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# MEGAN'S LAW: ANALYSIS ON WHETHER IT IS CONSTITUTIONAL TO NOTIFY THE PUBLIC OF SEX OFFENDERS VIA THE INTERNET

Man seeketh in society comfort, use, and protection.

—Francis Bacon<sup>1</sup>

## I. INTRODUCTION

On October 22, 1989, Jacob Wetterling, an eleven year old from Minnesota, was abducted at gunpoint.<sup>2</sup> Neither Jacob nor his abductor has been found.<sup>3</sup> On July 29, 1994, Megan Kanka, a seven year old from New Jersey, was abducted, raped, and murdered near her home.<sup>4</sup> Unknown to the community, the offender who had been twice convicted of sex offenses involving young girls lived across the street from Megan with two other convicted sex offenders.<sup>5</sup>

Because of the above two cases and others,<sup>6</sup> the public demanded stronger governmental action against those who commit violent and sex-

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1. OXFORD DICTIONARY OF QUOTATIONS (3rd ed. 1979). Francis Bacon lived from 1561 to 1626. *Id.*

2. See Dirk Johnson, *Mom Awaits Miracle A Decade After Son's Abduction*, THE PLAIN DEALER, Jan. 3, 1999, at 8A. Jacob, his brother, and friend rode their bikes home from renting a movie at a store. *Id.* A masked man stepped out of a driveway and told Jacob's brother and friend to run or he would shoot them. *Id.* The man took Jacob. *Id.*

3. *Id.* No arrest was made and no body was found. *Id.* See also Staff and Wire Reports, *Across the USA: News From Every State*, USA TODAY, Nov. 2, 1998 at 16A. On the anniversary of his abduction, October 22, 1998, Jacob's mother, Patty Wetterling, wrote a letter of appeal to his abductor. *Id.* The letter, which was published on the Internet and in newspapers, generated fifteen new leads in the case. *Id.*

4. See *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

5. See *E.B.*, 119 F.3d at 1081 (describing the New Jersey Registration and Community Notification Laws, which if available before Megan's death, might have saved her life).

6. See Michelle Johnson, *Notification Dilemmas: Megan's Law Spawned Flurry of State Acts, But Implementation Proves Problematic for All*, THE QUILL, Sept. 1, 1998. In 1990, Washington State passed the first community notification law in response to convicted sex offenders assaulting a seven year old boy in Tacoma. *Id.*; see also Laura LaFay, *Heartfelt Sponsor for "Megan's Law" in Virginia Victim, Survivor, and Advocate*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR, Feb. 3, 1998, at A1. In Minnesota, after Jacob Wetterling's abduction, Zachary Snider was molested, murdered, and thrown off a bridge by a neighbor who was a released sex offender. *Id.*

ual offenses against children.<sup>7</sup> Sex offenders are nine times more likely to repeat their crimes than any other class of criminals.<sup>8</sup> Congress responded to this problem by passing the "Jacob Wetterling Crimes Against Children and Law Enforcement Act of 1994" of Title XVII ("Wetterling Act").<sup>9</sup> The Wetterling Act establishes guidelines for states to implement programs requiring an offender, convicted of a crime against a child, to register their current address and other information with a state law enforcement agency.<sup>10</sup> States must develop registration sys-

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7. See H.R. Rep. 104-555, at 2 (1996) (revealing the impetus for community notification legislation).

8. H.R. Rep. 105-256, at 6 (1997). "It is for this reason that so many communities feel unsafe . . . and why more and more communities are seeking to know their whereabouts." *Id.*; see also *Doe v. Poritz*, 662 A.2d 367, 374 (N.J. 1995). In 1995, the New Jersey Supreme Court reported that the recidivism rate of sex offenders is seven to thirty-five percent. *Id.* Offenders who molest young girls have a ten to twenty-nine percent rate and those who molest young boys have a thirteen to forty percent recidivism rate. *Id.* Moreover, of those who re-offend, one study found that forty-eight percent repeat the crime during the first five years and fifty-two percent within the next seventeen years. *Id.* See also MEGAN NICOLE KANKA FOUNDATION, PUBLIC AWARENESS (1994) (exploring various calculations of sex offender recidivism rates, but demonstrating that any calculation results in the high likelihood of re-offense for this class of criminals). "Each year in the United States over 510,000 children are sexually assaulted." *Id.* "There are 43,000 inmates in prison for sexual offenders." *Id.* "Many sex offenders are habitual criminals who can never be rehabilitated." *Id.*

9. H.R. Rep. 104-555, at 2; see LaFay, *supra* note 6, at A1. The act was initiated in response to Jacob Wetterling's abduction. *Id.* Minnesota representative, Jim Ramstad, introduced the federal bill requiring all convicted sex offenders to notify police when they move into a community. *Id.*

10. See H.R. Rep. 105-845, at 69 (1999). See also 42 U.S.C.A. § 14071 (1999), which states the following:

[T]he Attorney General shall establish guidelines for State programs that require (A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6) of this section; and (B) a person who is a sexually violent predator to register a current address unless such requirement is terminated under subparagraph (B) of subsection (b)(6) of this section.

*Id.* at (a)(1)(A) and (B); 42 U.S.C.A. § 14071, which states the following:

[I]f a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, the court, or another responsible officer or official, shall . . . (iii) inform the person that if the person changes residence to another State, the person shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student.

*Id.* at (b)(1)(A)(iii); 42 U.S.C.A. § 14071, which states the following:

[F]or a person required to register under . . . this section, the State prison officer, the court, or another responsible officer or official, as the case may be, shall obtain the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

tems for felons convicted of crimes against children or lose ten-percent of their crime-fighting funding.<sup>11</sup> Although sex offender registration has been challenged, it has generally been found to be constitutional.<sup>12</sup>

"Megan's Law"<sup>13</sup> is an amendment Congress made to strengthen the Wetterling Act's objectives by mandating that the registered information be unlimited in disclosure so long as the information released is necessary to protect the public.<sup>14</sup> Megan's Law and methods used to notify

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*Id.* at (b)(1)(B); *see also* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, SEX OFFENDER REGISTRATION (1998). "As of February 1998, there are nearly 240,000 offenders registered in the United States." *Id.*

11. *See* H.R. Rep. 104-555, at 5. Reduction will be from Byrne Grant funding. *Id.* Extra funds will be reallocated to complying States. *Id.*; *see also* 42 U.S.C.A. § 14071(g)(1) and (2)(A)-(B); LaFay, *supra* note 6, at A1. Virginia, for example, gets about \$11 million in federal funding each year. *Id.* If the law is not enacted by October 1, 1998, the state would lose \$1.1 million in 1999. *Id.* The amount will increase ten percent every year thereafter. *Id.* *See also* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, SEX OFFENDER REGISTRATION (1998). "To date, all 50 states require that sex offenders register with either law enforcement or state agencies." *Id.*

12. *See* Russell v. Gregoire, 124 F.3d 1079, 1089 (9th Cir. 1997). The Ninth Circuit stated, as follows:

[R]egistration programs have overwhelmingly been sustained as constitutional by other courts. *See e.g.*, Doe v. Pataki, 120 F.3d 1263, 1265-6 (2d Cir. 1997); Artway, 81 F.3d at 1267; Doe v. Kelley, 961 F. Supp. 1105 (W.D. Mich. 1997); Doe v. Weld, 954 F. Supp. 425 (D. Mass. 1996); People v. Afrika, 168 Misc.2d 618, 648 N.Y.S.2d 235 (N.Y. Sup.Ct. 1996); Doe v. Poritz, 142 N.J. 1, 662 A.2d 367 (1995); State v. Costello, 138 N.H. 587, 643 A.2d 531, 533 (1994); State v. Noble, 171 Ariz. 171, 829 P.2d 1217, 1224 (1992); Kitze v. Commonwealth, 23 Va.App. 213, 475 S.E.2d 830 (1996); State v. Manning, 532 N.W. 2d 244 (Minn.Ct.App. 1995).

*Id.* (illustrating the numerous cases that find sex offender registration constitutional).

13. *See* H.R. Rep. 105-557, at 26 (1998). "The passage of Megan's Law (Pub. L. 104-145), which amended the community notification provisions of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Pub. L. 103-322), to require the release of relevant information that is necessary to protect the public concerning registered sex offenders. . . ." *See also* H.R. Rep. 104-555, at 2.

[T]he 1994 Act provision with respect to notification only required States to give law enforcement agencies the discretion to release offender registry information when they deemed it necessary to protect the public. . . Notwithstanding the clear intent of Congress that relevant information about these offenders be released to the public in these situations, some law enforcement agencies are still reluctant to do so. This bill would amend the 1994 Act to mandate that States require their law enforcement agencies to release 'relevant information' in all cases when they deem it 'necessary to protect the public.'

*Id.*

14. *See* 42 U.S.C.A. § 14071(e), which states the following:

[T]he information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State. The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

*Id.* at (e)(1)-(2).

communities of sex offenders raise challenges to the Bill of Attainder,<sup>15</sup> Cruel and Unusual Punishment,<sup>16</sup> Double Jeopardy, Due Process,<sup>17</sup>

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15. U.S. CONST. art. I, § 9; *Roe v. Farwell*, 999 F. Supp. 174, 193 (D. Mass. 1998). The Bill of Attainder Clause prohibits legislation that applies either to named individuals or easily ascertainable member of a group, to inflict punishment without a trial. *Id.* The two elements of the test for a Bill of Attainder Clause challenge are specificity and punishment. *Id.* The specificity element is satisfied when people or groups are designated based on irreversible past conduct. *Id.* Megan's Law meets the specificity requirement because it applies to any person convicted of a particular offense. *Id.* Just because the law imposes burdens on convicted sex offenders does not mean it violates the Bill of Attainder Clause. *Id.* The court found that because public notification is not punishment, the challenge to the Bill of Attainder Clause must fail. *Id.*; see *Lanni v. Engler*, 994 F. Supp. 849, 854-5 (E.D. Mich. 1998). The court reasoned that community notification does not impose punishment because of the following: the purpose of the act was to protect the public, not to punish sex offenders; historical precedent does not show an objective punitive goal; and neither direct nor indirect effects of notification are sufficient to conclude that any punitive effects clearly outweigh the remedial purpose. *Id.* The court held that "under either the *Hudson* or *Halper* test," community notification acts do not violate the Bill of Attainder Clause. *Id.*; see also *Doe v. Kelley*, 961 F. Supp. 1105, 1108 (W.D. Mich. 1997). The court analyzed the legislative intent, design of the statute, historical treatment of punishment, effects of community notification, and held that because notification does not constitute a punitive purpose, the Bill of Attainder Clause was not violated. *Id.*

16. U.S. CONST. amend. VIII; See *Roe*, 999 F. Supp. at 192 (stating the purpose of the Cruel and Unusual Punishment Clause is to regulate types of punishment). The clause limits the type of punishment imposed, forbids punishment "grossly disproportionate to the severity of the crime," and inflicts some substantive limits on the conduct deemed criminal. *Id.* The clause is only applicable if the law is punitive. *Id.* The court gives examples of what the Supreme Court has held constitutes cruel and unusual punishment. *Id.* One example that was not cruel and unusual punishment was a mandatory life sentence imposed for a repeat petty larceny violation. *Id.* The court distinguished community notification from that case and held that it does not constitute cruel and unusual punishment. *Id.* See also *Doe*, 961 F. Supp. at 1112. The court held that because the legislative intent, design of the statute, historical treatment of punishment, and effects of community notification do not constitute a punitive purpose, cruel and unusual punishment was not shown. *Id.* See also *Paul v. Verniero*, 982 F. Supp. 961-6 (D. N.J. 1997) [hereinafter *Paul I*]. The court held that consistent with the Third Circuit Court of Appeals, community notification does not constitute punishment and thus, does not violate the Cruel and Unusual Punishment Clause. *Id.* at 966. See also *Lanni*, 994 F. Supp. at 855. The court held that "under either the *Hudson* or *Halper* analysis," the plaintiff failed to demonstrate that notification violates the Cruel and Unusual Punishment Clause. *Id.*

17. U.S. CONST. amend. V. The Due Process Clause of the Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. *Id.*; see *Femedeer v. Haun*, 35 F. Supp.2d 852, 859 (D. Utah 1999). To demonstrate violation of the Due Process Clause, an offender must show he or she is deprived of a protected liberty interest by a two step analysis. *Id.* at 860; see also *Roe*, 999 F. Supp. at 195. The first step is to determine whether the state interfered with a liberty interest. *Id.* See *Femedeer*, 35 F. Supp.2d at 860. If a liberty interest exists, the second step is to determine whether procedures for the deprived liberty interest are constitutionally sufficient. *Id.* Several federal courts find these challenges fail. *Id.* See also *Russell*, 124 F.3d 1094; *Lanni*, 994 F. Supp. at 856; and *Doe*, 961 F. Supp. at 1112. First, notification does not interfere with an offender's liberty interest because the truthful information Megan's Law makes convenient

Equal Protection,<sup>18</sup> and Ex Post Facto Clauses in the United States Constitution. Additionally, opponents of Megan's Law argue that community notification invades an offender's right to privacy.

Several states notify the public by providing Internet addresses that release registry information.<sup>19</sup> This Comment analyzes the use of the

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is not a constitutionally protected interest. *Id. See Femedeer*, 35 F. Supp.2d at 860; *E.B. v. Verniero*, 119 F.3d 1077, 1105-11 (3d Cir. 1997). Second, most states give offenders the opportunity to challenge notification and classification at a hearing. *Id.* Allowing Tier 2 or 3 offenders the opportunity to challenge the plan does not violate the Due Process Clause. *Id.* Furthermore, the prosecutor has the burden of persuasion and must prove the case by clear and convincing evidence. *Id. But see Paul I*, 982 F. Supp. at 968 (holding that offenders, allowed re-determination hearings must get the opportunity to develop a new record with the state bearing the burden of persuasion by clear and convincing evidence). Without the possibility of re-determination hearings, the Due Process Clause may be violated. *Id.* at 970. *See Russell*, 124 F.3d at 1094. Because sex offenders have no protected liberty interest deprived by notification, challenges to the Due Process Clause are rejected. *Id. Femedeer*, 35 F. Supp.2d at 860 (holding that plaintiff could not establish that disclosure impairs a constitutionally protected interest under the Due Process Clause). *See Lanni*, 994 F. Supp. at 855. Even if the offender could prove deprivation of a liberty interest, challenge to the Due Process Clause must fail. *Id.*

18. U.S. CONST. amend. XIV. The Equal Protection Clause of the Fifth Amendment provides that no person shall be denied equal protection of the laws. *Id. See Roe*, 999 F. Supp. at 193-4; *Femedeer*, 35 F. Supp.2d at 860. The clause does not prohibit classifications, but prevents government from treating people arbitrarily. *Id. See Lanni*, 994 F. Supp. at 855. Legislatures are presumed to have acted within their constitutional power, even when some inequality results. *Id. See Roe*, 999 F. Supp. at 193-4; *Lanni*, 994 F. Supp. at 855 (stating that the Supreme Court finds that unless a classification warrants heightened review due to infringement on a fundamental right, the Equal Protection Clause only requires that the classification rationally further a legitimate state interest). *See H.R. Rep.* 104-555, at 2. Congress' purpose in enacting Megan's Law is to protect the public from potential sex offenses. *Id. See also Roe*, 999 F. Supp. at 194. One argument challenges offender classification as overinclusive because it includes offenders who complete treatment programs and are no longer found dangerous. *Id.* However, rationality of a law is assessed by the relationship between the means and ends of the law. *Id.* First, the purpose of Megan's Law is to prevent sex offenses, so it is rational to extend the class of people for whom the law applies to those previously convicted of sex offenses. *Id.* Second, because the degree of community notification is individually determined, the law is rationally related to the legitimate governmental interest of protecting the public. *Id.* Moreover, classification as a sexually dangerous person is not related to classification as a sex offender and does not invalidate the legitimate interest. *Id.* Just because some offenders are not sexually dangerous and pose a minimal risk to society, does not mean notification violates the Equal Protection Clause. *Id.* In *Doe*, 662 A.2d at 413-4, the New Jersey Supreme Court also rejects this argument. *Id. See also Lanni*, 994 F. Supp. at 855; *Roe*, 999 F. Supp. at 195. The legislature could reasonably assume that requiring community notification advances the objectives of Megan's Law. *Id.* The offender in the case is not treated differently than similar felons convicted of a sex offense. *Id. See also Femedeer*, 35 F. Supp.2d 859-60. In light of the foregoing, the court reasoned that Megan's Law does not violate the Equal Protection Clause. *Id.*

19. *See Carol Ann Riha, Web Sites Help Parents ID Predators*, THE COLUMBIAN, Nov. 15, 1998 at B11 (listing eight states currently using the Internet for community notifica-

Internet as a medium for notifying the public regarding the addresses of sex offenders. This Comment also discusses whether promoting the Internet<sup>20</sup> enhances the compelling governmental interest in protecting children.<sup>21</sup> Finally, this Comment concludes that Megan's Law is constitutional because of the compelling governmental interests in protecting children and promoting the Internet.

In coming to this conclusion, the Comment focuses on federal courts' interpretation of state notification statutes complying with Megan's Law and Internet use as a medium for community notification. First, it discusses the Wetterling Act's legislative history, evolution of Megan's Law, current methods of community notification, Internet history, structure, regulation, and related governmental interests. Next, this Comment analyzes the constitutional challenges made the Double Jeopardy and Ex Post Facto Clauses, as well as the right to privacy. Then, it discusses Internet regulation, governmental interests, differences between the Internet and other acceptable methods of notification, Internet use in solving crimes, and a recent federal case addressing community notification of sex offenders via the Internet. This Comment concludes that Megan's Law is constitutional and that use of the Internet is acceptable for notifying the public of sex offenders in communities.

## II. BACKGROUND

### A. LEGISLATIVE HISTORY OF THE "JACOB WETTERLING CRIMES AGAINST CHILDREN AND SEXUALLY VIOLENT OFFENDER REGISTRATION ACT"

The 1994 Wetterling Act encouraged states to establish systems where anyone who commits a sexual or kidnapping offense against a child is required to register his or her address with the state upon release.<sup>22</sup> This first version of the Wetterling Act required states to give

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tion). See also NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, A SUMMARY OF MEGAN'S LAW STATUTES BY STATE (1998). In Alaska, the database of sex offenders is found at <<http://www.dps.state.ak.us/Sorer/>>; in Florida, <<http://www.fdle.fl.us/index.asp?Sexualpredators>>; in Indiana, <<http://www.ai.org/cii/html/sexoffender.html>>; <<http://www.wink.org/public/kbi/kbisexpage.html>>; and in Michigan, <<http://www.jaye.org/MACPSOR.html>>. *Id.*

20. See 47 U.S.C.A. § 230 (1996) (indicating that the government's policy is to promote Internet development).

21. See *Reno v. ACLU*, 521 U.S. 844, 869 (1997). There is a "compelling interest" in protecting the physical and psychological well-being of children. *Id.* See also H.R. Rep. 104-555, at 2. There is a need to protect the public from sex offenders. *Id.*

22. See H.R. Rep. 104-555, at 2. See also 42 U.S.C.A. § 14071, which states the following regarding the length of registration:

[A] person required to register under subsection (a)(1) of this section shall continue to comply with this section, except during ensuing periods of incarceration, until (A) 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation; or (B) for the life of that person if that person (i) has 1 or more prior convictions for an offense described in subsection

law enforcement agencies the discretion to decide whether to notify the public of an offender's release when necessary for the public's protection.<sup>23</sup> Although Congress' intent was that sex offender information be publicly released, some law enforcement agencies did not do so.<sup>24</sup>

In 1996, Congress and the President amended the 1994 Wetterling Act to correct the problem of agencies not releasing registry information to the public.<sup>25</sup> The Department of Justice recommended an amendment known as "Megan's Law."<sup>26</sup> First, Megan's Law mandates states to require agencies to release information in all cases necessary to protect the public.<sup>27</sup> Second, any registry information may be disclosed for any purpose permitted under state law.<sup>28</sup> Third, Megan's Law requires agencies

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(a)(1)(A) of this section; or (ii) has been convicted of an aggravated offense described in subsection (a)(1)(A) of this section; or (iii) has been determined to be a sexually violent predator pursuant to (a)(2) of this section.

*Id.* at (b)(6)(A)(B)(i)-(iii). Failure to register will result in a penalty. *See also* 42 U.S.C.A. § 14071(d), which states "A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed." *Id.*

23. *See* H.R. Rep. 104-555, at 2-3.

24. *Id.* (setting forth the problem and basis for why Megan's Law was enacted). "Notwithstanding the clear intent of Congress that relevant information about these offenders be released to the public in these situations, some law enforcement agencies are still reluctant to do so." *Id.*

25. *See* H.R. Rep. 104-879, at 190 (1997). On May 7, 1996, Megan's Law passed the House and on May 9, 1996 it passed the Senate. *Id.* President Clinton signed it into law on May 17, 1996. *Id.*

26. *See* H.R. Rep. 104-555, at 5. In addition to Megan's Law, other changes were made to the Wetterling Act. *See* H.R. Rep. 105-256, at 7. The first amendment provides national availability of registered sex offenders and is named the "Pam Lychner National Sex Offender Tracking and Identification Act." *Id.* The provisions of 42 U.S.C.A. § 14071(b)(2)(A) and (B) provide prompt availability of registry information, prompt transmission of data fingerprints to the Federal Bureau of Investigation, and state participation in updating the national database with sex offender information. *Id.*; *see* H.R. Rep. 105-845, at 69. The second amendment, the "Jacob Wetterling Improvements Act," strengthens Megan's Law programs and closes loopholes that allowed some sex offenders to avoid registration. *Id.* The amendment requires federal and military offenders to participate in this program and provides states with more flexibility in implementing these systems. *Id.*; *see* James Turpin, *1998 Federal Budget Includes Increased Criminal Justice Funds*, CORRECTIONS TODAY, Feb. 1, 1998, at 64. Congress proposed an additional modification in 1998 to further expand and clarify the Wetterling Act. *Id.*

27. *See* H.R. Rep. 104-555, at 5. H.R. 2137 makes disclosure of registered information, necessary to protect the public, mandatory rather than permissive. *Id.*

28. *See* H.R. Rep. 104-555, at 6. Prior to this amendment, registered information was treated as "private data" and disclosed "only for criminal purposes." *Id.* The three exceptions were disclosure to law enforcement agencies for law enforcement purposes, disclosure to government agencies conducting background checks, and disclosure for public safety reasons. *Id.* *See also* H.R. Rep. 105-256, at 22. Megan's Law deleted this restriction because the Department of Justice recommended that treating the information as private data is



to notify the community when a sex offender moves into their neighborhood.<sup>29</sup> Presently, all 50 states have community notification provisions.<sup>30</sup>

## B. COMMUNITY NOTIFICATION

Not all registry information is disseminated to the public.<sup>31</sup> Some states have adopted "Tier" levels that numerically rank offenders according to factors used to determine the offender's risk of re-offense.<sup>32</sup> The higher numbered "Tier" classification given an offender, the more information about the offender is released to the public.<sup>33</sup> States use prosecutors,<sup>34</sup> boards,<sup>35</sup> or clinics<sup>36</sup> to determine an offender's risk level. Under

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not necessary, does not obtain the objectives of the Wetterling Act, and imposes a limitation on the states that did not previously exist. *Id.*

29. See H.R. Rep. 105-845, at 69. See also H.R. Rep. 105-160, at 2 (1997) (stating that at that time "At least forty States have established some form of community notification programs which inform communities when sex offenders move into their neighborhoods"). "This resolution re-emphasizes Congress' support of the States which have set up sex offender registration and notification programs." *Id.*

30. See NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, SEX OFFENDER REGISTRATION (1998). "To date, all 50 states require that sex offenders register with either law enforcement or state agencies." *Id.*; see also Johnson, *supra* note 6, at 9 (indicating that by mid-1998, the only state that did not have a community notification statute was New Mexico, but it had pending legislation for the next session).

31. See *infra* text accompanying note 107.

32. See *E.B. v. Verniero*, 119 F.3d 1077, 1083 (3d Cir. 1997).

33. *Id.*; see also Johnson, *supra* note 6, at 9. A 1997 study revealed that ten states use "tier" systems. *Id.*; NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, A SUMMARY OF MEGAN'S LAW STATUTES BY STATE (1998). The states using a "tier" system are Delaware, Massachusetts, Minnesota, Nevada, New Jersey, New York, Washington, and Wyoming. *Id.* In New Jersey, a Registrant Risk Assessment Scale, developed from scientific literature by mental health and law enforcement professionals, is used to evaluate sex offenders' risk of recidivism. *Id.* "Tier" status is determined by the following factors: whether the offender is supervised, getting therapy or treatment; any physical condition like age or illness reducing the risk of re-offense; criminal history like whether the behavior is repetitive or compulsive, whether the offense was against a child, and whether the maximum term was served; the relationship between the offender and victim, use of weapon or violence during commission of the crime; number and date of prior offenses; comparison of psychological profiles demonstrating the risk of re-offense; offender's recent behavior and response to treatment; and finally, recent threats or indications of intent to re-offend. *Id.* These factors and others are grouped into four categories. *Id.* Low risk, or Tier 1, is 0-36 points, Tier 2, or moderate risk, is 37-73 points, and Tier 3, or high risk, is a result of 74-111 points. *Id.* The two exceptions to the calculations are if the offender indicates that he or she will re-offend upon release, he or she will automatically get high risk status; and if the offender has a physical condition, such as age or illness minimizing the risk of re-offense, the offender will get low risk status. *Id.* (making the point that the higher the risk an offender poses, the greater the need that the public should be notified of his or her presence in the community).

34. See *E.B.*, 119 F.3d at 1083. In New Jersey, prosecutors from the county of the offender's intended residence and the county where the conviction occurred, jointly assess

this system, all sex offenders qualify for at least low risk "Tier 1" where notification about the offender is made only to law enforcement agencies.<sup>37</sup> An offender given "Tier 2" ranking is moderate risk where notification is made to agencies, schools, and community organizations.<sup>38</sup> An offender given "Tier 3" ranking is high risk where community notification is required.<sup>39</sup> In addition, some states require that a sex offender be given notice of the notification plan.<sup>40</sup> That way, a review process is available if the offender wants to challenge the classification.<sup>41</sup>

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the registered information and other data to determine the offender's risk of re-offense. *Id.*; *but see* Cutshall v. Sundquist, 980 F. Supp. 928, 931 (M.D. Tenn. 1997). The notification statute in Tennessee allows law enforcement officials to determine public safety and dissemination of the information, without any guidelines or procedures governing the decision. *Id.*

35. *See* Roe v. Farwell, 999 F. Supp. 174, 178 (D. Mass. 1998). In Massachusetts, the Sex Offender Registry Board, a subdivision of the Criminal History Systems Board, establishes guidelines for assessing the recidivism risk of sex offenders; sets guidelines determining the risk level of a particular offender; creates guidelines for police departments distributing registry information; and recommends to the court a sex offender's risk of re-offense and notification plan. *Id.*

36. *See* Roe v. Office of Adult Probation, 125 F.3d 47, 50-1 (2d Cir. 1997). In Connecticut, counselors at The Connections, Inc., a nonprofit corporation, make a tier determination after a clinical assessment. *Id.* Variables like degree of denial, number of prior offenses, nature of offenses, number and age of victims, are used to decide the degree of risk an offender poses. *Id.* Connecticut has only two levels of notification. *Id.* The first level applies to all probationers. *Id.* The offender's name, address, physical description, crime, sentencing, and special conditions of probation are released to specified community members like the victims, and their parents or guardians, police, offender's immediate family, and other occupants of the offender's residence. *Id.* The second level applies to sex offenders who fall within the category of "pedophiles, predatory rapists, and other extreme cases." *Id.* The offender's identity, background, and address are released. *Id.* The information is given to those in the first level and also the offender's immediate neighbors, local day care centers, offender's employer, officials of organizations the offender participates in, and other at-risk groups like the Scouts. *Id.*

37. *See E.B.*, 119 F.3d at 1083.

38. *Id.* Tier 2 also includes day care centers, summer camps, and community organizations for women and children. *Id.* at 1085. In New Jersey, the prosecutor also determines which institutions and organizations are notified. *Id.* *See also* Roe, 999 F. Supp. at 178. In Massachusetts, notification for the moderate risk offenders is also made to religious and youth organizations and sports leagues. *Id.* *See also* Johnson, *supra* note 6, at 9. In 1997, a study concluded that fourteen states notify these people. *Id.*

39. *See E.B.*, 119 F.3d at 1083; *Russell*, 124 F.3d at 1082. Washington State has similar standards, but at "level 3" a sex offender's information is also distributed to the local news media. *Id.*

40. *See E.B.*, 119 F.3d at 1085. The New Jersey Supreme Court held that prosecutors must give offenders notice of the information disseminated, if possible. *Id.* *See also* Roe, 999 F. Supp. at 196. Massachusetts also gives sex offenders an opportunity to have a pre-deprivation hearing. *Id.*

41. *See E.B.*, at 1086. The New Jersey Supreme Court held that a pre-notification judicial review process should be available to those offenders wishing to challenge their tier status. *Id.* Challenges can be made that the score is incorrect and evidence may be intro-

States use various methods to notify the public of sex offenders. In some states, authorities knock on doors in the offender's neighborhood to inform the members of the community.<sup>42</sup> Other states publish names in newspapers<sup>43</sup> or distribute fliers.<sup>44</sup> One state makes offenders announce their presence in the community by sending postcards to neighbors within a one-mile radius.<sup>45</sup> Other states have lists of sex offenders available at the local police department by submitting a written request and paying a fee.<sup>46</sup> Still other states disseminate information about high-risk sex offenders' information through the media.<sup>47</sup> Several states no-

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duced that an offender is an exception to the calculation and deserves a different tier. *Id.* The hearings are not adversarial and rules of evidence do not apply, so expert opinions and hearsay are admissible. *Id.* at 1087. If proof of a material fact is at issue, a fact-finding hearing is then convened. *Id.* See also *Roe*, 999 F. Supp. at 196. The Massachusetts Constitution allows a sex offender an opportunity for a pre-deprivation hearing determining whether the offender is required to register, and if so, whether public notification is necessary. *Id.* See also National Center For Missing And Exploited Children, A Summary Of Megan's Law Statutes By State (1998). Delaware and Florida also allow a sex offender a judicial hearing before information is publicly released. *Id.* (illustrating the procedural safeguards that some states afford sex offenders before registry information is publicly released, in the event the risk assessment was incorrect).

42. See Riha, *supra* note 19, at B11.

43. See Johnson, *supra* note 6, at 9. Texas and Louisiana require sex offenders to pay for and place advertisements in the local newspaper informing residents of their age, gender, street name, and crime. *Id.*

44. *Id.* A 1997 study found that eighteen states sent notices to a large number of people after the release of offenders. *Id.*

45. See LaFay, *supra* note 6, at A1. Louisiana uses this method. *Id.*

46. See Johnson, *supra* note 6, at 9. A 1997 study revealed that fifteen states give the public access to information, but do not actively warn the community when an offender is released. *Id.*; Fran Silverman, *Web Sites List Sex Offenders; Debate Ensues*, THE HARTFORD COURANT, Jan. 2, 1999, at A1. In Connecticut, some police departments have not made the list of sex offenders available upon request. *Id.* See also Johnson, *supra* note 6, at 9. Some states, including Connecticut, required those requesting information to give a reason for viewing the information. *Id.*; *Roe v. Farwell*, 999 F. Supp. 174, 179 (D. Mass. 1998). At the local police departments in Massachusetts, anyone may inquire whether a person is a sex offender and whether the offender resides or works in a particular geographic area, but the inquiry must be for protecting a minor or other person in the custody, care, and control of the inquirer. *Id.* If the sex offender is identified, police provide the inquirer the registry information if the address is within one mile of a specified area. *Id.* Also, anyone eighteen years and older may request verification from the Criminal History Systems Board of whether a person is a sex offender, committed offenses, and conviction date. *Id.* See, e.g., Michael Stroh, *Maryland May List Sex Convicts on Web; Officials Watching Stampede to Virginia Site With Great Interest*, BALTIMORE SUN, Jan. 11, 1999, at 1A. Virginia previously charged \$15 for the state's list. *Id.*; NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, A SUMMARY OF MEGAN'S LAW STATUTES BY STATE (1998). In California, the public may access registry information by a 900 number, but must pay a \$10 fee for each inquiry. *Id.*

47. See *Russell*, 124 F.3d at 1082. Washington State does this. See also *Byron v. City of Whittier*, 46 F. Supp.2d 1037, 1041 (C.D. Cal. 1998). In California, the District Court held that because the plaintiff did not demonstrate that disseminating certain information

tify communities of sex offenders by publishing them via the Internet.<sup>48</sup> Users may reach the database by supplying their name, county, city, or zip code.<sup>49</sup> Critics of Internet notification claim that releasing this information to the public invades an offender's privacy.<sup>50</sup>

### C. THE INTERNET

The Internet<sup>51</sup> has existed for almost thirty years, but on a smaller scale.<sup>52</sup> The concept originated as an experiment by the Department of Defense in case of enemy attacks.<sup>53</sup> Computers used to conduct defense research communicated with each other through networking channels.<sup>54</sup> Eventually, the networking idea developed into its present form available to civilians.<sup>55</sup>

The Internet is a unique medium of communication<sup>56</sup> that has no geographical boundaries<sup>57</sup> or set path.<sup>58</sup> The system links numerous computers to form a network.<sup>59</sup> Networking allows the user to corre-

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about high risk offenders to the media causes irreparable injury, no injunction preventing the release of information is granted. *Id.*

48. See Riha, *supra* note 19, at B11. States using the Internet for community notification include Alaska, Florida, Georgia, Indiana, Kansas, North Carolina, Utah, and Wisconsin. *Id.*; see also Stroh, *supra* note 46 at 1A. Virginia began publishing offenders' names on December 29, 1998 via the Internet. *Id.* See also Unknown, *More Sex Offender Notification Asked City Council*, METRO CHICAGO, Jan. 22, 1999. Chicago, Illinois posts names of sex offenders on the Internet and makes the names available at all district police stations. *Id.*; see also Silverman, *supra* note 46, at A1. Connecticut began publishing names, addresses, and pictures of sex offenders at midnight on Jan. 1, 1999. *Id.*

49. See Stroh, *supra* note 46, at A1.

50. See *id.* Civil libertarians like the American Civil Liberties Union (ACLU) take this position. *Id.*

51. See *Sprint v. De'Angelo*, 12 F. Supp.2d 1188, 1191 (D. Kan. 1998). The Federal Communications Decency Act defines the "Internet" as "the international computer network of both Federal and non-Federal interoperable packet switched data networks." *Id.*

52. See *Shea v. Reno*, 930 F. Supp. 916, 925 (S.D.N.Y. 1996).

53. See *Reno v. ACLU*, 521 U.S. 844, 849-50 (1979). The military program, named ARPANET, began in 1969. *Id.* This program acted as a safeguard in case some parts of the network were damaged in a war. *Id.* at 850; *Shea*, 930 F. Supp. at 925-6 (giving a similar description of the defense project).

54. See *Reno*, 521 U.S. at 850. Although ARPANET no longer exists, it set an example for civilian computer networks. *Id.*

55. *Id.*

56. *Id.* at 870. Although each medium presents its own problems, the Internet is not like radio or television because Internet communications do not invade homes or appear on computer screens by accident. *Id.* (comparing the mediums of radio and television with the Internet).

57. See *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 170-1 (S.D.N.Y. 1997).

58. See *Sprint Corp.*, 12 F. Supp.2d at 1191. Electronically coded information is broken into packets that may take the same or different routes to the destination. *Id.* Upon arrival, the information packets are reassembled to their original form. *Id.*

59. See *Reno*, 521 U.S. at 850; *Shea*, 930 F. Supp. at 926.

spond with one or many other users and access resources from other computers worldwide.<sup>60</sup> This worldwide network has more than 50,000 links to millions of computers with an estimated number of 200 million users.<sup>61</sup> As a result, the Internet gives numerous people access to all kinds of information.<sup>62</sup>

The policy contained in the Federal Communications Decency Act's ("CDA") is to "promote the continued development of the Internet" and "preserve the vibrant and competitive free market that presently exists for the Internet."<sup>63</sup> One state enacted a statute that mirrored the CDA, but restricted the transmission of indecent material via the Internet.<sup>64</sup> The Internet serves as a conduit for transporting goods and services; therefore, the District Court found it analogous to traditional instruments of commerce, like railroads or highways.<sup>65</sup> Additionally, the Internet's network structure creates interstate communication that falls under the Commerce Clause.<sup>66</sup> Thus, the court found the New York statute unconstitutional because it violated the Commerce Clause by regulating conduct outside the state.<sup>67</sup> The District Court further reasoned that uncoordinated state regulation of the Internet would only frustrate the United States' policy and stunt the growth of cyberspace.<sup>68</sup> To comply with the Commerce Clause and ensure uniformity, Internet regulation at the federal level is necessary.<sup>69</sup>

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60. *Id.*

61. *See* *Shea v. Reno*, 930 F. Supp. 916, 925 (S.D.N.Y. 1996). The Internet describes more than 50,000 networks to nine million host computers in ninety countries. *Id.*

62. *See Reno*, 521 U.S. at 870; *Stroh*, *supra* note 46, at 1A. When Virginia began publishing sex offenders' information on the Internet, more than 260,000 people accessed the site the first week. *Id.* The user is not charged a fee to access the site. *Id.* *See also* *Silverman*, *supra* note 46, at A1. When Connecticut posted sex offenders on the Internet, more than 1500 queried the site within the first eight hours of publication. *Id.*

63. *See* 47 U.S.C.A. § 230 (1996).

64. *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997). New York limited the transmission of indecent material to minors via the Internet. *Id.* at 163.

65. *Id.* at 161. The Internet is named the "information superhighway." *Id.* (revealing its vastness as a medium of communication).

66. *See generally American Libraries Ass'n*, 969 F. Supp. 160.

67. *Id.* at 184. The Commerce Clause bars state regulations that unduly burden interstate commerce. *Id.* at 169. Because of their unique nature, aspects of commerce that demand cohesive national treatment also offend the Commerce Clause. *Id.*

68. *Id.*

69. *See American Libraries Ass'n*, 969 F. Supp. at 184 (concluding Congress is to regulate the Internet and not the states).

## III. ANALYSIS

## A. CONSTITUTIONALITY OF MEGAN'S LAW

1. *The Double Jeopardy and Ex Post Facto Clauses*

The Double Jeopardy Clause forbids multiple punishments for criminal offenses.<sup>70</sup> The Ex Post Facto Clause forbids enacting a law that imposes punishment for criminal<sup>71</sup> conduct not punishable at the time of commission or imposes additional punishment from what was earlier prescribed.<sup>72</sup> In order to violate the Double Jeopardy and Ex Post Facto Clauses, the issue of whether community notification is punishment must first be determined.<sup>73</sup>

The United States Supreme Court ("Supreme Court") defines punishment as a deliberate imposition intended to discipline an offender.<sup>74</sup>

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70. See U.S. CONST. amend. V; see also *Roe v. Farwell*, 999 F. Supp. 174, 183 (D. Mass. 1998); *Lanni v. Engler*, 994 F. Supp. 849, 852 (E.D. Mich. 1998). In *Lanni*, the plaintiff was convicted of a sex offense and argued that community notification violated the Bill of Attainder, Cruel and Unusual Punishment, Double Jeopardy, Due Process, Equal Protection and Ex Post Facto Clauses, as well as invaded his right to privacy. *Id.* The defendant argued plaintiff's claims were without merit and filed a motion to dismiss. *Id.* The court granted defendant's motion to dismiss, explaining that in the *Hudson v. United States* case, 522 U.S. 93 (1997), the Supreme Court explicitly overruled the *Halper* case, 490 U.S. 435, 448 (1989). *Id.* The District Court indicated that as the Supreme Court stated in *Hudson*, 522 U.S. 93, the Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense." *Id.* Whether a sanction was a criminal punishment depended on whether it served traditional goals of punishment which were retribution and deterrence. *Id.* The analysis now looks at legislative intent and the law's effects. *Id.* See, e.g., *Roe*, 999 F. Supp. at 183 (using the intent and effects analysis in *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

71. See *Roe*, 999 F. Supp. at 183. Plaintiffs sought a declaratory judgment that the Massachusetts' Megan's Law was unconstitutional on its face because it violates the terms of his plea agreement, Bill of Attainder, Cruel and Unusual Punishment, Double Jeopardy, Due Process, Equal Protection, and Ex Post Facto Clauses of the United States Constitution. *Id.* The court held challenges to the Cruel and Unusual Punishment, Bill of Attainder, and Equal Protection Clauses must fail. *Id.* at 192-5. The court explains, but does not decide the Due Process Clause challenge. *Id.* at 195-8.

72. See *Russell*, 124 F.3d at 1083. In this case, plaintiffs were convicted of sex offenses in 1989. *Id.* In 1990, Washington State enacted the Community Protection Act requiring sex offenders to register with local law enforcement and subjecting some to community notification. *Id.* Plaintiffs sought declaratory relief and claimed violations of the Ex Post Facto and Due Process Clauses, as well as invasion of privacy rights. *Id.* at 1082. The Ninth Circuit Federal Court of Appeals held that as a matter of law, the Act does not violate the Ex Post Facto Clause, Due Process Clause, and does not invade an offender's privacy rights, so plaintiffs were not entitled to a preliminary injunction. *Id.* at 1094.

73. See *Femedeer v. Haun*, 35 F. Supp.2d 852, 855 (D. Utah 1999); *Roe*, 999 F. Supp. at 183 (giving the same requirement).

74. See *Doe*, 961 F. Supp. at 1108. Punishment is "the deliberate imposition, by some agency of the state, of some measure intended to chastise, deter, or discipline an offender." *Id.* The plaintiffs were convicted of sex offenses and sought a preliminary injunction from having registry information publicly available at the local law enforcement agency. *Id.*

If the legislative purpose lacks intent to punish, federal courts must give substantial deference to that judgment.<sup>75</sup> To analyze the Double Jeopardy and Ex Post Facto Clauses,<sup>76</sup> the Supreme Court applied a two-part test to determine whether a civil law constitutes punishment.<sup>77</sup> The first part requires a decision on whether the legislature intended the law to serve a remedial, non-punitive purpose.<sup>78</sup> The second part explores the law's effects and indirect effects.<sup>79</sup> A sex offender challenging Megan's Law has a "heavy burden" to provide "the clearest proof"<sup>80</sup> that the effects of the law are so punitive that it takes it out of the realm of civil law.<sup>81</sup> In applying the Supreme Court's test, neither the legislative intent of Megan's Law nor its effects constitute punishment.

*a. Legislative Intent*

The Supreme Court found that legislation protecting the public and preventing crimes is regulatory.<sup>82</sup> Several federal courts have agreed

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Plaintiffs asked the court to declare the retroactive application of the notification provision unconstitutional as a violation of the Bill of Attainder, Cruel and Unusual Punishment, Double Jeopardy, Due Process, and Ex Post Facto Clauses, as well as invasion of privacy rights. *Id.* The court concluded that plaintiffs are not entitled to preliminary injunctive relief. *Id.* at 1112. *See also* BLACK'S LAW DICTIONARY 860 (6th ed. 1991). The dictionary defines "punishment" as "any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." *Id.*

75. *See* E.B. v. Verniero, 119 F.3d 1077, 1096 (3d Cir. 1997).

76. *See* Roe, 999 F. Supp. at 183. The punishment analysis in *Kansas v. Hendricks*, 521 U.S. 346 (1997) is applicable to both the Double Jeopardy and Ex Post Facto Clauses. *Id.*

77. *See* *Femedeer*, 35 F. Supp.2d at 855; *Lanni v. Engler*, 994 F. Supp. 849, 852-4 (E.D. Mich. 1998) (applying the *Kansas v. Hendricks*, 521 U.S. 346 (1997), intent and effects test to analyze whether a law constitutes punishment).

78. *See* *Lanni*, 994 F. Supp. at 853; *Femedeer*, 35 F. Supp.2d at 856.

79. *See* *Lanni*, 994 F. Supp. at 853-4. *But see* *Femedeer*, 35 F. Supp.2d at 856 (finding no need to look at the indirect effects).

80. *See* *Femedeer*, 35 F. Supp.2d at 856; *Lanni*, 994 F. Supp. at 853. In addition, these factors must be considered in relation to the law on its face and only the clearest proof will sufficiently override legislative intent to change a civil remedy into a criminal penalty. *Id.*

81. *See* *Femedeer*, 35 F. Supp.2d at 855; *Lanni*, 994 F. Supp. at 852. In determining whether a punishment is criminal or civil, federal courts look at what the legislature expressly or impliedly intended the law to be. *Id.* Even if the legislature labels a law a civil penalty, federal courts also examine the purpose or effect, so that a civil remedy is not changed to a criminal penalty. *Id.*

82. *See* E.B. v. Verniero, 119 F.3d 1077, 1097 (3d Cir. 1997) (discussing *Kansas v. Hendricks*, 521 U.S. 346 (1997)). In *E.B.*, two identical challenges to the state's Megan's Law were combined. *Id.* at 1087. Each case alleged notification violated the Ex Post Facto, Double Jeopardy, and Due Process Clauses. *Id.* The court stated that the fundamental premise of registration and carefully tailored notification is to alert the public and law enforcement of possible re-abuse, which is not an unreasonable premise. *Id.* at 1097. The court held that application of Megan's Law does not violate the Ex Post Facto or Double

that the purpose of community notification is regulatory.<sup>83</sup> The Supreme Court found that even a law requiring involuntary commitment of the mentally abnormal is not punitive in legislative intent.<sup>84</sup> The Constitution does not prevent states from civilly detaining dangerous people from society.<sup>85</sup> In passing Megan's Law, Congress intended to identify potential recidivists,<sup>86</sup> alert the public when necessary, and thus prevent future sex offenses.<sup>87</sup> Megan's Law is not as severe as commitment because it requires no physical confinement. Pursuant to Megan's Law, sex offenders may move to different states provided they register with that state.<sup>88</sup> Megan's Law is similar to civil commitment because both have the same objective of protecting the public from dangerous people. Therefore, because Congress intended to protect the public from sex offenses by enacting Megan's Law, it is regulatory and not punitive.

*b. Effects*

Federal courts use the following factors to determine if the effects of notification constitute punishment: 1) whether a burden is imposed on sex offenders that is historically regarded as punishment; 2) whether notification is excessive beyond its legitimate purpose; 3) whether notifica-

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Jeopardy Clauses. *Id.* at 1111. If an opportunity to challenge the classification and notification were not given to any Tier 2 or 3 offender, the Due Process Clause is violated. *Id.*

83. See *Lanni*, 994 F. Supp. at 853; *E.B.*, 119 F.3d at 1096-7; *Russell*, 124 F.3d at 1090. (standing for the same proposition).

84. See *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997). A Kansas statute establishes procedures for civil commitment of people likely to commit sexually violent acts. *Id.* at 350. Hendricks had a long history of sexually molesting children and was committed. *Id.* Hendricks challenged the commitment as violative of the Due Process, Double Jeopardy, and Ex Post Facto Clauses. *Id.* The United States Supreme Court held that the Act is not punitive, so it does not violate the Double Jeopardy or Ex Post Facto Clauses. *Id.* at 370-1.

85. *Id.* at 366.

86. See BLACK'S LAW DICTIONARY 878 (6th ed. 1991). The definition of "recidivist" is "a habitual criminal; a criminal repeater." *Id.*

87. See H.R. Rep. 104-555, at 2, which states the following:

[P]erhaps no type of crime has received more attention in recent years than crimes against children involving sexual acts and violence. Several recent tragic cases have focused public attention on this type of crime and resulted in public demand that government take stronger action against those who commit these crimes. In partial response to this demand, Congress passed Title XVII of the Violent Crime Control and Law Enforcement Act of 1994, (Public Law 103-322). That title, the "Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act," attempted to address the concerns about these crimes by encouraging States to establish a system where every person who commits a sexual or kidnapping crime against children . . . would be required to register his or her address with the State upon their release from prison. As a further protection, the 1994 Act required States to allow law enforcement agencies to release "relevant information" about the offender if they deemed it necessary to protect the public.

*Id.*

88. See 42 U.S.C.A. § 14071(b)(1)(A)(iii) (indicating that offenders moving to a new state must register with that state, but does not prohibit them from moving).



tion inflicts suffering or restraint; and 4) whether notification promotes deterrence.<sup>89</sup> Historically, Megan's Law is not regarded as punishment.<sup>90</sup>

Types of sanctions recognized as punishment were death, imprisonment, banishment,<sup>91</sup> punitive forfeiture,<sup>92</sup> restriction from a profession,<sup>93</sup> branding, and shaming.<sup>94</sup> Community notification is not the same as shaming or banishment because the purpose and method are completely different.<sup>95</sup> First, the intent of shaming, branding, or banishment is to punish.<sup>96</sup> Notification, however, occurs after offenders are punished and is not a substitute for punishment.<sup>97</sup> Further, the goal of Megan's Law is to alert the public of a sex offender in the area to prevent future sex offenses, not to shame, brand, or banish the offender.<sup>98</sup> Second, shaming and branding required physical participation of the offender and direct confrontation with the public.<sup>99</sup> Since notification does not involve this physical confrontation, it is not the same as historical

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89. See *Femedeer v. Haun*, 35 F. Supp.2d 852, 855-58 (D. Utah 1999) (using some of the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) factors in analyzing Megan's Law); *Lanni v. Engler*, 994 F. Supp. 849, 852-3 (E.D. Mich. 1998). (stating the factors used in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), as the following: 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has been historically regarded as punishment; 3) whether it is applicable only in a finding of scienter; 4) whether the effect promotes retribution and deterrence; 5) whether the behavior is already criminal; 6) whether a rationally related purpose is found; and 7) whether it appears excessive in relation to the alternative purpose assigned).

90. See also *Lanni*, 994 F. Supp. at 853-4. Although one argument is made that public notification is similar to requiring the Jews in Nazi Germany to wear the Star of David as identification, notification has no historical precedent as being punishment. *Id.* The purpose of notification is to warn the public of the potential serious threat a sex offender poses to the community. *Id.*

91. See BLACK'S LAW DICTIONARY 97 (6th ed. 1991). The dictionary defines "banishment" as "a punishment inflicted upon criminals, by compelling them to leave a country for a specified period of time, or for life." *Id.*

92. *Id.* at 860. The dictionary defines "punitive" as "having the character of punishment or penalty" and "forfeiture" as the "loss of some right or property as a penalty for some illegal act." *Id.*

93. See *Roe v. Farwell*, 999 F. Supp. 174, 189 (D. Mass. 1998).

94. *Id.* Shaming is analogized to wearing the "Scarlet Letter." *Id.* See also *E.B. v. Verniero*, 119 F.3d 1077, 1099 (3d Cir. 1997). Public shaming, humiliation, and banishment all involve more than dissemination of information. *Id.* Colonial practices were punishment because they physically held the person up before fellow residents or physically removed them from the community. *Id.*

95. See *Roe*, 999 F. Supp. at 189.

96. *Id.* at 190. (distinguishing traditional forms of punishment from Megan's Law).

97. See *id.*; *Russell*, 124 F.3d at 1091.

98. See *E.B.*, 119 F.3d at 1097.

99. See *Roe*, 999 F. Supp. at 190; *Russell*, 124 F.3d at 1091. Historical punishment like whipping, pillory, and branding required the participation of the offender. *Id.* (distinguishing these practices from community notification).

punishment.<sup>100</sup> Therefore, Megan's Law is not historically regarded as punishment.

The Supreme Court found that imprisoning people not legally entitled to be in the United States to hard labor "inflicts an infamous punishment."<sup>101</sup> Megan's Law is different because notification does not physically imprison or restrain sex offenders. Notification, unlike imprisonment, releases truthful information about a sex offender, which to an offender may not be as severe as hard labor. Arguably, offenders might feel ostracized when such information is publicly released, however, courts have found that ostracism is "speculative" because there is no evidence that ostracism will occur.<sup>102</sup> Moreover, Megan's Law limits the information released.<sup>103</sup> The first limitation is the kind of information released about a sex offender.<sup>104</sup> Congress limits the kind of information released to that which is relevant and necessary to protect the public.<sup>105</sup> The second limitation is on the area where the information is

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100. See *Russell*, 124 F.3d at 1091; *Doe*, 961 F. Supp. at 1110-1; *Roe*, 999 F. Supp. at 190. (standing for this same proposition).

101. See generally, *Wong Wing v. United States*, 163 U.S. 228 (1896). The phrase "infamous punishment from imprisonment" is quoted in *Lanni v. Engler*, 994 F. Supp. 849, 854 (E.D. Mich. 1998), which cites two United States Supreme Court cases. *Id.*

102. See *infra* text accompanying note 131.

103. See *Russell*, 124 F.3d at 1082-3. In Washington State, an offender must register his or her name, address, state and place of birth, place of employment, crime, and date and place of conviction, aliases, social security number, photograph, and fingerprints. *Id.* However, the information released is the offender's name, age, date of birth, other identifying information, crime committed, and general vicinity of the offender's address. *Id.* See also, *E.B.*, 119 F.3d at 1082-4. In New Jersey, an offender must register his or her name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address, and place of employment. *Id.* However, the information disseminated is the offender's name, photograph, physical description, crime committed, home address, place of employment or school, vehicle description, and license plate number. *Id.* See also *Roe*, 999 F. Supp. at 178. In Massachusetts, an offender must register their name, alias, date and place birth, sex, race, height, eye and hair color, social security number, address, work address, photograph, fingerprints, description of crime, place where offense occurred, date of conviction, sentence, identifying characteristics, and other information helpful in assisting potential recidivism. *Id.* However, the information released is the offender's name, address, employment address, offense committed, age, race, sex, height, weight, hair and eye color, and photograph. *Id.*; *Cutshall*, 980 F. Supp. at 930. In Tennessee, an offender must register his or her name, date and place of birth, social security number, state and number of any driver's license, name and address of probation or parole officer, sexual offenses committed, place of employment, and address and length of time at that residence. *Id.* For all offenders convicted before July 1, 1997, this information is confidential, except if "necessary to protect the public." *Id.* (illustrating the differences between what information about a sex offender is registered and what information is disseminated to the public).

104. See *Lanni*, 994 F. Supp. at 853-4.

105. See 42 U.S.C.A. § 14071(e)(2). "The State shall release relevant information that is necessary to protect the public." *Id.*

released.<sup>106</sup> Some states allow access to registry information only to those with the same zip code as an offender.<sup>107</sup> Obviously, such limitations would not be included in a law designed to punish sex offenders.<sup>108</sup> Therefore, Megan's Law does not inflict suffering or restraint on sex offenders.

If Megan's Law is deemed punitive, releasing truthful information about offenders' past crimes is not found punitive when done to further a legitimate governmental interest.<sup>109</sup> First, the government has a compelling interest to protect children and communities from repeated sex offenses.<sup>110</sup> Megan's Law furthers these governmental interests through the release of registry information to communities by alerting them of sex offenders in their area. Second, the judicial system insists that criminal proceedings be released to the public, which has neither been intended nor regarded as punishment.<sup>111</sup> Further, registry information is already available from law enforcement, court, and Department of Corrections records.<sup>112</sup> Megan's Law merely creates an easier method for the public to access information that is otherwise tedious to obtain.<sup>113</sup>

Federal courts have analogized notification to wanted posters.<sup>114</sup> Although similar in purpose, one important distinction between Megan's Law and wanted posters is that some of the people displayed on the posters have not yet been convicted of a crime.<sup>115</sup> Pursuant to Megan's Law,

106. See *Lanni*, 994 F. Supp. at 853-4.

107. *Id.* at 853. In Michigan, access to registry information "is limited by zip code so that only those living in the same zip code as the sex offender can obtain the information." *Id.* See also *Russell*, 124 F.3d at 1082. In Washington State, "information may only be disseminated within a narrow geographic area." *Id.*; *Roe*, 999 F. Supp. at 179. In Massachusetts, any person may inquire at the local police department whether a sex offender lives or works in a certain area, but the inquiry must be to protect the inquirer or minor in their custody. *Id.*

108. See *Lanni*, 994 F. Supp. at 853. "A law designed to punish a sex offender would not contain those strict limitations on public dissemination." *Id.*; but see *Femedeer v. Haun*, 35 F. Supp.2d 852, 859 (D. Utah 1999). The court held that because no limits or guidelines were set forth on the information disseminated, the notification provision violated the Double Jeopardy and Ex Post Facto Clauses. *Id.*

109. See *Lanni*, 994 F. Supp. at 854; *E.B. v. Verniero*, 119 F.3d 1077, 1100 (3d Cir. 1997) (representing essentially the same idea).

110. See *supra* text accompanying note 21.

111. See *E.B.*, 119 F.3d at 1100. Dissemination of criminal information results from society's insistence on "public prosecution." *Id.* "Nevertheless our laws' insistence that information regarding criminal procedures be publicly disseminated is not intended as punishment and has never been regarded as such." *Id.*

112. See *Lanni*, 994 F. Supp. at 853 (emphasizing the point that the information released about sex offenders is the same as what is contained in records already available to the public).

113. *Id.*

114. See *E.B.*, 119 F.3d at 1101; *Russell*, 124 F.3d at 1092 (using the same analogy).

115. See *Russell*, 124 F.3d at 1092.

registered sex offenders are already convicted before the information is released. Megan's Law achieves the same result as wanted posters displayed in public areas because the information disseminated pertains to potentially dangerous individuals. The purpose of wanted posters and Megan's Law is to further the governmental interests of protecting people by alerting the public of potentially dangerous individuals.<sup>116</sup> Therefore, because Megan's Law has a governmental interest in protecting children, notification is not punitive.<sup>117</sup>

Deterring potential sex offenders may be an effect of notification.<sup>118</sup> Although deterrence is traditionally viewed as having a punitive purpose,<sup>119</sup> the Supreme Court explicitly stated that deterrence may serve both civil and criminal goals.<sup>120</sup> In addition, a secondary criminal purpose does not undermine a primary remedial purpose.<sup>121</sup> Consistent with the Supreme Court, federal courts have found that deterring sex offenders does not make notification punitive because notification does not implicate retribution, which is the primary objective of criminal punishment.<sup>122</sup> Retribution requires labeling the offender as more culpable than before.<sup>123</sup> For example, the Ninth Circuit Federal Court of Appeals found that notification does not implicate retribution and thus is not punishment.<sup>124</sup> However, if notification is deemed punitive, the government has an interest in protecting children from harm posed by sex offenders.<sup>125</sup> Therefore, even if Megan's Law is found to deter offenders, community notification is not punitive.

### c. *Indirect Effects*

To constitute punishment, detrimental effects of a law must be "extremely onerous."<sup>126</sup> Effects as drastic as deportation or termination of

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116. See *supra* text accompanying notes 87 and 21.

117. See *supra* text accompanying note 21.

118. See *Lanni v. Engler*, 994 F. Supp. 849, 854 (E.D. Mich. 1998) (indicating that deterring registered sex offenders from committing additional offenses could be an effect of community notification).

119. *Id.*

120. See *Roe v. Farwell*, 999 F. Supp. 174, 190 (D. Mass. 1998).

121. See *Femedeer v. Haun*, 35 F. Supp.2d 852, 857 (D. Utah 1999). This case quotes *United States v. Ursery*, 518 U.S. 267, 292 (1996) (stating that "though both statutes may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals"); see *Lanni*, 994 F. Supp. at 854; *Roe*, 999 F. Supp. at 190 (representing the same proposition).

122. See *Russell*, 124 F.3d at 1091. See *Roe*, 999 F. Supp. at 190 (concluding that deterrence does not render notification punitive).

123. See *Russell*, 124 F.3d at 1091.

124. *Id.*

125. See *supra* text accompanying note 21.

126. See *Femedeer*, 35 F. Supp.2d at 857; *E.B. v. Verniero*, 119 F.3d 1077, 1101 (3d Cir. 1997) (stating the same standard).

social security benefits have not been found to be “onerous.”<sup>127</sup> The potential indirect consequences of Megan’s Law are not as severe as deportation or termination of benefits. The Third Circuit Federal Court of Appeals found the indirect effects of Megan’s Law not “onerous” because Megan’s Law only mandates registration and notification.<sup>128</sup>

Several types of indirect effects may potentially arise from community notification. These effects include embarrassment or isolation of the sex offender after the information is disseminated.<sup>129</sup> However, notification is not punitive because embarrassment from public information does not rise to the level of punishment.<sup>130</sup> Also, federal courts find these effects “speculative” because some offenders may not feel embarrassed or isolated when the information is released.<sup>131</sup> An unpleasant consequence to an offender does not make Megan’s Law punitive.<sup>132</sup> Embarrassment or isolation is unpleasant, but not legal consequences.<sup>133</sup> Further, courts find that it is not Megan’s Law that prompts some to treat sex offenders less favorably, it is the offender’s criminal act that elicits such response.<sup>134</sup> Other indirect effects include harassment, assault, eviction, or loss of employment.<sup>135</sup> Still, federal courts do not blame Megan’s Law for indirect effects because criminal punishment

127. See *Femedeer*, 35 F. Supp.2d at 857.

128. See *E.B.*, 119 F.3d at 1101. The effects of Megan’s Law “clearly do not rise to the level of extremely onerous burdens that sting so severely as to compel a conclusion of punishment.” *Id.* The Court of Appeals used a three-part test to determine whether a law is punishment. *Id.* at 1093. The test was taken from *Artway v. Attorney General*, 81 F.3d at 1235 (3rd Cir. 1996), that confronted the constitutionality of registration, but not notification. *Id.* The court indicates that if the legislature intends notification to be punishment, then it must fail constitutional scrutiny. *Id.*

129. See *Lanni v. Engler*, 994 F. Supp. 849, 854 (E.D. Mich. 1998); *E.B.*, 119 F.3d at 1101.

130. See *Lanni*, 994 F. Supp. at 854. The negative effects are not regarded as punishment. *Id.*

131. See *Femedeer*, 35 F. Supp.2d at 856. “The record is devoid of any evidence that such ostracism will occur.” *Id.* “Plaintiffs concerns are merely speculative.” *Id.*; *Doe*, 961 F. Supp. at 1112. “Such effects are purely speculative.” *Id.*

132. See *Lanni*, 994 F. Supp. at 854; *Femedeer*, 35 F. Supp.2d at 856.

133. See *Doe*, 961 F. Supp. at 1111.

134. See *Femedeer*, 35 F. Supp.2d at 857.

[A]s other courts have concluded, it is not the statute that prompts some people to treat sex offenders less favorably. The adverse consequences feared by Plaintiff stem primarily from a registrant’s past criminal activity. ‘Although notification conveys to the public the information that prompts some people to take unlawful action against the convicted sex offender, it is the offender’s prior conviction—or, more precisely, the offender’s criminal act itself—that motivates such hostile action.’ Pataki, 120 F.3d at 1280.

*Id.*

135. See *Doe*, 961 F. Supp. at 1110 (highlighting the fact that these indirect effects could occur, but will not always happen to every offender).

must be a deliberate imposition intended to discipline.<sup>136</sup> Even if loss of employment or housing is attributed to Megan's Law, some states combat this potential by requiring that notification procedures include a warning against the use of registry information to commit a crime, discriminate against, or harass an offender.<sup>137</sup> If loss of employment or eviction occur, it is a result of the offender's own criminal conviction. Employment and housing applications may ask whether a person was convicted of a crime, and if so, the person must list the crime. Answering such a question would reveal to a boss or landlord that one is a sex offender, which could result in loss of employment or housing. Thus, loss of employment or housing is an effect not exclusively attributed to Megan's Law, but is attributable to an offender being convicted of a crime. Still another indirect effect is vandalism of the offenders' property or threats to the offender.<sup>138</sup> However, studies show acts of vigilantism are infrequent.<sup>139</sup> In any event, to combat these potential occurrences, states mandate that the information contain a warning both in the provisions of the notification statute and in the actual information released that vigilantism will be punished.<sup>140</sup> Thus, actions by the public do not determine whether a law is punitive.<sup>141</sup>

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136. *Id.* at 1111; *Lanni*, 994 F. Supp. at 855 (stating that releasing information may destabilize employment or other community relations, but these are just speculative).

137. *See Roe v. Farwell*, 999 F. Supp. 174, 190 (D. Mass. 1998). In Massachusetts, any person who uses registry information to commit a crime against, illegally discriminate against, or harass a sex offender is guilty of a misdemeanor and subject to a fine or imprisonment. *Id.* *See also* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, A SUMMARY OF MEGAN'S LAW STATUTES BY STATE (1998). In California, misuse of registry information to commit a felony is punishable by a five-year prison term. *Id.* To commit a misdemeanor is punishable by a fine of not less than \$500 and not more than \$1000. *Id.* There are also civil penalties for misuse of the information. *Id.*; *Russell*, 124 F.3d at 1083. Washington State also includes a warning on their notification forms. *Id.*

138. *See Johnson*, *supra* note 6. One survey in Washington State found that four percent of sex offenders were harassed. *Id.* Between 1990-1996, thirty-three incidents were reported which ranged from verbal harassment, vandalism of the offender's home, assault, picketing, and burning of an offender's home. *Id.* In order to prevent this, Washington police educate the public about sex offenders and the dangers involved. *Id.* *See also E.B. v. Verniero*, 119 F.3d 1077, 1090 (3d Cir. 1997). In 1995 in Oregon, less than ten percent of sex offenders experienced harassment. *Id.* Some incidents involved name-calling, graffiti, toilet papering, minor property damage, and one offender had a gun pointed at him. *Id.*

139. *See E.B.*, 119 F.3d at 1089.

140. *Id.* at 1084. A typical warning included in notification information is as follows: "Any actions taken by you against this individual, including vandalism of property, verbal, or written threats of harm or physical assault against this person, his or her family or employer will result in your arrest and prosecution for criminal acts." *Id.* "THIS INFORMATION IS CONFIDENTIAL!" *Id.* (illustrating an awareness of this potential occurrence that attempts to protect sex offenders from vigilantism by including warnings of the penalties available).

141. *See Doe*, 961 F. Supp. at 1111 (showing that even if the public acts negatively towards sex offenders, that does not make notification punishment).

A final indirect effect of notification is injury to a sex offender's reputation.<sup>142</sup> First, the Supreme Court found that distributing lists of shoplifters' names and pictures, even those not convicted of shoplifting, is not sufficient to cause reputational harm.<sup>143</sup> Megan's Law is similar to releasing shoplifters' names and pictures, but one important difference is that sex offenders are convicted of an offense prior to release of information. Thus, if distributing hundreds of "shoplifter" lists, including those not even convicted of shoplifting, is not sufficient to harm one's reputation,<sup>144</sup> neither is Megan's Law. Second, although there is a constitutional right to personal privacy,<sup>145</sup> the Supreme Court rejected the argument that a person's reputation is sufficiently fundamental to fall under constitutional protection.<sup>146</sup> The Supreme Court held that protected personal privacy rights relate only to matters involving marriage, procreation, contraception, family relationships, child rearing, and education.<sup>147</sup> Clearly, harm to an offender's reputation does not involve marriage, procreation, or education, which are constitutionally protected. Therefore, Megan's Law does not constitute reputational harm to sex offenders.

The Supreme Court held that harm to reputation may be protected if coupled with a loss or adverse effect on one's prior legal status or rights.<sup>148</sup> Opponents argue that Megan's Law imposes such additional adverse effect because the released information is private.<sup>149</sup> Even if courts determine that Megan's Law imposes harm to an offender's reputation and adversely effects the offender's legal rights, this argument still fails. The registry information, an offender's name, address, physi-

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142. See *Lanni v. Engler*, 994 F. Supp. 849, 855 (E.D. Mich. 1998); *Paul I*, 982 F. Supp. at 966. Reputational interests are "very different" from constitutionally protected matters. *Id.* See *Doe*, 961 F. Supp. at 1112; *Femedeer v. Haun*, 35 F. Supp.2d 852, 860 (D. Utah 1999).

143. See *E.B.*, 119 F.3d at 1102 (referring to *Paul v. Davis*, 424 U.S. 693 (1976)).

144. *Id.* at 1103 (reasoning that because in *Paul v. Davis*, 424 U.S. 693 (1976), flyers distributed to the public about an arrest, even though not convicted, did not raise any fundamental privacy rights, it follows that notification of a sex offender's conviction does not implicate any fundamental privacy rights). See *Paul I*, 982 F. Supp. at 966 (following the reasoning of that case).

145. See *E.B.*, 119 F.3d at 1102-3; *Roe v. Farwell*, 999 F. Supp. 174, 196 (D. Mass. 1998). (stating the same premise).

146. See *E.B.*, 119 F.3d at 1102-3 (discussing *Paul v. Davis*, 424 U.S. 693 (1976), and indicating that personal rights must be limited to those "fundamental or implicitly in the concept of ordered liberty"). See *Roe*, 999 F. Supp. at 195; *Femedeer*, 35 F. Supp.2d at 860.

147. See *infra* text accompanying note 163.

148. See *Femedeer*, 35 F. Supp.2d at 860 (quoting *Paul v. Davis*, 424 U.S. 693 (1976)). The Supreme Court rejected the argument that a person's reputation falls under constitutional protection, and found that because notification does not impair a constitutionally protected interest, sex offenders cannot establish an injury to reputation claim. *Id.*

149. *Id.*

cal description, and other pertinent information is not private.<sup>150</sup> Names and addresses are listed in telephone books and a person's physical description can be obtained by asking neighbors. Finally, any effects of Megan's Law result from the offenders' own misconduct in committing a sex offense.<sup>151</sup> Therefore, the indirect effects of Megan's Law are not punitive.

In sum, Megan's Law satisfies the Supreme Court's intent and effects test. The legislative intent of Megan's Law is remedial, not punitive in purpose.<sup>152</sup> The effects of notification are not historically regarded as punishment, not excessive in legislative purpose, do not inflict suffering or restraint on sex offenders, and the deterrent effect does not constitute punishment.<sup>153</sup> The indirect effects, such as embarrassment, isolation, harassment, vandalism, or injury to reputation are also not punishment.<sup>154</sup> Therefore, because Megan's Law does not constitute punishment, it violates neither the Double Jeopardy Clause<sup>155</sup> nor the Ex Post Facto Clause.<sup>156</sup>

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150. *Id.*; *Russell*, 124 F.3d at 1024.

151. *See Lanni v. Engler*, 994 F. Supp. 849, 855 (E.D. Mich. 1998); *Doe*, 961 F. Supp. at 1112 (stating that any damage to reputation "would appear to flow most directly from" an offender's "own convicted misconduct and from private citizens' reaction thereto, and only tangentially from state action").

152. *See Lanni*, 994 F. Supp. at 853; *Russell*, 124 F.3d at 1093.

153. *See infra* text accompanying notes 155 and 156.

154. *Id.* *See Lanni*, 994 F. Supp. at 855; *Doe*, 961 F. Supp. at 1111. "The court is unwilling to assign blame for such indirect consequences to the mere compilation and provision of public information under the notification amendment." *Id.*

155. *See Paul I*, 982 F. Supp. at 965. The plaintiffs claimed that the tier classification violated the Double Jeopardy Clause because the hearing process subjects sex offenders to a second proceeding that could result in punishment. *Id.* However, the District Court held that consistent with the Third Circuit Federal Court of Appeals, community notification does not violate the Double Jeopardy Clause because it does not constitute punishment. *Id.* *See also Doe*, 961 F. Supp. at 1112. The District Court held that the Double Jeopardy Clause was not violated because the legislative intent, design of the statute, historical treatment of punishment, and effects of notification do not constitute a punitive purpose. *Id.* *E.B. v. Verniero*, 119 F.3d 1077, 1105 (3d Cir. 1997). Because the state's Megan's Law satisfies the three elements of the court's test, the court held it does not violate the Double Jeopardy Clause. *Id.*; *Lanni*, 994 F. Supp. at 855. The court held notification does not violate the Double Jeopardy Clause. *Id.*; *but see Roe v. Farwell*, 999 F. Supp. 174, 192 (D. Mass. 1998). The District Court held that because the Massachusetts' Judicial Court ruled that their notification statute lacked a remedial purpose, it violated the Double Jeopardy Clause. *Id.*

156. *See Doe*, 961 F. Supp. at 1112. The District Court held that the Ex Post Facto Clause was not violated because the legislative intent, design of the statute, historical treatment of what punishment is, and effects of the community notification act did not constitute a punitive purpose. *Id.*; *Lanni*, 994 F. Supp. at 855. The court reasoned that the community notification act did not impose punishment because the purpose of the act was to protect the public, not to punish sex offenders; historical precedent does not show an objective punitive goal; and neither the direct nor indirect effects of the act are sufficient to



## 2. Privacy

The right to privacy is composed of the First, Fourth, Fifth, and Ninth Amendments<sup>157</sup> and encompasses "only personal rights that can be deemed 'fundamental.'"<sup>158</sup> Opponents to Megan's Law argue that publishing registry information about sex offenders via the Internet is an invasion of privacy.<sup>159</sup> Specifically, it is argued that a sex offender's right to privacy is violated because home addresses are released and family relationships are interfered with, however, these arguments fail.<sup>160</sup>

The Third Circuit Federal Court of Appeals recently held that the notification provisions in Megan's Law do not invade sex offenders' privacy rights.<sup>161</sup> Regulating contraception is an example of a law that the Supreme Court held invades privacy rights because the law unnecessarily invaded marital relationships, which are fundamentally protected by the Constitution.<sup>162</sup> In other decisions, the Supreme Court held that protected privacy rights include marriage, procreation, contraception,

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conclude that any punitive effects clearly outweigh the remedial purpose. *Id.* The court held that under either the *Hudson* or *Halper* test, the act does not violate the Ex Post Facto Clause. *Id.* See also *E.B.*, 119 F.3d at 1105. Because the state's Megan's Law satisfies the three elements of the court's test, the court held notification does not violate the Ex Post Facto Clause. *Id.*; *Roe v. Office of Adult Probation*, 125 F.3d 47, 55 (2d Cir. 1997). In this case, the plaintiff is a convicted sex offender who was a candidate for community notification. *Id.* The plaintiff met with a psychologist who concluded that plaintiff posed a significant risk of recidivism. *Id.* The court held that because of the way in which the constitutional standards are applied, the challenge to the Ex Post Facto Clause must be rejected. *Id.* Thus, the District Court's preliminary injunction was vacated. *Id.*; *Russell*, 124 F.3d at 1093. Notification provisions do not violate the Ex Post Facto Clause. *Id.* But see *Roe*, 999 F. Supp. at 192. The District Court in Massachusetts held that because the Supreme Judicial Court ruled that the Massachusetts notification statute lacked a remedial purpose, the Ex Post Facto Clause was violated. *Id.*

157. U.S. CONST. amend. I, IV, V, and IX. See *E.B.*, 119 F.3d at 1102.

158. See *Paul v. Verniero*, 170 F.3d 396, 399 (3d Cir. 1999) (quoting *Roe v. Wade*, 410 U.S. 113 (1973)) [hereinafter *Paul II*].

159. See *Stroh*, *supra* note 46, at 1A. Because the ACLU believes more harm than good is done when using the computer, the organization filed lawsuits to block states from releasing sex offenders' names through computer databases. *Id.* Also, the ACLU argues that sex offenders' rights to privacy are invaded as well as the possibility that intentional and unintentional mistakes in registry information may result. *Id.*

160. See *Paul II*, 170 F.3d at 399-400; *Paul I*, 982 F. Supp. at 967 (setting forth these same two arguments).

161. See *Paul II*, 170 F.3d at 406.

162. See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). The law prohibited the assistance or use of drugs or other instruments to prevent conception. *Id.* Defendants were physicians at the Planned Parenthood League, who were arrested for giving information, instruction, and medical advice to a married couple regarding methods used to prevent conception. *Id.*

family relationships, child rearing, and education.<sup>163</sup> However, Megan's Law is distinguishable from regulating contraception because notification does not involve protected rights the Supreme Court deemed fundamental such as contraception, child rearing, or education.

It is argued that disseminating an offender's home address infringes upon the offender's privacy rights.<sup>164</sup> However, the information compiled in the registry is already public knowledge.<sup>165</sup> Public information, by definition, is not confidential information that is constitutionally protected.<sup>166</sup> Thus, home addresses are not a constitutionally protected privacy right.<sup>167</sup> Opponents also argue that notification interferes with an offender's intimate family relationships.<sup>168</sup> Although offenders have protected interests in their family relationships, laws may interfere with such relationships if there is sufficient interest to do so.<sup>169</sup> The privacy interest does not outweigh the governmental interests in protecting the public from the danger of repeated sex offenses and interest in the health, education, and welfare of children.<sup>170</sup> Children living near and attending schools near the homes of sex offenders may be endangered if not warned of the offender's presence in the community.<sup>171</sup> Additionally,

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163. See *Zablocki*, 434 U.S. at 386; *Griswold*, 381 U.S. 479; see also *Paul I*, 982 F. Supp. at 966; *Paul II*, 170 F.3d at 399 (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

164. See *Paul II*, 170 F.3d at 399.

165. See *Paul I*, 982 F. Supp. at 966-7. Those New Jersey courts that found that notification does not implicate a privacy interest conclude that those interests fade when the information is of public record. *Id.* The court also indicated that the Supreme Court in *Paul v. Davis*, 424 U.S. 693 (1976), held that dissemination of an arrest record does not implicate any constitutionally protected right to privacy. *Id.*

166. See *Paul I*, 982 F. Supp. at 967; *Paul II*, 170 F.3d at 403. "Records of criminal convictions and pending criminal charges are by definition public, and therefore not protected." *Id.*

167. See *Paul II*, 170 F.3d at 401 (using the District Court's decision in *Paul v. Verniero*, 982 F. Supp. at 966, that followed the Third Circuit Federal Court of Appeals decision in *E.B. v. Verniero*, 119 F.3d 1077, to reach the same conclusion).

168. See *Paul II*, 170 F.3d at 400.

169. See *Paul I*, 982 F. Supp. at 966-7; *Paul II*, 170 F.3d at 401.

170. See *Paul I*, 982 F. Supp. at 966-7; *Paul II*, 170 F.3d at 401 (reiterating the District Court decision in *Paul v. Verniero*, 982 F. Supp. at 966-7 and the Third Circuit Federal Court of Appeals decision in *E.B. v. Verniero*, 119 F.3d 1077, in its analysis of this issue). See *supra* text accompanying note 21.

171. See *Paul I*, 982 F. Supp. at 967. This case involved four sex offenders who filed a joint complaint, applied for a temporary restraining order, and requested a preliminary injunction. *Id.* The complaint sought to enjoin the release of notification information pursuant to that state's Megan's Law. *Id.* at 963-4. Challenges were made to the Cruel and Unusual Punishment, Double Jeopardy, and Due Process Clauses, as well as right to privacy. *Id.* The court granted summary judgment to the defendant on the challenges to the Cruel and Unusual Punishment and Double Jeopardy Clauses and as a matter of law held that there was no constitutionally protected privacy interest. *Id.* However, the court allowed the challenge to the Due Process Clause to go to discovery. *Id.* at 969-70. See also Unknown, *Outing Offenders*, BANGOR DAILY NEWS, Feb. 21, 1998 (making the analogy that

family relationships may be strained as a result of conviction, but that strain is caused by the offenders' status as a felon, resulting from his or her own behavior in committing a sex offense and not from community notification.<sup>172</sup> Therefore, Megan's Law does not violate sex offenders' privacy rights.<sup>173</sup>

## B. CONSTITUTIONALITY OF USING THE INTERNET FOR COMMUNITY NOTIFICATION

### 1. *Regulation of the Internet*

One state law restricting the kind of information available on the Internet was found unconstitutional because it violated the Commerce Clause.<sup>174</sup> Because the Internet is linked nationwide, a message sent intrastate from one citizen to another, could actually go out-of-state, resulting in interstate commerce.<sup>175</sup> The District Court held that because states are not allowed to regulate interstate commerce, Congress must regulate the Internet.<sup>176</sup>

Congress did not establish specific guidelines in Megan's Law for which medium of communication is to be used to notify communities of sex offenders.<sup>177</sup> In accordance with the District Court's decision, Congress, and not the states, has the authority to restrict the kind of information published on the Internet.<sup>178</sup> Therefore, because Congress did not restrict registry information from being published via the Internet,

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notification is equal to society becoming probation officers by keeping their eye on sex offenders in the community).

172. *Id.* at 966-8. "The community notification imposed by Megan's Law does not trigger a protected interest and is no greater than other deprivations already borne by the offender due to his or her status as a felon." *Id.*

173. *See Paul II*, 170 F.3d at 406; *Paul I*, 982 F. Supp. at 968; *Doe*, 961 F. Supp. at 1112, which found that privacy claims fail because a sufficient legitimate interest does not exist in preventing the release of truthful information that is already public record. *Id.* *See also Lanni v. Engler*, 994 F. Supp. 849, 856 (E.D. Mich. 1998) (finding that reputational interests are not given the same level of protection as those the Supreme Court deemed implicit). The court reasoned that because the information is already of public record and there is no protected privacy interest, notification does not violate an offender's right to privacy. *Id.*; *Russell*, 124 F.3d at 1094 (stating that any right to privacy would protect only personal information). Registry information is not constitutionally protected and is already available to the public. *Id.* The court held that dissemination of information does not violate any protected privacy right. *Id.*; *E.B. v. Verniero*, 119 F.3d 1077, 1103 (3d Cir. 1997).

174. *See American Libraries Ass'n*, 969 F. Supp. at 167. The Internet easily fits within the interests protected by the Commerce Clause. *Id.*

175. *Id.* (explaining the drawback to Internet communication and why it results in interstate commerce).

176. *Id.* at 184.

177. *See generally*, 42 U.S.C.A. § 14071.

178. *See American Libraries Ass'n*, 969 F. Supp. at 184.

for which it has authority to do, using the Internet to meet the objectives of Megan's Law is acceptable and consistent with the Commerce Clause.

## 2. *Governmental Interests*

Notifying the public of sex offenders via the Internet fulfills important governmental interests. The first involves compelling governmental interests in protecting the physical and psychological well being of children,<sup>179</sup> and in protecting the public from the danger of sex offenders.<sup>180</sup> Consistent with the governmental interest in protecting children and the public, many criminal cases receive media attention.<sup>181</sup> It is believed that alerting the public of these dangerous criminals will prevent future crimes. Megan's Law, by mandating the release of information about dangerous sex offenders to the public,<sup>182</sup> and the Internet, as a medium for communicating this information, fulfill a similar goal as criminal cases receiving media attention because both aid in protecting the public from potential crimes committed by dangerous sex offenders. The second governmental interest involves the United States' policy to protect the Internet from intrusion.<sup>183</sup> The Supreme Court found that the Internet is entitled to the highest protection from governmental intrusion because it has low barriers to entry, which are the same for both speakers and listeners.<sup>184</sup> Also, due to the low barriers, a great amount of information is available and is provided to all that want access to it.<sup>185</sup> There is no question that continuing to allow the Internet for community notification satisfies this policy because numerous people visit the registry site.<sup>186</sup> Therefore, because of the compelling state interest to protect children from sex offenders and the Internet's highest protection from governmental intrusion, notifying communities of sex offenders via the Internet is constitutionally permissible.

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179. See *Reno v. ACLU*, 521 U.S. 844, 869 (1979).

180. See H.R. Rep. 104-555, at 2.

181. See *E.B. v. Verniero*, 119 F.3d 1077, 1100 (3d Cir. 1997).

182. See *supra* text accompanying note 27.

183. See *Reno*, 521 U.S. at 863 (concluding that "the Internet as the most participatory form of mass speech yet developed, is entitled to the highest protection from governmental intrusion").

184. *Id.* The issue involved the constitutionality of two provisions enacted to protect minors from indecent and offensive communication on the Internet. *Id.* at 849. Even though the Supreme Court recognized the importance of protecting children from harmful materials, the statute abridged freedom of speech, found in the First Amendment. *Id.* The Supreme Court severed the term "indecent" from the statute, which may allow the statute to survive future constitutional challenges. *Id.* at 883.

185. *Id.*

186. See *supra* text accompanying note 62 (revealing how many people query sex offender websites). See *infra* text accompanying note 209 (revealing how many people visited the FBI's website).

3. *Internet vs. Other Methods of Community Notification*

States use various methods of notification to comply with Megan's Law. Presently, such methods include, but are not limited to, knocking on doors<sup>187</sup> or mailing postcards to those who live in the offender's neighborhood,<sup>188</sup> distributing fliers,<sup>189</sup> making available lists of offenders at local police departments,<sup>190</sup> publishing names in newspapers<sup>191</sup> and via the Internet,<sup>192</sup> and broadcasting offender information through the media.<sup>193</sup> Yet, using the Internet for notification is sharply criticized because it allegedly invades a sex offender's privacy.<sup>194</sup>

The Internet and television accomplish Megan's Law objectives, yet they are different mediums of communication. Currently, the Internet has an estimated 200 million users.<sup>195</sup> In 1998, the estimated number of television viewers was 254 million.<sup>196</sup> In addition, for breaking news, 76 percent of the overall population turn to television, whereas, only twelve percent turn to the Internet.<sup>197</sup> The Supreme Court indicates the Internet is not as invasive as television or radio because affirmative steps must be taken to receive information.<sup>198</sup> Unlike television or radio, receiving sex offender information via the Internet is not achieved by simply turning on the computer.<sup>199</sup> To reach registry information via the Internet, one must first enter a website address and perhaps a zip code, county, city, or name to gain access to the information.<sup>200</sup> Thus, in comparing the Internet to television, the barriers to gaining access to registry information via the Internet are more difficult than television and the number of people using television as a medium of communication is greater than the Internet.

187. See Riha, *supra* note 19, at B11.

188. See *supra* text accompanying note 45.

189. See *supra* text accompanying note 44.

190. See *supra* text accompanying note 46.

191. See *supra* text accompanying note 43.

192. See *supra* text accompanying note 48.

193. See *Russell*, 124 F. Supp. at 1082; see also *Byron*, 46 F. Supp.2d at 1041.

194. See *supra* text accompanying note 50. See also *supra* text accompanying note 48 (indicating some states currently using the Internet for notification).

195. See *Shea*, 930 F. Supp. at 925. This figure is for 1999. *Id.*

196. See Brian Lowry, *Final 'Seinfeld': How Huge Will the Ratings Be?*, LOS ANGELES TIMES, May 14, 1998, at F48. Nielsen Media Research also estimates that there are 98 million homes in the United States with television sets. *Id.*

197. See Steven Vonder Haar, *Portals Reach Online News Readers*, INTERACTIVE WEEK FROM ZDWIRE, Dec. 8, 1998. For breaking news, the television figure breaks down into 39 percent of the overall population turning to broadcast television, 37 percent turning to cable television, 9 percent turning to radio, and 2 percent turning to newspapers. *Id.*

198. See *Reno*, 521 U.S. at 870 (comparing the Internet with other forms of mass communication).

199. *Id.* (illustrating the difference between the Internet and radio or television).

200. See *Stroh*, *supra* note 46, at A1.

Community notification methods take all forms. First, mailing postcards, distributing fliers, and publishing registry information in newspapers are more invasive than the Internet. These methods merely require the ability to read. In essence, registry information is placed in the mailbox, personally handed to, or printed in a section of the newspaper. The only way registry information is not conveyed is if the person discards the material without reading it. The Internet requires more than just the ability to read. Initially, a person must have a computer with Internet access. Then, the website's address must be known and entered, and perhaps additional information, like a zip code, county, city, or name may be required before access is given.<sup>201</sup> Second, knocking on doors is the most invasive method of notifying the public of sex offenders because direct communication is used. Unless a person is hearing impaired, registry information is verbally conveyed to the occupant of the residence. It is clear that the Internet is not as invasive as knocking on doors because direct communication is not initiated and affirmative steps must be made by Internet users to gain access to registry information. Thus, in comparing the Internet with other methods of community notification, using the Internet to access registry information is not as direct or easily obtained as using other methods.

The Internet has more barriers to access information and has less number of people using it as a medium of communication. Also, it is not as invasive or direct as other methods of community notification. Despite these facts, opponents argue that using the Internet for community notification violates sex offenders' privacy rights.<sup>202</sup> It is clear that this argument cannot be sustained. Arguably, if the Internet was found to invade sex offenders' privacy rights, all other methods of notification would be found to invade privacy rights because they are more direct, invasive, or used by a greater number of people than the Internet. Eliminating all methods of notification would defeat Megan's Law objectives of protecting the public from sex offenders. Therefore, the Internet is equally as acceptable as other methods used for community notification.

#### 4. *Internet Use for Megan's Law vs. Solving Crimes*

Across the nation<sup>203</sup> and the world,<sup>204</sup> the Internet is being used to

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201. *See id.*

202. *See supra* text accompanying note 50.

203. *See* Del Quentin Wilber, *Police Take Their Investigations to Cyberspace*, BALTIMORE SUN, Aug. 3, 1998, at 1C.

204. *See* *Criminals Unmasked on Internet*, EVENING MAIL, Apr. 13, 1999, at 16. Scotland Yard implemented its own website featuring eight crimes, that is modeled after the FBI's Most Wanted website. *Id.* The site was created after an appeal for information was published via the Internet that led to the arrest of a multiple-murderer. *Id.*

aid law enforcement agencies in solving crimes.<sup>205</sup> First, information about an unidentifiable victim was published on at least one state's website.<sup>206</sup> Second, information about wanted criminals is published on the Internet.<sup>207</sup> One example of this is some states publishing wanted prostitutes or parents owing child support on state police websites.<sup>208</sup> Another example is the FBI globally publishing information about wanted criminals on its Ten Most Wanted Fugitives website.<sup>209</sup> Still another example is Fox Television's America's Most Wanted website displaying robbery footage from security cameras.<sup>210</sup> Thus, the Internet is an acceptable medium of communication that law enforcement agencies use to solve crimes.

Using the Internet to fulfill Megan's Law objectives is not as invasive as using the Internet to solve crimes. Critics of the Internet's use for notification argue that it invades an offender's right to privacy,<sup>211</sup> however, this argument fails. First, the information published about unsolved crimes involves people who are wanted and not yet convicted of the crime.<sup>212</sup> If the police are misinformed as to who committed the crime, an innocent person may be displayed on a worldwide website<sup>213</sup> that 14 million visit monthly.<sup>214</sup> In contrast, the sex offenders published

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205. See Wilber, *supra* note 203, at 1C. From March 1996 to August of 1998, in Baltimore County, at least three fugitives were arrested after residents recognized their pictures on the website. *Id.*

206. *Id.* In Maryland, police found a badly burned body, shot and stabbed, off the interstate. *Id.* The police had little physical evidence and the body's identity was unknown. *Id.* The police posted the images of the man's teeth on the website because duplicating the photo in newspapers would have been impossible. *Id.*

207. *Id.*

208. *Id.* In Minnesota, wanted prostitutes are displayed online and in Maryland, pictures and descriptions of parents owing child support are published on the website. *Id.*

209. *Id.* More than 140 million people visited this website in a ten-month period, from October to August. *Id.* See *FBI Ties Decades of Killings Along I-45 to Serial Killers*, THE FORT WORTH STAR-TELEGRAM, Mar. 18, 1999, at 2. The FBI is attempting to publish six recent abductions that fall under the federal kidnapping statute. *Id.*; see John O'Brien, *Syracuse Mother on FBI Web Site*, THE POST STANDARD, Sept. 21, 1998, at B1. The FBI's Most Wanted website existed for three years and now added a "Kidnapping/Missing Persons" category that includes "Parental Kidnappings." *Id.*

210. See Mike Mills, *Police Cast A Web For Wanted Criminals*, THE WASHINGTON POST, Apr. 6, 1999, at E1. The FBI's most wanted website shows "full-motion video clips" of criminals. *Id.* (demonstrating that some websites are publishing actual footage from unsolved crimes on the Internet).

211. See *supra* text accompanying note 50.

212. See Wilber, *supra* note 203, at 1C.

213. See Today (NBC News broadcast, July 15, 1999). The FBI's Ten Most Wanted Internet website is seen worldwide in different languages. *Id.* Of 457 fugitives listed on the website, 428 were captured, resulting in a 94 percent success rate. *Id.*

214. See Wilber, *supra* note 203, at 1C. 140 million people visited the FBI's website in a ten-month period. *Id.*; Heidi Prescott, *Ten Most Wanted' Have Own Website*, SOUTH BEND

on the Internet pursuant to Megan's Law have actually been convicted and are not merely believed to have committed a crime.<sup>215</sup> Second, the types of wanted criminals displayed on state websites are prostitutes and parents owing child support.<sup>216</sup> Most likely, these types of criminals do not pose as much of a threat to a community as a convicted sex offender does. Yet, displaying wanted, but not convicted prostitutes and parents on the Internet are acceptable. Third, information about the victims, like dental records, is pictured on the Internet to solve crimes.<sup>217</sup> Megan's Law, however, is more discrete because the victim's identity cannot be released.<sup>218</sup> Therefore, because comparing Internet use in solving crimes with fulfilling Megan's Law objectives reveals that using the Internet for community notification is not as invasive, it too is clearly acceptable to use.

##### 5. *Femedeer v. Haun*

To date, there is one federal case involving community notification and the Internet.<sup>219</sup> The case was decided in the District Court of Utah on January 22, 1999.<sup>220</sup> The plaintiff was a convicted sex offender who challenged Utah's amended notification law<sup>221</sup> on several constitutional grounds.<sup>222</sup> The Utah statute was amended to provide unlimited access

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TRIBUNE, Nov. 23, 1998, at C7. The FBI's Ten Most Wanted website address is [www.fbi.gov/mostwant/tenlist.htm](http://www.fbi.gov/mostwant/tenlist.htm). *Id.*

215. *See supra* note 10 (citing pertinent parts of 42 U.S.C.A. § 14071).

216. *See supra* text accompanying note 208.

217. *See supra* text accompanying note 206.

218. *See* 42 U.S.C.A. § 14071(e)(2). "The identity of a victim of an offense that requires registration under this section shall not be released." *Id.*

219. *See generally* *Femedeer v. Haun*, 35 F. Supp.2d 852 (D. Utah 1999).

220. *Id.*

221. *Id.* The plaintiff challenges the constitutionality of Utah's amendments to registration and notification provisions. *Id.* at 854. The statute was amended to give the public unlimited access to registry information and removed the restriction against retroactive application. *Id.* Without establishing guidelines, the Department of Corrections intended to make registry information available to the public unrestricted, via its Internet website. *Id.* The Department intended to include offenders who were convicted and served their sentences prior to the date the statute was passed. *Id.* The court applied a two part test as in *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Id.* at 855 (using the "intent and effects" test).

222. *See Femedeer*, 35 F. Supp.2d at 855. The challenges were to Double Jeopardy, Equal Protection, Ex Post Facto, and Due Process Clauses. *Id.* The court held that "because the plaintiff cannot establish that dissemination impairs a constitutionally protected interest, he cannot establish a cognizable injury to his reputation," and thus, found that notification does not violate the Due Process Clause. *Id.* at 859. The court also held that the Equal Protection Clause is not violated by public notification and stated the following:

[A]s other courts have found, 'if the purpose of the legislation is to guard against sexual offenses, surely it is rational to proceed by extending the class of persons to whom the regulatory scheme applies to those who have been convicted of sexual offenses in the past' . . . the Equal Protection Clause requires no more than that.

*Id.*



to registry information because the Department of Corrections could not process and respond to the numerous requests for registry information.<sup>223</sup>

Like other federal courts, in analyzing the Double Jeopardy and Ex Post Facto Clauses, the District Court found that community notification was not punitive in legislative intent or deterrent effect, did not impose an affirmative restraint, and was not historically regarded as punishment.<sup>224</sup> However, the court held that Utah's law was excessive and violative of the Double Jeopardy and Ex Post Facto Clauses because registry information published on the state's website was available to anyone without restriction, regardless of whether one would encounter the sex offender.<sup>225</sup> The court reasoned that because no procedural safeguards existed to limit access to registry information to those who need it, the means used were not reasonably related to the law's intent.<sup>226</sup> The District Court also discussed the risk assessments or classifications of offenders used in most other states and indicated that notification statutes passing constitutional muster in other states contained such procedural safeguards.<sup>227</sup> The District Court did not issue an injunction because the Department of Corrections stipulated that it would administer its notification statute in accordance with this decision.<sup>228</sup>

Megan's Law contains the limitations deficient in Utah because it explicitly requires states to release information that is "necessary to protect the public."<sup>229</sup> Clearly, the unrestricted Utah law fails because it permits access to registry information for sex offenders that the public may not even encounter. Logically, the public does not need protection from sex offenders they will not encounter. Consistent with *Femedeer*, it

223. *Id.* at 856. One example was a request to check 100,000 Boy Scout volunteers. *Id.* The 1998 amendment intended to give the Department of Corrections flexibility to develop a more convenient method to handle this problem. *Id.*

224. *Id.* at 859. The District Court found that the legislative intent of the notification statute was remedial and not punitive. *Id.* at 856. The court also reasoned that the adverse effects of notification stem from the offender's own past actions. *Id.* at 857. Further, the court rejected the argument that notification was tantamount to branding him, a sanction historically regarded as punishment. *Id.* The District Court followed the reasoning in *Roe v. Farwell*, 999 F. Supp. 174, 193 (D. Mass. 1998), and found the deterrence argument unpersuasive. *Id.* at 859.

225. *Id.* at 855. The website address in Utah is <<http://www.cr.ex.state.ut.us/soreg/info>>. *Id.*

226. *Id.* at 859. The notification provisions of the 1998 statute violate the Double Jeopardy and Ex Post Facto Clauses "insofar as the statute fails to limit the extent of disclosure to the degree necessary to accomplish the statute's non-punitive goals of assisting in the investigation of sex-related crimes, apprehending offenders, and providing registry information to the possible victims of recidivist offenders." *Id.*

227. *Id.* at 858.

228. *Id.*

229. See 42 U.S.C.A. § 14071(e)(2).

is proposed that if Megan's Law is to pass constitutional muster, limits on access to registry information must be implemented. The public should first provide some type of information showing the need for registry information before gaining access to the database in a particular geographical area. Also, Internet addresses could be different for various areas and access to a site not within one's area would be denied. The court found that "tier" levels or classification of sex offenders is not constitutionally required.<sup>230</sup> Nevertheless, it is advisable for notification laws to provide a ranking system and allow offenders an opportunity to challenge the classification before disseminating registry information. These safeguards protect the Due Process Clause by giving offenders an appeals process.<sup>231</sup> Additionally, this would enable "Tier 1" offenders, who do not pose a threat to the public, to be distinguished from dangerous sex offenders. Therefore, if notification laws follow the limitations in the text of Megan's Law, they will pass constitutional muster.

It is apparent that the same constitutional challenges and arguments to community notification raised in *Femedeer* are made in other federal cases not involving the Internet as a medium used to notify of sex offenders.<sup>232</sup> The District Court did not discuss whether the Internet is a constitutionally acceptable medium, but focused on Utah's lack of procedural safeguards.<sup>233</sup> Therefore, through its own acquiescence, the sole federal court addressing the issues of Megan's Law and the Internet found that using the Internet for community notification is acceptable, so long as safeguards limiting access to registry information by those not needing such information are implemented.

#### IV. CONCLUSION

Megan's Law is constitutional because it is not punitive and because it furthers governmental interests. Congress enacted Megan's Law because sex offenders have a high recidivism rate and there is a need to protect children from such occurrences.<sup>234</sup> The Double Jeopardy and Ex Post Facto Clauses are not violated because community notification is

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230. See *Femedeer v. Haun*, 35 F. Supp.2d 852, 859 (D. Utah 1999). The District Court agreed that risk assessment of a sex offender is not constitutionally required, but the means must be reasonably related to the statute's non-punitive purpose of preventing future sex offenses. *Id.*

231. See *E.B. v. Verniero*, 119 F.3d 1077, 1105-1111 (3d Cir. 1997). Giving offenders the opportunity to challenge their notification plan does not violate the Due Process Clause. *Id.*; see *supra* text accompanying note 41.

232. See generally *Lanni v. Engler*, 994 F. Supp. 849 (E.D. Mich. 1998); *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998); *Doe*, 961 F. Supp. 1105; *Russell*, 124 F.3d 1079 (comparing other cases that resolved similar constitutional challenges made to community notification, but did not address the Internet as a method of notification).

233. See generally *Femedeer*, 35 F. Supp.2d 852.

234. See *supra* text accompanying note 8. See H.R. Rep. 104-555, at 2.

not punishment.<sup>235</sup> Neither the legislative intent, nor the direct or indirect effects of notification constitute punishment of a sex offender. Opponents to notification argue that offenders are discriminated against and threatened because registry information is released, however, these arguments fail in light of statutory provisions prohibiting such public actions.<sup>236</sup> Privacy rights are not violated either because disseminating public information is not a protected right or the information released results from the offender's own misconduct.<sup>237</sup>

The Internet is an acceptable medium to use in releasing information about a sex offender to the public. Using the Internet for Megan's Law is not as invasive, direct, or vast as other acceptable methods used for community notification, nor is it as invasive as using it to solve crimes. In addition to the Supreme Court and Congress recognizing a compelling governmental interest in protecting children from sex offenders<sup>238</sup> and in protecting the Internet from governmental intrusion,<sup>239</sup> an overwhelming majority of the public favors community notification.<sup>240</sup> Regulation of the Internet must be done by Congress or a Commerce Clause violation will result.<sup>241</sup> To date, Congress has not restricted the medium used to achieve the goals of Megan's Law. The only federal case to address the constitutionality of notification and the Internet determined that the state notification statute is constitutional and publishing the names of sex offenders via the Internet is constitutional, provided that public access is limited to those who may potentially encounter the sex offender.<sup>242</sup> This limitation to access is present in the text of Megan's Law.<sup>243</sup> Therefore, Megan's Law is constitutional and using the Internet is an acceptable medium of communication to accomplish this goal.

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235. See *supra* text accompanying notes 155 and 156 (concluding that Double Jeopardy and Ex Post Facto requirements are not violated by community notification).

236. See *supra* text accompanying note 137.

237. See *supra* text accompanying note 173 (concluding that privacy rights are not violated by community notification).

238. See *supra* text accompanying note 21 (illustrating the government's compelling interest in protecting children).

239. See 47 U.S.C.A. § 230 (illustrating the government's interest in promoting the Internet).

240. See Johnson, *supra* note 6, at 9. A 1994 Gallup Poll reveals that eighty-nine percent of adults favored public notification laws requiring police to inform residents of a sex offender in the community. *Id.*

241. See *supra* text accompanying note 69.

242. See *Femedeer v. Haun*, 35 F. Supp.2d 852 (D. Utah 1999).

243. 42 U.S.C.A. § 14071(e)(2). "The State shall release relevant information that is necessary to protect the public." *Id.*