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Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy

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NOTES

FEDERAL STANDARDS FOR SEX OFFENDER REGISTRATION: PUBLIC DISCLOSURE CONFRONTS THE RIGHT TO PRIVACY

In recent years, media commentators, political pundits, and private citizens alike have spoken ominously of a rising tide of violence in the United States.¹ Initially, their anxieties focused on highly visible threats typically concentrated in urban settings, such as illicit drug trafficking, driveby shootings, and gang warfare.² To the perpetrators of such acts, the public has managed some measure of reasoned response, however successful or ineffectual. Trade-in programs exchange guns for cash, food, and highly desirable consumer goods.³ The so-called "war on drugs" combines youth education programs, televised public service announcements, and paramilitary operations designed to stem the flow of illegal substances at their source.⁴ Through

1. See, e.g., Joseph R. Biden, Jr., *Combatting Violence in America: Crime Affects All of Us*, 60 VITAL SPEECHES 322 (1994); Richard Mott & Deborah Short, *Explaining Away the Unacceptable*, WASH. POST, Apr. 17, 1994, at C6 (Letter to the Editor); Jolie Solomon et al., *Waging War in the Workplace*, NEWSWEEK, July 19, 1993, at 30.

2. See, e.g., Rachel Ehrenfeld, *Whither Colombia, America?*, L.A. TIMES, Dec. 6, 1992, at M5 (Commentary); Jay Mathews, *Rash of Shootings Escalates in 'War' on California Roads*, WASH. POST, July 28, 1987, at A1; Alessandra Stanley, *Child Warriors: Los Angeles: All Ganged Up*, TIME, June 18, 1990, at 50.

3. See, e.g., Constantine Angelos, *Public Supports Gun Buy-Backs*, SEATTLE TIMES, May 27, 1993, at B2; *Buy-Back Program Brings in 1,000 Guns*, L.A. TIMES, Oct. 16, 1991, at A13; Serge F. Kovaleski, *Cold Cash for Cold Steel: Bowe's Gun Trade-In Draws Crowd*, WASH. POST, Jan. 16, 1994, at A1.

4. See, e.g., Stuart Elliott, *The Partnership for a Drug-Free America Accentuates the Positive in a New Campaign*, N.Y. TIMES, Oct. 1, 1993, at D16; Cindy H. Finney, *Drug Fight Enlisting Students: Discovery 5th Graders Learn To Resist Pressure*, ORLANDO SENTINEL TRIB., Mar. 26, 1992, at K1; Saul Friedman, *Overseas U.S. War on Drugs Offers Echoes of Vietnam*, NEWSDAY, Sept. 17, 1989, at 6; Gail

these and other efforts, Americans seek to regain some degree of control over the forces that touch their daily lives.

Increasingly, however, not only has the violence extended its reach to the seemingly undefilable realms of suburban elites,⁵ but another breed of social deviant has captured the imagination and heightened the fears of middle class America. Sexual offenders commit millions of acts of molestation, assault, and rape each year.⁶ Their crimes leave no bullet wounds or track marks—a violence all the more threatening for its silence—but the victims of sex offenders suffer for a lifetime. Adding to the outrage, these victims consist primarily of those considered among the most vulnerable within our society—school-aged children physically and emotionally unprepared to protect themselves against such threats. For precisely these reasons, the American public has again perceived a frightening loss of control and has again responded.

On September 13, 1994, President Bill Clinton signed into law the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the "Federal Registration Act"),⁷ a portion of the administration's long-awaited and hotly debated Violent Crime Control and Law Enforcement Act.⁸ The Federal Registration Act requires the states to establish programs under which persons classified as sexually violent predators and persons having committed sexually violent offenses against minors must register with designated law enforcement agencies.⁹ Non-

Hagans, *The Truth About DARE: It Helps Kids Say No*, ATLANTA J. & CONST., Feb. 8, 1993, at J1.

5. See, e.g., Jill Smolowe, *Danger in the Safety Zone*, TIME, Aug. 23, 1993, at 29.

6. For 1993, the U.S. Justice Department reported 140,930 incidents of attempted and completed rape alone. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PUB. NO. NCJ-148211, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 246 (1993).

7. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994).

8. *Id.* §§ 10001-330025.

9. The standards provide that upon the release or parole of a sex offender, state prison officials or, in the case of probation, the court must inform the offender of the duty to register and notify law enforcement authorities in writing of residence address changes within ten days. *Id.* § 170101(b)(1)(A)(i-iv). The official must then obtain specific registration information mandated by the statute. *Id.* § 170101(b)(1)(A)(i). Finally, the sex offender must read and sign a form stating that

compliance results in the denial of funds allocated under the Omnibus Crime Control and Safe Streets Acts of 1968.¹⁰ While politically popular, the Act raises a number of constitutional concerns, from the potentially cruel and unusual nature of the punishment imposed to the procedural due process rights of the offender.¹¹

This Note examines the Federal Registration Act and likely judicial interpretations of its provisions under established substantive due process analysis. It will first trace the development of previously existing state laws requiring the registration of sexual offenders and explore the political forces prompting passage of such measures. This Note will then discuss state court interpretations of various state-level registration acts. The next portion of the Note will argue that certain provisions of the Federal Registration Act will provoke unconstitutional intrusions into the convicted sex offender's private life, specifically the public disclosure provisions, the means of classifying "sexually violent predators," and the length of continued registration. This section will illustrate the need for more clearly defined standards for classifying sexual offenders and for new procedures to tailor the length of registration to the period during which an offender truly endangers public safety. Finally, the Note will conclude that simple, yet significant, amendments to constitutionally vulnerable provisions of the Federal Registration Act would allow the statute to survive the scrutiny of judicial review.

STATE LEVEL SEX OFFENDER REGISTRATION LAWS

When President Clinton signed the Federal Registration Act in September 1994, existing laws already required sexual offenders to register with law enforcement officials in more than thirty

the duty to register has been fully explained. *Id.* § 170101(b)(1)(A)(v).

10. *Id.* § 170101(f).

11. See, e.g., *In re Reed*, 663 P.2d 216 (Cal. 1983) (limiting the use of a similar California statute because its requirements violated constitutional protections against cruel and unusual punishment as applied to certain offenders); *In re Birch*, 515 P.2d 12 (Cal. 1973) (requiring courts to advise defendants of the requirements of California's registration statute before accepting a guilty plea when conviction would result in the duty to register).

states,¹² and proposed legislation in others promised to increase the total.¹³ California's statute,¹⁴ providing for the registration of any individual convicted of a sexual offense in that state after July 1, 1944,¹⁵ ranks among the oldest examples of this class of legislation.¹⁶ Typical of such measures, the California law requires sex offenders convicted of any of a specifically enumerated list of sexual offenses¹⁷ to furnish the local police chief or

12. See, e.g., ALA. CODE §§ 13A-11-200 to -203 (1994); ALASKA STAT. §§ 12.63.010-.100 (Supp. 1994); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3824 (1989 & Supp. 1994); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie Supp. 1993); CAL. PENAL CODE § 290-290.7 (West 1988 & Supp. 1994); COLO. REV. STAT. § 18-3-412.5 (Supp. 1994); DEL. CODE ANN. tit. 11, § 4120 (Supp. 1994); FLA. STAT. ANN. §§ 775.21-.23 (West Supp. 1995); GA. CODE ANN. § 42-9-44.1 (1994); IDAHO CODE §§ 18-8301 to -8311 (Supp. 1994); ILL. ANN. STAT. ch. 730, para. 150 (Smith-Hurd 1992 & Supp. 1994); IND. CODE ANN. § 5-2-12 (Burns Supp. 1994); KAN. STAT. ANN. §§ 22-4901 to -4910 (Supp. 1994); KY. REV. STAT. ANN. §§ 17.500-.540 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. §§ 15:540-549 (West Supp. 1994); ME. REV. STAT. ANN. tit. 34-A, §§ 11001-11004 (West Supp. 1994); MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1995); MONT. CODE ANN. §§ 46-23-501 to -507 (1993); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1992 & Supp. 1993); N.H. REV. STAT. ANN. § 632-A:11-19 (Supp. 1994); N.D. CENT. CODE § 12.1-32-15 (Supp. 1993); OHIO REV. CODE ANN. §§ 2950.01-.99 (Baldwin 1993); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1991 & Supp. 1995); R.I. GEN. LAWS § 11-37-16 (1994); S.D. CODIFIED LAWS ANN. §§ 22-22-30 to -39 (Supp. 1994); TENN. CODE ANN. §§ 40-39-101 to -108 (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1995); UTAH CODE ANN. § 77-27-21.5 (Supp. 1994); VA. CODE ANN. §§ 19.2-298.1 to -298.3 (Michie Supp. 1994); WASH. REV. CODE ANN. §§ 9A.44.130-.140 (West Supp. 1995); W. VA. CODE §§ 61-8F-1 to -8 (Supp. 1994); WIS. STAT. ANN. § 175.45 (West Supp. 1994); WYO. STAT. §§ 7-19-301 to -306 (Supp. 1994).

13. See, e.g., N.J. STAT. ANN. §§ 2C:7-1 to -11 (West Supp. 1995).

14. CAL. PENAL CODE § 290-290.7 (West 1988 & Supp. 1994).

15. *Id.* § 290(a).

16. Although the California Penal Code has included a registration statute for decades, state lawmakers have amended the exact provisions of the statute as recently as 1994. *Id.* § 290.

17. *Id.* § 290(a)(2). These offenses include kidnapping of a child under age 14, *id.* § 207(b); assault with intent to commit rape, sodomy, oral copulation, rape in concert with another, lascivious act upon a child, or penetration of the genitals or anus with a foreign object, *id.* § 220(b); sexual battery, *id.* § 243.4; rape of a mentally disordered or developmentally or physically disabled individual, *id.* § 261(a)(1); rape or spousal rape accomplished by means of force, violence, duress, menace, or fear of bodily injury, *id.* §§ 261(a)(2), 262(a)(1); rape of an individual known to be prevented from resisting because of the influence of drugs or alcohol, *id.* § 261(a)(3); rape of an individual known to be unconscious, *id.* § 261(a)(4); rape under threat of retaliation, *id.* § 261(a)(6); sexual intercourse, penetration by a foreign object or substance, oral copulation, or sodomy with consent procured by false or fraudulent representation with intent to create fear, *id.* § 266c; inveiglement or enticement of an unmarried

county sheriff¹⁸ with a current address,¹⁹ fingerprints, and a photograph, as well as any information deemed necessary by the state's Department of Justice.²⁰ The statute imposes these same requirements on persons convicted of similar sexual crimes in other states who subsequently relocate to California.²¹ Both the local authorities and the central Department of Justice maintain files of this information.²² Following initial registration at the time of release, parole, probation, or relocation to the state, sex offenders must inform law enforcement officials of any changes of address within ten days of such an occurrence.²³ Failure to do so results in mandatory jail sentences that increase in length depending on the severity of the underlying offense and the number of prior violations.²⁴ Finally, members of the public can

female under 18 for purposes of prostitution or aiding and abetting in the same, *id.* § 266; procuring a female for illicit intercourse by false pretenses, *id.*, procurement of a child under age 16 for lewd or lascivious act, *id.*, abduction of a person under age 18 for purposes of prostitution, *id.* § 267; incest, *id.* § 285; certain instances of sodomy, *id.* § 286; lewd or lascivious acts with a child under age 14, *id.* § 288; certain instances of oral copulation, *id.* § 288a; continuous sexual abuse of a child, *id.* § 288.5; certain instances of penetration of genital or anal openings by foreign or unknown objects, *id.* § 289; sending or bringing into the state, for sale or distribution, matter depicting sexual conduct by a minor, *id.* § 311.2(b)-(d); printing, exhibiting, distributing, exchanging, possessing, or controlling such matter within the state, *id.*, employment or use of a minor to perform sexual acts for the preparation of such matter, *id.* § 311.4; advertising such matter for sale or distribution, *id.* § 311.10; sexual exploitation of a child, *id.* § 311.3; annoying or molesting a child under age 18, *id.* § 647.6; loitering in or about a public toilet for the purpose of engaging in or soliciting any lewd, lascivious, or unlawful act, *id.* § 647(d); indecent exposure, *id.* § 314(1)-(2); causing, encouraging, or contributing to the delinquency of persons under 18 years when lewd and lascivious conduct is involved, *id.* § 272; certain instances of sending harmful matter with intent to seduce a minor, *id.* § 288.2; the attempt to commit any of the listed offenses, *id.* § 290(a)(2)(B); or any other offense that the court finds resulted from sexual compulsion or the desire for sexual gratification, *id.* § 290(a)(2)(C).

18. *Id.* § 290(a)(1).

19. *Id.* § 290(b)-(d).

20. *Id.* § 290(e).

21. *Id.* § 290(a)(2).

22. *Id.* § 290(b)-(d).

23. *Id.* § 290(f).

24. If registered following a conviction for most misdemeanors, the offender's initial violation of the registration statute generally constitutes a misdemeanor and results in a maximum jail term of one year. *Id.* § 290(g)(1). Subsequent violations result in a felony conviction and a maximum prison term of three years. *Id.* § 290(g)(3). If registered following a conviction for certain specified misdemeanors,

call a "900" telephone number to determine whether specific individuals are registered as sexual offenders.²⁵ By providing the first and last names and middle initial of a registered offender, callers can obtain that individual's physical description, town of residence, and ZIP code.²⁶ In addition, the state will describe the crimes giving rise to the registration duty.²⁷

As the news media has continued to increase its coverage of sex crimes, other states have followed California's lead and passed more stringent sex offender registration statutes.²⁸ These statutes shorten the time limit for reporting address changes to authorities.²⁹ Some statutorily mandate the collection of more detailed information.³⁰ More importantly, the laws

however, the first violation of the statute results in a maximum prison term of three years. *Id.* § 290(g)(2)-(3). Any failure to adhere to the requirements of the registration statute following a felony conviction constitutes an additional felony, also punishable by a maximum prison term of three years. *Id.* § 290(g)(3).

25. *Id.* § 290.4(a)(3).

26. *Id.* § 290.4(a)(2)-(3).

27. *Id.* § 290.4(a)(3).

28. *See supra* notes 12-13.

29. *See, e.g.*, FLA. STAT. ANN. § 775.22(3)(b)(1) (West Supp. 1995) (requiring notification of changes of address "within 48 hours after arrival at the new place of permanent or temporary residence"); IND. CODE ANN. § 5-2-12-8 (Burns Supp. 1994) (requiring registration "not more than seven (7) days" after any change of address); NEV. REV. STAT. ANN. § 207.152 (Michie 1992 & Supp. 1993) (requiring registration by the sex offender "within 48 hours after his arrival in a county in which he resides or is temporarily present for 48 hours or more").

30. *See, e.g.*, ALASKA STAT. § 12.63.010(b) (Supp. 1994) (requiring "the sex offender's name, address, place of employment, date of birth, each conviction for a sex offense for which the duty to register has not terminated, date of sex offense convictions, place and court of sex offense convictions, all aliases used, and driver's license number" as well as fingerprints and a photograph); CAL. PENAL CODE § 290.2 (West 1988 & Supp. 1994) (mandating the collection of blood specimens and saliva samples for DNA analysis); FLA. STAT. ANN. § 775.22(3)(a)(1) (West Supp. 1995) (requiring the sex offender's "[n]ame, social security number, age, race, sex, date of birth, height, weight, hair and eye color, photograph, address of legal residence, address of any current temporary residence, date and place of any employment, date and place of each conviction, fingerprints, and a brief description of the crimes committed"); IND. CODE ANN. § 5-2-12-6 (Burns Supp. 1994) (requiring the offender's "full name, alias, date of birth, sex, race, height, weight, eye color, Social Security number, driver's license number, and home address" as well as a "description of the offense for which the offender was convicted, the date of conviction, and the sentence imposed"); KAN. STAT. ANN. § 22-4907 (Supp. 1994) (requiring the offender's name, date of birth, offenses committed, convictions obtained, city or county of convictions, photograph, fingerprints, and Social Security number); NEV.

enacted in a number of states allow law enforcement officials to publicize all or a portion of the compiled registration information.³¹ Indeed, some of these newer laws provide law enforcement officials with immunity from any liability that may arise from the release of such information.³²

With the increasing popularity and broadening scope of these statutes, however, come not only a heightened public awareness

REV. STAT. ANN. § 207.153 (Michie 1992) (requiring the sex offender's name, aliases, a complete description of his person, the offenses committed, the name and location of any hospital or penal institution to which he was committed for each listed offense, and a current address, including how long the offender has resided there, how long he expects to reside there, and how long he expects to remain in the county and in the state); N.J. STAT. ANN. § 2C:7-4(b) (West Supp. 1995) (requiring the sex offender's name, Social Security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal and current temporary residence, date and place of employment, date and place of each conviction, adjudication or acquittal by reason of insanity, indictment number, fingerprints, and a description of the crimes giving rise to registration, as well as any other information deemed necessary by the State Attorney General); WASH. REV. CODE ANN. § 9A.44.130(2), (5) (West Supp. 1995) (requiring the offender's name, address, date and place of birth, place of employment, crime for which convicted, date and place of conviction, aliases, Social Security number, fingerprints, and a photograph).

31. See, e.g., ALASKA STAT. § 18.65.087 (1994) (allowing the release of "the sex offender's name, address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, and length of sentence," despite assertions of confidentiality and a prohibition on public disclosure); GA. CODE ANN. § 42-9-44.1(e) (1994) (allowing "public inspection" of registration data); KAN. STAT. ANN. § 22-4909 (Supp. 1994) (making registration information "open to inspection at the sheriff's office by the public and specifically subject to the provisions of the Kansas open records act"); LA. REV. STAT. ANN. § 15:546(A) (West Supp. 1994) (authorizing criminal justice agencies "to release relevant and necessary information regarding sex offenders to the public when necessary for public protection"); N.J. STAT. ANN. § 2C:7-5(a) (West Supp. 1995) (allowing the release of relevant information necessary for public protection); N.D. CENT. CODE § 12.1-32-15(8) (Supp. 1993) (stating that the required registration records are "open to inspection by the public"); WASH. REV. CODE ANN. § 4.24.550(1) (West Supp. 1995) (authorizing public agencies "to release relevant and necessary information regarding sex offenders to the public when necessary for public protection").

32. See, e.g., LA. REV. STAT. ANN. § 15:546(B) (West Supp. 1994) (immunizing law enforcement officials from "civil liability for damages for any discretionary decision to release relevant and necessary information," unless that decision resulted from "gross negligence" or "bad faith"); WASH. REV. CODE ANN. § 4.24.550(3) (West Supp. 1995) (granting immunity from "civil liability for damages for any discretionary decision to release relevant and necessary information," unless that decision resulted from "gross negligence" or "bad faith"); N.J. STAT. ANN. § 2C:7-5(b) (West Supp. 1995) (releasing authorities from civil liability, unless resulting from "gross negligence" or "bad faith").

of the seriousness and prevalence of violent sexual crimes, but also disturbing stories of social dislocation. Using Washington's Community Protection Act,³³ residents of one town received word that a convicted sexual offender had entered their community. They then tracked and publicized his movements, made threatening phone calls, and vandalized his home.³⁴ As a result of the same Act, another Washington man was refused enrollment in the local school system, evicted from his apartment, featured in a front-page newspaper story, denied employment, and finally forced to take refuge in a homeless shelter.³⁵ A third individual targeted by the Act received hate mail, became the subject of parents' meetings at a local school, and eventually left the community so opposed to his presence.³⁶

No less disturbing are the signs of questionable political posturing that form the backdrop for a growing number of state registration laws. On July 29, 1994, Jesse K. Timmendequas, a twice-convicted sexual offender, molested and murdered seven-year-old Megan Kanka³⁷ in Hamilton Township, New Jersey.³⁸ Exactly one month later, the lower house of the state legislature passed seven bills,³⁹ collectively dubbed "Megan's Law,"⁴⁰ aimed at preventing the recurrence of this undeniably tragic episode.⁴¹ Included among the measures was a proposal for the registration of released sex offenders.⁴² Although some lawmakers admitted that "the bills were vague and half-formed and left

33. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1995).

34. Mary A. Kircher, Note, *Registration of Sexual Offenders: Would Washington's Scarlet Letter Approach Benefit Minnesota?*, 13 HAMLINE J. PUB. L. & POL'Y 163, 175 (1992).

35. Daniel Golden, *Sex-Cons: As Sex Crimes Flood the Courts and the Media, Communities Are Scrambling To Inform and Protect Themselves*, BOSTON GLOBE, Apr. 4, 1993, (Sunday Magazine), at 12.

36. *Id.*

37. See Kimberly J. McLarin, *Trenton Races To Pass Bills on Sex Abuse*, N.Y. TIMES, Aug. 30, 1994, at B1.

38. Ralph Siegel, *Police: Suspect Admits Killing Girl, Details Sexual Assault of 7-Year Old*, PHILA. DAILY NEWS, Aug. 2, 1994, (Local), at 7.

39. McLarin, *supra* note 37, at B1.

40. See Siegel, *supra* note 38, at 7.

41. *Id.*

42. See N.J. STAT. ANN. § 2C:7-1 to -11 (West Supp. 1995); see also McLarin, *supra* note 37, at B1 (discussing passage of the New Jersey bills).

too many specifics up to the State Attorney General,"⁴³ most, like State Representative Steven J. Corodemus, decided that they would "rather err on the side of potential victims and not on the side of criminals."⁴⁴ Spurred by Assembly Speaker Chuck Haytaian's declaration of an emergency,⁴⁵ a majority of the measures reached the State Senate without public committee hearings,⁴⁶ despite heated floor debates concerning the bills' equal protection, due process, and ex post facto implications.⁴⁷

The unusual procedures employed to secure the passage of these bills do not necessarily raise suspicions of political posturing. At the time of the bills' passage, however, several additional factors pointed to such a possibility. Assembly Speaker Haytaian was then engaged in a close contest for a United States Senate seat.⁴⁸ In addition, potentially controversial funding provisions remained conspicuously absent from the bills.⁴⁹ Nevertheless, the Assembly passed nearly all by a unanimous vote.⁵⁰

The political benefits of passing sex offender registration legislation have not influenced state lawmakers alone. On the federal level, Congress had considered the Jacob Wetterling Crimes Against Children Registration Act⁵¹ on numerous occasions prior to 1994.⁵² Tragic events around the nation clearly played

43. McLarin, *supra* note 37, at B2.

44. *Id.* (quoting State Rep. Steven J. Corodemus).

45. Russ Bleemer, *Assembly to Senate: You Figure Out the Tough Parts*, N.J. L.J., Sept. 5, 1994, at 5.

46. McLarin, *supra* note 37, at B2.

47. Bleemer, *supra* note 45, at 5; see also 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §§ 18.1-4 (2d ed. 1992 & Supp. 1995) (providing an overview of equal protection analysis); 2 *id.* § 17.1 (giving a general explanation of procedural due process); *id.* §§ 15.5-7 (discussing the fundamentals of substantive due process); *id.* § 15.9(b) (reviewing the basics of the Constitution's ex post facto prohibitions).

48. See McLarin, *supra* note 37, at B2. Haytaian eventually lost his bid for the Senate to incumbent Frank Lautenberg. See Iver Peterson, *The 1994 Elections: New Jersey Senator Lautenberg Edges Out Haytaian for 3d Term*, N.Y. TIMES, Nov. 9, 1994, at B13.

49. Bleemer, *supra* note 45, at 5.

50. McLarin, *supra* note 37, at B2.

51. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994).

52. See, e.g., 140 CONG. REC. H5612, 5614 (daily ed. July 13, 1994) (remarks of Mr. Ramstad in Motion to Instruct Conferees on H.R. 3355, Violent Crime Control

some role in securing its eventual passage.⁵³ In fact, Mrs. Maureen Kanka, mother of young Megan who inspired the New Jersey bills, stood next to President Clinton on the White House lawn as he signed the Federal Registration Act into law.⁵⁴

The political pressures that ensured passage of the Federal Registration Act also undoubtedly influenced its content. The federal law combines and expands the most severe state registration requirements. It imposes an address verification process on all offenders.⁵⁵ Each year, within ten days of receipt, those registered for offenses against minors must return a nonforwardable verification form, while those classified as sexually violent predators must do so every ninety days.⁵⁶ The Federal Act requires state law enforcement agencies to share registration information with the Federal Bureau of Investigation.⁵⁷ Significantly, law enforcement agencies may share that data not only with one another, but also with the public, when disclosure proves necessary to community protection from specific individuals.⁵⁸ In addition, the Act provides immunity from liability for

and Law Enforcement Act of 1993); 140 CONG. REC. S2825 (daily ed. Mar. 10, 1994) (statement of Sen. Durenberger discussing three years of unsuccessful efforts to enact the Jacob Wetterling bill); 139 CONG. REC. S6863-64 (daily ed. May 28, 1993) (statement of Sen. Durenberger discussing the failure of the 102d Congress to pass the Jacob Wetterling bill as a part of both the Democratic and Republican crime bills).

53. Congressional debate regarding the bill emphasized a number of highly publicized cases of violent sexual attack. See, e.g., 140 CONG. REC. H5612 (daily ed. July 13, 1994) (Motion to Instruct Conferees on H.R. 3355, Violent Crime Control and Law Enforcement Act of 1993, containing references to the slaying of Polly Klaas); 140 CONG. REC. S2825 (daily ed. Mar. 10, 1994) (statement of Sen. Durenberger referring to both the disappearance of Jacob Wetterling and the abduction and murder of Polly Klaas) (quoting Christine Spolar & Barbara Vobejda, *Grass-Roots Crusaders Embrace a Mission To Find the Missing*, WASH. POST, Mar. 10, 1994, at A23); 139 CONG. REC. S6863 (daily ed. May 28, 1993) (statement of Sen. Durenberger describing the 1989 disappearance of Jacob Wetterling). In addition, the House Report on the bill itself briefly discusses the story of Jacob Wetterling's abduction. See H.R. REP. NO. 392, 103d Cong., 1st Sess. 3 (1993).

54. David Bauman, *Crime Victim's Mom: Signing of Crime Bill 'Bittersweet'*, GANNETT NEWS SERV., Sept. 13, 1994, available in LEXIS, Nexis Library, GNS File.

55. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(b)(3), 108 Stat. 1796, 2038 (1994).

56. *Id.*

57. *Id.* § 170101(b)(2).

58. *Id.* § 170101(d).

the good faith conduct of officials releasing such information.⁵⁹ Finally, the Federal Registration Act strongly urges the states to establish registration programs, but, like the New Jersey law, fails to provide the funds required for their implementation.⁶⁰

MODERN STATE COURT JURISPRUDENCE: STIGMATIZING THE OFFENDER

Although the constitutional validity of state statutes mandating the registration of sex offenders and other convicted criminals has never reached the Supreme Court under a substantive due process challenge,⁶¹ state courts have addressed, both explicitly and implicitly, the implications of such laws on convicted sex offenders' right to privacy.⁶² Judicial analysis of the registration statutes under a number of constitutional theories has produced varying opinions regarding their effect on privacy rights. Certain differences among these opinions may arise from the individual provisions of the statute at issue. Others reflect confusion over the constitutional status of these increasingly popular laws. Each judicial perspective merits some examination in an analysis of the Federal Registration Act under substantive due process theory.

In re Birch,⁶³ a 1973 decision by the Supreme Court of California, used the California Constitution's right to counsel to examine the validity of a guilty plea entered by an unrepresented defendant without notice that such a plea would subject him to the requirements of the state's sex offender registration stat-

59. *Id.* § 170101(e).

60. *Id.* § 170101; see *supra* text accompanying note 49.

61. The Supreme Court has examined the constitutional ramifications of criminal registration statutes only once, reaching its decision to invalidate the law at issue on procedural due process grounds. *Lambert v. California*, 355 U.S. 225 (1957); see *infra* notes 156-57 and accompanying text (discussing the rationale behind the *Lambert* decision).

62. See, e.g., *In re Reed*, 663 P.2d 216 (Cal. 1983); *In re Birch*, 515 P.2d 12 (Cal. 1973); *People v. Mills*, 146 Cal. Rptr. 411 (Cal. Ct. App. 1978); *People v. Adams*, 581 N.E.2d 637 (Ill. 1991); *State v. Taylor*, 835 P.2d 245 (Wash. Ct. App. 1992); see also *Artway v. Attorney General*, 876 F. Supp. 666, 679-82 (D.N.J. 1995) (finding privacy concerns relevant to an ex post facto challenge to New Jersey's registration law).

63. 515 P.2d 12.

ute.⁶⁴ When Birch pled guilty to the charge of lewd and dissonate conduct for urinating in public, he apparently expected no greater punishment than the five-day suspended sentence imposed by a municipal judge.⁶⁵ He had not been advised that the obligation to register as a sex offender would also result.⁶⁶ In setting aside the plea, the state supreme court noted that "[a]lthough the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime."⁶⁷ The court thus subtly recognized that registration constitutes more than an administrative inconvenience. Its decision acknowledged that the statute's requirements implicated the offender's privacy, exposing him to community scrutiny. Indeed, the opinion of the court noted that in enacting the measure, the legislature intended to impose "continual police surveillance"⁶⁸ on the convicted sex offender, such that "[w]henver any sex crime occurs in his area, the registrant may very well be subjected to investigation."⁶⁹

In 1978, a California appellate court explicitly examined the state's registration requirements in light of the U.S. Constitution's substantive due process requirements. In *People v. Mills*,⁷⁰ the defendant was convicted of the crime of lewd and lascivious conduct on a child less than fourteen years old after fondling and attempting sexual intercourse with a seven-year-old girl.⁷¹ In addition to the short jail term and a longer probationary period imposed by the trial court, the California Penal Code required the defendant to register as a convicted sex offender.⁷² When Mills claimed on appeal that the registration requirement violated his right to privacy,⁷³ the court admitted

64. *Id.* at 12-13.

65. *Id.* at 13.

66. *Id.* at 12.

67. *Id.* at 17.

68. *Id.*

69. *Id.*

70. 146 Cal. Rptr. 411 (Cal. Ct. App. 1978).

71. *Id.* at 412-13.

72. *Id.*, see also CAL. PENAL CODE § 290 (West 1988 & Supp. 1995) (requiring sex offender registration).

73. *Mills*, 146 Cal. Rptr. at 417.

that the statute may result in the violation of that freedom.⁷⁴ However, without offering any justification for its opinion, the court stated that "any person who physically molests, in a sexual sense, a seven-year-old child, has waived any right to privacy"⁷⁵ As a result, the court looked only for a rational basis for the legislature's action⁷⁶ and concluded that the invasion of a sex offender's right to privacy "is proper and in the exercise of the state's fundamental right to enact laws which promote public health, welfare and safety"⁷⁷

Five years later, in *In re Reed*,⁷⁸ the Supreme Court of California held the same registration statute unconstitutional as applied to individuals convicted of lewd or dissolute conduct in a public place.⁷⁹ In *Reed*, the defendant faced three years of probation and potentially lifelong registration as a sex offender following his conviction on the charge of soliciting lewd or dissolute conduct from an undercover vice officer in a public restroom.⁸⁰ Although the defendant petitioned the court to invalidate the registration law for infringing his right to privacy,⁸¹ the decision on appeal rested on the defendant's argument that application of the registration requirement to his case constituted cruel and unusual punishment under the California Constitution.⁸² In reaching this conclusion, however, the court echoed its earlier sentiments in *In re Birch*, alluding to the "lifelong stigma" imposed on sex offenders by the registration requirement.⁸³ Once again, the court implicitly recognized the consequences of registration on the convicted sex offender's pri-

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. 663 P.2d 216 (Cal. 1983).

79. *Id.* at 222.

80. *Id.* at 217.

81. *Id.*

82. *Id.* at 222. Significantly, the court's finding that the registration requirement imposed a punishment disproportionate to the defendant's crime rested in part on both the possibility of perpetual harassment by law enforcement officials and the lack of any provision for expungement of the initial registration following a release from the ongoing obligation to register. *Id.* at 218-19; see also CAL. CONST. art. I, § 17 (prohibiting cruel and unusual punishment and excessive fines).

83. *Reed*, 663 P.2d at 222.

vacy Further, the majority noted that "[a]part from the bother and loss of privacy which mere registration entails, the 'ready availability' to the police, if it serves its purpose, presumably means a series of command performances at lineups."⁸⁴

Paradoxically, while arguing to uphold the registration law, Justice Richardson's dissent in *Reed* also highlighted the implications of the statute's requirements for the right to privacy. He urged judicial restraint in the consideration of legislatively determined criminal punishments, but nevertheless argued that "[c]ompliance with the registration requirement involves only the barest minimum intrusion or restriction upon personal freedom or privacy."⁸⁵ Although this statement downplays the extent of any invasion of the right to privacy, it nonetheless admits that the infringement of a substantive personal right results from the imposition of the registration requirement. Finally, in finding the statute constitutional, Justice Richardson relied heavily on the confidential nature of the information obtained from registering offenders.⁸⁶ Justice Richardson's dissenting opinion in *Reed* thus warrants some consideration in an analysis of the constitutionality of the Federal Registration Act's more extensive public disclosure provisions.

In 1991, the Supreme Court of Illinois reached the opposite conclusion of the *Reed* majority when it examined the constitutionality of a registration law nearly identical to the California statute. The Illinois court upheld the statute in the face of a challenge under the U.S. Constitution's prohibition against cruel and unusual punishment and the Equal Protection and Due Process Clauses of both the Federal and Illinois Constitutions.⁸⁷ In *People v. Adams*,⁸⁸ the defendant did not allege any infringement of substantive due process rights.⁸⁹ The opinion of the Illi-

84. *Id.* at 218 (quoting Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1222 (1974)).

85. *Id.* at 223 (Richardson, J., dissenting).

86. *Id.* at 224. *But cf. supra* notes 25-27 and accompanying text (providing the current version of the California statute, which allows public access to some information).

87. *People v. Adams*, 581 N.E.2d 637, 637-38 (Ill. 1991); see ILL. ANN. STAT. ch. 730, para. 150 (Smith-Hurd 1992 & Supp. 1994) (Habitual Child Sex Offender Registration Act).

88. 581 N.E.2d 637.

89. The constitutional basis for the defendant's appeal rested on the Eighth

nois court nevertheless foreshadowed its probable decision if faced with such a claim in the future.

The defendant in *Adams* pled guilty to criminal sexual assault in connection with an incident involving his twelve-year-old daughter.⁹⁰ Sentenced to three years in prison, Adams also faced registration under the state's Habitual Child Sex Offender Registration Act.⁹¹ In response to the defendant's argument that compliance with the statute would socially stigmatize him, the court asserted that the possibility of stigmatization arose not from the requirements of the registration law, but rather from the defendant's own actions in assaulting his daughter.⁹² The court noted that any information obtained through the defendant's registration already appeared in the public record and concluded that "[t]he Registration Act simply makes that information more readily available to the police."⁹³ Finally, the majority emphasized that the law prohibited law enforcement officials from sharing registration information with the public and reasoned that without publication, stigmatization could not occur.⁹⁴ Such a conclusion has important ramifications for the constitutional validity of the Federal Registration Act.⁹⁵

In the 1992 case of *State v. Taylor*,⁹⁶ the Washington Court of Appeals faced an ex post facto challenge to the state's sex offender registration law.⁹⁷ The law not only applied to previously convicted sex offenders, but also allowed unrestricted public dissemination of the information obtained.⁹⁸ Convicted of attempted indecent liberties, the defendant appealed the imposition of the registration requirement because the statute had

Amendment's prohibition against cruel and unusual punishment and the equal protection and procedural due process requirements of the Fourteenth Amendment. *Id.* at 640.

90. *Id.* at 639.

91. *Id.*

92. *Id.* at 641.

93. *Id.*

94. *Id.*

95. See *infra* notes 164-66 and accompanying text (discussing the public notification provisions of the Federal Registration Act and their role in any determination of the Act's constitutionality).

96. 835 P.2d 245 (Wash. Ct. App. 1992).

97. *Id.* at 246.

98. *Id.*

become effective three months after he committed his crime.⁹⁹

The majority in *Taylor* upheld the constitutionality of the law's retroactive application. The court recognized the stigmatizing effect of the registration requirement,¹⁰⁰ but concluded that the defendant's conviction for a sexual offense constituted the original source of that stigmatization.¹⁰¹ Further, its opinion noted that "it is unlikely that the additional dissemination of the information brought about by registration will significantly increase the stigmatic effect over what it would be absent any registration requirement."¹⁰² The court's acknowledgement of the possibility of some stigmatization proves particularly important, however, in light of the fact that federal lawmakers modeled the Federal Registration Act on the Washington statute.¹⁰³

SUBSTANTIVE DUE PROCESS DENIED: WHEN PUBLIC DISCLOSURE VIOLATES THE RIGHT TO PRIVACY

Existing state court jurisprudence suggests that a portion of any challenge to the Federal Registration Act must include substantive due process analysis.¹⁰⁴ In order to trigger strict scrutiny review, a challenger would have to identify a fundamental right affected by the statute.¹⁰⁵ If the reviewing court agreed with the challenger's classification of the right at issue, the federal government would have to demonstrate a compelling governmental interest served by the law.¹⁰⁶ The finding of a compelling state interest would then necessitate a determination of whether Congress sufficiently tailored the statute to the government's interest.¹⁰⁷

Despite the U.S. House of Representatives' invocation of *Peo-*

99. *Id.*

100. *Id.* at 249. The court noted that "registration makes it likely more persons will learn of the conviction." *Id.*

101. *Id.*

102. *Id.*

103. See 140 CONG. REC. H5612 (daily ed. July 13, 1994) (Motion to Instruct Conferees on H.R. 3355, Violent Crime Control and Law Enforcement Act of 1993).

104. See *supra* notes 61-102 and accompanying text.

105. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (following Court decisions employing strict scrutiny review in cases involving fundamental rights).

106. *Id.*

107. *Id.*

*ple v. Adams*¹⁰⁸ and *People v. Mills*¹⁰⁹ to demonstrate that "registration requirements do not violate the constitutional right[] to privacy,"¹¹⁰ *Adams*, *Mills*, and other decisions suggest that an individual's fundamental right to privacy provides the first, and perhaps most obvious, basis for an examination of the Federal Registration Act under substantive due process theory.¹¹¹ The Act provides for the disclosure of registration information to a broad segment of the law enforcement community¹¹² and, importantly, to the general public to the extent "necessary to protect the public concerning a specific person."¹¹³ The likelihood of such widespread disclosure raises the specter of government-sponsored intrusions into the sex offender's private life.¹¹⁴

Although the Constitution does not explicitly establish a substantive right to privacy, the Supreme Court identified such a right in its 1965 decision, *Griswold v. Connecticut*.¹¹⁵ Drawing on the various freedoms expressly guaranteed in the First, Third, Fourth, Fifth, and Ninth Amendments,¹¹⁶ the Court in *Griswold* recognized the legitimacy of the right to privacy,¹¹⁷ a right "older than the Bill of Rights."¹¹⁸ In subsequent years, the Court continued to invoke a fundamental right to privacy in a highly controversial, yet enduring, series of cases.¹¹⁹ The

108. 581 N.E.2d 637 (Ill. 1991).

109. 146 Cal. Rptr. 411 (Cal. Ct. App. 1978).

110. H.R. REP. NO. 392, 103d Cong., 1st Sess. 4 & n.10 (1993).

111. See *supra* notes 61-102 and accompanying text.

112. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(b)(2), 108 Stat. 1796, 2038 (1994).

113. *Id.* § 170101(d)(3).

114. Intrusion into the private life of a sex offender may seem inherently justifiable to proponents of the Federal Registration Act. As the court in *Reed* pointed out, however, "[a] felon convicted of [robbery, burglary, or arson] may serve his time and be done with it." *In re Reed*, 663 P.2d 216, 222 (Cal. 1983). Under the Federal Act, however, a sex offender may serve a full prison sentence as punishment for the crimes committed and yet remain subject to limitations on his or her right to privacy. This reality represents the underlying basis for any challenge to the law.

115. 381 U.S. 479 (1965).

116. *Id.* at 484.

117. *Id.* at 485.

118. *Id.* at 486.

119. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (recognizing the right to marry as part of the right to privacy in invalidating a Wisconsin statute requiring

constitutionally protected right to privacy has thus become a fixture of Supreme Court jurisprudence in cases as diverse as *Roe v. Wade*¹²⁰ and *Zablocki v. Redhail*.¹²¹

Despite the variety of its right to privacy decisions, the Court has never addressed the implications of that right for statutes that, like the Federal Registration Act, allow full public disclosure of detailed personal information. The Court's support of state court decisions that merely suggest that the sex offender registration statutes impact and indeed infringe upon the right to privacy thus remains in doubt.

In *Paul v. Davis*,¹²² the Supreme Court addressed the constitutional concerns raised by community notification of an individual's arrest on shoplifting charges.¹²³ Local authorities had distributed a flier to area businesses providing the names and photographs of "active" shoplifters.¹²⁴ The flier identified the petitioner as a member of that group,¹²⁵ but a court subsequently dismissed the shoplifting charge against him.¹²⁶ Nevertheless, the Supreme Court held that the distribution of the fliers had not infringed on the petitioner's right to privacy.¹²⁷ Writing for the majority, then-Justice Rehnquist limited privacy right protections to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education."¹²⁸ He thus concluded that the petitioner's claim rested solely on an assertion that "the State may not publicize a record of an official act such as an arrest."¹²⁹ Because prior case law

court approval prior to the marriage of any state resident paying child support); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (reaffirming the existence of a right to privacy in declaring unconstitutional a New York statute restricting the sale, distribution, advertisement, and display of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (acknowledging a right of personal privacy in striking down Texas's criminal abortion statutes).

120. 410 U.S. 113.

121. 434 U.S. 374.

122. 424 U.S. 693 (1976).

123. *Id.* at 694-95.

124. *Id.* at 695.

125. *Id.*

126. *Id.* at 696.

127. *Id.* at 713.

128. *Id.*

129. *Id.*

failed to support that proposition, the five-to-three majority rejected the privacy claim outright.¹³⁰

The outcome in *Paul*, however, does not eliminate the possibility of a challenge to the Federal Registration Act on privacy grounds. First, the governmental action at issue in *Paul* differs to a significant degree from the disclosure allowed by the Registration Act. In *Paul*, the law enforcement authorities distributed a limited amount of information to a rather small group of interested storeowners. This scenario contrasts sharply with the possibility of detailed personal data becoming available to any member of the public under the federal sex offender registration statute.¹³¹ Second, one year after *Paul*, the Supreme Court considered a law remarkably similar to the Federal Registration Act.¹³² *Whalen v. Roe* modified the Court's position as announced in *Paul* and recognized a more expansive privacy right.¹³³

The plaintiffs in *Whalen* challenged the constitutionality of a

130. *Id.* at 714.

131. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(b)(1), 108 Stat. 1796, 2039-40 (1994) (requiring state officials to obtain the sex offender's fingerprints, photograph, name, identifying factors, anticipated future residence, offense history, and documentation of any psychiatric treatment received).

132. *Whalen v. Roe*, 429 U.S. 589, 591-93 (1977). The New York law at issue provided that:

[P]rescription[s] for controlled substances shall be prepared in triplicate. The original and both copies must contain the following:

- (a) the name, address, and age of the ultimate user for whom the substance is intended
- (b) the name, address, registration number, telephone number, and handwritten signature of the prescribing practitioner;
- (c) specific directions for use, including but not limited to the dosage and frequency of dosage and the maximum daily dosage;
- (d) the date upon which such prescription was actually signed by the prescribing practitioner.

Act of June 8, 1972, ch. 878, § 3332(2), 1972 N.Y. Laws 2608, 2629 (current version at N.Y. PUB. HEALTH LAW § 3332(2) (Consol. 1987)). The law further mandated that:

A practitioner dispensing a substance which may be prescribed only upon an official New York state prescription must at the time of such dispensing prepare an official New York prescription. The practitioner shall retain the original for a period of five years and shall file the two copies with the [state health] department.

Id. § 3331(6) (current version at N.Y. PUB. HEALTH LAW § 3331(6) (Consol. 1987)).

133. *Whalen*, 429 U.S. at 599.

New York law requiring physicians to file an official form with the New York State Department of Health when prescribing drugs classified as dangerous.¹³⁴ This law required the form to provide the name of the physician, the pharmacy used, the drug, the dosage prescribed, and the name, address, and age of the patient.¹³⁵ The plaintiffs claimed that misuse of this information would stigmatize them as drug addicts.¹³⁶ Significantly, while concluding that the possibility of misuse remained sufficiently unlikely to justify invalidation of the statute,¹³⁷ a unanimous Court found that the right to privacy protected not only the limited interests identified by Justice Rehnquist in *Paul*, but also "the individual interest in avoiding disclosure of personal matters."¹³⁸

The Court in *Whalen* declined to "decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional."¹³⁹ However, the decision provides ample justification for concluding that the Court would classify the personal information obtained under the Federal Registration Act as "private data." Further, *Whalen* indicates that the Court would likely prove receptive to the notion that widespread disclosure of this information implicates the fundamental right to privacy.¹⁴⁰

134. *Id.* at 591-93.

135. *Id.* at 593.

136. *Id.* at 595.

137. *Id.* at 600-02.

138. *Id.* at 599.

139. *Id.* at 605-06.

140. Mary A. Kircher argues that the disclosure of information regarding sex offenders does not implicate the right to privacy because it constitutes both the publication of public records and the publication of matters of legitimate public interest. Kircher, *supra* note 34, at 172-74. Although grounded in the Supreme Court's defamation jurisprudence, this analysis proves inapplicable to sex offender registration. In the area of sex offender registration, the central issue does not concern records obtained through court proceedings and open to public inspection, but rather the purposeful consolidation and active broadcast of data designed to maintain constant public vigilance over the activities of registered individuals. While a legitimate public interest in this information exists, this Note will demonstrate that any governmental action must balance that interest with the rights of the individuals involved. *But see Doe v Poritz*, 662 A.2d 367, 406-11 (N.J. 1995) (rejecting a convicted offender's claim that New Jersey's registration law violated his right to privacy because he had no reasonable expectation of privacy regarding matters of public record or matters ex-

Under substantive due process analysis, the threshold finding of a fundamental right justifies analysis of the registration statute's constitutionality under the heightened strict scrutiny standard of review.¹⁴¹ Under strict scrutiny review, the state must justify any action infringing on a fundamental right by demonstrating that the action both serves a compelling governmental interest and is narrowly tailored to the fulfillment of that interest.¹⁴²

Protection Through Public Disclosure: The State's Compelling Interest

In order to satisfy the first prong of the strict scrutiny standard, the government could easily identify a compelling governmental interest served by the registration of sex offenders. Indeed, in arguing for the validity of the Registration Act, the state presumably need only point to the tragic molestation and murder of Megan Kanka,¹⁴³ the slaying of Polly Klaas,¹⁴⁴ and the unsolved disappearance of Jacob Wetterling¹⁴⁵ to convince the Court of the compelling interest served by the Federal Registration Act.

The statements of legislative purpose accompanying state registration statutes provide additional and more reasoned bases for the enactment of such laws. The stated purposes are to: (1) enhance public safety,¹⁴⁶ (2) protect the public from sex offenders,¹⁴⁷ (3) "deter the commission of repeat sex offenses and sex

posed to public view and finding that the state's interest in public disclosure outweighed his interest in limiting the dissemination of private information under the state's notification law).

141. See generally *Roe v. Wade*, 410 U.S. 113, 155 (1973) and the cases cited therein.

142. *Id.*

143. See generally Siegel, *supra* note 38 (describing the details of Megan's abduction, the community's search for the girl, and Jesse Timmendequas's confession).

144. See generally 140 CONG. REC. S2825 (daily ed. Mar. 10, 1994) (statement of Sen. Durenberger) (quoting Christine Spolar & Barbara Vobejda, *Grass-Roots Crusaders Embrace a Mission To Find the Missing*, WASH. POST, Mar. 10, 1994, at A23).

145. See generally H.R. REP. NO. 392, 103d Cong., 1st Sess. 3 (1993) (explaining the background of the Jacob Wetterling Crimes Against Children Registration Act); 139 CONG. REC. S6863 (daily ed. May 28, 1993) (statement of Sen. Durenberger) (introducing the registration bill and describing the abduction of Jacob Wetterling).

146. See, e.g., ALASKA STAT. §§ 12.63.010-.100 (Supp. 1994); FLA. STAT. ANN. § 775.22 (West Supp. 1995).

147. See, e.g., ALASKA STAT. §§ 12.63.010-.100 (Supp. 1994); LA. REV. STAT. ANN. §

offenses involving physical violence,"¹⁴⁸ (4) "enhance law enforcement's ability to react when violent or repeat sex offenses are committed,"¹⁴⁹ (5) "prevent[] and promptly resolv[e] incidents involving sexual abuse and missing persons,"¹⁵⁰ and (6) "collect and analyze statistical and informational data for monitoring and tracking purposes."¹⁵¹

State courts have concluded that sex offender registration statutes address important, perhaps compelling, governmental interests. For example, in *People v. Mills*,¹⁵² a California appellate court asserted the existence of the state's "right to enact laws which promote public health, welfare and safety"¹⁵³ In *People v. Monroe*,¹⁵⁴ another California appellate court identified children as a "class of victims who require paramount protection."¹⁵⁵

As the U.S. Supreme Court recognized when examining a Los Angeles ordinance requiring the registration of convicted felons, the government's police power affords broad opportunities for action in the interest of preventing harm to the community.¹⁵⁶ In *Lambert v. California*, the Court limited that power only by the requirements of procedural due process; it imposed no other restrictions on the operation of the ordinance.¹⁵⁷

The House of Representatives sought specifically to justify the Federal Registration Act as a legitimate exercise of the government's police power. It reported that the "protection of children from violence and sex offenses falls clearly within the Federal government's purview in protecting the health, safety

15:540 (West Supp. 1995).

148. FLA. STAT. ANN. § 775.22 (West Supp. 1995).

149. *Id.*

150. N.J. STAT. ANN. § 2C:7-1(b) (West Supp. 1995).

151. FLA. STAT. ANN. § 775.22 (West Supp. 1995).

152. 146 Cal. Rptr. 411 (Cal. Ct. App. 1978).

153. *Id.* at 417.

154. 215 Cal. Rptr. 51 (Cal. Ct. App. 1985).

155. *Id.* at 56 (quoting *People v. Tate*, 210 Cal. Rptr. 117, 121 (Cal. Ct. App. 1985)).

156. *Lambert v. California*, 355 U.S. 225, 228 (1957). While *Lambert* represents the only example of a registration statute to reach the Supreme Court, the main issue in that case concerned whether authorities could convict an unregistered individual absent notice of the duty to do so. *See id.* at 227.

157. *Id.* at 228.

and welfare of its citizens.”¹⁵⁸ Further, the House of Representatives reported that its purpose in enacting the Federal Registration Act was “[t]o address crimes of violence and molestation,”¹⁵⁹ “to deter repeat offenses and protect children from victimization,”¹⁶⁰ and to assist in the monitoring of sex offenders, convicted in one state, who subsequently relocate to another.¹⁶¹ These aims, nearly identical to those justifying state registration statutes, would likely gain similar judicial approval as compelling state interests.

A more important implication for any right to privacy analysis of the Federal Registration Act is that such legislative goals provide compelling justification not only for the registration of sex offenders, but also for the public release of that information. Community access to this information, and even active public notification, would presumably advance the state’s asserted purposes by enlisting community assistance in preventing the occurrence of sexually violent crime.

Under the broad police powers of the state, Congress’s express reasons for enacting the Federal Registration Act thus likely represent a compelling governmental interest. By furthering that interest, the public disclosure provisions of the Federal Registration Act would also likely satisfy the first prong of the strict scrutiny standard.

Constitutional Failings Under the “Narrowly Tailored” Prong: Who Must Register and for How Long?

The second prong of strict scrutiny analysis examines whether the government has narrowly tailored the challenged law to the identified compelling interest.¹⁶² To survive judicial review, the state action at issue must represent the least restrictive means available for the fulfillment of that interest.¹⁶³ This prong of the test proves substantially more troubling when applied to the

158. H.R. REP. NO. 392, 103d Cong., 1st Sess. 5 (1993).

159. *Id.* at 3.

160. *Id.* at 4.

161. *Id.* at 4-5.

162. See generally *Roe v. Wade*, 410 U.S. 113, 155 (1973) and the cases cited therein.

163. *Id.* (requiring legislative enactments to be narrowly drawn).

public disclosure provisions of the Federal Registration Act. Given the statute's vaguely defined criteria for public disclosure,¹⁶⁴ as well as its provision for immunity from liability for the "good faith" release of registration information by law enforcement agencies and state officials,¹⁶⁵ widespread dissemination of the data obtained seems likely to occur. Indeed, in light of mounting political pressure for protection from released sex offenders,¹⁶⁶ the Act will almost certainly result in liberal community notification. Strict scrutiny requires, therefore, that the Federal Registration Act operate only (1) on those individuals truly deserving inclusion on the sex offender registry and (2) for that period of time during which the offender presents a legitimate threat to the community's health, safety, or welfare. Only subject to these limitations can the public disclosure provisions of the statute serve their intended purpose while invading the right to privacy to the least restrictive degree possible.

Sexually Violent Offenders and Repeat Behavior

The first group of offenders targeted by the federal legislation consists in large part of individuals "convicted of a sexually violent offense."¹⁶⁷ In its initial report on the law, the House of Representatives pointed to a criminal justice study that "concluded the 'behavior [of child sex offenders] 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."¹⁶⁸ From this study, Congress reasoned that community monitoring of these offenders would advance the government's compelling interest in protecting the public from violent sexual crime against both children and adults. By relying on such statistics, the lawmakers implicitly asserted that they

164. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(d)(3), 108 Stat. 1796, 2042 (1994) (permitting the release of information "necessary to protect the public").

165. *Id.* § 170101(e).

166. See *supra* notes 37-54 and accompanying text.

167. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(a)(1)(A), 108 Stat. 1796, 2038 (1994).

168. H.R. REP. NO. 392, 103d Cong., 1st Sess. 4 (1993) (citing *A Study of the Child Molester: Myths and Realities*, 41 LAE J. AM. CRIM. JUST. ASS'N 17, 22 (1978)).

had tailored the registration requirements to apply to a narrow group of individuals prone to repeat offenses. Other studies, however, have shown that sex offenders exhibit no greater tendency to engage in repeat behavior than other types of offenders.¹⁶⁹ Department of Justice statistics indicate that 66% of robbers, 42.1% of murderers, 54.5% of kidnappers, and 51.5% of rapists are arrested again within three years of release from state prisons.¹⁷⁰ These statistics demonstrate that the incidence of repeat behavior among at least one class of freed sex offenders—rapists—appears no greater than that among individuals convicted of other violent crimes.

Viewed in relation to these statistics, the Federal Registration Act appears arbitrary from two perspectives. On the one hand, the law proves underinclusive. If the incidence of repeat behavior among sex offenders parallels that among other criminal classes, a properly tailored law would provide for the registration of all violent criminals, not only sex offenders. On the other hand, the law is also overinclusive. While the Federal Registration Act imposes its requirements on all sex offenders, a large number of them will not engage in repeat behavior.

Despite the Act's apparent arbitrariness, use of its provisions to monitor and control sexually violent offenders may still survive the narrow tailoring requirement of strict scrutiny analysis. The simple fact remains that, unlike murderers, sex offenders leave no smoking guns. As a result, published statistics regarding repeat sex offenders do not reflect the many instances of repeat behavior that go unreported and thus unpunished.¹⁷¹ A plethora of anecdotal evidence supports this view. One sex of-

169. See, e.g., ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 (1989); Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809, 812 (1992); Kircher, *supra* note 34, at 164.

170. BECK & SHIPLEY, *supra* note 169, at 5 (Table 8).

171. Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 745 (1992) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 232 (1981)); Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 296-97 (1992) (citing Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 291 (1991)).

fender, convicted of a single incident of molestation, admitted in prison to having violated thirty children.¹⁷² Another, imprisoned for the molestation of two young girls, later claimed responsibility for more than 3,000 incidents of child sexual abuse.¹⁷³ Despite mild statistical evidence of repeat behavior among "sexually violent offenders," such claims, whether exaggerated or not, justify the assertion that lawmakers have narrowly tailored the Federal Registration Act to preserve community safety

Sexually Violent Predators: Unclear Definitions and Unreliable Predictions

The Federal Registration Act's application to so-called "sexually violent predator[s]"¹⁷⁴ must also satisfy the narrowly tailored requirement of strict scrutiny analysis. The Act defines the "sexually violent predator" as an individual "who has been convicted 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 violent offenses."¹⁷⁵ The sentencing court determines whether a particular individual deserves this classification "after receiving a report by a State board composed of experts in the field of the behavior and treatment of sexual offenders."¹⁷⁶ The Federal Act defines the term "mental abnormality" as "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."¹⁷⁷ Although Congress did not provide any definition of the term "personality disorder," legislators apparently intended the overall definitional framework to narrow the Act's application to a constitutionally permissible scope. Never-

172. Golden, *supra* note 35, at 12.

173. *Id.*

174. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(a)(1)(B), 108 Stat. 1796, 2038 (1994).

175. *Id.* § 170101(a)(3)(C) (emphasis added).

176. *Id.* § 170101(a)(2).

177. *Id.* § 170101(a)(3)(D).

theless, medical professionals have severely criticized the use of the terms "mental abnormality" and "personality disorder" in state statutes affecting sex offenders.¹⁷⁸

While the Federal Registration Act relies on mental health experts to assist in judicial determinations of "mental abnormality," the term lacks any established clinical meaning.¹⁷⁹ Indeed, it does not appear as a recognized psychiatric diagnosis in the latest edition of the profession's official manual, the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*¹⁸⁰ Further, the Washington State Psychiatric Association described the term as "hopelessly vague"¹⁸¹ when the group argued against its use in that state's Sexually Violent Predator Statute. As one mental health professional observed, "[m]ental abnormality' connotes sufficient vagueness that nearly any symptom, deficit, or historical detail might be included."¹⁸² Commentators have also criticized the use of the term "mental abnormality" because it allows a certain circularity of reasoning.¹⁸³ According to this argument, the diagnosis of mental abnormality depends on two facts: (1) the existence of prior sexual offenses and (2) a predisposition for the commission of criminal sexual acts;¹⁸⁴ however, only one piece of evidence exists to establish the presence of both elements—prior sexual offenses.¹⁸⁵ Any conviction for a sexual crime would thus almost certainly guarantee a finding of mental abnormality¹⁸⁶

The drafters of the Model Penal Code recognized that just such an unfounded diagnosis might result from their use of the

178. See, e.g., Brooks, *supra* note 171, at 727-33; Robert M. Wettstein, M.D., *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 601-04 (1992).

179. See Brooks, *supra* note 171, at 730 (citation omitted).

180. AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994) [hereinafter *DSM-IV*].

181. Brooks, *supra* note 171, at 730.

182. Wettstein, *supra* note 178, at 602.

183. *Id.*

184. See *id.*

185. See *id.*

186. See Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 KAN. L. REV. 887, 908 (1994).

term "mental disease or defect."¹⁸⁷ In order to avoid any misapplication of that phrase, they specifically stated that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."¹⁸⁸ The Federal Registration Act, however, contains no such caveat, and the potential for ascribing a "mental abnormality" to even the most undeserving sex offender looms large.

Unlike the term "mental abnormality," "personality disorder" is not defined in the Federal Registration Act. However, the phrase carries some meaning in the psychiatric community.¹⁸⁹ In fact, "personality disorders" constitute one of the five axes of the *DSM-IV*'s system for categorizing mental disorders.¹⁹⁰ In analyzing the use of that term under Washington's Sexually Violent Predators Statute,¹⁹¹ mental health professionals have questioned whether lawmakers intended to incorporate the term's clinical definition into the law or envisioned some other, unarticulated standard.¹⁹² Even if the legislature wanted experts to apply the term's technical meaning when evaluating sex offenders, the inherent uncertainties of psychiatric diagnosis suggest that application by even the most seasoned professionals would produce disparate results.¹⁹³

Some commentators have argued that the judiciary should accord deference to statutory uses of "mental abnormality" and "personality disorder" under the theory that, in this context, the terms relate to legal rather than psychiatric concepts.¹⁹⁴ As applied to the Federal Registration Act, however, that contention contradicts Congress's plain emphasis on the need for a clinical determination of the existence of either condition in any particular individual. If lawmakers had intended to employ "mental

187. MODEL PENAL CODE § 4.01 (1962).

188. *Id.* § 4.01(b).

189. *See, e.g.*, Brooks, *supra* note 171, at 727; Wettstein, *supra* note 178, at 603.

190. *DSM-IV*, *supra* note 180, at 25.

191. WASH. REV. CODE ANN. §§ 71.09.010-.902 (West 1992). On August 25, 1995, a U.S. District Court invalidated the law for violating the Federal Constitution's Due Process, Double Jeopardy, and Ex Post Facto Clauses. *Young v. Weston*, No. C94-480C, 1995 WL 529429, at *10 (W.D. Wash. Aug. 25, 1995).

192. *See* Wettstein, *supra* note 178, at 603.

193. *Id.* at 603-04.

194. *See, e.g.*, Brooks, *supra* note 171, at 730.

abnormality" or "personality disorder" as legal, rather than psychiatric, terms, they presumably would not have provided for expert evaluations at all. Similarly, if "mental abnormality" and "personality disorder" carried purely legal connotations, the presiding judge would be the most qualified individual to apply the terms, and no need for outside consultation would arise. Instead, the statute explicitly defers any judicial decision on the matter until after receipt of "a report by a State board composed of experts in the field of the behavior and treatment of sexual offenders."¹⁹⁵ Judicial deference cannot excuse a lack of legislative clarity when legislators evidently intended individuals outside the legal system to apply the terms at issue.

While use of the phrases "personality disorder" and "mental abnormality" initially appears to lend scientific precision to the identification of sexually violent predators, closer analysis reveals the inadequacies of congressional attempts to tailor the statute to conform to the constitutional requirements imposed on any exercise of the state's police powers. Indeed, neither term seems capable of providing a sound and consistently accurate justification for including an individual in the "sexually violent predator" category and requiring registration. Absent a sound basis for applying the statute, public disclosure of the personal information obtained necessarily constitutes an unwarranted invasion of the sex offender's constitutional right to privacy. The government has not narrowly tailored the possible release of such private data to information about individuals posing a genuine threat to public health, safety, or welfare. The provision relating to "sexually violent predators" must therefore fail the second prong of the strict scrutiny standard.¹⁹⁶

A second aspect of the Federal Registration Act's definition of "sexually violent predators" merits close examination under the "narrowly tailored" prong of strict scrutiny analysis. According to

195. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(a)(2), 108 Stat. 1796, 2038 (1994).

196. While a judicial invalidation of the Act's "sexually violent predator" provisions would still subject the offender to registration for the violent sexual crime committed, it would eliminate both the heightened address verification procedure and the potential for lifelong registration currently in force. *See id.* § 170101(b)(3), (6); *supra* notes 167-73 and accompanying text; *infra* note 224 and accompanying text.

the Act, "[t]he term 'sexually violent predator' means a person who has been convicted 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 violent offenses*."¹⁹⁷ Again, the sentencing court makes this determination, guided by a board of mental health professionals.¹⁹⁸ In drafting this definition of the "sexually violent predator," Congress apparently assumed that experts can accurately predict the recidivism of individual sex offenders. Reliable predictions would allow the Federal Registration Act to target a select group of particularly dangerous individuals. The statute would thus achieve the government's compelling interest in community protection using sufficiently narrow means.¹⁹⁹

Members of the psychiatric community, however, have increasingly questioned the accuracy of such predictions.²⁰⁰ In fact, "[i]t has been widely accepted for some time that predictions of an individual's likelihood of committing future serious violent crime are only one-third accurate."²⁰¹ Because of this inaccuracy, only one of every three offenders labelled "sexually violent predators" will actually recidivate. However, the Federal Registration Act requires all three to register with law enforcement authorities and thus subject themselves to the twin possibilities of public disclosure and loss of privacy.²⁰²

197. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(a)(3)(C), 108 Stat. 1796, 2039 (1994) (emphasis added).

198. *Id.* § 170101(a)(2).

199. This analysis differs from the preceding section's discussion of repeat behavior to the extent that the issue of actual instances of repeat behavior differs from the question of accuracy in predicting that behavior.

200. See Beth K. Fujimoto, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 898 n.114 (1992) (relying on data indicating that mental health professionals overpredict dangerousness); Wettstein, *supra* note 178, at 605 (emphasizing the difficulties of predicting future violent behavior); Bochnewich, *supra* note 171, at 293-96 (pointing out the difference between the standard of proof required to find an individual dangerous and the level of unacceptable risk society chooses to define as dangerous). But see Brooks, *supra* note 171, at 739-50 (arguing that methodological flaws in recidivism studies have overstated the inaccuracy of dangerousness predictions).

201. Bochnewich, *supra* note 171, at 293-94.

202. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(a)(1)(B), 108 Stat. 1796, 2038 (1994).

While seemingly overinclusive, this portion of the Federal Registration Act should nevertheless satisfy the narrow tailoring requirements of strict scrutiny review. In a variety of contexts, the Supreme Court has approved judicial reliance on expert predictions of future dangerousness.²⁰³ The Court has generally acquiesced in legislative decisions to define future dangerousness in terms of its probability, rather than its actual occurrence.²⁰⁴ In addition, in analyzing this portion of the Act, the Court would likely acknowledge that, as discussed, reported instances of sex offender recidivism substantially underrepresent actual incidents of repeat behavior.²⁰⁵ For both of these reasons, the Supreme Court should find that while problems remain with the "sexually violent predator" classification, at least this portion of the Federal Registration Act—basing registration on predictions of recidivism—satisfies the narrowly tailored requirement of strict scrutiny analysis.

Length of Registration and the Retention of Records

Perhaps the most serious constitutional flaws of the Federal Registration Act lie in (1) its provisions establishing the length of time during which convicted sex offenders have a duty to provide updated personal information to law enforcement officials and (2) the absence of any procedure for purging registration records when that duty has ended. Significantly, in *Whalen v. Roe*,²⁰⁶ the Supreme Court upheld New York's prescription

203. Bochnewich, *supra* note 171, at 288-93 (discussing the use of predictions of dangerousness in pretrial detention, sentencing, parole release decisions, and the involuntary commitment of insanity acquittees); see also *United States v. Salerno*, 481 U.S. 739 (1987) (approving consideration of the possibility of future criminal conduct in decisions to deny bail); *Schall v. Martin*, 467 U.S. 253 (1984) (allowing predicted dangerousness to justify the pretrial detention of juveniles); *Greenholtz v. Inmates of the Neb. Penal and Correctional Complex*, 442 U.S. 1 (1979) (upholding reliance on predictions of dangerousness in parole determinations).

204. See, e.g., Bochnewich, *supra* note 171, at 293. According to the logic of this definition, the two of three anticipated recidivists who do not fulfill expert predictions within a defined period still pose a threat to the community, but have temporarily succeeded in thwarting their own recidivistic tendencies. See *id.* at 296 (comparing sex offenders to bombs, dangerous whether or not they actually explode) (citation omitted).

205. See *supra* notes 171-73 and accompanying text.

206. 429 U.S. 589 (1977).

drug registration statute only after finding that the law expressly prohibited disclosure of the information obtained,²⁰⁷ making the potential for such disclosure remote²⁰⁸ and that the legislation required the destruction of the collected data after a period of five years.²⁰⁹

Both the length of registration and the absence of any expungement process determine the period during which private data remains subject to public disclosure; thus, each also implicates the right to privacy. According to the Federal Registration Act, sexually violent offenders must register with law enforcement authorities for ten years.²¹⁰ The statute's legislative history provides no justification for choosing this length of time.²¹¹ Lacking any provisions for early release from the duty to register, the law indicates that not even affirmative evidence of total rehabilitation would allow authorities to terminate the registration requirement prior to the ten-year mark.

The Federal Registration Act easily might allow offenders to petition law enforcement authorities to reconsider the need for registration at any point during the ten-year period. The statute could provide for a hearing, similar to that used in making parole decisions, in which the offender could present evidence of reform. Even if the offender's attempt to secure a release proved unsuccessful, the reevaluation process would more narrowly tailor the Act's registration requirement to that period during which the offender legitimately threatens community health, safety, and welfare.

As currently formulated, the law imposes too heavy a burden on the sex offender's right to privacy. In an indeterminate number of cases, registration will continue well past the point when monitoring a particular individual would further the government's interest in protecting the community from violent sexual crime. Even when no longer dangerous, the offender remains subject to public disclosure and the related threat of pri-

207. *Id.* at 594.

208. *Id.* at 601-02.

209. *Id.* at 593.

210. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(b)(6)(A), 108 Stat. 1796, 2041 (1994).

211. See H.R. REP. NO. 392, 103d Cong., 1st Sess. 3 (1993).

vacy right infringements.

At least one state legislature has recognized the potential problem that arises from requiring registration beyond the period of its utility and has modified its statutory scheme accordingly. The California Penal Code provides that a court, "in its discretion and the interests of justice,"²¹² can release qualified petitioners from the penalties and disabilities related to any felony conviction²¹³ and must release qualified petitioners from the penalties and disabilities related to misdemeanor convictions.²¹⁴ In addition, the California Code enables qualified individuals to petition for a certificate of rehabilitation and pardon after only three years residency in the state.²¹⁵

The Supreme Court of California has specifically referred to the possibilities of release and rehabilitation in considering the constitutional validity of individual applications of the state's registration statute.²¹⁶ In *In re Birch*,²¹⁷ the court identified the release procedure as one factor mitigating, but not eliminating, the unconstitutional effect of allowing a defendant to plead guilty to a sexual offense without notice of the registration duty.²¹⁸ The court in *In re Reed*²¹⁹ implicitly acknowledged that the release process bolstered the constitutional legitimacy of applying the law to individuals convicted of lewd or dissolute conduct in a public place.²²⁰ Most recently, in *People v.*

212. CAL. PENAL CODE § 1203.4(a) (West Supp. 1995).

213. *Id.* § 1203.4. A California appellate court first confirmed the application of this section to the state's sex offender registration statute in *Kelly v. Municipal Court*, 324 P.2d 990, 994-95 (Cal. Dist. Ct. App. 1958). Another California state appellate court reached the same conclusion in *Bradford v. State*, 111 Cal. Rptr. 852, 853, 855 (Cal. Ct. App. 1973). Presumably, a court would only exercise this discretion in the sex offender context when the individual no longer endangers public safety.

214. CAL. PENAL CODE § 1203.4(a) (West Supp. 1995).

215. *Id.* § 4852.01(a). Significantly, the California legislature amended this section in 1994 to apply not only to convicted felons, but also to "any person who is convicted of a misdemeanor violation of any sex offenses specified in [the state's sex offender registration statute]." *Id.* § 4852.01(c) (emphasis added).

216. See, e.g., *People v. McClellan*, 862 P.2d 739, 745 n.7 (Cal. 1993); *In re Reed*, 663 P.2d 216, 218-19 (Cal. 1983); *In re Birch*, 515 P.2d 12, 17 & n.9 (Cal. 1973).

217. 515 P.2d 12.

218. *Id.* at 17 & n.9.

219. 663 P.2d 216.

220. *Id.* at 218-19.

McClellan,²²¹ the court identified the possibility of both release and rehabilitation as factors that allowed a guilty plea to stand when the defendant failed to raise a timely objection to the trial court's failure to advise him of the registration duty.²²²

Proponents of the Federal Registration Act might argue that registration occasionally reaching beyond the period of actual dangerousness poses no real constitutional question because courts routinely impose prison sentences without the possibility of parole. Although worthy of consideration, this argument ignores the main focus of the Federal Registration Act. The statute's legislative history clearly indicates that the law's primary purpose in requiring violent sexual offenders to register lies not in imposing punishment, but in monitoring offenders to prevent repeat behavior.²²³ Although a prison sentence continues to serve its overriding punitive function even after full rehabilitation, the registration statute does not achieve any of its stated goals when the possibility of repeat behavior disappears. This provision of the Act thus cannot fulfill strict scrutiny's narrow tailoring requirement because it subjects offenders to public notification and privacy right violations without furthering the state's compelling interests.

The Federal Registration Act requires the registration of sexually violent predators during a differently defined, but equally suspect, period. The Act mandates that the registration of a sexually violent predator "shall terminate upon a determination that the person no longer suffers from a mental abnormality or personality disorder that would make the person likely to engage in a predatory sexually violent offense."²²⁴

On the one hand, this portion of the legislation provides a definite standard for terminating the registration duty of deserving individuals. It takes account of the unique circumstances giving rise to each offender's crime and recognizes that every individual responds differently to psychiatric treatment. Thus, it narrowly tailors registration to a period during which

221. 862 P.2d 739 (Cal. 1993).

222. *Id.* at 745 n.7, 749.

223. See, e.g., H.R. REP. NO. 392, 103d Cong., 1st Sess. 4 (1993).

224. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(b)(6)(B), 108 Stat. 1796, 2041 (1994).

public disclosure of the information obtained would most benefit law enforcement efforts to safeguard public health, safety, and welfare.

On the other hand, the law ties its registration terminating procedure to the same questionable terminology initially used to classify offenders as "sexually violent predators."²²⁵ The disparate conclusions likely to follow even expert application of the terms "mental abnormality" and "personality disorder" render the length of the registration duty imposed on these offenders constitutionally invalid.²²⁶ Again, public notification and invasions of privacy would plague the offender without enhancing public welfare.

A final difficulty that arises from the Federal Registration Act lies in the absence of any procedure for purging law enforcement records after the sex offender's duty to register has terminated. For example, when the Supreme Court of California declared certain applications of that state's registration statute unconstitutional in *In re Reed*,²²⁷ it specifically noted that the law did not require officials to expunge collected private data following a sex offender's release from the registration duty.²²⁸ Instead, such information remained "permanently available."²²⁹ Other courts have failed to address any constitutional ramifications of the perpetual retention of registration information.

Without a records-purging procedure, however, public disclosure of private data obtained under the Federal Registration Act would threaten the privacy rights of sex offenders throughout their lives, probably well after the data had ceased to advance the government's compelling interest in community safety. Under this analysis, the Federal Registration Act fails to meet the narrow tailoring requirement of the strict scrutiny test.

225. See *supra* notes 175-96 and accompanying text.

226. Although proponents of the Federal Registration Act might again argue for judicial deference to implied legislative definitions of these terms, the Federal Registration Act's reliance on expert evaluations indicates that Congress intended the use of precise clinical diagnoses. See *supra* note 195 and accompanying text.

227. 663 P.2d 216 (Cal. 1983).

228. *Id.* at 217; cf. *Whalen v. Roe*, 429 U.S. 589, 593 (1977) (noting that the New York State Controlled Substances Act of 1972 required authorities to destroy registration materials after five years).

229. *Reed*, 663 P.2d at 219.

CONCLUSION

The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act addresses public concerns about the health, safety, and welfare of communities in which released sex offenders reside. It proposes to safeguard children and other potential victims of violent sexual offenses from an admittedly troubled segment of modern American society by allowing law enforcement officials and members of the general public to obtain personal data on convicted sex offenders. Such aims provide a compelling interest in the operation of the statute.

For all of its lofty goals, however, the Registration Act still must conform to the basic tenets of the Constitution and refrain from any unnecessary encroachment on the right to privacy. The statute has a low threshold for triggering the public disclosure of registry information.²³⁰ It must therefore narrow the list of offenders subject to privacy right infringements to the greatest possible degree. The Act must also require these truly dangerous individuals to register for only that period during which they pose a real threat to community health, safety, and welfare.

The registration of sexually violent, but not mentally abnormal, offenders should withstand constitutional scrutiny. Although research indicates that such individuals recidivate no more often than other violent criminals, the likelihood of unreported instances of repeat behavior justifies their registration under the Act.

The Federal Registration Act's provisions for the registration of "sexually violent predators" raise more serious constitutional concerns. For these portions of the Act to survive strict scrutiny review, lawmakers must eliminate "mental abnormality" from the Act's classification framework. This term carries no meaning in the psychiatric community and can only lead to the unjustified inclusion of undeserving individuals in the category of "sexually violent predators." As an alternative, legislators should amend the law to cover individuals afflicted by relevant disorders listed in the American Psychiatric Association's *DSM-IV*. In

230. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101(d), 108 Stat. 1796, 2038 (1994) (allowing public disclosure necessary to community protection).

addition, the statutory scheme should contain specific cross-references to that volume and its successors. A straightforward provision, specifying that the definition of "personality disorder" intended by the statute conforms to the *DSM-IV*'s use of that term, would bolster the Act's chances of surviving a right to privacy challenge. Only in this manner can (1) experts evaluate defendants with some degree of precision and (2) judges label only truly dangerous individuals as "sexually violent predators" and thus rightfully subject them to heightened address verification procedures and potentially lifelong registration.

Further, the Federal Registration Act must allow all offenders, regardless of their classification as "sexually violent offenders" or "sexually violent predators," to petition for release from the duty to register upon an adequate showing of rehabilitation. For sexually violent offenders, the Act should provide for this opportunity at any point before the end of the current ten-year period. In any case, the registration duty should automatically terminate at that point. For sexually violent predators, this determination must find its basis not in the vague language of "mental abnormality" or "personality disorder" currently provided by the Act, but in psychiatric terms precisely defined in and cross-referenced to the *DSM-IV*. In this manner, potential privacy right infringements will affect sex offenders only during the precise period when they pose a true threat to community interests.

Finally, lawmakers must provide that when the sex offender has made a showing of rehabilitation or when the statutorily prescribed registration period has ended, state and federal law enforcement authorities must purge their records of any reference to the offender's registration. Such a provision will eliminate the potential for lifelong invasions of the offender's privacy that do not further the government's aim of safeguarding public health, safety, and welfare.

Each of these reforms requires precise drafting by federal legislators and can only occur if lawmakers withstand the impulse to answer impassioned public outcry with expansive and ill-considered legislation. While politically popular in the short term, such a response to the horrors of violent sexual offense will in the long term only increase public cynicism and generate widespread frustration with the political process. In time, the

communal outrage now directed at convicted sex offenders could easily shift its focus to legislators themselves, if the courts invalidate provisions of the Federal Registration Act for unconstitutionally infringing the right to privacy

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