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Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition against Cruel and Unusual Punishment - A Focus on Vigilantism Resulting from Megan's Law.

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COMMENTS

DOES COMMUNITY NOTIFICATION FOR SEX OFFENDERS VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT? A FOCUS ON VIGILANTISM RESULTING FROM "MEGAN'S LAW"

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I. INTRODUCTION

In August of 2000, the Texas Department of Public Safety initiated its latest offensive in notifying residents of sex offenders living in their communities.[1] Pursuant to recently enacted legislation,[2] nearly 16,000 Texans received postcards in their mailboxes informing them that a convicted sex offender lives in their neighborhood.[3] Although similar information was previously available to the public, many residents were nevertheless surprised and alarmed by the warnings.[4]

Postcard mailings are just one way in which states attempt to make information about sex offenders available to the public.[5] However, Texas's mailing program has reinvigorated a constitutional debate regarding due process and privacy.[6] Sex offender registration has found a niche

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1. *See* Jason Trahan, *DPS Mails Out Postcards Warning Residents of Sex Offenders in Area*, DALLAS MORNING NEWS, Aug. 24, 2000, at 21A, *available at* 2000 WL 25849629 (reporting that the sex offender notification postcards supplement other methods of notification previously required by law).

2. *See* TEX. CODE CRIM. PROC. ANN. art. 62.03 (Vernon Supp. 2001) (establishing Texas's community notification program, whereby neighborhood residents are notified by mail of the names and addresses of high-risk sex offenders living nearby); *see also* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (1996) (describing the congressional predicate upon which all sex offender registration acts are founded).

3. *See* Jason Trahan, *DPS Mails Out Postcards Warning Residents of Sex Offenders in Area*, DALLAS MORNING NEWS, Aug. 24, 2000, at 21A, *available at* 2000 WL 25849629 (explaining that postcards are mailed to notify neighbors of nearby sex offenders by supplying the offender's name, age, and address).

4. *See id.* (chronicling residents' startled reactions to the discovery of sex offenders in their neighborhood, even though the same information was previously available).

5. *Id.*

6. *See generally* Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1220 (1999) (noting that "[c]ommentators have concluded that we are in the midst of a due process 'counterrevolution,' characterized by an atavistic return to a narrow definition of constitutionally protectible 'liberty'"). "[A]lthough sex offenders indisputably warrant our disdain," they do not lose due process protection. *Id.* at 1231. *See generally* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 508-09 (1997) (suggesting that Florida's sex offender registration, and its publication on the Internet, violates a sex offenders' right to privacy); Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 94, 102 (1996) (arguing that publicizing an offender's identity deprives him of his due process rights, as well as, his right to privacy).

in all fifty states.[7] However, its more invasive and active offspring, community notification, is beginning to take root while few pause to question its constitutional validity.[8]

This Comment illustrates how the Eighth Amendment's prohibition against cruel and unusual punishment is compromised by the violence and vigilantism incited by community notification programs. Part II traces the evolution of registration and notification programs from their unassuming federal roots and examines Texas's statutory method of classifying sex offenders. Part III dissects and compares the present applications of active, passive, and community-wide notification measures generally practiced within the fifty states. Furthermore, Part III demonstrates how this paradox manifests acts of vigilantism. Part IV discusses the legal paradox created when legislators unevenly weigh the rights of one class of citizens against the rights of another.

Part V critically examines the constitutionality of community notification under the Eighth Amendment. The examination reveals subtle inconsistencies within the judicial system regarding the use of public notification. The analysis reveals that community notification requirements often meet historical and present-day definitions of punishment. Additionally, Part V discusses the concerns of such notification constituting cruel and unusual punishment as evidenced by vigilantism.

Part VI affirms the need to reevaluate certain aspects of community notification and the actual effects that notification laws have upon offenders and non-offenders. Finally, Part VII offers suggestions that provide public protection through notification without the cruel and unusual punishment ramifications, which current programs impose. Most importantly, Part VII calls for new legislation requiring timely updating and management of sex offender databases, so that public safety is enhanced. Ideally, the system will keep the public intelligently informed while protecting the offender's constitutional rights.

II. THE EVOLUTION OF COMMUNITY NOTIFICATION LAW

On September 22, 1999, Thinh Pham, a mentally retarded Vietnamese refugee, played ball with neighborhood children near a Dallas, Texas,

7. *See* Appendix A (comparing the various state's sex offender registration statutes).

8. *See* Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 637 (1999) (questioning the constitutionality of sex offender registration laws since the United States Supreme Court has yet to completely address the matter).

Boys and Girls Club.[9] As he played, Mr. Pham was unaware that he was about to become a victim of vigilante violence.[10] Mr. Pham, an adult who functions at a sixth grade mentality, was suddenly attacked by four men who beat him upon his face and head while yelling "Child molester! Child molester!"[11] The attack left Mr. Pham nearly unconscious, bloody, and missing four front teeth.[12]

Although he did not know why he was brutally attacked, Mr. Pham experienced a nightmare that leads many to question current community notification legislation.[13] Mr. Pham's attackers, incited by neighborhood rumors, mistakenly identified him as a pedophile.[14] The violent mistake arose because Mr. Pham's home was misidentified as that of a convicted sex offender.[15] Unfortunately, the group home that Mr. Pham shared

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9. Jeffrey Weiss, *Fair Warning or Fair Game? Backers Say Right to Know About Sex Offenders Overrides Risk of Vigilante Violence*, DALLAS MORNING NEWS, Oct. 22, 1999, at 1A, *available at* 1999 WL 29304181.

10. *But see* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1317 (10th ed. 1993) (defining *vigilante* as "a self-appointed doer of justice").

11. Connie Piloto, *Retarded Man's Beating Spreads Fear: Authorities Cite Flaws in Sex-Offender Data, Condemn Vigilantism*, DALLAS MORNING NEWS, Oct. 16, 1999, at 27A, *available at* 1999 WL 28018283; *see also* Jeffrey Weiss, *Fair Warning or Fair Game? Backers Say Right to Know About Sex Offenders Overrides Risk of Vigilante Violence*, DALLAS MORNING NEWS, Oct. 22, 1999, at 1A, *available at* 1999 WL 29304181 (noting that Mr. Pham has an elementary-school level mental capacity).

12. *See* Connie Piloto, *Retarded Man's Beating Spreads Fear: Authorities Cite Flaws in Sex-Offender Data, Condemn Vigilantism*, DALLAS MORNING NEWS, Oct. 16, 1999, at 27A, 1999 WL 28018283 (describing the brutal physical attack upon Mr. Pham).

13. *See Accuracy Imperative: Erroneous Information in the State Sex-Offender Registry Can Be Dangerous*, FORT WORTH STAR-TELEGRAM, Nov. 15, 1999, at 8, *available at* 1999 WL 23958194 (commenting on the inherent dangers associated with disseminating inaccurate sex-offender information).

14. *Id.* The jurors took less than fifteen minutes to convict one of Mr. Pham's assailants. *See* Manolo Barco, *Judge Sets Term of 48 Years in Beating Case: Victim's Identity Was Mistaken*, DALLAS MORNING NEWS, July 13, 2000, at 23A, *available at* 2000 WL 23716710 (recounting the assailant's jury verdict). That particular assailant, who had three prior felony convictions, was sentenced to forty-eight years of confinement. *Id.* Charges against one man were dismissed, another received two years of probation in exchange for a guilty plea, and the final nineteen year old assailant was given a ten-year deferred adjudication sentence following a guilty plea. *Metro in Brief: Man Gets Probation in Beating*, DALLAS MORNING NEWS, Aug. 26, 2000, at 32A, *available at* 2000 WL 25849941.

15. *See Accuracy Imperative: Erroneous Information in the State Sex-Offender Registry Can Be Dangerous*, FORT WORTH STAR-TELEGRAM, Nov. 15, 1999, at 8, *available at* 1999 WL 23958194 (commenting that the attack occurred just three weeks after new state legislation became effective requiring the postings of more detailed information regarding sex offenders on the State's sex registry website).

with three other mentally disabled men was the former address of a registered sex offender.[16]

A. *The Creation of Megan's Law*

Ironically, Mr. Pham's violent attack is not unlike the very crimes that originally outraged communities, and led to state and federal movements supporting public notification of sex offenders' residences. On July 29, 1994, a twice-convicted sex offender raped and murdered a seven-year-old New Jersey girl, Megan Kanka, who lived across the street from his home.[17] The child's death and the revelation of the murderer's sexual offense history sent a tremor through the community, which was soon felt at the New Jersey capital.[18] Within a few weeks of the tragic murder of Megan Kanka, New Jersey became the first state to enact a sex offender registration statute, known as "Megan's Law."[19]

Megan's Law requires the registration of all sex offenders convicted of certain designated crimes.[20] Registrants also have to confirm their address every ninety days and notify the local municipal law enforcement agency of any address change.[21] More importantly, Megan's Law allows for public dissemination of the registered information.[22]

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16. *See* Connie Piloto, *Retarded Man's Beating Spreads Fear: Authorities Cite Flaws in Sex-Offender Data, Condemn Vigilantism*, DALLAS MORNING NEWS, Oct. 16, 1999, at 27A, *available at* 1999 WL 28018283 (noting that the actual offender, a juvenile, had previously moved from the residence and was not required to update his address because a judge had ruled that the juvenile no longer had to register); *see also* Manolo Barco, *Defendant Denies Beating Retarded Man*, DALLAS MORNING NEWS, July 12, 2000, at 24A, *available at* 2000 WL 23716484 (indicating that Mr. Pham now resides in a different group home).

17. *See* E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997) (detailing that the murderer, who later confessed to the crime, resided in a house with two other felons convicted of sex offenses).

18. *See id.* (commenting that neither the members of the New Jersey community nor local law enforcement knew of the murderer's sexual offense history).

19. *See id.* (noting the swiftness with which the New Jersey legislature passed the emergency bill); *see also* Artway v. Attorney Gen., 81 F.3d 1235, 1242 (3d Cir. 1996) (stating that the vote to enact the New Jersey legislation was unanimous; the committee process was skipped, and the only debate was on the Assembly floor).

20. *Verniero*, 119 F.3d at 1080; *see also* Megan's Law, N.J. STAT. ANN. § 2C:8c (West 1995) (setting forth the three tier sex offender rating based upon a re-offense risk level).

21. *See* Artway v. Attorney Gen., 81 F.3d 1235, 1243 (3d Cir. 1996) (discussing the requirements of New Jersey's Megan's Law).

22. *Verniero*, 119 F.3d at 1080.

B. *Federal Endorsement*

Before Megan's Law in New Jersey, no such policy existed on the national level.[23] Community notification and sex offender registration began on the federal level in 1994, when Congress enacted legislation establishing federal guidelines and financial incentives for states to create their own versions of Megan's Law.[24] Named after another child victim,[25] the federal statute requires certain offenders to register for a minimum of ten years and provides states the option to publicize sex offender information contained within their registries.[26] Two years later, citing public safety concerns and a desire to more appropriately inform potential victims, Congress enacted an amendment requiring states to disclose their information.[27]

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23. *But see* Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 122 (1998) (recognizing a historical precedent of community notification dating back to colonial America). *See generally*, Samuel Jan Brakel & James L. Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 70 (2000) (recognizing the criminal law trend to create therapeutic legislation for sex offenses, instead of the typical punitive legislation for other crimes).

24. *See* Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 101 (1998) (recognizing the enactment of the Jacob Wetterling Act); *see also* Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 643 (1999) (noting that funds withheld from non-compliant states are reallocated to states that do comply with the Jacob Wetterling Act).

25. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (1996); *see also* Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401 (noting that Jacob Wetterling's body and his abductor were never discovered).

26. *Cf.* Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 597-600 (2000) (analyzing whether the release of information is an integral and necessary element of protecting the public).

27. *See id.* (mentioning the considerable latitude given to states when determining the extent and manner by which public notifications are made available). A further amendment to the Jacob Wetterling Act established a national sex offender database accessible to state and national law enforcement agencies. FBI Database, 42 U.S.C. § 14072 (1996); *see also* Brian McGrory, *Clinton Sets Tracking of Sex Offenders*, BOSTON GLOBE, Aug. 25, 1996, at A1 (reporting on former President Clinton's remarks regarding the nation-wide registry, whose purpose he characterized is to "'keep track of [sex offenders]-not just in a single state, but wherever they go, wherever they move, so that parents and police have the warning they need to protect our children . . . . Deadly criminals don't stay within state lines, so neither should law enforcement's tools to stop them'").

C. *States' Adaptation of Megan's Law*

Within two years of Megan Kanka's death, all fifty states enacted sex offender registration statutes.[28] Although the manner and means of notification varies with each state,[29] some have adopted extreme systems that warn the public of relatively harmless offenders.[30] However, before a state begins any notification process, they must first determine which offenders, if any, are subject to the policy.

D. *Three-Tier Classification*

Texas has opted for a tiered program that ranks offenders based upon their risk or likelihood of recidivism.[31] Risk level determinations are often made by clinical assessors.[32] In a few states, a prosecutor determines the level of risk posed by an individual.[33] The Texas statute establishes guidelines for creating and operating a Risk Assessment Review

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28. Appendix A; John Gibeaut, *Defining Punishment: Courts Split on Notification Provisions of Sex Offender Laws*, A.B.A. J., Mar. 1997, at 36. *See generally*, Carol Schultz Vento, Annotation, *Validity, Construction, and Application of State Statutes Authorizing Community Notification of Release of Convicted Sex Offenders*, 78 A.L.R.5th 489, 494-502 (2000) (detailing state registration statutes).

29. *See* Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401 (noting that state agencies establish their own guidelines regarding information dissemination).

30. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 888 (1995) (commenting that a few states, such as Arizona and Louisiana, require registration for the benign offenses of adultery and bigamy, respectively).

31. *See* Act of May 4, 2001, 77th Leg., R.S., ch.177, 2001 TEX. SESS. LAW SERV. 177 (Vernon) (to be codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 62.03(a)); *see also* E-mail from Vincent Castilleja, Sex Offender Registration Coordinator, Texas Department of Public Safety, to the author (Oct. 19, 2000, 08:29 CST) (on file with the *St. Mary's Law Journal*) (stating that as of Oct. 18, 2000, exactly 26,702 sex offenders were reported to the Texas state repository in Austin).

32. *See* Act of May 4, 2001, 77th Leg., R.S., ch. 177, 2001 TEX. SESS. LAW SERV. 177 (Vernon) (to be codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 62.03(a)) (detailing that before a sex offender is released from prison, the "Texas Department of Criminal Justice or the Texas Youth Commission" determines the sex offender's level of risk).

33. *See* Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1461 (1999) (commenting that New Jersey's program allows a criminal assessor or prosecutor to evaluate an offender's risk level for notification purposes); N.Y. CORRECT. LAW § 168-n(3) (McKinney 2001) (specifying that the district attorney has the duty to determine "the duration of registration and level of notification"); *see also* WYO. STAT. ANN. § 7-19-303(c) (Michie 1999) (authorizing a judge to designate an offender's risk level based upon statutory criteria).

Committee, which determines an offender's risk level.[34] Furthermore, the statute requires the Risk Assessment Review Committee to develop an objective point system based on a variety of factors to assess an individual's risk level.[35] This system, known as a "sex offender screening tool," acts as the measuring stick from which three classifications are objectively drawn.[36]

Texas classifies offenders as either "level one," "level two" or "level three" offenders, with level three being the most dangerous.[37] Individuals assigned a numeric risk level of three are believed to "pose[ ] a serious danger to the community and will continue to engage in criminal sexual conduct."[38] Level three offenders are also classified by attaining a "designated range of points on the sex offender screening tool."[39]

The Risk Assessment Review Committee also uses the screening tool to distinguish between level three and level two offenders and sets minimum numeric scores that distinguish the three levels.[40] Level two offenders "pose[ ] a moderate danger to the community and may continue to engage in criminal sexual conduct."[41] However, the difference in classification between level three and level two is all but insignificant because both levels of offenders are subject to registration under the Texas statute.[42]

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34. *See* TEX. CODE CRIM. PROC. ANN. art. 62.035(a) (Vernon Supp. 2001) (mandating that the "review committee, to the extent feasible, should include at least: (1) one member having experience in law enforcement; (2) one member having experience working with juvenile sex offenders; (3) one member having experience as a sex offender treatment provider; and (4) one member having experience working with victims of sex offenses").

35. TEX. CODE CRIM. PROC. ANN. art. 62.035(c) (Vernon Supp. 2001).

36. *Id.*

37. Act of May 4, 2001, 77th Leg. R.S., ch.177, § 2, 2001 TEX. SESS. LAW. SERV. 177 (Vernon) (to be codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 62.035(c)). Prior to September 1, 2001, a "level one" offender was a person believed to pose the greatest danger to the community whereas a "level three" offender was believed to pose no danger. *Id.*; *see also* Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 108 (1998) (noting that several states evaluate sex offenders' risk level as either "low, moderate, or high").

38. Act of May 4, 2001, 77th Leg. R.S., ch.177, § 2, 2001 TEX. SESS. LAW. SERV. 177 (Vernon) (to be codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 62.035(c)).

39. *Id.*

40. *Id.*

41. *Id.*

42. *See* TEX. CODE CRIM. PROC. ANN. art. 62.035 (Vernon Supp. 2001); *see also* E-mail from Vincent Castilleja, Sex Offender Registration Coordinator, Texas Department of Public Safety, to the author (Oct. 19, 2000, 08:29 CST) (on file with the *St. Mary's Law Journal*) (noting that as of Oct. 18, 2000, in Texas, there were 655 reported risk level three offenders and 1807 reported risk level two offenders).

Level one offenders are believed to "pose[ ] a low danger to the community" because they "will not likely engage in criminal sexual conduct."[43] Nevertheless, law enforcement agencies are notified of level one offenders.[44] In Texas, level one offenders constitute a fraction of the number of level two and level three offenders.[45] Much like Texas, many states attempt to classify and differentiate sex offenders on paper. However, in the realm of current community notification, almost all "high-risk" offenders are publicized.[46]

III. COMMUNITY NOTIFICATION IN PRACTICE

Many argue that sex offender registration laws have little purpose if the information is not disseminated to the public.[47] Hence, supporters reason that the essence of any effective notification program is to provide people the most relevant information available.[48] Accordingly, most state agencies create guidelines regarding the type of information that is made available and how to disseminate that information.[49] As a result, three prominent methods of notification emerge: (1) passive notification, (2) active notification, and (3) community-wide notification.[50]

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43. Act of May 4, 2001, 77th Leg. R.S., ch.177, § 2, 2001 TEX. SESS. LAW. SERV. 177 (Vernon) (to be codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 62.035(c)).

44. *Id.*

45. *See* E-mail from Vincent Castilleja, Sex Offender Registration Coordinator, Texas Department of Public Safety, to the author (Oct. 19, 2000, 08:29 CST) (on file with the *St. Mary's Law Journal*) (stating that as of Oct. 18, 2000, there were only twenty-six reported risk level one offenders in the entire state of Texas).

46. Jason Trahan, *DPS Mails Out Postcards Warning Residents of Sex Offenders in Area*, DALLAS MORNING NEWS, Aug. 24, 2000, at 21A, *available at* 2000 WL 25849629.

47. *See* Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401 (arguing that the lack of public knowledge concerning the location of sex offenders "may have cost Megan Kanka her life").

48. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 903 (1995) (suggesting that the availability of sex offender registration data allows individuals to "police their own communities" versus merely reacting after a crime has been committed).

49. Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401; *see also*, Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1462 (1999) (illustrating the diversity amongst state notification programs). Some states limit access to sex offender information to law enforcement, others limit it to institutions responsible for children, and a few grant complete access to the general public. *Id.*

50. *Cf.* Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401 (summarizing the various levels of notification employed throughout the nation); Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 903 (1995) (proffering four basic types of notifica-

A. *Passive Notification*

The Passive Notification method is the least aggressive method of notification and requires citizen initiative.[51] The passive method is best identified by the minimal level of government action when compared to the level required of the inquiring citizen.[52] Typically, the interested party, such as a potential employer or neighbor, must request information about a particular individual at the local police or sheriff's department.[53]

However, other varieties of passive notification methods exist that provide an inquiring party a more discreet atmosphere. One of the most widely implemented methods of passive notification uses the Internet.[54] Visitors to many sex offender registry websites can search for an offender specifically by name to find out if the offender lives in the area.[55] Generally, a website lists an offender's name, physical description, date of birth, social security number, address, employer, and, when available, a photo-

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tion: (1) mandatory self-identification, (2) discretionary police identification, (3) public access to police book, and (4) public access by telephone); *see also* Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 597 (2000) (acknowledging the different methods of classifying sex offenders and types of notification). "At present, jurisdictions use any (or some combination) of three primary methods of informing communities of the whereabouts of registered offenders . . . (1) 'public access' . . . (2) Internet access . . . and (3) affirmative community notification by law enforcement." *Id.* at 637 n.12.

51. Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401.

52. *See id.* (advancing that in a passive notification system, citizens must access the offender databases on their own initiative).

53. *See id.* (discussing Iowa's program which requires inquiring citizens to "complete a request for registry information form" by providing the individual's name and one of three pieces of information: the offender's address, date of birth, or social security number).

54. *See* Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 596 n.12 (2000) (noting that the Internet's "unrestricted geographic sweep . . . arguably possesses the greatest potential for widespread dissemination—even beyond state or local boundaries"); Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1463-64 (1999) (noting that as of November 1999, at least sixteen states made sex registry information available online: Alabama, Alaska, Connecticut, Delaware, Florida, Georgia, Kansas, Indiana, Louisiana, Michigan, North Carolina, South Carolina, Texas, Utah, Virginia and West Virginia).

55. Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1465 (1999); The Texas Department of Public Safety Convictions and Sex Offender Registration Database, *at* http://txdps.state.tx.us/sosearch (last visited Aug. 28, 2001) (allowing searches by either an alleged offender's name or, more broadly, by zip code and city). The Texas website has a one-page disclosure that provides, *inter alia*, that "searches based on names, dates of birth and other alphanumeric identifiers are not always accurate." *Id.*

graph.[56] In Texas, anyone with Internet access may search the entire Texas Sex Offender Database and locate any specific registered offender, or they can merely peruse a list of offenders located within their neighborhood.[57]

California provides its sex offender registry information on CD-ROM, and often passes them out free of charge from booths located at public events and other high traffic areas.[58] The CD-ROM format allows sex offender information to be downloaded onto personal computers or privately maintained websites designed to warn the community. In many states without a government-maintained sex offender website, information is commonly made available through privately maintained sites.[59]

As another means of passive notification, some states provide a toll-free hotline, while others require a nominal service fee.[60] Callers are able to inquire whether a certain individual is a registered sex offender by

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56. *See* Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1465 n.81 (1999) (describing the Florida website as having sex offenders' photographs surrounded by flashing police lights).

57. *See* The Texas Department of Public Safety Convictions and Sex Offender Registration Database, *at* http://txdps.state.tx.us (last visited Sept. 18, 2001); *see also* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 508 (1997) (proffering the argument that Florida's Internet listing of sex offenders, which is similar to Texas's, violates the constitutional rights of the offenders).

58. *See* Devon B. Adams, *Summary of State Sex Offender Registry Dissemination Procedures*, BUREAU OF JUSTICE STATISTICS FACT SHEET, Aug. 1999, at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sssordp.pdf (noting that as of August 1999, California is the only state that uses a CD-ROM format); *see also* Michael Dear & Django Sibley, *The One-Way Strategy for Sex Offenders Makes Nobody Safe*, L.A. TIMES, Oct. 1, 2000, at M6 (reporting that "[i]n 1947, California became one of the first states to require registration of sex offenders, and the state now has one of the nation's strictest notification and registration laws").

59. *See Stop Sex Offenders!*, *at* http://www.stopsexoffenders.com/ (last visited Sept. 18, 2001) (providing lists of states' sex offender registries).

60. Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401 (noting both New York and California operate nominal-fee phone services); Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 517 n.87 (1997); *see also* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 905-06 (1995) (noting California's phone system only provides information on child sex offenders). Proceeds from the calls fund the continued operation of the program. *Id.* The California statute requires that callers "have a reasonable suspicion that a person is at risk." *Id.* (citing CAL. PENAL CODE § 290.4(a)(5)(C)(viii) (West 2001)).

providing the suspected individual's name, along with other identifying information, such as an address or birth date.[61]

B. *Active Notification*

A slightly more aggressive method of notification focuses on the government proactively informing those citizens most likely to be endangered by a sex offender.[62] Institutions such as schools, day care centers, churches, and other youth-oriented organizations considered vulnerable to the crimes of a sex offender are notified by the state of sex offenders in the area.[63] Prior victims and current landlords are also selectively notified because they are considered at risk due to their unique relationship and the offender's proximity.[64]

C. *Community-Wide Notification*

The most proactive of all notification statutes are those providing community-wide notification of certain sex offenders. The Texas statute allows the mailing of notices to all residential neighbors within a three-block radius of a registered sex offender's home.[65] The notices are brightly colored postcards providing the name, any known alias, and a detailed physical description of the offender, including race, sex, weight, hair and eye color, and even shoe size.[66] The postcards also supply the

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61. Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1463 (1999). The caller is provided with an offender's physical description, specifics regarding the crimes that resulted in the conviction, and the zip code of the area where the offender resides. *See* CAL. PENAL CODE § 290.4(a)(2)-(3) (West 2001).

62. *See* Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401 (discussing forms of "active notification").

63. *Id.*

64. *Id.*

65. *See* Act of May 4, 2001, 77th Leg. R.S., ch.177, 2001 TEX. SESS. LAW. SERV. 177 (Vernon) (to be codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 62.045(a)) (legislating that all level three sex offenders are subject to community notification, either following release from a penal institution, or following a move to a new address). The statute provides for a one-mile radius of notification in areas not subdivided. *See id.* Louisiana mandates a one-square block radius of notification in urban areas, yet imposes a three-mile radius in rural areas. Alan D. Scholle, *Sex Offender Registration*, FBI L. ENFORCEMENT BULL., July 1, 2000, *at* 2000 WL 12023401; *see also* Daryl Bell, *ACLU Plans to Sue DPS over Sex Offender Cards; Policy Notifies Neighbors by Mail*, SAN ANTONIO EXPRESS-NEWS, Aug. 18, 2000, at 3B, *available at* 2000 WL 27328846 (reporting that Texas joined California, Maryland, Louisiana, and Oregon in implementing community-wide notification).

66. *See* The Texas Department of Public Safety Convictions and Sex Offender Registration Database, *at* http://txdps.state.tx.us/sosearch (last visited Sept. 18, 2001) (listing the sex offender information provided on the notification postcards).

offender's sexual offense, date of conviction, the verification agency, and the victim's age.[67] Due to the widespread surprise and concern that the postcards generate, the Texas Department of Public Safety's website has a detailed "Frequently Asked Questions" page explaining the postcards and their meaning.[68]

The Texas statute also allows neighborhood meetings and the posting of notices when deemed appropriate by local law enforcement.[69] However, often, neighbors host unofficial meetings and distribute their own leaflets to notify their neighborhoods.[70] In Colorado, for instance, one Denver woman prints out special maps for neighbors and schools pinpointing offenders' homes, and has even gone so far as to stake out offenders' homes to monitor their activities.[71] On occasion, and without government provocation, newspapers publish names and photographs of area offenders.[72] Offenders are sometimes required to place ads confess-

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67. *Id.* The postcards also include the offender's criminal sentence and current supervisory status, including supervisory department. *Id.*

68. *Id.* In an attempt to explain the differences in the three risk assessment classification levels, the website employs much of the Texas statutory language. *Id.*

69. *See* TEX. CODE CRIM. PROC. ANN. art. 62.045 (Vernon Supp. 2001); *cf.* Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 645 (1999) (discussing forms of more aggressive community notification). Some judges have required offenders to post signs on their residences and their cars reading "Dangerous Sex Offender—No Children Allowed." *Id.* at 646. Other offenders have had to confess their crimes through public media devices such as their area newspapers. *Id.*

70. *See* Robert Sanchez, *Vigilante Tracks Sex Offenders: Woman's Database Born of Obsession*, DENVER ROCKY MOUNTAIN NEWS, Oct. 29, 2000, at 4A, *available at* 2000 WL 6611533 (reporting that a former child abuse victim, passes "out hundreds of fliers in pursuit of her own brand of vigilante justice").

71. *Id.*

72. *See* Jamie Dettmer, *British Vigilantes Don't Suffer Perverts Lightly*, INSIGHT MAG. (United Kingdom), Sept. 4, 2000, at 6, *at* 2000 WL 2664360 (reporting on the wave of vigilantism incited by a "name-and-shame" list of alleged British sex offenders published by a local European tabloid). The Church of England condemned the newspaper for initiating violence that stemmed from its publication. *Id. But see* Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1174 n.35 (1999) (noting that in California local law enforcement agencies are statutorily permitted to solicit the assistance of news media in publicizing offender information).

ing their crimes,[73] or place signs in their yards declaring that they are convicted sexual offenders.[74]

Regardless of the method, notification engenders in the community a false sense of security.[75] Because communities are notified of some offenders, they develop a false sense of security trusting that all offenders are disclosed. In reality, full disclosure may never be achieved.[76] Also, inherent problems plague notification, such as outdated offender information and the failure of some offenders to register; thus, leaving a system that fails to completely inform the community.[77] Regardless of the flaws, states are currently joining the community notification bandwagon that believes it is an effective way to warn society of potentially dangerous sexual offenders.

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73. *See* Michael Grunwald, *Shame Makes Comeback in Court: Texas Judge Likes to Impose Public Punishment for Crime*, ARIZ. REPUBLIC, Jan. 11, 1998, at A14, *available at* 1998 WL 7742935 (reporting on the sentence handed down to a New Hampshire child molester, which required him to purchase ads in the newspaper to confess his crimes and to implore similar offenders to seek treatment); *see also* TEX. CODE CRIM. PROC. ANN. art. 62.03(e) (Vernon Supp. 2001) (requiring that in some situations the local law enforcement authority "shall immediately publish notice [of the sex offender] in English and Spanish in the newspaper of greatest paid circulation in the county").

74. *See* Larry Copeland, *Does 'Scarlet Letter' Judge Cross the Line? Some Applaud Texas Jurist for Taking Creative Approach to Sentencing Sex Offenders*, USA TODAY, July 10, 2001, at A5, *available at* 2001 WL 5466528 (detailing that the sign must say "DANGER: Registered Sex Offender Lives Here").

75. Robin L. Deems, Comment, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1230 (1996) (citing the public's false sense of security as a major argument among critics).

76. *Cf.* Connie Piloto, *Retarded Man's Beating Spreads Fear: Authorities Cite Flaws in Sex-Offender Data, Condemn Vigilantism*, DALLAS MORNING NEWS, Oct. 16, 1999, at 27A, *available at* 1999 WL 28018283 (noting that the actual convicted sexual predator had moved from the address listed).

77. *See* Robin L. Deems, Comment, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1230-32 (1996) (asserting that notification statutes are ineffective); Robert Sanchez, *Vigilante Tracks Sex Offenders: Woman's Database Born of Obsession*, DENVER ROCKY MOUNTAIN NEWS, Oct. 29, 2000, at 4A, *available at* 2000 WL 6611533 (commenting on how some offenders avoid registration by providing false addresses or merely list themselves as transients); *see also* Sarah Duran, *Is There a Sex Offender Living Next Door? Up to 40% of Lists Are Wrong. Inaccurate Addresses Keep Public from Being Warned*, THE NEWS TRIBUNE (Tacoma, WA), June 4, 2000, at A1, *available at* 2000 WL 5332383 (reporting that the Washington State Patrol is struggling to keep up with the 1000 sex offender database changes it receives each month); Mike Ward, *Problems Plague Sex Offender Registry, Internet Listing Brands Even Some with Dropped Charges*, AUSTIN AM.-STATESMAN, Dec. 19, 1999, at A1, *available at* 1999 WL 7435041 (reporting that the Texas sex offender registration program only requires the registration of offenders convicted since 1970).

IV. The Legal Paradox of Community Notification

> The proliferation of sex offender notification laws signifies Americans' clear preference for community protection at the expense of the liberty interest of sex offenders: the laws seek to preempt sex crimes by at once branding offenders and providing information to communities in the putative name of public safety through self-protection.[78]

Notification of a sex offender's presence creates a legal paradox where the constitutional rights of one citizen are infringed because of a self-proclaimed right-to-know of another.[79] Community notification essentially provides the public with a label to place upon an individual, which informs the community of the offender's criminal history.[80] The notification often exposes the offender to extraordinary punishment in the form of violence and vigilantism.

While the public is often relieved to know of an offender's past, that knowledge soon translates into a feeling of helplessness. As a result, some individuals choose to channel their emotions into violence.[81] Incidents ranging from verbal harassment to life-threatening attacks have

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78. Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167, 1225 (1999); *see also* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 Cal. L. Rev. 885, 939 (1995) (concluding that "most community notification proposals are problematic from a policy standpoint because they sacrifice an offender's humanity in the name of protecting the public").

79. *See also* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 Clev. St. L. Rev. 505, 506 (1997) (suggesting that "[o]ne of the toughest challenges for the courts is determining how to balance society's need for protection against an individual's constitutional rights").

80. Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 Cal. L. Rev. 885, 906 (1995); *see also* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 Wm. & Mary J. Women & L. 171, 174 (1995) (noting that "a person should not be labeled a 'bad person,' and therefore more likely to commit crimes, solely from the fact that he has previously committed a crime"). "Any condition that requires a defendant to label himself . . . or to be shunned by his fellow citizens violates [the] concept of the dignity of [humanity]." *Id.* (citing Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 Duke L.J. 1357, 1382 (1989)).

81. *See* Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 Drake L. Rev. 635, 657 (1999) (noting the "lynch-mob" mentality that notification can invoke); Mike Ward, *Problems Plague Sex Offender Registry, Internet Listing Brands Even Some with Dropped Charges*, Austin Am.-Statesman, Dec. 19, 1999, at A1, *available at* 1999 WL 7435041 (noting that Texas State Senator Florence Shapiro, sponsor of the first community notification bill, admitted that "[v]igilantism was a concern").

been directly attributed to sex offender notification.[82] The brutal attack of Mr. Pham in Dallas, Texas, is not an isolated event. Hundreds of other examples of vigilantism incited by public notification are reported.[83] In New Jersey, the birthplace of Megan's Law, a man armed with a handgun fired five shots at a sex offender's home after receiving a neighborhood notice regarding the offender's presence.[84] In Washington, neighbors burned down the house of a convicted rapist after sheriffs distributed posters with the message: "VIEWED AS AN EXTREMELY DANGEROUS UNTREATED SEX OFFENDER WITH A VERY HIGH PROBABILITY FOR RE-OFFENSE . . . HAS SADISTIC AND DEVIANT SEXUAL FANTASIES WHICH INCLUDE TORTURE, SEXUAL ASSAULT, HUMAN SACRIFICE, BONDAGE AND THE MURDER OF YOUNG CHILDREN."[85]

In *E.B. v. Verniero*,[86] the Third Circuit commented that vigilante justice occurs "with sufficient frequency and publicity" to justifiably induce fear within the offenders.[87] Yet, vigilante violence is not solely a concern to those convicted of sex crimes. Inaccurate information, wrong addresses, and misidentified individuals have also lead to attacks against completely innocent individuals. The confusion is often the result of erroneous information reported by the state.[88] The Texas sex offender website provides information regarding 20,000 registered offenders, and officials acknowledge the possibility of erroneous information.[89] Before beginning a

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82. *See* Jerry Bergsman, *Home Burns on Day Rapist Was to Arrive*, SEATTLE TIMES, July 12, 1993, at A1, 1993 WL 6007628 (reporting that arsonists burned a child sex offender's home); *see also* Lynn Okamoto, *Iowans Are Comparatively Calm*, DES MOINES REG., Nov. 22, 1998, at 4, *available at* 1998 WL 22773442 (reporting on the firebombing of a California offender's home). Several offenders have committed suicide as a direct result of community notification. Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1176 n.45 (1999).

83. *See* Edward Martone, *No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, 81 A.B.A. J. 39, 39 (1995) (describing a similar New Jersey attack where attackers misidentified and beat someone they believed to be a child molester because of an erroneous police notice).

84. *See* Deepti Hajela, *Linden Man Gets 10-Year Terms in Vigilante Shooting*, THE RECORD, NORTHERN N.J., Feb. 20, 1999, at A3, 1999 WL 7090231 (reporting that a neighbor of an alleged sex offender was narrowly missed by a vigilante shooting).

85. David Biema, Burn Thy Neighbor, TIME, July 26, 1993, at 58.

86. 119 F.3d 1077 (3d Cir. 1997).

87. E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997).

88. *See* Connie Piloto, *Retarded Man's Beating Spreads Fear: Authorities Cite Flaws in Sex Offender Data, Condemn Vigilantism*, DALLAS MORNING NEWS, Oct. 16, 1999, at 27A, *available at* 1999 WL 28018283 (noting that the state gave the wrong address of the offender).

89. *See* The Texas Department of Public Safety Convictions and Sex Offender Registration Database, *at* http://txdps.state.tx.us (last visited Sept. 28, 2001). The introduction to

search on the Texas website, visitors must first read a disclaimer page.[90] Shockingly, a random spot check of ten offenders' files on the Texas website in 1999 revealed that seven files contained errors, ranging from wrong addresses and inaccurate victim information to the reporting of wrong crimes altogether.[91]

The over-abundance of inaccurate addresses of sex offenders has many Texas law enforcement agencies struggling to keep the database updated.[92] In Dallas, Texas, more than 100 officers spent four days attempting to verify addresses of the city's more than 2,200 registered offenders.[93] As expected, many addresses were wrong.[94] In Washington, Tacoma police conducted similar checks on their city's sex offenders list and discovered that nearly half were registered with wrong or inaccurate addresses.[95] Despite the abundance of inaccuracies and errors, states continue to advance community notification statutes with seemingly little deference for the rights of the offenders or the threat of danger for innocent citizens. Vigilantism from these programs has reached a nation-wide level, yet few realize it stems from the notifications within their own backyards. By failing to correct the vast problems plaguing many notification methods, many states, including Texas, are fueling a fire that needs extinguishing.

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the website has a disclaimer that reads "DPS cannot guarantee the records you obtain through this site relate to the person about whom you are seeking information. Searches based on names, dates of birth and other alphanumeric identifiers are not always accurate." *Id.*

90. *Id.* (requiring that "[e]xtreme care should be exercised in using any information obtained from this Website"). The site's disclaimer adds that "neither the DPS nor the State of Texas shall be responsible for any errors or omissions produced by secondary dissemination of this information." *Id.*

91. *See* Mike Ward, *Problems Plague Sex Offender Registry, Internet Listing Brands Even Some with Dropped Charges*, AUSTIN AM.-STATESMAN, Dec. 19, 1999, at A1, *available at* 1999 WL 7435041 (reporting that an embarrassed Fort Worth, Texas teenager shot herself after seeing her father's photo on the website).

92. Dave Michaels, *Police Check Sex Offenders' Whereabouts: 4-Day Effort Examines Compliance with Law*, DALLAS MORNING NEWS, Dec. 8, 1999, at 33A, *available at* 1999 WL 30756170 (reporting Dallas's latest effort to check on sex offender compliance with the mandatory law requiring the offender to re-register following every move).

93. *Id.*

94. *See id.* (noting that one offender was discovered not to have lived at his registered address for more than ten years).

95. *See* Sarah Duran, *Is There a Sex Offender Living Next Door? Up to 40% of Lists Are Wrong. Inaccurate Addresses Keep Public from Being Warned*, THE NEWS TRIBUNE (Tacoma, WA), June 4, 2000, at A1, *available at* 2000 WL 5332383 (reporting that when Tacoma, Washington police checked 106 offenders, they discovered that forty-three percent had inaccurate addresses).

V. VIGILANTISM INCITED BY COMMUNITY-WIDE NOTIFICATION IS CRUEL AND UNUSUAL PUNISHMENT

The widespread epidemic of vigilante violence is an additional form of punishment for many offenders. In fact, this additional punishment typically lasts longer than the original punishment imposed by a court of law. Often times, this new sentence forced upon offenders raises viable Eighth Amendment arguments when the punishment exceeds the boundaries of what society considers cruel and unusual.[96]

The United States Constitution prohibits the infliction of "cruel and unusual" punishment.[97] When the Framers adopted the English phrase, they did so with little debate and by a considerable majority.[98] The phrase "cruel and unusual" has been interpreted differently over time.[99] A review of case law provides the best insight for defining "cruel and unusual" and the limitations on its application.[100] Likewise, the case law offers precedent to help measure whether a possible violation has occurred.

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96. *Cf.* Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (asserting that the Eighth Amendment's scope must be determined by the "evolving standards of decency that mark the progress of a maturing society").

97. U.S. CONST. amend. VIII. *See generally* Yale Glazer, Note, *The Chains May Be Heavy, But They Are Not Cruel and Unusual: Examining the Constitutionality of the Reintroduced Chain Gang*, 24 HOFSTRA L. REV. 1195, 1202-04 (1996) (providing a historical look back as far as biblical times, which supports a prohibition against excessive punishments).

98. *See* Yale Glazer, Note, *The Chains May Be Heavy, But They Are Not Cruel and Unusual: Examining the Constitutionality of the Reintroduced Chain Gang*, 24 HOFSTRA L. REV. 1195, 1203-04 (1996) (noting the relative ease with which the phrase "cruel and unusual" was incorporated into the original drafting of the Constitution). However, there was concern regarding the vagueness and ambiguity of the term. *Id.* The following discussion between colonial statesmen took place:

> Mr. Smith, of South Carolina, objected to the words, "nor cruel and unusual punishment," the import of them being too indefinite.
>
> Mr. Livermore [of New Hampshire]-the [C]lause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have not meaning in it, I do not think it necessary . . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whippings, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?

Id. at n.59 (citing 1 ANNALS OF CONG. 782-83 (1789)) (alterations in original).

99. *Id.* at 1204-05; *see also* Harmelin v. Michigan, 501 U.S. 957, 967-74 (1991) (discussing the history of England's Cruel and Unusual Punishment Clause).

100. Yale Glazer, Note, *The Chains May Be Heavy, But They Are Not Cruel and Unusual: Examining the Constitutionality of the Reintroduced Chain Gang*, 24 HOFSTRA L. REV. 1195, 1204 (1996).

The Supreme Court historically applies one test, known as the "proportionality test," to determine whether punishment is cruel and unusual.[101] The test balances the nature of the punishment against the benefit and protection the punishment provides the community.[102] Community notification programs fail the proportionality test because the promulgation of vigilante violence it encourages is both cruel and unusual.

A. *Community-Wide Notification is Punishment*

Before a court addresses the constitutionality of any punishment, it must first address the preliminary question of whether the questioned act is in fact punishment, or merely a non-punitive regulatory measure.[103] If the questioned act is punishment, a court then determines if that punishment is grossly disproportionate to the crime.[104] Thus, community notifi-

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101. *See* Harmelin v. Michigan, 501 U.S. 957, 961, 994 (1991) (opining that a life sentence was not disproportionate for the crime of possessing 672 grams of cocaine). *But see* Hudson v. McMillian, 503 U.S. 1, 4 (1992) (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)) (opining that the legal standard governing Eighth Amendment claims involving physical abuse, is "the unnecessary and wanton infliction of pain").

102. *See* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 529 (1997) (evaluating Florida's Internet notification under Eighth Amendment scrutiny). Cruel and unusual punishment is defined as "punishment that is torturous, disproportionate to the crime in question, degrading, inhuman, or otherwise shocking to the moral sense of the community." BLACK'S LAW DICTIONARY 514 (pocket ed. 1996); *see also* State v. Freeman, 574 P.2d 950, 956 (Kan. 1978) (asserting a three-part test to determine if a length of a criminal sentence violates the Eighth Amendment provision against cruel and unusual punishment). The *Freeman* test requires consideration of:

> (1) [t]he nature of the offense and the character of the offender . . . with particular regard to the degree of danger present to society . . . ; (2) [a] comparison of the punishment with punishment imposed in this jurisdiction for more serious offenses . . . ; and (3) [a] comparison of the penalty with punishments in other jurisdictions for the same offense.

Id.

103. *See* Artway v. Attorney Gen., 81 F.3d 1235, 1264 (3d Cir. 1996) (opining that the threshold question under each clause is "whether [Megan's] law can be explained solely by a remedial purpose"); Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 178 (1995) (suggesting that "in evaluating the Virginia sex offender registration law, the first question is whether the registration requirement is punishment for purposes of the Eighth Amendment"); *see also* Hon. Debra H. Goldstein & Stephanie Goldstein, *Sex Offender Registration & Notification: The Constitution vs. Public Safety*, 60 ALA. LAW. 112, 116 (1999) (proclaiming that "[t]he key issue in Ex Post Facto challenges is whether a given law can be defined as punishment"). *But cf.* State v. Myers, 923 P.2d 1024, 1044 (Kan. 1996) (holding that the intent of the Kansas Sexually Violent Predator Act's registration requirement of public safety was not penalizing, but designed to regulate convicted sex offenders).

104. *See* Trop v. Dulles, 356 U.S. 86, 99 (1958) (opining that those punishments which are grossly disproportionate raise viable Eighth Amendment challenges).

cation programs must first be identified as punishment before conducting a more thorough analysis of their constitutionality.[105]

B. *Punitive or Regulatory Measure?*

Legislative intent is often the first place to begin an inquiry into a statute's nature, albeit punitive or regulatory.[106] The Texas statute authorizing community notification, however, is void of any explicit legislative expression of intent.[107] Legislative intent, even when identifiable, is subject to scrutiny. In some cases, courts rule that a statute is punitive in nature despite the legislature's expressed regulatory intent.[108] Hence, a state legislature cannot mask an otherwise punitive measure by merely drafting into the statute an intent resembling something regulatory in nature.

1. The *Mendoza-Martinez* Test

The Supreme Court has opined that only the "clearest proof" may change an otherwise civil statute into one that is in effect a punitive measure.[109] To facilitate the characterization of a statute as either punitive or regulatory, a court must balance a variety of factors.[110] In *Kennedy v.*

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105. *See* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 178 (1995) (citing Trop v. Dulles, 356 U.S. 86 (1958)); Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 637 (1999) (proffering the opinion that public disclosure of sex offender information violates the Ex Post Facto Clause and the Double Jeopardy Clause of the Constitution).

106. *See* Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 115 (1998) (noting that in *United States v. Ursery*, 518 U.S. 267, 288-89 (1996), the Supreme Court intimated that in a statutory analysis, the intent of the legislature should be an initial inquiry).

107. TEX. CODE CRIM. PROC. ANN. art. 62.03 (Vernon Supp. 2001).

108. *See* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 524-25 (1997) (noting that a "court must look to the actual effect of the statute" when delineating punitive over regulatory effect); *see also* United States v. Ward, 448 U.S. 242, 248-49 (1980) (opining that a legislature does not protect itself merely by asserting that a statute's intent is regulatory and not punitive); Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 118 (1998) (commenting that "in the event a court determines the legislative intent behind a statute to be punitive, the inquiry should end and the statue should be held to impose punishment for constitutional purposes").

109. United States v. Ward, 448 U.S. 242, 248-49 (1980).

110. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (establishing the test that "must be considered in relation to the statute on its face" to appropriately determine whether an act is punitive or regulatory in character); *accord* Doe v. Kelley, 961 F.

Mendoza-Martinez,[111] the Supreme Court outlined a series of factors to assist a court in making this determination:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a 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 assign[able to it.][112]

The subjectivity of the *Mendoza-Martinez* test makes it difficult to accurately apply; subsequently, many lower courts differ in their analysis of a statute's punitive effect.[113] In the case of community notification statutes, some courts hold notification laws to be punishment,[114] while others

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Supp. 1105, 1108 (W.D. Mich. 1997) (opining that "determining whether government action is punishment requires consideration of the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation").

111. 372 U.S. 144 (1963).

112. *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted). The Court further noted "we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive." *Id.* at 169. The Court also suggested that the factors "may often point in differing directions." *Id.*; *see also* United States v. Ward, 448 U.S. 242, 249 (1980) (stating that these factors are "neither exhaustive nor dispositive," but nonetheless "helpful"); Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 181 (1995) (emphasizing four of the *Mendoza-Martinez* factors as applied to Virginia sex offender registration: "whether the sanction imposes an affirmative disability or restraint, whether it has been regarded historically as punishment, whether it serves the traditional aims of punishment, and whether it appears excessive in relation to the alternate purpose assigned"); Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 116 (1998) (suggesting that the "Supreme Court has never really attempted to explain when these factors are relevant, and when they are not").

113. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 914 (1995) (concluding that "courts have not arrived at a consensus as to whether registration and community notification laws are regulatory or punitive").

114. *See* Young v. Weston, 898 F. Supp. 744, 753-54 (W.D. Wash. 1995) (concluding that the statute in question improperly allows for punishment before the offender is evaluated and treated); *In re* Reed, 663 P.2d 216, 219-20 (Cal. 1983) (indicating that it is unclear whether the statute is an effective tool, therefore, the court ruled that the statute is a form of punishment).

rule that similar sex offender notification laws do not constitute punishment.[115]

The United States Supreme Court, in a 1997 decision, *Kansas v. Hendricks*,[116] refused to rule a Kansas sex offender civil commitment statute a punitive measure in terms of either double jeopardy or ex post facto challenges, despite applying the *Mendoza-Martinez* criterion.[117] The Court, in a 5-4 decision, upheld a Kansas law requiring additional confinement for offenders designated as having a "mental abnormality" or a "personality disorder," which makes them likely to engage in sexual violence.[118] The majority held that additional confinement was not punitive because the confinement of mentally-ill persons is for civil purposes, therefore, "punitive conditions" are inapplicable.[119] Furthermore, the Court refused to acknowledge any possible punitive aspects of the statute because the confinement was limited to "a small segment of particularly dangerous individuals."[120]

The Arizona Supreme Court applied the *Mendoza-Martinez* test to determine the legislative intent behind its own sex offender registration statute.[121] Eventually opining that Arizona's statute was a regulatory measure, the supreme court did admit that its ultimate decision was "close."[122] The supreme court determined that the statute's purpose in aiding law enforcement to locate child sex offenders favored the classification of the statute as regulatory and not punitive.[123] However, the su-

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115. *See* Artway v. Attorney Gen., 81 F.3d 1235, 1267 (3d Cir. 1996) (ruling that the statute does not have a "draconian" effect that renders it a form of punishment); State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992) (en banc) (ordering that, in the narrow scope of child molestation and sexual misconduct, the statute is not excessive); State v. Costello, 643 A.2d 531, 534 (N.H. 1994) (deciding that the statute "inflicts no greater punishment, [and] no *ex post facto* violation occurs").

116. 521 U.S. 346 (1997).

117. Kansas v. Hendricks, 521 U.S. 346, 371 (1997); *see also* Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 113-14 (1998) (analyzing the Court's apparent reasoning for upholding the Kansas statute's constitutionality).

118. *See Hendricks*, 521 U.S. at 347 (upholding KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1995)).

119. *Id.* at 363.

120. *Id.* at 368.

121. *See* State v. Noble, 829 P.2d 1217, 1221 (Ariz. 1992) (en banc) (applying the *Mendoza-Martinez* factors to determine whether the statue was intended to be punitive or regulatory). Actually, the court did not analyze the third or fifth elements of the test, only briefly considered the fourth element, and combined the sixth and seventh elements. Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 916 (1995).

122. *Noble*, 829 P.2d at 1224.

123. *Id.*

preme court placed great emphasis on the relative confidentiality of the registry information.[124] This rationale suggests that if Arizona's statute contained a community notification provision, the Arizona Supreme Court's decision may have been different.[125]

Some lower courts classify community notification statutes as punishment.[126] The California Supreme Court opined that notification is punishment, and not a regulatory measure.[127] Unfortunately, the United States Supreme Court has yet to apply the *Mendoza-Martinez* test to community notification and the associated vigilante dangers.

2. The *Artway* Test

In *Artway v. Attorney General*,[128] the Third Circuit Court of Appeals created another method of determining whether notification provisions are punishment.[129] In deciding that New Jersey's Megan's Law did not constitute punishment, the court developed a multi-part test.[130] The first part of the test examines "the legislature's subjective purpose in enacting the challenged measure."[131] Legislative intent, however, is an inconclusive method of determining whether a statute is punitive or regulatory in

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124. *See id.* (emphasizing that providing the information required by the registration statute does not force convicted offenders "to display a scarlet letter to the world").

125. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 917 (1995) (stating that other cases relying on *Noble* "did not share the same concerns about confidentiality").

126. *See* State v. Babin, 637 So. 2d 814, 823-25 (La. App. 1 Cir. 1994), *writ denied*, 644 So. 2d 649 (La. 1994) (implying that notification statutes are excessive punishment in particular circumstances); State v. Payne, 633 So. 2d 701, 702-03 (La. App. 1 Cir. 1993), *writ denied*, 637 So. 2d 497 (La. 1994) (stating that notification may violate *ex post facto* laws).

127. *See In re* Reed, 663 P.2d at 220 (opining that the California statute requiring those offenders convicted under a misdemeanor statute violated the Cruel and Unusual Clause found in California's Constitution, which is modeled after the same clause found in the United States Constitution); *see also* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 195 (1995) (citing *In re* Reed, 663 P.2d at 220) (noting that the California Supreme Court cited the United States Supreme Court opinions of *Weems* and *Trop* "in commenting on the 'flexible and progressive standard for assessing the severity of punishment'").

128. 81 F.3d 1235 (3d Cir. 1996).

129. Artway v. Attorney Gen., 81 F.3d 1235, 1263-67 (3d Cir. 1996); *see also* David S. DeMatteo, Note, *Welcome to Anytown, U.S.A.—Home of Beautiful Scenery (And A Convicted Sex Offender): Sex Offender Registration and Notification Laws in* E.B. v. Verniero, 43 VILL. L. REV. 581, 604-07 (1998) (offering a detailed analysis of the *Artway* test).

130. *Artway*, 81 F.3d at 1254.

131. *Id. But see* Doe v. Kelley, 961 F. Supp. 1105, 1108 (W.D. Mich. 1997) (indicating that absent any discernable manifestation of legislative intent, the intent may only be gleaned from the actual design of the act itself).

nature.[132] Hence, the first part of the *Artway* test is insufficient to begin any punitive inquiry.

The second part of the *Artway* test looks at the objective purpose of a statute in terms of proportionality and history.[133] The objective purpose has three subparts: (1) whether "the law can be explained solely by a remedial purpose," (2) whether "a historical analysis show[s] that the measure has traditionally been regarded as punishment," and (3) "whether the effects . . . of a measure [are] so harsh . . . that [they constitute] 'punishment.'"[134]

Historically, community notification for a variety of offenses was considered punishment.[135] In the Book of Genesis, Moses explained how God placed upon Cain a "mark" as punishment for killing his brother, Abel.[136] Centuries later in colonial America, "branding" a member of the community who disobeyed the law was commonplace.[137]

More recently, the shaming of individuals has clearly served punitive purposes. Some courts apply a form of "branding," such as forcing convicted drunk drivers to place bumper stickers on their cars notifying others of their convictions and forcing juvenile delinquents to place signs

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132. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 919 (1995) (noting that the California Supreme Court bypassed an inquiry into legislative intent and proceeded directly to analyze a sex offender registration statute using the *Mendoza-Martinez* factors).

133. *See Artway*, 81 F.3d at 1264-65 (analyzing the test's objective prong).

134. *Id.* at 1263, 1266.

135. *See* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 505 (1997) (discussing Nathaniel Hawthorne's novel, The Scarlet Letter, which depicted how the protagonist, Hester Pryne, was forced to wear a scarlet letter "A" upon her clothing to symbolize her adultery conviction).

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

Id. at 506 (citing NATHANIEL HAWTHORNE, THE SCARLET LETTER (Bantam Classic ed. 1986) (1850)).

136. *Genesis* 4:15; *see also* Yale Glazer, Note, *The Chains May Be Heavy, But They Are Not Cruel and Unusual: Examining the Constitutionality of the Reintroduced Chain Gang*, 24 HOFSTRA L. REV. 1195, 1202 (1996) (noting that the Bible also authorized "heinous punishments for heinous crimes" through its concept of *lex talionis*: "an eye for an eye, a tooth for a tooth").

137. *See* Doe v. Pataki, 940 F. Supp. 603, 624 (S.D.N.Y. 1996) (illustrating that branding was used to subject an individual believed to be incurable to ongoing public humiliation). "The message was that *this* offender was not likely to mend his ways; disgrace would and should last until death." *Id.* at 625; *see also* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 911 (1995) (noting that "[t]he purpose was to humiliate the offender before the community").

in their front yards proclaiming their crimes.[138] Although rarely affirmed at the appellate level, these punitive measures show a modern tendency to place public shame on individuals.

Community notification is clearly an embodiment of a modern shame punishment.[139] Traditionally, shame punishments had the purpose to diminish an offender's standing in the community through some form of public humiliation.[140] The community shames an offender by beginning to harass and shun him, ultimately barring the offender from participating in normal community life.[141] Aside from physical and life-threatening abuse, offenders undergo other forms of harassment.[142] In *Trop v. Dulles*,[143] the Supreme Court held that Eighth Amendment concerns arose regardless of physical maltreatment if the action led to "the total destruction of the individual's status in organized society."[144] As a result, offenders often move from community to community following notification of their past crimes.[145] Police in one California town handed out flyers

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138. *See* People v. Letterlough, 655 N.E.2d 146, 151 (N.Y. 1995) (invalidating a district court ruling that required a drunk driver to affix a sign reading "convicted dwi" to his vehicle); State v. Burdin, 924 S.W.2d 82, 87 (Tenn. 1996) (reversing a court order requiring a shaming sign to be placed outside of an offender's home).

139. *But see* David S. DeMatteo, Note, *Welcome to Anytown, U.S.A.—Home of Beautiful Scenery (And A Convicted Sex Offender): Sex Offender Registration and Notification Laws in* E.B. v. Verniero, 43 VILL. L. REV. 581, 616-17 (1998) (noting that the Third Circuit Court of Appeals likened community notification to public safety warnings, as opposed to acts meant to bring about shame). "[T]he court compared community notification under Megan's Law with quarantine notices, which pertain to dangerous health-related matters, and 'warning' posters, which notify the public that a pictured individual represents a danger to the community." *Id.*

140. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 911-12 (1995) (suggesting that requiring a sex offender to identify himself through print ads and postcards "is the modern day equivalent of an afternoon in the pillory in the public square").

141. *See id.* at 912 (illustrating how community notification, as well as other similar models of notification, damage the offender's relationship to the community). "Shaming thus becomes merely an outlet for the community's rage." *Id.* at 913.

142. *See* Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1468-69 (1999) (highlighting several accounts of vigilantism and ostracism ranging from hate mail, threatening phone calls, protestors armed with signs and bullhorns, and other hostile methods of confrontation). "These anecdotes represent only a few of hundreds of overt acts of animosity toward released sex offenders." *Id.* at 1469.

143. 356 U.S. 86 (1958).

144. Trop v. Dulles, 356 U.S. 86, 101 (1958). The Court held that a statute authorizing the denationalization of a convicted deserter, even without alliance to a foreign power, was beyond the scope of Congress's war powers. *Id.* at 90, 103.

145. *See* Christy Hoppe & Diane Jennings, *Ex-inmates Pose Quandary For Many States - Convicts Seen as Threat Even After Their Release*, DALLAS MORNING NEWS, Aug. 29, 1993, at 1A, *available at* 1993 WL 9283171 (reporting that one offender was chased

and continually pursued one offender until he accepted a one-way plane ticket to another state.[146] Having no safe place to resort, many offenders divest themselves from society and become virtual prisoners within their own homes.[147] Whether it is public flogging or community notification, shaming in any manifestation serves punitive purposes.

The last element of the *Artway* objective test looks generally at the measure's effects.[148] As evidenced by the numerous violent acts committed since the enactment of Megan's Law, vigilantism is a real and identifiable effect.[149] Therefore, by both historical standards and modern views, community notification, especially when accompanied with vigilantism, constitutes punishment.[150] Clearly community notification meets all three elements of the *Artway* test, thereby establishing notification as punishment.[151] Furthermore, community notification punishment may

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from seven towns until finally settling on a South Texas ranch, away from threatening neighbors and violent protestors); *see also* Michael Dear & Django Sibley, *The One-Way Strategy for Sex Offenders Makes Nobody Safe*, L.A. TIMES, Oct. 1, 2000, at M6, *available at* 2000 WL 25902533 (noting that "[r]ejected sex offenders do not disappear; they simply move elsewhere and work harder to protect their anonymity").

146. *See* Michael Dear & Django Sibley, *The One-Way Strategy for Sex Offenders Makes Nobody Safe*, L.A. TIMES, Oct. 1, 2000, at M6, *available at* 2000 WL 25902533 (reporting that Monrovia police sought private donations to fund a one-way plane ticket to get the offender to leave their community).

147. *See* Edward Martone, *No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 39 (noting that sex offenders through community notification ultimately "run from family, avoid treatment and seek the safety of anonymity by hiding out, thus subjecting the public to even greater risk").

148. Artway v. Attorney Gen., 81 F.3d 1235, 1263 (3d Cir. 1996).

149. *See* Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 650 (1999) (suggesting that notifications through media releases, leaflets, and other public notices creates a lynch-mob type attitude).

150. *See* E.B. v. Verniero, 119 F.3d 1077, 1113 (3d Cir. 1997) (Becker, J., concurring and dissenting) (summarizing that "[b]ecause the history of notification evidences an objective punitive intent, and because the design or operation of notification does not negate this objective intent, the notification provisions of Megan's Law must be considered punishment"). *But see* David S. DeMatteo, Note, *Welcome to Anytown, U.S.A.—Home of Beautiful Scenery (And A Convicted Sex Offender): Sex Offender Registration and Notification Laws in* E.B. v. Verniero, 43 VILL. L. REV. 581, 620 (1998) (noting that the majority of the Third Circuit Court of Appeals failed to conclude that application of Megan's Law constituted punishment). The court did acknowledge the potential for private violence through notification, yet it ultimately held that such risks were still insufficient to compel the classification of community notification as punishment because it was not "sufficiently burdensome." *Id.* at 623 (citing *Verniero*, 119 F.3d at 1104).

151. *But see* W. Paul Koenig, Comment, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?*, 88 J. CRIM. L. & CRIMINOLOGY 721, 737 (1998)

rise to cruel and unusual levels when the registration of offenders incites vigilantism.[152]

C. *Community Notification May Not Withstand Eighth Amendment "Cruel and Unusual" Scrutiny*

The Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments* inflicted."[153] Historically, the Eighth Amendment's prohibition against cruel and unusual punishment protects citizens from gruesome tortures and lingering deaths.[154] However, the scope of the Eighth Amendment's application has broadened from the ancient torture devices of yesteryear to a more modern paradigm.[155]

(suggesting that the recent case decisions of *Hendricks* and *Verniero* make it unlikely that the Supreme Court will find community notification a punitive measure).

152. *See* Amy L Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 650 (1999) (implying that cruel and unusual punishment occurs when notification inspires "far more assaults and further violence").

153. U.S. CONST. amend. VIII (emphasis added). Cruel and unusual punishment was also viewed negatively by the American colonists. *See* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 189 (1995) (noting that in 1776, a verbatim copy of the English Bill of Rights prohibition against cruel and unusual punishment was included in the Virginia Constitution).

154. *See* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 524 (1997) (noting that the Eighth Amendment initially protected against severe punishments delivered as a consequence of regicide and treason).

155. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (opining that the Eighth Amendment "proscribes more than physically barbarous punishments"); Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 190 (1995) (emphasizing that courts have held that the Eighth Amendment not only limits punishment associated with torture, but all punishments excessively severe or long, or even greatly disproportioned to the crime"); *see also* Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (discussing the historical context from which the Eighth Amendment stems). Writing for the majority, Justice Warren discussed the nature of cruel and unusual punishment:

> 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. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eight Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. The

1. The Proportionality Test

In determining whether a modern statute or law is otherwise cruel and unusual, the Supreme Court often relies on the aforementioned proportionality test.[156] Simply stated, the test weighs the punishment inflicted upon the offender against the protection and safety the community enjoys as a result of the punishment.[157] Although the Eighth Amendment does not require the punishment to be strictly proportional to the crime, some Justices suggest it prohibits a grossly disproportionate punishment when compared to the offense.[158]

Within the past twenty years, the Supreme Court decided three important cases regarding the proportionality test for non-capital cases: *Rummel v. Estelle*,[159] *Solem v. Helm*,[160] and *Harmelin v. Michigan*.[161] In *Rummel*, the defendant was sentenced to a mandatory life sentence after obtaining $120.75 on false pretenses.[162] Writing a strong dissent, Justice Powell opined that the sentence was grossly disproportionate to the of-

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Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Id.

156. Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 529 (1997); *see also* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 927 (1995) (suggesting that, as of 1991, the Supreme Court's divided decision in *Harmelin v. Michigan* may signal an adoption of a "new standard in the near future").

157. Andrea L. Fisher, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 529 (1997); *see also* Michigan v. Ayres, 608 N.W.2d 132, 136 (1999) (opining that "[i]n deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state as well as the penalty imposed for the same crime in other states. In addition, we consider the goal if rehabilitation").

158. *See* United States v. Bajakjian, 524 U.S. 321, 336 (1998) (stating that although the facts of the case dealt with excessive fines, the Court emphasized utilizing the gross disproportionality standard); Weems v. United States, 217 U.S. 349, 367 (1910) (opining that the proportionality principle "is a precept of justice that punishment for crime should be graduated and proportioned to offense"); *see also* Marti Paulsen, *Does Public Access to Sex Offender Registration Information Under the Kansas Sex Offender Registration Act Constitute Cruel and Unusual Punishment? [State v. Scott, 961 P.2d 667 (Kan. 1998)]*, 38 WASHBURN L.J. 727, 734 (1999) (analyzing whether the Kansas Sex Offender Registration Act violates the Eighth Amendment's prohibition against cruel and unusual punishment).

159. 445 U.S. 263 (1980).

160. 463 U.S. 277 (1983).

161. 501 U.S. 957 (1991).

162. Rummel v. Estelle, 445 U.S. 263, 269 (1980) (noting that the life sentence was a result of a felony theft conviction and two prior felony convictions).

fense committed.[163] To determine the proportionality of a punishment as it relates to the offense, Justice Powell created a test based on three objective factors: "(i) the nature of the offense[,] . . . (ii) the sentence imposed for commission of the same crime in other jurisdictions [,] . . . and (iii) the sentence imposed upon other criminals in the same jurisdiction."[164] The following year, the majority of the Court adopted Justice Powell's three-part test in *Solem v. Helm*.[165]

In *Solem*, the defendant was sentenced to life imprisonment without the possibility of parole for the crime of "uttering a 'no account' check for $100."[166] Now writing for the majority, Justice Powell traced the meaning of the Eighth Amendment, and eventually concluded that the concept of proportionality was "deeply rooted" in American jurisprudence.[167] However, the Court recognized that "'[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare,' . . . [yet] [t]his does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases."[168] The Court acknowledged that "a criminal sentence must be proportionate to the crime for which the defendant [was] convicted."[169] To determine proportionality, the Court adopted Justice Powell's three-part test set forth in his *Rummel* dissent.[170] The concept of proportionality would not see a change until 1991.

In *Harmelin v. Michigan*,[171] the Court questioned the validity of any proportionality guarantee within the Eighth Amendment.[172] Justice

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163. *Id.* at 307 (Powell, J. dissenting) (opining that the sentence was grossly unjust).

164. *Id.* at 295 (Powell, J. dissenting).

165. *See* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 193 (1995) (indicating that a court should be guided by the 'objective factors' proffered by Justice Powell in an Eighth Amendment proportionality analysis).

166. *See* Solem v. Helm, 463 U.S. 277, 281-82 (1983) (noting the defendant had six prior felony convictions and was subject to the State's recidivist statute that enhances the sentence when there are three prior convictions).

167. *Id.* at 284; *see also* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 928 (1995) (noting that *Solem* "established the validity of the proportionality principle for noncapital sentencing").

168. *Solem*, 463 U.S. at 289-90 (quoting *Rummel*, 445 U.S. at 272) (alterations in original).

169. *Id.* at 290.

170. *Id.* at 290-92 (indicating that the objective criteria includes "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions").

171. 501 U.S. 957 (1991) (plurality opinion).

172. *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (writing for a divided Court, Justice Scalia dismissed the proportionality test precedent and opted to explore the histori-

Scalia, writing for a divided Court, chose to break precedent by surprisingly deciding that the Eighth Amendment contains no proportionality guarantee.[173] As Justice Scalia's opinion overruled three centuries of precedent supporting the proportionality test, only one other Justice supported his rationale.[174] Justice Kennedy, joined by Justices Souter and O'Connor, opined that the Eighth Amendment's prohibition against cruel and unusual punishment encompasses a narrow proportionality principle.[175] "As a result, the proportionality test for non-capital offenses currently encompasses Justice Powell's three-part test as set forth in *Solem* and as modified by Justice Kennedy's *Harmelin* limitation of the test to only those punishments that are 'grossly disproportionate.'"[176] Ostensibly, the vigilante violence suffered by registered sex offenders may fall into this established grossly disproportionate category.

2. Vigilantism Creates Eighth Amendment Concerns

According to the proportionality test, the effects of community notification on offenders must be proportional to the benefit the notification provides to society. The existence of such a benefit causes considerable debate. Since most notification statutes were "enacted with the ostensible goals of protecting public safety," it is logical to measure the success of these statutes by whether they accomplished the legislative goals originally sought.[177]

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cal background of the Constitution in more detail); *see also* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 933 (1995) (noting that "[a] better test of cruel and unusual punishment would provide guidelines or underlying values for determining the severity of the punishment" and "[w]ithout a clear standard, the proportionality test is ill equipped to analyze punishments which stray from traditional sanctions").

173. *Harmelin*, 501 U.S. at 965. Justice Scalia's opinion apparently disregarded the Court's adoption of seventeenth century law which clearly endorsed the proportionality test. *See* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 194 (1995) (commenting that Justice Scalia ignored precedent dating back to the seventeenth century).

174. *See* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 194 (1995) (noting that only Chief Justice Rehnquist joined Justice Scalia's opinion).

175. *See id.* (noting that although Justices Kennedy, O'Conner, and Souter joined Justice Scalia and Chief Justice Rehnquist on the separate issue of capital-sentencing, they disagreed with Justice Scalia and Chief Justice Rehnquist on rejecting the proportionality test).

176. *See id.* (stating further that "although Justice Scalia's opinion overruled *Solem* and declared that the Eighth Amendment contains no proportionality principle, this part of his opinion was not joined by a majority of the Court").

177. Peter Finn, *Sex Offender Community Notification*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN ACTION, (Feb. 1997), *available at* http://www.ncjrs.org/txtfiles/

One study sought to measure the success of these goals. After five and a half years of research, the study failed to empirically show any additional benefit to the public through community notification.[178] In fact, prior to the 1970's, criminological studies indicated that dangerous sex offenders had a lower rate of recidivism than the average criminal.[179] In 1989, a United States Department of Justice report found that, excluding murderers, rapists repeated their crimes less than any other type of criminal offender.[180] Furthermore, community notification offers little assistance to the community when the sex offender is someone within the victim's own home. Another United States Department of Justice report concluded that only a little over half of all rapes are committed by strangers.[181] Thus, close to fifty percent of all sex offenses are committed by acquaintances or family members.[182]

To classify vigilante violence incited by community notification as cruel and unusual punishment, the government must at least implicitly sanction the violence, and thereby share responsibility for the additional punishment.[183] Department of Justice officials, including former Attorney General Janet Reno, are aware of the obvious dangers of vigilantism.[184] The

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162364.txt; *see also* Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 171 (1995) (noting that the underlying purpose of such statutes is "to deter repeat offenses and to protect children and others from becoming victims of recidivists").

178. *See* Peter Finn, *Sex Offender Community Notification*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN ACTION, (Feb. 1997), *available at* http://www.ncjrs.org/txtfiles/162364.txt (citing a report prepared for the Washington State Institute for Public Policy as the only known empirical study of its kind).

179. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 893 (1995) (offering an examination of recent studies which link sex offenders and recidivism).

180. *See id.* at 895-96 (stating that the recidivism rate for rapists was approximately eight percent, while, excluding murder, all other offenses were significantly higher).

181. *See id.* at 907 (recognizing that strangers account for fifty-two percent of all rapes).

182. *See id.*; *see also* Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 510 (1997) (noting that a 1991 Bureau of Justice Statistics study concluded that forty-five percent of the male offenders serving time for sexually abusing a child had committed the offense against either their own children or another family member).

183. *See* W. Paul Koenig, Comment, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?*, 88 J. CRIM. L. & CRIMINOLOGY 721, 736 (1998).

184. *See* Daryl Bell, *ACLU Plans to Sue DPS over Sex Offender Cards; Policy Notifies Neighbors by Mail*, SAN ANTONIO EXPRESS-NEWS, Aug. 18, 2000, at 3B, *available at* 2000 WL 27328846 (expressing the sentiment passed on by Peggy Burke, principal for the Center for Sex Offender Management in Maryland). In 1997, the Department of Justice

National Center for Missing and Exploited Children issued a statement warning that "[c]onstant harassment and ostracism . . . may cause serious psychological damage, possibly even causing [a sex offender to] . . . return to his previous, dangerous lifestyle."[185] Respective state and federal authorities must recognize the threat of vigilante violence. Nevertheless, the very system of notification that incites this violence remains intact.

To rebut arguments of vigilantism, proponents of notification often cite narrowly construed and often misleading studies by law enforcement agencies.[186] A 1997 Oregon study suggested that "less than ten percent of offenders experienced some form of harassment . . . ."[187] However, the study included interviews from only forty-five law enforcement officials that dealt with sex offenders solely on a limited, custodial level.[188] It is illogical to assume that an offender would report harassment to the same law enforcement agency promoting the notification from which the vigilantism stems. Rather, society should take notice and legislators should take action to prevent the proliferation of vigilantism, which clearly violates the Constitution.

VI. PROPOSAL

"States needn't abandon community notification but should instead carefully attempt to meet the constitutional parameters established by the courts."[189] Even though vigilantism incited by community notification may rise to the level of cruel and unusual punishment, the overall policy

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created the center to train officials in law enforcement. *Id.*; *see also* Christy Hoppe & Diane Jennings, *Ex-inmates Pose Quandary For Many States - Convicts Seen as Threat Even After Their Release*, DALLAS MORNING NEWS, Aug. 29, 1993, at 1A, *available at* 1993 WL 9283171 (citing an unnamed Bureau of Justice Statistics sourcebook stating "a 1991 poll shows that 39 percent of the population thinks that vigilantism has increased in the last 10 years and 33 percent think that it is justified at times").

185. Peter Finn, *Sex Offender Community Notification*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN ACTION, (Feb. 1997), *available at* http://www.ncjrs.org/txtfiles/162364.txt (noting the organization's awareness of the sex offender's stressful environment); *see also* Edward Martone, *No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 39 (asserting a former New Jersey mayor's position that the solution to deterring sex crimes does not lie in community notification statutes, since community notification is merely a political ploy "to placate an angry public").

186. *See* Peter Finn, *Sex Offender Community Notification*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN ACTION, (Feb. 1997), *available at* http://www.ncjrs.org/txtfiles/162364.txt (adopting an unnamed Oregon study that surveyed forty-five parole sex offender specialists and probation officers, who supervised only 2160 sex offenders).

187. *See id.* (noting illegalities committed against offenders).

188. *See id.* (stating that sex offenders were picketed against and threatened for their lives or the safety of their homes).

189. *See id.* (revealing the National Center for Missing and Exploited Children's desire for a more sound method of dealing with sex offenders).

of notifying certain members of the public outweighs that danger. Groups identified as targets for sex offenders, such as schools and youth groups, should continue to receive notification. States must also attempt to minimize any Eighth Amendment violations by instituting and enforcing a few relatively simple measures. Educating the community and releasing accurate sex offender information are the best places to start.

A. *Educate the Community*

"Educating the community about the nature and purposes of notification is considered essential to preventing undue community alarm and vigilantism . . . ."[190] The public deserves awareness of an offender's presence, but in a manner less likely to inflame their fears. The bright yellow postcards Texas employs speak in generalities regarding the offender and the offense, thereby failing to provide the community sufficient facts to make informed conclusions.[191] By better informing the community about offenders and how to respond to the notification, fear would decrease, as would violence.

Likewise, the notification information should alert the community of the severe penalties for taking the law into their own hands. Citizens should receive instruction that under our legal system, the offenders have already served their debt to society. States must indicate that community notification is not necessarily a warning that the named offender will reoffend, but merely notifies them that recidivism remains a possibility. All too often, Texas's postcard distribution sends the message that the named offender is an immediate danger, thus striking fear in the recipient.[192]

B. *Release Accurate Information*

Releasing accurate information is another means of preventing violent acts against offenders and non-offenders, as well as, avoiding most constitutional complaints. Immediately before disseminating any information regarding an offender, the address must be verified. Texas mailed 16,000

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190. *Id.*

191. *See* Daryl Bell, *ACLU Plans to Sue DPS over Sex Offender Cards; Policy Notifies Neighbors by Mail*, SAN ANTONIO EXPRESS-NEWS, Aug. 18, 2000, at 3B, *available at* 2000 WL 27328846 (inferring that law suits against the Texas Department of Public Safety are imminent as a result of the postcard mailings).

192. *See* Jim Vertuno, *Mailing Warns Neighbors of Sex Offenders: Authorities Say Postcards Not Invitations to Violence*, DALLAS MORNING NEWS, Aug. 16, 2000, at 27A, *available at* 2000 WL 24852154 (asserting the public safety spokesman's view that although the Texas Department of Public Safety has a zero-tolerance for vigilantes, "[t]he average person will be unsettled when they first receive [the notification postcards]").

postcards to neighbors of only twenty-seven offenders.[193] Alternatively, it is plausible that Texas could first send certified postcard-questionnaires to those few offenders to verify their addresses. If an offender fails to respond, the State can follow up with a personal visit. Finally, only after this confirmation, should the offenders address be disseminated.

Texas should evaluate whether the dissemination of inaccurate information outweighs the danger imposed upon innocent citizens, such as Mr. Pham. No excuse exists for the proliferation of incorrect addresses and names. Legislators should recognize the dangers of inaccurate information and attempt to create new standards and laws that require timely updating and routine maintenance of sex offender registries. It is alarming how underdeveloped and poorly monitored sex offender registries are, considering their widespread use and potential for danger.[194] The legislature has a duty to assure that the information they require disseminated is timely and accurate. By adequately and intelligently informing the community, a state can minimize the potential for vigilante violence and maximize the protection of its citizens. Until then, all citizens, regardless of criminal history, are vulnerable to physical and life-threatening attacks due to notification errors.

VII. CONCLUSION

With any type of criminal conviction, an offender is subjected to public persecution.[195] However, there are few crimes that provoke such intense public anger and outcry as sexual offenses, especially when the victims are children.[196] Community notification and its brash method of blanket, public announcements, essentially makes every citizen part of a continued prosecution.[197] Some citizens assume the role of renegade judges,

193. *See* Rick Klein & Jason Trahan, *DPS Mails Out Postcards Warning Residents of Sex Offenders in Area: 'High-risk' Label Not Fair, Critics Say*, DALLAS MORNING NEWS, Aug. 24, 2000, at 21A, *available* 2000 WL 25849629 (averaging a distribution of nearly 600 postcards per offender).

194. *See* TEX. DEP'T OF PUB. SAFETY CRIME RECORDS SERV., SEARCHING THE SEX OFFENDER DATABASE, *at* http://records.txdps.state.tx./us/sosearch/default.cfm (stating that "it is your responsibility to make sure the records you access through this site pertain to the person about whom you are seeking information").

195. *Cf.* NATHANIEL HAWTHORNE, THE SCARLET LETTER (Bantam Books 1981) (1850) (describing one woman's struggle with society after committing adultery).

196. *See* Edward Martone, *No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 39 (understanding the public's rage toward sex offenders since "[t]heir crimes, especially when visited upon children, leave life-long scars and offend the community's deepest sensibilities.").

197. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 939 (1995) (inferring that supporters of community notification programs are dissatisfied with the criminal justice system).

jurors, and executioners. In addition, the lengthy duration of most states' sex offender registrations extend the offender's exposure to a hostile environment, thereby increasing the risk of violence.

Community notification has created an environment that encourages the public to take matters into their own hands. In the process, offenders and mistakenly identified innocent citizens are injured. Community notification, and the vigilantism it provokes, wrongfully creates an additional form of punishment that tests the threshold of the Cruel and Unusual Punishment Clause of the Constitution.[198]

Thorough analysis of community notification laws, pursuant to the *Mendoza-Martinez* factors, demonstrate that such programs are indeed punishment, regardless of any supposed regulatory intent. Further investigation into the dangerous and life-threatening side effects of community notification reveals that the proportionality test, as outlined by centuries of Supreme Court precedent, demonstrates a potential breach of the Constitution's prohibition against cruel and unusual punishment.

Because of vigilantism's threat, citizens and politicians alike should realize that overzealous notification leads to decreased offender registration. The few offenders that do register are often harassed and physically threatened to the point where they flee to other states where their sexual offense history is unknown. Legislators should not maintain the status quo advocated by an angry lobby of greatly misinformed citizens. Nor should our government readily yield to the trend of community notification without tangible evidence of its success. We must shoulder the responsibility to release accurate information, while balancing the level of danger imposed on past sex offenders with our interests in public safety. A strong effort will keep the community informed and curb vigilante violence.

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198. *See id.* (expounding that most community notification models offend the Eighth Amendment and compromise "an offender's humanity in the name of protecting the public"); Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 197 (1995) (indicating that some California registration statutes resulted in punishment that was too severe for some crimes); Andrea L. Fischer, Note, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protections for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 529 (1997) (asserting that a sex offender is branded for life); W. Paul Koenig, Comment, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?*, 88 J. CRIM. L. & CRIMINOLOGY 721, 735 (1998) (noting that although amended versions of Megan's Law could be held constitutional, that statute and its like, reek of cruel and unusual punishment).

APPENDIX A: STATE COMPARISON CHART—SEX OFFENDER REGISTRATION STATUTES

The following chart demonstrates how each state has chosen to regulate their respective sex offender registries. The compilation of statutory data is meant to only provide a cursory overview.

State	Citation	Subject
Alabama	ALA. CODE §§ 13A-11-200 to -203 (1994)	- Registration of persons who have been convicted of certain specified offenses is required with the sheriff in the county of residence - Register is only open for inspection by law enforcement agencies and officers
Alaska	ALASKA STAT. §§ 12.63.010.020, .030, .100 (Michie 2000)	- Sex offenders must register within specified time periods, provide specific information, and allow fingerprints and a photograph to be taken - The offense committed determines the duration of registration
Arizona	ARIZ. REV. STAT. ANN. §§ 13-3821 to -3825 (West 2001)	- Law enforcement officials are required to notify the community of the sex offender's presence - Offenders must register every year following initial registration
Arkansas	ARK. CODE ANN. §§ 12-12-901 to -919 (Michie Supp. 1999)	- The legislature concluded that an offender's privacy is less important than public safety because sex offenders pose a high risk of recidivism
California	CAL. PENAL CODE §§ 290-90.95 (Deering & Supp. 2001)	- The Department of Justice is required to provide law enforcement agencies with CD-Rom or other electronic media containing registrant's information and that information is available for public viewing upon showing an articulable purpose - The Department of Corrections must forward blood and saliva samples to the community where the offender is released
Colorado	COLO. REV. STAT. ANN. § 18-3-412.5 (West 2000)	- Local law enforcement officials must release registration information upon request to any person in that community with proof of residence and identification - The Colorado Bureau of Investigation must post a link on the Colorado homepage to a list containing registration information and photographs
Connecticut	CONN. GEN. STAT. ANN. §§ 54-251 to -260 (West Supp. 2001)	- Courts may restrict registration information access to law enforcement if access is not necessary for public safety - Agencies who provide public access must post warnings indicating that any persons using registration information to harass, injure, or commit other criminal acts against an offender are subject to criminal prosecution

State	Citation	Subject
Delaware	DEL. CODE ANN. tit. 11, § 4120 (1995 & Supp. 2001)	- Persons convicted of offenses or attempted offenses must register and verify residence every ninety days
Florida	FLA. STAT. ANN. § 775.21 (West 2000 & Supp. 2001)	- Offender must provide detailed information such as height, weight, eye color, date of birth, age, etc. - Sheriff or Chief of Police will notify the community in manner deemed appropriate - Sheriff or Chief of Police will, within forty-eight hours, notify day cares and schools within one-mile of the radius of the registrant's home - After ten years without a felony or misdemeanor, offender may petition to be released from the registration requirement
Georgia	GA. CODE ANN. § 42—9-44.1 (1997)	- Persons convicted of an offense shall register within ten days of their parole or residency - Board must notify public school superintendent of the offender's residency
Hawaii	HAW. REV. STAT. ANN. § 846E (Michie. 1999)	- The offender must register with the attorney general by providing among other things, all current addresses, and any future addresses
Idaho	IDAHO CODE §§ 18-8301 to -8311 (Michie Supp. 2000)	- Persons convicted of the offense must register within ten days of coming into the county
Illinois	730 ILL. COMP. STAT. ANN. § 150/1 to /12.9 (West 1997 & West Supp. 2001)	- Sex offender shall include current place of employment when registering with Chief of Police of city or Sheriff of the county - Must register even if temporarily domiciled over ten days - If offender gets new domicile for ten days, the offender must register again
Indiana	IND. CODE ANN. § 5-2-12-1 to -13 (Michie 1997 & Michie Supp. 2000)	- Sex offender must register with the local law enforcement within seven days if the offender has resided or intends to reside in an area for more than seven days - Registry list is supplied to schools, state agencies that work with children, child care facilities, and any other entity requesting the registry
Iowa	IOWA CODE ANN. § 692A.1-.16 (West Supp. 2001)	- Sex offender shall register with the sheriff of the county within five days of establishing a residence or changing residences - Registry may be released to juvenile justice agencies, governmental agencies or any person who requests, in writing, information regarding a registrant

State	Citation	Subject
Kansas	KAN. STAT. ANN. § 22-4901 to –4910 (1995)	- Sex offender must register with the sheriff of the county within fifteen days of entering the county or if the offender is temporarily domiciled for more than fifteen days - Information is forwarded to the appropriate law enforcement agency maintaining jurisdiction over place of residence
Kentucky	KY. REV. STAT. ANN. § 17.500-.540 (Michie 1996 & Michie Supp. 2000)	- Sex offenders shall register with the parole officer in the county in which he/she intends to reside - Registration information is sent to the Information Services Center, which releases the information to any state or local law enforcement agency
Louisiana	LA. REV. STAT. ANN. §§ 15:540 to -:549 (West Supp. 2001)	- Sex offender must register with the police department - Sex offender must personally notify residences and businesses within a one-mile radius, the school district superintendent and any landlord of his/her name, address and convicted crime - Authorities must release the information when necessary to protect the public - Public officials are immune from civil liability for any consequences resulting from release
Maine	ME. REV. STAT. ANN. tit. 34A, §§ 11101-44 (West Supp. 1998)	- Sex offenders are required to register their current address with Maine's Department of Public Safety - Registration information is considered part of the offender's criminal record
Maryland	MD. ANN. CODE art. 27, § 792 (1996 & Supp. 2000)	- Sex offender must register every ninety days for a ten year period or for life if the offender is classified as a violent predator or is convicted of multiple sex offenses - Police department must notify school superintendents who determine which school principals need notification to protect the safety of children - Information is also sent to the FBI and may be given to a public requestor or posted on the Internet by a local police department

State	Citation	Subject
Massachusetts	MASS. ANN. LAWS ch. 6, §§ 178C-178P (Law Co-op. 1988 & Supp. 2001)	- Prior to release from custody, the custody agency is required to send all registration data to the state board - Sex offender is then required to register after release to verify and update the data if necessary - Police departments where the offender plans to live and work and where the offense occurred receive registration information - Information may be released upon request if the offender is classified as a level two or level three sex offender - Release of information includes a warning not to use the registry information to commit a crime or discriminate against or harass the offender
Michigan	MICH. STAT. ANN. § 4.475(1)-(12) (Michie 1997 & Supp. 2000)	- Sex offenders must register with local police departments, who must maintain a computerized database of all registration information - Police departments may only reveal the information to the public for law enforcement purposes as the information is not subject to disclosure under the Freedom of Information Act
Minnesota	MINN. STAT. ANN. § 243.166 (West Supp. 2001)	- Predatory offenders must register as soon as they are assigned a corrections agent and at least five days before living at a new address - Registration includes a written statement signed by the offender which must include relevant information, a fingerprint card, and a photograph
Mississippi	MISS. CODE ANN. §§ 45-33-25 to -57 (2000)	- Sex offenders must register within three days after the date of judgment unless the offender is immediately confined or committed - Every individual convicted for a sexual offense after January 1, 1996, must provide a blood sample for purposes of DNA identification analysis within three working days after registration
Missouri	MO. ANN. STAT. §§ 589.400-.425 (West Supp. 2001)	- Sex offenders must register within ten days after judgment or upon entering any county - Registration includes a written statement by the sex offender, fingerprints, and a photograph - Chief law enforcement official of the county must maintain a complete list of all registered offenders' names, addresses, and crimes for which the offenders are registered - The information may be requested by any person
Montana	MONT. CODE ANN. §§ 46-23-501 to -508 (2000)	- No retroactive status - Offender must be in custody, sentenced, or under Department of Corrections supervision on or after July 1, 1989

State	Citation	Subject
Nebraska	NEB. REV. STAT. ANN. §§ 29-4001 to –4013 (Michie Supp. 2000)	- The legislature concluded that sex offenders pose a high risk of recidivism - Requires registration of persons convicted of false imprisonment and kidnapping of minors
Nevada	NEV. REV. STAT. §§ 179D.010-.800 (1999)	- Applies a three-tiered system of notification - Includes a section on juvenile sex offenders
New Hampshire	N.H. REV. STAT. ANN. §§ 651-B:1-:19 (Supp. 2000)	- A list of sexual offenders is kept with law enforcement agencies and can be made available to the public only upon request
New Jersey	N.J. STAT. ANN. §§ 2c:7-2 to –11 (West 1995 & Supp. 2001)	- Law enforcement agencies may only release information concerning sex offenders when necessary for public safety
New Mexico	N.M. STAT. ANN. §§ 29-11A-1 to –8 (Michie Supp. 2000)	- Allows the state's department of public safety to establish and maintain an Internet website providing offender information, except their social security number and place of employment - The public can request offender information from law enforcement officials
New York	N.Y. CORRECT. LAW § 168 (McKinney Supp. 2001)	- Provides a statutorily-required "900" number in which the public may call for information regarding sex offenders
North Carolina	N.C. GEN. STAT. §§ 14-208.5 to .32 (1999)	- Registration requirement terminates after ten years if there are no subsequent convictions for sexual offenses
North Dakota	N.D. CENT. CODE § 12.1-32-15 (Supp. 1999)	- Law enforcement agencies must disclose registration information if the individual is determined a public risk
Ohio	OHIO REV. CODE ANN. § 2950.11 (West, WESTLAW through 124 G.A., 2001)	- Sheriff shall notify, among others, all superintendents of school boards within county
Oklahoma	OKLA. STAT. ANN. tit. 57, §§ 581-589 (West Supp. 2001)	- Any offender required to register cannot work with or provide services to children
Oregon	OR. REV. STAT. § 181.585-.602 (1995)	- Offender may petition to relieve him/her of registering in county of residence if offender has only one misdemeanor or Class C felony conviction and is not classified a predatory sex offender
Pennsylvania	PA. STAT. ANN. 42, §§ 9791 (West Supp. 2001)	- No statutory duty for real estate agents or employees to disclose information regarding sexual predators

State	Citation	Subject
Rhode Island	R.I. GEN. LAWS §§ 11-37.1-1 to -19 (2000)	- Requiring offenders to register in person annually and verify his/her address on a quarterly basis for life - Information may be released without consent to law enforcement or governmental agencies completing background checks - Law enforcement may release relevant information necessary to protect an individual concerning a specific registrant
South Carolina	S.C. CODE ANN. §§ 23-3-400 to -530 (Law. Co-op. Supp. 2000)	- The county sheriff must release all registered information, or a list of registered sex offenders residing in the community to the public upon proper written request - The sheriff must provide the newspaper with general circulation within the county a listing of the registry for publication
South Dakota	S.D. CODIFIED LAWS §§ 22-22-30 to -41 (Michie 1998 & Supp. 2001)	- Any person who, as a juvenile, was placed on the sex offender registry may petition the Circuit Court for removal upon a showing that he has not been adjudicated or convicted of any sex offenses for at least ten years and no longer considered a threat to reoffend.
Tennessee	TENN. CODE ANN. §§ 40-39-101 to -110 (Michie 1997 & Supp. 2000)	- Information must not be used to inflict retribution or additional punishment on any offender - Specified offenders must register within ten days of release on probation, parole, or any other alternative to incarceration or of move into municipality
Texas	TEX. CRIM. PROC. CODE ANN. §§ 2.01-.12 (Vernon Supp. 2001)	- Specified offenders must register with the local law enforcement authority in any municipality where the offenders reside or intend to reside for more than seven days
Utah	UTAH CODE ANN. § 77-27-21.5 (1999)	- Specified offenders must register after release from incarceration every year for ten years and within ten days of moving - Law enforcement agencies shall inform the Department of Corrections when a person commits a sex crime or is arrested for one
Vermont	VT. STAT. ANN. tit. 13, §§ 5401-13 (1998 & Supp. 2000)	- Prior to sentencing and upon release from serving sentence, a sex offender must provide registration to either the court or police department - Information cannot be disclosed except for law enforcement purposes, background checks by government agencies, authorized potential employers to protect public safety, or to the actual offender to review for accuracy - Victim's identities are not released

State	Citation	Subject
Virginia	VA. CODE ANN. § 19.2-390.1 (Michie 2000)	- State Police distribute registration information to local police departments, who may release information to anyone upon proper request - If the information is used to harass an offender, the harasser may be charged with a Class One misdemeanor - Police officials have no liability for releasing or not releasing information
Washington	WASH. REV. CODE ANN. §§ 9A.44.130-.140 (West 2000 & Supp. 2001)	- Local police chiefs must make reasonable efforts to verify addresses registered by sex offenders to county sheriffs - Each year, the addresses are verified by certified mail - Requirement to register continues for ten to fifteen years or upon court order
West Virginia	W. VA. CODE ANN. § 15-12-1 to 10 (Michie 2000 & Michie Supp. 2000)	- When a sex offender is released from incarceration, the administrator of the institution must send written notice to the state police within three days - State police shall distribute this information to the law enforcement officer of the county, the superintendent of schools, the child protective services office, all community organizations involving youths, day care centers, and the FBI in the county where the sex offender will reside
Wisconsin	WIS. STAT. ANN. § 301.45-.46 (West Supp. 2000)	- All sex offenders must register with the Department of Corrections, which immediately makes the information available to the police chief or the sheriff - Information is available, upon request to schools, day care centers, neighborhood watch programs, and many other organizations
Wyoming	WYO. STAT. ANN. § 7-19-301 –303 (Michie 1999)	- Sex offender must register with the division of criminal investigation if residing or intending to reside in the state - If risk of reoffense is low, notification shall only be to persons authorized to receive criminal history records - If risk of reoffense is moderate, notification shall be to residential neighbors within at least 750 feet of the offender's residence - If risk of reoffense is high, notification will be provided to the public through electronic internet technology that contains the public registry