California’s Sex Offender Notification Statute: A Constitutional Analysis

The recent proliferation of sex offender registration and community notification statutes raises a number of constitutional issues respecting the rights of convicted offenders. Although politically popular, such statutes may be an ineffective means of protecting children, while unduly burdening the constitutional rights of those persons subject to the statute’s requirements. This Comment analyzes the constitutional issues implicated by sex offender registration and notification statutes, and examines the underlying public policy concerns which the statutes seek to address.

I. INTRODUCTION

On July 29, 1994, seven-year old Megan Kanka was sexually assaulted and murdered in New Jersey.1 The man charged with the crime lived across the street from Megan’s family.2 Unknown to Megan’s family, or to other neighbors, he was a convicted pedophile.3 Understandably, the community, as well as the country, reacted with outrage.

In this emotionally charged atmosphere, the New Jersey Legislature responded swiftly. Only three months after Megan’s murder, New Jersey Governor Christine Todd Whitman signed into law a package of bills known as “Megan’s Law.”4 The law requires, among other things, that convicted sex offenders register with local law enforcement agencies.5 The requirement applies both to offenders paroled from prison and to those given a sentence of probation. More controversial

---

2. Id.
3. Id.
is the new law's mandate of notification to the community in which a violent or repeat offender lives.\textsuperscript{6} The statute provides guidelines by which sex offenders are to be assigned to one of three risk levels, or "tiers."\textsuperscript{7} Those in the first tier are classified as low risk and are not subject to public notification. Moderate risk offenders are subject to notification to community organizations, including schools and church and youth organizations. The highest risk offenders in the third tier are subject to notification to all "members of the public likely to encounter" the registrant.\textsuperscript{8} The registration and notification provisions apply to the convict for his lifetime, and apply to offenders convicted prior to the enactment of the laws as well as to current offenders.\textsuperscript{9}

In response to similar heinous crimes, other state legislatures have passed strict sex offender registration laws.\textsuperscript{10} About half of these

\textsuperscript{6} Id. § 7-8.
\textsuperscript{7} Id.
\textsuperscript{8} Id. § (c)(3).
\textsuperscript{9} Id. § 7-2. A provision is made for the registrant to petition the Superior Court to terminate the obligation to register. The registrant must prove that he has not committed an offense for 15 years. Id. § (c)(4)(f).
include some form of community notification.\textsuperscript{11} The provisions of each statute vary as to length of time imposed\textsuperscript{12} and the crimes to which the provisions apply.\textsuperscript{13} A federal statute passed in 1994 requires states to enact sex offender registration laws conforming to the guidelines set forth.\textsuperscript{14} Under these guidelines, a state that fails to implement a program by September 13, 1997 will lose ten percent of the federal crime control funds which it would otherwise be entitled to receive.\textsuperscript{15} The federal registration program does not mandate notification to the community. It does, however, require that the information be made available to law enforcement agencies and to government agencies conducting confidential background checks, and that a specific registrant’s information may be released to the community at the discretion of local law enforcement officials.\textsuperscript{16} The federal statute also

\begin{itemize}
  \item \textsuperscript{11} Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Montana, Nevada, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Washington all have notification provisions. These provisions range from discretionary release of information to the public by local law enforcement as necessary to protect the public, to limited notification to schools and child-related organizations, to mandatory community notification. The reader should note that these states’ provisions are as of 1995, and that the body of law respecting sex offender notification is rapidly changing.
  \item \textsuperscript{12} Connecticut’s registration provision applies for only one year, Utah’s for five years. Michigan’s has a duration of 25 years for a first-time offender, and for life after a second conviction. Most states have a limit of ten years. Several, like Michigan, mandate a longer period of registration for more serious offenses. The reader should note that these provisions are as of 1995, and that the body of law respecting sex offender notification is rapidly changing.
  \item \textsuperscript{13} Some statutes, such as those of Arkansas, Georgia, Illinois, Indiana, Maine, and Maryland, apply only to sex offenses against minors. A few states have statutes which apply to misdemeanors, such as Alabama (indecent exposure) and South Carolina (indecent exposure and “peeping”). \textit{See supra} note 10.
  \item \textsuperscript{14} 42 U.S.C. § 14071 (1994).
  \item \textsuperscript{15} \textit{Id.} §§ (f)(1), (f)(2)(A). An additional two years may be granted by the Attorney General if the state is making a good faith effort to implement the program. \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} § (d)(3).
\end{itemize}

After this Comment was completed, but prior to publication, an amendment to 42 U.S.C. § 14071(d) was enacted. The new language requires states to “release relevant information that is necessary to protect the public” regarding registered sex offenders. \textit{See} H.R. 2137, 104th Cong., 2d Sess. (1996); S. 4921, 104th Cong., 2d Sess. (1996). The bill, called “Megan’s Law,” was signed by President Clinton on May 17, 1996. \textit{See}
limits the period of time during which the offender is required to register. The registrant must comply with the requirements for ten years from the date of his release from prison, or from the date he is placed on parole or probation. 17

California's sex offender registration statute was originally promulgated in 1947. 18 Registration is mandatory for any person convicted of an enumerated offense since July 1, 1944 in any court, including federal and military courts. 19 The registration requirement applies to the offender for life, while residing in California. 20 The statute also requires that the registrant submit blood samples which will be filed in


The amendment does not, however, specify what information shall be released, to whom it must be released, or how the states should determine which registered offenders will be subject to the notification mandate. In Senate debate on the proposed law, Senator Gorton stated that "[e]ven with this mandate . . . state and local law enforcement officials . . . retain the substantial discretion to determine when community notification is called for, what information to release, and how best to inform the community." 142 Cong. Rec. S4921-01 (daily ed. May 9, 1996) (statement of Sen. Gorton).

19. CAL. PENAL CODE § 290(a) (West 1995). The enumerated offenses are CAL. PENAL CODE §§ 207(b) (kidnaping a child under 14 for the purpose of committing lewd or lascivious acts); 208(b) (kidnaping of a child under 14, except by a parent); 220 (assault with intent to commit rape, sodomy, oral copulation, rape in concert with another, lascivious acts upon a child, or penetration of genitals or anus with foreign object); 243.4 (sexual battery); 261 (rape under any of the following circumstances: upon mentally disordered person, accomplished against a person's will, upon a person unable to resist because of intoxicating or anesthetic substance, upon an unconscious person, or where accomplished by use of threats to retaliate); 262(a)(1) (rape of a spouse where it is accomplished by use of force or violence); 264.1 (rape or penetration by foreign object); 266 (enticement of unmarried female under 18 for purposes of prostitution); 266c (unlawful sexual intercourse); 266j (procurement of child under age 16 for lewd or lascivious acts); 267 (abduction of person under 18 for purposes of prostitution); 285 (incest); 286 (sodomy); 288 (lewd or lascivious acts with child under age 14); 288a (oral copulation with person under age 18); 288.5 (continuous sexual abuse of a child); 289 (penetration of genital or anal openings by foreign object against the victim's will by means of force); 311.2 (b)(c)(d) (sending or bringing into state for sale, printing, exhibiting, distributing, or possessing matter depicting sexual conduct by minor); 311.3 (depicting by film, photograph, videotape, etc. sexual conduct by person under age 18); 311.4 (employment or use of minor to perform prohibited acts); 311.10 (advertising for sale or distribution obscene matter depicting a person under age 18); 311.11 (possession or control of matter depicting minor engaging in sexual conduct); 647.6 (annoying or molesting child under 18); 314 (lewd or obscene conduct, indecent exposure, obscene exhibitions); 272 (causing, encouraging or contributing to delinquency of persons under 18 years, where lewd and lascivious conduct is involved); 288.2 (second conviction for harmful matter sent with intent of seduction of minor); or, any conviction for the attempt to commit any of the above mentioned offenses.
a DNA databank accessible by law enforcement agencies.\textsuperscript{21} In 1994, a provision was added authorizing public dissemination of registrants' information.\textsuperscript{22} The provision includes a "900" number which the public may utilize to identify registered sex offenders.\textsuperscript{23} A subdirectory, organized by county and zip code, is to be available in local law enforcement offices providing the name, photograph, physical description, and age of offenders deemed to be "habitual" offenders.\textsuperscript{24} Access to the subdirectory is given to any person with an articulable purpose.\textsuperscript{25} Neither the 900 number nor the subdirectory may give the offender's exact street address.\textsuperscript{26} The notification provisions only apply to those offenders convicted of certain sex offenses against children.\textsuperscript{27}

When legislation is enacted in response to an emotionally charged public campaign, there is a risk that the issue will not be rationally debated and carefully considered.\textsuperscript{28} Few elected officials are willing to incur the wrath of their constituency by voting against such bills. Sex crimes are particularly reprehensible to the American public. Sex crimes against children are so abhorrent that even among prison populations, the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} CAL. PENAL CODE § 290.2 (West 1995). The Ninth Circuit Court of Appeals upheld a similar statute in Oregon which was challenged as an unconstitutional violation of the offender's Fourth Amendment rights. Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995).
\item \textsuperscript{22} CAL. PENAL CODE § 290.4 (West 1995).
\item \textsuperscript{23} Id. § (a)(3).
\item \textsuperscript{24} Id. A person convicted of two or more of the crimes enumerated in § 290(a), with at least one involving a minor, is considered "habitual" for the purposes of the statute. See CAL. PENAL CODE § 13885.4 (West 1995). For a listing of the enumerated offenses, see supra note 19.
\item The subdirectory was completed in February, 1996 and contained profiles of 912 habitual offenders, or about 2.5% of all registered sex offenders. See Shante Morgan, List of Sex Offenders Released, SAN DIEGO UNION TRIB., Feb. 10, 1996, at A3.
\item \textsuperscript{25} CAL. PENAL CODE § 290.4 (West 1995). See Peter Rowe, Parents Sure to Shudder at this Book of Horrors, SAN DIEGO UNION TRIB., Feb. 25, 1996, at D1. Lt. Ray Sigwalt of the San Diego Police Department's Family Protection Section is quoted as "urg[ing] concerned parents and employers to visit their local police or sheriff's station and ask for the book." Id. Presumably, the fact that one is a concerned parent or employer is a sufficient articulable purpose and those persons will be given access to the directory.
\item \textsuperscript{26} CAL. PENAL CODE § 290.4 (West 1995).
\item \textsuperscript{27} Id. The offenses are CAL. PENAL CODE §§ 261, 266, 267, 207(b), 286, 288, 288a, 288.5, 289, 647.6, and 208(d) where the offenses are committed against minors. See supra note 19 for a description of the offenses.
\end{itemize}
\end{footnotesize}
child molester is at the "bottom of the social totem pole." A California bill calling for harsh sentencing of first-time violent sex offenders became a divisive issue in the 1994 California gubernatorial campaign. Candidates were accused of not being genuinely interested in creating sound legislation to address a serious problem, but instead of using the issue for political gain.

The New Jersey Senate passed Megan's Law "with only token debate," and the Assembly scheduled a vote on five of the ten bills "without a customary committee hearing." A critic of New York's sex offender legislation criticized the legislature for leaving the question of the bills' constitutionality to the courts: "It would be better for the legislators to exercise their own judgment and not pollute the system with laws that are empty gestures in a highly emotional climate." In Artway v. Attorney General of New Jersey, a case challenging Megan's Law, the court stated:

Well-intentioned legislators, responding to public outcry, have sought to confront serious social issues—sexual crime and recidivism. These were, are and remain vital issues of concern to every member of our society. But, however well-intentioned, all laws must pass constitutional muster. The role of the judiciary is a difficult one. It does not involve policy-making, legislating, or otherwise reacting to public pressures. Rather, it requires an impartial review of those legislative actions based upon constitutional principles created by the Founders of this great nation.

This Comment will examine the constitutional issues applicable to sex offender statutes, and particularly to the California notification provisions. Part II will analyze constitutional challenges which rest on the premise that the notification requirements constitute punishment, including the Ex Post Facto Clause, the Eighth Amendment Cruel and Unusual Punishment Clause, the Bill of Attainder Clause, and the Double Jeopardy Clause. Part III looks at constitutional issues of Due Process, the Right to Privacy, and Equal Protection. Part IV addresses some policy concerns and assumptions underlying sex offender statutes, and whether the goals of these statutes are likely to be achieved. Part V concludes with a brief overview of alternatives to sex offender

30. See John Marelius, Rape: It's Now a Hot Campaign Buzzword, SAN DIEGO UNION TRIB., Aug. 9, 1994, at A1. Of the proposed "one-strike" law, Professor Robert Pugsley of Southwestern University School of Law said, "It's political gangbusters, but it's shortsighted." Id. at A13.
32. Id.
II. CONSTITUTIONAL CHALLENGES TO SEX OFFENDER NOTIFICATION STATUTES BASED ON THE PUNITIVE ELEMENT

A. Do Notification Requirements Impose Punishment?

A constitutional challenge to a statutory requirement under the Ex Post Facto Clause, the Bill of Attainder Clause, the Double Jeopardy Clause, or the Cruel and Unusual Punishment Clause requires a finding that the statute imposes punishment. Where a law does not have a clear punitive purpose, courts may look to the effect of the law to determine whether, in its application, it is punitive or regulatory. Even when legislatures state that the law's purpose is regulatory or remedial, courts will scrutinize the law to determine if its impact is, nevertheless, punitive.

Courts faced with this task in cases challenging the constitutionality of sex offender statutes have begun their analysis with the factors set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*. But see *Doe v. Poritz*, 662 A.2d 367, 399 (N.J. 1995) (observing that “the Mendoza-Martinez test is not relevant to our analysis” in evaluating the constitutionality of Megan’s Law). The *Doe* court argued that the *Mendoza-Martinez* factors are properly utilized only to determine whether proceedings are civil or criminal. *Id.* at 397 n.14. However, in *Mendoza-Martinez* the factors were used by the Court to conclude that the sanction imposed by a federal statute was penal, and therefore triggered constitutional procedural safeguards.

---

36. Id.
37. U.S. CONST. amend. V.
38. U.S. CONST. amend. VIII.
41. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *But see Doe v. Poritz*, 662 A.2d 367, 399 (N.J. 1995) (observing that “the Mendoza-Martinez test is not relevant to our analysis” in evaluating the constitutionality of Megan’s Law). The *Doe* court argued that the *Mendoza-Martinez* factors are properly utilized only to determine whether proceedings are civil or criminal. *Id.* at 397 n.14. However, in *Mendoza-Martinez* the factors were used by the Court to conclude that the sanction imposed by a federal statute was penal, and therefore triggered constitutional procedural safeguards. 372 U.S. at 184. In United States v. Halper the Court stated that “in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.” 490 U.S. 435, 447 n.7 (1989) (emphasis added). Such an evaluation utilizes the *Mendoza-Martinez* factors, especially the first, fourth, sixth, and seventh factors. *See also Young v. Weston*, 898 F. Supp. 744, 752-54 (W.D. Wash. 1995) (utilizing the *Mendoza-Martinez* factors to invalidate a Washington sex offender statute under the Ex Post Facto, Double Jeopardy, and Due Process Clauses of the Constitution).
seven factors articulated by the Court are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.  

Each of the Mendoza-Martinez factors will be considered separately as they have been interpreted by courts and applied to sex offender statutes.  While many sex offender registration laws have been in effect for years, most notification provisions are relatively recent; consequently, there are few reported cases. However, cases addressing the constitutional validity of registration statutes contain a useful

42. Mendoza-Martinez, 372 U.S. at 168-69 (footnotes omitted).
43. Several courts have decided cases challenging sex offender statutes without engaging in the regulatory-punitive analysis, simply presuming that such statutes are punitive. See, e.g., State v. Lammie, 793 P.2d 134 (Ariz. Ct. App. 1990); In re DeBeque, 212 Cal. App. 3d 241, 260 Cal. Rptr. 441 (1989).
44. Two cases challenging the constitutionality of Megan's Law are referred to extensively throughout this section of this Comment: Artway v. Attorney Gen. of N.J., 876 F. Supp. 666 (D.N.J. 1995), and Doe v. Portitz, 662 A.2d 367 (N.J. 1995). Artway, invalidating the notification provisions of Megan's Law, was decided on February 28, 1995. Doe, upholding the same provisions, was decided nearly five months later, on July 25, 1995. Artway has been appealed to the Third Circuit Court of Appeals, and Doe has been appealed to the U.S. Supreme Court. Although a federal court ruling in constitutional cases generally overrides a state court ruling, New Jersey's Attorney General has argued that the Artway holding applies only to the individual offender who brought the case. See Joseph Wharton, Court Upholds Megan's Law, A.B.A. J., Oct. 1995, at 36. See also Michelle Ruess, Megan's Law Goes to Top Court, N.J. REC., Oct. 25, 1995, at Al (citing the comments of Professor Frank Askin of Rutgers Law School that it is expected that if the Third Circuit affirms Artway, the U.S. Supreme Court will grant certiorari to hear both cases).

Author's Note: Shortly after this Comment was completed, the Third Circuit Court of Appeals issued its decision in the Artway appeal. Artway v. Attorney Gen. of N.J., 81 F.3d 1235 (3d Cir. 1996), reh'g denied, 83 F.3d 594 (1996). The majority of Artway's claims relating to notification were dismissed as unripe, because he had not yet been subjected to the notification requirement. Id. at 1242. Because the constitutional issues respecting community notification were not addressed, the Third Circuit opinion contributes little to the analysis in this Comment. The court engaged in an exhaustive discussion of the test to determine whether a sanction constitutes punishment, id. at 1254-63, and rejects the Mendoza-Martinez factors as "too indeterminate and unwieldy." Id. at 1263. The court goes on to adopt a three-prong test which analyzes (1) the actual purpose of the sanction, (2) the objective purpose of the sanction, and (3) its effects. Id. The second prong includes the determination of whether the "measure has traditionally been regarded as punishment." Id. The effects prong looks at the degree of negative repercussions caused by imposition of the sanction, regardless of its justification. Id. Whether the difference between these factors and the Mendoza-Martinez factors is simply a matter of semantics is debatable. The Third Circuit Court acknowledged that "the law in this area, like an adolescent's room, needs tidying." Id. at 1251.
analytical framework applicable to notification statutes and will be employed in this Comment.

1. Does public notification involve an affirmative disability or restraint?

While registration of sex offenders has generally been found to be a minimal burden to the individual, the addition of public notification provisions has been found to impose a greater stigma on offenders, which can detrimentally affect their personal and professional lives, associations with neighbors, and choice of housing. The Supreme Court of California held in In re Reed that the lifetime registration requirement imposed a "lifelong burden" on the offender and subjected him to increased police scrutiny. Thus, while public notification laws have a regulatory purpose of assisting law enforcement, they also have a significant punitive element.

The degree of public dissemination of information is clearly relevant to this inquiry. In an Arizona case challenging a sex offender law, State v. Noble, the court did not find notification to be an affirmative disability or restraint because the registrant's information was available only to law enforcement agencies and, in limited circumstances, to potential employers. However, as the number of individuals with access to such information increases, so does the burden on the individual offender.

47. Id.
49. In re Reed, 33 Cal. 3d 914, 920-22, 663 P.2d 216, 218-19, 191 Cal. Rptr. 658, 660-61 (1983). Justice Mosk likened the increased burden of police scrutiny to the final scene of the film Casablanca in which the inspector gives orders to "round up the usual suspects." Id. at n.5.
2. Has public dissemination of a person's criminal record historically been regarded as punishment?

Historically, public humiliation and stigma were punishments for a number of crimes. The California Supreme Court in In re Birch called sex offender registration an "ignominious badge carried . . . for a lifetime." Even courts that have found registration statutes not to be punitive have nevertheless agreed that registration has traditionally been regarded as punitive.

Although the Washington Supreme Court in State v. Ward disagreed with the Noble court's finding that registration was traditionally viewed as punitive, they did not distinguish between registration and community notification. The Ward court stated that "[r]egistration is a traditional governmental method of making available relevant and necessary information to law enforcement agencies" and supported this statement with reference to statutory requirements that drivers notify the Department of Motor Vehicles of address changes, a requirement that could hardly be described as a stigmatizing event. The Ward court's view is unpersuasive for its failure to address the notification provision of the Washington statute as distinct from mere registration.

Courts may disagree as to whether registration for law enforcement purposes is historically regarded as punishment. However, to the extent that the information is disseminated to the public for non-regulatory purposes, the resulting stigma and humiliation clearly contain traditional elements of punishment.

3. Do notification provisions affect individuals only on a finding of scienter?

Registration and notification requirements are triggered by conviction for sex offenses. Such conviction requires a finding of knowingly

53. Noble, 829 P.2d at 1222.
55. Id. (emphasis added).
wrongful conduct, and is indicative of the punitive effect of the laws.\textsuperscript{56} Therefore, this factor weighs in favor of a finding that notification is punitive.

4. \textit{Does community notification promote traditional aims of punishment—retribution and deterrence?}

Registration of sex offenders with law enforcement agencies has a clear regulatory purpose. But notification statutes go beyond mere registration and seek to deter recidivism by convicted offenders. Legislatures have claimed that the public must be allowed to protect themselves and their children from dangerous offenders. It follows that because the law only applies to convicted offenders, it is clearly intended to deter those offenders from committing another crime.\textsuperscript{57} The \textit{Ward} court acknowledged that deterrence might be a secondary effect of registration, but declined to hold that “such positive effects” were punitive.\textsuperscript{58} Legislatures may, understandably, be reluctant to specify that such statutes are for deterrent purposes, and risk being invalidated by the courts.\textsuperscript{59} Notwithstanding a legislature’s insistence that notification statutes are solely regulatory, the underlying assumption that such requirements will protect children from recidivists indicates a clear deterrent purpose.

\textsuperscript{56} See Rowe v. Burton, 884 F. Supp. 1372, 1378-79 (D. Alaska 1994) (this factor is indicative of a punitive effect, but is given light weight in the balance). \textit{But see} Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 690 (D.N.J. 1995) (holding that because of the disagreement as to the recidivism rate of sex offenders, the court must defer to the findings of the legislature and find that this factor weighed in favor of the regulatory nature of Megan’s Law).


\textsuperscript{58} \textit{Ward}, 869 P.2d at 1073.

\textsuperscript{59} See \textit{Doe} v. \textit{Poritz}, 662 A.2d 367, 389 (N.J. 1995) (“We assume that if the legislative purpose was to deter sex offenders, the law would be invalid.”); \textit{see also} Bell v. Wolfish, 441 U.S. 520, 539 n.20 (“[D]eterrence [is] not [a] legitimate nonpunitive governmental objective[].”).
5. **Is the behavior to which notification provisions apply already a crime?**

This factor seeks to distinguish regulatory statutes from penal statutes by inquiring whether the restrictions or requirements imposed are applicable only upon conviction of a crime, or whether they merely regulate conduct incident to a legitimate state purpose, without regard to past criminal conduct. For example, the Supreme Court found that a double tax imposed on liquor dealers who had been convicted of a crime was punitive, not regulatory, because their criminal conviction was the sole reason for the additional assessment. The court in *Artway v. Attorney General of New Jersey*, invalidating the notification provision of Megan's Law, found that because the restriction was imposed on the basis of prior criminal behavior, it was indicative of the penal nature of the challenged statutes.

6. **Is there an alternative purpose assignable to notification provisions to which they may be rationally connected? Does the requirement appear to be excessive in relation to the alternative purpose assigned?**

The last two *Mendoza-Martinez* factors are considered together. Justice Stein, dissenting in *Doe v. Poritz*, states that these two factors "consistently are referred to as a shorthand test for determining punishment." The inquiry is "whether the legislature intended punishment, and if not, whether the restriction is rationally related to a legislative goal and not excessive in relation to that goal." It has long been recognized that, notwithstanding a legislature's stated regulatory purpose, the effect of the statute as applied must be evaluated to determine whether it is in fact punitive. Courts agree that legitimate, non-punitive purposes exist for sex offender registration statutes. Such statutes aid law enforcement in protecting the public from

---

63. *Id.*
64. *Huss*, 7 F.3d at 1447-48.
convicted offenders whom the legislature has determined to be a threat for potential recidivism.66

However, the Artway court and the court in Rowe v. Burton also agreed that notification provisions go beyond justifiable law enforcement purposes.67 Public dissemination of information on registered sex offenders is excessive in relation to the legitimate purpose of facilitating law enforcement.68 It has been argued that public dissemination of registrant's information encourages citizens to engage in private law enforcement and vigilantism.69 Professor Arthur Miller has warned that resort to such methods "exemplifies a breakdown in the criminal justice system" and admits the failure of law enforcement to control sex offenders.70

The fact that the statutes challenged in State v. Noble71 and People v. Adams72 authorized release of registrant's information solely to law enforcement agencies was critical to those courts' findings that sex

66. See Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 691-92 (D.N.J. 1995); Rowe v. Burton, 884 F. Supp. 1372, 1379-80 (D. Alaska 1994). See also In re Reed, 33 Cal. 3d 914, 922, 663 P.2d 216, 219-20, 191 Cal. Rptr. 658, 661-62 (1983). The Reed court found that the legislature may have reasonably intended that sex offender registration serve as a law enforcement tool, but questioned whether that purpose was being served by the present administration of the law. Id. at n.7.

The New Jersey legislature declared that the purpose of Megan's Law is "to protect the public by increasing community awareness of the risk involved . . . ." Artway, 876 F. Supp. at 691. The legitimacy of this purpose has been questioned by many critics. See Montana, supra note 48 (arguing that Megan's Law fails to achieve its declared legislative purpose). See also discussion infra Part IV.


68. Id.

69. Edward Martone, Mere Illusion of Safety Creates Climate of Vigilante Justice, A.B.A. J., Mar. 1995, at 39; Doug Conner, Did Flyer on Sex Offender Release Invite Vigilantism?, L.A. TIMES, July 22, 1993, at A5. Arguing against a community notification provision to the federal sex offender statute, Congressman Nadler of New York asked, "Of what use is this information? If we are going to mandate the release of information to the public, it should be with information that someone can do something with." 140 CONG. REC. H5613 (daily ed. July 13, 1994). See discussion infra Part IV.


71. 829 P.2d 1217, 1222-24 (Ariz. 1992). The court stated "[o]ur decision is close" but nonetheless found the statute nonpunitive because registrant's information was kept confidential. Id. at 1224.

72. 581 N.E.2d 637, 641 (Ill. 1991). See also State v. Costello, 643 A.2d 531, 533 (N.H. 1994) ("This information is held confidentially within the law enforcement community.").
offender registration was not punitive. While the *Ward* court found registration was not excessive in relation to a non-punitive goal, again they failed to address whether the notification provision had any effect on their analysis.73

The Supreme Court of New Jersey, upholding Megan's Law, argued that a punitive effect of a law renders it punishment only if the sole explanation for that impact is punitive intent.74 The court argued that a law characterized by the legislature as regulatory must be considered regulatory despite a punitive impact, "if that impact is simply an inevitable consequence of the regulatory provisions themselves."75 However, this holding is contrary to a line of cases considering the question of whether a statute is regulatory or penal in nature.76

The *Mendoza-Martinez* factors establish a useful framework within which courts may evaluate whether a statute is regulatory or punitive. From the foregoing analysis of the cases challenging sex offender statutes, it is clear that courts weigh in favor of finding the registration requirements not punitive, but find that the notification provisions are punitive, and therefore amenable to constitutional challenges.

B. Is California's Notification Provision Punitive?

Applying the *Mendoza-Martinez* factors, it is likely that a California court would find the notification provision to be penal in nature. As discussed in the foregoing analysis, the statute imposes an affirmative disability or restraint on the convicted offender. Public dissemination of a person's criminal past results in stigmatization and has traditionally been regarded as punishment. Notification affects individuals only on a finding of *sciente-r*, upon conviction for sex offenses which require a finding of knowingly wrongful conduct. Notification is aimed at deterrence, a traditional goal of punishment. The requirement is imposed upon conviction of a crime, rather than merely as a regulatory measure. And, while the legislative intent may not have been to punish, its effect is nevertheless punitive.

Although there are no reported cases yet challenging the new notification law, those addressing the registration provision have found

---

75. Id.
76. See, e.g., United States v. Halper, 490 U.S. 435, 446-50 (1989) (holding that legislative intent is not the exclusive test to determine whether a statute was punitive); United States v. Ward, 448 U.S. 242, 248-49 (1980) (using a two-part intent-effects test to determine whether a statute was punitive).
the registration provision to be punitive. It follows that because of
the greater burden imposed by the notification provision, a similar
conclusion will result. The fact that California's provision applies to
the offender for his lifetime will no doubt weigh in favor of a finding
that the requirement is punitive.

California's notification provision does not require local law enforce­

ment agencies to disclose the presence of a convicted sex offender to his
community. Rather, the information is simply made accessible to
persons with legitimate concerns regarding a specific person. The
California law does not allow the exact street address of the registrant
to be disclosed. These provisions lessen the burden of the California
registrant, but clearly the burden is still greater than if he were only
required to register, which has been found by California courts to be
punitive.

With the threshold question of punishment met, the question becomes
whether the punishment is of a degree sufficient to invoke constitutional
protections for those persons subject to public notification provisions.

C. Do Retroactive Sex Offender Statutes Violate the Constitutional
Prohibition Against Ex Post Facto Laws?

The U.S. Constitution prohibits any State from passing an Ex Post
Facto law. Although the Ex Post Facto Clause does not use the term
"punishment," it has been interpreted since 1798 to apply to laws
imposing punishment, thus prohibiting states from enacting laws that
inflict greater punishment for a past criminal act than the law attached
to the crime at the time it was committed.

Most sex offender notification statutes apply retroactively to convicted
offenders. California's notification provision subjects all offenders

77. See, e.g., In re Reed, 33 Cal. 3d 914, 922, 663 P.2d 216, 220, 191 Cal. Rptr.
658, 662 (1983); People v. Mills, 81 Cal. App. 3d 171, 177, 146 Cal. Rptr. 411, 414
(1978); In re Birch, 10 Cal. 3d 314, 321-22, 515 P.2d 12, 16-17, 110 Cal. Rptr.
212, 216-17 (1973).
78. U.S. CONST. art. I, § 10, cl. 1 ("No State shall ... pass any ... ex post facto
Law ... ").
80. Id. at 390.
81. Of the 25 states with notification provisions, only Colorado, Georgia, Indiana,
Maryland, North Carolina, Oklahoma, and Tennessee are not retroactively applied. See
supra notes 10-11. The federal statute does not require states to apply their registration
convicted since July 1, 1944 of the enumerated offenses to the notification requirement.82 If public disclosure of registrant's information is found to impose punishment, then the statute imposes greater punishment to prior criminal convictions, and therefore becomes vulnerable to ex post facto scrutiny.83

In Calder v. Bull, the Court articulated standards for evaluating whether a law was invalid under the Ex Post Facto Clause.84 Justice Chase listed four types of laws he considered to be within the prohibition as ex post facto laws:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.85

Justice Chase's third classification of invalid ex post facto laws is applicable in evaluating sex offender notification laws. The Supreme Court restated the Calder standards in Beazell v. Ohio:

[A]ny statute . . . which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto . . . . [T]he criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.86

Retroactively applied notification statutes clearly violate the ex post facto prohibition under the Calder standards. Retroactive notification provisions subject offenders to punishment greater than that which attached to the crime when it was committed. In challenges to notification statutes, Alaska and Louisiana courts have invalidated the laws as violative of the Ex Post Facto Clause.87 The Artway court

82. CAL. PENAL CODE § 290.4 (West 1995). For a list of enumerated offenses see supra notes 19 and 27.
83. See Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 673 (D.N.J. 1995) (where a statute is retroactive on its face, the court must engage in ex post facto analysis).
84. 3 U.S. (3 Dall.) 386 (1798).
85. Id. at 390.
similarly found that Megan's Law, where retroactively applied, violated the Ex Post Facto Clause. 88

The Arizona Supreme Court in State v. Noble 89 found that the Arizona registration statute was both retrospectively applied and burdensome to the individual affected, but held that the statute did not violate the Ex Post Facto Clause because registration did not constitute punishment. 90 However, the court clearly indicated that the addition of a community notification provision would tip the balance in favor of a finding of unconstitutionality. 91 The unavailability of registrant's information to the public was also a decisive factor for the Supreme Court of New Hampshire in State v. Costello. 92 The court held that the New Hampshire registration statute did not violate the Ex Post Facto Clause. 93 The federal statute requiring states to implement a sex offender registration program does not require states to apply the law retrospectively. 94

California's sex offender registration statute was enacted in 1947 and applied to those convicted since July 1, 1944. 95 There have been no reported cases challenging the registration statutes based on a violation of the Ex Post Facto Clause. However, the notification statute, effective July 1, 1995, applies to all offenders convicted of any of the enumerated offenses since July 1, 1944. 96 The statute is clearly retrospective on its face. To the extent that registration has been found punitive, it is certain that under the standards articulated by the Supreme Court, 97 the California notification provision, as retroactively applied, would be invalidated as an ex post facto law.

The legislative purpose of community notification statutes, to aid law enforcement in protecting the public by informing those likely to encounter a recidivist, would be severely undermined if the statutes only applied to those who committed crimes after the law was enacted. However, legislators should not ignore such fundamental individual

90. Id. at 1220-21, 1224.
91. Id. at 1224.
93. Id.
97. See supra note 85 and accompanying text.
rights as the Framers explicitly provided for in the Constitution. In *Landgraf v. U.S.I. Film Products*, Justice Stevens observes that "retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."  

California's sex offender notification statute is facially retroactive, imposing punishment which did not attach to the crime at the time it was committed. Clearly, the legislature has identified a serious problem and has attempted to remedy it. However, constitutional mandates cannot be ignored. The law should be found invalid under the Ex Post Facto Clause. The California Legislature should fashion a scheme which is not constitutionally prohibited, and yet is effective in achieving its worthy purpose.

D. Do Sex Offender Notification Statutes Violate the Constitutional Prohibition Against Bills of Attainder?

The United States Constitution explicitly prohibits the States from passing any Bill of Attainder. A Bill of Attainder is defined as a legislative act that applies to ascertainable individuals or groups, which imposes punishment on them without a judicial trial. The Bill of Attainder Clause was intended as an implementation of the separation of powers doctrine, preventing legislatures from usurping the function of the judiciary. The Supreme Court in *Nixon v. Administrator of General Services* noted that a "major concern that prompted the bill of attainder prohibition [was] the fear that the legislature, in seeking to..."

98. Justice Stein, dissenting in Doe v. Poritz, writes that "settled Constitutional principles...are neither negotiable nor flexible." 662 A.2d 367, 441 (N.J. 1995). He cautions that Constitutional values must transcend current societal pressures. "Today, our concern is with prior sex offenders; in the 1950's the legislative concern focused on Communists; and in the 1860's Congress was determined to punish legislatively those who had supported the Confederacy." *Id.*


100. See discussion *infra* part V.


103. For a history of the bill of attainder doctrine, see Nixon v. Adm'r of Gen. Serv., 433 U.S. 425, 473-75 (1977). See also United States v. Brown, 381 U.S. 437, 447 (1965) ("the evil the Framers...sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups."). The *Brown* Court found that a law prohibiting a Communist from holding a position as an officer of a labor union violated the bill of attainder clause. *Id.* at 461-62.

1212
pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or worse still, lynch mob."\(^{104}\)

Traditionally, the Bill of Attainder Clause applied to general retributive acts of a legislature towards specific groups or persons.\(^{105}\) However, the Court in *United States v. Brown* held that the Bill of Attainder prohibition was also applicable to preventive legislation.\(^{106}\)

The Court in *Nixon* applied a three-part test to determine whether the challenged Congressional act constituted punishment within the scope of the Bill of Attainder doctrine.\(^{107}\) First, the historical test inquired whether the punishment imposed was traditionally judged to be prohibited by the Bill of Attainder Clause.\(^{108}\) These punishments include death, imprisonment, banishment, punitive confiscation of property, and laws barring certain designated persons from engaging in specified employment or vocations.\(^{109}\) The second test looks at whether the statute reasonably furthers a non-punitive purpose.\(^{110}\) The third test asks whether the statute evidences a legislative intent to punish.\(^{111}\)

Applied to sex offender notification statutes, the *Nixon* tests and case law interpreting the Bill of Attainder doctrine do not result in a conclusive finding of unconstitutionality. Historically, punishments entailing public humiliation were not within the scope of the Bill of

---

105. The law found to violate the bill of attainder clause in *Brown* was directed at Communists. 381 U.S. at 461. *But see* DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (holding that a New York statute prohibiting a convicted felon from holding office in any waterfront labor organization did not violate the bill of attainder clause because the restriction was “incident to a regulation of a present situation,” not a punishment for past activity).
106. *Brown*, 381 U.S. at 458. The Court found that punishment within the meaning of the bill of attainder clause included not only retributive punishment, but “rehabilitative, deterrent—and preventive” as well. *Id. But see* Justice White’s dissent in *Brown*, arguing that the Court should defer to legislative findings: “[T]he Court implies that legislation is sufficiently general if it specifies a characteristic that makes it likely that individuals falling within the group designated will engage in conduct Congress may prohibit.” *Id.* at 463. The *Nixon* Court likewise warned that too expansive a reading of the bill of attainder doctrine would “invalidate[e] every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals.” 433 U.S. at 471.
108. *Id.* at 473-75.
109. *Id.*
110. *Id.* at 475-78.
111. *Id.* at 478-80.
Attainer prohibition. The Nixon Court interpreted the Bill of Attainder Clause less broadly than the Brown Court, clearly indicating that legislative findings should be deferred to in the absence of clear punitive intent. They found that some detrimental effect was tolerable where there were legitimate non-punitive purposes the legislature sought to achieve.\textsuperscript{112} Judicial deference to legislative findings that public awareness of likely recidivists will aid in protecting the public will result in holdings that notification provisions do not violate the Bill of Attainder Clause.

Nor does the politically motivated nature of sex offender notification statutes necessarily invalidate the laws. The Court in \textit{Artway v. Attorney General of New Jersey} found that, “[a]lthough Megan's Law was enacted in response to public disgust[, ] . . . such a fact alone is not fatal to the act's survival.”\textsuperscript{113} While a challenge under the Bill of Attainder Clause, standing alone, will not invalidate public notification laws, relevant concerns are raised which should be considered when evaluating the validity of such laws.

The \textit{Artway} court found that the punitive effects of Megan's Law did not fall within the punishments banned by the Bill of Attainder doctrine.\textsuperscript{114} California courts have not ruled on whether sex offender statutes violate the Bill of Attainder Clause. However, California's notification entails a lesser degree of notification than does Megan's Law. If the courts are persuaded by the \textit{Artway} decision, it is unlikely that they will find the degree of punitive effect severe enough to fall within the scope of the Bill of Attainder doctrine.

\textbf{E. Do Retroactive Sex Offender Notification Statutes Violate the Constitutional Prohibition Against Double Jeopardy?}

The Fifth Amendment to the Constitution guarantees that no person will be “subject for the same offence to be twice put in jeopardy of life or limb.”\textsuperscript{115} The Supreme Court defined the scope of the Double Jeopardy Clause in \textit{United States v. Halper}: “[P]unishing twice, or attempting a second time to punish criminally, for the same offense.”\textsuperscript{116} The plaintiff in \textit{Artway} argued that Megan's Law, retroac-

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.} at 469-70.
  \item \textsuperscript{113} 876 F. Supp. 666, 684 (D.N.J. 1995).
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} U.S. CONST. amend. V. The provision is made applicable to the States by the Fourteenth Amendment.
  \item \textsuperscript{116} 490 U.S. 435, 442 (1989) (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).
\end{itemize}

1214
tively applied, violated the Double Jeopardy Clause because he was convicted and punished for his offense and then subjected to another punishment, public notification, for the same offense. Of course, only retroactive notification provisions are amenable to double jeopardy analysis. Multiple punishments for a single crime may be authorized by the legislature and do not violate the Double Jeopardy Clause. The Halper Court stated that "the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." The third of these abuses is at issue in sex offender notification challenges.

The threshold question is whether notification provisions constitute criminal penalties. The Supreme Court in Halper found that a civil penalty imposed subsequent to a criminal penalty was punitive in nature and violated the Double Jeopardy Clause. The Halper case involved a monetary civil penalty which the Court found had "no rational relation to the goal of compensating the Government for its loss," and as such, "cross[ed] the line between remedy and punishment." Sex offender statutes may be similarly viewed. Mandatory registration with law enforcement agencies clearly serves a remedial goal and does not implicate the Double Jeopardy Clause. Notification to the community, however, crosses the line between remedy and punishment and serves no greater law enforcement purpose than does the registration requirement. The New Jersey Supreme Court acknowledged that retroactive notification provisions, if punitive, would violate the Double Jeopardy Clause. The Artway court discussed the double jeopardy concerns of Megan's Law, but declined to reach a conclusion because it found the Ex Post Facto Clause to be dispositive of the case.

119. Halper, 490 U.S. at 440.
120. Id. at 448-49. As discussed earlier in this Comment, notification provisions are clearly punitive when analyzed under the Mendoza-Martinez factors. See supra notes 41-77 and accompanying text.
122. Doe v. Poritz, 662 A.2d 367, 392 n.12 (N.J. 1995). The Doe court found that notification did not impose punishment and did not implicate the double jeopardy clause. See supra note 41.
In a case challenging the Washington Sexually Violent Predator statute, the court held that the statute violated the Double Jeopardy Clause because it subjected the offender to a second punishment for the same crime. Even though the statute was classified as "civil" and had a remedial purpose of treatment for the offender, the court employed the Mendoza-Martinez factors to establish that the statute was punitive within the meaning of the Double Jeopardy Clause. Admittedly, involuntary civil confinement imposes a greater burden than does community notification. But the same analysis is applicable to the double jeopardy determination as to the ex post facto analysis. Statutes invalidated under the Ex Post Facto Clause should also be found invalid under the Double Jeopardy Clause; where a second punishment is imposed for the same crime, the statute violates the prohibition against double jeopardy on its face.

F. Do Sex Offender Notification Statutes Violate the Constitutional Prohibition Against Cruel and Unusual Punishment?

The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishment." Originally, "cruel and unusual punishment" encompassed "something inhuman and barbarous, torture and the like." The meaning has evolved over time. Courts have never defined the exact scope of "cruel and unusual" but have generally considered punishment which is excessively lengthy or severe or which is disproportionate to the crime committed to be within the Eighth Amendment prohibition. In Trop v. Dulles Chief Justice Warren wrote that

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . [T]he words of the Amendment are not precise, and . . . their

124. Wash. Rev. Code Ann. § 71.09 (West Supp. 1995). The statute allows the state to involuntarily confine offenders, after serving their criminal sentence, if they are deemed to be sexually violent.
125. Young v. Weston, 898 F. Supp. 744, 753-54 (W.D. Wash. 1995) (holding that involuntary civil confinement after the offender had served his prison sentence was double jeopardy).
126. Id. at 752-54.
127. See, e.g., id. at 754.
128. U.S. Const. amend. VIII.
130. See, e.g., O'Neil v. Vermont, 144 U.S. 323, 331 (1892).
scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

In *Solem v. Helm* the Court adopted a proportionality test to determine whether a punishment was cruel and unusual, but this approach was rejected just a few years later in *Harmelin v. Michigan* as "an invitation to [the] imposition of subjective values." Justice Scalia asserted that the Eighth Amendment did not contain a proportionality guarantee, but that proportionality was simply a factor to consider in extreme circumstances, usually in the context of capital punishment cases. The Court has not articulated a clear standard for determining whether a punishment is cruel and unusual within the meaning of the Eighth Amendment. However, since most state Constitutions contain a similar clause, state courts have developed clear tests of cruel and unusual punishment within the meaning of their own Constitutions.

Many state and federal courts have had the opportunity to rule on the Cruel and Unusual Punishment Clause as it is implicated by sex offender registration and notification statutes. While the *Harmelin* holding may preclude proportionality challenges to the federal prohibition on cruel and unusual punishment, most states also have a similar clause in their constitutions. Mandatory registration of convicted sex offenders has not been found to be cruel and unusual except in two California cases involving misdemeanor convictions. However, in *In re*
DeBeque, where a misdemeanor conviction for indecent exposure involved two young boys as victims, a California court found that registration was not cruel and unusual punishment. California courts have consistently used a proportionality test to evaluate claims of cruel and unusual punishment. In In re Lynch the California Supreme Court adopted a three-prong proportionality test to analyze punishments challenged as cruel and unusual. The Lynch test, first, examined “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society,” second, “compare[d] the challenged penalty with the punishments prescribed in the same jurisdiction for different offenses which, by the same test, must be deemed more serious,” and third, compared “the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision.”

Applying the Lynch analysis to the California notification provision, a court may very well find that they need go no further than the first inquiry. The DeBeque court stressed that legislation enacted to protect children was entitled to great deference. The court distinguished the case from In re Reed, a case which found the registration requirement disproportionate to a conviction for soliciting lewd or dissolute conduct from an undercover vice officer in a public restroom. The DeBeque court noted that the crime for which DeBeque was convicted required a “motivation of abnormal sexual interest in children” in contrast to Reed’s “relatively minor sexual indiscretion between adults.” The holding in DeBeque was based on an application of the Lynch analysis to the specific facts of the case and to the mens rea required by the statute in order to convict. Since all of the crimes which trigger the notification requirement concern sexual abuse of children,
it appears unlikely that under this first Lynch prong a California court would find notification cruel and unusual.148

The Lynch court explained that the underlying premise of the second prong of its analysis was that a finding of disproportionality renders a statute suspect as "generated in response to transitory public emotion."149 The DeBeque court did not find the registration requirement defective under this second prong, deferring to the legislature's designation of crimes likely to be committed by recidivists and assignment of penalties it deemed appropriate to the gravity of the crimes.150

Notification may very well be considered differently. Notification only applies to those enumerated crimes involving sexual abuse of children.151 Conviction for sex crimes against adults requires the offender to register, but he is not subject to the notification provisions.152 The only other criminal convictions which require the offender to register are arson153 and certain drug offenses,154 but there is no notification provision for these registrants. Whether these disparities indicate that public notification is a disproportional penalty for convicted sex offenders is a difficult question. The legislature's determination that persons convicted of any of the crimes requiring registration display a high rate of recidivism cannot be easily dismissed. It could be argued that the public has a right to know if there is a murderer, rapist, drug dealer, or arsonist living in their neighborhood as much as they have a right to know if their neighbor is a convicted child

148. See, e.g., People v. Monroe, 168 Cal. App. 3d 1205, 1212, 215 Cal. Rptr. 51, 57 (1985) (holding that the registration requirement for a conviction for annoying or molesting a 10-year-old girl was not cruel and unusual because of the serious nature of the crime. The court wrote that such a requirement for this crime "does not shock the conscience or offend fundamental notions of human dignity.").


150. In re DeBeque, 212 Cal. App. 3d 241, 251-52, 260 Cal. Rptr. 441, 446-47 (1989). But see infra notes 203-212 and accompanying text (because of the inconclusive studies on recidivism, which is a fundamental assumption of sex offender notification statutes, individual consideration of particular circumstances of a case may result in a finding that notification constitutes cruel and unusual punishment in certain cases).

151. See supra notes 19 and 27.

152. See supra note 19.

153. CAL. PENAL CODE § 457.1 (West 1995). The statute provides that the information on registrants shall not be open to the public.

molester. The definition of crime and assignment of penalties is a legislative function, and courts often "tread lightly when approaching matters within the unique province of the Legislature." However, the fact that only certain convicted sex offenders are subject to the public notification provision is an indication of disproportionality which should be evaluated by courts, together with other factors, to determine whether the penalty is cruel and unusual within the constitutional meaning.

The third prong of the Lynch test is similar to the second. However, under this inquiry the penalty challenged is compared to those imposed for the same crime in other jurisdictions. A finding of disproportionality is indicative of the penalty's excessiveness within the meaning of "cruel and unusual." 157

Of the forty-eight states with sex offender registration statutes, twenty-five have some provision for community notification. 158 These provisions allow for varying degrees of public dissemination of registrant's information. 159 The virtually unlimited public access to registrant's information in California places it among the more onerous of the notification provisions.

The second and third prongs of the Lynch proportionality test weigh towards a finding of unconstitutionality of California's notification provision. However, it must be noted that the courts in cases challenging the registration statutes have overwhelmingly favored the first

---

155. It is true that legislatures, in addressing a particular crime which they seek to prevent, need not fashion a remedy for all other crimes as well. See, e.g., United States v. Brown, 381 U.S. 437, 474 (1965) ("[T]his Court has long recognized . . . that a legislature may prefer to deal with only part of an evil.") (White, J. dissenting).


157. In re Lynch, 8 Cal. 3d 410, 427, 503 P.2d 921, 932, 105 Cal. Rptr. 217, 228 (1972). But see also State v. Lammie, 793 P.2d 134, 140 (Ariz. Ct. App. 1990) (rejecting defendant's claim that the disproportionality of Arizona's registration statute rendered it unconstitutional. The court went on to say that "[t]o hold otherwise would make it virtually impossible for a state to be on the leading edge in passing laws increasing punishment for criminal offenses.").

158. See supra notes 10-13.

159. Eight states allow local law enforcement to release information they have determined to be necessary for the protection of the public; these are Alaska, Colorado, Louisiana, Maryland, Mississippi, Montana, North Dakota, and Tennessee. Delaware, Georgia, Indiana, Nevada, Oklahoma, and South Dakota disseminate information only to schools and child-related organizations such as daycare providers. California, Idaho, Kansas, New York, North Carolina, and Oregon provide unlimited access to the public, through registries available in law enforcement offices, or 900 numbers. Only five states, Arizona, New Jersey, Pennsylvania, Texas, and Washington mandate public notification through publication in newspapers or written notices distributed throughout the community. See supra note 19.

1220
prong. Because of the serious nature of the crime and the moral culpability of the offenders, these courts have declined to find registration statutes to be cruel and unusual. The added burden of public notification would certainly alter the analysis, but it may not be found to be so burdensome as to constitute cruel and unusual punishment. The fact that the registration provision is effective for the lifetime of the offender was troublesome to the DeBeque court, which urged the legislature to revise this shortcoming of the statute. Viewing the growing number of notification provisions in sex offender statutes enacted by the states, a court could be persuaded that this represents the "evolving standards" spoken of by the Court in Trop v. Dulles. However, many of the harshest notification schemes have been found unconstitutional, albeit on grounds other than instances of cruel and unusual punishment. California's notification provision is arguably less burdensome than mandatory notification to the community, because it requires affirmative action on the part of the citizen requesting the information. This factor may mitigate the "cruel and unusual" aspects of the statute, and combined with the substantial deference shown to legislative findings on the subject of child sexual abuse, it is unlikely that a California court would invalidate the notification statute as violative of the prohibition against cruel and unusual punishment.

III. FOURTEENTH AMENDMENT CHALLENGES: DUE PROCESS, THE RIGHT TO PRIVACY, AND EQUAL PROTECTION

The Fourteenth Amendment mandates that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Sex offender statutes have been challenged as an unconstitutional infringement of liberty and as a denial of equal protection of the

161. Id.
laws. This section looks at these issues as implicated by sex offender notification provisions.

A. Substantive Due Process and the Right to Privacy

In a line of cases from Griswold v. Connecticut\textsuperscript{166} to Eisenstadt v. Baird\textsuperscript{167} to Roe v. Wade,\textsuperscript{168} the Supreme Court has found a "right to privacy" implicit in the Fourteenth Amendment concept of liberty. In Whalen v. Roe, the Court recognized two types of protected privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."\textsuperscript{169} The first of these two interests is relevant to sex offender notification statutes. Before an analysis of whether a statute violates due process is appropriate, it must be determined whether the liberty interest, here privacy, is constitutionally protected. The Whalen case involved personal information that was not otherwise publicly available. The Court held that a New York State Health Department data compilation on users of certain prescription drugs did not violate the privacy rights of those users because the information was not publicly available, and because access to the information was strictly limited.\textsuperscript{170} A question arises in the context of sex offender notification statutes whether there is a protected privacy interest in public information. The court in Rowe v. Burton found that convicted sex offenders did not have a reasonable expectation of privacy in the information required to be publicly disclosed by the Alaska registration act.\textsuperscript{171} The Rowe court observed that "residences, job locations, drivers license number, date of convictions, and nature of the convictions are ... considered public information ... not ... traditionally protected from disclosure by the federal right to privacy."\textsuperscript{172} Likewise, in Doe v. Poritz the New Jersey Supreme Court held that the information disseminated to the public pursuant to Megan's Law was not constitutionally protected.\textsuperscript{173} However, the Doe court acknowledged that disclosure of a registrant's home address implicates a privacy interest, especially where such disclosure could result in unsolicited

\textsuperscript{166}. Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{170}. \textit{Id.} at 600-04.
\textsuperscript{172}. \textit{Id.}

1222
California's Sex Offender
SAN DIEGO LAW REVIEW

contact. They also noted that the notification law "links various bits of information . . . that otherwise might remain unconnected," but that on the whole, the state interest in public disclosure outweighed the registrant's privacy interests.

The Supreme Court addressed this issue in United States Dept'T of Justice v. Reporters Comm. for Freedom of the Press. A unanimous Court held that disclosure of criminal information contained in F.B.I. history files could reasonably be expected to constitute an invasion of personal privacy within the meaning of the Freedom of Information Act, even though the information was a matter of public record. Of particular relevance to public disclosure of registered sex offenders' information is the following statement from Reporters Comm.:

The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying files or to the general public. . . . [T]he 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 . . . and a computerized summary located in a single clearinghouse of information.

Case law addressing disclosure of public information as a violation of an individual's right to privacy provides no clear rule. However, two California courts found that the respective plaintiffs stated a cause of action for invasion of privacy for the publication of their prior criminal convictions, even though the information published was accurate and, admittedly, in the public record. While the courts in Conklin v.

174. Id. at 411.
175. Id. The Doe court believed that the inclusion of penalties for the use of registrant's information for unlawful purposes or harassment justified the disclosure of such information in spite of registrants' privacy rights. Id. at 409. The court's confidence may be misplaced, as incidents of vigilantism have resulted from public disclosure of the identities and addresses of convicted sex offenders. See infra notes 221-24 and accompanying text.
177. Id.
178. Id.
179. Conklin v. Sloss, 86 Cal. App. 3d 241, 150 Cal. Rptr. 121 (1978) (holding that a newspaper article revealing that the plaintiff had been convicted 20 years earlier for murdering his brother-in-law invaded his privacy, exposing him to contempt, ridicule, mental anguish, embarrassment and humiliation); Briscoe v. Reader's Digest Ass'n, 4 Cal.
Sloss and Briscoe v. Reader's Digest Ass'n conceded that recent crimes were newsworthy, they found that identification of actors in reports of past crimes served little public purpose. However, in a California case challenging the registration statute as a violation of the right to privacy, the court was not so generous. In People v. Mills the court made this harsh statement: "[Plaintiff] also argues [that] the registration requirement deprives him . . . of his right to privacy. This may well be true, but any person who . . . physically molests . . . a seven-year-old child, has waived any right to privacy. . . . The argument is without merit." Several years later, the same court rejected a privacy challenge to the registration requirement for convicted drug offenders in People v. Hove. In Hove, the court found that the law did intrude on the registrant's privacy, but that the intrusion was not substantial, noting that the law was "designed to minimize the intrusion into individual privacy" by strictly limiting access to the information to law enforcement personnel.

The foregoing analysis of case law lends support for at least the possibility that a court in California would find a protected privacy interest implicated by the notification provision, thus necessitating a balancing of those privacy interests and the public interest. Where a protected liberty interest is implicated, due process requires that a statute bear a reasonable relationship to the legitimate state interest to be served, and that the means are reasonable to accomplish that desired objective. Protection of children from recidivistic child molesters is a compelling state interest, and courts have allowed legislatures broad latitude in fashioning appropriate remedies. Registration of sex offenders deemed likely to recidivate is a reasonable means of accomplishing the state objective, because it aids law enforcement officials in monitoring such persons. But the inquiry must now be whether public

3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (finding that publication of plaintiff's criminal conviction for hijacking eleven years after he was convicted was not newsworthy and constituted an invasion of his privacy, subjecting him to humiliation and ridicule).

180. Conklin, 86 Cal. App. 3d at 244-45, 150 Cal. Rptr. at 123; Briscoe, 4 Cal. 3d at 536-37, 483 P.2d at 39-40, 93 Cal. Rptr. at 871-72. The Briscoe court called it a "crass legal fiction to assert that a matter once public never becomes private again." Id. at 539, 483 P.2d at 41, 93 Cal. Rptr. at 873.


182. Id. (emphasis added).


184. Id. at 1007 n.7, 9 Cal. Rptr. 2d at 297 n.7.


disclosure of registrant's information substantially furthers the state purpose any more than does registration alone, so that the burden upon the registrant's privacy interests is justified. Many critics of community notification have argued that more harm than good is done by these statutes and that they will result in greater, not less, danger to the public.187

Legislative acts designed to remedy a particular social evil are entitled to a presumption of constitutionality.188 Where statutes represent a legislative policy decision, courts are reluctant to invalidate the legislation unless it is unmistakably unconstitutional on its face.189 While hesitant to tread into the Legislature's domain, courts nevertheless have a duty to review acts which implicate constitutionally protected rights.

A court reviewing California's notification provision might consider whether the safeguards included in the statute mitigate the burden on the registrant's privacy. The California statute prohibits the release of the registrant's home address.190 Penalties are imposed on persons who use the disclosed information to commit a felony or misdemeanor.191

187. See Montana, supra note 48, at 584-85 (arguing that notification interferes with the rehabilitation of the offender); Sandi Dolbee & Mark Sauer, Religion & Ethics: Redemption, Repulsion, SAN DIEGO UNION TRIB., Nov. 3, 1995, at E1, E4 (hereinafter Dolbee) (forcing offenders out of one neighborhood "simply transfers the problem"). James Boren, a director of the Louisiana Association of Criminal Defense Lawyers, said of Louisiana's notification statute: "What you're doing is setting these offenders up for complete failure .... They'll get out and soon realize that no matter what they do, they're seen as evil, so they might as well be evil." Sex Offender Registration Law, supra note 10.

188. See People v. Wingo, 14 Cal. 3d 169, 174, 534 P.2d 1001, 1006, 121 Cal. Rptr. 97, 102 (1975).

189. See, e.g., id. The Wingo court stated that "[t]he doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment." Id.

190. CAL. PENAL CODE § 290.4 (a)(2), (b)(1) (West 1995). Callers to the 900 number are warned that it is illegal to use the information obtained to commit a crime against the registrant, discriminate against the registrant, or engage in harassment against the registrant. Id. § (a)(4)(c)(v). Justice Stein, dissenting in Doe v. Poritz wrote that the expectation that information obtained about registrants would be used responsibly was "simply unrealistic." 662 A.2d 367, 439 (N.J. 1995). "[G]iven the normal range of human emotion one reasonably could anticipate that notice of the presence of a sex offender will trigger fear, suspicion, hostility, anger, evasive behavior [and] ostracism."
Finally, rehabilitated offenders may avail themselves of a legal proceeding to terminate the registration requirement. Clearly, the legislature designed the statute to lessen the burden on the individual's privacy by including these safeguards, but the burden is still substantial.

The question remains how disclosure of sex offender registrants' information aids law enforcement in protecting the public, or the public in protecting themselves. Certainly, if parents know the identity and whereabouts of a convicted child molester, they can warn their children to avoid him. And, neighbors can alert police to suspicious activities of the registrant, or to excessive contacts of the registrant with children. As discussed in Part IV of this Comment, the California notification provision has serious drawbacks which tend to limit its efficacy. Despite this, a court could find that the legislature had at least some rational basis for the statute and would most likely defer to the legislature's policy decision. Therefore, on privacy grounds alone, a challenge to the sex offender notification statute is unlikely to succeed.

B. Equal Protection

The essential concept of the Equal Protection Clause of the Fourteenth Amendment is that persons similarly situated should be treated alike. When legislation uses classifications, those classifications must not be

---

Id.

192. CAL. PENAL CODE § 290.5 (West 1995). It has been argued that public notification interferes in the rehabilitative process; relief from the duty to register via § 290.5 is not available until the offender obtains a certificate of rehabilitation. See Montana, supra note 48, at 584-85.

193. Most child molestation cases are committed by family members or friends. It is presumed that had parents suspected or known of the risk posed by the molester, they would have taken protective measures. Thus, California's notification provision would be of no help in these cases. See Popkin, supra note 1, at 67. "Of the 139,000 confirmed cases of child sexual abuse reported to state child-protective services in 1992, most victims were thought to have been molested by friends and relatives." Id. See also infra note 209 and accompanying text.

194. It has been argued that a molester whose identity is known in his neighborhood will simply molest elsewhere. A paroled child molester confirmed this: "I would go to some other part of town where no one knew who I was." Popkin, supra note 1, at 68. It is also believed that offenders who experience harassment as a result of notification will move and fail to re-register, thus impeding law enforcement efforts to monitor such individuals. In Washington State, a registered offender was evicted from his rented home and shunned by neighbors after local police distributed a notification flier. Gary Ridgway said he will register again after moving, and if he is harassed again, "then it's the hell with their program." Jim Hooker, Megan's Law has a Harsh Prototype, N.J. REC., Oct. 10, 1994, at A1.

arbitrary and must be rationally related to a legitimate state interest. Challenges to sex offender statutes have alleged that because the laws do not distinguish among various "types" of sex offenders, they violate the constitutional guarantee of equal protection.

The protection of children from recidivistic child molesters is a legitimate state interest. By enacting the notification provision, the California Legislature has identified a "class" of persons, convicted child molesters, as potential recidivists. To the extent that the legislature finds that members of this class are likely to repeat their crimes, the classification is neither arbitrary nor irrational in relation to a legitimate purpose.

The fact that the class may be over-inclusive or under-inclusive does not in itself invalidate the legislation. The plaintiff in Doe v. Poritz argued unsuccessfully that as an offender who had completed rehabilitative treatment, he should not be classified with other sex offenders. California's registration and notification requirements apply for the lifetime of the offender, and require no assessment of the risk the offender poses to the public. To be relieved from the duty to register, an offender must obtain a certificate of rehabilitation and initiate a legal proceeding. During the offender's probation or parole, however, he is not relieved of the duty to register, and is subject to notification. Despite the overinclusiveness of California's statute, judicial

196. Id. at 439-40. When the classification is a "suspect" class, such as race or ethnicity, strict scrutiny is the standard of review. Where the classification is not suspect, only rationality is required. Id.


198. See infra notes 213-20 and accompanying text for a discussion of the over- and under-inclusiveness of the California statute. See United States v. Brown, 381 U.S. 437, 474 (1965) ("[T]his Court has long recognized in equal protection cases that a legislature may prefer to deal with only part of an evil.") (White, J., dissenting). See also People v. Adams, 581 N.E.2d at 642 ("When the legislature creates a statute, it is not required to solve all the evils of a particular wrong in one fell swoop.").

199. 662 A.2d 367, 414 (N.J. 1995). But see State v. Ward, 869 P.2d 1062, 1076-77 (Wash. 1994) (finding that the Washington registration statute did not violate equal protection, noting that the statute distinguished between offenders who were under corrective supervision and those who had been released from corrective supervision).

200. Megan's Law provides for a three-tier classification system; those at the first tier are thought to be of little danger to the public, and are not subject to notification. See Doe v. Poritz, 662 A.2d 367, 378 (N.J. 1995). For example, it is believed that offenders that have committed incest pose little threat to other children. See Dolbee, supra note 187, at E4.

201. CAL. PENAL CODE § 290.5 (West 1988).
deference to legislative findings of a high likelihood of recidivism among the targeted class of offenders would probably result in the failure of an equal protection challenge. As with the other challenges, this one raises legitimate concerns that the legislature would be wise to consider in fashioning a more effective, less burdensome statute.

IV. IS PUBLIC NOTIFICATION AN EFFECTIVE MEANS TO PROMOTE PUBLIC SAFETY? SOME POLICY ISSUES

Widely publicized accounts of children molested by convicted sex offenders have fueled demands by the public to know if there is an offender living in their community. Legislators have responded with sex offender notification statutes. But a closer look at California's notification statute reveals a largely symbolic measure which may do more harm than good, for several reasons.

A. The Assumption of Recidivism

The assumption underlying sex offender statutes is that sex offenders have a high rate of recidivism. Therefore, it is necessary for the safety of the public that these individuals be closely monitored at all times by law enforcement agencies. Notification provisions enable concerned citizens and parents to identify convicted offenders and thus take preventive measures on behalf of children who may be at risk. Studies of sex offender recidivism, however, are anything but conclusive.

202. *But see* Justice Stein's dissent in *Doe v. Poritz*, 662 A.2d 367, 439 (N.J. 1995). The dissent argued that the court had a duty to inquire further:

The court appears to conclude, however, despite any deficiencies in the classification and notification process adopted by the Legislature, that its rationality establishes its constitutionality. That is, because the court concludes that the Legislature reasonably could determine that these statutes prevent harm to the public by mandating notice to the community of the whereabouts of prior sex offenders, the constitution does not prohibit their enactment. I disagree. The Legislature's value judgment about these laws is entitled to great respect, but that judgment comprises only one part of the constitutional equation. The judiciary's task is to complete the equation by evaluating the legislative determination in the context of settled Constitutional principles. Those principles are neither negotiable nor flexible.

203. The legislative purpose of Cal. Penal Code § 290 is "to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature has deemed them likely to commit similar offenses in the future." *In re Reed*, 33 Cal. 3d 914, 919, 663 P.2d 216, 217, 191 Cal. Rptr. 658, 659 (1983).

204. One researcher has said that the available data on recidivism and treatment of child sexual offenders is "in chaos." JOHN J. McMAHON, LEGIS. REFERENCE BUREAU HAW., INTRAFAMILY CHILD SEXUAL ABUSE: EXPLORING SENTENCING ALTERNATIVES 1228
and reported recidivism rates for various types of sex offenses vary widely.\textsuperscript{205} It has been argued that because of the public outrage over sex crimes, government funding for scientific studies of sexual disorders and recidivism has been meager.\textsuperscript{206} Offenders convicted of incest are not generally considered dangerous to other children,\textsuperscript{207} and when treated are much less likely to recidivate.\textsuperscript{208} Since incest offenders constitute the largest group of sex offenders committing crimes against children, the persons subject to notification include many unlikely recidivists.\textsuperscript{209} Studies have also found that the highest rate of recidi-
vism among sex offenders is among non-violent exhibitionists, or those convicted of “indecent exposure.” 210

The public perception which often prompts sex offender legislation seems to be that child molesters are highly recidivistic and untreatable. 211 It is true that some types of pedophiles are rarely treatable. 212 Because all of these types of offenders are included among those subject to the notification provision, the class is vastly overinclusive and unnecessarily burdens those individuals that pose no real danger to the public.

B. Notification Promotes a False Sense of Security

Public access to registrants' information may promote a false sense of security. 213 If a “suspected” child molester is not listed in the registry, this does not mean he is not a sex offender. His crime may have been committed while he was a juvenile and his records sealed. 214 He may

Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, 98 Harv. L. Rev. 806, 807 n.14 (1985) (citing Jon R. Conte & Lucy Berliner, Sexual Abuse of Children: Implications for Practice, J. Contemp. Soc. Work 601, 603 (1981), finding that in 47% of the child sexual abuse cases they studied, the offender was a family member); Diane Depanfilis, U.S. Dep't of Health & Hum. Serv., Literature Rev. of Sexual Abuse 5 (1986) (reporting that in an analysis of reported child sexual abuse cases between 1976 and 1982, 56.5% of abusers were the natural parent of the victim, 20.9% were other (foster, step) parents, 16.3% were other relatives, and only 6.3% were unrelated to the victim).

210. See McGrath, supra note 208, at 334. This is not to say that an incident of exhibitionism is not traumatic to a child, but that it is questionable whether such an offense justifies subjecting the offender to public notification. Megan's Law classifies these offenders as “tier I” offenders, and they are only required to register. See supra note 200.

211. An Oregon judge's statement reflects the belief that all child molesters can be expected to reoffend: “One time, I thought of dyeing all child molesters green and telling children to stay away from green people.” Silverman, supra note 70. A member of an advocacy group for victims of sexual abuse in Tacoma, Washington said of a convicted offender who was severely harassed by the community, “People like him try to blend right back into the system and hide themselves in this cloak of normalcy so they can start molesting again.” Sex-Offender Registration Law, supra note 10.

212. See McGrath, supra note 208, at 335-46 (citing factors which tend to make treatment unsuccessful, including multiple paraphilias, impulsivity, substance abuse, and psychopathology). See also Lucy Berliner, Nature and Dynamics of Child Sexual Abuse, in A Judicial Primer On Child Sexual Abuse 1994, A.B.A. Ctr. on Children & the Law 7-8 (finding that offenders that are exclusively sexually interested in children are the most difficult to treat successfully, but that these tend to be a very small percentage of all offenders).

213. See Jerusalem, supra note 51, at 247; Montana, supra note 48, at 593-96.

214. See Groth et. al., supra note 205, at 454-55 (finding that the majority of adult sex offenders committed their first offense while they were juveniles). In New Jersey, Amanda Wengert was assaulted and murdered by a 20-year-old neighbor whose record of prior sex offenses was sealed because they were committed when he was a juvenile.
have been allowed to plead to a lesser offense, which does not trigger notification. He may have simply failed to register, or to re-register, upon moving to a new community.215 Included in this group might be offenders from other states who have served their time and completed their parole. Although required to register upon moving to California, the state has few resources to track such persons. Of course, first time offenders will not be in the registry, nor will those offenders whose crimes were not reported or discovered.216 In short, a parent who relies on the registry to remove a person from suspicion may in fact be unwittingly endangering his child.217

Notification laws that purport to protect children virtually ignore the fact that the majority of child sexual abuse is perpetrated by family members.218 A 900 number will do nothing to protect these children. Nor will a 900 number protect children from attacks by strangers, which, though far less frequent than abuse by persons known to the child, often draw the most publicity and spark widespread outrage.219

The underinclusiveness of California's notification provision so severely diminishes its usefulness that it should be asked whether the
diversion of resources needed to fund the program is justified. It would seem that improving the registration program would be far more efficacious in accomplishing the purpose of protecting the public. 220

C. Encouragement of Vigilantism

Instances of vigilantism and extreme harassment in response to community notification are many. 221 Proponents of public notification laws argue that the laws contain penalties for using the information obtained to commit a crime against the offender. 222 While most citizens would not resort to criminal violence, it is unrealistic for legislatures to assume that the information will not be used to drive the offender out of the community. 223 Indeed, one would expect that this would be the natural response of most parents who would not knowingly expose their children to even a minimal risk. But harassment of convicted sex offenders simply moves the problem to another neighborhood and increases the risk that the offender will not re-register or will

220. California's SHOP program has been very effective in monitoring sex offenders, but funds are limited. See discussion infra Part V.

221. In Washington, deputies notified residents that Joseph Gallardo, a convicted child molester, was about to be released into their neighborhood. The day before he was to arrive, his house was burned. In Detroit, neighbors of a suspected child molester vandalized his rented apartment and posted warning signs in front. He moved, and police do not know where he is. Popkin, supra note 1, at 73. In New Jersey, two men entered a home where a convicted offender lived and beat up the wrong man. Robert L. Jackson, Sex-Offender Notification Laws Facing Legal Hurdles, L.A. TIMES, Aug. 8, 1995, at A5. A group home for mentally retarded persons in Minnesota was picketed daily by neighbors when a mentally retarded sex offender was paroled to the home. The director of the home planned to move because he feared for the safety of the staff and residents. Rhonda Hillbery, Group Home's Point of Peril: Is the Danger Inside or Outside?, L.A. TIMES, Dec. 22, 1992, at A5. Unfortunately, these are not isolated incidents. The predominant attitude of communities towards sex offenders is: "Yes, they've served their prison sentence; no, they aren't welcome in my neighborhood." Dolbee, supra note 187, at E4.

222. See supra note 191 for a discussion of California's notification provision. See also Bruce Fein, Community Self-Defense Laws Are Constitutionally Sound, A.B.A. J., Mar. 1995, at 38 (arguing that Megan's Law protects offenders from vigilantism because the community is "admonished against vigilantism and is warned that crimes against the offender, the offender's family, employer, or school will be unfailingly prosecuted").

223. This was the case for Carl deFlumer, a twice-convicted sex offender who was paroled in 1994. When neighbors of his sister found out that he intended to stay with her, the furor was so great that she refused to take him in. He lived in a prison cell for seven months before prison officials found a halfway house willing to take him. Janny Scott, Sex Offender Due for Parole, But No Place Will Have Him, N.Y. TIMES, Sept. 19, 1994, at A1; Charisse Jones, For a Sex Offender, Freedom is Limbo, N.Y. TIMES, May 16, 1995, at B1. Edward Martone warns that the "climate of ugly vigilantism" created by community notification can cause offenders to "run from family . . . and seek the safety of anonymity by hiding out, thus subjecting the public to even greater risk." Martone, supra note 69.
reoffend, thus defeating the purpose of the legislation and impeding law enforcement efforts to monitor these individuals.224

D. Failure to Reassimilate

Notification may have the negative consequence of interfering with, or preventing, the rehabilitation of the offender and his successful reassimilation into the community. Some believe that the stress experienced by the offender as a result of notification may increase his likelihood of reoffending.225 The stigma attached to a known sex offender can impede his ability to find stable employment and housing, and to establish normal relationships,226 thus increasing his chance of reverting to crime.227

For the foregoing reasons, California's notification provision fails to meet policy goals and does not justify the burden placed on the offender. The real usefulness of the statute is so limited that the use of scarce crime-control resources to fund the program is unjustified as well. Edward Martone writes that the "sole function [of community notification laws] is political—to placate an angry public."228 A responsible legislature must address these concerns and find real, workable solutions to the serious problem of child sexual abuse, not empty gestures. Part V offers some recommendations for a less burdensome, but efficient, statute.
V. ALTERNATIVES TO NOTIFICATION AND RECOMMENDATIONS FOR A MORE EFFECTIVE STATUTE

California's sex offender registration program has been a dismal failure, as have registration laws elsewhere. Lack of resources is usually cited as the reason. However, a new comprehensive tracking system has been quite successful in California, and treatment programs for adult and especially for juvenile offenders may prevent reoffenses. These proven, successful programs also lack adequate funding, which is why it is imperative that scarce resources not be diverted to programs of such limited efficacy as the notification program.

A. California's SHOP System

An experimental program, the Sexual Habitual Offender Program (SHOP), has been so successful in Northern California that it is being expanded statewide. The SHOP system identifies parolees that pose a high risk for recidivism and compiles extensive information on the offender in a statewide computerized database. This system enables investigators to connect sex crimes that might occur in different areas of the state, as well as to link the offenders to unsolved crimes. A nationwide SHOP system could be very effective in alerting local police to offenders who move between states.

229. See Most Sex Offenders Fail to Report Moves, supra note 215, at A3 (reporting that the State of California has lost track of most of its registered sex offenders); Kenneth Reich, Sex Offender Registration Not Working, L.A. TIMES, Aug. 8, 1986, at 6 (the registration law is "not being obeyed, nor effectively enforced"); Marla Williams, Where Are Sex Offenders? Authorities Say They Lack Resources to Track Them, SEATTLE TIMES, Aug. 30, 1990, at A1 (citing lack of resources in Washington State to enforce the registration law).

230. See James P. Sweeney, State's Child-Molest Hotline Can't Be Called a Ringing Success, SAN DIEGO UNION TRIB., Aug. 9, 1995, at A3. During the first month of operation of the hotline, only one-fourth of the anticipated number of calls was received; the program, at $10 per call, was intended to pay for itself. Attorney General Dan Lungren stated that additional funds would be needed from general revenue funds to sustain the hotline, and additional funds would be needed to compile the local subdirectories as well.

231. See Kelly Thornton, Bills Aim To Keep Tabs on Abusers, SAN DIEGO UNION TRIB., May 29, 1994, at B1. The SHOP program guidelines have been codified at CAL. PENAL CODE § 13885 (West 1995).

232. Thornton, supra note 231. The information includes a physical description, genetic information, and detailed information about the offender's crime and method. Repeat offenders often use the same method of committing crimes. Id.
The SHOP system includes local efforts to track down registered sex offenders.\textsuperscript{233} A recent task force sweep in San Diego County was quite successful, resulting in "a barrage of calls from [convicted, but unregistered, sex offenders] who had heard and wanted to register," rather than face a misdemeanor conviction for failure to do so.\textsuperscript{234} The California Legislature also recently upgraded the penalty for failure to register from a misdemeanor to a felony, which no doubt will increase compliance. A considerable savings would be realized if there were a provision allowing for automatic termination of the duty to register, at least for a low risk group, after ten years.\textsuperscript{235} Perhaps a longer period of monitoring could apply to higher risk individuals. In either case, a risk assessment system should be put in place so that the greatest efforts of law enforcement personnel can be concentrated on those at a higher risk of recidivism.

It has also been argued that electronic monitoring devices would be an effective and cost-efficient method of supervising high-risk offenders.\textsuperscript{236} It is a suggestion that merits investigation as a tool for law enforcement agencies to be able to monitor and easily locate offenders, while allowing a greater measure of privacy for the offender.


\textsuperscript{234} Id. A Seattle therapist has said that registration, when enforced, is effective. "Sex offenders must be convinced they are accountable, otherwise the effort is wasted." Williams, \textit{supra} note 229. To ensure adequate monitoring of paroled sex offenders, many states have included provisions in their statutes which provide measures for increased supervision. See, e.g., FLA. STAT. ANN. § 775.21 (West Supp. 1995) (outlining the strategy of the Florida Sexual Predators Act to include "[p]roviding . . . an adequate number of well-trained probation officers with low caseloads" to ensure that released sex offenders are closely supervised).

\textsuperscript{235} See McGrath, \textit{supra} note 208, at 342 (finding that the risk of reoffense lessens greatly over time). \textit{But see} Berliner, \textit{supra} note 212, at 8 (claiming that sex offenders remain at risk "indefinitely," citing examples of a father who sexually abuses his own daughter, and then does not reoffend for as many as thirty years, when he abuses his granddaughter). The lack of long-term follow-up studies of convicted sex offenders is often cited as a serious flaw of studies of recidivism rates over time. See McMahon, \textit{supra} note 204, at 19.

B. Increased Sentences, Disallowance of Plea Bargains to Lesser Offenses

Experts agree that some offenders are rarely treatable and pose such a risk to society that they should be permanently incarcerated or committed. 237 To enhance the deterrent effect on potential recidivist sex offenders, prison sentences should be substantially increased, and a "life without parole" option made available for the most violent or repeat offenders. California law provides for a minimum prison term of twenty-five years for habitual offenders and requires that at least eighty-five percent of the sentence be served. 238 The statute is narrowly tailored to identify those offenders that pose the greatest risk to the public. The status of the offender as "habitual" must be admitted by the defendant in open court or found to be true by a jury. 239 Sentences for first time offenders should also be increased. However, so-called "one-strike" laws for first time violent offenders have been criticized as "overly Draconian," thereby posing a risk of jury nullification. 240 Prison overcrowding and the lack of funds to build new prisons are concerns, as is the possibility that victims and their families will be discouraged from reporting abuse when their attackers are family members or acquaintances. 241 Finally, sex offenders should not be allowed to plea bargain to a lesser offense to bypass the registration requirements, or to receive a lighter sentence. 242

237. See McGrath, supra note 208, at 329.
238. CAL. PENAL CODE § 667.71 (West I 995). "Habitual" is defined as having been convicted of two or more sex crimes committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim. Id.
239. Id.
242. See Nathaniel J. Pallone, A View from the Front Line, CRIM. JUST. ETHICS, Summer/Fall 1995, at 9, 10. Professor Pallone reports that Megan Kanka's killer, as a result of plea-bargains, received a sentence of only seven years for his second sexual assault conviction. Had he not been allowed to plea-bargain, his sentence would have been 30 years, and Megan would be alive today. Concern about the expense of a trial seems to have been the state's justification for allowing the plea-bargain, according to Professor Pallone. Id.
C. Mandatory Treatment Programs

Rehabilitation of some sex offenders is possible through treatment and should be required while the offender is incarcerated. Therapy should continue after the offender is paroled to ensure that he does not relapse during his transition back into the community. Development of successful treatment programs has been hampered by the paucity of reliable studies. Furthermore, treatment programs are subject to the same lack of resources as are research programs. For those offenders who are amenable to treatment, such programs would surely be more cost-effective over the long term than would lifetime incarceration.

A more difficult question arises with regard to those violent repeat offenders or those deemed to be "mentally disordered" and at extremely high risk for reoffense. A new California law allows commitment to a mental institution for up to two years after the offender serves his prison sentence. While this may increase the possibility that the offender

243. See Janice K. Marques et al., Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism, 21 CRIM. JUST. & BEHAV. 28, 49-50 (Mar. 1994) (reporting that results of a study of treated sex offenders were "promising" in controlling recidivism); McGrath, supra note 208, at 329 (outcomes of recent studies were encouraging that sex offender recidivism could be substantially reduced through effective therapy); see also Goode, supra note 29 (reporting that in 1993 only 11,200 of the 85,000 prisoners classified as sex offenders were enrolled in treatment programs).

244. See McGrath, supra note 208, at 342 (the period of greatest risk of recidivism is the first year following release).

245. See supra notes 204-06 and accompanying text.

246. See Goode, supra note 29.

247. Assembly Bill 888, enacted on October 11, 1995 amended CAL. WELF. & INST. CODE §§ 6250, 6600 (West 1995). The procedure requires a full professional evaluation, as well as a court or jury to determine, beyond a reasonable doubt, that the person is a sexually violent predator. A California Superior Court judge upheld the constitutionality of California's civil commitment statute in the state's first test case. See Catalina Ortiz, 'Sexual Predator' Law Upheld by Court, SAN DIEGO UNION TRIB., Feb. 10, 1996, at A3. The case will be appealed to a higher court. Id.

A similar statute in Washington was found unconstitutional as violative of due process, double jeopardy, and the ex post facto clause. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995). But see Wisconsin v. Carpenter, 541 N.W.2d 105 (Wis. 1995) (upholding the civil commitment statute in Wisconsin). The Supreme Court of Kansas found its states' Sexually Violent Predator Act violative of due process; the case was appealed to the U.S. Supreme Court and has been granted certiorari and will be heard during the 1996-97 term. In re Hendricks, 912 P.2d 129 (Kan. 1996), cert. granted sub nom. Kansas v. Hendricks, 116 S. Ct. 2522 (1996). The outcome of Hendricks will no doubt influence legislation in all states.
can be rehabilitated with intensive treatment, it may not be enough; lifetime incarceration or chemical treatment may seem severe, but may be the only options available for these most dangerous offenders.

D. Mandatory Background Checks For Child-Related Employment

The vast majority of calls thought necessary to the 900 number concern persons working closely with children, including daycare workers, coaches, community recreation programs, camp counselors, and teachers. Researchers agree that the offenders who pose the greatest danger to children are “fixated” offenders, those who are exclusively sexually interested in children.248 These types of offenders actively seek out potential child victims and often attempt to secure jobs that will give them access to children.249 A mandatory background check of all persons seeking such positions should alleviate parents' concerns and assure them that the person working with their child has not been convicted of a sex offense against a child.250 The requirement that persons seeking child-related employment sign a release form for the background check should have a strong deterrent effect on convicted child molesters.

E. Safety Education Programs, Community Awareness, and Parental Responsibility

Schools, preschools, and daycare centers should continue to instruct even the youngest children in appropriate safety measures and “stranger-danger” situations. Because of the high rate of intrafamilial sexual abuse, children must also be taught what constitutes appropriate adult-child physical interaction and be encouraged to confide in a teacher without fear of reprisals, humiliation, or embarrassment. Childcare professionals must be instructed in the appropriate methods of questioning a child about possible abuse and must know how to react appropriately when the child does reveal that she has been abused. Parents should realize that only a small number of potential child molesters,

For an analysis of the constitutional issues inherent in civil commitment statutes, see Peter A. Zamoyski, Comment, Will California's “One Strike” Law Stop Sexual Predators, or Is a Civil Commitment System Needed?, 32 SAN DIEGO L. REV. 1249 (1995).

248. See, e.g., LANNING, supra note 207.
249. See Berliner, supra note 212, at 8.
250. See, e.g., IND. CODE ANN. § 5-2-12-1 (Burns Supp. 1995); OKLA. STAT. ANN. tit. 57, § 581 (West 1989 & Supp. 1994) (providing a registry to schools and child-related organizations with a warning that the organization may incur civil liability for employing any person listed on the register).
those already convicted, are known to police and monitored. Education is a powerful tool in preventing child abuse; parents and teachers can learn to recognize the signs of child sexual abuse and to take appropriate measures. Safety precautions should be reinforced constantly by parents and teachers and through public campaigns aimed at children, such as public service messages during television programs.251

F. Reform Judicial Procedures for Child Sex Abuse Cases

The difficulty of dealing with child witnesses and the inevitable trauma to children as a result of judicial proceedings in sex abuse cases has prompted many legal professionals to call for reform of procedures in these cases to alleviate the stress of the child involved.252 Children are especially susceptible to suggestion and may become easily confused, resulting in conflicting, hence less credible, testimony.253 The use of videotaped testimony has been suggested to protect children from embarrassment and from the intimidation of facing their attacker in the courtroom.254 Judge Charles B. Schudson has argued that evidentiary requirements should be reformed to accommodate the special needs of the child witness, such as exceptions to the hearsay rule, so that statements made by the child to teachers, doctors, or others may be admitted as evidence.255 The legislature would be wise to recognize the special needs and problems of children as witnesses in abuse cases and to make the necessary reforms. Offenders will not be punished,

251. See DEPANFILIS, supra note 209, at 13-16 (detailing several child sexual abuse prevention programs for parents, professionals, and children). But see RICHARD A. GARDNER, SEX ABUSE HYSTERIA 15-16 (1991) (arguing that sex abuse prevention programs can "plant seeds" in the minds of children and engender confusion as to where to draw the line between innocent touching and sexual abuse).


254. Id. See also Maryland v. Craig, 497 U.S. 836 (1990) (holding that an accused's Sixth Amendment right to confront witnesses against her was not violated by allowing the plaintiff, a six-year-old child, to testify by means of a one-way closed circuit television).

treated, or monitored until they are convicted; getting “caught” will put many offenders on the road to recovery.

G. Address the Problem of Juvenile Offenders

A majority of convicted sex offenders committed their first offense while they were juveniles. Often, the juvenile sex offender has been molested himself, thus repeating a cycle of abuse, which may continue unless there is intervention. Successful prevention of sex offenses by adults against children must begin with intervention and treatment of juvenile offenders, who are too often tomorrow's adult offenders.

Sexual offenses against children continue to increase, and concerned parents are justified in demanding that something be done. Focusing resources and manpower on effective enforcement of registration, expanded treatment programs, enhanced prison sentences, and education programs will be far more effective than California's notification provision in protecting children from sexual abuse.

VI. CONCLUSION

Sex offender notification is largely symbolic and an ineffective means of protecting children from sexual abuse. Retroactively applied statutes violate the Ex Post Facto Clause and the Double Jeopardy Clause of the Constitution; other constitutional protections are implicated, and the limited efficacy of the notification statute does not justify the burden it places on the offender. Notification may do more harm than good by impeding the offender's rehabilitation and by providing an illusory sense of security to the community. Lack of resources is a continuing problem in crime control, but responsible legislators should not shift the law enforcement function to the public under the guise of protection. Far more effective alternatives are available which do not burden the constitutional rights of convicted sex offenders.

ROBIN L. DEEMS

256. See Groth et. al., supra note 205, at 454-55.
257. See Mareva Brown, When Kids Molest Kids, State's Justice System Stumbles, SACRAMENTO BEE, Oct. 31, 1993, at A1 (reporting that therapy programs are overcrowded, that problems with legal proof and testimony of young victims prevent many prosecutions, or that sexual abuse is simply not recognized by parents, teachers, or police).