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Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders

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FLORIDA'S COMMUNITY NOTIFICATION OF SEX OFFENDERS ON THE INTERNET: THE DISREGARD OF CONSTITUTIONAL PROTECTIONS FOR SEX OFFENDERS

I. INTRODUCTION

In the early colonial years the commonwealth in America had chosen different forms of "branding" as punishment for members of the community who did not follow the laws.[1] Nathaniel Hawthorne's famous book *The Scarlet Letter* described how the character Hester Pryne was forced to wear a scarlet letter "A" on her clothing to show that she was convicted of adultery.[2] Hawthorne created the protagonist Hester Pyrne to depict the treatment of women in America during the colonial times who defied the moral body of law of society.[3] Hawthorne wrote,

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[1]Doe v. Pataki, 940 F. Supp. 603, 624 (S.D.N.Y. 1996). Branding was used to subject individuals to ongoing public animus based on the premise that the offenders were incorrigible. *Id.* at 623-25. "The message was that the offender was not likely to mend his ways; disgrace would and should last until death." *Id.* at 625.

[2]NATHANIEL HAWTHORNE, THE SCARLET LETTER (Bantam Classic ed. 1986) (1850).

[3]W.P. v. Poritz, 931 F. Supp. 1199, 1215 (D.N.J. 1996), *rev'd sub nom.* E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997).

> But the point which drew all eyes, and, as it were, transfigured the wearer . . . was that Scarlet Letter, so fantastically embroidered and illuminated upon her bosom. It had the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself.[4]

Although the use of the "scarlet letter" was later abandoned, many people have argued that today's culture has restored its concept through the creation of community notification and registration laws that inform the community about members who are convicted sex offenders.[5]

One of the toughest challenges for the courts is determining how to balance society's need for protection against an individual's constitutional rights.[6] The courts have been examining different community notification and registration laws ever since sex offenders began bringing actions arguing that their state's community notification and registration laws should be found unconstitutional. Though the majority of the courts have found the laws to be constitutional, another important question is whether the laws will meet their intended role of helping communities protect children from these offenders who victimize children.

On November 12, 1996, playmates of DeAnn Mu'Minn and Alicia Jones were pallbearers of the two sisters who were slain by a child molester.[7] Police officials say the girls, seven and eleven, were abducted on their way home from school and later strangled to death.[8] Police say that Howard Ault, a convicted child molester and registered sexual predator, confessed to the slayings and to molesting one of the children.[9] Howard Ault is a resident of Florida, which has enacted extremely broad community notification and registration laws in order to disclose information about sex offenders to the community.

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[4] *Id.* at 1216 (quoting a portion of THE SCARLET LETTER, *supra* note 2).

[5] Banishment is something the New York State Assembly intended when creating community notification laws. As an example, Assemblyman Weisenberg publicly expressed the hope that the Act would drive sex offenders out of town and out of the state. *See Doe*, 940 F. Supp. at 626.

[6] David Kaplan, *The Incorrigibles. They Rape. They Defy Treatment. How Can Society Protect Itself?*, NEWSWEEK, Jan. 18, 1993, at 48.

[7] Deborah Sharp, *Small Caskets Rekindle Debate on Sex Offenders Notification Laws; Lack of Consistency from State to State*, USA TODAY, Nov. 13, 1996, at A3.

[8] *Id.*

[9] *Id.*

All the states have created some form of registration[10] of sex offenders, and many states have also formed community notification statutes.[11] Florida's

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[10] ALA. CODE § 13A-11-200 (1994); ALASKA STAT. §§ 12.63.010, 18.65.087 (Michie 1994); ARIZ. REV. STAT. ANN. §§ 13-3821, 41-1750(B) (West 1995); ARK. CODE ANN. § 12-12-901 (Michie 1995); CAL. PENAL CODE § 290-290.7 (West 1996); COLO. REV. STAT. ANN. § 18-3-412.5 (West 1996); CONN. GEN. STAT. § 54-102R (1997); DEL. CODE ANN. tit. 11, § 4120 (1994); FLA. STAT. ch. 775.21 (1996); GA. CODE ANN. § 42-9-44.1 (1997); HAW. REV. STAT. § 707-743 (1996); IDAHO CODE §§ 18-8301-8311 (1997); 730 ILL. COMP. STAT. 150/1 (West 1997); IND. CODE § 5-2-12-1-12 (1996); IOWA CODE ANN. §§ 692A.1-692A.13 (West 1996); KAN. STAT. ANN. § 22-4901 to 4909 (1996); KY. REV. STAT. & R. SERV. ANN. § 17.510 (Banks-Baldwin 1996); LA. REV. STAT. ANN. §§ 15.540-549 (West 1995); ME. REV. STAT. ANN. tit. 34A, §§ 11003, 11004 (West 1995); MD. CODE ANN. § 27-692B (1996); MASS. GEN. LAWS ch. 22C, § 37 (1996); MICH. COMP. LAWS ANN. § 28.721 (West 1996); MINN. STAT. § 243.166 (1996); MISS. CODE ANN. § 45-33-1 (1996); MO. REV. STAT. § 566.600 (1996); MONT. CODE ANN. §§ 46-23-401-507 (1995); 1996 NEB. LAWS 645; NEV. REV. STAT. §§ 207.151-.157 (1995); N.H. REV. STAT. ANN. § 632-A:12 (1994); N.J. STAT. ANN. §§ 2C:7-1-7-5 (West 1995); N.M. STAT. ANN. §§ 29-11A-1-11-8 (Michie 1997); N.Y. CORRECT. LAW § 168 (Consol. 1997); N.C. GEN. STAT. §§ 14-208.5-.13 (1996); N.D. CENT. CODE § 12.1-32-15 (1993); OHIO REV. CODE ANN. § 2950.01 (Banks-Baldwin 1997); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1996); OR. REV. STAT. §§ 181.586, 181.595 (1996); PA. CONS. STAT. ANN. § 42-9791 (West 1995); R.I. GEN. LAWS § 11-37-16 (1995); S.C. CODE ANN. § 23-3-400 (Law Co-op. 1996); S.D. CODIFIED LAWS §§ 22-22-31, 37, 38, 39 (Michie 1995); TENN. CODE ANN. §§ 40-39-101-108 (1996); TEX. REV. CIV. STAT. ANN. § 4413[51] (West 1995); UTAH CODE ANN. § 77-27-21.5 (1997); VT. STAT. ANN. tit. 13, § 5402 (1996); VA. CODE ANN. §§ 19.2-298.1 to 3, 19.2-390.1 (Michie 1997); WASH. REV. CODE ANN. §§ 9A.44.130, 4.23.550 (West 1996); W. VA. CODE §§ 61-8F-1-8 (1996); WIS. STAT. ANN. § 175.45 (West 1996); WYO. STAT. ANN. § 7-19-302 (Michie 1997).

[11] ALA. CODE § 15-10-23 (1996) (notification to former victims), § 15-20-22 (1996) (notification of persons living in proximity to sex offender); ARIZ. REV. STAT. § 13-3825 (1996) (notification of persons living in proximity to certain sex offenders); FLA. STAT. ch. 775.21 (1996) (public notice of presence of sexual predator), ch. 944.606 (1996) (type of information to be provided to the public); IDAHO CODE § 18-8306 (1997) (local community notification), § 9-340 (1997) (limitations on community notification); IND. CODE ANN. § 5-2-12-11 (Michie 1996) (computer disk of offenders sent to schools and child care facilities); IOWA CODE ANN. § 692A.3 (West 1995) (requirements general public must meet before information regarding offender is released); KAN. STAT. ANN. § 45-221 (1996) (police registration records open to public); LA. REV. STAT. ANN. § 15:540 (West 1997) (rationale for community notification), § 15:542 (1997) (records open to public); MASS. GEN. LAWS ch. 6, § 178K (1996) (sex offender registry board to determine how to notify community and when); N.J. STAT. § 2C:7-8 (Michie 1996) (procedure for notification), 2C:7-10 (Michie 1996) (forms of notification not limited by act); N.C. GEN. STAT. § 14-208.10 (1996) (public access to registration information); N.D. CENT. CODE § 12.1-32-15 (1997) (disclosure to public by law enforcement); OKLA. STAT. tit. 57, § 584 (1996) (notification to entities that provide services to children); OR. REV. STAT. § 181.586 (1996) (limitations on public notification), § 181.589 (1996) (notice to juvenile sex offender); 42 PA. CONS. STAT. ANN. § 9797 (West 1996) (notification to victim), § 9798 (1996) (other notification); S.D. CODIFIED LAWS § 22-22-34 (Michie 1996) (notification to criminal justice organizations); VA. CODE ANN. §§ 19.2-390.1 (Michie 1997) (notification for schools and daycares); WASH. REV. CODE ANN. § 43.43.745 (West 1996) (notification to local agencies).

community notification law,[12] which is the focus of this Note, has created a form of community notification that includes posting information about sex offenders on the Internet.[13] Most courts that have upheld community notification laws have focused on the importance of the police notifying the neighborhood where the offender plans to live and work.[14] This approach, utilized by the courts to examine the constitutionality of community notification statutes, makes Florida's use of the Internet unique, because the information is easily accessible to anyone with a computer.

This Note provides an analysis of the controversy concerning community notification of sex offenders who victimize children, with the discussion directed to the constitutionality of community notification over the Internet, and suggests other possible ways to help prevent repeat sex offenses against children. Part II begins by focusing on which members of our communities are sex offenders that victimize children and looks at the reasons why they choose children as their victims. In Part III, this Note traces the development of community notification laws by focusing on the Federal Violent Crime Control and Law Enforcement Act of 1994,[15] which was based on New Jersey's Megan's Law,[16] and then examines Florida's recently enacted Sexual Predator Act.[17] Part IV discusses constitutional challenges in general and then analyzes how federal and state courts have applied them to statutes that allow for community notification and registration of sex offenders.[18]

In conjunction with the discussion of these constitutional challenges, this Note extends the analysis to Florida's unchallenged statute which allows the law enforcement to provide community notification on the Internet. It is further proposed that Florida's listing of sex offenders on the Internet should be found unconstitutional based on the Eighth Amendment's cruel and unusual clause[19]

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[12]FLA. STAT. ch. 775.21 (1996).

[13]*Florida Department of Law Enforcement Web Site* (visited Feb. 10, 1996) <http://www.fdle.state.fl.us.> [hereinafter *Florida Web Site*].

[14]*See infra* note 154 and accompanying text.

[15]Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (1997).

[16]N.J. STAT. ANN. §§ 2C:7-1-7-5 (West 1995).

[17]FLA. STAT. ch. 775.21 (1996).

[18]*See infra* note 152 and accompanying text.

[19]Cruel and unusual punishment is any punishment so disproportionate to the offense as to shock the moral sense of the community. BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

and the right to privacy[20] because the notification provisions of the law can arguably be seen as a form of punishment instead of being used for the purpose of protecting the children in the community where the sex offender lives and works. In Part V, this Note looks to other methods of dealing with society's fear of sex offenders that would not violate the Constitution.[21]

II. BACKGROUND OF SEX OFFENDERS

There is no set standard to determine who is a sex offender, which helps explain why state legislatures have decided to find a way to keep track of all sex offenders as soon as they commit a single offense. In general, sex offenders that choose to victimize children are characterized under two similar labels: pedophile and child molester.[22]

Pedophilia, which translates literally as "a love of children" is defined as a six month period of recurrent, intense sexual urges and sexually arousing fantasies that involve sexual activity with prepubescent children, generally age thirteen or younger.[23] In order to be characterized as a pedophile, the individual must experience marked distress by these urges.[24]

However, most perpetrators of child sexual abuse are characterized as child molesters, herein defined as older persons whose conscious sexual desires or responses are directed, at least in part, toward dependent, developmentally immature children and adolescents who do not fully comprehend those actions and are unable to give informed consent.[25] There is no required period of time that the individual must recurrently act on these desires in order to be labeled a child molester. Even though the medical community has distinguished child molesters and pedophiles, the Florida Legislature did not recognize the distinction when it created the sex offender registration and notification statutes.

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[20] The right to privacy is said to exist so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain or malice. Id. at 1195 (6th ed. 1990). *See also* Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298 (1924) (early example of a right to privacy).

[21] David G. Savage, *Sex Offender Case to Go Before Supreme Court: Justices to Decide if Dangerous Pedophiles and Repeat Rapists Can Be Kept in Prison After Term Expires. Ruling Could Affect Laws in California*, LOS ANGELES TIMES, June 8, 1996, at A12.

[22] For the purpose of this Note, the author will only use the term pedophile. However, child molesters should also be read into the analysis.

[23] Kenneth J. Fuller, *Child Molestation and Pedophilia: An Overview for the Physician*, 261 JAMA 602, 602 (Jan. 27, 1989). *See also* RICHARD A. GARDNER, TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE 45-51 (1992)(discussing the meaning of pedophilia).

[24] GARDNER, *supra* note 23, at 45-51.

[25] *Id.*

In most cases, the child and the parents know the pedophile;[26] pedophiles are rarely strangers.[27] The Bureau of Justice Statistics, along with the Office of Juvenile Justice and Delinquency Prevention, completed a 1991 survey of inmates in state correctional facilities through personal interviews focusing on male inmates.[28] This study found that forty-five percent of the offenders in prison for sexually abusing a child committed the offense against their own children or another family member.[29] The study also indicated that forty percent of sex offenses are committed by an acquaintance.[30] Lastly, the study found that only ten percent of sex offenses against children were committed by a stranger.[31]

Those who stereotype the child molester as a "dirty old man" ignore the large percentage of sex offenders who are in their mid-thirties or younger. Pedophiles stretch across all age ranges. However, they tend to fall within three major clusters.[32] The first is adolescence, the second group is in their mid-thirties, and the last group is around age sixty.[33] The classic "dirty old man" stereotype does not occur nearly as frequently as the other two groups.[34]

Child molesters target alarmingly young victims. Case reports of the sexual abuse of male children document that such abuse can occur in infancy and throughout childhood and adolescence.[35] However, the typical male victim of sexual abuse is between eight and thirteen years old, and the perpetrator is typically a trusted male authority figure.[36] Other statistics show an average of

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[26] *See* Bureau of Justice Statistics, U.S. Dept. of Justice, *Child Victimizers: Violent Offenders and Their Victims*, 10 tbl. 13 (1996) [hereinafter Bureau of Justice].

[27] KENNETH PLUMMER, ADULT SEXUAL INTEREST IN CHILDREN 224 (Mark Cook & Kevin Howells eds., 1981). One study showed that twelve percent of girls engaged in pedophiliac acts were involved with a stranger. *Id.* Another showed sixteen percent. *Id.* The relationship of boys to strangers is even less common. *Id.* at 224-25.

[28] *See* Bureau of Justice, *supra* note 26, at 23.

[29] *Id.* at 10. Furthermore, an average of forty-nine percent of sex offenses against children are committed in the victim's home. *Id.* at 12.

[30] *Id.* at 12.

[31] *Id.*

[32] *See* PLUMMER, *supra* note 27, at 224.

[33] *Id.*

[34] *Id.* Clinical experience suggests that the most common age of onset is adolescence. *Id.* This is the time when individuals generally become active and establish their sexual identities. *Id.* However, child molesting behaviors may occur for the first time at any age. *Id.*

[35] Dennis J. Butler, *Men Sexually Abused in Childhood Sequelae and Implications for the Family Physician*, ARCHIVES OF FAM. MED. (Jan. 1993).

[36] *Id.*

fifty-two percent of victims being under the age of twelve, leaving forty-eight percent of the victims in the twelve to seventeen age range.[37]

Pedophiles are completely different from other sex offenders. These offenders perceive a benefit to the child as a result of sexual contact, they feel there is complicity on the child's part in such behavior, and they feel less responsible for the initiation.[38]

Further, sex offenders do not fall within easily defined profiles. Researchers have not determined a way to differentiate pedophiles from the general population based on race, religion, intelligence, education, occupation, or social class.[39] Societal fears about not knowing who could be a pedophile have become elevated by studies that show pedophiles victimize multiple children.[40] Based on these fears, the need to prevent offenses committed by pedophiles is obvious, but it is not clear whether community notification will help.

III. LEGISLATIVE BACKGROUND FOR REGISTRATION AND NOTIFICATION OF SEX OFFENDERS

A. Federal Violent Crime Control and Law Enforcement Act

Perhaps no category of crime has received more legislative attention in recent years than crimes against children involving sexual acts and violence.[41] Tragic stories like that of seven-year-old Megan Kanka, who was raped and murdered by a neighbor previously convicted of two other sex offenses against children, led to the creation of federal and state community notification and registration laws.[42] The driving force behind the community notification laws was to decrease the recidivism of sex crimes against children by pedophiles.[43] Shortly thereafter the state of New Jersey, where Megan Kanka had lived, created a statute that allowed for the registration and community notification of sex

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[37] *See* Bureau of Justice, *supra* note 26, at 2.

[38] *See* Fuller, *supra* note 23, at 603. The motivation that leads to an individual being a pedophile includes both sexual and nonsexual factors. *Id.* These include stress, dysfunctional family home situation, familial violence, substance abuse, interpersonal deficits, and antisocial mores. *Id.*

[39] *See* Bureau of Justice, *supra* note 26, at 5-6. It seems clear that pedophilia, like many childhood disorders, may have its roots in some childhood sexual trauma. Alice Park, *Crimes Against Children*, TIME INT'L, Sept. 2, 1996, at 25. Pedophiles are almost exclusively male. *Id.*

[40] *See* Bureau of Justice, *supra* note 26, at 10.

[41] H.R. REP. NO. 104-555, at 1 (1996).

[42] *See, e.g.*, Michelle Reuss, *Rapists Will Challenge Megan's Law: Seek to Block Public Notification Rule*, RECORD, Dec. 31, 1994, at A1.

[43] 42 U.S.C. § 14071 (1997).

offenders, the federal government followed by creating the Jacob Wetterling Act, which is also known as "Megan's Law."[44]

Congress set out to create a statute that would allow for community notification and registration of sex offenders. Through this Act, Congress created a guideline for each state that implemented its own system of community notification.[45] The Act allows states to implement a system where all persons who commit sexual or kidnapping crimes against children, or who commit sexually violent crimes against any person, are required to register their addresses with the state upon their release from prison.[46] If the states follow the federal Act, the state law enforcement agencies must also release "relevant information" about an offender if they deem it necessary to protect the public.[47] While this Act does not mandate that states comply with its provisions, a state's failure to implement such a system by September of 1997 results in that state losing part of its annual federal crime-fighting funds.[48]

The Act creates two categories of sex offenders. The first category is comprised of individuals who are generally convicted of a sex crime against a minor or other types of sex crimes.[49] "Sexual predators" comprise the second category.[50] The first category must register with every state that they live in for ten years following release from prison.[51] The Act specifically grants the courts the right to determine if someone fits under the more serious category labeled "sexual predator."[52] The court can only make a determination that an offender is no longer a sexually violent predator after receiving a report by a state board composed of experts in the fields of the behavior and treatment of sexual offenders.[53]

Sexual predators must register annually until the determination is made that the offender is no longer a sexual predator.[54] General sex offenders must register annually until ten years after release.[55] There is no standard that

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[44] *See, e.g.*, N.J. STAT. ANN. § 2C:7-1 (West 1995).

[45] *Id.*

[46] H.R. REP. NO. 104-555, at 1. "It is bad enough that some convicted sex offenders are ever released. At the very least we should let people know when they move into our neighborhood." 142 CONG. REC. H10101 (Sept. 5, 1996).

[47] H.R. REP. NO. 104-555, at 1.

[48] *Id.*

[49] *Id.*

[50] 42 U.S.C. § 14071(a)(1)(A)(B) (1997).

[51] 42 U.S.C. § 14071(b)(6)(A) (1997).

[52] 42 U.S.C. § 14071(a)(2) (1997).

[53] *Id.*

[54] 42 U.S.C. § 14071(b)(6)(A).

[55] *Id.*

requires the judge to make further classifications within these two categories according to the seriousness of their offenses.[56] Once a court determines that an offender is a sex offender or sexual predator, state law enforcement agencies must immediately enter all registration information into the appropriate state law enforcement record system and notify the appropriate law enforcement agency having jurisdiction where the person expects to reside.[57]

The Act has recently been amended by making it mandatory for the state police to release relevant information in order to protect the public from sexually violent offenders.[58] This amendment states that the information collected under a state registration program[59] may be disclosed for any purpose permitted under the laws of the state.[60] The Act specifically explains that the designated state law enforcement agency and any local law enforcement agency authorized by the state agency shall release relevant information that is necessary to protect the public concerning a specific person

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[56] Federal law provides a list of offenses against children that the state laws should apply to:

(i) kidnapping of a minor, except by a parent;
(ii) false imprisonment of a minor, except by a parent;
(iii) criminal sexual conduct toward a minor;
(iv) solicitation of a minor to engage in sexual conduct;
(v) use of a minor in a sexual performance; and
(vi) solicitation of a minor to practice prostitution.

42 U.S.C. § 14071(a)(3)(A) (1997).

[57] 42 U.S.C. § 14071(b)(2) (1997). A state registration program established under this section must include the following elements:

(A) Duty of a state official or court to:
(i) inform the person of the duty to register and obtain the information necessary for such registration;
ii) inform the person that if the person changes residence, the person shall give a new address to a designated State law enforcement agency in writing within 10 days; and
iii) obtain fingerprints and a photograph of the person.

42 U.S.C. § 14071(b)(1)(A) (1997).

[58] Pub. L. No. 104-145, 110 Stat. 1345 (1996).

[59] 42 U.S.C. § 14071(a) sets forth that the Attorney General of each state shall establish guidelines for State programs that require:

(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 with a designated State law enforcement agency;
(B) person who is a sexually violent predator to register a current address with a designated State law enforcement agency unless such requirement is terminated under subsection (b)(6) regarding length of registration.

Id.

[60] Pub. L. No. 104-145, 110 Stat. 1345 (1996).

required to register under this section.[61] There is no indication by Congress that certain procedures for community notification of sex offenders must be adopted by the states when creating these laws. Rather, as explained by Assistant Attorney General Andrew Fois, "the Act accords states discretion concerning the standards and procedures to be applied in determining whether a registering offender constitutes a danger to the public, and concerning the nature and extent of disclosure necessary to protect the public from such an offender."[62]

Lastly, the federal legislation has approved the creation of a new statute[63] that requires state law enforcement agencies to send all registration information under this Act to the Federal Bureau of Investigation ("FBI") in order to incorporate all listed offenders into one FBI database.[64] The FBI will be allowed to notify the community whenever it is necessary to protect the public.[65] The new legislation adds to the Jacob Wetterling Act by doing three things. First, it creates a nationwide system that will help state and local law enforcement agencies track offenders as they move from state to state.[66] Second, while most States have established tracking systems, this legislation ensures that there is no place where sexual predators can hide and not register.[67] Finally, this legislation ensures that the most serious predators will be registered with law enforcement officials for the rest of their lives.[68]

B. Florida's Sexual Predator Act

Florida is required to follow the requirements set forth in the Federal Violent Crime Control and Law Enforcement Act of 1994 when creating laws for community notification and registration of sex offenders in order to receive federal funding. In 1996, Florida made some changes to its previous statutes in order to meet the suggested guidelines conveyed in the Violent Crime Control and Law Enforcement Act of 1994. The final statute sets forth a strategy to promote public safety. The strategy includes requiring the registration of sexual predators, with a requirement that complete and accurate information be

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[61] 42 U.S.C. § 14071(d)(2) (1997). However, the identity of a victim of an offense that requires registration under this section shall not be released. *Id.* The requirement that states inform the public when necessary was a recent amendment to the Act. This requirement was based on the problem of certain law enforcement agencies expressing reluctance to inform the public. H.R. REP. NO. 104-555.

[62] H.R. REP. NO. 104-555, at 1.

[63] Pam Lynchner Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. § 14072 (1997).

[64] *Id.*

[65] 42 U.S.C § 14072.

[66] 142 CONG. REC. H11130 (Sept. 25, 1996).

[67] *Id.*

[68] *Id.*

maintained and accessible for use by law enforcement agencies, communities, and the public.[69] Furthermore, the strategy provides for community notification concerning the presence of sexual predators.[70] The information provided to the community includes information set forth in the registration; however, it excludes the identity of the victim.[71]

The Florida legislature made several findings about sex offenders before creating the Sexual Predators Act. First, the legislature found that sexual offenders[72] pose a high risk of engaging in sexual offenses even after being released from incarceration or commitment and that protection of the public from sexual offenders is of paramount importance.[73] The legislature listed repeat sex offenders, sex offenders who use physical violence, and sex offenders who prey on children, as sexual predators who present an extreme threat to the public safety.[74] Based upon these findings, the state legislature determined there is a compelling state interest in protecting the public from sexual predators.[75] Furthermore, the legislature concluded that the findings justified requiring the public notification and registration of sexual predators.[76]

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[69] FLA. STAT. ch. 775.21(3)(b)(3) (1996). "Community" is defined by the legislature as any county where the sexual predator lives or otherwise establishes temporary or permanent residence. FLA. STAT. ch. 775.21(2)(b) (1996). The legislature did not define "public."

[70] FLA. STAT. ch. 775.21(3)(b)(4). The statute also provides for the following:

(1) Incarcerating sexual predators and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space.
(2) Providing for specialized supervision of sexual predators who are in the community by specially trained probation officers with low caseloads.
(3) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

FLA. STAT. ch. 775.21(3)(b)(1)(2)(5).

[71] FLA. STAT. ch. 775.21(7)(a) (1996). The Supreme Court has held that the press cannot publish the name of a rape victim. Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

[72] A "sex offender" is defined as a person who has been convicted of a felony violation of chapter 794 (sexual abuse), chapter 800.04 (lewd, lascivious, or indecent assault or act upon or in presence of a minor), chapter 827.071 (abuse of children), chapter 847.0145 (selling or buying of minors), or a violation of a similar law of another jurisdiction, when the department has received verified information regarding such conviction. FLA. STAT. ch. 944.606 (1996).

[73] FLA. STAT. ch. 944.606.

[74] FLA. STAT. ch. 775.21(3)(a) (1996).

[75] *Id.*

[76] FLA. STAT. ch. 775.21(3)(c). The legislature based this decision on the fact that many sex offenders have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. *Id.*

Under Florida's law, a judge must make a written finding at an offender's sentencing before the individual can be classified as a sexual predator.[77] To be considered a sexual predator, an individual must be convicted of a first-degree felony count of sexual battery.[78] However, individuals convicted of second-degree sex crimes can also be defined as predators if they have a history of sexual offenses or have committed more than one crime.[79]

In instances where courts fail at the time of sentencing to make a written finding that the offender should be labeled a sexual predator, the amended statute allows the state attorney to bring the matter to the court's attention to establish if the offender meets the sexual predator criteria.[80] If the court makes a written finding that the offender is a sexual predator the offender is designated as a sexual predator, and must register or be registered as a sexual predator subject to community and public notification provisions.[81]

Florida's registration of sexual predators includes the following information: name, social security number, age, race, sex, date of birth, height, weight, hair color, eye color, photograph, address of legal residence, address of any current temporary residence, date and place of employment, date and place of each conviction, fingerprints, and a brief description of the crime or crimes committed by the offender.[82] The law enforcement agency may also add any other relevant information, including criminal and correction records, treatment records, abuse registry records, and evidentiary genetic markers when available.[83]

Following the federal Act, the Florida legislature determined that all information regarding any sexual offender released after a period of incarceration must be provided to the community. Upon notification of a sexual predator's residence in the community, the county sheriff or the municipality's chief of the police where the sexual predator temporarily or permanently

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[77] FLA. STAT. ch. 775.21(4)(a)(1) (1996).

[78] Tim Roche, *Web Site Identifies Sex Crime Convicts*, ST. PETERSBURG TIMES, Sept. 16, 1996, at 1B.

[79] *Id.*

[80] FLA. STAT. ch. 775.21(4)(a)(2)(b). For a current offense committed on or after Oct. 1, 1993, and before Oct. 1, 1995:

(1) The offender that has been registered as a sexual predator by the Department of Corrections shall have his name removed.
(2) The department should notify the state attorney who prosecuted the offense that triggered the administrative sexual predator designation for the offender.
(3) The state attorney may bring the matter to the court's attention in order to establish that the offender meets the sexual predator criteria.

Id.

[81] FLA. STAT. ch. 775.21(4)(1996).

[82] FLA. STAT. ch. 775.21(6)(a)(1) (1996).

[83] FLA. STAT. ch. 775.21(6)(a)(2).

resides shall notify the community and the public of the presence of the sexual predator in a manner deemed appropriate by the sheriff or the chief of police.[84] This information must include the sexual predator's name, physical description, a photograph, current address, the circumstances of the offense or offenses, and the victim's age.[85]

The federal Act did not state any specifics on how the community may be notified when a sex offender moves into the neighborhood. The Florida legislature decided to allow for community[86] notification of sex offenders over the Internet.[87] Upon entering the Florida Department of Law Enforcement web site, the viewer sees blinking red letters above each sexual predator's photograph with the message "Warning" and sirens on each side.[88] Below is a terse description of the sexual predator.[89] This description includes the sexual predator's race, date of birth, social security number, scars, last known address, county, sex, height, weight, and a comment concerning the sexual act or acts committed by the individual.[90]

Included on the web site is an old list of 317 offenders which has become inaccurate because of the recent amendment of Florida's sexual predator law.[91] The old list is not updated, yet the information about the individuals remain on the Florida Internet site even if the individuals do not meet the criteria set forth in the amended statutes.[92] A new, smaller list exists as well.[93]

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[84] FLA. STAT. ch. 775.21(7)(a) (1996). The sheriff or the police chief may coordinate the community and public notification efforts with the department. *Id.* Statewide notification to the public is authorized, as deemed appropriate by local law enforcement personnel and the department. FLA. STAT. ch. 775.21(7)(b). The department shall adopt a protocol to assist law enforcement agencies in their efforts to notify the community and the public of the presence of sexual predators. *Id.* The department, in consultation and cooperation with the Department of Highway Safety and Motor Vehicles, shall determine the feasibility of requiring sexual predators to have a special designation on a driver's license. FLA. STAT. ch. 775.21(7)(c).

[85] FLA. STAT. ch. 775.21(7)(a)(1)-(5).

[86] *See supra* note 65. This use of the term "community" does not meet the qualification set forth in the legislature's definition.

[87] *See Florida Web Site, supra* note 13 (visited Jan. 14, 1997). Florida has also established a toll free number, 1-888-FL-PREDATOR, which allows the public to request information twenty-four hours a day, seven days a week, about specific predators living in their communities and around the state.

[88] *See* Roche, *supra* note 78, at 1B.

[89] *Id.*

[90] *Florida Web Site, supra* note 13 (visited Jan. 14, 1997).

[91] Roche, *supra* note 78, at 1B.

[92] *See id.* The old list, which will not be updated, warns that some of the people listed may not qualify as sexual predators under the current law. Prosecutors said the list in some instances is inaccurate. *Id.*

[93] *Id.* The Florida web site does state that positive identification of a person believed to be a sexual predator cannot be established unless a fingerprint comparison is made.

IV. LEGAL DISCUSSION OF POSSIBLE CONSTITUTIONAL CHALLENGES

A. Violation of the Right to Privacy

Courts have stated there is a well-recognized, though ill-defined, right to privacy under the United States Constitution.[94] Generally, the right may be broken down into two components. The first involves the right to avoid disclosure of personal matters.[95] The second component shields a person's right to make important and intimate decisions, such as the decision to have an abortion, unfettered from governmental regulation.[96] Most individuals released from prison would argue they have served their time and now should be free from limitations imposed by the government.[97] The courts recognize that an offender who has been subject to community notification has suffered a decrease in his privacy, as the word is commonly understood: "People know things about him that he would rather keep to himself."[98] However, this does not mean the courts will find a constitutional right to privacy preventing such disclosures.[99]

The Supreme Court has examined the right to privacy for shoplifters. In *Paul v. Davis*, the police distributed information on flyers containing mug shots of criminals who had been active in various criminal fields in high density shopping areas.[100] The flyers stated they were being distributed to businessmen so the recipients could inform their security personnel to watch for these subjects.[101] The Court determined that to find a right to privacy there must be a fundamental liberty interest relating to marriage, procreation, contraception, family relationships, or child rearing.[102] The Court determined

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Florida Web Site, *supra* note 13 (visited Jan. 14, 1997). Furthermore, it is illegal to use public information regarding a registered sexual predator to facilitate the commission of a crime. *Id.*

[94] *See, e.g.*, Rowe v. Burton, 884 F. Supp. 1372, 1384 (D. Alaska 1994).

[95] Whalen v. Roe, 429 U.S. 589, 599-600 (1977). *See generally* Doe v. City of New York, 15 F.3d 264 (2d Cir. 1994) (individual's right to privacy concerning HIV status).

[96] *Rowe*, 884 F. Supp. at 1384.

[97] Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 96 (Winter 1996). It follows that once released from prison, offenders should reasonably expect that they can keep their criminal pasts private and begin to rebuild their lives. *Id.* at 96-97.

[98] Opinion of the Justices of the Senate, 668 N.E.2d 738, 756 (Mass. 1996).

[99] *Id.*

[100] Paul v. Davis, 424 U.S. 693, 695 (1976).

[101] *Id.* The flyer stated these persons had been arrested during 1971 and 1972 and included photographs and names. *Id.*

[102] *Id.* at 713. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (right to an abortion as a privacy issue); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy right of married

that the disclosure of the facts from a shoplifting charge are not part of the sphere considered "private" and thus declined to enlarge the right to privacy to include this type of disclosure.[103] Hence, the conclusion to be drawn is that there will not be a right to privacy against information being placed on the Internet regarding sex offenders because it is not a fundamental right.[104]

The New Jersey Supreme Court applied a balancing test to determine whether the right to privacy has been violated. In *In re Registrant G.B.*, the court acknowledged that "a privacy interest is implicated when the government assembles diverse pieces of information into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity."[105] Furthermore, the court added that community notification implicates a privacy interest.[106] The balancing test that has commonly been used in the discussion of notification of sex offenders is whether the offender's privacy interest outweighs the public interest to obtain the information[107] as it relates to the state's asserted purposes of crime prevention.[108]

The District Court of Alaska in *Rowe v. Burton* stated that information in a registry concerning an offender's job location, residence, driver's license number, date of conviction, and nature of the convictions is generally considered public information.[109] "Such information does not reveal intimate facts traditionally protected from disclosure by the federal right to privacy."[110] However, the court determined that if the information in the registry is to be accessible to the public, then the balancing of hardships would tip in favor of

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couples to use contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942)(procreation determined to be fundamental); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing and education).

[103]*Paul*, 424 U.S. at 713. *But see* Nixon v. Warren Communications, 435 U.S. 589 (1978)(holding the press had no right to copies of presidential tape recordings).

[104]However, Florida's use of the Internet can be distinguished because it allows for more information to be accessible to the public, besides the offender's name, picture, and offense. *See supra* note 78 and accompanying text.

[105]*In re* Registrant G.B., 685 A.2d 1252, 1254 (N.J. 1996).

[106]*Id.*

[107]Most courts addressing the right to confidentiality have applied a balancing or intermediate standard of review. *See, e.g.*, National Treasury Employees Union v. United States Dep't of Treasury, 25 F.3d 237 (5th Cir. 1994); Doe v. Attorney Gen. of the United States, 941 F.2d 780 (9th Cir. 1991); Igneri v. Moore, 898 F.2d 870 (2d Cir. 1990). *See also* Doe v. Poritz, 662 A.2d 367, 406 (N.J. 1995)(giving further discussion of cases dealing with the right to privacy).

[108]*See* Lewis, *supra* note 97, at 96.

[109]Rowe v. Burton, 884 F. Supp. 1372, 1384 (D. Alaska 1994).

[110]*Id.*

the offenders.[111] Based on this opinion, Florida's use of the Internet to post information about sex offenders should be found to be a violation of the right to privacy.

In general, most courts limit information that will be accessible to the public through a classification system based on the probability the sex offender will cause future harm.[112] Courts have also determined that community notification systems which utilize a classification system will not violate a right to privacy because the information will be disclosed based on the seriousness of the offense.[113] However, Florida does not utilize a classification system. In Florida, all sex offenders are classified as sexual predators without regard to the probability of future criminal behavior.[114] Therefore, courts might find a violation of the right to privacy under Florida's law for offenders who have committed lesser offenses.[115] To prevent this from occurring, Florida's legislature should follow the majority of states by amending the law to include a classification system.

The court in *Doe v. Poritz*[116] determined that a privacy interest existed with regard to certain information provided under the community notification provision, and adopted a seven-step test to determine whether the state's interests still justified disclosure: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.[117] Based on these factors, the New Jersey Supreme Court determined the state interest in public disclosure substantially outweighed the sex offender's privacy interest.[118]

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[111] *Id.* at 1385.

[112] *See generally* Artway v. Attorney Gen., 876 F. Supp. 666 (D.N.J. 1995); *In re* Reed, 663 P.2d 216 (Cal. 1983); Roe v. Pataki, 919 F. Supp. 691 (S.D.N.Y. 1996); Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

[113] *See, e.g.*, Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

[114] FLA. STAT. ch. 775.21(a) (1996).

[115] *See supra* notes 104-06 and accompanying text.

[116] *Doe*, 662 A.2d at 411.

[117] *Id.* These factors have generally been applied in cases involving disclosures to the government, not the general public. *Id. But see* Ms. B. v. Montgomery County Emergency Serv., Inc., 799 F. Supp. 534 (E.D. Pa. 1992), *aff'd*, 989 F.2d 488 (3d Cir. 1993)(granting motion for summary judgment to state mental health professionals who disclose threats made by patients during course of treatment).

[118] *See Poritz*, 662 A.2d at 411. The court determined that the degree and scope of disclosure is carefully calibrated to the need for public disclosure. *Id.* at 412.

In reaching this conclusion, the court in *Poritz* set forth the following reasoning. First, the information disseminated to notify the public is not deserving of a high degree of protection.[119] Second, because of the public nature of the information, there is no harm either from nonconsensual disclosure or damage to the relationship in which the records were generated.[120] Lastly, the court reasoned that the invasion of the fundamental right to privacy was minimized by using the narrowest means to achieve the public purpose.[121]

When utilizing the test from *Doe v. Poritz*, there are constitutional concerns that seem apparent in the existing Florida statute for community notification of sex offenders. First, some of the information is deserving of a high degree of protection. For example, the listing of an individual's social security number on the Internet is not necessary to protect the public[122] and should be given a higher degree of protection than the offender's name, sex, and height.[123] Furthermore, there is a risk of harm that may occur to the sex offender.[124] Listing the social security number of sex offenders will increase the possibility of exposing other intimate details of an offender's life.[125]

Another problem of Florida's notification provision, concerning the right to privacy, is that there is no system of classification.[126] Other states have a tier system that limits the amount of community notification depending on the risk

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[119] *Id.* at 411.

[120] *Id.* The court noted that there was no risk of exposing intimate details of the offender's life. *Id.* at 412.

[121] *Poritz*, 662 A.2d at 411. *See also* Lehrhaupt v. Flynn, 356 A.2d 35, 37 (N.J. 1976)(concluding that even if the governmental purpose is legitimate and substantial, the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose).

[122] *See supra* notes 68-71 and accompanying text.

[123] *See supra* note 78 and accompanying text. There is an express public policy militating toward disclosure: the danger of recidivism posed by sex offenders. *Poritz*, 662 A.2d at 411.

[124] The New Jersey Supreme Court stated it had no right to assume that the public will act punitively when the legislature did not. *Poritz*, 662 A.2d at 367. Furthermore, it found no reason to believe that the community leaders, public officials, and law enforcement authorities would not seek to educate the public concerning the legislature's intent, including appropriate responses to notification provisions. *Id. But see infra* note 210 (example of vigilantism by a community, including acts by local politicians in the community, where the offender moved).

[125] However, the web site does state that it is illegal to use public information regarding a registered sexual predator to facilitate the commission of a crime. *See supra* note 91.

[126] *See supra* note 72. A sex offender is someone who poses a high degree of risk of engaging in sexual offenses even after being released from incarceration. FLA. STAT. ch. 944.606(2)(1996). However, all sex offenders are then grouped together under the label sexual predator. FLA. STAT. ch. 775.21 (1996).

of reoffense and the likelihood that the offender will encounter those individuals who receive the information.[127] This limited protection of the offender's privacy is not employed by Florida. Instead, Florida law allows the information to be given to anyone. Lastly, even if the government purpose[128] is legitimate, the invasion of the right to privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose. There are many other ways that Florida may protect the community methods that are not as invasive as the use of the Internet.[129]

The state courts have not recognized a United States Supreme Court decision "where the constitutional right to privacy was found to have been violated by a governmental disclosure of information properly in its possession that the individual would rather not have disseminated."[130] However, the courts have acknowledged the proposal that there is a right to privacy regarding information that is compiled as a matter of public record.[131] The United States Supreme Court dealt with the relation of the right to privacy and the Freedom of Information Act (FOIA) in *United States Department of Justice v. Reporters Committee for Freedom of the Press*.[132] The facts involved a denial of a FOIA request by the press to the FBI. The request was made to obtain certain information in a "rap sheet" concerning Charles Medico, who allegedly had

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[127]New Jersey has a three-tier system that is used for community notification of sex offenders.

(1) If risk of reoffense is low, law enforcement agencies likely to encounter the person registered shall be notified.
(2) If the risk of reoffense is moderate, organizations in the community including schools, religious and youth organizations shall be notified, in addition to the notice required by paragraph (1) of this subsection.
(3) If risk of reoffense is high, the public shall be notified through means in accordance with the Attorney general's guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required in paragraphs (1) and (2) of this subsection.

N.J. STAT. ANN. § 2C:7-8c (West 1995).

[128]*See supra* notes 72-76 and accompanying text.

[129]*See supra* note 87 (listing of a toll free number for those individuals who live in community to find out information about local sex offenders).

[130]*See Opinion*, 668 N.E.2d at 757.

[131]*See id.* However, at least one court has rejected that opinion on the grounds that the decision was to only be applied to situations concerning FOIA directly; the court decided there was no relation to the constitutionally protected right to privacy. *See* Lewis, *supra* note 97, at 99.

[132]United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1988). *See also* Forsham v. Harris, 445 U.S. 169 (1980) (strict interpretation of FOIA not to include items not technically within the possession and control of an agency covered by the Act, even though the agency could have acquired or once had in their possession the documents which contained the information).

relations to the Mafia.[133] The press argued that the information was a matter of public record and should be given out.[134] The Court held the disclosure of information on an FBI rap sheet to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of exemption 7(C)[135] of the FOIA and therefore was prohibited by that exemption.[136]

The above holding could be relevant in a limited manner to the present situation of community notification over the Internet. Some have expressed that a FOIA right to privacy has nothing to do with a constitutional right to privacy.[137] However, it should be noted that both sets of information go directly to the FBI database.[138] Presently, the FBI limits the amount of information that it distributes to the press under FOIA. From this, one could expect that the limitation on the press for accessibility of information would, on policy grounds, lead to further limitations to the general public. Despite the fact that the above case only dealt directly with FOIA, one could reason that government compilations of offender information on the Internet should not be released. The information that is in the FBI database, which includes state records, would be easily accessible to any member of the press who would not have to go through the categorical decision making that is usually necessary under the exemption in FOIA.[139]

B. Eighth Amendment Cruel and Unusual Punishment

The Eighth Amendment states: "Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[140] "The

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[133] *See Reporters Comm.*, 489 U.S. at 749.

> The Pennsylvania Crime Commission had identified Medico's family company as a legitimate business dominated by organized crime figures, and since the company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman, [the CBS press] asserted that a record of financial crimes by Medico would potentially be a matter of public interest.

Id.

[134] *Id.*

[135] 5 U.S.C. § 552(b)(7)(C).

[136] *See Reporters Comm.*, 489 U.S. at 751.

[137] *See Opinion*, 668 N.E.2d at 757.

[138] *See supra* note 57.

[139] *See supra* note 59. Where the subject of a rap sheet is a private citizen and the information is in the government's control as a compilation, rather than as a record of what the government is up to, the privacy interest in maintaining the rap sheet's "practical obscurity" is always at its apex while the FOIA based public interest in disclosure is at its nadir. *See Reporters Comm.*, 489 U.S. at 750.

[140] U.S. CONST. amend. VIII. Once a notification provision is considered to be cruel and unusual punishment, it will also violate the ex post facto and double jeopardy

basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[141] Courts are faced with many sex offenders bringing forward claims "that community notification, like branding, stocks, and other measures intended to expose the offender to public obloquy and humiliation, offends the evolving standards of decency, and therefore violates the prohibition against cruel and unusual punishment."[142]

Historically, the Eighth Amendment was used to address gruesome torments devised in England and Europe as the punishment for crimes like treason and regicide.[143] For example, in *Wilkerson v. Utah*,[144] the Court determined it is safe to affirm that punishments of torture and all others in the same line of unnecessary cruelty are forbidden by the Eighth Amendment.[145] Similarly, in *In re Kemmler*,[146] the Court held that punishments are cruel when they involve torture or a lingering death.[147] However, recent cases have not been limited to these historical circumstances.

The Supreme Court has moved beyond the actual instances that the Eighth Amendment was meant to address and sought to discern a principle of sufficient generality behind the particular provision to allow its application to contemporary concerns.[148] Recent cases have determined that the Eighth Amendment "proscribes more than physically barbarous punishments."[149] Generally, the Eighth Amendment limits the kind of punishment that can be imposed on those convicted of crimes.[150] Furthermore, it also forbids punishment that is grossly disproportionate to the severity of the crime.[151]

A court must first decide whether a regulatory law establishes a form of punishment at all before they can make a determination that the law violates the Eighth Amendment cruel and unusual clause. When the legislature's intended purpose of a statute is to regulate, the court must look to the actual

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clauses. *See Opinion*, 668 N.E.2d at 758.

[141] Trop v. Dulles, 356 U.S. 86, 100 (1958). While the State has the power to punish, the Amendment stands to assure that this power is exercised within the limits of civilized standards. *See Opinion*, 668 N.E.2d at 758. The Amendment must draw meaning from the evolving standards of decency that mark the progress of a maturing society. *Id.*

[142] *Id.*

[143] *Id.*

[144] Wilkerson v. Utah, 99 U.S. 130 (1879).

[145] *Id.* at 136.

[146] *In re* Kremmler, 136 U.S. 436 (1890).

[147] *Id.* at 447.

[148] *See Opinion*, 668 N.E.2d at 758.

[149] Estelle v. Gamble, 429 U.S. 97, 102 (1976).

[150] WAYNE R. LAFAVE ET AL., CRIMINAL LAW § 2.14(f) (2d. ed. 1995).

[151] *Id.*

effect of the statute and determine if the effect is so punitive as to negate the legislature's regulatory intent.[152]

Characterization of the effect of a law as punitive or regulatory is determined by balancing a variety of factors identified in *Kennedy v. Mendoza-Martinez*.[153] In *Mendoza-Martinez*, the Supreme Court indicated the appropriate factors for courts to look to when faced with an Eighth Amendment challenge to a state statute should include whether: (1) the sanction involves an affirmative disability or restraint; (2) it has historically been regarded as punishment; (3) its operation will promote the traditional aims of punishment; (4) the behavior to which it applies is already a crime and an alternative purpose to which it may rationally be connected is assignable to it; and (5) it appears excessive in relation to the alternative purpose assigned.[154] "The Court noted that the factors may point in differing directions."[155]

Courts have found registration and public notification laws to be punishment after using the *Mendoza-Martinez* test.[156] However, these decisions focused only on the relationship of the punishment to the Ex Post Facto Clause.[157] Other courts have determined that even though the public notification and registration statutes have a punitive effect, this effect did not outweigh the government's interest in protecting the public.[158] These courts made this determination after relying on the confidentiality of the registration laws and the individualized classification systems.[159] Lastly, in *Doe v. Poritz*, the court determined that the laws did not constitute punishment at all.[160]

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[152]United States v. Ward, 448 U.S. 242, 248 (1980). A legislature may not insulate itself from a challenge simply by asserting that a statute's purpose is to regulate rather than punish prior conduct. *Id.* at 248-49.

[153]Rowe v. Burton, 884 F. Supp. 1372, 1378 (D. Alaska 1994).

[154]Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

[155]*Rowe*, 884 F. Supp. at 1378.

[156]*See generally* Artway v. Attorney Gen., 876 F. Supp. 666 (D.N.J. 1995); *In re* Reed, 663 P.2d 216 (Cal. 1983); Doe v. Pataki, 919 F. Supp. 691 (S.D.N.Y. 1996); Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

[157]U.S. CONST. art. I, § 10.

[158]*See generally* State v. Noble, 829 P.2d 1217 (Ariz. 1992); State v. Costello, 643 A.2d 531 (N.H. 1994); State v. Ward, 869 P.2d 1062 (Wash. 1994).

[159]*Rowe*, 884 F. Supp. at 1380. The court noted:

> The absence of public disclosure of the information was a critical consideration in *Noble* and *Adams*. In *Ward*, the majority of the interpreted the statute to limit public disclosure to cases in which the state had established the individual's probable danger to the community. In *Costello*, the information was given only to law enforcement agencies.

Id.

[160]Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

Florida's sexual predator law sufficiently satisfies the test for determining whether a law is punitive in effect.[161] Despite the fact that the Florida Legislature asserts that the community notification law has a regulatory effect, it is greatly outweighed by the punishment. Therefore, the statute is one of the rare instances when a court might determine that a community notification provision meets the judicial scrutiny necessary to establish a violation of the Eighth Amendment.

The use of community notification on the Internet in Florida imposes an affirmative disability on the sexual predators, therefore allowing the first element of the *Mendoza-Martinez* test to be met. The notification is not limited to placing a public stigma on the individual in his or her community.[162] The notification provision also allows anyone in the United States access to this information.[163] The provision may have devastating effects on the offender's personal life and may also negatively impact employment opportunities.[164] Unlike other state registration and notification provisions, Florida's use of the Internet does not deny anyone access and the government cannot control how the information is used.[165]

The second element of the *Mendoza-Martinez* test can be established when examining Florida's use of the Internet for community notification. "The fact that sex offender registration and [notification] may not have historically been regarded as punishment is not dispositive."[166] The application of two early United Supreme Court decisions establishes the contention that registration, and especially notification, of offenders has historically been regarded as punishment.

The court, in *In re Reed*, focused on the United States Supreme Court decision in *Weems v. United States*.[167] The *Weems* decision stressed the severity of the nonphysical punishment imposed which included a sentence involving a lengthy period of required government surveillance.[168] The Court stated:

> his prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is

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[161] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

[162] *See Rowe*, 884 F. Supp. at 1378.

[163] *See* FLA. STAT. ch. 944.606 (1997).

[164] *Rowe*, 884 F. Supp. at 1378. "The [Arizona] act may subject registrants to public stigma and ostracism that would affect both their personal and professional lives." *Id.*

[165] The Arizona Supreme Court, which decided that registration provisions do not affirmatively limit offenders, did acknowledge that the dissemination of information to persons other than law enforcement agencies could impose an affirmative disability or restraint on offenders. State v. Noble, 829 P.2d 1217, 1222 (Ariz. 1992).

[166] *In re* Reed, 663 P.2d at 219. The court noted that "the *Mendoza-Martinez* opinion sets out a number of relevant considerations, not a checklist of absolute requirements." *Id.*

[167] Weems v. United States, 217 U.S. 349 (1910).

[168] *Id.* at 362-82.

> forever under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the authority immediately in charge of his surveillance.[169]

Applying the reasoning in *Weems* to Florida's community notification on the Internet, it could be argued that government surveillance *is* a punishment, *especially* since Florida law designates that community notification is a lifetime sentence.

This analysis is further supported by the early Supreme Court decision in *Trop v. Dulles*, where the Supreme Court of the United States held a statute that authorized denationalization of a person who was convicted by a military court of desertion from the United States Army in wartime and given a dishonorable discharge, even though no attempt was made to give allegiance to a foreign power, was beyond the war powers of Congress.[170] The Court rationalized that even though there may be no physical maltreatment involved, the Eighth Amendment should bar this type of action because it led to "the total destruction of the individual's status in organized society."[171] The Court stated that it was a form of punishment more primitive than torture, and that the punishment would strip the citizen of his status in the national and international political community.[172] Furthermore, "his very existence [was] at the sufferance of the country which he happened to find himself."[173] By allowing community notification of sex offenders on the Internet, courts would approve the destruction of a an individual's status in organized communities.

Another important element of the *Mendoza-Martinez* test has also been met in regard to Florida's community notification provision. This element asks whether the community notification provision serves one of the traditional goals of punishment deterrence and retribution.

The Florida legislature has presented the argument that community notification on the Internet will establish a deterrent effect on individuals. The law establishes a "significantly unpleasant consequence"[174] on the offender by posting his or her identity and crimes on the Internet which can be accessed at any time by any person.[175] Dissemination of an offender's address and identity

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[169] *Id.* at 366. The Court also stated that "he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty." *Id.*

[170] Trop v. Dolles, 356 U.S. 86, 102-04 (1958).

[171] *Id.* at 101.

[172] *Id.*

[173] *Id.*

[174] *See* Doe v. Pataki, 919 F. Supp. 691, 701 (S.D.N.Y. 1996).

[175] *See Florida Web Site, supra* note 13.

will inevitably cause him, at a minimum, to be ostracized by the community.[176] It could also have an effect on him from locations where he does not reside.[177] Such public humiliation certainly would deter future criminal conduct.[178]

Florida's community notification law also serves the second goal of punishment which is retribution. There are numerous instances of communities retaliating against an offender who moves into the community.[179] For example, individuals who were notified that a convicted sex offender would be moving into a Southeast Portland duplex decided to vandalize the sex offender's home.[180] They spray-painted death threats, anti-gay epithets, and other graffiti around the home.[181] Florida's use of the Internet to notify communities only adds to the harm.[182]

Another consideration identified in the *Mendoza-Martinez* test is whether the behavior to which the sanction applies is already a crime.[183] This is the present case in Florida. The next consideration of the *Mendoza-Martinez* test is whether there is an alternative purpose which might rationally be assigned to the challenged sanction.[184] In Florida, the law states that the legislative intent is to limit the number of sex offenses against children because sex offenders pose a high risk of engaging in sexual offenses even after being released from incarceration.[185] The state's purpose limits the amount of punitive effect the law will have, thus necessitating the application of a balancing test.

The last element of the *Mendoza-Martinez* test is whether the sanction appears excessive in relation to its legitimate nonpunitive effect. If Florida only required registration, the burden on the criminal would be insignificant when compared to the goal of decreasing such offenses.[186] However, Florida has chosen to post

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[176] *See Doe*, 919 F. Supp. at 701.

[177] *See* FLA. STAT. ch. 775.21 (1996)(permitting community notification on the Internet).

[178] *See Doe*, 919 F. Supp. at 701.

[179] Elizabeth Schroeder, *Vigilantism Masks Real Threat to Kids Crime: Alarming Neighbors About Sex Offender's Presence is Only an Illusory Protection*, L.A. TIMES, Jan. 28, 1997, at B7.

[180] Steven Amick, *Vandals Attack Ex-Convicts Home*, PORTLAND OREGONIAN, July 27, 1996, at B1.

[181] *Id.* This was not the first time the offender faced the wrath of neighbors. *Id.* He had also received anonymous threats to burn or bomb him out of another neighborhood. *Id.*

[182] The Court stated that "[i]t is difficult to foresee that the adoption of regulations consistent with the Registration Act could somehow eliminate public disclosure and the concomitant consequences for offenders." *See* Rowe v. Burton, 884 F. Supp. 1372, 1379 (D. Alaska 1994). The court concluded that this is a strong indicator that the registration act has a punitive effect. *Id.* at 1379.

[183] *Id.* at 1378.

[184] *Id.*

[185] *See supra* text accompanying notes 65-68.

[186] *Rowe*, 884 F. Supp. at 1379.

information about sexual predators on the Internet.[187] Furthermore, the information regarding the sex offenders on the Internet is not always accurate.[188] It should be noted that the information is not set out to only protect the general community where the offender lives, because the information is accessible to anyone with a computer. There are other options available to Florida communities to enable them accurately discover offenders in the neighborhoods while at the same time protecting the sexual predator from harm.[189]

The United States Supreme Court has relied on a "proportionality test" when making a determination on whether a punishment should be considered cruel and unusual.[190] This test balances the punishment against the protection of the community.[191]

The State of Florida has no evidence that community notification and registration of sex offenders has been able to protect against future sex offenses.[192] However, the offender has several limitations imposed on him that support the conclusion that the punishment outweighs the protection. First, sex offenders are given a sentence, serve it, and then are expected to re-enter society, hopefully having been rehabilitated by their punishment of incarceration.[193] However, relatives, halfway houses, and community transition programs have become more reluctant to take in sex offenders because of community notification.[194] Imposing this type of punishment on the offenders for life,[195] as Florida has done in almost all cases, substantially interferes with the objective of the original punishment, including the eventual rehabilitation of the offender.[196] This supports a conclusion that this specific

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[187] *See Florida Web Site, supra* note 13 and accompanying text (visited Jan. 14, 1997).

[188] *See* Roche, *supra* note 78 and accompanying text.

[189] *See Florida Web Site, supra* note 13 (visited Jna. 14, 1997).

[190] *See, e.g.*, Stringer v. Black, 503 U.S. 222 (1992); Harmelin v. Michigan, 501 U.S. 957 (1991); Stanford v. Kentucky, 492 U.S. 361 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989).

[191] *Id.*

[192] *See* Sharp, *supra* note 7.

[193] Doe v. Pataki, 940 F. Supp. 603, 628 (S.D.N.Y. 1996).

[194] *Id.*

[195] A sexual predator must maintain registration with the department for the duration of his or her life, unless the sexual predator has had his or her civil rights restored, or has received a full pardon or has a conviction set aside in a postconviction proceeding for any felony sex offense which met the criteria for the sexual predator designation; however, a sexual predator who has been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 10 years and has not been arrested for any felony or misdemeanor offense since release, may petition the criminal division of the circuit court for the purpose of removing the sexual predator designation. FLA. STAT. ch. 775.21(6)(e)(1996).

[196] *Doe*, 940 F. Supp. at 628. "No matter how compelling the reasons, no matter how pure the motive, constitutional protections for individuals - even unsympathetic ones -

form of notification, which does not use a classification system in order to define the amount of information which should be made public, tips the balance in favor of the sex offender.[197]

V. ALTERNATIVES TO NOTIFICATION OF SEX OFFENDERS

A. Prevention

Research shows that the need for prevention services is often overlooked.[198] Despite the lack of prevention services, evidence supports the proposition that prevention breaks the offender's pattern by furnishing children, parents, and community members with a most powerful tool - the knowledge necessary to recognize an inappropriate approach that can be made by the offender, to understand that it is the offender who is responsible for deviant behavior, and to help children and those who care for them learn how to respond when such behavior occurs.[199] Therefore, it is necessary for neighborhoods to implement a prevention strategy that emphasizes education, including teaching youngsters to protect themselves and enlightening the general public regarding the nature of the problem[200] and availability of treatment.[201] It is also important to have prevention programs include "sensitizing the medical community to identify abused children and to detect molesters before they offend."[202]

The first type of prevention programs that could be implemented are specifically for children. Studies show "that many children do not know what sexual abuse is, that sexual touch need not be tolerated, that adults want to know about sexual touching by older persons or that it is possible to tell about sexual abuse to have it cease."[203] Activities may include "'personal safety' curricula in the schools, either free-standing or as part of a broader 'family life' program."[204] These programs give children the knowledge and skills necessary for preventing or escaping their own abuse.[205] These classes should focus on

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cannot be cast aside in the name of the greater good." *Id.* at 693.

[197] *See* Rowe v. Burton, 884 F. Supp. 1372, 1385 (D. Alaska 1994).

[198] ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS 70 (1988).

[199] *Id.*

[200] *See* Fuller, *supra* note 23, at 605.

[201] *Id.* There should also be guidelines set up to "regulate the screening, training, and monitoring of people working with children." *Id.*

[202] *Id.* Our knowledge of child sexual abuse and its perpetrators is imperfect; however, since it is such an enormous social problem, physicians need to be familiar with current information regarding the challenging issue. *See id.*

[203] ANN WOLBERT BURGESS, CHILD TRAUMA I: ISSUES AND RESEARCH 339 (1992).

[204] *See* SALTER, *supra* note 198, at 70.

[205] *See* BURGESS, *supra* note 203, at 339.

the fact that the children own their own bodies and, therefore, can control access to their bodies.[206]

The second effort at prevention could involve workshops for "teachers, daycare providers, and other professionals who work with children, as well as workshops for parents designed to assist them in learning how to help their [children] avoid being victimized and what to do if [they are]."[207] It is important to dispel common misconceptions such as "kids lie about sexual abuse" or "sex offenders are dirty old men," before discussing how to avoid victimization and how to respond to it.[208] Only by educating people to the reality and prevalence of child sexual abuse can we really begin to help them appropriately respond.[209]

Research indicates that most children can learn most of the information necessary to prevent sexual abuse through these education programs. However, this learning may decrease over a relatively short period of time after the training. Therefore, periodic post-training sessions are necessary to help maintain levels of learning.[210] Furthermore, the nature of the risk of sexual abuse may change over a child's development.[211] Therefore, "[communities] that implement prevention programs will have to recognize that the content and training will need to be made available at various points throughout the time children are in school."[212]

B. Continue Registration of Sex Offenders

The states have all formed similar types of registration of sex offenders.[213] Unlike community notification, these laws do not violate the right to privacy, nor can they be seen as cruel and unusual punishment. Florida's registration is generally the same as all other state registration systems that have been upheld in the courts.[214] The only difference is that Florida's registration law does not have a classification system.[215]

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[206] *Id.*

[207] *See* SALTER, *supra* note 198, at 71.

[208] *Id.*

[209] *Id.*

[210] *See* BURGESS, *supra* note 203, at 354.

[211] *Id.*

[212] *Id.*

[213] *See supra* note 10.

[214] *See, e.g., In re* Registrant, 685 A.2d 1252 (N.J. 1995); State v. Ward, 869 P.2d 1062 (Wash. 1994); State v. Noble, 829 P.2d 1217 (Ariz. 1992); People v. Adams, 581 N.E.2d 637 (Ill. 1991); Doe v. Pataki, 919 F. Supp. 691 (S.D.N.Y. 1996); Doe v. Weld, 954 F. Supp. 425 (D. Mass. 1996); Rowe v. Burton, 884 F. Supp. 1312 (D. Alaska 1994). *But see In re* Reed, 663 P.2d 216 (Cal. 1983)(refusal to allow the same registration to be applied to both misdemeanor and felony crimes). *See supra* note 57 for the general requirements of Florida's registration law.

Registration itself does not affirmatively limit the sex offender.[216] Furthermore, it does not disqualify the registrant from any activity, personal or professional.[217] The registration provisions are not concepts that were historically believed to be punishment; the provisions entail no obligation to accept continuing supervision, submit to searches, perform community service, live in a particular place or otherwise comply with any of the myriad and often intrusive conditions of parole or supervised release.[218] Therefore, most forms of registration of sex offenders would meet the *Mendoza-Martinez* test.[219]

VI. CONCLUSION

Despite the tremendous amount of fear expressed by members of all communities, Florida should not continue to post information about sex offenders on the Internet. The use of this particular notification provision revitalizes the use of the "scarlet letter."[220] Furthermore, the Internet is not absolutely necessary as a source to protect the children in society.

If the notification on the Internet continues then there should be a few general changes in Florida's law for community notification of sex offenders. First, Florida's law should not allow for information, such as a person's social security number, to be listed on the web site. This information does nothing to help the local community protect themselves and distinguish the offender from the rest of the community. Second, law enforcement should remove all information that is not updated because this information can be misleading. Finally, Florida should follow the majority of other states and employ a classification system. This would limit information about those individuals who are not at a high risk of reoffending, and increase the amount of information about offenders who are at a high risk of reoffending. Though these changes would not end all constitutional challenges against the statute, they

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[215] FLA. STAT. ch. 775.21(7) (1996).

[216] Rowe v. Burton, 884 F. Supp. 1372, 1378 (D. Alaska 1994). *See also* State v Noble, 829 P.2d 1217, 1222 (Ariz. 1992).

[217] *Rowe*, 884 F. Supp. at 1378.

[218] *See id.* at 1378. Registration is not a concept imbued by history with a punitive connotation. State v. Ward, 869 P.2d 1062, 1072 (Wash. 1994).

[219] *See Rowe*, 884 F. Supp. at 1372.

[220] The community notification will also lead to vigilantism. One example is that of:

> Carlos Diaz, a convicted sex offender, was literally driven out of town after a crowd of news vans, reporters, and members of the Guardian Angels set up a round-the-clock stakeout outside his mother's apartment, where he'd been living. Local politicians and community leaders also made statements condemning him and objecting to the presence of his family in the community.

Doe v. Pataki, 940 F. Supp. 603, 609 (S.D.N.Y. 1996).

would assist in protecting members of the community from the offender, while at the same time continuing to protect the offender's right to privacy.

Society needs to realize that there is much more that must be done to protect children from offenders. It will be necessary to employ prevention programs to teach children, their families, and their doctors to recognize who may be a sex offenders and how to handle the problem. Furthermore, registration laws should still exist. These records can help to keep track of offenders and should not violate the offender's right to privacy nor the Eighth Amendment's cruel and unusual clause.

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