MEGAN'S LAW: BRANDING THE SEX OFFENDER OR BENEFITTING THE COMMUNITY?

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I. INTRODUCTION

Maureen Kanka now wakes up every day thinking, "If I had only known." If she had only known that a previously convicted child molester had been living in her neighborhood, her daughter Megan, may still be alive today. On July 29, 1994 seven-year old Megan Kanka became a victim of Jesse Timmendequas, the person accused of taking Megan's life.[1] Nobody knew that this convicted pedophile had moved into their Hamilton Township, New Jersey neighborhood.[2] Maureen Kanka had no idea a convicted child molester was living across the street from her home. When she discovered that Jesse Timmendequas was a convicted sex offender, it was too late to save Megan. On July 29, Jesse Timmendequas lured Megan Kanka into his home.[3] There, he sexually assaulted and strangled Megan to death.[4]

Megan Kanka's death prompted outraged citizens to demand legislation in New Jersey which would require notification to a community when a sex offender moves there. Such legislation was enacted on October 31, 1994 and is commonly referred to as "Megan's Law."[5] A similar notification

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[1]James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 65, 66.

[2]*Id.*

[3]*Id.* Jesse Timmendequas, 33, had been previously convicted twice and served time for a sex offense. He was charged in an eight-count indictment charging him with murder, felony murder, kidnapping, and aggravated sexual assault. Timmendequas was subsequently convicted of Megan's murder on October 19, 1994. *Convicted Sex Offender Indicted in Death of Girl*, N.Y. TIMES, Oct. 20, 1994, at Region News Section.

[4]*Id.*

[5]Criminal Justice — Sex Offenders — Community Notification ("Community Notification"), 1994 N.J. Sess. Law Serv. 128 (West) (to be codified at N.J. STAT. ANN. §§ 2C:7-6 to -11).

requirement is also part of the federal crime bill which President Clinton signed in September 1994.[6]

The law in New Jersey regarding community notification reflects the government's efforts to protect its citizens, and more importantly, its children. This Comment will explore the legal issues that arise when a state enacts legislation which would require a community to be notified when a sex offender moves into its neighborhood. First, this Comment will examine and outline New Jersey's notification law. Second, this Comment will trace the development of the constitutional right of privacy as it applies to community notification. Third, this Comment will discuss the constitutionality of community notification provisions, focusing on the competing rights of the sex offender's right to privacy, the resident's rights to be informed, and the state's interests in protecting its citizens. Finally, this Comment will conclude that community notification provisions which allow citizens to be informed that a sex offender is living in their neighborhood are constitutional.

II. THE NEW JERSEY APPROACH TO COMMUNITY NOTIFICATION

After Megan Kanka was murdered by a twice-convicted child molester, the New Jersey legislature responded swiftly to community outrage and demand for laws that would focus on protecting communities from sex offenders. The package of bills the legislature proposed included a community notification provision which is commonly referred to as Megan's Law.[7]

Megan's Law was originally proposed as part of a package consisting of ten bills focusing on reforming how the state deals with people who commit sexual assaults.[8] The legislation was signed into law on October 31,

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[6]Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (West Supp. 1995). See *infra* note 32 (providing the relevant text of this Act).

[7]Community Notification, 1994 N.J. Sess. Law Serv. § 1.

[8]James Ahearn, *"Megan's Law": A Mixed Bag*, REC., Oct. 9, 1994, at A34.

1994.[9] New Jersey legislators patterned its community notification provision after the law enacted in Washington,[10] the first state to adopt such a law.[11]

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[9]Ivette Mendez, *Sex Offender Bills Enacted by Whitman*, STAR LEDGER, Nov. 1, 1994, at 1, 10. Eleven bills were signed into law. Nine of these comprise Megan's Law. *Id.* This Comment will focus on the provision which allows community notification of released sex offenders. The bill was first introduced to the New Jersey Assembly on August 15, 1994. Ivette Mendez, *Sex Crime Package Voted by Assembly*, STAR LEDGER, Aug. 30, 1994, at 1. The Assembly passed its version of this bill on August 29, 1994. The Assembly's version of this bill requires local authorities to notify community organizations, such as schools, churches, and youth organizations; the press; and citizens when a convicted sex offender moves into their neighborhood. A. 85, 206th N.J. Leg., 1st Sess. (1994). A sex offense, for purposes of this Act, includes: aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping, or an attempt to commit any of the aforementioned offenses; a conviction, finding of delinquency, or acquittal by reason of insanity for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping, endangering the welfare of a minor, luring or enticing, or an attempt to commit any of these offenses. Criminal Justice — Sex Offender — Registration ("Registration"), 1994 N.J. Sess. Law Serv. 133 § 2(b)(1) (West) (to be codified at N.J. STAT. ANN. 2C:7-1 to -5). This proposal, however, did not set forth specific methods on how to inform a community. Instead, it leaves this determination to the Attorney General. A. 85, 206th N.J. Leg., 1st Sess. (1994). The Assembly's rationale for passing this bill is that sex offenders are unlikely to be cured and that there is a high likelihood that they will commit the same offenses after being released. *Id.* Specifically, the Assembly stated that community notification of a sex offender in the community is necessary to protect the community's safety. *Id.*

This bill was introduced to the Senate on September 12, 1994. The Senate passed an amended version of the Assembly's bill on October 3, 1994. S. 14, 206th Leg., 1st Sess. (1994). The Senate's version of the bill establishes a three-tiered system under which an offender is evaluated and categorized as being a low, moderate, or high risk of committing a sexual offense again. *See infra* note 13 (discussing the factors to consider in making such a determination). Under this system, the public will only be notified if the offender is determined to have a high possibility of offending again. As in the Assembly bill, the Senate's version vests the Attorney General with the responsibility of developing procedures for implementing community notification and evaluating an offender's propensity to re-offend. The Senate bill provides that an advisory council be established to assist the Attorney General in enacting guidelines for notification. The Senate approved this amended version on October 3, 1994. Ivette Mendez, *"Megan's Law": 10 Sex Offender Bills Clear Senate*, STAR LEDGER, Oct. 4, 1994, at 1, 22.

[10]WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1992) ("Public agencies are authorized to release relevant and necessary information regarding sex offender to the public when the release of the information is necessary for public protection."). Washington's notification provision was passed in 1990 as part of it's Community Protection Act. WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1992). The Community Protection Act was passed in response to public concern over numerous sexual crimes that had occurred. Mary Anne Kircher, *Registration of Sexual Offenders: Would Washington's Scarlet Letter Approach Benefit Minnesota?*, 13 HAMLINE J. PUB. L. &

New Jersey's notification provision sets up a three-tiered system under which the prosecutor of the county in which the registrant is expected to reside makes a determination concerning the sex offender's risk to the community.[12] These levels are determined by an offender's propensity to offend again.[13] Under Tier One, if it is concluded that there is a low risk

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POL'Y 163 (1992). Any juvenile or adult who has been convicted of a sex offense in the state of Washington must register with the county sheriff of the Washington county in which he or she intends to reside within twenty-four hours of release from confinement. *Id.* The provision allows the release of information to the community regarding those sexual offenders who have registered that they are living in a certain neighborhood. *Id.* at 169.

[11]Four other states besides New Jersey have enacted laws allowing public notification in certain situations. *See, e.g.*, ALASKA STAT. §§ 12.63.010, 18.65.087 (1994); LA. REV. STAT. ANN. § 15:546 (West Supp. 1993); OR. REV. STAT. § 181.508 (1994); WASH REV. CODE ANN. § 4.24.550 (West Supp. 1994). Three other states, although not permitting notification, allow public access to registration information. Julia A. Houston, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729 (1994). Idaho allows its citizens to obtain a registrant's name, birth date, and social security number, if a written request is submitted. IDAHO CODE § 18-8309 (1990 & Supp. 1993). Maine allows a state citizen to find out whether an offender is registered if the citizen submits a request indicating the offender's name, date, and charged offense. ME. REV. STAT. ANN. tit. 16, § 611-22 (West 1983 & Supp. 1993). North Dakota permits public inspection of registration information. N.D. CENT. CODE § 12.1-32-15 (1993).

[12]Community Notification, 1994 N.J. Sess. Law Serv. § 3(a). The statute provides: "[T]he guidelines shall identify factors relevant to risk of re-offense and shall provide for three levels of notification depending upon the degree of the risk of re-offense." *Id.* In Washington, after a person has registered as required by the law, notification is governed by individual department policy. Christy Scattarella, *Release of Sex Offender Data Varies by Jurisdiction*, SEATTLE TIMES, Feb. 20, 1991, at F1. It is within the discretion of each police department to determine whom to notify and what information should be disclosed. The Washington Association of Sheriffs and Police Chiefs have a proposed policy involving a three-tiered system, which many departments choose to follow. Kircher, *supra* note 10, at 171. This guide suggests releasing information according to the individual's likelihood of re-offense. *Id.* At the first level, only public agencies are notified. *Id.* At the second level, notification is given to community groups and school districts. *Id.* At the third level, the press is given the information. *Id.*

[13]Community Notification, 1994 N.J. Sess. Law Serv. § 3(b)(1) sets forth what factors to consider in making this determination:

> Factors relevant to risk of re-offense shall include, but not be limited to the following:
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> (1) Condition of release that minimize risk of re-offense, including but not limited to whether the offender is under supervision of probation

of re-offense, the municipality's chief law enforcement is to notify the law enforcement agencies that are likely to come into contact with the offender.[14] Under Tier Two, if it is determined that there is a moderate risk of re-offense, in addition to enforcement agencies being contacted,

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> or parole; receiving counseling, therapy, or treatment; or residing in a home situation that provides guidance and supervision;
> (2) Physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness;
> (3) Criminal history factors indicative of high risk of re-offense, including:
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> (a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior;
> (b) Whether the offender served the maximum term;
> (c) Whether the offender committed the sex offense against a child;
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> (4) Other criminal history factors to be considered in determining risk, including:
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> (a) The relationship between the offender and the victim;
> (b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury;
> (c) The number, date and nature of prior offenses;
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> (5) Whether psychological or psychiatric profiles indicate a risk of recidivism;
> (6) The offender's response to treatment;
> (7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence, and
> (8) Recent threats against persons or expressions of intent to commit additional crimes.

Id. Similarly, in Washington State, the likelihood of re-offense is the guiding factor employed by individual police departments. Kircher, *supra* note 10, at 168. Some criteria a police department may use in classifying a released sex offender include: the nature of the crime, the treatment the offender has received, and the offender's feelings about the crime he committed. Wayne Wurzer, *Some Sex Offenders Home to Be Secret*, SEATTLE TIMES, July 29, 1994, at B2. Thus, the person's propensity to re-offend determines who will be notified. *Id.*

[14]Community Notification, 1994 N.J. Sess. Law Serv. § 3(c)(1). Similarly, in Washington State, at Tier One, only the police will be notified of a sex offender's release. Scattarella, *supra* note 12, at 1. Tier One generally applies to offenders who are viewed as the least threatening to the community. *Id.*

notification is to be given to community organizations.[15] Under Tier Three, when it is concluded there is a high risk of re-offense, the public is finally notified.[16] The form of notification pursuant to Tier Two and Tier Three includes the registrant's name, a recent photograph, a physical description of the offender, the offense, the offender's address, place of employment or schooling, and a description of the registrant's vehicle including the license plate number.[17] A warning against committing acts of vandalism, threats, and assaults accompanies every notification.[18]

New Jersey's notification provision also establishes procedures addressing when a sex offender changes his address.[19] Specifically, the offender must register with the appropriate law enforcement agency within

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[15]Community Notification, 1994 N.J. Sess. Law Serv. § 3(c)(2). At the second level in Washington, notification is given to schools and community organizations situated close to the sex offender's intended residence. Scattarella, *supra* note 12, at 1. Although the types of offenders in Level Two vary considerably, they are considered to be less violent than someone placed in the Level Three category. *Id.*

[16]Community Notification, 1994 N.J. Sess. Law Serv. § 3(c)(3). Level Three in Washington includes the most violent sex offenders who are categorized as "sexual predators." Scattarella, *supra* note 12, at 1. These offenders are perceived as the greatest threat to the public. Thomas Guillen, *Thousands of Sex Offenders Now Registered — Data Survey Finds 73% Compliance by Those in Most Serious Cases*, SEATTLE TIMES, July 7, 1991, at B3. At Level Three, the press is informed in addition to the police and community groups. Scattarella, *supra* note 12, at 1.

[17]N.J. Att'y Gen., Attorney General's Guidelines for Law Enforcement for Notification to Local Officials and/or the Community of Entry of a Sex Offender into the Community 11 (1994). The guidelines also propose some methods of notification, including: community meetings, speeches in schools and religious organizations, and door-to-door. *Id.* at 11-13. In Washington, the manner in which this information is disseminated varies according to each department. Kircher, *supra* note 10, at 171. Some police departments maintain a directory which is open to inspection by any member of the public. Other departments do not allow the public to inspect the directory, but will inform the public when they deem it is necessary. Still other departments post the information at the police station so the media has access to the information at all times. *Id.* at 172-73.

[18]*Id.*

[19]Community Notification, 1994 N.J. Sess. Law Serv. § 2 provides that if a person required to register "intends to change his address, the chief law enforcement officer of the municipality to which the person is relocating shall provide notification of that relocation to the community pursuant to section 3 of this act." *Id.*

seventy days of moving into an area in New Jersey.[20] If an offender already living in New Jersey changes his address, he must inform the agency with which he is registered and re-register with the appropriate person within ten days of moving.[21] Moreover, New Jersey has added a section requiring registered persons to verify their address either every three months or annually, depending upon the type of sex offense for which they had been convicted.[22]

New Jersey's guidelines for determining an offender's risk to the public are mandatory.[23] In New Jersey, the guidelines set forth by the Attorney

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[20]Registration, 1994 N.J. Sess. Law Serv. § 2(c)(3) states: "A person moving to or returning to this State from another jurisdiction shall register . . . within 70 days of first residing in or returning to a municipality in this State." *Id.* Under Washington's registration statute, a convicted sex offender moving into the state for the first time or returning to the state must register with the county sheriff where he intends to live within thirty days of establishing his residence. WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1992).

[21]Specifically, § (2)(d) reads: "Upon a change of address, a person shall notify the law enforcement agency with which the person is registered and must re-register with the appropriate law enforcement agency no less than 10 days before he intends to first reside at his new address." Registration, 1994 N.J. Sess. Law Serv. § (2)(d). In Washington, the offender must notify the county sheriff within ten days if he moves either, within the county of his present address or to a new county. WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1993).

[22]Section (2)(e) states:

> A person required to register under paragraph (1) of subsection b. of this section or under paragraph (3) of subsection b. due to a sentence imposed on the basis of criteria similar to the criteria set forth in paragraph (1) of subsection b. shall verify his address with the appropriate law enforcement agency every 90 days in a manner prescribed by the Attorney General. A person required to register under paragraph (2) of subsection b. of this section or under paragraph (3) of subsection b. on the basis of a conviction for an offense similar to an offense enumerated in paragraph (2) of subsection b. shall verify his address annually in a manner prescribed by the Attorney General. One year after the effective date of this act, the Attorney General shall review, evaluate, and if warranted, modify pursuant to the "Administrative Procedure Act" . . . [t]he verification requirement.

Registration, 1994 N.J. Sess. Law Serv. § (2)(e).

[23]Community Notification, 1994 N.J. Sess. Law Serv. § 1 recites in pertinent part: "[T]he chief law enforcement office of the municipality where the [sex offender] intends to reside *shall* provide notification in accordance with the provisions [of this act]." *Id.* (emphasis added). Washington's law, on the other hand, is merely a suggestion. WASH.

General governing notification procedures must be followed by the municipalities.[24] While the county prosecutor determines when notification is appropriate, she must do so in accordance with the Attorney General's guidelines.[25]

Moreover, New Jersey's provision applies retroactively in that it affects those who have been convicted of a sex offense prior to the law's enactment.[26] Accordingly, the statute applies to sex offenders who were convicted prior to the enactment of this legislation and allows release of this information to the public in situations where a prosecutor determines the sex offender is a "high risk."[27]

REV. CODE ANN. § 4.24.550 (West Supp. 1992) ("Public agencies are authorized to release [information] regarding sex offenders . . . .").

[24]Community Notification, 1994 N.J. Sess. Law Serv. § (3)(e) provides: "The Attorney General's guidelines shall provide for the manner in which records of notification provided pursuant to this act shall be maintained and disclosed." *Id.*

[25]*Id.* Alternatively, in Washington, individual departments determine when the community should be notified and what information should be released. Kircher, *supra* note 10, at 171. Many departments follow a proposed policy guide, but they are not required to do so. *Id.*

[26]Community Notification, 1994 N.J. Sess. Law Serv. § 1. Any inmate previously convicted or a sex offense is required to register and is therefore, subject to the provisions of the notification law. *Id.* Washington's provision is similar to New Jersey in that it requires all sex offenders to register. Kathy Barret Carter, *Retroactive Sex Crime Law Raises Thorny Issues*, STAR LEDGER, Jan. 15, 1995, at 1, 14. However, Washington's guidelines impose significant limitations on allowing information to be released to the public. *Id.* Despite a finding that Washington's statute applied retroactively, in specified circumstances the Washington Supreme Court has held the sex offender registration requirement and the release of such information constitutional. State v. Ward, 123 Wash. 2d 488, 502-03 (Wash. 1994). In *Ward*, the court determined that there was no additional punishment placed on sex offenders required to register because the information which can be released is limited. *Id.*

[27]Community Notification, 1994 N.J. Sess. Law Serv. § 1. In the very first constitutional challenge to Megan's Law in New Jersey, the basis of the suit was the statute's retroactive application. Guy Sterling, *Sex Offender Nearing His Release Will Be First to Test Megan's Law*, STAR LEDGER, Dec. 23, 1994, at 1, 11. Carlos Diaz, a convicted rapist filed suit to stop prosecutors from notifying schools and community groups of his presence. Guy Sterling, *Rapist Gains Temporary Ban on Megan's Law Notification*, STAR LEDGER, Jan. 4, 1995, at 1, 4. United States District Court Judge John Bissell issued a preliminary injunction to bar prosecutors from releasing Diaz's information. *Id.* In doing so, the Judge questioned whether the New Jersey statute's retroactivity was punitive because it applied to prisoners who had been sentenced prior to this statute being

Another bill enacted as part of Megan's Law, complementing the notification provision, is a measure which requires sex offenders to register with local authorities.[28] The New Jersey registration statute requires a sex offender to register in the municipality where he intends to reside.[29] The

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enacted. *Id.* The Judge's opinion on this matter, however, applied only to Carlos Diaz's situation. *Id.*

In another challenge to Megan's Law on February 28, 1995, United States District Court Judge Politan held that Megan's Law Tier Two and Tier Three notification violated the *Ex Post Facto* Clause of the United States Constitution. Artway v. Attorney General of New Jersey et al., No.94-6287, slip op. at 1, 66 (D.N.J. filed Feb. 28, 1995). Judge Politan, however, did hold that the registration requirement was constitutional. *Id.*

[28]Registration, 1994 N.J. Sess. Law Serv. § 1. The following states have laws requiring sex offenders to register with law enforcement authorities upon their release from prison: ALA. CODE § 13A-11-202 (1982); ARK. CODE ANN. § 12-12-909 (Michie Supp. 1993); ALASKA STAT. § 12.63.010 (1994); ARIZ. REV. STAT. ANN. § 13-3821 (1994); CAL. PENAL CODE § 290 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 19-3-412.5 (West Supp. 1993); DEL. CODE ANN. tit. 11, § 4120 (1994); FLA. STAT. ANN. § 775.23 (West 1994); GA. CODE ANN. § 42-9-44.1 (1994); IDAHO CODE § 18-8301 (1994); ILL. REV. STAT. ch. 730, para. 3 § 150 (1995); IND. CODE § 5-2-12-5 (1994); KY. REV. STAT. ANN. § 17.510 (Michie 1994); KAN. STAT. ANN. § 22-4904 (1994); LA. REV. STAT. ANN. § 15:540-542 (West 1995); ME. REV. STAT. ANN. tit. 34-A, § 11003 (West 1994); MINN. STAT. § 243.166 (1994); MONT. CODE. ANN. § 566.610 (1994); NEV. REV. STAT. ANN. § 207.152 (1993); N.H. REV. STAT. ANN. § 632-A:12 (1994); OHIO REV. CODE. ANN. § 2950.02 (Anderson 1994); OKLA. STAT. ANN. tit. 581, §§ 1-7 (West 1995); OR. REV. STAT. § 181.519 (1994); R.I. GEN. LAWS § 11-37-16 (1994); S.D. CODIFIED LAWS ANN. § 22-22-31 (1994); TEXAS CRIM. PROC. CODE ANN. § 6252-13c.1 (1995); UTAH CODE ANN. § 77-27-21-21.5 (1994); VA. CODE ANN. § 19.2-298.1 (Michie 1994); WASH. REV. CODE § 9A.44.130 (1994); WIS STAT. § 175.45. (1994); W. VA. CODE § 61-8F-2 (1994); WYO. STAT. § 7-19-302 (1994).

[29]Registration, 1994 N.J. Sess. Law Serv. § 2(c) reads:

> A person required to register under the provisions of this act shall do so . . . as follows:
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> . . . .
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> (3) A person moving to or returning to this State from another jurisdiction shall register with the chief law enforcement officer of the municipality in which the person will reside . . . .
> (4) A person required to register on the basis of a conviction prior to the effective date who is not confined or under supervision on the effective date of this act shall register . . . with the chief law enforcement officer of the municipality in which the person will reside or, if the municipality does not have a local police force, the

information received in a registration is ultimately sent to the Superintendent of State Police who will maintain a central registry.[30] Information in a registration may be released only if it is essential to protecting the public.[31]

A community notification provision is also part of the federal crime bill which became law on September 12, 1994.[32] Under the federal provision,

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Superintendent of State Police.

Id.

[30]Section (4)(c) states:

> Within three days of receipt of a registration pursuant to section c. of section 2 of this act, the registering agency shall forward the statement and any other required information to the prosecutor who shall, as soon as practicable, transmit the form of registration to the Superintendent of State Police, and, if the registrant will reside in a different county, to the prosecutor of the county in which the person will reside. The prosecutor of the county in which the person will reside shall transmit the form of registration to the law enforcement agency responsible for the municipality in which the person will reside and other appropriate law enforcement agencies. The superintendent shall promptly transmit the conviction data and fingerprints to the Federal Bureau of Investigation.

Id.

[31]As provided for in § (5)(a):

> Records maintained pursuant to this act shall be open to any law enforcement agency in this state, the United States or any other state. Law enforcement agencies in this State shall be authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection in accordance with the provision of P.L. 1994, c. 128.

Id.

[32]Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (West 1995). This provision was included as part of this Act and states in pertinent part:

> (d) Release of Information: The information collected under a State registration program shall be treated as private data except that — (1) such information may be disclosed for law enforcement purposes; (2) such information may be disclosed to government agencies conducting confidential background checks; and (3) the designated State law enforcement agency and any local law enforcement agency authorized by the State agency may release

police can notify a community if a convicted pedophile or rapist will be living in their neighborhood or if that person has been in their neighborhood frequently.[33] Under the federal provision, such information can only be released if it "is necessary to protect the public."[34] The federal law, therefore, permits notification only in the most serious cases where it is evident there is a threat to the public.[35] Notification, however, is not mandatory.[36] States are required under the federal law to enact similar laws within three years.[37] States that fail to enact similar legislation within the required time period will be penalized by having certain federal funds cut.[38]

III. THE RIGHT TO PRIVACY

A. THE EVOLUTION OF THE RIGHT TO PRIVACY

Some opponents to community notification statutes assert that allowing the release of such information interferes with that offender's right to privacy, specifically, the offender's right to not have private information disclosed.[39] The United States Supreme Court explicitly recognized a

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> relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

Id.

[33]Popkin, *supra* note 1 at 66.

[34]42 U.S.C. § 14071(d)(3) (West 1995).

[35]*Id.*

[36]*Id.*

[37]*Id.*

[38]*Id.* The federal statute provides that funds allocated to states pursuant to 42 U.S.C. § 3756 will be decreased if a state does not comply. Jacob Wetterling, 42 U.S.C. § 14071(f)(2)(A) (1994). These funds include grants for correctional institutions and grants for improving drug control programs. 42 U.S.C. § 3756 (1994).

[39]The right to privacy has its roots in the late 1800's. In an article, Samuel Warren and Louis Brandeis posited that persons whose private affairs were invaded should have access to some form of tort relief. Samuel Warren & Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). Much of the substance in that article was derived

constitutionally guaranteed right of privacy in *Griswold v. Connecticut*.[40] The Court found that the right of privacy was an unenumerated right[41] included in the Due Process Clauses of the Fifth[42] and Fourteenth Amendments.[43] Adopting a total incorporation position,[44] the Court

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from Cooley's treatise on torts which had been published two years earlier. THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888). These ideas were eventually codified by William Prosser. William Prosser, *Privacy*, 48 HARV. L. REV. 383 (1960). Prosser established four distinct torts which came under the rubric of "privacy." The first was "intrusive invasion" which involves an unpermitted intrusion on one's solitude and is not necessarily a publication. *Id.* Second, there was "commercial appropriation" which is a publication of a person's name, face, or figure in a commercial advertisement without that person's permission. *Id.* "False light" is a publication which does not amount to libel but is a false reporting about the person. *Id.* Finally, "public revelation" of private facts involves the publication of facts, although true, which were private. *Id.*

[40]381 U.S. 479 (1965). Justice Douglas delivered the majority opinion. *Id.* at 480. Justice Goldberg authored a separate concurrence. *Id.* at 486 (Goldberg, J., concurring). Chief Justice Warren and Justice Brennan joined in Justice Goldberg's concurring opinion. *Id.* Justice White wrote a separate concurring opinion. *Id.* at 502 (White, J., concurring). Justice Black, joined by Justice Stewart, wrote a dissenting opinion. *Id.* at 507 (Black, J., dissenting). Justice Stewart, joined by Justice Black, also penned a separate dissenting opinion. *Id.* at 527 (Stewart, J., dissenting). In *Griswold*, a Connecticut statute prohibited the use of any device which would prevent conception. *Id.* Aiding and abetting the prevention of conception was also a criminal offense in that state. *Id.* The Planned Parenthood League of Connecticut operated a family planning center in New Haven, Connecticut. *Id.* An Executive Director of the League, Griswold, and a Medical Director at the family planning center, Buxton, gave information and advice about contraception to married couples. *Id.* at 480. They were prosecuted under this statute for providing such assistance and found guilty. *Id.* The appellate division of the Connecticut circuit court and the Connecticut Supreme Court both upheld these convictions upon appeal. *Id.* The United States Supreme Court reversed these convictions and held the statute invalid. *Id.*

[41]*Id.* at 484.

[42]U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

[43]U.S. CONST. amend XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

[44]The dispute surrounding incorporation is usually said to begin with Gitlow v. New York, 268 U.S. 652 (1925), in which the Court held that the First Amendment freedoms of speech and the press were protected from state action by the Due Process Clause of the Fourteenth Amendment. *Id.* The dispute continued and focused on whether the Due Process Clause of the Fourteenth Amendment should protect all of the guarantees in the Bill of Rights and whether it should protect unenumerated rights. G. Sidney Buchanan,

construed the due process clauses to protect rights that were not specifically listed in the Constitution.[45]

The majority in *Griswold* found that several Bill of Rights guarantees[46] protect privacy interests and create a "penumbra" or "zone" of privacy.[47] Justice Douglas, writing for the majority, asserted that certain constitutional guarantees "have penumbras, formed by emanations from those guarantees that help give [the guarantees] life and substance[,]" and which imply a right to privacy.[48] The Court stated, for example, that the First Amendment's explicit protections of freedoms of speech and the press create a "penumbra" which protects freedom of association, a freedom implicit in the Constitution.[49] Likewise, the Court found a penumbra emanating from the Fourth Amendment's ban on unreasonable governmental searches which

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The Right of Privacy: Past, Present, and Future, 16 OHIO N.U. L. REV. 403, 418-21 (1989). The total incorporation view asserts that only the specified Bill of Rights guarantees are protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 419.

[45]*Griswold*, 381 U.S. at 484. There is no right of privacy expressly stated in the Constitution. Therefore, the Court had to find that certain rights, though not specified in the Constitution, are nevertheless, a protected right. *Id.*

[46]*Id.* The Court posited that a right to privacy could be found in the First Amendment right of association, in the Third Amendment's prohibition of housing soldiers during peacetime without the homeowner's consent, in the Fourth Amendment's prohibition against unreasonable searches and seizures, in the Fifth Amendment's Self-Incrimination Clause, and in the Ninth Amendment's language suggesting there may be unenumerated rights. *Id.*

[47]*Id.* at 484.

[48]*Id.* The Court stated that the relationship among these guarantees form a zone of privacy. *Id.* at 485.

[49]*Id.* at 483.

> The association of the people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice . . . is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

Id.

protects individual privacy interests, as do the Third[50], Fifth[51], and Ninth Amendments.[52]

The *Griswold* Court determined that the Connecticut statute, which prohibited counseling married couples regarding contraception, violated this penumbra of privacy.[53] The majority emphasized that the statute had "a maximum destructive impact" upon the privacy of the marriage relationship.[54] This, Justice Douglas stated, was a means that "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms."[55] Consequently, the Court expressly recognized an unenumerated right of privacy.[56] Specifically, the Court held that the right of privacy protects against the government's intrusion into a married couple's decision regarding contraception.[57]

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[50]U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

[51]U.S. CONST. amend. V.

[52]U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.").

[53]*Griswold*, 381 U.S. at 485. Justice Douglas, writing for the majority, concluded: "the right of privacy which presses for recognition here is a legitimate one." *Id.* Justice Douglas emphasized that the statute, which was unnecessarily broad, invaded the privacy of a marriage relationship resulting in a "maximum destructive impact" on the marriage. *Id.* The concurring opinions in *Griswold* agreed with Justice Douglas's conclusion invalidating the Connecticut statute, but implemented different reasoning to reach this result. *See id.* at 486-87 (Goldberg, J., concurring) (stating that the Ninth Amendment supports the view that there exists certain unenumerated rights, thus the Fourteenth Amendment should be found to do the same); *id.* at 500 (Harlan, J., concurring) (stating that although the Bill of Rights may be helpful, "[t]he Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom"); *id.* at 502-03 (White, J., concurring) (stating that the Fourteenth Amendment protects the right to marry which includes the right of the marriage relationship to be free from governmental regulation).

[54]*Id.* at 485.

[55]*Id.*

[56]*Id.* at 485-86.

[57]*Id.* The Court determined that the statute prohibiting the use of contraception by married couples was an attempt by the state to regulate activities, which they deemed to be constitutionally protected. *Id.*

In a concurring opinion, Justice Goldberg rejected the majority's total incorporation position.[58] Relying heavily upon the Ninth Amendment,[59] the Justice opined that the Due Process Clause of the Fourteenth Amendment protects unenumerated rights.[60] Justice Goldberg, thus, fully agreed with the Court that "[t]he right of privacy is a fundamental right . . . ."[61] However, the Justice disagreed with Justice Douglas on the conceptual point that the right of privacy could be found in the penumbras in the guarantees of the Bill of Rights.[62] Alternatively, Justice Goldberg asserted that this right is in the concept of liberty which the Due Process Clause of the Fourteenth Amendment protects.[63] Justice Goldberg, therefore, construed the Fourteenth Amendment's Due Process Clause as an independent source of unenumerated rights.

Justice Harlan wrote separately, joining in the judgment but not the opinion of the Court.[64] Justice Harlan posited that the Due Process Clause of the Fourteenth Amendment should be interpreted by an approach which questions whether the concept of ordered liberty is violated.[65] Justice Harlan, therefore, did not believe such an inquiry depended upon using any provisions of the Bill of Rights.[66] Justice Harlan agreed with Justice Goldberg's opinion that the Due Process Clause may be construed

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[58]*Id.* at 486. Chief Justice Warren and Justice Brennan joined in Justice Goldberg's concurring opinion. Justice Goldberg conceded that he had "not accepted the view that 'due process' as used in the Fourteenth Amendment incorporates all of the first eight Amendments . . . ." *Id.* (Goldberg, J., concurring). Justice Goldberg referred to his concurring opinion in Pointer v. Texas, 380 U.S. 400, 410 (1965) and the dissenting opinion of Justice Brennan in Cohen v. Hurley, 366 U.S. 117, 154 (1961).

[59]U.S. CONST. amend. IX.

[60]*Griswold*, 381 U.S. at 486-87.

[61]*Id.* at 494 (Goldberg, J., concurring).

[62]*Id.* at 486 (Goldberg, J., concurring) ("Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments. . . . I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.").

[63]*Id.* at 486 (Goldberg, J., concurring).

[64]*Id.* at 499 (Harlan, J., concurring).

[65]*Id.* at 500 (Harlan, J., concurring).

[66]*Id.*

independently to protect unenumerated rights, like marital privacy.[67] Justice Harlan, explicitly rejecting Justice Douglas' penumbra theory, asserted that the rights which the Due Process Clause of the Fourteenth Amendment protects are not dependent upon specific Bill of Rights guarantees.[68] Justice Harlan agreed that the statute at issue amounted to an unwarranted invasion of privacy.[69]

Justice White also joined in the judgment of the Court but not in it's opinion.[70] Justice White opined that unenumerated rights are protected pursuant to the concept of liberty in the Due Process Clause of the Fourteenth Amendment.[71] The Justice agreed that the right to marry is protected under the Fourteenth Amendment.[72] Justice White argued that the stated goal, to discourage illicit sexual relationships, was legitimate.[73] The Justice, however, found the ban on contraceptives to be both irrational and intrusive.[74] Thus, the Justice determined that the statute was unconstitutional.[75]

Justices Black and Stewart wrote separate dissenting opinions, while joining the opinions of each another.[76] Both Justices asserted that the Due Process Clause of the Fourteenth Amendment does not protect unenumerated rights.[77] Finding no right to marital privacy, both Justices concluded that the Connecticut statute did not interfere with any protected right.[78]

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[67]*Id.*

[68]*Id.* at 500-01 (Harlan, J., concurring).

[69]*Id.*

[70]*Id.* at 502 (White, J., concurring).

[71]*Id.*

[72]*Id.* at 502-03 (White, J., concurring) (citations omitted).

[73]*Id.* at 505 (White, J., concurring).

[74]*Id.* at 505-06 (White, J., concurring).

[75]*Id.* at 507 (White, J., concurring).

[76]*Id.* at 507 (Black, J., dissenting); *id.* at 528 (Stewart, J., dissenting).

[77]*Id.* at 511-13 (Black, J., dissenting); *id.* at 528 (Stewart, J., dissenting).

[78]*Id.* at 527 (Black, J., dissenting); *id.* at 528-30 (Stewart, J., dissenting).

Although the Justices found the law offensive, they could locate no explicit constitutional provision that would prohibit it.[79]

Several Justices also addressed the standard of review to be employed when determining whether a government infringement on an individual's right of privacy is constitutional.[80] The *Griswold* majority did not address this issue, merely asserting that the statute at issue was unconstitutionally broad. However, in characterizing the right of privacy as fundamental, the five concurring justices applied what is referred to as "strict scrutiny review."[81] Indeed, a majority of justices in *Griswold* proffered that strict scrutiny review should be used when a government regulation interferes with the right of privacy.[82]

Griswold, thus, stands for the proposition that the right of privacy is an unenumerated right protected by the Constitution. Although *Griswold* involved specifically the right of marital privacy, subsequent holdings have expanded this to include other rights encompassed by privacy.[83]

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[79]*Id.* at 508 (Black, J., dissenting); *id.* at 530 (Stewart, J., dissenting).

[80]*Id.* at 497 (Goldberg, J., concurring). Chief Justice Warren and Justice Brennan joined in the concurring opinion of Justice Goldberg. *Id.* Justice Harlan addressed standard of review in his concurrence. *Id.* at 500-01. (Harlan, J., concurring). Justice White authored a separate concurrence in which he also addressed the applicable standard of review. *Id.* at 503-04 (White, J., concurring).

[81]*Id.* at 497 (Goldberg, J., concurring). Justice Goldberg stated that: "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling . . . ." *Id.* (citation omitted). The law must be shown to be "necessary and not merely rationally related to the accomplishment of a permissible state policy." *Id.* (citations omitted). Under strict scrutiny review, the government is required to demonstrate that a compelling interest is being furthered by a necessary or narrowly tailored means. *Id.* at 497-98 (Goldberg, J., concurring). Under substantive due process, strict scrutiny is utilized when a fundamental right is significantly encroached or impaired by a governmental action. *Id.* There are two other tiers of review. Under "middle tier review," the state must show that the law is substantially related to the achievement of an important state interest. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW, § 10.01, at 595 (1989). Rational basis review, the lowest level of review, asks whether the law is rationally related to a legitimate state interest. *Id.*

[82]Griswold v. connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

[83]*See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding that the right to privacy includes decisions regarding childbearing); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy encompasses a woman's choice as to whether to terminate her pregnancy); Loving v. Virginia, 388 U.S. 1 (1967) (holding that the right

The finding in *Griswold* of a fundamental right of privacy has been embraced, applied in other situations, and extended beyond the precise holding in *Griswold*. *Griswold* consistently has been applied in situations concerning the use of contraceptives.[84] In *Eisenstadt v. Baird*,[85] for example, the Supreme Court invalidated a statute that permitted contraceptives to be distributed only to married persons and only by registered physicians and pharmacists, holding that the statute discriminated against people who were not married.[86] Although the case was decided substantially on equal protection grounds,[87] the majority referred to the right of privacy as an individual right, whether married or single.[88] Thus,

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to marry is an unenumerated right protected by the Due Process Clause of the Fourteenth Amendment).

[84]*See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that single persons, as well as married persons, could not be denied access to contraceptives); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding that childbearing decisions are a constitutionally protected right).

[85]405 U.S. 438 (1972).

[86]*Id.* at 443. In *Baird*, William Baird exhibited contraceptive devices during a lecture at Boston University and distributed a contraceptive to a young woman thereafter. *Id.* at 440. Baird was prosecuted pursuant to a Massachusetts statute, which precluded single persons from obtaining contraceptives but allowed physicians and pharmacists to distribute contraceptives to married persons. *Id.* at 440-41.

[87]*Id.* at 442-43. The Court stated that the statute's distinction between married and unmarried persons created an unconstitutional distinction between single and married people thereby denying single persons equal protection of the law. *Id.* The majority asserted that single persons should be afforded the same rights as married persons to have access to contraceptives. *Id.*

[88]*Id.* at 453. Justice Brennan, writing for the majority, stated:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. (citations omitted) (emphasis in original).

the Court extended the right of privacy to include the right of unmarried persons to have access to contraceptives.[89]

The landmark case of *Roe v. Wade*[90] extended the right of privacy recognized in *Griswold* to abortion cases.[91] The Court held a statute banning abortions was unconstitutional on privacy grounds.[92] The Court explicitly recognized a personal right of privacy that encompassed a woman's decisions concerning her pregnancy.[93] The Court then reaffirmed the determination in *Griswold* that the right of privacy is fundamental, one subject to strict scrutiny review.[94]

After *Roe*, the Court again dealt with the regulation of contraception in *Carey v. Population Services International*.[95] In *Carey*, the Court

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[89]*Id.* at 452-53.

[90]410 U.S. 113 (1973). Justice Blackmun delivered the opinion for the majority. *Id.* at 116. Justice Stewart penned a concurring opinion. *Id.* at 167 (Stewart, J., concurring). Chief Justice Burger also wrote a separate concurrence reported in the companion case *Doe v. Bolton*. *Bolton*, 410 U.S. at 207 (Burger, C.J., concurring). Justice Douglas authored a third concurring opinion. *Id.* at 209 (Douglas, J., concurring). Justice White, joined by Justice Rehnquist, dissented from the majority's opinion. *Id.* at 221 (White, J., dissenting). Justice Rehnquist authored the final dissenting opinion. *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting).

[91]*Id.* In *Roe*, the Court was confronted with a Texas statute which in effect, almost completely banned abortions by making it a crime to procure or attempt to procure an abortion except if it was necessary to save the mother's life. *Id.* at 117-18. Jane Roe was a single woman living in Texas. *Id.* at 120. Roe wished to terminate her pregnancy with a legal abortion, but was unable to do so because her life was not in danger as a result of the pregnancy. *Id.* Roe alleged the Texas statute was an unconstitutional invasion of her right to privacy. *Id.* In furtherance of Jane Roe's argument, a physician, who had been prosecuted for violating the anti-abortion statute, claimed that the statute was vague and violated his and his patient's privacy rights. *Id.* at 120-21. A third party, a married couple, filed a companion complaint seeking to have a legal abortion should the wife become pregnant in the future. *Id.* at 121. The doctor's and the married couple's suits were eventually dismissed, and Jane Roe's complaint was the sole issue before the Court. *Id.* at 122.

[92]*Id.* at 160-62.

[93]*Id.* at 153.

[94]*Id.* at 155.

[95]431 U.S. 678 (1977). *Carey* involved a New York law that made it illegal for anyone but a pharmacist to distribute contraceptives to adults and placed a complete ban on the sale or distribution of contraceptives to minors. *Id.* at 681-82. Population Planning

recognized that an individual has a right of privacy in childbearing decisions, including the access to contraceptives.[96] When *Carey* is considered along with the *Roe*, *Griswold*, and *Baird* decisions, it seems apparent that childbearing decisions are protected because of a right of privacy.[97] These decisions also support strict scrutiny review as the standard to be implemented in evaluating government regulations which impede such decisions.[98]

B. NON-DISCLOSURE OF INFORMATION

Implicit in *Griswold* and its progeny is that the right of privacy includes the right not to disclose certain personal information that an individual chooses to keep private. Indeed, even prior to *Griswold*, the Supreme Court already had recognized a privacy interest in the non-disclosure of information.[99]

Community notification provisions confront two separate interests that derive from an individual's privacy interest in non-disclosure of information: (1) whether the government can disclose an individual's private information; and (2) whether the government can actively disseminate information about an individual that is a matter of public record.

Associates, Inc. ("PPA") is a corporation primarily engaged in the mail-order retail sale of nonmedical contraceptive devices from its North Carolina offices. *Id.* at 682. PPA advertised in a New York college newspaper and also filled mail orders for New York residents. *Id.* PPA did not limit the availability of their product according to an individual's age. *Id.* The state of New York notified PPA that its activities violated the New York law. *Id.* at 682-83. PPA then sued New York State, challenging the constitutionality of the New York statute. *Id.* at 683. The Court held the statute was an unconstitutional invasion of an individual's right of privacy. *Id.* at 689.

[96]*Id.* at 687. Justice Brennan, on behalf of the *Carey* majority stated: "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state." *Id.*

[97]Buchanan, *supra* note 44, at 446.

[98]*Id.*

[99]*See* NAACP v. Alabama, 357 U.S. 449, 466 (1958).

1. NON-DISCLOSURE OF PRIVATE INFORMATION

In *NAACP v. Alabama*,[100] the state of Alabama attempted to force the NAACP[101] to disclose it's membership list.[102] The demand was made as part of the state's request for an injunction against the NAACP to cease activities in Alabama because it had not qualified for doing business in that state.[103] The Court, however, recognizing the extreme importance of the correlation between an individual's freedom to associate and his privacy right in these associations, held that the NAACP could not be required to make such a disclosure.[104] The Court could not find a sufficient state interest to justify impeding the NAACP's members' freedom of association.[105]

Although the Supreme Court somewhat indirectly recognized a privacy interest in non-disclosure of information in *NAACP*, the Court explicitly recognized the interest in *Whalen v. Roe*.[106] In *Whalen*, the Supreme Court upheld a New York statute that allowed computerized records of prescriptions for certain dangerous but lawful drugs, which included the

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[100]357 U.S. 449 (1958). The Alabama statute required a foreign corporation to file with the Secretary of State before doing business in the state of Alabama. *Id.* at 451. The NAACP never complied with this statute. *Id.* at 452. The Attorney General filed suit to enjoin the organization from engaging in business in Alabama because it had not complied with the qualification statute. *Id.* The NAACP alleged that they were exempt from this statute. *Id.* at 453. The trial court ordered production of company records, including membership lists, which the organization refused to disclose. *Id.* The NAACP alleged that these lists could not be constitutionally compelled. *Id.* at 454.

[101]*Id.* at 451-52. NAACP is an acronym for the National Association for the Advancement of Colored People. *Id.* at 450. It is a nonprofit organization organized under New York law. *Id.* The Association's certificate of incorporation states that its purpose is to promote the interest of colored citizens and to increase their opportunities. *Id.* at 451-52.

[102]*Id.* at 451.

[103]*Id.* at 452.

[104]*Id.* at 462-67. The Court emphasized that disclosing members' names would impair their ability to engage in group activities. *Id.* at 462. The Court was unable to find that Alabama had a compelling interest which would justify interfering with members' rights. *Id.* at 464.

[105]*Id.* at 466.

[106]429 U.S. 589 (1977).

patient's identity, to be maintained.[107] The statute, however, provided that the patient's identity could not be disclosed.[108] While the Court recognized an individual's privacy interest may be threatened when personal information is stored in a computer file, the Court nevertheless concluded that compiling records was not sufficient to amount to an invasion of individual privacy or, more specifically, an interest in non-disclosure of personal information.[109]

In reaching this conclusion, the majority focused on an individual's right to withhold information.[110] The Court inquired into the statute's purpose, justification, and the means used to accomplish the purpose, while considering the personal interest in informational privacy.[111] The Court recognized that the Due Process Clause protects two separate privacy interests: first, the interest in freedom from disclosure of personal information; and second, "the interest in independence in making certain

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[107]*Id.* at 591-95. The state was concerned with such drugs being used for unlawful purposes. *Id.* at 92-95. A special legislative commission found that this method was the best way to regulate the use of prescriptions. *Id.* at 593.

[108]*Id.* at 594. Security measures were taken to protect these files. The forms were kept in a vault in a receiving room. *Id.* at 593. The receiving room was protected with an alarm system. *Id.* at 594. The computer tapes containing the prescription information remained in a locked cabinet, and when the tapes were looked at, it was done so that other computers could not read or record any of the data. *Id.*

[109]*Id.* at 605-06. Justice Stevens, writing for the majority, stated:

> [A]nd the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program . . . .
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> . . . [W]e hold that neither the immediate nor the threatened impact of the patient-identification requirements . . . [i]s sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.

Id. at 601-04.

[110]*Id.* at 598-99.

[111]*Id.* at 598-604.

kinds of important decisions."[112] The Court acknowledged that the right of privacy may include "the individual interest in avoiding disclosure of personal matters . . . ."[113] Since the Court did not determine the right to nondisclosure of information to be fundamental, the Court did not utilize strict scrutiny review and, instead, balanced the privacy interest against the state interest in regulating the distribution of drugs.[114] The Court found the state's interest in combatting drug-related crimes outweighed the prescription holder's privacy interest.[115] Thus, the Court held the statute was constitutional.[116] The Court, however, left open the question of whether other comparable statutes lacking the same privacy protections found in the New York statute would violate interests protected by the Due Process Clause.[117]

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[112]*Id.* at 599-600. The former category (an interest in withholding private information), the Court stated, incorporated the right to be let alone. *Id.* at 599 n.24. The latter category (an interest in making personal decisions), the Court determined, included decisions regarding marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* at 599 n.26.

[113]*Id.* at 599-600. The physicians and patients challenging this law alleged that these privacy interests are at risk by compiling data in a computer. *Id.* at 600. They asserted that there is a concern that such information may become public and will cause patients to become reluctant to seek medical help and doctors reluctant to prescribe medicine. *Id.* The Court nonetheless found that compiling information like this does not amount to an invasion of an individual's privacy. *Id.*

[114]*Id.* at 602.

[115]*Id.* The state enacted this statute to classify potentially harmful drugs because many drugs have both legitimate and illegitimate uses and, prior to this, there was no effective way to oversee the use of prescription drugs. *Id.* at 592. Because the statute stipulated for procedures to protect an individual's privacy, the Court found that the state interest was greater. *Id.* at 598.

[116]*Id.* at 604. The Court stated its holding as follows:

> We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York [statute] on either the reputation or the independence of patients for whom schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.

Id.

[117]*Id.* at 605-06.

2. NON-DISCLOSURE OF PUBLIC INFORMATION

The Supreme Court has also addressed whether the government may disclose individual information which is in the public domain. For example, the Supreme Court confronted whether the state could publish a record of an official act in *Paul v. Davis*.[118] In *Paul*, the police distributed a flyer containing a list of names and photographs of people who had been arrested for shoplifting.[119] The name of Edward Davis was included in the list even though he had not been convicted of shoplifting.[120] Davis's suit alleged his liberty or property rights, as well as his right of privacy, had been deprived.[121] In addressing Davis's arguments, the Supreme Court first held that the plaintiff's interest in his reputation alone was not a constitutionally protected liberty or property interest.[122] Next, the Court held that the State did not violate Davis's privacy by publicizing a record of an official act.[123] The Court reasoned that the right to have this information remain confidential

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[118]424 U.S. 693 (1976).

[119]*Id.* at 695. The flyer that was distributed referred to the people on the list as "active shoplifters." *Id.* The list, however, did not account for those people who had not been convicted of shoplifting. *Id.* at 695-96.

[120]*Id.* Davis had entered a plea of not guilty to his shoplifting charge. *Id.* His charge was then filed so it could be reinstated. *Id.* Thus, his guilt or innocence had not been determined at the time the flyer was distributed. *Id.* at 696. The charge against him was ultimately dismissed after the flyer's circulation. *Id.*

[121]*Id.* at 696-97.

[122]*Id.* at 710-12 ("[P]etitioner's defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause."). *Id.* at 712.

[123]*Id.* at 712-13. Writing for the majority, Justice Rehnquist stated:

> He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713.

did not fall within the personal rights of privacy the Court had found in the past.[124]

A broad reading of *Paul* seems to imply that a claim that the government has needlessly gathered or disclosed information about an individual will be unsuccessful. The *Paul* decision implies that public records, even though containing some personal information, are not private, and thus, the state may disseminate data contained in such a record.

In 1989, the Court once again addressed the issue of a privacy interest in non-disclosure of personal information in *United States Department of Justice v. Reporters Committee.*[125] In *Reporters*, the Court faced the challenge of interpreting the right of privacy in the context of the Freedom of Information Act ("FOIA") and determined that information contained in "rap sheet" of an individual's criminal record is not public.[126] FOIA grants individuals broad access to information gathered by government agencies.[127] Nevertheless, the statute contains two specific exceptions to this general access policy where the issue involves information implicating an individual's right to privacy. Under Section 6, protection is afforded to "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy."[128] Additionally, one exemption affords protection to data compiled for the purpose of law

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[124]*Id.* (citing Roe v. Wade, 410 U.S. 113 (1973); Katz v. United States, 389 U.S. 347 (1967); Terry v. Ohio, 392 U.S. 1 (1968)). The Court noted that the rights the *Roe* Court deemed to be fundamental, creating a privacy interest therein, were activities such as marriage matters, procreation, contraception, family relationships, child rearing, and education. *Id.*

[125]489 U.S. 749 (1989).

[126]*Id.* at 755-56 (citing 5 U.S.C. § 552 (1994)). FOIA allows agencies to publish certain governmental records. *Id.* Certain records are not subject to disclosure under the FOIA. *Id.* at 755. Under FOIA, the exemptions relevant in *Reporters* include: records that need not be disclosed pursuant to another statute; personnel or medical records or those which if published would amount to an interference with privacy; and law enforcement records if disclosure of the information would invade an individual's privacy. *Id.*

[127]5 U.S.C. § 552(a) (1994).

[128]5 U.S.C. § 552(b)(6) (1994).

enforcement but only to the extent that disclosure of such material would not amount to an invasion of privacy.[129]

In *Reporters*, a CBS reporter requested, pursuant to FOIA, information in criminal records known as "rap sheets."[130] The request sought the arrest records, indictments, acquittals, convictions, and sentences of four members of a crime family.[131] Following the deaths of three members, the information on those individuals was released to the reporter, and the reporter requested information on the fourth member.[132] The Justice Department, however, refused to release this information, suggesting that such a release would be an invasion of privacy.[133]

Balancing the privacy interest in keeping the rap sheets confidential against the public's interest in the release of this information,[134] the Supreme Court agreed with the Department of Justice and held that the "rap sheets" should not be made public.[135] The Court determined there was a strong privacy interest in not having information, which is contained in a

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[129]5 U.S.C. § 552(b)(7) (1994). These sections indicate the value that Congress places on an individual's right to privacy.

[130]U.S. Dep't of Justice v. Reporters Comm., 489 U.S. 749, 752 (1989). Rap sheets contain personal information, including birth date, physical characteristics, and criminal history. *Id.* The primary use for this data is to aid in finding and prosecuting criminals. *Id.* These records are generally treated as confidential and can normally be used only for government purposes. *Id.* The FBI's two general exceptions to keeping rap sheets confidential are: only the subject of the rap sheets is allowed access; and the rap sheets can sometimes be used to help capture wanted persons or fugitives. *Id.*

[131]*Id.* at 757.

[132]*Id.*

[133]*Id.* at 757-58. The public's access to rap sheet data is limited despite the fact that some rap sheet information is public record. *Id.* at 753. Specifically, "[a]rrests, indictments, convictions and sentences" are of public record and can be found in court records. *Id.*

[134]*Id.* at 762. ("Exemption 7(c) requires us to balance the privacy interest in maintaining, as the Government puts it, the 'practical obscurity' of the rap sheets against the public interest in their release.")

[135]*Id.* at 762-63.

compiled computer system, disclosed to the general public.[136] The Court further noted that the intent of FOIA was to keep private citizens' names and other personal information confidential.[137]

The Court's holding in *Reporters* seems to be limited where FOIA is involved and, thus, would be difficult to extend to other circumstances.[138] Although *Reporters* focused on the Court's interpretation of FOIA, it details the Court's concern with an individual's privacy when information is compiled. Nevertheless, it is questionable whether this decision would apply to cases where FOIA was not involved.

Later that same year, in *Florida Star v. B.J.F.*,[139] the Supreme Court held that a newspaper could not be civilly liable for publishing a rape victim's name that had been listed in a publicly released police report.[140]

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[136]*Id.* at 764-66. Justice Stevens opined:

> But the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. *Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.*

Id. at 764 (emphasis added).

[137]*Id.* at 765.

[138]*Id.* at 780. In its conclusion, the Court stated:

> [W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted.

Id.

[139]491 U.S. 524 (1989).

[140]*Id.* at 541. B.J.F. reported to the Sheriff's Department in Duval County, Florida that she had been robbed and sexually assaulted. *Id.* at 527. The Department's report contained B.J.F.'s full name. *Id.* The report was filed in the Department's pressroom, to which there are no restrictions on access. *Id.* A Florida Star reporter-trainee wrote an article about the incident after copying the police report verbatim. *Id.* The article was printed in the "Police Reports" section of the newspaper and included B.J.F.'s full name. *Id.* The publication of B.J.F.'s full name violated the Florida Star's policy to not list

B.J.F. involved a Florida statute making it unlawful to disclose the name of a victim of a sexual offense.[141] B.J.F. sued, alleging the statute was violated because her name was published in an article concerning her report of being sexually assaulted.[142] Balancing the privacy interests against the First Amendment right to freedom of the press, the Court found that although sexual offense victims had significant interests, the press's right to release this public information was greater.[143] In so finding, the Court emphasized that the newspaper acquired the information lawfully and that the information in the article was accurate.[144] Moreover, the Court stated that the article's substance, despite the publication of the victim's name, confronted "a matter of public significance."[145]

While the Court explicitly stated that it was not holding that truthful publication would always be afforded constitutional protection, its decision demonstrates its willingness to subordinate privacy interests when competing interests are found to be compelling.[146] Further, this group of cases

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names of sexual crime victims. *Id.* at 528.

[141]*Id.* Florida statute § 794.03 states it is unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual offense. *Id.* at 524.

[142]*Id.* at 528.

[143]*Id.* at 532-33. Although the Court recognized that sexual offense victims have interests that are highly significant, the Court found that those interest are not strong enough to justify imposing civil liability on a newspaper publishing lawfully obtained, truthful information that concerns an incident of public significance. *Id.* at 532. The Court, however, refused to make a broad holding that the press can never be punished for publishing truthful information. *Id.* at 533. As the Court espoused: "We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.*

[144]*Id.* at 536. Even though the Department failed to meet the requirements of the Florida statute, the Court found the newspaper's actions in obtaining the report to be legal. *Id.* Moreover, the Court stated that if the state wished to limit the disclosure of information, it did not take any measures to do so. *Id.*

[145]*Id.* The Court noted the public interest involved was the reporting of the occurrence of a violent crime. *Id.* at 536-37.

[146]*Id.* at 540. Justice White, joined by Chief Justice Rehnquist and Justice O'Connor dissented. *Id.* at 543 (White, J., dissenting). Justice White focused upon the victim's rights and stated:

illustrates another underlying theme: the constant tension between privacy interests and the First Amendment.[147] This is a tension which also inheres in notification provisions like Megan's Law.

The Court has confronted the conflict between freedom of the press and privacy interests. In *Time, Inc. v. Hill*,[148] the Court considered an action under a New York right of privacy statute,[149] in which a family alleged that a magazine falsely reported the family's experience in being held hostage.[150] The Court held that the magazine could only be held liable if it were determined that the magazine published the article while knowing it

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> Surely the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns. That is, whatever rights alleged criminals have to maintain their anonymity pending an adjudication of guilt . . . the rights of crime victims to stay shielded from public view must be infinitely more substantial.

Id. at 545 (White, J., dissenting). Thus, the Justice clearly distinguished between a victim's right to privacy and a criminal privacy interest and subordinated the criminal's privacy right.

[147]U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .").

[148]385 U.S. 374 (1967).

[149]*Id.* at 376. As was reflected in *Time*, New York Civil Rights Law § 50 provided in pertinent part:

> A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Id. at 376 n.1.

[150]*Id.* at 378-79. Three escaped convicts held James Hill and his family hostage for nineteen hours on September 11-12, 1952. *Id.* at 378. Upon release, Mr. Hill explicitly stated that they had not been harmed in any way during that time. *Id.* The family made conscious efforts to remain out of the public eye. *Id.* In 1953, Joseph Hayes published a novel, *Desperate Hours*, portraying a family's ordeal in being held hostage. *Id.* In the novel, however, the family is subjected to violence during the time they are held. *Id.* The book was eventually made into a play bearing the same title. *Id.* *Life* magazine published an article about the play, and the Hill family sued the magazine, alleging that the article implied that the play reflected the family's experience although it had not. *Id.* In their defense, the magazine asserted that the article was of legitimate interest and was published in good faith. *Id.* at 379.

was untrue or with reckless disregard for the truth.[151] The Court, noting that being part of society contains an inherent risk that information about one's self may be disclosed, placed a greater value on freedom of speech and press and found in favor of the magazine.[152]

This issue was addressed in subsequent Supreme Court cases. In *Cox Broadcasting v. Cohn*,[153] for example, the Court similarly held that a radio station was not liable for publishing the name of a rape-murder victim whose name had been disclosed in indictments.[154] The Court determined that the press could not be punished for disseminating truthful information that appeared in the public record.[155] Four years later, in *Smith v. Daily Mail Publishing Co.*,[156] the Court held that a state could punish a publisher of true, publicly significant information only when the state demonstrates it has a compelling interest in keeping the information private.[157]

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[151]*Id.* at 390. The Court noted that if they were to hold the press liable for negligent or innocent misstatements, the press would be discouraged from informing the public. *Id.* at 389.

[152]*Id.* at 388-89. The Court reasoned: "Exposure of the self to others in varying degrees is concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Id.* at 388.

[153]420 U.S. 469 (1975).

[154]*Id.* at 495-97. A Georgia statute made it a misdemeanor to publish or broadcast a rape victim's identity. *Id.* at 471-72. A victim of a rape-murder, Cynthia Leslie Cohn, was listed in the indictments returned by the Grand Jury. *Id.* at 472. A radio station published her name. *Id.* at 472-74. Ms. Cohn's father sued the radio station, alleging an invasion of privacy. *Id.* at 474.

[155]*Id.* at 495. As the Court espoused:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Id.

[156]443 U.S. 97 (1979).

[157]*Id.* at 104. The Court found a strong presumption in favor of protecting the press. *Id.*

The Court in *B.J.F.* utilized these cases to conclude that the First Amendment would be violated if the newspaper were punished for publishing a rape victim's name.[158] The Court emphasized that because lawfully obtained information may be protected, the government is still able to protect individual interests if it implements procedures to keep files confidential.[159] The Court also placed great emphasis on the fact that no interest would be served by prohibiting the disclosure of information that already is contained in public records.[160] Moreover, the *B.J.F.* Court considered how the media would in effect be censored if they were to be punished for disclosing truthful data.[161] In *Reporters* the Court also addressed the First Amendment, albeit implicitly. Specifically, because the Court found the rap sheet information to be private and, therefore, protected under the FOIA, the Court concluded that there was no right to disclose this information.[162]

While an individual's privacy interest is significant, it is not absolute. When confronted with a situation concerning disclosure of information, other factors must always be considered. For example, the Government must always consider the impact of disclosure on the safety of the community.[163] The Government should also consider the impact of non-disclosure in light of the First Amendment's commitment to the unfettered dissemination of truthful information.[164]

Balancing these competing interests, it is clear that the right of privacy does not prohibit the publication of a matter that is in the public record. The Supreme Court has consistently upheld the press's right to publish "truthful information about a matter of public significance."[165] The individual's rights must be balanced against society's interest. If society's interest in the

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[158]See *supra* notes 139-46 (discussing *B.J.F.*).

[159]Florida Star v. B.J.F, 491 U.S. 524, 534 (1989).

[160]*Id.* at 535.

[161]*Id.* at 535-36.

[162]U.S. Dep't of Justice v. Reporters Comm., 489 U.S. 749, 762-71 (1989).

[163]140 CONG. REC. H5612 (daily ed. July 13, 1994) (statement of Rep. Pryce).

[164]Houston, *supra* note 11, at 763-64.

[165]Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979). Nevertheless, the Court has not addressed whether a newspaper can be punished for publishing unlawfully obtained information. *Id.* at 104.

information that is to be released is greater than an individual's privacy interest, release of the information should be allowed.

The aforementioned cases further demonstrate that the Supreme Court in only limited circumstances has recognized the existence of the privacy interest in the non-disclosure of personal information. The Court, however, has never explicitly defined the boundaries of this particular privacy interest. The level of scrutiny the Court will apply to this issue also remains uncertain, although the previously mentioned cases indicate that the Court most likely will balance the interests involved.

IV. APPLICATION OF THE PRIVACY LAW TO COMMUNITY NOTIFICATION STATUTES

A. THE SEX OFFENDER'S RIGHT TO PRIVACY

Opponents to community notification have asserted that a sex offender's right of privacy, specifically the right to maintain confidentiality of private information, is violated when community notification is allowed.[166] They argue that these offenders have already paid their debt to society by fulfilling their sentence and that they should not be punished further by taking away the offender's constitutional right of privacy.[167] Additionally, these opponents assert that offenders have the right to live in a community of their choice without being "harassed." Critics have called these community notification provisions "scarlet letter" laws, alleging that they brand the sex offender forever.[168]

New Jersey's statute is drafted to minimize the intrusion upon an individual's privacy and community-wide notification is done only after the sex offender is determined to be a "high risk."[169] Although the Supreme Court has recognized a privacy right in the non-disclosure of personal information, it has done so in only limited situations. Recall, the Court has upheld the release of an individual's personal information when the state's

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[166]Jason Gottlieb, *Megan Ill-Served by Assembly*, REC., Sept. 6, 1994, at B9.

[167]*Id.*

[168]Popkin, *supra* note 1, at 66.

[169]*See supra* notes 12-18 and accompanying text (discussing how such a determination is made). Critics assert that giving county prosecutors the responsibility of classifying offenders makes the process prejudicial. Sterling, *Sex Offender Nearing His Release*, *supra* note 27, at 1. These critics allege that a fairer determination would be made by a neutral party after a hearing evidence on the matter. *Id.* at 11.

interest is greater. The limitations imposed on disclosure of information by the New Jersey statute safeguards an individual's privacy. Information is only released about those offenders deemed to be the most dangerous. Therefore, information on all sex offenders is not released. Moreover, the information contained in a community notification is not private information.[170] Thus, the intrusion on the small number of sex offenders deemed to be high risk is minimal when compared to the competing public and state interests.

B. THE PUBLIC'S "RIGHT TO KNOW"

An interest that competes with a sex offender's privacy right is the public's right to be warned that a convicted sex offender is or will be living in their neighborhood.[171] A First Amendment right that works together with the public interest is the right to disseminate information to the public. To determine if a community notification provision is constitutional, these rights must be balanced against the sex offender's right of privacy.

The public's right to know is derived from the public's interest in the free dissemination of news and information.[172] The statement preceding the registration provision sets forth the legislature's findings to support the public's interest in being notified of a sex offender's release: "The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety."[173] The public has a significant interest not only in public safety but also in the effective operation of government. This interest must be weighed against the sex offender's expectation of privacy to determine if allowing community notification is constitutional.

The public has a right to be informed of a sex offender's presence in their neighborhood so that they can take measures to protect themselves and

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[170]The information that will be released in a notification includes: the individual's name, crimes for which the person had been convicted, a current photograph, a physical description, vehicle information, the person's address, and the individual's place of employment or schooling. N.J. Att'y Gen., *supra* note 17, at 14.

[171]*Talk Back Live* (CNN television broadcast, Sept. 13, 1994). The transcript for this show can be obtained in LEXIS, Nexis Library, CURNWS File.

[172]Kircher, *supra* note 10, at 174.

[173]Registration, 1994 N.J. Sess. Law Serv. § 1.

their children.[174] The risk sex offenders pose to a community is unique in that a sex offender's likelihood of re-offense is high when compared to other criminals.[175] A community has a right to be safe, and notification of released sex offenders is a method to achieve that goal. In addressing this issue at the federal level, Congressman Kyl from Arizona stated: "Given the recidivist nature of these offenders, it makes clear and perfect sense to let the citizens of a community know that a potentially dangerous person is living in their neighborhood."[176]

A matter which is a legitimate public interest can be published by the press without violating an individual's right of privacy.[177] An individual

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[174]S. 14, 206th N.J. Leg., 1st Sess. (1994). The statement preceding the Senate bill provided:

> Because sex offenders are likely to be unsusceptible to the "cures" offered by the prison system, the urges that cause them to commit offenses can never be eliminated but merely controlled. The danger posed by the presence of a sex offender, who has committed violent acts against children requires a system of notification to protect the public safety and welfare of the community.

Id.

[175]Popkin, *supra* note 1, at 66. A 1983 study by the Bureau of Justice Statistics found that approximately 8% of rapists who had been released had been arrested for rape again within three years of release. *Id.* Other studies have found that 35% of released rapists re-offend. *Id.* A 1991 study by the Johns Hopkins Sexual Disorders Clinic in Baltimore, Md., determined that within five years of release seven percent of previously convicted pedophiles had been charged or convicted with another sexual offense. *Id.* It should be noted that this statistic is for sex offenders who had been treated. *Id.* For those offenders not treated, re-offense was much more likely. *Id.* at 67.

[176]140 CONG. REC. H5612 (daily ed. July, 13, 1994) (statement of Rep. Kyl). There is great variance in the repeat offense rates of sex offenders who had not received treatment: 4-10% for those who had committed incest; 7-35% for rape offenders; 10-29% for those who had molested girls; 13-40% for those who had molested boys; and 41-71% for those who were exhibitionists. Lisa Anderson, *Demand Grows to I.D. Molesters: States Weigh Childrens' Safety Versus Offenders' Rights*, CHI. TRIB., Aug. 15, 1994, at n.1.

[177]Frith v. Associated Press, 176 F. Supp. 671, 675 (E.D.S.C. 1959). In *Frith*, six men were arrested for severely beating a man in Columbia, South Carolina. *Id.* at 673. This incident had become a significant interest to the public. *Id.* At a press conference where these arrests were announced, law enforcement officers handed out photographs of these men to the press, including the Associated Press. *Id.* The Associated Press distributed the photographs over its wire service. *Id.* The men who were arrested alleged

may unintentionally become involved in a matter of public interest.[178] When this occurs, the individual's privacy right is not invaded when items are published concerning his association with the event.[179]

The press has a right to publish truthful, public information.[180] The information must be truthful, lawfully obtained, and must address an issue that concerns the public.[181] When information is in the public record, an individual's right to privacy decreases significantly.[182] If records are public, the media should not be subject to punishment for publishing information contained within those records.[183] The Supreme Court, in recognizing that there is a great public interest in publishing the truth,[184] stated that "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[185]

Critics of public notification assert that communities will ostracize sex offenders and will deprive sex offenders of the opportunity to begin

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that publication of these pictures invaded their privacy. *Id.* at 673-75. The court held that because this incident had become a matter of significant public concern, the men's privacy had not been invaded when the press published their pictures. *Id.* at 676.

[178]*Id.* at 675. In *Frith*, by being involved and arrested for a beating that had generated significant public interest, the individuals became involved in an event that interested the public. *Id.*

[179]*Id.*

[180]*See supra* notes 148-65 and accompanying text (discussing the conflict between freedom of press and the right to privacy).

[181]*Id.*

[182]Florida Star v. B.J.F., 491 U.S. 524, 532 (1989).

[183]*Id.* at 535-36.

[184]*Id.* at 535 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975)).

[185]*Id.* at 533 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)). *See* U.S. Dep't of Justice v. Reporters Comm., 489 U.S. 749 (1989) (holding that the press did not have a right to access "rap sheets" because the privacy interest was greater than the public interest in release of the information).

anew.[186] They also profess that notification will cause vigilantism.[187] While some incidents of vigilantism have occurred,[188] they are small in

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[186]*Dealing with Sex Offenders*, N.Y. TIMES, Aug. 15, 1994, at A14 ("[S]ome proposals would do more harm than good — by triggering outbreaks of vigilantism or by destroying the efforts of thousands of law-abiding former sex offenders to rebuild their lives . . . . Community notification laws do little or nothing to prevent a sex offender from striking again; they simply make it more likely that the offender will be hounded from one town to another.").

[187]Since the enactment of Megan's Law, there has been at least one incident of vigilantism. David Vanhorn & Art Charlton, *Megan's Law Linked to Vigilante Mis-attack*, STAR LEDGER, Jan. 11, 1995, at A1, A13. In the first incident of vigilantism, a father and son broke into the home of a sex offender whose name and address had been released pursuant to Megan's Law. *Id.* While in the home, however, they attacked the wrong man. *Id.* In addition to this incident, there was an incident in which the wrong address was given in a notification. Jerry DeMarco, *Megan's Law Fallout: Critics Blame Vigilantism for Alleged Break-in, Beating*, NEWS TRIB., Jan. 11, 1995, at 1, 4. A sex offender being released gave officials an address in Woodbridge, New Jersey as his intended residence. *Id.* Using this address, officials sent notices out to the community. *Id.* The officials discovered too late that the sex offender was not residing at this address. *Id.* The person living at the given address received numerous threats. *Id.* In response, the town's police sent out fliers explaining the error. Lenny Melisurgo, *Woodbridge Police Fliers Explain the Mixup on Sex Offender's Address*, STAR LEDGER, Jan. 14, 1995, at 8.

[188]Popkin, *supra* note 1 at 73. In one instance in Lynwood, Washington, law enforcement officials informed neighborhood residents that Joseph Gallardo, a convicted child rapist, would be moving to their neighborhood following his release from prison. *Id.* Residents burned his home to the ground the day he was scheduled to move. *Id.*

A similar episode occurred in Houston, Texas to Raul Meza, who had been in prison for eleven years for the rape and murder of an eight year old child. Mark Smith, *Public vs. Private: Debate Rages Over Ex-Con's Rights, Community Safety*, HOUS. CHRON., Nov. 6, 1994, at 1. Meza's sentence was shortened, and he was released early because of his "good behavior" while in prison. *Id.* Because of harassment by angry residents, however, Meza had to move six times before residing in Austin, Texas. *Id.* Nonetheless, Meza was again imprisoned after only fourteen months for violating his parole. *Id.* His family claims he was destined to fail because the press and victims' rights groups harassed him endlessly. *Id.*

In 1991, when John Peterson, who had been convicted of raping a four year old boy and molesting a six year old boy, was released from prison in Hansville, Washington, he was ostracized by the residents of the community. *Sex-Offender Registration Laws Pit Victims' Rights Against Civil Rights*, N.Y. TIMES, Feb. 20, 1993, at 5. Further, Peterson lost three jobs in three months and was evicted from his mobile home. *Id.*

number when compared to the number of people released.[189] Further, the risk that sex offenders will be victims of vigilantism is minimal when compared to the risk to the public when they are not informed about a sex offender's presence in their neighborhood. The public has a right to know whether a sex offender, who is more than likely to repeat his offense, is in their midst so they can take the steps they deem appropriate to protect themselves and their family. Moreover, notification serves as a deterrence to sex offenders by keeping people's attentions focused on the sex offender's actions.[190]

C. THE STATE'S INTEREST

In addition to considering the sex offender's right of privacy and the public's right to be informed, the state's interest must be evaluated. The state has an interest in the safety of the public and in the public's perception of the criminal and mental health systems.[191] Community notification provides the tool by which law enforcement officials can achieve the goal of

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[189]Anderson, *supra* note 176, at A1. A survey indicated that between March 1990 and March 1993 there were only fourteen incidents in the state of Washington that were related to community notification. *Id.* During the same time period, 3,123 offenders had registered, and within that number, 98 were deemed of moderate risk and 78 were deemed to be high risk — the categories subject to community notification. *Id.*

[190]*Sex Offender Registration Laws*, *supra* note 188, at 5 ("These laws are good in that they reinforce to the offender the seriousness of his crime. They keep him honest.").

[191]Kircher, *supra* note 10, at 175 (quoting WASH REV. CODE ANN. § 4.24.550(4) (West Supp. 1992)). The statute provides in pertinent part: "Release of information about sexual predators to public agencies and under limited circumstances, to the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of these goals." WASH REV. CODE ANN. § 4.24.550(4) (West Supp. 1992).

protecting communities.[192] The government has a duty to ensure that its citizens can live safely in their homes.[193]

The Supreme Court has stated that government regulation infringing upon an individual's rights to privacy will be subjected to strict scrutiny.[194] The Court has also enunciated that almost every action taken by the government, to some degree, will interfere with an individual's privacy. Therefore, the resulting question is whether the Constitution is violated by the interference.[195]

The effective operation of government and protection of citizens are paramount interests to the government; and when limitations are placed on disclosure, such as in the Washington and New Jersey statutes,[196] these

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[192]140 CONG. REC. H5612 (daily ed. July 13, 1994) (statement of Rep. Pryce). Congresswoman Pryce of Ohio stated:

> [A]s a former judge, I strongly believe one of the most important duties of government is to ensure that its citizens can live safely in their homes and neighborhoods, free from violence and crime . . . .
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> . . . .
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> For the thousands of individuals who are victims of sexual violence every year, we are simply trying to give the law enforcement officials another common sense tool to do their jobs to protect the communities from these most violent and brutal criminals . . . .

Id.

[193]*Id.*

[194]Roe v. Wade, 410 U.S. 113, 156 (1973). For example, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), involved the enjoining of obscene films being shown in certain commercial theaters. *Id.* at 51-52. The Court not only held that privacy does not afford protection to obscene materials but also that states may regulate the exhibition of this material in public theaters. *Id.* at 57-63. The Court found that even if there were a legitimate privacy interest involved, the state interest in the public's quality of life and safety was greater. *Id.* at 58. The Court explained that "the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition . . . and that Courts should be careful not to extend such prohibitions beyond their obvious meaning . . . ." *Id.* at 60 n.11 (citations omitted).

[195]Katz v. United States, 389 U.S. 347 (1969).

[196]WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1992); Community Notification, 1994 N.J. Sess. Law Serv. § 1. Both statutes provide for evaluating an offender's risk of re-offense. Disclosure to the person is limited to instances where the offender's likelihood

interests are furthered while the impact on the sex offender's privacy is minimized.[197] Although notification interferes with a sex offender's privacy, it is well justified by the government's goal of maintaining public safety.

D. BALANCING THE INTERESTS

It must be determined, then, whether community notification is justified to further the government interests which are involved. Notification provides officials the mechanism needed to protect communities from these sexual offenders.[198] While it is recognized that a sex offender does have some level, albeit minimal, of privacy, that interest is outweighed by the competing public and state interests. Further, the New Jersey notification statute is drafted to allow community-wide notification for those offenders posing the greatest threat to the public. Consequently, notification to the public is done only in limited situations and not for every release of a convicted sex offender. The New Jersey statute, therefore, minimizes the potential intrusion into an individual's privacy.

Notification assists in minimizing the risk sex offenders pose to the public. Due to sex offenders' likelihood of recidivism endangering the public safety, notification gives the public information they can use to take precautions to protect themselves and their families. Notification also gives public officials the opportunity to take measures to protect the public safety and welfare of its citizens. Although there may be negative impacts upon the sex offender, protecting the public is a greater concern. The possibility that the sex offender will be stigmatized is a small price to pay to protect citizens.

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of re-offense is deemed high. WASH. REV. CODE ANN. § 4.24.550(1); Community Notification, 1994 N.J. Sess. Law Serv. § 3(c)(3).

[197]140 CONG. REC. H8957 (daily ed., Aug. 21, 1994) (statement of Rep. Edwards). In passing the federal crime bill, Congress stated that the federal notification provision should be interpreted in the same manner as the Washington Supreme Court had interpreted the Washington notification provision in State v. Ward, 123 Wash. 2d 488 (1994). 140 CONG. REC. H8957 (daily ed., Aug. 21, 1994) (statement of Rep. Edwards).

[198]140 CONG. REC. H5612 (daily ed., July 13, 1994) (statement of Rep. Kyl). Congressman Kyl of Arizona asserted that monitoring a sex offender's location and warning communities about where he resides is simply a common sense precaution. *Id.*

The constitutionality of Megan's Law in New Jersey, regarding the sex offender's right to privacy, has not yet to be decided.[199] The right of privacy, however, has been addressed in the few New Jersey decisions that concern the constitutionality of Megan's Law. In *Artway v. Attorney General*,[200] the United States District Court for the District of New Jersey held that Megan's Law was unconstitutional in its retroactive application.[201] The District Court found that Megan's Law not only applied retroactively but was punitive in nature.[202] Nevertheless, the court addressed the privacy interest involved and stated: "[T]here are certain personal matters innate to every individual into which the government cannot pry. The cases interpreting and delineating the constitutional right to privacy provide no clear answer to the effect of that liberty on the instant determination."[203]

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[199]Carlos Diaz was the first person in New Jersey to challenge Megan's Law. Maureen Castellano, *Judge Calls Megan's Law Vulnerable: New Jersey to Appeal*, N.J.L.J., Jan. 9, 1995, at 5. Diaz challenged the law on *ex post facto* grounds. *Id.* United States District Court Judge John Bissell issued a preliminary injunction to stop Passaic County prosecutors from notifying community organizations and schools about Diaz's release. *Id.* Judge Bissell questioned the constitutionality of Megan's Law because it applied to prisoners convicted before the law was enacted. Guy Sterling, *Rapist Gains Temporary Ban*, *supra* note 27, at A1, A4. Judge Bissell, however, emphasized that his decision applied only to Carlos Diaz's situation. *Id.*

[200]No. 94-6287, slip op. at 1 (D.N.J. filed Feb. 28, 1995) (order granting preliminary injunction). After finding that Tiers Two and Three of New Jersey's notification statute violated the *ex post facto* clause, Judge Politan issued a preliminary injunction against having the registration requirement apply to the plaintiff. *Id.* at 66.

[201]*Id.* The plaintiff was found guilty of sodomy in 1971. *Id.* at 3. In 1975, the plaintiff was sentenced to a maximum of twenty years imprisonment. *Id.* The judge found that the plaintiff's behavior exhibited a pattern of repetition and compulsion. *Id.* The plaintiff served seventeen years and was subsequently released from prison in 1992. *Id.* at 4. Pursuant to Megan's Law, the plaintiff was required to register, and he challenged the law because his conviction was prior to the enactment of the statute. *Id.*

[202]*Id.* at 63-66. The court found that Megan's Law clearly applied to an individual's prior criminal activity. *Id.* Moreover, the court noted that the statute was punitive despite its legitimate purpose of facilitating law enforcement because its effect is excessive punishment, excessive because information that may be otherwise difficult to obtain would be released. *Id.*

[203]*Id.* at 41.

In *Doe v. Poritz*,[204] the court opined that Megan's Law did not violate the convicted offender's right to privacy.[205] In addressing the privacy claim, the court noted that the Government's gathering of information should not be subject to serious challenge because most of the information being disclosed was already in the public record.[206] The court determined that if notification were required to protect the public, the state could publish the information.[207] Thus, this decision finds that notification does not interfere with an individual's privacy interest.[208]

In Washington, however, the issue has been decided. In *State v. Ward*,[209] the Supreme Court of Washington found that community notification was justified by the governmental interests.[210] The Washington

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[204]No. 1-5-95, slip op. at 1 (N.J. Super. Ct. Law Div. Feb. 22, 1995).

[205]*Id.* at 21. In *Doe*, the plaintiff was charged with molesting two teenage boys in 1985. *Id.* at slip op. 2. The plaintiff was sentenced to a maximum term of fifteen years in prison. *Id.* After the plaintiff's psychological examination in 1985, the psychologist deemed that the plaintiff exhibited a pattern of repetitive and compulsive behavior. *Id.* The plaintiff was then admitted to a treatment program for a ten year term with eligibility of parole in three years. *Id.* In January 1992, the New Jersey State Parole Board released him. *Id.* The plaintiff challenged the registration requirement of Megan's Law, claiming among other things, that Megan's Law violates the *Ex Post Facto* Clause of the Constitution and his right of privacy. *Id.* at 4-5.

[206]*Id.* at 19.

[207]*Id.* at 21.

[208]Other states have found notification provisions unconstitutional, but not on privacy grounds. *See* Louisiana v. Babin, 637 So.2d 814 (La. Ct. App. 1994) (holding that a notification provision violated the *Ex Post Facto* Clause of the Constitution because it was not in effect at the time the offender committed his crime); Rowe v. Burton, No. A. 94-206 (D. Alaska July 27, 1994) (holding that public dissemination rendered Alaska's registration act overly broad).

[209]123 Wash. 2d 488 (Wash. 1994). In *Ward*, two defendants were separately convicted of rape. *Id.* at 494. Each person, upon his release, was notified of his duty to register. *Id.* Each separately failed to do so. *Id. Ward* involved the challenge by each of these individuals to the registration and notification provisions in the Washington statute. *Id.*

[210]*Id.* at 502. The court noted: "Release of information about sexual predators to public agencies and under limited circumstances, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals." *Id.* The court recognized the legislative intent to limit disclosure of this

Supreme Court emphasized that disclosure under the notification statute was limited to circumstances in which the safety of the public was threatened.[211] Such limits, the court explained, allowed for the interest in public safety to be furthered while minimizing the burdens placed on the offender.[212] In a situation where a sex offender is released, however, the Washington Supreme Court noted that the legislature required that disclosure be rationally related to the interest in public safety.[213]

In addition to the reasoning asserted in *Ward*, the information released — the offender's name and crime for which the offender was convicted — already is in the public record and, hence, is not protected.[214] Further, the

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information only to the cases where public safety may be at risk. *Id.* The court found that these limitations on disclosure furthered the interest in public safety and outweighed any burden placed on the released sex offender. *Id.*

[211]*Id.* The court acknowledged that disclosure would only be warranted when a public agency determined: (1) the offender's potential dangerousness in the future; or (2) the probability of whether he would re-offend or the danger he possessed in the community. *Id.* at 503.

[212]*Id.* The court noted that if the offender were determined not to be a threat to the community, no purpose would be served if the information were disclosed to the public. *Id.*

[213]*Id.* The court explained:

> [T]he geographic scope of dissemination must rationally relate to the threat posed by the registered offender. Depending on the particular methods of an offender, an agency might decide to limit disclosure only to the surrounding neighborhood, or to schools and day care centers, or, in cases of immediate or imminent risk of harm, the public at large.

Id. The court, in reviewing congressional hearings, enunciated that the members of Congress stated their intent also was to apply a rational basis standard. *Id.* (citing 103rd Cong., 2nd Sess. (Aug. 21, 1994)). The Washington court additionally stated: "Any publicity or other burdens which may result from disclosure arise from the offender's future dangerousness and not as punishment for past crimes. We conclude, therefore, that registration and limited public disclosure does not alter the standard of punishment which existed under prior law." *Id.* at 504.

[214]*See, e.g.*, Cox Broadcasting v. Cohn, 420 U.S. 469, 494-96 (1975) (holding that there can be no punishment for disseminating a rape victim's name that is in the public record); Paul v. Davis, 424 U.S. 693, 712-14 (1975) (holding that privacy is not invaded by publishing the name of an unconvicted shoplifter); Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that the state cannot punish a newspaper for publishing truthful, lawfully obtained information).

other information subject to release also is usually available through public records or agencies, such as the motor vehicle agency. Thus, the only information being released is that which is already in the public domain.

It is clear that the public interests weigh in favor of notification and against the offender's privacy interest. The privacy interest of the convicted sex offender is subordinate to the public and state interests involved.

V. CONCLUSION

While Megan's Law may not be a panacea to all the ills from which society suffers due to crimes committed by sex offenders, it is certainly a step in the right direction. It may be conceded that its impact on deterring sex offenders may be minimal; however, minimal improvement is better than nothing at all. If sentencing guidelines are altered to make longer and stricter sentences for sex offenders, Megan's Law would have an even greater effect.

Even though every individual has a right of privacy, this right is not absolute. Much of the information contained in a notification is a matter of public record. If a matter is already public, an individual cannot have a privacy interest in that information. Thus, disseminating that information does not invade the individual's privacy.

The Government is justified in distributing this information. The Government has a significant interest in protecting the public and ensuring the safety of members of the community. This interest is furthered by notifying the public about a sex offender's presence in their neighborhood, and the governmental interest clearly outweighs any privacy interest the sex offender holds. This notification may have saved Megan Kanka.