1997

Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?

Chrisandrea L. Turner
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol86/iss2/8

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?

BY CHRISANDREA L. TURNER

INTRODUCTION

What was briefly heralded as one of our greatest weapons in protecting our children from sex offenders may soon meet its demise. Community notification laws, which provide the public with information regarding the release of convicted sex offenders back into society, have recently been plagued by constitutional challenges across the country. The most prominent community notification law, "Megan’s

* J.D. expected 1998, University of Kentucky.

Law, has been under attack since the New Jersey legislature enacted it in early 1995. The district court struck down two provisions of the notification portion of the law (which also contains registration provisions) pertaining to the release of information to agencies and organizations involving children and battered women and to the members of the general public. On appeal, the Court of Appeals for the Third Circuit refused to consider the constitutionality of the notification provisions on ripeness grounds, and thus vacated the judgment of the district court striking them down, while upholding the law's registration provisions. New York's version of Megan's Law, the New York State Sex Offender Registration Act, recently suffered a temporary setback at the hands of a Manhattan federal judge. The judge barred the state from releasing information to the public about convicted sex offenders who committed their crimes before the January 21, 1996 enactment of the law. The court upheld, however, the portion of the law requiring sex offenders to periodically register with law enforcement authorities, even if their crimes were committed before January 21, 1996. The judge issued a permanent injunction preventing New York from releasing the records of convicted sex offenders to the public. On appeal, the Court of Appeals for the Second Circuit reversed, finding that the community notification aspects of the law did not violate any constitutional provisions.

This Note will discuss the evolution, purpose, and function of community notification laws and their impact, both positive and negative, on society. It will present arguments of both proponents and critics of community notification laws, and will evaluate whose interests deserve the greater protection: the convicted sex offender or our children.

Part I will discuss the relationship between registration laws and community notifications laws. Part II will examine the four basic models for community notification laws. Part III will discuss the arguments in favor of community notification laws. Part IV will survey both successful and

3 See Artway, 876 F Supp. at 692.
4 See Artway, 81 F.3d at 1235.
5 N.Y. CORRECTION LAW § 168 (West Supp. 1997).
6 See Pataka, 919 F Supp. at 691 (striking down a section of the public notification portion of the law as violative of the Ex Post Facto Clause of the U.S. Constitution).
7 See Judge Says No to Part of Megan's Law, NEWSDAY, Sept. 25, 1996, at A61.
8 See Pataka, 919 F Supp. at 702.
9 See Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997).
unsuccessful constitutional challenges to which these laws have been subjected. Finally, Part V will provide the public policy arguments against these laws, and the Conclusion offers the author's view that the interests of our children deserve the greater protection.

I. COMMUNITY NOTIFICATION LAWS: THE PROGENY OF SEX OFFENDER REGISTRATION LAWS

A. Background

Community notification laws are relatively recent legislative enactments that followed state statutes requiring convicted sex offenders to register with the state upon release from incarceration.10 Sex offender registration laws require convicted sex criminals to provide local law enforcement with information enabling the authorities to “create a list of potential suspects to pursue whenever a child [is] harmed or missing.”11 Forty-seven states require sex offenders to register with local authorities.12 Of these states,


11 See id. at 1713 (citing 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, 795 (1996)).

Alaska, California, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, and Virginia have provisions for community notification within their registration statutes. Community notification laws differ from registration laws in that notification laws authorize law enforcement agents to distribute registration information about sex offenders to the general public. Most community notification laws grant local police forces broad discretion in determining which sex offenders are so dangerous that they present a public safety problem requiring notification.

Registration statutes themselves are relatively new enactments by state legislatures. This flurry of legislative activity can largely be attributed to the 1994 Federal Crime Bill, also known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act ("Wetterling Act"). The Act "established guidelines for a child sex offender registration law while allowing states to enact more stringent requirements if they so chose." To encourage all states to enact sex offender registration laws, the Wetterling Act


See Note, supra note 10, at 1713.

Earl-Hubbard, supra note 11, at 790.
provided that any state failing to pass a similar law by 1997 would lose ten percent of its share of federal grants for state and local anti-crime programs.\textsuperscript{19} In the wake of several well-publicized violent crimes against children by serial sex offenders, many state legislators have been prompted to go beyond mere registration laws and enact community notification laws.\textsuperscript{20}

\textbf{B. Components of Registration Laws}

It is important to discuss the components and requirements of sex offender registration laws because law enforcement agents acting under community notification laws have the authority to release to the general public information provided by offenders pursuant to the registration laws.\textsuperscript{21} Typically, when convicted sex offenders begin their probation period upon release from prison, they must register with the chief of police where they live.\textsuperscript{22} States vary in the amount of data they require sex offenders to provide, but all registration laws require at least the offender’s name, address, and Social Security number.\textsuperscript{23} Some states require an annual update of the information.\textsuperscript{24} The offender may also be required to provide a photograph, fingerprints, date and place of birth, crimes committed, and dates and places of conviction.\textsuperscript{25} Several states also require sex offenders to provide blood samples that are subsequently DNA-tested, screened, and filed in the state’s criminal justice data bank.\textsuperscript{26} Having DNA information on hand may aid in the investigation of murders, sexual assaults, and other types of crimes that often yield fluids that can be tested for identification purposes.\textsuperscript{27}

The time factor in registration laws varies from state to state. However, almost all states require registration for a specific period of time, ranging from five years to life.\textsuperscript{28} The majority of jurisdictions require that a sex

\textsuperscript{19} See id. at 796.
\textsuperscript{20} See Note, supra note 10, at 1712.
\textsuperscript{21} See id. at 1711.
\textsuperscript{22} See Abril R. Bedarf, Comment, Examining Sex Offender Community Notification Laws, 83 CAL. L. REV 885, 889 (1995).
\textsuperscript{23} See Note, supra note 10, at 1713.
\textsuperscript{24} See id.
\textsuperscript{25} See id.
\textsuperscript{26} See id. at 1713, 1714; see, e.g., CONN. GEN. STAT. § 54-102g (West Supp. 1997); OR. REV. STAT. § 137.076 (1995); VA. CODE ANN. § 19.2-310.2 (Michie 1995).
\textsuperscript{27} See Note, supra note 10, at 1714. “DNA fingerprinting” purportedly aids in the identification, apprehension, and prosecution of repeat sex offenders.
\textsuperscript{28} See Bedarf, supra note 22, at 890.
offender complete the registration requirement within thirty days of release from incarceration.\(^{29}\) If the offender does not register within the allotted time, he or she is subject to either misdemeanor or felony criminal charges, depending on the state.\(^{30}\) A sex offender must register with local authorities even if he or she intends to reside only temporarily in an area. When moving to a different area, the sex offender must notify the authorities there within a specified time frame.\(^{31}\)

Most registration statutes list the offenses that require registration.\(^{32}\) States often correlate the duration of the registration requirement with the severity of the crime.\(^{33}\) If the sex offender does not commit any registrable offenses during the registration period, the state may automatically terminate the registration duty, or the sex offender may petition for termination of the registration duty if he or she can show rehabilitation has occurred.\(^{34}\) A few states require indefinite registration unless the sex offender makes a showing

\(^{29}\) See id. at 889.


\(^{31}\) See Bedarf, supra note 22, at 889.

\(^{32}\) See id. at 888.

\(^{33}\) See, e.g., COLO. REV STAT. ANN. § 18-3-412.5(7)(a)-(c) (Bradford 1997) (20 years for a class 1, 2, or 3 felony, 10 years for a class 4, 5, or 6 felony, and 5 years for a misdemeanor); WASH. REV CODE ANN. § 9A.44.140(1)(b), (c) (1994) (15 years for class B felony, 10 years for class C felony).

\(^{34}\) See Bedarf, supra note 22, at 890.
of rehabilitation.  Although an offender’s duty to register may expire, registration data usually remain on file permanently, as most states do not allow the offender to petition for expungement of his or her records from the registration file.

Registration laws and community notification provisions focus on relatively specific criminal acts. Most statutes deal with sexual assaults, including forcible rape and sodomy, and sexual abuse of children, including incest. Several states also include crimes involving the promotion of child pornography and child prostitution. A few states include crimes such as public indecency and indecent exposure in their registration and notification laws. Sex offenders convicted of attempting any of the enumerated crimes may also be subject to registration and notification laws.

II. THE BASIC MODELS OF COMMUNITY NOTIFICATION

In Examining Sex Offender Community Notification Laws, Abril R. Bedarf discusses four basic models of community notification laws either enacted or proposed in various states across the country. Currently, eighteen states have community notification laws. These notification laws are

---

35 See id.
36 See id.
37 See id. at 888.
40 See, e.g., NEV. REV. STAT. ANN. § 207.151(3) (1993); OKLA. STAT. ANN. tit. 57, § 582 (West Supp. 1997).
41 Bedarf, supra note 22.
designed to benefit five different groups: "victims and witnesses connected to specific offenders, law enforcement agencies, school districts and child care facilities, volunteer organizations serving children, and citizens in a particular neighborhood or community." The following is a summary of the models compiled by Bedarf.

A. Self-Identification Model

The self-identification model has been in effect in Louisiana since 1992 and applies only to convicted child molesters. This model takes effect when a convicted offender is granted parole and terminates upon completion of parole. The convicted child molester must notify the local authorities, neighbors, and the superintendent of the school district in which he or she resides of his or her presence within the neighborhood. Included in the information given to these organizations and individuals is the offender's name, address, and type of conviction. An official journal of this information is kept within each municipality. Depending on the creativity of the parole board, the offender may be required to declare his or her status as a convicted child molester by posting signs or bumper stickers or by wearing labeled clothing reminiscent of Nathaniel Hawthorne's *The Scarlet Letter*.

B. Police Discretion Model

The police discretion model has been in effect in Washington state since 1990, and was incorporated into the federal Violent Crime Control and Law

---


44 See Bedarf, *supra* note 22, at 903-06.

45 See id. at 904.

46 See id.

47 See id.

48 See id.

49 See id.

50 See id.

51 In this novel, one of the leading characters, Hester Prynne, was forced to wear a red "A" on her outer garments after her adultery conviction.

Enforcement Act of 1994.\textsuperscript{53} It gives discretion to law enforcement agencies to release information to the community about convicted sex offenders when necessary for public safety.\textsuperscript{54} The police discretion model provides very little guidance as to the quantity of information to be released, the manner in which police are to release it, or the circumstances that call for its release.\textsuperscript{55} As a result, abuse by law enforcement is an ever-present possibility. This model comes with a grant of immunity from civil liability damages for all law enforcement agencies disseminating information unless an agency acts with gross negligence or bad faith.\textsuperscript{56}

C. \textit{Police Book Model}

A recent enactment by the California legislature brought the police book model into effect.\textsuperscript{57} This model allows an individual to decide when he or she wants to know about sex offenders in the community by permitting the individual to go to the local sheriff’s office and examine a book of registration data and photographs of sex offenders living in a particular area.\textsuperscript{58} Accompanying the photograph of the sex offender is the offender’s name, age, zip code, and registrable sex offenses.\textsuperscript{59}

D. \textit{Telephone Request Model}

California has given the public another source of information on child sex offenders by providing a “900” telephone number.\textsuperscript{60} In order to receive

\begin{itemize}
\item \textsuperscript{53} Pub. L. 103-322, 108 Stat. 1796 (West 1995); see also Bedarf, \textit{supra} note 22, at 904.
\item \textsuperscript{54} See Bedarf, \textit{supra} note 22, at 904.
\item \textsuperscript{55} See \textit{id.} at 904-05.
\item \textsuperscript{56} See \textit{id.} at 905 (Bedarf points out that the federal law is slightly different in that it authorizes the release of “relevant information that is necessary to protect the public concerning a specific person required to register” and grants “immunity to officials who disseminate such information in good faith.” \textit{Id.} (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 170101(d)(3)(E), 1994 U.S.C.C.A.N. (108 Stat.) 1796, 2042)).
\item \textsuperscript{57} See Bedarf, \textit{supra} note 22, at 905; CAL. PENAL CODE §§ 290, 290.1, 290.5 (West 1988 & Supp. 1994).
\item \textsuperscript{58} See CAL. PENAL CODE § 290.4(a)(1) (West Supp. 1996).
\item \textsuperscript{59} See \textit{id.}, \textit{id.} § 290.4(a)(2).
\end{itemize}
information on whether a particular individual is a sex offender, the caller must have a reasonable suspicion that a child is at risk and be able to provide very specific information, such as the exact street address, birth date, or detailed physical description of the person in question. California uses all proceeds from the calls to fund the program’s operation.

Recently, Kentucky established a computerized twenty-four-hour toll-free number known as the VINE system that “gives crime victims immediate updates on inmate information and pending releases” of their offenders. Hailed as “a vehicle that could save lives,” this system “provides a critical link between the victim and the criminal justice system.” The VINE system “monitors the custody status of every offender in Kentucky through a computer software link between county jails and state prisons and a centralized computer.” Upon registering with the system, identifying the inmate, and providing a telephone number where the victim may be reached, the crime victim may be given status updates by phone or computer. The victim “can [then] learn everything from the [offender’s] location to his next parole date,” as well as the offender’s “projected release date.” In addition, when a convicted offender is released, a registered victim will automatically be notified within ten minutes. Notification provides the victim with adequate “time to take precautionary measures” to protect himself or herself from a repeat of the crime.

---

61 See Bedarf, supra note 22, at 905-06.
62 See id. at 906.
63 The VINE system is formally named Victim Information and Notification Everyday and can be accessed by the general public through telephone registration. The toll-free number is 1-800-511-1670.
64 Terry Flynn, Crime Victim Notification: They’ll Be Told When Inmate Free, THE CINCINNATI ENQUIRER, Aug. 1, 1997, at B01 (citing Boone County, Kentucky jailer John Schickel, member of the Kentucky Jailers Association, which developed and helped implement the VINE system).
65 Id. (quoting Schickel (see id.)).
66 See id.
67 See id.
69 Bob Driehaus, Victims to be Warned of Freed Inmates: Kentucky First to Get Fully Automated System, THE CINCINNATI POST, July 11, 1997, at 12A.
70 See id.
71 Id.
III. THE NEED FOR COMMUNITY NOTIFICATION LAWS

A. State Rationalization

1. Police Power of the State

States have always been the guardian of the health, safety, and general welfare of their people. Thus, one may argue that states may constitutionally exercise this power by enacting community notification laws, because such laws have the purpose of protecting the safety of the general public. In the past, states have been allowed to enact laws that seek to prevent harm to the general public when there is a compelling government interest, even if the laws have the effect of restricting individual liberty. The United States Supreme Court has held that a state is generally free to impose restrictions on the general public if the restrictions are rationally related to the goal of public safety. Therefore, a state may rationalize the necessity of inconveniencing sex offenders by pointing to its compelling interest in protecting the general safety of the population as a whole, an interest served by the dissemination of information to citizens regarding the release of convicted sex offenders back into society.

2. Statistical Basis

States' interest in informing the general public of the location of convicted sex offenders is also supported by statistical data. For the most part, the focus of sex offender registration laws and community notification laws is on children. In 1994, sixty-one percent of rape victims in the United States were minors, with twenty-nine percent of all rape victims being under age eleven. Despite these statistics, the exact number of children victimized is difficult to assess due to the fact that sex offenses are among the most under-reported crimes. Estimates are that one of every three girls and one

---

73 See Note, supra note 10, at 1715.
75 See generally Earl-Hubbard, supra note 11, at 789.
76 See id. (citing National Victims Center statistics).
77 See id.
78 See id. at 789 n.4 (noting that as many as 50% to 90% of child sex offenses are never reported to the police).
of every seven boys will be sexually abused before they reach the age of eighteen. By enacting registration laws and community notification laws, legislatures are attempting to assist law enforcement in identifying potential sex offenders. In 1991, fifty-two percent of rapes were committed by strangers; thus, notification laws may enhance people's awareness of potentially dangerous individuals in their neighborhood. Without notification, this potential danger would remain unknown.

3. Rehabilitation and Recidivism

States also hope that enacting registration and community notification laws will help combat recidivism. Seventy-four percent of imprisoned child sex offenders have at least one prior conviction for a similar offense. Statistics like this clearly demonstrate that sex offenders are one of the most difficult classes of criminals to rehabilitate.

A tragic statistic exemplifying the problem of recidivism is found in the story of Megan Kanka, for whom New Jersey's Megan's Law is named. In July 1994, three new neighbors, all of whom were convicted sex offenders, moved into the house across the street from the Kankas. The Kankas had no idea that any of these men had been convicted of sex crimes; they seemed to be "mild-mannered laborers." One of these neighbors, Jesse Timmendequas,

---

79 See id. at 789.
80 See id. at 789-90.
82 See Earl-Hubbard, supra note 11, at 795; see also 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, 92 n.23 (1996) (citing 139 Cong. Rec. H10, 319, H10, 321, in which Rep. Ramstad quoted studies showing 74% of child sex offenders who are imprisoned have at least one prior conviction and have molested 117 children).
84 See supra note 2.
86 Id. at 1190.
was a twice-convicted felon who had served six years for attempted sexual assault on a child. Timmendequas lured seven-year-old Megan into his home to see his new puppy, and then led her upstairs, strangled her to unconsciousness with a belt, raped her, asphyxiated her to death with a plastic bag, placed her small body in a box, and dumped it in some bushes in a nearby soccer field.

After Megan's death, her parents launched a campaign demanding legislation that would require authorities to inform residents when a convicted sex offender moves into their neighborhood. Pointing to the high risk of recidivism among sex offenders, the New Jersey legislature responded by enacting Megan's Law, "the most comprehensive sex offender legislation in the nation." Despite its breadth, Megan's Law survived constitutional attack in Doe v. Poritz, however, two portions of its community notification provisions were struck down in Artway v. Attorney General for violating the Double Jeopardy Clause of the Constitution. The community notification portions that were stricken involved two tiers of offenders. Tier 2 involved notification of "schools, licensed day care centers and summer camps, as well as certain other designated agencies and community organizations involved in the care or supervision of children or the support of battered women and rape victims" when moderate risk offenders enter the community. Tier 3 involved notification of "members of the public likely to encounter" a convicted sex offender posing high risk of re-offense. Finding that the notification requirement had an actual purpose of protecting the public and preventing crimes – a solely remedial purpose – and did not historically

---

87 See Michael L. Bell, Comment, Pennsylvania's Sex Offender Community Notification Law: Will It Protect Communities From Repeat Sex Offenders?, 34 DUQ. L. REV 635 (1996).
88 See id.
89 See id. at 636.
91 See supra note 2.
92 Goodman, supra note 90, at 768.
95 See id. at 669.
96 Id.
97 Id.
resemble punishment, the Third Circuit Court of Appeals reversed and upheld those provisions.98

As previously noted, states have justified the use of community notification laws by citing studies showing that sex offenders pose a special danger to the community due to a high rate of recidivism.99 Moreover, other studies reveal that this high rate of recidivism is largely unaffected by treatment.100 In response to those studies, some states have focused on making the public more aware of the presence of these offenders. Two of the first states to adopt proactive legislation aimed at fostering widespread public awareness of sex offenders were Washington and Louisiana.101 The legislatures in those states found that these offenders posed a high risk of engaging in sex offenses even after being released from incarceration or commitment, and that protecting the public from them is a paramount governmental interest.102

Many authorities on the psychological aspects of rehabilitation and recidivism are convinced that treatment of sex offenders is still ineffective.103 Due to the unavailability of effective treatment while in prison, many sex offenders re-enter society “with the same problems” that originally imprisoned them.104 A study by Vikkie Henlie Sturgeon and John Taylor105 noted that nearly thirty percent of the mentally disordered sex offenders released into free society were convicted of new crimes during the five-year follow-up period. Approximately fifteen percent of those crimes were sex-related.106 Given the recidivism factor and the accompanying risk the sex offender poses to society, the goal of community notification is to increase public safety by making people aware of the existence of possible offenders

99 See Goodman, supra note 90, at 775 n.66.
100 See id. at 778 n.88.
102 See id. Washington and Louisiana legislators concluded that rapists have the highest recidivism rates of all sex offenders. See Bedarf, supra note 22, at 897
103 See Boland, supra note 15, at 185 n.12; Lita Furby et al., Sex Offender Recidivism: A Review, 105 PSYCHOL. BULL. 3, 25-28 (1989). After conducting a comprehensive review of sex offender treatment programs, the authors of the study concluded that “we can at least say with confidence that there is no evidence that treatment effectively reduces sex offense recidivism.” Id. at 25.
104 Boland, supra note 15, at 184.
106 See id.
in their neighborhoods. Since only a small group of dangerous offenders with repetitive and compulsive behavior are targeted, the public is given information only when authorities believe a true danger exists. There is not an overflow of unnecessary information regarding sex offenders disseminated to the public.

B. Community Rationalization

One may assume that members of the public want to know about potential hazards present in their environment. This would particularly be true of parents of young children, some of whom feel the legal system protects sex offenders more than it protects children. Upon release from prison or commencement of probation, the offender’s life starts anew. On the other hand, the victim—if he or she survived the attack—and the victim’s family must go on living with the emotional and physical trauma typical of such an offense. Families suffering through such an emotional ordeal often feel that they could have somehow prevented the tragedy. Perhaps if they had known who was living across the street, their loved ones could have been protected.

“[A]n offender can prey on innocent women and children because the victims are not aware of the offender’s potential to harm.” When residents living near high risk sex offenders have the proper information, they can take steps to protect themselves. Notification proponents argue that an offender will be deterred if society is made aware of his deviant behavior.” Secrecy, they assert, is the biggest weapon the offender has to endanger the community. Publicizing information relating to convicted sexual offenders removes this veil of secrecy. “Supporters of the public’s right to know argue that notification ‘help[s] deter sex offenders from repeating their crimes by keeping a spotlight on them and by giving nearby residents the ability to warn and protect their families.”

107 See, e.g., N.J. STAT. ANN. § 2C:7-8(c) (West 1995) (Megan’s Law, like others, allows public notification only when the risk of a repeat offense is high).
108 See Boland, supra note 15, at 187
109 See id.
110 Kimball, supra note 85, at 1195.
111 See id.
112 Id. at 1194.
113 See id. at 1194-95.
114 See id.
Notification laws have gained support throughout communities for several reasons. Public notification allows for “community surveillance of sex offenders [that] augments police surveillance.... Under hundreds of watchful eyes, it is more difficult for a sex offender to escape into anonymity.” Another positive effect from public notification is deterrence. Registered sex offenders are less likely to commit another offense if they believe their chances of detection are greater. Public notification brings a feeling of empowerment to the community and can dispel a sense of helplessness. Adversaries of community notification laws argue that the mere release of information will not deter a sex offender destined to become a repeat offender. However, deterrence of the desire to commit sex offenses is immaterial if the neighborhood can act and react to prevent access to children.

IV. CONSTITUTIONAL CHALLENGES TO COMMUNITY NOTIFICATION LAWS

Community notification laws have been challenged, both successfully and unsuccessfully, on a variety of constitutional grounds. Among them, this Note will discuss the Ex Post Facto Clause, the Bills of Attainder Clause, the Cruel and Unusual Punishment Clause, the Equal Protection Clause, the Due Process Clause, and the right to privacy.

A. Community Notification Laws as Punishment

Convicted sex offenders subject to community notification laws have argued that these laws are punitive in nature and therefore unconstitutional based on one or more theories. One theory is that the Ex Post Facto Clause of the United States Constitution prohibits these laws. The Constitution

---

116 Bedarf, supra note 22, at 906.
117 See id.
118 See id.
119 See id.
121 U.S. CONST. art. I, §§ 9, cl. 3, 10, cl. 1.
122 See, e.g., Poritz, 662 A.2d at 404 (discussing petitioner’s argument that Megan’s Law was retroactive punishment and thus violative of the Ex Post Facto
prohibits the federal government and any state from creating an ex post facto law,\textsuperscript{123} which is any law that has a retroactive punitive effect.\textsuperscript{124} Other constitutional arguments based on the punitive effect of community notification laws include the notion that these laws are cruel and unusual punishment, and thus prohibited by the Eighth Amendment,\textsuperscript{125} or that they are bills of attainder, which inflict punishment on individuals without a judicial trial\textsuperscript{126} and are prohibited by Article I.\textsuperscript{127}

Requiring convicted sex offenders to register with authorities and requiring the authorities to notify the public after release creates a "'thorny problem,'" according to constitutional law Professor Eric Neisser.\textsuperscript{128} "[A]pplying the law 'ex post facto' [is difficult] because the framers of the Constitution believed it was 'fundamentally unfair' to enhance the penalties for an offense after a person had either pleaded guilty or been found guilty."\textsuperscript{129} Neisser maintains that both "registration and notification [laws] are forms of penalties."\textsuperscript{130} "While prosecutors maintain that [these requirements] are not enhanced penalties," Neisser says that these laws "clearly make [it] more difficult for [a] former inmate to reenter society."\textsuperscript{131} Neisser also indicates that the "risk of vigilantism" may "be viewed as a form of punishment."\textsuperscript{132}

"In determining whether a law is punitive in its 'purpose or effect,' the United States Supreme Court has looked to a number [of] factors which the Court enumerated in \textit{Kennedy v. Mendoza-Martinez}."\textsuperscript{133} These factors include:

- Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of \textit{scienter}, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the

\textsuperscript{123}See U.S. CONST. art. I, §§ 9, cl. 3, 10, cl.1.
\textsuperscript{125}U.S. CONST. amend. VIII.
\textsuperscript{126}See BLACK'S LAW DICTIONARY 127 (6th ed. 1990).
\textsuperscript{127}U.S. CONST. art. I, §§ 9, cl. 3, 10, cl. 1.
\textsuperscript{129}\textit{Id.} (quoting Neisser (see id.)).
\textsuperscript{130}\textit{Id.} (quoting Neisser (see supra note 128)).
\textsuperscript{131}\textit{Id.} (quoting Neisser (see supra note 128)).
\textsuperscript{132}\textit{Id.} (quoting Neisser (see supra note 128)).
\textsuperscript{133}Goodman, \textit{supra} note 90, at 783.
behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. 

Applying these factors, which the Supreme Court has noted are not exhaustive, a court will view “the legislative history and the statutory purposes articulated in the statute [to see if they] clearly established a remedial purpose [and if] the provisions [are] carefully tailored to perform their remedial function while avoiding excessive intrusion into the offender’s anonymity.” A community notification law passing this criteria will not be held unconstitutional.

B. The Right-to-Privacy Argument

The Supreme Court of the United States has created for us the right to privacy using a combination of amendments and common law. Convicted sex offenders argue that publication of their names and addresses violates this right. There are two major limitations on the right, however, that make it difficult for convicted sex offenders to successfully argue that this information is unpublishable. The first limitation is that “facts must be truly private” in order to avoid publication. The second limitation is that “[m]atters of public record are not private facts.” Additionally, “the right of privacy will not be infringed when the publication concerns a matter of legitimate public interest.” If a court considers the information provided by the convicted sex offender a matter of public record, then a right-to-privacy

134 Id. at 785 n.134 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 114, 168-69 (1963)).
136 Goodman, supra note 90, at 788-89.
137 See id. at 789.
138 See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy includes a woman's decision whether to terminate her pregnancy); Loving v. Virginia, 388 U.S. 1 (1967) (holding that individuals' decisions relating to marriage are protected from unwarranted government intrusion); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating as unconstitutional a statute prohibiting the use of contraceptives); Goodman, supra note 90, at 789 n.165.
139 See Kimball, supra note 85, at 1217
140 Id.
141 Id.
142 Id.
claim will be defeated. Moreover, a court may see the protection of the community as a matter of legitimate public interest that outweighs the right to privacy asserted by the offender.

C. Procedural Due Process Argument

Convicted sex offenders have attempted to use the Due Process Clauses of the Fifth and Fourteenth Amendments to invalidate community notification laws. These amendments require that neither the federal nor state government deprive a person of "life, liberty or property, without due process of law." By penalizing convicted sex offenders for failing to register, community notification laws may violate notions of due process. For example, a court may find that a community notification law does not provide an offender with adequate notice, that he or she can be punished for failing to register. Most community notification statutes formally notify "all child sex offenders paroled, sentenced, or released within the state at the time of their release or discharge from" incarceration of their duty to register. On the other hand, only a few states provide for any form of notice to offenders who are convicted of an offense outside the state and who move to the state after they have completed parole. States that affirmatively notify convicted sex offenders of their duty to register will likely defeat this portion of the due process argument.

Another due process argument asserted by offenders is the lack of an appropriate hearing. Most state community notification laws do not require a hearing before an offender can be prosecuted for failing to register. An offender may argue that deprivation of a hearing is a violation of due process because it prevents the offender from speaking on his or her own behalf.

143 See id.
144 See id. at 1216.
145 U.S. CONST. amends. V, XIV
147 U.S. CONST. amends. V, XIV
148 Earl-Hubbard, supra note 11, at at 849.
149 See id.
150 Id. at 829.
151 See id. at 806-07 These states include Alaska, Idaho, Louisiana, Mississippi, New Jersey, New Mexico, Oklahoma, Tennessee, and Washington.
152 See id. at 831.
153 See id. at 835.
154 See id.
155 See id. at 843.
evaluating the strength of a sex offender’s due process argument, a court will
look to see if there is a direct relationship between the registration of sex
offenders and the purpose served by the statute, which is the protection and
welfare of the community. The court will perform a balancing test
involving the private interests of the sex offender, the risk of erroneous
deposition of the sex offender’s private interest, the value of additional
safeguards, and the public’s interest in protecting the community.

V PUBLIC POLICY CHALLENGES AND OTHER GROUNDS

A. Erroneous Statistics Regarding Recidivism

Abril R. Bedarf suggests that “recidivism statistics have been
manipulated to gain support for registration,” in that research shows that the
recidivism rate for sex offenses is relatively low, despite public perception to
the contrary. In 1965, a comprehensive study concluded that only ten
percent of sex offenders were “convicted for another sexual crime within
twelve to twenty-four years.”

In 1985, a study of the correlation between recidivism rates and the type
of sexual crime committed found that “although the average rate of rearrest
for a sexual crime among the subjects within the ten year study period was
11.3%, this rate varied significantly with the type of offender: pedophiles at
6.2%, sexual assailants at 10.4%, and exhibitionists at 20.5%.”

Bedarf points out that “[d]espite studies indicating low recidivism rates,
the public continues to perceive . . . that the threat from sex offenders is
greater than it actually is.” A 1986 Canadian study indicates the extreme
misperception of recidivism among sex offenders. The actual recidivism
rate was 13.5%, while the public estimated the rate at 57.6%, more than four
times the actual rate. The study concluded that sex offenders had the lowest
official rate of recidivism yet ironically the public believed that they had the
highest rate of any repeat criminal.

156 See Boland, supra note 15, at 214.
158 Bedarf, supra note 22, at 886.
159 See id. at 893.
160 Id. at 894.
161 Id. at 894-95.
162 Id. at 897-98.
163 See id. at 898.
164 See id.
165 See id.
Political influence may be the basis for such a steep misperception regarding recidivism rates among sex offenders. Whether these rates are used in a politician’s political platform, which supports notification laws, or in a personal attack on an opponent for being soft on crime, they hover on the television screen and the radio, lingering in the public’s mind and creating a sense of fear and frustration. Fueling this misperception, advocates of sex offender registration tout high recidivism rates as the basis for registration laws.166

Bedarf argues that if statistics on recidivism are indeed misleading, then the purpose of community notification laws, which is to protect and deter sex offenders through public awareness, is defeated.167 If these laws are not serving their intended purpose, then the legislature should repeal them, since they can be costly to the taxpayers and burdensome on those who must abide by them.168

B. Community Retaliation and Vengeance

The effect of community notification laws on the public is potentially enormous. The idea of sex offenders preying on innocent victims, especially children, invokes feelings of fear, hate, and anger in a community. Even after an offender has spent time in prison for his or her conviction, members of the public may feel the need to lash out at the offender or inflict some type of further punishment in the name of the victim. Many who oppose community notification laws fear that sex offenders who have paid their debt to society will suffer not just public humiliation, but physical harm as well. Knowledge of an offender’s name, address, and physical appearance may incite “vigilantes” to seek their own justice against convicted sex offenders. If these individuals feel an offender did not receive a tough enough sentence or was paroled too soon, the actions taken against an offender may be quite severe, even to the point of an all-out witch hunt.

Such is the fate of several sex offenders living in states with community notification laws. Joseph Gallardo was released from a Washington state prison in the summer of 1993.169 Just hours before his release, someone set his

166 See id.
167 See id. at 886.
168 See id.
home in Lynnwood, Washington on fire,\textsuperscript{170} sending a clear message of vigilante justice. Gary Ridgway, another convicted sex offender subject to Washington's community notification laws, was shunned by neighbors and evicted from his home within hours of those neighbors being notified of his status.\textsuperscript{171}

Even the court system may appear to act out of vengeance on behalf of the victim. For example, the Court of Appeals of Kentucky recently barred a convicted sex offender's claim of emotional distress when the father of one of his victims placed a sign in the offender's yard that read "Danger – Child Molester in the Community."\textsuperscript{172} The court of appeals quoted the trial judge, who reasoned that "[t]hroughout the history of civilized man we have operated on the premise that you don't kill the messenger boy, which is what the [convicted sex offender] wants to do."\textsuperscript{173} If any damages are sustained by the convicted sex offender, the court stated, they are the "direct and proximate result of his criminal conduct and not a result of the [victim’s father’s] actions."\textsuperscript{174}

It is not only sex offenders who are subjected to vigilantism, but also relatives, friends, and employers of the offenders and anyone else who associates with them. Bradford Webb was a mildly retarded individual who pled guilty to second-degree sexual assault. His sister tried to keep his status a secret from the community upon his release from prison.\textsuperscript{175} Her efforts failed, and Webb's daughters, who were very young, were so badly ostracized by their former friends that the children came home in tears several times a week.\textsuperscript{176} It is not uncommon for family members of a convicted sex offender to be placed in the position of either forbidding the offender from visiting them or requiring him or her to move out.\textsuperscript{177} Even those who provide shelter to convicted sex offenders may feel the sting of vigilantism. For example, after an elderly couple in Washington state took in convicted sex offender

\textsuperscript{170} See id.
\textsuperscript{171} See id.
\textsuperscript{172} Allen v. Clemons, 920 S.W.2d 884, 885 (Ky. Ct. App. 1996). This case is an example of the extremes to which some individuals may go when it is made known to them that convicted sex offenders are living in their neighborhoods. Although Kentucky does not require community notification, it does have a registration requirement. See KY. REV STAT. § 17.500 - .540 (Michie 1994).
\textsuperscript{173} Allen, 920 S.W.2d at 887 (quoting trial court opinion).
\textsuperscript{174} Id.
\textsuperscript{176} See id.
\textsuperscript{177} See id. at 1202.
Warren Pendleton, they began to receive hate mail and threatening visits from community leaders. It is argued that community notification laws impose a continuing punishment upon a sex offender and his or her family due to the vigilantism these laws spark. A convicted sex offender must move on to a new community, with the hope of his or her status remaining unknown to neighbors, to prevent another onslaught of vigilantism. However, he or she may be followed into a new community by those seeking “justice.” Guardian Angels followed one sex offender all the way to Puerto Rico after he fled New Jersey when the Angels “mounted a leafletting campaign to publicize his presence in the community.” Harassment is likely to drive a sex offender to move, assume an alias, or otherwise fail to comply with his community notification duties altogether. In this type of situation, which is essentially banishment from the community, “the benefits of community notification [laws] are lost altogether.”

C. Incorrect Data in the Criminal File Bank

The purpose of sex offender registration and community notification laws is frustrated when incorrect or outdated information is listed in a state’s criminal file bank. States like Washington and California that have strict registration requirements have been criticized for having erroneous data on file with law enforcement agencies. When requirements fail to serve their legislative purpose, one may argue that it is appropriate to remove such requirements from the books. This is especially true when listed data provide no leads to the police, or even worse, lead police in the wrong direction, wasting precious time in the search for a missing child. A study done in the Los Angeles area in the 1980s revealed that during one search for a missing child, ninety percent of the registry addresses in the criminal file bank were “either wrong, out-of-date, or non-existent.” A December 1993 study in Sacramento County revealed that approximately eighty out of one hundred registered sex offender addresses were incorrect.

Even if a sex offender recently released from prison may comply with the law, the registration information becomes useless if the offender moves

178 See id.
179 See, e.g., Bedarf, supra note 22, at 913; Kimball, supra note 85, at 1200.
180 Bedarf, supra note 22, at 908.
181 Id. at 909.
182 Id.
183 See id. at 899-900.
184 Id. at 900.
185 See id. at 902.
without notifying the authorities of his or her new address. A study done by the California Department of Justice in 1988 criticized the lack of up-to-date information contained in the state’s registration system caused by a “lack of knowledge or cooperation on the part of the offender to register and/or provide law enforcement with address changes.”

Criticism of the inadequacies of criminal file banks also has come from the agencies who use the banks most frequently. Law enforcement personnel often feel overwhelmed by the volume of information, much of which is outdated, that they receive through sex offender registration. It takes a great deal of time and money to check every name in the registry when attempting to solve a sex crime. Because criminal files are often incomplete or inaccurate, they are not very helpful in identifying suspects based on location or type of crime. Thus, these files are of little utility to law enforcement agencies.

D. The NIMBY Argument

There seems to be a uniform feeling in communities about new neighbors who are sex offenders. This feeling has even been characterized as a syndrome known as NIMBYism (“Not In My Back Yard”). Communities have been known to band together in an effort to drive an offender from the community in which he or she is attempting to settle and start a new life. Such behavior occurred in the state of Washington, where neighbors burned down the home of a newly released sex offender just hours before he planned to move into it. NIMBYism also may cause a previously convicted sex offender to be “fired from his job, evicted from his residence, or generally harassed until he [leaves] the area.”

A frightening consequence of NIMBYism is that convicted sex offenders may be forced to seek refuge in areas that have no registration provisions. An example of this “search for refuge” was noted in the Lexington Herald-

---

186 See id. at 901.
187 Id. at 900-01.
188 See id.
189 See id.
190 See id.
191 See id.
192 See Kimball, supra note 85, at 1197
193 See id.
194 See supra text accompanying notes 166-67
195 Kimball, supra note 85, at 1197-98.
196 Id. at 1198.
Leader when a felony sex offender from Arkansas wanted to move to a state where there was no law requiring him to tell police where he lived and worked. He called his brother, who contacted the Kentucky State Police and found out that Kentucky had no such law. The brother then encouraged the offender to move to Kentucky.

The unhealthy result of this “search for refuge” is that previous crimes of sex offenders will remain anonymous, to the detriment of potential future victims. Also, there may be no family or support group to help the offender adjust to his or her freedom, causing the offender to slip back into the behavior that initially put him or her behind bars. This relocation could lead to concentrations of sexual offenders in communities that are not legally, economically, or politically equipped to deal with them, thus posing a direct threat to public safety and undermining any benefits of registration and community notification laws.

E. The Scarlet Letter Syndrome

Informing a community of a sex offender’s past crimes may have the stigmatizing effect of branding the offender, much like forcing Hester Prynne, in Nathaniel Hawthorne’s The Scarlet Letter, to wear a red “A.” After an offender has “paid his or her debt to society” through incarceration, the punishment continues no matter where he or she moved. This is because the community would be informed quickly of the offender’s past through a state’s notification laws. This particular effect would be magnified tenfold where a person was required to declare his or her status as a convicted sex offender by posting signs or bumper stickers or wearing labeled clothing.

---

198 See id.
199 See id.
200 See Kimball, supra note 85, at 1198.
201 See id.
202 See id.
203 See id.
205 See Bedarf, supra note 22, at 904.
An extreme example of The Scarlet Letter syndrome occurred in Oregon, where a judge required a convicted sex abuser to post signs reading “Dangerous Sex Offender” on his residence and on any vehicle he was operating. In Louisiana, “[c]hild molesters released on probation or parole are required to mail notices to their neighbors within thirty days of release or establishing residence” in their neighborhood. Convicted child molesters also must publish, at their expense, two notices in a community newspaper that detail their names, crimes, and addresses. Additionally, a released offender must contact the superintendent of the school district where he or she plans to live so that the superintendent, at his or her discretion, may notify area school principals. Opponents of community notification laws find such branding cruel and inhumane. “Offenders argue that communities will not forgive or forget their offenses even if they make a concerted effort to rehabilitate themselves and that they will continue to be ostracized despite their best efforts to become law-abiding citizens of the community.” Arguably, it would be difficult for a community to forget the past of a convicted sex offender if he or she were required to publicize a conviction through signs, clothing, or newspaper advertisements.

F False Sense of Security

There is also the argument that the existence of community notification laws may cause some communities to develop a false sense of security and become complacent. If community notification is mandated, the general public may assume that it will be notified about every released sex offender entering its midst. Because state laws vary, an offender may have to be of a certain type before notification is required. For example, first-time offenders may not trigger notification, or the time period during which notification is required may have expired. In addition, the public may not take into account the clear and demonstrated possibility that all sex offenders may

207 Cierziak, supra note 43, at 725 (citing LA. REV STAT. ANN. § 15:574.4H(2)(b) (West Supp. 1997)).
208 See id.
209 See id.
210 Kimball, supra note 85, at 1199.
211 See Cierziak, supra note 43, at 725.
212 See Kimball, supra note 85, at 1197.
213 See id.
CONVICTED SEX OFFENDERS V OUR CHILDREN

not register properly or may not register at all. A complacent attitude may pose a greater risk to a community's children than would a lack of notification requirements.

VI. WHOSE INTERESTS DESERVE THE GREATER PROTECTION?

As proven by the successful challenges to Megan's Law, it is difficult to create a notification statute that will survive constitutional attack entirely. Essentially, there has been a pitting of the rights of convicted sex offenders against those of innocent children. The rights of the offenders are imbedded in the history of our Constitution. They include the right to avoid additional punishment after conviction and the right against disclosure of private facts. The rights of innocent children are imbedded in humanity and include the right to be safe from harm. To secure the rights of innocent children, a certain amount of knowledge is necessary. That knowledge must include the identity of individuals posing a danger to children in their environment. The right to be safe from harm must surely be as fundamental as any constitutional right afforded by the Bill of Rights.214 As long as courts strike down community notification laws, we are placing the rights of convicted sex offenders above those of innocent children. The convicted sex offender is receiving the greater protection under our laws.

CONCLUSION

In determining who should be afforded the greater protection, we should look to the words of Chief Judge Lester of the Kentucky Court of Appeals. In his opinion regarding the emotional distress allegedly suffered by a man and his family when the community became aware of his past sex crimes,215 Chief Judge Lester noted that "[t]hroughout the history of civilized man we have operated on the premise that you don't kill the messenger boy."216 He went on to say that if a man suffers any damages as a result of the community's knowledge of his illegal conduct, those damages are the "direct and proximate result" of his own actions.217 The effect a community notification law has on a convicted sex offender is directly attributable to the offender's own wrongdoing:218 if the offender had not sexually abused the victim, there would have been no notification, and thus no implication of the law.219

214 See supra note 135.
216 Id. at 887
217 Id.
218 See id.
219 See id.
This reasoning brings us again to the fact that striking down community notification laws would protect the so-called rights of convicted sex offenders over the genuine rights of innocent children. Chief Judge Lester reminds us that it is the wrongdoer who must suffer, not the innocent victim. It is only fitting that the law afford our children the greater protection and uphold community notification laws including their retroactive effect.