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NOVA LAW REVIEW



ARTICLES

The Information Highway Patrol: Here Come the
Cybercops *Claire Ann Koegler*

Here Come the Cybercops 2: Who Should Police
Cybermarks? *Claire Ann Koegler*

Here Come the Cybercops 3: Betting on the Net..... *Claire Ann Koegler*

NOTES AND COMMENTS

When Is Same-Gender Sexual Harassment Actionable
under Title VII? *Fredette v. BVP Management
Associates* *Linda K. Davis*

Convicted Sex Offenders: Where Do You Live?
Are We Entitled to Know? A Year's Retrospective of
Ex Post Facto Challenges to Sex Offender Community
Notification Laws *Charles J. Dlabik*

When Does the Loser Pay under Florida's Offer of
Judgment Laws? The Combination of Legislative and
Judicial Authority on Offers of Judgment has Undermined
the Goal of Facilitating Settlement *Jason R. Himschoot*

VOLUME 22

WINTER 1998

NUMBER 2

NOVA LAW REVIEW

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TABLE OF CONTENTS

ARTICLES

- The Information Highway Patrol: Here Come the
Cybercops *Claire Ann Koegler* 513
- Here Come the Cybercops 2: Who Should Police
Cybermarks? *Claire Ann Koegler* 531
- Here Come the Cybercops 3: Betting on the Net..... *Claire Ann Koegler* 545

NOTES AND COMMENTS

- When Is Same-Gender Sexual Harassment Actionable
under Title VII? *Fredette v. BVP Management
Associates* *Linda K. Davis* 559
- Convicted Sex Offenders: Where Do You Live?
Are We Entitled to Know? A Year's Retrospective of
Ex Post Facto Challenges to Sex Offender Community
Notification Laws *Charles J. Dlabik* 585
- When Does the Loser Pay under Florida's Offer of
Judgment Laws? The Combination of Legislative and
Judicial Authority on Offers of Judgment has Undermined
the Goal of Facilitating Settlement *Jason R. Himschoot* 645

The Information Highway Patrol: Here Come the Cybercops*

Claire Ann Koegler**

As communications on the Internet become more and more a part of American culture, the law is evolving to regulate activities on the Internet ("Net"). Various government agencies and private entities are patrolling the Net to crack down on tortious and criminal activities.

In substance, these cyberspace activities are no different than activities in person, by mail, by telephone, by broadcast, or by print publication. Thus, government agencies patrolling the Net are seeing garden variety fraud, gambling, and securities violations, while private entities are seeing the usual copyright and trademark infringement, libel, and the like.

The message is the same only the medium is different. Thus, the courts have been applying preexisting substantive law to tortious and criminal conduct in this new medium. In some cases, Congress has amended statutes to include expressly Net activities.

A. *An Introduction to the Net*

The Net evolved from a computer system built a quarter of a century ago by the Department of Defense to enable academic and military researchers to continue to do government work even if part of the network were taken out by a nuclear blast. From its inception, it steadily grew to link universities, government facilities, and corporations around the world. The people given access to it soon learned that it was useful for more than official business, and thus e-mail and bulletin boards were born.¹

From four host computers in 1969, the Net had grown to over one million computers by 1993 and was approaching ten million in 1996.² There

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1. Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50, 52.

2. ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

were an estimated forty million users worldwide as of 1996; that number is expected to reach 200 million by 1999.³

“The Internet is a vast international network of networks that enables computers of all kinds to share services and communicate directly, as if they were part of one giant, seamless, global computing machine.”⁴ The Net might be analogized to the system of interstate highways—many different routes to many different places. In this analogy, access providers are the companies that operate entrance ramps to the Net, some with tollgates.⁵

Content providers come in a variety of forms.⁶ Some provide archives of documents and operate much as newsstands, bookstores, or libraries. Some provide bulletin board systems (“BBS”) which permit subscribers to post documents thereon; some provide chat rooms where subscribers can “talk;” some sell goods over the Net. Content providers exercise varying degrees of control over the material made available at their sites.

Since no one owns or controls the Net, activity thereon is determined by the access providers, the content providers, and the subscribers and/or users.

While subscribers and users are typically liable for their own actions (although possibly judgment proof), liability of access providers and content providers depends upon the existing substantive law and the facts of each case.

B. *Common Carriers, Vendors, and Publishers*

The rights and obligations of providers and of users under the law is determined not only by the substantive law, but also by the characterization of the parties, which can determine the duty owed by a certain defendant to a certain plaintiff. For example, local telephone companies are considered

3. *Id.*

4. See Elmer-Dewitt, *supra* note 1, at 52. Congress has defined the Net as “the international computer network of both Federal and non-Federal interoperable packet switched data networks.” 47 U.S.C.A. § 230(e)(1) (West Supp. 1998).

5. Congress defines an “access software provider” as “a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.” *Id.* § 230(e)(4). Access software providers are also “interactive computer services,” such a service being defined as: “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” *Id.* § 230(e)(2).

6. Congress has defined an “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(e)(3).

common carriers; they must provide access to those who want it. They have neither the right nor the obligation to oversee how users use their phone lines. Since they cannot control the content of telephone conversations or facsimile transmissions, they cannot be held liable for customers' libelous, infringing, fraudulent, or otherwise tortious or criminal conduct.⁷

Publishers stand on a different footing. A newspaper is not required to print every story, commentary, or letter submitted. Thus, it has an obligation not to publish material that it knows or should know is tortious, such as libelous, infringing a copyright or a trademark, or the like.⁸

Vendors, such as libraries, bookstores, and newsstands, cannot be held to the same standards as publishers. They cannot be expected to review material in their possession, nor is it in the public interest to have them act as censors. Such would have a chilling effect on free speech.⁹

7. The copyright act has a common carrier exemption:

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

....
the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others....

17 U.S.C. § 111(a)(3) (1994).

8. The trademark act does contain an exemption for innocent infringement by publishers carrying paid advertisements:

Where the infringement or violation complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical or in an electronic communication . . . , the remedies . . . shall be limited to an injunction against the presentation [of such advertising matter in future issues of] such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications. The limitations of this subparagraph shall apply only to innocent infringers and innocent violators.

15 U.S.C. § 1114(2)(B) (1994).

9. In reversing a bookseller's conviction under an obscenity statute which had no requirement of scienter, the United States Supreme Court explained:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected If the contents of

C. *Protected Speech and Unprotected Speech*

While freedom of speech or expression is recognized as a fundamental right, some types of expression—seditious, obscene, and tortious—are subject to regulation or even prohibition. In regulating speech, the courts look to both the content and the context: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”¹⁰

D. *Obscenity*

Federal law prohibits the importation, interstate transportation, mailing, and broadcasting of obscene material.¹¹ This prohibition includes dissemination via the Net.¹²

In 1978, the United States Supreme Court upheld the Federal Communications Commission’s (“FCC”) regulation of indecent but not obscene material in radio broadcasting.¹³ The case involved the midafternoon broadcast of George Carlin’s “Filthy Words” monologue, preceded by a notice that the program would include language which might be offensive to some.¹⁴ In a variation on the content/context analysis, the FCC had likened offensive language to nuisance and determined that it should be channeled, not prohibited.¹⁵ Specifically, words depicting sexual and excretory activity should be aired at “times of day when children most likely would not be exposed to it.”¹⁶ In upholding the regulation, the Court stated:

We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most

bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.

Smith v. California, 361 U.S. 147, 153 (1959).

10. Schenck v. United States, 249 U.S. 47, 52 (1919).

11. 18 U.S.C. § 1462 (1994) (importation and transportation); 18 U.S.C. § 1461 (1994) (mailing); 18 U.S.C. § 1464 (1994) (broadcasting).

12. Section 1462 was amended in 1996 to expressly include the use of an interactive computer service to transfer such material. See 18 U.S.C. § 1462 (1994). An interactive computer service is defined in 47 U.S.C. § 230(e)(2) (1994), set forth in *supra* note 5.

13. FCC v. Pacifica Foundation, 438 U.S. 726, 751 (1978).

14. *Id.* at 729.

15. *Id.* at 726.

16. *Id.* at 733 (quoting *In re Matter of a ‘Petition for Clarification or Reconsideration,’* 59 F.C.C. 2d 892 (1976)).

limited First Amendment protection . . . First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's [*sic*] written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. . . . The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting.¹⁷

In *Sable Communications of California, Inc. v. FCC*,¹⁸ the Court chronicled the attempts of the FCC and Congress to regulate dial-a-porn in the wake of the *Pacific* decision. In 1982, Congress amended the Communications Act to criminalize providing, to those under eighteen years of age, indecent as well as obscene commercial telephone messages.¹⁹ The FCC promulgated regulations providing defenses based on time channeling and credit card screening; the time channeling defense was set aside in *Carlin Communications, Inc. v. FCC* ("*Carlin I*") as "both overinclusive and underinclusive."²⁰ The FCC promulgated new regulations keeping the credit card screening defense and adding a user identification code defense; these regulations were set aside in *Carlin II* for failure to consider exchange blocking.²¹ The FCC promulgated a new set of regulations keeping the two prior defenses and adding as a defense message scrambling; these regulations were upheld in *Carlin III*.²² The court, however, struck down as

17. *Id.* at 748–50.

18. 492 U.S. 115 (1989).

19. *Id.* at 120.

20. *Id.* at 121 (quoting *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) [hereinafter *Carlin I*]).

21. *Id.* at 121–22 (citing *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) [hereinafter *Carlin II*]).

22. *Id.* at 122 (citing *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1998), *cert. denied*, 488 U.S. 924 (1988) [hereinafter *Carlin III*]).

unconstitutional the attempt to regulate “indecent” as opposed to “obscene” speech.²³ Thereafter, Congress amended the act to ban indecent as well as obscene commercial telephone messages, without regard to the age of the recipient,²⁴ thus leading to the *Sable* case. The United States Supreme Court upheld the constitutionality of the statute as applied to obscene speech but struck down as unconstitutional its application to indecent speech, distinguishing the case before it from *Pacifica*:

The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.²⁵

One might have thought that Congress would have learned something from the *Carlin* and *Sable* cases. Apparently not. Since the terms “indecent” and “patently offensive” were undefined in the statute, Congress amended the act to restrict the dissemination of both obscene and “indecent” material by telecommunications devices and of “patently offensive” material by interactive computer services, to persons under eighteen years of age.²⁶ These provisions were found facially unconstitutional by a three-judge district court, and their enforcement was preliminarily enjoined.²⁷ The court distinguished accessing the Net from broadcasting: “Communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden. Users seldom encounter content ‘by accident.’”²⁸ The court rejected the act’s defenses of credit card verification, adult access codes, and adult personal identification numbers as not available for “noncommercial, not-for-profit entities.”²⁹ The court also rejected the government’s proposal for “tagging” of indecent material to facilitate blocking, as it was extremely burdensome to content providers such as

23. *Sable*, 492 U.S. at 122.

24. *Id.*

25. *Id.* at 127–28.

26. 47 U.S.C.A. § 223(a)(1)(B), (d)(1) (West Supp 1998). Liability was extended to facilities providers who knowingly permitted such activities to occur. *Id.* § 223(a)(2), (d)(2).

27. *ACLU v. Reno*, 929 F. Supp 824, 849 (E.D. Pa. 1996).

28. *Id.* at 844.

29. *Id.* at 849.

libraries, that might simply tag an entire site, thereby not reaching foreign content providers.³⁰

The principles enunciated in the obscenity cases have been adapted and applied in libel and infringement cases.

E. *Defamation and Other Intentional Torts*

*Cubby, Inc. v. CompuServe Inc.*³¹ was an action for libel, business disparagement, and unfair competition.³² CompuServe included an online forum called the Journalism Forum managed by an independent contractor who agreed to “manage, review, create, delete, edit and otherwise control the contents’ of the Journalism Forum ‘in accordance with editorial and technical standards and conventions of style as established by CompuServe.’”³³ The allegedly false and defamatory statements appeared in a daily newsletter available on the *Journalism Forum*.³⁴ Under the applicable New York State law, “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it,” however, “vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.”³⁵

The rationale for the distinction is the same as in the obscenity cases: vendors and distributors cannot be expected to review all material in their possession; imposing such a requirement would severely limit the material available to the public, in contravention of the First Amendment.³⁶ The court found that CompuServe acted as a for-profit library, not a publisher: “CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.”³⁷ In addition, “[g]iven the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.”³⁸

30. *Id.* at 847–48.

31. 776 F. Supp. 135 (S.D.N.Y. 1991).

32. *Id.* at 135.

33. *Id.* at 137.

34. *Id.* at 138.

35. *Id.* at 139 (citations omitted).

36. *Cubby*, 776 F. Supp. at 139–40.

37. *Id.* at 140.

38. *Id.* at 140–41. Since the plaintiffs failed to show an issue of fact regarding CompuServe’s knowledge, summary judgment was granted for CompuServe. *Id.* at 142.

Stratton Oakmont, Inc. v PRODIGY Services Co.,³⁹ was an action for libel based on statements on a PRODIGY bulletin board "Money Talk," alleging fraud by the plaintiffs in the sale of an initial public offering.⁴⁰ In finding that PRODIGY acted as a publisher, the court noted: "PRODIGY held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper."⁴¹ PRODIGY stated:

We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.⁴²

PRODIGY also promulgated content guidelines, electronically prescreened bulletin board postings for offensive language, used board leaders to enforce the guidelines, and provided board leaders with an emergency delete function to remove inappropriate postings.⁴³ In entering summary judgment for the plaintiffs, the court distinguished *Cubby*:

Let it be clear that this Court is in full agreement with *Cubby* . . . Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates.

...

PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.⁴⁴

F. *Intellectual Property Rights*

Numerous companies are patrolling the Net to enforce their intellectual property rights. Paramount Pictures for years has been trying to stop the proliferation of Star Trek photographs, Elvis Presley Enterprises has ordered

39. No. 31063/94, 1995 WL 323710 (N.Y. Sup. May 24, 1995).

40. *Id.* at *1.

41. *Id.* at *2.

42. *Id.* (quoting Ex. J).

43. *Id.* at *2-3.

44. No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. May 24, 1995). The case was settled in December of 1995 for a reported two-and-a-half million dollars. PRODIGY no longer monitors its bulletin boards. See No. 3106/94, 1995 WL 805178 (N.Y. Supp. Dec. 11, 1995).

the removal of sound clips of Presley's recordings and photographs of Graceland from home pages, and Sony Music Entertainment has sent notices to Web page owners using Pearl Jam images.⁴⁵ Many publishers are pushing for the passage of changes to the Copyright Act to define digital transmission as a form of publication, to include electronic coding of copyrighted material that would notify publishers when their material was copied, and to impose criminal penalties.⁴⁶

Playboy Enterprises has complained to a number of universities about students posting Playboy photographs.⁴⁷ *Playboy Enterprises, Inc. v. Frena*⁴⁸ was an action for copyright infringement, trademark infringement, and unfair competition, in which the court granted the plaintiff's motion for summary judgment.⁴⁹ The defendant provided a bulletin board for subscribers to upload and download pictures from *Playboy* magazine.⁵⁰ In holding that the defendant infringed the plaintiff's copyrights, including distributing copies of and publicly displaying the works, the court rejected Frena's defense that he was unaware of the copyright infringement, since "[i]ntent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement."⁵¹ The court also found trademark infringement of the marks *Playboy* and *Playmate* used to identify files, again rejecting Frena's defense that he did not intend to use the plaintiff's mark, since "a showing of intent or bad faith is unnecessary to establish a violation of § 1141(a)."⁵²

The Church of Scientology has been particularly vigilant in patrolling the use of its material on the Internet, with varying results. In *Religious Technology Center ("RTC") v. Lerma*,⁵³ a former church member posted allegedly stolen church documents through Digital Gateway Systems and provided them to the *Washington Post*.⁵⁴ After the court ordered return of the documents and seizure of Defendant Lerma's computer equipment, the *Washington Post* copied the documents from the court file, which was

45. Ross Kerber, *On-Line: Vigilant Copyright Holders Patrol the Internet*, WALL ST. J., Dec. 13, 1995, at B1.

46. *Id.*

47. *Id.*

48. 839 F. Supp. 1552 (M.D. Fla. 1993).

49. *Id.* at 1563.

50. *Id.* at 1554.

51. *Id.* at 1556-57, 1559.

52. *Id.* at 1560-61. To the extent that Frena removed the *Playboy* trademarks and substituted his own identification, the court found the intent necessary for the claim of unfair competition based "on reverse passing off." *Playboy*, 839 F. Supp. at 1562.

53. 897 F. Supp. 260 (E.D. Va. 1995).

54. *Id.* at 261-62.

subsequently sealed.⁵⁵ The court rejected the Religious Technology Center's request to restrain publication by the *Washington Post* of an article based on the documents, stating that if "a threat to national security was insufficient to warrant a prior restraint" in the "Pentagon Papers" case,⁵⁶ "the threat to plaintiff's copyrights and trade secrets is woefully inadequate."⁵⁷ Moreover, RTC was unlikely to succeed on the copyright claim, due to the fair use exception,⁵⁸ or on the trade secret claim, since the documents were in the public domain, having found their way onto the Net from sources in addition to the defendant.⁵⁹ In a later opinion,⁶⁰ the court rejected RTC's claim that the failure to restrain the publication violated the Free Exercise Clause. The court further declined to issue an injunction against Lerma or Digital Gateway Systems, based in part on RTC's unclean hands in executing the TRO against Lerma and, in part, on the decision of the Colorado District Court in a related case.⁶¹

The Colorado case was factually the same, with a different set of defendants—FACTNET and two former church members who were members of FACTNET's board.⁶² The defendant in the Virginia case, Lerma, was also a member of FACTNET's board and had posted the information from the court files in the Virginia case on the FACTNET BBS.⁶³ Like the Virginia court, the Colorado court found that the plaintiff was unlikely to succeed on the copyright claim, due to the fair use exception,⁶⁴ or on the trade secret claim, since the documents were in the

55. *Id.* at 262.

56. *See* *New York Times Co. v. United States*, 403 U.S. 713 (1971).

57. *Religious Tech. Ctr.*, 897 F. Supp. at 263. In a rare case, the court restrained publication of an article containing technical information regarding the construction of a hydrogen bomb, accepting the government's claim that it posed a threat to the national security: "A mistake in ruling against The Progressive will seriously infringe cherished First Amendment rights A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot." *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979). The issue apparently became moot when similar articles were published elsewhere.

58. *Religious Tech. Ctr.*, 897 F. Supp. at 263 (citing 17 U.S.C.A. § 107 (West Supp. 1995)).

59. *Id.* at 266.

60. *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353 (E.D. Va. 1995).

61. *Id.* at 1358, 1361 (citing *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995)).

62. *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1521–22 (D. Colo. 1995).

63. *Id.* at 1522.

64. *Id.* at 1525–26.

public domain, having found their way onto the Net from sources other than the defendant Lerma.⁶⁵

The Scientologists found a friendlier environment in California, where a similar action for copyright infringement and trade secret misappropriation was brought against Netcom and Erlich, a former minister of the church, who had posted allegedly proprietary church documents on a Netcom bulletin board.⁶⁶ In issuing a preliminary injunction against Erlich, the court found a likelihood of success on the copyright claim, since the fair use exception was not justified on the facts,⁶⁷ but that RTC was unlikely to succeed on the trade secret claim, since the information had been posted on the Net by others:

The court is troubled by the notion that any Internet user, including those using “anonymous remailers” to protect their identity, can destroy valuable intellectual property rights by posting them over the Internet, especially given the fact that there is little opportunity to screen postings before they are made. . . . While the court is persuaded by the Church’s evidence that those who made the original postings likely gained the information through improper means . . . this does not negate the finding that, once posted, the works lost their secrecy.⁶⁸

In a later opinion,⁶⁹ the court considered motions for summary judgment by the access provider, Netcom, and the BBS operator Klemesrud.⁷⁰ The court rejected Netcom’s attempts to use the common carrier exception to the Copyright Act:⁷¹

Netcom compares itself to a common carrier that merely acts as a passive conduit for information. In a sense, a Usenet server that forwards all messages acts like a common carrier, passively retransmitting every message that gets sent through it. Netcom would seem no more liable than the phone company for carrying an infringing facsimile transmission or storing an infringing audio recording on its voice mail. As Netcom’s counsel argued, holding such a server liable would be like holding the owner of the

65. *Id.* at 1526.

66. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

67. *Id.* at 1249–50.

68. *Id.* at 1256 (footnote omitted).

69. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

70. *Id.* at 1361.

71. 17 U.S.C. § 111 (1994).

highway, or at least the operator of a toll booth, liable for the criminal activities that occur on its roads.⁷²

Nevertheless, the court found that Netcom could not be held liable as a direct infringer:

The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from noninfringing bits. Because the court cannot see any meaningful distinction (without regard to knowledge) between what Netcom did and what every other Usenet server does, the court finds that Netcom cannot be held liable for direct infringement.⁷³

However, the court found that Netcom might still be liable for contributory infringement or vicarious infringement, since RTC notified Netcom and Klemesrud of the alleged infringement and Netcom took no action.⁷⁴

In *Sega Enterprises Ltd. v. Maphia*,⁷⁵ the court entered a preliminary injunction against copyright infringement, trademark infringement, and unfair competition.⁷⁶ The defendant provided a bulletin board for subscribers to upload and download SuperNintendo and Genesis games.⁷⁷ In some cases, subscribers were charged a fee for downloading games.⁷⁸ The court found a prima facie case that the defendant directly and contributorily infringed the plaintiff's copyrights including making copies of the works, noting that the defendant had knowledge of the copying.⁷⁹ The court further found a prima facie case of trademark infringement and of false designation

72. *Religious Tech. Ctr.*, 907 F. Supp. at 1369 n.12.

73. *Id.* at 1372-73.

74. *Id.* at 1375. "Where a defendant has knowledge of the primary infringer's infringing activities, it will be liable if it 'induces, causes, or materially contributes to the infringing conduct of' the primary infringer." *Id.* "A defendant is liable for vicarious liability for the actions of a primary infringer where the defendant (1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement." *Id.* As against Klemesrud, the court found no direct infringement for the same reasons as Netcom, a possibility of contributory infringement for the same reasons as Netcom, and insufficient evidence on the issue of vicarious liability, due to a failure to allege a financial benefit. *Religious Tech. Ctr.*, 907 F. Supp at 1381-82.

75. 857 F. Supp. 679 (N.D. Cal. 1994).

76. *Id.*

77. *Id.* at 683.

78. *Id.* at 683-684.

79. *Id.* at 686-87.

of origin based on the use of Sega's trademark on files and in the programs copied.⁸⁰

*United States v. LaMacchia*⁸¹ was a criminal action against a student at the Massachusetts Institute of Technology ("MIT") who had created a bulletin board in which correspondents were encouraged to upload popular applications software and computer games, which LaMacchia transferred to a second bulletin board from which subscribers could download the software.⁸² Because there was no showing of any financial benefit to LaMacchia, he could not be prosecuted under the criminal provisions of the Copyright Act.⁸³ Accordingly, he was indicted under the federal wire fraud statute.⁸⁴ The court determined that in enacting the Copyright Felony Act in 1992, Congress made a conscious decision to limit the extension of the felony provisions to criminal copyright infringement as defined in the Copyright Act,⁸⁵ so as not to accidentally bring "a large percentage of the American people . . . into the gray area of criminal law."⁸⁶ Accordingly, the court declined to extend the reach of the wire fraud statute to reach LaMacchia for fear of reaching "the myriad of home computer users who succumb to the temptation to copy even a single software program for private use."⁸⁷

G. *Fraud on the Net*

Much of the attention to the Net in the popular press has been directed to fraud on the Net. What makes fraud on the Net different from other schemes is the large volume of potential dupes that can be reached at low cost. Moreover, if the pitch is made on a bulletin board, rather than by e-mail, the dupes come to the con artist, not the other way around. However, unlike telephone solicitations, the Net leaves the equivalent of a paper trail, so it is easier to police these fraud schemes.

At the federal level, the Department of Justice has a computer crimes unit which investigates online crimes,⁸⁸ the Federal Trade Commission

80. *Religious Tech. Ctr.*, 857 F. Supp. at 688.

81. 871 F. Supp. 535 (D. Mass. 1994).

82. *Id.* at 536.

83. *Id.* at 539-40. See 17 U.S.C. § 506(a) (1994).

84. *LaMacchia*, 871 F. Supp. at 536, 540 (citing 18 U.S.C. § 1343 (1994)).

85. *Id.* at 540.

86. *Id.* at 544-45 n.18.

87. *Id.* at 544.

88. Julio Ojeda-Zapata, *Computerized Sleuthing Becomes Virtual Reality*, STAR-LEDGER (Newark, N.J.), Dec. 17, 1995, at 52.

("FTC") monitors online advertising and commercial services,⁸⁹ the Securities and Exchange Commission ("SEC") does not monitor advertising but does watch financial chatter in cyberspace.⁹⁰ What they are finding are the same old scams.

The FTC shut down an Internet-based pyramid scam that allegedly took in six million based on a purported 2000 percent return on investment.⁹¹ Fortuna Alliance of Bellingham, Washington, ran the operations for seven months before the FTC obtained an injunction shutting down the scheme. Some three-and-a-half million went into an Antiguan account, which the injunction ordered Fortuna to return to the United States.⁹²

The SEC brought charges of fraud and sale of unregistered securities against Telephone Information Systems, touted on CompuServe as a telephone lottery, which the SEC considered to be a pyramid scheme.⁹³ The SEC was also investigating Biosonics, who claimed to have medical devices that could cure everything from dry mouth to a dull sex life and was touted on an investment news group.⁹⁴

The Minnesota Attorney General's Office, first by accident and later by design, has become a leader in bringing lawsuits based on illegal business activities on the Net and in organizing states attorney generals to do the same.⁹⁵ In one case, a Las Vegas company had been charged with illegal bookmaking, by allowing bettors to place wagers on sporting events using the Net.⁹⁶ The company sought to avoid United States laws by setting up its WagerNet bookmaking service in Belize.⁹⁷ In another, a company was charged with false advertising relating to health claims related to the sale of germanium for acquired immune deficiency syndrome ("AIDS"), cancer, and other diseases.⁹⁸ In yet another case, they are trying to find a defendant who offered bogus "credit repair" services over America Online and collected the payments at a private post office box in Georgia.⁹⁹

The New Jersey Attorney General's Office was one of the first to create a team of "cyber cops" who regularly log onto the Net and the various

89. *Drag-Net 1995*, STAR-LEDGER (Newark, N.J.), Aug. 13, 1995, at 1, 14.

90. Susan Antilla, *Has Cyberspace Got a Deal for You*, N.Y. TIMES, Mar. 19, 1995, at 5.

91. *Alleged Pyramid Scheme on Internet Shut by FTC*, WALL ST. J., May 30, 1996, at B10.

92. *Id.*

93. See Antilla, *supra* note 90, at 5.

94. *Id.*

95. See Ojeda-Zapata, *supra* note 88, at 52.

96. *Id.*

97. *Id.*

98. See *Drag-Net 1995*, *supra* note 89.

99. See Ojeda-Zapata, *supra* note 88.

commercial online services to crack down on electronic pyramid schemes, e-mail chain letters, false advertising, and illegal business offerings.¹⁰⁰ The New Jersey Bureau of Securities went after questionable investment opportunities on newsgroup bulletin boards and forums on PRODIGY, CompuServe, and American OnLine, which led to cease and desist orders against twenty individuals on PRODIGY for e-mail chain letters found to be in violation of New Jersey's security laws.¹⁰¹

Programs to create fraudulent credit card numbers, such as Credit Master, are circulating on America Online and numerous electronic bulletin boards on the Net.¹⁰² While less than five percent of the numbers they generate correspond to valid card numbers, the increasing ability to charge services by entering credit card numbers through phone or computer lines without verification permits potential use of such numbers.¹⁰³ However, it is relatively easy for the police to find the users, since the merchandise ordered by phone or computer must be shipped to an address, which is how Nassau County New York police arrested four college students who went on a \$100,000 buying spree.¹⁰⁴

H. *Expanding Notions of Jurisdiction on the Net*

While an in-depth analysis of jurisdiction is beyond the scope of this paper, some consideration is necessary. General jurisdiction exists when the defendant's activities in the state are such as to amount to doing business in the state; specific jurisdiction exists when the cause of action sued upon arises in the state. A cause of action can be based on acts in the state or acts outside the state causing injury within the state, the latter being evaluated by the "effects test." In any case, the defendant's contacts with the state must be such that exercise of personal jurisdiction does not offend due process.¹⁰⁵ These contacts can be evaluated by whether the defendant purposefully availed to the forum.¹⁰⁶

Previous cases have found jurisdiction based on direct mail solicitation¹⁰⁷ and telemarketing.¹⁰⁸ There are only a handful of cases considering jurisdiction based on Net transactions and the authority is split.

100. See *Drag-Net 1995*, *supra* note 89.

101. *Id.*

102. *On Line, and inside Credit Card Security*, N.Y. TIMES, Mar. 19, 1995, at 37, 44.

103. *Id.*

104. *Id.*

105. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

106. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

107. See, e.g., *United States Golf Ass'n v. United States Amateur Golf Ass'n*, 690 F. Supp. 317, 320 (D.N.J. 1988).

In *EDIAS Software International, L.L.C. v. BASIS International Ltd.*,¹⁰⁹ the plaintiff was an Arizona company who had contracted with the defendant New Mexico company for distribution of software products.¹¹⁰ In addition to the breach of contract claims, the plaintiffs alleged that the Internet messages gave “rise to claims for libel, defamation, tortious interference with contract” and unfair competition under the Lanham Act.¹¹¹ After considering the extent of the defendant’s sales in Arizona for the “purposeful availment” test, the court considered the “effects test” in upholding jurisdiction: “BASIS directed the e-mail, Web page, and forum message at Arizona because Arizona is EDIAS’ principle place of business. EDIAS allegedly felt the economic effects of the defamatory statements in Arizona.”¹¹²

*CompuServe, Inc. v. Patterson*¹¹³ was a declaratory judgment action for non-infringement of common law trademarks.¹¹⁴ The defendant was a subscriber who provided shareware; he entered into an agreement with the plaintiff by computer transmission from his home in Texas to their computer in Ohio and thereafter transmitted software in a similar manner.¹¹⁵ The court found that the “purposeful availment” prong of the jurisdiction test was satisfied by the “stream-of-commerce” approach: “Patterson frequently contacted Ohio to sell his computer software over CompuServe’s Ohio-based system. Patterson repeatedly sent his ‘goods’ to CompuServe in Ohio for their ultimate sale. CompuServe, in effect, acted as Patterson’s distributor, albeit electronically and not physically.”¹¹⁶

*Panavision International, L.P. v. Toeppen*¹¹⁷ was a trademark infringement and antidilution action based solely on registration of a domain name for an Internet site.¹¹⁸ The court analyzed the case under the “effects test,” found infringement at the plaintiff’s principal place of business in California, and concluded that such was sufficient to satisfy the “purposeful

108. See, e.g., *AT&T Co. v. MCI Communications Corp.*, 736 F. Supp. 1294, 1304 (D.N.J. 1990).

109. 947 F. Supp. 413 (D. Ariz. 1996).

110. *Id.* at 414–15.

111. *Id.* at 415.

112. *Id.* at 420.

113. 89 F.3d 1257 (6th Cir. 1996).

114. *Id.* at 1259.

115. *Id.* at 1260–61.

116. *Id.* at 1265.

117. 938 F. Supp. 616 (C.D. Cal. 1996).

118. *Id.* at 619.

availment” prong of the jurisdiction test.¹¹⁹ The court denied that it was finding jurisdiction based on doing business via the Net.¹²⁰

In *Hearst Corp. v. Goldberger*,¹²¹ the magistrate recommended against jurisdiction in a trademark infringement action based solely on a web site:

Where, as here, defendant has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy.¹²²

Jurisdiction is the most problematic issue regarding regulation of activities on the Net. As recognized by the court in *ACLU v. Reno*:¹²³

Once a provider posts content on the Internet, it is available to all other Internet users worldwide. . . . For example, when the UCR/California Museum of Photography posts to its Web site nudes . . . to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing—wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site . . . are available not just in Philadelphia, but also in Provo and Prague. A chat room organized by the ACLU to discuss the United States Supreme Court’s decision in *FCC v. Pacifica Foundation* would transmit George Carlin’s seven dirty words to anyone who enters.¹²⁴

This concern is not theoretical. CompuServe ran afoul of German laws against minors viewing sexually explicit material.¹²⁵ CompuServe reacted by banning world wide access to such material, including access in the

119. *Id.* at 621-22.

120. *Id.* at 622.

121. No. CIV.3620-PKL-AJP, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

122. *Id.* at *1. See also *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2nd Cir. 1997). Notably, New York does *not* extend its long-arm statute to the full extent of constitutional limits. *Hearst*, 1997 WL 97097, at *9.

123. 929 F. Supp. 824 (E.D. Pa. 1996); *aff’d*, 117 S. Ct. 2329 (1997).

124. *Id.* at 844.

125. Jarel Sandberg, *CompuServe Bans Its Internet Access to Sexual Material*, WALL ST. J., Dec. 29, 1995, at B2.

United States;¹²⁶ thereafter, it reactivated the access and made blocking software available to users in Germany.¹²⁷

I. Conclusion

Because the intention of the Net was decentralization, there is no hub, no control point, and no on/off switch. As such, it has been described as “the closest thing to true anarchy that ever existed.”¹²⁸ The thinking of the old guard is “[a]ccess to computers should be unlimited and total,” “[a]ll information should be free,” and “[m]istrust authority and promote decentralization.”¹²⁹

The recent rumblings inside the Beltway about the possible creation of an Internet Commerce Commission to regulate the Net is troubling to newbies as well as the old guard. People tend to do the jobs they are given to do. Thus, regulators regulate and legislators legislate.

Activities in cyberspace should receive neither less nor more protection under the law. So far, the courts have been doing a fine job of applying existing law to activities on the Net. Likewise, Congress has exercised admirable self-restraint in not over-legislating in this area. A continued wait-and-see approach as the law develops in the courts appears to be a wise one.

126. *Id.*

127. Shailagh Murray & Richard L. Hudson, *Europe Seeks to Regulate the Internet, As Industry Fears Support for Controls*, WALL ST. J., Mar. 18, 1996, at A7.

128. See e.g., Elmer-Dewitt, *supra* note 1, at 53.

129. *Id.*

Here Come the Cybercops 2: Who Should Police Cybermarks?*

Claire Ann Koegler**

The growth of the Internet has led to an explosion in registration of domain names. A domain name allows a web site to be accessed by entering the name (for example, "coke.com"). Without a domain name, a web site is accessed by means of its address, a series of numbers such as 123.456.789.123, which is sometimes referred to as an "ugly" domain name.

Initially, domain names were issued on a first-come, first-serve basis. Words corresponding to valuable trademarks were registered as domain names by so-called trademark "pirates" and held for ransom. Many companies which were slow to apply for domain names were surprised to find that the domain name they wanted had already been registered.

In response to the outcry from disappointed applicants, the organization responsible for registering domain names in the United States established a procedure by which a late-comer asserting trademark rights in a domain name may challenge its use by the domain name registrant and, in many cases, obtain the domain name for its own use. The courts have also rushed to the aid of trademark owners, utilizing the newly enacted Federal Trademark Dilution Act.¹

Some Internet users have protested the assertion of rights to domain names based on trademarks, feeling that the two are not the same, that big business is bullying the small entrepreneur, and that governmental involvement will spoil the Internet as they know it. Some attorneys also object to the expansion of federal trademark law, by Congress and the courts, as contrary to the intended policy of the law and overly restrictive of free enterprise.

I. A BRIEF INTRODUCTION TO TRADEMARK LAW

A trademark is a symbol used to represent the source of goods.² Under the federal statute "[t]he term 'trademark' includes any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and

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1. 15 U.S.C. § 1051 (1995).

2. See BLACK'S LAW DICTIONARY 1493 (16th ed. 1990).

distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods.”³

Trademarks are intended to protect consumers against confusion as to the source of goods or services. They also protect the goodwill of the owner of the mark in the goods or services. In the United States, a trademark cannot exist in gross; it can only exist in conjunction with the goodwill of the business.⁴ “An axiom of trademark law is: no trade, no trademark. The right to register a mark depends upon actual use in trade.”⁵ It must be used on the goods, that is, “placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale.”⁶

A complaint for trademark infringement requires that the infringing use be a trademark type use (e.g., use in connection with goods or services) and that it gives rise to a likelihood of consumer confusion.⁷ Since domain names are not per se used in connection with the sale of goods and services, it is hard to see how the use, much less the mere registration, can give rise to a claim of trademark infringement.

Under traditional trademark law, a registrant was entitled to a reasonable zone of expansion, both in product line and geographical area, in which a probability of confusion might exist.⁸ Thus, one could not adopt “Cadillac” for automobile tires, since a reasonable consumer might assume that the car company was now making tires. On the other hand, one could adopt “Cadillac” for dog food, since a reasonable consumer would not assume that the car company was now making dog food. For non-competing goods, relief might

3. 15 U.S.C. § 1127 (1994). The Lanham Act distinguishes between trademarks used on goods and service marks used in connection with services. In this paper, “trademarks” is used generically to include both types of marks. Similarly, “goods” is used generically to include both goods and services.

4. *Society de Devs. et d’Innovations des Marches Agricoles & Alimentaires-Sodima-Union de Cooperatives Agricoles v. International Yogurt Co.*, 662 F. Supp. 839, 849 (D. Or. 1987).

5. *Id.* at 847.

6. 15 U.S.C. § 1127 (1994). This section of the statute also requires that the goods be sold or transported in interstate or international commerce. *Id.*

7. *Id.* § 1114 (1)(a), which provides in pertinent part:

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided.

8. See 15 U.S.C. § 1225 (1994).

be available under the law of unfair competition.⁹ Under the new law, neither competition nor confusion is required.¹⁰

II. DOMAIN NAMES

The rapid growth of the Internet¹¹ has led to a proliferation of Internet web sites, which has led to an exponential increase in registration of domain names.¹² A domain name comprises a first, top level domain name ("TLD"), such as "coke" and a second extension, such as "com." A three-letter extension refers to a United States site and reflects the origin and nature of the site, such as commercial, educational, governmental, organizational, or network. Outside the United States, two-letter extensions are used to represent the country. Such extensions generally comprise the country's internationally recognized two-letter abbreviation. Thus, one could have: 1) coke.uk; 2) coke.fr; 3) coke.de; 4) coke.ch; 5) coke.nl; etc.

Each country has appointed its own internal entity to manage addresses and register domain names. In the United States, the Internet Assigned Numbers Authority ("IANA") is the overall authority for Internet addresses. IANA has delegated authority for the issuance of domain names to the Internet Network Information Center ("InterNIC"), which is funded by the National Science Foundation ("NSF"). In April of 1993, NSF contracted with Network Solutions, Inc. ("NSI"), a private corporation, for the processing of commercial domain name applications. To help keep track of names elsewhere in the world, regional registries exist, namely RipeNCC in Europe and APNIC for the Asia-Pacific Region.

9. 15 U.S.C. § 1125(a)(1)(A) (1994) which provides in pertinent part:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

10. *Id.* § 1127; see discussion *infra* pp. 19–20.

11. Information on the development of the Internet and figures on growth of host computers and users are provided in "The Information Highway Patrol: Here Come the Cybercops," a paper presented at the Twenty-Sixth Popular Culture Association and Eighteenth American Culture Association Annual Conference, Las Vegas, Nev. (Mar. 24–28, 1996).

12. Registrations have increased from 100 a day in 1994 to over 1000 a day in 1996. See Greg Miller, *Cyber Squatters Give Carl's Jr., Others Net Loss*, L.A. TIMES, July 12, 1996, at A1.

In the United States, TLDs initially were issued on a first-come, first-serve basis. To make domain names available, to make web sites more easily accessible, and to help get businesses up and running on the Internet, expedition in the issuance of TLDs was paramount. The only fact considered was whether or not the identical word had previously been registered as a TLD. Thus, the consideration in issuing TLDs was comparable to the consideration of corporate names made by a Secretary of State when issuing a certificate of incorporation.

As a result, companies with foresight got the domain names they wanted, while late comers found that the domain names they wanted were in the hands of entrepreneurs with foresight, who acquired the names in the hope of eventually selling them.¹³ These entrepreneurs were disparaged as "pirates" seeking ransom for the captive names.¹⁴ Companies who reportedly paid the ransom include McDonald's, Kentucky Fried Chicken, and Taco Bell.¹⁵ Some of the more interesting disputes include: MTV, which was registered by a former employee;¹⁶ Kaplan, which was registered by its competitor, Princeton Review;¹⁷ and MCI, which was registered by its competitor, Sprint.¹⁸ Perhaps the most notorious pirate is Toeppen, who registered over 200 domain names.¹⁹

13. The initial fee for registration is \$100 for two years. The annual maintenance fee thereafter is \$50. A cottage industry (from Internet Consulting Corporation to Hell's Kitchen) has sprouted up to acquire and maintain domain names for companies who do not know how to, or want to, do it themselves.

14. This practice is not without precedent. For years, enterprising speculators have registered famous trademarks in countries which do not require use prior to registration in anticipation of eventually licensing or selling their rights. For example, when the American trademark the registrant's business expanded to that foreign country. Registration and maintenance of trademarks is far more expensive than the costs incurred in registering and maintaining domain names, but the eventual payoff could be a windfall for the speculator. Many American companies had to pay the price when they expanded abroad and denounced these foreign trademark pirates. Had the roles been reversed, the practice might well have been chalked up to "Yankee ingenuity" rather than piracy.

15. See Miller, *supra* note 12. E.T. Fingerhut's remarks and accompanying paper, "Hammering out the Nuts and Bolts of Trademarks and the Internet" was presented at the Current Intellectual Property Issues Symposium, New York City, N.Y. (Dec. 2, 1996).

16. MTV Networks, Div. of Viacom Int'l, Inc. v. Curry, 867 F. Supp. 202 (S.D.N.Y. 1994); see Fingerhut, *supra* note 15.

17. *Id.*

18. See Fingerhut, *supra* note 15.

19. See Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996), [hereinafter *Toeppen I*], later opinion, 945 F. Supp. 1296, (C.D. Cal. 1996); Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227 (N.D. Ill. 1996) [hereinafter *Toeppen II*].

In response to the outcry from disappointed applicants, NSI changed its application and instituted dispute resolution procedures in 1995.²⁰ Now, applicants must represent *inter alia* that registration of the domain name does not infringe or interfere with the rights of any third party.²¹ The current dispute resolution policy requires that the trademark owner send a notice to the domain name registrant and a copy of the notice to NSI of the dispute, together with a certified copy of a federal registration on the Principal Register (or of a foreign registration) of a mark identical to the TLD.²² So now NSI examines priority in addition to the identical nature of domain names.²³ Priority is given to the holder of the trademark registration if the date of first use on the trademark registration precedes the date of registration of the TLD.²⁴ This procedure relies solely on the federal registration and ignores state registrations and common law rights.²⁵

More recently, Congress has enacted the Federal Trademark Dilution Act²⁶ as an amendment to the Lanham Act (Federal Trademark Statute).²⁷ In the short time since it became law on January 16, 1996, courts have been liberally interpreting this new law in its application to domain names to quash the so-called piracy.

III. WHAT IS AND IS NOT A TRADEMARK

Corporate names are given out on a first-come, first-serve basis, without reference to trademark rights. Secretaries of State generally consider only the identical nature when registering a corporate name.²⁸ Mere registration of a corporate name is not a trademark use.²⁹

Stock ticker symbols³⁰ are assigned by the exchanges upon request and subject to availability. Some ticker symbols are, in fact, trademarks of the companies they represent, such as GE, GM, IBM, and TWA. Others may well be trademarks, but not of the companies they represent: RCA is not the

20. These documents are available from NSI Headquarters, 505 Huntmar, Herndon, Va, 22070.

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *See supra* note 20.

26. 15 U.S.C. § 1051 (1995).

27. *Id.* § 1127.

28. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 9.01[3] at 9-25 (1996).

29. *Id.*

30. These are symbols that represent stocks on the market. A "ticker" is a "telegraphic receiving instrument that automatically prints stock prices." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY 1981 (1996).

company acquired by GE, but rather the Retirement Care Associates; GAP is not the clothing store, but rather the Great Atlantic & Pacific Tea Company; and CNBC is not the cable station that runs a ticker, but rather Center Bancorp. Nor are ticker symbols international. Although NA on the New York Stock Exchange is Nabisco Holdings, NA on the Toronto Stock Exchange is the National Bank of Canada.³¹

In what may be the only case of its kind, Donna Karan (ticker symbol DK) sued Donnkenny (ticker symbol DNKY) for infringement and unfair competition based on Donna Karan's trademark DKNY.³² The case was settled with Donnkenny keeping its DNKY ticker symbol but agreeing not to promote in its advertising, promotion, or marketing.³³

Local telephone numbers are given out on an availability basis, although requesting a specific number may result in a fee. The same is true of "800" numbers.³⁴ There are a handful of cases involving the protectability of "ciphers," which are telephone numbers that correspond to words.

For instance, consider the case of *Dial-a-Mattress Franchise Corp. v. Page*³⁵ involving a mattress company in the metropolitan New York City area.³⁶ The company had acquired all of the local "MATTRES" (628-8737) numbers in the tri-state metropolitan area, named itself "Dial-A-Mattress," and advertised for customers to "dial a mattress and leave off the last s for savings."³⁷ They sought to acquire the corresponding "800" number but were informed it was not available.³⁸ Page sold sofa beds under the name "Easy Bed" and had acquired "1-800-327-9233" ("EASY BED").³⁹ When he expanded into the mattress business, he sought to acquire the "1-800-MATTRES" number and was told that it was unavailable.⁴⁰ However, Page by a series of purchases and exchanges, eventually acquired the desired number.⁴¹ Initially, Page was allowed to keep the number, subject to certain

31. Stock ticker symbols are published in *Barron's*, *Wall Street Journal*, *Value Line Reports*, and *Standard and Poor's Reports*.

32. *Donna Karan Settles Case with DonnKenny over Trademark Law Use*, WALL ST. J., May 28, 1997, at B5.

33. *Id.*

34. It seems odd, to say the least, that the companies did not learn from their experience with foreign trademarks, *see* 15 U.S.C. § 1114, and did not plan ahead when "800" numbers started to become popular. The introduction of "888" numbers is bound to raise a host of new conflicts.

35. 880 F.2d 675 (2d Cir. 1989).

36. *Id.* at 675.

37. *Id.*

38. *Id.* at 676.

39. *Id.* at 677.

40. *Dial-a-Mattress*, 880 F.2d at 677.

41. *Id.*

provisos reprised in the appellate decision.⁴² “The Magistrate recommended that Page be permitted to use the number ‘1-800-MATTRES(S),’ but that he be required to answer each telephone call received with the following greeting: ‘Easy Bed. We are not connected with Dial-A-Mattress which advertises on radio and television.’”⁴³

The District Judge ordered Page to notify the telephone company not to connect to Page’s telephone any call placed “to the number 1-800-MATTRES(S) that originated from area codes 201, 212, 516, 203, and 718, and to pay any charges required for that purpose.”⁴⁴ The appellate court left unchanged the terms of the preliminary injunction, despite making broad pronouncements about the protectability of telephone numbers as trademarks.⁴⁵

If you can dial a mattress, why not dial a lawyer? In *Murrin v. Midco Communications, Inc.*,⁴⁶ a Minnesota lawyer named Murrin had the local phone number for “LAWYERS” (612-529-9377).⁴⁷ A New York lawyer named Davis had his areas local phone number for “LAWYERS” (212-529-9377), and like the Dial-A-Mattress Company, had acquired the local number in five different area codes for the New York City metropolitan area.⁴⁸ Davis was the first to track down the “800” service provider who had been assigned the number and to reserve the “800” number. In the meantime, Murrin registered “Dial LAWYERS” as a service mark.⁴⁹ The preliminary injunction permitted use of the number by Davis with the proviso that, outside metropolitan New York City he could not use the word “DIAL” or dots or hyphens between the letters of “LAWYERS.”⁵⁰

Now, take the case of a personal injury law firm in southeastern Pennsylvania with the local telephone number “INJURY-1.”⁵¹ Add to this a personal injury lawyer in southeastern Pennsylvania with the local telephone number “INJURY-9.” Each party had filed an application to register its

42. *Id.*

43. *Id.*

44. *Id.* The district judge’s order prevents would-be customers of Dial-A-Mattress from accidentally reaching Easy Bed. However, such a would-be customer instead of hearing Easy Bed’s disclaimer and knowing he reached the wrong number, would simply not be connected at all and likely give up on calling Dial-A-Mattress.

45. *Dial-a-Mattress*, 880 F.2d at 678. There is no final opinion in the case, however, the Dial-A-Mattress Company is now using the “1-800-MATTRES” number, which is displayed on their trucks.

46. 726 F. Supp. 1195 (D. Minn. 1989).

47. *Id.* at 1196–97.

48. *Id.* at 1197.

49. *Id.* at 1196.

50. *Id.* at 1201.

51. *Dranoff-Perlstein Assocs. v. Sklar*, 967 F.2d 852 (3d Cir. 1992).

mnemonic phone number as a service mark.⁵² The district court granted summary judgment for the INJURY-1 lawyers.⁵³ The appellate court reversed and remanded on the issue of secondary meaning and likelihood of confusion of the mark as a whole.⁵⁴ However, the appellate court found that the "INJURY" part of the mark was generic and specifically disagreed with both the DIAL-A-MATTRESS and DIAL-LAWYERS cases on the grounds that MATTRESS and LAWYERS were generic and not protectible as a matter of law.⁵⁵

One of the first "800" cases involved a businessman who acquired and promoted their use of "800" "ciphers," including "1-800-AMERICA" (1-800-263-7422).⁵⁶ Some time after making a promotion to American Airlines, who was not interested, he had his "800" line installed at a travel agency and listed as "1-800-AMERICAN" (not "1-800-AMERICA") under "Airline Companies" (not "Travel Agents") in a wide range of telephone directories.⁵⁷ He then gave interviews to the press representing that he expected to get a lot of booking calls for American.⁵⁸ The court found that "[t]here can be no doubt it was [defendant's] intention to contrive and promote 1-800's name in a manner designed to confuse the public and to trade on American's goodwill and substantial business and advertising,"⁵⁹ and enjoined his use, *inter alia*, of the telephone number.⁶⁰

A variation on ciphers are complementary numbers, which are predictably misdialed numbers.⁶¹

Because of this phenomena, some long distance carriers encourage their clients to subscribe to both the vanity and complementary numbers. Many companies, including hotel chains like Marriott and Red Roof Inns, have done so. Others, like Holiday Inns, have not. In the event that these complementary numbers are not assigned or are not in active use, callers who reach them will receive a busy signal or a recorded message indicating the number is out of

52. *Id.* at 854.

53. *Id.*

54. *Id.* at 862-63.

55. *Id.* at 856-57.

56. *American Airlines, Inc. v. A 1-800-A-M-E-R-I-C-A-N Corp.*, 622 F. Supp. 673 (N.D. Ill. 1985).

57. *Id.* at 674-75.

58. *Id.* at 676.

59. *Id.*

60. *Id.* at 686.

61. For example, substituting the number one for the letter I (four on the dial) and, more commonly, substituting the number zero for the letter O (six on the dial). *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 838 F. Supp. 1247, 1250 (E.D. Tenn. 1993), *aff'd in part and rev'd in part*, 86 F.3d 619 (6th Cir. 1996), and *cert. denied*, 117 S. Ct. 770 (1997).

service. Obviously, if the complementary number is assigned to another user and is active, then callers will reach that entity.⁶²

Enter the defendant service bureau who, among other things, provided an answered "800" service for numerous customers.⁶³ As a result of its own experience and investigation, it discovered the "complementary" number problem and recommended the use of complementary numbers to its customers.⁶⁴ It then recognized that there could be a market for other users of "800" numbers who might be interested in paying a service bureau to answer their complementary numbers for them.⁶⁵ At that time, Holiday Inn used "1-800-HOLIDAY" (1-800-405-4329) for registrations. The complementary number for "HOLIDAY" is thus 405-4329, which was purchased by the service bureau.⁶⁶ Later, the service bureau created "800" Reservations to handle reservations for a number of hotel chains.⁶⁷ Holiday Inns paid 800 Reservations a commission for reservations made through it, so both parties profited from the use of the complementary number.⁶⁸

The message received by customers when they reached "800" Reservations started with the following disclaimer:

Hello. *You have misdialed and have not reached Holiday Inns or any of its affiliates.* You have called 800 Reservations, America's fastest growing independent computerized hotel reservations service. One of our highly trained hotel reservations specialists will be with you momentarily to provide the Holiday Inns number or to assist you in finding the lowest rate at over 19,000 properties worldwide, including such hotel chains as Holiday Inns, Guest Quarters, Hampton Inn, Sheraton, Comfort Inn, and many more.⁶⁹

Moreover, at no time did the defendant ever advertise the complementary number or mnemonic "HOLIDAY."⁷⁰ "The court agrees with defendants that, in a traditional sense, they have made no use of a Holiday Inns' registered mark or of any similar name or logo."⁷¹ These two factors notwithstanding, the district court found the conduct so "nefarious," "insidious," and

62. *Id.* at 1250.

63. *Id.*

64. *Id.* at 1251.

65. *Id.*

66. *Holiday Inns, Inc.*, 838 F. Supp. at 1251.

67. *Id.*

68. *Id.* at 1252.

69. *Id.* at 1253 (emphasis added); *see also* *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619, 621 (6th Cir. 1996).

70. *Holiday Inns, Inc.*, 838 F. Supp. at 1254.

71. *Id.* (emphasis added); *see also* *Holiday Inns, Inc.*, 86 F.3d at 621.

“parasitic” as to warrant relief.⁷² Fortunately, the appellate court recognized the gravamen of a complaint under the Lanham Act:

Nevertheless, the defendants’ use of a protected mark or their use of a misleading representation is a *prerequisite* to the finding of a Lanham Act violation. . . . Holiday Inns does not offer, and our own research has not produced, a case in which the defendant neither *used* the offending mark nor *created* the confusion and yet was deemed to have committed a trademark infringement. We believe that stretching the plain language of the Lanham Act to cover the present dispute is unjustified. As a matter of law, therefore, we hold that [defendants] did not violate §§ 32 and 43 of the Lanham Act by the use of the 405 number.⁷³

What one learns from this handful of cases is that courts are capable of analyzing new issues, such as mnemonic telephone numbers, under the existing law of trademarks and unfair competition, although they may not agree on what is or is not generic. And, despite the broad language in some of the opinions about the protectability of telephone numbers, the only holding which forced the defendant to give up his number was the *American Airlines* case, where the defendant’s advertisements in the yellow pages amounted to infringement and unfair competition under existing law.⁷⁴ Had the defendant in *American Airlines* not actively advertised the number in a misleading and infringing fashion, he could have presumably warehoused it indefinitely in the hope of selling it to the highest bidder.

The treatment of domain names should not be *sui generis*. A name of a company is not a trademark unless and until it is used to identify goods. A stock ticker symbol is not a trademark unless and until it is used to identify goods. A telephone number is not a trademark unless and until it is used to identify goods. Therefore, a domain name should not be a trademark unless and until it is used to identify goods. Mere acquisition of a domain name, even if for speculative purposes, should not be condemned.

IV. THE EARLY DOMAIN NAME CASES

The parallel between “800” numbers and domain names was first noted by the district court in the *MTV* case:

72. *Holiday Inns, Inc.*, 838 F. Supp. at 1255.

73. *Holiday Inns, Inc.*, 86 F.3d at 626. The Lanham Act § 32 (15 U.S.C. § 1114) covers trademark infringement; section 43 of the Act (15 U.S.C. § 1125) covers unfair competition.

74. *American Airlines, Inc. v. A 1-800-A-M-E-R-I-C-A-N Corp.*, 622 F. Supp. 673, 686 (N.D. Ill. 1985).

Internet domain names are similar to telephone number mnemonics, but they are of greater importance, since there is no satisfactory Internet equivalent to a telephone company white pages or directory assistance, and domain names can often be guessed. A domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base.⁷⁵

This note was cited to the district court in *Agema Infrared Systems AB v. Infrared Service Corp.*,⁷⁶ where the court went on to say:

I have previously in this case issued an injunction precluding the defendants from using an 800 number with the name Agema in it, holding that in that instance the trademark protection of the name Agema would prevail. I have the same type of situation here.

In essence, as [another court] said . . . the INTERNET system is akin to a telephone. I think it is more dramatic than a telephone. It is the way that people are going to start communicating with one another. It seems to me if trademark protection does not go to that kind of a listing, then I don't know what it would go to.⁷⁷

V. THE FEDERAL TRADEMARK DILUTION ACT

The Federal Trademark Dilution Act, which was signed into law on January 16, 1996, to amend the Lanham Act, provides in part:

The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection.⁷⁸

75. *MTV Networks, Div. of Viacom Int'l, Inc. v. Curry*, 867 F. Supp. 202, 203-04 n.2 (S.D.N.Y. 1994). No substantive ruling was based on this factor; the case was before the court on a motion to dismiss counterclaims. *Id.* The case was reportedly settled without a decision on the merits.

76. On file with Nova Law Review.

77. Transcript of Proceedings, August 21, 1995, at 28-29. By an order dated *nunc pro tunc* August 21, 1995, the defendant was ordered to contact InterNIC to arrange termination of the AGEMA.COM name within seven days. A previous order dated January 27, 1995, had required termination of the "800" number.

78. 15 U.S.C.A. § 1125(c)(1) (West 1998).

The act makes clear that neither competition nor confusion is required: "The term 'dilution' means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of—(1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception."⁷⁹ Nothing in the act eliminates the requirement of use in commerce.

VI. THE LATER DOMAIN NAME CASES

The first reported domain name case under the new federal statute appears to be *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*⁸⁰ The defendant set up an internet site at candyland.com with sexually explicit material.⁸¹ The district court entered a preliminary injunction against the use of the domain name citing federal and state antidilution statutes.⁸² There was no discussion of whether a domain name identifying a web site was a trademark use within the contemplation of the federal statute, leaving one to wonder whether the court's interest was to prevent children from accidentally accessing sexually explicit material, which is not the purpose of the Act.

Once the floodgates were opened by the *Hasbro* case, latecomers seeking to avoid ransoming domain names flooded the courts, and the courts accommodated them under the new Act without regard to whether domain names were being used as marks or whether the marks were "famous," as required by the act. The act does not define "famous," but its common meaning is "[w]ell or widely known."⁸³

Is "ActMedia" "widely known?" The district court in *ActMedia, Inc. v. Active Media International, Inc.*⁸⁴ apparently thought so. The case presents the usual story. The plaintiff had a registered trademark and the defendant owned the domain name.⁸⁵ With little discussion, the court found the domain name registration to be a violation of the Lanham Act and state common law, and entered a final injunction against its use.⁸⁶

Is "Intermatic" Famous? The court thought so in *Toeppen II*: "As a matter of law the Court finds that the Intermatic mark is famous within the meaning of 15 U.S.C. § 1125(c)."⁸⁷ As earlier noted, Toeppen was a master

79. *Id.* § 1127 (quoting *Panavision Int'l, L.P. v. Toeppen*, 945 F. Supp. 1296, 1303–04 (C.D. Cal. 1996)).

80. No. C96-130WD, 1996 WL 84853 at *1 (W.D. Wash. 1996).

81. *Id.* at *1.

82. *Id.*

83. WEBSTER'S NEW COLLEGIATE DICTIONARY 414 (1977).

84. No. 96C3448, 1996 WL 466527 (N.D. Ill. 1996).

85. *Id.* at *1–2.

86. *Id.* at *2.

87. *Toeppen II*, 947 F. Supp. at 1239.

of registering famous domain names, some of which were set forth in *Toeppen II* and others in *Toeppen I*.⁸⁸ Among the airlines, he registered: 1) air-canada.com; 2) deltaairlines.com; 3) flydelta.com; 4) northwestairlines.com; 5) lufthansa.com;⁸⁹ and 6) britishairways.com.⁹⁰ In the sports arena, he registered: 1) australiaopen.com; 2) frenchopen.com; 3) anaheimstadium.com; 4) camdenyards.com; and 5) yankeestadium.com.⁹¹ In the retail sector, he registered: 1) crateandbarrel.com, 2) eddiebauer.com, and 3) neiman-marcus.com.⁹² Perhaps the court thought that since Toeppen had registered the domain name, the trademark must be famous.

The next hurdle the court faced was use of the mark. Toeppen had temporarily posted a Web page with some software on which he was working and then replaced it with a map of Champaign-Urbana, Illinois.⁹³ The court recognized that Toeppen had never used "Intermatic" in a trademark sense:

"At no time did Toeppen use intermatic.com in connection with the sale of any available goods or services. At no time has Toeppen advertised the intermatic.com domain name in association with any goods or services."⁹⁴ Thus, the court was forced to find "use in commerce" based on Toeppen's alleged "commercial use" of the domain name:

Toeppen's intention to arbitrage the "intermatic.com" domain name constitutes a commercial use. At oral argument Toeppen's counsel candidly conceded that one of Toeppen's intended uses for registering the Intermatic mark was to eventually sell it back to Intermatic or to some other party. Toeppen's desire to resell the domain name is sufficient to meet the "commercial use" requirement of the Lanham Act.⁹⁵

A similar result was obtained in *Toeppen I*, in which the court found that plaintiff's "Panavision" and "Panaflex" were "famous."⁹⁶ The court also found that Toeppen had used the mark in commerce because "Toeppen's 'business' is to register trademarks as domain names and then to sell the domain names to the trademarks' owners."⁹⁷ Here, the court focused on the "in commerce" part of the requirement and ignored the "use" part of the requirement.⁹⁸

88. *Toeppen I*, 938 F. Supp. at 616.

89. *Id.* at 619.

90. *Toeppen II*, 947 F. Supp. at 1230.

91. *Toeppen I*, 938 F. Supp. at 619.

92. *Toeppen II*, 947 F. Supp. at 1230.

93. *Id.* at 1232.

94. *Id.* at 1233.

95. *Id.* at 1239.

96. *Toeppen I*, 945 F. Supp. at 1302-03.

97. *Id.* at 1303.

98. *Id.* at 1303 n.5.

VI. CONCLUSION

Did we really need a Federal Trademark Dilution Statute? Protecting marks that have become icons—or taken on a life of their own—is desirable. A T-shirt with the signature Coca-Cola script or Budweiser label has a commercial value just as a T-shirt with a picture of Mickey Mouse, the Three Stooges, or The Rolling Stones. But consider this query: whether another form of protection—copyright, right of publicity, protection against unfair competition, or unjust enrichment—might not prove more suitable than trademark law when the mark is not being used as a trademark.

Under the revised Lanham Act, a presidential candidate could not say “Where’s the Beef?” without fear of being hailed into court. The consumer is no longer the focus of the protection afforded by the Act rather, it is the owner of the “famous” mark—typically, big business.

Furthermore, if the intent of the revision to the Act was to protect famous marks, why has every mark considered been found to be famous? ActMedia or Intermatic are simply not in the same class as Coca-Cola or Budweiser. And why the total disregard as to whether the mark is being used on or in connection with goods or services? Under the courts’ interpretation of the new Act, mere registration of corporate names, stock ticker symbols, and telephone numbers would be subject to assertions of trademark dilution and court-enforced forfeiture of the name, symbol, or number, without compensation to the registrant.

To borrow a line from Judge Learned Hand: “[T]here is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today.”⁹⁹ Can one hope that what is reckoned an actionable wrong today may not be so in the future?

99. *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925), *rev’d on other grounds*, 273 U.S. 132 (1927).

Here Come the Cybercops 3: Betting on the Net*

Claire Ann Koegler**

As the Internet plays an increasing role in American culture, more and more people are betting on the Net—everything from sports betting to casino gambling, from playing the stock market, the world's largest crap game, to falling for various get-rich-quick schemes. In this era of irrational exuberance, who can resist? Who is betting on the Net? Who stands to profit from it? Who wants to regulate it?

A wealth of federal and state law exists to regulate securities transactions, but recently Congress has acted to limit the rights of states to regulate securities transactions. Regulation of gambling has been the exclusive province of the states, but some members of Congress would also like that to change. In 1996, Congress commissioned a two-year multi-million dollar study of the national impact of gambling, "whether conducted in a casino, on a riverboat, on the Internet, on an Indian reservation, or anywhere else in the United States."¹ The Commission's report is expected to be released later this year. Without waiting for the Commission's findings, members of Congress have already introduced legislation to prohibit gambling on the Internet.

A. *Cybercommerce and Cybercops*

The exponential growth of the Internet has prompted governments around the world to look at ways they might regulate and derive revenue from cybercommerce. Worldwide, there are approximately ten million host computers with forty million users.² It is projected there will be 200 million users by 1999.³ Seventy percent of companies in the United States have web sites to promote their products and ten percent sell their products online.⁴ That number is expected to increase to forty percent within the next two

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1. Statement by President Clinton upon Signing H.R. 497, Aug. 3, 1996, *reprinted in* 1996 U.S.C.C.A.N. 1192, 1207–1.

2. *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

3. *Id.*

4. CNBC television broadcast, Mar. 10, 1998 (similarly, Bloomberg News Radio, Mar. 10, 1998).

years.⁵ It has been estimated that new web sites are appearing at the rate of 65,000 per hour.⁶

The United States is home to the greatest number of host computers; about half of the total host computers are in the United States, followed by Germany, the United Kingdom, Canada, and Australia, with Japan, Finland, the Netherlands, Sweden, and France finishing in the top ten.⁷ It is estimated that the annual worldwide revenue on the Internet will reach nearly eighty billion dollars by the year 2000.⁸ It is no surprise that legislatures around the world are considering regulating the Internet.⁹

In the United States, numerous federal and state agencies are monitoring the Net to crack down on online fraud in connection with so-called business opportunities and investments.¹⁰ The Federal Trade Commission's cyberspace sheriff receives between 100 and 200 complaints a month.¹¹ The Security Exchange Commission's ("SEC") cyberforce, composed of sixty attorneys and accountants, receives between thirty and forty complaints per day from private cybersleuths.¹² So far, the cyberforce has prosecuted about a dozen complaints, including one against a teenager in Ohio who had a web page with the "SEC's Top Ten Stockpicks."¹³

Postings on legitimate bulletin boards on the Internet are no different than those found in newspapers, heard on the radio, or promoted on television; these include "make money at home," "own your own business," and "buy real estate for nothing down." Bulletin boards have also become a new source for "pump and dump" operators—the old boiler room approach of creating demand for a penny stock and then dumping when the created demand pumps up the price.¹⁴

Even though these slogans are typical fraud, consumers seem more likely to fall for it on the Net. Perhaps it is a generation growing up in front

5. *Id.*

6. President Clinton, press conference, Mar. 12, 1998.

7. Shailagh Murray & Richard L. Hudson, *Europe Seeks to Regulate Global Internet: As European Union Joins Fray, Industry Fears Support for Controls*, WALL ST. J., Mar. 18, 1996, at A7.

8. *Id.*

9. *Id.*

10. Information on the various federal and state agencies and private entities patrolling the Net is provided in "The Information Highway Patrol: Here Come the Cybercops," paper presented at the Twenty-Sixth Popular Culture Association and Eighteenth American Culture Association Annual Conference, Las Vegas, Nev. (Mar. 24–28, 1996).

11. CNBC television broadcast, Feb. 10, 1998.

12. Sarah Hewitt, "Securities Law and the Internet," New York, N.Y. (Mar. 26, 1997).

13. *Id.*

14. *E.g.*, Ted Sherman, *Snake Oil '95: Swindlers, Hucksters Take to the Internet*, STAR-LEDGER (Newark, N.J.), Jan. 8, 1995, at 1.

of a television screen who believe all, not half, of what they see, even if they believe none of what they hear. Perhaps it is a generation growing up with calculators who believe what they see, even if the decimal point is in the wrong place. Perhaps it is because one must take some positive action to reach these web sites, and hence one's guard is not raised as it might be when approached by a stranger in person or by telephone. But, we are more gullible on line. For example, in the case of online pen pals, based on their "friendship," one sent the other a check for ten thousand dollars to invest in a nonexistent mutual fund.¹⁵

B. *Security Online: Encryption*

Security of transactions on the Net without public release of private information generally involves some sort of encryption technique by which the communications are scrambled and descrambled. For example, the various Internet casinos and lotteries utilize secure transmissions; the host computer and user computer use an encryption scheme to scramble the communications.¹⁶ International transactions, and to a lesser extent, interstate transactions on the Net have been handicapped by the United States' restrictions on encryption software.¹⁷ The Arms Export Control Act ("AECA") authorizes the President to control the import and export of defense items by designating them to the United States Munitions List ("USML").¹⁸ Encryption software has long been on the USML list.¹⁹ Thus, such software has to be submitted to the State Department in order to obtain a license for export.²⁰

A mathematics Ph.D. candidate, who submitted a computer source code and an explanatory academic paper and who was denied a license under the AECA, brought suit challenging the constitutionality of the statute and the associated regulations in *Bernstein v. United States Department of State* ("*Bernstein I*").²¹ After the suit in *Bernstein I* was filed, the State Department reevaluated its classification of the academic paper; as recognized by the court: "The paper, an academic writing explaining plaintiff's scientific work in the field of cryptography, is speech of the most

15. Susan Antilla, *Has Cyberspace Got a Deal for You*, N.Y. TIMES, Mar. 19, 1995, at 5.

16. Todd Copilevitz, *Betting on the Net Old Vice, New Form: Casinos Beckon via Home Computers*, DALLAS MORNING NEWS, Oct. 22, 1995, at 1A.

17. See 22 U.S.C. § 2778 (1994); 22 C.F.R. § 121.1 (1997).

18. 22 U.S.C. § 2778(a)(1) (1994). This designation is not subject to judicial review. *Id.* § 2778(h).

19. 22 C.F.R. § 121.1 (1997).

20. 22 U.S.C. § 2778(b)(1)(A) (1994).

21. 922 F. Supp. 1426 (N.D. Cal. 1996) [hereinafter *Bernstein I*].

protected kind.”²² The court relied on copyright law in determining that “source code is speech” for purposes of the First Amendment.²³

In *Bernstein v. United States Department of State* (“*Bernstein II*”), the court determined that the licensing scheme constituted a prior restraint on speech and that the regulations provided no limits on discretion in licensing.²⁴ The regulation failed to neither provide a certain time limit for making a decision nor for judicial review; the burden was placed on the licensor to support the denial.²⁵ Thus, the court concluded that the licensing system constituted “an unconstitutional prior restraint in violation of the First Amendment.”²⁶

Just before the decision was entered in *Bernstein II*, the President signed an executive order transferring from the State Department to the Commerce Department the authority to license the import and export of nonmilitary encryption software as an exercise of his temporary national emergency power.²⁷ The order provided that “the export of encryption software, like the export of other encryption products described in this section, must be controlled because of such software’s functional capacity, rather than because of any possible informational value of such software.”²⁸ Despite the President’s express language, in *Bernstein III*, the court adhered to its opinion that the encryption source code was speech and determined, notwithstanding some differences in the new regulations before the court, that the regulations still constituted an unconstitutional prior restraint for substantially the same reasons as stated in *Bernstein II*.²⁹

During pendency of the *Bernstein* cases in 1996, forty-bit encryption software was used by access providers on the Net, despite customers’ complaints that the forty-bit code had been cracked by hackers.³⁰ United States citizens could order 128-bit encryption code by mail, but could only download forty-bit code from the Net because export of encryption code was limited to forty-bit code.³¹ In mid-1996, the government approved distribution of 128-bit encryption code over the Net to United States citizens

22. *Id.* at 1434.

23. *Id.* at 1436. Thus, the plaintiff stated a claim sufficient to survive a motion to dismiss. *Id.*

24. 945 F. Supp. 1279, 1286–87, 1289 (N.D. Cal. 1996) [hereinafter *Bernstein II*].

25. *Id.* at 1289.

26. *Id.* at 1290.

27. *Bernstein v. United States Dep’t of State*, 974 F. Supp. 1288, 1293 (N.D. Cal. 1997) [hereinafter *Bernstein III*].

28. *Id.* at 1293–94 (quoting Exec. Order No. 13026, 61 Fed. Reg. 58768 (1996)).

29. *Id.* at 1308.

30. Joan Indiana Rigdon, *U.S. Lets Netscape Issue Encryption Tool over Internet, but Only to Americans*, WALL ST. J., July 16, 1996, at B2.

31. *Id.*

through Netscape; however, each request for distribution was subject to screening by Netscape because the State Department “fears foreign terrorists or criminals could use the software to threaten national security.”³² In late 1996, the President signed an executive order to permit the export of the 128-bit code and computers containing such code, subject to providing United States law enforcement with “keys” to intercept and decode communications and subject to “licensing” of the seller.³³ Time will tell whether this new order will facilitate secure transactions on the Net.

C. *Securities Online: One Way to Bet on the Net*

For several years, brokerage companies have been offering online investing. Television commercials depict the addictive nature of online investing. More recently, television, radio, and newspaper advertisements solicit people to train as online or day traders, to be their own boss, and not to worry about job security. The number of brokerage companies offering online trading has doubled from thirty-three in 1996 to sixty by the end of 1997, with some fourteen million accounts predicted to be online by the end of 2002.³⁴

More recently, brokerage and research companies have begun offering a wide variety of financial information online.³⁵ The SEC now requires electronic filing of some documents, including registration statements and prospectuses.³⁶ Electronic filing of other documents, including annual reports, is optional.³⁷ Filings relating to exempt securities are still “paper only.”³⁸ All electronic filings since January of 1994 are contained in the SEC’s Electronic Data Gathering, Analysis and Retrieval System (“EDGAR”) database. EDGAR was initially available online through “Disclosure,” a program on Lexis/Nexis, at a hefty cost, and hence was used primarily by businesses.³⁹ Temporary government funding made EDGAR freely available over the Net, thus extending its availability to individuals

32. *Id.*

33. Dean Takahashi, *Clinton Loosens Export Policy on Encryption*, WALL ST. J., Nov. 18, 1996, at B3.

34. David Barboza, *On-Line Trade Fees Falling off the Screen*, N.Y. TIMES, Mar. 1, 1998, at 1; Howard R. Gold, *Deeper and Deeper: In 1997, the Internet Extended Its Reach into the Investing World*, BARRON’S, Jan. 5, 1998, at 52.

35. Sana Siwolop, *Now, the Superhighway Leads to Mutual Funds*, N.Y. TIMES, Aug. 13, 1995, at 1.

36. 17 C.F.R. § 232.101(a) (1997).

37. *Id.* § 232.101(b).

38. *Id.* § 232.101(c).

39. G. Burgess Allison, *THE LAWYER’S GUIDE TO THE INTERNET* (American Bar Association, Section of Law Practice Management, 1995), at 93 n.25; Sana Siwolop, *A Two-for-One Stock Information Split*, N.Y. TIMES, Sep. 17, 1995, at 1.

through joint management by New York University and Internet Multicasting Service.⁴⁰ It proved so popular that the SEC arranged to keep the program operating, prompting Disclosure to offer free Internet access to EDGAR as well.⁴¹

The SEC also permits electronic delivery of mandated disclosure documents to shareholders.⁴² The documents must be posted on the company's web page, available until the annual meeting, and in accordance with the following rules: a paper copy must be available on request; they must have some way of confirming receipt by shareholders; and the shareholder must have given informed consent.⁴³ A shareholder who wishes to receive annual reports and proxy statements via e-mail can contact the appropriate web site and follow the instructions.⁴⁴ Shareholders may also be able to vote their proxies by e-mail.⁴⁵

The birth of direct stock offering over the Net can be traced to Spring Street Brewing Company. Spring Street first made the news when it went public in March of 1995, without an underwriter, by advertising its shares on the Net.⁴⁶ Its founder, Andrew Klein, was a securities lawyer. The stock was registered for sale in fifteen states. Since it was not listed on an exchange and limited in size, it did not need to meet the stiffest requirement of the SEC. Nor were there any investment bankers, brokers, or research analysts reviewing, or touting, the offering. Nor, for that matter, was there any market for the shares.⁴⁷

Spring Street made news a year later in March of 1996, when it offered its stock directly to purchasers over the Internet. After making two sales, it voluntarily suspended trading pending a review by the SEC.⁴⁸ The SEC objected to the fact that Spring Street directly took the money in exchange for the shares, since Spring Street was not a registered broker/dealer;

40. See Allison, *supra* note 39, at 93 n. 25.

41. See Siwolop, *supra* note 35, at 1.

42. See Hewitt, *supra* note 12.

43. *Id.*

44. E.g., Gateway 2000 notice, Jan. 27, 1998, directing shareholders to investor-delivery.com. *Caveat actor*: electing this option for one company can result in electronic delivery of information for other companies held in the same brokerage account. *Id.*

45. IBM press announcement (CNBC television broadcast, March 18, 1998).

46. Reed Abelson, *Microbrew Stock Offer: Mostly Foam*, N.Y. TIMES, Mar. 19, 1995, at 5.

47. *Id.*

48. SEC Halts Bid to Trade Brewer's Stock on Internet, WALL ST. J., Mar. 21, 1996, at B6.

therefore, Spring Street arranged for the money to go to an escrow agent. The SEC allowed the Internet sales and a new industry was born.⁴⁹

Its founder, Andrew Klein, has since gone on to found Wit Securities which provides Internet stock offerings for other start-up companies.⁵⁰ To date, the company has done seven public offerings. According to Mr. Klein, in the most recent offering, e-mail notification was sent to a million potential purchasers, nineteen thousand of whom clicked on to the web site to get the prospectus for the offering.⁵¹

Other direct stock offerings on the Internet include Destiny Pictures, which made a public offering online in the spring of 1997, seeking to raise half the equity in a new picture *Intimate Stranger*, which was considered an "erotic thriller." Caveat emptor: The offering was not registered with any state securities authority.⁵² Caveat venditor: States are taking the position that if it is downloaded in the state, it is an offering in the state.⁵³

However, states have considerably less authority to regulate securities offerings than in the past. Although federal and state securities law had existed side-by-side since the early 1930s, the Capital Markets Efficiency Act of 1996 preempted certain state legislation. Federal registration for nationally traded securities (those traded on the New York Stock Exchange ("NYSE"), American Stock Exchange ("AMEX"), or the National Association of Securities Dealers Automated Quotations ("NASDAQ") is now exclusive; these securities are now exempt from state requirements.⁵⁴ Rules on broker/dealers were also limited to the federal rules, and a national de minimis exception for dealing across state lines was enacted.⁵⁵ The only area not preempted, aside from local securities exempt from national registration, was the state's right to investigate and prosecute fraud and deceit in the sale of securities.⁵⁶

D. *Gambling Online: A New Way to Bet on the Net*

Licensed gaming has long been recognized as a matter reserved to the states within the meaning of the Tenth Amendment.⁵⁷ Forty-eight states

49. *E.g.*, CNBC television broadcast, Mar. 25, 1996; Monty Wexler, *Securities Law and the Internet*, New York, N.Y. (March 26, 1997).

50. *Andrew Klein, personal commentary* (CNBC television broadcast, Mar. 2, 1998).

51. *Id.*

52. *MoneyWorld*, Feb. 1998 at 36.

53. *See Sherman, supra* note 14, at 1.

54. 15 U.S.C. § 77r (1994).

55. *Id.* § 78o.

56. *Id.* § 77r.

57. *E.g.*, *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988), *aff'd*, 896 F.2d 555 (9th Cir. 1990); *State v. Rosenthal*, 559 P.2d 830, 836 (Nev. 1977). Under the Constitution, "[t]he

(every state except Hawaii and Utah) allow some form of gambling.⁵⁸ Thirteen states have casino gambling; only one, Nevada, has sports gambling.⁵⁹ Thirty-six states and the District of Columbia have state lotteries.⁶⁰ These figures neither include gambling on Native American lands nor cruises to nowhere but international waters for the purpose of gambling. The annual revenue casinos take in alone exceeds the combined amount of money spent annually on movies, theater, and concerts.⁶¹ It is estimated that online betting will generate more than ten billion dollars per year by the year 2000.⁶²

Although regulation of gaming on Native American tribal lands falls to Congress under the Indian Commerce Clause of the Constitution,⁶³ Congress has ceded some authority to the states. In 1988, Congress enacted the Indian Gaming Regulation Act (“IGRA”).⁶⁴ The purposes of the Act include:

[T]o provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and the players⁶⁵

In other words, Congress decided that the Native American tribes are not capable of running their own business. Congress also determined that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”⁶⁶ In essence, Native American tribes do not

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

58. H.R. REP. NO. 104-440 at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1192, 1193; Rep. Bill McCollum, House Judiciary Committee, Subcommittee on Crime, CNBC, Feb. 4, 1998.

59. *See* McCollum, *supra* note 58.

60. H.R. REP. NO. 104-440 at 4, *reprinted in* 1996 U.S.C.C.A.N. 1192, 1193.

61. James Sterngold, *Imagine the Internet as Electronic Casino*, N.Y. TIMES, Oct. 22, 1995, at 3.

62. *See* Copilevitz, *supra* note 16, at 1A; Greg Miller, *World Wide Wagering*, L.A. TIMES, Oct. 18, 1996, at D1.

63. The Constitution provides in pertinent part: “The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST., art. I, § 8, cl. 3.

64. Pub.L. 100-497, 102 Stat. 2467 (Oct. 14, 1998) (codified at 25 U.S.C. §§ 2701-2721 (1994)).

65. 25 U.S.C. § 2702(2) (1994).

66. *Id.* § 2701(5).

have the exclusive right to regulate their own gaming activity. Rather, Congress limited such exclusivity to bingo and similar games; as to casino gambling, slot machines, dog racing, lotteries, and the like, the tribes were required to negotiate a compact with the state in which they were located.⁶⁷

Under the IGRA, a state was required to negotiate in good faith and a failure could subject the state to suit, only if the state agreed to be sued.⁶⁸ Even though the granting to the states of some measure of authority over gaming on Native American lands “extends to the States a power withheld from them by the Constitution,”⁶⁹ “the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”⁷⁰ Hence, the right of a tribe to sue to compel good faith negotiation depends on the state’s consent to be sued. So, if a state has a lottery and does not want competition on Native American lands, it can refuse to negotiate the necessary compact and it can refuse to be sued. Nevertheless, many states feel they do not have sufficient control over Native American gaming within their jurisdiction or without.⁷¹

In June of 1997, the Coeur d’Alene’s Indian tribe in Idaho opened what is believed to be the first Internet gambling site based in the United States, which reportedly has been denounced by the Governor of Idaho.⁷² The tribe first opened bingo and casino gambling in 1993; the web site provides scratch tickets, blackjack, and lotto games.⁷³ Already, the Attorney General of Missouri has brought suit against the Internet carriers seeking blocking of the games; other attorney generals may rally to the call.⁷⁴

Private entities are also gearing up to offer Internet gambling. “Think about it. You’re at your desk or in your home and all of a sudden you have an urge to gamble. Just click an icon on your computer and next thing you know you’re at our casino,” said the Chief Executive Officer of Internet Casinos.⁷⁵ Internet Casinos has no physical casino, only computers, based in St. Marten, with additional operations in a half dozen other countries.⁷⁶ Although Internet Casinos do not accept memberships from United States

67. *Id.* § 2710; § 2703(7)(A).

68. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (citing 25 U.S.C. § 2710(d) (1994)).

69. *Id.* at 58.

70. *Id.* at 72.

71. H.R. REP. NO. 104-440 at 5, 1996 U.S.C.C.A.N. at 1194.

72. *Tribe Starts New Business: Gambling Site on Internet*, N.Y. TIMES, July 5, 1997, at 6.

73. *Id.*

74. *Id.*

75. Copilevitz, *supra* note 16, at 1A.

76. *Id.*

residents, some users in the United States have reportedly been able to get online.⁷⁷

Sports International, Ltd., based in Antigua and limited to sports betting, has started accepting Internet wagers after years of accepting telephone wagers.⁷⁸ Customers who find the web site can complete an application, wire the money to Antigua, and start betting within a half-hour.⁷⁹ VentureTech Inc. in Reston, Virginia planned to be online in 1997, but only outside the United States, pending resolution of the legal issues.⁸⁰

World Wide Web Casinos bases its betting in real casinos in Antigua and in computer-based operations in South Africa.⁸¹ Potential customers can fill out an online registration and set up an account by credit card online or by mailing a check.⁸² Customers can either receive a packet of CD-ROMs with the necessary software by mail or directly download the necessary software, and a Visa debit card reflects wins and losses.⁸³

Betting on the Net is not confined to private offerings. New York State's Off-track Betting ("OTB") is getting into the act. In late 1996, the state announced that in addition to setting up accounts online, customers soon would be able to place their bets online.⁸⁴ Another example is the country of Liechtenstein, which runs a lottery over the Internet—six numbers cost six dollars for a chance to win one million dollars.⁸⁵ Liechtenstein considers people coming to their web site as coming to Liechtenstein and thus subject only to Liechtenstein's laws.⁸⁶

E. *Regulating Betting on the Net*

Over opposition that regulation of gaming is reserved to the states under the Tenth Amendment, Congress has already commissioned a study of gambling.⁸⁷ Proponents of the Commission, the House Judiciary Committee, argue that "insofar as the bill relates to Indian gambling, it falls within the

77. *Id.*

78. *Id.*

79. *Id.*

80. See Miller, *supra* note 62, at D1.

81. See Copilevitz, *supra* note 16, at 1A.

82. *Id.*

83. See Miller, *supra* note 62, at D1.

84. *OTB Web Site to Let Bettors Play the Ponies On-Line*, WALL ST. J., Dec. 26, 1996, at

11.

85. See Copilevitz, *supra* note 16, at 1A.

86. *Id.*

87. H.R. REP. NO. 104-440 at 7-8, *reprinted in* 1996 U.S.C.C.A.N. 1192, 1196-97 (1996).

power of Congress to regulate commerce with the Indian tribes.”⁸⁸ Been there, done that.

Proponents also argue that it falls within the commerce clause: “For example, many gamblers cross state lines to travel to gambling operations. That alone is enough to bring gambling within the interstate commerce clause.”⁸⁹ A lot of theater-goers cross state lines to travel to Broadway. That alone is not enough to bring Broadway shows within the interstate commerce clause.

And then they argue that: “Gambling, and the public corruption that has come with it in some instances, implicate a variety of federal criminal statu[t]es The Committee is not aware of any instance in which any of these statutes has been held to exceed the power of Congress to regulate interstate commerce.”⁹⁰ This may be true, but the Commission is intended to study the effects of *legal* gambling not *illegal* gambling.⁹¹

Additionally, proponents of the Commission argue that “Congress can look into any matter [at] least for the limited purpose of determining whether it is properly within its legislative powers.”⁹² For this, Congress needs two years and millions of dollars? They argue that the legislation only empowers the Commission to conduct a study and that “[f]ederal regulation of gambling is not in issue at this time.”⁹³ After two years and millions of dollars, how likely is it that the Commission will not determine that regulation is necessary?

In the meantime, the people both inside and outside the Washington beltway, are not waiting for the Commission’s study. In fact two separate bills are currently being considered by Congress.⁹⁴ In addition, bills to regulate Internet gambling are under consideration in at least eight states.⁹⁵

88. *Id.* at 1196.

89. *Id.*

90. *Id.* at 1196–97.

91. Interestingly, the legislation was codified as a note to 18 U.S.C. § 1955 (1994) in the Chapter 95 on “Racketeering,” rather than in the Chapter 50 on “Gambling.”

92. H.R. REP. NO. 104-440 at 7–8, *reprinted in* 1996 U.S.C.C.A.N. 1197.

93. *Id.* at 1196.

94. These include the 1997 House Bill No. 2380 (Goodlatte), which was sent to the Judiciary Committee on Sept. 3, 1997, and 1997 Senate Bill No. 474 (Kyle), which was sent to the Judiciary Committee on March 19, 1997, and reported out of committee on October 23, 1997, as amended.

95. At last count on March 13, 1998, bills were pending in Arizona, California, Connecticut, Illinois, Indiana, Louisiana, New York, and Pennsylvania.

F. Conclusion

There is no need for the pending federal legislation. If offshore gaming exists, money is going to flow overseas. Similarly, collecting taxes on winnings will be more difficult, if not impossible, as long as the host site is off-shore. Prohibiting Internet gambling is likely to do more harm than good.

The Department of Justice already has the authority to prosecute illegal interstate gambling, including betting on the Net.⁹⁶ Title 18 prohibits the use of

a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers.⁹⁷

The Department of Justice, of course, has no jurisdiction overseas: "If the casinos are outside the United States, there's not a thing we can do about it . . .," and it is unlikely to prosecute individuals who gamble over the Net.⁹⁸

Those who want the federal government to prohibit Internet gambling have raised a host of reasons that do not stand up to investigation. Regarding the concern that individuals need protection from fraud or pyramid schemes, such protection could be enforced more readily against sites based in the United States or, at least, controlled by United States companies.⁹⁹ For example, the FTC shut down an Internet-based pyramid scam run by a company in Washington; the injunction ordered the company to return to the United States approximately three-and-a-half million dollars that had been transferred to an account in Antigua.¹⁰⁰ In addition, the Minnesota Attorney General is prosecuting a Nevada company for illegal

96. See McCollum, *supra* note 58; Copilevitz, *supra* note 16.

97. 18 U.S.C. § 1084(a) (1994): "[A] wire communication facility" includes "any and all instrumentalities, personnel, and services . . . used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection." *Id.*

98. See Copilevitz, *supra* note 16, at 1A (quoting John Russell, spokesman for the Department of Justice); see McCollum, *supra* note 58.

99. Horn, *National Coalition against Gambling*, (CNBC television broadcast, Feb. 5, 1998).

100. *Alleged Pyramid Scheme on Internet Shut by FTC*, WALL ST. J., May 30, 1996, at B10.

bookmaking, even though the company sought to avoid United States laws by setting up its WagerNet bookmaking service in Belize.¹⁰¹

One commonly cited issue is the restriction of access to prevent children from betting online.¹⁰² One needs to take active steps to create, fund, and access, a gambling account, just as one needs to take such steps with regard to an investment account. In the years since companies have permitted trading online, the media have been devoid of any stories of children trading in their parents' accounts. There is no reason to believe that casinos will not be equally protective of their accounts. Moreover, the necessary steps to prevent access to gambling by minors have already been vetted in the development of the regulations relating to preventing access to obscenity by minors.¹⁰³

Another issue commonly raised is compulsive gamblers: "The person never has to get up from their chair and[,] in no time at all, can lose a lot of money."¹⁰⁴ It has been argued that at-home electronic wagering removes too many necessary controls, such as urging gamblers to take a break.¹⁰⁵ Losses will, of course, be limited to what customers have in their accounts. Do we need to tell high rollers how to spend their money? We do not tell investors how much or how to spend money online. More problematic is the issue raised by New York's OTB going online; can state lotteries be far behind? Lottery players are not high rollers. Yet, it is unlikely the federal government could, or should, interfere with state lotteries.

The states should retain the right to regulate gambling within their own jurisdiction. Thus, if New York wishes to permit online betting, it can; if Missouri wishes to prohibit it, it can.

[T]he thrust of the legislation clearly reflects a view that the states have chosen unwisely by allowing their private citizens to spend too much of their own funds on gambling. The notion that the federal government should rebuke the states for allowing private citizens to gamble with their own money in privately run gambling

101. See *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. 1997); Julio Ojeda-Zapata, *Computerized Sleuthing Becomes Virtual Reality*, STAR-LEDGER (Newark, N.J.), Dec. 17, 1995, at 52. It is thought to be the first criminal case with jurisdiction based on the ability of state residents to access the site through the Internet. *Id.*

102. See Copilevitz, *supra* note 16 (citing Sue Cox, Director of the Texas Council on Problem and Compulsive Gambling); McCollum, *supra* note 58; Horn, *supra* note 99.

103. See generally *Reno v. ACLU*, 117 S. Ct. 2339 (1997); see also discussion in "The Information Highway Patrol: Here Come the Cybercops," *supra* note 10.

104. See *OTB Web Site to Let Bettors Play the Ponies On-Line*, *supra* note 84 (quoting Laura Letson, director of the New York Council on Problem Gambling).

105. See Copilevitz, *supra* note 16, at 1A (citing Sue Cox, Director of the Texas Council on Problem and Compulsive Gambling).

enterprises seems to me to be the antithesis of a respect both for the rights of states and for individual choices about how they should spend their own money.¹⁰⁶

Do we need federal regulation of Internet gambling? No.

106. Hon. Barney Frank's Dissenting Views, H.R. REP. NO. 104-440 at 18, *reprinted in* 1996 U.S.C.C.A.N. 1207.

When Is Same-Gender Sexual Harassment Actionable under Title VII? *Fredette v. BVP Management Associates*

I. INTRODUCTION

Imagine your supervisor at work, Chris, makes sexual advances towards you. Chris tells you life at work will be much better for you if you just give in to Chris's demands for sex. You might even get a promotion, and certainly, extra perks will come your way. Chris's "requests" occur on a daily basis and make you feel uncomfortable. You ask Chris to stop, but Chris persists. You complain to Chris's supervisor and nothing happens; Chris's lewd comments and sexual suggestions continue. Are you experiencing sexual harassment that is prohibited by federal law? Maybe. If Chris is a man, and you are a woman, then, yes, you are experiencing classic sexual harassment on the job, and Chris's behavior is illegal. Even if Chris is a woman and you are a man, though less common, Chris's behavior is still considered to be illegal sexual harassment. But, what if Chris is a man and you are a man? Or, Chris is a woman and you are a woman? Then, whether Chris's behavior is illegal sexual harassment depends primarily upon where you live. It also might depend upon Chris's sexual orientation. This discrepancy in the courts' interpretation and application of federal law in same-gender sexual harassment actions is the subject of this article. This article also explores, in depth, the Eleventh Circuit Court of Appeals recent first impression decision in *Fredette v. BVP Management Associates*,¹ regarding the issue of whether same-gender sexual harassment is actionable under federal law.

II. SEXUAL HARASSMENT AS A FORM OF SEX DISCRIMINATION UNDER TITLE VII

Title VII of the Civil Rights Act of 1964² makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."³ It is generally accepted that the congressional intent of Title VII was to hinder

1. 112 F.3d 1503 (11th Cir. 1997), *cert. denied* 118 S. Ct. 1184 (1998).

2. 42 U.S.C. § 2000e-2(a)(1) (1994).

3. *Id.*

racial discrimination.⁴ One day before the House of Representatives voted and approved the Civil Rights Act, the word “sex” was added as a floor amendment.⁵ It has been suggested that this last-minute addition was an attempt to prevent passage of the bill as a whole.⁶ However, the attempt failed, and the bill passed with the sex discrimination amendment included without significant discussion of its meaning or intent prior to its passage.⁷

The United State Supreme Court first recognized traditional male-on-female sexual harassment as a form of sex discrimination actionable under Title VII in *Meritor Savings Bank, FSB v. Vinson*⁸ in 1986. In *Vinson*, the Supreme Court recognized two types of actionable sexual harassment: 1) *quid pro quo* harassment; and 2) harassment that results in a hostile or offensive work environment.⁹ In *quid pro quo* harassment, a supervisor promises and/or gives specific employment benefits to a subordinate in exchange for sexual favors.¹⁰ In a hostile work environment claim, the sexual harassment “must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”¹¹

The Equal Employment Opportunity Commission (“EEOC”) is the administrative agency given the authority to enforce Title VII.¹² The EEOC guidelines define sexual harassment as any unwelcomed behavior of a sexual nature where: 1) the person’s compliance affects some term or condition of his/her employment; 2) the person exhibiting the unwelcomed sexual behavior uses the other person’s compliance, or refusal to comply, in making decisions that affect the other’s employment; or 3) the unwelcomed behavior excessively interferes with the person’s work or creates an environment that is “intimidating, hostile, or offensive.”¹³

4. 110 CONG. REC. 2581 (1964).

5. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

6. 110 CONG. REC. 2577–84 (1964).

7. *Id.*

8. 477 U.S. 57 (1986).

9. *Id.* at 62.

10. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

11. *Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (alteration in original)).

12. 42 U.S.C. § 2000e-5(a) (1994).

13. 29 C.F.R. § 1604.11(a) (1997).

III. JUDICIAL INTERPRETATION OF THE APPLICABILITY OF TITLE VII WHEN THE HARASSER AND VICTIM ARE THE SAME SEX

A. *United States Supreme Court*

To date, the United States Supreme Court has not reviewed the issue of whether same-gender sexual harassment is actionable under Title VII. However, on June 9, 1997, the United States Supreme Court granted certiorari on a Fifth Circuit Court of Appeals case, *Oncale v. Sundowner Offshore Services, Inc.*¹⁴ In *Oncale*, Mr. Oncale alleged *quid pro quo* and hostile work environment sexual harassment by his male supervisor and two male co-workers. Employed on an offshore oil rig, Mr. Oncale claimed that the three men sexually assaulted him on at least three separate occasions and that two of the men threatened to rape him.¹⁵ Reluctantly relying upon "binding precedent"¹⁶ established by the Fifth Circuit Court of Appeals in *Garcia v. Elf Atochem North America*,¹⁷ the appeals court refused to recognize Mr. Oncale's claim as viable under Title VII.¹⁸

B. *Circuit Courts of Appeals*

In 1977, in the case of *Barnes v. Costle*,¹⁹ the District of Columbia Circuit Court of Appeals became the first appellate level court to recognize the cognizability of same-gender sexual harassment as discrimination under Title VII.²⁰ Although the case dealt with traditional male-on-female sexual harassment, the court, in a footnote, commented:

It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same-gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, *but for his or her sex*, the employee would not have faced.²¹

14. 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct 2430 (1997), *rev'd*. 118 S. Ct. 998 (1998).

15. *Id.* at 118–19.

16. *Id.* at 120.

17. 28 F.3d 446 (5th Cir. 1994).

18. *Oncale*, 83 F.3d at 120 (while this book was in the process of being published, the United States Supreme Court rendered its opinion, which is discussed in the addendum).

19. 561 F.2d 983 (D.C. Cir. 1977).

20. *Id.* at 984.

21. *Id.* at 990 n.55 (emphasis added).

Later that same year, the Third Circuit Court of Appeals commented on the same-sex sexual harassment issue parenthetically in *Tomkins v. Public Service Electric & Gas Co.*:²²

It is not necessary to a finding of a Title VII violation that the discriminatory practice depend on a characteristic “peculiar to one of the genders,”²³ or that the discrimination be directed at all members of a sex. It is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff “had been a man she would not have been treated in the same manner.”²⁴

To date, only five circuit courts have specifically heard and ruled on the issue of whether same-sex sexual harassment is actionable under Title VII, with conflicting results. The Eleventh Circuit was the first appeals court to address the issue, albeit without a published opinion, in *Joyner v. AAA Cooper Transportation*.²⁵ In that case, a male employee alleged *quid pro quo* sexual harassment by a homosexual male supervisor.²⁶ The appeals court affirmed the district court’s holding that “unwelcomed homosexual harassment . . . states a violation of Title VII.”²⁷ The court applied the five elements of *quid pro quo* harassment as established in *Henson v. City of Dundee*.²⁸ “1) the employee belongs to a protected group . . . ; 2) the employee was subject to unwelcome sexual harassment . . . ; 3) the harassment complained of was based upon sex . . . ; 4) the harassment complained of affected a term, condition, or privilege of employment . . . ; and 5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.”²⁹ Regarding the critical third element, i.e., that the harassment complained of was based on sex, the court stated: “[S]ince the evidence established the terminal manager’s homosexual proclivities, the harassment to which plaintiff complained was based upon sex.”³⁰ The Eleventh Circuit Court of Appeals had not heard another case on this issue until *Fredette v. BVP Management Associates*, the subject of this article.

22. 568 F.2d 1044 (3d Cir. 1977).

23. *Id.* at 1047 n.4 (quoting *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976)).

24. *Id.* (quoting *Skelton v. Blazano*, 424 F. Supp. 1231, 1235 (D.D.C. 1976)).

25. 749 F.2d 732 (11th Cir. 1984) (unpublished table decision).

26. *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983), *aff’d*, 749 F.2d 732 (11th Cir. 1984) (emphasis in original).

27. *Id.* at 541 (emphasis in original).

28. 682 F.2d 897 (11th Cir. 1982).

29. *Id.* at 903–05.

30. *Joyner*, 597 F. Supp. at 542.

Nine years passed after the *Joyner* case before another circuit court of appeals heard the issue again. In 1993, the Fifth Circuit in *Giddens v. Shell Oil Co.*³¹ affirmed, without a published opinion, the district court's holding that same-sex sexual harassment does not state a claim under Title VII.³²

Although the district court's opinion was unpublished, it was subsequently relied upon by the Fifth Circuit Court of Appeals and quoted in *Garcia*.³³ "Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination."³⁴ As noted above, in 1996, the Fifth Circuit, in *Oncale v. Sundowner Offshore Services, Inc.*, relied upon *Giddens* and *Garcia* in affirming that same-sex sexual harassment is not cognizable under Title VIII.³⁵

The Fourth Circuit Court of Appeals first heard the issue in 1996, in *McWilliams v. Fairfax County Board of Supervisors*.³⁶ In *McWilliams*, a male employee alleged hostile work environment sexual harassment by several of his male co-workers.³⁷ The circuit court of appeals affirmed the district court's granting of summary judgment for the defendants stating:

As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be "because of the [target's] 'sex.'" Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed [sic] speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's sex.³⁸

In his dissent, Judge Michael noted: "It is too early to write this case off to meanness and horseplay. For now there is a material factual issue whether *McWilliams* was discriminated against because of his sex."³⁹ The Fourth Circuit again considered the issue two months later in *Hopkins v. Baltimore*

31. 12 F.3d 208 (5th Cir. 1993).

32. *Id.* at 208.

33. 28 F.3d 446 (5th Cir. 1994).

34. *Id.* at 451-52 (citation omitted).

35. 83 F.3d 118, 119 (5th Cir. 1996).

36. 72 F.3d 1191 (4th Cir. 1996).

37. *Id.* at 1194.

38. *Id.* at 1195-96 (emphasis in original).

39. *Id.* at 1198 (Michaels, J., dissenting) (arguing that same sex harassment in the workplace should be actionable under Title VII).

Gas & Electric Co.,⁴⁰ but gave no opinion about this issue. In August of 1996, the Fourth Circuit relied upon its holding in *McWilliams* to affirm a district court's dismissal of a same-gender sex discrimination action in *Mayo v. Kiwest Corp.*⁴¹ Most recently, in October of 1996, the Fourth Circuit refined its holding on the issue by recognizing the possibility of same-sex sexual harassment of a male by other male co-workers who were homosexuals, resulting in a hostile work environment.⁴² In *Wrightson v. Pizza Hut of America, Inc.*,⁴³ the court stated:

An employee is harassed or otherwise discriminated against "because of" his or her sex if, "but-for" the employee's sex, he or she would not have been the victim of the discrimination There is . . . simply no "logical connection" between Title VII's requirement that the discrimination be "because of" the employee's sex and a requirement that a harasser and victim be of different sexes.⁴⁴

In *Quick v. Donaldson Co. Inc.*,⁴⁵ the Eighth Circuit Court of Appeals reversed a district court's granting of summary judgment for the defendant/employer in a situation where a male employee was subjected to over 100 incidents of "bagging"⁴⁶ by his male co-workers.⁴⁷ Applying the test established in *Harris v. Forklift Systems, Inc.*,⁴⁸ the court established: "The proper inquiry for determining whether discrimination was based on sex is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"⁴⁹ The court determined that a material issue of fact existed as to whether the treatment of Quick was based on his gender.⁵⁰

Prior to the Eleventh Circuit's recent holding in *Fredette*, the Sixth Circuit was the latest appeals court to weigh in on the same-gender sexual harassment issue. In *Yeary v. Goodwill Industries-Knoxville, Inc.*,⁵¹ a male alleged sexual harassment by a male co-worker who was known to be

40. 77 F.3d 745 (4th Cir. 1996).

41. 94 F.3d 641 (4th Cir. 1996).

42. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996).

43. *Id.* at 138.

44. *Id.* at 142.

45. 90 F.3d 1372 (8th Cir. 1996).

46. *Id.* at 1374 (the court defined "bagging" as the intentional grabbing and squeezing of a male's testicles).

47. *Id.*

48. 510 U.S. 17 (1993).

49. *Quick*, 90 F.3d at 1379 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

50. *Id.* at 1379.

51. 107 F.3d 443 (6th Cir. 1997).

homosexual.⁵² The court reversed the district court's granting of the defendants' motion to dismiss noting: "[W]hen a male sexually propositions another male *because of sexual attraction*, there can be little question that the behavior is a form of harassment that occurs *because* the propositioned male is a male—that is, 'because of . . . sex.'" ⁵³

While not specifically addressing the issue, both the Seventh and Ninth Circuit Courts of Appeals have acknowledged, in dicta, the cognizability of same-gender sexual harassment as an actionable claim under Title VII. In *Baskerville v. Culligan International Co.*,⁵⁴ Judge Posner stated, as an aside: "Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases."⁵⁵ Also, in *Steiner v. Showboat Operating Co.*,⁵⁶ the court stated: "[A]lthough words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women working at Showboat have viable claims against [the male supervisor] for sexual harassment."⁵⁷

C. District Courts

The remaining seven circuits courts of appeals⁵⁸ have not ruled on the issue of whether same-gender sexual harassment is actionable under Title VII, but all have district courts that have heard and ruled on the issue. District courts in the First, Second, and District of Columbia Circuits have consistently held that same-gender sexual harassment is actionable under Title VII, but with a limited number of judicial opinions to support their holdings.⁵⁹ District courts in the Third and Tenth Circuits have also consistently allowed same-gender sexual harassment claims under Title VII, both with slightly more supportive case law than the First, Second, and

52. *Id.* at 444.

53. *Id.* at 448 (emphasis in original).

54. 50 F.3d 428 (7th Cir. 1995).

55. *Id.* at 430.

56. 25 F.3d 1459 (9th Cir. 1994).

57. *Id.* at 1464 (emphasis in original).

58. Specifically, the First, Second, Third, Seventh, Ninth, Tenth, and District of Columbia Courts.

59. *King v. Town of Hanover*, 959 F. Supp. 62 (D.N.H. 1996); *Williams v. District of Columbia*, 916 F. Supp. 1 (D.D.C. 1996); *Sardinia v. Dellwood Foods*, 69 Fair Empl. Prac. Cas. (BNA) 705 (S.D.N.Y. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995); *Nogueras v. University of P. R.*, 890 F. Supp. 60 (D.P.R. 1995).

District of Columbia Circuits.⁶⁰ The decisions of the district courts in the Seventh and Ninth Circuits that have heard the issue can only be described as contradictory.

District courts in the Seventh Circuit have heard eighteen cases on the issue of same-gender sexual harassment since 1981.⁶¹ This is equal to the number of cases on the issue heard by district courts in all other circuits combined. The first case on point in the Seventh Circuit, *Wright v. Methodist Youth Services, Inc.*,⁶² was decided in 1981. The court unequivocally recognized the actionability of Mr. Wright's claim under Title VII when he was terminated from his job because he refused the homosexual advances of his male supervisor.⁶³ The court relied on dicta in *Barnes v. Costle*,⁶⁴ a 1977 decision, from the District of Columbia Circuit Court of Appeals.

Seven years later, Judge Williams refused to recognize a Title VII claim in *Goluszek v. Smith*.⁶⁵ Mr. Goluszek alleged hostile work environment

60. *Caldwell v. KFC Corp.*, 958 F. Supp. 962 (D.N.J. 1997); *Eschbach v. County of Lehigh*, No. CIV.A. 95-7276, 1997 WL 109611 (E.D. Pa. Feb. 28, 1997); *Wiley v. Burger King*, 72 Fair Empl. Prac. Cas. (BNA) 500 (E.D. Pa. 1996); *Ward v. Ridley Sch. Dist.*, 940 F. Supp. 810 (E.D. Pa. 1996); *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357 (D. Colo. 1996); *Swage v. Inn Philadelphia*, 72 Fair Empl. Prac. Cas. (BNA) 438 (E.D. Pa. 1996); *Wehrle v. Office Depot, Inc.*, 954 F. Supp. 234 (W.D. Okl. 1996); *Johnson v. Community Nursing Serv.*, 932 F. Supp. 269 (D. Utah 1996); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*, 917 F. Supp. 766 (N.D. Okla. 1995); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161 (E.D. Pa. 1995).

61. *Harris v. National Precision Blanking*, No. 95-C6022, 1997 U.S. Dist. LEXIS 7740 (N.D. Ill. May 27, 1997); *Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996); *Torres v. National Precision Blanking*, 943 F. Supp. 952 (N.D. Ill. 1996); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730 (N.D. Ill. 1996); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403 (E.D. Wis. 1996) *aff'd*, 125 F.3d 408 (7th Cir. 1997); *Peric v. Board of Trustees of Univ. of Ill.*, 71 Fair Empl. Prac. Cas. (BNA) 1760 (N.D. Ill. 1996); *Shermer v. Illinois Dep't of Transp.*, 937 F. Supp. 781 (C.D. Ill. 1996); *Rushing v. United Airlines*, 919 F. Supp. 1101 (N.D. Ill. 1996); *Kaplan v. Dacommed Corp.*, No. 95-C6987, 1996 WL 89148 (N.D. Ill. Feb. 27, 1996); *Ton v. Information Resources, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 355 (N.D. Ill. 1996); *Wenner v. C.G. Bretting Mfg. Co., Inc.*, 917 F. Supp. 640 (W.D. Wis. 1995); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133 (C.D. Ill. 1995); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995); *Boyd v. Vonnahmen*, 67 Fair Empl. Prac. Cas. (BNA) 1769 (S.D. Ill. 1995); *Parrish v. Washington Nat'l Ins. Co.*, No. 89-C 4515, 1990 U.S. Dist. LEXIS 13934 (N.D. Ill. Oct. 16, 1990); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

62. 511 F. Supp. 307 (N.D. Ill. 1981).

63. *Id.* at 310.

64. 561 F.2d 983 (D.D.C. 1977).

65. 697 F. Supp. 1452 (N.D. Ill. 1988).

sexual harassment by several male machine operators at H.P. Smith.⁶⁶ Relying, in part, on a *Harvard Law Review* article, written by a student, Judge Williams stated that the behavior Mr. Goluszek had been subjected to was not the type Congress intended to prohibit under Title VII.⁶⁷ Rather, according to Judge Williams, Congress enacted Title VII to protect vulnerable persons from those more powerful, who exploit their power by inflicting sexual demands upon the weaker group.⁶⁸ Finding that Mr. Goluszek worked in a male-dominated environment, Judge Williams wrote: "In fact, Goluszek may have been harassed 'because' he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace."⁶⁹ Judge Williams's opinion in *Goluszek* has been occasionally relied upon; sometimes openly criticized,⁷⁰ and often distinguished or ignored by judges,⁷¹ including other district court judges within the Seventh

66. *Id.* at 1453.

67. *Id.* at 1456.

68. *Id.*

69. *Id.* (citation omitted).

70. See *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48 (6th Cir. 1996); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994); *Ashworth v. Roundup Co.*, 897 F. Supp. 489 (W.D. Wash. 1995); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521 (D.S.C. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996); *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1 (S.D. Tex. 1992).

71. *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 704 (E.D. Wis. 1996) ("Reliance on *Goluszek* is misplaced. . . . [T]he *Goluszek* court built its understanding of Congressional intent upon a foundation of quicksand. . . . [T]he *Goluszek* court had no basis for its gloss on Title VII's legislative history. Not only is it inappropriate to delve into Congressional intent when the statute's language is clear, *Goluszek* is simply not persuasive or reliable authority for interpreting Title VII's provisions on sex discrimination."); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 400 (D. Minn. 1996) ("We are not persuaded by the rationale articulated in *Goluszek*."); *Kaplan v. Dacommed Corp.*, No. 95-C6987, 1996 WL 89148, at *1 (N.D. Ill. Feb. 27, 1996) ("[T]his Court has disagreed sharply with *Goluszek* from the beginning—in this Court's view, that decision and others like it represent a kind of social judgment about Congress' purposes in enacting Title VII that is at odds with what Congress actually said."); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996) ("Notwithstanding the *Goluszek* court's sweeping statements regarding Congressional intent, its analysis is unsupported by any legislative history. . . . Moreover, the additional requirement imposed by *Goluszek* on a sexual harassment plaintiff is an unwarranted extension of the elements of proof set forth by the Supreme Court"); *Ton v. Information Resources, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 355, 360 (N.D. Ill. 1996) ("*Goluszek* has . . . developed into a favored target of jurisprudential criticism, most of which makes sense."); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1379 (C.D. Cal. 1995) ("In *Goluszek*, the court explored the 'underlying concerns of Congress' to determine that Title VII did not apply to a male

Circuit.⁷² The other sixteen cases heard within the district courts of the Seventh Circuit have, for the most part, recognized a claim for same-gender sexual harassment under Title VII.⁷³ The exceptions consist of three cases

versus male hostile environment claim As logically appealing [as] this argument may be, it does not reflect the current state of anti-discrimination jurisprudence.”); *King v. M.R. Brown*, 911 F. Supp. 161, 167 (E.D. Pa. 1995) (“This Court respectfully declines to follow the reasoning of *Goluszek* . . . that the only sex discrimination Title VII endeavors to prevent is that ‘stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.’”) (quoting *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988)); *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995) (“Unfortunately, the district court in *Goluszek* did not support its view of Congress’s intent with any citations to the legislative record.”); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (“While [the] argument [in *Goluszek*] may be logically appealing, it is not the current state of anti-discrimination jurisprudence.”).

72. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996); *Harris v. National Precision Blanking*, No. 95-C6022, 1997 WL 709653 (N.D. Ill. May 30, 1997); *Torres v. National Precision Blanking*, 943 F. Supp. 952 (N.D. Ill. 1996); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730 (N.D. Ill. 1996); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403 (E.D. Wis. 1996); *Peric v. Board of Trustees of Univ. of Ill.*, 71 Fair Empl. Prac. Cas. (BNA) 1760 (N.D. Ill. 1996); *Shermer v. Illinois Dep’t of Transp.*, 937 F. Supp. 781 (C.D. Ill. 1996); *Tietgen v. Brown’s Westminster Motors, Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996); *Rushing v. United Airlines*, 919 F. Supp. 1101 (N.D. Ill. 1996); *Sardinia v. Dellwood Foods*, 69 Fair Empl. Prac. Cas. (BNA) 705 (S.D.N.Y. 1995); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *Wenner v. C.G. Bretting Mfg. Co., Inc.*, 917 F. Supp. 640 (W.D. Wis. 1995); *Dixon v. State Farm Fire & Cas. Ins. Co.*, No. CIV.A.4:94cv165, 1995 WL 810016 (E.D. Va. Aug. 23, 1995); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995); *Boyd v. Vonnahmen*, 67 Fair Empl. Prac. Cas. (BNA) 1769 (S.D. Ill. 1995); *Parrish v. Washington Nat’l Ins. Co.*, No. 89C4515, 1990 U.S. Dist. LEXIS 13934 (N.D. Ill. Oct. 16, 1990).

73. *Harris v. National Precision Blanking*, No. 95-C6022, 1997 U.S. Dist. LEXIS 7740 (N.D. Ill. May 27, 1997); *Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996); *Torres v. National Precision Blanking*, 943 F. Supp. 952 (N.D. Ill. 1996); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730 (N.D. Ill. 1996); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403 (E.D. Wis. 1996) *aff’d*, 125 F.3d 408 (7th Cir. 1997); *Peric v. Board of Trustees of Univ. of Ill.*, 71 Fair Empl. Prac. Cas. (BNA) 1760 (N.D. Ill. 1996); *Shermer v. Illinois Dep’t of Transp.*, 937 F. Supp. 781 (C.D. Ill. 1996); *Rushing v. United Airlines*, 919 F. Supp. 1101 (N.D. Ill. 1996); *Kaplan v. Dacommed Corp.*, No. 95-C6987, 1996 WL 89148 (N.D. Ill. Feb. 27, 1996); *Ton v. Information Resources, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 355 (N.D. Ill. 1996); *Wenner v. C.G. Bretting Mfg. Co., Inc.*, 917 F. Supp. 640 (W.D. Wis. 1995); *Vandeventer v. Wabash Nat’l Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133 (C.D. Ill. 1995); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995); *Boyd v. Vonnahmen*, 67 Fair Empl. Prac. Cas. (BNA) 1769 (S.D. Ill. 1995); *Parrish v. Washington Nat’l Ins. Co.*, No. 89-C 4515, 1990 U.S. Dist. LEXIS 13934 (N.D. Ill. Oct. 16, 1990).

heard before Judge Norgle, who gives a thoughtful and thorough analysis of his reasoning for not allowing same-gender sexual harassment claims in two of his three opinions on the issue.⁷⁴ Referring to Judge Posner's affirmation of the possibility of same-gender sexual harassment in dicta in *Baskerville*, and relying, ultimately, upon his own interpretation of Congress's intent in passing Title VII, Judge Norgle states:

[T]he court agrees with Chief Judge Posner that sexual harassment occurs in male-on-male and female-on-female formats, though less frequently than in the prevalent male-on-female harassment cases. Yet, Title VII's drafters did not intend to protect one gender from the sexual conduct of those of the same-gender, and therefore, Title VII cannot be a vehicle for sexual harassment litigation between individuals of the identical gender. No matter whether the predator is a homosexual or heterosexual, and no matter whether the prey is sexually attracted to men or women, Title VII does not allow for claims alleging same-gender sexual harassment.⁷⁵

Finally, in *Blozis v. Mike Raisor Ford, Inc.*,⁷⁶ and *Vandeventer v. Wabash National Corp.*,⁷⁷ Judge Sharp appears to come out on both sides of the question, but his opinions are, in fact, consistent. While the opinion in *Blozis* is dated before that in *Vandeventer*, Judge Sharp obviously wrote the *Vandeventer* opinion first, as he distinguishes it in the *Blozis* opinion.⁷⁸ In *Vandeventer*, the plaintiff, Douglas Feltner, alleged he had been sexually harassed by a male co-worker who had called him a "dick sucker" and a homosexual.⁷⁹ Judge Sharp stated: "[A] man can state a claim under Title VII for sexual harassment by another man *only* if he is being harassed *because* he is a man."⁸⁰

While the epithet used and the taunting had a 'sexual' component, as do most expletives, the crucial point is that the 'harasser' was not aiming expletives at the victim *because of the victim's maleness*. He was taunting the victim because he did not like him; Mr. Feltner's gender was irrelevant. . . . Thus, [his claim is] not actionable under Title VII.⁸¹

74. *Harris*, No. 95-C6022, 1997 U.S. Dist. LEXIS at 7740; *Torres*, 943 F. Supp. at 952; *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730 (N.D. Ill. 1996).

75. *Schoiber*, 941 F. Supp. at 739.

76. 896 F. Supp. 805 (N.D. Ind. 1995).

77. 887 F. Supp. 1178 (N.D. Ind. 1995).

78. *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 806 (N.D. Ind. 1995).

79. *Id.* at 1181 n.2.

80. *Id.* (emphasis in original).

81. *Id.*

In *Blozis*, Judge Sharp allowed the claim of same-gender sexual harassment to go forward, refusing to grant the defendant's motion to dismiss.⁸² He distinguished his decision here from his summary judgment ruling in *Vandeventer*, noting courts' general reluctance to grant motions to dismiss and the fact that the plaintiff in *Vandeventer* produced no evidence that he was harassed because he was a male.⁸³ In *Blozis*, Judge Sharp found that it was the existence of a male or female bias that was protected by Title VII and not just being subjected to sexual comments or actions. Though he expressed some doubt about the cognizability of male bias between heterosexual men, he acknowledged that it might be possible to prove and allowed Mr. Blozis' claim to proceed.⁸⁴

Finally, the district courts in the Ninth Circuit are also conflicted on the issue of whether same-gender sexual harassment is actionable under Title VII, but with very little case support on either side.⁸⁵ In *Ashworth v. Roundup Co.*,⁸⁶ the court refused to recognize the possibility of same-gender sexual harassment under Title VII, relying upon the decision in *Goluszek and Garcia*.⁸⁷ In *Easton v. Crossland Mortgage Corp.*,⁸⁸ and *Tanner v. Prima Donna Resorts, Inc.*,⁸⁹ the judges were critical of the *Goluszek* decision and allowed the claim.

IV. FREDETTE V. BVP MANAGEMENT ASSOCIATES

A. *Background of the Case*

Robert Fredette, a male heterosexual, worked from 1988 until 1994 as a waiter at Arthur's 27, a restaurant in the Buena Vista Palace Hotel in Orlando, Florida. BVP Management Associates owned and operated Arthur's 27 during the time of Mr. Fredette's employment. Dana Sunshine, a male homosexual, was the maitre d'/manager of the restaurant during the time of Mr. Fredette's employment. As manager, Mr. Sunshine had the authority to hire, fire, and schedule the servers.⁹⁰

82. *Id.* at 808.

83. *Blozis*, 896 F. Supp. at 806.

84. *Id.* at 808.

85. *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351 (D. Nev. 1996); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368 (C.D. Cal. 1995), *rev'd*, 114 F.3d 979 (9th Cir. 1997); *Ashworth v. Roundup Co.*, 897 F. Supp. 489 (W.D. Wash. 1995).

86. 897 F. Supp. 489 (W.D. Wash. 1995).

87. *Ashworth*, 897 F. Supp. at 489.

88. 905 F. Supp. 1368 (C.D. Cal. 1995), *rev'd*, 114 F.3d 979 (9th Cir. 1997).

89. 919 F. Supp. 351 (D. Nev. 1996).

90. Brief for Appellant at 4, *Fredette*, (No. 95-3242) [hereinafter Brief for Appellant].

Mr. Fredette alleged that Mr. Sunshine sexually harassed him over the course of several years. The alleged harassment began shortly after Mr. Fredette began to work at Arthur's 27. He claimed that Mr. Sunshine told him of an easy way for him to get promoted, and he should see him on his day off so they could discuss it. Mr. Fredette told Mr. Sunshine he preferred to be promoted through his hard work. Mr. Sunshine then, allegedly, grabbed his crotch, shook it at Mr. Fredette, and said that being "hard is exactly what it takes."⁹¹ Mr. Fredette alleged that Mr. Sunshine repeatedly sexually propositioned him and that some of these propositions were made with the promise of a raise or a promotion.⁹²

Other male servers at the restaurant, some homosexual and some heterosexual, testified to Mr. Sunshine's sexual harassment of them. Mr. Fredette also alleged that one male homosexual waiter, with no fine dining experience, was promoted by Mr. Sunshine after providing Mr. Sunshine with sexual favors. This waiter allegedly told Fredette: "[U]se your imagination, you don't have to know how to wait tables to get what you want around here."⁹³ Allegedly, Mr. Sunshine's sexual partner told Mr. Fredette and other servers that they could get better table assignments by giving in to Mr. Sunshine's requests.⁹⁴ Despite his refusals of Mr. Sunshine's requests, Mr. Fredette was promoted to captain in November of 1989, six months after beginning work. He retained that position until his resignation in February of 1993.⁹⁵

In January of 1993, Mr. Fredette became intoxicated at the restaurant's bar and caused a disturbance.⁹⁶ As a result of his drunken behavior, he was suspended for three days, required to obtain counseling for alcohol abuse, and subjected to random drug testing. Upon returning to work, Mr. Fredette met with the Human Resource Manager of the hotel and, for the first time, complained of Mr. Sunshine's sexual harassment. The Director of Human Resources met with Mr. Sunshine who denied most of the allegations. Mr. Sunshine was given a written warning as a result of that meeting.⁹⁷

Following his meeting with human resources personnel, Mr. Fredette was no longer sexually harassed by Mr. Sunshine. However, Mr. Fredette claims that Mr. Sunshine subjected him to retaliatory actions by reprimanding him for minor infractions, assigning him to fewer or lower-

91. Brief for EEOC at 3, *Fredette*, (No. 95-3242) (quoting Fredette deposition) [hereinafter Brief for EEOC].

92. Brief for Appellant, *supra* note 90, at 4.

93. Brief for EEOC, *supra* note 91, at 4-5 (quoting Fredette deposition).

94. Brief for Appellant, *supra* note 90, at 5.

95. *Id.* at 4.

96. Brief for Appellee at 7, *Fredette*, (No. 95-3242) [hereinafter Brief for Appellee].

97. Brief for Appellant, *supra* note 90, at 5-6.

tipping tables, and by having other employees complain about him.⁹⁸ On the advice of his doctor, Mr. Fredette resigned from his position on February 6, 1993.⁹⁹

B. *Procedural History*

On March 17, 1994, Mr. Fredette filed suit against Mr. Sunshine, BVP Management Associates, Royal Palace Hotel Associates, and Buena Vista Hospitality Group.¹⁰⁰ In his complaint, Mr. Fredette alleged violations of Title VII, the Florida Human Rights Act, and the Fair Labor Standards Act.¹⁰¹ Specifically, Mr. Fredette alleged hostile work environment and “*quid pro quo* sexual harassment.”¹⁰²

On July 6, 1994, Mr. Sunshine filed a motion to dismiss on the grounds that he could not be held individually liable for sexual harassment. A magistrate judge reviewed the motion and recommended its denial.¹⁰³ On October 26, 1994, the United States District Judge agreed with the Magistrate Judge’s recommendation and denied Mr. Sunshine’s motion to dismiss.¹⁰⁴

On February 16, 1995, Mr. Sunshine filed a motion for judgment on the pleadings, again claiming he could not be held individually liable for sexual harassment. Mr. Fredette filed his opposition to Mr. Sunshine’s motion on March 17, 1995. On May 1, 1995, Mr. Sunshine filed a motion for summary judgment. On May 10, 1995, the magistrate issued a report regarding Mr. Sunshine’s motions.¹⁰⁵ In his report, he recommended that Mr. Sunshine’s motion for judgment on the pleadings be granted as Mr. Sunshine was not a proper defendant under Title VII or the Florida Human Rights Act.¹⁰⁶ On June 19, 1995, the district judge approved the magistrate’s report and dismissed all claims against Mr. Sunshine.¹⁰⁷

On April 19, 1995, Mr. Fredette voluntarily dismissed his claims against Royal Palace Hotel Associates and Buena Vista Hospitality Group.¹⁰⁸ On May 9, 1995, BVP filed a motion for summary judgment stating that Title VII does not prohibit same-gender sexual harassment. BVP claimed that

98. *Id.* at 6.

99. *Id.*

100. Brief for Appellee, *supra* note 96, at 2.

101. Brief for EEOC, *supra* note 91, at 2.

102. *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1504 (11th Cir. 1997) (emphasis added).

103. Brief for Appellee, *supra* note 96, at 3.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Brief for Appellee, *supra* note 96, at 3.

Congress did not intend to protect men in a male-dominated work environment and that Mr. Fredette may have been discriminated against, but the discrimination was due to his sexual preference and not because of his gender. Title VII, BVP claimed, does not protect against discrimination based on sexual orientation.¹⁰⁹ On June 5, 1995, Mr. Fredette filed opposition to BVP's motion for summary judgment.¹¹⁰ Mr. Fredette claimed that Title VII does protect against same-gender sexual harassment when the harassment is an attempt to extract sexual favors because he is a male.¹¹¹

On June 30, 1995, the magistrate issued a report and recommended that the district judge deny BVP's motion for summary judgment.¹¹² The magistrate relied on his interpretation of the plain language of the applicable statutes, prohibiting discrimination based on sex regardless of the gender of the alleged harasser or the victim.¹¹³ He noted that, if the harassment would not have happened but for the victim's gender, then Title VII protections would apply.¹¹⁴

On September 11, 1995, the district judge refused to accept the magistrate's recommendations and issued an order granting BVP's motion for summary judgment under Title VII and the Florida Human Rights Act.¹¹⁵ The judge adopted the magistrate's recommendation regarding the denial of BVP's motion on the Fair Labor Standards Act claim, stating a genuine issue of fact remained to be resolved.¹¹⁶

In granting BVP's motion on the Title VII and Florida Human Rights Act claims, the district judge agreed with BVP that the alleged discrimination of Mr. Fredette was based on his sexual orientation and was not, therefore, actionable under Title VII.¹¹⁷ "[T]he determinative factor is that the discrimination or harassment would not have occurred 'but for the fact of [the plaintiff's] sex.'"¹¹⁸ But, the judge added, "[T]he term 'sex' as used in Title VII is not synonymous with 'sexual preference.'"¹¹⁹ Quoting from *Garcia*,¹²⁰ the judge wrote: "[H]arassment by a male supervisor against a

109. Brief for EEOC, *supra* note 91, at 5.

110. Brief for Appellant, *supra* note 90, at 2.

111. Brief for EEOC, *supra* note 91, at 5-6.

112. Brief for Appellee, *supra* note 96, at 4.

113. Brief for EEOC, *supra* note 91, at 6.

114. *Id.*

115. Brief for Appellee, *supra* note 96, at 4.

116. *Id.*

117. Brief for EEOC, *supra* note 91, at 7.

118. *Fredette v. BVP Management Assocs.*, 905 F. Supp. 1034, 1037 (M.D. Fla. 1995) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (alteration made by *Fredette* court).

119. *Id.*

120. 28 F.3d 446 (5th Cir. 1994).

male subordinate does not [necessarily] state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.”¹²¹ The judge justified his decision by claiming that Mr. Fredette would not have suffered the discrimination if he had given in to Mr. Sunshine’s requests.

Thus, if Fredette suffered the claimed harassment or discrimination at the hands of the restaurant manager, it stemmed not from the fact that Fredette was a man, but rather from the fact that Fredette refused the manager’s propositions and did not share the same sexual orientation or preferences as the manager. Title VII does not provide a cause of action for discrimination or harassment levied because of one’s sexual orientation or preference. Any expansion of Title VII . . . that would include such a cause of action is for . . . Congress . . . and not this court, to make.¹²²

On September 21, 1995, Mr. Fredette filed a notice of appeal of the district court’s judgments in favor of Mr. Sunshine and BVP.¹²³ The parties agreed to dismiss the Fair Labor Standards Act claims and, in December of 1995, Mr. Fredette dismissed the claims against Mr. Sunshine.¹²⁴ The case proceeded on appeal to the Eleventh Circuit Court of Appeals on Mr. Fredette’s claim against BVP Management Associates for discrimination in violation of Title VII and the Florida Human Rights Act.¹²⁵

C. *Appeals Court’s Holding and Rationale*

The court narrowly defined the legal issue in *Fredette*: “[W]hether, under the circumstances of this case, the sexual harassment of a male employee by a homosexual male supervisor is actionable under Title VII.”¹²⁶ In deciding that Mr. Fredette’s claim was actionable under Title VII, the court considered five areas: 1) the language of Title VII; 2) the statute’s causation requirement, that the discrimination occurred “because of” the person’s sex; 3) the legislative history of Title VII; 4) the EEOC’s interpretation of Title VII; and 5) relevant case law.¹²⁷

First, the court quoted and reviewed the wording of the statute itself. Focusing on Congress’s use of such gender neutral terms as “employer” and

121. *Fredette*, 905 F. Supp. at 1037 (quoting *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451–52 (5th Cir. 1994)) (alteration made by the *Fredette* court).

122. *Id.* at 1037–38 (citations omitted).

123. Brief for Appellee, *supra* note 96, at 4.

124. *Id.*

125. *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1504 (11th Cir. 1997).

126. *Id.*

127. *Id.* at 1504–06.

“any individual,” the court said, “[t]here is simply no suggestion in these statutory terms that the cause of action is limited to opposite gender contexts.”¹²⁸

Many courts have used, to some extent, a similar interpretation of the statute’s plain language and relied on it in finding same-gender sexual harassment claims actionable under Title VII.¹²⁹ The court in *Easton v. Crossland Mortgage Corp.*¹³⁰ established: “Where the statutory language is clear, our sole function is to enforce it, according to its terms.”¹³¹

The *Fredette* appeals court then looked to the statute’s causation requirement, that the alleged discrimination be “because of” the person’s sex. Comparing Mr. Fredette’s male-on-male sexual harassment by Mr. Sunshine to a traditional male-on-female situation, the court noted that “[t]he

128. *Id.* at 1505.

129. *See* *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (“Through its proscription of ‘employer’ discrimination against ‘individual’ employees, the statute obviously places no gender limitation whatsoever on the perpetrator or the target of the harassment.”); *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 702 (E.D. Wis. 1996) (“Title VII’s plain language is broad and does not limit its prohibition on sex discrimination to discrimination of one sex by the other.”); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996) *aff’d*, 125 F. 3d 408 (7th Cir. 1997) (“The statutory language of Title VII is non-exclusive and protects all employees from gender discrimination inflicted by an ‘employer.’ The gender of the harasser is irrelevant.”); *Peric v. Board of Trustees of Univ. of Ill.*, 71 Fair Empl. Prac. Cas. (BNA) 1760, 1762 (N.D. Ill. 1996) (“The statute is clearly worded in gender neutral terms, and no legislative history exists to contradict a gender neutral reading.”); *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 361 (D. Colo. 1996) (“[T]itle VII [does not] refer to the sex of the offending party or the sex of the victim.”); *King v. Town of Hanover*, 959 F. Supp. 62, 66 (D.N.H. 1996) (“[T]he text of Title VII [does not place] a restriction on the gender of the discriminator.”); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 400 (D. Minn. 1996) (“[T]he language [of Title VII] is gender neutral.”); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) (“The text of [Title VII] is gender neutral and contains no suggestion that the sex of either gender is a prerequisite to maintaining a claim under Title VII.”); *Sardinia v. Dellwood Foods*, 69 Fair Empl. Prac. Cas. (BNA) 705, 709 (S.D.N.Y. 1995) (“[T]here is nothing in the language of Title VII to support a finding that same sex harassment is not prohibited.”); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1378 (C.D. Cal. 1995) *rev’d*, 114 F.3d 979 (9th Cir. 1997) (“[T]he plain language of Title VII . . . does not preclude a same-gender sexual harassment claim for relief.”); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995) (“[N]othing in the text of the statute indicates that Title VII’s protections extend only to individuals who are harassed by members of the opposite sex.”); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136–37 (C.D. Ill. 1995) (“The plain language of Title VII simply does not restrict its prohibition against discrimination to employees of the opposite sex.”); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (“[T]he plain language of 42 U.S.C. § 2000e-2 does not limit Title VII to heterosexual harassment.”).

130. 905 F. Supp. 1368 (C.D. Cal. 1995).

131. *Id.* at 1378 (quoting *Rake v. Wade*, 508 U.S 64 (1993)).

reasonably inferred motives of the homosexual harasser are identical to those of the heterosexual harasser—i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers.”¹³² Also, the court found, that since the alleged harassment experienced by Mr. Fredette was not experienced by women at the restaurant, this supported Mr. Fredette’s claim that he was harassed because of his gender, in other words, because he was a man.¹³³

In *Yeary v. Goodwill Industries-Knoxville, Inc.*,¹³⁴ a male employee alleged sexual harassment by a male co-worker, a known homosexual.¹³⁵ In *Yeary*, the court held: “[W]hen a male sexually propositions another male *because of sexual attraction*, there can be little question that the behavior is a form of harassment that occurs *because* the propositioned male is a male—that is, ‘because of . . . sex.’”¹³⁶ Two other courts have allowed Title VII causes of action where the alleged harasser was known to be homosexual, finding the fact that the harasser was a homosexual as support of the plaintiff’s position that he/she was harassed because of his/her sex.¹³⁷ Other courts have found the homosexuality of the harasser persuasive, but not conclusive, in determining that the plaintiff was harassed because of his/her sex.¹³⁸

Next, the appeals court looked to the legislative history and intent of Title VII. The court said, “we find nothing in the legislative history that

132. *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997).

133. *Id.*

134. 107 F.3d 443 (6th Cir. 1997).

135. *Id.* at 445.

136. *Id.* at 448 (emphasis in original).

137. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (“[W]e hold that a same-sex ‘hostile work environment’ sexual harassment claim may lie under Title VII where a homosexual male (or female) employer discriminates against an employee of the same sex or permits such discrimination against an employee by homosexual employees of the same sex.”); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1102–03 (M.D. Tenn. 1995) (“[I]t is obvious that sexual harassment by a homosexual supervisor of the same sex is exaction of a condition of employment which, but for his or her sex, an employee would not have faced.”).

138. *See McCoy v. Macon Water Auth.*, 966 F. Supp. 1209, 1217 (M.D. Ga. 1997) (“[Specific courts] have held that Title VII provides a cause of action for same-sex harassment if the harasser is homosexual, but not if the harasser is heterosexual. . . . This Court finds [these holdings] more consistent with the language of Title VII and the judicially-created doctrine of sexual harassment.”); *Caldwell v. KFC Corp.*, 958 F. Supp. 962, 969 (D.N.J. 1997) (“Like any other sexual-harassment plaintiff, plaintiff must still prove that the sexual harassment he suffered was “because of” his sex—that had he been a woman, he would not have been subjected to Mr. Worley’s sexual harassment.”); *Swage v. Inn Philadelphia*, 72 Fair Empl. Prac. Cas. (BNA) 438, 441 (E.D. Pa. 1996) (“[P]laintiff must still prove that the alleged harassment was ‘because of’ his sex.”).

suggests an express legislative intent to exclude same-sex harassment claims from the purview of Title VII."¹³⁹

Many courts have lamented about the lack of congressional intent regarding Title VII.¹⁴⁰ Most of those courts have overcome the lack of intent and found same-gender sexual harassment claims actionable under Title VII.¹⁴¹ However, Judge Murnaghan, in *Wrightson v. Pizza Hut of America, Inc.*, gave this critical dissent:

The majority treats the absence of legislative history as a license to 'legislate' and impermissibly to rewrite Title VII to include claims never intended, nor contemplated, by Congress. The majority's approach ignores the context within which Congress enacted Title VII. The absence of legislative history to guide the courts can be read in either of two ways. Either, as the majority argues, Congress's failure to exclude the possibility of same sex claims should be interpreted as allowing for such claims. Or, Congress simply never fathomed that Title VII would be used in the manner in which the majority today holds, and hence, Congress, not the courts, should address, in the first instance, whether Title VII's 'sex' language should apply when a heterosexual male alleges that he was harassed by a homosexual male. The instant case demonstrates the wisdom of the Constitution's three branches of

139. *Fredette v. BVP Management Assoc.*, 112 F.3d 1503, 1505 (11th Cir. 1997).

140. *See Wrightson v. Pizza Hut Am. Inc.*, 99 F.3d 138, 142 n.3 (4th Cir. 1996) ("[W]e are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" (quoting *Meritor Sav. Bank v. Vinson* 477 U.S. 57, 64 (1986); *Caldwell v. KFC Corp.*, 958 F. Supp. 962, 968 (D.N.J. 1997) ("[T]here is no legislative history on the meaning of 'sex discrimination.'"); *Swage v. Inn Philadelphia*, 72 Fair Empl. Prac. Cas. (BNA) 438, 440 (E.D. Pa. 1996) ("There is no legislative history on the meaning of 'sex discrimination.'"); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 272 (D. Utah 1996) ("Legislative history is silent"); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996) ("[T]here is little legislative history regarding the scope of the sex discrimination prohibition."); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995) ("[N]o legislative history exists on this issue."); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 n.3 (C.D. Ill. 1995) ("The Court also notes that little legislative history exists on Title VII's prohibition against sex discrimination."); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) ("Virtually no legislative history is available to guide the courts in interpreting Title VII's interpretation against discrimination based on sex.") *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1171 (D. Nev. 1995) ("The result is a paucity of legislative history to inform the courts what Congress intended.").

141. *Wrightson*, 99 F.3d at 138; *Caldwell*, 958 F. Supp. at 962; *Swage*, 72 Fair Empl. Prac. Cas. at 438; *Johnson*, 932 F. Supp. at 269; *Tanner*, 919 F. Supp. at 351; *King*, 911 F. Supp. at 161; *Griffith*, 887 F. Supp. at 1133; *Walden Book Co.*, 885 F. Supp. at 100.

government, which leaves to the legislative branch, not the judiciary, the task of making the law.¹⁴²

Like the appeals court in *Fredette*, at least three other courts have found that the lack of legislative intent does not negate the possibility of same-gender actions.¹⁴³

Also regarding congressional intent, the *Fredette* court noted: "The obvious Congressional focus on discrimination against women has not precluded the courts from extending the protections of Title VII to men."¹⁴⁴ This reverse discrimination analogy used in same-gender actions was relied upon by the courts in *EEOC v. Walden Books*,¹⁴⁵ and *Sardinia v. Dellwood Foods*.¹⁴⁶

Next, the court considered the EEOC's interpretation of Title VII. In a footnote, the court recognized the EEOC's expertise that, while not binding on courts, can be useful for interpretation of and guidance in Title VII actions.¹⁴⁷ The court quoted the EEOC's Compliance Manual that explicitly states that sexual harassment can exist even if the harasser and victim are not of opposite genders.¹⁴⁸ Instead, the EEOC recommends that the focus be on the disparate treatment of one person by another and sexual harassment based on a person's sex.¹⁴⁹ The court quotes a specific example in the EEOC Compliance Manual of sexual harassment where the harasser and victim are, in fact, the same sex.¹⁵⁰ Many other courts have relied, in part, on the

142. *Wrightson*, 99 F.3d at 145.

143. See *Peric v. Board of Trustees of Univ. of Ill.*, 71 Fair Empl. Prac. Cas. (BNA) 1760, 1762 (N.D. Ill. 1996) ("[N]o legislative history exists to contradict a gender neutral reading."); *Williams v. District of Columbia*, 916 F. Supp. 1, 9 (D.D.C. 1996) ("There is no legislative history that suggests that victims of sexual harassment must be sexually harassed by harassers of the opposite sex before they may invoke the protections of Title VII."); *Sardinia v. Dellwood Foods*, 69 Fair Empl. Prac. Cas. (BNA) 705, 709 (S.D.N.Y. 1995) ("[T]here is little legislative history to support such a claim [that same sex harassment is not prohibited under Title VII].").

144. *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997).

145. 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) ("It would be untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII.").

146. 69 Fair Empl. Prac. Cas. (BNA) 705, 709 (S.D.N.Y. 1995) ("I agree with those courts . . . which finds [sic] it 'untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII.'") (quoting *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995)).

147. *Fredette*, 112 F.3d at 1505 n.4.

148. *Id.* at 1505.

149. *Id.* at 1505-06.

150. *Id.*

EEOC's recognition of the possibility of same-gender sexual harassment in finding for a plaintiff in a same-gender Title VII action.¹⁵¹

Finally, the *Fredette* appeals court looked for guidance from case law precedent in making its decision. It noted that the United States Supreme Court has not explicitly ruled on the same-gender sexual harassment issue.¹⁵² However, the appeals court stated that the United States Supreme Court did rule on a case of reverse employment discrimination. In *Johnson v. Transportation Agency*,¹⁵³ a male supervisor's decision to promote a female over a male employee was analyzed by the Court for possible discrimination under Title VII.¹⁵⁴ The appeals court found that the United States Supreme Court's acknowledgment of this type of reverse discrimination claim with same-gender undertones was enough, at least implicitly, to support the idea of same-gender sexual harassment claims.¹⁵⁵

The *Fredette* court then looked at cases beyond the Eleventh Circuit, relying especially upon the decisions of the Sixth and Fourth Circuit Courts of Appeal in *Yeary* and *Wrightson*. The court found both of those cases factually similar to *Fredette* as the male victims had been sexually harassed by a male homosexual. In both *Yeary* and *Wrightson*, the courts allowed the plaintiffs' claims to continue. The *Fredette* court also noted supportive dicta in *Barnes v. Costle*, *Tomkins v. Public Service Electric & Gas Co.*, *Baskerville v. Culligan International Co.*, and *Steiner v. Showboat Operating*

151. See *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996); *Caldwell v. KFC Corp.*, 958 F. Supp. 962 (D.N.J. 1997); *McCoy v. Macon Water Auth.*, 966 F. Supp. 1209 (M.D. Ga. 1997); *Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403 (E.D. Wis. 1996); *Peric v. Board of Trustees of Univ. of Ill.*, 71 Fair Empl. Prac. Cas. (BNA) 1760 (N.D. Ill. 1996); *Gerd v. United Parcel Serv.*, 934 F. Supp. 357 (D. Colo. 1996); *Swage v. Inn Philadelphia*, 72 Fair Empl. Prac. Cas. (BNA) 438 (E.D. Pa. 1996); *Wehrle v. Office Depot, Inc.*, 954 F. Supp. 234 (W.D. Okl. 1996); *Johnson v. Community Nursing Servs.* 932 F. Supp. 269 (D. Utah 1996); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393 (D. Minn. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351 (D. Nev. 1996); *Ton v. Information Resources, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 355 (N.D. Ill. 1996); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*, 917 F. Supp. 766 (N.D. Okl. 1995); *Sardinia v. Dellwood*, 69 Fair Empl. Prac. Cas. (BNA) 705, 705 (S.D.N.Y. 1995); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *Dixon v. State Farm Fire & Cas. Ins. Co.*, No. CIV.A.4:94cv165, 1995 WL 810016 (E.D. Va. Aug. 23, 1995); *Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995); *Roe v. K-Mart Corp.*, No. CIV.A.2:93-2372-18AJ, 1995 WL 316783 (D.S.C. Mar. 28, 1995).

152. *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997).

153. 480 U.S. 616 (1987).

154. *Id.* at 616.

155. *Id.*

Co.,¹⁵⁶ and cited, in a footnote, to several district court cases that have recognized the cognizability of same-gender sexual harassment under Title VII.¹⁵⁷

The *Fredette* court criticized the decisions of the Fifth Circuit Court of Appeals in *Oncale* and *Garcia*. First, the court examined what it determined to be those courts' lack of reasoning in reaching a decision that all same-gender sexual harassment claims are not actionable. The *Fredette* court then went on to factually distinguish *Oncale*, where the behavior was "teasing and harassment with sexually-focused speech or conduct"¹⁵⁸ between coworkers and not a supervisor's request for sexual favors from a subordinate. The *Fredette* court was also critical of the district court's decision to not recognize a same-gender sexual harassment claim in *Goluszek v. H.P. Smith*. Again, finding the court's reasoning flawed, and relying upon judicial acceptance of reverse discrimination actions, the *Fredette* court noted that there is no need to demonstrate a male dominated environment, as required in *Goluszek*.

Both the lower district court and BVP Management Associates asserted that the harassment suffered by Mr. Fredette was based upon sexual orientation, and not upon gender. The appeals court concluded that its decision to allow Mr. Fredette's claim for same-gender sexual harassment was, in no way, an endorsement of sexual harassment claims based upon sexual orientation. Specifically, the court stated: "[W]e hold today that when a homosexual male supervisor solicits sexual favors from a male subordinate and conditions work benefits or detriment on receiving such favors, the male subordinate can state a viable Title VII claim for gender discrimination."¹⁵⁹

156. *Fredette*, 112 F.3d at 1508.

157. *Id.*; *McCoy v. Macon Water Auth.*, 966 F. Supp. 1209 (M.D. Ga. 1997); *Williams v. District of Columbia*, 916 F. Supp. 1 (D.D.C. 1996); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393 (D. Minn. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351 (D. Nev. 1996); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229 (S.D. Ga. 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545 (M.D. Ala. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133 (C.D. Ill. 1995); *Sardinia v. Dellwood Foods*, 69 Fair Empl. Prac. Cas. (BNA) 705 (S.D.N.Y. 1995); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161 (E.D. Pa. 1995); *Nogueras v. University of P.R.*, 890 F. Supp. 60 (D.P.R. 1995); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983); *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

158. *Fredette*, 112 F.3d at 1508 (11th Cir. 1997).

159. *Id.* at 1510 (emphasis in original).

V. CONCLUSION

The significant trend by courts is to find sexual harassment claims actionable under Title VII. Title VII's obvious intent, regardless of the lack of specific legislative history, is to protect against discrimination in the work place based upon, among other things, a person's "sex." If a plaintiff can show that the sexual harassment he or she has experienced was directed to him/her because of sex, then a Title VII claim exists. In same-gender claims, the homosexuality of the harasser, though persuasive, should not be the sole determining factor in deciding whether the harassment was based on sex. Nor should the heterosexuality of the harasser rule out the possibility of a viable Title VII claim. Whether the harassment was based on the victim's sex is a question of fact to be decided by the fact finder. Judge Lawson, in *McCoy v. Macon Water Authority*, put it aptly: "Proving that the harassment was directed at the plaintiff because of sex, rather than for some other reason, may be an unpleasant and difficult affair, but it is the duty of courts, and especially of juries, to sort out such things."¹⁶⁰

Linda K. Davis

ADDENDUM

On March 4, 1998, the United States Supreme Court published its decision of *Oncala v. Sundowner Offshore Services, Inc.*¹⁶¹ At long last, the issue of whether a sexual harassment claim under Title VII is viable when the harasser and victim are the same sex has been answered affirmatively.¹⁶² The unanimous Court, in an opinion written by Justice Scalia, seemed genuinely confused by the "bewildering variety of stances" taken by courts that have previously addressed the issue.¹⁶³

Not unlike many circuit courts of appeals that have faced this question, the United States Supreme Court looked for case law precedent on related issues to support its position that same-gender harassment claims are actionable under Title VII. For example, the Court referenced its decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,¹⁶⁴ which extended Title VII's protection to men as well as women.¹⁶⁵ The Court observed that it had previously rejected the notion that individuals do not discriminate

160. *McCoy v. Macon Water Auth.*, 966 F. Supp. 1209 (M.D. Ga. 1997).

161. No. 96-568, 1998 WL 88039 (U.S. Mar. 4, 1998).

162. *Id.* at *5.

163. *Id.* at *3.

164. 464 U.S. 669 (1983).

165. *Id.* at 685.

against members of their own race in *Castaneda v. Partida*.¹⁶⁶ Finally, the Court cited favorably to *Johnson v. Transportation Agency, Santa Clara County*,¹⁶⁷ where a man filed a claim for sex discrimination against his employer when a promotion for which he applied was given to a female employee by his male supervisor.¹⁶⁸

The Court relied most heavily upon the statutory language and its interpretation of broad Congressional intent for its decision that same-sex harassment claims are not precluded from Title VII actions. Even though same-gender claims were not the “principal evil” considered by the legislature when it enacted Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹⁶⁹ Since the language of Title VII prohibits “discriminat[ion] . . . because of . . . sex,”¹⁷⁰ the Court extended the statute’s coverage to include any sexual harassment that meets the statutory requirements.¹⁷¹ This includes same-gender claims.

Thankfully, the Court went beyond its mere holding, giving guidelines for plaintiffs wishing to prove same-gender sexual harassment claims under Title VII.¹⁷² Harassment by a homosexual of another of his/her same-gender was compared by the Court to traditional male-on-female sexual harassment claims.¹⁷³ One can assume, the Court reasoned, that the harassment in that situation is likely due to the person’s sex, thus, meeting Title VII’s requirement that the discrimination be because of sex.¹⁷⁴ However, the Court did not restrict legitimate discriminatory harassment to that based on sexual desire. If a plaintiff can show that the harasser demonstrated general hostility toward the presence of the particular gender in the workplace, the because of sex requirement will be satisfied.¹⁷⁵ Proof of disparate treatment of one sex in a mixed sex work environment would also constitute legitimate proof that the harassment met the statutory requirement.¹⁷⁶ Finally, the Court emphasized that “[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged

166. 430 U.S. 482, 499 (1977).

167. 480 U.S. 616 (1987).

168. *Id.* at 641-42.

169. *Oncale v. Sundowner Offshore Servs., Inc.*, No. 96-568, 1998 WL 88039 (U.S. Mar. 4, 1998).

170. 42 U.S.C. 2000e-2(a)(a) (1994).

171. *Oncale*, 1998 WL 88039, at *3.

172. *Id.* at *4.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Onacle*, 1998 WL 88039, at 4.

with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’¹⁷⁷

While some may construe this decision by the Court to open the gate to the slippery slope of sexual harassment lawsuits, the Court was quick to reinforce what it considers a “crucial” requirement of Title VII.¹⁷⁸ The conduct must be so offensive, the Court reminded readers, that it either: 1) alters the conditions of the victim’s employment; or 2) is “severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.”¹⁷⁹ Normal social behavior in the workplace (“such as male-on-male horseplay or intersexual flirtation”)¹⁸⁰ is not enough to meet this standard.¹⁸¹ The Court cautioned that factfinders must look to the context of the behavior and use common sense in their determination of what constitutes actionable sexual harassment under Title VII.¹⁸²

Although the Court, with its decision in *Oncale*, has relieved some of the confusion about same-general sexual harassment claims under Title VII, questions still remain. For example, what of plaintiffs like Joseph Oncale? How does Mr. Oncale prove that the sexually humiliating treatment he received from three male heterosexual co-workers in an all-male work environment constituted discriminatory treatment because of his sex? Is sexual harassment in his situation legally possible, even given the arguably lenient evidentiary guidelines delineated by the Court?

And, what of Mr. Fredette in his same-gender sexual harassment claim against BVP Management Associates? As of this writing, his claim has not been reheard by the trial court. Given the Supreme Court’s ruling in *Oncale*, Mr. Fredette’s claim, unlike Mr. Oncale’s, may be easier to prove. His harasser was a known homosexual, thus easing his burden of proving that the harassment was because of his sex. However, like all sexual harassment plaintiffs, Mr. Fredette will still need to prove that the harassment he experienced altered the conditions of his employment in some way and/or was so abusive or hostile as to offend the “objective” reasonable person.

At least the Supreme Court has now made clear that whether Mr. Fredette, Mr. Oncale, and other plaintiffs like them, experienced discriminatory treatment because of their sex is not a legal question, but one of fact, to be decided by the factfinder.

177. *Id.*

178. *Id.*

179. *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 50 U.S. 17 (1993)).

180. *Id.*

181. *Oncale*, 1998 WL 88039, at *4.

182. *Id.*

Convicted Sex Offenders: Where Do You Live? Are We Entitled to Know? A Year's Retrospective of Ex Post Facto Challenges to Sex Offender Community Notification Laws

I. INTRODUCTION

Jesse Timmenedequas has been sentenced to death for the July 29, 1994, kidnapping, rape, sodomy, and murder of seven-year-old Megan Kanka.¹ The thirty-six-year-old pedophile, whose crime stunned the nation and sparked dozens of laws aimed at protecting children and the public from sexual predators, had previously been convicted and sentenced to ten years in a New Jersey state prison for sexual offenders for two sexual assaults against both a five and a seven-year-old girl.² Timmenedequas, along with two other men who also had been convicted of child sex crimes, lived across the street from the Kanka family.³ The Kankas had no idea of Timmenedequas's violent past.⁴ Perhaps if they had, the tragedy of Megan's death could have been prevented.

Turning their personal loss into a positive campaign to protect other children, Richard and Maureen Kanka led the fight for legislation to better protect families and communities from becoming victims of violent sexual predators.⁵ As a result of their efforts, New Jersey Governor Christine Todd Whitman signed a package of bills known as "Megan's Law" on October 31, 1994, just three months after Megan's death.⁶ This legislation requires convicted sex offenders to register with local authorities upon their release from prison. The law goes even further to allow authorities to notify the public if a potentially dangerous sex offender lives or works in the area.⁷

Unfortunately, despite the effectiveness of sex offender laws,⁸ civil rights and civil liberties lawyers have led a crusade on behalf of sex

1. Lisa L. Colangelo, *Jury Sentences Megan Kanka's Killer to Death*, ASBURY PARK PRESS, June 21, 1997, at A1.

2. Joel Bewley, *Chief Criticizes Middlesex*, TIMES, June 21, 1997, at A4.

3. Colangelo, *supra* note 1, at A4.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Kirsten R. Bredlie, *Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in Doe v. Poritz*, 81 MINN. L. REV. 501, 512 (1996). A study of Washington's Community Protection Act, a statute similar to "Megan's Law," concluded

offenders, challenging the constitutionality of “Megan’s Law” and similar sex offender statutes across the country. They have argued that the registration and public notification laws violate the prohibitions against Double Jeopardy, Bills of Attainder, invade sex offenders’ constitutional rights to privacy, and do not adhere to the provisions of the Constitution’s Due Process Clause.⁹ Because legislatures have applied their sex offender statutes to offenders convicted before the passage of these statutes, the attorneys contend that the laws also impose impermissible punishments on previously convicted sex offenders, thus violating the United States Constitution’s Ex Post Facto Clause.¹⁰

II. EX POST FACTO LAWS

According to the United States Constitution, neither the federal government nor any state shall make an ex post facto law.¹¹ The Ex Post Facto Clause prohibits legislatures and judiciaries from punishing as a crime an act which was innocent when it occurred, because it occurred before the enactment of the new legislation.¹² In order to determine if a law is an ex post facto law, courts must determine if the law is being applied retroactively, in addition to whether the law is merely a regulation or an unconstitutional second form of punishment.¹³ The Framers passed the Ex

that sex “offenders who were subject[ed] to community notification were arrested for new crimes much more quickly than comparable offenders who were released without notification.” *Id.* at 512 (citations omitted). Law enforcement authorities in Hamilton Township, New Jersey, the hometown of the Kanka family, credit “Megan’s Law” with helping police departments to better protect citizens against sex offenders. Bewley, *supra* note 2, at A4.

9. Ronald K. Chen, *Constitutional Challenges to Megan’s Law: A Year’s Retrospective*, 6 B.U. PUB. INT. L.J. 57, 58–59 (1996). “[T]he Double Jeopardy Clause prohibits ‘a second prosecution for the same offense after conviction and multiple punishments for the same offense.’” *Id.* at 60 (quoting *United States v. Halper*, 490 U.S. 435, 440 (1989)). The Bill of Attainder Clause prohibits legislatures from enacting “[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *Id.* at 59–60 (quoting *United States v. Brown*, 381 U.S. 437, 448–49 (1965)).

10. John Gibeaut, *Defining Punishment: Courts Split on Notification Provisions of Sex Offender Law*, A.B.A. J., Mar. 1997, at 36.

11. U.S. CONST. art. I, § 10, cl. 1 An ex post facto law is defined as “[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.” BLACK’S LAW DICTIONARY 580 (6th ed. 1990).

12. Ryan A. Boland, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183, 198 (1995).

13. *Id.*

Post Facto Clause because they were apprehensive about “the violent acts which might grow out of the feelings of the moment, . . . the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.”¹⁴ The Ex Post Facto Clause aims to ensure that legislatures give citizens notice of the law, so that they may know what the law is before they act.¹⁵ The Clause also aims to inhibit legislatures from succumbing to political pressure by passing legislation that is vengeful toward unpopular individuals or groups.¹⁶

III. EX POST FACTO CHALLENGES TO STATE SEX OFFENDER LAWS

The requirement of convicted sex offenders to register with local police upon their release from prison or treatment facilities has almost unanimously been upheld against ex post facto challenges because courts view the registration requirement as merely a regulation, not a second form of punishment.¹⁷ However, many state legislatures have gone further than requiring registration with police. More than forty states, including New Jersey, have adopted additional community notification provisions to their sex offender laws which allow authorities to notify the public of a convicted sex offender’s presence in the community.¹⁸ Such notification provisions, when applied retroactively, are continuously being challenged as violative of the Ex Post Facto Clause of the United States Constitution.

The proponents of public notification provisions contend that the legislation aims to protect the public, not to punish those sex offenders who have already served their court imposed sentences.¹⁹ Opponents of the provision argue that when applied, the laws impose an unconstitutional, additional form of punishment by publicly humiliating sex offenders and

14. *W.P. v. Poritz*, 931 F. Supp. 1199, 1211 (D.N.J. 1996) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866)), *rev’d*, *W.P. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998). While this case was reversed, this reversal does not effect the substance of this article. For further analysis see addendum.

15. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

16. *Doe v. Pataki*, 940 F. Supp. 603, 614 (S.D.N.Y. 1996), *aff’d in part, rev’d in part*, 120 F.3d 1263 (2nd Cir. N.Y. 1997), *and cert. denied*, 118 S. Ct. 1066 (1998). While this case was reversed, this reversal does not effect the substance of this article. For further analysis see addendum.

17. *Id.* at 629.

18. Daniel L. Feldman, *The Scarlet Letter Laws of the 1990’s: A Response to Critics*, 60 ALB. L. REV. 1081, 1083 (1997).

19. Bredlie, *supra* note 8, at 510. Proponents of the notification provision contend that the laws have increased public awareness about sex crimes and have led to the deterrence of sex crimes and apprehension of reoffenders. *Id.* at 512.

leaving them susceptible to public vengeance.²⁰ Since most states' sex offender laws apply to acts committed prior to their effective date, courts must examine whether the enforcement of such laws adds a more burdensome punishment to convicted sex offenders to determine whether there is an ex post facto violation.²¹ Thus, if courts determine that informing the public that a sex offender is living or working in the community does not constitute punishment, there can be no ex post facto violation.²² A court's finding that public notification violates the Ex Post Facto Clause, however, does not make the statute unconstitutional; the statute can still be applied to those convicted of sexual crimes after the statute's effective date.

IV. IS COMMUNITY NOTIFICATION A FORM OF PUNISHMENT? SPLIT DECISION

The problem for courts facing ex post facto challenges to sex offender laws' public notification provisions is that the United States Supreme Court has yet to establish a definitive test to apply in determining whether such laws are punitive.²³ Consequently, this lack of certainty adds to the disagreement among lower courts on the legal standard to be used in evaluating whether public notification provisions have a punitive effect.²⁴ In one of the Court's more recent decisions regarding whether government action constituted punishment, *United States v. Ursery*,²⁵ the Court seemed to give lower courts even more flexibility in deciding ex post facto challenges to notification provisions of state sex offender laws.²⁶ Thus,

20. *Id.* at 542. Sex offenders in Louisiana whose victims were under 18 years old must send postcards to their neighbors notifying them of their crimes and presence in the community. *Id.* at 508. In addition, sex offenders may be required to place "Sex Offender On Board" bumper stickers on their cars. *Id.* Enforcement of the public notification provision will lead to harassment, ostracism and vigilantism. These results make the public notification provision punitive, rather than remedial or regulatory. Bredlie, *supra* note 8, at 542.

21. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 326 (1866); *see also Calder v. Bull*, 3 U.S. 386, 389 (1798) ("With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice.").

22. *See W.P. v. Poritz*, 931 F. Supp. 1199, 1211 (D.N.J. 1996).

23. *See Doe v. Pataki*, 940 F. Supp. 603, 620 (S.D.N.Y. 1996).

24. *Id.*

25. 116 S. Ct. 2135 (1996).

26. *Id.* The United States Supreme Court heard two separate double jeopardy challenges to civil forfeiture statutes 21 U.S.C. § 881(a)(4) and (7) (1994). *Id.* at 2147. The Court ruled that civil drug-asset forfeitures are not punishment under the Double Jeopardy Clause of the Constitution. *Id.* The Justices indicated that other courts have incorrectly interpreted *United States v. Halper*, 490 U.S. 435 (1989), and *Austin v. United States*, 509 U.S. 602 (1993), to arrive at a universal definition of punishment. *Id.* *Ursery* expressly

since the *Ursery* decision, court opinions regarding ex post facto constitutional challenges to sex offender notification laws have continued to be inconsistent.²⁷

Given the importance of the issue, the increasing number of convicted sex offenders who will be affected by community notification laws across the United States, and the growing division among the lower courts, the Supreme Court needs to address the ex post facto question. Within the past year alone, from July 1996 through July 1997, at least nine ex post facto challenges against the application of community notification provisions have been heard by state supreme courts, United States District Courts, and United States Courts of Appeal.²⁸ The score: four courts have held that public notification is punishment and, is thus unconstitutional. Five others have ruled that notification is not punishment and upheld the provision. Such courts have found themselves in disagreement on the essential question of whether public notification is considered a second form of punishment, or

rejects the notion that a definition of punishment can be derived through a synthesis of the Supreme Court's recent decisions in *Halper* and *Austin*. *Ursery*, 116 S. Ct. at 2147.

In its decision, the Court looked at both the legislative intent of the civil forfeiture statute and also determined whether the statute was deemed punitive in either its purpose or effect. *Id.* at 2142. First, the Court concluded that civil forfeiture has historically not been viewed as punishment. *Id.* at 2149. Also, the Court emphasized that civil forfeiture was an *in rem* proceeding brought against property. *Id.* at 2147. The Court contrasted *in rem* forfeiture proceedings with punitive or potentially punitive *in personam* proceedings. *Id.* at 2140–42, 2147. *In personam* is defined as an “[a]ction seeking judgment against a person involving his personal rights.” BLACK’S LAW DICTIONARY 791 (6th ed. 1990). *In rem* is defined as “actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*.” *Id.* at 793. Finally, the Court concluded that while civil forfeiture had certain punitive aspects, it also served more important nonpunitive goals. *Ursery*, 116 S. Ct. at 2148.

Although *Ursery* was based on a Double Jeopardy Clause challenge, the Second Circuit Court of Appeals held that *Ursery*'s analysis was “equally applicable” to ex post facto challenges. *U.S. v. Certain Funds*, 96 F.3d 20, 26 (2d Cir. 1996), *cert. denied*, *Ko v. United States*, 117 S. Ct. 954 (1997).

Despite leaving courts with a more flexible analytical framework for future cases involving dual forms of punishment, the *Ursery* decisions instructs courts to find precedent more closely related to the factual scenarios of the cases before them. *Ursery*, 116 S. Ct. at 2146; *see also W.P.*, 931 F. Supp. at 1209 (stating the tests used by courts to determine punishment will vary from case to case depending on the nature of the provision challenged).

27. Gibeaut, *supra* note 10, at 37.

28. *See Doe v. Kelley*, 961 F. Supp. 1105 (W.D. Mich. 1997); *Doe v. Gregoire*, 960 F. Supp. 1478 (W.D. Wash. 1997); *State v. Pickens*, 558 N.W.2d 396 (Iowa 1997); *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1996); *Lee v. Louisiana*, 681 So. 2d 1020 (La. Ct. App. 1996); *Doe*, 940 F. Supp. at 603; *Roe v. Office of Adult Probation*, 938 F. Supp. 1080 (D. Conn. 1996); *Kansas v. Myers*, 923 P.2d 1024 (Kan. 1996), *cert. denied*, 117 S. Ct. 2508 (1997); *W.P. v. Poritz*, 931 F. Supp. at 1199.

merely serving a legitimate public service—public safety.²⁹ Now that the line has been drawn, it is time for the United States Supreme Court to declare a winner.

This Note critically examines a year's retrospective of the judicial trends regarding *ex post facto* challenges to the community notification and public disclosure provisions of state sex offender laws. The Note concludes by advocating that the Supreme Court should uphold the provisions, even if to a limited extent.

V. W.P. V. PORITZ

*W.P. v. Poritz*³⁰ was one of the first decisions to declare that the public notification provision of New Jersey's sex offender statute did not impose "punishment" within the meaning of the Ex Post Facto Clause of the Constitution.³¹ The court used both an objective and subjective test to determine whether the state's statute was punitive, thus, violating the Ex Post Facto Clause.³² In analyzing whether the law's community notification provision was punitive, the court examined such factors as: 1) the expressed subjective legislative intent; 2) the objective purpose of the legislation, including the balancing of remedial and punitive goals; 3) the historical analysis of community notification laws; and 4) the effects of such legislation.³³

Also known as "Megan's Law," New Jersey's sex offender statute³⁴ forces convicted sex offenders to register with local governmental authorities.³⁵ After registering, the sex offenders are then categorized depending on their degree of dangerousness and their likelihood of committing another sexual offense.³⁶ "Megan's Law" classifies convicted sex offenders into three levels of dangerousness: Tier I is for low-risk

29. Gibeaut, *supra* note 10, at 36.

30. 931 F. Supp. 1199 (D.N.J. 1996), *rev'd*, *W.P. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998). While this case was reversed, this reversal does not effect the substance of this article. For further analysis see addendum.

31. *Id.* at 1219. Sex offenders who, as required by law, had registered with local authorities upon their release from treatment facilities, brought a class action suit challenging the public notification provisions of New Jersey's Registration and Community Notification Laws. The suit alleged that the notification provision was violative of their due process rights and/or of the prohibition against *ex post facto* laws and double jeopardy. *Id.* at 1203.

32. *Id.* at 1213.

33. *Id.* at 1209; *see also* *United States v. Ursery*, 116 S. Ct. 2135 (1996) (suggesting that purpose and effect of a statute should be considered in *ex post facto* analysis).

34. N.J. STAT. ANN. § 2C:7 (West 1995 & Supp. 1997).

35. *W.P.*, 931 F. Supp. at 1204.

36. *Id.*

offenders; Tier II is for moderate risk offenders; and Tier III is for those with the highest risk of recidivism.³⁷ Under Tier I, only law enforcement officials are notified of a sex offender's presence in the community.³⁸ However, if classified under Tier II, law enforcement officials notify certain community organizations who may come into contact with the Tier II sex offender, including local schools, child day care centers, summer camps, community groups, and other organizations that work with children and battered women.³⁹ Finally, if classified as a Tier III sex offender, officials must inform all members of the community, including specific individuals who are likely to come in contact with the sex offender.⁴⁰

When the New Jersey Legislature passed "Megan's Law" in response to the public's fears and reports indicating that sex offenders pose a danger to the community, it declared "[t]he danger of recidivism posed by sex offenders . . . require[s] a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety."⁴¹ The court accepted the legislature's sentiments as sufficient evidence of the legislature's subjective intent for the statute.⁴² Clearly, according to the court, the subjective intent of the legislature revealed a public safety concern for the community, rather than an intent to punish convicted sex offenders.⁴³

In analyzing the second element, the objective purpose of the legislation, the court paid close attention to the history of the statute to determine if "Megan's Law" was enacted out of the "sudden and strong passions" which the Framers specifically designed the Ex Post Facto Clause to combat.⁴⁴ Such analysis included whether "Megan's Law" was passed for a remedial, retributive, or a deterrent purpose.⁴⁵ The court concluded that the statute served the remedial purpose of protecting the community, especially children, from convicted sexual predators who have a statistically-

37. *Id.*

38. *Id.*

39. *Id.*

40. *W.P.*, 931 F. Supp. at 1204.

41. *Id.* at 1213 (quoting N.J. STAT. ANN. § 2C:7-1 (West 1995 & Supp. 1997)).

42. *W.P.*, 931 F. Supp. at 1213.

43. *Id.*

44. *Id.*

45. *Id.* at 1214. The court defined such terms as *remedial*, *retributive*, and *deterrent* as it thought the United States Supreme Court would use them. *Id.* *Remedial* measures "seek to solve a problem, for instance by removing the likely perpetrators of future corruption instead of threatening them (*De Veau*), or compensating the government for costs incurred (*Halper*)." *W.P.*, 931 F. Supp. at 1214. *Retribution* is "vengeance for its own sake." *Id.* Finally, *deterrent* measures serve as a "threat of negative repercussions to discourage people from engaging in certain behavior." *Id.*

proven risk of committing sexual crimes again in the future.⁴⁶ However, the court also noted that the statute served a deterrent purpose as well.⁴⁷ Nonetheless, in the court's opinion, this complement of both a remedial and a deterrent purpose did not make the notification provision of "Megan's Law" a second form of punishment.⁴⁸ The community notification provision did not suggest a retributive purpose, rather, its goal was to prevent or reduce the likelihood of similar sexual offenses.⁴⁹ Therefore, the court ruled that the legislature's motivation behind the passage of "Megan's Law" was not punitive, but remedial.⁵⁰

The court's historical analysis of the community notification provision focused on whether the impact of the law is one that could historically be regarded as punitive.⁵¹ Throughout American history, public humiliation has often been used to punish wrongdoers.⁵² Although "Megan's Law" aims to inform communities about potentially dangerous sex offenders, community notification arguably results in public humiliation for such offenders.⁵³ Thus, the impact of "Megan's Law" may be similar to other forms of colonial punishment.⁵⁴ Nonetheless, although public humiliation could be an anticipated result of "Megan's Law," the court ruled that public shame or embarrassment was not enough to deem the notification provision a form of punishment.⁵⁵

Noting the differences between historical punishments and "Megan's Law," the court first concluded that public humiliation and community ostracism was not a certain result, unlike the procedures used in colonial times.⁵⁶ Second, essential to the historical forms of punishment was the physical participation of the offender.⁵⁷ On the contrary, "Megan's Law" only requires sex offenders to register with authorities.⁵⁸ Modern

46. *Id.* at 1214.

47. *Id.*

48. *W.P.*, 931 F. Supp. at 1214.

49. *Id.*

50. *Id.*

51. *Id.* at 1215.

52. *Id.* Throughout colonial times, criminals, as well as religious sinners were often required to stand in public with signs notifying the public of their offenses. *W.P.*, 931 F. Supp. at 1215. An example of public humiliation as a form of punishment can best be seen in Nathaniel Hawthorne's novel *Scarlet Letter*, where Puritans forced Hester Prynne to wear the letter "A" on her clothing to symbolize her adultery. *Id.*

53. *See id.* at 1216.

54. *Id.*

55. *See id.*

56. *W.P.*, 931 F. Supp. at 1217.

57. *Id.* at 1216.

58. *Id.*

technology, such as photographs, are used to notify the public and require no physical participation by sex offenders.⁵⁹ Third, unlike historical public forms of punishment whose primary purpose was to chastise, “Megan’s Law” was not intended to punish sex offenders, but to protect the public and deter similar crimes from reoccurring.⁶⁰ Finally, the court noted that the historical public humiliation forms of punishment were the criminal’s or sinner’s primary sentence.⁶¹ However, from the days of the United States’ origin, the government has informed the community about wanted dangerous criminals and their presence in the community without violating the United States Constitution.⁶² Through the use of “wanted” posters and the FBI’s most wanted list, the government has been able to both inform and protect the public, as well as solicit the public’s assistance in apprehending such criminals.⁶³ The use of these procedures has never been characterized as devices used to punish the criminals, but have been viewed as means for public protection and safety.⁶⁴ Therefore, the court concluded that although “Megan’s Law” has some similarities to historical forms of punishment, the notification provision was designed and used to protect the public, rather than punish sex offenders.⁶⁵

Turning to the final element, the effects of “Megan’s Law” on the lives of sex offenders, the court found that the effects of the community notification provision did not constitute a form of punishment.⁶⁶ Looking to the precedent of the Third Circuit Court of Appeals, the court stated that “[i]f the negative repercussions—regardless of how they are justified—are great enough, the measure must be considered punishment.”⁶⁷ With the enactment of “Megan’s Law” and similar sex offender statutes across the country, sex offenders have often been targets of vigilantism.⁶⁸

59. *Id.*

60. *Id.*

61. *W.P.*, 931 F. Supp. at 1217.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1218.

66. *W.P.*, 931 F. Supp. at 1219.

67. *Id.* at 1218 (quoting *Artway v. Attorney General*, 81 F.3d 1235, 1263 (3d Cir. 1996)).

68. *Id.* at 1211–12. In New Jersey, an innocent man was severely beaten by two assailants who mistakenly believed him to be a sex offender. *Id.* at 1211, n.11. The innocent man happened to live at the address that was given to members of the community through the implementation of “Megan’s Law.” *Id.* In Washington, the enforcement of community notification led to a sex offender’s house being burned to the ground. *W.P.*, 931 F. Supp. at 1211, n.11. Furthermore, when the Guardian Angels received information regarding a sex

Acknowledging the existence of such vigilantism, the court was nevertheless satisfied that the criminal activity directed toward sex offenders was neither condoned nor promoted by the courts or the state.⁶⁹ The court noted that when authorities notify the public of a sex offender's presence in the community, they specifically inform the public that any criminal activity directed toward sex offenders will not be tolerated and vigorously prosecuted.⁷⁰

Although the defendants did not condone the public vigilantism, they successfully argued that the public is entitled to take legally-justified action to protect themselves from sex offenders and to further achieve the remedial goals of "Megan's Law."⁷¹ Such legally-justified action includes avoiding contact with sex offenders, warning children about the sex offender's presence, boycotting a registrant's place of business, refusing to hire the sex offender or purchase his or her property, and taking steps to further disseminate information about the registrant through local talk radio and newspapers.⁷² While neither condoning nor disapproving these actions, the court concluded that such behavior, along with criminal vigilantism, could not be equated to additional forms of "punishment" under the law.⁷³ Therefore, the court entered summary judgment for the defendants, declaring that the notification provision did not violate the Ex Post Facto Clause of the United States Constitution.⁷⁴

VI. STATE V. MYERS

Shortly after the *W.P. v. Poritz* decision, the Supreme Court of Kansas decided otherwise in *State v. Myers*.⁷⁵ In that case, the court held that the retroactive application of Kansas's Sex Offender Registration Act's ("KSORA")⁷⁶ public disclosure provision violated the Ex Post Facto Clause. Additionally, the court ruled that the provision imposed an additional form of punishment on convicted sex offenders.⁷⁷ In finding the public notification provision of KSORA unconstitutional, the court considered the factors used by the United States Supreme Court in *Kennedy v. Mendoza-*

offender's presence in the community, they organized a manhunt to discover the person's true identity. *Id.* at 1213.

69. *Id.* at 1212.

70. *Id.*

71. *Id.*

72. *W.P.*, 931 F. Supp. at 1212.

73. *Id.* at 1209.

74. *Id.* at 1224.

75. 923 P.2d 1024 (Kan. 1996), *cert. denied*, 117 S. Ct. 2508 (1997).

76. See KAN. STAT. ANN. § 22-4901 (1995).

77. *Myers*, 923 P.2d at 1027.

Martinez.⁷⁸ The court examined such factors as: 1) whether KSORA's public notification provision placed an affirmative disability or restraint on a plaintiff; 2) whether the provision could historically be viewed as punishment; 3) whether it comes into play only on a finding of scienter; 4) whether its application promotes traditional punishment—deterrence and retribution; 5) whether it applies to behavior which is already a crime; 6) whether the provision serves another purpose; and 7) whether KSORA's public notification provision is excessive in relation to its alternate purpose.⁷⁹

However, some contend that the *Mendoza-Martinez* factors are inapplicable in determining whether a public notification provision of a sex offender law is punitive and therefore, their use conflicts with the Supreme Court's decision in *Ursery*.⁸⁰ Nonetheless, beginning with the decision in *Myers*, the next three ex post facto challenges to sex offender public notification provisions in 1996 would all favor the side of convicted sex offenders.

Unlike the community notification laws of states like New Jersey and New York, which only provide for the public dissemination of information regarding those sex offenders who pose a high risk of recidivism, KSORA

78. *Id.* at 1040; see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). In *Mendoza-Martinez*, the Court declared that the provisions in the Nationality Act of 1940 and the Immigration and Nationality Act of 1952, which strip Americans of their citizenship for evading the draft, are unconstitutional because of their punitive nature and due to the fact that they fail to provide the procedural safeguards required by the Fifth and Sixth Amendments of the Constitution. *Id.* at 186. However, the Supreme Court also stated that the *Mendoza-Martinez* factors should be used to determine whether a law is punitive only when there is no conclusive evidence of the legislature's purpose for a statute. *Id.* at 168–69; see also *People v. Adams*, 581 N.E.2d 637, 641–42 (Ill. 1991) (noting that the *Mendoza-Martinez* factors should only apply when the legislative purpose for a sex offender statute is unclear or when the purpose of the statute is regulatory rather than punitive). Clearly, in *Myers* the legislature stated a public safety purpose for KSORA. See *Myers*, 923 P.2d at 1032.

79. *Id.* at 1033; see *Mendoza-Martinez*, 372 U.S. at 168–69. The court in *Myers* stated that the *Mendoza-Martinez* factors are helpful in considering the plaintiff's ex post facto claim. However, the court ruled that the *Mendoza-Martinez* factors should not be applied as a "pass/fail test or in a checklist fashion." *Myers*, 923 P.2d at 1033. The court believed some of the factors are more important and significant than others in determining whether KSORA's public notification provision has a punitive effect. *Id.*

80. See *Doe v. Poritz*, 662 A.2d 367, 400–01 (N.J. 1995); see also *Artway v. New Jersey*, 81 F.3d 1235, 1262 (3d Cir. 1996) (holding that the *Mendoza-Martinez* test cannot be used with "Megan's Law" because the "Supreme Court has made [it] clear that the *Mendoza-Martinez* test is not controlling for the issue in this case.").

However, according to the court in *Myers*, the Supreme Court in *Ursery* advocated the use of the *Mendoza-Martinez* factors in deciding whether a statute has a punitive or a nonpunitive effect. See *Myers*, 923 P.2d at 1036.

permits complete public access to information regarding all registered sex offenders.⁸¹ Keeping this in mind, the Supreme Court of Kansas was convinced that both the application and effects of KSORA's broad public notification provision were extreme.⁸²

As required by KSORA, the defendant Kym E. Myers registered with the local sheriff's office upon his release from prison. As a result of his registration, local television and newspapers provided the public with information about Myers, including his name and address, and branded him as a convicted sex offender.⁸³ During his hearing regarding his motion to challenge the enforcement of KSORA, the judge allowed Myers to tell the court about his life since registering with authorities as a sex offender under KSORA.⁸⁴ Myers spoke of how he would rather have remained in prison than face the ostracism that he had experienced since registering as a convicted sex offender.⁸⁵ Having been evicted from his mother's apartment, Myers, a disbarred lawyer, claimed that no one would hire him or rent him a place to live. Myers claimed that he was forced to live in a halfway house with twelve other convicted criminals.⁸⁶ Myers said, "I can't live like this and every morning I get up to look at the paper – I'm paranoid . . . I have no money. I don't know what I'm going to do. At least in prison I knew I had a place to sleep."⁸⁷

Although the legislature intended KSORA's public notification provision to protect the public by serving as a deterrent to sexual predators,

81. *Myers*, 923 P.2d at 1029. Besides Kansas, only Georgia and South Dakota have sex offender laws that provide unrestricted public access to information regarding sex offenders. New York, New Jersey, Iowa, North Carolina, and Vermont have all begun to limit the disclosure of information to the public regarding sex offenders. *Id.* 1028–29. In order to avoid ex post facto challenges, the State of Pennsylvania has gone even further by applying its community notification provision only to sex offenders who have committed their crimes after the effective date of their statute. *Id.* at 1029. The Kansas Legislature passed KSORA after the murder of Stephanie Schmidt. *Id.* at 1031. She was killed by her co-worker Donald Ray Gideon how had previously been convicted of rape and aggravated sodomy. *Myers*, 923 P.2d at 1031.

82. *Id.* at 1043.

83. *Id.* at 1027. The defendant in the case, Kym E. Meyers, was convicted of sexual battery and rape in 1991. *Id.* However, the conviction was reversed by the Court of Appeals and remanded for a new trial. *Id.* Upon remand, he pled no contest to the aggravated sexual battery of a seventeen-year-old female. *Myers*, 923 P.2d at 1027. Sentenced from two to five years, Myers was given credit for his time served in prison and received only one year probation. *Id.*

84. *Id.* at 1027–28.

85. *Id.* at 1028.

86. *Id.*

87. *Myers*, 923 P.2d at 1028.

the court believed the unlimited public disclosure of information would lead to retributive or punitive results.⁸⁸ Upholding KSORA's registration provision, the court stated that the unlimited public access to information about sex offenders far exceeded what is necessary to "promote public safety."⁸⁹ Not persuaded by the *W.P. v. Poritz* decision, the court feared that unlimited access would allow television and radio stations, as well as newspapers, to disseminate information about sex offenders on a daily basis, forcing the offenders to become victims of public disgrace, ostracism, and potential vigilantism.⁹⁰ Although the court thought that public access should be provided in limited circumstances, unlike "Megan's Law," KSORA does not provide for limited access.⁹¹ Thus, finding the scope of disclosure excessive and punitive in nature, the court ruled that KSORA was unconstitutional as applied to the defendant, Myers.⁹² Furthermore, the court ordered sheriff's offices across the state to prevent the disclosure of information pertaining to sex offenders who committed offenses prior to KSORA's effective date.⁹³

VII. ROE V. OFFICE OF ADULT PROBATION

Just four days after the Kansas Supreme Court's decision in *Myers*, the United States District Court of Connecticut, in *Roe v. Office of Adult Probation*,⁹⁴ granted a convicted sex offender a preliminary injunction that prohibited authorities from notifying the public that a sex offender was in the community.⁹⁵ The court found that Connecticut's Sex Offender Notification Policy constituted punishment, when applied retroactively to the plaintiff, a

88. *Id.* at 1041–42. Even though the legislature pointed to public safety as its purpose for KSORA, the court analyzed the effects of the statute to determine if they would negate the legislature's nonpunitive purpose. *Id.* at 1032. The court noted that the hardship on a sex offender in finding a job, housing, or maintaining stable relationships, as a result of KSORA's notification provision, imposed an "affirmative disability" on the lives of sex offenders. *Id.* at 1041.

89. *Id.* at 1043.

90. *Myers*, 923 P.2d at 1042. The court noted that unlimited public disclosure would lead to a situation like that in the novel *The Scarlet Letter* and other forms of punishment like "shame" and "ignominy." *Id.* at 1042.

91. *Id.*

92. *Id.* at 1044.

93. *Id.*

94. 938 F. Supp. 1080 (D. Conn. 1996), *vacated*, 125 F.3d 47 (2d Cir. 1997). While this case was vacated on appeal, it did not effect the substance of this article. For further analysis see addendum.

95. *Id.* at 1094.

previously convicted sex offender.⁹⁶ Therefore, the court ruled that the notification policy violated the Ex Post Facto Clause of the United States Constitution.⁹⁷

In contrast to Kansas's sex offender statute, which called for unlimited public access, Connecticut's Sex Offender Notification Policy has two levels of notification, depending upon a sex offender's risk of danger.⁹⁸ If a sex offender is classified under the first level, authorities will notify the offender's victims, victims' parents, local police, as well as the offender's immediate family and those who reside with the offender.⁹⁹ If after a clinical evaluation, a sex offender is considered extremely dangerous, such as being deemed a pedophile or predatory rapist, authorities will notify the offender's neighbors, the offender's employer, local elementary schools and child day care facilities, and others who might be in danger because of the sex offender's close proximity.¹⁰⁰ Authorities, however, are not bound by the sex offender notification policy guidelines. In fact, they may exceed the notification requirements, if they believe others need to be notified about a sex offender in order to help prevent another sexual crime.¹⁰¹

Upon his release from prison, after serving six years for six counts of second degree sexual assault of a minor, the plaintiff was deemed a "high risk" sexual offender who posed an extreme danger to minors.¹⁰² As a result of the plaintiff's classification, authorities intended to notify the plaintiff's neighbors, employer, and others in his community about his criminal history.¹⁰³ Alleging that public notification of his criminal history violated his constitutional rights by subjecting him to a second form of punishment—public stigma and ostracism—the plaintiff filed suit.¹⁰⁴ The court ordered that before authorities could release information about the plaintiff to the community, Connecticut's Office of Adult Probation needed to review the plaintiff's classification as a "high risk" sexual offender.¹⁰⁵ Unfortunately, before such a review could take place, the plaintiff's probation officer had already informed the plaintiff's family, employer, landlord, and his victims about the plaintiff's criminal past. In addition to the details of his criminal history, these individuals were also given information regarding the plaintiff's address, age, height, weight, build, hair and eye color, skin color,

96. *Id.*

97. *Id.*

98. *Id.* at 1084.

99. *Roe*, 938 F. Supp. at 1084.

100. *Id.*

101. *Id.* at 1083.

102. *Id.* at 1085.

103. *Id.*

104. *Roe*, 938 F. Supp. at 1085.

105. *Id.*

and a description of his car.¹⁰⁶ Regardless of the outcome of the plaintiff's legal action, the damage to the plaintiff had already been done.

To determine whether the public notification provision would inflict a greater punishment on the plaintiff, the State advocated that the court look only to the legislative intent of Connecticut's sex offender law in deciding if it serves a remedial or punitive purpose.¹⁰⁷ Rejecting the State's argument, the court found that the legislative intent is but one factor to consider in its analysis.¹⁰⁸ Considering the tests applied by other courts in their determination of whether state action constitutes punishment,¹⁰⁹ the court adopted the *Mendoza-Martinez* test for its ex post facto analysis, despite the State's objections.¹¹⁰ The court found that this test was closely related to the test used by the United States Supreme Court in its recent *Ursery* decision.¹¹¹

After analyzing the first element of the *Mendoza-Martinez* test, the court found that the effects of Connecticut's public notification provision placed an affirmative disability on sex offenders.¹¹² The court found the provision would inevitably lead to unlimited negative consequences, such as restricting a sex offender's ability to move from place to place.¹¹³ According to the court, notifying a sex offender's neighbors, employers, landlords, and

106. *Id.*

107. *Id.* at 1089 (relying on *Trop v. Dulles*, 356 U.S. 86, 96 (1958)).

108. *Id.* at 1090.

109. *Roe*, 938 F. Supp. at 1090-91; see *United States v. Ursery*, 116 S. Ct. 2135 (1996); *Austin v. United States*, 509 U.S. 602, 610 n.6 (1993); *United States v. Halper*, 490 U.S. 435, 447 n.7 (1989).

110. *Roe*, 938 F. Supp. at 1090; see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The Supreme Court in *Mendoza-Martinez* considered: 1) whether the sanction involves an affirmative disability or restraint; 2) whether its operation will promote the traditional aims of punishment; 3) whether the behavior to which it applies is already a crime; 4) whether an alternative purpose to which it may rationally be connected is assignable for it; and 5) whether the sanction appears excessive in relation to the alternative purpose assigned. *Id.*

The State in *Roe* unsuccessfully argued that the *Mendoza-Martinez* factors should not be used in deciding whether an additional form of punishment is being imposed. *Roe*, 938 F. Supp. at 1090.

111. *Id.* In *Ursery*, an *in rem* forfeiture proceeding, the Supreme Court looked at both the legislative intent and punitive effects of the forfeiture proceedings. *Ursery*, 116 S. Ct. at 2147. Other considerations used by the Supreme Court included: 1) a historical analysis of forfeiture; 2) whether the government must show scienter as a prerequisite to the sanction; 3) whether the sanction serves a criminal goal; and 4) whether the sanction is tied to criminal activity. *Id.* at 2149. The court in *Roe* found the factors considered by the Supreme Court in *Ursery* "bear a substantial similarity to those enumerated in *Mendoza-Martinez*." *Roe*, 938 F. Supp. at 1091.

112. *Id.* at 1092.

113. *Id.*

others who reside with the sexual offender, of his or her violent, criminal past would adversely affect all areas of a sex offender's life.¹¹⁴ The public notification provision would force both sex offenders and others who come in contact with the offender to change their behavior.¹¹⁵ The court felt that this modification of behavior indicated that the public notification provision served punitive goals.¹¹⁶

Along with finding that the public notification provision was analogous to historical forms of punishment, the court concluded that the provision was designed to deter people, including convicted sex offenders, from committing sexual crimes.¹¹⁷ The provision's deterrent purpose helped the court to find that the sanction was punitive.¹¹⁸ Moreover, because the community notification provision applied to the plaintiff solely because of his prior criminal sexual behavior, the court found this factor also supported its view of the provision as punishment.¹¹⁹

Next, the court considered whether the community notification provision served a legitimate purpose, other than punishing a sex offender for their criminal past.¹²⁰ Secondly, the court examined whether the provision seemed excessive in relation to the alternate non-punitive purpose that the State advocated.¹²¹ Although the court agreed with the State that community notification aims to protect the public from heinous crimes, it found the punitive effects of notification outweighed the State's non-punitive intentions for the statute.¹²² In addition, the court was not satisfied with the link between the State's non-punitive goals—public safety and the prevention of sex offenders committing similar crimes—and the means used by the State—community notification—to carry out these goals.¹²³

In order to find Connecticut's Sex Offender Notification Policy constitutional in the present case, the court said that the State needed to show a "tight fit" between the means, community notification, and the ends, public safety and reduction of recidivism.¹²⁴ According to the State, the use of two levels of community notification demonstrated a close link between the means and their remedial goals.¹²⁵ However, based on the testimony

114. *Id.*

115. *Id.*

116. *Roe*, 938 F. Supp. at 1092.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Roe*, 938 F. Supp. at 1092.

122. *Id.* at 1092–93.

123. *Id.*

124. *Id.*

125. *Id.* at 1093.

presented, the court found no distinction between the two levels of public notification.¹²⁶ The court concluded that the public notification provision does nothing more than to single out and punish sex offenders for their prior conduct.¹²⁷

When the plaintiff has both committed his crimes and been sentenced, the plaintiff could not be subjected to the community notification provision because the plaintiff did not have notice of the potential punishment for his crimes.¹²⁸ According to the court, under the Constitution, the plaintiff was entitled to such notice.¹²⁹ Since the community notification subjected the plaintiff to a second form of punishment, and the plaintiff was not given notice of the potential governmental sanction, the court concluded that Connecticut's sex offender notification policy offended the Ex Post Facto Clause.¹³⁰ Therefore, the court granted the plaintiff a preliminary injunction enjoining the Office of Adult Probation from enforcing its community notification policy.¹³¹

VIII. DOE V. PATAKI

A month after the *Roe* decision, the United States District Court of New York held in *Doe v. Pataki*,¹³² that retroactive application of the New York State Sex Offender Registration Act's¹³³ public notification and disclosure provisions violated the Constitution's prohibition against ex post facto laws.¹³⁴ Groups of sex offenders who committed sexual crimes before the statute took effect, brought suit to enjoin the state from notifying the public of their release and disclosing information about their criminal pasts.¹³⁵

The New York State Sex Offender Registration Act, like similar statutes in other states, classifies sex offenders based on their danger and likelihood of recidivism.¹³⁶ New York's statute calls for three levels of

126. *Roe*, 938 F. Supp. at 1093.

127. *Id.*

128. *Id.* at 1094.

129. *Id.* at 1093-94.

130. *Id.* at 1091, 1093-94.

131. *Roe*, 938 F. Supp. at 1094.

132. 940 F. Supp. 603 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2nd Cir. N.Y. 1997), *and cert. denied*, 118 S. Ct. 1066 (1998). While this case was reversed, this reversal does not effect the substance of this article. For further analysis see addendum.

133. N.Y. CORRECT. LAW § 168 (McKinney Supp. 1996).

134. *Pataki*, 940 F. Supp. at 605.

135. *Id.* at 604.

136. *Id.* at 607. The statute also requires sex offenders to register with the Division of Criminal Justice Services within 10 days after discharge, parole, or release. Sex offenders must register annually for a period of 10 years. *Id.* To register, sex offenders must provide

classification—low, moderate, and high.¹³⁷ If the Board of Examiners of Sex Offenders finds that there is a low risk of a sex offender repeating a sexual offense, only law enforcement officials are notified of an offender's release from prison and presence in the community.¹³⁸ However, if a sex offender is considered a moderate risk, authorities can notify "any entity with vulnerable populations."¹³⁹ Authorities are permitted to release a sex offender's zip code, a photo of the sex offender, and information about the sex offender's criminal history.¹⁴⁰ If classified as a high risk sex offender, authorities can also provide the public with a sex offender's address.¹⁴¹ Furthermore, a high risk sex offender's registry information, including the offender's address, physical description, and photograph, is placed in a special violent sex offender directory.¹⁴² The directory is sent to local police stations across the state and is accessible to the public.¹⁴³ Regardless of a sex offender's classification, information about all registered sex offenders is also made available to the public via a "900" telephone number.¹⁴⁴ Though the legislature intended for these measures to protect, the court believed the legislature also intended to punish.¹⁴⁵

The statistics for sexually violent crimes in the United States are astounding. Nearly 133,000 females ages twelve and older fall victim to rapes or attempted rapes each year.¹⁴⁶ According to Department of Justice, more than 17,000 girls under the age of twelve were raped in 1992.¹⁴⁷ The defendants also presented evidence revealing "high rates of recidivism among sex offenders, particularly those who prey on children and that sex offenders are significantly more likely than other repeat offenders to

such information as their name, birthday, sex, race, height, weight, eye color, driver's license number, home address, description of their offense, date of conviction, sentence imposed, a photograph of themselves, and their fingerprints. *Id.*

137. *Pataki*, 940 F. Supp. at 607.

138. *Id.*

139. *Id.* (quoting N.Y. CORRECT. LAW § 168-l(6)(b) (McKinney Supp. 1996)).

140. *Id.*

141. *Id.*

142. *Pataki*, 940 F. Supp. at 607.

143. *Id.*

144. *Id.* Before receiving information about sex offenders through the "900" number, callers must be able to provide "some identifying information that reasonably identifies the person in question." *Id.* at 607–08. Callers will also have to identify themselves. *Id.* at 608. However, once a person receives information about a sex offender, they can further disclose this information at their discretion. *Pataki*, 940 F. Supp. at 607.

145. *Id.* at 622.

146. *Id.* at 606.

147. *Id.*

reoffend with sex offenses or other violent crimes.”¹⁴⁸ Furthermore, according to statistics, sex offenders are more likely than other criminals “to go for long periods of time between offenses (thereby giving the false impression of having been successfully rehabilitated).”¹⁴⁹

Despite accepting the defendants’ statistics as accurate and being horrified by the circumstances of the Megan Kanka case,¹⁵⁰ the court held that the Constitution does not allow courts to balance the rights of children and others with those of convicted sex offenders.¹⁵¹ Unfortunately, the Ex Post Facto Clause does not provide exceptions to laws that will protect society from becoming victims of rape, murder, or sexual abuse.¹⁵²

Looking to other court decisions regarding ex post facto challenges to sex offender statutes, as well as United States Supreme Court decisions regarding whether government action constitutes punishment, the *Pataki* court formulated its own test for deciding the constitutionality of New York’s version of “Megan’s Law.”¹⁵³ Because the Supreme Court had not formulated a definitive test for whether government action constitutes punishment for deciding ex post facto cases, the court in *Pataki* decided to look at the “totality of the circumstances” surrounding New York’s sex offender public notification provision to determine if it constituted punishment.¹⁵⁴ Noting that other courts have had difficulty in deciding whether to use the *Mendoza-Martinez* factors in their ex post facto analysis, the *Pataki* court stated that the factors are indeed helpful in such cases.¹⁵⁵ Thus, the court decided to look at the statute’s: 1) legislative intent; 2) design; 3) history; and 4) the effects of the notification statute, to determine

148. *Id.*

149. *Pataki*, 940 F. Supp. at 606.

150. *Id.* at 605.

151. *Id.*

152. *Id.*

153. *Id.* at 620. The *Pataki* court looked to such decisions as *United States v. Ursery*, 116 S. Ct. 2135 (1996); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Artway v. Attorney Gen.*, 81 F.3d 1235 (3d Cir. 1996); *Roe v. Office of Adult Probation*, 938 F. Supp. 1080 (D. Conn. 1996); *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996); *State v. Myers*, 923 P.2d 1024 (Kan. 1996); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995); and *State v. Ward*, 869 P.2d 1062 (Wash. 1994), to help formulate its own test for deciding the plaintiff’s ex post facto challenge to the public notification provision of New York’s Sex Offender Registration Act. *Pataki*, 940 F. Supp. at 615–20. The court found that virtually all of the cases looked at such factors as legislative intent, whether the statute is designed to punish, historical treatment, and whether the law has the effects of punishing. *Id.* at 616.

154. *Id.* at 620.

155. *Id.* The court noted that the Supreme Court actually used some of the *Mendoza-Martinez* factors to reach its decision in *United States v. Ursery*. *Id.*

if public notification imposes additional punishment on convicted sex offenders.¹⁵⁶

Similar to the court in *W.P. v. Poritz*, the *Pataki* court analyzed the legislative intent behind the passage of New York's sex offender public notification provision from both objective and subjective viewpoints.¹⁵⁷ According to the preamble of the statute, the legislature's intent for public notification was to protect the public from the "danger of recidivism posed by sex offenders."¹⁵⁸ Furthermore, the preamble also states that public notification would help authorities in their quest to investigate, apprehend, and prosecute sex offenders if they return to their prior devious activities.¹⁵⁹ Thus, according to the court, the preamble revealed a subjective nonpunitive intent for the public notification provision.¹⁶⁰ While the court accepted the preamble's regulatory intent for public notification, it had no doubt that the legislature also intended to punish convicted sex offenders a second time.¹⁶¹

In finding the legislative intent clearly punitive, the court had to look no further than the debate minutes of the New York Legislature when it passed the Sex Offender Registration Act in July of 1995.¹⁶² Commenting on sex offenders who have molested children, a member of the assembly stated, "[w]e are talking about . . . the lowest of the low . . . [w]e are telling those who act like that, . . . that we in New York have had it. We are coming out to get them and it's going to stop."¹⁶³ Another speaking out to opponents of the legislation stated "[d]on't give the protection to the animals, don't give it to the people exploiting children, protect the children."¹⁶⁴ And another speaking on the effects of public notification proclaimed "a sex offender who is [coming] out after serving his time might rethink as to where he is going to relocate . . . one of the results of this legislation might be that this guy is going to go out of town, out of state, and that's very good for us."¹⁶⁵ Finally, another member of the assembly equated repeat sexual offenders with "the human equivalent of toxic waste."¹⁶⁶ In addition to making broad characterizations about sex offenders, some legislators also stated that because sex offenders had committed such reprehensible crimes, they deserved any negative treatment that they would receive from the

156. *Pataki*, 940 F. Supp. at 620.

157. *Id.* at 621.

158. *Id.* (quoting N.Y. CORRECT. LAW § 168 (McKinney Supp. 1996)).

159. *Id.*

160. *Id.*

161. *Pataki*, 940 F. Supp. at 621.

162. N.Y. CORRECT. LAW § 168 (McKinney Supp. 1996).

163. *Pataki*, 940 F. Supp. at 621 (emphasis omitted).

164. *Id.* (emphasis omitted).

165. *Id.* (emphasis omitted).

166. *Id.* at 622. (emphasis omitted).

communities.¹⁶⁷ Such thinking, combined with broad generalizations about sex offenders, clearly demonstrated a punitive intent for the statute, according to the court.¹⁶⁸

In its analysis of the legislature's design of the public notification provision, the court concluded that the legislation did not do enough to limit the public dissemination of information about convicted sex offenders.¹⁶⁹ Although the state tried to limit both public notification and public access to personal data about registered sex offenders, the state's protective measures were still too excessive and abusive.¹⁷⁰ First, the Sex Offender Registration Act covered too many people; the statute not only pertained to first time sexual offenders, but to people who engaged in consensual sexual relations with another person who was not a spouse, as well as others who did not even engage in any sexual activity at all.¹⁷¹ Even though the Act only applied to people who engaged in illegal criminal activity, clearly some circumstances covered by the Act did not warrant public notification, according to the court.¹⁷²

Secondly, the court found that subjecting even low risk sexual offenders to community notification indicated a punitive design for the statute.¹⁷³ Unlike other states such as Washington and New Jersey, which do not allow for community notification or public access to information regarding all sex offenders, New York allows for some public disclosure for all registered sex offenders.¹⁷⁴ Under the Act, information regarding all sex offenders is available through a special sex offender directory or through a "900" telephone number.¹⁷⁵ Authorities, however, do attempt to control the public access to information about sex offenders in several ways.¹⁷⁶ A person requesting information about a sex offender through the "900" line must first

167. *Id.*

168. *Pataki*, 940 F. Supp. at 622.

169. *Id.* at 624.

170. *Id.*

171. *Id.* at 623-24. The Act covers some 36 offenses, including seven misdemeanors. A 21-year-old who engages in sexual intercourse with a consenting 16-year-old is subjected to the legislation. In addition, the Act covers people who engage in incest, as well as, someone who "restrains another person," so long as the victim is under the age of 17, even if no sexual conduct is involved. *Id.* at 624. (citing N.Y. PENAL LAW § 135.05 (McKinney 1987)).

172. *Pataki*, 940 F. Supp. at 624.

173. *Id.*

174. *Id.*; see *State v. Ward*, 869 P.2d 1062, 1070 (Wash. 1994); see also *W.P. v. Poritz*, 931 F. Supp. 1199, 1204 (D.N.J. 1996) (noting only disclosure to law enforcement officials is allowed with regard to sex offenders who were deemed a low risk of recommitting a sexual offense).

175. *Pataki*, 940 F. Supp. at 624.

176. *Id.* at 623.

identify himself or herself to the authorities. Next, the person must provide the authorities with some identifying information about the sex offender before the requested information will be disseminated.¹⁷⁷ As for the special sex offender directory, information will only be given out after a request in writing.¹⁷⁸ Despite the state's efforts, the court was convinced that the Act was overly broad and suggestively punitive.¹⁷⁹

Analyzing whether community notification is similar to historical forms of punishment, the *Pataki* court looked at two traditional measures of punishment: stigmatization and banishment.¹⁸⁰ The use of public humiliation as a form of punishment dates back to Biblical times, while excluding people from society because of their crimes began in Colonial England.¹⁸¹ According to the court, the New York Sex Offender Registration Act's community notification provision was similar to such historical punishments as stocks, pillories, and branding.¹⁸² Yet, instead of branding sex offenders or placing them in stocks to inflict public humiliation and shame, authorities today designed a "900" phone line, published a sex offender directory, and used mass mailings to notify the public of a sex offender's presence in a community.¹⁸³ Like its historical counterparts, the court found that community notification aimed to help sex offenders mend their ways.¹⁸⁴

Advocates of the Sex Offender Registration Act argued that community notification was a way to protect society, as opposed to a way of publicly humiliating sex offenders for their wrongdoing.¹⁸⁵ However, the court did not buy this argument, nor was the court persuaded by the comparison of community notification laws to wanted posters seen in post offices across the country.¹⁸⁶ The difference between public notification and wanted posters, according to the court, was that convicted sex offenders have already paid their debt to society, while wanted fugitives still need to be

177. *Id.*

178. *Id.*

179. *Id.* at 624. The Act also permitted law enforcement authorities to "disseminate 'relevant information' to 'any entity with vulnerable populations.'" *Pataki*, 940 F. Supp. at 624. Authorities can then disclose information about sex offenders to others "at their discretion." *Id.* The court found that this factor, combined with the other means of public notification and disclosure, suggested a punitive design for the statute. *Id.*

180. *Id.*

181. *Id.* at 624–26.

182. *Pataki*, 940 F. Supp. at 625.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 625–26; see *W.P. v. Poritz*, 931 F. Supp. 1199, 1217 (D.N.J. 1996).

apprehended and prosecuted.¹⁸⁷ Furthermore, the court noted that the state's comparison of sex offenders to outlaws further suggested the punitive nature of the community notification provision.¹⁸⁸

Along with being analogous to historical forms of public humiliation, the public notification provision of the New York statute was also comparable to historical banishment.¹⁸⁹ According to the court, sex offenders subjected to community notification are often forced to move from town to town, or from state to state.¹⁹⁰ Because physical banishment was considered a harsher punishment than the public humiliation measures, colonials designed banishment for those criminals who were most likely to repeat their crimes.¹⁹¹ Similarly, legislators approved the community notification laws to prevent sex offenders from recommitting their crimes and to effectively banish them from society.¹⁹² Because the court found many similarities between community notification and historical forms of punishment, the court deemed public notification a form of punishment.¹⁹³

Nevertheless, of all the elements that the court looked at—intent, design, and history—the court found that the effects of community notification overwhelmingly made the provision punitive.¹⁹⁴ Undoubtedly, the harsh results to sex offenders as a result of community notification both in New York and other states, influenced the court in finding public notification punitive.¹⁹⁵ In New York, school officials sent out information to all residents of the school district, informing them of a sex offender's presence in the community.¹⁹⁶ Officials gave residents the sex offender's name and specific address. As a result, the sex offender lost his job, and his family members were tormented after receiving numerous harassing phone calls. Moreover, someone even attempted to break into a sex offender's home.¹⁹⁷ In another case, a local newspaper published information about the release of a "sexually violent predator" into the community.¹⁹⁸ Law enforcement officials notified the public, releasing the sex offender's name, street address, and photograph.¹⁹⁹ The community branded the sex offender

187. *Pataki*, 940 F. Supp. at 626.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Pataki*, 940 F. Supp. at 621, 626.

193. *Id.* at 626.

194. *Id.*

195. *Id.* at 608–11, 627.

196. *Id.* at 609.

197. *Pataki*, 940 F. Supp. at 609.

198. *Id.*

199. *Id.*

as a child molester, notwithstanding the fact that he committed his crime against an adult woman.²⁰⁰

Some of the most extreme cases of vigilantism occurred in New Jersey. After being released from prison, a convicted sex offender was forced out of town due to the public's reaction to his presence in the community.²⁰¹ News reporters and the Guardian Angels, a community anti-crime organization, set up a twenty-four hour stake-out in front of the sex offender's residence.²⁰² In addition to publicly threatening the sex offender and his family, the Guardian Angels placed wanted posters throughout the community.²⁰³ Local politicians also objected to the sex offender's presence. As a result, both the sex offender and his mother were forced to move elsewhere.²⁰⁴ In another case, the sex offender's landlord locked him out of his apartment after authorities notified the public of the convicted child molester's presence in the community. In addition, the sex offender on multiple occasions, was physically attacked.²⁰⁵ Finally, in another extreme incident, members of a community broke into the home of a sex offender and mistakenly beat-up and severely injured a visitor to the home, not the convicted sex offender.²⁰⁶

Incidents of vigilantism have also occurred in Washington. After disclosing to the public that a convicted child rapist would soon be released from prison, the sex offender's home was burnt down.²⁰⁷ Upon moving to another state, Washington authorities informed his new neighbors of his presence. As a result, the sex offender had to move once more.²⁰⁸ In another situation, a sex offender had become the target of community harassment. After moving to another community, he was forced to move again because local citizens distributed fliers that contained his photograph.²⁰⁹ The sex offender finally moved to another state, having lost three jobs since the public was informed of his presence in the community.²¹⁰ As a result of community notification, sex offenders in several states have reportedly lost their jobs, found it difficult to obtain employment, suffered damage to their property, have been forced to move, and have been victimized by public threats and acts of violence.²¹¹

200. *Id.*

201. *Id.*

202. *Pataki*, 940 F. Supp. at 609.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Pataki*, 940 F. Supp. at 610.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 608-12.

Even though the court was influenced by the negative consequences of community notification, evidence suggested that community notification may have also saved children from the hands of child molesters.²¹² For example, after learning that a released convicted sex offender lived near the school where she worked, a New Jersey teacher's aid informed authorities that the offender had come into contact with a child. Such contact violated the conditions of the sex offender's parole.²¹³ Further investigation revealed that the sex offender attended another child's birthday party and asked yet another child to come into his home to have some ice cream.²¹⁴ Similar situations in which convicted sex offenders violated conditions of their parole, by being in the presence of children, have also been reported thanks to community notification.²¹⁵

In a report published by the Oregon Department of Corrections in January of 1995, fewer than ten percent of sex offenders subjected to Oregon's community notification law experienced forms of vigilantism or public harassment.²¹⁶ Overall, the report concluded that the results of community notification were positive and advocated that public notification should continue to be used.²¹⁷ In California, as in New York, authorities use a directory and a "900" telephone service to provide the public with information about convicted offenders, and have received few complaints.²¹⁸ Between 1994 and 1996, the California Department of Justice had not received any information from law enforcement officials that the public disclosure of information about a sex offender led to harassment, discrimination, or criminal acts against registered sex offenders.²¹⁹

Despite evidence of some positive results from the use of community notification, the unlimited negative consequences of public notification outweighed the positive, according to the court.²²⁰ Through community notification, states impose a public stigmatization on sex offenders which "pervades into every aspect of an offender's life."²²¹ Defending community notification, the defendants argued that neither the state, nor the

212. *Pataki*, 940 F. Supp. at 609–10.

213. *Id.* at 609.

214. *Id.*

215. *Id.* at 609–10.

216. *Id.* at 611.

217. *Pataki*, 940 F. Supp. at 611. The report indicated that communication within the community had improved as a result of community notification. Also, the report noted that community notification has motivated many sex offenders to more actively participate in treatment. *Id.*

218. *Id.* at 610.

219. *Id.*

220. *Id.* at 627.

221. *Pataki*, 940 F. Supp. at 627.

community notification provision itself, could be blamed for the “private reactions” by members of the community.²²² The defendants argued that information regarding sex offenders is already available to the public at courthouses and other government buildings.²²³ Not persuaded by the defendants’ argument, the court pointed out that there was a huge difference between diligently searching through government files for a sex offender’s criminal history and having someone summarize the information for you in a simple and organized fashion.²²⁴

According to the court, another indication of the community notification’s punitive nature was the fact that it prevents sex offenders from being able to effectively rehabilitate.²²⁵ Upon their release from prison or treatment facilities, sex offenders are expected to find employment, a place to live, and attempt to reintegrate into society.²²⁶ However, according to the court, with community notification in place, offenders have had a difficult time doing all three.²²⁷ Thus, because community notification laws make it more difficult for sex offenders to rehabilitate and reintegrate into society, the court found that the provision increases the punishment on sex offenders.²²⁸ Therefore, the provision violated the Ex Post Facto Clause.²²⁹

In its final point, the *Pataki* court noted that community notification served the three traditional goals of punishment—deterrence, retribution, and incapacitation.²³⁰ New York’s Sex Offender Registration Act was designed to deter future criminal conduct, inflict punishment through public ostracism and humiliation, and incapacitate sex offenders by preventing them from effectively re-entering society.²³¹ According to the court, community notification results in the banishment of sex offenders from society.²³² Thus, the court concluded that the legislative intent, design, historical treatment, and, most importantly, the Act’s negative effects, all revealed that the community notification provision was a form of punishment.²³³ Therefore, the court entered judgment for the plaintiffs and permanently enjoined the retroactive enforcement of the Act’s community notification provisions.²³⁴

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 628.

226. *Pataki*, 940 F. Supp. at 628.

227. *Id.*

228. *Id.*

229. *Id.* at 631.

230. *Id.* at 629.

231. *Pataki*, 940 F. Supp. at 629.

232. *Id.*

233. *Id.*

234. *Id.* at 631.

IX. LEE V. STATE

With the decisions in *Pataki*, *Roe*, and *Myers*, it seemed that the courts began to side with convicted sex offenders, as least in finding retroactive application of community notification laws unconstitutional under an ex post facto analysis. However, this momentum was short lived. Starting with *Lee v. State*,²³⁵ other courts have shifted the momentum, ruling for legislatures and communities who believe they are entitled to know if a convicted sex offender is living in their midst.

The plaintiff, Edward Lee, had been convicted for his indecent behavior with a child in 1988, and was sentenced to five years in prison.²³⁶ Less than two years later, a court found the plaintiff guilty of child molestation and sentenced him to another eight-year prison term.²³⁷ Yet in 1994, Lee received a reduced sentence due to good behavior.²³⁸ At the time of his release, Lee brought suit against the State of Louisiana, seeking a temporary restraining order against the enforcement of the state's sex offender laws.²³⁹ Lee contended that he could not be subjected to the state's sex offender statutes,²⁴⁰ since the state legislature passed the laws after he had committed his crimes. Thus, he argued that the United States Constitution's Ex Post Facto Clause protected him from being subjected to the state's sex offender statutes.²⁴¹

In a rather bizarre twist to the decision, the *Lee* court found Louisiana's retroactive application of its sex offender registration law, not its community notification provision, violated the Ex Post Facto Clause.²⁴² In contrast, most states' sex offender registration laws have been upheld against many constitutional challenges, including ex post facto, due process, and double jeopardy.²⁴³ Courts have found that the registration laws are similar to other constitutionally permissible consequences that go along with criminal convictions, such as denying a convicted criminal the right to vote, the right to own a gun, or the right to enter certain areas of employment.²⁴⁴ In Louisiana, convicted sex offenders released from prison because of parole or from receiving reduced sentences due to good behavior must register with

235. 681 So. 2d 1020 (La. Ct. App. 1996).

236. *Id.* at 1021.

237. *Id.*

238. *Id.*

239. *Id.*

240. LA. REV. STAT. ANN. § 15:542, 15:574.4(H) (West 1995).

241. *Lee*, 681 So. 2d at 1021.

242. *Id.* at 1023.

243. Gibeaut, *supra* note 10, at 36.

244. *Id.*

state authorities.²⁴⁵ Upon release, sex offenders must register with local sheriffs of the community where they plan to reside.²⁴⁶ In addition, they must notify certain people in their community about their criminal history, and also provide them with their names and addresses.²⁴⁷ Failure to comply with the state's registration requirements could result in such penalties as a fine, imprisonment, or both.²⁴⁸ The court concluded that such penalties impose a greater penalty upon the plaintiff than his original sentence for indecent sexual behavior toward a minor.²⁴⁹ Thus, the court found that the registration requirement violated the Ex Post Facto Clause.²⁵⁰ Consequently, the court refused to enforce the statute's registration requirements.²⁵¹

However, according to the court, if a sex offender, who was released for good behavior or paroled, fails to comply with the state's notification provision, he or she is not subjected to a new penalty.²⁵² Rather, failing to comply with public notification only results in the loss of parole or good behavior time, thereby forcing the sex offender to return to prison to serve out the remainder of his or her sentence.²⁵³ Thus, noncompliance with the state's community notification provision does not impose a second form of punishment.²⁵⁴ Therefore, the court found no ex post facto violation with regard to the state's public notification provision.²⁵⁵

Although the holding in *Lee* is limited, in that it only applies to sex offenders released for parole or for good behavior, the ex post facto decisions that followed were much broader and more persuasive.

X. DOE V. WELD

Prior to Massachusetts's passage of its own version of "Megan's Law,"²⁵⁶ the plaintiff in *Doe v. Weld*²⁵⁷ pled guilty to four counts of indecent assault and battery on a child under the age of fourteen.²⁵⁸ Because it was the plaintiff's first offense, he received a sentence of four months

245. *Lee*, 681 So. 2d at 1022.

246. *Id.* at 1021.

247. *Id.*

248. *Id.* at 1023.

249. *Id.* at 1022.

250. *Lee*, 681 So. 2d at 1022.

251. *Id.*

252. *Id.* at 1023.

253. *Id.*

254. *Id.*

255. *Lee*, 681 So. 2d at 1023.

256. MASS. GEN. LAWS ANN. ch. 6, § 178C-1780 (West Supp. 1997).

257. 954 F. Supp. 425 (D. Mass. 1996).

258. *Id.* at 429.

probation.²⁵⁹ At the time of the guilty plea, plaintiff's counsel informed him that juvenile court proceedings were confidential, and that they were only available to the public with court authorization.²⁶⁰ Four months later, the plaintiff's probation expired, he turned eighteen, and he planned to attend college.²⁶¹ However, shortly after the state's enactment of "Megan's Law" in August of 1996, the plaintiff was informed that he was required by law to register as a convicted sex offender, and that information about his juvenile delinquency would be accessible to the public.²⁶²

Massachusetts's version of "Megan's Law" applies to a person who has been "convicted of a sex offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense . . . on or after August first, nineteen hundred and eighty-one."²⁶³ The law creates a statewide computerized sex offender directory which provides authorities with information about Massachusetts's registered sex offenders.²⁶⁴ In addition, like other states, Massachusetts's sex offender law has three levels for community notification which allow the public to receive information about a sex offender's name, home address, and place of employment, as well as physical characteristics including a photograph of the sex offender.²⁶⁵ Established by Massachusetts's "Megan's Law," the Sex Offender Registry Board determines a sex offender's designation as a level one, level two, or level three sex offender, depending on the likelihood that the offender will recommit a sexual crime.²⁶⁶ In classifying the risk level of sex offenders, the Board considers the age of the sex offender at the time he or she committed the sexual crime.²⁶⁷ In addition, the Board considers evidence submitted on behalf of sex offenders, as well as testimony from their victims.²⁶⁸

Under the more extreme notification levels, levels two and three, authorities are required to inform the public about released offenders and their presence in the local community.²⁶⁹ Schools, child day care centers, religious and youth groups, sports leagues, and other organizations that may come in contact with a convicted sex offender, may receive information from police.²⁷⁰ Level three notification goes even further in that it allows

259. *Id.*

260. *Id.*

261. *Id.*

262. *Weld*, 954 F. Supp. at 429.

263. *Id.* at 427 (quoting MASS. GEN. LAWS ch. 6, § 178C (1996)).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Weld*, 954 F. Supp. at 428.

268. *Id.*

269. *Id.*

270. *Id.* at 428.

authorities to notify particular individuals, in addition to organizations, who may encounter the convicted sex offender.²⁷¹ Moreover, sex offenders classified under level two and three may challenge their assessment in superior court, unlike those classified under level one.²⁷²

Unlike level two and level three sexual offenders, police do not notify the public that a level one, low risk of reoffense, sex offender lives or works nearby.²⁷³ However, information about level one sex offenders is still available to the public under limited circumstances.²⁷⁴ In order for a member of the public to receive information about a registered level one offender, a person must be at least eighteen years old and request the information in person at a local police department.²⁷⁵ After presenting proper identification, the person must then fill out a special “record of inquiry” form, which remains confidential.²⁷⁶ Those requesting information about sex offenders must also provide their name and address, a geographical vicinity or specific person that is the subject of the inquiry, and the reason for the inquiry.²⁷⁷ Furthermore, before disseminating registry information, authorities must warn inquirers that if the information received is used to further criminal activity or discrimination toward registered sex offenders, the inquirers will be subject to criminal penalties.²⁷⁸

The plaintiff in the present case, who was deemed a class one sexual offender, brought suit seeking an ex parte temporary restraining order and preliminary injunction from being subjected to Massachusetts’s “Megan’s Law.”²⁷⁹ According to the plaintiff, the application of “Megan’s Law” to juvenile sex offenders violated his constitutional rights.²⁸⁰

The central issue before the court in *Weld* dealt with whether Massachusetts’s version of “Megan’s Law” inflicted punishment upon juvenile sex offenders.²⁸¹ Looking for an appropriate test to employ in its punishment analysis, the court looked to the decisions of *W.P. v. Poritz*, *Doe v. Pataki*, *Roe v. Office of Adult Probation*, as well as the United States Supreme Court’s decisions in *Ursery* and *Mendoza-Martinez*.²⁸² The court in *Weld* finally decided that the considerations utilized by the United States

271. *Id.* at 429.

272. *Weld*, 954 F. Supp. at 429.

273. *Id.* at 428.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Weld*, 954 F. Supp. at 428.

278. *Id.*

279. *Id.* at 429.

280. *Id.*

281. *Id.* at 431.

282. *Weld*, 954 F. Supp. at 431–32.

Supreme Court in *Ursery* would be most helpful in deciding whether “Megan’s Law” is punitive.²⁸³ Thus, the *Weld* court analyzed: 1) the legislative intent of the Massachusetts’s Legislature in passing “Megan’s Law;” 2) the practical effects of the legislation; 3) the purpose of the statute; and 4) analogous historical precedents.²⁸⁴ The court concluded that these factors were utilized by most courts in deciding the constitutionality of state sex offender laws.²⁸⁵

According to the court, the legislative debates prior to the approval of Massachusetts’s “Megan’s Law” indicated a nonpunitive intent for the legislation.²⁸⁶ Unlike the New York State Legislature’s debates discussed in *Pataki*, there was no evidence of name calling by Massachusetts legislators.²⁸⁷ According to the court in *Weld*, there was no indication from the record that Massachusetts’s legislators referred to sex offenders as “animals” or “toxic waste.”²⁸⁸ In fact, at least one legislator showed particular concern for juvenile sexual offenders in stating:

I’m disappointed that there is no language here addressing juveniles who are arrested for sex offenses. . . [T]hey will be subject to this law. Some 750 youths have gone through treatment in DYS [Department of Youth Services]. There has not been one who has gone back. They should have their confidentiality protected. We want juveniles punished but we also should give them the opportunity [to] become productive citizens. They have long lives.²⁸⁹

According to the court, because the legislature took the time to include juveniles in “Megan’s Law,” the legislature indicated a nonpunitive motive of protecting children and others from the potential harm caused by repeat sex offenders.²⁹⁰ Despite the plaintiff’s argument that the statute’s level one community notification provision leads to punitive results, the court concluded that the provision is nothing but remedial in both form and

283. *Id.* at 432.

284. *Id.*

285. *Id.*

286. *Id.* at 433.

287. *Weld*, 954 F. Supp. at 433.

288. *Id.*; see also *Doe v. Pataki*, 940 F. Supp. 603, 621–22 (S.D.N.Y. 1996) (finding the New York State Legislature revealed a punitive intent for New York’s version of “Megan’s Law” because of the remarks made during the legislature’s debate prior to the approval of the statute).

289. *Weld*, 954 F. Supp. at 433 (citation omitted). These comments were made by State Representative Paulsen on July 30, 1996. *Id.*

290. *Id.*

effect.²⁹¹ Not persuaded by the evidence of vigilantism and prejudice presented in the *Pataki* decision, the court found there was no evidence in the record to support a finding that the public accessibility to the plaintiff's criminal past has a punitive effect on him.²⁹² Furthermore, the court noted that the statute was effectively designed to limit both those who may receive information about sex offenders, and the amount of information disclosed.²⁹³ Not only must the inquirers be at least eighteen-years-old and make the inquiry in person, they must also sign a statement acknowledging that they are aware of the criminal penalties for misuse of the information.²⁹⁴ According to the court, information pertaining to level one registered sex offenders is only given to community members concerned for the protection of themselves and their children.²⁹⁵ The statute's precautionary measures enable the public to receive just enough information about registered sex offenders to take steps to prevent future sexual crimes, and nothing more.²⁹⁶

The plaintiff further argued that juvenile sex offenders are punished under "Megan's Law" because their juvenile criminal records no longer remain confidential.²⁹⁷ Without a doubt, the court was troubled by the application of "Megan's Law" to juveniles who committed their sex crimes many years before the law's enactment and who are unlikely to recommit a sexual crime.²⁹⁸ Nonetheless, the court found that the plaintiff had not shown how the disclosure of confidential juvenile records would lead to punishment under constitutional analysis.²⁹⁹ The court reiterated that the level one notification provision is rationally designed to limit the disclosure of information so that only those who may be susceptible to sex crimes can protect themselves.³⁰⁰ Thus, the court found that the application and the effects of minimal level one public disclosure would not be so great as to be deemed a form of punishment.³⁰¹ In finding the retroactive application of "Megan's Law" to juvenile sex offenders constitutionally sound, the court denied the plaintiff's motion for a preliminary injunction.³⁰²

291. *Id.* at 434–35.

292. *Id.* at 435.

293. *Weld*, 954 F. Supp. at 434–35.

294. *Id.* at 435.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Weld*, 954 F. Supp. at 435–36.

299. *Id.* at 436.

300. *Id.*

301. *Id.*

302. *Id.* at 427.

XI. IOWA V. PICKENS

According to the Supreme Court of Iowa in *Iowa v. Pickens*,³⁰³ Iowa's sex offender registration statute³⁰⁴ was presumed constitutional unless sex offenders could successfully negate every reasonable basis for its existence.³⁰⁵ Thus, the plaintiff in the case faced a difficult task in convincing the court that Iowa's retroactive application of the statute violated the United States Constitution's ex post facto provision.³⁰⁶ The defendant, Randall Wayne Pickens, argued that the law aimed to punish him a second time for sexually assaulting a minor.³⁰⁷ Backed by the presumption of constitutionality, the State countered Pickens's contention claiming Iowa's community notification law does not aim to punish, but to insulate people from being harmed by dangerous sex offenders.³⁰⁸ According to the State, any harm caused to the lives of sex offenders is a product of their own sexual crimes, not a result of sex offender registration and notification laws.³⁰⁹ Needless to say, one of the first ex post facto decisions of 1997 fell in favor of the state and community notification.

Unlike the courts in *Pataki* and *Weld*, which were aided by records of legislative debates, the court in *Pickens* was not as fortunate to have such clear evidence of the Iowa Legislature's intent for its notification statute.³¹⁰ Because the court lacked proof of the legislature's intent for its notification law, the court used the *Mendoza-Martinez* test to determine if the provision was punitive in nature.³¹¹

However, the State conceded the third and fifth elements of the *Mendoza-Martinez* test—whether community notification comes into play

303. 558 N.W.2d 396 (Iowa 1997).

304. IOWA CODE ANN. § 692A. (West Supp. 1997).

305. *Pickens*, 558 N.W.2d at 398.

306. *Id.* at 396.

307. *Id.*

308. *Id.* at 398.

309. *Id.* at 397.

310. *Pickens*, 558 N.W.2d at 398.

311. *Id.* In *Kennedy v. Mendoza-Martinez*, the United States Supreme Court stated that the *Mendoza-Martinez* factors should be used to determine if a law is punitive only when there is no conclusive evidence of the legislature's purpose for a statute. *Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). The *Mendoza-Martinez* test includes: 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as punishment; 3) whether it comes into play on a finding of scienter; 4) whether its operation will promote the traditional aims of punishment—retribution or deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether the sanction's alternative purpose to which it may rationally be connected is assignable for it; and 7) whether it appears excessive in relation to the alternative purpose assigned. *Id.* (citations omitted).

on a finding of scienter and whether community notification applies to behavior that is already a crime.³¹² On the other hand, the defendant did not argue that Iowa's community notification law appeared excessive in relation to the State's alternative purposes of public notification and public safety.³¹³ Arguing that registration and notification laws place an affirmative disability upon a sex offender, Pickens contended that the law stigmatizes sex offenders, resulting in a form of punishment.³¹⁴ Responding to Pickens's allegations, the State informed the court that information regarding sex offenders is only disseminated to the public on a limited basis.³¹⁵

According to Iowa's version of "Megan's Law," sex offender registry information is mainly restricted to government and criminal justice agencies who conduct background checks and informational studies about convicted sex offenders.³¹⁶ In addition, a person may request information about an alleged sex offender only by writing to his or her local sheriff and providing the sheriff with his or her own name and address, the alleged sex offender's name and address, and a reason for requesting the information.³¹⁷ Authorities are required to keep a record of the people who have requested information about registered sex offenders.³¹⁸ The statute allows for community-wide notification of a sex offender's presence under limited circumstances and only when necessary to protect the public.³¹⁹

Finding that Iowa's sex offender statute does not provide for extensive dissemination of information, and noting that a sex offender's conviction record and criminal history is already a matter of public record, the court found that Iowa's statute did not impose an affirmative disability on the life of a convicted sex offender.³²⁰ The court further ruled that Iowa's version of "Megan's Law" could neither be viewed as a historical form of punishment nor as serving the traditional goals of punishment—deterrence and retribution.³²¹ According to the court, the purpose of the statute was to help law enforcement agencies protect the general welfare.³²² Although the court found that public dissemination provisions are "unpleasant consequences" of sexual offenses, the court found that such negative consequences did not

312. *Pickens*, 558 N.W.2d at 399.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Pickens*, 558 N.W.2d at 399.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 400.

322. *Pickens*, 558 N.W.2d at 400.

make the statute punitive.³²³ Thus, concluding that the statute was rationally connected to its purpose of protecting the public, and that it did not unconstitutionally increase the punishment of convicted sex offenders subjected to retroactive application of Iowa's sex offender law, the court upheld the statute.³²⁴

XII. DOE V. GREGOIRE

Like New Jersey, which enacted legislation in response to the outrage following the tragic death of Megan Kanka, Washington passed its version of "Megan's Law," the Washington Community Protection Act,³²⁵ following the brutal sexual assault of a young boy at the hands of a previously convicted sexual predator, Earl Shriner.³²⁶ Before being released from prison, authorities were aware of Shriner's dangerous potential to commit future sexual crimes.³²⁷ He often spoke of his ongoing fantasies about molesting and killing children.³²⁸ Shortly after his release, Shriner forced a boy from his bicycle, raped and stabbed the boy, and then cut off the child's penis.³²⁹ Fortunately, the boy lived to identify Shriner as his attacker and helped convict him.³³⁰

The Washington Community Protection Act forces criminals convicted of sex offenses to register with authorities in the county where they intend to reside within twenty-four hours of their release from prison or treatment facilities.³³¹ Sex offenders must provide authorities with their name, date of birth, address, employment address, conviction history, aliases, and social security number.³³² In addition, offenders must provide their local sheriff with a recent photograph and fingerprints.³³³ Those sex offenders convicted of first-degree rape and other class A sexual felonies can petition the court to relieve them of their duty to register.³³⁴ In order to be relieved of the requirements of the Community Notification Act, offenders must convince the court, through clear and convincing evidence, that registration will not

323. *Id.*

324. *Id.*

325. WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1990).

326. See Sheila A. Campbell, *Battling Sex Offenders: Is Megan's Law an Effective Means of Achieving Public Safety?*, 19 SETON HALL LEGIS. J. 519, 527 (1995).

327. *Id.*

328. *Id.*

329. *Id.* at n.40.

330. *Id.*

331. WASH. REV. CODE ANN. § 9A.44.130(1) (West Supp. 1990).

332. *Id.* at § 9A.44.130(2).

333. *Id.* at § 9A.44.130(5).

334. Campbell, *supra* note 326, at 529 n.58.

serve its intended purpose.³³⁵ Those convicted of first-degree incest, second-degree rape, second-degree statutory rape, and other class B sexual felonies, will no longer be subjected to the Community Protection Act if they maintain a clean criminal record for a period of fifteen years following their release from prison.³³⁶ Those convicted of class C sexual felonies, which include third-degree rape, second-degree incest, and statutory rape, must not have any new criminal convictions for a period of ten years in order to be relieved of the requirements of the state's Community Protection Act.³³⁷

Once registered as a sex offender, authorities can release the registry information to the public when necessary for public safety reasons.³³⁸ Similar to "Megan's Law" in New Jersey, the Washington Community Protection Act has three levels of notification, which depend on a sex offenders risk of committing future crimes.³³⁹ At the first level, which is the lowest risk level, only the police receive information about the sex offender, not the general public.³⁴⁰ At level two, where there is a greater likelihood of recidivism, police inform community organizations, school districts, universities, and governmental officials and entities.³⁴¹ Finally, at the third level of notification, where there is the highest risk of recidivism, authorities notify the general public, as well as the news media.³⁴² Authorities provide the public and the media with a photograph of the sex offender, the offender's name, age, birth date, vicinity of current address, history of past crimes, as well as a statement that the offender is likely to recommit a sexual crime.³⁴³ Although authorities are not required to obey these guidelines for community notification, most police departments in Washington do abide by the statute's guidelines.³⁴⁴

Upon the plaintiff's release from prison, authorities classified him as a class three sexual offender, deeming him as a high risk for recidivism.³⁴⁵ The Washington Department of Corrections first notified the police of the plaintiff's release.³⁴⁶ Accompanying the notification were details of the plaintiff's violent rape of an adult woman in 1985, and details of other

335. *Id.*

336. *Id.* at 529.

337. *Id.*

338. WASH. REV. CODE ANN. § 4.24.550(1) (West Supp. 1998).

339. *Doe v. Gregoire*, 960 F. Supp. 1478, 1481 (W.D. Wash. 1997).

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *See Campbell*, *supra* note 326, at 530.

345. *Gregoire*, 960 F. Supp. at 1482

346. *Id.*

crimes in which the plaintiff was never charged.³⁴⁷ The notification characterized the plaintiff as an untreatable, violent sex offender who was extremely likely to commit another brutal sexual crime against a woman, and who also had the potential for homicide.³⁴⁸ Unless the court granted the plaintiff an injunction, both the media and the community at large were to be notified about the plaintiff and his potential for violent sexual behavior.³⁴⁹

According to the plaintiff, at the time he committed his crimes, the Washington Community Protection Act did not provide for the release of information about a sex offender's alleged crimes, nor did it allow authorities to give an appraisal of the offender's propensity to commit future crimes.³⁵⁰ In addition, the Act did not allow for the release of a sex offender's address or place of employment, nor a detailed description of a sex offender's criminal history.³⁵¹ Thus, based on the Ex Post Facto Clause, the plaintiff contended that the additional circulation or disclosure of such information increased his punishment.³⁵² Therefore, he argued that the dissemination of additional information was unconstitutional.³⁵³

The court in *Gregoire* recognized a huge difference between informing the public about a sex offender through public dissemination laws, and allowing the public to carefully search for the information themselves in county archives and courthouse file rooms.³⁵⁴ Regardless of whether the information disseminated was a matter of public record, the court found that broadcasting information about sex offenders to communities imposed an affirmative disability or restraint upon sex offenders.³⁵⁵

Noting that there was no bright line test to employ in deciding whether Washington's Community Protection Act imposes punishment upon sex offenders in violation of the Ex Post Facto Clause, the court in *Gregoire*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Gregoire*, 960 F. Supp. at 1482.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* at 1483. According to the court in *Gregoire*, the United States Supreme Court in *Department of Justice v. Reporters Committee*, 489 U.S. 749, 764 (1989), found a difference between a state keeping information in an open file available to the public on the one hand, and broadcasting that information to the public on the other. *Gregoire*, 960 F. Supp. at 1483. The court in *Gregoire* stated that through public dissemination laws, states provide information about sex offenders to everyone in the community; such laws not only provide the information to those likely to search through public records, but to others who will have no use for the information at all. *Id.* (citing *Artway v. Attorney Gen.*, 876 F. Supp. 666, 689 (D.N.J. 1995), *vacated in part*, 81 F.3d 1235 (3d Cir. 1996)).

355. *Id.* (citing *Artway v. Attorney Gen.*, 876 F. Supp. 666, 689 (D.N.J. 1995)).

looked to the persuasive authority of *Doe v. Pataki*, as well as ex post facto cases heard by the United States Supreme Court.³⁵⁶ Using the Supreme Court's decision in *Lynce v. Mathis*,³⁵⁷ the court in *Gregoire* concluded that the legislative intent behind Washington's sex offender community notification law was but a small factor in the analysis of whether the law unconstitutionally punished sex offenders.³⁵⁸ Rather, the greater focus of analysis, according to the court, was whether the consequences of the community notification measure disadvantages sex offenders to the extent of increasing their punishment.³⁵⁹

Despite the legislature's intentions of protecting society from sex offenders who pose a high risk of recidivism, the court concluded that the adverse effects of Washington's community notification law warranted a finding that the law was clearly a punitive measure.³⁶⁰ The plaintiff effectively persuaded the court by introducing news clippings as evidence which described the harassment and persecution that sex offenders received as a result of community notification laws.³⁶¹ According to the articles, gun shots were fired into sex offenders' homes, others were threatened by firebombs, and another sex offender even had his house burnt to the ground by angry neighbors.³⁶² Furthermore, as a result of community notification, sex offenders were fired from their jobs, evicted from their apartments, and ultimately, had nowhere to hide from the public outcry.³⁶³

Attempting to rebut the evidence of vigilantism, the state unsuccessfully argued that such cases of harassment are infrequent and mild. Furthermore, the state claimed that it had taken steps to prevent the harassment of sex offenders by warning the public against retaliation, by holding emergency

356. *Id.* The court first looked at the factors addressed in *Doe v. Pataki*: 1) legislative intent; 2) design of the statute; 3) historical treatment of community notification laws; and 4) the effects of the law. *See id.*; *see Doe v. Pataki*, 940 F. Supp. 603, 616 (S.D.N.Y. 1996). The court then turned to *United States v. Ursery*. *Gregoire*, 960 F. Supp. at 1483. Finally, the court looked to the Supreme Court's decision in *Lynce v. Mathis*. *Id.*

357. 117 S. Ct. 891 (1997). In *Lynce*, a state awarded a prisoner early release credits under a statute designed to reduce the overcrowding of prisons. *Id.* at 896. Subsequently, pursuant to a later statute, the state canceled those credits and forced the man to return to prison. *Id.* The Court held that the state's action violated the Ex Post Facto Clause. *Id.* However, the Court noted that both sides to the case placed too much emphasis on the legislature's intent in granting the early release credits, instead of looking at the consequences of their revocation. *Id.*

358. *Lynce*, 117 S. Ct. at 896.

359. *Gregoire*, 960 F. Supp. at 1483.

360. *Id.* at 1485.

361. *Id.*

362. *Id.*

363. *Id.*

community meetings, stressing that harassment would not be tolerated, and informing the public that any acts of violence toward sex offenders could result in the revocation of the Washington Community Protection Act.³⁶⁴ In spite of the state's rebuttal that private citizens, not the government, tormented sex offenders, the court found that the intolerable consequences of community notification were both inevitable and punitive in nature.³⁶⁵

Finally, the court also criticized the state's classification of the plaintiff as a level three sexual offender.³⁶⁶ Pointing out that the plaintiff committed his offenses against his wife and other women whom he had met in parking lots and bars, the court found that community-wide notification was unwarranted.³⁶⁷ Although the court deplored the plaintiff's conduct, the plaintiff's criminal history did not reveal signs of pedophilia or that he posed a high risk of danger to his neighbors.³⁶⁸ According to the court, authorities should only notify such groups as schools, parks and recreation departments, libraries, and the public at large when a sex offender could legitimately be considered a threat to the entire community.³⁶⁹ Informing such a wide variety of people, including the media and community organizations, suggested that the notification provision aimed to punish the sex offender, not protect the public.³⁷⁰ Furthermore, according to the court, because the state could not legally impose community notification laws on other criminals such as burglars or shoplifters, who also have the potential to recommit their crimes, the state could not legally place the burden of community notification on sex offenders either.³⁷¹ Therefore, since the court viewed the Washington Community Protection Act's community notification provision as a punitive measure, it enjoined the state from enforcing the provision on those sex offenders whose crimes were committed before the Act's effective date.³⁷² Regardless of the sex offenders' unpopularity and reprehensible sexual crimes, the court ruled that the Ex Post Facto Clause protects the rich and the poor, sex offenders, as well as saints.³⁷³

364. *Gregoire*, 960 F. Supp. at 1485.

365. *Id.* at 1486.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Gregoire*, 960 F. Supp. at 1486; *see State v. Ward*, 869 P.2d 1062, 1069–70 (Wash. 1994) (holding that the authorities must have some evidence of an offender's future dangerousness, must disclose the information when necessary, and must use a geographical scope of dissemination rationally related to the threat posed by the registered offender).

370. *Gregoire*, 960 F. Supp. at 1486.

371. *Id.* at 1486.

372. *Id.*

373. *Id.* (citing *Lynce v. Mathis*, 117 S. Ct. 891, 895 (1997)).

XIII. DOE V. KELLEY

By the end of March of 1997, the United States District Court for the Western District of Michigan had its own *ex post facto* challenge to the public disclosure provision of the Michigan Sex Offender Registration Act³⁷⁴ on its hands.³⁷⁵ Effective April 1, 1997, the statute provided for public access to information about convicted sex offenders, including those who committed sexual crimes before the statute's effective date.³⁷⁶ Upon visiting local police or sheriff departments, the public could learn of a sex offender's name and any alias, his or her physical description, address, date of birth, and also receive detailed information about an offender's sexual crimes.³⁷⁷ Although the statute does not allow authorities to notify the public on a grand scale of a sex offender's presence in the community, the plaintiffs in *Kelley*, three convicted sex offenders, argued that public accessibility to sex offender information results in punishment.³⁷⁸ Thus, according to the plaintiffs, retroactive application of the statute violated the *Ex Post Facto* Clause of the Constitution.³⁷⁹

Strapped for a universal test to help decide whether the Michigan Sex Offender Registration Act imposed punishment upon convicted sex offenders, the court in *Kelley* looked to several of the decisions previously discussed for guidance.³⁸⁰ Looking to the decisions in *United States v. Ursery*, *W.P. v. Poritz*, *Doe v. Weld*, as well as *Roe v. Office of Adult Probation* to determine whether the retroactive application of Michigan's sex offender statute constituted punishment, the *Kelley* court finally adopted the test employed in *Doe v. Pataki*.³⁸¹ Therefore, the court considered the totality of the circumstances behind the statute's public accessibility provision, including the: 1) legislative intent; 2) design or purpose of the statute; 3) historical treatment of similar measures; and 4) effects or results of the legislation.³⁸²

Unlike many of the other courts which dealt with the retroactive application of state sex offenders laws, the *Kelley* court lacked evidence of the Michigan Legislature's intentions for passing the statute.³⁸³ Without

374. MICH. COMP. LAWS ANN. § 28.721 (West 1996).

375. *Doe v. Kelley*, 961 F. Supp. 1105 (W.D. Mich. 1997).

376. *Id.* at 1107.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Kelley*, 961 F. Supp. at 1108.

381. *Id.* at 1108-10.

382. *Id.* at 1108; *see Doe v. Pataki*, 940 F. Supp. 603, 620 (S.D.N.Y. 1996); *W.P. v. Poritz*, 931 F. Supp 1199, 1209 (D.N.J. 1996).

383. *Kelley*, 961 F. Supp. at 1108-09.

having any evidence clearly demonstrating either a remedial or punitive intent for the statute, like the *Pataki* court had in the debate minutes of the New York Assembly, the court turned to the statute's design in an attempt to determine the legislators' intentions for approving the measure.³⁸⁴ The Michigan Sex Offender Registration Act forces police to keep a computerized data base of information pertaining to state registered sex offenders.³⁸⁵ Any person residing in the State of Michigan who has been convicted of a sexual offense must register with authorities and provide them with his or her name and any aliases, address, physical description, birth date, and a list of the offenses committed.³⁸⁶ Among the sexual offenses included in the statute are: 1) accosting, enticing, or soliciting a child for immoral purposes; 2) the production, distribution, promotion, or possession of child pornography; 3) indecent exposure; 4) pandering or enticing a female to become a prostitute; and 5) various forms of criminal sexual conduct.³⁸⁷ Once the state police compile the sex offender data base, the registry information is then passed on to local law enforcement agencies who, in turn, must make the information available to the public.³⁸⁸

Arguing against the constitutionality of the statute, the plaintiffs contended the Act was overly broad, in that it allowed for public access to information about all registered offenders, regardless of the seriousness of the offense or registrant's risk of future danger.³⁸⁹ In addition, they argued that anyone could access the registry, including those who would have no use for the information or be at risk of harm.³⁹⁰ According to the plaintiffs, the broad public disclosure scheme suggested a punitive intent for the statute.³⁹¹ Despite the court's agreement that the statute was broad, the court found the provision rationally related to its intended purpose of making information about persons in the community who have engaged in sexually predatory or indecent conduct easily accessible to the public.³⁹²

According to the court, the public notification provision saves the public from having to rummage through court files to find out information about sex offenders.³⁹³ It imposes no undue burden upon the life of a convicted sex offender.³⁹⁴ Authorities make the information available to the

384. *Id.*

385. *Id.* at 1108.

386. *Id.* at 1108–09.

387. *Id.*

388. *Kelley*, 961 F. Supp. at 1109.

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.* at 1110.

393. *Kelley*, 961 F. Supp. at 1109.

394. *Id.*

public so that the public can take lawful precautions to prevent from becoming victims of sexually violent and obscene crimes.³⁹⁵ Because of the high recidivism rates and risk of danger posed by serious sexual offenders, the statute allows for the release of information pertaining to those individuals only after an offense has been committed.³⁹⁶ However, others who have committed nonviolent sexual crimes are subjected to the law's public disclosure scheme only after multiple offenses.³⁹⁷ Thus, according to the court, the perceived risk of danger justifying public disclosure is supported by the offender's own history of repetitive criminal behavior and an inability to conform to the requirements of the law.³⁹⁸ Therefore, the court rejected the plaintiffs' argument that the statute was overly broad and punitive, and instead found that the provision served a protective purpose.³⁹⁹

Turning to the historical treatment of public notification laws, the court held that the Michigan Sex Offender Registration Act's notification provision had no historical counterpart.⁴⁰⁰ Although access to information about sex offenders may lead to such historical forms of punishment as public humiliation and ostracism, the court found such results were not inevitably caused by the statute itself.⁴⁰¹ At best, public notification laws could best be compared to governmental warnings about dangerous people.⁴⁰² Yet, according to the court in *Kelley*, no court has ever considered such warnings to be a form of punishment.⁴⁰³

Although the court did not dispute that sex offenders are often targets of violence and harassment, and experience loss of employment and eviction, the court was not satisfied that public access and community notification laws were the cause of these negative consequences.⁴⁰⁴ While other courts, including *Pataki* and *Roe*, found a strong connection between such laws and harsh effects on the lives of sex offenders, the *Kelley* court considered the connection to be slight.⁴⁰⁵ According to the court, in order for the negative effects of such laws to be deemed punishment, the state must have intended to "chastise, deter or discipline" sex offenders.⁴⁰⁶ However, the public's reaction, whether lawful or criminal, to sex offenders did not prove that the

395. *Id.*

396. *Id.* at 1110.

397. *Id.*

398. *Kelley*, 961 F. Supp. at 1110.

399. *Id.*

400. *Id.*

401. *Id.* at 1110–11.

402. *Id.* at 1111.

403. *Kelley*, 961 F. Supp. at 1111.

404. *Id.*

405. *Id.*

406. *Id.*

legislature purposely tried to punish sex offenders by passing the Michigan Sex Offender Registration Act.⁴⁰⁷ Even if evidence of harassment and vigilantism directed towards sex offenders was the direct result of the statute's public access provision, such evidence would not have persuaded the court into finding the law punitive in nature.⁴⁰⁸ According to the court, the legislation served remedial, not punitive, objectives.⁴⁰⁹ Therefore, the court upheld the Michigan Sex Offender Registration Act, thereby allowing authorities to retroactively apply the statute's public access provision to all convicted sex offenders.⁴¹⁰

XIV. CONCLUSION—HENDRICKS DECISION COMES TO THE AID OF COMMUNITIES ACROSS AMERICA?

Although the United States Supreme Court has yet to come down with a definitive ruling of whether community notification of a sex offender's presence constitutes punishment in violation of the Ex Post Facto Clause, the highest Court's decision in *Hendricks v. Kansas*⁴¹¹ is a positive indication of how the Court might view some states' methods for dealing with convicted sex offenders.

In *Hendricks*, the Court found that states can keep violent sexual predators locked up for an indefinite period of time, even after they have fulfilled their sentences, without violating the Constitution's prohibition of ex post facto laws or its ban on double jeopardy.⁴¹² Ruling 5-4 in the case of an admitted pedophile from Kansas, the Justices stated that people could be held in prison if they are considered mentally abnormal and likely to engage in new sexual crimes in the future.⁴¹³ Justice Clarence Thomas wrote that although a simple finding of dangerousness alone would not be enough to justify the extended confinement, a finding that a sexual offender poses a danger to the public health and safety, along with additional proof of a "mental abnormality" or "personality disorder," would enable authorities to

407. *Id.*

408. *Kelley*, 961 F. Supp. at 1111-12.

409. *Id.*

410. *Id.* at 1112.

411. 117 S. Ct. 2072 (1997).

412. *Id.* at 2075-76. The Constitution prohibits double jeopardy. Generally, the Double Jeopardy Clause prohibits a second prosecution for the same offense. The United States Supreme Court has further interpreted double jeopardy as preventing states from punishing twice, or attempting a second time to punish criminally for the same offense. *Id.* at 2085 (citing *Witte v. United States*, 515 U.S. 389 (1995)).

413. *Id.* at 2077, 2079.

prevent a person from being released back into the community.⁴¹⁴ The extended confinement, the Court noted, was intended to protect society, rather than to punish sexual offenders a second time for their crimes.⁴¹⁵ Therefore, the Court held that such confinement does not punish a sex offender a second time and, thus, does not violate the Constitution's Ex Post Facto Clause.⁴¹⁶

The Kansas Legislature enacted the Sexually Violent Predator Act⁴¹⁷ to deal with the sexual offenders whom the legislature believed were more than likely to repeat their acts of sexual violence and for whom the prognosis for rehabilitation was poor.⁴¹⁸ Thus, the legislature passed the statute so that the state could indefinitely confine sexually violent predators until they no longer were a threat to themselves or, more importantly, to others.⁴¹⁹

Convicted of taking "indecent liberties" with two thirteen-year-old boys in 1984, the plaintiff, Leroy Hendricks, served nearly ten years in prison.⁴²⁰ Nearly thirty years before this conviction, Hendricks indecently exposed himself to two young girls.⁴²¹ In 1957, Hendricks was convicted of lewdness involving another young girl.⁴²² After serving a brief jail term, Hendricks went to work for a carnival where he later molested two young boys.⁴²³ Upon his release from prison, the repeat offender was arrested again, this time for molesting a seven-year-old child.⁴²⁴

After receiving treatment at a state psychiatric hospital for his aberrant sexual behavior, Hendricks was considered safe to re-enter society.⁴²⁵ Shortly after his discharge, however, Hendricks returned to prison in 1967 for performing oral sex on an eight-year-old girl and fondling an eleven-year-old boy.⁴²⁶ After being diagnosed as a pedophile, Hendricks abandoned his treatment regiment, concluding he could not be helped.⁴²⁷ According to Hendricks, death would be the only thing that could prevent him from sexually abusing children in the future.⁴²⁸ Before conditionally releasing

414. *Id.* at 2080.

415. *Hendricks*, 117 S. Ct. at 2083.

416. *Id.* at 2085.

417. KAN. STAT. ANN. § 59-29a01 (1994).

418. *Hendricks*, 117 S. Ct. at 2077.

419. *Id.* at 2077.

420. *Id.* at 2078.

421. *Id.*

422. *Id.*

423. *Hendricks*, 117 S. Ct. at 2078.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Hendricks*, 117 S. Ct. at 2078.

Hendricks from prison in 1994, the State of Kansas filed a petition in Kansas state court attempting to keep him civilly confined because of his status as a sexually violent predator.⁴²⁹ Fortunately, a jury agreed with the State and the court ordered Hendricks committed to the custody of the Secretary of Social and Rehabilitation Services.⁴³⁰

Giving deference to the state legislature's nonpunitive purpose for the statute—public safety—the plaintiff in the case had an enormous obstacle to overcome.⁴³¹ In order to find the statute an unconstitutional form of punishment, Leroy Hendricks, a criminal with a long history of sexually molesting children, needed to demonstrate that the challenged statute provides “the clearest proof” that “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention to deem it ‘civil.’”⁴³² Hendricks contended that extended civil confinement for an indefinite period of time demonstrated the state’s punitive intent for the measure.⁴³³ Furthermore, he claimed that civil confinement was a new form of punishment for his prior sexually deviant conduct.⁴³⁴ Thus, Hendricks argued that by civilly confining him after he already served out his original prison sentence, the state violated the United States Constitution’s Ex Post Facto Clause.⁴³⁵ Needless to say, the Court rejected Hendricks’ argument.⁴³⁶

Using elements in its analysis gathered from such cases as *Ursery* and *Mendoza-Martinez*, the Court found that the extended confinement of sexual offenders did not serve the traditional goals of punishment—retribution or deterrence.⁴³⁷ According to the Court, a sexual offender was not subjected to additional confinement because of his or her prior criminal history, but rather, prior criminal conduct was used by the state to help show that the offender had the potential to commit such sexual crimes again.⁴³⁸ Furthermore, because those subjected to the extended confinement have mental disabilities/disorders, the Court found that the probability of the sex offenders to be deterred by confinement was extremely low.⁴³⁹ Finally, the Court concluded that the state had a legitimate, nonpunitive governmental

429. *Id.* at 2079.

430. *Id.*

431. *Id.* at 2082.

432. *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

433. *Hendricks*, 117 S. Ct. at 2083.

434. *Id.* at 2081.

435. *Id.*

436. *Id.*

437. *Id.* at 2082.

438. *Hendricks*, 117 S. Ct. at 2082.

439. *Id.*

objective to detain mentally unstable people, such as sex offenders, who pose a dangerous risk to the community.⁴⁴⁰

Without a doubt, the holding in *Hendricks* sheds some light on how the Court will decide the constitutional muster of state sex offender community notification laws. If holding someone in prison after they have served their criminal penalty is not considered by the United States Supreme Court a form of punishment, then how could it be unconstitutional to allow a sex offenders to live free while informing neighbors about their past? If detention for the purpose of protecting the community from harm does not constitute punishment, then certainly neither does notifying the public that a sex offender is in the midst. Although advocates of community notification are undoubtedly praising the decision, the Court's split decision could indicate a different result for sex offender public notification provisions. Nonetheless, at the very least, the decision makes overturning states' community notification provisions much more difficult.

Using the United States Supreme Court's analysis in *Hendricks* to determine whether retroactive community notification laws impose punishment upon convicted sex offenders, such laws should pass constitutional analysis. Similar to the nonpunitive legislative intent for Kansas's civil confinement laws, community notification statutes are also designed to protect the public from the potential harm caused by convicted sex offenders. As stated in *Hendricks*, the Court will only disregard the legislature's stated intent when the party challenging the statute provides convincing evidence that the statute is "so punitive in either purpose or effect as to negate the State's intention."⁴⁴¹ Because the Court ordinarily gives deference to the legislature's stated intent, the United States Supreme Court should find that in passing community notification laws, legislators intended to provide people with a means of protection against sex offenders, as opposed to punishing convicted sex offenders for their prior crimes. Although sex offenders lack credible evidence of a punitive purpose for community notification, opponents of community notification laws suggest such laws lead to punitive effects.

It is undisputed that upon release from prison or treatment facilities, many sex offenders are discriminated against, experience difficulties finding suitable places to live, and in some cases, are subjected to acts of violence and vigilantism. Furthermore, some contend that community notification makes it impossible for sex offenders to find and maintain employment. Nevertheless, wouldn't any reasonably competent and adept employer research an applicant's background and inquire about an applicant's criminal history? Community notification laws simply help assure that sex offenders

440. *Id.* at 2083.

441. *Id.* at 2082.

tell the truth; they don't necessarily prevent sex offenders from gaining employment. Although sex offenders experience unfortunate results after serving time, there is no proof that community notification laws such as "Megan's Law" are to blame for the harassment, discrimination, and violence. Rather, crimes of rape, murder, sexual assault, child sexual molestation, sexual abuse, as well as other heinous sexual acts, cause the public outcry and hostile reaction to sex offenders, not the community notification laws themselves. Any negative treatment directed toward sex offenders is a result of their atrocious sexual offenses, not the public notification laws.

In many cases, the public receives word of a sex offender's presence in the community, not through public notification laws, but from newspaper stories and television broadcasts which both recount a sex offender's criminal past and warn about their potential for repeat violence. Unfortunately, it took the tragic murder of a seven-year-old girl, Megan Kanka, for both the media and the public to heighten the awareness of the risks posed by repeat sexual offenders. Regardless of whether the media or the state notifies the public about the existence of sex offenders in the community, the information disseminated through community notification laws is a matter of public record. It is not as if the government is breaking into the confidential sex offender files and spreading lies about sex offenders. Through community notification laws, states are merely telling the public the truth in an effort to help protect them from falling victim to those sex offenders who may commit sexual crimes again.

Despite the negative impact that community notification laws allegedly have on the lives of sex offenders, providing the public with information contained in police reports and court proceedings cannot be deemed a form of punishment. Community notification laws simply enable states to research a sex offender's criminal past and present location of residence, then make that information more accessible to the public. Sex offenders have no right to blame community notification laws for their hardships. They can only blame themselves. Because there is no legitimate causal connection between community notification laws and punitive effects on the lives of sex offenders, challengers of such provisions will likely fail in satisfying their difficult burden of proving legislators' punitive intentions. The United States Supreme Court will likely adopt legislators' remedial, nonpunitive public safety intentions for community notification laws.

Opponents of community notification laws further contend that legislatures passed such provisions out of response to political and public pressure to impose retroactive legislation to harm and punish sex offenders, an undoubtedly unpopular group. According to these opponents, the Framers designed the United States Constitution's Ex Post Facto Clause to shield people, like sex offenders, from such laws passed out of strong

passion and emotion.⁴⁴² Certainly in some instances legislators have responded to the public's passion, pain, and anger by passing sex offender legislation that is overly broad, too inclusive, and excessive. Such overly broad and all encompassing community notification legislation, like Kansas's Sex Offender Registration Act, leaves sex offenders susceptible to public violence and vigilantism, and needs to be redrafted to meet constitutional scrutiny. In order to be found constitutional, state community notification legislation must be narrowly tailored to apply only to those sex offenders who are deemed a danger to society and pose a risk of committing another sexual crime.

However, other legislators have analyzed the data indicating sex offenders' likelihood of recommitting their sexual crimes and have carefully crafted constitutionally sound community notification laws in order to protect the public, not to subject sex offenders to criminal acts of vigilantism. Legislators in New York, New Jersey, Massachusetts, and California, among other states, demonstrated that the laws can be designed to both reduce the potential for repeat sexual crimes, as well as to minimize acts of vigilantism directed toward sex offenders. First, many states use procedural safeguards and have different levels of public notification to help reduce the laws' negative effects. According to the Kansas Sexually Violent Predator Act discussed in *Hendricks*, a sex offender will only be civilly confined if, after a clinical evaluation and a jury trial, the sex offender is deemed a sexually violent predator.⁴⁴³ Similarly, before notifying the public of a sex offender's presence, authorities evaluate a sex offender's risk of re-offense by looking into such factors as: 1) a sex offender's criminal history; 2) physical conditions such as age or debilitating illness; 3) psychological evaluations; 4) recent behavior; 5) expressions of intent to commit future crimes; and 6) success in responding to treatment.⁴⁴⁴ After analyzing such factors, authorities will then classify sex offenders based on their risk of recidivism.⁴⁴⁵ Only after a sex offender is deemed a true risk of recidivism is the sex offender subjected to community notification laws. Secondly, before notifying the public many states also warn the public against the misuse of the information received through community notification laws and provide stiff penalties for those who use the information to pursue acts of violence against registered sex offenders. Thus, many states have narrowly structured

442. See *Doe v. Pataki*, 940 F. Supp. 603, 614 (S.D.N.Y. 1996); see also *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866) (holding that the Framers adopted the Ex Post Facto Clause because they wanted to protect themselves and the people of the United States "from the effects of those sudden and strong passions to which men are exposed").

443. *Hendricks*, 117 S. Ct. at 2077.

444. See Boland, *supra* note 12, at 194.

445. *Id.* at 193.

laws aimed at limiting the negative impact on sex offenders' lives, while at the same time providing the public with the important information it needs for protection. Therefore, the United States Supreme Court will likely find that in passing community notification laws, state legislators intended to protect, not punish.

As with Kansas's civil confinement statute addressed in *Hendricks*, community notification laws do not embroil the two objectives of criminal punishment, retribution and deterrence. Community notification laws do not punish sex offenders for their prior sexual offenses. Instead, authorities use sex offenders' criminal pasts to determine a sex offender's likelihood of recommitting a sexual crime and help predict future behavior. Thus, community notification does not seek retribution for sex offenders' prior sexual exploits.

Moreover, community notification laws are not intended to deter sexual offenders from committing future sex crimes. Such laws neither punish for past behavior nor deter future behavior, but rather give the public the chance to take precautions and protect themselves. In *Hendricks*, the Court noted that sex offenders committed under Kansas's civil confinement statute suffer from mental or personality disorders.⁴⁴⁶ Therefore, the Court stated that those suffering from such disorders were unlikely to be deterred by the threat of civil confinement.⁴⁴⁷ Similarly, community notification will not deter sex offenders who, according to statistics, have high rates of recidivism.⁴⁴⁸ According to a fifteen-year study in California, twenty percent of convicted sex offenders were later arrested again for committing another sexual crime.⁴⁴⁹ A similar study conducted in Maryland found forty percent of sex offenders were arrested for another sex offense within three years of being released from prison.⁴⁵⁰ And, other studies reveal sex offender recidivism rates as high as seventy-five percent.⁴⁵¹ Jesse Timmendequas, the killer of Megan Kanka, and Leroy Hendricks, the plaintiff in *Hendricks*, both committed multiple sexual crimes. Furthermore, there is yet to be conclusive evidence showing that the treatment of sex offenders is successful in preventing them from recommitting sexual crimes.⁴⁵² Given

446. *Hendricks*, 117 S. Ct. at 2082.

447. *Id.*

448. See Robert Tier & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405 (1997).

449. *Id.*

450. *Id.*

451. *Id.*

452. Feldman, *supra* note 18, at 1104. Unlike other criminals, a sex offender's propensity for recommitting sexual crimes does not decrease as the sex offender gets older. *Id.* at 1105.

the statistics and evidence of recidivism among sex offenders, it is highly unlikely that sex offenders will be deterred by threats of community notification. If extended periods of imprisonment, institutionalization, and treatment do not deter sex offenders from committing future sexual offenses, then how could community notification laws possibly function as a deterrent? Although the community notification provision of New Jersey's "Megan's Law" would unlikely have deterred Jesse Timmendequas from killing little Megan Kanka, if in place, the provision would at the very least have helped Megan's parents and neighbors ensure that Megan and other children in the neighborhood steered clear of the Timmendequas residence. Thus, community notification laws cannot be characterized as a criminal form of punishment, but rather as an effective means of protecting innocent children.

It is further argued in *Hendricks* that the Kansas Sexually Violent Predator Act's indefinite duration of confinement is evidence of the statute's punitive intent.⁴⁵³ However, the Court found that such involuntary and potentially indefinite confinement does not suggest a punitive purpose for the legislation.⁴⁵⁴ Under the law, a person may be civilly committed until the person's mental or personality disorder no longer causes them to be a threat to society.⁴⁵⁵ Thus, the duration of confinement could last from one year till one's lifetime.⁴⁵⁶ Unlike the civil commitment statute, most sex offender registration and notification laws require convicted sex offenders to register with authorities and be subjected to community notification for specific periods of time, depending upon an offender's risk of danger.⁴⁵⁷ Furthermore, sex offenders in many states are given the opportunity to petition courts to terminate the registration and public notification provisions, after demonstrating that they have not committed another sexual crime within a specific period of time following their release from prison.⁴⁵⁸ Given the proven statistics of recidivism among sex offenders, most states will not allow sex offenders to petition the courts for at least ten to fifteen years.⁴⁵⁹ Petitioners must show that they no longer pose a threat to the safety of others.⁴⁶⁰ Since sex offenders are only subjected to registration and

453. *Hendricks v. Kansas*, 117 S. Ct. 2072, 2083 (1997).

454. *Id.*

455. *Id.*

456. *Id.*

457. Boland, *supra* note 12, at 191.

458. See Campbell, *supra* note 326, at 538–39. According to some state laws, if, after a hearing, the court finds by the preponderance of the evidence that the sex offender is rehabilitated, the court may grant an order relieving the sex offender of the duty to further register with authorities as a convicted sex offender. See Boland, *supra* note 12, at 192 n.42.

459. *Id.* at 191.

460. *Id.* at 191–92.

community notification until they are no longer considered dangerous to society, the United States Supreme Court will likely uphold the provisions as nonpunitive measures, just as it did with Kansas's civil commitment provision in *Hendricks*.

Finally, community notification laws are less stringent than Kansas's civil confinement provision of its Sexually Violent Predator Act. Community notification laws do not force sex offenders to be detained in prison or treatment facilities after serving out their sentences. In an effort to help the public protect itself from sexual offenders, community notification laws enable states to inform the public that a sex offender is living or working nearby. Thus, because community notification is less of a burden on sex offenders than spending additional time in prison or treatment facilities, the United States Supreme Court will unlikely require a link between a finding of dangerousness, with proof of a mental or personality disorder, in order to be subjected to community notification. Nonetheless, this link will be satisfied in the cases of extremely violent sex offenders, such as pedophiles and child molesters, who have nearly doubled the recidivism rates of sex offenders who target adults.⁴⁶¹

Without a doubt, in order to be most effective, community notification statutes must apply to both sex offenders who committed sexual offenses prior to the law's enactment, as well as to those who committed sexual offenses since the laws came into effect.⁴⁶² Eventually, the United States Supreme Court will have to decide the ex post facto issue, even though in due time it will disappear as sex offenders convicted before the passage of community notification provisions pass away. However, with the 1994 passage of President Clinton's Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,⁴⁶³ also known as the Violent Crime Control Act, all states must pass both sex offender registration and community notification provisions by September 13, 1997, in order to qualify for the maximum amount of federal funds for law enforcement.⁴⁶⁴ The Violent Crime Control Act allows law enforcement officials to publicly release information about sex offenders as necessary to protect the public.⁴⁶⁵ Inevitably, as more and more states come in compliance with the Violent Crime Control Act by passing sex offender community notification laws, more and more ex post facto constitutional challenges will be brought.

461. See Tier & Coy, *supra* note 448.

462. Josephine Sacco, *New York's Megan's Law: Retroactive Application Determines the Fate*, 13 N.Y.L. SCH. J. HUM. RTS. 179, 219 (1996).

463. 42 U.S.C.A. § 14071 (West Supp. 1995).

464. *Id.* § 14071(f). States may be granted an additional two years as long as the state is making a legitimate, good faith effort to pass such laws. *Id.*

465. *Id.* § 14071(d)(3).

Finally, to some, allowing authorities to anticipate crimes of sex offenders before they occur and penalizing them before they have been committed is a frightening precedent for courts to set. However, allowing sexually dangerous and violent predators to secretly live in communities where innocent people work and play is an even more horrifying scenario. Community notification laws do not punish convicted sex offenders a second time. Yet, without community notification laws, communities across America are the ones who would be punished by the villainous acts of repeat sexual predators. Therefore, in the interest of public safety, the United States Supreme Court should uphold community notification laws, by finding that such laws aim to protect, not punish, thereby satisfying the requirements of the United States Constitution's Ex Post Facto Clause.

Charles J. Dlabik

ADDENDUM

E.B. v. VERNIERO

*W.P. v. Poritz*⁴⁶⁶ was appealed to the United States Court of Appeals, Third Circuit in the case of *E.B. v. Verniero*.⁴⁶⁷ In *Verniero*, the court agreed with the lower court that the community notification requirement of "Megan's Law" did not impose an unconstitutional second form of punishment under ex post facto analysis.⁴⁶⁸ However, the court reversed the lower court's ruling and remanded the case to be decided on a due process issue.⁴⁶⁹

In determining that "Megan's Law's" notification provisions were not punitive under the Ex Post Facto Clause, the court was undoubtedly persuaded by a January 1995 study conducted by the Oregon Department of Corrections, which analyzed the impact of sex offender community notification provisions.⁴⁷⁰ The study concluded that less than ten percent of sex offenders in Oregon subjected to the state's community notification law were victims of public vigilantism or harassment.⁴⁷¹ Although there were reports of sex offenders being subjected to name calling, graffiti, toilet papering, and minor property vandalism, there were only two extreme cases

466. 931 F. Supp. 1199 (D.N.J. 1996).

467. 119 F.3d 1077 (3d Cir. 1997).

468. *Id.* at 1081.

469. *Id.*

470. *Id.* at 1089-90.

471. *Id.* at 1090.

of vigilantism reported during the fourteen-month study.⁴⁷² In addition to finding that sex offenders were subjected to some forms of harassment, the study also found that community notification made it more difficult for sex offenders to find places to live and work upon being released from prison.⁴⁷³ Nevertheless, the court did not view community notification laws as imposing an unconstitutional second form of punishment on sex offenders.

In its analysis of determining whether “Megan’s Law’s” community notification law was punitive, the court adopted the three-prong test derived in *Artway v. Attorney General*:⁴⁷⁴ 1) the actual purpose of the community notification provision; 2) the community notification’s objective purpose; and 3) the punitive effects of the community notification provisions.⁴⁷⁵ In its ex post facto analysis, the court also looked to the United States Supreme Court’s recent decision in *Kansas v. Hendricks*,⁴⁷⁶ for guidance. In *Hendricks*, the Court held that the involuntary confinement of a previously convicted sex offender for an indefinite period of time, after he had already served his prison sentence, did not constitute punishment under ex post facto analysis.⁴⁷⁷ The court in *Verniero* agreed that Hendricks “provide[d] a new and important ‘fixed point’ that is of great utility in determining on which side of the punitive/nonpunitive line to place [sex offender] community notification [laws].”⁴⁷⁸

Under the first prong of the *Artway* test, the court in *Verniero* found that the purpose of such laws was to identify potential repeat sexual offenders and warn the public when necessary for public safety.⁴⁷⁹ Thus, the court found the community notification provisions of “Megan’s Law” satisfied the “actual purpose” test.⁴⁸⁰

In its analysis of the community notification provision’s “objective purpose,” the court used a reasonable legislator test: “If a reasonable legislator motivated solely by the declared remedial goals could have believed the means chosen were justified by those goals, then an objective observer would have no basis for perceiving a punitive purpose in the adoption of those means.”⁴⁸¹ The court concluded that the notification of people who are likely to come into contact with potential repeat sexual

472. *Verniero*, 119 F.3d at 1090.

473. *Id.* at 1090.

474. 81 F.3d 1235 (3d Cir. 1996).

475. *Verniero*, 119 F.3d at 1093.

476. 117 S. Ct. 2072 (1997).

477. *Verniero*, 119 F.3d at 1094–95.

478. *Id.* at 1096.

479. *Id.* at 1097.

480. *Id.*

481. *Id.* at 1098.

offenders is reasonably related to “Megan’s Law’s” nonpunitive goals.⁴⁸² In addition, because the community notification laws do not subject all registered sex offenders to public dissemination of their personal information, the court found such laws did not impose too great a burden on sex offenders to be deemed punitive in nature.⁴⁸³ “Megan’s Law” provides for the dissemination of sex offender information only to those people who are “reasonably certain” to come into contact with the registered sex offender.⁴⁸⁴ The dissemination of truthful information that is a matter of public record about a sex offender’s prior criminal activities and potential risk for recidivism “has never been regarded as punishment when done in furtherance of a legitimate governmental interest.”⁴⁸⁵ Therefore, the court found that the objective purpose of “Megan’s Law” was certainly not a punitive one.⁴⁸⁶

Under the third prong of the *Artway* test, in order for the effects of community notification laws to be deemed “punishment,” the effects of the provisions must be “extremely onerous.”⁴⁸⁷ According to the court, the “deprivation of one’s livelihood is not sufficiently onerous.”⁴⁸⁸ The court noted that “Megan’s Law” has neither deprived registered sex offenders of living and working in a community and relocating to other parts of the state or country, nor has the law deprived sex offenders of governmental benefits.⁴⁸⁹ Thus, according to the court, the direct effects of the “Megan’s Law” community notification provisions are not punitive in nature.⁴⁹⁰ Nevertheless, what did concern the court in deciding that the community notification provisions were not unconstitutionally punitive, were the indirect effects of community notification.

The indirect effects of being subjected to sex offender community notification laws include: 1) injury to reputation; 2) difficulty in finding employment; 3) difficulty in finding housing; 4) the destruction of personal relationships; and 5) vandalism and retributive assaults directed toward sex offenders by private citizens.⁴⁹¹ Despite these indirect effects of community notification, the court concluded that the public notification provided for in

482. *Verniero*, 119 F.3d at 1098.

483. *Id.* at 1098–99.

484. *Id.* at 1098.

485. *Id.* at 1099–1100.

486. *Id.* at 1101.

487. *Verniero*, 119 F.3d at 1101.

488. *Id.*

489. *Id.* at 1102.

490. *Id.*

491. *Id.* at 1104.

“Megan’s Law” did not constitute punishment for the purposes of the Ex Post Facto Clause.⁴⁹²

Looking to *Hendricks*, the court concluded that remedial legislation may damage one’s reputation and cause severe individual hardship, but may nevertheless avoid triggering the Ex Post Facto Clause. According to the court, the state’s interest in protecting the public from repeat sexual offenders justified the potential damage to the sex offender’s reputation.⁴⁹³ Moreover, the court agreed with the lower court that the risk of private violence is rare and is most likely attributable to a sex offender’s past criminal behavior, not from community notification laws themselves.⁴⁹⁴ In addition, the court noted that many states, including New Jersey, have taken steps to warn the public against the misuse of the disseminated information and to discourage the exercise of private vengeance.⁴⁹⁵ Finally, the court concluded that community notification satisfied the *Artway* test and that the burden imposed by community notification “pales by comparison to the civil commitment of sex offenders sanctioned in *Hendricks*.”⁴⁹⁶

Although the court in *Verniero* concluded that community notification was not punishment under ex post facto analysis, the court reversed the District Court’s decision on procedural due process grounds.⁴⁹⁷

DOE V. PATAKI

After the *Doe v. Pataki*⁴⁹⁸ decision, state agencies and officials appealed the district court’s ruling that New York’s version of “Megan’s Law,” specifically, the retroactive application of its notification provisions, was punitive in nature, thereby violating the United States Constitution’s Ex Post Facto Clause. Fortunately for state officials and the public-at-large, the United States Court of Appeals, Second Circuit, reversed this decision and ruled that neither the registration nor public notification provisions of New York’s sex offender law imposed “punishment” under ex post facto analysis.⁴⁹⁹ Thus, the court of appeals concluded that the provision could be imposed upon sex offenders convicted before the law’s effective date.⁵⁰⁰

492. *Verniero*, 119 F.3d at 1104.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.* at 1105.

497. 119 F.3d at 1105–11.

498. 940 F. Supp. 603 (S.D.N.Y. 1996).

499. *Doe v. Pataki*, 120 F.3d 1263, 1265–66 (2d Cir. 1997).

500. *Id.* at 1265.

In determining whether New York's version of "Megan's Law" imposed punishment for purposes of ex post facto analysis, the district court looked at four categories: 1) legislative intent; 2) statutory design; 3) historical analogies; and 4) punitive effects of the statute.⁵⁰¹ Applying these four factors to the state's sex offender community notification law, the district court ruled that community notification increased the form of punishment on previously convicted sex offenders.⁵⁰²

In addressing the district court's four-part analysis, the court of appeals focused mainly on two questions in determining whether New York's version of "Megan's Law" was unconstitutionally punitive in nature: 1) whether the legislature intended the provisions to be criminal or civil in nature; and 2) whether community notification is so punitive in form and effect as to render it criminal despite the legislature's intent to the contrary.⁵⁰³

Of the four factors addressed by the district court in determining whether the law was punitive, the district court was heavily persuaded by the New York Legislature's intent in enacting the statute. Specifically, the district court pointed to several statements made by legislators during floor debates that exhibited a desire to punish sex offenders for their prior crimes.⁵⁰⁴ In concluding that the legislature's motivation for community notification was a desire to punish sex offenders, the district court was undoubtedly convinced that the legislator's comments revealed a degree of animosity directed toward sex offenders.⁵⁰⁵ The court of appeals rather "decline[d] to rely on these isolated statements to characterize the legislature's intent as punitive."⁵⁰⁶ The court of appeals observed that a legislature's floor debates provide little assistance in determining a legislature's intent in enacting a statute.⁵⁰⁷

In sum, the court of appeals accepted the view that the legislature intended to retroactively apply its sex offender notification law to protect communities and the general public from potentially dangerous sexual offenders.⁵⁰⁸ The court accepted the view that the regulation's goal was to "afford concerned citizens with the ability to access information which may ultimately provide significant protection to their family."⁵⁰⁹ According to the court, the text of the community notification statute itself reasonably

501. *Id.* at 1271.

502. *Id.* at 1271-72.

503. *Id.* at 1274; *see also* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

504. *Pataki*, 940 F. Supp. at 604-05.

505. *Id.* at 621-22.

506. *Pataki*, 120 F.3d at 1277.

507. *Id.*

508. *Id.*

509. *Id.* (citation omitted).

addressed its nonpunitive goal of protecting the public and facilitating future law enforcement efforts.⁵¹⁰

For example, the court of appeals pointed out that New York's version of "Megan's Law" had several features which manifested its nonpunitive purpose: 1) the extent of notification depends on the sex offender's perceived risk of recidivism—the greater the likelihood of recidivism, the broader and more detailed notification to the public; 2) the extent of notification is carefully controlled by classifying sex offenders based on their risk of recidivism—low risk, moderate risk, and high risk; 3) the fact that the notification provision contains many procedural safeguards to prevent the misuse of registration information; and 4) that it provides for the punishment of the unauthorized release of any information.⁵¹¹ Therefore, according to the court, the legislation's text and structure convincingly supported the legislature's stated regulatory and nonpunitive intent for the statute.⁵¹²

Turning to the second prong that the court of appeals addressed in its determination of whether community notification is punitive—whether community notification is so punitive in form and effect as to render it criminal, despite the legislature's intent to the contrary—the court was unpersuaded by the plaintiff's description of numerous instances in which sex offenders have suffered harm in the aftermath of notification.⁵¹³ Despite evidence of public ostracism, picketing, loss of employment, eviction, threats of violence, physical attacks, and arson, the court of appeals did not agree that "these detrimental consequences suffice to transform the regulatory measure of community notification into punishment."⁵¹⁴

Although the court of appeals noted that community notification is the "but for" cause of some of these incidents, according to the court, they are not consequences imposed by the community notification provision.⁵¹⁵ According to the court, these acts of violence, ostracism, and discrimination are caused by private third parties and result from information, most of which was publicly available, though a bit more difficult to obtain, prior to the passage of New York's version of "Megan's Law;" the sex offender's underlying conviction or criminal act itself prompts some people to take unlawful action against the convicted sex offender.⁵¹⁶

510. *Id.*; see N.Y. CORRECT. LAW § 168-1(5) (McKinney Supp. 1996).

511. *Pataki*, 120 F.3d at 1278.

512. *Id.*

513. *Id.* at 1279.

514. *Id.*

515. *Id.* at 1280.

516. *Pataki*, 120 F.3d at 1279.

Furthermore, the court noted that numerous other statutes imposing exceedingly harsh consequences and disabilities have been upheld against ex post facto challenges.⁵¹⁷ According to the court, “consequences as drastic as deportation, deprivation of one’s livelihood, and termination of financial support have not been considered sufficient to transform an avowedly regulatory measure into a punitive one.”⁵¹⁸ As a result, the court of appeals concluded that whatever personal and societal burdens placed upon convicted sex offenders that arose from community notification are not “so disproportionately severe and so inappropriate to nonpunitive ends” as to constitute punishment.⁵¹⁹ Therefore, the court held that the notification requirements of New York’s “Megan’s Law” did not constitute punishment for purposes of the Ex Post Facto Clause.

ROE V. OFFICE OF ADULT PROBATION

In *Roe v. Office of Adult Probation*,⁵²⁰ the district court in Connecticut ruled that the community notification provisions were punishment for ex post facto purposes. Nevertheless, on appeal, the court of appeals held that public notification pursuant to Connecticut’s sex offender community notification statute was not punishment for purposes of ex post facto analysis.⁵²¹

Using the same two-prong analysis used by the court in *Doe v. Pataki*⁵²² and by the United States Supreme Court in *Kansas v. Hendricks*,⁵²³ the court of appeals in *Roe* rejected the plaintiff’s ex post facto challenge and declared the community notification law constitutionally sound under ex post facto analysis.⁵²⁴

Looking to the specific language of the Office of Adult Probation’s community notification policy, the court of appeals concluded that the primary purpose of the notification provision was to protect society from potentially dangerous sex offenders and probationers under its supervision.⁵²⁵ The Guidelines state: “Information on convicted sex

517. *Id.*; see, e.g., *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997) (finding the civil commitment of sex offenders with “mental abnormality” and who pose a threat to society did not constitute punishment under ex post facto analysis).

518. *Pataki*, 120 F.3d at 1279.

519. *Id.* at 1280.

520. 938 F. Supp. 1080 (D. Conn. 1996).

521. *Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997).

522. 120 F.3d 1263, 1274–75 (2d Cir. 1997).

523. 117 S. Ct. 2072, 2081–82 (1997).

524. *Roe*, 125 F.3d at 53–55.

525. *Id.* at 53.

offenders will be provided to police, victims and other relevant individuals and organizations in order to enhance public safety and awareness.”⁵²⁶ Moreover, the court was satisfied that another goal of community notification was to make sure sex offenders get through their period of probation without recommitting a crime and go on to have long-term rehabilitative effects.⁵²⁷ Thus, the court concluded that the Office of Adult Probation’s community notification policy was promulgated to serve dual nonpunitive goals.⁵²⁸

Turning to the second prong of its analysis, the court of appeals stated that the plaintiff bears the “heavy burden” of overcoming the regulatory or remedial purpose served by community notification.⁵²⁹ According to the court, the plaintiff’s burden of proving the community notification law unconstitutional could only be sustained by the “clearest proof” that notification was so punitive “in form and effect” as to render it punitive despite the Office of Adult Probation’s prospective, regulatory intent.⁵³⁰ The court of appeals pointed to several factors which indicated that the plaintiff’s burden could not be met.⁵³¹

First, citing *Pataki*, the court of appeals explained that the Office of Adult Probation’s public dissemination policy consisted of a limited dissemination to selected members of the community.⁵³² Moreover, the information provided to these members of the community was already publicly available.⁵³³ Second, according to the court, the community notification provision was not excessive in relation to its purpose of enhancing public awareness and preventing recidivism.⁵³⁴ For instance, only seven crimes can trigger public dissemination of information, only persons deemed a high risk of recidivism are subjected to notification, and only those individuals potentially endangered by the sex offender’s proximity will be notified through the state’s sex offender policy.⁵³⁵ Third, the court found no evidence that community notification was intended to serve a retributive purpose.⁵³⁶ The court noted that deterrence of repeating sexual crimes while on probation was not indicative of punitiveness.⁵³⁷

526. *Id.*

527. *Id.*

528. *Id.*

529. *Roe*, 125 F.3d at 54; *see* *Hendricks v. Kansas*, 117 S. Ct. 2072, 2082 (1997).

530. *Roe*, 125 F.3d at 54; *see* *United States v. Ursery*, 116 S. Ct. 2135, 2148 (1996).

531. *Roe*, 125 F.3d at 54.

532. *Id.*

533. *Id.*

534. *Id.* at 55.

535. *Id.*

536. *Roe*, 125 F.3d at 55.

537. *Roe*, 125 F.3d at 55.

Fourth, again citing *Pataki*, the court of appeals concluded that modern day community notification measures are not analogous to historical forms of punishment in that they “serve vastly different purposes than those served by historical punishments, operate without the physical participation by the offender, and lack the general social significance accompanying traditional shaming and banishment penalties.”⁵³⁸

Finally, unlike most community notification laws in effect, including the New York version upheld in *Pataki*, the Office of Adult Probation’s sex offender notification law incorporates the clinical assessment of a sex offender by a mental health counselor directly into the determination of whether notification will occur for each potential subject of notification.⁵³⁹ The critical responsibility of determining whether notification will occur rests with an expert in the field of sex offender behavior and treatment, who must make a prospective determination after an individualized examination and assessment of the sex offender.⁵⁴⁰ Because of this special feature unique to Office of Adult Probation’s community notification law, combined with the other limitations imposed by the statute, the court concluded that the measure was not punitive in character.⁵⁴¹

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

When Does the Loser Pay under Florida's Offer of Judgment Laws? The Combination of Legislative and Judicial Authority on Offers of Judgment has Undermined the Goal of Facilitating Settlement

I. INTRODUCTION

An offer of judgment is a simple concept that was created to encourage litigants to settle their cases before going to trial in order to help relieve an already jammed court system.¹ The offer of judgment allows a party on either side of an existing suit to offer a settlement to the adverse party before trial.² This mechanism encourages settlement because the offeree may end up paying the offeror's costs and attorneys' fees if the offer is rejected under certain conditions.³ Thus, the offer of judgment provides parties with an additional incentive to settle before trial. However, accomplishing the goal of easing the court system's load of cases through the offer of judgment process in Florida has been a difficult task. This is primarily because there are multiple sources of law governing offers of judgment.⁴

In Florida, three sources of law govern offers of judgment that can come into play when an offer of judgment is made by either party: sections 768.79⁵ and 45.061⁶ of the *Florida Statutes*, and Rule 1.442⁷ of the *Florida*

1. Lesley S. Bonney, et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 379-80 (1997).

2. *Id.* at 382.

3. *Id.*

4. Clinton A. Wright III, Note, *Confusion in Florida Offer of Judgment Practice: Resolving the Conflict Between Judicial and Legislative Enactments*, 43 FLA. L. REV. 35, 39 (1991).

5. The 1997 version of section 768.79 provides:

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees,

less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

- (a) Be in writing and state that it is being made pursuant to this section.
- (b) Name the party making it and the party to whom it is being made.
- (c) State with particularity the amount offered to settle a claim for punitive damages, if any.
- (d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) An offer shall be accepted by filing a written acceptance with the court within 30 days after. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(5) An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If the plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in

accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

FLA. STAT. § 768.79 (1997).

6. The 1997 version of section 45.061 provides:

(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude the making of a subsequent offer. Evidence of

an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

(2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a "test-case," presenting questions of far-reaching importance affecting nonparties.

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent less than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law.

(3) In determining the amount of any sanction to be imposed under this section, the court shall award:

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of costs or expenses which may be provided by contract or in other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in s. 768.28.

(6) This section does not apply to causes of action that accrue after the effective date of this act.

FLA. STAT. § 45.061 (1997).

The 1997 version of Rule 1.442 of the *Florida Rules of Civil Procedure* provides:

(a) **Applicability.** This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

(b) **Time Requirements.** A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

(c) **Form and Content of Proposal for Settlement.**

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorney fees and whether attorney fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080(f).

(3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

(d) **Service and Filing.** A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

(e) **Withdrawal.** A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once, withdrawn, a proposal is void.

(f) **Acceptance and Rejection.** A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of rule 1.090 (e) do not apply to

Rules of Civil Procedure. Generally, an offer of judgment allows for a plaintiff or defendant to recover attorneys' fees and costs from the date the offer was made.⁸ That is, if a plaintiff makes an offer to settle and the defendant rejects the offer, the plaintiff can then recover costs and fees if there is a judgment in favor of the plaintiff that is twenty-five percent more than the plaintiff's original offer to settle.⁹ Conversely, the defendant may recover fees and costs if the plaintiff rejects the defendant's offer, and there

this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

(g) **Sanctions.** Any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by service of an appropriate motion within 30 days after the entry of judgment in a nonjury action, the return of the verdict in a jury action, or the entry of a voluntary or involuntary dismissal.

(h) **Costs and Fees.**

(1) If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorney fees.

(2) When determining the reasonableness of the amount of an award of attorney fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

(A) The then-apparent merit or lack of merit in the claim.

(B) The number and nature of proposals made by the parties.

(C) The closeness of questions of fact and law at issue.

(D) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

(i) **Evidence of Proposal.** Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

(j) **Effect of Mediation.** Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.

FLA. R. CIV. P. 1.442.

8. FLA. STAT. § 768.79(1) (1993).

9. *Id.*

is either a judgment of no liability or the judgment rendered is at least twenty-five percent less than the defendant's offer.¹⁰

The notion of providing an incentive for parties to settle through fee shifting enactments is not new. Rule 68 of the *Federal Rules of Civil Procedure*, governing offers of judgment, was adopted in 1938 "to lessen the burden on an already taxed justice system."¹¹ The first offer of judgment rule in Florida, Rule 1.442 of the *Florida Rules of Civil Procedure*,¹² which was modeled after the federal provision, was adopted by the Supreme Court of Florida in 1972, and became effective January 1, 1973.¹³ Since the adoption of rule 1.442 in 1972, the Florida Legislature responded by creating sections 768.79 and 45.061 of the *Florida Statutes* to try and fill in the gaps left by the original procedural rule.¹⁴

At this point there were three provisions "with varying applicability, sanctions, and procedural requirements."¹⁵ Thus, the Supreme Court of Florida felt the need to come to the rescue of rule 1.442 in order to achieve greater uniformity and therefore revised the rule to include attorneys' fees along with costs.¹⁶ This version of rule 1.442 also, for the first time, made an offer of judgment accessible to both plaintiffs and defendants.¹⁷ Even though the 1990 version of rule 1.442 included selected requirements in either section 45.061 or 768.79, of the *Florida Statutes*, the revision failed to clear up the confusion.¹⁸

Thus the Florida Legislature introduced subsection six of section 45.061 which prohibits section 45.061 from being used for all causes of action accruing after October 1, 1990.¹⁹ Reducing the number of legal

10. *See id.* Note that a defendant was not able to recover attorney's fees under the 1989 version of section 768.79 of the *Florida Statutes* when the court entered a judgment of no liability in favor of the defendant. In other words, a defendant could only recover attorney's fees when a judgment of some amount was entered in favor of the plaintiff. *See Johnson v. Fye*, 654 So. 2d 1233, 1234 (Fla. 1st Dist. Ct. App. 1995).

11. Bonney, *supra* note 1, at 380.

12. The original version of rule 1.442 did not provide for attorneys' fees as a sanction and could only be utilized by defendants. FLA. R. CIV. P. 1.442 (1972).

13. William VanDercreek, *Civil Procedure: 1992 Survey of Florida Law*, 17 NOVA L. REV. 96, 126 (1992).

14. Wright, *supra* note 4, at 39.

15. *Id.* at 39.

16. *In re* Amendments to the Fla. Rules of Civil Procedure, Rule 1.442, 550 So. 2d 442, 443 (Fla. 1989).

17. *Id.*

18. *See* VanDercreek, *supra* note 13, at 126.

19. FLA. STAT. § 45.061(6) (1991).

sources aids in reaching uniformity in Florida's offer of judgment practice.²⁰ In *Timmons v. Combs*,²¹ in another attempt to achieve uniformity, the Supreme Court of Florida changed rule 1.442.²² In *Timmons*, the court stated:

The legislature has now repealed section 45.061 with respect to causes of action accruing after October 1, 1990. Ch. 90-119, § 22, Laws of Fla. This leaves section 768.79 as the only statute on the subject for new causes of action. Because the statute does contain procedural aspects which are subject to our rule-making authority, we hereby adopt the procedural portion of section 768.79 as a rule of this Court effective as of the date of this opinion.²³

Thus, for the period between the *Timmons* decision in 1992²⁴ and the recent enactment of the new version of the *Florida Rules of Civil Procedure* 1.442²⁵ by the Supreme Court of Florida, the only provision available to practitioners was section 768.79²⁶ for causes of action that accrued after 1990.²⁷

However, the Supreme Court of Florida has decided to enter the fray once again. The Civil Procedure Rules Committee of the Florida Bar recently recommended a new version of rule 1.442 which was adopted, in part, by the Supreme Court of Florida.²⁸ The idea behind the new version of the rule is to harmonize the differences between the rule and the existing statutes, namely sections 768.79²⁹ and 45.061.³⁰

Despite the concerted efforts of the legislative and judicial branches to simplify the process, the mystery surrounding offers of judgment still exists. The reason is because the procedural requirements of section 768.79³¹ and rule 1.442 are different.³² Therefore, the existence of two different sources

20. Scott Distasio, *Offers of Judgment-Wading Through the Confusion*, 68 FLA. B.J. 65 (1994).

21. 608 So. 2d 1 (Fla. 1992).

22. FLA. R. CIV. P. 1.442. In *Timmons*, the court decided to give deference to section 768.79 of the *Florida Statutes* by stating: "Florida Rule of Civil Procedure 1.442 is hereby repealed as of the date of this opinion." *Timmons*, 608 So. 2d at 3.

23. *Timmons*, 608 So. 2d at 3.

24. *Id.*

25. *See In re Amendments to Fla. Rules of Civil Procedure*, 682 So. 2d 105 (Fla. 1996).

26. FLA. STAT. § 768.79 (1990).

27. VanDercreek, *supra* note 13, at 126.

28. *In re Amendments to Fla. Rules of Civil Procedure*, 682 So. 2d 105 (Fla. 1996).

29. FLA. STAT. § 768.79 (1993).

30. FLA. STAT. § 45.061 (1990) (*repealed by Fla. Laws 1990, c. 90-119, § 22*).

31. FLA. STAT. § 768.79(2)-(6) (1997).

32. FLA. R. CIV. P. 1.442(A)-(H) (1997).

with conflicting procedures leaves one wondering which section to utilize in order to make a proposal for settlement successfully. In an efficient judicial system one should not have to wonder what statute and or procedural rule will govern when one is considering the option of making a proposal for settlement.

Because Florida's offer of judgment provisions differ in their approach, confusion has been created among practitioners and courts on which provision to apply and how to apply its intricate parts.³³ Further, in a given year that a cause of action accrues, amendments to the statutes and the rule can create substantive and procedural difficulties such that the delicate balance of the separation of powers³⁴ between the legislative and judicial branches may come into conflict.³⁴ Consequently, Florida's offer of judgment laws do not achieve the goal of alleviating the judicial system's caseload because the interplay among the existing sources results in prolonged litigation to determine whether attorneys' fees and costs should be awarded.³⁵ In fact, a recent opinion by the Fourth District Court of Appeal, stated: "We regret that this case is just one more example of the offer of judgment statute causing a proliferation of litigation, rather than fostering its primary goal to 'terminate all claims, end disputes, and obviate the need for further intervention of the judicial process.'"³⁶ Additionally, practitioners have been inclined to present an offer under all three provisions perhaps to increase their client's chances of being awarded,³⁷ which, in effect, sacrifices the court's efficiency in deciding disputes.³⁸

Although there are several areas that have caused confusion in Florida's offer of judgment laws this article focuses on two key areas that have created the most confusion. The first issue discusses the distinction between situations where an amendment to the statute or procedural rule can apply retroactively and situations where an amendment does not apply retroactively. The second issue discusses the element of reasonableness and how it may effect the amount awarded in a particular case.

II. ATTEMPTING TO ACHIEVE UNIFORMITY

33. See *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 610-13 (Fla. 1995) (comparing sections 45.061 and 768.79 of the *Florida Statutes*, and Rule 1.442 of the *Florida Rules of Civil Procedure*).

34. See *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992).

35. See *Security Prof'ls, Inc. v. Segall*, 685 So. 2d 1381, 1384 (Fla. 4th Dist. Ct. App. 1997).

36. *Id.* at 1381 (quoting *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989)).

37. *VanDercreek*, *supra* note 13, at 126.

38. *Segall*, 685 So. 2d at 1384.

A. *Confusion May Result When Substantive and Procedural Considerations Affect the Outcome*

Generally, the power to create substantive rights rests in the legislative,³⁹ branch while the power to create procedural rules rests in the judiciary.³⁹ The Supreme Court of Florida has always maintained the position that the right to collect attorneys' fees and costs is a substantive right and thus the legislature has the power to create an entitlement to fees.⁴⁰

However, under section 768.79⁴¹ or 45.061⁴² of the *Florida Statutes*, the procedural requirements of the statutes differ with the procedural requirements of rule 1.442.⁴³ The difficulty that arises is determining what guidelines will apply when a question exists as to whether or not a particular requirement creates a substantive right or whether the requirement is viewed as procedural in nature. In this situation, a problem may arise resulting in a potential infringement on the court's capacity to implement procedural rules.⁴⁴ The substantive and procedural distinction bears importance when a situation arises where a determination needs to be made on what version of a rule will apply where a cause of action accrues before an amendment to the rule has been made.

In *Twiddy v. Roca*,⁴⁵ the Second District Court of Appeal held that the defendants were not entitled to attorneys' fees because the 1987 version of section 768.79 of the *Florida Statutes*⁴⁶ did not allow for the recovery of fees and costs where a judgment of no liability was entered on behalf of defendants.⁴⁷ However, the amended version of section 768.79⁴⁸ in effect at the time the offer was made does allow for costs and fees for a defendant who receives a verdict of no liability. This amendment was based on the reasoning that the plaintiff should not be in a better position because they lost the entire case as opposed to the defendant being able to recover if the

39. FLA. CONST. art. V, § 2.

40. See *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995). *But see* Wright, *supra* note 4, at 35 (standing for the proposition that Florida's legislative enactments concerning offers of judgment are an unconstitutional infringement on the Supreme Court of Florida's procedural rule-making authority).

41. FLA. STAT. § 768.79 (1997).

42. FLA. STAT. § 45.061 (1997).

43. FLA. R. CIV. P. 1.442.

44. See *Hanzelik v. Grottoli*, 687 So. 2d 1363, 1365 (Fla. 4th Dist. Ct. App. 1997).

45. 677 So. 2d 387 (Fla. 2d Dist. Ct. App. 1996).

46. *Id.* at 388.

47. *Id.* In *Twiddy*, the appellate court reversed an award of attorney's fees granted to the defendant by holding that the 1987 version of section 768.79 of the *Florida Statutes* applied.

48. FLA. STAT. § 768.79.

plaintiff received a verdict of some amount.⁴⁹ The *Twiddy* court stated: “An award of attorney’s fees pursuant to section 768.79 is controlled by the statute in effect when the cause of action accrued, not when the offer was made.”⁵⁰ Thus, the defendant in this case was not entitled to fees and costs, because the old version of the statute did not provide an entitlement. The defendant could have recovered had the new version applied.⁵¹

However, in *Dynasty Express Corp. v. Weiss*,⁵² the Fourth District Court of Appeal rejected the defendant’s argument that the version of the rule in effect at the time the action accrued will govern rather than the version of the rule in effect when the offer was made.⁵³ This appears to be in direct conflict with the reasoning of *Twiddy*. However, it is not. The reason is because a subsequent amendment to a statute or rule will only apply retroactively if the controversy in the case concerns a procedural matter. In *Weiss*, the controversy centered around the effect of a withdrawal of an offer—which is a procedural matter.

In *Weiss*, the defendant made an offer which was accepted by the plaintiff for damages resulting from an automobile accident which allegedly caused the plaintiff to quit his practice as a physician.⁵⁴ Upon reaching an impasse in mediation on April 4, 1995, the defendant made an offer on April 5, 1995, pursuant to section 44.102 of the *Florida Statutes*.⁵⁵ Defendant’s offer was made under section 44.102, which allows an offer of judgment to be made under section 768.79 or 45.061 of the *Florida Statutes* after an

49. See *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992).

50. *Twiddy*, 677 So. 2d at 388.

51. *Id.* at 388. See also *Brodose v. School Bd. of Pinellas County*, 622 So. 2d 513, 515 (Fla. 2d Dist. Ct. App. 1993); *Metropolitan Dade County v. Jones Boatyard, Inc.*, 611 So. 2d 512, 514 (Fla. 1993).

52. 675 So. 2d 235 (Fla. 4th Dist. Ct. App. 1996).

53. *Id.* at 238.

54. *Id.* at 237.

55. *Id.* at 238. Section 44.102(6) of the *Florida Statutes* provides:

(6)(a) When an action is referred to mediation by court order, the time periods for responding to an offer of settlement pursuant to s. 45.061, or to an offer or demand for judgment pursuant to s. 768.79, respectively, shall be tolled until:

1. An impasse has been declared by the mediator; or
2. The mediator has reported to the court that no agreement was reached.

(b) Sections 45.061 and 768.79 notwithstanding, an offer of settlement or an offer or demand for judgment may be made at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.

FLA. STAT. § 44.102 (1996). See *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996).

impasse in mediation has been reached.⁵⁶ One year later, on April 6, 1996, after the offer was made and accepted, the defendant was made aware that the plaintiff testified in an unrelated suit in 1994 that he never intended to end his surgical practice due to any disability but instead gave other reasons.⁵⁷ Upon this finding, the defendant orally withdrew the offer made on April 5, 1995.⁵⁸ The defendant's position was that a verbal withdrawal was sufficient, while the plaintiff argued that the withdrawal had to be in writing.⁵⁹

The district court summed up its approach by stating: "[t]hese contrary positions depended upon which version of the statute and/or rule was determined to be dispositive."⁶⁰ The provisions of section 768.79⁶¹ enter the picture because the Supreme Court of Florida ruled in *Knealing v. Puleo*⁶² that section 768.79 is applicable to offers made under section 44.102.⁶³ The defendant based its position on the fact that "[t]he 1989 version of section 768.79, which was in effect in 1990 when the cause of action accrued in this case, did not dictate any method for withdrawing an offer of judgment."⁶⁴ However, the 1990 version of section 768.79 expressly stated that in order for an offer to be properly withdrawn it must be in writing.⁶⁵

The *Weiss* court rejected the defendant's argument that the reasoning of *Metropolitan Dade County v. Jones Boatyard, Inc.*⁶⁶ should apply "[b]ecause the right to collect fees is substantive in nature, in this regard the statute would not apply retroactively."⁶⁷ In *Jones Boatyard*, the court held that section 768.79 "does not apply to offers of judgment where the underlying cause of action accrued prior to its effective date."⁶⁸ Thus, the rule appears to be that if the controversy surrounding an offer of judgment

56. See § 44.102.

57. *Weiss*, 675 So. 2d at 237.

58. *Id.* at 238.

59. *Id.*

60. *Id.*

61. FLA. STAT. § 768.79 (1990).

62. 675 So. 2d 593 (Fla. 1996).

63. *Id.* at 593.

64. *Weiss*, 675 So. 2d at 238.

65. FLA. STAT. § 768.79(5) (1991). The statute reads as follows: "An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void." *Id.* In *Weiss*, the court concluded that "[t]his version, which indicates that a withdrawal must be in writing, has remained in effect since the 1990 amendment." *Weiss*, 675 So. 2d at 238.

66. 611 So. 2d 512 (Fla. 1993).

67. *Weiss*, 675 So. 2d at 238.

68. *Jones Boatyard*, 611 So. 2d at 513 (citing *Mudano v. St. Paul Fire & Marine Ins. Co.*, 543 So. 2d 876 (Fla. 4th Dist. Ct. App. 1989)).

deals with the substantive right to collect fees and costs, then an amendment to a rule disturbing this right will not apply retroactively.

Therefore, the court in *Weiss* relied on the reasoning of *State Farm Mutual Automobile Insurance Co. v. Laforet*,⁶⁹ which stated that: “[t]he general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary,⁷⁰ but that a procedural or remedial statute is to operate retrospectively.”⁷¹ By this reasoning, the *Weiss* court found that the amended version of section 768.79 that required all withdrawals be in writing applied retroactively to the defendant, because a retraction is determined to be a procedural matter rather than a substantive matter.⁷¹ Therefore, the court held that because the defendant’s offer was not retracted in writing, an oral retraction was ineffective.⁷² Additionally, the court pointed out that the procedural requirement of a written withdrawal in section 768.79 of the *Florida Statutes* did not conflict with Rule 1.442 of the *Florida Rules of Civil Procedure* because the Supreme Court of Florida’s decision in *Timmons*⁷³ incorporated the procedural portions of section 768.79 into rule 1.442.

The *Weiss* decision reached an undesirable result in the sense that the plaintiff may recover an offer of settlement that may have been induced by fraudulent representations.⁷⁴ Fortunately, a separate issue in the *Weiss* decision did grant an evidentiary hearing on the issue of the truthfulness of plaintiff’s representations.⁷⁵

It is important to illustrate here that normal contract principles do not apply to offers of judgment because the process is solely governed by statute or procedural rule.⁷⁶ The defendant in *Weiss* argued that common law principles of contract should apply and allow a verbal withdrawal because the 1989 version of 768.79 does not mention anything about the procedure for withdrawing an offer.⁷⁷ The court did not address this argument directly, but it would be safe to assume that the court would most likely read any

69. 658 So. 2d 55 (Fla. 1995).

70. *Id.* at 61 (citations omitted).

71. *Weiss*, 675 So. 2d at 238.

72. *Id.* at 239.

73. *Id.* (citing *Timmons v. Combs*, 608 So. 2d 1, 1 (Fla. 1992)).

74. *Id.* (“Thus the procedure of section 768.79, *Florida Statutes* (1991), as incorporated by rule 1.442, governed and required that the withdrawal be in writing”).

75. *Weiss*, 675 So. 2d at 240. The court determined that there was enough evidence presented by the defendant that the plaintiff fraudulently induced the offer made by the defendant and that “[g]iven the legal standards set out above . . . it is clear that the motions in this case sufficiently alleged conduct that would warrant an evidentiary hearing.” *Id.*

76. *Id.* at 239.

77. *Id.*

implications concerning contract doctrines into the statute instead of actually applying contract principles.

Accordingly, practitioners should be forewarned that when considering an offer of judgment it is imperative to first, look when the cause of action accrued and second, make a determination as to whether or not a substantive versus a procedural issue may arise. Then it should be more clear as to what version of a particular offer of judgment provision should be utilized.

B. The Element of Reasonableness: Should it Apply to the Amount Awarded or the Consideration of Entitlement?

Generally, once it has been decided that a party is entitled to costs and fees the judge then has the discretion to determine whether or not the amount awarded is reasonable.⁷⁸ Thereafter, the judge can make any adjustments to the amount awarded that are deemed necessary. After the Supreme Court of Florida's decision in *Timmons v. Combs*, Rule 1.442 of the *Florida Rules of Civil Procedure* adopted the procedural portions of section 768.79 so that all causes of action accruing after July 9, 1992, will be interpreted under section 768.79.⁷⁹ Thus, from the date of the *Timmons* decision to the present, section 768.79 of the *Florida Statutes* and Rule 1.442 of the *Florida Rules of Civil Procedure* approach the element of reasonableness in an identical fashion.⁸⁰ Therefore the uniformity between section 768.79 and rule 1.442 should provide a more stable approach in applying the element of reasonableness.⁸¹ However, section 45.061 remains unique in its approach to the element of reasonableness and how it is applied in a proposal of settlement.

For purposes of clarity, it is important to examine how each provision presently deals with reasonableness side by side.

Paragraph two of the 1997 version of section 45.061 of the *Florida Statutes* provides:

If upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider

78. See, e.g., § 768.79 (7)(b) (1997).

79. *Timmons v. Combs*, 608 So. 2d 1, 2 (Fla. 1992).

80. See *id.* and *In re Amendments Fla. Rules of Civil Procedure*, 682 So. 2d 105 (Fla. 1996).

81. See, David L. Kian, *The 1996 Amendments to Florida Rule of Civil Procedure 1.442 Reconciling a Decade of Confusion*, 71 FLA. B.J. 32, 35 (1997).

all of the relevant circumstances at the time of the rejection including:

- (a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer . . .

....

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected.⁸²

Paragraph (h), titled "Costs and Fees" of the 1997 version of the *Florida Rules of Civil Procedure* 1.442 provides:

(1) If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorney fees.

(2) When determining the reasonableness of the amount of an award of attorney fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

- (A) The then-apparent merit or lack of merit in the claim.
 (B) The number and nature of proposals made by the parties.
 (C) The closeness of questions of fact and law at issue.

(D) Whether a party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties;

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

(i) **Evidence of Proposal.** Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

(j) **Effect of Mediation.** Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.⁸³

82. FLA. STAT. § 45.061 (1997).

83. FLA. R. CIV. P. 1.442 (*amendment by In re Fla. Rules of Civil Procedure*, 682 So. 2d 105 (Fla. 1996)).

Likewise, section 768.79 of the *Florida Statutes* provides:

7(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such cases the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

At one point, both statutes 45.061 and 768.79 of the *Florida Statutes* and procedural rule 1.442 contained a different outlook on reasonableness and how it was to be used in determining whether attorney's fees would be awarded and/or how much would be granted.⁸⁴ Each source of law was worded differently so that the interplay between them could create conflicting results.⁸⁵ Before the *Timmons* decision the 1990 version of rule 1.442 provided a combination of sections 45.061 and 768.79 of the *Florida Statutes* in its treatment of how reasonableness affects whether an award of costs and attorneys' fees will be granted.⁸⁶ The 1990 version of rule 1.442 required a finding of both an unreasonable rejection of an offer and that the judgment be either twenty-five percent more or less than the offer rejected, depending on whether the offeror is the plaintiff or the defendant. On the other hand, section 45.061 of the *Florida Statutes* only requires that an offer be unreasonably rejected; the twenty-five percent factor only provides a presumption of unreasonableness.⁸⁷ Thus a party, with the judge's

84. Compare, FLA. STAT. § 45.061 (2) (1987), FLA. STAT. § 768.79 (7) (1990), and FLA. R. CIV. P. 1.442 (1990). Note, the latest version of FLA. R. CIV. P. 1.442 does not include any reference to the notion of the determination of the reasonableness of the rejection of an offer. See *In re Amendments to Fla. Rules of Civil Procedure*, 682 So. 2d 105, 106 (Fla. 1997).

85. See, *TGI Friday's v. Dvorak* 663 So. 2d 606 (Fla. 1995).

86. FLA. R. CIV. P. 1.442(h) (1991).

87. See *State Farm Mut. Auto. Ins. Co. v. Malmberg*, 623 So. 2d 755, 757 (Fla. 5th Dist. Ct. App. 1993) (citing *Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992) for the contention that "the

discretion, may recover fees and costs even if the judgment does not meet the twenty-five percent disparity between the offer and the judgment.⁸⁸

Section 768.79 of the *Florida Statutes*, however, creates an automatic entitlement to attorneys' fees and costs without making a determination on whether a rejection of an offer was reasonable.⁸⁹ The only way an award of fees and costs will be disallowed under section 768.79 is if the judge determines that the offer was not made in good faith.⁹⁰ Further, under section 768.79, the court can only make a determination of reasonableness⁹¹ as applied to the amount awarded, not as applied to the rejection of an offer.

Thus, when an offer is made under all three provisions simultaneously, courts are forced to pick through a pile of hay to find a needle in order to impose sanctions of costs and fees on the offeree. This is illustrated by the following analysis between two cases where a party made an offer under all three provisions.

In *Buchanan v. Allstate Insurance Co.*,⁹² the defendant insurance company was awarded attorneys' fees on appeal under section 45.061 of the *Florida Statutes*⁹³ when the plaintiffs rejected an offer of \$10,000, and the jury returned a verdict of no liability in favor of the defendant.⁹⁴ The offer by the defendant was made under sections 768.79 and 45.061 of the *Florida Statutes* and Rule 1.442 of the *Florida Rules of Civil Procedure*.⁹⁵ The court applied the facts of this case to each statute in turn to reach its conclusion.

Because the version of section 768.79 in effect at the time the cause of action accrued did not allow a defendant to recover fees where a judgment of no liability is rendered, the court denied the defendant attorney's fees under this section.⁹⁶ Likewise, the court found that because rule 1.442 had been interpreted to not allow the defendant to recover attorney's fees when a judgment of no liability was entered,⁹⁷ the defendant was prevented from recovering fees under this rule as well.

key to the operation of the statute is the unreasonable rejection of an *offer of settlement*") (emphasis in original).

88. FLA. STAT. § 45.061(2) (1991).

89. See *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993) ("Turning to the substance of section 768.79 itself, we conclude that the legislature has created a mandatory right to attorney's fees, if the statutory prerequisites have been met.").

90. FLA. STAT. § 768.79 (7)(a) (1997).

91. *Id.*

92. 629 So. 2d 991 (Fla. 1st Dist. Ct. App. 1993).

93. FLA. STAT. § 45.061(2)(b) (1991).

94. *Buchanan*, 629 So. 2d at 992.

95. *Id.*

96. *Id.*

97. *Id.* at 993.

However, the court concluded that the defendant could recover attorney's fees under section 45.061 on the basis that "the operative events that trigger the provisions of section 45.061 are the making of an offer and a rejection thereof."⁹⁸ More specifically, the court pointed out that because section 45.061(2)(b) provides a presumption of unreasonableness when the plaintiff rejects an offer that is at least twenty-five percent less than the judgment rendered, the defendant is entitled to attorney's fees.⁹⁹ Thus the court held: "[B]ecause the Buchanans rejected Allstate's \$10,000 offer and a judgment was entered for Allstate upon the jury's zero verdict, Allstate was entitled to attorney's fees as a sanction for the Buchanans' unreasonable rejection of the offer."¹⁰⁰

Accordingly, had the defendant made an offer under only section 768.79 or rule 1.442, the defendant would not have recovered anything. This is somewhat of an absurd result considering the fact that all three provisions were enacted for the same purpose, yet the purpose would have been defeated had the defendant not made an offer under section 45.061. In the future it is unlikely that there will be much litigation concerning section 45.061 because the Florida Legislature repealed this section as to causes of action accruing after October 1, 1990.¹⁰¹

The Supreme Court of Florida took a different approach in awarding a plaintiff attorney's fees and costs in *TGI Friday's, Inc. v. Dvorak*.¹⁰² The plaintiff made three different offers of judgment, one under each statute and procedural rule, before trial and the defendant restaurant rejected each one in turn. The jury awarded the plaintiff a verdict well in excess of plaintiff's offer to settle, but the trial court refused to award plaintiff attorney's fees under both statutes and rule 1.442.¹⁰³

The trial court denied the plaintiff's request under sections 768.79 and 45.061 on the grounds that both statutes were an unconstitutional infringement on the Supreme Court of Florida's authority to adopt all relevant rules of procedure.¹⁰⁴ Also, the trial court denied the plaintiff fees and costs under rule 1.442 because the judge determined that "1.442 provided no authority for the award of attorney's fees to Dvorak because the rule, which was enacted after Dvorak's cause of action accrued, was substantive in nature and could not be applied retroactively."¹⁰⁵

98. *Id.* at 993 (citing *Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992)).

99. *Buchanan*, 629 So. 2d at 993.

100. *Id.*

101. FLA. STAT. § 45.061(6) (1991).

102. 663 So. 2d 606 (Fla. 1995).

103. *Id.* at 610.

104. *Id.*

105. *Id.*

On appeal, the Fourth District Court of Appeal affirmed the trial court's denial of attorneys' fees under section 45.061 and rule 1.442 but reversed the trial court's denial of fees under section 768.79.¹⁰⁶ The Supreme Court of Florida, on review, established: "We approve each of the four distinct holdings of the district court and adopt its reasoning as our own."¹⁰⁷

Concerning the issue of reasonableness the district court held "whether TGI Friday's had unreasonably rejected Dvorak's offer of judgment had no bearing on whether Dvorak was entitled to an award of attorney's fees under section 768.79 [The statute] does not require that an offeree's rejection be unreasonable as a prerequisite to an award of fees."¹⁰⁸ More precisely, the district court stated: "[S]ection 768.79 does not give the trial court discretion to deny attorney's fees, once the prerequisites of the statute have been fulfilled, except if the court determines under section 768.79([2])(a) that 'an offer was not made in good faith.'"¹⁰⁹ In *Dvorak*, the Supreme Court of Florida also relied on the interpretation of section 768.79¹¹⁰ given in *Schmidt v. Fortner*,¹¹¹ which explained that the statute created an entitlement to fees once the statutory prerequisites were met.¹¹²

After it has been determined that an offer was made in good faith, there are only two requirements necessary under section 768.79 to be entitled to an award of attorneys' fees and costs.¹¹³ First, an offer or demand must be made and subsequently rejected, and second, the judgment rendered must be at least twenty-five percent more or less than the demand or offer.¹¹⁴

The only discretion the judge has in awarding attorneys' fees and costs under section 768.79 applies to the reasonableness of the amount awarded under all relevant circumstances¹¹⁵ upon a finding that a qualifying offer was made in good faith.¹¹⁶ Section 768.79 creates an entitlement to fees and costs once the two prerequisites are met, and then the court may consider whether the amount awarded is reasonable.¹¹⁷ Thus, under section 768.79

106. *Id.* at 609 (note that the court also found that sections 768.79 and 45.061 were constitutional).

107. *Dvorak*, 663 So. 2d at 611.

108. *Id.* at 610.

109. *Id.* (quoting *Dvorak v. TGI Friday's, Inc.*, 639 So. 2d 58, 59 (Fla. 4th Dist. Ct. App. 1993)).

110. FLA. STAT. § 768.79 (1991).

111. 629 So. 2d 1036 (Fla. 4th Dist. Ct. App. 1993).

112. *Dvorak*, 663 So. 2d at 611 (*but see id.* at 614 (Wells, J., dissenting)).

113. *See Schmidt*, 629 So. 2d at 1039.

114. *Dvorak*, 663 So. 2d at 611.

115. *See State Farm Mut. Auto. Ins. Co. v. Malmberg*, 623 So. 2d 755, 758 (Fla. 5th Dist. Ct. App. 1993).

116. *Dvorak*, 663 So. 2d at 611.

117. FLA. STAT. § 768.79 (1990).

and rule 1.442, unlike section 45.061, the question of reasonableness only applies to the amount awarded and not to the reasonableness of the rejection. The Supreme Court of Florida summed it up nicely when it stated: “[T]he wording of [section 768.79] the statute as a whole leaves no doubt that the reasonableness of the rejection is irrelevant to the question of entitlement.”¹¹⁸

In comparing the differences between section 45.061 and section 768.79 of the *Florida Statutes*, it is clear that section 45.061 grants the judiciary more discretion in awarding fees and costs. Perhaps this is part of the reason why the Supreme Court of Florida recommended that the legislature change section 768.79.¹¹⁹ The recommended change would give the court discretion to determine the entitlement to attorneys’ fees and costs which would include the reasonableness of a rejection of an offer as a determinative factor of entitlement.¹²⁰ The supreme court stated:

We believe that it would advance the goals of justice and fairness to empower the trial court with the discretion to decide the entitlement to attorney fees based upon the criteria set forth in Section 768.79 plus the recommended factor (A) in addition to the discretion to decide the reasonableness of the amount of an award of attorney fees.¹²¹

However, the court did not adopt the recommendation by the Rules Committee to give the court discretion through rule 1.442 to determine a party’s entitlement to fees and costs because the court “must respect the legislative prerogative to enact substantive law.”¹²² If the court had adopted the recommended version of rule 1.442 presented by the Rules Committee, the effect would essentially bestow the power upon the court to determine the entitlement of an award of attorneys’ fees based on several factors, including the reasonableness of the rejection of an offer.¹²³ The power of the court to determine the entitlement of fees was expressly forbidden in *Dvorak*

118. *Dvorak*, 663 So. 2d at 613.

119. *In re Amendments to the Florida Rules of Civil Procedure*, 682 So. 2d 105, 106 (1996).

120. *Id.*

121. *Id.*

122. *Id.* at 106.

123. The Civil Procedure Rules Committee of the Florida Bar recommended that rule 1.442(h)(2) be amended to read: “‘When determining *the entitlement to* and the reasonableness of the amount of an award of attorneys’ fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following [additional] factors . . . (A) whether the proposal was reasonably rejected.’” *Id.* at 105 (emphasis provided by the court).

on the basic fact that only the legislature can create the substantive right to attorneys' fees.¹²⁴

In summary, the present state of the law regarding the element of reasonableness is that once it is determined that a party is entitled to an award of fees and costs the judge can only alter the amount awarded in accordance with the factors listed in section 768.79(7)(b) and rule 1.442(h).¹²⁵

III. CONCLUSION

Presently, the law regarding proposals for settlement in Florida is in better shape than it was in the late eighties and the early nineties. There are two reasons why the process is improved: section 768.79 and rule 1.442 are in agreement with respect to the approach of the element of reasonableness and how it applies to the amount awarded and secondly, the number of sources directly governing a proposal for settlement has been reduced because section 45.061 is no longer applicable to causes of action that accrue after October 1, 1990. Reducing the number of sources directly governing proposals for settlement and achieving uniformity regarding the element of reasonableness reduces confusion and thus provides a more efficient judicial system. However, there are two areas that, if modified, can further enhance the proposal for settlement process in the future.

First, there are procedural portions of section 768.79 that are in conflict with rule 1.442 that need to be rectified and second, the legislature should follow the advice of the Supreme Court of Florida by allowing the judiciary to apply the standard of reasonableness to the entitlement to fees and costs.

Currently, "[r]ule 1.442 differ[s] from corresponding provisions of 768.79 in several significant ways: the time for service of a 'proposal for settlement' . . . ; the form and content of a proposal; the acceptance or rejection of a proposal; and the effect of mediation on the time requirements for proposals."¹²⁶ The Florida Legislature can easily solve this discrepancy by deleting the remaining sections of the statute that conflict with the procedural rule. In addition, the legislature could expressly refer a party to rule 1.442 for the procedure required for a proper proposal. In the mean time, section (a) titled "Applicability" under rule 1.442 insures that any procedural difference, mainly concerning the time frame for filing an offer of judgment and the form of the offer, with section 768.79 will result in

124. *Dvorak*, 663 So. 2d 606. *But see id.* at 614 (Wells, J., dissenting).

125. Compare FLA. STAT. § 768.79(7)(b) (1997) and FLA. R. CIV. P. 1.442 (h) (1997).

126. David L. Kian, *The 1996 Amendments to Florida Rule of Civil Procedure 1.442: Reconciling a Decade of Confusion*, 71 FLA. B.J. 32, 35 (1997). Compare FLA. STAT. § 768.79(1)-(6) (1997) and FLA. R. CIV. P. 1.442(b)-(g) (1997).

conflict. The undesirable effect of this is that practitioners who are deceived by the procedural requirements of section 768.79¹²⁷ may make an offer that conforms with the statute but does not conform with rule 1.442. Therefore, a party that should be awarded fees and costs may be denied simply because of the deceptive procedural requirements of the statute.

Accordingly, the legislature should limit section 768.79 to the relevant sections that create an entitlement to attorneys' fees and costs¹²⁸ and refer the offering party to rule 1.442 for the necessary criteria for a properly drafted offer of judgment.

Furthermore, if the Florida Legislature adopts the recommendations of the Supreme Court of Florida, with respect to the issue of reasonableness, the fairness of the proposal for settlement process will be enhanced. The reason is because the existing twenty-five percent threshold that creates an automatic entitlement to fees and costs, assuming that the proposal was made in good faith, is somewhat arbitrary. The current process would deny a party fees and costs if a verdict is one penny short of coming within the twenty-five percent threshold. For example, if a party offered to settle a case for \$100 and the opposing party rejected the offer, the current system would deny the offering party fees and costs if the verdict is returned in the amount of \$124.99. Although this example consists of a small amount of money the consequences are much worse when the verdict is much larger.

Thus, section 45.061 of the *Florida Statutes* provides the most suitable approach to the issue of reasonableness because the twenty-five percent element is viewed as a presumption of unreasonableness and not as a determinative factor.¹²⁹ The point is the judge, in most circumstances, has been with the case since day one and is in the best position to decide whether or not an offer was reasonably or unreasonably rejected. Therefore, the Florida Legislature should incorporate the spirit of 45.061 regarding the statute's approach to the reasonableness of a rejection of an offer in to section 768.79.

In closing, the current process is better off than it was in the past decade but efforts to refine the process must continue. Until then, the proposal for settlement process will unnecessarily remain another complex area of the law.

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127. FLA. STAT. § 768.79(2)-(5) (1997).

128. FLA. STAT. § 768.79(6)-(8) (1997).

129. FLA. STAT. § 45.061(2) (1997).

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Totenberg's ground-breaking report about University of Oklahoma Law Professor Anita Hill's allegations of sexual harassment forced the Senate Judiciary Committee to re-open the hearings on the Supreme Court nomination of Judge Clarence Thomas. Totenberg anchored NPR's Peabody Award-winning gavel-to-gavel coverage of the congressional confirmation that captured the attention of the nation.

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