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# Critical Perspectives on Megan's Law: Protection vs. Privacy

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## Critical Perspectives on Megan's Law: Protection vs. Privacy

*Prof. Nadine Strossen*

NADINE STROSSEN: I want to call this gathering to order. My name is Nadine Strossen. I am a member of the faculty at New York Law School and also the National President of the American Civil Liberties Union.

I am delighted to be here to introduce our distinguished speakers at this important conference. I really want to sincerely thank them for taking the time from their busy schedules to share their expertise with us.

I also want to thank New York Law School and the *New York Law School Journal of Human Rights* for organizing this significant

program. I want to extend a special thanks to two individuals with whom I have had the pleasure of working very closely in connection with this conference for their outstanding efforts. First and foremost, Roger Gold, the Executive Topics Editor of the *Journal of Human Rights*. Roger did the lion's share of the work in putting this program together, and it was a big lion. Second, I would like to thank my academic assistant, Raafat S. Toss, who also provided valuable assistance.

This symposium could not be more timely. We have recently marked the first anniversary of the original Megan's Law<sup>1</sup> in New Jersey.

Ever since Megan's Law was originally proposed, it has provoked widespread discussion and controversy.<sup>2</sup> On the one hand, it has been very popular among the public and politicians.<sup>3</sup> Other jurisdictions—including our federal government—have passed or are considering laws that are modeled on it.<sup>4</sup> On the other hand, though, it

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<sup>1</sup> N.J. STAT. ANN. §2C:7 (West 1995 & Supp. 1996). The statute took effect on October 31, 1994. *Id.*

<sup>2</sup> Arguments in favor of and in opposition to sex offender notification laws can be found in articles and news publications. See, e.g., Patricia L. Petrucelli, *Megan's Law: Branding the Sex Offender or Benefitting the Community?*, 5 SETON HALL CONST. L.J. 1127 (1995). "Megan's Law may not be a panacea to all the ills from which society suffers due to crimes committed by sex offenders," but "it is certainly a step in the right direction." *Id.* at 1169. Jason Gottlieb, *Megan Ill-Served by Assembly*, THE RECORD (New Jersey), Sept. 6, 1994, at B9; Guy Sterling, *Sex Offender Nearing His Release Will be First to Test Megan's Law*, STAR LEDGER (Newark), Dec. 31, 1994, at 1; G. Scott Rafshoon, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1667, 1673 (1995). The author states that sex offenders may be driven out of communities by notification laws, but the laws do nothing to stop sexual abuse. *Id.*

<sup>3</sup> See Nekesa M. Moody, *Liberals Feel Pressure to Pass Megan's Law*, ASSOC. PRESS, June 25, 1995 (stating that Congress recognizes the immediacy of the registration and notification laws); Ivette Mendez, *Megan's Tragedy Touched Public's Heart, Brought Change to Protect Kids*, STAR LEDGER (Newark, New Jersey), Jan. 1, 1995 (stating that public fervor and exposure forced politicians to pass registration and notification laws).

<sup>4</sup> See Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Law of the 1990's*, 90 NW. U. L. REV. 788 (noting that while Congressman Jim Ramstad of

is the subject of ongoing legal challenges,<sup>5</sup> and serious arguments have been made that Megan's Law violates a range of constitutional rights.<sup>6</sup> Moreover, there is a raging debate about whether the law is wise or effective from a public policy and public safety point of view.<sup>7</sup>

In light of the law's recent anniversary and the ongoing litigation surrounding it, all of these important questions are now getting more attention than ever.<sup>8</sup> To cite just one example, they were the subject of

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Minnesota was starting work on a bill to require sex offenders to register with police, New Jersey and Washington passed laws in the "memory of the victimized children," referring to Megan Kanka of New Jersey and Zachary Snider of Washington).

<sup>5</sup> See *Artway v. Attorney General of New Jersey*, 81 F.3d 1235 (3d Cir. 1996); *E.B. v. Poritz*, 914 F. Supp. 85, 87 (D. N.J. 1996). This case challenged the registration and notification laws and the Court temporarily enjoined notification. *Id.*; see also *Doe v. Poritz*, 662 A.2d 367 (N.J. Sup. Ct. 1995).

<sup>6</sup> See, e.g., *Artway*, 81 F.3d at 1245 (challenging enforcement of Megan's Law, contending that enforcement of the law would violate various "federal constitutional rights, including equal protection, due process, and the right not to be punished in violation of the Ex Post Facto, Bill of Attainder, and Double Jeopardy Clauses"); see also *Doe v. Poritz*, 662 A.2d at 380 (noting "plaintiff's claims are the same as any offender could assert . . . although his *ex post facto* and bill of attainder claims apply only to previously convicted offenders"); Elga A. Goodman, *Megan's Law: The New Jersey Supreme Court Navigates Uncharted Waters*, 26 SETON HALL L. REV. 764 (1996) (noting the constitutional challenges raised against Megan's Law).

<sup>7</sup> See Earl-Hubbard, *supra* note 4, at 850-53 (identifying some of these concerns, including that "a sex offender registry may have limited usefulness due to the scope of the individuals forced to register, the lack of resources available to monitor compliance, and the minor penalties attached for failing to register"); see also *Rafshoon*, *supra* note 2, at 1674 (stating that sex offenders can move away from states without notification and render registration laws virtually useless, and that notification could have the effect of deterring sex offenders from registering and could "encourage future crimes particularly if the fear of being found out prevents offenders from seeking legal help once they are released").

<sup>8</sup> See, e.g., Andy Newman, *Megan, Her Law and What It Spawned*, N.Y. TIMES, Feb. 25, 1996, §13 at 1; Bruce Fein, *When a Sex Offender Moves In, Is there a Duty to Warn the Community? Yes: Community Self-Defense Laws are Constitutionally Sound*, A.B.A. J., Mar. 1995, at 38 (supporting Megan's Law because although the law is "no panacea," any impact on crime is "welcome"); Edward Martone, *When a Sex Offender Moves In, Is there a Duty to Warn the Community? No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 3 (opposing Megan's Law because it will lead to vigilante justice).

a recent major article in the New Jersey edition of the New York Times.<sup>9</sup>

What we fairly loosely call "Megan's Law" actually consists of several different provisions,<sup>10</sup> each of which raises distinct constitutional and policy issues.<sup>11</sup> For that reason, the *Journal of Human Rights* has assembled this distinguished panel of speakers, who will discuss various facets of the inter-related issues that are at stake from diverse perspectives.

Speaking of perspectives, I have to disclose what I'm sure many of you already know, namely, that the A.C.L.U. has been a leading opponent of these laws all across the country.<sup>12</sup> And I personally have

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<sup>9</sup> Newman, *supra* note 8, at 1.

<sup>10</sup> These include N.J. STAT. ANN. §2C: 7-1 (West 1995 & Supp. 1996) Registration and Notification of Release of Certain Offenders Act; Legislative Findings and Declarations; §2C:7-2 Registration of Sex Offenders; Definitions; §2C: 7-3 Notice of Obligations to Register as Sex Offender; §2C:7-4 Registration Forms; Contents; Transmission of Forms; §2C:7-5 Records; Access; Immunity; §2C:7-6 Notification of Community of Intent of Sex Offender Released From Correctional Facility or Adjudicated Delinquent to Reside in Municipality; §2C: 7-7 Chief Law Enforcement Officer To Provide Notification to Community; §2C:7-8 Notification Guidelines; Identification of Factors to Risk of Re-Offense; §2C: 7-9 Immunity From Civil and Criminal Liability for Providing or Failing to Provide Relevant Information; § 2C 7-10 Notification Concerning Other Dangerous Circumstances Unaffected; §2C: 7-11 Notification of Advisory Council Established; Qualifications of Members.

Another aspect of Megan's Law is that it provides for prolonged detention after the offender's sentence has expired. *Id.* at §30:4-27.10; *see also generally* Rosie Sherman, *Psychiatric Gulag or Wise Safekeeping? Lawmakers Use Civil Commitment to Detain Sex Offenders*, NAT. L.J., Sept. 5, 1994, at A1 (stating that Megan's Law "requires an end-of-sentence review 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").

<sup>11</sup> *See* Goodman, *supra* note 6, at 779 (discussing how the registration and notification laws have been constitutionally challenged based on claims that they violate Ex Post Facto, Bill of Attainder, Double Jeopardy, Cruel and Unusual Punishment, Due Process, and Equal Protection Clauses, and they also violate the right to privacy).

<sup>12</sup> *See* Simeon Schopf, *Megan's Law: Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 119 (1995) (stating "[t]he ACLU and others argue that it is unconstitutional to treat sex offenders differently from other violent criminals").

often argued against them, most recently on a CBS television show a couple of weeks ago.

But my role here is not to present arguments against the law. That will be done ably by other speakers. I am here only in a neutral capacity to give you some brief biographical information about our moderator for this opening session and the participants in it. They all have very impressive credentials. For that reason, I want to leave as much time as possible for them to speak. Accordingly, I am only going to be presenting brief biographical headlines about each of them in the order in which they will speak.

First, our moderator will be my esteemed New York Law School colleague, Stephen Newman. A graduate of Columbia Law School, who has been on our faculty since 1974, Professor Newman has published many scholarly and popular writings in the family law area. He also appears frequently on news and public affairs broadcasts to discuss family law issues.

Our first speaker is Jane Grall, Assistant Attorney General for Legislative Affairs in New Jersey. Ms. Grall's responsibilities include formulating legislative initiatives and developing and advocating the Attorney General's position on pending legislation. She has also taught criminal justice at Temple University and Trenton State College.

Our second speaker will be Robert Farley. Since January 1995 he has been Deputy Attorney General for Governmental Relations and Chief of the Legislative Division in the New York State Attorney General's Office. Prior to that, Mr. Farley served as counsel to the Assembly minority leader and was also elected to the Schenectady County Legislature.

Our next speaker will be Linda Fairstein. Ms. Fairstein is Chief of the Sex Crimes Prosecution Unit and Deputy Chief of the Trial Division in the Manhattan District Attorney's office. In 1993, Ms. Fairstein published a book entitled *Sexual Violence: Our War Against Rape*, for which she received *Glamour Magazine's* Woman of the Year award. She has also received numerous other awards and has widely lectured on most aspects of the criminal justice system, including sexual

assault. As I warned her in advance, I cannot resist adding what I consider the single most intriguing item on Ms. Fairstein's impressive resume. She has just written a crime novel, which will be published by Scribner this summer, and I'm really looking forward to reading it.

We will next hear from Professor John Gibbons. Since 1990, Professor Gibbons has been the Richard J. Hughes Professor of Constitutional Law at Seton Hall University School of Law. Before joining the Seton Hall faculty, Professor Gibbons served on the U.S. Court of Appeals for the Third Circuit for twenty years and for the last three of those years was the Chief Judge. Professor Gibbons, by the way, prefers to be called "Professor," not "Judge," showing an admirable sense of priorities. Professor Gibbons represented the plaintiff in the *Artway*<sup>13</sup> case, the federal court challenge to the retroactive application of Megan's Law. Professor Gibbons also filed a brief in the New Jersey Supreme Court case *Doe v. Poritz*,<sup>14</sup> concerning the constitutionality of Megan's Law on behalf of the A.C.L.U. of New Jersey. He has also been an active volunteer lawyer with the A.C.L.U. of New Jersey in other cases as well. That is likewise true of our next speaker, Professor Ronald Chen.

Professor Chen teaches at Rutgers Law School in Newark and is also the acting Associate Dean for Academic Affairs at Rutgers Law School. Professor Chen has litigated many important constitutional cases. Of particular note for present purposes, in December 1994 the U.S. District Court in New Jersey appointed him Special Pro Bono Counsel in *Diaz v. Whitman*,<sup>15</sup> a challenge to certain aspects of Megan's Law.

Following Professor Chen is one of his colleagues from Rutgers Law School, Alex Brooks, who is the Justice Joseph Weintraub Professor of Law Emeritus at Rutgers. Professor Brooks is an internationally known lecturer and scholar in mental health law. In 1975

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<sup>13</sup> *Artway v. Attorney General of N.J.*, 876 F. Supp. 666 (D. N.J. 1995).

<sup>14</sup> 662 A.2d 367 (N.J. 1995).

<sup>15</sup> No. 94, slip op. at 9 (D. N.J. Jan. 3, 1995).