemical Castration Statute*, 7 *Temp. Pol. & Civ. Rts. L. Rev.* 141 (1997) (questioning both effectiveness and constitutionality of castration statutes and noting that, although chemically castrated offenders are not able to achieve erection, they can and do reoffend). But see Kris W. Druhm, *Comment, A Welcome Return to Draconia: California Penal Law § 645, the Castration of Sex Offenders and the Constitution*, 61 *Alb. L. Rev.* 285 (1997) (arguing for serious consideration of castration laws); Warren E. Leary, *New Therapy Offers Promise in Treatment of Pedophiles*, *N.Y. Times*, Feb. 12, 1998, at A11 (discussing promising results of use of synthetic hormone triptorelin to decrease sexual fantasies and desires).

At least one state is considering a proposal that would extend the death penalty to include repeat child molesters. See Terrence Stutz, *Sharp Offers Anti-Crime Plan*, *Dallas Morning News*, Jan. 8, 1998, at 17A (describing Texas proposal).

Another radical and most likely unworkable measure was suggested by former United States Senator Lauch Faircloth of North Carolina, who proposed a bill that would prohibit anyone convicted of a sex crime from using the Internet. See Robert Gebeloff, *Blocking an Avenue for Sex Offenders*, *Record (Hackensack, N.J.)*, Oct. 15, 1997, at A1, available in 1997 WL 6905717 (discussing Sen. Lauch Faircloth's proposal). Delaware recently began putting a special mark on the driver's licenses of its offenders. See, e.g., Thomas Moran, *Megan's Law or Murphy's Law?*, *Star-Ledger (Newark, N.J.)*, Dec. 6, 1998, § 10, at 1.

<sup>43</sup> See 42 U.S.C. § 14,071(b)(1)(A)(iv) (1994). The federal statute describes "sex offenders" as persons "convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" and "sexually violent predator[s]." See *id.* § 14,071(a)(1)(A), (B). Most states employ a broader definition of "sex offender." See, e.g., Ala. Code § 13A-111-200 (1994); Ariz. Rev. Stat. Ann. § 13-3821 (West Supp. 1998); Colo. Rev. Stat. § 18-3-412.5 (1998); Ky. Rev. Stat. Ann. § 17.500 (Michie 1996).

<sup>44</sup> 42 U.S.C. § 14,071(b)(1)(B) (1994 & Supp. III 1997). Offenders must register annually. See *id.* § 14,071(b)(3)(A). An offender who plans to change residence must send notice to the registration agency within ten days of the move. See *id.* § 14,071(b)(1)(A)(ii). An offender who plans to move to a different state must register in the new state within ten days. See *id.* § 14,071(b)(1)(A)(iii). Registration under the Jacob Wetterling Act lasts for ten years or, if the offender has committed more than one offense, is a sexually violent predator, or has been convicted of an aggravated offense, could continue for life. See *id.* § 14,071(b)(6)(A), (B). Individuals who fail to register will be subject to criminal sanctions. See *id.* § 14,071(b)(6)(C); see also Kan. Stat. Ann. § 22-4903 (1995) (assigning penalty of class A nonperson misdemeanor to failure to register). States provide different

forwarded to the state and federal bureaus of investigation.<sup>45</sup>

### 1. Registration

Most states have a general "sex offender" registry, and notification applies uniformly to all sex offenders. A few states have developed a tiered risk scale,<sup>46</sup> which ranks offenders on the basis of risk, while others do not differentiate.<sup>47</sup> In some states, such as New Jersey, risk level determination is made by the prosecutor or a clinical assessor.<sup>48</sup> In others, the determination is made by a board impaneled for the purpose, by a judicial officer, or by a clinical professional.<sup>49</sup> Few states provide for an appeal from a determination of risk level.<sup>50</sup> Some include factors that should be considered in the determination of reoffense risk.<sup>51</sup>

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procedures for petitioning for review, with some states offering no petition for relief from the obligation to register.

<sup>45</sup> See 42 U.S.C. § 14,071(b)(2) (1994 & Supp. III 1997). For a discussion of the possibility that use of such a database will lead to perpetual suspicion of known offenders, see Lewis, *supra* note 38, at 105-06.

Some states also collect DNA samples, which has resulted in positive matches for some unsolved crimes. See, e.g., Richard Willing, FBI Activates 50-State DNA Database Tuesday, USA Today, Oct. 12, 1998, at 1A.

<sup>46</sup> These states include Connecticut, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, and Rhode Island. See Conn. Gen. Stat. Ann. § 54-259 (West Supp. 1999); Mass. Gen. Laws Ann. ch. 6 § 178K (West Supp. 1999); N.J. Stat. Ann. § 2C:7-8 (West 1995); N.Y. Correct. Law § 168-1 (McKinney Supp. 1998); 42 Pa. Cons. Stat. Ann. § 9794 (West 1998); R.I. Gen. Laws § 11-37.1-12 (Supp. 1997). Offenders are determined to be either low risk (level one), serious risk (level two), or high risk (level three). See, e.g., N.Y. Correct. Law § 168-1(6) (McKinney Supp. 1998) (describing three levels of notification); N.J. Stat. Ann. § 2C:7-8(c) (West 1995 & Supp. 1999) (same).

<sup>47</sup> See, e.g., 730 Ill. Comp. Stat. Ann. 150/2 (West Supp. 1999); Ind. Code Ann. § 5-2-12-4.5 (West Supp. 1998); Mich. Stat. Ann. § 4.475 (Law. Coop. 1997).

<sup>48</sup> See, e.g., N.J. Stat. Ann. § 2C:7-8 (West 1995 & Supp. 1999) (describing procedure).

<sup>49</sup> See, e.g., N.Y. Correct. Law § 168-1 (McKinney Supp. 1998) (describing board).

<sup>50</sup> See, e.g., *People v. Rodriguez*, 660 N.Y.S.2d 714 (App. Div. 1997) (dismissing appeal for lack of jurisdiction).

<sup>51</sup> See, e.g., N.J. Stat. Ann. § 2C:7-8 (West 1995 & Supp. 1999) (including following factors in consideration: whether offender is under supervision or receiving counseling or treatment; physical conditions which would minimize risk reoffense; whether offender's conduct was repetitive and compulsive; whether offender served maximum term; whether offender committed sex crime against child; relationship between offender and victim; use of weapon in commission of offense; number, date, and nature of prior offenses; whether psychological profiles indicate potential recidivism; response to treatment; recent behavior; and any threats made); see also N.Y. Correct. Law § 168-1 (McKinney Supp. 1998) (calling for consideration of following factors: criminal history; indications of mental abnormality; whether conduct was repetitive and compulsive or associated with drugs or alcohol; whether offender served maximum term; whether crime was committed against child; age of offender at time of first offense; relationship between offender and victim; use of weapon; number and date of prior offenses; conditions of release; physical conditions; psychological profiles; response to treatment; recent behavior; any threats indicating intent to

## 2. Notification

States allow for varying degrees of community notification. In some states, information concerning registration is available only to law enforcement officials.<sup>52</sup> Other states provide limited notification to institutions responsible for children, such as schools, day care centers, and camps.<sup>53</sup> Some states allow complete public access to sex offender registries,<sup>54</sup> while still other states leave the scope of notification to the discretion of law enforcement officials.<sup>55</sup>

States have gone to extremes in their attempts to get information regarding sex offenders to the public quickly. For instance, former California Attorney General Dan Lungren took the CD-ROM database of 64,000 registered sex offenders to the public, establishing "Megan's Law" booths at county fairs and allowing individuals to browse through the registry by zip code.<sup>56</sup> The booths are very popular, and reactions have been intense: Individuals are stunned to see neighbors and friends pictured in the database.<sup>57</sup> However, the database itself has been criticized for containing numerous inaccuracies.<sup>58</sup> Furthermore, the CD-ROM system does not give specifics about criminal history, does not indicate the date of the individual's last offense, and does not distinguish offenders convicted of less serious crimes from violent offenders.<sup>59</sup> The type of protection offered by

reoffend; and review of victim impact statement); see also Ohio Rev. Code Ann. § 2950.09 (West 1996 & Supp. 1997) (listing factors relevant to judicial determination).

<sup>52</sup> See, e.g., Ala. Code § 13A-11-200 (1994); Ky. Rev. Stat. Ann. § 17.500 (Michie 1996); Mich. Stat. Ann. § 4.475 (Law. Coop. 1997); Neb. Rev. Stat. § 29-4001 (Supp. 1998); N.M. Stat. Ann. § 29-11A-5 (Michie 1997); S.D. Codified Laws § 22-22-30 (Michie 1998); Wis. Stat. Ann. § 301.45 (West 1999); Wyo. Stat. Ann. § 7-19-303 (Michie 1995).

<sup>53</sup> See, e.g., Del. Code Ann. tit. 11, § 4120(i) (1995 & Supp. 1998); Ind. Code Ann. § 5-2-12-11 (West Supp. 1998); Va. Code Ann. § 19.2-390.1 (Michie 1999).

<sup>54</sup> See, e.g., Ga. Code Ann. § 42-9-44.1(e) (1997); Idaho Code § 18-8304 (1998); Mass. Gen. Laws Ann. ch. 6, § 178D (West Supp. 1999); Mont. Code Ann. § 46-23-508 (1997); N.Y. Correct. Law § 168 (McKinney Supp. 1999); N.D. Cent. Code § 12.1-32-15 (Supp. 1997); 42 Pa. Cons. Stat. Ann. § 9798 (West 1998); Tex. Crim. P. Code Ann. § 62.08 (West Supp. 1999).

<sup>55</sup> See, e.g., Ariz. Rev. Stat. Ann. § 13-3821 (West 1989 & Supp. 1996); Cal. Penal Code § 290(i), (m), (n) (West 1999); Colo. Rev. Stat. § 18-3-412.5(6.5)(b) (1998); La. Rev. Stat. Ann. § 15:540(A) (West Supp. 1999); Miss. Code Ann. § 45-33-1 (West Supp. 1998); S.C. Code Ann. § 23-3-400 (Law. Co-op. Supp. 1996); Utah Code Ann. § 77-27-21.5 (1998); Wash. Rev. Code Ann. § 9A.44.130 (West Supp. 1999).

<sup>56</sup> See William Claiborne, *At the Los Angeles County Fair, 'Outing' Sex Offenders*, Wash. Post, Sept. 20, 1997, at A1 (describing county fair exhibit).

<sup>57</sup> See *id.* (describing reactions of browsers).

<sup>58</sup> See *id.* (quoting Elizabeth Schroeder, associate director of American Civil Liberties Union of Southern California, as claiming that for registrants in some communities, database is 40% inaccurate and that database contained those convicted of obsolete crimes).

<sup>59</sup> See *id.*

this service is questionable; although it does provide information to the community, it seems to be geared more toward sensationalism than a reasoned use of information.

Another method of notification used by some states is the use of 1-800 or 1-900 phone numbers, by which members of the public may inquire if a specific individual is a registered sex offender.<sup>60</sup> Callers must provide the name of the individual about whom they wish to inquire together with other identifying information.

In addition to implementing other public notification schemes, many states are making their sex offender registries available online.<sup>61</sup> Alabama,<sup>62</sup> Alaska,<sup>63</sup> Connecticut,<sup>64</sup> Delaware,<sup>65</sup> Florida,<sup>66</sup> Georgia,<sup>67</sup> Kansas,<sup>68</sup> Indiana,<sup>69</sup> Louisiana,<sup>70</sup> Michigan,<sup>71</sup> North Carolina,<sup>72</sup> South

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<sup>60</sup> At least one state, Wisconsin, has established a toll free 1-800 number for sex offender information. See Wisconsin Sex Offender Registry Information (visited June 16, 1999) <<http://badger.state.wi.us/agencies/doc/html/sexoffender.html>>. The registry includes information on offenders after December 25, 1993. See *id.* Requests are processed only by entering the full name, birth date, and either social security number or driver's license number of the individual about whom the caller is inquiring. See *id.* No information about the caller is required. See *id.* A legal warning about misuse of the information is contained in the automated message. See Telephone Call to Wisconsin 1-800 hotline (June 16, 1999). Victims of crime can enter their victim identification number to obtain information about the offender who abused them. See *id.*

New York, California, and Oregon use toll-required 1-900 numbers to disseminate information. See, e.g., Sex Offender Hot Line, USA Today, Apr. 1, 1998, at 3A, available in 1998 WL 5720380 (discussing New York's 1-900 number).

<sup>61</sup> See generally David Hakala, Megan's Law in Cyberspace, Newsday, Sept. 24, 1997, at C3 (describing sex offender Internet sites).

<sup>62</sup> <[http://www.gsiweb.net/so\\_doc/so\\_index\\_new.htm/](http://www.gsiweb.net/so_doc/so_index_new.htm/)> (visited June 16, 1999).

<sup>63</sup> <<http://www.dps.state.ak.us/Sorcr/>> (visited June 16, 1999) [hereinafter Alaska website].

<sup>64</sup> <<http://www.state.ct.us/DPS/SOR.htm>> (visited June 16, 1999).

<sup>65</sup> <<http://www.state.de.us/dsp/sexoff/index.htm>> (visited June 16, 1999).

<sup>66</sup> <[http://www.fdle.state.fl.us/Sexual\\_Predators/](http://www.fdle.state.fl.us/Sexual_Predators/)> (visited June 21, 1999) [hereinafter Florida website].

<sup>67</sup> <<http://www.ganet.org/gbi/sorsch.cgi>> (visited June 16, 1999).

<sup>68</sup> <<http://www.ink.org/public/kbi/kbisexpage.html>> (visited June 16, 1999) [hereinafter Kansas website]. The Kansas site also includes a statement that, as per the Kansas Supreme Court's determination in *State v. Myers*, 923 P.2d 1024 (Kan. 1996), notification does not include individuals who committed offenses before Kan. Stat. Ann. § 22-4901 (1995) was enacted on April 14, 1994.

<sup>69</sup> <<http://www.ai.org/cji/html/sexoffender.html>> (visited June 21, 1999) [hereinafter Indiana website].

<sup>70</sup> <<http://www.scarletweb.com/laoffenders.htm>> (visited June 16, 1999).

<sup>71</sup> <<http://www.mipsor.state.mi.us/>> (visited June 21, 1999) [hereinafter Michigan website].

<sup>72</sup> <<http://sbi.jus.state.nc.us/sor/MainText.htm>> (visited June 16, 1999) [hereinafter North Carolina website].

Carolina,<sup>73</sup> Texas,<sup>74</sup> Utah,<sup>75</sup> Virginia,<sup>76</sup> and West Virginia<sup>77</sup> have Internet sites devoted to sex offender information.<sup>78</sup> Although Internet sites make access easier, the sites distribute sensitive information about offenders to a community much larger than a neighborhood: The information contained on the sites is made available, in effect, to the entire world.

The sites are not limited to high-risk offenders; in some states, the entire registry is available online.<sup>79</sup> Most of the sites do not distinguish between dangerous and low-risk offenders, and many contain minimal or no information about the crime committed.<sup>80</sup> Color photographs, physical descriptions, date of birth, name of employer, and home addresses are accompanied by warnings that the individual is a

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<sup>73</sup> <<http://scattorneygeneral.com/public/registry.html>> (visited June 21, 1999) [hereinafter South Carolina website].

<sup>74</sup> <<http://records.txdps.state.tx.us/dps/default.cfm>> (visited June 21, 1999). The Texas site requires payment and registration before allowing a search. See *id.*

<sup>75</sup> <[http://www.cr.ex.state.ut.us/soreg/info\\_soreg.htm](http://www.cr.ex.state.ut.us/soreg/info_soreg.htm)> (visited June 21, 1999).

<sup>76</sup> <<http://sex-offender.vsp.state.va.us/cool-ICE>> (visited June 21, 1999).

<sup>77</sup> <<http://www.wvastatepolice.com/sexoff/>> (visited June 21, 1999).

<sup>78</sup> Most sites are maintained by the state, although a site for Macomb County, Michigan is run by State Representative Dave Jaye. See <<http://www.jaye.org/MACPSOR.html>> (visited June 21, 1999). Representative Jaye stated his motivation in creating the site was so that parents will know if “‘a perv lives in [their] neighborhood.’” Fracassa & Bakri, *supra* note 24, at 4D (quoting Rep. Jaye). A few cities also have websites. See, e.g., Tucson, Arizona <<http://www.ci.tucson.az.us/police/>> (visited June 22, 1999); Oconee County, Georgia <<http://www.oconeesheriff.org/sexoff/index.html>> (visited June 22, 1999); Paulding County, Georgia <<http://www.webmarketsouth.com/pauldingcountygovernment/offender.htm>> (visited June 22, 1999); Whitfield County, Georgia <[http://www.wcso.com/so\\_index\\_page\\_two.html](http://www.wcso.com/so_index_page_two.html)> (visited June 22, 1999); City of Bellingham, Washington <<http://www.city-govt.ci.bellingham.wa.us/cobweb/police/sexoffr.htm>> (visited June 21, 1999); King County, Washington <<http://www.metrokc.gov/sheriff/sxoffsch.htm>> (visited June 22, 1999); Longview, Washington <<http://ci.longview.wa.us/service/police/pd20.html>> (visited June 22, 1999); Renton, Washington <<http://www.ci.renton.wa.us/police/sexlevl3.htm>> (visited June 22, 1999).

In addition to these government-sponsored sites, a private citizen in California, Ken LaCorte, maintains a controversial website. See <<http://www.sexoffenders.net>> (visited June 22, 1999). The information on the site does not contain photos and is limited to high-risk offenders. See *id.* Another site lists registries around the country, and encourages people to gather information themselves and mail it to the site. See <<http://www.chillicothe.com/>> (visited June 22, 1999). Other private sites, such as the KlaasKids Foundation, provide information about child protection and an overall survey of registration and notification laws for all fifty states. See <<http://www.klaaskids.org>> (visited June 22, 1999).

<sup>79</sup> See, e.g., Florida website, *supra* note 66; Michigan website, *supra* note 71; North Carolina website, *supra* note 72; South Carolina website, *supra* note 73.

<sup>80</sup> On the Kansas site, for many offenders information about the offense is “Not Available.” See Kansas website, *supra* note 68. On the Florida website, more than one individual’s offense was listed cryptically as “uttering forgery.” See Florida website, *supra* note 66. An offender’s detailed criminal history is available by sending \$15.00 and a request form. See *id.* The photo and home address, though, are free. See *id.*

convicted sex offender.<sup>81</sup> A visitor to the sites can search by name in most states and can search by county or zip code in some.<sup>82</sup> Some states use Internet sites to convey information about the registration and notification laws and directions about how to obtain offender information.<sup>83</sup>

### C. *Dangers of Notification*

Notification poses significant risks to the privacy and safety of offenders. Because of the stigma attached to the label "sex offender,"<sup>84</sup> and because of a frightened community's potentially extreme reactions, it is important to acknowledge the dangers created by notification. Two such dangers are improper notification and vigilantism.

#### 1. *Concerns with Improper Notification*

A significant risk of notification is that of improper notification. Improper notification can take a number of forms: Lists of sex offenders can, through human error, contain persons never convicted of a sex crime; lists can contain persons convicted for conduct that has been decriminalized;<sup>85</sup> and, finally, lists can contain persons who committed crimes so long ago that they can no longer be considered a threat.<sup>86</sup> For example, a thirty-eight-year-old Massachusetts man who pleaded guilty to statutory rape eighteen years earlier was given a

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<sup>81</sup> The Florida website features photos of offenders framed by flashing police lights and the boldface title "Sex Offender." See Florida website, *supra* note 66.

<sup>82</sup> Michigan's website currently can only be searched by zip code. The site does not yet contain photographs or detailed physical descriptions. See Michigan website, *supra* note 71. Many states allow searches by name, by county or city, or by zip code. See, e.g., Alaska website, *supra* note 63; Florida website, *supra* note 66; North Carolina website, *supra* note 72; South Carolina website, *supra* note 73. Indiana's site is more restricted: Information on an offender is available only by submitting an individual's first and last name. See Indiana website, *supra* note 69.

<sup>83</sup> The Wisconsin site, <<http://badger.state.wi.us/agencies/doc/html/sexoffender.html>> (visited June 16, 1999), provides a 1-800 number as well the information a caller will have to enter in order to inquire about a specific individual. The Massachusetts site, <<http://www.star.net/people/~danvrspd/sexreg.htm>> (visited June 16, 1999), contains a description of the risk scale, a listing of sex offenses, and details about where the public may access the registry. Other sites, like Iowa's site, provide information about the number of registered offenders. See <<http://www.state.ia.us/government/dps/dci/isor/sorstats.htm>> (visited June 16, 1999).

<sup>84</sup> See discussion *infra* Part II.A.

<sup>85</sup> See Megan's Law Symposium, *supra* note 3, at 59-60 (comments of Hon. John J. Gibbons) (stating that although neither sodomy with adult nor statutory rape with someone over thirteen are still considered to be crimes in New Jersey, people who were convicted of those offenses would still be subject to registration and notification provisions).

<sup>86</sup> See Palmer, *supra* note 3, at A10 ("[P]eople convicted of 50-year-old crimes, including sex between unmarried people or gay people, are candidates for registry.").

high-risk ranking, even though court records showed that no force was used and he had no subsequent convictions.<sup>87</sup> Police notified his neighbors, who threw rocks at his car.<sup>88</sup> Such errors result in part from the fact that many states, hurrying to make the information available to the public, created lists of sex offenders from old conviction records.<sup>89</sup>

Hastily compiled registries have been plagued with inaccuracies. A clerical error in a court record mistakenly made it appear that a fifty-four-year-old California man had been convicted of child molestation.<sup>90</sup> His picture and name appeared in the state's CD-ROM sex offender database and was shown to the public at the county fair.<sup>91</sup> In another case, a woman who was incarcerated for statutory rape put her sister-in-law's address on prison work release documents.<sup>92</sup> The community was notified that a sex offender was moving into their area, though the woman would not be released for three months and was not moving in with the sister-in-law.<sup>93</sup> The convict's sister-in-law received numerous threatening phone calls and death threats, and someone shot at her children.<sup>94</sup>

Lesbians and gays have been particularly burdened by many notification statutes. Until recently, many states considered homosexual conduct criminal.<sup>95</sup> A California man who, forty years ago, was charged with consensual sodomy (which is no longer a crime in California) was summoned to register.<sup>96</sup> Despite the fact that consensual adult homosexual activity poses no threat to children or community members, hundreds of gay men have been ordered to register as sex offenders.<sup>97</sup> As of 1997, California's sex offender law allows gay men

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<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See Megan's Law Symposium, *supra* note 3, at 59-60 (comments of Hon. John J. Gibbons).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See Mary Pemberton, *Sex Offender Law Victimizes Innocent Family*, *L.A. Times*, Nov. 16, 1997, at A28, available in 1997 WL 14000796 (describing sister-in-law's ordeal).

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*

<sup>95</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia anti-sodomy statute). But see *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (declaring Georgia anti-sodomy statute unconstitutional under state constitution "insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent").

<sup>96</sup> See Palmer, *supra* note 3, at A10.

<sup>97</sup> See *id.*

convicted of consensual homosexual acts to remove their names from the lists, but other states have not taken similar steps.<sup>98</sup>

## 2. *The Problem of Vigilantism*

Community notification programs, however they are carried out, may lead to acts of vigilantism.<sup>99</sup> Vigilantism in this context can take two forms: ostracism or outright acts of violence.

In 1995, the New Jersey Supreme Court, evaluating the constitutionality of New Jersey's SORA, dismissed the notion that it would lead to vigilantism:

This Court has no right to assume that the public will be punitive when the Legislature was not, that the public, instead of protecting itself as the laws intended, will attempt to destroy the lives of those subject to the laws . . . .<sup>100</sup>

Although the court's opinion put great faith in the public, the years following *Poritz* have proved the court's assumption wrong. Many released offenders have been threatened or attacked.<sup>101</sup> Relatives and friends of sex offenders may also be the victims of ostracism and pub-

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<sup>98</sup> See *Gay Men Can Pull Names Off Sex Registry*, *Seattle Times*, Nov. 13, 1997, at A7 (describing court procedures available to gay men to remove names from California registry); Nicholas Riccardi & Jeff Leeds, *Revision of Megan's Law Takes Effect*, *L.A. Times*, Nov. 12, 1997, at A3 (describing change to California SORA).

<sup>99</sup> See Lewis, *supra* note 38, at 90 ("Communities with information identifying former sex offenders by name, address, photograph, vehicle description, and place of employment or school will likely ostracize them, make their search for a job tremendously difficult, impede their rehabilitation progress, and possibly threaten their physical safety."); see also *Megan's Law Symposium*, *supra* note 3, at 65-66 (comments of Hon. John J. Gibbons) ("Notification will result in vigilantism, harassment, and legal ostracism."); Montana, *supra* note 15, at 577-78 ("Community notification laws heighten community fears concerning the threat of convicted sex offenders and create an environment that is ripe for acts of vigilantism.").

The risk of improper notification is inherent in any notification scheme: Even if individuals are properly notified, there is a possibility that those individuals will share the information with others. Schools receiving notification may inform parents, neighbors of offenders may tell the public, and notified people may contact newspapers. The only remedy for this is to impose penalties on those who distribute the information irresponsibly. However, little action has been taken against non-law enforcement individuals who spread information about sex offenders.

<sup>100</sup> *Doe v. Poritz*, 662 A.2d 367, 376 (N.J. 1995). The court went on to state:

We do not suggest any absolute rule that a court should never pass constitutional judgment in a case on the basis of its unalterable conviction concerning predicted community conduct. . . . We do not perceive in this case a society clamoring for blood, demanding the names of previously-convicted sex offenders in order to further punish them . . . .

*Id.* at 377.

<sup>101</sup> See, e.g., Montana, *supra* note 15, at 579 (stating that offenders have been subjects of death threats, protests, and attacks); Palmer, *supra* note 3, at A10 (noting that "offenders have been hounded, threatened and even car-bombed").

lic anger.<sup>102</sup> There is also a substantial risk that individuals who are either mistaken for sex offenders or are mistakenly placed on a sex offender list will suffer the consequences of public anger.<sup>103</sup>

Many sex offenders have been physically assaulted.<sup>104</sup> A gunman riddled one sex offender's home with bullets after receiving notification.<sup>105</sup> When members of Joseph G.'s<sup>106</sup> community were notified that he was to be released, they held a rally that culminated in the burning of his house.<sup>107</sup> George H., a repeat sex offender whose address had been publicly released, answered his door and was punched in the mouth.<sup>108</sup> Many others have faced violence in their communities at the hands of angry neighbors.<sup>109</sup>

Other offenders face ostracism and social animosity. Released sex offenders may find it extremely difficult to reassimilate into society.<sup>110</sup> Problems finding and maintaining employment, securing housing, and making and keeping social relationships are the inevitable

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<sup>102</sup> See Kimball, *supra* note 36, at 1201 (describing ostracism of relatives of Bradford W., convicted of second-degree sexual assault); Daniel Golden, *Sex-Cons*, *Boston Globe*, Apr. 4, 1993, *Magazine*, at 13 (relating story of sex offender's 82-year-old sister who had rocks thrown at her).

<sup>103</sup> See *supra* notes 85-98 and accompanying text.

<sup>104</sup> Additionally, at least two suicides have been linked to notification efforts, though they were not directly related to acts of vigilantism. Michael P., a sex offender registered in California, committed suicide soon after California police distributed fliers, throughout his neighborhood, identifying him as a high-risk offender. See Todd S. Purdum, *Suicide Tied to Megan's Law*, *News & Observer* (Raleigh, N.C.), July 9, 1998, at 5A. Another man, an offender registered in Florida, shot himself after the local sheriff's department placed an ad in a newspaper that identified him as a sexual predator. See *id.*

<sup>105</sup> *Man Who Shot at Home of Offender is Sentenced*, *N.Y. Times*, Feb. 21, 1999, at 44. The perpetrator, James Johnson, fired five shots from a .45 caliber handgun at a high-risk offender's house after being notified of his presence in the community. See *id.* Johnson was sentenced to multiple 10-year sentences, to be served concurrently. See *id.*

<sup>106</sup> This Note, in the interest of protecting the privacy of offenders, will not use their full names.

<sup>107</sup> See Kimball, *supra* note 36, at 1200; Montana, *supra* note 15, at 579.

<sup>108</sup> See Golden, *supra* note 102, *Magazine*, at 13.

<sup>109</sup> Two men broke into the Phillipsburg, N.J., house of paroled sex offender Michael G., "announced they were looking for 'the child molester,'" and began attacking a visitor. Edward Martone, *Megan's Law*, *A.B.A. J.*, Mar. 1995, at 39. Edward B., an 81-year-old man who wears an electronic monitor that prevents him from leaving a confined area, found his house being picketed by community members. See *id.* Alan G. and his mother were evicted from their apartment after community protests. See *id.* When Russell M. was released from jail, one hundred residents demonstrated outside his duplex, collecting signatures to convince the landlord to evict him. See Rick DelVecchio, *Residents Want Molester out of Santa Rosa*, *San Francisco Chron.*, July 7, 1997, at A13. Gary R. was evicted from his home and ostracized by the community soon after notification. See Kimball, *supra* note 36, at 1200.

<sup>110</sup> See *Megan's Law Symposium*, *supra* note 3, at 65 (comments of Hon. John J. Gibbons) (stating that "[n]otification will result in isolation from normal social contacts"); Montana, *supra* note 15, at 584-85 (arguing that notification laws impede offenders' reintegration into society).

results of the stigma attached to the label "sex offender," regardless of the severity of the crime or the likelihood that the individual will reoffend.<sup>111</sup>

Joseph C. found himself confronting the community's outrage: Neighbors erected, in a yard across the street, a sign that pointed at his house and which read "CONVICTED CHILD MOLESTER."<sup>112</sup> A neighbor was quoted as saying, "If he's going to ruin [our neighborhood] we're not going to make him feel comfortable."<sup>113</sup> John B. was heckled by two neighbors who picketed his house with signs and bullhorns. He received threatening calls, visitors to his house were heckled, and his car was vandalized.<sup>114</sup> An elderly couple who took a released sex offender into their house received hate mail.<sup>115</sup> These anecdotes represent only a few of hundreds of overt acts of animosity toward released sex offenders.<sup>116</sup>

### 3. *General Policy Concerns*

Community notification is not only problematic because of its potentially devastating impact on the offender. Current notification schemes also may be flawed in significant ways that thwart the protective purposes of notification statutes.

Some critics argue that recent sex offender legislation fails to address the underlying problem of sex crime by focusing only on *ex post* action<sup>117</sup> and offers communities a false sense of security: Communities may think that they know who poses a danger when in reality they

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<sup>111</sup> See Megan's Law Symposium, *supra* note 3, at 65 (comments of Hon. John J. Gibbons) ("Notification will affect a person's ability to find a job, meet a companion and establish a stable relationship, and initiate membership in a church. Moreover, it will affect the ability to be let alone."); Golden, *supra* note 102, Magazine, at 13 (discussing offender's difficulties holding job and finding lodging); Ruess, *supra* note 3, at A1 (stating that business declined at gas station employing registered offender).

<sup>112</sup> See Greg Munno, *Ex-Convict's Return Upsets Neighbors, Post-Standard* (Syracuse, N.Y.), Oct. 1, 1997, at B1, available in 1997 WL 5767922.

<sup>113</sup> *Id.*

<sup>114</sup> See Andrew Metz, *Neighbors Settle Dispute Aimed at Child Molester*, *Newsday*, Nov. 13, 1997, at A33.

<sup>115</sup> See Golden, *supra* note 102, Magazine, at 13 (describing incident); Kimball, *supra* note 36, at 1202 (same).

<sup>116</sup> Some actions are nonviolent, but are invasive nonetheless. See, e.g., Nicole Brodeur, *Looking Backward, Staying Alert*, *News & Observer* (Raleigh, N.C.), Apr. 8, 1998, at B1, available in 1998 WL 6133788 (describing one reader's reaction to Brodeur's efforts, after printing registry from North Carolina website and contacting registered offender, as "nothing short of harassment").

<sup>117</sup> See Greenberg, *supra* note 15, at 334 (noting that underlying problem is not eliminated by use of penal sanctions).

may only know the convicted offenders who were subject to notification requirements.<sup>118</sup>

Notification about individuals who pose a minimal risk imposes a potentially high cost both on offenders and on the community.<sup>119</sup> In addition to painting an unrealistic picture of the problem of sex crime, overnotification creates a climate of fear and suspicion that fragments communities.<sup>120</sup>

The risks of mistaken notification, vigilantism, and community strife all support the conclusion that SORAs must be structured carefully to avoid unintended consequences that interfere with the goal of community protection. In the next Part, this Note shows that there are constitutional as well as practical reasons for limiting notification under SORAs.

## II

### COURTS ADDRESS NOTIFICATION

The initial court challenges to sex offender registration and notification laws took the form of *ex post facto* and double jeopardy claims.<sup>121</sup> The courts that have addressed these issues almost uniformly have held that SORAs are not punitive and therefore retroac-

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<sup>118</sup> See Kimball, *supra* note 36, at 1197; see also Earl-Hubbard, *supra* note 3, at 861 (arguing that notification schemes fail to protect most victims—those individuals abused by family members or nonstranger offenders); Montana, *supra* note 15, at 594-95 (same). Unfortunately, it is the sad reality of human nature that crime and cruelty can never completely be prevented or eliminated. It may be that no notification scheme can provide adequate protection to the community. See generally Megan's Law Symposium, *supra* note 3, at 54 (comments of Linda Fairstein) (stating that "I do not know that a tragedy like the Kanka case could ever have been prevented" and arguing that notification provisions do not speak to reality of sex crimes in metropolitan areas). Notification cannot include the offenders who have not been convicted, nor can it address the problem of underreporting of offenses. See Abril R. Bedarf, Comment, Examining Sex Offender Community Notification Laws, 83 Cal. L. Rev. 885, 907 (1995) (arguing that even if notified, communities are not safe from first-time offenders).

<sup>119</sup> See Rudin, *supra* note 25, at 9 (discussing boycotts of businesses employing sex offenders).

<sup>120</sup> See Bedarf, *supra* note 118, at 907 (discussing fear aroused by notification and arguing that benefits of notification do not outweigh harms); Rudin, *supra* note 25, at 9 (discussing panic caused by notification); see also Bedarf, *supra* note 118, at 910 (arguing that "community notification laws jeopardize an offender's chances of reintegrating into society and leading a productive life. . . . A reformed sex offender cannot become a productive member of society so long as the community treats him as a criminal"); Greenberg, *supra* note 15, at 337 ("[I]n our zeal to protect ourselves and our children, we should not enact measures that do more harm than good.")

<sup>121</sup> The United States Constitution provides: "No State shall . . . pass any Bill of Attainder, [or] *ex post facto* Law." U.S. Const. art. I, § 10, cl. 1. The Fifth Amendment of the United States Constitution provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." U.S. Const. amend. V.

tive application of the statutes does not violate the ex post facto or double jeopardy provisions of the Constitution.<sup>122</sup>

The Supreme Court has not yet directly addressed the issue of sex offender registration or notification.<sup>123</sup> However, the Court has shown a great reluctance to strike down laws that appear to be aimed at community protection. Two of the Court's recent decisions have important implications for the constitutionality of SORAs. First in *Kansas v. Hendricks*,<sup>124</sup> then again in *Hudson v. United States*,<sup>125</sup> the Court made it clear that the imposition of a civil penalty after criminal punishment would not violate the Double Jeopardy Clause.<sup>126</sup>

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<sup>122</sup> See, e.g., *Roe v. Office of Adult Probation*, 125 F.3d 47, 55 (2d Cir. 1997) (finding that SORA was civil statute and did not violate ex post facto prohibition); *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997) (same); *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997) (same); *E.B. v. Verniero*, 119 F.3d 1077, 1111 (finding that SORA did not violate Double Jeopardy or Ex Post Facto Clauses), reh'g denied, 127 F.3d 298 (3d Cir. 1997), cert. denied, 118 S. Ct. 1039 (1998); *Artway v. Attorney General*, 81 F.3d 1235, 1267 (3d Cir. 1996) (finding that registration provisions of SORA did not violate Double Jeopardy or Ex Post Facto Clauses and that notification challenge was not ripe for review); *Commonwealth v. Gaffney*, 702 A.2d 565, 568, 569-70 (Pa. Super. Ct. 1997) (holding that SORA did not violate ex post facto or double jeopardy prohibitions). But see *Neal v. Shimoda*, 131 F.3d 818, 834 (9th Cir. 1997) (Reinhardt, J., concurring and dissenting) (arguing that Hawaii's imposition of Sex Offender Treatment Program on inmates convicted prior to law's enactment violates Ex Post Facto Clause); *State v. Myers*, 923 P.2d 1024 (Kan. 1996) (holding that as applied to defendant, Kansas's notification provisions violated Ex Post Facto Clause).

For a more complete discussion of these issues, see, e.g., Feldman, *supra* note 24, at 1119 (concluding that Megan's Law does not violate ex post facto prohibition of Constitution); Lewis, *supra* note 38, at 90-91 (arguing that SORAs "substantially infringe the rights and liberties of individuals who . . . have served their time in prison and been released"); Megan's Law Symposium, *supra* note 3, at 63 (comments of Hon. John J. Gibbons) (stating that laws are "plainly retributive"); Greissman, *supra* note 7, at 200, 207, 210 (concluding that New York SORA does not violate prohibition on ex post facto laws and cruel and unusual punishment, or infringe on right to privacy); Hacking, *supra* note 36, at 805-06 (arguing that notification statutes violate ex post facto provision of Constitution); Tara L. Wayt, Note, *Megan's Law: A Violation of the Right to Privacy*, 6 Temp. Pol. & Civ. Rts. L. Rev. 139, 141 (1997) (arguing that "right to privacy guaranteed by both the federal and state constitutions prohibits community notification of a person's prior convictions for sex crimes").

<sup>123</sup> In 1998, the Court denied certiorari on the issue. See *Verniero v. W.P.*, 118 S. Ct. 1039, 1039 (1998).

<sup>124</sup> 521 U.S. 346 (1997).

<sup>125</sup> 522 U.S. 93 (1997).

<sup>126</sup> In 1997, the Supreme Court held that the postconfinement involuntary commitment of a sex offender under Kansas's Sexually Violent Predator Act was neither a criminal proceeding nor a punitive measure and therefore did not violate the Ex Post Facto or Double Jeopardy Clauses of the Constitution. See *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The Court, determining that the procedures were civil in nature, looked to legislative intent and concluded that the legislature sought to protect the community rather than punish the offender. See *id.* at 363 (discussing intent). The Court pointed to the procedural protections offered (including annual judicial review of commitment) as evidence that "the Kansas Legislature has taken great care to confine only a narrow class of particu-

Although courts almost uniformly have refused to invalidate SORAs,<sup>127</sup> a few have begun to designate certain procedural protections that must be available to satisfy due process requirements. Just as the Supreme Court in both *Hendricks* and *Hudson* deemed that

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larly dangerous individuals.” *Id.* at 364. Because Kansas’s Act did not impose punishment, the Court rejected the ex post facto challenge. See *id.* at 370-71 (stating that Ex Post Facto Clause only applies to application of punitive measures). The Court similarly rejected the double jeopardy challenge, stating that the Double Jeopardy Clause only prohibits a second prosecution for the same offense or multiple punishments. See *id.* at 369-70 (concluding that Act did not violate Double Jeopardy Clause). This Note will not discuss ex post facto or double jeopardy claims in great detail because, in the wake of *Hendricks*, such claims are unlikely to succeed.

The Supreme Court strengthened its double jeopardy holding in *Hendricks* with its ruling in *Hudson*, where it held that the Double Jeopardy Clause protected only against imposition of multiple criminal punishments for a single offense as the result of successive proceedings. See *Hudson*, 522 U.S. at 99. The Court, recognizing that “all civil penalties [will] have some deterrent effect,” stated its commitment to the idea that the “Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, ‘in common parlance,’ be described as punishment.” *Id.* at 99 (overruling standard for determining whether sanction is punitive enunciated in *United States v. Halper*, 490 U.S. 435 (1989)). While severely limiting the scope of what will constitute double jeopardy, the Court noted that “[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational.” *Id.* at 495. Only criminal punishment, the Court concluded, could subject a defendant to double jeopardy. See *id.* at 493. While the case did not involve a sex offender, the Court expressly mentioned challenges to Megan’s Laws as an example of “the wide variety of novel double jeopardy claims” that prompted it to grant certiorari in order to reshape the doctrine. See *id.* at 493 & n.4.

Though the courts have almost uniformly held that SORAs are not punitive, it is possible that a court may find a specific law punitive in fact due to the harsh consequences of the law. The impacts of notification, discussed *infra* Part II.A, closely resemble early American practices of shaming. This Note will not explicitly discuss shaming arguments, though they have great merit. For an excellent discussion of the parallels between notification and colonial shaming punishments, see *Verniero*, 119 F.3d at 1113 (Becker, J., concurring and dissenting) (concluding that “[b]ecause the history of notification evidences an objective punitive intent, and because the design or operation of notification does not negate this objective intent, the notification provisions of Megan’s Law must be considered punishment”).

<sup>127</sup> The Kansas Court of Appeals has struck down part of the state’s notification scheme though. In *State v. Scott*, 947 P.2d 466 (Kan. Ct. App. 1997), the court held that “unrestricted public access” to plaintiff’s registration information was “grossly disproportionate” to the crime committed and therefore violated section 9 of the Kansas Constitution, which contains a consideration of the proportionality of sentence to crime committed. See *id.* at 470. The plaintiff in the case had pleaded no contest to attempted aggravated sexual battery after sexually assaulting an acquaintance. The court noted that “the record strongly suggests that Scott, in an intoxicated condition, impulsively committed a serious violent crime against the victim under . . . circumstances not likely to arise in the future.” *Id.* at 470. The court, in deciding that the plaintiff’s criminal record would not be open to public inspection under the Kansas SORA, stated:

There is no evidence in the record to support a reasonable inference that Scott is a repeat sex offender posing a danger to the community . . . Scott is not a pedophile or a child molester, and there is no indication that he has [a specific trait] that would suggest he will reoffend.

*Id.*

available procedural protections bolstered a determination that civil consequences did not violate *ex post facto* or double jeopardy protections,<sup>128</sup> several courts have noted the presence of procedural safeguards in upholding several SORAs. Other courts have gone farther, employing the balancing test of *Mathews v. Eldridge*<sup>129</sup> to insist that procedural protections that balance the potential harms of notification must be in place for a SORA to be constitutional.

### A. *Establishing a Protected Interest*

The Fourteenth Amendment of the United States Constitution states that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>130</sup> The first inquiry in a due process challenge is whether a protected liberty interest exists.<sup>131</sup> The recognition of a protected liberty interest triggers the Fourteenth Amendment guarantee of procedural due process.<sup>132</sup>

Since due process challenges to SORAs are in their infancy, only a few courts have found a federal right implicated by notification provisions.<sup>133</sup> Others have found no liberty or property interest involved and flatly have rejected due process challenges,<sup>134</sup> while still others have relied on state constitutional law to find a protected interest.<sup>135</sup>

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<sup>128</sup> See *Hendricks*, 521 U.S. at 369-70; *Hudson*, 522 U.S. at 105.

<sup>129</sup> 424 U.S. 319 (1976).

<sup>130</sup> U.S. Const. amend. XIV, § 1.

<sup>131</sup> See *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

<sup>132</sup> See *id.*; see also *Sandin v. Connor*, 515 U.S. 472 (1995) (discussing liberty interests and procedural due process protections); *Mathews*, 424 U.S. at 332 (same).

<sup>133</sup> See, e.g., *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) (concluding that stigmatizing consequences of “sex offender” label creates deprivation of liberty); *Cutshall v. Sundquist*, 980 F. Supp. 928 (M.D. Tenn. 1997) (holding that SORA’s discretionary disclosure provisions do not violate due process).

<sup>134</sup> See, e.g., *Femedeer v. Haun*, 35 F. Supp. 2d 852, 859 (D. Utah 1999) (finding no demonstration of deprivation of constitutionally protected interest); *Lanni v. Engler*, 994 F. Supp. 849, 855 (E.D. Mich. 1998) (holding that plaintiff had not demonstrated deprivation of liberty or property interest); *People v. Logan*, 705 N.E.2d 152, 160-61 (Ill. App. Ct. 1998) (same).

<sup>135</sup> See *Sandin*, 515 U.S. at 483-84 (stating that interest created by state law could trigger procedural protections).

In *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), the Third Circuit recognized that the plaintiffs had a protected liberty interest under the New Jersey Constitution in “be[ing] free of the disclosures required by Megan’s Law, absent a demonstration that such disclosures are required by a legitimate and substantial state interest.” *Id.* at 1105. Finding an interest protected by the state constitution, the court deemed it unnecessary to determine whether a federally protected interest was implicated. See *id.*

The Massachusetts Supreme Judicial Court recognized a protected interest under its state’s constitution in *Doe v. Attorney General*, 686 N.E.2d 1007 (Mass. 1997). The plaintiff alleged that if his registration became known publicly, he would be ostracized and would lose customers in his carpentry business. See *id.* at 1009-10. The court agreed that he faced a potentially great harm, stating that “[t]he availability of information on request

While challenges based on interests protected by state constitutions may prove effective, this Note argues that sex offender notification statutes implicate federally protected interests that trigger the due process protections of the Fourteenth Amendment. Some of the interests that may be infringed upon by notification include interests in reputation, privacy, employment, and physical safety.

Under current Supreme Court case law, a reputational interest alone is insufficient to trigger procedural due process protections.<sup>136</sup> However, harm to reputation plus another deprivation would be enough to trigger due process concerns.<sup>137</sup> The Supreme Court recognized a right to a zone of privacy in *Roe v. Wade*.<sup>138</sup> It clarified the privacy right in *Whalen v. Roe*,<sup>139</sup> holding that the right to privacy consists of two interests: the interest "in avoiding disclosure of personal matters"; and the interest in "independence in making certain kinds of important decisions."<sup>140</sup> The Court has further recognized an interest in personal privacy, holding that compilations of information (including name, date of birth, and history of arrests and convictions) may implicate a protected privacy interest.<sup>141</sup> SORAs implicate pro-

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concerning a registered sex offender threatens the reputation of the offender and stigmatizes him as a currently dangerous sex offender." *Id.* at 1011. The court determined that the aggregate burdens of registration, disclosure upon request, potential harm to earning capacity, potential damage to reputation, and "statutory branding . . . as public danger, a sex offender" gave rise to a protected liberty and privacy interest under the state constitution. See *id.* at 1013. This state-created interest entitled the offender to Massachusetts procedural due process protections before being subjected to the registration or disclosure provisions of the Act. See *id.* at 1012-13. The court declined to determine whether interests protected by the Federal Constitution were implicated. See *id.* at 1013. It did note, however, that a similar interest might be found under the Fourteenth Amendment of the United States Constitution. See *id.* at 1013 n.8.

The Massachusetts Supreme Judicial Court reaffirmed its determination that the SORA implicated interests protected by the state constitution one year later in *Doe v. Sex Offender Registry Bd.*, 697 N.E.2d 512 (Mass. 1998), and stated:

Constitutional privacy interests are implicated in these cases because the information to be disseminated would be obtained from the offenders themselves and by reason of their required acts of registration. The damage to their reputations resulting from such dissemination stigmatizes them as currently dangerous sex offenders, can harm their earning capacities, and can cause them to be objects of derision in the community.

*Id.* at 518 n.12. The court reserved the question of whether dissemination of publicly available information would constitute a similar violation of privacy interests. See *id.*

<sup>136</sup> See *Paul v. Davis*, 424 U.S. 693, 701 (1976).

<sup>137</sup> See *Cutshall*, 980 F. Supp. at 931 (citing *Paul* and discussing what is known as "stigma plus" test).

<sup>138</sup> 410 U.S. 113, 152-53 (1973).

<sup>139</sup> 429 U.S. 589 (1977).

<sup>140</sup> *Id.* at 598-600.

<sup>141</sup> See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 752 (1989) (holding that disclosure of FBI rap sheet is invasion of privacy).

tected interests, including privacy and reputation. These interests combined should trigger due process protections.

Several lower courts have held that sex offender statutes infringe upon interests protected by the Federal Constitution. The Ninth Circuit, addressing the issue of SORA notification in *Neal v. Shimoda*,<sup>142</sup> determined that the "stigmatizing consequences of the attachment of the 'sex offender' label" in addition to the "subjection . . . to a mandatory treatment program" gave rise to "the kind of deprivations of liberty that require procedural protections."<sup>143</sup> Similarly, a Tennessee district court held that the notification provisions of the Tennessee SORA infringed upon sex offenders' federally protected rights to reputation, privacy, and employment.<sup>144</sup>

The New Jersey Supreme Court, in *Doe v. Poritz*,<sup>145</sup> determined that an offender has a federally protected liberty interest in his privacy, which is implicated by public disclosure of his home address and other personal information.<sup>146</sup> It defined the right as one implicated "when the government assembles . . . diverse pieces of information into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity."<sup>147</sup> The Supreme Court of Oregon also held that its state's SORA implicated a federally protected liberty interest.<sup>148</sup> It held that:

[T]he interest . . . goes beyond mere reputation. . . . It is an interest in knowing when the government is moving against you and why it has singled you out for special attention. It is an interest in avoiding the secret machinations of a Star Chamber. . . . [And] it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and . . . even physical

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<sup>142</sup> 131 F.3d 818 (9th Cir. 1997).

<sup>143</sup> *Id.* at 830.

<sup>144</sup> See *Cutshall v. Sundquist*, 980 F. Supp. 928, 933 (M.D. Tenn. 1997). The court also found a protected privacy right based on the Tennessee Declaration of Rights. See *id.* at 932.

The court was careful to craft the recognized rights within the framework laid out by the Supreme Court. The *Cutshall* court found infringed interests in employment and privacy as well as a reputational interest and determined that these cumulative interests were sufficient to trigger due process. See *id.*

<sup>145</sup> 662 A.2d 367 (N.J. 1995).

<sup>146</sup> See *id.* at 409 ("That the information disseminated under the Notification Law may be available to the public . . . does not mean that plaintiff has no interest in limiting its dissemination.").

<sup>147</sup> *Id.* at 411. The Third Circuit tentatively has recognized a federally protected privacy interest in home addresses. See *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) (stating that "[w]e are . . . unwilling to hold that absent a statute, a person's home address is never entitled to privacy protection").

<sup>148</sup> See *Noble v. Board of Parole and Post-Prison Supervision*, 964 P.2d 990, 996 (Or. 1998).

harassment likely to follow from designation. . . . [T]hat interest, when combined with the obvious reputational interest that is at stake, qualifies as a "liberty" interest within the meaning of the Due Process Clause.<sup>149</sup>

SORAs may have a significant impact on an offender's life in terms of privacy, reputation, employment, and safety.<sup>150</sup> The severe consequences of these regimes, especially in the notification context, impact on significant individual rights. Courts confronted with notification challenges should evaluate the cumulative impact of SORAs on the individual in determining whether a state or federally protected interest is implicated. Once a court establishes that the prospective effects of a SORA infringe on a protected right, the due process protections of the Fourteenth Amendment are triggered, and a court must evaluate procedural protections available to the offender.

### B. *Evaluative Standard: Mathews v. Eldridge*

The Supreme Court's decision in *Mathews v. Eldridge*<sup>151</sup> established the standards of due process in civil proceedings.<sup>152</sup> Therefore, because SORAs have been deemed civil statutes, the *Mathews* standard should apply.<sup>153</sup>

Before the government can deprive someone of a liberty or property interest, it must provide adequate procedural safeguards. However, there is no universal definition of "process" that is due in all situations; the Court has long recognized that due process "is flexible and calls for such procedural protections as the particular situation

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<sup>149</sup> *Id.* at 995-96.

<sup>150</sup> See *supra* Part I.C.2.

<sup>151</sup> 424 U.S. 319 (1976). The *Mathews* decision marked the expansion and refinement of *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Court determined that welfare recipients must be given notice and the opportunity for a hearing before their benefits may be terminated. See *id.* at 262-63. The Court in *Goldberg* stated that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

*Mathews* involved a challenge brought by a disabled man whose Social Security disability benefits had been terminated without a pre-termination hearing. See *Mathews*, 424 U.S. at 323-24. The principal claim in the case was that the termination of benefits without a prior hearing violated the due process guarantees of the Fourteenth Amendment to the United States Constitution. See *id.* The Court distinguished the facts of the case from *Goldberg* and held that a pre-termination hearing was not required for recipients of Social Security disability benefits. See *id.* at 349.

<sup>152</sup> See *Mathews*, 424 U.S. 319.

<sup>153</sup> See *supra* note 126.

demands.’”<sup>154</sup> In *Mathews*, the Court developed a test for determining the degree to which procedural protections are required under the Due Process Clause. First, a court should weigh the private interest implicated, then evaluate the risk of an erroneous deprivation through existing procedures, and, finally, look at the government’s interest in not providing further procedures.<sup>155</sup> If these factors weigh in favor of the personal interest of the plaintiff, and if the risks of erroneous deprivation are high, more procedural safeguards will be warranted than if the factors weigh in favor of the governmental interests.

### C. Applying *Mathews* to SORAs

Once a liberty interest is found in a notification scheme, the due process balancing test becomes an essential part of evaluating a sex offender law. Despite their reluctance to invalidate SORAs, courts have increasingly analyzed the adequacy of procedural protections in evaluating these laws. The following sections compare several cases from courts that have refused to apply the *Mathews* test with cases from courts that have adopted the *Mathews* approach.

#### 1. Courts Rejecting the *Mathews* Approach

Although some courts have begun to analyze SORAs in the *Mathews* framework, others have refused to engage in any balancing of interests. Three cases illustrate the possible ramifications of declining to employ the *Mathews* test.

The Ohio Court of Appeals rejected a due process challenge in *Ohio v. Ward*.<sup>156</sup> In its discussion of the contours of due process rights, the court invoked *Mathews*, but declined to engage in any balancing of interests, holding that because the defendant was given notice and an opportunity to be heard, due process was satisfied.<sup>157</sup> The court neither discussed nor weighed the burdens imposed on the de-

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<sup>154</sup> *Mathews*, 424 U.S. at 321 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Supreme Court applies a narrower standard to criminal procedures. See *Medina v. California*, 505 U.S. 437, 443-46 (1992) (declining to apply *Mathews* test and applying narrower standard instead). However, because most courts have determined that SORAs are civil rather than criminal laws, the *Mathews* framework should guide courts making registration and notification decisions.

<sup>155</sup> *Mathews*, 424 U.S. at 335 (describing test).

<sup>156</sup> No. 72371, 1999 WL 43303 (Ohio Ct. App. Jan. 28, 1999). Ward pled guilty to “attempted felonious sexual penetration of a person under thirteen years of age.” *Id.* at 1. Three years later, the state moved to have him declared a sexual predator. See *id.* At a hearing, the defendant stipulated the facts of the previous case and was determined to be a sexual predator. See *id.* He challenged the designation on the basis of the Ex Post Facto, Equal Protection, and Due Process Clauses. See *id.* at \*1-\*2, \*7.

<sup>157</sup> See *id.* at \*2-\*3.

defendant by registration and notification, the interests of the state, or the risks of improper classification.<sup>158</sup>

Two other courts, the Eastern District of Michigan, in *Lanni v. Engler*,<sup>159</sup> and the Illinois Appellate Court, in *People v. Logan*,<sup>160</sup> also rejected the possibility of a due process challenge to their states' SORAs. Both courts found no protected interest at stake, a determination that might have ended the inquiry,<sup>161</sup> however, both courts went further, stating that even if a protected liberty interest could be established, plaintiffs had no due process claim because the statutes in question subjected all offenders to registration and notification.<sup>162</sup> Thus, the courts each concluded, "a hearing would serve no purpose."<sup>163</sup>

Neither the Michigan district court nor the Illinois Appellate Court investigated the possibility that due process rights might be implicated by a system that subjected all offenders to equal burdens of registration and notification. Neither court investigated the risks to the individual inherent in public notification, and neither court engaged in any balancing discussion.<sup>164</sup> Both courts indicated that because the law arbitrarily treats all people who fall into the broad category "sex offender" the same, individual sex offenders have no due process rights, even if they can establish a protected interest at stake.

## 2. Courts Applying Mathews

The courts that have applied the *Mathews* factors to SORAs have done so primarily in two contexts: to bolster a finding of constitutionality or to insist that further procedural protections be granted to sex offenders facing registration and notification. Both approaches support the proposition that the *Mathews* framework should apply to registration and notification regimes. Where liberty interests are at

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<sup>158</sup> See *id.*

<sup>159</sup> 994 F. Supp. 849 (E.D. Mich. 1998).

<sup>160</sup> 705 N.E.2d 152 (Ill. App. Ct. 1998).

<sup>161</sup> See *Lanni*, 994 F. Supp. at 855 (finding no protected interest and stating that "any detrimental effects that may flow from the Act would flow most directly from plaintiff's own misconduct and [a] private citizen's reaction thereto"); *Logan*, 705 N.E.2d at 160-61 (rejecting defendant's argument "that the registration and notification statutes . . . deprive him of a protected liberty or property interest" and stating that "[a]ny injury to the defendant's reputation is a result of his underlying conviction of a sex offense").

<sup>162</sup> See *Lanni*, 994 F. Supp. at 855; *Logan*, 705 N.E.2d at 160.

<sup>163</sup> *Lanni*, 994 F. Supp. at 855; *Logan*, 705 N.E.2d at 161.

<sup>164</sup> Of course, it was not necessary for either court to engage in a *Mathews* analysis because both courts rejected plaintiffs' interest arguments. See *supra* note 134 and accompanying text. However, because the courts discussed what would happen if an interest were found, some discussion of balancing would have been appropriate.

stake in these civil proceedings, some procedural protections must be made available. This Note recognizes that notions of due process are flexible and does not advocate one specific formula. However, it argues that courts must weigh the interests of the offender when evaluating the constitutionality of registration and notification laws.

*a. Courts Invoking Mathews to Find SORAs Constitutional.*

Two courts have relied on procedural protections to uphold SORAs against ex post facto and double jeopardy challenges, looking to procedural mechanisms present in individual statutes as evidence of nonpunitive intent.<sup>165</sup>

The Ninth Circuit underscored the importance of due process protections in *Russell v. Gregoire*.<sup>166</sup> Upholding Washington's SORA against an ex post facto challenge,<sup>167</sup> the court emphasized the presence of a three-tier risk scale and limitations on notification<sup>168</sup> as support for the conclusion that the law was not punitive, stating: "The law contains careful safeguards to prevent notification in cases where it is not warranted and to avoid dissemination of the information beyond the area where it is likely to have the intended remedial effect."<sup>169</sup>

In 1996, while formulating a registration and notification scheme, the Massachusetts Senate transmitted the proposed statute to the

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<sup>165</sup> An interesting variation on this can be seen in *Femedeer v. Haun*, 35 F. Supp. 2d 852, 859 (D. Utah 1999). The Utah district court applied rational basis review to Utah's SORA, focusing specifically on the provision allowing for Internet notification, and determined that the public disclosure provisions violated the double jeopardy and ex post facto provisions of the United States Constitution "insofar as the statute fails to limit the extent of disclosure to the degree necessary to accomplish the statute's nonpunitive goals." *Id.* In reaching this conclusion, the court stated that procedural safeguards "designed to ensure that the burden imposed on registrants does not exceed the burden inherent in accomplishment of [the] act's goals" are essential to a SORA's constitutionality. *Id.*

<sup>166</sup> 124 F.3d 1079 (9th Cir. 1997).

<sup>167</sup> The plaintiffs alleged that because their convictions predated the Washington SORA, their constitutional rights were violated by application of the registration and notification requirements to them. See *id.* at 1081-82. The court concluded that registration and notification were not punitive, first finding that they were not intended to be criminal punishments and then determining that the effects were not overly punitive in fact. See *id.* at 1093.

<sup>168</sup> The structure of the notification scheme provided gradations of notification based on risk: No public notification would occur for level one (low risk) offenders; there would be limited notification to law enforcement agencies, government agencies, and schools for level two (medium risk) offenders; and there would be distribution of information to local news media for level three (high risk) offenders. See *id.* at 1082.

<sup>169</sup> *Id.* at 1090. The court, however, expressly refused to consider the harsh effects of notification, such as vigilantism, in its decision and similarly rejected the similarities between notification and shaming. See *id.* at 1091-93.

Massachusetts Supreme Judicial Court.<sup>170</sup> The justices responded with an opinion reflecting their preliminary appraisal of the constitutionality of the notification provisions.<sup>171</sup> Concluding that the provisions would be constitutional, the justices placed great emphasis on the procedural protections that would be accorded offenders under the statute, including guidelines for risk determination, judicial determination of ultimate risk classification, opportunity for a hearing, and availability of counsel.<sup>172</sup>

The court, invoking *Mathews*, stated that “the process due in a particular case is a function of the severity of the [potential] deprivation.”<sup>173</sup> The court emphasized the need for a balancing of purposes and effects:

The more harshly the measures bear on the individual . . . the more urgent must be the regulatory concern, the more soundly rooted in fact rather than prejudice and conjecture must be the basis for that concern, and the more closely we must insist that the proffered regulation must hew to the well-grounded regulatory aim.<sup>174</sup>

The court rejected the notion that general statistics could be applied directly to individual offenders and called for a development of guidelines and individual assessments of risk.<sup>175</sup> Thus the court made it clear that the procedural protections available to offenders are extremely significant to an evaluation of the registration and notification scheme’s constitutionality.

*b. Courts Applying Mathews to Find SORAs Unconstitutional.*

Other courts have applied *Mathews* to SORAs in order to insist upon greater procedural protections. A few cases stand out as sketching the beginning contours of what process is due to sex offenders. The Ninth Circuit and Massachusetts, addressing due process challenges to

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<sup>170</sup> See *Opinion of the Justices*, 668 N.E.2d 738, 738 (Mass. 1996). The statute the justices evaluated was different from the one ultimately enacted. See *infra* notes 183-86 and accompanying text for a discussion of the court’s later analysis of the final law.

<sup>171</sup> See *Opinion of the Justices*, 668 N.E.2d at 746-47 (stating that justices would not address constitutionality of registration provisions). The justices indicated their preliminary opinion that the notification provisions did not on their face constitute punishment. See *id.* at 754. However, they also cautioned that “a burden does not necessarily escape characterization as punitive because the purpose of its imposition can be shown to be regulatory. Some burdens may be of a kind or so severe in their effects as to stand as punishments in spite of an explicitly stated regulatory purpose.” *Id.* at 752.

<sup>172</sup> See *id.* at 754 (discussing procedural protections of proposed statute).

<sup>173</sup> *Id.* at 754-55 (discussing application of *Mathews*).

<sup>174</sup> *Id.* at 750 (underscoring importance of evaluation of effects on offenders).

<sup>175</sup> See *id.* at 752-53 & n.18 (stating that some types of offenders might be more likely to reoffend, but cautioning against using statistics too broadly, noting that “[o]urs is so large and heterogeneous a nation that it may truly be said that whatever can happen will happen somewhere, sometime”).

SORAs, have gone beyond the opinions discussed above to demand greater procedural protections for offenders. Additionally, in New Jersey, creator of the original Megan's Law, the courts have provided two of the most detailed opinions on the subject of sex offender registration and notification.<sup>176</sup>

The Ninth Circuit has suggested the extent to which due process protections must be afforded sex offenders in *Neal v. Shimoda*,<sup>177</sup> in which it addressed a challenge brought by inmate sex offenders. Because inmates are generally afforded fewer procedural protections than free citizens,<sup>178</sup> *Neal* might be read as setting out minimum protections that should be provided by SORAs. In *Neal*, the court held that in order for due process to be satisfied, an inmate must receive notification of classification, including the reasons for the classification and a hearing at which he may call witnesses and present evidence to contest the classification.<sup>179</sup> The court concluded that failure

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<sup>176</sup> A few other cases that engage in a detailed *Mathews* evaluation deserve mention and will be referenced in Part III. In *Cutshall v. Sundquist*, 980 F. Supp. 928 (M.D. Tenn. 1997), a district court applied *Mathews* to Tennessee's SORA and found that the act's notification provisions, which allowed law enforcement officials discretion to disclose information, violated the plaintiff's due process rights. See *id.* at 934. The court, holding that "the notification procedures offend notions of due process," ruled that the state must provide the offender with notice and a hearing before notification occurs. See *id.*

The Oregon Supreme Court engaged in a detailed *Mathews* analysis and held that offenders had a due process right to notice and a hearing before a risk designation is made. See *Noble v. Board of Parole and Post-Prison Supervision*, 964 P.2d 990, 997 (Or. 1998). The court found that the individual interests and risk of erroneous decision were significant. It noted that the state's serious interests (community protection) would not be harmed by allowing a predetermination hearing. See *id.* The court further found that a predetermination hearing would not burden the state's interests in procedural efficiency. See *id.* The court, after weighing the interests, held that predeprivation notice and a hearing were required by due process. See *id.*

<sup>177</sup> 131 F.3d 818 (9th Cir. 1997). Two state prisoners brought § 1983 actions against prison administrators, alleging that the label "sex offender" and the requirement that they participate in a sex offender treatment program as conditions of parole, as mandated by Hawaii's Sex Offender Treatment Program (SOTP), violated the Federal Constitution. See *id.* at 821-22. Neal was never and had not previously been convicted of a sex offense; however, he was classified as a sex offender under the SOTP while in prison because his crimes had involved "sexual misconduct." *Id.* at 822. This classification impacted both his assignment to a medium security facility and his chances for parole. See *id.*

The plaintiffs claimed that the state's actions violated the Ex Post Facto Clause and their Fourteenth Amendment right to due process. See *id.* at 823. The plaintiffs also challenged the law on self-incrimination and cruel and unusual punishment grounds, but the court disposed of those claims with minimal discussion. See *id.* at 832-33 (addressing Fifth and Eighth Amendment claims).

The court, relying heavily on the Supreme Court's opinion in *Hendricks*, determined that the SOTP did not violate the Ex Post Facto Clause. See *id.* at 825-27.

<sup>178</sup> See *Sandin v. Connor*, 515 U.S. 472, 485 (1995) (noting that incarceration necessarily results in limitation of many rights afforded nonprisoners).

<sup>179</sup> See *Neal*, 131 F.3d at 830-31 (discussing process due).

to present detailed notice and opportunity for a hearing prior to the labeling of an inmate as a sex offender violated the Fourteenth Amendment.<sup>180</sup>

The Ninth Circuit's decision offers substantial support for the proposition that an individualized classification and an opportunity to contest that classification are essential for due process to be fulfilled. The liberty interest in avoiding the stigma associated with the label "sex offender" is constant,<sup>181</sup> and the burdens that come with public notification (ostracism, limited employment and residential choice, and threat of physical harm) can be paralleled to the burdens placed on the inmate (impact on assignment and parole opportunities). Because a nonconfined offender also faces severe deprivation resulting from a designation as a sex offender, and because the stigma associated with the "sex offender" label is arguably even greater outside prison, the same due process protections the court discusses should apply to noninmate offenders.

Like the Ninth Circuit, Massachusetts courts have insisted upon procedural protections for offenders. The Massachusetts Supreme Judicial Court expanded the procedural protections of its state's SORA in 1997 when it got a chance to evaluate the revised SORA actually enacted by the legislature.<sup>182</sup> The court, finding that the provisions of the act that automatically classified persons as sex offenders violated the plaintiff's due process rights, applied the *Mathews* balancing test to evaluate the interests of the individual and those of the state.<sup>183</sup> It held that individuals are entitled to a hearing in which it must be found that the individual poses a risk to children and "other vulnerable persons for whose protection the Legislature adopted the registration and notification requirements" before he or she may be labeled a sex offender.<sup>184</sup> The court also found that an individual must be given an opportunity to demonstrate that notification is unwarranted because he or she does not pose a risk to children or other vulnerable

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<sup>180</sup> The court reversed summary judgment only as to Plaintiff Neal because he had not been convicted of a sex offense and thus did not have an opportunity "formally [to] challenge the imposition of the 'sex offender' label in an adversarial setting." *Id.* at 831. The court determined that because Plaintiff Martinez had been convicted of rape, his due process protections had been satisfied. See *id.*

<sup>181</sup> The court analogized the stigmatizing consequences of being labeled a sex offender to the stigmatizing effects of being labeled mentally ill. See *id.* at 828-29 (stating that "[w]e can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender").

<sup>182</sup> See *Doe v. Attorney General*, 686 N.E.2d 1007, 1010-12 (Mass. 1997).

<sup>183</sup> See *id.*

<sup>184</sup> *Id.* at 1008. The Massachusetts act automatically classified some individuals as level one (low risk) sex offenders. See *id.*

groups.<sup>185</sup> The court explicitly calls for an evaluation based on the "public need to which the sex offender act responded."<sup>186</sup>

New Jersey, which has the prototypical SORA, has also emphasized the necessity of procedural protections for offenders. In 1995, the New Jersey Supreme Court addressed the problem of sex offender registration and community notification for the first time in *Doe v. Poritz*,<sup>187</sup> when it addressed a challenge brought by a convicted sex offender seeking to enjoin application or enforcement of New Jersey's SORA.<sup>188</sup> While the court upheld most of the provisions of New

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<sup>185</sup> See *id.* at 1014.

<sup>186</sup> *Id.*

The Massachusetts Superior Court bolstered the *Doe v. Attorney General* decision one month later in a case with radically different facts but very similar claims. See *Doe v. Sex Offender Registry Bd.*, No. CIV.A. 97-2462, 1997 WL 819765 (Mass. Super. Ct. Dec. 22, 1997). The plaintiff, a man convicted of raping his own young daughter, served at least 11 years of his 12-year sentence and was released in 1995. See *id.* at \*1. The Massachusetts SORA went into effect in 1996, and the plaintiff was determined to be a Level Three (high risk) offender. See *id.* The court distinguished the facts of *Doe v. Attorney General* and *Doe v. Sex Offender Registry Board*, remarking that the crimes committed by this plaintiff were far more serious than those committed by the plaintiff in the previous case. See *id.* at \*3 (comparing both cases). Another significant difference between the two cases, the court noted, was that the plaintiff in this case had committed his sex crime against a child, a member of one of the "vulnerable" groups that the SORA was intended to protect. See *id.* at \*4. Despite these substantial differences, the court held that the *Mathews* factors mandated a prenotification hearing, and enjoined the Registry Board from any release of information relating to the plaintiff until such a hearing was conducted. See *id.* at \*5, \*9. The court rejected the argument that the legislature's tiered risk classification provided adequate process:

[The plaintiff] has a constitutionally protected interest in not having personal information about himself and his past offenses made available to the public upon request and in not being stigmatized as a sex offender whom the government has determined presents a threat to minors and other vulnerable persons. The harm which potentially may be visited upon him if such information and label are erroneously made available to the public is great. In the circumstances, more than a legislative generalization is required to justify depriving him of the liberty and property interests he has at issue here. The plaintiff is entitled to the opportunity for a hearing where he would have the chance to show that despite the nature of his offenses, he does not present a risk of reoffense.

*Id.* at \*7 (citation omitted).

<sup>187</sup> 662 A.2d 367 (N.J. 1995).

<sup>188</sup> In a lengthy opinion by Chief Justice Wilentz, the court held that the SORA violates neither the Ex Post Facto nor Double Jeopardy Clauses. See *id.* at 372.

The New Jersey statute, like the Washington SORA upheld in *Russell*, provided three levels of risk classification with different levels of notification attaching at each risk level. See N.J. Stat. Ann. § 2C:7-8(c) (West 1995 & Supp. 1999). The statute defines a sex offender as a person who has been convicted of a number of offenses, including sexual assault, aggravated criminal sexual contact, and debauching the morals of a child. See *id.* § 2C:7-2(b). An offender must register within 120 days of the enactment of the law (or upon release from confinement), providing information including his or her name, social security number, physical description, and address. See *id.* §§ 2C:7-2(c)-(e), 2C:7-4(b)(1). The registration obligation lasts for 15 years. See *id.* § 2C:7-2(f). After registration, the

Jersey's SORA, it made considerable alterations to the procedures regarding notification.<sup>189</sup> After weighing the interests of the individual offender, the risk of erroneous deprivation of the interest, and the interest of the state, the court concluded that notice and hearing before public dissemination of information are mandated by due process for higher risk offenders, and emphasized that "additional safeguards would ensure that deprivations of those interests occur only when justified by the risk posed by the offender."<sup>190</sup>

The court made explicit the scope of notification allowed for Tier Two and Tier Three offenders, limiting Tier Two notification to those who have "a fair chance to encounter" the offender.<sup>191</sup> Notification for Tier Three offenders was similarly limited to the "likely to encounter" standard, but the court expanded the zone to include the offender's immediate neighborhood and schools in adjacent municipalities "depending upon their distance from the offender's residence, place of work, or school."<sup>192</sup> Notification that exceeds the "likely to encounter" standard, the court held, would exceed the legislature's intent and would be impermissible.<sup>193</sup>

The Third Circuit first addressed sex offender notification in *E.B. v. Verniero*, a case challenging New Jersey's SORA.<sup>194</sup> A class of sex offenders brought a constitutional challenge to the SORA, as modi-

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prosecutor of the offender's home county and the prosecutor of the county of conviction assess the risk of reoffense and assign a risk classification (Tier Three is high risk, Tier Two is moderate risk, and Tier One is low risk). See *id.* § 2C:7-8(c)-(d). Notification for Tier One is limited to law enforcement agencies likely to encounter the offender; notification for Tier Two also includes schools, day care centers, and youth organizations; notification for Tier Three includes any members of the public likely to encounter the offender. See *id.*

<sup>189</sup> See *Poritz*, 662 A.2d at 417 (describing liberty interest).

<sup>190</sup> *Id.* at 421 (applying *Mathews* factors). The opinion further held that offenders must be provided counsel at the adversarial hearing, that the state must bear the burden of going forward, and that the offender will bear the burden of persuasion regarding risk level and scope of notification. See *id.* at 382-83 (discussing details of required proceedings).

<sup>191</sup> *Id.* at 385 (stating that notification beyond this standard was "not at all the intent of the Legislature, the law having struck the balance between the need for safety and individual rights through the 'likely to encounter' standard").

<sup>192</sup> *Id.*

<sup>193</sup> See *id.* (stating that such broad means of notification are "apparently designed to inform the entire community of the offender's presence, rather than means designed, as the statute requires, 'to reach members of the public likely to encounter the person registered'").

<sup>194</sup> 119 F.3d 1077 (3d Cir. 1997). The Third Circuit first addressed a challenge to the New Jersey SORA, as modified by the *Poritz* court, in 1996. See *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996). Plaintiff Artway, who had served a 17-year sentence for sodomy, challenged Megan's Law on ex post facto, double jeopardy, bill of attainder, equal protection, and due process grounds. See *id.* at 1242. The plaintiff had completed his sentence in 1992, got married, and found a job. When Megan's Law was passed in 1994, he became subject to its registration and notification provisions. See *id.* Determining that the laws did not constitute punishment, the court held that registration did not violate the

fied by *Poritz*, on ex post facto, double jeopardy, and due process grounds.<sup>195</sup> After rejecting the ex post facto and double jeopardy claims and concluding that the punishment imposed was civil,<sup>196</sup> the court turned to the due process claim. Accepting the conclusion reached in *Poritz* that offenders are entitled to the opportunity to contest a risk classification and notification scheme before notification occurs, the Third Circuit applied the *Mathews* test to determine where the burdens would lie at a hearing.<sup>197</sup> Applying the *Mathews* balancing factors,<sup>198</sup> the court concluded that the burden of persuasion at a Megan's Law hearing must rest on the state and that the state must prove its case by clear and convincing evidence.<sup>199</sup>

A number of courts have found that due process protections must be provided by SORAs. These protections may take a number of different forms, depending on the case. In all cases, though, a common thread exists: Due process requires individualized assessment before notification can occur. In the next Part, this Note examines ways in

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Ex Post Facto, Double Jeopardy, or Bill of Attainder Clauses. See *id.* at 1271. The court dismissed the claims regarding notification as unripe. See *id.*

<sup>195</sup> See *Verniero*, 119 F.3d at 1081 (discussing nature of challenge). Applying the punishment test it developed in *Arnway*, and drawing from the Supreme Court's decision in *Hendricks*, the court determined that public notification for Tier Two and Tier Three offenders is "reasonably related to the nonpunitive goals of Megan's Law" and thus does not constitute punishment. *Id.* at 1098 (discussing goals of statute). The court further concluded that the law violates neither the Ex Post Facto nor the Double Jeopardy Clauses. See *id.* at 1081. Plaintiffs' argument that the scope of notification may exceed the remedial purpose of the statutes was also rejected. See *id.* at 1099 (discussing "fit" between notification and legislative purpose). The court also rejected the claim that public notification closely resembled shaming punishments. See *id.* The court discussed warning posters and quarantine notices as historical parallels to community notification, stating that the state has a right to "issue such warnings and the negative effects are not regarded as punishment." *Id.* at 1101. However, this analogy is not as strong as it might appear at first blush. Judge Becker's concurring and dissenting opinion eloquently attacks this line of reasoning, offering compelling arguments for distinguishing notification from wanted posters and quarantine notices and concluding that shaming punishments are indeed the best analogy for public notification. See *id.* at 1115-19 (Becker, J., concurring and dissenting).

<sup>196</sup> The court determined that although the extreme effects of a state action could rise to the level of punishment, the effects of Megan's Law were not onerous enough to constitute punishment. See *id.* at 1101-04. The court reasoned that "[a]ll Megan's Law mandates is registration and notification. . . . The state has imposed no restrictions on a registrant's ability to live and work in a community, to move from place to place, to obtain a professional license or to secure governmental benefits." *Id.* at 1102.

<sup>197</sup> See *id.* at 1106-07.

<sup>198</sup> See *id.* at 1107-08 (allocating burden). Weighing the *Mathews* factors, the court concluded that the individual's interests at stake were substantial because notification puts significant aspects of the offender's everyday life in jeopardy; that the state's interests were significant in protecting its citizens, but that the state also had an interest in the fairness of risk classification and notification; and that the risk of error would be significantly reduced if the burden was placed on the prosecutor. See *id.* at 1107.

<sup>199</sup> See *id.* at 1111.

which SORAs can be narrowly tailored within the due process framework of *Mathews*.

### III

#### NOTIFICATION WITHIN THE *MATHEWS* FRAMEWORK

When addressing a due process challenge to sex offender notification, courts should look to the entirety of circumstances to evaluate the constitutionality of a statute. Notification poses significant threats to reputation, employment opportunity, personal safety, and privacy.<sup>200</sup> Offenders of all risk levels may face ostracism, vigilantism, and limited opportunities for employment and socialization as a result of notification.<sup>201</sup> In the aggregate, the significant protected interests at stake in a notification regime should trigger the protections of the Fourteenth Amendment.<sup>202</sup> Under *Mathews*, these interests need to be balanced against the state's need to protect communities and vulnerable groups (especially children). Although more cumbersome than a uniform rule, the *Mathews* standard makes real the Fourteenth Amendment's protections of individual rights.

Application of *Mathews* will not result in a fixed conclusion; the calculus will be different depending on the facts of each case. The following sections analyze the impact certain practices might have on the *Mathews* calculus. A special section is devoted to notification on the Internet and concludes that most Internet notification should be held unconstitutional.

#### A. *Weighing Specific Procedures*

A constitutional notification system will strive above all to balance the need for public safety with the rights and interests of individual offenders and the risks of error. Such a system will take into consideration the variety and uniqueness of individual offenders, recognizing that different sex offenders pose different risks to the community. And finally, a reasonable notification statute will craft the elements of notification specifically to community protection, carefully guarding against notification that exceeds that purpose and at-

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<sup>200</sup> See *supra* Part I.C.

<sup>201</sup> See *supra* Part I.C.; see generally *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir. 1999). Although the Third Circuit held that the New Jersey SORA did not violate privacy interests as a matter of law, it remanded to the district court for determination as to whether the application of the law violated plaintiffs' privacy interests. See *id.* at 406. During the pendency of the appeal, plaintiffs filed several motions under seal in an effort to introduce evidence of adverse consequences to them and their families. See *id.* at 405-06.

<sup>202</sup> See *supra* Part II.A for a discussion of interest analysis.

tempting to minimize the possibility that offender information will be used improperly.

### 1. *Notice and a Hearing*

The essential minimal elements of due process as defined in *Mathews* are notice and a hearing. These procedural protections are essential to a valid notification scheme. A sex offender should be informed prior to any risk classification or public disclosure and should be allowed to challenge both.<sup>203</sup> Absent notice and a hearing, a SORA should not survive a due process challenge.

The exact components of the hearing should also be evaluated, though different regimes could survive the *Mathews* formula. A hearing that decreases the burden imposed on the individual would allow final determinations of risk classification to be made by a judge,<sup>204</sup> would allow the offender an opportunity to be assisted by counsel,<sup>205</sup> and would make available appellate review.

Another important element—not contained in many SORAs—that decreases the burden on the individual is the opportunity to petition for review of classification during the notification period.<sup>206</sup> Such review would allow an offender to offer evidence that he has not reoffended or that his circumstances have changed in such a way that he no longer poses a risk to the community.<sup>207</sup> Provisions for review would mitigate the risks of error in notification and would tip the *Mathews* calculus in favor of a finding of constitutionality.

### 2. *Tiered Risk Classification*

A tiered risk classification system, like the New Jersey system, is an important procedural protection because it reduces the risk that a

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<sup>203</sup> See, e.g., *Cutshall v. Sundquist*, 980 F. Supp. 928, 934 (M.D. Tenn. 1997) (holding that due process mandates notice and hearing); *Noble v. Board of Parole and Post-Prison Supervision*, 964 P.2d 990, 997 (Or. 1998) (same).

<sup>204</sup> See Committee on Criminal Law, Ass'n of the Bar of the City of N.Y., Principles on Megan's Law, 52 Rec. Ass'n B. City N.Y. 704, 711 (1997) [hereinafter NYCBA Proposals] (recommending that judge make final determination); see also *Doe v. Poritz*, 622 A.2d 367, 382-83 (N.J. 1995) (holding that judicial determination is necessary).

<sup>205</sup> See, e.g., *Neal v. Shimoda*, 131 F.3d 818, 830-31 (9th Cir. 1997) (finding due process right to hearing); *E.B. v. Verniero*, 119 F.3d 1077, 1111 (3d Cir. 1997) (same); *Doe v. Attorney General*, 686 N.E.2d 1007, 1014 (Mass. 1997) (same); *Doe v. Sex Offender Registry Bd.*, No. CIV.A. 97-2462, 1997 WL 819765, at \*7 (Mass. Super. Ct. Dec. 22, 1997) (same); *Poritz*, 662 A.2d at 421 (same).

<sup>206</sup> This right would not have to be unlimited. A statute can provide a minimum time of notification but should not subject an individual to public notification for a full 15 years with no opportunity to seek interim review.

<sup>207</sup> Such changed circumstances might include enrollment in an offender treatment program, participation in therapy, participation in substance abuse programs (if relevant to the offense), advanced age, or disability.

notification statute will be overly broad. "Offenders" cannot reasonably be lumped together in a singular category: The crimes included in the definitions of a "sex offense" are too varied to be assigned the same level of dangerousness.<sup>208</sup> Narrowly tailored distinctions between high, moderate, and low level offenders relate more closely to the purpose of community protection than one-category systems. Risk classification systems would conceivably strengthen the government's interest under the *Mathews* rubric because classification based on the offender's actual threat to the community is closely tied to the legitimate protective purpose of the SORA.

Risk classification should be based on an evaluation of the individual offender. A classification should be proposed by a board or clinical professional that has assessed the criminal record and evaluated the individual offender.<sup>209</sup> A scale of risk factors and mitigating factors could be developed to aid in the determination.<sup>210</sup>

Individualized risk assessment would further the goal of community protection, would provide valuable procedural safeguards for individual rights, and would protect against erroneous classifications.<sup>211</sup> This is not to say that a statute without a risk classification scheme would necessarily violate due process.<sup>212</sup> However, a risk classification system increases the chance that notification will be narrowly tailored to the state's protective interest.

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<sup>208</sup> For instance, solicitation of a prostitute poses less of a threat to the public welfare than the rape of an eight-year old. This is especially important considering that many SORAs treat all people convicted of a sex-related offense as "sex offenders." As discussed *supra* Part I.C.1, this may include people convicted of acts that were consensual or involved only the offender.

<sup>209</sup> See, e.g., NYCBA Proposals, *supra* note 204, at 710 (recommending that classifications should be made "only by qualified professionals who are adequately informed about the nature of the sex offense, have personally examined the sex offender, are familiar with the . . . nature and risk of future dangerousness . . . and are familiar with the circumstances under which treatment would be most effective for the sex offender").

<sup>210</sup> Such risk factors should include: past criminal history; age of the victim; relationship to the victim; physical factors (such as age or physical handicap); participation in treatment programs; violence or the use of a weapon involved in the commission of the crime; date and nature of the offense; and conditions of release or supervision. These factors will enable a deeper analysis of the actual risk posed by an individual offender.

<sup>211</sup> See, e.g., *Ohio v. Hart*, No. 73307, 1999 WL 148478, at \*3-\*5 (Ohio Ct. App. Mar. 18, 1999) (unpublished disposition) (holding that state had not demonstrated by clear and convincing evidence that offender posed risk of reoffense); *Ohio v. Boyce*, No. 73375, 1999 WL 135270, at \*1, \*4 (Ohio Ct. App. Mar. 11, 1999) (finding trial court's failure to specify factors supporting sexual predator classification violative of clear and convincing evidence standard).

<sup>212</sup> See, e.g., *Femedeer v. Haun*, 35 F. Supp. 2d 852, 859 (D. Utah 1999) (agreeing with state that risk assessment is not constitutionally required).

### 3. Notification Narrowly Tailored to Threat

Because states enacted sex offender laws as community protection measures,<sup>213</sup> the application of the laws should be closely linked to this significant purpose and should impose the lowest burden possible on individual interests.<sup>214</sup> In states that assign risk classifications, notification for low-level offenders should be severely limited (for example, to law enforcement personnel but not to the public).

Courts should consider the risks and burdens notification places on individuals—when evaluating a sex offender law, courts should weigh possible harms that will flow from notification against the risk that a particular individual poses to the community.<sup>215</sup> Because low-level offenders pose minimal risk of reoffense, the harms of loss of reputation and anonymity along with the stigma of being branded a sex offender and the threat of vigilantism would outweigh the protective value of public notification under the *Mathews* test.

Notification about higher risk offenders should be carried out carefully and only after an evaluation of the offender. In order to protect both the community's and the offender's interests, notification should be given only to those individuals and groups that the offender is likely to encounter, and to which the offender poses an actual threat.<sup>216</sup> For example, a preschool should not be notified of all sex offenders on a state's registry, as not all sex offenders pose a risk to preschoolers in a given locality.<sup>217</sup>

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<sup>213</sup> See, e.g., *In re Registrant R.F.*, 722 A.2d 538, 540 (N.J. Super. Ct. App. Div. 1998) (“[T]he constitutional justification for Megan’s Law rests on the belief that it is intended as nonpunitive remedial legislation.”).

<sup>214</sup> See, e.g., *Femedeer*, 35 F. Supp. 2d at 859 (stating that although risk classification is not required, “the legislature is not free from the constitutional requirement that the means selected be reasonably related to the statute’s nonpunitive purpose of preventing additional sex offenses”).

<sup>215</sup> Interestingly, the U.S. Court of Appeals for the Ninth Circuit recently was confronted with a vivid example of the effects of being labeled a sex offender. While *Rowe v. Burton*, an appeal from a denial of a motion to proceed under pseudonyms, was pending, the court was contacted by an individual named James Rowe who claimed that his reputation had been harmed by a newspaper story about the case because he might be mistaken for the pseudonymous Rowe of the case name. See *Doe v. Burton*, No. 94-35734, 1996 WL 252825, n.1 (9th Cir. May 13, 1996) (unpublished opinion). The appeal was dismissed for lack of jurisdiction. See *id.* at \*3. The court determined to change the case name to *Doe v. Burton*. See *id.* at \*1 & n.1.

<sup>216</sup> See NYCBA Proposals, *supra* note 204, at 705 (suggesting that “[t]he identity, description, and modus operandus of a sex offender should be disseminated only to those categories of officials or individuals who are in a position to use the information to protect themselves or others meaningfully”).

<sup>217</sup> The New Jersey Superior Court made it clear that risk to the community must be demonstrated before notification can occur: “[I]t is the prosecutor’s burden to prove by clear and convincing evidence not only the degree of risk created by registrant’s presence in the community, but also the scope of notification necessary to protect the members of

A narrowly tailored notification regime minimizes both the risks of improper notification<sup>218</sup> and the burdens on the offender while furthering the state's interest in community protection. Notification closely tied to actual threat is least likely to run afoul of the Fourteenth Amendment.

#### 4. *Manner of Notification*

The manner of notification may also figure into the *Mathews* framework. Notification should occur in carefully controlled environments, such as in a police station, where inquiring individuals can be warned about the consequences of misuse of the information.<sup>219</sup> Use of 1-800 or 1-900 numbers to process specific requests might also be appropriate because the inquirer bears the burden of investigation.<sup>220</sup> This type of notification, if tailored to provide information about higher risk offenders, allows concerned members of the community to inquire about specific individuals and might be particularly effective in allowing employers whose businesses involve children to make sure that job applicants are not sex offenders. If the service is limited to high-risk offenders, the burden borne by the offender would be minimal compared to the state's interest under the *Mathews* framework. Services that require callers to provide some personal information may further decrease risks to offenders because law enforcement officials could hold notified individuals accountable for their actions. Use of CD-ROM offender databases, such as at the county fair,<sup>221</sup> should be evaluated more strictly because notification does not occur in a controlled environment with protections against irresponsible use of the information.

#### 5. *Notification by Internet*

It cannot be stressed enough that if the true purpose of notification statutes is community protection, notification should be limited to means which may actually provide protection to the community. Extensive notification such as the posting of photographs and home ad-

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the community likely to encounter him." *Registrant R.F.*, 722 A.2d at 540 (holding that prosecutor failed to establish need for notification about man whose victims were placed in his care).

<sup>218</sup> See supra Part I.C for a discussion of the dangers associated with vigilantism and improper notification.

<sup>219</sup> See NYCBA Proposals, supra note 204, at 706 (suggesting that when "members of the community at large are permitted to review sex offender registrations, they should be permitted to do so only under circumstances that promote the responsible, safe, and effective use of the information").

<sup>220</sup> See supra note 60 and accompanying text.

<sup>221</sup> See discussion supra Part I.B.2.

dresses on the Internet clearly goes beyond this purpose and exposes the individual to substantial burdens.<sup>222</sup>

Internet notification sites are extremely popular; sites with sex offender information receive hundreds of "hits" a day.<sup>223</sup> Sites post photographs, personal information, and home addresses, but remarkably little information about the crimes committed.<sup>224</sup> It is unclear how much protection these sites provide communities. More troubling is the fact that Internet notification is not limited to the community in which the offender lives; anyone who can access the Internet can get an offender's information.

The availability of photographs and home addresses carries with it high consequences for error.<sup>225</sup> Internet sites, by allowing notification to a limitless audience, also pose the risk that individuals who get the information from the Internet will take it upon themselves to notify others, thus making notification an even less controlled process by taking it out of the government's hands.<sup>226</sup>

Internet notification far exceeds the reasonable bounds of a state's SORA and thus should not survive a due process challenge. Internet notification would likely not meet the *Mathews* standard because the risks of improper notification and harms faced by the individual are very high, while the state's interest in protection is low: The protective purposes of community notification statutes cannot

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<sup>222</sup> See, e.g., *Femedeer v. Haun*, 35 F. Supp. 2d 852, 859 (D. Utah 1999) (striking disclosure provisions of SORA on nonprocedural grounds and stating:

Registry information posted on the Department [of Corrections]'s website will be available without restriction to a global audience, many members of whom will be at no risk of encountering the registered offenders.

A reasonable legislator motivated solely by the aim of preventing additional sex offenses could not believe that the means chosen by the Department were justified by that aim. On the contrary, the means chosen by the Department appear to be motivated by a desire to reduce to the barest minimum the amount of consideration and effort required to carry out the important statutory aims entrusted to it).

<sup>223</sup> See, e.g., Craig Jarvis, *Website Listing Sex Offenders Stays Busy*, News & Observer (Raleigh, N.C.), Apr. 2, 1998, at A1, available in 1998 WL 6133039 (reporting that North Carolina site received 37,000 hits on its first day online); Fran Silverman, *Website Lists Sex Offenders*, Hartford Courant, Jan. 2, 1999, at A1, available in 1999 WL 6339337 (reporting that Connecticut site received more than 1500 hits in first eight hours).

<sup>224</sup> See descriptions of specific sites *supra* Part I.B.2.

<sup>225</sup> In many ways, Internet notification closely resembles early American shaming practices in that online registries display offenders' faces and personal information without a close fit with a nonpunitive legislative purpose.

<sup>226</sup> See, e.g., Nicole Brodeur, *Looking Backward, Staying Alert*, News & Observer (Raleigh, N.C.), Apr. 8, 1998, at B1, available in 1998 WL 6133788 (detailing Brodeur's efforts, after printing registry from North Carolina website, to contact registered offender and publicize his offense, and noting rapid spread of notification among his landlord and neighbors).

possibly reach the entire world. Thus, the burden placed on the offender's interests by literally universal notification should be found to violate due process.<sup>227</sup>

There are many possible procedural protections that would be constitutionally adequate. Individualized risk determinations and carefully controlled, narrowly tailored notification are among the most promising possibilities. Notification regimes that apply uniformly to all sex offenders or that provide personal information indiscriminately should fail the *Mathews* test. Above all, SORAs must balance the rights of the individual against the needs of community protection.

### CONCLUSION

Legislatures across the country have responded swiftly to several brutal, well-publicized sex crimes against children. Public fear and outrage led to sex offender registration and notification laws, passed in an attempt to provide protection against the perceived monsters who commit sex offenses. However, many of these laws are overbroad and do not make critical distinctions between different types of sex crimes and offenders. Misconceptions about the dangers posed by every person labeled a "sex offender" have fueled laws that impose harsh consequences across a broad and diverse category.

Public notification subjects an offender to several potential harms: vigilantism; ostracism; loss of employment; loss of anonymity; and damage to reputation. Although the state has a substantial interest in providing protection to its citizens, it is unclear that notification actually provides a significant measure of protection or reduces the chance of reoffense.

Procedural safeguards are crucial to maintaining the balance between the individual interests of an offender and the protective interests of the state. Because the harms associated with being labeled a sex offender can be so dire and long lasting, procedural protections must be accorded a sex offender before public notification occurs. Courts evaluating sex offender notification laws should apply the *Mathews* balancing factors, weighing individual interest, risks of error, and the interests of the state to ensure that procedural protections are included in community notification regimes.

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<sup>227</sup> This is not to say that a state could never create a constitutional Internet notification system. For instance, states could offer the information to individuals who submit their names and addresses via email. After confirming an inquirer's address, the state could transmit her a password that would allow the inquirer to view the database of high-risk offenders living within her zip code.

Notification statutes, if they are to exist at all, must be tailored to meet a realistic protective purpose. The scope of notification should be closely related to the risk an individual poses to the community.

Only after we take a realistic view of sex offense and take proactive steps to decrease its occurrence will we be able to decrease these shocking and terrifying crimes. Anger at the heinous crimes of a few should not lead us to tread upon the fundamental guarantees of due process. We should not abandon the rights of individuals in the name of community protection.

