

A Community's Response to a Shocking Crime: The Jessica Lunsford Act and the Florida Sexual Offender Registry

*"In the little world in which children have their existence whosoever brings them up, there is nothing so finely perceived, and so finely felt, as injustice."*¹

I. INTRODUCTION

On February 23, 2005, Florida residents awoke to a news bulletin: a young girl was missing and police were asking for the public's help.² Over the next month, the search for twelve-year-old Jessica Lunsford dominated local news as pictures of the young girl, and details of her abduction, traveled across the state.³ As time passed and nobody came forward with information, hope for Lunsford's safe return diminished.⁴ Finally, on March 19, 2005, investigators recovered her body in a shallow grave in her neighbor's yard.⁵ With the search over, Lunsford's neighbors and family demanded answers to how this crime was possible and sought to punish those responsible for her death.⁶

Floridians were shocked to learn that John Couey, a convicted sexual offender, who lived with his sister across the street from Lunsford, confessed to the crime.⁷ In response to Lunsford's murder, the Florida legislature initiated debates on whether to enact tougher sexual offender registry provisions and also whether to establish new sexual offender crimes and punishments.⁸ As a

1. CHARLES DICKENS, *GREAT EXPECTATIONS* 61-62 (Margaret Cardwell ed., *The World's Classics* 1994) (1861).

2. Amy L. Edwards, *Emotions Drive Day 2 of Search*, ORLANDO SENTINEL, Feb. 26, 2005, at A1 (describing initial efforts in search for Lunsford).

3. *Investigators: Did Girl Run Away or was She Abducted?*, CNN.COM, Feb. 28, 2005, <http://www.cnn.com/2005/US/02/28/missing.girl/index.html> (discussing possible reasons for Lunsford's disappearance).

4. See Mike Branom, *Search For Girl, 9, Starts Second Phase*, S. FLA. SUN-SENTINEL, Mar. 2, 2005, at 8B (explaining search for Lunsford progressed beyond usual missing person case).

5. Rich McKay, *Girl Was Killed by Neighbor, Cops Say*, ORLANDO SENTINEL, Mar. 19, 2005, at A1 (detailing where police found Lunsford's body and describing police suspect).

6. *Murder Charge Brought Against Man Accused in Slaying of Girl*, CNN.COM, Mar. 23, 2005, <http://www.cnn.com/2005/LAW/03/21/lunsford.case/index.html> (portraying murder suspect as convicted sex offender).

7. See Amy L. Edwards, *Missing Girl's Body Is Found While the Suspect Is Jailed in Georgia, 3 Others Are Charged with Obstructing Police*, ORLANDO SENTINEL, Mar. 20, 2005, at A1 (noting Couey's confession and alleging relatives assisted Couey in murder cover-up).

8. See Lewis Duberman, *No Second Chance for Child Predators*, S. FLA. SUN-SENTINEL, Mar. 29, 2005, at 16A (stressing need for tougher sexual offender legislation in wake of Lunsford's murder).

result, the Florida legislature passed the Jessica Lunsford Act (Lunsford Act),⁹ as an attempt to create one of the toughest sexual offender laws in the country.¹⁰

All fifty states and the District of Columbia have enacted some type of sexual offender registry.¹¹ Individual states are free to determine which provisions and conditions to apply to convicted sexual offenders as long as those provisions meet general federal requirements.¹² Failure to abide by federal requirements may result in the state's forfeiture of funds allotted for law enforcement block grants.¹³

Convicted sexual offenders have raised challenges alleging such state laws infringe on their constitutional due process rights and constitute ex post facto laws.¹⁴ This Note will analyze specific provisions of the Lunsford Act and determine how prior court decisions will likely apply to the expected challenges to this new law.¹⁵ Specifically, in Part II, this Note will focus on the constitutional substantive and procedural due process requirements in enacting sexual offender registries and the limitation that such laws must not violate the Ex Post Facto Clause of the United States Constitution.¹⁶ Finally, this Note will analyze the remaining provisions of the Lunsford Act, its objective to keep children safe from sexual offenders, and the practicality of complying with all of its requirements.¹⁷

9. H.B. 1877, 2005 Leg., 107th Reg. Sess. (Fla. 2005) (announcing Jessica Lunsford Act).

10. See *Florida Senate Eyes Tougher Sex Offender Law: House Unanimously Passes Bill Named for Jessica Lunsford*, CNN.COM, Apr. 20, 2005, <http://www.cnn.com/2005/POLITICS/04/20/florida.sexoffender/index.html> (observing Florida House's speedy enactment and unanimous support for Lunsford Act).

11. See generally VIRGINIA B. BALDAU, U.S. DEPT. OF JUSTICE, SUMMARY OF STATE SEX OFFENDER REGISTRIES: AUTOMATION AND OPERATION, 1998 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ssorao.pdf> (outlining state sexual offender registries and describing differences between states' laws).

12. *Id.* at 4 (distinguishing individual state sexual offender registries from mandatory minimum federal guidelines).

13. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (2000) (announcing newly established criminal actions and imposing financial penalties for noncompliant states).

14. See Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731, 2733-34 (2004) (highlighting several state sexual offender registries and resulting constitutional challenges).

15. See Kimberly B. Wilkins, Comment, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245, 1245 (2003) (outlining challenges and arguments supporting and opposing sexual offender registries); see also *infra* notes 107-133 (examining Lunsford Act in context of previous court decisions).

16. See *infra* notes 80-92 and accompanying text (analyzing substantive and procedural due process claims in regards to sexual offender registry laws); see also *infra* notes 68-77 and accompanying text (detailing ex post facto arguments against sexual offender registries).

17. H.B. 1877, 2005 Leg., 107th Reg. Sess. (Fla. 2005) (announcing new legislation entitled Jessica Lunsford Act).

II. HISTORY: THE EVOLUTION OF SEXUAL OFFENDER REGISTRIES

Sexual offender registration and community notification laws first gained national prominence in the mid 1990s.¹⁸ Although sexual offender registries originated in individual states, requiring such offenders to register their current locations and provide biographical information for tracking and crime prevention purposes became a federal goal in the wake of several high profile murders involving sexual offenders.¹⁹ Federal law now dictates the minimum steps states must take towards classifying and registering sexual offenders and implementing of community notification programs that alert the public of offenders living in the area.²⁰ Federal law is clear, however, that individual states may go beyond these minimum standards and have wide autonomy to use their discretion in enacting tougher sexual offender laws.²¹ The differences between states' sexual offender registries have generated much judicial review, as each state must demonstrate that its registry meets the minimum federal requirements but does not infringe upon an individual's constitutional rights.²²

A. *Recidivism: The Driving Force Behind Sexual Offender Laws*

Aside from the odious nature of sexual offenses, the underreporting of sexual crimes and the threat of recidivism are major reasons why the law must distinguish convicted offenders from the common criminal.²³ A recidivist is defined as someone who has been convicted of multiple criminal offenses, usually similar in nature, or in other words, a repeat offender.²⁴ Extensive

18. See BALDAU, *supra* note 11, at 4 (noting public outrage over sexual offenses spurred federal legislation in 1990s); see also Wilkins, *supra* note 15, at 1247 (indicating federal law passed in 1994 advanced state sexual offender registries).

19. See David S. DeMatteo, Note, *Welcome to Anytown, U.S.A. - Home of Beautiful Scenery (and a Convicted Sex Offender): Sex Offender Registration and Notification Laws in E.B. v. Verniero*, 43 VILL. L. REV. 581, 582-84 (1998) (examining federal response to public reaction over state sexual offender registries and notification requirements); see also *infra* note 23 and accompanying text (describing difficulty in sexual offender rehabilitation and recidivism rates require careful monitoring).

20. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (2000) (codifying minimal steps each state must take to enact its own sexual offender registry).

21. 42 U.S.C. § 14071(a)(2)(B) (2000) (establishing federal guidelines waived upon state demonstrating registry meets minimum requirements).

22. See Wilkins, *supra* note 15, at 1250-53 (observing states' broad discretion in developing state registries produces different constitutional challenges).

23. See TIM BYNUM ET AL., CTR. FOR SEX OFFENDER MANAGEMENT, *RECIDIVISM OF SEX OFFENDERS 3* (2001), available at <http://www.csom.org/pubs/recidsexof.pdf> (stating underreporting of sex crimes frustrates attempts to quantify statistical information). Studies conducted in 1994, 1995, and 1998 indicated that only one out of every three sexual assaults against persons twelve and over were reported to the police. *Id.*; see also Nadine Strossen, *Critical Perspectives on Megan's Law: Protection v. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1, 35-36 (1996) (arguing high recidivism rate of pedophiles requires post-conviction supervision). Rehabilitation is not a viable option for most sexual offenders nor is it an adequate protection for the general public. See Strossen, *supra*, at 36.

24. BLACK'S LAW DICTIONARY 586 (2d Pocket ed. 2001) (providing general definition of recidivism).

evidence shows that sexual offenders are among the most likely criminals to commit repeat offenses in the future.²⁵ Mindful of such evidence, both Congress and state legislatures have determined that sexual offenders require extra attention.²⁶

Many states have attempted to deal with repeat sexual offenders by enacting laws focused on reducing this continuing threat.²⁷ There are two general categories of sexual offender statutes: those that require the registration and tracking of sexual offenders and those that allow, and sometimes compel, the disclosure of this information to the public.²⁸ Sexual offender registries are lists that local jurisdictions collect and maintain to keep track of certain individuals previously convicted of certain, usually sexually based, crimes.²⁹ Community notification statutes allow members of the general public to access information that alerts them of potentially dangerous sexual offenders living in their communities.³⁰ Both types of statutes achieved widespread acceptance in the 1990s and Congress requires every state in the nation to enact such laws.³¹

B. Federal Sexual Offender Laws

In 1994, Congress enacted the Jacob Wetterling Crimes Against Children

25. See U.S. Dept. of Justice, *Bureau of Justice Statistics, Criminal Offender Statistics: Recidivism*, <http://www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism> (last visited Mar. 25, 2007) (noting sexual offenders more likely than other criminals to commit similar crimes repeatedly). A 1994 Department of Justice study concluded that police rearrested sexual offenders for committing other sex crimes nearly four times as often as other re-offending criminals. *Id.*; see also 139 CONG. REC. H10,321 (daily ed. Nov. 20, 1993) (statement of Rep. Ramstad) (excerpting congressional testimony noting sexual offenders among most likely criminals to re-offend). Representative Ramstad cited studies revealing that seventy-four percent of imprisoned sexual offenders against children had at least one prior conviction and that the average child sexual offender molests 117 children. 139 CONG. REC. H10,321 (daily ed. Nov. 20, 1993) (statement of Rep. Ramstad).

26. See Chrisandrea L. Turner, Note, *Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?*, 86 KY. L.J. 477, 479-80 (1997) (commenting on flurry of registries enacted by individual states). The risk sexual offenders pose to the general public is significant enough that states may enact legislation that diminishes offenders' liberty interests. *Id.* at 487.

27. See *supra* notes 11, 23-25 and accompanying text (outlining state sexual offender registries and continuing problem of recidivism).

28. See Wilkins, *supra* note 15, at 1247 (detailing purpose and requirements of sexual offender registries and community notification statutes).

29. See Wilkins, *supra* note 15, at 1251 (explaining sexual offender registries and difference between compulsory and discretionary classification). Compulsory notification, utilized in nineteen states, mandates community notification regardless of the offender's potential for recidivism, while discretionary notification systems use a case-by-case determination of whether to disclose the offender's information to the general public. *Id.*

30. See *supra* note 29 and accompanying text (describing compulsory versus discretionary notification statutes); *infra* notes 41-44 and accompanying text (explaining minimum federal guidelines for community notification laws required of individual states).

31. *Infra* notes 41-44 and accompanying text (setting forth minimum state requirements for sexual offender registries and notification laws); see also Turner, *supra* note 26, at 479-83 (describing sanctions for individual states' failure to meet minimum federal requirements). Individual states failing to adopt minimum federal requirements of sexual offender legislation risk losing ten percent of their share of federal grant money for state and local anti-crime programs. Turner, *supra* note 26, at 480-81.

and Sexually Violent Offender Registration Act (Wetterling Act), which is federal legislation that requires each state to create and maintain a sexual offender registry.³² The Wetterling Act remains the predominant federal sexual offender legislation upon which all state registries are based.³³ Originally, police and government agencies used the registry for law enforcement purposes and to conduct background checks, but such information was not readily accessible to the general public.³⁴ A state's failure to comply with the Wetterling Act subjects the state to the loss of ten percent of its federal law enforcement block grants and results in the reallocation of that funding to compliant states.³⁵ As high-profile sexual assaults continued, and loopholes became apparent, Congress amended the Wetterling Act several times to incorporate new methods of combating sexual offenses.³⁶

In 1996, Congress amended the Wetterling Act to include a federal version of Megan's Law.³⁷ Modeled after the statute New Jersey enacted following a repeat child molester's murder of seven-year-old Megan Kanka, the federal legislation requires community notification of sexual offenders living in the area.³⁸ The New Jersey statute created a risk assessment scale based on factors such as the number and type of prior offenses, past treatment of the individual, response to this treatment, and the likelihood of recidivism.³⁹ After the New

32. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, H.R. 3355, 103d Cong. § 170101 (1994) (outlining original version of act adopted by Congress and signed into law).

33. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2000) (setting forth current version of Wetterling Act). The Wetterling Act established guidelines and serves as model legislation for states enacting sexual offender registration and notification statutes. *Id.*

34. H.R. 3355, 103d Cong. § 170101(d)(1)-(3) (detailing release of registry information only allowable in certain circumstances). The 1994 version of the Wetterling Act allowed law enforcement agencies to "release relevant information that is necessary to protect the public concerning a specific person required to register under this section". *Id.* at § 170101(d)(3).

35. *Id.* at § 170101(f)(1)-(2) (requiring states to comply with Wetterling Act or face financial consequences). States had three years from the date of enactment to comply with the statute's minimum requirements. *Id.* at § 170101(f)(1). Failure to comply would subject a state to the loss of ten percent of the allotted funds it would have received through the Omnibus Crime Control and Safe Street Act of 1968. *Id.* at § 170101(f)(2)(A). The money would then be reallocated to the compliant states. *Id.* at § 170101(f)(2)(B).

36. *Infra* notes 37-39, 43-44 (explaining circumstances prompting amendments to Wetterling Act and outlining requirements of such amendments).

37. 42 U.S.C. § 14071(e) (2000) (amending the Wetterling Act by including new community notification provision). The amendment was called "Megan's Law" because it replicated, for the most part, an existing New Jersey law. See *infra* note 38 and accompanying text.

38. See Strossen, *supra* note 23, at 8-9 (noting Kanka's murderer was repeat offender). Jesse Timmendequas, a twice-convicted pedophile, moved into Kanka's community unbeknownst to the neighborhood. *Id.* at 11-12. Timmendequas, a person whose criminal history was completely unknown to the general public, lured Kanka into his home by promising to show her his new puppy. *Id.* at 11. The public outcry following Kanka's murder triggered the enactment of community notification legislation less than four months after her death. *Id.* at 12.

39. See Strossen, *supra* note 23, at 16-18 (explaining factors leading to mandatory registration under New Jersey's Megan's Law). New Jersey was the first jurisdiction to require law enforcement officials to notify the public of sexual offenders when necessary for public safety. See *id.* at 19. New Jersey divided notification

Jersey Supreme Court restructured the statute, the state became one of the first to mandate disclosure of sexual offender information to private organizations and the general public.⁴⁰ Similarly, the federal version of Megan's law changed the way the state could disseminate the information collected under the Wetterling Act to the general public and private organizations.⁴¹ The statute's broad language grants law enforcement extensive discretion to determine what information it may release, and provides the general public with the power and right to request such information.⁴²

In 1996, Congress also created the National Sexual Offender Registry, in an amendment called the Lychner Act.⁴³ The Lychner Act amended the Wetterling Act and required the Federal Bureau of Investigation (FBI) to create a national database to track, and not just register, certain sexual offenders.⁴⁴ Named for Pam Lychner, an assault survivor, the FBI database tracks persons convicted of crimes against children, certain violent sexual offenses, and persons designated as violent sexual predators.⁴⁵ Individual states with sexual offender registries that include the same information may simply forward it to the database, but offenders in jurisdictions that do not require this level of supervision must submit their information directly to the FBI.⁴⁶

requirements into three categories, each with different levels of disclosure. *Id.* For low risk offenders, the statute only required notification to law enforcement officials. *Id.* For moderate risk offenders in the state, additional notification was required to community organizations that oversaw children or serviced rape victims. *Id.* For high-risk offenders, however, the statute required notification to anyone in the general public likely to encounter the offender. *Id.*

40. *See Doe v. Poritz*, 662 A.2d 367, 422 (N.J. 1995) (upholding New Jersey's community notification program and indicating program was first of its kind).

41. 42 U.S.C. § 14071(d)(3) (2000) (amending Wetterling Act's disclosure provision). Congress now allows law enforcement to disclose registry information for any permissible state purpose and mandates that law enforcement officials disclose registry information whenever necessary to protect the public. *Id.*

42. *See* 42 U.S.C. § 14071(d)(3) (2000) (adopting new provisions of Wetterling Act); *see also* Wilkins, *supra* note 15, at 1247-48 (noting law enforcement has little discretion in releasing sexual offender information under federal Megan's Law). The statute gives law enforcement officials the power to release previously confidential information, and provides the general public with the opportunity to receive information about sexual offenders in the community. *See* Wilkins, *supra* note 15, at 1247-48.

43. 42 U.S.C. § 14072 (2000) (amending Wetterling Act and creating national sexual offender registry). This amendment is called the "Lychner Act" after Pamela Lychner, a sexual assault survivor who lobbied for the legislation. *See* Justice for All, A Criminal Justice Reform Organization, <http://www.jfa.net/index.html> (last visited Dec. 17, 2005) (describing origin of Lychner Act).

44. *See* 42 U.S.C. § 14072 (defining FBI's obligations under Lychner Act). The Lychner Act created a national database, maintained by the FBI, to track the whereabouts of persons convicted of criminal offenses against minors or sexually violent offenses, and/or classified as sexually violent predators. *Id.* at § 14072(b). Individuals residing in jurisdictions that are not compliant with this act must register themselves directly with the local branch of the FBI. *Id.* at § 14072(c).

45. *See id.* at § 14072(b)-(c) (listing persons tracked under Lychner Act); *see also* Justice for All, A Criminal Justice Reform Organization, <http://www.jfa.net/index.html> (last visited Dec. 17, 2005) (outlining purpose of group and resources available to victims). The victims' rights advocacy group, "Justice For All," was created after a Realtor®, Pamela Lychner, survived an assault by a twice-convicted felon posing as a homebuyer. Justice for All, A Criminal Justice Reform Organization, <http://www.jfa.net/index.html> (last visited Dec. 17, 2005)

46. *See* 42 U.S.C. § 14072(c) (listing procedures for offenders required to register as sexual offenders).

Additional concerns over sexual offenders committing repeat offenses led to further Wetterling Act amendments and also to new laws aimed at closing any existing loopholes in the current law.⁴⁷ In 2002, as an amendment to the Wetterling Act, Congress passed the federal Campus Sex Crimes Prevention Act (CSCPA).⁴⁸ The CSCPA mandates that individuals already required to register with state sexual offender registries must provide additional information if they are employed by, or enrolled at, an institution of higher education.⁴⁹ Independent to the Wetterling Act, Congress also enacted the Child Protection Act (Protect Act) in 2003, and dramatically changed federal legislation as it related to crimes committed against children.⁵⁰ One of the Protect Act's most important provisions is the creation of a national Amber Alert, a system that law enforcement can use to spread the news of abducted or missing children quickly throughout the community, and to assist with the search for, and apprehension of, any potential kidnappers.⁵¹

Congress drafted the Wetterling Act, its amendments, and additional independent laws for the purpose of protecting the general public from sexual offenders.⁵² Such laws, however, pertain only to federal crimes, and while they specify minimum requirements for the states to follow, each state is free to enact its own sexual offender laws and registries.⁵³ This latitude creates problems when states enact constitutionally suspect legislation.⁵⁴

When state regulations fail to meet minimally sufficient standards, persons subject to registration requirements may satisfy the statute by either registering on a state sexual offender registry or reporting directly to their local branch of the FBI. *Id.*

47. See *infra* notes 48-51 and accompanying text (addressing additional amendments to Wetterling Act and other independent federal sexual offender legislation).

48. Federal Campus Sex Crimes Prevention Act (CSCPA), 42 U.S.C. § 14071(j) (2000) (adding further registration requirements for offenders with access to colleges and universities).

49. *Id.* (providing institutions of higher learning need extra protection from sexual offenders). The CSCPA requires anyone required to register under Megan's Law to provide additional information and inform the authorities if they are employed or enrolled at an institution of higher learning. *Id.* The CSCPA requires sexual offenders to provide information about their duration and purpose on campus and allows law enforcement to notify the institution and community of their presence. *Id.*

50. Protect Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.) (targeting sexual offenses committed against children). The Protect Act mandates that law enforcement officials supervise all federally convicted sexual offenders for at least five years upon release from prison and increases the maximum penalty for sexual exploitation of a child to thirty years. *Id.*

51. *Id.* at §§ 301-05. The Protect Act establishes national coordination of Amber alerts within the Department of Justice and includes funding for states to establish or improve their own Amber alert programs. *Id.* at §§ 302-303.

52. See Wilkins, *supra* note 15, at 1246-50 (highlighting various federal statutes dealing with sexual offenders); see also Turner, *supra* note 26, at 479-81 (setting forth progression of sexual offender legislation).

53. See Wilkins, *supra* note 15, at 1250-53 (describing state autonomy in enacting sexual offender laws and registries). Individual states have discretion to enact statutes designating compulsory or discretionary registration and notification as they see fit. See Wilkins, *supra* note 15, at 1250.

54. See Wilkins, *supra* note 15, at 1249-50, 1253 (commenting on constitutional issues presented by varying state registries).

C. A Case Study: Florida's Sexual Offender Registry

Florida, similar to many states and the federal government, employs different sexual offender registration requirements depending on the individual's criminal conviction.⁵⁵ The key distinction between the registration requirements hinges on whether the state designates the individual as a sexual predator or sexual offender.⁵⁶ This designation affects every requirement, from the degree of community notification, to the level of offender supervision.⁵⁷

i. Sexual Offender Status

The Florida legislature, citing the high risk sexual offenders pose to the general public, enacted legislation to formally label certain individuals as sexual offenders.⁵⁸ Individuals are labeled as sexual offenders if they are convicted, or otherwise deemed guilty, of certain enumerated offenses.⁵⁹ A sexual offender must register with the Florida Department of Law Enforcement (FDLE) within forty-eight hours of establishing a temporary or permanent Florida address and abide by all existing conditions of probation.⁶⁰ A sexual offender is also subject to certain community notification requirements if the

55. See Wilkins, *supra* note 15, at 1248 (discussing heightened federal requirements for sexually violent predators); see also *infra* notes 58-62, 64-65 (defining Florida's sexual offender and sexual predator laws).

56. See *infra* notes 59, 64-65 and accompanying text (examining Florida statutes addressing distinction between sexual offenders and sexual predators).

57. See *infra* notes 60-61, 64-65 and accompanying text (describing different requirements Florida imposes on sexual offenders versus sexual predators).

58. FLA. STAT. § 943.0435(12) (2006) (noting increased public concern over recidivism rate of sexual offenders). The legislature found that the general public's safety interest outweighed a convicted sexual offender's expectation of privacy. *Id.*

59. *Id.* at § 943.0435(1)(a) (listing various ways individuals are labeled sexual offenders). Florida labels an individual as a sexual offender if he or she is convicted of committing, attempting, soliciting, or conspiring to commit: kidnapping, FLA. STAT. § 787.01, false imprisonment, § 787.02, luring or enticing a child, § 787.025, sexual battery, § 794, procuring a person under the age of eighteen for prostitution, § 796.03, lewd or lascivious offenses committed upon or in the presence of a person less than sixteen, § 800.04, lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled adult, § 825.1025, sexual performance by a child, § 827.071, protection of minors in prohibiting certain acts, § 847.0133, computer pornography, § 847.0135, transmission of child pornography, § 847.0137, transmission of material harmful to minors, § 847.0138, or buying or selling minors for depiction in sexually explicit conduct, § 847.0145. A sexual offender must also have been in the custody or control, or under the supervision of, the Florida Department of Corrections on or after October 1, 1997, as a result of being convicted of one or more of the crimes listed above. § 943.0435 (1)(a). A person designated as a sexual offender in another jurisdiction, but currently residing in Florida, must also register as a sexual offender if certain conditions are met. § 943.0435(1)(a)(2)-(3).

60. See FLA. STAT. § 943.0435(2) (requiring offenders to register with FDLE within forty-eight hours of release); see also § 775.21(6)(a) (requiring that sexual offenders submit photographs and fingerprints to FDLE upon release); § 775.21(6)(e) (mandating personal and biographical information be provided to sheriff's office); § 943.0435(2) (declaring sexual predators must submit photographs and fingerprints to sheriff's department). The offender must report in person to the sheriff's office where law enforcement officials must take photographs and fingerprints. *Id.* Failure to abide by FDLE regulations subjects the noncompliant offender to a third-degree felony. § 943.0435(9).

jurisdiction's chief law enforcement officer deems such action necessary.⁶¹ This designation and the associated requirements constitute a lifetime obligation unless a court grants relief.⁶²

ii. Sexual Predator Status

Individuals that Florida designates as sexual predators are subject to much more stringent registration and community notification standards than sexual offenders.⁶³ In 1998, the Florida legislature enacted the Florida Sexual Predators Act (FSPA) which serves as Florida's version of Megan's Law.⁶⁴ Not all sexual offenders are sexual predators; this label only attaches to an individual after he or she is convicted of a capital, life, or first degree sex-related felony or attempted commission of such an offense (or violation of a similar law in another jurisdiction), convicted of certain enumerated sex-related felonies after a previous conviction for another enumerated felony, or designated as a sexual predator in a civil commitment hearing.⁶⁵ Upon release

61. See FLA. STAT. § 943.043 (defining sexual offender); see also § 944.606(4) (authorizing release of sexual offender information as deemed necessary by law enforcement). Notification of a sexual offender's presence is authorized but not *required* and left to the discretion of the jurisdiction's chief law enforcement officer. § 944.606(4); § 944.606(3)(d) (determining when chief law enforcement officer may release information to public). Even if law enforcement officials do not issue the information to the general public, they must release such information to any requesting individual or community organization. § 944.606(3)(d).

62. See § 943.0435(11) (requiring lifetime registration upon sexual offender designation). A court may relieve an individual of his or her sexual offender status and registration obligations if the individual shows that he or she was released from incarceration or supervision stemming from the registering offense, whichever is later, and has not been arrested for a felony or misdemeanor offense for at least twenty years from that date; or he or she was eighteen or under at the time of the offense, the victim was twelve or older, and the individual has not committed another offense. § 943.0435(11)(a)-(b). Whether to provide such relief is solely within the discretion of the court, however, the state must continue to meet all required conditions under the Wetterling Act. § 943.0435(11)(b).

63. *Infra* note 64-65 and accompanying text (highlighting provisions and requirements of Florida Sexual Predators Act (FSPA)).

64. FLA. STAT. § 775.21 (announcing legislation targeting individuals labeled as sexual predators); see *State v. Robinson*, 873 So. 2d 1205, 1210-11 (Fla. 2004) (describing FSPA as similar in purpose to Megan's Law). The Florida Supreme Court determined that the high threat posed by repeat violent and sexual offenders presents a sufficiently compelling interest to require sexual offender registration and community notification programs. *Robinson*, 873 So. 2d at 1210.

65. FLA. STAT. § 775.21(4)(a)-(c) (2006) (describing crimes mandating sexual predator designation after first offense). Under the theory that one offense is enough, law enforcement officials may label an individual as a sexual predator if he or she is convicted of a serious crime such as kidnapping or false imprisonment of a person not classified as offspring of the offender, sexual battery, lewd or lascivious offenses committed upon or in the presence of a person under the age of sixteen, or selling or buying minors for portrayal in visual depiction of a sexually explicit action. § 775.21(4)(a). A second-strike sexual predator designation applies when a person who has previously been convicted of, or pled *nolo contendere* to, enumerated offenses similar to those listed under the sexual offender statute, then commits another similar offense. § 775.21(4)(a); § 394.910 (creating mental health civil commitment legislation extending incarceration of sexual offenders). Citing the high likelihood of recidivism and the lack of suitable treatment in prison, the civil commitment statute allows a Florida court to civilly designate individuals as sexual predators and commit them to long periods of incarceration for mental health treatment and evaluation. § 394.910. Once this label attaches as the result of a civil hearing, it will follow the felon if he or she is ever released. *Id.*

from incarceration, a sexual predator also faces potential lifetime registration in a manner similar to sexual offenders, but the law also requires additional measures of direct supervision and community notification.⁶⁶

D. Constitutional Challenges to Sexual Offender Laws

i. Ex Post Facto Clause Challenges

The United States Constitution prohibits both federal and state governments from enacting ex post facto statutes.⁶⁷ Sexual offenders often argue that sexual offender registration and community notification statutes violate the Ex Post Facto Clause of the United States Constitution because such statutes involve state action at the completion of the offender's prison sentence.⁶⁸

Recently, the Supreme Court dealt a significant blow to offenders seeking to invalidate their registration and notification requirements under an ex post facto theory.⁶⁹ In 2003, the Supreme Court decided *Smith v. Doe*,⁷⁰ which was the first Supreme Court challenge to sexual offender registries and notification statutes under the Ex Post Facto Clause.⁷¹ In *Smith*, two men, after pleading nolo contendere to sexual assault charges, were released from prison in 1990.⁷²

66. FLA. STAT. § 775.21(7) (2006) (stating community notification requirements); *see supra* notes 60-62 and accompanying text (listing registry requirements for sexual offenders). Unlike the discretion the statute allows for sexual offenders, the chief law enforcement officer *must* notify the community of the presence of any sexual predators. § 775.21(7)(a). Furthermore, law enforcement must inform each licensed day care center and all elementary, middle, and high schools located within one mile of the predator's residence of that person's presence. *Id.* Law enforcement officials must provide the predator's name, description (including a photograph), current address, information about the predator's prior offense, and limited information about the age of the victim. *Id.*

67. U.S. CONST. art. I, § 9, cl. 3 (forbidding federal government from enacting ex post facto laws); U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from passing ex post facto laws); *see Calder v. Bull*, 3 U.S. 386, 390 (1798) (explaining historical definition of ex post facto). According to *Calder*, an ex post facto law is:

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

Calder, 3 U.S. at 390.

68. *See Note, The Supreme Court, 2002 Term: Leading Cases: I. Constitutional Law: Ex Post Facto Clause*, 117 HARV. L. REV. 268, 268 (2003) (contending public reaction over sexual abuse cases led to legislation punishing past action); *see also Wilkins, supra* note 15, at 1261 (noting sexual offenders often challenge sexual offender registries as ex post facto violations).

69. *See infra* note 77 and accompanying text (explaining *Smith* effectively eliminated ex post facto claims against sexual offender registries).

70. 538 U.S. 84 (2003).

71. *Id.* at 92, 96 (noting case is one of first impression and declining to rule Alaskan registry violated constitutional clause).

72. *Id.* at 91 (addressing facts leading to plaintiffs' Ex Post Facto Clause challenge of Alaskan sexual

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In 1994, Alaska enacted a version of Megan's Law requiring all sexual offenders or kidnappers located in the state to submit to the registry and notification statute, regardless of when the offenders committed the predicate act.⁷³

In deciding the case, the Court first identified the legislative intent behind the statute to determine whether the plaintiffs could sustain an ex post facto challenge.⁷⁴ The Court then analogized Alaska's registry to Kansas's civil commitment statute, upheld in *Kansas v. Hendricks*,⁷⁵ and determined that the Alaska statute was non-punitive in nature, and thus, did not violate the Ex Post Facto Clause.⁷⁶ The Court also reemphasized the standard that only the "clearest proof" may override the state's legislative intent, thus eliminating most, if not all, challenges to state sexual offender registries and notification statutes on ex post facto grounds.⁷⁷

offender registry).

73. See *id.* at 89-90 (highlighting retroactive nature of Alaska's sexual offender registry); see also Bryan R. Diederich, Note, *Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition*, 99 COLUM. L. REV. 1551-52 (1999) (explaining ex post facto laws apply to actions committed prior to law's enactment). Ex post facto prohibitions do not apply to laws that change the direction in which a state combats crime; rather, they apply when a state seeks to punish an individual retroactively for actions he or she committed before the state enacted the law. See Diederich, *supra*, at 1560.

74. See *Smith*, 538 U.S. at 92-95 (examining legislative intent behind Alaskan Megan's Law). In an ex post facto analysis, a court must first identify whether the legislation is civil in nature, whether it presents legitimate, non-punitive measures, or whether the legislation is really "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* at 92. In *Smith*, the Supreme Court upheld Alaska's sexual offender laws based upon the intent and objective of the law, the protection the law provides to the public from the high risk of sexual recidivism, and the fact that most of the act falls under civil law. *Id.* at 93, 95.

75. 521 U.S. 346 (1997).

76. *Smith v. Doe*, 538 U.S. 84, 93, 96 (2003) (upholding Alaska's notification laws based upon analogy to Kansas' civil commitment and registration laws). The Alaskan statute's primary purpose, to protect the public from sexually violent, recidivist offenders, was similar to the legitimate, non-punitive governmental objective the Court found in *Hendricks*. See *id.* at 94. Alaska's legitimate public interest further strengthened the argument that sexual offender registries and notification statutes are more regulatory than punitive, and therefore more closely resemble civil laws than criminal laws. See *id.* at 93-94; see also *Hendricks*, 521 U.S. at 363 (holding detention alone does not signify punitive purpose). Sexual offenders challenged the Kansas civil commitment provision, which calls for the continued detention of sexually dangerous individuals after the completion of their penal sentences, as an added punishment for a crime. See *Hendricks*, 521 U.S. at 363-64. The Supreme Court declined to accept this contention, instead affirming a state's right to protect the general public from a "small but extremely dangerous group of sexually violent predators" not suffering from a mental disease that would otherwise allow a civil commitment. See *id.* at 351, 360. Specifically, the Court found that the Kansas statute did not implicate the two main objectives of criminal statutes, to punish and deter, and, combined within the procedural safeguards imbedded with the legislation, upheld the statute as permissible state action. *Id.* at 361-62, 364-65.

77. *Smith*, 538 U.S. at 92 (reiterating burden necessary to override state's legislative intent); see Wilkins, *supra* note 15, at 1274-75 (arguing "clearest proof" burden creates almost irrefutable presumption of constitutionality under Ex Post Facto Clause). In effect, by upholding the "clearest proof burden" and Alaska's retroactive application of sexual offender registries and notification laws, the Supreme Court essentially put an end to all ex post facto challenges. See Wilkins, *supra* note 15, at 1274-75.

ii. Procedural Due Process

In addition to *ex post facto* challenges, sexual offenders have also alleged that sexual offender statutes violate their procedural due process rights.⁷⁸ The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution require federal and state governments to give a person adequate notice or opportunity to be heard before they can deprive that person of life, liberty, or a property interest.⁷⁹ Individuals required to register as sexual offenders and provide community notification information often contend that their respective states never provided adequate notice nor afforded them with an opportunity to be heard prior to imposing statutory obligations.⁸⁰

Recently, the Supreme Court decided a case that rendered successful procedural due process claims nearly impossible.⁸¹

On the same day the Supreme Court decided *Smith*, it also decided *Connecticut Department of Public Safety v. Doe*,⁸² which involved a procedural due process challenge to Connecticut's sexual offender registry.⁸³ Similar to Alaska's sexual offender registry, which the Court upheld in *Smith*, Connecticut's registry also encompasses all sexual offenders located anywhere within the state, and does not provide a current dangerousness determination.⁸⁴ Because Connecticut does not designate different levels of disclosure for different classifications of sexual offenders, its Department of Public Safety must compile and disseminate information about every sexual offender in the

78. See Turner, *supra* note 26, at 495-96 (explaining offenders' challenges to sexual offender laws based upon procedural due process arguments).

79. U.S. CONST. amend. V (affording federal due process to citizens); U.S. CONST. amend. XIV, § 1 (prohibiting state action violating citizens' due process rights).

80. See Turner, *supra* note 26, at 495-96 (noting due process claims raised in attempt to invalidate offender registries and community notification laws). A common due process challenge arises when individuals convicted out-of-state later move to a new jurisdiction where the law requires that they register. *Id.* at 495. If the offender does not comply with the statute, the state will charge him or her with failure to register as a sexual offender. *Id.* The offenders, however, allege that the state never notified them of their obligation to register, therefore, any conviction for failure to register under these circumstances and without a hearing violates their procedural due process rights. *Id.*; see Wilkins, *supra* note 15, at 1255 (cautioning procedural due process involves rights previously enjoyed under law). A due process claim will not be successful if the state can show that it has not interfered with this previously enjoyed right. Wilkins, *supra* note 15, at 1255.

81. *Infra* notes 88-91 and accompanying text (highlighting Court's unanimous holding and providing Court's reasons for eliminating procedural due process claims).

82. 538 U.S. 1 (2003).

83. *Id.* at 3-4 (noting Court granted certiorari to determine procedural due process issues). The respondent, a convicted sexual offender, contended that Connecticut's sexual offender registry law deprived him of a liberty interest, namely the effect on his reputation resulting from public disclosure of his sexual offender status, without the benefit of a hearing to determine his current dangerousness. *Id.* at 6.

84. See CONN. GEN. STAT. §§ 54-251, 54-252, 54-254 (2006) (articulating respondent's major arguments against constitutional validity of registry statute). The respondent was a convicted sexual offender and Connecticut's version of Megan's Law required him to register as such. *Conn. Dep't of Pub. Safety*, 538 U.S. at 5-6. He contended that Connecticut's failure to provide a dangerousness hearing and the method in which the state sought to disseminate his name and information violated his procedural due process rights. *Id.* at 6.

state, predominantly over the Internet.⁸⁵

The Court unanimously rejected the respondent's assertion that Connecticut denied his procedural due process rights and upheld the statute based on several factors.⁸⁶ The Court analyzed the Connecticut statute, the legislative intent behind it, and the procedure Connecticut followed in enacting it, much as the Court did in *Smith*.⁸⁷ The Court declined to rule that Connecticut violated the respondent's procedural due process rights, reasoning that the respondent received sufficient procedural due process protection during the criminal phase of his case.⁸⁸ Although the respondent further argued that he was not currently dangerous, the Court explained that dangerousness determinations are irrelevant under the Connecticut statute because prior convictions represent the only factor governing sexual offender status and community notification requirements.⁸⁹ Connecticut's sexual offender statute does not violate procedural due process rights because convicted sexual offenders have ample opportunity to challenge this status during their criminal cases.⁹⁰

85. See CONN. GEN. STAT. §§ 54-251, 54-252, 54-254 (detailing dissemination methods of Connecticut's sexual offenders); see also *Conn. Dep't of Pub. Safety*, 538 U.S. at 4-5 (focusing on Connecticut's decision to require release of information about all sexual offenders). Connecticut treats every sexual offender, from the most dangerous repeat offender to a one-time offender who was convicted thirty years ago, exactly the same. See *Conn. Dep't of Pub. Safety*, 538 U.S. at 4-5. The respondent argued that Connecticut's failure to distinguish between different classes of sexual offenders before deciding what information to release was unconstitutional. See *id.* at 6; see also CONN. GEN. STAT. §§ 54-251, 54-252, 54-254 (2006) (announcing requirements of challenged Connecticut sexual offender laws).

86. *Conn. Dep't of Pub. Safety*, 538 U.S. at 8 (rejecting allegation of procedural due process violation). All nine Supreme Court justices joined in the opinion, although Justice Scalia and Souter also submitted concurring opinions. *Id.* at 2.

87. See *id.* at 4-5 (listing similarities between factors Court considered in deciding *Smith* and *Connecticut Department of Public Safety*). The Court determined that sexual offenders are a serious threat to the country, and, therefore, Connecticut had a right to enact legislation to fight this danger. See *id.* at 4. In implementing the obligations under the legislation, the Connecticut Department of Public Safety disseminates the information collected from this registry to the public for educational and safety purposes. See *id.* at 4-5; see also *supra* notes 74-77 and accompanying text (explaining systematic procedure outlined by Court in *Smith*).

88. See *Conn. Dep't. of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (stressing procedural due process rights satisfied under sexual offender statute). The Court analyzed the wording of the statute and the community notification disclosure language. See *id.* The website in question included disclaimers that stated the Connecticut legislature's intent to broadcast all sexual offender information, not just information regarding dangerous offenders. *Id.*

89. *Conn. Dep't of Pub. Safety*, 538 U.S. at 7 (holding procedural due process arguments not applicable in this situation). Because dangerousness was not a factor that the Connecticut Department of Public Safety considered before disseminating sexual offender information, individuals subject to its provisions were not entitled to a hearing to establish dangerousness. See *id.* at 7-8. The prior conviction of a sexual offense is the only factor needed for this statute to apply. See *id.* at 7; see also *Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding injury to reputation alone not violation of due process). Reputation is not a right entitled to special attention or protected by state law under a due process theory. See *Paul*, 424 U.S. at 701; see also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (proclaiming due process requires notice or hearings). A hearing required by due process exists to determine facts at issue. See *Constantineau*, 400 U.S. at 437. Unless a nexus between the hearing and the previously enjoyed liberty interest can be established, procedural due process challenges are not applicable. *Id.*

90. *Conn. Dep't of Pub. Safety*, 538 U.S. at 7 (noting offender afforded ample opportunity to contest sexual offender designation at trial). Connecticut's sexual offender website is very clear; the information

iii. *Unanswered Questions: Equal Protection and Substantive Due Process*

While affirming the Connecticut statute on procedural due process grounds, the Court openly questioned whether the statute would survive a challenge based on substantive due process grounds.⁹¹ Substantive due process requires both state and federal governments to enact laws that are fair and reasonable in content, while furthering legitimate governmental interests.⁹² The sexual offender in *Connecticut Department of Public Safety* not only failed to raise a substantive due process issue, but actually refuted such a claim, and the Court did not consider the issue.⁹³

In addition to questioning the validity of the statute under the Substantive Due Process Clause, Justices Souter and Ginsberg also expressed doubt as to its validity under the Equal Protection Clause.⁹⁴ With the Court's outright

posted is solely from prior convictions. *Id.* Connecticut gives no consideration to rehabilitation, to the passage of time from the prior offense, or to any issue of current dangerousness. *Id.* Unless otherwise reversed on appeal or pardoned by an appropriate body, the most and least dangerous sexual offenders in Connecticut are subject to the same community notification over the internet. *Id.*

91. See *Conn. Dep't of Pub. Safety*, 538 U.S. at 7-8 (questioning validity of statute under substantive due process). The majority opinion and both concurring opinions indicated that the Connecticut statute possibly violates an offender's substantive due process rights. See *id.* at 8; see also *id.* at 8-9 (Scalia, J., concurring) (indicating possible substantive due process violation under Connecticut statute); *id.* at 9-10 (Souter, J., concurring) (implying factors of case present substantive due process issues).

92. See *supra* note 79 and accompanying text (explaining constitutional foundations of procedural and substantive due process rights); see also Wilkins, *supra* note 15, at 1253-54 (defining substantive due process in context of criminal trials). A criminal enjoys a reduced expectation of privacy, but the government may not intrude on someone with a substantive expectation of privacy that society reasonably recognizes. See The U.S. Constitution Online: Constitutional Topic: Due Process, http://www.usconstitution.net/consttop_duep.html (last visited Mar. 26, 2007) [hereinafter U.S. Const. Online] (contending substantive due process focuses on reasonableness); see also Wilkins, *supra* note 15, at 1253-54. Substantive due process is the "why" of due process, and procedural due process is the "how". See U.S. Const. Online, *supra*. A law may be properly enacted and attempt to serve a legitimate government interest, thus satisfying procedural due process, yet still fail under the substantive due process theory that laws must be reasonable in their application. See *id.*; see also *State v. Robinson*, 873 So. 2d 1205, 1216-17 (Fla. 2004) (requiring substantive due process protections in legislation). In *Robinson*, the defendant was convicted of kidnapping after he carjacked a vehicle with a baby left in a car seat. *Robinson*, 873 So. 2d at 1208. Although the State did not concede any sexual intent on behalf of the defendant, the court was obligated to designate him as a sexual predator upon conviction. *Id.* The court held that in cases where there is absolutely no sexual element, sexual predator status upon conviction is a violation of an individual's substantive due process rights. *Id.* at 1217. The purpose of the Florida Sexual Predator Act is to protect the public from sexual predators, a goal that is not furthered by its application to individuals not involved in sexual crimes. *Id.* at 1216.

93. *Conn. Dep't. of Pub. Safety*, 538 U.S. at 8 (noting respondent did not believe substantive due process rights at issue). Chief Justice Rehnquist, writing for the majority, theorized that the respondent's entire claim was possibly "a substantive [due process] challenge to Connecticut's statute recast in procedural due process terms." *Id.*

94. *Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 9-10 (2003) (Souter, J., concurring) (leaving open equal protection questions). The Equal Protection Clause requires that statutes be applied equally to all citizens, not favoring one class of people over another. *Id.* In addition to the substantive due process issues that the other Justices raised, Justice Souter also found possible equal protection problems in the way Connecticut allows some petitioners to avoid the registration and reporting of prior sexual offenses. *Id.* at 9. Because the line between mandatory registration and exemption is a legislative decision, it is open to challenge under the Equal Protection Clause. *Id.* at 10; see also U.S. CONST. amend. XIV, § 1 (affording equal protection

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rejection of ex post facto and procedural due process challenges to sexual offender registries, the dicta expounded in *Connecticut Department of Public Safety* regarding substantive due process and equal protection allows for the possibility of declaring state sexual offender registries unconstitutional in the future.⁹⁵

iv. Constitutional Challenges in Florida Courts

In the wake of *Smith* and *Connecticut Department of Public Safety*, Florida experienced similar challenges to its sexual offender laws.⁹⁶ *Smith* and *Connecticut Department of Public Safety* provide useful guidance to Florida courts because the Florida sexual offender registry closely resembles the registries that the Supreme Court considered in those cases.⁹⁷ Relying on *Smith* and *Connecticut Department of Public Safety*, Florida courts have already upheld the sexual offender registry and the FSPA as constitutional, despite several challenges.⁹⁸ The Florida Supreme Court, however, overturned some provisions of the Florida sexual offender statutes, holding that such provisions are not reasonably related to the purpose of the legislation and are vague about due process rights.⁹⁹ Until either the United States or Florida Supreme Court

rights to United States citizens in relation to state action).

95. See *supra* note 92, 94 and accompanying text (theorizing substantive due process and equal protection issues still outstanding in sexual offender registry context).

96. See *infra* notes 97-99 and accompanying text (detailing Florida cases challenging sexual offender registry after *Smith* and *Doe*).

97. See *Ames v. State*, 870 So. 2d 203-04 (Fla. Dist. Ct. App. 2004) (highlighting prior offenses as sole qualification for requiring sexual offenders to register). Much like the Alaska and Connecticut registries, the Florida registry bases sexual offender designation solely on the existence of a prior conviction, and not on factors such as current dangerousness. *Id.*

98. *DeJesus v. State*, 862 So. 2d 847, 849 (Fla. Dist. Ct. App. 2003) (upholding Florida's sexual offender registry). Many of Florida's district courts have held both the sexual offender registry and the FSPA constitutional because they do not unduly infringe on an individual's rights. See *id.*; see also *Givens v. State*, 851 So. 2d 813, 814 (Fla. Dist. Ct. App. 2003) (holding sexual offender registry not unconstitutional). The Florida court in *Givens* upheld the sexual offender registry against both ex post facto and procedural due process claims, citing the recent Supreme Court rulings. See *id.*; *Reyes v. State*, 854 So. 2d 816, 817-18 (Fla. Dist. Ct. App. 2003) (asserting compelling state interest in notifying public of sexual offenders and predators); see also *Johnson v. State*, 795 So. 2d 82, 87-88 (Fla. Dist. Ct. App. 2000) (holding Florida legislature did not design sexual offender registry as punitive). Similar to the federal registry, Florida's registration is not meant to punish offenders; it is designed to protect and educate the public about the dangers of sexual offenders in the community. See *Johnson*, 795 So. 2d at 88.

99. *Milks v. State*, 894 So. 2d 924, 925 (Fla. 2005) (upholding constitutionality of Florida's Sexual Predators Act). *Milks* resolved a split among Florida appellate courts regarding whether the Sexual Predators Act violated procedural due process. *Id.* Relying on *Connecticut Department of Public Safety*, the Florida Supreme Court rejected the procedural due process claim because all appropriate opportunities to contest sexual predator determinations were available to the offenders at their criminal trials. See *id.* at 928. The court, however, did not address substantive due process and equal protection issues, despite the fact that both parties briefed the issue. *Id.* at 925; see also *State v. Robinson*, 873 So. 2d 1205, 1217 (Fla. 2005) (affirming district court's decision to reverse conviction based on violation of due process). In *Robinson*, the court refused to declare a reasonable relationship between the defendant's crime and his mandatory registration as a sexual predator. *Robinson*, 873 So. 2d at 1215. The defendant was convicted of carjacking and kidnapping a child

rules on the substantive due process and equal protection issues mentioned in the dicta of *Connecticut Department of Public Safety*, however, the constitutionality of many provisions of the Lunsford Act will remain unclear.¹⁰⁰

III. ANALYSIS: A CONSTITUTIONAL EXAMINATION OF THE LUNSFORD ACT

A. *Questions Answered: Ex Post Facto and Procedural Due Process*

Rulings in both federal and Florida courts have made successful ex post facto arguments against sexual offender laws nearly impossible.¹⁰¹ Although the standard significantly favors government actors, courts must apply the proper analysis to the Lunsford Act to determine if its contained provisions are punitive.¹⁰² Under Ex Post Facto Clause challenges, the Lunsford Act bears the indicia of legality because it is based on laws that have already survived similar ex post facto attacks.¹⁰³

The provisions of the Lunsford Act are also very similar to Alaska's sexual offender registry that the Supreme Court upheld against ex post facto violation allegations in *Smith*.¹⁰⁴ The Court upheld Alaska's registry after determining that its requirements were not punitive in nature.¹⁰⁵ In *Givens v. State*,¹⁰⁶ a Florida appellate court noted the similar nature of Florida's sex offender registry and Alaska's sex offender registry that the Court examined in *Smith*.¹⁰⁷ The close comparison between Florida's sex offender registry and Alaska's sex

that remained in a car seat in the back of the vehicle. *Id.* at 1208. Under Florida's sexual offender laws, the kidnapping offense required the defendant to register as a sexual predator, despite the state's concession that there was no sexual element to this crime. *Id.* The Florida Supreme Court held that the stigma of being labeled as a sexual predator, coupled with the registration requirements, triggered due process rights. *Id.* at 1213-14. In the narrow circumstance where the state concedes that no sexual act occurred and the individual did not commit the crime with any sexual intent or motivation, due process forbids sexual predator designation from attaching. *See id.* at 1217.

100. *See Milks*, 894 So. 2d at 925 (suggesting possible challenges to Florida's sexual offender statutes based on Supreme Court dicta); *see also supra* notes 91, 94 and accompanying text (indicating future challenges to statute on substantive due process and equal rights grounds possible).

101. *See Givens*, 851 So. 2d at 814-15 (applying *Smith* analysis to Florida law and denying ex post facto relief to sexual offenders); *see also supra* notes 71-77 and accompanying text (setting forth Supreme Court rejection of ex post facto challenge in *Smith*).

102. *See supra* notes 74, 76 and accompanying text (recognizing punitive aspect of sexual offender laws necessary to trigger ex post facto violation); *see also supra* note 77 and accompanying text (explaining only upon "clearest proof" of punitive nature will courts strike down statute).

103. *Milks*, 894 So. 2d at 925 (upholding FSPA); *see also DeJesus*, 862 So. 2d at 849 (observing similarities between Florida, federal, and other state's sexual offender laws).

104. *See Givens v. State*, 851 So. 2d 813, 814 (Fla. 2003) (comparing Alaska registry upheld in *Smith* with Florida registry); *see also supra* notes 71, 76-77 (detailing provisions of Alaska's sex offender registry).

105. *See Smith v. Doe*, 538 U.S. 84, 93 (2003) (reiterating non-punitive nature of sexual offender registries); *see also Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (asserting sexual offender registries not punitive).

106. 851 So. 2d 813 (Fla. Dist. Ct. App. 2003).

107. *See id.* at 814-15 (comparing Florida registry with Alaska's and holding registry neither punitive nor ex post facto violation).

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offender registry, combined with the holdings in *Smith* and *Givens*, make it unlikely that either the Florida Supreme Court or the United States Supreme Court will overturn this law on ex post facto grounds.¹⁰⁸

In 2003, a Florida appellate court indicated in *Dejesus v. Florida* that Florida's sexual offender registry was "similar but not identical" to the Connecticut registry that the Supreme Court upheld in *Connecticut Department of Public Safety*.¹⁰⁹ Comparisons of the Lunsford Act to the Connecticut sexual offender registry may resolve any allegations of procedural due process violations.¹¹⁰ In *Connecticut Department of Public Safety*, the Court set forth an extremely difficult standard that is necessary to overturn a sexual offender registry on procedural due process grounds.¹¹¹ The Florida Supreme Court has similarly decided the issue of procedural due process in favor of the state.¹¹² In *Milks v. State*, the Florida Supreme Court agreed with the United States Supreme Court and held that the state affords all necessary procedural rights and protections to the defendant at the criminal trial and, therefore, no constitutional violation occurs in post-conviction registration and community notification requirements.¹¹³ It is unlikely, therefore, that Florida courts will overturn the Lunsford Act on procedural due process grounds because they have already upheld the sexual offender registry and the FSPA.¹¹⁴

B. Questions Unanswered

i. Equal Protection

Despite the Supreme Court's dicta in *Connecticut Department of Public Safety*, courts have yet to examine state sexual offender statutes in the context of equal protection rights.¹¹⁵ Perhaps waiting for federal guidance, the Florida Supreme Court has also declined to resolve this issue, leaving speculation as to

108. See Wilkins, *supra* note 15, at 1267-69 (stressing *Smith* decision virtually ends ex post facto challenges to sexual offender statutes); see also *supra* note 107 and accompanying text (comparing Florida and Alaskan sex offender registries after *Smith*).

109. See *Dejesus v. State*, 862 So. 2d 847, 849 (Fla. Dist. Ct. App. 2003) (noting Florida sex offender registry similar to Connecticut registry).

110. Compare *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4-5 (2003) (outlining Connecticut sex offender registry); with *supra* notes 58-62, 64-66 and accompanying text (detailing Florida sex offender registry and notification provisions).

111. See *supra* note 86 and accompanying text (pointing to Court's unanimous decision in finding no procedural due process violation in *Connecticut Department of Public Safety*).

112. See *Milks v. State*, 894 So. 2d 924, 927-28 (Fla. 2005) (analogizing procedural due process arguments rejected in *Connecticut Department of Public Safety* to challenges against FSPA).

113. See *id.* at 928 (citing *Connecticut Department of Public Safety* precedent in upholding FSPA in face of procedural due process challenges).

114. See *supra* notes 82-86, 88-91, 104 and accompanying text (noting federal courts upheld Florida statutes and Florida courts upheld sexual offender registries on procedural due process grounds).

115. See *Conn. Dep't of Pub. Safety*, 538 U.S. at 10 (Souter, J., concurring) (explaining analysis of equal protection in never completed).

possible judicial rulings on equal protection grounds.¹¹⁶

Based on the similarities between the Connecticut and Florida sexual offender registries, Justice Souter's and Justice Ginsberg's equal protection dicta will definitely apply to any analysis of the Lunsford Act.¹¹⁷ It is unlikely, however, that Florida Courts will invalidate the Lunsford Act on equal protection grounds.¹¹⁸ Equal Protection concerns arose in *Connecticut Department of Public Safety* because Connecticut allowed certain convicted offenders to avoid sexual offender registration and community notification requirements.¹¹⁹ A similar analysis of Florida law will likely show that the Florida exemptions are fewer than those in Connecticut and serve legitimate public functions that are rationally related to the legislative intent behind and purpose of Florida's sexual offender statutes.¹²⁰ Florida's registration and notification requirements, division of individuals into sexual offenders and predators, and methods for exemption are clearly listed and difficult to circumvent.¹²¹ As a result, it is unlikely that any court will find an equal protection violation in the Florida sexual offender legislation or the Lunsford Act.¹²²

ii. *Substantive Due Process*

Similar to the absence of any equal protection decisions in the sexual offender law context, legal practitioners also have little guidance on how courts may interpret sexual offender legislation, such as the Lunsford Act, on substantive due process grounds.¹²³ Under substantive due process

116. See *Milks*, 894 So. 2d at 925 (avoiding equal protection analysis in upholding Florida Sexual Predators Act). In light of the *Connecticut Department of Public Safety* dicta, both parties in *Milks* addressed equal protection issues in their briefs. *Id.* The Florida Supreme Court, however, declined to address this issue. *Id.*

117. *Supra* note 104 and accompanying text (explaining Connecticut statute similar to Florida statute).

118. See *supra* notes 59-60, 62 and accompanying text (explaining Florida sex offender registry and notification laws apply equally to all convicted offenders).

119. See *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4-5 (2003) (Souter, J., concurring) (asserting equal protection analysis of Connecticut statute necessary). Under Connecticut law, exceptions to the mandatory registration and community notification requirements exist for certain individuals. *Id.* at 9. For example, if an individual under the age of nineteen was convicted of intercourse with a person between the ages of thirteen and sixteen, a court may exempt registration. *Id.* A court may also exempt an individual from community notification requirements if that notification would identify the victim, which is a situation that often arises in cases of sexual assaults committed upon relatives. *Id.* Because the state treats certain offenders differently under the Connecticut statute, an equal protection analysis is appropriate. *Id.* at 10.

120. See FLA. STAT. § 775.21(7) (2004) (cautioning disclosure of victim's identity not permitted in community notification requirements).

121. See *supra* notes 59-60, 62 and accompanying text (outlining sexual offender and predator definitions, registration requirements, and notification methods of exempting designation).

122. See *supra* notes 59-60, 62, 104 and accompanying text (stating equal protection violation unlikely in Connecticut statute).

123. See *Milks v. State*, 894 So. 2d 924, 925 (Fla. 2005) (declining to analyze FSPA under substantive due process). Although both parties briefed substantive due process issues, the court expressly avoided any interpretation of such issues. See *id.*; see also *Conn. Dep't of Pub. Safety*, 538 U.S. at 8 (recognizing possible

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requirements, the Florida sexual offender registry must reasonably serve a legitimate governmental interest if it is to withstand judicial review.¹²⁴ Similar to the Supreme Court's decision in *Connecticut Department of Public Safety*, the Florida Supreme Court also declined to address a substantive due process claim in *Milks*.¹²⁵ The fact that the Supreme Court expressly questioned the validity of sexual offender laws on substantive due process grounds without analysis is troubling for proponents of such legislation.¹²⁶ Several provisions of sexual offender laws, such as the Lunsford Act, therefore require a thorough review for substantive due process compliance.¹²⁷

The substantive due process issues the Court mentions in the *Connecticut Department of Public Safety* dicta raise the question of how sexual offenders are categorized, especially in cases where offenders maintain they are not a danger to the community, and therefore, are not worthy of registration and notification.¹²⁸ As specifically applied to the Florida sexual offender registry and the Lunsford Act, Florida must show that the registration and notification provisions rationally serve a legitimate governmental interest.¹²⁹ Although a direct analysis of substantive due process has yet to occur, it is possible to infer the result from existing Florida case law.¹³⁰

In *Reyes v. State*, Florida's Fourth District Court of Appeals upheld both the sexual offender registry and FSPA as serving legitimate and compelling governmental interests and denied a substantive due process argument.¹³¹ The

substantive due process challenge to sexual offender laws). Although the Court's majority and concurring opinions expressed a substantive due process concern, the parties did not brief the issue, and the respondent expressly disavowed it, leaving the Court powerless to decide the matter. *Conn. Dep't of Pub. Safety*, 538 U.S. at 9-10 (Souter, J., concurring).

124. U.S. Const. Online, *supra* note 92 (theorizing valid legislation must comply with substantive due process requirement).

125. See *Milks*, 894 So. 2d at 925 (declining to consider substantive due process issues).

126. See Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731, 2739-41 (2004) (suggesting sexual offender registries violate substantive due process rights). The author theorized that sexual offender laws violate substantive due process rights when they force individuals to disclose personal information. *Id.* at 2739. The Note further alleges that Megan's Law statutes are not narrowly tailored enough to serve the compelling governmental interest of protecting and informing the general public, because all individuals convicted of varying degrees of sexual offenses are treated the same. See *id.*

127. See *supra* notes 59-60, 62 and accompanying text (outlining provisions of Florida sex offender registry that may not survive substantive due process scrutiny).

128. *Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (noting all sexual offenders subject to registry and notification requirements regardless of actual danger posed). Under the Connecticut statute, the State is not required to prove the sexual offender is currently dangerous. *Id.* The registration and notification requirements stem solely from the prior conviction. *Id.*

129. See *supra* notes 59-60 and accompanying text (explaining different ways sexual offender status attaches to individuals and how states remove it); see also *supra* note 62 and accompanying text (commenting community notification not required for sexual offenders); *supra* notes 59, 64-65 and accompanying text (highlighting sexual predator status).

130. *Infra* notes 131-132 and accompanying text (detailing Florida cases that support finding sufficient substantive due process protections in sex offender registry).

131. *Reyes v. State*, 854 So. 2d 816, 817-18 (Fla. Dist. Ct. App. 2003) (holding threat posed by sexual

lack of a substantive due process violation is further supported by the *Robinson* decision in which the Florida Supreme Court limited a provision of the FSPA on substantive due process grounds, determining that sexual predator status may only apply to crimes where an element of sexual conduct is present.¹³² The court was explicitly clear, however, that the offender's sexual status was invalid solely because no sexual conduct existed, thereby indicating a reluctance to expand such substantive due process rights to individuals convicted of sexual offenses.¹³³

IV. CONCLUSION

The threat that sexual offenders pose to the public, especially repeat sexual offenders, warrants tough legislation. The question of where to draw the line between civil liberties and the need to protect the public is not easily definable. Sufficient evidence exists, however, to bolster the government's ability to enact legislation such as the Lunsford Act.

The documented threat of sexual offender recidivism, combined with the publicity that follows these types of crimes, makes it very likely that courts, both federal and state, will uphold the sexual offender registry and notification statutes. In upholding various sexual offender statutes against ex post facto and procedural due process challenges, the Supreme Court has set the parameters of acceptable sexual offender legislation for individual states to follow. Although equal protection and substantive due process questions remain, courts are unlikely to invalidate sexual offender statutes based upon such grounds. The rational relation between the purpose of sexual offender statutes and the means of accomplishing this purpose is clearly reasonable. Furthermore, such statutes affect only those individuals who have already been convicted of certain offenses and who require heightened supervision. Statutes such as the Lunsford Act, therefore, are constitutional and courts are unlikely to invalidate their registration and community notification provisions.

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offenders and predators sufficient to infringe on individuals' liberty interests). The *Reyes* court cited evidence of recidivism and violence among sexual offenders and predators as reasons for imposing sexual offender registries and notification statutes. *Id.* at 818-19. Even if a liberty interest exists, an infringement upon such interests is justified given the significant compelling governmental interest of protecting society from sexual offenders. *Id.* at 818.

132. *See* State v. Robinson, 873 So. 2d 1205, 1217 (Fla. 2004) (affirming district court's decision and reversing sexual predator designation for individual convicted of kidnapping).

133. *Id.* (citing narrow application of ruling to particular facts of case).