NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 13
Issue 1 *SYMPOSIUM: CRITICAL PERSPECTIVES ON MEGAN'S LAW: PROTECTION VS. PRIVACY*

Article 8

Fall 1996

Prof Ronald K. Chen: Critical Perspectives on Megan's Law

Ronald K. Chen

STEPHEN NEWMAN: Thank you, Professor Gibbons. The next speaker is Professor Ronald K. Chen.

Prof. Ronald K. Chen

RONALD K. CHEN:[415] Thank you very much. Like Ms.Grall, I am very pleased to be speaking on these issues in an academic setting as a law professor, and since there are so many of that species in the room, I guess I will presume to speak for all of us. We are sometimes accused of dealing with legal issues and propounding law, divorced from practical impact or the needs of the community. It was, therefore, with some trepidation that I accepted the appointment over a year ago to deal with the issue that has become of such public concern since then.

I was assigned to represent Carlos Diaz,[416] whose main claim to fame was that he was the subject of the first case in New Jersey in which the constitutional challenge to Megan's Law was met.[417] He was convicted some ten years prior of the rape of an adult woman.[418] He was not convicted of an offense against a minor.[419] He is not a pedophile.[420] I mention that merely to reinforce the scope of the statute. Even though

---

[415] Assistant Professor, Rutgers University School of Law, Newark, New Jersey.

[416] *See* Guy Sterling, *Rapist Gains Temporary Ban on Megan's Law Notification*, STAR LEDGER (Newark), Jan. 4, 1995, at 1. Ronald Chen was appointed special counsel to Carlos Diaz by U.S. District Court Judge John Bissell. *Id.* at 7.

[417] *See Group Takes Megan's Law to Puerto Rico*, THE RECORD (New Jersey), Jan. 10, 1995, at A5.

[418] *Id.* (stating Diaz served 12 years for kidnapping and raping a 20-year-old woman). *See also Injunction on Megan's Law Brings Appeal*, N.Y. TIMES, Feb. 2, 1995, at B7.

[419] *See Group Takes Megan's Law to Puerto Rico*, *supra* note 417.

[420] *See generally* Montana, *supra* note 180, at 569 n.6 (quoting DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 91 (1986) (defining a pedophile as "a person who is sexually interested in children . . .")).

Megan's Law is often thought of or perceived to be addressing the problems of pedophilia, it, in fact, goes beyond that.[421]

By way of another example, in the case *Doe v. Poritz*,[422] the one that was eventually addressed by the New Jersey Supreme Court, John Doe, obviously not his real name, was convicted previously of an offense against minors.[423] He was adjudicated under a longstanding New Jersey criminal practice as a repetitive and compulsive offender[424] and committed to the Adult Diagnostic Treatment Center, commonly called Avenel.[425]

Unlike most of his fellow inmates, though, he was paroled from Avenel.[426] This is a relatively rare occurrence, which happens only after a multi-tiered review[427] that is a more complicated process than the parole procedures for someone committed to the general prison population.[428] After a finding that he had responded to treatment and

---

[421] *See, e.g.*, N.J. STAT. ANN. §2C:7-1(a) (West 1995) (indicating that the high rate of recidivism by sex offenders was another major concern in passing Megan's Law).

[422] Doe v. Poritz, 661 A.2d 1335 (N.J. Super. Ct.), *modified*, 662 A.2d 367 (N.J. 1995).

[423] Doe v. Poritz, 661 A.2d at 1337. Doe entered into a plea agreement after being charged and indicted with molesting two teenage boys in June of 1985. *Id.*

[424] *Id.* at 1338.

[425] Lori N. Sabin, Note, *Doe v. Poritz: A Constitutional Yield to an Angry Society*, 32 CAL. W. L. REV. 331, 333 (1996). Doe was examined by a psychologist at Avenel and found to have a pattern of repetitive and compulsive behavior and so was sentenced to a ten-year term. *Id.*

[426] Doe v. Poritz, 662 A.2d at 374. Most inmates at Avenel serve their maximum sentences. *Id.* Doe was one of "the few who were released as 'capable of making an acceptable social adjustment in the community'. . . ." *Id.*

[427] *See* Petrucelli, *supra* note 2, at 1130-32 (defining the three-tiered system of the notification provision); Michelle Ruess, *Hard to Say Which Sex Offenders Pose Threat, Experts Say*, THE RECORD (New Jersey), Aug. 25, 1994, at A3 [hereinafter *Sex Offenders Pose Threat*] ("[B]efore Avenel staff make a recommendation, they review the number of crimes committed, the type of crime, and the offender's conduct in therapy. . . .").

[428] *See* Michelle Ruess, *Many Sex Abusers Released Without Treatment*, THE RECORD (New Jersey), Feb. 25, 1995, at A12 [hereinafter *Released Without Treatment*] (stating that sexual offenders sentenced to the general prison population are eligible for parole sooner than those undergoing treatment at Avenel).

was no longer a risk of re-offense, he was paroled from Avenel and has been living in the community as a member of society since then.[429]

The statute thus applies not only to those, for instance, like the accused killer of Megan Kanka, who was not paroled from Avenel but simply had to be released because he had reached the maximum term of his sentence,[430] but also to those whom the state has already determined no longer pose such a risk.[431] It also applies to those like Carlos Diaz, who was never convicted of offenses involving pedophilia, which are a large measure of the driving force behind the statute.[432]

Notably, about a year ago, when this case came before the Federal District Court in New Jersey, Carlos Diaz was scheduled to be released on January 1st.[433] At that time, the Attorney General's Office and the Passaic County prosecutor had voluntarily agreed not to engage in community notification because the Passaic County prosecutor had, under the process that was then in effect, simply determined that he fell

---

[429] Doe v. Poritz, 662 A.2d at 380.

[430] According to the chairman and other health care professionals at Avenel, Timmendequas had "maxed out" his sentence and there was simply no legal basis for keeping him there. Ruth Bonapace, *Can Sex Offenders Really Be Cured?*, N.Y. TIMES, Aug. 21, 1994, §13J at 1.

[431] *See* Doe v. Portiz, 662 A.2d at 378. There is no provision in the Community Notification Law for no-risk individuals. *Id.* All offenders, no matter how low the risk of re-offense, are subject to at least Tier One notification. *Id.*

[432] Carlos Diaz was convicted for kidnapping and aggravated sexual assault of a 20-year-old woman in 1983. Montana, *supra* note 180, at 574. *See* N.J. STAT. ANN. §2C:7-1 (West 1995 & Supp. 1996). This section states that the New Jersey legislature enacted Megan's Law to protect against sex offenders who commit predatory acts against children. *Id.* The registration law covers those sex offenders convicted after the effective date of the law as well as prior convicted offenders whose conduct was found "repetitive and compulsive," regardless of whether the victim involved was a minor. Doe v. Poritz, 662 A.2d at 377.

The statute, and the wide public support it has received, appears to be motivated specifically by public outcry following the murder of 7-year-old Megan Kanka. Newman, *supra* note 8, at 8. *Artway*, 81 F.3d 1235 at 1243 (stating that legislation rushed through as an emergency measure in response to public outcry over girl's death); *see also* Montana, *supra* note 180, at 571.

[433] *Group Takes Megan's Law to Puerto Rico*, *supra* note 417.

within Tier Two.[434] Tier Two entails a moderate risk of re-offense, which involves notification to schools and victim support organizations.[435]

For a few days, the Attorney General's Office and the Passaic County prosecutor voluntarily agreed to hold off because the New Year's holiday intervened and we could not have a hearing in time.[436] In the meantime, however, the press found out Diaz's name and so, Carlos Diaz's picture, a rather unflattering portrayal, was on the front page of the (Newark, New Jersey) *Star Ledger* with a somewhat enhanced description of what was going on.[437] This in some ways limited the efficacy of any relief that could be granted by the district court.[438] That led to organizations such as the Guardian Angels patrolling the streets of the town of Passaic and handing out leaflets with the picture, which provided a phone number to call in the event someone saw this person.[439]

The day Carlos Diaz was released he was staying at his mother's apartment and was unable to go out on the streets.[440] In addition, family members got into fracases with members of the public, and for reasons

---

[434] *See* Kenneth Crimaldi, Note, *"Megan's Law:" Election-Year Politics and Constitutional Rights*, 27 RUTGERS L.J. 169, 175 n.45 (1995); Bill Sanderson, *Over 900 Offenders Registered in N.J.*, THE RECORD (New Jersey), Apr. 26, 1995, at A1.

[435] N.J. STAT. ANN. §2C:7-8(c) (West 1995 & Supp. 1996).

[436] Crimaldi, *supra* note 434, at 175; *see also* Christopher Kilborne, *Federal Judge Blocks Officials From Enforcing Megan's Law 'A Chilling Effect' Notification on Rapist Barred*, THE RECORD (New Jersey), Jan. 4, 1995, at A1.

[437] Guy Sterling, *Sex Offender Nearing His Release Will Be the First to Test 'Megan's Law'*, STAR LEDGER, Dec. 31, 1994, at 1 (stating counsel appointed to the prisoner will begin the court proceedings by asking the judge to keep the prisoner's name from becoming public, however, the article named the prisoner by stating that "a spokesman for the State Department of Corrections said the suit challenging Megan's Law had been filed by Carlos Diaz").

[438] *Id.*

[439] Ivette Mendez, *State Will Challenge Judge's Bar of Enforcement on Megan's Law*, STAR-LEDGER, Jan. 6, 1995.

[440] Malcolm Gladwell, *N.J. Law on Released Sex Offenders Proves Problematic; Ex-Inmates Must Report Addresses, but Enforcement is Burdensome; Some are Harassed*, WASH. POST, Jan. 16, 1995, at A6.

obviously unrelated to what was going on in the streets, Diaz left very quickly and has since permanently relocated outside the state.[441]

It is also well known, but Professor Gibbons will tell me if I am wrong, that Alexander Artway, because he would have been required to register,[442] also relocated outside the state.[443] The latter raises questions that requires some discussion: what is going to be the practical effect of community notification?[444] Will it simply cause offenders to either go underground or go to other jurisdictions?[445] And if that is the effect, what is the real benefit to the public by simply shifting the problem to make it someone else's problem?

Going back to the theme of being a law professor out of touch with community concerns, part of the problem in this case are at least some of the constitutional issues that are involved: the Ex Post Facto Clause,[446] the Bill of Attainder Clause,[447] and to some extent the Double

---

[441] Steve Chambers, *A Public Safeguard . . . or Cruel Punishment? Law Enforcement, Civil Libertarians Continue Debate Over Registration*, STAR LEDGER, July 26, 1995.

[442] *See Artway* 876 F. Supp. at 670 ("[H]e is compelled to register prior to midnight on this date, February 28, 1995, or else face prosecution for a fourth degree felony").

[443] *See* Chambers, *supra* note 441. "When Alexander Artway heard about Megan's Law, the released sex offender took two steps. He filed a federal lawsuit against the state, and he started making plans to move to New York." *Id.*

[444] *See* Earl-Hubbard, *supra* note 4, at 824 (noting that "[a]uthorities have documented numerous instances of vigilantism and attacks on registered offenders in the few years the registration laws have been in effect").

[445] *See id.* (stating example of a sex offender who, after being harassed by neighbors, relocated to a state with no registration laws).

[446] U.S. CONST. art. I, §10, cl. 1; *see also* Collins v. Youngblood, 497 U.S. 37, 41 (1990). The Court, in defining the boundaries of the Ex Post Facto Clause, stated that "[a]lthough the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." *Id.*

[447] U.S. CONST. art. I, §9, cl. 3; *see also* BLACKS LAW DICTIONARY 165 (6th ed. 1990) (defining bills of attainder as "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial").

Jeopardy Clause, although that has gotten certainly some attention in recent Supreme Court cases.[448] These are all very abstract concepts, which, even in the firmament of constitutional protections, are not exactly of the first magnitude to the same degree as, say, the First Amendment[449] or the Fourth Amendment.[450] For that reason, the members of the media repeatedly asked me about a year ago: "Is Megan's Law constitutional?" I sat down and had to give them a long, scholarly discussion, nuancing my answer—first of all, are we talking about retroactive application? What is extent of the community notification involved? Of course, after two seconds, with their eyes glazed over, they repeated: "Well, just tell us, is Megan's Law constitutional?" The answer to that question has sort of become the symbol of judicial force that has been driving these issues, and it is simply not capable of a quick 'yes' or 'no' answer in the way that they would like it.

This is really no one's fault. My observation is that there is a very serious, in this case more serious than usual, dislocation and disparity between common expectations of the way the judicial process

---

[448] "No person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. *See* Schiro v. Farley, 510 U.S. 222 (1994) (holding that the sentencing phase of a capital trial is not a successive prosecution that would violate the Fifth Amendment); United States v. Dixon, 509 U.S. 684 (1993) (classifying various proceedings as either in harmony with or in violation of the Fifth Amendment).

[449] *See, e.g.*, Carney R. Shegerian, *A Sign of the Times: The United States Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions*, 25 LOY. L.A. L. REV. 453, 471-72 (1992) (discussing what kind of speech is protected by the First Amendment: "communicative expression in a pure state without physical activity," "speech plus" which is a combination of speech and activity, and "communicative activities that involve no verbal expression," such as saluting a flag).

[450] *See* David A. Christensen, *Warrantless Administrative Searches under Environmental Laws: The Limits to EPA Inspectors' Statutory Invitation*, 26 ENVTL. L. 1019 (1996). "The Fourth Amendment to the U.S. Constitution protects citizens' privacy from unreasonable searches and seizures that are unsupported by a warrant based on probable cause . . . . The U.S. Supreme Court extended this general rule to protect business owners and operators because they also have an expectation of privacy against unreasonable administrative searches of their commercial property." *Id.* at 1019.

should work and the way the process does work if the constitutional proscriptions are being applied faithfully.[451] For instance, the Ex Post Facto Clause,[452] as Professor Gibbons noted, would seem to be, on its face, a fairly straightforward proscription.[453] You may not impose a punishment retroactively.[454] On its face, and this is part of the topical problem, it does not allow for inquiry into the nature of the offender or the interests of the public in engaging in community notification.[455] There is no way to balance the public interest or the dastardly nature of the offender in that inquiry that caused a lot, and continues to cause a lot of confusion as to what the constitutional issues that are currently before the Court, particularly the Third Circuit, really are.[456] For instance, let

---

[451] William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988). "[T]here appears to be a more systematic and open experimentation in judicial lawmaking than there is in legislative lawmaking, because of the hierarchical structure of the federal court system." *Id.* at 307. "Legal issues may first be treated by district and circuit courts, which justify their positions by setting forth rationales in published opinions." *Id.*

[452] U.S. CONST. art. I, § 10, cl. 1 ("[N]o state shall . . . pass any . . . *ex post facto* law . . . ."); *see also* BLACKS LAW DICTIONARY 580 (6th ed. 1990) (defining an *ex post facto* law as "a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences of relations of such fact or deed").

[453] Sheldon D. Pollack, *Constitutional Interpretation as Political Choice*, 48 U. PITT. L. REV. 989, 997 (1987) (discussing Chief Justice Marshall's observations in Marbury v. Madison, 5 U.S. 137 (1803), that "*ex post facto* laws . . . involves a literal invoking of the text").

[454] *See, e.g.*, Schopf, *supra* note 12, at 133-34 (stating that "[r]eleased offenders suddenly subject to community notification laws may claim that at the time of their incarceration no law existed requiring them, as a result of their crime, to register and face the sanction of community notification").

[455] *But see* Steven P. Bann, *Sex Offenders—Megan's Law*, N.J.L.J., Aug. 12, 1996, at 61 (stating, in evaluating Megan's Law against due process rights, a judicial hearing will compare, among other things, private and public interests).

[456] *See, e.g.*, Schopf, *supra* note 12, at 118 (stating that the community notification provision of Megan's Law has been subject to considerable constitutional controversy). The Third Circuit has dealt with the topic of community notification in four cases: Artway v. Attorney Gen. of New Jersey, 81 F.3d 1235 (3d Cir. 1996); W.P. v. Poritz, 931 F. Supp. 1187 (D. N.J. 1996); C.P.M. v. D'Ilio, 916 F. Supp. 415 (D. N.J. 1996); E.B. v. Poritz, 914 F. Supp. 85 (D. N.J. 1996).

me quote some language from the opinion in *Doe v. Poritz*, in which the Supreme Court stated:[457] "[W]e sail on truly uncharted waters,"[458] which I think is already a somewhat candid admission for a Court to make:

> [F]or no other state has adopted such a far-reaching statute. All other notification statutes apparently make public notification discretionary on the part of officials. The statute before us, however, mandates it. Despite the unavoidable uncertainty of our conclusion, we remain convinced that the statute is constitutional. To rule otherwise is to find that society is unable to protect itself from sexual predators by adopting this simple remedy of informing the public of their presence.[459]

This seems to be a not completely successful veiled attempt to inject a balancing inquiry. We can really do this if there is a good enough reason for inquiry into a constitutional proscription that facially does not admit itself of that type of rationalization.[460] As we know, the New Jersey Supreme Court is currently at some disagreement, not only as to the result, but as to the methodology, of determining whether a retroactive provision violates the Ex Post Facto Clause.[461] Professor Gibbons has already outlined our thinking on the operation of the Ex Post Facto Clause,[462] the Double Jeopardy Clause,[463] and the Bill of

---

[457] 662 A.2d 367 (N.J. 1995).

[458] *Id.* at 422.

[459] *Id.*

[460] U.S. CONST. art. I, §10, cl. 1.

[461] *See* Sabin, *supra* note 425, at 356 (stating that "the *Poritz* Court justified the *ex post facto* application to released offenders on the need for societal safety"). Judge Stein in the *Poritz* dissent disagreed by stating, "[b]ecause the Community Notification Law 'makes more burdensome the punishment for a crime, after its commission,' I conclude that the law, despite its understandable objectives, violates the constitutional prohibition against *ex post facto* laws." 662 A.2d at 424.

[462] U.S. CONST. art I, §10, cl. 1.

[463] U.S. CONST. amend. V.

Attainder Clause,[464] all of which ask the question: "What constitutes punishment for purposes of the Constitution?"[465] Our positions are essentially coterminous on this matter. The New Jersey Supreme Court adopted an analysis, although there will be others who can, in good faith, try to characterize it otherwise, that essentially says: if the actual subjective legislative motive was pure in that it did not intend to punish, then it is not punishment.[466] The position of the federal courts, not only on preliminary injunction, for instance, the *Artway* case,[467] was resolved

---

[464] U.S. CONST. art. I, § 10, cl. 1. *see also* BLACK'S LAW DICTIONARY 165 (6th ed. 1990) (defining bill of attainder as "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial").

[465] *See supra* notes 358-60, and accompanying text.

[466] *See* Sabin, *supra* note 425, at 343. In performing an *ex post facto* analysis of the registration and notification statutes in Megan's Law, the *Poritz* Court

> focus[ed] on the purpose of the legislation. The Court found if the statute imposed a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it would be considered penal. However, if it imposed a disability not to punish but to accomplish some other legitimate governmental purpose, then it would not be considered penal for purposes of constitutional analysis. *Id.*

[467] *Artway*, 876 F. Supp. 666.

on a final adjudication on the merits, and that is what is on appeal now to the Third Circuit.[468] The federal courts have adopted a more functional analysis that inquires, whether viewed from the historical understanding or the functional effect of the statute, whether the sanction in question effectively imposes punishment.[469] That determines whether retroactive provision imposes new punishment for purposes of the Ex Post Facto Clause, as well as others.[470]

That is a very basic difference in methodology, and, in fact, it almost transcends the issue of Megan's Law.[471] I take the view very strongly that whatever result you come out with, for purposes of constitutional adjudication, you cannot simply rely upon the outward facial pronouncements of the legislature's pure motive. And for those reasons, I will venture to risk a prediction that, however it comes out, the Third Circuit will at least inquire into the practical effects of community notification. I do not want to spend too much time on what those practical effects might be. We all have seen or heard of incidents of possible vigilantism[472] and, if not vigilantism, as Professor Gibbons

---

[468] Artway v. Attorney Gen. of N.J., 81 F.3d 1235 (3d Cir. 1996).

[469] *Artway*, 876 F. Supp. at 684. The Court stated that there are three tests for "determining whether a statute is punitive within the context of the bill of attainder doctrine . . . the historical test . . . the functional test . . . and . . . the motivational test." *Id.* The Court determined that the functional test was appropriate in the present case. *Id.*

[470] *See, e.g., id.* at 672 (stating "[w]hen the challenged legislation has a clear punitive purpose the court should apply an *ex post facto* analysis").

[471] *See* Sabin, *supra* note 425, at 345. The article notes that New Jersey Supreme Court Justice Gary Stein, in his dissenting opinion in *Doe v. Poritz*, said the majority should have taken into consideration factors used in a previous case to determine whether the Ex Post Facto Clause was violated. *Id.* Instead, "the Court chose to risk unfairness to previously convicted sex offenders over unfairness to children and women who might suffer due to ignorance of the offender's presence in the community." *Id.* at 356. Rather than apply the factors discussed by Justice Stein, the majority looked at the legislative intent of Megan's Law to determine it was remedial, and should be applied retroactively "to all sex offenders." *Id.* at 345.

[472] *E.g.*, Doe v. Poritz, 662 A.2d at 430. The dissent cited two newspaper accounts of action taken against sex offenders subject to Megan's Law. *Id.* In one instance, a father and son broke into the house of a sex offender and attacked the man they thought to be the

noted, legal ostracism and harassment in the non-criminal sense.[473]

It is interesting to note that in *Doe v. Poritz*,[474] Chief Justice Wilentz makes reference to what happened to Carlos Diaz, and said that if this happens again, they, I guess meaning the Guardian Angels, might likely be subject to criminal prosecution,[475] citing to the New Jersey harassment statute,[476] which says that it is a misdemeanor to engage in communications that are alarming or annoying.[477]

Professor Strossen, in this context, does not stress and did not note that I am the vice president of the state board of the A.C.L.U. Members of the media asked me whether I think that Curtis Sliwa should be criminally prosecuted? What am I supposed to say? He was

---

sex offender. *Id.* However, "the two ended up attacking the wrong man." *Id.*

[473] *Id.* While the Court granted him an injunction preventing law enforcement officials from notifying community members of his release, "[t]he Guardian Angels, a New York-based civilian group, organized a community protest outside the residence of Diaz's mother." *Id.* The Guardian Angels . . . hand[ed] out fliers "with a large photo of Diaz, the warning 'BEWARE' in big black block letters and a phone number to call if Diaz [was] spotted." *Id.* (quoting Rosemarie Ross, *Rapist, Beware: Residents' Fear Turns to Anger, Revenge*, NORTH JERSEY HERALD & NEWS, Jan. 6, 1995, at A1).

[474] 662 A.2d 367 (N.J. 1995). The New Jersey Supreme Court held that two of the bills at issue comprising part of Megan's Law, the Registration and Community Notification Laws, are constitutional, "but that the prosecutor's decision to provide community notification, including the manner of notification, is subject to judicial review before such notification is given, and that such review is constitutionally required." *Id.* at 367.

[475] *Id.* at 377. The majority discusses its disagreement with the dissent's prediction that dire consequences will certainly occur if communities are notified about "previously-convicted sex-offenders." *Id.* The Court noted the two examples of harassment referred to by the dissent, in which one has "already led to indictment and the other involves conduct that may very well be subject to criminal sanctions if and when it occurred again." *Id.* The majority further held that in the law-abiding nature of society, for the most part, families will use notification concerning previously-convicted sex offenders to protect their children. *Id.*

[476] N.J. STAT. ANN. §2C:33-4 (West 1995).

[477] *Id.* "[A] person commits a petty disorderly persons offense if, with purpose to harass another, he: a. [m]akes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm . . . ." *Id.*

leafleting, presenting information that he validly obtained,[478] and therefore, I would be very hard put, if I want to keep my job at the A.C.L.U., at least, to argue that that type of activity can be criminally proscribed. It seemed to me it simply could not be, certainly not as an alarming or annoying communication, and therein, points the difficulty. Even if we put aside the issues of criminal activity, vigilantism,[479] the arsons,[480] and the assaults[481] that we have read about in the newspapers,[482] and limit ourselves to activity that cannot be criminally proscribed because the Constitution forbids it,[483] what is going to be the effect of legal ostracism?[484] To put it another way, is legal ostracism

---

[478] Doe v. Poritz, 662 A.2d at 430. Referring to a newspaper report, the dissent noted that Curtis Sliwa, founder of the Guardian Angels, and members of the group were responsible for distributing flyers identifying Diaz throughout the Passaic community. *Id.* "Sliwa suggested that convicted criminals deserve to be treated as outcasts and that their ostracism would deter others." *Id.* at 431; *see also Megan's Law*, USA TODAY, Jan. 5, 1995, at 6A (noting that a federal judge "barred officials from notifying the community that a sex offender had moved in, but Guardian Angel Curtis Sliwa says the order doesn't apply to private citizens").

[479] *See* Campbell, supra note 389, at 546-47 (listing an act of vigilantism where a community forced a man to move out of his house). Martone, *supra*, note 8, at 39 (discussing two acts of vigilantism in the wake of community notification statutes).

[480] *See* Campbell, *supra* note 389, at 546 (noting that when the local sheriff's department notified residents in Washington that "child rapist Joseph Gallardo would be moving into their neighborhood, his house was set on fire").

[481] *Id.* at 546-47.

[482] *See* Doe v. Poritz, 662 A.2d at 430 (listing newspaper accounts of vigilantism taken against two sex offenders who were subject to the registration and notification provisions).

[483] *See id.* at 431 (explaining that the restrictions on the legislative power of the states are founded on the belief that people will not give into their violent tendencies, and that "the Constitution of the United States contains what may be deemed a bill of rights for the people of each state").

[484] *See* Elizabeth Kelley Cierzniak, *There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester is Released into the Community*, 28 IND. L. REV. 715, 719 (1995). The author explains that while community notification prevents some previously-convicted sex offenders from re-offending, it also results in scattered instances of vigilantism and harassment against these offenders. *Id.* Consequently, released offenders may find themselves unable to integrate into society unless they go underground or to a

itself an indication that what is being opposed effectively is new punishment?[485] The answer to that question may resolve the constitutional issue on the Ex Post Facto Clause,[486] along with the related Double Jeopardy Clause[487] and Bill of Attainder Clause arguments.[488]

Among the other constitutional issues that have come up is the substantive privacy claim.[489] In that case, the constitutional methodology that the Supreme Court has adopted does admit to take into account the strength of the State's interest in abridging or disclosing personal information.[490] I could see a court balancing a substantive privacy claim the other way, even though, as Professor Gibbons noted, the New Jersey Supreme Court did go out of its way to establish that disclosure of personal information, such as one's home address, does trigger a substantive privacy concern both under the federal Constitution and under the state Constitution.[491] The New Jersey Supreme Court in

---

community where they can live in anonymity. *Id.* As a result, public notification can be self-defeating if offenders leave communities that know about their criminal history for areas where they are anonymous. *Id.*

[485] *See* Sabin, *supra* note 425, at 349 (discussing Artway v. Attorney Gen. of N.J., 876 F. Supp. 666 (D. N.J. 1995) which held that the New Jersey notification law constituted additional punishment because notification is likely to result in ostracizing the offender).

[486] *See, e.g., Artway*, 81 F.3d at 1242. Artway challenged the registration and notification statutes on the basis that they were unconstitutional under the Ex Post Facto, Bill of Attainder and the Double Jeopardy Clauses of the U.S. Constitution. *Id.*

[487] *Id.*

[488] *Id.*

[489] *See* Catherine A. Trinkle, *Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy*, 37 WM. & MARY L. REV. 299, 309 (1995).

[490] *See generally* Doe v. Poritz, 662 A.2d at 409-13 (discussing the balancing method under the state constitution and that the federal Constitution is to take both the state's interest of disclosure and the individual's right of privacy into consideration).

[491] *See id.* at 419. However, "government dissemination of information . . . caus[ing] damage to reputation . . . does not in itself state a cause of action for violation of a constitutional right; infringement of more 'tangible interests' . . . must be alleged as well." *Id.*

Doe,[492] in a ruling that, apart from the other contexts of the case, would be considered a great boon to civil libertarians,[493] found that reputation alone was a liberty interest protected under the New Jersey State Constitution.[494] In distinction, the United States Supreme Court's interpretation is that reputation alone is not a liberty interest.[495] The New Jersey Supreme Court, although ruling otherwise, did take great pains to establish the existence of a palpable and, under other circumstances, protectable interest.[496]

The other day I was asked by a member of the media about the constitutionality of a proposal from the State Treasurer: to sell driver's license information to direct mail outfits for money as this would raise the state ten million dollars.[497] This of course includes, not just sex offenders, but all of us, since the great majority of the citizens of New Jersey, I would assume, have a driver's license. So put in that context, a strong argument can be made, and has been made, that disclosure of the type of information called for under the community notification provision, at the very least, amounts to some abridgment of a privacy or liberty interest.[498]

---

[492] 662 A.2d 367 (N.J. 1995).

[493] *See generally* Rafshoon, *supra* note 2, at 1653-54 (discussing a positivist approach to liberty when applied to prisoners in procedural due process cases).

[494] *See* Doe v. Poritz, 662 A.2d at 419.

[495] "The 'stigma' resulting from the defamatory factor of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau [the defendant] of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment." Paul v. Davis, 424 U.S. 693, 709 (1976).

[496] Doe v. Poritz, 662 A.2d at 419.

[497] *See* Jeffrey Page, *State Wants to Take License with DMV Lists Considers Selling Data to Advertisers*, THE RECORD (New Jersey), Feb. 21, 1996, at A3. The New Jersey State Treasurer, Brian Clymer, proposed to make the Department of Motor Vehicles lists available to direct marketing companies. *Id.* Mr. Clymer estimated that the information could bring in $11 million to the state. *Id.*

[498] *See generally* Earl-Hubbard, *supra* note 4 (arguing that disclosure of certain information can be an invasion of an individual's liberty interest). "Perhaps the offender's criminal record is not a private matter, but his home and work addresses and phone numbers

The third constitutional element that has been litigated is, as has been mentioned before, the procedural due process element.[499] Originally, when Carlos Diaz[500] and Alexander Artway[501] were being subjected to registration and/or notification,[502] there was no provision for review of the prosecutor's unilateral determination of tier classification, no process or hearing.[503] Chief Justice Wilentz,[504] as a predicate to upholding the statute, inserted an extremely comprehensive exposition of what process would be required, and the courts and prosecutors in New Jersey are now dealing with this new process.[505]

---

are still within the realm of privacy encompassed under the term 'liberty.'" *Id.* at 841.

[499] "The question treated in this section is whether in the implementation of notification, procedural protections are required beyond those found in these laws in order to assure fairness and accuracy in carrying them out." Doe v. Poritz, 662 A.2d at 417.

[500] *See* Montana, *supra* note 180, at 604 (citing Diaz v. Whitman, slip op. at 9, No. 946376 (D. N.J. Jan. 6, 1995). Carlos Diaz was convicted for the kidnapping and sexual assault of a twenty-year-old woman in 1983. *Id.* He challenged Megan's Law on the grounds that it violated his due process and privacy rights. *Id.* District Court Judge John Bissell issued a preliminary injunction preventing Passaic County law enforcement officials from notifying community groups in the area to which Diaz planned to return after his release from prison. *Id.*

[501] *See* Artway v. Attorney Gen. of N.J., 876 F. Supp. 666 (D. N.J. 1995) (upholding the registration requirement for Alexander Artway, convicted of sodomizing a twenty-year old woman, although sodomy was no longer illegal at the time of his registration).

[502] *See generally* N.J. STAT. ANN. § 2C:7-1 to 7-5 (West 1995 & Supp. 1996) (providing for varying levels of community notification regarding the location of certain convicted sex offenders, depending upon the seriousness of their crime and the likelihood of recidivism).

[503] Sabin, *supra* note 425, at 334 n.27 (maintaining that prior to *Doe v. Poritz*, "the public notification process could take place at any time, without notice or an opportunity to be heard by the registrant . . . . Since *Poritz*, the prosecutor must promptly notify the registrant of the tier classification decision as well as his or her right to a hearing in order to contest the decision").

[504] Chief Justice Wilentz is the author of the majority opinion in Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

[505] Doe v. Poritz, 662 A.2d at 417-22 (examining why both fundamental fairness and procedural due process dictate that a defendant classified as Tier Two or Tier Three must be granted a pre-notification hearing).

This is not a closed book, however. My observation is that a growing administrative structure is fast becoming necessary to deal with this process of community notification. Back in September when it was thought that the private bar of New Jersey would have to accept assignments to represent registrants in these tier classification hearings, the bar more or less threatened to revolt.[506] There quickly came a compromise in which the state Public Defender was given additional funding in which to represent indigent clients in tier classifications.[507] The prosecutors, of course, are now required to designate at least one prosecutor as a Megan's Law prosecutor.[508] Each vicinage now has at least one Megan's Law judge assigned to hear these classifications.[509] It is imposing a cost on our system.[510]

Recently, the New Jersey Supreme Court has accepted certification on another Megan's Law case,[511] not dealing with the constitutional issues in *Doe v. Poritz*,[512] but more the procedural

---

[506] *See* Tom Hester, *State Bar Protests Unpaid Megan Work*, STAR LEDGER, Oct. 21, 1995.

[507] *See* Michelle Ruess, *State Pays for Megan's Law: $250,000 Covers Public Defenders*, THE RECORD (New Jersey), Oct. 31, 1995, at A1 [hereinafter *State Pays for Megan's Law*].

[508] *Cf.* Lisa L. Colangelo, *Paying for Megan's Law Backlog*, ASBURY PARK PRESS, Nov. 3, 1995, at A3 (noting that "Attorney General Poritz has told county prosecutors they should consider using forfeiture monies to handle the backlog of cases they face under Megan's Law").

[509] *See 15 Judges Appointed to Hear Objections to Megan's Law*, THE RECORD (New Jersey), Aug. 24, 1995, at A3.

[510] *See generally* Edward T. McHugh, *Senate Oks Sex Offender Registry Plan; Police Will Handle Queries*, TELEGRAM & GAZETTE (New Jersey), May 30, 1996, at A1 (noting that "municipal officials would discourage [sex offenders] from registering to hold down the cost to government").

[511] *In re* C.A. 679 A.2d 1159 (1996).

[512] 662 A.2d 367. The Court considered the following constitutional issues concerning the Sex Offender Registration and Notification Laws of New Jersey: whether the statutes "constituted punishment." *Id.* at 387. Whether the statute violated Doe's right to equal protection under the federal and state constitutions. *Id.* at 413. Whether the statute violated Doe's procedural due process rights under the Fourteenth Amendment. *Id.* at 417.

issues.[513] Can one use evidence of alleged criminal activity that did not result in a conviction, for instance, in determining the risk of re-offense? Last week, the Court, in fact, issued a letter to counsel which suggests that it might get into some substantive re-evaluation of how the risk assessment scale has been constructed.[514]

All of which leads me to have this concern: we are building structures upon structures upon structures, but we are essentially asking lawyers, prosecutors, public defenders and judges to answer a question that is, if it is answerable: "What is the risk of re-offense?" The answer to that question would not seem to be answered competently simply by a panel or a process of lawyers. Well, I will leave it there, and I will look forward to any questions that come later.

STEPHEN NEWMAN: Thank you, Professor Chen. Our colleague, Professor Alexander Brooks is next.

---

[513] *See, e.g., In re* C.A., 679 A.2d 1153 (holding that Megan's Law permits prior allegations of sex crimes, including those never prosecuted, to be used in a procedure to determine the risk of re-offense).

[514] *See Risk Assessment Scale Manual, supra* note 396. Current decision-making about the risk of re-offense by sex offenders under the assessment scale is made by county prosecutors, who place each offender within a "low," "moderate" or "high" tier. *Id.* at 1. The placement is based on risk points accumulated by offenders depending on factors such as the number of prior offenses, progress in therapy, community support, abstention from drugs and the violence of any past crimes. *Id.* at 3.