

10-1-2001

# Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England

Meghann J. Dugan

---

## Recommended Citation

Meghann J. Dugan, *Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 Loy. L.A. Int'l & Comp. L. Rev. 617 (2001).  
Available at: <http://digitalcommons.lmu.edu/ilr/vol23/iss4/5>

# COMMENTS

## MEGAN'S LAW OR SARAH'S LAW? A COMPARATIVE ANALYSIS OF PUBLIC NOTIFICATION STATUTES IN THE UNITED STATES AND ENGLAND

### I. INTRODUCTION

Sarah Payne was playing in a wheat field in England on July 1, 2000, when she disappeared.<sup>1</sup> Her naked body was found sixteen days later buried in a shallow grave twelve miles away from where she was last seen.<sup>2</sup> Authorities reported that a pedophile murdered the eight-year-old,<sup>3</sup> and even though he<sup>4</sup> had not yet been found, the tragedy immediately started a public outcry for more stringent laws regarding registration and notification of sex offenders.<sup>5</sup> The public, encouraged by the tabloid newspaper, *News of the World*<sup>6</sup>, demanded that the British government enact a version of the United States' public notification statute.<sup>7</sup>

This U.S. law, often called Megan's Law,<sup>8</sup> was passed in 1996<sup>9</sup> and compelled all states to create their own systems requiring all convicted sex offenders to register with local law enforcement agencies.<sup>10</sup> In some instances, law enforcement may be required either to alert the public of the offender's location or give the public access to

---

1. Nic North, *Charged; Man, 42, Is Accused of Kidnap and Murder of Schoolgirl Sarah Payne*, MIRROR (Eng.), Feb. 7, 2001, at 7, available at LEXIS, News Library, Mirror File.

2. *Id.*

3. See Philip Johnston, *Confusion Over Paedophile Law*, DAILY TELEGRAPH (Eng.), Sept. 13, 2000, at 5.

4. Because an overwhelming majority of sex offenders are males, the author of this Comment chooses to use only male articles and pronouns. See Yvonne Roberts, *You Can't Be Liberal about Sex Abuse*, NEW STATESMAN (Eng.), Aug. 21, 2000, at 8.

5. See Matthew Hickley, *Sarah's Law Won't Open Up Paedophile Register*, DAILY MAIL (Eng.), Sept. 16, 2000, at 19.

6. Ian Stobie, *The Net Moves Into Everyday Political Life*, COMPUTING, Aug. 3, 2000, at 7.

7. Hickley, *supra* note 5, at 19.

8. 42 U.S.C. § 14071(d) (1994) (amended 1996).

9. Cutshall v. Sundquist, 193 F.3d 466, 470 (6th Cir. 1999).

10. Kerri L. Arnone, Note, *Megan's Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief?*, 42 ARIZ. L. REV. 157, 157–58 (2000).

such information.<sup>11</sup> The purpose of this statute is two-fold: (1) to allow members of the public to better protect themselves from criminals who are likely to commit another crime; and (2) to discourage sex offenders from repeating their crimes.<sup>12</sup> Generally speaking, thus far, the American public has not used its best discretion when learning of a pedophile in the neighborhood, and often resorts to lynch mob tactics to run the offender out of the neighborhood.<sup>13</sup>

Conversely, even though England has required police registration of sex offenders since 1997,<sup>14</sup> Parliament does not wish to pass a law making it easier for the public to obtain information regarding the location of pedophiles.<sup>15</sup> It does not consider this course wise, however, as the people still demand action.<sup>16</sup> In an effort to urge the British government to pass such a law, the tabloid newspaper, *News of the World*, placed the names and locations of pedophiles from all over Britain on a Web site to "name and shame" the offenders.<sup>17</sup> As a result of this Web site and the general attitude of its citizens, England has already seen the same mob mentality problems that the United States has experienced since the inception of Megan's Law.<sup>18</sup> The impassioned public has protested outside of pedophiles' residences, physically abused offenders, run pedophiles out of town, and even harassed one to the point of suicide.<sup>19</sup>

Aside from the above mentioned public outbursts in its own country, England had the opportunity to look at the results and repercussions of the notification provision of Megan's Law even before

---

11. See, e.g., *Megan's Law on the Internet*, CNN.com, at [wysiwyg://85/http://www.cnn.com/2000/LAW/09/25/meganlaw.internet.ap/](http://wysiwyg://85/http://www.cnn.com/2000/LAW/09/25/meganlaw.internet.ap/) (Sept. 25, 2000) [hereinafter CNN] (explaining New Jersey's version of the law); see also Stobie, *supra* note 6, at 7 (explaining California's version). For a list of all fifty state statutes, see Maria Orecchio & Theresa A. Tebbett, Note, *Sex Offender Registration: Community Safety or Invasion of Privacy?*, 13 ST. JOHN'S J. LEGAL COMMENT. 675, 677 n.14 (1999).

12. Arnone, *supra* note 10, at 160–61.

13. See, e.g., John T. McQuiston, *Sex Offender Is Suing His Neighbors Over Protests*, N.Y. TIMES, June 20, 1997, at B1.

14. Sex Offenders Act, 1997, c. 51 (Eng.).

15. SENTENCING & OFFENCES UNIT HOME OFFICE, SEX OFFENDERS ACT 1997, at <http://www.homeoffice.gov.uk/circulars/1997/hoc9739.htm> (Aug. 11, 1997) [hereinafter Circular]; see also Johnston, *supra* note 3, at 5.

16. See Johnston, *supra* note 3, at 11.

17. *Witch Hunt: Would a British Version of "Megan's Law" Work?*, ECONOMIST, Aug. 12, 2000, at 34 [hereinafter Witch Hunt]; see also Stobie, *supra* note 6, at 7.

18. See *id.*

19. See *id.* "A man who faced police charges for sex offences . . . was said by his solicitor to have killed himself after his neighbours hounded him from his home." *Id.*

making any changes to its own laws.<sup>20</sup> For example, there have been several constitutional challenges against Megan's Law in the state and circuit courts.<sup>21</sup> It is true that England is not constrained by constitutional doctrines as is the United States;<sup>22</sup> these challenges, however, can be enlightening to Parliament because both countries share the same Western ideals regarding privacy rights and punishment issues.<sup>23</sup> Not one of these constitutional challenges has been successful in overturning or diluting Megan's Law, but the U.S. Supreme Court has yet to grant certiorari so the system has not heard the final word.<sup>24</sup> These constitutional challenges include: Procedural Due Process;<sup>25</sup> the right to privacy;<sup>26</sup> Equal Protection;<sup>27</sup> Habeas Corpus;<sup>28</sup> Double Jeopardy;<sup>29</sup> the right to travel;<sup>30</sup> and Ex Post Facto.<sup>31</sup>

In addition to constitutional challenges, opponents to public notification also insist that public notification in the United States has not proven to be successful in reducing recidivism.<sup>32</sup> First, opponents argue that sex offenders are less likely to comply with the law because they do not want to be harassed.<sup>33</sup> Second, they believe that the pedophiles are more likely to kill their victims in order to hide the

---

20. See Home Office, *Government Proposals Better to Protect Children from Sex and Violent Offenders*, at <http://wood.ccta.gov.uk/homeoffice/hopre...8011d8044e18025695b0047e2ee?OpenDocument> (Sept. 15, 2000) [hereinafter *Government Proposals*]. This news release, dated September 15, 2000, explains the Home Secretary's reasons for not allowing public access to the Sex Offenders' Register: "[C]ontrolling such access would be impossible to enforce . . . [and] [s]uch an arrangement would not in our judgement assist the protection of children or public safety." *Id.*

21. E.g., *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998). The parties in these cases challenging Megan's Law dispute not only notification and public access but also registration. For purposes of this Comment, the author will only discuss the notification and public access provisions.

22. See generally INST. FOR PUB. POLICY RESEARCH, A WRITTEN CONSTITUTION FOR THE UNITED KINGDOM (1991). The United Kingdom does not have a written constitution but it does have constitutional law.

23. See *id.* ch. 2.

24. See *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999).

25. See *Cutshall*, 193 F.3d at 469.

26. *Id.*

27. *Id.*

28. See Arnone, *supra* note 10, at 158.

29. *Cutshall*, 193 F.3d at 469.

30. *Id.*

31. *Id.*

32. *Witch Hunt*, *supra* note 17, at 34.

33. *Id.*

evidence.<sup>34</sup> Third, because most cases of sexual abuse occur within families, opponents say that Megan's Law does not make much of a difference.<sup>35</sup> Finally, they believe the law does not address the issue of what to do with these sex offenders once their sentences are up and they are released back into society.<sup>36</sup> Instead of providing sex offenders with the rehabilitation they need to stop committing these horrible acts<sup>37</sup>, their communities take on a "high noon" mentality and run them out of town.<sup>38</sup>

The legislature in England took all of these criticisms of public notification into account when it passed amendments to the Sex Offenders Act of 1997<sup>39</sup> at the end of 2000. Appropriately named "Sarah's Law,"<sup>40</sup> it tightens up the police registration in which sex offenders must participate,<sup>41</sup> but stops just short of public notification as to the exact locations of sex offenders.<sup>42</sup> The police and probation officers have set up "risk panels." These panels will assess the level of danger each released offender poses and enforce national guidelines to protect the public.<sup>43</sup> Similar to Megan's Law, the public has access to figures about the number of local sex offenders, but are *not* allowed to obtain their names and addresses.<sup>44</sup> Offenders are kept away from particular places at certain times,<sup>45</sup> and judges can impose lifelong restrictions on those convicted.<sup>46</sup> Victims or their families have the choice to be consulted regarding the release arrangements of offenders

---

34. Brian D. Gallagher, *Now That We Know Where They Are, What Do We Do with Them?: The Placement of Sex Offenders in the Age of Megan's Law*, 7 WIDENER J. PUB. L. 39, 62 (1997).

35. *Witch Hunt*, *supra* note 17, at 34.

36. See Gallagher, *supra* note 34, at 41.

37. Although psychiatrists disagree as to what is the best method of rehabilitation, they all agree that some method is needed. See Evelyn Larrubia, *In Need of Therapy*, L.A. TIMES, Sept. 19, 1999, at B1.

38. Fergus Kelly, *Do Sex Offenders Have a Right to Privacy?*, TIMES (London), Dec. 17, 1995, at 5.

39. Sex Offenders Act, 1997, c. 51 (Eng.).

40. Sexual Offences (Amendment) Act, 2000, c. 44 (Eng.); see also HOME OFFICE, *New Clauses Added to the Criminal Justice and Court Services Bill at Lords Committee*, at <http://www.homeoffice.gov.uk/cpg/newlords.htm> (Oct. 19, 2000) [hereinafter *New Clauses*] (explaining that the Amendments followed Sarah Payne's murder).

41. Penny Lewis, *Why Our Children Are Still Far from Safe*, INDEP. (London), Sept. 26, 2000, at 11; see also *New Clauses*, *supra* note 40.

42. Lewis, *supra* note 41, at 11; see also *New Clauses*, *supra* note 40.

43. Philip Johnston, *Straw Rules Out "Sarah's Law" on Paedophiles*, DAILY TELEGRAPH (London), Sept. 16, 2000, at 11; see also *New Clauses*, *supra* note 40. At the time of this Comment's publication, these "risk panels" had not yet been established.

44. Johnston, *supra* note 43, at 11; see also *New Clauses*, *supra* note 40.

45. Johnston, *supra* note 43, at 11; see also *New Clauses*, *supra* note 40.

46. Johnston, *supra* note 43, at 11.

jailed for more than a year.<sup>47</sup> Finally, those convicted must register with police within seventy-two hours after release from prison.<sup>48</sup>

This Comment proposes that England's Sarah's Law is more rationally crafted and is therefore superior to the United States' Megan's Law. Part II gives an overview of Megan's Law and some of the challenges and criticisms it has faced. Part III describes the struggle that has taken place in England and what the future most likely holds for sex offenders there. Part IV analyzes the differences between Megan's Law and Sarah's Law, and reveals that Sarah's Law has the potential to achieve its dual goals of keeping both the police and public aware of sex offenders without essentially destroying the offenders' lives. Finally, Part V delves into the extremely difficult problem of rehabilitating repeat sex offenders.

## II. THE UNITED STATES AND "MEGAN'S LAW"

Megan Kanka was a seven-year-old girl living in New Jersey.<sup>49</sup> On July 29, 1994, Jesse K. Timmendequas, a next-door neighbor, lured her into his house by offering her a puppy.<sup>50</sup> He then raped and murdered her.<sup>51</sup> After he confessed to her murder, Megan's parents discovered that this man living next-door to them was a previously convicted pedophile and murderer.<sup>52</sup> They then began a crusade to pass a law in New Jersey that would allow the public to know the locations of sex offenders.<sup>53</sup> They claimed that they would have been able to better protect Megan if they had known Timmendequas' past.<sup>54</sup> Megan's Law flew through the New Jersey legislature at lightening speed.<sup>55</sup> Probably due to public popularity of the proposed legislation, there were no legislative hearings on the impact the law might have on both the public and the convicted sex offenders.<sup>56</sup> Once the federal

---

47. *Id.*

48. *Id.*; see also *New Clauses*, *supra* note 40.

49. Gallagher, *supra* note 34, at 43.

50. See CNN, *supra* note 11.

51. Charles Laurence, *The Murder that Led to Megan's Law*, DAILY TEL. (Eng.), Jan. 30, 1997, at 17.

52. *See id.*

53. Gallagher, *supra* note 34, at 45.

54. CNN, *supra* note 11.

55. *Id.*

56. Ronald K. Chen, *Constitutional Challenges to Megan's Law: A Year's Retrospective*, 6 B.U. PUB. INT. L.J. 57, 73 (1996). Although it passed because of a pedophile, Megan's Law also applies to sex offenders who attack adults. E.g., CAL. PENAL CODE §§ 290 to 290.6 (West Supp. 1997).

government decided to mandate that all states pass their own versions of the law, it only took Congress and the rest of the states a mere twenty-two months to enact their own versions.<sup>57</sup>

Currently, all fifty states have their own versions of Megan's Law, but each varies considerably regarding the level of public access and the information released.<sup>58</sup> For example, Connecticut has an Internet Web page with sex offenders' names, hometowns, personal descriptions, and sometimes, even photographs.<sup>59</sup> At the other end of the spectrum, California provides the public access to a CD-ROM database but only after the requester proves that he or she lives in the area of the sex offender and that the requester is not a convicted sex offender.<sup>60</sup>

Even though the laws differ from state to state, examining a state whose version appears to run middle-of-the-road, such as New York, provides an indication of the impact of the law on the public, local authorities, and convicted sex offenders. New York has a three-tiered ranking system to determine the proper level of community notification.<sup>61</sup> Depending on several factors, including risk of re-offense and danger to the public, a reviewing committee places the convicted sex offender into one of three tiers.<sup>62</sup> A Level One sex offender is a low risk for becoming a repeat offender and therefore he is only required to notify the local police of his whereabouts.<sup>63</sup> A Level Two sex offender is at a moderate risk to repeat.<sup>64</sup> Local law enforcement may disclose his personal information and location to any entity with vulnerable populations,<sup>65</sup> most likely groups such as day care centers and Boy Scout troops.<sup>66</sup> Level Three sex offenders are at a high risk to re-offend.<sup>67</sup> Registration is maintained in a subdirectory and publicly disseminated.<sup>68</sup> The public can obtain information about a Level Three sex offender either by directly accessing a subdirectory,

---

57. See, e.g., CAL PENAL CODE §§ 290 to 290.6 (West Supp. 1997).

58. Gallagher, *supra* note 34, at 47.

59. Stobie, *supra* note 6, at 7.

60. *Id.*

61. Orrecchio & Tebbett, *supra* note 11, at 683.

62. *Id.*

63. *Id.* at 684.

64. *Id.*

65. *Id.*

66. CNN, *supra* note 11.

67. Orrecchio & Tebbett, *supra* note 11, at 685.

68. *Id.*

calling a “900” number, or contacting the local law enforcement agency with jurisdiction over the offender.<sup>69</sup>

Even though models of Megan’s Law across the country are generally well-accepted by the public, there have been several constitutional challenges.<sup>70</sup> These have included claims of Double Jeopardy; Ex Post Facto; bills of attainder; cruel and unusual punishment; the right to interstate travel; Procedural Due Process; the right to privacy; Equal Protection Clause; and federal Habeas Corpus.<sup>71</sup> Although these arguments are too broad to fully examine in this Comment, some of them are worth discussing. Currently, none of these arguments have succeeded in the federal courts, but the Supreme Court has yet to grant certiorari.<sup>72</sup> The Court is not likely to grant certiorari until there is a conflict among the lower circuits.<sup>73</sup> Given that, the most promising arguments in favor of finding a constitutional violation, and therefore the ones that will be discussed in this Comment, are Equal Protection, Double Jeopardy, Procedural Due Process, and cruel and unusual punishment.

#### *A. Equal Protection*

The Fourteenth Amendment proclaims that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>74</sup> In general, a state cannot arbitrarily favor or disfavor one group of its citizens over another.<sup>75</sup> The Supreme Court has interpreted this clause in such a way that, aside from certain classifications such as race and gender that require a heightened level of scrutiny,<sup>76</sup> as long as a state law is rationally related to a legitimate state purpose it will pass the Equal Protection Clause.<sup>77</sup> At this lowest level of review, the state does not even have to show that the purportedly “rational” purpose was

---

69. *Id.* at 685–86.

70. See, e.g., *Cutshall v. Sundquist*, 193 F.3d 466, 469 (6th Cir. 1999); *Williamson v. Gregoire*, 151 F.3d 1180, 1181 (9th Cir. 1998).

71. See *Cutshall*, 193 F.3d at 469; *Williamson*, 151 F.3d at 1181.

72. See Arnone, *supra* note 10, at 182.

73. See *id.*

74. U.S. CONST. amend. XIV.

75. See generally *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (holding that a school board could not segregate school children on the basis of race).

76. See generally *id.*; see also *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding that the Virginia Military Institute could not continue to exclude women from its school).

77. See generally *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) (holding that the state could subject opticians to a regulatory system while exempting all sellers of ready-to-wear glasses).

its actual purpose when passing the law.<sup>78</sup> Considering that this standard of review is low, if a challenger wishes to prove to the court that the classification violates Equal Protection, he or she must negate every conceivable state purpose that might be considered rational.<sup>79</sup> This process might seem nearly impossible, but opponents of Megan's Law insist that to classify sex offenders apart from all other criminals bears no rational relationship to a legitimate state goal.

In all cases where a sex offender has brought an Equal Protection challenge against the notification provision of Megan's Law, the courts have brushed it aside with a short analysis, finding that the law is rationally related to the state's goal of promoting public safety.<sup>80</sup> Nevertheless, the courts fail to explain how notification of repeat sex offenders is rationally related to furthering public safety when notification of other types of repeat violent offenders is not. Although some believe that the recidivism rate of sex offenders is much higher than other violent offenders, studies have concluded otherwise.<sup>81</sup> All violent offenders should be subject to the same public punishment because they are all just as likely to commit another crime. Classifying sex offenders separately from other repeat offenders tends to show that Megan's Law is not rationally related to public safety, but rather it is the product of public sentiment rushed into becoming law.

As stated earlier, public notification will pass constitutional muster as long as it is rationally related to furthering a potential state interest. The most dangerous sex offenders, especially the ones that continually prey upon children who are outside of their families, will probably never stop.<sup>82</sup> In these cases, because the court is not required to look at the reality and ramifications of public notification, it is easy to see why the courts hold that public notification is rationally related to furthering public safety. While it does makes intuitive sense to give parents an extra tool to protect their children, most men convicted of child molestation restrict their victim pool to relatives or children of close associations.<sup>83</sup> In these cases, public notification would be useless. This often being the case, the fact that public notification is not

---

78. See generally *id.*

79. See generally *id.*

80. See, e.g., *Preston v. Bradley*, No. 96-6545, 1997 U.S. App. LEXIS 27033, at \*4 (6th Cir. Sept. 25, 1997); *Artway v. New Jersey*, 81 F.3d 1235, 1267-68 (3d Cir. 1996); *Cutshall v. Sundquist*, 193 F.3d 466, 482-83 (6th Cir. 1999).

81. Gallagher, *supra* note 34, at 42.

82. See Alison Bass, *Treating Sex Criminals a Long Road*, BOSTON GLOBE, Feb. 26, 1990, at 29.

83. See *Witch Hunt*, *supra* note 17, at 34.

restricted to those who prey upon strangers strongly supports the argument that the classification has no rational basis.

Moreover, aside from applying simple rational basis, the Supreme Court could use mid-level scrutiny when examining challenges to Megan's Law. In *City of Cleburne v. Cleburne Living Center*,<sup>84</sup> the Supreme Court required a showing by the state that the classification of the mentally retarded was not based on irrational prejudice.<sup>85</sup> The Court's rationale was that mentally retarded people have historically been politically powerless.<sup>86</sup> As offensive as it sounds, the same could be said of sex offenders who fall under the notification provision. Given the abhorrent nature of their actions, attempts to defend sex offenders would most likely result in a public outcry.<sup>87</sup> Therefore, because of this, the offenders do not have much of a political voice.

If the Supreme Court did examine an Equal Protection argument by sex offenders under *City of Cleburne*, the states would most likely be unable to put forth a showing that the classification of sex offenders is not based on irrational prejudice. As stated before, Megan's Law legislation was rushed into becoming law.<sup>88</sup> If the courts look at the actual effects of public notification, they would realize that notification does not effectively further public safety since it makes sex offenders less likely to register for fear of public punishment.<sup>89</sup> Also, it is highly questionable whether sex offenders have a substantially higher recidivism rate than other offenders.<sup>90</sup> If the offender does commit again, rather than be subject to public notification, he might be more likely to kill his victim to hide the evidence.<sup>91</sup>

Finally, and perhaps most important, public safety will never truly improve unless the offenders receive rehabilitative treatment. As will be discussed below, some experts believe that the offenders need therapy to learn how to control their urges and lead a normal life.<sup>92</sup> If

---

84. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

85. *Id.*

86. *Id.*

87. This is due to strong public sentiment. E.g., McQuiston, *supra* note 13, at B1; Michael Dear & Django Sibley, *The One-Way Strategy for Sex Offenders Makes Nobody Safe*, L.A. TIMES, Oct. 1, 2000, at M6.

88. See *supra* Part II.

89. Registration has decreased since the enactment of public notification. *Witch Hunt*, *supra* note 17, at 34.

90. See *supra* Part II.A.

91. Cf. Gallagher, *supra* note 34, at 62 (asserting that increased criminal punishment will make offenders more likely to kill their victims).

92. Bass, *supra* note 82, at 29.

they must run from community to community, they will not receive the necessary therapy and, therefore, are more likely to repeat their crimes.<sup>93</sup>

### B. Double Jeopardy.

Under the Double Jeopardy clause of the Fifth Amendment “[no person] shall . . . be subjected for the same offense to be twice put in jeopardy of life or limb.”<sup>94</sup> The most important factor under Double Jeopardy is whether or not the court can be convinced that public notification of the location of sex offenders is punishment.<sup>95</sup> Sex offenders subject to public notification claim that they have served their time in prison and that the public notification provision of Megan’s Law effectively punishes them a second time by branding them as outcasts to the community.<sup>96</sup>

To determine whether a statute imposes a punishment, the courts follow a two-part inquiry that the Supreme Court created in *Hudson v. United States*.<sup>97</sup> A court must first ask whether the legislature intended the statute to punish the offender.<sup>98</sup> The legislature expresses its intent either by outright stating it or implying it in the wording of the statute.<sup>99</sup> Second, if the statute is not intended to punish but merely to create a civil regulation, the court must ask if the statute is so punitive either in purpose or effect as to transform it into a criminal punishment.<sup>100</sup> In determining this second question, the Supreme Court advised looking at the following factors:

- (1) whether the sanction involves an affirmative disability or restraint,
- (2) whether it has historically been regarded as a punishment,
- (3) whether it comes into play only on a finding of scienter,
- (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence,
- (5) whether the behavior to which it applies is already a crime,
- (6) whether an alternative purpose to which it may rationally be connected is assignable for it,

---

93. See Kelly, *supra* note 38, at 5. “Under stress and ostracised from the community, the offender may be even more likely to offend again.” *Id.*

94. U.S. CONST. amend. V.

95. Chen, *supra* note 56, at 59.

96. *Cutshall v. Sundquist*, 193 F.3d 466, 472. Plaintiffs also argue that lifelong monitoring also serves as a punishment. *Id.* Nevertheless, due to the nature of this Comment, this issue will not be addressed.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

and (7) whether it appears excessive in relation to the alternative purpose assigned . . . It is important to note, however, that these factors must be considered in relation to the statute on its face.<sup>101</sup>

When using the above inquiry, courts have thus far denied that Megan's Law is punishment for several reasons.<sup>102</sup> One reason is that none of the state statutes expressly declare that it was the legislature's purpose to punish the sex offenders.<sup>103</sup> The federal Megan's Law itself allows the states to disclose registry information for a permissible state law purpose or to protect the public.<sup>104</sup> Also, there is no clear legislative intent to punish because the information can only be released to the public for safety purposes.<sup>105</sup> Opponents of Megan's Law claim it is a punishment along the same lines as banishment and pillory, which both constitute Double Jeopardy.<sup>106</sup> This type of punishment has a long history, and conjures up images of the punishments inflicted in the classic literary tale, *The Scarlet Letter*.<sup>107</sup> The courts have found that banishment and pillory involved more than the dissemination of information, unlike public notification involved in Megan's Law.<sup>108</sup> Furthermore, the courts have thus far found that any quasi-punishment the sex offenders might suffer comes entirely from abuse of the registry information by the public and has nothing to do with the actual requirements of Megan's Law.<sup>109</sup>

It appears that these lower courts are giving Megan's Law great deference and are turning a blind eye to the truly punitive effects that are bound to occur, and have consistently occurred, because of the law.<sup>110</sup> The public abuses of the system are inevitable because child molesters infuriate and disgust almost everyone. Once pedophiles are discovered in the community, they are often run out of town, denied job opportunities, physically attacked, and harassed to the point of suicide.<sup>111</sup> Research for this Comment revealed no incidents where a

---

101. *Id.* at 473 (emphasis added) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

102. *Id.* at 476.

103. *Id.* at 473.

104. *Id.* at 469.

105. *Id.* at 474.

106. *Id.*

107. *Russell v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir. 1997).

108. *Cutshall*, 193 F.3d at 474.

109. *Id.* at 476.

110. *Witch Hunt*, *supra* note 17, at 34.

111. See, e.g., *id.*; see also *Gallagher*, *supra* note 34, at 53 (giving examples of the abuses that pedophiles must endure).

pedophile received a warm, or even neutral welcome from his community. By not calling this punishment, the courts are hiding behind legalities and ignoring the actual effect on the pedophiles' fundamental rights. As Justice Stevens said, "[f]requently, the most probative evidence of intent [of the state legislature] will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor . . ."<sup>112</sup> As previously stated, these cases have not yet been received by the Supreme Court, which could very well find that Megan's Law is a punishment.

### C. Procedural Due Process

Another possible argument available to a sex offender to challenge Megan's Law is procedural Due Process.<sup>113</sup> The Fourteenth Amendment to the Constitution "prohibits state actors from depriving an individual of life, liberty, or property without due process of law."<sup>114</sup> In other words, before a state can interfere with a protected property or liberty interest, an offender is entitled to a "pre-deprivation process."<sup>115</sup> "The purpose of the due process hearing [would be] two-fold: to ensure that (1) the information to be disclosed is accurate; and (2) disclosure is in fact necessary to protect the public."<sup>116</sup> If the particular Megan's Law statute does not allow for such a hearing, and instead permits the local government to simply decide the level of danger at which a sex offender belongs, it violates procedural due process.

If the states still insist on public notification, and the courts continue to allow them to do so, at the very least the Constitution requires that a sex offender is entitled to a hearing prior to public disclosure.<sup>117</sup> Even though some states do conduct such hearings, others do not.<sup>118</sup> As discussed above, it is quite possible for the Supreme Court to view Megan's Law's requirements as a form of punishment.<sup>119</sup> But even if they choose not to, as one judge stated, "[a] state statute designed to protect the public from criminals and criminal

---

112. *Washington v. Davis*, 426 U.S. 229, 253 (1976).

113. *Cutshall*, 193 F.3d at 469.

114. U.S. CONST. amend. XIV.

115. *Cutshall*, 193 F.3d at 478 (dissenting opinion).

116. *Id.* at 484.

117. *Id.* (dissenting opinion). Some states do, in fact, have procedural hearings that do not violate Due Process; therefore, this argument would not apply to them *Id.*

118. *See, e.g., id.*

119. *See supra* Part II.B.

behavior—no matter how vile the crime—must comport with constitutional guarantees.”<sup>120</sup> Even proponents of public notification agree that Megan’s Law is designed to protect the public.<sup>121</sup> Therefore, it is imperative in the context of public notification for the states to comply with procedural Due Process by providing a hearing.

#### *D. Cruel and Unusual Punishment*

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments afflicted.”<sup>122</sup> When courts examine this argument in the context of Megan’s Law, it is usually brought up in conjunction with Double Jeopardy,<sup>123</sup> and is often discarded after the courts find that public notification is not a form of punishment.<sup>124</sup> Nevertheless, as previously discussed,<sup>125</sup> if the courts look to the reality of the effects instead of only legislative intent, public notification can easily be seen as punishment.

In 1968, the Supreme Court decided *Powell v. Texas*,<sup>126</sup> stating that punishment of an alcoholic for public drunkenness does not violate the Eighth Amendment.<sup>127</sup> The defendant argued that the law was punishing him for the disease of alcoholism, which he was unable to control.<sup>128</sup> The Court disagreed and found that while a law cannot punish a person for *having* a disease, it can punish the person if he or she commits a crime that is a *result* of the disease.<sup>129</sup> The Court upheld the defendant’s conviction not because of his alcoholism but rather in spite of it.

This precedent is indicative of what the Supreme Court could do with Megan’s Law. Experts in the field of sexual offenses often compare the disease of alcoholism to the deviancies that control sex offenders.<sup>130</sup> Both can be treated and controlled but not cured.<sup>131</sup> In

---

120. *Cutshall*, 193 F.3d at 484.

121. *Id.* at 471.

122. U.S. CONST. amend VIII.

123. See, e.g., *Cutshall*, 193 F.3d at 469.

124. *Id.* at 474.

125. See *supra* Part II.B.

126. *Powell v. Texas*, 392 U.S. 514 (1968).

127. *Id.* at 515.

128. *Id.* at 532. The basis for Powell’s argument is a Supreme Court case overruling a California law that made it a crime to be addicted to narcotics. *Robinson v. California*, 370 U.S. 660 (1962).

129. *Powell*, 392 U.S. at 534.

130. See Bass, *supra* note 82, at 29.

addition, as will be discussed later in this Comment,<sup>132</sup> sex offenders, like alcoholics, are also very difficult to treat because every person responds to a different type of treatment.<sup>133</sup>

If an alcoholic cannot be punished for a psychological condition then neither can a sex offender. A sex offender should be punished for his despicable acts; once he has served his time in prison, however, his punishment should be complete. Nevertheless, those who are subject to public notification laws are repeatedly punished for their condition.

Although the public is the largest contributor to this punishment of banishment, law enforcement is also to blame.<sup>134</sup> For example, in Monrovia, California, the police took several steps to run a high-risk sex offender, Aramis Linares, out of their town by handing out fliers and notifying local media of his address, physical description, and license plate number.<sup>135</sup> Even though Linares complied with his registration duties and had never committed an offense in Monrovia, the police eventually raised private funds and bought him a one-way ticket back to the city from which he came.<sup>136</sup> This type of punishment by the public and law enforcement, made legal by Megan's Law, punishes a sex offender for having a condition that requires treatment and therefore is cruel and unusual.

### III. ENGLAND AND "SARAH'S LAW"

#### A. History

England passed the Sex Offenders Act of 1997<sup>137</sup> (1997 Act) to protect society from dangerous sex offenders.<sup>138</sup> The 1997 Act addresses other issues relating to sex offenses,<sup>139</sup> but the section regarding notification is the one that has recently been changed.<sup>140</sup> Originally, the law required that once a sex offender was deemed dangerous, he had to register his name (including all aliases), home address, date of birth, name at birth, and home address at birth within

---

131. *Id.*

132. See *infra* Part V. This Comment will also discuss both the difficult problem of rehabilitating sex offenders and the responsibility of the criminal justice system.

133. Compare Bass, *supra* note 82, at 29, with Powell, 392 U.S. at 527.

134. See, e.g., Dear & Sibley, *supra* note 87, at M6.

135. *Id.*

136. *Id.*

137. Sex Offenders Act, 1997, c. 51 (Eng.).

138. See Lewis, *supra* note 41, at 11.

139. Sex Offenders Act, 1997, c. 51, pt. II (Eng.).

140. See Hickley, *supra* note 5, at 19.

fourteen days of release from prison.<sup>141</sup> He also had to alert the police within fourteen days of any changes in his name or address.<sup>142</sup> If the sex offender either failed to register with the police or knowingly gave false information, he could be fined, imprisoned for six months, or both.<sup>143</sup> Also, contrary to what most citizens of England believe, there is not a separate registry for child abusers: all names of sex offenders are maintained on one list.<sup>144</sup>

To be subject to the registration requirement, the offender must have been convicted of a sexual offense, been found not guilty by reason of insanity, or been cautioned with respect to an offense that he admitted to doing.<sup>145</sup> The duration of time that the offender spends as a registrant depends on his jail sentence.<sup>146</sup> If he was sentenced to imprisonment for a term of thirty months or more, he remains on the list for an indefinite period.<sup>147</sup> If he was found not guilty by reason of insanity or he was sentenced to less than thirty months, he remains a registrant for seven years.<sup>148</sup> If he falls under some other category, then he is a registrant for a minimum of five years.<sup>149</sup>

The 1997 Act also gives the police the power to inform schools and certain members of the public in exceptional circumstances about convicted child sex offenders living in an area.<sup>150</sup> There were, however, no statutory guidelines as to when and how to disclose this information.<sup>151</sup> Even so, in conjunction with the enactment of the 1997 Act, the Home Office<sup>152</sup> published a Circular that gives some guidance

---

141. Sex Offenders Act, 1997, c. 51, pt. I § 2(1)(3) (Eng.).

142. *Id.* pt. I § 2(2)(b).

143. *Id.* pt. I § 3(1).

144. Lewis, *supra* note 41, at 11.

145. *Id.* pt. I § 1(1)(a)-(b).

146. See *id.* pt. I § 1(4).

147. *Id.*

148. *Id.*

149. *Id.*

150. James Hardy, *Police Told They Can Name Paedophiles*, SUNDAY TELEGRAPH (Eng.), Aug. 10, 1997, at 1.

151. Lewis, *supra* note 41, at 11.

152. The Home Office is a governmental department and is headed by the Home Secretary. He or she oversees the police forces. LEONARD JASON-LLOYD, THE LEGAL FRAMEWORK OF THE CONSTITUTION 40 fig. 9 (1997). The Home Office also deals with internal affairs in England and Wales that have not been assigned to other departments. E-mail from Marney Crainey, Information Department, Home Office (Jan. 22, 2001, 15:44:48 GMT) (on file with author). "The principal aim of the Home Office is to build a safe, just and tolerant society in which the rights and responsibilities of individuals, families and communities are properly balanced and the protection and security of the public are maintained." Home Office Web Page, at <http://www.homeoffice.gov.uk> (last visited Mar. 29, 2001).

to law enforcement in dealing with these limited public disclosures.<sup>153</sup> It states that “[i]nformation should not be handed out gratuitously, however and assessment of risk is at the heart of the process which should be adopted.”<sup>154</sup> It goes on to say that the police should “take such decisions on a case by case basis” while “having regard [for] the relevant operational considerations and the over-riding priority of protecting the public, particularly children.”<sup>155</sup> The Home Office acknowledges that it is the courts’ responsibility to lay out the law for disclosure of information but it offers these guidelines:

Disclosure to third parties of personal information about individual offenders should be exceptions to a general policy of confidentiality.

Each decision on whether or not to disclose has to be justified on the basis of the likelihood of the harm which non-disclosure might otherwise cause.

Disclosure should be seen as part of an overall plan for managing the risk posed by a potential offender and the need to protect an individual child, a group of children or other vulnerable persons.

There will always be a risk of legal action by an offender against the police relating to disclosure.

In some circumstances it may be appropriate to warn an offender that disclosure is to be made to encourage different behaviour.

Decisions should be based on an assessment of the seriousness of the risk, of displacing the offending, of the continuing visibility of the offenders and any other operational considerations in respect of the management of the risk posed by the offender.<sup>156</sup>

The courts have agreed with the statements above by holding that disclosure to these special agencies must be made only if there is a “pressing need.”<sup>157</sup> The cases also stress that disclosure is *only* to be made to protect children who are at risk of abuse, and not merely for general public knowledge.<sup>158</sup>

---

153. *Circular*, *supra* note 15. This Circular was published in conjunction with the Act. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Regina v. A Local Authority in the Midlands and Another*, 1 F.C.R. 736 (Q.B. 1999). The court set forth several factors to consider when contemplating disclosure. *See id.*

158. *See In re L. (Sexual Abuse: Disclosure)*, 1 W.L.R. 299 (C.A. 1999).

### B. Current Contentions and "Sarah's Law"

The 1997 Act was brought into force on September 1, 1997,<sup>159</sup> but has disappointed the citizens of England since its inception.<sup>160</sup> In fact, both before and after its enactment, a vocal group of British citizens demanded they receive the same public notification protection that U.S. citizens possess under Megan's Law.<sup>161</sup>

When Parliament was debating the 1997 Act, there was much talk of a public notification provision.<sup>162</sup> Parliament eventually decided against such a provision because vigilante action, which is virtually inevitable, causes pedophiles to go into hiding rather than register with the police.<sup>163</sup> In turn, if the pedophiles do not register, it is impossible to monitor them and child protection decreases.<sup>164</sup> Even though this occurred in the United States, the British public was still unhappy with the existing system and felt that there was "an immense gap between public opinion and public policy."<sup>165</sup> Consequently, Sarah Payne's murder in July 2000 fueled the public's anger, resulting in a demand for change.

Sarah Payne was an eight-year-old girl from West Sussex.<sup>166</sup> She was reported missing after she vanished while walking to her grandparents' house.<sup>167</sup> Her body was found in a field; she had been sexually abused.<sup>168</sup> Roy Whiting, age 42, was arrested on February 6, 2001,<sup>169</sup> and is expected to go to trial in November 2001.<sup>170</sup>

The biggest reaction to Sarah's death, and the impetus that most likely fueled the public's demand for public notification of sex offenders, came from the tabloid newspaper, *News of the World*. It

---

159. See *Circular*, *supra* note 15.

160. See generally Nick Pisa, *12,000 Reasons Why Labour Backs Our Child Sex Campaign*, SUNDAY MIRROR (Eng.), May 11, 1997, at 8 (expressing the public's frustration with the 1997 Act); Malcolm Dean, *Tabloid Campaign Forces UK to Reconsider Sex-Offence Laws*, LANCET, Aug. 26, 2000, at 745. (providing examples of the people's dissatisfaction with the Act).

161. See Angela Upex, *Mother Begins Fight for Justice*, JOURNAL (Eng.), Feb. 16, 1998, at 11; see also Pisa, *supra* note 160, at 8.

162. Dean, *supra* note 160, at 745.

163. *Id.*

164. *Id.*

165. Roberts, *supra* note 4, at 8.

166. Chris Ferris, *Agency*, W. MORNING NEWS (Eng.), Oct. 5, 2000, at 1, available at LEXIS, News Library, WMNPLY File.

167. *Id.*

168. *See id.*

169. North, *supra* note 1, at 7.

170. Christian Gysin, *Sarah's Mother Attacks Cash 'Joke'*, DAILY MAIL (Eng.), July 30, 2001, at 17, available at LEXIS, News Library, Mail File.

sought to prove that police monitoring of sex offenders was not enough and that there needed to be public notification.<sup>171</sup> The newspaper attempted to create its own public notification system when it launched a campaign to “name and shame” all 110,000 known child sex offenders by creating a Web site with their names, addresses and pictures.<sup>172</sup> This plan backfired once the public began harassing people on the list, resulting in a government order directed at *News of the World* to dismantle the Web page.<sup>173</sup>

Upon seeing the public’s strong and widespread reaction to Sarah’s death, Parliament passed legislation to improve the 1997 Act.<sup>174</sup> Police and probation officers are now required to have “risk panels” to determine what level of danger a sex offender poses<sup>175</sup> by using nationwide guidelines.<sup>176</sup> This is different from when each local government was on its own.<sup>177</sup> Also, pedophiles must register with the police within seventy-two hours of release instead of within fourteen days.<sup>178</sup> Aside from the above changes, the original 1997 Act still applies.<sup>179</sup>

The closest the new law comes to widespread public notification is a provision allowing the public access to the *number* of sex offenders in the area.<sup>180</sup> Although this seems very similar to the notification provision of Megan’s Law, it is different because it does not allow law enforcement to give names and addresses to the public.<sup>181</sup> This allows the public to be aware that there is a danger of a sex offender in their area, without giving them the information that so often leads to vigilantism. Sarah’s family and *News of the World* agree that this is an encouraging start but state that they will not be satisfied until there is a British version of the Megan’s Law notification provision.<sup>182</sup>

---

171. Dean, *supra* note 160, at 745.

172. *Id.*

173. Roberts, *supra* note 4, at 8.

174. Hickley, *supra* note 5, at 19.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. See *id.*

180. *Id.*

181. *Id.*

182. *Id.*

#### IV. THE RATIONALITY OF SARAH'S LAW

A detailed comparison of Megan's Law and Sarah's Law highlights the negatives of Megan's Law and the potential positives of Sarah's Law. When the New Jersey legislators first passed Megan's Law in 1994, their main purpose in enacting public notification was to allow parents the opportunity to better protect their children.<sup>183</sup> The federal legislators had the same honorable goal when they passed the mandate to all fifty states in 1996.<sup>184</sup> Nonetheless, while rushing the legislation and feeling pressured by public outcry,<sup>185</sup> Congress failed to investigate whether public notification would actually increase public safety.

While the registration provision of Megan's Law is effective at helping law enforcement keep track of sex offenders in order to protect the public, the notification provision negates this value.<sup>186</sup> The following is an example of the natural progression of the law: a convicted sex offender fulfills his duty by registering under Megan's Law. He is deemed dangerous enough to fall under the notification provision and law enforcement notifies his neighbors. The neighbors must decide what to do with this information—leave him alone or harass him? More often than not, they will decide to harass him.<sup>187</sup> Other sex offenders hear about the harassment and decide they would rather not register, despite the risk of getting caught, rather than be harassed by the public.

In fact, before public notification, ninety-seven percent of America's convicted sex offenders complied with any applicable registration requirements.<sup>188</sup> That percentage has dwindled to eighty-five percent.<sup>189</sup> This twelve percent difference may seem to be a small price to pay in order for parents to be aware. Nevertheless, this increase for the parents conversely decreases the level of protection the police can provide. When the police are aware of the location of offenders, they are better equipped to protect the public from any future dangers. Also, they are certainly better prepared than the offender's neighbors to protect the public because they have more effective resources at their

---

183. CNN, *supra* note 11.

184. *Cutshall v. Sundquist*, 193 F.3d. 466, 470 (6th Cir. 1999).

185. See Laurence, *supra* note 51, at 17. The legislature felt great pressure because “[c]hallenging Megan's Law is a deeply unpopular move in America.” *Id.*

186. Kelly, *supra* note 38, at 5.

187. See Gallagher, *supra* note 34, at 56.

188. *Witch Hunt*, *supra* note 17, at 34.

189. *Id.*

disposal. When arriving at the realization that they live next door to a pedophile, neighbors often have an emotional reaction and will harass that person into leaving the neighborhood.<sup>190</sup> This may be sufficient for those particular neighbors, but ineffective on the aggregate level, especially if law enforcement loses track of the pedophile. These sex offenders have to live in someone's neighborhood. If they are on the run from the public, they will be out of contact with family, close relationships, and therapists, and are therefore more dangerous.<sup>191</sup>

Also, public notification may hinder public safety because it can lure people into a false sense of security.<sup>192</sup> If a parent is aware of this law and he or she does not receive any notification, he or she might feel that there is nothing to worry about. Furthermore, as stated before, the bulk of pedophiles' offenses are committed within the family or with a close family association. Public notification is useless in these situations because that type of offender is not likely to molest a random child.<sup>193</sup> Additionally, not all sex offenders are on the list. In some states, if a person was convicted of the crime before registration statutes were enacted, he is not subject to the list.<sup>194</sup> The list also does not include those offenders who have never been convicted. Further, the only offenders that neighbors can find out about are the ones deemed most dangerous by the government.<sup>195</sup>

Even given all of the above, a conundrum still exists: if a parent does know that a pedophile lives next door, he or she will better protect his or her own child by avoiding the pedophile. But how can a government balance the protection of a child against the protection of a sex offender? Fortunately, there is an answer to this question and it lies in England's Sarah's Law. England had the fortunate opportunity of observing Megan's Law in action before enacting its own provision.<sup>196</sup> Parliament was in a better position than was the United States; it could point to the results of Megan's Law in order to determine what not to do. England has been more objective by looking at both sides of that argument, and has not bent so easily to the voice of the constituency.<sup>197</sup>

---

190. See McQuiston, *supra* note 13, at B1.

191. Kelly, *supra* note 38, at 5.

192. *Witch Hunt*, *supra* note 17, at 34.

193. *Id.*

194. Gallagher, *supra* note 34, at 52.

195. See Amitai Etzioni, *Isolate Them*, GUARDIAN (London), Sept. 19, 2000, at 19.

196. Sarah's Law was passed after Megan's Law. See *supra* Part I.

197. See *Government Proposals*, *supra* note 20 (demonstrating that the Home Office weighed both sides of the public notification argument in making its proposal).

Even though Sarah's Law has not yet had a chance to show any long-term results, its promise is real.

Sarah's Law provides public notification of local sex offenders while at the same time shields them from public harassment. Parents are alerted when a dangerous sex offender is in the area so they can better protect their children.<sup>198</sup> Sex offenders will have less fear of registering; and accordingly, law enforcement will be in a better position to protect the public at large due to better tracking of the offenders.<sup>199</sup> Unlike in the United States, the public will not be given the freedom to choose whether or not to harass the offenders. Finally, because the offenders will be able to lead a more stable and normal life, their recovery is likely to be more successful.<sup>200</sup>

## V. THE CURRENT STATE OF REHABILITATION

No matter what melange of actions the United States and England attempt regarding public notification, both countries' citizens are aware that more needs to be done to rehabilitate sex offenders, especially pedophiles.<sup>201</sup> One of the catalysts of public notification requirements is the reportedly high recidivism rate of sex offenders.<sup>202</sup> A majority of the public believes that all individuals who are convicted of such crimes will inevitably commit that crime again.<sup>203</sup> Some statistics actually do support that contention.<sup>204</sup> Many studies, however, claim that sex offenders are no more likely to repeat an offense than any other violent criminal.<sup>205</sup> Psychiatrists and lawyers who specialize in this field believe many sex offenders can improve with treatment, but debate continues as to what is the best method of rehabilitation.<sup>206</sup>

Although no single profile perfectly describes all characteristics of a sex offender, two traits are shared by most.<sup>207</sup> First, many offenders have extremely low self-esteem and have trouble sustaining personal

---

198. See Lewis, *supra* note 41, at 11.

199. See *id.*

200. Cf. Bass, *supra* note 82, at 29 (asserting that sex offenders need to be taught to live normal lives).

201. See, e.g., Larrubia, *supra* note 37, at B1; Sarah Hall, *Hughes Urges Tougher Curbs for Most Dangerous Sex Offenders*, GUARDIAN (Eng.), Sept. 22, 2000, at 12.

202. See CNN, *supra* note 11.

203. See, e.g., McQuiston, *supra* note 13, at B1. The sex offender was not bothering any of his neighbors but was run out because they thought he would offend again. *Id.*

204. See, e.g., Kelly, *supra* note 38, at 5.

205. Gallagher, *supra* note 34, at 42.

206. See, e.g., Bass, *supra* note 82, at 29.

207. *Id.*

relationships both with men and women.<sup>208</sup> Second, they are usually pursuing sexual fantasies when they commit their assaults.<sup>209</sup>

Psychiatrists identify two different types of offenders: those with the possibility of rehabilitation and those with none.<sup>210</sup> For those with no possibility of rehabilitation, the issues are the following: first, to teach them how to control themselves,<sup>211</sup> and second, to set up a system to monitor them.<sup>212</sup> Yet, similar to alcoholics, even those who respond to treatment are never actually cured, they instead learn to suppress their urges.<sup>213</sup>

Examining rehabilitation in conjunction with an analysis of Megan's Law is critical because rehabilitation is at the very heart of the debate: namely, how to protect the public from repeat offenders. Legislators claim that public notification is necessary for public safety.<sup>214</sup> As established above, this contention is debatable. In fact, psychiatric and legal experts in the field insist that the only way to really ameliorate the problem is to heal the offenders before they are released into society again.<sup>215</sup> The following discussion highlights some of the options regarding sex offenders and their likelihood of success.

#### *A. Therapy*

Sex offenders exposed to therapy often respond in a positive way.<sup>216</sup> One study reports that after receiving therapy, the likelihood of a second offense can drop from as high as eighty percent to as low as ten percent.<sup>217</sup> Experts claim that first-time offenders, especially teenagers, respond most favorably to therapy.<sup>218</sup> Effective therapy teaches the offender how to control his urges, earn a living, and maintain stable and satisfying relationships.<sup>219</sup>

---

208. *Id.*

209. *Id.*

210. *See id.*

211. *See generally* Bass, *supra* note 82, at 29 (describing different methods of therapy).

212. *See, e.g.*, Larrubia, *supra* note 37, at B1 (detailing California's system of civil commitment and criticisms of this approach).

213. *See id.*

214. *See* Beth Shuster, *Slamming Door on Predators*, L.A. TIMES, May 2, 2000, at A1; Bass, *supra* note 82, at 29.

215. *Id.*

216. Dear & Sibley, *supra* note 87, at M6.

217. *Id.*

218. Bass, *supra* note 82, at 29.

219. *Id.*

The challenging component about treatment is that each offender's motivation for abusing is unique, and therefore, no one treatment will work for everyone.<sup>220</sup> Accordingly, the first step in therapy is to help the offender understand his motivation for acting out and realize his denial.<sup>221</sup> Some experts think that this process needs to be done immediately after conviction so that the offender does not have time to excuse his actions or shift the blame to the victim.<sup>222</sup> Next, the offender needs to find some sort of motivation to change.<sup>223</sup> Therapists then identify specific fantasies and attempt to modify them.<sup>224</sup> This is often done by recognizing the chain of thoughts and events that lead up to an assault, and then teaching the offender a method to disrupt this chain at any and all points.<sup>225</sup> For example, the offender is told to associate his fantasies with something unpleasant, such as being raped in jail.<sup>226</sup> Eventually, the offender will associate his fantasy with the unpleasant event and will not feel the need to act upon it.<sup>227</sup> Besides this method of therapy, psychiatrists also try traditional psychotherapy and group sessions.<sup>228</sup> Once the offender learns how to control his urges, he is then taught how to lead a normal life and foster healthy relationships.<sup>229</sup>

Another method of rehabilitation other than therapy on its own is the use of halfway houses.<sup>230</sup> This gives the offender the opportunity to practice the skills he has learned for leading a normal life in a controlled environment.<sup>231</sup> Some experts see the outside world as a healing force if used correctly.<sup>232</sup> A prevailing problem with a halfway house is that if the community discovers its presence, no matter how effective and safe the facility is, members of the community will usually band together to force it out of their neighborhood.<sup>233</sup>

---

220. *See id.*

221. *Id.*

222. *See* Shuster, *supra* note 214, at A1.

223. Bass, *supra* note 82, at 29.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See* Sharon Lamb, *False Remedies Hinder Abuse Prevention*, LA TIMES, June 18, 1997, at B7.

233. Gallagher, *supra* note 34, at 58.

Even though therapy has great potential, it does not coincide with most communities' definition of punishment and, therefore, the courts and legislators are hesitant to include it in a prison sentence.<sup>234</sup> Although punishment can have a rehabilitating effect, the courts often consider retribution to be their top priority.<sup>235</sup> This might stem from the fact that most individuals in the legal system simply do not know enough about paraphilia and therefore do not understand the complex psychological aspects.<sup>236</sup> Judge Harold Shabo, who presides over a Los Angeles County Court that hears only sex offender cases, suggests having a separate institution to house sex offenders for their entire time in prison.<sup>237</sup> Judge Shabo's proposal would not only help to rehabilitate them, but would also protect them from the general prison population, which often tries to harm sex offenders.<sup>238</sup> For sex offenders to be able to control their urges their first time out of prison, therapy must become an integral part of the prison term.

### B. Castration<sup>239</sup>

There are some sex offenders who are simply unable to control their urges, even if they very strongly desire to do so.<sup>240</sup> For these offenders who do not respond to therapy, some states have proposed castration as an alternative to permanent jail sentences.<sup>241</sup> This can be done either as an operation or by using a chemical called Depo-Prova, which wards off all sexual urges.<sup>242</sup> Even though some short-term studies indicate that Depo-Prova is effective, the decrease in sexual urges that sex offenders experience does diminish over time.<sup>243</sup> For those sex offenders who are desperate to change, castration is accepted.<sup>244</sup> California enacted a law allowing repeat offenders to be

---

234. See, e.g., *id.* at 64. "The first duty of any legal system is justice, not social work." *Id.*

235. See *Powell v. Texas*, 392 U.S. 514, 530 (1968).

236. Shuster, *supra* note 214, at A1. "[P]araphilia is a relatively generic term to describe deviant sexual behavior." *Id.*

237. *Id.*

238. *Id.*

239. Castration and the constitutional issues surrounding it have been discussed in numerous other articles. For purposes of this Comment, only the purpose and criticisms of this method of rehabilitation will be discussed. For more discussion, see Gallagher, *supra* note 34, at 80–83.

240. See Larrubia, *supra* note 37, at B1.

241. Gallagher, *supra* note 34, at 81.

242. *Id.*

243. *Id.* at 82.

244. See, e.g., Larrubia, *supra* note 37, at B1 (describing how public officials agreed to continue providing drug treatment for a recently released sex offender who requested the continual drug treatment).

castrated surgically or with medication.<sup>245</sup> Despite this law, it is unlikely that most U.S. citizens will accept "state-sponsored mutilation."<sup>246</sup> Also, since no long term study is available, it is not known whether actual or chemical castration actually works.<sup>247</sup> Until more studies and results are known regarding castration, the states should delay hormonal alterations.

### *C. Isolation and Civil Commitment*

No one feels comfortable when an un-healable sex offender is released into society. Some offenders admit that they cannot change,<sup>248</sup> while others claim they can change, but no matter how often they get caught they continue to commit offenses.<sup>249</sup> For this reason, some experts recommend either complete isolation or civil commitment.<sup>250</sup>

Basically, proponents of complete isolation want an equivalent of a sex-offender city.<sup>251</sup> After serving their prison sentences, sex offenders deemed dangerous enough would be forced to live in a completely separate, functioning city full of other sex offenders.<sup>252</sup> Although children would not be allowed in the city, the sex offenders would be able to get jobs, come and go as they please, and even live with women.<sup>253</sup> As far-fetched as this may sound, this proposal to isolate a specific group of people that the government wishes to control does have precedent: Australia,<sup>254</sup> Native American reservations,<sup>255</sup> and Japanese encampment during World War II. Nevertheless, there are serious flaws to this proposal. For example, the sex offenders would be difficult to track because they would be mobile.<sup>256</sup> Also, finding citizens to staff the town would be difficult.<sup>257</sup> Finally, finding a location in which to place the "city" might be next to impossible.

---

245. Gallagher, *supra* note 34, at 81.

246. *Id.* at 82.

247. *See id.* at 82-83.

248. *See, e.g.*, Larrubia, *supra* note 37, at B1 (detailing the story of a sex offender who feared that if he were let loose into society, he would commit his crime again).

249. *See* Shuster, *supra* note 214, at A1; Bass, *supra* note 82, at 29.

250. Gallagher, *supra* note 34, at 56.

251. *Id.* at 78-80.

252. Etzioni, *supra* note 195, at 19.

253. *Id.*

254. Gallagher, *supra* note 34, at 79.

255. *Id.*

256. *Id.*

257. *Id.*

Another option for the non-curable sex offenders is civil commitment. For example, California instituted a system whereby repeat offenders, who have already served their sentences, can be held civilly in a state treatment facility if a special court determines they are still dangerous.<sup>258</sup> Commitment requires a showing that the person is a present threat to society. If deemed dangerous, the hospital holds them anywhere from two years to life.<sup>259</sup> The Supreme Court upheld a similar arrangement in Kansas, ruling that it did not violate Double Jeopardy or Ex Post Facto.<sup>260</sup>

Even though this may seem to be an effective way to administer therapy, there have been numerous criticisms from both the psychiatric and legal fields.<sup>261</sup> Some judges and lawyers question the constitutionality of detainment after a prison sentence is complete and insist that rehabilitation should occur during their time served.<sup>262</sup> Also, the inmates complain about being detained after their prison terms.<sup>263</sup> Advocates of the mentally ill insist this is “diagnosis by legislation” and that sex offenders are taking up valuable space in the states’ mental healthcare system that could be occupied by patients that have a better chance to be cured.<sup>264</sup> This Comment suggests the states institute a therapy system that sex offenders must complete during their prison sentence so that they are prepared to lead a normal life once they are released. For the time being, however, this civil commitment might be the only way to detain dangerous sex offenders so they cannot hurt again.

## VI. CONCLUSION

The effects of a sexual assault, especially on a child, can have tragic and long-lasting consequences.<sup>265</sup> This effect troubles society and highlights the need to protect the vulnerable.<sup>266</sup> Megan’s Law gives U.S. citizens the opportunity to take an easy and obvious stand: sex offenders appall us, and as a society and we want better

---

258. Shuster, *supra* note 214, at A1.

259. *Id.*

260. Gallagher, *supra* note 34, at 69.

261. Shuster, *supra* note 214, at A1.

262. *Id.*

263. *Id.*

264. *Id.*

265. Gallagher, *supra* note 34, at 49.

266. See Laurence, *supra* note 51, at 17 (discussing the rape and murder of seven-year-old Megan Kanka).

protection.<sup>267</sup> No one wants to protect the rights of a killer pedophile.<sup>268</sup> The unfortunate reality is that at the same time Megan's Law infringes on the rights of pedophiles, it does not accomplish its own goal of heightened protection. It does nothing to reform sex offenders and gives people a false sense of security.

While it is too early to determine if the amendments to the English system will be effective, the potential for success is certainly present. Registration without public notification will continue to aid the police in preventing and detecting sexual offenders.<sup>269</sup> The police have, at their fingertips, an automatic list of suspects present in a specific area once an offense occurs. That alone should ease public apprehension<sup>270</sup> while acting as a deterrent to those on the list. These factors can only work when offenders are known and can be readily located, and, as previously shown, Megan's Law discourages offenders from registering out of fear of public persecution.<sup>271</sup>

Although legally sound, the constitutional arguments discussed above are unlikely to persuade the courts from discarding Megan's Law's public notification provision anytime soon because of its strong public support. England had the advantage of seeing the effects of Megan's Law in the United States. This is advantageous to British society, but regardless of what occurs, both nations need to enact more rehabilitation programs.<sup>272</sup>

Whether or not the U.S. courts agree with the arguments against public notification, they should *always* remember that it is the government's responsibility, not its citizens', to monitor, punish, and rehabilitate sex offenders. As one expert poignantly stated,

---

267. *Id.*

268. *Id.*

269. Dear & Sibley, *supra* note 87, at M6.

270. *Id.*

271. See *supra* Part II.

272. See Bass, *supra* note 82, at 29; see Roberts, *supra* note 4, at 8.

[t]he test of a civilised society is the way it treats its sex offenders, because they provoke the most visceral reaction. If the law is to say, "Over to you people, you deal with this person," that is not the sign of a civilised society. They should be punished by being sent to jail, but not left to the law of the jungle.<sup>273</sup>

*Meghann J. Dugan\**

---

273. Kelly, *supra* note 38, at 5.

\* J.D. candidate, Loyola Law School, Los Angeles, 2002; B.S., Business Administration, honors, University of Illinois at Urbana—Champaign, 1999. Thank you to all of the editors and staff members of the *Loyola of Los Angeles International & Comparative Law Review*, without whose tireless efforts I would have been lost, especially Jean Yasuhara Law, Kristen Marsh, Henry Hwang, and Caroline Djang. Thank you also to Professor Allen Ides for his substantive guidance; however, any shortcomings completely belong to me. This Comment is dedicated to my parents, who have always believed in me—a special thanks to Mom for acting as my secret research editor. This Comment is especially dedicated, of course, to Mike, whose love and devotion is the best support I could ever ask for. Finally, a special thanks to my friend, John, for giving me a copy of *News of the World* as a joke, which just happened to contain an article about a little girl named Sarah Payne.