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Douglas Griswold

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SEX OFFENDERS IN THE COMMUNITY: THEIR PUBLIC PERSONA AND THE MEDIA'S CORRESPONDING PRIVILEGE TO REPORT

Douglas Griswold*

INTRODUCTION

On the night of October 22, 1989, eleven-year-old Jacob Wetterling rode his bicycle to the local video store along with his brother and a friend.¹ The trip was sanctioned by Jacob's parents, who were out for the evening at a house-warming party.² The boys lived in a small Minnesota town of less than three thousand inhabitants, a place best known for its "porch swings, stone churches and candy-striped barber poles."³ Accordingly, the boys' trip that night was deemed safe; the video store was less than ten minutes away by bicycle.⁴

The boys, however, were not safe that night. Returning home from the video store they were stopped by a man standing in the street holding a gun.⁵ The man ordered the boys off their bikes, and told Jacob's brother and his friend to run away quickly or they would both be shot.⁶ Jacob was not as lucky. Upon turning to run, one of the boys saw the man grab Jacob by the shoulder.⁷ When they found it safe to look again, Jacob and the man were gone.⁸ Jacob Wetterling disappeared that night.

Jacob's disappearance became national news. Local law enforcement officials brought in state and federal agencies to help track down Jacob and his kidnapper.⁹ The entire Midwest was soon aware of Jacob's abduction.¹⁰ The Wetterling family

* J.D., William & Mary School of Law, 2007; A.B., Harvard University, 2002. I wish to thank the *William & Mary Bill of Rights Journal* editors and staff for their assistance with this Note. I also wish to thank my family for their guidance and support.

¹ See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES 3 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ncsor.pdf> [hereinafter SEX OFFENDER REGISTRIES]; *Troops Join in Search for Boy, 11, Governor Calls out Minnesota Guard*, ST. LOUIS POST-DISPATCH, Oct. 29, 1989, at 5B.

² See SEX OFFENDER REGISTRIES, *supra* note 1, at 3.

³ Dirk Johnson, *Small Town Is Shaken by a Child's Abduction*, N.Y. TIMES, Oct. 30, 1989, at A10.

⁴ See SEX OFFENDER REGISTRIES, *supra* note 1, at 3.

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *Minnesota National Guard to Join Search for Kidnapped Boy*, CHI. TRIB., Oct. 29, 1989, at C3.

¹⁰ See SEX OFFENDER REGISTRIES, *supra* note 1, at 4.

received an outpouring of support both publicly and privately.¹¹ For example, the Minnesota Vikings wore "Jacob's hope" hats on the sidelines at a home game while simultaneously projecting Jacob's picture on the stadium's giant video screen.¹² Unfortunately, these efforts were not successful and Jacob remains missing to this day.¹³

Eighteen months after Jacob's disappearance a man was arrested for burglary in St. Cloud, Minnesota.¹⁴ Upon running a criminal background check, law enforcement officials discovered that the man was a previously convicted sex offender.¹⁵ Further, the St. Joseph police learned that in October, 1989 the man had lived closer to Jacob's abduction site than did the Wetterling family; yet, local police had not been aware of his presence within the community.¹⁶ In fact, unbeknownst to local police at the time of Jacob's disappearance, there were halfway houses in the St. Joseph area that housed sex offenders upon their release from prison.¹⁷ This information was disconcerting because during the search it was commonly assumed that Jacob's kidnapper had attempted similar behavior in the past.¹⁸ The St. Joseph police lamented that prior knowledge of the presence of these previously convicted sex offenders may have prevented Jacob's abduction in the first place.¹⁹

A. The Legislative Response to the Sex Offender Debate

Congress responded to this tragedy, and others like it, by passing the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, "the Wetterling Act," as part of the Violent Crime Control and Law Enforcement Act of 1994.²⁰ The Wetterling Act required individual states to establish extensive sex offender registration programs to record the locations of convicted sex offenders within their jurisdiction.²¹ Congress considered the federal registration

¹¹ *See id.*

¹² *Id.* The NBA's Minnesota Timberwolves planned to donate the proceeds from their first home game to the search for Jacob Wetterling. *NBA Update*, USA TODAY, Nov. 9, 1989, at 10C.

¹³ *See* SEX OFFENDER REGISTRIES, *supra* note 1, at vii.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See id.* (providing a copy of the FBI profile that suggested that Jacob's kidnapper was probably a previous sex offender, a white male twenty-five to thirty-five years old with some type of physical deformity, and was likely to work at an unskilled job).

¹⁹ *See id.*

²⁰ 42 U.S.C. § 14071 (2000).

²¹ *See id.* § 14071(a)(1)(A) (establishing guidelines for states requiring persons "convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address" for a specified time period); *see also* H.R. REP. NO. 103-392, at 5-6 (1993) (defining a criminal offense against a minor as "any criminal offense that consists of kidnapping or false imprisonment of a minor, except by a parent; soliciting or engaging in criminal sexual conduct toward a minor, or engaging in any conduct that by its nature

program a legitimate use of government authority because its stated purpose was to protect public safety.²² This objective was accomplished by providing law enforcement officials with a list of the addresses of those individuals who previously had been convicted of violent sex crimes.²³ Congress also asserted that the registration requirements did not violate any fundamental rights possessed by the affected sex offenders.²⁴

The Wetterling Act was amended in 1996 to include a community notification statute.²⁵ Congress determined that community notification was necessary to protect the public, and thus authorized the public disclosure of relevant information about those individuals forced to register under the Wetterling Act.²⁶ The amendment was called Megan's Law in honor of seven-year-old Megan Kanka, who was raped and killed by her next-door neighbor, a twice-convicted sex offender.²⁷ Megan's Law was perceived as an effective tool in promoting public safety because it enlisted community aid to help prevent the occurrence of sexually violent crimes.²⁸

B. Pertinent Sex Offender Data

As of late 2005, there were roughly 550,000 registered sex offenders in the United States.²⁹ In general, sex offender data is quite limited, and it is only recently that

is a sexual offense against a minor; using a minor in a sexual performance; soliciting a minor to practice prostitution; or attempting to commit any of these offenses if the State has made such an attempt a criminal offense and includes such an offense in their registration program").

²² H.R. REP. NO. 103-392, at 5 (1993) ("The Committee believes that protection of children from violence and sex offenses falls clearly within the Federal government's purview in protecting the health, safety and welfare of its citizens. The guidelines created in this bill serve a legitimate Federal governmental purpose.").

²³ *See id.* at 4 ("Registration of convicted felons, especially sex offenders, reentering a community is one control States have used to deter repeat offenses and protect children from victimization. The highly repetitive nature of these crimes has provided a strong incentive for States to monitor the whereabouts of convicted sex offenders.").

²⁴ *See id.* ("There is little doubt as to the authority of the States to impose registration requirements upon sex offenders. Courts have found that registration requirements do not violate the eighth amendment, and do not violate the due process clause, the equal protection clause, or the constitutional rights to privacy or travel." (citations omitted)).

²⁵ *See* 42 U.S.C. § 14071(e)(1) (amended as of May 17, 1996).

²⁶ *See id.* ("The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State."); *id.* § 14071(e)(2) ("The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released. The release of information under this paragraph shall include the maintenance of an Internet site containing such information that is available to the public and instructions on the process for correcting information that a person alleges to be erroneous.").

²⁷ *See* SEX OFFENDER REGISTRIES, *supra* note 1, at vii.

²⁸ *See id.*

²⁹ Wendy Koch, *Despite High-Profile Cases, Sex Crimes Against Kids Fall*, USA TODAY,

studies have focused specifically on sex crimes.³⁰ There are certain facts, however, upon which most crime analysts will agree. It is clear that the majority of all sexual assaults in this country are inflicted upon juveniles.³¹ The majority of their assailants are adult males.³² It is also evident that the majority of young victims are assaulted by persons with whom they are acquainted.³³ Moreover, most young victims are sexually abused in residential settings.³⁴ Finally, evidence suggests that recidivism among convicted offenders is high, and rehabilitation often fails among the most violent of sex offenders.³⁵

These numbers support the theory that convicted sex offenders are a widespread danger to communities and thus pose a real threat to the safety of those most targeted, children. In recognition of this threat, there is a potent public debate regarding the most efficient means to combat the plague of sexual offenses.³⁶

It is within this debate that state legislatures have enacted the aforementioned sex offender registration and notification programs to serve the noble purpose of protecting communities and preventing future tragedies at the hands of sexually violent

Aug. 25, 2005, at 1A.

³⁰ See HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 1 (2000) (suggesting that only recently have legislators and law enforcement officials acquired "hard facts on which to base their response to [sex] crimes, their victims, and their offenders"), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf>.

³¹ See *id.* at 12 ("[C]rimes against juvenile victims are the large majority (67%) of all sexual assaults handled by law enforcement agencies."); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDER STATISTICS (noting that in 1994 the median age of the victims of all imprisoned sex offenders was less than thirteen years old), available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> [hereinafter CRIMINAL OFFENDER STATISTICS].

³² See SNYDER, *supra* note 30, at 8 (concluding that nearly all (96%) reported sex offenders were male, and another large majority (77%) of sex offenders were adults).

³³ See *id.* at 13 ("Rarely were the offenders of young juvenile victims [characterized as children under twelve] strangers.").

³⁴ See *id.* at 6 (determining that over eighty-three percent of all young victims were assaulted in residences).

³⁵ H.R. REP. NO. 103-392, at 4 (1993) ("Evidence suggests that child sex offenders are generally serial offenders. Indeed, one recent study concluded the 'behavior is highly repetitive, to the point of compulsion,' and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child." (citations omitted)). *But cf.* CRIMINAL OFFENDERS STATISTICS, *supra* note 31 (noting that of the 4,300 convicted child molesters released from the prisons of fifteen states in 1994, only 3.3% of them were rearrested for a sex crime against a child within three years); Koch, *supra* note 29 (stating that sex "offenders are less likely to be rearrested after prison for any type of crime than other former inmates").

³⁶ See generally Lydia Saad, *Sex Offender Registries Are Underutilized by the Public*, GALLUP NEWS SERVICE, June 9, 2005, <http://poll.gallup.com/content/default.aspx?ci=16705&pg=1> (arguing that the effectiveness of sex offender registries may depend on the extent to which the public is aware of the existence of these registries).

criminals.³⁷ The preceding paragraphs have served to provide an overview of the compelling debate surrounding convicted sex offenders and their place within the community. It is a debate that inflames passions on all sides of the equation, and ultimately rests on this fundamental question: Can our loved ones be safe when such dangerous persons are allowed to reside in our communities and often in our homes?

C. The Note's Premise

The focus of this Note, however, rests on a much narrower issue. If the government asserts a right to notify the public of the existence of convicted sex offenders in the community, does the media possess a similar right to pursue the same goal? Specifically, does the media face liability when discussing the plight of sex offenders and their victims, or is the media assigned a fundamental right to share with the government the burden of community notification? This Note will establish the claim that the media is entitled to notify the public of the presence of convicted sex offenders in the community.³⁸

To support this supposition, the media's right to notification will be examined through two congruent legal disciplines: the First Amendment and the public figure doctrine. First, it will be argued that the First Amendment protects the media from liability when reporting on issues that are of public concern.³⁹ This argument will include an examination of the powerful tension that exists between the media's right to report on matters of public concern and the individual's right to privacy.⁴⁰ In resolving this issue in favor of the media, an analysis of case law validating the media's First Amendment protective shield will be considered in conjunction with relevant case law that confirms that a sex offender's right to privacy is outweighed by the public interest in community awareness and protection.⁴¹

³⁷ See *supra* text accompanying notes 20–28.

³⁸ For the purpose of this Note, it is assumed that the type of information upon which the media may legitimately report should follow the registration and notification guidelines established under the Wetterling Act. See generally 42 U.S.C. § 14071 (2000). Specifically, the media's right to publicize sex offender information should adhere to Congress's definition of the pertinent information that the FBI may release to the public under the principle of community notification. Accordingly, the media should be able to report on only "relevant information concerning a person required to register under [a community notification statute] that is necessary to protect the public." 42 U.S.C. § 14072(f)(1). Generally, the term "relevant information" comprises information that is already part of the public record, including the convicted offender's sexual offense, current address, place of employment, etc. See *infra* text accompanying note 104. Such information is already included within sex offender registration databases, and thus media coverage will not serve to expose the convicted sex offender, but rather will serve as an additional means to notify the public. It is important to note, however, that analogous to the guidelines established under the Wetterling Act, the media should have no congruent right to report on the names of the victims of the publicized sex crimes. See 42 U.S.C. § 14072(f)(2).

³⁹ See *infra* Part I.

⁴⁰ See *infra* Part I.A–B.

⁴¹ See *infra* Part I.A–D.

After determining conclusively that the media has the right to notify, the analysis will then shift to an examination of the media's potential liability for defaming the reputations of those persons affected by public notification. This examination will focus on defamation law and the tort liability that the media might incur for notifying the public of the potential safety threat.⁴² This liability could potentially weaken the media's resolve to publicize the status of resident sex offenders, a scenario that would muzzle the freedom acquired in the First Amendment discourse. Immunizing the media from liability, therefore, will become a matter of vital importance to the success of the overall argument.

Fortunately, the mechanism to immunization is found in the public figure doctrine expounded most noticeably within defamation law.⁴³ By analyzing the public figure doctrine through a series of relevant cases, it will be determined that convicted sex offenders are accurately deemed public figures.⁴⁴ This outcome will take into consideration the alleged lack of voluntary action that sex offenders exhibit upon being thrust to the forefront of the public controversy surrounding their presence in the community.⁴⁵ The retort to this criticism will conclude that convicted sex offenders are that elusive class of persons who are involuntary public figures.⁴⁶ Consequently, by attaining public figure status, sex offenders will hesitate to initiate defamation lawsuits against potential media adversaries because of the high standard of liability that is accorded media entities when discussing the plights of public figures.⁴⁷

Upon reaching the conclusion that convicted sex offenders are legitimate public figures, dual benefits will result. First, the sex offender notification programs will attain their ultimate purpose of protecting the public by allowing the dissemination of pertinent information through the most efficient mediums. Second, the media's First Amendment right to report on matters of public concern will be upheld, which is a powerful interest necessary to ensure that a vigorous debate on important public issues remains sacred.

I. THE FIRST AMENDMENT

First Amendment⁴⁸ analysis adheres to the notion that speech of public concern is of greater value than speech of private concern.⁴⁹ Hence, in order to determine

⁴² See *infra* Part II.

⁴³ See *infra* Part II.A–B.

⁴⁴ See *infra* Part II.

⁴⁵ See *infra* Part II.B.2.b, II.C.

⁴⁶ See *infra* Part II.C.

⁴⁷ For a discussion of the standards of liability attached to public and private individuals, refer to Part II.B.1.

⁴⁸ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁴⁹ See generally *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)

whether the media has the right to notify the public of the local presence of convicted sex offenders, the analysis must focus on the First Amendment and the protective shield it affords media entities when reporting on matters of public concern.⁵⁰

To begin with, the claim that sex offenders are a public concern is relatively unquestioned.⁵¹ Arguably, then, it is equally unquestioned that the media's notification of the presence of local sex offenders deserves First Amendment protection. The problem with this contention, however, is that it potentially infringes upon the sex offender's fundamental right to privacy.⁵² It is crucial to the validity of this argument that the ostensible tension that arises between the media's right to notification and the individual's right to privacy is resolved in favor of the media. It is only upon this conclusion that the media may legitimately expect, and ultimately receive, First Amendment protection when publicly reporting on local sex offenders. A detailed analysis of the factors that distinguish public and private speech is therefore necessary.

The analysis must begin with an examination of those interests that have attained legitimacy under the First Amendment. Included within this analysis is an extensive investigation into the essential Supreme Court decisions that have defined specific media rights when reporting on issues of public concern.⁵³ This analysis must discern how private facts become public knowledge if deemed newsworthy and essential to the public debate.⁵⁴ Finally, the analysis will compare the media's right to report on matters of public concern with the government's authority to enact sex offender notification programs that publicize the presence of sex offenders in the community.⁵⁵ Ultimately, it will become apparent that the media's right to notification is supported by the existing principles of current First Amendment jurisprudence.⁵⁶

(finding that not all speech is of equal First Amendment importance, and specifically determining that false statements in a private credit report did not involve matters of public concern).

⁵⁰ See *infra* Part I.B.

⁵¹ See, e.g., Daniel Merkle, *Poll: Crime Worries Running High but Americans Don't Know What to Do About It*, ABCNews.com, June 4, 2001, http://abcnews.go.com/sections/us/DailyNews/crime_poll010604.html (finding that 57% of all adults say worries about crime affect the way they live); see also Saad, *supra* note 36 (finding that 94% of all Americans favor sex offender registration laws and 66% think that it is likely a convicted sex offender lives in their community).

⁵² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (recognizing that "the First Amendment has a penumbra where privacy is protected from governmental intrusion"); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (stating that fundamental rights include those liberties that are "deeply rooted in this Nation's history and tradition").

⁵³ See *infra* Part I.B.

⁵⁴ See *infra* Part I.B.

⁵⁵ See *infra* Part I.C.

⁵⁶ See *infra* Part I.D.

A. The Legitimacy of the Media's Right to Report: The First Amendment and the Public-Private Debate

As already noted, the media is generally protected from liability when reporting on issues of public concern.⁵⁷ In light of this general rule, the question arises: how does the law distinguish between matters of public and private concern for purposes of the First Amendment? There are a variety of methods by which the two principles are distinguished.

First, some scholars argue that deference must always be accorded to the media because it is the most salient judge in determining what information is public.⁵⁸ Although this argument has its merits, it is too biased toward the media's interests because it grants the media almost unlimited authority in determining what it may report in the interest of public knowledge. This scenario unfairly burdens the individual's right to privacy by granting it tenuous protection from the constant intrusion of an aggressive media.

A second, and more applicable, method to examine the difference between public and private concern looks to the status of the individual whom the media seeks to publicize.⁵⁹ In emphasizing the status of the individual, this analysis forces an examination of the person's specific role in society to determine the public nature of his or her actions.⁶⁰ This analysis is quite valid, but is more relevant to an examination of the public versus private debate found within defamation law, and is not as relevant to the analysis surrounding the First Amendment.⁶¹ The status of the individual will be examined extensively within the subsequent public figure argument⁶² but is not applied as broadly within this First Amendment analysis.

Instead, the proper test to resolve the tension between public and private concern emphasizes the nature of the information involved within the specific debate.⁶³ Investigating the nature of the information adheres to certain basic principles that courts often use when determining the status of information upon which the media has a right to report.⁶⁴ The analysis focuses closely on the relationships in which the information

⁵⁷ See *supra* text accompanying notes 49–50.

⁵⁸ See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 353–54 (1983) (“[D]eference to the judgment of the press may actually be the appropriate and principled response to the newsworthiness inquiry.”).

⁵⁹ See Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1008 (2003).

⁶⁰ See *id.*

⁶¹ Cf. *id.* at 1009 (arguing that focusing on the status of the individual is not conducive to defining public versus private concern because there are instances where information about private figures is of great public concern).

⁶² See *infra* Part II.

⁶³ See Solove, *supra* note 59, at 1010–13.

⁶⁴ *Id.*

is transferred and the uses to which this information is ultimately put.⁶⁵ Consequently, pertinent inquiries within this analysis address the means by which the media acquires its information, the pervading results of the information's dissemination, and the manner in which other entities have used similar information.⁶⁶

In the context of the sex offender debate, such inquiries are useful because they acknowledge both the means by which the media acquires information concerning specific sex offenders and the subsequent purpose for releasing this information to the greater public. This investigation is also substantially related to fundamental First Amendment principles, which are generally expounded in the *Cox Broadcasting Corp. v. Cohn*⁶⁷ line of cases that inquire into the types of information for which, upon reporting, the media may expect First Amendment protection. These cases adhere to the principle that free speech contributes to the promotion of truth, and that greater public disclosure yields more truth.⁶⁸ Such a principle supports the proposition that the more one knows about somebody or something, the more accurate one's judgment is when assessing that person or thing.

B. Compelling Interests Within the First Amendment

Examination of the media's right to report on matters of public concern is guided by those principles that determine whether speech is accorded protection under the First Amendment. When faced with competing interests, most courts apply strict scrutiny to discern whether the potentially infringed upon individual right, which in the case of sex offenders is the right to privacy, outweighs the competing right of the media to report on matters of public concern.⁶⁹ Constitutional challenges are rarely successful in meeting these stringent demands, because in order for a competing interest to outweigh a First Amendment free speech interest, the law must be the "least restrictive means" to achieve a "compelling" governmental interest.⁷⁰ The focal point of the current argument, therefore, is whether a sex offender's right to privacy is a sufficiently compelling interest to dictate government regulation of the media's right to report on their status as sex offenders.⁷¹ Consequently, to determine whether the

⁶⁵ *Id.* at 1013–14 (focusing specifically on the nature of "one's relationships with other people, social institutions, and the government").

⁶⁶ *Id.*

⁶⁷ 420 U.S. 469 (1975).

⁶⁸ See Solove, *supra* note 59, at 998 (expounding upon the notion of a "marketplace of ideas").

⁶⁹ See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). In the case of sex offenders, the individual right at issue is the right to privacy.

⁷⁰ *Id.* at 126. The concept of what constitutes a "compelling" governmental interest is relatively undefined. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 767 (2d ed. 2002).

⁷¹ Any constitutional challenges to state sex offender registration and notification statutes are based on the notion that sex offenders possess a fundamental right to privacy concerning

media's First Amendment right to report outweighs this privacy interest, a detailed examination of the type of information that is generally protected under the First Amendment is required.

This examination begins with the Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*, which expounded upon the premise that the First Amendment prevents liability for the public disclosure of private facts if the information was lawfully obtained from public records and was truthfully reported.⁷² Specifically, the Court in *Cox* did not impose liability upon a media outlet for publicizing the identity of a rape victim whose name was acquired from public records that were maintained in connection with a public trial and were open to public inspection.⁷³

In reaching this decision, the Court acknowledged that in this particular situation the individual's right to privacy was in direct confrontation with the media's right to free speech.⁷⁴ Further, the Court asserted that these competing interests were "plainly rooted in the traditions and significant concerns of our society."⁷⁵ In balancing these competing interests in favor of the media outlet, the Court acknowledged that in a society where the general public relies heavily on the media as its primary source for important information concerning the "operations of [the] government," the media accepts a "[g]reat responsibility" to accurately report on such proceedings.⁷⁶ Accordingly, the Court determined that "[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed" when reporting the contents of these records.⁷⁷ Moreover, without access to this vital information, citizens could not accurately judge the government's conduct, thus diminishing the citizenry's role as the final arbiter of public business.⁷⁸ The Court thus concluded that any rule allowing public records to remain available to the media while simultaneously imposing liability for reporting on this information was objectionable on the dual grounds that it hindered the public's ability to remain informed about important public issues, and it invited "timidity and self-censorship" to creep into a media hesitant to report on items of public concern in fear of incurring future liability.⁷⁹

The *Cox* decision established the principle that the First Amendment protects the media from liability for truthfully reporting on matters available to the public in official court records.⁸⁰ In subsequent decisions the Supreme Court relied on *Cox* to

the specific controversy surrounding their sex offense. See *infra* Part I.C (analyzing the sex offender's right to privacy).

⁷² 420 U.S. at 491.

⁷³ *Id.*

⁷⁴ *Id.* at 489.

⁷⁵ *Id.* at 491.

⁷⁶ *Id.* at 491-92.

⁷⁷ *Id.* at 495.

⁷⁸ *Id.*

⁷⁹ *Id.* at 496.

⁸⁰ *Id.* at 496-97.

find other areas in which the First Amendment prohibited media liability when reporting on issues of public concern.

For example, in *Oklahoma Publishing Co. v. Oklahoma County District Court*,⁸¹ the Court declared unconstitutional an Oklahoma state court's pretrial order enjoining the media from publishing the name or photograph of an eleven-year-old boy in connection with a juvenile proceeding that reporters had attended with the prior consent of the presiding judge, prosecutor, and defense counsel.⁸² Similarly, in *Smith v. Daily Mail Publishing Co.*,⁸³ the Court held that a West Virginia statute making it a crime to publicize the name of a juvenile delinquent violated the First Amendment when the reporting newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor.⁸⁴ These cases further established the principle that state officials may not constitutionally punish media entities when reporting on lawfully obtained, truthful information about matters of public concern, "absent a need to further a state interest of the highest order."⁸⁵

Subsequently, a cogent summation of the *Cox* line of decisions was expounded in *The Florida Star v. B.J.F.*⁸⁶ In *Florida Star*, the Supreme Court held unconstitutional an attempt to hold a newspaper liable for identifying the name of a rape victim inadvertently released in a police document.⁸⁷ In reaching this conclusion, the Court reinforced the important principle of modern First Amendment jurisprudence that, absent a vital governmental interest of "the highest order," the media was entitled to report on the truthful material it lawfully obtained.⁸⁸ The Court cited as supporting factors concepts similar to those initially presented in *Cox*, *Oklahoma Publishing*, and *Daily Mail*, including the facts that the disputed information was lawfully obtained, was truthful in content, was already part of the public record, and that any punishment extolled upon the media might lead to self-censorship.⁸⁹

Particularly fatal to governmental regulation in *Florida Star* was the fact that the government, itself, was the culpable party that provided the controversial material to the media.⁹⁰ As a result, in a scenario where the government had "failed to police itself in disseminating information," the imposition of liability against the media for subsequently reporting on the material was not a narrowly tailored means to protect the affected individual's privacy.⁹¹ Accordingly, when receiving information from a

⁸¹ 430 U.S. 308 (1977).

⁸² *Id.* at 308-09.

⁸³ 443 U.S. 97 (1979).

⁸⁴ *Id.* at 105-06.

⁸⁵ *Id.* at 103.

⁸⁶ 491 U.S. 524 (1989).

⁸⁷ *Id.* at 532.

⁸⁸ *Id.* at 541.

⁸⁹ *Id.* at 534-35.

⁹⁰ *Id.* at 538.

⁹¹ *Id.*

government-issued news release, the receiving party would understand that dissemination of the information was lawful, and even expected.⁹²

Having completed an inquiry into the general principles depicting the media's right to free speech and its applicable First Amendment protection,⁹³ a corresponding venture into the jurisprudence pertaining specifically to the sex offender is necessary to discern the privacy rights they possess as a class. After completing this particular analysis, it is possible to predict how the courts will balance the distinctive rights accorded to sex offenders with those First Amendment rights generally granted to the media.

C. How "Compelling" Is the Sex Offender's Right to Privacy?

A phenomenon of the modern media age is that amid the zeal to report on newsworthy matters, media outlets often pursue the same information that law enforcement officials perceive as essential in their quest for justice.⁹⁴ Critics of this trend argue that these collaborative efforts invite the use of "shaming" as a type of criminal punishment.⁹⁵ Additionally, there is the sense that when providing media outlets with desired information concerning the status of prominent criminal investigations, law enforcement officials in return expect the media to publicize the notoriety of these crimes, placing public opinion squarely in favor of the law and potentially prejudicing future legal proceedings.⁹⁶

This argument is particularly relevant to sex offenders who argue that their depiction within the media is an invasion of their privacy and unfairly stigmatizes them as dangerous. The sentiment thus exists that media access to sex offenders' records must be restricted to prevent the widespread dissemination of their notorious status.⁹⁷ This sentiment, however, is balanced against the general consensus that crime

⁹² *Id.* at 538–39.

⁹³ For other Supreme Court decisions expounding upon the media's First Amendment right to report on matters of public concern, see *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (determining that First Amendment interest in publishing matters of public importance outweighed individuals' privacy rights to conversation intercepted illegally, when the media outlet played no part in the illegal act); *Butterworth v. Smith*, 494 U.S. 624 (1990) (extending First Amendment protection to the revelation of information from grand jury proceedings); *Landmark Commc'ns Inc. v. Virginia*, 435 U.S. 829 (1978) (refusing to permit criminal sanctions against a media outlet for reporting information from confidential judicial disciplinary proceedings leaked to them).

⁹⁴ See Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1099 (1999) (arguing that "there is a growing sense that the media and the law enforcement are often in cahoots").

⁹⁵ See *id.* at 1099–100.

⁹⁶ See *id.* at 1132.

⁹⁷ See generally Catherine A. Trinkle, Note, *Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy*, 37 WM. & MARY L. REV. 299, 334–35 (1995) (arguing that sex offender registration programs should refrain from unwarranted intrusion upon a sex offender's right to privacy and thus should be limited to those

reporting is within the legitimate province of the media and thus is generally accorded First Amendment protection.⁹⁸ It is apparent, then, that the tension that exists between the individual's right to privacy and the media's right to report extends to circumstances in which the private individual is a criminal. As a result, the preceding analysis of those important Supreme Court decisions that attempt to resolve the First Amendment tension between public concern and the right to privacy is also applicable within a criminal context. Nonetheless, to resolve this tension equitably in the case of the previously convicted sex offender, it is important to discern how courts depict their specific right to privacy. In general, courts are confronted with this issue within the context of constitutional challenges to the applicable sex offender notification statutes.⁹⁹ This is where the current inquiry must proceed, then, in order to effectively determine whether the media has the right to notification when dealing with local sex offenders.

1. Constitutional Challenges to Sex Offender Notification Statutes

In general, individuals affected by sex offender notification laws have challenged the relevant statutes on two main grounds: either the statutes constitute punishment and therefore violate the Ex Post Facto Clause, or the statutes are an invasion of their right to privacy and thus violate a fundamental liberty interest.¹⁰⁰ Relevant to the inquiry at hand are those decisions that expound upon the potential privacy rights that are infringed upon in the name of community protection.¹⁰¹ The majority of these challenges also include claims alleging violations of the sex offender's right to due process, and thus the right to privacy is often intertwined with the larger question of whether sex offender notification laws violate substantive or procedural due process.¹⁰²

At first glance, it appears that the majority of courts presiding over issues pertaining to a sex offender's right to privacy have determined that the disputed laws do not violate any privacy rights.¹⁰³ Generally, the reviewing courts have concluded that

periods in which the convicted offender actually poses a threat to the community at large).

⁹⁸ See *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34 (Cal. 1971) (outlining the standards by which courts balance First Amendment protections with individual privacy rights in a criminal context).

⁹⁹ See SEX OFFENDER REGISTRIES, *supra* note 1, at 51 (noting that if sex offenders possess a constitutional right to privacy in the dissemination of their criminal records, it must be limited by balancing the public's right to be informed with the sex offender's right to remain anonymous).

¹⁰⁰ See *id.* at 50–51.

¹⁰¹ For a Supreme Court decision examining the alleged punitive nature of sex offender registration and notification laws, see *Smith v. Doe*, 538 U.S. 84 (2003) (denying a convicted sex offender's § 1983 action challenging the constitutionality of Alaska's Sex Offender Registration Act as a violation of the Ex Post Facto Clause).

¹⁰² See SEX OFFENDER REGISTRIES, *supra* note 1, at 51–52.

¹⁰³ See, e.g., *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S.

the information contained in community notification, which includes the sex offender's conviction, residence, place of business or school, and driver's license number, is already part of the public record, and thus dissemination of such information is not revealing of intimate personal details traditionally protected from disclosure by the federal right to privacy.¹⁰⁴ Consequently, any right to privacy possessed by a convicted sex offender regarding this information is not a compelling enough interest to outweigh the government's own compelling interest in protecting the public.¹⁰⁵

Not all courts, however, have followed this line of reasoning when analyzing sex offenders' privacy rights. In fact, some courts have found that community notification does implicate a protected liberty interest.¹⁰⁶ These courts have determined that notification brands previously convicted sex offenders as threats to the community, and thus registration places a "tangible burden" on them, potentially damaging their legal status "for the rest of their lives."¹⁰⁷ Because the sex offender's reputation is at stake, these courts have determined that notification statutes implicate sufficient constitutional interests to affect state due process rights.¹⁰⁸ Typically, these courts attempt to protect the sex offender's right to due process by providing that individual with a right to a hearing in order to assess the risk he or she poses to the community at large.¹⁰⁹ Only if the specific sex offender poses a serious enough risk do these courts determine that the public's right to notification outweighs the ensuing deprivation of the affected sex offender's right to privacy.¹¹⁰

These decisions constitute a reconsideration of the relevant balancing factors and thus place a greater emphasis on the sex offender's right to privacy as compared to the public's right to notification. This reassessment of the balancing factors seems to weaken the argument proposed within this analysis, i.e., that the media has a right to community notification. The reconsideration is diminished, however, upon inspection of the Supreme Court's subsequent analysis of the tension between notification and privacy in *Connecticut Department of Public Safety v. Doe*.¹¹¹

In *Connecticut Department of Public Safety*, the Court determined that Connecticut's sex offender notification statute did not violate procedural due process because it failed to provide sex offenders with the right to a hearing before releasing the required information to the public.¹¹² Vital to this conclusion was the fact that Connecticut based its registry requirements on the previous conviction, and not the

1007 (1998); *Paul P. v. Verniero*, 982 F. Supp. 961 (D.N.J. 1997); *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995).

¹⁰⁴ See *Paul P.*, 982 F. Supp. at 966; *Rowe*, 884 F. Supp. at 1384; *Poritz*, 662 A.2d at 407.

¹⁰⁵ *Poritz*, 662 A.2d at 411-12.

¹⁰⁶ See *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998); *Poritz*, 662 A.2d at 420-21.

¹⁰⁷ *Pataki*, 3 F. Supp. 2d at 468.

¹⁰⁸ *Poritz*, 662 A.2d at 420.

¹⁰⁹ *Id.* at 421.

¹¹⁰ *Id.*

¹¹¹ 538 U.S. 1 (2003).

¹¹² See *id.* at 7.

sex offender's current dangerousness.¹¹³ Consequently, a constitutional challenge alleging a violation of procedural due process was misguided, because it was not material to the application of Connecticut's statute.¹¹⁴ The statute's requirements stressed that the sex offender had already received a constitutionally guaranteed right to a hearing during trial, and for that reason the question of whether the sex offender still posed a threat to the community was immaterial to the resolution of a procedural due process challenge, and the Court's decision sanctioned this reasoning.¹¹⁵

D. Combining Theories: The First Amendment and Community Notification

In *Connecticut Department of Public Safety*, the Supreme Court upheld Connecticut's sex offender registration scheme by focusing on the sex offender's prior conviction as compared to their current mental status.¹¹⁶ A question left unresolved, however, was whether the statute could also withstand a challenge on *substantive* due process grounds.¹¹⁷ Since the challenge was presented on procedural due process grounds only, the Court deemed it unnecessary to address that question directly.¹¹⁸ It is arguable, however, that the Court's assertion that "'sex offenders are a serious threat in this Nation'" suggested that Connecticut's statute would withstand a constitutional challenge on substantive grounds also.¹¹⁹

A substantive due process challenge invokes the deeper question of whether injury to reputation alone is sufficient to establish a liberty interest compelling enough to outweigh the government's interest in public protection.¹²⁰ It is this question, ultimately, that is central to the resolution of the second main inquiry of this Note, i.e., whether sex offenders are public figures and thus subject to an infringement of their right to privacy that is injurious to their personal reputations.¹²¹

¹¹³ *Id.* at 4.

¹¹⁴ *Id.* at 7.

¹¹⁵ *See id.*

¹¹⁶ *See id.* at 4.

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 8 (asking whether the respondent's claim was actually a substantive due process claim "recast in 'procedural due process' terms" (quoting *Reno v. Flores*, 507 U.S. 292, 308 (1993) (Scalia, J., concurring))).

¹¹⁹ *Id.* at 4 (quoting *McKune v. Lile*, 536 U.S. 24, 32 (2002)). For a recent decision in which a federal court rejected a substantive due process challenge to a sex offender registration program, see *In re W.M.*, 851 A.2d 431, 447–51 (D.C. 2004) (determining that sex offender registration does not infringe upon any fundamental liberty interests possessed by affected sex offenders). *See also* SEX OFFENDER REGISTRIES, *supra* note 1, at 53 (noting that courts are more likely to uphold community notification statutes that rely on public safety and attempt to relate community notification to the public benefit).

¹²⁰ For a Supreme Court decision casting doubt on whether injury to reputation constitutes a deprivation of a viable liberty interest, see *Paul v. Davis*, 424 U.S. 693 (1976).

¹²¹ *See infra* Part II.

For purposes of the First Amendment argument, however, the Supreme Court's denial of the constitutional challenge to Connecticut's sex offender notification statute is significant because it rejects the notion that the lack of a subsequent hearing prior to the public release of the convicted sex offender's information is a violation of procedural due process.¹²² When this principle is combined with the general tenet that a sex offender's right to privacy is outweighed by the governmental interest in community protection, it is reasonable to infer that the public has the right to notification of a sex offender's presence in their community.

Moreover, the prior analysis profiling the media's First Amendment right to report on matters of public concern suggests that public notification of pertinent sex offender data is the type of information that media outlets may publicly report with the expectation of First Amendment protection.¹²³ Ultimately, such principles merge into a single theory that makes the following assertion plausible: in order to satisfy the compelling governmental interest in notifying the public of the presence of convicted sex offenders in their communities, the government may enlist the aid of media outlets to help disseminate such vital information, because it is the media's right under the First Amendment to report on matters of public concern, including the local presence of convicted sex offenders.

If further proof is needed to ascertain whether sex offenders are a viable public concern deserving of an application of the First Amendment's free speech protection, it may be helpful to ask this question: would Jacob Wetterling be sitting at home with his family now if the public was informed of the local presence of convicted sex offenders prior to his abduction?

II. THE PUBLIC FIGURE

The preceding analysis focused primarily on the question of whether the media is protected by the First Amendment when reporting on matters of public concern. Specifically, the inquiry focused on the nature of the information reported and its significance within the public forum.¹²⁴ In particular, if this information was deemed vital to the public interest, the First Amendment provided the media with a protective shield under which it could report with widespread immunity.¹²⁵ Consequently, First Amendment protection was properly accorded to the media upon determining that the local presence of sex offenders in the community was a public concern.¹²⁶

The second part of the current inquiry focuses less on the media's right to report and more on the sex offender's position in society. The fundamental question to be answered in this analysis is whether sex offenders are public figures due to the controversy that surrounds their crimes and thus are subject to the inevitable media scrutiny

¹²² *Conn. Dep't of Public Safety*, 538 U.S. at 4.

¹²³ *See supra* Part I.B.

¹²⁴ *See supra* text accompanying notes 63–65.

¹²⁵ *See supra* Part I.B.

¹²⁶ *See supra* Part I.C–D.

that undoubtedly will result. Such an inquiry is entrenched within those principles of defamation law that outline the specific standards of liability applied to media entities when reporting on particular individuals within society.¹²⁷

The hurdle to proving liability for defamation is much higher for public figures than for their private counterparts.¹²⁸ Accordingly, if an examination of the public figure doctrine supports a conclusion that sex offenders are public figures, media organizations gain added protection when reporting on their presence to the public; an outcome that is equivalent to that which is secured in a First Amendment analysis.¹²⁹ Such a conclusion would support the principal notion that the First Amendment protects the media's right to report on matters of public concern, namely, the presence of local sex offenders.

Nonetheless, while acknowledging that this inquiry will attempt to sustain those principles vital to the First Amendment, this argument will proceed in a manner that is quite unique. Rather than attempting to argue that sex offenders are public figures and thus subject to public investigation into their sexual and criminal histories, this argument will instead prove that sex crimes are public acts, and that those persons who commit such crimes warrant public figure status as a result.¹³⁰ The sex offender's status is accordingly defined by the consequences of their actions.

As a result, the following inquiry into the public figure doctrine will proceed in the same manner as that of the previous First Amendment analysis. The difference in the investigations will ultimately lie in the bodies of law that are controlling, namely, defamation jurisprudence instead of First Amendment jurisprudence. This difference will change the type of data assimilated, focusing on the individual's status in society instead of the nature of the information that is reported.¹³¹ The conclusion of each inquiry, however, will remain the same: the media has the right to report on local sex offenders because sex offenses are a public concern, and as a consequence, the persons who commit such crimes are public figures.

A. Defamation Jurisprudence: The Public-Private Tension Revisited

Before initiating an extensive analysis of the public figure doctrine and its potential implications on the sex offender notification debate, it is first necessary to return to an issue raised at the end of the preceding First Amendment analysis. As noted in the examination of the Supreme Court's decision in *Connecticut Department of Public Safety*, the Court did not investigate the issue of whether Connecticut's sex offender notification statute violated substantive due process because the respondent's claim alleged only a violation of procedural due process.¹³² If the Court had presided over

¹²⁷ See *infra* Part II.B.1–2.

¹²⁸ See *infra* Part II.B.1.

¹²⁹ For a of these First Amendment rights, see *supra* Part I.A.

¹³⁰ For a of the public nature of sex crimes, see *infra* Part II.B.2.a–b.

¹³¹ See *infra* Part II.B–C.

¹³² See *supra* text accompanying notes 117–19.

a substantive due process challenge, however, the examination would have rested on the question of whether injury to an individual's personal reputation was a compelling enough liberty interest to outweigh the government's competing interest in public protection.¹³³

A substantive due process challenge, therefore, presents a similar tension involving the right to privacy and the public's right to notification as that which forms the basis of the public-private tension in the First Amendment analysis.¹³⁴ Consequently, courts must rely on those principles vital to the Supreme Court's decisions in the preceding First Amendment cases when rendering decisions in substantive due process challenges to media reports on the presence of local sex offenders.¹³⁵

Hence, the existence of this tension between public information and an individual's right to privacy also is essential to the successful resolution of disputes within defamation law.¹³⁶ Specifically, protection is provided for media entities in defamation actions in order to uphold the First Amendment's "vital guarantee of [a] free and uninhibited discussion of public issues."¹³⁷ This is the same guarantee that compelled the Supreme Court to rule favorably on the media's behalf when deciding whether they could legitimately publicize information that pertained to matters of public concern.¹³⁸ On the other hand, courts in defamation actions must also recognize society's "pervasive and strong interest in preventing and redressing attacks upon reputation."¹³⁹ The prevention of public injury to personal reputation, therefore, is a core value that is considered when judging the media's conduct in distributing information.¹⁴⁰

In light of this core value, analyzing a sex offender's public status in the context of defamation law is important because a defamation claim is the most common avenue by which sex offenders seek to redress personal attacks upon their reputation.¹⁴¹ If it

¹³³ See *supra* Part I.C.1, I.D.

¹³⁴ The success of the substantive due process challenge again rests on the issue of whether the right to privacy is a fundamental right, sufficient to outweigh the corresponding compelling governmental interest in public protection by way of public notification. See *supra* Part I.A, I.C.1.

¹³⁵ Those cases are *Cox Broadcasting Corp. v. Cohn* and its progeny, discussed *supra* Part I.B.

¹³⁶ See generally *Rosenblatt v. Baer*, 383 U.S. 75, 84-88 (1966) (discussing the extent to which the First Amendment's adherence to upholding public speech must be balanced with society's competing interest in protecting personal reputations).

¹³⁷ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990).

¹³⁸ See *supra* Part I.B.

¹³⁹ *Rosenblatt*, 383 U.S. at 86. Justice Stewart eloquently depicted society's interest in protecting personal reputations in his concurrence in *Rosenblatt*, stating that "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Id.* at 92-93 (Stewart, J., concurring).

¹⁴⁰ *Id.* at 86.

¹⁴¹ See *Miami Herald Publ'g Co. v. Ane*, 423 So. 2d 376 (Fla. Dist. Ct. App. 1983) (determining that the defamation action plays an important role in society by representing an individual's sole remedy against the occasional excesses of the media, which has in comparison

is proven that defamation law does not provide a safe haven in which sex offenders may shelter their public reputations, then the media has achieved a decisive victory in its goal to notify the public of their presence in the community. Such a victory is obtainable upon a finding that convicted sex offenders are public figures, and thus are accorded diminished personal reputation protection because of this position within society.¹⁴² The remainder of this argument will therefore focus on defamation law and, specifically, the public figure doctrine, and will ultimately demonstrate that convicted sex offenders are accurately defined as public figures.

B. The Public Figure Defined: The Doctrinal Foundation of the Public Figure Status

At the outset of this analysis it is important to note that there is no bright-line standard with which to define the public figure.¹⁴³ Consequently, the public figure remains an elusive and often amorphous character within the law. This reality makes the sex offender a viable candidate for the status because the public figure has been interpreted broadly by a variety of jurisdictions, and thus there is ample space in which to insert the sex offender within the definition.¹⁴⁴ Indeed, an analysis of decisions classifying certain individuals as public figures, especially within the criminal context, compels it as preferable that sex offenders are regarded as public figures.¹⁴⁵ Ultimately, the importance of determining whether sex offenders are public figures does not arise from the label itself, but instead arises from the standard of liability that is attached to this class of individuals.¹⁴⁶ Concluding that convicted sex offenders are public figures in effect immunizes and, subsequently, emboldens the media in reporting on sex offenders in the community, which enhances the ultimate goal of sex offender notification statutes: public protection and safety.

To make this determination an initial discussion will focus on the historical background of the public figure, and the corresponding development of the standards of liability attached to each class of media subjects.¹⁴⁷ Then the discussion will delve into an analysis of key concepts in the public figure equation, namely, the public controversy and the manner in which individuals enter into these controversies.¹⁴⁸ Finally, in order to demonstrate the means by which sex offenders become embroiled in viable public controversies, an analysis of relevant case law involving similar fact patterns will commence, and will ultimately support the conclusion that sex offenders are public figures.¹⁴⁹

vast resources to inflict damage to an individual's reputation).

¹⁴² See *infra* Part II.B.1.

¹⁴³ See CHEMERINSKY, *supra* note 70, at 1049–52.

¹⁴⁴ See *infra* Part II.B.2.

¹⁴⁵ See *infra* Part II.B.2.a.

¹⁴⁶ See *infra* text accompanying notes 163–68.

¹⁴⁷ See *infra* Part II.B.1.

¹⁴⁸ See *infra* Part II.B.2.a–b.

¹⁴⁹ See *infra* Part II.B.2.b, II.C.

1. The Development of the Public Figure Doctrine and Its Applicable Standards of Liability

The origins of the public figure doctrine are commonly attributed to the influential 1964 Supreme Court decision of *New York Times Co. v. Sullivan*.¹⁵⁰ In *New York Times* the Court held that a public official plaintiff could recover for defamation only upon proving with "convincing clarity" that the allegedly defamatory statements were made with "actual malice."¹⁵¹ The Court defined actual malice as evidence that the defendant knew his or her statement was false or acted in reckless disregard of the truth when issuing the statement.¹⁵² By requiring that public official plaintiffs prove actual malice in order to recover for defamation, the Court established an exceptionally high barrier to recovery that essentially made media entities liability-proof when reporting on public officials. Accordingly, *New York Times*'s importance rested in its application of the First Amendment as a limitation on tort liability, especially when pertaining to speech of political importance.¹⁵³ Moreover, this decision validated the importance of a free and uninhibited public debate vital to the notion of a marketplace of ideas often regarded as the epitome of a robust democracy.¹⁵⁴

In 1967 the Supreme Court extended the actual malice standard to individuals classified as public figures in *Curtis Publishing Co. v. Butts*.¹⁵⁵ In *Butts*, the Court determined that a "public figure" who was not a public official could recover damages for a defamatory falsehood only upon showing that the media defendant in question had published its statements with actual malice.¹⁵⁶ In reaching this decision the Court acknowledged that not all speech of public interest concerned public officials and thus public speech must include information that was necessary for the public "to cope with the exigencies of their period."¹⁵⁷

Hence, the *Butts* Court concluded that within the public debate there was no logic behind a regime that differentiated between a public official and a public figure.¹⁵⁸

¹⁵⁰ 376 U.S. 254 (1964).

¹⁵¹ *Id.* at 285–86.

¹⁵² *Id.* at 279–80.

¹⁵³ See CHEMERINSKY, *supra* note 70, at 1044–45.

¹⁵⁴ As Justice Brennan stated, writing for the Court, allowing tort liability to exist for speech containing criticisms of government officials would undermine "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and further would deny speech the "breathing space" it needs to survive. *N.Y. Times Co.*, 376 U.S. at 270–71.

¹⁵⁵ 388 U.S. 130 (1967) (defining public figures as those persons who achieved prominence in their communities).

¹⁵⁶ *Id.* at 162 (Warren, C.J., concurring).

¹⁵⁷ *Id.* at 147 (majority opinion) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

¹⁵⁸ *Id.* at 163 (Warren, C.J., concurring) ("[D]ifferentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law,

Four years later, in *Rosenbloom v. Metromedia, Inc.*, the Court extended the *Butts* analysis even further by expanding the actual malice standard to all defamatory statements of public concern, irrespective of the plaintiff's status.¹⁵⁹ The Court determined that the public's interest in the protection of a free and open public forum was of such importance that the status of the individual in question, whether public or private, was essentially inconsequential in comparison to the media's right to free speech.¹⁶⁰

As a result, by 1974, a mere ten years after the landmark *New York Times* decision reshaped the landscape of defamation jurisprudence, distinctions between public officials, public figures, and private individuals had become obsolete. Instead, a proper inquiry focused solely on the public interest in the material reported.¹⁶¹ In *Gertz v. Robert Welch, Inc.*, however, the Supreme Court reassessed the public figure status as a means for determining defamation liability, and in the process provided a more complex spectrum in which to scrutinize the media's right to free speech concerning individuals embroiled within public controversies.¹⁶²

At the center of the dispute in *Gertz* was the issue of whether a private individual could recover damages from a media entity for the publication or broadcast of a defamatory statement.¹⁶³ In answering this question affirmatively, the Court recognized that the legitimate state interest in protecting the reputation of private individuals required a different standard of liability than that which was attached to public individuals.¹⁶⁴ Consequently, the *Gertz* Court overruled its previous decision in *Rosenbloom* and held that, in regards to defamatory statements issued against private individuals, states could determine for themselves the applicable standard of liability, so long as they did not impose no-fault liability.¹⁶⁵

The Court based its ruling on two fundamental principles differentiating public and private individuals. First, the Court determined that public figures had greater access to "channels of effective communication" than did private individuals, and thus could effectively rebut defamatory statements made against their character.¹⁶⁶ Second, public figures generally had chosen to enter the public spotlight voluntarily, and thus exposed themselves to the increased risk of incurring reputational injury from defamatory statements.¹⁶⁷

logic, or First Amendment policy.").

¹⁵⁹ 403 U.S. 29 (1971).

¹⁶⁰ *Id.* at 43 ("If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved.").

¹⁶¹ *See id.* at 45–49.

¹⁶² 418 U.S. 323 (1974).

¹⁶³ *Id.* at 332.

¹⁶⁴ *See id.* at 342–43.

¹⁶⁵ *Id.* at 347.

¹⁶⁶ *Id.* at 344.

¹⁶⁷ *See id.* at 344–45.

In the end, the *Gertz* holding lowered the applicable standard of liability that private individual plaintiffs must prove before recovering damages in a defamation lawsuit. Hence, the true importance of the *Gertz* decision was the implementation of a negligence standard upon which private figure individuals could recover for defamatory falsehoods made by media entities.¹⁶⁸ Unfortunately, the *Gertz* Court did not provide a clear definition of the public figure. As a result, defamation plaintiffs enjoy wide latitude to argue that they are private individuals and thus deserving of the applicable lesser burden to establishing liability.

2. The Public Figure's Relevant Legal Tests

While the *Gertz* Court did not provide a concise definition of the public figure, the Court did hint at certain features fundamental to the public figure.¹⁶⁹ Specifically, the Court provided two alternative foundations upon which to support public figure status. First, individuals could achieve such "persuasive power and influence" that they "are deemed public figures for all purposes."¹⁷⁰ More commonly, individuals could become public figures by voluntarily "thrust[ing] themselves to the forefront of a particular public controversy" and thus becoming a public figure for purposes of the specific controversy in question.¹⁷¹ The Court also acknowledged that it was possible that an individual could become a public figure "through no purposeful action of his own."¹⁷² Such circumstances were considered rare, and thus most individuals became public figures by assuming "roles of special prominence in the affairs of society."¹⁷³ In addition, the general all-purpose public figure was also said to be rare, and thus absent clear evidence that an individual had achieved general fame and notoriety in society, individuals were not to be considered public figures for all facets of their lives.¹⁷⁴ Instead, the inquiry favored by the Court was an examination into the "nature and extent of [the] individual's participation in the particular controversy giving rise to the defamation."¹⁷⁵ Based on this preference, the *Gertz* Court established the limited-purpose public figure as the dominant character within defamation jurisprudence.

Although no subsequent Supreme Court decision has formulated a precise definition of the public figure, the *Gertz* Court did indicate that to achieve public figure status an individual generally had to voluntarily thrust himself into the public spotlight.¹⁷⁶ Accordingly, most courts interpreting the *Gertz* standard typically focus

¹⁶⁸ See *supra* text accompanying notes 159–65.

¹⁶⁹ *Gertz*, 418 U.S. at 345.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 352.

¹⁷⁵ *Id.*

¹⁷⁶ For examples of individuals voluntarily thrusting themselves into the public spotlight,

on two important concepts when determining whether the plaintiff in question is a public or private figure.¹⁷⁷ First, reviewing courts must decide whether the controversy in which the individual is involved is sufficient to constitute a real public controversy.¹⁷⁸ Second, these courts must determine whether the plaintiff's subsequent involvement in the controversy is sufficient to achieve public prominence.¹⁷⁹

Hence, to determine whether a convicted sex offender is the type of individual correctly accorded public figure status, an analysis of these concepts is required.

a. The Public Controversy

When attempting to define a public controversy it is proper to question whether this concept is actually an equitable articulation of the aforementioned public concern theory.¹⁸⁰ There are scholars that would argue the veracity of such a premise, citing as evidence the relative compatibility of the two concepts.¹⁸¹ The problem with this assertion, however, stems from the existence of legal doctrine that mandates that a public controversy is a prerequisite to the existence of a legal public figure.¹⁸²

see generally *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (ruling that a research scientist who received a derogatory award from a public official was not a public figure because he had not assumed any role of public prominence); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) (finding that an individual was a private figure even though he had been convicted of contempt for his refusal to appear before a grand jury investigating espionage by the Soviet Union); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (determining that a plaintiff's divorce, though a "cause celebre," was not sufficient to make her a public figure in a constitutional sense).

¹⁷⁷ See, e.g., *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980), *cert denied*, 449 U.S. 898 (1980). *Waldbaum* established an effective three-prong test, a version of which is generally accepted in most jurisdictions, to determine whether defamation plaintiffs are limited purpose public figures. *Id.* The three factors include: (1) isolating the pertinent public controversy; (2) ascertaining the extent of the plaintiff's role in that controversy; and (3) determining whether the alleged defamation was germane to the plaintiff's participation in that controversy. *Id.* For the purposes of this argument, the second and third prongs of the *Waldbaum* test are combined.

¹⁷⁸ *Id.* at 1296.

¹⁷⁹ *Id.* at 1297.

¹⁸⁰ For a discussion of the public concern concept, see *supra* Part I.A.

¹⁸¹ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 880-81 (2d ed. 1988) (noting that the test for determining public figure status requires judges "to determine whether a controversy is 'public,' a determination indistinguishable . . . from whether the subject matter is of public or general concern"). But see *Firestone*, 424 U.S. at 454 (stating that public controversies are not equatable to all matters of public interest); *Waldbaum*, 627 F.2d at 1296 (noting that public controversies are not merely matters of public interest, but are real disputes that affect the public in tangible ways).

¹⁸² See *Firestone*, 424 U.S. at 453 (failing to find plaintiff a public figure without involvement in a particular public controversy); see also *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994) (finding that the controversy must exist "prior to the publication

Consequently, the declaration that sex offenders, because of their categorization as matters of public concern, are genuine participants in a legitimate public controversy is not as straightforward as it may initially seem.

Generally, public controversies must involve matters of significant importance to the public, rather than matters that simply pique the public's interest.¹⁸³ As a result, private disputes do not become public controversies simply because they attract public attention.¹⁸⁴ Instead, the public controversy is a dispute that has received public attention because its ramifications are felt by persons who are not direct participants.¹⁸⁵ Accordingly, public controversies exist in situations that affect the public health and safety, involve significant public policy issues, or concern fundamental community values.¹⁸⁶ Public controversies are not created by the media's willingness to report on issues that it considers newsworthy, but instead are a product of the public debate and give rise to potential ramifications that affect the public at large.¹⁸⁷

Society, therefore, sets the agenda as to what constitutes significant public controversies, and both the courts and the media must act accordingly. It is evident, then, that any dispute substantial enough to affect non-participants is sufficient to warrant public concern.¹⁸⁸ It is also evident that public controversies must constitute significant debates within the public forum, and thus will touch upon serious issues relating to community values, civic activities, or public safety.¹⁸⁹

Based on the public uproar surrounding the presence of undetected sex offenders in the community and the subsequent legislative response attempting to rectify this crisis, it is hardly a stretch to classify convicted sex offenders as a legitimate public controversy.¹⁹⁰ Tragedies like that which befell Jacob Wetterling incite public sentiment against the perpetrators of sex crimes, while simultaneously solidifying public resolve in support of sex offender notification programs.¹⁹¹ Indeed, the multitude of

of the defamatory statement"); *Waldbaum*, 627 F.2d at 1296 (determining that courts must initially find a public controversy before determining whether a plaintiff is a public figure). For an analysis of how courts adhere to a separate inquiry into the existence of a public controversy before examining the plaintiff's ensuing role within that controversy, see Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1040-47 (1996).

¹⁸³ See *Waldbaum*, 627 F.2d at 1296.

¹⁸⁴ See *Firestone*, 424 U.S. at 454-55.

¹⁸⁵ See *Waldbaum*, 627 F.2d at 1296.

¹⁸⁶ See *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000). For other cases involving public controversies, see *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985) (human tragedy), *cert. denied*, 476 U.S. 1141 (1986); *Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1107 (D.D.C. 1991) (public policy); *ELM Med. Lab. v. RKO Gen., Inc.*, 532 N.E.2d 675, 680 (Mass. 1989) (public health).

¹⁸⁷ See *Waldbaum*, 627 F.2d at 1297.

¹⁸⁸ See *id.*

¹⁸⁹ See *supra* text accompanying note 186.

¹⁹⁰ See *supra* Introduction, Part A.

¹⁹¹ For a discussion of how the community reacted to Jacob's disappearance, see *supra* text

constitutional questions raised by the advent of stringent sex offender registration and notification programs confirms the existence of an ongoing public debate within society that serves to keep the public status of sex offenders at the forefront of the nation's consciousness.¹⁹²

A finding that the presence of sex offenders in the community is a legitimate public controversy, however, does not settle the debate over whether sex offenders are viable public figures. Courts may acknowledge a public controversy's existence but subsequently determine that the plaintiff's involvement in the controversy is not sufficient to warrant public figure status.¹⁹³ Accordingly, the second part of the public figure analysis will focus on the plaintiff's role in the public controversy, and specifically will focus on whether his or her involvement in this controversy is voluntary and thus adequately substantial to merit public figure status and its appropriate standard of liability.¹⁹⁴ Proving the voluntary nature of the sex offender's involvement within the relevant public controversy is particularly difficult, and will ultimately rest on the determination of whether sex offenders reside in that elusive class of individuals known as involuntary public figures.¹⁹⁵

b. The Plaintiff's Involvement in the Public Controversy

Upon determining that the controversy in question is public, the second determinant of public figure status involves defining the plaintiff's role within that controversy.¹⁹⁶ If this role is trivial, the plaintiff is regarded as a private individual.¹⁹⁷ As initially expounded in *Gertz*, public figures must "thrust themselves to the forefront" of a public controversy so as to become integral to its ultimate resolution.¹⁹⁸ Public figure plaintiffs, therefore, must intentionally try to affect the outcome of the controversy or must realistically expect, because of their position within the controversy, to have an impact on its resolution.¹⁹⁹ Subsequently, a reviewing court may look "to the plaintiff's past conduct, the extent of [the media's] coverage, and the public[s] reaction to the [plaintiff's] conduct," as viable factors in determining the public or private status of the libel plaintiff in question.²⁰⁰

There also exists a phenomenon in which the plaintiff's aggressive conduct within a specific controversy may persuade a court to find that the controversy is public even

accompanying notes 9–13.

¹⁹² See *supra* Part I.C–D.

¹⁹³ See *Stern*, *supra* note 182, at 1046.

¹⁹⁴ See *supra* Part II.B.2.b.

¹⁹⁵ See *supra* Part II.C.

¹⁹⁶ See *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

¹⁹⁷ See *id.*

¹⁹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

¹⁹⁹ See *Waldbaum*, 627 F.2d at 1297.

²⁰⁰ See *id.*

if that controversy is not considered public under a classic definition.²⁰¹ Conversely, controversies of "unusual magnitude or with close connection to the core concerns of the First Amendment" may diminish the extent to which the plaintiff's conduct is vital to a public figure assessment.²⁰² Consequently, there is some flexibility in which courts may tweak the formal standards applicable to the public controversy in order to uphold the best interests of the community.

Because it is apparent that sex offender notification programs constitute significant public controversies, this flexibility of standards becomes extremely important in clarifying whether the active participation of sex offenders within this specific debate is sufficient to merit public figure status. When resolving whether sex offenders demonstrate that active standard of participation required to attain public figure status, it is important to note that significant public controversies require lower thresholds of involvement in order to satisfy these participation requirements.²⁰³

Correspondingly, the controversy's importance is derived from its connection to significant public issues that are fundamental to the First Amendment's protection of free speech.²⁰⁴ Those individuals whose conduct falls under the scope of the First Amendment's interest in protecting speech involving matters of public concern may not have to exhibit a high level of voluntary participation to attain public figure status for the purposes of the controversy in question. On the contrary, plaintiffs who engage in conduct that is likely to invite public attention, and initiate the public debate as a result, may position themselves to attain public figure status.²⁰⁵ Furthermore, the plaintiff's aversion to public attention is not a persuasive factor in determining the individual's public status.²⁰⁶ It appears, then, that a principal qualification possessed by most public figures is the public perception that they are involved in a significant public controversy, an inquiry that effectively replaces a focus on their active participation within the controversy.

The validity of this statement is illustrated by an examination of the public figure status of convicted criminals whose state of affairs are relatively similar to that experienced by convicted sex offenders. In general, individuals who choose to engage in criminal activity effectively expose their reputations to injury.²⁰⁷ In addition, crimes

²⁰¹ See Stern, *supra* note 182, at 1048 (stating that a court can "tailor its description of the relevant dispute to assure that plaintiffs have thrust themselves into it").

²⁰² *Id.*

²⁰³ *Id.* at 1053 (citing Michael A. Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 719 (1978)).

²⁰⁴ See *id.* at 1054 ("The notion that speech on public issues stands at the apex of a hierarchy of expression has a long jurisprudential pedigree."); see also *supra* Part I.A-C.

²⁰⁵ See *Brueggemeyer v. Am. Broad. Co.*, 684 F. Supp. 452, 458 (N.D. Tex. 1988).

²⁰⁶ See *McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985) (undertaking "a course of conduct that invites attention," regardless of express intent, may confer "[p]ublic figure status"); *Bandelin v. Pietsch*, 563 P.2d 395, 398 (Idaho 1977) (noting that "[p]ublic figure status does not hinge upon an individual's preference in the matter[,] even if that preference is to remain anonymous), *cert. denied*, 434 U.S. 891 (1977).

²⁰⁷ See, e.g., *Ali v. Daily News Publ'g Co., Inc.*, 540 F. Supp. 142 (D.D.C. 1982) (finding

where public figures are the victims, or that are of a particularly heinous nature, are also public controversies, and thus become matters of great concern to the public.²⁰⁸ Accordingly, criminal activity that has warranted public figure status includes murder,²⁰⁹ organized crime,²¹⁰ and drug trafficking.²¹¹

Comparing sex offense crimes with the aforementioned felonies presents favorable similarities, especially when considered in conjunction with the great disdain with which the public views sex offenders.²¹² Even though criminal activity by itself does not create public figure status, it is a convincing factor that often leads courts to determine that law-breaking individuals are public figures.²¹³ It is a compelling argument that criminal defendants assume the risk of personal attacks to their reputations by choosing a life of crime. Moreover, regardless of whether criminals enter into a path of misconduct with this risk in mind, the significant interest in public protection demands public disclosure.²¹⁴

C. An Assumed Risk: Sex Offenders as Involuntary Public Figures

The preceding analysis of the public controversy and active participant concepts is critical in defining the public figure.²¹⁵ Moreover, the examination of the public figure status of criminal defendants provides an important corollary to support the premise that sex offenders are public figures.²¹⁶ The concept that individuals who engage in criminal activities assume the risk of publicity provides the foundation for the final argument of this section, which is that sex offenders are an example of that rare class of persons who have involuntarily become public figures. This argument's validity rests on its ability to negate the contradictory claim that sex offenders are not public figures because they lack the voluntary impetus to thrust themselves to the forefront of a public controversy.²¹⁷ Hence, an investigation into the validity of the

that a prisoner convicted of murder was a public figure); *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978) (determining that plaintiff became a public figure by attempting to become a hit man); *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992) (noting that in some circumstances a plaintiff may become a public figure by committing a crime).

²⁰⁸ See *Ruebke v. Globe Commc'ns Corp.*, 738 P.2d 1246 (Kan. 1987).

²⁰⁹ See *Ali*, 540 F. Supp. at 145; *Logan*, 447 F. Supp. at 1331; *Ruebke*, 738 P.2d at 1252.

²¹⁰ See *Rosanova v. Playboy Enter. Inc.*, 580 F.2d 859 (5th Cir. 1978).

²¹¹ See *Marcone v. Penthouse Int'l Magazine*, 754 F.2d 1072 (3d Cir. 1985).

²¹² For a discussion why sex offenders acquire public contempt, see *supra* Introduction.

²¹³ See *Marcone*, 754 F.2d at 1085.

²¹⁴ See *Scottsdale Publ'g, Inc. v. Superior Court*, 764 P.2d 1131, 1140 (Ariz. Ct. App. 1988) (noting that criminal defendants assume the risk of "unflattering limelight" by "choosing a life of crime").

²¹⁵ See *supra* Part II.B.2.a-b.

²¹⁶ See *supra* Part II.B.2.b.

²¹⁷ For a decision presenting a successful argument that individuals accused of committing sex crimes are not public figures, see *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994).

involuntary public figure status itself provides the appropriate scheme in which to represent the convicted sex offender's dubious place within society.

The involuntary public figure inquiry must begin with the *Gertz* Court's famous statement that involuntary public figures are "exceedingly rare."²¹⁸ Abiding by the notion that involuntary public figures are scarce requires that this doctrine be strictly applied to those controversies that implicate serious threats to the public health and safety.²¹⁹ Accordingly, the key factor in the formation of the involuntary public figure is the course of conduct that inserts the individual into a significant public controversy.²²⁰ Involuntary public figures do not voluntarily seek public attention; instead, they assume the risk of publicity by pursuing a course of conduct from which "it [is] reasonably foreseeable, at the time of the conduct, that public interest [will] arise."²²¹ The foundation of the involuntary public figure doctrine, therefore, rests on the notion that the individual in question "has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere."²²² Hence, if an individual acts in a manner which will foreseeably inject them into a significant public controversy, then it is equally foreseeable that public scrutiny will arise from such conduct. It is not surprising, therefore, when media coverage ensues to further inform the public.

Based on these factors, the plight of the sex offender provides a favorable setting in which to apply the involuntary public figure doctrine. The position of convicted sex offenders in society is the fulcrum of a significant public debate that touches upon issues of extreme public importance, including public health and safety.²²³ Moreover, the existence of highly publicized, and controversial, sex offender registration and notification programs legitimizes the currency and ultimately the permanence of this debate.²²⁴ If sex offenders wish to avoid the burden of the public figure label, they must successfully argue that despite their crimes they have not assumed any risk of ongoing public attention.²²⁵

²¹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

²¹⁹ See *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980) (defining the test for establishing an involuntary public figure), *cert. denied*, 449 U.S. 898 (1980).

²²⁰ See *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000); see also *Wiegel v. Capital Times Co.*, 426 N.W.2d 43, 49–50 (Wis. Ct. App. 1988) (noting that public figure inquiry should focus "on the plaintiff's role in the public controversy rather than on any desire for publicity or other voluntary act on his or her part").

²²¹ *Wells*, 186 F.3d at 540.

²²² *Id.*; see also *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 185 (Ga. Ct. App. 2001) (noting that when determining the public figure status of an individual a court must ask "whether a reasonable person would have concluded that the plaintiff would play or was seeking to play a major role in determining the outcome of the controversy"), *cert. denied*, 537 U.S. 814 (2002).

²²³ See *supra* Introduction.

²²⁴ See *supra* Introduction, Part A.

²²⁵ An alternative argument might rest on whether community notification constitutes a second punishment for the convicted sex offender. The argument asserts that having already

The success of the sex offender's argument rests on the ability to differentiate between the public debate concerning sex offenders and the actual execution of the sex crime. The fallacy of this argument lies in the misguided belief that the sex offender's crime hurts only the victims and not the public at large.²²⁶ Sex crimes are not committed in a vacuum in which they damage the victims while inciting the offenders.²²⁷ Instead, sex crimes exist on the dangerous fringe of society that shocks the public conscience and jeopardizes the vitality of the community.²²⁸ Individuals who commit sex crimes cannot legitimately claim that they are unaware of the serious repercussions of their conduct, and the ensuing pain it inflicts upon the victims, the community, and ultimately themselves.²²⁹ In addition, the general preference of the sex offender to

served their time in prison, convicted sex offenders are subjected to further punishment upon their release by having to face the public stigma attached to registration in a community notification program. See, e.g., Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 815–26 (1996) (arguing that community notification statutes constitute “cruel and unusual punishment” for convicted sex offenders). The Supreme Court, however, determined that sex offender notification programs are non-punitive, and instead are enacted with the purpose of protecting the public from convicted sex offenders. *Smith v. Doe*, 538 U.S. 84, 93 (2003). Furthermore, any stigma that results from community notification does not make sex offender notification punitive, because such information is part of the public record and thus does not constitute the imposition of a significant “affirmative disability or restraint” on the part of the affected individuals. *Id.* at 98–100. For additional discussion relating to the Supreme Court's analysis of the due process rights of convicted sex offenders, see *supra* Parts I.C.1, I.D, II.A.

²²⁶ Recent studies concerning the impact of sexual abuse upon the victims and their surrounding communities have refocused the prevention of sexual abuse as a public health issue. Fran Henry & Keith Kauffman, *Introduction to the Special Issue*, 11 SEXUAL ABUSE: J. RES. & TREATMENT 255, 255 (1999); see also, James A. Mercy, *Having New Eyes: Viewing Child Sexual Abuse as a Public Health Problem*, 11 SEXUAL ABUSE: J. RES. & TREATMENT 317 (1999) (arguing that defining sexual abuse as a public health problem acknowledges the role that the community plays in preventing sexual abuse and accordingly gives it a sense of “ownership” in the fight against sexual abuse); Sandy K. Wurtele, *Comprehensiveness and Collaboration: Key Ingredients of an Effective Public Health Approach to Preventing Child Sexual Abuse*, 11 SEXUAL ABUSE: J. RES. & TREATMENT 323, 324 (1999) (arguing that the prevention of sexual abuse must target “personal, familial, and environmental conditions that both increase and decrease the likelihood of abuse occurring,” and that the effective prevention of sexual abuse, especially child sexual abuse, requires educating such diverse groups as “parents, professionals, the general public, and policy makers”).

²²⁷ See Madeleine Carter et al., *Promoting Offender Accountability and Community Safety Through the Comprehensive Approach to Sex Offender Management*, 34 SETON HALL L. REV. 1273, 1275–76 (2004) (arguing that while community protection from sex offenders has typically been the “exclusive responsibility of the criminal justice system,” a new focus has emerged that recognizes the importance of community education to combat the danger of sexual violence).

²²⁸ See *supra* notes 29–36 and accompanying text.

²²⁹ Cf. CTR. FOR SEX OFFENDER MANAGEMENT, U.S. DEP'T. OF JUSTICE, AN OVERVIEW OF SEX OFFENDER MANAGEMENT (2002) (stating that “the great majority of sex offenders do not commit their crimes impulsively without any planning or forethought”).

remain hidden from the public view pales in comparison to the atrocities they have committed. Consequently, it is highly unlikely that sex offenders can avoid the involuntary public figure label regardless of their preference to shun such publicity.

Under federal regulations, sex offenders are defined as violent individuals who present a continuing threat to the community.²³⁰ Their crime violates both the physical and mental state of its victims,²³¹ and consequently enflames the public to seek retribution.²³² Even if the perpetrator does not foresee the likelihood of the ensuing public debate caused by his or her actions, the reasonable person certainly does; thus, ignorance affords no protection. To attach involuntary public figure status to the legal record of a sex offender therefore does not signify personal discrimination against the sex offender's wish to remain private; it instead represents justice.

Ultimately, the determination that sex offenders are public figures rests on two important principles. First, the sex offender notification debate is a significant public controversy, and concerns matters vital to promoting public safety.²³³ Second, sex offenders are active participants within this debate, and thus it is reasonably foreseeable that their relevant conduct will invite public attention.²³⁴ It is arguable, therefore, that sex offenders achieve public figure status under either the limited or involuntary public figure classes.²³⁵ In addition, the sex offender's public figure status is particularly significant to media entities, because it elevates the status of the sex offender debate to a matter of vital public concern while simultaneously immunizing the media from future liability stemming from defamation lawsuits.

CONCLUSION

As stated from the beginning, this Note's purpose was to demonstrate the media's right to report on the presence of convicted sex offenders in the community.²³⁶ It was

²³⁰ See 42 U.S.C. § 14071 (2000).

²³¹ See Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 48–50 (1998) (noting how victims of sexual abuse may exhibit harmful psychological effects arising from the sexual offense, including Post-Traumatic Stress Disorder and an inclination toward unusual sexual behaviors); see also CATHY SPATZ WIDOM, NAT'L INST. OF JUSTICE, VICTIMS OF CHILDHOOD ABUSE: LATER CRIMINAL CONSEQUENCES 4–5 (1995) (noting that victims of sex crimes are at greater risk of arrest later in life than are non-victims, and victims may also be more likely to run away from home).

²³² See Saad, *supra* note 36 (finding that almost two-thirds of all Americans have little or no concern for the privacy rights of those individuals affected by sex offender registration and notification programs).

²³³ See *supra* Part II.B.2.

²³⁴ See *supra* Part II.C.

²³⁵ See generally W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1 (2003) (arguing that distinctions between the limited purpose and the involuntary public figure should be abolished in favor of a renewed focus on the controversy in question).

²³⁶ See *supra* Introduction, Part C.

suggested that granting this right to the media would accomplish two important objectives. First, granting the media the right to notify would support the First Amendment interest in protecting the media when reporting on matters of public concern. Hence, the right to notify would ensure that sex offenders were included within the overall debate on public safety. Second, sex offenders' increased publicity would heighten the public's awareness of their presence in the community. This intensified focus on local sex offenders would assist government-authorized sex offender notification programs by creating a more informed populace.

These conclusions were supported by two main bodies of law. Initially, the argument focused on the First Amendment and attempted to discern whether the media is accorded free speech protection when notifying the public of sex offenders in the community.²³⁷ Crucial to the resolution of this inquiry was the supposition that the media's right to report on matters of public concern outweighed the competing interest in the sex offender's right to privacy. This outcome was predicated on the determination that sex offenders were a viable public concern.

The second main inquiry focused on defamation law and its public figure doctrine.²³⁸ Foundational to this analysis was the proposition that granting public figure status to convicted sex offenders would limit the media's liability when notifying the public of their presence in the community. The determination that sex offenders were public figures, therefore, rested on the successful conclusion of two critical questions. First, is the sex offender debate a public controversy? Second, if the sex offender debate is a legitimate public controversy, do sex offenders play an active enough role within the controversy to merit public figure status? The affirmative answer to each question was supported by the argument that the characteristics of a sex offender fit within the narrow class of involuntary public figures.

Consequently, the connection between the First Amendment and the public figure inquiries rests on the manner in which each body of law analyzes the tension between the public's right to be informed of matters of public concern and the individual's competing right to keep personal matters private. The tension between the public and private domain is essential to both legal doctrines, and is essential to the ultimate conclusion of this Note. Hence, to successfully determine that the media has a right to notify the public of the presence of convicted sex offenders in the community, the public's interest in remaining informed must be deemed greater than the sex offender's opposing interest in remaining outside the public sphere. Accordingly, the similar legal principles relevant to both the First Amendment and the public figure doctrines are appropriate mechanisms in which to analyze the public-private tension.

First Amendment jurisprudence, as it pertains to the media's right to free speech, generally focuses on the issue of public concern. Specifically, the First Amendment analysis attempts to discern whether the particular information that is being disputed as

²³⁷ See *supra* Part I.

²³⁸ See *supra* Part II.

a matter of legitimate public concern is significant enough to outweigh the competing interests that the disputing party possesses. Likewise, the public figure doctrine also seeks to differentiate between public and private matters. Unlike First Amendment jurisprudence, however, the public figure analysis focuses on the public status of the individual rather than the public status of the information in question to determine whether the specific individual has a public persona sufficient to warrant increased public attention. Often the determination of whether the individual is worthy of public attention centers on the specific controversy in which the individual is embroiled.

Except for those rare cases in which the individual is an all-purpose public figure, a proper inquiry focuses as much on the public significance of the controversy in question as it does on the active participation of the individual within the specific controversy. Further, it is arguable that any significant controversy sufficient to bestow upon an individual public figure status is equally sufficient to merit First Amendment protection. Accordingly, it may be inferred that the determining factor in each debate is the fact that sex offender notification is of sufficient public interest to merit First Amendment protection for the media and correspondingly merit public figure status for the sex offender.

Currently, the scourge of sex crimes is at the forefront of the national consciousness.²³⁹ Highly-publicized sex crime controversies are the impetus behind the resurgence of legislation mandating the public registration and subsequent dissemination of personal information pertaining to individuals who have been previously convicted of sexual offenses.²⁴⁰ These statutes are enacted with the intent to protect the community from future tragedy. Hence, sex offender notification statutes stand for the proposition that information is power, and thus the more information the public possesses in regards to the proximity of convicted sex offenders within their communities, the less likely it is that future violence will result.

The media's right to notification relies on more than legal doctrine as a sufficient justification; it relies on common sense. It is highly unlikely that any person, regardless of how adamantly they support the right to privacy, would wish to experience the tragedy of Jacob Wetterling and his family. Most people, therefore, would generally support rational measures that might serve to prevent similar tragedies. Community notification of sex offenders is one such measure used to prevent the future occurrence of sexually violent crimes. Allowing the media to notify the public of the presence of convicted sex offenders is a significant tool to help ensure the success of community notification.

²³⁹ See *supra* Introduction, Part A; see also Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1167 (1999) ("Sex offenders are the scourge of modern America, the 'irredeemable monsters' who prey on the innocent." (citations omitted)).

²⁴⁰ See *supra* Introduction, Part A.

In the end, as acknowledged under the First Amendment, the media is often the mechanism through which the public becomes informed on important matters. As it pertains to convicted sex offenders, the media must be allowed to do its job and help publicize the presence of these potentially dangerous individuals who reside in the community. Providing the media with anything less undermines the First Amendment and jeopardizes the safety of our communities.