SYMPOSIUM ON MEGAN'S LAW

INTRODUCTION

PURSUING PUBLIC PROTECTION THROUGH MANDATORY COMMUNITY NOTIFICATION OF CONVICTED SEX OFFENDERS: THE TRIALS AND TRIBULATIONS OF MEGAN'S LAW

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We sail on truly uncharted waters, for no other state has adopted such a far-reaching statute.[1]

— Chief Justice Robert N. Wilentz, Supreme Court of New Jersey

I. INTRODUCTION

No recent New Jersey legislation has generated as much national attention as the statute commonly known as "Megan's Law."[2]Enacted in October 1994,

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[1] Doe v. Poritz, 662 A.2d 367, 422 (N.J. 1995). With the enactment of Megan's Law in 1994, New Jersey became the first state to require, rather than merely allow, law enforcement officers to disseminate personal information about certain sex offenders to residents and employees within their community. *See id.*

[2] As used in this article, the phrase "Megan's Law" refers specifically to N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-11 (West 1995), which stem from two bills of a 10-bill "sex-offender package" enacted into law in New Jersey on October 31, 1994. The bills were known as Bill A-84, "An Act Concerning Registration of Sex Offenders," and S-14, "An Act Providing for Community Notification of Certain Offenders." It should be observed,

Megan's Law has served as the inspiration for similar legislation adopted by the federal government[3]and at least sixteen other states.[4] Megan's Law was

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however, that a reference to Megan's Law may be meant to include the entire 10-bill package. *See* Donald DiFrancesco, *There's More to Megan's Law Than Notification*, COURIER NEWS (Bridgewater, N.J.), Apr. 9, 1995, at 8 (Mr. DiFrancesco is President of the New Jersey State Senate). The other eight sex-offender bills, with their respective codifications and subject matter, are: S-11, N.J. STAT. ANN. § 2C:43-7 and § 2C:44-3 (West 1995)(setting longer, minimum prison terms for violent sex offenses against victims under age 16, including the possibility of life without parole); A-81, N.J. STAT. ANN. § 2C:11-3 (West 1995) (making murder of a child under age 14 an aggravating factor for a jury to consider in death penalty proceedings); S-15, N.J. STAT. ANN. § 2C:47-8 (West 1995) (eliminating prison sentence reductions, known as "good behavior credits," for sex offenders who refuse to participate in psychotherapy or treatment); A-86, N.J. STAT. ANN. §§ 2C:47-3, 30:4-27.2, 30:4-82.4, 45:14B-28 (West 1996) (revising procedures governing civil commitment of certain mentally ill and dangerous persons); S-320, N.J. STAT. ANN. §§ 2C:47-8, 2C:43-6.4 (West 1995) (requiring lifetime supervision for sex offenders as part of any conviction, making it possible for parole officers to track offenders after the expiration of normal prison and parole terms); A-1592, N.J. STAT. ANN. § 53:1-20.17 to 1-20.28 (West 1996) (requiring persons convicted of certain sexual offenses to provide samples of blood for DNA profiling and for use in connection with subsequent criminal investigations; A-165, N.J. STAT. ANN. §§ 30:4-123.53(a) and 4-123.53(b) (West 1996) (requiring the state Department of Corrections to notify county prosecutors 30 days in advance of when a sex offender from their jurisdiction is released from prison); and ACR-8 (filed with the Secretary of State on Oct. 4, 1994) (establishing an investigative task force to study the treatment of sex offenders at the Adult Diagnostic and Treatment Center, as well as recommending reforms). *See* Ivette Mendez, *Megan's Law: 10 Sex Offender Bills Clear Senate*, STAR-LEDGER (Newark, N.J.), Oct. 4, 1994, at 1, 22. Two other statutes enacted in the fall of 1994 are also often associated with Megan's Law: S-1398, N.J. STAT. ANN. §§ 2A:12-14, 30:4-6.1, 30:4-1523.55(a) (West 1996) (requiring the Administrative Office of the Courts to establish procedures for advance notice to prosecutors and victims of domestic violence of release of defendants in such cases); and A-722, N.J. STAT. ANN. § 2C:43-2 (West 1995) (requiring "truth in sentencing" for sexual offenses).

[3] *See* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14071 (1994). This law was enacted as part of a comprehensive federal anti-crime bill on September 13, 1994. It requires states to register convicted sex offenders and permits — but, unlike New Jersey, does not mandate — community notification where "necessary to protect the public concerning a specific person required to register." *Id.* § 14071(d)(3). A state failing to adopt such legislation within three years of the enactment of Section 14071 could lose up to 10% of its anti-crime grants. *See id.* § 14071(f)(2)(A).

Since the enactment of Section 14071, Attorney General Janet Reno has pressured states to enact notification laws requiring sex offenders to notify police of their whereabouts for at least 10 years following their release from prison. *See* Michael J. Sniffen, *Reno Presses States on Notification Law*, THE INQUIRER (Philadelphia, Pa.), Apr. 8, 1995, at A6. Congressman Dick Zimmer (R-N.J.), whose district includes the County of Mercer, where Megan Kanka resided, and who was one of the early advocates of Megan's Law on both the federal and state levels, subsequently sponsored a bill to amend the federal act to make community notification mandatory rather than permissive. *See* Henry Stern, *Megan's Law Bill Change Garners Key Endorsements*, DAILY RECORD (Morris County,

prompted by public outrage over the rape and murder of seven-year-old Megan Kanka in July 1994 by a twice-convicted sex offender who lived across the street from the Kanka family.[5] The statute requires the registration of convicted sex offenders following their release from incarceration; it further requires law enforcement officials to provide community notification as to the identity and location of those offenders deemed likely to pose a significant risk of recidivism.[6] Megan's Law has raised complex constitutional concerns,[7] with critics contending that the law runs afoul of several protections afforded convicted criminals.[8]

N.J.), Mar. 8, 1996, at A11. The bill was signed into law by President Clinton on May 17, 1996, at a public ceremony attended by the parents of Megan Kanka. *See* Alison Mitchell, *Clinton Signs Bill on Warning of Sex Offenders*, N.Y. TIMES, May 18, 1996, at 8.

[4] *See* Adelia Yee & Donna Lyons, *Registration and Notification of Sex Offenders*, NATIONAL CONFERENCE OF STATE LEGISLATORS LEGISBRIEF, vol. 3, no. 39 (Nov./Dec. 1995) (hereinafter "LEGISBRIEF") (copy on file with author). Washington and Louisiana enacted the first community notification statutes, "but many have passed since the highly publicized 'Megan's Law' in New Jersey in 1994." *Id.* Those states following New Jersey's lead include California, Georgia, New York, North Dakota, Oregon and Texas. Other states which have enacted more limited forms of community notification legislation include Colorado, Idaho, Kansas, Maine, Maryland, Mississippi, Montana, Ohio, and Tennessee. *See id.* By November 1995, only four states — Massachusetts, Nebraska, Pennsylvania, and Vermont — in addition to the District of Columbia, had failed to enact sex offender registration laws. *See id.*

[5] *See* Jerry Gray, *Sex Offender Legislation Passes in the Senate*, N.Y. TIMES, Oct. 4, 1994, at B1. The original Statement to S-14, *see supra* note 2, made the following finding:

> Heinous crimes have been committed against children by sex offenders after their release from incarceration. The most recent case involves the tragic rape and murder of seven-year-old Megan Kanka of Hamilton Township by a neighbor who had committed sex offenses against children. Residents of the neighborhood had no knowledge of the man's criminal history. Because sex offenders are likely to be unsusceptible to the "cures" offered by the prison system, the urges that cause them to commit offenses can never be eliminated but merely controlled. The danger posed by the presence of a sex offender who has committed violent acts against children requires a system of notifcation to protect the public safety and welfare of the community.

Id. (copy of the original Statement on file with author). For more background concerning the comprehensiveness and reasonableness of Megan's Law, see *infra* note 27 and accompanying text.

[6] *See* N.J. STAT. ANN. § 2C:7-1-11 (West 1995) (entitled "Registration and Notification of Release of Certain Offenders").

[7] *See* Tom Avril & Chris Mondics, *U.S. Judge Rejects Part of Megan's Law as Unconstitutional*, THE INQUIRER (Philadelphia), Mar. 1, 1995 at A1.

[8] The major grounds for challenging Megan's Law involve the application of the following constitutional safeguards: the *Ex Post Facto* Clause (U.S. CONST. art. I, § 10, cl. 1); the prohibition against cruel and unusual punishment (U.S. CONST. amend. VIII); the Due Process and Equal Protection Clauses (U.S. CONST. amend. XIV); the right to privacy (*see, e.g.*, Griswald v. Connecticut, 381 U.S. 479 (1965); Paul v. Davis, 424 U.S.

As a consequence, Megan's Law has itself come under serious assault in both the state and federal courts,[9] and its constitutionality remained in doubt eighteen months after its enactment.[10]

II. ENACTMENT OF MEGAN'S LAW

The origins of New Jersey's Megan's Law can be traced back to July 29, 1994, the day when Jesse Timmendequas, a twice-convicted sex offender, allegedly raped and murdered Megan Kanka.[11] At the time, Timmendequas lived across the street from the Kankas in a Trenton suburb with two other convicted sex offenders, whom he had met while previously incarcerated at a special prison for "compulsive and repetitive sex offenders."[12] Other than the three men themselves, no one in the residential neighborhood was aware of their criminal backgrounds.[13] Timmendequas reportedly lured Megan into his house by promising to show her a new puppy,[14] and then proceeded to rape and murder her.[15] Megan's mother later observed that, had she been made aware of Timmendequas' prior record, she could have taken steps to prevent her daughter's tragic

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695 (1976); and Whalen v. Roe, 429 U.S. 589 (1977)); the prohibition against bills of attainder (U.S. CONST. art. I, § 10, cl. 1); and the Double Jeopardy Clause (U.S. CONST. amend. V). *See* Artway v. Attorney General of New Jersey, 876 F. Supp. 666, 671 (D.N.J. 1995).

[9] *See* Robert Hanley, *'Megan's' Law Under Assault in U.S. Courts*, N.Y. TIMES, Mar. 16, 1996, at 23; *See also* Jim Hooker, *Knocking down Megan's Law*, ASBURY PARK PRESS (Asbury Park, N.J.), Mar. 1, 1995, at A1. These articles provide a partial chronology of several of the state and federal court challenges to Megan's Law filed in 1995.

[10] *See* George Berkin, *Judge Halts Sex Offender Notifications*, STAR-LEDGER (Newark, N.J.), Mar. 15, 1996, at 1; Robert Hanley, *'Megan's Law' Suffers Setback in Court Ruling*, N.Y. TIMES, Mar. 1, 1995, at A1. Although it is beyond the scope of this article to provide a detailed examination of the constitutional issues which have been raised through state and federal court challenges, an abbreviated description of the leading New Jersey cases appears in Section VI, *infra*.

Numerous court challenges have also occurred in other states. Challenges to registration, alleging violations of the Eighth Amendment's protection against cruel and unusual punishment, were defeated in Arizona, Illinois, New Hampshire and Washington (on the basis that registration does not constitute punishment) and in California (on the basis that registration does not constitute cruel and unusual punishment). *See* LEGISBRIEF, *supra* note 4. But several federal district courts have struck down key provisions of registration and community notification statutes. *See infra* note 118 and accompanying text.

[11] *See* Charles Stile, *In Memory of Megan*, TRENTON TIMES, Oct. 4, 1994, at A1.

[12] *Id.* at A10. Timmendequas had been released despite his own admission and the doubts of a therapist that he could adjust to life outside prison. Moreover, he had been granted early release for "good time," even though he had failed to participate regularly in prescribed therapy. *See id.*

[13] *See* Ralph Siegel, *Megan's Alleged Killer Appears Before Judge*, THE RECORD (Hackensack, N.J.), June 10, 1995, at A3.

[14] *See* Editorial, *Tricks of the Scum Trade*, THE TRENTONIAN, May 2, 1995, at 24.

[15] *See* Siegel, *supra* note 13, at A3.

death.[16]

Megan Kanka's death marked the second occasion in less than a five-month period in which a young New Jersey girl was allegedly victimized by a convicted sex offender living in her neighborhood.[17]Although the Legislature had recently adopted tough criminal sanctions as a means to deter such incidents,[18] victims' rights advocates demanded a still stronger legislative response, including public notification of the identity and location of convicted child molesters released into their communities.[19] Megan's mother, Maureen Kanka, led this effort.[20] The arguments in favor of mandatory registration and community notifica-

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[16] *See* Deborah Privitera, *Helping Children Be Aware*, THE RECORD (Hackensack, N.J.), May 19, 1995, at A1. "Had I known that there were three pedophiles living across the street from my home, I never would have allowed Megan to walk out of the door of my house alone," stated Maureen Kanka. "I guarantee she would be alive today." *Id.*

[17] On March 6, 1994, six-year-old Amanda Wengert of Manalapan Township was allegedly abducted and murdered by a neighbor with a history of prior sexual offenses. *See* Mendez, *supra* note 2, at 1.

[18] In response to Amanda Wengert's death, *see supra* note 17, the Legislature enacted the following bills: S-868, which amended N.J. STAT. ANN. § 2C:18-3 (West 1994) by upgrading the offense of criminal trespass to a crime of the fourth degree if it is committed in schools or on school property; S-869, which amended N.J. STAT. ANN. § 2C:13-6 (West 1994) by making it a crime of the third degree to attempt to lure or entice a child into a structure or isolated area; S-870, which amended N.J. STAT. ANN. § 2C:44-6 (West 1994) by requiring pre-sentence investigations of defendants convicted of certain serious crimes to contain a report of their mental condition; and S-893, which amended N.J. STAT. ANN. § 2A-4A-60 (West 1994) by increasing public access to information related to the juvenile justice system.

[19] Individual legislators were flooded with petitions containing hundreds of signatures, calling for passage of the following measures:

1. That all residents of a community be vested with the right to know of a convicted child sexual offender's conviction should this sex offender desire to live in and among the community.

2. That a twice convicted child sexual offender be automatically subject to a life sentence, in prison, without parole.

3. That a person convicted of murdering and sexually molesting a child be committed to death under the State of New Jersey's death penalty.

(Copy of sample petition on file with author).

[20] *See* Mendez, *supra* note 2. On October 3, 1994, the day Megan's Law passed in the State Senate, Ms. Kanka "said action on the notification bill was just the beginning of a nation-wide effort to pass similar state laws." *Id.* Since then, she has become a passionate "activist," taking her message to other states and lecturing to various community groups. *See* Privitera, *supra* note 16. At one such meeting held at Ramapo State College in New Jersey, her children also attended, handing out pink ribbons and selling T-shirts and hats emblazoned with the words "Megan's Law." *See id.* The Kankas contributed the proceeds from the sales to a non-profit foundation created in Megan's memory. *See id.* Ms. Kanka was also appointed by Governor Whitman to serve on the Notification Advisory Council, which was created to assist the Attorney General in developing guidelines for implementation of Megan's Law. *See infra* note 31.

tion are that they would enhance public safety, assist law enforcement in criminal investigations, and diminish opportunities for child molesters to commit new offenses. Critics, on the other hand, raise concerns about the protection of civil liberties, and maintain that such legislation discourages sex offenders from pursuing rehabilitation, creates a false sense of security in the community, and wastes money that could otherwise be used for preventive treatment. Critics further contend that such legislation can lead to vigilantism and inadvertent disclosure of a victim or sex offender's identity.[21]

A memorandum issued a few days before the New Jersey Legislature voted on Megan's Law explained the majority party's position and justification for supporting Megan's Law as an obligation on the part of the legislature to provide the highest level of protection to the "most vulnerable members of our society."[22] Legislators were disturbed by perceived "gaps" in the laws to protect children.[23] In crafting a statutory remedy, legislators attempted to address three problems: (1) the ability of presumably repetitive and compulsive sex offenders to "max out," permitting them to be free of governmental supervision upon their release from custody; (2) the opportunity for such sex offenders to be released into the community without any coordinated effort to notify the public of their whereabouts; and (3) the inability of the correctional system to compel sex offenders to continue treatment for their antisocial behavior.[24] The Legislature considered the ten-bill package eventually introduced as a comprehensive method of combatting all three problems.[25] In weighing the statutes' possible infringement upon privileges previously enjoyed by convicted sex offenders, legislators made a clear policy choice to give precedence to the rights of potential victims over those of sex offenders in any area where those rights might conflict.[26]

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[21] *See* LEGISBRIEF, *supra* note 4. Advocates also suggested that such legislation could establish the legal grounds to hold for investigation previously convicted sex offenders found in suspicious circumstances. *See id.*

[22] James A. Harkness, MEMORANDUM TO ALL REPUBLICAN SENATORS, Sept. 30, 1994, at 1 (copy on file with author). Mr. Harkness is Counsel to the New Jersey Senate Majority.

[23] *See id.* The Legislature focused on the fundamental question of how a dangerous person such as Jesse Timmendequas could be released without supervision and allowed to live with two other sex offenders. *See id*; *see also* NEW JERSEY SENATE REPUBLICAN NEWS, Oct. 3, 1994 (Senate President Donald DiFrancesco called the legislation "an effort at filling the gaps in current law").

[24] *See* Harkness, *supra* note 22, at 1.

[25] Senate President Donald DiFrancesco observed that the package of bills provides "a comprehensive revamping of the state's approach to dealing with sexual offenders." Mendez, *supra* note 2, at 1, 22. "From lifetime prison terms for violent sexual attacks against children to community notification and registration to a more effective civil commitment procedure, these initiatives are designed to close the deficiencies and the leniency in our laws that allow dangerous, even deadly, sexual offenders to threaten our neighborhood and harm our children." *Id.* at 22.

[26] *See* Harkness, *supra* note 22, at 3. Prior to enactment, the Legislature had referred

The legislative history suggests that, once drafted, the sex offender package moved in a prompt but deliberative manner through the legislative process.[27] The primary components of Megan's Law, mandatory registration and community notification,[28] were approved by the General Assembly on August 29, 1994[29] and then referred to the Senate Law and Public Safety Committee. During the course of extensive hearings,[30] the Committee made substantial amendments to A-84 and S-14, the registration and notification provisions, respectively, prior to releasing committee substitutes on September 26, 1995.[31] On October 4, 1994, the

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the bills to the New Jersey Attorney General's office for a review of potential constitutional defects. *See id.* The Attorney General made several recommendations, and the legislature subsequently revised the bills to incorporate these recommendations. *See id.* Ultimately, the Attorney General publicly endorsed the entire package. *See id.*

[27] Although the bills moved expeditiously, their progress was punctuated with painstaking review, especially in Senate committees. In fact, the media and the public severely criticized the Senate for taking too much time in addressing the constitutional concerns raised by Megan's Law and for trying to "close all the loopholes." Harkness, *supra* note 22 at 4 (discussing the "Speed of Consideration"). "[I]t is essential that we not just pass bills willy nilly. Rather, we really must have a result which will close the loopholes and give some confidence back to New Jersey parents that public safety matters more than public relations." *Id.* Senate committees worked diligently and closely with the Governor's Counsel and the Attorney General's Office to address problems with the bills and, where necessary, to amend them to produce better and more defensible legislation. *See* Telephone Interview with Jane Grall, Assistant Attorney General of New Jersey (Mar. 6, 1996).

[28] *See supra* note 2 for an explanation of the distinction between Megan's Law (i.e., A-84 and S-14) and the remainder of the sex offender package.

[29] The Speaker of the Assembly, Chuck Haytaian took the unusual step of declaring the need for passage of the bills "an emergency," which allowed the Assembly to circumvent the regular committee process. *See* Ivette Mendez, *Sex Crime Package Voted by Assembly*, STAR-LEDGER (Newark, N.J.), Aug. 30, 1994, at 1.

[30] *See* Brief Submitted on Behalf of the Amicus Curiae New Jersey Senate at 6-7, Doe v. Poritz, 662 A.2d 367, 422 (N.J. 1995) (No. 39-989) [hereinafter "Senate Brief"]. The Committee hearings were held on August 29 and September 26, 1994. *See id.* Among those speaking in favor of the registration and notification provisions were the Attorney General, the County Prosecutor's Association, the Fraternal Order of Police, and the parents of Megan Kanka; those speaking in opposition included the American Civil Liberties Union, Criminal Defense Lawyers and the Association on Corrections. *See* Ken Raatz, BILL COMMENTS, Oct. 31, 1994. Mr. Raatz is Special Counsel for Policy and Planning in the Office of the New Jersey Senate Majority.

[31] *See* Raatz, *supra* note 30. A comparison of the original and the amended versions of the bills, particularly S-14, demonstrates that the Senate Law and Public Safety Committee paid close attention to the bill's contents and was deeply concerned with ensuring that the extent of notification was narrowly tailored to fit the degree of risk which individual sex offenders presented. S-14, as originally introduced, provided for indiscriminate community notification of sex offenders upon their release from prison without an assessment of each individual offender's potential for recidivism. *See* S-14, § 3. As amended, S-14 was augmented to include a three-tier notification system wherein there is less notification when the risk of recidivism by an offender is considered low or moderate. *See* S-14,

Senate passed the committee substitutes to A-84 and S-14 and the amended bills were then returned to the General Assembly for concurrence, where they were approved on October 20, 1994.[32] Finally, on October 31, 1994, Governor Christine Todd Whitman, with Megan Kanka's mother at her side, signed Megan's Law and the entire ten-bill sex offender package into law, effective immediately.[33]

III. THE PROVISIONS OF MEGAN'S PROVISIONS LAW: MANDATORY REGISTRATION AND COMMUNITY NOTIFICATION

The centerpiece of the package of bills giving rise to Megan's Law is S-14,[34] the bill mandating community notification of convicted sex offenders.[35] This bill, however, is dependent upon the implementation of A-84, which requires the registration of persons convicted, adjudicated delinquent, or found not guilty by

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§ 3. The bill was further amended to permit creation of "The Notification Advisory Council" to assist the Attorney General in developing "Guidelines" for implementation and to monitor the statute's effectiveness. *See* S-14, § 6. A-84 was amended to classify, with more specificity, those crimes which would mandate registration and potentially necessitate increased community notification, as well as to conform the legislation to the list of offenses included in the Violent Crime Control and Law Enforcement Act of 1994. *See* Grall Interview, *supra* note 27.

These amendments provide further indication that the legislative intent was directed at providing reasonable regulatory methods of community protection, as opposed to means of imposing increased punishment to sex offenders. *See* Senate Brief, *supra* note 30, at 4.

[32] The General Assembly only voted on seven of the bills on October 20, 1994, because three of the bills which they had previously approved on August 29, 1994 (A-81, A-86 and ACR-8) were not amended by the Senate and thus did need to be resubmitted to the Assembly. *See* Michelle Ruess, *Senate Passes Sex-Offender Crackdown*, THE RECORD (Hackensack, N.J.), Oct. 4, 1994, at A3.

[33] *See* Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES, Nov. 1, 1994, at B1. Actually, Governor Whitman signed nine bills into law on October 31, 1994. ACR-8 did not require her signature because it was crafted in the form of a resolution, rather than a bill. S-14 stated, "This act shall take effect immediately."

[34] *See* Jim Hooker & Thomas Zolper, *Senate OKs Sex Offender Bills*, ASBURY PARK PRESS (Asbury Park, N.J.), Oct. 4, 1994, at A1.

[35] The full legislative history of S-14 is as follows: S-14 was introduced on September 12, 1994 and co-prime sponsored by Senators Peter A. Inverso and Dr. Gerald Cardinale. *See* OFFICE OF LEGISLATIVE SERVICES, NEW JERSEY STATE LEGISLATURE BILL GUIDE 1994-1996 (copy on file with author). The bill was referred to the Senate Law and Public Safety Committee, which prepared a committee substitute to the original bill and held a hearing on September 26, 1994, at which time S-14 was favorably released by a 5 to 0 vote. *See id.* On October 3, the Senate approved S-14 by a vote of 40 to 0. *See id.* On October 20, 1994, S-14 was merged with A-85, co-prime sponsored by Assembly Members Paul R. Kramer and Michael J. Arnone, and debated on the floor of the General Assembly, which subsequently approved it by a vote of 68 to 0, with 12 members abstaining. *See id.* S-14 was signed into law by Governor Whitman on October 31, 1994. *See id.*

reason of insanity of committing a sex offense.[36] In enacting mandatory registration, the legislature made a finding that the danger of recidivism posed by sex offenders require a system of registration to enable law enforcement to alert the public.[37] The Legislature also found that a central registry system would "provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons."[38]

As a precautionary measure, the legislature deliberately designed the registry system to be extensive; it applies to more than those sex offenders who are currently incarcerated.[39] Those individuals who were no longer incarcerated or involuntarily committed on the date the statute went into effect, but who had committed offenses prior to that date, had to register with the police department in the municipality in which they resided within 120 days of the statute's effective date.[40] Individuals placed on probation or in other forms of community supervi-

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[36] A-84 appears as N.J. STAT. ANN. § 2C:7-2a (West 1995). The offenses triggering registration are as follows: aggravated sexual assault, sexual assault, aggravated criminal sexual contact; kidnapping pursuant to N.J. STAT. ANN. § 2C:13-1c(2) (West 1996) (which applies only if the victim is less than 16 years of age); or an attempt to commit any of these crimes if the court found that the offender's conduct was characterized by a pattern of repetitive and compulsive behavior, regardless of the date of the commission of the offense or the date of conviction. *See* N.J. STAT. ANN. § 2C:7-2b(1) (West 1995). If the court did not find a pattern of repetitive and compulsive behavior, the registration provision requires registration for these offenses, as well as for several others, only if the conviction, adjudication of delinquency, or acquittal by reason of insanity is entered on or after the effective date of the statute (Oct. 31, 1994), or if the offender is serving a sentence of incarceration, probation, parole or other form of community supervision as a result of the offense or is confined following acquittal by reason of insanity or as a result of civil commitment on the effective date of the statute. *See id.* § 2C:7-2b(2).

The rationale for the "split categories" derived from legislative recognition that the retroactive aspect of mandatory registration (with respect to persons who had committed offenses prior to the effective date of the act) could raise serious constitutional concerns. Therefore, the Legislature concluded that — for those who had completed their sentences and had already been released from any further form of supervision (such as parole or civil confinement) — registration would only be required if the prior offenses were the most serious in kind and degree and the offender's conduct was "characterized by a pattern of repetitive, compulsive behavior." Grall Interview, *supra* note 27.

The statute also requires registration if the offender was convicted, adjudicated delinquent or acquitted by reason of insanity of an offense similar to those specifically enumerated in violation of federal law or committed in another state. *See id.* § 2C:7-2b(3).

[37] *See* N.J. STAT. ANN. § 2C:7-1a (West 1995).

[38] *Id.* § 2C:7-1b.

[39] *See id.* § 2C:7-2. Individuals who were confined in a correctional or juvenile facility or involuntarily committed at the time of the statute's effective date had to register prior to their release in accordance with procedures established by the Departments of Corrections and Human Services. *See id.* § 2C:7-2c(2).

[40] *See id.* § 2C:7-2c(4). Such individuals were required to register with the chief law enforcement officer who, in most cases, is the local police chief. If the municipality does not have a police department — and many of the more rural municipalities in New Jersey

sion have to register prior to being released into the community.[41] Individuals previously convicted of a sex offense who moved into or returned to the state from another jurisdiction had to register within 120 days of their arrival.[42]

Once registered, individuals who seek to change their address must re-register with the police department in the municipality in which they intend to reside at least ten days prior to their relocation.[43] All registrants must also verify their addresses either every ninety days or annually.[44] Those who fail to comply with the registration requirements may be found guilty of a crime of the fourth degree.[45] However, individuals required to register may apply to the Superior Court to terminate their registration obligation.[46] To terminate their registration requirement, individuals must prove that they have not committed an offense for at least fifteen years following conviction or release from a correctional facility, whichever occurred later, and that they are not likely to pose a threat to the safety of others.[47]

Once mandatory registration has been completed, the statutory scheme of Megan's Law requires the police chief of the municipality in which a registrant intends to reside to notify the community.[48] The chief must do so within forty-five days after receipt of notification that the sex offender is to be released from incarceration and after receipt of the offender's registration.[49] The extent of the community notification depends upon the potential risk of re-offense which the registrant poses.[50] The statute classifies the degree of risk into three levels.[51] If the risk of re-offense is low ("Tier One"), the chief must notify only those law enforcement agencies likely to encounter the registrant.[52] If the risk of re-offense

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do not — then the individual must register with the Superintendent of State Police. *See id.* Because the effective date of the act was October 31, 1994, all such individuals were required to register by February 28, 1995.

[41] *See id.* § 2C:7-2c(1).

[42] *See id.* § 2C:7-2c(3).

[43] *See id.* § 2C:7-2d.

[44] *See id.* § 2C:7-2e. Those convicted of the more serious offenses enumerated in § 2C:7-2b(1) must verify their addresses every 90 days; those convicted of offenses enumerated in § 2C:7-2b(2) must verify their addresses annually. The Attorney General was required to review the verification provision after one year from the effective date of the act and, if warranted, modify the time frame for verification. *Id.*

[45] *See id.* § 2C:7-2a.

[46] *See id.* § 2C:7-2f.

[47] *See id.*

[48] *See id.* §§ 2C:7-6 to 2C:7-7. Similar to the registration statute, *see supra* note 36, if there is no local police department, the State Superintendent of Police shall provide the required community notification. *Id.*

[49] *See id.* § 2C:7-6.

[50] *See id.* § 2C:7-8.

[51] *See id.* § 2C:7-8c. Although the statute uses the term "levels," the word commonly used to refer to one of these levels is "tier." Thus the three levels are commonly known as Tier One, Tier Two, and Tier Three.

[52] *See id.* § 2C:7-8c(1).

is moderate ("Tier Two"), the chief must notify (in addition to law enforcement agencies) local community organizations such as schools, religious institutions and youth groups.[53] If the risk of re-offense is high ("Tier Three"), the police chief must notify the public by means designed to reach those persons likely to encounter the registrant, as well as law enforcement agencies and community organizations.[54] In all three levels of notification, the information provided must include the offender's name, description, photograph, address, place of employment or schooling, and a description of any vehicle with its license plate number.[55] The statute enumerates an extensive list of factors relevant to risk of re-offense that must be considered to determine into which tier an individual registrant will be placed.[56]

Under Megan's Law, county prosecutors have the responsibility of determining both the tier in which a registrant is placed and the means of community notification.[57] According to the Guidelines promulgated by the Attorney General,

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[53] *See id.* § 2C:7-8c(2). Although this subsection does not expressly limit notification to organizations likely to encounter the registrant, the Supreme Court of New Jersey read such a limitation into the statute. *See* Doe v. Poritz, 662 A.2d 367, 381-82 (N.J. 1995).

[54] *See id.* § 2C:7-8c(3).

[55] *See* NEW JERSEY DEP'T OF LAW & PUBLIC SAFETY, OFFICE OF THE ATT'Y GEN., NEWS, Dec. 20, 1994 [hereinafter "NEWS"] (copy on file with the author).

[56] *See* N.J. STAT. ANN. § 2C:7-8b (West 1995). The eight factors relevant to placement are:

(1) Conditions of release that minimize risk of re-offense, including but not limited to whether the offender is under supervision of probation or parole; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision.

(2) Physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness;

(3) Criminal history factors indicative of high risk of re-offense, including:

(a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior;

(b) Whether the offender served the maximum term;

(c) Whether the offender committed the sex offense against a child;

(4) Other criminal history factors to be considered in determining risk, including:

(a) The relationship between the offender and the victim;

(b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury;

(c) The number, date and nature of prior offenses;

(5) Whether psychological or psychiatric profiles indicate a risk of recidivism;

(6) The offender's response to treatment;

(7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence; and

(8) Recent threats against persons or expressions of intent to commit additional crimes.

Id.

[57] *See* N.J. STAT. ANN. § 2C:7-8d (West 1995).

both the prosecutor of the county in which a registrant has been convicted and the prosecutor of the county in which the registrant intends to reside determine tier classification.[58] Only the prosecutor of the county in which the registrant intends to reside, however, determines the means of providing community notification.[59]

IV. THE ATTORNEY GENERAL'S GUIDELINES AND REVISED GUIDELINES FOR IMPLEMENTATION OF MEGAN'S LAW

On December 20, 1994, pursuant to the statutory provisions,[60] the New Jersey Attorney General issued the first set of "Guidelines" to New Jersey's twenty-one county prosecutors, "marking the beginning of community notification as required by 'Megan's Law.' "[61] Using the statutory factors as their source, the Guidelines expanded on the criteria prosecutors must employ in determining which tier to place convicted sex offenders.[62] The Guidelines also stipulated that in order to qualify, those community organizations entitled to receive direct notification must register with their local police departments.[63] Only organizations which conduct activities involving the care or supervision of children are permitted to participate.[64] The Guidelines delegated to each participating organization

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[58] *See id.* § 2C:7-8d(1). The two prosecutors may also consult with any other law enforcement officials either deem appropriate. *See id.*

[59] *See id.* § 2C:7-8d(2). The prosecutor must, however, consult with local law enforcement officials prior to determining the means of notification. *See id.*

[60] *See id.* § 2C:7-8a. The statute required the Attorney General to issue Guidelines within 60 days after the enactment of the Act, which took effect on October 31, 1994. *See id.*

[61] NEWS, *supra* note 55. The Attorney General developed the Guidelines in consultation with the 12-member "Notification Advisory Council," authorized by the statute and whose members were appointed the Governor, as well as the President of the Senate and Speaker of the Assembly. *See id; See also* N.J. STAT. ANN. § 2C:7-11 (West 1995).

[62] *See* NEW JERSEY DEP'T OF LAW & PUBLIC SAFETY, OFFICE OF THE ATT'Y GEN., GUIDELINES FOR LAW ENFORCEMENT FOR NOTIFICATION TO LOCAL OFFICIALS AND/OR THE COMMUNITY OF THE ENTRY OF A SEX OFFENDER INTO THE COMMUNITY (issued Dec. 20, 1994) [hereinafter "NOTIFICATION GUIDELINES"]. While the statute enumerated eight general factors (*see supra* note 57 and accompanying text), the original Guidelines set forth seven specific factors for consideration of placement in Tier One, 10 factors for consideration of placement in Tier Two, and 15 factors for consideration of placement in Tier Three. *See id.* at 5-11.

[63] *See* NOTIFICATION GUIDELINES, *supra* note 62, at 4.

[64] *See id.* The Guidelines offered the following examples: community Crimewatch programs, Big Brothers and Big Sisters; Girl Scouts and Boy Scouts; and parent-teacher associations. It also permitted "appropriate" groups, such as battered women's organizations, rape victim support groups and women's advocacy groups to qualify. *See id.* All educational institutions were automatically included and exempted from the obligation of registration. Educational institutions were defined to include both public and private schools, as well as licensed day-care centers and summer camps. *See id.* The New Jersey Supreme Court has since read into the statute certain additional restrictions. *See* Doe v.

the responsibility of educating and alerting its own staff members and cautioning them that released information can only be used to protect children within their custody.[65] Prosecutors are obligated to inform such organizations of the name of any local registrants classified in either Tier Two or Tier Three, accompanied by a recent photograph and physical description.[66] Prosecutors must also inform organizations reagarding a registrant's address, place of employment or schooling, vehicle license plate number, and prior criminal record.[67]

Additionally, the Guidelines assigned county prosecutors the duty of designing the means for notifying the community-at-large of the those registrants classified in Tier Three.[68] Some of the methods contemplated include community meetings, speeches in schools and religious congregations, and door-to-door visits within the community.[69] The Guidelines emphasized that prosecutors have an obligation to issue only pertinent information and to present constructive advice and guidance to the community-at-large.[70] The Guidelines expressly directed prosecutors to warn the community about the consequences of vigilante activity.[71]

Less than ten months after they were first issued, the Guidelines were substantially revised following the New Jersey Supreme Court's decision in *Doe v. Poritz*.[72] The revised Guidelines established a procedure for judicial review of a county prosecutor's decision to place a registrant in either Tier Two or Tier

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Poritz, 662 A.2d 367, 381-82 (N.J. 1995).

[65] *See* NOTIFICATION GUIDELINES, *supra* note 62, at 11. The Guidelines further advised participating organizations that the information cannot be used or disseminated to notify the community-at-large. *See id.*

[66] *See id.* at 11-12.

[67] *See id.*

[68] *See id.* at 12. Prosecutors are encouraged to coordinate their methods of notification with local police departments. *See id.*

[69] *See id.* Prosecutors, however, are given the discretion of choosing other methods in consultation with local law enforcement officials or, in communities with no local police department, the State Police. *See id.* The information to be released to the community-at-large is the same as that provided to community organizations who qualify to receive notification of Tier II and Tier III registrants. *See supra* notes 65-66 and accompanying text. The method of notification has since been restricted by the New Jersey Supreme Court. *See* Doe v. Poritz, 662 A.2d 367, 379 n.5 (N.J. 1995).

[70] *See* NOTIFICATION GUIDELINES, *supra* note 62, at 12-13.

[71] *See id.* The Guidelines warned that law enforcement agencies will "carefully investigate all allegations of criminal conduct taken by any person against the offender, the offender's family, employer or school and will criminally prosecute where appropriate." *See id.* at 13. The Guidelines also instructed prosecutors to provide training to local law enforcement agencies and communityorganizations to insure that both the law enforcement agencies and the public understand the purposes for and methods of implementing Megan's Law. *See id.* at 14. The Guidelines further admonished prosecutors to keep confidential that information which they rely upon in making tier classifications. *See id.* at 3.

[72] *See* NEW JERSEY DEP'T OF LAW & PUBLIC SAFETY, OFFICE OF THE ATT'Y GEN., GUIDELINES FOR LAW ENFORCEMENT FOR NOTIFICATION TO LOCAL OFFICIALS AND/OR THE COMMUNITY OF THE ENTRY OF A SEX OFFENDER INTO THE COMMUNITY (issued Oct. 3, 1995) [hereinafter "NOTIFICATION GUIDELINES II"].

Three classification.[73] Prosecutors must provide written notice to such registrants informing them that they can appeal their prospective placement prior to community notification.[74] Prosecutors must further advise registrants that they have the right to retain counsel to represent them or, if indigent, have a court-appointed attorney.[75]

The revised Guidelines also established a more sophisticated scheme for risk assessment and tier determination, tailored to produce a more objective, uniform and precise means of classification through the utilization of widely recognized criteria.[76] Prosecutors must now base their classifications on a "Registrant Risk Assessment Scale" (RRAS) as delineated in the RRAS Manual.[77] The RRAS re-

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[73] *See id.* at 1. This revision was specifically mandated by the New Jersey Supreme Court. Doe v. Poritz, 662 A.2d 367, 379 n.5 (N.J. 1995).

[74] *See* NOTIFICATION GUIDELINES II, *supra* note 72, at 15. However, if a registrant fails to appeal to the designated judge by a specified date, community notification will automatically occur. *See id.* Those offenders facing Tier Two or Tier Three classification must receive personal notice. *See id.* Individuals must receive a Sex Offender Notice, an Application Form for appeal purposes, a completed Registration Risk Assessment Scale (RRAS), *see infra* note 77 and accompanying text, and a copy of the RRAS Manual. *See id.* The timeframe in which they can appeal is no less than two weeks from the date they first receive notice. *See id.* The revised Guidelines, however, allow for exceptions to notifying offenders in certain cases where it is impractical to provide notice or where an offender refuses to accept service. *See id.* at 15-16. But, prior to proceeding with community notification in such instances, the prosecutor must first obtain a court order from the designated judge. *See id*; *see also* Notice of Tier 2 or Tier 3 Classification and Manner of Notification (copy on file with author). This notification form, with minor technical changes, was approved by Order of the Supreme Court of New Jersey on October 23, 1995 (copy of Order on file with author). *See infra* note 92 and accompanying text.

[75] *See id. See also* Application for Judicial Review of Registrant Notification Tier Designation and Lawyer Information Form (copy on file with author). As with the Notice of Classification, *see supra* note 75, this Application for Judicial Review was adopted, with minor technical changes, by Order of the Supreme Court of New Jersey on October 23, 1995 (copy of file with author). *See infra* note 84 and accompanying text.

[76] *See id.* County prosecutors are now permitted to set up a special task force, comprised of persons with expertise in the area of sex crimes and child abuse, to facilitate the process of assessing sex offenders for risk of re-offense and tier classification. *See id.* at 8. They can also avail themselves of existing multidisciplinary teams. *See id.* In addition, prosecutors are directed to establish a separate "Megan's Law file" for each registrant in which all information and documentation concerning tier placement shall be maintained. *See id.* This file will be made available for discovery purposes to offenders or their counsel should they make an application for judicial review of their tier classification. *See id.*

Presumably, this new scheme of risk assessment and tier determination was developed, in part, to address specific concerns raised by the Federal District Court in Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 671 (D.N.J. 1995). In *Artway*, Judge Politan opined in dicta that "the absence of a provision for objective judicial scrutiny in the pre-classification stage is, at the very least, troubling." *Id.* at 671 n.7.

[77] *See* NOTIFICATION GUIDELINES II, *supra* note 72, at 8-10. *See generally* REGISTRANT RISK ASSESSMENT SCALE MANUAL (Oct. 3, 1995) [hereinafter "RRAS MANUAL"] (copy

quires that the assessment of the potential risk of recidivism by sex offenders be measured by two components: (1) the seriousness of the offense should an offender recidivate; and (2) the likelihood that an offender will recidivate.[78] Based upon these components, the RRAS divides relevant criteria into four general categories: (1) Seriousness of Offense; (2) Offense History; (3) Characteristics of Offender; and (4) Community Support.[79] A detailed numerical weighting system is then employed to determine individual placements within the three tier levels.[80]

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on file with author). The individuals who assisted the Attorney General in preparing the manual, some 15 in number, included physicians, psychologists, prosecutors, and several other professionals involved with state prisons and the State Diagnostic Treatment Center at Avenel. *See id.* at 11. The Manual asserts that the RRAS

> was rationally derived by a panel of mental health and legal experts by the following process: 1) the selection or risk assessment criteria that have empirical support; 2) the weighing of these pertinent risk assessment criteria; and 3) the use of sample cases to assist in the setting of numerical cut-off points for low, moderate and high risk scores.

Id. at 1.

[78] *See* RRAS MANUAL, *supra* note 77, at 2.

[79] *See id.* at 4. The Manual also references more technical descriptions of these general categories. With respect to "Seriousness of Offense," it refers to "intensity, duration, and frequency of illegal sexual behavior: Victim selection, number of offenses/victims, duration of offensive behavior, and length of time since last offense." *Id.* at 3. With respect to "Offense History," the Manual refers to "Antisocial lifestyle: History of antisocial acts (other than sex offenses), substance abuse, and employment/educational stability." *Id.* With respect to "Characteristics of Offender," the Manual refers to "Involvement in treatment: Response to treatment and therapeutic support." With respect to "Community Support," it refers to "Social support: Residential support." *Id.* at 3. The first category relates to the first component of risk assessment and tier classification: the seriousness of the offense should the offender recidivate. The last three categories relate to the second component: the likelihood that the offender will recidivate. *See id.* at 4.

In addition, the Manual lists thirteen more distinct criteria for use in risk assessment: (1) Degree of Force, (2) Degree of Contact, (3) Age of Victim, (4) Victim Selection, (5) Number of Offenses/Victims, (6) Duration of Offensive Behavior, (7) Length of Time Since Last Offense, (8) History of Anti-Social Acts, (9) Response to Treatment, (10) Substance Abuse, (11) Therapeutic Support, (12) Residential Support, and (13) Employment/Educational Stability. *See id.* at 6-10. The Manual notes that the eight factors set forth in N.J. STAT. ANN. § 2C:7-8b, "have been subsumed in the criteria." *See id.* at 2. *See also* N.J. STAT. ANN. § 2C 7-8 b *supra* note 57 and accompanying text.

[80] For individual placements, the RRAS requires that the sex offender be evaluated on the basis of all 13 criteria. For each criteria a determination of low risk, moderate risk and high risk is made, and a corresponding score of zero, one or three is given. The four general categories are then weighted, with the Seriousness of Offense given a multiplier of five, the Offense History given a multiplier of three, the Characteristics of Offender given a multiplier of two, and the Community of Support given a multiplier of one. Hence, the total range of scoring on the RRAS runs from a minimum point total of zero to a maximum of 111. Those sex offenders receiving a total score below 36 are placed in Tier One, those receiving a score between 37 and 73 are placed in Tier Two, and those

The revised Guidelines also contain other important safeguards for registrants. Prior to dissemination of community notification under Tier Two or Tier Three, law enforcement personnel now must visit the addresses registrants list to verify that the residents in fact reside at those locations.[81] Moreover, to help shield Tier Three registrants from unnecessary publicity, the revised Guidelines prohibit prosecutors from disseminating community notification by means of press releases or radio announcements.[82] In every case, dissemination must be carefully devised to reach only those persons and their families deemed to be at risk and likely to encounter the registrant within the confines of the community.[83]

V. THE SUPREME COURT'S PROCEDURAL ORDERS

Coinciding with the release of the revised Guidelines, the Supreme Court of New Jersey issued an order ("Order") further clarifying the procedural steps which must be followed in those instances where registrants seek to challenge their prospective tier classification.[84] The Order allows registrants fourteen calendar days from receipt of notification to file an objection to their Tier Two or Tier Three classification with the designated Superior Court judge.[85] In their original notification, registrants must be advised of the proposed date for a mandatory judicial conference.[86] The Order permits registrants to attend the judi-

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receiving a score above 73 are placed in Tier Three. *See id.* at 4-5. The Manual references extensive literature in support of its system of evaluation. *See id.* at 4-5 n.2.

[81] *See* NOTIFICATION GUIDELINES II, *supra* note 72, at 10.

[82] *See id.* at 13. The revised Guidelines also instruct prosecutors not to respond to any press inquiries about particular offenders. *See id.*

[83] *See id.*

[84] *See* Supreme Court of New Jersey, Order, Oct. 23, 1995 (signed by Chief Justice Robert N. Wilentz) (copy of order on file with author) [hereinafter "Oct. 23, 1995 Order"]. The Order specified that judicial review "shall be governed by the procedures set forth in the attached Outline of Procedure for Hearings on Objections to Megan's Law Tier 2 or 3 Classification and Manner of Notification Determinations,' except that the trial court may vary those procedures if the circumstances of the case make them impractical." *Id.*

[85] *See* OUTLINE OF PROCEDURE FOR HEARINGS ON OBJECTIONS TO MEGAN'S LAW TIER 2 AND TIER 3 CLASSIFICATION AND MANNER OF NOTIFICATION DETERMINATIONS § IV (on file with author). Because all sex offenders who are required to register have to be classified into one of three tier designations, those classified in Tier One (lowest risk) are not permitted to challenge their classification. Those registrants who seek an assignment of counsel based on indigence must make their requests within five days of the original receipt of notice. *See id.* § III(A). The designated court must then rule within two days of the initial request. *See id.* § III(A)(1).

[86] *See id.* § III(B). The mandatory conference must be scheduled between 21 and 24 days from the date of a registrant's original receipt of notice. *See id.* The Order also stipulates that an attorney representing a registrant may request discovery at any time after the registrant has received the original classification notice and that discovery must be made available within two working days thereafter. *See id.* § III(C). Discovery is defined as "all papers, documents and other materials compiled for the purpose of the prosecu-

cial conference even if they have not yet been released from prison.[87] At the conclusion of the conference, the designated judge is to render a final determination if the court determines a further hearing is unnecessary.[88]

Should such a hearing prove necessary, the Order requires that the matter be heard *in camera*.[89] The Order places the burden of establishing a *prima facie* case with respect to tier classification and the manner of community notification on the prosecutor; it places the burden of persuasion on the registrant.[90]At the conclusion of the hearing, the trial judge must render a final determination on all issues in dispute.[91]

The Supreme Court of New Jersey also issued a separate but related Order establishing the procedures should one of the parties choose to appeal the trial judge's determination.[92] To expedite disposition of the appeal, which must be filed with the Appellate Division, the Supreme Court's Order directs the parties not to submit briefs without leave of court.[93] The Order further directs the Ap-

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tor's review." *Id.* § III(C)(1)(b). The procedures further clarify that

> [a]ny rule, regulation or policy of confidentiality notwithstanding, the registrant shall have the right to inspect and copy all papers, documents and other materials compiled for the purpose of the prosecutor's review, and/or which were relied upon to determine the registrant's tier or the manner of notification, and any other records relating to registrant's mental or physical condition which may be maintained by other agencies or entities.

Id. § III(C)(1)(c).

[87] *See id.* § VI(A). Conferences are intended to resolve, as much as possible, issues pertaining to the prospects for settlement, the necessity for and availability of experts, the identification of relevant documents, the general areas of controversy, and the scheduling of a hearing, if necessary. *See id.* § VI.

[88] *See id.* § VI(C)(1). If a hearing is so ordered, the Order requires the judge to define the nature of the hearing, which must take place within 10 to 14 days after the date of the conference. *Id.* § VI(C). In delineating the agenda, the Order obligates the judge to decide what issues still need to be resolved, what issues can be decided by written submissions, and what issues require testimony and which individuals must testify, especially if expert testimony is requested. *See id.*

[89] *See id.* § VII(A).

[90] *See id.* § VII(B). The Order stipulates that formal rules of evidence shall not apply. *See id.* § VII(C). However, the evidence presented must be deemed "relevant and trustworthy," in accordance with New Jersey Court Rule, R. 3:21-4, Comment 1. *Id.* § VII(C)(1).

[91] *See id.* § VII(D). The entire process must be performed on an expedited basis because of the statutory time limit. N.J. STAT. ANN. § 2C:7-6 restricts a maximum of 45 days the time from the date when law enforcement officials first receive a registrant's tier classification to the date when they disseminate community notification. *See* N.J. STAT. ANN. § 2C:7-6 (West 1995).

[92] *See* Supreme Court of New Jersey, Order, Oct. 18, 1995 (signed by Chief Justice Robert N. Wilentz).

[93] *See id.* The attorney assigned to represent the registrant in the trial court is also required to represent the registrant through the appeal process unless relieved of that responsibility by the Appellate Division. *See id.*

pellate Division to consider the appeal following oral argument.[94] The Order also permits the Appellate Division to dispose of an appeal by simple order, without formal written opinion, when deemed appropriate.[95]

These two procedural Orders, in conjunction with the Attorney General's revised Guidelines and the amended bills enacted by the Legislature, constitute the fundamental framework of Megan's Law. This three-pronged, sustained and concerted effort, which has drawn upon the resources of all three branches of government, has overcome several unanticipated obstacles involving the right of representation and funding.[96] It has not yet, however, overcome the one clearly

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[94] *See id.* The appeal must be held *in camera* and recorded verbatim. *See id.* The parties also are given the option to waive oral arguments. *See id.*

[95] *See id.*

[96] Tier Two and Tier Three registrants are entitled to notice and a hearing before prosecutors can proceed with community notification. *See* Doe v. Poritz, 662 A.2d 367 (N.J. 1995). The court ordered designated judges to assign lawyers to represent those who cannot afford attorneys. *See* Chris Conway, *Pro Bono Mandate Rankles Lawyers*, THE INQUIRER (Philadelphia), Oct. 22, 1995, at B1, B15. No funding was originally allocated for these assignments, however, which meant that lawyers would have to perform this representation for free. *See id.* The 20,000-member New Jersey State Bar Association threatened to sue the Governor, the Legislature, and the Court, unless the State remedied the situation. *See id. See also* Dana Coleman, *Bar to State: No Free Lunch*, N.J. LAWYER, Oct. 25, 1995, at 1. "[T]he bottom line is that attorneys should not be forced to handle cases of such a highly specialized, costly, time-consuming and onerous nature," asserted Bar President Harold A. Sherman. Tom Hester, *State Bar Protests Unpaid Megan Work*, STAR-LEDGER (Newark), Oct. 21, 1995, at 8. The Senate Judiciary Committee conducted a hearing on the matter on October 30, 1995. *See* Ralph Siegel, *Case Shift Set Stage for Megan's Law Setback*, DAILY RECORD (Morristown, N.J.), Mar. 17, 1996, at A12. A crisis was ultimately averted when the State agreed to require the New Jersey's Public Defender's Office — rather than *pro-bono* lawyers — to represent indigent registrants at their hearings. *See id.* Ironically, it was the Public Defender's Office which then brought the class action suit in *Artway*, which finally led to at least a temporary and perhaps permanent suspension of the community notification component of Megan's Law. *See id.*

There were also other funding problems besides the method of paying for the representation of indigent registrants. As early as October 1994, even before Megan's Law was enacted, local law enforcement officials expressed concern about the additional expense of enforcing the legislation. "Like most of the mandates that come down through the Legislature, they have us do them, but in most cases they don't provide the wherewithal to do it," stated Lakewood Police Chief Michael J. Lynch. Monique Parsons, *Lack of Funding Seen as a Flaw in 'Megan's Law,'* ASBURY PARK PRESS (Asbury Park, N.J.), Oct. 4, 1994, at A8. Subsequently, county prosecutors as well as the courts, themselves, complained about the costs incurred to carry out mandatory provisions of Megan's Law. *See* Tom Hester, *Costs Debated on Megan's Law*, STAR LEDGER (Newark), Oct. 18 1995, at 33. Most of these problems were resolved — although not to everyone's complete satisfaction — by reallocating several million dollars from monies obtained through the confiscation of property utilized in illegal drug sales. *See* Telephone Interview with James Harkness, Counsel to the New Jersey Senate Majority Office (Mar. 28, 1996).

foreseeable and anticipated obstacle: court challenges concerning the law's constitutionality.

VI. THE MAJOR COURT CHALLENGES: *DOE V. PORITZ* AND *ARTWAY V. ATTORNEY GENERAL OF NEW JERSEY*

From the outset, Megan's Law has been besieged by court challenges.[97] At the state level, a complaint and order to show cause were filed on January 3, 1995 by John Doe (a fictitious name) seeking a preliminary injunction to restrain the Attorney General from enforcing the registration and notification requirements of Megan's Law.[98] Doe had been convicted ten years earlier of sexually assaulting two teenage boys.[99] In 1992, Doe completed his sentence and parole requirements and, at the time of the instigation of this lawsuit, was renting an apartment and working in the community.[100] Following the enactment of Megan's Law, he was then required to register as a convicted sex offender and, depending upon his level of classification, could have been subjected to community notification.[101]

Doe alleged numerous state and federal constitutional violations.[102] The trial

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[97] As discussed earlier, see *supra* note 10, it is beyond the scope of this article to present a detailed analysis of the court cases challenging the implementation of Megan's Law. These cases are extremely complex, involving numerous issues pertaining to both the United States and New Jersey Constitutions, as well as to state statutes and regulations. The leading cases are highlighted, however, so as to provide the reader with a general understanding of the major constitutional questions. Other cases include Diaz v. Whitman, No. 94-6376 (D.N.J. filed Mar. 7, 1995); Roe v. Poritz, No. 95-1327 (filed Apr. 25, 1995); E.B. v. Poritz, No. 96-130 (D.N.J. filed Feb. 20, 1996); and R.T. v. Whitman, No. 95-98 (filed Feb. 26, 1996). These constitutional questions will not be fully resolved until the Third Circuit Court of Appeals has rendered a decision on the substantive issues of Megan's Law, *see infra* note 134 and accompanying text, and unless and until the Supreme Court of the United States acts upon a subsequent appeal by granting certiorari.

[98] *See* Doe v. Portiz, 661 A.2d 1335, 1339 (N.J. App. Div.), *aff'd as modified*, 662 A.2d 367 (N.J. 1995). The plaintiff filed the suit individually and on behalf of all others similarly situated. *See id.* at 1335.

[99] *See id.* at 1337. Prior to sentencing, the plaintiff had been examined at the Adult Diagnostic and Treatment Center, where the character of his conduct had been diagnosed "by a pattern of repetitive and compulsive behavior." *Id.* at 1338.

[100] *See id.*

[101] *See id.* at 1338-39.

[102] *See id.* at 1339. Specifically, Doe alleged violations of the following constitutional doctrines: due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, paragraph 1 of the New Jersey Constitution; the *Ex Post Facto* Clause of the United States Constitution; the prohibition against cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution and Article 1, paragraph 12 of the New Jersey Constitution; the right to privacy as created by N.J. STAT. ANN. § 30:4-24.3 (West 1996) (dealing with the confidentiality of records pertaining to mental health patients); equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and art. 1, par. 1 of the New Jersey

court rejected most of these claims because it determined that the registration and notification provisions of Megan's Law do not amount to punishment in a constitutional sense.[103] It held that the goals of the law were not accomplished by means of punishment, and that the law itself does not modify the standard of punishment which existed prior to its enactment.[104] The trial court did find, however, that Doe faced the real possibility — because of potential community notification of his name, residence and criminal record — of public stigmatization and prejudice.[105] It held that, after Doe had been released from governmental control, the state's authority to expose the identification of Doe to the community deprived him of a certain liberty interest.[106] Thus the court insisted that Doe receive due process in the form of a hearing before permitting Tier Two or Tier Three notification to proceed.[107]

Both plaintiff and defendant appealed the trial court's decision in *Doe*, and the Supreme Court of New Jersey granted direct certification on March 14, 1995.[108] On July 25, 1995, the court issued an extensive opinion affirming, in most re-

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Constitution; and the protection against double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and art. 1, par. 11 of the New Jersey Constitution. *See id.* Doe also alleged that the requirements of Megan's Law as applied to him would constitute a legal disqualification because of his conviction, in violation of N.J. STAT. ANN. 2C:51-1 (West 1995), thereby depriving him of civil and statutory rights, under color of law, in violation of 42 U.S.C. § 1983 (1994) as applied to the Privileges and Immunities Clause of the Fourteenth Amendment to the U.S. Constitution. *See id.* at 1339-40.

[103] *See id.* at 1340-52. The court found that the legislative intent of Megan's Law was to prevent the dangers posed by recidivism among sex offenders, not to impose additional punishment upon them. *See id.* at 1341. Moreover, the legislative scheme also supported the legislature's finding that Megan's Law does not seek to punish sex offenders. *See id.*

[104] *See id.* The court opinion, written by The Honorable Harold B. Wells, Assignment Judge of Burlington County, declared that

> Megan's Law does not seek to alter the behavior of sex offenders or to restrict their movement; it does not forbid them from holding jobs or becoming productive members of society; it does not impose heavy fines or penalties; and it does not increase the term of imprisonment or parole. The cost of compliance amounts to minutes of their time per year and perhaps the cost of postage or bus fare. It only seeks to protect the public. Any punitive effects are incidental to the legislature's overriding purpose of safeguarding the public.

Id.

[105] *See id.* at 1349-50.

[106] *See id.* at 1350. "In summary, then, the Court has identified in the penumbra between 'punishment' and 'unpleasant consequences' a protectible liberty interest vested in Doe under the 14th Amendment which mandates that he be given a fair, due process hearing before he may be deprived of that liberty." *Id.* at 1352.

[107] *See id.* at 1350. The judicial hearing was subsequently incorporated into the Attorney General's Revised Guidelines. *See supra* note 73 and accompanying text.

[108] *See* Robert Hanley, *Court Hears 'Megan's Law' Argument*, N.Y. TIMES, May 3, 1995, at B1.

spects, the lower court's decision.[109]

> The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish; that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, further assured by our opinion and judicial review, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense. The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further. They represent only the conclusion that society has the right to know of their presence, not in order to punish them but in order to protect itself.[110]

The Supreme Court of New Jersey based its holding on the premise that the validity of Megan's Law, measured against the various constitutional challenges, depends upon whether the statute should be perceived as inflicting punishment.[111] The court relied upon the portion of *United States v. Halper*[112] that declares that a civil sanction which can fairly be said to serve solely a remedial purpose, as opposed to also serving either retributive or deterrent purposes, should not be deemed punishment.[113] The court found that Megan's Law, which

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[109] *See* Doe v. Poritz, 662 A.2d 367, 372 (N.J. 1995).

[110] *Id.* at 372-73. The court opined that the Legislature was aware of the retroactive (i.e., *ex post facto*) aspect of Megan's Law and recognized that if the law did not apply to previously-convicted sex offenders, notification would provide little protection now and in the near future. *See id.* at 373. The court asserted that the proposed remedy of community notification goes directly to the question of what the public can do to protect itself against the potential of reoffense by a class of offenders that the Legislature could find has a relatively high risk of recidivism involving crimes which threaten the most vulnerable and defenseless members of society. *See id.* at 376.

[111] *See id.* at 390.

[112] 490 U.S. 435 (1989).

[113] *See Doe*, 662 A.2d at 393 (citing *Halper*, 490 U.S. at 448-49.) *Halper* was a double jeopardy case in which it was alleged that the monetary sanctions sought pursuant to the Civil False Claims Act constituted multiple punishment. The Supreme Court of New Jersey, however, was careful to point out that mere legislative intent and purpose is not the sole determinant of punishment, stating that "[i]f the implementing provisions go beyond that regulatory purpose — if they are 'excessive' in fact — and have a punitive impact, punishment results, regardless of claimed regulatory intent." *Id.* at 404-05. The Supreme Court of New Jersey determined that Megan's Law has solely a regulatory purpose and that its implementing provisions, which also have a solely regulatory purpose,

> are not excessive but aimed solely at achieving, and, in fact, are likely to achieve, that regulatory purpose. The fact that some deterrent punitive impact may result does not, however, transform those provisions into "punishment" if that impact is an in-

"can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some deterrent impact and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions."[114] Similar to the trial court, however, the New Jersey Supreme Court also held that Megan's Law does "implicate protectible liberty interests in privacy and reputation," thus invoking the right to due process.[115] Consequently, the Court determined that convicted sex offenders are entitled to a hearing, by an independent decision-maker, prior to community notification and classification within Tier Two or Tier Three.[116]

At the same time that New Jersey's state courts were wrestling with *Doe v. Poritz*, the federal courts were considering several similar challenges to Megan's Law, including those posed in *Artway v. Attorney General of New Jersey*.[117]

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evitable consequence of the regulatory provision, as distinguished from an impact that results from "excessive" provisions, provisions that do *not* advance the regulatory purpose.

Id. at 405. Ironically, Justice Stein's dissent also relied upon *Halper*, but used a separate analysis to formulate a different test. *See id.* at 434-36. He maintained that the Supreme Court of the United States in *Halper* "indicated that for purposes of double jeopardy, and the analogous protections afforded by the *Ex Post Facto* and Bill of Attainder Clauses, the determination of punishment would largely depend on a functional test that focused on the purposes actually served by the sanction." *Id.* at 435. This functional test requires an examination of whether the statute's impact "is consistent with practices historically employed as punishment in the past," and the statute's probable effects on those to whom it is applied. *See id.* at 437. Applying that standard, Justice Stein came to the opposite conclusion of the majority opinion, contending that Megan's Law imposes punishment, at least on offenders convicted prior to the date of its enactment. *See id.* at 439-40.

[114] *Id.* at 388. The court further stated that "a law does not become . . . punitive unless the only explanation for that impact is a punitive purpose: an intent to punish." *Id.*

[115] *See id.* at 420.

[116] *See id.* at 421. See *supra* notes 84-96 and accompanying text for a description of how the Supreme Court of New Jersey, by issuing Orders, developed the mechanism for the pre-notification/pre-classification "due process" hearings. Note that the Court did not invalidate Megan's Law; it simply read into the statute various constitutional safeguards and instructed the Attorney General to revise her Guidelines to include appropriate procedural standards. *See supra* notes 73-84 and accompanying text.

[117] 876 F. Supp. 666 (D.N.J. 1995), *aff'd in part and vacated in part*, 81 F.3d 1235, *reh'g en banc denied*, 1996 U.S. LEXIS 11363 (3d Cir. 1996). *See infra* note 134 and accompanying text. Judge Nicholas H. Politan issued the Federal District Court opinion on February 28, 1995, declaring the community notification component of Megan's Law unconstitutional. Judge Politan is not alone among federal judges in ruling against certain aspects of registration and community notification statutes for sex offenders. Besides decisions rendered in the Federal District Court of New Jersey by Judges Bissell and Simandle, *see infra* notes 141-43 and accompanying text, the following cases are illustrative: Young v. Weston, 898 F. Supp. 744 (W.D. Wa. 1995) (declaring Washington's Sexually Violent Predator Statute unconstitutional as applied); Rowe v. Burton, 884 F. Supp. 1372 (D. Alaska 1994) (concluding that Alaska's Registration Act would likely be

Artway had previously been convicted of sodomy and, at the time of his sentencing in 1975, the trial judge had found that his conduct "was characterized by a pattern of repetitive, compulsive behavior."[118] Artway subsequently completed his sentence at the Adult Diagnostic Treatment Center and was released into the community in 1992.[119] He now contended "that the purpose and/or effect of Megan's Law is punitive, and constitutes a badge of ignominy."[120]

The Federal District Court for the District of New Jersey deemed the dispositive issue in *Artway* to be the retroactive application of Megan's Law, which necessarily prompted *ex post facto* analysis.[121] Unlike the Supreme Court of New Jersey, which focused its analysis on *Halper* and its progeny,[122] the district court relied upon a list of factors set forth in *Kennedy v. Mendoza-Martinez*[123] to de-

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unconstitutional because it provides for public notification); State v. Babin, 637 So. 2d 814 (La. Ct. App.), *writ denied*, 644 So. 2d 649 (1994) (holding that Louisiana's community notification statute is unconstitutional).

[118] *Artway*, 876 F. Supp. at 668.

[119] *See id.*

[120] *Id.* at 669. As in the state courts, the central arguments in *Artway* hinged largely on the distinction between punishment and regulation. This distinction frequently overlaps with the purported distinction between criminal and civil sanctions and inevitably implicates the related issue of legislative intent versus legislative effect. "The question, then, is whether [an action] is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial." United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (*cited in Doe*, 662 A.2d at 434-35).

[121] *See Artway*, 876 F. Supp. at 673. "In the instant case, this Court is faced with a challenge to a statue which is, on its face, retroactive in application. As such, the Court must engage in *ex post facto* analysis." *Id.*

[122] *See supra* notes 113-14 and accompanying text. Among the principal cases which the New Jersey Supreme Court relied upon, in addition to *Halper*, were United States v. Ward, 448 U.S. 242, 248-49 (1980) (requiring the clearest proof that a sanction is punitive in either purpose or effect before concluding that a civil remedy has been transformed into a criminal penalty); Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 777 n.14 (1994) (stating that "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment'"). *See Doe*, 662 A.2d at 397-98.

[123] 372 U.S. 144 (1962). The factors are commonly referred to as the "test" of *Mendoza-Martinez*. *See Doe*, 662 A.2d at 399. The factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69.

Significantly, the New Jersey Supreme Court specifically rejected the applicability of the *Mendoza-Martinez* test. "The clear thrust of repeated Supreme Court decisions is that the *Mendoza-Martinez* 'test' has been rejected in all contexts other than those that present

termine whether Megan's Law constitutes impermissible punishment.[124] Using this test, the court decided that Megan's Law represents an affirmative restraint on a plaintiff's future conduct;[125] that American society has historically regarded the public dissemination of a plaintiff's identity and criminal record as a form of punishment;[126] that Megan's Law promotes one of the traditional aims of punishment (i.e., deterrence);[127] that the behavior to which the law applies is already a crime;[128] and that the law amounts to an excessive intrusion into the realm of punishment.[129]

The district court went so far as to suggest that Megan's Law could be construed as "a branding of registrants with a 'Mark of Cain' or a 'Scarlet Letter.'"[130] The court also compared the consequences of Megan's Law to the actions of Nazi Germany in forcing Jews to display publicly the Star of David.[131] Not surprisingly, then, the court held the community notification provision of Megan's Law to be unconstitutional.[132] The court found, however, that the registration provision and the resulting release of pertinent information to law enforcement agencies does not violate constitutional doctrine.[133]

The Attorney General of New Jersey quickly appealed the district court decision in *Artway* to the Court of Appeals for the Third Circuit, which did not rule on the constitutionality of the notification provision, but instead vacated the district court's holding as to the unconstitutionality of the notification provision on

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the question whether the *proceedings* are civil or criminal." *Doe*, 662 A.2d at 398 n.14.

[124] *See Artway*, 876 F. Supp. at 672, 687.

[125] *See id.* at 689.

[126] *See id.*

[127] *See id.* at 690-91.

[128] *See id.* at 691.

[129] *See id.* at 692.

[130] *Id.* at 687. "In analyzing Megan's Law, the Court must consider whether the notification provisions inherent therein constitute a branding of registrants such that they will be exposed to public humiliation rising to the level of punishment." *Id.*

[131] *See id.* Megan Kanka's parents subsequently issued a written statement highly critical of the comparison, stating: "[W]e are outraged that a federal judge would compare a law that will protect our children to all the horrendous acts done by the Nazis to the Jewish people." Charles Stile, *Kankas Criticize Judge for Holocaust Analogy*, TRENTON TIMES, Mar. 3, 1995, at 1.

[132] *See Artway*, 876 F. Supp. at 692. In making and discussing these analogies, the district court seemed to place little emphasis on the obvious distinction that Megan's Law, unlike these other sanctions, provided (in the Legislature's judgment) a critical means to help safeguard potential victims from those deemed abnormally likely to commit future crimes of violence against society. The court also found DeVeau v. Braisted, 363 U.S. 144 (1960) (rejecting an *ex post facto* challenge to a New York statute which prohibited unions from collecting dues if any union officer or agent was a convicted felon), "to be inapposite," although noting that in that case the Supreme Court had expressly "cautioned against knee-jerk reaction to the possible unpleasant consequences of legislation which was intended by the legislature to be regulatory." *Id.* at 685-86.

[133] *See id.* at 688.

the grounds that the challenge was unripe.[134]

VII. CURRENT STATUS OF MEGAN'S LAW

Given the Third Circuit's refusal to rule on the constitutionality of the notification provision, the fate of Megan's Law remains in limbo. After the New Jersey Supreme Court handed down its ruling in *Doe v. Poritz* in July 1995, the Attorney General continued to instruct county prosecutors to carry out the full provisions of Megan's Law.[135] As of March 1, 1996, a total of 3409 convicted sex offenders had registered under the statute.[136] Out of this total, prosecutors had placed 1120 into tier classifications; with 526 registrants placed in Tier One (low risk), 538 placed in Tier Two (moderate risk), and fifty-six placed in Tier Three (high risk).[137] Prosecutors had also disseminated community notification

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[134] *See Artway v. Attorney Gen. of N. J.*, 81 F.3d 1235, 1252-53 (3d Cir.), *reh'g en banc denied*, 1996 U.S. LEXIS 11363 (1996). The Third Circuit affirmed the District Court's holding that the registration provision is not punishment and thus passes constitutional muster. *See id.* at 1267. The Court also held that singling out for registration those offenders whose behavior has been deemed "compulsive and repetitive" does not violate equal protection or due process. *See id.* at 1267-69.

[135] *See* Grall Interview, *supra* note 27. Although the federal district court in *Artway* had held the Community Notification Law to be unconstitutional in its retrospective application, the New Jersey Attorney General took the position that the decision only applied to that individual plaintiff. *See id.* Thus other sex offenders were still obligated to register and potentially become subjected to community notification. *See id.*

[136] *See id.* This total, although predictable, was relatively high because registration was a new requirement and all former convicted sex offenders had to register under the terms of the statute, regardless of their date of release from a correctional institution, by February 28, 1995. With this initial backlog processed, the number of registrants annually will be much lower. *See* NEW JERSEY DEP'T OF CORRECTIONS, SEX OFFENDERS BY OFFENSE AND RELEASE TYPE (Aug. 3, 1995) (showing that between July 1993 and June 1994, a total of 484 sex offenders were released from New Jersey correctional institutions; and, during the next year, 511 offenders were released) (copy on file with author). The actual number of registrants will undoubtedly vary from the number of released offenders due to the fact that some offenders will move into or out of the state, while others will defy the law by not registering at all. There is some preliminary indication that, because of the enactment of Megan's Law, many sex offenders have selected to move permanently out-of-state. *See* Steve Chambers, *Offenders Move into Obscurity*, STAR-LEDGER (Newark, N.J.), Aug. 20, 1995, at 25.

[137] *See* Grall Interview, *supra* note 27. The Attorney General had advised the county prosecutors, given their limited resources and the large initial backlog of filings (due to the retroactive aspect of the statute), that they should attempt to prioritize registrants. Hence, prosecutors were instructed to concentrate their efforts first on classifying those offenders who were believed to be the most potentially dangerous. Of course, this also meant that they would have to follow up with community notification if those offenders were classified in Tier Two or Tier Three. It was presumed that once the initial placements were completed, most of the remaining offenders would be classified in Tier One. *See id.*

regarding seventy-four Tier Two and seventeen Tier Three registrants.[138] In general, both the registration and community notification process seemed to operate smoothly,[139] with one major exception: an increasing number of registrants kept filing court challenges.[140]

With the assistance of the Office of Public Defender, many of these registrants filed motions in New Jersey's federal district court seeking to prevent community notification.[141] Judges routinely continued to grant these motions, basing their rulings on reasoning similar to that expressed by the district court in *Artway*.[142] Ultimately, Judge Bissell stopped what he labeled a "cumbersome" approach, granting a motion certifying a class action on behalf of all registrants classified in Tier Two and Tier Three.[143] He also granted a corresponding motion for a preliminary injunction, thereby barring the state from continuing to disseminate public information about these registrants until after the Third Circuit rendered its decision on the appeal of *Artway*.[144]

As discussed, the Third Circuit did not provide answers to the constitutional

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[138] *See id.*

[139] *See id.* It should be observed that there was little evidence of vigilantism. There had been at least one highly publicized incident shortly after Megan's Law went into effect. *See* Iver Peterson, *Mix-Ups and Worse Arising from Sex-Offender Notification*, N.Y. TIMES, Jan. 12, 1995, at B1, B6. But after that — and despite the large number of registrants and subsequent community notification pertaining to almost 100 Tier Two and Tier Three designees — there were few reported problems. *See* Affidavit of Jessica Oppenheim, Deputy Att'y Gen. of N.J., *cited in* W.S. v. Poritz, No. 96-491, slip op. at 11 n.4 (D.N.J. Feb. 15, 1996). "In that Affidavit, Ms. Oppenheim states that only one act of vigilantism has occurred as a result of community notification, and that this act of vigilantism occurred prior to the [New Jersey] Supreme Court's ruling in *Doe*." *Id.*

Ironically, the most publicized controversy occurred after Judge Politan refused to permit community notification to be disseminated about a child molester and murderer residing in Englewood, New Jersey. In January 1996, New York's Guardian Angels distributed fliers to area residents revealing the individual's name, address and criminal history. The scope of the released information and manner of distribution actually exceeded that which the statute allows. *See* Lawrence Van Gelder, *Parolee's Name Made Public*, N.Y. TIMES, Jan. 29, 1996, B1.

[140] *See* Hanley, *supra* note 9, at 23.

[141] *See id.* The cases were brought in federal district court because the New Jersey state courts had previously held that Megan's Law was constitutional, whereas the federal court had declared its community notification provision unconstitutional. "At first 1 case was sent to Judge John W. Bissell in Newark. Then he received a second petition representing 7 released sex offenders and, shortly afterward, a third for 15 more. Judge Jerome B. Simandle in Camden got a brief for 9, then one for 12." *Id.* At least 44 such petitions were filed. *See id.*

[142] *See id. See, e.g.*, W.S. v. Poritz, No. 96-491, slip op. at 14 (D.N.J. Feb. 15, 1996). In this matter the district court granted a temporary restraining order preventing the dissemination of community notification with respect to nine registrants placed within Tier Two classification. *See id.* at 1-2.

[143] *See* W.P. v. Poritz, No. 96-97, slip op. at 2-3 (D.N.J. Mar. 15, 1996).

[144] *See id.* at 3, 4.

questions surrounding Megan's Law's notification provision.[145] Thus the viability of Megan's Law — and its goal of creating a means of warning residents about potentially dangerous sex offenders within their communities — remains in the hands of the federal judiciary.[146] The controversy surrounding the constitutionality of Megan's Law promises to continue even beyond any rulings by the District Court or Third Circuit, as New Jersey Governor Christine Todd-Whitman has vowed to take an appeal to the Supreme Court of the United States, if necessary, in an attempt to have the validity of the statute upheld.[147] Many legal experts predict that this is where the fate of Megan's Law will ultimately be resolved.[148]

VIII. CONCLUSION

Megan's Law, the first statute to require law enforcement officials to notify communities about certain convicted sex offenders, has had a troubled history. The Legislature designed this dynamic initiative to serve as a shield, permitting the public, once forewarned, to take precautionary steps to decrease the possibility that other children will suffer the same tragedy as that which befell Megan Kanka.

Legislators intended Megan's Law to furnish at least as much concern to the rights of potential victims as that afforded to convicted criminals. In order to function successfully, however, the statute must apply retroactively. As the Su-

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[145] *See supra* note 135 and accompanying text.

[146] There are still ongoing efforts, however, to challenge various provisions of Megan's Law in New Jersey's state courts. The primary effort has focused on the methodology of tier classification. *See* Rocco Cammarere, *High Court Considers New Megan Challenge*, N.J. LAWYER, Mar. 25, 1996, at 3. In Matter of Registrant C.A., 666 A.2d 1375 (N.J. Super. Ct. App. Div. 1995), two questions were raised concerning tier placement: 1) Can criminal charges that are dismissed be used to assess the likelihood of a sex offender committing another similar offense? 2) Does the risk assessment scale issued by the attorney general meet statutory requirements and address concerns the court had in its July 1995 decision upholding Megan's Law? *See* Cammarere, *supra*, at 3. The Appellate Division answered both of these questions in the affirmative, thereby denying the plaintiff's request for removal from Tier III classification. An appeal of that decision is currently pending before the New Jersey Supreme Court. *See id.* at 12. Although such challenges in the state courts are potentially disruptive, they presumably can be overcome, if need be, by further revisions to the Attorney General's Guidelines. *See supra* note 63 and accompanying text. Because the Supreme Court of New Jersey has already determined that Megan's Law passes constitutional muster, *see supra* notes 110-11 and accompanying text, it seems unlikely that these state challenges will place the overall statutory scheme in jeopardy.

[147] *See* Hanley, *supra* note 9, at 28.

[148] *See* Russ Bleemer, *State's Megan's Law Appeal Faces Renewed Constitutional Questions*, N.J.L.J., Oct. 23, 1995, at 4. "[I]f the Third Circuit invalidates Megan's Law on ex post facto or other federal constitutional grounds, the state Supreme Court scheme likely would have to be scrapped. And attorneys on both sides say if that happens, it also is likely the case would be heard by the U.S. Supreme Court." *Id.*

preme Court of New Jersey noted in *Doe v. Poritz*, "[t]he legislative choice was undoubtedly influenced by the fact that if the law did not apply to previously-convicted offenders, notification would provide practically no protection now, and relatively little in the near future."[149] Chief Justice Wilentz went on to observe that "[t]he Legislature reached the irresistible conclusion that if community safety was its objective, there was no justification for applying these laws only to those who offend or who are convicted in the near future, and not applying them to previously-convicted offenders."[150]

Yet this very need for retroactive application has proven to be the most significant impediment for Megan's Law as its proponents struggle to convince the courts that the statute does not run afoul of the Constitution. The issue of whether the *Ex Post Facto*, Double Jeopardy and other clauses of the Constitution comprise, in fact, an insurmountable barrier forever barring the enforcement of Megan's Law remains unresolved. The outcome should settle a classic confrontation between the rights of the public to demand greater security versus the rights of the convicted to receive minimum protection. Because the jury is still out, the trials and tribulations of Megan's Law persist.

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[149] Doe v. Poritz, 662 A.2d 367, 373 (N.J. 1995).

[150] *Id.*