January 2000

Maine's Sex Offender Registration and Notification Act: Wise or Wicked?

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Recommended Citation
James A. Billings & Crystal L. Bulges University of Maine School of Law, Maine's Sex Offender Registration and Notification Act: Wise or Wicked?, 52 Me. L. Rev. 175 (2000).
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MAINE’S SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: WISE OR WICKED?

To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal; but it would never be asserted that he would thereby be made a criminal for life.¹

I. INTRODUCTION

Earl Shriner was a mentally disordered sex offender with a twenty-four-year criminal history; murder, kidnapping, and sexual assault were his forte.² In fact, he was a diagnosed sexual psychopath.³ He was just finishing a ten-year sentence in 1987 when prison officials discovered his secret plan to torture children;⁴ he kept lists of the materials he would need to kill and mutilate.⁵ Officials used all available resources to prevent his release, but were unable to show a recent overt act as evidence of his continued dangerousness.⁶ The officials were thus unable to prevent Shriner from reentering the community upon finishing the term of his sentence.⁷

In late 1989, a seven-year-old boy was abducted by a man while riding his bike near his home in Tacoma, Washington.⁸ The man brutally raped the boy, wrapped a cord around his neck in an effort to strangle him, cut off his penis, and left him for dead in the woods. The boy was found and rescued by a family burying a pet cat.⁹ His attacker was Earl Shriner, who lived just a short distance away. Shriner was sentenced to more than 130 years in jail for the attack; prosecutors had sought a 600-year sentence.¹⁰

No one would deny that actions must be taken to stop such instances of horrific sexual abuse and even murder. Earl Shriner’s story is but one example of the tragic effect of a sex offender’s reoffense, and among the most well publicized. In many cases, the victims live short distances from their attackers. Had the parents of the victims known about the proximity and past offenses of their children’s attackers, these tragedies could have been avoided. Or so the argument goes.

What course is best to accomplish the goal of preventing such incidents of reoffense is not clear, however. A recent and controversial response is the registration of sex offenders in a state database and notification of the surrounding area when a released sex offender moves into the neighborhood. The terms of these sex

³ See Erik Lacitis, Chemicals Might Have Helped Earl Shriner, SEATTLE TIMES, June 1, 1989, at D1.
⁴ See Lieb et al., supra note 2, at 66.
⁵ See Lacitis, supra note 3, at D1.
⁶ See Lieb et al., supra note 2, at 66.
⁷ See id.
⁸ See Lacitis, supra note 3, at D1.
⁹ See Lieb et al., supra note 2, at 66.
¹⁰ See 131 Years For Shriner, SEATTLE TIMES, March 27, 1990, at A10.
offender notification statutes vary by jurisdiction but contain many common and intensely disputed elements.

The purpose of this Comment is to discuss both the constitutionality and advisability of such sex offender notification statutes with specific reference to Maine's Sex Offender Registration and Notification Act (the SORNA). Part II will first identify the extent and nature of the problem sought to be relieved by such statutes: sex offense incidence and recidivism, the nature of sexual offense, and rates of treatment success. Next, Part III of the Comment will discuss the requirements of the first notification statute, Washington's Community Protection Act, as well as the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the Wetterling Act). Part III will also describe Maine's statutory notification provisions as they compare to those of other jurisdictions. Part IV will discuss the challenges to the constitutionality of such statutes and will examine the constitutionality of the SORNA in light of these challenges in other states. Finally, this Comment will discuss, independent of their constitutionality, the advisability of such statutes on a policy level. It is the Authors' thesis that the SORNA will survive constitutional challenges, but as a means of alleviating the problem of sex offender recidivism in this country, the SORNA and similar statutes fail both in theory and in practice. Alternative approaches based on interdisciplinary study will be suggested.

II. THE PROBLEM

A. Repeat Sex Offenders: A National Concern

The Bureau of Justice Statistics reports high rates of sex offense in the United States. In 1995, for example, those age twelve and over reported experiencing over a quarter of a million attempted or completed rapes; they also reported 95,000 threatened or completed sexual assaults other than rape. These rates are alarming, especially considering that almost two-thirds of rape and sexual assault victims are children. Rape and sexual assault offenders make up roughly 5% of the total correctional population. The rate of increase in sex offender population in

11. See Me. REV. STAT. ANN. tit. 34-A, §§ 11001-11144 (West Supp. 1998) Maine's original Registration Act did not contain a community notification provision. See infra Part III.C.1. Because this Comment is primarily concerned with community notification, the Authors will focus on the SORNA and the Sex Offender Registration and Notification Act of 1999 (the SORNA '99), which retains the notification provisions of the SORNA. See Sex Offender Registration and Notification Act of 1999, P.L. 1999, ch. 437, § 2 (effective Sept. 18, 1999), 1999 Me. Legis. Serv. 1268 (West) (to be codified at Me. REV. STAT. ANN. tit. 34-A, §§ 11201-11252).
14. See LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS v (1997) [hereinafter GREENFELD, SEX OFFENSES]. The actual number of attempted or completed rapes for those over age 12 is 260,300. See id.
16. See GREENFELD, SEX OFFENSES, supra note 14, at vi.
prisons is problematic as well; the population of people in prison for sexual assaults other than rape, for example, has increased by 15%, the second fastest increase overall and more than any other violent crime category.17 These trends, however, may reflect changes in the social climate that encourage reporting of such crimes to law enforcement officials rather than a real change in the number of these offenses being committed.18

Among the difficulties in dealing with sex crimes is the popular sentiment that punishments are too lenient. The average time a sex offender serves in prison is five years; that is a recent increase from about three and one-half years.19 Rapists serve an average of just under fourteen years in prison.20 In 1993, sex offenders served only 41% of their prison sentences.21 These statistics reinforce the public’s belief that longer prison terms for sex offenders are appropriate.

Recidivism rates are of tantamount importance to the debate regarding the problem of sex offenses. In 1991, 19% of those in prison for sexual assault, and 24% of those in prison for rape were already on probation or parole when they committed these offenses.22 Rapists on probation are more likely than any other type of felon to be rearrested for a new rape. Furthermore, during the three-year period following release, 52% of rapists and 48% of all other sex offenders were rearrested for new crimes.23 These percentages are high compared to reoffense rates for other felonies: just 1% for murder, robbery, and nonsexual assault.24 However, of these incidents of reoffense, only 8% were for a new rape; the numbers 52% and 48% represent any reoffense, not just sexual reoffense.

Like all crimes, sex offenses are significantly underreported; comparisons of victimization surveys with rates of report to law enforcement consistently confirm this fact. Even this comparison is inaccurate, however, because victimization surveys do not elicit all instances of offense. One victimization study demonstrated that only 12% of rape victims report the crime to law enforcement.25 Nonforcible sexual assaults may elicit an even lower rate of reporting.26

B. Costs of Sex Offender Victimization

Indeed, part of the overwhelming response to the sex offense problem relates to the nature of the problem itself. Victims of sex crimes may also be victims of more potent and long-lasting psychological after-effects than victims of nonsexual

17. See id. at 18.
18. Legislators have been particularly responsive to what has been deemed a sex-crime wave. See infra note 84.
19. See GREENFELD, SEX OFFENSES, supra note 14, at vi.
20. See id. at 14.
21. See id. at 20.
22. See id. at 25.
23. See id. at 26.
24. See id. at 27.
25. See Lieb et al., supra note 2, at 50-51.
26. The United States Department of Justice, defines “violent crimes” as those crimes that “involve force or threat of force. “ U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 11 (1997). The Authors acknowledge that all sex offenses involve coercion on some level; however, the Authors will use the terms nonforcible and nonviolent to refer to those offenses that do not involve physical force.
crimes. Family and friend offenders are more likely to cause severe psychological effects than stranger offenders.27 Sex crimes contain an element of personal invasiveness unlike many other types of crimes, even violent crimes.28 Evolutionary psychologists theorize that sex crimes have more severe consequences because they can compromise the reproductive capabilities of the victims, particularly females because they are most often the victims of such crimes.29

Psychological diagnoses indicate a high number of cases of post-traumatic stress disorder (PTSD) among victims of sex crimes, also referred to as rape trauma syndrome. Such a diagnosis includes symptoms of overarousal, feelings of terror and helplessness, avoidance responses, and intrusive recollections.30 To put this trauma in context, PTSD is a diagnosis often given to war veterans and Holocaust survivors. Studies indicate that approximately 3% of Americans suffer from PTSD.31 Nearly 100% of rape victims show symptoms of PTSD immediately after the offense, and as many as 46% still fulfill the criteria for PTSD three months later.32

Victims are also more prone to depression than victims of other types of crimes. Depression can be a devastating disorder with symptoms such as a depressed mood, loss of pleasure, feelings of despair, low self-esteem, and sleep disturbance. In the general population, depression rates range from 13% to 21%;33 these rates increase dramatically for victims of sex crimes.34 Sexual consequences to victims can also be severe. Victims of sexual offenses are more prone to sexual dysfunction. Child victims are more likely to engage in unusual sexual behaviors such as exhibitionism and fetishism.35

The victims of childhood sexual abuse may be especially prone to mental disorder. Short-term consequences include sexual acting out, fearfulness, poor self-esteem, and PTSD.36 As many as one-third of children show no symptoms, however.37 Childhood sexual abuse has been linked to a number of serious long-

27. See Lieb et al. supra note 2, at 50.
28. See id. at 48.
29. See id. The Authors will refer to sex offenders with the use of male personal pronouns, for ease of reference and because the vast majority of sex offenders in this country are indeed men. The Uniform Crime Reports, compiled each year by the Department of Justice, indicate that 98.7% of rapists are men and only 1.3% are women. See U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 239 (1997). Ninety-one percent of sex offenses other than rape are committed by men whereas only nine percent are committed by women. See id.
32. See Lieb et al., supra note 2, at 49 (citing S. Boney-McCoy & D. Finkelhor, Is Youth Victimization Related to Trauma Symptoms and Depression After Controlling for Prior Symptoms and Family Relationships? (paper presented at the Fourth Int'l Family Violence Research Conference, Durham, New Hampshire (July 1995))).
34. See Lieb et al., supra note 2, at 49.
35. See id.
37. See id. at 417-18.
term psychological dysfunctions, including borderline personality disorder, somatization disorder, dissociative symptoms, chronic pelvic pain, and dissociative identity disorder. Sexual symptoms can range from sexual withdrawal to extreme sexual promiscuity. Sexual victimization can also carry other long-lasting physical and emotional disturbances. Victims can contract a sexually transmitted disease or become pregnant. Rape, for example, can have a significant negative impact on the victim's marriage or on other intimate relationships.

Certainly, the degree of violence and nature of the offense are relevant to the impact on the victim; also likely to exacerbate such psychological effects is the identity of the attacker. These psychological effects may be more severe when the offense occurs within the context of a dating relationship, friendship, marriage, or family role. Elements of incest are particularly devastating. Among children who were sexually abused, as many as 80% of girls and 60% of boys were abused by friends or relatives.

Also noteworthy is the fact that as many as 35% of sex offenders were physically or sexually abused themselves as children; this is more than any other category of criminals. For 90% of sex offenders who were victims as children, their own attacker was someone known to them. Thus, those who have once been abused are more likely to sexually abuse others, a fact that raises the stakes of preventing the cycle of sexual abuse. State action to prevent sex offenses now can also prevent sex offenses a generation from now, and a generation from that, and so on.

Sentiments that sex offender treatment is relatively useless are shared by many. Only 14% of sex offenders in prison are required to receive any kind of psychological treatment as an element of their sentence. This is in comparison to the 4% of violent offenders who are required to obtain treatment. Even among those who receive sex offender treatment, rates of success have been challenged.

III. THE SOLUTION

A. Washington State's Response

Washington was one state unwilling to respond slowly to the perceived threat of sex offender recidivism. Media-hyped cases, such as that of Earl Shriner's mutilation, rape, and attempted murder of a seven-year-old boy, prompted many to

38. See id. at 418.
39. See id.
40. See id. at 426.
41. See Lieb et al., supra note 2, at 50.
42. See id.
43. See GREENFELD, SEX OFFENSES, supra note 14, at 23.
44. See GREENFELD, CHILD VICTIMIZERS, supra note 16, at 7.
45. See GREENFELD, SEX OFFENSES, supra note 14, at 23.
46. See id.
seek an immediate and severe solution. Washington’s Community Protection Act was passed by the legislature to become effective in 1990 as a safeguard against sex offender recidivism. Proponents feel such statutes will serve three important goals: first, provide an important investigative tool in solving new offenses by locating and tracking sex offenders; second, have a deterrent effect; and third, help citizens protect their families.

The registration requirements of the statute are clear. All sex offenders living in the state of Washington are required to register with the county sheriff in the county where they live. The information they must provide includes their name, address, place and date of birth, place of employment, social security number, any aliases, the sex offense for which they were convicted, and the date and place of conviction. The offender must also provide a photograph and a fingerprint sample. This information is then forwarded to the Washington State Patrol by the county sheriff; the State Patrol ensures that the information is updated in the state’s central sex offender registry. Upon changing their residence, each sex offender must notify the county sheriff in writing if remaining in the same county or, if changing counties, register with the county sheriff in the new county within twenty-four hours of the change in residence. In Washington, failing to register in such a manner could expose the offender to either a class C felony or gross misdemeanor charge; the extent of the charge depends on the severity of the underlying offense that initially gave rise to the duty to register.

The most notable provision of the Community Protection Act for the purposes of this Comment is the community notification provision. Washington’s statute grants local law enforcement agencies a wide degree of discretion in determining when to notify, how to notify, and who to notify. This provision permits notification when disclosure of sex offender information is “relevant and necessary to protect the public and counteract the danger created by the particular offender.” Notification generally extends to the area of the sex offender’s residence and employment, or where he can regularly be found. Furthermore, the statute requires all notification to be rationally related to these locations, the needs of the affected community, and the level of risk posed by the offender.

Washington’s power to notify the community about a sex offender is highly dependent on the level of risk posed by the offender. Upon release of a sex offender, local law enforcement agencies consider the risk level classifications given to the offender by the Department of Corrections, Department of Social and Health

51. See id. § 9A.44.130(1).
52. See id. § 9A.44.130(3).
53. See id.
55. See id. § 9A.44.130(5)(a).
56. See id. § 9A.44.130(9).
58. Id. § 4.24.550(1).
59. See id. § 4.24.550(2).
Services, and the Sentence Review Board. The law enforcement agency then assigns its own risk level classification based on all available information: risk level I, II, or III. Risk level I is attributed to offenders who pose the lowest level of risk; in these cases, the scope of notification includes only other law enforcement agencies and, upon request, any victim or witness in the area. Sex offenders who pose a moderate level of risk are assigned to risk level II; notification for these types of offenders extends to schools, day care centers, organizations that primarily serve women, children, or vulnerable adults; community groups; and neighbors, in addition to those notified under risk level I. Offenders with a risk level III classification carry the highest level of risk; law enforcement may therefore notify the public at large, in addition to those notified under risk levels I and II. At all risk levels, notification can include only "relevant, necessary, and accurate information."

Once the risk level and extent of notification is determined by the law enforcement agency, the agency may disseminate the information in the manner deemed most appropriate. The statute requires that law enforcement make a good faith effort to complete notification at least fourteen days prior to the offender's release. This measure is an effort to allow the notified persons or groups time to prepare for the release of the offender. Legislative history indicates an intent to avoid public hysteria: "A sufficient time period allows communities to meet with law enforcement to discuss and prepare for the release, to establish block watches, to obtain information about the rights and responsibilities of the community and the offender, and to provide education and counseling to their children."

Accompanying these notification provisions is the civil immunity provision. The statute provides immunity to all public officials, employees, or agencies in determining discretionary risk level classifications unless there is evidence of gross negligence or bad faith. The discretionary decision of local law enforcement to issue a different risk level classification than that given by the Department of Corrections, Department of Social and Health Services, or the Sentence Review Board is not, by itself, considered gross negligence or bad faith. Immunity is also provided for failure to disclose the information permitted by the notification provision.

The Washington legislature was clear in its intent, stating:

The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. There-

60. See id. § 4.24.550(4).
61. See id. § 4.24.550(3).
62. See id.
63. See id.
64. Id.
65. See id. § 4.24.550(4).
68. See id.
fore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in RCW 9A.44.130.70

Washington's statute was the first of its kind in terms of community notification laws, but it was not the first attempt by states to deal with the unique problems posed by sex offenders. Registration statutes are by no means new. California was the first to require sex offender registration in 1947.71 Another attempt to deal with sex offenders includes civil commitment statutes.72 Furthermore, five states currently permit or require courts to order habitual sex offenders to receive Depo-Provera injections.73 Used as birth control for women, Depo-Provera is a progesterone injection that is believed to inhibit sex drive in men.74 Surgical castration has also been discussed as a viable option in treating sex offenders.75 In addition, many states now have "three-strike" criminal laws for sex offenders with a possible life sentence without parole.76

B. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act

In October of 1989, Jacob Wetterling was a happy eleven-year-old boy living in Minnesota. He was riding his bike home from the video store with his older brother and his best friend at dusk one evening.77 A man with a gun approached the three boys.78 The man told Jacob's older brother and best friend to run into the woods or he would shoot them.79 They did. Jacob did not follow them.80 The

69. See id. § 4.24.550(6).
70. 1990 Wash. Laws ch. 3, § 401 (codified as a note to WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1999)).
72. See infra Part IV.A.1 for a discussion of the Kansas civil commitment statute considered in Kansas v. Hendricks, 521 U.S. 346 (1997). According to the STATE OF MAINE JOINT SELECT COMMITTEE TO IMPLEMENT A PROGRAM FOR THE CONTROL, CARE AND TREATMENT OF SEXUALLY VIOLENT PREDATORS, FINAL REPORT 9-10 (Oct. 15, 1998) (hereinafter FINAL REPORT), there are at least 10 states that have civil commitment statutes: Arizona, California, Florida, Illinois, Iowa, Kansas, Minnesota, New Jersey, Washington, and Wisconsin. See id. at 9. This committee did not recommend civil commitment for Maine, however, citing problems such as: the difficulties in defining the class of persons subject to civil commitment, the problems with predicting dangerousness and conveying that information to a court, the difficulty with designing a treatment paradigm, and the problems—legal and practical—of designing a civil commitment process. See id. at 9-10.
73. The five states are California, Colorado, Florida, Montana, and Texas. See Lieb et al., supra note 2, at 70.
74. See CARSON et al., supra note 31, at 430.
75. See id. at 429-30.
77. See Patty Wetterling, The Jacob Wetterling Story, in Nat'l Conf. on Sex Offender Registries 3 (U.S. Dept. of Justice ed. 1998).
78. See id.
79. See id.
80. See id.
search for Jacob lasted a year and a half. Jacob has never been found, nor has his attacker.81

Jacob would now be a twenty-one-year-old man, but the search for his attacker continues. In October of 1998, on the ninth anniversary of her son's disappearance, Patty Wetterling published a letter in the newspaper. She made a plea to her son's abductor, described Jacob, and disclosed her emotions:

You took away a wonderful person. Someone who probably would have stood up for you if things weren't fair. Did no one do nice things for you?

I have found some comfort picturing you not as a mean old ugly bad guy, but at one time, you were an 11-year-old boy. Someone's son . . . .

. . . .

. . . I wonder, were you ever like Jacob? Did you also love peanut butter? Did you sneeze when you looked at the sun? . . . . Jacob is not just a kid on a poster.

. . . All I'm asking for is your response, a call to allow me and all the people whose lives Jacob touched to find peace and a sense of calm that disappeared that night in 1989. . . . You have held the answers for so long. . . . Please talk to me.82

Fifteen new leads on the Wetterling disappearance were generated from the publication of this letter in a few newspapers and on the Internet.83 Yet Jacob remains unfound.

A November 20, 1993 United States House of Representatives Report from the Committee on the Judiciary described the extent of the problem that faces children in this country in the following passage:

Unfortunately, Jacob's fate is not that uncommon in the United States. Each year, the Department of Justice estimates there are approximately 114,000 non-family attempted child abductions. While most attempts are unsuccessful, as many as 4,600 children like Jacob disappear each year.

Two-thirds of the cases of non-family child abduction reported to police involve sexual assault. Like rape, child molestation is one of the most underreported crimes, with no more than ten percent ever disclosed.

Evidence suggests that child sex offenders are generally serial offenders. Indeed, one recent study concluded the "behavior is highly repetitive, to the point of compulsion," and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child.84

81. See id. at 4.

Senator Durenberger also provided some statistics on child abuse and abductions in a statement on the floor of the Senate:

The reasons for enacting this legislation on the national level are clear: sexual crimes against children are widespread; the people who commit these offenses repeat
The above House Report was taken from the legislative history of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. The Wetterling Act was enacted on September 13, 1994, as part of the

their crimes again and again; and local law enforcement officials need access to an interstate system of information to prevent and respond to these horrible crimes against children.

If there is any doubt about the seriousness of the problem, consider the following statistics, provided to me by the National Center for Missing and Exploited Children: ChildHelp USA estimates that 1 in 3 girls and 1 in 6 boys will be sexually abused or victimized before the age 18. More than half—54 percent—of sexually abused children are victimized before age 7, and 84 percent are younger than 12 years old. Of the 2.4 million reported cases of child abuse in 1989, 380,000 involved sexual abuse. Two-thirds of reported nonfamily child abductions involved sexual assault. According to the FBI Law Enforcement Bulletin, child molestation is one of the most underreported crimes—only one to 10 percent of these crimes are ever disclosed.

The widespread tragedy of sexual abuse and molestation of children is compounded by the fact that child sex offenders are serial offenders. A National Institute of Mental Health study found that the typical offender molests an average of 117 children, most of whom do not report the offense. Those who attack young boys molest an average of 281. A study of imprisoned offenders found that 74 percent had one or more prior convictions for a sexual offense against a child.

The behavior of child sex offenders is repetitive to the point of compulsion. In fact, one State prison psychologist has observed that sex offenders against children have the same personality characteristics as serial killers.

Sex offenders against children are not only repeat offenders, but they are also dangerous and violent. The Justice Department has reported that over 85 percent of nonfamily abductions involved force and over 75 percent involved a weapon. Of the homicides that occur from stranger abductions, almost 40 percent involved rape or another sexual offense, and those are only the cases in which the circumstances were known.


Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act Program

(a) In general

(1) State guidelines—The Attorney General shall establish guidelines for State programs that require—

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency for the time period specified in subparagraph (A) of subsection (b)(6); and

(B) a person who is a sexually violent predator to register a current address with a designated State law enforcement agency unless such requirement is terminated under subparagraph (B) of subsection (b)(6).

(2) Court Determination—A determination that a person is a sexually violent predator and a determination that a person is no longer a sexually violent predator shall be made by the sentencing court after receiving a report by a State board composed of experts in the field of the behavior and treatment of sexual offenders.

(3) Definitions—For purposes of this section:

(A) The term "criminal offense against a victim who is a minor" means any criminal offense that consists of—
(i) kidnapping of a minor, except by a parent;
(ii) false imprisonment of a minor, except by a parent;
(iii) criminal sexual conduct toward a minor;
(iv) solicitation of a minor to engage in sexual conduct;
(v) use of a minor in a sexual performance;
(vi) solicitation of a minor to practice prostitution;
(vii) any conduct that by its nature is a sexual offense against a minor; or
(viii) an attempt to commit an offense described in any of clauses (i) through
(vii), if the State—
(I) makes such an attempt a criminal offense; and
(II) chooses to include such an offense in those which are criminal offenses against
a victim who is a minor for the purposes of this section.

For purposes of this subparagraph conduct which is criminal only because of the
age of the victim shall not be considered a criminal offense if the perpetrator is 18
years of age or younger.

(B) The term "sexually violent offense" means any criminal offense that con-
ists of aggravated sexual abuse or sexual abuse (as described in sections 2241 and
2242 of title 18, United States Code, or as described in the State criminal code) or an
offense that has as its elements engaging in physical contact with another person with
intent to commit aggravated sexual abuse or sexual abuse (as described in such sec-
tions of title 18, United States Code, or as described in the State criminal code).

(C) The term "sexually violent predator" means a person who has been con-
victed of a sexually violent offense and who suffers from a mental abnormality or
personality disorder that makes the person likely to engage in predatory sexually vi-
olent offenses.

(D) The term "mental abnormality" means a congenital or acquired condition of
a person that affects the emotional or volitional capacity of the person in a manner
that predisposes that person to the commission of criminal sexual acts to a degree that
makes the person a menace to the health and safety of other persons.

(E) The term "predatory" means an act directed at a stranger, or a person with
whom a relationship has been established or promoted for the primary purpose of
victimization.

(b) Registration requirement upon release, parole, supervised release, or proba-
tion.—An approved State registration program established under this section shall
contain the following elements:

(1) Duty of state prison official or court.—
(A) If a person who is required to register under this section is released from
prison, or placed on parole, supervised release, or probation, a State prison officer, or
in the case of probation, the court, shall—

(i) inform the person of the duty to register and obtain the information required
for such registration;

(ii) inform the person that if the person changes residence address, the person
shall give the new address to a designated State law enforcement agency in writing
within 10 days;

(iii) inform the person that if the person changes residence to another State, the
person shall register the new address with the law enforcement agency with whom the
person last registered, and the person is also required to register with a designated law
enforcement agency in the new State not later than 10 days after establishing resi-
dence in the new State, if the new State has a registration requirement;

(iv) obtain fingerprints and a photograph of the person if these have not already
been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person
to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to
register under subparagraph (B) of subsection (a)(1), the State prison officer or the
court, as the case may be, shall obtain the name of the person, identifying factors,
anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and the FBI.—

The officer, or in the case of a person placed on probation, the court, shall, within 3 days after receipt of information described in paragraph (1), forward it to a designated State law enforcement agency. The State law enforcement agency shall immediately enter the information into the appropriate State law enforcement record system and notify the appropriate law enforcement agency having jurisdiction where the person expects to reside. The State law enforcement agency shall also immediately transmit the conviction data and fingerprints to the Federal Bureau of Investigation.

(3) Verification .

(A) For a person required to register under subparagraph (A) of subsection (a)(1), on each anniversary of the person's initial registration date during the period in which the person is required to register under this section the following applies:

(i) The designated State law enforcement agency shall mail a nonforwardable verification form to the last reported address of the person.

(ii) The person shall mail the verification form to the designated State law enforcement agency within 10 days after receipt of the form.

(iii) The verification form shall be signed by the person, and state that the person still resides at the address last reported to the designated State law enforcement agency.

(iv) If the person fails to mail the verification form to the designated State law enforcement agency within 10 days after receipt of the form, the person shall be in violation of this section unless the person proves that the person has not changed the residence address.

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1), except that such person must verify the registration every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address.—A change of address by a person required to register under this section reported to the designated State law enforcement agency shall be immediately reported to the appropriate law enforcement agency having jurisdiction where the person is residing. The designated law enforcement agency shall, if the person changes residence to another State, notify the law enforcement agency with which the person must register in the new State, if the new State has a registration requirement.

(5) Registration for change of address to another State.—A person who has been convicted of an offense which requires registration under this section shall register the new address with a designated law enforcement agency in another State to which the person moves not later than 10 days after such person establishes residence in the new State, if the new State has a registration requirement.

(6) Length of registration.—

(A) A person required to register under subparagraph (A) of subsection (a)(1) shall continue to comply with this section until 10 years have elapsed since the person was released from prison, placed on parole, supervised release, or probation.

(B) The requirement of a person to register under subparagraph (B) of subsection (a)(1) shall terminate upon a determination, made in accordance with paragraph (2) of subsection (a), that the person no longer suffers from a mental abnormality of personality disorder that would make the person likely to engage in a predatory sexually violent offense.

(c) Penalty.—A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed.

(d) Release of information.—The information collected under a State registration program shall be treated as private data except that—

(1) such information may be disclosed to law enforcement agencies for law enforcement purposes;
Violent Crime Control and Law Enforcement Act of 1994. The purpose in enacting the Wetterling Act was to provide an incentive for states to enact laws that required convicted sex offenders to register with state agencies upon their release from prison, probation, parole, or other supervised release programs. States that fail to enact such registration laws can be denied up to ten percent of their allocated funds under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968. Under the Wetterling Act, states had three years from September 13, 1994, to enact their own sex offender registration laws. The Act applies to individuals who are "convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" and persons who are "sexually violent predators." The term "sexually violent predator" refers to a person convicted of a "sexually violent offense" that also "suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexu-
ally violent offenses."\textsuperscript{90} The underlying criminal offenses that trigger the Wetterling Act include: kidnapping, false imprisonment, criminal sexual conduct, solicitation, use of a minor in a sexual performance, and the catch-all "any conduct that by its nature is a sexual offense against a minor."\textsuperscript{91} The definition of sex offender under the Wetterling Act is therefore much broader than under the SORNA, and it is doubtful that the SORNA complies with the Wetterling Act.\textsuperscript{92} The changes to the registration law wrought by the SORNA '99, however, likely bring the Maine registration provisions within the Wetterling Act's mandate.\textsuperscript{93}

The original version of the Wetterling Act did not include a notification provision.\textsuperscript{94} The Act was initially offered as an effort to register convicted sex offenders, and release of information was only authorized to law enforcement officials.\textsuperscript{95} The committee report stated that both state and federal governments had a legitimate purpose in protecting children from violence, and that "[c]ourts have found that registration requirements do not violate the eighth amendment, and do not violate the due process clause, the equal protection clause, or the constitutional rights to privacy or travel."\textsuperscript{96} Senator Durenberger pointed out that the proposed legislation required a choice between two interests:

One of those interests is the interest in protecting children from sexual abuse and exploitation. The other interest is the inconvenience to convicted child sex offenders who would be required to register an address with law enforcement officials once a year and each time they move.

Mr. President, for this Senator, there are no competing issues to debate. If a registration requirement for convicted sex offenders will assist law enforcement authorities in one criminal apprehension, or if it will deter a single kidnapping, I believe it is worth implementing.\textsuperscript{97}

\textsuperscript{90} Id. § 170101, 108 Stat. at 2039.

(D) The term "mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(E) The term "predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

\textsuperscript{91} Id. To come within the Act, the victim of these offenses has to be a minor. See id.


\textsuperscript{95} See id. at 7 ("The information collected under a State registration program must be treated as private data on individuals and can only be disclosed to law enforcement agencies for investigative purposes or to government agencies conducting confidential background checks with fingerprints on applicants for positions involving contact with children."). See also 137 Cong. Rec. S6703 (daily ed. May 23, 1991) (statement of Sen. Durenberger); 139 Cong. Rec. S6864-65 (daily ed. May 28, 1993) (statement of Sen. Durenberger); 139 Cong. Rec. H10319-20 (daily ed. Nov. 20, 1993) (clerk's reading of the bill).


The notification provisions of sex offender laws, however, are generally the more contested issue, and the final draft of the Wetterling Act included a provision that allowed the release of “relevant” registration information to the public.\textsuperscript{98}

If the notification provision was not included in the original House version of the legislation, how—and perhaps more important, why—did it get included? Senator Groton from Washington introduced the notification provision as an amendment to the Senate version of the crime bill called the Sexually Violent Predators Act.\textsuperscript{99} Senator Groton declared that the purpose of the amendment was to “encourage States to establish registration and tracking procedures and community notification with respect to released sexually violent predators.”\textsuperscript{100} Senator Groton compared his amendment to the House version of the Wetterling Act but pointed out the addition of the community notification provision, and said the amendment was “modeled in part after the Washington State law.”\textsuperscript{101} The amendment also contained a provision immunizing law enforcement personnel from liability for good faith conduct.\textsuperscript{102} Senator Groton observed that law enforcement officials often had failed to warn communities about released sex offenders in the past, in part, due to a fear of liability for their actions.\textsuperscript{103}

\textsuperscript{98} Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2041-42 (1994) (codified as amended at 42 U.S.C. § 14071 (1994 & Supp. II 1996)). Even commentators that are generally opposed to the notification requirements concede that the registration requirements are constitutional. See, e.g., 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 (1996) (arguing that the Jacob Wetterling Act is unconstitutional, but conceding the validity of the registration provisions). In addition, there are several cases where a court has either (1) ruled that the registration provisions are constitutional without ruling on notification, or (2) ruled that the registration provisions are constitutional and that all or some of the notification provisions are unconstitutional. See, e.g., Artway v. Attorney General of New Jersey, 81 F.3d 1235 (3d Cir.), reh’g denied, 83 F.3d 594 (3d Cir. 1996) (holding that registration is constitutionally permissible but declining to rule on notification provisions); Roe v. Farwell, 999 F. Supp. 174 (D. Mass. 1998) (enjoining enforcement of particular notification provisions against appellant but upholding registration provisions); State v. Costello, 643 A.2d 531 (N.H. 1994) (upholding registration provisions).

\textsuperscript{99} See 139 Cong. Rec. S15310 (daily ed. Nov. 8, 1993) (statement of Sen. Groton). The notification provision was included under the heading “Community Notification,” and read, “The designated State law enforcement agency may release relevant information that is necessary to protect the public concerning a specific sexually violent predator required to register under this section.” Id. at S15311.

\textsuperscript{100} Id.

\textsuperscript{101} Id. “Washington State leads the Nation in coping with this small group of criminals who terrorize playgrounds, parks, and neighborhoods, preying on the most vulnerable in society.” Id.

\textsuperscript{102} See id.

\textsuperscript{103} See id. The Senator went on to say that Washington also provided for “post-incarceration indefinite civil commitment” for violent sex offenders, and the Washington Supreme Court had recently upheld that statute. Id. He added that a similar civil commitment provision was contemplated for the federal legislation but that it had been removed because a number of senators were “troubled” by it. Id.
Billings and Bulges: Sex Offender Registration and Notification Act

C. The Maine Statute: Sex Offender Registration and Notification Act

1. Prior Maine Law

Prior to the enactment of the SORNA, Maine already had two laws on the books dealing with sex offender registration and access to information regarding criminal convictions.\(^{104}\) In 1991, the Maine Legislature enacted the Sex Offender Registration Act, which requires all sex offenders to register with the Department of Public Safety, State Bureau of Identification (SBI).\(^{105}\) Sex offenders are required to register their names and addresses with the SBI within fifteen days after discharge from a correctional facility and to keep their addresses current for a period of fifteen years from their date of discharge.\(^{106}\) The registration provision applies to all sex offenders unless there is a “waiver.”\(^{107}\) A waiver can be granted where the conviction is vacated, a pardon is given, or the superior court waives registration—either upon petition by the sex offender or on its own initiative for “good cause.”\(^{108}\) No petition is allowed, however, until at least five years have passed since the sex offender was first required to register; furthermore, a sex offender is allowed to petition the court only once a year.\(^{109}\) Maine’s other prior law of interest in this field is the Criminal History Record Information Act which explicitly allows public access to criminal records.\(^{110}\) Under the Criminal History Record Information Act, conviction data can be supplied to any person for a wide variety of purposes.\(^{111}\) When the Maine Legislature passed the Sex Offender Registration Act, it explicitly noted that the Criminal History Record Information Act


\(^{106}\) See id.

\(^{107}\) See id.

\(^{108}\) Id.

\(^{109}\) See id. The petitioner has to show the court that there is a “reasonable likelihood” that registration is no longer needed for that particular individual. Id. Although the statute does not define “reasonable likelihood,” that term is thought to embody a standard less than the civil standard of preponderance, such as a “probability or a substantial possibility.” Letter from Charles K. Leadbetter, Assistant Attorney General, to the Joint Committee on Criminal Justice 10 (on file with the Maine Law Review). Likewise, the term “good cause” is not defined by the statute, but in context was taken to mean that the sex offender would have to show that registration was not necessary. Id. at 11. The Assistant Attorney General also presumed that the court’s ruling on a waiver would be reviewable for abuse of discretion, and that there would be no right to court appointed counsel at a waiver hearing, but that a sex offender that had obtained counsel would be entitled to representation. See id.


\(^{111}\) See id. § 615. The Criminal History Record Information Act specifically sets forth what is “conviction data” and what is “nonconviction data.” Id. § 611. The statute further states:

“Criminal history record information” means notations or other written evidence of an arrest, detention, complaint, indictment, information or other formal criminal charge relating to an identifiable person. It shall include the identification or description of the person charged and any disposition of the charge. The term does not include identification information such as fingerprints, palm prints or photographic records to the extent that the information does not indicate involvement of the individual in the criminal justice system. The term does not include records of civil violations.

Id. § 611(3).
governs access to information recorded under the Sex Offender Registration Act.112
Therefore, even before the enactment of the SORNA, the two prior Maine laws worked together to allow members of the public that were concerned about a particular individual in their community to determine whether that individual had a criminal sex offense history. Neither the Criminal History Record Information Act nor the Sex Offender Registration Act, however, has community notification provisions.

2. The Maine Sex Offender Registration and Notification Act113

The SORNA applies to all sex offenders who are sentenced or placed in insti-

113. The text of the statute follows:
§ 11101. Short title
This chapter may be known and cited as the “Sex Offender Registration and Notification Act.” The purpose of this chapter is to protect the public safety by enhancing access to information concerning sex offenders.
§ 11102. Application
This chapter applies to all sex offenders sentenced or placed in institutional confinement under Title 15, section 103 on or after September 1, 1996.
§ 11103. Definitions
As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.
1. Conditional release. “Conditional release” means supervised release of a sex offender from institutional confinement for placement on probation, parole, intensive supervision, supervised community confinement, home release monitoring or release under Title 15, section 104-A.
2. Discharge. “Discharge” means unconditional release and discharge of a sex offender from institutional confinement upon the expiration of a sentence or upon discharge under Title 15, section 104-A.
3. Law enforcement agency. “Law enforcement agency” means the State Police, a municipal police department or a county sheriff’s department.
4. Risk assessment instrument. “Risk assessment instrument” means an instrument created and modified as necessary by reviewing and analyzing precursors to a sex offense, victim populations of a sex offender, living conditions and environment of a sex offender and other factors predisposing a person to become a sex offender or to become a repeat sex offender, used for the ongoing purpose of identifying risk factors used to provide notification of a sex offender’s conditional release or discharge from a state correctional facility to law enforcement agencies and to the public.
5. Sex offender. “Sex offender” means an individual convicted of gross sexual assault if the victim had not in fact attained 16 years of age at the time of the crime or an individual found not criminally responsible for committing gross sexual assault by reason of mental disease or defect if the victim had not in fact attained 16 years of age at the time of the crime.
§ 11104. Access to records
Sex offender registration information under section 11142, subsection 1 in the possession or custody of the Department of Public Safety, State Bureau of Identification or any other criminal justice agency is criminal history record information, and its dissemination is governed by Title 16, chapter 3, subchapter VIII.
§ 11105. Liability
Neither the failure to perform the requirements of this chapter nor compliance with this chapter subjects the commissioner, the department, the Commissioner of Public Safety, the Department of Public Safety, the county jail, any other law enforcement
agency or the Commissioner of Mental Health and Mental Retardation or a state mental health institute or the employees or officers of the commissioner, the department, the Commissioner of Public Safety, the Department of Public Safety, the county jail, any other law enforcement agency, the Commissioner of Mental Health and Mental Retardation or the state mental health institute to liability in a civil action.

§ 11121. Registration of sex offenders
1. Notice of duty to register. The department, the state mental health institute or the county jail that has custody of a sex offender required to register under this subchapter shall inform the sex offender, prior to discharge or conditional release, of the duty to register. If no period of institutional confinement is to be served, the court shall inform the sex offender at the time of sentencing of the duty to register under this subchapter.

2. Duty to register. At least 15 days before discharge or conditional release from a state correctional facility, a state mental health institute or a county jail, a sex offender shall register that person's intended address after conditional release or discharge with the Department of Public Safety, State Bureau of Identification or, if no period of institutional confinement is to be served, a sex offender shall register that person's intended address within 5 calendar days of sentencing.

This registration requirement remains in effect for 15 years from the date of:
A. Sentencing if no period of institutional confinement is to be served; or
B. Discharge or conditional release from a state correctional facility, a state mental health institute or a county jail.

If a sex offender on conditional release violates a condition of that release and is returned to institutional confinement, the sex offender's duty to register terminates. The registration requirement begins again and remains in effect for 15 years from the date of the sex offender's new conditional release or discharge.

3. Change of address. If a sex offender required to register under this subchapter changes address, that person shall register the new address with the Department of Public Safety, State Bureau of Identification at least 5 days before moving to the new address.

4. When address unknown. If a sex offender required to register under this subchapter does not have an intended address in time to comply with the notification requirements in subsections 2 and 3, the sex offender shall provide, at the time of registration, to the Department of Public Safety, State Bureau of Identification the intended municipality of residence and shall provide an address as soon as it becomes known.

5. Duties of the State Bureau of Identification. Upon receiving notice of a sex offender's conditional release or discharge and the sex offender's address or change in address, the Department of Public Safety, State Bureau of Identification shall notify all law enforcement agencies having jurisdiction in the municipality where a sex offender registers an address.

6. Waiver of registration. Registration may be waived only if:
A. The conviction is vacated;
B. A full and free pardon is granted;
C. The Superior Court, upon the petition of the sex offender, waives the registration requirement.

A sex offender may not petition for waiver of the registration requirement until at least 5 years after the sex offender is first required to register.

A sex offender may petition once a year for waiver of the registration requirement. Before waiving the registration requirement, the court must determine that the sex offender has shown a reasonable likelihood that registration is no longer necessary and waiver of the registration requirement is appropriate. The court shall consider the sex offender's progress in treatment and may request an independent forensic evaluation provided through the State Forensic Service. If the court orders an independent forensic evaluation, the court shall reimburse the State Forensic Service for the cost of the evaluation and order the sex offender to reimburse the court for the cost of the evaluation; or
D. The sentencing court, for good cause shown, waives the registration requirement.

7. Violation. A sex offender who fails to register or update the information required under this section commits a Class D crime, except that a violation of this section when the sex offender has 2 or more prior Maine convictions for violations of this section or 2 or more prior Maine convictions for violations of section 11003 is a Class C crime. For purposes of this subsection, the dates of both of the prior convictions must precede the commission of the offense being enhanced by no more than 10 years, although both prior convictions may have occurred on the same day. The date of the conviction is deemed to be the date that sentence is imposed, even though an appeal was taken. The date of a commission of a prior offense is presumed to be that stated in the complaint, information or indictment, notwithstanding the use of the words "on or about" or the equivalent. It is an affirmative defense that the failure to register or update information resulted from just cause.

§ 11141. Risk assessment
The department shall establish and apply a risk assessment instrument to each sex offender under its jurisdiction for the purpose of notification to law enforcement agencies and to the public.

§ 11142. Mandatory notification of conditional release or discharge of sex offenders
The department and the Department of Public Safety, State Bureau of Identification are governed by the following notice provisions when a sex offender is conditionally released or discharged.

1. Duties of the department. The department shall give the Department of Public Safety, State Bureau of Identification notice of the following:
   A. The address where the sex offender will reside;
   B. The address where the sex offender will work, if applicable;
   C. The geographic area to which a sex offender’s conditional release is limited, if any; and
   D. The status of the sex offender when released as determined by the risk assessment instrument, the offender’s risk assessment score, a copy of the risk assessment instrument and applicable contact standards for the offender.

2. Duties of the Department of Public Safety, State Bureau of Identification. Upon receipt of the information concerning the conditional release or discharge of a sex offender pursuant to subsection 1, the Department of Public Safety, State Bureau of Identification shall forward the information in subsection 1 to all law enforcement agencies that have jurisdiction in those areas where the sex offender may reside or work.

§ 11143. Public notification
1. Department. Upon the conditional release or discharge of a sex offender from a state correctional institution, the department shall give notice of the information under section 11142, subsection 1 to members of the public who the department determines appropriate to ensure public safety.

2. Law enforcement agencies. Upon receipt of the information concerning the conditional release or discharge of a sex offender pursuant to section 11142, subsection 2, a law enforcement agency shall notify members of that municipality who the law enforcement agency determines appropriate to ensure public safety.

§ 11144. Risk assessment assistance
Upon request, the department shall provide to law enforcement agencies technical assistance concerning risk assessment for purposes of notification to the public of a sex offender’s conditional release or discharge.


114. See id. § 11102. Statutes are presumed to be prospective and not retroactive unless the legislature shows a clearly contrary intent. See Terry v. St. Regis Paper Co., 459 A.2d 1106, 1109 (Me. 1983). See infra Part III.C.4 for a discussion of the definition of “sex offender” under the SORNA.
intended address with the SBI at least fifteen days before discharge from a state correctional facility, county jail, or mental health institute. The sex offender is informed of his duty to register by the Department of Corrections (DOC), the state mental health institute, or the county jail that has custody over him. The duty to register remains in effect for fifteen years from the date of discharge; if the sex offender changes addresses during that period, he must then notify the SBI of the move at least five days prior to moving to the new address. If a sex offender has no address at the time of discharge, however, he must provide the SBI with the name of the town in which he will reside, and must provide the address as soon as it becomes known. The SBI is then required to notify all law enforcement agencies having jurisdiction in the town in which the sex offender will reside. The registration provision applies to all sex offenders as defined in the SORNA unless there is a waiver. The waiver provision under the SORNA is identical to that under the Sex Offender Registration Act. Under the SORNA, a sex offender who violates the registration requirement commits a Class D crime. It is possible to upgrade such a violation to a Class C crime if the sex offender has multiple violations of the registration requirement.

Subchapter III of the SORNA sets forth the notification provisions. Under the SORNA, notification of law enforcement agencies by the SBI is mandatory. The DOC must notify the SBI whenever a sex offender is about to be discharged and must provide the SBI with the sex offender's residential address, the address where the sex offender will work, and the sex offender's "status" as determined by a "risk assessment instrument." The risk assessment instrument, a tool mandated by the SORNA, was developed by the DOC and the state forensic service to

115. See Me. Rev. Stat. Ann. tit. 34-A, § 11121(2). The SORNA also applies to individuals that received no period of confinement; these individuals must register within five days of sentencing. See id.

116. See id. § 11121(1). If no period of confinement is imposed, then the court shall inform the sex offender of his duty to register. See id.

117. See id. § 11121(2). However, if no period of confinement is imposed, then the 15-year period runs from sentencing. See id. Also, the sex offender's duty to register terminates if he is incarcerated again during that 15-year period, and a new 15-year clock begins to run at the subsequent release date. See id. See also Me. Rev. Stat. Ann. tit 34-A, § 11103(2) (defining discharge).

118. See id. § 11121(3).

119. See id. § 11121(4).

120. See id. § 11121(5).

121. See id. § 11121(6).

122. See id. See supra Part III.C.1. The waiver may be granted where the conviction is vacated, a pardon is given, or the superior court waives registration—either upon petition by the sex offender or of its own initiative for "good cause." See id. No petition is allowed, however, until at least five years have passed since the sex offender was first required to register, and a sex offender is only allowed to petition the court once a year. See id. The primary factor to be considered by the superior court in determining whether to waive the registration requirement is the sex offender's progress in treatment. See id. The court may order an independent forensic evaluation of the sex offender to determine whether registration is no longer necessary. See id.

123. See id. § 11121(7). Under Maine law, a Class C crime is a felony and is punishable by up to five years imprisonment; a Class D crime is a misdemeanor punishable by a term of less than one year. See Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West 1983 & Supp. 1998).


125. Id. The DOC must also inform the SBI of any geographic limitations on a sex offender's conditional release. See id.
predict the future dangerousness or likelihood of recidivism of released sex offenders. The DOC, if requested, must provide law enforcement agencies with "technical assistance concerning risk assessment" for the purposes of determining when and to what extent the general public should be notified of a particular sex offender's release. Under the SORNA, community notification—or notification of the general public—is discretionary: it is a matter primarily for local police officials to determine at their discretion. The SORNA does allow the DOC to disseminate information to the general public where "appropriate to ensure public safety," but the DOC generally leaves community notification to the local police. The SORNA includes a provision that immunizes law enforcement agencies and their employees from civil liability for either compliance with the Act or failure to perform the requirements of the Act. The SORNA also allows the registration information collected under the Act to be accessed under the Criminal History Record Information Act.

3. Legislative History of the SORNA

The SORNA was the result of five drafts by the Joint Standing Committee on Criminal Justice. Initially, the SORNA was not part of Legislative Document 1510 (L.D. 1510), which was a senate bill "to make comprehensive changes to the sex offender laws," but was instead added as a committee amendment. Legislative Document 1510 had a variety of proposals to address the plight of sexual assault victims and deal with sex offenders, including: strengthening victims' rights provisions, providing for counseling for offenders, requiring offenders to compensate victims for counseling costs for amounts up to 50% of an offender's wages, education and prevention of sexual abuse, and changes in Maine's existing Registration Act. The committee held public hearings, and a wide range of individual members of the public and organizations either appeared and testified or submitted their opinions in writing, including the Maine Civil Liberties Union, Maine Pretrial Services, the Maine Council of Churches, DOC officials, representatives from the Cumberland County District Attorney's Office, and social workers and counselors. Discussions of this issue elicit a lot of emotion, but, unfor-

126. See id. §§ 11103(4), 11141, 11144. See supra Part II.A. for a discussion of recidivism rates among sex offenders; see infra Part III.C.5. for an analysis of the risk assessment instrument.


128. See id. § 11143 ("[A] law enforcement agency shall notify members of that municipality who the law enforcement agency determines appropriate to ensure public safety.").

129. Id.; see also Interview with David Edwards, Sex Offender Management Specialist for the DOC, in Portland, Maine (Feb. 12, 1999) (on file with the Maine Law Review) [hereinafter Edwards Interview].


131. See id. §11104.


133. See L.D. 1510 (117th Legis. 1995).

134. See id.

135. See L.D. 1510 Master File, supra note 132. Also contained in the materials submitted to the committee was a letter written by an anonymous woman who identified herself as the mother of a man convicted of a sex offense who was himself the victim of sexual molestation, along
fortunately, there is no way of telling which particular arguments persuaded the committee members because there are no public records of the committee’s deliberations.

Committee amendment “A” added the notification provisions of the SORNA to L.D. 1510 under a separate chapter—Chapter 13—to title 34-A of the Maine Revised Statutes. According to the Statement of Fact that accompanied committee amendment “A,” the legislature intended the registration and notification provisions to “protect the public safety by enhancing access to information concerning sex offenders.” Prior to the amendment, there was speculation that any bill coming out of the committee would receive a split recommendation and that there would be a protracted floor debate between two primary camps. One camp, led by legislators and citizen groups, sought mandatory public notification by the police department any time a convicted sex offender was released into a community. The other viewpoint shared by then DOC Commissioner Joseph Lehman, the Maine Civil Liberties Union, and most of the committee members, was that notification should be largely discretionary depending on the level of risk posed by a sex offender. Committee amendment “A” was heralded as a workable solution in the press, and the Criminal Justice Committee unanimously voted 13-0 that Legislative Document 1510 ought to pass as amended. The committee recommendation was accepted without debate in the house by a vote of 112-0, and the bill also flew through the senate without debate.

4. Definitions

Under the SORNA, a “sex offender” is an individual who has been convicted of gross sexual assault where the victim is under sixteen years old. The term also applies to individuals who are found not criminally responsible for gross sexual assault by reason of mental disease or defect where the victim was under sixteen. Under Maine law, gross sexual assault results when an individual en-

137. Id. at 17. According to the Maine Supreme Judicial Court sitting as the Law Court in State v. Adams, 457 A.2d 416 (Me. 1983), the Statement of Fact from a Legislative Document “is ‘a proper and compelling aid to ascertaining the legislative purpose and intent’ of the law when enacted.” Id. at 420 n.2 (quoting Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 223 (Me. 1981)).
142. See ME. REV. STAT. ANN. tit. 34-A, § 11103(5).
gages in a "sexual act" with another person and the other person submits due to compulsion or is under fourteen.143 Gross sexual assault also includes situations where an individual engages in a sexual act with another person and the actor has substantially impaired the other person’s capacity for judgment or control through the use of drugs or other intoxicants; where the actor compels the sexual act by threat; where the other person suffers from mental disability or is unconscious or otherwise incapable of consent; where the other person is detained in a prison, hospital, or other institution and the actor has supervisory or disciplinary authority over the other person; where the other person is in school and under eighteen and the actor is in a position of authority; where the other person is under eighteen and the actor is a parent or guardian; or where the actor is a psychologist or psychiatrist and the other person is a patient.144

In June of 1999, the Maine Legislature again weighed in on sex offender registration and notification, and passed the SORNA ‘99.145 The changes are notable

143. See Me. Rev. Stat. Ann. tit. 17-A, § 253(1). Maine law provides a distinction between a “sexual act” and “sexual contact.” The relevant statutes provide:
  § 251. Definitions and general provisions
  ...  
  C. “Sexual act” means:
  (1) Any act between 2 persons involving direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other;
  (2) Any act between a person and an animal being used by another person which act involves direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other;
  (3) Any act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.
  A sexual act may be proved without allegation or proof of penetration.
  D. “Sexual contact” means any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.
  144. See Me. Rev. Stat. Ann. tit. 17-A, § 253(2) (West 1983 & Supp. 1998). Thus, an individual who forces a 17-year-old into a sexual act is not covered by the SORNA, and an individual who has unlawful sexual contact with a five-year-old is also not covered by the SORNA—so long as the sexual contact does not constitute a sexual act under Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(C) (West Supp. 1998). See supra note 143 and Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(D) (West Supp. 1998) (defining "sexual contact" as any touching of the genitals or anus for the purpose of arousing or gratifying desire “other than as would constitute a sexual act”). Conversely, if an individual commits a sexual act with a 13-year-old prostitute who consents and charges the individual a fee, the SORNA would apply, and that individual, unlike the individuals in the above examples would—if convicted of gross sexual assault—have to comply with the provisions of the SORNA.
  Sex Offender Registration and Notification Act of 1999
  Subchapter I
  General Provisions
§ 11201. Short title
This chapter may be known and cited as the "Sex Offender Registration and Notification Act of 1999."  
§ 11202. Application
This chapter applies to a person sentenced as a sex offender or a sexually violent predator on or after the effective date of this chapter.
§ 11203. Definitions
As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.
2. Domicile. "Domicile" means the place where a person lives, resides or dwells.
3. FBI. "FBI" means the Federal Bureau of Investigation.
4. Law enforcement agency having jurisdiction. "Law enforcement agency having jurisdiction" means the chief of police in the municipality where a sex offender expects to be or is domiciled. If the municipality does not have a chief of police, "law enforcement agency having jurisdiction" means the sheriff of the county where the municipality is located. "Law enforcement agency having jurisdiction" also means the sheriff of the county in an unorganized territory.
5. Sex offender. "Sex offender" means a person who is an adult convicted or a juvenile convicted as an adult of a sex offense.
6. Sex offense. "Sex offense" means a conviction for one of the following offenses or for an attempt or solicitation of one of the following offenses if the victim was less than 18 years of age at the time of the criminal conduct:
A. A violation under Title 17, section 2922;
B. A violation under Title 17-A, section 253, subsection 2, paragraph E, F, G, H, I or J; Title 17-A, section 254; Title 17-A, section 255, subsection 1, paragraph A, E, F, G, I or J; Title 17-A, section 256; Title 17-A, section 258; Title 17-A, section 301, unless the actor is a parent of the victim; Title 17-A, section 302; Title 17-A, section 511, subsection 1, paragraph D; Title 17-A, section 556; Title 17-A, section 852, subsection 1, paragraph B; or Title 17-A, section 855; or
C. A violation of an offense [sic] in another jurisdiction, including, but not limited to, a state, federal, military or tribal court, that includes the essential elements of an offense listed in paragraph A or B.
7. Sexually violent offense. "Sexually violent offense" means:
A. A conviction for or an attempt to commit an offense under Title 17-A, section 253, subsection 1; Title 17-A, section 253, subsection 2, paragraph A, B, C, or D; or Title 17-A, section 255, subsection 1, paragraph B, D, or H; or
B. A conviction for or an attempt to commit an offense of the law in another jurisdiction, including, but not limited to, a state, federal, military or tribal court, that includes the essential elements of an offense listed in paragraph A.
8. Sexually violent predator. "Sexually violent predator" means a person who is an adult convicted or a juvenile convicted as an adult of a:
A. Sexually violent offense; or
B. Sex offense when the person has a prior conviction for which registration is required by this chapter.

Subchapter II
Sex Offender Registration
§ 11221. Maintenance of sex offender registry
1. Maintenance of registry. The bureau shall establish and maintain a registry of persons required to register pursuant to this subchapter. The registry must include the following information on each registrant:
A. The sex offender's or sexually violent predator's name, aliases, date of birth, sex, race, height, weight, eye color, mailing address, home address or expected domicile;
B. Place of employment or college or school being attended and the corresponding address and location;
C. Offense history;
D. Notation of any treatment received for a mental abnormality or personality disorder;
E. A photograph and set of fingerprints;
F. A description of the offense for which the sex offender or sexually violent predator was convicted, the date of conviction and the sentence imposed; and
G. Any other information the bureau determines important.

2. National or regional registry. The bureau is authorized to make the registry available to and accept files from a national or regional registry of sex offenders for the purpose of sharing information.

3. Registration form. The bureau shall develop a standardized registration form to be made available to the appropriate reporting authorities and persons required to register.

4. Verification form. The bureau shall develop and mail a nonforwardable verification form to the last reported mailing address of each person required to meet the verification requirements of this chapter.

5. Sexually violent predator directory. The bureau shall develop and maintain a directory of sexually violent predators.

6. Distribution of information. The bureau shall distribute information to the department and law enforcement agencies having jurisdiction as required by this chapter.

7. Rules. The bureau may adopt rules that are necessary to administer its responsibilities pursuant to this chapter. Rules adopted pursuant to this subsection are routine technical rules pursuant to Title 5, chapter 375, subchapter II-A.

§ 11222. Duty of sex offender or sexually violent predator to register

1. Determination by court. The court shall determine at the time of conviction if a defendant is a sex offender or a sexually violent predator. A person who the court determines is a sex offender or a sexually violent predator shall register according to this subchapter.

2. Responsibility of ensuring initial registration. The department, the county jail or the state mental health institute that has custody of a sex offender or sexually violent predator required to register under this subchapter shall inform the sex offender or sexually violent predator, prior to discharge or conditional release, of the duty to register. If a sex offender or sexually violent predator does not serve a period of institutional confinement, the court shall inform the sex offender or sexually violent predator at the time of sentencing of the duty to register. The department, county jail, state mental health institute or court shall:

A. Inform the sex offender or sexually violent predator of the duty to register and obtain the information required for the initial registration;
B. Inform the sex offender or sexually violent predator that if the sex offender or sexually violent predator changes domicile, the sex offender or sexually violent predator shall give the new address to the bureau in writing within 10 days;
C. Inform the sex offender or sexually violent predator that if that sex offender or sexually violent predator changes domicile to another state, the sex offender or sexually violent predator shall register the new address with the bureau and if the new state has a registration requirement, the sex offender or sexually violent predator shall register with a designated law enforcement agency in the new state not later than 10 days after establishing domicile in the new state;
D. Inform the sex offender or sexually violent predator that if that sex offender or sexually violent predator has part-time or full-time employment in another state, with or without compensation, for more than 14 consecutive days or for an aggregate period exceeding 30 days in a calendar year or if that sex offender or sexually violent predator enrolls in any type of school in another state on a part-time or full-time basis, the sex offender or sexually violent predator shall give the bureau the registrant’s place of employment or school to be attended in writing within 10 days after beginning work or attending school and if the other state has a registration requirement, shall register with the designated law enforcement agency in the other state;
E. Obtain fingerprints and a photograph of the sex offender or sexually violent predator or the court may order the sex offender or sexually violent predator to submit to the taking of fingerprints and a photograph at a specified law enforcement agency within 3 days if the fingerprints and photograph have not already been obtained in connection with the offense that necessitates registration; and

F. Enforce the requirement that the sex offender or sexually violent predator read and sign a form provided by the bureau that states that the duty of the sex offender or sexually violent predator to register under this section has been explained.

3. Transfer of initial registration information to bureau and FBI. The department, county jail, state mental health institute or court within 3 days of receipt of the information described in subsection 2 shall forward the information to the bureau. If the court orders the sex offender or sexually violent predator to submit to the taking of fingerprints and a photograph at a specified law enforcement agency, the law enforcement agency shall submit the fingerprints and photograph to the bureau within 3 days. The bureau shall immediately enter the information into the registration system, notify the law enforcement agency having jurisdiction where the sex offender or sexually violent predator expects to be domiciled and transmit the information to the FBI for inclusion in the national FBI sex offender database.

4. Verification. During the period a sex offender or sexually violent predator is required to register, the bureau shall verify a sex offender’s or sexually violent predator’s domicile. The bureau shall verify the domicile of a sex offender on each anniversary of the sex offender’s initial registration date and shall verify a sexually violent predator’s domicile every 90 days after that sexually violent predator’s initial registration date. Verification of the domicile of a sex offender or sexually violent predator occurs as set out in this subsection.

A. At least 10 days prior to the required verification date, the bureau shall mail a nonforwardable verification form to the last reported mailing address of the sex offender or sexually violent predator.

B. The verification form must state that the sex offender or sexually violent predator still resides at the address last reported to the bureau.

C. The sex offender or sexually violent predator shall take the completed verification form and a photograph to the law enforcement agency having jurisdiction within 10 days of receipt of the form.

D. The law enforcement agency having jurisdiction shall verify the sex offender’s or sexually violent predator’s identity, have the sex offender or sexually violent predator sign the verification form, take the sex offender’s or sexually violent predator’s fingerprints, complete the law enforcement portion of the verification form and immediately forward the fingerprints, photograph and form to the bureau.

5. Change of domicile. A sex offender or sexually violent predator shall notify the bureau in writing of a change of domicile within 10 days after establishing that domicile.

A. If the sex offender or sexually violent predator establishes a new domicile in the State, the bureau shall notify, within 3 days, both the law enforcement agency having jurisdiction where the sex offender or sexually violent predator was formerly domiciled and the law enforcement agency having jurisdiction where the sex offender or sexually violent predator is currently domiciled.

B. If the sex offender or sexually violent predator establishes a domicile in another state, the bureau shall notify, within 3 days, the law enforcement agency having jurisdiction where the sex offender or sexually violent predator was formerly domiciled and the law enforcement agency having jurisdiction where the sex offender or sexually violent predator is currently domiciled.

For purposes of registration requirements pursuant to this subchapter, convictions that result from or are connected with the same act or result from offenses committed at the same time are considered as one conviction.

§ 11223. Duty of person establishing domicile to register
A person required under another jurisdiction to register as a sex offender or sexually
violent predator, or who is convicted of a similar sex offense or sexually violent offense in another jurisdiction, shall register as a sex offender or sexually violent predator within 10 days of establishing domicile in this State. The person shall contact the bureau, which shall provide the person with the registration form and direct the person to take the form and a photograph of the person to the law enforcement agency having jurisdiction. The law enforcement agency shall supervise the completion of the form, take the person’s fingerprints and immediately forward the form, photograph and fingerprints to the bureau.

§ 11224. Duty of person employed or attending school to register
A person who is required under another jurisdiction to register as a sex offender or sexually violent predator because the person is domiciled in another state or who is convicted of a similar sex offense or sexually violent offense in another jurisdiction shall register as a sex offender within 10 days of beginning full-time or part-time employment, with or without compensation, for more than 14 consecutive days or for an aggregate period exceeding 30 days in a calendar year or beginning school on a full-time or part-time basis in this State. The person shall contact the bureau, which shall provide the person with a registration form and direct the person to take the form and a photograph of the person to the law enforcement agency having jurisdiction. The law enforcement agency shall supervise the completion of the form, take the person’s fingerprints and immediately forward the form, photograph and fingerprints to the bureau.

§ 11225. Duration of registration
1. Sex offender. A sex offender shall register for a period of 10 years from the initial date of registration pursuant to this chapter, except that a sex offender required to register because the sex offender established a domicile in this State subsequent to being declared a sex offender in another state or under another jurisdiction shall register for a maximum of 10 years from the date when the sex offender was first required to register in the other state or under another jurisdiction.

2. Sexually violent predator. A sexually violent predator shall register for the duration of the sexually violent predator’s life.

3. Periods of incarceration or civil confinement. Notwithstanding subsections 1 and 2, the bureau may suspend the requirement that a sex offender register during periods of incarceration or civil confinement.

4. Relief from duty to register. If the underlying conviction for a sex offense or sexually violent offense is reversed, vacated or set aside, or if the registrant is pardoned for the offense, registration or continued registration as a sex offender or sexually violent predator is no longer required.

§ 11226. Fee
The bureau may charge a $25 annual fee to persons required to register under this chapter. Sex offenders and sexually violent predators shall pay the fee at the time of initial registration and shall pay the fee on each anniversary of their initial registration.

The fee must be credited to the General Fund and the Highway Fund in an amount consistent with currently budgeted appropriations and allocations.

§ 11227. Violation
A sex offender or sexually violent predator who fails to register or update the information required under this chapter commits a Class D crime, except that a violation of this section when the sex offender or sexually violent predator has 2 or more prior convictions in this State for violation of this chapter is a Class C crime. For purposes of this section, the dates of both of the prior convictions must precede the commission of the offense being enhanced by no more than 10 years, although both prior convictions may have occurred on the same day. The date of the conviction is deemed to be the date that sentence is imposed, even though an appeal was taken. The date of a conviction of a prior offense is deemed to be that stated in the complaint, information or indictment, notwithstanding the use of the words “on or about” or the equivalent. It is an affirmative defense that the failure to register or update information
because they broaden the scope of the registration requirements under the SORNA significantly—first, by adding more predicate crimes; second, by extending the registration requirements to juveniles; and third, by requiring offenders that have convictions from other state, tribal, or federal courts that include the essential elements of the predicate crimes to register in Maine while living or working here.\(^{146}\) The SORNA '99 left unchanged the notification provisions of the SORNA.\(^{147}\)

Under the SORNA '99, there are two categories of offenders that must register: "sex offenders" and "sexually violent predators."\(^{148}\) A sex offender is defined as an adult or juvenile that is convicted of committing or of attempting one of the following crimes against a victim of less than eighteen years of age: sexual exploitation of a minor,\(^{149}\) gross sexual assault,\(^{150}\) sexual abuse of minors,\(^{151}\) unlawful sexual contact,\(^{152}\) visual sexual aggression against a child,\(^{153}\) sexual misconduct with a child under fourteen years of age,\(^{154}\) kidnapping (except where the actor is a parent of the victim),\(^{155}\) criminal restraint,\(^{156}\) violation of privacy,\(^{157}\) incest,\(^{158}\) aggravated promotion of prostitution,\(^{159}\) and patronizing prostitution of a minor.\(^{160}\)

Under the SORNA '99, a sexually violent predator is an adult or juvenile convicted of committing or of attempting one of the following offenses where the

resulted from just cause.

Subchapter III
Notification.
§ 11251. Notification

The provisions regarding notification in chapter 13, subchapter III are applicable to a person determined to be a sex offender or sexually violent predator pursuant to this chapter.

§ 11252. Immunity from liability

Neither the failure to perform the requirements of this chapter nor compliance with this chapter subjects any state, municipal or county official or employee to liability in a civil action. The immunity provided under this section applies to the release of relevant information to other officials or employees or to the general public.

Id.


147. See id. 1999 Me. Legis. Serv. at 1272 (to be codified at Me. Rev. Stat. Ann. tit. 34-A, § 11251). Because of this, the Authors, when referring to Maine's notification provisions, will still make reference to the SORNA and not the SORNA '99.

148. Id. at 1999 Me. Legis. Serv. 1268-69 (to be codified at Me. Rev. Stat. Ann. tit. 34-A § 11203(5)-(8)).


151. See id. § 254.

152. See id. § 255(1)(A), (E), (F), (G), (I), (J).

153. See id. § 256.

154. See id. § 258.

155. See id. § 301.

156. See id. § 302.

157. See id. § 511.

158. See id. § 556.

159. See id. § 852(1)(B).

victim was under eighteen: gross sexual assault where the victim was under fourteen, where the victim submitted as a result of compulsion, where the offender used drugs or intoxicants to impair the victim, where the actor compelled the victim by any threat, where the victim suffers from a mental disability that is reasonably apparent, or where the victim was unconscious and incapable of consent, and unlawful sexual contact where the victim submitted due to compulsion, where the victim was unconscious or incapable of consent, where the victim was under fourteen, or where the victim suffers from a mental disability that is reasonably apparent.\textsuperscript{161} All of these crimes involve some sort of compulsion against a child victim.\textsuperscript{162}

Under the SORNA '99, offenders must provide more information to law enforcement agencies than under the SORNA.\textsuperscript{163} The SORNA '99 also changed the period of time that an offender must register. Under the SORNA '99, a sex offender must register for only ten years—down from fifteen under the SORNA, but a sexually violent predator must register for life.\textsuperscript{164} Furthermore, the SORNA '99 does away with the waiver provisions of the old Registration Act and the SORNA; under the SORNA '99 the only relief from a duty to register is when the underlying conviction is vacated, overturned, or pardoned.\textsuperscript{165}

5. Guidelines\textsuperscript{166}

In Maine, risk assessment is completed with the use of the “Sex Offender Assessment Guideline” (the Guideline). The current draft of the Guideline utilizes four categories of analysis to determine the dangerousness posed by any individual offender: Sexual Drive/Preoccupation Factor, Impulsive/Antisocial Behavior Factor, Intervention Factor, and Community Stability/Adjustment Factor.\textsuperscript{167} These four categories are analyzed in the Guideline with a total of only eighteen questions. The first section, Sexual Drive/Preoccupation, rates offenders on the nature

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162. With the exception of gross sexual assault where the victim is under 14; any sexual act with a child under 14 is considered a gross sexual assault and is a Class A felony in Maine. See Me. Rev. Stat. Ann. tit. 17-A, § 253 (West Supp. 1998).


166. The Authors acknowledge that the Guidelines are currently under revision and it is possible that the newer version may ameliorate some of the problems that the Authors point out. As of the writing of this Comment, there was no final revised version of the Guidelines available to the Authors.

167. See Letter from Nancy Bouchard, Associate Commissioner, Maine Department of Corrections, to James A. Billings (Feb. 22, 1999) (on file with the Maine Law Review) (containing sample draft of Risk Assessment Guidelines).
and duration of their sex offense history as well as any evidence of sexual preoccupation. Like most of the Guideline, individuals are rated on a three-point scale for each question. On the factor considering “prior legally charged sex offenses,” for example, a score of zero equals no prior sex offenses, one indicates one prior sex offense, and two indicates more than one prior sex offense. The second category, Impulsive/Antisocial Behavior Factor, analyzes substance abuse history, types of offenses, and assaultive behavior patterns, all on a similar three-point scale. The third category, Intervention Factor, seeks information about the offender’s feelings regarding their level of personal responsibility for their actions, any indication of a motivation to change, an understanding of the cycle of assault, the presence of any “thinking errors,” as well as evidence of remorse or guilt. Finally, the Community Stability/Adjustment Factor scores the offender based on the living situation they will be entering upon release, the type of community, employment, available support systems, and peer relationships. The final element of the Guideline is the one-page scoring procedure, which simply instructs the assessor to add up the scores from each section. This total score is then compared to a risk scale; a score of zero to eight indicates “few risk factors”; a score of nine to fifteen indicates “moderate number of risk factors”; a score between sixteen and twenty-five indicates “high number of risk factors”; and a score of more than twenty-six shows “very high number of risk factors.”

6. Implementation

According to David Edwards, a Sex Offender Management Specialist with the DOC in Portland, Maine, the sex offender and the corrections facility are supposed to notify the SBI of the sex offender’s release date. Sex offenders sen-

168. Id.
169. See id.
170. Id.
171. See id.
172. Id. Contained in the L.D. 1510 Master File, supra note 135, was an October 3, 1995, New Jersey report that discussed risk assessment. Although there is no indication to what extent the committee relied on the report in fashioning the Guideline, it is interesting to note that the Risk Assessment Scale Manual (the Manual) uses a similar approach to that found in the Guideline. See id. The Manual states, “The assessment process required by the statute is not intended to determine the actual probability of any one registrant reoffending. . . . Instead, using well recognized criteria, the panel has formulated a method of objectively placing registrants in tiers . . . .” Id. Once the score for an offender is calculated, the Manual notes, the corresponding tier determination cannot be modified unless the offender indicates intent to reoffend or demonstrates a physical condition such that risk of reoffense is minimized. See id. The Manual goes on to recognize two foundational factors in tier determinations: the likelihood of reoffense and the seriousness of the offense if the offender does reoffend. See id. Those making the risk assessments are further instructed to “look to the most serious instance of each [factor] as it appears on the record.” Id.
173. Mr. Edwards has nine years experience as a corrections officer with the DOC and four years experience as a probation officer. Mr. Edwards supervises around 30 convicted sex offenders, and he estimates that there are currently “several thousand” convicted sex offenders in Maine—in and out of correctional facilities. See Edwards Interview supra note 129. The DOC estimates that there are, on average, 300 individuals convicted of sex offenses per year in Maine. See Final Report supra note 72, at 8.
174. See Edwards Interview, supra note 129.
tenced on or after June 30, 1992, and before September 1, 1996, are only subject to the registration requirements of the Sex Offender Registration Act. \textsuperscript{175} Sex offenders sentenced on or after September 1, 1996, are subject to the SORNA. \textsuperscript{176} The corrections facility then notifies the local police of the sex offender's release. Included within the materials that go to the SBI is the risk assessment for that particular offender, with a score of moderate, high, or very high. The SBI passes this information along to the police. \textsuperscript{177} The local police make the decision regarding who will be notified in the community. \textsuperscript{178} One controversial aspect of community notification is leafleting. Leafleting occurs when local police make the decision to conduct widespread community notification and post flyers announcing that a convicted sex offender is being released into a particular neighborhood. The SORNA only authorizes community notification to members of the public that local law enforcement determines are “appropriate to ensure public safety.” \textsuperscript{179} There have been reports, however, of local law enforcement agencies going door to door handing out fliers with photographs and descriptions of released sex offenders—even before the SORNA ever took effect. \textsuperscript{180} Even Edwards acknowledges that the effectiveness of this technique is questionable, however, stating that:

Leafleting is probably highly overrated in terms of public safety . . . it's all debatable . . . it effectively gets the word out. The result is, the end result, whatever you're trying to accomplish, I guess could be called dubious. People don't know how effective it is. Certainly it helps to drive the offender out of the community in many cases . . . it makes it difficult for them to hold a job, impossible in some cases. \textsuperscript{181}

\section*{D. Other State Statutes}

All states have some specific sex offender statutory provisions. These statutes vary to a great degree on the details and requirements, as well as in the scope and extent of notification. As of fall 1999, all fifty states had a registration provision requiring released sex offenders to submit personal information to a state regis-


\textsuperscript{176} See supra Part III.C.2.

\textsuperscript{177} See Me. Rev. Stat. Ann. tit. 34-A, § 11142; see also Edwards Interview, supra note 129.

\textsuperscript{178} See Me. Rev. Stat. Ann. tit. 34-A, § 11143(2); see also Edwards Interview, supra note 129. The police can and do consult the DOC on this decision. See id.


\textsuperscript{180} See Dieter Bradbury, Police Warning of Sex Offenders: Portland Police Chief Michael Chittwood Fears the Parkside Area Will Become a “Dumping Ground,” PORTLAND PRESS HERALD, Mar. 28, 1996, at B1. Because this activity is clearly outside the SORNA (the law had not even taken effect yet), it is also clear that the police would not be entitled to the immunity provision of the SORNA. See Me. Rev. Stat. Ann. tit. 34-A, § 11105 (granting immunity from civil liability). Whether officers would be subject to liability in a civil suit for such conduct, either as officers or personally, is beyond the scope of this Comment. Whether the SORNA is being applied retroactively, however, raises some interesting constitutional questions. Neither the SORNA nor the SORNA '99 are themselves retroactive, so they are not ex post facto laws, but if they are being applied retroactively, then a court might consider that in ruling on the constitutionality of the two statutes.

\textsuperscript{181} Edwards Interview, supra note 129.
try.\textsuperscript{182} Usually included is information such as name, current address, prior sex offense convictions, dates of commission and conviction of such offenses, date of birth, current place of employment, a physical description, photograph, and fingerprints.\textsuperscript{183} The information is kept by state and local law enforcement agencies as a tool for identifying and locating suspects for subsequent unsolved offenses, and as a means to monitor and track individuals who the state believes are among the most dangerous and likely to reoffend.\textsuperscript{184}

Most states currently have some type of notification provision in their statutory scheme.\textsuperscript{185} State notification provisions contain more variation than do the

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registration statutes; four discrete categories of notification statutes are clearly identifiable. These categories are divided as a function of the scope of notification they authorize. The first two categories involve law enforcement's affirmative duty to notify the public; the third category is a limited disclosure category which permits law enforcement to divulge the information to certain groups or individuals only when those groups or individuals request the information from law enforcement; the final category is a combination of more than one of the first three categories.

In the first category, eighteen states currently authorize broad sex offender notification to the public. Of those eighteen, three states, Alabama, Louisiana, and Texas, permit notification of all types of sex offenses. Because notification in these states does not depend on the danger posed by the offender or the specific offenses committed, the decision regarding who and how to notify is not discretionary by public officials. The remaining fifteen states in this first category notify the public about only those sex offenders thought to pose a risk of recidivism. Different methods are used to release such information, such as flyers, telephone numbers, CD-ROM, the Internet, and notices in newspapers. At least one state requires that the offender inform the community, for example, by requiring that he mail letters explaining his prior conviction to all those living within a certain radius. Such methods solve the problem of cost for law enforcement of notification. Other states actually profit from public notification. California, for example, maintains a "900-number" that citizens can call to locate a sex offender.

Fourteen states fall within the second category of notification statutes by permitting the release of information contingent on a need-to-know basis. That is, those who are notified of the sex offender's proximity are those believed to be at risk by local law enforcement officials. Such decisions of who is at risk are discretionary by law enforcement. Those notified often include past victims, childcare


186. See Pearson, supra note 49, at 47.
187. See id.
facilities, local schools, and religious organizations. In these states, where notification depends on the risk posed by the offender, the dangerousness of offenders is often divided into tiers.

New Jersey’s Megan’s Law is one example of a statute that uses a tiered notification process. The law provides for three tiers of notification as a function of the risk of reoffense. If the risk of reoffense is low, only those “likely to encounter” the offender are notified of his proximity (Tier I). If the risk of reoffense is moderate, Tier II, community organizations such as schools, religious groups, and youth organizations are notified in addition to those notified in Tier I. The strictest category, Tier III, that of high reoffense risk, mandates public notification in addition to Tier I and Tier II notification. Because all convicted sex offenders are deemed to pose some risk, all will be subjected to at least Tier I notification. The county prosecutor determines both the method of notification and the risk of reoffense.

The third category of statutes includes those that allow law enforcement to divulge sex offender information when groups or individuals ask for the information. Fifteen states currently maintain such a system. Usually the county sheriff or local police department maintains the information in this category. Who can request such information varies among states. Some states allow general public inspection of the records of sex offenders; other states allow the information to only be given to those at risk from a specific offender. Finally, some permit only community groups such as schools and childcare facilities to gain access to such information.

The final category includes those states that use a combination of the first three categories. California, for example, allows notification by CD-ROM, the Internet, and a “900-number”. In addition to such active notification by residents, the police are permitted to notify communities in a more passive manner.

Regardless of which of the four categories a statute falls in, all of them contain procedural requirements. In most states, sex offenders are required to register
within three days of their release. There are continuing registration requirements as well. If a sex offender moves, he must inform the state of his new address, usually within ten days of moving. Such procedural provisions are a product of the Wetterling Act requirements. Some states also have provisions allowing sex offenders to appeal the decision regarding community notification. Such appeals are generally permitted in those states where notification of an offender is contingent on risk of reoffense. Such procedural access is integral to the statutes’ constitutionality under a procedural due process analysis.

A unique feature of many of the state notification statutes is their retroactive application. Of the states with notification statutes, almost all have applied the statutes retroactively to all sex offenders currently released, or those released after a certain date. Proponents claim this is necessary if the statute is to have any sort of effect; otherwise, communities would not be informed of dangerous sex offenders who had committed crimes before enactment of the registration and notification laws. Opponents note, however, that such a retroactive application is dangerous to the statutes’ constitutionality under the Ex Post Facto and Double Jeopardy Clauses.

IV. THE PROBLEM WITH THE SOLUTION

A. State and Federal Cases

Challenges to registration and notification statutes arose just days after their passage, and have occurred in almost every state. A federal district court in New Jersey, for example, issued a temporary injunction to prevent enforcement of part of Megan’s Law just two days after its effective date. Nationally, sex offender registration and notification laws have been attacked on a variety of constitutional grounds, including ex post facto, double jeopardy, the “right” to privacy, procedural due process, cruel and unusual punishment, and equal protec-


207. See infra Part IV.A.3.

208. See infra Part IV.A.1.


None of the challenges has yet reached the United States Supreme Court. There are United States Supreme Court cases, however, that shed some light on the constitutional challenges, and there are several cases that have reached the highest state courts and federal district courts and circuit courts. In this Part, the Authors will review the various arguments articulated by opponents of the notification laws and discuss the relevant case law.

1. The Ex Post Facto and Double Jeopardy Clauses

The argument that sex offender registration and notification laws violate the Ex Post Facto Clause is based on the assumption that these laws constitute a form of punishment because they are applied retroactively. According to the Court in Calder v. Bull, "[E]very ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law: The former, only, are prohibited." The Court's decision in Calder v. Bull contains the authoritative definition of what constitutes an ex post facto law. In Calder v. Bull, the Court had to decide whether a Connecticut law that granted a new hearing was prohibited by the United States Constitution. In formulating its standard the Court stated that an ex post facto law consisted of the following:

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

211. There have also been challenges to sex offender registration and notification laws based on the Bill of Attainder Clause. According to the Third Circuit, however, bills of attainder punish "without a judicial trial." See Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1253, n.15 (quoting United States v. Brown, 381 U.S. 437 (1965)). The court pointed out that Artway had a trial and was convicted of the underlying offense that triggered the registration requirements, and that there really was no bill of attainder issue. See id. This Comment does not address challenges brought under the Bill of Attainder Clause for this very reason; the more legitimate challenge is that the laws are ex post facto.


213. 3 U.S. (3 Dall.) 386 (1798).

214. Id. at 391.

215. See id. at 386-87. The hearing was a probate hearing where the Calders claimed property of the deceased and were opposed by the Bulls. See id. at 386. Originally, the probate court ruled in favor of the Calders by denying probate of the will of Normand Morrison, but then the Connecticut Legislature passed a law that set aside the probate court's ruling and ordered a new trial. See id. at 385. At the new trial, the Bulls prevailed, and the Calders appealed to the United States Supreme Court. See id. at 386.

216. Id. at 390. See also State v. Chapman, 685 A.2d 423 (Me. 1996). In Chapman, the Law Court held that a criminal statute only violates the Ex Post Facto Clause if the new law punishes what was not a crime when done; or if it increases the punishment for a crime after its commission; or deprives an accused of a defense that was available when the crime was done. See id. at 424.
Thus, the Ex Post Facto Clauses prohibit Congress and the states from enacting laws that impose punishment on a person for an act that, when done, was legal. It also proscribes passage of laws that increase the punishment or makes it greater than when the offense was committed. Therefore, a registration and notification law only implicates the Ex Post Facto Clause if the law is retroactive. Otherwise, if the registration and notification law only applies prospectively, there is no punishment added after commission of the crime and no ex post facto issue is implicated.

The constitutional attack on the registration and notification laws that is put forth under the Fifth Amendment's Double Jeopardy Clause only applies to sex offenders that have been convicted prior to enactment of the registration and notification law. The challenge under the Double Jeopardy Clause rests on the assumption that the sex offender is being punished twice for the same offense. This is necessarily so because anyone convicted after passage of the registration and notification law will not be subject to more than one prosecution or punishment in order for the provisions of the act to apply. This assumes, of course, that the Double Jeopardy Clause protects against double punishment as well as double prosecution.

It follows then, that what constitutes punishment becomes critical to an analysis of whether a statute violates the Constitution on ex post facto and double jeopardy grounds. The United States Supreme Court spoke to this issue in Trop v. Dulles and Kennedy v. Mendoza-Martinez. In Trop, the plurality opinion of Chief Justice Warren held that stripping a private in the United States Army of his citizenship for desertion during World War II was punishment. The nature of the inquiry into what constitutes punishment is to examine the purpose of the stat-

218. Of course, for the law to be fully effective, it must apply to those convicted of sex offenses before implementation of the act; otherwise the states would have to wait for the already identified and convicted sex offenders to be released and re-offend in order to make the act apply to them. See infra Part V.B.
219. Of course, the SORNA is not retroactive; nonetheless, for the purposes of this Comment, it is necessary to determine whether the SORNA constitutes punishment.
220. See Benton v. Maryland, 395 U.S. 784, 794 (1969) (extending the Fifth Amendment protection against double jeopardy to the states under the Fourteenth Amendment).
221. See United States v. Ursery, 518 U.S. 267 (1996) (ruling that the Double Jeopardy Clause does apply to both successive punishments as well as successive prosecutions). But see Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting) ("To be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions.").
222. See State v. Myrick, 436 A.2d 379, 383 (Me. 1981) (stating that the Ex Post Facto Clause is limited to statutes that are designed to impose further punishment); see also Cierznia, supra note 212, at 727-28.
224. 372 U.S. 144 (1963). In both cases, Trop and Mendoza-Martinez, ex post facto challenges were not determinative in the outcome.
225. See Trop v. Dulles, 356 U.S. at 97. The Court also ruled that section 401(g) of the Nationality Act of 1940 was unconstitutional because it violated the Eighth Amendment's provision against cruel and unusual punishment. See id. at 101. See infra Part IV.A.4 for a discussion of the Eighth Amendment's prohibition of cruel and unusual punishment.
ute and not merely its form. If the purpose is to punish, deter, or reprimand, then the law is penal and imposes a punishment. In Mendoza-Martinez, the Court considered the constitutionality of a law that stripped two men of their citizenship for leaving the country at a time of war in order to avoid military service. The Court held that the law was punitive and unconstitutional because it deprived them of their citizenship without procedural due process.

In Department of Revenue of Montana v. Kurth Ranch, the Court affirmed the Ninth Circuit’s ruling, and held that a tax on the possession of marijuana assessed after criminal penalties for the same conduct violated the double jeopardy protections afforded under the Fifth Amendment. The case came to the Court from the Ninth Circuit after the district court had affirmed a bankruptcy court’s ruling that the tax assessment constituted a form of double jeopardy. In reaching its decision, the bankruptcy court looked to the factors announced in Mendoza-Martinez and decided that the statute’s purpose was deterrence and punishment. Even though the Court in Kurth Ranch stated that a deterrent purpose did not necessarily lead to the conclusion that a statute was punitive, the Court nonetheless affirmed the lower court’s ruling and invalidated the statute. In reaching its decision, the Court looked to United States v. Halper, and stressed that whether

226. See id. at 96 ("In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.").

227. See id.


229. See id. at 165-66. In ruling that the statute was punitive, the Court looked to:
[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 assigned....]

Id. at 168-69 (footnotes omitted). The Court also pointed to the history of the statute as a separate ground for holding it punitive. See id. In his dissenting opinion, Justice Stewart disagreed that the statute was punitive; he did, however, utilize a similar test for determining whether the statute was punitive. See id. at 208 (Stewart, J., dissenting).


231. See id. at 784.

232. See id. at 773.

233. See id. at 774. The bankruptcy court had reasoned:

[Because drug tax laws have historically been regarded as penal in nature, the Montana Act promotes traditional aims of punishment—retribution and deterrence, the tax applies to behavior that is already a crime, the tax allows for sanctions by restraint of Debtors' property, the tax requires a finding of illegal possession of dangerous drugs and therefore a finding of scienter, the tax will promote elimination of illegal drug possession, and the tax appears excessive in relation to the alternate purpose assigned, especially in the absence of any record developed by the State as to societal costs. Finally, the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report.

Id. (quoting In re Kurth Ranch, 145 B.R. 61, 75-76 (Bankr. D. Mont. 1990)).

234. See id. at 780.

a law is punishment or not cannot be determined based on the defendant’s perspective because even laws that are remedial carry the “sting of punishment.”

In United States v. Ward, the Court stated that the proper inquiry in determining whether a statute is regulatory or punitive is first to look to legislative intent, and second, to determine whether the statute is “so punitive in either purpose or effect as to negate that intention.” The Court in Ward went on to say that for the second inquiry “only the clearest proof” would suffice to invalidate a statute.

In Kansas v. Hendricks, the Court reversed the Kansas Supreme Court and upheld the constitutionality of the Kansas Sexually Violent Predator Act. Originally, Hendricks was convicted of taking “indecent liberties” with two thirteen-year-old boys, had served most of his ten year sentence, and was ready for release into a halfway house, but the state filed a petition seeking civil commitment under the Kansas Act before he was released. The majority opinion rejected Hendricks’s claims that the Kansas Act violated the Constitution on double jeopardy and ex post facto grounds. The Kansas Act established a civil commitment procedure for sexually violent predators. Under the Act, Hendricks, who had multiple convictions for past sex offenses, was involuntarily committed for an indefinite term under the care of a treatment facility administered by the Kansas Secretary of Social and Rehabilitative Services until such time as his “mental abnormality or personality disorder has so changed that [he] is safe to be at large.”

236. Department of Revenue of Montana v. Kurth Ranch, 511 U.S. at 777, n.14. Since this decision, and the decision in Arrows v. Attorney General of New Jersey, 81 F.3d 1235 (1996), the Supreme Court has back away from Halper, and in Hudson v. United States, 522 U.S. 93 (1997), the Court disavowed the methods of Halper and reaffirmed those of United States v. Ward, 448 U.S. 242 (1980). See Hudson v. United States, 522 U.S. at 96. The particular method at question in Halper was the lack of deference extended to the subjective intent of the legislature when it announced whether a particular statute was intended as punitive or remedial. See id. See also United States v. Halper, 490 U.S. at 448; United States v. Ward, 448 U.S. at 248-49.


238. Id. at 248-49.

239. Id. at 249.


241. See id. at 350.

242. Id. at 353-54.

243. The Court also rejected Hendrick’s substantive due process challenge. The Kansas Supreme Court had accepted Hendricks’s argument that the Act violated substantive due process because committing a person involuntarily in a civil proceeding required clear and convincing evidence that the individual was both mentally ill and a danger to himself or others. See In re Hendricks, 912 P.2d 129, 137-38 (Kan. 1996). The Kansas court ruled that under the Act, “mental abnormality” did not meet the United States Supreme Court’s requirements for civil commitment. Id. However, the Court, in reversing the Kansas Supreme Court, stated that it had “consistently held such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards” and rejected Hendricks’s substantive due process claim. Kansas v. Hendricks, 521 U.S. at 357.

244. See KAN. STAT. ANN. §§ 59-29a01 to -29a15 (1994). The Act defined “sexually violent predator” as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” Id. § 59-29a02(a). And the Act defined “mental abnormality” as a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” Id. § 59-29a02(b).

Under the Act, as applied to Hendricks, the state corrections agency notified the local prosecutor of the release of a person that might come under the Act; the prosecutor then had forty-five days to decide whether or not to file a petition to seek involuntary commitment.\textsuperscript{246} If the prosecutor filed the petition, a court then determined whether probable cause existed to support a finding that the individual was a sexually violent predator; if the court ruled that there was probable cause, the individual had to be transferred to a facility for a professional evaluation.\textsuperscript{247} After this evaluation, a trial was held to determine whether, beyond a reasonable doubt, the individual was a sexually violent predator.\textsuperscript{248} A jury concluded that Hendricks was a sexually violent predator, and he was involuntarily committed after the trial court concluded that pedophilia was a “mental abnormality” under the Act.\textsuperscript{249}

In considering Hendricks’s double jeopardy and ex post facto claims, the Court rejected the argument that the Act was “punishment.” The Court stated that civil commitment under the Act did not further either of the two primary objectives of punishment: retribution or deterrence.\textsuperscript{250} The Act is not retributive, according to the Court, because no finding of scienter is required and past criminal conduct is used only for an “evidentiary” function and not to “affix culpability.”\textsuperscript{251} The majority indicated that the Kansas Legislature did not intend the Act as a deterrent because it was confined to those individuals that had difficulty controlling their behavior due to a “mental abnormality” and the behavior of such persons was unlikely to be deterred.\textsuperscript{252} The Court also found it significant that the conditions of the confinement were more like those experienced by other involuntarily committed persons than those experienced in prison.\textsuperscript{253} To the majority, this suggested that the legislature had not intended the Act to be punitive.\textsuperscript{254} The Court pointed out that just because a person was detained, it did not necessarily follow that the government had imposed punishment, and that a state may take appropriate measures to restrict the freedom of mentally ill persons that were dangerous to themselves or others.\textsuperscript{255} The Court relied on \textit{United States v. Ward} and quoted the two-part standard enunciated in that case:

\begin{quote}
Although we recognize that a “civil label is not always dispositive,” we will reject the legislature’s manifest intent only where a party challenging the statute provides “the clearest proof” that “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention” to deem it “civil . . . .”\textsuperscript{256}
\end{quote}

\textsuperscript{246} See id. at 352.
\textsuperscript{247} See id.
\textsuperscript{248} See id. at 352-53.
\textsuperscript{249} See id. at 355-56. Under the Act, an individual that was involuntarily committed could petition for his release at any time, and if a court found that the state could not sustain its burden, the individual would be freed. See id. at 353. Also, the court that committed the individual had to conduct an annual review to satisfy that the commitment continued to be necessary. See id.
\textsuperscript{250} See id. at 361-62.
\textsuperscript{251} Id. at 362. See also \textit{Kennedy v. Mendoza-Martinez}, 372 U.S. 144, 168 (1963).
\textsuperscript{252} See \textit{Kansas v. Hendricks}, 521 U.S. at 362-63.
\textsuperscript{253} See id. at 363.
\textsuperscript{254} See id.
\textsuperscript{255} See id. (citing \textit{United States v. Salerno}, 481 U.S. 739, 746 (1987)).
\textsuperscript{256} Id. at 361 (alteration in original) (citations omitted) (quoting \textit{Allen v. Illinois}, 478 U.S. 364, 369 (1986) and \textit{United States v. Ward}, 448 U.S. 242, 248-49 (1980)).
Thus, only if an individual challenging a statute can demonstrate by the “clearest proof” that the challenged provision is clearly punitive will the Court set aside the stated legislative intent.

The point pressed by Hendricks and the dissent was that the Act was punitive because it failed to offer any treatment to the individual while confined against his will.\textsuperscript{257} On balance, Justice Breyer determined that the Act was punitive; he wrote that where an individual is first incarcerated for an offense for which treatment is available, then is denied the treatment throughout the incarceration period, and then is involuntarily committed because treatment is still needed, that the “legislative scheme begins to look punitive.”\textsuperscript{258} Justice Breyer pointed out that in\textit{Allen v. Illinois},\textsuperscript{259} the Court had looked to see whether treatment was offered in deciding whether a civil commitment law was punitive or not.\textsuperscript{260} The majority dismissed this argument, however, quoting language from the Kansas Supreme Court that indicated that treatment was “all but nonexistent.”\textsuperscript{261} The Court went on to state that even if treatment was not a primary objective of the Act, the Act was still constitutional because detaining those that pose a danger to themselves or others is a permissible objective whether treatment exists or not.\textsuperscript{262} The majority, in conclusion, held that the Act was not punitive; therefore, the double jeopardy and ex post facto claims failed by necessity.\textsuperscript{263}

In\textit{Artway v. Attorney General of New Jersey},\textsuperscript{264} a convicted sex offender challenged the retroactive application of New Jersey’s Megan’s Law in the federal courts.\textsuperscript{265} Artway sought an injunction in United States District Court. The dis-

\textsuperscript{257} See \textit{id.} at 379 (Breyer, J., dissenting).

\textsuperscript{258} \textit{Id.} at 381. Justice Breyer observed that as the Act was applied to previously convicted sex offenders, it raised some questions because the Act deferred diagnosis and treatment until shortly before the individual was to be released from prison. \textit{See id.} at 385. He noted:

But it is difficult to see why rational legislators who seek treatment would write the Act in this way—providing for treatment years after the criminal act that indicated its necessity. . . . [T]he timing provisions of the statute confirm the Kansas Supreme Court’s view that treatment was not a particularly important legislative objective.

\textit{Id.} at 386.

\textsuperscript{259} 478 U.S. 364 (1986).

\textsuperscript{260} See\textit{ Kansas v. Hendricks}, 521 U.S. at 381 (Breyer, J. dissenting). Justice Breyer noted that the Kansas Supreme Court had found that the state had not provided Hendricks with treatment, had not as yet set aside funding to provide treatment under the Act, and that the treatment facility had “little, if any qualified treatment staff.” \textit{Id.} at 384.

\textsuperscript{261} \textit{Id.} at 365.

\textsuperscript{262} \textit{See id.} at 365-66.

\textsuperscript{263} \textit{See id.} at 369. The Court stated:

Where the state has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

\textit{Id.} at 368-69.

\textsuperscript{264} 81 F.3d 1235 (3d Cir. 1996).

\textsuperscript{265} \textit{See id.} at 1242. Challenges to the registration provisions have been brought in state courts as well. For example, Arizona’s registration statute was challenged in 1992 in\textit{ State v. Noble}, 829 P.2d 1217 (Ariz. 1992). The challengers argued that the statute requiring registration
amounted to punishment and had not yet been enacted when their offenses were committed. See id. at 1219. These provisions, they argued, violated the Ex Post Facto Clauses of both the state and Federal Constitutions. See id. The Supreme Court of Arizona, in applying the Calder v. Bull analysis, held that the statute did not violate the Ex Post Facto or Double Jeopardy Clauses. See id. at 1224. The court found that the statute was retroactive, despite the government’s position that the registration requirement was triggered by conviction rather than the commission of the sex offense. See id. at 1220.

The Arizona court analyzed whether the statute constituted punishment under the Kennedy v. Mendoza-Martinez factors. See id. at 1221. The lower court had found that the registration statute constituted an affirmative disability or restraint because it “impair[s] employability, subject[s] registrants to increased police scrutiny, and last[s] for life.” State v. Noble, 808 P.2d 325, 329 (Ariz. Ct. App. 1990). The Arizona Supreme Court disagreed, holding that this was not the kind of disability that amounted to punishment. See State v. Noble, 829 P.2d at 1224. The court ruled that registration, although not itself traditionally regarded as punishment, constituted a lifelong badge of ignominy. See id. This badge was mitigated, however, by the limited access to the registration information. See id. Registration serves the traditional aim of deterrence, “the notion being that a convicted sex offender is less likely to commit a subsequent offense if his whereabouts are easily ascertained by law enforcement officials.” Id. at 1223. Significantly, however, the court held that registration was not excessive in relation to its non-punitive purpose—to aid law enforcement agencies in investigating sex offenses. See id. at 1224. Despite the fact that sex offenders may be burdened by more questioning and investigation, the court stated, “With respect to the offenses of child molestation and sexual misconduct with a minor . . . the registration requirement is not excessive given the assistance it provides to law enforcement agencies in investigating future offenses and the importance of locating and apprehending recidivists.” Id. at 1224. Finally, the court noted that its task was not just to add the factors on either side, but to balance them as well. See id. The court found that the factor carrying the most weight was locating child sex offenders; thus, the statute was held constitutional under an ex post facto analysis. See id.

The appellant in State v. Ward, 869 P.2d 1062 (Wash. 1994), presented similar arguments. Ward challenged Washington State’s registration statute on ex post facto grounds because it was enacted after his conviction in March of 1988. See id. at 1066. The Washington Supreme Court had adopted the Calder v. Bull framework for ex post facto analysis in State v. Edwards, 701 P.2d 508 (Wash. 1985). See State v. Ward, 869 P.2d at 1057. The Washington court restated the test for ex post facto analysis to include the following elements: (1) whether the law was substantive, (2) whether retrospectively applied, and (3) whether it disadvantaged the affected individual. See id. at 1057-68. This was first formulated in In re Powell, 814 P.2d 635 (Wash. 1991). See State v. Ward, 869 P.2d at 1057. Disadvantage was determined with reference solely to whether the law changed the standard of punishment that existed under prior law. See id. at 1068.

The court assumed, without deciding, that the registration statute was substantive because it was not located among the criminal or civil procedural statutes of the state. See id. The court held that the law was clearly retrospective, having been enacted after the relevant conviction. See id. The third part of the ex post facto test, however, was not met. See id. Although the court found the statute to be burdensome to Ward, it held that Ward was not disadvantaged by the law because it did not change the standard of punishment that existed under prior law. See id. The appellants argued that the registration statute was punitive because it constituted an affirmative disability that amounted to a “badge of infamy,” relying on Mendoza-Martinez. Id. at 1069. The court disagreed, however, and determined that the only affirmative burdens placed on offenders were to provide basic information already routinely kept on file at the time of conviction and sentencing. See id. The physical act of registration was not a disability or restraint according to the court because it did not prevent offenders from any daily activities or from moving their residence. See id. The court held that the statute was regulatory rather than punitive because registration was not historically regarded as a form of punishment. See id. Any “Scarlet Letter” argument the appellants may have tried to advance failed on this front. The court further noted that the registration statute was not a lifetime badge because of the procedural provisions allowing for petition for relief from the duty to register. See id. at 1073-74. The court also relied on
strict court held that the notification provisions of Megan’s Law violated the United States Constitution and enjoined enforcement of the law against Artway, but upheld the registration component of Megan’s Law. The Third Circuit affirmed the portion of the district court’s ruling that held the registration provisions constitutional. However, the court reversed that part of the district court’s ruling that enjoined enforcement of the notification provisions as they applied to Artway because Artway’s challenges to the notification provisions were unripe. The Third Circuit spent a substantial portion of its opinion wading through the murky United States Supreme Court precedent on the question of what constitutes punishment, and then articulated a three-part test that “looks to the legislature’s subjective purpose in enacting the challenged measure, its ‘objective’ purpose in terms of proportionality and history, and the measure’s effects.” Under the first prong of the Artway test, courts should look to the subjective intent in passing the law; if the legislature’s purpose was punitive, or if one of its motivations was retributive, then the law is punishment and must fail under the Ex Post Facto Clause. If, on the other hand, the statute satisfies this first prong, then the court must apply the second prong of the Artway test—which itself has three subparts. Finally, the third prong applies only when the first and second prongs are satisfied; under this third

the fact that the duty to register ended after 15 years from the date of release in the absence of any new sex offense convictions. See id. See WASH. REV. CODE ANN. § 9A.44.140 (West Supp. 1999). Another Mendoza-Martinez factor considered by the court was whether the statute furthered the two traditional aims of punishment: deterrence and retribution. See id. at 1073. The court held that it did not do so any more than the threat of conviction and sentence did, regardless of the registration requirement. See id. at 1073. Finally, the court determined that registration was not excessive when compared to its nonpunitive purposes. See id. The court was unpersuaded by the appellants’ argument that the burden of the statute lies in making them the target of every sex offense investigation in the area. See id. The court reasoned that the offender still possessed all his constitutional due process protections. See id.

266. See Artway v. Attorney General of New Jersey, 81 F.3d at 1242.

267. See id. Artway challenged the registration provisions as a violation of the Ex Post Facto, Double Jeopardy, and Bill of Attainder Clauses, and further insisted that the law was unconstitutional on equal protection and due process grounds, and that the law was unconstitutionally vague. See id.

268. See id. Artway’s challenges to the notification provisions mirrored his challenges to the registration provisions. See id. The court found the challenge to registration ripe because these provisions applied to Artway. See id. at 1243. Even though he had left the state in order to keep from having to comply, the court reasoned that if he returned, he would, by law, have to register under the act or face prosecution. See id. at 1246. On the other hand, it was not certain that the notification provisions would apply to Artway because whether those provisions applied was too speculative. See id. at 1251. Application of the notification provisions depended on a preliminary classification that Artway posed a moderate or high risk of reoffense since Megan’s Law’s notification provisions only apply to second and third “tier” sex offenders. See id. at 1247-52.

269. Id. at 1254.

270. See id. at 1263. The Artway court split the “objective” purpose test into three separate inquiries:

First, can the law be explained solely by a remedial purpose? If not, it is “punishment.” Second, even if some remedial purpose can fully explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? If so, and if the text or legislative history does not demonstrate that this measure is not punitive, it must be considered “punishment.” Third, if the legislature did not intend a law to be retributive but did intend it to serve some mixture of deterrent
prong, if the “negative repercussions” of the measure are severe enough then the measure must be considered punishment—no matter how it is justified.271

In applying its tests to New Jersey’s registration provisions, the Third Circuit found that the intent of the legislature was not to punish but rather to ensure the public’s safety and to prevent further criminal activity.272 In appraising the law’s objective purpose under the three-part second prong, the court ruled that there was a remedial purpose to the registration provisions that fully explained the registration requirement; namely, that registration allowed law enforcement agencies and personnel to keep track of released sex offenders.273 The court also concluded that under the historical analysis required by the second part of the second prong, the registration provisions were not historically regarded as punishment, pointing to Selective Service registration as an example.274 The court also noted because registration is traditionally regulatory, any purpose to deter future unlawful acts was incidental and did not invalidate the law under the final part of the objective purpose prong.275 The court then turned to the effects of the registration provisions, and stated that there was little if any effect because most of the information provided to law enforcement officials was public information already.276 Of course, the result would have been quite different if Artway’s challenges to the notification provisions had been before the court, but, as the court repeatedly pointed out, only the registration provisions were properly before it.277

Nearly a year and a half later, the notification provisions were presented to the Third Circuit in E.B. v. Verniero.278 In its decision, the court restated the Artway test, looked to see whether recent Supreme Court cases had an impact on its Artway test, and then applied the test to the notification provisions of the New Jersey law. The court looked primarily at two cases: United States v. Ursery,279 and Hendricks, and determined that neither case challenged the viability of the Artway test.280 The court described the holding of Ursery as being “limited to civil forfeitures” because the proportionality analysis undertaken in Ursery did not translate well into cases where the challenged provision was not a civil fine that was claimed to be so excessive as to be punitive.281 The court acknowledged the relevance of

and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its “usual” manner, consistent with its historically mixed purposes. Unless the partially deterrent measure meets both of these criteria, it is “punishment.” If the measure meets both of these criteria and the deterrent purpose does not overwhelm the salutary purpose, it is permissible under Kurth Ranch.

Id. (citations omitted).

271. See id.
272. See id. at 1264.
273. See id. at 1265.
274. See id. at 1264–65.
275. See id. at 1266.
276. See id. at 1266–67.
277. See id. at 1265–66.
278. 119 F.3d 1077 (3d Cir.), reh’g denied, 127 F.3d 298 (3d Cir. 1997), and cert. denied, 522 U.S. 1109 (1998).
281. See id. at 1094.
Hendricks, however, and stated that there was considerable congruence between the methods in Hendricks and those used by the Third Circuit in Artway, and then reaffirmed its Artway test as the proper method for analyzing the notification provisions. The court pointed out that even though the Hendricks Court did not explicitly adopt an “effects prong” like that used in Artway, the Hendricks Court, nonetheless, did help to illuminate just how far a remedial statute could go and still not be declared punitive because of unpleasant effects. The court noted that in Hendricks, the Supreme Court had allowed involuntary civil commitment of sex offenders even when the commitment was for an indefinite term. The court also pointed to the “clearest proof” language of Hendricks and noted that a court must show deference to the legislature’s stated intent, and that its Artway test would accomplish this goal.

After reaffirming the vitality of the Artway test, the Third Circuit applied it to the notification provisions of the statute. The court started with the subjective legislative intent prong. As in Artway, the court found the legislative intent was “remedial and devoid of any indication of an intent to punish.” In addressing the second—or “objective” purpose—prong of the Artway test, the court pointed out that there was only a requirement that the notification provisions be “reasonably related to a legitimate goal,” and as long as the means were reasonably related to the ends, there was no requirement that the notification provisions be perfectly tailored. The court stated that the notification provisions, like the registration provisions, could be explained entirely by their remedial purpose, and rejected the challengers’ claim that the notification provisions were historically punitive because they were analogous to “public shaming, humiliation and banishment.” The court observed that all of these historically punitive measures—public shaming, humiliation, and punishment—involving more than merely releasing or distributing information; rather, they involved punishing a person by physically holding them out to ridicule or physically expelling them from society. The court stated that the notification provisions were more akin to wanted posters and quarantine notices than to the punitive measures cited by the challengers. The court then turned to the third prong of the Artway test and evaluated the effects of notification, noting that “for the effects of a measure to render it ‘punishment,’ those effects must be extremely onerous.” Furthermore, the court noted, even

282. See id. at 1095-96.
283. See id. at 1096.
284. See id.
285. Id. at 1097.
286. Id. at 1097 (quoting Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1265 (3d Cir. 1996)). The court went on to say that, “If a reasonable legislator motivated solely by the declared remedial goals could have believed the means chosen were justified by those goals, then an objective observer would have no basis for perceiving a punitive purpose in the adoption of those means.” Id. at 1098. But this seems to be importing part of the first prong—the subjective intent—into the second, or objective purpose, prong of the Artway test, and is not entirely justified.
287. Id. at 1099-99.
288. See id. at 1099.
289. See id. at 1101.
290. Id. (citing Flemming v. Nestor, 363 U.S. 603 (1960) (terminating a deportee’s social security benefits not punishment); Hawker v. New York, 170 U.S. 189 (1898) (depriving a doctor convicted of a felony of his medical license not punishment)).
in cases where a law has been held to be punitive—situations including incarceration or deprivation of citizenship—there are exceptions that allow these drastic measures under certain circumstances. For example, the Court has upheld involuntary civil commitment, and even denaturalization is justified if citizenship is fraudulently obtained.291 In this context, the court ruled that the notification provisions were not so onerous in effect as to equal punishment, and therefore, upheld the notification provisions.292

In Doe v. Pataki,293 the United States Court of Appeals for the Second Circuit considered whether New York’s sex offender registration and notification law violated the Ex Post Facto Clause. The court held that neither the registration nor the notification provisions of the act constituted punishment, and therefore, the act was constitutional when applied retroactively.294 The Pataki court looked to Hendricks, Ursery, and United States v. Ward in formulating a two-part test that examined the subjective congressional intent and then looked to “whether the statutory scheme was so punitive either in purpose or effect as to negate that intention”—noting that only “the clearest proof” would be enough to invalidate a statute on these grounds.295 In Russell v. Gregoire,296 the Ninth Circuit rejected a similar ex post facto challenge to Washington State’s Community Protection Act. In Russell, the Ninth Circuit rejected the Artway test because Ursery cast doubt on the application of Halper and Kurth Ranch; instead, the court relied on the same two-part test that the Second Circuit applied in Doe v. Pataki.297 The Massachusetts Supreme Judicial Court also rejected the Artway test in Opinion of the Justices to the Senate.298 In Opinion of the Justices, the Massachusetts court issued an advisory opinion for the state senate regarding that state’s proposed registration and notification law.299 In adopting a test closely related to that announced by the Second and Ninth Circuits, the court summarized the punishment inquiry as follows:

292. See id. at 1105. The court did accept the challengers’ claims that the New Jersey law was suspect on due process grounds. See infra Part IV.A.3.
293. 120 F.3d 1263 (2d Cir. 1997), cert. denied, 522 U.S. 1122 (1998).
294. See id. at 1265.
297. See id. at 1084, n.5.
299. See id. The state senate certified four questions to the Massachusetts court. The questions were whether the proposed community notification provisions would violate the Massachusetts and Federal Constitutions on ex post facto, due process, and equal protection grounds, and also, whether the provisions would violate the federal Constitution on double jeopardy, cruel and unusual punishment, and right to privacy grounds. See id. at 739. As the court pointed out throughout its opinion, its determination was limited to whether the proposed law was unconstitutional on its face because the law had not been passed yet and there was, therefore, no record to examine. After receiving the court’s opinion, the state legislature went ahead and changed the law anyway, and in Roe v. Farwell, 999 F. Supp. 174 (D. Mass. 1998), the United States District Court for the District of Massachusetts enjoined enforcement of that portion of the law that allowed public access to the sex offender registry created by the law. The district court, however, upheld the balance of the Massachusetts statute. See id. at 199.
The more harshly the measures bear on the individual and the more closely they resemble traditional criminal sanctions, the more urgent must be the regulatory concern, the more soundly rooted in fact rather than prejudice and conjecture must be the basis for that concern, and the more closely we must insist that the proffered regulation must hew to the well-grounded regulatory aim. 300

The court then went on to hold that the Massachusetts law did not violate the Ex Post Facto or Double Jeopardy Clauses because the notification provisions did not constitute punishment. 301

In Doe v. Poritz, 302 the New Jersey Supreme Court analyzed the constitutionality of Megan's Law under the Ex Post Facto Clause. 303 In holding that Megan's Law was a legitimate nonpunitive measure, the court phrased the issue as:

[W]hether this statute, this sanction, is an impermissible use of government's power to punish, or whether it is an honest, rational exercise of government's power, aimed solely at effecting a remedy, its provisions explainable as addressed to that which is being remedied, its deterrent or punitive impact, if any, a necessary consequence of its remedial provisions. 304

The Washington Supreme Court echoed the conclusions of Doe v. Poritz in State v. Ward. 305 Appellants Jeffrey Ward and John Doe were the first to challenge Washington's registration statute. 306 After release for a statutory rape conviction, Ward was charged with failing to register with the county sheriff as the statute mandates. 307 Ward moved to dismiss the charge on ex post facto grounds under both the Washington and United States Constitutions. 308 Although the appellants in State v. Ward were not subject to public notification, the court saw fit to analyze that portion of the statute as well. 309 Appellants argued that community notifica-

300. Opinion of the Justices to the Senate, 668 N.E.2d at 750.
301. See id. at 753. In fact, the court rejected each challenge to the act by answering each of the four certified questions in the negative. See id. at 761.
303. See id. at 398.
304. Id. at 398. The court in Doe v. Poritz summarized its decision as follows:

The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only that purpose, and not designed to punish; that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, further assured by our opinion and judicial review, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense. The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children.

Id. at 372-73.
305. 869 P.2d 1062 (Wash. 1994).
306. The registration statute was challenged in State v. Ward jointly by Ward as well as John Doe Parolee, who had been convicted and was serving time for first degree rape when the statute was passed. Doe was informed that because of the nature of his prior offense, failure to register would result in the commission of a felony. See id. at 1066. Doe brought his action under WASH. Rev. Code § 9A.44.140(2), which allows offenders to petition the superior court to be relieved of the duty to register. See State v. Ward, 869 P.2d at 1066.
307. See id. at 1065-66.
308. See id. at 1066. Doe also challenged the registration provision on equal protection and due process grounds. See id.
309. See id. at 1069.
tion would result in "hostile publicity" with a punitive effect. The court held that because the legislature had carefully limited the disclosure by regulating when an agency may disclose, what agency may do so, and where it may do so, the statute did not result in additional punishment to the offender. Among the factors considered relevant by the court were the following: that state public policy expressly favored information exchange with regard to sexual predators, that cases where disclosure was allowed were those containing evidence of a future public threat, that public warnings were limited to "necessary and relevant" information, and that the geographic scope of notification was rationally related to the threat posed. Finally, the court found that any stigma that resulted from public disclosure was a product not of registration or notification, but of private reactions by private citizens to the conviction information.

In State v. Myrick, the Maine Supreme Judicial Court sitting as the Law Court held that the Ex Post Facto Clause was not implicated where "there existed a sufficiently rational connection between the defendant's past activity and the legislative purpose to protect the public." In Myrick, the court rejected a challenge to a Maine statute that prohibited convicted felons from possessing a firearm. The defendant challenged the statute on the ground that the prior Maine law had prevented possession of a concealable firearm, and that by changing the law so as to make it criminal to possess any firearm, the new law was ex post facto because it criminalized an act that when committed was lawful. In rejecting this argument, the court stated that if the past conduct was of a type that indicated "unfitness" for a particular activity, then it would assume that the purpose of the law was not punitive. The court noted that the statute was intended to protect the public from a "high potential of danger," and that the disability created by the act operated to protect the public. Therefore, the court concluded, the act furthered a legitimate state interest, and because there was no additional punishment, the act was constitutional. Moreover, in State v. Flemming, the Law Court upheld an indeterminate sentence for involuntary commitment of an individual that was found not guilty "by reason of mental disease." Under Maine law, indeterminate prison sentences are not allowed. The court based its determina-

310. Id.
311. See id. at 1069-70.
312. Id. at 1070-71.
313. See id. at 1072.
315. Id. at 383.
316. See id. at 380.
317. See id. at 382.
318. Id. at 383. See also State v. Savard, 659 A.2d 1265, 1267-68 (Me. 1995) (holding that revocation of a driver’s license in an administrative proceeding served a remedial purpose and was not punishment) (citing United States v. Halper, 490 U.S. 435 (1989); Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994)).
319. Id.
320. See id.
321. 409 A.2d 220 (Me. 1979).
322. Id. at 225.
tion on the premise that authorized involuntary commitment is not punishment.\textsuperscript{324}

The SORNA does not violate the Ex Post Facto and Double Jeopardy Clauses, first and foremost, because the SORNA is not retroactive. Even if the SORNA were retroactive, however, it would not constitute punishment, and therefore, would still not violate the Ex Post Facto or Double Jeopardy Clauses. This follows from \textit{Hendricks} and \textit{State v. Flemming}, where even involuntary commitment has been held not to constitute punishment. The negative effects and burdens imposed by the SORNA pale in comparison to the total deprivation of liberty imposed by involuntary civil commitment. Furthermore, applying the tests approved by the Second, Third, and Ninth Circuits, as well as the state supreme courts, reveals that the SORNA is not punishment because the legislative intent is remedial and the Act is not so punitive in either purpose or effect as to negate that intention.

\textbf{2. The Right to Privacy and Substantive Due Process}\textsuperscript{325}

There are two main currents included within the “right to privacy,” one is that individuals are free to make important decisions about life, such as whether to marry, bear children and in what manner to raise those children. The other is that individuals have an interest in preventing disclosure of private information.\textsuperscript{326} The right to privacy does not explicitly appear in the U.S. Constitution, but has been recognized as implicit in several of the first ten amendments and in the Fourteenth Amendment.\textsuperscript{327} In his famous dissent in \textit{Olmstead v. United States},\textsuperscript{328} Justice Brandeis said that the right to privacy is “the most comprehensive of rights and the right most valued by civilized men.”\textsuperscript{329}

The first branch of the right to privacy stemmed from \textit{Griswold v. Connecticut}\textsuperscript{330} and its progeny. In \textit{Griswold}, the Court overturned a Connecticut law that made the use of contraceptives by married couples illegal.\textsuperscript{331} Justice Douglas wrote for the Court and cited specific provisions in the Bill of Rights that had “penumbras” that created “peripheral” rights.\textsuperscript{332} “Without those peripheral rights

\begin{itemize}
\item \textsuperscript{324} State v. Fleming, 409 A.2d at 225.
\item \textsuperscript{325} Substantive due process arguments other than those based on the right to privacy are beyond the scope of this Comment. For a discussion of other substantive due process arguments in the context of sex offender registration and community notification see Lewis, supra note 98, at 102-14.
\item \textsuperscript{326} See Whalen v. Roe, 429 U.S. 589, 599-600 (1977).
\item \textsuperscript{328} 277 U.S. 438 (1928), overruled by \textit{Katz v. United States}, 389 U.S. 347 (1967).
\item \textsuperscript{329} \textit{Id.} at 478 (Brandeis, J., dissenting).
\item \textsuperscript{330} 381 U.S. 479 (1965).
\item \textsuperscript{331} See \textit{id.} at 480. The law also made it a crime for anyone to assist or advise married couples in the use of contraceptives, and it allowed the person giving assistance or counsel to be prosecuted “as if he were the principal offender.” \textit{Id.}
\item \textsuperscript{332} Justice Douglas pointed to the First, Third, Fourth, Fifth, and Ninth Amendments as creating a “zone of privacy.” \textit{Id.} at 484-85.
\end{itemize}
the specific rights would be less secure." 333 Justice Douglas explained that the Connecticut law dealt with a matter that was "lying within the zone of privacy created by several fundamental constitutional guarantees." 334 A few years later, in *Eisenstadt v. Baird*, 335 the Court addressed a statute that made it a crime to distribute contraceptives. In this case, Baird had distributed the contraceptive to an unmarried person. 336 In *Griswold*, particular emphasis was placed on the fact that the Connecticut statute proscribed the use of contraceptives and not merely their manufacture or sale. In *Eisenstadt v. Baird*, however, the Court extended the principles enunciated in *Griswold* to unmarried individuals and decided that outlawing the distribution of contraceptives could not survive constitutional scrutiny. The Court stated, "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 337 In the landmark case of *Roe v. Wade*, 338 the Court invalidated a Texas statute that proscribed abortions except in cases where it was necessary to save the life of the mother. 339 Once again the Court looked to the "right to privacy" and characterized the issue as whether there was a right to privacy under the United States Constitution that would allow a woman to decide whether to bear children or to terminate her pregnancy. 340 The Court held the Texas law unconstitutional and declared that the right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 341 In *Carey v.*

333. *Id.* at 482-83. Justice Douglas cited to *NAACP v. Alabama*, 357 U.S. 449 (1958), as standing for the principle that "freedom to associate and privacy in one's associations" were protected. *Griswold v. Connecticut*, 381 U.S. at 483 (quoting *NAACP v. Alabama*, 357 U.S. at 462). *NAACP v. Alabama* decided that the state of Alabama could not force the NAACP to disclose the names and addresses of its rank and file members consistent with the Fourteenth Amendment's Due Process Clause. See *NAACP v. Alabama*, 357 U.S. at 451. In that case the Court reviewed a state court judgment of contempt entered against the NAACP for refusing to hand over its membership lists. See *id.* *NAACP* claimed that turning over the lists of rank and file members' names and addresses would have the effect of curtailing the freedom to associate. See *id.* at 460-61. The NAACP showed that on previous occasions "revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462.


335. 405 U.S. 438 (1972).

336. See *id.* at 440.

337. *Id.* at 453.


339. See *id.* at 117-18 & n.1.

340. See *id.* at 129.

341. *Id.* at 153. The Court cited *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1922), among others. In *Meyer*, the Court struck down a state law that prohibited the teaching of foreign languages to school children as a violation of the Court's broad view of personal liberty. In discussing this liberty interest, Justice McReynolds wrote that:

"Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."
Population Services International, the Court held that a New York law prohibiting the sale of contraceptives to anyone under sixteen and allowing the sale of contraceptives to those sixteen and older only by a licensed pharmacist, was unconstitutional under the First and Fourteenth Amendments. Justice Brennan's majority opinion reiterated that even though there was no explicit constitutional provision that granted a right to privacy, the Court had recognized the right to privacy as an aspect of the liberty protected under the Due Process Clause of the Fourteenth Amendment. The Court also asserted that this right to privacy was not enough to invalidate every state law regulating the sale of contraceptives; in some cases, "compelling state interests" would justify even a "burdensome" regulation where the regulation was "narrowly drawn" to express those interests. But the statute at issue in Carey was not narrowly drawn and did not survive the Court's scrutiny.

All of these right to privacy cases—whether based on "peripheral" rights emanating from "penumbras" or substantive due process—recognized a fundamental right to privacy that extended protection to individuals under the Federal Constitution, and which could, and did, invalidate state statutes. Nevertheless, this right to privacy has not invalidated every state enactment that infringes on an individual's privacy expectations. In Whalen v. Roe, the Court upheld a New York law that required the names and addresses of all persons that had prescriptions for certain drugs be recorded in a centralized computer database. The law was challenged on the ground that it violated the respondents' rights of privacy, and the district court enjoined enforcement of the provisions of the Act that required that records be kept. The Court stated that because disclosure of medical informa-

Id. at 399. In Pierce, a unanimous Court held that an Oregon law that required attendance at public schools was unconstitutional as interfering with the liberty of parents to control and direct the upbringing of their children. See Pierce v. Society of Sisters, 268 U.S. at 534-35. According to the Court in Skinner, the Oklahoma Habitual Criminal Sterilization Act "involve[d] one of the basic civil rights of man," and the Court invalidated the Oklahoma Act because it infringed on fundamental interests. Skinner v. Oklahoma, 316 U.S. at 541-43.

343. See id. at 681-82. The First Amendment was implicated because the statute also prohibited the "advertisement or display" of contraceptives.
344. See id. at 684 (quoting Roe v. Wade, 410 U.S. 113 (1973)). Justice Brennan went on to list some of the specific cases where the Court had already ruled that this right of privacy existed, including Eisenstadt v. Baird, 405 U.S. 438 (1972). See supra notes 330-341 and accompanying text (discussing cases). See also Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional a Virginia law that prohibited marriage between people of different races).
345. Carey v. Population Services Int'l, 431 U.S. at 685-86. Justice Brennan pointed to Roe v. Wade as an example of how the right to privacy was not absolute and how a state interest could become "sufficiently compelling" to sustain the challenged regulation. Id.
346. See id. at 689. The Court ruled that in order to hold the law unconstitutional it did not have to find a "right of access to contraceptives" since the law unnecessarily burdened the right to a decision on "matters of childbearing." Id. at 688.
348. See id. at 591. "The law was primarily concerned with keeping track of prescriptions for "opium and opium derivatives, codeine, methadone, amphetamines, and methaqualone." Id. at 593 n.8. The law also imposed penalties for willful public disclosure of information kept in the records. See id. at 594-95.
349. See id. at 591. The respondents here were composed of a group of patients who were regularly given prescriptions for such drugs, doctors who prescribed the drugs, and two physicians' associations. See id. at 595. The district court held that the doctor-patient relationship was protected by one of the "zones of privacy." Id. at 596.
tion to health care professionals and insurance companies was “an essential part of modern medical practice,” requiring further disclosures to representatives of the state with a responsibility for the health of the people was not an “impermissible invasion of privacy.”\textsuperscript{350} In upholding the New York law, the Court held that the impact of the law on the patients’ reputation or independence was not sufficient to constitute an invasion of privacy protected under the Fourteenth Amendment.\textsuperscript{351}

Defining the second branch of the right to privacy is left largely to state tort law. Under Maine law, a violation of a person’s right to privacy is an actionable tort, and there are four distinct interests that are protected.\textsuperscript{352} The four types of invasion of privacy that are protected by tort law are: intrusion upon a person’s solitude; public disclosure of private facts; portraying someone in a false light in public; and appropriation of another’s likeness for benefit.\textsuperscript{353} Although this branch of the right to privacy has been recognized, it has been subordinated to more fundamental interests, such as the rights enjoyed by the press under the First Amendment.\textsuperscript{354} For example, in \textit{Time, Inc. v. Hill},\textsuperscript{355} the Court set aside a judgment entered against \textit{Life} magazine for running an article that falsely portrayed an incident from Hill’s life.\textsuperscript{356} The Court held that the First Amendment protections for free speech and a free press precluded application of a New York statute that proscribed the appropriation of a person’s name, portrait, or picture for use in advertising or for the sale of goods without that person’s consent.\textsuperscript{357} The Court held that the statute violated the First Amendment where an article reported “matters of public interest” unless there was proof that the article was published “with knowledge of its falsity or in reckless disregard for the truth.”\textsuperscript{358} Even Justice Douglas

\textsuperscript{350} Id. at 602.
\textsuperscript{351} Id. at 603-04.
\textsuperscript{353} See Estate of Berthiaume v. Pratt, 365 A.2d at 795. \textit{See also} Nelson v. Maine Times, 373 A.2d 1221 (Me. 1977).
\textsuperscript{354} \textit{See} Cierznik, \textit{supra} note 212, at 748-49.
\textsuperscript{355} 385 U.S. 374 (1967).
\textsuperscript{356} \textit{See} id. at 398. Apparently, Hill and his family, while living in Philadelphia, were held hostage in their home by three escaped convicts. \textit{The Life} magazine story was a report on a play, \textit{The Desperate Hours}, that was loosely based on this incident, although the magazine mischaracterized the extent to which the play was a “true story,” and Hill sought damages. \textit{Id.} at 376, 378. The jury awarded $50,000 compensatory and $25,000 punitive damages, but the Appellate Division of the New York courts ordered a new trial on the damages issue. \textit{See} id. at 379. A jury was waived on retrial and the court awarded $30,000 compensatory without punitive damages, and the New York Court of Appeals affirmed. \textit{See} id.\textsuperscript{357} \textit{Id.} at 387-88.
\textsuperscript{358} Id. at 388. The Court thereby extended its holding from \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964), to include situations where the subject of the report was a private citizen seeking damages—requiring proof of malice or reckless disregard for the truth on the part of the press at least where the report concerned a “matter of public interest.” \textit{Time, Inc. v. Hill}, 385 U.S. at 388. This approach, however, was abandoned in \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974), where the Court held that a private person could recover damages for defamation so long as they were compensatory in nature; however, for punitive damages, a private individual would have to show knowledge of falsity or reckless disregard for the truth. \textit{See} id. at 348-50.
saw this as less than a close call; in fact, he saw no privacy issue at all present in the case. "It seems to me irrelevant to talk of any right of privacy in this context. Here a private person is catapulted into the news by events over which he had no control. . . . Such privacy as a person normally has ceases when his life has ceased to be private."359

Another freedom of the press versus right to privacy case, Cox Broadcasting Corp. v. Cohn,360 addressed the issue of whether a newspaper could be held liable for damages stemming from its publication of a seventeen-year-old woman's name who had been raped and murdered in Georgia.361 In reversing the Georgia Supreme Court, the Court cited Time, Inc. v. Hill and held that a state may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records."362 The Court stressed that the press had a crucial role in reporting the proceedings and business of government, and pointed out that judicial proceedings are "events of legitimate concern to the public."363 The Court went on to cite from the comments to the Restatement (Second) of Torts which recognizes a cause of action for public disclosure of private matters, and pointed out that according to the Restatement, "ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions."364

In his concurring opinion in Time, Inc. v. Hill, Justice Black took issue with the majority's "weighing the right to privacy against the freedom of the press embodied in the First Amendment. Time, Inc. v. Hill, 385 U.S. at 399. Justice Black saw the "make no law" language of the First Amendment as a more absolute prohibition on any governmental infringement of the freedom of the press—whether by regulation or by subjecting the press to damage awards. See id. at 399-400.

359. Id. at 401. Justice Fortas filed a dissenting opinion in which Chief Justice Burger and Justice Clark joined. The dissent saw the right to privacy as "a basic right" and would not insulate the press from state laws that sought to effectively protect against infringement of this right. Id. at 415. The Fortas dissent relied on dicta in, among other cases, Mapp v. Ohio, 367 U.S. 643 (1961), that referred to a right of privacy as a justification for the Fourth Amendment, and on Griswold v. Connecticut, 381 U.S. 479 (1965).


361. See id. at 471. Under a Georgia statute, it was unlawful for any news media to publish or broadcast the name of a rape victim. A television reporter working for Cox was in court when the six defendants charged with the crime appeared. See id. at 472. Five of the six pled guilty to rape when the murder charge was dropped, but the sixth pled not guilty. See id. The reporter saw the victim's name in the indictments—which were public records—and later that day broadcast a report concerning the court proceedings via a television station owned by Cox; the name of the victim was revealed in that report. See id. at 473-74. The victim's father, Cohn, filed suit one month later seeking damages because, he claimed, his right to privacy had been invaded by the report—citing the Georgia statute. See id. at 474. The trial court granted summary judgment for Cohn on liability and Cox appealed. See id. The Georgia Supreme Court held that the lower court erred in recognizing a civil cause of action under the statute but held that a cause of action did exist for the father under the common law and agreed that the First and Fourteenth Amendments did not require judgement for Cox. See id. The Georgia court also ruled that the lower court erred in granting summary judgment and remanded. See id. at 475. Because of the procedural posture of the case, much of Justice White's opinion considered whether or not the U.S. Supreme Court had jurisdiction, and Justice Rehnquist's dissent was exclusively concerned with the jurisdictional issue presented by the case—that there was no appeal from a "final" judgment. Id. at 501.

362. Id. at 491.

363. Id. at 492.

364. Id. at 494.
Thus, not only was the broadcast protected under the First and Fourteenth Amendments, but the Court also cast doubt on whether it was even tortious.

In Smith v. Daily Mail Publishing Co., the Court extended the rule from Cox Broadcasting to cover a case where state law prohibited publishing the names of juvenile defendants without permission of the trial court. The Court cited Cox Broadcasting, stating that where truthful information of public significance was lawfully obtained, a state could not punish its publication except to further a substantial state interest, and that the protection of juvenile offenders' identities was not enough of an interest.

Ten years later, in The Florida Star v. B.J.F., the Court was faced with a Florida case where a newspaper was held liable for publishing the name of a rape victim that it had obtained from publicly released police reports of the crime.

366. See id. at 104-05. The West Virginia statute at issue in the case made it a misdemeanor for a newspaper to publish the name of any child charged as a juvenile offender—unless the paper had written authorization from the juvenile court. In February of 1978, a fifteen-year-old student was shot and killed at a local junior high school, and reporters went to the school after hearing of the shooting on a police scanner. See id. at 99. While there, the reporters learned the name of the fourteen-year-old alleged assailant by asking questions of witnesses, police, and an assistant prosecutor. See id. The Daily Mail first published a story without identifying the alleged attacker by name, but the Charleston Gazette put the juvenile's name and picture in its February 10 morning edition. See id. The Daily Mail then published the juvenile's name in its afternoon edition of February 10, and three radio stations also broadcast the boy's name. See id.

367. See id. at 102-04. The Court also pointed out that by only prohibiting newspapers and not all mass media from publishing the sensitive information, the statute failed because it did not achieve its stated purpose—even if it was assumed that the law served a state interest of the "highest order." Id. at 105. Justice Rehnquist wrote a concurring opinion in which he agreed with the outcome for this very reason—the underinclusiveness of the statute. However, Justice Rehnquist wrote that even though freedom of the press was "indispensable to a free society," the state's interest in this case—protecting the anonymity of juvenile offenders—was sufficient to outweigh "any minimal interference with freedom of the press that a ban on publication of the youths' names entails." Id. at 106-07. Justice Rehnquist observed that prohibiting the publication of a juvenile offender's name served to protect a juvenile from the "stigma of his misconduct." Id. at 107. It is interesting to note Justice Rehnquist's position on one's interest in reputation as contrasted to his opinion in Paul v. Davis, 424 U.S. 693 (1976), where he wrote the majority opinion that held there was no interest in reputation guaranteed under the Due Process Clause. See id. at 711-12. The difference may lie in the fact that in Daily Mail, the privacy interest was recognized by state law, whereas in Paul v. Davis, the state law did not purport to grant any "right to privacy" that protected one's reputation.

369. See id. at 526. A Florida statute prohibited all mass media from publishing or broadcasting the names of victims of sexual offenses. See id. The newspaper was sued for negligently violating the Florida statute, and the trial court denied a motion to dismiss which argued that the law violated the First Amendment. See id. at 528. The woman, B.J.F. (as she is identified throughout the Court's opinion), also brought suit against the Duval County Sheriff's Department; the Department settled the suit by paying her $2500. See id. At the end of the paper's defense, the court granted B.J.F.'s motion for a directed verdict on liability, and a jury awarded damages. See id. at 528-29. The trial court granted the directed verdict because it found the paper "negligent per se," and the jury awarded $75,000 compensatory and $25,000 punitive damages. See id. The newspaper violated its own internal policy by publishing the woman's name; furthermore, the assailant was still at large when the report was published. See id. at 528. The victim was forced to move, change her phone number after receiving threatening calls, seek police protection, and get counseling after the report was published in the paper. See id.
The majority opinion cited to *Cox Broadcasting* and *Daily Mail*, and enunciated a two-part test under *Daily Mail*. First, the Court had to determine whether the information was truthful and lawfully obtained, and second, the Court looked to whether a state interest of the “highest order” was served by imposing liability on the newspaper.\(^{370}\) According to the Court, imposing damages on the paper violated the First Amendment because it was “undisputed that the information was accurate,” the information was lawfully obtained, and it concerned “a matter of public significance.”\(^{371}\) The Court then looked to the second part of the *Daily Mail* test and acknowledged the following state interests: providing for the privacy of victims, the safety of victims, and encouraging the reporting of such crimes. Under the Court’s analysis and in the circumstances of this particular case, however, the Court ruled that imposing liability was “too precipitous a means of advancing those interests.”\(^{372}\)

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,\(^{373}\) the Court held that disclosing the contents of an FBI “rap sheet” to a third party was within an exception to the Freedom of Information Act (FOIA) because disclosure of such materials could reasonably be expected to constitute an unwarranted invasion of personal privacy.\(^{374}\) In its opinion, the Court drew a distinction between the release of bits of public information contained within a rap sheet and the wholesale release of the entire rap sheet.\(^{375}\) In doing so, the Court characterized the rap sheet as a “computerized summary located in a single clearinghouse of information.”\(^{376}\) The Court noted that even if an event is not entirely private, it does not follow that an individual has no interest in limiting disclosure of the information, and that prior FOIA cases had established that the purposes for invading someone’s privacy could not justify the invasion.\(^{377}\) The Court determined that the purposes behind the FOIA were to ensure that the activities of the government were open to public scrutiny, not to allow information about private individuals that “happens to be in the warehouse of the Government” to be disseminated.\(^{378}\) The Court also observed that in none of its prior cases had it found it appropriate to honor a FOIA request for information concerning a specific private individual.\(^{379}\) The privacy interest recognized here, however, was under the statute itself, and was not based on any constitutional right to privacy.\(^{380}\)

Even though the Court has recognized a right to privacy in certain areas like marriage, procreation, and child rearing, it does not follow that there is a right to

\(^{370}\) *Id.* at 536-37.
\(^{371}\) *Id.* at 536.
\(^{372}\) *Id.* at 537.
\(^{373}\) 489 U.S. 749 (1989).
\(^{374}\) *Id.* at 756, 780.
\(^{375}\) *See id.* at 764.
\(^{376}\) *Id.*
\(^{377}\) *See id.* at 770-71 (quoting William Rehnquist, Is An Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, in NELSON TIMOTHY STEPHENS LECTURES, University of Kansas Law School, pt. 1, at 13 (Sept. 26-27, 1974)).
\(^{378}\) *Id.* at 774.
\(^{379}\) *See id.* at 774-75.
\(^{380}\) *See id.* at 755-56. *See also* Opinion of the Justices to the Senate, 668 N.E.2d 738 (Mass. 1996).
privacy under the Federal Constitution that protects against unauthorized publicity of private information.381 In Paul v. Davis,382 the Court upheld a Kentucky statute that permitted posting a flyer with a photograph of the respondent in approximately eight hundred stores that identified respondent by name as an “active shoplifter.”383 Edward Charles Davis III had been arrested for shoplifting but was never convicted, and soon after the flyer appeared the charges against Davis were dropped.384 The majority opinion stated that reputation alone was not a sufficient interest to invoke the procedural protections of the Due Process Clause.385 In rejecting Davis’s claim that the Kentucky law deprived him of a right to privacy under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Federal Constitution, the Court stated that:

His claim is based, not upon any challenge to the State’s ability to restrict his freedom of action in a sphere contended to be “private,” but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.386

In Opinion of the Justices to the Senate, the Massachusetts Supreme Judicial Court pointed to the Court’s decision in Paul v. Davis as closely analogous to the situation posed by community notification.387 In evaluating the potential for violating the Constitution on right to privacy grounds, the court quoted the above passage from Davis, and stated that even if there was a “version” of a right to privacy under the federal Constitution that encompassed disclosure of information, such an interest would be outweighed by the state’s interest in public safety.388 Likewise, in Russell v. Gregoire, the Ninth Circuit pointed to Davis in rejecting an argument that Washington’s community notification statute violated the petitioners’ right to privacy.389 The court stated that the petitioners’ right to privacy claim was “fatally defective as a matter of law, and must fail” because the community notification provisions did not violate any protected privacy interest.390

The absence of a right to privacy under the Federal Constitution that prohibits states from disclosing information does not end the matter, however, because a state is free to impose greater constraints on the actions of its own government than does the United States Constitution and the United States Supreme Court. The holdings of the Court set forth a minimum floor that states must observe;

381. See Opinion of the Justices to the Senate, 668 N.E.2d at 757. “The Justices know of no case decided by the Supreme Judicial Court or the Supreme Court where the constitutional right to privacy was found to have been violated by a governmental disclosure of information properly in its possession that the individual would rather not have disseminated.” Id.
383. Id. at 695.
384. See id. at 695-96.
385. See id. at 701. See infra Part IV.A.3 for a discussion of Davis’ procedural due process challenge.
386. Paul v. Davis, 424 U.S. at 713.
388. Id. at 757-58. See also Petruccelli, supra note 327, at 1165 (concluding that sex offenders’ privacy interests are “outweighed by competing public and state interests”).
389. See Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997). The petitioners also challenged the Washington law on ex post facto grounds. See id. at 1082.
390. Id. at 1094.
however, the highest courts of the states are free to interpret their own constitutions to extend more liberty interests than those that are guaranteed by the Federal Constitution as interpreted by the U.S. Supreme Court. In E.B. v. Verniero, the Third Circuit recognized that the New Jersey Constitution encompasses a right to privacy. According to the New Jersey Constitution, “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” There are several New Jersey Supreme Court decisions that recognize a fundamental right to privacy derived not only from the Federal Constitution but also from the language of the New Jersey Constitution.

The New Jersey Supreme Court, for example, devoted a great deal of attention to the claim that Megan’s Law violated sex offenders’ privacy rights in Doe v. Poritz. Quoting language from Whalen v. Roe, the court stated that two kinds of privacy were at issue in the statute: the right to confidentiality and the right to autonomy. In determining whether the statute’s challenger had a reasonable expectation of privacy in the information required for registration and notification, the court noted that no privacy interests generally exist in readily available public information. New Jersey specifically grants the public the right to access all court records, including criminal records. The disclosure of the home address of offenders was particularly controversial; the court acknowledged that the home is typically accorded special consideration. The court held that a significant privacy concern was raised by the release of home address information because of the potential for harassment, but placed great faith in the hands of the citizens of the state, stating, “[W]e expect that the information disclosed will be used as in-

391. See Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."); State v. Caouette, 446 A.2d 1120, 1122 (Me. 1982) (the Court’s rulings create a minimum standard rather than a “complete statement of controlling law”).

392. There were two actions before the court in this case. The first, that of E.B., was dismissed for lack of subject matter jurisdiction because E.B. had already attacked Megan’s Law in the state courts of New Jersey, and the only federal court with appellate jurisdiction over a final judgement from a state court of last resort is the United States Supreme Court by writ of certiorari. The second case, W.P. v. Verniero, was a certified class consisting of convicted sex offenders that were all classified as either Tier I or Tier II offenders under Megan’s Law, and therefore, the notification provisions applied to them. See supra notes 195-99 and accompanying text (discussing New Jersey’s Megan’s Law).

393. See E.B. v. Verniero, 119 F.3d 1077, 1105-06 (3d Cir. 1997). This was a critical step for that court in ruling that the Due Process Clause of the Federal Constitution required that New Jersey give added procedural protections to the challengers to New Jersey’s sex offender registration and notification law. See infra Part IV.A.3.


397. See id. at 406.

398. See id. at 407.

399. See id.

400. See id. at 408-09.
tended: as a means of protection, not as a means of harassment."\textsuperscript{401} In addition, the court found that notification in general implicated privacy interests: "We believe a privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity . . . ."\textsuperscript{402}

After holding that a privacy interest was implicated by notification, the court went on to analyze whether the state interest in disclosure was justified in spite of the existence of such a privacy interest. The court held that the state interest in disclosure substantially outweighed any privacy interest it infringed.\textsuperscript{403} Factors the court deemed relevant to such a determination included the relatively benign nature of the information disclosed and the already public nature of such information.\textsuperscript{404} Conversely, the court found that the state interest in preventing sex reoffense is high and that the statute was "carefully calibrated" to accomplish such a goal.\textsuperscript{405} Thus, Megan's law was held constitutional on the right to privacy challenge.

The Maine Constitution has language that is almost identical to that used in the New Jersey Constitution: "All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."\textsuperscript{406} Of particular interest is the inclusion of a right to "happiness" that is absent from the United States Constitution. There would seem to be a textual basis for recognizing interests under Maine's Constitution that are not recognized under the Federal Constitution. Unlike New Jersey, however, Maine does not have a distinct body of case law that draws on that language to extend the right to privacy beyond that which is recognized by the United States Supreme Court.\textsuperscript{407} The Law Court has had occasion to limit the right to privacy recognized under Maine law to similar areas that are protected under the Federal Constitution. In Brown v. Department of Inland Fisheries and Wildlife,\textsuperscript{408} the Law Court declined to extend the right to privacy to include matters that did not come within those areas like marriage, procreation, and child rearing that the U.S. Supreme Court has embraced.\textsuperscript{409} Likewise, in State v. Willoughby,\textsuperscript{410} the court refused to recognize a privilege pertaining to familial communications, stating that "[t]he Supreme Court's privacy decisions do not extend that far."\textsuperscript{411} Maine does, however, recognize a right to privacy under both tort law and criminal law,\textsuperscript{412} and the federal law is a minimum floor requiring

\textsuperscript{401} \textit{Id.} at 409.
\textsuperscript{402} \textit{Id.} at 411.
\textsuperscript{403} See \textit{id}.
\textsuperscript{404} See \textit{id}.
\textsuperscript{405} \textit{Id.} at 412.
\textsuperscript{406} Me. Const. art. I, \S 1.
\textsuperscript{407} See Jennifer Wriggins, Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality under State and Federal Law, 50 Me. L. Rev. 345 (1998). "Maine has not developed a significant jurisprudence on the right to privacy under the state constitution." \textit{Id.} at 376 n.220.
\textsuperscript{408} 577 A.2d 1184 (Me. 1990), cert. denied, 498 U.S. 1122 (1991).
\textsuperscript{409} See \textit{id} at 1186.
\textsuperscript{410} 532 A.2d 1020 (Me. 1987).
\textsuperscript{411} \textit{Id.} at 1022.
\textsuperscript{412} See supra note 352 and accompanying text.
Maine to recognize a right to privacy at least to the extent that the Supreme Court does under the Federal Constitution.

As previously mentioned, under Maine law there are four types of invasion of privacy torts: intrusion upon a person's solitude; public disclosure of private facts; portraying someone in a false light in public; and appropriation of another's likeness for benefit. To state a tort claim for public disclosure of private facts, however, a plaintiff must allege that: 1) the disclosed facts were private; 2) the disclosure would be highly offensive to a reasonable person; and 3) the disclosed facts are not of legitimate concern to the public. Because the information that is released by community notification is of public record, it is doubtful that community notification would even be tortious, and it is universally accepted that a legislature may supersede the common law by enacting a statute at any time. The Supreme Court has stated that where state law threatens a fundamental interest, the state must demonstrate that the measure is narrowly drawn so as to promote compelling state interests. The Maine Legislature has identified compelling state interests in the Statement of Fact to the SORNA. Because the SORNA explicitly ties community notification to a sex offender's risk of reoffense, the means chosen to achieve those state interests are also narrowly tailored so as to take the least intrusive approach possible. Based on Supreme Court precedent, decisions in other state courts, decisions in the circuit courts, and Maine law, the SORNA does not infringe on any constitutionally protected right to privacy.

3. Procedural Due Process

Any procedural due process analysis looks to see whether there is state action, whether there is a liberty interest, and then what process is due. Thus, there are three elements to a procedural due process challenge; if any one of them is absent, then the statute satisfies the Due Process Clause. When looking at a procedural due process attack on the SORNA it is readily apparent that there is state action sufficient to implicate the Fourteenth Amendment. The question then becomes whether the SORNA infringes on any recognized liberty interest, and if so, whether the Act provides adequate procedural safeguards. In Board of Regents v. Roth, the Court pointed out that the requirements of procedural due process apply where there is a "deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Furthermore, in Sandin v. Conner, the Court stated that the Due Process Clause could be triggered whenever there was a liberty interest created by the Federal Constitution or state law. The argument

413. See Hudson v. S.D. Warren Co., 608 F. Supp. 477 (D. Me. 1985); Nelson v. Maine Times, 373 A.2d 1221, 1225 (Me. 1977). "Merely exposing a person to undesired publicity is insufficient per se to constitute a tort even though the exposure was unauthorized. Conjoined with the exposure, publicity must be given to matters concerning the private, as opposed to the public, life of the person involved." Id. at 1225.


415. For the purposes of this Comment, neither a "property" nor a "life" interest is implicated.


417. Id. at 569.


419. See id. at 483-84.
that sex offender notification laws violate procedural due process is based on the fact that a convicted sex offender has to register and is subject to community notification. It is contended that this is a deprivation of a liberty interest because the individual will suffer stigma and damage to their reputation and may lose employment opportunities.\textsuperscript{420} If there is state action that deprives a liberty interest without adequate procedural safeguards, the measure fails to pass constitutional muster.

In \textit{Wisconsin v. Constantineau},\textsuperscript{421} the Court invalidated a Wisconsin law that allowed the posting of a person’s name on a flyer in a retail liquor store.\textsuperscript{422} The flyer identified the individual as someone who could not purchase alcoholic beverages because they had engaged in “excessive drinking” and had exposed their family to financial difficulty or had become “‘dangerous to the peace’ of the community.”\textsuperscript{423} According to the majority opinion, the chief of police of Hartford had posted a notice in all retail liquor stores that prohibited sales or gifts of alcohol to Constantineau for a period of one year—without any notice or hearing.\textsuperscript{424} In affirming the opinion of the court of appeals and the district court, the Court agreed that such “posting” was, to some persons, such a “stigma or badge of disgrace” that due process required “notice and an opportunity to be heard.”\textsuperscript{425} The Court stated unequivocally that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”\textsuperscript{426} Two dissenting opinions were filed, but both agreed that the Wisconsin statute was unconstitutional on its face.\textsuperscript{427}

Five years later, however, in \textit{Paul v. Davis}, the Court limited the holding in \textit{Constantineau} when it upheld a Kentucky statute that permitted posting a flyer with a photograph of the respondent in approximately eight hundred stores; the flyer identified respondent by name as an “active shoplifter.”\textsuperscript{428} Davis claimed

\begin{footnotesize}
420. Also, if a sex offender registration and notification act were punitive and retroactive, it might violate the Due Process Clause if there were not adequate procedural safeguards built into the Act. The SORNA, however, is not punitive and is not retroactive; therefore, it is not subject to this additional constitutional challenge under the Due Process Clause. \textit{See supra} Part IV.A.1. \textit{See also} Opinion of the Justices to the Senate, 668 N.E.2d 738, 754-55 (Mass. 1996). \textit{But see} Commonwealth v. Williams, 733 A.2d 593 (Pa. 1999) (invalidating Pennsylvania statute on due process grounds because it impermissibly shifted burden of proof to defendant for purposes of classifying defendant a sexually violent predator).


422. \textit{See id.} at 439.

423. \textit{Id.} at 434 (quoting Wis. \textit{Stat.} \textsection 176.26 (1967)).

424. \textit{See id.} at 435.

425. \textit{Id.} at 436.

426. \textit{Id.} at 437. The Court went on to add that “[u]nder the Wisconsin Act, a resident of Hartford is given no process at all. . . . [The appellee] may have been the victim of an official’s caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.” \textit{Id.}

427. \textit{See id.} at 439 (Burger, C.J., dissenting); \textit{id.} at 443 (Black, J., dissenting). Both dissents were filed on other grounds, namely that it was improper for the Court to rule on the constitutionality of the statute because the Wisconsin courts had not addressed the issue. \textit{See, e.g., id.} at 439-40 (Burger, C.J., dissenting). Constantineau had brought suit in federal court under 28 U.S.C. \textsection 1343. \textit{See id.} at 434.

\end{footnotesize}
that circulating the flyer with his name and photograph prominently displayed and identifying him as an “active shoplifter” was a deprivation of a liberty interest without due process under the Fourteenth Amendment. The majority opinion stated that reputation alone was not a sufficient interest to invoke the procedural protections of the Due Process Clause. The court of appeals relied on language in Constantineau in reaching its decision that the state’s conduct implicated a liberty interest. Nevertheless, the Court in Davis distinguished Constantineau on the ground that in Constantineau, the State of Wisconsin had done more than stigmatize Constantineau when it posted her name. In Constantineau, the Wisconsin statute also denied a previously held right—the right to buy liquor. The Davis Court stated that the damage to reputation, by itself, did not deprive Constantineau “of any ‘liberty’ protected by the procedural guarantees of the Fourteenth Amendment.” Under the Davis analysis, it is the underlying activity that is dispositive in analyzing whether there has been a deprivation of a liberty interest. In Constantineau, the underlying activity was buying liquor, a lawful activity under state law. In Davis, however, the underlying activity was shoplifting, and the Court implied that damage to reputation aside, there was no liberty interest in being able to shoplift. Nor is there a liberty interest under state law in being able to sexually molest children. To the contrary, both activities are unlawful, and a state that denies an individual the opportunity to engage in these activities cannot be said to be denying any liberty interest contemplated by the Due Process Clause. In Davis, the challenge failed because it did not satisfy the second element of the due process challenge: that there was a deprivation of a liberty interest. As discussed above, there is no broad right to privacy in Maine under either the federal or Maine Constitution that gives rise to a liberty interest like that relied on in New Jersey. Therefore, because there is no liberty interest that is being deprived by the SORNA, the Act does not violate the Due Process Clause.

In Opinion of the Justices, the court held that the proposed notification provision did not violate the Due Process Clause of either the state or Federal Constitutions. The court assumed, arguendo, that there was a liberty interest that gave

429. Paul v. Davis, 424 U.S. at 697. Davis’s complaint alleged that being stamped as an “active shoplifter” would inhibit him from frequenting the business establishments where the flier was posted for fear of being suspected. Id. Davis also asserted that the flier would interfere with future employment opportunities. See id.

430. See id. at 701.

431. See id. at 707-08.

432. See id. at 709.

433. Id.

434. See id. at 713.

435. But note that once a state grants probation or parole and sets out the conditions, due process protections attach to a decision to revoke parole or probation. See Morrissey v. Brewer, 408 U.S. 471, 484-89 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973).

436. See supra Part IV.A.2.

437. See Opinion of the Justices to the Senate, 668 N.E.2d 738, 755 (Mass. 1996). On the other hand, in E.B. v. Verniero, the Third Circuit recognized that under New Jersey law, a convicted sex offender had a liberty interest consisting of a state created right to privacy. See E.B. v. Veniero, 119 F.3d 1077, 1105 (3d Cir. 1997). See supra Part IV.A.2 for a discussion of the right to privacy under the state and Federal Constitutions. Because a liberty interest is recognized by state law, the Fourteenth Amendment prohibits deprivation of that liberty interest without due process; thus, the court had to determine exactly what process was due in this context.
rise to due process protections, but pointed out that the proposed law had adequate procedural protections built into it.\textsuperscript{438} Under the Massachusetts Senate’s proposed notification law, a court would decide whether community notification was justified, and a sex offender could appear and be heard and had a right to appointed counsel to contest the determination.\textsuperscript{439} The court contrasted the procedural protection built into the notification law to the Kentucky law in \textit{Paul v. Davis}, where there was no right to appear and be heard and the decision to post the notices was made by local police.\textsuperscript{440} In \textit{Opinion of the Justices}, the law was held to be valid because the third element of the due process challenge failed: there were adequate procedural safeguards.

The proposed Massachusetts law can be distinguished from the SORNA on the ground that the Massachusetts law applies retroactively to sex offenders convicted prior to passage of the law.\textsuperscript{441} The SORNA is not retroactive.\textsuperscript{442} Because the Act is not retroactive, it applies only to those sentenced for convictions of the predicate sex offenses after its passage.\textsuperscript{443} Even though the SORNA does not include procedural safeguards like those in the New Jersey or Massachusetts laws, all of the individuals to whom the SORNA applies had these procedural safeguards at their criminal trial.\textsuperscript{444} Hence, even if the Law Court determines that the SORNA

\textit{See E.B. v. Verniero}, 119 F.3d at 1106. The \textit{Verniero} court cited \textit{Mathews v. Eldridge}, 424 U.S. 319 (1976), and used its factors for evaluating what procedural safeguards were warranted. \textit{See E.B. v. Verniero}, 119 F.3d at 1106-07. The factors include consideration of the private interest affected; the risk of error using existing procedures and the benefit of added procedural safeguards; and the government’s interest, including fiscal and administrative burdens entailed in any additional procedural safeguards. \textit{See id.} at 1107 (quoting Mathews v. Eldridge, 424 U.S. at 334-35). Under the New Jersey statute, local prosecutors make the determination that an offender is either a Tier II or Tier III sex offender—thus triggering the notification provisions of the Act. \textit{See id.} at 1083. The court then held that a sex offender was entitled to the following procedural safeguards at a hearing challenging the prosecutor’s classification: first, that the government should bear the burden of persuasion; and second, that the government had to prove its facts by clear and convincing evidence. \textit{See id.} at 1109, 1111.

438. \textit{See Opinion of the Justices} to the Senate, 668 N.E.2d at 754-55.

439. \textit{See id.} at 741-42. The SORNA does not contain provisions for appointed counsel or a hearing; moreover, it is the local police and not a court that determines when and to what extent community notification is justified, but the SORNA does limit notification to members of the public that are “appropriate to ensure public safety.” Me. Rev. Stat. Ann. tit. 34-A, § 11143 (West Supp. 1998). \textit{See also supra} Part III.C.2.

440. \textit{See Opinion of the Justices} to the Senate, 668 N.E.2d at 753-54.

441. \textit{See id.} at 740.

442. \textit{See supra} Part III.C.2.


444. Even if an individual were convicted by a plea agreement, failure to inform him of the consequences under the SORNA would not violate due process because the notification provisions are “but one of the many contingent consequences” of a conviction. Opinion of the Justices to the Senate, 668 N.E.2d at 755 (quoting Commonwealth v. Morrow, 296 N.E.2d 468 (Mass. 1973)).

In \textit{State v. Ward}, 869 P.2d 1062, 1075 (Wash. 1994), Doe argued that registration and possible notification was not a term of his plea agreement reached in 1980. The court, in rejecting this argument, reasoned that registration and notification were collateral issues, rather than a direct consequence of a guilty plea, that did not require notice during the plea agreement stage; the court analogized these statutes to determinations of habitual offender status in subsequent independent trials. \textit{See id.} at 1075-76.
deprives convicted sex offenders of a liberty interest, it does not do so without due process.

Therefore, the SORNA does not violate the due process clause of the Maine or Federal Constitutions because, either way, one of the three elements to a successful due process challenge is missing. If the Act does not deprive a liberty interest on the authority of Davis, the challenge fails, and even if the Act is found to deprive a liberty interest, there are adequate procedural safeguards because the SORNA is not retroactive.

4. Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment.445 In Trop v. Dulles, the Court pointed out that the death penalty has been upheld under the Eighth Amendment, but that it does not follow from this that any punishment short of death is permissible.446 "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."447 It follows, then, that if a government regulation inflicts no punishment, it does not violate the Eighth Amendment.448 As pointed out above, it is unlikely that the SORNA constitutes punishment.449 Even if a law does impose punishment, the Eighth Amendment only prohibits punishments that are "grossly disproportionate to the severity of the crime."450 Therefore, even if the SORNA is deemed to be punitive, it is highly unlikely that the Act would be held to be so grossly disproportionate as to constitute cruel and unusual punishment. Therefore, the Eighth Amendment is not implicated at all.

5. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."451 Historically, when determining whether a state law violates the Equal Protection Clause, the standard of review utilized by the Court varies depending on whether or not the individual challenging the law is a member of a suspect classification. In general, legislation is presumed valid and will be upheld if a classification is rationally related to a legitimate state interest.452 A law that deals with suspect classes like race, alienage, or national origin,
will be subject to strict scrutiny by the Court. Laws that deal with other, quasi-suspect classes like gender, may also be subject to heightened—or intermediate—levels of scrutiny.

In the equal protection challenges to community notification provisions, the courts have refused to recognize sex offenders as a protected class and have used a rational relation standard of review. In Opinion of the Justices, the Massachusetts Supreme Judicial Court rejected an equal protection challenge to that state's proposed notification provisions in its advisory opinion to the senate. Challenges to the notification provisions under the equal protection clause are based on claims that the laws are both overinclusive and underinclusive. In rejecting the underinclusiveness argument, the court stated that the legislature is not held to a standard of a perfect fit in drafting legislation; the legislature may proceed against a perceived evil "one step at a time." The court also rejected the argument that the provision was overinclusive, pointing out that the notification provisions were tailored to apply to sex offenders who posed a risk of reoffense and were a danger to the community.

In Mahaney v. State, the Maine Law Court stated that:

In order to find a violation of the equal protection clause, the court must first have some indication that similarly situated persons have not been treated equally. Once it is established that a person is treated differently than similarly situated persons, the court must then evaluate the purpose of the differential treatment. A state is permitted to make distinctions and treat individuals differently, provided that the difference in the treatment "rationally furthers a legitimate state pur-

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453. See id.
454. See id. at 440-41. See also Craig v. Boren, 429 U.S. 190, 197 (1976).
455. See, e.g., Opinion of the Justices to the Senate, 668 N.E.2d 738, 755-56 (Mass. 1996); State v. Ward, 869 P.2d 1062, 1077 (Wash. 1994). In Ward, a second defendant, Doe, advocated the application of a strict scrutiny test over a rational relation test because the statute compromised his ability to support himself and find shelter. See id. The court held, however, that the presence of a liberty interest alone was not sufficient to merit the application of the heightened strict scrutiny standard. See id. Rather, the court elected to apply a rational relation test and found the statute valid in furthering the legitimate state interest of aiding local law enforcement. See id.
456. See Opinion of the Justices to the Senate, 668 N.E.2d at 755-56.
457. The statutes are overinclusive because they concededly apply to people who will not reoffend, and are underinclusive because there are people who will reoffend that are not covered.
459. See id. at 755 (stating that it was certainly rational to apply the Act to persons that had committed sex offenses in the past).
460. 610 A.2d 738 (Me. 1992).
pose.” The test of a “rational relationship” requires proof of facts that may be reasonably conceived to justify the distinction drawn by the state.\textsuperscript{461} Thus, a challenger to the SORNA would have to demonstrate that: (1) he was being treated differently than other similarly situated individuals; and (2) that the difference in this treatment did not rationally further a legitimate state interest.

The SORNA is similar to the legislation under review in Opinion of the Justices because both laws base community notification on the risk of reoffense posed by a particular sex offender; therefore, the SORNA’s means are rationally related to its ends for purposes of equal protection analysis. Even if classifications made by the legislature are not perfectly tailored, they will pass equal protection challenges where there is no suspect class and the law is drafted so that the means are rationally related to its ends.\textsuperscript{462} No one could realistically argue that sex offenders are a suspect or quasi-suspect class; thus, any state law that deals with the individuals in that class must only show that the classification is rationally related to a legitimate state interest. Under a state’s general police power, it is clear that protecting the health and welfare of a state’s most vulnerable population—children—is a legitimate state interest. Hence, even if a challenger to the SORNA could demonstrate that he was being treated differently than other similarly situated individuals, it is unlikely that he could satisfy the second prong of the \textit{Mahaney} test. For this reason, any equal protection challenge to a state’s sex offender registration and notification law faces an uphill—indeed, an almost insurmountable—burden, and therefore, challenges to such laws are almost always brought on other grounds. The SORNA, even though arguably underinclusive and overinclusive, passes constitutional muster under the Equal Protection Clauses of the Maine and Federal Constitutions.

\textbf{B. The Advisability of the SORNA}

\textbf{1. Is Sex Offense Incidence and Recidivism Really a Disproportionate Concern?}

Although statistics regarding the incidence of sex offense in this country seem astronomical, a thorough inquiry undermines the assumption that sex offenses are a disproportionate concern. Granted, the occurrence of just one sex crime is one occurrence too many, but unique strategies to combat the problem of sex offense cannot be justified solely on the basis of their incidence compared with the incidence of other types of crimes. Forcible rape, for example, accounted for just 0.7\% of all crimes committed in the United States in 1997.\textsuperscript{463} Arrests for sex offenses accounted for less than four percent of all arrests.\textsuperscript{464} The vast majority of crimes committed in this country are larceny/theft crimes—58.6\%. \textit{This} is a disproportionate concern, sex offenses are not.\textsuperscript{465} Moreover, the rate of sex offenses

\begin{footnotesize}
\textsuperscript{461} \textit{Id.} at 743 (quoting Zobel v. Williams, 457 U.S. 59, 60 (1983)) (internal citations omitted).

\textsuperscript{462} See Railway Express Agency v. New York, 336 U.S. 106, 109 (1949); Opinion of the Justices to the Senate, 668 N.E.2d at 755 (“In general, if the distinction is rationally related to the proper purpose the law pursues, there is no violation.”).

\textsuperscript{463} See U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 9 (1997).

\textsuperscript{464} \textit{See id.} at 223.

\textsuperscript{465} \textit{See id.} at 9.
\end{footnotesize}
is decreasing, not increasing. The rate of rapes in 1997, for example, is down 13% from 1993, the sixth consecutive decrease in the rate of rape committed. The same trend can be seen in Maine.\textsuperscript{466} The fact remains, however, that a majority of American citizens believe the national crime problem is getting worse, especially with regard to sex offenses. From where does this sentiment originate? Passionate political speeches and sensational news coverage may help TV and political ratings, but they do little to promote rational safety in the nation's neighborhoods. The success of the media is dependent on the number of viewers who watch their programs or read their newspapers. What the media chooses to report and how it chooses to report it is directly related to this rating success; more news happens in a day than there is time to report. The media's techniques and selectivity in reporting topics can be detrimental to public welfare. Such techniques include removing fact from context, using undocumented authority, presenting opinions as facts, selective fact presentation, and using value-laden terminology such as "a 'gang' that 'preys' on 'unsuspecting' victims."\textsuperscript{468} These media tactics can unfairly manipulate the public's understanding of the nature and incidence of crime, and specifically of sex crimes. Such manipulation can only encourage public frenzy rather than harness it. As Victor Kappeler noted in \textit{The Mythology of Crime and Criminal Justice}:

The selection of crime problems is often limited to the most bizarre or gruesome act a journalist or investigator can uncover. Incident and problem selection are driven by the competitive nature of modern media. By culling unique and fascinating issues for public exhibition, the media ensure the marketability and success (viewers and advertising dollars) of a given media production. Once an incident has been selected, it is then presented as evidence of a common, more general, and representative crime problem.\textsuperscript{469} This tendency of the media to promote sensational stories as a means of increasing readership or viewership, and thereby profits, is dubbed "yellow journalism."\textsuperscript{470} In this way, isolated incidents, violent and tragic though they may be, become social issues that are politicized and eventually deemed part of a major crime problem.\textsuperscript{471} The creation of crime problems in this manner attracts other media and, eventually, a crime wave is born. Such effects are reflected in the statistics. One study, for example, reported that 50% of news stories involved violent crimes, but only 6% of actual crimes were violent in nature.\textsuperscript{472} Eighty-eight percent of respondents in a national crime survey overestimated the prevalence of violent crime.\textsuperscript{473} The media's harmful influence extends even further. Although including graphic and emotional details, the media conversely overlooks what may be the most essential element of a report—prevention techniques and personal risk issues.\textsuperscript{474}

\textsuperscript{466} See id. at 26.
\textsuperscript{467} See id. at 69.
\textsuperscript{469} Id. at 5-6.
\textsuperscript{470} Id. at 6.
\textsuperscript{471} See id.
\textsuperscript{472} See id. at 17 (citing Kenneth Tunnell, \textit{Film at Eleven: Recent Developments in the Commodification of Crime}, 12 \textit{Soc. Spectrum} 293, 295 (1992)).
\textsuperscript{473} See id.
\textsuperscript{474} See id. at 16.
Psychological theory and phenomena related to the creation of these false crime beliefs are abundant; the media often demonstrates the reliability of these theories. Confirmation bias, for example, denotes every individual’s tendency to seek information that confirms any preconceptions or already formed beliefs.475 People who, from whatever source, already believe in the prevalence of sex offenses and reoffenses are likely, then, to pay more heed to information that confirms this belief. They find it in the media.

Similarly, the representativeness heuristic theory hypothesizes that people judge the likelihood of events by how well they match any previously formed representations of such an event.476 For example, individuals are more likely to believe all sex offenders are similar to those sex offenders they have already seen. Because most people’s readily accessible memories of sex offenders are derived from violent and outrageous media depictions, they are more likely to believe that all sex offenders are like those they see on TV. Although this may be a convenient cognitive strategy to categorize the world efficiently, it sometimes results in the creation and maintenance of harmful false beliefs. Because the media is more likely to show only the most sensational stories of sex offenses, the public’s perceptions may therefore be quite skewed toward beliefs that violent sexual predators are more representative of the average sex offender than the more mundane truth that most sex offenders are not violent or predatory—a truth that is too mundane to make it into media stories. Moreover, one of the great dangers of the representativeness heuristic is that it encourages maintenance of these beliefs to the exclusion of other reliable information.477 Thus, people who come to believe sex offenders are violent predators in this way are very likely to ignore more accurate information that advises toward more realistic beliefs.

A third example of psychological theory demonstrating the power of media to portray false images is the availability heuristic. The availability heuristic states that individuals judge the likelihood of events by the availability of similar occurrences in their memory. Under this theory, therefore, if instances of violent sexual offense readily come to mind, individuals will presume their occurrence to be more frequent than it really is.478 The available memories may also include fiction;479 if someone has just seen a movie about a sex offender, he is more likely to inflate the rate of sex offense he believes to be accurate. The media contribute to this theory by providing the prior instances of sex offense with which to compare current events. This is especially true if the media are presenting more violent sex crime information than nonviolent sex crime information; people will thus overestimate the rate of sex offense in general as well as the incidence of violent sex offense. Because most sex offenses are nonviolent, these media portrayals of violent sex offenses cause people to increase their belief in the prevalence of such crimes.

Difficulty lies also in the fact that the passage of registration and notification statutes is a highly political topic. Political figures are just as prone to false social

476. See id. at 53.
477. See id.
478. See id. at 55.
479. See id. at 56.
belief, including the view of crime proposed by the media. Few politicians will refuse to support an effort to reduce crime, especially sex crimes against children. Everyone supports crime control; political candidates can only garner support by taking a stand on crime issues. Polls indicate that citizens believe crime is among the most important social problems and that the criminal justice system is too lenient on criminals.\textsuperscript{480} Refusing to support a sex offender notification law may seem to a politician's constituency as if he does not support the control and eradication of sex crimes. "Such a reaction makes it politically impracticable, and almost impossible, for legislators to oppose notification laws."\textsuperscript{481} Thus, these statutes easily pass in state legislatures. Consequently, what is not often addressed in these legislatures is what harm may come from notification statutes. New Jersey, for example, passed Megan's Law without any of the standard committee meetings normally used to discuss and argue about bills.\textsuperscript{482} Opponents see this as an indication of the rash and emotional element to the passage of such statutes. The danger that sex offender statutes are passed as a result of emotion and media manipulation rather than rational and empirical data analysis is high:

The belief that sex offenders reoffend repeatedly fuels the rush toward community notification. "Statistics show that 95\% of the time, anyone who molests a child will likely do it again," declared the Indiana senator proposing sex offender registration in that state. A Florida senator referred to "sexual predators who start to look for their next victim as soon as they are released from prison," and a California legislator warned the public that sex offenders "will immediately commit this crime again at least 90 percent of the time."

Scholarly research does not support these claims.\textsuperscript{483} Such instances in legislative history are common. In her statement at the National Conference on Sex Offender Registries, Texas Senator Florence Shapiro stated, "I like to say [sex offenders] have three very unique characteristics: They are the least likely to be cured; [t]hey are the most likely to reoffend; and [t]hey prey on the most innocent members of our society."\textsuperscript{484} She later quoted James Baldwin: "If one really wishes to know how justice is administered in this country, one does not question the policemen. One does not question the lawyers or the judges. One goes to the unprotected; those precisely who need the protection the most, and listen to their testimony."\textsuperscript{485}

Such exaggerated claims regarding the nature and incidence of sex offenses belie the real statistics. Margaret Alexander's comprehensive study of recidivism rates of sex offenders was presented in 1994; her meta-analysis of more than 7500 sex offenders found a reoffense rate of only 10.9\% among treated sex offenders,

\begin{itemize}
\item \textsuperscript{480} See Lieb et al., supra note 2, at 43-44.
\item \textsuperscript{481} Claire M. Kimball, A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders are Released into the Community, 12 Ga. St. U. L. Rev. 1187, 1220 (1996).
\item \textsuperscript{482} See Kimberly J. McLarin, Trenton Races to Pass Bills on Sex Abuse, N.Y. TIMES, Aug. 30, 1994, at B1.
\item \textsuperscript{483} Eric Lotke, Politics and Irrelevance: Community Notification Statutes, 10 FED. SENTENCING REP. 64 (1997) (internal footnotes omitted).
\item \textsuperscript{484} Florence Shapiro, The Big Picture of Sex Offenders and Public Policy, in Nat'1 Conf. on Sex Offender Registries 92-93 (U.S. Dept. of Justice ed. 1998).
\end{itemize}

\textsuperscript{485} Id. at 94.
and 18.5% among untreated sex offenders.\textsuperscript{486} Other studies show similar numbers. Lita Furby’s study of 15,000 sex offenders revealed a reoffense rate of only 12.7%.\textsuperscript{487} Another meta-analysis of sixty-one studies of sex offender recidivism completed in 1998 found an average recidivism rate of only 13.4%.\textsuperscript{488} Thus, reports of recidivism rates of 90% cited in legislative committee meetings and hearings are false and misleading; more than 80% of sex offenders never reoffend. Moreover, the reoffense rate among criminals in general is astronomically high compared to the recidivism rate for sex offenders. In one follow-up study, the Department of Justice found a reoffense rate of 62.5% among all prisoners released in 1983.\textsuperscript{489} Thus, not only is sex offense recidivism lower than reported by legislators, it is significantly lower than the general recidivism rate. Unique concerns about sex offense recidivism are unfounded in light of this fact. And although the prospect of even eighteen out of one hundred sex offenders committing new offenses is far from good news, recognizing the actual rate of recidivism is more likely to enhance understanding of the nature of the problem, and hence, what solutions are most appropriate to combat it. Reliance on myth is not an effective legislative tool.

Even those offenders who victimized more than one person before arrest are no more likely to reoffend than sex offenders with only one instance of offense.\textsuperscript{490} After arrest, such urges may be diluted. One ex-offender stated:

>[W]ith arrest and the other shocking consequences of being discovered, those uncertain boundaries [stemming from one’s own prior victimization] are suddenly and vividly redrawn. For most, that drawing emerges with very hard lines. More than with any other class of offender, getting caught leaves sex offenders humiliated, shamed and shaken to the core. Being handcuffed and hauled away from decent society is a shattering experience for anyone, but it is all the more electrifying and soul-stripping when the nature of the offense is as intimate and shameful a secret as is a sex crime.\textsuperscript{491}

Those studies that do find significantly higher recidivism rates among sex offenders often suffer from serious methodological and statistical problems. The single most important methodological problem in recidivism and treatment studies is the lack of randomly assigned controls equally motivated to receive treatment.\textsuperscript{492} In most recidivism and treatment studies, those offenders who wish to receive treatment are put in the treatment group. Those who do not wish to receive treatment are put in the nontreatment group. Aside from the ethical considerations in denying treatment to sex offenders who seek it, placing some offenders who want

\textsuperscript{486} See Lotke, supra note 483, at 64 (citing Margaret Alexander, \textit{Sex Offender Treatment: A Response to Furby et al.}—1989 Quasi-Meta-analysis (paper presented at the conference of the American Association for the Treatment of Sexual Abusers (Nov. 11, 1994))).

\textsuperscript{487} See Lotke, supra note 483, at 64 (citing Lita Furby et al., \textit{Sex Offender Recidivism: A Review}, 105 PSYCHOL BULL. 3 (1989)).


\textsuperscript{490} See Lotke, supra note 483, at 64-65.

\textsuperscript{491} See id. at 65 (alteration in original) (quoting National Center on Institutions and Alternatives, \textit{Report by Anonymous Offenders} (Alexandria, Virginia 1996)).

\textsuperscript{492} See Carson et al., supra note 31, at 430.
treatment in the nontreatment group is more likely to yield accurate and generalizable data. Such individuals, because they seek assistance, may be more likely to avoid reoffense after release; the recidivism rates for untreated offenders would thereby decrease overall. Without such a measure, study results are necessarily skewed. The Authors do acknowledge, however, that the outcome variable in most recidivism studies is reconviction for a crime; in many cases, the crimes go unreported or the crime goes unconvicted for various reasons, factors that can result in a vast overestimation of treatment efficacy, but to what extent is unknown.\textsuperscript{493} Use of reconviction as the outcome variable is standard in recidivism studies researching all types of crimes, however. Any underestimation of recidivism is equally true for nonsexual offenses. Thus, the proportional difference in recidivism rates, at least theoretically, remains the same.

Studies that have found higher recidivism rates in sex offenders sometimes include all reoffense statistics. That is, these studies include general offenses as well as sex offenses in calculating recidivism. Thus, a sex offender who is released from jail and is later arrested for shoplifting or drug use will be included among those who have reoffended. In fact, a sex offender whose only recidivist act is a failure to register as a sex offender will be calculated as a reoffender! Reliance on such subsequent nonsexual offenses is unfounded in light of the stated legislative purpose of notification statutes. Such statutes are intended to decrease sex offense recidivism by notifying the community of prior sex offenses; they are not intended to inform the community about every crime that was committed by a former sex offender. Including these general reoffense incidents can substantially inflate recidivism rates.

Furthermore, the language used when reporting recidivism rates also errs on the side of rate inflation. Citations of reoffense rates often include only those rates on the high end of the spectrum. Reporting rates of "up to" 40%, for example, ignores the perhaps considerable range of lower recidivism rates. When these figures are used by the media and legislators, the "up to" is often removed from the statistic, resulting in a great overstatement of the actual rate.\textsuperscript{494} Such overstatement in the media and in political realms thereby increases the emotional reaction to sex offenses and results in a greater perceived danger. These emotional reactions in turn demand more and more stringent solutions, the very same sentiments that led to the passage of notification laws in the first instance.

Another alarming factor is that registration and notification laws may actually result in increases in sex offender recidivism rates. Researchers argue that the "best path to safety" in terms of lowering the risk of sex offender reoffense is to ensure their smooth transition back into the community.\textsuperscript{495} Because most sex offenders were themselves abused at some point in their lives, factors surrounding such victimization are at the root of their current victimization of another. Sex offenders themselves often report feelings of subjective distress as one of the causes of their victimization of others.\textsuperscript{496} This distress can include feelings of isolation and rejection, poor social and communication skills, anger management problems,

\textsuperscript{493} See id.
\textsuperscript{494} See Lotke, supra note 483, at 65.
\textsuperscript{495} See id.
\textsuperscript{496} See Hanson & Bussiere, supra note 488, at 357.
lack of trust, and the trauma of being victimized themselves. Furthermore, “sexual offenders often report taking solace in sexual thoughts and behavior when confronted with stressful life events.”

Halfway houses, relatives, and community programs have become more reluctant to take in sex offenders in the wake of the notification statutes. Employment is virtually impossible in communities that have been notified about a particular offender. Social and family relationships may be all but nonexistent. These may be exactly the types of problems that led to the initial sex offense in the first place. Notification attaches a stigma; such a stigma exacerbates these problems in sex offenders. Community rejection, ostracism, and further isolation are only likely to enhance the feelings and emotional turmoil of sex offenders that caused them to offend initially. Some current research focuses on “negative emotional states” and “poor coping strategies” as precursors to sex offending. Research in this area is severely lacking, however. Despair that they will never lead a normal life “drive[s] people inwards, where they may dwell on increasingly inappropriate fantasies” in an effort to combat their feelings of helplessness and hopelessness in real life. The stigmatic effects of notification—which exacerbate these feelings of isolation and ostracism—may therefore increase recidivism.

Considerable concern has been raised regarding the success of notification statutes in decreasing sex offender recidivism and protecting the public. The efficacy of notification statutes largely depends on the empirical basis upon which the statutes are founded. Are notification statutes founded on solid empirical data? The answer is no. Public concern rests on the assumption that sex offense incidence is high and increasing steadily, and that recidivism rates are astronomical. The data simply does not support such conclusions. Rather, notification statutes are the product of emotion, rash decision making, media and political frenzy, and reliance on simple myth.

2. Are Notification Statutes the Best Remedy?

Questions of policy are important independent from the argument that sex offenses are a disproportionate concern. If the justification for registration and notification statutes is that the nature of sex offenses renders them a more formidable opponent than other types of crimes, the question remains whether this remedy is the most appropriate solution in light of the theoretical and practical consequences of such statutes. The answer is emphatically “no.” The problems with the “solution” of notification far outweigh any benefits that it may produce.

Independent from the constitutional analysis, other problems with such statutes are evident. Sex offender notification statutes are not advisable from a policy perspective. The efficacy of these registration and notification statutes rests on untrue assumptions and misplaced intentions. The prevention of sexual victimiza-

497. Id. at 358 (quoting F. Cortoni et al., Sex as a Coping Mechanism and Its Relationship to Loneliness and Intimacy Deficits in Sexual Offending (paper presented at the 15th Annual Conference of the Association for the Treatment of Sexual Abusers (Chicago, Illinois 1996))).


499. Hanson & Bussiere, supra note 488, at 349.

500. See id.

501. Lotke, supra note 483, at 66.
tion is, of course, an admirable yet lofty goal. More likely to accomplish such a goal is reliance on scientific data and an analysis of the practical consequences of such statutes.

a. Theoretical and Practical Difficulties

The key feature of notification statutes is risk assessment, or, determinations of which offenders are dangerous, violent, or most likely to reoffend. Such assessments must necessarily incorporate sociological, psychological, and basic criminal justice research to be most effective. Few states have examined the many inherent and devastating problems in predicting dangerousness, however.

After a young woman in California was stabbed to death by a voluntary outpatient of a mental health clinic, her parents brought a suit against her murderer’s treating psychologist. In the resulting decision, the court in Tarasoff v. Regents of the University of California502 held that psychologists have a duty to warn others about their violent patients.503 Implicit in the court’s holding was the notion that mental health professionals have the capacity to predict dangerousness. Such predictions, however, are among the most difficult tasks in the field of psychology. This pessimism is noted in Abnormal Psychology in Modern Life:

Violent acts are particularly difficult to predict because they are apparently determined as much by situational circumstances as they are by an individual’s personality traits or violent predispositions. It is, of course, impossible to predict with any great certainty what environmental circumstances are going to occur or what particular circumstances will provoke or instigate aggression for any given violently disposed person.504

Furthermore, “clinicians are unable to specify the type or severity of harm an individual may cause, or to predict with great accuracy the probability of harm even occurring.”505

Assessments of potential dangerousness must consider two factors: the predisposing personality, and environmental instigation.506 Because environmental stimuli can never be predicted, attempts to predict dangerousness must necessarily focus on the personality and prior acts of the offender.507 Furthermore, violence, even in the most dangerous offender, occurs relatively infrequently. In fact, “[v]iolent behavior happens (or is reported) so infrequently that if you say it will happen, the odds are already against you.”508 The best predictor of future behavior is by far past behavior;509 yet those offenders who are serving time for one offense have not had the opportunity to show the extent or nature of their past behavior in a way that would be helpful in assessing the extent or nature of their future behavior. These uncertainties often lead to an overestimation of the dangerousness of individuals.

503. See id. at 340.
504. See CARSON ET AL., supra note 31, at 685.
506. See CARSON ET AL., supra note 31, at 685.
507. See id.
508. BARTOL, supra note 505, at 178.
509. See id.
The fact that clinicians overestimate the likelihood of dangerousness in individuals is particularly relevant in community notification.\textsuperscript{510} The problem of overestimation is an expansive one; studies continue to find that "false positives" outnumber "true positives" by a margin of two to one.\textsuperscript{511} Although such overestimation by psychologists may best serve their purposes, such conservative estimates will only increase the pool of individuals that the community will be warned about, thereby exacerbating the problems of notification and doing a disservice to the community at large. Aside from community notification problems, the consequences to the offender of being a false positive can be enormous. These consequences include social stigma, inability to find work, and victimization from vigilante acts, to name just a few.

A further problem is that in most states, risk assessments are performed not by mental health experts, but by criminal justice personnel with even less training and education in predicting behavior. Judges, juries, and probation and parole personnel are well-versed in making such decisions about dangerousness, but with little or no training on the theory behind such prediction.

Maine demonstrates perfectly the problems inherent in risk assessment. First, the DOC and law enforcement agencies perform the risk assessments of sex offenders soon to be released.\textsuperscript{512} DOC personnel simply do not have the training or education to attempt behavior prediction, an ability that has thus far eluded even the most experienced of psychologists. Furthermore, the eighteen-question, three-point scale used in the Guideline does little to capture any of the intricacies of personality variability and environmental stimuli important in the prediction of dangerousness.

Another of the most often-cited justifications for notification statutes is the belief in low treatment success of sex offenders. Many believe "nothing works."\textsuperscript{513} Lita Furby, in her 1989 study of treatment outcome effectiveness, found that reoffense rates remained around 13% for both treated and untreated sex offenders.\textsuperscript{514} She thus determined that these studies were inconclusive with regard to treating sex offenders. It is results like this that are noted as justification for the sentiment that treatment of sex offenders is ineffective. More recent studies have supported such inconclusiveness as well. Inconclusiveness, however, is an entirely different conclusion than "nothing works."

Many researchers are optimistic about treatment success. Generally, sex offender treatment takes one of three forms: modification of sexual arousal patterns, modification of cognitions and social skills to encourage more appropriate sexual interactions with adults, or reduction of sexual drive.\textsuperscript{515} The success of treatment programs may depend largely on which form of treatment the offenders are receiving. It is unlikely that a reduction of sexual drive, for instance, will solve the problem of sex offense; rather, more success is predicted with replacing these de-

\textsuperscript{510} See Carson et al., supra note 31, at 685.
\textsuperscript{511} Bartol, supra note 505, at 175. False positives are those inaccurately believed to be dangerous, while true positives are those accurately believed to be dangerous. See id.
\textsuperscript{512} See Me. REV. STAT. ANN. tit. 34-A, §§ 11141, 11144 (West Supp. 1998).
\textsuperscript{513} Lita, supra note 483, at 65.
\textsuperscript{514} See Lita Furby et al., Sex Offender Recidivism: A Review, 105 PSYCHOL. BULL. 3 (1989).
\textsuperscript{515} See Carson et al., supra note 31, at 429.
viant sexual arousal patterns with arousal to more appropriate stimuli such as age similar mates for child molesters or consensual interactions for violent offenders. 516 Both of these therapies have found some treatment success in the laboratory, but questions about result generalizability remain. Some progress has also been found in attempts to change sex offenders' cognitive distortions (such as a child molester's belief that his victim was a willing participant). 517 The earlier the intervention in the life of a sex offender, the more treatment success can be expected. Young sex offenders may be effectively cut off from their offenses before they have a chance to develop sexually aggressive patterns of behavior. 518

Whatever the treatment type, the long-term effectiveness of treatment for sex offenders is unclear. Some types of offenders may be more receptive to certain types of treatment, as may certain types of individuals. Some researchers have indeed found disappointing results; 519 it is these studies that are most often cited by legislators. Others have found promise in the data. 520 Psychological consensus indicates that, "it is probably most accurate to say that at the present time we simply do not know how likely it is that various treatments will significantly reduce sex offenders' likelihood of recidivism." 521 If treatment can be successful, it should be fostered. Much more research is necessary to reach any conclusion regarding the efficacy of sex offender treatment; any negation of the possibility of treatment success now is premature and unfair. Danger lies also in the possibility that if offenders are driven underground because their community is made aware of their identity and past offenses, they may not get any valuable treatment. 522

From a theoretical perspective, sex offender notification laws are distasteful. Instead of forcing the offender to come to terms with the wrongs he has committed and relegating him the responsibility of preventing such future acts, the statutes shift responsibility to past and possible future victims by implying that they now have a duty to avoid victimization. Such a shift in responsibility may be harmful from a treatment perspective. A central tenet of successful sex offender treatment programs is that the offender must take full responsibility for his actions. The treatment and community integration that is so essential to preventing sexual reoffense can only be undermined by such an external system of notification.

Furthermore, such statutes send the message that if the victims had known about the past acts of their attacker, they could have prevented their own victimization. This cannot be true. Victims are not responsible for the crimes committed

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516. See id.
521. CARSON ET AL., supra note 31, at 429.
against them, the offenders are. Neither Megan Kanka's parents nor Megan Kanka herself were to blame for Megan's untimely and vicious death.

Many believed, after discovering that police knew the nature of Timmendequas's criminal history, that if the Kankas had only known, Megan might be alive today. Although we will never know if this is true in the case of Megan Kanka, a haunting question remains. Even if parents know about the identity and history of a sex offender living in their neighborhood, what will they do with the information? Aside from the problem of vigilantism, what use is the information? Will parents refuse to allow their children to play outside? Will they move? If a violent sexual predator really wanted to victimize a particular child, of what use would the knowledge of that offender's past be to the child's parents? It takes just a moment to abduct a child, even one warned to stay away from a sex offender. What actions can parents take that will prevent the victimization of their child?

It is here where questions concerning the effectiveness of warnings given to children come to the forefront. Even if warned of the presence of a sex offender, to what extent will children, especially very young children, heed the warning? One newspaper relayed the following hint:

“What?” said a disinterested 6-year-old Chris Nappi when his aunt asked him about the picture [of a released sex offender] he’d gotten the day before at PS 49 in Middle Village. Chris’ brother, 7-year-old Robert, remembered talking to his family about some picture the previous night.

But he couldn’t remember what it was all about.523

The utility of any data regarding differences in recidivism rates in the wake of notification is obscured by an inability to be sure of what the data mean. Finding a lower recidivism rate in notification groups could demonstrate that notification does work to reduce reoffense, or it could mean that the wrong offenders were chosen for notification in the first place.524 The efficacy of these statutes must be drastically affected, however, by the fact that we live in a mobile society. The constitutionality of the registration and notification statutes under a due process analysis is often contingent on the fact that the liberty of sex offenders is not deprived in any way. They are still free to live and work and travel as they please. Restricting the movement of sex offenders is unlikely to pass constitutional muster because it could be seen as a form of punishment. It is this ability to remain mobile that is at the heart of questions concerning the effectiveness of the statutes.

Whether because of vigilant acts or simply the effects of social stigma, a likely result of such notification laws is forcing the offender to move elsewhere, to states that do not have notification statutes perhaps, or to less organized communities where the offender may be able to reoffend unnoticed. One author labeled such a phenomenon “offender dumping.”525 Even if an offender elects to reside in the notified neighborhood, nothing prevents him from traveling to surrounding, but unnotified, communities in search of victims. Notification can only hope to effect a small radius; any broader notification may implicate the delicate balance

525. Silva, supra note 210, at 1972.
of constitutional issues. Furthermore, "the sphere of notification cannot possibly extend as far as a person can easily move in a motorized society." Notification may therefore simply move the problem, not solve it.

b. Victim, Family, and Social Costs of Notification

The potential consequences of sex offender notification include victim, family, and social costs as well. Central to the justifications for community notification is the assumption that a sex offender and his victim are strangers. The empirical data indicate that just the opposite is more often true. Sex offenses involving physical contact are the most emotionally distressing; these crimes, however, are often committed by family members or friends, and often with child victims. Rape victims under age twelve, for example, know their attackers 90% of the time. Children are victimized by family members 43% of the time; that is four times the percentage of adults victimized by family members. In fact, one third of all sex offenders in state prisons committed their offense against their own child. Three-fourths of all rape and sexual assault victims were victimized by someone with whom they had a relationship. Notification in these situations almost invariably identifies not only the offender, but also the victim, a class of individuals who more often prefer to remain anonymous. Community notification in these instances can be more psychologically damaging to the victim than helpful in promoting community safety; this is especially true in cases of incest. In addition, "the community that most needs to know of the incident—the family—almost certainly already knows."

These facts may also contribute to an actual decrease of sex offense reporting by victims, especially for victimization occurring within families. In a state with community notification, a victim of a sex offense by a family member has two reasons not to report the crime: 1) the victim is concerned that the family member will be stigmatized by community notification, and 2) if the offender is a family member, the victim may fear that he or she will also be exposed and stigmatized. New Jersey and Colorado have noted a decrease in the reporting of sex offenses against children, including incestuous victimization, because people do not want to subject the family, including the victim, to the perils of community notification. Such disincentives on reporting by victims are disastrous. Failure to

526. Locke, supra note 483, at 66.
527. See Greenfeld, Sex Offenses, supra note 14, at 11.
528. See id.
529. See Greenfeld, Child Victimizer, supra note 15, at iv.
530. See Greenfeld, Sex Offenses, supra note 14, at 4.
531. Locke, supra note 483, at 66.
532. See id. at 67. Registration and notification laws may also serve to lower conviction rates for certain sex crimes by impacting on the plea negotiations between prosecutors and defendants in such a way that some cases that would have reached a negotiated settlement are either brought to trial and result in acquittal or are simply dismissed altogether. These laws up the ante for defendants who may be more likely to risk a trial in an effort to obtain an acquittal when they are faced with mandatory registration—perhaps for life—and possible widespread notification of their crime in their community. Prosecutors must already perform a delicate balancing act when evaluating whether they can obtain a conviction in a particular case—a balance between a desire to see justice done, for both society and victim, against the problems of proof inherent in many of these sex offender trials where many times it is simply one person's word against another's. The impact that registration and notification laws may have on this process deserves further consideration and public comment.
report prevents the offender from receiving both punishment and treatment, and also prevents the victim from receiving assistance. It may be this assistance that the victim receives that could prevent the cycle of sex victimization from continuing.

Moreover, when a community is notified of a sex offender’s proximity, it is not just the offender himself that is branded. Nonoffending family members and friends of an offender who were not themselves victims are unnecessarily and unfairly burdened by community notification. One author legitimately asks, “How should we help his children cope with the taunts in school?”533 Another offender’s brother expressed concern for the safety of his own family and property, saying, “I have done nothing other than offer my home, my heart and my love to my brother.”534

More general social costs can result as well. Notified communities may find themselves amidst two paradoxical and competing perceptions: the spread of irrational, hysterical fears versus a false sense of security. Media hype can increase irrational fears regarding sex offenders, while public beliefs about the nature and extent of notification simultaneously encourage a false sense of security.

The scope of the definition of sex offenses is central to these problems. Definitions of sex offenses about which notification is appropriate often necessarily include nonviolent offenses that may not merit community notification. Community notification of a seventeen-year-old convicted of statutory rape for having consensual sex with his sixteen-year-old girlfriend, for example, seems ludicrous. Likewise, although many would find such behavior offensive, notification regarding the possession of child pornography or the solicitation of prostitution is likely only to alarm the neighborhood with no resulting increase in community safety. Much like notification that an escaped felon is in the neighborhood, sex offender notification will only cause hysteria. The entire purpose of notification is defeated in such cases.

Notification statutes may also be harmful in promoting a false sense of security in the community. Such a false sense of security is founded on many factors. First, overbroad statutes may mandate registration for too many offenders, so the truly dangerous names are buried in a sea of minor offenses and nondangerous people. Furthermore, a child molester may plead guilty to a lesser offense that does not require notification, but actually may be more dangerous than others about whom the community is notified. Thus, the public is prevented from identifying the truly dangerous offenders. Although the public may believe that registration and notification regard only dangerous sexual predators, the truth is much more mundane. California, for example, has a CD-ROM database system with 64,000 names, “including underaged youth[s] convicted of consensual sex and gay men convicted of consensual sodomy.”535 The danger of a false sense of security also lies in the fact that no notification is given regarding sex offenders merely visiting the area. Parents may relax their guard around their children believing all the sex offenders are in other neighborhoods, ignoring, again, the mobile nature of our society.

533. Id. at 66.
535. Lotke, supra note 483, at 66.
Second, the public may believe notification includes all sex offenders or all dangerous sex offenders. Yet the theoretical and practical success of notification statutes requires the cooperation of the sex offenders themselves. What about the sex offenders, even dangerous ones, who fail to register? Or those who register with a false address? A failure to register is, in many cases, merely a misdemeanor offense. Police time and effort is more necessary in other arenas, such as apprehending felons. Police tracking of offenders who have either failed to register or failed to maintain their database information as required is a relatively low priority in the face of other, more important, police responsibilities. Police resources are already in high demand; tracking down sex offenders who have not registered may not be realistic in many jurisdictions. The community may be convinced that the police are aware of the whereabouts of a particular offender, when in fact they are not. “Ostensibly, these programs will give local officials and residents some idea of where a registrant resides, but most statutes impose a duty to register with little means of enforcing this duty.” Released offenders often give false addresses; local law enforcement lacks the time and resources to effectively combat this problem. “[C]umbersome administrative problems” could also defeat the goals of the statute. Mike Lawlor, a representative from the Connecticut General Assembly expressed this sentiment: “My greatest fear is that many States may end up creating systems that generate a lot of paperwork and a lot of forms for police and probation officers to fill out, but that do not contribute to public safety.” When police demands must be prioritized due to lack of resources and administrative constraints, it is the ongoing criminal investigation that will prevail, not registration paperwork or tracking down released sex offenders.

Civil liability may become an issue relevant to notification as well. Potential liability lies in landlord-tenant, employer-employee, and real estate transactions. In Sanchez v. Guerrero, for example, a real estate agent was held liable for a failure to disclose that a child molester previously occupied a house sold by the agent. Liability in this case stemmed from a statute other than the registration and notification statute, but these are nonetheless the likely practical effects of notification. Also possible are actions by tenants alleging a landlord’s failure to disclose that a sex offender lives in an apartment building, for example.

539. Lotke, supra note 483, at 64.
541. See Williams, supra note 537, at A1.
543. See id. at 493.
545. See id. § 17.46.
Property values are also at issue. In Louisiana, the State Attorney General’s Office released a statement in September of 1994 stating that although the registration and notification statute did not require disclosure to a potential homebuyer of the proximity of a sex offender, if such information is requested by the potential homebuyer, the owner must respond honestly because to do otherwise would result in fraud. Requirements of sign and billboard postings, as well as newspaper announcements, could have the same effect. Should homeowners and landlords be compensated for the resulting decrease in property value?

c. Costs to Sex Offenders

As comparatively unimportant as it may seem, the potential costs to offenders as a result of notification are overwhelming. Effectively branded for life, sex offenders are not permitted the fresh start presumably afforded other released criminals. In addition to problems stemming from stigmatization, such as finding employment and housing, and a lack of any community support, vigilantism is a concern as well. Although fears of widespread vigilante attacks have not yet come to fruition, a sufficient number of individual stories have occurred to recognize vigilantism as a problem. The Institute for Public Policy in Olympia, Washington, found in a 1993 study that 26% of those offenders whose communities were notified about their presence were harassed. Furthermore, in 73% of the cases where there was some kind of harassment, the offender’s family was also a victim of such harassment.

Joseph Gallardo’s house was burned down only three days after his neighborhood in Seattle, Washington, was informed about his criminal sexual history. In Texas, sex offender Raul Meza was forced to flee six towns. Residents of one Oregon town beheaded a sex offender’s dog and left the head on his doorstep. A New Jersey offender moved to three locations in one month because of harassment by local residents. In Kansas, it was the family of a sex offender who was the victim of a hate mail campaign. The offender’s children were also reportedly harassed by other children. In Phillipsburg, New Jersey, a truck driver from Pennsylvania was mistaken for a recently released sex offender and severely beaten by a neighbor and his son.

Although statutes contain misdemeanor antivigilantism provisions, punishment for such offenses is usually a small
Furthermore, sex offenders’ complaints of harassment are unlikely to receive much sympathy from local law enforcement. 558

It is imperative that legislatures address these and other concerns in fashioning a solution to the problem of sex offenses. The consequences of notification statutes may prove severely detrimental to public welfare rather than the helpful solution legislatures intend them to be. In discussing Megan’s Law, Ed Martone of the American Civil Liberties Union was noted as saying, “such legislative changes are troublesome and are akin to a Band-Aid in dealing with the problem of sex offenders.” 559 The interplay of factors important to sex offenses is delicate; recidivism rates, treatment success, victim reporting, family and community stability, individual physical safety, and the intergenerational cycle of victimization hang in the balance as notification statutes are subjected to the lowest species of empirical test: trial and error.

V. CONCLUSION: NOT WICKED, BUT NOT WISE

A. The Constitutionality of Maine’s Notification Statute

The question remains what the Maine Law Court will do with the SORNA. While no constitutional challenges are currently pending, history and the experience in other states counsel that such a challenge will not be long in coming. Although the SORNA’s wisdom is questionable, the proper inquiry for a court is to determine whether the SORNA conflicts with the state or Federal Constitutions. As Justice Holmes said in his famous dissent in Lochner v. New York: 560

If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. 561

Because there are no fundamental rights infringed by the SORNA, and because the legislature could rationally conclude that community notification will work to protect children from convicted sex offenders, a court must use a deferential standard of review in assessing the Act’s constitutionality.

The Supreme Court’s holding in Kansas v. Hendricks, 562 the decisions in the circuit courts, and the rulings of state courts demonstrate that the SORNA does not constitute punishment, and even if it did, the SORNA is not retroactive. Therefore, the Act does not violate either the Ex Post Facto or Double Jeopardy Clauses. Based on the Court’s announcement in Paul v. Davis 563 that there is no liberty interest in reputation alone, and on the statements by the U.S. Supreme Court and the Law Court that there is no constitutional right to privacy that proscribes the

557. See, e.g., Idaho Code § 18-8413 (LEXIS Supp. 1999). The SORNA does not contain a similar provision.
560. 198 U.S. 45 (1905).
561. See id. at 75.
disclosure of information, the SORNA is not in conflict with the state or Federal Constitutions on substantive due process grounds. Because no liberty interest is deprived by the SORNA, and because the Act is not retroactive, the SORNA does not violate the due process guarantees of the state or Federal Constitutions. Because the Act does not inflict punishment, the Act cannot be said to violate the Eighth Amendment's prohibition of cruel and unusual punishment, and because the Act neither infringes on a fundamental right nor is directed at a suspect class, it does not violate the Equal Protection Clause. Based on the analysis above, when the constitutionality of the SORNA is challenged in Maine, the Law Court will uphold the law.564

B. Alternative Approaches

The underlying premises supporting notification as a viable solution are questionable. Alternatives to sex offender registration and notification center around two primary themes: tougher crime legislation and treatment. Longer sentences for sex offenses and disallowance of plea bargains to lesser offenses are two suggestions. Another alternative is reform in judicial procedure for child sex abuse cases in an effort to facilitate child testimony, for example. Sex offenders must first be apprehended and convicted to fall within the confines of societal influence. Such solutions are favored by many, apart from their support or criticism of sex offender notification laws. One legislator stated at the National Conference on Sex Offender Registries in 1997:

In my opinion, the registration and community notification process is the last resort. The first resort is incapacitation. Registration and notification are fallbacks. If all else fails and there is no other option, then by all means, we should know where these sex offenders live.

I would rather increase the penalties for predatory-type sex offenses so we can put people in jail forever.

....

Our argument is that sex offenders should not be living near potential victims.565

Maine has recently broadened the definition of "sex offender" so as to bring more underlying sex offenses under the Act. In addition to the SORNA '99 and the new law repealing the statute of limitations for unlawful sexual contact and sexual abuse of a minor,566 the 119th Maine Legislature also considered a bill to prohibit sex offenders from residing or loitering within 1000 feet of a school or daycare facility,567 enacted a law that deals with juvenile sex offenders,568 and carried over a bill that would implement the recommendations of the Joint Select Committee to Implement a Program for the Control, Care and Treatment of Sexually

564. See supra Part IV.A.
565. Lawlor, supra note 540, at 89-90.
566. See supra note 165.
567. See L.D. 195 (119th Legis. 1999). This bill was not carried over to the second session of the 119th Legislature.
Violent Predators. Among the committee’s recommendations and the corresponding bill provisions are measures to change the punishments for sex offenders and to implement supervised release programs for sex offenders. The changes in punishment for convicted sex offenders include: removing the ceilings—or caps—on terms of imprisonment for “dangerous sexual offenders” and allowing imprisonment for “any term of years”; removing the caps on probation periods and allowing probation for “any term of years”; allowing revocation of the suspended portion of a sentence if, while serving the unsuspended portion, a convicted sex offender refuses treatment; and the imposition of “supervised release” after completion of a term of imprisonment.

Treatment is also integral to sex offense solutions. Better funding must be established for comprehensive treatment programs and for research into sex offender treatment. Treatment as an element of punishment in conjunction with jail time, or other mandatory procedures, is a rational alternative as well. Once sex offenders are released, a focus on reintroduction into society and reintegration, rather than stigmatization, may be more likely to reduce reoffense rates of sex offenders than community notification.

If community notification does prove to be a viable option, there are various modifications to these statutes that could greatly enhance their effectiveness. More precise statutes are necessary. Communities should be notified only about the most dangerous offenders. Registration requirements must be altered in an effort to help the community identify the truly dangerous offenders. Thus, minor or victimless offenses should not be included in the notification system. Furthermore, very old convictions should be discounted just as judges often discount them in sentencing.

One problem with the SORNA is that it does not act retroactively. If Maine is going to deal with the problem of sex offender recidivism through community notification, it makes no sense at all to allow those sex offenders sentenced prior to September 1, 1996, to escape from the requirements of the SORNA. Any sex offender that is in prison and was sentenced prior to September 1, 1996, would have to reoffend before he came under the SORNA. This, in effect, gives con-

569. See L.D. 308 (119th Legis. 1999) (carried over to the second regular session of the 119th Legislature).
571. L.D. 308 (119th Legis. 1999). The committee recommended focusing on treatment and additional supervision and punishment for sex offenders instead of a civil commitment program for Maine. See Final Report, supra note 72, at 12-13. Increasing sentences for “dangerous sexual offenders” may give rise to a need for further procedural protections for offenders before they can be labeled as such. See Commonwealth v. Williams, 733 A.2d 593 (Pa. 1999). Such procedural safeguards might include requiring the state to bear the burden of persuasion and proving the defendant is a “dangerous sexual offender” by clear and convincing evidence. See id.; see also supra note 437.
573. Any prisoner sentenced prior to September 18, 1999 would not come under the SORNA ’99. See id. Thus, despite broadening the definition of who is a sex offender and adding the category of sexually violent predator, the SORNA ’99 applied to no one from the day it became law until September 18, 1999.
victed sex offenders one free pass, allowing them to reoffend once more before the community notification provisions take effect. If the legislature concludes that community notification is the appropriate measure, then it should make the Act as effective as possible. The court in Doe v. Poirier, for example, noted that:

The Legislature reached the irresistible conclusion that if community safety was its objective, there was no justification for applying these laws only to those who offend or who are convicted in the future, and not applying them to previously-convicted offenders. Had the Legislature chosen to exempt previously-convicted offenders, the notification provision of the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one.

If, however, the Maine Legislature were to change the SORNA so that it applied retroactively, it would need to also add some further procedural safeguards to the Act, because the constitutionality of the SORNA as it is now, if made retroactive, would be questionable. At first glance, the Act appears punitive if retroactive, but it would probably still be considered remedial and not punitive by the Law Court. On the other hand, the Act would definitely have procedural due process problems if it were made retroactive without also adding some procedural safeguards like those in the New Jersey law. For instance, if a sex offender convicted before September 1, 1996, had an opportunity to challenge his risk level determination at a hearing before community notification was carried out, the law would still pass constitutional muster even if retroactive in its application. If the legislature changes the SORNA to allow retroactive application, it should also change the waiver provisions of the Act. Currently, the SORNA allows a petition for waiver only after five years of being registered. If the Act were made retroactive, however, this mandatory minimum five-year period might look like a minimum sentence. As long as the Act is changed so that it gives adequate procedural safeguards to those that wish to challenge their risk classifications and apply for waivers, then it will survive a procedural due process challenge and will be constitutional even if retroactive—and much more likely to achieve its stated purpose.

One of the purposes of these statutes is to aid local law enforcement in solving unsolved sex crimes by providing a starting point for investigation. This purpose is served just as well by permitting notification to local law enforcement only. Public notification is not justified by such reasoning. Implementation of sophisticated tracking systems and devoting more resources to sex offender registration could also alleviate some of the current practical difficulties of registration and notification.

574. 662 A.2d 367 (N.J. 1995).
575. Id. at 373.
576. This is even more of a concern under the SORNA '99 because that Act has no waiver provision, requires sexually violent predators to register for life, and requires offenders to pay a yearly fee to offset some of the costs of the program. See supra notes 164-65 and accompanying text. However, as previously pointed out, the SORNA '99 merely changes the registration provisions and not the notification provisions, and the registration provisions have been almost universally declared as remedial and not punitive by the courts. Thus, the real constitutional challenge would still likely focus on the notification provisions of the SORNA '99.
Instead of releasing information about convicted and released offenders to the public at large, a better approach might be to make police reports, victim statements, and all court records available to those providing treatment to sex offenders. This information may be a very powerful tool in getting a convicted offender that is still in denial about the effects and consequences of his actions to confront his problem and make strides in a treatment setting.

Independent of whether or not notification statutes are retained as a viable means to combat the problem of sex offenses, proactive and reactive community education and awareness is essential to accomplishing this goal. If self-report study comparisons to crime statistics are to be believed, most sex offenders are never caught. Thus, reactive laws like this, although necessary, are not likely to help the big picture.\(^{578}\) This country must also work to prevent sex offenses; prevention of the intergenerational cycle of abuse is essential to eradicating sexual abuse and victimization.\(^{579}\) Central to such a goal is providing treatment and assistance to those who have already offended.

Safety education and community awareness programs are recommended. Schools and daycare systems should continue to teach of potential dangers and inform children of safety measures.\(^{580}\) Children must also be taught about what types of physical interactions between adults and children are appropriate; this is especially necessary in light of the fact that the majority of victimized children are abused by family members and friends.\(^{581}\) Childcare and medical professionals must be instructed regarding the best way to question a child about abuse and to react appropriately.\(^{582}\) Recognition of the signs of abuse by parents and teachers, and the knowledge of how to report such signs can substantially alleviate the problem as well.\(^{583}\) All of these solutions require using education as the powerful tool it can be.

Even though the wisdom of these laws is questionable, courts should not look to the wisdom of legislation in deciding whether the legislation is constitutional. The SORNA is constitutional, and if Maine is going to use community notification to battle repeat sex offenses, then some changes to the existing law should be made to make it more effective. It is the position of this Comment, however, that community notification as a whole is not a wise legislative undertaking and that there are many other means of achieving the same goals.

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Crystal L. Bulges

\(^{578}\) See Silva, supra note 210, at 1979-80.

\(^{579}\) See Lotke, supra note 483, at 64.


\(^{581}\) See id.

\(^{582}\) See id.

\(^{583}\) See id.