A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure

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"[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or careless."[1]

I. INTRODUCTION

Although recidivism among select criminal subgroups has long been a central focus of American penology,[2] the current generation of sex offender registration and community notification laws surely marks a high water mark in this regard.[3] Driven by affirmative "legislative findings"[4] that typically vastly overstate the capacity of

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1. New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

2. See, e.g., Lawrence Friedman, Crime and Punishment in American Society 335-39 (1993); Nicole Raftner, Eugenics, Class, and the Professionalization of Social Control, in Inequality, Crime and Social Control (G. Bridges & M. Myers eds., 1994); Note, Criminal Registration Laws, 27 J. Crim. L. & Criminology 295 (1936); Note, Criminal Statistics and Identification of Criminals, 19 J. Crim. L. & Criminology 36 (1928).

3. Criminal registration laws trace their origins in the United States back to at least the 1930s. See Note, Criminal Registration Ordinances: Police Control Over Potential Recidivists, 103 U. Pa. L. Rev. 60, 62 (1954). California is believed to have enacted the first exclusively sex offender-oriented registration law in 1947. See Elizabeth A. Pearson, Status and Latest Developments in Sex Offender Registration and Notification Laws 45, in National Conference on Sex Offender Registries (U.S. Bureau of Justice Statistics 1998). The State of Washington, in 1990, became the first U.S. jurisdiction to implement a "notification" provision for sex offenders. Id. For an insightful examination of why sex offenders, in particular, historically have been singled out for special treatment, see Deborah W. Denno, Life Before the Modern Sex Offender Statutes, 92 Nw. U. L. Rev. 1317 (1998).

4. See, e.g., Ark. Code Ann. § 12-12-902 (Michie 1999) ("The General

social science to predict the likelihood, frequency, and nature of sex offender recidivism,[5] such laws are now

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Assembly finds that sex offenders pose a high risk of reoffending after release from custody . . . . "); Fla. Stat. Ann. § 775.21(3)(a) (West 1999) ("Sexual offenders are extremely likely to use physical violence and repeat their offenses . . . . "); Idaho Code § 18-8302 (1999) ("The legislature finds that sexual offenders present a significant risk of reoffense . . . . "); La. Rev. Stat. Ann. § 15:540(A) (West 1999) ("The Legislature finds that sex offenders, sexually violent predators, and child predators often pose a high risk of engaging in sex offenses . . . even after being released . . . . "); Mass. Gen. Laws ch. 74 § 1 (1999) ("The general court hereby finds that: (1) the danger of recidivism posed by sex offenders . . . to be grave and that the protection of the public from these sex offenders is of paramount interest to the government . . . . "); Neb. Rev. Stat. Ann. § 29-4002 (Michie 1999) ("The Legislature finds that sex offenders present a high risk to commit repeat offenses."); N.M. Stat. Ann. § 29-11A-2(A) (Michie 1999) ("The legislature finds that: (1) sex offenders pose a significant risk of recidivism . . . . "); N.C. Gen. Stat. § 14-208.5 (1999) ("The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or confinement . . . . "); Ohio Rev. Code Ann. § 2950.02(2) (Anderson 1999) ("Sexual predators and habitual sex offenders pose a high risk of engaging in further offenses even after being released . . . . "); Okla. Stat. tit. 57, § 581(B) (1999) ("The Legislature finds that sex offenders who commit other predatory acts against children . . . pose a high risk of re-offending after release from custody."); S.C. Code Ann. § 23-3-400 (Law. Co-op. 1999) ("Statistics show that sex offenders pose a high risk of re-offending."); Tenn. Code Ann. § 40-39-101(b)(1) (1997) ("sexual offenders pose a high risk of engaging in further offenses after release … and protection from these offenders is a paramount public interest.").

The Colorado Legislature, in contrast, has adopted the nation's most measured provision of this sort:

> The general assembly hereby finds that a small percentage of persons who are convicted of offenses involving unlawful sexual behavior and who are identified as sexually violent predators may pose a high enough level of risk to the community that persons in the community should receive notification concerning the identify of these sexually violent predators. The general assembly also recognizes the high potential for vigilantism that often results from community notification and the dangerous potential that the fear of such vigilantism will drive a sex offender to disappear and attempt to live without supervision. The general assembly therefore finds that sex offender notification should only occur in cases involving a high degree of risk to the community and should only occur under carefully controlled circumstances that include providing additional information and education to the community concerning supervision and treatment of sex offenders.

Colo. Rev. Stat. § 16-13-901 (1999).

5. See Doe v. Attorney Gen., 715 N.E.2d 37, 44 (Mass. 1999) (concluding that "the expert evidence makes plain that the data concerning recidivism rates change significantly depending on circumstances . . . . We glean from that evidence that uncertainties surround many aspects of the subject of sex offender recidivism."). Indeed, sex offender risk assessments are notoriously inaccurate in

subjecting hundreds of thousands of offenders to ongoing state control and community opprobrium, sometimes for their lifetimes.[6] With their avowed faith in the predictive capacity of aggregate statistics, present-day registration and notification laws appear the embodiment of what Malcolm Feeley and Jonathan Simon call "actuarial justice," an approach characterized by a pervasive skepticism, indeed pessimism, about the capacity of certain offenders to pursue lawful lives.[7] To a significant extent, the laws serve "a kind of waste management function,"[8] a

favor of finding false-positives. See, e.g., Eric S. Janus, The Use of Social Science and Medicine in Sex Offender Commitment, 23 New Eng. J. on Crim. & Civ. Confinement 347, 372 (1997) (citing studies); Jenny A. Montana, Note, An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law, 3 J.L. & Pol'y 569, 590 (1995) (noting that predictions of dangerousness result in false-positives two-thirds of the time). See generally R. Karl Hanson & Monique T. Bussiere, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. of Consult. & Clinical Psych. 348, 357 (1998) (concluding, on basis of review of multiple empirical studies, that only 13% of offenders committed new sex offenses within 4-5 year follow-up period); Robert J. McGrath, Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings, 35 Int'l J. of Offender Therapy & Comp. Criminology 328, 331 (1995) (providing comprehensive review of studies revealing the difficulty of assessing likelihood of sex offender recidivism). Even more fundamentally, there exists widespread disagreement over whether, in fact, sex offenders as a criminal sub-group manifest higher recidivism rates than other criminal actors. See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 572-73 (1994) (stating that "no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major offenders."); Kirk Heilbrun et al., Sexual Offending: Linking Assessment, Intervention and Decision Making, 4 Psychol. Pub. Pol'y & L. 138, 139 (1998) (noting that there is "little consensus in the literature").

6. See Megan's Law in All 50 States, <http://www.klaaskids.org/pg-legmeg.htm> (providing state-by-state totals of registered offenders).

7. See, e.g., Malcolm Feeley & Jonathan Simon, Actuarial Justice: The emerging New Criminal Law, in The Futures of Criminology 173, 174 (David Nekin ed., 1994).

8. Malcolm Feeley & Jonathan Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 Criminology 449, 470 (1992). See also Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 Psychol. Pub. Pol'y & L. 505, 560 (1998) (observing that "[a] paradigm shift has occurred in which the focus has moved from dangerousness to risk."). For an insightful discussion of the ongoing legal, scientific, and ethical controversies surrounding actuarial versus clinical risk assessments more generally see Grant H. Morris, Defining Dangerousness:

massive corrections experiment taking place beyond prison walls.[9]

In a departure from previous commentaries, which focused largely on the constitutionality of registration and notification,[10] issues now largely resolved by the courts,[11] this Article addresses the methods now being used by U.S. jurisdictions to sort and classify sex offenders deemed by legislatures to possibly warrant registration and community notification.[12] As will be evident, jurisdictions

Risking a Dangerous Definition, 10 J. Contemp. Legal Issues 61 (1999).

9. See, e.g., Tim Doulin, Sex-Abuse Hearings Piling Up, The Columbus Dispatch (Ohio), Apr. 29, 1999, at 1A (discussing how prosecutors, public defenders and courts are struggling to carry out classification hearings for hundreds of current and previously convicted offenders).

10. See, e.g., Daniel L. Feldman, The "Scarlet Letter Laws" of the 1990s: A Response to the Critics, 60 Alb. L. Rev. 1081 (1997); Stephen R. McAllister, The Constitutionality of Kansas Laws Targeting Sex Offenders, 36 Washburn L.J. 419 (1997); April R. Bedarf, Comment, Examining Sex Offender Community Notification Laws, 83 Cal. L. Rev. 885 (1995).

11. For examples of unsuccessful eighth amendment claims see, Roe v. Farwell, 999 F. Supp. 174, 193 (D. Mass. 1998); Doe v. Kelly, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); State v. Scott, 961 P.2d 667, 674 (Kan. 1998); Doe v. Poritz, 662 A.2d 367, 405 (N.J. 1995). For examples of unsuccessful ex post facto and double jeopardy claims see, Doe v. Poritz, 662 A.2d at 404; Spencer v. O'Connor, 707 N.E.2d 1039, 1044 (Ind. Ct. App. 1999); Snyder v. State, 912 P.2d 1127, 1132 (Wyo. 1996). For its part, the U.S. Supreme Court has denied certiorari in several cases raising unsuccessful constitutional challenges to registration and notification. See, e.g., Russell v. Gregoire, 124 F.3d 1079 (9th Cir.), cert. denied sub nom. Stearns v. Gregiore, 118 S. Ct. 1191 (1998); Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997), cert. denied, 118 S. Ct. 1066 (1998); E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997), cert. denied sub nom. Verniero v. W.P., 118 S. Ct. 1039 (1998). Moreover, the Court's outright approval of Kansas' "Sexually Violent Predator Act," in Kansas v. Hendricks, 521 U.S. 346 (1997), which involved the post-confinement, involuntary civil commitment of sex offenders, further signals the Court's disinclination to find basic constitutional fault with registration and notification, a demonstrably less intrusive method of social control. See generally Eric S. Janus, Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation, 92 Nw. U. L. Rev. 1279 (1998) (discussing historic and modern applications of sex offender commitment laws).

12. At present, jurisdictions use any (or some combination) of three primary methods of informing communities of the whereabouts of registered offenders. These involve: (1) "public access," which requires interested members of the community to request information from a given jurisdiction's registry (which can exist in written or CD-ROM form, and at times can also be accessed by telephone "hot-line"); (2) Internet access, whereby the jurisdiction maintains a sex offender "web site" containing registrants' information; and (3) affirmative community

differ broadly not just in their basic approaches to classification for purposes of notification, but also in the procedural and substantive rules that increasingly dominate sex offender classification decision-making. In many jurisdictions these procedures were imposed legislatively from the outset, with little in the way of judicial refinements occurring over time. In others, successful due process challenges have resulted in imposition of new procedural requirements, where none (or some lesser form) initially existed legislatively.[13]

Taken as a whole, the various approaches now in use reflect differing levels of faith in the actuarial capacity of the justice system to predict sex offender recidivism. In many jurisdictions, for instance, legislatures have mandated that offenders convicted of specified offenses register and be subject to notification, without regard for individual risk, in explicit deference to empirical estimates

notification by law enforcement, which can involve the use of informational fliers and door-to-door visits by police. See Devon B. Adams, U.S. Bureau of Justice Statistics, Update 1999: Summary of State Sex Offender Registry Dissemination Procedures (Aug. 1999) (describing variety of methods); Alan R. Kabat, Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake, 35 Am. Crim. L. Rev. 333, 344-45 (1998) (same). Among the various strategies, the Internet, with its unrestricted geographic sweep and capacity to convey large amounts of information, arguably possesses the greatest potential for widespread dissemination—even beyond state or local boundaries. Indeed, in California, where authorities primarily use a CD-ROM to effectuate notification, individuals have transcribed registrant information and implemented their own web sites. See Kathleen Ingley, Sex Offender Info Goes Online; Posting Seen as Powerful Tool, Menace, Ariz. Republic, May 4, 1999, at A1. Maintaining and ensuring the accuracy of such information among the states that utilize the Internet method has become a costly and time-consuming endeavor. Id.

13. See, e.g., E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997); Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998); Roe v. Farwell, 999 F. Supp. 174 (D. Mass. 1998); Doe v. Attorney Gen., 686 N.E.2d 1007 (Mass. 1997); In re Risk Level Determination of C.M., 578 N.W.2d 391 (Minn. Ct. App. 1998); Doe v. Poritz, 662 A.2d 367 (N.J. 1995); Noble v. Board of Parole and Post-Prison Supervision, 964 P.2d 990 (Or. 1998). But see Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999) (rejecting procedural due process challenge); Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997) (same), cert. denied sub nom. Stearns v. Gregoire, 118 S. Ct. 1191 (1998); Femedeer v. Utah Dep't of Corrections, 35 F. Supp. 2d 852 (D. Utah 1999) (same); Doe v. Kelly, 961 F. Supp. 1105 (W.D. Mich. 1997) (same); Lanni v. Engler, 994 F. Supp. 849 (E.D. Mich. 1998) (same).

of unacceptably high rates of sex offender recidivism. In others, less actuarial faith is evinced, and offenders are evaluated on a case-by case basis often by means of "risk assessment" tools, themselves premised on recidivism risk-related criteria. Even among this latter category of jurisdictions, however, basic differences prevail on the core issues of how much proof is required to satisfy risk-level classification criteria, which party (offender or the state) bears the burden of proof, and whether a right to appeal the classification exists, issues that similarly turn on risk and its allocation.

In short, with sex offender registration and community notification in effect virtually nationwide, Americans are now engaged in an unprecedented national experiment in actuarial justice. This Article represents an initial inquiry into the procedural machinery involved in this undertaking, and considers what the diversity of procedures adopted by jurisdictions perhaps says about our faith in actuarial justice.

II. FEDERAL LAW

Current federal law pertaining to sex offender registration and community notification has its origins in three recent congressional initiatives. The initial federal law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, enacted in September 1994, specifies the minimum standards for state registration of sex offenders. The Wetterling Act directs states to obtain particular information from designated sex offenders, requires eligible sex offenders to remain registered for at least ten years, and mandates that states release "relevant information that is necessary to protect the public concerning a specific person required to register."[14] States must register persons convicted of a criminal offense against a victim who is a minor[15] and those

14. 42 U.S.C. §§ 14071(a)(1)(A), (b)(6)(A)(e)(2) (Supp. 1999).

15. Such an offense is defined as:

any criminal offense in a range of offenses specified by State law which is

convicted of a "sexually violent offense."[16] Registration information, at a minimum, for such offenders must include name, address, fingerprints and a photograph.[17] Offenders are to remain subject to the law for the entire minimum ten-year period, with exceptions made only when the underlying conviction is reversed, vacated or set aside, or the offender is pardoned.[18]

The federal standards "constitute a floor for state programs, not a ceiling"; states are free to broaden the list of eligible offense categories, lengthen the mandated registration period, and impose other measures more stringent than required by the Wetterling Act.[19] Likewise, although Wetterling requires that registered information be released, as "necessary to protect the public,"[20] federal requirements on the geographic scope, method and extent

comparable to or which exceeds the following range of offenses:

(i) kidnapping of a minor, except by a parent;

(ii) false imprisonment of a minor, except by a parent;

(iii) criminal sexual conduct toward a minor;

(iv) solicitation of a minor to engage in sexual conduct;

(v) use of a minor in a sexual performance;

(vi) solicitation of a minor to practice prostitution;

(vii) any conduct that by its nature is a sexual offense against a minor; or

(viii) an attempt to commit an offense described in any of clauses (i) through (vii), if the State—

(I) makes such an attempt a criminal offense; and

(II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

42 U.S.C. § 14071(a)(3)(A) (1994 & Supp. 1999).

16. Defined by federal law to include "a range of offenses specified by State law which is comparable to or which exceeds the range of offenses encompassed by aggravated sexual abuse or sexual abuse. . . or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse." 42 U.S.C. § 14071(a)(3)(B) (Supp. 1999).

17. See Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 Fed. Reg. 572, 579 (issued Jan. 5, 1999, amended Jan. 22, 1999) [hereinafter Final Guidelines].

18. See id. at 576.

19. Id. at 575.

20. See supra note 14 and accompanying text.

of registration information disseminated are notably open-ended.[21] Also, and most important to the discussion here, Congress provided states with considerable discretion relative to standards and procedures for determining which offenders warrant specific degrees of notification.[22] According to the Final Guidelines implementing the Wetterling Act, the states retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes and to specify standards and procedures for making those classification determinations.[23]

The Pam Lychner Sexual Offender Tracking and Identification Act of 1996 amended the Wetterling Act, increasing the registration requirements in relation to certain serious offenders. Pursuant to the Lychner Act, states must impose lifetime registration for offenders with one or more prior convictions for a registration-eligible offense and those initially convicted of specified "aggravated" sex offenses.[24] The latter category covers sex crimes involving penetration through the use or threat of force, and sexual acts involving penetration with victims below the age of twelve.[25]

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21. See Final Guidelines, supra note 17, at 581-82.

22. See id. at 582.

23. Id. The Guidelines acknowledge the acceptability of at least three different classification approaches. First, states can engage in "particularized risk assessments of registered offenders, with differing degrees of information released based on the degree of risk." Second, states are free to "make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." Third, states can provide information on registrants upon request and "make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning these offenders." Id. As discussed at length infra, these approaches are reflected to varying degrees in the evolving classification systems of the states.

24. 42 U.S.C. § 14071(b)(6)(B)(i)-(ii).

25. See Final Guidelines, supra note 17, at 582. The Final Guidelines reflect the additional requirement contained in the Lychner Act that information, to some degree, must be circulated to the public, not just local law enforcement, governmental and non-governmental agencies, prospective employers and victims

Finally, pursuant to the Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Congress prescribed heightened registration and notification requirements for offenders deemed "sexually violent predators" (SVPs),[26] which federal law mandates that jurisdictions take steps to identify.[27] Such an offender is one who has "been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses."[28] Jurisdictions are free to decide the timing of the determination of whether an offender is a SVP (at pre-release or time of sentencing) and how the determination is to be initiated (either by prosecutorial discretion or routinely after conviction for a sexually violent offense).[29]

Federal law is more particular with respect to the procedures used to identify SVPs. The determination must be "made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies."[30] The Department of Justice, however, can (1) waive these requirements if a state "has established alternative procedures or legal standards for designating a person as a

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of registrants' offenses: "Information must be released to members of the public as necessary to protect the public from registered offenders." Final Guidelines, supra note 17, at 581.

26. 42 U.S.C. § 14071(a)(2), (a)(3)(C)-(E), (b)(1)(B), (b)(3)(B), (b)(6)(B)(iii) (Supp. 1999).

27. See Final Guidelines, supra note 17, at 583.

28. 42 U.S.C. § 14071(a)(3)(C). For a definition of "sexually violent offense" see supra note 16. Federal law defines "mental abnormality" as follows:

> a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

See 42 U.S.C. § 14071(a)(3)(D). Congress failed to define "personality disorder," thereby making the category "a matter of state discretion." See Final Guidelines, supra note 17, at 583.

29. See id. at 583.

30. 42 U.S.C. § 14071(a)(2)(A).

sexually violent predator";[31] or (2) "approve alternative measures of comparable or greater effectiveness in protecting the public from unusually dangerous or recidivistic sexual offenders."[32] As for the latter, the Final Guidelines suggest as acceptable alternatives the use of live expert and other testimony to permit courts to reach their own decisions or, in lieu of judicial involvement, delegate responsibility to "a parole board or other administrative agency with adjudicatory functions."[33]

SVPs, at a minimum, must provide the following information: their name, "identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the[ir] mental abnormality or personality disorder."[34] Federal law also requires that SVPs verify their address information on a more frequent basis, quarterly,[35] and remain subject to registration and notification requirements throughout their lifetimes.[36]

Congress has required that all U.S. jurisdictions comply with the aforementioned standards by November 25, 2000, subject to possible extension, under threat of loss of a significant portion of federal law enforcement funding.[37] At present, virtually all U.S. jurisdictions have some form of registration and notification classification regime in place, although not all satisfy the specific federal requirements set forth above.

III. THE MECHANICS OF CLASSIFICATION

Jurisdictions now use two basic methods of classifying

31. 42 U.S.C. § 14071(a)(2)(B).
32. 42 U.S.C. § 14071(a)(2)(C).
33. Final Guidelines, supra note 17, at 583.
34. 42 U.S.C. § 14071(b)(1)(B).
35. See 42 U.S.C. § 14071(b)(3)(B).
36. See 42 U.S.C. § 14071(b)(6)(B) (iii).
37. See Final Guidelines, supra note 17, at 586. According to the Final Guidelines, states that fail to come into compliance within the specific time periods will be subject to a mandatory 10% reduction of Byrne Formula Grant funding, and any funds that are not allocated to non-complying states will be reallocated to states that are in compliance. Id.

sex offenders for purposes of notification: compulsory and discretionary.[38] The compulsory method, used in nineteen states,[39] requires all offenders convicted of certain child or sex offenses specified by the legislature to register and undergo notification, without regard for risk of individual offender recidivism.[40] In Tennessee, for instance,

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38. To the extent possible, the procedures discussed here are current as of October, 1999 based on a state-by-state Westlaw review of existing statutory law and telephone conversations with local authorities. The survey made it quite evident that sex offender classification procedures are in a significant state of flux, due both to state efforts to comply with the federal mandates, and the highly charged political nature of the subject matter. Another factor complicating the analysis here is that jurisdictions very often prescribe different procedures for different offender populations, drawing distinctions on the basis of date of offense or release. For practical purposes, the Article therefore focuses only upon law and procedures affecting offenders subject to the classification approach most recently put in effect.

Also, the approaches of two jurisdictions, Vermont and Pennsylvania, will not be addressed here. Vermont, at this time, has no system in place to effectuate registrant community notification, yet it is expected that the Vermont Legislature will revamp the State's system by May, 2000. Telephone Interview with Max Schlueter, Director, Vermont Criminal Information Center, Dept. of Public Safety (January 11, 2000) (transcript on file with author). In Pennsylvania, a successful due process challenge to the Commonwealth's classification and notification system has obliged the legislature to recast the system used there. See Commonwealth v. Williams, 733 A.2d 593 (Pa. 1999), cert. denied, 68 U.S.L.W. 3311 (U.S. Jan. 10, 2000). It is expected that the legislature will do so some time in Spring 2000. Telephone Interview with Jennifer Hitz, Office of Legislative Affairs, Pennsylvania Board of Probation and Parole (January 11, 2000) (transcript on file with author).

For a discussion of the emerging procedural due process concerns in the area, especially whether community notification jeopardizes constitutionally protectible liberty interests, see Wayne A. Logan, Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws, 89 J. Crim. L. & Criminology (forthcoming 2000).

39. See Ala. Code § 15-20-21 (1999); Alaska Stat. §§ 18.65.087, 12.63.010 et seq. (Michie 1999); Cal. Penal Code § 290 et seq. (West 1999); Conn. Gen. Stat. § 54-251 et seq. (1999); Del. Code Ann. tit. 11, § 4121(3) (1999); 730 Ill. Comp. Stat. 150/3 et seq. (West 1999); Ind. Code § 5-2-12-4 et seq. (1999); Kan. Stat. Ann. § 29-4902 et seq. (1999); Mich. Comp. Laws Ann. § 28.722 et seq. (West 1999); Miss. Code Ann. § 45-33-1 et seq. (1999); Mo. Rev. Stat. § 589.400 et seq. (1999); N.H. Rev. Stat. Ann. § 651-B:1 et seq. (1999); N.M. Stat. Ann. § 29-11A-2 et seq. (Michie 1999); Okla. Stat. tit. 57, § 581 et seq. (1999); S.C. Code Ann. § 23-3-410 et seq. (Law. Co-op. 1999); S.D. Codified Laws § 22-22-31 et seq. (Michie 1999); Tenn. Code Ann. § 40-39-102 et seq. (1997); Utah Code Ann. § 77-27-21.5 et seq. (1999); Va. Code Ann. § 19.2-298.1 (Michie 1999).

40. A few states in this category do provide courts a degree of modest discretion to not subject offenders to registration and notification. Alabama, for

individuals convicted of specified sex offenses are required to register, without regard to individual risk.[41] The Tennessee Bureau of Investigation thereafter makes available on its Internet site the registration information collected (including the offender's name, home address, photo, date of birth, and driver's license number).[42] In Oklahoma, depending on which statutorily specified crime an offender is convicted of, the offender is classified as a "sex offender," or a "habitual" or "aggravated sex offender."[43] Sex offenders must verify their registration status annually for ten years,[44] while habitual or aggravated offenders must do so every ninety days for their lifetimes.[45] Information (e.g., name, address, photo, and offense) on all registrants is available to the public by request or by Internet access,[46] but local law enforcement can also provide information on registrants to the community at-large "by any method of communication it deems appropriate."[47]

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instance, expressly excepts juvenile sex offenders from its compulsory registration and notification scheme, mandating that "certain precautions should be taken to target the juveniles that pose the more serious threats to the public." Ala. Code § 15-20-20. Juvenile offenders are thus subject to community notification only upon request by the state and ultimate recommendation by the sentencing court, which evaluates each juvenile offender in terms of recidivism-related criteria. Ala. Code § 15-20-28(c)-(g). If the court concludes that notification is warranted, the juvenile is categorized in any of three risk-levels, with level three entailing the same aggressive public notification as experienced by adult sex offenders. Ala. Code § 15-20-28(g). See also, e.g., Conn. Gen. Stat. Ann. § 54-251(b)(c) (allowing court to "exempt" certain low-level offenders but only if otherwise "not required for public safety."); Del. Code Ann. tit. 11, § 4121(e)(6)(7) (permitting sentencing court to grant classification relief under limited circumstances and permitting prosecution to seek court approval of classification "higher than the presumptive tier").

At the same time, statutory law can permit supervising courts limited discretion to require registration, and hence perhaps notification, for non-enumerated offenses. See, e.g., Conn. Gen. Stat. § 54-254(a) (any felony "committed for a sexual purpose").

41. See Tenn. Code Ann. § 40-29-102 (1997).
42. See id § 40-39-106(f).
43. Okla. Stat. tit. 57, § 583 (1999).
44. See id.
45. See id § 584.
46. See id §§ 584(C),(D).
47. Id. § 584(H)(3).

Similarly, in Alabama, certain juveniles and all adults convicted of a "criminal sex offense,"[48] as specified by statute, are subject to compulsory registration and community notification by means of a "notification flyer,"[49] which is distributed by hand or regular mail by police.[50] In Alabama's larger cities, all persons who live within 1,000 feet of the registrant's declared address are to be notified, as well as all schools and child care centers within three miles; in smaller cities and towns, residents within 1500-2000 feet of the registrant's home, as well as schools and child care centers within three miles receive notification.[51]

The Alaska Court of Appeals, interpreting the Alaska Sex Offender Registration Act, recently articulated the rationale supporting this compulsory approach:

> Under ASORA, the Department of Public Safety collects the information provided by each registrant but performs no adjudication or classification of individual offenders. The Department creates the registry and enables public access to the registry . . . The legislature decided that the fact of an offender's conviction for a sex offense was sufficient reason to include that offender in the registry because of the potential for re-offense. It is not an irrational conclusion for the legislature to create the sex offender registry in response to the potential for recidivism that sex offenders

48. Ala. Code § 15-20-21.

49. Id. § 15-20-21(3). In particular, the flyer, which is to be distributed before the registrant's release or upon any change in residence, is to include:

> Name; actual living address; sex; date of birth; complete physical description, including distinguishing features such as scars, birth marks, or any identifying physical characteristics; and a current photograph. This statement shall also include a statement of the criminal sex offense for which he or she has been convicted, including the age and gender of the victim, and the geographic area where the offense occurred . . . .

Id.

50. Ala. Code § 15-20-25(a)(b). Alabama law also permits notification by means of posting or by "publicizing the notice in a local newspaper, or posting electronically, including the Internet, or other means available." Id. § 15-20-25(b).

51. Id. § 15-20-25(a).

have as a group.[52]

The approach employed by the remaining states (and the District of Columbia) involves the exercise of varying degrees of discretion relative to registration and classification-notification decisions. Four basic approaches are evident.

1. Discretionary Risk Assessments Made as to "SVP" Status Alone, By Courts

Seven jurisdictions single out potential SVPs for special attention, directing the judiciary to make such determinations. Within this group, six jurisdictions require that courts make classification decisions based on recommendations of expert review boards.[53] Another state, Florida, relies on judicial determinations, but eschews expert input.[54]

Most but not all states in this group have statutory procedures that guide judicial SVP determinations. Idaho has perhaps the most expansive procedural standards of any state in this category. In Idaho, a four-member board makes an ex parte determination that a statutorily eligible offender is a SVP, pursuant to criteria developed by the board.[55] Offenders are entitled to seek judicial review of

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52. Patterson v. State, 985 P.2d 1007, 1017 (Alaska Ct. App. 1999).

53. See Colo. Rev. Stat. §§ 16-11.7-103, 18-3-414.5 (1999); Ga. Code Ann. § 42-1-12 (1999); Idaho Code §§ 18-8312 to 8321 (1999); La. Rev. Stat. Ann. § 542.1 (West 1999); N.C. Gen. Stat. § 14-208.20 (1999); W. Va. Code §§ 61-8F-2a to 2b (1999). As a result of recent legislative enactment, North Carolina targets juveniles for special treatment. Juvenile offenders convicted of specified sex offenses are subject to registration only if found by the court to be a "danger to the community." N.C. Gen. Stat. § 14-208.26. However, the information pertaining to juveniles required to register is not available to the public. See id. § 14-208.29.

54. See Fla. Stat. Ann. § 775.21 (West 1998).

55. Idaho law specifies as follows:

> (3) The board shall establish guidelines to determine whether an offender scheduled for release is a violent sexual predator presenting a high risk of reoffense. The guidelines shall be established with the assistance of sexual offender treatment and law enforcement professionals who have, by education, experience or training, expertise in the assessment and treatment of sex offenders.

this determination within 14 days of receiving such notice,[56] and enjoy a right to counsel at the judicial hearing, appointed if necessary.[57] The hearing is "conducted as a summary, in camera review proceeding, in which the court decides only whether to affirm or reverse the board's designation as a violent sexual predator."[58] The court has "broad discretion" with respect to whether and to what extent to allow live witnesses and cross-examination,[59] and the rules of evidence are inapplicable.[60]

In West Virginia, after the local prosecutor petitions for SVP designation, the sentencing court conducts a non-jury summary proceeding on the designation question. The offender has a right to be present, to have assistance of counsel, and to introduce evidence and cross-examine witnesses.[61] The court makes a finding of fact based upon a "preponderance of the evidence" relative to whether SVP status is warranted,[62] upon consideration of the recommendation of an expert advisory board.[63]

Under these regimes, sex offenders deemed

> > (a) Factors used in establishment of the guidelines must be supported in the sexual offender assessment field as criteria reasonably related to the risk of reoffense and be objective criteria that can be gathered in a consistent and reliable manner.
> >
> > (b) The guidelines shall include, but are not limited to, the following general categories for risk assessment: seriousness of the offense, offense history, whether the offense was predatory, characteristics of the offender, characteristics of the victim, the relationship of the offender to the victim, the number of victims and the number of violations of each victim.
>
> (4) If the offender has indicated an intention to reoffend if released into the community and the available record reveals credible evidence to support this finding, then the offender shall be deemed a violent sexual predator regardless of the application of the guidelines.

Idaho Code § 18-8314(3)(4) (1999).

56. See id. § 18-8319(3).
57. See id. § 18-8319(3)(c).
58. Id. § 18-8321(4).
59. See id. § 18-8321(5).
60. See id. § 18-8321(6). The proceeding "is civil, not criminal, and remedial, not adversarial." Id. § 18-8321(1).
61. See W. Va. Code § 61-8F-2a (1999).
62. Id. § 61-8F-2a(g).
63. See id. § 61-8F-2a(f).

undeserving of SVP status are nonetheless subject to registration and possible community notification, yet are subject to less stringent verification requirements, shorter periods of registration and, if notification is warranted, less intrusive forms. However, no risk evaluations are made relative to the non-SVP group.[64]

2. Discretionary Risk Assessments Made of Select Serious Offenders, By Courts

In two states, Maryland and Ohio, statutory law singles out broader categories of particular offenders for discretionary risk classification. Maryland requires that persons convicted of certain statutorily specified offenses be labeled "child sex offenders" or "sexually violent offenders," and be subject to registration and notification.[65] The judiciary, however, is free to decide whether to classify a statutorily eligible person as an "offender," which entails the least onerous registration requirements, or a SVP, which requires lifetime registration and extensive notification.[66]

Ohio subjects all statutorily eligible sex offenders to registration and review for SVP status but, in the SVP hearing, also engages in risk assessments of non-SVP offenders.[67] If deemed undeserving of SVP status, an offender is categorized as a "habitual sex offender" or "sexually oriented offender," with the former category reserved for those having been previously convicted of a "sexually oriented offense."[68] With respect to SVP

64. See, e.g., N.C. Gen. Stat. § 14-208.6A (1999) (expressly creating two programs: the "Sex Offender and Public Protection Registration Program" and the "Sexually Violent Predator Registration Program").

65. Md. Code Ann., Crimes and Punishments § 792(a)(2),(10) (1999).

66. Id. § 792(a)(6)(10), (12).

67. See Ohio Rev. Code Ann. § 2950.09(B)(1) (Anderson 1999) ("The judge shall conduct the [SVP] hearing prior to sentencing and, if the sexually oriented offense is a felony, may conduct it as a part of the sentencing hearing."). The SVP eligibility hearing otherwise must be conducted before the offender's release from confinement. See State v. Brewer, 712 N.E.2d 736, 739 (Ohio 1999).

68. Ohio Rev. Code Ann. § 2950.01(D) (Anderson 1999) (specifying sex offenses).

determinations, Ohio offenders receive notice of the hearing and enjoy the right: to counsel (by appointment if necessary); to testify; to present evidence; and to offer and cross-examine witnesses.[69] The court evaluates a list of specified statutory SVP criteria and determines, by "clear and convincing evidence," whether the offender is a SVP.[70] Both the offender and the State can appeal the sentencing court's SVP decision.[71] SVPs must verify their registration status every ninety days throughout their lifetimes[72] and are exposed to maximum community notification.[73] Offenders not deemed SVPs in the discretion of the sentencing court (i.e., "habitual sex offenders" and "sexually oriented offenders") are subject to less onerous registration and notification requirements. "Sexually oriented" offenders are not subject to community notification, but must verify their registration status on an annual basis for ten years; "habitual" offenders must verify their registration status annually for twenty years, and can be subject to extensive notification requirements, in the discretion of the court.[74]

3. *Discretionary Risk Assessments Made of All Offenders, By Local Law Enforcement*

Although virtually all jurisdictions permit local law enforcement some measure of discretion in the decision whether to release notification information,[75] seven states

69. See id. § 2950.09(B)(1).
70. Id. § 2950.09(B)(2),(3).
71. See id. § 2950.09(B)(3).
72. See id. §§ 2950.06(B)(1), 2950.07(B)(1).
73. See id. § 2950.11(A)(B).
74. See id. § 2950.11(F).
75. See, e.g., Cal. Penal Code § 290(m)(n) (West 1999); N.J. Stat. Ann. § 2c:7 to 10 (West 1994 & 1999 Supp.); N.D. Cent. Code § 12.1-32.15(12) (1999). In a new twist, the Connecticut Supreme Court recently held that a probation officer possessed discretion to subject an offender to community notification, despite the fact that the offender pled to misdemeanors not otherwise the subject of statutory notification requirements. See State v. Misiorski, 738 A.2d 595 (Conn. 1999). The probation officer saw fit to provide registration information to, inter alia, members of the offender's bowling league, a practice the Misiorski court deemed

direct local law enforcement to make offender classification decisions, which determine the extent and scope of community notification that ultimately occurs.[76] The authorities often make their decisions on the basis of specified offender risk-related criteria, typically promulgated by an appointed board originated to prepare such criteria and oversee registration and notification. Arizona law, for instance, provides for the creation of a "community notification guidelines committee," the politically bi-partisan membership of which is prescribed in detail,[77] which provides guidelines for local police to use in reaching individual classification decisions.[78] The guidelines provide for three "levels of notification based on the risk that a particular sex offender poses to the community."[79]

permissible on the basis of the officer's discretionary authority. Id. at 601-02. Justice Berdon dissented, stating that the majority afforded "probation officers despotic discretion to violate a citizen's privacy arbitrarily and without any judicial review whatsoever." Id. at 603 (Berdon, J., dissenting).

76. See Ariz. Rev. Stat. Ann. § 13-3825 (West 1999); Haw. Rev. Stat. §§ 846E-1 to 846E-3 (1999); Me. Rev. Stat. Ann. tit. 34-A §§ 11121 to 11144 (West Supp. 1999); Neb. Rev. Stat. Ann. §§ 29-4005, 29-4013 (Michie 1999); N.D. Cent. Code § 12.1-32-15 (1999); Wash. Rev. Code Ann. § 4.24.550 (West 1999); Wis. Stat. Ann. §§ 301.45, 301.46 (West 1999).

77. Ariz. Rev. Stat. Ann. § 13-3826(A) (West 1999). Several other states impose similar political bi-partisanship requirements. See, e.g., N.J. Stat. Ann. § 2C:7-11 (West 1999); Nev. Rev. Stat. Ann. § 179D.700 (Michie 1999); R.I. Gen. Laws § 11-37.1-12(A) (1999). Also, notwithstanding that the boards seemingly operate in an executive capacity, it is not uncommon for state law to require that the respective branches of government be represented on the board. See, e.g., Nev. Rev. Stat. Ann. § 179D.700 (Michie 1999).

78. See Ariz. Stat. Ann. § 13-3825(C) (West 1999) (providing that "[a]fter reviewing the information received and any other information available. . .the local law enforcement agency shall categorize each offender and place each offender into a notification level."). Despite the guidelines, it appears that officers in different localities reach varied determinations. See Kathleen Ingley, A Fearful Eye; Keeping Watch on the Valley's Sex Offenders; Monitoring Procedures Get Tougher, Ariz. Republic, May 2, 1999, at A1 (describing how police in Gilbert, Arizona designated a particular offender a Level 2 offender, while Phoenix police ranked the offender as a Level 1).

79. Ariz. Rev. Stat. Ann. § 13-3826(E). Local police in Arizona also possess discretion to undertake community notification with respect to offenders not specified by law. See id. § 13-3825(G) (providing that nothing shall prevent police "from giving a community notice of any circumstances or persons that pose a danger to the community under circumstances that are not provided for under

In Nebraska, Maine, North Dakota, Wisconsin, and Hawaii although statutory law mandates that certain offenders must register, law enforcement officials enjoy less fettered discretionary authority over individual notification decisions. In Nebraska, the State Patrol is to promulgate rules and regulations for the release of notification information, once again based on three degrees of offender risk.[80] The State Patrol has the ultimate responsibility for assigning notification levels to all persons required to register under Nebraska law.[81] In Maine, statutory law specifies which offenders must register as a "sex offender" or a SVP,[82] while the State Department of Corrections is charged with developing and applying a "risk assessment instrument" in the evaluation of registered sex offenders.[83] However, local law enforcement then notifies those in the community it "determines appropriate to ensure public safety."[84] Similarly, in Hawaii, North Dakota, and Wisconsin, local law enforcement enjoys total discretion in individual notification decisions.[85]

Finally, in Washington State, local law enforcement agencies review initial risk level classifications made by the State Department of Corrections and other relevant agencies, which assign each eligible offender to one of three classification tiers.[86] In the event local law enforcement

this section").

80. See Neb. Rev. Stat. Ann. § 29-4013(2) (Michie 1999).

81. See id. § 29-4013(2)(e). In Nebraska, in addition to the risk-level determination made by the State Patrol, the sentencing court "may also determine if the person is a sexually violent offender." Id. § 29-4005(2)(a). "When making its determination the court shall consider evidence from experts in the field of the behavior and treatment of sexual offenders." Id. § 29-4005(2)(a).

82. Me. Rev. Stat. Ann. tit. 34-A § 11222(1) (West 1999).

83. Id. §§ 11141, 1142(1)(D).

84. Id. § 11143(2). Maine law further provides that "[u]pon request, the department shall provide to law enforcement agencies technical assistance concerning risk assessment for purposes of notification to the public of a sex offender's conditional release or discharge." Id. § 11144.

85. See Haw. Rev. Stat. § 846E-3; N.D. Cent. Code § 12.1-32-15; Wis. Stat. Ann. § 301.46.

86. See Wash. Rev. Code Ann. § 4.24.550(2),(3),(4) (West 1999). As a result of recent legislative change, one factor influencing the risk-level determination is whether the offender "lacks a fixed address." Id. § 9A.44.130(6)(b).

assigns a different risk classification than that of the agency, it must notify the appropriate agency and submit its rationale for the departure.[87] Preliminary data indicate that law enforcement departures from agency decisions in Washington occur almost as a rule, with the vast majority resulting in one-level increases on the basis of "law enforcement discretion."[88]

Decisions made by law enforcement authorities in this group are made informally and outside the presence of offenders, and no right of appeal is afforded with respect to risk classification decisions.

4. Discretionary Risk Assessments Made of All Offenders By Non-Law Enforcement

Finally, several jurisdictions require that risk evaluations be made of all registration-eligible sex offenders, based on risk-level determinations rendered by persons or entities other than police. Jurisdictions in this group employ four different evaluative methods.

Agency-Based

The first approach vests primary discretionary authority in an executive agency, such as a parole board, the state department of corrections, or a specially convened

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Washington's appellate courts have on occasion addressed the complexities of maintaining registration of homeless persons in particular. In State v. Pickett, the Washington Supreme Court held that a homeless registrant lacked a "residence" and therefore could not provide his address to the county sheriff, as required by law. 975 P.2d 584 (Wash. 1999). However, in State v. Pray, the Court of Appeals upheld the conviction of a registrant who failed to re-register upon moving to another city, and thereupon established a succession of three "temporary" residences. 980 P.2d 240 (Wash. Ct. App. 1999). Unlike the homeless individual in Pickett, Pray knew "where he would sleep each night," although the address was subject to change. Id. Therefore, although his residence was "temporary," not "permanent," he had a duty to inform the sheriff of his whereabouts.

87. See Wash. Rev. Code Ann. § 4.24.550(8).

88. Document Entitled "Departure Notice," dated Sept. 27, 1999, generated by Department of Corrections, Division of Offender Programs, State of Washington (on file with author).

board, to make risk assessments and categorize statutorily eligible offenders.[89] Arkansas,[90] Iowa,[91] Massachusetts,[92] Minnesota,[93] Nevada,[94] Oregon,[95] Rhode Island,[96] Texas,[97]

89. Despite the dominant role played by agencies in this category, it is important to recognize that offenders deemed to warrant possible SVP status can be subject to non-agency based determinations. See, e.g., Ark. Code Ann. § 12-12-918(a) (Michie 1999); Mass. Gen. Laws ch. 6, § 178K(2)(c) (1999); Nev. Rev. Stat. Ann. § 179D.510 (Michie 1997); R.I. Gen. Laws § 11-37.1-6(B) (1999). In Massachusetts, for instance, the sex offender registry board can designate an offender as both a level 3 offender and a SVP. See Mass. Gen. Laws ch. 6, § 178K(2)(c). The designation is subject to automatic review by the sentencing court, which informs the offender of the designation, his right to be heard, and his right to counsel. Id. The registry board's decision is defended by counsel employed by the board and the court determines whether a preponderance of the evidence supports SVP status. Id. If the court disagrees with the SVP recommendation, the offender remains subject to level 3 classification. Id. The offender, like all offenders classified by the registry board, is then entitled to seek judicial review of the level 3 designation. See Mass. Gen. Laws ch. 6, § 178M. It is worth noting that this discretionary right to appeal also exists in other jurisdictions, a right if exercised, can effectively vest ultimate classification discretion in a reviewing court. See, e.g., D.C. Code Ann. §§ 24-1105(B)-(E) (1999); R.I. Gen. Laws §§ 11-37.1-13 - 11.37.1-15 (1999).

90. See Ark. Code Ann. § 12-12-1303 (Michie 1999) (specifying that department of corrections or the "Sex Offenders Assessment Committee" is to render classification decision).

91. See Iowa Code Ann. § 692A.13A (West 1999) (specifying that any of three agencies is to provide assessment, depending on institutional status of offender).

92. See Mass. Gen. Laws ch. 6, §§ 178K, 178L (1999) (specifying duties of "sex offender registry board"). Massachusetts procedural law has been significantly affected by ongoing judicial modifications. For instance, citing due process concerns, the Commonwealth's highest court in August 1999 required that all eligible offenders receive a classification hearing, even those convicted of low-level sex offenses (who, under Massachusetts law, are subject to notification by means of public access). See Doe v. Attorney Gen., 715 N.E.2d 37 (Mass. 1999). In response, the Massachusetts legislature recently refined and expanded the already extensive procedural framework associated with sex offender classifications. See Mass. Gen. Laws ch. 6, §§ 178K to 178M.

93. Minn. Stat. Ann. § 244.052 (West 1999) (specifying that an "end-of-confinement review committee," housed in each state correctional and treatment facility, assesses each statutorily eligible sex offender).

94. Nev. Rev. Stat. Ann. §§ 179D.720, 179D.730, 179D.7301 (Michie 1999).

95. Or. Rev. Stat. § 181.586 (1999) (specifying that Board of Parole and Post-Prison Supervision, Department of Corrections or a "community corrections agency" is to determine if a statutorily eligible offender is a "predatory sex offender").

In Noble v. Board of Parole and Post-Prison Supervision, the Oregon Supreme Court held that the State's failure to afford offenders notice and a hearing prior to classifying them as "predatory sex offenders" violated procedural

and the District of Columbia[98] have adopted such an approach. In Nevada, for instance, all statutorily eligible sex offenders are evaluated by the Division of Probation and Parole on the basis of a three-level recidivism risk scale,[99] employing guidelines prepared by the attorney

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due process. 964 P.2d 990 (Or. 1998). According to the Noble court, the consequences of community notification jeopardized a protectible "liberty interest," requiring due process protections:

> When a government agency focuses its machinery on the task of determining whether a person should be labeled publicly as having a certain undesirable characteristic . . . and that agency must by law gather and synthesize evidence outside the public record in making that determination, the interest of the person to be labeled goes beyond mere reputation. The interest cannot be captured in a single word or phrase. It is an interest in knowing when the government is moving against you and why it has singled you out for special attention. It is an interest in avoiding the secret machinations of a Star Chamber. Finally, and most importantly, it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and, perhaps, even physical harassment likely to follow from designation.

Id. at 995. In response to Noble, the State now requires that a "paper trial" occur. Offenders receive notice that they might be labeled a "predatory sex offender," and can submit written materials, but are not entitled to appear or present live witnesses. Telephone Interview with Pam Wood, Oregon Deputy Attorney General (Sept. 10, 1999) (interview transcript on file with author).

96. R.I. Gen. Laws § 11-37.1-12(C)(4) (1999) (specifying that the "the parole board shall assess the risk of re-offense of each offender referred to them for community notification," and assign a risk level, based on criteria specified by statute and guidelines promulgated by "notification advisory council."). Upon request of the district attorney, however, the court is to determine whether a particular offender warrants SVP status, based on the recommendation of the "sexually violent predator board of review." Id. § 11-37.1-6(B).

97. Tex. Penal Code Ann. § 62.03(a) (West 1999) ("Before a person who will be subject to registration . . . is due to be released from a penal institution, the risk assessment review committee . . . shall determine the person's level of risk to the community using the sex offender screening tool developed . . . . "). In Texas, the sentencing court conducts the risk assessment of probationers, using the identical risk assessment instrument. See id. § 62.03(c).

98. D.C. Code Ann. § 24-1104(a) (1999) (stating that the "Sex Offender Registration Advisory Council" is to "develop guidelines and procedures to assess the risk of a repeat offense and the threat posed to the public by the sex offender's release."). In the District, persons categorized as level 2 or 3 offenders or a SVP (but not level 1) can request an appeal of the Council's recommendation, and the offender "shall be afforded an opportunity to contest the Advisory Council's recommendation and to present evidence, by proffer or otherwise." Id § 24-1105(C).

99. Nev. Rev. Stat. Ann. §§ 179D.720, 179D.730, 179D.7301. Sex offenders placed on probation are assessed by the Division "on or before the sentencing of

general and the "advisory council for community notification."[100] Although the initial assessment is conducted ex parte, upon receiving notice of being designated a class II or III offender, an individual can request reconsideration of the designation, whereupon the offender is permitted to appear personally to present evidence in favor of re-designation, and the State can offer rebuttal evidence.[101] Local law enforcement then carry out notification in a scope and method consistent with the tier ultimately designated.[102]

Prosecutor-Based

In New Jersey, although statutory law specifies which convicted sex offenders must register, prosecutors evaluate each eligible sex offender for notification purposes in terms of "risk of re-offense,"[103] by means of a three-tier risk assessment scoring system that accords points to different risk factors identified by mental health and law enforcement professionals (the "Registrant Risk Assessment Scale").[104] The prosecutor then notifies the

the offender." See Guideline 5.00 Risk Assessment Procedures; Timing, Office of the Nevada State Attorney General, <http://www.state.nv.us/ag>.

100. Nev. Rev. Stat. Ann. §§ 179D.710, 179D.720.

101. See id. § 179D-740(2); Guideline 6.10, supra note 99.

102. See Nev. Rev. Stat. Ann. § 179D.730; Guidelines 8.00, 8.10, supra note 99.

103. See N.J. Stat. Ann. § 2C:7-8d(1) (specifying that "[t]he county prosecutor of the county where the person was convicted and the county prosecutor of the county where the registered person will reside, together with any law enforcement officials that either deems appropriate, shall assess the risk of re-offense by the registered person.").

104. See N.J. Stat. Ann. § 2C:7-8(a) (stating that "[a]fter consultation with members of the advisory council . . . the Attorney General shall promulgate guidelines and procedures for the notification required pursuant to the provisions of this act. The guidelines shall identify factors relevant to risk of re-offense and shall provide for three levels of notification depending upon the degree of risk of re-offense."). See generally Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws, June 1998 (containing "Registrant Risk Assessment Scale") (available online at <http:www.state.nj.us/lps/dcj/megan1.pdf>). The Third Circuit Court of Appeals described the scoring system as follows:

> The Scale itself is a matrix with thirteen factors grouped into four general categories: (1) Seriousness of Offense; (2) Offense History; (3)

registrant of the tier designation and that notification will ensue unless the designation is appealed to the local county court.[105] If appealed, the registrant is entitled to a summary *in camera* judicial hearing, with counsel provided,[106] in which the court makes a "case-by-case" determination of the propriety of the prosecutor's determination.[107]

Judge-Based

The next approach has been adopted by Wyoming, which allocates classification authority entirely to judges. In Wyoming, upon application by the district attorney,[108] the court is to provide notice to the offender and conduct an *in-camera* hearing, ultimately designating the offender's risk of re-offense as "low," "moderate," or "high" based on statutory criteria.[109]

> Characteristics of Offender; and (4) Community Support. Guided by the promulgated examples and commentary, the prosecutors determine whether the registrant poses a low, moderate, or high risk to the community under each of the factors and assign zero, one, or three points, respectively, for each factor. Then the prosecutors multiple these raw scores by a coefficient, reflective of the relative weight attributed to the various general categories by the creators of the Scale . . . .

E.B. v. Verniero, 119 F.3d 1077, 1084 (3d Cir. 1997), cert. denied sub nom. Verniero v. W.P., 118 S. Ct. 1039 (1998).

105. See Id. at 1086 (citing Doe v. Poritz, 662 A.2d 367, 382 (1995)).

106. See id.

107. See In re C.A., 679 A.2d 1153, 1171-72 (N.J. 1996). Procedural requirements relating to judicial review in New Jersey's classification regime, in particular proof requirements, are discussed at further length infra.

108. See Wyo. Stat. Ann. § 7-19-303(c) (Michie 1999) (specifying that district attorney "shall file an application for hearing . . . if the offender is an aggravated sex offender or a recidivist"). Wyoming law also cedes discretion to local prosecutors relative to less serious statutorily eligible offenders. See id. (stating that "[f]or other offenders registered under this act, the district attorney shall file an application for hearing under this section if, based upon a risk of reoffense factors specified in W.S. 7-19-303(d), it appears that public protection requires that notification be provided . . . . ").

109. Id. § 7-19-303(c)(d). In Delaware, although classification decisions are mainly compulsory, see supra note 39, the courts possess discretion to render classification decisions with a limited subgroup of offenders. See Del. Code Ann. tit. 11, § 4121(a)(4)(e)-(f), (d) (stating that, upon motion by the State, the court is to conduct risk level classification hearings for those having pled "guilty to any

Hybrid

The last approach is utilized in three jurisdictions, Kentucky,[110] Montana,[111] and New York,[112] where courts render final classification judgments on all statutorily eligible sex offenders, with varying degrees of deference paid to initial assessments made by experts, on the basis of risk-related criteria and guidelines. These jurisdictions place premium importance on due process concerns, typically affording offenders a right to counsel and requiring that offenders receive notice of and have the opportunity to be heard at the judicial proceeding.[113] At such hearings, standard rules of evidence typically do not apply,[114] and the reviewing court enjoys broad discretion in the amount and type of evidence allowed,[115] including expert testimony proffered on behalf of offenders.[116]

New York's recently modified law contains perhaps the nation's most onerous procedural requirements of any jurisdiction in this category, due in significant part to a 1998 federal court order enjoining application of New York's sex offender classification law.[117] In New York, the board of examiners of sex offenders conducts an initial evaluation of all offenders statutorily eligible to register,[118]

offense included in the originally charged offense" and those offenders convicted of specified sex offenses before the effective date of the notification law, yet have violated probation or parole).

110. See Ky. Rev. Stat. Ann. § 17.570 (Michie 1999)

111. See Mont. Code Ann. § 46-23-509 (1999). As a result of recent amendment, Montana law provides that the Department of Corrections is to carry out risk-level determinations in the event a statutorily eligible offender did not receive a risk designation at the time of sentencing. See id. § 46-23-509(5).

112. See N.Y. Correct. Law § 168-a et seq. (McKinney 1999).

113. See Ky. Rev. Stat. Ann. § 17-570; N.Y. Correct. Law § 168-m. But see Mont. Code Ann. § 46-23-509 (1999) (specifying only that the sentencing court is to review, inter alia, "any statement by the offender").

114. See, e.g., People v. Salaam, 666 N.Y.S.2d 881 (N.Y. Sup. Ct., Oct. 30, 1997). But see Ky. Rev. Stat. Ann. § 17.570(4) (stating that "[t]he court shall conduct a hearing in accordance with the Rules of Criminal Procedure.").

115. See, e.g., In re C.A., 679 A.2d 1153 (N.J. 1996).

116. See e.g., In re G.B., 685 A.2d 1252 (N.J. 1996).

117. See Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998).

118. N.Y. Correct. Law § 168-l (McKinney 1999).

on the basis of guidelines prepared by the board.[119] The board evaluates each offender in terms of "low," "moderate," or "high" risk, a designation, which as elsewhere determines the duration of registration and extent of community notification that will occur.[120] The offender is permitted to "submit to the board any information relevant to the review."[121] The evaluation rendered by the board serves as a "recommendation to the sentencing court,"[122] which makes the ultimate classification decision. The court notifies the offender of his right to be heard at the proceeding and his right to counsel, appointed if necessary.[123] At the hearing, the court must decide whether the district attorney has established by clear and convincing evidence that the board's initial recommendation was correct.[124] In making its determination, the court is to:

> review any victim's statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the recommendation and any materials submitted by the board, and may consider reliable hearsay evidence submitted by either party, provided that it is relevant to the determination. Facts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated.[125]

119. N.Y. Correct. Law § 168-l(5). See generally Sex Offenders Registration Act: Risk Assessment Guidelines and Commentary, November 1997.

120. N.Y. Correct. Law § 168-l(6). Like New Jersey, New York's assessment instrument entails a variety of recidivism-related criteria, requiring numeric designations relative to numerous factors. See Guidelines, supra note 119.

121. N.Y. Correct. Law § 168-n(3).

122. Id. § 168-l(6).

123. Id. § 168-n(3).

124. Id.

125. Id. When before the court, it appears that offenders lack the legal right to call, and examine, their victims. See People v. Tucker, 676 N.Y.S.2d 841, 842 (N.Y. 1998) (denying offender's effort "to call the victim as a witness to establish facts which he feels would be favorable to him in the overall review of the risk assessment."). According to the Tucker court, the "review procedure is to assess the defendant in order to protect the public; it was not created to place additional

At the conclusion of the hearing, the court renders an order "setting forth its risk level determination and the findings of fact and conclusions of law on which the determination is based."[126]

IV. SELECT PROCEDURAL ASPECTS OF OFFENDER CLASSIFICATION DECISIONS

As should be evident, jurisdictions use a variety of approaches to determine whether particular sex offenders warrant registration and community notification, and, if warranted, the extent of such requirements. In nineteen jurisdictions, legislatures effectively make the classification decision, requiring that offenders convicted of specified offenses be subject to varying degrees of registration and notification, regardless of the individual risk they possibly pose.[127] In the majority of jurisdictions, however, discretion is exercised (even if only with respect to the SVP determination), requiring that individualized decisions be made relative to offender risk.

The balance of this Article focuses on the varied decision-making protocols of this latter group, and in particular those jurisdictions affording some measure of procedural due process in classification decisions.[128] In particular, two of the most important areas of procedural disagreement are examined: (1) how the burden of persuasion on classification decisions is allocated and the quantum of proof required; and (2) the availability and extent of offender rights of appeal to classification decisions.

burdens on victims of these crimes." Id. at 843.

126. N.Y. Correct. Law 168-n(3).

127. See supra notes 39-52 and accompanying text.

128. As noted above, in seven jurisdictions in which discretion is exercised, local law enforcement render ex parte decisions on classification decisions. See supra notes 75-88 and accompanying text.

(A) Burden of Persuasion

Courts and legislatures have reached varying results over which party—the offender or the state—bears the burden of persuasion on classification decisions, and the quantum of proof by which this burden must be satisfied.

1.) Allocation of the Burden

Plainly, given the significant consequences attending classification designations, the question of which party bears the burden of satisfying classification criteria has critical importance. Because it is the state that seeks to impose registration and notification requirements on the offender, logic and tradition would suggest that the state should be the party required to shoulder the burden of establishing the appropriateness of any ultimate discretionary decision.[129] Typically, however, this is only impliedly so, as the issue of allocation is usually not specified.[130]

The Third Circuit Court of Appeals, addressing New Jersey's classification scheme in the face of legislative silence on the allocation issue, invoked the classic three-part procedural due process analysis set forth in *Matthews v. Eldridge*.[131] Interpreting the *Matthews* factors, the court in *E.B. v. Verniero* held that the persuasive burden rightly belonged to the state, based on:

(1) the interest of the registrant and the state in an accurate

129. See Charles A. Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure § 5122 (1977 & Supp. 1999).

130. See, e.g., Mont. Code Ann. § 46-23-509; Ky. Stat. Ann. § 17.570.

131. The Matthews test weighs:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

> determination of the relevant issues of fact. . ., (2) the absence of a substantial economic or other burden to the state from allocating the burden of persuasion to it, and (3) our conclusion that such an allocation will materially reduce the risk of error in those cases in which the allocation of that burden plays a role. . . . [132]

Similarly, New York law specifies that the district attorney bears the burden of establishing "the duration of registration and level of notification,"[133] as recommended by the board of examiners of sex offenders, when before the reviewing court.

Not all jurisdictions, however, agree with this position. In Minnesota, for instance, offenders bear the burden of proving that the initial risk assessment made by the expert board is erroneous.[134] Pennsylvania law until recently also imposed on offenders the burden of rebutting the statutory presumption that SVP status is warranted.[135] The Pennsylvania Supreme Court, however, citing to *E.B.*, invalidated the approach on the rationale that it created too great a risk of erroneous classification.[136]

2.) Quantum of Proof

Considerable variation also exists among jurisdictions

132. E.B. v. Verniero, 119 F.3d 1077, 1109 (3d Cir. 1997), cert. denied sub nom. Verniero v. W.P., 118 S. Ct. 1039 (1998).

133. N.Y. Correct. Law § 168-n(3).

134. Minn. Stat. Ann. § 244.052(6)(a),(b).

135. See Pa. Stat. Ann. tit. 42, § 9794 (1998).

136. See Commonwealth v. Williams, 733 A.2d 593, 608 (Pa. 1999), cert. denied, 68 U.S.L.W. 3311 (U.S. Jan. 10, 2000). Significantly, under the Pennsylvania law before the court, the SVP determination also fixed the offender's prison sentence (mandatory life), a factor of obvious importance to the Williams court. Id. Compare Cooper v. Oklahoma, 517 U.S. 348, 368 (1996) (invalidating statute that required defendants to prove by clear and convincing evidence their incompetence to stand trial); Medina v. California, 505 U.S. 437, 452-53 (1992) (upholding statute that required defendants to establish their incompetence by a preponderance of the evidence); United States v. Gatewood, 184 F.3d 550, 554-55 (6th Cir. 1999) (invalidating federal "three strikes" sentencing statute that required convicted felons to disprove the violent nature of their prior felony convictions by clear and convincing evidence).

on the related question of how much evidence must support the classification decision. To a significant degree, the quantum of proof question turns on how a jurisdiction believes the risk of classification error should be distributed, as between offender and the state, and the extent to which such risk should be tolerated. As the Supreme Court has stated, the proof standard selected "reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between litigants."[137]

Most often, the question is resolved by reference to the nature of the proceeding itself.[138] For instance, in criminal guilt adjudications, the most demanding standard of "proof beyond a reasonable doubt" applies.[139] In sentencing proceedings, with guilt having been adjudicated, factors can be established by a "preponderance of the evidence,"[140] a civil law standard permitting confirmation of the disputed fact by the greater weight (50%) of the evidence.[141]

Finally, the "clear and convincing" standard, as observed by one court, is required "where the interests at stake are deemed to be more substantial than the mere loss of money, there is a need to protect particularly important individual interests, or [the outcome] might result in stigmatization of the individualization."[142] This

137. See Santosky v. Kramer, 455 U.S. 745, 755 (1982). See also Cooper, 517 U.S. at 362 (stating that "[t]he more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."); Addington v. Texas, 441 U.S. 418, 423 (1979) (citation omitted) (stating that the "function of a standard of proof . . . is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"); In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (stating that the quantum of proof required entails "a very fundamental assessment of the comparative social costs of erroneous factual determinations.").

138. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (stating that the nature of the procedural protections afforded should be appropriate to the nature of the case).

139. See Winship, 397 U.S. at 364.

140. See McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986).

141. See Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure § 7.6, at 316 (3d ed. 1985).

142. People v. Salaam, 666 N.Y.S.2d 881, 885 (N.Y. Sup. Ct. 1997).

intermediate standard is met when the outcome is supported by roughly 70% of the evidence.[143] In *Addington v. Texas*, for instance, the Supreme Court held that in involuntary civil commitment proceedings the state must establish the appropriateness of commitment by "clear and convincing evidence," given the loss of liberty and stigma associated with involuntary commitment.[144] According to the *Addington* Court, an individual facing compelled civil commitment should not "be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[145]

The nature of sex offender classifications, however, eludes ready classification.[146] Given that offenders typically have already been adjudicated guilty of the crime making them eligible for notification, the "beyond a reasonable doubt" standard obviously need not apply. The question remains, however, which of the lesser standards of proof—"clear and convincing" or "preponderance of the evidence"—best reflects the nature of the classification proceeding?

Interpreting New Jersey law, the Third Circuit in *E.B. v. Verniero* held that the state bears the burden of proving to the reviewing court by clear and convincing evidence that the tier classification—initially reached by prosecutors—is proper.[147] Stating that the "factual determinations required in a Megan's law hearing are of

143. See United States v. Fatico, 458 F. Supp. 388, 405 (E.D.N.Y. 1978).

144. 441 U.S. 418 (1979).

145. Id. at 427. The clear and convincing standard also applies in other proceedings threatening similarly serious deprivations. See Cruzan v. Missouri Dep't of Mental Health, 497 U.S. 261 (1990) (termination of biological life-support); Sanotsky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights); Woodby v. INS, 385 U.S. 276 (1966) (deportation of resident aliens); Chaunt v. United States, 364 U.S. 350 (1960) (denaturalization).

146. See Doe v. Pataki, 3 F. Supp. 2d 456, 477 (S.D.N.Y. 1998) (observing that "[t]he question of what process is due convicted sex offenders at their risk level classification hearings is a difficult one, given the unique nature of the proceeding itself.").

147. 119 F.3d 1077, 1110-11 (3d Cir. 1997), cert. denied sub nom. Verniero v. W.P., 118 S. Ct. 1039 (1998).

greater complexity than those typically involved in sentencing,"[148] the *E.B.* court likened the classification decision to that in *Addington*, insofar as both determinations involve significant stigmatization and largely depend on predictions of future behavior.[149] The majority weighed the respective risks as follows:

> An erroneous underestimation of an individual's dangerousness will not necessarily result in harm to protected groups. Registration alone, which Megan's Law mandates regardless of an offender's classification, allows law enforcement officials to monitor offenders and provides considerable disincentive to offenders to commit criminal acts because of the high likelihood of being apprehended. On the other hand, an overestimation of an individual's dangerousness will lead to immediate and irreparable harm to the offender: his conviction becomes public, he is officially recorded as being a danger to the community, and the veil of relative anonymity behind which he might have existed disappears.[150]

As for the countervailing governmental interest involved, the *E.B.* court reasoned: "the state has no substantial interest in notifying persons who will not come into contact with the registrant; nor has it any interest in notifying those who will come into contact with a registrant who has erroneously been identified as a moderate or high risk."[151] In short, the Third Circuit held, offenders should not "'be asked to share equally with society the risk of error.'"[152] New York and Ohio also utilize a clear and convincing proof standard.[153]

Massachusetts, by contrast, uses a "preponderance of the evidence" standard in judicial review of risk-level determinations initially reached by its sex offender registry

148. Id. at 1111.
149. See id. at 1110.
150. Id.
151. Id. at 1107.
152. Id. at 1110 (quoting Addington, 441 U.S. at 427).
153. See N.Y. Correct. Law § 168-n(3); State v. Cook, 700 N.E.2d 570, 586 (Ohio 1998).

board.[154] According to the Massachusetts Supreme Judicial Court, although there exists a risk that "the board will apply general factors to the offenders that may not correctly predict their propensity to reoffend," the risk is minimized because of the adversarial nature of the evidentiary hearing, the requirement that the board make explicit findings, and the provision to offenders of the right to appeal the decision to superior court.[155] The court expressly rejected a clear and convincing standard, out of concern for "erroneous underclassifications."[156] In so doing, the court distanced itself from the Third Circuit's decision in *E.B.*, stating that the Third Circuit "concluded that the possible injury to sex offenders from being erroneously overclassified was significantly greater than any harm to the State from an erroneous underclassification. We believe that the harms of erroneous classification are more nearly equal."[157] Idaho, Minnesota and Rhode Island also use a preponderance standard.[158]

Finally, the law of numerous states is silent on the critical issue of proof quantum. Kentucky, for instance, requires that eligible sex offenders undergo risk

154. Mass. Gen. Laws § 178L(2); Doe v. Sex Offender Registry Bd., 697 N.E.2d 512, 520 (Mass. 1998).

155. Doe, 697 N.E.2d at 519.

156. Id.

157. Id. at 520 n.14. Justice Marshall disagreed, concluding that a clear and convincing evidence standard "would enable police and community to focus on those offenders who may pose an actual threat to young children and others that the statute seeks to protect." Id. at 520-21 (Marshall, J., concurring and dissenting in part). Justice Marshall also noted that the offense eligibility criteria used by Massachusetts for registration are significantly broader than those in New Jersey and New York, where designations are reached by the more stringent clear and convincing evidence standard. See id. at 521. He stated:

> Because the definition of 'sex offender' sweeps in persons whose crimes may have nothing to do with victimizing anyone, much less the vulnerable populations with which the statute is concerned, careful and individualized due process is necessary to sort sexual predators likely to repeat their crimes from large numbers of offenders who pose no danger to the public, but who are nonetheless caught in the statute's far-flung net of registration.

Id. (footnote omitted).

158. See Idaho Code § 18-8321(10),(11); Minn. Stat. Ann. § 244.052(6)(a),(b); R.I. Gen. Laws § 11-37.1-16(B)(6).

assessments by "certified providers" (at their own cost), placing them in high, moderate, or low-risk categories, which determine the duration of registration and extent of community notification.[159] The sentencing court reviews the recommendation, as well as any victim statements and materials submitted by the offender. After conducting a hearing, at which the offender has a right to be heard and have appointed counsel, "[t]he sentencing court shall issue findings of fact and conclusions of law and enter an order designating the level of risk."[160] Similarly, in the District of Columbia, offenders are entitled to contest expert risk-level determinations before the sentencing court, and to present evidence, yet the law specifies only that "the court shall consider the recommendations of the Advisory Council in its determination of whether the offender is a sexually violent predator and the level of risk of repeat offense."[161] Other jurisdictions are similarly reticent on the issue.[162]

(B) Right of Appeal

Another area of procedural uncertainty concerns the availability, and extent, of offenders' right to contest classification designations. This is so despite the manifold significant consequences of classification decisions—including the duration and extent of community stigmatization and the constant threat of vigilantism,

159. Ky. Rev. Stat. Ann. § 17.570. Other states similarly specify that offenders are to pay for the evaluation themselves. See, e.g., Idaho Code § 18-8318.

160. Ky. Rev. Stat. Ann. § 17.570(6).

161. D.C. Code Ann. § 24-1105(4).

162. See, e.g., Md. Code Ann., Crimes and Punishment, §§ 792 et seq.; Nev. Rev. Stat. Ann. §§ 179D.710 et seq.; Or. Rev. Stat. §§ 181.585 et seq.; Wyo. Stat. Ann. § 7-19-303. See also, e.g., Fla. Stat. Ann. § 775.21(5) (stating only that the "sentencing court must make a written finding at the time of sentencing that the offender is a sexual predator"); La. Rev. Stat. Ann. § 15:542.1 (stating only that "[u]pon receiving a recommendation from the sexual predator commission, the court shall make a determination as to whether or not an offender is a sexually violent predator"); N.D. Cent. Code § 12.1-32-15 (stating only that "the court shall determine upon motion of the state's attorney and after receiving a report from the qualified board if that person is a sexually violent predator.").

possibly for offenders' lifetimes.[163] Less obvious, but no less real, registrants must: verify registration information at varying durations, often under threat of felony prosecution if they do not;[164] endure significant limits on where they can live and work;[165] and in many jurisdictions forfeit, or suffer

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163. See Doe v. Pataki, 120 F.3d 1263, 1279 (2d Cir. 1997) (detailing direct and indirect negative effects of notification), cert. denied, 118 S. Ct. 1066 (1998); E.B. v. Verniero, 119 F.3d 1077, 1110 (3d Cir. 1997) (same), cert. denied sub nom. Verniero v. W.P., 118 S. Ct. 1039 (1998). Furthermore, the classification designation embodies a state action that does far more than merely reify a released offender's status as a convicted sex offender. As Judge Myron Thompson recently stated:

> While it might seem that a convicted felon could have little left of his good name, community notification . . . will inflict a greater stigma than would result from conviction alone. Notification will clearly brand the plaintiff as a "criminal sex offender" within the meaning of the Community Notification Act- a "badge of infamy" that he will have to wear for at least 25 years-and strongly implies that he is a likely recidivist and a danger to his community.

Doe v. Pryor, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999).

164. See, e.g., Alaska Stat. § 11-56.835 (class "C" felony); Ariz. Stat. Ann. § 13-3824 (class "4" felony); Arkansas Rev. Stat. Ann. § 12-12-904 (class "D" felony); Del. Stat. Ann. tit. 11 § 4120(g) (class "G" felony); Haw. Rev. Stat. Ann. § 846E-9(a) (class "C" felony); Mich. Comp. Laws Ann. § 28.729 ("felony"); Mont. Code Ann. § 46-23-507 (punishment "up to 5 years"); Neb. Rev. Stat. Ann. § 179D.290 (category "D" felony); Wash. Rev. Stat. Ann. § 9A.44.130(9) (class "C" felony). Cf. People v. Franklin, 84 Cal. Rptr. 2d 24, 245 (1999) (addressing claim of registrant who failed to maintain registry information and was therefore subject to "three strikes" law). Such provisions are reminiscent of earlier registration laws of the 1930s, which had as one of their principle objectives the "incarceration or expulsion of undesirables." See Note, Criminal Registration Ordinances: Police Control Over Potential Recidivists, 103 U. Pa. L. Rev. 60, 63 (1954).

165. See, e.g., Ala. Code § 15-20-26 (1975 & Supp. 1999); Minn. Stat. Ann. § 244.052(3)(k), (4) (1992 & Supp. 1999). In addition to legislative limits, local authorities have imposed housing limits of their own. See, e.g., Town Restricts Sex Offenders, Denver Rocky Mtn. News, Aug. 26, 1999, at 39A (noting decision of the Lakewood Town Board, in a Denver suburb, barring more than one registered sex offender from living in a residence). Even in the absence of such formal limits, notification creates significant housing-related difficulties. See, e.g., David Chanen, Threat Lead to Eviction of St. Paul Sex Offender; Cases Illustrates Trouble Placing Level 3 Ex-cons, Star Tribune (Minneapolis), Feb. 26, 1998, at 1B (recounting several scenarios including that involving one offender who was forced to live in the car of his parole officer); Lisa Sink, Long After Release Date, Man Still Lives in Prison, Milwaukee Journal Sentinel, June 1, 1999, at 1 (discussing plight of registrant who tried in vain for one year to find housing and was eventually returned to prison for failure to find housing).

In his recent book, Professor Amitai Etzioni, a promoter of "Communitarian" values, proposed a solution to the dilemma faced by states and

major limits on, their freedom to change their legal names.[166] Despite these significant consequences, the law in the vast majority of states is silent on the question of appeal.[167] In others, a right to appeal exists, but its contours remain uncertain.[168] In others still, the right exists in limited form, perhaps permitting only review of SVP decisions[169] or level II and III offenders,[170] or seemingly

local communities. Etzioni advocates locating sex offenders:

> [in a] guarded village or town where they are allowed to lead normal lives aside from the requirement that they stay put. Those sentenced to stay in such a place could have jobs, visitors, free access to TV, unlimited phone privileges, and bank accounts; they could come and go within the community as they wished, conduct a social life, have town meetings and elections, or even have their spouse move in with them (although no children would be allowed to live in these places). These places could be quite expansive and might include, for instance, adjacent beaches, lakes, or ski areas. . . The basic idea is that even though society needs to be protected from high-risk sex offenders, those offenders who have completed the punitive stage of their sentence should be allowed to lead nearly normal, autonomous, and private lives, at least as much as possible under the circumstances.

Amitai Etzioni, The Limits of Privacy 73-74 (1999).

166. See, e.g., Cal. Civ. Pro. § 1279.6 (no change unless "it is in the best interest of justice to grant [the name change] and doing so will not adversely affect the public safety."); 730 Ill. Comp. Stat. 5/21-101 (duration of registration); Indiana Code § 5-2-12-8.6 (no change unless upon new marriage); N.H. Rev. Stat. Ann. § 547:3-i (permitted only if petitioner "makes a compelling showing that a name change is necessary."); Utah Code Ann. § 77-27-21.5 (no change during period of registration); Wash. Rev. Code Ann. § 9A.44.130(7) (no change if county sheriff determines that doing so "will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage.").

167. See, e.g., D.C. Code Ann. § 24-1105; Nev. Rev. Stat. § 175D.740; N.C. Gen. Stat. § 14-208.20; W. Va. Code § 61-8F-2a; Wyo. Stat. Ann. §§ 7-19-301 to 7-19-307.

168. See e.g., Ark. Code Ann. § 12-12-1303(f) (stating only that the department of corrections and the "Sex Offender Assessment Committee" are to "promulgate rules and regulations to establish the appeal process for the assessments and determinations."); Ky. Rev. Stat. Ann. § 17.570(7) (specifying only that the sentencing court's "order designating risk shall be subject to appeal.").

169. See, e.g., Downs v. State, 700 So. 2d 789, 789-90 (Fla. Ct. App. 1998) (invoking state rules of appellate procedure to permit direct appeal of sexual predator designations alone); Idaho Code § 18-8321(14) (expressly stating that non-SVP designated registered sex offenders are not entitled to judicial review of their registration and notification status); Ohio Rev. Code Ann. § 2950.09(B)(3) (expressly permitting only appeal of SVP status, but extending the right to

extends only to review by the sentencing court of the classification decision reached by the entity charged with making the initial classification decision.[171]

New York, until very recently, barred the right to appeal. However, as a result of recent legislative changes prompted by federal judicial intervention,[172] both the state and the offender now "may appeal as of right" from the court's classification order.[173] However, in a decision rendered before the legislative modification, the New York Court of Appeals provided what remains the best discussion of the uncertain legal status of registrants' right to appeal. In *People v. Stevens*,[174] the court held that, absent an expressly enunciated right in statutory law, two sex offenders lacked the right to appeal their classifications. Citing to the avowed civil and regulatory nature of the classification decision, the court rejected the argument that classification represented a "final disposition of the original criminal sentence," which would carry a statutory right to appeal under New York law.

> Whatever else the determination may be or be classified as, we are satisfied that it and its registration and notification requirements under the Act . . . are not a traditional, technical or integral part of a sentence that somehow

offender and state).

170. For instance, in the District of Columbia, Minnesota, and New Jersey only level II and III offenders enjoy such a right of review. In Massachusetts, on the other hand, as a result of judicial intervention, offenders assigned to all risk levels can seek review of the board's designation. See Doe v. Attorney Gen., 686 N.E.2d 1007, 1014 (Mass. 1997). See also Mass. Gen. Laws ch. 6, § 178M. In Texas, the right to appeal expressly extends only to those subject to notification by means of newspaper publication of their registration information, providing a right to seek enjoinment of such publication. See Tex. Rev. Code Crim. P. § 62.07.

171. See, e.g., Iowa Code § 692A.13A(2); R.I. Gen. Laws §§ 11-37.1-12 to 11-37.1-16; Wyo. Stat. Ann. § 7-19-303(e).

172. See Doe v. Pataki, 3 F. Supp. 2d 456, 477 (S.D.N.Y. 1998) (concluding that "[t]he lack of any provision for review of risk level determination effectively denies convicted sex offenders the opportunity to fully and fairly litigate their claims of due process violations at their risk classification hearings.").

173. N.Y. Correct. Law § 168-n(3). The offender also enjoys a right to counsel for such appeal, appointed if necessary. Id.

174. 692 N.E.2d 985 (N.Y. 1998).

> relates back to or becomes incorporated into the antecedent judgment of conviction.[175]

In effect, the court reasoned, the "criminal action" terminated upon sentencing; because the offenders had served their sentence, the classification decision was both temporally and legally distinct from the sentencing decision, precluding a right to appeal.[176] According to the unanimous court, classifications are "neither an amendment to the judgment of conviction, nor a resentencing."[177] Rather, they are "discrete" determinations that "are a consequence of convictions for sex offenses."[178] Because "'no provision of the New York Constitution constrains the Legislature to provide a right of review by an appellate court of every decision,'"[179] and the Legislature noticeably failed to codify a right of appeal in the Sex Offender Registration Act, the Court of Appeals was loath to invoke an "alternative source of authority to fill the gap that the offenders would like us to fill."[180] The *Stevens* court also expressly deferred on elucidating the "true nature" of the classification decision: whether the court "is acting *qua* court or as a distinct quasi regulatory entity."[181] If the latter, the court implied but did not endorse, that registrants might have a right to "some discrete,

175. Id. at 987.

176. Id. at 987-88.

177. Id. at 988.

178. Id.

179. Id. (quoting People v. Gersewitz, 61 N.E.2d 427, 429 (N.Y. 1945)). See also id. at 989 (noting that "new-type proceedings and attendant direct criminal appeals may lie within the criminal procedure orbit only if jurisdiction to review such determinations is otherwise prescribed by statute."). Cf. McKane v. Durston, 153 U.S. 684, 687 (1894) (stating that "review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law.").

180. People v. Stevens, 692 N.E.2d at 988. The court added: "While some may persuasively point to policy reasons why a risk level assessment ought to be subject to some form of 'appellate' review, that is no substitute in these circumstances for a legislative authorization by enactment of an appropriate statutory regime." Id at 990.

181. Id.

authorized appellate review" of an administrative nature.[182]

Administrative review is, in fact, available in a few jurisdictions. Minnesota offenders can seek review of their risk level designations before an administrative law judge, and the review hearing is subject to the applicable administrative review standards.[183] Minnesota law expressly provides that the judge's decision is "final."[184] Oregon also permits administrative review before Oregon appellate courts of notification classification decisions,[185] subject to the significant deference typically afforded

182. Id. To complicate matters further still, the Court of Appeals in a subsequent, but pre-legislative amendment decision, People v. Hernandez, 711 N.E.2d 972 (N.Y. 1999), held that those subject to the law enjoyed a right to appeal the court's "certification that the person is a sex offender"—as opposed to the "risk level determination," as addressed in Stevens. See N.Y. Correc. Law § 168-d(1) (McKinney 1999) (stating that upon conviction "the court shall certify that the person is a sex offender and shall include the certification in the order of commitment. The court shall also advise the sex offender of the duties of this article."). According to the Hernandez court, the certification is appealable and reviewable as part of the judgment of conviction, as distinct from the classification decision addressed in Stevens, which occurred "postsentence." Hernandez, 711 N.E.2d at 975-76. "Risk level determinations thus fell into an appellate void, which the Court eschewed filling in the absence of any legislative prescription and authorization." Id. at 976 (citing Stevens, 91 N.Y.S.2d 270, 276). Certification, on the other hand, was not "belated" but rather "actually and temporally and part of the judgment of conviction," and hence appealable as of right. Id. at 977. The court concluded by offering that the "arguable lack of symmetry merely reemphasizes the need for plenary legislative consideration of the appellate review possibilities of all these intricate procedural tracks and timetables." Id.

183. Minn. Stat. Ann. § 244.052(6)(a),(b), (d) (West 1999).

184. Id. § 244.052(6)(c). Recently, the Minnesota Court of Appeals addressed the claim of an offender who had been convicted of a burglary and charged, but not convicted, of a sex offense, yet was designated a level III sex offender by the committee, triggering maximum community notification. See In re the Risk Level Determination of C.M., 578 N.W.2d 391 (Minn. Ct. App. 1998). The C.M. court characterized the outcome as "unprecedented in that at no point does the state bear the burden of proving, even by a preponderance of the evidence, that the offender actually committed a sex offense," and held the notification provision applicable to only persons actually convicted of offenses for which registration is required. Id. at 398-99. Compare Boutin v. LaFleur, 591 N.W.2d 711 (Minn. 1999) (concluding that an offender but not convicted of an enumerated felony can be subject to registration alone).

185. See Noble v. Board of Parole and Post-Prison Supervision, 964 P.2d 990 (Or. 1998); Schuch v. Board of Parole and Post-Prison Supervision, 912 P.2d 403 (Or. Ct. App. 1996).

agency decisions.[186]

Finally, New Jersey, the jurisdiction in which the modern sex offender registration and notification movement largely began, affords an express right to direct judicial appeal. As noted earlier, in New Jersey, the local prosecutor evaluates the offender's risk of reoffense pursuant to the Registrant Risk Assessment Scale, and makes a risk-level designation on that basis, which the prosecutor must support by clear and convincing evidence if appealed to a court.[187] The court's classification decision, however, "is subject to judicial review by either side through appeal."[188] With direct judicial review available, New Jersey appellate courts on numerous occasions have seen fit to reduce risk classifications reached by lower courts.[189]

In short, widespread disagreement currently exists over the availability and extent of offender rights to appeal classifications. Although jurisdictions often permit non-SVPs to petition at a later date for relief from registration

186. See Or. Rev. Stat. § 183-482(8) (setting forth grounds for remand).

187. See supra notes 103-07 and accompanying text.

188. In re C.A., 679 A.2d 1153, 1172 (N.J. 1996).

189. See, e.g., In re R.F., 722 A.2d 538, 543 (N.J. Super. Ct. App. Div. 1998) (reducing assigned risk level from II to I); In re E.I., 693 A.2d 505, 508 (N.J. Super. Ct. App. Div. 1997) (doing same and concluding that "the registrant has not been shown to be the type of sexual offender contemplated by the community notification provisions of Megan's Law . . . [I]f Megan's Law is applied literally and mechanically to virtually all sexual offenders, the beneficial purpose of this law will be impeded.").

In New York, as well, the courts have modified initial classification recommendations made by the board of examiners of sex offenders. See, e.g., People v. Jimenez, 679 N.Y.S.2d 510, 518 (N.Y. Sup. Ct. 1998) (reducing registrant classification from level 2 to level 1, based on de novo review of the record). It remains to be seen how the recent provision by the New York Legislature of a right to direct judicial appeal beyond the lower courts will influence the perceived accuracy of classification determinations. See supra notes 117-26 and accompanying text (discussing recent legislative modifications).

In Ohio, where there exists a right to appeal SVP designation, the case law reflects numerous successful appeals. See, e.g., State v. Shepherd, No. CR-176217, 1999 WL 632901 (Ohio Ct. App., 8th Dist., Aug. 19, 1999); State v. Wimberly, No. CR-237301, 1999 WL 608802 (Ohio Ct. App., 8th Dist., Aug. 12, 1999); State v. Thomas, No. 98CA16, 1999 WL 624540 (Ohio Ct. App., 4th Dist., Aug. 10, 1999).

and notification, usually after ten or fifteen years of crime-free community release,[190] the vast majority of states fail to offer specific guidance on the question of appeals. As made clear in the New York Court of Appeals decision in *Stevens*,[191] legislative silence can have dispositive effect in the absence of some avenue of administrative redress.[192] This is especially so because risk classification decisions do not appear subject to the writs of mandamus[193] or habeas corpus.[194] Conceivably, declaratory relief might be available,[195] but such relief is speculative due to the fact that classifications are "civil," precluding any Sixth Amendment right to counsel.[196]

190. Typically, the duration depends on the risk level designation. See, e.g., D.C. Code Ann. § 24-1105(5); Nev. Rev. Stat. § 179D.760. In Montana, level II and III offenders can petition to change risk designations, but only after having successfully completed a sex offender treatment program. See Mont. Code Ann. § 46-23-509 (4) (1997). The court is authorized to modify the designation if it finds "by clear and convincing evidence that the offender's risk of committing a repeat sexual offense has changed since the time sentence was imposed." Id. Compare W. Va. Code § 61-8F-4(2) (1997) (requiring registration "for life").

As a result of legislative changes in 1999, Louisiana offenders can no longer petition the sentencing court to be relieved of the duty to register (and hence be subject to notification). See La. Rev. Stat. Ann. § 584 (West 1999). Applying the former law, one Louisiana appellate court recently upheld a lower court's grant of relief to a man convicted of bigamy, otherwise subject to compulsory registration and notification. See State v. Griffin, No. 99-K-2025, 1999 WL 1079621 (La. App. 4th Cir., Nov. 17, 1999).

191. See supra notes 174-82 and accompanying text (discussing same).

192. In many respects, sex offender classifications rendered by agencies or specially created boards resemble parole decisions customarily undertaken by the executive branch, decisions also governed by statutorily-based procedures and criteria. It is well-settled that decisions to grant or deny (but not to revoke) parole are matters of executive grace, virtually immune to substantive judicial review. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979). See generally Arthur W. Campbell, The Law of Sentencing § 17.7-17.8 (2d ed. 1991 & Supp. 1998). At the same time, however, it is apparent that the consequences of classification decisions, which can extend far beyond the parole period of offenders, differ from run-of-the mill parole decisions, and that therefore less judicial deference is arguably warranted.

193. See, e.g., Pisarri v. State, 724 So. 2d 635, 636 (Fla. Dist. Ct. App. 1998).

194. See Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998) (holding that no right to federal habeas exists because offender is not "in custody"), cert. denied, 119 S. Ct. 824 (1999).

195. See, e.g., Angell v. State, 712 So. 2d 1132, 1132 (Fla. Dist. Ct. App. 1998) (adverting to possible relief by way of state declaratory relief).

196. See, e.g., Collie v. State, 710 So. 2d 1000 (Fla. Dist. Ct. App. 1998)

V. CONCLUSION

Current sex offender classification approaches, for better or worse, bear obvious earmarks of actuarial justice.[197] This influence is most apparent in jurisdictions that eschew individual risk assessments in favor of legislative imposition of compulsory registration and notification for those offenders convicted of specified sex offenses.[198] But it is also manifest in those jurisdictions actually engaging in individualized decision-making as to offenders, especially when based on risk assessment scales[199] prepared by "expert boards."[200]

(rejecting Sixth Amendment claim because "the sexual predator proceedings were not criminal or quasi-criminal in nature").

197. It remains an open question whether this influence, to the extent it is based on ambiguous social scientific estimates of recidivism, represents a perversion of the salutary goals of scientific input in legal decision-making. Several commentators have assailed the use of recidivism data in the context of SVP commitments. See John Q. LaFond, Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy, 41 Ariz. L. Rev. 375 (1999); Michael L. Perlin, "There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of Kansas v. Hendricks, 92 Nw. U. L. Rev. 1247 (1998); Howard Zonana, The Civil Commitment of Sex Offenders, Science, Nov. 14, 1997, at 1248.

198. See supra notes 39-52 and accompanying text.

199. See People v. Salaam, 666 N.Y.S. 2d 881, 887 (N.Y. Sup. Ct. 1997) (noting that "the calculated presumptive risk level is based upon factors or overrides which experts and professionals in the field have indicated are the greatest predictors of future behavior."). The scales commonly enjoy presumptive validity. See, e.g., In re G.B., 685 A.2d 1252, 1264 (N.J. 1996) (stating that "[c]hallenges to the Scale itself, or challenges to the weight afforded to any of the individual factors that comprise the Scale, are not permitted. Instead, all challenges must relate to the characteristics of the individual registrant and the shortcomings of the Scale in his particular case."). But see In Re C.A., 679 A.2d 1153, 1171 (N.J. 1996) (stating that "the scale is not a scientific device. It is merely a useful tool to help prosecutors and courts determine whether a registrant's risk of re-offense is low, high, or moderate.").

200. The boards themselves pose an interesting set of legal questions. In addition to bearing responsibility for promulgating applicable evaluation rules and criteria, they wield enormous power over offenders, for periods of time that extend well beyond that exercised by traditional probation and parole authorities. In Massachusetts, for instance, where the board has foremost decision-making power, if an offender seeks judicial review of the board's decision, the board is to "defend" its classification, with an attorney employed by the board. See Mass. Gen. Laws Ann. ch. 6, § 178M. Massachusetts' highest court recently dismissed concern over this apparent conflict, arising "because the same agency would both

Conceived in broad systemic terms, the procedures adopted by legislatures and courts reflect value choices based on risk and its allocation. Those jurisdictions using the compulsory method of classification show utmost risk averseness, motivated by a deference to aggregate estimates of sex offender risk. In those jurisdictions permitting the exercise of discretion in the classification of offenders, less actuarial deference is shown. There, risks of error,[201] i.e., subjecting those offenders who will not recidivate to the travails of notification, are weighed against the averred community safety benefits of registration and notification.[202] As discussed, however, even within this latter group, jurisdictions manifest varied tolerance for risk. Rights of appeal, and burdens of proof and their allocation, can at once be outcome-determinative, and reflect a given jurisdiction's values relative to risk (of recidivism and hence error).[203]

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prosecute and adjudicate the risk classification claim," expressing its hope that the board would "develop internal procedures which provide offenders with fair and impartial hearings." Doe v. Sex Offender Registry Bd., 686 N.E.2d 512, 517 n.11 (Mass. 1998). See also Doe v. Attorney Gen., 715 N.E.2d 37, 45 nn.19, 20 (Mass. 1999) (emphasizing the significant rule making authority delegated to board by the Massachusetts Legislature). Compare N.Y. Correct. Law sec. 168-n(3) (providing that "[t]he state shall appear by the district attorney, or by his or her designee, who shall bear the burden of proving the facts supporting the duration of registration and level of notification sought [by the examiners' board] by clear and convincing evidence.").

201. What Ronald Dworkin would call "the moral harm" of erroneous adjudications. See Ronald Dworkin, A Matter of Principle 79-84 (1985). See also Doe v. Sex Offender Registry Bd., No. 97-2462, 1997 WL 819765 at *6 n.13 (Mass. Sup. Ct., Dec. 22, 1997) (stating that "[t]he conflicting research and studies . . . highlight the potential for error in making a determination as to risk of reoffense without any sort of hearing.").

202 See e.g., Ohio Rev. Code Ann. § 2950.02(A)(1) (legislative finding that "[i]f the public is provided adequate notice and information . . . members of the public and communities can develop constructive plans to prepare themselves and their children . . . . ").

203. See Addington v. Texas, 441 U.S. 418 at 1809 (1979) (noting that "standards of proof are important for their symbolic as well as for their practical effect."); Robert Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 Geo. L.J. 887, 889 (1999) (observing that "procedure has substantive effects and involves controversial value choices."). See also Richard H. Gaskins, Burdens of Proof in Modern Discourse 22 (1992) ("By allocating in advance certain procedural and evidentiary

At present, sex offender classification laws and procedures are in the midst of a period of significant change, serving as true testament to Justice Cardozo's precept that "[s]tatutes are designed to meet the fugitive exigencies of the hour."[204] From a resource perspective, although the most expansive actuarial model (characterized by legislative presumptions as to risk and compulsory classification) carries short-term benefits because of its avoidance of individualized, procedure-bound classification decisions,[205] it is increasingly becoming apparent that registration and notification themselves are very costly and burdensome. Such systemic costs range from increased demands on scarce judicial resources, because sex offense suspects are less likely to plead guilty and thus automatically become subject to registration and notification,[206] to the enormous demands on local law enforcement faced with implementation of the blunderbuss

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burdens . . . legislation favors substantive outcomes that defy the bland and balanced rhetoric one finds in many statutes . . . . "). Cf. Edson R. Sutherland, An Inquiry Concerning the Functions of Procedure in Legal Education, 21 Mich. L. Rev. 372, 381-82 (1922) (referring to substantive law as "primary and constitut[ing] an essential part of the structure of society," in contrast to procedural law which is "secondary and derivative, and merely serves to make [the former] operative.").

204. Benjamin N. Cardozo, The Nature of the Judicial Process 83 (1921). Cf. Carol Steiker, Death, Taxes, and – Punishment? A Response to Braithwaite and Tonry 46 UCLA L. Rev. 1793, 1798 (1999) (recognizing that "[t]he division of labor in the American constitutional system creates incentives for legislators to create very broad criminal laws and very high sentences.").

205 See generally D.J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures 122-27 (1996) (discussing costs and social benefits associated with added procedural protections).

206. See Alison Bass, Suspects Battle to Stay Off Sex Offender Registry, Boston Globe, Aug. 16, 1999, at A1 (stating that "[p]rosecutors, defense attorneys, and probation officials say defendants' fears of being publicly branded a sexual criminal" account for a 22% increase in sex offense jury trials from 1996-1998).
It goes without saying, as well, that discretionary approaches surveyed here, to varying degrees, carry resource demands. In Massachusetts, for instance, the estimated annual operating budget of the sex offender registry board, which classifies eligible offenders, will run to $10 million as a result of the recent legislative expansion of due process rights accorded potential registrants. See Brian MacQuarrie, Overhaul Set on Sex Offender Registry; Cellucci to Sign Bill That Revives Board, Boston Globe, Sept. 10, 1999, at A1.

classification regimes.[207] Eventually, even putting aside the persistent concerns over the efficacy of registration and notification,[208] the resource strain alone associated with the inevitable overestimates that occur with such a compulsory, actuarial model, might compel states to move toward a narrower, more individualized approach.[209] Only time will tell.

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207. See, e.g., Kay Lazar, States Lack Money, Manpower to Do the Job, Boston Herald, July 19, 1998, at 9; Jonathan D. Rockoff, Notification Process on Sex Offenders Runs into Difficulties, Providence Journal, Mar. 28, 1999, at 2; Editorial, Compliance Money Sought, Seattle Times, Jan. 11, 1999, at B3. See also People v. Kearns, 677 N.Y.S.2d 497, 498 (N.Y. App. Div. 1998) (stating that "it would unreasonably burden criminal justice officials to require them to maintain maximum scrutiny of all convicted sex offenders, when statistics indicate that only about 5 % of them actually qualify as 'high risk' public menaces.").

In Arizona, six full-time state employees dedicate their working hours to verifying the addresses of registered offenders; the City of Phoenix employs six detectives whose sole job is to monitor offenders and perform notifications, yet the City predicts that its program will "have to grow dramatically." See Kathleen Ingley, A Fearful Eye: Keeping Watch on the Valley's Sex Offenders; Monitoring Procedures Get Tougher, Ariz. Republic, May 2, 1999, at A1. To defray the costs of registration and notification, many jurisdictions now require that offenders pay a fee or "surcharge." See, e.g., Ark. Code Ann. §§ 12-12-911, 12-12-918; Colo. Rev. Stat. § 24-33.5-415.5; Iowa Code § 692A.11; Me. Rev. Stat. Ann. tit. § 34A-11226; Mont. Code Ann. § 46-23-504(5) (1999).

208. See, e.g., James R. Acker & Catherine Cerulli, When Answers Precede Questions: Megan's Laws' Uncertain Policy Consequences, 34 Crim. L. Bull. 23, 246-49 (1998) (examining pitfalls, including: the tendency of the laws to engender a false sense of security within communities, in part because offenders will "go underground" to avoid notification; the increased chance that offenders will commit crimes, due to the isolation, pressures and ostracism they experience; and the likelihood that offenders' rehabilitation will be hindered); Lenore M.J. Simon, Sex Offender Legislation and the Antitherapeutic Effects on Victims, 41 Ariz. L. Rev. 485 (1999) (criticizing the laws for their failure to give effect to the empirical reality that most sex crimes committed against women and children do not involve "strangers").

209 Cf. State v. Stevens, No. 81, 633, 1999 WL 1062932 *6 (Kan. Ct. App. 1999) (stating that "[a] strong argument can be made for requiring a court to determine a level of risk involved on a case-by-case basis . . . . We can assume here that the legislature carefully studied such a proposal and rejected it.").