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TESTIMONY OF

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on

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Bills to create a sexual offender registration and community notification program

for the

Judiciary Committee
Pennsylvania House of Representatives

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Branches:
California
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Adam Walsh Children's Fund

Mr. Chairman, as Director of Legal & Legislative Affairs of the National Center for Missing and Exploited Children, I want to thank you for the opportunity to present testimony regarding the bills being considered in this special session to create a sexual offender and community notification program in the Commonwealth of Pennsylvania. I also want to thank the various Senators and Representatives of this Legislature who have sponsored these bills for their leadership on this vital issue.

Let me begin by first briefly describing the National Center for Missing and Exploited Children (NCMEC). Established in 1984, NCMEC is a private, nonprofit organization working with the U.S. Department of Justice to help find missing children and prevent child victimization. Serving as the national resource center on missing and exploited children required under the Missing Children's Assistance Act passed by the U.S. Congress, NCMEC provides assistance to parents, law enforcement, public and private agencies, legislators, and other professionals handling cases of missing children and child sexual exploitation.

As part of our technical assistance mission, we monitor state laws on a variety of child protection topics, including sex offender registration. Currently 40 states have passed legislation on this topic, beginning with California in 1947 and most recently New Jersey in October, 1994. During the current legislative year, a number of states besides Pennsylvania are considering similar legislation and several are considering amendments to existing laws. Last fall Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act which was intended to provide guidance to the states to pass laws addressing sex offender registration.

The registration of convicted sex offenders reentering the community is a control that helps protect children from victimization. Since sexual attraction of these offenders to children may not be curable, and there is abundant evidence of the high propensity of such offenders to reoffend, states have good reason to monitor the whereabouts of convicted sex offenders. Protecting the public, especially children, from sex offenders is a primary governmental interest. The privacy interests of persons convicted of sex offenses do not supersede the government's legitimate interest in public safety.

On April 14, 1992 the New York Times reported that one in six prisoners in state and federal prisons were sex offenders. It noted, "the number of imprisoned sex offenders is growing at a rate second only to drug crimes, in large part because of an increased willingness of victims to report the crimes."

There is a growing recognition that most sex offense victims are children, and that reporting is still low. The FBI Law Enforcement Bulletin reported that "only one to ten percent of child molestation cases are ever reported to police." A National Victim Center survey estimated that 61% of rape victims are less than 18 years of age, 29% less than 11. A recent U.S. Department of Justice study of 11 jurisdictions and the District of Columbia reported that 10,000 women under the age of 18 were raped in 1992 in these jurisdictions. At least 3,800 were children under the age of 12. The Attorney General of California found that 61% of the more than 60,000 registered sex offenders in California were convicted of offenses against victims who were less than 18 years of age, and another 18% victimized children and adults.

The courts have consistently upheld the constitutionality of sex offender

registration programs. I am attaching for your information a memorandum of case law to date which I have prepared.

The programs have generally been viewed as a way to protect children and to aid law enforcement. Nothing in the legislation changes in any way the requirement that law enforcement follow existing due process requirements in investigating an offense, questioning an offender, and obtaining a search warrant.

Creation of a sex offender registry will assist law enforcement in investigating cases involving sexual offenses against children by providing immediate access to computerized information on convicted felony sexual offenders living in the community. In light of the fact that these cases are extremely difficult for law enforcement to investigate and victims of sexual offenses frequently suffer long-term effects as a result of crime, a sex offender registry can provide law enforcement with a valuable investigative tool.

An additional component of community notification has been considered. The National Center believes that programs such as the one used in Washington State, and the one described in the Jacob Wetterling Act, that permits law enforcement to release relevant and necessary information to the public when necessary for public protection is the most appropriate way to share information about sex offenders with the community. Notification guidelines should be developed to implement whatever program that is ultimately passed to provide for educating the community on appropriate ways to use and react to the information they may be provided about individuals returning to the community.

A sex offender registry is not a panacea, but it is a simple, common sense approach to this problem. It is tough, aggressive, balanced, sensitive to victims, practical and most importantly effective. I urge this committee to give careful attention to the issues of sex offender registration and community notification which you are considering today to help protect the children of the Commonwealth of Pennsylvania.

Dean

THE CONSTITUTIONALITY OF STATUTES REQUIRING CONVICTED SEX OFFENDERS TO REGISTER WITH LAW ENFORCEMENT

As of November 1, 1994, forty states have passed legislation requiring persons convicted of certain crimes or sex offenses to register with local and state police.[1] Typically, the person must provide his name and address within one or two weeks of arriving in the jurisdiction. Some of these statutes have been challenged in state courts as violative of state and federal constitutional provisions. Although some courts have limited their scope of application, the statutes have generally withstood attack on constitutional grounds.

I. CONSTITUTIONAL CHALLENGES

Constitutional challenges to sex offender registration statutes most frequently arise under state and federal constitutional provisions relating to punishment. These include the prohibition against *ex post facto* laws and the Eighth Amendment's prohibition against cruel and unusual punishment. Courts have upheld the statutes in one of two ways. Some courts, such as the Supreme courts of Arizona, Illinois, and Washington State have characterized the registration requirement as non-punitive and therefore outside the scope of constitutional provisions relating to punishment. Courts of other states, such as California, hold that the registration requirement is "punishment" within the Eight Amendment, but not "cruel and unusual" punishment prohibited by the Constitution. Courts have also upheld the statutes against equal protection and due process challenges.

A. Retroactive Application

Sex offender registration statutes often apply to sex offenders who were convicted before the statute was enacted. The *ex post facto* clause of the U.S. and comparable provisions of state

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[1] *Ala. Code § 13A-11-200 to 13A-11-203; Alaska Stat. § 12.63.010; Ariz. Rev. Stat. Ann. § 13-3821 to 13-3824; Ark. Stat. Ann § 12-12-901 to 12-12-909; Cal. Penal Code § 290, 290.2, 290.3 and 290.4; Col. Rev. Stat. §18-3-412.5; Conn. Pub. Act 94-246; Del. Code Ann. tit. 11 § 4120; Fla. Stat. Ann § 775.13; Ga. Code Ann 42-9-44.1; Idaho Code § 18-8301 et seq.; 730 Illinois Compiled Statutes 150/1 et seq.; Ind. Code 5-2-12; Kan. Stat. Ann. § 22-4901 to 22-4910; KRS Chap. 17.510; La. Rev. Stat. Ann. Tit. 15 § 540-549; Me. Rev. Stat. Ann. Title 34A c. 11 §11001; Mich. Senate Bill 397 (1994) (effective 10/1/95); Minn. Stat. § 243.166; 1994 Miss. H.B. 2482; Missouri Senate Bill 693 (1994); Mont. Code Ann. § 46-18-254 and § 46-23-501 to 507; Nev. Rev. Stat. § 207.151 to 207.157; N.H. Rev. Stat. Ann. § 213:1; N.J.S. 2C:52-2; N.D. Cent. Code § 12.1-32-15; Ohio Rev. Code Ann. § 2950.01 to 2950.08; Okla. Stat. ch. 8B § 581 to 587; Ore. Stat. §181.518 to 181.519; R.I. Gen. Laws § 11-37-15; S.C. Code Ann. § 23-3-400 to 23-3-490; S.D. Codified Laws § 22-22-31; Tenn. Code Ann. § 38-6-110; Tex. Penal Code Ann. Title 110A Art. 6252-13c.1; Utah Code Ann. § 77-27-21.5; Va. Code Ann. §19.2-390.1; Wash. Rev. Code § 9A.44.130 & § 9A.44.140; W.Va. Code § 61-8F-2; Wis. Stat. § 175.45; Wyo. Stat. §7-19-301 to 7-19-306.*

constitutions prohibit the retroactive application of laws which inflict criminal punishment. The U.S. Supreme Court has held that a law violates the *ex post facto* clause if it 1) punishes as a crime an act previously committed, which was innocent when done, 2) makes more burdensome the punishment for a crime, after its commission, or 3) deprives one charged with crime of any defense available according to law at the time when the offense was committed. Collins v. Youngblood, 497 U.S. 37 (1990). Since this only applies to laws which inflict punishment, some courts have upheld the registration statutes by characterizing them as non-punitive.

In State v. Noble, 829 P.2d 1217 (Ariz. 1992), the Arizona Supreme Court upheld the retroactive application of the state sex offender registration statute. Noble pleaded guilty to child molestation and sexual conduct with a minor and was ordered to register as a sex offender even though the statute was passed after his criminal conduct. The Arizona Supreme Court reasoned that the statute was outside the scope of the *ex post facto* clause because it was regulatory rather than punitive. In making this determination, the Court first looked to legislative purpose. Specifically, "whether the legislative aim was to punish [an] individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." Id. at 1221. (*quoting* De Veau v. Braisted, 363 U.S. 144, 160 (1960)). If the court finds that the purpose is non-punitive, the next step is to determine "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." Id. (*quoting* United States v. Ward, 448 U.S. 242, 250 (1980)). In this case, because the statute's legislative history did not indicate whether the purpose was punitive or regulatory, the Court applied the factors enumerated in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963). Those factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . .

Applying these factors, the court concluded that the statute was, on balance, regulatory and not punitive because it served the legitimate government purpose of providing assistance to law enforcement officials.

The analytical framework set up by the Arizona Supreme Court has been followed by the courts of Washington State. In State v. Ward, 869 P.2d 1062 (Wash. 1994), two cases were consolidated and heard by the Washington Supreme Court, which held that the Washington registration statute, enacted in February, 1990, could be applied to crimes committed prior to its enactment. The court also concluded that the statute did not violate the equal protection and due process clauses of the state and federal Constitutions. On March 18, 1988, Ward was convicted of first degree statutory rape and incarcerated. He was released in April, 1990 and informed in May, 1990 of his duty to register as a sex offender. Ward claimed that the statute violated constitutional provisions against *ex post facto* laws. The other defendant, John Doe, pleaded

guilty to a rape which occurred in 1979. He was paroled in 1987 and finally discharged in 1992. Doe received written notification of the registration requirement in June, 1990. Doe claimed that the statute violated the *ex post facto*, equal protection, and due process clauses of the state and federal Constitutions.

The Washington Supreme Court first found that the state legislature had unequivocally stated that the statute's purpose was to "assist local law enforcement." Id. at 24. The court went on to determine whether the statute had an effect so punitive that it nullified the regulatory intent. After applying the Mendoza-Martinez factors, the court concluded that the registration requirement was not punishment.

Characterizing the registration requirement as non-punitive has allowed state courts to impose registration on offenders who plead guilty without knowledge of the requirement. In People v. Taylor, 561 N.E.2d 393 (Ill. App. Ct.), *cert. denied*, 567 N.E.2d 340 (1990), the Illinois Court of Appeals upheld a lower court's certification of a defendant as a sex offender even though it was done several months after sentencing. The defendant argued that (1) the trial court lost jurisdiction 30 days after sentencing, and (2) he was not advised of the certification provision prior to pleading guilty. The court held that the trial court retains jurisdiction over sex offender certification because it is an administrative function. In addition, certification is not punishment and therefore is not part of the sentencing procedure. In a similar case, People v. Murphy, 565 N.E.2d 1359 (Ill. App. Ct. 1991), the Illinois Court of Appeals upheld the defendant's certification as a sex offender even though the trial court ordered it over a year after it imposed the sentence. The court held that the statute was administerial, not penal, and therefore independent of sentencing. Furthermore, the trial court was not required to inform the defendant of the certification requirement before accepting his plea.

The New Hampshire Supreme Court has likewise relied on the regulatory nature of the registration statute to overcome a defendant's challenge on *ex post facto* grounds. In State v. Costello, 643 A.2d 531, the defendant was convicted of a sexual offense in Massachusetts in 1991 and placed on probation. His probation was transferred to New Hampshire. The legislature enacted a sex offender registration statute in 1992 and amended it in 1993 in such a way that it applied retrospectively to the defendant. The court emphasized the non-punitive, regulatory nature of the statute and found any punitive effect to be *de minimis*. The court further noted that the violation for which the defendant was being prosecuted, failure to register as a sex offender, was itself a separate offense and therefore there was no retroactivity issue.

In California where the registration requirement is regarded as punishment, the California Supreme Court has held that with regard to a guilty plea, there is no violation of the *ex post facto* clause unless the defendant shows prejudice. In People v. McClellan, 862 P.2d 739 (Cal. 1993), the defendant entered into a plea bargain agreement in which he pleaded guilty to several crimes, including assault with intent to rape. The trial court sentenced him to a total of thirteen years and then informed him of the requirement to register as a sex offender. The defendant appealed on the grounds that he was not informed of the registration requirement prior to his plea. The California Supreme Court refused to grant relief on two grounds: first, defendant's counsel failed

to make a timely objection, and second, the defendant failed to show prejudice. The record failed to show that the defendant would not have pleaded guilty even if he had known about the registration requirement. The defendant's assertion that he would have pleaded otherwise is insufficient if not supported by the record.

Not all sex offender statutes have received favorable treatment by state courts when challenged on *ex post facto* grounds. In State v. Payne, 633 So.2d 701 (1st Cir. 1993), the Louisiana Court of Appeals for the First Circuit rejected the Noble analysis and held that the statute violated the *ex post facto* clause. The defendant in that case pleaded no contest to five counts of indecent behavior with juveniles. He was sentenced to five concurrent sentences of seven years at hard labor. The judge suspended five years on each count and assigned four years of supervised probation. The defendant was then required to register as a special condition of probation. The defendant appealed his sentence as excessive and claimed that the registration requirement violated the *ex post facto* clause of the state and U.S. Constitutions. The Louisiana Court of Appeals for the First Circuit found that the registration exposes the defendant to additional penalties since he may be fined and/or imprisoned for failing to register. Therefore, the requirement is punishment and violates the *ex post facto* provisions of the U.S. and Louisiana Constitutions.

B. Eighth Amendment Prohibition Against Cruel and Unusual Punishment

The U.S. Constitution and corresponding sections of state constitutions prohibit the state from inflicting cruel and unusual punishment. Courts characterizing the sex offender registration requirement as non-punitive have held that the Eight Amendment does not apply. Courts which view the requirement as punishment have traditionally weighed the severity of the offense against the harshness of the penalty based on a three-part test articulated by the U.S. Supreme Court in Solem v. Helm, 463 U.S. 277 (1983). Under the Solem test, courts considered "(1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. 277 (1983). Recently, a divided Supreme Court seems to have overruled the Solem test, holding that statutorily-mandated penalties do not require consideration of individual suitability unless the penalty is death. Harmelin v. Michigan, 501 U.S. 957, 996 (1991). The concurring opinion of Justices Kennedy, O'Connor and Souter would retain a degree of proportionality consideration for "extreme sentences that are grossly disproportionate to the crime." Harmelin at 1001 (*quoting* Solem). It would therefore appear that the particulars of Eighth Amendment doctrine are still in such flux that it is unlikely that the Supreme Court would find a sex offender registration scheme unconstitutional under any of these tests.

In People v. Adams, 581 N.E.2d 637 (Ill. 1991), the defendant was informed of the duty to register after he pleaded guilty to criminal sexual assault. The defendant appealed the order requiring him to register as a sex offender. The Illinois Supreme Court held that registration was not punishment for Eighth Amendment purposes and that, even if it was punishment, it was not "cruel and unusual" punishment prohibited by the Eighth Amendment. The court reasoned that

there is no additional stigma attached to registration because the registrant's criminal history is already public record. Registration only makes the information more readily available to police. In addition there were restrictions on the dissemination of information. In finding that the statute was not punitive, the court asserted that the Mendoza-Martinez factors were only relevant where there was no conclusive evidence of legislative intent. The court refused to apply the factors because legislative intent was clear in this case.

In Arizona v. Lammie, 793 P.2d 134 (Ariz. 1990), the defendant confessed to sexually assaulting a mother and her 17 year old daughter after entering their home at knife point. Through a plea bargain agreement, the defendant was convicted of a lesser included offense of attempted sexual assault. The Arizona Supreme Court upheld the sex offender registration statute as applied to the defendant even though the statute did not explicitly provide for attempted sexual assault. The court went on to find that lifetime registration for an attempted sexual assault was not "cruel and unusual punishment" prohibited by the Eighth Amendment. The court noted that registration serves the dual purpose of deterring future crimes and of aiding police investigation. "Registration for lifetime places a defendant on notice that when subsequent sexual crimes are committed in the area where he lives, he will be subject to investigation. This may well have a prophylactic effect, deterring him from future sexual crimes. Furthermore, it is a proper tool to be given to police officers for use in investigating criminal offenses." Id. at 139-140.

The California registration statute applies to all classes of sex offenses and imposes a lifetime obligation. Since the California courts regard the registration requirement as punishment, they review cruel and unusual punishment cases under the proportionality analysis. In this regard, the statute has run into constitutional problems as applied to relatively minor offenses. In In re Reed, 663 P.2d 216 (Cal. 1983), the California Supreme Court held that mandatory registration of sex offenders convicted of the misdemeanor of disorderly conduct violates the state constitution's prohibition against cruel and unusual punishment. The defendant was convicted of a misdemeanor under Section 647(a) of the penal code for soliciting "lewd and dissolute conduct" from an undercover vice officer in a public restroom. The court reasoned that Section 647(a) was originally enacted as a vagrancy statute which proscribed certain kinds of conduct. The registration requirement was not applicable to this offense because the defendant did not pose a serious danger to society. The court then held that the registration statute was void as applied to Section 647(a) offenses.

Since 1983, the California Court of Appeals has upheld the application of the statute to other misdemeanor sex offenses. In People v. King, 20 Cal.Rptr.2d 220 (Cal. Ct. App. 1993), the California Court of Appeals found that the registration requirement was not cruel and unusual punishment as applied to a misdemeanor offender. The defendant was apprehended after he was seen on the street exposing himself and making lewd gestures and comments to pedestrians. The court applied a test similar to the Solem three factors: 1) the nature of the offense; 2) penalties imposed in the same jurisdiction for more serious crimes; and 3) penalties imposed for the same offense in other jurisdictions. The court then found that the punishment was not cruel and unusual on its face or as applied to that particular offender.

In In re DeBeque, 260 Cal.Rptr.441 (Cal. Ct. App. 1989), the California Court of Appeals upheld the registration of an offender convicted of the misdemeanor of masturbating in front of two young boys. The court recognized that the object of the registry statute "is to protect children from sex offenders and to permit apprehension and segregation of such offenders." The statute was properly applied to this offender because children are a class of victims who require paramount protection and the purpose of the law is to make persons convicted of a crime such as child molesting available for police surveillance.

The state courts of Ohio have similarly taken the view that the registration requirement is punishment. Like California, the Ohio statute imposes the registration requirement on misdemeanor offenses. The Ohio statute, however, applies to misdemeanors only upon a second conviction. In State v. Douglas, 586 N.E.2d 1096 (Ohio Ct. App. 1989), the Court of Appeals of Ohio upheld the statute as applied to a sex offender convicted four times of public indecency or indecent exposure, a fourth degree misdemeanor. Applying the three factors enumerated in Solem v. Helm, the court concluded that the registration requirement was not cruel and unusual punishment.

C. Due Process

The problem of notice is again at issue in due process challenges to the registration statutes. Federal and state Constitutions provide that a person shall not be deprived of life, liberty, or property without due process of law. Due process requires a defendant to make plea bargain agreements intelligently and voluntarily. In this regard, sex offender statutes have been challenged because the defendant may have no knowledge of the requirement at the time of his plea, and only later learn that he must register. States differ on their analysis of the due process question depending on whether or not they view registration as punishment. Courts which characterize the requirement as punitive have had a more difficult time circumventing due process issues.

The Washington Supreme Court held in State v. Ward, 869 P.2d 1062 (Wash. 1994), that due process only requires a defendant to be informed of all direct consequences of his plea. Since the court does not regard the registration requirement as additional punishment, it reasoned that registration is a collateral consequence so there is no constitutional requirement to advise the defendant of the requirement at the time of his guilty plea. The collateral consequence analysis was used in State v. Clark, 880 P.2d 562 (Wash. Ct. App. 1994). There, the defendant received notice of his duty to register at his sentencing rather than at the time of his plea agreement. The court again emphasized the indirect, or collateral, nature of the duty to register, comparing it to mandatory DNA testing, and rejected defendant's claim that such knowledge would have affected his plea. Further, the court went on to hold that the lack of notice problem was cured by the actual notice given at the time of sentencing.

An Illinois Appellate Court similarly relied on the collateral consequence argument in rejecting a defendant's due process claim in People v. Murphy, 565 N.E.2d 1359 (Ill. App. Ct. 1991). The defendant contended that his certification as a Habitual Child Sex Offender was void

because the trial court had certified him more than 30 days after sentencing, and that his plea was involuntary because the court had not informed him of the possibility of such certification. The court held that "because certification is a collateral consequence of a defendant's conviction for a sex offense against a child rather than a penalty or an enhancement of the sentence, courts are not prohibited from certifying a defendant after his sentence has been imposed." Id. at 1360. The court also noted that courts are under no duty to inform of eligibility for certification prior to accepting a plea. Id.

In Arizona v. Lammie, 793 P.2d 134 (Ariz. 1990), the Arizona Supreme Court held that applying the statute to an attempted sexual assault does not violate due process even though the statute did not explicitly provide for attempted assaults. The court reasoned that the defendant had adequate notice because an attempted assault is a lesser included offense.

In People v. Adams, 581 N.E.2d 637 (Ill. 1991), the Illinois Supreme Court rejected the defendant's claim that the statute irrationally and arbitrarily differentiates among sex offenders. The court noted that a statute will be upheld if it bears a rational relationship to a public interest and the means used are reasonable. Id. at 642. The court held that the statute has a rational relation to law enforcement by providing ready access to information on previously convicted sex offenders. "There is a direct relationship between the disability, the registration of child sex offenders, and the purpose served by the statute, the protection of children." Id.

D. Equal Protection

Constitutional guarantees require equal treatment for similarly situated persons. Statutes making arbitrary classifications are subject to equal protection challenges. A statute which distinguishes against a suspect class, such as along racial lines, will receive strict scrutiny. In most other cases, the classification need only have a rational basis to the intended purpose. Since sex offenders have not been found to be a suspect class, courts have applied the rational basis test. Thus far, registration statutes have met this standard.

The Washington state statute was challenged on equal protection grounds because it only applies retroactively to those under some form of supervision. Therefore, offenders who were on parole when the statute was enacted would have to register while those who had already been released from parole would not. The Supreme Court of Washington noted that sex offenders are not a suspect class and applied the rational basis standard. The court held that the classification has a reasonable and substantial relationship to its purpose of assisting law enforcement and is therefore a valid exercise of the state's police power. State v. Ward, 869 P.2d 1062 (Wash. 1994).

In People v. Adams, 581 N.E.2d 637 (Ill. 1991), the defendant claimed that the statute is underinclusive because it omits other similarly situated sex offenders such as child pornographers and those who would use children for prostitution. The court held that "the legislature is not required to solve all of the evils of a particular wrong in one fell swoop." Id. at 642. The court reasoned that the statute is targeted at preventing direct victimization of

children. Although child pornographers may also victimize children, the legislature could rationally conclude that a pornographer's activities are profit-oriented rather than sex-oriented. Id.

II. SCOPE OF APPLICATION

In the course of applying the sex offender registration statutes, courts have interpreted the statutes to encompass a broad class of offenders in some instances while narrowing the scope in others. Although most courts are reluctant to strike down a sex offender registration statute as unconstitutional on its face, courts have been more willing to limit the scope of the statute by holding it inapplicable in some instances.

The Washington registration statute has withstood a challenge to its application to juvenile offenders. The defendant in State v. Acheson, 877 P.2d 217 (Wash. Ct. App. 1994), claimed that as a juvenile offender, he could not be required to register because he had not been "convicted" under the meaning of the statute. The court acknowledged that juvenile offenses ordinarily are not considered convictions, but argued that the legislative intent driving the statute compelled application to juvenile offenders. Id. The court further held that the juvenile's duty to register arises pursuant to the statutory mandate and therefore survives the jurisdiction of the juvenile court. As such, the juvenile offender's duty to register does not automatically expire upon turning twenty-one years of age. Id.

The California Court of Appeals has held that with respect to juveniles, the registration statute only applies to offenders who have been committed to the State Youth Authority and are subsequently released or paroled. In People v. Bernardino, 5 Cal. Rptr. 2d 746 (Cal. Ct. App. 1992), the appellant undressed and tried to penetrate a child who was under 14 years old. Appellant, who was 15 or 16 years old at the time, was charged with committing a lewd and lascivious act by means of force or fear upon a child under the age of 14. The court held that the registration requirement did not apply to the appellant because he had never been committed to the Youth Authority.

Earlier, the California court reached a seemingly contrary conclusion. In People v. Tate, 210 Cal.Rptr. 117 (Cal. Ct. App. 1985), the defendant was charged with lewd and lascivious acts upon a child under the age of 14 years, enhanced by the fact that the child was under the age of 11 years and the defendant occupied a position of special trust. Defendant was convicted of annoying or molesting a child under the age of 18 years in a *nolo contendere* plea. The California Court of Appeals held that the registration requirement was applicable to this offense.

Illinois has been similarly inconsistent in this area. In Illinois v. Rogers, 555 N.E.2d 53 (Ill. App. Ct. 1990), the Illinois Court of Appeals held that the defendant did not have to register for his prior offense of contributing to the delinquency of a child. The defendant allegedly had sexual intercourse with a 15-year old girl when he was 17 years old. The court held that the defendant's earlier conviction under a 1984 statute that was no longer valid law did not qualify

him as a habitual child sex offender. However, in Illinois v. Doyle, 578 N.E.2d 15 (Ill. App. Ct. 1991), the state statute defined a habitual sex offender as one who "is convicted a second or subsequent time" of any of the specified offenses. The defendant pleaded guilty to separate offenses against two different victims at different times. The defendant appealed the order requiring him to register as a sex offender claiming that he was not convicted a "second" time since the pleas were entered at the same proceeding. Rejecting this argument, the court noted that the pleas were entered at the same time only as a matter of administrative convenience. The defendant pleaded guilty to two unrelated incidents and the order registering him as a habitual sex offender was valid.

III. CONCLUSION

State courts have differed in their treatment of constitutional challenges to sex offender registration statutes. The most consequential dividing line between the courts is their treatment of whether or not the registration requirement is punishment. State courts in Arizona, Illinois, and Washington State have held that the statutes are merely regulatory and not punitive. Courts taking this approach have had an easier time upholding the statutes against challenges that they violate the *ex post facto* clause and the Eighth Amendment's prohibition against cruel and unusual punishment. A clear declaration of legislative intent unequivocally stating that the purpose of the statute is regulatory have aided courts in holding that the statutes are non-punitive. Even so, the statute must not be so punitive in effect to negate the legislature's non-punitive purpose.

Courts taking the view that registration is punishment, such as the state courts of California, Louisiana, and Ohio, have had to weigh the seriousness of the offense against the harshness of the registration requirement. Statutes which have been held to be punitive are more susceptible to challenges that they violate the *ex post facto* clause, the Eighth Amendment, and the due process clause. This is particularly true if the statute is not limited to more serious sex offenses. Due process and *ex post facto* problems also arise when the statute is applied to offenses which occurred before the statute was enacted and to offenders who pleaded guilty without knowledge of the registration requirement. Although state courts differ in their approaches to resolving constitutional questions regarding sex offender statutes, the statutes have generally been well received and most courts have not held the statutes facially unconstitutional.