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Hon. John J. Gibbons: Critical Perspectives on Megan's Law

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Hon. John J. Gibbons

JOHN J. GIBBONS:[321] I should say at the outset that I was assigned by a United States district court judge to represent a pro se litigator who brought an action challenging the constitutionality of the New Jersey statute. People in law enforcement like to refer to this statute as Megan's Law,[322] but it is actually Chapter 133 of the Laws of 1994, the Registration Act,[323] and Chapter 128, the Notification Act.[324] Those statutes were proposed in the New Jersey legislature in October of 1994, as the result of a public outcry[325] over a terrible tragedy.[326] Three hundred thousand signatures were presented to the legislature on a petition to do something about this kind of offense.[327]

The legislation consisted not just of the two statutes I mentioned, but also of eleven statutes dealing with such diverse subjects as changing the sentencing of sex offenders[328] to the creation of a DNA data bank[329]

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[321] Richard J. Hughes Professor of Constitutional Law, Seton Hall University School of Law; Chief Judge, United States Court of Appeals, Third Circuit, 1987-1990.

[322] N.J. STAT. ANN. §2C:7-1 to 11 (West 1994) (providing a system of registration which authorizes law enforcement officials to identify sex offenders and alert the public when public safety requires).

[323] *Id.* at §2C:7-2.

[324] *Id.* at §2C:7-5.

[325] *See* Joyce Price, *States Find New Ways to Stop Sex Offenders*, WASH. TIMES, Oct. 1, 1995, at A1.

[326] *See* Thomas Martello, *Zimmer, Hoping Convention Will Boost Campaign, Cite's Megan's Law*, ASSOC. PRESS, Aug. 12, 1996.

[327] *See* Michelle Ruess, *A Mother's Plea: Pass Megan's Bill Panel Oks Compromise*, THE RECORD (New Jersey), Sept. 27, 1994, at A1 [hereinafter *A Mother's Plea*].

[328] *See, e.g.*, Michael Booth, *Sex-Offender Bills Awaiting Signature*, N.J.L.J., Oct. 24, 1994, at 8 (stating that the package of bills, commonly known as "Megan's Law" includes a measure "allow[ing] for a prison term of 30 years to life if a person is convicted of an aggravated sexual assault that involves violence upon a victim who is 16 years old or younger").

for the State of New Jersey and, as Ms. Grall mentioned, the lowering of the standard for civil commitment.[330] The statutes were passed under emergency suspension of the rules so as to eliminate any hearings in the New Jersey Assembly, and to eliminate all but the briefest of hearings in the New Jersey Senate.[331] The only emergency, however, which led to the suspension of the rules, was a statewide election on November 8th,[332] in which the Speaker of the Assembly, Mr. Haytaian, was a candidate for United States Senate.[333]

Passion does not always lead to wise reflection, and the question that has to be considered with respect to these statutes is not whether

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[329] *See, e.g., id.* (stating that "Megan's Law" also includes a provision "manda[ting] that sex offenders provide a blood specimen for DNA analysis and establish a database for the results . . .").

[330] *See generally* Sherman, *supra* note 10, at A1 (stating that Megan's Law "requires an end-of-sentencereview for every convicted sex offender and allows the attorney general to apply for the civil commitment of those who have demonstrated a pattern of compulsive behavior and pose a danger to others").

[331] *See, e.g.*, Michelle Ruess, *Assembly OKs Megan's Law; Whitman Promises to Sign Bill*, THE RECORD (New Jersey), Oct. 21, 1994, at A1 [hereinafter *Assembly Oks Megan's Law*] (stating that when the Megan's Law legislation was introduced "Assembly Speaker Chuck Haytaian . . . declared an emergency and placed the bills on the floor for a vote . . . without holding the usual committee hearings").

[332] *See* Thomas J. Fitzgerald, *Incumbent Survives Grueling Race*, THE RECORD (New Jersey), Nov. 9, 1994, at A1. Democrat Frank Lautenberg defeated Republican Assembly Speaker Chuck Haytaian in an election for the United States Senate. *Id.*

[333] *See, e.g.*, Michelle Ruess, *Second Thoughts About Megan's Law; Concern Growing Over Ripple Effects*, THE RECORD (New Jersey), Feb. 19, 1996, at A1 [hereinafter *Second Thoughts*]. Assembly members did not hold a committee hearing concerning Megan's Law because the Speaker of the Assembly, Chuck Haytaian, was running for the United States Senate. *Id.*; *see also* Michelle Ruess, *Megan's Law Moving Fast in Assembly; Crackdown on Sex Offenders*, THE RECORD (New Jersey), Aug. 16, 1994, at A1 [hereinafter *Moving Fast*] (stating that Haytaian's justification for declaring the legislative emergency that forced the Megan's Law proposals to move directly to the floor without the usual committee debates was that it was in accordance with the wishes of the people of New Jersey). *But see* Bill Sanderson, *Glamour Politics Isn't the Name of the Game*, THE RECORD (New Jersey), Sept. 3, 1995, at O5 [hereinafter *Glamour Politics*] (noting the belief that Haytaian pushed Megan's Law through the Assembly without the usual debates to guarantee its passage before Election Day).

deterring and punishing sex offenders is wise social policy.[334] The question is whether the Constitution permits this kind of legislation reflected in the Registration and Notification Statutes.[335]

As Ms. Grall pointed out, the statutory classification, with respect to notification, creates three tiers of offenders: a low risk of re-offense, a medium risk of re-offense, and a high risk of re-offense.[336] As initially enacted, the determination of that risk and, thus, of the level of community notification, was left entirely up to the prosecutor with no notice, no opportunity to be heard, and no judicial review.[337]

Originally, the Attorney General's position was that the scheme presented no constitutional problem at all because nobody, prisoners or non-prisoners, former offenders, or people with no record at all, had

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[334] *See Second Thoughts*, *supra* note 333. Commentators say that Megan's Law was the product of "politics and passion," because at a New Jersey Senate Committee meeting, "after a tearful testimonial from Megan Kanka's mother, the lawmakers ignored the few witnesses who raised questions." *Id.* Herb Honig, Councilman from Englewood, New Jersey, said that Megan's Law "was a political solution . . . . [g]enerally, that is not the best way to handle things." *Id.*

[335] *See* Doe v. Poritz, 661 A.2d 1335, 1339 (N.J. 1995), *aff'd as modified*, 662 A.2d 367 (N.J. 1995) (challenging the constitutionality of the two statutes claiming that they violated several constitutional provisions, including protection from *ex post facto* laws, bill of attainder, double jeopardy, cruel and unusual punishment, his right to privacy, due process, and equal protection); Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 668 (D. N.J. 1995) (challenging Megan's Law on *ex post facto* laws, bill of attainder, double jeopardy, cruel and unusual punishment, right to privacy, due process, and equal protection claims), *aff'd in part*, 81 F.3d 1235, *reh'g denied* 83 F.3d 594 (3d Cir. 1996). *See also* Kathy Barrett Carter, *Judge Rules Megan's Law Constitutional but Temporarily Bars Warnings to Public*, STAR LEDGER (Newark), Feb. 23, 1995, at 1. Judge Wells said that the registration and notification provisions were not punishment in a constitutional sense and were enacted to protect the public. *Id.*

[336] N.J. STAT. ANN. §2C:7-8(c) (West 1995) (providing for determination of the risk of re-offense by grouping the offenders into three categories).

[337] Doe v. Poritz, 662 A.2d at 382. Although the Court upheld the law's constitutionality, the Court concluded that any person determined to be a moderate or high risk offender may request judicial review by a summary proceeding. *Id.*

liberty or privacy interests that would be affected by the requirement of registration and notification.[338]

The Supreme Court of New Jersey held otherwise.[339] It held, effectively, that the law was unconstitutional in that the offenders' liberty or privacy interests are entitled to some level of procedural protection.[340] Thus, under the New Jersey "Judicial Surgery Doctrine," in which the Supreme Court of New Jersey regularly undertakes to re-write legislation, the Court re-wrote the statute and built in a series of procedural protections.[341]

Even as re-written by that eminent Court, however, the present New Jersey scheme still violates federal standards of due process for the protection of the acknowledged liberty and privacy interests that are affected.[342] I will come back to what those defects are in a moment.

But considering the upcoming election and the emotional atmosphere in which these statutes were enacted,[343] they are classic

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[338] *See* Bill Sanderson, *State Shows Willingness to Modify Megan's Law*, THE RECORD (New Jersey), May 3, 1995, at A1. The New Jersey State Attorney General, Deborah Poritz, stated that the "law is a form of regulation, not punishment." *Id.* Further, Poritz stated that giving information about a sex offender's dangerousness does not violate any constitutional privacy rights because such information is publicly available. *Id.; see also* Kathy Barrett Carter, *Justices Hear Arguments on 'Megan,'* STAR LEDGER, May 3, 1995, at 1 (noting U.S Attorney Faith Hochberg's beliefs that when dealing with one's criminal history, there is no constitutional right to privacy and that even if this right existed, the risks the offenders pose to children outweigh any privacy right).

[339] Doe v. Poritz, 662 A.2d 367 (1995) (holding, in part, that neither the registration nor the notification statutes imposed punishment upon the offender and that they were rationally related to the states interest in protecting the public from repeat sex offenders).

[340] *Id.* at 381-82 (discussing the power of the court to amend statutes to remove possible constitutional problems).

[341] *Id.* at 381. The Court re-wrote the statute to limit notification under Tier Two and Tier Three to organizations and people "likely to encounter" the offender. *Id.*

[342] *See* C.P.M. v. D'Ilio, 916 F. Supp. 415, 420 (1996) (discussing the *Doe v. Poritz* decision which stated that although the statute does not violate substantive due process rights, the offender "[h]as an interest in privacy and reputation protected by procedural due process afforded under both the federal and state constitutions").

[343] *See Glamour Politics*, *supra* note 333 (discussing how many politicians are using Megan's Law as a popular idea to help them win elections).

examples of why the Founding Fathers included in the Constitution the prohibitions against bills of attainder,[344] *ex post facto* laws,[345] and double jeopardy.[346] These clauses reflect the need for the court to be a sober second voice of the community; a voice that provides reflective, rather than reactive, decision making.[347] With respect to retroactivity, the statutes violate all three clauses because they apply to people who have been sentenced, who have completed their sentence, and who have not been under supervision for years.[348]

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[344] *See* U.S. CONST. art. I, § 9, cl. 3. The United States Constitution provides that "[n]o . . . *ex post facto* Law shall be passed." *Id.*

[345] *Id.* art. I, § 10, cl. 1. The United States Constitution provides that "[n]o State shall . . . pass any Bill of Attainder (or) *ex post facto* Law." *Id.*

[346] "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." *Id.* at Amend. V.

[347] *See* THE FEDERALIST NO. 78, at 438-39 (Alexander Hamilton) (Isaac Kranmick ed. 1987).

> It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority . . . . Nor does this conclusion by any means suppose a superiority of the judicial to the legislature power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

[348] *But see* Doe v. Poritz, 662 A.2d at 423. The New Jersey Supreme Court held that Megan's Law does not violate the Ex Post Facto nor the Double Jeopardy Clauses of the United States Constitution, nor did it violate the Bill of Attainder Clause. *Id.* at 406; *see also* Artway v. Attorney Gen. of N.J., 81 F.3d 1235, 1271 (1996) (holding that the registration component of Megan's Law did not violate the Ex Post Facto, Double Jeopardy or the Bill of Attainder Clauses).

Indeed, they apply to people who have been convicted of offenses that are no longer crimes in the State of New Jersey.[349] Alexander Artway, for example, the plaintiff in the case pending in the Court of Appeals for the Third Circuit,[350] was convicted of sodomy with an adult female.[351] He was acquitted of charges with respect to the use of force.[352] Sodomy with an adult is no longer a crime in the State of New Jersey,[353] but it is the Attorney General's position that Artway is subject to the Registration and Notification Statutes.[354] The statutes apply to people who have been convicted of statutory rape,[355] for example, even though statutory rape is no longer a crime in the state of New Jersey if the victim is over thirteen.[356]

The test for whether there is a violation of the three constitutional clauses is well settled by the Supreme Court in three

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[349] Artway v. Attorney Gen. of N.J., 81 F.3d 1235. The Court held that Artway was still subject to Megan's Law notification policies despite Artway's assertion that it was not clear whether his prior sodomy conviction qualified as a sexual assault crime since at the time of his conviction, sodomy had been repealed by N.J. STAT. ANN. §2C:98-2. *Artway*, 81 F.3d at 1269-70.

[350] *Artway*, 81 F.3d 1235. This case was decided on April 12, 1996. *Id.* "The court vacated the judgment of the district court insofar as it enjoined the enforcement of Tier Two and Tier Three notification under Megan's Law, and affirmed that judgment insofar as it holds the registration (including Tier One notification) of the law constitutional." *Id.* at 1235-36.

[351] Artway v. Pallone, 672 F.2d 1168, 1170 (3d Cir. 1982).

[352] *See Artway*, 81 F.3d at 1243 (reiterating that Artway was convicted for sodomy and that the judge in that case found that Artway had used force in the commission of the crime).

[353] Sodomy has been reclassified as sexual assault. N.J. STAT. ANN. §2C:14-2 (West 1996). The definition of sexual assault does not encompass sodomy between consenting adults. *Id.*

[354] *Artway*, 876 F. Supp. at 667.

[355] N.J. STAT. ANN. §2C:7-2(b)(1)(2) (West 1995 & Supp. 1996) (including statutory rape in the definition of sexual assault under N.J. STAT. ANN. §2C:14-3(b) (West 1995 & Supp. 1996)).

[356] N.J. STAT. ANN. §2C:14-2(a)(1) (West 1995 & Supp. 1996).

opinions, *Halper* in 1989,[357] *Austin* in 1993,[358] and *Kurth Ranch* in 1994.[359] The test is whether the statute imposes punishment.[360] What is punishment presents a epistemological problem, but the Supreme Court has given us the answer.[361] The Court has held that a state imposes punishment if it has any retributive or deterrent effect.[362]

The Supreme Court of New Jersey stated in rejecting the retroactive challenge to the statute that that is not the test, that the regulatory purpose saves the statute from retroactive challenge.[363]

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[357] United States v. Halper, 490 U.S. 435, 447 (1989). The Court analyzed whether a civil penalty could be considered punishment in the context of double jeopardy. *Id.* at 448. The Court rejected the Government's argument that because the statute in question was merely civil in nature, the Court was limited to an analysis of statutory construction to determine the law's punitive nature. *Id.* at 441. The Court explained its cases have acknowledged that for the defendant, even remedial sanctions carry the sting of punishment. *Id.* at 448.

[358] Austin v. United States, 509 U.S. 602, 610 (1993) (stating that the central inquiry in analyzing a forfeiture statute is not whether the statute is criminal or civil, but whether it is punishment).

[359] Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994) (asserting that the state's Dangerous Drug Tax is not remedial, but purely retributive, and thus, constitutes punishment).

[360] *See, e.g.*, *Halper*, 490 U.S. at 448. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied to the individual case serves the goals of punishment. *Id.* *Austin*, 509 U.S. at 607 (noting the distinction between remedial and retributive laws); *Kurth Ranch*, 511 U.S. at 781 (asserting that state drug tax constitutes punishment); Goodman, *supra* note 6, at 786 (pointing out that "in the *Halper* line, the Court seems to focus exclusively on whether the sanction serves the dual aims of statutory sanctions, namely retribution and deterrence").

[361] *Halper*, 490 U.S. at 448.

[362] *Id.*

[363] *See* Doe v. Poritz, 662 A.2d 367 (N.J. 1995). Here, the New Jersey Supreme Court rebuffed the constitutional attacks on the registration and notification provisions of the statute. *Id.* at 423. The Court acknowledged that unless the law was made to apply retroactively, it would not protect anyone until some time in the distant future. *Id.* at 373. Notwithstanding the foregoing, the Court upheld Megan's Law based on an interpretation of the statute that strictly confines notification by tier classification in accordance with legislative intent. *Id.* at 422.

The whole criminal code has a regulatory purpose,[364] and the Supreme Court case law is clear: if the statute has any deterrent or retributive purpose, it punishes, and if it punishes, it is unconstitutional when retroactively applied.[365]

Do these statutes have a retributive or deterrent purpose? On their face, they clearly do.[366] First, they are triggered by past criminal conduct and by nothing else.[367] They are plainly retributive.[368] Secondly, no risk factors other than past criminal conduct are dealt with,[369] although children are far more at risk of sex offenses by others than recidivist stranger offenders.[370]

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[364] For example, the possession of dangerous weapons and the carrying of concealed weapons are violations of a regulatory scheme defining how and where even law-abiding citizens are permitted to carry weapons. Gregory W. O'Reilly, *Truth-in-Sentencing: Illinois Adds Yet Another Layer of "Reform" to its Complicated Code of Corrections*, 27 LOY. U. CHI. L.J. 985, 1002 (1996).

[365] *See* Calder v. Bull, 3 U.S. 386, 390 (1798) (stating that the purpose of the Ex Post Facto Clause is "to protect person(s) from punishment by legislative acts having retrospective operation"); *Austin*, 509 U.S. at 609-10 (stating that a statute imposes punishment where it serves either retributive or deterrent purposes).

[366] *See* Doe v. Poritz, 662 A.2d at 405 (recognizing that Megan's Law does have a "deterrent punitive impact").

[367] 42 U.S.C.A. §14071(a)(1)(A) (West Supp. 1996). The United States Code requires "the Attorney General to establish guidelines for state programs that require a person who is convicted of a criminal offense against a victim who is a minor *or* who is convicted of a sexually violent offense to register with a designated state law enforcement agency." *Id.*; N.J. STAT. ANN. §2C:7-2(a) (West 1994). The New Jersey statute requires "a person who has been convicted, adjudicated or found not guilty by reason of insanity for commission of a sex offense . . . to register." *Id.*

[368] *See* Fred Cohen, *Sex Offender Registration Laws; Constitutional and Policy Issues*, 31 CRIM. L. BULL. 151, 153 (1995).

[369] 42 U.S.C.A. §14071(a)(1)(A)(West 1996); N.J. STAT. ANN. §2C:7-2(a) (West 1994).

[370] Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 n.14 (1985) (stating that "of the 583 cases of child sex abuse examined in one survey, the offender was a family member in 47% of the cases, otherwise an acquaintance of the child in 42%, and a stranger in only 8%").

The statute involves specific deterrence.[371] The registration requirement, standing alone, reminds the offender that he is constantly under police surveillance.[372] He must give the police ten days notice of his intention to move.[373] He must report to the police every ninety days.[374] The statute also requires that when registering he must furnish pictures, fingerprints, and genetic markers.[375] The registration provisions and three-tiered notification scheme warn him that he is more likely to be detected and identified if he re-offends.[376] Plainly, this is specific deterrence, which it is intended to be.[377] Furthermore, the statute involves general deterrence as well because potential sex offenders are aware that if they are convicted, they are going to be subjected to the registration and notification obligation forever.[378] Deterrence is laudable.[379] However, it covers a constitutional problem.[380]

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[371] N.J. STAT. ANN. §2C:7-2 (West 1995 & Supp. 1996).

[372] *See Artway*, 81 F.3d at 1265 (specifying that one of the purposes of registration is to help law enforcement agencies to "keep tabs on these offenders").

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

[374] *Id.* at §2C:7-2(e).

[375] *See Artway*, 81 F.3d at 1264.

[376] *See generally id.* (stating that in passing Megan's Law, the legislature declared the danger of repeat offenses by sex offenders requires a system of registration that permits law enforcement officials to identify the offender easily and alert the public if necessary).

[377] *See id.* at 1266 (generalizing that any incidental purpose to deter under the registration requirement is constitutionally valid). *But see id.* at 1264 (interpreting the legislative intent of New Jersey's Megan's Law as for the prevention of crime and the protection of the public, not as being punitive in nature).

[378] *See* Earl-Hubbard, *supra* note 4, at 796 (stating that registration places a sex offender on notice that "subsequent sexual crimes" will be followed by investigation, thus deterring future sex crimes).

[379] *See Artway*, 81 F.3d at 1265 (noting that "the means chosen—registration and law enforcement notification only—is not excessive in any way," the Court held registration will help satisfy a "legitimate goal" of "allowing law enforcement to stay vigilant against possible re-abuse"). *Id.*

[380] *See Austin*, 509 U.S. at 620. The Court noted that forfeiture laws argued by the government to be remedial, not punitive, do not withstand constitutional scrutiny. *Id.* Civil sanctions cannot be viewed only as remedial, but also as "serving either retributive or deterrent purposes, "and are therefore considered punishment." *Id.* at 621. *But see* Doe v.

You cannot impose punishment twice; hence, if the statute has a deterrent purpose, it is imposing punishment a second time.[381]

The statute, moreover, involves retribution.[382] Notification will result in isolation from normal social contacts.[383] Historically, punishment has been just that, the pillory, the scarlet letter, the destruction of reputation.[384] To say that this notification is not what has been historically recognized as punishment is nonsense. Notification will affect a person's ability to find a job,[385] meet a companion and establish a stable relationship,[386] and initiate membership in a church.[387] Moreover, it will affect the ability to be let alone, the right Justice Brandeis described as our most precious liberty.[388] Notification will

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Poritz, 662 A.2d at 388 (noting that although a statute "characterized as remedial" might have some deterrent effect, it does not mean the law is punitive and therefore unconstitutional).

[381] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1962) (stating that to determine if a statute is punitive, one can use the test "applied to determine whether an Act of Congress is penal or regulatory" and one factor included in this test is "whether its operation will promote the traditional aims of punishment - retribution and deterrence").

[382] *See* Petrucelli, *supra* note 2, at 1161-62 (noting that notification laws will ostracize sex offenders).

[383] *Id.* at 1158 (stating that notification provisions have been referred to as "'scarlet letter' laws, alleging that they brand the sex offenders forever").

[384] *See Artway*, 876 F. Supp. at 689 (discussing the historical significance of being branded by a community). *Id.* at 689 (finding that the public dissemination portion of Megan's Law is a measure that has historically been punitive); Doe v. Poritz, 662 A.2d at 441 (Stein, J., dissenting) (arguing that the "identification, scorn and humiliation" which result from notification are similar to punishments imposed during the time the United States Constitution was adopted). *But see* Doe v. Poritz, 662 A.2d at 422 (holding that because the legislation addresses a "pressing societal problem" which aims to safeguard the public despite the possible detriment to past sex offenders, it "is not what those who drafted the Constitution had in mind as an abuse of the government's power to punish").

[385] *Artway*, 876 F. Supp. at 688.

[386] *Cf. id.* at 689.

[387] *Cf. id.*

[388] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[T]he right to be let alone - the most comprehensive of rights and the right most valued by civilized men.").

result in vigilantism, harassment, and legal ostracism.[389] One of the eleven statutes adopted at the same time is a statute providing for notice to crime victims with respect to various stages in the criminal justice system.[390] Clearly, this statute was motivated significantly by a retributive purpose.[391]

With respect to its prospective application, Megan's Law was enacted with no procedural safeguards whatsoever.[392] Case law is clear, however, that if there is either a federal substantive liberty interest or a state substantive liberty or privacy interest, federal law determines what level of procedural due process is required.[393] In this instance, as re-written by the New Jersey Supreme Court, there is now an opportunity

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[389] *See* Martone, *supra* note 8, at 39 (listing various vigilante acts carried out by citizens in states that have sex offender notification statutes); Sheila A. Campbell, *Battling Sex Offenders: Is Megan's Law an Effective Means of Achieving Public Safety?*, 19 SETON HALL. LEGIS. J. 519, 546-47 (1995). The author lists various vigilante acts committed by citizens upon learning that a past sex-offender was living in their community. *Id.* The accompanying harassment that deters individuals from housing past sex-offenders inevitably results in prolonged prison terms while officials attempt to find suitable living quarters for them. *Id.* at 547.

[390] *See, e.g.*, N.J. STAT. ANN. §52:4B-44 (West 1995 & Supp. 1996) (providing, among other things, for notification to crime victims of any change in the status and disposition of the case as it relates to dismissal, trial, sentencing and release of the criminal for custody).

[391] *But see* N.J. STAT. ANN. §2C:7-1 (West 1995) (declaring that the purpose of the statute is to "permit law enforcement officials to identify and alert the public when necessary for the public safety" and "provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons").

[392] *See, e.g.*, Poe v. Ulman, 367 U.S. 497, 541 (1961) (maintaining that the "guaranties of due process . . . considered as procedural safeguards against executive usurpation and tyranny have in this country 'become bulwarks also against arbitrary legislation'"). In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty without due process of law—without adequate procedures. *Id. But see* Doe v. Poritz, 662 A.2d at 421 (qualifying the decision to sustain the constitutionality of Megan's Law on the requirement that there be an opportunity for judicial review of the prosecutor's decision to impose Tier Two and Tier Three notification).

[393] Mills v. Rogers, 457 U.S. 291, 300 (1982) (stating that the federal Due Process Clause protects "state created liberty interests").

for a hearing and for judicial review.[394] The Supreme Court of New Jersey stated that in the judicial review process the burden of overcoming the classification decision is on the prospective registrant.[395]

In making the determination, the Attorney General's guidelines set forth the registration and community notification laws bench manual.[396] The manual reads, among other things, that in applying the criteria, this weighing process may take into account any information available and encompass all credible evidence.[397] Thus, a determination of the number of victims or offenses may be based on documentation other than a criminal conviction.[398] Such documentation may include, but is not limited to, criminal complaints not the subject of a conviction, but which are supported by credible evidence; victims' statements; admissions by the registrant; police, medical, psychological, psychiatric and pre-sentencing reports; and Department of Corrections discharge

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[394] Doe v. Poritz, 662 A.2d at 422-23.

[395] *Id.* at 383. In implementing community notification procedures,

> the State shall have the burden of going forward, that burden satisfied by the presentation of the evidence that *prima facie* justifies the proposed level and manner of notification. Upon such proof, the offender shall have the burden of persuasion on both issues, that burden to remain with the offender. In other words, the court . . . shall affirm the prosecutor's determination unless it is persuaded by a preponderance of the evidence that it does not conform to the laws and Guidelines. *Id.*

[396] *See* Memorandum from Deputy Attorney General Jessica S. Oppenheim, Prosecutor's Bureau, State of New Jersey Department of Law and Public Safety, Division of Criminal Justice to all [N.J.] County Prosecutors, *Guidelines for Law Enforcement for Notification to Local Officials and/or the Community of the Entry of Sex Offender into the Community* 8-10 (Sept. 14, 1995) [hereinafter *Memorandum*], and its accompanying addendum, *Sex Offender Risk Assessment Scale Manual* (Sept. 14, 1995) [hereinafter *Risk Assessment Scale Manual*] (both on file with the *New York Law School Journal of Human Rights*).

[397] *Risk Assessment Scale Manual, supra* note 396, at 5.

[398] *Id.*

summaries.[399] All this material is in the possession of the state, yet the registrant has the burden of overcoming the state's classification decision.[400]

Also taken into account are histories of anti-social acts.[401] The more extensive the anti-social history, the worse the prognosis for the offender.[402] Anti-social acts include sex offenses or sexual deviancy not the subject of criminal prosecution,[403] as well as other crimes against persons, crimes against property, and status offenses for juveniles.[404] Acts that are not the subject of criminal charges, but that are credibly represented in the records, may be considered.[405] Such documentation may include evidence of truancy, behavioral problems in schools, school suspensions, or prior diagnoses of conduct disorders or of oppositional defiant disorder.[406] Acts perpetrated while incarcerated or committed are

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[399] *Id.*

[400] *In re* C.A., 679 A.2d 1153, 1159 (N.J. July 31, 1996) (stating that after the prosecutor has met its burden "the Registrant then has the burden of producing evidence challenging the prosecutor's determinations on both [the proposed level of risk and the manner of notification] issues").

[401] *Risk Assessment Scale Manual, supra* note 396, at 8 (stating that history of anti-social acts is to be considered to evaluate the risk the sex offender poses).

[402] *In re* C.A., 679 A.2d at 1158-59 (citing to the Registrant Risk Assessment Manual which gives greater weight to historical factors related to anti-social behavior when determining offender's future risk of re-offense).

[403] *See Risk Assessment Scale Manual, supra* note 396, at 8, and accompanying text. "Anti-social acts include sex offenses or sexual deviancy not the subject of criminal prosecution. . . ." *Id. See also* N.J. STAT. ANN. §2C:7-8(4)(c) (West 1995 & Supp. 1996) (stating that the number, date and nature of prior offenses are factors a prosecutor may consider in determining an offender's tier classification).

[404] *Risk Assessment Scale Manual, supra* note 396, at 8.

[405] *In re* C.A., 679 A.2d at 1162. "Therefore, non-conviction offenses are to be considered in evaluating a registrant's risk of re-offense, provided there is sufficient evidence that the offense occurred." *Id.*

[406] *Id.* (discussing how "sentencing authorities must attempt [to be] predictors of an offender's future behavior . . . by tak[ing] the defendant's 'whole life' into view. . .") (quoting Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 553 (1993)).

also included in determining what notification classification is to be applied.[407]

The state has this panoply of hearsay that puts the burden on the registrant to prove that he is not a compulsive repetitive offender.[408] There is a form to fill out and also a lot of fancy language, but, in fact, none of these categories have any scientific validity at all.[409]

Furthermore, I have heard some things stated today about the recidivism rates of sex offenders, which the Supreme Court of New Jersey, quoting from a government brief, included in its opinion.[410] When one actually looks at the rates, it is clear that the recidivism rate among sex offenders is no greater than, and in some states lesser than, the recidivism rate among other offenders.[411]

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[407] *See* N.J. STAT. ANN. §2C:7-8(7) (West 1995 & Supp. 1996) (stating that a prosecutor must consider "recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence" in determining an offender's tier classification).

[408] W.P. v. Poritz, 931 F. Supp. 1199 (D. N.J. 1996) (stating that an offender who challenges the tier classification is similar to a plaintiff in a civil action who must overcome the prosecution's case "by a preponderance of the evidence"); *see also* State v. Howard, 539 A.2d 1203, 1210 (N.J. 1988) (citing N.J. CODE OF CRIM. JUST., N.J.S.A. §2C:1-13d(1)). *Id.* at 1210. "The general rule that a party whose interest or contention will be furthered if the finding should be made . . ." has the burden of proof. *Id.*

[409] *See* Scheingold, *supra* note 215, at 809. The diversity among sex offenders casts doubts on the reliability of using empirical evidence to predict the likelihood of future dangerous behavior. *Id.* at 814.

[410] *See* Doe v. Poritz, 662 A.2d at 374 (introducing statistics from briefs of the Attorney General and the United States citing the Response Brief for the Attorney General). Other studies showed a seven to thirty-five percent rate of recidivism for rapists; ten to twenty-nine percent for molesters of young girls; thirteen to forty percent for molesters of young boys. *Id.* at 375 (citing the Brief for the United States). Other studies showed that sex offenders are more apt to re-offend than other types of offenders. *Id.*

[411] *See generally* Scheingold, *supra* note 215, at 812 (citing GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, FINAL REPORT, IV-4 (1989)). The Bureau of Justice Statistics indicating rates of recidivism for released murderers, released rapists, all released sex offenders and released robbers. *Id.* Rates of re-arrest for robbers were higher than any other offenders. *Id.*

This classification system of attempting to predict future individual human behavior is scientific nonsense. It is like the days when we relied on phrenology, measuring the bumps on people's heads to predict future criminal behavior.[412]

The application of this notification statute to people who have been out in the community, having completely served their sentence, will impose severe disabilities on them.[413]

Ultimately, of course, the Supreme Court of the United States is going to have to decide whether these statutes can pass constitutional muster. In order to uphold them, the Court is going to have to overrule three cases.[414]

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[412] *See generally* United States v. Freeman, 357 F.2d 606, 616 (2d Cir. 1966) (discussing how the scientific standards of phrenology and monomania are primitive).

[413] Many released sex offenders who were subject to notification statutes were harassed. *See generally* Popkin, *supra* note 117, at 65. Joseph Gallardo, after his release, intended to move to Lynwood, Washington. *Id.* at 73. The community was notified of his release and his plans to move into the neighborhood. *Id.* His house was burned down the same day he planned to move in. *Id.* In another case, neighbors of a released sex offender in Detroit stuffed tissues in his bathtub drain and flooded his apartment. *Id.; see also* Mark Smith, *Public vs. Private: Debate Rages Over Ex-Con's Rights, Community Safety*, HOUS. CHRON., Nov. 6, 1994, at 1. Raul Meza, a released sex offender, was harassed and forced to move from six Texas cities. *Id.* According to his family, he was persecuted by the media and victims' rights groups. *Id.* His family said that he was set up to fail, and ultimately ended up back in jail for violating his parole. *Id.*; David Vanhorn & Art Charlton, *Megan's Law Leads to Vigilante Attack*, STAR LEDGER (Newark), Jan. 11, 1995, at A1. A father and son broke into the house of a newly released sex offender, Michael Groff, the first resident of Warren County to have his name and address released to the public. *Id.* Unfortunately, the father and son attacked the wrong man. *Id.*

[414] *See Artway*; 876 F. Supp. 666 (holding, in part, that Tier Two and Three notifications violated the Ex Post Facto Clause if enforced retroactively); State v. Babin, 637 So. 2d 814, 824 (La. Ct. App.), *cert. denied*, 644 So. 2d 649 (La. 1994) (holding, in part, that application of special probation provisions, specifically notification requirements that were not in effect at the time he committed his crime, would unconstitutionally violate the Ex Post Facto Clauses in the United States and Louisiana State Constitutions); Rowe v. Burton, 884 F. Supp. 1372, 1380 (D. Alaska 1994) (concluding that plaintiffs had a meritorious claim that the notification provision in the Alaska Registration Act was punitive and violated the Ex Post Facto Clause of the United States Constitution).