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Jane Grall: Critical Perspectives on Megan's Law

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the American Psychiatric Association gave him the Guttmacher Award for his pioneering casebook, *Law, Psychiatry and the Mental Health System*. Five years ago, after teaching law for forty years, Professor Brooks allegedly retired. Since then, though, he has done extensive work in the area of sex offender law. Among many other things, he is working on a comprehensive book on the subject.

Finally, closing out this symposium will be Professor Eric Janus of the William Mitchell College of Law in St. Paul, Minnesota. Professor Janus' many publications include two books on mental health law. Prior to becoming a law professor, he was a legal services attorney for eleven years, and one of his areas of specialty was mental health law. Professor Janus is co-counsel in *In Re Linehan*,¹⁶ litigation challenging the constitutionality of Minnesota's sex offender commitment law. As you can see, we are in for a very stimulating and informative session, so without further ado, I turn the podium over to Jane Grall.

Ms. Jane Grall

JANE GRALL:¹⁷ Thank you very much. It is a real pleasure to be here today to discuss Megan's Law, which has been extremely controversial in an academic forum, as opposed to the heat of the legislative forum, or, more recently, the judicial forum. I have been asked to speak about the legislative and the jurisprudential history of the law, as well as to cover its major components. The history really starts with an event—the rape and murder of seven-year-old Megan Kanka.¹⁸ I raise that at the start, not to inject emotionalism into this day of academic discussion, but to

¹⁶ 544 N.W.2d 308 (Minn. App. 1996).

¹⁷ Assistant Attorney General, Legislative Affairs, State of New Jersey, Office of the Attorney General.

¹⁸ See Jon Nordheimer, 'Vigilante' Attack in New Jersey is Linked to Sex-Offenders Law, N.Y. TIMES, Jan. 11, 1995, at A1.

acknowledge the reality.

The legislature in New Jersey was confronted by and has dealt with the difficult issues surrounding community notification and the balance between public safety and individual rights in an extremely highly charged atmosphere, and they did it under the pressure of a grass roots movement calling for a community notification law.¹⁹ Some would say that that, in itself, creates a presumption of invalidity and suggests that the law was a reaction, and a reaction that was improper.²⁰ I think that we have to get beyond that. We have to acknowledge that legislators are often confronted with acting on public safety issues especially because of dramatic events.²¹

Dramatic events point out problems. In this case, the person has not yet been convicted,²² but confessed and is charged with the rape and murder of Megan Kanka; he was a two-time offender through the New Jersey system.²³ Both instances were cases involving sexual offenses

¹⁹ Joel B. Rudin, *Megan's Law: Can it Stop Sexual Predators--and at What Cost to Constitutional Rights?*, CRIM. JUSTICE, Fall 1996, at 3 (stating vicious acts of sexual violence against children and other victims have galvanized a national movement for sex offender registration and notification laws).

²⁰ Robert Hanley, "Megan's Law" Is Questioned As Injunction Is Extended, N.Y. TIMES, July 10, 1996, at B6 (stating in response to the pleas of Megan's parents, state lawmakers rushed the bill through without committee hearings).

²¹ The Brady Bill is just such an instance of legislators acting for public safety in response to a dramatic event. See Glenn Kessler, *Convention 96 / Thumbs Up / Brady's, Delegates Applaud Clinton on Gun Control*, NEWSDAY, Aug. 27, 1996, at 5.

²² See, e.g., Leslie Haggin, *Measure Not Enough, Some Say*, THE RECORD (New Jersey), Aug. 30, 1994, at A1 (explaining that a sexual offender who is not technically convicted, but remains free, is a "loophole that lawmakers have not addressed during the recent furor over Jesse Timmendequas, a convicted sex offender, accused of killing . . . Megan Kanka").

²³ William Glaberson, *Stranger on the Block -- A Special Report: At Center of "Megan's Law" Case, A Man No One Could Reach*, N.Y. TIMES, May 28, 1996, at A1 (stating that Megan's alleged attacker, Jesse K. Timmendequas, had twice pled guilty to sexually assaulting small children and served more than seven years in prison for his two crimes).

against children.²⁴ He had been sent to a special New Jersey prison for sex offenders, where every person who is found to have committed aggravated sexual assault, sexual assault, or aggravated criminal sexual contact, the most serious of sex offenses, is evaluated by a team of psychologists and a psychiatrist, prior to sentencing.²⁵ Then the sentencing judge has an option, to sentence that person to the term of imprisonment for the offense, as they would with any other offender, and then to designate that the offender be sentenced to regular prison or to the Adult Diagnostic and Treatment Center, where he will receive special treatment.²⁶

The test in the evaluation is whether the person's conduct in

²⁴ *Id.*

The first attack occurred in 1979 when Timmendequas was 18 years old. He rode up on his bicycle and persuaded two 5-year-old girls to accompany him searching for ducks, leading them by the hand. One of the girls left and went for help, but the other remained with Timmendequas. He told police '[w]hen we got down to the bottom of the hill by the brook, I knocked her down and then pulled her pants down.' Timmendequas pled guilty to attempted aggravated sexual assault. The second attack took place in 1981, Timmendequas had just turned twenty years old. This incident too involved two girls each age seven. He was able to lure them away with the promise of firecrackers, but again one of the girls went for help. Timmendequas told police '[w]e walked down the trail a little bit and I grabbed her around the throat, and pulled her off to the side of the woods and when she started to turn blue I let her go and ran and that's it.' Doctors concluded that no sexual contact had occurred and Timmendequas pled guilty to attempted sexual contact and attempting to cause serious bodily injury. *Id.*

²⁵ *Id.* (stating "Timmendequas was sentenced to ten years and sent to New Jersey's center for sexual offenders at Avenel for the 1981 attack"); see also Mike Kelly, *Megan's Law Could Drive Predators Underground*, ASBURY PARK PRESS (New Jersey), Aug. 1, 1996, at A9 (explaining that Avenel, or the Adult Diagnostic and Treatment Center, is a prison specially set up to treat sex offenders and it is there that work of understanding sexual predators is started).

²⁶ See *N.J. v. Dittmar*, 457 A.2d 842, 843 (N.J. Super. Ct. App. Div. 1982) (stating that a sentencing judge under N.J. STAT. ANN. §2C:47-3 may sentence the offender "upon the recommendation of the Adult Diagnostic and Treatment Center . . . to the Center for a program of specialized treatment for his mental condition. . .").

committing the offense is characterized by a pattern of repetitive and compulsive behavior.²⁷ If the psychiatrist, the evaluative team, and the Adult Diagnostic Center so recommend, and the judge so finds, the judge is authorized, but not required, to sentence the defendant to that prison.²⁸

This is significant because such a sentence was given here.²⁹ Therefore, under New Jersey law, everything that could be done to rehabilitate this offender was done.³⁰ He was sent to Avenel, or ADTC, the Adult Diagnostic Treatment Center, where he served his entire sentence.³¹ He was never paroled.³² The parole standard in New Jersey, and especially for the Adult Diagnostic Treatment Center, has to do with the likelihood of commission of an offense.³³ This offender was never found capable of making an acceptable adjustment in the community,

²⁷ *Id.* at 843 (explaining that no sex offender may be sentenced to Avenel without a finding of repetitive, compulsive behavior).

²⁸ *Id.* at 843 (stating that as a complete alternative to incarceration, the sentencing judge upon recommendation of the Adult Diagnostic and Treatment Center may sentence an offender to a term of probation with the condition that he receive "outpatient psychological treatment in a manner to be prescribed in each individual case").

²⁹ See Ralph Siegal, *Suspect Admits Killing Girl, 7,; Also Accused of Sexual Abuse*, THE RECORD (New Jersey), Aug. 2, 1994, at A4.

³⁰ *Id.* (stating that Timmendequas was released prior to serving his entire sentence because "there [was] no basis on which to hold [him] beyond 1988").

³¹ See *id.* at A1 (stating that Timmendequas, who was sentenced to a ten-year prison sentence for attempted sexual assault of a child in 1982, was released, despite being denied a recommendation to appear before the parole board in 1984, for work and good behavior after serving only six years). Parole and early release differ in that one can be released prior to completion of their sentence without a parole board recommendation based on factors such as credit for good behavior, time served prior to conviction, etc. Telephone Interview with Jane Grall, Assistant Attorney General, State of New Jersey (Jan. 3, 1997). Timmendequas was released early, not paroled. *Id.*

³² Siegal, *supra* note 29, at A4.

³³ See *Doe v. Poritz*, 662 A.2d at 374 (explaining that "very few offenders sentenced to ADTC [Adult Diagnostic Treatment Center] ever meet the dual standards required for parole from ADTC" and that the majority of ADTC inmates leave only after serving their maximum sentences because they are not found "capable of making an acceptable social adjustment in the community").

and so he never even got before the parole board,³⁴ which would have had to deny parole if they had found it likely he was going to commit another crime if released.³⁵ So the system obviously did not work.³⁶

We had a person who served the maximum sentence and then was released, not with any support, but into the community at large, because the law had no basis to have any jurisdiction over that offender anymore.³⁷ He had served his full sentence.³⁸ Looking at this, as the facts developed, there was outrage that the law could not have done anything.³⁹ There was no parole board to point to as a scapegoat, nor was there a prosecutor to point to as a scapegoat for downcharging or plea bargaining the charge. Here was someone who had served the maximum term, and still the public was not protected.

He had lived in Megan Kanka's neighborhood for eighteen months prior to her death.⁴⁰ He was a person known in the neighborhood, and according to his confession, he lured Megan into his home by promising to show her his puppy.⁴¹ The parents and the people

³⁴ See Siegal, *supra* note 29, at B5.

³⁵ See *Doe v. Poritz*, 662 A.2d at 374.

³⁶ See generally *id.* Timmendequas was sentenced to ADTC, whose program is designed specifically to treat such a mental condition. *Id.* However, any rehabilitation obviously failed. *Id.*

³⁷ See generally Siegal, *supra* note 29, at B5 (noting that there is no program in New Jersey which would require that a community be notified after a sex offender is released from prison).

³⁸ *Id.*

³⁹ Ivette Mendez, 'Megan's Law' Sex Offender Bills Go to Governor, STAR LEDGER (Newark), Oct. 10, 1994 (quoting New Jersey State Senate President Donald DiFrancesco as stating that the new community notification laws would be designed to close the "deficiencies and leniency in our laws that allow dangerous, even deadly, sexual offenders to threaten our neighborhoods and harm our children").

⁴⁰ See Donna Murphy Weston, *Megan's Law Based on Fallacy; Did Parents Know About a Molester*, THE RECORD (New Jersey), July 9, 1996, at A1 (stating that the Kanka's neighbor, Joseph Cifelli, invited Jesse Timmendequas to live with him at his mother's house in late 1992 or 1993 and that Megan was murdered July 29, 1994).

⁴¹ See Henry Stern, *Clinton Gets GOP Praise on Megan's Law*, THE RECORD (New Jersey), Aug. 18, 1994, at A3 (reciting the circumstances surrounding the death).

in the community asked, "why didn't we know?"⁴² No one knew, the police didn't know, no one knew of this offender's conviction or record, and that's what started the grass roots movement.⁴³

The legislature's reaction was quick. Megan's death was on July 29th.⁴⁴ On August 9th, the legislature announced that it was going to consider legislation to address this problem,⁴⁵ and by October 31st the Governor signed the legislation.⁴⁶ Community notification and registration aspects of the law, which I know are the major topics today, were not the only aspects of the law and they were not all the Legislature looked at.⁴⁷

Immediately, people realized that our parole system was clearly broken.⁴⁸ It was set up in a way to invite failure.⁴⁹ Our riskiest

⁴² See David Jackson, *Ashley Estell Slaying Haunts Plano; Suspect in '93 Killing To Go on Trial in Midland*, DALLAS MORNING NEWS, Aug. 16, 1994, at 1A (stating the neighbors of Megan Kanka were unaware of Timmendequas' prison record).

⁴³ See Mike Kelly, *Megan's Law Could Drive Predators Underground*, ASBURY PARK PRESS (New Jersey), Aug. 1, 1995, at A9.

⁴⁴ See Weston, *supra* note 40.

⁴⁵ See Michelle Ruess, *Victim's Kin Work to Pass Megan's Law; Press Congress on Crime Bill*, THE RECORD (New Jersey), Aug. 9, 1994, at A1 (noting that New Jersey Governor Christine Todd Whitman and the legislature prepared to announce that day legislation in response to the deaths of Megan Kanka and another girl, Amanda Wengert, at the hands of previously convicted sex offenders).

⁴⁶ See N.J. STAT. ANN. §2C:7 (West 1995 & Supp. 1996).

⁴⁷ See Goodman, *supra* note 6, at 764. The nine bills enacted by the New Jersey Legislature that are known as Megan's Law, which contain aspects other than community notification and registration of sex offenders. *Id.* The law includes:

- 1) the registration of sex offenders and the creation of a central registry;
- 2) community notification;
- 3) notification procedures for the release of certain offenders;
- 4) extended terms of incarceration for sexually-violent predators;
- 5) the consideration of murder of a child under fourteen as an aggravating factor in death penalty proceedings;
- 6) involuntary civil commitment of dangerous criminals;
- 7) lifetime community supervision;
- 8) the collection of a DNA sample from sex offenders for the creation of a DNA database and data bank; and
- 9) no good-time credits for sex offenders who refuse treatment. *Id.*

offenders, the people who are kept incarcerated until the end of their sentence, are the riskiest people in the prisons, and those are the people who are being sent out of our prisons with no supervision or support.⁵⁰ The legislature passed a bill to change that.⁵¹ Community supervision is now a part of every sentence that a sex offender receives in New Jersey.⁵²

Another thing the legislature changed was related to treatment, because the people who worked at the Department of Corrections and the Adult Diagnostic Center said the offenders have no motivation to

⁴⁸ See generally Bill Sanderson, *Tougher Parole System Touted; N.J. Law Makers Weighing Bills*, THE RECORD (New Jersey), Mar. 23, 1995, at A1 (noting that proposals to increase prison terms and enforce the death penalty did not go far enough so legislators sought to make it tougher to get out of prison by proposing a bill that places the burden of proof on prisoners to show they deserve parole, rather than the current law, which requires that the Parole Board prove why inmates should remain imprisoned).

⁴⁹ *Report Blasts State Parole System*, U.P.I., May 18, 1986, available in LEXIS, Nexis library, UPI file.

New Jersey's parole system is fraught with problems. Parolees are being released from prison after serving only a fraction of their sentences with some serving just one-fifth of their jail terms. The parole process uses an elaborate method to speed inmates through the overcrowded prison system that is allowing the most violent group of prisoners in the state's history to be released with little or no effort at rehabilitation. *Id.*

⁵⁰ *Fixing Avenel's Failures; It's Just a Dormitory for Deviates*, THE RECORD (New Jersey), Jun. 25, 1995, at L2. The article describes the findings of a legislative task force which studied the Adult Diagnostic and Treatment Center at Avenel as:

[a] third of the inmates, all deemed 'compulsive and repetitive' sex offenders, receive as little as 1.5 hours of group therapy a week, and the groups are much too large to be effective. A small percentage of inmates refuse treatment altogether. And none is required to keep getting psychological help upon release, even though continued treatment is considered a key to prevention. It is difficult to imagine a worse strategy for dealing with compulsive violent sex offenders. *Id.*

⁵¹ N.J. STAT. ANN. §2C: 43-6.4 (West 1995).

⁵² *Id.*

participate in treatment.⁵³ Every offender in New Jersey is getting time off their sentence for good behavior, which is awarded automatically.⁵⁴ You have to affirmatively show a disciplinary charge to take that away.⁵⁵ The legislature changed that with respect to Avenel offenders, or the sex offenders sentenced to our special prison.⁵⁶ They now are awarded good time credits only if they are participating in treatment.⁵⁷

Another thing people asked is, "why do convicts get out of jail so quickly?"⁵⁸ There was another law in this package of bills that increased sentences.⁵⁹ It gave extended terms for people who commit violent sex offenses against children.⁶⁰ And there was another change; it said if someone is mentally ill and dangerous under our ordinary civil commitment standard, when they are going out the door of the prison we want a double check on them, and if commitment proceedings are

⁵³ *But see* Michelle Ruess, 'Tremendous Effect' Of Megan's Law Cited Getting Inmates Back Into Therapy, Task Force Told, THE RECORD (New Jersey), Feb. 2, 1995, at A3 (commenting that denying inmates credit for good behavior if they refuse to participate in treatment, motivates them to participate).

⁵⁴ N.J. STAT. ANN. §30:4-140 (West 1995 & Supp. 1996).

⁵⁵ N.J. STAT. ANN. §30:4-123.53 (West 1995 & Supp. 1996). Stating in relevant part:

[a]n adult inmate shall be released on parole at the time of parole eligibility, unless information supplied in the [pre-parole] report . . . indicates by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time. *Id.*

⁵⁶ N.J. STAT. ANN. §2C:47-8 (West 1995).

⁵⁷ *Id.*

⁵⁸ *Violent Felons Do Less Than Half of Sentences*, THE RECORD (New Jersey), July 26, 1995, at A14 (stating that "violent criminals serve just under half of their prison sentences behind bars. . .").

⁵⁹ N.J. STAT. ANN. §2C:43-7 (West 1995).

⁶⁰ N.J. STAT. ANN. §2C:44-3(g) (West 1995) (requiring extended terms of imprisonment for defendants convicted of a crime which involved violence or threat of violence and the victim of the crime was 16 years of age or less).

appropriate, we will initiate them.⁶¹

The changes in our civil commitment law is another topic for today.⁶² The changes in the parole law with the period of community supervision afterwards,⁶³ the changes in good time credits,⁶⁴ and the longer sentences,⁶⁵ of course, the legislation applied prospectively—only to crimes committed after the effective date of the law.⁶⁶

That was not the case with two pieces of this package: the civil commitment bill⁶⁷ and the community notification and registration laws.⁶⁸ They were applied retroactively.⁶⁹ I think the legislature did that because they did not view either of these measures as punitive.⁷⁰ The registration law and the community notification law were both designed

⁶¹ N.J. STAT. ANN. §30:4-82.4 (West 1995 & Supp. 1996) (requiring those "in need of involuntary commitment" not be released without appropriate supervision and treatment). Those in need of involuntary commitment are defined by N.J. STAT. ANN. §30:4-82.4(m) as "an adult who is mentally ill, whose mental illness causes the person to be dangerous to self or dangerous to others . . . and who is unwilling to be admitted to a facility voluntarily for care. . . ." *Id.*

⁶² See N.J. STAT. ANN. §30:4-82.4 (West 1995 & Supp. 1996).

⁶³ *Id.* at §2C:43-6.4.

⁶⁴ *Id.* at §2C:47-8.

⁶⁵ *Id.* at §2C:43-7.

⁶⁶ N.J. STAT. ANN. §2C: 7-2 (b) (1) (West 1995 & Supp. 1996) (requiring registration for "repetitive" and "compulsive" sex offenders regardless of date of commission of offense or date of conviction); §2C:7-2 (b)(2) (requiring other sex offenders to register "if conviction, adjudication of delinquency or acquittal by reason of insanity . . . is entered on or after the effective date of this act" or if the offender is serving a sentence or is confined to a mental institution as a result of the offense); *cf.* N. Y. CORRECT. LAW §168 (g) (requiring registration and notification "for every sex offender who on the effective date of this article is then on parole or probation" for a sex offense).

⁶⁷ See N.J. STAT. ANN. §30-:4-82.4. Although the civil commitment statute does not state whether the law can be applied retrospectively, it applies to inmates incarcerated prior to enactment. *Id.*

⁶⁸ See *id.* at §§2C:7-1 to 7-13 (providing the community notification and registration laws will take effect immediately).

⁶⁹ *Id.*

⁷⁰ *Doe v. Poritz*, 662 A.2d at 422 (holding that the registration and notification provisions are not punitive).

to do exactly what the public had demanded in its grass roots movement, which was, give the public information that it can use, if it chooses, to protect victims, likely victims, potential victims. These measures are designed so that we never again have the situation where the police and public are totally unaware of the fact that there is a sex offender living in the community.⁷¹ So came the registration and community notification law.

Briefly, the registration law requires all of the following people to register: anyone who has committed a serious sex offense;⁷² anyone who has endangered the welfare of a child in a manner that involves a sex offense;⁷³ and anyone who has committed kidnapping,⁷⁴ luring,⁷⁵ false imprisonment,⁷⁶ when a child is involved and the perpetrator is not the parent.⁷⁷ All of these people have to register. The people required to register are those on probation at the time of the law,⁷⁸ those on parole at the time of the law,⁷⁹ and those in the prisons at the time the law took effect.⁸⁰ Additionally, there was one group of people who were required to register even if their parole terms were over, and that is, those offenders who, at the time of their sentencing, had been found to be repetitive and compulsive sex offenders and given the special sentence

⁷¹ Goodman, *supra* note 6, at 768.

⁷² N.J. STAT. ANN. §2C:7-2 (b) (West 1995).

⁷³ *Id.* at §7-2 (b).

⁷⁴ *Id.* at §2C: 7-2b(1)(2); *see also* §2C: 13-1(c)(2) (defining the crime of kidnapping).

⁷⁵ *Id.* at §2C: 7-2(b)(2); *see also* §2C: 13-6 (defining the crime of luring or enticing a child).

⁷⁶ *Id.* at §2C:7-2(b); *see also* §2C: 13-3 (defining the crime of false imprisonment).

⁷⁷ N.J. STAT. ANN. §§2C:7-1 to 7-5 (West 1995). The statute is not limited to those offenders who are sentenced to a term of incarceration. *Id.* The statute includes those offenders who may be serving a sentence of probation, parole, or other form of community supervision. *Id.*

⁷⁸ *Id.* at §2C:7-2b(2).

⁷⁹ *Id.*

⁸⁰ *Id.*

to our Adult Diagnostic and Treatment Center.⁸¹ Those people have to register regardless of the date of their conviction.⁸² Of course, with respect to the constitutional question of an *ex post facto* law, if the law were *ex post facto*, which in our opinion it is not, the constitutional bar would apply equally to the people who were still in prison and had been out of prison. This is because the constitutional test for an *ex post facto* law relates back to the date of the commission of the crime.⁸³ Therefore, if someone is in prison on the effective date of the law, their crime has already been committed on the effective date of the law, just as much as a person who has already been released from prison.⁸⁴

The group that must register in New Jersey does not only include convicted offenders.⁸⁵ It also includes juveniles who are adjudicated delinquent,⁸⁶ and persons who have been found not guilty by reason of insanity.⁸⁷ In looking at the group of people who might pose a danger to the community—persons as to whom the community—should have

⁸¹ *Id.* An offender is required to register under the provisions of the statute if his/her conviction, adjudication of delinquency, or acquittal by reason of insanity is entered on or after October 31, 1994, the effective date of the act. *Id.*

⁸² N.J. STAT. ANN. §2C: 7-2b(1) (West 1995). However, if the court finds an offender's conduct to be characterized by a pattern of repetitive, compulsive behavior, the offender must register as provided in the statute regardless of the date of the commission of the sexual offense or the date of conviction. *Id.*; see *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995) (stating such a requirement provides a justification that supports the remedial, not punitive intent of the statute).

⁸³ See *Doe v. Poritz*, 662 A.2d at 390-92.

⁸⁴ *Doe v. Poritz*, 662 A.2d at 388-89 (stating that the plaintiff's *ex post facto* challenge was rejected because the legislature's intent was not to punish but rather to protect the public from danger).

⁸⁵ See N.J. STAT. ANN. §2C: 7-2(a) (West 1995).

⁸⁶ *Id.* at §2C:7-2(a); see also *Goodman*, *supra* note 6, at 766 n.20 (stating that New Jersey is one of six states that require juveniles to register).

⁸⁷ See N.J. STAT. ANN. §2C:7-2(a) (West 1995); see also N.J. STAT. ANN. §2C:7-2(b)(2) (West 1995) (defining insanity).

noticethe legislature said the fact of conviction is not the determinant.⁸⁸ This is another indication that what the legislature intended to do here was not to punish, but to provide information to the public.

With respect to notification, registration is an obligation for life.⁸⁹ Every time you move, you must give notice of the move prior to doing so,⁹⁰ but you can ask to be relieved of the responsibility to register if you have gone fifteen years without committing a crime and you can show that you are not likely to pose a danger to others.⁹¹ Notification is not automatic.⁹² New Jersey's notification was patterned after Washington's law on community notification, but it has been amplified.⁹³ The Washington law permits law enforcement officials to give notification when necessary to protect the public.⁹⁴ The New Jersey law goes farther than that. It requires notification when necessary to protect

⁸⁸ *See id.* at §2C: 7-1. The purpose of the statute, according to the legislature, is to "alert the public" to individuals who have been deemed sex offenders who prey on children, and those who do so as a result of mental illness. *Id.* Therefore, it is the danger of recidivism that is the determinant, not the requirement of a conviction. *Id.*

⁸⁹ *Id.* at §2C:7-2(e) (West 1995 & Supp. 1996); *see also*, *Doe v. Pataki*, 919 F. Supp. 691, 695 (D. N.J. 1996) (stating an offender must register every ninety (90) days, potentially for life).

⁹⁰ N.J. STAT. ANN. §2C:7-2(d) (West 1995 & Supp. 1996).

⁹¹ *Id.* at §2C:7-2(f).

⁹² *Id.* at §2C:7-8 (a). "The Attorney General shall promulgate guidelines and procedures for the notification." *Id.* "The guidelines shall identify factors relevant to risk of re-offense and shall provide for three levels of notification depending upon the degree of the risk of re-offense." *Id.*

⁹³ *See* Michael L. Bell, Comment, *Pennsylvania's Sex Offender Community Notification Law: Will it Protect Communities from Repeat Sex Offenders?*, 34 DUQ. L. REV. 635, 636 (1996) (stating that New Jersey's community notification law was modeled after Washington's Community Protection Act); *see also* WASH. REV. CODE. ANN. §9A.44.130 (West 1988 & Supp. 1996) (providing only for registration). *But see* WASH. REV. CODE. ANN. §4.24.550 (1) (West 1988 & Supp. 1996) (providing that law enforcement agencies provide notification where necessary).

⁹⁴ WASH. REV. CODE. ANN. §4.24.550 (1) (West 1988 & Supp. 1996).

the public.⁹⁵ Notification consists of three levels. First, for offenders found to be low risk, the notification is to all law enforcement officers.⁹⁶ It goes out to law enforcement officers in the community where the person will reside and where they are likely to encounter the registrant.⁹⁷ For moderate risk offenders, community organizations with responsibility for the supervision of children or that provide services to rape victims or battered women are also given notification.⁹⁸ And, for the third level, high risk, notification is given to members of the community at large likely to encounter the registrant.⁹⁹

Our notification provisions called for the prosecutor to make the risk assessment,¹⁰⁰ and the law did not provide an opportunity for a judicial hearing prior to notification.¹⁰¹ The New Jersey Supreme Court, in the first and only challenge in state court, found that the law violated due process.¹⁰² The Court required that a hearing take place at which the prosecutor bears the burden of coming forward with evidence of a prima facie case that the person belongs in the risk group to which the

⁹⁵ See N.J. STAT. ANN. §2C:7-1 (West 1995) (stating that "the 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").

⁹⁶ *Id.* at §2C:7-8 (c)(1) (providing that "law enforcement agencies likely to encounter the person registered shall be notified").

⁹⁷ *Id.*

⁹⁸ *Id.* at §2C:7-8(c)(2) (providing for notification to organizations such as schools, religious and youth organizations).

⁹⁹ *Id.* at §2C:7-8(c)(3) (providing for notification to "members of the public likely to encounter the person registered").

¹⁰⁰ See N.J. STAT. ANN. §2C:7-8(d)(1) (West 1995) (providing that the county prosecutor where the person was convicted, along with the county prosecutor where the person will reside and law enforcement officials will determine the risk of re-offense of the registered person).

¹⁰¹ *Id.*; see also *Doe v. Poritz*, 662 A.2d 367,420 (N.J. 1995) (requiring a hearing because absent notice and an opportunity to be heard, the risk assessment procedure violated the sex offender's due process rights).

¹⁰² See *Doe v. Poritz*, 662 A.2d at 421 (holding that due process requires that a sex offender must have a hearing before the public is notified about his conviction).

prosecutor has assigned them,¹⁰³ and the registrant has an opportunity to challenge the placement.¹⁰⁴

Under the law, the Attorney General's Office was charged with developing guidelines for risk assessment,¹⁰⁵ and those guidelines have been modified in light of the New Jersey Supreme Court's decision.¹⁰⁶ The guidelines are applied through a risk assessment scale that considers factors such as the number of prior offenses, the type of prior offenses, response to treatment, recent behavior in jail or in the community, and other factors relevant to the increased or reduced risk of a re-offense.¹⁰⁷

As you know from what I have just said, the New Jersey Supreme Court found a problem with that aspect of the law. But with respect to *ex post facto* claims,¹⁰⁸ claims that the law violates the Double Jeopardy Clause by providing additional punishment¹⁰⁹ and claims that it is cruel and unusual punishment,¹¹⁰ the Court concluded that the law

¹⁰³ *Id.* (holding that a hearing is required prior to notification under Tiers Two and Three, where the offender is categorized as a moderate or high risk offender, respectively).

¹⁰⁴ *Id.*

¹⁰⁵ See N.J. STAT. ANN. §2C:7-8(C) (West 1995).

¹⁰⁶ *Doe v. Poritz*, 662 A.2d at 381-87 (modifying the Attorney General's guidelines to require: a) "behavior in the community" and psychological profiles be considered to reduce risk level as well as increase risk at all tier levels; b) notice only be given to organizations "likely to encounter" offender for Tiers II and III; c) notice only go to organizations actually caring for or supervising women or children for Tier II; d) judicial review of prosecutor's determination of risk classification).

¹⁰⁷ N.J. STAT. ANN. §2C:7-8(c) (West 1995).

¹⁰⁸ See *Doe v. Poritz*, 662 A.2d at 387 (stating that the problem of recidivism and the concern "to devise a remedy without punishing -- are of a constitutional dimension involving . . . *ex post facto* and double jeopardy provisions").

¹⁰⁹ Kathy Barrett Carter, *State Top Court Upholds Megan's Law: Justices Put Safeguards Before Offender Rights*, STAR LEDGER (Newark), July 26, 1995, at 1 (explaining that the court rejected the legal claims raised on behalf of the sex offenders including, but not limited to, double jeopardy and cruel and unusual punishment claims and holding that Megan's Law is valid and constitutional, "so long as the means of protection are reasonably designed for that purpose (to protect society) and only for that purpose, and not designed to punish").

¹¹⁰ *Id.*

does not provide punishment, but the law is, as the legislature intended it to be, an important vehicle for protecting the public by getting information to the public.¹¹¹

The federal courts have not reached the same conclusion on preliminary injunctions,¹¹² although no court has decided the case on the merits.¹¹³ Preliminary injunctions have been issued, and the State of New Jersey has appealed to the Third Circuit.¹¹⁴ The case has been argued, and we are awaiting the Third Circuit's decision.¹¹⁵ Notification is, however, going ahead in New Jersey.¹¹⁶

One of the concerns about this law, and I know from the materials one thing that people are interested in discussing today, is:

¹¹¹ Doe v. Poritz, 662 A.2d at 367 (stating that the legislative intent was not to punish, but "to enable the public to protect itself from the danger posed by sex offenders . . .").

¹¹² Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 692 (D. N.J. 1995) (holding that the Tier Two and Tier Three provisions of the notification statute are unconstitutional in retroactive application).

¹¹³ Artway v. Attorney Gen. of N.J., 81 F.3d 1235 (3d Cir. 1996) (holding that claims relating to the notification requirement were unripe since the defendant had not actually been subject to them because he had not yet registered). In July, 1996, a federal district court in New Jersey ruled Megan's Law constitutional based on the merits of a case. W.P. v. Poritz, 931 F.Supp. 1199 (D. N.J. 1996). The Court held that the notification provisions of New Jersey's Megan's Law do not impose "punishment" under the Due Process and Ex Post Facto Clauses of the U.S. and New Jersey Constitutions. *Id.* The case has since been appealed to the Third Circuit Court of Appeals and oral arguments were heard on October 21, 1996. See Kathy Barrett Carter, *Appeals Judge, Prosecutor Tangle on Megan's Law: Court Weighs Constitutionality*, STAR LEDGER (Newark), Oct. 22, 1996, at 1.

¹¹⁴ Artway, 81 F.3d 1235.

¹¹⁵ *Id.* at 1271. The Third Circuit for the United States Court of Appeals affirmed the district court's judgment insofar as it holds the registration provisions constitutional, but vacated insofar as it enjoins the enforcement of Tier Two and Tier Three notification provisions. *Id.*

¹¹⁶ Cf. Michael Booth, *Federal Court Again Signals Trouble for Megan's Law*, N.J.L.J., Oct. 28, 1996, at 5 (stating "[r]egistration is continuing, but sex offenders who have served their time and who are protesting the rules calling for community notification have so far been successful in having Megan's Law put on hold with their challenges in federal court").

what is the impact on the offender in the community?¹¹⁷ As of February 14th, we have had eighty-six notifications completed in New Jersey.¹¹⁸ There are probably more as of today.¹¹⁹ Only in one instance was there any type of harassment against the registrant. And that was an instance where prior notification actually had not been given but the press learned about it before the law actually took effect and there was vigilante harassment-type activity.¹²⁰ I think that is because of the guidelines that have been developed and the manner in which notification is given. People are warned that they will be prosecuted if they use the information improperly, and, to date, luckily, people have used the information properly.¹²¹

¹¹⁷ See generally James Popkin, *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 65 (stating some critics of Megan's Law fear branding sexual offenders might actually do greater harm than good because such a law "could drive sexual predators away from getting help and irretrievably harm released offenders who have served their time and truly are controlling their dangerous urges").

¹¹⁸ See Newman, *supra* note 8, at 1 (quoting New Jersey Attorney General, Deborah Poritz, "[w]e've done 86 notifications. . ."); see also *Court Halts Sex Abuser Notifications* ASBURY PARK PRESS, July 10, 1996, at A1 (stating as of July, 1996, when the Court of Appeals for the Third Circuit extended the injunction preventing notification of sex offenders there were approximately 100 "actual notifications"). At the time of the continuation of the injunction, Ocean County Prosecutor Daniel J. Carlussio said "his office had been prepared to send out . . . three Tier III and twenty-five Tier II notifications." *Id.* Stating that the latest tally for classifications as of July 10, 1996, was 1,221; 595 were classified as Tier I, 563 as Tier II and 63 as Tier III but author does not mention how many of those 1,221 have already been notified to the community. *Id.*

¹¹⁹ *Id.*

¹²⁰ See Nordheimer, *supra* note 18, at A1.

¹²¹ See N.J. STAT. ANN. §2C:7-5 (b) (West 1995 & Supp. 1996) (stating "an elected public official, public employee, or public agency is immune from civil and criminal liability for damages for any discretionary decision to release relevant and necessary information, unless it is shown that the official, employee, or agency acted with gross negligence or in bad faith").