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Foreward (Symposium: Critical Perspectives on Megan's Law: Protection vs. Privacy)

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Foreword

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This timely Symposium focuses on the laws that recently have been adopted by states all over the country as well as the U.S. Congress, imposing new sanctions on convicted sex offenders. Named after the New Jersey law that was enacted in 1994 in the wake of the brutal rape and murder of 7-year-old Megan Kanka,[2] these laws contain a range of provisions, but public attention and legal controversy have centered on two of them, which are also the center of this Symposium: "community notification" provisions, which require or permit public notice that a convicted sex offender who has served out his sentence is moving into the community; and "sexual predator" commitment procedures, which permit the involuntary, indefinite civil commitment of convicted sex offenders after they have completed their prison sentences, based on the prediction that they are likely to engage in future acts of sexual violence and the finding that they suffer from a mental abnormality or personality disorder (even though they are not diagnosed as mentally ill).

The U.S. Supreme Court will rule on the constitutionality of the civil commitment aspects of Megan's Law this term in *Kansas v. Hendricks*,[3] thus resolving a conflict among the lower courts. Lower court judges have reached differing conclusions as to whether this

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[2] N.J. STAT. ANN. §2C:7-6 to -11 (West Supp. 1995).

[3] Matter of Care and Treatment of Hendricks, 912 P. 2d 129, *cert. granted*, 64 U.S.L.W. 3830, No. 95-1649 (June 18, 1996). The Supreme Court heard oral argument on this case on December 10, 1996.

element of the law violates any or all of the following constitutional guarantees: substantive due process, the Equal Protection Clause, procedural due process, the Double Jeopardy Clause, and the ban on *ex post facto* laws.[4]

Likewise, the lower courts that have considered constitutional challenges to the community notification provisions of Megan's Law have also reached divergent results on whether it violates any or all of the same constitutional guarantees.[5] No doubt the Supreme Court will ultimately have to resolve this conflict as well.[6] At stake are profound

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[4] *See* Matter of Care and Treatment of Hendricks, 912 P.2d 129 (Kan. 1996) (holding that Kansas' Sexually Violent Predator Act violates substantive due process rights); In re Young, 857 P.2d 989 (Wash. 1993), *rev'd,* Young v. Weston, 898 F. Supp. 744 (D. Wash. 1995) (granting writ of habeas corpus and rejecting challenge based on substantive and procedural due process, and Double Jeopardy, Ex Post Facto, and Equal Protection Clauses); Wisconsin v. Post, 541 N.W. 2d 115 (1995) (reversing, on all issues, Wisconsin circuit court holding that Wisconsin law allowing post-sentence commitment of sex offenders violates constitutional protections against double jeopardy and *ex post facto* laws, as well as the guarantees of substantive due process and equal protection); In re Blodgett, 510 N.W. 2d 910 (Minn. 1994), *cert. denied,* 115 S.Ct. 146 (1994) (rejecting challenge to Minnesota's Psychopathic Personality Statute based on substantive due process and equal protection guarantees).

[5] Four courts have enjoined community notification provisions, pending full trials, after reaching the preliminary conclusion that they violated the Ex Post Facto Clause. *See* State v. Payne, 633 So. 2d 701, 703 (La. App. 1st Cir. 1993); Doe v. Pataki, 919 F. Supp. 691 (S.D.N.Y. 1996); Artway v. Attorney General of New Jersey, 876 F. Supp. 666 (D.N.J. 1995), *rev'd on other grounds,* 81 F. 3d 1235 (3d Cir. 1996); Rowe v. Burton, 884 F. Supp. 1372 (D. Alaska 1994). *See also* In re Reed, 663 P. 2d 216, 218 (1983) (holding that misdemeanant's lifelong registration obligation violated California Constitution's ban on cruel and unusual punishment). *But see* Doe v. Poritz, 662 A. 2d 367 (1995) (upholding law as against claims that it violated Ex Post Facto, Bill of Attainder, and Cruel and Unusual Punishment Clauses). *Accord,* State v. Ward, 869 P. 2d 1062, 1070-71 (Wash. 1994) (en banc) (same).

[6] As one commentator noted, if the Supreme Court upheld the civil commitment aspect of Megan's Law, then the pressure to enforce the community notification aspect would probably abate, since offenders considered to pose ongoing threats would likely be committed rather than returned to the community. Joel B. Rudin, *Megan's Law: Can it Stop Sexual Predators—and at What Cost to Constitutional Rights?*, CRIM. JUST. (1996) at 3, 5. As he cautioned, though, "[t]he effect on traditional civil liberties in this country would be

questions about the nature of punishment and the purpose of our criminal justice system, as well as fundamental issues about the constitutional constraints upon that system.

Even beyond these pressing moral and constitutional issues, Megan's Law also raises important pragmatic and policy questions. Is it an effective response to the tragic problem of sex crimes? Will it provide meaningful protection to potential victims of such crimes, including children? Is it cost-effective? And is it more effective—and more cost-effective—than alternative strategies would be?

I have spelled out some of the essential policy questions presented by Megan's Law because the public and political debate has often ignored them, simply assuming or presuming—without analysis or evidence—that Megan's Law would be an effective approach to protecting our children and communities from sexual offenses. The "debate" in our legislative halls has too often proceeded on a rushed, oversimplified, emotional level, without examining the law's underlying premises, but rather simply assuming that it effectively protects the public and penalizes pedophiles. As John Gibbons noted during the Symposium, the original New Jersey Megan's Law itself was passed under an emergency suspension of that state's legislative rules, with no hearings in one house of the legislature and only limited hearings in the other.[7] Congress's consideration of the federal counterpart was equally cursory.[8]

The political rhetoric that has fueled the recent Megan's Law juggernaut at least implies that those who question the law's constitutionality or efficacy thereby elevate the privacy of convicted sex

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incalculable. Indefinite preventive detention for other forms of violent (or even nonviolent) crimes surely would follow." *Id.*

[7] Symposium, *Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1, 57 n.331 (1997).

[8] *See* Rudin, *supra* note 6, at 4. "In its speed to enact a mandatory public notification provision—the legislation took all of two days to be introduced and enacted, without amendment, in the House and the Senate—Congress did not stop to consider any guidelines for how individual state notification statutes are to work." *Id.*

offenders above public safety—in particular, the safety of young children. Sometimes the rhetoric does more than imply this kind of false—and dangerous—conflict between public safety and individual rights. For example, one New York newspaper demonized a federal judge who upheld a constitutional challenge to New York's version of Megan's Law as "the pervert's pal."[9]

The presence of such inflammatory rhetoric, and the concomitant absence of serious analysis, in the public discussion about Megan's Law clearly disserves the rights of convicted and released offenders, who have paid their debt to society under the laws pursuant to which they were sentenced. Moreover, equally disserved is society's interest in assuring a rational allocation of public resources to prevent crime and to protect actual and potential crime victims. In fact, much analysis and evidence suggests that Megan's Law is as unconstructive in protecting the public's safety as it is destructive of the rights and interests of released sex offenders. Consider, for example, the following points that have been made in support of the conclusion that the community notification aspect of Megan's Law is at best ineffective, and at worst counterproductive, in combating sex crimes:

- These laws create a sense of panic on the part of parents and children concerning the individuals about whom notice is given.
- Because only a small minority of sexual offenses against children are committed by strangers, these laws will give children and their parents a false sense of security. Community notification laws do not provide information about the innumerable first-time, never-apprehended or unregistered offenders. Therefore, people must still be cautious in

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[9] *Rogues Gallery of Junk Judges*, DAILY NEWS (New York), Mar. 31, 1996, at 40 (referring to Judge Denny Chin of the U.S. District Court for the Southern District of New York).

supervising and educating their children.

- Because community notification is likely to deter offenders from registering with local law enforcement authorities, it has the potential to render such registration requirements worthless. Many sex offenders subjected to community notification laws flee the notified community or refuse to comply with the requirement, thus making it more difficult for police to keep track of them.
- By ostracizing ex-offenders from the community, and making them prey to vigilantism and harassment, the law prevents their re-integration into society. Psychologists say that what a sex offender needs to prevent re-offense is better socialization, not the isolation that notification laws tend to cause.
- Generally, pedophiles have difficulty relating to adults and hence look to children for companionship and sexual gratification. By ostracizing sex offenders, community notification laws may reinforce their attraction toward children.
- The stress generated by community notification laws may also drive offenders to re-offend. Studies indicate that certain emotions—such as frustration, anger or sadness—trigger deviant behavior. Since community notification laws stir these emotions, they may trigger deviant behavior.[10]

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[10] A number of the foregoing adverse impacts of community notification requirements were well-stated in Rudin, *supra* note 6, at 8:

> Offenders who lose their jobs or are shunned by the community, who are publicly humiliated and shamed, may go underground, moving to large cities and trying to live anonymously. Parole and probation authorities will be unable to provide these ex-offenders with the structure and guidance of supervision or the benefit of psychological treatment, while local police departments will lack the resources to track them down. Rendered unemployable and unable to function in society, deprived of any hope, such outcasts may be driven to commit new sexual or other crimes. *Id.*

- Because predictions of a sex offender's propensity to re-offend average a one-third accuracy rate, and because community notification is generally required only concerning those past offenders who are deemed likely to commit further crimes, potentially dangerous sex offenders may well escape community notification and live anonymously.
- Court-required due process procedures for offenders, as well as cumbersome community notification and monitoring procedures, are imposing substantial expenses upon local law enforcement agencies, thus diverting resources from other crime-control strategies not only in the area of sex offenses, but also regarding crime more generally.
- A study of the Washington State community notification law, the first such law in the country, indicated that the notification had little effect on recidivism, in terms of either sex offenses or crime in general.[11]
- Conversely, no study of any community notification law has indicated that it has had a positive effect on recidivism either for sex crimes in particular or for crimes in general.
- Community notification obscures the real problem of lack of treatment. As phrased by Ed Martone, Executive Director of the ACLU of New Jersey, this is analogous to the government warning the public that drinking water is tainted, but not doing anything to treat the water.

Summarizing the adverse impact that community notification will have on community safety—as well as on the rights of ex-offenders—Jerome Miller, a national authority on corrections, wrote:

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[11] Donna D. Schram & Cherlyn Darling Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism*, prepared for the Washington State Institute for Public Policy, Oct. 1995, at ii.

> In the end, all the hot lines, leaflets, talk-show kitsch and vigilantism won't slow the rate of sexual abuse. Precisely the reverse. As troubled individuals are tagged and driven from neighborhoods and families and friends and slip into that nether world of isolation and trance that feeds perverse fantasy, sexual offending can only grow more dangerous and egregious.[12]

The widespread, simplistic misconception that Megan's Law pits public protection against pedophiles' privacy is reflected in the subtitle of this Symposium, "Protection vs. Privacy." Yet the bright-line conflict that the Symposium title posits is, in fact, belied by the information and evaluation presented in the Symposium itself. More accurate is the Symposium's main title, since the Symposium does indeed provide "critical perspectives" on the law. And these perspectives are diverse, critically examining the subtitle's suggested dichotomy from all sides. Thus, not only do some contributions criticize the assumption that Megan's Law will effectively protect public safety; correspondingly, some contributions criticize the assumption that Megan's Law will substantially undermine privacy and other interests of convicted sex offenders.

Unfortunately, the New Jersey Legislature, the U.S. Congress, and other legislative bodies that rushed to enact these laws with scant if any hearings or discussion were not informed by the kind of constructive exchange that occurs in this Symposium. At least that exchange should serve as an important source of ideas and information for the judges, policymakers, scholars, and members of the public who are now taking a sober second look at these laws.

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[12] Jerome G. Miller, *Why the Scarlet "A" Works Against Us*, LOS ANGELES TIMES, Oct. 19, 1994, at B7.