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Notes

WELCOME TO ANYTOWN, U.S.A.—HOME OF BEAUTIFUL SCENERY (AND A CONVICTED SEX OFFENDER): SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS IN *E.B. v. VERNIERO*

I. INTRODUCTION

One of the most vexing aspects of sexual predation is the high recidivism rate, especially among sex offenders who target and victimize children.¹ In response to recent tragedies highlighting the recidivistic

1. See Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 407-09 (1997) (discussing chronic recidivism problem among sex offenders who target children). The recidivism of sex offenders has devastating effects on the victims. See John Briere & Marsha Runtz, *Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment*, 8 J. OF INTERPERSONAL VIOLENCE 312, 323-24 (1993) (noting that children who are victims of sexual molestation are likely to develop severe psychosocial problems); Robert E. Freeman-Longo & Fay Honey Knopp, *State-of-the-Art Sex Offender Treatment: Outcome and Issues*, 5 ANNALS OF SEX RES. 141, 147 (1992) (discussing effects of sex offender recidivism on individual victims and society). In addition, there is also an economic impact on taxpayers because of the cost incurred in the investigation of sex crimes and in the conviction, incarceration and treatment of sex offenders. See Freeman-Longo & Knopp, *supra*, at 147.

Despite the importance that has been attached to the recidivism problem, however, there is little agreement in the literature regarding the frequency and severity of reoffending by sex offenders. See Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 3 (1989) (presenting comprehensive review of empirical studies of sex offender recidivism). Compare Symposium, *Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 23, 36, 136-37 (1996) (asserting that "statistics have demonstrated that recidivism rates are extremely high with this type of crime" and that recidivism rates for "[p]edophiles . . . are in the ninety percent range"), with R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. OF CONSULTING & CLINICAL PSYCHOL. 646, 648 (1993) (finding that 42% of child molesters in study group were reconvicted for sex offense or violent crime), and Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. OF CONSULTING & CLINICAL PSYCHOL. 381, 383 (1991) (finding 31% recidivism rate for child molesters released from maximum security psychiatric institution). Researchers have conducted extensive research on recidivism rates among sex offenders who target children. See Teir & Coy, *supra*, at 408. For example, a study of 453 pedophiles, funded by the National Institute of Mental Health, reported that each of the pedophiles in their study molested an average of 52 girls or 150 boys. See *id.* Another study reported that pedophiles victimize an average of 72 children. See *id.*; see also Margit C. Henderson & Seth C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 PSYCHIATRIC Q. 273, 273 (1990). In addition, the results of a recent survey conducted by the United States Department of Justice indicate that sex offenders who victimize children are more than twice as likely to have multiple victims than sex offenders who target adults.

tendencies of sex offenders who target children, all fifty states have enacted laws requiring persons convicted of certain designated crimes, all of which involve sexual assault, to register with local law enforcement authorities upon release from incarceration.² Similarly, in May of 1996, partially

See Teir & Coy, *supra*, at 407 (citing Brian McGrory, *Clinton Sets Tracking of Sex Offenders*, BOSTON GLOBE, Aug. 25, 1996, at A1). The Justice Department survey also found that the speed of recidivistic attacks among child molesters is faster than the recidivistic attacks among sex offenders who target adults. See *id.* Despite considerable variation in the recidivism statistics, however, recent commentators have nevertheless concluded that "recidivism is a serious problem that demands attention." *Id.* at 408. In fact, reducing recidivism has been identified as the "most important goal of legal and therapeutic intervention with sex offenders." Lucy Berliner et al., *A Sentencing Alternative for Sex Offenders: A Study of Decision Making and Recidivism*, 10 J. OF INTERPERSONAL VIOLENCE 487, 490 (1995) (discussing sex offender recidivism and alternative treatments).

2. See James O. Hacking, III, *Won't You Be My Neighbor?: Do Community Notification Statutes Violate Sexual Offenders' Rights Under the Constitution's Ban on the Passage of Ex Post Facto Laws?*, 41 ST. LOUIS U. L.J. 761, 761-62 (1997) (discussing sexual attacks and murders of three New Jersey girls that resulted in public outrage and action by New Jersey Legislature); Teir & Coy, *supra* note 1, at 405-06, 408 (discussing rapes and murders of Polly Klass and Megan Kanka at hands of previously convicted sex offenders). Richard Allen Davis, the man who raped and murdered Polly Klass, had eight prior convictions for sexually assaulting and molesting children. See *id.* at 408. Jesse Timmendequas, who confessed to the abduction, rape and murder of Megan Kanka, was a twice convicted sex offender. See *id.* Leroy Hendricks, who recently challenged the Kansas sexual predator statute, committed sexual crimes against almost a dozen youths. See *id.* Kevin Aquino, a 17 year-old who was previously arrested for sexually assaulting three children, recently pleaded guilty to the kidnapping and murder of six year-old Amanda Wengert. See Hacking, *supra*, at 761. Finally, Conrad Jeffrey, who was charged with the kidnapping, rape and murder of seven year-old Divina Genao, was on parole for only six weeks when the alleged crime occurred. See *id.*

For a survey of the sex offender statutes enacted in all fifty states, see ALA. CODE § 13A-11-200 (1994); ALASKA STAT. §§ 12.63.010, 18.65.087 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-3821, 41-1750(B) (West 1996); ARK. CODE ANN. § 12-12-901 (Michie 1995); CAL. PENAL CODE § 290 (West 1996 & Supp. 1997); COLO. REV. STAT. § 18-3-4123.5 (1996); CONN. GEN. STAT. ANN. § 54-102r (West 1997); DEL. CODE ANN. tit. 11, § 4120 (1995); FLA. STAT. ANN. § 775.21 (West 1997); GA. CODE ANN. § 42-1-12 (1997); HAW. REV. STAT. §§ 707-743 (1995); IDAHO CODE §§ 18-8301 to -8311 (1997); 730 ILL. COMP. STAT. §§ 730-150/1 to 150/10 (West 1995); IND. CODE ANN. §§ 5-2-12-1 to -12 (West 1996); IOWA CODE ANN. §§ 692A.1-.13 (West 1997); KAN. STAT. ANN. §§ 22-4902 to -4907 (1996); KY. REV. STAT. ANN. § 17.510 (Michie 1996); LA. REV. STAT. ANN. §§ 15:540 to :549 (West 1997); ME. REV. STAT. ANN. tit. 34-A, §§ 11003-11004 (West 1996); MD. ANN. CODE art. 27, § 792 (1996 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 22, § 37 (West 1994); MICH. COMP. LAWS ANN. §§ 28.721-.730 (West 1997); MINN. STAT. ANN. § 243.166 (West 1997); MISS. CODE ANN. § 45-33-1 (1997); MO. ANN. STAT. § 566.600 (West 1997); MONT. CODE ANN. §§ 46-23-501 to -507 (1995); NEB. REV. STAT. §§ 29-4001 to -4013 (1996); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1997); N.H. REV. STAT. ANN. § 651-B:1 to -B:9 (1996); N.J. STAT. ANN. §§ 2C:7-1 to :7-5 (West 1995 & Supp. 1997); N.M. STAT. ANN. §§ 29-11A-1 to -8 (Michie 1996); N.Y. CORRECT. LAW § 168 (McKinney 1997); N.C. GEN. STAT. §§ 14-208.5-.13 (1996); N.D. CENT. CODE § 12.1-32-15 (1995); OHIO REV. CODE ANN. §§ 2950.01-.08 (Anderson 1996); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1997); OR. REV. STAT. §§ 181.594-600 (1996); 42 PA. CONS. STAT. ANN. §§ 42-9791 to -9798 (West 1997); R.I. GEN. LAWS §§ 11-37-16, -19 (1996); S.C. CODE ANN. §§ 23-3-400 to -490 (Law Co-op. 1996); S.D. CODIFIED LAWS

due to the immense publicity that state sex offender registration laws received, Congress passed and President Clinton signed a federal sex offender registration law.³

Many states, however, require more than just registration of sex offenders.⁴ For example, in response to the abduction, rape and murder of seven-year-old Megan Kanka by a twice convicted sex offender, New Jersey became the first state to enact a sex offender notification law.⁵ The New

§§ 22-22-39 to -41 (Michie 1997); TENN. CODE ANN. §§ 40-39-101 to -108 (1996); TEX. CIV. PRAC. & REM. CODE ANN. § 4413(51) (West 1997); UTAH CODE ANN. § 77-27-21.5 (1997); VT. STAT. ANN. tit. 13, §§ 5401-5413 (1997); VA. CODE ANN. §§ 19.2-298.1-3, 19.2-390.1 (Michie 1997); WASH. REV. CODE ANN. § 9A.44130 (West Supp. 1997); W. VA. CODE §§ 61-8F-1 to -10 (1994 & Supp. 1997); WIS. STAT. ANN. § 175.45 (West 1996); WYO. STAT. ANN. §§ 7-19-301 to -306 (Michie 1997).

3. See 42 U.S.C. § 14071 (1994 & Supp. 1997) (requiring states to establish systems for notifying communities when convicted sex offenders move into neighborhood after being released from incarceration).

This law, named the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act was enacted as part of the Violent Crime Control and Law Enforcement Act ("Act") of 1994, 42 U.S.C. §§ 13701-14223 (1994), otherwise known as the 1994 Omnibus Crime Bill. See *State v. Myers*, 923 P.2d 1024, 1028 (Kan. 1996) (discussing federal sex offender registration law), *cert. denied*, 117 S. Ct. 2508 (1997); see also Hacking, *supra* note 2, at 765-73 (discussing New Jersey's Megan's Law and Jacob Wetterling Act); Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. PUB. INT. L.J. 29, 30 (1996) (noting that New Jersey's Megan's Law served as inspiration for similar legislation adopted by federal government); Tara L. Wayt, Note, *Megan's Law: A Violation of the Right to Privacy*, 6 TEMP. POL. & CIV. RTS. L. REV. 139, 156-57 (1997) (stating that federal government enacted "its own 'Megan's Law'" in May of 1996); Associated Press, *House Passes Federal Version of Megan's Law*, BLOOMINGTON HERALD-TIMES, May 8, 1996, at A3 (reporting that United States House of Representatives passed federal version of Megan's Law by vote of 418 to 0).

Congress amended the 1994 Act by requiring states to establish systems whereby communities are notified when a convicted sex offender moves into the neighborhood. See Wayt, *supra*, at 157 n.136 (discussing recent amendments to federal sex offender legislation); see also Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 300-02 (1997) (discussing federal sex offender legislation and noting that states must comply with requirements of law to receive federal funding). Prior to the 1996 amendment, notification was left to the discretion of the states. See Wayt, *supra*, at 157 n.136.

4. See John Gibeaut, *Defining Punishment*, A.B.A. J., March 1997, at 36, 36 (1997) (noting that many states enacted legislation allowing local law enforcement authorities to notify public of sex offender's presence in community). By March of 1997, all 50 states had enacted sex offender registration laws that generally require individuals convicted of certain statutorily-specified sex offenses to register with the local law enforcement authorities. See *id.* In addition, at least 20 states had also enacted sex offender notification laws that generally allow local law enforcement authorities to notify the public of a sex offender's presence in the community. See *id.*

5. See N.J. STAT. ANN. §§ 2C:7-1 to :7-11 (West 1995 & Supp. 1997) (requiring individuals who commit certain designated crimes involving sexual assault to register with local law enforcement authorities and providing for dissemination of information regarding those required to register). See generally Elga A. Goodman, Comment, *Megan's Law: The New Jersey Supreme Court Navigates Uncharted Waters*, 26

Jersey registration and community notification laws, popularly known as "Megan's Law," require those who have committed certain designated crimes involving sexual assault to register with local law enforcement authorities.⁶ In addition to the registration requirement, however, Megan's Law also provides for community notification in varying degrees, with information about the registrant disseminated to statutorily-designated organizations and members in the local community.⁷ Subsequently, a majority of states followed New Jersey's lead by enacting some form of community notification program whereby information about the registrant is released to statutorily-specified entities.⁸

This recent proliferation of sex offender registration and notification laws gave rise to numerous state and federal cases challenging the laws on various constitutional grounds.⁹ Many of the courts faced with these chal-

SETON HALL L. REV. 764 (1996) (providing discussion of New Jersey's Megan's Law).

6. See N.J. STAT. ANN. § 2C:7-2a to :7-2b (requiring all persons who have "been convicted, adjudicated delinquent or found not guilty by reason of insanity" for certain designated crimes involving sexual assault to register with local law enforcement authorities). Although sex offender registration and notification statutes vary considerably from state to state, both in terms of requirements and scope, "Megan's Law" has become a generic term for any law providing for the registration of sex offenders. See Teir & Coy, *supra* note 1, at 409-13 (discussing various state sex offender registration and community notification laws and referring to them generally as "Megan's Laws"). For the remainder of this Note, unless otherwise specified, the use of the term "Megan's Law" will specifically refer to the New Jersey legislation.

7. See N.J. STAT. ANN. § 2C:7-8c (providing for three levels of community notification with scope of notification based on designated "tier" classification of registrant).

8. See *People v. Ross*, 646 N.Y.S.2d 249, 250 (Sup. Ct. 1996) ("A majority of states require notification to the community or access by the public to information on convicted sex offenders."); see also Teir & Coy, *supra* note 1, at 406 (noting that some state sex offender statutes provide for public notification to "warn those who need to know").

9. See, e.g., *Artway v. Attorney General*, 81 F.3d 1235, 1242 (3d Cir. 1996) (challenging New Jersey's Megan's Law on various constitutional grounds including ex post facto, double jeopardy, bill of attainder, due process, equal protection and vagueness grounds); *Doe v. Gregoire*, 960 F. Supp. 1478, 1480 (W.D. Wash.) (challenging sex offender legislation on ex post facto grounds), *aff'd sub nom. Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Doe v. Pataki*, 940 F. Supp. 603, 604 (S.D.N.Y. 1996) (challenging constitutionality of New York state sex offender registration law on basis of Ex Post Facto Clause of United States Constitution), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997); *Roe v. Office of Adult Probation*, 938 F. Supp. 1080, 1085 (D. Conn. 1996) (challenging sex offender notification legislation on ex post facto, equal protection, due process and double jeopardy grounds), *vacated*, 125 F.3d 47 (2d Cir. 1997); *State v. Myers*, 923 P.2d 1024, 1027 (Kan. 1996) (challenging Kansas sex offender registration law on ex post facto grounds), *cert. denied*, 117 S. Ct. 2508 (1997); *Doe v. Criminal History Sys. Bd.*, No. Civ.A.96-6046, 1997 WL 100878, at *1 (Mass. Super. Ct. Feb. 25, 1997) (challenging constitutionality of Massachusetts sex offender registration and community notification law on ex post facto, double jeopardy and due process grounds); *In re Registrant C.A.*, 679 A.2d 1153, 1157 (N.J. 1996) (determining whether various provisions of New Jersey's Megan's Law offend procedural due process and doc-

lenges have reached conflicting conclusions regarding the constitutionality of sex offender registration and notification laws.¹⁰ In one of the latest challenges, *E.B. v. Verniero*,¹¹ the United States Court of Appeals for the Third Circuit held that the community notification provisions of New

trine of fundamental fairness); *Doe v. Poritz*, 662 A.2d 367, 380-81 (N.J. 1995) (determining whether New Jersey's Megan's Law is constitutional in face of challenges based on state and federal constitutional prohibitions against ex post facto laws, bills of attainder, double jeopardy and cruel and unusual punishment); *People v. Afrika*, 648 N.Y.S.2d 235, 237 (Sup. Ct. 1996) (challenging constitutionality of application of New York's sexual offender registration law on ex post facto grounds); *Gress v. Board of Parole and Post-Prison Supervision*, 924 P.2d 329, 329 (Or. Ct. App. 1996) (challenging classification as "predatory sex offender" under Oregon's sex offender legislation on ex post facto grounds); *Van Doren v. Mazurkiewicz*, 695 A.2d 967, 971 (Pa. Commw. Ct. 1997) (challenging constitutionality of Pennsylvania sex offender registration law on ex post facto and double jeopardy grounds).

Recent commentators have noted that sex offender registration and notification laws have been challenged on numerous constitutional grounds. See Ronald K. Chen, *Constitutional Challenges to Megan's Law: A Year's Retrospective*, 6 B.U. PUB. INT. L.J. 57, 58-72 (1996) (discussing various constitutional challenges to Megan's Law); Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1085 (1997) (noting that sex offender registration and notification laws have been challenged on following constitutional grounds: ex post facto, unreasonable search and seizure of fingerprints and photographs, denial of equal protection of law, cruel and unusual punishment, double jeopardy, bills of attainder, invasion of privacy by virtue of government disclosure of certain types of information to public and violations of procedural due process); Gibeaut, *supra* note 4, at 36 ("Sex offender registration laws have survived a barrage of constitutional challenges on grounds ranging from due process and double jeopardy to ex post facto."); *A Survey of Cases Addressing State Statutes Pertaining to the Treatment, Registration and Community Notification Requirements for Sexual Offenders*, 6 B.U. PUB. INT. L.J. 293, 293, 299, 306, 312, 317, 321, 325, 328 (1996) (providing survey of cases that have addressed constitutionality of sex offender registration and notification laws); Mark J. Swearingen, Comment, *Megan's Law as Applied to Juveniles: Protecting Children at the Expense of Children?*, 7 SETON HALL CONST. L.J. 525, 532 (1997) ("Concern as to the constitutionality of Megan's Law mounted from the moment the statute was conceived."); see also Gil Smart, *Protecting Whom? In Theory, Megan's Law Protects Children From Child Molesters. In Practice, Pennsylvania's Law May Not Achieve That Goal*, LANCASTER NEW ERA, Sept. 28, 1997, at A1 ("Dozens of sex offenders have sued states over Megan's Law in both federal and state courts.").

Although sex offender registration and notification laws have been challenged on numerous constitutional grounds, this Note only addresses whether the Tier 2 and Tier 3 community notification provisions of New Jersey's Megan's Law impermissibly inflict punishment in violation of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.

10. *Compare Artway*, 81 F.3d at 1242-43 (upholding constitutionality of New Jersey's Megan's Law provisions requiring sex offender registration and Tier 1 notification), and *Poritz*, 662 A.2d at 381 (finding registration provisions of New Jersey's Megan's Law constitutionally valid), with *Roe*, 938 F. Supp. at 1091 (determining that community notification provisions of Connecticut's sex offender notification policy guidelines constitute punishment in violation of Ex Post Facto Clause of United States Constitution as applied to defendant), and *Myers*, 923 P.2d at 1025-26 (holding that notification requirements of Kansas sex offender registration law impose "punishment in violation of the Ex Post Facto Clause of the United States Constitution" as applied to defendant).

11. 119 F.3d 1077 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998).

Jersey's Megan's Law did not inflict "punishment" in violation of the Ex Post Facto or Double Jeopardy Clauses of the United States Constitution.¹²

This Note discusses and compares the Third Circuit's holding with other state and federal court decisions addressing the constitutionality of sex offender registration and notification laws.¹³ Part II summarizes the history, implementation and operation of New Jersey's Megan's Law, the constitutional issues associated with the operation of Megan's Law and the manner in which other courts have treated these constitutional issues.¹⁴ Part III describes how the challenge to New Jersey's Megan's Law arose.¹⁵ Next, Part IV traces the Third Circuit's approach in upholding the constitutionality of the community notification provisions of New Jersey's Megan's Law.¹⁶ Part V analyzes the conclusions of law made by the Third Circuit regarding the constitutionality of Megan's Law.¹⁷ Finally, Part VI focuses on the likely impact of the Third Circuit's decision on the community notification provisions of Megan's Law and on the relevant areas of constitutional law.¹⁸

II. BACKGROUND

A. *Factual and Procedural History of Megan's Law*

On July 29, 1994, seven-year-old Megan Kanka was abducted, raped and murdered near her home in New Jersey.¹⁹ The man who eventually confessed to, and was convicted of, the rape and murder of Megan Kanka was a neighbor of the Kanka family and had two prior convictions for sex offenses involving young girls.²⁰ Megan, her parents, local law enforcement authorities and members of the community, however, were unaware that the man was a twice-convicted pedophile.²¹ The rape and murder of Megan Kanka served to focus public attention on the risks that repeat sex

12. *See id.* at 1105.

13. For a discussion of the court's decision in *E.B.*, see *infra* notes 134-206 and accompanying text.

14. For a discussion of the operation of New Jersey's Megan's Law, the ex post facto and double jeopardy concerns associated with Megan's Law and other court decisions addressing the constitutionality of sex offender registration and notification laws, see *infra* notes 26-118 and accompanying text.

15. For a discussion of how the recent challenge to New Jersey's Megan's Law arose, see *infra* notes 119-33 and accompanying text.

16. For a discussion of the Third Circuit's decision in *E.B.*, see *infra* notes 134-206 and accompanying text.

17. For a discussion of the appropriateness of the conclusions of law reached by the Third Circuit, see *infra* notes 207-46 and accompanying text.

18. For a discussion of the consequences of the Third Circuit's decision, see *infra* notes 247-59 and accompanying text.

19. *See E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998).

20. *See id.*

21. *See id.*

offenders, especially those who target children, present to the community.²²

22. See Teir & Coy, *supra* note 1, at 405-06. Recent commentators have noted that “[i]n response to these murders, committed by repeat sexual offenders, states have enacted a variety of laws designed to warn communities when convicted sex offenders move into their neighborhoods.” *Id.* at 406.

Recognizing the risk that repeat sex offenders pose to the community, many state legislatures have proposed various legislative tools to address the recidivism problem among sex offenders. See *id.* at 406-07 (discussing increased prison terms, civil commitment and castration of sex offenders as legislative alternatives); see also Note, *Prevention Versus Punishment: Toward A Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1712-15 (1996) [hereinafter *Prevention Versus Punishment*] (discussing various legislative approaches designed to address and reduce recidivism problem among sex offenders). In addition to the registration and community notification requirements found in various versions of Megan’s Law, one approach is mandating longer prison terms through legislation that is specifically directed at repeat sex offenders. See Teir & Coy, *supra* note 1, at 406. Although this approach would probably be effective at keeping dangerous sex offenders off the street, some states may be reluctant to financially support the warehousing of these individuals in state penal facilities. See *id.*

As an alternative to mandating longer prison terms, Kansas and a handful of other states are employing post sentence, involuntary civil commitment as a way to keep “sexually violent predators” off the street. See *id.* at 407. For example, the Kansas sexually violent predator law established procedures for the post sentence, involuntary civil commitment of persons who, due to a “mental abnormality” or a “personality disorder,” are likely to engage in predatory acts of sexual violence. See *id.* at 416-17; see also KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1995) (providing for post sentence, involuntary civil commitment of sexually violent predators). The Kansas law protects the public from convicted sex offenders, but avoids the “warehousing” of numerous prisoners in state and federal correctional facilities. See Teir & Coy, *supra* note 1, at 407 (noting that approach employed by state of Kansas “provide[s] a tough, but realistic, answer to the serious problem of recidivism presented by sexual offenders”). The constitutionality of the Kansas law was recently challenged in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997). The Supreme Court of the United States held that the law comports with due process requirements and does not violate the Ex Post Facto or Double Jeopardy Clauses of the United States Constitution. See *id.* at 2086; see also Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347 (1997) (discussing use of psychological and psychiatric research to address ex post facto concerns raised by post sentence, involuntary civil commitment of sexually violent predators); Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 624-37 (1997) (addressing constitutional concerns associated with post sentence, involuntary civil commitment of sexually violent predators).

Two recent trends in sex offender legislation, also designed to address the risk that repeat sex offenders pose to the community, are chemical castration and DNA testing. See Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 311-17 (1997) (discussing various legislative tools, including chemical and surgical castration, designed to reduce recidivism risk among repeat sexual offenders); *Prevention Versus Punishment, supra*, at 1713-14 (discussing use of DNA testing as means to gather information about sex offenders). The chemical castration laws mandate that convicted sex offenders undergo hormone treatment that is designed to dramatically reduce their sex drive. See Freeman-Longo, *supra*, at 314 (noting that most commonly used drug is Depo-Provera, which lowers blood

By August 15, 1994, just two weeks after the murder of Megan Kanka, bills providing for sex offender registration and community notification were introduced into New Jersey's General Assembly.²³ Two weeks later, the bills were declared emergency measures, thereby allowing them to bypass the often lengthy committee process.²⁴ By October 31, 1994, as a result of determined campaigning by Megan's parents and the public outcry that followed Megan's brutal rape and murder, New Jersey enacted registration and community notification laws as part of a ten bill package collectively referred to as "Megan's Law."²⁵

B. *Megan's Law Statutory Scheme: Registration and Notification*

The fundamental premise of Megan's Law is that registration and carefully tailored notification will prevent sex offenders from reoffending by alerting law enforcement authorities and those members of the community likely to encounter a sex offender to the potential danger posed by

serum testosterone levels in males). The first chemical castration law was passed in 1996 by the California Legislature and since that time, at least seven other states have considered similar legislation. *See id.* (noting that Colorado, Florida, Massachusetts, Michigan, Montana, Texas and Washington are considering similar legislation). Several other states, such as Connecticut, Oregon and Virginia, also require convicted sex offenders to provide blood samples that are "subsequently DNA tested, screened, and filed in the state's criminal justice data bank." *Prevention Versus Punishment, supra*, at 1713 & n.21. The theory behind DNA testing is that "investigations of murders and sexual offenses are . . . likely to yield the type of evidence from which DNA information can be derived." *Id.* at 1713-14 (quoting *Rise v. Oregon*, 59 F.3d 1556, 1561 (9th Cir. 1995)). These "DNA fingerprinting laws purportedly aid in the identification, apprehension, and prosecution of repeat sex predators." *Id.* at 1714.

23. *See E.B.*, 119 F.3d at 1081 (noting that public reaction to Megan Kanka's murder was intense and that New Jersey's governor, Christine Todd Whitman, and legislature responded quickly); *see also* Kirsten R. Bredlie, Comment, *Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in Doe v. Poritz*, 81 MINN. L. REV. 501, 501 (1996) (noting that New Jersey Legislature passed Megan's Law in response to public pressure and reports indicating that repeat offenders pose extreme danger to public safety).

24. *See E.B.*, 119 F.3d at 1081-82 (tracing procedural history of Megan's Law through New Jersey Legislature); *see also* *Artway v. Attorney General*, 81 F.3d 1235, 1243 (3d Cir. 1996) (stating that proposed legislation was only debated on floor of General Assembly, with no member voting against it); Robin L. Deems, Comment, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1200 (1996) (noting that New Jersey Senate passed Megan's Law "with only token debate" and New Jersey Assembly scheduled vote on five of ten bills "without customary committee hearing" (quoting Jerry Gray, *Sex Offender Legislation Passes in the Senate*, N.Y. TIMES, Oct. 4, 1994, at B6)); Hacking, *supra* note 2, at 806 (discussing fact that Megan's Law was "passed in record time and under very unusual circumstances").

25. *See* N.J. STAT. ANN. § 2C:7-1 to :7-11 (West 1995 & Supp. 1997) (providing for registration of sex offenders and subsequent community notification); *see also* *Artway*, 81 F.3d at 1243-44 (describing factual and procedural history leading to legislative enactment of Megan's Law); Freeman-Longo, *supra* note 22, at 313 (discussing factual origins of sex offender registration and notification legislation).

repeat sex offenders.²⁶ Specifically, the stated legislative purpose of Megan's Law is to identify potential recidivists, alert the public when necessary for public safety and help prevent and promptly resolve incidents involving sexual abuse and missing persons.²⁷ To accomplish these goals, Megan's Law provides for both mandatory registration and a three tier notification system.²⁸ The Megan's Law registration provisions require all persons who have completed a sentence for certain statutorily-designated sex crimes after the enactment of Megan's Law to register with local law enforcement authorities.²⁹ The registrant is required to provide the following information to the chief law enforcement officer of the municipality in which the registrant resides: name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary legal residence and date and place of employment.³⁰ After registration is completed and the registration agency forwards the registrant's information to the prosecutor of the

26. See *E.B.*, 119 F.3d at 1098 (citing *Artway*, 81 F.3d at 1265).

27. See N.J. STAT. ANN. § 2C:7-1. Section 2C:7-1 provides:

The legislature finds and declares:

- a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.
- b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

Id.

28. See *id.* §§ 2C:7-2 to :7-11 (outlining registration and notification provisions of Megan's Law); see also *E.B.*, 119 F.3d at 1082-84 (discussing registration and subsequent notification required under Megan's Law); *Artway*, 81 F.3d at 1243-44 (same).

29. See N.J. STAT. ANN. § 2C:7-2b(1) (defining relevant terms and establishing registration requirements for sex offenders). The relevant statutory provision provides:

- b. For the purposes of this act a sex offense shall include the following:
 - (1) Aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping . . . 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, compulsive behavior, regardless of the date of the commission of the offense or the date of conviction

Id.

30. See *id.* § 2C:7-4b(1) (stating that registrant must provide information in written statement signed by registrant acknowledging that registrant was advised of duty to register and reregister imposed by Megan's Law). The relevant statutory provision provides:

- b. The form of registration required by this act shall include:
 - (1) A statement in writing signed by the person required to register acknowledging that the person has been advised of the duty to register and reregister imposed by this act and including the person's name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary residence, date and place of employment

county where the registrant was prosecuted, the information is forwarded to the Division of State Police where it is incorporated into a central registry.³¹ As a final step, the registrant's information is provided to the prosecutor of the county in which the registrant plans to reside.³² Megan's Law penalizes noncompliance by providing that any person subject to the registration requirements who fails to register is guilty of a fourth degree crime.³³ The registration requirement continues for fifteen years from the date of conviction or release, whichever is later.³⁴ Once this fifteen year period lapses, a registrant may apply to the Superior Court of New Jersey to terminate his or her obligation to register.³⁵

The information obtained during the registration phase of Megan's Law is used as the basis for the next step—notification.³⁶ The prosecutor of the county where the registrant plans to reside and the prosecutor from the convicting county use the registration information to jointly assess the risk of reoffense posed by the registrant.³⁷ Together, they determine whether the registered sex offender poses a low (Tier 1), moderate (Tier 2) or high (Tier 3) risk of reoffense.³⁸ The designated tier classification determines the scope of the subsequent notification, with Tier 1 having the smallest scope and Tier 3 having the largest scope.³⁹ The Attorney

Id. In addition, the registrants are required to confirm their permanent address every 90 days, notify the municipal law enforcement agency if they move and reregister with the law enforcement agency of any new municipality. *See id.* § 2C:7-2d to :7-2e.

31. *See id.* § 2C:7-4c to :7-4d (describing responsibilities of county prosecutors and administrative procedures for forwarding of registrant's information).

32. *See id.* § 2C:7-4c (discussing procedures for forwarding of registrant's information to prosecutor of county in which registrant plans to reside).

33. *See id.* § 2C:7-2a.

34. *See id.* § 2C:7-2f.

35. *See id.* The registration obligation will only be terminated upon proof that the registrant did not commit an offense within 15 years following conviction or release from a correctional facility, whichever is later. *See id.* In addition, the obligation will only be terminated "upon a persuasive showing that the registrant is not likely to pose a threat to the safety of others." *E.B. v. Verniero*, 119 F.3d 1077, 1083 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998).

36. *See E.B.*, 119 F.3d at 1083-84 (describing use of registration information in subsequent notification process).

37. *See N.J. STAT. ANN.* § 2C:7-8d(1) (listing individuals who are responsible for determining registrant's degree of risk of reoffense). The statute provides, in relevant part:

(1) The county prosecutor of the county where the person was convicted and the county prosecutor of the county where the registered person will reside, together with any law enforcement officials that either deems appropriate, shall assess the risk of re-offense by the registered person;

(2) The county prosecutor of the county in which the registered person will reside, after consultation with local law enforcement officials, shall determine the means of providing notification.

Id. § 2C:7-8d(1), (2).

38. *See id.* § 2C:7-8c ("The regulations shall provide for three levels of notification depending upon the risk of re-offense by the offender . . .").

39. *See id.* § 2C:7-8c(1)-(3). Specifically, the statute provides:

General of New Jersey, pursuant to the statutory requirements of Megan's Law, developed guidelines to assist authorities in the classification of sex offenders.⁴⁰ The Supreme Court of New Jersey, however, has slightly mod-

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- (1) If the risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;
 - (2) If the risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified . . . in addition to the notice required by paragraph (1) of this subsection;
 - (3) If the risk of re-offense is high, the public shall be notified through means . . . designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

Id. Tier 1 notification, which is also known as "law enforcement alert," is required for every registrant. *See E.B.*, 119 F.3d at 1083. Tier 2 notification, also known as "law enforcement, school and community organization alert," provides notification to the following entities: registered schools, day care centers, summer camps and community organizations that care for children or provide support to women. *See id.* Tier 3 notification, also known as "community notification," extends to members of the public likely to encounter the registered sex offender. *See id.*

To promote and preserve uniformity and consistency in the classification and notification process, Megan's Law requires the state Attorney General to develop and promulgate guidelines to be used by the county prosecutors when assessing the registrant's degree of risk of reoffense. *See* N.J. STAT. ANN. § 2C:7-8a to :7-8d. The guidelines are required to include consideration of the following factors:

- (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. § 2C:7-8b(1)-(8).

40. *See E.B.*, 119 F.3d at 1083. The "Registrant Risk Assessment Scale" consists of a matrix with 13 factors divided into four broad categories. *See id.* at 1084. The specific factors and their organization can be summarized as follows:

Seriousness of Offense:

- 1) degree of force

ified and revised the substantive and procedural aspects of the legislative scheme discussed above.⁴¹

2) degree of contact

3) age of victim

Offense History:

4) victim selection

5) number of offenses/victims

6) duration of offense

7) length of time since last offense

8) history of antisocial acts

Characteristics of Offender:

9) response to treatment

10) substance abuse

Community Support:

11) therapeutic support

12) residential support

13) employment/educational stability.

Id. at 1084 n.2. The prosecutors determine whether the registrant poses a low, moderate or high risk to the community based on the 13 factors and then assign zero, one or three points, respectively, for each factor. *See id.* at 1084. The prosecutors then multiply the raw scores under "Seriousness of Offense" by five, the factors under "Offense History" by three, the factors under "Characteristics of Offender" by two and the factors under "Community Support" by one. *See id.* The points are totaled and the registrant is placed into the appropriate classification tier: Tier 1 (low risk): 0 to 36 points; Tier 2 (moderate risk): 37 to 73 points; and Tier 3 (high risk): 74 to 111 points. *See id.* As a final step, the prosecutors consider the applicability of two exceptions. *See id.* First, if the offender indicates that he or she will reoffend if released back into the community, he or she will be deemed to be a high risk of reoffense regardless of the scale score. *See id.* Second, if the offender has a physical condition that minimizes the risk of reoffense, he or she will be deemed to be a low risk of reoffense regardless of the scale score. *See id.*

Predicting dangerous behavior, or "risk assessment," has recently received a great deal of attention. *See* Kirk Heilbrun, *Prediction Versus Management Models Relevant to Risk Assessment: The Importance of Legal Decision-Making Context*, 21 L. & HUM. BEHAV. 347, 348 (1997) (discussing importance of risk assessment to society and significant research advances made within area during last decade); Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 L. & PSYCHOL. REV. 43, 43 (1994) (discussing increasing use of risk assessment and problems associated with prediction of violent behavior). A recent commentator noted that predicting whether an individual will engage in violent or dangerous behavior is increasingly becoming a function of the judiciary and other decision-making bodies. *See id.* at 44-45, 67 (noting that courts and other decision-making bodies engage in predictions of behavior). Despite 25 years of research, however, those engaged in the practice of predicting violent or dangerous behavior "have barely scratched the surface of [using] risk assessment as a predictive tool." *Id.* at 67-68.

41. *See E.B.*, 119 F.3d at 1085-87 (discussing recent decisions by Supreme Court of New Jersey that have helped to refine and shape Megan's Law); *see also In re Registrant G.B.*, 685 A.2d 1252, 1264 (N.J. 1996) (recognizing that registrant is entitled to lodge three distinct challenges to tier designation); *In re Registrant C.A.*, 679 A.2d 1153, 1164 (N.J. 1996) (determining that registrant's hearing is "civil, not criminal, and remedial, not adversarial"); *Doe v. Poritz*, 662 A.2d 367, 381-82 (N.J. 1995) (upholding constitutionality of Megan's Law and reading into statute certain procedures designed to prevent any "excessiveness of community notification"); Herbert B. Kaplan, *Is This What They Mean by Sex Education?: Keep-*

ing *Sex Offenders Out of the Schools*, 8 U. FLA. J.L. & PUB. POL'Y 51, 63-73 (1996) (discussing constitutional challenges to Megan's Law in *Artway v. Attorney General*).

Three recent decisions by the Supreme Court of New Jersey have shaped and refined the Megan's Law statutory scheme. See *E.B.*, 119 F.3d at 1085-87 (discussing judicial refinement of Megan's Law by Supreme Court of New Jersey). In *Doe v. Poritz*, the Supreme Court of New Jersey upheld the constitutionality of Megan's Law, while at the same time reading additional procedural protections into the statute. *Poritz*, 662 A.2d at 381. There were three noteworthy aspects in the *Poritz* court's decision. See *id.* at 381-82. First, the court held that when a prosecutor classifies a registrant in Tier 2, the prosecutor must make an individual determination, on a case-by-case basis, regarding the appropriate institutions and organizations to include in the subsequently developed notification program. See *id.* at 382, 385. Second, the court added a requirement to the Megan's Law scheme whereby county prosecutors are required to provide registrants with written notice if they are classified in either Tier 2 or Tier 3. See *id.* at 382. In addition, prosecutors must also provide registrants with notice of the proposed notification plan. See *id.* The court recognized, however, that in some cases it may be impossible to provide notice or to do so in a timely manner and, in those cases, written notice would not need to be provided. See *id.* Finally, the *Poritz* court held that the state is required to make a prenotification judicial hearing available to registrants who wish to challenge either their tier classification or the proposed notification plan. See *id.* In these proceedings, the court decides only whether to affirm or reverse the prosecutor's determinations and thus, the registrant bears the burden of persuasion. See *id.* The court will only reverse the prosecutor's determinations if the registrant persuades the court by a preponderance of the evidence that the prosecutor's determinations do not adhere to the statutory requirements. See *E.B.*, 119 F.3d at 1086 (discussing role of court in pre-notification judicial review process); see also *In re Registrant A.I.*, 696 A.2d 77, 79 (N.J. Super. Ct. App. Div. 1997) (challenging high risk sex offender designation under New Jersey's Megan's Law).

While the *Poritz* court was mostly concerned with the procedural aspects of Megan's Law, the Supreme Court of New Jersey also addressed the three bases upon which registrants can challenge their tier classification. See *G.B.*, 685 A.2d at 1264 (discussing bases on which registrants may challenge their tier classification). First, a registrant may present evidence showing that the calculation leading to the Registrant Risk Assessment Scale score was incorrectly performed because: (1) there was a factual error; (2) there was a dispute concerning a prior offense committed by the registrant; or (3) the variable factors were improperly determined. See *id.* Second, a registrant may introduce evidence that the scale calculations do not adequately encompass his or her specific case and, due to unique circumstances, the tier classification is not appropriate. See *id.* Third and finally, a registrant may introduce evidence demonstrating that the notification required by the tier classification is excessive because of unique aspects of his or her case. See *id.*

The *G.B.* court also recognized a limitation on the challenges that a registrant may make. See *id.* Specifically, the court noted that a registrant may not challenge the scale itself or the weight afforded to any of the individual factors that comprise the scale. See *id.* Instead, all challenges must be based on the characteristics of the individual registrant and the inadequacies of the scale in his or her particular case. See *id.*

Finally, the Supreme Court of New Jersey addressed the nature of a registrant's hearing under Megan's Law in *In re Registrant C.A.*, 679 A.2d at 1164. The court noted that the rules of evidence do not apply in a Megan's Law hearing. See *id.* In addition, the court recognized that the hearing is substantially similar to an evidentiary or investigative hearing. See *id.* Accordingly, the court concluded that a registrant's hearing under Megan's Law "is civil, not criminal, and remedial, not adversarial." *Id.* Based on these considerations, the court adopted the format used in probation violation hearings as the appropriate format for Megan's Law notification hearings. See *id.* at 1166.

C. *Constitutionality of Sex Offender Registration and Notification Laws*

The enactment of sex offender registration and notification laws has led to numerous challenges to the constitutionality of these laws.⁴² Megan's Law, however, has primarily been challenged on two constitutional grounds: ex post facto and double jeopardy.⁴³ When addressing these issues, federal and state courts have reached quite different results regarding the constitutionality of these laws.⁴⁴ Before exploring cases that address such constitutional challenges to sex offender registration and notification laws, it is first necessary to consider the evolution of the Ex Post Facto and Double Jeopardy Clauses in the jurisprudence of the Supreme Court.⁴⁵

1. *Ex Post Facto Clause*

The United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto [l]aw."⁴⁶ The Supreme Court of the United States first interpreted the range and scope of the Ex Post Facto Clause in *Calder v. Bull*.⁴⁷ In *Calder*, Justice Chase noted four types of laws that the Ex Post Facto Clause expressly prohibits and, by doing so, established the appropriate scope of the Clause.⁴⁸ First, the Ex Post Facto Clause prohibits any law that punishes a previously-committed act as a crime if the act was not a

42. For a discussion of state and federal cases in which sex offender registration and notification laws have been challenged on various constitutional grounds, see *supra* note 9.

43. For a discussion of the cases in which Megan's Law has been challenged on ex post facto and double jeopardy grounds, see *infra* notes 71-118 and accompanying text.

44. For a discussion of recent state and federal decisions in which courts have reached conflicting conclusions regarding the constitutionality of sex offender registration and notification laws, see *supra* note 10.

45. For a discussion of Supreme Court cases that have addressed challenges based on the Ex Post Facto and Double Jeopardy Clauses, see *infra* notes 46-70 and accompanying text.

46. U.S. CONST. art. I, § 10, cl. 1. Article I, Section 9 of the United States Constitution also provides, in relevant part: "No . . . ex post facto Law shall be passed." *Id.* at art. I, § 9, cl. 3. The fundamental role of the prohibition against ex post facto laws found in the United States Constitution was summarized by James Madison as follows:

Bills of Attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted. Very properly therefore have the Convention added this constitutional bulwark in favor of personal security and private rights.

THE FEDERALIST NO. 44, at 301 (James Madison) (Jacob E. Cooke ed., 1961).

47. 3 U.S. (3 Dall.) 386 (1798).

48. See *id.* at 390.

crime when committed.⁴⁹ Second, any law that aggravates a crime, or makes it more serious than it was when committed, is prohibited by the Ex Post Facto Clause.⁵⁰ Third, the Ex Post Facto Clause prohibits the retroactive application of a law that inflicts a greater punishment for the crime than the law originally provided at the time the crime was committed.⁵¹ Fourth and finally, the Ex Post Facto Clause prohibits every law that alters the legal rules of evidence that existed at the time the crime was committed.⁵²

A review of various Supreme Court decisions in which the Court applied the Ex Post Facto Clause reveals that the Clause serves two fundamental purposes.⁵³ First, the Ex Post Facto Clause is designed to ensure that legislative acts provide fair warning of their effect, thereby allowing individuals to rely on the currently accepted meaning of the act until it is explicitly changed by the legislature.⁵⁴ Second, the Ex Post Facto Clause

49. *See id.*

50. *See id.*

51. *See id.* This third prohibition provides the constitutional basis on which sex offender registration and notification laws are most often challenged. *See, e.g., E.B. v. Verniero*, 119 F.3d 1077, 1081, 1092 (3d Cir. 1997) (noting that E.B. challenged Megan's Law on ex post facto grounds, alleging that it inflicts greater punishment than law annexed to crime when crime was committed), *cert. denied*, 118 S. Ct. 1039 (1998).

52. *See Calder*, 3 U.S. at 390. The four categories of laws prohibited by the Ex Post Facto Clause, as first articulated by Justice Chase in *Calder*, were eventually rephrased by the Supreme Court in the following manner:

[A]ny statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Bezell v. Ohio, 269 U.S. 167, 169-70 (1925).

This interpretation of the range and scope of the Ex Post Facto Clause has remained relatively constant since first being articulated in *Calder* and it has been reaffirmed repeatedly by the Supreme Court. *See Collins v. Youngblood*, 497 U.S. 37, 41-43 (1990) (reaffirming definition of Ex Post Facto Clause first articulated in *Calder*); *Bezell*, 269 U.S. at 169-70 (same); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (same). Specifically, in *Collins*, the Supreme Court reaffirmed that the Ex Post Facto Clause incorporated a "term of art with an established meaning at the time of the framing of the Constitution." *Collins*, 497 U.S. at 41.

53. *See Miller v. Florida*, 482 U.S. 423, 429-30 (1987) (discussing two traditionally-recognized purposes of Ex Post Facto Clause); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (same). In addition to the Supreme Court, other federal courts have discussed the purposes of the Ex Post Facto Clause. *See United States v. Meeks*, 25 F.3d 1117, 1118-19 (2d Cir. 1994) (discussing Ex Post Facto Clause and purposes it serves); *Doe v. Pataki*, 940 F. Supp. 603, 613 (S.D.N.Y. 1996) (same), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997); *Roe v. Office of Adult Probation*, 938 F. Supp. 1080, 1087 (D. Conn. 1996) (same), *vacated*, 125 F.3d 47 (2d Cir. 1997).

54. *See Pataki*, 940 F. Supp. at 613 (stating that it is "fundamentally fair for people to know the law before they act"); *see also Roe*, 938 F. Supp. at 1087 (stating that one traditionally-accepted purpose of Ex Post Facto Clause is to provide notice of legislation's effect).

“prevent[s] legislative abuses by curbing the ‘enact[ment of] arbitrary or vindictive legislation’” on individuals or classes of individuals.⁵⁵

The constitutional prohibition against ex post facto laws, however, only applies to penal statutes which have the effect of disadvantaging the offender subject to the laws.⁵⁶ Accordingly, in an effort to promote uniformity in this area of constitutional law, the Supreme Court in *DeVeau v. Braisted*⁵⁷ established the test that must be applied when a party alleges that a legislative act violates the Ex Post Facto Clause.⁵⁸ Specifically, the Court stated that the hallmark of an ex post facto law is the imposition of punishment for previously-committed acts.⁵⁹ Thus, the Court held that

55. *Roe*, 938 F. Supp. at 1087 (quoting *Meeks*, 25 F.3d at 1118-19); see also *Pataki*, 940 F. Supp. at 613 (discussing inherent unfairness of ex post facto legislation).

56. See *State v. Myers*, 923 P.2d 1024, 1030 (Kan. 1996) (discussing application of constitutional prohibition against ex post facto laws), *cert. denied*, 117 S. Ct. 2508 (1997); see also *Beazell*, 269 U.S. at 169-70 (noting that “ex post facto” is term of art applicable only to punishment); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1074 (1997) (“Even the Ex Post Facto Clause, with its explicit prohibition on retroactivity, applies only in the criminal context.”); Gregory Y. Porter, Note, *Uncivil Punishment: The Supreme Court’s Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 545-46 (1997) (noting that Ex Post Facto Clause only applies in criminal context). One commentator has noted, however, that the Ex Post Facto Clause could also apply in “quasi-criminal” contexts. See *id.* at 546. According to this commentator, almost all of the courts that addressed the issue have indicated that if civil sanctions are determined to be quasi-criminal in nature, the prohibitions found in the Ex Post Facto Clause would apply. See *id.*

57. 363 U.S. 144 (1960).

58. See *id.* at 160. In *DeVeau*, the Supreme Court was faced with a challenge to the constitutional validity of section 8 of the New York Waterfront Commission Act of 1953. See *id.* at 144-45. The New York act, which formulated a detailed scheme for governmental supervision of employment on the waterfront in the Port of New York, was challenged as being in violation of various constitutional provisions, including the Ex Post Facto Clause. See *id.* at 145. The act was enacted to combat the “corruption” and “dishonesties” perpetrated by many officials in the Port of New York. See *id.* at 147. The challenged provision of the act, section 8, generally provided that no person shall solicit or receive any dues on behalf of any waterfront union if any officer of such union has been convicted of a felony. See *id.* at 145. The appellant, an officer of waterfront union Local 1346, had previously pleaded guilty to a charge of grand larceny in 1920 and, as a result of the operation of section 8, was suspended from the union. See *id.* at 145-46. Upon being suspended, the appellant brought an action challenging the constitutional validity of section 8 of the act. See *id.* at 146. Specifically, the appellant claimed that section 8 was imposing punishment for a past act in violation of the Ex Post Facto Clause of the United States Constitution. See *id.* at 145. After the lower court sustained the validity of the challenged section and an appellate court affirmed the lower court’s judgment, appellant sought review in the Supreme Court of the United States. See *id.* at 146. In upholding the constitutionality of the act, the Court noted that the legislative aim behind the act was not to “punish” ex-felons, but to devise a necessary plan for regulation of the waterfront. See *id.* at 160. Therefore, because the challenged provision did not impose punishment for a past act, it did not violate the Ex Post Facto Clause. See *id.*

59. See *id.*

the relevant inquiry is whether the legislative goal is to punish the individual for past conduct or whether the negative consequences are merely incidental.⁶⁰ Therefore, when examining challenged legislation, the court must determine whether the legislation impermissibly imposes “punishment” in violation of the Ex Post Facto Clause.⁶¹

2. *Double Jeopardy Clause*

In addition to challenges based on the Ex Post Facto Clause, sex offender registration and notification laws are also challenged on double jeopardy grounds.⁶² The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits “successive punishments and . . . successive prosecutions.”⁶³ It protects against three separate and distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.⁶⁴

60. *See id.* The court noted that if the negative consequences are merely incidental, the challenged law or clause will be declared valid. *See id.*

61. *See E.B. v. Verniero*, 119 F.3d 1077, 1092 (3d Cir. 1997) (“[T]he critical issue . . . is whether the notification called for in situations involving Tier 2 and Tier 3 registrants is ‘punishment’ for purposes of the Ex Post Facto [Clause] . . .”), *cert. denied*, 118 S. Ct. 1039 (1998).

62. *See U.S. CONST.* amend. V (“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . .”). The Fifth Amendment has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969).

63. *United States v. Ursery*, 116 S. Ct. 2135, 2139 (1996) (alterations in original) (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

64. *See United States v. Halper*, 490 U.S. 435, 440 (1989) (discussing Supreme Court’s interpretation of purposes and functions of Double Jeopardy Clause in *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)); *see also Smalis v. Pennsylvania*, 476 U.S. 140, 145-46 (1986) (recognizing that Double Jeopardy Clause prohibits retrial of criminal charges after acquittal); *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (recognizing that Double Jeopardy Clause can preclude retrial after prosecutorial misconduct causes mistrial).

The third protection afforded by the Double Jeopardy Clause, the prohibition against multiple punishments for the same offense, provides the constitutional basis on which sex offender registration and notification laws are most often challenged. *See, e.g., E.B.*, 119 F.3d at 1081, 1092 (noting that E.B. challenged Megan’s Law on double jeopardy grounds, alleging that it inflicts multiple punishments for same offense). The protection against multiple punishments for the same offense is deeply rooted in the history and jurisprudence of the Supreme Court, first being recognized in 1873 when the Court observed that “no man can be twice lawfully punished” for the same offense. *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873). James Madison, in drafting the initial version of what subsequently became the Double Jeopardy Clause of the United States Constitution, primarily focused on the issue of multiple punishments for the same offense: “No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense.” 1 ANNALS OF CONGRESS 434 (Joseph Gales ed., 1789).

In *United States v. Ursery*⁶⁵ and *Kansas v. Hendricks*,⁶⁶ arguably the most important authorities in evaluating legislation under the Double Jeopardy Clause, the Supreme Court established guidelines for determining whether legislation impermissibly imposes a second punishment in violation of the Double Jeopardy Clause.⁶⁷ The court should examine the legislature's intent and determine whether the legislature intended the legislation to be a remedial civil sanction or a criminal penalty.⁶⁸ If the court determines that the legislature intended the legislation to be a criminal penalty, the legislation will be prohibited as inflicting a second punishment in violation of the Double Jeopardy Clause.⁶⁹ Conversely, if the court determines that the legislature's intent was remedial, the court must then determine whether the statutory scheme is so punitive, either in purpose or effect, that it results in a negation of the legislature's remedial intent, thereby violating the Double Jeopardy Clause.⁷⁰

3. *Constitutional Challenges to Sex Offender Registration and Notification Laws*

As a result of the recent enactment of sex offender legislation in all fifty states, many state and federal courts are faced with various constitutional challenges to these laws.⁷¹ While most of the challenges to sex of-

65. 116 S. Ct. 2135 (1996).

66. 117 S. Ct. 2072 (1997).

67. See *Hendricks*, 117 S. Ct. at 2081-86; *Ursery*, 116 S. Ct. at 2142. In *Ursery*, the Court addressed a challenge to the constitutionality of a governmental action. See *id.* at 2138-39. The Government commenced civil in rem forfeiture proceedings against Ursery's house, alleging that it was being used to facilitate illegal drug transactions. See *id.* Ursery paid \$13,250 to the United States to settle the forfeiture claim. See *id.* at 2139. Shortly before the settlement transaction was completed, however, Ursery was indicted for manufacturing marijuana. See *id.* He was subsequently found guilty and sentenced to 63 months in prison. See *id.* Ursery argued that he had been "punished" in the forfeiture proceeding that was instituted against his property and, therefore, the criminal prosecution inflicted a second punishment in violation of the Double Jeopardy Clause. See *id.* The United States Court of Appeals for the Sixth Circuit reversed Ursery's criminal conviction, holding that the conviction violated the Double Jeopardy Clause of the United States Constitution. See *id.* The Supreme Court of the United States granted certiorari. See *id.* In reversing the Sixth Circuit, the Court, in an opinion by Chief Justice Rehnquist, held that civil in rem forfeitures were not punishment or criminal for purposes of the Double Jeopardy Clause. See *id.* at 2142. In *Hendricks*, the Court upheld the constitutionality of a Kansas statute providing for the post sentence, involuntary civil commitment of persons who are likely to engage in predatory acts of sexual violence. See *Hendricks*, 117 S. Ct. at 2086. Specifically, the Court held that the law comports with due process requirements and does not violate the Ex Post Facto or Double Jeopardy Clauses of the United States Constitution. See *id.*

68. See *Hendricks*, 117 S. Ct. at 2081-82; *Ursery*, 116 S. Ct. at 2142.

69. See *Hendricks*, 117 S. Ct. at 2082; *Ursery*, 116 S. Ct. at 2142.

70. See *Ursery*, 116 S. Ct. at 2142 (holding unanimously that Double Jeopardy Clause is inapplicable to civil in rem forfeiture actions).

71. For a discussion of state and federal cases in which sex offender registration and notification laws have been challenged on constitutional grounds, see *supra* note 9.

fender legislation are based on the same constitutional grounds, the courts addressing these constitutional challenges often reach conflicting results, particularly with respect to the notification provisions of the laws.⁷²

a. Successful Constitutional Challenges to the Notification Provisions

In *State v. Myers*,⁷³ the Supreme Court of Kansas upheld the constitutionality of the registration provisions of the Kansas Sex Offender Registration Act (KSORA),⁷⁴ but held that the public disclosure provision of KSORA was unconstitutional.⁷⁵ In *Myers*, the court ordered a defendant who pleaded no contest to aggravated sexual battery to be processed as a sex offender under KSORA, thereby requiring the defendant to register with local law enforcement authorities.⁷⁶ Because he committed the offense before April 14, 1994, the date KSORA took effect, the defendant challenged the constitutional validity of the KSORA registration requirement on the basis that, as applied to him, it retroactively inflicted a second punishment in violation of the Ex Post Facto Clause of the United States Constitution.⁷⁷ The Supreme Court of Kansas held that the registration provisions of KSORA are remedial civil sanctions and, therefore, do not trigger the protections afforded by the Ex Post Facto Clause.⁷⁸ With respect to KSORA's public disclosure provision, however, the court held that by allowing unrestricted public access to the registrant's information, the public disclosure is excessive and increases the punishment for a crime after its commission, thereby violating the constitutional prohibition against ex post facto laws.⁷⁹

72. For a discussion of state and federal court decisions addressing the constitutionality of sex offender registration and notification laws in which the courts have reached differing conclusions, see *supra* note 10.

73. 923 P.2d 1024 (Kan. 1996), *cert. denied*, 117 S. Ct. 2508 (1997).

74. KAN. STAT. ANN. §§ 22-4901 to -4910 (1996).

75. See *Myers*, 923 P.2d at 1027.

76. See *id.* In 1991, Myers was convicted of one count of sexual battery and one count of rape. See *id.* The Kansas Court of Appeals reversed his convictions and remanded the case for a new trial. See *id.* The Supreme Court of Kansas affirmed the decision of the Kansas Court of Appeals. See *id.* On August 15, 1994, Myers pleaded no contest to the aggravated sexual battery of a 17 year-old girl who was assisting her mother in cleaning Myers' law office. See *id.* Subsequently, Myers was ordered to be processed under the Kansas Sex Offender Registration Act (KSORA) as a sex offender, which is defined as any person convicted of a named offense on or after July 1, 1993. See *id.* After his no contest plea in 1994, Myers filed a motion to eliminate KSORA's registration requirement. See *id.* Myers challenged the constitutionality of KSORA, claiming that it violated the Ex Post Facto Clause of the United States Constitution. See *id.* Myers' motion was denied and he appealed to the Supreme Court of Kansas. See *id.*

77. See *id.* at 1026-27.

78. See *id.* at 1041.

79. See *id.* at 1043. The Supreme Court of Kansas focused on two factors in evaluating the constitutionality of KSORA's public disclosure provision. See *id.* at 1041-43. Specifically, the court looked to the scope and the effects of KSORA's

Similarly, in *Doe v. Pataki*,⁸⁰ the United States District Court for the Southern District of New York held the retroactive application of the registration provisions of the New York State Sex Offender Registration Act (NYSSORA)⁸¹ to be constitutional, but also held the retroactive application of NYSSORA's public notification provisions to be precluded by the Ex Post Facto Clause of the United States Constitution.⁸² In *Pataki*, three convicted sex offenders challenged the retroactive application of NYSSORA under the Ex Post Facto Clause because they committed their crimes before NYSSORA took effect.⁸³ Employing an analysis substantially similar to that used by the *Myers* court, the *Pataki* court held that the registration provisions of the Act do not constitute punishment because they do not result in the same negative consequences that follow public notification.⁸⁴ By contrast, however, the court held that the notification provi-

public disclosure provision. *See id.* The court concluded that the scope of public disclosure under KSORA is excessive because "KSORA places no restrictions on who is given access to the registered offender information or what that person does with the information." *Id.* at 1041. With respect to the effects of KSORA's public disclosure provision, the court concluded that the provision has both a deterrent and retributive effect. *See id.* The court also concluded, however, that the nonpunitive purpose of KSORA could not be accomplished without the public disclosure provision. *See id.* According to the court, if the statute had limited public disclosure to that necessary to protect the public, the public disclosure could be viewed as incidental to the nonpunitive, remedial purpose. *See id.* Because the public disclosure is unlimited, however, KSORA impermissibly imposes punishment in violation of the Ex Post Facto Clause. *See id.* at 1044.

80. 940 F. Supp. 603 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997).

81. N.Y. CORRECT. LAW § 168 (McKinney 1997).

82. *See Pataki*, 940 F. Supp. at 604-05.

83. *See id.* at 604. The New York State Sex Offender Registration Act (NYSSORA) was passed on July 25, 1995, and it took effect on January 21, 1996. *See id.* at 605. Under NYSSORA, convicted sex offenders are required to register with local law enforcement authorities after parole or release. *See id.* at 604. According to the public notification provisions of NYSSORA, law enforcement authorities are permitted to provide the public with the identity and location of the registrant. *See id.*

The plaintiffs in this action were three convicted sex offenders. *See id.* at 608. In 1990, plaintiff John Doe was convicted of first degree attempted rape in New York and sentenced to prison. *See id.* In 1994, Doe was released on parole, remaining on parole since that time without incident. *See id.* On February 5, 1996, Doe was notified that he had been officially classified as a "level three sex offender" subject to lifetime registration. *See id.* In 1995, plaintiff Richard Roe was convicted in New York of a crime involving first degree sexual abuse. *See id.* As a result, Roe was sentenced to probation, remaining on probation since that time without incident. *See id.* In 1989, plaintiff Samuel Poe was convicted of attempted sodomy in the first degree in New York. *See id.* Poe was sentenced to a period of incarceration and was entitled to immediate conditional release at the time the action was filed. *See id.* Upon release, however, Poe would be on parole under the supervision of the Division of Parole. *See id.* Pursuant to NYSSORA, Poe was required to be officially classified prior to being released on parole. *See id.*

84. *See id.* at 605. The court stated that "there are some punitive aspects to registration [but] ultimately . . . registration is regulatory and not punitive." *Id.* at 629.

sions of NYSSORA constitute punishment, concluding that the retroactive application of the notification provisions would therefore violate the Ex Post Facto Clause.⁸⁵

The *Pataki* court based its conclusion on an analysis of four factors: intent, design, history and effects.⁸⁶ First, the court noted that although the legislature's stated intent in passing NYSSORA was to protect the public from repeat sex offenders, which is remedial in nature, it was evident that the legislature also intended to inflict punishment on sex offenders.⁸⁷ Second, the court concluded that the design of NYSSORA, which contains the "classic indicia of a punitive scheme," suggests that the notification provisions are punitive in nature.⁸⁸ Third, the court stated that a historical analysis suggests that notification is punitive because "notification is the modern-day equivalent of branding and banishment," which have traditionally been recognized as punitive measures.⁸⁹ Fourth and finally, the court concluded that the overall effect of NYSSORA is to punish the offender because public notification serves the traditional goals of punishment: retribution, incapacitation and deterrence.⁹⁰

Moreover, in *Roe v. Office of Adult Probation*,⁹¹ the United States District Court for the District of Connecticut held that the community notification provisions of Connecticut's sex offender notification policy

85. *See id.* at 604-05. The court stated that the "public notification provisions [of New York's Megan's Law] are quintessentially punitive in nature." *Id.* at 604.

86. *See id.* at 604-05.

87. *See id.* at 604.

88. *See id.* at 605. The court elaborated on this factor as follows:

[NYSSORA] contains the classic indicia of a punitive scheme: it is triggered by the commission of a crime; it provides for the sentencing judge to determine the level of notification; and it provides for the submission of victim impact statements. Moreover, [NYSSORA] is excessive in its sweep, covering an overly broad group of offenses and individuals and permitting broad and virtually uncontrolled disclosure.

Id.

89. *Id.*

90. *See id.* In commenting on the negative effects of public notification, the court stated that "[p]ublic notification results in an affirmative disability or restraint on sex offenders and their families." *Id.* The court also found that public notification hinders the rehabilitation of sex offenders, which has the effect of increasing their punishment. *See id.*

After the district court's decision in *Pataki* the state agencies and officials appealed and the three sex offenders cross-appealed; the United States Court of Appeals for the Second Circuit held that the registration and notification provisions of NYSSORA did not inflict punishment in violation of the Ex Post Facto Clause. *See Doe v. Pataki*, 120 F.3d 1263, 1265 (2d Cir. 1997). The Second Circuit recognized that the specific issue was whether NYSSORA inflicted punishment, in which case the Ex Post Facto Clause would prevent application of NYSSORA to individuals who committed their offenses prior to the enactment of the Act. *See id.* Concluding that the registration and notification provisions of NYSSORA were remedial, the Second Circuit rejected the proffered analogy comparing the notification provisions of NYSSORA to the shaming punishments of colonial America. *See id.* at 1284.

91. 938 F. Supp. 1080 (D. Conn. 1996), *rev'd*, 125 F.3d 47 (2d Cir. 1997).

guidelines constitute punishment, concluding that their retroactive application would violate the Ex Post Facto Clause of the United States Constitution.⁹² Engaging in an analysis similar to that used by the *Pataki* court, the *Roe* court focused on three factors in determining the constitutionality of the community notification provisions: design, history and effect.⁹³ First, the court noted that application of the community notification provisions imposes an affirmative disability on an individual.⁹⁴ Specifically, the court concluded that community notification was an “affirmative placement by the State of a form of public stigma” on the registrants.⁹⁵ Second, the court recognized that the practice of community notification is “closely akin” to what is historically viewed as punishment.⁹⁶ Third and finally, the court stated that the effect of community notification is to punish sex offenders because community notification results in deterrence, which is a traditional goal of punishment.⁹⁷

92. *See id.* at 1091. In addition to alleging that the application of the Connecticut sex offender registration law violated the Ex Post Facto Clause, the plaintiff in *Roe* also raised several other constitutional challenges to the law as applied in his case. *See id.* at 1085. Specifically, the plaintiff alleged that the law violated the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause and the Double Jeopardy Clause. *See id.* Because the court determined that the retroactive application of the Connecticut sex offender registration law violated the Ex Post Facto Clause, it did not address the other constitutional issues raised by the plaintiff. *See id.* at 1087 (noting that initial Complaint also alleged violation of Eighth Amendment’s prohibition of cruel and unusual punishment, which was not pursued in Second Amended Complaint).

In 1989, the police arrested the plaintiff in *Roe*, Robert Roe, for sexual assault. *See id.* at 1082. In May of 1991, Roe entered into a plea agreement in which he agreed to plead no contest to six counts of sexual assault and six counts of risk of injury to a minor. *See id.* In August of 1991, Roe was sentenced to 12 years imprisonment and five years probation. *See id.* Roe remained in prison until he was released on parole in August of 1994. *See id.* at 1082-83. Roe’s parole was revoked in December of 1994 after he violated the terms of his parole. *See id.* at 1083. As a result, Roe returned to prison for eight months to complete his original sentence. *See id.* The state subsequently released Roe from prison in August of 1995 and, pursuant to his sentence, placed him on probation under the supervision of the Office of Adult Probation (OAP). *See id.* According to the Connecticut General Assembly, Connecticut’s sex offender registration law applied to individuals convicted of sexual assault on or after January 1, 1995. *See id.* Roe brought the present action after his probation officer informed him that he was planning to inform Roe’s “employer, neighbors and the general community of [Roe’s] prior criminal record.” *Id.* at 1084-85.

93. *See id.* at 1091-94.

94. *See id.* at 1092. (“[T]his court concludes that the effect of the community notification does amount to an affirmative disability.”).

95. *Id.*

96. *See id.*

97. *See id.* The court stated that the “punitive effects of community notification . . . are not merely incidental to an overriding non-punitive purpose.” *Id.* at 1093. After the district court’s decision in *Roe*, the State appealed the order entered by the district court, which preliminarily enjoined the retroactive application of OAP’s sex offender notification policy guidelines to the plaintiff. *See Roe v. Office of Adult Probation*, 125 F.3d 47, 47 (2d Cir. 1997). The United States Court of Appeals for the Second Circuit reversed the order of the district court, conclud-

b. Unsuccessful Constitutional Challenges to the Notification Provisions

Not all courts, however, have found the notification provisions of sex offender legislation to be unconstitutional.⁹⁸ In a recent federal case, *Doe v. Gregoire*,⁹⁹ the United States District Court for the Western District of Washington held that the Ex Post Facto Clause did not prohibit the enforcement of the Washington Community Protection Act (WCPA), which provides for the registration of convicted sex offenders and notification to law enforcement agencies.¹⁰⁰ In *Gregoire*, a Washington prisoner alleged that application of WCPA, which was passed in 1990, would impermissibly increase the punishment for his crime committed five years prior to WCPA's enactment.¹⁰¹ According to the court, the threshold issue was whether the challenged legislation was remedial or punitive in nature.¹⁰² Concluding that the statutory requirements of registration and notification were regulatory, not punitive, the court held that they could be applied retroactively without triggering the protections afforded by the Ex Post Facto Clause.¹⁰³

Although the *Gregoire* court held that the provisions of WCPA providing for notification to law enforcement agencies are constitutional, the court distinguished notification to law enforcement agencies from broader community notification by noting that the latter would violate the Ex Post Facto Clause.¹⁰⁴ The court focused on the effects of community notification by reviewing historical analogues comparable to community notification.¹⁰⁵ By doing so, the court found that the punitive effects of community notification, which include the infliction of humiliation, ostracism and the exposure of the sex offenders to hostility, harassment and

ing that the "plaintiff's ex post facto challenge [to OAP's notification policy guidelines] must be rejected." *Id.* at 55. The Second Circuit stated that the underlying intent of OAP's notification policy guidelines is regulatory and non-punitive. *See id.* In addition, the Second Circuit concluded that the plaintiff failed to demonstrate that notification pursuant to OAP's notification policy guidelines constitutes punishment. *See id.*

98. For a discussion of cases in which the court determined that the notification provisions of sex offender legislation were constitutional, see *infra* notes 99-118 and accompanying text.

99. 960 F. Supp. 1478 (W.D. Wash. 1997), *aff'd sub nom.* Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997).

100. *See id.* at 1484 (stating that registration and notification provisions of Washington Community Protection Act (WCPA) "are regulatory, not punitive, and may be applied to plaintiff without violating the Ex Post Facto Clause").

101. *See id.* at 1481-82.

102. *See id.* at 1481 ("The key issue is whether the statute's public notification provisions are punitive or merely regulatory; if punitive, they cannot be enforced against the plaintiff.").

103. *See id.* at 1484.

104. *See id.* at 1486.

105. *See id.* at 1485-86.

reprisal, are “dominant and inescapable.”¹⁰⁶ The court also analogized community notification to historical punishments that were designed to inflict shame, humiliation and public hatred.¹⁰⁷ Specifically, the court noted the similarities between community notification and the stocks, pillory and facial markings of colonial America.¹⁰⁸

c. Ex Post Facto and Double Jeopardy Challenges in the Third Circuit

Recently, the United States Court of Appeals for the Third Circuit addressed the constitutionality of sex offender registration and notification laws.¹⁰⁹ In *Artway v. Attorney General*,¹¹⁰ the United States Court of Appeals for the Third Circuit upheld the constitutionality of the registration and Tier 1 notification provisions of New Jersey’s Megan’s Law, concluding that the challenged provisions did not inflict punishment in

106. *Id.* at 1486.

107. *See id.*

108. *See id.* After the district court’s ruling in *Gregoire*, the plaintiff appealed and the United States Court of Appeals for the Ninth Circuit upheld the constitutionality of WCPA, concluding that the registration, law enforcement notification and community notification provisions of WCPA did not amount to punishment in violation of the Ex Post Facto Clause. *See Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997). Although the Ninth Circuit agreed with the district court that the pertinent inquiry was whether the registration and notification provisions of WCPA impermissibly inflicted punishment, the Ninth Circuit rejected the district court’s finding that community notification was analogous to the shaming punishments of colonial America. *See id.* at 1087-88. The Ninth Circuit was not persuaded by the proffered analogy to historical shaming punishments, adding that the analogy was not strong enough to overcome WCPA’s remedial and nonpunitive intent. *See id.* at 1088. Specifically, the court stated that it was influenced by the “strong remedial goals of the notification provision.” *Id.* at 1093. The court also concluded that a proper historical analysis would be very difficult because the challenged notification provisions of WCPA do not have “identical historical antecedents.” *Id.* at 1091.

In addition, the court drew a distinction between the notification provisions of WCPA and the shaming punishments of colonial America, an analogy that was relied upon by the district court. *See id.* According to the court, the main distinction could be summarized as follows: “Historical shaming punishments like whipping, pillory, and branding generally required the physical participation of the offender, and typically required a direct confrontation between the offender and the members of the public.” *Id.* The court noted that the more appropriate comparison was between community notification and “wanted” posters, adding that “wanted” posters “have not been regarded as punishment, though they disclose essentially the same information [as community notification], may rouse public excitement, and may carry a greater risk of vigilantism.” *Id.* at 1092. While the court conceded that the shaming punishments of colonial America often relied on humiliation, the court also noted that “humiliation alone does not constitute punishment.” *Id.* Thus, the court held that the notification provisions were intended to be regulatory, not punitive. *See id.* at 1093.

109. *See Artway v. Attorney General*, 81 F.3d 1235, 1242 (3d Cir. 1996) (addressing constitutionality of Megan’s Law).

110. 81 F.3d 1235 (3d Cir. 1996).

violation of the Ex Post Facto or Double Jeopardy Clauses.¹¹¹ In *Artway*, Alexander Artway, a convicted sex offender recently released from prison, sought an injunction against enforcement of the registration and community notification provisions of Megan's Law claiming that application of Megan's Law impermissibly inflicted a second punishment in violation of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.¹¹² Specifically, Artway claimed that Megan's Law is analogous to "that most famous badge of punishment: the Scarlet Letter," a shaming punishment practiced in colonial America.¹¹³

In *Artway*, the Third Circuit limited the scope of its holding to the registration and Tier 1 notification provisions, declining to address the

111. *See id.* at 1271. The Third Circuit's decision in *Artway* was not limited to ex post facto and double jeopardy challenges. *See id.* at 1242. The plaintiff, Alexander Artway, also claimed that the application of Megan's Law violates the Bill of Attainder, Equal Protection and Due Process Clauses. *See id.* In addition, Artway also argued that Megan's Law is unconstitutionally vague as applied to him because it forces him to "guess" whether he is covered by the law. *See id.* at 1269. The court not only held that the registration and Tier 1 notification provisions of Megan's Law do not violate the Ex Post Facto or Double Jeopardy Clauses, but also that the challenged provisions do not violate the Bill of Attainder, Equal Protection or Due Process Clauses. *See id.* at 1242-43. Finally, the court held that Megan's Law is not unconstitutionally vague as applied to Artway because the law provides fair notice and his duty under Megan's Law is "patent." *See id.* at 1269-70.

112. *See id.* at 1242.

113. *Id.* at 1265. Artway contended that application of Megan's Law, like the "scarlet letter" of literary fame, resulted in "public ostracism and opprobrium." *Id.* The Third Circuit faced a similar argument in *United States v. Criden*, 648 F.2d 814, 825 (3d Cir. 1981). In *Criden*, the court rejected a tendered analogy between the media rebroadcast of material placed into evidence at a criminal trial and the shaming punishments of colonial America. *See id.* Accordingly, the court reversed an order of the district court denying the application of television networks "for permission to copy, for the purpose of broadcasting to the public, those video and audio tapes admitted into evidence and played to the jury in open court" during the criminal trial of two members of the Philadelphia City Council. *Id.* at 815.

In *Criden*, a number of local, state and federal public officials were tried on charges of bribery and related offenses allegedly committed during the course of a "sting" operation initiated by the Federal Bureau of Investigation. *See id.* Prior to the start of the trial, representatives of ABC, NBC, CBS and Westinghouse Broadcasting, Inc., requested permission to copy and broadcast to the public, the video and audio tapes introduced into evidence. *See id.* at 816. The request was denied. *See id.* Subsequently, the television networks renewed their request, but the district court denied their request again. *See United States v. Criden*, 501 F. Supp. 854, 863 (E.D. Pa. 1980). Following the second denial, the television networks appealed to the United States Court of Appeals for the Third Circuit. *See Criden*, 648 F.2d at 814. The Third Circuit, in reversing the order of the district court, stated that the networks were entitled to copy and broadcast the video and audio tapes on the basis of the "strong common law presumption of access." *Id.* at 829. In addition, the court noted that the request of the networks should be granted because of the "educational and informational benefit[s] which the public would derive from broadcast of evidence introduced at a trial which raised significant issues of public interest." *Id.*

broader notification required for Tier 2 and Tier 3 registrants.¹¹⁴ Because the Supreme Court has not devised a consistent, coherent and principled means for determining what constitutes punishment, the Third Circuit sought to “divine” a “test for punishment.”¹¹⁵ After reviewing the relevant Supreme Court case law and looking for common considerations, the *Artway* court harmonized the often conflicting decisions and developed an analytical framework to determine whether a particular legislative provision’s goal was to punish.¹¹⁶ After applying the newly-developed analytical framework, the court concluded that the registration and Tier 1 notifica-

114. See *Artway*, 81 F.3d at 1242. The Third Circuit refused to address the constitutionality of the Megan’s Law notification required in situations involving Tier 2 and Tier 3 registrants, stating that those issues were “unripe.” See *id.*

115. *Id.* at 1254.

116. See *id.* at 1254, 1263-67 (synthesizing relevant Supreme Court case law and developing analytical framework, including three-prong test, for determining if measure is nonpunitive). The *Artway* court looked to six Supreme Court cases in developing the analytical framework. See *id.* at 1254-63 (citing California Dep’t of Corrections v. Morales, 514 U.S. 499, 504, 510 (1995) (shifting focus of court’s determination regarding whether challenged measure is punishment to effects of measure and establishing that appropriate analysis is flexible and context dependent); Department of Revenue v. Kurth Ranch, 511 U.S. 767, 779 (1994) (expanding on historical inquiry previously undertaken by Supreme Court); Austin v. United States, 509 U.S. 602, 603 (1993) (focusing on history as part of “punishment” test); United States v. Halper, 490 U.S. 435, 448 (1989) (articulating objective legislative intent test); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (establishing multi-factor analysis to determine whether challenged measure constitutes punishment, which would trigger criminal process guarantees); DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (announcing subjective, or actual, legislative purpose test)).

The *Artway* court primarily focused on the Supreme Court’s decision in *Mendoza-Martinez*, which established a seven factor analytical framework for determining whether a legislative measure constitutes “punishment.” See *Mendoza-Martinez*, 372 U.S. at 168-69. In *Mendoza-Martinez*, the Court noted that all seven of the factors are relevant to the determination and that each of the factors may often point in a different direction. See *id.* at 169. The seven factor framework was summarized by the Court:

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

Id. at 168-69 (footnotes omitted). The *Mendoza-Martinez* test is not without its critics. See *Prevention Versus Punishment*, *supra* note 22, at 1720-22 (discussing criticisms of *Mendoza-Martinez* test as applied to sex offender legislation). Critics argue that the list of factors articulated in *Mendoza-Martinez* is “far too open-ended to yield consistent results, especially as applied to sex offender statutes.” *Id.* at 1721. In addition, it has been noted that some of the *Mendoza-Martinez* factors are “patently inapplicable” to sex offender legislation. See *id.* at 1722 (noting that ambiguities in *Mendoza-Martinez* factors preclude reliance on factors in evaluation of sex offender legislation). Consequently, critics argue that the *Mendoza-Martinez* “test” is not well-suited to the evaluation of sex offender statutes.” *Id.*

tion provisions of Megan's Law do not impermissibly inflict unconstitutional punishment.¹¹⁷ This analytical framework and the court's ruling and rationale regarding the constitutionality of the Tier 1 notification provisions of Megan's Law would eventually provide the foundation for the Third Circuit's subsequent decision in *E.B. v. Verniero*, in which the Tier 2 and Tier 3 notification provisions of Megan's Law were challenged on the same constitutional grounds.¹¹⁸

III. FACTS: *E.B. v. VERNIERO*

In 1974, E.B. was sentenced to thirty-three years in prison after pleading guilty in the Superior Court of New Jersey to three counts of sexual abuse involving young boys.¹¹⁹ Two years later, in the Virginia Circuit Court, E.B. pled guilty to two separate murders and the court sentenced him to concurrent terms of twenty years, which were to run consecutively with the New Jersey sentence.¹²⁰ In 1979, after E.B. served less than six years of his thirty-three year New Jersey sentence, he was paroled and extradited to Virginia to serve the murder sentences.¹²¹ Subsequently, in June of 1989, E.B. was paroled by Virginia.¹²² E.B., who is presently free, will remain subject to supervised release by the New Jersey Bureau of Parole until July 23, 2006.¹²³

Pursuant to the statutory requirements of Megan's Law, E.B. registered with the local law enforcement authorities in Englewood, New Jersey.¹²⁴ On October 24, 1995, the Bergen County Prosecutor's Office

117. See *Artway*, 81 F.3d at 1271. There were two noteworthy aspects of the Third Circuit's decision in *Artway*. See *id.* at 1243, 1263-67. The first noteworthy aspect was that the court devoted a significant portion of its opinion to explaining, analyzing and synthesizing prior case law that addressed the issue of what constitutes punishment. See *id.* at 1263-67. In doing so, the court developed an analytical framework for determining if a measure impermissibly inflicts punishment in violation of the Ex Post Facto and Double Jeopardy Clauses. See *id.* The second noteworthy aspect of *Artway* was the narrow scope of the court's holding. See *id.* at 1242. The Third Circuit limited the scope of its holding to the constitutionality of the registration and Tier 1 notification provisions of Megan's Law, declining to address the constitutionality of the Tier 2 and Tier 3 notification provisions. See *id.* at 1242-43. The court concluded that *Artway's* challenges to the notification provisions that accompany Tier 2 and Tier 3 classification "fail[ed] . . . the ripeness test." *Id.* at 1251.

118. See *E.B. v. Verniero*, 119 F.3d 1077, 1093-1105 (3d Cir. 1997) (applying analytical framework developed in *Artway* to determine if community notification provisions of Megan's Law impermissibly inflict punishment in violation of Ex Post Facto and Double Jeopardy Clauses), *cert. denied*, 118 S. Ct. 1039 (1998).

119. See *id.* at 1087.

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*; see also N.J. STAT. ANN. § 2C:7-2b(1) (West 1995 & Supp. 1997) (requiring all persons who complete sentence for certain designated crimes involving sexual assault to register with local law enforcement authorities).

notified E.B. that he had been classified as a Tier 3 sex offender.¹²⁵ Based on E.B.'s Tier 3 classification, the Bergen County prosecutor proposed to issue notification to "all public and private educational institutions and organizations within a one-half mile radius of [E.B.'s] home, and all parties who resided or worked within a one block radius of [E.B.'s] home."¹²⁶

Upon E.B.'s objection to his Tier 3 classification and the proposed notification plan, the New Jersey Superior Court held a hearing.¹²⁷ On December 18, 1995, the court ruled that E.B.'s Tier 3 classification was appropriate and permitted notification to proceed according to the prosecutor's proposed plan.¹²⁸ E.B. appealed to the New Jersey Appellate Division and then to the New Jersey Supreme Court, but both appeals were unsuccessful.¹²⁹ E.B. then filed a federal action in the United States District Court for the District of New Jersey seeking a preliminary injunction to enjoin the defendants from implementing the proposed notification plan.¹³⁰ The district court promptly entered a preliminary injunction, enjoining the defendants from implementing the proposed Tier 3 notification plan.¹³¹ Upon entry of the preliminary injunction by the district court and a subsequent order denying the defendant's application for a stay of the preliminary injunction, the defendants filed an appeal in the United States Court of Appeals for the Third Circuit.¹³² On appeal, the Third Circuit held that the Tier 2 and Tier 3 notification provisions of Megan's Law do not inflict punishment in violation of the Ex Post Facto or Double Jeopardy Clauses of the United States Constitution.¹³³

IV. NARRATIVE ANALYSIS

In holding that the community notification provisions of Megan's Law do not violate the Ex Post Facto or Double Jeopardy Clauses, the Third Circuit first noted that the Ex Post Facto and Double Jeopardy Clauses are not implicated unless the state has inflicted punishment.¹³⁴

125. See *E.B.*, 119 F.3d at 1087.

126. *Id.* at 1087-88.

127. See *id.* at 1088.

128. See *id.* The court permitted notification to the following: "(1) 82 public and private educational institutions, licensed day care centers and summer camps in Englewood, Teaneck, Bergenfield, Tenafly, Englewood Cliffs, Leonia and Fort Lee, and (2) all residences within a one block radius of E.B.'s house." *Id.*

129. See *id.* During the pendency of the proceedings, however, notification remained stayed by order of the court. See *id.*

130. See *id.* The defendants included the Attorney General of New Jersey, the Bergen County Prosecutor and the local police chief. See *id.* at 1087.

131. See *E.B. v. Poritz*, 914 F. Supp. 85, 92 (D.N.J. 1996), *rev'd*, 119 F.3d 1077 (3d Cir. 1997), *and cert. denied*, 118 S. Ct. 1039 (1998).

132. See *E.B.*, 119 F.3d at 1088.

133. See *id.* at 1111.

134. See *id.* at 1092. Prior to addressing the ex post facto and double jeopardy issues, the Third Circuit first addressed a threshold jurisdictional issue. See *id.* at 1090-92. The appellants contended that the district court lacked subject matter jurisdiction under the doctrine articulated by the Supreme Court in *Rooker v. Fidel-*

Accordingly, the Third Circuit noted that the critical issue is whether the community notification required under Megan's Law, in situations involving Tier 2 and Tier 3 registrants, is punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses.¹³⁵

ity Trust, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). See *E.B.*, 119 F.3d at 1090.

The Third Circuit began its analysis of the jurisdictional question by first noting that 28 U.S.C. § 1257 grants appellate jurisdiction to the Supreme Court of the United States. See *id.* (noting that this appellate jurisdiction is affirmative grant of power to Supreme Court to review final judgments of highest courts of each state) (citing 28 U.S.C. § 1257 (1994)). The court noted that "by negative implication," the "*Rooker-Feldman*" doctrine suggests that the lower federal courts lack subject matter jurisdiction to review judgments of the highest state courts. See *id.* The Third Circuit has interpreted the "*Rooker-Feldman*" doctrine as also covering the final judgments of lower state courts. See, e.g., *Port Auth. Police Benevolent Ass'n v. Port Auth.*, 973 F.2d 169, 177-78 (3d Cir. 1992) (holding that "*Rooker-Feldman*" doctrine precludes federal district courts from reviewing final judgments of lower state courts).

In support of their argument, the appellants first noted that E.B. received judicial review of his Tier 3 classification and the prosecutor's proposed notification plan in the Superior Court of New Jersey, Law Division. See *E.B.*, 119 F.3d at 1090 (noting that E.B. advanced several federal constitutional arguments to prevent classification and notification plan from being implemented). After the New Jersey Superior Court rejected E.B.'s challenge and ordered that the prosecutor proceed with the proposed notification plan, E.B. appealed to the New Jersey Appellate Division, which affirmed the lower court's ruling. See *id.* Subsequently, the Supreme Court of New Jersey denied E.B.'s petition for certification of appeal. See *id.* The appellants emphasized that the relief sought by E.B. from the Third Circuit in the present case is an injunction that would effectively prevent the notification ordered by the New Jersey Superior Court from being carried out. See *id.* The appellants argued that in light of the "*Rooker-Feldman*" doctrine, the United States District Court for the District of New Jersey was without subject matter jurisdiction. See *id.*

The Third Circuit agreed with the appellants and held that the district court did not have proper subject matter jurisdiction. See *id.* at 1090-91. The court noted that for the district court to be able to grant E.B. relief, the district court would be required to determine that the New Jersey court's judgment was erroneous, which would violate the "*Rooker-Feldman*" doctrine. See *id.* at 1091. Accordingly, the Third Circuit reversed the judgment of the district court and remanded with instructions to dismiss for want of subject matter jurisdiction. See *id.* at 1092.

135. See *E.B.*, 119 F.3d at 1092 (recognizing that both parties agreed that "punishment" has same meaning under Ex Post Facto and Double Jeopardy Clauses); see also *Feldman*, *supra* note 9, at 1085 (stating that central issue when determining constitutionality of Megan's Law under Ex Post Facto Clause is whether sex offender community notification constitutes punishment); Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 439 (1997) (stating that primary issue in constitutional challenges based on Ex Post Facto and Double Jeopardy Clauses is whether community notification applies new punishment to crime already committed); G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1670-71 (1995) (discussing constitutionality of sex offender community notification laws).

While many of the courts that have addressed ex post facto and double jeopardy challenges to sex offender registration and notification laws have recognized that the central issue is whether the law impermissibly imposes punishment, it has been noted that "punishment" is an ambiguous concept. See *Doe v. Pataki*, 120

A. *Application of the Artway Framework*

The court began its constitutional analysis of the community notification provisions of Megan's Law by looking to the analytical framework it developed in *Artway v. Attorney General*.¹³⁶ According to the *Artway* framework, a challenged measure must pass the following three-prong test in order to constitute nonpunishment: (1) the actual (legislative) purpose of the measure must be nonpunitive; (2) the objective purpose of the measure must be nonpunitive; and (3) the effects of the measure must be nonpunitive.¹³⁷

F.3d 1263, 1272 (2d Cir. 1997) ("'Punishment' . . . is an imprecise concept with meanings that vary depending on the purpose for which the concept is defined."). Furthermore, the term "punishment" has been noted to have many synonyms, including penal, punitive, penalty and criminal. *See id.* A review of definitions of punishment found in the legal literature can be somewhat helpful. *See, e.g.,* Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1678-81 (1980) ("Punishment is the deprivation of legal rights in response to a prior offense for the purpose of deterrence and social condemnation.").

136. *See E.B.*, 119 F.3d at 1093 (discussing analytical framework developed by Third Circuit in *Artway*); *Artway v. Attorney General*, 81 F.3d 1235, 1263-67 (3d Cir. 1996) (developing analytical framework for determining if registration and Tier 1 notification provisions of Megan's Law constitute punishment in violation of Ex Post Facto and Double Jeopardy Clauses).

137. *See Artway*, 81 F.3d at 1263. Prior to applying the *Artway* framework, however, the Third Circuit first addressed the argument that in light of two recent Supreme Court decisions, *Artway* no longer provides the appropriate standard for determining whether a challenged measure impermissibly inflicts unconstitutional punishment. *See E.B.*, 119 F.3d at 1094 (citing *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *United States v. Ursery*, 116 S. Ct. 2135 (1996)).

In *Ursery*, the Supreme Court held that civil in rem forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause even if the value of the forfeited property is arguably excessive when compared to the harm inflicted on the government from the conduct giving rise to the forfeiture. *See Ursery*, 116 S. Ct. at 2149. The Third Circuit noted, however, that the holding of *Ursery* is narrow and strictly limited to civil forfeitures. *See E.B.*, 119 F.3d at 1094. In addition, according to the court, nothing in the Supreme Court's punishment analysis is inconsistent with the *Artway* framework. *See id.* In *Hendricks*, the Supreme Court upheld a Kansas statute providing for the post-sentence, involuntary civil commitment of "sexually violent predators." *See Hendricks*, 117 S. Ct. at 2086. The Third Circuit emphasized that the *Hendricks* Court did not establish a "single formula" for determining which legislative measures constitute punishment but instead only established that courts should give substantial deference to legislative judgment when reviewing the constitutionality of challenged legislation. *See E.B.*, 119 F.3d at 1095-96. The Third Circuit did note, however, that certain portions of the Supreme Court's analysis in *Hendricks* provide guidance in the determination of whether challenged legislation constitutes punishment. *See id.* at 1096. Thus, the Court stated that while a civil label is not always dispositive, the Court "will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Hendricks*, 117 S. Ct. at 2082 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). In light of *Hendricks*, the Third Circuit concluded that similar deference to the judgment of the legislature is required whenever legislative measures are challenged under the Ex Post Facto and Double Jeopardy Clauses. *See E.B.*, 119 F.3d at 1096. Therefore, after distinguishing *Ursery* and *Hendricks* from the case before the court, the Third

1. *Actual (Legislative) Purpose*

Under the first prong of the *Artway* framework, the Third Circuit had to determine whether the New Jersey legislature's actual purpose in enacting Megan's Law was to punish sex offenders.¹³⁸ After rejecting the appellants' argument that the legislative purpose of community notification is to punish sex offenders, the Third Circuit concluded that because the legislative purpose of community notification is remedial and nonpunitive, it satisfies the actual purpose prong of the *Artway* framework.¹³⁹

In arriving at this conclusion, the court examined whether the negative effects on the registrants result from a desire of the New Jersey Legislature to punish sex offenders for past conduct or whether the negative effects are merely a "by-product" of a legitimate legislative effort aimed at remedying a perceived societal problem.¹⁴⁰ After examining the statement of purpose of Megan's Law, the court concluded that the legislative purpose of Megan's Law was to identify potential repeat sex offenders, notify the public when necessary for public safety and help prevent and promptly resolve incidents involving sexual abuse and missing persons.¹⁴¹ The court then noted that protecting the public and preventing crimes,

Circuit concluded that nothing in *Ursery* or *Hendricks* justifies abandoning the previously-established and judicially-tested *Artway* framework. *See id.* at 1094, 1096.

138. *See E.B.*, 119 F.3d at 1096. Since 1898, the Supreme Court has focused on the legislative intent underlying a challenged measure as the touchstone of the ex post facto analysis. *See Hawker v. New York*, 170 U.S. 189, 191 (1898) (focusing on legislative intent while engaging in ex post facto analysis). In *Hawker*, the Supreme Court focused exclusively on the legislature's intent in rejecting an ex post facto challenge against an 1893 law that prohibited persons who had been convicted of a felony from practicing medicine. *See id.* at 196. Specifically, the Court stated: "The state [was] not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." *Id.* The approach taken by the Court in *Hawker*, focusing on the intended purpose served by the retroactively applied measure, has been repeatedly reaffirmed since 1898. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 96 (1958) ("In deciding whether or not a law is penal [for purposes of ex post facto analysis], this Court has generally based its determination upon the purpose of the statute.").

139. *See E.B.*, 119 F.3d at 1096-97.

140. *See id.* at 1093, 1096. With respect to this first prong, the *Artway* court stated: "If the legislature intended Megan's Law to be 'punishment,' i.e., retribution was one of its actual purposes, then it must fail constitutional scrutiny. If, on the other hand, 'the restriction of the individual comes about as a relative incident to a regulation,' the measure will pass this first prong." *Artway*, 81 F.3d at 1263 (quoting *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960)).

141. *See N.J. STAT. ANN.* 2C:7-1 (West 1995 & Supp. 1997) (declaring legislative statement of purpose behind Megan's Law). The Third Circuit noted that the only legislative history of Megan's Law is the following statement, which accompanied the bill when it was first introduced into the New Jersey Senate:

Heinous crimes have been committed against children after [sex offenders'] 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.

two of the stated legislative objectives of Megan's Law, are types of purposes that the Supreme Court has traditionally found to be regulatory, not punitive.¹⁴²

The court then examined the appellants' argument that the context in which Megan's Law was enacted, referring to the quick response from the New Jersey Legislature following the murder of Megan Kanka, is indicative of a punitive intent on the part of the legislature.¹⁴³ The court, however, disagreed with this contention and found the legislative context surrounding the enactment of Megan's Law to be "entirely consistent with its declared remedial purpose."¹⁴⁴ Therefore, the Third Circuit stated that it had no basis for questioning the New Jersey Legislature's stated purpose for enacting Megan's Law, which it found to be "remedial and devoid of any indication of an intent to punish."¹⁴⁵ Accordingly, in light of the substantial deference required by *Hendricks*, the Third Circuit deferred to the legislature's judgment and concluded that the community notification provisions of Megan's Law passed the actual purpose test.¹⁴⁶

2. Objective Purpose

The second prong of the *Artway* framework focuses on the actual operation of the challenged legislation and considers whether courts have traditionally regarded analogous historical measures as punitive.¹⁴⁷ In *Artway*, the Third Circuit stated that before determining whether a challenged measure constitutes punishment under the objective purpose prong, the court must consider three separate factors.¹⁴⁸ First, the court must consider the measure's proportionality—can the measure be ex-

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 notification to protect the public safety and welfare of the community.

E.B., 119 F.3d at 1097 n.17; *see also Artway*, 81 F.3d at 1264 (noting that minimal amount of legislative history accompanied Megan's Law when first introduced into New Jersey Legislature).

142. *See E.B.*, 119 F.3d at 1097 (discussing stated legislative purposes of Megan's Law and Supreme Court jurisprudence relevant to determination of whether stated legislative purposes are regulatory or punitive in nature) (citing *Deveau*, 363 U.S. at 160).

143. *See id.*

144. *Id.*

145. *Id.*

146. *See id.*; *see also Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (recognizing that substantial deference must be accorded to legislature's judgment when determining whether challenged legislative measure is remedial or punitive in nature).

147. *See E.B.*, 119 F.3d at 1093.

148. *See Artway v. Attorney General*, 81 F.3d 1235, 1263-66 (3d Cir. 1996) (discussing three factors of objective purpose prong of analytical framework).

plained solely by a remedial, nonpunitive purpose?¹⁴⁹ Second, historical analogues must be considered—has society traditionally regarded analogous historical measures as punishment?¹⁵⁰ Third, it must be determined if the challenged measure has both salutary and deterrent effects and, if so, whether the deterrent purpose outweighs the salutary purpose?¹⁵¹ Based on an analysis of these three factors of the objective purpose prong, the Third Circuit concluded that the community notification provisions of Megan's Law do not constitute punishment.¹⁵²

a. Proportionality

The Third Circuit stated that the central issue under the proportionality aspect of the objective purpose prong is whether the provisions of Megan's Law providing for the dissemination of information beyond law enforcement personnel are fully explained by a nonpunitive, legislative purpose.¹⁵³ Thus, the court articulated the pertinent inquiry as whether the Tier 2 and Tier 3 notification provisions of Megan's Law are reasonably related to a legitimate, nonpunitive goal.¹⁵⁴ The Third Circuit concluded that the challenged community notification provisions are reasonably related to the previously-discussed, nonpunitive goals of Megan's Law.¹⁵⁵ In addition, the court noted that the New Jersey Legislature has not attempted to achieve the goals of Megan's Law in such a manner as to impose a burden on the registrants that is clearly greater than the burden inherent in accomplishing the goals.¹⁵⁶ Finally, the court concluded that Megan's Law is a "measured response to the identified problem," the recidivism of sex offenders, that does not uniformly and unfairly subject all registrants to notification beyond law enforcement personnel.¹⁵⁷

149. *See id.* at 1264; *see also E.B.*, 119 F.3d at 1093 (discussing second prong under *Artway* analytical framework).

150. *See Artway*, 81 F.3d at 1265-66 (discussing role of history in determining whether challenged measure constitutes punishment); *see also E.B.*, 119 F.3d at 1099-1101 (same).

151. *See Artway*, 81 F.3d at 1266 (noting that because registration is regulatory technique with salutary purpose, it satisfies third aspect of objective purpose prong); *see also E.B.*, 119 F.3d at 1101 (applying third aspect of objective purpose prong of *Artway* analytical framework).

152. *See E.B.*, 119 F.3d at 1097-1101.

153. *See id.* at 1097.

154. *See id.*

155. *See id.* at 1098. The court also stated that the fundamental premise of Megan's Law is reasonable. *See id.* The court noted that "[t]he fundamental premise of Megan's Law is that registration and carefully tailored notification can enable law enforcement and those likely to encounter a sex offender to be aware of a potential danger and 'to stay vigilant against possible re-abuse.'" *Id.* (quoting *Artway*, 81 F.3d at 1265).

156. *See id.*

157. *See id.* The court noted that the maximum scope of the community notification plan is determined by the risk assessment procedures. *See id.* Each of the three sex offender tier classifications has a different scope of notification. *See id.*

While the appellants conceded that the legislative aims of Megan's Law are remedial in nature, they argued that the range of information disseminated for Tier 2 and Tier 3 registrants is excessive in light of those stated remedial aims.¹⁵⁸ The appellants also argued that due to the unique features of each registrant's situation, some of the information that is disseminated may be unnecessary.¹⁵⁹ The court was not persuaded by either argument.¹⁶⁰ While the court conceded that some of the disseminated information may be unnecessary in certain cases, it quickly added that the legislature's decision not to tailor notification plans for each particular registrant is consistent with the good faith pursuit of the statute's declared remedial purpose.¹⁶¹

b. Historical Precedent

After the court found a reasonable "fit" between the stated remedial goals of Megan's Law and the legislative means chosen to effectuate those goals, the court turned to an analysis of historical precedents.¹⁶² Under this aspect of the objective purpose prong, a measure that has historically served punitive purposes will be recognized as punishment unless the text or legislative history of the measure shows a contrary, remedial purpose.¹⁶³

The appellants argued that the dissemination of information beyond law enforcement personnel, which is required in situations involving Tier 2 and Tier 3 registrants, is "closely analogous" to the punishments of public shaming, humiliation and banishment as practiced in colonial America.¹⁶⁴ The Third Circuit noted that it addressed a similar argument

For the Tier 1 registrants, who comprise over 45% of the total number of those required to register, the dissemination of information is limited to law enforcement personnel. *See id.* For the Tier 2 registrants, who comprise about 50% of those required to register, the notification is limited to members of the community who have responsibility for, or provide support to, those who are most likely to be victimized if the registrant reoffends. *See id.* Finally, even for the sex offenders who are determined to pose the greatest risk and are classified as Tier 3 registrants, who comprise about 5% of the total number of registrants, information is only disseminated to those who are "reasonably certain" to encounter the registrant. *See id.*

158. *See id.* The information disseminated for registrants officially classified as either Tier 2 or Tier 3 sex offenders includes the following: name, description, recent photograph, address, place of employment or schooling and a description of any vehicle used by the registrant along with the license plate number. *See id.*

159. *See id.* at 1098-99.

160. *See id.* at 1099.

161. *See id.* (noting that tailoring individual notification plans for each registrant would unnecessarily expend great amount of resources).

162. *See id.*

163. *See Artway v. Attorney General*, 81 F.3d 1235, 1257 (3d Cir. 1996) (citing *Austin v. United States*, 509 U.S. 602, 619 (1993)).

164. *See E.B.*, 119 F.3d at 1099; *see also* Feldman, *supra* note 9, at 1094-97 (discussing historical approach with respect to sex offender registration and notification legislation); Gibeaut, *supra* note 4, at 36 (stating that some courts have found

in *United States v. Criden*,¹⁶⁵ in which it rejected a tendered analogy comparing the media rebroadcast of material placed into evidence at a criminal trial with the shaming punishments of colonial America.¹⁶⁶

sex offender notification provisions to be “a modern-day version of the scarlet letter, that badge of humiliation pinned on adulterers in colonial America”); Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1360-62 (1989) (discussing historical analogues to modern probation conditions and stating that public humiliation, or stigmatization, played major role in punishment for early American societies).

A similar argument, also based on historical analogues, was made by the plaintiff in *Artway*. See *Artway*, 81 F.3d at 1265. Specifically, Alexander Artway, a convicted sex offender required to register with local law enforcement authorities under Megan’s Law, argued that the registration provisions of Megan’s Law were analogous to the Scarlet Letter of literary fame. See *id.* See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1950). Artway contended that registration under Megan’s Law, like the scarlet letter, results in “public ostracism and opprobrium.” *Artway*, 81 F.3d at 1265. Artway further argued that Megan’s Law, in a similar manner as the scarlet letter, would subject him to potential vigilantism, hinder his employment opportunities and impair his ability to develop and maintain stable interpersonal relationships. See *id.*

The Third Circuit rejected Artway’s proposed analogy, concluding that the registration provisions of Megan’s Law bear “little resemblance to the Scarlet Letter.” *Id.* The court noted that the registration provisions of Megan’s Law merely require certain sex offenders to provide a package of information to local law enforcement authorities. See *id.* According to the court, the primary distinction between registration under Megan’s Law and the scarlet letter is that registration does not involve public notification. See *id.* The court stated that “[w]ithout this public element, [the plaintiff’s] analogy fails.” *Id.* The court observed that the scarlet letter, in addition to the other shaming punishments of colonial America, relied on the disgrace of an individual before the community. See *id.* According to the court, however, registration can not be reasonably compared to public humiliation because the entities that would have access to a registrant’s information (i.e., local law enforcement authorities) would constitute only a “de minimis” portion of the registrant’s community. See *id.* Based on the foregoing historical analysis, the Third Circuit concluded that the registration requirements of Megan’s Law do not constitute punishment. See *id.* at 1267.

165. 648 F.2d 814 (3d Cir. 1981).

166. See *id.* at 825. The district court in *Criden* made the following observation:

The greater and more widespread the publicity about a particular criminal case, the more likely it is that penalties not prescribed by the law will be visited upon the accused and, more importantly, upon innocent relatives and friends

Given the nature of our society these side effects are inevitable; indeed, it can be argued that they form an important, if unofficial, part of the sanctions imposed by society upon lawbreakers. The unfortunate fact is, however, that these side effects are not uniformly visited upon persons accused of violating the law. And, since they are not an official part of the criminal justice process, and are beyond the reach of that process, there is probably no acceptable way of ensuring uniformity of application. *United States v. Criden*, 501 F. Supp. 854, 860 (E.D. Pa. 1980), *rev’d*, 648 F.2d 814 (3d Cir. 1981).

The Third Circuit concluded that the media rebroadcast of evidentiary material did not subject the defendants to public ridicule and shame. See *Criden*, 648 F.2d at 825 (“In this case, particularly, when the defendants themselves were public figures and their conduct was already the subject of national publicity and com-

In addition to relying on the analysis and rationales set forth in *Criden*, the Third Circuit delineated distinctions between community notification under Megan's Law and the shaming punishments of colonial America.¹⁶⁷ Specifically, the court noted that the colonial practices of public shaming, humiliation and banishment all involved more than simply disseminating information.¹⁶⁸ Rather, the colonial practices to which appellants referred inflicted punishment because they either physically shamed the wrongdoer before his or her fellow citizens or physically removed the wrongdoer from the community.¹⁶⁹ Furthermore, the court noted that from a historical viewpoint, the dissemination of information about criminal activity has always held the potential for considerable negative consequences for the individuals involved in the activity, but such dissemination of information, however, has never been considered punishment when done to further a legitimate governmental interest.¹⁷⁰ Finally, the court noted that when there is probable cause to believe that an individual has engaged in criminal behavior, the law has always demanded public proceedings, including public indictment, public trial and public sentencing.¹⁷¹ These public proceedings, according to the court, naturally include the dissemination of information about the accused.¹⁷² Rather than viewing this public dissemination of information as punishment, as the appellants contended, the Third Circuit noted that it *insists* on public dissemination because it heightens public respect for the judicial process, allows the public to "check" the power of the judiciary and plays an important role in the unhindered discussion of governmental activities.¹⁷³

Additionally, the Third Circuit adopted the appellees' view regarding the appropriate historical analysis of community notification.¹⁷⁴ Specifi-

ment, we find the . . . concerns about the incremental effect of rebroadcast publicity to be unconvincing."). Accordingly, the court held that the enhanced publicity resulting from the media rebroadcast was not severe enough to constitute punishment. *See id.*

167. *See E.B.*, 119 F.3d at 1099 (rejecting appellants' argument that dissemination of information is closely analogous to shaming punishments of colonial America).

168. *See id.* (noting also that dissemination of information by state regarding crime and its perpetrators was unnecessary in colonial times because everyone in colonial settlement would have known such information).

169. *See id.*

170. *See id.* With respect to the dissemination of information to the community regarding criminal activity, the court conclusively stated that the "[d]issemination of such information in and of itself, however, has never been regarded as punishment when done in furtherance of a legitimate governmental interest." *Id.* at 1099-1100.

171. *See id.* at 1100.

172. *See id.*

173. *See id.* (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984)).

174. *See id.* at 1100-01. The appellees argued that community notification is comparable to state warnings regarding threats to public safety. *See id.*

cally, the appellees contended that instead of comparing community notification under Megan's Law to the shaming punishments of colonial America, the more apt comparison would be between community notification under Megan's Law and state warnings regarding threats to public safety.¹⁷⁵ Accordingly, the court compared community notification under Megan's Law with quarantine notices, which pertain to dangerous health-related matters, and "warning" posters, which notify the public that a pictured individual represents a danger to the community.¹⁷⁶

The court further noted that whenever these state-sanctioned warnings are based on a specific risk posed by a particular individual, that individual can expect to experience embarrassment and isolation.¹⁷⁷ Nevertheless, it is generally accepted that states are entitled to issue such

175. *See id.* (noting that to provide members of public with opportunity to protect themselves, state governments have traditionally published appropriate warnings about range of public hazards).

176. *See id.* at 1101. In addition to situations involving dangerous individuals and highly contagious illnesses, there are other situations that the New Jersey Legislature has determined to be serious enough to warrant public notice. *See id.* at 1101 n.22. For example, there is a New Jersey statute requiring that the public be given notice when an adult inmate is being considered for parole. *See* N.J. STAT. ANN. § 30:4-123.48g (West 1995). Specifically, the statute provides that "[t]he [Parole B]oard shall give public notice prior to considering any adult inmate for release." *Id.* A related New Jersey statute specifically defines "public notice":

"Public notice" shall consist of lists including names of all inmates being considered for parole, the county from which he [or she] was committed and the crime for which he [or she] was incarcerated. At least 30 days prior to parole consideration such lists shall be forwarded to the prosecutor's office of each county, the sentencing court, the office of the Attorney General, any other criminal justice agencies whose information and comment may be relevant, and news organizations.

Id. § 30:4-123.45b(5). There is also a New Jersey statute requiring that victims be given notice when a defendant is released from incarceration. *See* N.J. STAT. ANN. § 52:4B-44b(21) (West 1995). Specifically, the statute provides in relevant part:

b. The standards [to insure rights of crime victims] shall require that the Office of Victim-Witness Advocacy in the Division of Criminal Justice and each county prosecutor's office provide the following services upon request for victims and witnesses involved in the prosecution of a case:

(21) Notification to the victim of the defendant's release from custody which shall include:

- (a) notice of the defendant's escape from custody and return to custody following escape;
- (b) notice of any other release from custody, including placement in an Intensive Supervision Program or other alternative disposition, and any associated conditions of release;
- (c) notice of the filing by an inmate of an application for commutation of sentence pursuant to [relevant statute] and its disposition;
- (d) notice of parole consideration pursuant to provisions of [relevant statute]; and
- (e) notice of the pending release of an inmate due to expiration of sentence

Id.

177. *See E.B.*, 119 F.3d at 1101 (recognizing negative effects of state-sanctioned warnings).

warnings and that the adverse consequences that accompany the warnings do not constitute punishment.¹⁷⁸ Accordingly, after demonstrating that courts have traditionally not regarded the closest historical analogues as punishment, the Third Circuit concluded that historical precedent does not demonstrate that community notification under Megan's Law has an objective punitive purpose.¹⁷⁹

c. Mixed Salutary and Deterrent Effects

The Third Circuit recognized that some statutory measures are intended to have two purposes, a salutary purpose and a deterrent purpose.¹⁸⁰ Under this final hurdle of the objective purpose prong, the court noted that such "mixed measures" will not be deemed punitive, despite their deterrent purpose, unless: (1) the measure's deterrent purpose is an unnecessary complement to its salutary purpose; (2) the measure is operating in a manner that is inconsistent with its historically mixed purposes; or (3) the deterrent purpose overwhelms the salutary purpose.¹⁸¹ The Third Circuit interpreted this aspect of the objective purpose prong as a "savings provision" because a challenged measure that has punitive or deterrent purposes that can not be fully justified by its remedial or salutary purposes will nonetheless be declared nonpunitive if similar measures have traditionally served both salutary and deterrent purposes.¹⁸² According to the court, however, because of its finding that the remedial purpose of Megan's Law justifies all of its components, an analysis under this third aspect of the objective purpose prong does not lead to the conclusion that Megan's Law is punitive.¹⁸³

178. *See id.*; *see also* 134 CONG. REC. 16,008 (1988) (statement of Sen. Strom Thurmond) (stating that state governments have authority to issue warning posters to protect health and safety of its citizens).

179. *See E.B.*, 119 F.3d at 1101.

180. *See id.* at 1101 (noting that some laws have more than one discernible purpose). Specifically, the court noted that "some measures are intended to have a mixed salutary and deterrent effect." *Id.* at 1093.

In *Artway v. Attorney General*, the court provided examples of legislative measures that have both salutary and deterrent effects. *See Artway v. Attorney General*, 81 F.3d 1235, 1258-59 (3d Cir. 1996). The Third Circuit defined "salutary" as including "both remedial and otherwise beneficial goals." *Id.* at 1259 n.23. The *Artway* court noted that taxes on illegal activities and taxes on activities that the state wants to discourage are examples of measures that have mixed salutary and deterrent effects. *See id.* at 1259. For example, the court noted that "mixed-motive" taxes, such as the taxes that are imposed on the sale of cigarettes, do not constitute "punishment" because the government wants the activity to continue "to the extent that its benefits—including tax revenues—outweigh its harms." *Id.*

181. *See E.B.*, 119 F.3d at 1093 (discussing evaluation of legislative measures that have both salutary and deterrent effects); *see also Artway*, 81 F.3d at 1263 (same).

182. *See E.B.*, 119 F.3d at 1101 (interpreting third aspect of objective purpose prong of *Artway* framework).

183. *See id.*

3. *Effects*

Under the final prong of the *Artway* framework, the court examined the effects, both direct and indirect, of community notification pursuant to Megan's Law.¹⁸⁴ In *Artway*, the Third Circuit noted that an otherwise nonpunitive measure could inflict unconstitutional punishment if its effects were sufficiently harsh.¹⁸⁵ For the effects of an otherwise nonpunitive law to render it punishment, however, the Third Circuit stated that those effects must be "extremely onerous."¹⁸⁶

184. See *id.* at 1093 (noting that final prong of *Artway* framework requires court to examine scope and severity of direct and indirect effects of challenged legislative measure).

185. See *Artway*, 81 F.3d at 1260 (noting that judicial determination of whether challenged legislative measure impermissibly inflicts unconstitutional punishment is based on evaluation of challenged measure's direct and indirect effects); see also *United States v. Halper*, 490 U.S. 435, 448 (1989) ("[A] civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.").

In reaching its conclusion, the *Artway* court relied on the Supreme Court's recent decision in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995). See *Artway*, 81 F.3d at 1260-61 (discussing Supreme Court's decision in *Morales*). In *Morales*, the Supreme Court rejected the respondent's ex post facto challenge to a California statute that decreased a prisoner's right to parole eligibility hearings. See *Morales*, 514 U.S. at 501-02. Prior to the enactment of the challenged statute and under the law that was in effect at the time the respondent committed the crime, the respondent would have been entitled to parole suitability hearings every year after the initial parole determination. See *id.* at 503. Under the challenged statute, the parole review board was authorized to defer subsequent parole suitability hearings under certain specified conditions. See *id.* In deciding this case, the Supreme Court framed the issue as whether the statute increased the punishment attached to the respondent's crime. See *id.* at 505. The Supreme Court held that the effects on the respondent were not great enough to warrant a finding that the challenged statute violates the Ex Post Facto Clause. See *id.* at 514.

According to the Third Circuit in *Artway*, the *Morales* Court contributed two elements to the "punishment" analysis. See *Artway*, 81 F.3d at 1260. First, *Morales* shifted the judicial focus from a law's purpose to its effects. See *id.* Specifically, *Morales* made it clear that a law can be considered unconstitutional punishment solely because of the harshness and severity of its effects. See *id.* Second, *Morales* established that the "appropriate 'punishment' analysis is flexible and context-dependent." *Id.* After analyzing the Supreme Court's decision in *Morales*, the *Artway* court stated that "[w]hile even a substantial 'sting' will not render a measure 'punishment,' at some level the 'sting' will be so sharp that it can only be considered punishment regardless of the legislators' subjective thoughts." *Id.* at 1261 (citations omitted).

186. See *E.B.*, 119 F.3d at 1101. The court noted that an analysis of the effects prong of the *Artway* framework involves "difficult line-drawing." *Id.* at 1093. While searching for guidance in this unenviable task, the court examined a few Supreme Court cases that provide relatively fixed, although somewhat conflicting, points at which the line can be drawn. See *id.* After reviewing the relevant Supreme Court case law, the court noted that the only clear examples of "sufficiently onerous" effects are deprivation of one's United States citizenship and incarceration. See *id.* at 1101 (noting that case law suggests that these two deprivations can constitute "sufficiently onerous" effects); see also *Miller v. Florida*, 482 U.S. 423, 435-36 (1987) (holding that effect of incarceration can be severe enough to require finding of unconstitutional punishment when challenged on ex post facto grounds); *Trop v.*

The Third Circuit began its analysis by looking at the direct effects of community notification pursuant to Megan's Law.¹⁸⁷ The court conclusively stated that the direct effects of community notification "clearly do not rise to the level of extremely onerous" so as to compel the court to conclude that the application of Megan's Law constitutes punishment.¹⁸⁸ Specifically, the court noted that by enacting Megan's Law, which only mandates registration and notification, the state did not impose any *direct* restrictions on a registrant's ability to live and work in a community.¹⁸⁹

The next step in the court's analysis involved an examination of the indirect effects of community notification pursuant to Megan's Law.¹⁹⁰ While the court conceded that the indirect effects of Tier 2 and Tier 3 notification on the registrants and their families are harsh, these effects were not sufficiently burdensome so as to require the classification of the law as punitive.¹⁹¹ In its analysis, the court identified and discussed two

Dulles, 356 U.S. 86, 98-99 (1958) (holding that effect of forfeiture of one's United States citizenship can be sufficiently severe so as to require finding of punishment).

Even these deprivations, however, do not invariably constitute per se punishment. *See E.B.*, 119 F.3d at 1101. For example, the Supreme Court has also held that incarceration by itself does not necessarily constitute punishment. *See Kansas v. Hendricks*, 117 S. Ct. 2072, 2083, 2086 (1997) (noting that mere fact individual is detained does not inexorably lead to conclusion that government has imposed punishment and holding that post sentence, involuntary civil commitment of sexually violent predators does not constitute unconstitutional punishment); *United States v. Salerno*, 481 U.S. 739, 746, 755 (1987) (holding that pre-trial detention of dangerous offenders does not constitute punishment). In addition, the Supreme Court has held that the effects of the deprivation of one's livelihood are not so onerous that a finding of punishment is required. *See Flemming v. Nestor*, 363 U.S. 603, 616-17 (1960) (holding that effects of termination of social security benefits are not sufficiently onerous and therefore do not constitute punishment); *Hawker v. New York*, 170 U.S. 189, 196 (1898) (holding that revocation of license to practice one's profession is not punishment).

187. *See E.B.*, 119 F.3d at 1102.

188. *See id.* (providing examples of "extremely onerous" effects and concluding that community notification pursuant to Megan's Law does not result in such effects).

189. *See id.* (stating specifically that "state has imposed no restrictions on a registrant's ability to live and work in a community, to move from place to place, to obtain a professional license or to secure governmental benefits").

190. *See id.* at 1102-05. The court noted that the registrants were more concerned with the indirect effects than the direct effects of Megan's Law. *See id.* at 1102. The court also noted that the indirect effects of Megan's Law include "[a]ctions that members of the community may take as a result of learning of the registrant's past, his [or her] potential danger, and his [or her] presence in the community." *Id.*

191. *See id.* at 1105. The court discussed numerous documented examples of the types of indirect effects that registrants and their families have experienced. *See id.* at 1102. First, registrants and their families have experienced extreme humiliation, embarrassment and isolation as a result of community notification pursuant to Megan's Law. *See id.* Second, employment and employment opportunities have either been jeopardized or lost as a result of community notification. *See id.*; *see also* Robert C. Gottlieb, *Cops Are Taking New Law Too Far*, *NEWSDAY*, Oct. 8, 1997, at A47 (stating that community notification has numerous detrimental

indirect effects that often result from community notification: (1) injury to what is often denoted as reputational interests and (2) exposure to an increased risk of private violence that can result in property damage or personal injury.¹⁹²

The court first examined the effects of community notification on the reputational interests of the registrants, noting that society has traditionally regarded reputational interests and injuries to those interests as very serious.¹⁹³ At the same time, however, the court recognized that reputational interests have traditionally not received the same degree of protection as other fundamental interests, such as the constitutionally-secured right to privacy.¹⁹⁴ Additionally, the Third Circuit noted that the reputa-

effects on individual, including loss of employment). Third, housing opportunities have been jeopardized or lost. *See E.B.*, 119 F.3d at 1102. Fourth, interpersonal relationships with family members and friends have been strained or destroyed. *See id.*

Of particular concern, however, is the threat of physical violence. *See id.* The court noted that those individuals subject to the Tier 2 and Tier 3 notification requirements of Megan's Law have occasionally been exposed to violence. *See id.* The court further noted that while incidents of "vigilante justice" are not common, the incidents have happened "with sufficient frequency and publicity" to result in a justifiable fear on the part of the registrants. *Id.* Recent commentators noted that "vigilantism" is a major problem that results from the release of information to the public at large. *See Hacking, supra* note 2, at 804 (providing examples of violence that resulted after community was notified pursuant to Megan's Law); Gottlieb, *supra*, at A47 (emphasizing that community notification has resulted in threats of physical violence, physical attacks and arson). In one instance, citizens of the local community burned down the home of a convicted rapist on the day he was to move into the community. *See Hacking, supra* note 2, at 804. In another example, two individuals broke into a house and beat the occupant, who was staying in the same residence as a registered sex offender. *See id.*; *see also* Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL. 569, 577-80 (1995) (asserting that community notification pursuant to Megan's Law encourages lawlessness among citizenry).

192. *See E.B.*, 119 F.3d at 1102-05.

193. *See id.* at 1102-04. The court emphasized that our law has traditionally sought to protect reputational interests and provide compensation for wrongful injuries to those interests. *See id.* at 1102. According to the court, legislatures originally designed the law of defamation to provide a legal remedy for individuals whose reputations are injured by spurious allegations of criminal conduct. *See id.*

194. *See id.*; *see also* Paul v. Davis, 424 U.S. 693, 712-13 (1976) (rejecting argument that reputational interests are fundamental and concluding that they do not come within right of privacy created by United States Constitution); Roe v. Wade, 410 U.S. 113, 152 (1973) (noting that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in constitutional guarantee of personal privacy).

In *Davis*, local law enforcement authorities decided to alert area businesses to the threat of shoplifters who might be operating during the Christmas season. *See Davis*, 424 U.S. at 694-95. To provide notice to the area merchants regarding the threat of potential shoplifters, local officials distributed 800 "flyers" containing the name and "mug shot" photo of individuals recently arrested for shoplifting. *See id.* at 695. *Davis*, who was recently arrested but not convicted for shoplifting, was included on the flyer. *See id.* at 695-96. Subsequently, *Davis* brought a civil rights action against the law enforcement officials in the United States District Court for the Western District of Kentucky. *See id.* at 696. Specifically, *Davis* alleged that the

tional interests asserted by the appellants are very different from the interests that are traditionally viewed as “fundamental.”¹⁹⁵ Accordingly, the court held that the effects of community notification on the registrants’ reputational interests do not implicate any interest that is of fundamental constitutional magnitude and, consequently, the impact of community notification is insufficient to constitute punishment.¹⁹⁶

Next, the court examined the second category of indirect effects that may result from community notification—exposure to an increased risk of violence.¹⁹⁷ While the court conceded that registrants are exposed to an increased risk of violence as a result of community notification, it ultimately concluded that the risk is not of such magnitude as to compel the conclusion that community notification constitutes punishment.¹⁹⁸ The court recognized that when a person commits an egregious crime and is subject to public prosecution, the risk of retributive violence is aug-

officials destroyed his reputation by distributing the flyers and, by doing so, they violated his constitutionally-secured right to privacy. *See id.*

The district court granted the defendants’ motion to dismiss Davis’s complaint, holding that the facts did not establish that the officials deprived Davis of any right guaranteed by the United States Constitution. *See id.* Upon the dismissal of his complaint, Davis appealed to the United States Court of Appeals for the Sixth Circuit, which concluded that Davis set forth a viable civil rights claim because he alleged facts that constituted a denial of due process of law. *See id.* at 696-97. The Supreme Court granted certiorari and concluded that Davis’s reputational interest was not sufficiently fundamental so as to invoke the procedural protections of the Due Process Clause or to come within the constitutionally-secured right to personal privacy. *See id.* at 712-13. The Court stated that “the interest in reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.” *Id.* at 712.

Similarly, the Supreme Court in *Roe* emphasized that the United States Constitution does not explicitly mention any right to privacy. *See Roe*, 410 U.S. at 152. The Court noted, however, that throughout its decisions, it has recognized that a right of personal privacy does exist under the Constitution. *See id.*

195. *See E.B.*, 119 F.3d at 1103. The court noted that the judiciary has traditionally viewed interests related to marriage, procreation and child rearing as “fundamental.” *See id.* (citing *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 749 (1989) (discussing background of case addressing issue of whether there is right to privacy in Federal Bureau of Investigation “rap” sheets)).

196. *See id.* at 1103-04.

197. *See id.* at 1104-05.

198. *See id.* at 1104. The court noted that even though there are documented incidents in which community notification has resulted in personal injury and property damage, these occurrences are relatively rare. *See id.* Of the 135 notifications completed in New Jersey for which there is data, there were only two incidents serious enough to warrant a report to law enforcement authorities. *See id.*; *see also Hacking*, *supra* note 2, at 804 (citing examples of vigilantism resulting from sex offender registration and subsequent community notification); *Montana*, *supra* note 191, at 577-80 (asserting that community notification pursuant to Megan’s Law and similar sex offender legislation encourages lawlessness among citizenry); *Gottlieb*, *supra* note 191, at A47 (discussing increased risk of physical violence that results from community notification).

mented.¹⁹⁹ The court further recognized that the duration of the augmented risk is probably extended as a result of community notification pursuant to Megan's Law.²⁰⁰ Nevertheless, the court concluded that this augmented risk of personal violence is not so "sufficiently burdensome" that it requires community notification under Megan's Law be considered punishment.²⁰¹

B. *Satisfaction of the Artway Framework*

After completing its constitutional analysis of the challenged provisions of Megan's Law, the court concluded that the Tier 2 and Tier 3 notification provisions of Megan's Law satisfy each of the three prongs of the *Artway* framework.²⁰² Accordingly, the Third Circuit held that the community notification required by Megan's Law does not impermissibly inflict punishment in violation of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.²⁰³

In a concurring and dissenting opinion, Judge Becker agreed with the appellants that community notification under Megan's Law is analogous to the shaming punishments of colonial America, which were "indubitably and unabashedly punitive."²⁰⁴ In addition, Judge Becker noted that noth-

199. *See E.B.*, 119 F.3d at 1104.

200. *See id.*

201. *See id.* After reaching its conclusion regarding the increased risk of physical violence that may result from community notification pursuant to Megan's Law, the Third Circuit stated its belief that the Supreme Court would also view this indirect effect of Megan's Law as not sufficiently burdensome to require that Megan's Law be classified as punitive. *See id.* at 1105.

202. *See id.* (concluding that community notification pursuant to Megan's Law satisfies all three prongs of *Artway* framework and, therefore, does not constitute punishment).

203. *See id.* While the Third Circuit upheld the constitutionality of the community notification provisions of Megan's Law as applied to Tier 2 and Tier 3 registrants, it reversed the district court on procedural due process grounds. *See id.* at 1111. The Third Circuit held that the application of the community notification provisions of Megan's Law to the class certified by the district court, Tier 2 and Tier 3 registrants, would not violate the Ex Post Facto or Double Jeopardy Clauses. *See id.* The Third Circuit also held, however, that the Due Process Clause would be violated by any Tier 2 or Tier 3 notification that occurred without first providing the registrant with an opportunity to challenge the tier classification and community notification plan in a hearing in which the prosecutor has the burden of proving his or her case by clear and convincing evidence. *See id.* Based on this conclusion, the Third Circuit reversed and remanded the case with instructions for the district court "(1) to enter an injunction foreclosing notification in Tier 2 and Tier 3 cases without compliance with these requirements of procedural due process, and (2) to deny any further relief." *Id.*

204. *Id.* at 1113 (Becker, J., concurring in part, dissenting in part) (discussing similarities between community notification under Megan's Law and shaming punishments of colonial America).

Although Judge Becker disagreed with the majority's constitutional analysis under the *Artway* framework, he agreed with the majority's rulings on some of the other issues. *See id.* at 1112-13 (Becker, J., concurring in part, dissenting in part). Specifically, Judge Becker agreed with the majority's conclusion that *Artway* pro-

ing in the design or operation of Megan's Law contradicts this historical understanding.²⁰⁵ Accordingly, Judge Becker concluded that because the history of notification evidences a punitive intent and because the design and operation of Megan's Law do not negate the punitive intent, community notification under Megan's Law should be considered punishment according to the second prong of the *Artway* framework.²⁰⁶

V. CRITICAL ANALYSIS

The Third Circuit addressed the issue of whether community notification under Megan's Law violates the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.²⁰⁷ The court properly concluded that the analytical framework developed in *Artway* provides the appropriate legal standard for determining whether community notification under Megan's Law constitutes punishment.²⁰⁸ The Third Circuit, however, improperly concluded that community notification under Megan's Law does not inflict punishment in violation of the Ex Post Facto and

vides the appropriate legal standard for determining if a challenged legislative measure impermissibly inflicts punishment in violation of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, even after the Supreme Court's recent decisions in *United States v. Ursery* and *Kansas v. Hendricks*. *See id.* at 1112 (Becker, J., concurring in part, dissenting in part). Judge Becker also agreed with the majority that the "*Rooker-Feldman*" doctrine effectively precludes the Third Circuit from reviewing E.B.'s challenge. *See id.* at 1113 (Becker, J., concurring in part, dissenting in part). Furthermore, Judge Becker agreed with the majority that the Due Process Clause prohibits imposing the burden of persuasion at a Megan's Law tier classification hearing on the sex offender. *See id.* (Becker, J., concurring in part, dissenting in part). Finally, Judge Becker agreed that the prosecutor's burden of proof at a Megan's Law tier classification hearing must be met by clear and convincing evidence. *See id.* (Becker, J., concurring in part, dissenting in part).

205. *See id.* (Becker, J., concurring in part, dissenting in part). Judge Becker noted that the design of the community notification provisions of Megan's Law does not negate the understanding that society has traditionally viewed community notification as punishment. *See id.* at 1122 (Becker, J., concurring in part, dissenting in part). Similarly, Judge Becker noted that the operation of Megan's Law, particularly the community notification provisions, does not contradict the historical understanding of the measure as punitive. *See id.* (Becker, J., concurring in part, dissenting in part).

206. *See id.* at 1113 (Becker, J., concurring in part, dissenting in part). Judge Becker noted that the failure to satisfy the second prong of the *Artway* framework, objective purpose, is necessarily fatal to the constitutionality of the community notification provisions of Megan's Law. *See id.* (Becker, J., concurring in part, dissenting in part).

207. *See id.* at 1105 (holding that community notification required by Megan's Law does not impermissibly inflict punishment in violation of Ex Post Facto and Double Jeopardy Clauses).

208. *See id.* at 1093-96 (concluding that analytical framework developed in *Artway* remains appropriate legal standard, despite two recent Supreme Court decisions, for determining if challenged legislative measure constitutes unconstitutional punishment).

Double Jeopardy Clauses.²⁰⁹ According to the second prong of the *Artway* framework, if an historical analysis indicates that society has traditionally regarded the challenged measure as punishment and if the text of the measure does not negate the punitive intent, the measure must be considered punishment.²¹⁰ Therefore, because a proper historical analysis indicates that society has traditionally regarded community notification as punishment and because the text of Megan's Law does not negate this traditional understanding, community notification under Megan's Law should be considered punishment according to the second prong of the *Artway* framework.²¹¹

A. *Historical Analysis Indicates that Community Notification Pursuant to Megan's Law Evidences a Punitive Intent*

A proper analysis of historical analogues that are comparable to community notification under Megan's Law reveals that society has traditionally regarded community notification as punishment.²¹² The Third Circuit, however, deftly avoided the appellants' contention that community notification under Megan's Law is comparable to the shaming punishments of colonial America and instead asserted that warning posters and quarantine notices constitute far more compelling analogies to community notification.²¹³ Therefore, the critical inquiry is whether community

209. See April R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 913 (1995) ("Even if there were compelling policy justifications for community notification laws, such laws are probably unconstitutional."). In addition to arguing that sex offender community notification laws violate the Ex Post Facto and Double Jeopardy Clauses, critics argue that "[t]he public stigma inflicted by community notification laws may violate the Eighth Amendment prohibition against cruel and unusual punishment." *Id.*

210. See *E.B.*, 119 F.3d at 1113 (discussing relevant inquiry under objective purpose prong of *Artway* framework).

211. For a discussion of a proper historical analysis under the second prong of the *Artway* framework, see *infra* notes 212-46 and accompanying text.

212. See Brilliant, *supra* note 164, at 1360 ("Early forms of punishment contained a strong element of gross public humiliation; in fact, public humiliation . . . functioned as punishment by itself." (footnotes omitted)); see also Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1535 (1996) (noting that community notification was major component of shaming punishments and that "shame punishments are directly, pointedly, and consistently aimed at communication to wider society"); Gottlieb, *supra* note 191, at A47 (noting that community notification "invokes the frightening spirit of 17th-Century Puritan New England"). A recent commentator noted that the media coverage that surrounds modern criminal trials and convictions is "the [modern-day] pillory." See Persons, *supra*, at 1534 (stating that "newspapers often find criminal trials and convictions to be of public interest . . . and . . . the paper becomes the pillory").

213. See *E.B.*, 119 F.3d at 1101 (discussing similarities between community notification pursuant to Megan's Law and governmental warnings about public dangers). With respect to the appellants' argument regarding the similarities between community notification under Megan's Law and the shaming punishments of colonial America, the court stated:

notification under Megan's Law is more analogous to the shaming punishments of colonial America, which society has traditionally regarded as punitive, or warning posters and quarantine notices, which are remedial and nonpunitive.²¹⁴ By comparing community notification under Megan's Law to insufficiently comparable historical analogues, such as warning posters and quarantine notices, the Third Circuit engaged in a faulty historical analysis.²¹⁵ A better reasoned historical analysis compares community notification under Megan's Law to the shaming punishments of colonial

We also agree with appellees that various forms of state warnings about threats to public safety provide more apt analogies to Tier 2 and Tier 3 notification than the referenced colonial practices. In order to provide members of the public with an opportunity to take steps to protect themselves, the government has traditionally published appropriate warnings about a range of public hazards.

Id. at 1100-01.

The shaming punishments of colonial America took many different forms. *See id.* at 1115-16. Traditionally-practiced shaming punishments included admonition, labeling, branding, maiming, mutilation, banishment, forced sign wearing, confinement in stocks, whipping, dunking in water and the wheel. *See id.*; *see also* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1881-82 (1991) (discussing shaming punishments of colonial America); Gregory W. O'Reilly, *Illinois Lifts the Veil on Juvenile Conviction Records*, ILL. B.J., Aug. 1995, at 402, 403 (discussing shaming punishments of colonial America with respect to legislative release of juvenile records); Persons, *supra* note 212, at 1533 (discussing various forms of shaming punishments as practiced in colonial America). Although some of these punishments also involved a physical component, the authorities often dispensed with the physical aspect of the punishment because the genuine "sting" of the punishment often resulted solely from the publicity aspect. *See E.B.*, 119 F.3d at 1116.

The shaming punishment of labeling took two different forms, one temporary and one permanent. *See id.* at 1115-16. The temporary version involved having the offender display a label signifying his offense. *See id.* at 1115. For example, if an individual was convicted of adultery, the offender might have been required to display a letter "A" that was cut from cloth and attached onto his or her outer garments. *See id.* at 1115-16. A more permanent labeling approach involved branding, in which the label was burned directly onto the offender's body. *See id.* at 1116. For example, a murderer might have had an "M" branded onto his or her body, while a thief might have been branded with a "T." *See id.*; *see also* Brilliant, *supra* note 164, at 1361 (discussing various forms of colonial American shaming punishments, including branding). In colonial New Jersey, burglars were often punished by having their hands branded for a first offense and their foreheads branded for subsequent offenses. *See id.* Another shaming punishment was maiming or mutilation. *See E.B.*, 119 F.3d at 1116. One of the more common forms involved the detachment of the offender's ear. *See id.* Banishment, or forced exclusion from the community, was reserved for those individuals who either presented a permanent risk of danger to the community or engaged in repeated acts of criminality. *See id.*

214. *See E.B.*, 119 F.3d at 1116.

215. *See id.* The court rejected the appellants' proffered analogy comparing community notification under Megan's Law to the traditionally-practiced shaming punishments of colonial America. *See id.* at 1100.

America, leaving no doubt that the objectively discernible purpose of Megan's Law is essentially punitive.²¹⁶

The Third Circuit's analysis contains two major flaws which are necessarily fatal to the court's preferred analogy.²¹⁷ First, the court erroneously concluded that community notification under Megan's Law is more comparable to warning posters and quarantine notices because the state designed each of those measures to alert the community to a risk.²¹⁸ While it is admittedly true that community notification, warning posters and quarantine notices were all designed to alert the community to a risk, the court overlooked the fact that the shaming punishments of colonial America were also designed to alert the community to a risk.²¹⁹

216. See Gottlieb, *supra* note 191, at A47 (noting that community notification component of sex offender registration and notification laws "invokes the frightening spirit of 17th-Century Puritan New England"); see also Brilliant, *supra* note 164, at 1357-62 (comparing modern day probation conditions to colonial American shaming punishments).

Many courts, including the Supreme Court of the United States, have relied on historical analyses in reaching their conclusions. See John Paul Stevens, *A Judge's Use of History*, 1989 Wis. L. REV. 223, 225 (1989) (discussing use of history by judges and noting that judge's task often involves study of past events). While judicial reliance on history is not a new phenomenon, a review of a few recent Supreme Court decisions adequately illustrates the integral role that history plays in our jurisprudence. See *E.B.*, 119 F.3d at 1114 (discussing role of historical analysis in four recent Supreme Court decisions). In *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997), the Supreme Court made use of the historical understanding of a challenged legislative measure to determine if the measure was punitive. See *id.* at 2079-80 (tracing history of civil commitment of mentally ill). In *Richardson v. McKnight*, 117 S. Ct. 2100 (1997), the Court reviewed the operation of jails in the nineteenth century to determine if guards employed by private prison management firms enjoyed qualified immunity. See *id.* at 2104-05 (analyzing historical operation of jails as part of decision making process). Similarly, in *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), the Court relied on "over 700 years . . . [of] Anglo-American common-law tradition" to determine whether assisted suicide is a fundamental liberty interest protected by the Due Process Clause of the United States Constitution. See *id.* at 2263 (relying on historical analysis to determine constitutionality of assisted suicide). Recently, in *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), the Court looked to modern history to distinguish the Internet from radio broadcasts. See *id.* at 2343 (reviewing recent cases dealing with broadcast regulations). The Court noted that the Internet has no history of limited First Amendment protections and found provisions of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. § 223), to be unconstitutional. See *Reno*, 117 S. Ct. at 2351. Finally, in *Printz v. United States*, 117 S. Ct. 2365 (1997), relying on an analysis of "statutes enacted by the first Congresses," the Court held that the interim provisions of the Brady Handgun Violence Prevention Act are unconstitutional. See *id.* at 2370, 2384.

217. See *E.B.*, 119 F.3d at 1099-1101 (discussing similarities between community notification under Megan's Law and warning posters and quarantine notices).

218. See *id.* at 1117 (discussing majority's comparison of Tier 2 and Tier 3 community notification under Megan's Law to state-sanctioned governmental warnings regarding potential public hazards).

219. See Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1228 (1982) ("Less common, but equally effective, were branding and mutilation, punishments that fixed upon the offender an indelible 'mark of infamy,' to warn community members to keep

The second major flaw in the court's analysis pertains to what the court did not address. The court ignored two important similarities between community notification under Megan's Law and the shaming punishments of colonial America which, if addressed, would demonstrate that community notification is more similar to the shaming punishments than to the remedial measures of warning posters and quarantine notices. First, while attempting to draw a distinction between community notification and the shaming punishments, the court inadvertently illuminated a striking similarity when it noted that the "sting" of community notification results from the dissemination of accurate information about the registrant's past criminal activity and potential future risk.²²⁰ Thus, the court overlooked the fact that shaming punishments were effective precisely because the punishment involved the dissemination of accurate information regarding the offender's past criminal activity and potential future risk.²²¹

Second, the court ignored the fact that the type of information disseminated pursuant to community notification under Megan's Law is the same type of information that the state disseminated in carrying out the shaming punishments.²²² By contrast, warning posters and quarantine notices do not disseminate the same type of information.²²³ Warning posters do not provide information regarding the location of the individual, which is a key component of Megan's Law notification, and quarantine notices are limited to health-related information, which generally does not contain a culpability component.²²⁴

In addition to the Third Circuit's misplaced reliance on insufficiently comparable historical analogues, the Third Circuit's reliance on *United*

their distance."); Massaro, *supra* note 213, at 1913 ("Branding and maiming also were designed in part to prevent the offender from committing future similar acts . . . by warning future victims of their criminal propensities" (footnotes omitted)); *see also* *E.B.*, 119 F.3d at 1117 (noting that one important purpose of colonial American shaming punishments was to alert community to potential risk posed by offender).

220. *See E.B.*, 119 F.3d at 1099 (noting that effect of community notification pursuant to Megan's Law results from dissemination of accurate information about registrant).

221. *See id.* at 1116 (Becker, J., concurring in part, dissenting in part) (noting that in colonial America, publicity of offense was cause of shame and "sting" of shaming punishments); *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630-49 (1996) (arguing that dissemination of information in shaming punishments expressed society's disapproval of crimes).

222. *See E.B.*, 119 F.3d at 1118 (Becker, J., concurring in part, dissenting in part).

223. *See id.* (Becker, J., concurring in part, dissenting in part) (comparing and contrasting type of information disseminated pursuant to Megan's Law community notification with type of information disseminated by warning posters and quarantine notices).

224. *See id.* (Becker, J., concurring in part, dissenting in part) (drawing distinction between information disseminated by warning posters and quarantine notices and information disseminated pursuant to community notification under Megan's Law).

States v. Criden was similarly misplaced.²²⁵ In *Criden*, the Third Circuit rejected a tendered analogy between the media rebroadcast of evidentiary material from a criminal trial and the shaming punishments of colonial America.²²⁶ The *E.B.* court found substantial similarities between the challenged rebroadcast at issue in *Criden* and the challenged community notification provisions of Megan's Law.²²⁷ The *E.B.* court reasoned that because the challenged rebroadcast was determined to be unlike the shaming punishments, the challenged community notification provisions must also be unlike the shaming punishments.²²⁸ The court's reliance on *Criden*, however, was necessarily misplaced because the community notification provisions of Megan's Law differ from the challenged rebroadcast in one major respect. Specifically, the private media was responsible for rebroadcasting the evidentiary material at issue in *Criden*, whereas the state is responsible for carrying out community notification pursuant to Megan's Law.²²⁹ Because a *private* entity rebroadcasted the material, the Ex Post Facto and Double Jeopardy Clauses are not implicated.²³⁰ The Ex Post Facto and Double Jeopardy Clauses are only implicated if the *state* has impermissibly inflicted punishment.²³¹ Therefore, *Criden* does not provide appropriate jurisprudential precedent for the Third Circuit to rely on when evaluating ex post facto and double jeopardy claims. In addition, the fact that Megan's Law is a state-run program bolsters the appellants' argument that Megan's Law should be compared to shaming punishments, which were also state-run programs.²³²

B. *The Text of Megan's Law Does Not Negate the Punitive Intent of the Community Notification Provisions*

Although the community notification provisions of Megan's Law evidence a punitive intent, the law will nevertheless be declared constitutional for purposes of the Ex Post Facto and Double Jeopardy Clauses if

225. See *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981). For a discussion of *Criden*, see *supra* notes 165-66 and accompanying text.

226. See *Criden*, 648 F.2d at 825.

227. See *E.B.*, 119 F.3d at 1099 (comparing challenged rebroadcast at issue in *Criden* to community notification under Megan's Law).

228. See *id.*

229. See *id.* at 1115 (noting that private media rebroadcasted evidentiary material at issue in *Criden*, whereas state provides community notification pursuant to Megan's Law).

230. For a discussion of the Ex Post Facto Clause, see *supra* notes 46-61 and accompanying text. For a discussion of the Double Jeopardy Clause, see *supra* notes 62-70 and accompanying text.

231. See U.S. CONST. art. I, § 9, cl. 3 (stating that "[n]o state shall . . . pass any . . . ex post facto law . . .") (emphasis added).

232. See *E.B.*, 119 F.3d at 1119 (Becker, J., concurring in part, dissenting in part) (recognizing that shaming punishments of colonial America, in similar manner as community notification pursuant to Megan's Law, were judicially endorsed and carried out by state).

the text of the law negates the punitive intent.²³³ A proper examination of the statutory design and operation of Megan's Law, however, does not negate the punitive intent of the community notification provisions. The pertinent inquiry in this analysis is whether the statute is designed, or functions, in such a manner as to contradict the previously-established punitive intent.²³⁴ Because of the legislative placement of Megan's Law and the aims which it promotes, it must be concluded that the statutory design and operation of the community notification provisions of Megan's Law do not negate the punitive intent.

Perhaps the most noteworthy aspect of the statutory design of Megan's Law is the legislative placement of Megan's Law within the criminal justice system.²³⁵ The registration and notification provisions of Megan's Law are contained in Chapter 7 of the New Jersey Code of Criminal Justice.²³⁶ Moreover, pursuant to the statutory requirements of Megan's Law, the New Jersey Attorney General, a law enforcement officer, is responsible for promulgating the guidelines and procedures for the community notification required by Megan's Law.²³⁷ Additionally, the guidelines are implemented by the county prosecutors.²³⁸ Finally, law enforcement officers, either the local police or the state police, provide the actual notification.²³⁹

233. *See id.* at 1119-22 (Becker, J., concurring in part, dissenting in part) (analyzing text, legislative history and statutory design of community notification provisions of Megan's Law).

234. *See id.* at 1119-20 (Becker, J., concurring in part, dissenting in part) (noting that key inquiry is whether New Jersey Legislature designed Megan's Law in such manner as to contradict historical understanding of community notification provisions as constituting punishment).

235. *See* N.J. STAT. ANN., §§ 2C:7-1 to :7-11 (West 1995 & Supp. 1997). Title 2C of the New Jersey Code is the New Jersey Code of Criminal Justice. *See id.*

236. *See id.* Chapter 7 of Title 2C is entitled the "Registration and Notification of Release of Certain Offenders." *See id.*

237. *See id.* § 2C:7-8a. Section 2C:7-8a states that "the Attorney General shall promulgate guidelines and procedures for the notification required pursuant to the provisions of this act." *Id.*

238. *See id.* § 2C:7-8d. Section 2C:7-8d provides, in relevant part:

(1) The county prosecutor of the county where the person was convicted and the county prosecutor of the county where the registered person will reside . . . shall assess the risk of re-offense by the registered person;

(2) The county prosecutor of the county in which the registered person will reside . . . shall determine the means of providing notification.

Id.

239. *See id.* §§ 2C:7-6 to :7-7. Section 2C:7-6 provides in relevant part: Within 45 days after receiving notification . . . that an inmate convicted of or adjudicated delinquent for a sex offense . . . is to be released from incarceration and after receipt of registration as required therein, the chief law enforcement officer of the municipality where the inmate intends to reside shall provide notification in accordance with the provisions of section 3 of this act of that inmate's release to the community. If the municipality does not have a police force, the Superintendent of State Police shall provide notification.

Id. § 2C:7-6. Section 2C:7-7 provides in relevant part:

In addition to the legislative placement of Megan's Law, the operation of Megan's Law functions to promote the traditional aims of punishment—retribution and deterrence.²⁴⁰ The Third Circuit did not dispute that community notification under Megan's Law inflicts a degree of shame on the registrant because publicizing information about an offender's crime and potential future risk invariably leads to shame.²⁴¹ Further, the court agreed that the infliction of shame, whether specifically intended by Megan's Law or not, effects a degree of retribution on the offender.²⁴² Moreover, this shame will presumably discourage the registrants from engaging in certain prohibited behavior, thereby also providing a deterrent effect.²⁴³ Indeed, one of the primary reasons that the legislature enacted Megan's Law was to combat the recidivism problem by deterring sex of-

After receipt of notification and registration . . . that a person required to register . . . intends to change his address, the chief law enforcement officer of the municipality to which the person is relocating shall provide notification of that relocation to the community pursuant to section 3 of this act.

If the municipality does not have a police force, the Superintendent of State Police shall provide notification.

Id. § 2C:7-7.

240. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (stating that two primary objectives of criminal punishment are retribution and deterrence); *United States v. Halper*, 490 U.S. 435, 448 (1989) (“[A] civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (“[T]he traditional aims of punishment—retribution and deterrence”); see also *Persons*, *supra* note 212, at 1533 (noting that shaming punishments, which often involved community notification component, served as excellent tools for retribution and deterrence).

In *Halper*, the Supreme Court addressed the difficulty of determining whether a challenged legislative measure constitutes unconstitutional punishment. *Halper*, 490 U.S. at 447-48. The Court made the following observation:

In making this assessment, the labels “criminal” and “civil” are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.

Id. (footnotes and citations omitted).

241. See *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (recognizing that Tier 2 and Tier 3 registrants and their families experience profound humiliation and isolation as result of reaction of those notified), *cert. denied*, 118 S. Ct. 1039 (1998).

242. See *id.* (noting that community notification pursuant to Megan's Law has also resulted in retribution from private entities).

243. See *id.* at 1120-21 (stating that there is “no disputing” that shame functions as deterrent).

fenders from re-offending.²⁴⁴ It is admittedly true, however, that simply because a statute has the effect of promoting the traditional aims of punishment, it does not invariably lead to the conclusion that the purpose of the statute was to do so.²⁴⁵ Nevertheless, such an effect suggests that the design of the particular statute does not explicitly negate the punitive intent, which is a key consideration under the second prong of the *Artway* framework.²⁴⁶

Based on the above analysis, it can reasonably be concluded that the design and operation of Megan's Law does not negate the previously-established punitive intent. Therefore, because the history of community notification evidences a punitive intent and because the design and operation of Megan's Law does not negate that punitive intent, community notification under Megan's Law should be considered punishment according to the second prong of the *Artway* framework.

VI. IMPACT

Under a proper constitutional analysis, the Third Circuit should have held that the Tier 2 and Tier 3 notification provisions of Megan's Law inflict punishment in violation of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. The court should have found that society has traditionally viewed community notification, of the type required by Megan's Law, as punishment. Moreover, because the statutory design and operation of Megan's Law does not negate the punitive intent, the court should have concluded that the community notification provisions fail the second prong of the *Artway* framework and, therefore, constitute the impermissible infliction of punishment.

Instead, the court's decision in *E.B.* will have implications that reach far beyond an improper analysis of constitutional principles. Given that legislation similar to Megan's Law is present in all fifty states and in the federal jurisdiction, other courts will most likely address similar constitutional challenges in the near future.²⁴⁷ Therefore, because the Ex Post Facto Clause is the highest "constitutional hurdle" facing any legislation similar to Megan's Law, the Third Circuit's decision in *E.B.* will undoubtedly provide the basis for other courts to sustain the constitutionality of these laws.²⁴⁸ In fact, shortly after the Third Circuit's decision in *E.B.*, the

244. See N.J. STAT. ANN. § 2C:7-1 (stating legislative findings and declaration).

245. See *Artway v. Attorney General*, 81 F.3d 1235, 1255 (3d Cir. 1996) (noting that legislative measure can effectively promote traditional aims and goals of punishment even when that was not stated legislative purpose of measure).

246. See *E.B.*, 119 F.3d at 1120 (discussing importance of punitive intent under second prong of *Artway* framework).

247. See Gibeaut, *supra* note 4, at 36 (stating that all 50 states have enacted similar legislation and noting that sex offender registration and notification laws have faced a "barrage of constitutional challenges").

248. See Feldman, *supra* note 9, at 1120 (discussing ex post facto and other constitutional challenges to sex offender registration and notification laws). One commentator has suggested that the Ex Post Facto Clause is the toughest constitu-

United States Court of Appeals for the Ninth Circuit sustained the constitutionality of Washington's "Megan's Law," relying in part on the Third Circuit's analysis in *E.B.*²⁴⁹

In addition to providing the basis for other courts to sustain the constitutionality of similar legislation, the Third Circuit's decision will also have a significant impact on the individuals subject to the community notification provisions of Megan's Law.²⁵⁰ Community notification can result in isolation, harassment, loss of employment and housing, damage to property, physical violence and arson.²⁵¹ There are numerous examples of vigilante attacks following community notification, and continuing notification may lead to a dramatic increase in such incidents.²⁵²

Furthermore, allowing community notification to proceed will have little impact in preventing sexual abuse, which is a primary objective of Megan's Law.²⁵³ First, in more than seventy-five percent of sexual abuse

tional challenge facing any legislation similar to Megan's Law. *See id.* ("The ex post facto test is the highest constitutional hurdle facing any similar variation of Megan's Law."). Accordingly, if it is determined that sex offender registration and notification laws pass constitutional muster with respect to the Ex Post Facto Clause, all other constitutional challenges will be easier to overcome. *See id.*

249. *See Russell v. Gregoire*, 124 F.3d 1079, 1093-94 (9th Cir. 1997) (sustaining constitutionality of Washington community protection law in face of various constitutional challenges).

250. For a discussion of the impact of Megan's Law on those required to register and their families, see *supra* notes 184-201 and accompanying text.

251. *See, e.g.,* Gottlieb, *supra* note 191, at A47 (noting that registered sex offenders have been subjected to public shunning, picketing, press vigils, loss of employment, eviction, threats of violence, physical attacks and arson as result of community notification).

252. *See Hacking, supra* note 2, at 804 (discussing vigilante attacks on those individuals who made decision to comply with statutorily-mandated registration under Megan's Law); Gottlieb, *supra* note 191, at A47 (noting that physical attacks have resulted from community notification pursuant to sex offender registration and notification laws); Thomas Zolper, *Megan's Law Put on Trial: U.S. Court Panel Challenges Statute*, THE RECORD (NEW JERSEY), Oct. 22, 1996, at A01 (discussing increased risk of vigilantism resulting from community notification pursuant to sex offender registration and notification laws).

253. *See Freeman-Longo, supra* note 22, at 313-14 (discussing efficacy of community notification of sex offender release and concluding that community notification laws will be largely ineffective); Smart, *supra* note 9, at A1 (noting that state sex offender registration and notification laws may not provide children with protection intended by legislatures due to statutory requirements regarding classification of sex offenders and resulting community notification). In addition to problems inherent in the sex offender legislation itself, many jurisdictions have experienced confusion regarding the correct implementation of the laws. *See Stephanie Reitz, Confusion Causes Varied Access to Data on Sex Offenders*, THE HARTFORD COURANT, Oct. 10, 1997, at A5 (noting that several Connecticut police chiefs are so confused by Connecticut's Megan's Law that they are uncertain about how to comply with law); *see also* Elizabeth Benjamin, *Megan's Law: Who'll Know, and How Much?*, TIMES UNION (ALBANY), Oct. 2, 1997, at B1 (recognizing that after enactment of sex offender registration and notification laws, law enforcement agencies often experience confusion regarding correct implementation of law). Recent commentators noted that after the enactment of sex offender registration and notification laws, various local police agencies acknowledged that they are still con-

cases, the sexual abuse is perpetrated by someone the victim knows, not a stranger.²⁵⁴ In these cases, community notification will have little impact in preventing further incidents of sexual abuse in the community because the community itself is not at risk.²⁵⁵ Second, there is no empirical scientific research to support the effectiveness of sex offender notification laws.²⁵⁶ Third, the mobility of sex offenders will seriously impair the effectiveness of Megan's Law and similar sex offender legislation.²⁵⁷ Other than the statutory mandates, there is nothing to stop a registered sex offender from traveling outside of the notified community to select a victim.²⁵⁸

The Supreme Court has not yet addressed the constitutionality of sex offender registration and notification laws. Ultimately, however, this issue may come before the Court for review.²⁵⁹ With similar legislation enacted

fused about how to put the law into effect. *See Reitz, supra*, at A5; *see also Benjamin, supra*, at B1.

254. *See Freeman-Longo, supra* note 22, at 313 (discussing inherent problems with sex offender notification laws and noting that sexual abuse is often perpetrated by someone victim knows).

255. *See id.* at 313-14. A recent commentator noted that denial is another factor that may impair the effectiveness of community notification laws, especially when the sexual abuse is being perpetrated by someone the victim knows. *See id.*

256. *See id.* at 314 (addressing extreme paucity of empirical scientific research on efficacy of sex offender registration and notification laws, particularly with respect to community notification component).

257. *See id.* (stating that sex offenders can travel to neighboring communities, where they are not known, to select victims).

258. *See id.* (noting that sex offenders subject to registration and notification requirements of Megan's Laws could conceivably travel outside of notified communities to select victims).

In light of the many concerns regarding the efficacy of sex offender registration and notification laws, one commentator is arguing for the enactment of a stronger version of Megan's Law. *See Tom Bromwell, A Stronger Megan's Law*, THE WASHINGTON POST, Sept. 28, 1997, at C8 (discussing proposed legislative revisions to Maryland's Megan's Law). Tom Bromwell, a Democratic state senator representing Baltimore County, stated that during the 1998 General Assembly session, he will sponsor legislation to expand Maryland's Megan's Law. *See id.* Bromwell's proposed expansion provides that sex offenders who are determined to present a high risk for reoffending can be indefinitely confined in a mental health facility after they have completed their prison sentence. *See id.* In support of his position, Bromwell relies on the Supreme Court's recent decision in *Kansas v. Hendricks*. In *Hendricks*, the Supreme Court upheld the constitutionality of Kansas legislation providing for the post-sentence, involuntary civil commitment of sexually violent predators after they have completed their prison sentences. *See Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997).

259. *See Hacking, supra* note 2, at 806 (noting need for Supreme Court ruling on constitutionality of sex offender registration and notification laws); *see also Gibeau, supra* note 4, at 37 ("Given the importance of the issues and the deep rift among the lower courts, it is a safe bet that the Supreme Court will take up the *ex post facto* question."); Tony Mauro, *High Court Tackles Big Issue This Term: Affirmative Action*, USA TODAY, Oct. 3, 1997, at 1A (stating that Supreme Court may decide to address constitutionality of federal Megan's Law in upcoming term).

During the writing of this Note, the attorney for E.B., Gerald R. Salerno, filed a petition for a rehearing en banc in front of the United States Court of Appeals

in all fifty states and in the federal jurisdiction, it is crucial that the Court determine whether community notification pursuant to sex offender legislation imposes punishment in violation of the United States Constitution. In view of the Third Circuit's improper constitutional analysis under the *Artway* framework, the Court should unequivocally hold that community notification pursuant to sex offender registration and notification laws is unconstitutional.

David S. DeMatteo

for the Third Circuit. *See* Telephone Interview with Gerald R. Salerno, Counsel for E.B. (Sept. 11, 1997). After the Third Circuit denied the petition for rehearing, Mr. Salerno stated that he will seek review in the Supreme Court of the United States. *See* E.B. v. Verniero, 127 F.3d 298 (3d Cir. 1997) (denying petition for rehearing en banc); Telephone Interview with Gerald R. Salerno, Counsel for E.B. (Nov. 5, 1997). Subsequently, the Supreme Court denied certiorari. *See* W.P. v. Verniero, 118 S. Ct. 1039 (1998).

