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Message to Sex Offenders: Sex Registration and Notification Laws Do Not Infringe upon Your Pursuit of Happiness, A;Note

Hope E. Durant

NOTES

A Message to Sex Offenders: Sex Registration and Notification Laws Do Not Infringe Upon Your Pursuit of Happiness

I. Introduction

She only wanted to see his puppy.[1] With that desire, seven year-old Megan Kanka entered her neighbor's home.[2] Once inside, Megan did not find a puppy. Instead, her neighbor, Jesse Timmendequas, strangled her with a belt, and then sexually assaulted her.[3] Unbeknownst to her family and the rest of the community, Jesse Timmendequas was a sex offender who had twice been convicted of sex offenses, and had received a ten-year prison term for the second offense.[4] Shocked by the heinous nature of Megan's death,[5] the New Jersey legislature enacted a sex offender registration and notification law, commemoratively known as "Megan's Law." This law mandates both registration of sex offenders and notification to local law enforcement officials and, in some cases, the community, upon the release of a sex offender into the community.[6] Since the passage of Megan's law, other states have quickly followed suit and enacted, in many cases, virtually identical or very similar sex offender registration and notification acts. The purpose of these laws is not to punish the offender, but rather to protect the community.[7] Sex offenders, in numerous states, have attempted to challenge the constitutionality of these laws under almost every imaginable constitutional provision. However, most have not succeeded.

On the whole, courts throughout this country have held that sex offender registration and notification laws do not violate federal constitutional claims of due process,[8] equal protection,[9] cruel and unusual punishment,[10] ex post facto,[11] double jeopardy,[12] or right to privacy claims.[13] Furthermore, while it has not ruled directly on each of these assertions, it appears unlikely that the Supreme Court disagrees. The Supreme Court has implicitly affirmed a constitutional basis for sex offender laws both through its *Kansas*

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1. Ralph Stegel, *Suspect Admits Killing Girl, 7 Also Accused of Sexual Abuse*, The Record, August 2, 1994, at 1.
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See* N.J. STAT. ANN. § 2C:7-8c (West 1995).
7. *See* Doe v. Poritz, 662 A.2d 367, 372-73 (N.J. 1995).
8. *See, e.g.*, State v. Clark, 880 P.2d 562 (Wash. App. 1994); *Poritz*, 662 A.2d at 367.
9. *See, e.g., Poritz*, 662 A.2d at 367; Lanni v. Engler, 994 F. Supp. 849 (E.D. Mich. 1998).
10. *See e.g.*, Roe v. Farwell, 999 F. Supp. 174 (D. Mass. 1998); People v. Adams, 581 N.E.2d 637 (Ill. 1991); *Poritz*, 662 A.2d at 367; State v. Lammie, 793 P.2d 134 (Ariz. Ct. App. 1990).
11. *See, e.g.*, State v. Noble, 829 P.2d 1217 (Ariz. 1992); State v. Costello, 643 A.2d 531 (N.H. 1994); Snyder v. Wyoming, 912 P.2d 1127 (Wyo. 1996).
12. *See, e.g.*, Collie v. Florida, 710 So. 2d 1000 (Fla. Dist. Ct. App. 1998).
13. *See id.*

v. Hendricks[14] decision and its subsequent dual denial of certiorari to two constitutional challenges to these laws by sex offenders. The denials of certiorari on February 25, 1998 were without comment.[15] Supporters of "Megan's Law" have claimed these denials as victories.[16]

With few exceptions, the constitutional challenges to the various "Megan's Laws" in the states have been upheld. Yet sex offenders continue to challenge the laws on various constitutional claims. The latest innovative attempt to strike down these laws is an allegation that the law violates Ohio's "pursuit of happiness" clause in its state constitution. A close examination of the meaning and design of the "pursuit of happiness" clause demonstrates that this clause, like most of the other challenges, does not warrant a repeal of Ohio's sex offender registration and notification law. This Note will examine the sex offender statistics in an effort to recognize the complexity and severity of the problem. In addition, the Note will explore the history of various registration and notification laws as well as the numerous constitutional challenges they have withstood. Finally, it will analyze the likely outcome of the newest "pursuit of happiness" challenge, in light of the trend of other recent court decisions.

II. Sex Offenders and Society

Perhaps the reason Megan Kanka's death shocked the conscience of the nation was a consequence of the barbaric nature of the act. This atrocity shed light, in a humanly painful way, on one of the gravest problems facing American citizens today. It showed the magnitude, both in number and severity, of sexual assaults that occur each day. Unlike other crimes, sexual assaults are perhaps the most painful because the attacks desecrate the victim in a very intimate manner.[17] The sheer brutality of a sexual assault is completely contrary to the sexual union's intended intimacy. Because of the nature of this violation, many victims suffer extensive psychological trauma.[18] This trauma does not dissipate with time, but may resurface later in life.[19] In addition, many victims display physical effects, including eating disorders[20]and depression.[21] Similarly, sexual assault victims often develop a greater tendency to abuse drugs or alcohol later in life.[22] In particular, children who have been sexually abused often resort to "regular use of cocaine and stimulants, frequent drinking and drug use, and being high on drugs more often than those who had not been sexually abused."[23] Furthermore, adults who have been sexually abused as children may suffer from more serious bouts of depression than others who have not been abused.[24] This depression may result in hospitalization or suicide attempts.[25] The severity of this problem cannot be fully understood without a complete understanding of the nature and complexity of a sexual offense.

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14. Kansas v. Hendricks, 521 U.S. 346 (1997).
15. Richard Carelli, *Supreme Court Upholds Megan's Law*, PORTLAND OREGONIAN, Feb. 24, 1998, at A5.
16. *Id.*
17. *See* Alison Virag Greissman, Note, *The Fate of "Megan's Law" in New York*, 18 CARDOZO L. REV. 181, 181 (1996).
18. *Today's debate: KEEPING KIDS SAFE; OUR VIEW: If done right, public notification can help prevent sex crimes and stop cycle of abuse*, USA TODAY, August 11, 1994, at The Editorial Page.
19. KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE 37 (1995).
20. *Id.* at 41.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 42.

Sex offender statistics attempt to show both the complexity and the severity of the problem. However, surveys hampered by underreporting and an inability to predict future occurrences are unable to accurately reflect the gravity of the situation. Nonetheless, the statistics are staggering. Between 1980 and 1994, the number of sex offenders in the United States shot upward by 300 percent.[26] Today, about "234,000 convicted sex offenders are under the care, custody, or control of corrections agencies."[27] Sixty percent of these offenders are conditionally supervised within the community each day.[28] In addition, 95,000 sex offenders are currently housed in state prisons. Of those offenders in state prisons, 60,000 of them have committed a violent sex crime against a child under the age of eighteen.[29] Furthermore, over half of these prisoners serving time for violent crimes against children committed their acts upon children who were twelve years old or younger.[30] In one survey, the Justice Department found that each year between 1987 and 1991 "nearly 133,000 women in the United States age twelve or older were victims of rape or attempted rape, 44% committed by strangers."[31] Thus, over half of these rape victims were accosted by someone they knew. Additionally, the Justice Department estimated that in 1992, 17,000 rapes occurred to girls under the age of 12 across the nation. While 54% of these rapes were committed by either non-family members (acquaintances or strangers),[32] almost half of the victimized adolescent girls suffered at the hands of family members directly. Indeed, a correlation exists to suggest that "the younger the rape victim, the more likely it is that a family member or friend was the aggressor."[33] Sexual assaults by family members or acquaintances often result in shame, disappointment, anger and fear in their victims.[34] Because of the intensity of these feelings, many victims are unwilling to report the assault. These silent victims only perpetuate the problem of vast underreporting of sexual offenders.

While law enforcement officials try to encourage people to report sexual assaults, they are faced with a more pressing demand. Law enforcement officials often have the complicated and difficult job of determining accurately which sex offenders will reoffend upon release.[35] Child molesters and rapists merit strict scrutiny since they are most likely to commit another offense. According to a 1991 Johns Hopkins survey, 1/3 of *treated* child molesters will commit another sex crime.[36] This statistic fails to account for those child molesters left untreated. Thus, among *untreated* child molesters, the recidivism rate is much higher.[37] In addition, in its most recent recidivism study, tracking

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26. 26Jan M. Chaiken, U.S. Department of Justice, *National Conference on Sex Offender Registries* (Foreword) (visited Mar. 8, 2000) <http://www.ojp.usdoj.gov/bjus/pub/pdf/ncsor.pdf >.

27. Lawrence A. Greenfield, Bureau of Justice Statistics, U.S. Department of Justice, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (v-vi) (visited Mar. 8, 2000) <http://www.ojp.usdoj.gov/bjs/pub/ascii/soo.txt>.

28. *Id.* at vi.

29. *See* Chaiken, *supra* note 26, at viii.

30. *Id.* at 9.

31. Doe v. Poritz, 662 A.2d 367, 374 (N.J. 1995).

32. *Id.*

33. *See* James Popkin et. al., *Natural Born Predators*, U.S. NEWS AND WORLD REP., Sept. 19, 1994, at 74.

34. *See* KINNEAR, *supra* note 19, at 36-37.

35. *See* Popkin, *supra* note 33, at 74.

36. *See id.*

37. *See id.* ("A 1991 survey of 406 pedophiles and 111 exhibitionists treated at the Johns Hopkins Sexual Disorders Clinic in Baltimore showed that about 7 percent of the pedophiles had been charged with or convicted of another sexual offense after five years. Nearly one fourth of exhibitionists had been charged with or convicted of another sex crime. Those figures, though, are for offenders who *receive* treatment. The great majority does not get any treatment, and their recidivism rates are much higher.") (Emphasis added).

felons released from prison in 1983, the Department of Justice found that "[a]n estimated 28 percent of released rapists had a new arrest for violence and 8 percent were re-arrested for rape"[38] within three years after being released. That same study found that half of both rapists and sexual offenders committed another serious, albeit non-sexual, crime.[39]

Other recidivism studies have found much starker numbers. The California Department of Justice conducted a 15-year follow-up study of sex offenders arrested in 1973. It found that "19.7% [of the offenders] were re-arrested for a subsequent sexual offence."[40] However, of those offenders who raped by using force or threats, the Department reported a recidivism rate of 63.8% for any offense and 25.2% for a subsequent offense."[41] In addition, "[s]ex offenders were five times as likely as other violent offenders, and more than six times as likely as all types of offenders, to re-offend by committing a sex offense."[42]

While it is generally difficult to determine which convicted offenders are likely to re-offend, law enforcement officials have even more difficulty determining who will become a sexual offender.[43] Sexual offenders can be found in any neighborhood in the United States. Unlike other crimes that may be influenced by socio-economic backgrounds, race and wealth are not distinguishing factors.[44] In fact, any ethnic, religious, or socioeconomic characteristic cannot be used to predict future sexual abuse.[45] Indeed, whether one has himself suffered prior sexual abuse is not a reliable indication of whether he is likely to abuse others in the future. Some sexual offenders were sexually abused themselves, others were not.[46] Thus, a lack of reliable, concrete factors to predict sexual offenders makes it difficult for law enforcement officials to prevent the assaults from occurring.

Because of sex offenders' high recidivism rate and the difficulty of identifying them, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.[47] This act obligated states to establish registration programs for sex offenders within three years of the enactment of the act.[48] The Act also established guidelines for the release of information collected by these programs.[49]

States have responded to this federal legislation by passing various community registration and notification acts. While each state has its own nuances and modifications, the typical community notification statute requires a convicted and released sex offender to register with law enforcement officials where he resides.[50] To register, a sex offender must normally provide personal information, such as his present address, physical description, and place of employment.[51] While local and state police are generally privy to

38. Chaiken, *supra* note 26, at 12.
39. *Id.*
40. Doe v. Poritz, 662 A.2d 367, 375 (N.J. 1995).
41. *Id.*
42. *Id.*
43. *See* Popkin, *supra* note 33, at 74.
44. *See id.*
45. *See* KINNEAR, *supra* note 19, at 31.
46. *See id.*
47. 42 U.S.C. § 14071 (1994) (This act was part of the crime package President Clinton signed on September 13, 1994).
48. The only exception to this is if a state is making a good faith effort to implement the registration program. In that case, the Attorney General may grant a two-year extension to allow for the implementation of the program. 42 U.S.C. § 14071(f)(1) (1994).
49. 42 U.S.C. § 14071(d) (1994).
50. Madelyn J. Daley, Comment, Do Sexually Violent Predators Deserve Constitutional Protection? 23 S. ILL. U. L.J. 715, 721 (1999).
51. *Id.*

this information,[52] on occasion, the general public may be informed when it is necessary for their protection.[53]

Despite good intentions by the legislators, many inadequacies have surfaced in the implementation of new registration and notification acts. First, the broad discretion afforded legislators and law enforcement officials in determining whether to release sex offender information to the public creates potential for abuse.[54] Second, the success of registration and notification laws can be undermined by communities' unwillingness to report suspicious acts of sex offenders.[55] The registration and notification laws only make people aware of a potential problem. They lack any power to restrain a potential sex offender, and may instead suggest inappropriate guilt if a sex crime is committed. Furthermore, the registration and notification laws are often inaccurate and unreliable due to human error. Occasionally, notification lists may list a person as a sexual offender who has never been convicted of a sex offense or they may list a person who is no longer considered a threat.[56] Other errors have occurred when, in an effort to give the lists to the public quickly, states have created lists of sex offenders from old conviction records.[57] These conviction records are often filled with outdated or inaccurate information, thus resulting in communities receiving unnecessary and inaccurate information.[58] Finally, vigilantism against registered sex offenders can result in either violence or ostracism. Many sex offenders have been threatened or attacked as a result of their residing in the neighborhood.[59]

In one instance a woman convicted of statutory rape had used her sister-in-law's address on her prison form.[60] Three months prior to her release, despite lacking any intent to move in with her sister-in-law, the sister-in-law's neighborhood was informed that a sexual offender was moving into the neighborhood.[61] The sister-in-law received death threats and threatening phone calls, and someone shot at her children.[62]

In another occurrence, a sex offender's home was the subject of gunfire when the community received notification.[63] Another sex offender had his home burned to the ground when the community heard he was to be released.[64] Other sex offenders were ostracized by the community. Neighbors erected signs saying "CONVICTED CHILD MOLESTER" in the front yard of one sex offender.[65] Neighbors of another sex offender picketed his house with signs, threatened him over the phone, harassed his visitors, and vandalized his car.[66] Because of all these problems, many sex offenders have sued to challenge the constitutionality of the various registration and notification laws within a particular state.

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52. *Id.*

53. 42 U.S.C. § 14071(d).

54. Greissman, *supra* note 17, at 188-89.

55. Daley, *supra* note 50, at 722.

56. See Jane A. Small, Comment, Who are the People in your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws, 74 N.Y.U. L. REV. 1451, 1465 (1999).

57. *Id.* at 1466.

58. *See id.*

59. *See, e.g., Man Who Shot at Home of Offender is Sentenced,* N.Y. TIMES, Feb. 21, 1999, at 44; Greg Munno, *Ex-Convict's Return Upsets Neighbors,* POST-STANDARD (Syracuse, NY), Oct. 1, 1997, at B1; Andrew Metz, *Neighbors Settle Dispute Aimed at Child Molester,* NEWSDAY, Nov. 13, 1997 at A33.

60. *See* Mary Pemberton, *Sex Offender Law Victimizes Innocent Family,* L.A. TIMES, Nov. 16, 1997 at A28.

61. *Id.*

62. *Id.*

63. *Man Who Shot At Home of Offender is Sentenced, supra* note 59, at 44.

64. *See* Small, *supra* note 56, at 1467.

65. *See* Munno, *supra* note 59, at B1.

66. *See* Metz, *supra* note 59, at A33.

III. Constitutional Challenges

Constitutional challenges to these sex offender registration and notification statutes have taken many forms. These challenges allege due process, equal protection, cruel and unusual punishment, ex post facto, and double jeopardy clause violations respectively. Despite the numerous claims, the challenges have garnered little support, and typically have been struck down.

A. Due Process

The United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[67] To trigger this clause, a sexual offender must show he was deprived of a protected liberty or property interest as a result of the particular registration or notification act of his state. While "due process" is generally a fluid concept, the minimum requirements of this clause are notice and an opportunity to be heard.[68] The success of a sexual offender's "due process" challenge is often determined by whether the offender actually needed notice of the state's particular registration and notification act, and the consequences that may result. Most registration and notification acts were passed by respective state legislatures without any punitive intent toward the individual sexual offenders. Instead, these laws were designed to be regulatory in nature. Generally, courts hold that sexual offenders do not need notice of the registration and notification law if the legislature's intent upon passage of the law was regulatory, but not punitive in nature.

One sexual offender in Florida claimed that his due process rights were violated by the designation of "sexual predator" itself.[69] He claimed that the title infringed upon his protected liberty rights[70] of the Fourteenth Amendment. In examining his claim, the Florida Court of Appeals considered the purpose and intent of the legislature when it passed Florida's registration and notification act.[71] The court sought to determine whether or not the legislature's intent was punitive. [72] Ultimately, it rejected the sex offender's due process claim because the purpose of registration and notification was "nonpunitive and remedial in nature."[73] This ruling suggests that a non-punitive intent by the legislature, coupled with an emphasis on safety for the community will successfully defeat a "due process" claim, provided the sexual offender has participated in the judicial process.

Alternatively, some sexual offenders have claimed that their due process rights were violated when, prior to pleading guilty, they were not informed of their obligation to register as a sex offender with the state.[74] They claim that this withheld information would have made them change their plea. Courts have rejected those arguments by differentiating between direct and collateral consequences of a crime. Due process only requires a defendant to "be informed of all of the direct consequences of the plea."[75] Direct consequences are those which "represent a definite, immediate, and largely automatic effect on the range of the defendant's punishment."[76] Since most registration and

67. U.S. CONST. amend. XIV, δ. 1.

68. *See, e.g.*, Bodie v. Connecticut, 91 S.Ct. 780 (1971).

69. *See* Collie v. Florida, 710 So. 2d 1000, 1012 (Fla. Dist. Ct. App. 1998).

70. *See id.*

71. *See id.*

72. For a discussion on what constitutes a "punitive" intent, see discussion of "cruel and unusual" infra Part III C.

73. *Collie*, 710 So. 2d at 1012.

74. State v. Clark, 880 P.2d 562, 563 (Wash. App. 1994).

75. *Clark*, 880 P.2d at 564.

76. *Id.* (citing State v. Barton, 609 P.2d 1353, 1358 (Wash. 1980)).

notification laws have been deemed to be non-punitive, courts have generally construed them to also be collateral in nature and thus not a violation of due process.[77]

Perhaps the only legitimate chance a sex offender has to succeed on a due process challenge involves the notification portion of the particular state's statute. While each state has nuances which differentiate it from other states, each has specified its own set of conditions that must be met before a community will be notified of a sexual offender's presence in the neighborhood.

Broad statutes that give police a lot of discretion and not much guidance when determining whether to inform a neighborhood are more apt to be struck down or to have a successful due process claim found against it. In *Cutshall v. Sundquist*,[78] a sex offender successfully brought a due process claim challenging the notification portion of Tennessee's particular registration and notification law, entitled "Sexual Offender Registration and Monitoring Act."[79] Tennessee's Act stated that sex offender information should remain confidential. However, it gave the Tennessee Bureau of Investigation (TBI) permission to "release relevant information deemed necessary to protect the public concerning a specific sexual offender."[80] The Tennessee statute allowed "disclosure simply on the basis of the discretion of law enforcement officials, with absolutely no guarantees that the disclosure is truly necessary. No procedures exist[ed] for law enforcement to follow in determining whether or not a convicted sex offender may be dangerous in the future."[81]

The United States District Court for the District of Tennessee recognized the unbridled discretion in the hands of the TBI and the resulting harm that may result from false information or an inaccurate assessment of the risk. It recognized the need for a sexual offender to have an opportunity to be heard before authorities disseminate the information about his sexual offender status to the public. Indeed, "'[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'"[82] Because of the vast discretion entrusted to law enforcement officials (namely, the Tennessee Bureau of Investigation), the lack of strict guidelines to determine when information should be released to the public, and the risk of false information or mis-assessment of risk, the Tennessee court affirmed a sexual offender's right to refute or deny these allegations in a hearing.[83]

Other states have avoided the defects of the Tennessee statute by implementing a tiered risk classification system for its convicted sexual offenders. These offenders are assessed as to their future risk to the community and placed in a level. In New Jersey, the home state of Megan Kanka, the New Jersey legislature divided sexual offenders into three possible tiers. All tiers were forced to register. As the level of risk posed by the sex offender increased with each tier, the information given to the community and law enforcement officials was disseminated more easily and frequently.

While affirming the constitutionality of "Megan's Law" in *Doe v. Poritz*,[84] the New Jersey Supreme Court still recognized the need for sexual offenders to have an opportu-

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77. *See Clark*, 880 P.2d at 564; *See generally* State v. Ward, 869 P.2d 1062 (Wash. 1994), and Doe v. Poritz, 662 A.2d 367, 368 (N.J. 1995) (Defendant must be aware of all penal consequences of a guilty plea, but not necessarily all collateral consequences).

78. Cutshall v. Sundquist, 980 F. Supp. 928 (Tenn. 1997), *aff'g* in part and *rev'd* in part, 193 F.3d 466, and *cert. denied*, __ U.S. ___, 2000 W.L. 36203.

79. TENN. CODE ANN. § 40-39-101 et. seq. (1997).

80. TENN. CODE ANN. § 40-39-106(c) (1997).

81. *Cutshall*, 980 F. Supp. at 934.

82. *Id.* (quoting Paul v. Davis, 424 U.S. at 693, 707 (1976)).

83. *See Cutshall*, 980 F. Supp. at 934.

84. Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

nity to be heard when the tier assessment takes places.[85] It required the New Jersey Attorney General to notify the sexual offender of the proposed level and the various obligations imposed upon him at that level.[86] As a portion of that notice, it advised the sexual offender to obtain an attorney and to submit a written objection to the proposed classification.[87] An opportunity for the sexual offender to be heard, as provided by the due process clause of the Fourteenth Amendment is important because the disclosure of this particular information to the community may result in unpleasant occurrences to the sexual offender. Thus, courts have insisted upon the sexual offender's right to refute or deny the rationale behind the state's recommended classification. However, the court ultimately determines the final tier classification upon reviewing the evidence and assessing fully the sexual offender's risk to the community.

B. Equal Protection

The United States Constitution guarantees that no state will "deny to any person within its jurisdiction the equal protection of the laws."[88] This clause does not forbid classifications; rather "unless it jeopardizes a fundamental right . . . the Equal Protection Clause requires only that the classification rationally further a state interest."[89] Furthermore, classifications may not be arbitrary.[90] Equal protection does not require the classification to be narrow,[91] it only requires it to be rational.[92] Barring a fundamental right, the Equal Protection Clause essentially permits classifications, but demands that the government treat persons who are similarly situated in the same manner.

Sexual offenders have alleged that notification statutes that disseminate their information to the public violate their right to equal protection. Two arguments are commonly asserted: sex offenders' equal protection rights are violated when they are viewed as a class rather than as individuals,[93] and their rights are again violated through the registration and notification process because they are distinguished from all other convicted criminals who are not forced to register.[94] However, courts have been unwilling to uphold these equal protection claims.

Two state court opinions demonstrate judicial reaction to sex offender's equal protection claims. In *Doe v. Poritz*,[95] the court rejected a sex offender's contention that he should be assessed individually and not classified with the sex offenders in his tier.[96] In *Lanni v. Engler*,[97] the court was unreceptive to the contention that forcing only con-

85. Note that the New Jersey Supreme Court did not advocate notice for Tier One Sexual Offenders since only law enforcement agents, and not the general public was notified of their status. In addition, unless a clerical mistake has been made or false information has been given, it is difficult to protest a Tier One classification since one conviction is all that is needed to be classified as a Tier One offender. *See generally, Doe*, 662 A.2d at 367.

86. *See Poritz*, 662 A.2d at 382.

87. *See id.*

88. U.S. CONST. amend. XIV, § 1.

89. Lanni v. Engler, 994 F. Supp. 849, 855 (E.D. Mich. 1998) (*paraphrasing* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-441 (1985)).

90. *Poritz*, 662 A.2d at 413.

91. *Id.* at 414.

92. *See Lanni*, 994 F. Supp. at 855.

93. *See generally Poritz*, 662 A.2d at 414 (Plaintiff argues that he should not be classified with other repetitive compulsive sex offenders because he has successfully completed treatment and has been released on parole).

94. *See generally Lanni*, 994 F. Supp. at 849.

95. *Poritz*, 662 A.2d at 367.

96. *See id.* at 414. (The defendant contended that successful completion of treatment meant that he was no longer a danger to society, and was cured).

97. *Lanni*, 994 F. Supp. at 849.

victed sex offenders and not others convicted of other crimes to register violated a sex offender's equal protection. Each court recognized a legitimate state interest of protecting public safety.[98] Mandating that sexual offenders comply with the respective registration and notification acts was a rational means to promote public safety.[99] A legislature is only required to have a rational reason for its determination. Thus, both cases maintain that registration and notification statutes do not violate equal protection because they are a reasonable means to further a legitimate state interest, namely protecting the public.

C. Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[100] Many sexual offenders have alleged that a state's registration and notification laws constitute cruel and unusual punishment. However, most courts have characterized the registration and notification requirements to be non-punitive in nature.[101] Thus, the Eighth Amendment is, in effect, inapplicable.

Traditionally, sex offenders have alleged that registration and notification acts constitute cruel and unusual punishment because of the burdens they will suffer as a result. Such alleged burdens include unnecessary and unwarranted interrogation and detention when a sex offense occurs, [102] a requirement to register even after their debt to society has been paid,[103] a stigma as a result of the registration,[104] and threats and harassment by those they meet.[105] Because they have already paid their debt to society, sex offenders insist these additional requirements are demeaning and unnecessary. However, courts have been unreceptive to the sex offenders' pleas. Instead, allegations that registration and notification acts constitute cruel and unusual punishment have been routinely struck down.

Courts have justified their position in two primary ways. First, the courts have routinely reviewed the legislature's intent. In most cases, it is apparent that public safety[106] and child protection[107] were the key objectives of the various registration and notification acts. In addition, courts have also found that the registration requirement enables law enforcement agencies to obtain the habitual sexual offender's address to question him if the circumstance arises.[108] Therefore, because the legislature's intent was not to

98. *See Poritz*, 662 A.2d at 413, *Lanni*, 994 F. Supp. at 855.

99. *See generally Poritz*, 662 A.2d at 414 ("The Legislature has determined that convicted sex offenders represent a risk to the public safety .... [s]ince the registration and notification requirements are rationally related to that legitimate state interest, the requirements of equal protection under the Fourteenth Amendment are satisfied.).

100. U.S. CONST. amend. VIII.

101. *See, e.g.*, People v. Adams, 581 N.E.2d 637, 640 (Ill. 1991) ("the Registration Act doesn't constitute punishment under the Eight Amendment"); State v. Lammie, 793 P.2d 134,139 (Ariz. Ct. App. 1990) (lifetime registration for a sex offender doesn't constitute cruel and unusual punishment); *See generally* Roe v. Farwell, 999 F. Supp. 174 (D. Mass 1998) (holding that registration and disclosure requirements do not violate the Eighth Amendment's Cruel and Unusual Punishment clause).

102. *See Adams*, 581 N.E.2d at 641 ("compliance with the Registration Act will subject him to interrogation and detention whenever a sex offense occurs.").

103. *See id.* ("[The Registration Act] requires him to register even after his debt to society has been paid.").

104. *See id.* ("the statute is cruel because it places a stigma upon him after his debt to society has been paid"); *See also Farwell*, 999 F. Supp. at 188 ("[Public disclosure] ... is an affirmative disability and restraint due to the effect of public stigma towards him as a sex offender on his personal life and professional life").

105. *See Farwell*, 999 F. Supp. at 188 ("[Public disclosure] ... results in excessively harsh effects on sex offender, i.e. threats and harassment.").

106. *See id.*

107. *See Adams*, 581 N.E.2d at 641.

108. *See id.* at 640.

punish offenders, but to protect citizens and to aid law enforcement officials, courts did not find the registration and notification statutes to be penal in nature.

Second, some sexual offenders assert that a penal law is one that has deterrence or retribution as its main characteristic.[109] While registration and notification are designed to prevent and deter crime, sex offenders maintain that such statutes impose criminal sanctions.[110] Despite the apparent logic to such a claim, courts like the *Doe* court have maintained that "[a] law is characterized as punitive only if the punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purpose."[111] Essentially then, a law may have a punitive impact, if the impact is necessary to carry out its regulatory function. "[A] law does not become punitive simply because its impact, in part, may be punitive unless the only explanation for that impact is a punitive purpose: an intent to punish."[112]

D. Ex Post Facto Laws

The Ex Post Facto Clause of the United States Constitution[113] prohibits the legislature from retroactively enacting laws that impose criminal punishment. Many sexual offenders allege that registration and notification acts, passed after their conviction, inflict a greater punishment than what was proscribed by the law, when committed.

As early as 1798, in *Calder v. Bull*,[114] the Supreme Court articulated the principles to guide courts as to when a law is a violation of this ex post facto provision. Ex post facto laws are those which: 1) make a prior action, which legal when done, criminal, and punishes such action; 2) aggravate a crime, or make it greater than it was, when committed; 3) charge the punishment, and inflict a greater punishment, than the law annexed to the crime, when committed; 4) alter the legal rules of evidence, and requires less, or different testimony than the law required at the time of the offense in order to convict the offender.[115] The Supreme Court reaffirmed these principles in *Collins v. Youngblood*,[116] stating that "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."[117] Thus for an ex post facto violation to exist, it must be deemed to be "punishment."[118]

To assess the constitutionality of registration and notification laws in light of the claims of ex post facto violations, the key question for the courts is whether these laws are punitive in nature. To make this determination, courts have examined the intent of the legislature when it passed the legislation.[119] If the intent of the legislature has a legitimate government interest, such as the safety of its citizens, courts have deemed the legislation to be regulatory in nature.[120] However, while legislative intent is important, it is not the only factor. Despite the legislature's non-punitive intent, if the "statutory

109. *See* Doe v. Poritz, 662 A.2d 367, 389 (N.J. 1995).
110. *See id.*
111. *Id.* at 390.
112. *Id.* at 388.
113. U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto law shall be passed.").
114. Calder v. Bull, 3 U.S. 386 (1798).
115. *Id* at 390.
116. Collins v. Youngblood, 497 U.S. 37 (1989).
117. *Id.* at 43.
118. *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997).
119. *See, e.g.*, State v. Noble, 829 P.2d 1217 (Ariz. 1992); State v. Costello, 643 A.2d 531 (N.H. 1994); Snyder v. Wyoming, 912 P.2d 1127, 1130-31 (Wyo. 1996).
120. *See, e.g., Snyder*, 912 P.2d at 1130-31 (holding the registration statute is regulatory "because it has a law-enforcement related purpose and is designed to protect children from sexual abusers and predators"); *Noble*, 829 P.2d at 1224 (deciding the registration requirement is regulatory in nature); *Costello*, 643 A.2d at 533 (rejecting a defendant's ex post facto claim because of the non-punitive nature of the statute).

scheme [is] so punitive either in purpose or effect as to negate that intention,"[121] the court can find that the law violates the ex post facto clauses because it confers an additional punishment upon the offender. Most courts have upheld registration and notification statutes, in the face of ex post facto claims, by finding that the statutes are regulatory, and thus non-punitive in nature.[122]

On occasion, a court has allowed an ex post facto claim to succeed. The court in *State v. Payne*[123] held that requiring a sex offender, convicted before the passage of the law, to register violated the ex post facto provision because it imposed a greater punishment upon the defendant. The court differentiated between sexual offenders convicted after the registration law was passed and those whose convictions had already occurred. Stating that failure to comply with the registration would subject the defendant (and those like him) to "a fine, imprisonment, or both,"[124] the court concluded the requirement "exposes [the] defendant to additional penalties for his criminal conduct."[125] Thus, the court declared that the registration requirement violated the ex post facto clause of the United States Constitution.[126]

E. Double Jeopardy

The Double Jeopardy Clause, found in the Fifth Amendment to the United States Constitution, provides that no person "[shall] be subject for the same offence to be twice put in jeopardy of life or limb."[127] The "[c]lause protects only against the imposition of multiple *criminal* punishments for the same offense.[128] In addition, the clause "serves the function of preventing both 'successive punishments and . . . successive prosecutions.'"[129] Sexual offenders often allege that multiple punishment occurs when they are forced to register under the respective registration and notification act, in addition to serving the requisite prison time.

In *Usery*, the Supreme Court advanced a two-part test to determine whether a specific regulation violates the double jeopardy provision. Initially, a court must examine the intent of the legislature to determine if the regulation is intended to be punitive or remedial.[130] If the legislation is punitive, a double jeopardy violation has occurred. However, if the court deems the legislative intent to be remedial, the court must evaluate "'whether the statutory scheme [of the legislature is] so punitive either in purpose or effect as to negate'"[131] its own intention.

In *Collie v. Florida*,[132] the Florida Appellate Court applied the two-pronged test developed in *Usery*. In *Collie*, the defendant pled nolo contendere to three counts of sexual battery and two felonies. Following a violation of his original plea bargain, Collie was given a five-year prison sentence by the court. A few months later, during a hearing, the trial court determined Collie was a sexual predator. Thus, Collie was subject to Florida's

121. *Noble*, 829 P.2d at 1221 (quoting United States v. Ward, 448 U.S. 242, 250 (1980)).

122. *See, e.g., Noble*, 829 P.2d at 1217; *Costello*, 643 A.2d at 531; *Snyder*, 912 P.2d at 1130-31; Arizona Dept. of Public Safety v. Super. Ct. of Arizona, 949 P.2d 983 (Ariz. Ct. of App. 1997); Rickman v. State, 714 So. 2d 538 (Fla. Dist. Ct. App. 1998).

123. State v. Payne, 633 So.2d 701 (La. App. 1993).

124. *Id.* at 703.

125. *Id.*

126. *See id.* (noting that the court also stated that the ex post facto provision violated the Louisiana Constitution as well).

127. U.S. CONST. amend. V.

128. Hudson v. United States, 522 U.S. 93, 99 (1997).

129. United States v. Usery, 518 U.S. 267, 273 (1996) (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

130. *See id.* at 277.

131. *Id.* at 278 (quoting United States v. Ward, 448 U.S. 242, 250 (1980)).

132. Collie v. Florida, 710 So. 2d 1000 (Fla. Dist. Ct. App. 1998).

Sexual Predator's Act.[133] Collie appealed, claiming that his "classification as a sexual predator violates the prohibition against double jeopardy."[134]

Applying the *Usery* test, the Florida Appellate Court found that the legislature's "statement of . . . findings, purpose, and intent evince[d] a clear intent to protect the public. Moreover, . . . no evidence [existed] anywhere in the statute to indicate an intent to punish."[135] Thus, the court found the Florida legislature's non-punitive intent to comply with the first prong of the *Usery* test.[136] The second prong of the *Usery* test required the Florida Appellate Court to determine whether Florida's Sexual Predator Act,[137] despite the non-punitive intent of the Florida legislature, was punitive either as to the Act's "purpose or effect."[138] To make this determination, the Florida Appellate Court applied the seven factors the Supreme Court cited in *Kennedy v. Mendoza-Martinez*.[139] These factors are:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as 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, and [7] whether it appears excessive in relation to the alternative purpose assigned.[140]

Applying these factors to the case at hand, the Florida Appellate Court determined that no double jeopardy violation occurred since the registration requirements were not punitive enough to negate the legislature's clearly non-punitive intent.[141]

F. Right to Privacy

While the right to privacy is not specifically stated in the United States Constitution, the Supreme Court has determined an individual's right to keep certain private matters free from public scrutiny.[142] Resolving what constitutes a private matter, and thus what

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133. FLA. STAT. ANN. § 775.21-.23 (West Supp. 2000).

134. *Collie*, 710 So. 2d at 1008.

135. *Collie*, 710 So. 2d at 1009.

136. When it evaluated the first prong of the Usery test, the court examined the legislature's evaluation of the large number of sexual offenders who use physical violence, prey on children and have a high recidivism rate. The legislature found sexual predators to be a large threat to public safety and felt the state had a compelling interest to protect both the general public and the children from them. *See generally Collie*, 710 So. 2d at 1009.

137. FLA. STAT. ANN. § 775.21 (West Supp. 2000).

138. United States v. Usery, 518 U.S. 267, 278 (1996) (quoting *United States v. Ward*, 448 U.S. 242, 250 (1980)).

139. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (enumerating seven factors which the court found helpful in determining that divesting an American citizen of his citizenship for draft evasion constituted punishment for purposes of the Fifth and Sixth Amendments)(The "Mendoza" test is often used by courts to determine whether a legislative action is punitive or remedial.).

140. *Collie*, 710 So. 2d at 1009 (quoting *Kennedy*, 372 U.S. at 168-69).

141. In applying the seven factors to the facts of *Collie*, the court noted 1) registration requirements do not restrain sexual offenders since offenders are not restricted in their movement within or outside of the community; 2) registration itself has not historically been viewed as punishment; 3) the scienter requirement should be given little weight in determining whether a law is punitive; 4) the deterrent effects of the registration requirement are de minimis; 5) the sexual offender's crimes have already qualified him for the designation 6) the purpose of the registration act is to inform the public; and 7) registration and notification requirements are limited so as to protect unnecessary disclosure of the information. *See generally Collie*, 710 So.2d at 1010-11.

142. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (established right to privacy in certain instances was a constitutionally recognized right); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (In rationalizing a woman's right to abort a fetus, the court recognized that certain activities such as procreation, contraception,

constitutes a reasonable expectation of privacy, is the primary way to determine whether a statute has imposed upon this right.[143] If a reasonable expectation of privacy to the disclosed information exists, the court must weigh the "the governmental interest in disclosure against the private interest in confidentiality."[144] Sex offenders claim that the information that must be provided in a state's registration and notification statute constitutes such a private matter. As such, their reasonable expectation of privacy is violated when this information is disclosed. However, sex offenders' right to privacy claims challenging these registration and notification statutes have a marginal chance of success at best. Most information that is disclosed in these statutes tends to be matters of public record. By their nature, matters of public record have no "constitutionally protected privacy interest."[145] Thus, most right to privacy claims challenging these statutes fail on this basis.[146]

G. Pursuit of Happiness

A new and clever twist in the challenges to registration and notification statutes has arisen within the state courts of Ohio. These sex offenders challenge Ohio's registration and notification statute claiming the statute prohibits them from "seeking and obtaining happiness"[147] as expressed in Ohio's state constitution. The Eleventh District Court of Appeals has declared Ohio's registration and notification laws void in its entirety because of Ohio's constitutional provision.[148] However, before paying credence to this clause, and thus encouraging a body of jurisprudence to develop, a thoughtful analysis should be made as to what meaning and weight should be attributed to this clause. In addition, the consequences of this decision upon future litigation, both within and outside the realm of registration and notification statutes, should be given due consideration. Only upon a determination that this clause merits judicial scrutiny, and thus would necessarily warrant its own body of jurisprudence, can a careful analysis of Ohio's sexual offender registration and notification law under this clause be complete. A careful analysis, even giving due credence to the happiness clause, exposes that Ohio's sexual offender registration and notification laws do not infringe upon a sex offender's right to "seek . . . and obtain . . . happiness and safety."[149]

Generally, a "happiness and safety" clause takes one of two forms within a state constitution. One form declares that the goal of government is happiness and safety of its citizens, and is usually found within the preamble or the bill of rights within the specific state constitution.[150] The other form may also be found in the bill or declaration or

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child rearing and education were private areas which should be protected under a right to privacy provision); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (recognizing that certain personal rights are "fundamental" or "implicit in the concept of ordered liberty").

143. Doe v. Poritz, 662 A.2d 367, 406 (N.J. 1995).

144. *Id.*

145. *Id.* at 407.

146. *See, e.g.*, Lanni v. Engler, 994 F. Supp. 849 (E.D. Mich. 1998) (holding that sex offender registration and notification statute did not constitute a right to privacy claim because information required by the statute was public information); People v. Mills, 146 Cal. Rptr. 411 (Cal. App. 1978) (registration requirements did not constitute a right to privacy claim because the registration was a proper way for the state to exercise its police power of health, safety and welfare of the community).

147. OHIO CONST. of 1851, art. I, δ 1 (1851).

148. *See generally* State v. Williams, No. 97-L-191, 1999 WL 76633, at *1 (Ohio Ct. App. Jan. 29, 1999), *cert. granted*, 711 N.E.2d 233 (Ohio June 16, 1999).

149. OHIO CONST. of 1851, art. I, §1 (1851).

150. *See* Joseph R. Grodin, "Rediscovering the State Constitutional Right to Happiness and Safety," 25 HASTINGS CONST. L.Q. 1, 2 (1997).

rights of the constitution; however, it "is a part of a statement of rights characterized as 'inalienable,' 'inherent' or 'natural.'"[151] It is this second type which warrants focus since this form appears in Ohio's state constitution.

Some scholars have believed the 'happiness' clause in the respective state constitution to be only an interesting historic relic with no modern day relevance.[152] Others have viewed the clause as simply a statement expressing the objectives of government, but without any applicability to the judicial branch.[153] The Ohio courts have interpreted Ohio's "happiness and safety" clause as a statement of rights, which they should enforce.[154] It is this most recent interpretation of this clause by the Eleventh District Court of Appeals in *State v. Williams*[155] which may be the subject of much litigation and controversy in the future. Indeed, if this decision is left unchanged, it may have unintended and sweeping effects upon both the "happiness and safety" clause and the future of Megan's law in Ohio. Thus, ultimately, additional questions regarding the meaning weight and definition of the clause and its effects, in light of the judicial scrutiny, must be addressed. First, an initial investigation into original meaning and history of this clause must be undertaken.

On May 10, 1776, the Second Continental Congress encouraged the representatives of the colonies to "adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[156] A few days later, the Virginia Declaration of Rights was adopted. In pertinent part, the document read:

> 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and persuing [sic] and obtaining happiness and safety.[157]

Other states replicated or incorporated these ideas into their own constitutions during the end of the eighteenth century and the beginning of the nineteenth century. Pennsylvania chose language that declared people to have the right of "pursuing their own happiness."[158] Ohio adopted similar language to that of Pennsylvania in its 1802 constitution, but chose to incorporate the idea of "safety" also.[159] In 1816 and 1819 respectively, Indiana and Maine followed Ohio's lead.[160] Illinois, Arkansas, and Florida subsequently adopted Pennsylvania's lead.[161]

While affirming the general principle, the slight variations in language among the states' constitutions suggest that the language chosen in each was purposeful. Thus, a plain meaning reading of the language found in Ohio's state constitution, coupled with a discussion of how the terminology was used and understood, is warranted. "[T]o pursue

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151. *Id.* at 2-3.

152. *See id.* at 4.

153. *Id.*

154. *See id.* at 5-6 (listing three ways courts have interpreted the 'happiness and safety' clauses).

155. *Williams*, 1999 WL 76633, at *1.

156. *See* Grodin, *supra* note 150, at 5 (quoting 1 Bernard Schartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 229 (1971).

157. The Virginia Declaration of Rights, *reprinted in* THE AMERICAN BEGINNINGS (*The Virginia Commission on Constitutional Government* 1961).

158. PA. CONST. art. I, § 1.

159. OHIO CONST. of 1802, art. VIII, § 1 (1851) ("pursuing and obtaining happiness and safety").

160. IND. CONST. of 1816, art. 1 § 1 (1851); ME. CONST. art. 1 § 1 (amended 1993).

161. ILL. CONST. of 1818, art. VIII, § 1 (1970); ARK. CONST. of 1836, art. II § 1 (1874); FLA. CONST. of 1838, art. 1, §1 (1857).

and 'obtain' happiness appears to be something more than the right simply to pursue it, and the right to pursue and obtain safety implies something more than individual autonomy."[162] Indeed, using the word 'obtain' suggests a right to acquire that which is pursued. Thus, the question remains as to precisely what an individual has a right to obtain. Ohio's state constitutional language answers that question as "happiness and safety." Thus, knowledge of how these terms are defined and understood is necessary.

The question of the precise meaning of 'happiness' and 'safety' at the time of the Founders is a bit ambiguous. This ambiguity is due in part to the numerous references to "happiness" found in many historical writings at the time of the Founding Fathers, and the frequent references to the popular political goal of 'happiness' among American political writings.[163] Despite this ambiguity, history has provided the tools necessary to make a reasonable assumption. The Founding Fathers were well-read, educated and thoughtful men. Thus, it seems reasonable to assume that "several strands of classical and enlightenment thought ... [carried] particular resonance with the language in question."[164]

Aristotle's concept of 'happiness,' coupled with the ideas articulated by the natural rights philosophers, and Jean Jacques Rousseau's social contract probably dominated the understanding. Furthermore, the Founders' concept of 'safety' was grounded in Roman classical tradition. While it included physical safety, it also suggested a more sound condition which included "health, welfare, and property preservation as well. . . . [Indeed], [t]he term 'welfare of the people' perhaps best captures the concept."[165] While a precise understanding cannot be stated with certainty, it was these general understandings of 'happiness and safety' which were embodied within the language of the various state constitutions.[166]

The significance and weight given to this language in the Ohio Constitution can be seen even with the placement of it within the document within the 'Inalienable Rights' section. The placement of the language itself suggests a great amount of deference and weight to the meaning and ideas conveyed. These initial drafters recognized that men have certain rights that are inherent in them by virtue of being human beings. These rights are "'inalienable' in the sense that men continue to possess those rights even after they have subjected themselves to common governance."[167] Recognition of the right to pursue and obtain happiness as an inalienable right only further reflects the seriousness and importance of it to the Founders.

Ohio courts have long since recognized that right as well. In *Palmer & Crawford v. Tingle*,[168] the Ohio Supreme Court found an inalienable right to enjoy liberty and to acquire property is guaranteed by the first section of the bill of rights of Ohio's constitution.[169] This "right to be free in the enjoyment of [our] faculties . . . [is] subject only to such restraints as are necessary for the common welfare."[170] While the court did not directly address the specific 'happiness and safety' clause, the court recognized individual rights within the context of this clause. In that specific case, the court found that an

162. Grodin, *supra* note 150 at 7.

163. *See id.* at 8-16.

164. *Id.* at 11.

165. *Id.* at 12 (quoting William J. Novak, *The People's Welfare Law and Regulation in Nineteenth Century America* 52-53 (1996)).

166. In his law review article, Mr. Grodin asserts that the understanding of 'happiness and safety' cannot be known. He recognizes a general proposition that people may pursue these, however he is "leaving aside how those terms are to be defined." *Id.* at 19.

167. *Id.* at 12.

168. Palmer & Crawford v. Tingle, 45 N.E. 313 (Ohio 1896).

169. *See id.* at 315.

170. *Id.*

individual's right to contract can only be restrained by the general assembly to the extent that such restraint is for the common welfare, equal protection, and benefit of the people.[171] More generally, however, the court's decision acknowledged that extensive individual rights were guaranteed by Section I, Article I of the Ohio Constitution as a whole, as long as the conduct did not infringe upon the rights of others.

In more recent cases, the Ohio courts have reaffirmed that principle. In *Preterm Cleveland v. Voinvovich*, the court stated:

> Section I, Article I . . . make[s] it quite clear that, under the Ohio Constitution's Bill of Rights, every person has inalienable rights under natural law which cannot be unduly restricted by government, which is formed for the purpose of securing and protecting those rights, and that all governmental power depends upon the consent of the people.[172]

The court also noted that Ohio's Section I, Article I provision was broader than that of the federal government since neither the Bill of Rights nor the United States Constitution mentions natural law.[173] However, this provision may be interpreted as broadly or narrowly, at the court's discretion. Thus, Ohio has the power to impose either a few narrow restrictions or many broad ones to the federal constitution.[174]

In addition, the Ohio Supreme Court has continued to recognize and affirm the power of the provisions of its own constitution. In *Arnold v. City of Cleveland*,[175] the court affirmed the force of the provisions of its constitution by stating:

> [t]he Ohio Constitution is a document of independent force. In the areas of individual rights and liberties, the United States Constitution . . . provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the Untied States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.[176]

Yet while Ohio courts have the right to interpret Ohio's state constitutional provisions more broadly or narrowly to offer greater or lesser civil liberties to its citizens, they have exercised discretion in doing so. Notably, the Ohio Court of Appeals rejected an argument that a welfare statute which limited benefits to a six-month period violated the recipients' rights to seek and obtain safety.[177] While the court sympathized with the recipients' condition, the court believed "the framers meant to give no other substance to the word than that of an aspirational statement of natural law rights upon which the state may not place unreasonable restrictions."[178] The Ohio Court of Appeals was unwilling to impose too many burdens upon the state. Welfare benefits were not a right necessary

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171. *See id.*

172. Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 574 (Ohio. Ct. App. 1993).

173. *Id.* at 575.

174. *See, e.g., id.* (noting that a woman's choice whether to bear a child is found within the first section of article one of Ohio's constitution, however, this right was not unlimited. Thus, a statute requiring a physician to provide a woman with information about the abortion procedure and obtain her consent was constitutional and not a violation of a woman's right to liberty).

175. State v. Williams, No. 97-L-191, 1999 WL 76633 at *2 (quoting *Arnold v. City of Cleveland*, 616 N.E.2d 163, 164 (Ohio 1993)).

176. *Id.*

177. Daugherty v. Wallace, 621 N.E. 1374, 1377 (Ohio Ct. App. 1993).

178. *Id.*

179. *Williams*, 1999 WL 76633 at *1.

for happiness and safety. Indeed, having to confer welfare benefits to recipients indefinitely was too great of a burden because it imposed unreasonable demands and expectations upon the state of Ohio.

The Ohio courts have recognized and guaranteed the inalienability of the rights of individuals. In some cases, they have been willing to expand those rights beyond that of the federal constitution. In other cases, the minimum floor established by the United States Constitution has been the measure, with no additional liberties given by the state courts. Yet in either case, the Ohio courts have seriously interpreted and considered each provision of its constitution. Thus, because the court has always given great meaning and weight to the clauses of its constitution, and because its body of jurisprudence surrounding the "happiness and safety" clause is developing, the consequences from developing this body of jurisprudence are warranted.

Should Ohio courts be ready to accept this clause as an appropriate mechanism to bring claims, they should be aware of the consequences that could occur. Giving great deference to the clause would increase substantially the number and nature of the claims brought under this clause. Courts with little concern for the original intent of the Founders could broadly interpret the "happiness and safety" clause to include anything that could not be justified or rationalized through another constitutional provision. Judges who wish to implement their own political or judicial agenda could use this clause as a vehicle to obtain it. While traditional safeguards, such as judicial review, may be intact to prevent substantial abuse, judicial standards of review and ability to hear cases on appeal may preclude other cases from being heard.

Recently, in one decision, the Eleventh District Court of Appeals of Ohio managed to both increase the power of the "happiness and safety" clause and void an entire statute aimed at safeguarding the citizens of Ohio from sex offenders. In *State v. Williams*,[179] the Ohio Eleventh District Court of Appeals invalidated Ohio's version of Megan's Law.

In May 1986, Daniel Williams pled guilty to one count of rape and one count of aggravated burglary, and received a seven to twenty-five year prison sentence. In March 1997, a classification hearing was held to determine whether Williams was a sexual predator. The trial court dismissed the proceedings against Williams because it ruled that the statute could not retroactively apply to those already convicted of a sex offense.[180] The state of Ohio appealed this decision to the Eleventh District Court of Appeals. Basing its decision, in part, upon Ohio's 'happiness and safety' clause, the appellate court affirmed the decision of the trial court, and then proceeded further and voided Ohio's entire Megan's Law statute.

The court's decision rests primarily on two "principles established by its precedents interpreting Ohio's constitution and set forth a two-part test for the validity of police power legislation."[181] The court recognized that any police power, including the Megan's Law statute presently at issue, will interfere with an individual's right within the meaning of Section I, Article I of Ohio's constitution. However, it recognized that "an exercise of police power . . . will be valid if [1] it bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and if [2] it is not unreasonable."[182] The appellate court majority concluded "that Megan's Law is unconsti-

180. Since that time, the Ohio Supreme Court has upheld the constitutionality of the retroactivity of the statute in *State v. Cook*, 700 N.E.2d 570 (Ohio 1998).

181. *Williams*, 1999 WL 76633, at *3.

182. *Id.* at *3 (The Ohio Supreme Court first articulated this test in *Benjamin v. Columbus*, 146 N.E.2d 854 (Ohio 1957)).

183. *Id.* at *5 (The court's decision rests upon Section I, Article I of Ohio's Constitution. However, it should be noted that one portion of the court's opinion, namely one's right to reputation, rests upon Section

tutional on its face because it unreasonably interferes with the rights of individuals beyond the necessities of the situation, and because in our opinion the statutory scheme is unduly oppressive."[183]

The majority faults specific provisions of the act because of four purported constitutional infringements of Section I, Article I of Ohio's constitution upon the sex offender's rights. First, a sex offender may suffer potential harm as a result of an invasion of his privacy. Second, a sex offender may have trouble obtaining title to real property. Third, a sex offender may have trouble finding future employment. Fourth, a sex offender's liberty is infringed upon when he must comply with various verification requirements imposed upon him by the statute.

First, the majority claims that a sex offender's right to privacy is violated when his name is released to the community, he is designated as a "predator," and his address is released to the community where he will reside.[184] The court defines the right to privacy as "a right to be left alone."[185] A constitutional violation occurs when a person "has been needlessly deprived of their constitutional right to be undisturbed."[186] The court reasoned that release of a sex offender's information to the community infringes upon his right to be left alone since the release could potentially cause offenders to be ostracized, harassed, or embarrassed.[187] Singling out the offender by the release of information deprives him of his right to privacy.

Second, the majority asserts that the release of information will deprive the sex offender of the right to acquire property.[188] The court contends that future neighbors may conspire to prevent the sex offender from taking title to property within the area.[189] Alternatively, they may damage or destroy the property once he has taken possession of it.[190] The court asserts that the neighbors' actions, whether to prevent the sex offender from acquiring title or from the damage to his property, deprive the sex offender of the right to obtain or protect his property. In either case, a constitutional violation of Section I, Article I of Ohio's constitution occurs.

Third, the majority asserts that release of the information will prevent the offender from working or obtaining a job.[191] The court maintains that part of the "right to happiness guaranteed in Section I, Article I of the Ohio Constitution has been interpreted to encompass the right to pursue a business or occupation."[192] Any release of information will have a detrimental effect upon the individual since hiring personnel may not hire the offender upon obtaining this information. Thus, the court claims a sexual offender's right to happiness has been violated.

Finally, the court contends that a sexual offender's right to liberty is violated when he is forced to comply with various verification requirements imposed upon him by the

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16, Article I of the Ohio Constitution. This section guarantees that any injury done to a person's reputation will have remedy at law. The court stated that labeling a person a "predator" is similar to that of an animal and causes him humiliation. However, since the sheriffs are immune from liability when they label this person, there is no remedy available.) *See id.* at *7.

184. *See id.* at *5.

185. *Id.* at *6 (quoting *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956)) (The court contends the "right to privacy" is found in the natural law, thus, it is guaranteed by Section I, Article I of Ohio's Constitution).

186. *See id.*

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

192. *Id.*

193. Ohio Rev. Code Ann. § 2950.06(B)(1) (Anderson 1999).

statute. The court points to two portions of the statute, which the court finds the most troubling. First, Ohio requires a sexual offender to verify his current residence every ninety days.[193] The court contends that this provision subjects the sexual offender to vigilantism because it encourages law enforcement officials to be vigilant.[194] Second, for the verification of his residence to be complete, the sex offender must personally appear every ninety days.[195] The court maintains that a personal appearance by the defender "has no functional purpose other than harassing and inconveniencing him."[196] Thus, these frequent personal appearances have infringed upon the sex offender's liberty.

The decision reached by the Ohio Court of Appeals in *State v. Williams*[197] is flawed and should be reversed. In accessing the purported constitutional violations, the court misapplies the definition behind a right to privacy claim. In addition, the court's reasoning is flawed because it is predicated solely upon future occurrences that have not been proven, but only presumed. Furthermore, as the dissent demonstrates, the court's focus tends to be upon the legislature's word choice of "predator," as opposed to the actions behind that word. Finally, its substantive analysis of the facts of *Williams* is misguided because it drastically underestimates the extent to which Ohio's Megan's Law is a necessary police power in order to protect the innocent citizens of the community.

First, the majority of the court alleged a constitutional violation associated with Section I, Article I of the Ohio Constitution, namely the right to privacy. However, the court's reasoning is misguided. The right to privacy analysis lacks validity because the court's definition of privacy, namely, "a right to be let alone"[198] is overly broad. In *Williams*, the court does not suggest any limitations to that definition, but rather offers it as an absolute. However, that is not a fair or reasonable portrayal of the "right to privacy" first defined by the Ohio Supreme Court in the precedented case which the *Williams* court cites for validity. While the originally cited case, *Housh v. Peth*,[199] defines the right to privacy as "a right to be left alone," the Ohio Supreme Court also clearly states limits upon that definition.

In *Housh v. Peth*, the court defined a right to privacy within the context of a debtor's action against a collection agency for an alleged wrongful invasion of his privacy right. In that case, the debtor was subjected to late night harassing phone calls, phone calls to her home and place of employment, and calls to her superiors to inform them of her debt.[200] In holding that these actions warranted a claim for invasion of privacy, the Supreme Court of Ohio concluded that the right of privacy, "embraced within the absolute rights of personal security and personal liberty[,]"[201] includes, among others, the right

> 'to be let alone'; to determine one's mode of life, whether it shall be a life of publicity or of privacy; and to order one's life and manage one's affairs in a manner that may be most agreeable to him so long as he does not violate the rights of others or of the public.[202]

194. State v. Williams, No. 97-L-191, 1999 WL 76633 at *8 (quoting *State v. Cook*, 700 N.E.2d 570 (Ohio 1998)).
195. OHIO REV. CODE ANN. § 2950.06(C)(1) (Anderson 1999).
196. *Williams*, 1999 WL 76633 at *8.
197. *Id.* at *1.
198. *Id.* at *7 (quoting *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956)).
199. Housh v. Peth, 133 N.E.2d 340 (Ohio 1956).
200. *See id.* at 344.
201. *Id.* at 342.
202. *Id.* at 343.
203. *Id.*

The key limitation, conveniently omitted by the Ohio State Court of Appeals, is "so long as he does not violate the rights of others or of the public."[203] This limitation is crucial because it transforms the right to privacy definition from one that is absolute, as suggested by the *Williams* court, to one subject to the limitations of the rights of others and the public. Indeed, the *Williams* court alleges the constitutional violation rests solely upon whether the "notice [to the community] subjects the offender to harassment[; if it has, the offender has] been needlessly deprived of their [sic] constitutional right to remain undisturbed."[204] The *Williams* court does not focus upon, much less does it even mention, the right of the public. It does not address any concerns for public safety, including the high recidivism rates of sex offenders and the inability to accurately predict who will re-offend in the future. In addition, the court never recognizes that a sex offense is more scarring than other offenses because it invades the sanctity of a human body. Instead, the court's focus is primarily upon whether the sex offender may be inconvenienced. By not applying the second-half of the right to privacy definition as declared by the Ohio Supreme Court in *Housh*, the Ohio Court of Appeals did not properly analyze harm to the public. Had it done so, the court would have realized that the importance of public safety far outweighs any embarrassment a sex offender may sustain.

Second, the alleged harms suggested by the court have not been substantiated. No extrinsic evidence was introduced to show that any harassment or inconvenience had been incurred.[205] Indeed, the court's analysis is based solely upon the possibility of harassment or inconvenience, instead of actual substantiated facts. Court decisions should be made upon the facts presented, not upon unproven possibilities that lack evidence. The court, therefore, should have decided the *Williams* case on the facts presented, not upon alleged unsubstantiated future harms.

Third, the dissent correctly recognizes that the majority of the court is greatly concerned with the term "predator" because it may suggest a negative inference to the community at large.[206] However, the majority of the court incorrectly places its concern. The court is concerned with the *label* of "predator" given to a sex offender, as opposed to the *actions* that have necessitated the label being given.[207] Many of the offenders have committed grievous acts against innocent citizens. Many will repeat these same acts. The Ohio Legislature has a responsibility to protect the safety of its citizens. Informing the public of someone who may endanger those around him is certainly not unreasonable. The label chosen to convey that danger does not create the negative image, rather the negative image is conveyed by the sex offense itself. For it is the sex offense that gives rise to the negative stigma in the minds of the community, not the label imposed. In addition, many words used in the judicial process denote negative images. Felon, convict, and criminal are words that suggest a negative connotation. However, no suggestion is being made to refrain from using them to designate persons as such.

Finally, the *Williams* court, as a whole, underestimates the extent to which Ohio's Megan's Law is a police power needed to protect the innocent citizens of the community. Ohio's Megan's Law, like so many others of its kind across the country, was designed in an effort to protect its citizens from sex offenders who "pose a high risk of engaging in further offenses even after being released from imprisonment."[208] In addi-

204. State v. Williams, No. 97-L-191, 1999 WL 76633 at *6.

205. *See id.* at 12 (dissenting opinion).

206. *See id.*

207. It is true that the statute does provide that a sex offender convicted of a misdemeanor offense could be labeled as a sexual predator for life. However, this one possibility does not warrant voiding an entire statute.

208. OHIO REV. CODE ANN. § 2950.02(A)(2) (Anderson 1999).

209. OHIO REV. CODE ANN. § 2950.06 (Anderson 1999).

tion, the brutal nature of the sex offense warrants notice to the community. Yet, the Ohio court is concerned solely with the inconvenience of the sex offender, and not the effect upon the community.

What the court fails to recognize is that actions have consequences. Whatever impositions the sex offender may incur are a result of the actions in which he chose to engage. The Ohio legislature has enacted specific provisions in an effort to ensure that those actions do not occur in the future. One key provision requires the sex offender to appear in person every ninety days to ensure the address is correct.[209] While this provision may indeed be a slight imposition to the sex offender, rational reasons behind this policy are not difficult to imagine. Without an actual appearance at the station, a sex offender could have another person send in the required information, while he fled the state or country in an effort to escape law enforcement officials. Local law enforcement officials would have a more difficult time keeping accurate records to locate the sex offender. The Ohio legislature simply wants to ensure that the sex offender remains in the geographic location in which he claims to reside.

As a final note, the information provided to the community is no more intrusive than that which is found presently in the public record. The notable difference in the information is in the dissemination process. Community notification distributes the information in a more efficient, effective and timely process than a simple search through the public records. Since the information can be found in the public record, responsible dissemination of that information, like that required by Ohio's Megan's Law, should not be opposed.

IV. Conclusion

Megan Kanka only wanted to see a puppy. That one desire cost one little girl her life. He was a man across the street, whom she even may have smiled or waved at before. Yet her smile will never again be seen. Her parents had no practical, efficient, way of knowing that they lived across the street from a man twice convicted of sex offenses. Because of Megan Kanka's death, state legislatures and the federal government have been working to ensure that the streets are safer for their children. The various Megan's Law statutes are designed to protect, not to punish. The goal is to keep children and other citizens safe and unharmed.

A sex offender has chosen to act in a manner that is hurtful to those around him. His actions have both direct and indirect consequences. Whatever ostracism the sex offender may experience is not brought about by the *label* imposed upon him, but rather it is associated with the *act* which warranted the label. Community notification is a reasonable means to ensure the safety of the citizens. States have a responsibility to protect their citizens. Courts throughout the nation have affirmed the validity of these statutes. The Supreme Court of Ohio should do the same.

Hope E. Durant[*]

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* Candidate, Juris Doctorate, Notre Dame Law School, 2001.